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Trinity College Dublin

School of Law

Ph.D. Thesis Submitted By:

AOIFE DALY

The International Legal Right of Children to be Heard in Proceedings Affecting them and Implementation in Ireland

20 October 2011

Supervisor:

Dr. Liz Heffernan

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Declaration

I, Aoife Daly, declare that this thesis has not been submitted as an exercise for a degree at this or any other university. It is entirely my own work.

Sig

Aoi

Summary

This thesis explores the nature of the right of children to be heard in proceedings affecting them as enshrined in the Convention on the Rights of the Child (CRC), the international obligations which it creates, and how this pertains to Ireland. The primary focus of the thesis is i) to elucidate the international right and ii) to determine whether the right is being implemented in Ireland in accordance with the CRC.

It is inevitable that courts will be required to make decisions about the interests of children, particularly in child care and cases and cases concerning custody and access. Ascertaining the views of the child in such cases is increasingly seen as improving decision-making, and a right to which children are entitled. However there appears to exist a lack of agreement and understanding on the substance of the right of children to be heard. This thesis explores a number of vital issues in this regard. The methodological approach used throughout the thesis is one of critical legal analysis, specifically analysis in terms of compliance with human rights law. The rules, principles and jurisprudence which constitute the human rights law standards are analysed with regard to the child's right to be heard. As they constitute the criteria against which to measure state practice, the relevant standards are structured as a comprehensive model. This model is then utilised to analyse whether Ireland is indeed in compliance with these standards.

In the first chapter, the right to be heard is considered through the issue of children and the law and children as rights-holders. The civil law proceedings in which children may be involved, and the ambivalence with which children are treated by the courts are considered. The complex matters of children's capacities and the weight to accord to children's views are examined. It is highlighted that the research is unclear as to what conclusions we can infer about categorising children by age, if any, but that children have been traditionally underestimated by researchers and society generally. It is concluded that, considering the seriousness with which states treat the matter of the due process rights of adults, overriding children's wishes should be treated with the utmost of caution, and require extensive justification.

The purpose of Chapter 2 is to elucidate the nature of the right of children to be heard and to establish the factors which must exist for vindication of the right in accordance with international human rights standards. After comprehensive analysis of Article 12, factors which must be in place for a minimum standard of implementation are identified and encapsulated in a model of the right.

Chapter 3 examines the point that, despite the existence of the international legal right of children to be heard, there are significant difficulties relating to sovereignty and the lack of enforcement mechanisms inherent in implementing the current international human rights framework. The question of whether states are indeed obliged to implement the provisions of the treaties which they have ratified is raised. It is submitted that the primary obligation on states as regards the right to be heard is to adequately incorporate the provisions of the Convention on the Rights of the Child into domestic law. A legitimate expectation exists that states will incorporate the international human rights standards enshrined in the treaties which they ratify. Ireland's dualist legal system is considered.

The European Court of Human Rights increasingly recognises the influence of the CRC in its judgments. This furthers the possibility that the Court will find an implied right of children to be heard within the European Convention. In Chapter 4 it is noted that the case law of the court relating to hearing children has, to date, been primarily positive, with the European Court attributing significant weight to the views of the children involved. However it possible that a case taken by or on behalf of a child will be necessary in order to establish the right to be heard as a Convention right, as to date the Court has primarily been asked to adjudicate on matters relating to the rights of parents.

Chapter 5 examines child law in Ireland in order to set the context for in-depth analysis of the practice and jurisprudence of the courts relating to the right to be heard. It is established that the rights of children in Ireland are becoming increasingly recognised, and the language of Article 12 of the CRC is certainly permeating law and policy. Perhaps most importantly, the right to be heard is included in the text of the proposed amendment to the Constitution to include explicit reference to children's rights. However at present, where it is provided for in the legislation, hearing children is not seen as a right, but an option for the courts where it sees fit to utilise its discretion in a minority of cases.

The case law of the superior courts of Ireland is examined in Chapter 6. It is submitted that, compounded by the presumption in favour of return of children under the Hague Convention, there exists a trend whereby the views of children under approximately 12 years will be ascertained, but overridden. It is argued that insufficient consideration is accorded to the nuances of the maturity of the individual children and the way in which their wishes are weighed against other factors. The failure to place the best interests of children, and consequently their views, at the heart of all superior court decisions affecting them is highlighted, and it is suggested that a standardised 'checklist' of the likes contained within the Children Act 1989 of England and Wales would be useful.

Chapter 7 involves analysis of data collected as part of practical research in the Irish District Courts. It is determined that, although the role of the guardian *ad litem* (the main mechanism through which children are heard in Ireland) is valued, issues as regards appointment, payment, and the nature of the role of the professional persist. Other trends in practice are also highlighted. It is submitted that there is an urgent need for a regulatory body and to enact legislation to permit the voices of children to be heard in family law cases.

The concluding chapter applies the model to Irish practice. It also highlights the existence of a number of limitations relating to Article 12 itself as well as the comments of the Committee on the Rights of the Child. The most obvious deficiency is the fact that there are many questions left unanswered about when children should be accorded party status and have the right to appeal the substance of decisions made about them. It is also submitted that the wishes of the person about whom a decision is being made should be assumed to constitute the most important factor in the decision-making process. International legal standards should include an assumption that a child's views should be overridden by the courts only where there is a strong basis for doing so. It is argued that an optional protocol to the CRC to recognise greater due process rights for children should be drafted.

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The right to be heard somehow by someone before a claim is denied, particularly if life hangs in the balance, is far greater in importance to society, in the light of the said history of its denial, than inconvenience in the execution of the law.

– Frankfurter J, Douglas J and Brennan J, US Supreme Court.[1]

Judges should listen to kids. Adults are smarter, but kids know the truth.

– Five year old child of separated parents.[2]

[1] *Caritativo v People of the State of California* 357 US 549; 78 S Ct 1263; 2 L Ed 2d 1531 (1958). Dissenting Opinions of Frankfurter J, Douglas J and Brennan J, para 19.

[2] Cited in Marsha Kline Pruett and Kyle Pruett, "'Only God Decides': Young Children's Perceptions of Divorce and the Legal System" 38 *Journal of the American Academy of Child and Adolescent Psychiatry* 1544 (1999), at 1550.

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Introduction to Thesis

Children are in a unique legal position. They are the only group of human beings generally assumed by the law (including international law) not to have autonomy over their own lives.[1] This position is arguably appropriate for many purposes– it is the responsibility of adults to prepare children for autonomy and to guide them accordingly.[2] However, the situation raises some difficult issues. First, it is currently recognised that children should have increasing influence over their own lives as they get older and progressively attain the experience necessary to make decisions.[3] Secondly, a number of situations arise whereby the interests of children potentially conflict with those of the adults who are assumed to provide such guidance.[4] Legal systems acknowledge this by providing for the resolution of custody and access disputes, as well as permitting children to be taken into the care of state authorities in certain circumstances. When such cases arise, the circumstances of the child involved obviously become a matter for the courts, which have been entrusted with responsibility for upholding justice and the rule of law. The right to be heard in legal matters concerning oneself

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[1] With the exception of adults who have diminished decision-making capacities.

[2] This is recognised in Article 5 of the UN Convention on the Rights of the Child (GA res 44/25, annex, 44 UN GAOR Supp [No 49] at 167, UN Doc A/44/49 [1989]; 1577 UNTS 3; 28 ILM 1456 [1989], came into force 2 September 1990, hereafter 'CRC') which enshrines the principle of children's evolving capacities which acknowledges that children should be accorded more autonomy as they grow in terms of both age and capacity.

[3] See, for example, the Convention on the Rights of the Child (Articles 5 and 12). It is also recognised in domestic law, for example in Scotland children are considered competent to instruct a lawyer at age 12 under the Age of Legal Capacity (Scotland) Act 1991. In the Irish context, children have the right to consent to medical treatment from the age of 16 under the Non-Fatal Offences Against the Person Act, 1997. There are numerous other examples, some of which are discussed in Chapter 1.

[4] These include care cases, in which parents who contest care applications wish to retain rights of care over their children (even where they may have been neglectful or abusive), and custody/access cases, in which parents may be in dispute.

is a key due process right and it is internationally recognised as applying to children by Article 12 of the Convention on the Rights of the Child.[5] The right of children to be heard is, however, an area that is little understood and much of society has not even accepted that the right exists, or that it is in any way valuable. The courts, as guardians of justice and equal treatment for all citizens, are in a unique position to interpret, apply, and therefore enforce this right.

This thesis explores the nature of the right to be heard as enshrined in the Convention on the Rights of the Child, the international obligations which it creates and how this pertains to Ireland. The primary focus of the thesis is i) to elucidate the international right and ii) to determine whether the right is being implemented in Ireland in accordance with the Convention on the Rights of the Child.

Children's Rights, the Convention on the Rights of the Child, and the Right to be Heard

The UN Convention on the Rights of the Child is an international treaty which enshrines human rights specific to children.[6] Although creating a dedicated treaty could be argued to sideline children's rights by differentiating them from those of adults, on balance it seems that such an instrument was a necessary development in international human rights law.[7] The other general human rights

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[5] The Convention on the Rights of the Child, GA res 44/25, annex, 44 UN GAOR Supp (No 49) at 167, UN Doc A/44/49 (1989), adopted 20 November 1989, entered into force 2 September 1990.

[6] The Convention was adopted and opened for signature on 20 November 1989 and entered into force on 2 September 1990.

[7] See generally Geraldine Van Bueren, *The International Law on the Rights of the Child* (Martinus Nijhoff, 1995, at 13). Differentiating between the rights of children and those of adults may beg the question of whether this precludes rights in general human rights treaties which are not explicitly mentioned in the CRC from applying to children. However Article 41 of the CRC states that, "[n]othing

treaties were assumed to be relevant to children,[8] however there were a number of difficulties. First, the existence of rights which children are not permitted to exercise (e.g. right to vote) or unable to exercise without adult assistance (e.g. right to property) gave rise to questions about which of the rights enshrined in the main instruments applied to children, and in some instances, how. Secondly, because of the existence of needs specific to children, interpretative principles were necessary for the meaningful enjoyment of their rights. These ultimately came to be the best interests principle and the principle of the evolving capacities of the child.[9] The best interests principle recognises the fact that children (particularly very young children) will often require adults to make decisions on their behalf. The principle of the evolving capacities of the child recognises that the needs of a newborn are very different to those of a 17 year old, and that there are numerous stages of development in between. As children grow older they should have more autonomy over their lives.

The CRC therefore acknowledged that a child should not be completely denied civil and political rights just because she is not yet classed as an 'adult'. This constituted the first time in international law that such rights were explicitly recognised in relation to children. The term most frequently used to describe the civil and political rights enshrined in the CRC is 'participation rights'.[10] Although

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in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in: (a) The law of a State party; or (b) International law in force for that State."

[8] For example the International Covenant on Civil and Political Rights, UN GA Res 2200A [XX1], 21 UN GAOR Supp (No 16) at 52, UN Doc. A/6316 (1966); 999 UNTS 171; 6 ILM 368 (1967) adopted 16 December 1966, entered into force 23 March 1976. See further Chapter 1.

[9] Van Bueren, note 7, at 45. Van Bueren describes them as "umbrella principles underlining the exercise of all the rights in the Convention" (at 51).

[10] 'Participation rights' refer to the participation of children in decision-making affecting them. It is currently a term which is widely used in relation to Article 12

there are a number of other articles in the CRC which enshrine various civil and political, or 'participation rights', the most extensive source of participation rights is Article 12.[11] This article provides children with the 'right to be heard'– i.e. the right to express views in all matters affecting them, including the right to be heard in judicial and administrative proceedings. The importance of the right to be heard is highlighted by its status as a general principle of the Convention.[12] This means that the interpretation of other provisions of the CRC should include consideration of Article 12, and vice versa.[13]

The CRC has the highest rate of support of any international human rights treaty- it has been ratified by every state except the US and Somalia,[14] and Somalia has indicated that it will do so soon.[15] Yet the issue of participation rights for children is a contentious one, despite the crucial position of such rights within the Convention. There is significant evidence that implementation of the right to be heard in civil legal proceedings is poorly implemented globally.[16] It is certainly poorly understood.[17] Questions persist, for example,

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and other relevant articles of the CRC. See Committee on the Rights of the Child, *General Comment No. 12: The Right to be Heard* (1 July 2009) CRC/C/GC/12, para. 3. See also Malfrid Flekkoy and Natalie Kaufman, *The Participation Rights of the Child: Rights and Responsibilities in Family and Society* (Jessica Kingsley Publishers, 1997), at 27.

[11] This is because of the fact that it refers to "all matters affecting the child."

[12] This means that all other rights in the CRC are to be interpreted with Article 12 in mind.

[13] See Committee on the Rights of the Child, *General Comment No. 5: General Measures of Implementation*, (27 November 2003), CRC/GC/2003/5, at 3-5.

[14] Eugene Verhellen, *Convention on the Rights of the Child: Background, Motivation, Strategies* (4th ed, Garant Publishers, 2006), at 9.

[15] Somalia has announced that it plans to ratify the CRC. *Somalia to Join Rights Pact: UN*, Reuters Africa, Friday 20 November 2009, available at http://af.reuters.com/article/topNews/idAFJOE5AJ0IT20091120 (last accessed 18 July 2010).

[16] Rachel Hodgkin and Peter Newell, *Implementation Handbook for the UN Convention on the Rights of the Child* (UNICEF, 2002), at 163.

[17] Note for example in Irish law children in family law cases are only very rarely heard (under the Children Act 2001), whilst children in child care cases (under the

regarding potential age limits in relation to the right, the relationship with other rights, as well as potential restrictions on the meaningful enjoyment of the right. Furthermore, there has yet to be detailed consideration of the development of this right since the entry into force of the Convention, particularly as regards the treatment of the right to be heard in domestic and international courts. There is certainly a lack of information on implementation of the right in the Irish system, despite the fact that the right may be expressly enshrined in the Irish Constitution in the near future.[18] It is hoped that the current research will provide illumination and analysis in respect of the lacunae identified.

Aims and Objectives

This thesis aims to advance understanding of children's rights by providing a comprehensive analysis of the nature of the international legal right of children to be heard in civil law proceedings affecting them.[19] It also aims to elucidate in detail how and whether children are heard in the Irish context. The first objective of the thesis, therefore, is to clarify the international legal concept of the child's right to be heard. The second objective is to determine whether Irish state practice is in compliance with international human rights law,

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Child Care Act 1991) are heard much more frequently. This dichotomy also exists in the UK context, under the Children Act 1989. This does not constitute adequate implementation under Article 12 of the CRC which stipulates that children must be heard in, "all matters affecting them".

[18] See generally Joint Oireachtas Committee on the Constitutional Amendment on Children, *Final Report* (Houses of the Oireachtas, 2010), available at: http://www.oireachtas.ie/documents/committees30thdail/j-conamendchildren/reports_2008/20100218.pdf (last accessed 16 September 2010). and Aoife Daly, "Implementing the Right of Children to be Heard" *Irish Times*, 1 March 2010, at 22.

[19] Hereafter "the right to be heard." This should not be confused with the general Article 12 "right to be heard" in all circumstances – family, school, court etc. See below at 7 for clarification of the contexts which will be covered by this thesis.

i.e. whether the right is being implemented in the manner intended by the CRC and other relevant instruments.

This thesis will explore a number of vital questions which have not been addressed in the existing literature. What is the scope of state obligations in relation to the right to be heard? What constitutes adequate and appropriate implementation? There also exists the question of whether, and if so how, the right to be heard differs from the right to make decisions and to what extent, if any, this key due process right can and should be limited for those who have not yet reached adulthood. The thesis will also examine whether the Republic of Ireland provides appropriate mechanisms for the right of the child to be heard, and whether the state is in compliance with the Convention on the Rights of the Child. Other questions to be explored in the Irish context include: to what extent do judges cite children's wishes as a determining factor when making decisions that affect them? Are there emerging trends in practice? What factors influence the weight being given to children's views in the legal system? The substantive chapters in this thesis will go some way towards answering these questions.

Rationale

The right of children to be heard is a relatively new and emerging right, which is of significant international interest.[20] The primary reason for this enquiry is the crucial nature of the right. While the right of children to be heard and to participate in all matters affecting them is of enormous significance, it is arguable that the implementation of this right in legal proceedings (as opposed to

[20] Note, for example, the inclusion of the right to be heard in Article 11(2) of the "Brussels II Regulation" (Council Regulation [EC] 2201/2003 of 27 November 2003) and Article 24 of the EU Charter of Fundamental Rights.

other contexts) is particularly important. The primary reason for this is the long-standing existence and fundamental nature of due process rights. Furthermore, decision-making in the area of both care and custody/access proceedings is generally of profound, often life-changing, consequence for the children involved.[21] Moreover, if states fail to implement the right of children to be heard in the courts, it is likely that this will send a message to civil society that hearing children generally, for example in policy decision-making and schools, is not in fact an international legal obligation, but an optional practice to be ignored when its implementation causes inconvenience (which is, of course, all of the time).

Another important reason for the current analysis is the lack of clarity surrounding the precise nature of the right to be heard and the obligations which it places on states. Although the right is prominent within the CRC, direction is not provided by that instrument regarding the exact manner in which states should implement the right, and a number of grey areas persist. In the absence of detailed elaboration, the nature of the right to be heard is left to individual states to determine, inevitably resulting in diverse interpretations of the principle.[22] The Committee on the Rights of the Child[23] has

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[21] For example being taken into the care of the state, or no longer living with/having contact with one parent.

[22] For example in Ireland, England and Wales, the child rarely meets directly with the judge, see Judy Cashmore and Patrick Parkinson, "What Responsibility do Courts Have to Hear Children's Voices?" 15 *International Journal of Children of Children's Rights* 43 (2007), at 49. However such practice is commonplace in the German system, see Nina Dethloff and Dieter Martiny, *National Report: Germany* (Commission on European Family Law, 2004), cited in Branka Resetar and Robert Emery, "Children's Rights in European Legal Proceedings: Why are Family Practices so Different from Legal Theories?" 46 *Family Court Review* 65 (2008), at 69.

[23] The Committee on the Rights of the Child is the monitoring body for the Convention on the Rights of the Child, established under Article 43 of that Convention. The Committee is tasked with examining state reports under Article 44 of the Convention, and also publishes General Comments, which are explanatory or interpretative documents on various aspects of the Convention. It can also organise Days of General Discussion to hold discussions on aspects of the

provided useful guidance through the General Comment on Article 12.[24] However this General Comment provides guidance in relation to the totality of Article 12, as it relates to the right to be heard within the family, community, school, the political arena, as well as criminal and civil proceedings affecting children. There is little guidance provided in the General Comment specifically on the matter of hearing children in proceedings affecting them. The Committee on the Rights of the Child itself refers in its General Comment on Article 12 to "a need for a better understanding of what [A]rticle 12 entails and how to fully implement it for every child."[25] The Committee also "remains concerned about the quality of many of the practices that do exist."[26] This thesis seeks to further understanding of the international legal right of children to be heard in civil law proceedings affecting them. Such a study seems necessary considering there exists no monograph on this topic specifically. Ireland is a particularly good choice for a case study because of the existence of a relatively well established legal system which is grappling with this modern right, and because of recent developments relating to children's rights in the jurisdiction.[27] A handful of books have been published in Ireland which pertain to child law[28] and children's rights.[29] However a thorough examination of implementation of the right to be heard is necessary.

Convention. See further the website of the UN High Commissioner for Human Rights, at http://www2.ohchr.org/english/bodies/crc/ (last accessed 18 July 2010).

[24] Committee on the Rights of the Child, note 13.

[25] *Ibid,* para. 4.

[26] *Ibid.*

[27] Relevant cases include *N. v N. [hearing a child]* [2008] IEHC 382 and *F.N. and C.O.* [2004] 4 IR 311; [2004] IEHC 60. A referendum is due to be held in 2011 to determine whether explicit reference to the rights of children (including the right to be heard if the wording which is currently proposed is ultimately accepted) will be included in the Constitution. See Oireachtas Committee on the Proposed Amendment on Children, note 18. It should also be noted that the decision to focus on the Irish context was also related to the fact that the opportunity arose for first-hand research in the Irish District Courts.

[28] See e.g. Geoffrey Shannon, *Children and the Law* (Round Hall, 2005).

Scope of the Thesis

In an ideal world, it would have been desirable to carry out a full analysis of all proceedings concerning children and to analyse a wide range of practice in various jurisdictions around the world. The thesis, however, limits itself primarily to child care and family law proceedings. Cases regarding youth justice and children as witnesses and/or victims in criminal cases clearly constitute proceedings relating to children. It would also have been useful to examine practice in the area of administrative proceedings such as those relating to family conferences,[30] immigration and school expulsion. The area of children and medical consent is another topic which potentially implicates the right to be heard. However this breadth of research was not possible within the scope of the current thesis, as will be outlined in this section. A more in-depth study of the area of care and custody/access proceedings constitutes the most relevant and original research. As noted above, the court system is a crucial area in terms of human rights, and it is in these types of court proceedings that children's interests are most frequently and directly involved.

The right to be heard enshrined in Article 12 of the CRC is clearly relevant to children in conflict with the law and child victims/witnesses. However there are a number of factors which highlight the need for a thorough but separate analysis of Article 12

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[29] Ursula Kilkelly, *Children's Rights in Ireland: Law, Policy, and Practice* (Tottel, 2009).

[30] The term 'family conferences' is used in the Irish context to describe both meetings regarding mediation between families in which there are separation proceedings or custody/access disputes, as well as meetings to discuss the best interests of children (usually teenagers) whose behaviour is challenging (see Chapter 5). There are also diverse meanings attached to the term internationally.

in relation to these areas. The issue of hearing children in such proceedings is complicated by the fact that a major priority of such proceedings is the perceived public interest of punishing or preventing crime.[31] This punitive element is not present in care/custody proceedings and therefore the best interest of the child is usually, ostensibly at least, the primary consideration.[32] This thesis does not aim to explore the criminal context, for the reason that there would simply not be sufficient scope in the project for adequate analysis of the unique features of criminal justice.

The area of administrative proceedings has also been omitted. Administrative proceedings are those which are non-judicial or quasi-judicial in nature. Such proceedings may involve a determination of fault or guilt and may also include penalties of various forms. The guarantee of the right to a fair trial (Article 6), enshrined within the European Convention on Human Rights, has been found by the Court to apply to proceedings against public administrations relating to damages.[33] The right of children to be heard may arise in relation to administrative proceedings such as those relating to expulsion from school. However issues of this kind will not be examined in detail in this study, as they arise outside the setting of civil proceedings in the strict sense and therefore involve many distinct issues. The right to be heard is also pertinent as regards matters relating to medical consent. Reference will be made

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[31] Cashmore and Parkinson, note 22, make the point that in cases where children are witnesses or allegedly victims, "[t]he outcome, however, is not about the child– it is about the accused" (at 44).

[32] This is commonly the case with care and custody proceedings, e.g. in the Irish system the Child Care Act 1991 Section 24 holds, "the welfare of the child as the paramount consideration" in proceedings regarding the care and protection of the child.

[33] See e.g. *Editions Périscope v France*, Appl. No. 11760/85, judgment of 26 March 1992, and *X. v France*, Appl. no. 9993/82, judgment of 3 March 1992. See further Nuala Mole and Catharina Harby, *The Right to a Fair Trial: A Guide to the Implementation of Article 6 of the European Convention on Human Rights, Handbook No. 3* (Council of Europe, 2006), at 13.

in the thesis to current thinking and pertinent cases which further understanding of the right to be heard, however this study does not purport to provide in-depth analysis of this area (much of which also relates to decision-making outside the formal court system).

Similarly, it would have been useful to compare and contrast the implementation of the right to be heard in a number of different jurisdictions rather than simply in Ireland. However it was deemed more appropriate to focus on a single state in detail as a case study, and to use examples of international practice throughout the thesis to inform the enquiry. The study is strongly grounded in Irish practice due to the inclusion of an in-depth empirical section on District Court proceedings in Ireland made possible by the recent relaxation of the *in camera* rule.[34] It was clear that such research could provide extensive information and facilitate analysis of the status of the right to be heard in Ireland. It would have also been useful to conduct first-hand research with children to ascertain their views. However it was not possible for the study to include this within its scope. There are already a number of studies which examine the views of children in relation to the right to be heard.[35] Such research is referred to throughout, in order to inform the current thesis.

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[34] The Family Law (Divorce) Act 1996, the Domestic Violence Act 1996 and the Child Care Act 1991 contain provisions stipulating that family law cases must be heard in private. However Section 40 of the Civil Liability and Courts Act 2004 makes it permissible for certain persons to attend proceedings, subject to receiving permission to do so.

[35] See e.g. Marsha Kline Pruett and Kyle Pruett, "'Only God Decides': Young Children's Perceptions of Divorce and the Legal System" 38 *Journal of the American Academy of Child and Adolescent Psychiatry* 1544 (1999), Diane Hogan, Ann Marie Halpenny and Sheila Greene, *Children's Experiences of Parental Separation*, (Children's Research Centre, 2002), and Judith Huddart and Sandra Demson, "Listening to Children in the Collaborative Process," paper presented at *4th World Congress on Family Law and Children's Rights* (Cape Town, 20-23 March 2005). It is acknowledged that there is a lack of information on the views of children in the Irish context, as the research of Hogan, Halpenny and Greene, which relates to experiences of separation specifically, appears to be the only Irish research relevant to the current study.

It is acknowledged that the current thesis is essentially a study which focuses on 'Western/Northern,'[36] Anglophone states, and primarily common law systems. Among the reasons for this approach is the fact that it has proven difficult to access information from states which do not have English as the first language[37] and also because of the under-developed status of the right to be heard in the 'Global South.'[38] It is evident that there are a number of interesting initiatives in operation outside the 'Global North,'[39] therefore a study which focuses exclusively on such initiatives would be welcomed. It is also useful to note that the terminology of 'care' and 'custody/access' used throughout the thesis, while probably the best-understood terms in relation to these particular situations, are not universally used. For example, in Ireland we refer to 'children in the care of the state' while in the UK the term 'looked after children' is preferred.[40] The terms 'custody' and 'access' are similarly avoided in the UK[41] and elsewhere.[42] The term 'custody' is indeed very problematic because of the fact that it objectifies children.

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[36] The terms 'North' and 'South' are arguably preferable to the terms 'developed' and 'developing' or 'Western' and 'non-Western,' although it is acknowledged that they are not ideal. See further Rafael Reuveny, "The North-South Divide and International Studies: A Symposium" 9 *International Studies Review* 556 (2007).

[37] For example Norway has incorporated the Convention on the Rights of the Child into domestic law, and would therefore serve as an interesting case study.

[38] For example many reports of the Committee on the Rights of the Child (the monitoring body of the Convention on the Rights of the Child) note that a number of countries with Sharia law systems do not enshrine the best interests principle in custody decisions, as custody decisions are based on the age of the child. Younger children tend to be placed with mothers and older children with fathers. See for example Committee on the Rights of the Child, *Concluding Observations: Iran* (31 March 2005) CRC/C/15/Add.254, at para. 27.

[39] For example an impressive child-friendly courts initiative in Ethiopia, see Solomon Areda Waktolla, "Case Study: The Creation of Child Friendly Courts in Ethiopia," paper presented at conference: *Convention on the Rights of the Child: From Moral Imperatives to Legal Obligations* (Geneva, 12-13 November 2009).

[40] The term 'looked after' was introduced by the Children Act (1989). It refers to children in the care of, (i.e. 'looked after' by), a Local Authority under a court order.

[41] Although they are still often used in practice, the 1989 *Children Act* of England and Wales also replaced the terms 'custody' and 'access' with the term 'parental responsibility.' It includes the presumption that married parents are both entitled to shared parental responsibility after separation. See Jonathan Smith, "For Children's

It is also worth noting at this point that although this thesis refers to the right of 'children' to be heard, this term in fact encompasses 'children and young people,' meaning all those under the age of 18.[43] The term 'children' is used firstly because in the legal context those who are under 18 are considered children or minors,[44] and secondly to avoid repeated reference to 'the right to be heard of children and young people,' which is cumbersome. The study aims to encompass the right as it relates to all those under 18, as part of the enquiry is the crucial issue of differing capacities of children at different ages.[45] Therefore the nature of the right of a 17 year old to be heard will be very different to rights pertaining to infants. This is one of the most fascinating and complex matters in relation to the right to be heard. It is also one of the reasons that the right to be heard in civil law proceedings has been so neglected; it has been easier for society and for legal systems to treat all children under 18 as if they were the same, despite the wide variety of 'individual differences'[46] and capacities.

Sake, we must Drop the Word 'Custody'" *The Guardian*, 9 October 2008 (available at:
http://www.guardian.co.uk/commentisfree/2008/oct/09/children.youngpeople, last accessed 18 July 2010), although ironically Smith only refers to the conflict between parents caused by the term 'custody' and not to the fact that it objectifies children.

[42] See e.g. Richard Chisholm, "Children's Participation in Family Court Litigation" Paper presented at *Conference International Society of Family Law 10th World Conference* (Brisbane, 9-13 July 2000), at 2.

[43] See Barrie Thorne, "What's in an Age Name?" 15 *Childhood* 435 (2008), for consideration of the use of terminology to classify individuals as 'children' or within related categories such as 'young people.'

[44] The Convention on the Rights of the Child states, "a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier" (Article 1).

[45] It is acknowledged that many under 18s would not consider themselves 'children' however this term is often used by authors with that caveat in mind. See e.g. Kay Tisdall et al., "Children's Participation in Family Law Proceedings: A Step too Far or too Small?" 26 *Journal of Social Welfare and Family Law* 17 (2004), at 19.

[46] This term is from the discipline of psychology and refers to the study of how individual people differ in their behaviour and capacities. See John Maltby, Liz

Methodology of the Study

The methodological approach used throughout the thesis is one of critical legal analysis,[47] specifically analysis in terms of compliance with human rights law. First, the nature of the right to be heard will be analysed (in Chapter 2) to determine the nature of the right to the furthest extent possible. Data in the form of legislation, policy and case law regarding the right to be heard will be analysed.[48] Analysis 'in terms of human rights law' means that the data will be analysed with regard to the articles of the CRC relating to the right to be heard, the two interpretive principles[49] of the CRC (the best interests principle and the principle of the evolving capacities of the child), comments of the Committee of the Rights of the Child, relevant articles in other international legal texts, (e.g. the Universal Declaration on Human Rights), as well as the jurisprudence of international and regional human rights enforcement mechanisms, (e.g. the Human Rights Committee and the European Court of Human Rights). These rules, principles and jurisprudence constitute the human rights law standards relating to the child's right to be heard; standards under which states should operate. They are the criteria against which to measure state practice, in order to determine whether it is in line with international human rights law. This thesis will analyse whether Ireland is indeed in compliance with these standards.

Day, and Ann Macaskill, *Personality, Individual Differences and Intelligence* (Pearson Education, 2007).

[47] See Roy Mersky, *Fundamentals of Legal Research* (Foundation Press, 2002).

[48] Data analysis is the process of searching for patterns in data. See William Neuman, *Social Research Methods: Qualitative and Quantitative Approaches* (Allyn and Bacon, 2003).

[49] These principles are intended to guide interpretation of all articles of the CRC.

It is also noteworthy that legal scholarship has followed various differing approaches, for example, within the 'black letter law' approach, law is assumed to be a self-sustaining set of principles which can be understood with little reference to the outside world.[50] A differing approach, 'law in context,' takes as its starting point not law, but the problems in society about which one can generalise. Law may be a contributor to, or cause of, the social problem.[51] Therefore while law may provide solutions, non-law solutions may also be necessary, such as those provided by political and social change.[52] The current thesis utilises elements from both approaches. The traditional black-letter approach uses legal reasoning, "to evaluate legal rules and suggest further development of the law."[53] In this thesis, however, the traditional approach is complemented with an analysis of problems which may be affecting the law (i.e. the 'law in context' approach). For example, flaws in the policies which underlie the law will be identified and highlighted and possible changes in the law will be suggested. This combined methodology places law firmly within the social, economic and political environment.

This thesis involves extensive analysis of international and domestic Irish case law. As noted above, the cases are analysed from the perspective of international human rights law, and most particularly the perspective of the right to be heard.[54] The research aims to tread a delicate line between drawing inferences and conclusions from the judgments but, at the same time, not reading too deeply into decisions that are based on multiple factors, of which the right to be

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[50] Mike McConville and Wing Hong Chui, *Research Methods for Law* (Edinburgh University Press, 2007).
[51] *Ibid.*
[52] *Ibid.*
[53] *Ibid* at 2.
[54] Please see Chapter 7 for description of methodology specific to the fieldwork phase of the study.

heard is just one. The approach taken throughout is that children are inherently deserving of the right enshrined in Article 12 of the CRC, and conclusions are drawn accordingly.

Outline of the Study

The first section of the thesis involves analysis of the right to be heard in the international legal framework. Chapter 1 provides a context for an examination of the right to be heard, through consideration of the relationship between children and the law, children's capacities, and due process rights. Chapter 2 elucidates the right to be heard through analysis of the preparatory documents of the Convention, the text of Article 12, and the comments of the Committee on the Rights of the Child. A model of implementation of the right to be heard is presented based on this study. Chapter 3 provides an analysis of implementation and enforcement of international human rights law generally and the right to be heard in particular. The international law as it pertains to Ireland is given distinct consideration. In Chapter 4, the right to be heard is considered through the framework of the European Convention on Human Rights. Although such a right has not been explicitly recognised by the European Court of Human Rights, the potential for the right to be derived from relevant provisions of the Convention (primarily through the right to family life and the right to a fair trial) is considered. Secondly, the matter of how the Court has dealt with the issue of hearing children in its jurisprudence is analysed.

In the second section of the thesis, detailed consideration is given to the right to be heard in the Irish context. Chapter 5 provides analysis of children and the law in Ireland, with particular emphasis on provisions for hearing children. In Chapter 6, the case law of the

superior courts in Ireland is examined. The emergence of cases under the Hague Convention on Civil Aspects of International Child Abduction is given particular consideration. Chapter 7 outlines empirical research conducted in the Irish District Courts, detailing child care and family law cases and the extent to which children are heard in relevant proceedings. The concluding chapter considers the international standards and the limitations of those standards. The Irish context is analysed with regard to the model of implementation of the right to be heard, and recommendations are made in this regard.

Chapter 1: The Right to be Heard in Context

1.1 Introduction

The right of children to be heard in civil law proceedings affecting them is set in a challenging legal context. John Stuart Mill's famous dictum, "over himself, over his own body and mind, the individual is sovereign,"[1] is not presumed to apply to children. This particular group of individuals are in the unique position that, legally, they usually do not possess sovereignty in these areas.[2] It is assumed that adults– usually parents– will oversee the exercise of their rights on their behalf. People are legally considered minors (and therefore under the control of parents or guardians) until they reach the age of majority, at which point they are considered adults for legal purposes.[3] Little consideration is given to the crucial fact that due process rights place vital obligations on the state and to negate them is a significant interference with human rights, which requires justification. Furthermore, the legal status of children as subject to parental authority is problematic when cases arise in the legal arena which involve stark conflicts of interest between parents and their children, as they frequently do. These cases are most commonly those where the state seeks to take children into care and cases in which separated parents engage in disputes over custody and access.

There are a number of other issues which most also be considered in relation to the general subjection of children to this legal "liability."[4] Children attain increasing capacities as they age, the majority of children

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[1] John Stuart Mill, *On Liberty* (4th ed, Longman, Roberts and Green, 1869 [1859]), at 9.
[2] Eekelaar states that no other individuals "are normally subjected to this liability except in special circumstances (perhaps mental illness, or unconsciousness)." John Eekelaar, "The Interests of the Child and the Child's Wishes: The Role of Dynamic Self-Determinism" in Philip Alston, Stephen Parker and John Seymour, eds, *Children, Rights and the Law* (Oxford University Press, 1992), at 43.
[3] In most countries this is, of course, 18 years, although this may differ for particular purposes, for example as regards the age of medical and sexual consent.
[4] Eekelaar, note 2, at 34.

wish to express views on matters concerning them,[5] and research indicates that involving children in such decisions is helpful.[6] For these reasons, the assumption that children (and particularly children of all ages) should simply be excluded completely from legal proceedings concerning them seems seriously deficient. Article 12 of the Convention on the Rights of the Child (CRC) attempts to acknowledge and rectify this matter. The provision aims to afford children, *inter alia*, the right to be heard in civil law proceedings affecting them. According to the Committee on the Rights of the Child, states must implement this by "listening to the views of the child and according them due weight."[7]

The right of children to be heard is a multi-faceted and complex right. One difficulty is the fact that the right applies to a group of human beings who have infinitely differing experiences, needs, views and capacities. Some children may never wish to exercise it. The diversity of the right is another complicating factor. It straddles the divide of civil and political rights on the one hand and social, cultural and economic rights on the other. It is at once procedural and substantive, in that particular procedures must be followed to vindicate the right to be heard, and there are substantive judgements to be made about children's lives. Moreover it "makes life more difficult for the decision-makers" or can at least be perceived to.[8] It is inextricably linked to the rights of other individuals– parents, guardians, accused parties– and may need to be balanced accordingly. Another significant issue is that this same group of people are subject to an almost universal prejudice in terms of their

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[5] Judith Huddart and Sandra Demson, "Listening to Children in the Collaborative Process," paper presented at *4th World Congress on Family Law and Children's Rights* (Cape Town, 20-23 March 2005).

[6] See generally Marsha Kline Pruett and Kyle Pruett, "'Only God Decides': Young Children's Perceptions of Divorce and the Legal System" 38 *Journal of the American Academy of Child and Adolescent Psychiatry* 1544 (1999) and Nigel Lowe and Mervyn Murch, "Children's Participation in the Family Justice System– Translating Principles into Practice" 13 *Child and Family Law Quarterly* 137 (2001).

[7] This is a synopsis of Article 12 by the Committee on the Rights of the Child, *General Comment No. 12: The Right to be Heard* (1 July 2009) CRC/C/GC/12, para 15.

[8] See e.g. Richard Chisholm, "Children's Participation in Family Court Litigation," paper presented at *10th World Conference of the International Society of Family Law* (Brisbane, 9-13 July 2000), at 4. However by the same token it can be argued that it improves decision-making, see below at 69.

abilities and understandings. The right inclines directly against the primary assumptions about children– that they are incapable and in need of protection.[9] Careful consideration of law, psychology, social science and individual differences is necessary for the right to be adequately implemented, as the nature of the right and of the group that it purports to benefit does not lend itself well to a 'one size fits all' approach to implementation. This section gives consideration to these varied matters.

The focus of this thesis is on the nature of the right to be heard as enshrined by Article 12 of the CRC and other international legal texts, how it should be vindicated, and Irish implementation. This chapter aims to provide an overview of the background and various arguments in relation to the right.[10] This will permit a more robust understanding of the nuances of the matter of hearing children and consequently further the critique of the nature of right, as well as examination of Irish practice.[11]

In this chapter, the background to the right to be heard will be considered through the issue of children and the law and children as rights-holders. The civil law proceedings in which children can be involved, and the ambivalence with which children are treated by the courts[12] will also be considered. The CRC, the participation rights enshrined within this and how they relate to the right to be heard will then be analysed. The matter

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[9] It is notable, however, that the right promotes consideration of the wishes of child, as opposed to necessarily holding those wishes to be determinative. Therefore this assumption is still inherent in the right to be heard in accordance with Article 12.

[10] For more in-depth consideration of merits and demerits of vindicating the right of children to be heard in civil law proceedings, see e.g. Chisholm, note 8, Kay Tisdall *et al.,* "Children's Participation in Family Law Proceedings: A Step too Far or too Small?" 26 *Journal of Social Welfare and Family Law* 17 (2004), Nicola Taylor, Pauline Tapp and Mark Henaghan, "Respecting Children's Participation in Family Law Proceedings" 15 *International Journal of Children's Rights* 61 (2007), Greg Mantle *et al.,* "Whose Wishes and Feelings? Children's Autonomy and Parental Influence in Family Court Enquiries" 37 *British Journal of Social Work* 785 (2007).

[11] Chapters 5 to 7 consider the Irish context in detail. The right to be heard generally, across different jurisdictions, will be considered in this introductory chapter in order to place Irish law and practice in context.

[12] See Adrian James, "Children, the UNCRC and Family Law in England and Wales" 46 *Family Court Review* 1 (2008) and Felicity Kaganas and Alison Diduck, "Incomplete Citizens: Changing Images of Post-Separation Children" 67 *The Modern Law Review* 959 (2004).

of children's capacities and the significance of this area for the right will be examined, as will the relationship between the principle of the best interests of the child and the right to be heard. The issue of due process rights, and how these relate to children, will also be analysed. It is hoped that this analysis will provide a robust background in order to enable thorough examination of the right as enshrined at international level and as implemented at Irish level.

1.2 Children and the Law: The Emergence of the Right to be Heard

1.2.1 Children and the Law

The perception of children as rights bearers is relatively new and the international legal concepts considered within this thesis reflect important cultural and legal developments in relation to children.[13] Parental authority is seen as derivative of the biological realities of human nature, and the relationship of dependency pertaining to biological parents and their infants.[14] However, the notion of dependency is arguably taken to unnecessary extremes. Until recently, legal systems in the 'Western/Northern World' did not recognise children as separate legal persons, or as legal actors with interests. Parents and guardians were free to impose their will on children, no matter how cruel the demand or punishment.[15] Van Bueren goes so far as to refer to "[a] failure to see children as separate human beings."[16]

When one considers that in the past some jurisdictions had legislation which pertained to the protection of animals from their guardians but

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[13] Nicola Ross, "Agency, Article 12 and Models for Legal Representation of Children in Australia," paper presented at *4th World Congress on Family Law and Children's Rights* (Cape Town, 20-23 March 2005).

[14] John Eekelaar and Petar Sarcevic, *Parenthood in Modern Society: Legal and Social Issues for the Twenty-First Century* (Martinus Nijhoff, 1993), at 432.

[15] Raymond Arthur, "Medical Treatment: The Welfare of the Child v. The Wishes of the Parents" 5 *Irish Journal of Family Law* 20 (2002), at 1.

[16] Geraldine Van Bueren, *The International Law of Children's Rights* (Martinus Nijhoff, 1995), at xx.

none to that of children,[17] it seems that comparatively there have been significant strides in terms of children's rights in the recent times. Historically, children were seen as the property of the father and the child was, therefore, "subsumed within legal notions of marriage and the family."[18] However the family has experienced significant changes in recent times, most notably because women have become recognised as "separate juristic persons and no longer part of the chattels of the man."[19] Moreover, traditional norms further dissolved with the advent of divorce and the family was seen more in terms of a unit consisting of individuals. Through this process, the child became visible as one of these individuals, with rights and interests to be protected.[20] Furthermore, in society more broadly, industrialisation meant a decreased need for child labour, and educating children became valued.[21] Children became perceived not as economic actors but in terms of the love and nurture they were thought to deserve.

These dramatic changes in society and within the family have fundamentally changed the legal relationship between states, parents and children.[22] The traditional conception of children as non entities under the law was challenged radically by US theorists in the 1960s and 1970s, parallel with challenges to discrimination against other repressed groups such as ethnic minorities. Richard Farson wrote that treating children differently from adults was a classic form of discrimination which denied them rights pertaining to them by virtue of their humanity.[23] John Holt went so far as to argue for the liberation of children from almost all

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[17] See Mary Renck Jalongo, "The Story of Mary Ellen Wilson: Tracing the Origins of Child Protection in America" 34 *Early Childhood Education Journal* 1 (2006). In 1874, the case of Mary Ellen, a severely abused child in New York was taken, in the absence of child protection legislation, by a church worker and the founder of the American Society for the Prevention of Cruelty to Animals.

[18] Ross, note 13, at 5.

[19] Van Bueren, note 16, at xxi. See also Mr. Justice Munby, "Families Old and New– the Family and Article 8" (2005) 17 *Child and Family Law Quarterly* 487.

[20] Annette Kronborg and Idamarie Leth Svendsen, "Children's Right to be Heard: The Interplay between Human Rights and National Law," paper presented at *11th World Conference of the International Society of Family Law* (Copenhagen and Oslo, 2-7 August 2002), at 1.

[21] Van Bueren, note 16, at xxi.

[22] Kronborg and Leth Svendsen, note 20, at 1.

[23] Richard Farson, *Birthrights: A Bill of Rights for Children* (Macmillan, 1974).

disabilities imposed on them by law.[24] Ethnographic researchers argued that children's views and perceptions were valid and important, and the tendency to rely on interpretations by adults of the experiences of children was questioned.[25] The agency of children, i.e. their ability to affect changes within the contexts in which they live, as opposed to simply being passively affected by their environments, was increasingly recognised.[26] The value of childhood as an experience in its own right began to be acknowledged, and as Qvortrup describes, children began to be seen "as human beings rather than as human becomings."[27]

There have been significant developments in recent decades regarding children's rights and the courts. Grover highlights how the status of 'legal standing' can be accorded to children in both criminal and civil law cases.[28] Status can be accorded in whole (including the right to "initiate actions in one's own name and to be a party throughout the action and perhaps even to represent oneself without a counsel"),[29] or in part (permitting "one or more" of these rights).[30] The right to legal representation was extended to children in the 1960s in some 'Western/Northern' countries.[31] The 'next friend' has emerged as a means of permitting cases to be taken on behalf of children.[32] The guardian *ad litem* has become an accepted professional in cases

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[24] John Holt, *Escape from Childhood* (E. P. Dutton, 1974). Holt stated "I propose...that the rights, privileges, duties of adult citizens be made available to any young person, of whatever age, who wants to make use of them" (at 1).

[25] Charlotte Hardman, "Can there be an Anthropology of Children?" 4 *Journal of the Anthropology Society of Oxford* 85 (1973).

[26] Allison James and Alan Prout, "Strategies and Structures: Towards a New Perspective on Children's Experiences of Family Life", in Julia Brannen and Margaret O'Brien, eds, *Children in Families: Research and Policy* (RoutledgeFalmer, 1996).

[27] Jens Qvortrup, "An Introduction" in Jens Qvortrup *et al.,* eds, *Childhood Matters: Social Theory, Practice and Politics* (Avebury Press, 1994), at 4.

[28] Sonja Grover, *The Child's Right to Legal Standing* (LexisNexis, 2008), at xiii. Grover discusses this with regard to children in North America.

[29] *Ibid.*

[30] *Ibid.*

[31] In the seminal US case *In Re Gault* 387 US 1; S Ct (1967), due process rights were extended to young people appearing in juvenile (i.e. criminal) courts, including the right to legal counsel.

[32] This is a common law term which refers to a person who represents another person in an action who has a disability or is unable to take a suit on their own behalf for other reasons. See Raymond Byrne and Paul McCutcheon, *The Irish Legal System* (4th ed, Butterworths, 2003), at 287.

concerning children.[33] This professional is particularly important because of the fact that frequently, children are not accorded party status or legal representation in proceedings concerning them, and the guardian *ad litem* often brings the voice of the child to proceedings in the absence of any other mechanism. However, even this basic provision is often absent for children.[34] Fortin makes the point that in the context of England and Wales, although judges may have discretion to hear children, "no child, whatever his or her age, has a legal *right* to be consulted over the arrangements to be made for their future."[35] The same can be said for most legal contexts in most jurisdictions. Nevertheless, considering the negligible status of children until relatively recently, modern developments have been progressive.

1.2.2 Children as Rights Holders

Before it is recognised that children have the right to be heard in legal proceedings affecting them, it must be acknowledged that children are the subjects of rights *per se*. There are a number of theorists who argue against the notion of children as rights holders. O'Neill has argued that it is preferable to focus on the obligations of adults as opposed to the rights of children, because of the fact that children's dependence on others is not comparable to that of other groups which have been traditionally

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[33] The guardian *ad litem* (guardian at law) has different roles in different jurisdictions– in the UK and Ireland it is a professional (usually an independent social worker) appointed by the court to represent the interests of children and incapacitated adults in court. In the US this professional can be a trained lawyer (Elizabeth Hartnett and Geraldine Waldorf, *New York Practice Guide: Probate and Estate Administration* [Matthew Bender and Company, 2010]). In the Irish context, Raymond and McCutcheon, note 32, refer to the guardian *ad litem* as "a person who represents the interests of the child separately from the views expressed by the child's parents or a health board" (at 287).

[34] See in the Irish context National Children's Office, *Review of the Guardian Ad Litem Service: Final Report from Capita Consulting Ireland, in Association with the Nuffield Institute for Health* (National Children's Office, 2004), Ursula Kilkelly, *Children's Rights in Ireland* (Tottel Publishing, 2008), at 146 and Aoife Daly, "Limited Guidance: The Provision of Guardian *ad litem* Services in Irish Family Law" 13 *Irish Journal of Family Law* 8 (2010). In the international context there are a number of relevant concluding observations of the Committee on the Rights of the Child which outline the lack of provision for the right to be heard, detailed in Chapter 2.

[35] Jane Fortin, note 12, at 240. Emphasis original.

oppressed.[36] Guggenheim states that, although children's rights are appropriate in the context of protection against state interference, it is questionable whether "children need rights or that speaking in terms of 'rights' is even good for children"[37] in the context of family law. Theorists such as Freeman have argued forcefully against this claim, on the basis that, amongst other things, adults sometimes fail in their duties towards children,[38] that children's capacities are ever-evolving,[39] and that rights make redress possible.[40] Furthermore, Guggenheim's argument that parental rights should be "deeply cherished" belies the fact that parents themselves often seek guidance from courts because they cannot come to agreement amongst themselves as to the future of their children.[41] Inescapable conflicts of interests between parents and children can arise.

A number of cases from Ireland and elsewhere clearly demonstrate the conflict between parental autonomy and the recognition of children as separate entities. The Irish Supreme Court found in the 'PKU' case[42] that it was unconstitutional for the authorities to test a child for serious and

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[36] Onora O'Neill, "Children's Rights and Children's Lives" in Philip Alston, Stephen Parker and John Seymour, eds, *Children, Rights and the Law* (Oxford University Press, 1992). O'Neill does not dismiss the notion that children have positive rights, but she dismisses the concept that they should be based on claims about fundamental rights, because, she argues "in the specific case of children, taking rights as fundamental has political costs rather than advantages" (at 25).

[37] Martin Guggenheim, *What's Wrong with Children's Rights* (Harvard University Press, 2005), at xi. Guggenheim perceives children's rights as a gateway for undue state interference in private life. In the context of parental rights see also Goldstein, Freud and Solnit, who emphasise a "firm belief as citizens in individual freedom and human dignity" (Joseph Goldstein, Anna Freud, and Albert Solnit, *Before the Best Interests of the Child* [The Free Press, 1979], at 12), a reference to the need to avoid interfering in the family unit.

[38] Michael Freeman, "Taking Children's Rights More Seriously" in Philip Alston, Stephen Parker and John Seymour, eds, *Children, Rights and the Law* (Oxford University Press, 1992), at 55.

[39] *Ibid*, at 58-59.

[40] *Ibid*, at 53. Freeman opines that "[r]ights are important because they recognise the respect the bearers are owed. To accord rights is to respect dignity: to deny rights is to cast doubt on humanity and on integrity." Michael Freeman, "Review Essay: What's Right with Rights for Children" 2 *International Journal of Law in Context* 89 (2006), at 90.

[41] Guggenheim, note 37, at 32.

[42] *North Western Health Board v W. (H.)* [2001] IESC 70. For analysis of this case, see Graeme Laurie, "Better to Hesitate at the Threshold of Compulsion: PKU Testing and the Concept of Family Autonomy in Eire" 28 *Journal of Medical Ethics* 136 (2002), at 136-137.

common genetic diseases against the will of the parents. The finding is questionable as the test caused no harm to the children– it was a matter of parental preference. In another controversial case, (the 'Baby Ann' case)[43] the Irish courts ordered the transfer of custody of a child who had spent two and a half years with prospective adopters to her birth parents when they withdrew their consent to the adoption.[44]

The 'PKU' and 'Baby Ann' cases highlight the fact that clashes between the interests of parents and children inevitably raise the controversial question of the extent to which the state can infringe on the rights of "intact"[45] families. In such cases legislators and judges alike will face difficulties in balancing the interests of children, parents (or other carers) and the state. Hardiman J delineates in *N. & anor. v Health Service Executive & ors.*[46] the parental "preference" inherent in Irish law, a preference which is also present in most other legal systems.[47] Hardiman J explains the reasons for this preference:

> Both according to the natural order, and according to the constitutional order, the rights and duties necessary for those

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[43] *N. & anor. v Health Service Executive & ors.* [2006] IEHC 278; [2006] IESC 60.

[44] The decision was made despite the fact that the child had bonded with her prospective adopters, and the fact that the court acknowledged that to be given into the custody of her birth parents, who were strangers to her, "would cause serious both immediate and lasting damage." McGuinness J, *N. & anor. v Health Service Executive & ors.* [2006] IESC 60, at 10.

[45] Guggenheim, note 37, at 102. By this Guggenheim means a family where two birth parents live together. He is describing cases in which grandparents have applied to the courts seeking visits/contact with grandchildren.

[46] [2006] IESC 60, at 6.

[47] See e.g. in the context of England and Wales, *Re KD (A Minor)(Ward: Termination of Access)* [1988] AC 806; *Re K (a minor: care and control)* [1990] 1 WLR 431; *Re H (a minor: custody)* [1990] 1 FLR 51; and more recently *Re G. (Children)* [2006] 4 AER 241. There is ambivalence in the courts of England and Wales, however, regarding the parental preference, which– Fortin opines– is rarely mentioned but seemingly present in cases where there is a choice to be made between birth parents and other carers when both are apparently satisfactory parents and there has in the past been an interruption in the care of the birth parent. See Fortin, note 35, at 521-528. Courts have been more willing in this jurisdiction (i.e. England and Wales) than in Ireland, however, to emphasise that birth parents do not necessarily have a right to raise their children. In *Re B (A Child)* [2010] 1 FCR 1 it was emphasised that the best interests of the child was secondary to parental rights. In this case a birth father sought to gain custody ('residence' in the terminology of that jurisdiction) of his three year old son, however the court determined that it was in the child's best interests to remain in the care of his grandparents with whom he had lived since birth.

> purposes are vested in the child's parents. Though selflessness and devotion towards children may easily be found in other persons, it is the experience of mankind over millennia that they are very generally found in natural parents, in a form so disinterested that in the event of conflict the interest of the child will usually be preferred.[48]

He further makes reference in his judgment to approaches to child welfare which claim to be "child centred".[49] In some instances, he continues, such approaches involve the opinion of "third parties" (by which he presumably means people other than birth parents) as to what is in the interests of the child. Therefore he argues that "it is of great importance that terms such as those just mentioned should be thought through, should evoke an intellectual and not merely an emotional response, and that their actual content should be ascertained."[50] The matter of retaining the balance between child, parent/carer, and state is undoubtedly a vital one to consider throughout this thesis. A prominent feature of a democratic state upholding the rule of law is that intervention in family life should be proportionate.[51] As outlined above, there exists a concern in some quarters that considering separately the rights of children in this equation, particularly where their views are concerned, will undermine the rights of parents.[52]

This thesis is not, however, concerned solely with this balancing exercise, where the prominent issue for many is the fact that children's rights may be pitted against parents rights in the exercise of determining the best interest of the child. While this important issue will be borne in mind at all times in this work, the primary matter under consideration is

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[48] [2006] IESC 60, at 4.
[49] *Ibid.*, at 5. Hardiman J is referring specifically here to young children.
[50] *Ibid.*
[51] In the context of the European Convention on Human Rights see e.g. *Hokkanen v Finland* [1995] 19 EHRR 139; *Sahin v Germany* , (30943/96) [*2003*] ECHR 340; and *P, C and S* v *UK* [2002] 35 EHRR 1075.
[52] See e.g. Guggenheim note 37 and Bruce Hafen and Jonathan Hafen, "Abandoning Children to their Rights" (1995) 55 *First Things* 18.

of the *views* of the child in this exercise. There are certainly constant intersections between the matter of the interests of parties in the balancing exercise and the matter of the views of the child. However one can point to the nature of the cases analysed in this work to demonstrate how little the increase in respect for the views and wishes of the child has affected the prominence of parental authority in the legal arena where cases regarding children are concerned. Certainly one could argue that the views of the child have become a complicating factor in the judicial decision-making exercise. However the value of including children's views has become increasingly accepted at both domestic and international level in all disciplines, and the evidence in favour of hearing children is striking.[53]

In the vast majority of the instances where children's views are relevant, the case has been initiated as a result of disagreement between parents, or because of a disagreement between parent and state.[54] Some cases, such as those relating to medical consent, involve the wishes of the child pitted against the best interest determinations of state authorities.[55] However there is a lacuna where cases which are initiated by children are concerned. There is certainly a distinct lack of cases which explicitly involve children against parent/s, i.e. without the situation involving two parents in disagreement with each other. Such cases (i.e. those involving child versus parent) are typically of most concern to commentators against participation rights for children on the basis of a perceived threat to parental authority.[56]

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[53] See Section 1.3.1.

[54] See for example the jurisprudence of the European Court of Human Rights in Chapter 4, and the proceedings of the Irish courts analysed in Chapters 6 and 7. Guggenheim opines that "[t]he history of child custody disputes is the story of adults using the language of children and their rights to gain something for themselves." Guggenheim, note 37, at 143.

[55] See e.g. *Re R. (a minor) (wardship: consent to treatment)* [1992] Fam 11; [1991] 3 WLR 592, *Re W* [1992] 4 All ER 627 and *Re E. (a minor) (wardship: medical treatment)* [1993] 1 FLR 386, considered in Chapter 2, at 32-34.

[56] See e.g. Hafen and Hafen, note 52.

A handful of such cases exist in England and Wales because Section 10(8) of the Children Act permits children, with the permission of the High Court, to bring cases concerning where children live, who they have "contact" (i.e. visits/access) with, or any other specific matter. This provision has had a "mixed judicial response" however[57] and the lack of case law concerning the initiation of proceedings by children suggests such cases are rare.[58] A disagreement between parents and a 15 year old regarding whether she could go on a foreign holiday with another family was insufficiently important for the court to permit the girl to apply under 10(8). In *Re CE (section 37 direction)*[59] a 14 year old went to live with her boyfriend's family against the will of her parents. The parents of the girl applied for a residence order (i.e. to determine where she would live). The girl herself also sought the permission of the court to apply for a residence order but this was not proceeded with. Therefore it seems that it is rare that children are permitted to initiate proceedings, and that precludes a consideration of whether the courts will find in favour of the wishes of the child where they run counter to those of parents. A rare example of a case where permission was granted is *Re C (residence: child's application for leave)*,[60] however in this case the wishes of the 12 year old girl were in line with those of her mother (with whom she sought to live).

In the US some interesting case law has also emerged. In the case of *Katherine B.T. v Sally G. Jackson (Judge of the Family Court of Jefferson County, West Virginia and Richard B.*,[61] a 15 year old boy was successful in obtaining a protective order sought on the basis that domestic violence had been perpetrated against him by his mother. He applied for the order without the representation of a guardian *ad litem*, and the mother submitted that the court had exceeded its jurisdiction by

[57] Fortin, note 35, at 134.
[58] *Ibid.*, at 136.
[59] [1995] 1 FLR 26.
[60] [1995] 1 FLR 927.
[61] 640 S.E.2d 569, 2006 w. Va. LEXIS 119 (W. Va. 2006).

failing to dismiss the boy's petition on this basis.[62] The matter centred, therefore, on whether it was permitted under the law for a child to take a case without an intermediary. The court held that, because the relevant statute aimed to render available to all persons the system for addressing domestic violence, and because children were "persons" in accordance with the text of the legislation, "a minor may file a petition for a domestic violence protection order."[63] This reaffirmed the right of children to access such mechanisms against abuse in the family home on a somewhat equal basis to adults. Although undoubtedly some commentators would be uncomfortable with the challenge to parental authority in this case, it is difficult to argue against the logic of the West Virginia court. The challenge to such authority seems proportionate and necessary in order to permit children to access expeditiously protection from domestic abuse where their safety is clearly under threat.

Cases which have proven particularly problematic are those concerning parental consent to a young person seeking abortion services. In the case of *Re T.W.*[64] the Supreme Court of Florida invalidated the statute which enshrined the requirement for parental consent where a minor seeks an abortion. In England and Wales that same interference with parental rights was upheld as being in conformity with the Human Rights Act 1998 (which enshrines the European Convention on Human Rights in that state). The *Axon* case involved a petition for judicial review of a document providing guidance to medical professionals on matters relating to sexual health. It stated that advice and treatment could be provided to persons under the age of 16 without parental consent where the young person understood the advice, treatment and implications. The petition was dismissed and the validity of the guidance upheld.[65] The *Axon* case was, of course, a clear challenge to the *Gillick* decision, which also recognised the evolving capacities of young people to make

[62] The order had expired and the boy was ultimately represented by his adult sister at the final hearing, however the court considered the submission of the mother as a matter of public interest.
[63] At 5.
[64] *Re T.W.* 551 So. 2d 1186, Fla. LEXIS 972 (1989).
[65] *R (on the application of Axon) v Secretary of State for Health* [2006] EWHC 37.

decisions relating to treatment for themselves. The importance of the right to bodily integrity of young people where they seek sexual health services has long been recognised. It has been enshrined, for example, in statutes where they attain majority earlier for that purpose,[66] as well as being highlighted in the cases outlined above. It is undoubtedly of concern to some that such evolutions in the law constitute corrosion to an extent of the primacy of the right of parents to determine the experiences, education and upbringing of their children.[67] The infringement on parental rights by the state is indeed a matter to be treated with great caution and one which requires ongoing justification– consider for example historic instances of abuses of the right to family life perpetrated under both autocratic regimes,[68] and more democratic authorities.[69]

In modern democratic states the prospect of government interference in the family is less daunting but nevertheless necessitates that the notion of proportionality remain prominent. The risk persists that the quest to put children to the forefront of decisions concerning them will have the unwanted result of failing to recognise the importance to children of parental freedoms, as opposed to undue state authority. As Hardiman J opined in *N. & anor. v Health Service Executive & ors.*:

> A presumptive view the children should be nurtured by their parents is, in my view, itself a child centred one and the alternative view, calling itself "child centred" because it is prepared more easily to dispense with the rights and duties of parents must guard against the possibility that in real individual

[66] For example in England and Wales by the Family Law Act 1969.
[67] See further Guggenheim, note 37, Chapter 7.
[68] Van Beuren (note 16, at 240) makes the point that the right of parents to ensure that the education of their children is "in conformity with their own religions and philosophical convictions" enshrined in Protocol 1 Article 2 of the European Convention on Human Rights was drafted with the indoctrination which occurred in Nazi Germany in mind.
[69] Consider, for example, the removal by the government of aboriginal children from parents in Australia. Peter Read, *The Stolen Generations: The Removal of Aboriginal Children in New South Wales 1883 to 1969* (Department of Aboriginal Affairs [New South Wales Government], 1981).

> cases it may become merely a proxy for the views of social workers or other third parties.[70]

However this difficult area reflects the fraught manner in which parent and state may conflict. It seems to point to a need for greater regard for the rights of– and in many cases the voice of– the child rather than less, as the interests of the person whom the decision will most severely affect may be lost in the battle between the two more powerful actors.

The cases considered above certainly involve challenges to the primacy of parental rights and highlight that some cases are heard which clearly involve a "wishes of parent" versus "wishes of child" scenario. Such cases, however, appear to be relatively rare. Overwhelmingly the case law in the area, and therefore the issues considered in this thesis, relate to the approach of the law and the courts to children's views when adults are in dispute about the best interests of the child.

1.2.3 Children and Civil Law Proceedings

For the reasons noted above, 'Western/Northern' societies have had to increasingly grapple in recent decades with the necessity of dealing with children's interests in the legal system. This necessity was borne not just from increased societal concern with child protection, but also out of the modern phenomena of separation and divorce. Fawcett refers to the current UK social trends of "falling marriage rates, rising divorce rates and increased levels of co-habitation and re-marriage"[71] and emphasises that "[a]s a consequence, children today have to deal with increasingly complex family circumstances."[72] Civil law courts have had to grapple more and more with matters relating to children. James and James emphasise the key role played by the law in constructing notions about children:

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[70] At 6.
[71] Margaret Fawcett, "Foreword" 14 *Child Care in Practice* 233 (2008), at 233.
[72] *Ibid.*

> [T]he concept of "childhood"- however and wherever it finds local expression- can be theorised in terms of the cumulative history of social practices and policies about children, expressed as Law, which have arisen in response to the activities of children in their ongoing engagement with the adult world and adults' views about those activities.[73]

Kaganas and Diduck outine two popular perceptions of children in family law.[74] The first is the traditional image of "the child"[75] as unformed, incompetent and dependent. This "romantic, developmentalist child"[76] is a product of developmental psychology which equates age with capacity, and is, according to the authors, the current image of children held by those who work in family law. The second image, the "autonomous reflexive child,"[77] perceives children as active participants in the determination of their lives, and as having the capacity to influence their environment. The commentators state that the latter is the new ideal of child law, and that the two competing images of the child indicate the ambivalence towards childhood within the legal arena.

James also notes the ambivalence toward the notion of children as social actors and as bearers of rights and how this manifests in court judgments.[78] James takes the illuminating example of *Re W. (Contact: Joining Child as Party)* in which a district judge found that a father should not have contact with his son.[79] This decision was made on the basis of the view of both the son and the report of an independent social

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[73] Allison James and Adrian James, *Constructing Childhood: Theory, Policy and Social Practice* (Palgrave Macmillan, 2004), at 50-51.
[74] Kaganas and Diduck, note , at 973.
[75] The term 'the child' is itself problematic as it assumes one type of child, when in fact the experiences and lifestyles of children are as rich and diverse as those of adults. See Sheila Greene, "Children as Social Actors," paper presented at *Irish Human Rights Commission and Law Society of Ireland Conference: Achieving Rights-Based Child Law* (Dublin, 14 October 2006).
[76] Kaganas and Diduck, note 12, at 74.
[77] *Ibid.*
[78] See James, note 12, at 53.
[79] *Re W. (Contact: Joining Child as Party)*, [2001] EWCA Civ 1830; [2003] 1 FLR 681.

worker, and was related to a deterioration in the arrangements for the child to have over night contact with his father. The Court of Appeal found in favour of the father, who challenged the district court decision, stating "the child had a right to a relationship with his father, *even if he did not want it*, and his welfare demanded that efforts be expended to make contact possible."[80] James remarks on the questionable nature of a 'right' to be forced to do something against one's own wishes.[81] The European Court of Human Rights appears to refrain from finding states in breach of Convention rights where authorities have not forced children into contact (where the children strongly resist it).[82] Perhaps this approach heralds an end to the "cruel to be kind" approach to children's choices demonstrated in cases like *Re W. (Contact: Joining Child as Party)*.

Nevertheless the case highlights the view of many theorists that children "are not always, or even usually"[83] the best judges of their own best interests and should therefore be forced into what adults perceive as best, in order to achieve long term benefits.[84] For example, a young child may not wish to attend school, and indulging this would clearly affect her

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[80] At 16. Emphasis added by James, note 12, at 53. See also Fortin, note 1235, at 311 who states that it is arguable that the court was right on this point. Nevertheless the language of the court seems questionable at the very least.

[81] James, note 12, at 53.

[82] See e.g. *Hokkanen v Finland* (1994) 19 EHRR 139; *Suss v Germany* Appl. No. 40324/98, judgment of 10 November 2005 and *C. v Finland* Appl. No. 18249/02, judgment of 9 May 2006. See further Chapter 4. It also appears to incline against the ruling of Tyrer J in *Re S. (Contact: Children's Views)* [2002] EWHC 540 (Fam), [2002] 1 FLR 1156 at 1171C that it would be counterproductive to force a 16 year old into access, although the child in this case was older and it must also be considered that in the context of England and Wales, somewhat divergent approaches can be attributed– at least in part– to the level of discretion accorded to the family law courts. Harris-Short and Miles make the point that in England "[t]he outcomes of cases are frequently determined not by rules, but by the exercise of judge's discretion, guided only rather loosely by general statutory principles." Sonia Harris-Short and Joanna Miles, *Family Law: Text, Cases and Materials* (Oxford University Press, 2007), at 45. Herring, however, opines that "I have a sneaking suspicion that if the judges agree with the children, they attach much weight to their views, but if they do not, they attach little weight. But that might be rather unfair." Jonathan Herring, *Family Law* (3rd ed, Pearson Education Limited, 2011).

[83] Neil MacCormick, *Legal Right and Social Democracy: Essays in Legal and Political Philosophy* (Clarendon Press, 1982), at 156. Cited in Fortin, note 35, at 21.

[84] See also Jospeh Raz, "Liberty and Trust" in Robert George, ed, *Natural Law, Liberalism and Morality* (Oxford University Press, 1996), at 121. Cited in Fortin, note 35, at 21.

personal development and future opportunities.[85] Judge LJ helpfully differentiated in *Re K. (a child) (secure accommodation order: right to liberty)*[86] between "normal" and "abnormal" family life. The law should only intervene, Judge LJ opined, where parents' behaviour can be identified as cruel or abusive, as opposed to enforcing such matters as school attendance.[87] However the matter of when courts should force children into situations (such as access visits with parents) against strongly held views and wishes is far from clear.

The search for minimum ages in the civil law context (and even more so in the criminal law context) reflects the ambivalence of the law and the courts to children and their capacities. This is as evident in the area of the right to be heard as any other. The Pérez-Vera report (the explanatory document accompanying the Hague Convention on International Child Abduction[88]) states that:

> [A]ll efforts to agree on a minimum age at which the views of the child could be taken into account failed, since all the ages suggested seemed artificial, even arbitrary. It seemed best to leave the applications of this clause to the discretion of the competent authorities.[89]

The issue of developmental psychology and age-based categorisation of children will be examined in some detail below, however it is useful to consider the legal aspects of the area at this point. States have chosen a variety of different ages for different legal purposes.[90] Under Romanian law, children over 10 years must be heard in any legal or administrative

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[85] Fortin, note 35, at 21. It would also, of course, place parents in a difficult legal situation where school is compulsory.
[86] [2001] 1 FLR 526.
[87] *Ibid* at para. 99.
[88] The Hague Convention on Civil Aspects of International Child Abduction, TIAS No 11670, 1434 UNTS 48, adopted 25 October 1980, entered into force 1 December 1983.
[89] Elisa Perez-Vera, *Explanatory Report on the Hague Abduction Convention*, (Hague Conference on Private International Law, 1981), para. 30. Available at www.hcch.net (last accessed 22 June 2010).
[90] See further Angela Melchiorre, *At What Age?* (UNICEF, 2005).

proceedings affecting them and reasons must be provided where a child's request to be heard is refused.[91] In the German legal system, a number of rights pertain to children in family law proceedings.[92] For example, an obligation exists that children over the age of 14 be heard in person, children can lodge an appeal without the need for legal representation and younger children are regularly heard by the court.[93] Mitigating circumstances must exist for the court to refrain from hearing children.[94] Scandinavian legal systems are amongst the most facilitative regarding hearing children. Norway's Child Welfare Law provides, *inter alia*:

> A child who has reached the age of 7, and a younger child who is able to form his own viewpoints, shall be informed and given the opportunity to state his/her opinion before a decision is made in the matter which affects him or her. The child's opinion shall have weight in accordance with the child's age and maturity.[95]

In Finland, the views of the child have a place of prominence in proceedings affecting them. In child care law, children's views on care placements must be heard,[96] and placements without the consent of parents or guardians are conditional upon the consent of the child where she is aged 12 years or older. In family law, the child's views on custody and access decisions must be obtained (depending on age and maturity) where parents disagree.[97] Finnish law also provides that neither custody

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[91] Law 272/2004, Article 24(1) and Article 24(5) respectively.
[92] Nina Dethloff and Dieter Martiny, *National Report: Germany* (Commission on European Family Law, 2004), cited in Branka Resetar and Robert Emery, "Children's Rights in European Legal Proceedings: Why are Family Practices so Different from Legal Theories?" 46 *Family Court Review* 65 (2008), at 69.
[93] *Ibid.*
[94] *Ibid.*
[95] As amended. Section 3-6. Available at: http://www.regjeringen.no/en/doc/Laws/Acts/the-child-welfare-act.html?id=448398. Last accessed 25 May 2010.
[96] Act on the Status and Rights of Social Welfare Clients, 2000. See Third Report of Finland to the Committee on the Rights of the Child, CRC/C/129/Add.5 (2003), paras. 142 and 118.
[97] 1983 Act on Child Custody and Right of Access with regard to Children (*laki 361/83 lapsen huollosta ja tapaamisoikeudesta, lag 361/83 ang. vårdnad om barn och umgängesrätt*– "the 1983 Act"), Section 11. It is of note that the Act specifies that the

arrangements nor contact visits can be enforced against the will of children aged 12 and over, or that of younger children who are deemed sufficiently mature.[98] Brazil's Statute of the Child and Adolescent goes so far as to recognise the right of any child to intervene in a legal matter under the statute which affects her, as well as the right to free legal aid for this purpose.[99] It is clear that states have set a variety of age limits in order to accomodate aspects of the right to be heard.

Some states have refrained from setting age limits, possibly for this reason. The courts of England and Wales have not established an age threshold below which it will be assumed that a child's views will not be considered, however these courts have held that it is not necessarily inappropriate to take into account the views of children aged six years.[100] Age limits for this purpose are undefined in Irish law, although there is some interesting emerging jurisprudence on the matter in the context of cases concerning the Hague Convention on International Child Abduction. In the High Court case of *N. v N. [hearing a child]* Finlay Geoghegan J held that a child of six should be given the opportunity to be heard.[101] In the case of *A.Bu. v J.Be.*, the Supreme Court held that it would be inappropriate to hear a child of five years.[102] With a large increase in the number of Hague Convention cases in recent times, it is likely that the approach of the Irish courts to the matter will be elucidated further in the future. The differing approaches across jurisdictions (and perhaps within them, as shall be demonstrated in this thesis) to hearing children reflect the uncertainty within legal systems in relation to children's capacities and notions about children generally. It

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consultation should be carried out in a tactful manner and should avoid causing harm to the child's relations with parents. See *C. v Finland* Appl. No. 18249/02, judgment of 9 May 2006.

[98] Section 2 of the Act on the Enforcement of Decisions concerning Custody and Access Rights (*laki 619/1996 lapsen huoltoa ja tapaamisoikeutta koskevan päätöksen täytäntöönpanosta, lag 619/1996 om verkställighet av beslut beträffande vårdnad om barn och umgängesrätt*), 1996. See *C v Finland, ibid.*

[99] Adopted 1990. Article 206.

[100] *Re R. (Child abduction: Acquiescence)* [1995] 1 FLR 716.

[101] *N. v N. [hearing a child]* [2008] IEHC 382.

[102] *A.Bu. v J.Be.* [2010] IESC 39. See Chapter 6 for detailed analysis of Hague Convention cases in the Irish context.

may also reflect a concern that arbitrary age limits may have a negative effect.

There are, of course, many other circumstances (aside from child care and family law) in which the interests of children come before the courts where their views are highly relevant. Freeman opines that "[o]ne of the best test cases for children's rights is in the area of health care. It is thus not surprising that the leading English case on children's rights should have arisen in this area."[103] The crucial case to which he refers is that of *Gillick v West Norfolk and Wisbech Area Health Authority*.[104] This case gave rise to the concept of "*Gillick* competence"[105]– a term now used in medical law which refers to whether a child under 16 years is competent to consent to medical treatment without the need to obtain parental permission. The standard has influenced courts in a number of other jurisdictions. It arose from litigation by a mother against a circular regarding a policy of the health department which advised doctors that they had discretion to prescribe contraception to children under 16, without parental consent. The House of Lords held the circulars to be lawful, and concluded, "minor's capacity to make his or her own decision depends on the minor having sufficient understanding and intelligence to make the decision and is not to be determined by reference to any judicially fixed age limit."[106] Their Lordships held that parental rights existed for the benefit of the child and such rights were only justifiable to the extent that they enabled parents to carry out their duties in relation to their children.[107] Parental control over children will, therefore, vary before the infant attains majority,[108] "as the child develops,"[109] and becomes increasingly independent.

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[103] Freeman note 40, at 92.
[104] *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112; [1985] 3 WLR 830.
[105] See Fortin, note 35, at 6.
[106] At 187.
[107] [1986] AC 112, at 185.
[108] See further Inge Clissman and Paul Hutchinson, "The Right of the Child to be Heard in Guardianship, Custody and Access Cases" 9 *Irish Journal of Family Law* 11 (2006).
[109] [1986] AC 112, at 171.

It must follow, then, that the courts should also recognise such increasing independence. Freeman highlights the significance of the decision and its broad application to other areas additional to health care.[110] However the ambivalence with which the courts approach the matter of children's autonomy has been evident from the resilement from that judgment which has been evident in subsequent cases, most particularly where adolescents have refused treatment.[111] The case of *R.* concerned a 15 year old who was refusing to consent to taking a particular medication.[112] In the course of the judgment, Lord Donaldson considered the conflict between the wishes of the child's and those of the parents, and held that a child considered to be *Gillick* competent could be forcibly treated against her will.[113] In another case, *Re W.*, Donaldson held that no minor of any age "has power by refusing consent to treatment to override a consent to treatment by someone who has parental responsibility of the minor and *a fortioro* a consent by the court."[114]

Freeman raises the deeply troubling possibility that, according to the logic of denying children and young people the right to refuse treatment, although a young person could decide to consent to an abortion herself, she "could not refuse treatment (and therefore a pregnancy termination) if it was in her best interests..."[115] Freeman further notes a number of cases in which young people with strong beliefs as Jehovah's Witnesses were forced to undergo life-saving blood transfusions against their will,

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[110] Michael Freeman, "Rethinking *Gillick*" 13 *International Journal of Children's Rights* 201 (2005), at 202.

[111] *Ibid.* Freeman argued as far back as 1998 that the judgment had not been as influential as had been expected. Michael Freeman, "The Right to be Heard" 22 *Adoption and Fostering* 50 (1988/89), at 57. James too has argued that the judgment, "has proved to have less of a lasting impact than had been expected." James, note 12, at 55.

[112] *Re R. (a minor) (wardship: consent to treatment)* [1992] Fam 11; [1991] 3 WLR 592. See Freeman, note 110, and Fortin, note 35.

[113] *Re R. (a minor) (wardship: consent to treatment) [1992]*, at 25.

[114] [1992] 4 All ER 627, 639-640. See Freeman, note 110, and Fortin, note 35.

[115] This is what Lord Donaldson suggests in *Re W* [1992] 4 All ER 627, 639-640. See Freeman note 40, at 91. Lord Donaldson maintains, however, that doctors would ensure that this only happened where it was in the best interest of the child.

because of a lack of recognition by the courts of a right to refuse consent.[116]

In principle the stance of the courts in such cases would seem defensible on the grounds that it was necessary to save the lives of the young people. Yet Freeman takes a highly critical approach to this somewhat comfortable conclusion. It is undeniably tempting to dismiss the possibility for a child to make what seem to be very unwise decisions to the outside observer, as the decision will result in the child's death.[117] Freeman points to a number of troubling considerations.[118] In *Re E.*,[119] the young man died shortly after his 18th birthday, having after two and a half years gained the right to refuse further transfusions. In the case of *Re S.*[120] the 15 year old girl involved reported that being forced to undergo blood transfusions was "like rape."[121] These cases in the area of health raise significant questions about value-laden 'best-interest' decisions,[122] and the fact that even very mature children are subject to forcible treatment which, as an adult, they would (and did, in the case of E.) reject out of hand. Breen emphasises that adolescents may not be far removed from adults in their ability to understand the consequences of a decision to refuse treatment, and that the justifiability of differentiation between the two groups should be proportionate and necessary.[123]

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[116] See also Fortin, note 35, at 154.

[117] See for example Fortin, note 35, who argues at 155 that "[t]he court can legitimately argue that society has an interest in protecting under-age minors, irrespective of their legal competence until they attain their majority."

[118] See Freeman, note 110.

[119] *Re E. (a minor) (wardship: medical treatment)* [1993] 1 FLR 386.

[120] [1994] 2 FLR 1065.

[121] It is beyond the scope of this study to examine cases relating to *Gillick* competence in detail. However it is worth noting that issues exist in relation to the way in which *Gillick* competence is determined. W. was considered by the judge not to be *Gillick* competent, despite the fact that a psychiatric witness in the case expressed doubt whether the girl was 'seriously immature' for her age. Freeman suggests, "a finding of *Gillick* incompetence is, of course an easy way out" (at 209) and that "it is clear that competence is irrelevant where the really important questions are addressed." Freeman, note 110, at 211.

[122] Considered in further detail below.

[123] Claire Breen, *Age Discrimination and Children's Rights* (Martinus Nijhoff Publishers, 2006), at 68-69. The matter of discrimination and proportionality is considered further below.

Nevertheless it would appear that there has been a reassertion of the notion of *Gillick* competence in the recent judgment of *R (Axon) v Secretary of State for Health.*[124] This particular case concerned the failure of a parental challenge to the policy of granting children confidentiality when they seek advice on sexual matters. The judgment strongly defended the confidentiality and autonomy of mature children.[125] Future court decisions relating to children and medical decision-making in England and Wales will be observed with interest in order to ascertain whether courts will return to the reasoning in *Gillick*, or perhaps exceed it in terms of children's autonomy rights.

Divergent approaches to children in criminal law further illustrates the ambivalent approach of the courts to children's capacities.[126] The minimum age of criminal responsibility is, "the lowest age limit for juvenile justice delinquency jurisdiction– the youngest age at which children may potentially be held liable for infringements of a given country's penal laws."[127] The spectrum of minimum ages that states have adopted varies from 7 (Scotland and India) to 16 (Spain)[128] and 18 (Belgium and Luxemburg).[129] James makes the point that:

> [W]hile the criminal law in the United Kingdom regards children as young as 10 years old as being responsible for their

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[124] [2006] EWHC 37 (Admin).

[125] See Rachel Taylor, "Reversing the Retreat from Gillick? R (Axon) v Secretary of State for Health" 19 *Child and Family Law Quarterly* 81 (2007).

[126] The CRC does not specify a minimum age for criminal responsibility. However Article 40.3 of the CRC stipulates that States must promote, "the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe penal law."

[127] Don Capriani, *Children's Rights and the Minimum Age of Criminal Responsibility* (Ashgate, 2009), Preface. Capriani differentiates between this and the minimum age of penal majority, i.e. "the lowest age at which children may be held responsible specifically in adult criminal courts."

[128] See Defence for Children International, *Ensuring Appropriate Age Limits of Criminal Responsibility* (Defence for Children International, 2007). However Amnesty International highlights the fact that in one US state– North Carolina– the minimum age is six. See Amnesty International, *Betraying the Young: Children in the US Justice System* (Amnesty International, 1998), Section 4. Available at: http://www.amnestyusa.org/document.php?id=D94FCE82406321E18025690000692DCA&lang=e (last accessed 28 May 2010).

[129] See John Gillen, "The Age of Criminal Responsibility: 'The Frontier between Care and Justice'" 12 *Child Care in Practice* 129 (2006), at 136.

> actions...family law regards children as being not capable of (or as needing protection from) taking responsibility, apparently setting increasingly high standards of competence the greater the perceived degree of responsibility.[130]

This paradox is indeed particularly visible and questionable in the context of England and Wales, where the age of criminal responsibility is ten, and children accused of homicide will be sent automatically to the Crown Court for trial.[131] In an extreme example, the two children found guilty of murdering toddler Jamie Bulger (aged ten at the time of the offence and 11 at the time of conviction) were tried in an adult court.[132] The pattern was repeated more recently in relation to two ten year old boys found guilty of the attempted rape of an eight year old girl.[133] Likewise, in Ireland children as young as ten can face trial in the Central Criminal Court on charges of serious sexual assault, manslaughter and murder.[134]

Yet in certain proceedings, not only are children of the same age considered incapable of decision-making in relation to their lives, but for many purposes, they will not even be asked their opinions on the matter. In the family law context in Ireland and England/Wales it is most likely that children will not be heard in proceedings affecting them.[135] Judge Gillen highlights the lack of consistency of the minimum age of criminal responsibility in the Northern Ireland with other minimum ages– 16

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[130] James, note 12, at 55.

[131] See further Paul Cavadino, *Children who Kill: An Examination of the Treatment of Juveniles who Kill* (Waterside Press, 1998), at 68. The Crown Court is one of the constituent parts of the superior courts in the jurisdiction of England and Wales.

[132] They were convicted in November 1993. See "The Bulger Case: A Chronology", *The Guardian*, 16 December 1999. Available at: http://www.guardian.co.uk/uk/1999/dec/16/bulger2, (last accessed 30 May 2010). See also the European Court of Human Rights case *T. v United Kingdom* (1999) 30 EHRR 121.

[133] Sam Jones, "Boys, Aged 10 and 11, Guilty of Attempted Rape" *The Guardian*, 24 May 2010.

[134] Under the Criminal Justice Act 2006. See further Kilkelly, note 34, at 537.

[135] See Fortin, note 35, at 234-235 on the context of England and Wales and for consideration of the Irish context see National Children's Office, note 34, at 52.

years of age (with parental consent) for marriage, 17 for sexual consent, and 18 for voting rights.[136]

It is clear that the courts take an ambivalent approach to children and their capacities. On the one hand, children have legal personality, but on the other, they are not permitted to exercise it on their own behalf. Children are considered responsible for criminal actions at very young age, but are often not asked their opinions on important legal matters concerning them at that same age. Clearly the approach to children's capacities by both legislation and courts are fraught with difficulties and inconsistencies. It is in this context that the nature of Article 12 and the right to be heard, and the implementation of these standards, must be considered.

1.3 The Convention on the Rights of the Child, Participation Rights and the Right to be Heard

As far back as 1924, the world acknowledged through the primary international organisation of the time that children had the right to protection from harm and to provision for their needs by adopting the 1924 Declaration on the Rights of the Child.[137] However this particular instrument was concerned primarily with matters relating to protection of and provision for children, reflecting the notion of childhood as a time of vulnerability and helplessness. Even at that point in history, Janusz Korczak, a Polish children's author and doctor, felt that the Declaration did not go far enough for children and wanted to provide them with, "more 'rights' without making them into adults."[138] The

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[136] See Gillen, note 129, at 85.

[137] The Declaration on the Rights of the Child, 1959. G.A. res. 1386 (XIV), 14 UN GAOR Supp (No 16) at 19, UN Doc A/4354, adopted 20 November 1959. This document was drafted and advocated by Save the Children founder Eglantyne Jebb. It was later followed by the 1959 Declaration on the Rights of the Child which contained additional rights, for example the right to play. See generally Van Bueren, note 16, at 1-12.

[138] Philip Veerman, "Janusz Korczak and the Rights of the Child" 7 *Concern: Journal of National Children's Bureau* 7 (1987), at 7. Korczak argued for respect for the capacities of children and for the openness of adults to work with them. See generally

conceptualisation of children solely as subjects of protection rights[139]– as opposed to active individuals to whom participation rights[140] apply– arguably persists in modern thinking.[141] However the drafting of the Convention on the Rights of the Child challenged this.[142] For the first time in an international legal text, it was explicitly recognised that, amongst the rights that pertain to children are those that relate to their participation in matters affecting them, a theme which is "reiterated throughout the Convention."[143] Prominent amongst these rights are those which relate to the right of children to be heard, most notably Article 12, which affords to children the right to be heard in matters affecting them, including relevant proceedings.[144] Lansdown writes that Article 12 is at the core of the CRC and that, by "insist[ing] on the visibility" of children as people in their own right, the provision requires that we recognise the

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Janusz Korczak, *When I am Little Again; and, The Child's Right to Respect* (University Press of America, 1992).

[139] 'Protection rights' are the provisions of the Convention on the Rights of the Child that aim to protect children from harmful acts and practices. See Jim Lurie, "The Tension Between Protection and Participation– General Theory and Consequences as related to Rights of Children, Including Working Children" 7 *Inter University Centre Journal of Social Work Theory and Practice* 3 (2003).

[140] "Participation rights" are those which relate to the participation of children in decision-making affecting them and other aspects of their lives. It is currently a term which is widely used in relation to Article 12 and other relevant articles of the CRC. See Committee on the Rights of the Child, note 7, para. 3.

[141] See e.g. Hill *et al.* who state that, "[t]he refusal to accept that children and young people are competent witnesses to their own lives has confined them to a state of impotency, at the mercy of adults, some of whom, as history teaches us, cannot be relied upon." Malcolm Hill *et al.*, "Moving the Participation Agenda Forward" 18 *Children and Society* 77 (2004), at 83, citing Liam Cairns and John Davis, "Issues in the Practice of Children and Young People's Participation," paper presented at *ESRC Seminar Series Challenging Social Inclusion: Perspectives for and from Children and Young People*, (Stirling, 2003).

[142] The Convention opened for signature on 20 November 1989 and came into force on 2 September 1990.

[143] Gerison Lansdown, *Children's Participation in Democratic Decision-Making* (UNICEF, 2001), at 12.

[144] Article 12 stipulates that:

> 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
> 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

value of their experiences and views and concerns, and question the nature of adult responsibilities in respect of children.[145]

Lansdown also notes that the Committee on the Rights of the Child has described Article 12 as requiring "a recognition of children as active agents, entitled to participate in decisions that affect their lives."[146] The notion of children's 'agency' is a recurring theme throughout children's rights literature. Freeman holds that:

> Rights are important because those who have them can exercise agency. Agents are decisionmakers *(sic)*. They are people who negotiate with others, who alter relationships or decisions, who can shift social assumptions and constraints.[147]

On the one hand Article 12 appears to have acted as a catalyst for the assumption that children, as active agents with valuable insight into their own experiences, should participate in some way in decisions affecting them, even if that simply involves ascertaining their views.[148] In 2001 UN Secretary-General Kofi Annan stated that the growing recognition of children's participation rights was, "one of the most significant advances of the previous decade" and that processes for the implementation of such rights needed to be developed and promoted.[149] On the other hand, however, participation rights have remained amongst the most controversial of the CRC provisions and amongst the most difficult to implement, according to states reporting to the Committee on the Rights of the Child.[150]

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[145] Lansdown, note 143, at 1.
[146] *Ibid*, at 4.
[147] Freeman, note 40, at 90.
[148] Bren Neale "Dialogues with Children: Children, Divorce and Citizenship" 9 *Childhood* 455 (2002), at 455. Neale argues that, "[t]he notion of listening to children so that they can participate in decision-making about their everyday lives has become an established principle of child law and policy in England and Wales."
[149] Kofi Annan, *We the Children: Meeting the Promises of the World Summit for Children* (UNICEF, *2001*), at 79.
[150] Rachel Hodgkin and Peter Newell, *Implementation Handbook for the UN Convention on the Rights of the Child* (UNICEF, 2002), at 163.

Nevertheless the notion of participation has been considered in detail in recent years, and the image of the 'competent child'[151] has been prominent in academic discourse regarding children's rights. Roger Hart defines participation as:

> [T]he fact of being involved in the decision-making that concerns oneself and that concerns the life of the community in which one lives. It is the corner stone of democracy on the looks of which democracies should be evaluated.[152]

Other theorists also make a strong link between participation and social inclusion. Participation corresponds, according to Ang *et al.,* "to the current tendency in our Western democracies to see participation as a crucial notion in social development."[153] Winick refers to the inherent motivation within individuals to be self-determining and holds that, "[p]eople who have been labelled incompetent are deprived of their ability to satisfy the basic human need to be self-determining and self-actualizing."[154] Young makes reference to social justice theory, which emphasises the tendency of a dominant group to view the excluded group in terms of 'abilities'.[155] This tendency stereotypes members of the excluded group in accordance with the perceptions of those who are dominant, and renders their aspirations invisible.[156] Resistance to the participation rights of children can be seen within this framework, as children are certainly an excluded group whose agency and experiences have been under valued by the dominant group– adults.

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[151] Didier Reynaert *et al.,* "A Review of Children's Rights Literature since the Adoption of the United Nations Convention on the Rights of the Child" 16 *Childhood* 518 (2009), at 520.
[152] Roger Hart, *Children's Participation: From Tokenism to Citizen* (UNICEF, 1992), at 5.
[153] Fiona Ang *et al.,* "Introduction", in Fiona Ang *et al.,* eds, *Participation Rights of Children* (Intersentia, 2006), at 3.
[154] Bruce Winick, "The Side Effects of Incompetency Labelling and the Implications for Mental Health" 1 *Psychiatry, Public Policy and Law* 6 (1995), at 22.
[155] Iris Marion Young, *Justice and the Politics of Difference* (Princeton University Press, 1990), at 58.
[156] *Ibid.*

1.3.1 Reasons for Embracing Participation Rights

There are a number of arguments which can be made in favour of affording children participation rights, and consequently the right to be heard in proceedings affecting them. It is increasingly recognised that children are experts on their own lives and experiences and that even very young children may have perspectives to bring to decision-making about their own lives.[157] Indeed children make decisions on a daily basis, and in some contexts children must (and do) take huge responsibilities to ensure the survival of themselves and often their families.[158] Furthermore, while it may be appropriate for younger children to be shielded from processes such as family law proceedings, the principle of the 'evolving capacities of the child' enshrined in Article 5 of the Convention on the Rights of the Child[159] recognises that the contribution of a 16 or 17 year old young person will be very different to that of an infant. Lansdown explains that:

> The concept of evolving capacities in the Convention acknowledges that childhood is not a single, fixed universal experience and that, while all the rights embodied in the Convention apply to all children, the capacities and context of the individual child must influence both how they are applied and the degree of autonomy of the child in their exercise.[160]

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[157] See e.g. Allison James, Chris Jenks and Alan Prout, *Theorizing Childhood* (Polity Press, 1998) and Allison James and Alan Prout, *Constructing and Reconstructing Childhood: Contemporary Issues in the Sociological Study of Childhood* (Falmer Press, 1990).

[158] See e.g. Lucy Tobin, "South Africa's Children Caring for Parents with Aids" *The Guardian*, 22 June 2010. Lucie Cluver of the department of social policy and social work at Oxford University describes in the article the daily lives of children who, "make sure their parents take their anti-retrovirals, miss school for hospital trips, and queue to get medication for their carers who are too sick to stand..." Available at http://www.guardian.co.uk, last accessed 1 October 2011.

[159] Article 5 stipulates that, "States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention."

[160] Lansdown, note 143, at 22.

The CRC recognises through the principle of the 'evolving capacities of the child' that, while children should not be expected to take responsibility for decisions to an extent which is beyond their capacities, they *should* be permitted to be involved in the decision-making process relating to matters "over which they do have competence," as Lansdown opines.[161] It seems important to clarify that an individual may still be capable of, and wish to, contribute to decision-making concerning them although the individual is legally considered a child and therefore is without legal capacity. Such a consideration is needed to counter discriminatory blanket approaches to the status of children in relation to such decision-making.

Children have much to teach adults about their lives and experiences, in particular strangers (i.e. judges) who are tasked with making vital decisions concerning them in civil law proceedings. In the context of children with disabilities, Conteh, Thoronka and Bangura[162] "emphasise that the only way to find out about young people's lives and capacities is to ask them."[163] Chisholm makes the point that, despite the inconvenience of taking the trouble to ascertain how and whether children should participate, "it is necessary to think through the various options, and their advantages and disadvantages, in order to make wise decisions."[164] Children may well have solutions which parents do not. Indeed the Committee on the Rights of the Child holds that:

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[161] *Ibid.* In the legal context this of course necessitates effective mechanisms to determine capacities in children, which are not always available. In the family context this becomes even more difficult in terms of enforcement (i.e. it is unlikely and indeed undesirable that the state would intrude in general adult-child disputes), however it is significant that Lord Scarman stated in the *Gillick* case that, "the parental right yields to the child's right to make his own decisions when he reaches a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision." *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112; [1985] 3 WLR 830, at 186.

[162] John Conteh, Saidu Thoronka and Mariatu Bangura, "Disability: Support? Yes. Sympathy? No." in "Measuring Maturity: Understanding Children's 'Evolving Capacities'" 23 *CRIN (Children's Rights Information Network) Review* 26 (2009).

[163] Paraphrased by Jennifer Thomas, "Editorial" in "Measuring Maturity: Understanding Children's 'Evolving Capacities'" 23 *CRIN (Children's Rights Information Network) Review* 4 (2009), at 4.

[164] Chisholm, note 8, at 4.

> The views expressed by children may add relevant perspectives and experience and should be considered in decision-making, policymaking and preparation of laws and/or measures as well as their evaluation.[165]

Chisholm cites a case where siblings aged nine and 11 suggested an arrangement whereby one child would be alone with each parent for some periods, and the children would be together at other times. Chisholm states that, "[t]his proposal was greeted with relief and high emotion, and formed the basis of the eventual solution finalised by the parents. The point is that the kids thought of it and the parents had not been able to."[166] This highlights the fact that children often see things differently to adults, and this alternative view can lead to the generation of useful ideas.[167]

Moreover, children generally want to contribute. The traditional approach to children in divorce/separation disputes has been to keep children away from the process in an attempt to protect them from such disputes.[168] Arguably the most significant concern has been to protect them from having to take sides. However current research into the experience of children of divorce shows that excluding children from the legal process may in fact harm children by ignoring their views and interests.[169] The research of Pruett and Pruett into the perceptions of young children of divorce proceedings shows that, in family law proceedings, children are often left feeling confused and powerless where they are not consulted.[170] There are further issues at play in child

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[165] See Committee on the Rights of the Child, note 7, at para.12.
[166] Chisholm, note 8, at 21.
[167] Lansdown provides the example of a project undertaken with children of four and five years in a disadvantaged area of London in 1993 (the Stepney and Wapping Community Child Health Project). When asked to create a mural of their ideal space, as opposed to the grass which adults assumed the children would desire, children chose concrete as grass prevents them from seeing waste such as dog waste and used needles. Lansdown, note 143, at 5.
[168] Huddart and Demson, note 5, at 1.
[169] *Ibid*, at 4.
[170] Marsha Kline Pruett and Kyle Pruett, "'Only God Decides': Young Children's Perceptions of Divorce and the Legal System" 38 *Journal of the American Academy of*

care cases. Schofield makes the point that children who have been mistreated are likely to have low self esteem as well as negative feelings about themselves. Consequently there is a risk that court proceedings will confirm for such a child that she is indeed a bad person and that she is the cause of the disaster which her family is experiencing.[171] Consulting children as to their opinions under such circumstances helps to communicate to them that this is not the case and that their views and feelings are indeed of significance.[172] Chisholm suggests that including children in the decision-making process in proceedings affecting them "might provide them with information or reassurance that will make them happier, or less anxious."[173]

As noted above the right to participation of individuals in society, including that of children, can be seen as a social issue. Cattrijsse and Delens-Ravier outline the benefits of participation as increasing a sense of community and social cohesion which "facilitates the acceptance of decisions, even if a decision does not bring into account everybody's concern. It secures social rest."[174] Repressing a group can lead to resentment towards the oppressors and such 'social unrest' can ensue. The consent of children can be gained through their involvement in a process, even if the ultimate decision does not correlate exactly to their wishes. Therefore gaining the consent of children to particular arrangements can be valuable.[175] The benefits of obtaining the consent of the child in decisions made about his or her future are emphasised by Huddart and Demson, who hold that, "[p]articipation of children in a

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Child and Adolescent Psychiatry 1544 (1999). Huddart and Demson, note 5, also emphasise that current international research into the experience of children of divorce shows that excluding them from the legal process may be harmful to children by ignoring their views and interests (at 4).

[171] Gillian Schofield, "The Voice of Children in Public Law Proceedings: A Developmental Model" in Lord Justice Thorpe and Justine Cadbury, eds, *Hearing the Children* (Jordan Publishing Ltd., 2004), at 39.

[172] *Ibid.*

[173] Chisholm, note 8, at 22.

[174] Lieve Cattrijsse and Isabelle Delens-Ravier, "Reflections on the Concept of Participation" in Fiona Ang *et al.,* eds, *Participation Rights of Children* (Intersentia, 2006), at 32.

[175] A related example is that given by Hart, who states that, in his experience, community design processes which are highly participatory experience less vandalism after completion. Hart, note 152, at 13.

family's transition after separation is not only possible but perhaps necessary to optimise the outcome for children as well as their parents."[176] The goal of facilitating child participation in the decision-making process need not involve asking children to choose between parents in family law cases,[177] or between parents and state care in child care cases. Instead such consultation can lead to the creation of plans with which children are more likely to co-operate, for the reason that they have had input. It is the child's plan too. Indeed the logic of refraining from forcing children into arrangements which they do not want is being increasingly adopted by the judiciary. In the UK case of *Re S. (Contact)*, Tyrer J gave his reason for not making an order to force a 16 year old into access as:

> I do not consider the court should make orders in the expectation that they are not going to be respected or obeyed. Into the national curriculum at the moment has come the concept of and the element of citizenship. It is not right for me to make orders that I do not expect to be obeyed with young adults and the need for respect for the law.[178]

Although this boy was an older teen, the judge also commented in relation to younger children that, if such an order were enforced, "it would be a pyrrhic victory indeed because, whatever they were ordered to do, if they did it they would do it with bad grace and with a counter-productive result."[179] Similar logic was noted in the Irish District Courts during the fieldwork conducted for the purpose of the current thesis-judges consistently refrained from forcing children in care to visit birth parents.[180] It is clear that it is increasingly acknowledged that children

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[176] Huddart and Demson, note 5, at 4.
[177] *Ibid*, at 11.
[178] In *Re S. (Contact: Children's Views)* [2002] EWHC 540 (Fam); [2002] 1 FLR 1156, at 1171C.
[179] *Ibid*, at 1170F.
[180] See Chapter 7. Such logic was absent, however, in relation to child care cases where children wished to see birth parents but child protection was at issue. It was also in contrast to family law cases where access orders were made even when it was suggested the child did not wish to see the parent.

should have a voice in proceedings affecting them and that this can be highly relevant– in some cases determinative– as regards the outcome of a case.

1.3.2 Types of Participation in Practice

In spite of protests by some commentators that children should not be burdened with undue involvement in the complexities of the adult world,[181] it seems that there are few who would currently agree with the cliché that children should be seen and not heard. Most would agree that children should participate in some way in most matters concerning them. A significant challenge, however, is deciding how this should work in practice. Archard opines, "the idea that children should have the very same rights of choice as adults is defended as self-evident by some whilst dismissed as evidently mistaken by others."[182] What one believes to constitute 'participation' seems to be the most crucial issue, and the spectrum of participation (i.e. the degree to which children participate) can be very broad.

There have been a number of theories as regards the participation of children in matters affecting them. Roger Hart's 'Ladder of Participation' remains the most prominent model.[183] The model identifies eight stages of participation, ranging from manipulation, children as 'decoration', and tokenism (both considered non-participation), to involving children as partners with adults in the

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[181] Noted by Hart, note 152, at 5. Hart notes the views of sceptics:

> [M]any will say that participation by children is a naive notion for children who simply do not have the decision-making power of adults. Others feel that children should be protected from undue involvement and responsibility in the problems of society.

Hafen and Hafen, note 52, express such concerns.

[182] David Archard, "Children" in Hugh Lafollette, ed, *The Oxford Handbook of Practical Ethics* (Oxford University Press, 2005), at 91.

[183] Hart, note 152. Research conducted on behalf of Save the Children confirmed in 1996 that Hart's model had far-reaching influences on UK organisations, see Gill Barn and Annie Franklin, "Article 12- Issues in Developing Children's Participation Rights" in Eugene Verhellen, ed, *Monitoring Children's Rights* (Martinus Nijhoff, 1996).

decision-making process. The final three stages constitute 'true'[184] participation according to Hart:

- Rung 1: Children are manipulated (e.g. adults pretending cause inspired by children);[185]
- Rung 2: Children are 'decoration' (children used to bolster a cause e.g. by their presence); [186]
- Rung 3: Tokenism (children apparently given a voice but in reality are not); [187]
- Rung 4: Children are 'assigned and informed' (children assigned a role and informed about their involvement);[188]
- Rung 5: Children 'consulted and informed' (children consulted but also kept informed about their involvement and the outcome);[189]
- Rung 6: Adult-initiated, shared decisions with children (e.g. program initiated by adults but decision-making shared with children);[190]
- Rung 7: Children lead and initiate action (e.g. young people lead a program, whilst adults have merely a supportive role);[191]
- Rung 8: Children and adults share decision-making (e.g. programs initiated by children but decision-making shared with adults, thereby benefitting from adult experience).[192]

Hart highlights the methods which involve children most deeply through the latter three rungs of this 'Ladder'. Shier, referring to the 'non-participation' rungs of the ladder, holds that, "ironically, the greatest

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[184] Hart, note 152, at 12.
[185] *Ibid*, at 9.
[186] *Ibid.*
[187] *Ibid.*
[188] *Ibid*, at 11.
[189] *Ibid*, at 12.
[190] *Ibid.*
[191] *Ibid*, at 14.
[192] *Ibid.*

practical benefit of Hart's work may be his exposure of these false types of participation, as much as his classification of the more positive types."[193] Shier also proposes a linear spectrum[194] with his 'Pathways to Participation' model.[195] He adapts Hart's ladder and includes "stages of commitment"[196] in order to assist practitioners to understand the participation process.[197] A number of commentators have criticised these linear models, however, on the basis that they imply a hierarchy of participation, and value judgments that the top rungs of the ladder are superior.[198] Kirby *et al.* (2003) have developed a model of participation which is non-hierarchical. No particular level in Kirby's model is assumed preferable to another (Hart's non-participation stages are, of course, omitted), instead the nature of the participation activity used will be determined by the particular circumstances at hand.[199] Franklin and Sloper hold that, "[i]t is now generally accepted that the level of participation will vary depending on the decision being made and the capability and choice of the child."[200] Although they are critical of the linear approaches of Hart and Shier, Mantle *et al.* argue that linear approaches may well be applicable in the family court context because of the fact that:

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[193] Harry Shier, "Pathways to Participation: Openings, Opportunities and Obligations: A New Model for Enhancing Children's Participation in Decision-Making in Line with Article 12 (1) of the
United Nations Convention on the Rights of the Child" 15 *Children and Society* 107 (2001), at 110.

[194] Mantle *et al.* synopsise the model as "Level 1 Children are listened to; Level 2 Children are supported in expressing their views; Level 3 Children's views are taken into account; Level 4 Children are involved in decision-making processes; Level 5 Children share power and responsibility for decision making." Mantle *et al.*, note 10, at 790.

[195] Shier, note 193, at 117.

[196] Described as "'openings', 'opportunities' and 'obligations'". *Ibid* at 107.

[197] *Ibid.*

[198] See e.g. Phil Treseder, *Empowering Children and Young People* (Children's Rights Office/Save the Children, 1997); Clare Lardner, *Exploring Good Practice in Youth Participation: A Critical Review.* (Clarity, 2001).

[199] Perpetua Kirby, *Building a Culture of Participation: Involving Children and Young People in Policy, Service Planning, Delivery and Evaluation* (Department for Education and Skills, 2003).

[200] Anita Franklin and Patricia Sloper, *Young People in Decision-Making within Social Services Departments: Quality Projects Research Initiative: Interim Report* (The University of York, 2004), at 4.

> Where factors mitigate against high levels of participation and where individual rights are closely confined, any opportunity for children to be involved might represent a significant step forward.[201]

Whilst such models of child participation are useful frameworks in which to conceptualise the realities of involving children in decision-making, the underestimation of children is sometimes still apparent within such theories. Donnelly states that, "[a]rguably, the ''higher rungs'' in Hart's model may not be realistic goals"[202] however she fails to elaborate on why this must be the case, presumably assuming that the reader implicitly understands the reason for the inherent impossibility of shared decision-making between adults and children. Moreover, the models of both Shier and Hart conceptualise the highest level of participation as involving shared decision-making between adults and children. Control regarding the final judgment, however, remains with adults. Perhaps surprisingly, there appears to be little or no reflection in the literature on the absence of a stage, rung, or status where final decision-making rests with children. Such a category could arguably have the benefit of children operating free from adult-centric judgments about what is 'best'.

Nevertheless, the challenges of applying such models to the setting of proceedings concerning children are clear. The usual process of 'participation' is the reporting of the views of the child to the court by a practitioner (i.e. a guardian *ad litem* or psychologist). Mantle *et al.* consider this process to constitute 'Level 3' participation in accordance with Shier's model (i.e. 'children's views are taken into account').[203] It could also be said that such a process can be categorised as Rung 5 on Hart's 'Ladder' (children 'consulted and informed'). This presumably

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[201] Mantle *et al.*, note 10, at 791.
[202] Cathy Donnelly, "Reflections of a Guardian Ad Litem on the Participation of Looked-after Children in Public Law Proceedings" 16 *Child Care in Practice* 181 (2010), at 184.
[203] *Ibid*, at 801.

would place such processes at a seemingly acceptable level in the context of such models, in that it does not constitute 'manipulation'.[204] However it is important to remember that ascertaining children's views is not sufficient for vindication of Article 12, and what that provision refers to as the "right to be heard." This right includes the requirement that children's views be considered seriously,[205] and that reference is made to this in any judgment by the decision maker.[206] Without this practice, involving clear demonstration of consideration by the courts of the views of the child, a process could arguably constitute 'tokenism'.[207] In this sense, children should be 'consulted' as to their views, and 'informed' about how they were taken into account. Indeed another crucial point is that it should be made clear to children, where appropriate, that their views will *not* be determinative. In many cases, children will not want the pressure that such power brings (the scenario of having to choose between two parents is often cited) and it should be made clear that their views will be considered along with many other factors.[208]

It seems necessary to consider in the context of civil law proceedings the likelihood that 'participation' (which merely involves seeking the views of children) constitutes consultation, not genuine participation. Hill *et al.* opine that it is likely that children must be directly involved in decision-making for 'participation' to exist, otherwise it is a consultation exercise rather than participation.[209] The authors state that:

> Consultation may be a means of enabling children to participate but it can also be a substitute for participation in that decisions

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[204] Rung 1 of Hart's ladder, Hart, note 152, at 12.
[205] Lansdown, note 143, at 8. See also Chapter 2.
[206] For consideration of the failure to do this in the Irish context, see Aoife Daly, "Considered or Merely Heard? The Views of Young Children in Hague Convention Cases in Ireland" 12 *Irish Journal of Family Law* 16 (2009).
[207] Rung 3 of Hart's ladder, Hart, note 152, at 9.
[208] See further Judy Cashmore and Patrick Parkinson, "What Responsibility do Courts Have to Hear Children's Voices?" 15 *International Journal of Children's Rights* 43 (2007), at 52.
[209] Hill *et al.*, note 141, at 83.

> are made without the direct involvement of children, though their views may be fed in by those who have carried out the consultation.[210]

It seems that there may well be a significant difference between what is arguably a *consultation* model[211] used in proceedings on the one hand,[212] and *participation* of the child, on the other. 'Participation' seems to imply that children's views will affect the outcome of the decision, and it would be expected, presumably, that this would be demonstrated in some way by the adults involved in the process.

It is difficult to envisage what type of process could fall within the category of what Hill *et al.* consider genuine participation of children in civil law proceedings, given that the adults involved in civil law proceedings do not share decision-making with the judge– the judge makes a unilateral decision after considering all the evidence submitted to her.[213] It could be argued, however, that, since adults do not have 'best interests' decisions made about them,[214] the participation of the child in the process could offset the paternalistic nature of this process which is exclusively reserved for them.

It is interesting to note that the language of 'participation' has become the common term associated with the discourse of the right to be heard in the context of civil law matters. This is the case despite the fact that 'consultation' arguably prevails, not 'participation'.[215] This is visible, for example, in child welfare legislation in New South Wales, which contains a statement of principle regarding participation, to the extent

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[210] *Ibid.*
[211] Hill *et al.*, note 141, at 83.
[212] It is worth noting that it is demonstrated throughout this thesis that such basic consultation is not universally applied in proceedings, see for example Chapter 7.
[213] Although in family law there is an increasing trend towards family mediation, which is a more participatory model. In the context of England and Wales, see e.g. "Minister wants More Mediation in Family Justice System" *Family Law*, 20 September 2010.
[214] The exception of adults with decreased decision-making capacities, see below Section 1.5.3.
[215] Hill *et al.*, note 141, at 83.

that it must be ensured, "that a child or young person is able to participate in decisions made."[216]

Yet, despite the recent acceptance of the need for some level of 'participation' of children within the area of civil law proceedings, notions of the best interest of the child are still frequently used to legitimise the sidelining of the valid views of children.[217] James interviewed practitioners of mediation and some of the quotes were insightful as regards adult child relations, for example the remark that:

> Okay, we listen to wishes and feelings but at the end of the day, we're adults and we've got to say, we have a child here, whatever age, but a child. Her wishes and feelings are this but as an adult we can see those wishes and feelings don't key into what is their best interests, and we have to work it from the best interest point of view.[218]

This indicates the assumption that children's wishes, whilst it may be useful to hear them, are subject ultimately to adult judgments. This point is borne out by the case law of Ireland and the UK. Wilson J recognised in *Re: B. (Change of Surname)* in the context of England and Wales, "orders nowadays which run flatly counter to the wishes of normal children aged 16, 14 and 12 are virtually unknown to family law."[219] Yet the judge saw fit to rule against the wishes of these children to change from the surname of their father (with whom their relationship had completely broken down) to that of their mother, on the basis that this may further weaken the relationship between the children and their father. This is despite the fact that, had the 16 year old in this case fallen pregnant, the minor would have been able to consent to an abortion in that jurisdiction, and the younger children may have been found 'Gillick

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[216] Children and Young Persons (Care and Protection) Act 1998 (NSW), Section 10.
[217] Adrian James, note 12, at 61.
[218] Cited in Adrian James *et al.*, "Turn Down the Volume?—Not Hearing Children in Family Proceedings" 16 *Child and Family Law Quarterly* 189 (2004), at 196.
[219] *Re: B. (Change of Surname)* [1996] FLR 791, at 794.

competent' for that purpose also. Arguably the consequences of an abortion are much more concrete and long-lasting than changing one's surname, which can always be changed back at a later stage.

Neale emphasises the fact that, in civil law proceedings, not only are children's wishes subject to adult judgments, but so too is the determination of whether their views are sought or heard.[220] Adults determine whether children are 'adult' enough to be worth hearing, and therefore, "[t]he whole process relies on adult discretion to judge children's developing competencies..."[221] This highlights that the role of the adult in vindicating participation rights is both crucial and questionable. It further highlights that adults need a good understanding of child development and child psychology in order to assess capacities as well as to properly facilitate children to be heard.

1.3.3 How to Hear Children

There are specific questions which pertain to how children are heard in accordance with Article 12. The first possibility is that the child will be heard 'directly' in proceedings, without an intermediary, i.e. speak with the judge privately, or give evidence in court. Writing a letter to the court would arguably fall under this heading also.[222] Secondly, the child can be heard 'indirectly'– i.e. have separate representation, with the consequence that she does not have to appear at proceedings in person. In the UK and the Republic of Ireland, this will involve representation of the child's views by a guardian *ad litem*, or instruction of a solicitor by the child (although usually in the child care context). Cashmore and

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[220] Neale, note 148, at 456.
[221] *Ibid.*
[222] The submission of letters to the court by children in care was observed during the fieldwork for this thesis (i.e. Court 20 in the District Courts in Dublin). It must be considered, however, that children usually receive adult assistance to do this. For example in the Irish context, children who have guardian *ad litem* representation may be assisted by this professional. Therefore the extent to which letter-writing is a 'direct' method is arguable, as the adult intermediary is crucial to the process. In Scotland, children in family law cases are invited by the court by post to give their views through 'Form F9'. Tisdall notes parental influence on the answers given. See Tisdall *et al.*, note 10, at 25.

Parkinson note the different types of trained representative in family law cases in different states ("trained counsellor [Australia and New Zealand], CAFCASS[223] officer [England and Wales] or custody evaluator [US]")[224] through which children can express their views. Although children are regularly heard directly by judges in some civil law jurisdictions,[225] there is considerable debate in common law jursidictions about whether being heard directly or indirectly is preferable for children. Cashmore and Parkinson state that:

> In various common law jurisdictions, and in England and Australia in particular, the conventional wisdom is that these more indirect methods of informing the court of children's views are greatly superior to the judge interviewing children directly.[226]

The authors argue that such professionals are seen as better trained than judges to interview children, and to interpret their views, considering all the circumstances.[227] However the assumption that children should be shielded from the process and heard only indirectly is becoming increasingly questioned.[228] Research has highlighted that children themselves express dissatisfaction with providing their views to the courts indirectly. In one study with children who had been involved in family law proceedings "[m]ost children (85%) said that children should have the opportunity to talk to the judge if they wished to do so."[229] As one young person put it:

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[223] The Children and Family Court Advisory and Support Service safeguards the welfare of children in family law proceedings in England and Wales.
[224] Cashmore and Parkinson, note 208, at 48.
[225] For example it is commonplace in the German system, see Nina Dethloff and Dieter Martiny, *National Report: Germany* (Commission on European Family Law, 2004), cited in Branka Resetar and Robert Emery, "Children's Rights in European Legal Proceedings: Why are Family Practices so Different from Legal Theories?" 46 *Family Court Review* 65 (2008), at 69 and Andrew Moylan, "Children's Participation in Proceedings- The View from Europe" in Lord Justice Thorpe and Justine Cadbury, eds, *Hearing the Children* (Jordan Publishing Ltd., 2004).
[226] *Ibid*, at 49.
[227] *Ibid*.
[228] See e.g. Judy Cashmore, "Children's Participation in Family Law Decision-Making: Lessons from Abroad" 1 *Australian Journal of Family Law* 119 (2006).
[229] Patrick Parkinson, Judy Cashmore and Judi Single, "Parents' and Children's Views on Talking to Judges in Parenting Disputes in Australia," paper presented at the

> I think that's a good idea. I think that if the judge is going to be determining something that's going to affect the child directly, then the judge should at least know the person they're going to be making a decision on and have spoken to them.[230]

Cashmore and Parkinson make the point that speaking directly with children means that a particular judge can ensure that children's views are current, and the judge can get her own impression of the maturity of the child, in order to better decide the weight to give to the views of that child. The authors continue, "[i]t also allows them to see the person they are making such an important decision about and to have a better appreciation of the depth and intensity of the child's feelings."[231]

Birnbaum and Bala[232] conducted research on the matter of judicial interviews of children in relation to family law disputes by judges in Ohio in the US. In this jurisdiction there exists a requirement to interview a child if a party to proceedings requests it, unless this would be contrary to the best interests of the child.[233] Judges may also use their own discretion to interview the child, and, the authors report, because interviews are commonplace and because judges "interview children as their ordinary practice,"[234] they are more likely to consider *how* rather than *whether* to engage in the practice.[235] Judges are reported to have interviewed even very young children, and one case of the Ohio Court of Appeals was remanded as it was held that the trial judge had erred when

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International Conference on Children and Divorce, (University of East Anglia, 24-27 July 2006), cited in Cashmore and Parkinson, note 208, at 51.

[230] 16 year old girl. *Ibid.*

[231] Cashmore and Parkinson, note 208, at 52.

[232] Rachel Birnbaum and Nicholas Bala, "Judicial Interviews with Children in Custody and Access Cases: Comparing Experiences in Ontario and Ohio" 24 *International Journal of Law, Policy and the Family* 300 (2010).

[233] Section 3109.04 of the Domestic Relations Code.

[234] Birnbaum and Bala, note , at 316.

[235] *Ibid.*, at 312.

he refrained from interviewing the child in the case, who was six years old.[236]

Judges interviewed by Birnbaum and Bala did not express a reluctance to interview children based on concerns relating to parents' due process rights, an oft-cited concern in some states where such interviews are not commonplace.[237] The authors make reference to the existence of "almost a universally receptive attitude to judicial interviews with children" amongst Ohio judges, and also to some of the comments of those interviewed: "It's a great law...You see the case through the children's eyes...Maybe [I value it] because of the system and grew up in it."[238] The authors compare these positive attitudes with widespread disapproval amongst judges towards interviewing children in Ontario, Canada,[239] and conclude that interviewing children should be used to a greater extent in Ontario than is currently the case. Clearly judicial interviews are not as problematic as perceived in jurisdictions where they are not commonly undertaken. It would be desirable to see greater practice of judicial interviews– the most direct means of hearing children's views in proceedings affecting them– since children express that they wish to have the option, and where it is practiced the judiciary find it to be a positive exercise.

Nevertheless the main method of hearing children in proceedings affecting them in the Republic of Ireland and the UK is indirect, usually involving the report of a guardian *ad litem*. This professional will meet and interview children whose interests are the subject of proceedings.[240]

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[236] *Badgett v. Badgett* [1997], 120 Ohio App. 3d 448, 698 N.E. 2d 84. See Birnbaum and Bala, note , at 313. The case related to a disagreement as to which school the child should attend.

[237] *Ibid.*, at 314. In fact, in *Myers v. Myers* [2007], 170 Ohio App. 3d 436, 867 N.E. 2d 848, the court established that the transcripts of *in camera* interviews with children should only be seen by the court, and not by parents. See Birnbaum and Bala, note , at 314.

[238] *Ibid.*

[239] *Ibid.*, at 316.

[240] The remit of this professional has been questioned however because of the fact that they not only bring the wishes of the child to the judge but what they believe to be in the 'best interests' of that child.

Mantle *et al.* make the point, however, that little is known about how report writers find out exactly what children's wishes are during these interviews.[241] The authors conducted extensive research into how family court enquiries are conducted in the UK.[242] They outline the primary considerations which exist when interviewing children, as well as means by which to best conduct such interviews:

> Where should the interview take place and who should be present…How is confidentiality ensured, what limits are there to confidentiality, and how will these issues be explained to the child?...What purpose should play serve and how 'free' or guided should it be?... What form should questions take and what information are they expected to produce…What techniques and aids are used for interviewing children of different ages and competences?[243] …How will the interview be concluded?... How will information be recorded, analysed, evaluated and made use of?[244]

This highlights the fact that there are many crucial factors which must be considered when interviewing children in order to ascertain their 'true' wishes and views. Much information is potentially subject to interpretation by the interviewer– a crucial consideration if children are to continue to be heard indirectly by courts in proceedings affecting them. However the research conducted by Mantle *et al.* fortunately highlights a significant amount of positive practice in this regard. For example practitioners were found to take care to ensure that children understood the process, to ensure children understood how they could contribute to the process, and that children were informed about how the

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[241] Mantle *et al.*, note 10, at 788.
[242] *Ibid*, at 793.
[243] Mantle *et al.* refer to Vasquez, who outlines a portfolio of games in the context of child custody interviews in the US. Raul Vasquez, "Interviewing Children," paper presented at *National Court Appointed Special Advocate Association Annual Conference* (Arizona, 1995). Mantle *et al.*, note 10.
[244] Mantle *et al.*, note 10, at 789.

information they provided would be used.[245] All practitioners reported taking significant care to validate the views of children through "testing out children's wishes and feelings" on different occasions.[246] It is positive that the authors identified extensive use of what could be considered to be 'good practice'– or at least practice which is mindful of the need for sensitivity and a thorough approach– in relation to the right to be heard in the UK context.[247] However the potential risks associated with the subjective nature of hearing children indirectly means that tight guidelines are a necessity.[248] It must also be considered that no such research has been conducted in the Republic of Ireland. Although guidelines are now in place for guardians *ad litem* in Ireland, they are voluntary, and there is no regulatory body in place to monitor practice.[249]

1.3.4 Children's Capacities

An important aspect of Article 12 is the matter of the capacities and maturity of children. Article 12 does not specify an age limit at which a child will be heard– the right is applicable to a child who is "capable of forming his or her own views."[250] The child's views must be given "due weight in accordance with the age and maturity of the child"[251] meaning that the two criteria of age and maturity must be given consideration when deciding how much weight the views of the child should be given. Therefore age alone is not sufficient in deciding this.[252] It is not stipulated within Article 12 who should determine the maturity of the child or the criteria for doing so, but instead left to states or courts to

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[245] *Ibid*, at 798.
[246] *Ibid*, at 800.
[247] See Chapter 2 for further consideration of what constitutes good practice in accordance with international legal standards.
[248] Professionals, although well-intentioned, could interpret children's views incorrectly by asking leading questions or making adult-centric assumptions about answers or behaviours.
[249] Of the likes of CAFCASS in the UK or NIGALA (the Northern Ireland Guardian *ad litem* Agency) in Northern Ireland.
[250] Article 12(1).
[251] *Ibid*.
[252] See Committee on the Rights of the Child, note 7, para. 21. See further Catharina Davel, "Exploring the Implications of Article 12 of the United Nations Convention on the Rights of the Child for Legal Practice and Legal Process: The Child's Right to Participate in Legal Proceedings," paper presented at *4th World Congress on Family Law and Children's Rights* (Cape Town, 20-23 March 2005).

determine. Therefore there are many unanswered questions in relation to these aspects of the right, and the matter of children's capacities has been extensively considered in relation to participation generally and the right to be heard in particular. It involves consideration of various theories and empirical research studies, across the disciplines of anthropology, social science, and in particular within developmental psychology. The study of 'human development' is the study of the growth and change of human beings during the course of the life span. Newcombe defines 'development' as:

> [O]rderly and relatively enduring changes over time in physical and neurological structures, in thought processes, in emotions, in forms of social interaction, and in many other behaviours.[253]

It is common sense, and has been scientifically verified in recent decades by, for example, Jean Piaget[254] that children's thinking generally develops significantly from infancy to childhood, to adolescence and then on to adulthood. Piaget's 'Stage Theory' is well accepted within developmental psychology[255] as well as the field of law.[256] Piaget conceptualised cognitive development– the process by which children "get to know things about themselves and the world"[257]– in terms of a maturational process, on the basis that children of approximately the

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[253] Nora Newcombe, *Child Development: Change Over Time* (8th ed, HarperCollins College Publishers, 1996).

[254] See e.g. Jean Piaget, *The Origins of Intelligence in Children* (Routledge and Kegan Paul Ltd., 1953 [1936]); Jean Piaget, *The Construction of Reality in the Child* (Routledge and Kegan Paul Ltd., 1955 [1937]) and Jean Piaget and Bärbel Inhelder, *The Psychology of the Child* (Routledge and Keegan Paul, 1969).

[255] Piaget is described by Carlson and Buskit as "the most influential student of child development." Neil Carlson and William Buskit, *Psychology: The Science of Behaviour* (Allyn and Bacon, 1997), at 378. However many later theorists argued that Piaget's methods actually underestimated the abilities of children at specific ages, because of the use of assessments that were not child appropriate, see e.g. Margaret Donaldson, *Children's Minds* (William Collins Sons and Co. Ltd, 1978).

[256] See e.g. Jennifer Woolard, Dickon Reppucci and Richard Redding, "Theoretical and Methodological Issues in Studying Children's Capacities in Legal Contexts" 20 *Law and Human Behavior* 219 (1996), Department of Justice Canada, *The Interaction Between Children's Developmental Capabilities and the Courtroom Environment: The Impact on Testimonial Competency* (Department of Justice Canada, 2002), at 13 and Quebec Bar Committee, "The Legal Representation of Children: A Consultation Paper Prepared by The Quebec Bar Committee" 13 *Canadian Journal of Family Law* 1 (2006).

[257] Carlson and Buskit, note 255, at 377.

same age have a tendency to engage in similar behaviours, as well as to make the same kinds of errors in problem solving.[258] Therefore, Piaget theorised, there exists a sequence of development which is followed by the average child, although "the cognitive structures of children may vary from age to age".[259]

According to Piaget, childhood consists of four main stages. From birth to age two, children are in the 'sensorimotor stage' whereby they experience the world through movement and their senses.[260] The 'preoperational' stage continues from age two to seven. This period is characterised by an increasing ability to use and represent objects through words and images, i.e. to use 'symbolic thinking.' Although mental reasoning is developing, children are expected to think in 'egocentric' terms, that is, to have difficulty in considering the viewpoints of others, although they are increasingly gaining these skills. Children generally start to develop the capacity to think objectively and logically about concrete events at age seven, though they may still be unable to logically consider all outcomes. This more logical thinking means that children at this stage become conscious of cause and effect relationships. Children are also able to see themselves much more objectively in comparison with others. This particular stage of development in childhood– the 'concrete operational stage'– continues to approximately age 12. At this point, children enter the 'formal operational stage,' and abstract thought starts to become sophisticated. Individuals reason logically, draw conclusions from available information and apply to hypothetical situations all of these processes.[261]

Since the 1970s, however, Piaget's stage theory has been criticised on the basis that his experiments were artificial and misleading and were

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[258] See note 254.
[259] Carlson and Buskit, note 255, at 378. See Piaget, note 254.
[260] Piaget, note 254.
[261] *Ibid.*

designed, in a way, to trick children.[262] It has been argued that this approach served to underestimate children's capacities as they were challenged to respond to misleading requests, in alien contexts, by those with more power than themselves (i.e. adults) and may therefore have responded in accordance with the perceived expectations of the adults involved. It is useful to consider the research conducted by other seminal theorists who place a large degree of emphasis on the context and experiences of children, rather than simply biological considerations, as influencing the capacities of children for the purposes of particular tasks. Rogoff has demonstrated that children become more adept at problem-solving when they have practiced solving problems with parents or older children.[263] Vygotsky argued that cognitive development is significantly affected by the culture in which the child lives.[264] Carlson and Buskit hold that, "Vygotsky's work has gone beyond Piaget's theory in explaining how cultural variables, especially language, influence cognitive development."[265] Nevertheless, while contemporary researchers may challenge the Piagetian model, they continue to acknowledge its value in terms of understanding the cognitive development of children.[266]

As noted above, the law recognises the different capacities of children of different ages for various purposes– the capacity to make decisions

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[262] See e.g. Rochel Gelman, "The Nature and Development of Early Number Concepts" 7 *Advanced Child Development* 115 (1972), Margaret Donaldson, *Children's Minds* (Fontana, 1978), John Morss, "After Piaget: Rethinking 'Cognitive Development'" in John Morss and Tim Linzey, eds, *Growing Up: The Politics of Human Learning* (Longman-Paul, 1991) and David Bjorklund, "In Search of a Metatheory for Cognitive Development (or, Piaget is Dead and I Don't Feel so Good Myself)" 68 *Child Development* 144 (1997).

[263] Barbara Rogoff, *Apprenticeship in Thinking: Cognitive Development in Social Context* (Oxford University Press, 1990).

[264] Lev Vygotsky, "The Role of Play in Development" in Michael Cole *et al.*, eds, *Mind in Society: The Development of Higher Processes* (Harvard University Press, 1978). Bronfenbrenner has also emphasised the need to consider the vital part played by the environment in which children develop when considering their capacities. Urie Bronfenbrenner, *The Ecology of Human Development: Experiments by Nature and Design* (Harvard University Press, 1979).

[265] Neil Carlson and William Buskit, *Psychology: The Science of Behaviour* (Allyn and Bacon, 1997), at 383.

[266] Rhonda Gay Hartman, "Adolescent Autonomy: Clarifying an Ageless Conundrum" 51 *Hastings Law Journal* 1265 (2000), at 1285.

about, for example, drinking alcohol, smoking, having sexual intercourse or getting married.[267] These constitute age-based restrictions based on adult assumptions that children do not have the capacity to make 'good' decisions in certain areas and consequently need protection in this respect.[268] Many of these restrictions do not correlate with the age of majority (usually 18 years in common law countries). Lansdown emphasises that, "[c]hildren cannot, or should not, be categorised under a set of blanket assumptions that either exaggerate or undervalue their development."[269] To consider children from birth to the day before their 18th birthday as incapacitated, and equally so at different stages, is clearly unrealistic. One could not, for example, suggest that children are spontaneously imbued with expert decision-making capacities on their 18th birthday. Development is a continuous process and a very personal one. Some children will have reached cognitive levels which some adults will never reach. Individual development also continues after the age of 18, right through the lifespan; this is why developmental psychology as a discipline is not concerned only with children.

The capacities for communication and agency that even infants possess must be acknowledged. We are not passive, non-entities from birth, in fact infants exercise a significant degree of agency in relation to their environment from the moment they enter the world:

> Minutes after birth, in the delivery room, babies can make the smallest of sounds, flash a glance or wave a hand and get their

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[267] It is necessary to acknowledge the "ambiguity and complexities" of age classifications (Barrie Thorne "What's in an Age Name?" 15 *Childhood* 435 [2008], at 436), and in particular discrepancies regarding minimum ages, as noted above in relation to the minimum age of criminal responsibility in particular. Melchiorre highlights these discrepancies stating, "at least 33 States have no minimum age of employment and in 44 girls can be married earlier than boys. In at least 125 countries children may be taken to court and risk imprisonment for criminal acts at an age between 7 and 15, often the age range for compulsory education." Angela Melchiorre, *At What Age?* (UNESCO, 2004), at 4.

[268] Thomas, note 163, at 4.

[269] Lansdown, note 143, at xiv.

parents cooing in satisfaction, gazing fondly back or cuddling them tight.[270]

Schofield refers to these early interactions as "carefully synchronised behavioural conversations."[271] This level of relative power is necessary for the survival of infants and babies learn quickly that particular behaviours can assist in the fulfilment of needs. For example infants learn that when they experience hunger, crying will elicit feeding from a caregiver. What the child learns will, of course, depend on the response of the adult.[272] Indeed the capacities of children have been shown to be very closely related to how much they have been guided by adults.[273] Experience in decision-making is strongly related to capacities. In one study which involved interviews with professionals working with children in the legal context, the interviewees emphasise that the capacity of children to express themselves does not come overnight. They state "that it is by practice and experience, guided by an adult, that the child will learn the skills of participation."[274]

It is not the case that children are simply passive recipients of adult care throughout childhood; throughout childhood, they are continuously making decisions. Such decisions can range from deciding with whom to play in the playground to the decision as to which university course a young person will choose. As regards children from difficult backgrounds, such decisions can involve how to find food for his younger siblings, or how to protect his mother from a violent father.[275] Agency relating to economic survival can be much more pronounced in the Global South. Street children in Brazil can be economically

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[270] Schofield, note 171, at 40.
[271] *Ibid.*
[272] *Ibid.*
[273] See Vygotsky, note 264.
[274] Fiona Ang *et al.,* "Transcending Disciplines: Legal Professionals' Views on Participation", in Fiona Ang *et al.,* eds, *Participation Rights of Children* (Intersentia, 2006), at 44.
[275] A number of survivors of domestic violence stated that the intervention of a child had saved their lives on one or more occasions during an incidence of domestic violence in the research of Liz Kelly, *Surviving Sexual Violence* (Polity, 1988).

independent from the age of five,[276] and it is common for teenage girls to be married and to have a number of children of their own in some cultures.[277] However even children in industrialised nations, who have not been severely economically disadvantaged, have been recognised as displaying high levels of agency within the family context. Research documents the sophistication with which children negotiate family dynamics within families which have experienced parental separation.[278] In research conducted by the Children's Research Centre in Dublin, one boy spoke of his understanding of his mother's needs:

> If she's stressed out at work. If she has to meet a deadline or something, she can come back and I can help her with stuff around the house and everything...I'd bring her a cup of tea or whatever and put my brother to bed. (Boy aged 12)[279]

Mantle *et al.* cite participatory research which has been conducted which demonstrates that, "even young children, from various backgrounds, can take part in the design, execution and evaluation of research."[280] The authors argue that this highlights that children possess greater competence than had previously been assumed.

Placing a large degree of weight on age-based categorisations is problematic in the context of children's capacities– it is easy to

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[276] See e.g. Rosa Aneci *et al.,* "The Street Children of Recife: A Study of their Background" 38 *Journal of Tropic Paediatrics* 34 (1992).
[277] See e.g. Melchiorre, note 267.
[278] Diane Hogan, Ann Marie Halpenny and Sheila Greene, *Children's Experiences of Parental Separation*, (Children's Research Centre, 2002). Mantle *et al.* also highlight the influence of children on family dynamics and that relationships are a two-way affair. Mantle *et al.,* note 10, at 788.
[279] Cited in Greene, note 75, at 4.
[280] Mantle *et al.,* note 10, at 792. Mantle *et al.* cite Tina Moules, *Whose Quality Is It? Children and Young People's Participation in Monitoring the Quality of Care in Hospital: A Participatory Research Study* (Unpublished Ph.D. Thesis, Anglia Ruskin University, Chelmsford, 2006); Mary Kellett *et al.* "Just Teach us the Skills Please, We'll do the Rest: Empowering Ten Year Olds as Active Researchers" 18 *Children and Society* 329 (2004); and Michael Fielding and Sara Bragg, *Students as Researchers: Making a Difference* (Pearson, 2003).

overestimate the value of such categorisations.[281] However it is useful to consider briefly the research findings on the capacities of children, in order to place the right to be heard in context. A significant amount of research has been carried out into the capacities of children for different purposes at different ages. Usefully, Lansdown and others[282] have considered these various research studies as a whole, and the sometimes conflicting findings which have emerged from them. Some research indicates that many adolescents under the age of 16 have difficulty recognising the risks and the long-term consequences of decisions, or the vested interests that other people may have.[283] However other research contradicts this, indicating that decision-making competence does not appear to be affected by differences between adults and young people (such as a tendency to be influenced by shorter term goals).[284]

The evidence in favour of a high level of decision-making competency appears to be particularly strong in relation to those aged 14 years and over. Recent research conducted in Italy sought to examine representations of justice in young people. 141 young people aged from 14 to 17 years were presented with scenarios involving questions of

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[281] Greene states that, "a consequence of the emphasis on children's development has been our preoccupation with age and grading. In the West we are committed to the notion that children are engaged in a predictable unfolding of capacities which can be charted and used as metric for gauging their normality." Greene, note 279, at 3.

[282] Fortin, note 35, Lansdown, note 143, Gay Hartman, note 266, and Thomas Grisso, "The Competence of Adolescents as Trial Defendants" 3 *Psychology, Public Policy and Law* 3 (1997).

[283] Lansdown (note 143) cites Martin Ruck *et al.,* "Children's and Adolescents' Understanding of Rights: Balancing Nurturance and Self Determination" 64 *Child Development* 404 (1998), and Catherine Lewis, "How Adolescents Approach Decisions, 52 *Child Development* 538 (1981). See also Leon Mann, Ross Harmoni and Colin Power, "Adolescent Decision-Making: The Development of Competence" 12 *Journal of Adolescence* 265 (1989), who claim that 12-14 year olds are not as adept as older persons in identifying a wide range of benefits and risks.

[284] Lansdown (note 143) cites Terry Bartholomew, "Challenging Assumptions about Young Peoples' Competence– Clearing the Pathways to Policy," paper presented at the *Australian Institute of Family Studies' Fifth Australian Family Research Conference* (Brisbane, 27-29 November 1996). See also David Scherer, "The Capacities of Minors to Exercise Voluntariness in Medical Treatment Decisions" 15 *Law and Human Behavior* 431 (1991), Ellen Greenberg Garrison, "Children's Competence to Participate in Divorce Custody Decisionmaking" 20 *Journal of Clinical Child Psychology* 78 (1991); cited in Grisso, note 282, at 15, and Bruce Ambuel and Julian Rappaport, "Developmental Trends in Adolescents' Psychological and Legal Competence to Consent to Abortion" 16 *Law and Human Behavior* 129 (1992). These studies have found few differences in decision-making functions between adolescents and adults.

justice and moral dilemmas. Bosisio concludes, "young people are social actors who possess the reasoning skills to face even complex questions of justice and moral issues" [285] and that they:

> [A]re able to evaluate and choose which of several criteria best fits a given context, and therefore choose on the basis of the specific circumstances and situations involved, while retaining a core set of firm general principles.[286]

Research also indicates that the capacity of 14 year olds to make decisions is as advanced as that of adults, on the basis of the level of understanding of the facts, the processes of the decision making and understanding of potential outcomes of choice.[287] In another study in which participants in different age groups were given hypothetical decisions to make relating to "custodial preference in divorce situations,"[288] it was found that 14 year olds were "as competent as the 18-year-olds according to the applicable legal standards."[289] Gay Hartman also identifies 14 as an important age in decision-making capacities:

> [A]dolescents, aged 14 and older, possess the cognitive capability to reason, understand, appreciate, and articulate decisions comparable to young adults. Perhaps more significantly, there is a paucity of scientific or social science study that supports the present legal view of adolescent incapacity.[290]

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[285] Roberta Bosisio, "'Right' and 'Not Right': Representations of Justice in Young People" 15 *Childhood* 276 (2008), at 290.
[286] *Ibid* at 292.
[287] Catherine Lewis, "Decision-Making related to Health: When Could/Should Children Behave Responsibly?" in Gary Melton *et al.*, eds, *Children's Competence to Consent* (Plenum Press, 1998).cited in Lansdown, note 143, at 24.
[288] Greenberg Garrison, note 284, at 78.
[289] *Ibid.*
[290] Gay Hartman, note 266, at 1286. Hartman cites William Gardner *et al.*, "Asserting Scientific Authority: Cognitive Development and Adolescent Legal Rights" 44 *American Psychologist* 895 (1989), at 897.

Gay Hartman goes so far as to conclude that, on the whole, available research suggests that no perceptible difference exists between the decision-making capacities of adolescents and young adults in medical treatment.[291]

However research in the criminal law context has highlighted troubling issues in relation to the ability of children and young people to understand legal concepts. In one Canadian study, 80% of participants of 12 years and over (up to the age of 21) were able to correctly define a plea of 'guilty'. Yet virtually no subjects of any age (young adults included) demonstrated an accurate understanding of the 'not guilty' plea. The authors conclude that, "the extent of young people's competence appears to vary depending on the particular legal concept or principle under question."[292] In a US study of children aged nine to 16 (who had been accused of offences), many children could not describe the charges against them or other legal terms vital to their case. The researchers argued for a legal presumption of incompetence to stand trial for children under 14 years on the basis of this research.[293] Perhaps, however, one should differentiate between the criminal law context, which will involve concepts which are very alien to children, and the family/child care law context which, while still involving complex legal terms, will involve family matters on which children are experts (because they are intimately familiar with their own family environment).[294]

There have also been interesting findings in relation to younger children. Nine year olds have been found to be as competent as adults in

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[291] Gay Hartman, note 266, at 1286.

[292] Michele Peterson-Badali and Rona Abramovitch, "Children's Knowledge of the Legal System. Are they Competent to Instruct Legal Counsel?" 34 *Canadian Journal of Criminology* 139 (1992), at 19.

[293] Thomas Grisso, "The Competence of Adolescents as Trial Defendants" 3 *Psychology, Public Policy and Law* 3 (1997), cited in Lansdown, note 143, at 23-24.

[294] Moreover, Grissio (note 293) notes "delinquent youths" are not generally performing at a level of, "average intelligence or middle socioeconomic status" (at 15), unlike children and young people in most other studies conducted.

demonstrating "choice based on reasonableness."[295] Regarding research in the area of "custodial preference in divorce situations,"[296] it was found that nine year olds were as competent as 18 year olds on one of the two tests applied.[297] Research has also found, however, that younger children can display a tendency to defer to individuals in power, and their decisions have been found to be influenced by whether adult authority would be challenged.[298] Therefore it seems that this dynamic– the younger child trying to please the adult– must be borne in mind when considering children's decision making capacities.[299] The potential for children lying to the courts is a common misconception. Casey cites extensive research which demonstrates that in general, children provide reliable evidence and that, "children are no more likely to lie while testifying than adults."[300]

One must also consider the potentially difficult and distressing nature of decision-making under the particular circumstances surrounding civil law proceedings. Schofield states that children, particularly those in care,

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[295] Lewis, note 287. Cited in Lansdown, note 143, at 24.

[296] Ellen Greenberg Garrison, "Children's Competence to Participate in Divorce Custody Decisionmaking" 20 *Journal of Clinical Child Psychology* 78 (1991), at 78.

[297] *Ibid.*

[298] Lewis, note 287. Cited in Lansdown, note 143, at 24.

[299] However Milgram demonstrated that a similar deference to power pertains to adults, Stanley Milgram, "Behavioural Study of Obedience" 67 *Journal of Abnormal and Social Psychology* 371 (1963). Milgram noted "[t]he extreme willingness of adults to go to almost any lengths on the command of an authority constitutes the chief finding of the study..." Stanley Milgram, *Obedience to Authority; An Experimental View* (Harpercollins, 1974), at 6.

[300] Rachel Casey, *The Evidence of Child Witnesses: Where the Rules of Evidence and the Constitution Collide* (Unpublished Ph.D. Thesis, Trinity College Dublin, 2007), at 5. Casey cites K. Murray, *Alternatives to In-Court Testimony in Criminal Proceedings in the United States of America: Research Paper on Evidence from Children* (Research Paper, 1988), Australian Law Reform Commission, *Evidence* (Australian Law Reform Commission, 1987), Law Reform Commission of Ireland, *Consultation Paper on Child Sexual Abuse* (Law Reform Commission of Ireland, 1989), New Zealand Law Commission, *Evidence- Reform of the Law* (New Zealand Law Commission, 1990), Minister of Supply and Services Canada, *Report of the Committee on Sexual Offences against Children and Youths, Sexual Offences against Children* (Minister of Supply and Services Canada, 1984), Scottish Executive, *Vital Voices: Helping Vulnerable Witnesses to Give Evidence* (Edinburgh, The Scottish Office, 2002). See also Kathleen Kendall-Tackett, "How Many Children Lie about Being Sexually Abused?: A Survey of Mental Health and Law Enforcement Professionals," paper presented at the *Annual Meeting of the American Professional Society on the Abuse of Children* (San Diego, 23-26 January, 1991), at 1, and Lina Leander, "Police Interviews with Child Sexual Abuse Victims: Patterns of Reporting, Avoidance and Denial" 34 *Child Abuse and Neglect: The International Journal* 192 (2010).

may have mixed feelings (as indeed adults would in distressing situations) and that their feelings may well shift and change, "for example between sadness and anger."[301] Children in care may initially feel very distressed at having been removed from a family, no matter how abusive or neglectful. The child may initially wish to have contact with the family, or even resist a foster care placement. However the initial feelings of sadness, distress, loneliness and guilt may give way to the realisation that distance from the family is for the best. Therefore it seems that it is natural for children to have various changes of mind in the course of dealing with family difficulties, perhaps indicating that decision-makers should be mindful of this, and not interpret it as a failing in the decision-making capacities of the child. Indeed it has been shown that the decision-making capacities of adults are also impacted by a difficult family situation which causes them anxiety and depression.[302]

It must also be acknowledged that the nature of decision-making is potentially complex for all individuals, including adults. Adults regularly display poor decision-making in their daily lives, which have extremely dangerous health and safety consequences– it is estimated that over 10 million adults in the UK are smokers,[303] and it is estimated that there are 10,000 deaths relating to drink-driving annually in Europe.[304] These

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[301] Schofield, note 171, at 40. Research conducted by the Irish Association of Children and Young People in Care highlights this. One 12 year girl reported, "[t]hey [staff] did a scrapbook with all the changes in my life– but it messed me up, and made me feel happy sometimes and sad as well". Available at:
http://www.iaypic.ie/ORG/ypviews.htm (last visited 12 April 2010).

[302] Frédéric Pochard *et al.,* "Symptoms of Anxiety and Depression in Family Members of Intensive Care Unit Patients: Ethical Hypothesis regarding Decision-Making Capacity" 29 *Critical Care Medicine* 1893 (2001).

[303] This constitutes 22% of men and 21% of women. Action on Smoking and Health, *Facts at a Glance*, (2008). Available at http://www.ash.org.uk/information/facts-and-stats/facts-at-a-glance (last accessed 16 October 2010). Smokers act despite having full knowledge of the dangers of smoking, even when obviously otherwise highly intelligent. US President Barak Obama, for example, is a smoker (*Smoker in Chief: Can Obama Quit?* CBS News, 1 March 2010, available at:
http://www.cbsnews.com/8301-503544_162-6255658-503544.html [last accessed 23 October 2010])

[304] *Alcohol Statistics in Europe*, available at:
http://alcohol-statistics-in-europe.own69.com/drink_driving_statistics_europe/ (last accessed 16 October 2010).

statistics indicate that it is not the case that 'good' decision-making begins immediately on having reached adulthood.

A large amount of research relating to competence assessment has been carried-out in the area of medical consent. Arguably the criteria which have been developed in this context are relevant to other areas, for example decision-making of children in custody/access and child care cases.[305] Lansdown holds that the main elements which must be present in children in order for competence to exist in the area of health care include:

> Ability to understand and communicate relevant information...Ability to think and choose with some degree of independence...Ability to assess the potential for benefit, risk and harm. ...Achievement of a fairly stable set of values.[306]

Donnelly refers to the fact that the ability to consider/accept compromises as well as the point of view of another is an indicator of strong decision-making ability.[307] She highlights the difficulties which may exist in relation to children in care or children from backgrounds which have been challenging in other ways, and the importance of engaging their participation:

> Given the childhood experiences of 'looked-after' children, particularly the absence of usual family life and the possibility of having experienced a high level of disruption in placement arrangements, it is likely that they will find it more difficult to reach compromises; and these circumstances and difficulties may generate hostility between 'looked-after children' and professionals. Thus, there is a need for professionals to develop

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[305] Lansdown, note 143, at xi.
[306] *Ibid.*
[307] Donnelly, note 202, at 190. Donnelly cites Leon Mann, Ross Harmoni and Colin Power, "Adolescent Decision-Making: The Development of Competence" 12 *Journal of Adolescence* 265 (1989).

> various engagement strategies and more importantly to guard against a young person becoming demoralised about the value attached to their participation in the decision making processes.[308]

Although such children may indeed have difficulty in the participation process, regard must be had for the fact that children involved in civil law proceedings, which often stem from complex and distressing family situations, will have more acute experience of complex emotions and thought processes than the average child.[309] Family law scenarios (as well as child care cases) that enter the legal arena impose situations on children that require cognitive, emotional and social capacity to negotiate.[310] Research indicates that children who have experienced major surgery may develop decision-making capacities that far exceed expectations of children of their age group,[311] and the same may well apply to children who have experienced family difficulties. It has been shown that experience of the legal process is crucial to children's capacities in that context.[312] Therefore authorities should always be mindful of the need to fully inform children when facilitating them to be heard in relation to proceedings affecting them.

Schofield emphasises that the ability of children "to put their feelings into words will vary greatly depending on the child's experience in close relationships".[313] Children who have experienced sensitive care from an adult or adults will be better able to regulate their feelings, whereas those who have not are much more likely to become confused about their

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[308] Donnelly, note 202, at 190-191.
[309] See Mantle *et al.,* note 10, at 788.
[310] Jantine Hemrica and Frieda Heyting, "Tacit Notions of Childhood: An Analysis of Discourse about Child Participation in Decision-Making regarding Arrangements in Case of Parental Divorce" 11 *Childhood* 449 (2008), at 463.
[311] Priscilla Alderson, *Children's Consent to Surgery* (Oxford University Press, 1993).
[312] Maunsell *et al.* argue that, whilst children and young people are sometimes unaware of legal proceedings, programmes designed to inform child witnesses about court proceedings have been very successful. Catherine Maunsell *et al.,* "What Happens in Court? The Development of Understanding of the Legal System in a Sample of Irish Children and Adults" 21 *Irish Journal of Psychology* 215 (2000), at 226.
[313] Schofield, note 171, at 37.

feelings and be reluctant to express them.[314] In fact research has demonstrated that children who have experienced maltreatment will show less negative emotion, even from the age of two.[315] Schofield highlights that this is because of the fact that from birth, the feelings expressed by the child from infancy of happiness, fear, etc. have not been responded to through synchronised expressions in the face of the caregiver. The happy face of the infant, for example, may be met with the fearful or even blank face of a caregiver experiencing depression or domestic violence. This will create confusion for the child about the feelings which they are experiencing, and the child may even become overwhelmed by those feelings, or learn to suppress them if they provoke a negative reaction from the caregiver.[316]

The differences in capacities which exist in ability between individuals (including children), on the basis of individual attributes, must also be considered. Chisholm states that:

> Children vary as much as adults in their personalities, talents, vulnerabilities, and so on. Some children will be outraged if they don't get to say their piece: others would shrink from the prospect. And there will be endless variation in their capacities to participate, their insight, their honesty, and the like.[317]

So what does this research mean for the right to be heard and its implementation? Chisholm makes the point that it is attractive to rely on age-based presumptions of capacity, however such presumptions certainly have inherent weaknesses.[318] Considering the many factors considered above– background, parenting style, life experience and other matters, it seems that age, while arguably a pragmatic gauge of the

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[314] *Ibid.*
[315] Patricia Crittenden and David DiLalla, "Compulsive Compliance: The Development of an Inhibitory Coping Strategy in Infancy" 16 *Journal of Abnormal Psychology* 585 (1988), cited in Schofield, note 171, at 37.
[316] Schofield, note 171, at 37.
[317] Chisholm, note 8, at 24.
[318] *Ibid*, at 13.

attainment of particular childhood stages,[319] is far from the sole factor in determining decision-making capacity in a particular child. Lansdown concludes that, in relation to the empirical research on age and capacity:

> [T]he very diverse findings are themselves evidence of the impossibility of defining rigid or prescriptive ages at which competence emerges. To date, developmental psychology has failed to provide scientifically valid yardsticks against which children's evolving capacities can be evaluated, nor is it likely to do so in the future.[320]

Greene also states that our fixation in the 'West' with age– and with what age can imply about the competence of a particular child– belies the fact that it is actually very difficult to generalise in terms of what children can do (or should be able to do) at a particular age.[321] What, however, would be the most desirable way in which to measure children's decision-making capacities? Lansdown suggests a system whereby:

> In order to overrule the child's expressed wishes it would be necessary to demonstrate that the child is not competent to understand the implications of the choice *and* that the consequent risks associated with the choice would be counter to the child's best interests.[322]

Perhaps the notion of *Gillick* competence should be extended to the arena of other civil law matters relating to children's interests. Why for example, should those under 16, with the capacities to do so, be able to consent to medical treatment but not to give consent about matters relating to care and custody/access? The research outlined above

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[319] Rutter and Rutter make the point that no amount of training will, for example, enable a four month old baby to walk. Michael Rutter and Marjorie Rutter, *Developing Minds: Challenge and Continuity across the Lifespan* (Penguin, 1993), at 195.
[320] Lansdown, note 143, at 24.
[321] Greene, note 279, at 4.
[322] Lansdown, note 143, at 56. Emphasis original.

highlights that current policies which determine whether children will be heard, and the degree of weight to be given to their views, are highly questionable. Some states have set minimum ages at which children will be heard, others have left this decision to the discretion of the court (and the subjective notions that individual professionals bring to this). However it seems that the factors that will determine the capacities of children are so complex that such assessments are best left to professionals to carry out on an individual basis. Eekelaar has long proposed the concept of 'dynamic self-determinism' which involves a presumption in favour of compliance with children's wishes to the extent that it does not restrict their life goals.[323] It is arguable, therefore, that assumptions of capacity should exist for all children, with the requirement that overruling the right to be heard or children's wishes should be treated as a matter of great significance which needs to be justified in detail by the decision-maker, considering the criteria for competence, for example those outlined by Lansdown.[324]

1.4 Relationship with the Best Interest Principle

While practitioners, policy makers and others have sought to better accommodate children's views and/or participation in decision-making processes affecting them, the notion of the 'welfare'[325] or the 'best

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[323] See Eekelaar, note 2. Freeman advocates an approach to children's autonomy rights that he refers to as "liberal paternalism." See Michael Freeman, *The Rights and Wrongs of Children* (Frances Pinter, 1983). This approach means that we need to, "confine paternalism (the philosophy at the root of protection) without totally eliminating it." Michael Freeman, "Taking Children's Rights More Seriously" in Philip Alston, Stephen Parker and John Seymour, eds, *Children, Rights and the Law* (Oxford University Press, 1992), at 67.

[324] See above note 322. Lansdown also states that the following factors are commonly used to determine competence in the medical arena: the ability to understand the information, to choose with some degree of independence, to assess risks and the existence of a set of values. Lansdown, note 143, at xi.

[325] 'Welfare' is the term which is prevalent in the Irish legislation in relation to child care (e.g. Child Care Act 1991) and in the Children Act 1989 of England and Wales (Section 1). Although the two terms are often used interchangeably, it has been argued in the Irish context that the welfare principle focuses only on ensuring that there is no serious impairment of the interests of children, instead of focusing on actively promoting the welfare of children. See e.g. Law Society of Ireland, *Right-Based Child Law: The Case for Reform*, (Law Society of Ireland, 2006), at 51.

interests'[326] of the child (terms which are often used interchangeably) has remained paramount.[327] The 'best interest principle' is a legal device which is used by courts to ascertain what is best for a child, because of the fact that children are deemed, for most purposes, incapable of exercising their own rights. It can also modify the adversarial nature between the adults concerned. It can be used, for example, in family law in situations where courts must decide who will have custody of a child, or whether a child will be taken into the care of the state.[328] It has an enormous amount of influence over children's legal rights. The best interest principle has a long history, and even before the existence of the Convention on the Rights of the Child it was to be found in a significant amount of domestic legislation relating to children.[329] In the 19th century, the original conceptualisation in English and American common law of children as the property of their father gave way to a presumption that it was 'best' for a younger child to be with the mother. Bix explains that, over time, "the justificatory language of 'best interests' turned into a standard itself: a legislative or judicial rule that custody decisions should be grounded on the bests interests of the children."[330]

The standard is vague and open to different interpretations, and this feature constitutes simultaneously both its strength and its inherent weakness. Its greatest strength is that the principle has the potential for application in all situations (i.e. across states, cultures, etc.) Alston highlights the value in the fact that it can be interpreted differently to suit different settings.[331] The principle permits cultural relativity, and appreciation that there is objectively no one way in which it is preferable to live. For example, in industrialised countries, autonomy and

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[326] Article 3 of the Convention on the Rights of the Child.
[327] See Mantle *et al.,* note 10, at 786.
[328] Robert van Krieken, "The 'Best Interests of the Child' and Parental Separation: on the 'Civilising of Parents'" 68 *The Modern Law Review* 25 (2005).
[329] See generally Brian Bix, "The Best Interest of the Child" *University of Minnesota Law School: Legal Studies Research Paper Series*, Research Paper No. 08-08 (2008), at 1.
[330] *Ibid*, at 1.
[331] Philip Alston, "The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights," in Philip Alston, ed, *The Best Interests of the Child. Reconciling Culture and Human Rights* (Clarendon Press, 1994), at 1.

individuality are arguably considered highly desirable qualities, however in more traditional societies, links to family and local community are considered preferable.[332] However it could be argued to be left open to subjectivity to the extent that it can potentially be very harmful. Early marriage and female genital mutilation are two matters which are commonly held as problematic in relation to the best interests principle- in some cultures it is considered 'best' for children and young people to experience these phenomena.

Article 3(1) of the CRC holds that, "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." This provision was extensively discussed by the group drafting the Convention on the Rights of the Child, but a definition for the 'best interests' standard was not sought.[333] Alston opines that the positive aspect of its presence within the Convention on the Rights of the Child is that this document constitutes a collection of rights covering all aspects of children's lives which provides a template for a "starting point in distinguishing primary interests from other interests." [334]

Bix argues that the standard provides direction to authorities to "focus on the perspective of the child (rather than on the claims and interests of other parties)."[335] The principle has positive aspects, then, in that it focuses on the needs and interests of children in particular. A large degree of division exists, however, between commentators on the matter of the validity of the best interest principle. Fortin states that the claim "that a rights-based approach must necessarily be devoid of any element

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[332] *Ibid.*
[333] *Ibid.*
[334] *Ibid.* Interestingly Van Bueren makes the point that the CRC does not refer to children's 'best rights,' interests constituting a broader concept than rights (note 16, at 47).
[335] Bix, note 329, at 1.

of any paternalism or 'welfare' misconstrues the concept of rights."[336] Therefore, according to this logic, the existence of paternalism does not preclude a rights-based approach. Other theorists, however, go so far as to argue that the best interest principle leaves children without rights. Eekelaar, for example, argues that the 'right' that another person has the power to determine one's interests leaves one with no rights whatsoever.[337] The principle can clearly be manipulated to suit adult constructions of what is 'best' for children, even where a child's conception of what is 'best' may be quite different. For example, children can be (and indeed are) forced to comply with court orders to attend access visits with parents against their will.[338] This is highly questionable when one considers that no parent would be legally obliged to spend time with a child, or any other person for that matter and there are claims that it can be damaging for children.[339] Yet such forced interactions can in some cases be considered 'best' because, presumably, decision-makers hold that the child involved has not made a 'good' decision because of her lesser capacities as an individual under 18. For example, the wishes of children are often overridden in the interests of maintaining the bond with a non-resident parent.[340]

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[336] Jane Fortin, "Children's Rights: Are the Courts Taking Them More Seriously?" 15 *King's College Law Journal* 253 (2004), at 259.

[337] John Eekelaar, "The Interests of the Child and the Child's Wishes: The Role of Dynamic Self-Determinism" 8 *International Journal of Law, Policy and the Family* 42 (1994).

[338] See e.g. the case of *Re W. (Contact: Joining Child as Party)*, [2001] EWCA Civ 1830, [2003] 1 FLR 681, cited above at note 79, where the young person in question had "a right to a relationship with his father, even if he did not want it" according to the judge (at 16).

[339] The child psychiatrists who advised the Court of Appeal of England and Wales on the matter of the effects on children of contact disputes in cases which involved domestic violence were of the view that "it is damaging to a child to feel he or she is forced to do something against his or her will and against his or her judgment if the child cannot see the sense of it" (Claire Sturge and Danya Glaser, "Contact and Domestic Violence- the Experts' Court Report" 30 *Family Law* 615 (2000), at 621, cited in Fortin, note 35, at 298).

[340] In the context of Hague Convention cases in Ireland, see *R. v R.* [2008] IEHC 162, *K. v K.* [2006] IEHC 277 and *N. v N.* [2008] IEHC 382, considered in Chapter 6.

The concept of 'parental alienation syndrome' is of particular note.[341] The rejection (either temporary or long term) of one parent by children in custody disputes is a common phenomenon.[342] However Gardner's[343] concept of parental alienation as a syndrome (i.e. a psychological 'condition' of a child which may develop under circumstances where one parent encourages the child to turn against the other) has not been accepted in the professional arena due to a lack of sufficient scientific reliability.[344]

Gardner claims that forcing contact is in the best interests of children in certain cases where children resist it,[345] and recommends in some cases "custodial transfer"[346] to the alienated parent or even temporary institutionalisation before the transfer.[347] However, even if one were to argue that the harm to the child of forcing contact was outweighed by the benefit of the parent-child relationship, some research actually indicates that children who are forced to have contact with fathers against their will are less likely to have positive relationships with them later in

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[341] It has been raised several times by applicants in cases at the European Court of Human Rights, although the 'syndrome' has not been engaged with by the court, e.g. *Elzholz v Germany* Appl. No. 25735/94, judgment of 13 July 2000; *Suss v Germany*, Appl. No. 40324/98, judgment of 10 November 2005; *Sommerfeld v Germany*, Appl. No. 31871/96, judgment of 8 July 2003. See further Chapter 4.

[342] See e.g. Janet Johnson, "Parental Alignments and Rejection: An Empirical Study of Alienation in Children of Divorce" 31 *Journal of the American Academy of Psychiatry and the Law* 158 (2003).

[343] Gardner introduced the term "Parental Alienation Syndrome" in a 1985 paper; Richard Gardner, "Recent Trends in Divorce and Custody Litigation" 29 *Academy Forum* 3 (1985). The paper describes a number of symptoms which Gardner had observed during the course of his work as a psychiatrist during the early 1980s.

[344] See e.g. Carol Bruch, "Parental Alienation Syndrome and Alienated Children–Getting it Wrong in Child Custody Cases" 14 *Child and Family Law Quarterly* 381 (2002), Jennifer Hoult, "The Evidentiary Admissibility of Parental Alienation Syndrome: Science, Law, and Policy" 26 *Children's Legal Rights Journal* 1 (2006) and William Bernet, "Parental Alienation Disorder and DSM-V" 36 *The American Journal of Family Therapy* 349 (2008).

[345] Richard Gardner, "Should Courts Order PAS Children to Visit/Reside with the Alienated Parent? A Follow-up Study" 19 *The American Journal of Forensic Psychology* 61 (2001), at 66.

[346] *Ibid*, at 65.

[347] Richard Gardner, "Legal and Psychotherapeutic Approaches to the Three Types of Parental Alienation Syndrome Families—When Psychiatry and the Law Join Forces" 28 *Court Review* 14
(1991).

life.[348] Further research shows that, in cases where children resist access with a parent, the relationship is usually repaired eventually.[349] It appears, therefore, that to force children into contact visits against their will may be in opposition to their best interests, particularly where such drastic steps as institutionalisation are in question.[350]

Another pertinent point is the fact that children are left to the whim of changing assumptions about what is 'best' for children within society and manifested within the legal system. For example, Neale outlines how it was previously thought that after parental separation, children needed to be with a 'psychological parent,'[351] that later it was believed that children belonged with their mothers,[352] and that currently children are believed to require two biological parents, in a co-parenting arrangement, in order for their best interests to be served.[353] Einhorn refers to decision-making in family law as inherent with contradictions, which reflects the changing notions within society of how men, women and children are and ought to be.[354]

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[348] Research indicates that relationships should not be forced, and that children who are forced to have contact with fathers against their will are less likely to have positive relationships with them later in life. See Ann O'Quigley, *Listening to Children's Views: The Findings and Recommendations of Recent Research* (Joseph Rowntree Foundation, 2000) who cites the research of Felicity Kaganas, 'Contact, conflict and risk', in Shelley Day Sclater and Christine Piper, eds, *Undercurrents of Divorce* (Dartmouth, 1999) and Heather Smith, *Children, Feelings and Divorce: Finding the Best Outcome* (Free Association Books, 1999).

[349] See e.g. Janet Johnston, "Children of Divorce Who Refuse Visitation", in Charlene Depner and James Bray, eds, *Nonresidential Parenting*, (Sage, 1993), at 124 and Judith Wallerstein and Joan Kelly, *Surviving the Breakup- How Children and Parents Cope with Divorce* (Basic Books, 1980).

[350] For example, Bruch states that she was first introduced to the theory of 'parental alienation syndrome' when she was called to intervene in the case of an eight year old girl who had become suicidal while placed in an institution pending transfer to the 'rejected' parent. Bruch, note 344, at 386. Such drastic measures are obviously questionable in terms of long-term outcomes for children, even considering the importance of the relationship of a child with both parents.

[351] That is, a single, stable carer. Joseph Goldstein, Anna Freud and Albert Solnit, *Before the Best Interests of the Child* (The Free Press, 1979).

[352] Neale, note 148. Neale notes that this notion was so accepted that it became enshrined in the UN Declaration of the Rights of the Child (1959).

[353] *Ibid*, at 458.

[354] Jay Einhorn, "Child Custody in Historical Perspective: A Study of Changing Social Perceptions of Divorce and Child Custody in Anglo-American Law" 4 *Behavioural Sciences and the Law* 119 (1986), at 120.

The vague nature of the standard is certainly hugely problematic. The point is made in the Pérez-Vera report (the explanatory document accompanying the Hague Convention on International Child Abduction) that the principle of the best interests of the child is so vague that it resembles a sociological paradigm rather than a solid juridical standard.[355] What steps should be taken, in the legal context and elsewhere, in order to ascertain what exactly is in the best interests of a particular child? The Committee on the Rights of the Child have not yet released a General Comment on Article 3, however it is expected to be drafted in the near future.[356] Hopefully this document will provide a more concrete approach to determining the criteria in making best interests decisions. It is of note that the Children Act 1989 of England and Wales provides a list of considerations relating to the welfare of a particular child:

> (a) the ascertainable wishes and feelings of the child concerned (considered in
> the light of his age and understanding);
> (b) his physical, emotional and educational needs;
> (c) the likely effect on him of any change in his circumstances;
> (d) his age, sex, background and any characteristics of his which the court
> considers relevant;
> (e) any harm which he has suffered or is at risk of suffering;
> (f) how capable each of his parents, and any other person in relation to
> whom the court considers the question to be relevant, is of meeting his
> needs;

[355] Pérez-Vera, note 89, at para. 21. Pérez-Vera cites the 'Dyer Report'(Adair Dyer, *Questionnaire and Report on International Child Abduction* (One Parent, August 1977). There is no reference to the best interests of the child in the Hague Convention, although the Preamble makes reference to the "interests of children" as having "paramount importance."

[356] This information was ascertained in conversation with staff at the Children's Rights Information Network.

(g) the range of powers available to the court under this Act in the proceedings in question.[357]

Interestingly, although the list is not intended to be constructed in order of importance, the factor of the "wishes of the child" is the first consideration on this list. The broad variety of other considerations mentioned within this provision on the one hand confirm the broad range of experiences that can be relevant both to the capacities of children, as well as what could be considered 'best' for them. However, on the other (predictably, considering the nature of the principle), the potential for a large degree of subjectivity is clear. Note the reference to 'harm' and consider the Johovah's Witnesses cases considered above.[358] To go without blood transfusions was considered 'harmful' by the courts, while undergoing such treatment was considered 'harmful' by the children and their families. Indeed this theme- that other interests are overridden in order for children of the Jehovah's Witness faith to undergo blood transfusions- has emerged in England as one of the most notable instances of the use of the best interests principle. Huxtable makes the point that these contentious judgments demonstrate the tension between applying general principles while remaining responsive to the particularities of the individual.[359]

The existence of this list within the Children Act provides opportunities for examining the treatment of the principle and the interplay between children's best interests and views. Donnelly holds that conclusions about the precise meaning of the principle within the Act range from a paternalistic focus on protection to a liberal stance which values children's autonomy.[360] Huxtable refers to the need for "further

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[357] Section 1(3).
[358] [1992] 4 All ER 627, 639-640.
[358] See *Re E. (a minor) (wardship: medical treatment)* [1993] 1 FLR 386 and *Re S. (a minor)(medical treatment)* [1993] 1 FLR 376.
[359] Richard Huxtable, "Re C (A Child) (Immunisation: Parental Rights) [2003] EWCA Civ 1148" 26 *Journal of Social Welfare and Family Law* 69 (2004), at 72.
[360] Donnelly, note 202, at 183.

specification and some form of ranking"[361] however this ranking too would be inevitably value-laden. The difficulties of such decisions become clear when one considers the vastness of the question:

> Deciding what is best for a child poses a question no less ultimate than the purposes and values of life itself. Should the judge be primarily concerned with the child's happiness? Or with the child's spiritual and religious training? Should the judge be concerned with the economic "productivity" of the child when he grows up? Are the primary values in life in warm interpersonal relationships or in discipline and self-sacrifice?...[W]here is the judge to look for the set of values that should inform the degree of what is best for the child?...if a judge looks at society at large, he [sic] finds neither a clear consensus as to the best child rearing strategies nor an appropriate hierarchy of ultimate values.[362]

Moloney argues that, contrary to common belief, judicial decision-making cannot necessarily determine the 'truth' or a 'correct' outcome in family law cases.[363] The author suggests that there is much indeterminacy associated with cases in which the best interest principle must be used.[364] He argues that a good decision-making process should be the aim, and the limitations of the court to predict need to be recognised. [365] Outcomes will involve both gains and losses when such decisions as those regarding employment opportunities in different locations must be made.[366] This is the same as what is experienced by intact families. Moloney concludes that, "as in democratic decision making, the best one can hope for is the least worst option."[367] Perhaps

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[361] Huxtable, note 359, at 72.
[362] Robert Mnookin, "Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy" 39 *Law and Contemporary Problems* 226 (1975), at 260–261.
[363] Lawrence Moloney "The Elusive Pursuit of Solomon: Faltering Steps toward the Rights of the Child" 46 *Family Court Review* 39 (2008).
[364] *Ibid* at 44.
[365] *Ibid.*
[366] *Ibid* at 45.
[367] *Ibid.*

part of ensuring the best process possible is to consider the views of children as the starting point of that process.

The Convention on the Rights of the Child does not provide guidance on how the principle of the best interests of the child and the right to be heard should be balanced, or how they relate to each other. Ross states that because the best interest principle is "fundamentally about expert, adult interpretations about what is best for children,"[368] it is in conflict with the approach of Article 12, which perceives children as competent social actors whose views are important to any decisions being made about him or her. However Van Bueren claims that the best interest principle itself has been reformulated just by being incorporated into a Convention that has such an emphasis on participation rights.[369] The Committee on the Rights of the Child emphasises that the best interests of the child cannot have been properly considered without due regard for the views of the child.[370] Perhaps the two principles are compatible, if the primary consideration in relation to the best interests of the child are the views of the child, and any decisions which are not in conformity with those wishes must be taken very seriously– i.e. outlined in detail, leaving scope for appeal by the child involved.

One thing is clear, however, in light of the evidence above. Society generally and the legal system in particular have an excessive preoccupation with the 'best interests of the child' and insufficient regard for the potential harm caused by denying children autonomy over their own lives on very questionable grounds (i.e. not evidence-based). As Smith notes, "no wonder we bump into children's best interests at every turn– *adults* simply cannot manage without them."[371] Federle goes so far as to call for the abolition of the best interests standard, because she argues, it acts as a norm which serves to disempower children by

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[368] Ross, note 13, at 4.
[369] Van Bueren, note 16, at 46.
[370] Committee on the Rights of the Child, note 7, para. 70.
[371] Carole Smith, "Children's Rights: Judicial Ambivalence and Social Resistance" 11 *International Journal of Law, Policy and the Family* 103 (1997), at 136. Emphasis original.

emphasising their lack of capacity.[372] Perhaps a compromise solution is to consider the views of the child the most important factor in the decision-making process, and to require extensive justification of a decision-maker when overriding those views.

1.5 Deconstructing the Right to be Heard: 'Adult' Due Process Rights

1.5.1 Due Process Rights

It seems important in the context of the current study to briefly consider the 'adult's right to be heard' in civil law proceedings, and how they relate to the right of children to be heard in proceedings affecting them. Although not all rights are absolute,[373] presumably restrictions placed on such rights for children should only be those that are necessary and proportionate in accordance with their status as minors, in line with non-discrimination principles.[374] Such principles exist in legislation in many states,[375] as well as within a significant body of international law.[376]

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[372] Katherine Federle, "Looking for Rights in all the Wrong Places: Resolving Custody Disputes in Divorce Proceedings" 15 *Cordozo Law Review* 241 (1994).

[373] This point is made, for example, by Claire Breen, *Age Discrimination and Children's Rights* (Martinus Nijhoff Publishers, 2006), at 12. Note the qualifying clauses in various provisions of the European Convention for Human Rights, for example in Article 8 the right to family and private life is protected "except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

[374] See further Breen, *ibid.*

[375] For example the Equal Status Act 2000 in the Republic of Ireland. Furthermore, EU states are subject to EU anti-discrimination legislation. The Charter of Fundamental Rights of the European Union (2006) Chapter III relates to equality and Article 21(1) holds that "[a]ny discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited."

[376] Various forms of the prohibition of discrimination are enshrined in, for example Articles 1(3), 13(1)(b), 55(c) and 76 of the UN Charter, Articles 2 and 7 of the Universal Declaration on Human Rights, Articles 2(1) and 26 of the International Covenant on Civil and Political Rights and Article 2 of the Convention on the Rights of the Child. Instruments such as the Convention on the Elimination of all Forms of Discrimination against Women, (GA res 34/180, 34 UN GAOR Supp [No 46] at 193, UN Doc A/34/46, adopted 18 December 1979, entered into force 3 September 1981) and the International Convention on the Elimination of all Forms of Racial Discrimination (GA res 2106 [XX], Annex, 20 UN GAOR Supp [No 14] at 47, UN Doc A/6014 [1966], 660 UNTS 195, adopted 20 November 1963, entered into force 4

Such laws enshrine the principle of proportionality– the principle that distinctions in legal rights should have a "reasonable relationship of proportionality between the means employed and the aim sought to be realised."[377] Therefore, there arguably exists an obligation on states to facilitate children to be heard in proceedings affecting them, to the extent that adults enjoy that right, where there is insufficient justification for the difference.[378]

The 'right to be heard' in respect of adults does not seem to constitute a major area of study in its own right. The rights of adults which correspond to the right of children to be heard in proceedings affecting them are most notably contained within 'due process' rights.[379] The term 'due process' refers to "fundamental procedural legal safeguards of which every citizen has an absolute right when a state or court purports to take a decision that could affect any right of that citizen."[380] Shauer outlines how, although the term "due process" is primarily an American one, similarly claims regarding "procedural protection in areas such as deprivation of 'privileges'"[381] by Government have a traditional basis in the laws of England. Procedural rights are protected in the English legal tradition through "natural justice",[382] whereby two fundamental principles apply. The first– "*audi alteram partem*"– is sometimes referred to as "the right to be heard" or "hear the other side," as is the

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January 1969) exist, of course, for the specific purpose of addressing prohibition of discrimination as regards certain groups.

[377] *Belgian Linguistic* Case, Series A no. 6, judgment of European Court of Human Rights 23 July 1968, para. 10.

[378] This point is already recognised in the area of criminal law, where children accused of infringing the law will usually be accorded legal representation in situations where adults would be accorded such representation. In the U.S. the landmark case was *In re Gault* 387 US 1 (1967); S Ct (1967), in which the US Supreme Court held that juveniles accused of infringing the law had the right to counsel.

[379] Other terms are also used such as 'fair trial rights' see generally Nuala Mole and Catharina Harby, *The Right to a Fair Trial: A Guide to the Implementation of Article 6 of the European Convention on Human Rights, Handbook No. 3* (Council of Europe, 2006)– and "the right to a fair hearing", see e.g. Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CPPR Commentary* (N.P. Engel, 1993), at 246.

[380] Duhaime Law Dictionary (2009), available at: http://duhaime.org/legaldictionary.aspx (last accessed 2 April 2010).

[381] Frederick F. Shauer, "English Natural Justice and American Due Process: An Analytical Comparison" 18 *William & Mary Law Review* 47 (1976).

[382] *Ibid.*, at 48.

direct translation. The second, "*nemo debet esse judex in propria sua causa*" is the right to a tribunal which is unbiased.[383] Shauer states that there are various aspects to these principles which may apply in certain actions by authorities such as, (under the heading of "*audi alteram partem*") "notice, hearing, right to counsel, statement of reasons, confrontation and cross-examination of witnesses, and other components of a full trial."[384] The parallels with the right of children to be heard in proceedings affecting them, as enshrined in Article 12 of the CRC, are clear. This right also encapsulates procedural entitlements to apply where the state (represented by the courts) makes a decision about a child.

Due process rights are enshrined in a number of international human rights texts, due to the important status accorded to such rights at domestic level.[385] Arguably the two most significant treaties are the International Covenant on Civil and Political Rights (ICCPR)[386] and the European Convention on Human Rights (ECHR).[387] Article 6 of the ECHR enshrines the right to a fair hearing in the determination of the civil rights and obligations of an individual, or of any criminal charge against the individual. Mole and Hardy affirm that:

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[383] *Ibid.*

[384] *Ibid.*, at 49.

[385] The Fourteenth Amendment to the US Constitution, for example, contains a Due Process Clause which has been interpreted to recognise procedural due process rights. See Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (Liberty Fund, 1997), at 223. The right to fair procedures was recognised as an unspecified personal right under the Irish Constitution in *Re Haughey* [1971] IR 217.

[386] International Covenant on Civil and Political Rights, GA res 2200A (XXI), 21 UN GAOR Supp (No 16) at 52, UN Doc A/6316 (1966), 999 UNTS 171, adopted 16 December 1966, entered into force 23 March 1976. Article 14 of the ICCPR enshrines fair trial rights.

[387] European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNT 222, opened for signature 1 November 1955, entered into force 3 September 1953. This is due to the status of the ICCPR as the landmark document on civil and political rights and the extensive jurisprudence of the European Court of Human Rights, as well as the applicability of the ECHR in the Irish context. Although it is, of course, of note that fair trial rights also feature in the African Charter on Human and Peoples' Rights (OAU Doc CAB/LEG/67/3 rev 5, 21 ILM 58 (1982), adopted 27 June, 1981, entered into force 21 October, 1986) and The American Convention on Human Rights (OAS Treaty Series No 36, 1144 UNTS 123, adopted 22 November 1969, entered into force 18 July 1978).

> This expression (in Article 6) incorporates many aspects of the due process of the law, such as the right of access to court, a hearing in the presence of the accused, freedom from self-incrimination, equality of arms, the right to adversarial proceedings and a reasoned judgment.[388]

Most of these principles can be argued to apply to the right of children to be heard. It should be acknowledged that, despite notable similarities, the status of children in civil proceedings is quite different to those of adults for a number of reasons, which renders it difficult to compare directly the rights of both groups. The primary reason is the assumption that children are inherently different to adults and therefore "children, by reason of their age, lack of experience, their physical size and immaturity, lack the capacity to protect their own interests fully without the support of others and of society itself."[389]

It is widely believed that children should be 'shielded' from the judicial process altogether, whilst adults determine their best interests in that process. Furthermore, children rarely initiate proceedings themselves and are generally not made parties where they are the subject of care and custody/access proceedings. This is in clear contrast to adults, who will either initiate such proceedings, at which point they become parties, or have proceedings initiated against them, at which point they likewise become parties. Children, on the other hand, are usually rendered passive objects in the process, even where their lives in fact may form the main focus of proceedings. It could also be argued that, because children lack liberty (in that their legal rights are vindicated through parents/guardians), it is not intended that due process rights will apply to this group. However children are in fact accorded a number of due process rights as evidenced, for example, by the jurisprudence of the

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[388] See Mole and Harby, note 379, at 38. It is also of note that the ICCPR and the Charter of Fundamental Rights of the European Union 2006 (Article 47) enshrine fair trial rights which could be argued to apply to children.

[389] William Binchy, "Reconciling Children's Rights and Children's Welfare," paper presented at *Children's Rights and the Constitution: A Conference on Recent Developments and Future Reforms* (Trinity College Dublin, 21 February 2007), at 4.

European Court of Human Rights.[390] Therefore it is not the case that children are denied all such rights, although the exact application of the full spectrum of due process rights to children lacks clarity.

1.5.2 Similarities between Due Process Rights and the Right of Children to be Heard

The right of children to be heard can clearly be argued to intersect with, or at least to or relate to, fair trial rights. The right of children to be heard may include, where appropriate, the right to legal representation, the right to be present at relevant proceedings and to have access to information at all stages.[391] These are all rights that adults generally enjoy as regards legal proceedings, in both domestic and international law. The preparatory documents of the Convention on the Rights of the Child relating to Article 12 demonstrates an intention on the part of the drafters that "the child should have a degree of freedom comparable to that enjoyed by an individual under the Covenants and comparable instruments of law,"[392] highlighting the connection between the right of children to be heard and comparable rights in conventions which were drafted with adults in mind. As regards the right to representation,[393] there arguably exists an obligation on states to facilitate children to be heard without the necessity of attending court[394] as well as a need to present an independent assessment of the best interests of the child–

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[390] For example as regards fair trail rights, see *Salduz v. Turkey* (2009) 49 EHRR 19 and *T. v United Kingdom* (1999) 30 EHRR 121.
[391] See further Chapter 2.
[392] Travaux Préparatoires of the Convention on the Rights of the Child, *Considerations of 1981 Working Group*, E/CN.4/L.1575, para. 77. Accessed in Sharon Detrick, Jaap Doek and Nigel Cantwell, *The Convention on the Rights of the Child: A Guide to the Travaux Préparatoires* (Martinus Nijhoff, 1992).
[393] The text of Article 6(3)(c) of the European Convention of Human Rights provides for the right to legal representation. It was held in *Airey v Ireland* (1979-80) 2 EHRR 305 that representation is required in the civil law context under certain circumstances.
[394] This is because of the assumption that children should not be exposed to the court environment. See Geoffrey Shannon, *Child Law* (Thomson Round Hall, 2005), at 234.

requirements which are unique to children in order for them to be facilitated to participate in proceedings.[395]

The principle of 'equality before the law' seems highly relevant to children, because of the fact that they are regularly denied many of the rights accorded to adults in civil proceedings. Under the ICCPR the active exercise of some rights may be restricted as provided for by the Covenant "for minority-aged persons or the mentally ill."[396] Therefore limits are permissible under certain circumstances. Carlson and Gisvold opine that the placing of limitations on legal capacity to act based on an individual's status as below the age of majority most likely would not violate Article 16 (the right to legal personality),[397] because of the fact that the seemingly "absolutist wording" of Article 16 applies only to recognition of legal personality, but "does not protect the right to act with legal effect."[398] Therefore there are potentially significant obstacles within the principle of equality before the law in relation to the right of children to be heard. However evolutive interpretation in accordance with modern standards (e.g. the existence of the CRC), as well as the principle of proportionality could potentially lead to a finding under the ICCPR (if the relevant case were taken) that children hold the right to act with legal effect regarding certain due process rights relating to the right to be heard. Indeed there are numerous examples at domestic level where the right of children to act with legal effect is already recognised.[399]

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[395] See e.g. the case of *T. v UK* (1999) 30 EHRR 121, in which it was found that states must make special provision for children in criminal proceedings. Considered further in Chapter 4.

[396] Nowak, note 379, at 286. Nowak provides examples of Articles 19(3)– freedom of expression; 22(2)– freedom of association; and 25– the right to take part in public affairs and to vote– all of which permit reasonable restrictions by states.

[397] Article 16 of the ICCPR states that, "[e]veryone shall have the recognition everywhere as a person before the law."

[398] Scott Carlson and Gregory Gisvold, *Practical Guide to the International Covenant on Civil and Political Rights* (Transnational Publishers, 2003), at 104. The authors further cite the narrow interpretation by the Committee of Article 16 in the few cases considered under that article. In fact in the case of *Monaco de Gallicchio and Vicario v Argentina*, Communication 400/1990, judgment of 3 April 1995, the Committee held that the inability of an applicant to represent her grandchild (of whom she was primary carer) on a number of occasions was not in violation of Article 16. See further Carlson and Gisvold, at 104.

[399] For example Thomson highlights that in the Scottish context there are notable exceptions to the general rule of the absence of legal capacity of children until the age

The right of children to initiate cases is an issue which is somewhat neglected in the discourse on Article 12 of the CRC. As Fortin notes, it is unusual for children to initiate litigation themselves, and far more likely that they will be drawn into the legal proceedings of their parents.[400] However there is generally some provision for this right at domestic level, for example, in England and Wales, children have the right to apply for leave to the court, subject to judicial discretion.[401] In the Irish system, actions concerning personal injuries involving minors (or adults considered to lack 'mental capacity') can be taken by a 'next friend', including parents.[402] There generally exists in Ireland and the UK legislative provision for the court to join a child to child care or guardianship proceedings or to appoint a solicitor to represent a child.[403] This could be considered an aspect of the right to access court. However this is often discretionary as opposed to a right.[404]

The right to access the courts is a key due process right at international level.[405] Article 14(1) of the ICCPR stipulates that, "[a]ll persons shall

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of 16 (this general rule is enshrined in the Age of Legal Capacity [Scotland] Act 1991, Section 1[1][a]). For example a child over the age of 12 has the legal capacity to make a will (Age of Legal Capacity [Scotland] Act 1991, Section 2[2]) and children can enter contracts which are commonly entered into by children, such as buying sweets (Age of Legal Capacity [Scotland] Act 1991, Section 2[1][a] and [b]). See Joe Thompson, *Family Law in Scotland* (5th ed, Tottel Publishing, 2006), at 230.

[400] Fortin, note 35, at 234.

[401] Children Act 1989 (Section 10[8]). Such applications must be heard at the level of the High Court.

[402] *Dunne v National Maternity Hospital* [1989] IR 91 and *Best v Wellcome Foundation Ltd* [1993] 3 IR 421. The Irish constitution expressly confers the right of access to court in Article 40(4)(2), and it has also been held to constitute an unenumerated right under Article 40(3), see *Macauley v Minister for Posts and Telegraphs* [1966] IR 345. The right of access to court, however, may be curtailed in some instances, see *Murphy v Greene* [1990] 2 IR 566.

[403] Child Care Act 1991, Section 25 and Guardianship of Infants Act 1964, Section 28 (as amended by the Children 1997, Section 11).

[404] Section 25 of the Child Care Act 1991 permits the joining of children to proceedings by the court "where it 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..." and guardians *ad litem* may be appointed by the court under Section 26 "if it is satisfied that it is necessary in the interests of the child and in the interests of justice to do so..." In family law cases in Ireland the rights of children to access the court in any way (let alone join as parties) appear almost negligible– see further Chapter 5.

[405] See e.g. *Golder v United Kingdom*, Appl. No. 4451/70, judgment of 21 February 1975, para. 35.

be equal before the courts and tribunals" in the determination of his or her rights and obligations and this provision includes equality of access to court.[406] The European Court of Human Rights has held that regulation of access to court by the State must never injure the very substance of the right[407] and affirmed the principle of proportionality in relation to the right.[408] Therefore to restrict the right of children to access court, the state would arguably have to demonstrate such proportionality and that the substance of the right was not delimited by such a restriction.[409] Moreover, in *Airey v Ireland* the European Court of Human Rights found that the state may be obliged to provide free legal aid in order for individuals to exercise rights to access the courts in civil law proceedings.[410] A child could potentially seek legal aid to participate in proceedings affecting them, subject to the court making the child a party to proceedings. The child could also claim a breach of her rights under the ECHR on this basis where it could be argued that the court failed to make her party to proceedings without adequate justification.[411]

Another right relevant to access to court is the right to an effective remedy. Where children have not been heard in a particular case (and it could be argued that fair trial rights have been violated), they

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[406] See Carlson and Gisvold, note 398, at 40.

[407] *Ibid,* para. 38.

[408] *Ashingdane v. the United Kingdom*, Appl. No. 8225/78, judgment of 28 May 1985, para. 57.

[409] The European Court has opined that the right of access to the court can be restricted in the case of certain persons (minors were included on the list alongside vexatious litigants and persons of unsound mind) in *M. v United Kingdom* (1987) 52 DR 269, at 270. However in *Canea Catholic Church v Greece* (Appl. No. 25528/94, judgment of 16 December 1997), the Court held that the ruling of a Greek court that the applicant church lacked legal personality, and the consequential dismissal of the action of the church, had impaired the substance of the right to access to court. The Court has also found a violation of that right where legal proceedings in respect of an applicant could be taken only by another body where the applicant had a directly concerned their interests (*Philis v Greece* [1991] 13 EHRR 741). Arguably where minors are denied access to court without a legitimate aim, or where their interests are represented by others without a legitimate aim (for example where a child is in her late adolescence and has a high level of understanding), parallels with these cases could be drawn.

[410] *Airey v Ireland* (1979-80) 2 EHRR 305. The Charter of Fundamental Rights of the European Union (2006) also holds in Article 47 that, "[l]egal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice."

[411] Application of the right to representation under the ECHR to the context of the right to be heard is further considered in Chapter 4.

theoretically have a right to access the courts in order to exercise the right to an effective remedy. Article 2(3) of the ICCPR enshrines the right to an effective remedy for those who have had Covenant rights (and, therefore, fair trail rights) violated to be "determined by competent judicial, administrative or legislative authorities, or by any other competent authority."[412] The European Court of Human Rights has also held that where the state fails to provide redress to victims where their Convention rights have been violated, the state has also been in violation of Article 13 of the Convention (the right to an effective remedy).[413]

The right to appeal is also relevant to the right to be heard, as evidenced by the reference by the Committee on the Rights of the Child to the right to appeal in the context of Article 12 of the Convention on the Rights of the Child.[414] The ICCPR enshrines the right of those convicted of a crime "to his conviction and sentence being reviewed by a higher tribunal according to law."[415] This equality as regards the right to appeal could be applied to the civil law context. It could be argued in the civil law context that, if adult parties have a right to review in civil law proceedings, then so too should the children about whom decisions have been made. However the challenges inherent in vindicating the right to appeal are also quite clear, considering children are not usually parties to

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[412] The Human Rights Committee found in *Faure* that not every claim necessitates a remedy at state level. However, where a claim under the Covenant is sufficiently well-founded, a state has a duty to make a remedy available. *Faure v Australia*, Communcation 1036/2001, judgment of 23 November 2005. See Sarah Joseph, "United Nations Human Rights Committee: Recent Cases" 6 *Human Rights Law Review* 281 (2006).

[413] *Z and others v the United Kingdom*, Appl. No. 29392/95, judgment of 10 May 2001, *TP and KM v the United Kingdom*, Appl. No. 28945/95, judgment of 10 May 2001. The Charter of Fundamental Rights of the European Union (2006) also holds in Article 47 that, "[e]veryone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article."

[414] The Committee holds in General Comment No. 12 that, "[t]he right to be heard applies both to proceedings which are initiated by the child, such as complaints against ill-treatment and appeals against school exclusion, as well as to those initiated by others which affect the child, such as parental separation or adoption." Committee on the Rights of the Child, note 7, para. 33.

[415] Article 14 (5).

proceedings. It is a legal obstacle that is unique to children[416] and raises many difficult questions.[417]

This matter appears particularly troublesome when one considers the basic legal principles relating to due process to the right to be heard. The doctrine of equality of arms is referred to by Nowak as "the most important criterion of a fair trial"[418] therefore it is necessary to consider its application to children in care and custody/access proceedings. The doctrine, put simply, is that "one side to litigation shall have no advantage over the other by way, for example of being able to provide the tribunal with evidence or comments not available to the other side."[419] It could be argued that children could similarly claim such rights in proceedings in which their interests are being determined, where they have the capacity to do so. However, the fact that the child is generally not a party to proceedings creates obstacles to the potential for the principle to further children's rights.

The legal maxim '*audi alteram partem*'[420] is, of course, relevant in the context of the right to be heard.[421] However a similar difficulty arises– children are usually not legally 'the other side.' It is either the state and the parent who are parties (in care proceedings) or both parents of the child (or other relatives, in custody/access proceedings).[422] It seems then, on the basis of the difficulty of applying these key principles to children

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[416] Save perhaps for adults with decreased decision-making capacities.
[417] See further Chapter 2.
[418] Nowak, note 379, at 246.
[419] Joseph Jacob, *Civil Justice in the Age of Human Rights* (Ashgate, 2007), at 105. The European Court of Human Rights has also affirmed this right, see e.g. *De Haes and Gijsels v. Belgium*, Appl. No. 19983/92, judgment of 24 February 1997, *T.P. and K.M. v. the United Kingdom*, Appl. No. 28945/95, judgment of 10 May 2001 and *Van Orshoven v. Belgium*, (1997) 26 EHRR 55.
[420] As noted above this literally translate as 'hear the other side.'
[421] See John Kelly, "Audi Alteram Partem" 9 *Natural Law Forum* 103 (1964), at 103, who states that, "a judge or anyone exercising a judicial function must hear both sides of every case." In *Caritativo v People of the State of California* 357 US 549 (1958); Frankfurter J, Douglas J and Brennan J, stated in their dissenting opinion that the maxim applies "whenever any individual, however lowly and unfortunate, asserts a legal claim" (para. 19).
[422] The preparatory documents of the Convention on the Rights of the Child seem to indicate that Article 12 does not require that children are made independent parties to proceedings affecting them. *Travaux préparatoires*, note 392, para. 20.

in cases concerning them, there is a strong argument to be made that children (or at least children who are capable of forming views)[423] should be accorded party status as a matter of course in such cases, in order to avoid such obstacles to their due process rights.

1.5.3 Comparisons with Rights of Adults with Decreased Decision-Making Capacities

It is useful to compare the rights accorded to adults with decreased decision-making capacities with those accorded to children, considering the fact that, ostensibly, the rights of children in relation to the court context are restricted because of children's limited capacities in this regard.[424] Courts are sometimes called upon to make decisions in the 'best interests' of adults with limited decision-making capacities.[425] Adults may have diminished decision-making capacities through learning disability (e.g. due to autism), through acquired brain injury, or through mental health problems (e.g. schizophrenia).[426] Furthermore, there are correlations because of the fact that, similar to the situation of children's capacities, the law must grapple with the fact that, "the

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[423] Although there is also an argument to be made for representation (or indeed party status) for infants in such cases. See further Chapter 2 and Conclusion.

[424] For detailed analysis of Irish law pertaining to adults lacking capacity see Mary Donnelly, "Legislating for Capacity: Developing a Rights-Based Framework" 30 *Dublin University Law Journal* 315 (2009).

[425] See e.g. in the Irish context, *Re a Ward of Court (No.2)* [1996] 2 IR 79 (SC). For detailed consideration of various conceptualisations of 'legal capacity' internationally, see Aminta Dhanda, "Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future?" 34 *Syracuse Journal of International Law and Commerce* 429 (2006).

[426] It is notable that the various terminology in respect of adults with diminished capacities varies between contexts (e.g. from country to country and even between organisations). The less sensitive terms sometimes used to refer to adults with decreased or limited decision-making capacities are 'the mentally disabled,' 'the mentally retarded,' etc., as well as more modern terms such as 'people with intellectual disability' and 'people with special needs.' The term 'adults with decreased or limited decision-making capacities' is chosen here as it arguably covers the spectrum of adults in this category. The term also avoids the assumption that people with learning disability are less intelligent than the general population– instead they have learned in a different way or are operating from a different basis, and this may make it challenging for them to function in their particular society, in particular as regards decision-making.

spectrum of intellectual disability extends from people with mild difficulty in learning to those with more profound disabilities."[427]

It is difficult to make general assertions about international law and practice in the area of people with disabilities, as laws and procedures will differ between different domestic legal systems. Moreover, insufficient attention has been accorded historically to the due process rights of such adults.[428] However the recent drafting of the UN Convention on the Rights of People with Disabilities provides a significant basis for comparisons between due process rights of children and adults with decreased decision-making capacities.[429] The Convention contains a number of provisions relating to due process rights, which are far more extensive than those included in the CRC. This could be partly due to the fact that the Convention for People with Disabilities was drafted close to twenty years after the CRC. Perhaps it is also due to the fact that the UN Convention on the Rights of People with Disabilities was intended to apply to adults as well as children. Nevertheless, the Convention accords significant due process rights including the right of people with disabilities to equal recognition before the law, affirming the obligation on states to "take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity."[430] Such measures must involve safeguards to ensure vindication of "the rights, will and

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[427] Law Reform Commission, *Vulnerable Adults and the Law* (Law Reform Commission, 2006), at 8.

[428] A World Health Organisation Report highlighted the fact that 25% of states did not, in fact, have any laws relating to mental health. World Health Organisation Press Release, *Shaky Mental Health Rules Fuel Abuse of Patients' Rights* (World Health Organisation, 21 June 2005) and Michael Perlin, "International Human Rights Law and Comparative Mental Disability Law" 34 *Syracuse Journal of International Law and Commerce* 333 (2007), at 333. Perlin makes the point that this occurred despite the fact that they are regularly detained against their will in institutions, in most cases without access to free counsel or judicial review. This permitted severe abuses of systems ostensibly established for the protection of those with diminished decision-making capacities, highlighting the vital nature of vindication of due process rights in this area (at 341).

[429] UN Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, G.A. Res. 61/106, Annex I, UN GAOR, 61st Sess, Supp No 49, at 65, UN Doc A/61/49, adopted 13 December 2006, entered into force 3 May 2008.

[430] Article 12(3).

preferences of the person"[431] and to ensure these measures are free of "conflict of interest and undue influence."[432] In other words, where another individual is exercising legal rights on behalf of a person with disability, this must be monitored in some way to ensure abuse does not occur. The relevant measures must also be "proportional and tailored to the person's circumstances"[433] so that allowances are made for individuals with lesser or greater decision-making capacities.

Property rights are particularly protected in relation to equal recognition before the law.[434] The right of access to justice is also included in the Convention, which affirms that people with disabilities have a right to:

> [P]rovision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.[435]

An earlier draft of the Convention had included a clause that provided that "where a person with intellectual disability is not able to exercise this right [the right to own and administer property], the legal guardian of that person shall be entitled to exercise the right on behalf of, and in the interests of, that person."[436] However this clause was not included in the final draft of the Convention, due to the opposition of non-governmental organisations to "paternalistic guardianship laws" in that Convention.[437] The right to liberty and security is also enshrined by the Convention. Where people with disabilities are deprived of liberty, "they

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[431] Article 12(4).
[432] *Ibid.*
[433] *Ibid.*
[434] Article 12(5).
[435] Article 13(1).
[436] Asia Pacific Regional Expert Group Meeting, *Revised Bangkok Draft: Proposed Elements of a Comprehensive and Integral International Convention to Promote and Protect the Rights of Persons with Disabilities*, 2003. Cited in Amita Dhanda, "Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future?" 34 *Syracuse Journal of International Law and Commerce* 429 (2006), at 439.
[437] Dhanda, note 436, at 439.

are, on an equal basis with others, entitled to guarantees in accordance with international human rights law…"[438]

The extensive provision for these due process rights of people with disabilities is in clear contrast to the comparatively vague due process articles in the Convention on the Rights of the Child. Article 37(b) of the CRC enshrines a well-explicated right to freedom from unlawful deprivation of liberty, including the right to access to legal assistance and the courts in relation to any deprivation of liberty.[439] However the similarities between the two Conventions end there. Save for the exception of the short text outlining the right to be heard in Article 12, nowhere is there a detailed elucidation of the civil law due process rights of children in the CRC. There is no reference for example, to the right to equality before the law, safeguards to avoid conflicts of interest,[440] or age-appropriate access to justice– all included in the Convention on the Rights of People with Disabilities. Property rights are only mentioned in the CRC in the context of non-discrimination.[441] The only exception appears to be the brief reference to the obligation that, in relation to decision-making about children's interests in "courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration"[442] (i.e. the best interests principle).

It seems that children have merely been accorded 'protection' by the CRC in the areas in which people with disabilities have been accorded extensive due process rights by the Convention for People with

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[438] Article 14(2).

[439] Article 40 of the CRC constitutes an extensive section on the rights of children in conflict with the law. However this obviously pertains to rights in the context of criminal, as opposed to civil, law.

[440] And indeed one could argue that this occurs any time that a family member purports to represent children's legal interests in civil proceedings.

[441] Article 2 affirms that CRC rights apply to all children, "without distinction of any kind, such as…property…"

[442] Article 3. Although there is reference to "judicial review" in the case of children separated from parents when this is in the best interests of the child, there is no explication of the nature of the due process rights pertaining to children under such circumstances.

Disabilities.[443] However it must be considered that Article 12 and the 'right to be heard' contained within it is a principle of interpretation of the CRC, therefore all such provisions would have to be interpreted in line with this principle. It must also be considered that the CRC also enshrines the principle that no CRC right can trump any instrument which enshrines stronger provisions,[444] and other international texts (such as the ICCPR) recognise the civil rights of "all persons."[445] Furthermore, the vague nature of Article 12 is a double-edged sword. While it lacks the detailed explication of children's due process rights comparable to those contained in the Convention for People with Disabilities, it leaves much scope for the evolution of the right in line with the development of social norms.[446]

The international treaties and monitoring mechanisms clearly highlight the vital importance of due process rights for adults. There does not yet seem to have been a strong link made between these rights for adults and those for children in the international arena and there exists very little international jurisprudence in this area.[447] This seems quite surprising considering the fact that the interests of children are determined in courts of law every day, probably in every state in the world. The Convention

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[443] E.g. Article 20(1) holds that, "[a] child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State." Although 'protection' could be argued to extend to protection of due process rights, this is not explicit in the CRC.

[444] Article 41.

[445] Article 26.

[446] It could, for example, become accepted one day that children (at least over a certain age) have full legal autonomy, the age of majority could be lowered to 15 or perhaps even to 12. It already stands at age 16 in Scotland (Age of Legal Capacity Scotland Act 1991, Section 2), and the age of sexual consent in Spain is 13 years (Spanish Penal Code, Article 181[2]). Consider, for example, that the age of majority used to be 21 years in most common law countries until relatively recently. The age of majority was lowered to 18 years by the Family Law Act 1969 in England and Wales and the Age of Majority Act 1985 in the Republic of Ireland.

[447] The main sources are comments of the Committee on the Rights of the Child, most notably Committee on the Rights of the Child (note 7), and the jurisprudence of the European Court of Human Rights, which has not focused specifically on hearing children as a rights of children- see e.g. *Hokkanan v Finland,* Appl. No. 19823/92, judgment of 23 September 1994, *Elzholz v Germany*, Appl. No. 25735/94, judgment of 13 July 2000, *Sommerfeld v Germany*, Appl. No. 31871/96, judgment of 8 July 2003, *Haase v Germany*, Appl. No. 11057/02, judgment of 8 April 2004, *Sahin v Germany*, (2003) 36 EHRR 765 and *Haase v Germany*, Appl. No. 11057/02, judgment of 8 April 2004 and *C. v Finland*, Appl. No. 18249/02, judgment of 9 May 2006.

for People with Disabilities arguably exposes inconsistency (and possibly discrimination) in the assumption that children should not be entitled to exercise their own due process rights. The drafters rejected the inclusion of a clause in this Convention explicitly outlining an assumption that the legal guardian of a person with 'intellectual disability' would exercise property rights on her behalf.[448] Assumptions exist throughout the CRC that legal guardians will exercise the due process rights of children. Perhaps such assumptions would have been questioned had the Convention been drafted in modern times, as it is more commonly accepted today that children should not necessarily be excluded from every aspect of proceedings concerning them.[449] A case has yet to be heard at international level which explicitly links due process provisions with the right of children to be heard in civil proceedings affecting them. However there are certainly correlations in the international legal texts between adult rights regarding due process and the right of children to be heard, which can and almost certainly will be built upon in the future.

1.6 Conclusion

It is well documented that children are regularly abused and neglected. Rendering children completely voiceless has had grave consequences, and has lead in some situations to institutionalised violence of terrifying proportions.[450] The connection between protection and participation is

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[448] See notes 436 and 437.

[449] For example in the Irish context, the right to be heard has been interpreted to constitute an unenumerated right under the Irish Constitution (*F.N. and C.O.* [2004] 4 IR 311; [2004] IEHC 60), and the right is included in the proposed constitutional amendment to include a specific article on children's rights. See Joint Committee on the Constitutional Amendment on Children, *Twenty-eighth Amendment of the Constitution Bill 2007: Proposal for a Constitutional Amendment to Strengthen Children's Rights- Final Report* (Houses of the Oireachtas, February 2010), available at:
http://www.oireachtas.ie/documents/committees30thdail/j-conamendchildren/reports_2008/20100218.pdf (last accessed 16 September 2010). In the context of England and Wales, see for example *Mabon v Mabon and others* [2005] EWCA Civ 634; [2005] Fam 366 in which it was held that independent representation of articulate teenagers was appropriate in a family law case.

[450] See e.g. in the Irish context Commission to Inquire into Child Abuse, *Committee Investigation Report* (Commission to Inquire into Child Abuse, 2009), available at

made clear by Röbäck and Höjer, who hold that, "[t]he reason for involving children in decision-making in family law is consequently not only to uphold children's rights, but to promote children's protection as well."[451] This observation is possibly even more apt in the child care context.[452] The ratification of the CRC in 1989 has lead states to approach children's issues in a fashion that is significantly more child-centred than was previously the case.[453] A large number of states have adapted laws in the areas of child care and family matters to promote inclusion of the views of children in the decision-making process.[454] Donnelly makes the point that, although there exists some general consensus on children possessing a right to be heard in proceedings, "there is still much to be learnt about how practitioners and courts can improve and enhance effective participation for children."[455] We do have to be mindful that participation of children involves the challenge of balancing the need for taking great care in how we hear children (involving clear guidelines, etc.), while still remaining flexible to the needs of all children, some of whom, possibly due to difficult backgrounds, do not find it easy to express views.

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http://www.rirb.ie/ryanreport.asp (last accessed 23 March 2010); Commission of Investigation, *Report into the Catholic Archdiocese of Dublin* (Commission of Investigation, 2009) available at:
http://www.justice.ie/en/JELR/Part%201.pdf/Files/Part%201.pdf (last accessed 17 September 2010) and the Francis Murphy, Helen Buckley, and Larain Joyce, *The Ferns Report*, (Government Publications, 2005) available at:
http://www.bishop-accountability.org/ferns/ (last accessed 17 September 2010).
and in the UK context Allan Levy and Barbara Kahan *The Pindown Experience and the Protection of Children: The Report of the Staffordshire Child Care Enquiry* (Staffordshire County Council, 1991) and Andrew Kirkwood *The Leicestershire Inquiry 1992* (Leicestershire County Council, 1993).

[451] Karin Röbäck and Ingrid Höjer, "Constructing Children's Views in the Enforcement of Contact Orders" 17 *International Journal of Children's Rights* 663 (2009), at 663.

[452] For consideration of the usefulness of child participation as a means of keeping children safe in the care system, see Carolyne Willow, *Participation in Practice: Children and Young People as Partners in Change* (The Children's Society, 2002).

[453] See e.g. Alan Campbell, "The Right to be Heard: Australian Children's Views about their Involvement in Decision-making following Parental Separation" 14 *Child Care in Practice* 237 (2008), on the influence of the Convention regarding a more child-centred approach to children in legal proceedings in Australia.

[454] A number of provisions in domestic legislation, whilst lacking in some ways, reflect Article 12. For example, Section 26 Guardianship of Infants act 1964, as inserted by Section 11 of the Children Act 1997, in public law proceedings and Child Care Act 1991, Section 28, in private law proceedings, in the Irish context, Section 41 of the Children's Act 1989 in England and Wales and the Family Law Act 1975, Section 60CC in Australia.

[455] Donnelly, note 202, at 190.

The dependent status of children, young children in particular, means that obtaining their views and taking those views into account may be a more complex task than if one were dealing with an adult. However it seems vital that a balance is struck. Not all children are in a state of weakness and dependency, and those that are (for example those who have been badly affected by child abuse and/or neglect) may still wish to be heard. The difficult question as regards the weight to accord to children's views persists. The research, while indicating that children's capacities have been underestimated, is unclear as to what conclusions we can infer about categorising children by age, if any. Not all children will make what the average adult (or perhaps the average child for that matter) would consider to be an objectively 'good' or 'wise' decision.[456] However, considering the seriousness with which states treat the matter of the due process rights of adults, overriding children's wishes should be treated with the utmost of caution, and require extensive justification.

[456] See e.g. the case of *Re E. (a minor) (wardship: medical treatment)* [1993] 1 FLR 386 outlined above.

Chapter 2: The Nature of the Right to be Heard

2.1 Introduction

It is necessary to explore the meaning of Article 12 in order to determine the nature of the right of children to be heard in civil law proceedings affecting them, and consequently what exactly constitutes implementation in accordance with the Convention on the Rights of the Child.[1] Under Article 12, children must be "provided the opportunity to be heard in any judicial and administrative proceedings" affecting them where they wish to do so, and to have weight accorded to those views in accordance with age and maturity.[2] Treaties relating to international human rights law generally do not provide a detailed elaboration of the obligations in relation to the rights which they enshrine. This is partly because of the fact that treaties aim to attract as many ratifying states as possible through vague provisions, which in practice place fewer clear obligations on states than provisions which are more specific. However it also reflects recognition that the place to determine how best to implement a particular standard in a particular context will be domestic level.[3] This lack of elucidation within the CRC of the right to be heard has inevitably resulted in different interpretations of the right in different jurisdictions.[4]

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[1] Hereafter referred to as 'the CRC' or 'the Convention.'

[2] Hereafter referred to as 'the right to be heard.'

[3] See Denis Galligan and Debra Sandler, "Implementing Human Rights" in Simon Halliday and Patrick Schmidt, eds, *Human Rights Brought Home: Socio-Legal Perspectives on Human Rights in the National Context* (Hart Publishing, 2004). Also see *Handyside v UK*, (1976) 1 EHRR 737, paras. 48 and 49, where the European Court of Human Rights opined that, due to continuous contact with their countries, domestic authorities are, in theory, better placed to decide whether a measure is necessary in a democratic society than an international judge.

[4] For example, in the German system, judges frequently speak directly with children to obtain their views in family law cases, whereas in the Irish system, this is a very rare occurrence. See Nina Dethloff and Dieter Martiny, *National Report: Germany* (Commission on European Family Law, 2004), cited in Branka Resetar and Robert Emery "Children's Rights in European Legal Proceedings: Why are Family Practices so Different from Legal Theories?" 46 *Family Court Review* 65 (2008), at 69 and Andrew Moylan, "Children's Participation in Proceedings– The View from Europe" in Lord Justice Thorpe and Justine Cadbury, eds, *Hearing the Children* (Jordan Publishing Ltd., 2004).

The purpose of this chapter, therefore, is to elucidate the nature of the right of children to be heard and to establish the factors which must exist for vindication of the right in accordance with international human rights standards. In this context, 'state obligations' which are derived from the nature and substance of the right will be referred to. However it must be noted that the matter of the obligations which states attain on ratifying an international human rights treaty is complicated by issues relating to the applicability of international human rights law within domestic systems and whether provisions are to be considered 'binding' in national law. It is also acknowledged that states have wide discretion as regards positive human rights obligations.[5] These complex matters are analysed in the next chapter. The current chapter confines itself to interpreting the nature of the right in accordance with international human rights standards (i.e. the 'ideal' implementation in terms of international human rights law) and analysing these stipulations. Where areas exist which involve a lack of clarity as regards international legal guidance, recommendations will be made where possible and appropriate. As domestic systems across the globe are so varied, it is difficult to generalise as to how the right to be heard should be vindicated at state level. However it is submitted that such an exercise is useful, considering that the right is very clearly stipulated at international legal level, yet rarely considered a procedural necessity within domestic systems.

The chapter will take into account the different methods of interpreting a treaty.[6] The starting point of treaty interpretation is examination of the treaty text. However the *travaux préparatoires* (preparatory work)[7] is

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[5] Nowak holds that, as regards the ICCPR, "positive duties to guarantee rights leave States Parties with wide discretion and thus may not be interpreted broadly"- Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (Engel, 1993), at 427.

[6] See Vienna Convention on the Laws of Treaties, UN Doc A/CONF.157/24, 8 ILM 679, adopted 22 May 1969, entered into force on 27 January 1980, Articles 31-33; see also See also Rudolf Bernhardt, "Interpretation in International Law" in *Encyclopaedia of Public International Law No. 7* 318 (North Holland, 1984), at 322.

[7] The *travaux préparatoires* of a treaty is "the record of the drafting of the treaty" (David Harris, *Cases and Materials on International Law* [6th ed, Sweet and Maxwell, 2004], at 840). The *travaux* documents are often useful in clarifying the intentions of

also a supporting means of treaty interpretation[8] and will therefore be included in the analysis. The comments of the Committee on the Rights of the Child,[9] the monitoring body of the Convention on the Rights of the Child, are also insightful regarding the nature of the right. The comments are incorporated in a number of different documents. The report on recommendations of the Committee after the Day of General Discussion on Article 12 is one such document.[10] The Committee has also produced a number of General Comments on various aspects of the CRC.[11] Fortunately, the Committee on the Rights of the Child recently released a General Comment on Article 12.[12] The document is broad, covering all aspects of children's participation (including participation in the family, school etc.), and therefore contains relatively limited analysis of the issue of the right to be heard in civil proceedings specifically. There are, however, aspects of General Comment No. 12 that involve elaboration on other facets of Article 12 which are relevant to the right of children to be heard in proceedings affecting them.[13] Therefore, although the document is limited in some respects it is possible to glean significant guidance regarding the right to be heard.

The concluding observations and recommendations of the Committee in relation to state reports also generate useful commentary from the Committee.[14] Under Article 44[15] of the CRC, every ratifying state must

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the drafters of a treaty.

[8] *Ibid.*

[9] Hereafter referred to as 'the Committee.' The Committee on the Rights of the Child was established under Article 43 of the Convention. States parties are required to submit regular reports to the Committee on measures taken to implement the Convention.

[10] Committee on the Rights of the Child, *Day of Discussion on the Right to be Heard*, Forty-third session, 11-29 September 2006.

[11] General Comments, which are drafted by monitoring bodies, aim to clarify specific rights within a treaty.

[12] Committee on the Rights of the Child, *General Comment No. 12: The Right to be Heard* (1 July 2009) CRC/C/GC/12. Hereafter referred to as 'General Comment No. 12.'

[13] For example, the commentary of the Committee under the heading: "[b]asic requirements for the implementation of the right of the child to be heard" (*Ibid*, paras. 132-134) is as applicable to the right to be heard in judicial proceedings as it is to other aspects of the right to be heard.

[14] A full list of state reports as well as conclusions and recommendations of the Committee can be found at http://www2.ohchr.org/english/bodies/crc/sessions.htm (last accessed 15 November 2010).

regularly report to the Committee on the situation regarding children's rights in their state.[16] The Committee then makes comments on these reports so there exists a corresponding document of conclusions and recommendations of the Committee for every state report. Consequently, a relatively large body of material has emerged in relation to the right of children to be heard in proceedings affecting them (as well as the other rights of the CRC). Committee member Jean Zermatten comments that a strict interpretation of the legal status of such documents as General Comments would indicate that they are not binding on states, as states have not signed them. However he makes the point that a "creative interpretation" holds these documents as obliging states to consider their contents when interpreting a given article of the Convention.[17] They are, of course, very valuable for the purposes of analysing the nature of a particular right.

The right of children to be provided the opportunity to be heard in proceedings affecting them intersects with a number of other rights guaranteed in the CRC. This is because of its status as a general principle[18] of the Convention. This means that the interpretation of other provisions of the CRC should include consideration of Article 12, and vice versa. Therefore the text of other articles of the Convention on the Rights of the Child and General Comments relating to other rights will also be examined in this chapter where appropriate. The analysis will then be encapsulated in a model constructed to illustrate the nature of the right to be heard.

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[15] Article 44 of the CRC holds that, "States Parties undertake to submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made on the enjoyment of those rights…"

[16] At this time (November 2010), all states but two– the US and Somalia– have ratified the Convention.

[17] Jean Zermatten, "General Measures of Implementation of the CRC and the Need for System Reform," paper given at conference *Convention on the Rights of the Child: From Moral Imperatives to Legal Obligations* (Geneva, 12-13 November 2009).

[18] This means that all other rights in the CRC are to be interpreted with Article 12 in mind.

2.2 Article 12 as a General Principle of the Convention on the Rights of the Child

Article 12 is the main article of the Convention which sets out 'participation rights' of children.[19] 'Participation rights' refer to the participation of children in decision-making affecting them. 'Participation' is one of the 'Three Ps' (protection, provision and participation) developed by the non-governmental organisation Defence for Children International and UNICEF (the United Nations Children's Emergency Fund) as a slogan to express the essence of the Convention.[20] It is currently a term which is widely used in relation to Article 12.[21] Ang *et al.* outline that 'participation rights' in the context of the Convention on the Rights of the Child include the rights to: respect for the views of the child,[22] freedom of expression,[23] freedom of thought conscience and religion,[24] freedom of association and peaceful assembly[25] and the evolving capacities of the child, "as a legitimate limitation ground for parental guidance."[26] The Committee usefully provides a description of the term 'participation' as:

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[19] The other articles include Article 13 (freedom of expression), Article 14 (freedom of thought, conscience and religion), Article 15 (freedom of association and freedom of assembly) and Article 17 (right to information).

[20] See Jim Lurie, "The Tension Between Protection and Participation– General Theory and Consequences as related to Rights of Children, Including Working Children" 7 *Inter-University Centre Journal of Social Work Theory and Practice* 3 (2003).

[21] See Committee on the Rights of the Child, note 12, para. 3. See also Malfrid Flekkoy and Natalie Kaufman, *The Participation Rights of the Child: Rights and Responsibilities in Family and Society* (Jessica Kingsley Publishers, 1997). The more recent formulation of 'Four Ps' (whereby the principle of 'protection' is giving a further dimension of 'prevention') is the terminology used by the Council of Europe. See on-line document "Protecting Children and Promoting their Rights' where it is stated that, "[i]n its advocacy of the rights of the child, the Council of Europe's policies are guided by the four P's– protection of children, prevention of violence, prosecution of criminals and participation of children." At http://www.coe.int/t/dc/files/themes/childrens_rights/default_EN.asp (last accessed 2 June 2009).

[22] Article 12 CRC.

[23] Article 13 CRC.

[24] Article 14 CRC.

[25] Article 15 CRC.

[26] Article 5. Fiona Ang *et al.*, "Participation Rights in the UN Convention on the Rights of the Child" in Fiona Ang *et al.*, eds, *Participation Rights of Children* (Intersentia, 2006), at 9. However there are also aspects of participation explicitly mentioned in other articles, such as Article 9(2) and Article 41.

> [O]ngoing processes, which include information-sharing and dialogue between children and adults based on mutual respect, and in which children can learn how their views and those of adults are taken into account and shape the outcome of such processes.[27]

The Committee does not stipulate that this is an exact definition of the term, which leaves open the possibility of a broader understanding of the concept. It is notable that there is no reference in this description to children necessarily influencing decision-making. Indeed Hart's 'Ladder of Participation' describes levels of 'participation' which range from 'Children are Manipulated'[28] to 'Young People and Adults Share Decision-Making.'[29] This perhaps highlights the fact that, while children could ostensibly 'participate' in something, it does not necessary follow that that participation has been empowering or that they have had influence.

Nevertheless, the crucial position of participation rights within the CRC is evident from the fact that the drafting of the CRC was in part due to the neglect of civil and political rights in earlier documents relating to children's rights.[30] Furthermore, whilst in theory binding regimes such as the International Covenant on Civil and Political Rights (ICCPR) apply to "all individuals,"[31] before the drafting of the CRC it was not clear which of the civil and political rights applied to children. It seems unlikely that one could argue that children are not accorded the basic

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[27] Committee on the Rights of the Child, note 12, para. 3.

[28] Although Hart emphasises that manipulation constitutes non-participation. See Roger Hart, *Children's Participation: From Tokenism to Citizen* (UNICEF, 1992).

[29] Roger Hart, *Children's Participation: The Theory And Practice Of Involving Young Citizens In Community Development And Environmental Care* (UNICEF, 1997).

[30] The Declaration on the Rights of the Child 1924 and the Declaration on the Rights of the Child 1959. These documents enshrined rights of protection and provision. See Geraldine Van Bueren, *The International Law on the Rights of the Child* (Martinus Nijhoff, 1995), at 6-12.

[31] Article 2 of the ICCPR states that, "[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

civil and political rights enshrined in the ICCPR such as the right to life, the right to freedom from torture. However, inevitably, because of the evolving capacities of children, there will be limits for children in comparison to adults as regards the application of civil and political rights. For example the Human Rights Committee has ruled that it is acceptable to set a minimum age for the right to vote.[32] The Convention on the Rights of the Child provided an opportunity to clarify the nature of civil and political rights for children. Conte, Davidson and Burchill define civil and political rights as follows:

> [C]ivil rights are those rights that are calculated to protect an individual's physical and mental integrity to ensure that they are not victims of discrimination and to preserve their right to a fair trial, political rights are those which ensure that individuals are able to participate fully in civil society. Such rights include rights of democratic participation, such as the right to vote and to participate in the public life of the state, freedom of expression and assembly and freedom of thought, conscience and religion. [33]

'Participation' (i.e. the term used in the context of children's rights, outlined above) is clearly a key feature in this definition of the term 'civil and political rights.' The CRC stipulated for the first time in international law that children enjoy participation rights, and therefore civil and political rights. It is clear from the above definition that the right to be heard fits within the context of civil rights.[34]

Another reason for the drafting of the CRC was the recognition that principles of interpretation specific to children were necessary for existing international law to be applicable to children.[35] The principle of participation as enshrined in Article 12 is acknowledged by the

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[32] See Alex Conte, Scott Davidson and Richard Burchill, *Defining Civil and Political Rights: The Jurisprudence of the United Nations Human Rights Committee* (Ashgate, 2004), at 71.
[33] *Ibid* at 2.
[34] The right to be heard is closely linked to the right to a fair trial. See Chapters 1 and 4.

Committee on the Rights of the Child as one of four guiding principles (also referred to as 'general principles') of the CRC.[36] This means that the interpretation of all other rights in the Convention should involve consideration of Article 12, and that states must "strive to ensure that the interpretation and implementation of all other rights incorporated in the Convention are guided by it."[37] It is outlined by the Committee on the Rights of the Child that for effective implementation of the CRC, a children's rights perspective must be instilled throughout government, parliament and the judiciary.[38] The general principles of the CRC are an important part of this process, the Committee continues, and Article 12, "the child's right to express his or her views freely in 'all matters affecting the child', those views being given due weight"[39] is one of these principles.

It is evident that the right of children to be heard falls under many different headings. It may be classified as part of the categories of 'participation rights,' 'civil and political rights' and 'respect for the views of the child.' Although there are clear differences between the right enshrined in Article 12 and the rights to freedom of expression and information, there are also obvious links. Freedom of expression requires that the views of children are not suppressed (or, indeed left unfacilitated, violating positive obligations)[40] in proceedings affecting them. Freedom of information requires that children are kept fully informed of proceedings affecting them insofar as possible. This permits them to make decisions regarding whether they want to be heard, as well as informing their views. The Committee on the Rights of the Child,

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[35] Van Bueren, note 30, at 21.

[36] Along with Article 2, the obligation of states to respect and ensure the rights set forth in the Convention to each child within their jurisdiction without discrimination of any kind, Article 3(1), the best interests of the child as a primary consideration in all actions concerning children, and Article 6, the child's inherent right to life and States Parties' obligation to ensure to the maximum extent possible the survival and development of the child.

[37] Committee on the Rights of the Child, note 12, para. 17

[38] Committee on the Rights of the Child, *General Comment No. 5: General Measures of Implementation of the Convention on the Rights of the Child*, (27 November 2003) CRC/GC/2003/5, 27 November 2003, para. 12.

[39] *Ibid.*

however, makes a pertinent point regarding the difference between the right to be heard (as enshrined in Article 12) and the right to freedom of expression (Article 13). The Committee states that Article 12 relates to freedom of expression regarding matters directly relating to children and therefore involves more positive obligations than freedom of expression generally.[41] An examination of the definition of civil and political rights of Conte, Davidson and Burchill indicates a further difference– that Article 12 falls more within the category of civil rights, whereas the 'freedom' rights fall more within the sphere of political rights.[42] Nevertheless, all of the categories to which the right (of children to be heard in proceedings affecting them) belongs are, of course, interrelated and complementary in that elements of each are reflected in Article 12. Another crucial principle to which the right to be heard is related is that of the best interests of the child.

2.3 Article 12 and the Best Interest Principle

The close links between Article 3, the article which enshrines the best interests of the child, and the right of children to be heard in proceedings affecting them is highlighted by the fact that they were originally included in the same article of the Convention. It is therefore useful to look briefly at the relationship between the two principles in this context– the principle of the best interest of the child is also a guiding principle of the CRC– to fully understand the nature of the right which is the focus of this thesis. During the drafting of Article 3 in 1981, the US submitted a draft concerning the best interest principle which actually included the right to be heard in proceedings, even though the latter right had been provided for in another article in the context of the right to be heard generally. The proposed text read:

Article 3

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[40] See Chapter 4, ECHR.
[41] Committee on the Rights of the Child, note 12, para. 81.
[42] Although the right to information could obviously relate directly to proceedings

1. In all official actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, or administrative authorities, the best interests of the child shall be a primary consideration.
2. In all judicial and administrative proceedings affecting a child that has reached the age of reason, an opportunity for the views of the child to be heard as an independent party to the proceedings shall be provided, and those views shall be taken into consideration by the competent authorities.[43]

It was highlighted by the Finnish representative in the final stage of the drafting of the Convention (1989) that the scope of draft Article 3(2) overlapped with the scope of draft Article 12, which would ensure the right of children to express views generally. It was agreed that paragraph 2 would be deleted from draft Article 3, and that it would be discussed under draft Article 12.[44] That the two principles were originally contained in one article highlights the close relationship between the right of children to be heard in proceedings affecting them and the best interest principle. The right to be heard may constitute an element of the process for the decision-maker (e.g. a judge) in deciding what is in the best interest of a child. In fact it was emphasised during drafting that the right to be heard provided a way for authorities to determine the best interest of the child.[45]

This point is also made by the Committee on the Rights of the Child in the General Comment on Article 12. The Committee indicates that states are obliged to ensure that those who are responsible for determining the

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affecting an individual child.

[43] Travaux Préparatoires of the Convention on the Rights of the Child, *Considerations of 1981 Working Group*, E/CN.4/L.1575, para. 20. Accessed in Sharon Detrick, Jaap Doek and Nigel Cantwell, *The Convention on the Rights of the Child: A Guide to the Travaux Préparatoires* (Martinus Nijhoff, 1992).

[44] Travaux Préparatoires of the Convention on the Rights of the Child, *Considerations of 1981 Working Group*, E/CN.4/1989/48, para. 235. Accessed in Detrick, Doek and Cantwell, note 43.

[45] Travaux Préparatoires, note 43, para. 20. Accessed in Detrick, Doek and Cantwell, note 43.

best interests of the child "hear the child as stipulated in article 12."[46] The Committee goes so far as to emphasise that such a step is 'mandatory'[47] and that Article 3 cannot be applied correctly if Article 12 has not been respected.[48] While the inextricable relationship between the best interest principle and the right to be heard is acknowledged by the Committee, the clear tensions are not. The Committee states that, "(t)here is no tension between articles 3 and 12, only a complementary role of the two general principles."[49] This is perhaps a simplistic approach. While indeed the two principles of protection and participation are to be viewed as complementary, there are a number of contentions which arise in their application. For one thing, it could reasonably be decided that it is in a child's best interests not to participate in proceedings affecting her. Perhaps the child is too young or sensitive to have the emotional maturity to deal with proceedings concerning intimate matters, in intimidating surroundings, with professionals who are strangers. This is, in fact, acknowledged in an earlier draft of the General Comment:

> [E]xercising participation rights can sometimes expose a child to risk, resulting in the need, in the child's best interests, to limit opportunities for the expression of views. There can be a tension between participation and protection which needs to be balanced.[50]

The tension can exist because of the scope for excluding children from being heard in such proceedings, on the grounds that it is in their best interest. It is helpfully stated in the Draft General Comment that, unless clear grounds can be determined for restricting the involvement of a child, a presumption should exist in favour of participation. There is,

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[46] Committee on the Rights of the Child, note 12, para. 70.
[47] *Ibid.*
[48] *Ibid.*
[49] *Ibid*, para. 74.
[50] Committee on the Rights of the Child, *Third Draft of Draft General Comment on Article 12*, (Committee on the Rights of the Child, 2007), para. 26. Available at: http://www.unicef.org/voy/media/CRC-GCArt12-Draft3-Gerison-31july2007.pdf (last

unfortunately, no such guidance provided in the final version of the General Comment.

Another potential issue arises as regards the relationship between the best interest principle and the right to be heard. This relates to circumstances where children are under the undue influence of another individual– a situation which has been the subject of significant consideration, for example, by the European Court of Human Rights, in cases where children resist access with a parent.[51] Two matters arise in such circumstances. The first is whether the views of children in such cases require the analysis of an expert in order to determine the 'reality' of the situation.[52] The second is whether the views of children who are unduly influenced should be considered their own.[53] This crucial area is not the subject of guidance by the Committee.

What is significant, however, is the framing of the best interest principle by the Committee as a vital component of the right to be heard. The Committee states that, "article 3 reinforces the functionality of article 12."[54] This suggests that the Committee does indeed consider the best interest principle as vital in the implementation of the right to be heard. The Committee simply refrains from engaging in more detailed consideration of the relationship. This is perhaps unfortunate, because the application of the right to be heard in legal proceedings is highly dependent on the best interests principle and General Comment No.12, as the official UN document analysing Article 12, would have been the

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accessed 15 November 2010).

[51] See further Chapter 4.

[52] The European Court of Human Rights has held that the rights of the applicant parent were violated due to the lack of expert analysis in the case of a five to seven year old child (*Elzholz v Germany*, Appl. No. 25735/94, judgment of 13 July 2000), but not in the case of a child between the ages of ten to 13 years (*Sommerfeld v Germany*, Appl. No. 31871/96, judgment of 8 July 2003).

[53] The European Court of Human Rights held in the case of *Suss v Germany* (Appl. No. 40324/98, judgment of 10 November 2005) that, despite the fact that the views of the child (between the ages of ten to 13 years in the period in question) were influenced by the mother, it was the wish of the child that prevailed. The European Court did, however, express the belief that there was a strong possibility that the wishes expressed by the child were not his 'true' wishes in the case of a boy between the ages of five and seven years (*Elzholz v Germany*, Appl. No. 25735/94, judgment of 13 July 2000).

ideal place in which to clarify a number of the issues involved. Nevertheless it remains clear that the best interest principle, as a guiding principle of the Convention, is crucial in any analysis of the right to be heard.

The text of Article 12[55] provides substantial material for consideration. As can be seen from the text, the article consists of two parts. The first outlines the right of children who are capable of forming views the right to express those views freely in all matters affecting them. The second paragraph then specifies that a crucial component of this right to express views is the right of children to be provided the opportunity to be heard in judicial and administrative proceedings affecting them. The wording of Article 12(2), "[f]or this purpose," makes clear that the right to be heard as outlined in Article 12(1) includes the right to be heard "in any judicial and administrative proceedings affecting the child." Therefore the stipulations that the child "capable of forming his or her own views" has "the right to express those views freely in all matters affecting the child," and that the views of the child must be "given due weight in accordance with the age and maturity of the child" all apply to the right to the right to be heard in judicial and administrative proceedings. The nature of the text and the consequential rights contained within it will now be analysed in detail.

2.4 Situations in which the Right to be Heard Applies: *"[A]ll matters affecting the child"*

Article 12 covers a much broader range of scenarios in which children

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[54] Committee on the Rights of the Child, note 12, para. 74.

[55] Article 12 stipulates that:

> 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

should be heard than solely legal proceedings concerning an individual child. In the first section of Article 12, it is clear that a child has the right to be heard in "all matters affecting the child," therefore the right arguably extends to policy matters affecting children generally. Earlier drafts of what was ultimately to be Article 12 included lists of matters concerning the child, for example; "marriage, choice of occupation, medical treatment, education and recreation."[56] However, the drafters agreed that the matters on which a child should be heard should not be subject to the limits of a list,[57] and a list was not included. Instead it was decided that the umbrella phrase "all matters" would be used, with the consequence that the right arguably extends to a very broad spectrum of matters concerning children.[58]

The Committee states in General Comment No. 12. that whether the matter under discussion affects the child needs to be "understood broadly"[59] and that children's views should be considered "wherever their perspective can enhance the quality of solutions."[60] This broad understanding of the right is positive, however it needs elaboration in the context of civil proceedings (and indeed other matters). For example it is unclear whether children should be offered the opportunity to be heard in relation to matters such as child support and court orders against domestic violence.[61] It is quite likely that children (particularly older children) would enhance the understanding of a judge about the matter in question, however would this justify their involvement in parent's finances and disputes involving violence? This is unclear, although such areas could be argued to constitute "matters affecting the child."

The second section of Article 12 makes it clear that both judicial and administrative proceedings affecting a child must involve the child being

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[56] Travaux Préparatoires, note 43, para.74.
[57] *Ibid*, para.78.
[58] *Ibid*, para.79.
[59] Committee on the Rights of the Child, note 12, para. 26.
[60] *Ibid*, para. 27.
[61] For example, the matter of the views of children did not arise during the fieldwork in the Irish District Courts. See Chapter 7.

heard, if he or she so wishes. This indicates that the right is applicable to family law proceedings that involve courts, as well as those that relate to dispute resolution outside a formal court setting. The term "administrative proceedings" was clarified by the Draft General Comment on Article 12 as including:

> [M]echanisms to address discipline issues in schools (e.g. suspensions and expulsions), refusals to grant school certificates and performance-related issues, disciplinary measures and refusals to grant privileges in juvenile detention centres, asylum requests from unaccompanied children, and applications for driver's licences.[62]

This clarification was inexplicably not included in the final General Comment No. 12. Although the text of the Draft General Comment is not authoritative it remains useful in that it provides an indication of the types of proceedings to be considered 'administrative'.

The Committee holds in General Comment No. 12 that, "[t]he right to be heard applies both to proceedings which are initiated by the child, such as complaints of ill-treatment and appeals against school exclusion, as well as to those initiated by others which affect the child, such as parental separation or adoption."[63] It is constructive to have clarification that the right to be heard applies to both types of proceedings. However it is important to acknowledge that children may wish to initiate proceedings appealing decisions made in relation to such matters as parental separation, as opposed to only having the right to be heard in family proceedings initiated by others. It is unfortunate that the Committee was not clearer on this point as confusion may arise as to whether children should or should not be empowered to initiate these types of proceedings. This issue may be resolved by the fact that the Committee has emphasised that the right to be heard "applies to all

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[62] Committee on the Rights of the Child, note 12, para. 67

[63] *Ibid*, para. 33.

relevant settings without limitation"[64] (which may be interpreted to include all proceedings involving children, including those which the child seeks to initiate herself) and lists the various groups of children who may find themselves in need of being heard in proceedings affecting them: children separated from their parents, children involved in custody and adoption cases, children in conflict with the law, children victims of physical violence, sexual abuse or other violent crimes, asylum seeking and refugee children and children who have been the victims of armed conflict and in emergencies.[65]

It follows that a wide range of legal situations exist where it is arguable that a state is obliged under Article 12 to facilitate the right of children to be provided the opportunity to be heard. The Committee highlights the lack of emphasis on the right to be heard at state level:

> The Committee's experience is that the child's right to be heard is not always taken into account by States parties. The Committee recommends that States parties ensure, through legislation, regulation and policy directives, that the child's views are solicited and considered, including decisions regarding placement in foster care or homes, development of care plans and their review, and visits with parents and family.[66]

Questions relating to the relevant details arise here also. Should legislation accord children the right to access to court regarding arrangements which have been made privately between parents? Legally, how would children challenge arrangements made by the court without being party to proceedings? And does a right exist for children to bring new cases as parties themselves (either relating to a case that has gone through the courts or initiating a case of their own volition)? There are many pertinent questions left unanswered.

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[64] Travaux Préparatoires, note 43, para. 39.
[65] *Ibid.*
[66] Committee on the Rights of the Child, note 12, para. 54.

The category of 'children in conflict with the law' is one which is not often analysed in relation to Article 12. This is because Article 40 of the CRC covers the administration of juvenile justice in detail. It is also complicated by the fact that there is often an approach to proceedings concerning children in conflict with the law which holds the public interest of punishing or preventing crime as a major priority. Whether one agrees that this is the correct approach to youth justice or not,[67] this tends to be the dominant approach, although the best interest of the child will also usually be a factor in decision-making. However this punitive element is absent from care/custody proceedings and therefore the best interest of the child is ostensibly always the primary consideration.[68] Because of the criminal justice aspect to proceedings, it is arguable that children do not have as much potential to contribute views to the decision-making process as those involved in care and custody proceedings. However the correlation with the current analysis is evident from the fact that Article 40 of the CRC refers to a number of due process rights, including the right to legal assistance where appropriate. Article 40 stipulates that every child accused of having infringed the penal law has the right to a fair trial, including an interpreter if necessary, as well as the right;

> [T]o be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians and to have legal or other appropriate assistance in the preparation and presentation of his or her defence. [69]

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[67] The punitive element is significantly reduced in the Scottish system, for example. Any children under 16 (or children under 18 who are subject to a supervision requirement) who offend are referred to a children's hearing, unless it is decided that the seriousness of the case requires prosecution in the court system. Children's hearings are conducted by highly trained lay persons. Compulsory measures of supervision or restorative justice may be ordered. See e.g. Linda Tyler, "The Children's Hearing System and the European Convention on Human Rights" 3 *Irish Journal of Family Law* 6 (2003).

[68] This is commonly the case with care and custody proceedings, e.g. in the Irish system the Child Care Act 1991 Section 24 holds "the welfare of the child as the paramount consideration" in proceedings regarding the care and protection of the child.

[69] Convention on the Rights of the Child, Article 40(2)(b)(ii).

Article 40 does not explicitly stipulate that children accused of having infringed the criminal law has a 'right to be heard.' However from the text of Article 40 outlined above, it is clear that children have due process rights which must be upheld which arguably could be held to relate to or include a right to be heard. As outlined in Chapter 4, these provisions have been reinforced by the European Court of Human Rights in relation to children.[70] Moreover they can be said to constitute participation rights, as they refer to the right to adequate participation of children in decision-making affecting them. However the context within which they are due undoubtedly differs to that of civil proceedings which directly relate to the best interests of the child. In any case, Article 12 is a guiding principle of the CRC, therefore Article 40 must be interpreted in conjunction with it to ensure to children the right to be heard in juvenile justice proceedings.

The connection between juvenile justice and the right to be heard is also made within texts outside the Convention. Article 14 of the UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules)[71] provides that the proceedings should be conducted in a way that will allow the child to participate and to express herself or himself freely.[72] General Comment No. 10 of the Committee[73] is another useful source on children's rights in juvenile justice. It outlines the obligations of states in relation to the right of children accused of having infringed the penal law to be heard. The Committee states that "[t]he right of the child to express his/her views freely in all matters affecting the child should be fully respected and implemented throughout every stage of the process of juvenile justice."[74] The Committee further elaborates that "[i]t is obvious that for a child alleged as, accused of or recognized as having

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[70] *T. v UK* (1999) 30 EHRR 121.
[71] UN General Assembly Resolution 40/33, *Standard Minimum Rules for the Administration of Juvenile Justice* (1985). ("The Beijing Rules").
[72] Article 14 of the Beijing Rules.
[73] Committee on the Rights of the Child, *General Comment No. 10: Children's Rights in Juvenile Justice*, (9 February 2007) CRC/C/GC/10.
[74] *Ibid*, at 3.

infringed the penal law, the right to be heard is fundamental for a fair trial."[75] The Committee, then, is acknowledging in General Comment No. 10 the fair trial rights of children accused of infringing the law, including the right to be heard ("express views freely") as a crucial part of that process. It is of note, however, that the right of children to *have their views taken into account* is not prominent in the discourse of the Committee on youth justice. It is perhaps unintentional, as the attempts of the Committee to cover a broad number of circumstances globally seems to sometimes result in a lack of thorough commentary on such matters. There is, however, a possibility that this constitutes recognition of the reality that there is less scope for contributing to decision-making for children under such circumstances, for the reasons outlined above.

The issue of child victims is similarly complicated by matters relating to the public interest of punishing or preventing crime. Despite this there exists a right to be heard where appropriate. The Committee acknowledges this in General Comment No. 12[76] by stating that child victims and witnesses of a crime must be provided the opportunity to express views in accordance with the UN Economic and Social Council resolution 2005/20, "Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime."[77] This resolution stipulates that professionals should "make every effort"[78] to ensure that child victims and witnesses are enabled to express views in relation to their involvement in the process of justice. This may imply that the right to be heard relates to an obligation to consider children's views in terms of how they are to be involved in proceedings (e.g. how they are to give evidence). It may also relate to their views on how they have been affected as a victim of a crime. However it is likely that the *outcome* in terms of sentencing of the convicted will not be affected by the views of the child to the extent that is possible to influence the outcome in civil

[75] *Ibid*, para. 23(c).
[76] Committee on the Rights of the Child, note 12, para. 62.
[77] UN Economic and Social Council Resolution 2005/20, *Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime* (2005).
[78] Article 21.

proceedings where the primary consideration is the best interests of the child involved. However the more recent UN document "Justice in Matters Involving Child Victims and Witnesses of Crime: Model Law and Related Commentary"[79] expands on the Guidelines' reference to expressing views, referring to a "right to contribute to decisions affecting his or her life, including those taken in the course of the justice process."[80] This reference to "contributing to decisions" as opposed to simply "expressing views" possibly refers to a right to contribute to the decision-making process regarding outcomes for perpetrators, as opposed to simply decision-making about the process of involvement. Perhaps it simply refers to the fact that, through their testimonies, children may contribute to a decision affecting their lives, for example the conviction of someone who has harmed them. General Comment No. 12 refers only to the right of children to be heard/to participate on matters relating to the procedural aspects of the judicial process,[81] so further guidance is necessary on this issue.

2.5 The Factor of Capacity: *"[T]he child who is capable of forming his or her own views"*

From the text of Article 12 of the Convention on the Rights of the Child, it can be determined that there is no age limit under which children should automatically be denied the right to be provided the opportunity to be heard in judicial and administrative proceedings affecting them. The text refers solely to children "capable of forming his or her own views" without designating any specific age limit. During drafting, the US proposed that the right to be heard would be applicable to "a child that has reached the age of reason."[82] However it was expressed by some

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[79] UN Office on Drugs and Crime/UNICEF, *Justice in Matters Involving Child Victims and Witnesses of Crime: Model Law and Related Commentary* (UN Office on Drugs and Crime/UNICEF, 2009).

[80] Art 2(6).

[81] See Committee on the Rights of the Child, note 12, paras. 61-64.

[82] Travaux Préparatoires, note 43, para. 20. It is theorised that on reaching approximately age 7, the conscience of a child becomes mature enough to guide her behaviour. According to child psychiatrists Theodore Shapiro and Richard Perry (see their article, "Latency Revisited: The Age of Seven, Plus or Minus One" 43

delegates that they believed that "the age of reason" could be very difficult to determine and it was agreed that the current wording would be used.[83] It is not clear from the *travaux préparatoires* what the drafters perceived to be the additional benefits of using the terminology "capable of forming his or her own views." However it is possible that the benefit of this term is that it provides less encouragement for states to set age limits for the right to be heard. The term "age of reason" is accepted as approximately age seven,[84] however the term "capable of forming his or her own views" does not imply a lower age limit. Therefore the phrase "capable of forming his or her own views" is arguably a more subjective standard than the former suggestion.[85]

A strong argument exists in favour of states facilitating the views of younger children in decision-making affecting them where appropriate. Children, after all, develop at different rates (so a very advanced five year old child could possess the capacities of the average seven year old),[86] and even very young children can demonstrate advanced social skills.[87] In General Comment No. 12 the Committee discourages states from introducing age limits in law which restrict children's right to be

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Psychoanalytic Quarterly 79 [1976]) there is a significant increase in moral and mental maturity at this age. The age of seven has been called the "age of reason" for this reason. The main guiding factors for children are no longer displeasing adults or getting caught. Children have made up their own minds about what is right and wrong and apply their values quite rigidly. Under common law (which prevails in England, Ireland, the US and other states previously colonised by England), seven was traditionally the "age of reason." Children under the age of seven were presumed incapable of committing a crime, as it was believed that they did not possess the necessary reasoning ability (*West's Encyclopedia of American Law*, [2nd ed, The Gale Group, 2008]).

[83] Travaux Préparatoires, note 43, para. 29.

[84] See Shapiro and Perry, note 82.

[85] This necessitates the question– who shall determine whether a child is capable of forming her own views? Although Article 12 itself remains silent on this point, the Committee has provided some guidance on this issue, which is discussed below at Section 2.6.

[86] Sheila Greene makes the point that, "it is in fact very difficult to generalise about what children can or should do at any age, witness the extraordinary lack of agreement from jurisdiction to jurisdiction about the age of criminal responsibility." Sheila Greene, "Children as Social Actors," paper presented at *Irish Human Rights Commission and Law Society of Ireland Conference: Achieving Rights-Based Child Law* (Dublin, 14 October 2006), at 4.

[87] *Ibid.*

heard,[88] which indicates that the Committee is of the view that refraining from introducing a lower age limit constitutes the highest standard of implementation of Article 12. In fact, the Committee has frequently expressed concern that age limits prevent children under those age limits from enjoying their right to be heard[89] and that the decision should be made on "a case-by-case basis."[90] The Committee advises that where states *have* established a minimum age over which children have the right to be heard in proceedings, measures should be taken to ensure that the views of the child below the minimum age be considered where the child is capable of forming his or her own views.[91]

The Committee asserts a presumption in favour of the capacity to form views, stating that it is not the obligation of the child to prove capacity but rather "an obligation for States parties to assess the capacity of the child to form an autonomous opinion to the greatest extent possible."[92] This places the onus firmly on the state to have processes in place for assessing capacity if there is doubt that it exists. The exception to this seems to be in the area of health care decisions. The Committee in fact "welcomes the introduction in some countries of a fixed age at which the right to consent transfers to the child."[93] The reason behind the difference in approach in this particular area of decision-making is not elucidated. However the Committee goes on to recommend that the views of younger children on medical decisions be given due weight, where they demonstrate capacity to express informed views on their treatment.[94] This, in effect, appears to bring the approach of the Committee to the area of medical decisions on a par with other matters.

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[88] Committee on the Rights of the Child, note 12, para. 21.
[89] See, for example, Committee on the Rights of the Child, *Concluding Observations: Kazakhstan* (7 October 2003) CRC/C/OPSA/KAZ/1, para 30.
[90] Committee on the Rights of the Child, note 12, para. 52.
[91] See for example Committee on the Rights of the Child, *Concluding Observations: Albania* (31 March 2005), CRC/C/15/Add.249, para. 31. In the Irish Context, see *N. v N. [hearing a child]* [2008] IEHC 382, where it was held that a six year old boy would be heard in proceedings under the Hague Convention. Discussed in Chapter 6.
[92] Committee on the Rights of the Child, note 12, para. 20.
[93] *Ibid*, para. 102.
[94] *Ibid.*

UNICEF raised the point during drafting that in stipulating that children must be "capable of forming his or her own views," draft Article 12 was introducing a new restriction on freedom of expression.[95] This is an interesting observation, however the restriction is arguably necessary to render the right amenable to implementation. There are at least two categories into which one could place a child who does not meet the criteria inherent in the term "capable of forming his or her own views." First, the child may be incapable of forming views, for example in the case of an infant, which means that exercise of the right is simply not possible in the strict sense. Secondly the child may be incapable of forming her 'own' views because of undue influence from another. The second matter is extremely complex and there is no straightforward formula to apply. In the context of the European Court of Human Rights, the court held in *Suss v Germany*[96] that although the negative attitude of the child towards the applicant father was partly caused by the mother, it was the wish of F. that prevailed (as opposed to that of the mother). It should be considered that every individual is influenced by people and factors in their environment in the views that they form. Because we adopted, for example religious beliefs from parents, does it make them any less our own? There are few easy answers. Perhaps there should be differentiation between a child who has taken on the views of another to the extent that they become her own views, and a child who is consciously repeating what they have been instructed to say (where those views are not necessarily her own). However it seems that courts should be cautious before denying the right to be heard, including the right to have one's views taken into account, on the basis of undue influence.

The Committee has decided to interpret a very broad understanding of the term "capable of forming his or her own views." The Committee refers in its General Comment on Article 12 to research on the evolving capacities of the child[97] and asserts that children are capable of forming

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[95] *Ibid*, para 21.
[96] *Suss v Germany*, Appl. No. 40324/98, judgment of 10 November 2005.
[97] The Committee refers (at para. 21) in particular to the research of Gerison Lansdown,

views from "the youngest age," even while non-verbal. As a consequence:

> Full implementation of article 12 requires recognition of, and respect for, non-verbal forms of communication including play, body language, facial expressions, and drawing and painting, through which very young children demonstrate understanding, choices and preferences.[98]

This may seem a radical assertion in the context of legal proceedings, however it is already the case that under certain circumstances (for example "Section 20" and "Section 47" reports[99] in the Irish context) social workers may observe non-verbal children in their environments to make recommendations to the court when best interest decisions are to be made. The behaviour of non-verbal children can provide information, for instance, regarding 'attachment' to carers.[100] Attachment theory is accorded much weight within the social sciences. It could therefore be deduced that, according to the Committee on the Rights of the Child, it is an obligation for states to establish processes whereby professionals such as social workers carry out this role even in relation to non-verbal children.

There are some questionable issues here– cost considerations[101] versus the usefulness of the exercise, as well as the danger of considering the

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The Evolving Capacities of the Child, (UNICEF/Save the Children, 2005).

[98] Committee on the Rights of the Child, note 12, para. 21.

[99] Section 47 of the Child Care Act 1991 provides that, "[w]here a child is in the care of a health board, the District Court may, of its own motion or on the application of any person, give such directions and make such order on any question affecting the welfare of the child as it thinks proper and may vary or discharge any such direction or order." Section 20 reports (of the same Act) permit the court to direct health authorities to "undertake an investigation of the child's circumstances" even where children are not in care.

[100] Attachment theory, proposed by Bowlby, provides that normal social and emotional development in young children necessitates the development of a relationship with at least one primary caregiver. See John Bowlby, "The Nature of the Child's Tie to His Mother" 39 *International Journal of Psycholanalysis* 350 (1958).

[101] As noted above, in the Irish context the court can order a report on the circumstances of a child under Section 47 (private law) or 20 (public law) of the Child Care Act 1991. However they are usually only ordered where there are child protection

behaviour of non-verbal children as demonstrating preferences without the capacity of the individual child to clarify whether this is the case. It is hoped that, on the former issue, judges could use discretion to determine where such reports would be useful (bearing in mind the civil rights issue of decisions being made about an individual without input from that individual in some way), and on the latter, experts would bear the dilemma in mind. It could be argued that the narrow language used by the Convention ("children capable of forming views") precludes the necessity for states to facilitate input by non-verbal children. However the broad approach of the Committee indicates that, in fact, a modern element of the right to be heard is to consider non-verbal forms of communication to constitute a type of 'view'.

Despite the fact that the Committee discourages minimum ages on the right to be heard, a number of states have set such minimum ages. In the instances where reference is made by the Committee to minimum ages set in various states, significant diversity in state practice is evident. The minimum ages outlined are over 16 (China, but it only applies to children "who earn their own liv[e]lihood"),[102] over 15 (Eritrea and Finland),[103] and over 10 (Albania, Slovenia and Kazakhstan).[104] Where minimum ages are provided, the Committee expresses concern that children under these specified ages are not considered, and emphasises the right of children under these age limits to be heard in proceedings. In relation to Kazakstan, the Committee recommends that the State party:

> Promote and facilitate, within the family and the school as well as in judicial and administrative procedures, listening to children

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considerations, as opposed to vindicating the right of the child to be heard.

[102] Committee on the Rights of the Child, *Concluding Observations: China* (24 November 2005) CRC/C/83/Add.9, para. 37.

[103] Committee on the Rights of the Child, *Concluding Observations: Eritrea* (6 June 2003) CRC/C/41/Add.12, para 25, Committee on the Rights of the Child, *Concluding Observations: Finland* (20 October 2005) CRC/C/15/Add.272, para. 22.

[104] Committee on the Rights of the Child, *Concluding Observations: Slovenia* (2005) CRC/C/15/Add. 230, para. 25, Committee on the Rights of the Child, *Concluding Observations: Kazakhstan* (2003) UN Doc CRC/C/15/Add.213, para. 30, Committee on the Rights of the Child, *Concluding Observations: Albania* (31 March 2005), CRC/C/15/Add.249, para. 30.

and giving their views due weight, including children who are below the legal age limit of 10 years if they are considered to be mature enough in this regard.[105]

There appears to exist, insofar as the Committee is concerned, no limit to the age at which children can contribute views to proceedings. Even non-verbal children should be considered capable of contributing through expert analysis of their behaviour.

2.6 Who makes the Decision regarding Capacity and how do they do it?

The text of Article 12 does not stipulate *who* should decide whether a child is capable of forming his or her own views. However the Committee has stated that the types of professionals who are best placed to do this are "specially trained social workers or other professionals".[106] It seems that these professionals would be assessors who would decide whether a child is capable of forming her own views. The Committee has expressed on numerous occasions that neither the courts nor individual judges should have the discretion to decide whether the views of children are sought and included in proceedings affecting them. In its comments on the report of Malaysia in 2007, for example, the Committee "notes with concern that in legal and administrative proceedings it is in practice left to the discretion of the judge to decide whether the child is heard."[107] It is possible that judges could receive training to enable them to determine the capacities of children. However considering that in practice judges would be potentially engaged in numerous meetings with children (both to assess them and hear their views) this does not seem to constitute the best use of the time of judges.

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[105] Committee on the Rights of the Child, *Concluding Observations: Kazakhstan* (7 October 2003) CRC/C/OPSA/KAZ/1, para. 31.
[106] Committee on the Rights of the Child, note 10, para. 51.
[107] Committee on the Rights of the Child, *Concluding Observations: Malaysia* (25 June 2007) CRC/C/MYS/CO/1, para. 30. See also Committee on the Rights of the Child, *Concluding Observations: Turkmenistan* (6 February 2006) CRC/C/TKM/CO/1 para. 29 and Committee on the Rights of the Child, Committee on the Rights of the Child,

It seems, as stipulated by the Committee, that it is more practical to have the judge advised by a well-trained professional such as a social worker. This suggests that trial judges should not carry out the assessment of capacity themselves.

There is no indication of the type of training the relevant professionals are to receive. The Committee simply states that "good practice for assessing the capacity of the child has to be developed."[108] Nor is there illumination of the criteria which professionals should use to assess whether a particular child has the capacity to form his or her own views. This is problematic because there is a clear lack of effective definitions for competence of children regarding decision-making[109] as well as a lack of consensus amongst scholars on the criterion for deciding whether a child has the capacity to form and express her views.[110] Indeed it is perhaps *due* to this lack of consensus that the Committee saw fit to refrain from making reference to particular criteria. The Committee has indicated that children "who are able to understand the significance of the proceedings"[111] should be heard. However this necessitates a determination of such understanding. Further clarification of state obligations (and best practice) from the Committee on the Rights of the Child in this regard would possibly be helpful, however too much specification could fail to take account of the ongoing developments in psychological research.[112] A balance needs to be achieved by the Committee in this area. Perhaps pointing states towards the most recent psychological/social work research in Concluding Observations, and requiring states to devise such criteria for the judiciary, would be useful.

Concluding Observations: Ireland (29 September 2006) CRC/C/IRL/CO/2, para. 23.

[108] Committee on the Rights of the Child, note 12, para. 44.

[109] Lansdown, note 97, at xi.

[110] Ang *et al.*, note 26, at 14.

[111] Committee on the Rights of the Child, *Concluding Observations: Slovenia* (26 February 2005) CRC/C/15/Add. 230, para. 25.

[112] Ang *et al.*, note 26, note that "models of competence" are continuously evolving in

2.7 Providing the Opportunity: *"[T]he child shall in particular be provided the opportunity to be heard."*

For children to enjoy the right to be heard in proceedings affecting them, they have to be made aware of the fact that they are in possession of this right. Chisholm makes the point that, "[c]hildren, after all, have to live with the result of whatever is decided, and only if they know what is going on can they make informed decisions about what sort of involvement they want to have."[113] The Committee has outlined that, "all children involved in judicial and administrative proceedings must be informed in a child friendly manner about their right to be heard."[114] The reference to 'all' children seems to imply that there is no age limit to this stipulation. This has been reinforced by the General Comment which emphasises an obligation on states to determine on a case-by-case basis whether children can contribute.[115] Perhaps it can be interpreted to mean that all children should be assessed to see if they have the capacities to form views, if they have the wish to contribute and whether it is in their best interest to do so. If they are unable to contribute, then arguably a report on their circumstances would be appropriate.

Preparing the child for providing views is a crucial element of the process of being heard, according to the Committee. Elements of the process such as the choice to be heard directly or through a representative, the details of the hearing and the participants involved must be explained.[116] Crucially, the impact of the views of the child on the outcome of proceedings must also be made clear insofar as possible.[117] This is a welcome stipulation by the Committee, as children may feel responsible for a decision (e.g. relating to custody or access) and blame themselves for the suffering of a parent, when most likely the

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line with the most recent psychological findings (at 14).

[113] Richard Chisholm, "Children's Participation in Family Court Litigation," paper presented at *International Society of Family Law 10th World Conference* (Brisbane, 9-13 July 2000), at 24.

[114] Committee on the Rights of the Child, note 10, para. 40.

[115] Committee on the Rights of the Child, note 12, para. 44.

[116] *Ibid*, para. 41.

views of the child will have been only one factor in the decision-making process. The issue of placing too much responsibility on children is often used as an argument against providing children the opportunity to be heard. Providing an adequate explanation to the child can overcome this objection.

Arguably, because General Comment No. 12 errs so strongly on the side of provision of the right to be heard, the document does not provide sufficient guidance to states in relation to the developmental capacities of children to exercise that right. Because of the fact that the best interest principle is a guiding principle of the Convention, it must of course be considered in the context of implementation of the right to be heard. There may be issues around children– particularly those who are very young– being confused or upset by such an offer. According to the stage theory of Piaget, children generally start to develop the capacity to think objectively about concrete events at age seven.[118] Consider for example the scenario of a professional, who is a stranger, asking a two or even three year old child whether she would like to contribute views to care or custody access proceedings. Perhaps some children of this age could contribute directly, however many most likely could not and would find the experience upsetting.[119] For children under seven years, it might be advisable for a child development professional to assess whether it is in

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[117] *Ibid.*

[118] See Jean Piaget, *The Origins of Intelligence in Children* (first published 1936, Routledge and Kegan Paul Ltd., 1953); and Jean Piaget, *The Construction of Reality in the Child* (1937, Routledge and Kegan Paul Ltd., 1955). The Stage Theory of Jean Piaget is very accepted within developmental psychology (Neil Carlson and William Buskit, *Psychology: The Science of Behaviour* [Allyn and Bacon, 1997], at 378.), to the extent that it is accepted within the field of law. Jennifer Woolard, Dickon Reppucci and Richard Redding "Theoretical and Methodological Issues in Studying Children's Capacities in Legal Contexts" 20 *Law and Human Behaviour* 219 (1996), Department of Justice Canada, *The Interaction Between Children's Developmental Capabilities and the Courtroom Environment: The Impact on Testimonial Competency* (Department of Justice Canada, 2002), at 13 and Quebec Bar Committee, "The Legal Representation of Children: A Consultation Paper Prepared by The Quebec Bar Committee" 13 *Canadian Journal of Family Law* 49 (2006).

[119] Young children have much greater difficulty regulating their emotions than adults. See generally Piaget, note 118. However, as noted in the example of a guardianship application outlined in Chapter 7 (at 361), even very young children can demonstrate their feelings to a decision-maker, albeit somewhat indirectly (i.e. without specifically verbalising those views).

the best interest of the child whether to be informed about the right to be heard.[120] The Committee has not yet commented directly in relation to this;[121] the "case-by-case basis"[122] recommended by the Committee relates to the issue of whether children can contribute, not to whether they should be made aware of the right. It is arguable, however, that making very young children aware of the right should be subject to the decision of the expert determining that this is in the best interest of the individual child.[123]

Nonetheless, it certainly is the case that Article 12 requires that children be made aware of the right to be heard where appropriate. It is advisable that the Committee should require that states develop guidelines on methods of making children aware of the right without putting them under pressure. This is because children will seldom be aware of their entitlements in this regard, and they must of course be made aware of the right before they can exercise it. The Committee confirms the need for children to be informed of the right in its comments on the report of France in 2004. It expressed concern that inconsistent practice in France may render the right available "subject to the child's own request."[124] The Committee recommended that the right be promoted for children in proceedings "as a right they are informed of, not merely a possibility."[125] The Committee went so far as to advise states to positively encourage children to provide views, not simply facilitate them where they wish to

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[120] For example, in the ECHR case of *Sahin v Germany*, (2003) 36 EHRR 765, one of the issues under consideration was the fact that the expert evidence of a psychologist (who had met the then four year old child) had determined that to ask the child about her father, from whom she was estranged, would be harmful to the child.

[121] The Committee emphasises that particular care is to be taken when facilitating the right to be heard in cases which involve young children or victims of abuse or mistreatment, but does not expand on this point. Committee on the Rights of the Child, note 12, para 21.

[122] Committee on the Rights of the Child, note 12, para. 44.

[123] In the Scottish legal system, the sheriff (judge) sends a letter to children in custody/access cases ("Form F9") enquiring as to whether they would like to contribute their views. This indirect method (i.e. the child is not subject to an enquiry from an adult directly) seems a positive way to involve children without pressure. It does, however, mean that children would need adequate literacy skills to effectively access the right to be heard.

[124] Committee on the Rights of the Child, *Concluding Observations: France* (2 June 2004) CRC/C/65/Add.26, para. 23.

[125] *Ibid*, para. 24

do so in its General Comment. The Committee held that, "States parties should encourage the child to form a free view and should provide an environment that enables the child to exercise her or his right to be heard."[126] This strongly indicates the existence of significant positive obligations on the state in this regard.

2.8 How Children are to be Heard

A number of details relating to hearing children can be examined through the text of the CRC and other means. The most pertinent issues are the meaning of the term "freely," the issue of whether the child is to be heard directly or through a representative.

2.8.1 "States Parties shall assure...the right to express those views freely"

Article 12 stipulates that "States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child." During drafting, the phrase "[t]he States parties to the present Convention shall enable the child" was suggested.[127] The wording which was ultimately chosen ("shall assure") seems to indicate that the drafters intended the text to place a strong obligation on the state in relation to Article 12. Detrick, Doek and Cantwell argue that the ultimate decision to use the word "assure" and the insertion of the word "freely" implies that children have the right to say as they please without interference, as well as the right to choose whether to express views or not.[128] They deduce this based on interpretations of the freedoms recognised by the International Convenant on Civil and Political Rights.[129] The use of the term "freely"

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[126] Committee on the Rights of the Child, note 12, para. 11.
[127] Travaux Préparatoires, note 43, para.77.
[128] Detrick, Doek and Cantwell, note 43, at 225.
[129] *Ibid.* To this end, Detrick, Doek and Cantwell (note 43) cite Karl Joseph Partsch, "Freedom of Conscience and Expression, and Political Freedoms" in Louis Henkin, ed, *The International Bill of Rights: The Covenant on Civil and Political Rights* (Columbia University Press, 1981).

in Article 12(1), according to the authors, indicates that States Parties are under an obligation to assure the right to freedom of expressing one's views.[130] The Committee on the Rights of the Child contributes further to the understanding of the term "freely" by highlighting that it refers to expressing views without pressure and without being manipulated or placed under undue influence.[131]

Interpretation of the international legal resources available indicate the importance of sensitive implementation of the right to be heard in terms of respecting the wishes of children *not* to be heard. To ensure children express views "freely" necessitates that children have every opportunity to decline to provide views. The Committee on the Rights of the Child is also clear on this point. The Committee states that, "[t]he child, however, has the right not to exercise this right. Expressing views is a choice for the child, not an obligation."[132] The Committee asserts that states must also have regard to child protection issues when facilitating the right to be heard.[133] Circumstances in which legal decisions must be made regarding children's best interests are usually extremely sensitive, often involving separating parents or parents who do not have the capacity to care for their children. While the right to be heard places an obligation on states to provide children the opportunity to express views, so too must children be free to decline to do so:

> The child has the right "to express those views freely". "Freely" means that the child can express her or his views without pressure and can choose whether or not she or he wants to exercise her or his right to be heard.[134]

The General Comment places emphasis on the considerate practice of this right. Particular care is to be taken when facilitating the right to be

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[130] Detrick, Doek and Cantwell, note 43, at 225.
[131] Committee on the Rights of the Child, note 12, para 22.
[132] *Ibid*, para. 16.
[133] *Ibid*, para. 21.
[134] *Ibid*, para. 22.

heard in cases which involve young children or victims of abuse or mistreatment.[135] The Committee also emphasises that children should not be interviewed more times than necessary to avoid traumatisation.[136]

The word "freely" implies that there is a negative obligation on states not to interfere with the child's right to be heard in proceedings affecting them. However, a positive obligation can also be interpreted. Children may, of course, require additional assistance to an adult to exercise the right to freedom of expression,[137] including the right to be heard in legal proceedings. To this end, the Committee makes a number of stipulations in relation to practical requirements, such as the point that the relevant environment (in which the child is to be heard) must not be intimidating and that it should be child-appropriate. Such an environment should involve the provision of child-friendly information as well as "adequate support for self-advocacy, appropriately trained staff, design of court rooms, clothing of judges and lawyers, sight screens, and separate waiting rooms."[138] However the Committee fails to provide detail on these points. What, for example, constitutes child-friendly information? Does it necessitate the involvement of a professional with experience of communication with children and 'translating' proceedings for their level of understanding? Furthermore, the term "self-advocacy" in this context requires explanation. Under what circumstances will it be appropriate for a child to provide advocacy for herself? Does this refer to direct communication with the judge in chambers and/or open statements in court? This is, seemingly, another area where many of the specificities necessarily fall to be determined at state level.

The Committee further asserts that states have a particular obligation to facilitate children who may experience particular difficulties in expressing their views. The General Comment on Article 12 makes reference to minority or migrant children, indigenous children and those

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[135] *Ibid*, para. 21.
[136] *Ibid*, para. 24.
[137] Van Bueren, note 30, at 132.

who do not speak the majority language. The General Comment also refers to children with disabilities as a group which may be in particular need of facilitation. The Committee emphasises that, "children with disabilities should be equipped with, and enabled to use, any mode of communication necessary to facilitate the expression of their views."[139] This indicates a particular positive obligation on states to ensure that the right to be heard is accorded to children with disabilities and that particular facilities may be necessary. It could be argued that states are obliged to ensure the availability of professionals trained in communication techniques for children with disabilities, as this may be necessary to facilitate the views of children with intellectual disabilities.

It is clear from the comments of the Committee that keeping children informed during proceedings is a vital component of the right to be heard. Documents relating to the decision-making should be made available to children. The Committee on the Rights of the Child states that, "[i]f consultation is to be meaningful, documents as well as processes need to be made accessible."[140] The Committee also outlines that decision-makers should explicitly explain the outcome of proceedings, especially if the views of the child involved could not be accommodated.[141] The General Comment further provides that legislative measures should be put in place to "explain the extent of the consideration given to the views of the child and the consequences for the child."[142] It would arguably have been useful if the Committee explicitly stated that explaining the outcome of proceedings should be legislated for, as this is one aspect of proceedings that seems to be often overlooked. It also constitutes an aspect which involves risk of harm to children.[143] The Committee also calls attention to the issue of informing children about the conditions under which they will be expressing views.

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[138] Committee on the Rights of the Child, note 12, para. 34.
[139] *Ibid*, para. 21.
[140] Committee on the Rights of the Child, note 38, at 4.
[141] Committee on the Rights of the Child, note 10, para. 41.
[142] Committee on the Rights of the Child, note 12, para. 33.
[143] For example, children could feel understandably upset if they had given their views (possibly at personal risk to themselves in terms of the possibility of upsetting a parent)

This is an obligation of Article 12, according the Committee "because it is a precondition of the child's clarified decisions."[144] This is an important point, considering that a child in an access/custody dispute may decline an opportunity to be heard on the basis that adults (e.g. parents) are to be informed of the child's wishes.

The Day of Discussion on the Right to be Heard provides some additional information on the environment necessary for meaningful enjoyment of the right to be heard. The Committee requested on the Day of Discussion "that States parties establish specialised legal aid support systems in order to provide children involved in administrative and judicial proceedings with qualified support and assistance."[145] It was also stated that children must be informed of procedures ('modalities') relating to how they will be heard, and other aspects of the proceedings.[146] This points to the existence of obligations on the state to have mechanisms in place to give children both explanatory and legal support, as well as an obligation to keep children informed of developments in proceedings affecting them.

While many of the details of positive obligations are left undetermined by the Committee, it seems that a high level of organisation and facilitation, including specialised legal aid support systems, is necessary at domestic level in order to provide for the right to be heard. Whether a service of the likes of CAFCASS in England and Wales[147] would constitute such legal aid support system is not explained, although it could be argued to fit that description, as guardians *ad litem* are often

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and it appears that those views had not been given serious consideration.

[144] Committee on the Rights of the Child, note 12, para. 25.

[145] Committee on the Rights of the Child, note 10, para. 43.

[146] *Ibid*, para. 40.

[147] The Child and Family Courts Advisory and Support Service. In England and Wales, it is mandatory that the court appoint a Children's Guardian (the equivalent of the guardian *ad litem* in Ireland) in child care cases, unless it is satisfied that it is not necessary to do so, under Section 41(1) of the Children Act 1989. A 'dual representation model' is used, whereby the Children's Guardian will appoint a solicitor for the child but the solicitor usually takes instructions from the Children's Guardian. CAFCASS oversees the service of the Children's Guardian. The standard of provision for hearing children is much lower however for custody/access cases.

represented by solicitors in that jurisdiction. Nonetheless, the Committee seems to be proposing a much more cohesive approach to legal representation for children than is currently in operation in either the UK or Ireland.

2.8.2 "[E]ither directly, or through a representative or an appropriate body"

There are two different ways in which children can be heard, according to Article 12.2, "either directly, or through a representative or an appropriate body." The US draft of what is now Article 12[148] stated that, "an opportunity for the views of the child to be heard as an independent party to the proceedings shall be provided." The principle of an assumption that children would become party to proceedings was ultimately not included. It was proposed by the representative for the Netherlands that the phrase "either directly or indirectly through a representative" should be included.[149] This perhaps indicates a regard for the fact that it may not be best for children to meet the decision-maker directly. The proposal of the Netherlands is reflected in the Finnish draft of the current Article 12[150] which was considered by the 1989 Working Group:

> [T]he child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, through a representative or an appropriate body...[151]

It is of note that the word "or" (between "directly, through a representative") is absent from this text. Concern was expressed by the representative of Portugal that the word "directly" was neglected in this

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[148] Travaux Préparatoires, note 43, para. 20. This draft was considered as part of Article 3, relating to the best interest principle.
[149] *Ibid*, para. 30.
[150] What was ultimately to be Article 12 was actually referred to as Article 7 in the drafting process.

paragraph. She emphasised that this posed a risk to a child's freedom of expression.[152] The word "or" was added after "directly" to satisfy the concern of Portugal in this regard. This implies a preference on the part of drafters that decision-makers hear from children directly in proceedings affecting them. The Committee, like the drafters, has expressed the clear view that it is best practice for children to be heard directly by the decision-maker in proceedings affecting them. When commenting on the report of Finland (2005), for example, the Committee recommended that the state take measures to ensure that, "the child has the right to express his/her views directly to the judge when decisions in judicial and/or administrative proceedings affecting the child have to be taken."[153]

Although the emphasis of the Committee to date has been on the preference for children being heard directly, it is noteworthy that accepted psychological theories indicate that younger children are generally shy and nervous in strange situations.[154] Being put under pressure to express views in the presence of judges who are strangers may be highly undesirable for them. Representatives who can act as an intermediary between the child and the judge may be necessary, and may serve in the best interest of the child. This is acknowledged in the text of Article 12, which states that a child may be heard "through a

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[151] Travaux préparatoires, note 44, para. 235.

[152] *Ibid*, para. 247.

[153] Committee on the Rights of the Child, *Concluding Observations: Finland* (20 October 2005) CRC/C/15/Add.272, para. 23. The Committee also expresses concern about the fact that in proceedings in Iran, the views of children are only represented through the father or paternal grandfather (or other appointed guardian) and not by the child directly, Committee on the Rights of the Child, *Concluding Observations: Iran* (28 February 2005) CRC/C/104/Add.3, para. 33. It has been emphasised by the Committee that the right of children to be heard directly during proceedings also applies to juvenile justice proceedings. See Committee on the Rights of the Child, note 73, para. 23(c).

[154] This was evidenced in research with infants conducted by Mary Ainsworth *et al.*, *Patterns of Attachment: A Psychological Study of the Strange Situation* (Erlbaum, 1978). However other researchers have built on the pioneering research of Bowlby (see e.g. John Bowlby, *Maternal Care and Mental Health* [World Health Organisation, 1951]) to consider the reactions of older children in strange situations, such as Mary Main *et al.*, *Security in Infancy, Childhood, and Adulthood: A move to the Level of Representation* (Monographs of the Society for Research in Child Development, Serial No. 209, 1985).

representative or an appropriate body."[155] The point that it may not be in the best interests of the child to be heard directly is not emphasised by the Committee. However General Comment No. 12 does stipulate that particular care should be taken when facilitating the right to be heard in cases which involve young children or victims of abuse or mistreatment.[156] Part of this care, then, could be the necessity to be mindful that children may need to be heard through a representative, even though being heard directly by the decision-maker is the ideal means of vindicating the right.

General Comment No. 12 places strong emphasis on the wishes of the child in relation to the means by which she is heard. According to the Committee, once a child has decided to exercise the right to be heard, she then has to decide "how to be heard"[157] and must be provided with guidance as to the options.[158] Perhaps this high level of input by the individual child will ensure that the ultimate decision regarding hearing directly or indirectly can be resolved in a way that is appropriate to the child's needs (e.g. not to speak with the judge directly), as determined by the child herself. Furthermore, while the Committee emphasises hearing children directly, it also holds that, "[p]referably, a child should not be heard in open court, but under conditions of confidentiality."[159] This seems a reasonably prudent approach by the Committee to this issue. It seems unnecessary to subject children to public pressure when a private hearing with the decision maker (although for child protection reasons with the presence of a neutral party, preferably known to the child) is a possibility. However an individual child may well wish to be heard in open court under certain circumstances, so this should not be precluded as an option.[160]

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[155] See also Section 2.8.2 above.
[156] Committee on the Rights of the Child, note 12, para. 21.
[157] *Ibid*, para. 35.
[158] *Ibid*, para. 41.
[159] *Ibid.*
[160] It should also be noted that problems may arise in relation to the views of the child as evidence in the common law system. The parties (usually parents) may request the views of children as evidence, however the child may wish to keep such views private. In the Scottish case of *Dosoo v Dosoo* ([1999] SLT [Sh Ct] 86) the court held that it

A key matter is the type of adult/professional that could represent the views of the child. The Committee usefully provides a list of possible representatives; "the parent(s), a lawyer, or another person (*inter alia*, a social worker)."[161] However the Committee emphasises the potential for conflicts of interest between children and their parents in such proceedings. This is a crucial point, as in care and custody proceedings parents cannot be considered neutral representatives of the child's wishes, as they are generally party to proceedings as an adversary of either the state or the other parent. Similarly an appropriate consideration is that social workers (such as those of the Health Service Executive) in care proceedings, while undoubtedly holding the best interests of children as a primary consideration, are representatives of the state and therefore cannot be considered neutral in cases where the state is party to proceedings.

A vital point regarding representatives, according to the Committee, is that the views of the child are transmitted correctly by the representative to the decision maker.[162] Significantly, General Comment No.12 emphasises that, "representatives must have sufficient knowledge and understanding of the various aspects of the decision-making process and experience in working with children."[163] The final point made by the Committee in relation to representatives of the views of children is imperative in terms of practice– that there is a necessity for codes of conduct to be developed for such representatives.[164] The problems relating to the lack of such guidance in the Irish context indicates why this point is so important.[165]

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was permissible for the views of the children to be kept confidential from their father who was requesting that information. Counsel for the mother cited Section 6 of the Children (Scotland) Act 1995, and its relationship with Article 12 of the CRC (in particular the right of the child to express their views *freely*) in favour of such an approach. What is clear is that children should be informed in advance of such procedural matters.

[161] Committee on the Rights of the Child, note 12, para. 36.

[162] *Ibid.*

[163] *Ibid.*

[164] *Ibid*, para. 37.

[165] See Chapter 6.

A number of questions persist in relation to the representation of the views of children in proceedings affecting them. It is clear that children must be heard directly by the representative before being represented. In the comments on the report of Finland in 2005, the Committee criticises the fact that when the views of children are submitted to the court via a third party, sometimes this is done without the child being heard by that third party. Further questions surround whether such a representative is obliged to give solely the views of the child, or both the views of the child as well as the representative's own views on what course of action is in the child's best interest. It must be asked whether, from a children's rights perspective, experts are required to interpret children's views (particularly very young children) to assess whether in fact the views of the child are independently formed and whether the decision could be said to be in the best interest of the child.

It is arguable that regard must be had for the need to protect children from being placed in a situation where they are encouraged to provide 'wishes' which are not their own. The most-cited example is that where the child expresses a wish not to have access visits with a non-resident parent, however the child has come under undue influence from the resident parent. It seems useful here to draw a distinction between children who have been influenced to the extent that they truly hold these wishes, and cases where they consciously provide another's views as their own. In the latter case, a child may express an opinion in order not to displease a parent, or because she is afraid of that parent. The services of an expert may be necessary to identify such complex circumstances and to determine whether children should be asked directly to provide views, or whether it would be more appropriate to simply provide the court with a report on the family environment (noting these complexities) in order to avoid placing the child in a difficult situation. Or perhaps such an approach is overly-restrictive, and children should be encouraged to provide views freely in any case.

Under these circumstances, the difficult issue would be whether children's views should be assessed by a child expert in order for the judge to have received adequate guidance on the psychological issues at play. Such a report could be argued to be overly-paternalistic in respect of the children involved (in that it renders the process of providing views to the court less direct) as well as resource-intensive, and it could be argued that the judge should come to her own determinations on the matter. In two cases where parental alienation was invoked, the European Court of Human Rights held that the rights of the applicant parent were violated due to the lack of expert analysis in the case of a five to seven year old child,[166] but not in the case of a child between the ages of ten to 13 years.[167] Perhaps the approach of the European Court– that is, requiring reports for younger children– is the appropriate one,[168] however further guidance is needed from the Committee on the Rights of the Child.

Another vital issue on which there is an absence of guidance is that of children as separate parties to proceedings. The *travaux* of the Convention indicate that this is not a requirement under Article 12. An early US draft proposed the wording, "[i]n all judicial and administrative proceedings affecting a child that has reached the age of reason, an opportunity for the views of the child to be heard as an independent party to the proceedings shall be provided."[169] Ultimately the reference to the child as "independent party" was removed. This indicates that generally, as long as the views of the child are included in the decision-making process, that this satisfies Article 12 requirements as regards the standing of the child in proceedings.

Interestingly, the Third Draft of General Comment No. 12 emphasised the fact that Article 9(2) of the CRC requires that, in any proceedings

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[166] *Elzholz v Germany*, Appl. No. 25735/94, judgment of 13 July 2000.
[167] *Sommerfeld v Germany*, Appl. No. 31871/96, judgment of 8 July 2003.
[168] Although notably the matter was framed in terms of the rights of applicant parents, as opposed to those of the children, in these cases.
[169] Travaux Préparatoires, note 43, para. 20. This draft was considered as part of Article

which consider separation of a child from parents, opportunities to participate must be given to "all interested parties," and therefore, children capable of forming views, as parties who clearly have an interest in proceedings, must have the opportunity to express those views.[170] The Third Draft also went so far as to hold that, "in any court proceedings affecting them, they should be made party to the proceedings and have access to representation where required."[171] This is perhaps a very progressive assertion, considering that the preparatory documents of the Convention on the Rights of the Child indicate that Article 12 does not require that children are made independent parties to proceedings affecting them.[172]

It may have been realistic on the part of the Committee to have ultimately refrained from constructing Article 12 as containing an express right to become a party in such cases, as this practice is not universally accepted.[173] However some commentators would disagree with denying children party status, and perhaps it could indeed be argued that a more modern interpretation of the right may require that children are always made party to proceedings (both child care and custody/access), for reasons relating to equality before the law. Cleland, for example, opines that, "[i]n order to influence court decision-making to a significant degree, children must be on a par with the adults involved. This requires party status."[174] Perhaps the potential for party status should be put before the child as an option in terms of her right to be heard. The matter of according children party status where they do not have the capacity to understand such proceedings (for example, where the individual is a baby) is also left unclarified by the Committee. There are strong arguments for according party status to such children so that their perceived interests are represented by a guardian *ad litem* and a

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3, relating to the best interest principle.

[170] Committee on the Rights of the Child, note 50, para. 67.

[171] *Ibid.*

[172] Travaux Préparatoires, note 43, para. 20.

[173] In the Irish context, for example, it is very rare that children are made party to proceedings, even those involving a deprivation of liberty. See Chapter 7.

[174] Alison Cleland, "A Tale of Two Systems: Children's Views in Family Actions in

legal representative.[175] In the Irish context, McGuinness J commented in *N. & anor. v Health Service Executive & ors.*[176] on the fact that, "the one person whose particular rights and interests, constitutional and otherwise, were not separately represented, whether by solicitor and counsel or through a guardian ad litem"[177] was the infant whose future was at stake. However, other authors question the wisdom of requiring that professionals hypothesise about the decisions that an individual would make if she possessed the necessary decision-making capacities.[178] The matter of party status requires further guidance at the level of international human rights law.

A related matter is that of the possibility of appeal by children in relation to proceedings affecting them. It is clear that the right to appeal and/or complain in relation to the breach of a right is part of the right to be heard, as the Committee holds that:

> If the right of the child to be heard is breached with regard to judicial and administrative proceedings (Article 12, para. 2), the child must have access to appeals and complaints procedures which provide remedies for rights violations.[179]

Scotland and England" 4 *Irish Journal of Family Law* 3 (2001).

[175] See e.g. in the US context the case of *In Re: Vickie Lynn Marshall A/K/A Anna Nicole Smith (Deceased)* 7 Fla Broward Co Cir Ct 61 (2007). In this case, the Florida Circuit Court held that since the deceased mother had not left written instructions regarding a choice of burial spot, under Florida case law the decision was up to her next of kin (her six month old daughter) as represented by her guardian *ad litem*. In the UK context see *Portsmouth NHS Trust v. Derek Wyatt and Charlotte Wyatt by her Guardian (CAFCASS) (with Southampton NHS Trust intervening)* [2004] EWHC 2247.

[176] [2006] IESC 60. In this case, a two and a half year old child had been placed shortly after birth with foster carers who intended to adopt her. Her birth parents decided to marry and withdraw consent to adoption. The Supreme Court ultimately ordered the return of the child to her birth parents.

[177] Para. 1.

[178] See e.g. Mary Donnelly, "Legislating for Capacity: Developing a Rights-Based Framework" (2008) 30 *Dublin University Law Journal* 395, at 420. Donnelly refers to "decisions based on the invented or even non-existent wishes of the person which became an unfortunate aspect of the application of substituted judgment in the United States." The author cites the US cases of *Superintendent of Belchertown v Saikewicz* (1977) 373 *Mass 723*, *In Re Grady* 170 NJ Super 98 (1979) *and In re Moe* 432 NE 2d 712 (1982) where substitute decisions were made on medical matters on behalf of incapacitated persons who had never had views on those issues.

The Committee refers to a need for legislation and an Ombudsman to deal with situations in which the right of children to be heard has been violated.[180] However a separate issue is the matter of whether children should be accorded the right to appeal against a decision on the substance or merits of a case. The Committee fails to engage with the issue of whether, if a child is not a party to proceedings, or if the matter is not already before the courts, she can appeal a decision through the courts.[181] This is another point which needs further explication.

2.9 The Weight the Views are to be given: *"[T]he views of the child being given due weight..."*

It is not stated in Article 12 that the views of children are to be the determining factor in decisions about their future. The provision does not even go so far as to state that the views of children are to be the *most important* factor in the process. However it is not sufficient that the those views are simply heard. They must also be considered by the decision-maker. It was suggested during the drafting process that Article 12 should stipulate that children have the right not just to be heard, but also the right to have an influence on decisions made about matters affecting them. Denmark's delegation proposed that Article 12 include the phrase:

> Parents or other guardians have the right and duty to decide in matters concerning the person of the child. But the child shall, as soon as possible, have an influence on such matters.[182]

This reflects a growing recognition of the evolving capacities of the

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[179] Committee on the Rights of the Child, note 12, para. 47.
[180] *Ibid*, para. 46.
[181] Note, for example, the obstacles encountered in the Irish context (outlined in Chapter 7). In the case of G., the child had to enlist the assistance of a non-governmental organisation to enable him to bring before the District Court a decision on his care with which he was unhappy. In that instance, however, the court upheld the standing of the organisation to represent him, despite the resistance of counsel for the Health Service Executive (at 329).
[182] Travaux Préparatoires, note 43, para.75.

child (eventually expressed in Article 5 of the Convention). The Danish text was not ultimately included in the final wording of Article 12. However Article 12 does contain the obligation that the views of the child must be given consideration. This obligation can be deduced from the phrase in Article 12 which provides "the views of the child being given due weight..." This phrase requires that decision-makers determine the value of the views of the child "...in accordance with the age and maturity of the child." The Committee on the Rights of the Child confirms this point in General Comment No. 12 by asserting that, "simply listening to the child is insufficient; the views of the child have to be seriously considered when the child is capable of forming her or his own views."[183] It could be argued that a decision-maker could decide that the views of the child be given very little weight if the judge held that the maturity of the child was proven to be at a notably low level. Nevertheless the phrase "the views of the child being given due weight" can be seen as requiring that the decision-maker now decide *how much* weight the views be given, not whether the views be given any weight at all. Therefore children's views cannot be dismissed out of hand.[184]

This interpretation of the right is confirmed by Committee comments. The Committee has stated that, "*[t]o speak, to participate, to have their views taken into account*. These three phases describe the sequence of the enjoyment of the right to participate from a functional point of view."[185] This highlights the Committee's conclusions that Article 12 involves an obligation that states not only facilitate children to be heard in proceedings affecting them, but also ensure that their views are taken into account. The Committee emphasises that it is this part of the obligation which is the most difficult to implement. The Committee warns against tokenism, asserting that "appearing to 'listen' to children

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[183] Committee on the Rights of the Child, note 12, para. 28.

[184] Note consideration of Hague Convention cases involving the views of young children (see Chapter 6). Arguably the well-formed views of these children were overridden without significant consideration of the maturity of the children involved. *R. v R.* [2008] IEHC 162, *D. v D.* [2008] IEHC 176, *K. v K.* [2006] IEHC 277 and *N. v N.* [2008] IEHC 382.

[185] Committee on the Rights of the Child, note 10, para. 5. Emphasis original.

is relatively unchallenging; giving due weight to their views requires real change."[186] Clearly, hearing a child's views without giving any consideration to or placing any weight on those views would constitute tokenism, and this is not acceptable according to this Committee statement. In fact, General Comment No. 12 has taken the weight to be given to children's views a step further. The Committee claims that, "the decision maker must consider the views of the child as a significant factor in the settlement of the issue."[187] This is dependent on the condition that the child is capable of forming views "in a reasonable and independent manner."[188] It would seem, then, that seeking the views of the child, and dismissing those well-formed views simply on the basis of age could constitute 'tokenism'[189] and would be contrary to the nature of the right enshrined in Article 12.[190]

It is unclear why the Committee refrained from proposing an assumption of the views of the child as the *most* significant factor in the settlement of a particular issue in proceedings affecting them. While such an approach may at first seem radical, it would seem that it would involve a change in approach of decision-makers rather than a substantive change to the law. Such an assumption could still permit discretion to override those views where there existed a threat to the life of the child or other significant danger. However the benefit would be to require decision-makers to consider first the views of the child, and require explanation for deviating from that. This approach can be justified by the evidence as regards the decision-making abilities of children, the importance of valuing their experiences, as well as the seriousness with which international human rights standards treats the deprivation of autonomy.[191]

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[186] Committee on the Rights of the Child, note 38, para. 12.
[187] Committee on the Rights of the Child, note 12, para. 44.
[188] *Ibid.*
[189] Hart, note 29, describes tokenism as non-participation.
[190] Although there is evidence that such tokenism has occurred in the Irish context. See Aoife Daly, "Considered or Merely Heard? The Views of Young Children in Hague Convention Cases in Ireland" 12 *Irish Journal of Family Law* 16 (2009).

Nevertheless, the importance of the expertise of all forms of personnel involved in proceedings regarding decision-making around children's lives is acknowledged by the Committee, which emphasises that professionals require special education and training in relation to Article 12. In its recommendations after the Day of Discussion on the right to be heard, the Committee "advises States parties to provide all relevant professional categories involved in judicial and administrative proceedings with mandatory training on the implications of article 12 of the Convention."[192] "Implications" presumably includes the fact that the views of capable children must be given some weight by decision-makers. The Committee does not, however, specify the nature of this training, for example what models of practice would be proposed to staff.

Similar questions to those regarding the capacity of the child to give views arise here. What criteria, for example, should professionals be trained to apply when determining what weight should be given to the views of a child? How should it be proposed that those views are balanced against conflicting views which a decision-maker may have in relation to what is in a child's best interest? There is very little in the comments of the Committee on state reports to give guidance on this point. The only reference to the level of weight which children's views are to given is made in relation to the state report of Denmark. The Committee recommends that staff working with children in relation to decision-making procedures should ensure that, "their views are effectively taken into account."[193] There is no elaboration on what would constitute 'effective' consideration. However the Committee emphasises that decision-makers should explicitly explain the outcome of proceedings to children.[194] To be effective therefore, the state obligation

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[191] See Chapter 1.

[192] Committee on the Rights of the Child, note 10, para. 41.

[193] Committee on the Rights of the Child, *Concluding Observations: Denmark* (24 November 2005) CRC/C/DNK/CO/3, para.28.

[194] "Judges and other decision makers should, as a rule, explicitly state and explain the outcome of the proceedings, especially if the views of the child could not be accommodated." Committee on the Rights of the Child, note 10, para. 41.

necessitates an element of accountability on the part of the decision-maker, in that he or she would have to demonstrate that the child's view was considered, in order to adequately explain the outcome. Perhaps this is another area in which the Committee could require states to set guidelines, as opposed to imposing its own, considering cultural differences between states as well as the changing views of childhood and children's abilities.

The issue of "the age and maturity of the child" is closely related to the notion of the capacity of the child. Again there is no provision in the text of Article 12 for particular weight to be given at a particular age. Account must be taken of individual differences between children as regards capacity, maturity and levels of understanding. The Committee on the Rights of the Child usefully provides a definition of maturity as "the ability to understand and assess the implications of a particular matter."[195] This definition seems to conform to the conception of maturity used in the area of the medical consent.[196] The Committee holds that the capacity of the child "has to be assessed in order to give due weight to her or his views..."[197] It is likely that this would involve use of the same expert assessment of capacity to form views (by a trained expert) to inform the decision maker as to the weight to be given to those views. The Committee also states that the greater the impact of the decision-making process on the life of the child involved, "the more relevant the appropriate assessment of the maturity of the child."[198] Therefore the more significant the matter, the deeper the analysis of the maturity (and perhaps also of other factors, such as the strength of the views of the child and the influence of adults) is required to be.

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[195] Committee on the Rights of the Child, note 12, para. 30. The Committee does not cite the source for this definition, which suggests that it is the Committee's own definition.
[196] See generally Lansdown, note 97.
[197] Committee on the Rights of the Child, note 12, para. 28.

2.10 Conclusions and Model of the Right to be Heard

Through analysis of the right to be heard as enshrined in Convention on the Rights of the Child, as well as the commentary of the Committee on the Rights of the Child as well as the preparatory documents of the CRC, it has been possible to elucidate some key aspects of the nature of the right, which inform the model of the international legal right of children to be heard.[199] The right of children to be heard is a central right within the CRC. Article 12 and the principle of participation guide interpretation of all other principles of the Convention.[200] Because of the status of children, the best interest principle is a crucial consideration, although the right to be heard is useful in this regard as it provides a way for authorities to better determine what is in the best interest of the child.[201] Likewise, Article 3 cannot be applied correctly if Article 12 has not been respected.[202] The tensions which potentially arise in the application of both principles require further consideration. The scope of matters affecting the child on which she should be heard is potentially very broad[203] and certainly includes the right of children to be heard in care and custody/access proceedings.[204]

The right to be heard should not be subject to an age limit, and where it is, facilities should be in place to consider whether children under the age limit have the capacities to form their own views.[205] A presumption should exist at state level in favour of the capacity to form views.[206] States should, therefore, have processes in place for assessing capacity if the matter is in doubt. There are some grey areas around the discretion of

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[198] *Ibid*, para. 30.
[199] See below at 192.
[200] Committee on the Rights of the Child, *General Comment on General Measures of Implementation of the Convention on the Rights of the Child*, CRC/GC/2003/5, 27 November 2003, para. 12.
[201] Travaux Préparatoires, note 43, para.20.
[202] Committee on the Rights of the Child, note 12, para. 70.
[203] Travaux Préparatoires, note 43, para.78.
[204] Committee on the Rights of the Child, note 10, para. 39.
[205] Travaux Préparatoires, note 43, para.29 and Committee on the Rights of the Child, *Concluding Observations: Albania* (31 March 2005), CRC/C/15/Add.249, para. 31.
[206] Committee on the Rights of the Child, note 12, para. 20.

decision-makers, who should be professionals trained in child psychology/social work,[207] to determine whether very young children[208] should be informed of the right, and it is clear that the principle of the best interest of the child needs to be carefully considered in such cases. There are also some questions about the types of proceedings which necessitate hearing children. Does the process outlined below apply, with the expense to the state and effort for the child which this involves, in every case where children's interests feature, no matter how incidentally? Should children be asked their views on the financial matters of their parents? The answer in unclear, yet such cases form the bulk, for example, of Irish family law jurisprudence.

It is to be concluded in this chapter that this text and its interpretation by the Committee on the Rights of the Child create obligations which extend from the short-hand term 'right to be heard' to mean that children have a number of consequential rights, that is a 'sub-set' under the heading of the 'right to be heard.' Some are inherent in the text of Article 12, such as the right to have views taken into account, and some can be read into the right. It is possible to construct a model of the right to be heard on the basis of the points covered in this chapter, in order to represent in a clear fashion the steps necessary to vindicate the right. An explication of the model will now be provided.

The evidence examined indicates that there exists an important context to vindication of the right, and therefore a number of 'background' considerations. A presumption should exist at state level in favour of the capacity to form views,[209] and it is best that age limits are not set.[210] All children whose interests feature in proceedings are to be kept fully informed of proceedings,[211] and communication with them on the matter,

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[207] Committee on the Rights of the Child, note 10, para. 51.
[208] Perhaps those aged under seven years, in accordance with Piagetian theory. See note 118 above.
[209] Committee on the Rights of the Child, note 12, para. 20.
[210] Travaux Préparatoires, note 43, para. 29 and Committee on the Rights of the Child, *Concluding Observations: Albania* (31 March 2005), CRC/C/15/Add.249, para. 31.
[211] Committee on the Rights of the Child, note 38, Committee on the Rights of the

as well as any other activities in respect of the right to be heard, must be conducted in a child-friendly environment which is sensitive to their needs.[212] States (and presumably judges and other professionals operating on the states behalf) must also have regard to the best interest principle[213] and child protection issues when facilitating the right to be heard.[214] All relevant professionals must have received explicit training on the right to be heard.[215]

The more specific points in order to vindicate the right are as follows. Such children, as a first step, have the right to a professional such as a guardian *ad litem* to assess their capacity to form views.[216] The Committee have not specified the criteria for determining capacity, and indeed maybe it is wise not to be overly-prescriptive in the context of changing theories and understandings of children.[217] It appears that states should develop their own sets of criteria through which child experts will demonstrate how they have determined decision-making capacities.[218] Where they have such capacity, children have the right to have their views transmitted to the decision-maker by this professional if they so wish, or to speak directly to the judge if appropriate,[219] in proceedings affecting them. In some cases a legal representative may be necessary.[220]

Child, note 10, para. 41 and Committee on the Rights of the Child, note 12, paras. 25 and 33.

[212] Committee on the Rights of the Child, note 12, paras. 21 and 34.

[213] Travaux Préparatoires, note 43, para.20 and Committee on the Rights of the Child, note 12, para. 70.

[214] Committee on the Rights of the Child, note 12, para. 21.

[215] Committee on the Rights of the Child, note 10, para. 41.

[216] Committee on the Rights of the Child, note 12, para. 36. This professional could well be the same professional who assessed capacities and indeed it may be advisable considering resources (see the comments of Finlay-Geoghegan J in *N. v N. [hearing a child]* that, "[i]f the Court were to seek a separate professional assessment of the maturity and capability of the child to form his own views before determining whether he should be heard this would both lengthen proceedings and make them more costly if it were then decided that the child should be given an opportunity to be heard." [2008] IEHC 382, at para. 28).

[217] The need to consider many different factors such as age, maturity, experience, home situation should be acknowledged.

[218] Committee on the Rights of the Child, note 12, para. 44. The Committee states that "good practice for assessing the capacity of the child has to be developed."

[219] Committee on the Rights of the Child, *Concluding Observations: Finland* (20 October 2005) CRC/C/15/Add.272, para. 23.

[220] Committee on the Rights of the Child, note 10, para. 43. Although the extent to which this should be a possibility for children is unclear, see below. It seems that the

The Committee places much emphasis on the wishes of the child in relation to the means by which she is heard.[221]

Children also have the right to adequate information on the procedures involved,[222] as well as information on their own individual case.[223] They have the right to have their views seriously considered[224] and "effectively taken into account."[225] If those views are held to be clear, reasonable, and independent, those views should hold a significant amount of weight.[226] Children also have the right to have the outcome of a case explained to them,[227] including the position of their views within the decision-making process.[228] As with the factor of determining capacities, the Committee has not specified the criteria for a child-rights approach[229] to the decision-making process, i.e. considering age, maturity, experience, weighing the views of children against other factors etc., however accountability seems sufficiently important to justify a requirement that states develop their own sets of criteria through which judges need to demonstrate how they have balanced these complex considerations.[230] Children have the right to appeal on the basis of a violation of the heard to be heard,[231] however the right to appeal the substance of a decision has not been specified and is not, therefore, included in the model.

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court would be the main decision-maker on this point.

[221] Committee on the Rights of the Child, note 12, para. 35.

[222] *Ibid*, para 34.

[223] Committee on the Rights of the Child, note 38.

[224] Committee on the Rights of the Child, note 12, para. 28.

[225] Committee on the Rights of the Child, *Concluding Observations: Denmark* (24 November 2005) CRC/C/DNK/CO/3, para.28.

[226] Committee on the Rights of the Child, note 12, para. 44 .

[227] *Ibid*, para. 41.

[228] *Ibid*, para. 33.

[229] A 'child-rights approach' is taken in this context to mean an approach which accords sufficient focus on the right to be heard.

[230] Article 12 states, "the views of the child being given due weight..." The Committee holds that children's views "have to be seriously considered..." Committee on the Rights of the Child, note 12, para. 28, and that professionals must ensure that children's views "are effectively taken into account," Committee on the Rights of the Child, *Concluding Observations: Denmark* (24 November 2005) CRC/C/DNK/CO/3, para. 28. It is of note that in the context of England and Wales the Children Act 1989 contains a list of considerations relating to the welfare of a particular child. The wishes of the child is the first factor on the list (Section 1[3]).

[231] Committee on the Rights of the Child, note 12, paras. 46 and 47.

There are further rights which seem crucial in the legal process in light of correlating due process provisions,[232] however it is unclear from the evidence whether the right exists for children, or what form such rights should take. It seems uncertain whether children should have the right to become party to proceedings which affect them in all cases, including where they do not have the capacity to understand such proceedings.[233] As the matter is framed within Committee jurisprudence, it has not been ruled out so it exists as a possibility, as opposed to constituting a right. It is also unclear whether children have the express right to be present at proceedings affecting them, particularly where they do not wish to transmit views to the decision-maker. This appears to be another possible method through which to vindicate the right to be heard, rather than constituting a right itself. The Committee appears to encourage assessment in the case of non-verbal children,[234] implying that perhaps a facility such as a social report could take the place of transmission of views. However the language used by the Committee ("recognition of, and respect for, non-verbal forms of communication") does not indicate clear existence of such a right.

It is also uncertain whether children have the right to take a case relating to decisions made outside the court process, for example by their parents or by a state body.[235] For this reason, the right hand side of the model currently remains discretionary; i.e. this would probably be left to the discretion of the court or the regulatory organisation tasked with making decisions about implementation of the right to be heard.[236] The left hand side specifies rights in a more authoritative way, primarily on the basis of the comments of the Committee.

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[232] See Chapter 1 for consideration of these provisions.
[233] In which case their perceived interests would possibly be represented by a guardian *ad litem* and a legal representative. See above at 141.
[234] Committee on the Rights of the Child, note 12, para. 21.
[235] For example, if a child wanted to initiate proceedings on the basis that the Health Service Executive took them into the care of the state unjustifiably.
[236] This organisation would be of the likes of CAFCASS, but with a broader remit.

It is unclear whether children have the right (and this would be a protection right within the context of participation) to have their best interests considered by an expert as well as having their views transmitted, on the basis that their capacities are less developed and they may, therefore, make decisions which an adult would not. This is particularly pertinent in cases where children are under undue influence from another. Because of the lack of specificity on the part of the Committee on these points, they have been omitted from the model and will be considered further in the concluding section of this thesis.

There also exist broader issues which are given only cursory consideration by the Committee. It is surprising, for example, that the less developed capacities of children are not given more detailed analysis in the General Comment on Article 12. It is undoubtedly the case that the status of children will be used as an excuse to refrain from offering them the right to be heard. Sometimes the fact that children will be upset by proceedings may need to take precedence over vindication of that right. In extreme cases adults will place pressure on children to give views which suit that parent.[237] However this does not seem to outweigh the benefits of a general assumption in favour of hearing children and taking their views into account, particularly considering the reliability of children's testimony in general.[238] Article 12 could have provided a prime opportunity to consider generally discrimination against children as regards autonomy rights, and to perhaps provide some answers (or at least raise pertinent questions) as to what is acceptable discrimination and what is not in the context of the right to be heard. Perhaps the Committee was avoiding being overly-specific in this regard, because of the risk of creating baselines under which children would not be heard, or under which their views would not be determinative. However it is

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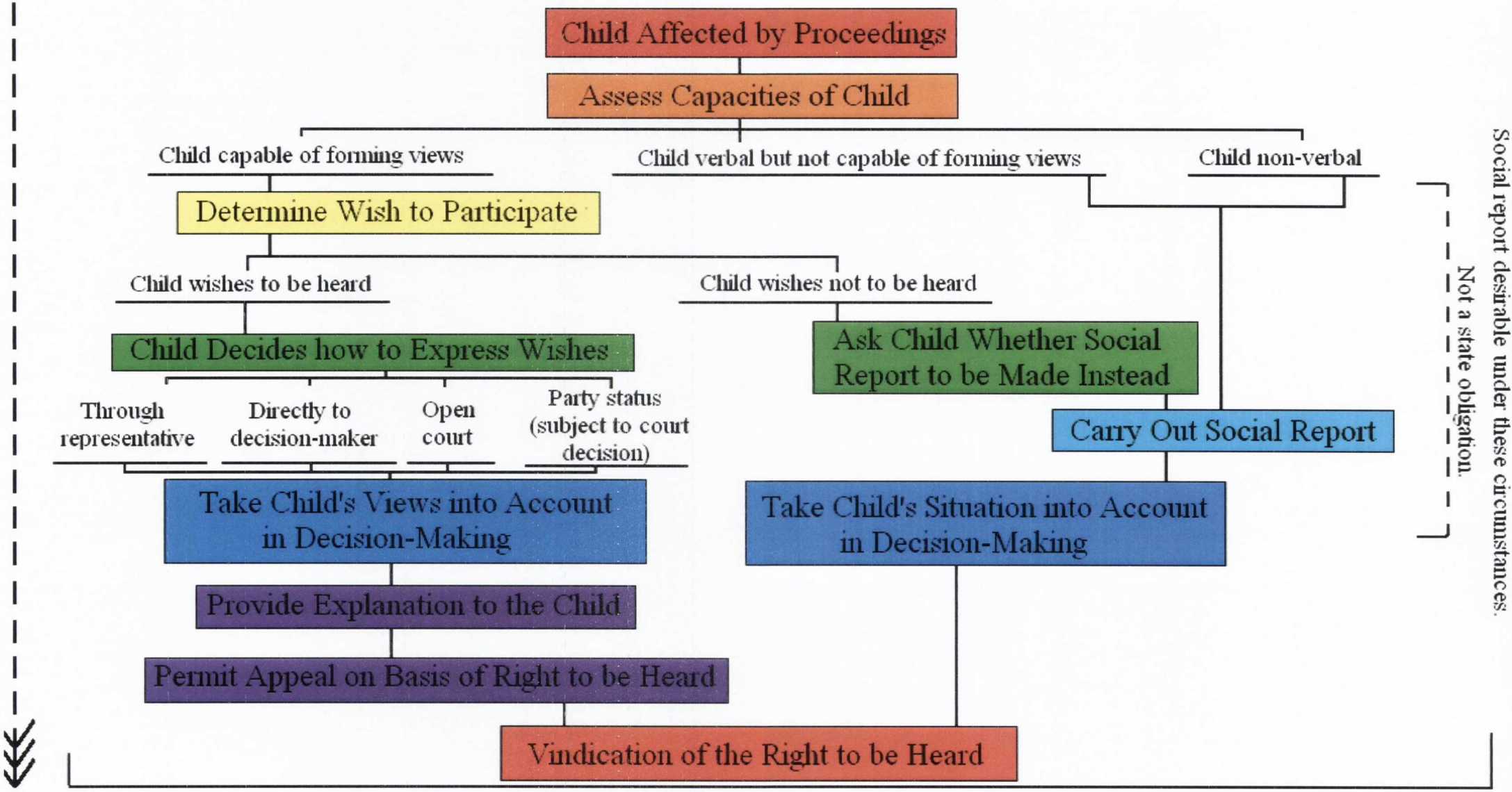
[237] As happened, for example, in the Roscommon case in Ireland where six children were horrifically abused for a number of years despite being known to authorities. See Mark Hilliard, "'House of Horror' Mother tried to Silence Children" *The Sunday Tribune*, 25 January 2009.

[238] Rachel Casey, *The Evidence of Child Witnesses: Where the rules of Evidence and the Constitution Collide* (Unpublished Thesis, Trinity College Dublin, 2007), at 5. See Chapter 1, note 260, for extensive references.

arguable that by failing to engage with the more difficult issues, the Committee is compounding the uncertainty in the area of law and children.

Article 12 is probably the most controversial of rights because of traditional notions of children's rights involving only protection, and this may have contributed to a tradition of neglect and vague illumination of its practical meaning. However it is important to acknowledge that, despite some remaining lacunae, the Committee is increasingly commenting on Article 12, and therefore further elucidating its meaning. It is hoped that as the Committee makes additional comments, such questions in relation to implementation will be answered. Nevertheless, there are already a number of useful guidelines provided by the Committee as regards the details of the nature of the right, as outlined in this chapter. The following model provides guidance on implementation of the right of the child to be heard in accordance with international human rights law, based on the evidence above, and considering the lacunae described above:

Model of the Right to be Heard



Background Considerations: Information provided to child, Child-friendly environment; Child protection/best interests considered; Professionals trained in child development; Age limits avoided.

Chapter 3: The Right to be Heard: Obligations at Domestic Level

3.1 Introduction

The Convention on the Rights of the Child is closer to global ratification than any other human rights treaty.[1] However, similar to other human rights standards, there is evidence of poor implementation at domestic level.[2] In particular, there are clear indications that there is a low rate of incorporation globally of the right of children to be heard in civil legal proceedings affecting them into domestic law.[3] Participation rights have remained amongst the most controversial of the CRC provisions and amongst the most difficult to implement.[4] To explain this anomaly it is necessary to examine the area of implementation of human rights in general and to position the right to be heard within this context. Whether implementation at domestic level is, in fact, a legal obligation for ratifying states generally and Ireland in particular must be explored.

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[1] To date all but two states, the US and Somalia, have ratified.

[2] Implementation is defined as "the process by which human rights standards are made effective" by Denis Galligan and Debra Sandler, "Implementing Human Rights" in Simon Halliday and Patrick Schmidt, eds, *Human Rights Brought Home: Socio-Legal Perspectives on Human Rights in the National Context* (Hart Publishing, 2004), at 29. 'Implementation' contains many elements, including incorporation of the relevant standard into domestic law and policy, provision of the necessary resources, as well as education of the relevant professionals. It will be assumed in this section that the term 'implementation' encompasses all of these elements.

[3] The vast majority of states are criticised by the Committee as not having incorporated the right to be heard into domestic legislation. The author in particular surveyed reports examined by the Committee on the Rights of the Child in 2006 and 2007. 15 out of 22 reporting states were criticised by the Committee on this basis. See Concluding Observations and Recommendations of the Committee on the Rights of the Child, e.g. Committee on the Rights of the Child, *Concluding Observations: India* (26 February 2004) CRC/C/15/Add.228, para. 34, Committee on the Rights of the Child, *Concluding Observations: Mexico* (8 June 2006) CRC/C/125/Add.7, para. 27, and Committee on the Rights of the Child, *Concluding Observations: Ireland* (29 September 2006) CRC/C/IRL/CO/2, para. 26; Committee on the Rights of the Child, *Concluding Observations: Oman* (29 September 2006) CRC/C/OMN/CO/2, para. 30.

[4] Rachel Hodgkin and Peter Newell, *Implementation Handbook for the UN Convention on the Rights of the Child* (UNICEF, 2002), at 163.

The current chapter will examine issues relating to implementation and enforcement of international human rights law generally, highlighting the problems and shortcomings at both international and domestic level. The consequences of the existence of different legal systems across for implementation of the right to be heard will be examined. Problems inherent in implementing children's rights in particular will then be discussed as will the divide between implementation of civil and political versus economic, social and cultural rights. Correlations between the right to be heard and other rights will be explored. Relevant legislation and case law of the Republic of Ireland will then be examined and conclusions will be made in relation to the implementation of the right to be heard and the obligations involved.

3.2 Implementation of International Human Rights Law in Domestic Systems

3.2.1 Issues relating to the System of Enforcement[5]

The difficulties inherent in implementing the current international human rights framework have persisted since the establishment of the UN system. Following the creation of the UN Charter in 1945,[6] continuing efforts were made to codify and define human rights, beginning with the Universal Declaration of Human Rights,[7] and followed by the main UN treaties.[8]

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[5] The definition of 'enforcement' (all measures intended to induce respect for human rights) proposed by Bernhard will be used in this context. See Rudolf Bernhardt, "General Report" in Rudolf Bernhardt and Anthony Jolowicz, eds, *International Enforcement of Human Rights* (Springer-Verlag, 1987), cited in Henry Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals* (2nd ed, Clarendon Press, 2000). However it must be noted that the term 'enforcement' is contentious as some theorists hold that the term 'enforcement' can only be equated with the use of sanctions or force. See Steiner and Alston, at 593.

[6] UN Charter, 59 Stat 1031, TS 993, 3 Bevans 1153, adopted 26 June 1945, entered into force 24 October 1945.

[7] Universal Declaration of Human Rights, GA res 217A (III), UN Doc A/810, adopted 10 December 1948.

[8] See generally Dinah Shelton, *Remedies in International Human Rights Law* (Oxford University Press, 1999).

However this codification of international human rights norms requires implementation and observance at domestic level to be meaningful. As international law cannot usually address itself directly to individuals[9] there is an onus on the state to provide for the relevant international human rights standards through domestic legislation.[10]

Yet many human rights standards contained in international treaties have not been incorporated into the domestic systems of ratifying states. This can be attributed in part to the weaknesses of the protection of human rights within the UN system. The UN has an obvious inability to enforce concrete measures for action within ratifying states, even in the case of treaties with as high a level of ratification as the CRC. Heintze points to "the very complex problem of the sovereignty of states"[11] to explain the frequent inability to enforce international human rights law at domestic level.

The language of international legal documents makes it quite clear that states accrue legal obligations through ratification of international human rights treaties. The Vienna Convention on the Law of Treaties stipulates that, "[t]he consent of a State to be bound by a treaty is expressed by the signature of its representative..."[12] Article 4 of the CRC states that, "States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention." One could easily derive from the terminology used that states are bound to legislate for the obligations in the CRC once they have signed and ratified, as almost all states have done. However international human

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[9] Antonio Cassese, *International Law* (2nd ed, Oxford University Press, 2005), at 376. The European Convention of Human Rights is an exception to this rule, as the European Court of Human Rights can consider individual petitions from citizens of states who have ratified the Convention.

[10] Although theoretically those rights can be directly invoked in domestic courts within states with monist legal systems. See Section 3.2.2 below.

[11] Heinz-Joachim Heintze, "The UN Convention and the Network of the International Human Rights Protection by the UN" in Michael Freeman and Philip Veerman, eds, *The Ideologies of Children's Rights* (Martinus Nijhoff Publishers, 1992), at 71.

[12] Vienna Convention on the Laws of Treaties, Article 12(1).

rights law involves obstacles to implementation which are specific to this area of international law. States observe international law for a number of reasons, including habit and commitment to order. They also observe it because of the potential reaction of a victim state which could result in harmful consequences for a violating state. However in the case of international human rights law such deterrence generally does not exist. States are often reluctant to react to internal violations of (or instances of failure to observe) human rights by another state. This may be because their own human rights records could be open to criticism, or because they have not yet accepted the idea that the treatment of its own citizens by one state could be a legitimate concern of another state.[13]

For these reasons, the international human rights regime has developed its own methods of 'enforcement'. The system of reporting to treaty monitoring bodies (such as the Committee on the Rights of the Child) is the main method of enforcement of the human rights regime,[14] and this is considered to be a weak mechanism.[15] Individual complaints procedures,[16] inter-state complaint procedures[17] and special rapporteurs[18] can also be used as mechanisms for monitoring and enforcement. The charter-based organs (i.e. organs created by the UN Charter, such as the General Assembly and the

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[13] Significantly, Article 2(7) of the UN Charter stipulates that:

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

[14] Although regional mechanisms, such as the European Convention on Human Rights (ECHR) have been successful as regards individual petitions. See Chapter 4 on the European Court of Human Rights.

[15] See generally Geraldine Van Bueren, *The International Law on the Rights of the Child* (Martinus Nijoff, 1995), at 379.

[16] For example the individual complaints procedures under the ECHR and International Covenant on Civil and Political Rights (ICCPR).

[17] For example the inter-state complaints procedure under the ECHR. The ICCPR also contains such a mechanism, however it has never been used.

[18] Special Rapporteurs work on behalf of the UN to investigate, monitor and propose solutions to particular human rights issues, e.g. the Special Rapporteur on Children and Armed Conflict.

Office of the High Commissioner for Human Rights) also contribute to human rights enforcement mechanisms as they have sometimes appointed monitors to investigate issues and condemned violations, including those relating to children's rights.[19] However, as is evidenced by ongoing global human rights violations,[20] these mechanisms have a limited amount of influence.

The enforcement mechanism of the CRC involves no more than self-reporting to the Committee on the Rights of the Child,[21] based on the positive spirit of co-operation. While many commentators highlight the positive aspects of this system,[22] it is generally considered a very weak system of enforcement, particularly in legal terms. Alen and Pas opined in 1996 that the enforceability of the CRC was "practically non-existent" because of the weakness of the state reporting system.[23] Under the Convention, States Parties to the CRC are required to submit a report to the Committee on the Rights of the Child within two years of ratification and thereafter every five years. These reports must detail the measures they have adopted which give effect to the rights of the CRC as well as the difficulties affecting the degree of fulfilment of the CRC rights. There existed a lack of state support for an individual complaints mechanism during the drafting process of the CRC, and proposals were never formally discussed. However

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[19] E.g. the 64th Session of the General Assembly (which opened 15 September 2010) considered the promotion and protection of the rights of children. See http://www.un.org/en/ga/64/agenda/agenda.shtml, last accessed 24 October 2010.

[20] See e.g. Amnesty International, *Amnesty International Report 2009: State of the World's Human Rights* (Amnesty International, 2009). Available at http://thereport.amnesty.org/ (last accessed 23 September 2010).

[21] Although it must be noted that non-governmental organisations usually submit shadow reports in addition to state reports, which prove highly useful in determining the situation of children's rights in the relevant state and provide bases from which to lobby for human rights improvements. Technical advice and assistance is also available under the CRC.

[22] This is because of the positive nature of the co-operation it encourages, and because of the potential for the Convention on the Rights of the Child not just to enshrine human rights for children but also to increase respect towards them.

[23] André Alen and Wouter Pas, "The UN Convention on the Rights of the Child's Self-executing Character", in Eugeen Verhellen, ed, *Monitoring Children's Rights* (Kluwer Law International, 1996), at 176. See also Van Bueren, note 15, at 393.

a Working Group of the Human Rights Council was established in early 2010 to explore the possibility of establishing such a mechanism through an additional protocol,[24] and a draft of the additional protocol was subsequently produced by the Working Group.[25] The existence of such a mechanism will undoubtedly raise the status CRC, and therefore children's rights, closer to that of equivalent instruments. However the additional value for children's rights to be gained through the creation of an individual complaints mechanism, however, is likely to be somewhat limited, because of the inherent nature of such mechanisms.[26]

It is notable that children's rights can also be enforced through international human rights mechanisms other than the Convention on the Rights of the Child.[27] Although there is little express provision for children's rights in the European Convention for Human Rights,[28] that instrument affords civil and political rights to "everyone"[29] within the jurisdiction of contracting states. The European Court of Human Rights affords "just satisfaction"[30] to an injured party, including monetary compensation. It also has an inter-state complaint mechanism. Despite few direct references to children in that

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[24] See "Human Rights Council to Develop Communications Procedure for Violations of Children's Rights" *Children's Rights Information Network*, 25 March 2010. Available at: http://www.crin.org/resources/infodetail.asp?id=22274 (last accessed 24 October 2010).

[25] See UN General Assembly Human Rights Council Resolution 13/3, *Open-ended Working Group on an Optional Protocol to the Convention on the Rights of the Child to provide a Communications Procedure* (2010) and UN General Assembly Human Rights Council, *Proposal for a Draft Optional Protocol prepared by the Chair-person Rapporteur of the Open-ended Working Group on an Optional Protocol to the Convention on the Rights of the Child to provide a Communications Procedure* (1 September 2010) A/HRC/WG.7/2/2.

[26] See Jack Donnelly, "The Virtues of Legalisation" in Saladin Meckled-Garcia and Basak Cali, eds, *The Legalisation of Human Rights* (Routledge, 2006) on the limited effectiveness of individual petitions (at 73). Typically a limited number of complaints are accepted for consideration, the process is expensive and lengthy, and the legal status of such judgments is questionable. See below at 161-162.

[27] The articles of these Conventions which are relevant to the right to be heard are discussed below.

[28] Ursula Kilkelly, *Children's Rights in Ireland* (Tottel Publishing, 2008), at 40.

[29] Article 1, ECHR.

[30] Article 41, ECHR.

instrument, substantial jurisprudence has arisen in relation to family law issues.[31]

Regional courts have proven more successful for the implementation of human rights law than UN individual complaint mechanisms.[32] However Galligan and Sandler make the point that courts "are not populist institutions offering justice to the masses."[33] Individual complaints mechanisms respond to a small number of cases, where someone alleging breaches of rights has the time, energy and resources to take a case. Furthermore, the amount of monetary compensation awarded for a violation of one's rights under the European Convention on Human Rights (ECHR), for example, is generally very low indeed and findings against a state do not always lead to significant change.[34]

Children's rights are also protected by the International Covenant on Civil and Political Rights (ICCPR). Of the core international human rights instruments his Covenant is considered to have the strongest type of monitoring mechanism. Under the Optional Protocol to the ICCPR, individuals claiming a violation of ICCPR rights can file communications to the Human Rights Committee against a state party to the ICCPR, if that state has ratified the Optional Protocol. Donnelly highlights the fact that very few individual complaints have actually been examined through individual

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[31] The jurisprudence relevant to the right to be heard is discussed in Chapter 3.

[32] See Andrew Byrne, "Enforcement through International Law and Procedures" in Rebecca Cook, ed, *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press, 1994).

[33] Galligan and Sandler, note 2, at 44.

[34] For example the Grand Chamber of the European Court of Human Rights found that the Czech Republic had breached the Convention rights (Article 14, taken together with Article 2 of Protocol No. 1) of Roma children who were systematically placed in 'special needs' schools in *D.H. and Others v the Czech Republic*, Appl. No. 57325/00, judgment of 7 February 2006. However the practice still continues. See Amnesty International, *Czech Republic: End Injustice: Elementary Schools still Fail Romani Children in the Czech Republic* (Amnesty International, 2009), available at: http://www.amnesty.org/en/library/info/EUR71/004/2009/en (last accessed 19 November 2010).

petitions.[35] Furthermore, the findings of the relevant UN Committees do not constitute formally binding legal obligations,[36] nor do these mechanisms have a force with which to ensure compliance on the part of a particular state.[37]

There exists a clear lack of authoritative international fora in which states can be held accountable for failures to comply with international human rights law. For this reason, implementation at domestic level is crucial.

3.2.2 Incorporation of International Human Rights Law into Domestic Systems

When states ratify treaties, they may have to adapt their national legal systems to fulfil their obligations under international law.[38] There are different ways of doing this, and international law does not get directly involved with this process.[39] Generally, before a state becomes party to a treaty, its administration reviews the requirements of the treaty in terms of its national law and the methods by which compliance could potentially be achieved are examined.[40] The state does not have to implement all necessary changes before ratifying a treaty, but is obliged to comply with treaty provisions within a reasonable time after ratification.[41]

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[35] Donnelly, note 26, at 73.

[36] See e.g. Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (Engel, 1993), at XXII, para.6.

[37] For example a police force or a means of enforcing economic sanctions.

[38] Incorporation is taken to refer to the enactment of legislation. Implementation is taken to mean all the measures that are taken in order to further enjoyment of a right. This may not solely involve incorporation, but human rights education, financial resources, etc. See Committee on the Rights of the Child, *General Comment No. 5: General Measures of Implementation of the Convention on the Rights of the Child*, (27 November 2003) CRC/GC/2003/5.

[39] Alen and Pas, note 23, at 165. Cassese makes the point that, because of the crucial nature of domestic implementation for international law to take effect, it is surprising that there is no form of international regulation of the matter or a uniformity in how states put international legal standards into effect (note 9, at 217).

[40] See Van Bueren, note 15, at 380.

[41] *Ibid.*

The way in which international legal standards are implemented at domestic level depends on the type of legal system of the particular state. Alen and Pas suggest that the significance of an international treaty for the domestic system depends on three factors, and all of these factors are determined by the domestic law of the state.[42] These factors are the applicability of the treaty, whether a treaty is self-executing, and if so, the degree to which it is self-executing. The 'applicability' of a treaty is determined by the type of legal system of the particular state.[43] In the 'dualist' system (e.g. UK, Ireland and Sweden), there is a clear distinction between domestic and international law, and an international legal obligation must be transposed into national law to have affect within the domestic system.[44] In the 'monistic' system however, (e.g. France and the U.S.[45]) domestic law and international legal obligations are part of the one legal system.[46]

Where a treaty has a 'self-executing character,' a legal person can invoke the international legal provision directly in a domestic court.[47] A non-self-executing treaty is one that cannot be applied directly at national level even in monist systems, as it requires enacting legislation to be incorporated at domestic level.[48] Some provisions enshrined in a treaty may be considered self-executing and others may not.[49] The national judge will determine

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[42] See Alen and Pas, note 23.
[43] *Ibid*, at 166.
[44] *Ibid*, at 166. See also Cassese, who refers to dualist systems as those involving "legislative ad hoc incorporation," note 9, at 221.
[45] Treaties ratified by the US President after Senate's approval are considered "the supreme Law of the Land and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding" (Article VI[2] of the Constitution). See Cassese, note 9, at 226 and Alen and Pas, note 23, at 167.
[46] Although often an Act of Parliament is required. Cassese refers to monist systems as those involving, "automatic standing incorporation," note 9, at 220.
[47] Alen and Pas, note 23, at 168 and Cassese, note 9, at 227.
[48] Cassese, note 9, at 227.
[49] Frederic Kirgis, "International Agreements and US Law" *American Society of International Law Insights* (May 1997), at 3. Available at:
http://www.asil.org/insigh10.cfm (last accessed 26 October 2010). Cassese, note 9, at 227, notes that national courts have frequently taken a broad approach to which provisions they have considered to be self-executing, for example only in 1991 did the French Council of State recognise the self-executing nature of Article 8 of the ECHR, the right to private and

whether or not a treaty is self-executing.[50] The criteria which determine whether a treaty is self-executing are i) if states explicitly agree that the obligations are self-executing, and; ii) if the wording of the text is sufficiently clear for the state's obligation to be applicable by a judge.[51] The 'degree' of the self-executing power of the treaty is the final factor. This will depend on the discretionary power remaining for the state, which is also to be determined by a national judge.[52]

So what of the self-executing nature of right of children to be heard? Alen and Pas claim that the self-executing nature of ECHR and the ICCPR provisions is accepted widely.[53] Therefore, the authors conclude, the provisions of the CRC which correspond to the obligations of these treaties (for example the right to life and the right to a fair trial) can be assumed to be self-executing.[54] Alen and Pas consider Article 12 of the CRC as a reinforcement of a provision of the ECHR (they do not mention which)[55] and therefore as self-executing.[56] Presumably the authors are referring to the right to a fair trial which is enshrined in Article 6 of the ECHR, and arguably the most likely to correspond to the CRC Article 12 right to be heard.[57] The European Court of Human Rights, however, has not yet explicitly acknowledged that this pertinent provision (i.e. the right to a fair trial) extends to the right of children to be heard in civil legal proceedings

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family life (Cassese cites *Demizpence, France, Council of State*, 10 March 1995, no.141083, in 99 RGDIP [1995], at 1013).

[50] J. Verhoeven, "La Notion d'Applicabilité Directe du Droit Internationale" 15 *Belgian Review of International Law* (1980), cited in Alen and Pas, note 23, at 170.

[51] Alen and Pas, note 23, at 171.

[52] *Ibid.*

[53] Although presumably this is questionable in the context of states with dualist systems.

[54] *Ibid*, at 180

[55] *Ibid*, at 184.

[56] *Ibid.*

[57] For jurisprudence on the right of children to participate effectively in criminal proceedings see e.g. the case of *T. v UK* (1999) 30 EHRR 121, considered in Chapter 4.

affecting them,[58] which seems to place the assertion of the authors on questionable ground.

It is also relevant that states have not explicitly agreed that the right to be heard is self-executing. Considering the fact that the CRC has achieved near-universal ratification, almost every state in the world has in effect agreed to implement the right to be heard, which lends strength to the possibility that the right to be heard constitutes a self-executing right. However the slow pace at which states are incorporating the right provides an argument against the likelihood of the right having self-executing status.[59] Moreover, Alen and Pas note that the wording of the text must have sufficient clarity for the right to be justiciable.[60] The wording of Article 12 clearly stipulates that states are obliged to provide children who have the capacity to form their own views the opportunity to be heard in all proceedings affecting them. However some details of the implementation of the right are unclear.[61] The recent General Comment on Article 12 of the Committee on the Rights of the Child[62] could be argued to provide sufficient clarity for the right to be applied by a judge at domestic level.[63] Yet until these factors are the subject of thorough analysis by domestic courts (and

[58] See further Chapter 4 and Aoife Daly, "The Right of Children to be Heard in Civil Proceedings and the Emerging Law of the European Court of Human Rights" *International Journal of Human Rights* (forthcoming 2011).

[59] See note 3.

[60] Alen and Pas, note 23, at 171.

[61] It is not specified, for example, in which circumstances children should be heard directly or indirectly by the decision-maker, how the capacities of children should be measured, at what age (if any) assumptions should be made not to measure capacity (perhaps where the child is an infant), and how to accord weight to views.

[62] Committee on the Rights of the Child, *General Comment No. 12: The Right to be Heard* (1 July 2009) CRC/C/GC/12.

[63] It is necessary, however, to note the shortcomings of the document noted in Chapter 2 regarding the lack of elucidation on the relationship between the best interests principle, the failure to comment on the lack of party status for children in most cases concerning them, and other points. Moreover it must be borne in mind that the vast majority of judges will not be familiar with the General Comment. See Christof Heyns and Frans Viljoen, "The Impact of the United Nations Human Rights Treaties at the Domestic Level" 23 *Human Rights Quarterly* 483 (2001), at 490, in relation to the lack of knowledge amongst domestic judges about international human rights law, even in monist systems.

ideally international courts also) it will remain unclear whether the right of children to be heard is self-executing or not.

It seems that, for effective enjoyment of this right, a necessity exists to legislate for the right of children to be heard, regardless of whether the right can be invoked directly in court. This is because of the fact that, as noted above, some details of the way in which the right should be implemented are unclear and many judges will be unaware of the General Comment on Article 12.[64] Also, there is a need to determine the practical problems of implementation of this right at domestic level.[65] Therefore whether or not the right is self-executing in monistic systems, it should be provided for in domestic legislation.[66] Apart from the usefulness of clarifying the nature of the right at domestic level, it seems that the right is more likely to be observed if it has been incorporated into domestic law. Research indicates that international human rights treaties have had the strongest impact where the treaties have been incorporated into domestic law, as opposed to being enforced through a system of 'norm enforcement.' Heyns and Viljoen describe norm enforcement as states implementing human rights through the system of reporting and other international human rights treaty monitoring mechanisms, such as individual complaints mechanisms.[67] Therefore if the CRC is incorporated into domestic law, its provisions are more likely to be observed. In a study by Heyns and Viljoen most countries examined (13 out of 20) were found to follow the monist approach, where treaties automatically become part of national law through ratification. However it was found that, in reality, provisions of international treaties were not always applied simply because the treaty had been ratified. In Mexico, for example, many judges were found only to apply the provisions of treaties which have been legislated for within domestic law, because of a lack of

[64] Committee on the Rights of the Child, note 62.
[65] Outlined further in Section 3.2.3 below.
[66] In dualist systems, enabling legislation is needed in any case.
[67] Heyns and Viljoen, note 63, at 485.

knowledge of international law.[68] This seems to indicate that monist systems will not necessarily prove superior in terms of implementing the right to be heard. It is, therefore, of vital importance that provisions are made in domestic law for international human rights standards such as the right to be heard, within both monist and dualist systems.[69]

3.2.3 Discretion at National Level

It is important to consider the substantial amount of discretion which states possess in relation to the implementation of international human rights standards. Human rights norms are agreed at international level, but adopted at national level. Human rights obligations are often written in very vague terms and states then decide the nature of the application of the standards. For example many questions remain in relation to the right to be heard enshrined in Article 12, such as how the capacity of a child is to be determined, who shall make the determination, and whether the child will be heard directly or indirectly by the decision-maker.[70] This vagueness is partly due to the drafting process of international human rights treaties. Such treaties involve much compromise between states, as competing interests abound, and the intention is to create a text which as many states as possible will ratify. It is also partly because of an acceptance that domestic level is the most appropriate place to determine how best to implement a particular standard in a particular context. Indeed, the European Court of Human Rights has expressed the view that the way in which Article 6 of the ECHR

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[68] *Ibid,* at 490.

[69] This point is confirmed by Cassese (note 9, at 217), who opines that "...it is a fact that most international rules, to become operative, need to be applied by State officials or individuals within domestic systems. National implementation of international rules is thus of crucial importance."

[70] Article 12(1) of the CRC stipulates that, "States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely..." The questions above arise in relation to this phrase. See Fiona Ang et al., "Participation Rights in the UN Convention on the Rights of the Child" in Fiona Ang et al., eds, *Participation Rights of Children* (Intersentia, 2006), at 11.

(the right to a fair trial)[71] is implemented should remain at the discretion of the state, so long as it meets the requirements of the Convention:

> [I]t is not the Court's function to indicate, let alone dictate, which measures should be taken; all that the Convention requires is that an individual should enjoy his effective right of access to the courts in conditions not at variance with Article 6 para. 1[72]

Likewise in *Stubbings v UK*, the court stated that, "[t]he Contracting States enjoy a wide margin of appreciation in deciding how the right of access to court should be circumscribed."[73] Nowak also opines that, "positive duties to guarantee rights leave States Parties with wide discretion and thus may not be interpreted broadly."[74] Therefore it is probable that states will have a large margin of appreciation in determining how to implement the right to be heard. However now that the General Comment on Article 12 of the Committee on the Rights of the Child[75] has been published, due regard will have to be given by policy makers and drafters of legislation to guidance provided by the document. While the enforcement mechanisms of the UN system seem to provide a limited vehicle through which to achieve compliance with international human rights standards, the clarification provided by the General Comment on Article 12 is potentially very useful for advocating the specificities of the right to be heard at domestic level.

As it is clear that there is a serious lack of 'teeth' to decisions of monitoring bodies, and such discretion exists at domestic level, an obvious question is whether it is accurate to refer to the human rights framework as 'law' at all. Some commentators present approaches to human rights enforcement which

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[71] Artice 6 is, of course, relevant to the right to be heard.
[72] *Airey v Ireland* (1979-80) 2 EHRR 305 para. 26.
[73] (1996) 23 EHRR 213, para. 55.
[74] Nowak, note 36, at 427.
[75] Committee on the Rights of the Child, note 62.

minimise the legal aspect of human rights treaties. Human rights are portrayed by these commentators as not really constituting law, but instead to be seen primarily as ethical demands[76] or merely a political process.[77] Despite these points of view, other theorists claim that there is no doubt about the validity of international human rights law.[78] Heintze emphasises that the UN Charter "elevated human rights to the plane of international law and stipulated legal obligations on the part of Member states of the United Nations".[79] The Universal Declaration of Human Rights then gave definition to those human rights and fundamental freedoms "for all," including children. According to Heintze, it follows then that an international, binding standard of children's rights can be assumed.[80] Perhaps international human rights law can be seen as standards which are part of a legal system, although it is a legal system which is lacking in enforcement mechanisms and which grants states a wide discretion. Nevertheless it is clear that the language and structure (albeit a weak structure) of international human rights law provides a legitimacy to desirable social values, as there is greater normative force in the claim that a state has done something 'illegal' than something 'socially undesirable.'[81]

3.2.4 Implementation of Children's Rights in Particular

It is useful to note that, as well as the difficulties inherent in implementation of human rights law generally, problems of implementation exist which are specific to children's rights. Arguably, the international human rights community accords more importance to other categories of rights. Civil and

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[76] Amartya Sen, "Elements of a Theory of Human Rights" 32 *Philosophy and Public Affairs* 315 (2004), at 319.
[77] E.g. Myres McDougal et al., *Studies in World Public Order* (Yale University Press, 1960) and Myres McDougal, Harold Lasswell and Lung-chu Chen, *Human Rights and World Public Order* (Yale University Press, 1980), critiqued in Anthony D'Amato, "Is International Law Really 'Law'?" 79 *Northwestern Law Review* 1293 (1985), at 1299.
[78] Heintze, note 11, at 72.
[79] *Ibid.*
[80] *Ibid.*
[81] Donnelly, note 26, at 69.

political rights (and primarily those of adults) are arguably the category of rights with which the community is most concerned,[82] despite the expansion of the human rights regime into the areas of economic, social and cultural rights, women's rights, children's rights, etc. To illustrate this, Bunch et al. make the point that the UN International Covenant on Civil and Political Rights still receives more resources and has more effective implementation mechanisms than other human rights instruments.[83]

As well as the problems posed by this hierarchy of rights, children's rights can be considered particularly problematic because of traditional notions in relation to children. There are commentators who consider the Convention on the Rights of the Child to be a threat to the family and to the power of parents.[84] The right of children to be heard in proceedings affecting them is even more of a threat to these critics than the notion of children's rights generally. The right to be heard can raise mistaken notions– even for those well-disposed towards the provision of rights to children– of the potential for children to have rights to access pornography or engage in other undesirable behaviour, free from parental control.[85]

The resistance to the idea of children's rights– and the perception of children as falling outside the sphere of rights– is certainly a potential barrier to implementation. Wright outlines how human rights are so often characterised as men's rights, through the language traditionally used in the

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[82] Although the right to be heard can be considered to fall within the category of civil and political rights, this category of rights are traditionally considered to pertain to adults.

[83] Charlotte Bunch, "Making the Global Local, International Networking for Women's Human Rights" in Kelly Askin and Dorean Koenig, eds, *Women and International Human Rights Law* (Transnational Publishers Inc, 1999).

[84] See for example Bruce Hafen and Jonathan Hafen, "Abandoning Children to their Rights" 55 *First Things* 18 (1995).

[85] Cynthia Price Cohen, "Monitoring the UN Convention on the Rights of the Child in a Non-Party State: the United States" in Eugeen Verhellen, ed, *Monitoring Children's Rights* (Kluwer Law International, 1996), at 488. See Hafen and Hafen, note 84, at 24, who suggest that Article 13 of the CRC, which enshrines the right to freedom of information "fails, except in a vague reference to 'public health or morals,' to recognize the risks to children of obscenity and pornography."

area.[86] Terms such as 'the rights of man' or 'Mankind' are commonplace.[87] Equally human rights have been constructed as adult rights. As with women's rights, children's rights could be considered to be 'segregated' into their own Convention, ignored in general human rights processes,[88] with experiences specific to children undervalued.

It is also arguable that there are potentially much more serious violations of children's rights to contend with than a failure to hear children in proceedings that affect them. Children die from starvation and disease on a daily basis, and even in wealthier states, child poverty is a significant issue. However such points are generally not accepted as reasons for failing to uphold civil and political rights. Nevertheless, only norms of extraordinary political significance (such as the law of the UN Charter on the use of force) have been the focus of serious enforcement attempts by the international political bodies.[89] The right of children to be heard in matters that affect them is therefore much lower on the international agenda in a context where only very serious human rights matters are the focus of serious enforcement efforts.[90]

3.2.5 The Rights Dichotomy

Whether a particular right is categorised as 'civil and political' or 'economic, social and cultural' will have significant influence on the nature of its implementation in domestic law. The right of children to be heard in

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[86] Shelley Wright, "Human Rights and Women's Rights: An Analysis of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women", in Kathleen Mahoney and Paul Mahoney, eds, *Human Rights in the Twenty-First Century: A Global Challenge* (Nijhoff, 1993), at 77.
[87] *Ibid.*
[88] For example note that there are very few explicit references to children in the ECHR to the rights of children.
[89] Louis Henkin, *International Law: Politics and Values* (Martinus Nijhoff, 1995).
[90] It has proven extremely difficult even to intervene where the abuses involved exist on a massive scale, for example in the case of Rwandan genocide and more recently the ethnic violence in Darfur, Sudan.

proceedings affecting them provides a complex challenge because of the fact that it contains elements of both of these categories of rights.

Article 2(1) of the CRC obligates states parties to "respect and ensure" the principles of the Convention to all children within their jurisdiction. Detrick emphasises that this is similar to Article 2(1) of the International Covenant on Civil and Political Rights.[91] Conte, Davidson and Burchill note that, under Article 2(1) of the ICCPR, "states are required to take the necessary legislative or other measures to give effect in their domestic law to the rights recognised in the ICCPR."[92] This has been interpreted to amount to an immediate obligation to implement the relevant stipulations.[93] It can be seen from Article 4 of the CRC, however, that an element of progressive realisation was intended by the drafters in relation to economic, social and cultural rights.[94] This element of Article 4 of the CRC is similar to that of Article 2(1) of the International Covenant on Economic, Social and Cultural Rights. A previously adopted draft of Article 4, with proposed revisions, was submitted for consideration in the late stages of the drafting of the Convention on the Rights of the Child:

> (The) States Parties (to the present Convention) shall undertake all (appropriate) legislative, administrative, and other measures (in accordance with their available resources), and, where needed, within the framework of international co-operation, for the implementation of the rights recognised in this Convention.[95]

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[91] Sharon Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff, 1999), at 103.
[92] Alex Conte, Scott Davidson and Richard Burchill, *Defining Civil and Political Rights: The Jurisprudence of the United Nations Human Rights Committee* (Ashgate Publishing, 2004), at 2.
[93] Nowak, note 36, at 61, para. 58.
[94] Detrick, note 91, at 103.
[95] Travaux Préparatoires of the Convention on the Rights of the Child, *Considerations of Working Group*, E/CN.4/1989/48, para.170. Accessed in Sharon Detrick, Jaap Doek and Nigel Cantwell, *The Convention on the Rights of the Child: A Guide to the Travaux Préparatoires* (Martinus Nijhoff, 1992).

Yet while some states recognised that certain economic, social and cultural rights could be subject to the availability of resources, they objected to civil and political rights having the same qualification.[96] They emphasised that the International Covenant on Civil and Political Rights guaranteed civil and political rights without subjecting them to the availability of resources, and that these standards should not be weakened in the Convention on the Rights of the Child.[97] Therefore Article 4 ultimately provided that the principle of progressive realisation only applies to economic, social and cultural rights, stipulating that, "[w]ith regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources..."[98]

The right of children to be heard is generally considered by commentators to fall under the heading of 'civil and political rights.'[99] Civil and political rights involve negative obligations on the part of the state (i.e. abstention from interference) and must be observed immediately. Economic, social and cultural rights on the other hand involve positive obligations, i.e. provision on the part of the state. Therefore these rights are qualified by the resources of a state and by 'progressive realisation.' They are often considered to be 'second generation' rights because of this qualification.[100]

However the right of children to be heard highlights the problematic nature of the dichotomy between civil and political rights on the one hand, and economic, social and cultural rights on the other. According to Conte, Davidson and Burchill, "their interrelationship is far more complex than the

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[96] *Ibid*, para. 172.
[97] *Ibid.*
[98] Article 4, Convention on the Rights of the Child.
[99] See Committee on the Rights of the Child, *General Comment No. 5: General Measures of Implementation of the Convention on the Rights of the Child*, (27 November 2003) CRC/GC/2003/5, at para. 6.
[100] See Conte, Davidson and Burchill, note 92, at 1.

simple statement of categories of rights would lead one to suppose".[101] Although there are obvious elements of civil rights entrenched in the right,[102] to facilitate a child to be heard in judicial and administrative proceedings (which are usually very adult-oriented) will necessitate extra staff and training, and therefore the resources necessary to put these in place.

The fact that Article 12 contains elements of both civil and political as well as economic, social and cultural rights is acknowledged by the Committee itself. As observed by the Committee, "[e]njoyment of economic, social and cultural rights is inextricably intertwined with enjoyment of civil and political rights."[103] Yet it is important for implementation to identify which of the rights in the CRC constitute civil and political rights and which are to be considered economic, social and cultural rights. The CRC itself does not specify this. Alston states that indications as to which rights are to be considered economic, social and cultural rights are to be found in phrases such as "subject to available resources" and similarities between the formulation of a particular right in the CRC and its equivalent in the International Covenant on Economic, Social and Cultural Rights.[104] Article 12(2) does not fit either of these criteria, therefore it can be considered that it is better suited to inclusion in the civil and political rights category.[105] This, of course, implies that 'lack of resources' is not an adequate reason for a state not to have undertaken all measures for the implementation of the right of children to be provided the opportunity to be heard in judicial and administrative proceedings affecting them. Therefore, theoretically, all

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[101] *Ibid* at 2.
[102] For example aspects of the right to be heard which intersect with fair trial rights.
[103] Committee on the Rights of the Child, note 99, para. 6.
[104] Philip Alston, "The Legal Framework of the Convention on the Rights of the Child" 91 *United Nations Bulletin of Human Rights: The Rights of the Child* 2 (1992), at 5, cited in Detrick, note 91, at 103.
[105] Article 12(2) reads: "For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

states are obliged to undertake all appropriate legislative, administrative, and other measures for the implementation of the right, in accordance with Article 4.

3.3 The Convention on the Rights of the Child

A more thorough examination of the particular context of the Convention on the Rights of the Child and the position taken by the Committee on the Rights of the Child on incorporation[106] is useful for the purpose of examining state obligations in relation to the right to be heard. The obligation of states to incorporate all the provisions of the Convention (and therefore the right to be heard) into national law is expressed in Article 4 of the Convention on the Rights of the Child:

> States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

The wording in the first sentence of Article 4 mirrors Article 2(2) of the ICCPR which obliges states to "take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant." The second sentence then differentiates between civil and political rights on the one hand and economic, social and cultural rights on the other by using the language of Article 2(1) of the International Covenant on Economic, Social and Cultural

[106] I.e. incorporation of the right to be heard into domestic law.

Rights which stipulates that each state must take steps "to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means." This highlights the fact that the CRC contains both categories of rights. However it must be acknowledged that, although the Convention stipulates that legislative measures are needed to incorporate the CRC into domestic law, there are few means of ensuring that states do so.

Opinions of the Committee on the Rights of the Child, as expressed through conclusions and recommendations on state reports, indicate that the Committee considers States parties to be under a:

> [C]lear legal obligation... to recognize this right and ensure its implementation by listening to the views of the child and according them due weight. This obligation requires that States parties, with respect to their particular judicial system, either directly guarantee this right, or adopt or revise laws so that this right can be fully enjoyed by the child.[107]

The Committee refers in particular to the term "shall assure" in the text of Article 12. Article 12 provides that, "States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely..." The Committee utilises very strong language in the General Comment on Article 12, stating that "'[s]hall assure' is a legal term of special strength, which leaves no leeway for State parties' discretion. Accordingly, States parties are under strict obligation to undertake appropriate measures to fully implement this right for all children."[108] Therefore, according to the Committee, states are obliged in the strongest terms to implement Article 12. The Committee also "urges" states to

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[107] Committee on the Rights of the Child, note 62, para. 15.
[108] *Ibid*, para. 19.

conduct various steps to implement the provision, specifying that states "examine all existing laws and regulations with a view to ensure that article 12 is adequately integrated in all relevant domestic laws, regulations and administrative instructions."[109] Although the term "urge" is not as strong as the reference to the "strict obligation" above, it seems meaningful that the Committee has recommended a thorough examination of the domestic system as part of the process towards ensuring compliance with Article 12.

The Committee explicitly highlights in its comments on state reports when states have not made provision in domestic law for the right of children to be provided the opportunity to be heard in proceedings affecting them, as in the case of India:

> The Committee further notes with regret that there are virtually no legal provisions guaranteeing children's participation in civil proceedings affecting their rights and well-being.[110]

The Committee also recognises that states need to further enjoyment of the right through mechanisms other than legislation. Human rights institutions such as Ombudsmen, training on Article 12 for professionals such as lawyers and judges, as well as public campaigns to combat negative attitudes are all outlined by the Committee as vehicles through which to further the implementation of the right to be heard.[111] The Committee often urges states to change their legislation to provide for the right in its Concluding Observations on state reports. Mexico, for example, has been urged to "amend the procedural civil codes to ensure that children are heard

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[109] Committee on the Rights of the Child, *Day of Discussion on the Right to be Heard*, Forty-third session, 11-29 September 2006, para. 42.
[110] Committee on the Rights of the Child, *Concluding Observations: India* (26 February 2004) CRC/C/15/Add.228, para. 34.
[111] Committee on the Rights of the Child, note 62, para. 49.

in judicial proceedings affecting them".[112] Likewise, Antigua and Barbuda are advised to:

> [A]mend legislation so that the principle of respect for the views of the child is recognised and respected, *inter alia*, within custody disputes and other legal matters affecting children.[113]

However, whether or not a state receives this recommendation from the Committee is often arbitrary. In the case of India, for example, the Committee did not go on to emphasise the obligation to incorporate the right into domestic legislation. Instead, 'promotion' around the right to be heard was recommended. This may be attributable to a lack of consistency on the part of the Committee, as opposed to a lack of obligation on the state to provide for the right in domestic legislation.[114]

It is clear from state reports and Committee comments that incorporation into domestic law does not always mean that the right is being applied. In relation to Azerbaijan, the Committee highlighted that although the right to be heard in proceedings had been enshrined in domestic law, this did not translate into adequate implementation:

> While the Committee notes that the Family Code (article 52) protects the right of the child to express her/his views and that it is mandatory to hear the views of children when they are 10 or older in judicial

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[112] Committee on the Rights of the Child, *Concluding Observations: Mexico* (8 June 2006) CRC/C/125/Add.7, para. 27.

[113] Committee on the Rights of the Child, *Concluding Observations: Antigua and Barbuda* (3 November 2004) CRC/C/15/Add.247, para. 32

[114] The notable repetition and occasional lack of consistency which is evident in Committee comments is attributable to the wide breadth of issues which the Committee has tried to cover in its concluding observations on state reports. This is something which has been recognised by the Committee, and a different strategy is currently under consideration, whereby the Committee would consider in detail a number of prioritised points in relation to a state, as opposed to aiming to consider every CRC provision, as is currently the case. Learned in private conversation with member of the Committee on the Rights of the Child, Edinburgh, 1 September 2009.

> and administrative proceedings affecting them, it is concerned at the inadequate implementation of this right.[115]

This highlights the difference between legislating for the right of children to be heard in proceedings affecting them, and actually implementing it in practice. Despite the difficulties of quantifying the often vague comments of the Committee, it is clear from the comments that the majority of states have not incorporated the right into domestic law. Only a handful of states have not received criticism from the Committee in relation to incorporation of the right (where the right is mentioned in Committee comments on state reports).[116]

Despite this poor level of incorporation into domestic legislation, the Committee continues to take a strong position on the matter of the obligations of states to incorporate the right to be heard. The Committee recently reinforced this view in its recent General Comment on Article 12, again emphasising the legal obligation incurred by States Parties to the Convention in respect of the right to be heard:

> This right imposes a clear legal obligation on States parties to recognize this right and ensure its implementation by listening to the views of the child and according them due weight. This obligation requires that States parties, with respect to their particular judicial system, either directly guarantee this right, or adopt or revise laws so that this right can be fully enjoyed by the child. [117]

Declaring the existence of this level of obligation on states is perhaps a

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[115] Committee on the Rights of the Child, *Concluding Observations: Azerbaijan* (17 March 2006) CRC/C/AZE/CO/2, para. 29.

[116] This does not necessarily mean that those states which do not receive comments from the Committee in relation to the right are doing well regarding incorporation. The Committee's silence in relation to any particular state is arguably more a feature of the sometimes inconsistent nature of Committee comments.

[117] Committee on the Rights of the Child, note 62, para. 15

simplistic approach by the Committee, considering the points on the nature of international human rights law outlined above, as well as the different legal systems of states. However the consistent position taken by the Committee on the matter lends weight to the argument that ratifying states incur obligations to incorporate Article 12 of the CRC into domestic legislation. The many references within the comments of the Committee in concluding observations also undoubtedly contributes to keeping the issue current and relevant.

3.4 Reservations to Article 12

The apparent lack of implementation of Article 12 exists despite the fact that there are very few reservations to Article 12. A reservation is "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State."[118] Only three states entered reservations in relation to Article 12. Kirabati, Poland and Singapore all stated their understanding that the right "be exercised with respect for the authority of parents."[119] This small number is perhaps surprising, given the controversial nature of the provision.[120] However the fact that the drafting of the CRC was based on consensus means that all states had already provisionally agreed to this article during drafting. The low number of reservations arguably consolidates further the fact that states accepted this provision despite the controversy with which it is associated.[121] These reservations could be

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[118] Vienna Convention on the Laws of Treaties, Article 2.
[119] UN Treaty Collection Database, *Convention on the Rights of the Child: Declarations and Reservations*, available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en#EndDec (last accessed 19 November 2010).
[120] See above notes 3 and 4.
[121] *Ibid.*

considered to be valid,[122] given the fact that the CRC itself emphasises respect for the authority of parents. For example, Article 5 stipulates that states respect the right of parents to "appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention," in conformity with the principle of the evolving capacities of the child.

If the reservations involved states expressing an intention not to implement Article 12, this would be more problematic, because it is one of the guiding principles of the Convention. Therefore such a reservation would affect the object and purpose of the Convention, which is prohibited under the Vienna Convention.[123] Sweeping reservations made by many states in relation to the Convention generally are an obvious concern. Many Islamic countries have stated intentions not to comply with any elements of the Convention which are not in conformity with Sharia law.[124] For example, Iran lodged the following reservation upon ratification of the CRC:

> The Government of the Islamic Republic of Iran reserves the right not to apply any provisions or articles of the Convention that are incompatible with Islamic Laws and the international legislation in effect.[125]

It must be asked whether, despite a low number of reservations made by states in relation to Article 12, many of these general, sweeping reservations constitute an objection to Article 12. Reservations of this kind could potentially affect the implementation of the right to be heard. For example,

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[122] I.e. not in conflict with the object and purpose of the Convention, see William Schabas, "Reservations to the Convention on the Rights of the Child" 18 *Human Rights Quarterly* 472 (1996), at 475.

[123] Vienna Convention on the Laws of Treaties, Article 18.

[124] Schabas notes in particular the reservations of Pakistan, Djibouti, Syria and Iran. Schabas, note 122, at 478.

[125] Text of state reservations available at the website of the Office of the High Commissioner for Human Rights, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (last accessed 30 October 2010).

when determining custody outcomes under Sharia law, courts often automatically award custody to parents based on the age of the child. This means that the right of children to be given the opportunity to be heard in such proceedings is ignored. Since Article 12 of the CRC is a guiding principle of the Convention, this lack of regard for such a provision would be contrary to the object and purpose of the CRC.[126]

Furthermore, the Vienna Convention on the Law of Treaties also states in Article 27 that, "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." Therefore the municipal law of a state cannot be relied upon for that state to avoid international legal obligations.[127] If a State party to the CRC has legislation in place that is incompatible with the right of children to be provided the opportunity to be heard in judicial and administrative proceedings affecting them, it is in violation of the CRC according to the Vienna Convention, and cannot use its national law to avoid this. Of course, one could argue that it is necessary for a state to first incorporate the relevant treaty into its legal system before this obligation accrues. This certainly seems to be the case for dualist states, and also for non-self-executing provisions in monist states.[128] It is arguable that, technically, the state is in breach for not incorporating the treaty, rather than through a failure to facilitate the right in question.

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[126] Schabas notes that the CRC is silent on the matter of the legal effects of reservations (Schabas, note 122, at 481), but that invalid reservations– i.e. those not in accordance with the object and purpose of the Convention– may call into question the entire ratification (at 481). Schabas highlights, however, that traditional solutions of international law are problematic in relation to human rights law. He notes in particular the problem that unlike other international law treaties, when one state objects to the reservation of another as invalid, the usual consequence– a failure of the provision to be in force between those states– is irrelevant because of the fact that it's a human rights treaty, and not a treaty designed to benefit states (at 489). The actual legal effect of reservations which are incompatible with the CRC, then, is unclear.

[127] See David Harris, *Cases and Materials on International Law* (6th ed, Sweet and Maxwell, 2004).

[128] Note, however, that Alen and Pas hold that Article 12 is self-executing. Alen and Pas, note 23, at 184.

The low number of reservations to Article 12 is encouraging and lends weight to the significance of the right to be heard. It is also perhaps cause for optimism that the right to be heard can be said to be related to long-established civil and political rights in more legally significant instruments than the Convention on the Rights of the Child.[129]

3.5 Other Considerations in Relation to the Legal Status of the Right

Rights enshrined in the ECHR which relate to the right of children to be heard are most relevant to the Irish context, as this treaty has been incorporated into Irish law.[130] The right to a fair trial, Article 6(1) of the Convention, is of much relevance to the right of children to be heard, because of, *inter alia*, rights to representation[131] and the state obligation to make special provision for children in legal proceedings.[132] Although the right of children to be heard in civil proceedings has yet to be explicitly recognised by the Court, there is potential for recognition of the right in the future in line with the principle of evolutive interpretation. The relationship with the provisions of the ECHR and with the jurisprudence of the Court is promising, because of the binding nature of the ECHR. The ECHR has been incorporated into a number of domestic systems[133] and is binding in Irish law.[134] It is also noteworthy that there exists a European Convention on the Exercise of Children's Rights.[135] The purpose of this Council of Europe instrument was to strengthen CRC rights through procedural rights for children in family proceedings. However it is very clearly limited in

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[129] Committee on the Rights of the Child, note 99, at para. 6.
[130] Through the European Convention on Human Rights Act 2003. The substantive articles of the ECHR which pertain to the right to be heard are analysed in detail in Chapter 4.
[131] See e.g. *Airey v Ireland* (1979-80) 2 EHRR 305.
[132] *T. v UK* (1999) 30 EHRR 121
[133] For example, in the UK through the Human Rights Act 1998 and the Scotland Act 1998, and in Ireland through the European Convention on Human Rights Act 2003.
[134] Since the entry into force of the European Convention on Human Rights Act 2003.
[135] European Convention on the Exercise of Children's Rights, ETS No. 160, adopted 25 January 1996, entered into force 7 January 2000.

influence and ambit[136] and the instrument "has not proved very popular to date."[137]

The International Covenant on Civil and Political Rights is another authoritative text on civil and political rights which, although of questionable legal enforceability,[138] is considered to be self-executing.[139] Certain articles of the ICCPR are of relevance to the right of children to be heard, for example those relating to fair trial rights and equality before the law.[140] Until a case is heard at international level which links these provisions with the right to be heard, however, it remains unclear how useful the provisions noted above are in furthering implementation on the right to be heard.

It is worth considering whether the right to be heard constitutes customary international law.[141] A rule of customary international law is said to exist when a practice constitutes a general practice amongst states and an acceptance exists on the part of states that this practice conforms to a rule of international law (*opinio juris*).[142] The main feature of customary international law is that it is not a process of deliberate lawmaking.[143] The second feature is that customary international law binds all states, while

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[136] See Caroline Sawyer, "One Step Forward, Two Steps Back– The European Convention On The Exercise Of Children's Rights" 11 *Child and Family Law Quarterly* 151 (1999).
[137] Trevor Buck, *International Child Law* (Cavendish Publishing, 2005), at 124.
[138] Nowak, note 36, at XXII, para.6.
[139] Alen and Pas, note 23, at 180. See however the problems of enforceability evident in the Irish context, below at 3.6.
[140] Article 14. See further Chapter 1.
[141] Resort to customary international law has become increasingly rare since the Second World War. See Cassese, note 9, at 165. Cassese notes, however, that in some areas it still plays a significant role, for example in relation to economic interests, major conflicts and for clarifying areas of custom in need of elaboration, such as the rules on warfare (at 166). None of these areas, however, are related to the right to be heard.
[142] Article 38.1(b) of the Statute of the International Court of Justice (3 Bevans 1179, 59 Stat 1031, TS 993, 39 AJIL Supp 215 [1945]) lists international custom as amongst the sources of law from which it can draw. See Ian Brownlie, *Principles of Public International Law* (7th ed, Oxford University Press, 2008), at 8. Brownlie notes, however, that some commentators dispute 'acceptance' as a requirement for the existence of custom.
[143] Cassese, note 9, at 156.

treaty law only binds those states that have ratified a treaty relating to a particular practice.[144] Two elements need to be present for a customary international rule to have evolved– a conviction amongst states that a new standard of behaviour has become necessary, and established state practice.[145] In the *Nicaragua* case, the International Court of Justice held that it is not necessary that state practice be absolutely uniform for a customary rule to have evolved, as individual deviations may be considered breaches of international law or situations involving exceptional circumstances.[146]

Considering the fact that an initial examination of the reports of the Committee on the Rights of the Child indicates that the majority of states have failed to incorporate the right of children to be heard into domestic legislation, it is unlikely that this right could be considered to constitute customary international law. However widespread opposition to the existence of the right to be heard has certainly not occurred. As outlined above, there have only been a handful of reservations made by ratifying states to Article 12 of the CRC. It must also be considered that, according to the International Court of Justice, local customary rules may also possibly exist, which may be binding only upon states of a particular geographical region.[147] Perhaps it could be argued that EU states, most of whom have some element of the right to be heard in place at domestic level,[148] are

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[144] *Ibid*, at 157.
[145] *Ibid*.
[146] *Military and Paramilitary Activities in and Against Nicaragua (Nicar v US), Jurisdiction and Admissibility,* 1984 ICJ REP. 392, judgment of 27 June 1986. See Cassese, note 9, at 157.
[147] *Asylum (Columbia/Peru)* ICJ General List No. 7, judgment of 20 November 1950 (at 276).
[148] O' Donnell cites a high number of EU as having provided in some way for the right to be heard, for example Denmark, Norway, Iceland, Finland, Sweden, Belgium, the UK, the Czech Republic, Slovenia, Italy, the Netherlands, Germany, Spain and Romania. Daniel O' Donnell, *The Right to be Heard: Children's Right to have their Views taken into Account and to Participate in Legal and Administrative Proceedings* (UNICEF Innocenti Research Centre, 2009), at 10-17.

bound by custom to facilitate children to be heard in proceedings affecting them.[149]

Further weight is given to this theory by the fact that Article 24 of the EU Charter of Fundamental Rights, which enshrines children's rights, stipulates that children "may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity."[150] This provision mirrors closely the language of Article 12 of the CRC. The explanatory document for the Charter simply reads: "[t]his Article is based on the New York Convention on the Rights of the Child signed on 20 November 1989 and ratified by all the Member States, particularly Articles 3, 9, 12 and 13 thereof."[151] It is noteworthy and positive that the drafters of the Charter saw fit to include the right to be heard and to use the language of Article 12 of the CRC. The legal status of the Charter is questionable, however. It is stated by EU institutions that with the entry into force of the Lisbon Treaty in December 2009, the charter was imbued with binding legal effect equal to other EU treaties.[152] Yet it seems that, as with

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[149] Biehler, however, highlights that, having considered the case law in the area (e.g. *Horgan v An Taoiseach and Others* [2003] 2 IR 468 [HC]), "the application of customary international law in Ireland is in a state of continuing uncertainty." Gernot Biehler, *International Law in Practice* (Thomson Roundhall, 2005), at 148. Biehler also points to the fact that the Constitution Review Group state that, "the effect to be given in Irish domestic law to customary law is much less clear" than that to be given to treaty law (at 103).

[150] The Charter of Fundamental Rights of the European Union, OJ (C 364) 1, adopted 7 December 2000. Article 24(1).

[151] Draft Charter of Fundamental Rights of the European Union: Text of the explanations relating to the complete text of the Charter as set out in CHARTE 4487/00 CONVENT 50 (Brussels, 11 October 2000) Available at:
http://www.europarl.europa.eu/charter/pdf/04473_en.pdf (last accessed 15 November 2010).

[152] See for example the European Parliament website which quotes *inter alia* Romano Prodi, then President of the Commission, as stating that:

> In the eyes of the European Commission, by proclaiming the Charter of Fundamental Rights, the European Union institutions have committed themselves to respecting the Charter in everything they do and in every policy they promote (...). The citizens of Europe can rely on the Commission to ensure that the Charter will be respected…

(Nice, 7 December 2000). Available at:
http://www.europarl.europa.eu/charter/default_en.htm (last accessed 30 October 2010). See also Europa website, *Summaries of EU Legislation: The EU Charter* on which it is stated

other EU treaties, individual citizens will not be able to invoke the Charter in a domestic court or at the level of the European Court of Justice, unless the matter in question relates to implementation of EU law by the member state in question.[153] Nevertheless this provision of the Charter may well have a significant amount of persuasive influence on the domestic law of EU member states, including Ireland.

3.6 Status of CRC in Irish Law

As the right to be heard in the Republic of Ireland is the subject of particular analysis in the context of this thesis, it is necessary to examine the status of international law within Irish domestic legislation. The Republic of Ireland is committed to the rules of international law by Article 29.1-29.3 of the Constitution. Ireland is placed firmly in the dualist category of domestic legal systems, in that international rules (with the exception of EU law) must be incorporated into domestic law before they attain legal force at domestic level.[154] Article 29.6 of the Constitution stipulates that, "[n]o international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas." Because Ireland is a member of the EU, this provision has been amended a number of times in order to permit Ireland to ratify EU treaties and to allow those treaties to have direct effect in Ireland. However, most human rights treaties ratified by Ireland are never

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that on entry into force in 2009, "the charter was given binding legal effect equal to the Treaties." Available at:
http://europa.eu/legislation_summaries/justice_freedom_security/combating_discrimination/l33501_en.htm(last accessed 30 October 2010).

[153] In *Kremzow v Austria* (Series A, No 268-B; Appl. No. 12350/86, judgment of 21 September 1993) the European Court of Justice was called upon to determine whether a member state was obliged to apply a principle of EU law, the right to fair procedures. It held that since the laws which the applicant invoked had not been enacted by Austria in order to ensure compliance with EU law, the matter was outside the scope of EU law. See Erin Eiselein, "Kremzow v Republik Osterreich: A Case for Excluding Human Rights Issues from the Jurisdiction of the European Court of Justice" *Denver Journal of International Law and Policy* (1999), available at:
ttp://findarticles.com/p/articles/mi_hb3262/is_4_27/ai_n28748928/ (last accessed 30 October 2010).

[154] Raymond Byrne and Paul McCutcheon, *Byrne and McCutcheon on the Irish Legal System* (4th ed, Bloomsbury Professional 2003), at 673.

incorporated into domestic law, because, according to Byrne and McCutcheon, they confer rights which are already protected under Irish law.[155] Incorporation is usually achieved indirectly, in that the most important provisions of a treaty are mirrored in the body of an Act. However, Byrne and McCutcheon conclude that human rights enshrined in international agreements are not justiciable in Irish courts.[156]

The case law relating to the status of the European Convention on Human Rights in Ireland before the incorporation of that treaty into domestic law[157] emphasises the position of unincorporated treaties in Irish law. In *Re O Laighleis*[158] the Supreme Court found that, "[t]he Court...cannot accept the idea that the primacy of domestic legislation is displaced by the State becoming a party to the Convention for the Protection of Human Rights and Fundamental Freedoms."[159] Similarly, in the Supreme Court case of *Norris v Attorney General*[160] O'Higgins CJ opined:

> The Convention is an international agreement to which Ireland is a subscribing party. As such, however, it does not and cannot form part of our domestic law, nor affect in any way questions which arise thereunder. This is made clear by Article 29, s6 of the Constitution...[161]

Byrne and McCutcheon state that those seeking to rely on Conventions such as the ICCPR and the CRC, which have not been incorporated into Irish law, experience the same difficulties associated with cases relating to the

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[155] *Ibid.*
[156] *Ibid.*
[157] By the European Convention on Human Rights Act 2003 which incorporates Convention rights into domestic law in Ireland on a sub-constitutional basis. See Byrne and McCutcheon, note 154.
[158] [1960] IR 63 (SC).
[159] *Ibid*, at 125.
[160] [1984] IR 36 (SC).
[161] *Ibid*, para. 15.178.

ECHR before enactment of the European Convention on Human Rights Act 2003,[162] evident in the judgments of *Re O Laighleis*[163] and *Norris v Attorney General.*[164] In the case of *Kavanaugh v Governor of Mountjoy Prison*,[165] for example, the applicant argued that his trial by the Special Criminal Court had contravened his right to equal protection of the law under the ICCPR.[166] He claimed that Ireland's ratification of that instrument had established a legitimate expectation that the terms of the ICCPR, in substance, would be respected. The Supreme Court found against the applicant, holding that, the state may create legitimate expectation that the agencies of the state will respect the terms of an international agreement entered into by the state, however such an expectation could not come into conflict with Art 29.6 of the Constitution. Irish courts have, however, been willing to consider international legal standards as a persuasive source where it does not conflict with Irish law.[167]

Despite the failure to incorporate the Convention on the Rights of the Child into domestic law, sections of the relevant Irish legislation[168] provide for the obligations established by Article 12 through the guardian *ad litem*,[169] indicating an awareness of (and perhaps acceptance of to some extent) the right to be heard at domestic level.[170] However a child-rights approach is

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[162] Byrne and McCutcheon, note 154.
[163] [1960] IR 63 (SC).
[164] [1984] IR 36 (SC).
[165] [2002] 3 IR 97 (SC).
[166] Article 26.
[167] See e.g. *Desmond v Glackin (No 2)* [1993] 3 IR 67 (SC).
[168] The Child Care Act 1991 Section 26(1) permits the appointment of a guardian *ad litem* in relation to public proceedings covered by that Act. The Children Act 1997 (Section 28 of the Guardianship of Infants Act 1964 as amended by Section 11 of the Children Act 1997) extends this procedure by stipulating that it is possible for the court to appoint a guardian *ad litem* in certain private law proceedings under the Guardianship of Infants Act 1964.
[169] The guardian *ad litem* is a professional who can "independently establish the wishes, feelings and interests of the child and present them to the court with recommendations" according to the Children Acts Advisory Board in *Giving a Voice to Children's Wishes, Feelings and Interests: Guidance on the Role, Criteria for Appointment, Qualifications and Training of Guardians ad Litem Appointed for Children in Proceedings under the Child Care Act, 1991* (May 2009).
[170] Hogan and Whyte note that, "[u]nincorporated international agreements may also have indirect legal effect through the operation of a presumption of compatibility of domestic

distinctly lacking in the legislation. Hearing children in proceedings affecting them is not framed in a rights context, but in such a way that permits a judge to appoint a guardian *ad litem* if the court sees fit to do so.[171] This points to inadequate implementation of the right to be heard, in that many of the provisions of Article 12 (interpreted through the text of Article 12 as well as the comments of the Committee on the Rights of the Child) are not facilitated within the relevant legislation.

Further evidence of a lack of prominence of the CRC within Irish law is evidenced by the fact that, to date, there appears to have been very little reference to the Convention on the Rights of the Child in the case law of the Irish Superior Courts. However one such case– *N. v N. [hearing a child]*[172]– signifies a major development in terms of recognition of the right to be heard as enshrined by Article 12 the CRC, as this matter was explicitly considered. The applicant father of a six year old child sought an order pursuant to Article 12 of the Hague Convention on Civil Aspects of International Child Abduction[173] for the return of the child to the state of his habitual residence. The Court was asked to determine whether it was "inappropriate having regard to his or her age or degree of maturity"[174] to provide a child the opportunity to be heard during proceedings in this particular case. Counsel for the mother of the child argued that the obligation created by Article 11(2) of the Brussels II Regulation

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legislation with international obligations." The authors cite *O Domhnaill v Merrick* [1984] IR 151; ILRM 40 (SC) and *Doyle v Commissioner of An Garda Siochana* [1999] 1 IR 249; [1998] 2 ILRM 523 (SC) in this regard. Gerard Hogan and Gerry Whyte, *The Irish Constitution* (4th ed, LexisNexis Butterworths, 2004, reprinted by Tottel Publishing, 2006), at 553-554. However it is unlikely that current provision for the right to be heard in Ireland, whereby the judge has discretion to appoint a representative or order a report, could be said to constitute compatibility with Article 12.

[171] See Chapter 5.

[172] [2008] IEHC 382.

[173] See further Volume II for consideration of the influence of this treaty on implementation of the right to be heard in Ireland.

[174] [2008] IEHC 382, at para.3.

2201/2003[175] should be interpreted in a way which gave effect to "the right of the child to be heard, as recognised in Article 12 of the United Nations Conventions on the Rights of the Child, ratified by Ireland on 28th September, 1992."[176] Finlay-Geoghegan J opined that counsel for the mother may have been "overstating the legal status of Article 12 of the UN Convention on the Rights of the Child"[177] in arguing that Article 11(2) should be interpreted as giving effect to the rights given to the child by Article 12 of the CRC. The judge noted that Regulation 2201/2003 does not explicitly refer to the CRC.

The learned judge also made reference to Article 29.6 of the Constitution to emphasise that, although the state had ratified the CRC, the Convention does not form part of Irish domestic law, "because of the fact that it has not been given the force of law in Ireland by the Oireachtas."[178] However, she considered it permissible to have regard to Article 12 of the CRC in the current case, insofar as Recital (33) of Regulation 2201/2003 refers to the aim to seek to ensure respect for the rights of the child as specified by Article 24 of the EU Charter of Fundamental Rights, and the language of Article 24 is clearly based on Article 12 of the CRC. Finlay-Geoghegan J cited the opinion of Baroness Hale that the obligation imposed by Article 11(2) of the Brussels II Regulation is consistent with the obligations of the UK under Article 12 of the CRC.[179] The learned judge concluded that the child in the case should be heard.

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[175] Under Article 13 of the Hague Convention on International Child Abduction there is an exception to the rule of peremptory return where the child objects to that return and has the capacities to be consulted. This provision of the Convention has been strengthened by the Brussels II Regulation 2201/2003, which applies where the habitual residence of the child is an EU state. Article 11(2) of the regulation states that it shall be ensured that children are given the opportunity to be heard during proceedings when applying Article 13 of the Hague Convention.

[176] [2008] IEHC 382, at para. 16.

[177] *Ibid*, at para. 24.

[178] *Ibid*.

[179] *Re. D. (Abduction: Rights of Custody)* [2006] UKHL 51, cited in *N. v N. [hearing a child]* [2008] IEHC 382, at paras. 21 and 25.

The judgment clearly represents progression as regards the right to be heard in the Irish system.[180] However there are some anomalies in this judgment as regards the implementation of international law. As did the Supreme Court in the earlier cases of *Re O Laighleis*[181] and *Norris v Attorney General*,[182] Finlay-Geoghegan J made reference to the fact that Article 29.6 of the Constitution necessitates enacting legislation for international human rights treaties (in this case, the CRC) to become applicable in Irish courts. Finlay-Geoghegan J found it legally more authoritative to rely on Article 24 of the EU Charter of Fundamental Rights, which contains similar language to Article 12 of the CRC. However, as outlined above, the legal basis for the human rights standards enshrined in the EU Charter is questionable.[183] Furthermore, the learned judge referred to a quote from Baroness Hale regarding obligations of the UK under Article 12 of the CRC. Yet the status of the CRC in the UK is equivalent to that in Ireland, as the UK has a dualist system and has not incorporated the CRC into domestic law. Therefore if the UK is subject to obligations under the Article 12 of the CRC as Baroness Hale opined and Finlay-Geoghegan J quoted in the current judgment, then arguably so too is Ireland.

The Irish system remains resistant to interpreting international human rights documents as authoritative without enacting legislation, due to Article 29.6 of the Irish Constitution. However there is cause for optimism in the fact that certain legislation reflects to some extent the provisions of Article 12 of the CRC in that it permits judges to hear children under some

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[180] This judgment was, however, at the level of the Superior Courts and may fail to transfer to the lower courts, where most proceedings involving children take place. Note for example, the failure of the lower courts to systematically implement the judgment of *M.W.P. v T.K.P.* [2007] IEHC 145, in which it was held that the child's right to be heard in proceedings affecting them could be derived as an unenumerated right under Article 40.3 of the Constitution. See Ursula Kilkelly, *Children's Rights in Ireland: Law, Policy and Practice* (Tottel Publishing, 2009), at 63-64 and Chapter 7.

[181] [1960] IR 63 (SC).

[182] [1984] IR 36 (SC).

[183] See above at page 186.

circumstances. It is also encouraging that the *N. v N. [hearing a child]*[184] judgment indicates a willingness to look to obligations at EU level to apply the provisions of Article 12. It remains, however, for Ireland to incorporate the CRC into its legal system and therefore accrue the legal obligation to implement the Article 12 right to be heard.[185]

3.7 Conclusion

It is a difficult and complex task to determine the state obligations which derive from international human rights law in general and the right of children to be heard in particular. The implementation of international human rights standards is subject to the politics inherent in international law, the lack of a force to impose the law created at international level, issues of state sovereignty and the fact that the primary responsibility for implementation of international human rights standards exists at domestic level. There are further problems inherent in the area of children's rights, as this is traditionally a neglected subset of rights. The nature of international human rights law standards begs the question whether it does actually constitute law, and whether states are in fact under the obligations which are ostensibly imposed by the treaties which they have ratified.

States do acquire obligations, however, when they ratify international human rights treaties. It is suggested that states may not necessarily be in breach of Article 12 of the CRC through failure to implement the right to be heard. Rather, it is the obligation to incorporate the provisions of the CRC into domestic law which the state fails to observe when the right to be heard is not implemented. It has been highlighted above that states must generally legislate for international human rights law provisions, whether within monist or dualist systems. Yet to a large extent the problems of

[184] [2008] IEHC 382.
[185] Such incorporation would also make the right to be heard fully justiciable.

implementation of the right to be heard (and indeed other human rights standards) lie in the fact that the incorporation of such legislation at domestic level has not occurred.[186] As highlighted by Cassese, there is no mechanism at international level to monitor incorporation and implementation of international treaties generally.[187] This is surprising, considering the importance of action at domestic level and the frequency with which states fail to incorporate standards.

It must be considered that the CRC has not been accorded significant legal weight in comparison to more widely accepted international human rights law instruments. The ECHR[188] and the ICCPR[189] could be argued to provide for the right of children to be heard. It could be argued that, because of this connection, the right of children to be heard is a self-executing right which can be invoked directly in court.[190] It could also be maintained that the right is a norm of customary international law, if only at European level, for a number of reasons. The fact that European states have generally taken steps to provide in some way for the right to be heard,[191] as well as the increasing inclusion of the provision in recently drafted documents such as the European Charter and the Hague Convention on International Child Abduction all weigh in favour of such an argument.[192] In relation to the status of the right globally, it must be considered that there have only been three reservations to Article 12, and every state (save two) has ratified the

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[186] Or that it has not occurred to an acceptable standard, for example providing for the court to hear children under certain circumstances, but failing to provide for hearing children as a children's right.

[187] Cassese, note 9, at 217. Although international human rights monitoring bodies (such as the Committee on the Rights of the Child) go some way towards providing for this, the existence of a body which focused solely on achieving incorporation would be very welcome.

[188] Most notably Article 6.

[189] In particular Articles 14(1)(4) and 26.

[190] Such an assertion is, however, obviously problematic in the Irish context.

[191] O' Donnell, note 148, at 10-17.

[192] Regarding the exception to the rule of peremptory return where the child objects to that return and strengthened by the Brussels II Regulation 2201/2003. Article 11(2) of the regulation states that it shall be ensured that children are given the opportunity to be heard during proceedings when applying Article 13 of the Hague Convention.

CRC. Moreover, the right to be heard contains features which indicate that it belongs to the category of civil and political rights, meaning it is a right which must be observed immediately. However an international court has yet to acknowledge these points, and to clarify whether the right to be heard is self-executing or constitutes customary international law. The latter claim seems an excessively ambitious one, considering state reports to the Committee on the Rights of the Child indicate that the crucial practice element is missing, as many states have not legislated for the right at domestic level.[193]

Research also highlights the fact that judges are often unaware of international human rights law standards where these standards have not been transposed into domestic law.[194] This has been shown to be the case even within monist systems, where ostensibly it is possible to invoke such standards in national courts.[195] Within Irish case law, when international human rights treaties (which have been ratified by Ireland) have been invoked, reference has continuously made been to Article 29.6 of the Constitution, which provides that international law must be enacted by the Oireachtas in order to be justiciable. However, it has been demonstrated in the case of *N. v N. [hearing a child]*[196] that judges will look to other legal documents, such as the Charter of Fundamental Rights of the EU, to infer human rights standards. Moreover the fact that the ECHR has been incorporated into domestic law indicates the potential for elaboration on the right in the Irish context through the obligations placed on the state by that treaty.

It seems that further debate is needed in relation to the fact that Ireland tends to ratify international human rights law standards and subsequently fails to

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[193] See above at note 3.
[194] Heyns and Viljoen, note 62, at 490.
[195] *Ibid.*
[196] [2008] IEHC 382.

incorporate them into domestic law. This is a crucial point as judges cannot implement human rights laws that have not been transposed into national legislation. Furthermore, it is unsatisfactory that citizens would, as a matter of course, claim their rights through the court system. It is obviously preferable that the rights in question, for example the right of children to be heard, are explicitly provided for in the legislation and applied as a matter of course. There is a clear expectation that states will incorporate into domestic law the international human rights standards enshrined in the treaties which they sign and ratify.

Chapter 4: The Right of Children to be Heard and the Emerging Law of the European Court of Human Rights

4.1 Introduction

This thesis aims to elucidate the right of children to be heard in proceedings affecting them and to have those views taken into account, as stipulated by Article 12 of the Convention on the Rights of the Child. It also seeks to analyse domestic implementation of the right, taking Ireland as a case study. The European Convention on Human Rights[1] is binding in Irish law[2] and the matter of children's views has been a feature of the jurisprudence of the European Court of Human Rights.[3] The Convention also provides a potential vehicle through which to conceptualise the right to be heard as a key civil and political right. Therefore in-depth analysis of the relevant articles and principles of the Convention as well as the jurisprudence of the Court is necessary to give a complete picture as regards European standards in relation to the right of children to be heard.[4]

The ECHR is a regional human rights treaty which was adopted in 1950.[5] It established the European Court of Human Rights, which supervises implementation of the Convention by the states parties. The Convention was drafted within the Council of Europe, an organisation which was founded after the Second World War to uphold democracy, rule of law and human rights in the region. The Convention is distinguishable from other human rights treaties by the right of individual petition which it provides. It is also of note that it constitutes the human rights court with the largest body of

[1] Hereafter referred to as 'the ECHR' or 'the Convention.'
[2] Since the entry into force of the European Convention on Human Rights Act 2003.
[3] Hereafter referred to as 'the European Court' or 'the Court.'
[4] A version of this chapter is to be published as Aoife Daly, "The Right of Children to be Heard in Civil Proceedings and the Emerging Law of the European Court of Human Rights" *International Journal of Human Rights* (forthcoming 2011).
[5] The Convention entered into force in 1953.

jurisprudence in the world, and the many judgments handed down annually provide rich material for human rights analysis.[6]

The Convention entered into force for Ireland on 3 September 1953. It did not form part of Irish law until enacting legislation, the European Convention on Human Rights Act, was adopted by the Oireachtas in 2003. This is due to Ireland's dualist legal system, which requires the translation of international law into domestic law. Without this measure, the Convention was enforceable in Ireland only as a matter of Irish law. However, Irish judgments before the European Convention on Human Rights Act sometimes involved consideration of the Convention and the Irish government was bound to accept findings against it by the Court. Since the enactment of the European Convention on Human Rights Act, Irish courts are required to interpret and apply Irish law in a manner which is compatible with the Convention,[7] and to use the principles of the Convention when making decisions relating to issues pertaining to that Convention, as a matter of Irish law.[8] Furthermore, organs of the state are obliged to perform functions in a manner which is compliant with the Convention.[9]

The ECHR, one can argue, relates primarily to civil and political rights because of the fact that it is a product of the perceived needs of Europe after

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[6] Indeed, some commentators question the emphasis on the Convention on the Rights of the Child for vindicating the rights of children, over the European Convention on Human Rights, as the former Convention is not binding unless incorporated into domestic law, see e.g. Christina Lyon, "Interrogating the Concentration on the UNCRC Instead of the ECHR in the Development of Children's Rights in England?" 21 *Children and Society* 147 (2007).

[7] Section 2(1).

[8] Section 4.

[9] Section 3(1). However O'Connell *et al.* indicate that it is not entirely clear that incorporation of the Convention into Irish law is seen as "providing added-value in terms of substantive rights protection." Donncha O'Connell *et al.*, *ECHR Act 2003: A Preliminary Assessment of Impact* (Dublin Solicitors Bar Association and Law Society of Ireland, 2006), at 119.

the Second World War.[10] Despite a handful of references to children,[11] it is also notably lacking in provision for their specific interests. Kilkelly states that in light of the lack of express children's rights in the Convention, the potential of the right of children to equal enjoyment of the Convention needs to be maximised.[12] Article 1 of the Convention, after all, refers to the state obligation to "secure to *everyone* within their jurisdiction the rights and freedoms" (emphasis added) of the Convention. Article 14 also stipulates that the rights in the Convention are to be enjoyed without discrimination. The Court has not had the opportunity to date to consider whether states are obliged to adopt measures to ensure the effective enjoyment of the right of children to be heard in the civil context (i.e. care and custody/access proceedings).[13] Kilkelly makes the point, however, that neither has the Court attempted to limit the enjoyment of participation rights of children in this regard.[14] Indeed, where the matter of hearing children has come before the Court, it has generally taken a positive approach to children's views.[15] The matter has arisen in a number of care and custody/access cases where parents have sought to assert Convention rights.

It is notable that while many of the cases which have come before the Court have related to children– in particular under Article 8, the right to family

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[10] It should be noted that some provisions of the Convention relate to economic, social and cultural rights, such as (potentially) the right to education.

[11] Article 5 provides for the rehabilitation of minors in conflict with the law, Article 6 stipulates that the press and the public may be excluded from hearings in the interests of minors, and Article 1 of Protocol 2 (ETS No 44, entered into force 21 September 1970) guarantees the right to education. Article 5 of Protocol 7 (ETS No 177, entered into force 22 November 1984) also recognises the right of the state to take measures necessary in the interests of the child.

[12] Ursula Kilkelly, *The Child and the European Convention on Human Rights*, (Ashgate, 1999), at 3.

[13] The Court has found that special measures may be necessary to vindicate the right of children to a fair trial in criminal proceedings in *T. v UK* (1999) 30 EHRR 121.

[14] Kilkelly, note 12, at 117. It is arguable, however, that the case law frames the procedural aspects of hearing children as parental rights, which may be said to limit the enjoyment of the participation rights of children. Please see below.

[15] For example *Olsson (No. 2) v Sweden*, Appl. No. 13441/87, judgment of 30 October 1992, *Hokkanen v Finland,* Appl. No. 19823/92, judgment of 23 September 1994 and *C. v Finland*, Appl. No. 18249/02, judgment of 9 May 2006.

life– few have been brought by the children themselves[16] (whilst still children, or whilst adults).[17] The fact that the applicants are usually parents has resulted in the Court determining these cases from the perspective of those parents.[18] Therefore the Court has not yet been called upon to determine whether the rights of a child under the Convention were violated by a failure to be heard by decision-makers in care or custody/access proceedings. Neither has the Court considered issues which extend from the right to be heard in civil law proceedings, for example whether children possess a Convention right to be represented through lawyers or other experts (which may be necessary for younger children or children who do not wish to attend court)[19] or the right to be present at such proceedings.[20]

The right to be heard is not explicitly expressed in the ECHR. Indeed the Convention was adopted in 1950, long before the principle of participation of children in matters affecting them had entered the arena of international human rights law. However the Convention can be seen as a 'living instrument' in that it evolves in line with social developments on the basis of consensus on a particular issue within Europe.[21] For example, at the time at which the Convention was drafted, it was acceptable to discriminate

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[16] It is possible for children to take cases under the European Convention on Human Rights. See e.g. *Valsamis v Greece*, Appl. No. 21787/93, judgment of 1 October 1994 and *T.P. and K.M. v UK*, Appl. No. 28945/95, judgment of 10 May 2001.

[17] Ursula Kilkelly, *Children's Rights in Ireland: Law, Policy and Practice* (Tottel Publishing, 2009), at 40.

[18] *Ibid.*

[19] This is because of the fact that, in many jurisdictions, such as the Republic of Ireland, judges usually do not speak with children in such cases. This is arguably an appropriate approach as they are not specifically trained to do so. However it may necessitate the representation of children through the report of a social worker, or the presence of a neutral representative of that child in court (e.g. a lawyer or guardian *ad litem*).

[20] The Court has found that the accused must be present at the trial hearing in criminal proceedings in *Ekbatani v. Sweden*, Appl. No. 10563/83, judgment of 26 May 1988, para. 25. The requirement that the parties be present in civil proceedings, however, only extends to certain types of cases. See generally Nuala Mole and Catharina Harby, *The Right to a Fair Trial: A guide to the implementation of Article 6 of the European Convention on Human Rights, Handbook No. 3* (Council of Europe, 2006).

[21] See e.g. Laurence Helfer, "Consensus, Coherence and the European Convention on Human Rights" 26 *Cornell International Law Journal* 133 (1993). An analogy can be drawn here between the evolutive nature of the Convention and the vibrant unenumerated rights tradition in Irish constitutional law under Article 40.3.

against children on the grounds of 'illegitimacy' however subsequent social trends rendered this approach unacceptable.[22] Therefore the lack of an overt reference to the right of children to be heard (in cases where the views of children are factors in decision-making of domestic courts) does not preclude a "reading into" the Convention of the existence of such a right by the Court.

Consequently there are two issues to be considered in this chapter in relation to the right of children to be heard and the European Convention on Human Rights. First, the potential for the right to be derived from relevant provisions of the Convention (primarily through the right to family life and the right to a fair trial) will be examined. Secondly, the matter of how the Court has dealt with the issue of hearing children in its jurisprudence will be analysed. It will be argued that, although the ECHR does not contain a direct reference to the right of children to be heard, and although the Court has not yet derived such a right from the Convention, such a right is compatible with the Convention. It will also be argued that there is strong indication that the Court will acknowledge it as a Convention right, if and when a relevant case is taken.[23]

4.2 Guiding Principles of the European Convention on Human Rights

To analyse the position of the right of children to be heard under the ECHR, it is necessary to consider the principles of that Convention. There are features of the principle of evolutive interpretation, of the positive obligations inherent in the Convention and of the doctrine of the margin of appreciation that facilitate a reading into the Convention of a right of

[22] This was the basis of the outcome of the case of *Marckx v Belgium* (1979-80) 2 EHRR 330. The case involved discriminatory provisions within Belgian family law which hindered the development of family ties between unmarried mothers and their children.

[23] That is a case claiming a violation of Article 6 (the right to a fair trial) or Article 8 (the right to family life) and possibly also Article 14 (the right to freedom from discrimination) on the basis that the child was not heard, or not effectively heard, in proceedings affecting her.

children to be heard. Such a right is not explicitly expressed in the Convention. However the Convention can be seen as a 'living instrument'[24] which gives rise to evolutive interpretation by the Court implementing it. This evolutive approach to interpreting the Convention taken by the Court provides much potential for the development of the right of children to be heard.

Unenumerated rights, i.e. rights which are not explicitly stipulated in the Convention but can be derived from it, provide much potential for vindicating the right to be heard through the Convention. The Court has read unenumerated rights into the Convention, the keystone case being *Golder v United Kingdom*.[25] In this case, the Court found that the language of Article 6 (regarding the right to a fair trial) does not solely refer to proceedings which are pending, but may also encompass a right to have disputes relating to civil rights determined by a court. The Court has continued in this direction of considering the Convention as a 'living instrument' and deriving from it certain unenumerated rights. The Court has gone so far as to recognise rights that the drafters had clearly not intended to grant such as in the case of *Young, James and Webster v United Kingdom*.[26] Considering this high level of evolutive interpretation, it seems that there is much scope for arguing that a right of children to be heard can be derived from the Convention, particularly under Articles 6 and 8.[27]

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[24] The *Tyrer* case (*Tyrer v United Kingdom*, Appl. No. 5856/72, judgment of 25 April 1978) first inaugurated this 'living instrument' approach .

[25] *Golder v United Kingdom*, Appl. No. 4451/70, judgment of 21 February 1975.

[26] Appl. No. 7806/77, judgment of 13 August 1981. This case concerned mandatory membership of a trade union. The Court found that such mandatory membership was in breach of the Convention, despite the drafters of the Convention having purposely omitted a right to freedom from mandatory membership (as evident from the *travaux préparatoires* of the ECHR).

[27] It is arguably likely that the right will be derived from Article 6, as the case law on the right to a fair trial has been found by the Court to involve a right to legal representation in civil law cases. However since there are "procedural requirements implicit in Article 8" (*Sahin v Germany*, [2003] 36 EHRR 765, para. 77) claiming the right to be heard as falling under Article 8 may also be successful.

There is further indication that the right to be heard can be derived from the ECHR because of increasing reference to the Convention on the Rights of the Child by the European Court. Although the Convention on the Rights of the Child has weaker legal authority at domestic level than the European Convention on Human Rights,[28] it is arguable that the two instruments are related and compatible in a number of ways. All European countries are party to the Convention on the Rights of the Child. Moreover, there are common principles within the two systems of governance, such as the principle of the best interest of the child, enshrined within Article 3 of the Convention on the Rights of the Child. The European Court has adopted the language of the Convention on the Rights of the Child in relation to the best interest principle.[29] Where the Court considers a case involving the Article 8 rights of a parent, the Court emphasises (in all such cases) that a 'fair balance' must be struck between the child's interests and those of the parent.[30] The Court also states that in attempting to strike this balance, the principle of the best interests of the child is to be considered particularly important.[31] Depending on the nature and gravity of the issues at hand, such interests, the Court stresses, may take precedence over those of the parent.[32]

Increasing reference by the Court to the Convention on the Rights of the Child is a positive development (in terms of children's rights) in the jurisprudence of the Court. In *Keegan v Ireland*, for example, the Court made reference to Article 7 of the Convention on the Rights of the Child, which provides "that a child has, as far as possible, the right to be cared for by his or her parents."[33] The Convention on the Rights of the Child has been

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[28] For example the ECHR has been incorporated into the Irish legal system while the Convention on the Rights of the Chils has not. Moreover, the CRC has arguably more vague provisions than the ECHR, and does not have the benefit of authoritative interpretation by an international court.
[29] See e.g. *Bronda v Italy* (2001) 33 EHRR 81, para. 59.
[30] See e.g. *Elzholz v Germany* Appl. No. 25735/94, judgment of 13 July 2000, para. 50.
[31] *Ibid.*
[32] *Ibid.*
[33] *Keegan v Ireland*, Appl. No. 16969/90, judgment of 26 May 1994, para. 50.

considered by the Court as part of relevant domestic and international law in the cases of *Sahin*[34] and *Sommerfeld*.[35] In *Sommerfeld* the Court describes the Convention on the Rights of the Child as setting out "the human rights of children and the standards to which all governments must aspire in realising these rights for all children."[36] The European Commission on Human Rights[37] has also gone so far as to attach weight to concluding observations of the Committee on the Rights of the Child.[38] Considering these references by the Court (and formerly the Commission) to the principle of the best interest of the child and notions of children's rights, it is quite possible that consideration would be given by the Court to Article 12 of the Convention of the Rights of the Child in a case which turned on the claim that the right of an individual child to be heard was not upheld by the state in question.

Positive obligations under the Convention can be argued to apply to the right of children to be heard.[39] While the essential object of the Convention is to protect individuals from arbitrary state interference, it does not solely place obligations on public authorities to refrain from such interference. As well as the negative obligations stipulated by the Convention, positive obligations also exist, whereby the state is obliged to facilitate the vindication of a Convention right. Kenna states that, "[t]he doctrine of positive obligations requires Member States to protect individual persons from threats to their Convention rights or to assist them to achieve full

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[34] *Sahin v Germany*, (2003) 36 EHRR 765.
[35] *Sommerfeld v Germany*, Appl. No. 31871/96, judgment of 8 July 2003.
[36] *Ibid*, para. 37.
[37] The Commission was a special tribunal which decided whether cases would be heard by the Court, until its abolition by Protocol 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No 155, adopted 11 May 1994, entered into force 1 November 1998.
[38] *A. v UK*, Appl. No. 25599/94, Comm Rep, 18 September 1997, Reports 1998-VI no 90.
[39] Starmer comments that, "[p]ositive obligations are the hallmark of the European Convention on Human Rights, and mark it out from other human rights instruments; particularly those drafted before the Second World War." Keir Starmer, "Positive Obligations under the Convention" in Jeffrey Jowell and Jonathan Cooper, eds, *Understanding Human Rights Principles* (Hart, 2001), at 159.

enjoyment of those rights."[40] As outlined in Chapter 1, children are operating in an adult world in the court system. To participate effectively in this system, adequate resources may be necessary for that structure to be adapted to the needs of children through guardians *ad litem* and other facilities. The principle of effectiveness, which was first emphasised by the Court in the case of *Airey v Ireland*,[41] is also crucial in this regard. This principle recognises that an individual may require assistance from the state for meaningful enjoyment of rights. The Convention protects rights which are practical and effective, not simply theoretical. It is also relevant that the Court held in the case of *McCann v United Kingdom*[42] that the state may be required to take the positive step of expending resources in order to implement civil and political rights effectively. The right to a fair trial may have economic aspects, as it may require that the state provides certain facilities, such as legal representation.

It is important to also consider the doctrine of the margin of appreciation. This doctrine permits the European Court to take into consideration the fact that individual states may interpret the Convention differently for cultural, historic and philosophical reasons. It was developed by the Strasbourg organs and is not found in the text of the Convention itself.[43] It is possible that, were a case to be taken on behalf of a child before the European Court claiming a violation of Articles 6 and/or 8 on the basis that the child had not been heard, the doctrine of the margin of appreciation might prevent a finding in favour of the child. The Court has held that states "enjoy a wide margin of appreciation in deciding how the right of access to court should

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[40] Padraic Kenna, "Housing Rights: Positive Duties and Enforceable Rights at the European Court of Human Rights" 13 *European Human Rights Law Review* 193 (2008).
[41] See e.g. *Airey v Ireland* (1979-80) 2 EHRR 305.
[42] *McCann v United Kingdom*, Appl. No. 18984/91, judgment of 24 April 1994. The Court found that the state is under the obligation to investigate suspicious deaths of individuals in state custody or deaths that result from the use of force by the state.
[43] See George Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, (Oxford University Press, 2009), at 80.

be circumscribed."[44] This may limit the procedural obligation on states to hear children (although it could not negate the existence of such a right). It would certainly permit states considerable leeway regarding how children are to be heard. However one must consider, as the Court presumably would, that all European States have ratified the Convention on the Rights of the Child, which enshrines the right of children to be heard in all proceedings affecting them, and to have those views accorded weight in accordance with age and maturity.[45] This seems to constitute a strong argument in favour of a broad application of the right. Moreover, the right to a fair trial has been emphasised by the court as a particularly important right amongst member states,[46] and as outlined in the following section, the right to be heard is closely related to fair trial rights.

4.3 Provisions of the European Convention on Human Rights Most Relevant to Article 12

There are a number of provisions contained in the Convention which are arguably relevant to the right of children to be heard. Article 1 of the Convention refers to the state obligation to "secure to *everyone* within their jurisdiction the rights and freedoms" (emphasis added) of the Convention. Furthermore, Article 14 of the Convention stipulates that Convention rights must be secured "without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other

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[44] *Stubbings v United Kingdom* (1996) 23 EHRR 213, para. 55.

[45] Article 11(2) of Council Regulation (EC) No. 2201/2003 (the 'Brussels II Regulation') also stipulates that states must ensure children the opportunity to be heard during proceedings when applying Article 13 of the Hague Convention on the Civil Aspects of International Child Abduction (1980), unless this appears inappropriate having regard to the age or degree of maturity of the child. The fact that this provision is applicable to all EU states lends further weight to the right to be heard.

[46] *Golder v United Kingdom*, Appl. No. 4451/70, judgment of 21 February 1975, and *Airey v Ireland* (1979-80) 2 EHRR 305.

status."[47] The phrase "other status" could clearly be interpreted to include age. This provision provides further potential to protect the rights of children under the Convention generally, and the right of children to be heard in particular. It is arguable that children who are the subject of care or custody/access proceedings suffer discrimination if their right to be heard is not vindicated to the same extent as the adults involved.

The right to respect for family life is enshrined in Article 8 of the Convention.[48] This provision has been most prominent in cases which have involved issues relating to courts hearing children due to "procedural requirements implicit in Article 8."[49] A number of cases which have been brought by parents under Article 8 relate to care, custody and access. Many of these cases involve parents alleging breaches of their Article 8 rights on the basis that, *inter alia*, their child was not heard,[50] that expert opinions should have been sought regarding children's wishes,[51] or that the views of children should not have been determinative.[52] Parents have a right to adequate participation in decision-making processes related to Article 8. The Court held in *Elzholz*, for example, that the lack of expert advice to the Court on the views of the child (as well as the lack of appeal at regional level) constituted "an insufficient involvement of the applicant in the

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[47] Previously, a claim of violation of Article 14 was limited by the fact that such a claim had to be taken in conjunction with a substantive article of the Convention, however this has been changed through Protocol 12 to the European Convention for the Protection of Human Rights and Fundamental Freedom, ETS No 177, adopted 4 November 2000, entered into force 1 April, 2005.

[48] Article 8 reads:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

[49] *Sahin v Germany*, (2003) 36 EHRR 765, para. 77.

[50] *Sahin v Germany*, (2003) 36 EHRR 765.

[51] *Elzholz v Germany*, Appl. No. 25735/94, judgment of 13 July 2000.

[52] *C. v Finland*, Appl. No. 18249/02, judgment of 9 May 2006.

decision-making process"[53] and was, therefore, in violation of Article 8. It will be argued below that the jurisprudence under Article 8 has indicated a worrying trend– a construction of hearing children in proceedings affecting them as a right of the adults involved. This may be due to the fact that the ECHR ostensibly applies to all individuals, however children are inevitably a disempowered group. Walsh makes the point that Article 8 of the ECHR:

> [R]efers to the privacy of the family as if 'the family' was composed of members with shared interests. An assumption in legal documents of the sharing of interests by groups of persons can often merely reinforce the de facto power of particular members of that group to secure their own interests.[54]

It seems that, in order for the right to be heard to be vindicated from a child rights perspective under the ECHR, it will be necessary that a child petitioner taken a case under Article 8. It is arguable that, if Article 8 of the Convention is to be interpreted as according parents the right to be adequately involved in a decision-making process concerning a child, then the child involved should be accorded the same right. The child is, after all, the subject of the relevant proceedings. The right of a child to be heard in proceedings relating to care and custody/access proceedings could, then, be recognised by the Court as a procedural requirement under Article 8. As outlined above, it has long been held by the Court that positive obligations can be derived from Article 8 of the Convention.[55]

The right to a fair trial under Article 6(1) of the Convention is also relevant to the right of children to be heard. Article 6 has often been invoked by

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[53] *Elzholz v Germany*, Appl. No. 25735/94, judgment of 13 July 2000, para. 53.
[54] Bernadette Walsh, "The United Nations Convention on the Rights of the Child: A British View" 5 *International Journal of Law and the Family* 170 (1991), at 185.
[55] *Airey v Ireland* (1979-80) 2 EHRR 305.

parents,[56] in addition to Article 8, as a basis from which to argue that procedural requirements under the Convention have not been met in care and custody/access cases. The text of Article 6 provides that, "[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." One could certainly argue that care and custody/access proceedings relate to the civil rights of a child[57] and that a child has not enjoyed a fair trial in such proceedings where the views of that child were not heard. Considering the decision in *Airey v Ireland*[58] regarding positive obligations, it can also be argued that children must be provided assistance where necessary in civil matters relating to care and custody/access. The Court established in *Airey* that the state may be compelled by Article 6 to provide legal assistance in civil law disputes when this is necessary for effective access to court "either because legal representation is rendered compulsory, as is done by the domestic law of certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or of the case."[59] Although the factor of 'capacity of the individual involved' was not added by the Court in this paragraph, one could reason that procedures could be considered to be more complex for those with less developed capacities (such as children). These individuals could be argued to require extra assistance (such as a guardian *ad litem*) to enable them to deal with the complexities of proceedings, and therefore enjoy the effective exercise of the rights enshrined in Article 6.

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[56] E.g. *Hokkanen v Finland* (1994) 19 EHRR 139, *Sommerfeld v Germany*, Appl. No. 31871/96, judgment of 8 July 2003, *C. v Finland*, Appl. No. 18249/02, judgment of 9 May 2006, *Haase v Germany*, Appl. No. 11057/02, judgment of 8 April 2004 and *Elzholz v Germany*, Appl. No. 25735/94, judgment of 13 July 2000 (although the Court found a violation of Article 6 only in the case of *Elzholz*).

[57] The Court held in *H. v France*, Appl. No. 10073/82, judgment of 24 October 1989, that the determinative point regarding whether Article 6 is applicable or not is whether the outcome of the proceedings in question is decisive in relation to private law rights and obligations.

[58] *Airey v Ireland* (1979-80) 2 EHRR 305.

[59] *Ibid*, para. 26.

The obligation of the state to make special provision for children in criminal proceedings has already been established by the Court. The case of *T. v United Kingdom* [60] involved a child who was accused of a serious crime. The Court found that it was insufficient that the child was represented by skilled lawyers for the purposes of Article 6, as the inhibitions and immaturity of the applicant precluded him from effectively participating in the proceedings affecting him.[61] As the state has an obligation to facilitate children to participate effectively in criminal proceedings concerning them to meet the requirements of Article 6, it may follow that, under the Convention, guardians *ad litem* (or other experts where appropriate) are necessary to allow children to participate effectively in civil proceedings, because of the inhibitions and immaturity of some children. The Court held in this case, then, that some procedures which are deemed in conformity with Article 6 in relation to adults need to be modified to vindicate the right to effective participation for children.

It is, as yet, unclear whether it is more likely that the right of children to be heard will be established under Article 6 or Article 8 of the Convention. It is probable that, as the parents in the following cases have done, children would invoke both of these provisions to claim that they have not had the opportunity to participate adequately in care or custody/access proceedings affecting them. Nevertheless the relevant case law appears to provide evidence that the right of children to be heard, as well as the right to be represented or assisted where necessary, can be derived from the Convention. It is possible to analyse the scope of the right of children to be heard under the Convention through further examination of case law relating to care and custody/access proceedings.

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[60] (1999) 30 EHRR 121.

[61] The Court opined that, "the formality and ritual of the Crown Court must at times have seemed incomprehensible and intimidating for a child of eleven." *Ibid*, at 88.

4.4 Case Law

It is insightful to examine the approach of the Court to hearing children in case law relating to care, custody and access proceedings. As outlined above, neither the Commission nor the Court have heard a case involving the right of children to be heard as a substantive matter, i.e. no applicant has brought a case to the Court on the basis of an alleged violation of her own right to be heard during childhood. This is undoubtedly an indicator of the nature of the right– it is a relatively new right, it is not explicitly expressed in the Convention and it is held by a group which has traditionally been deprived of civil and political rights.[62] Indeed, such a claim has never expressly arisen in any international court to date. Furthermore, it is a reflection of the nature of the Convention. The Court can be seen as an institution which makes determinations on the implementation of rights contained in a Convention which imposes principally negative obligations on states to refrain from infringing rights, rather than positive obligations which necessitate states to provide for rights.[63] Finally, litigants are more likely to be concerned with their substantive (as opposed to procedural) rights in proceedings in which the issues of children's voices arise.

There have, however, been a number of cases in recent years which were brought before the Court in which the voice of the child was pivotal to the outcome of the case (both at domestic level and at the level of the European Court of Human Rights). Such case law has primarily been taken by parents (as opposed to having been taken by children) under Article 8, the right to family life as well as Article 6, the right to a fair trial. Although the applicants in the relevant cases are not children, this case law indicates the

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[62] The challenges of children as parties to proceedings must also be considered. Issues of parental consent, child protection, and other practical matters render it more difficult for interested lawyers and non-governmental organisations to litigate on behalf of children as opposed to adults.

[63] It is of note that some rights straddle the (supposed) boundary between civil and political and economic, social and cultural rights, such as the right to education.

scope that could be accorded to the right to be heard by the Court, as well as issues of the margin of appreciation doctrine which may affect the treatment of that right by the Court. Although the Court has not yet explicitly framed hearing children as a state obligation under the Convention,[64] the Court has demonstrated at times a high level of regard for the views of children, indicating that states have a margin of appreciation to permit children's wishes to be determinative under certain circumstances.[65] Furthermore, both the Commission and the Court have emphasised concurrence with the principle of acting in accordance with the wishes of the child where possible.[66] In 1994 the refusal of a child to have contact with her father was found to justify interference with the father's Article 8 rights in *Hokkanen v Finland*.[67] However the Court held six years earlier in *Nielsen v Denmark*[68] that the right to family life of a 12 year old boy was not violated by his detention in a psychiatric ward on the request of his mother (subject to medical control).[69] The boy was not mentally ill, but rather resisting the custody of his mother in favour of his father, and expressed a strong wish not to be detained in the institution. The Court opined that:

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[64] Kilkelly describes the role of the Court (and Commission) as "passive, rather than dynamic" in this regard. Kilkelly, note 12, at 117.

[65] See e.g. *Olsson (No. 2) v Sweden*, Appl. No. 13441/87, judgment of 30 October 1992. This indicates that the margin of appreciation can work both for and against the right of children to be heard..

[66] In *Hokkanen v Finland* (Appl. No. 19823/92, judgment of 23 September 1994, para. 61) the Court stated that:

> [T]he Court of Appeal came to the conclusion that the child had become sufficiently mature for her views to be taken into account and that access should therefore not be accorded against her own wishes (see paragraph 37 above). The Court sees no reason to call this finding into question.

[67] *Ibid.* It should be noted, however, that the Commission had been of the opinion that, because the child had expressed these opinions only in the presence of her present carers, little importance should have been attached to them. The Commission further emphasised that authorities should not refuse a parent access solely based on the wishes of the child without a consideration of the age and maturity of the child. However the Commission did not elaborate on how this should be done (No 19823/92 Comm Report, 22.10.93, Series A no 299, at 31).

[68] (1988) 11 EHRR 175, para. 61.

[69] It should be noted that the Commission had found such a failure. No 10924/88, Comm Report, 12 March 1987, Series A no 144, paras 125-126.

> [A] child may have to be hospitalised for medical treatment. Family life in this sense, and especially the rights of parents to exercise parental authority over their children, having due regard to their corresponding parental responsibilities, is recognised and protected by the Convention, in particular by Article 8 (Article 8).[70]

This judgment indicates a significant degree of weight in favour of parental rights over the rights of children generally and the right to be heard in particular. It must be considered that it is now over two decades since the Court provided the decision in this case. The Convention on the Rights of the Child, which has since influenced the Court's reasoning, had not yet been drafted at the time of the judgment.[71] As the case law below indicates, the approach of the Court to the right of children to be heard has progressed significantly since *Nielsen*. In the recent case of *C. v Finland*,[72] for example, the Court acknowledged that in custody and access proceedings, "[i]t is generally accepted that courts must take into account the wishes of children in such proceedings."[73] This indicates a shift from the Court simply holding that it is not in violation of the Convention for practice in an individual state to involve seeking the views of children (as in *Hokkanen v. Finland*[74]), to actually acknowledging that this is in fact common practice, perhaps implying that it is best practice.

The following case law clarifies a number of issues relating to the approach of the European Court of Human Rights to hearing children. The case law illustrates the margin of appreciation accorded to states under the Convention in relation to the extent to which children are consulted by state authorities and the weight which is given to their views. It must be borne in mind that it is the participation of parents in the decision-making process

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[70] *Ibid.*
[71] The Convention on the Rights of the Child opened for signature on 20 November 1989.
[72] *C. v Finland*, Appl. No. 18249/02, judgment of 9 May 2006.
[73] *Ibid*, para. 37.
[74] *Hokkanen v. Finland* (Appl. No. 19823/92, judgment of 23 September 1994, para. 61).

(relating to matters of care, custody and access) that is primarily at issue in the following cases, due to the fact that parents are the applicants.[75] The matter of the participation of the children involved arose only because parental rights were being considered. However the case law, primarily that relating to Article 8, provides valuable insight into the scope of the potential right to be heard (as expressed in the Convention on the Rights of the Child) under the ECHR.

4.4.1 Hearing the Child as the Right of a Parent

The emergence of the jurisprudence of the Court as regards the procedural right of parents to have their children heard in care and custody/access proceedings highlights, in some respects, the lack of a child-rights approach in the Court's reasoning. The case of *Sahin v Germany*[76] explicitly relates to whether a parent has a right under Article 8 of the ECHR to have the views of the child heard in disputes regarding contact. The Convention on the Rights of the Child, however, clearly frames hearing children as a right of the child.[77] When the *Sahin* case came before the European Court of Human Rights, the Court Chamber found that the Article 8 rights of the applicant father were violated by a failure of the domestic courts to hear his four year old child, whose mother refused to cooperate with access visits. The domestic courts had based their decision on the expert evidence of a psychologist (who had met the child) that to hear the child would be harmful to her.[78] The Court Chamber emphasised that this constituted insufficient

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[75] See e.g. *Sahin v Germany*, (2003) 36 EHRR 765, and *Haase v Germany*, Appl. No. 11057/02, judgment of 8 April 2004.

[76] *Sahin v Germany* (2003) 36 EHRR 765.

[77] Article 12 of the Convention on the Rights of the Child refer to the child to express views 'freely'. The Committee on the Rights of the Child is clear on this point, stating that, "[t]he child, however, has the right not to exercise this right. Expressing views is a choice for the child, not an obligation." Committee on the Rights of the Child, *General Comment No. 12: The Right to be Heard* (1 July 2009) CRC/C/GC/12, para. 16.

[78] The expert had met the child on several occasions and found that she had repressed the memories of her father. The German courts found that the report of the expert was reliable and that, as regards the child, "[t]he disagreements and sometimes open aggression between

involvement of the applicant in the access proceedings. However, on appeal by Germany, the Grand Chamber of the Court overturned this judgment. The Grand Chamber found that, considering the cautious approach of the expert, the German court did not exceed its margin of appreciation when it relied on her findings. The Grand Chamber continued in *Sahin*:

> It would be going too far to say that domestic courts are always required to hear a child in court on the issue of access to a parent not having custody, but this issue depends on the specific circumstances of each case, having due regard to the age and maturity of the child concerned.[79]

The Court seems to imply here that, under certain circumstances, courts are required under the ECHR to hear the child in custody/access cases. It is unclear whether the Court is referring to the obligation of authorities to provide for hearing children in such cases in order to vindicate the rights of the parent, or those of the child. However, considering the context of *Sahin* was a parent claiming a violation of his Convention rights due to a failure of the courts to hear his child, it is likely that the Court is referring to parental rights in the above quote.

The finding of the Grand Chamber validates the fact that, from a best interests standpoint, it seems extremely unwise to expect domestic courts to seek the direct testimony of such a young child against the expert advice of a psychologist. The initial finding of the Chamber risked a reading into the Convention of a parental right that their children be heard in all cases where those children are resisting access (even against expert advice). The wording contained in the judgment of the Grand Chamber seems to imply a reading

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her parents– in other words, the family violence she witnessed– have certainly left their mark on her" (para. 26). To question the child about her relationship with her father would, therefore, have placed the young child under psychological strain, according to the German courts.

[79] *Sahin v Germany* (2003) 36 EHRR 765, para. 73.

into the Convention of a parental right that their children be heard in some cases. The overturning of the ruling by the Grand Chamber is certainly a positive step for children's rights under the Convention, as it signifies that states are not obliged to hear a child where it would be harmful to the child in question. However, this ruling still frames hearing children as a parental right. This is highly questionable from a children's rights perspective, and possibly in contravention of the Convention on the Rights of the Child.

The Court has also considered the issue of whether Article 8 includes the right of a parent to have expert opinion (concerning the expressed wishes of a child not to have contact with the parent) submitted to courts in cases where children resist access. This has primarily arisen in cases where fathers have claimed that the resistance of a child to attend access visits are due to the inordinate influence of the mother, implying that children's views require analysis in such cases to determine such influence. The Convention on the Rights of the Child does not clarify whether such analysis is desirable from a children's rights perspective. Neither has the Committee on the Rights of the Child clarified whether it is the right of children (particularly younger children) to have best interests evaluated by professionals in addition to having their opinions heard.[80] Nevertheless, these European Court cases (as with *Sahin*) also frame 'hearing children' as a parental right, by claiming expert advice on children's views as a right of a parent, as opposed to being in the best interests of the child.

The case of *Elzholz v Germany*[81] concerned an alleged violation of the Article 8 rights of an unmarried father. From the ages of five to seven years his son expressed a wish in the domestic courts not to see his father and the

[80] Although the Committee states that it is the right of children to decide whether to be heard directly or through a representative (Committee on the Rights of the Child, note 77, para. 35). However whether it is the right of children (particularly younger children) to have best interests evaluated by professionals in addition to having their opinions heard has not been clarified by the Committee to date.
[81] Appl. No. 25735/94, judgment of 13 July 2000.

mother of the child refused to bring him to access visits. Because of the objections of both mother and child, the German courts refused to compel visits. The European Court found that there had been a violation of Article 8 (as well as Article 6) because the German courts should have sought an expert opinion on the views of the child, combined with the fact that there was no possibility of appeal at regional level. Indeed, considering the young age of the child, it may well be advisable that courts should seek expert opinions to guide them in decision-making in cases where such young children resist access visits. It is unfortunate, however, that because of the fact that the applicant in this case was the father, the obligation of the state to seek expert advice in this context is framed as a parental right. It is arguable that children, particularly those who are very young, should be accorded the right to expert advice to the courts on their views, so that children do not have to attend court at a young age, and so that both the best interests and the wishes of the child are considered by those courts. Under Article 12 of the Convention on the Rights of the Child, children may be heard by the court "directly, or through a representative."[82]

Alternatively, in the case of *Sommerfeld v Germany*[83] the Court found (just three years after the case of *Elzholz v Germany*[84]) that the Article 8 right of the applicant father had *not* been violated by the failure of the German courts to order a more recent expert opinion on the views of his daughter who consistently stated that she did not wish to have access visits with him. A psychologist had reported to the courts when the child was aged 10 years that it was not in the best interests of the child, M., to see her father before she was ready for such a visit. When she was aged 13, the domestic courts dismissed her father's appeal for access without further expert evidence, refusing to enforce a previous court order for access because of the wishes

[82] Indeed the Committee on the Rights of the Child asserts that states have a particular obligation to facilitate children who may experience difficulties in expressing their views (Committee on the Rights of the Child, note 77, para 21). Expert advice may be considered to facilitate the right to be heard.
[83] Appl. No. 31871/96, judgment of 8 July 2003.
[84] Appl. No. 25735/94, judgment of 13 July 2000.

of the child. The European Court held that, considering that the domestic courts had heard the 13 year old girl directly, they were therefore "well placed"[85] to evaluate the wishes of the child and to determine whether she could make up her own mind. The consistent views of the child, held for a number of years, was also a consideration.

The reasoning in *Sommerfeld*, that because the views of the child were held consistently for a number of years there was no need for further expert evidence examining her views, seems in contrast to the reasoning in *Elzholz*, which had been determined by the Court a number of years previously. In this case, the Court determined that there was indeed a need for expert evidence in such a case. The two findings are indicative of the case by case approach taken by the Court, with each case turning on its own facts. It is probable that the fact that the child involved in the *Sommerfeld* case was five or six years older than the child in *Elzholz* partially explains the difference in approach by the Court. It is possible that the court order in relation to the psychological report a number of years previous to the appeal was another reason for the decision. However the Court does not express this in the judgment, and only compares the present case to *Elzholz* in relation to the allegation of a violation of Article 14. This is unfortunate, as a reasoned explanation by the Court for the difference in approach in two very similar cases would have provided clarity.

The European Court of Human Rights also gave much consideration to the amount of times that the child in *Sommerfeld* had been heard by the domestic courts. In *Elzholz*, because of the relatively young age of the boy, the court had not heard his views as frequently or for as many years. This may be another reason for the discrepancy between the decisions of the two cases, and the finding of the Court that that expert evidence was necessary in *Elzholz*, but that it was not necessary in *Sommerfeld*. It seems reasonable

[85] *Sommerfeld v Germany*, Appl. No. 31871/96, judgment of 8 July 2003, para. 72.

for the Court to conclude that in the case of *Sommerfeld* the judge was well placed to make his own determinations on the views of the child, but that assistance may be needed for judges making decisions relating to the views of younger children. Again, explicit reasoning by the Court would have been useful here. In any case, it seems possible for one to assert that the Court has, albeit indirectly, indicated through *Sommerfeld* that it is acceptable for states to give significant (and possibly determinative) weight, without expert analysis, to views consistently held by children aged 10-13 years (but not children aged five to seven years, as in the case of *Elzholz*). The Convention on the Rights of the Child provides that the views of children should be given "due weight in accordance with the age and maturity of the child."[86] It is notable that, considering the developmental stages of children, the approach by the Court in *Sommerfeld* (i.e. holding that the views of children of this age should be accorded significant weight) does seem appropriate in terms of children's rights.[87]

In both *Sahin*[88] and *Sommerfeld*[89] the Grand Chamber held that whether a child will be heard in court (and whether an expert will be involved) depends on the circumstances of a particular case, and the age and maturity of the child involved. It is unfortunate that *Sommerfeld* did not clarify the boundaries in this regard. It is also regrettable that the best interests of the child (as being heard may be harmful, as in *Sahin*) and the willingness of children to contribute (some children may not wish to) were not explicitly added by the Court as important considerations, as these are vital issues

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[86] Article 12.

[87] According to Piaget, abstract thought starts to become sophisticated in young people at approximately age 12, although children start to develop the capacity to think logically about concrete events at age seven. See e.g. Jean Piaget, *The Origins of Intelligence in Children* (Routledge and Kegan Paul Ltd., 1953 [1936]); Jean Piaget, *The Construction of Reality in the Child* (Routledge and Kegan Paul Ltd., 1955 [1937]) and Jean Piaget and Bärbel Inhelder, *The Psychology of the Child* (Routledge and Keegan Paul, 1969). As noted in Chapter 1, subsequent psychologists determined that Piaget's work actually underestimated children's capacities (such as Margaret Donaldson, *Children's Minds* [William Collins Sons and Co. Ltd, 1978]).

[88] *Sahin v Germany*, (2003) 36 EHRR 765, para. 73.

[89] *Sommerfeld v Germany*, Appl. No. 31871/96, judgment of 8 July 2003, para. 71.

from a children's rights perspective.[90] Advocating a case by case approach to hearing children however, as the Court has done, is a reasonable stance, and seems in accordance with Article 12 of the Convention on the Rights of the Child.[91]

4.4.2 The Court's Regard for the Significance of Children's Views

There appears to be increasing recognition by the Court of the margin of appreciation of the state to attribute importance to children's views. As outlined above, the Court found in the case of *Hokkanen v. Finland*[92] that it had no reason to question the determination of the Finnish authorities that the child was sufficiently mature that access should not be enforced against her wishes.[93] The case is particularly interesting as the Court seems to emphasise the margin of appreciation of a state to permit the views of an 11 year old child to be determinative. The child's views had been consistent and the Court did not wish to undermine the state's actions in this regard. It is difficult to analyse what this might imply about the (relatively) early approach of the Court to the views of children. This particular finding possibly indicates deference to the policies of the domestic authorities rather than recognition by the Court that children have a Convention right to be heard (or a right that their views to be determinative in certain cases). Yet case law since *Hokkanen* seems to indicate increasing regard for the views of the child. In the more recent case of *Bronda v Italy*[94] for example, the expressed wish of S. not to leave her foster home was a strong factor in the decision of the Court that the Convention had not been breached when S. was not returned to her birth family. It was stated in the judgment that:

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[90] See Committee on the Rights of the Child, note 77, para. 16.
[91] Article 12 holds the age and maturity of the child, as well as the capacity to form views, as the factors on which the decision of how and whether to hear children will be based. This implies that a case by case basis is appropriate.
[92] Appl. No. 19823/92, judgment of 23 September 1994.
[93] Nor did the Court find that the failure to enforce custody decisions constituted a breach of Article 8, considering the facts of the case.
[94] (2001) 33 EHRR 81, para. 59.

> [T]he Court attaches special weight to the overriding interest of the child, who, now aged fourteen, has always firmly indicated that she does not wish to leave her foster home. In the present case, S.'s interest outweighs that of her grandparents.[95]

The language used in this judgment is encouraging in terms of deriving a right of children to be heard under the Convention. Although the Court refers here to the "interest" of S., this interest is intrinsically linked to her firm views and wishes. Considering that the Court attributes "special weight" to the interest of S., so too must it attribute such weight to her views.

A seemingly high level of regard for the views of children has also been evident in other cases which have come before the European Court which, like *Bronda v Italy*, relate to children in care. In *Olsson v Sweden*[96] the Court found that the restrictions on a couple's access to their children, who were in foster care, was not in violation of their Article 8 rights. An important factor in this decision was the fact that the access conditions requested by the parents were unacceptable to the children. The Court clearly accorded a high level of weight to the views of the children in *Olsson*. Furthermore, the fact that the Grand Chamber of the European Court seemed to imply in *Sahin* that parents have the right to have their children heard in some custody/access cases also indicates that the Court considers the views of the children to be valuable, or at least to add to the decision-making process, in such cases. However it may be recalled that the Court held in *Elzholz v Germany* that expert evidence was needed in the case of a child (aged five to seven years old at the time old domestic

[95] *Ibid*, para. 62.
[96] Appl. No. 13441/87, judgment of 30 October 1992.

proceedings) who expressed to the Court a wish not to see his father.[97] It is evident from the language used by the Court in its judgment that the Court believed that there was a strong possibility that the wishes expressed by the child were not his "true" wishes.[98] This may indicate that the Court does not consider that a large degree of weight should be accorded to the views of children of this age. However it is very likely that the Court was having due regard for the difficulties of this case, in which it appeared that undue influence was being placed on the child (by his mother against his father).[99] Although the Court held in this case that it may be necessary to appoint experts to advise the court regarding the views expressed by children, overall the case law indicates that the Court is according a considerable amount of weight to the views of children.

It is of note however that, under the ECHR, factors other than the views of children must be considered by domestic courts when making custody and access decisions. In the recent case of *C. v Finland*[100] the European Court found that, by holding children's views as determinative, without considering other factors or holding further hearings (to supplement the hearings of the lower courts), the Finnish Supreme Court had violated the right to family life of the applicant father. The European Court held that the decision-making procedure of the state did not strike a proper balance between the interests involved. At the time of the Supreme Court proceedings, the children were aged 14 and 12 and had consistently stated for a number of years that they did not wish to see their father. The lower courts had already considered matters such as the importance of retaining a relationship between father and children. However, since the Supreme Court was reversing the decision of these courts, the decision of the European

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[97] Appl. No. 25735/94, judgment of 13 July 2000.
[98] The expert should have "explored the true wishes of the child", according to the Court. (Appl. No. 25735/94, judgment of 13 July 2000, para 52).
[99] The Court did indeed make reference to "the mother's objections to the applicant which she imparted to the child." (*Ibid*, para. 52).
[100] Appl. No. 18249/02, judgment of 9 May 2006.

Court– that the Supreme Court should have considered these issues anew– can be argued to be reasonable. The judgment simply clarifies that there is an obligation on domestic courts to indicate that all of the relevant evidence has been considered.

4.4.3 Children Resisting Contact

Inextricably linked to the significance attached by the Court to children's views is the question of whether children should be forced to engage in access visits against their will, particularly where there exists heavy influence on the child from the parent with custody. Gardner's[101] concept of parental alienation as a syndrome (i.e. a psychological 'condition' of a child which may develop under circumstances where one parent encourages the child to turn against the other) has not been accepted in the professional arena due to a lack of sufficient scientific reliability.[102] It consequently seems positive that the Court has refrained from considering the issue of 'parental alienation syndrome' in a number of cases where it was raised by applicant parents. In *Elzholz v Germany* the Court avoided commenting on 'parental alienation syndrome' in finding that expert evidence should have been sought by the German courts on the views of a five year old boy that he did not wish to see his father, although the 'syndrome' had been referred to by the applicant.[103] The European Court did, however, express the belief that there was a strong possibility that the wishes expressed by the child

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[101] Gardner introduced the term 'Parental Alienation Syndrome' in a 1985 paper; Richard Gardner, "Recent Trends in Divorce and Custody Litigation" 29 *Academy Forum* 3 (1985). The paper describes a number of symptoms which Gardner had observed during the course of his work as a psychiatrist during the early 1980s.

[102] See e.g. Carol Bruch, "Parental Alienation Syndrome and Alienated Children– Getting it Wrong in Child Custody Cases" 14 *Child and Family Law Quarterly* 381 (2002), Jennifer Hoult, "The Evidentiary Admissibility of Parental Alienation Syndrome: Science, Law, and Policy" 26 *Children's Legal Rights Journal* 1 (2006) and William Bernet, "Parental Alienation Disorder and DSM-V" 36 *The American Journal of Family Therapy* 349 (2008). See further Chapter 1.

[103] Appl. No. 25735/94, judgment of 13 July 2000.

were not his "true" wishes.[104] This indicates that the Court considered the views of the child in this case to be influenced strongly by his mother, possibly to the extent that they were not his own. Considering the very young age of the child, this is arguably a reasonable consideration. However it seems to conflict with the approach of the Court to the views of the child resisting access in *Suss v Germany*.[105]

In the case of *Suss v Germany*,[106] the applicant father claimed that the German courts had violated his Article 8 rights by denying him access to his daughter, F. The child had expressed a wish not to see him since the age of 10, and expert evidence had persuaded the domestic courts that enforcing contact would cause her harm. The applicant father argued, *inter alia*, that denying him contact with his daughter without considering alternatives was disproportionate because 'parental alienation syndrome' was present in the case. As in the case of *Elzholz*, the European Court did not comment on the 'syndrome' claim, but agreed that the negative attitude of the child towards the applicant was partly caused by the mother. Despite this determination, the Court considered that it was the wish of F. that prevailed (as opposed to that of the mother). This finding of the Court indicates that the Court may hold the wishes of children in such cases to be their own,[107] even considering the parental influence that they may be under. This determination, however, is in contrast to the approach of the Court in *Elzholz*, where it was suggested that his expressed wishes were not his own.[108] Perhaps the age difference between the children in the two cases explains the difference in approach by the Court, however explicit acknowledgement of this would have been useful.

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[104] The expert should have "explored the true wishes of the child" according to the Court. (*Ibid*, para. 52).
[105] *Suss v Germany*, Appl. No. 40324/98, judgment of 10 November 2005.
[106] *Ibid.*
[107] It is possible, however that this determination may apply only to older (i.e. adolescent) children, as in the case of *Suss v Germany*, Appl. No. 40324/98, judgment of 10 November 2005..
[108] Appl. No. 25735/94, judgment of 13 July 2000, para. 52.

The case of *Sommerfeld v Germany*,[109] like *Elzholz*, also related to expert evidence, however the Court found that the Article 8 rights of the applicant had *not* been violated by a failure of the Court to order a more recent expert opinion on the consistently expressed wishes of his child (aged 13 at the time of the last domestic court hearing) not to see her father. 'Parental alienation syndrome' was again invoked by the applicant father, and again the Court refrained from commenting on this in its judgment.

Aside from the 'syndrome' issue, the Court has made some insightful determinations regarding whether children should be forced into contact with parents against their will. The determinations have concerned state obligations, i.e. to what extent states must enforce contact orders against the will of children (usually it is also against the will of their primary caregivers). The case of *Hokkanen v. Finland*[110] involved a child in the custody of her maternal grandparents who refused to comply with custody and access orders in respect of the child's father. The child had expressed a wish not to attend access visits since the age of eight. She had been interviewed by an expert at age 11 who recommended she not be forced to meet her father. The applicant father alleged a violation of his Article 8 rights because of the failure of the state to enforce custody and access orders. However the Court determined that the authorities had done everything that could have been reasonably expected to reunite father and daughter and that a state does not have any obligation to apply coercion in this area. The Court also concluded that it had no reason to question the determination of the authorities that the child was sufficiently mature that access should not be enforced against her wishes. The Court commented:

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[109] *Sommerfeld v Germany*, Appl. No. 31871/96, judgment of 8 July 2003.
[110] Appl. No. 19823/92, judgment of 23 September 1994.

> Whilst national authorities must do their utmost to facilitate such co-operation, any obligation to apply coercion in this area must be limited since the interests as well as the rights and freedoms of all concerned must be taken into account, and more particularly the best interests of the child and his or her rights under Article 8 (Article 8) of the Convention.[111]

This finding by the Court indicates that a parent does not necessarily have an Article 8 right for coercion to attend contact visits be applied by the state. The state had attempted in this case to provide such facilities as preparatory assistance for the child and her carers and that was deemed sufficient by the Court. Arguably, the Court seems to demonstrate in *Hokkanen* that it considers states to be in conformity with the Convention where they hold the views of children as young as 11 years not to have access with a parent as determinative,[112] even where they have been 'alienated' from that parent, possibly with strong influence from another carer (in this case, the maternal grandparents).

In the more recent case of *C. v Finland*,[113] the European Court found that the failure of the Finnish Supreme Court to provide for access visits ordered by lower courts did not violate the Article 8 rights of the applicant father, due to the children's continued resistance to such access. The Court acknowledged "the consistency and strength of the children's views"[114] and went on to state that:

> On a practical basis, there may also come a stage where it becomes pointless, if not counter-productive and harmful, to attempt to force a

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[111] *Ibid*, para. 58.
[112] It is, however, also arguable that the best interests decision is determinative in *Hokkanen*- the two are inextricably linked.
[113] Appl. No. 18249/02, judgment of 9 May 2006.
[114] *Ibid*, para. 37.

child to conform to a situation which, for whatever reasons, he or she resists.[115]

This provides a strong indication that the Court accepts that it may in some cases be impossible to implement orders for custody and access where the children involved are refusing to cooperate. Indeed, the Court decided conclusively in this case that the state was not in breach of Article 8 for failing to implement the access order, as the children consistently resisted such access. Although again it must be emphasised that the Court seems to be implying that it will sometimes be impossible (from a practical standpoint, short of use of force) to implement access orders when the children resist them, as opposed to making a finding that states should not implement such orders to respect the rights of children.

The weight accorded by the Court to the views of children regarding access visits appears to be higher in cases where children have been taken into care than in cases where parents have separated. In the case of *Olsson v Sweden*,[116] the Court agreed with Sweden's assertions that "not only the children's interests but also their rights under Article 8 of the Convention prevented the authorities from allowing requests for access under conditions which were unacceptable to the children."[117] There is a crucial difference between the language used in this case compared to *C. v Finland*. The former case uses the language of children's rights, however in the latter case, the Court considers it primarily "pointless" to force a child to have contact.[118] While the standard in relation to children in care is a positive development in terms of the weight to be given to the wishes of children under these circumstances, it does not seem logical to differentiate between children who have been in care for a number of years, and those who have

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[115] *Ibid.*
[116] *Olsson (No. 2) v Sweden*, Appl. No. 13441/87, judgment of 30 October 1992.
[117] *Ibid*, para. 89.
[118] Appl. No. 18249/02, judgment of 9 May 2006, para. 37.

simply been in the care of another adult or parent. The status of the 'rejected' parent is certainly different, in that a number of parental rights have been revoked in cases where children have been taken into care. However children in both care and custody/access cases may be equally as uncomfortable with the non-custodial parent seeking access. The similarities between the case of *Olsson v Sweden* for example, and that of *C. v Finland* are clear. Both involved non-custodial parents, with whom the children had had little access, seeking to regain custody. Both sets of children feared greatly the possibility of being returned to the custody of those parents, from that of their current trusted care-givers, and therefore requested that those carers be present at access meetings. The Court determined in both cases that states were not in breach of Article 8 for failing to implement the respective access orders. However the language inherent in the approach to the issue of children's rights is inconsistent in the two cases. Perhaps it is merely an academic point, however language can, of course, be crucial for future interpretation by the Court.

4.4 Conclusion

The European Convention on Human Rights is certainly permeable to the right of children to be heard, if interpreted in a manner which is evolutive and dynamic. Although the lack of express children's rights in the Convention is notable, the state obligation to "secure to everyone within their jurisdiction the rights and freedoms" is emphasised in Article 1 of the Convention. While there has not yet been a case before the Court to assert an implicit Convention right of children to be heard, there is much cause for optimism that such a case would be successful. The Convention can be seen as a 'living instrument'[119] from which unenumerated rights can be derived.[120] Both Article 8 (the right to family life) and Article 6 (the right to a fair trial) could be utilised to assert an implied right within the Convention

[119] See *Tyrer v United Kingdom*, Appl. No. 5856/72, judgment of 25 April 1978.
[120] *Golder v United Kingdom*, Appl. No. 4451/70, judgment of 21 February 1975.

of children to be heard. The fact that the Court increasingly recognises the influence of the Convention on the Rights of the Child in its judgments furthers this possibility,[121] as it indicates a willingness to engage with children's rights as well as a recognition of the relevance of the Convention on the Rights of the Child to interpretation of the ECHR.

It can be argued that, if parents have the right to participate effectively in proceedings relating to care and custody/access,[122] then so too do the children involved. This seems the strongest argument in favour of the recognition of the right to be heard under the Convention. It is also arguable that, under the Convention, children may require certain facilities (e.g. guardians *ad litem*) to enable them to participate effectively in civil proceedings affecting them, considering that the Court established in *Airey v Ireland*[123] that the state may be compelled by Article 6 to provide legal assistance in civil law disputes, when this is necessary for effective access to court. The obligation of the state to make special provision for children in criminal proceedings has already been recognised by the Court in the case of *T. v UK*.[124] Moreover, positive obligations have been derived from Article 8 of the Convention,[125] which strengthens the possibility of the Court recognising such a right.

It is a difficult task to make generalisations about the case law of the European Court which relates directly to hearing children in civil proceedings. Often the issue of hearing children is only one factor in a number relating to the outcome of the case. Furthermore, judgments of the Court sometimes seem in conflict with each other without clarification from the Court,[126] and the Court has held that the issue of whether a child should

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[121] See e.g. *Keegan v Ireland*, Appl. No. 16969/90, judgment of 26 May 1994, para. 50.
[122] See e.g. *Sahin* and *Sommerfeld*.
[123] *Airey v Ireland* (1979-80) 2 EHRR 305.
[124] (1999) 30 EHRR 121.
[125] *Marckx v Belgium* (1979-80) 2 EHRR 330.
[126] E.g. *Elzholz* and *Sommerfeld*.

be heard is to be determined on a case by case basis.[127] However one matter is very clear in relation to the case law examined in the previous section– the fact that the applicants have all been parents has resulted in the Court defining rights, both substantive and procedural, in terms of parents rather than children. This is perhaps most notable in the case of *Sahin v Germany.*[128] It is a positive development that the Chamber decision in *Sahin*[129] was overturned by the Grand Chamber, negating the interpretation of the Chamber that parents necessarily have a right that their children be heard (even against expert opinion) in cases where those children are resisting access. The ruling of the Grand Chamber may indicate a shift away from the perception of hearing children as a right of the parent seeking custody or contact. However, the wording contained in the judgment of the Grand Chamber (as well as the context of that judgment) seems to imply a reading into the Convention of a parental right that their children be heard in some cases, depending on the circumstances. This is questionable in terms of Article 12 of the Convention on the Rights of the Child, which frames hearing children as a right of children. So too is the finding in *Elzholz*[130] that parents have a right to have expert analysis of the wishes of young children submitted to domestic courts.

Yet there appears to be increasing recognition by the European Court of the margin of appreciation of the state to attribute importance to children's views. The case of *Hokkanen v Finland*[131] is particularly significant as the Court seems to emphasise the margin of appreciation of a state to permit the consistent views of an 11 year old child not to have access visits with her father to be determinative. In later cases such as *Bronda v Italy*[132] and

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[127] In both *Sahin*, para. 73 and *Sommerfeld*, para. 71.
[128] (2003) 36 EHRR 765.
[129] The Chamber found that the Article 8 rights of the applicant father were violated by a failure of the domestic courts to hear his four year old child, despite expert opinion that this would be harmful to the child.
[130] Appl. No. 25735/94, judgment of 13 July 2000.
[131] (1994) 19 EHRR 139.
[132] (2001) 33 EHRR 81, para. 59.

Olsson v Sweden[133] the European Court itself appears to attribute much weight to the views of the children involved. Despite the inference by the Court in *Elsholz* that a large degree of weight should not be accorded to even consistently held views of children of a young age, overall the case law indicates that the Court is according a significant amount of weight to the views of children. This is related to the fact that the Court has found that the obligation of the state to apply coercion in cases where children are strongly opposed to access visits with parents must be limited, because of considerations relating to the best interests of the child.[134] This is indicative of the generally positive approach taken by the Court to the wishes of children, although the Court appears to have more of a rights-based approach to the views of children in care cases than separation cases. It is of note, however, that factors other than the views of children must be considered by domestic courts when making custody and access decisions, such as the importance of retaining a relationship between father and children.[135]

In spite of the positive approach by the Court to children's views, the fact that cases which relate to hearing children have been brought by parents reflects, and possibly compounds, an approach to family law cases by domestic legal systems which places too much emphasis on the rights of parents to 'access' their children, with the traditional connotations that children are possessions of parents. Despite a number of positive determinations in relation to children's wishes, the Court has worked, it seems, with the issues at hand in a narrow fashion, in that it has failed to explicitly state that children have the right to be heard in legal proceedings affecting them. Perhaps a judgment relating to the rights of parents will ultimately be delivered by the Court in which dynamic interpretation of the

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[133] *Olsson (No. 2) v Sweden*, Appl. No. 13441/87, judgment of 30 October 1992.
[134] See e.g. *Olsson (No. 2) v Sweden*, Appl. No. 13441/87, judgment of 30 October 1992, *Hokkanen v Finland,* Appl. No. 19823/92, judgment of 23 September 1994 and *C. v Finland*, Appl. No. 18249/02, judgment of 9 May 2006.
[135] *C. v Finland*, Appl. No. 18249/02, judgment of 9 May 2006.

Convention is used to derive the right of children to be heard. However it may be necessary to wait until such time as a child brings a case which turns on the issue of her right to be heard for a full determination of the position of that concept/right under the European Convention on Human Rights. Nevertheless, the Convention appears to constitute a promising vehicle through which it will be possible to further the right of children to be heard in the future.

Chapter 5: Children and the Law in Ireland

5.1 Introduction[1]

The aim of this thesis is to elucidate the right of children to be heard in proceedings affecting them and to analyse domestic implementation of the right in the Irish legal system. To this end, it is useful to discuss child law in Ireland relating to the right of children to be heard.[2] Comprehensive texts have been written in which child law in Ireland generally, and children's rights in particular, are outlined and analysed in detail.[3] Moreover the position of children in the Constitution of Ireland has been a matter of considerable debate in recent times.[4] The current chapter aims to confine itself to provision of a brief overview of important aspects of the Irish legal system in order to enable a thorough analysis of the right to be heard in Ireland.

In this chapter, the law in Ireland as it relates to children will be examined. Various arguments concerning the position of children in the Constitution, the primary source of Irish law, will be considered. The proposed

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[1] Excerpts from this chapter have been included in Aoife Daly and Roisin Fegan, "The Implementation of the Convention on the Rights of the Child into Irish Law", in Paulo de Stefani, ed, *1989-2009: 20 Years of the Convention on the Rights of the Child in the EU Countries* (EU Inter-University Centre for Human Rights and Discrimination, forthcoming 2010) and Aoife Daly, "Limited Guidance: The Provision of Guardian ad litem Services in Ireland" 13 *Irish Journal of Family Law* 8 (2010).

[2] It is not sought at this point to provide an exhaustive overview of the relevant law. Some legislation, for example that relating to the powers of the state to take children into care, is left to subsequent chapters (to inform the analysis that immediately follows) in order to avoid duplication. The publications below at notes 3 and 4 provide deeper analysis of children's rights in Ireland more generally.

[3] Ursula Kilkelly, *Children's Rights in Ireland: Law, Policy and Practice* (Tottel Publishing, 2009) and Geoffrey Shannon, *Child Law* (2nd ed, Thomson Round Hall, 2010).

[4] See e.g. William Binchy, "Reconciling Children's Rights and Children's Welfare," paper presented at *Children's Rights and the Constitution: Recent Developments and Future Reforms* (Trinity College Dublin, 21 February 2007), at 17, Eoin Carolan, "The Constitutional Consequences of Reform: Best Interests after the Amendment" 10 *Irish Journal of Family Law* 9 (2007), Ursula Kilkelly and Conor O'Mahony, "The Proposed Children's Rights Amendment: Running to Stand Still?" 10 *Irish Journal of Family Law* 19 (2007), and Aoife Nolan, "The Battle(s) over Children's Rights in the Constitution" 22 *Irish Political Studies* 495 (2007).

amendment to the Constitution to include express provision for children's rights will be outlined. Changes to legal provision for the participation of children in proceedings affecting them will be examined, including the laws of evidence. The guardian *ad litem*– a professional who represents the views and interests of children in court– is the primary mechanism through which children are heard in court proceedings in Ireland. Provision for the appointment of this professional will be considered in detail, including the recent 'Guidance' provided on the matter by the Children's Acts Advisory Board. Conclusions will then be made on children and the law in Ireland.

5.2 Children and the Legal System in Ireland

The Republic of Ireland has a chequered history in relation to children's rights. The traditionally low status of children in society is highlighted by the fact that the state oversaw institutions responsible for severe and extensive abuse and neglect of vulnerable children in the past.[5] The law in Ireland, as elsewhere, traditionally conceptualised children as the property of their parents.[6] Shannon identifies a laissez-faire approach by the law to parent/child relations, "where the parents have sovereign dominion over the future of their children."[7] However there has been an increasing trend of the drafting of legislation and policy which aims to further children's well being. This has most likely been influenced by ratification of the

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[5] See recent reports documenting systematic child abuse: Commission to Inquire into Child Abuse, *Committee Investigation Report* (Commission to Inquire into Child Abuse , 2009) otherwise known as the 'Ryan Report,' available at http://www.rirb.ie/ryanreport.asp (last accessed 23 March 2010); Commission of Investigation, *Report into the Catholic Archdiocese of Dublin* (Commission of Investigation, 2009), otherwise known as the 'Murphy Report,' available at:
http://www.justice.ie/en/JELR/Part%201.pdf/Files/Part%201.pdf (last accessed 17 September 2010) and the Francis Murphy, Helen Buckley, and Larain Joyce, *The Ferns Report*, (Government Publications, 2005) available at http://www.bishop-accountability.org/ferns/ (last accessed 17 September 2010).

[6] The then Government of Ireland noted in 1996 the recent progression from this situation, Government of Ireland, *First Report to the Committee on the Rights of the Child* (17 June 1996) CRC/C/11/Add.12, para. 26.

[7] Geoffrey Shannon "Giving a Voice to the Child– the Irish Experience" 14 *International Journal of Law, Policy and the Family* 131 (2000), at 131.

Convention on the Rights of the Child[8] as well as other factors such as increased awareness of the vulnerability of children to abuse.

The Child Care Act 1991, for example, which legislates for issues relating to (*inter alia*) children who may need to be taken into the care of the state, marks a movement towards recognition of children as separate legal subjects with rights distinct from those of the family. The Irish Government has emphasised that the 1991 Act mirrors the Convention on the Rights of the Child,[9] and that "[t]he Act represents a movement away from the concept of children as parental property to an understanding of the child as a person who has rights by virtue of being a child."[10] There have also been significant policy developments– Ireland now has a National Children's Strategy, which notably uses language relating to the right to be heard enshrined in the Convention on the Rights of the Child.[11] Moreover, a number of statutory organisations such as the Office of the Minister for Children and the Ombudsman for Children have been established to oversee the implementation of the strategy and to further children's interests, indicating increasing priority for the rights and welfare of children in Ireland.

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[8] Although, as noted in Chapter 3, Ireland's dualist system means that international conventions which are ratified by Ireland are not automatically incorporated into domestic law. Article 29.6 of the Constitution of Ireland stipulates that, "[n]o international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas." This means that Irish courts cannot give effect to international law if it is in conflict with domestic law. As noted in Chapter 3, Ireland has not enacted legislation to incorporate the Convention into Irish law, despite recommendations from the Committee on the Rights of the Child that it do so. See Committee on the Rights of the Child, Concluding Observations: Ireland, (UN Doc. CRC/C/IRL/CO/2, 2006).

[9] Government of Ireland, note 6, para. 26.

[10] *Ibid*, at 7.

[11] It has as one of the three National Goals an objective that, "[c]hildren will have a voice in matters which affect them and their views will be given due weight in accordance with their age and maturity." Government of Ireland, *National Children's Strategy: Our Children: Their Lives* (Stationary Office, 2000), at 29.

5.2.1 The Constitution and Children

In an era of increasing concern for children's rights, the position of children in the Constitution of Ireland (Bunreacht na hÉireann) has become a highly contentious matter. The Constitution is the fundamental law of the state and is therefore crucial to the analysis of the right of children to be heard in Ireland. As Kilkelly opines, "practice and decision-making in a variety of areas of children's lives can be traced back to the Constitution's influence."[12] The Constitution does not contain detailed provision relating to children and it has long been argued that the Constitution fails to recognise sufficiently the rights of children independently from those of the family.[13] At the time the Constitution was drafted, children were perceived "as objects of parental rights and duties rather than autonomous rights-holders."[14] Consequentially, the document contains limited consideration of children,[15] although it contains very strong provisions in relation to the family.[16] Although the courts have on a number of occasions held that children possess constitutional rights,[17] the Constitution is argued to have

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[12] Kilkelly, note 3, at 59.

[13] E.g. Constitution Review Group, *The Report of the Constitution Review Group* (Stationary House Dublin, 1996), at 308, The Guardian Ad Litem Group, *Giving Children a Voice, The Case for Independent Representation of Children* (Guardian Ad Litem Group, 2001), at 11, Law Society of Ireland, *Right-Based Child Law: The Case for Reform*, (Law Society of Ireland, 2006), at 51, Kilkelly, note 3, at 59, Kilkelly and O'Mahony, note 4, Carolan, note 4, at 10, and Shannon, note 7, at 131. Similarly, during the Kilkenny Incest Investigation in 1993 it was stated that the extremely high emphasis on the rights of the family in the Constitution may be interpreted as according greater value to the right of parents than those of children. The Kilkenny Incest Investigation arose after system failures arose involving the absence of communication between social workers and police resulting in failure to protect at-risk children. See Catherine McGuinness, *Report of the Kilkenny Incest Investigation*, (Government Stationary Office, 1993), at 96.

[14] Aoife Nolan, note 4, at 500.

[15] *Ibid.* The Constitution refers explicitly to children in Article 42.1, which stipulates that the family is the primary and natural educator of the child and Article 42.2-4 which provide other provisions relating to education, as well as Article 42.5, which states that in exceptional circumstances the state will supply the place of the parents.

[16] In Articles 41 and 42. Shatter holds that it places the family on a "constitutional pedestal." Alan Shatter, *Shatter's Family Law* (4th ed, Tottel Publishing, 1997), at 5.

[17] See e.g. *Re Frost (Infants)* [1947] IR 3 (SC), *Re The Adoption (No2) Bill 1987* [1989] IR 656 (SC), and *M.W.P. v T.K.P.* [2007] IEHC 145. This is noted in *The Report of the Constitution Review Group*, note 13, at 296 as well as the *Report of the Kilkenny Incest Investigation*, note 13, at 96.

encouraged a judicial approach which emphasises the rights of adults, sometimes to the detriment of the rights of the child.[18] Although an individual may invoke rights on behalf of the family, it has been held that it is the family unit as a whole that is in possession of these rights, not the individuals within it.[19] The authority of the adults in the family was emphasised in *re. Frost (Infants)*, in which Sullivan CJ agreed with the contention that the courts "must regard the family as a unit, the control and management of which is vested in both parents."[20]

It is noteworthy that the well-established 'welfare principle'[21]– often used interchangeably in Ireland with the term 'best interests of the child'[22]– is not explicitly mentioned in the Irish Constitution. As far back as 1996, the Constitution Review Group recommended that the welfare principle should be explicitly guaranteed in the Constitution, despite the fact that it is already enshrined in several Irish statutes.[23] This is presumably due to the fact that statutes can be repealed or amended with relative ease, whereas the Constitution governs as paramount and far more permanent law. The only express reference to children's rights is included in Article 42.5 of the Constitution, which stipulates the limited circumstances in which the State may intervene in family life:

> [I]n exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian

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[18] See note 13.
[19] See *Murray v Ireland* [1985] ILRM 542 (HC), at 547.
[20] *Re Frost (Infants)* [1947] IR 3 (SC), at 9.
[21] Section 3 of the Guardianship of Infants Act 1964 (amended by the Status of Children Act 1987), for example, states that the welfare of the child will be "the first and paramount consideration" when decisions are made regarding the "custody, guardianship or upbringing of an infant."
[22] Although it has been opined that the approach to the 'welfare principle' adopted by the judiciary to date is a negative one which focuses on ensuring that there is no serious impairment of the interests of children, as opposed to focusing on actively promoting the welfare of children. See e.g. Law Society of Ireland, *Right-Based Child Law: The Case for Reform*, (Law Society of Ireland, 2006), at 51.
[23] Constitution Review Group, *The Report of the Constitution Review Group* (Stationary House Dublin, 1996), at 307.

> of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.

Although there is no detail on the nature of these "natural and imprescriptible rights of the child" in the Constitution, O'Higgins CJ identified in *G. v An Bord Uchtála*[24] a non-exhaustive list of the constitutional rights of all children, including "the right to be fed and to live, to be reared and educated, to have the opportunity of working and of realising his or her full personality and dignity as a human being."[25] Children, then, have constitutional rights which the state is obliged to vindicate. However, the list in *G. v An Bord Uchtála* constitutes a distinct welfare approach to children's rights, relating to physical aspects of their lives.[26] Moreover, this judgment could have marked the starting point for comprehensive development of the constitutional rights of children by the judiciary.[27] Yet few judgments have built on the principles established in this case, indicating that it is not just the privileged status afforded to the family by the Constitution, but also judicial reluctance that has played a role in the lack of development of constitutional rights relating to children.[28]

Recent judgments have highlighted that the controversy regarding parental primacy persists today. For example, in *North Western Health Board v W.*

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[24] [1980] IR 32 (SC).
[25] *Ibid*, at 44.
[26] See Law Society of Ireland, note 22, at 51. Enright also points to the need for the involvement of a certain level of catastrophe before the occurrence of state intervention. She opines that, "[i]f a parent behaves towards his child in a manner which has inevitably terrible and destructive consequences, the State may intervene to put things right. In all other matters, the child appears to be subordinate to his parents' will." Mairead Enright, "Interrogating the Natural Order: Hierarchies of Rights in Irish Child Law" 11 *Irish Journal of Family Law* 3 (2008), at 3.
[27] Kilkelly, note 3, at 61.
[28] *Ibid*, at 63-65. Note also the fact that in *T.D. v Minister for Education* ([2001] 4 IR 259 [SC]), Murphy J rejected the assertion that the Court had found such rights to exist in *G. v An Bord Uchtála*, and opined that legislation was the appropriate vehicle through which to elaborate on the extent of such rights.

(H.)[29] the Supreme Court found that it was unconstitutional for the authorities to test a child for serious and common genetic diseases against the will of her parents.[30] The finding is questionable as the test caused no harm to the children– it was a matter of parental preference.[31] In another controversial case, *N. & anor. v Health Service Executive & ors.*,[32] the Supreme Court was called upon to determine whether the custody of foster parents of a two year old child was lawful (they were also her prospective adopters). The unmarried birth parents of the child, who had originally placed her for adoption, had changed their minds as regards the adoption and married in the interim. The Supreme Court overturned the High Court decision despite the fact that the child had bonded with her prospective adopters, and that to be given into the custody of her birth parents, who were strangers to her "would cause serious both immediate and lasting damage."[33] The judgment was subject to significant criticism of the fact that, *inter alia*, while the court acknowledged that the rights of the child would be affected by the decision, she was not herself granted explicit recognition as a rights holder.[34] The primary focus of the court was whether there was a failure on the part of the birth parents, and whether there were compelling reasons to supersede the rights of those parents.[35] McGuinness J noted that:

> It is perhaps striking that the one person whose particular rights and interests, constitutional and otherwise, were not separately

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[29] [2001] IESC 70 (known as the 'PKU case').
[30] The parents were found to have the right to refuse to consent to the test under Article 41, although the decision was considered by Murray J to be "unwise and disturbing" (para. 229). The Court acknowledged the right of the child, but that this right was best exercised through her parents, who, although they were were making an objectively unwise decision, were otherwise caring.
[31] See further Graeme Laurie, "Better to Hesitate at the Threshold of Compulsion: PKU Testing and the Concept of Family Autonomy in Eire" 28 *Journal of Medical Ethics* 136 (2002), at 136-137.
[32] [2006] IEHC 278; [2006] IESC 60 (known as the 'Baby Ann' case[32]).
[33] *N. & anor. v Health Service Executive & ors.* [2006] IESC 60, at 10.
[34] See e.g. Ruth Kelly, "Baby Ann's Constitutional Rights" 10 *Irish Journal of Family Law* 12 (2007), at 23, Nolan, note 3, at 503 and Ursula Kilkelly, note 3, at 376.
[35] *Ibid*, at 23-26.

represented, whether by solicitor and counsel or through a *guardian ad litem*, was the child herself. [36]

Some legal academics argue that the Constitution does not prefer parents over children, but rather that it prefers parents over third parties, and that children's rights are protected by Article 40.3 of the Constitution which relates to personal rights.[37] It can be argued that every member of the family possesses certain rights enshrined within the Constitution. There is a prerogative under Article 40.3.1 that the Irish Constitution "defend and vindicate" personal rights, which has been held by the Irish courts to include unenumerated rights.[38]

In a recent landmark judgment, and one which is of significant interest for the purposes of the current discussion, *F.N. and C.O.*,[39] Finlay-Geoghegan J held that the child's right to be heard in proceedings affecting her could be interpreted as being an unenumerated right under Article 40.3 of the Constitution. She stated that an individual about whom a decision of significance is being made has "a personal right within the meaning of Article 40.3 of the Constitution to have such a decision taken in accordance with the principles of constitutional justice."[40] She continued that such principles included the right of a child to have her wishes taken into account where appropriate and referred to a "procedural right guaranteed by Article

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[36] *Ibid*, at 10.

[37] Hardiman J opined in *N. & anor. v Health Service Executive & ors.* ([2006] IESC 60) that it was "quite untrue to say that the Constitution puts the rights of parents first and those of children second. It fully acknowledges the 'natural and imprescriptible rights' and the human dignity, of children, but equally recognises the inescapable fact that a young child cannot exercise his or her own rights" (at 6). See also Binchy, note 4, at 17.

[38] *Ryan v Attorney General* [1965] IR 294. Binchy contends that, "[t]he fact that Article 40.3.2 identifies certain specific rights which require particular protection supports the inference that other unenumerated personal rights must be protected by Article 40.3.1." William Binchy, "The Irish Legal System" 26 *International Journal of Legal Information* 201 (2001), at 207. These rights are taken to stem from "the Christian and democratic nature of the State" acknowledged in the preamble of the Constitution (see *Ryan v the Attorney General* [1965] IR 294 [SC]) and consequently the practice of reading the Constitution in accordance with natural law.

[39] [2004] 4 IR 311; IEHC 60.

[40] *Ibid*, at 12.

40.3 to children of a certain age to have their wishes taken into account"[41] by the court when decisions are being made regarding the custody, guardianship or upbringing of the child. This interpretation indicates the potential for dynamic development of the rights of children under the Constitution in general, and the right of children to be heard in particular.[42] Unfortunately the influence of this progressive judgment– as well as other judicial interpretations recognising children's rights[43]– has been described as "negligible".[44] It seems that, although the potential to elevate the rights of children does indeed exist under Article 40.3, judicial reluctance prevents its realisation. Despite some evolutive judgments, the level of recognition by the courts of children as individual rights-holders remains unsatisfactory. This appears to further the argument that an amendment to the Constitution to explicitly recognise the rights of children as individuals is needed, in order to provide the judiciary with very clear direction on the position that the rights of children should hold when matters are being considered which concern their interests.

5.2.2 Proposed Amendment

A referendum will most likely be held in the near future in Ireland to make express provision for children's rights in the Constitution. Various factors have contributed to the calls for an amendment. A number of high-profile Supreme Court decisions raised questions as regards the lack of express provision for children's rights in the Constitution.[45] Extensive reporting of high levels of abuse of children in state care in the past also highlighted the

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[41] *Ibid*, at 12-13.

[42] See also *In Re the Adoption (No 2) Bill 1987* [1989] IR 656 and *Bode v Minister for Justice, Equality and Law Reform* [2006] IEHC 341 in which it was held that children have personal rights under Article 40.3.

[43] Such as *Eastern Health Board v An Bord Uchtála* [1994] 3 IR 207.

[44] Kilkelly, note 3, at 63. Kilkelly notes the fact that the ratio decidendi of *F.N.* was not considered by the Supreme Court in, for example, the important case of *McK. v Information Commissioner* [2006] IESC 2.

[45] E.g. *N. & anor. v Health Service Executive & ors.* [2006] IESC 60 and *North Western Health Board v W. (H.)* [2001] IESC 70.

traditional invisibility of children in Ireland.[46] It was intended that a referendum on a constitutional amendment including a specific article on children's rights would be held in 2008, however this did not occur.[47] The timing of the amendment is still unclear– recent reports indicate that it will be held in 2011.[48] Nevertheless the wording of the proposed amendment, the product of a cross-party Oireachtas (Parliamentary) Committee,[49] has largely been praised,[50] representing as it does "a significant advance on the rather tentative amendment mooted in 2007."[51] The Committee proposes the insertion of a new Article 42, dedicated to children, in the Constitution, stating that the "proposed new Article allows for a rebalancing of rights so that there can be a greater focus on the welfare of the child."[52]

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[46] See note 5. See also Éibhir Mulqueen, "Respect for Rights of Children must be Key Policy Driver– Ombudsman" *Irish Times*, 22 August 2009, and Pamela Newenham and Elaine Edwards, "Calls for Protection of Children" *Irish Times,* 29 November 2009.

[47] See Office of the Minister for Children and Youth Affairs, *Government Press Release on the Publication of 28th Amendment of the Constitution Bill 2007* (Office of the Minister for Children and Youth Affairs, 2007), available at: http://www.omc.gov.ie/viewdoc.asp?fn=%2Fdocuments%2Flegislation%2FconstRef.htm (last accessed 18 September 2010). The proposed wording was, in any case, rather weak (see e.g. Ursula Kilkelly, note 3, at 75, and generally Carolan, note 4) and made no reference to the right of children to be heard.

[48] This is the situation as of November 2010. See Jamie Smyth, "Children's Rights Referendum Unlikely before 2011" *Irish Times*, 28 July 2010; Michael O' Regan, "Cowen refuses to be drawn on date for referendum" *Irish Times*, 20 May 2010.

[49] See Joint Committee on the Constitutional Amendment on Children, *Twenty-eighth Amendment of the Constitution Bill 2007: Proposal for a Constitutional Amendment to Strengthen Children's Rights- Final Report* (Houses of the Oireachtas, February 2010), available at: http://www.oireachtas.ie/documents/committees30thdail/j-conamendchildren/reports_2008/20100218.pdf (last accessed 16 September 2010).

[50] See e.g. Ursula Kilkelly, "Kilkelly on 'Best Interests' and the Proposed Constitutional Amendment" *Human Rights In Ireland* (26 February 2010), available at: http://www.humanrights.ie/index.php/2010/02/26/kilkelly-on-best-interests-and-the-proposed-constitutional-amendment/ (last accessed 11 September 2010), Fergus Ryan, "Ryan on Family Law and the Children's Rights Amendment" *Human Rights In Ireland* (26 February 2010), available at: http://www.humanrights.ie/index.php/2010/02/26/ryan-on-family-law-and-the-childrens-rights-amendment/ (last accessed 15 September 2010), and Aoife Daly "Implementing the Right of Children to be Heard" *Irish Times* 1 March 2010.

[51] Ryan, note 50, at 1.

[52] Joint Committee on the Constitutional Amendment on Children, *Summary of Twenty-eighth Amendment of the Constitution Bill 2007: Proposal for a Constitutional Amendment to Strengthen Children's Rights- Final Report* (Houses of the Oireachtas, February 2010), available at: http://www.oireachtas.ie/documents/committees30thdail/j-conamendchildren/reports_2008/20100218.pdf, (last accessed 16 September 2010), at 3.

The proposed amendment covers a wide breadth of matters concerning children, namely an explicit reference to the best interest principle,[53] the recognition of the rights of children as individuals,[54] education,[55] child protection[56] and adoption.[57] The amendment also expressly includes the right to be heard. Proposed Article 42.2 reads:

> The State guarantees in its laws to recognise and vindicate the rights of all children as individuals including...iii) the right of the child's voice to be heard in any judicial and administrative proceedings affecting the child, having regard to the child's age and maturity.

The Committee outlined in its final report that many of the submissions from civil society in relation to the proposed amendment included proposals to enshrine the right of children to be heard, which is presumably the principal reason for the inclusion of the provision.[58] Perhaps surprisingly, the report itself does not provide significant consideration of the right to be heard in Ireland, nor justification for its inclusion in the text of the proposed amendment. Moreover, there are some questionable aspects to the text. It is of note that the reference in the proposed amendment is solely to the right of children to be heard in judicial and administrative proceedings. This seems questionable considering the need for the right of children to be heard in all other areas of their lives, as recognised by Article 12(1) of the Convention on the Rights of the Child. Furthermore, the reference is only to the right to be heard, and not the right to have views accorded weight.[59] Nevertheless,

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[53] Proposed Article 42(1)(3) reads "[i]n the resolution of all disputes concerning the guardianship, adoption, custody, care or upbringing of a child, the welfare and best interests of the child shall be the first and paramount consideration."
[54] 42.2.
[55] 42.2.ii, 42.3, 42.7 and 42.8.
[56] 42.4.
[57] 42.5 and 42.6.
[58] See Joint Committee on the Constitutional Amendment on Children, note 49, at 64-71.
[59] Perhaps, however the right to have views accorded weight can be inferred from the term "right to be heard."

the inclusion of the right is a crucial development and the insertion of such text in the Constitution would undoubtedly place the right to be heard in a prominent position in Ireland, as courts would be expressly required to consider the matter in all cases concerning children.

5.3 Court Proceedings

5.3.1 Proceedings Concerning Children's Interests

Shannon has stated that the legalistic and adversarial nature of family law proceedings has a negative effect on the "proper" consideration of children's interests.[60] As opposed to the more inquisitorial approach of civil law jurisdictions, common law courts tend to approach custody applications as involving parents competing for the "prize"[61] of the child.[62] This has most likely been one of the causes of the invisibility of children in proceedings affecting them in Ireland. The visibility of children is particularly lacking in matters relating to custody, access and guardianship, i.e. private law, where the parties are usually parents.[63] This is presumably due to a more a laissez-faire attitude to the views of children in these proceedings than in cases involving child care (where the parties are usually parents and the state), as evidenced in other jurisdictions.[64] Kilkelly attributes the exclusion of

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[60] Shannon, note 7, at 131.

[61] Geoffrey Shannon, *Child Law* (Thomson Roundhall, 2005), at 246.

[62] Although it was noted by Finlay JC in *State (D. & D.) v Groarke* [1990] 1 IR 305 (SC), that care order proceedings are not fully adversarial in character, as the primary issue of investigation is the welfare of the child. In custody, access and guardianship disputes, the same could be said about the nature of proceedings. However see Shannon, note 61, at 246, where he outlines the problems posed by the fact that proceedings are still adversarial in practice.

[63] This is due to weaker legislative provision as well as the failure to enact the relevant legislation, as outlined below at 5.4.

[64] For example in the legal system of England and Wales, in all public law proceedings (under Part IV of the Children Act 1989), the child is automatically a party to proceedings and is represented by a Children's Guardian (the equivalent of the guardian *ad litem*). In private law proceedings, however, (usually under Section 8 of the Children Act 1989) the child is not automatically a party to the proceedings and will not automatically be represented by a guardian. The court can request a welfare report under Section 7 of the Children Act 1989, yet this is weaker provision for hearing children.

children from proceedings concerning them in Ireland to "the prevalence of paternalistic views about children and their right to be heard"[65] and the fact that the debate remains stuck on whether, as opposed to how, children should be heard.[66]

The *in camera* rule has also possibly contributed to the invisibility of children in proceedings concerning them, by shrouding the proceedings themselves in mystery. Although the Constitution of Ireland stipulates that justice is to be administered in public in order to render the legal process transparent and open to scrutiny,[67] there are exceptions to this principle which applies to most proceedings in which children are involved.[68] Judges have much discretion as to whether to allow proceedings to be observed, however in practice the rule has resulted in the exclusion of all but the relevant parties and the legal representatives of those parties.[69] The Parliamentary Committee which considered a constitutional amendment on children's rights noted that most cases concerning children "are heard in the District Court where Judgments are rarely written and there is no facility for recording such Judgments."[70]

Due to the perception that greater transparency was necessary in the judicial process,[71] changes in the statutes have resulted in a relaxation of the *in*

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[65] Kilkelly, note 3, at 215.
[66] *Ibid.*
[67] Section 34(1) states that, "save in special and limited circumstances...justice shall be administered in public."
[68] The *in camera* rule was first used in family law in Section 45 of the Courts (Supplemental Provisions) Act 1961. The Act requires that, "justice shall be administered otherwise than in public in...matrimonial matters...and minor matters". The Family Law (Divorce) Act 1996 Section 38(5), the Domestic Violence Act 1996 Section 16(I), and the Child Care Act 1991 Section 29(1) also stipulate that family law cases must be heard in private. The judgments of some proceedings involving children in the superior courts are made available to the public– see Chapter 6.
[69] Kieran Walsh, "Privacy's New Paradigm: The Rise and Reform of the In Camera Rule" 1 *Irish Journal of Family Law* 8 (2005), at 10.
[70] See Joint Committee on the Constitutional Amendment on Children, note 52, at 6.
[71] See generally Rosemary Horgan, Geoffrey Shannon and Brian Gallagher, "Reform of the In Camera Rule" 7 *The Bar Review* 5 (2002), Walsh, note 69, and John Murray (Chief Justice) "Delivering Information and Protecting Privacy" 1 *Family Law Matters*, 1 (2006).

camera rule.[72] It is now possible to conduct research on proceedings concerning children, subject to the appropriate permission. This change constitutes a significant relaxing of the *in camera* rule and has permitted a considerable of amount of research to be conducted in family law courts by the Courts Services. Four editions of a publically available report, entitled 'Family Law Matters,' are now published every year.[73] However the lack of published judgments is a problem that persists.

It is in this context of paternalism and ambiguity regarding courts proceedings that the matter of hearing children is set. Until recently, very little consideration was given in Ireland to the possibility that children themselves should be heard or represented in proceedings affecting them.[74] Some notable provisions currently exist. Children can take cases relating to personal injuries and other matters through a 'next friend,' such as a parent.[75] In child care proceedings, the court must "in so far as practicable, give due consideration, having regard to his age and understanding, to the wishes of the child."[76] Judges can meet with (or 'interview') children directly,[77] although such practice is rare. Efforts have been made to reduce

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[72] Section 40 of the Civil Liability and Courts Act 2004 makes it permissible for certain persons to attend proceedings, subject to receiving permission to do so.

[73] These reports are available at the websites of the Courts Services of Ireland: http://www.courts.ie/Courts.ie/Library3.nsf/0/4A925BEEEE71148580257245005EEA1C?OpenDocument (last accessed 16 September 2010).

[74] Shannon, note 61, at 246.

[75] See, e.g. *Dunne v National Maternity Hospital* [1989] IR 91 (SC) and *Best v Wellcome Foundation Ltd* [1993] 3 IR 421 (SC).

[76] Child Care Act 1991, Section 24. Kilkelly notes that the language of this text gives the court "enormous discretion" and contrasts it to the care system in New South Wales, Australia, where children must be provided with all relevant information and have the opportunity to express views. See Kilkelly, note 3, at 216-217, who cites Patrick Parkinson, "The Child Participation Principle in Child Protection Law in New South Wales" 9 *International Journal of Children's Rights* 43 (2001), at 261-262.

[77] Shatter states that statutory authority was given to this practice in private law proceedings by the Custody of Children Act of 1891. Shatter further contends that Section 17(2) of the Guardianship of Infants Act 1964 now permits courts to interview children in applications brought under Section 11 of the 1964 Act (Shatter, note 16, at 565), although this provision appears to apply solely to proceedings regarding the religious upbringing of a child. Clissman and Hutchinson note the problems inherent in the fact that the information provided by children in such interviews cannot be tested in cross-examination. Inge

the formalities of proceedings in which children are involved, such as the prohibition of wearing wigs and gowns in certain proceedings.[78] Moreover, it is increasingly assumed that the views of children will be ascertained in cases concerning the Hague Convention on International Child Abduction[79] and in adoption cases.[80] However there remain significant shortcomings in the Irish system in proceedings in which children's interests are most frequently considered– those relating to child care and family law which are heard in the lower courts. It is at the discretion of the court to appoint a guardian *ad litem* to represent children's views and interests,[81] to order a 'social report' to provide information on the situation of a child,[82] or to make the child party to proceedings.[83] However the legislation which has been put in place to provide for hearing children is arguably fundamentally flawed as it does not frame hearing children as a right of children, but instead as an option available to the courts. This means that the legislative provisions relating to hearing children are invoked only in exceptional cases.[84]

Clissman and Paul Hutchinson, "The Right of Children to be Heard in Guardianship, Custody and Access Cases" 9 *Irish Journal of Family Law* 11 (2005), at 15-16.

[78] For example, judges and other legal representatives in family law proceedings are prohibited from wearing wigs or gowns in both the Circuit Family Court and the High Court by Section 33 of the Judicial Separation and Family Law Reform Act 1989. See further Shannon, note 61, at 235.

[79] See in particular *N. v N. [hearing a child]* [2008] IEHC 382.

[80] Under the Adoption Act 1988, Section 3(2).

[81] Child Care Act 1991, Section 26(1) in the area of child care law and Section 28 of the Guardianship of Infants Act 1964, as amended by Section 11 of the Children Act 1997, in family law.

[82] The Court may request a report from any person it deems appropriate on any question affecting the welfare of the child under Section 29 of the Child Care Act 1991. The Court may also request a report under Section 20 of that Act whereby it can direct the Health Service Executive to carry out an investigation of the circumstances of the child in family law proceedings. Such a report can also be ordered under Section 47 of the Family Law Act 1995. These reports may or may not include the views of the children involved.

[83] In child care law, the Child Care Act 1991, Section 26(4), provides that when a child is joined as a party to proceedings, the guardian *ad litem* is dispensed with and the judge may appoint a solicitor. However it very rarely happens in practice that children are made party to proceedings. There is no provision in family law for children to be made party to proceedings.

[84] See generally National Children's Office, *Review of the Guardian Ad Litem Service: Final Report from Capita Consulting Ireland, in Association with the Nuffield Institute for Health* (National Children's Office, 2004). Hereafter referred to as 'the Capita research.'

5.3.2 The Child Witness

Developments in the laws of evidence are of relevance to the right to be heard as a procedural right, as such developments can determine how or whether children are heard in child care and family law proceedings. Indeed exceptions to rules relating to the oath and to hearsay are vital to enable children to participate in proceedings affecting them, as such exceptions provide avenues through which to circumvent legal obstacles relating to capacities and presence in court where appropriate. A brief overview of such developments is necessary to place the right to be heard in Ireland in context.

The issue of the testimony of children is contentious because of the capacities of children.[85] Historically, two concerns have arisen regarding children's competence to testify: firstly, the issue of whether the child had the intelligence necessary to testify, and secondly whether the child had developed the adequate maturity to understand the oath. The first concern remains the standard consideration regarding children's testimony, while the second issue has been resolved through statutory reform of the principle of inadmissibility of evidence not given on oath. The Courts traditionally took a more restrictive approach to the evidence of children in civil law than in criminal law proceedings.[86] However, child witnesses are no longer obliged to take the oath in order to give testimony in either civil or criminal proceedings in Ireland.[87] The relevant provisions permit a level of flexibility, in that a child under 14 years may testify other than on oath, if

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[85] Although international research has highlighted the fact that child witnesses are capable of being as reliable as adult witnesses. Casey cites extensive research which demonstrates that in general children provide reliable evidence and that "children are no more likely to lie while testifying than adults." Rachel Casey, *The Evidence of Child Witnesses: Where the rules of Evidence and the Constitution Collide* (Unpublished Thesis, Trinity College Dublin, 2007), at 5. See Chapter 1, note 260, for extensive references.

[86] *Mapp v Gilhooley* [1991] 2 IR 253 (SC).

[87] Criminal Evidence Act 1992, Section 27(1); Children Act 1997, Section 28(1).

the court is satisfied that the child has the capacity to provide an intelligible account of the events in question.[88]

The Children Act 1997 provides for the use of hearsay (i.e. indirect) evidence, permitting its inclusion in all proceedings relating to the welfare of children, whether they are public or private.[89] The inclusion of hearsay evidence in cases involving children was affirmed by the Supreme Court in *Southern Health Board v C.H.*, which involved the admissibility of a video-recorded interview with the child.[90] The court may only permit hearsay, however, where it court is satisfied that the child is unable to give evidence orally to the court "by reason of age"[91] or that providing evidence orally would not be in the best interest of the child. The judge still retains discretion as to whether or not the hearsay evidence will be admitted, which is in contrast to English law where there has been a removal of the grounds on which it is possible to challenge the admissibility of hearsay evidence.[92] When hearsay evidence is admitted under the Children Act 1997, the court must consider Section 24 of that Act, which refers to the weight to be given to such evidence. In estimating the weight to be attached to hearsay evidence, the court must have regard for all the circumstances involved, such as whether the original statement was made simultaneously with the occurrence of the matters stated, whether the evidence involves multiple hearsay, whether any person involved may have a motive to misrepresent matters, or whether the original statement was an edited account. These changes are arguably indicative of more progressive attitudes to children's participation in proceedings.

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[88] See further Liz Heffernan, *Evidence: Cases and Materials* (Thomson Roundhall, 1995), at 77.
[89] Section 23.
[90] [1996] 1 IR 231 (SC).
[91] Section 23 of the Children Act 1997.
[92] See further Kilkelly, note 3, at 232-234.

5.4 Legislation relating to the Guardian *ad Litem*

Hearing children remains the exception rather than the rule in cases outside the superior courts. There is a distinct lack of procedures for hearing children, which is carried out on an *ad hoc* basis. This lacuna is well documented[93] and is largely due to the high degree of discretion accorded to the courts regarding hearing children. It is also most likely related to a failure at policy level to prioritise such a service or to establish a regulatory body for guardians *ad litem*, the primary mechanism through which the courts ascertain the views of children. The guardian *ad litem* is a professional (usually a former social worker) whose task is to "independently establish the wishes, feelings and interests of the child and present them to the court with recommendations."[94] The professional operates independently of the parents of the child and of the state[95] (i.e. the Health Service Executive in child care cases). The professional is appointed at the discretion of the court and is usually charged with conducting an inquiry into the circumstances of the child,[96] as well as reporting to court.[97]

The Child Care Act 1991[98] permits the appointment of a guardian *ad litem* in relation to public proceedings covered by that Act, where the child is not a party to proceedings. The appointment of a guardian *ad litem* is subject to the notable qualifications that it must be deemed by the court that it is necessary in the interests of the child, and in the interests of justice, to do so.

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[93] See generally Capita Research, note 84, Kilkelly, note 3, at 178 and Shannon, note 61, at 236. Finlay-Geoghegan J also noted "there is no mechanism readily available to the Court to obtain an independent professional assessment in a speedy or simple way as to the probable level of maturity of a child and capability" in *N. v N. [hearing a child]* [2008] IEHC 382, at para. 28.

[94] Children Acts Advisory Board, *Giving a Voice to Children's Wishes, Feelings and Interests: Guidance on the Role, Criteria for Appointment, Qualifications and Training of Guardians ad Litem Appointed for Children in Proceedings under the Child Care Act, 1991* (May 2009), at 3.

[95] Shannon, note 61, at 249.

[96] CAAB Guidance, note 94, at 3-5 and 12-16.

[97] *Ibid*, at 17.

[98] Section 26(1).

It is provided by the Child Care Act[99] that the health board (now the Health Service Executive) will cover the costs related to the guardian *ad litem*. The Children Act 1997[100] extends this procedure by stipulating that it is possible for the court to appoint a guardian *ad litem* in certain private (family) law proceedings under the Guardianship of Infants Act 1964. Similar to the Child Care Act, it is at the discretion of the court as to whether to appoint a guardian *ad litem*. However, the criteria for appointment are more stringent in private law, as there must be "special circumstances" involved in a case for a guardian *ad litem* to be appointed.[101] In private law proceedings, it is the parties themselves (or any other party identified by the court) who must bear the cost of the appointment of a guardian *ad litem*.[102] Some 12 years after the Oireachtas adopted the 1997 Act, these provisions have not yet been commenced.[103] Therefore, in practice, the appointment of a guardian *ad litem* has not yet been provided for in the area of family law.

5.4.1 Children's Acts Advisory Board 'Guidance'

While the legislation provides instruction on some aspects of the service of the guardian *ad litem*, much of the detail is left unspecified, for example the nature of the role and the training such a professional should have. It was recognised that the omissions were very problematic in some areas,[104] and that there existed a need to standardise the provision of this service and to assist courts in determining when appointment is appropriate in specific

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[99] Section 26(2).
[100] Section 28 of the Guardianship of Infants Act 1964, as amended by Section 11 of the Children Act 1997.
[101] *Ibid.*
[102] Children Act 1997 Section 28(5).
[103] I.e. enacting legislation has not been approved by Parliament. See Government of Ireland/National Children's Office, *Ireland's Second Report to the Committee on the Rights of the Child* CRC/C/IRL/2 (2006), para. 76. It should be noted that the non-governmental organisation Barnardos provide a service whereby a guardian *ad litem* will provide a social report in a handful of particularly difficult private law cases. See further below.
[104] See e.g. Shannon, note 61, at 247-249.

cases. The statutory body 'Children's Acts Advisory Board' (CAAB)[105] was therefore given the responsibility of drafting guidelines relating to the role.[106] The resultant 'CAAB Guidance' provides clarity on a number of issues, including a much needed definition of the role of the guardian *ad litem*,[107] qualifications guardians *ad litem* should have,[108] and guidance for the courts on the factors which a case should involve in order to merit appointment of a guardian *ad litem*.[109]

While the publication of the CAAB Guidance is very positive, it is a limited document in many respects. The first shortcoming of the Guidance relates to the status of the document. The Guidance is neither legislation nor regulation and is not, therefore, binding as a matter of law. It is for the court to recognise (or not) its value as a document. Neither does the Guidance have a regulatory body to oversee its implementation and consequently there is no basis on which to measure how rigidly it is being followed by guardians *ad litem* or the courts. The role of the Children's Acts Advisory Board did not extend to how the management, supervision or funding of the guardian *ad litem* service could be addressed. The Chief Executive of CAAB recognises that, "unless these issues are addressed any guidance offered to the sector cannot have the optimum effect."[110]

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[105] The CAAB was established under the Child Care (Amendment) Act 2007. It's remit included the provision of advice to the Ministers for Health and Children as well as Justice, Equality and Law Reform on policy issues relating to delivery of services to at risk children specifically under the Child Care Act, 1991 and the Children Act 2001. The Board is to be dissolved under the Child Care Amendment Bill (A Bill for the purpose of amending and extending the Child Care Act 1991) under Section 35 and the functions of CAAB are to be transferred to the Minister for Health and Children (Section 36 [1]). Therefore, unfortunately, the body that had responsibility for development in the area of guardians *ad litem* will no longer be in existence, and it is unclear how it is to be replaced.

[106] Under the Child Care (Amendment) Act 2007, Section 20. Following extensive consultation with professionals as well as children, the guidelines were published in May 2009 (see note 94). Hereafter referred to as 'the CAAB Guidance' or 'the Guidance,' as it is commonly known.

[107] CAAB Guidance, note 94, at 3. As noted above, the role of the professional is to "independently establish the wishes, feelings and interests of the child and present them to the court with recommendations".

[108] *Ibid*, at 6.

[109] *Ibid*.

[110] *Ibid*, at iii.

The most obvious and significant failing in the system is the lack of a regulatory body to oversee the guardian *ad litem* service. Although the non-governmental organisation Barnardos operates the 'Beacon' service which provides selection, training and management of a number of guardians,[111] other professionals operate outside any managed system. This obviously poses potential problems regarding the absence of management and accountability. There is no indication in the Guidance of, for example, who is to provide training to guardians *ad litem*.[112] The conflict of interest issue relating to the funding of guardians *ad litem* by the Health Service Executive, who is also a party to every case under the Child Care Act 1991, also persists. In England a regulatory body, the Children and Family Courts Advisory and Support Service (CAFCASS), is in place which is independent of the courts, social services and education and health authorities.[113] If established in Ireland, such a body could independently oversee the training and employment of guardians *ad litem*. Issues relating to conflicts of interest regarding the role of the Health Service Executive in the appointment and payment of guardians *ad litem* could also be overcome through the establishment of such a body. Such an organisation could also work in the Irish context to continuously progress the issue of consultation of children in proceedings affecting them. Since there are reportedly less than 40 guardians *ad litem* in Ireland,[114] it would does not appear that regulation through a single body would be particularly onerous for the state.

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[111] Barnardos oversaw 19 professionals as of October 2009. Information ascertained in phone interview with the Head of the Beacon Service, 19 October 2009.

[112] The Guidance outlines the qualifications and experience a guardian *ad litem* should have, and the fact that these professionals should keep up to date with changes in the system through training. There is, however, no established training specific to the role of guardian *ad litem* in the Republic of Ireland, as exists in other jurisdictions.

[113] The full mandate of CAFCASS is to safeguard the welfare of children, to give advice to the family courts, to make provision for children to be represented in court proceedings and to provide information and support to children and their families. See http://www.cafcass.gov.uk/about_cafcass.aspx (last accessed 19 March 2009). Northern Ireland also has an equivalent body, NIGALA.

[114] Information obtained through interviews with professionals in the field.

Furthermore, there is anecdotal evidence that guardians *ad litem* would welcome it.[115]

There is little guidance in either the 1991 Act or the 1997 Act on the circumstances in which a guardian *ad litem* should be appointed. There is some direction given in the CAAB Guidance, although the Guidance is not binding in law. The language used in this section is particularly weak: "the court may consider the guidance suggested by the CAAB in deciding to appoint a guardian *ad litem.*"[116] Moreover, the crucial point remains that it is left ultimately at the discretion of the judge as to whether an appointment is made, and there is no assumption that it will be made. As outlined in a study commissioned by the National Children's Office (and carried out by research consultants Capita), some judges tend to use the services of the guardian *ad litem* and others do not.[117] There were distinct regional differences found in the frequency of appointment, and it seemed that a lack of awareness of the possibility of using such a service was the reason that some judges were not making appointments.[118] This suggests that children are receiving different levels of service provision in accordance with the assigned judge as opposed to necessity. This fact was noted in 2006 by the Committee on the Rights of the Child in its Concluding Observations on Ireland's Second Report to the Committee.[119] In contrast, the system in England, Wales,[120] Scotland[121] and Northern Ireland[122] leans heavily in favour of appointment in care cases. It is mandatory that the court appoint a

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[115] *Ibid.*
[116] CAAB Guidance, note 94, at 5.
[117] Capita Research, note 84, at 53.
[118] *Ibid.* For example the authors noted that it was rare that such an appointment would be made by a rural District Court.
[119] Committee on the Rights of the Child, *Concluding Observations: Ireland* (29 September 2006) CRC/C/IRL/CO/2, para. 24.
[120] Section 41(1) Children Act 1989. In England children are automatically a party to the proceedings in public law cases and are represented by a Children's Guardian (the equivalent of the guardian *ad litem*) appointed by CAFCASS. See Jane Fortin, *Children's Rights and the Developing Law* (3rd ed, Cambridge University Press, 2009), at 245-248.
[121] Children (Scotland) Act 1995, Section 11(7)(b).
[122] Children (NI) Order 1995, Section 60(1).

guardian *ad litem* in care cases, unless the judge is satisfied that it is not necessary to do so.[123] This removes the potential for judges to appoint in accordance with other factors including knowledge of the relevant service.

Likewise, in the US, state courts are required by federal law to appoint an advocate to represent children in abuse and neglect cases.[124] Such an advocate may be an attorney (i.e. a lawyer) or a court appointed "special advocate"– appropriately trained volunteers who are "appointed by judges to watch over and advocate for abused and neglected children."[125] The relevant legislation states that the role of this advocate is "(I) to obtain first-hand, a clear understanding of the situation and needs of the child; and (II) to make recommendations to the court concerning the best interests of the child."[126] The regulatory organisation for such advocates cites independent research which demonstrates that children with such an advocate are likely to spend substantially less time in long-term care and are much less likely to re-enter care, mirroring the multi-faceted role of the guardian *ad litem* in Ireland.[127]

The fact that the relevant Irish legislation does not contain a presumption in favour of appointment is inextricably linked to the low frequency with which guardian *ad litem*s are appointed. Although precise figures are not

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[123] There is also provision for representation of children's voices in family law cases in England, Wales and Northern Ireland. Please see below.

[124] See Donald N. Duquette and Marvin Ventrell, "Certification of Child Welfare Attorneys: The Next Step in Building a Profession Dedicated to Justice for Children" (2004) 23 *Children's Legal Rights Journal* 53. The relevant provision is in the Child Abuse Prevention and Treatment Act (CAPTA) Public Law 93-273; 42 § U.S.C. 5106a(b)(2)(A)(ix).

[125] See the website of the regulatory organisation for such advocates, at: http://www.casaforchildren.org (last accessed 15 September 2011). The organisation further outlines that the advocate aims to make sure they don't get lost in the overburdened legal and social service system or languish in inappropriate group or foster homes. Volunteers serve as advocates on each case through to its closure and until the child has been placed in a secure and permanent home.

[126] Child Abuse Prevention and Treatment Act (CAPTA) Public Law 93-273; 42 § U.S.C. 5106a(b)(2)(A)(ix).

[127] See http://www.casaforchildren.org, note 125.

available, it is estimated in the Capita study that, in care proceedings, guardians *ad litem* are appointed in only 40% of cases where they could potentially have been used.[128] In family law cases, guardians *ad litem* are estimated to be appointed in "only a handful"[129] of cases. Clearly, considering the many care and family law proceedings in which the interests of children are involved, only a minority of children benefit from this service.

5.4.2 The Guardian ad litem *in Family Law*

As highlighted by the Capita research, guardians *ad litem* are appointed in only a small fraction of family law (private law) cases. The CAAB Guidance applies only to the Child Care Act 1991, which relates to care proceedings. As outlined above, the relevant provisions of the Children Act 1997 have not yet been commenced, therefore judges can only appoint a guardian *ad litem* with the agreement of both parties and the source of funding for such a service is uncertain. The handful of cases per annum in which the court sees fit to appoint a guardian *ad litem* tend to be extremely contentious cases in which the parties (i.e. usually the parents) have failed to agree on custody or access arrangements, typically for a number of years.[130] This is line with the "special circumstances" which must be present for the appointment of a guardian *ad litem* under Section 28 of the Children Act 1997.

Ireland also lags behind neighbouring countries in this regard. In England, the Children Act 1989[131] provides for the court to be assisted in reaching its decisions in family law cases by the provision of a report, either by a local authority social worker or a CAFCASS Family Court Adviser. In Northern Ireland in family law proceedings where parents cannot reach agreement,

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[128] Capita Research, note 84, at 53.
[129] *Ibid*, at 52.
[130] Information obtained from interviews with Barnardos guardians *ad litem*.
[131] Section 7.

social workers are appointed as Children's Court Officers and may interview the children involved to obtain views. In Scotland, all children in family law cases receive an 'F9' form from the court, inviting them to let the sheriff (judge) know whether they wish to express views,[132] and a presumption exists that children aged 12 and over have sufficient maturity to inform the court of their views.[133] The current approach to hearing children in family law proceedings in the Republic of Ireland is disorganised and *ad hoc* in comparison to other jurisdictions and results in children being consulted in only a handful of cases per year.[134]

5.4.3 Legal Representation

It is not possible for a child to be represented by both a guardian *ad litem* and a solicitor under the Child Care Act 1991,[135] as is the case in the UK system. It is at least partly as a consequence of this stipulation that children are rarely represented by a legal professional. Where children are made party to proceedings, the court is permitted to appoint legal representation in child care proceedings.[136] However the appointment of children as parties in child care proceedings occurs very rarely.[137] It most likely never occurs in family law proceedings. The lack of both types of professional providing a service simultaneously to a child in child care cases is likely due to resource considerations.[138] The fact that guardians *ad litem* are themselves often legally represented by is noteworthy. If a child has been appointed a

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[132] See Kathleen Marshall, "The Voice of the Child– The Scottish Experience," paper presented at *UK-German Judicial Conference* (Cardiff, 8-12 September 2004).
[133] Children (Scotland) Act 1995, Section 11(10).
[134] Capita Research, note 84, at 52.
[135] Section 26(4).
[136] Section 25(2). While making a child party to proceedings and appointment of legal representation are distinct matters, it would be highly unusual for children to be made party to proceedings without appointment of a legal representative by the courts.
[137] In the court observations conducted as part of this thesis it was observed that children who were themselves mothers were generally the only group appointed legal representation. In only one instance was appointment observed outside this group (where the wishes of a 16 year old in care and his birth mother differed). See Chapter 7, Section 7.9.2.
[138] It is also likely related to assumptions around protecting children from the court process.

solicitor, the solicitor may request the involvement of a guardian *ad litem* if he or she deems this necessary. The solicitor is then dismissed by the judge, a guardian *ad litem* is appointed, and the guardian *ad litem* then appoints the solicitor to represent her. Therefore the guardian *ad litem* interacts with the court as if she were a party (and not as an officer of the court). Shannon describes this system as "remarkably peculiar."[139]

From a financial perspective, this procedure is just as expensive as the "dual representation" approach used in England and Wales, whereby children are appointed both a guardian *ad litem* and a legal representative. From a children's rights perspective the Irish approach is highly unsatisfactory. While the child in question has the benefit of the guardian *ad litem*, she is left without legal representation, because the solicitor represents the guardian *ad litem*. The nature of the guardian *ad litem* model is arguably paternalistic as it separates children from the court process,[140] potentially with no recourse if she disagrees with the manner in which she is represented by the guardian *ad litem*. Moreover children are at a disadvantage in proceedings where the adults involved are legally represented, whereas children themselves are not represented. Instead the 'wishes and interests' of the child, as determined by someone else, are the subject of legal representation.[141]

The authors of the Capita research state that there is limited explicit analysis of dual representation to be found in the international literature.[142] However, where it is explicitly analysed, opinion is in favour of the use of the dual

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[139] Shannon, note 61, at 247.

[140] Although there are, of course, benefits to shielding children from the court process where appropriate.

[141] This is in contradistinction to representation of the child herself. See *Mabon v Mobon* [2005] EWCA Civ 634 in the context of England and Wales, where it was held that the mature adolescent brothers should be permitted to instruct counsel without the involvement of a Children's Guardian (in family law proceedings).

[142] Capita Research, note 84, at 26.

representation model.[143] While the resource implications of appointing two professionals instead of one are obvious, the international literature which covers the issue of the dual representation model depict it as an ideal model for complex and contentious cases which may arise, involving deprivation of liberty or life-changing decision-making.[144] This model has the benefit of providing for both the best interests of children (as represented by the guardian *ad litem*), and their wishes and feelings (represented by a solicitor). It recognises that children require extra assistance by a qualified child expert because of their evolving capacities, but also recognises the due process right to be legally represented to a similar extent to the adults involved.

5.5 Conclusion

The rights of children in Ireland are being increasingly recognised, as evidenced by recent law and policy. This is linked at least in part to the ratification of the Convention on the Rights of the Child.[145] The language of Article 12 of the Convention has certainly permeated law and policy in Ireland, for example it is included both in the National Children's Strategy[146] and the proposed amendment to the Constitution to include explicit reference to children's rights.[147] While it seems that it is inaccurate to claim that the Constitution as it stands does not provide for children's rights, it is significant that the potential for dynamic interpretation by the judiciary has been demonstrated in only a handful of cases. The case most relevant to the right to be heard is that of *F.N. and C.O.*[148] which demonstrated that the right can indeed be derived from the personal rights

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[143] *Ibid.* Indeed in *Mabon v Mabon and others* [2005] EWCA Civ 634, Thorpe LJ opined: "[t]his is a Rolls Royce model and is the envy of many other jurisdictions" (at 25). See also Shannon, note 61, who describes it as a "model of best practice" (at 247).

[144] *Ibid.* Indeed both child care and custody/access proceedings can be argued to lead to life-changing decisions.

[145] Shannon, note 7, at 134; Daly and Fegan, note 1, at 3.

[146] See Goal 1 of the National Children's Strategy, note 11, at 29.

[147] The right of children to be heard in proceedings affecting them is provided for in proposed Article 42(2)(iii).

[148] [2004] 4 IR 311; IEHC 60.

enshrined in Article 40.3.1, but which seems to have had very little influence on subsequent case law.

Where it is provided for in the legislation, hearing children is not seen as a right, but an option for the courts where it sees fit to utilise its discretion. This has lead in practice to the courts refraining from appointment of guardians *ad litem* in all but the most complex cases, with the result that most children are left unheard in proceedings affecting them. Moreover, children are rarely made party to cases, and where a guardian *ad litem* is appointed, it is she that is legally represented, not the child. The situation in private (family) law proceedings is particularly stark because the necessary enacting legislation relating to appointment of the guardian *ad litem* has not been passed. The number of family law cases in which children are heard annually in the lower courts are in single figures.[149] There exists an urgent need for the establishment of a regulatory body for vindicating the right to be heard, as well as legislative change in favour of hearing children. These points are considered in further detail in the remaining chapters. It is certainly positive that the proposed amendment to the Constitution includes explicit reference to the right to be heard, and if such a provision were to be included it could have potentially far-reaching consequences for the frequency with which children are heard in proceedings affecting them.

[149] Capita Research, note 84, at 52.

Chapter 6: The Right of Children to be Heard and the Irish Superior Courts

6.1 Introduction

The current section of this thesis seeks to ascertain whether children's views are sought in proceedings affecting them in Ireland and the extent to which those views are taken into account in decision-making.[1] The ultimate aim is to assess Irish compliance with the international right of children to be heard.[2] The purpose of the current chapter is to examine superior court judgments in Ireland in which decisions are made about the futures of children. The analysis of the case law concerning children in Ireland is impeded somewhat by the restrictions of the *in camera* rule which stipulates that no third party may attend family law or child care proceedings, and that no party should make public what occurred in such proceedings.[3] A number of judgments of the High Court and Supreme Court concerning children are published, however. The relevant judgments are therefore analysed in this chapter in order to ascertain the approach of Irish courts to the views of children in proceedings affecting them.[4] It is acknowledged that this analysis lacks material from the lower courts, where the majority of cases concerning children are heard, as written judgments are generally not handed down in these courts. This lacuna is filled somewhat by the fieldwork findings analysed in Chapter 7.

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[1] Chapters 5 to 7 focus on law and practice in the Irish context.

[2] As enshrined in Article 12 of the Convention on the Rights of the Child. See Chapter 2.

[3] The Family Law (Divorce) Act 1996, Section 38(5), the Domestic Violence Act 1996, Section 16(1) and the Child Care Act 1991, Section 29(1) stipulate that cases relating to family and child care law must be heard in private. See Chapter 5 for further consideration of the *in camera* rule.

[4] This analysis relates to cases concerning family and child care law, and excludes criminal and other proceedings which may relate to children, for the reasons outlined in Chapter 1.

The views of children in cases relating to their care and custody have not been particularly prominent in the superior courts to date, presumably due to the weak legislative provision for hearing children generally.[5] However such cases are increasingly coming before the High Court in Ireland, due to the higher number of cases taken under the Hague Convention on Child Abduction.[6] The enactment of Council Regulation (EC) 2201/2003,[7] known as the 'Brussels II Regulation,' or 'Brussels II,' requires the High Court to hear children in relation to Hague Convention proceedings unless this appears inappropriate having regard to the age or maturity of the child. The views of children in such cases have consequently become a matter of greater significance with the result that the issue of hearing children has recently been considered on a number of occasions by the High Court. In some ways the case law has been progressive from the perspective of children's rights– in *N. v N.*, for example, the High Court held that it was appropriate to seek the views of a child as young as six years.[8] Yet the approach of the superior courts to the matter of the weight to be accorded to the views of younger children, and how to balance those views against other factors, leaves many questions unanswered.[9]

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[5] The Child Care Act 1991 (Section 24) states that the court will give due consideration, as far as practicable, to the wishes of the child (having due regard to age and understanding) in child care proceedings. The provisions in private law proceedings are even weaker– Section 28 of the 1997 Act provides for the appointment of a guardian *ad litem* in "special circumstances." This provision has yet to be commenced, and children in family law proceedings are very rarely heard. It is left to the discretion of the judge as to whether children will be heard in both family and child care law. See further Chapter 5.

[6] The Hague Convention on Civil Aspects of International Child Abduction. Hereafter referred to as 'the Hague Convention' or 'the Convention.'

[7] Council Regulation (EC) 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

[8] *N. v N. [hearing a child]* [2008] IEHC 382.

[9] See e.g. *R. v R.* [2008] IEHC 162, *D. v D.* [2008] IEHC 176, *K. v K.* [2006] IEHC 277 and *N. v N.* [2008] IEHC 382, considered in detail below.

It also seems significant that, whereas cases taken under the Hague Convention can be appealed to the Supreme Court, the question of hearing children has been considered primarily within the High Court. This has further contributed to the lack of clarity in Irish law on the issue of hearing children, in particular on the matter of the weight to be accorded to their views. On one of the few occasions that the Supreme Court considered the matter,[10] the court held, in an arguably regressive judgment, that as a rule children under six will generally not be heard.[11] The relative dearth of Supreme Court judgments on hearing children means that there is a need for clarification of a number of points in this area, in particular the matter of the weight to be given to children's views.

The current chapter aims to identify the trends that are visible in the relevant case law of the superior courts. The early case law of the superior courts as regards the interests of children will be considered. An introduction to the background of the Hague Convention on Civil Aspects of International Child Abduction– and the exception to the rule of peremptory return on the basis of the views of the child– will then be provided. Developments as regards the approach of the courts to the views of older children will be considered, including the pivotal nature of the views of children in adoption cases. The matter of hearing the views of younger children in Hague Convention cases, and the apparent trend of overriding those views, will be analysed. The fact that the superior courts still refrain from engaging with the views of the child altogether in some cases will be considered. Conclusions on the case law will then be provided, and

[10] In a number of other Hague Convention cases which have been heard in the Supreme Court, the matter of hearing the views of the children was not considered, e.g. *R. v R.* [2006] IESC 7 and *P. v B.* [1999] IESC 326.

[11] *A. Bu. v J. Be.* [2010] IESC 38. The *ratio decidendi* of the Court, however, seems somewhat flawed in this case. See below at 6.4.3.

reference will be made to the standards pertaining to Article 12 of the Convention on the Rights of the Child.

6.2 Early Case Law

Judicial recognition in Ireland of the significance of speaking with children in proceedings affecting them can be traced back to well before the adoption of the Convention on the Rights of the Child. Shannon notes that there existed in some early cases a willingness on the part of the courts to "side-step" formalism in order to speak with children.[12] Interestingly, children probably met directly with judges to a greater extent than occurs today,[13] and a notable degree of regard was evident for the views of older children in some cases.[14]

For the most part, however, the courts appear to have approached children's views as a "potentially relevant factor"[15] as opposed to a matter of children's rights. In *B. v B.*,[16] the Supreme Court demonstrated willingness to interview children for the purpose of helping the Court in its deliberations on matters concerning those children. Following the separation of a husband and wife, the High Court awarded custody of two children aged ten and nine years to the father, and custody of the six year old child to the mother. The

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[12] Geoffrey Shannon "Giving a Voice to the Child– the Irish Experience" 14 *International Journal of Law, Policy and the Family* 131 (2000), at 132. Shannon notes the fact that in *M. O'S. v M. O'S.* (unreported, High Court, April 1972) the judge brought the children (whose interests were the subject of family law proceedings) to a boat show in order to speak with them.

[13] Shannon (note 12, at 132) links this with the lack of formal mechanisms at the time which the courts (at least the superior courts) have at their disposal to a greater extent today, such as the expert evidence of psychologists and guardians *ad litem*.

[14] See for example *Re Frost (Infants)* [1947] IR 3 (SC). In this case the court considered the views of a 14 year old boy on the matter of his education and living arrangements. The court decision was in line with his wishes.

[15] Inge Clissman and Paul Hutchinson, "The Right of Children to be Heard in Guardianship, Custody and Access Cases" 9 *Irish Journal of Family Law* 1 (2005), at 6.

[16] *B. v B.* [1975] IR 58 (SC).

older children were due to start at boarding school in two and three years respectively, so Kenny J decided that they should remain in the family home with their father. The judge declined to meet with the children, stating that it would not be useful and that the children might be upset by such a meeting.

Both parents appealed the decision to the Supreme Court, and that court permitted each party to submit additional oral evidence in the course of the appeal. In his judgment, Walsh J described how the judges met the children in chambers at the conclusion of all the evidence. Walsh J referred to them in the judgment as happy children and a credit to their parents, but there the description of the meeting promptly ends. There were fleeting references to the meeting in the lengthy judgment, for example that the meeting was useful for one judge in determining that the logic of the High Court judge was flawed. The High Court judge had decided that the daughter should remain with the older brother as the bond between them was close. However at the meeting between the Supreme Court judges and the children, the judges ascertained that she also had a very good relationship with her younger brother.

The meeting was apparently helpful in determining that the logic of the High Court judge was flawed, however the meeting was not expressly credited in the judgment with having helped the judges come to their conclusions in any significant way, and the wishes of the children as regards their living situations were not divulged. The judges were, presumably, upholding the confidentiality of the wishes of the children (although there does exist the possibly that the children's wishes are not referred to in the judgment because the children were not asked about them directly). It appears that the interview with the children was an exercise in ascertaining the facts

of the situation, rather than an inclination towards including their views in the decision-making process. Greatest consideration was given by the court to the age and gender of the children and assumptions around whether these factors positioned the mother on the one hand, or father on the other, as the more suitable primary carer.[17] It is not clear that the views of the children contributed to the decision-making process. Yet the willingness of the judges to meet with the children in this way appears to indicate increasing realisation that it may be a valuable exercise.

The case of *C. v C.*,[18] which involved a property dispute between separated parents, provides another early example of a court referring to the interests and experience of the children whose interests were in question. Although the ages of the children were not divulged in the High Court judgment, it is noted that a social worker gave evidence regarding the children's relationship with their father, who had a drinking problem and had allegedly engaged in abusive behaviour towards his wife. Kenny J stated that there was "coercive evidence that the children are frightened of the husband, and a social worker gave evidence that they reacted badly to him. Accordingly, I propose to award custody to the wife."[19] The judge decided that the behaviour of the father had affected the children badly and consequently proposed that an order be granted restraining him from entering the family home. While Kenny J refrained from interviewing the children, their views and interests were assessed by a professional. The judgment was made with a large amount of deference to the experience of

[17] For example Budd J stated that "[i]n considering the welfare of the elder son, I feel that it is a matter that should carry weight that he is now coming to the age where a boy tends to turn to his father for help and guidance in matters which perplex and worry a young lad" and concluded that the boy should be left "in the custody of his father" *B. v B.* [1975] IR 58 (SC), at 69.
[18] *C. v C.* [1976] IR 254 (HC).
[19] *Ibid*, at 258.

the children and the relationship between this and the interests of the children.

In the early cases in Ireland in which the views of children were sought, it seems to have been for the purpose of ascertaining the facts of the case as opposed to placing value on vindicating any right of the child to be heard. Furthermore, it is only in recent years that there has been a shift away from the perception that the views of children involved are a "potentially relevant factor"[20] as opposed to a matter of children's rights. It seems, however, that even in recent times the views of children have been conceptualised in terms of their rights in only a small number of cases,[21] and even then it seems that significant weight is accorded only to the views of older children.[22] Nevertheless, the increase in the number of Hague Convention cases has certainly prompted greater consideration of the issue of the right of children to be heard.

6.3 The Hague Convention

The Hague Convention on Civil Aspects of International Child Abduction was incorporated into Irish law by the Child Abduction and Enforcement of Custody Orders Act 1991. Cases taken under the Hague Convention are heard in the High Court with the possibility of an appeal to the Supreme Court. Article 1 of the Hague Convention states that its objectives are to secure the return of children wrongfully removed to a contracting state and to ensure that rights of custody and access under the law of one contracting state are

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[20] Clissman and Hutchinson, note 15, at 6.

[21] E.g. *R.W. v C.C.* [2004] IEHC 194; *F.N., E. B. v C. O., H.O., E. K.* [2004] 4 IR 311; [2004] IEHC 60; *M.W.P. v T.K.P.* [2007] IEHC 145, and to some extent *N. v N. [hearing a child]* [2008] IEHC 382, considered below.

[22] 'Older children' is taken here to refer to children of 12 years and over and 'younger children' is used to refer to those aged 11 and under. See below note 91.

respected in other Contracting States. Therefore the primary objective of the domestic courts of the state to which children have been removed in applying the Convention is to ensure that children wrongfully removed from a contracting state are returned. Making judgments about the best interest of the child is not the main objective for such courts, as it is intended that the substantive issues will be resolved by the courts of the country from which the child has been removed.[23] Arguably, this can lead to judgments which seem to focus more on technical issues than the interests of the children about whose lives very significant determinations are being made. However one of the broader objectives of the Convention is to benefit children generally, by deterring abduction and ensuring a quick return where it occurs. Waite LJ opined in *Re B (A Minor) Abduction*:

> The purposes of The (*sic*) Hague Convention were, in part at least, humanitarian. The objective is to spare children already suffering the effects of breakdown in their parents' relationship the further disruption which is suffered when they are taken arbitrarily by one parent from their settled environment and moved to another country for the sake of finding there a supposedly more sympathetic forum or a more congenial base.[24]

The Irish courts have also tackled the matter of the broad objectives of the Convention, in particular in relation to the Constitution of

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[23] In fact there is no reference to the best interest of the child in the articles of the Convention. The preamble does, however, read:

> The States signatory to the present Convention, [F]irmly convinced that the interests of children are of paramount importance in matters relating to their custody, [D]esiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access…

[24] [1994] 2 FLR 249, at 260.

Ireland. In the case of *W. v Ireland*,[25] the applicant mother argued that the Hague Convention, as implemented in Ireland through the Child Abduction and Enforcement of Custody Orders Act, 1991,[26] violated Article 40(3)(1) of the Constitution which relates to personal rights. She submitted, *inter alia*, that the 1991 Act failed to protect the personal rights of her child as it deprived her of "adjudication by an Irish court under the Guardianship of Infants Act, 1964, as to custody and access".[27] The High Court held that the rights of children were protected by the exceptions to the presumption in favour of return enshrined in Article 13 of the Convention. The court also opined that the Irish parliament had an entitlement to implement through the 1991 Act a Convention which aims to protect the interests of children and which confers jurisdiction to foreign courts in cases which are international in nature.[28]

The High Court made reference in *W. v Ireland* to *C.K. v. C.K.*[29] In which the High Court had rejected an argument that Article 20 of the Hague Convention,[30] which makes reference to the fundamental principles of the state to which the child has been taken, obliged the Irish courts to hold welfare enquiries in respect of children who were the subject of Convention proceedings. In that case the High Court had opined:

> [The defendant] has not made the case that the procedures in Australia would not be adequate. He has argued that there must be an enquiry here as to the children's welfare. The only

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[25] *W. v Ireland* [1994] ILRM 126; *sub nom, A.C.W. v Ireland* [1994] 3 IR 232.
[26] Hereafter referred to as "the 1991 Act".
[27] At p. 2.
[28] At p. 8.
[29] [1993] ILRM 535.
[30] Article 20 states that: "The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms."

> implication one can draw from this argument is that the Australian court would not adequately inquire into the welfare principle. The defendant has not made this case overtly and it is not for this court to accept such a case by implication.[31]

The Irish courts have, therefore, clearly confirmed that the concept of 'welfare' envisaged by the Hague Convention,[32] as implemented by the 1991 Act, is in conformity with the Irish Constitution.

In practice, however, the application of the principles of the Hague Convention has arguably resulted in judgments which risk significant additional disruption to children. This arises when courts order the return of children who have been resident for a number of years in the country to which they have been removed to the country from which they have been taken, despite the contrary wishes of those children.[33] This indicates that application of the presumption in favour of return of children will in some cases override the best interests of the individual child. As Baroness Hale has noted:

> In Convention cases, however, there are general policy considerations which may be weighed against the interests of the child in the individual case. These policy considerations include, not only the swift return of abducted children, but

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[31] At p. 22.

[32] The Court discusses in *C.K. v. C.K.* the reference made to the welfare of children in the Preamble to the Hague Convention, and the policy decision that the Convention would aim to seek the prompt return of adbucted children without the broader welfare enquiry. See p. 23.

[33] See in particular the cases of *R. v R.* [2008] IEHC 162, *D. v D.* [2008] IEHC 176 and *K. v K.* [2006] IEHC 277outlined below. The move ordered by the courts would ultimately have been very disruptive for the children who had resided in Ireland for significant periods of time.

> also comity between the contracting states and respect for one another's judicial processes.[34]

This approach is questionable in terms of the best interest principle as enshrined in the Convention on the Rights of the Child (CRC). It is clear that under the CRC, where decisions are being taken affecting an individual child, it is the best interests of that particular child which must be a primary consideration.[35] This incongruity notwithstanding, there are a number of stipulations in the Hague Convention which relate to the interests of the individual child.[36] Limited discretion to override the presumption of return is permitted under the Convention. Article 12, for example, provides an exception to return where proceedings have commenced after the expiration of a period of one year, and "it is demonstrated that the child is now settled in its new environment."[37] There also exists in

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[34] *Re M.* [2008] 1 AC 1288, at para. 42, cited with approval by Finlay-Geoghegan J in *A. v A. [aka Mc C.]* [2009] IEHC 460, at para. 32.

[35] Article 3 of the CRC admittedly refers to the best interest of the child as "a primary consideration" as opposed to "the primary consideration," leaving scope for holding other factors to be at least as important. However the Committee on the Rights of the Child interprets the best interest principle to imply that, "[i]n the case of children, the best interests of the child cannot be neglected or violated in preference for the best interests of the group." Committee on the Rights of the Child, *General Comment No. 11: Indigenous Children and their Rights under the Convention* (12-30 January 2009) CRC/C/GC/11, para. 30. It is also significant that the welfare principle enshrined in both the Irish Guardianship of Infants Act 1967, as well as the Children Act 1989 of England and Wales (Section 1), hold the welfare of the child as *the* primary consideration in decisions concerning the welfare of that child– this constitutes an even higher standard than that enshrined in Article 3 of the CRC.

[36] These exceptions (to the presumption of return of the abducted child) are deemed to be "clearly derived from a consideration of the interests of the child" by Elisa Perez-Vera in the *Explanatory Report on the Hague Abduction Convention*, (Hague Conference on Private International Law, 1981), para. 29. Available at www.hcch.net (last accessed 22 June 2010).

[37] In *P. v B.* [1999] IESC 326, at 14-15, Denham J cited with approval the comments of Bracewell J on the matter of the degree of settlement which has to be demonstrated in order to override the presumption in favour of return, stating that the degree of settlement must constitute "more than mere adjustment to surroundings" and that "the word 'settled' in this context has two constituents. First, it involves a physical element of relating to, being established in, a community and an environment. Secondly, I find that it has an emotional constituent denoting security and stability" (in *Re N. (Minors) (Abduction)* [1991]

Article 13 an exception to the rule of peremptory return of a child in circumstances where "there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."[38] However courts cannot engage in a wider welfare inquiry, which is deemed to be a matter for the courts of the jurisdiction from which the child has been taken and is to be returned.[39]

Invoking the defence of grave risk places a significant burden of proof on the party raising it and has proven to be a rare exception to the obligation to return children wrongfully removed to Ireland. The very high threshold suggested by the US Court of Appeals for the 6th Circuit in *Friedrich v Friedrich*[40]– involving extreme scenarios from which the courts in the country of "habitual residence"[41] could not protect the child– is often referred to by the Irish courts.[42] Therefore, while moving a child from one country to another may cause that child a level of harm and distress, it can be deduced that this does not amount to "grave risk" to the extent to which the Hague Convention seeks to deal in Article 13. Therefore the presumption in favour of return has taken priority in Irish case law over the harm

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1 FLR 413, at 417). Beaumount and McEleavy hold that the case law on the matter creates an impression of "strict interpretation" whereby neither a case having extended a few months over the time limit, nor mere adjustment to surroundings, will be held as significant. Paul Beaumount and Peter McEleavy, *Hague Convention on International Child Abduction* (Oxford University Press, 1999), at 206.

[38] In the Irish context see e.g. *B. v. B.* [1998] 1 IR 299 (SC). The Supreme Court held in this case that where a defence under Article 13 of the Convention is claimed, the court has a discretion whether or not to order the return of the children to the original jurisdiction.

[39] See e.g. comments of Finlay-Geoghegan J in *F.L. v C.L.* [2006] IEHC 66, at 20.

[40] 78 F 3d 1060; CA, (6th Cir, 1996). The threshold which the court foresaw in *Friedrich* involved a scenario where there was a prospect of a child returning to a state experiencing famine or war, or where there existed an extraordinarily strong emotional dependence, or if abuse would be likely to occur from which the courts of the country from which the child was taken could not protect the child.

[41] I.e. the country from which the child has been removed.

[42] See e.g. *A. Bu. v J. Be.* [2010] IEHC 77, *R.K. v. J.K.* [2000] *(Child Abduction: Acquiescence)* 2 IR 416 (SC) and *D. v D.* [2008] IEHC 176.

that may be caused to a child through the return to the country of habitual residence, even where the child has lived in Ireland for a number of years.[43]

Finally, a further exception to the rule of peremptory return, and the most important exception for the purposes of the present discussion, exists where a child is of the appropriate age and maturity and objects to return. Article 13 of the Hague Convention, in addition to providing an exception to the presumption of return on the grounds of grave risk, provides:

> The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

This provision of the Convention has been strengthened by the Brussels II Regulation which applies where the habitual residence of the child is in an EU state.[44] Article 11(2) of the regulation states:

> When applying Articles 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity.[45]

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[43] See e.g. *K. v K.* [2006] IEHC 277, *R. v R.* [2008] IEHC 162 and *D. v D.* [2008] IEHC 176 outlined below.

[44] Council Regulation (EC) 2201/2003. The Brussels II Regulation is a "directly effective instrument…concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility" *Bu. v Be.* [2010] IEHC 77, para. 14.

[45] Note that Recital (33) of Regulation 2201/2003 refers to the aim to seek to ensure respect for the rights of the child as specified by Article 24 of the EU Charter of Fundamental Rights, and the language of Article 24 is clearly based on Article 12 of the CRC.

This text constitutes a presumption in favour of hearing children in Hague Convention cases, as opposed to the language of the Convention itself, which merely accords the judge discretion to refuse return on the basis of the views of the child, without specifying that the court is ordinarily obliged to seek the views of the child. Therefore children who are habitually resident in EU countries have the express right to be heard in Hague Convention cases.

These standards have influenced recent Irish case law to the extent that the courts are increasingly recognising the obligation under EU law to seek the opinions of children in Hague Convention cases. This includes quite young children, as was highlighted by the case of *N. v N.*, in which Finlay-Geoghegan J ordered that a six year old child be interviewed in relation to the application of his father to have him returned to his state of habitual residence.[46] International research demonstrates that this provision of the Brussels II Regulation has had somewhat limited impact on international practice, however. Statistical research indicates that the child's objection to returning was the sole reason for a finding against returning the child in 13% of cases in 1999. The child's objection to return was the sole reason for return in a significantly lower 9% of cases four years later in 2003[47]– the decrease possibly reflects a hardening of attitudes to children's views. Although such research has not been conducted specifically in the Irish context, there appears to exist in Ireland a

[46] *N. v N. [hearing a child]* [2008] IEHC 382. The case is outlined in more detail below.

[47] Nigel Lowe *et al.*, *A Statistical Analysis of Applications Made in 2003 under the 1980 Hague Convention on the Civil Aspects of International Child Abduction: Preliminary Document No. 4 of October 2006 for the Special Commission of October/November 2006* (October 2006), at 38. Available at: http://www.hcch.net/index_en.php?act=publications.details&pid=3888&dtid=2 (last accessed 20 June 2010).

trend whereby the views of younger children are not accorded a large degree of weight.[48]

Some commentators question the emphasis placed on the views of children in such cases, given that the primary aim of the Hague Convention is to determine the forum in which the merits of a case will be heard.[49] Adults, after all, are not usually afforded an equivalent right. However, this does not seem a valid approach for a number of reasons. Children may have become settled in the country to which they have been taken, particularly where there has been considerable delay in hearing the case. Therefore determining the appropriate forum is not always the sole issue to be considered. Moreover, the standard enshrined in Article 12 of the Convention on the Rights of the Child specifies that a child must be heard in *all* matters affecting her (and this includes the right to have her views accorded due weight).[50] This international law standard has been set by the CRC in recognition of the fact that children's interests, unlike those of the vast majority of adults, may have to be determined by courts when parents cannot agree. Therefore it does not seem justified to approach the legal status of children as if it were identical to that of adults, when clearly it is not.

The stipulations of Article 13 of the Hague Convention and Article 11(2) of the Brussels Regulation have undoubtedly resulted in a dramatic increase in the number of cases coming before the High

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[48] See further section 6.4.3 below.

[49] Permanent Bureau of the Hague Convention of Private International Law, *Report of the Third Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction* (Permanent Bureau of the Hague Convention of Private International Law, 1997), at 15. Available at: http://hcch.e-vision.nl/index_en.php?act=publications.details&pid=2271&dtid=2 (last accessed 30 June 2010).

[50] Article 12(1). See further Chapter 2.

Court in which the views of children are sought and considered. Arguably it reflects a broader cultural shift at international level– possibly inspired by the CRC– in favour of consulting children in such cases.

6.4 Cases in which Children's Views are Included

6.4.1 The Views of Older Children[51]

Cases in the Irish superior courts in which children's views are sought indicate significant regard on the part of the judges for the views of the children consulted, particularly where the children are over 12 years. The case of *M.W.P. v T.K.P.*[52] is a rare example of the successful application of the exception to the Hague Convention's general rule of peremptory return in circumstances where there is a grave risk to the children. It is also an example of a case where the views of the children heavily influenced the decision. A mother took her daughters (aged 13 and 15) to Ireland from the United States in breach of court orders made in the State of Texas. The applicant father, who was divorced from the mother and had joint custody of the girls, sought relief under the Hague Convention, including an order to return the children to the United States. McGovern J appointed a clinical psychologist to conduct an examination of the situation of the girls,[53] who expressed a strong wish not to return to the father, as he had been violent towards them.[54] The psychologist reported that the girls had attained the appropriate level of maturity for their respective ages. The judge accepted that the situation in the

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[51] Brief excerpts from this section have been contributed to Sallie Newell, Anne Graham and Robyn Margaret Fitzgerald, *Results of an International Survey regarding Children's Participation in Decision-making following Parental Separation* (Childwatch International Research Network, 2009), at 44.

[52] *M.W.P. v T.K.P.* [2007] IEHC 145.

[53] *Ibid*, at 4.

[54] The US Courts had issued a 'protective order' as a result of his behaviour, indicating the seriousness of the violence. *Ibid*, at 3.

US presented a danger to the children and refused the relief sought by the applicant father in this case, permitting the children to remain in Ireland. The determination of the judge was reached through the evidence of the psychologist, other objective sources such as the protective order of the US court, and the views of the children.[55] While those views were just one of the factors in the decision-making process, it is clear from the judgment of McGovern J– who describes their distress at the possibility of returning to their father as "significant"[56]– that the views were influential.

The views of the children had been more explicitly pivotal in two earlier High Court cases. In *R.W. v C.C.*[57] two girls aged 13 and 14 years were resisting a court order[58] obliging visits to their non-custodial father in London, because of his insistence upon imposing circumstances on the visits with which they were unhappy.[59] Finlay-Geoghegan J held that it was no longer in accordance with the welfare of either of the girls that the order be enforced. The learned judge stated that it was desirable that they continue to be encouraged to have contact with their father, but that to force the children to see him would likely be damaging to their welfare:

> It is a matter of common sense that to force either of the girls (and in particular A who is now 14½) to travel to London to see the applicant in such circumstances against their express wishes and in light of the reasons for their objections would, as a matter of high probability, be

[55] *M.W.P. v T.K.P.* [2007] IEHC 145, at 7.
[56] *M.W.P. v T.K.P.* [2007] IEHC 145, at 7.
[57] [2004] IEHC 194.
[58] The girls had lived in Ireland with their maternal aunt for most of their lives, since the death of their mother.
[59] For example he insisted that they stay during the London visit with his adult daughter, whereas the girls wished to stay with their maternal aunt, who was their primary carer.

> damaging to their welfare and manifestly no longer in accordance with their welfare.[60]

The outcome of this case is a clear example of the views of the children involved proving pivotal to the determination of the judge. The relatively advanced age of the girls (and in particular 14 year old A., whose age was emphasised by the judge in the quotation above) clearly had a strong influence on the decision of the judge not to enforce the order of the English court. The judge felt that it was so obvious that it would be damaging to the girls to go against their expressed wishes that it was "common sense."[61] She also used the language of rights, referring to "the girls' right to choose where they should stay whilst in London."[62] This indicates a high level of regard on the part of Finlay-Geoghegan J for the entitlement of the children to influence their own situation, and in this instance to have their views held to be determinative.

F.N. and E.B. v C.O., H.O. and E.K.[63] involved circumstances similar to *R.W. v C.C.*[64] The applicant father, who also lived in the UK, sought the custody of his two daughters (also aged 13 and 14), who had been living in the care of their maternal grandparents in Ireland since the death of their mother nine years previously. Finlay-Geoghegan J ordered an assessment of each of the girls by a senior clinical psychologist and a social worker, and the judge also consulted with the children together in chambers. Each girl stated that she had a happy school life and expressed a strong wish to stay

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[60] *R.W. v C.C.* [2004] IEHC 194.
[61] *Ibid.*
[62] *Ibid.*
[63] [2004] 4 IR 311; [2004] IEHC 60. Some excerpts from this section have been included in Aoife Daly and Roisin Fegan, "The Implementation of the Convention on the Rights of the Child into Irish Law", in Paulo de Stefani, ed, *1989-2009: 20 Years of the Convention on the Rights of the Child in the EU Countries* (EU Inter-University Centre for Human Rights and Discrimination, forthcoming 2010).
[64] *R.W. v C.C.* [2004] IEHC 194.

living with the maternal grandparents in Ireland. The judge found both of the girls to be of an age and maturity where it was appropriate to take their wishes into account, and was satisfied that their views were independently formed. The judge was of the opinion that, although the father was a fit person to have custody, it would be detrimental to the welfare of the girls if they were forced to move to live with their father in England against their wishes. In this case the views of the children appear to have been the main factor in the decision-making process of the judge, rather than just one of many factors, as in the case of *M.W.P. v T.K.P.*[65] The wishes of the children were central to the determination of the case and are described by Power as "the biggest single factual and legal feature behind the decision."[66] Crucially, Finlay Geoghegan J further held that the child's right to be heard in proceedings affecting her could be derived as an unenumerated right from Article 40.3 of the Constitution, which places an obligation on the state to "defend and vindicate" personal rights.[67] However it appears that this progressive interpretation has had little influence on future judgments. Kilkelly states that "the significance of the conclusion was negligible beyond the terms of the case itself," but that it highlights the potential for the progression of children's rights through Article 40.3.[68]

Interestingly, the Hague Convention (and consequently the Brussels II Regulation) did not apply in the two latter cases, and therefore ascertaining the views of the children was not strictly required. That the court saw fit to do so was possibly due to the influence of the practice of ascertaining children's views, a practice which is

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[65] *M.W.P. v T.K.P.* [2007] IEHC 145.
[66] Conor Power, "Practice and Procedure" 7 *Irish Journal of Family Law* 3 (2004).
[67] This case is considered in further detail in Chapters 3 and 5.
[68] Ursula Kilkelly, *Children's Rights in Ireland: Law, Policy and Practice* (Tottel Publishing, 2009), at 63-64.

associated with Hague Convention,[69] and was also presumably due to the advanced age of the children involved. It is also probable that the children's views were sought because the cases were heard at the level of the High Court.[70] A consequence of the fact that these were not Hague Convention cases was that there did not exist a presumption in favour of return. A principle of this prominence, therefore, did not compete against the best interests or views of the individual children in these cases. This possibly provided the judge with greater discretion to make judgments in line with the wishes of the children involved. This points to the problematic nature of the Hague Convention and the uneasy position of the best interests of (and consequently the views of) the child within that instrument.

6.4.2 The Views of Older Children in Adoption Cases

Cases in which adoption orders are sought feature occasionally in the superior courts. In the few cases published which have involved children who were sufficiently old to be capable of forming views, those views have proved important in judicial decision-making regarding adoption. This seems to be due to the strong legislative basis for considering those views. The Adoption Act 1988 stipulates that before making an adoption order "the Court shall, in so far as is practicable, give due consideration, having regard to his age and

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[69] As noted above, children have the express right to be heard in Ireland in Hague Convention cases, due to the Brussels II Regulation.

[70] It appears to have become relatively common practice that children's views are sought in family law cases at the level of the High Court to an extent that has not developed in the lower courts. This is possibly due to the fact that Hague Convention cases (where an assumption exists that views will be sought) are heard at the level of the High Court, and possibly because of resource issues. Note the experience of a District Court judge who attempted to appoint a guardian *ad litem* in a particular case and had to fund this appointment with money from the court poor box, outlined in Chapter 7, at 7.8.3. It is likely that there are greater resources (of both time and finances) at the level of the superior courts to enable such exercises as obtaining reports on children's views.

understanding, to the wishes of the child concerned."[71] In the case of *In Re Article 26 and the Adoption (No 2) Bill*, 1987, Finlay CJ stated that the determination whether an adoption is in the best interests of a child should not be based on "some simple material test."[72] Instead, the enquiry:

> [W]ould necessarily involve proper consideration of all the consequences, from the point of view of the child of bringing it by adoption out of the family into which it was born and into an alternative family.[73]

This reflects the significance accorded by the Irish courts to the views of children in cases where a decision must be made whether or not to grant an adoption order.

In the case of *W.H.B. and W.S. and E.S. v An Bórd Uchtála*,[74] a 17 year old fostered young person wished to be adopted by her foster parents with whom she had resided since she was about three weeks old. The application of her foster parents to adopt the young person, L., was supported by the Health Board (although not by all of its personnel having dealings with her).[75] It was opposed by the birth parents of the child, who were separated, and by Lor., the younger surviving sister of L. The court paid considerable regard to the views of L., who expressed a strong desire to be adopted by her foster parents. The issue for the court was whether the adoption of L. by the foster parents was an appropriate means of supplying the place of her birth parents, under the Adoption Act 1988. O' Higgins J stated that because of L.'s age and maturity, and the fact that she had

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[71] Section 3(2).
[72] [1989] IR 656 (SC), at 665.
[73] *Ibid.*
[74] [2004] IEHC 110.
[75] *Ibid*, at 3.

expressed a desire to be adopted for seven years, the court was obliged to consider her wishes and give those views considerable weight in coming to its decision.[76] L. addressed the court directly in this case, stating that she wished to be adopted by her foster parents because they had raised her and had done everything for her that parents are expected to do. O' Higgins J remarked in his judgment that L. had impressed the court as an articulate and courageous person and a truthful witness. He also stated his belief that the initiative for adoption came from L. herself and not from her foster parents, and that it had been her heartfelt desire for many years to be adopted.[77]

The second issue of interest in this case regarding the right of children to be heard was that Lor., the 11 year old sister of L. who was in foster care with another family, had a guardian *ad litem* appointed on her behalf by order of the High Court.[78] Lor.'s guardian *ad litem* objected to the making of the order, on the basis that Lor. was fearful of losing contact with her sister.[79] The court turned to the evidence of L. herself in dealing with these issues. When asked about her sister, L. stated that they had a good relationship and strongly refuted the suggestion that she might stop seeing her sister if an adoption order were made. O' Higgins J stated that he accepted L.'s evidence,[80] and ultimately found that it would be in the best interests of L. for the court to make the adoption order sought.

O' Higgins J clearly considered the views of L. to be significant in the proceedings, which is perhaps unsurprising because of the advanced age and maturity of L. She was on the threshold of

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[76] *Ibid*, at 10.
[77] *Ibid.*
[78] *Ibid*, at 1.
[79] *Ibid*, at 12.
[80] *Ibid*, at 17.

adulthood at the time of proceedings and her testimony conveyed that she was an intelligent and articulate young person who understood the repercussions of adoption. However the fact that she had consistently expressed a desire to be adopted for seven years was another significant factor according to the judge. Her testimony undoubtedly contributed to the understanding of the court that the adoption was in her best interest and clarified that the fears that she would lose contact with her birth sister, Lor., were unfounded.

The case of *O'D (J.) (An Infant) Re.*[81] involved a significantly younger child in a similar position to L.[82] The case concerned 12 year old "J." who had also been in long term foster care. The views and wishes of the child involved also proved pivotal in this case. As in the case of *W.H.B. and W.S. and E.S. v An Bórd Uchtála*, the foster parents wished to adopt J., who had been in their care for almost 12 years, over the objections of the birth mother, who had an intellectual disability and mental health problems. Despite reassurances by the foster parents, the birth mother feared that she would no longer have access to J. if she were adopted.[83] The child's strong wish to be adopted was conveyed to the court through several mechanisms in this case, including a social worker and the child's foster mother. Herbert J also met with the child in chambers, in the presence of a solicitor and a stenographer. He took the view that considerable weight should be attached to the wishes of J. in light of her age.[84] He found her to be "a happy intelligent and open child"[85]

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[81] [2002] IEHC 53.
[82] However, as noted above, for the purposes of this discussion 'older children' are considered to be children from the age of 12 upwards, therefore this child still falls within that category.
[83] [2002] IEHC 53, para.8.
[84] *Ibid*, para. 64. Herbert J saw fit to place a large degree of weight on the child's views presumably because he considered her to be of a relatively advanced age at 12 years, although he did not specify this in the judgment.
[85] *Ibid*, at para. 38.

who described a very contented life with her foster family and indicated a strong desire to be adopted by them. The judge was satisfied that considerable weight should be attached to her wishes, considering both her age and her degree of understanding of the situation. The adoption order was granted by the court.[86]

Both of the previous cases indicate a high level of engagement on the part of the courts with the young people in whose interests the adoption orders were made. In both cases, the children's voices were heard first hand by the decision-maker.[87] The well-formed views of the children (as described in the judgments) were certainly taken into account by the judges, and analysis of these views was provided in the judgments.[88] From the judgments, the right of children to be heard in these cases would appear to have been treated with a high degree of respect.

6.4.3 The Views of Younger Children[89]

Recent case law in Irish courts indicates that the courts are consistently seeking the views of young children.[90] However the

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[86] An appeal by the birth mother to the Supreme Court was dismissed by that court. The Supreme Court considered the issue of whether the birth mother had 'abandoned' her parental rights in respect of J. in accordance with Section 3(i)(I)(C) of the 1988 Act and whether she had failed in her duties towards the child under Section 3(i)(I)(A) of that Act. The Court acknowledged the views of J. in the course of the judgment. *Northern Area Health Board & ors v An Bord Uchtala & anor* [2002] IESC 75.

[87] Although they were heard directly by the decision-maker, it is not clear that L. or J. were separately represented in proceedings. This is perhaps ironic considering L.'s sister and J.'s mother had both been appointed guardians *ad litem*. It is noted that L. had a guardian *ad litem* as a person in foster care, because her sister's guardian had spoken with this professional before proceedings (at 12). However it is not specified in the judgment that L.'s guardian *ad litem* was directly involved in the proceedings in question.

[88] It is noteworthy that it is unclear, however, whether this information was transmitted back to the children, and if so, by what means.

[89] An earlier draft of this section has been published as a journal article: Aoife Daly, "Considered or Merely Heard? The Views of Young Children in Hague Convention Cases in Ireland" 12 *Irish Journal of Family Law* 16 (2009).

extent to which the views of young children are actually taken into consideration is questionable. It is submitted that there exist significant differences between treatment of the views of older as against younger children. 'Younger children' is taken for the purpose of the present discussion to refer to those under 12 years of age.[91] It appears that the opinions of children aged 12 and over are tending to hold significant weight with the Irish courts and are in many cases the determining factor.[92] Recent case law, however, indicates a standard emerging in the Irish courts that discretion is unlikely to be used by judges in favour of the wishes of younger children in Hague Convention cases. The reasoning provided in the judgments appears to be that discretion need not be exercised in favour of the children involved (and against the general rule of peremptory return) as the children are considered to be too young. As previously noted, it must be acknowledged that in cases taken under the Hague Convention there exists a strong presumption in favour of return, considering that the primary objective of the domestic courts to which children have been removed in applying the Convention is to ensure that children wrongfully removed from a contracting state are returned. A clear pattern is emerging, however, whereby the court seeks the views of young children, and subsequently overrides those views. This certainly seems worthy of analysis, the presumption in favour of return notwithstanding.

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[90] See below the recent cases of *R. v R.* [2008] IEHC 162, *D. v D.* [2008] IEHC 176 and *K. v K.* [2006] IEHC 277.

[91] This is in accordance with Piaget's Stage Theory, as well as bearing in mind trends observed in the relevant case law. See e.g. Jean Piaget, *The Origins of Intelligence in Children* (Routledge and Kegan Paul Ltd., 1953 [1936]); and Jean Piaget, *The Construction of Reality in the Child* (Routledge and Kegan Paul Ltd., 1955 [1937]).

[92] See e.g. *F.N., E. B. v C. O., H.O., E. K.* [2004] 4 IR 311; [2004] IEHC 60 and *M.W.P. v T.K.P.* [2007] IEHC 145.

An emerging trend of seeking the views of younger children was recently confirmed by Finlay-Geoghegan J in *N. v N. [hearing a child]*.[93] In this case, the applicant father sought the return of a six year old boy who had been removed by his mother to Ireland from the state where he had resided. The mother of the boy made an application that the child be interviewed in accordance with Art 11(2) of Brussels II. She claimed that the child objected to a return and that he was competent and intelligent. The father of the boy opposed an interview and argued that the child was not particularly mature for his age. Finlay-Geoghegan J ordered that the boy be interviewed and assessed. This case was particularly illuminating as the judge opined for the first time in the Irish case law that in Hague Convention cases "[t]he starting point is that the child should be heard. The Court is only relieved of the obligation where it is established that it would be inappropriate..."[94] Finlay-Geoghegan J therefore affirmed that in any Hague Convention case, the High Court has an obligation to consider whether to obtain the views of the child involved. However the decision in *N. v N. [hearing a child]* is particularly significant due to the fact that the child involved was six years old, indicating that there is nothing to preclude children of this young age being heard, unless it is established that this is inappropriate.[95] Finlay-Geoghegan J emphasised that this obligation to seek the views of children was distinct from the level of influence which the views of the child should have on the outcome of the case. Indeed this particular finding regarding the weight to be accorded to views is also indicative of current practice in the Irish courts of seeking the views of younger children but consistently ordering the return of the children against their expressed wishes. It appears that

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[93] *N. v N. [hearing a child]* [2008] IEHC 382.
[94] *Ibid*, para. 19.
[95] Presumably such scenarios would be those where it was determined that hearing the child would be harmful to that child, or that the child had severe learning disability.

the strength of the presumption in favour of return, possibly taken together with attitudes to the views and capacities of younger children, are responsible for this trend.

In the case of *R. v R.*,[96] heard in May 2008, the father of K., a ten year old girl, sought her return to Latvia. He claimed that she had been wrongfully removed in December 2005 by her mother. Both parties were in agreement that there had been an unlawful abduction and the matter before the High Court turned solely on the objections of the child to her return.[97] A court-appointed psychologist stated that K. was a mature child who had a strong wish to remain in Ireland, where she had lived for three and a half years.[98] This desire was based on her friendships at school and the fact that she lived with her 17 year old brother and her new baby sister. The psychologist stated that a forced return to Latvia would be a painful and unpleasant experience for K. However he expressed concern that it was possible that K. could become completely separated from her father. He also stated that K. would adapt if she were returned if the environment was right.[99] The trial judge, Sheehan J, held that on the basis of the evidence of the psychologist, there were reasonable grounds as to why K. came to object to returning to Latvia. He also believed that K. was expressing her own views. Sheehan J considered it appropriate that the court take her objections into account.[100] However the judge was mindful of the opinion of Baroness Hale in *Re M.*,[101] where she stated that there are general policy considerations in Hague Convention cases which must be balanced against the interests of the child, such as the expedient

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[96] *R. v R.* [2008] IEHC 162.
[97] *Ibid*, para. 3.1.
[98] *Ibid*, para. 2.14.
[99] *Ibid.*
[100] *Ibid*, para. 4.1.
[101] *Re M.* [2007] UKHL 55, para. 42

return of abducted children in order to deter such abductions and ensure respect for the judicial processes of other contracting states. Sheehan J then stated:

> On the face of it, it would appear that the ideal situation for the minor, would be for her to remain in Ireland with every appropriate effort being made to enable her father to re-establish a relationship with her through occasional meetings, either here or in Latvia and with regular telephone access.[102]

Sheehan J decided that, notwithstanding this consideration, though he had taken the views of K. into account he did not regard them as determinative. He held that if the return to Latvia were properly managed, it "would not be so injurious to the child's interest that I ought to exercise my discretion in favour of her stated wishes"[103] and ordered that K. be returned to Latvia.[104]

A similar Hague Convention case, *K. v K.*[105] was decided in 2006. The mother in this case took children aged nine and five to Ireland from England and their father, who had access to the children one day a week, sought their return. A psychiatrist was appointed by the court to assess the eldest child (T.), and found that T. had developed the appropriate level of maturity for her age and that she objected to being returned to England, though she seemed sad at the loss of contact with her father.[106] She wished to stay because she was happy in Ireland, because of school and friends and because overall she had

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[102] *R. v R.* [2008] IEHC 162, para. 4.1.
[103] *Ibid*, para. 4.5.
[104] However the court put a stay on the order until such time as the Latvian Court was to review the custody and access arrangements for the child in light of her present situation, considering the length of time she had been in Ireland.
[105] *K. v K.* [2006] IEHC 277.
[106] *Ibid*, at 9.

a nicer life in Ireland than she had in London.[107] The psychiatrist could not establish that undue influence had been placed on the girl in forming these opinions.[108] Despite T.'s wishes, Gilligan J came to the conclusion that the children should be returned. The judge reasoned that he had weighed the nature and basis of the objections advanced by T. regarding a return to England.[109] However he was of the opinion that the long term best interest of T. to have a relationship with her father "far outweighed"[110] the basis of her objections and that he should use his discretion accordingly. Gilligan J made reference to the need "to bear in mind the view" of T., whom he described as being at "a very tender age,"[111] when coming to his decision. However, there is no further elaboration, apart from a reference to the relationship of T. with her father, on the basis of the decision to go against the views of a child he described as bright and mature. The young age of the child was undoubtedly an important factor in the decision, and the presumption in favour of return once again took precedence over the views of the child.

The Hague Convention case of *D. v D.*[112] was also heard in 2006. The case concerned a nine and a half year old boy (D.) taken from Poland to Ireland by his mother. They had lived in Ireland for almost two years at the time of the proceedings. The applicant maternal grandfather, who had had custody of the child in Poland, sought the return of D. The court-appointed psychologist stated that D. displayed immature social and emotional behaviour.[113] D. had also been diagnosed as developmentally delayed in Poland. However he had made considerable progress since he came to Ireland and

[107] *Ibid.*
[108] *Ibid*, at 10.
[109] *Ibid*, at 13.
[110] *Ibid.*
[111] *Ibid.*
[112] *D. v D.* [2008] IEHC 176.
[113] *Ibid*, at 7.

attended school.[114] The teachers stated that, though the nine year old had an English language reading age equivalent to that of a child aged 7.2 years, D. had made huge educational gains. Furthermore a psychologist's report expressed the opinion that D. was capable of functioning in the normal range of development.

The psychologist told the court that D. very specifically expressed a wish not to return to Poland.[115] D. had a negative emotional association with his grandfather's home and did not want to return there.[116] D. had told the psychologist that his grandfather shouted, was angry and had locked him in a room. D. expressed his wish to stay with his mother in Ireland who, he felt, loved him and was good to him. The psychologist stated that D. must have naturally been influenced by his mother (because of his age and capacities) and that he exhibited a willingness to please. However, D. had been open and frank with the psychologist and there was no evidence of him having been coerced in any way.[117] The psychologist stated that, due to traumatic experiences encountered by D. up to his departure to Ireland, he was concerned about the effects of the disruptive change involved in returning to Poland on his educational and psychological development.

MacMenamin J ultimately granted an order for the return of the child to Poland. The judge acknowledged the progress that D. had made in Ireland. He also noted his learning difficulties, his willingness to please and the close attachment of D. to this mother.[118] He acknowledged that a change in custody would be likely to have a

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[114] *Ibid.*
[115] *Ibid*, at 8.
[116] *Ibid.*
[117] *Ibid.*
[118] *Ibid*, at 10.

detrimental effect on the wellbeing of D.[119] However he stated that the views of D. were not "in law so compelling as to justify an order refusing the return of the child."[120] Furthermore, the judge was of the opinion that under both Article 13 of the Hague Convention and Article 11(2) of Brussels II, "once the child has been given an opportunity to be heard this obligation is satisfied."[121] The judge compared the current case to the English case of *S. v S.*,[122] whereby a nine year old girl was considered to have achieved enough maturity for the court to "to have regard to her views."[123] In addition to being mature for her age, her objection to return had not solely related to a desire to remain with a particular parent.[124] In the view of MacMenamin J, the evidence in relation to D. fell short of these tests.[125]

While one must indeed acknowledge the fact that, as noted by the learned judge, D. was "not a mature independent nine year old,"[126] D. had made great intellectual gains in Ireland and could function as a normal nine year old, according to the report of a doctor. D. had, according to the psychologist, very clear reasons why he did not wish to return to Poland, his dislike for his grandfather being one.[127] It is particularly unfortunate that the judge relied on the fact that D.'s reading development in English (his second language) was reported

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[119] *Ibid.*
[120] *Ibid*, at 11.
[121] *Ibid.*
[122] *S. v S. (Child Abduction) (Child's Views)* [1993] Fam. 242.
[123] This is the term used by MacMenamin J in *D. v D.* [2008] IEHC 176, at 12. It is not the term used in *S. v S.* (*Ibid.*)
[124] As highlighted by Eimear Long, *Children's Rights in Private International Law*, (Unpublished Ph.D. Thesis, Trinity College Dublin, 2008), at 236, it has been held that a child must object to returning to the country in question, and not simply to leaving the abducting parent. See *S. v S. (Child Abduction) (Child's Views)* [1993] Fam. 242; *Director-General, Department of Community Services v Rowe* (1996) 21 FLR 159; *S. v M.* [1997] NZFLR 337 and, in the Irish context, *T.M. v. M.D.* [2000] 1 I.R. 149.
[125] *D. v D.* [2008] IEHC 176, at 12.
[126] *Ibid*, at 11.
[127] *Ibid*, at 8.

to be equivalent to that of a child aged 7.2 years to decide that D. could not maturely form views.[128] Reading age does not necessarily correlate to the capacity to form views.[129] Moreover, it is recorded in the judgment that D. "stated that he felt happy in Ireland"[130] and that "[t]he child very specifically stated that he did not wish to return to Poland."[131] Considering these comments together with the gains he had made in Ireland, it seems difficult to argue that this constituted anything but a rational approach by the child to his current situation, separate to the matter of remaining with his mother. The court saw fit to refrain from exercising its discretion under Article 13 to refuse return in this case, considering the (seemingly very rational) views of the child. This highlights the strength of the presumption in favour of return under the Convention.

It seems significant that the varied use of the terms "have regard for",[132] "take into account",[133] "hold determinative"[134] and "attach weight"[135] in *D. v D.*– which appeared to be used apparently interchangeably at times[136]– suggests confusion between the related but separate matters of hearing children, according weight to their views, and holding those views to be determinative. The language of

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[128] *Ibid*, at 12.

[129] See e.g. the Hague Convention case of *S. v S. (Child Abduction) (Child's Views)* [1993] Fam. 242, in which it was noted that, whilst the nine year old child was dyslexic, she had the I.Q. of a child of 12 (at 245).

[130] *D. v D.* [2008] IEHC 176, at 8.

[131] *Ibid.*

[132] *Ibid*, at 8-9.

[133] *Ibid*, at 8.

[134] *Ibid*, at 8-9.

[135] *Ibid*, at 8.

[136] For example when MacMenamin J stated that in *S. v S. (Child Abduction) (Child's Views)* [1993] Fam. 242, the child had achieved enough maturity for the court to "to have regard to her views", he presumably meant that she had achieved enough maturity for her views to be held as determinative, although the language used in the judgment of *S. v S.* itself is also confusing, as it refers to the criteria for "taking into account" the views of the child.

Article 13 of the Hague Convention itself is imprecise,[137] and confusion has also arisen in other jurisdictions.[138] Yet the comment of MacMenamin J that "the child's objections cannot be a determinative factor to be taken into account"[139] is particularly ambiguous. Presumably the judge meant that he did in fact take the views of the child into account,[140] but that those views nonetheless did not constitute the determinative factor in the judgment. MacMenamin J was correct in asserting that, "[t]he views of the child are not synonymous with an obligation to bow to the child's wishes."[141] However the matter of how much weight the courts should accord to a child's views is further obscured in this case. The judgment appears to compound the lack of clarity on the issue generally– both in Irish courts and elsewhere.[142] It is submitted that the views of all children in such cases should be accorded weight and consideration, even if they are not ultimately determinative. The exact nature of the exercise (that is, how weight is to be accorded, measures of capacity to be used, etc.) requires much deeper consideration, both by the courts and policy makers.

It is instructive to consider these three recent cases together given that they share such similarities. The children were close in age (a ten year old and two nine year olds). All of the children had been in

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[137] Article 13 reads "[t]he judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views."

[138] For example Harrison points out that, in *Re T (Abduction: Child's Objections to Return)* [2000] 2 FLR 192, where Ward LJ refers to the views of the child (at 213), "it is clear from the context of this part of his judgment that he is referring to the discretionary exercise and equating the expression 'take account of' with 'uphold'." (Richard Harrison, "The Views of Children in Child Abduction Cases under the Hague Convention", *Family Law Week* [June 2006], at 3.)

[139] *D. v D.* [2008] IEHC 176, at 12.

[140] At another point in the judgment MacMenamin J stated that "I am prepared to attach significant weight to the views of the child." *Ibid*, at 12.

[141] *Ibid*, at 12.

[142] As noted above, the language of Article 13 is unclear (see note 137), and similarly confused language has arisen in the English courts (see note 138).

Ireland for a significant amount of time and there was clear evidence that they were all doing very well in Ireland. All of the children had expressed a strong desire to remain in Ireland. Yet in each of these three cases, these factors were held not to outweigh the presumption of return of the children to their original jurisdictions. It is possible that these three cases indicate an emerging standard at High Court level whereby the views of children aged ten and under will be sought, but these children will not be considered to have sufficient capacity for their views to override the presumption in favour of return. The opinion of MacMenamin J in *D. v D.*– that once the child has been given an opportunity to be heard, the obligation regarding the right to be heard is satisfied[143]– seems to be the accepted approach regarding these types of cases in the High Court.[144] This seems at odds with the standard of the Convention on the Rights of the Child, which stipulates that views of the child must be "given due weight"[145] and that children must be given information on the position of their views within the decision-making process.[146] Article 13 of the Hague Convention as well as Article 11(2) of Brussels II state that in Hague Convention cases, the court will have regard for the "age or degree of maturity" of the child when considering her views. In the judgments outlined above, there does not appear to be much emphasis placed on clarifying the weight to be accorded to children's views once they have been heard.

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[143] *D. v D.* [2008] IEHC 176, at 11. It has been noted above that MacMenamin J was referring here to Article 13 of the Hague Convention (under which there is no 'obligation' to hear the child as such, as it is at the discretion of the judge) and Article 11 (2) of the Brussels II R Regulation (Council Regulation 2201/2003).

[144] Considering the judgments in the cases outlined above.

[145] Article 12(1).

[146] "Judges and other decision makers should, as a rule, explicitly state and explain the outcome of the proceedings, especially if the views of the child could not be accommodated." Committee on the Rights of the Child, *Day of Discussion on the Right to be Heard*, Forty-third session, 11-29 September 2006, para. 41.

In the more recent case of *N. v N. [hearing a child]*,[147] while acknowledging the obligation to seek the views of even very young children, the court specifically differentiated between seeking views and according weight. In that judgment the court refrained from considering the matter of attributing weight to children's views in any depth,[148] but commented, *obiter*, that the views of younger children would be given less weight than those who are older.[149] There is a clear need for the matter of weight to be further considered and clarified in the Irish context, because the approach taken in the case law implies that seeking the views of younger children is an empty exercise, where their views are consistently overridden. While the judges in the cases outlined above do make reference to having considered the maturity of the children involved, the extent to which they have actually taken account of the strong, clear, and rational opinions of these children about their own futures is unclear. The judgments indicate that the emphasis of the judges is on the young age of the children involved, rather than the clarity of the views that they express and the manner in which this is weighed against other factors. In this context it appears almost impossible for the views of a young child to override the presumption in favour of return.

Developments in Hague Convention jurisprudence continue. It appears however that, despite the significant gains made in terms of recognition by the Irish courts of the requirement to ascertain children's views, little has changed in relation to perceptions of the weight to be given to those views. Sheehan J, when considering the

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[147] [2008] IEHC 382.
[148] Finlay-Geoghegan J briefly emphasised the need to distinguish between hearing children and the weight the views of children are given. *Ibid*, para. 23.
[149] *Ibid*, para. 31.

substantive matters in *N. v N. [hearing a child]*,[150] acknowledged that six year old M.N. "objects to being returned and has attained an age and a degree of maturity at which it is appropriate to take into account his views."[151] While Sheehan J gave some consideration to the views of the child, the judge found that, in light of the importance of the father's role "the child's views in this case cannot be determinative, particularly when one takes into account his young age."[152] The High Court ordered the return of M.N.[153] While the finding of the High Court may well have been in the best interests of M.N., little insight is provided into the rationale with which the views of the child were balanced with the factors which superseded those views.

In the case of *Li. v La.* [2009][154] the court ordered the return of two brothers, aged seven and a half and ten years, despite their stated preference to stay in Ireland. In that case, however, the children had been in Ireland only a little over a year, which is not quite as lengthy as the time spent in Ireland by children in the cases considered above. Nevertheless the court referred to the views of the children as an "important issue."[155] However the matter of the views of the children are given very little consideration in the judgment. In fact the only explicit reference to the views of the children is the statement of the judge: "I do take on board the children's views but they are not the sole determining factor."[156] He then makes reference

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[150] There were two separate judgments given in this case- the consideration as to whether M.N. should be heard (*N. v N. [hearing a child]* [2008] IEHC 382) and the substantive judgment on the matter of whether M.N. should be returned (*N. v N.* [2009] IEHC 213).
[151] *N. v N.* [2009] IEHC 213, para. 30.
[152] *Ibid*, para. 32.
[153] Although a stay was placed on the order to enable the mother to bring an application for review (of the child's access to his father) by the Lithuanian court.
[154] [2009] IEHC 585.
[155] *Ibid*, at 11.
[156] *Ibid*, at 13.

to the importance of the relationship between father and son, and his belief that there was no substance to an allegation by the older child at having been given a black eye by his father. There is no further reference to the views of the child, and again the value in ascertaining the views of the children seems questionable where so little consideration is accorded in the judgment to those views.

Finlay-Geoghegan's determination in *N. v N. [hearing a child]*,[157] that the court is obliged to consult even very young children, has been developed in a questionable way in the case of *A.Bu. v J. Be.*[158] When *A.Bu. v J. Be.* was heard in the High Court, the court rejected the application of the respondent mother that her five year old daughter be heard on the matter of being returned to Latvia as, pursuant to Brussels II Article 11(2) "the Court considered it inappropriate that the minor in the title be interviewed" in relation to the application.[159] The High Court ordered that the child be returned.[160] The mother appealed to the Supreme Court on the basis of several grounds, of which hearing the child was not one,[161] but nevertheless applied to the Supreme Court for the child to be interviewed. The Supreme Court considered the matter of hearing the child in a separate judgment, as the High Court had done.[162] In the course of deciding whether to interview the child, the Supreme Court cited *N. v N. [hearing a child]*,[163] and the determination by Finlay-Geoghegan J that it would be appropriate to hear the views of a six year old child. The Supreme Court came to the conclusion that:

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[157] [2008] IEHC 382.
[158] *A.Bu. v J. Be.* [2010] IEHC 77, IESC 38.
[159] *A.Bu. v J. Be.* [2010] IESC 38, para. 5.
[160] Finlay-Geoghegan J did not give a written judgment in this case– this is outlined in *A.Bu. v J. Be.* [2010] IESC 38, para. 12.
[161] *Ibid.*
[162] *Ibid*, para. 7.
[163] [2008] IEHC 382.

> While not setting a rigid rule, the High Court considered in *N. v. N.* that prima facie (*sic*) it was inappropriate for a court to hear a child under the age of six. This is not an inflexible rule, but will depend on all the circumstances of the case…In all the circumstances of the case, on the evidence before the Court, including the age of the child, I would not interfere with the decision of the High Court. For the same reasons I would refuse the application to this Court to have the child heard.[164]

The basis for this decision is confusing. Notwithstanding the admission by Denham J that a "rigid rule" has not been set, nowhere in the *N. v N. [hearing a child]*[165] judgment did the court appear to reach the conclusion that it would be inappropriate for a court to hear the views of a child under six. Finlay-Geoghegan J emphasised in that case that the primary consideration of the Court in determining whether or not to hear a child "is whether the child on the evidence appears *prima facie* to be of an age or level of maturity at which he is probably capable of forming his own views."[166] Finlay-Geoghegan J continued that, in deciding whether to make such a decision, judges must rely on common sense and that "anyone who has had contact with normal six year olds know that they are capable of forming their own views about many matters of direct relevance to them in their ordinary everyday life."[167] While five years is indeed a very early age, to exclude as a group those under six years seems somewhat arbitrary. Many five year olds, due to individual differences, will be as mature as a six year old. Where a particular

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[164] *A.Bu. v J. Be.* [2010] IESC 38, paras. 15-17.
[165] [2008] IEHC 382.
[166] *Ibid*, para. 29.
[167] *Ibid*, para. 32.

five year old is not quite as mature as a six year old, she may still be capable of forming views on her own life.[168]

Interpreting the existence of such a rule appears to conflict with the recognition of the dual factors of age and maturity specified in Article 12 of the Convention on the Rights of the Child, Article 13 of the Hague Convention, Article 11(2) of the Brussels II Regulation and Article 24 of the Charter of Fundamental Rights of the European Union. This was recognised in *S. v S.* where the English Court of Appeal commented on the Hague Convention that:

> Article 13 does not seek to lay down any age below which a child is to be considered as not having attained sufficient maturity for its views to be taken into account. Nor should we.[169]

The Supreme Court refers in *A.Bu. v J. Be.* to "circumstance"[170] under which there may exist an exception to the perceived rule of refraining from seeking the views of children under six. The nature of these hypothetical circumstances is left unspecified. Perhaps it could arise where a parent argued that the child had capacities beyond her years, however this is not indicated. It seems that without extenuating circumstances– which Denham J. fails to specify– the views of children under six will not be sought.

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[168] See further Chapter 1. Indeed Aubrey and Dahl argue that a number of studies highlight the successful participation of children as young as three to five years old in appropriately conducted interviews, but that "young children are not always asked for their views by those making decisions about their lives" Carol Aubrey and Sarah Dahl, "Children's Voices: The Views of Vulnerable Children on their Service Providers and the Relevance of Services they Receive" 36 *The British Journal of Social Work* 21 (2006), at 29. Likewise, Butler *et al.* conclude that their research highlights that, "there is abundant evidence to show that it is both desirable and possible to consult children, even as young as five years old, when decisions are being made about their future." Ian Butler *et al.*, *Divorcing Children: Children's Experience of their Parents' Divorce* (Jessica Kingsley Publishers, 2003), at 203.

[169] *S. v S. (Child Abduction) (Child's Views)* [1993] Fam. 242, at 251.

[170] *A.Bu. v J. Be.* [2010] IESC 38, paras. 15-17.

This is arguably an unfortunate precedent as it sets an age limit for seeking the views of children, in contrast to the international legal instruments noted above which specifically avoid such a limit. There is little guidance from the Supreme Court on the matter of the weight to be accorded to younger children where they are heard, however the following comment from Fennelly J in the Hague Convention case of *L. v C.*[171] is indicative of the approach of the Irish courts at present:

> The younger the child, the more likely he or she is to be suggestible. Family courts are cautious about acting on the expressions of opinion of children of tender years when they are concerned in disputes as to custody or access between parents.[172]

In this particular case, counsel for the appellant mother had submitted that proceedings should have been adjourned in order for the eight year old child to be further interviewed by the psychologist who had been appointed by the court to assess him.[173] The psychologist reported after a single meeting that the child was inconsistent in his views as to whether he wished to return to his country of habitual residence. The above consideration regarding "children of tender years" formed part of the *ratio decidendi* of the Supreme Court in holding that there was no need for further assessment and that the appeal on the basis of the views of the child be dismissed.[174] As can be determined from the approach of the High Court to the views of younger children, even where they appear to be independent, rational and long-held views, the Supreme Court's guidance in *L. v C.* has been followed.

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[171] *L. v C.* [2008] IESC 19.
[172] *Ibid*, para. 45.
[173] *Ibid*, para. 35.
[174] *Ibid*, para. 45.

6.5 Cases in which Children's Views are Absent

The case law highlights that provision is increasingly made for seeking the views of children in Hague Convention and adoption cases, most likely driven by the legislation pertaining to these types of proceedings. However available case law also indicates that there remain instances in which the superior courts are not consulting children when making decisions about matters regarding their lives, even where the children in question are at an advanced age. Child care proceedings, for example, are much less prevalent in the superior courts than Hague Convention cases which enter the system at High Court level. Child care proceedings are also subject to legislation which leaves to the discretion of the judge the matter of whether or not children will be heard.[175] In the case of *K. v HSE & Anor*,[176] the applicant mother sought an order quashing a decision which committed her child to the care of the Health Service Executive, who in turn passed the child into the custody of the father. Although reference is made to a Section 20 report,[177] the High Court judgment does not refer to the views of the seven year old child, reflecting the inferior provision for hearing children in cases which do not involve the Hague Convention or adoption.

McK. v The Information Commissioner[178] is another recent case in which the absence of the views of the child was also questionable.

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[175] The Child Care Act 1991 (Section 24) states that the court will give due consideration, as far as practicable, to the wishes of the child (having due regard to age and understanding). This provision is weaker than that of the Brussels II Regulation, which states that it "shall be ensured" that children are given the opportunity to be heard during proceedings when applying Article 13 of the Hague Convention.

[176] [2009] IEHC 591.

[177] Under Section 20 of the Child Care Act 1989 the court may order the report of a social worker on the welfare of the child. This may or may not include reference to the wishes of the child.

[178] [2006] IESC 2; [2002] IEHC 85.

The Supreme Court held that a guardian father had a right to access the medical records of his daughter despite the opposition of her other guardians and primary carers (her maternal uncle and aunt), as well as the hospital involved. The issue first arose when the girl was eleven years of age, and by the time judgment was handed down by the Supreme Court, she was 17 years old. It does not appear that she was consulted on the matter at any point. The application of the father to access the records was first refused by the Information Commissioner, who argued in this case that the father had not presented evidence that the release of his daughter's medical records to him would actually serve her best interests. The Commissioner concluded that the requirement to protect her privacy took precedence over the right of the father to have access to her records. However, on appeal, the High Court held that, by virtue of the provisions of the Constitution generally and Articles 41 and 42 in particular, the parent of the child concerned enjoys "parental primacy."[179] Consequently, the father was entitled to a constitutional presumption that he had "the welfare of his child at heart in the absence of evidence to the contrary."[180]

The Commissioner appealed this ruling to the Supreme Court, contending that the parent should have the burden of establishing that his access to the records of his child is indeed in that child's best interests. However the Supreme Court affirmed the decision of the High Court. The Supreme Court acknowledged the very lengthy period which had passed between the hospital stay of the child when she was aged 11 and the Supreme Court proceedings, at which point she had almost reached adulthood, being a few months from turning 18. Denham J. stated:

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[179] This principle was first articulated in the medical context in the case of *North Western Health Board v H. W.* [2001] IESC 70 (the "PKU case"), para. 235.
[180] *McK. v The Information Commissioner* [2006] IESC 2, para.13.

> This alters the circumstances, as her wishes are now most relevant...the effects of the delay cannot be ignored in view of the necessity to balance the changed circumstances, including the attitude of L.[181]

The court emphasised that the Commissioner should consider L.'s impending adulthood when making a renewed decision on the application in the light of the court's judgment. It is undoubtedly a positive point that the court saw fit to recognise the importance of the views of L. Power suggests, however, that the judgment seems to imply that it is only near adulthood that her views are considered relevant, because of the doctrine of parental primacy.[182] Kilkelly further notes that the due process rights of L. were not considered in the course of the judgment, which is particularly surprising considering the fact that L. herself, having turned 16 years, had the right to consent to medical treatment.[183] This seems to represent the inconsistent and often piecemeal approach to ascertaining children's views in cases concerning their interests. This is most likely due to the differing approaches of individual judges,[184] disparate provision in the legislation depending on the nature of proceedings,[185] as well

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[181] *Ibid*, para. 15.2.

[182] Conor Power, "Parental Access to Medical Records" 9 *Irish Journal of Family Law* 1 (2006), at 25.

[183] Ursula Kilkelly, *Children's Rights in Ireland* (Tottel Publishing, 2008). Section 23 of the Non-Fatal Offences Against the Person Act 1997 holds that a child over the age of 16 years is capable of consenting to medical treatment.

[184] National Children's Office, *Review of the Guardian Ad Litem Service: Final Report from Capita Consulting Ireland, in Association with the Nuffield Institute for Health* (National Children's Office, 2004), at 53.

[185] For example provisions for hearing children range from being heard as a right of the child in Hague Convention cases (*N. v N. [hearing a child]* [2008] IEHC 382) to circumstances where it is almost impossible to hear children in family law cases in the District Courts due to the failure to enact Section 28 of the Guardianship of Infants Act 1964, as amended by Section 11 of the Children Act 1997, as well as the failure to provide for resources for guardians *ad litem* in such cases (see note 70 above).

as the persistent lack of prominence of the right to be heard, despite some progressive judgments.

6.6 Conclusion

It is clear that Article 13 of the Hague Convention and Article 11(2) of Brussels II have resulted in a dramatic rise in the number of cases in the superior courts in which children's views are sought. There have been some very evolutive judgments relating to the right of children to be heard, at least as regards affording children "the opportunity to be heard in...proceedings affecting the child."[186] It has been established that the Irish courts are obliged to seek the views of even young children in Hague Convention cases,[187] and that the right of children to be heard can be derived from Article 40.3 of the Constitution.[188] It appears that the views of older children have consistently been accorded much weight.[189]

There are, however, a number of outstanding issues. The rationale used by courts to make decisions regarding the weight to be given to the views of children in accordance with age and maturity is unclear, and the approach of the courts to the views of younger children appears particularly ambiguous. A trend has emerged whereby the views of younger children will be ascertained, but overridden.[190] Admittedly the presumption in favour of return weighs heavily on the courts in Hague Convention cases, and there are other important factors to consider, such as relationships with relatives other than the primary carer. Yet the court has the discretion to refuse return where

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[186] Convention on the Rights of the Child, Article 12(1).
[187] *N. v N. [hearing a child]* [2008] IEHC 382.
[188] *M.W.P. v T.K.P.* [2007] IEHC 145.
[189] See e.g. *R.K. v. J.K.* [2000] 2 IR 416, *F.N., E. B. v C. O., H.O., E. K.* [2004] 4 IR 311; [2004] IEHC 60 and *M.W.P. v T.K.P.* [2007] IEHC 145.
[190] See e.g. *K. v K.* [2006] IEHC 277, *R. v R.* [2008] IEHC 162, *D. v D.* [2008] IEHC 176 and *N. v N.* [2008] IEHC 382, outlined above.

the child objects, and the primary factor for overriding children's views in the case law appears to be the fact that the children in question are young. Arguably insufficient consideration is accorded to the nuances of the maturity of the individual children and the way in which their wishes are weighed against other factors.

Some commentators would undoubtedly argue that the courts have taken a valid approach in assuming that children of the ages of nine and ten are insufficiently mature for judges to exercise discretion in favour of their stated wishes. However psychological research as regards the decision-making capacities of children indicates that this approach may underestimate the abilities of children of this age, as children generally start to develop the capacity to think objectively and logically about concrete events at an early age.[191] Moreover, there are questionable aspects to dismissing the experiences of even very young children, on the basis that they are not yet sufficiently 'adult'. It is arguably inadequate for courts to discount the wishes of a younger child primarily because of the age of that child. Considering the difference in treatment by the superior courts of the views of older and younger children outlined above, it appears that this may be occurring at present. Such an approach is incompatible with Article 12 of the Convention on the Rights of the Child as interpreted by the Committee on the Rights of the Child.[192] The Committee holds that the decision-maker must make the additional determination of *how much* weight the views be given, not merely

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[191] Although they may still be unable to logically consider all outcomes. See Piaget, note 91. See further Chapter 1.

[192] Although the Convention on the Rights of the Child does not form part of Irish domestic law, Finlay-Geoghegan J had regard to the instrument in *N. v N. [hearing a child]* [2008] IEHC 382, and in the English courts, the Convention on the Rights of the Child has also been considered in Hague Convention cases, e.g. *S. v S. (Child Abduction) (Child's Views)* [1993] Fam. 242, at 244.

whether the views be given any weight at all.[193] Effective consideration necessitates an element of accountability on the part of the decision-maker, in that he or she should have to demonstrate that the child's view was considered and provide an explanation (both in the judgment and to the children involved) as to why the court decided to go against the wishes of the child.[194] The question must be asked: if the views of younger children are consistently overridden, primarily because of the age of such children, then where is the value in seeking those views? The practice could be considered 'tokenism' on Hart's Ladder of Participation,[195] and it would constitute tokenism of a relatively expensive kind, considering the time required of the child development expert.

It is unclear whether information is fed back to children after their views have been sought, and if so, how. In the Day of Discussion on Article 12 of the Convention on the Rights of the Child, the Committee stipulated that decision-makers should explicitly explain the outcome of proceedings to children.[196] However this does not seem to be common practice in relation to cases in Ireland where children's views have been sought. There is no indication that children are given any explanation as to why judges come to the conclusions they do, and judgments often do not elaborate on the understanding of the decision-maker of the capacities of the child, nor how exactly the views of children have been weighed against other factors where their wishes are superceded.[197] If such action is not taken, young children could well be left confused and upset

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[193] Committee on the Rights of the Child, *General Comment No. 12: The Right to be Heard* (1 July 2009) CRC/C/GC/12, para. 28.
[194] Although the Committee on the Rights of the Child has not yet provided or suggested models of good practice in this respect (see Chapter 2).
[195] Roger Hart, *Children's Participation: From Tokenism to Citizen* (UNICEF, 1992).
[196] Committee on the Rights of the Child, note 146, para. 41.
[197] E.g. see *D. v D.* [2008] IEHC 176.

having given views which were ultimately overridden without adequate explanation.

It is unclear whether there exists a concrete framework used by courts elsewhere which permits them to demonstrate consideration of the views of children within such decision-making processes. A standardised 'checklist' of the likes contained within the Children Act 1989 of England and Wales[198] may be useful to guide the court in balancing the views of the child with other factors. There already exist well-established models through which decision-makers can determine the capacity of children to make decisions.[199] It would undoubtedly be useful if the professionals who prepare social reports for the courts were requested to give a detailed account to judges on this basis, as a lack of understanding of (or at least engagement with) developmental psychology is evident in the judgments.[200] Nevertheless an improved process is clearly required in order to clearly demonstrate the weight which has been attributed to the views of children in judicial decision-making processes.

Article 12 of the Convention on the Rights of the Child further requires that the judiciary and lawyers receive training on issues regarding children and the right to be heard.[201] Such education could include training on the accountability necessary for compliance with

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[198] Section 1(3). The first consideration on the list is the views of the child. See further Chapter 1.

[199] To determine whether children are capable of decision-making relating to health, it is theorised that the key factors are whether the child can understand and communicate the relevant information, can think and choose with some degree of independence, can assess the potential for benefit, risk and harm and whether the child holds a reasonably stable set of values from which to make a decision. See Gerison Lansdown, *The Evolving Capacities of the Child* (UNICEF Innocenti Research Centre, 2005), at xi.

[200] For example in the case of *D. v D.* [2008] IEHC 176, which involved a child with learning disability.

[201] Committee on the Rights of the Child, note 146, para. 41. See also Committee on the Rights of the Child, *Concluding Observations: Yemen* (3 June 2005) CRC/C/15/Add.266, para.38.

Article 12 of the Committee on the Rights of the Child.[202] Cases such as *D. v D.*[203] indicate that it would be desirable for judges in Ireland to receive basic training in developmental psychology to allow them to better understand the decision-making capacities of children. Perhaps there is an assumption that judges, particularly those experienced in family law cases, are already experts as regards children and development. There is little doubt that judges have considerable experience and knowledge. However without formal education in child psychology, arguably judges are not facilitated to make decisions relating to children to the highest of standards. Conclusions on the maturity of children involved in Hague Convention cases require clearer elaboration by the courts, and knowledge relating to child psychology would assist with this.

While it appears that the vast majority of cases involving the views of children in the superior courts are Hague Convention cases, there are also a number of other relevant proceedings in which children's interests are a factor. The legislative basis for proceedings other than those relating to the Hague Convention or adoption cases is clearly much weaker as regards hearing children.[204] Another important point is that the superior courts are often tasked with considering complex points of law apart from the substantive issues relating to the best interests of the child.[205] The points of law in the cases cited very often turn on the rights of parents (who are, of course, parties to the case), however the proceedings clearly affect children (who do not have such status). Because of this, the principle of the best interests

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[202] The Committee on the Rights of the Child outlines in the Day of Discussion recommendations that decision-makers should explicitly explain the outcome of proceedings to children. Committee on the Rights of the Child, note 146, para. 41.
[203] *D. v D.* [2008] IEHC 176.
[204] See above at note 185. Although, perhaps ironically, in cases which are outside the scope of the Hague Convention, there is more scope for children's views to have greater impact, as the presumption in favour of return is not an issue.
[205] E.g. *McK. v The Information Commissioner* [2006] IESC 2, [2002] IEHC 85.

of the child– and consequently the views of the child, which are very closely linked to this principle– often seem sidelined.

This is somewhat ironic considering that these cases involve the interests of the children arguably more than any other individual.[206] Take, for example, the case of *McK.*[207] which concerned the issue of access to information by a parent without custody. Although the case had general implications beyond the situation of L., the fact that the interests of L. were not represented in proceedings seems strangely at odds with the principle of the best interests of the child, and indeed due process rights generally. This is a feature of a substantial number of cases before the superior courts which concern the interests of children.[208] It is a matter of debate as to whether infants should be represented in proceedings affecting them, and indeed whether this point is relevant to the right to be heard. However in *N. & anor. v Health Service Executive & ors.*,[209] McGuinness J opined that it was significant that the child involved (aged two years) did not have independent representation. The learned judge continued:

> No doubt this was, in part at least, due to the form of the proceedings, where the issue to be decided by the court was whether Mr and Mrs Doyle's present custody of the child was lawful. In my personal view, however, and bearing in

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[206] And indeed Section 3 of the 1964 Guardianship of Infants Act states that "in any proceedings before any court the custody, guardianship or upbringing of an infant…is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration."

[207] E.g. *McK. v The Information Commissioner* [2006] IESC 2, [2002] IEHC 85.

[208] For example much-cited cases such as the 'Baby Anne' case (*N. & anor. v Health Service Executive & ors.* [2006] IEHC 278 and [2006] IESC 60) and the 'PKU Case' *(North Western Health Board v W (H)* [2001] IESC 70, 8 Nov 2001), as well as the more recent cases of *S. v The Adoption Board* [2009] IEHC 429, *B. v G.* [2009] IEHC 104, and *J. McB. v L.E.* [2010] IEHC 123.

[209] [2006] IESC 60. In this case, a two and a half year old child had been placed shortly after birth with foster carers who intended to adopt her. Her birth parents decided to marry and withdraw consent to adoption. The Supreme Court ultimately ordered the return of the child to her birth parents.

> mind the terms of such international instruments as the United Nations Convention on the Rights of the Child, or EU Regulation 2201/Nov. 2003 (Brussels 2 bis), this situation should at the very least give pause for thought.[210]

The lack of independent representation of the interests and/or voice of the child permeates many cases which relate to, ironically, the best interests of the child. Presumably this trend at superior court level guides the lower courts in their perception of the representation of children and their wishes.[211] It reinforces the assumption in this jurisdiction that parental primacy obviates the need to consider children as individuals distinct from those who care for them. The trend arguably indicates that a constitutional amendment to expressly protect the rights of children is indeed necessary to ensure that the interests of children are considered in proceedings on an equal basis to those of parents and other adults. It also raises the possible need for separate legal representation for the interests of children in all cases concerning them, whether or not they are capable of forming views, as has been recognised in other jurisdictions.[212]

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[210] *Ibid*, para. 1.

[211] Although it seems that the increasing inclination to ascertain the views of children demonstrated by the superior courts is not evident in the lower courts- see Chapter 7. This is presumably due to decreased resources at this level (it is very difficult for the courts to ascertain children's views in family law cases without an express mechanism to do so, and the guardian *ad litem* service used in child care cases is expensive), together with the low priority accorded to ascertaining children's views.

[212] Children automatically become party status in public law proceedings in England and Wales. See Jane Fortin, *Children's Rights and the Developing Law* (3rd ed, Cambridge University Press, 2009), at 245-248. In New Zealand, for example, it is mandatory that counsel be appointed for children in any proceedings under the Children, Young Persons and their Families Act 1989. See Committee on the Rights of the Child, *Concluding Observations: New Zealand* (12 March 2003) CRC/C/93/Add.4, para.134. In Nigeria, the Child Rights Act 2003, Article 155, holds that, "[a] child has the right to be represented by a legal practitioner and to free legal aid in the hearing and determination of in any matter concerning the child in the [Family] Court." See Daniel O'Donnell, *The Right of Children to be Heard: Children's Right to have their Views taken into Account and to Participate*

With a substantial increase in the number of Hague Convention cases in recent times, it is likely that the approach of the Irish courts to the matter will become progressively more clear and nuanced. Considering the obligation to vindicate the right of children to be heard in relation to the Hague Convention, it seems that there is scope for the progression of this right and an elaboration of the manner in which weight is accorded to children's views. Perhaps such a progression will precipitate a greater culture of respect for the views of children in cases which do not concern the Hague Convention.

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in Legal and Administrative Proceedings (UNICEF Innocenti Research Centre, 2009), at 50.

Chapter 7: The Right of Children to be Heard and the Irish District Courts

7.1 Introduction

Ireland was selected as a case study for this thesis, and consequently it was clear at the outset of the thesis that it would be useful to gain insight into the level of protection which is afforded to the right in practice. First hand research was necessary because most child care and family law proceedings involving the interests of children are conducted in the District Court. By virtue of the operation of the *in camera* rule, these proceedings are not held in public[1] and furthermore are not generally reported. Because of the recent relaxation of the *in camera* rule, research on the right of children to be heard in the Irish District Court became a possibility.[2] I was particularly well placed to conduct such research, having worked as a social researcher, with particular expertise in children's issues, for over four years. Research of this kind in the Irish context is innovative, as the *in camera* rule has only recently been modified to permit researchers in the court, subject to permission from the Minister for Justice, Equality and Law Reform. Therefore there is much about the practice of child care and family law that is relatively unknown to anyone other than the professionals working in the area.

It was clear that it would also be illuminative to interview key professionals to supplement the information obtained through court observations. Much of the decision-making relating to children, care and custody (for example by

[1] The Constitution of Ireland stipulates that justice be administered in public. However the Family Law (Divorce) Act 1996, the Domestic Violence Act 1996 and the Child Care Act 1991 contain provisions stipulating that family law cases must be heard in private. The rule has resulted in the exclusion of all but the relevant parties and the legal representatives of those parties.

[2] Section 40 of the Civil Liability and Courts Act 2004 makes it permissible for certain persons to attend proceedings, subject to receiving permission to do so.

social workers) takes place outside the court process. It occurs within meetings between professionals of the Health Service Executive (HSE), families, guardians *ad litem*, children and others. Therefore it was important to consult with the professionals involved to get an accurate picture of how family law proceedings unfold in practice. I decided that the focus of this aspect of my research would be on court proceedings in the principal cities, because this seemed the best use of limited time and resources and because courts sit only infrequently in other locations.[3] I intended that the interviews with professionals would also compensate for this, as the professionals interviewed would be able to outline the practice of rural courts.

7.1.1 Scope and Methodology

The District Court has jurisdiction to hear cases regarding disagreements relating to guardianship, custody of and access to children.[4] Therefore the majority of family law cases involving access issues and cases relating to care orders sought by the HSE are heard in the District Court. Cases relating to child care matters are heard in Court 20 in Dublin District Court or in other District Courts as they arise. The majority of divorce, separation and nullity proceedings take place in the Circuit Courts. Because proceedings of this nature are of secondary interest, it was decided that the fieldwork would be grounded in proceedings before the District Courts.[5] The District Courts

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[3] In the rural courts, District Court sittings are less frequent and may or may not involve any family law hearings. Where they do, the judge typically sees the parties in a private room away from the main 'court' setting, which may be a town hall or Gaelic Athletics Association hall. It did not appear a wise use of limited time and resources to attempt to locate such cases. This was particularly so because family law cases are characterised by the lack of representation of the child, i.e. I would be attending such proceedings simply to witness the lack of consultation of children (see Section 7.6 below). It was hoped that interviews with professionals, who are familiar with such proceedings, would verify or disprove these hypotheses.

[4] See, for example, The Guardianship of Infants Act 1964 (as amended by the Children Act 1997).

[5] The Circuit Courts were not attended.

were attended on an ad-hoc basis,[6] although on occasion a single court was attended for several days continuously to observe a case of particular interest,[7] or to follow a particular case through to another hearing date. I hoped that this broad approach would yield a clear picture of the reality of family law and child care hearings. Interviews and conversations with professionals are also referred to in this chapter where appropriate, for example in order to shed additional light on the intricacies of a particular issue.

Notes were taken of the proceedings observed and then analysed to identify various themes relating to the right of children to be heard. Once these themes were identified, information was compiled from the case notes and drafted in the form of a chapter of the dissertation. Cases were summarised and critically analysed against the benchmark of international human rights standards.[8]

It was important from the outset that consent from judges, other court staff and the parties was obtained in relation to the court research. Judges usually announced my presence at the 'call over' at the beginning of the day.[9] When it became clear that judges did not always see fit to do this, I prepared a brief letter to be handed to the judge when I attended a particular court for the first time.[10] The letter indicated that I had permission from the Minister for Justice to observe proceedings for the purpose of Ph.D. research, that I

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[6] My attendance in court was based on my own schedule. During the fieldwork period (October 2008- March 2009) I attended court as frequently as my schedule permitted, both within and outside Dublin.

[7] In some instances I was made aware of such proceedings in advance by a professional involved in the case.

[8] Such as Article 12 of the Convention on the Rights of the Child and other international legal texts relating to the right to be heard.

[9] This is a process at the beginning of the day whereby the court consults a provisional list of cases due for hearing that day and determines whether each case will proceed (taking into consideration factors such as whether the parties are present).

[10] I was not able to ask judges firsthand to announce my presence at the beginning of the court day, as I did not usually meet judges before proceedings and all correspondence with them before attending court was through the court clerk.

was there at the discretion of the judge and the individual parties and that I could be asked to leave at any time if the parties so wished. The letter also indicated that no information identifying parties would be used in my thesis. Most judges read this at the call-over, although some did not.[11]

An equally important consideration was the anonymity of the parties and professionals involved. I have aimed to ensure in this chapter that the details of individual cases are kept to a minimum to avoid the inclusion of identifying information in relation to both the parties and the professionals involved. While the dates and places of hearings, the initials of the parties,[12] as well as the identities of presiding judges and other professionals have been retained in my files, I have opted not to include this information in the chapter in order to ensure anonymity. This is in accordance with the guidelines for maintaining anonymity contained in the draft protocol for family law reporting,[13] which have been followed in this thesis for the most part.[14] In fact this chapter goes beyond these guidelines by refraining from referring to the names of individual judges, in order to also extend anonymity to these professionals. The only identifying information included is the location of the court,[15] in order to establish regional trends. The date of proceedings observed outside Dublin has been included, as it is not possible to identify individual judges as the exact location is not specified. Although I have specified whether a case was in Court 20 in Dublin District Court, this does not constitute significant information, as almost all child

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[11] It could be argued that parties may not have adequate opportunity to decline participation in the research, as it was only brought to their attention at the point at which court proceedings had begun. Indeed it would have been preferable to approach every party individually beforehand (perhaps through their legal representatives or the Court Services) to provide them with further information, the opportunity to ask questions and a formal consent form. However, I was not permitted to access the contact information of the parties before proceedings.

[12] The initials used below are not the actual initials of the names of children involved and are used solely for the purposes of clarity.

[13] Carol Coulter, "Protocol on Family Law Reporting" 1 *Family Law Matters* 36 (Spring 2007), at 36.

[14] A few minor differences exist. These modifications constitute heightened confidentiality– for example the identities of judges are not divulged in this chapter.

[15] That is, whether the court was located in Dublin or not.

care cases in Dublin are heard in this court. A number of different judges presided over the proceedings observed, so the judgments cannot be attributed to any one individual. The court numbers of family law proceedings in Dublin (such proceedings are usually heard in Courts 40 and 41) have not been included in order to refrain from identification of the presiding judges.

I attended proceedings in District Courts in four different counties– Dublin, Cork and two provincial cities between October 2008 and February 2009. Twenty four days and five half days were spent observing proceedings in the Dublin courts, seven full days were spent in Cork, and one day in each of the two provincial cities. A total of 22 days were spent observing cases relating to childcare, seven days observing family law cases, four days observing mixed proceedings (both child care and family law)[16] and five mornings observing secure care proceedings. This constitutes a total of 33 full days and five mornings during which proceedings were observed, amounting to approximately 24 days observation of child care proceedings and nine days observing family law proceedings. A greater number of care cases than family law cases were observed as it became evident that care proceedings were far more relevant to the topic at hand than family law cases. This stems from the fact that there is a mechanism in place for representation of the voice of the child in care cases (the guardian *ad litem*) but effectively none in family law cases. In addition to court attendances, I carried out several interviews with professionals. Approximately 17 professionals were interviewed. Those interviewed included solicitors, barristers, guardians *ad litem* and professionals from statutory bodies and non-governmental organisations. One judge was formally interviewed and

[16] In both of the courts in smaller cities, the court hears both child care and family law proceedings simultaneously (as opposed to holding such cases in separate courts as occurs in Dublin and Cork). On two days close to Christmas, the same type of dual court was held in Dublin District Court, presumably because cases were fewer as the holiday period approached.

other judges contributed on a more informal basis through conversations in court between hearings and, on occasion, in chambers.

In Dublin, I attended four District Courts. I frequently attended Court 20 as this is the court in which cases relating to child care are heard. Courts 40 and 41– which deal with family law cases– were also attended, as was Court 19 which deals with secure care cases. Proceedings before eleven different judges were observed.

The breakdown of attendance by location and case type is as follows:

Location	**Dublin**	**Cork**	**Provincial City 1**	**Provincial City 2**
Care	19 (+0.5x2)	3	0.5	0.5
Family	3 (+0.5x2)	4	0.5	0.5
Special/Secure Care	5	0	0	0

While this research constitutes relatively extensive fieldwork, it involved some limitations. One such limitation was that I did not have access to court files, therefore it was not possible to carry out a quantitative analysis which may have provided rich information on such matters as the percentage of guardians *ad litem* appointed. In the absence of such data, I have been limited to highlighting the themes which I observed to emerge from the court observations. This is, admittedly, a relatively subjective approach. In the interests of brevity, it has not been possible to provide all possible examples to highlight the numerous points which have emerged. For this reason, I have attempted to provide the most illustrative example of a particular theme. This is not necessarily the ideal approach (outlining all the relevant cases under a particular theme would have been preferable in some instances), however the need to keep this chapter to an appropriate size had to be considered.

Another issue is that time and resources were limited during the research phase of the thesis. It would have been preferable to observe a greater number of family law proceedings[17] and conduct further research days in courts outside of Dublin, where I was based during the research phase. I would argue that I observed enough proceedings to obtain a strong sense of how the courts system works in both family law and care cases. However it is clear that because of the limited time spent in courts outside of Dublin (nine days), the analysis below is simply a snapshot of proceedings in these courts. It is acknowledged that no rural courts were attended, again for resource reasons. I have compensated for this to some extent through interviews with professionals. One could also argue that it would have been preferable to have observed further family law proceedings (nine days of observations were completed). However I ceased this work once I felt I had reached what I considered to constitute a 'saturation point'– i.e. it seemed that the themes as regards court practice had crystallised (because I was observing certain practices repeated a number of times), and I felt that the material which I had gathered was sufficient. It seemed advisable at that point to focus on child care proceedings, as relevant practice emerged at a greater frequency in such proceedings. It would also have been preferable to provide more details on court dates and locations in this chapter, as well as on particular cases, however due to the ethical reasons stated above relating to anonymity, this has not been possible.

7.1.2 Court Protocols and Procedures

The research had to be conducted within the practical confines of the court which is, in turn, governed by its own protocols and procedures. District

[17] As noted below, there were far less cases relevant to the right to be heard observed during family law proceedings than during child care proceedings. Therefore, I made a decision that, in order not to spend valuable time observing less relevant proceedings (e.g. maintenance issues), I would spend more time observing child care cases.

Courts usually deal with large caseloads on a daily basis and many of the proceedings observed were superfluous to the research. Some cases are listed 'for mention': this term indicates that some preliminary matter in a case is being raised and that the court will not consider the merits of the case on that day. Moreover, matters relating to maintenance[18] and barring/protection orders[19] are arguably of secondary relevance to the views of children and their views are very rarely (if ever) sought when such matters are before the court.[20] Therefore the research necessitated attending a range of family law cases in order to ensure that cases directly relevant to the dissertation were observed.[21]

A further challenge was the fact that cases had often been heard on a number of other occasions in advance of my court attendance. For example the hearings which I attended frequently involved those set in order for the court to monitor access visits between a parent and a child. However this may have been merely one in a series of proceedings in which this particular matter came before the court. Therefore only a snapshot of the full case was observed at a particular hearing. Furthermore, the judge was party to a full

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[18] Parents have a legal responsibility to maintain any children they may have in accordance with their means under the Family Law (Maintenance of Spouses and Children) Act, 1976, Section 5. It is usually the parent with main custody of the child that makes such an application. As it is the income of the respondent parent which is the primary determining factor in the outcome of such cases, it is difficult to see how children could or should potentially have a voice in such proceedings.

[19] The Domestic Violence Act 1996 provides for the issuing of safety, barring and protection orders. Such orders are often relevant to the lives of children and this is dealt with below, although in the proceedings observed many of the cases were brought by parties without children.

[20] The best interests principle is arguably not as prominent in such cases, as such matters relate more directly to the relationship between adults than proceedings involving chid care and custody/access. These issues certainly affect children, however, as evidenced by research of the UK body the Children and Family Court Advisory and Support Service (CAFCASS). CAFCASS research on the situation of children of parents who were divorcing or separating indicated that "many of them worried about their financial situation." CAFCASS, "Children Suffer Financially after Separation" *CAFCASS Press Release*, 3 February 2010, at 1. Available at: http://www.cafcass.gov.uk/pdf/FINAL%20How%20It%20Looks%20To%20Me%20Press%20Release%2003.02.2010.pdf (last accessed 10 November 2010).

[21] Whilst time-consuming, this exposure to the broad canvas of family law proceedings was in many ways positive, as it enhanced familiarity with the context of the courtroom, the nature of the process, and the interaction between the various actors.

file relating to each case, as were the parties and their representatives. Because, however, I did not have access to the files in advance of proceedings, it was sometimes difficult to grasp all the relevant details of a case. For example, basic information, such as the ages of the children involved, was not necessarily discussed during the hearing. On occasion, the information gleaned from proceedings was supplemented by asking one of the professionals involved for additional information that had not been made clear during the hearing. The ability to follow up on cases of particular interest was hampered by constraints such as *ad hoc* changes in scheduled dates for hearings. The date of the next hearing, which was set when I was present in court, was often changed in the interim without my knowledge.[22]

In the course of this chapter, the approach to the right to be heard of the District Courts which I attended will be delineated. Cases will be outlined and analysed with a view to identifying trends and assessing practice against the yardstick of international human rights standards. The interviews with professionals will be used to complement these cases. However as one professional stated, "[c]ases have varying degrees of contentiousness, it is hard to say that something is a 'standard' case."[23] Aside from this diversity in the subject matter of the cases observed, practices also vary between regions and judges. Therefore it was sometimes difficult to identify 'trends' as practice appeared to vary significantly even between judges sitting in the same court. Nevertheless it was possible to identify several discernible patterns in the data collected from the court proceedings and these are outlined in the current chapter.

[22] For example in one case heard outside Dublin, 8 October 2008, a 16 year old boy was appointed legal representation. A hearing date was set in this case however when I attended court to observe the following hearing, the date had changed in the interim.
[23] Professional, Phone Interview, 28 April 2008.

7.2 Child Care Cases

It seems useful to consider at this point the legislative basis for the proceedings which will be considered in this chapter. Child care cases are governed by the Child Care Act 1991 and arise where the State deems it necessary that a child be taken into the care of the HSE for her own protection. The majority of the care cases which I observed during the course of the research related to children who had been taken into the care of the HSE against the will of the parents involved, i.e. under Section 13, 16 or 18 of that Act. It is, however, important to note that most children are taken into care voluntarily under Section 4 of the Act, and in such cases there is no supervision by the court.[24] Consequently, no mechanism exists for the appointment of a guardian *ad litem* for a child in a case of this kind.

The 1991 Act requires the "health board" (now the HSE) to institute proceedings where it appears that a child requires care or protection which he is unlikely to receive unless a court makes a care order or a supervision order.[25] The Act further stipulates that a care order commits the child to the care of the health board for so long as the court may determine.[26] It may be an interim care order (which is renewed by the court every 28 days as necessary) or a full care order. Supervision orders authorise the health board to have a child visited on such periodic occasions as the HSE considers necessary.[27] The Act stipulates that the welfare of the child shall be paramount in each of these proceedings and that due consideration should be given to the wishes of the child.[28] The Court may appoint a guardian *ad litem* "if [the court] is satisfied that it is necessary in the interests of the

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[24] HSE figures indicate that approximately 43% of cases involving the placement of children in care are dealt with through the courts. Cited in Conal Gibbons, "Aspects of Child Care in District Courts" 2 *Judicial Studies Institute* 169 (2007), at 171.
[25] Section 16.
[26] Section 18.
[27] Section 19.
[28] Section 24.

child and in the interests of justice to do so."[29] The Act also permits the court to proceed with a case without the child to whom the proceedings relate being brought before the court. This is possible where the court is satisfied that it is necessary for the proper disposal of the case.[30]

The Court may request a report under the Act from any person it deems appropriate on any question affecting the welfare of the child.[31] The Act also provides for what is often referred to as the 'Section 20 report'[32] whereby the court may direct the health board to carry out an investigation of the circumstances of the child in, *inter alia*, proceedings relating to enforcement of a right of custody,[33] or in any case relating to the granting of a decree of judicial separation.[34]

There are separate provisions under the legislation for emergency care orders. Members of the Garda Síochána (police) are permitted to take a child into safety under the Act where they have reasonable grounds for believing that there is an immediate and serious risk to the health or welfare of the child,[35] and it would not be sufficient for the protection of the child to await the making of an application for an emergency care order by a health board (now the HSE).[36] The District Court can make such an emergency order placing a child in the care of the health board for a period of eight days, if there is an immediate and serious risk to the welfare of the child.[37] The relevant provision of the Child Care Act does not provide for the

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[29] Section 26.
[30] Section 30.
[31] Section 27.
[32] Section 20 of the Child Care Act 1991.
[33] In respect of proceedings under Part III of the Guardianship of Infants Act, 1964.
[34] In respect of proceedings under Section 3(3), 11(b), or 16(g) of the Judicial Separation and Family Law Reform Act, 1989.
[35] Child Care Act 1991, Section 12.
[36] Emergency
Care Orders are provided for by Section 13 of the Child Care Act 1991.
[37] Section 13.

appointment of a guardian *ad litem*, so the voices of children in such cases are not represented.[38]

Aftercare is provided for by the Child Care Act, which specifies that the health board may assist a young person who has been in the care of the board and has attained the age of 18, for so long as the board is satisfied that he or she is in need of assistance, until the age of 21 years. After the age of 21 years, the board may continue to provide such assistance until the completion of the course of education in which the young person is engaged.[39]

The research findings relating to care cases will now be analysed. A number of themes relating to the right of children to be heard became evident in the child care proceedings observed. First, the deep and genuine concern on the part of judges for the children involved in the various types of cases which came before them must be noted at the outset. Secondly, the aspect of proceedings most relevant to the right is the role of the guardian *ad litem*, provided for under Section 26 of the Child Care Act. As outlined in detail in Chapter 5, there are a number of issues pertaining to the appointment of this professional. A number of other themes were also observed, such as circumstances where the best interests of the child as determined by the court were in conflict with the child's stated wishes, issues relating to access visits with parents and the low rate of appointment of solicitors to represent the children involved.

7.3 Guardians *ad Litem*

The proceedings observed provided valuable insight into the various functions of guardians *ad litem*, issues regarding the remit of the

[38] *Ibid.* However a guardian *ad litem* can be appointed once the child is subject to a care order under Section 16 (i.e. when it is no longer an 'emergency care order').
[39] Section 45.

professional, circumstances of appointment and other matters relating to the role in practice. Until relatively recently, no guidelines existed to illuminate the role of the guardian *ad litem* in Ireland. The recently published 'Guidance' on the guardian *ad litem* of the Children Acts Advisory Board has provided welcome clarification of the role in child care cases.[40] Before the direction provided in the Guidance, there was little to assist judges in determining when to appoint these professionals.

The practical research was carried out just before the publication of the Guidance. The research supports the widely held assumption that the lack of guidance to date has lead to inconsistency in judicial practice in the appointment of guardians *ad litem*.[41] The non-binding status of the Guidance means that, while judges now have more direction regarding the circumstances under which the professional should be appointed, it is still left entirely at their discretion whether to make that appointment. It is possible that the Guidance will not change trends in practice that resulted in the original problem, most particularly differences in appointment between region and between individual judges. It was observed during the practical research that, in proceedings before Dublin District Court 20, judges appointed guardians *ad litem* relatively regularly. However in some instances, guardians *ad litem* were appointed by an individual judge frequently, whereas in others an appointment was made only at the suggestion of a legal professional or the HSE.[42] In cases outside Dublin,

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[40] Children Acts Advisory Board, *Giving a Voice to Children's Wishes, Feelings and Interests: Guidance on the Role, Criteria for Appointment, Qualifications and Training of Guardians ad Litem Appointed for Children in Proceedings under the Child Care Act, 1991* (Children Acts Advisory Board, May 2009). Significantly, however, the Guidance relates only to guardians *ad litem* appointed in proceedings under the Child Care Act, 1991, and does not make reference to the Children Act 1997, Section 28, which provides for appointment of the professional in family law cases, although it has not yet been commenced. See below at 7.7.

[41] National Children's Office, *Review of the Guardian Ad Litem Service: Final Report from Capita Consulting Ireland, in Association with the Nuffield Institute for Health* (National Children's Office, 2004). Hereafter referred to as the "Capita Research."

[42] Two professionals interviewed separately referred to the variation in levels of appointment between judges. The Capita Research, note 41, at 53 also highlighted this

guardians *ad litem* were appointed for children and young people less frequently.

7.3.1 Role of Guardian ad Litem

Judges in District Court 20 regularly explained the role of the guardian *ad litem* to the parents of children in care. This practice provided significant insight into the judges' understanding of the role of the guardian *ad litem*. The primary characterisation by the judges was of the guardian *ad litem* as a professional who represents the voice of the child. One judge explained that, "a social worker works in their [children's] interest, but a guardian *ad litem* gives them their voice."[43] Another judge told the mother of a child in care that a guardian *ad litem* was "an independent person there for the protection and vindication of the child's rights. He's on the kid's side all the time; the rest of us are on no-one's side."[44] One judge confirmed the view expressed by many other professionals interviewed during the course of the research that the guardian *ad litem* plays the role of an independent representative of the child. He advised the parents before him that social workers:

> ...[A]re extremely busy, they have a huge amount of responsibility...whereas the guardian's function is more of reflection. The guardian is able to stand back a little bit, is not involved in the immediate day to day affairs...the guardian has the ability to reflect more and make all the parties, including the Court, reflect.[45]

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matter. It was borne out by the practice evident from observation of proceedings. At one hearing the presiding judge made known his opinion that "a guardian *ad litem* should be involved in every case because they are essential to these proceedings which are complex" (Dublin, Court 20). However, other judges did not seem to share this view.

[43] Dublin, Court 20.

[44] Dublin, Court 20.

[45] Dublin, Court 20.

This characterisation of the guardian *ad litem* as a professional who adds further reflection to the case is a view shared by other professionals.[46] It appears to be superfluous to the elaboration of the role of the guardian *ad litem* provided by the CAAB Guidance.[47] This understanding of the role is significant, as it goes further than the general interpretation of the mandate of the guardian *ad litem* as a professional that independently represents the best interests and wishes of children before the court. It seems that there is an added value brought by the guardian *ad litem*, in the form of further *general* analysis (as opposed to analysis solely of the wishes and best interests of the child) of the case to which she is appointed.

Judges in Dublin District Court 20 frequently stated that they valued the role of guardian *ad litem*. The importance that judges attached to the role was evident on a number of occasions. On one occasion, the presiding judge made a request for assessments of the placements of two orphaned children to be transmitted to the court in the future. My understanding of the situation was that this was to be the last time the case came before the court, as the placement was proving extremely successful. However the judge was seeking ongoing assessments, because, he explained, before the mother of the child had died, she had personally asked that "he would have a role in that [i.e. monitoring assessments of the placements]."[48] Counsel for the HSE stated that this was not common practice, but that enquiries could be made. The presiding judge sought the approval of the guardian *ad litem* on the matter, which seems to provide strong indication of the importance of her role on a matter of this kind. Another indication of the guardian *ad litem* as a valued professional in the court process is the fact that judges ensured

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[46] As expressed in interviews with a guardian *ad litem* and a solicitor.

[47] While there is no specific definition of the guardian *ad litem* provided by the CAAB Guidance, the document advises that "[a] guardian *ad litem* is a person generally understood to be independent and appointed by the courts to represent children in child care proceedings. This means that s/he must attend court in care proceedings to make known a child's wishes and feelings and to advise the court on the child's best interests" (CAAB, note 40, at 1).

[48] Dublin, Court 20.

that guardians *ad litem* were often provided with urinalysis results of parents whose drug addictions were being monitored,[49] presumably to assist them in forming opinions on issues regarding the best interests of the child (on such matters as whether children should have access visits with parents).

Despite this appreciation of the guardian *ad litem* expressed by some judges, the lack of clarity surrounding the role persisted in the proceedings observed. It occasionally came to light that parents felt that the guardian *ad litem* was simply an associate of social workers. For example in one particular case, counsel for the guardian *ad litem* stated that the mother, where a child was in the care of the HSE, felt that the guardian *ad litem* was on the side of the social workers. The judge then informed the mother that "she [the guardian *ad litem*] does have an independent view. She's there to give [the child] a voice before the courts." In another case, counsel for the guardian *ad litem* informed the court that the non-national parents involved had misunderstood the role of the guardian *ad litem.* They had considered her to be an adversary in the process and had expressed a wish not to speak with her. However once their legal representatives explained the role of the guardian *ad litem* to the parents, they were more open to engaging with her.[50] This highlights the level of confusion that persists among some parties in relation to the role, as well as the delicate balance that the guardian *ad litem* must tread when fulfilling that role. It is also an indication of the more general issue of how difficult it can be for a lay person to negotiate the legal process.

Professionals interviewed expressed the view that the ambiguity surrounding the role of guardians *ad litem* is hugely problematic, as it provides opportunities for the HSE to exert undue influence. This is an undesirable situation, because the HSE may have opposing interests to that

[49] E.g. Dublin, Court 20.
[50] Dublin, Court 20.

of the guardian *ad litem* in a particular case. One professional stated that the HSE has an interest in limiting the role of the guardian *ad litem*: "[t]he HSE are trying to corral the role of the guardian *ad litem* and to keep it as tight as possible. However it needs to be as broad as possible."[51] As indicated in this chapter, to date the lack of clarity has resulted in confusion for courts, legal representatives and parents. The absence of a definition regarding the circumstances under which guardians *ad litem* should be appointed gives rise to similar challenges, although it is hoped that the Guidance will improve the situation in this regard.[52]

7.3.2 Appointment of Guardians ad Litem

It was difficult to discern a pattern from the observed proceedings regarding the circumstances under which guardians *ad litem* were appointed. There was a relatively high rate of appointment in Court 20, reportedly derived in part from the strong belief of at least one of the judges in the importance of the role. Nevertheless, the appointment of guardians *ad litem* was not automatic even in this court. It did appear that guardians *ad litem* were more likely to be appointed in particularly complex cases. At one hearing, for example, the judge stated that he was appointing a guardian *ad litem* for a seven year old child in care, given the history of serious physical assaults on the mother of the children by their father. He opined: "I would say that there should be a guardian *ad litem* in this case, because of the nature of the difficulties between the parents. In a case like that, we have to focus on the child."[53] The same judge, while being strongly in favour of the role of the guardian *ad litem*, indicated that he did not see a need for appointing guardians *ad litem* in non-contentious cases. For example, on an application for extension of an interim care order of a 13 year old child by consent, this

[51] Interview with solicitor, Dublin, 11 March 2009.
[52] Although it must be noted that some contentious areas have not been clarified by the Guidance, see below in particular at 7.3 and 7.8.
[53] Dublin, Court 20.

judge asked whether there had been a guardian *ad litem* appointed for the child. The HSE replied that there had not, but that the mother of the child was doing well, the child was succeeding at school, and the parties were attending family therapy. The judge was satisfied not to pursue the matter of the appointment of a guardian *ad litem* on the basis of this information.[54]

The aforementioned judge clearly considered the complexity of every case before deciding whether to appoint a guardian *ad litem*. However the practice of a number of other judges (even in the same court) indicated that their subjective interpretations of the role of the guardian *ad litem* were the determining factor in the decision whether to appoint this professional to a case. One professional from a statutory organisation stated: "I was in Court 20 in the last couple of months. I have witnessed failure to appoint guardians *ad litem* in very contentious child care cases, where parents are trying to vary care orders."[55] Occasionally even in Court 20, where a relatively high rate of appointment of guardians *ad litem* was observed in the course of the research, hearings were conducted regarding very complicated cases in which guardians *ad litem* were not appointed. For example, one case in Court 20 involved an interim care order being sought for a ten year old boy. The child had been forced to call the Gardaí for the second time in a year because of his fears that his mother would engage in acts of self harm. Despite the very complex nature of the case and the likelihood that this was a situation where the independent representation of the child's interests appeared to be necessary, no guardian *ad litem* was appointed.[56]

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[54] Dublin, Court 20.
[55] Professional, Phone Interview, 28 April 2008.
[56] Dublin, Court 20. It must be borne in mind that, as outlined above, sometimes in cases in which guardians *ad litem* are deemed necessary they are not appointed until a number of hearings have been held. However this approach seems unwise, since there does not seem to be anything to preclude a judge from appointing the professional at the first hearing.

A significant issue which emerged was the assumption that guardians *ad litem* are only relevant in cases involving children with the capacity to form views. As noted above, one particular judge who presides over child care cases adheres to the belief that guardians *ad litem* should generally be appointed in all cases. He made this clear in a case relating to an application for an interim care order for an eleven month old baby. The baby's mother was not in court as she was facing criminal charges in another court. The judge asked the social worker whether there was a need for appointment of a guardian *ad litem.* The social worker replied that she did not think that there was, and a guardian *ad litem* was not appointed. The judge stated:

> I've a view guardians should be appointed in every case but I know that that will cause grief and stress to those in the HSE, because of funding issues– I think we're leading to that, considering the age of the child, where the mother has gone off.[57]

This comment indicates a reluctance to appoint guardians *ad litem* in all cases, on the part of even the most sympathetic judge, because of resource considerations for the HSE. This is a matter of concern. While of course judges must be mindful of funding issues, it is the function of judges to apply the law, not to serve as a gatekeeper for public resources. The same judge did however appoint a guardian *ad litem* for a new born baby in a very complex case in which the parents of the baby were drug addicts and the father was deemed to pose a threat to the child. The judge stated that he was appointing the guardian *ad litem* because her parents "could not remotely represent her interests."[58] Counsel for the HSE objected to the appointment, stating that "the difficulty is that the child can't speak…that would be my opinion, that the guardian *ad litem* is to represent the voice of the child." The judge responded that it was even more important that a guardian *ad*

[57] Dublin, Court 20.
[58] Dublin, Court 20.

litem be appointed in situations where the child could not speak as their interests may conflict with those of their parents.[59] This appointment indicates that judges do not necessarily defer to the position of the HSE. However the appointment seemed, in light of the observations as a whole, to be atypical. The stated view of counsel for the HSE– that guardians *ad litem* are only relevant in cases where children are capable of forming views– seemed to be the prevailing position amongst judges and other professionals in practice, although there is no definitive indication in law or policy that this should be the case. It could be argued that guardians *ad litem* are necessary to provide a best interests determination in cases involving children who are not capable of forming views.[60]

It is noteworthy that the same judge regularly consulted counsel for the HSE as to whether a guardian *ad litem* was necessary in a particular case. This was done in spite of the fact that counsel for the HSE routinely took the view that appointment of this professional was not necessary.[61] The HSE cannot be said to be impartial as regards the appointment of guardians *ad litem*, since this body pays guardian *ad litem* fees. Moreover the HSE, as party to proceedings, may oppose the stance of the guardian *ad litem* in a particular case.[62] It is clear that fair procedures require judges to canvass views before making decisions, in particular where the party in question is funding the procedure or mechanism. Therefore arguably the judge is acting appropriately when engaging in such consultation. Yet the fact that judges see fit to seek guidance from a body who cannot be said to be impartial

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[59] Dublin, Court 20.

[60] Although the CAAB Guidance (note 40) refers to guardians *ad litem* as representing wishes and best interests (at 3) it does not specifically exclude those children who do not express wishes. Older children, for example, may choose not to express wishes, but it is not suggested that guardians *ad litem* should not be appointed in such cases. Section 1.3.3. (c) of the Guidance provides criteria for the judge to consider when deciding whether to appoint guardians *ad litem*, including "the ability of the child concerned to express his/her wishes and feelings." This, however, does not necessarily preclude appointment for non-verbal children.

[61] For example this occurred twice in one day in Court 20.

[62] For example see below at 353.

seems to points to the need for an independent regulatory organisation of the likes of CAFCASS in the UK.[63] It seems that such an organisation may provide a preferable means of allocating guardians *ad litem* in particular cases.[64] Perhaps it also provides support for the argument that every child whose case appears before the courts should automatically be provided such representation (possibly to greater or lesser extents, depending on need) unless it is shown that it is not in her interest. This would avoid appointment being subject to the personal preferences of judges or guidance from a body which may not be impartial.

The uncertainty surrounding the circumstances in which guardians *ad litem* should be appointed was also problematic in relation to cases where issues arose in relation to children in care who had not been represented by a guardian *ad litem* during the original proceedings.[65] In one such case in Court 20 a boy of approximately 11 years, G., had been placed in institutional care in Dublin with the consent of his mother. The HSE intended to send him to an institution in another county against his wishes. G. opposed the plan primarily because he would be moving far from his family, with whom he had access visits on a regular basis. The Irish Association of Young People in Care[66] stated that there had not been

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[63] CAFCASS is the organisation responsible for advising the family courts in England on the views and interests of children in family proceedings. In England children are automatically a party to the proceedings in public law cases and are represented by a Children's Guardian (the equivalent of the guardian *ad litem*) appointed by CAFCASS. The child and the Children's Guardian will generally both be represented in proceedings by the same solicitor. In private law proceedings, the court can request a welfare report under Section 7 of the Children Act 1989, either from a Children and Family Reporter (an officer appointed by CAFCASS) or the local authority. If a child becomes a party to the proceedings (this is at the discretion of the court) a solicitor is appointed to act for the child and a CAFCASS Children's Guardian also represents the child. See Jane Fortin, *Children's Rights and the Developing Law* (3rd ed, Cambridge University Press, 2009), at 245-248.

[64] Indeed I would advocate that such an organisation should oversee the various aspects of the right to be heard, e.g. appointment of solicitors, social reports, etc. See concluding chapter of the thesis.

[65] Dublin, Court 20.

[66] The Irish Association of Young People in Care promote the rights and voices of children with experience of care. They became involved in this case when G.'s institution put him in contact with them.

sufficient consultation with the child regarding the intended placement in this institution. They had contacted a barrister and solicitor specialising in the area of children in care and these professionals were present to put this matter to the court. The judge surmised that it was not possible to appoint a guardian *ad litem* for a child already in care, but that the institution of proceedings by the Irish Association of Young People in Care provided a possible solution to this dilemma. The HSE argued against the appointment of a guardian *ad litem* on the basis that the mother of the child already had a representative. The judge responded that it was not the representation of the mother that was at issue, but that of the child, and that he would welcome information from the Irish Association of Young People in Care.

It was established during the proceedings that a guardian *ad litem* can be appointed by the court in whatever circumstances are deemed appropriate under Section 26 of the Child Care Act 1991.[67] A guardian *ad litem* was accordingly appointed for G. This outcome indicates that it is indeed possible in the Irish District Court for a guardian *ad litem* to be appointed for a child whose child care case has not previously come before the court, if that case is brought to the court by an organisation such as the Irish Association of Young People in Care. However, there was a lengthy discussion during proceedings as to whether this was the case, and the HSE initially objected strongly to such an appointment. The case also seems to highlight the difficulties children face in raising an issue in court, and the fact that the services of the Irish Association of Young People in Care are much needed. Given that the standing of this organisation was strongly disputed by the HSE in this particular case, it seems that its presence in the courts is probably a rare occurrence.[68] Perhaps such services could be

[67] Section 26 stipulates: "If in any proceedings under *Part IV* or *VI* the child to whom the proceedings relate is not a party, the court may, if it is satisfied that it is necessary in the interests of the child and in the interests of justice to do so, appoint a guardian *ad litem* for the child."

[68] The judge ultimately opined that anyone can make an application under Section 47 of the Child Care Act 1991 (Application for Direction) which holds "[w]here a child is in the care

expanded to ensure that children in care whose cases have not been before the court can raise such issues where necessary.

No pattern emerged during the course of the research regarding the point in legal proceedings at which guardians *ad litem* are appointed in practice. Where guardians *ad litem* were appointed, the appointment often seemed to be made after a number of hearings had been held.[69] The consequences of the lack of guidance for judges regarding when to appoint guardians *ad litem* became very clear in one particularly serious case, in which a 17 year old teenager in institutional care had become involved in a relationship with a very undesirable middle-aged man.[70] The girl was repeatedly disappearing with him for long periods of time. The judge expressed deep regret that he had not appointed a guardian *ad litem* earlier, as he felt that such a professional could have assisted in this case. He commented: "it is a shame and we did not do this girl any service by not appointing a guardian," however he did not give reasons as to why a guardian *ad litem* had not been appointed earlier. He made reference to the point at which a guardian *ad litem* should be appointed, when he stated that "the Court, at the first or second interim care order at the very least, must decide whether or not a guardian be appointed."[71] This is a helpful point, however it is not clear that it is common practice.

The reasons for the seemingly late appointment of guardians *ad litem* are unclear. Perhaps it is driven by resource considerations, or, considering the fact that judges seem to limit guardians *ad litem* to very complex cases,

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of a health board, the District Court may, of its own motion or on the application of any person, give such directions and make such order on any question affecting the welfare of the child as it thinks proper and may vary or discharge any such direction or order."

[69] Although there were a handful of instances whereby children were appointed a guardian *ad litem* at the first hearing of their case, for example Dublin, Court 20.

[70] The details of why this man was particularly undesirable (apart from his age alone which obviously suggests power discrepancy and consequently exploitation) will not be outlined here for anonymity reasons in respect of the girl involved.

[71] Dublin, Court 20.

perhaps judges prefer to wait until the level of gravity of a particular case becomes clear. Arguably there should be a system in place which facilitates the appointment of a guardian *ad litem* before the first hearing, or perhaps even from the moment that children are taken into care in emergency cases. It is of note that, although it would seem to be short notice for the guardian *ad litem* to be present from the first hearing, other professionals grapple with this level of short notice on a daily basis, for example HSE solicitors (as they must be present at such hearings to represent the HSE). If a regulatory body were established, it could establish procedures in order to oversee such a service.

The process of determining the identity of the person who will be appointed as guardian *ad litem* in a particular case is equally unclear. The judges in Court 20 were very familiar with the various individuals who routinely work as guardians *ad litem*: they knew them by name and sometimes suggested that a particular individual be appointed to a case. However, it was frequently left to the HSE to decide who would be appointed. For example, in one case the judge said to counsel for the HSE, "you know guardians *ad litem* better than me, so you know better than me who would work well on this case."[72] Seeking nominations for guardians *ad litem* from the HSE seems to create a conflict of interest. Guardians *ad litem* are parties to proceedings separate to the HSE and they may be required to go against the interests of the HSE in a given case.[73]

Among professionals, this potential conflict of interest (coupled with the input of the HSE as regards appointment) has engendered a sense that guardians *ad litem* are sometimes appointed on the basis of their relationship

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[72] Dublin, Court 20.

[73] Where it is left to the HSE to choose individual guardians *ad litem*, the potential pressure for guardians *ad litem* to refrain from opposing the HSE in the course of proceedings, in order to gain continued employment, is clear. However it must be emphasised that the practice of the guardians *ad litem* observed in the course of this research appeared to be executed to a very high standard.

with the HSE. As stated by one professional working in a statutory organisation, "there are also rumours that certain guardians *ad litem* get more work because they give the HSE a better time. It is the HSE that appoints and pays social workers. These rumours take away from the good work out there."[74] One solicitor also stated that she had:

> [E]ncountered situations whereby excellent guardians *ad litem* have been objected to by the legal representatives of the HSE, because they are considered 'troublemakers'. Therefore the HSE use the same guardians *ad litem* all the time as they pose less of a challenge to the HSE during the course of their work. This constitutes inappropriate intervention by the legal representatives of the HSE.[75]

Indeed an instance did occur during the proceedings observed in which the judge, when appointing a guardian *ad litem* suggested that the HSE approach one particular guardian *ad litem* in relation to the case. Rather than follow the judge's suggestion, counsel for the HSE put forward the names of other individuals whom they frequently use as guardians *ad litem*.[76] This further demonstrates the extent of the influence of the HSE over the manner in which guardians *ad litem* are selected.

7.3.3 Lack of Appointments of Guardians ad litem *outside Dublin*

It has been documented by the National Children's Office that the appointment of guardians *ad litem* is much lower in smaller towns and rural areas.[77] The fact that only two days of doctoral research were spent observing proceedings in provincial towns make it difficult to confirm or dispute this finding, although no appointments were observed on those days.

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[74] Professional, Phone Interview, 28 April 2008.
[75] Interview with solicitor, Dublin, 11 March 2009.
[76] Dublin, Court 20.
[77] Capita Research, note 41, at 53.

Barnardos, who employ and provide regulation in respect of many of the guardians *ad litem* in operation in Ireland, primarily operate from Dublin and Cork. However Barnardos states that it currently has a number of guardians *ad litem* who operate in Wexford, Waterford, Clonmel, Mullingar/Athlone, Roscommon, Meath, Louth, Cavan and Monaghan and occasionally Sligo, Castlebar and Galway.[78] Specifically, there are seven guardians *ad litem* working in the South of Ireland and, at any one time, they cover 40 to 45 cases between them.[79] Barnardos reports sporadic appointment of guardians *ad litem* outside Dublin and Cork.[80]

One guardian *ad litem* based in Cork stated that a handful of judges outside Dublin and Cork regularly use guardians *ad litem*, while others do not use the service at all.[81] However, there is cause for optimism in reports that judges are increasingly discovering that there are many benefits to appointing this professional. Visiting judges have reportedly become familiar with the work of a guardian *ad litem*– appointed by another judge– on a particular case over which he or she presides. Some of these judges then see the value of the professional and seek to use guardians *ad litem* in the future after having had this experience. This system is described as "very 'word of mouth'" by one Cork-based guardian *ad litem.*[82] Another guardian *ad litem* interviewed, who operates outside Dublin, verified this. She stated: "some [judges] wouldn't let a guardian *ad litem* cross their courtyard. However some have seen how useful the recommendations can be in assisting them in coming to a decision."[83]

The same guardian *ad litem* states that there has been a significant increase over the last few years in the appointment of guardians *ad litem* outside

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[78] Guardian *ad litem*, Phone Interview, 27 March 2009.
[79] *Ibid.*
[80] *Ibid and* Gaurdian *ad litem*, Phone Interview, 19 March 2009.
[81] *Ibid.*
[82] Guardian *ad litem*, Phone Interview, 27 March 2009.
[83] Gaurdian *ad litem*, Phone Interview, 19 March 2009.

Dublin. Despite this reported increase in the number of appointments, during the course of my research I observed provincial court proceedings in which guardians *ad litem* were arguably needed but not appointed. In one such child care case, a social work report indicated that a 12 year old boy living with a relative wished to remain in the care of that relative. His mother was suffering from alcohol addiction and although they had had fortnightly access visits while she was completing an alcohol programme in an institution, her whereabouts were currently unknown and the boy now stated that he did not wish to see her. The HSE agreed that the boy should remain with his relative and sought and received a 12 month order to give the child stability, indicating that both the HSE and the judge were receptive to the wishes of the child. Given the complexities of this case (for example the addiction involved, and the views expressed by the child), arguably a guardian *ad litem* should have been appointed. Indeed, it is likely that, had the case arisen in the Dublin District Court, a guardian *ad litem* would have been appointed (based on proceedings observed in that court).

7.3.4 Usefulness of Guardians ad Litem

The potentially dynamic role of guardians *ad litem* became evident during the proceedings observed. As outlined above, guardians *ad litem* often go beyond their role as representatives of the child before the court. In one Dublin case, for example, counsel for the father of a boy in care stated that, although initially the father had sought custody of the children, having spoken to the guardian *ad litem* he had decided it was best to establish a pattern of access and re-engagement with his son first.[84] On occasion the guardian *ad litem* brought matters to the attention of the judge which had not emerged clearly from the social report by the social worker.[85]

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[84] Dublin, Court 20.

[85] For example one case in Dublin, Court 20, concerned a boy named C. The judge credited the guardian *ad litem* with bringing to his attention a deterioration in the behaviour of C.'s

One of the most obvious areas in which the guardian *ad litem* added value was in relation to an impartial assessment of the best interests of children. It emerged from submissions to the court that guardians *ad litem* and social workers (represented by counsel for the HSE) usually concurred on most matters in relation to the best interests of children. However, one contentious issue which frequently arose is that the HSE have funding considerations which will inevitably have a bearing on their approach to a particular case. The guardian *ad litem*, as an independent representative of the child, does not typically have to consider resource constraints in respect of provision for children, and therefore seems better placed to make more impartial determinations on what is in the best interest of the child involved. On a number of occasions guardians *ad litem* recommended a particular therapeutic treatment such as counseling, but the HSE did not support, or was reluctant to support, the recommendation. The presiding judge was then in a position to consider both sides and make a decision accordingly. In one case, the guardian *ad litem* had stated in her report that the child involved would benefit from further therapeutic treatment. The HSE responded that they were "committed to looking into it." The judge commented:

> I want to know that the HSE are committed to *doing* it. I know times are tough and all that, but [K.] is a young boy and it would benefit him. The guardian *ad litem* report is very clear.[86]

The usefulness of the primary role of guardian *ad litem* as a conduit for the views and best interests of the child featured consistently in the various proceedings. In one particularly complex case, the guardian *ad litem* informed the court that a teenager, who had had a number of care placements, "said she felt like a bouncing ball." The guardian *ad litem* made

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older brother which had resulted in the near breakdown of his placement. This situation had not emerged clearly from the social report (provided by the social worker) in that case.

[86] Dublin, Court 20.

extensive recommendations relating to this girl and her sisters. Counsel for the HSE then outlined the care plans and arrangements for the four girls, stating: "we take the recommendations of the guardian *ad litem* on board and they will be carried out as soon as possible." Thus, the guardian *ad litem* proved an invaluable link between the young people, the HSE and the court. Incidences of the guardian *ad litem* providing a useful function such as this were quite frequent.

7.4 Children Objecting to Access in Child Care Cases

Judges were very respectful of the wishes of children in care. In particular, judges accorded a large degree of weight to the views expressed by children in the care of the HSE who did not wish to attend access visits with their parents. One such case involved a seven year old boy who had been taken into care because of what the judge described as "horrific physical abuse." The parents, who were non-Irish nationals, sought access visits with their son and the boy (F.) refused to go. The guardian *ad litem* was of the opinion that access was not appropriate at this time. Counsel for F.'s guardian *ad litem* stated: "he's getting mixed messages. He has outlined the abuse, and yet he's being told he has to see his parents, it's confusing." Counsel for the father argued that the HSE should do everything in its power to bring the child to access visits, as access was "in the best interest of the child." The judge opined that he was not comfortable forcing F. into access visits. The conclusion of the judge that, "parents have a right to their child, but the interests of F. will be favoured"[87] indicates a presumption against forcing children in care into access visits with parents.

This approach prevailed even in cases where there had not been a history of abuse by the parent seeking access. In one case, a father sought increased access (from one hour per month to two hours) to his children who were in

[87] Dublin, Court 20.

foster care. The children opposed the increase and the social worker testified that interaction between the children and their father remained quite poor at the visits.[88] The judge stated that although one hour was a very short period of time per month for access, he was reluctant to increase it if the children were not comfortable with that. The judge postponed the decision and ordered the social worker to set up an access plan to improve the quality of the visits.[89] It was significant that counsel for the HSE relied on Section 24 of the Child Care Act 1991[90] in this case and interpreted it to require that the wishes of the children be balanced with those of parents. This is very positive from a children's rights perspective and suggests that having regard for the wishes of children is a priority among the legal professionals and social workers in such cases.

In every child care case observed which related to children opposing access visits, the judgments made were in line with the wishes of the children. However the influence of the advice of the HSE must be considered. In all of the cases outlined above, the HSE was advocating the views of children in care who did not wish to see their parents at that time. It is possible that the judge was influenced more by the recommendations of the HSE than the wishes of the child. Of course, it could be argued that the judge considered both factors together, which is appropriate practice and seems to be in line with Article 12 of the Convention on the Rights of the Child, which does not state that the views of the child should be determinative, but that they be given "due weight," presumably in conjunction with other considerations. It was not possible to examine the decision-making process of the District Court when the HSE and the children in their care differed regarding an

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[88] For example conversation tended to be instigated by the children. Furthermore, access tended to involve the two younger boys playing football with the older boy seated, involving little interaction with the father.

[89] Dublin, Court 20.

[90] Section 24 stipulates that the court must, "in so far as is practicable, give due consideration, having regard to his age and understanding, to the wishes of the child," in proceedings under the Act.

access issue, as such a case did not arise during the court attendances. However, the fact that it did not arise may indicate that the HSE will not seek orders for children in care to attend access visits with parents when they do not wish to do so, which would also appear to constitute positive practice from the perspective of the right to be heard.

7.5 Conflict between the Protection of the Child and the Wishes of the Child

Cases occasionally arose in the proceedings observed which involved stark examples of the conflicts that may arise between the best interests and the wishes of children. It is perhaps not surprising that judges tended to lean in favour of the protection of the children in these cases, as opposed to prioritising their wishes. One such case concerned P., who was soon to turn 18.[91] The HSE reported that she was under the influence of a middle aged man, and that she was disappearing with him for a week at a time. Her social worker feared that P. would disengage from the HSE altogether if they attempted heavy-handed intervention. The judge described the situation as "absolutely appalling" and stated that he was very dissatisfied with the HSE's handling of the situation. He stated that whenever P. went missing with this man, the HSE should have her followed by a private investigator, as this would be how a parent would react. He also wanted to see the HSE focus on destroying the relationship between P. and this older man and to better engage her with the HSE. The case further reinforces the tendency of judges to oppose the wishes of children in circumstances where their protection is at issue. The circumstances of this particular case did, however, seemed to involve a significant level of risk to the teenager. The judge appeared to use his discretion appropriately in his effort to encourage the HSE to utilise stronger measures to keep the teenager from the influence of this much older and undesirable man.

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[91] Dublin, Court 20.

Despite the emergence of cases in which it was relatively clear cut that protection issues should supersede children's wishes, a number arose in which the situation was less clear. One particularly difficult case involved two teenage sisters who were in foster care.[92] An allegation of abuse had been made by another foster child against the foster father and the HSE sought to remove the two girls pending a full investigation, the conclusion of which was due in the next two to three weeks. An order had been made for their removal but the girls were refusing to go. According to the HSE, the girls had been residing with their foster family for most of their lives and regarded them as family. However the judge was insistent that the girls be removed for their protection, as adults should not let children dictate to them, he stated, where their welfare is at issue. Counsel for the HSE argued that the move would be traumatic for the girls and that it would be difficult to enforce the order. Both the girls and the foster parents had agreed to protection procedures in the household. However the judge emphasised that it is the job of the HSE to remove the children as the HSE has a legal obligation to protect them.

This highlights the fact that a judge will tend to oppose a recommendation of the HSE that the authorities act in accordance with the wishes of children if the judge feels that the protection of the children is at stake. In this particular case, it must be considered that the investigation was to be completed in the near future and protection procedures were in place in the household. It must also be noted that the move would likely have been traumatic for these vulnerable girls. Arguably the strong views of the girls to stay with their fosterers could have been given more weight in this case.

In a number of cases, I observed that judges seemed to incline against the wishes of children in care who were seeking contact with their parents. In

[92] Dublin, Court 20.

one case, the HSE was refusing a father access to his children as allegations of abuse had been made against him by one child. His older daughter B. was "very keen" to have contact with her father and this was conveyed to the court through her guardian *ad litem*. The guardian *ad litem* suggested that they have limited contact, for example by phonecall or letter, and that the contact be monitored. The judge refused the request because a full care hearing was due to be held in five weeks time, at which point the issue of access would be examined in detail. He also reasoned that, because the HSE refuse access only in exceptional circumstances, the case would need to be heard fully before he could make such a decision and the matter was left for consideration at the full hearing. Instances such as this reflect the caution that judges exercise in the face of allegations of abuse. It also seems to suggest that judges are much more likely to make decisions against the wishes of children in situations where children want to see parents from whose care they have been removed, than to force children to see parents against their will. Therefore judges are more likely to rule against children's wishes in favour of the protection of children.

The latter case also raises the issue of judges ruling in favour of recommendations of the HSE in situations where children's wishes and HSE recommendations are in opposition. The case of B. is of particular interest, as the judge chose to accept the recommendations of the HSE over those of the guardian *ad litem*, which were in line with the child's wishes. It could be argued that the judge was simply exercising his discretion not to accept such recommendations and that this is appropriate. However, in cases such as these, the need to protect the child does not seem to weigh so heavily when indirect contact such a phone call or letter is being requested. It was a regular feature of the child care cases observed that parents complained to the court that children in care wished to see them.[93] It is an issue that seems

[93] It is, of course, in the interests of parents who wish to have access to a child to claim that the child wants the same, so it could be argued that parents could easily exaggerate the

to warrant more attention from the courts, as children's voices seemed to be ignored in these circumstances.[94] Such instances seemed particularly unfortunate where the children lacked the benefit of guardian *ad litem* representation.[95]

7.6 Issues Specific to Special Care Proceedings and Emergency Care Orders

Special care orders may be distinguished from general care orders in so far as the underlying justification for taking the child into care relates to the behaviour of the child rather than necessarily involving abuse or neglect by the child's carers. A number of unique issues pertain to these proceedings from the standpoint of the right to be heard. The Children Act 2001 provides for special care orders where it appears to a health board that a child requires special care or protection which he or she is unlikely to receive unless a court makes such an order.[96] Young people who are subject to such orders typically exhibit behavioural problems which jeopardise their safety, and they are therefore detained in a 'special care unit.' A "family welfare conference" is held in advance of the application, at which the care plan for the young person is discussed.[97] The family welfare conference may be attended, *inter alia*, by the parents of the young person, the young person herself and a guardian *ad litem*, where such a professional has been appointed.[98] The family welfare conference must approve the application, which is made by the HSE and an initial order may extend from three to six months.

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wishes of children under these circumstances. However, it is natural that many children will miss parents when they are taken into care (even where parents have been abusive or neglectful).

[94] Although the point made by the judge in the case of B., that the HSE will only refuse in exceptional cases, is acknowledged.

[95] E.g. Court outside Dublin, 8 October 2008.

[96] Part 3.

[97] Section7.

[98] Section 9 (1) (a).

Guardians *ad litem* are automatically appointed to children in these cases, although this is not required under any legislation.[99] Special care proceedings involve heightened concerns in terms of human rights law, as they involve the deprivation of the liberty of young people who have not necessarily been charged with or convicted of any offence, but instead because of challenging behaviour. Special care cases are heard in the High Court. As McMenamin J. observed: "[t]he detention of a minor in a special care unit is a significant infringement of the child's right to liberty. The High Court may only make an order as a last resort and then only for the shortest period of time. It is an exceptional jurisdiction."[100]

The fact that young people are generally placed in secure care against their wishes is of particular concern from the perspective of the right of children to be heard in proceedings affecting them.[101] There is a lot of uncertainty for the young people who are subject to these orders. One solicitor made the point that sometimes young people prefer to be detained under criminal charges than in special care, because they at least know when they will be released.[102] By virtue of the fact that special care orders can be renewed time and again, children can be left in these institutions for an indeterminate amount of time.

As discussed above, a "family welfare conference" (whereby the HSE and the family discuss the care plan for the child) is used to support the detention application which is made by the HSE. One HSE officer who chairs family welfare conferences indicated that he encourages young

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[99] The passing of the Child Care (Amendment) Bill 2009 would ensure that appointment is placed on a statutory footing, although concerns have been raised that legal representation for the guardian *ad litem* will be curtailed by the Bill. Rose Forrest, "Guardians ad litem at Risk in New Child Care Bill" (Opinion Piece) *Irish Times*, 10 May 2010.

[100] *HSE v R.* [2007] IEHC 459.

[101] A matter has recently arisen within the High Court in relation to special care cases. The judge responsible for hearing these cases is seeking to inquire whether he has jurisdiction to hear them. He stated during a hearing attended as part of this research that "the tension between the welfare of the child and the liberty issue is the primary matter that I wanted to re-open. That's the critical issue."[101] It is hoped that the outcome of the inquiry of this judge will shed light on this tension. Dublin, Court 19.

[102] Interview with solicitor, Dublin, 12 March 2009.

people to attend such conferences. He explained that the presence of children at such meetings challenges professionals to be clear about their intentions. However he also emphasised the need to avoid placing pressure on children to be involved in adult proceedings. He cautioned against decision-making responsibility being placed on young people in family welfare conferences:

> It is important that the professionals take on board what the child is saying and to be aware of the difference between burdensome responsibility and respectful responsibility. To expect to take all the decision-making from the young person is unrealistic.[103]

The same HSE officer stated that children should be prepared for the meeting and made aware of its limits (i.e. that it will not solve many of the problems relating to the family) but that in practice such preparation tends to be "ad hoc." He is also of the view that while there is some information available on how to involve children in family law conferences,[104] there is still no settled policy to guide professionals.[105] This is an area in which guidelines are clearly required so that a more consistent service can be provided to children.

Emergency care orders also require further examination as regards the right of children to be heard. The lack of guardians *ad litem* in proceedings involving such orders was frequently apparent in the proceedings attended. This further highlights the problem that children are not usually appointed a guardian *ad litem* from the first hearing of their case. One emergency care order hearing related to four non-Irish national children from two different families. Both mothers involved were subject to deportation orders and had

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[103] Interview with professional, Dublin, 8 March 2009.
[104] Through Barnardos and other sources.
[105] Interview with professional, Dublin, 8 March 2009.

been transferred to prison that day. A social worker had sourced foster placements for the children but the HSE reported that:

> Gardaí can't tell us specifically when the deportation order will be processed, we need to contact the embassy of [original country of the families involved] and we are not sure how long this will take.[106]

It was quite clear that these children were in a situation in which their interests were in need of independent representation. Proceedings relating to applications to take children into emergency care, or to children who had already been taken into care under such circumstances, were notable for a failure to consider whether a guardian *ad litem* should be appointed.

7.7 Family Law Cases

A number of issues particular to the voice of children arise in family law cases. It is useful to consider the legislation relevant to such cases. The legislation relates to matters of custody, access and guardianship. The Guardianship of Infants Act 1964 states that in any proceedings in which the custody, guardianship or upbringing of an infant is in question, the court shall regard the welfare of the infant as the first and paramount consideration when making decisions on such matters.[107] The 1964 Act states that the father and mother of an infant shall be joint guardians, unless the parents are unmarried in which case the mother shall be the guardian.[108] The Children Act 1997 permits the court to appoint a father as guardian of a child where the father and mother are unmarried.[109] The 1964 Act (as amended by the 1997 Act) permits the granting of joint custody to a father and mother.[110] The 1997 Act provides for the appointment of a guardian *ad*

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[106] Dublin, Court 20.
[107] Section 3.
[108] Section 5.
[109] Section 6A.
[110] Section 11A.

litem in private law proceedings, provided that there are "special circumstances" that render the appointment necessary in the best interests of the child.[111] This section of the 1997 Act has not yet entered into force.[112] Significantly, the 1997 Act also stipulates that "[i]n any proceedings to which section 3 applies, the court shall, as it thinks appropriate and practicable having regard to the age and understanding of the child, take into account the child's wishes in the matter."[113] The provision does not specify, however, how the views of the child are to be obtained. The court is further permitted by the 1997 Act to order social reports[114] and to conduct the proceedings in the absence of the child.[115] The themes emerging from observations of family law proceedings will now be examined.

A recurrent theme in the child care cases discussed above was the concern of judges for the welfare of the children in question. The regard of judges for the best interests of children was also evident in the family law proceedings observed. Parents who were in disagreement over access arrangements for children were frequently reminded by presiding judges that the interests of the children should take priority. Nevertheless, guardians *ad litem* are appointed in "only a handful" of family law cases annually.[116] One significant reason for this is that Section 28 of the Children Act has not yet entered into force. A consequence of the failure to enact the legislation is that judges can only appoint a guardian *ad litem* in cases where both parties (usually the parents) agree to the appointment and to fund the service.

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[111] Section 28.
[112] Enacting legislation through the Oireachtas (Parliament) is necessary.
[113] Section 25.
[114] Section 26.
[115] Section 27.
[116] Capita Research, note 41, at 53.

The fact that the statutory basis for appointment of guardians *ad litem* is higher in family law cases[117] indicates a prevailing view that children in family law cases are less in need, and/or less entitled to, some form of representation in court.[118] One professional criticised this assumption, as he claimed that such proceedings can sometimes involve issues which are as serious as those in child care cases.[119] This suggests a clear failure on the part of the state to provide children with a crucial service. In the opinion of that professional, the section has not yet entered into force because of resource considerations.[120] Given the resistance of the HSE to the appointment of guardians *ad litem* in a number of the child care cases outlined above, this seems a reasonable determination.[121] Moreover, according to one independent guardian *ad litem*, busy family law court lists, as well as the lack of independent representation of children, means that judges lack the time and opportunity to give adequate consideration to the welfare of children in family law cases. This professional goes so far as to claim that this situation can lead in some family law cases to judges making orders that are damaging to children.[122]

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[117] There must exist "special circumstances" in accordance with Section 28 of the Children Act 1997, a stipulation which does not apply to the appointment of guardians *ad litem* in child care cases.

[118] The difference in treatment in relation to the right of children to be heard in child care and family law cases is considered in Chapters 1 and 4.

[119] Professional, Phone Interview, 28 April 2008. The case below at 354 below proves the point which this professional is making, i.e. that some such cases involve child protection issues. The case involved a father seeking access with young children who had not seen him since he had seriously assaulted their mother in their presence with a weapon some years previously. Not all professionals agree that children should be heard, however. See Geraldine Keehan, "Findings From a Reconnaissance of Anglo-Irish Child-Related Divorce Legislation" 4 *Irish Journal of Family Law* 20 (2003) at 29, in which it is reported that 6 of 11 Dublin legal practitioners interviewed did not think that children's wishes should be sought and included in 'Affidavits of Welfare' in divorce cases, in order to refrain from involving them in proceedings.

[120] He asks, "[w]hy has Section 28, which covers guardians *ad litem* in civil cases, not commenced? The answer is money. If the family involved can pay, fair enough." Professional, Phone Interview, 28 April 2008.

[121] It is likely that the HSE would not be responsible for payment of guardians *ad litem* in family law cases (as it is child care cases which fall within the remit of that body). However it is possible that other government bodies (whose remit may potentially extend to provision for hearing children in family law cases) are similarly reluctant to expend valuable resources on guardians *ad litem*.

[122] Interview with guardian *ad litem*, Dublin, 6 March 2009.

The absence in court of the voices of the children concerned was a striking feature of the family law proceedings observed during the course of the fieldwork. Simply put, there was no independent representation of children, nor consultation with them in any form, in any of the cases observed. When custody and access disputes arose, it was the parents (the formal parties to proceedings) who were present and/or represented in court. The wishes and opinions of children were sometimes reported through their parents, however it must be borne in mind that the parents had a vested interest in representing the views of their children in a manner that furthered the parents' cause. On no occasion did a child appear in person, have independent representation, or communicate with the court in any independent manner in the family law proceedings observed. The absence of children's views in the proceedings observed was consistent with the general experience of the professionals interviewed for the purpose of the thesis. However Barnardos representatives reported (when interviewed) that occasionally they have been asked to provide guardians *ad litem* in particularly contentious family law cases.[123]

Professionals interviewed suggested that, in the limited number of family law cases in which guardians *ad litem* are appointed, they make a very positive contribution. Such cases typically involve long term conflict between parents, with significant disagreement over access arrangements.[124] One guardian *ad litem* reported that a family law case on which she was then working had been running for three years when the judge requested a guardian *ad litem*. The couple involved were in disagreement regarding access arrangements for their young daughter. The guardian *ad litem* appointed to the case stated that, "if the judge had brought someone in

[123] Interview with guardian *ad litem*, Dublin, 13 May 2008. They are asked to contribute by judges either on the request of representatives of the parties involved, or because the individual judge is familiar with the guardian *ad litem* service.
[124] Interview with guardian *ad litem*, Dublin, 13 May 2008.

earlier it would have cut down so much court time...we have good movement in the case now and the judge might use us again."[125]

Individual judges appeared to have different views on the lack of a mechanism for hearing the views of children in family law cases. One family law judge outside Dublin indicated to me during a private conversation his firm belief that the voice of the child was seriously lacking in family law proceedings.[126] He said he regularly called the Department of Justice to enquire as to why Section 27 of the Children Act had not yet been commenced, given the need for a mechanism to facilitate conversation with children in such proceedings. It seems this view was shared by many legal practitioners. One solicitor who represents guardians *ad litem* in both the Republic and Northern Ireland aptly summarised the situation in the following terms:

> I do think it's a huge issue for private law– at least in public law the child is represented. In private law you have no representative and two warring parents who think they know best and that there is no need to hear the child.[127]

However, a Dublin judge held reservations based on time considerations. He questioned whether it would be realistic to involve guardians *ad litem* in family law cases in Ireland.[128] He wondered whether the turnover of cases per day in the UK, where the services of guardians *ad litem* are regularly used in family law cases, was much lower. The judge estimated that as many as 20 cases are heard in his court per day and emphasised that far fewer cases could be heard if professionals such as guardians *ad litem* were involved in proceedings. Notwithstanding this particular view, several

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[125] Interview with guardian *ad litem*, Dublin, 27 March 2009.
[126] Court outside Dublin, 28 October 2008.
[127] Solicitor, phone interview, 26 January 2009.
[128] Dublin District Court.

proceedings were observed where it was clear that the complete exclusion of children's views gave rise to difficulties.

As outlined in Chapters 2 and 3, children now have the international legal right to be heard in matters affecting them under Article 12 of the Convention on the Rights of the Child. Therefore on the basis of compliance with international law, states should make the necessary legislative changes to implement this right. However it is clear from the family law cases observed that there are other sound reasons for giving children a voice. It may potentially assist judges in the resolution of challenging cases and, by extension, enhance the administration of justice in our courts. A number of cases observed highlighted the lacuna caused by the failure to ascertain the views of the children concerned. It appeared to interfere not only with the rights of the children involved, but with judicial decision-making, depriving judges of valuable information which could assist the judicial process.

7.7.1 Cases Requiring the Voice of the Child

In one particular hearing observed relating to custody/access, the presiding judge clearly stated that he would have welcomed the views of the children involved.[129] A separated couple had joint custody of their children who were at the time of the proceedings aged seven and nine years. The mother claimed that this arrangement had become too disruptive and complex for the children, who had become "older and more verbal" since the original arrangements had been made.[130] She sought a change in the access order to the effect that the father would have five nights access out of 14 instead of the current seven. However the father asserted that the arrangement worked fine and that the children had expressed no dissatisfaction with it. The judge stated that although it was clear both parents loved their children dearly, it

[129] Court outside Dublin, 28 October 2008.

[130] The arrangement involved, for example, the children being dropped off in a car park after breakfast by one parent to be taken to school by another, two days per week.

was a difficult application in which the best interests of the children would be the paramount consideration. The judge continued:

> The missing parties are the children, whose wishes have not been heard. There is a procedure which has not been brought into force. This is a dilemma for the court because it cannot access the wishes of children directly. The evidence comes from the parties. A tripartite approach is the ideal one, which would involve the children's evidence…I must proceed with the disability that I don't have this third view presented.

The judge decided that, while decreasing the father's access was undesirable, it was preferable for the children to reside in one house during the school week. He concluded by saying "that's a good as I can do, I hope it's right, though there's no right."[131] It seems quite significant that the judge openly acknowledged in this case that the absence of the voices of the children was an obstacle to judicial decision-making.[132]

As noted above, this lament over the absence of such a mechanism was not uniformly voiced by district court judges. Other judges were silent on the lack of a mechanism in such cases. This was particularly notable in cases involving older teenagers whose views could quite possibly have assisted judges in their decision-making. In one case a father, who was in prison for assault, requested that his three eldest children (aged between 11 and 15) visit him in prison. The mother, who had also been assaulted by the father in the past, stated a preference that access resume once the father left prison.[133] The judge ultimately ordered that the children visit their father in prison. However, at no point in proceedings did the judge ask about the preferences

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[131] Court outside Dublin, 28 October 2008.
[132] The same judge again lamented the lack of the voice of the child in another case relating to access, Court outside Dublin, 16 December 2008.
[133] Court outside Dublin, 13 Jan 2009.

of the children. This is particularly surprising since the children were in their teenage years and it is very likely that they held views on the matter of access with their father.[134]

7.7.2 Children Objecting to Access

A theme that arose on a number of occasions in the family law proceedings observed was that of children reportedly objecting to attending access visits. On three occasions during the proceedings observed, judges made unsupervised access orders[135] under these circumstances, despite the reported resistance of the children involved. Access visits were often ordered with little or no preparation time for the children involved.[136] In one particularly complicated access case,[137] a father had not seen his daughter for over a year for various reasons and sought access effective immediately. The mother objected on the basis that the child did not wish to see her father and had seen him only when compelled to in the past. The judge decided that the father would collect the child from her home the following day for four hours, and the day after that for six hours. It was clear that it was important for the father-daughter relationship to be initiated quickly. However it did not seem good practice, given the reported objections of the child, that the father take her out unaccompanied the very next day and for such long periods of time. It would arguably have been more appropriate

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[134] A similar issue arose on another occasion in a different court. The judge made an access order in favour of a father in respect of his teenage children. A barring order was made by the mother of the children during the same hearing, and the judge noted the level of violence in the household. It was noteworthy that the judge sought the views of the mother on the matter of access, however at no point did the judge ask either parent about the views of the three teenage children. Dublin District Court.

[135] That is, access visits with parent and child alone.

[136] That is, time to permit the primary carer to introduce the child to the fact that such a visit would be taking place and to prepare the child for the visit.

[137] Proceedings under the Hague Convention on International Child Abduction had been initiated.

had a neutral person (e.g. a familiar grandparent) been present during such a visit, at least on the first occasion that access was reinstated.[138]

The presiding judge remarked to me after the hearing outlined above: "with a child of four or five, there's no point asking them their wishes."[139] This indicates that the views of the children (albeit as reported by parents) may be accorded little weight in such cases because of their age. This may also account for the lack of preparation time given in many of these cases, in that judges may consider that children of this age will not experience psychological distress once the 'correct' decision is made in their interests. However judges are not child psychologists and in these cases they do not even have the benefit of having met the child in question to make further enquiries about the source of the opposition/distress for the individual child. If there had been a mechanism in place for consulting the child (or perhaps judicial training in developmental psychology), the appropriateness of unaccompanied access might have been established more definitively. Moreover, it is questionable that introductory periods of supervised access were not considered as an option in such cases, as such supervision could have made the process of access less difficult for children who were resisting it.

The same judge indicated to me that he would typically give weight to the views of children aged 12 and above.[140] He also informed me that in some instances courts vary access orders on the request of the child as expressed through the parents.[141] This is encouraging, considering the lack, in effect,

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[138] For example in another case in the same court, two girls (aged eight and ten) did not wish to have access visits with their father, who happened to be terminally ill. The judge made an access order and disagreed with the wish of the mother to first obtain psychological assistance for the girls. In another court, a seven year boy reportedly did not wish to see his father who sought access. Access was ordered, however, in this instance the judge at least allowed two weeks before the access visit, in order for the mother to prepare her child. Court outside Dublin, 7 Jan 2009.

[139] Dublin District Court.

[140] Dublin District Court.

[141] Dublin District Court.

of a formal mechanism through which to obtain children's views. This judge cited one particular case in which the parents involved agreed that an access order should be varied at the request of the child, aged 12. The child did not always feel comfortable being alone with her father, therefore the order was altered by consent to include the stipulation that access be subject to the wishes of the child. The view that children of this age should have a degree of influence in access arrangements reflects a positive attitude on the part of the judge. However, the case cited was relatively straightforward as it involved a matter on which the parties consented and proceedings in which the parties themselves raised the issue of the child's wishes. The same judge was not observed asking the parents about the views of their children in any of the access proceedings observed.[142]

It was noteworthy that in one family law case, which explicitly involved child protection issues, the views of children featured more prominently. A father was seeking access to two boys aged eight and ten.[143] The father had previously suffered from a drug and alcohol problem and had been convicted of seriously assaulting the mother in front of the children with a weapon six years before the proceedings. The judge concluded that it was a very difficult case. He noted that the older boy had indicated clearly to his psychiatrist (who had submitted a report to the court) that he was reluctant to have contact with his father. The judge ultimately refused access; however he agreed with the recommendation of the psychiatrist that contact be initiated gradually. This case involved a greater level of regard for the psychological needs of the children concerned than the cases outlined above. It was one of the rare occasions in the family law proceedings observed in which a child was resisting access visits and the judge refrained from making an access order. This may be explained at least in part by the

[142] Although the same judge consistently expressed in different cases the need for the welfare of the children involved to be paramount, indicating his strong regard for the children involved.
[143] Court outside Dublin, 16 December 2008.

degree of violence which the children had witnessed their father perpetrate in the past. Because of this issue, the case had the benefit of the report of a psychiatrist to whom the child had expressed his views. The case was also heard by the family law judge noted above to be strongly in favour of obtaining children's views,[144] which undoubtedly contributed to the relative prominence of the wishes of the child in this case.

In a number of proceedings observed a practice was observed whereby young children were compelled to have unsupervised access with a parent whom the child had not met for a significant amount of time. While it is reasonable for judges to accord less weight to the views of younger children than those of older children, this practice is questionable. It is particularly so since alternative options exist, such as the possibility involving a neutral party (including relatives) to supervise the access for the initial visits as a prelude to unsupervised access. This practice was acknowledged by one of the guardians *ad litem* interviewed. The professional stated that he had witnessed family law cases whereby judges had ordered that young children engage in unsupervised access visits with fathers whom they had never met.[145] It is useful to compare these cases to child care proceedings, where the wishes of children resisting contact with parents were respected in all cases observed. Although child care cases and family law cases are undoubtedly different, the primary issue is similar– in relation to such matters, regard must be had to the sensitivities of young children, as expressed by them. It is submitted on the basis of proceedings observed that children in the care of the HSE would not be compelled to engage in unsupervised access under circumstances such as these.

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[144] See above at 7.3. The judge expressed these views to me in a court outside Dublin, 28 October 2008.
[145] Interview with guardian *ad litem*, Dublin, 6 March 2009.

7.7.3 Guardianship Orders

As noted above, the Children Act 1997[146] permits the court to appoint a father as guardian of a child where the father and mother are unmarried. The Guardianship of Infants Act 1964[147] provides for the appointment and removal of guardians by the court and outlines the powers and duties of guardians.[148] In the proceedings observed, guardianship issues were (somewhat surprisingly) determined without any reference to the views of the children involved. In a hearing outside Dublin a man was applying to the court for guardianship of the 16 year old twin sons of his wife.[149] The judge asked the petitioner whether he had been supporting the children and acting as their *de facto* guardian. He replied that he had been, and ultimately he was appointed guardian. The two young people were neither present nor consulted during the brief proceedings.[150] It is quite possible that the children were in agreement with their step father as to the order being sought, and perhaps the judge had information of which I was not aware. Yet on the face of it, they do not appear to have been consulted, and it does not seem adequate that young people of this relatively advanced age play no part in proceedings directly affecting them.

In another case which related to a child care matter, the issue of the guardianship of the father was considered.[151] The four boys (between eight and 19 years) were in foster care and the father had monthly access visits of one hour. The judge made the point that one of the boys was now 19 with the consequence that he would not be affected. Neither the judge nor any of the parties referred to the views of the children as to whether they desired their father become their guardian, despite the fact that one of the children

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[146] Section 6A.
[147] Section 8.
[148] Section 10.
[149] He was not their biological father.
[150] Court outside Dublin, 6 October 2008.
[151] Dublin, Court 20.

was 17 years old. This seems particularly regrettable, considering the boys were objecting to the increase in access which was sought by the father at the same hearing.

Some guardianship proceedings suggested a need for the appointment of guardians *ad litem*. One such case involved a father who had applied for guardianship of his two year old son following the recent death of the child's mother. His application for guardianship was supported by the child's social worker. His son was in foster care and the father had access visits with the child five days per week and also had guardianship of the child's older brother. However it transpired that the father had 92 criminal convictions and the judge was concerned about the influence he would exact over the boy. The social worker was not present in court and the judge stated that, before making a decision, he would seek her views and establish whether she was aware of the convictions. He stated that he would consider appointing the father as guardian for an initial period of two years at which point the judge would enquire as to whether the father had any new criminal convictions.[152] This is precisely the type of case in which the appointment of a guardian *ad litem* would have been useful to provide independent recommendations to the judge on the best interest of the child.

Overall, it is submitted that children would benefit from independent representation (such as a guardian *ad litem*) in cases which involve guardianship issues. Judges have a wealth of experience, as well as common sense, and are well placed to make decisions in the best interests of the children involved. However the cases above indicate that the views of the children are distinctly lacking in these cases. There is no mechanism for judges to ascertain the views of these children and guardians *ad litem*– who can provide the judge with additional, insightful information– may be beneficial, particularly in guardianship cases involving very young children.

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[152] Court outside Dublin, 8 October 2008.

7.7.4 Safety, Barring and Protection Orders

The Domestic Violence Act 1996 provides for the issuing of safety, barring and protection orders. These orders are relevant to children as dependents of the applicants are included in such orders. Safety orders are provided for under the 1996 Act and enable the court to direct that, *inter alia*, the respondent to the application does not threaten or use violence against the applicant or dependent person.[153] A protection order may be made by the court while an applicant awaits a court hearing and has the same effects as a safety order. Barring orders apply where the respondent has been residing with the applicant and the respondent is ordered by the court to leave the residence for the same reasons that would justify issuing a safety order. Interim barring orders (under which respondents are also directed to leave a residence) are provided for under the 1996 Act[154] and apply where there is an immediate risk of significant harm and where a protection order would be insufficient.

Applications for safety, barring and protection orders are a routine feature of family law proceedings. Yet it is interesting to note that in the proceedings observed, children were never consulted in such cases. The vast majority of cases observed were based on claims by women that they were in fear of physical harm by a current or former partner; they did not involve allegations that there was any danger to the children.[155] However barring and protection orders are directly relevant to children, as such orders apply to the dependent children of the adult to whom they are granted and judges are mindful of the potential impact on children of abuse of others in the household. Furthermore, occasionally there are claims of abusive behaviour towards children. For example, in one case a wife sought a protection order

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[153] Section 2.
[154] Section 4.
[155] I observed approximately 30 such hearings.

against her husband. She had three children between the ages of four and eight years and she claimed that their father regularly verbally abused them, for example by telling them they were 'stupid'. The barring order was granted.[156] In another case, the mother claimed that the father regularly beat their daughter.[157] These cases indicate that these orders, while of indirect legal relevance to most dependents, sometimes have a direct impact on the children of the adults involved.

It could be argued that children should not have direct involvement in such proceedings. There were few barring or safety orders granted in the proceedings observed which directly involved the children of the couple concerned. It could be argued that children's interests should not be independently represented in these proceedings as they are different to proceedings regarding custody and access, which affect children more directly. Moreover, given the context of cases necessarily involving domestic abuse, the substance of such proceedings could be traumatic for children, particularly when contested. It may not, therefore, be appropriate for children to be present in court during the hearing of such cases. However this does not preclude independent representation of their interests by a professional such as a guardian *ad litem*.

7.8 Other Matters in Both Care and Custody/Access Proceedings

7.8.1 Presence of Children in Court

Instances in which children appeared in court were rare in the proceedings observed and were limited to cases involving child care matters. One solicitor reported that young people that do appear in court are usually 14 or

[156] Court outside Dublin, 6 October 2008.
[157] Dublin District Court. The judge advised the mother that she should refer this matter to the HSE and the mother informed the judge that the HSE were already involved.

over[158] and this was consistent with the proceedings observed. One guardian *ad litem* made the point that he gives children the option of writing a letter directly to the judge or being heard through his representation and that "this is usually enough for them."[159] However he indicated that he does make children aware of the possibility of appearing personally in court. In his view, where children do elect to appear, the success of the exchange will depend largely on the judge. He stated that "enlightened judges will see them. Some judges are good with children and some are wooden. I believe judges should undergo psychological evaluation for their personality."[160] Indeed the fact that judges adopt different approaches to the matter was evident in the proceedings observed. District Court judges expressed various views on the usefulness of meeting with children. On occasion, judges presiding over child care cases encouraged the presence of teenagers.[161] However I asked one family law judge if children ever appeared in his courtroom. He responded, "no, I wouldn't allow them in at all. Some judges see them and ask them who they want to go to. I wouldn't bother."[162] This indicates a lack of uniformity in the approach of judges (at least in family law cases) as to whether it is desirable that children appear in court.

There is, of course, a difference between the presence of a child capable of understanding proceedings and the presence of a very young child. The former were sometimes invited to attend, but only in child care proceedings. This is presumably because these children have a social worker (and therefore someone to make the possibility of attendance known to them), whereas children in custody/access proceedings generally do not. Very young children were sometimes brought to court by their parents, usually because of a lack of child care. Judges were generally opposed to parents bringing young children into the courtroom. This seems an understandable

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[158] Interview with barrister, Dublin, 1 May 2009.
[159] Interview with guardian *ad litem*, 6 March 2009.
[160] *Ibid.*
[161] E.g. Dublin, Court 20, and Court outside Dublin, 6 October 2008.
[162] Court outside Dublin, 7 October 2008.

approach, since it is obviously difficult for judges to carry out their work with such children present. Furthermore, it is questionable whether parents can concentrate on complex proceedings when they have a young child to attend to. One particular judge advised a mother with a young child (the mother was party to proceedings): "you can't do two things at once."[163]

However the issue of whether family and child care courts should be made accessible to young children needs to be explored. The presence of young children in court during the proceedings observed yielded interesting results. In one case, a father was applying for guardianship of his one and a half year old son. While the mother was conversing with the judge the child became restless and the father took him in his arms. The child became upset at this and began to cry. The judge commented on this fact, saying to the father, "I'm concerned that when you took J. in his arms he got very upset, because he doesn't know this man." It transpired that the interpretation of the judge was entirely correct. On further questioning, it became apparent that the mother, who had been consenting to the application of the father, was mistaken in her understanding of the law. She was seeking to apply for a passport for the child and believed that the father needed to become a guardian of the child, and then sign the relevant forms, in order for the passport application to be approved. The judge explained to the mother that this was not the case. He did not grant the father guardianship, but told him that if he paid maintenance regularly and took an interest in the child, then guardianship could be considered.[164] Had the child not been in court and demonstrated the fact that he did not know his father, the judge may well have made the guardianship order in favour of a father who did not have a relationship with his child.

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[163] Court outside Dublin, 8 October 2008.
[164] Court outside Dublin, 7 January 2009.

Clearly it can be beneficial for a judge to witness family dynamics and meet children personally, even where those children are very young. It is difficult to imagine how such considerations could be facilitated in the courts. Possibly there could be a childcare service at the courts which would involve the judge meeting the child at the start of proceedings (perhaps in the courtroom) and the child then being cared for outside the courtroom (but within the courthouse) for the remainder of the case. Of course, where family members are free to look after the child (which sometimes arose) this could obviate the need for such a service. While this may seem an unorthodox suggestion, it became clear during the research that the difficulties pertaining to childcare already lead to unusual practices in the courthouse. On one occasion I witnessed a case which involved an application for guardianship by the father of a three year old child. During the proceedings, the Garda on duty outside the courtroom actually took the child for a walk within the courthouse at the request of the judge.[165] Therefore childcare is an issue in and of itself in proceedings involving children and is dealt with in an ad-hoc fashion. However it may also be a factor in vindicating the right of children to be heard. Some manner of childcare facilities may well enable young children to be present for at least some part of the proceedings affecting them. There are a number of potential arguments against this from the perspective of the right to be heard, for example, such young children cannot consent to such practices and they may find the arrangements distressing.[166]

It is clear that vindication of the right to be heard requires that children who are capable of forming views are given the opportunity to attend proceedings concerning them. On a few occasions I observed judges demonstrating their view that the presence of the young person was important in child care proceedings. In one case concerning a young person

[165] Court outside Dublin, 6 October 2008.

[166] Other obstacles would include matters relating to resources and the possibility of disrupting court.

in care who was about to turn 18, the judge expressed the view that the presence of the young person would be desirable. The judge set the next hearing for a Wednesday evening on the recommendation of the social worker who was present in court, as the young person had a half day from school on Wednesdays.[167] On another occasion, a judge questioned closely a social worker assigned to another young person in care as to why the girl was not present. The social worker explained that she had given the girl the opportunity to be present in court but the girl had declined the offer.[168]

In some instances, however, it was questionable whether the appearance of the young person in court benefitted the child or anyone else concerned. Perhaps this highlights the importance of having appropriate training for circumstances under which children attend proceedings. In one particular case it was arguably a negative experience for the young person. A 17 year old girl, who was in the care of the HSE, appeared before the court in relation to an issue of accommodation.[169] The HSE had decided that she reside at a particular institution and the girl was unhappy with this proposal. She began to cry and the judge stated, "she is clearly under a lot of pressure". The girl responded, "you would be too if you were out in a B & B." The judge said that there was not a lot that the HSE could do and that the girl should consider the institution which had been proposed. The demeanor of the judge appeared to have had an impact on the experience of the young person in court. While relatively receptive to the distress of the young person, the judge was clearly not as understanding and warm as another judge might have been. For example, in separate proceedings, judges were observed to make a significant effort to converse at length with

[167] Dublin District Court 20.
[168] Court outside Dublin, 6 October 2008.
[169] *Ibid.*

and give extensive words of encouragement to young people when they appeared in court.[170]

The inconsistent approaches of judges to the presence of young people highlights the need for judges to receive training in how to relate to children.[171] The need for clear practice guidelines is also evident. Judges should be given guidance in relation to which circumstances young people are to be encouraged to attend proceedings concerning them, and how to behave when they do. For example, it seems advisable that there should be basic guidelines in place that judges acknowledge the presence of children who attend court and refrain from speaking about them in the third person. The approach of the judge presiding in the proceedings outlined above seemed to exacerbate the distress of the young person. It is likely that the more training that a judge has in relation to young people, the more positive the experience of being present in court will be for young people and all concerned. This would be welcome, as young people should be able to (and encouraged to) attend proceedings relating to their care where appropriate, as this is considered an important part of the due process rights of adults.[172] The professionals involved should be trained to minimise further distress to children, particularly children in care, who are already amongst the most vulnerable in society.

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[170] In Dublin District Court 20 judges who regularly sit have the benefit of extensive experience in child care cases.

[171] This is particularly so in relation to those judges who regularly hear child care and family law cases.

[172] See Nuala Mole and Catharina Harby, *The Right to a Fair Trial: A Guide to the Implementation of Article 6 of the European Convention on Human Rights, Handbook No. 3* (Council of Europe, 2006), at 44.

7.8.2 Appointment of Solicitors for Children

Children in family law and child care cases are rarely appointed legal representation.[173] This is a highly questionable lacuna in Irish practice. Indeed, it is important to emphasise that where guardians *ad litem* are appointed, they do not act as a legal representative who will advocate the wishes of the child. Instead they provide information on the views of the child as well as an assessment of the best interests of the child. It is, in some ways, a paternalistic approach to children, as their views are filtered through an adult gate-keeper. A solicitor's role is, of course, to take direction from a client.

In the proceedings observed, the only circumstances in which solicitors were appointed to represent young people were cases involving minors who were themselves mothers of infants in care. However a solicitor was not appointed expeditiously in every case of this kind. In one instance a young mother D. was aged 17 and was herself in the care of the HSE and had an infant in care. She had not yet been appointed legal representation. The guardian *ad litem* for the baby recommended that the mother and child be placed in a mother and baby home. Counsel for the HSE stated that although funding was a concern, they would put proposals to the relevant Committee on this. They added "[D.] is without a solicitor at the moment and that's a shame." There were no reasons given as to why D. was unrepresented, which is highly unsatisfactory, particularly since an adult would be represented by a Legal Aid Board solicitor in similar circumstances. Although such adults occasionally appeared in court without such

[173] In England and Wales, children are automatically accorded party status in child care cases. They are then represented by a CAFCASS Children's Guardian and a solicitor. Children in family law proceedings are not automatically made party to proceedings (which usually means they will have legal representation), however a CAFCASS Child and Family Court Reporter must advise the court as to whether party status is appropriate. See Fortin, note 63, at 257.

representation due to delays in the process,[174] it could be argued that because minors in the same situation are in the care of the state, the HSE or some other state agency should take responsibility for engaging legal representation for the minor. Clearly, children are much less likely than adults to be aware of an entitlement to free legal aid and less capable of dealing with the seemingly lengthy and complicated process of applying for the same.

In the proceedings observed for purposes of the research there was only one instance, outside the category of mothers who are minors, where a court appointed legal representation. The case, which came before a district court outside Dublin, involved a 16-year old young man (L.), who was in the care of the HSE. His mother resided in the UK and she wished for him to join her there. L. appeared in court, stating that he had decided that he did not wish to join his mother in the UK. He told the judge "I want to stay here and get my education." Because he was not consenting to his mother's request, the judge decided that he "would consider appointing a solicitor for L., considering his age and situation." The judge explained to L. that when a solicitor is appointed for someone, the solicitor has to follow the instructions of their client. However, the judge also said:

> I advise the solicitor to exercise discretion, so they don't have to advise to the letter, if I appoint them for a child in care. If they're asked to do anything way out of bounds they don't have to take instructions.[175]

This appointment was a positive step in terms of the right to be heard of this young man. The case involved complicated issues and because the young person's wishes were not in line with those of his mother, a legal

[174] I.e. they had not yet submitted all the necessary paperwork to the Legal Aid Board, or the Board had not yet processed their application.
[175] Court outside Dublin, 8 October 2008.

representative for the young man seemed to be a beneficial and arguably essential mechanism to allow him to assert his interests. The proviso of the judge, that because a solicitor is being appointed to represent a minor the solicitor must exercise an element of discretion, seems understandable in some respects. Children's capacities are still evolving. However there are a number of points to consider. It does not seem that this qualification exists under any particular legislation. Nor do there appear to be safeguards in place to ensure that this proviso is not abused. It is questionable whether such a qualification is appropriate for older teenagers. Moreover, there does not seem to be any particular training for solicitors representing those under 18 years which is obviously undesirable.

In the proceedings observed there were no other instances in which solicitors were appointed to represent the children concerned.[176] One professional interviewed expressed very strong views on the lack of independent legal representation for young people:

> It is very rare that a child is made party to proceedings. You could argue that older children should be. If a child has no legal representation, they don't know their rights. If you have a 15 year old child and you are trying to explain what 'party to proceedings' is, he may have a learning disability, he may be out of school, it is very difficult. Under the Children Act, children are entitled to the same treatment as adults. Yet if you're an adult you will have legal representation but a child in care proceedings has none. [177]

This issue constitutes one of the most serious obstacles to the right of children to be heard. It is submitted that, ideally, children should be appointed both a guardian *ad litem* and a legal representative, as is the case

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[176] Outside of the situation of young mothers with children in care, as outlined above.
[177] Professional, Phone Interview, 28 April 2008.

in the UK system (as regards all children in care and in some family law cases). Even if children do not have both professionals appointed for them, there is a strong argument to be made that older teenagers should be provided legal representation, possibly as an alternative to the guardian *ad litem*, assuming the young person consents. Moreover, young mothers whose infants have been taken into care and who are themselves in the care of the HSE should clearly be appointed legal representation automatically and immediately.

7.8.3 Financial Considerations

Significant issues came to light during the research relating to financial resources. Resource considerations pose a constant obstacle to the right of children to be heard in all manner of proceedings in the Irish District Courts. Although children themselves are rarely appointed legal representation in civil law cases, such representation is generally appointed for guardians *ad litem*. The cost which this representation entails constitutes an obstacle to the right of children to be heard in such proceedings, as it has engendered an element of skepticism among professionals regarding that right. One professional interviewed stated that:

> Legal representation for guardians *ad litem* costs more than the guardians *ad litem* themselves. Most guardians *ad litem* are legally represented...in some cases there were seven barristers. Judges are saying that more should happen outside of the court.[178]

Social reports (whereby reports are submitted to the court by social workers, as opposed to the more extensive service provided by guardians *ad litem*) were sometimes suggested as an alternative to the costly guardian *ad litem*

[178] Professional, Phone Interview, 28 April 2008.

process.[179] Child care cases involve frequent submission to the court of the reports of social workers. However social reports can be requested by the court in family law cases under the Family Law Act 1995.[180] Such requests are usually limited to cases where there are concerns for the welfare of the child involved. These appear to provide a potentially more cost-effective method of providing the court with information on the best interests and wishes of children. However one solicitor noted that this method could diminish the right of children to be heard:

> I am very critical of social reports in the place of guardians *ad litem.* They are an information-gathering exercise. They don't involve the representation of children and their interests. They involve adults as they relate to children, and not the other way around. Social reports do not represent the views of the child.[181]

Another professional made the point that guardians *ad litem* go further than social reporting because they include an assessment of the situation of the child, commentary on the proposed care plan and recommendations. He concluded: "the High Court has said that guardians *ad litem* should cover these [areas]. I don't think the social report could cover all of these areas."[182] Mechanisms to vindicate the right of children to be heard in proceedings in the Irish District Courts are already minimal. It could be argued that to replace the guardian *ad litem* system with one involving social reports would further erode the right.

The issue of payment of guardians *ad litem* in family law cases is a crucial one. As mentioned above, there is reason to believe that the relevant section of the Children Act 1995[183] which provides for guardians *ad litem* in family

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[179] E.g. by Barrister, Interview with barrister, Dublin, 21 April 2008.
[180] Section 47.
[181] Interview with solicitor, Dublin, 16 May 2008.
[182] Professional, Phone Interview, 28 April 2008.
[183] Section 27.

law cases has not yet entered into force because of resource considerations. The professionals interviewed highlighted the financial difficulties which have arisen where guardians *ad litem* have been used in such cases. One judge indicated to me that in a particular family law case he had felt strongly that a guardian *ad litem* would be beneficial to the resolution of the case. He decided that to fund the services of the professional, he would use the court poor box. However, because the cost of the guardian *ad litem* was more than he had anticipated, he had to gather the funds from the poor boxes of other courtrooms in the building, which he felt was quite unfortunate.[184] A guardian *ad litem* from Barnardos highlighted the fact that a similar situation had arisen in a family law case on which she was working. The presiding judge had decided to take €2,000 from the poor box and decided further that the parents would contribute €1,000 each. Barnardos then agreed to fund the final €2,000 of the cost of providing a guardian *ad litem* in this case, as this was a particularly contentious case where the organisation felt that a guardian *ad litem* would provide valuable assistance.[185] This indicates the highly unsatisfactory situation in relation to the funding of guardians *ad litem* in family law cases. The problem will not necessarily be rectified through the full commencement of Section 27 of the Children Act, as the Act does not stipulate who is to fund the guardian *ad litem* in family law cases. HSE funding of guardians *ad litem* in such cases (as occurs in child care cases) could be considered until such time as a central funding/regulatory body is established to oversee payment of guardians *ad litem*. However in the long term, the establishment of such a body seems vital. This matter is very closely related to the need for a regulatory body to oversee all matters relating to guardians *ad litem*, and possibly all matters

[184] Court outside Dublin, 28 October 2008.

[185] Phone interview with *guardian ad litem*, 27 March 2009. Barnardos receives an amount of state funding to provide a guardian *ad litem* service. However the service (provided by Barnardos and private individuals) is almost exclusively confined to child care cases, primarily because of the relevant legislation. Therefore this case involved Barnardos going beyond its duties and remit in the interest of this child.

relating to the right to be heard which would, of course, require legislative change.

7.8.4 Legislative Change

There is a strong argument to be made that legislation in the Republic of Ireland should be brought into line with the much higher standards that exist in Northern Ireland. All children in child care proceedings are appointed guardians *ad litem* in proceedings affecting them under the Children (Northern Ireland) Order 1995,[186] unless the court deems that it is not in their interests to do so. This creates a presumption in favour of appointment. In contrast, the legislation in the Republic of Ireland requires judges to decide in child care proceedings whether to appoint a guardian *ad litem* on the basis that, "it is necessary in the interests of the child and in the interests of justice to do so."[187] In family law proceedings the criteria for appointment is even more stringent, as "special circumstances" must render the appointment necessary in the best interests of the child.[188] Therefore judges are not compelled to consider the necessity or desirability of the guardian *ad litem* for children in all relevant cases as a matter of course. It seems that this aspect of the legislation is at least partly responsible for the failings outlined above relating to the right of children to be heard, such as the lack of judicial consistency in the appointment of guardians *ad litem*, and the low rate of appointment outside of Dublin.

Professionals had mixed views as to the wisdom of amending the legislation in order to make the appointment of guardians *ad litem* compulsory. One professional stated that judges already have vast experience and that they aim to make decisions in the best interests of the child, so such legislation may not be necessary:

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[186] Article 60(1).
[187] Section 26 of the Child Care Act 1991.
[188] Section 28 of the Children Act 1997.

> As for judges being given guidance, everyone can do with guidance, but the judge already has the resolution of the case and the best interest of the child in mind. Resolution is the main concern of the court.[189]

However one guardian *ad litem* disagreed with this view and made the point that "judges do what the statute books tell them to."[190] There is merit to this assertion. Judges clearly have significant concern for the interests of children, however there are other competing interests at play in the legal arena. Therefore if legislation relating to relating to the right to be heard is not in place, it will not always be accorded the priority it deserves. Furthermore, the cases above indicate that there is a significant amount of confusion regarding the circumstances in which guardians *ad litem* are appointed, the nature of the role, and the matter of appointing legal representation for children.[191] They also highlight the reality that some judges are much more likely to appoint guardians *ad litem* than others. Therefore there is evidence, then, that legislative change is necessary to achieve a standardised approach to the right of children to be heard in proceedings affecting them.

Legislation specifying that specially trained judges oversee cases concerning children would also be a welcome reform. The need for training of judges who oversee family law and child care cases was a common theme among the professionals interviewed. It was reported that some judges are well disposed towards training and may ask for literature on aspects of child development and other topics. However others are very resistant to the idea that they may need additional specialised training.[192] One judge commented:

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[189] Interview with barrister, Dublin, 21 April 2008.
[190] Interview with guardian *ad litem*, Dublin, 6 March 2009.
[191] Although the fact that the role of the guardian *ad litem* has been clarified to some extent by the CAAB Guidance is welcomed. See CAAB Guidance, note 40.
[192] Interview with guardian *ad litem*, Dublin, 6 Mar 2009.

> Judges have issues about psychological expertise. For example one judge didn't accept a psychiatric report on a defendant. Judges should get training in psychology and social work.[193]

One solicitor went so far as to say that it is not possible to implement practice along the lines of the UK system because "the basics" are absent in Ireland. These basic factors are, in her opinion, compulsory training of judges, specifically designated judges for child care proceedings, and training for solicitors and barristers through specialised training courses. She made the point that, "the only experiences judges have is their own and this relates to their age, class, etc. Many of them do everything on 'feeling' rather than law."[194]

The research undertaken for the purpose of the thesis also highlights the substantial need for a regulatory body for guardians *ad litem*. The professionals, including guardians *ad litem* themselves, were unanimous on this matter. Such a body, CAFCASS, is already in place in England. It is independent of the courts, social services as well as education and health authorities.[195] The mandate of CAFCASS is to safeguard the welfare of children, to give advice to the family courts, to make provision for children to be represented in court proceedings and to provide information and support to children and their families.[196] If established in Ireland, such a body could potentially oversee the training and employment of guardians *ad litem*. Issues relating to conflicts of interest regarding the role of the HSE in the appointment and payment of guardians *ad litem* could be overcome through the establishment of such a body. One professional made the point that such a body could also work in Ireland to progress the issue of the right

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[193] Interview with District Court Judge, Dublin, 31 October 2008.
[194] Interview with Solicitor, Dublin, 11 March 2009.
[195] CAFCASS was established by the Criminal Justice and Court Services Act 2000.
[196] See further http://www.cafcass.gov.uk/about_cafcass.aspx (last accessed 19 March 2009). Northern Ireland also has an equivalent body, NIGALA.

of children to be heard. He emphasised that until such a body is in place, significant change in the area will not occur:

> There are less than 40 guardians *ad litem*, so it is not a huge job to regulate them. One person with a small staff could do it. But unless this is in place, the changes will not happen. The UN report on Ireland[197] commented on this. So it depends on how strong the influence is and how much the government wants to be seen to comply. [198]

He expressed a lack of confidence regarding the willingness of the government to establish such a body, but noted that there is a strong sense that this needs to happen.[199] The steps necessary to realise this reform have not yet been taken. Since there is evidence that guardians *ad litem* would welcome it and that it could effect substantial positive change in the system, it is unfortunate that it is unclear whether such an organisation will be established.[200]

It is further submitted that such a body could exceed the standards set in other countries. The organisation could deal with both child care and family law cases. It could provide the guardian *ad litem* service, and also take responsibility for determining whether and how children are to be heard. The organisation could potentially use a variety of methods in order to assist children to be heard, *inter alia*, letters to the court, guardians *ad litem*, legal

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[197] Presumably this professional was referring to the report of the UN Committee on the Rights of the Child. Committee on the Rights of the Child, *Concluding Observations on Ireland's Second Report to the Committee* (29 September 2006) CRC/C/IRL/CO/2.
[198] Professional, Phone Interview, 28 April 2008.
[199] *Ibid.*
[200] It was stated in the "*Implementation Plan of the Report of the Commission to Inquire into Child Abuse*" that the Minister for Children and Youth Affairs would seek to establish a policy of management and funding of guardian *ad litem* services, however it does not appear that there have been any further developments. Office of the Minister for Children and Youth Affairs, *Report of the Commission to Inquire into Child Abuse, 2009: Implementation Plan* (Department of Health and Children, July 2009), Action 80.

representation and facilitating children to attend court. Considering the fact that the proposed amendment to the Constitution includes the right to be heard, it seems that the potential for the establishment of such a body is stronger than at any time in the past.[201]

7.9 Conclusion

7.9.1 Child Care Proceedings

The proceedings observed and interviews conducted indicated that there is a high rate of appointment of guardians *ad litem* in Dublin District Court 20 which deals with child care proceedings. A presumption in favour of appointment appears to exist in Court 20. There is a significant, although probably lower, rate of appointment in Cork and a low rate outside these cities, although it seems to be increasing. The high rate of appointment in Court 20 and the increasing level of use outside Dublin seems very positive from the perspective of the right to be heard. Judges regularly expressed their appreciation of guardians *ad litem*, which is a strong indicator of their value. However appointment outside of Dublin and Cork is low and there is a very high level of discretion accorded the individual judge in this regard. This inevitably affects the right to be heard of children in care. It must also be taken into account that children in voluntary care are left unrepresented. As one professional aptly stated, although the family may not be objecting to the care order under such circumstances, "what about the child? Is she in agreement? The child does not get a say in the situation. She does not get to express what she wants."[202]

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[201] A referendum will most likely be held in Ireland in the near future to make express provision for children's rights in the Constitution. Proposed Article 42.2(iii) includes "the right of the child's voice to be heard in any judicial and administrative proceedings affecting the child, having regard to the child's age and maturity." See Joint Committee on the Constitutional Amendment on Children, *Summary of Twenty-eighth Amendment of the Constitution Bill 2007: Proposal for a Constitutional Amendment to Strengthen Children's Rights- Final Report* (Houses of the Oireachtas, February 2010).

[202] Confirmed for example by professional, phone interview, 28 April 2008.

There is a significant need for further clarification on when appointment of the guardian *ad litem* is appropriate, in addition to that provided by the CAAB Guidance.[203] The lack of clarity in some areas poses particular problems. For example, during the proceedings observed, the HSE resisted appointment for a child in care who had not been appointed a guardian *ad litem* when originally taken into care.[204] The HSE also resisted appointment for babies, on the basis that babies cannot express wishes.[205] Although the CAAB Guidance provides criteria to guide judges on when to appoint a guardian *ad litem*, it does not provide authority on such issues. The HSE also exercises a questionable degree of influence in the matter of the choice of the individual professional to be appointed as guardian *ad litem*, raising issues regarding conflicts of interest. This issue is also in need of clarification.[206] Another significant failing is the fact that children are not appointed guardians *ad litem* in relation to proceedings for emergency care orders.[207]

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[203] The CAAB Guidance (Section 1.3.3.) provides criteria for the judge to consider, e.g. "(b) The complexity of the case, for example where there is a difficulty in identifying an appropriate placement for the child" and "(c) The ability of the child concerned to express his/her wishes and feelings." (CAAB Guidance, note 40).

[204] See above at 7.3.2.

[205] *Ibid.*

[206] The Guidance provides clarification regarding eligibility for appointment to the role of guardian *ad litem* (1.3.2) and standards for qualification (1.4). Therefore the guidance provided relates to who can work as a guardian *ad litem*, not how to choose who to appoint on an individual case.

[207] It is of interest that uncertainties regarding the exact nature of the role of the guardian *ad litem* (although in the family law context) persist in the US as they do in Ireland. Questions about the appropriate way to proceed when children are not party to proceedings, for example, or where the child involved is very young, "have been answered variously by different states, individual trial courts, and sometimes even by the GALs themselves."[207] Sjostrom refers to "disarray" as regards the definition of the role of the guardian *ad litem* in the US (at 6). In difficult family law cases where the matter of custody or access is contested, courts may appoint a guardian *ad litem*, and most states have statutes for this purpose, although one fifth of states did not as of 2004. *Margaret E. Sjostrom,* "What's a GAL to do? The Proper Role of Guardians *Ad Litem* in Disputed Custody and Visitation Proceedings" (2004) 24 *Children's Legal Rights Journal* 52, at 3.

One HSE solicitor interviewed made the point that in child care cases, "the social worker feels that they are representing the voice of the child here."[208] However, the solicitor continued, social workers represents the HSE, so arguably this is not adequate representation for a child under these circumstances. Furthermore, the fact that children may not be appointed such a professional until after a number of hearings is also problematic. This can leave children even more vulnerable, as noted by the judge in the case outlined above, whereby a teenage girl, who had not been appointed a guardian *ad litem* until quite late in proceedings, became involved with a highly undesirable older man.[209] The issue of the appropriate point at which to appoint (or at least to consider appointment of) the guardian *ad litem* is not specified by the CAAB Guidance. It appears that the judiciary are in need of further guidance on this matter.

In many of the proceedings observed, the role played by the guardian *ad litem* in many cases seemed to go well beyond the mandate generally understood to apply to this professional. There were frequent instances of guardians *ad litem* contributing greatly to cases by working with families on issues such as access, preparing treatment plans and highlighting situations where the HSE was slow to provide services. They provided a means for children's views to be heard by the judge through their reports. There were also other means through which children were heard, such as through letters to the court.

The matter of attendance by children at proceedings affecting them needs further consideration, as the ad-hoc fashion in which it occurs is undesirable. Older teenagers occasionally attended court hearings concerning their particular child care matters. This seemed to be encouraged by judges, although it was observed that training for judges on

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[208] Interview with barrister, Dublin, 1 May 2008.
[209] See above at 7.3.2.

communication with children in such circumstances would be beneficial. The value of judges meeting even very young children about whom they are making decisions should also be considered.

It was noted that when children in care objected to access with parents, both the HSE and judges appeared to defer to their wishes. A high level of regard for the views of young people in their teenage years, particularly relating to access matters, was a common feature of the child care proceedings observed. However this related for the most part to situations where such children did not wish to attend access visits. Where it was reported (although usually by parents) that teenage children in care were upset at not having contact with their parents, the judge usually deferred to the decisions of the HSE. Where children's wishes were deemed to conflict with their protection in relation to matters other than access,[210] judges strongly opposed recommendations of the HSE and guardians *ad litem* not to enforce court orders. While the decisions of judges in this regard often seemed prudent and sensible, there appeared to be little reflection on the tension between 'protection' of the children involved on the one hand and their wishes on the other, where immediate danger did not exist.

7.9.2 Family Law Proceedings

The voice of children in family law cases is distinctly absent, at least in part because of the fact that Section 27 of the Children Act has not yet entered into force, but also because of the absence of funding for guardians *ad litem* in family law cases. A number of cases were observed in which it was clear that there was a need to ascertain whether children wished to contribute to the decision-making process. Despite the fact that judges were certainly mindful of the welfare and interests of children in these cases, the lack of an

[210] See for example the case relating to the two girls who wished to remain with their fosterers (above at 7.5).

effective mechanism seemed to result in a disproportionate focus on the interests of the adults involved. This could be, at least in part, because the adults were present to put forward their arguments to the court. As one solicitor commented, in many family law proceedings, "the interests of the child do not get a look in until the interests of the adults have been met."[211] This situation is inevitable if there is no independent representation of the wishes and interests of the child.

It is certainly far from ideal that at present the only circumstances in which guardians *ad litem* are appointed are those in which the parents agree that the appointment should be made and are willing to pay for it. Apart from the fact that parents are very likely to be unwilling or unable to fund this representative of the child, they may not consider it to be in their interests to do so. One solicitor interviewed gave the hypothetical example that, "if I'm a solicitor for the father, I may not want the voice of the child, as the child may say things that I do not want him to."[212] It is starkly obvious that there is an urgent need for the relevant legislation to enter into force, and for the service to be adequately funded.

It was evident that judges in family law proceedings often refrained from asking parents whether they knew the views of their child on the matter in question. While of course one must be mindful that parents may wish to represent the views of their children in a manner that benefits their own interests, it was surprising that judges often failed to make this basic inquiry. It is possible that it reflects the fact that many judges accord a low priority to the voice of the children involved.[213] In the absence of a mechanism to ascertain children's views in family law cases, judges should arguably make this enquiry, despite the fact that it constitutes a flawed method by which to vindicate the right to be heard.

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[211] Interview with barrister, Dublin, 21 April 2008.
[212] Interview with solicitor, Dublin, 12 March 2009.
[213] Although it also possibly reflects that this would constitute hearsay evidence.

One of the most questionable aspects of the family law court system as viewed through the research was the fact that judges made orders for unsupervised access to take place between young children and parents, in circumstances where those children were objecting to seeing that parent, and where the child had not met that parent for a significant amount of time. While on one occasion the judge had regard for the need for a short period of time (e.g. two weeks) for the child to be prepared for such access, one instance was observed whereby unsupervised access was ordered for the day following proceedings. It is also difficult to understand why judges did not, on any occasion observed, order that such access be supervised for an introductory period. Such practice seems unnecessary and indicates a need for judges to be trained in issues relating to child psychology.[214] It also highlights the absence of a mechanism for children to transmit their views to court in family law cases. If children had a means by which to provide judges with their views on such matters, arguably judges would be better placed to make orders and would undoubtedly be better able to consider matters from the perspective of the child.

A clear gap also exists in relation to representation of children in other family law matters. The proceedings observed highlight the relevance of applications for guardianship and safety, barring and protection orders to the lives of children. Children arguably require guardians *ad litem* to be appointed to them, at least in the more complex cases, although legislative change would be necessary to enable the court to make such appointments. Judges should at least be required to consider children's views in such cases.

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[214] Indeed the Committee on the Rights of the Child states that Article 12 of the Convention on the Rights of the Child necessitates adequate training of the relevant professionals as regards the right to be heard. Committee on the Rights of the Child, *Day of Discussion on the Right to be Heard* (11-29 September 2006), para. 41. Presumably this would involve training in child psychology, to better equip professionals to ascertain and consider children's views.

Overall, the family law proceedings observed were characterised by a striking failure to vindicate the right to be heard within the legal system. This matter requires urgent attention, as there exist clear due process issues. Children are disadvantaged in relation to their capacity to understand and negotiate legal proceedings because of their status as minors. This points to a need for representation of their interests to an extent which is greater than that afforded to adults, not less. It could be argued that the substance of the right of access to court is harmed by the lack of provision for children's views in such cases.[215] There also exist practical reasons for ascertaining children's views– it is very likely that having the benefit of being able to consider the views of children will enhance judicial decision-making.

[215] For example under Article 6 of the European Convention of Human Rights. See the case of *T. v UK* (1999) 30 EHRR 121, in which the European Court of Human Rights held that states have obligations to make special provision for children in criminal proceedings, and *Airey v Ireland* (1979-80) 2 EHRR 305 in which the court held that states may be compelled to provide legal assistance in civil law disputes, when this is necessary for effective access to court.

Final Conclusions

Hearing Children

This thesis has addressed the nature of the right to be heard as enshrined in Article 12 of the Convention on the Rights of the Child (CRC), the obligations which it creates, and implementation in Ireland. It is inevitable that courts will be required to make decisions about the interests of children. In particular, the abuse and/or neglect of some children requires that they be taken into the care of the state, and disagreements between parents as to what is best for their children can result in litigation. When applying the principle of the best interests of the child, some of the ambiguity surrounding this principle[1] can be mitigated by ascertaining the views of the child. As Mnookin states, judges cannot easily find clear consensus as regards values when determining the best interests of a particular child.[2] Whilst a list such as that contained in the Children Act 1989 of England and Wales[3] is useful in highlighting the most relevant factors, interests change from culture to culture and even within cultures and between individuals. For this reason, the views of children are invaluable in order to make good decisions about them. Moreover, there are arguably limits to the capacity of courts to predict 'correct' outcomes in cases concerning children.[4] Perhaps instead, or at least additionally, a good decision-making process should be the aim of the judicial process.[5] This points to the importance of acknowledging that children possess due process rights, and consequently

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[1] Philip Alston, "The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights," in Philip Alston, ed, *The Best Interests of the Child: Reconciling Culture and Human Rights* (Clarendon Press, 1994), at 1.
[2] Robert Mnookin, "Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy" 39 *Law and Contemporary Problems* 226 (1975), at 260–261.
[3] Section 1(3).
[4] Lawrence Moloney, "The Elusive Pursuit of Solomon: Faltering Steps toward the Rights of the Child" 46 *Family Court Review* 39 (2008), at 44.
[5] *Ibid.*

facilitating enjoyment of the right to be heard in the process of determining what is best for them.

Despite the existence of the international legal right of children to be heard, there are significant difficulties inherent in implementing the current international human rights framework. Complex considerations persist which relate to sovereignty, the lack of enforcement mechanisms and the relationship between domestic and international law. The difficulties inherent in implementation raise the question whether the CRC (and other such treaties) actually constitute law, and whether states are indeed obliged to implement the provisions of the treaties which they have ratified. It is unclear whether the right to be heard is a self-executing provision or whether it constitutes customary international law, as these questions have yet to be the subject of judicial determination at either domestic or international level. It is submitted that the primary obligation on states as regards the right to be heard (as enshrined in Article 12) is to adequately incorporate the provisions of the CRC into domestic law. A legitimate expectation exists that states will incorporate the international human rights standards enshrined in the treaties which they ratify. Although there may exist a lack of consensus as to the exact requirements of Article 12, the Committee on the Rights of the Child has given sufficient guidance for states to implement it to a reasonable minimum standard.

The failure to incorporate treaties, despite the expectation and requirement to do so, is a stark reality within the arena of human rights. In the meantime it is possible that the right of children to be heard will be progressed through stronger instruments than the CRC, most notably the European Convention on Human Rights and the International Covenant on Civil and Political Rights.[6] Although to date the right to be heard has not featured strongly in

[6] Although whether the International Covenant on Civil and Political Rights is indeed a more powerful instrument in Ireland is questionable, due to the fact that it has not been

the context of these instruments, significant potential exists. The European Court of Human Rights increasingly recognises the influence of the CRC in its judgments.[7] This indicates a willingness to engage with children's rights, as well as recognition that the CRC has, at least, a persuasive status in the interpretation of rights under the European Convention on Human Rights. It furthers the possibility that the Court will find an implied right of children to be heard within that instrument. The case law of the court relating to hearing children has, to date, been primarily positive.[8] In a number of cases such as *Olsson v Sweden*,[9] *Bronda v Italy*,[10] and *Sommerfeld v Germany*,[11] the European Court appears to attribute much weight to the views of the children involved. In particular, the court has held that the obligation of the state to apply coercion in cases where children are strongly opposed to access visits with parents must be limited, because of considerations relating to the best interests of the child.[12] In the Irish context, application of the Hague Convention on International Child Abduction has raised the profile of the right to be heard, as that instrument[13] requires the court to consider whether to ascertain the views of the child. It is also significant that the judgment of the High Court in *N. v N. [hearing a child]*[14] indicates a willingness to look to obligations at EU level to apply the provisions of Article 12. Ireland must, however, incorporate the Convention on the Rights of the Child into its legal system in order to fully acknowledge, and incur, the legal obligations of that Convention.

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incorporated into domestic law and that Ireland has a dualist legal system. See *Kavanaugh v Governor of Mountjoy Prison* [2002] 3 IR 97 (SC), and Chapter 3 generally.

[7] See e.g. *Keegan v Ireland*, Appl. No. 16969/90, judgment of 26 May 1994, para. 50.

[8] Although arguably the framing of the matter of hearing children as the right of parents is a concern , see Chapter 4.

[9] *Olsson (No. 2) v Sweden*, Appl. No. 13441/87, judgment of 30 Oct. 1992.

[10] (2001) 33 EHRR 81, para. 59.

[11] In *Sommerfeld* the Court implied that it is acceptable for states to give significant (and possibly determinative) weight to views consistently held by children aged 10-13 years. Appl. No. 31871/96, judgment of 8 July 2003.

[12] See e.g. *Olsson (No. 2) v Sweden*, Appl. No. 13441/87, judgment of 30 Oct. 1992, *Hokkanen v Finland,* Appl. No. 19823/92, judgment of 23 September 1994 and *C. v Finland*, Appl. No. 18249/02, judgment of 9 May 2006.

[13] Taken together with Council Regulation (EC) 2201/2003, known as the 'Brussels II Regulation.'

[14] [2008] IEHC 382.

The Model of the Right to be Heard

A model of implementation of the right to be heard as enshrined in Article 12 is provided at the end of Chapter 2 of this thesis, after careful consideration of the relevant legal instruments. The model is intended to assist professionals in ensuring that the right of children to be heard is vindicated in accordance with international legal standards. It is useful at this point to re-iterate the most important aspects of this model. As can be seen from an examination of the model itself, a presumption should exist in favour of the capacity to form views,[15] age limits should be avoided[16] and children should be kept fully informed of proceedings.[17] Furthermore, adequate training of the relevant professionals is necessary,[18] as is consideration of the best interest principle and child protection issues,[19] and a child-friendly environment which is sensitive to the needs of children.[20] Criteria must be developed at state level in order to provide effective methods for determining capacity.[21] From the information available it also seems advisable that criteria are established in order to demonstrate that the views of children have been 'effectively' considered and balanced against

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[15] Committee on the Rights of the Child, *General Comment No. 12: The Right to be Heard* (1 July 2009) CRC/C/GC/12, para. 20.

[16] Travaux Préparatoires of the Convention on the Rights of the Child, *Considerations of 1981 Working Group*, E/CN.4/L.1575, para. 29. Accessed in Sharon Detrick, Jaap Doek and Nigel Cantwell, *The Convention on the Rights of the Child: A Guide to the Travaux Préparatoires* (Martinus Nijhoff, 1992). See also Committee on the Rights of the Child, *Concluding Observations: Albania* (31 March 2005), CRC/C/15/Add.249, para. 31.

[17] Committee on the Rights of the Child, *Day of Discussion on the Right to be Heard* (11-29 September 2006), para. 41; Committee on the Rights of the Child, note 15, paras. 25 and 33.

[18] Committee on the Rights of the Child, *Day of Discussion on the Right to be Heard* (11-29 September 2006), para. 41.

[19] Travaux préparatoires, note 16, para. 20 and Committee on the Rights of the Child, note 15, paras. 21 and 70.

[20] Committee on the Rights of the Child, note 15, paras. 21 and 34.

[21] Committee on the Rights of the Child, note 15, para. 44. The Committee states that "good practice for assessing the capacity of the child has to be developed."

other factors.[22] The model attempts to represent only the points that are made clear within the documents examined.[23]

There are a number of more specific stipulations which must be observed in order to achieve full vindication of the right. Children have the right to a professional such as a guardian *ad litem* to assess their capacity to form views.[24] Children also have the right to have their views transmitted to the decision maker.[25] They should have a large degree of choice as to how this is achieved– through a professional, by speaking directly with the judge if appropriate, or in open court.[26] In some cases, a legal representative may be necessary.[27] Children have the right to have their views considered seriously and accorded significant weight where appropriate.[28] Children also have the right to have the outcome of a case explained to them, including the position of their views within the decision-making process.[29] Finally children have the right to appeal against breaches of the right to be heard.[30] The Committee on the Rights of the Child appear to encourage assessment in the case of very young and even non-verbal children,[31] implying that perhaps a facility such as a social report could take the place of direct transmission of

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[22] This point has not been included in the model, as it is not explicitly required by the relevant legal instruments. Article 12 refers to "the views of the child being given due weight…". The Committee holds that children's views "have to be seriously considered…" (Committee on the Rights of the Child, note 15, para. 28), and that professionals must ensure that children's views "are effectively taken into account," Committee on the Rights of the Child, *Concluding Observations: Denmark* (24 November 2005) CRC/C/DNK/CO/3, para.28. See further Chapter 2, at 128.

[23] That is the text of Article 12 of that Convention, the commentary of the Committee on the Rights of the Child, and the preparatory documents of the Convention on the Rights of the Child.

[24] Committee on the Rights of the Child, note 15, para. 36.

[25] Committee on the Rights of the Child, *Concluding Observations: Finland* (20 October 2005) CRC/C/15/Add.272, para. 23.

[26] Committee on the Rights of the Child, note 15, para. 35.

[27] *Ibid,* para. 34.

[28] *Ibid,* para. 44.

[29] "Judges and other decision makers should, as a rule, explicitly state and explain the outcome of the proceedings, especially if the views of the child could not be accommodated." Committee on the Rights of the Child, *Day of Discussion on the Right to be Heard*, (11-29 September 2006), para. 41.

[30] Committee on the Rights of the Child, note 15, para. 47.

[31] *Ibid,* para. 21.

views. Although this point has been included in the model for purposes of clarity, it constitutes a recommendation as opposed to a strict obligation.[32]

Arguably a regulatory body should exist at domestic level in order to ensure implementation of the obligations imposed by Article 12 and related commentary. It seems that a large pool of child experts (e.g. guardians *ad litem*) is necessary in order to facilitate assessment (regarding hearing the child) in all cases involving children. A high level of co-ordination between courts and child experts is required, which also points to the need for a regulatory body.[33] This seems to be one of the most crucial elements required to properly implement Article 12. The Committee specifies that child experts rather than judges are to determine whether children should be heard.[34] Arguably, such experts need to be overseen by an independent organisation in order to ensure that they are sufficiently qualified, that practice is consistent, and that there is no conflict of interest regarding appointment and payment.[35]

Shortcomings of Article 12

One of the most notable points to have emerged from the thesis is the existence of a number of limitations relating to Article 12 itself, and to the comments of the Committee on the Rights of the Child. The most obvious deficiency is the fact that there are many questions left unanswered by the comments of the Committee, despite the fact that a General Comment has been published on the right to be heard. For example, it is unclear whether children have the right under the CRC to take a case relating to decisions made outside the court process by their parents, a state body or any other

[32] *Ibid.* The language used by the Committee ("recognition of, and respect for, non-verbal forms of communication") does not indicate clear existence of such a right and therefore this may be at the discretion of the court or the regulatory body.
[33] The problems in Ireland due to the absence of such a body are outlined in Chapter 7.
[34] Committee on the Rights of the Child, note 15, para. 36.
[35] See for example the issues inherent in the Irish system where independent guardians *ad litem* are paid by the Health Service Executive (Chapter 7, at 7.3.2).

person or entity. A child may wish to initiate proceedings on the basis, for example, that she was taken into the care of the state unjustifiably.[36] As it stands, little evidence exists that the Article 12 right to be heard applies to any instances other than a proceeding concerning a child which has been initiated by *others*. Proceedings initiated by children themselves are not explicitly referenced in relation to Article 12.[37] Moreover, while it is clear that, according to the Committee, children have the right under the CRC to appeal on the basis that the right to be heard was not vindicated (i.e. a procedural matter),[38] it is unclear whether they have the right to appeal the substance of a decision made about them. For example, a child may disagree with the decision that she needs to be taken into care, or that living with one parent rather than the other is in her best interests. Given that, for most purposes, it is only parties to a case that can exercise the right to appeal effectively, the question of how children are to appeal such decisions deserves further consideration.

Indeed the lack of party status for children was an issue which arose time after time during the current research. The explicit recognition of party status for children was omitted during the drafting process of the CRC. In the US draft of what is now Article 12 it was stated: "an opportunity for the views of the child to be heard as an independent party to the proceedings shall be provided."[39] This was ultimately replaced by text enshrining the right to be heard, as opposed to the right to become party to proceedings. It seems that the interests of the child can, ironically, be lost in an adversarial

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[36] In the Irish context this would be against the Health Service Executive. See case described in Chapter 7 (at 341), in which the Irish Association of Young People in Care intervened on behalf of a boy in institutional care who was due to be moved to an institution which was a long distance from his family.

[37] For example, under Article 10(8) of the Children Act 1989 in England and Wales, children can apply for leave to seek an order relating to matters such as contact and residence where the court "is satisfied that he has sufficient understanding to make the proposed application for the section 8 order." However, such an application is exceptional and can be considered only by the High Court.

[38] Committee on the Rights of the Child, note 15, para. 47.

[39] Travaux Préparatoires, note 16, para. 20. This draft was considered as part of Article 3, relating to the best interest principle.

process between parents or between parents and the state, even though that process primarily concerns the best interest of the child. If adults are to be accorded party status, why not children, whose interests are arguably most directly affected by proceedings? This also begs the question of whether representation by a professional such as the guardian *ad litem*/social worker is sufficient for children and whether they should routinely be accorded both a 'child expert' representative as well as a legal representative in order to vindicate their civil/due process rights. This would ensure equality with legally represented adults (through legal representation) while at the same time providing for their status as minors who require extra assistance in order to participate (through a child expert such as a guardian *ad litem*).

There are very challenging issues which create barriers for the implementation of children's due process rights in proceedings affecting them where they do not have party status. For children who have the capacity to form views, it is difficult to see how the principle of '*audi alteram partem*' ('hear the other side') can be applied, and for any child (verbal or not), it seems difficult to invoke the principle of equality of arms[40] which could involve a challenge on the basis that a child has not been accorded legal representation. This is because children are not usually 'the other side' in legal terms. The opposing parties are either the state and the parent (in care proceedings), or both parents of the child (or other relatives, in custody/access proceedings).[41] Again, this begs the question of whether children should indeed become parties in all proceedings concerning them, in order to vindicate their due process rights.

The even more difficult issue of whether party status should extend to infants (i.e. babies) in all cases is also left outstanding. Is it the case that, since infants do not have the capacity for decision-making, this would not

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[40] See Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CPPR Commentary* (N.P. Engel, 1993), at 246.
[41] See Chapter 1 at 5.

constitute sensible use of resources? Or is it a key due process right which frequently is denied individuals solely on the basis of age?

In particular the area needs revisiting because of certain developments, most notably the recently drafted Convention on the Rights of People with Disabilities. Due process rights are far more prominent and explicit in this Convention.[42] Perhaps this is due to the fact that adult interests were considered during the drafting process. However many of the adults to which this Convention applies have learning disability, and consequentially decreased decision-making capacities, as do many children. The Convention enshrines the right of people with disabilities to equal recognition before the law, and the right to "the support they may require in exercising their legal capacity."[43] Such measures must involve safeguards to ensure vindication of "the rights, will and preferences of the person."[44] It also stipulates that states have the obligation to facilitate the role of people with disabilities "as direct and indirect participants, including as witnesses, in all legal proceedings,"[45] to ensure safeguards to avoid conflicts of interest,[46] as well as age-appropriate access to justice.[47] Nowhere is there a corresponding detailed elucidation of the civil law due process rights of children in the CRC, yet these rights are all included in the Convention on the Rights of People with Disabilities which applies to individuals many of whom lack capacity.

Although the focus of this thesis is the right to be heard generally and not autonomy rights specifically,[48] the crucial nature of this matter seemed to

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[42] See Chapter 1, at 77-82.
[43] Article 12(3).
[44] Article 12(4).
[45] Article 13(1).
[46] Indeed one could argue that this occurs any time that a family member purports to represent children's legal interests in civil proceedings relating to care and custody/access.
[47] Article 13(1).
[48] 'Autonomy' means in Ancient Greek "the state of being self-governed" - i.e. one who makes decisions for herself. Willard Gaylin and Bruce Jennings, *The Perversion of Autonomy: Coercion and Constraints in a Liberal Society* (Georgetown University Press, 2003), at 28.

arise repeatedly in the thesis in the course of the examination of Article 12. When one considers the notion of according 'weight' to children's views– a key component of the right to be heard– the autonomy rights of children are a central part of the process. Considering the fundamental nature of due process rights, it is highly questionable to assume a lack of autonomy for all children. This group of individuals have capacities and experience as vastly varied as the general population.[49] Yet the law assumes this lack of autonomy for most purposes,[50] presumably to account for matters such as the complete dependence of some children (for example, infants) on adults, and for the purposes of protecting older children from harm which they may cause themselves through 'poor' decision-making.

This relates to the practical matter of whether children's best interests should be assessed by an expert in all cases (including an analysis of the views of the child), in addition to having their views transmitted. It is unclear whether children have the right to such an assessment, or whether, conversely, routine assessment would in fact be inappropriately paternalistic. Children's capacities are less developed and it could be argued that a child may make a 'harmful' decision which she would not make as an adult. Furthermore, children may be under undue pressure from an adult to express certain opinions. In *Elzholz v Germany*[51] the European Court of Human Rights held that there had been a violation of Article 8 (as well as Article 6) of The European Convention on Human Rights because the German courts should have sought an expert opinion on the views of the child.[52] The Committee on the Rights of the Child emphasises the

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[49] Varying from infants who are totally reliant on adult care to older children. It is noted, however, that some children as young as five years old have the capacity for economic independence, see e.g. Rosa Aneci et al., "The Street Children of Recife: A Study of their Background" 38 *Journal of Tropic Paediatrics* 34 (1992). This mirrors to some extent the general population who range from adults with profound disabilities to the average autonomous adult. Of course, all of us rely on others to a greater or lesser extent.

[50] With the exception of some matters such as medical consent (e.g. 16 years in Ireland under Section 23 of the Non-Fatal Offences Against the Person Act 1997).

[51] Appl. No. 25735/94, judgment of 13 July 2000.

[52] This was combined with the fact that there was no possibility of appeal at regional level.

requirement that states adequately balance protection rights and the best interest principle against the right to be heard.[53] Perhaps this level of protection must be afforded to children, particularly very young children. If a trained expert is appointed to ascertain the views of a child in any event, it does not seem overly onerous to request a determination of the best interests of the child as part of the same assessment. However the matter is unclear and again guidance is not provided by the Committee on this.

Differing approaches by judges to the wishes of children highlight the ambivalence of courts to the matter of the weight to accord to children's views.[54] It seems troubling and somewhat surprising that more effort has not been expended on the elucidation of the difficult matter of the weight to be accorded to the views of children, in Ireland or elsewhere. Research has been conducted on the matter,[55] yet there is no evidence that it is being disseminated to those who make decisions about children's welfare. It seems unsurprising that decision-makers differ in their approaches to the weight to be accorded to children's views, as they have little guidance. In a rare comment on the matter, the Committee has stated that "the decision maker must consider the views of the child as a significant factor in the settlement of the issue."[56] Yet why, considering the vital nature of autonomy and due process rights, is it not the primary factor? Should the wishes of the person about whom the decision is being made not be assumed to constitute

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[53] Committee on the Rights of the Child, note 15, paras. 21 and 70. See also Travaux Préparatoires, note 16, at para. 20.

[54] In the English law case of *Re W. (Contact: Joining Child as Party)* [2003] 1 FLR 681, a district judge found that "the child had a right to a relationship with his father, *even if he did not want it*" yet in *Re S. (Contact)* [2002] EWHC 540, the judge refrained from forcing a 16 year old into access on the basis that it would be counter-productive and in the Irish case of *R.W. v C.C.* [2004] IEHC 194, Finlay Geoghegan held that forcing two girls (aged 13 and 14) to visit their father would be "damaging to their welfare." It could be argued, however, that judges simply use their discretion appropriately in cases with different facts.

[55] See e.g. overviews of relevant research in Thomas Grisso, "The Competence of Adolescents as Trial Defendants" 3 *Psychology, Public Policy and Law* 3 (1997), Rhonda Gay Hartman, "Adolescent Autonomy: Clarifying an Ageless Conundrum" 51 *Hastings Law Journal* 1265 (2000), and Gerison Lansdown, *The Evolving Capacities of the Child*, (UNICEF/Save the Children, 2005).

[56] Committee on the Rights of the Child, note 15, para. 44.

the most important factor? Even in the most obviously problematic scenario, where a child is experiencing severe abuse at home yet wishes to remain at home,[57] this assumption could potentially still be overridden on the basis that it is necessary for the protection of the child. I would submit that, subject to proving otherwise, children's wishes should be considered *the* primary factor in decisions about their interests. Indeed, legislation could explicitly provide that it is to be considered the primary factor in a decision, subject to certain considerations, such as child protection, the capacities of the child (considering age, maturity, experience, etc.), and the child's home life.

Perhaps the Committee wishes to remain general in its comments on the weight to be attributed to children's views, in order to permit local considerations to be taken into account at domestic level. However the lack of detail seems, in some areas, problematic in relation to implementation of the right. The issues pertaining to the right to be heard are very closely linked with developmental psychology and children's capacities, areas which may be poorly understood by the judiciary or those drafting legislation and policy. Arguably an element of specificity is necessary in this area in order for those creating law and policy to be provided with the appropriate guidance. It is perhaps most surprising that one area which clearly has not been sufficiently explored by the Committee[58] is the basis on which the restricted rights of children in the legal arena are founded– the less developed capacities of children. It seems crucial to examine the extent to which restrictions can be made to the right to be heard in the best interests of children. For example, the Committee does not discuss the fact that the wishes of the child may not be in line with what experts determine to be the

[57] Or indeed in the medical arena, a case where a child refused to take a course of action which would avoid death, as in the case of *Re E.* [1993] 1 FLR 386. See Chapter 1, at 27.
[58] It is perhaps most notable that it is left somewhat unquestioned within the General Comment on Article 12.

best interests of the child,[59] the point that adults can have inordinate influence on a child, or the fact that it may be unwise to read too deeply into the behaviour of younger (particularly non-verbal) children.[60] These are all real-life scenarios.

The General Comment appears to adopt a strong presumption in favour of affording children the right to be heard. However if children are to be accorded real and tangible rights in the legal arena, rhetoric is not sufficient. The lack of examination is problematic because without acknowledgement and subsequent exploration of the fact that children have less developed capacities, it is difficult to distinguish between action that constitutes prudent and realistic protection on the one hand, and discrimination on the basis of childhood on the other. It is hoped that the anticipated General Comment on Article 3 (which enshrines the best interests principle) will tackle these issues in greater depth.

The shortcomings of the text of Article 12 itself must be acknowledged. The various theories of participation rights all appear to highlight the fact that Article 12 and the stipulations in relation to implementing the right to be heard in legal proceedings comprise quite a conservative approach. Article 12 may, in fact, enshrine only a right to consultation, as opposed to participation. It is the primary participation provision in the CRC and the main article which pertains to children and legal proceedings.[61] Yet, analysed together with related commentary, it appears to maintain the position of the due process rights of children as substandard to those of adults, and leaves many vital questions unanswered. Considering this point and the broad due process rights enshrined in the Convention for People

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[59] See for example, the case of a teenage girl in a care institution who was involved with a highly undesirable older man, Chapter 7, at 331.

[60] It is particularly surprising that the Committee does not comment on this, considering that it makes reference to the need for "recognition of, and respect for, non-verbal forms of communication" Committee on the Rights of the Child, note 15, para. 21.

[61] With the exception of Article 40, relating to criminal proceedings.

with Disabilities, this is no longer acceptable. It seems there is a case for arguing for an Optional Protocol to the CRC on this basis.[62] Such a protocol could enshrine stronger due process and autonomy rights for children. Although ratification would be optional, it would at least acknowledge the shortcomings of Article 12.[63]

Application in the Irish Context

Significant gains have been made in Ireland in relation to children's rights. There has been a sizeable policy shift in recognition of such rights,[64] and the law, whilst lacking in many respects, is also increasingly recognising this shift.[65] However these gains need to be built upon in order to achieve full vindication of the right to be heard. Ireland must incorporate the CRC into domestic law in order to meet its international obligations. There are also a number of steps which need to be taken in order to conform to the standards

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[62] Optional Protocols are additional legal instruments that add to a treaty on a topic relevant to the original treaty. It is not automatically binding on parties to the original treaty and States must independently ratify a protocol. The CRC currently has optional protocols which concern children's involvement in armed conflict and the sale of children, child prostitution and child pornography. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts, GA Res 54/263, Annex I, 54 UN GAOR Supp (No. 49) at 7, UN Doc A/54/49, Vol III (2000), adopted 25 May 2000, entered into force 12 February 2002 and Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, GA Res 54/263, Annex II, 54 UN GAOR Supp (No 49) at 6, UN Doc A/54/49, Vol III (2000), adopted 25 May 2000, entered into force January 18, 2002.

[63] The First Optional Protocol to the CRC, for example, aimed to account for shortcomings as regards the laws of armed conflict, and such an addition to the CRC could achieve the same for due process rights of children.

[64] Note for example the drafting of the National Children's Strategy 2000 as well as the establishment of number of statutory organisations such as the Office of the Ombudsman for Children.

[65] For example provisions have been made for children to be appointed guardians *ad litem* to represent their wishes and interests in both child care (Child Care Act 1991, Section 26[1]) and family law cases (Section 28 of the Guardianship of Infants Act 1964, as amended by Section 11 of the Children Act 1997), however levels of appointment of such a professional is low. It was held in *N. v N. [hearing a child]* [2008] IEHC 382 that even very young children may be provided the opportunity to be heard in Hague Convention cases. In 2009, the 'Guidance' of the Children Acts Advisory Board was published- *Giving a Voice to Children's Wishes, Feelings and Interests: Guidance on the Role, Criteria for Appointment, Qualifications and Training of Guardians ad Litem Appointed for Children in Proceedings under the Child Care Act, 1991* (May 2009).

of international human rights law identified in this thesis. Most importantly, a uniform approach needs to be taken to ensure that all children who wish to be heard are indeed given that opportunity. At present, a presumption in favour of the right to be heard, as enshrined in Article 12 of the CRC as well as other instruments,[66] does not exist in the Irish legal context on the whole.

The courts increasingly recognise the right to be heard, however a perception appears to persist that hearing children under some circumstances is good practice, rather than a binding obligation. Judicial practice is inconsistent and the right to be heard is principally driven by the Hague Convention on International Child Abduction rather than the CRC.[67] The practice of hearing children is also prevalent in cases relating to adoption[68] and, to a lesser extent, cases in the superior courts generally.[69] As outlined in the fieldwork chapter of the thesis, this presumption does not appear to apply to cases in the lower courts[70] (or necessarily to all cases in the superior courts[71]). The practical research undertaken as part of this thesis confirmed the low rates at which children are generally appointed guardians *ad litem*,[72] particularly in the context of family law.[73] Clear consensus as to when views should be sought, and how they should be ascertained and weighed, does not appear to exist. Above all, the lack of mechanisms through which to hear children is a serious barrier to vindicating the right to be heard. This is a particular problem in family law cases where the

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[66] Article 13 of the Hague Convention, Article 11(2) of the Brussels II Regulation and Article 24 of the Charter of Fundamental Rights of the European Union.
[67] *N. v N. [hearing a child]* [2008] IEHC 382.
[68] See *O'D (J.) (An Infant) Re.* [2002] IEHC 53 and *W.H.B. and W.S. and E.S. v An Bórd Uchtála* [2004] IEHC 110.
[69] See *R.W. v C.C.* [2004] IEHC 194 and *F.N., E. B. v C. O., H.O., E. K.* [2004] 4 IR 311;[2004] IEHC 60.
[70] See National Children's Office, *Review of the Guardian Ad Litem Service: Final Report from Capita Consulting Ireland, in Association with the Nuffield Institute for Health*, (National Children's Office, 2004, 'Capita research') and Chapter 7.
[71] In a number of recent cases it appears that the views of the children involved were not sought, for example *K. v HSE & Anor* [2009] IEHC 591 and *McK. v The Information Commissioner* [2006] IESC 2; [2002] IEHC 85.
[72] See Chapter 7 at 7.3.2 and 7.3.3 and Capita research, note 70.
[73] See Chapter 7 at 7.7 and Capita research, note 70.

legislative provision for appointment of guardians *ad litem* has not been enacted.[74]

It is significant that the legislative basis for hearing children is strong in adoption cases in Ireland. Whilst adoption is a very significant issue in the life of any child, so too are other issues relating to care, custody and access. The question must be asked, why does hearing children appear to be a matter for the discretion of the court in most instances but a matter of obligation as regards adoption? While the legal link between children and birth families (which is, of course, lost on adoption) is undoubtedly important, issues such as placement in care can be just as momentous for children. Consistency in law and practice is needed, and I would propose that the strength of the presumption in favour of hearing children in adoption cases should be matched in other areas of child law such as care, custody and access.

The lack of a clear approach to hearing children in the Irish system has been highlighted in this thesis.[75] In order to meet the standard set by Article 12 of the CRC, the discretion accorded to the courts as to whether children will be heard should be replaced with statutory language which acknowledges that the matter of hearing children is primarily a children's right, which should be superseded only where it can be shown that it is contrary to the best interests of the child in question. Furthermore, in contrast to the process deployed in the case of *N. v N. [hearing a child]*,[76] whereby the judge

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[74] As well as in cases outside Dublin, where guardians *ad litem* are rarely appointed. See Chapter 7 at 345.

[75] Varying standards exist in the legislation pertaining to proceedings concerning children. Only in adoption cases and Hague Convention cases are judges obliged to consult children. In child care cases it is at the discretion of the judge and in family law cases it is quite difficult for judges to hear children even where they wish to do so, because the necessary facilities are available only for special circumstances (if at all). In particular there is generally no way to finance the appointment of a guardian *ad litem*. See e.g. the case relating to an application for a mother to vary an order relating to the joint custody of two children, Chapter 7, at 362.

[76] [2008] IEHC 382.

decided whether a six year old would be heard, the Committee have repeatedly held that a trained professional[77] should make a determination of this kind.[78] Meeting this stipulation would require significant change in the Irish legal context. Professionals would be appointed to meet a child and make decisions about hearing her in cases where the interests of that child were under consideration. This would replace the current system whereby the judge decides from the bench the matter of hearing the child, without ever having met her. It is likely that taking discretion away from the courts in this way would be controversial.

It is, of course, vital that judges are accorded a large degree of discretion in matters concerning children, as "family matters are infinitely variable– no two cases are the same."[79] However, it does not appear that the power of judges to respond to the circumstances of individual cases would be unduly affected by necessitating that the views of children are sought and considered in all matters affecting them. It seems a practical evolution in the legal system. Those trained to work with children would deal with the matter of whether children will be heard, and transmit the relevant information to the judge.[80] Judges would be required to consider the views of the children involved, as they consider all relevant factors.[81] Therefore it seems that such an approach would simply improve the decision-making process as opposed to restricting the decision-maker.

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[77] For example a guardian *ad litem* or another experienced professional trained in child development.

[78] Finlay-Geoghegan J noted in the judgment (*obiter*) the fact that there is no mechanism available to the court whereby children are assessed to determine the capacity to form views, save expensive individual professionals. This means that it is the judge who must make this initial determination: "[i]f the Court were to seek a separate professional assessment of the maturity and capability of the child to form his own views before determining whether he should be heard this would both lengthen proceedings and make them more costly if it were then decided that the child should be given an opportunity to be heard" (*N. v N. [hearing a child]* [2008] IEHC 382, at 28).

[79] Kate Standley, *Family Law* (7th ed, Palgrave Macmillan Law Masters, 2010), at 6.

[80] The matter of whether the child wishes to speak directly to the judge should, however, also be considered.

[81] Additionally, while judges would retain discretion as regards according weight to children's views, it seems advisable that the views of the child are considered the primary factor, as noted above.

There are other areas in which it is clear that change is needed in order to achieve compliance with the standards of Article 12. It is difficult to ascertain whether children are kept informed of proceedings affecting them. While children are undoubtedly provided with information on an ongoing basis where they have had a guardian *ad litem* appointed, children who are not appointed this professional (which is the vast majority of children in family law cases in Ireland) can rely only on accounts from their parents or state representatives,[82] who are adversaries in the legal context. This is surely undesirable. The extent to which the right to be heard is facilitated through a child-friendly environment is also unclear. Again, children who are appointed guardians *ad litem* have a representative trained in child development to facilitate their views. Children meet guardians *ad litem* at home or at a neutral space such as a family centre which would undoubtedly be more child-friendly than the court setting. Children rarely attend in person child care and family law proceedings affecting them. Where children do attend court, the environment could not be described as child-friendly, despite the attempts of most judges to put children at ease.[83] Adults in formal dress[84] use complex legal terms and speak about them as if they are not present. This is in contrast to, for example, the Scottish Children's Hearings, where there exists a presumption that children will attend all hearings.[85] Because of this, rooms have the appearance of being somewhat child-friendly in that toys are provided in a 'play corner' in the rooms in

[82] For example social workers for the Health Service Executive.
[83] See e.g. Chapter 7, at 7.8.1.
[84] However it must be recognised that wigs and gowns have been dispensed with in family courts, see Section 33 of the Judicial Separation and Family Law Reform Act 1989.
[85] The Children's Hearings System serves as the care and justice system for children in Scotland. Children are referred to a hearing where some aspects of their lives are of concern and it is deemed that compulsory measures of intervention are required. A Children's Hearing, which consists of trained volunteers, decides what measures are required after a hearing which is usually attended by caregivers, children, and the relevant professionals. See Scottish Children's Reporter Administration website: http://www.scra.gov.uk/children_s_hearings_system/index.cfm, last accessed 7 November 2010.

which the hearings are conducted.[86] This at least ensures that children understand that some advance consideration has been given to their presence. Such practice should be considered in the Irish context, in which the attendance of younger children at court seems to be actively discouraged.[87]

A crucial stipulation by the Committee in relation to Article 12 is that professionals are trained in relation the right to be heard. It is clear that social workers who serve as guardians *ad litem* have a professional understanding of child development, as they are usually former social workers. However there is no training of this kind for legal professionals in Ireland who may represent or make decisions about children (most notably judges).

A related point is that criteria must be developed at state level in order to provide effective methods of determining capacity and demonstrating that views have been considered.[88] Guardians *ad litem* most likely have criteria which they will use in order to assess children's capacities. It is also likely that in any reports submitted to the court, an outline of the determinations which they have made in relation to a child's capacities will be included.[89] The information in such a report can be utilised by judges as a basis from which to consider and accord weight to children's views. Many of the superior court judgments analysed in this thesis did not elaborate in detail

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[86] I attended Children's Hearings on two occasions as part of research for this thesis. Children's Hearing, Edinburgh, 9 June 2009 and Children's Hearing, Edinburgh, 23 October 2009.

[87] See Chapter 7, at 7.8.1.

[88] See note 22.

[89] The 'Guidance' of the Children Acts Advisory Board (see note 65) states that the court will have regard for "[t]he wishes, feelings and interests of the child concerned if they can be ascertained (considered in light of his/her age and level of understanding) regarding the appointment of a guardian *ad litem* or a specific guardian *ad litem*" (Section 2.3.4. [a]).There is no reference to a requirement that the guardian *ad litem* assess capacities (or that criteria must be developed through which to do this) although a list of the tasks of the guardian *ad litem* is provided at Section 2.2, which includes the requirement that the guardian *ad litem* "[c]onduct a thorough inquiry into the child's circumstances." This could arguably include an assessment of capacities.

the manner in which judges considered the capacities of the children whose views had been ascertained, and the consequential weight accorded to those views.[90] Questions persist in relation to the methodology with which judges balance the views of children against other considerations. A set of criteria (preferably statutory) for judges to follow would be welcome and seems necessary in order for there to be any purpose to ascertaining children's views. This is particularly so in respect of those of younger children in cases under the Hague Convention on International Child Abduction whose well-formed, long-held views seem to be frequently overridden in Ireland.[91]

As outlined in Chapter 2, the best interest principle is the base from which the right to be heard is vindicated. The views of children become relevant in the legal context when decisions are being made about their best interests. In Ireland the approach to the best interest or welfare principle (the terms are often used interchangeably[92]), requires revisiting. The Child Care Act 1991 specifies that:

> In any proceedings before a court under this Act in relation to the care and protection of a child, the court, having regard to the rights and duties of parents, whether under the Constitution or otherwise, shall- (a) regard the welfare of the child as the first and paramount consideration.[93]

Despite provision in the 1991 Act and elsewhere,[94] it appears that more rigorous regard needs to be had to this principle, to ensure it is not

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[90] See e.g. *K. v K.* [2006] IEHC 277, *R. v R.* [2008] IEHC 162, *D. v D.* [2008] IEHC 176 and *N. v N.* [2008] IEHC 382, considered in Chapter 6.
[91] *K. v K.* [2006] IEHC 277, *R. v R.* [2008] IEHC 162, *D. v D.* [2008] IEHC 176 and *N. v N.* [2008] IEHC 382.
[92] See Ursula Kilkelly, *Children's Rights in Ireland: Law, Policy and Practice* (Tottel Publishing, 2008), at 131-134.
[93] Section 24.
[94] For example the Children Act 1997, Section 11D- "[i]n considering whether to make an order under section 6A, 11, 14 or 16 the court shall have regard to whether the child's best

overlooked in proceedings affecting children.[95] There is no doubt that the best interests of children are generally considered by the Irish courts in proceedings affecting them. However the superior courts are often called upon to consider complex points of law in cases concerning children. In such cases the courts regularly fail to position the principle of the best interests of the child as the primary consideration, and sometimes it is not clear that the principle has been explicitly considered.[96] The points of law in these cases very often turn on the rights of parents, however the proceedings clearly affect children.

The current situation suggests that legislative change is necessary, whereby the courts would be directed to explicitly hold the best interests of the child (both the individual child and children generally) as the primary consideration in any proceedings affecting children. The right to be heard could be included as a vital component of the principle. A clear obligation on the courts to demonstrate that the best interests principle has been central in all cases concerning children would certainly constitute significant progress. This could be achieved through legislation which is more over-arching than that currently in place[97] or through a guidance note. However, the most authoritative way in which to place an obligation on courts to consider the best interests principle, would be via an amendment to the Irish Constitution. The current wording of the proposed amendment explicitly

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interests would be served by maintaining personal relations and direct contact with both his or her father and mother on a regular basis."

[95] For example much-cited cases such as the 'Baby Anne' case (*N. & anor. v Health Service Executive & ors.* [2006] IEHC 278 and [2006] IESC 60), the 'PKU Case' *(North Western Health Board v W (H)* [2001] IESC 70, 8 Nov 2001), *McK. v The Information Commissioner* [2006] IESC 2, [2002] IEHC 85,as well as the more recent cases of *S. v The Adoption Board* [2009] IEHC 429, *B. v G.* [2009] IEHC 104, and *J. McB. v L.E.* [2010] IEHC 123. See Chapter 6.

[96] See for example the case law cited in note 95.

[97] The current legislation pertains to particular areas of law, such as child care and family law. The welfare principle as enshrined in Section 1 of the Children Act 1989 of England and Wales (a statute which covers most matters relating to children under the civil law) has had significant impact on the way in which matters concerning children are considered by the courts. See generally Jane Fortin, *Children's Rights and the Developing Law* (3rd ed, Cambridge University Press, 2009).

includes the best interests principle[98] as well as the right to be heard.[99] It would undoubtedly progress children's rights in Ireland if accepted. Kilkelly opines that:

> [T]his section too has a potentially broad effect meaning that, overall, giving the principle constitutional expression in the manner outlined must be welcomed, insofar as it has real potential to ensure that decision-making that affects children has a much greater focus on children themselves.[100]

Greater regard for the best interests of children in decision-making concerning them would consequentially lead to deeper consideration of their views also. Moreover, the inclusion in the Constitution of "the right of the child's voice to be heard in any judicial and administrative proceedings affecting the child"[101] would, of course, be very authoritative. It would require all courts to consider whether children should be heard in any proceedings affecting them. It would undoubtedly lead to deeper consideration of how best to facilitate children to be heard– through social reports, guardians *ad litem* and/or legal representation. It is hoped that due regard will be had for Article 12 of the Convention on the Rights of the Child when further legislation and policy are drafted in relation to these matters.

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[98] Proposed Article 42(1)(3) reads "[i]n the resolution of all disputes concerning the guardianship, adoption, custody, care or upbringing of a child, the welfare and best interests of the child shall be the first and paramount consideration."

[99] Proposed Article 42(2) reads "The State guarantees in its laws to recognise and vindicate the rights of all children as individuals including…iii) the right of the child's voice to be heard in any judicial and administrative proceedings affecting the child, having regard to the child's age and maturity." See further Chapter 5.

[100] Ursula Kilkelly, "Kilkelly on 'Best Interests' and the Proposed Constitutional Amendment" *Human Rights In Ireland* (26 February 2010), available at: http://www.humanrights.ie/index.php/2010/02/26/kilkelly-on-best-interests-and-the-proposed-constitutional-amendment/ (last accessed 11 September 2010).

[101] Proposed Article 42(2).

Concluding Points

Children, while undoubtedly a particularly vulnerable group, are also active agents who influence their own environment. They have expert[102] and unique understandings in relation to their own lives and experiences and, on this basis, may have much to contribute when decisions are being made about them. However the value which they can bring in terms of good decision-making processes is not the sole reason why children should be accorded the right to be heard. The fundamental due process rights which pertain to us all must be vindicated for every human being, including the most vulnerable. Indeed it is arguable that the most vulnerable require provision for due process rights to a level which is increased, not decreased. The right to be heard is undoubtedly a due process right. If we refrain from according it to children effectively, we are seriously failing them.

It is crucial that Ireland draft and enact legislation to ensure that all children whose interests are the subject of legal proceedings are, as a matter of course, offered the opportunity to be heard. This will require extensive revision of child law and practice. It could be argued that such modifications to the system will require a large amount of resources in terms of drafting and enactment of new legislation, payment of professionals and court time. This is, of course, unattractive at a time where the matter of resources is clearly a difficult one.[103] One professional interviewed in the course of this thesis made the point that it may be a difficult process to vindicate the right of children to be heard. However, she continued, this does not mean that it is appropriate to dismiss it:

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[102] The Merriam-Webster Dictionary defines an expert as "having, involving, or displaying special skill or knowledge derived from training or experience."

[103] It could, however, be argued that dispensing with the ad hoc system and establishing a regulatory body for hearing children would mean greater efficiency and better use of the resources which are currently being utilised.

> Practically speaking it might look difficult, but it looked difficult to facilitate women and slaves to be heard at one point. There's always somebody who it's not convenient to hear. If there was a clear policy that children's voices would and should be heard, then you'd come to some conclusions about it.[104]

It is clear that, in order to recognise children as holding full status as human beings with inherent worth and dignity, appropriate vindication of the right to be heard must be prioritised in the Irish system and elsewhere.

[104] Interview with professional, Dublin, 20 Jan 2009.

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