Note on the Best Interests Principle in Private Law Proceedings

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The Children's Rights Alliance recommends the inclusion of an additional provision in the constitutional amendment which would secure the best interests of the child in all private law proceedings concerning the custody, guardianship and access arrangements between a child and his or her parent/s.

This will provide a constitutional basis for Section 3 of the Guardianship of Infants Act, 1964 which provides that:

> *Where 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.*

There is at present no constitutional basis for Section 3 of the Guardianship of Infants Act, 1964; and an existing authority, which predates the 1964 Act, indicates that this section is vulnerable to constitutional challenge.[1] This is due to a potential conflict between Section 3, which provides that the welfare of the child shall be the first and paramount consideration, and Articles 41 and 42 which grant "inalienable and imprescriptible" rights to parents in relation to their children. The case of *McK v Information Commissioner* has also highlighted the need to address issues in this area.[2]

The Supreme Court has determined that the welfare of a child must, unless there are exceptional circumstances or other overriding factors, be considered to be best served by the child remaining part of his or her marital family. This was dictated, the court considered in a number of cases, by the constitutional preference for the marital family exhibited in Article 41.3 of the Constitution and the requirement that the family be protected from unjust attack.[3] There is, therefore, an uneasy tension between, on the one hand, the provisions of Article 41 and 42 of the Constitution, and on the other, the welfare principle outlined in Section 3 of the Guardianship of Infants Act, 1964.[4]

It is interesting to note the facts in the 2004 High Court case of *FN v CO*[5] in which Finlay Geoghegan J. adopted a child-centred approach to the question of custody; it is uncertain that this judgment would have been upheld in the Supreme Court if challenged.

In the *FN* case, maternal grandparents sought sole custody of their two teenage granddaughters (aged 13 and 14). They were opposed by the girls' father (who lived in the UK), his new wife and the paternal grandfather. The girls' parents had separated and, following the death of their mother, the girls lived with their grandparents in Ireland. The judge considered that the grandparents were fit and

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[1] See *Re Tilson, Infants* [1953] IR 1 SC; and Geoffrey Shannon (2005) *Child Law*, Dublin: Thomson Round Hall.
[2] *McK v Information Commissioner* [2006] IESC; See speech of the Information Commissioner http://www.oic.gov.ie/en/MediaandSpeeches/PublishedArticles/2006/index.htm
[3] See *Re J (An Infant)* [1985] I.R. 375 and *North Western Health Board v .W. and C.W.* [2001] 3 I.R. 635.
[4] Geoffrey Shannon (2005) *Child Law*, Dublin: Thomson Round Hall, p.4.
[5] *FN. v CO* [2004] 4 IR 311; [2004] IEHC 60.

proper persons to be awarded custody, as was the father, though he had failed in his parental duty to provide normal day to day care for the girls since his separation from their mother. The judge also found that, though the girls loved their father and wished to have access to him, they regarded their grandparents as their *de facto* parents. The judge held that the children were of an age and maturity to have their wishes taken into account by the court according to their personal rights under Article 40.3 of the Constitution and the provisions of Section 25 of the Guardianship of Infants Act, 1964. Moreover, the court held that both children were doing well and to move them to live with their father in the UK, against their wishes, would cause significant damage to their educational and social development. The court therefore appointed the maternal grandparents as guardians over the two children.

The Alliance believes that the following provides a rationale for guaranteeing constitutional protection to the best interests principle in private law proceedings concerning the custody, guardianship and access arrangements between a child and his or her parent/s:

- Secure a constitutional basis for legislation: There is at present no constitutional basis for Section 3 of the Guardianship of Infants Act, 1964; and an existing authority, which predates the 1964 Act, indicates that this section is vulnerable to constitutional challenge.[6]

- Ensure consistency in judicial decisions: It is likely that judgments of the High Court may not be upheld in the Supreme Court in this area. For example, in *O'D v O'D & Ors*, Geoghegan J. in the High Court stated that a parent's access can be curtailed where there is reasonable suspicion of sexual abuse having occurred without such abuse having to be fully proven.[7]

- Ensure decisions protect children: There is concern among non-governmental organisations working in the child protection area that access arrangements between a child and his or her parent/s are not sufficiently governed by the principle of the best interests of the child.[8] As a consequence, there are instances where the courts do not appear to have taken sufficient account of child protection issues when deciding access arrangements and so make an order for access arrangements that may be unsafe or unsuitable for the child. Furthermore, the operation of the *in camera* rule in private law proceedings means that in general there is little documentation on how decisions are being made.

- Respect the child's right to have access with his or her parent/s: Since the 1992 High Court case, *MD v GD*, the granting of access orders has been considered to be a basic right of the child rather than a rights of the parent/s.[9] This emphasis on the best interests of the child is enshrined in the Guardianship of Infants Act, 1964[10] and is in line with Article 9.3 of UN Convention on the Rights of the Child, which provides that:

  > *States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.*

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[6] See footnote 1.
[7] In *O'D v O'D & Ors* [1994] 3 Fam LJ 81 (HC) the father was granted supervised access to his children.
[8] For example, an average of 8% of the 1,200 calls to CARI's helpline each year relate to unsafe access by parents (CARI 2006 *Submission to the Children's Rights Alliance – Discussion Paper regarding Constitutional Amendment on Children's Rights*).
[9] Unreported, High Court, July 30, 1992.
[10] Section 11 (D) to the Guardianship of Infants Act, 1964, as amended by Section 9 of the Children Act, 1997.