



Child Care Law Reporting Project

Report of a research study commissioned by the
Department of Children and Youth Affairs

**An Examination of Lengthy, Contested
And Complex Child Protection Cases
In the District Court**

By Carol Coulter

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It goes without saying that any inadequacies in this report are my responsibility alone.

Carol Coulter

March 2018

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Introduction

There were 6,182 children in care in November 2017 in Ireland.¹ Further, between 2013 and 2015, 59 per cent of those in care entered care on the basis of a voluntary agreement with their parents, with the remainder coming into care by way of court order.² This does not mean that 41 per cent of the children in care entered care following strongly contested court proceedings – the Child Care Law Reporting Project found that in the years 2013-2015 of the 707 cases it had seen concluded (rather than reviewed, adjourned, struck out or withdrawn) 63 per cent were granted on consent.³ Therefore less than 20 per cent of children in care entered care following contested court proceedings. Nonetheless, the courts are the final arbiters in our child protection system and of central importance in setting the standards for state intervention in families. Until recently there was no scrutiny of this important function of our courts, due mainly to the *in camera* rule which prohibited any reporting of the proceedings and any disclosure by anyone of what happened in court.

The Child Care Law Reporting Project (CCLRP) was set up in November 2012 to address this. This followed the modification of the *in camera* rule in relation to child protection proceedings, with the Child Care (Amendment) Act 2007. This in turn followed recommendations in a number of reports, including the Report of the Commission to Inquire into Child Abuse (the Ryan Report) on residential institutions and the report of the all-party Oireachtas committee on a children's amendment to the Constitution.⁴

The purpose of the CCLRP is outlined in Regulations referred to by the 2007 Child Care (Amendment) Act and made by the then Minister for Children and Youth Affairs in November 2012. These Regulations state that reporting may be carried out by people nominated by a number of academic organisations, and by “a class of persons” who can prepare such reports “if the Minister is satisfied that the publication of reports prepared in accordance with subsection (5) (a) by persons falling within that class is likely to provide information which will assist in the better operation of the Act, in particular in relation to the care and protection of children.” Free Legal Advice Centres was nominated as one such body and hosted the CCLRP.

Therefore the purpose of the reporting project is two-fold: to bring transparency to child care proceedings and to collect information “which will assist in the better

1 Child and Family Agency, 'Monthly Performance and Activity Data 2017: November 2017 (YTD)' (2018) <<http://www.tusla.ie/data-figures>> accessed 26 February 2018.

2 *ibid.*

3 Carol Coulter with Lisa Colfer, Kevin Healy & Meg MacMahon, *Final Report, Child Care Law Reporting Project* (Child Care Law Reporting Project 2015) 74.

4 Commission to Inquire into Child Abuse, 'Commission Report' (2009); Government of Ireland, 'Joint Committee on the Constitutional Amendment on Children, Third Report, Twenty-Eighth Amendment of the Constitution Bill 2007, Proposal for a Constitutional Amendment to Strengthen Children's Rights, Final Report' (2010).

operation of the Act". The project had two elements: attending child care proceedings and writing reports of individual cases, published at intervals on its website; and collecting data on all cases mentioned during the reporters' attendance, collating and analysing it in statistics published in three annual reports. The project also collected observations on the conduct of cases and some of the issues arising from them and published them in these reports.

To date the CCLRP has published approximately 400 case reports, ranging in length from about 400 words to 25,000 words, in 12 quarterly and four bi-annual volumes. The current volume, Volume 2 of 2017, is on its website, and the other volumes are all available on the Archive page.⁵ The hearings covered include applications for Emergency Care Orders or Interim Care Orders, renewals of those orders, applications for Care Orders or Supervision Orders and reviews of those orders. The reports also include cases where children are returned to their families, cases where the court orders services or plans for children on the application of their guardians *ad litem*, and various other aspects of the work of the court in overseeing the child protection system. The proceedings of the High Court, where secure care cases and those concerning disputes about the country of jurisdiction are heard, are also reported.

The Project also collected and analysed data on 1,272 cases, 1,194 in the District Court and 78 in the High Court. The data was analysed statistically, and the results also published in annual reports in 2013, 2014 and in a Final Report, combining three years' data, in 2015. Following this first phase of the CCLRP programme of work, the focus of the second phase, and the subject of this report, was on more contested cases. The Department of Children and Youth Affairs commissioned research to explore further issues identified during the first phase; of specific interest was the small minority of cases which became extremely protracted and contested. Therefore, in this second phase of the project, we sought to examine in depth a sample of such cases aligned with qualitative research with the different professionals involved so as to explore their varied perspectives on the processes involved, including the factors implicated in how and why some cases become so exceptionally protracted.

In examining these cases, it was hoped that lessons could be learned about the preparation of child care cases by the CFA more broadly, and the conduct of cases by the District Court, in order to seek to avoid excessive complexity in the future and deal with it expeditiously when it arises.

This report contains seven chapters, including this one. This chapter sets the context for the study, outlining the legal background, a brief review of the literature and a description of the method used. The second chapter analyses ten

5 The website of the Child Care Law Reporting Project can be found at <https://www.childlawproject.ie/>

exceptionally lengthy cases attended and reported on by reporters from the CCLRP. The third contains an analysis of the observations of the six reporters who attended these and other cases, and who participated in a group interview with the author of this study, who herself attended some of these cases. The fourth, fifth and sixth chapters examine the experiences of these and other lengthy cases through the prism of the different professionals engaged in the process: social workers, lawyers and guardians *ad litem* (GALs). The seventh contains conclusions and recommendations.

Chapter 1: Legal Context, Literature and Methodology

The Final Report (2015) of the CCLRP identified eight cases as taking 10 days or sometimes much more, spread over months and even years. Since its publication in November 2015 three further cases began which have taken in excess of 30 days and lasted for over two years. It must be stressed that such cases represent only a very small minority of all the child care cases in the District Court. For example, the initial eight cases identified that took more than 10 days represented just 0.7 per cent of all the cases attended by the CCLRP during a three year period.⁶ However, such cases consume an enormous amount of resources both in terms of the time and energy of CFA personnel and in legal costs. They also often involve multiple adjournments, sometimes spread over many months or even years, resulting in great uncertainty for the children, which is clearly not in their best interests. Prolonged involvement in lengthy court proceedings are not only hugely demanding of social workers' time and energy, the social workers also found such cases to be very difficult,⁷ and thus are likely to contribute to retention problems for the CFA. They are therefore problematic both in terms of their consumption of resources and the welfare of the children. In addition, an examination of these "extreme" cases may highlight specific issues of wider significance for the legal and care systems.

1.1 Aim of the Current Study

The overall aim of the research study reported here is to identify why some cases become so prolonged, to develop an insight into the characteristics that contribute to their complexity and to examine the organisational and procedural features of the proceedings which may contribute to or exacerbate it. It is intended that this will provide a sound basis for recommendations to improve the organisational and procedural context in which such cases are dealt with, and reduce the complexity of the cases and assist in improving the organisation of the proceedings.

1.2 Organisational Context

Child care proceedings in court are where the legal system and the child protection system interface and sometimes collide. They draw into the same forum professionals from two very different disciplines, law and social work. While the present study was commissioned by the Department of Children and Youth Affairs (DCYA), many of the issues raised below concern the operation of the courts, which does not fall within the remit of the DCYA and cannot be influenced by the Child and Family Agency (CFA), which initiates the court proceedings. These fall within the remit of the Department of Justice and Equality, the judiciary and the

⁶ Carol Coulter with Lisa Colfer, Kevin Healy & Meg MacMahon (n 3) 73.

⁷ Kenneth Burns and others, 'What Social Workers Talk about When They Talk about Child Care Proceedings in the District Court in Ireland' (2018) 23 Child & Family Social Work 113.

Courts Service. Nonetheless, the author discusses issues relating to court jurisdiction and organisation, practice and procedure, as well as the practice of the CFA, as the problems examined cannot be addressed otherwise. The study examines structures – the CFA and the courts – and specific processes in relation to those structures. The stakeholders interviewed come from different professional backgrounds and relate to the structures in varying ways, which is explored below.

The Child and Family Agency (CFA) is also known by the name Tusla, which is used as the agency's logo. This report does not use the term 'Tusla' as it is not included in statute and so has no legal basis.

1.3 Legal Framework

The central piece of legislation governing child protection proceedings is the Child Care Act 1991, along with its various amendments. The Child Care Act, as amended, enables the CFA to apply to the District Court for an order in respect of a child it deems in need of care and protection, and who would not be adequately protected without one of the orders available under the Act: an emergency care order, a supervision order, an interim care order or a care order until the child reaches adulthood or for such shorter time as the court may determine. This, like all our legislation, is subordinate to the Constitution, which guarantees the rights of the family and, since the enactment of the Children's Amendment, the specific rights of children. In this, our child protection legislation exists within a very different context to that in the neighbouring jurisdiction of England and Wales, where there is no written constitution and no constitutional protection for the family.

The Act also exists within the context of legally binding international treaties and their jurisprudence.⁸ Much of this jurisprudence has been developed since the enactment of the 1991 Act. Under the European Convention on Human Rights Act 2003 the courts are required to interpret legislation in line with the convention insofar as it is possible to do so. This Act also requires public bodies, including the CFA to perform their functions in a manner compatible with the convention, unless precluded by law. In addition, the Irish Human Rights and Equality Act 2014 places a duty on the CFA to take proactive steps to eliminate discrimination, promote equality and protect the human rights of the children and families who use its services.

In addition the Irish superior courts have delivered a number of judgments since 1991 elaborating on the rights of the family, the rights of the child and the role of

8 'Convention on the Rights of the Child (Adopted and Opened for Signature, Ratification and Accession on 20 November 1989) 1577 UNTS 3 (UNCRC); (2 September 1990); European Union, 'Charter of Fundamental Rights of the European Union' (26 October 2012) 2012/C 326/02; Council of Europe, 'European Convention for the Protection of Human Rights and Fundamental Freedoms', CETS No. 5, 1950; Council of Europe, 'European Social Charter (Revised)', European Treaty Series - No. 163; and Council of Europe, 'European Convention on the Exercise of Children's Rights', European Treaty Series - No. 160.

the State in protecting children and in intervening in the family. They have also dealt with the nature of child protection proceedings and the procedural rights of parents. While too numerous to be dealt with comprehensively here, they supplement the provisions of the Child Care Act and have a major bearing on the manner in which it is interpreted by the courts.

One of the main cases to examine the role and limits of the State in intervening in families to promote the welfare of children was *The North Western Health Board v. H.W. and C.W.* (2001)⁹ (the “Heel prick test” case). There the Supreme Court upheld a High Court decision and held, by a majority of four to one, that the North Western Health Board, the body then responsible for the welfare of children under the Child Care Act, could not compel the parents of an infant to consent to him undergoing a routine blood test to establish if he was at risk of a number of metabolic disorders.

After emphasising the special protection afforded to the family under Article 41 of the Constitution, much of the discussion related to Article 42.5, which has since been replaced by Article 42.A through the enactment of the Children’s Amendment. However, the provision that the State intervenes to take the place of parents only in “exceptional circumstances” remains, so the discussion on exceptional circumstances remains valid. The Supreme Court said that such circumstances would be established by the facts of each case, but included an immediate threat to the health or life of the child; a degree of parental neglect constituting an abandonment of the child and all rights in respect of him; and an immediate and fundamental threat to the capacity of the child to continue to function as a human person, physically, morally or socially, deriving from an exceptional dereliction of parental duty.

Mr Justice Murphy added:

“I do not accept that a particular ill-advised decision made by parents (whose care and devotion generally to their child was not disputed) could be properly categorised as such a default by the parents of their moral and constitutional duty so as to bring into operation the supportive role of the State. If the State had an obligation in the present case to substitute its judgment for that of the parents numerous applications would be made to the courts to overrule decisions made by caring but misguided parents.”

In other words, well-intentioned and caring parents have the right to parent their children in ways that run contrary to professional advice, unless they thus put the children at extremely serious risk. This constitutional principle, which should inform

⁹ The North Western Health Board Plaintiff v. H.W. and C.W. Defendants [2000 No. 6348 P.; S.C. No. 321 of 2000] High Court 27th October 2000, Supreme Court, 8th November 2001.

the administrative practice of the CFA, is likely to be problematic for some social workers, especially those trained in other jurisdictions that lack such constitutional provisions.

There have also been a number of judgments in the European Court of Human Rights relating to child protection and the actions of states. They emphasise the principle that removing children from their families must be a measure of last resort, and that, if they are removed, the reunification of the family must generally continue to be under active consideration. Corbett (2017) has analysed the use of this jurisprudence by the District Court in child protection proceedings as shown in 114 judgments published on the Courts Service website.¹⁰ She pointed out that over a third of the published 114 District Court judgments (39 judgments) include references to the ECHR – making it the most cited human rights instrument among the District Court judgments. These vary from a once-off reference to lengthy citation of ECtHR case law. The references to the ECHR in the published judgments concern a range of issues, including the threshold for granting a Care Order, the appropriate duration of the Care Order and issues of parental access.

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

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

“I accept that child care cases are not entirely analogous to other litigation; that the judge's role is more inquisitorial than usual and that there is a need to preserve a degree of flexibility in order to deal with exceptional circumstances. However, the normal rules are that courts act on evidence

10 Maria Corbett, 'An Analysis of Child Care Proceedings Through the Lens of the Published District Court Judgments' (2017) 20(1) Irish Journal of Family Law.

and that parties applying for an order must establish grounds for the making of the order.”¹¹

In another case Ms Justice O’Malley added: “The concept that ‘there are no winners or losers’ is an appropriate one for the attitude of the professional staff of the HSE and its lawyers but it asks a degree of detachment that is very unlikely to be shared by a parent. The procedure is, as a matter of fact, adversarial.”¹²

Judge Ní Chúlacháin in the Circuit Court elaborated:

“It is sometimes said that the Child Care proceedings are in the nature of an inquiry rather than the normal adversarial proceedings this court is used to. That may well be the case, but it remains clear that the onus of proving the matters set out in Section 18 of the Act remain firmly on the CFA at all times and that there is no onus on the respondents to prove the contrary. Furthermore ... the standard of proof in child care proceedings as in all civil proceedings before the court is the balance of probabilities ... where the allegations and their consequences are ... serious and grave ... the standard of proof is to be applied in a rigorous and exacting manner.”¹³

1.4 The Law in Practice

Applications for child protection orders are made to the District Court under the Child Care Act 1991. The Act obliges the State, through the Child and Family Agency to identify children in need of care and protection and to supply it. This includes various forms of family support and taking a child into care under a voluntary agreement. If this fails to protect the child, the CFA is under a duty to seek an appropriate order in the courts. The orders provided for in the Act are an emergency care order, an interim care order, a care order and a supervision order. An interim care order is made when “there is reason to believe” that the safety or welfare of a child is at serious risk. It is envisaged as a precursor to a care order, providing for the safety of the child while the case for a “full” care order is prepared, which usually involves a number of assessments of the child and the parent or parents. Many of the lengthy cases seen by the CCLRP where a care order is sought have been preceded by multiple renewals of interim care orders. If a child has been for a lengthy period under an interim care order a dynamic is created towards the child remaining in care, though the threshold for an interim care order is different from that required for a care order. While the existence of such a dynamic does not constitute legal grounds for the making of a full care order, in practice the CCLRP rarely saw children return home after lengthy periods in care.

11 A. -v- Health Service Executive [2012] IEHC 288.

12 Health Service Executive -v- O.A. [2013] IEHC 172.

13 Child and Family Agency and LG and SK, decision delivered 9th May 2017, unpublished, p.11.

A full care order (until the child is 18 or “for such shorter period as the court may determine” can only be made when the court is “satisfied” (as distinct from “has reason to believe”) that abuse or neglect of a child has existed, exists at the time of the proceedings or is likely to occur in future, and that only a full care order will avert that risk. Thus the threshold for a full care order is considerably higher than for an interim care order and the evidence required to support the application for a care order must be stronger than that needed for an interim care order.

This was outlined by Judge Ní Chúlacháin in the Circuit Court in May 2017:

“There must be compelling reasons why the child’s welfare cannot be secured within the family. The Court must be satisfied that a specified factual event or set of events has happened, is happening or is likely to happen. This presents a much higher threshold than that of having a reasonable cause to believe as [is] the required threshold for an interim care order in section 17.”¹⁴

This may be particularly difficult where there are concerns about possible sexual abuse, but it has not been proved.

All child protection applications are made in the District Court, with the exception of Special Care applications, where a child is detained for therapeutic purposes and which are brought to the High Court. The District Court is a court of limited and local jurisdiction, and deals in the main with minor criminal and civil matters, licensing and some family matters (excluding annulment, divorce and judicial separation). The fact that each District Court is of local jurisdiction can give rise to problems in cases where the residence of a family or of some of its members change, as the case then falls within more than one jurisdiction. It also limits the flexibility of the President of the District Court in allocating cases to the courts with the greatest capacity to hear them.

According to the Courts Service annual report for 2016, the District Court received 133,724 civil matters and 382,325 criminal matters in 2016.¹⁵ There are 64 judges of the District Court, 18 based in Dublin, 26 attached to specific districts and 20 “moveable” judges, who assist in areas where the local judge needs such assistance. Not all the matters listed before the court are proceeded with, but these figures show that the average workload of each District Court judge in 2016 was 8,063 cases.

14 Child and Family Agency and LG and SK, decision delivered 9th May 2017, unpublished, p.8.

15 Courts Service, ‘Courts Service Annual Report 2016’
<<http://www.courts.ie/Courts.ie/Library3.nsf/PageCurrent/AC7C2772ABD0E1F880257FC0003D294C>> accessed 10 March 2018, p 63.

It is hardly surprising, therefore, that certain courts find it difficult to give child care cases the time and attention they may require. In Dublin three or four judges hear child protection on a full-time basis in a single location and in Cork, Limerick and Waterford there are special days each week for child care cases, but in most districts outside Dublin child care cases jostle for time with other family law cases on already crowded lists. The CCLRP has learned that there were 116 family law applications listed on one day in 2017 in one rural town, of which over a dozen were child care cases.

In certain parts of the country the local judge routinely requests the assistance of a moveable judge when it appears a child care case is likely to be highly contested, though this does not occur in all areas where there is pressure on the court list. This will normally arise at interim care order stage, so the judge who hears the interim care order application may not be the one who hears the care order application and may have a different approach. While there is some correlation between specific moveable judges and certain parts of the country, there is no guarantee that the same moveable judge will be available to hear different cases in the same district. This means that the local area of the CFA, and the lawyers who service it, may have to deal with different approaches from different judges in different cases.

In Dublin and the cities where more judicial resources are devoted to child protection there is likely to be more consistency in approach. The resources also exist in Dublin for the judges to make more detailed and considered judgments, as revealed by the fact that the majority (76 per cent) of the written child care judgments from the District Court published on the Courts Service website are from Dublin (Corbett, 2017)¹⁶. The extent to which the organisation of the work of the District Court contributes to the difficulties seen in very complex cases is discussed in Chapter 6 below.

The cases examined in this study all concern applications for care orders, though they will all have been preceded by interim care orders, usually renewed repeatedly while the case for a full care order is being prepared. One of the cases went on appeal to the Circuit Court, where the care order was upheld.

1.5 Literature Review: Identifying Research Gaps

This study has not attempted a comprehensive review of literature on child protection legal proceedings, but outlines below some important overviews, and looks at the research gaps. The Irish child protection system exists within the legal framework of the common law tradition, and therefore looks to child protection practice in other common law jurisdictions, notably the UK, Australia and Canada.

16 Maria Corbett (n 10).

However, as referred to above, there are some significant differences between the legal systems of these jurisdictions and the Irish one.

In addition, most research has been in the field of social science, rather than law. Socio-legal research is in its infancy in Ireland (Cahillane and Schweppe, 2016, 1)¹⁷, with little examination of the interaction between legal and social systems.

The Centre for Effective Services (CES) carried out an international review of child care legislation for the Department of Children and Youth Affairs (CES 2017).¹⁸ This covered prevention and early intervention, types of care orders, permanency, corporate parenting, children's rights, risk, information sharing, aftercare arrangements and authority and powers to investigate. It did not look at the procedures for taking children into the care of the state. The jurisdictions selected for review and comparison were those considered by the researchers "to offer the most promising approaches on a particular topic" in relation to family support and child welfare (CES 3), and generally the *foci* of the research are England and Wales, Scotland, the different states of Australia and New Zealand.

The EU Regulation known as Brussels II *bis* is aimed at ensuring that family law decisions made in one EU member state can be implemented in another (Shannon, 2010)¹⁹, leading to the need for familiarity with policies and practices in child law across the EU, where the inquisitorial civil law system predominates. The different ways in which various EU member states apply family law relating to parental responsibilities and the role of the state where parents fail in their responsibilities are outlined by Boele-Woelki *et al* (2005)²⁰, where the procedures for taking children into state care are described, but not analysed.

Burns *et al* (2017) carried out a detailed analysis of child welfare removals by the state in nine high-income countries, both EU and non-EU, including Ireland.²¹ This showed that the Irish system of court-based child protection proceedings, with its capacity for high levels of conflict, may not be typical. "A key message of this review is that court-based care orders make up only one part of all the removals and may even be one of the smallest parts in many countries' child removal systems." (Burns *et al*, 2017, 229).

Across all the countries studied the authors found "scant original research and the existing literature tells us little about the quality of decision-making in child welfare

17 Laura Cahillane and Jennifer Schweppe (eds), *Legal Research Methods: Principles and Practicalities* (Clarus Press 2016).

18 Centre for Effective Services, 'International Review of Childcare Legislation – Phase II Identified Areas of Interest' (2016).

19 Geoffrey Shannon, *Child Law* (2nd ed., Thomson Round Hall 2010) 111.

20 Katharina Boele-Woelki and others (eds), *European Family Law in Action, Volume III: Parental Responsibilities* (Intersentia 2005).

21 Kenneth Burns, Tarja Pvsv and Marit Skivenes (eds), *Child Welfare Removals by the State: A Cross-Country Analysis of Decision-Making Systems* (Oxford University Press 2017).

systems, how decisions are made in courts and court-like bodies, and even less about the use of discretion in child welfare removal cases ... It is striking that for such an important area of state power there is such an enormous knowledge gap.” (Burns *et al*, 2017, 237)

Some of the gaps may be accounted for by difficulties researchers encounter in accessing child protection proceedings, and Burns *et al* point out: “In many countries little or nothing is known about what happens behind the closed door of *in camera* child welfare court proceedings and social work-led administrative processes.” (2017, 3) In Ireland, prior to the introduction of the Child Law (Amendment) Act 2007, supplemented by Statutory Instrument 467 of 2012, no researcher could attend judicial child care proceedings and report on them, so there was little literature in Ireland relating specifically to such proceedings and how they are conducted.

Buckley and Corrigan’s audit (2010) of child protection research in Ireland between 1990 and 2009 pointed out that over half of the research fell either wholly or in part under the category of policy/practice review/analysis. There was little on the evaluation of interventions, little too on the perspectives of service users, and none on the court decision-making process.²²

A number of writers have written on the law relating to child protection proceedings, notably Shannon (2012)²³, (2014)²⁴, (2015)²⁵, (2016)²⁶ and Kilkelly (1999)²⁷, (2008)²⁸, who has written particularly on the impact of European and international law on child protection in Ireland. Ward (2014)²⁹ has written a comprehensive analysis of the Child Care Acts, as amended, though none of these looked at the actual decision-making process.

In addition, McGrath (2005) pointed to the significant increase in contested proceedings from the 1990s onwards, stating that cases that previously took hours, or at most a day or two, now took weeks with as many as five legal teams, though he did not look at any specific cases³⁰. He commented that the higher profile accorded to child abuse in public discourse had increased the stigma for parents

22 Helen Buckley and others, ‘Report of an Audit of Child Protection Research, CAAB Research Report No 7’ (Children’s Acts Advisory Board 2010).

23 Geoffrey Shannon, ‘Fifth Report of the Special Rapporteur on Child Protection: A Report Submitted to the Oireachtas’ (2012).

24 Geoffrey Shannon, ‘Seventh Report of the Special Rapporteur on Child Protection: A Report Submitted to the Oireachtas’ (2014).

25 Geoffrey Shannon, ‘Eighth Report of the Special Rapporteur on Child Protection: A Report Submitted to the Oireachtas’ (2015).

26 Geoffrey Shannon, ‘Ninth Report of the Special Rapporteur on Child Protection: A Report Submitted to the Oireachtas’ (2016).

27 Ursula Kilkelly, *The Child and the European Convention on Human Rights* (Programme on International Rights of the Child (Series), Ashgate/Dartmouth 1999).

28 Ursula Kilkelly, *Childrens Rights in Ireland: Law, Policy and Practice* (Tottel 2008).

29 Paul Ward, *The Child Care Acts: Annotated and Consolidated* (Third Edition, Round Hall 2014).

30 Kieran McGrath, ‘Protecting Irish Children Better – The Case for an Inquisitorial Approach in Child Care Proceedings’ (2005) 5 *Judicial Studies Institute Journal*.

and rendered child protection proceedings more confrontational,³¹ arguing for an inquisitorial system in child protection proceedings, similar to that of the Netherlands.³² However, given the deep roots of the adversarial common law tradition in the Irish legal system, this is unlikely to happen.

The Scottish Children’s Hearings system is also a non-adversarial model of child protection decision-making, distinct from the court-based system used in Ireland and England and Wales. Children are referred to a lay panel both because of their behaviour, including offending, and where there are concerns about their care (McGhee, 2015).³³ If the evidence supporting the referral is contested the case is referred to a hearing in chambers in court. The system was substantially modified in 2011 following a number of challenges under the Human Rights Act 1998 and McGhee acknowledges that the consequent evolution of a more procedural rights-based system will probably see more involvement of lawyers (2015, 47) and therefore some convergence with the system in England and Wales and Ireland.

Buckley (2010) makes reference to the role of coercion in bringing about change in service-users behaviour, and there is no doubt that the ultimate coercive weapon is the threat of court proceedings³⁴, but this issue has yet to be explored by empirical research.

One of the first people to avail of this, and examine a specific aspect of child protection proceedings, was Corrigan (2015), whose doctoral thesis³⁵ examined the role of guardians *ad litem* in these proceedings. Her focus was on the realisation of children’s right to be heard in administrative and judicial matters affecting them, particularly through the guardian *ad litem* system in Ireland. Her observation that “a recurring theme has been the lack of consistency in relation to a number of the processes employed in both the provision of opportunities to children to have their wishes and feelings heard, and in the manner in which these are ascertained and reported” (2015, 257), is one echoed by the general findings of the CCLRP in relation to child protection proceedings as outlined in its Final Report.

In general, therefore, there is a dearth of examination and analysis of the decision-making process in child protection proceedings, and the impact that this process in itself has on vulnerable children and families.

31 *ibid* 140.

32 *ibid* 143.

33 Janice McGhee, ‘44 Years on - Reflections on the Scottish Children’s Hearings System’ in (Child Care Law Reporting Project and Law Society of Ireland, International Conference: Child Protection and the Law, Dublin, 13 April 2015).

34 Helen Buckley and others, ‘Like Walking on Eggshells: Service Users Views and Expectations of the Child Protection System’ (2011) 16(1) *Child and Family Social Work* 101.

35 Carmel Corrigan, ‘Children’s Voices, Adults’ Choices: The Voice of the Child Through the Guardian AD Litem in Child Care Proceedings in the Irish District Courts’ (Trinity College Dublin 2015).

One exception to this is the British study by Pearce and Masson (2011),³⁶ which examined the representation of parents in child care proceedings in a selection of courts in England between 2008 and 2011. The authors attended at a number of child care proceedings and interviewed the key participants, including some parents. It looked at the impact of newly-introduced time limits on proceedings, introduced because of concern at the length of time some proceedings were taking, and on how they were conducted. It found that the new measure aimed at reducing the time spent on child protection proceedings had “not reduced their length or the number of hearings, or changed the way in which cases have always been handled since before the Judicial Protocol,”³⁷ a salutary reminder that administrative measures may not be a panacea for reducing the length and complexity of child care proceedings.

The study made a number of findings that concur with those of the Child Care Law Reporting Project, including “that the child’s journey through care proceedings was more arduous in some courts than others.”³⁸ Its methodology, combining court attendance with semi-structured interviews, is similar to that used in this study. A number of its findings also resemble those of this study, but the legal framework is different to that operating in the Irish courts so many are not completely relevant.

An examination of the decision-making process in Ireland was conducted by a team of researchers from University College Cork’s departments of law and applied social studies (O’Mahony, Burns, Parkes and Shore, (2015, 2016, 2017)), who carried out qualitative research on child protection proceedings during 2011-2013 in three District Court areas, conducting interviews with judges, social workers, guardians *ad litem* and lawyers. They did not attend any proceedings, and their research began before this was permitted. The interviews collected the observations of the participants on a range of matters, including court facilities³⁹, the voice of the child in the proceedings⁴⁰, the voice of the parents⁴¹ and the experience of social workers in child care proceedings⁴². The same authors also contributed a chapter to the European comparative study of child protection systems referred to above.⁴³

The work of the UCC team was unprecedented in its examination of child protection proceedings from the point of view of the professional participants (they did not

36 Julia Pearce and others, *Just Following Instructions? The Representation of Parents in Care Proceedings* (School of Law, University of Bristol 2011).

37 *ibid* 45.

38 *ibid* 156.

39 Conor O’Mahony and others, ‘Child Care Proceedings and Family Friendly Justice: The Problem with Court Facilities’ (2016) 19(4) *Irish Journal of Family Law* 85.

40 Aisling Parkes and others, ‘The Right of the Child to Be Heard? Professional Experiences of Child Care Proceedings in the Irish District Court’ (2015) 27(4) *Child and Family Law Quarterly* 423.

41 Conor O’Mahony and others, ‘Representation and Participation in Child Care Proceedings: What about the Voice of the Parents?’ (2016) 38(3) *Journal of Social Welfare and Family Law* 302.

42 Kenneth Burns and others (n 7).

43 Kenneth Burns and others, ‘Child Removal Decision-Making Systems in Ireland: Law, Policy and Practice’ in Kenneth Burns and others (n 21).

interview children or their parents because of legal difficulties they encountered with the *in camera* rule) and was conducted within an information deficit due to the *in camera* rule. The authors did reference the almost contemporaneous work of the present author in the reports of the Child Care Law Reporting Project, which began after their research had commenced. Their work is therefore primarily descriptive rather than analytical, identifying various problems with the system according to the respondents, rather than attempting to analyse the reasons for them. The present study echoes many of the findings of the UCC team but seeks to go beyond them in looking for the reasons why the problems exist and flourish, using court observation to supplement and inform the qualitative interviews.

The existing literature therefore describes and analyses the law on child protection and practice and process in child protection, but has little to say on how legal practices and processes impact on the practice of social work, and how the practice of social work is interrogated within and by the legal system in Ireland. This study aims to address that gap.

This phase of the project has also been informed on best social work and court practice by a number of documents, including Buckley *et al's Framework for assessment of vulnerable children and their families* (2006)⁴⁴, the CFA's *Alternative Care Practice Handbook*⁴⁵ and the HSE's *Court: Best Practice Guidance*.⁴⁶

Child protection court proceedings are where social work and the law come together and sometimes collide, and where their different underlying philosophies can be thrown into relief. It can be difficult to reconcile the focus of social work on the social workers' individual assessment of the best interests of a child with the legal requirements of full procedural rights for all parties, including parents and indeed the child. This is particularly difficult when other areas of law, including the criminal law, are involved. These competing interests are comprehensively examined by Hoyano and Keenan (2010) in their major 2007 study, updated in 2010, which examines the intersection of child protection and the criminal law in the major high-income common law countries.⁴⁷

Though writing from a legal perspective, the authors do not consider the law to have all the answers in child protection: "We conclude that while adherence to the law may potentially prevent children 'disappearing' into the child protection system without consideration of whether such drastic action is justified, the law has also contributed to some of the problems which have dogged child protection practice

44 Helen Buckley and others, 'Framework for the Assessment of Vulnerable Children and Their Families: Assessment Tool and Practice Guidance' (Children's Research Centre, TCD 2006).

45 Tusla, Child and Family Agency, 'Alternative Care Practice Handbook' (2014).

46 Health Service Executive, 'Court: Best Practice Guidance' (2013).

47 Laura Hoyano and Caroline Keenan, *Child Abuse: Law and Policy Across Boundaries* (Oxford University Press 2007).

in all jurisdictions.”⁴⁸ After a comprehensive review of various inquiries into apparent failures in child protection in the UK and elsewhere, they conclude that “child protection practice does appear to benefit from legislation with clearly articulated principles, particularly when those principles are consistently repeated in the accompanying procedures. There are examples of clear child-focused legislative principles to guide investigative work in Australia and Canada. The law may also contribute to best practice by ensuring that child protection work in scrutinized.”⁴⁹

However they also warn that law which aims to coerce professionals into particular behaviour has not been very successful.⁵⁰ Nonetheless, their work is invaluable in identifying best practice in gathering and presenting evidence of child abuse, while preserving the central objective of upholding the best interests of the child.

1.6 Research Method

This study adopts a socio-legal methodology, seeking to answer one of the questions posed by O’Donovan (2016)⁵¹ where he states this methodology is appropriate where questions relating to the inadequacy of existing legal systems, or the need for reform, arise. (110) Socio-legal research examines how legal norms actually function in reality and what actors shape their implementation and so “socio-legal methodology attempts to foster connection and holism in solving research problems.” (128) This requires a mixed method approach.

As indicated above, the CCLRP encountered a number of extremely prolonged and complex cases in the course of its five years’ attendance at District Court proceedings. Between June 2015 and September 2016 the CCLRP identified a total of ten cases which it deemed to fall into the category of being both prolonged and complex. These ten cases comprise the case sample for the Phase Two study.

The basis on which these cases were selected was the length, not the nature, of the case. All of them took at least 11 days, and most took much more. Some of the lengthy cases are still going on and being attended by reporters from the CCLRP as part of the reporting function of the project under the 1991 Act, as amended. In-depth analysis of cases for the purpose of this study, however, revealed that much of the complexity was related to the nature of the case. Ten of these cases are explored further and presented in Chapter 2 based on secondary analysis of the related CCLRP reports of these cases already published. While the data contained in these reports reveal the features that most of such cases share, it does not go

48 *ibid* 427–28.

49 *ibid* 524.

50 *ibid* 525.

51 Darren O’Donovan, ‘Socio-Legal Methodology: Conceptual Underpinnings, Justifications and Practical Pitfalls’ in Laura Cahillane and Jennifer Schewpe (eds), *Legal Research Methods: Principals and Practicalities* (Clarus Press 2016).

behind what happens in court to examine the reasons why certain cases consume such an enormous amount of time and resources. The reports show *what* happens, they do not show *why* and *how* it happens.

The written reports are based on the attendance at the court proceedings of a reporter on behalf of the CCLRP, including the present author. Notes of the proceedings are taken, as close to verbatim as possible, and these are subsequently written up as reports for the CCLRP website. The reports are not full verbatim reports as for reasons of clarity and presentation they avoid repetition and seek to provide a coherent narrative.

A mixed method research design was chosen to achieve the in-depth exploration of the issues raised by the project's earlier work, combining observation of court proceedings; qualitative interviews with professionals with a varied stake in the legislative and procedural processes; analysis of court reports; and analysis of written judgments where these were available. Interpretations were tested out at each phase of the study through ongoing discussions with the six reporters who worked with the Project over its five years in existence and further explored through a group interview with the CCLRP reporters who attended the sampled cases. The reporters came from a variety of backgrounds: two from combined journalism/legal backgrounds, including one barrister; two from social science backgrounds and three barristers. Including the author of this report, seven people between them attended at some point of over 1,200 sets of proceedings, and wrote approximately 400 reports for the CCLRP website.

A significant feature of qualitative research and design and pertinent to the current study is that it does not simply involve a predetermined, linear sequence of steps but the inter-connection and interaction between design components (Maxwell 2013; Becker 1998).⁵² For example, simultaneous data collection and analysis means that emerging insights not anticipated at the outset may be explored through subsequent data collection. Further, the wealth of quantitative data already compiled provided a context and backdrop for this phase of the research and provided a sensitising lens to inform the sampling strategy, focus observations and develop the interview topic guides.

A triangulated approach was adopted, combining observation and interview methods. Semi-structured interviews were carried out with the key participants in these cases (many of whom also had experience of similar cases on which they drew in the interviews): social workers, GALs and lawyers for the CFA, respondents and GALs. Most of them were individual interviews, though some of the social workers involved in a particular case participated together in the

52 Joseph Alex Maxwell, *Qualitative Research Design: An Interactive Approach* (SAGE Publications 2013). Howard Becker, *Tricks of the Trade: How to Think about Your Research While You're Doing It* (The University of Chicago Press 1998).

interview. Where this occurred they are identified separately (Social Worker 1, Social Worker 2 etc.). These CFA interviewees include team leaders, social workers and access workers, but I describe them all as social workers, as they usually share the same experience of the case. Thirteen social workers were interviewed, three from Dublin and ten from other District Court areas. In addition, a former social worker / academic who had led a sex abuse unit was interviewed on the subject of dealing with sex abuse allegations. These were all “elite” interviewees, in that they were expert in the area and could be expected to provide an overview (Doherty, 2016).⁵³ These interviews ensured that the different perspectives of all sides in child care cases were explored.

The limitations of the study included the fact that respondent parents in these cases were not interviewed, both because of legal issues relating to the *in camera* rule and because they would not be in a position to compare their case to other similar cases. Consideration was given also to interviewing the judge in each case, but it was brought to the researcher’s attention that it would be impossible for a judge to speak about a specific case he or she had heard, outside of his or her comments made in court. However, in some of the cases the judge gave a written judgment and these judgments are integrated into the overall analysis.

Interviews followed a semi-structured schedule to ensure that the key research questions were covered, while allowing scope for additional issues to emerge and for interviewees to volunteer their observations and suggestions. In order to throw further light on the problems presented by these lengthy cases, two lawyers from two different areas which do not experience lengthy cases were also interviewed and they provided valuable insights on good practice. The interviews were recorded and transcribed verbatim and then analysed manually, using both hard and soft copies of the transcribed interviews. All interviews were conducted by the author, who also analysed the transcripts. Categories and themes were identified using search tools and integrated into the findings and conclusions published in Chapter 6.

It was hoped to conduct between 40 and 50 interviews and eventually 40 interviews were carried out as some of the cases it was hoped to analyse had not concluded and the professionals involved were not in a position to discuss them. Fourteen lawyers were interviewed (four representing the CFA, five representing respondents and five either guardians *ad litem* or both GALs and the CFA), 13 social workers and a specialist sex abuse assessor, and six guardians *ad litem*. Including the six reporters, there were 40 interviewees, which was considered a reasonable saturation point.

⁵³ Michael Doherty, ‘Getting Down and Dirty: The Case for Empirical Legal Research’ in Laura Cahillane and Jennifer Schewpe (eds), *Legal Research Methods: Principals and Practicalities* (Clarus Press 2016).

The cases completed so far and examined here came from both urban and rural areas, including a major city, medium-sized rural towns and rural areas. As mentioned above, two interviews were carried out with lawyers who work in areas which rarely see exceptionally lengthy cases.

1.7 Research Analysis

Notes and observations relating to the content of interviews and issues arising from the standpoint of the interviewee were subsequently expanded and written up alongside listening to the audio-recordings. Thus the process of thinking about and developing ideas to make sense of the emerging data was on-going and captured in notes and memos and suggested tentative ideas about themes, categories and relationships for exploration. More focused analysis involved multiple readings of the transcripts to examine range and variation within and between professionals and in relation to different cases using the method of constant comparison (Corbin and Strauss 2008).⁵⁴ All of the interviews relating to each individual case were examined.

Through coding and categorising transcripts, a matrix was developed, structured on the basis of the research questions, the codes applied and data relating to them, organised by professional role. The method of constant comparison was then employed to explore similarities and differences between professionals in different roles. As anticipated, the position of the interviewee coloured their perspective on the reason the cases developed the way they did, but we also found some commonality among all interviewees on certain issues. Through examining each case as a whole and identifying the conditions in which specific events and interactions occurred and their consequences for how the case developed, a narrative account of each case and the factors contributing to its duration was developed, supplementing the analysis of the published case reports.

A second level of analysis involved between-case comparison using the same analytic strategies of categorisation and contextualising. All of the analysis was carried out by the author. Managing researcher bias included on-going discussion with the reporters, acting as case reviewers, to check out findings and interpretations and to consider alternative explanations as well as the use of multiple sources of data.

All the professional interviewees were very eager to share their observations with the project and acknowledged the difficulties that arise in some cases. While they came from different perspectives, all were highly committed to the children at the centre of the proceedings, though the lawyers representing parents were also very

54 Juliet Corbin and Anselm Strauss, *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory* (SAGE Publications 2008).

sensitive to the high levels of vulnerability that usually characterised their clients and the difficulties that could arise in protecting their rights.

1.8 Ethics and Anonymity of Participants

The ethical issues raised included the sensitivity of the information under discussion, involving vulnerable children and their families, and the need to maintain the anonymity of the participants in the study. As the interviewees were all professionals, ethical considerations relating to interviewing vulnerable subjects did not arise, but the interviewer did undertake to advise any interviewee upset by revisiting distressing cases to self-refer to their organisation's support service.

All interviewees were invited to participate through an information sheet on the planned research and signed a consent form, published as an appendix to this report. The existing Protocol for reporting on cases while maintaining the anonymity of the parties applied by the Child Care Law Reporting Project (published on the CCLRP website) applied to this phase of the project. In addition, we took all possible precautions to ensure that no information is published that could identify the participants in the research.

While the study did not specifically go through a formal ethics process, it conforms to the type of ethics policy utilised by academic institutions, for example, the School of Social Work and Social Policy in Trinity College, at <http://www.tcd.ie/swsp/research/vulnerable-groups.php>.

Chapter 2: Analysis of Reports of Cases Attended

This chapter examines ten complex cases attended and reported on and identifies those features that have contributed to their length and complexity. Where relevant, these features are compared with those of the generality of cases examined in the Final Report of the Child Care Law Reporting Project.

Of the ten lengthy cases selected for the project, nine have been completed and one is still on-going with four weeks of hearings planned for 2018 (K). Reports on all ten have been published on our website, www.childlawproject.ie, including a number of reports on what has occurred so far in Case K.⁵⁵ Written judgments have been published on the Courts Service website (www.courts.ie) in five of the completed cases, with two written judgments on aspects of one case, and where this has occurred we have combined an examination of the judge's written judgment with our reports on the case in analysing their main features. In three further cases there are unpublished written judgments which have been made available to the CCLRP.

Three cases were heard in Dublin, including two of the shortest cases which, though they took 11 and 14 days respectively, were heard expeditiously in the circumstances of these particular cases. One Dublin case (J) was exceptionally long, for reasons we examine below. The remaining seven cases were heard in rural areas, all but one by a moveable judge.

It will be noted that one very lengthy case involved an allegation of non-accidental injury, and eight involved allegations of child sexual abuse. While together these account for 90 per cent of the long cases we examined, it must be stressed that they are not representative of the generality of cases. According to a study of 600 cases carried out by the Legal Aid Board, only one per cent involves allegations of non-accidental injury, and approximately six per cent involve allegations of child sex abuse.⁵⁶ According to the CCLRP Final Report, all abuse cases (including a small number of physical abuse) accounted for just over seven per cent of the cases attended.⁵⁷ While such cases are therefore rare, they absorb a disproportionate amount of the time and resources of the CFA.

55 Child Care Law Reporting Project, Archive, 2017, Vol 2, Case 2, Nearly two years after case started, court sees video of child describing abuse, <<https://www.childlawproject.ie/publications/nearly-two-years-after-case-started-court-sees-video-of-child-describing-abuse/>>

56 Catherine Ryan of the Legal Aid Board paper delivered at the Annual Legal Aid Board Conference in November 2017.

57 Carol Coulter with Lisa Colfer, Kevin Healy & Meg MacMahon (n 3).

2.1 Summary of Cases

Below are summaries and analyses of the ten cases reported upon by the CCLRP and examined as part of this study.

Case A

In Case A care orders were sought by the HSE, then the body responsible, for two very young children following an allegation of non-accidental injury of a young infant while in the care of her parents. The case resulted in a one-year care order, with the children placed in the care of relatives, and they returned home after the year. The Garda Síochána were made aware of the proceedings and sought to attend at the outset. This was refused by the judge. No prosecution was mounted subsequently.

The case was heard by the sitting judge in a rural town. Unlike most of the parents in child protection proceedings, the parents in this case were highly educated, with considerable financial and other resources (CCLRP 2015, 63)⁵⁸. Until they brought the infant to hospital, where it was discovered she had serious head and other injuries, they had never come to the attention of social services and their parenting of their other child, who had special needs, was seen as exemplary. At the time of the hearing the children were in relative interim foster care. While the children were in the care of the relatives the parents were found by social workers alone with the children, in breach of the agreed access arrangements. This led to an application by the CFA to move the children to non-relative foster care. The court refused the application. This decision was appealed to the Circuit Court, which upheld the District Court decision.

The case was highly contested, taking 17 days over six months with five adjournments, and this followed more than a year of interim care order hearings. The parents obtained separate legal representation in the middle of the case, as the mother abandoned her initial position that she did not consider her husband could have hurt the infant. There were 13 expert witnesses, most of them giving medical evidence, as well as social work witnesses from the CFA and the hospital. The mother also gave evidence. There was substantial input from the guardian *ad litem* (GAL) in the case, whose recommendations, that the children remain in relative foster care and eventually be reunited with their parents under a “Resolutions” model,⁵⁹ significantly influenced the judge’s decision to make a one-

58 *ibid.* The report showed almost 80 per cent of respondents were represented by the Legal Aid Board or had no legal representation.

59 This is a model for dealing with denied child abuse, outlined in Margaret Hiles and Colin Luger, ‘The Resolutions Approach: Working with Denial in Child Protection Cases’ (2006) 25(2) *Journal of Systemic Therapies* 24.

year care order. The judge gave a written judgment⁶⁰ and a report is published on the CCLRP website.⁶¹

The high level of conflict in the case was commented upon by the guardian *ad litem*, a psychologist called on behalf of the mother and the judge. The guardian *ad litem* in the case, who gave evidence at the end, said: “There is a tendency in social work to focus on the negatives and the issues that give rise to concerns, and not look at the positives.”⁶² This deepened the hostility between the parents and the social work department.

A psychologist who gave evidence on behalf of the parents said:

“I think there has been a huge difficulty in the relationship between the social work department and this family. There is a huge issue raised by the breach of trust [in access arrangements]. The social work department has not been keen to work with the family. It feels it’s difficult to move forward without an admission. Since the breach occurred there has been a reluctance to move forward.”⁶³

The judge also commented on the level of conflict in the case:

“The GAL expressed similar views in relation to the deceptions [around access], pointing out the social workers often feel betrayed when they have done a lot of work with a family, and then discover a breach of trust. This can affect the way a case moves forward, and can apply equally to parents in such cases. I refer to this because it illustrates the degree to which the parents’ and the social workers’ relationship has deteriorated, almost to the point where the social workers have difficulty acknowledging any positive aspects of the Respondent’s parenting...”

“The HSE acted properly in bringing these applications, and in their handling and investigation of the case. I find however that they have not done enough to exhaust all other alternatives to a long term Care Order...”

“[The] approach by the parents brought them into conflict with the social workers, and indeed the medical professionals from a very early stage, and undoubtedly has led to the very entrenched positions manifested by both sides throughout all the court appearances. It has to a very significant extent

60 Health Service Executive -v- JG & anor (Care Order - Physical Abuse) [2013] IEDC 16.

61 Child Care Law Reporting Project, Archive, 2013, Vol 4, Case 1, One year Care Order following serious non-accidental injury, <<https://www.childlawproject.ie/publications/one-year-care-order-following-serious-non-accidental-injury/>>

62 *ibid*

63 *ibid*. Motivational psychologist evidence <https://www.childlawproject.ie/publications/one-year-care-order-following-serious-non-accidental-injury/>

curtailed the ability, and the willingness, of the social workers to countenance an alternative to full Care Orders. It is deeply regrettable that this should be the case, as it has greatly prolonged these proceedings, by firstly delaying the holding of the Care Order hearing, and then by occupying the first full week of the hearing itself. It was only when the case came back to court on [date] for the continuation of the hearing that the parents accepted the medical evidence that the injuries were non-accidental.”⁶⁴

The significant features of the case, therefore, were: the serious nature of the injury to the child and the allegation of non-accidental injury; the refusal of the parents to acknowledge the basis for the HSE concerns; the extreme conflict between the parents and the social workers, demonstrated by the ancillary applications to remove the children from their interim relative carers; the large number of expert witnesses; the large number of adjournments; and the introduction of the previously unused “Resolutions” model as an alternative to the long-term care order sought.

Case B

Care orders for four children were sought in Dublin Metropolitan District Court in Case B, following a successful application for a supervision order on the ground of emotional and physical abuse, but the conditions of this order were not met by the parents and the care orders were sought and granted after an 11-day hearing. An appeal to the Circuit Court did not go ahead when the appellant mother failed to attend court.

Initially the case involved allegations of emotional and physical abuse, linked with alcohol abuse, and a care order application was made, but at an early stage the CFA considered it did not have sufficient evidence for a care order, a supervision order was substituted, only to be overtaken later by further care order proceedings. This change in the evaluation of the risk to the children prolonged the case and rendered it more complex.

This was exacerbated by a suspected personality disorder on the part of the mother. This was not formally diagnosed, but all the professionals in the case later interviewed by the CCLRP highlighted her behaviour as central to the problems encountered in the case, which included her reluctance to engage in the proceedings. Two days were lost when she failed to attend the District Court, and the hearing was delayed on other days because she arrived over an hour late, thus prolonging the proceedings. In addition she failed to engage with the social workers who attempted to support the family initially. In all the case took 11 days, with five adjournments over four months, hearing seven witnesses, but if the supervision order hearing was included the case took much longer. The delays were almost entirely caused by the attitude towards the proceedings of the respondent mother.

64 Health Service Executive -v- JG & anor (Care Order - Physical Abuse) [2013] IEDC 16.

The difficulties experienced by all the professionals, including the legal professionals, were reflected in the written judgment delivered by the judge: “The mother appears to have deliberately misled the professionals involved in this case and the court, and the father appears more passive but has also colluded in misleading the professionals and the court.”⁶⁵

The significant features of this case were: the personality and attitude of the mother, demonstrated by her repeated failure to attend court and to engage with the CFA; the number of adjournments that were therefore necessitated; the difficulty in obtaining evidence to support the initial application for a care order; and the resulting changes in the applications made by the CFA.

Case C

In Case C a care order was sought in a rural town for a young child on the grounds of a threat of serious sexual abuse, and included allegations of neglect. The child had been in care under interim care orders granted by the sitting judge, but a moveable judge was called in to hear the full care order application. The order was eventually granted on the grounds of a danger of future abuse, under Section 18(1)(c) of the Child Care Act. No finding was made that the child had been abused.

The case, which took 23 days over four months with one lengthy adjournment, heard nine witnesses, including four experts. Three of these were experts in child sex abuse and risk assessment and one was a paediatrician, all of whom gave very lengthy evidence. The central feature of this case, where the father had been intercepted by police as he was online proposing to abuse his very young daughter, was the contention by the Child and Family Agency (CFA) that the mother, who strongly contested the care order application, was complicit with the father’s behaviour and would be unable to protect her child. The father fled the jurisdiction following the intervention of the police. The CFA view that the mother was involved was supported by the guardian *ad litem*. The case was complicated by allegations of medical neglect, as the child suffered from a number of medical problems.

However, the child was not assessed by a specialist in child sex abuse, there was no conclusive evidence that she had been abused, and none that the mother had participated in any of her husband’s online activity. The child was interviewed by a Garda specialist interviewer, but this did not play a major role in the case. The CFA therefore had to rely heavily on evidence from an expert in risk assessment, and on its social workers’ and the GAL’s interpretation of the mother’s behaviour during access with the child. Their interpretation of the mother’s behaviour, that it sought to remind the child of sexual abuse, was strongly contested by the mother’s legal team, which included both senior and junior counsel.

65 CFA and L, Judgment delivered by Judge Colin Daly 27th March 2015, unpublished.

The difficulty in proving the case was reflected in the lengthy written judgment delivered by the judge in the case, where he said:

“The court is not satisfied that these allegations were proven to the required standard of proof necessary in care order proceedings. Further the court is bound to view evidence in child care cases in the light of the constitutional presumption in favour of the child being with the natural parents.”⁶⁶

He said that while the evidence on both medical neglect and sexual abuse gave grounds for concern, they did not meet the threshold for making an order under sub-sections (a) or (b) of Section 18(1) of the Child Care Act 1991. However, in the course of the case evidence emerged of the mother’s continued contact with the father, which she had denied, so he granted the order on the grounds of a risk of future sexual abuse, provided for in sub-section (c) of Section 18(1).

The specialist risk assessor remarked during this case: “Even quite experienced child protection workers have difficulty in recognising female sex offenders.”⁶⁷

The significant features of this case were: the extremely serious allegation of sexual abuse; the involvement of police from two jurisdictions; the difficulty in proving that such abuse had occurred in the case of a very young child where explicit disclosures had not been made; the fact that the main alleged perpetrator was not the respondent, but his wife, who denied knowledge of the alleged abuse; the number of expert witnesses; a very lengthy adjournment; and the fact that the case was heard outside Dublin and a moveable judge was required to hear it due to the lack of judicial capacity locally.

Case D

Case D involved applications for care orders for seven children on the grounds of exposure to domestic violence and allegations of sexual abuse. The children came from a Traveller background. Care orders for one year were granted, later extended until the children were 18. There was no written judgment. The case was heard by a moveable judge in a rural town, taking 19 days over an 18 month period. There were 12 adjournments. The Garda Síochána was made aware of the allegations and was also investigating, but to date there has been no prosecution.

The case came to light when one of the children alleged sexual abuse by her father. The mother had previously brought one of her children to the local hospital with anal bleeding, and had also contacted the social work department alleging he was being sexually abused by an older child. Her concerns were dismissed on both occasions. It later emerged that he had been very seriously sexually abused by an older child over a prolonged period, and this was the only case attended by the

66 Child and Family Agency and C, judgment delivered by Judge Alan Mitchell 5th March 2015, unpublished
67 Child Care Law Reporting Project, Archive, 2014, Vol 2, Case 4, Care Order sought after father offered on-line to abuse his child, <<https://www.childlawproject.ie/care-order-sought-after-father-offered-on-line-to-abuse-his-child/>>

CCLRP where a paediatrician was able to say there was conclusive physical evidence of sexual abuse.

This case also illustrated the difficulties faced by social services in certain parts of the country when dealing with sex abuse allegations, where no specialist sex abuse assessment services are available. The judge expressed surprise that care orders until the age of 18 were being sought for the seven children of the family without any specialist assessments.⁶⁸ The conclusions on sex abuse of some of the children had been come to by a social worker who had had a short-term placement in a sex abuse unit some years earlier. She was robustly challenged by the lawyer representing the parents. “You have little or no experience of dealing with Travellers and no outside expertise had been sought in relation to this case,” he said.

However, the head of the special unit where the child who showed physical evidence of sexual abuse had been placed, and who exhibited very disturbed behaviour, gave graphic evidence of the extent of the damage done to this child. The care orders were granted on the grounds of domestic violence and likely sexual abuse, from which the parents, who separated during the case, had been unable to protect the children. There was no finding of sexual abuse against the parents.

The significant features of this case were: allegations of sexual abuse which were vociferously denied by the parents apart from the abuse of one child by another outside the immediate family; the involvement of the Garda Síochána; the fact that the family had a Traveller background which became an issue in the case; the lack of availability of a specialist sex abuse unit in the area, and the lack of any assessment of all but one of the children; the fact that the case was heard in a rural area where the local judge was unable to hear it and a moveable judge was called in; and the large number of adjournments.

Case E

Case E concerned applications for Care Orders for eight children on the grounds of neglect. There were suspicions of sexual abuse, but no finding of fact was made on this ground. Care Orders were granted for one year, but when the case came back for review Care Orders until 18 were granted. The case took 45 days over 27 months, with 22 adjournments.

This case was also heard by a moveable judge in a rural town. Both parents were found to be at the bottom end of the cognitive spectrum. In this case the parents initially had a good relationship with the social workers, but were hampered by their

68 Child Care Law Reporting Project, Archive, 2014, Vol 2, Case 1, Care Orders for seven children where sexual abuse alleged, <<https://www.childlawproject.ie/care-orders-for-seven-children-where-sexual-abuse-alleged/>>

cognitive impairments. No assessments of the parents' cognitive ability and no parenting capacity assessment had taken place before the proceedings began. While allegations of physical and sexual abuse were the main issues in the case, the children had suffered severe neglect for a prolonged period prior to coming into care, with only minimal intervention by social services over the previous 13 years. The guardian *ad litem* was critical of the conduct of the case by the CFA, in particular regarding their earlier failure to intervene in the family and the lack of cognitive assessments of the parents.

The social work department concerned was the victim of chronic under-investment, exacerbated by the financial crash of 2008, in both social services and ancillary services, like psychology and sex abuse assessments. There is no specialist child sex abuse unit serving this area of the country and the allegations of sexual abuse, which emerged during the investigation of another case, were not confirmed. These services are the responsibility of a different State agency, the Health Service Executive, and so outside the control of the Child and Family Agency. The CCLRP saw numerous cases whose progress was held up by the inability of the CFA to access the services it needed and to produce relevant assessments in a timely manner, as they were outside its control.

The significant features of this case were: allegations of sexual abuse; the limited cognitive ability of the parents; the lack of parenting capacity assessments; the lack of assessment of the children for sexual abuse; conflict between the GAL in the case and the CFA; the fact that the case was heard by a moveable judge in a rural town due to the lack of judicial capacity locally; and the multiple adjournments.

Case F

Care orders until 18 were sought for five children, ranging in age from a few weeks to six years, in a rural town on the grounds of sexual abuse and neglect. The orders were granted on both grounds, with a strong statement from the judge accepting the allegations of sexual and physical abuse. The Garda Síochána was investigating the allegations, but to date no prosecution has been brought. There was no written judgment in the case. The case was heard over 31 days, lasting for 31 months, with 18 adjournments.

Case F sharply illustrated some of the issues that we have seen arise in cases involving allegations of sex abuse. After a period in care because of concerns about neglect the two older children made disclosures to their foster carer of very serious physical and sexual abuse by their parents and other family members. They repeated the disclosures to social workers and their guardian *ad litem*. At the time of the hearing the children had not been interviewed by Gardaí, though later the Gardaí interviewed the parents. Later, the oldest child retracted the allegations. No specialist unit was available to assess either the initial disclosures or the retraction.

The issue of retraction then became central to the case, and the parents' lawyer claimed this vindicated the parents' denial that the abuse had occurred. The guardian *ad litem* told the court: "What is happening now is that the children are disclosing to foster carers and then being interviewed on the same matters. They would also have to be interviewed by Gardaí. This is a lot of interviewing for very traumatised children." The judge commented on the older boy: "I'd say he's sick to his teeth of people asking him questions. He had to deal with a large number of adults [questioning him]."⁶⁹ No Section 23 (of the Children Act 1997) application was made in this case, to allow the admission of hearsay evidence from the foster-carers via the social workers. This evidence was admitted without a Section 23 ruling.

A forensic clinical psychologist specialising in child sex abuse came from the UK to examine the children's disclosures and give evidence, including on the retraction. He concluded that their descriptions of what had occurred and the sensory detail involved made the disclosures highly credible. "These are such complex allegations I don't see how you could get a child to make them."⁷⁰ The judge concluded the children had been abused and made full care orders until the children reached adulthood.

This case was also dogged by evidential difficulties. During the case one of the CFA's principal witnesses became ill, could not continue giving evidence and was not available for cross-examination. Some of this was due to stress, which is discussed in Chapter 4 below. Issues arose concerning records, where it emerged that after notes were transferred to the CFA electronic system the original notes were shredded, an occurrence which is described in the CCLRP report and was criticised by the judge. The case was also marked by a number of disputes between the CFA social workers and the children's guardian *ad litem* as to the kind of care the children required.

The significant features of this case were: the serious nature of the allegations of sexual abuse; the involvement of the Garda Síochána; the absence of a specialist child sex abuse unit in this area that could assess the children; serious differences between the children's guardian *ad litem* and the CFA social workers about the best approach to the children's welfare, requiring frequent recourse to the court to resolve the differences; evidential difficulties around social work notes and the illness of one social worker witness; the involvement of a forensic child psychologist from outside the jurisdiction; the fact that the case was heard by a moveable judge due to the lack of judicial capacity locally; and the frequent and multiple adjournments.

69 Child Care Law Reporting Project, Archive, 2014, Vol 3, Case 4, Care Orders for five very young children following abuse allegations, <<https://www.childlawproject.ie/publications/case-histories-2014-volume-3/care-orders-for-five-very-young-children-following-abuse-allegations/>>

70 *ibid*

Case G

Case G was a care order application in Dublin Metropolitan District Court for a young girl who came into care on an interim care order on the grounds of neglect, but while in care she made disclosures of very serious sexual abuse by a number of males, which formed a major ground for the application. The Garda Síochána also investigated, interviewing the child a number of times, but the Director of Public Prosecutions did not proceed with a prosecution. The care order was granted. The case took 14 days over seven months, with three adjournments. There was a written judgment in the case.

While Case G took 14 days, this was due mainly to the extensive nature of the evidence rather than to it being challenged during the proceedings. The case was concluded expeditiously given the gravity of the allegations, which were made against seven men and boys with the collusion of the mother.

At the outset an application was made under Section 23 of the Children Act 1997 to admit hearsay evidence. The application took three days and was granted. It included evidence from the child's foster carer and the Garda who had conducted a series of interviews with the girl with a view to mounting a criminal prosecution against the perpetrators of the sexual abuse. DVDs of the interviews with the child were admitted and played in court. In this case there had been an attempted credibility assessment by a specialist child sex abuse unit, but this was inconclusive, due to lack of coordination between the police interviews and those undertaken by the unit, which began an assessment and abandoned it when the police became involved. It was resumed after the police interviews, but was inconclusive.

The judge was highly critical of the specialist child sex abuse unit:

“I find as a fact in this case that the assessment by the Assessment Clinic did not constitute an assessment of credibility that this court could attach any weight to. The assessment was carried out by social workers, albeit having expertise in the field of child abuse assessment, but there was no demonstration of any analytical forensic tools in assessing the credibility of the child and in essence, I find on the facts of this case that the purported credibility assessment of the Assessment Clinic is not one on which the Court can place any reliance. It is noteworthy that the practice guidelines produced to this court by the Assessment Clinic as the guidelines to their practice referred to the assessment service being offered at paragraph 2.3 of those guidelines in the following terms: ‘An independent opinion regarding possible child sexual abuse and based on a psycho/social and paediatric evaluation where there are grounded concerns.’ I find as a fact in this case that there was no psychological input in the assessment process by the Assessment Clinic, contrary to the practice guidelines which were presented to me which seemed to indicate that there would be such.

“There is no evidence before this Court on this particular case that there was a comprehensive coordinated response and a joint agency approach by [the unit] with An Garda Síochána.”⁷¹

As the specialist unit’s credibility assessment was inconclusive, a UK-based forensic psychologist examined all the DVDs and gave evidence on credibility. He found the child’s account of the abuse was highly credible, but was very critical of the Garda interviews, finding that the child had been over-interviewed, which was “particularly concerning and almost abusive.”⁷² When told that the Director of Public Prosecutions had directed there not be a prosecution of the child’s abusers due to the quality of the evidence, he said: “That doesn’t surprise me at all.”⁷³ This case is referred to in the report of the Garda Inspectorate, *Responding to Child Sexual Abuse*, (2017, 158)⁷⁴ as an illustration of problems with the quality and monitoring of interview standards by Garda specialist interviewers.

Significant features of the case were: the extremely serious nature of the sex abuse allegations; the fact that the child made the disclosures herself, there was no evidential reliance on interpreting her behaviour; the involvement of the Garda Síochána; the fact that she was interviewed by the Garda Síochána and a specialist child sex abuse unit and the criticisms of aspects of the interviewing; the involvement of an expert child forensic psychologist from outside the jurisdiction; and the criticisms levelled at the specialist unit by both the expert and the judge.

Case H

Case H involved applications in a rural town before a moveable judge for care orders for five children, one of whom was born during the proceedings. The oldest child was five when the proceedings began. At the end of the case the judge delivered an oral ruling, in which he said the case raised “serious questions as to whether the District Court has systems in place for serious child care cases.”⁷⁵ There was no written judgment. It was then appealed to the Circuit Court. There was a written judgment from the Circuit Court which has not been published but has been made available to the CCLRP. The orders were granted by the District Court and were upheld by the Circuit Court.

The case began with allegations of neglect, but allegations of sexual abuse emerged after the children had spent some time in care. This was the longest case

71 Child and Family Agency -v- VR [2016] IEDC 16.

72 Child Care Law Reporting Project, Archive, 2017, Vol 1, Case 2, Full care order for sexually abused child after 14 day hearing, <<https://www.childlawproject.ie/publications/full-care-order-for-sexually-abused-child-after-14-day-hearing-3/>>

73 ibid

74 Garda Inspectorate, ‘Responding to Child Sexual Abuse: A Follow up Review from the Garda Inspectorate’ (2017).

75 Child Care Law Reporting Project, Archive, 2016, Vol 2, Case 6, Judge asks whether District Court systems can deal with long complex cases, following 68 days of hearings, <<https://www.childlawproject.ie/publications/judge-asks-whether-district-court-systems-can-deal-with-long-complex-cases-following-68-days-of-hearings/>>

attended by the CCLRP, lasting 67 days in the District Court,⁷⁶ and 47 days in the Circuit Court.⁷⁷ This case was also characterised by many delays at the interim care order stage before the local sitting judge, as well as the lengthy hearing of the care order by a moveable judge. It included a threatened judicial review by the CFA of a decision by the District Court on the discovery of documents, which was later withdrawn and the documents released.

The appeal heard 23 witnesses on behalf of the Child and Family Agency, as well as evidence from a guardian *ad litem* (GAL) and from the parents. The parents also called an independent forensic psychologist from another jurisdiction. An initial application was made on behalf of the parents to exclude certain hearsay evidence from social workers and foster carers concerning statements made by the children. Under Section 23 of the Children Act 1997 hearsay evidence from children, depending on all the circumstance of the case, can be admitted, and it was admitted by the court.

Several months after concerns about sexual abuse were raised the older children were interviewed by a specialist sex abuse unit, though the case fell outside its catchment area. The court ruled that the DVDs of interviews with the children could be admitted, along with evidence from people to whom they had made statements, including foster carers. The Circuit Court refused an application from the CFA to admit statements made to a foster carer who was unable to attend court.

The court heard detailed evidence of prolonged and serious neglect of the children. This included their living in a succession of very dirty and chaotic houses, which were extremely cold in winter, not being toilet-trained and suffering from neuropsychological delay which was attributed by an expert to neglect. The four older children also exhibited disturbed behaviour, and three of them had intellectual disabilities. The court heard evidence of highly sexualised behaviour on behalf of three of the children, all of whom also made statements suggesting that their father had sexually abused them in the company of their mother. The allegations were strenuously denied by the parents and the evidence was robustly challenged by lawyers on behalf of the parents.

While the evidence of neglect was extensive, and largely uncontested, most of the time in this extremely lengthy case was taken up with the allegations of sexual abuse, strongly contested by the parents, where the CFA sought and obtained findings of fact that the children had been sexually abused by at least one, and possibly both, of their parents.

76 *ibid.*

77 Child Care Law Reporting Project, Archive, 2017, Vol 1, Case 1, Circuit Court refuses appeal of District Court Care Orders for five children, <<https://www.childlawproject.ie/publications/circuit-court-refuses-appeal-of-district-court-care-orders-for-five-children/>>

The significant features of this case were: the exceptional length of the hearing, even by the standards of the lengthy cases surveyed; the seriousness of the allegations of sexual abuse by both parents of very young children; delays in the assessment of these allegations; the seriousness of the concerns about the behaviour of the children; the hearing of an application to admit hearsay evidence under Section 23 of the Children Act 1997; the large number of witnesses, including seven expert witnesses; the number of procedural disputes about the disclosure of documents; the requirement that the case be heard by a moveable judge in a rural town due to the lack of judicial capacity; the large number of adjournments, particularly during the District Court hearing; and the fact that the District judge questioned the suitability of the District Court to hear such cases.

Case J

This case involved Care Order applications heard in Dublin District Court for two young children but was complicated by earlier proceedings involving the children's older siblings, who came into care following allegations of sexual abuse against a relative. The children were in care on consent arising out of CFA concerns about severe neglect, alcohol and substance abuse and domestic violence. All four children exhibited sexualised behaviour.

As the parents had tackled their substance abuse issues, the CFA was considering reunification from early in the proceedings, and this was reflected in successive CFA applications for adjournments and an eventual attempt to withdraw the applications.

The older two children returned home when the three-year consented care order expired late in 2016, and the court heard that the parents were dealing with alcohol and substance abuse issues. Reports on the interim care order applications and the beginning of the care order applications are published as Case Reports 1 in both Volume 1 and Volume 2 of the 2016 reports on the CCLRP website.

The two younger children were returned home under supervision orders in November 2013, but went into care under interim care orders in February 2014 following sex abuse allegations made against the parents by the older siblings while they were in care. One of them subsequently withdrew his allegation, but there was no full investigation of the retraction and there has been no finding of fact relating to it. Nor has there been a finding of fact by the court in relation to the original allegation against the parents by the children. It was ten months before the older children were seen by a specialist unit, 18 months before one of them was interviewed by Gardaí and 22 months before the second child was interviewed. This case was also marked by a succession of legal disputes about the admissibility of evidence obtained by Gardaí.

During the hearing the Director of Public Prosecutions (DPP) secured an order restricting the reporting by the media of any information that could prejudice an ongoing criminal case involving allegations against the adult relative accused of abusing the older children. Several applications were made under section 23 (of the Children Act 1997) in relation to whether or not hearsay evidence from the child subject to the orders and also children residing in the foster home would be admissible, or if a child would be required to give evidence directly to the Court. The judge ruled in each instance that it was not in the best interests of the child to be required to give evidence in the proceedings, acknowledging that the case was “significantly based on hearsay”.

The proceedings primarily concerned two applications under section 47 and an application for a care order under section 18 of the Child Care Act 1991. None of these three applications ran to their conclusion so no judicial determination was made on them, the CFA withdrew the care order application and the children returned home.

The full care order hearing for the younger children began in February 2016. It involved 52 days of evidence over 33 months with multiple adjournments, sought by the CFA. The CFA then sought to withdraw the application and, when the judge ruled he could not maintain the proceedings if the CFA withdrew its application, the foster parents, supported by the GAL, sought the intervention of the High Court in the summer of 2016 on the basis that a plan for the safety of the children had not been established. The High Court agreed and referred the case back to the District Court to consider evidence of a risk assessment and safety plan.

The proceedings involved hearing in full or in part from six witnesses, including the longest cross examination of a witness (a foster carer) that the judge had ever seen in a child care case. The CFA social workers worked with the family under the newly-introduced “Signs of Safety” model in a process running parallel to the judicial proceedings.⁷⁸ The CFA told the court that initially the parents were reluctant to engage with this process, and hence the care order proceedings continued.

In July 2017 during the Care Order hearing, the CFA sought and secured an adjournment to the proceedings until October 2017 to facilitate the reunification of the children with their parents. The case ended in October 2017 with the children going home under the CFA’s “Signs of Safety” programme. To date there is no final written judgment in this case, but there have been a number of interim rulings. A four-day costs hearing has been set down for April 2018. The proceedings from

78 This is a system for engaging parents and a supportive circle in protecting children from harm, based on the parents acknowledging the legitimacy of the agency’s concerns, outlined in Dr Andrew Turnell and Terry Murphy, *Signs of Safety: Comprehensive Briefing Paper* (4th edition, Resolutions Consultancy 2017).

the end of 2016 up to October 2017 are currently outlined in Case Report 1 in Volume 2 of 2017 on the CCLRP website.⁷⁹

Throughout this case there appeared to be a lack of clarity on the part of the CFA as to its objectives in the case. There was no finding of fact against the parents on either the ground of neglect or sexual abuse. The parental difficulties that led to the children entering care on the grounds of neglect had been resolved to the satisfaction of the CFA by October 2013. After that the only grounds for the care order applications were alleged sexual abuse by the parents but this remained uninvestigated and unconfirmed. When the “Signs of Safety” model was initially mooted the parents in this case were reluctant to engage with it as they resisted accepting that the children had been sexually abused.

This was the first case observed by the CCLRP where the “Signs of Safety” model was used. The two processes are very different and potentially contradictory. The “Signs of Safety” model is non-blaming and future-focused, though all parties have to accept that the children have been abused before they can move on to address possible risk and the reunification of the family. Judicial child protection proceedings, although technically an inquiry, are focused on past facts and what past behaviour tells us about likely future behaviour, and usually require findings of fact in relation to past behaviour, which contains an element of blame absent from the “Signs of Safety” process.

The significant features of this case were: apparent confusion on the part of the CFA as to the level of risk faced by the children; the involvement of the Garda Síochána in relation to the allegations of the older siblings; multiple applications under Section 23 of the Children Act 1997 to admit hearsay evidence including DVDs of the Garda interviews with the older children; the lack of investigation of the allegations made by the older children against the parents, and the lack of assessment of the retraction of these allegations; the involvement of a number of expert witnesses; disputes between the parties about the disclosure of documents; serious differences between the guardian *ad litem* and the CFA about the best course to follow for the children; the involvement of the children’s foster parents in the proceedings; and the introduction of the “Signs of Safety” model of intervention at a late stage in the case.

Case K

Case K is still going on, with four weeks’ hearings planned for 2018. It concerns care order applications for four children in a rural town, and is being heard by a moveable judge. The care order applications began in January 2016, when the

79 Child Care Law Reporting Project, Archive, 2017, Vol 2, Case 1, After hearings over 15 months CFA withdraws Care Order proceedings for a second time, children return home under Signs of Safety model, <<https://www.childlawproject.ie/publications/after-hearings-over-15-months-cfa-withdraws-care-order-proceedings-for-a-second-time-children-return-home-under-signs-of-safety-model/>>

children had already been in care for two years, initially in voluntary care and then under interim care orders. So far it has taken 42 days over two years, and four weeks have been set aside for 2018. A report on it appeared on the CCLRP website as Case Report 8 in Volume 1 of 2017.

The four children came into care when the youngest, an infant, was taken to hospital following a fall which resulted in a head injury. This was later shown not to be serious. While in care the behaviour of the children gave rise to concerns about neglect, and the CFA applied for care orders for the four children, two of whom were the children of the mother's current partner, while the older two were the children of a former husband who had been convicted of sexually abusing an older step-daughter, now an adult.

Two years after the children came into care, and shortly after the care orders were sought, one of the children disclosed that he had been sexually abused by his step-father, the mother's partner. The mother immediately separated from the step-father, and the parents were subsequently separately represented.

The Care Order hearing began in January 2016 and was adjourned in order for the children to receive psychological assessments. During the adjournment the disclosure was made, and the focus of the case moved to the child who alleged the abuse. There were further adjournments while the Gardaí began an investigation. A number of short hearings took place to deal with specific procedural issues, and the full hearing resumed in October 2017 and again in November. The case will continue in 2018.

One of the features of this case has been continued procedural disputes between lawyers for the CFA and for the respondent mother, focusing particularly on the disclosure of reports and other documents. The mother resorted to Freedom of Information requests to obtain historical records of her contacts with social services in the area in which she previously lived. Reports from this area took up the first week of the care order hearing, though these contacts had not resulted in any court application being made in that area and the file was closed. Further delays were caused in this case by the fact that no decision had been made by the Gardaí concerning the prosecution of the alleged perpetrator of the sexual abuse, and over a year elapsed between the allegation and an interview with him.

Significant features of this case were: the emergence of serious allegations of sexual abuse after the reception of the children into care and the resultant change in the focus of the case; the involvement of the Garda Síochána in the case following these allegations; the involvement of the CFA (previously the HSE) from two areas of the country with the family, resulting in evidence being called from both parts of the country; prolonged delays in psychological assessments of the children, which were required by the court; extensive procedural disputes around

the admissibility of evidence; the necessity for a moveable judge due to the lack of judicial capacity in the area; and numerous adjournments.

2.2 Common Features of Prolonged Cases

The longest care order hearing took four years (case J), the shortest was four months. In all of them there was at least one adjournment and sometimes many more. All of them had been preceded by repeated renewals of interim care orders, so the child or children were already in care, often for a considerable time. All except one involved an allegation of serious abuse, mainly sexual abuse and one of non-accidental injury, both of which are criminal offences. In three of the cases a separate Section 23 application (seeking to admit hearsay evidence) formed part of the proceedings, and issues relating to Section 23 were discussed in four others. The average number of days taken by the ten cases (with Case K still going on) is 31 and the average length of time from the beginning to the end of the full care order hearing, including adjournments, is 17 months, with very wide variation between cases.

This does not include the time taken by interim care order hearings and the renewal of interim care orders, which typically take about two years. This means that the children are usually in care for at least three years by the time the care order proceedings have concluded, which in itself makes reunification of the family very unlikely.

In all but one of the cases both parents were respondents, though in one of them the father fled the country following his arrest for the online threat to abuse his child, and played no part in the proceedings. All the couples except three were married, and three were cohabiting at the time the proceedings began. In this they differ from the usual profile of respondents in child protection cases, where the majority are mothers parenting alone.⁸⁰ All the cases were strongly contested by the parents, and in some of them the parents were separately represented.

2.2.1 Allegations of Serious Harm

With one exception, all the lengthy cases involved very serious allegations of harm to children, with the possibility of a pending criminal prosecution. One of these included the allegation that a very young child was about to be abused online by her father; another involved allegations that the child's mother had colluded in her daughter's rape and sexual abuse by at least seven men. Three cases involved allegations of inter-familial sexual and physical abuse. Three involved allegations of sexual abuse by the children's parents or step-parent and possibly others. The issue of criminal prosecutions arose in all nine cases, though to date these have

80 Carol Coulter with Lisa Colfer, Kevin Healy & Meg MacMahon (n 3) 63.

not been pursued. The tenth case involved allegations of physical and emotional abuse.

It appears, therefore, that a serious allegation of abuse, bearing a heavy social stigma and carrying the possibility of a criminal prosecution, makes it highly likely that a case will be strongly contested and will be complex. Proving such serious allegations is also likely to require evidence from medical and psychological experts, while evidence of neglect is likely to be accepted from social workers by the court. These cases all featured at least one, and sometimes a large number of, expert witnesses.

In three of the cases the grounds of the application changed during the proceedings, where the families initially came to the attention of the CFA due to concerns about neglect. After a period in interim care the children's behaviour gave rise to concerns about sexual abuse, followed by disclosures of sexual abuse to foster carers. This led to a shift in emphasis in the case, with most attention focused on the sex abuse allegations, which was very strongly contested in one case.

The issue also arose of seeking direct evidence from foster carers, which was resisted by the CFA, as it is CFA policy not to call foster carers to give evidence. However, in three of the cases (G, H and J) the court heard extensive evidence from foster carers, and in the Circuit Court the judge explicitly refused to hear indirect evidence of a child's allegations when a foster carer was unavailable to give evidence.

2.2.2 Garda Involvement

Where it is alleged that a crime has been committed against a child the Garda Síochána are, or should be, involved. This raises many issues about their investigation of the allegation. In two of the cases above (A and D) the parents had not yet been interviewed by Gardaí and members of the Garda Síochána sought to attend the child care proceedings, but this was refused by the judge. Neither in these cases, nor in E, F or H was there any evidence brought that the Gardaí had interviewed any of the children. In G the manner in which the child was interviewed by a specialist Garda interviewer was heavily criticised by an expert from another jurisdiction.

In G and J also there were separate applications to admit evidence obtained by the Gardaí in their investigation. In K there were a number of adjournments while awaiting a decision from the Gardaí on their next step, though the child was interviewed by a specialist interviewer. In none of these cases was there a joint interview between members of the Garda Síochána and social workers, and in four of them there was no specialist interview of the children at all, either by Gardaí or a specialist unit.

The reasons for this are outlined very comprehensively in the recent report from the Garda Inspectorate, *Responding to Child Sexual Abuse*,⁸¹ which was critical of both the Garda Síochána and the CFA for the lack of progress in training adequate numbers of Gardaí and social workers in interviewing child victims of sexual abuse, for the lack of joint interviewing and general collaboration, including on the sharing of information, and for different approaches to dealing with child sexual abuse in different parts of the country. This has left certain areas with no specialist interviewers from either organisation, no protocol for the sharing of information, leading to disputes in court about access to Garda evidence, and no coordination of their investigations, leading to delays as the Gardaí seek adjournments pending progress in their investigation.

2.2.3 Legal Representation

Where there were allegations of serious harm to children, expert witnesses were usually involved, as well as several witnesses from the CFA relating to the various encounters between the family and the agency. The number of witnesses obviously had an impact on the length of time the cases took as did the number of parties legally represented. In most of the complex cases the CFA has counsel as well as a solicitor, as does the guardian *ad litem*. Sometimes the respondents do also. In some of the cases, where an allegation is made against one parent but not the other, the parents are represented separately. In one case two fathers were involved and legally represented, though only one father's lawyer actively participated in the case.

All this means that each witness will give their evidence to the lawyer for the CFA (or the respondents, if they have been called by them) and will then face cross-examination by up to four other lawyers. In addition the judge may ask questions. This greatly prolongs the time witnesses spend in the witness box, which often runs to several days.

2.2.4 Guardians *ad litem*

Guardians *ad litem* were appointed by the court in all the cases and they were granted legal representation without controversy. Their role varied: in some cases they supported the application of the CFA and supplemented the CFA case with additional evidence; in others (notably Case A) they did not support the care order application until 18, and put forward an alternative proposal; in others they supported the application but differed with the CFA in its approach to the case and the provisions being made for the children. In all but two cases the children were of primary school age or younger. In three cases the judge spoke to the children in his chambers about their views.

When the difference between the CFA and the GAL concerns the order being sought, it is appropriate that the court should decide, based on all the evidence.

81 Garda Inspectorate (n 74).

However, when a GAL differs with the CFA about the treatment of the children in care and the appropriateness of the care they receive, it would assist the progress of the case if attempts were made to resolve these differences outside of the court arena.

2.2.5 Witnesses

All the cases involved at least one expert witness, and most of them heard from many more. In none of the cases did the expert witnesses confer in advance of the case in order to reduce the oral evidence to what was agreed and what was in dispute. The cases also usually heard from more than one social worker witness or other witness (for example, access worker) for the CFA, whose evidence was often very repetitive. It is questionable whether detailed descriptions of numerous access meetings, for example, with slight variations on the theme that the parent's responsiveness to the child falls short of what is expected, adds significantly to evidence as to whether the threshold for a care order has been reached.

2.2.6 Problems with Assessments

Problems with assessments and therapy frequently contributed to delays in the proceedings. Many assessments (for sexual abuse, psychological assessments of both parents and children) are outside the control of the CFA and often cannot be accessed in a timely manner. In some cases (for example, D, E and F) the children cannot be, or were not, assessed at all due to the geographical location of the family. Delays in obtaining assessments prolonged the proceedings, and also, where the assessments were not taking place when required by the court, led to disputes between the CFA and the GAL or the respondents about the welfare of the child, in addition to the contesting of the application itself.

As two of the cases above demonstrate, the quality of the assessments themselves was sometimes in question and was criticised by judges and by experts from another jurisdiction. The lack of a coherent national approach to allegations of child sexual abuse contributed to confusion in the courts about dealing with such allegations.

Some parts of the country have limited or no access to specialist sex abuse units, which meant either that assessments of the allegation were made by social workers with limited training, or made long after the child had exhibited concerning behaviour or made a disclosure. Even in the cases where children were assessed by such a specialist unit, the quality of the assessment has sometimes been called into question by experts from other jurisdictions.

2.2.7 Lack of Judicial Resources

Seven of the ten cases took place outside of Dublin and none of them took place in one of our larger provincial cities. This raises huge organisational problems for the District Courts, as District Court judges in rural areas rarely have the time to

devote to complex cases and they request a judge to come in from the pool of unallocated judges in order to hear such cases. The exception was Case A, which was heard by the sitting judge, but he stated at the end of the case that, due to the demands of the other work of the court, he would never be able to hear such a long case again.

Despite the fact that the majority of these cases were heard in rural towns, there is no evidence to suggest that child sex abuse is more common in rural areas. An examination of the data collected by the CCLRP on 23 sex abuse cases, but not published, revealed that 13 were heard in Dublin or another city and 10 in one of the smaller towns. Thus it appears that where cases involving sex abuse allegations are heard in a big population centre, where there are more judicial resources and the court has weekly dedicated child care days before the same judge, such cases can be dealt with more expeditiously.

The unallocated judges have a roving brief, and their schedule can be complicated, so if a case does not finish within the allotted days it can be very difficult to arrange its resumption, giving rise to lengthy adjournments. Case A was adjourned five times, Cases D and E twice for lengthy periods, Case F 10 times and case K five times so far. The fact that different judges may attend the same District to hear child protection cases, with different emphases on different aspects of the law, makes it more difficult for the CFA and their lawyers to prepare the case. A case prepared for one judge at interim care order stage, whose evidential and other requirements are well understood by the CFA, may not meet the requirements of another judge.

2.2.8 Hearsay Evidence

Different judges have different approaches to certain evidential issues, for example, hearsay evidence. Section 23 of the Children Act 1997 deals with hearsay evidence from children. Some courts accept the admission of such evidence with little discussion. Others insist on a full hearing of a separate application to admit hearsay evidence, including DVDs of interviews with the children, based on the provision in the Act that the court have regard “to all the circumstances of the case”. Sometimes this is opposed by members of the Garda Síochána on the grounds that their investigation has not concluded. Some courts insist that the welfare of the child takes priority over the public interest in prosecuting crime (which in any case might never happen); others delay the proceedings until the Gardaí are prepared to release the interviews. Given the nature of the District Court, there is no uniform approach to the interpretation of Section 23 (and Section 24, concerning the weight to be given to hearsay evidence from children) and the issue is constantly re-litigated.

2.2.9 Procedural Matters

In addition, we have seen disputes about other procedural matters (which we generally do not report in detail) take up a significant amount of time. Typically respondents' lawyers complain that reports have not been delivered in a timely manner, or at all, and apply for Discovery. That is sometimes resisted by the Child and Family Agency, including by way of threatened judicial review of a discovery order. In Case K, for example, the respondent herself resorted to Freedom of Information requests in order to obtain some historical reports on previous contact between the CFA and her family. Where relations between the CFA and the respondents have become very strained, disputes arise between legal representatives about certain lines of questioning, or the relevance of certain evidence, or the order in which witnesses should be called. These disputes can cause major delays, though they may not affect the ultimate outcome of the case.

From the ten cases examined, therefore, we see that a number of elements contribute to cases becoming more complex and prolonged, some of which overlap:

- the seriousness of the allegation, especially sex abuse allegations;
- the possibility of a criminal prosecution and involvement of the Garda Síochána;
- the issue of hearsay evidence; the number of witnesses, especially expert witnesses;
- the number of parties represented; relations between parents and social workers;
- difficulty with assessments and availability of appropriate assessments;
- the use of non-allocated judges;
- frequent adjournments; and
- procedural disputes.

These elements provided the framework within which the interviews with key professionals were conducted, allowing the interviewer to compare and contrast such cases with the generality of cases in which the professionals were involved.

Table 1: Main Features of Complex and Lengthy Cases

	Case A	Case B	Case C	Case D	Case E	Case F	Case G	Case H	Case J†	Case K†
Application	Care Orders until 18 for 2 very young children	Care Orders for 4 children	Care Order until 18 for 1 child	Care orders until 18 for 7 children	Care Orders till 18 for 8 children	Care Orders until 18 for 5 children	Care Order until 18 for 1 girl	Care Orders for 5 children	Care Orders for 2 children	Care Orders for 4 children
Main grounds	Non-accidental injury of infant	Emotional and physical abuse, domestic violence	Grave danger of serious sexual abuse	Alleged sexual abuse; domestic violence	Alleged physical, sexual abuse; neglect	Physical and sexual abuse; neglect	Physical and sexual abuse; neglect	Neglect, sexual abuse	Neglect, sexual abuse	Neglect, sexual abuse
Location	Rural town	Dublin	Rural town	Rural town	Rural town	Rural town	Dublin	Rural town	Dublin	Rural town
Respondents	Married parents	Married parents	Married parents*	Married parents	Married parents	Cohabiting	Mother	Cohabiting parents	Cohabiting parents	Married parents
CO hearing (months)	6	4	4	18	27	31	7	7 D.Ct. 3 C.Ct.	33	26 to date
Days' hearing	17	11	23	19	45	31	14	67 D.Ct. 47 C.Ct.	52	51
Adjournments	5	5	1	22	22	18	3	10 in D.Ct. 2 in C.Ct.	Multiple, total unknown	Multiple, total unknown
Section 23 application	No	No	No	No	No	No	Yes	Yes	Yes	No
Outcome	CO refused; 1-year CO granted (Resolutions)	COs until 18 granted	CO until 18 granted	COs until 18 (3), CO 1 year (4) , later to 18	COs until 18 granted	CO until 18 granted	CO until 18 granted	Granted, upheld on appeal	Application withdrawn by CFA	Further 4 weeks in 2018
Number of witnesses	18	7	9	8	6	8	10	23 (CFA) 1 (parents)	Unknown	Unknown
Expert witnesses	13	1	4	2	0	3	2	7	Unknown	1 (so far)
Lawyers	9	5	6	7	6	6	6	6	10	10‡
Written judgment	Yes	Yes	Yes	No	No	No	Yes	Yes (C.Ct.)	Awaited	Not over

Father not present; + Some details unavailable as case not complete; ++ Including separate representation for mother

Chapter 3: Reporters' Observations

Since its inception in 2012 the Child Care Law Reporting Project has engaged six part-time reporters to assist the director in attending and reporting child protection cases in the District and High Court. Four are barristers and two have a background in children's rights and the voice of the child. Initially three were engaged and when, after three years, two of these left to do other work they were replaced by two more. In February 2016 a researcher was granted a Hardiman scholarship (later an Irish Research Council scholarship) in NUIG to carry out research linked to the CCLRP, and she was also approved by the Minister for Children to work as a reporter with the CCLRP.

Between them the six reporters and the CCLRP Director (the current author) have attended hundreds of child protection cases (data was collected from over 1,200 and 360 have been written up as reports). Some of these cases were lengthy and complex, and all seven have had experience of such cases, in some instances spending several weeks in a single case. It was decided, therefore, to include their experience and insights in this analysis.

As the methods section has outlined, it was decided to interview the six reporters for this phase of the study. The method adopted was to have a joint interview, conducted by the author, on their experience of, and reflections on, both the lengthy and complex cases and their more general experiences of having attended a wide range of cases. The joint interview took place over two and a half hours on May 26th 2017. Four of the seven are practising barristers and two have legal qualifications, so there was a pronounced legal emphasis in the discussion. While the interview was carried out jointly, the observations of each individual was noted and examined separately.

One interesting aspect of the reporter interviews is that two barrister-reporters have gone on to work in the child protection area and now have experience of acting for clients, usually parents. They brought this experience, as well as their reporting experience, to bear on their comments.

3.1 Preparation of Case and Presentation of Reports

One reporter pointed out that child protection proceedings are inherently unbalanced, compared with other civil proceedings in that usually the only documents in the case are the social work reports, presented by social work witnesses on behalf of the Child and Family Agency. Such reports tend to list the negative aspects of the parents, who then attempt to challenge the points made. It is extremely rare that the respondent parents submit their own written response.

“It’s the only case in civil litigation where you have written evidence or pleadings before the court for one side only, so it’s especially important there is a balance.” Reporter 2

Further, all the reporters felt that social work reports were often unbalanced, listing the negative aspects of the respondents’ parenting, rather than listing both the strengths and weaknesses and justifying the application on the basis of measuring the balance between them. One case was instanced where the respondents’ lawyer referred to best practice guidance by Helen Buckley *et al* (2006)⁸², which states that “every person has strengths and weaknesses” which can be built on, and which is circulated within the CFA, but the social worker witness responded that this was only guidance, not mandatory. Countering every negative statement in an overwhelmingly negative report can prolong the proceedings and may exacerbate a poor relationship between parents and social workers without altering the outcome of the case.

This can be combined with the presentation of evidence that is not directly relevant to the order being sought. The interviewees reported seeing many social work reports as unfocused, rather than setting out evidence supporting the basis for making a care order as outlined in Section 18 of the Child Care Act.

“Social workers are just listing random occasions of anything small that wouldn’t itself be of any significance, as opposed to beginning with ‘this is what we’re trying to prove, this is the threshold, this is our issue with the family, and these are the combination of instances put together that create that.’” Reporter 6

The late production of reports was also identified as a factor in delay, and a cause of friction between lawyers for the CFA and for respondents. While a Practice Direction exists in Dublin Metropolitan District Court detailing time-lines for the delivery of reports, it is not always adhered to. In addition, discovery of additional material can be sought at a very late stage in the proceedings after a series of interim care order hearings. All this can result in large amounts of information being produced on the eve of the hearing.

“[One extremely lengthy case] was scheduled for a 10-day hearing and on the first day [the lawyers] came in and they had got a huge information dump the night before, so they didn’t have time to process it, so the case effectively got adjourned again. It really had a major impact on the children ...” Reporter 6

82 Helen Buckley and others, ‘Framework for the Assessment of Vulnerable Children and their Families: Assessment Tool and Practice Guidance’ (n 44).

“In [Case J] it came up that their database system wasn’t efficient, didn’t show what they needed to hand over and some documents only came out as they emerged, no-one even knew that they existed.” Reporter 5

Adjournments in such circumstances are very difficult to avoid, as another interviewee pointed out:

“[When] reports have been issued the previous night the judge is in a very difficult position because he or she cannot refuse the adjournment, because if they do there’s a judicial review looming. It can only be addressed really by way of a Practice Direction.” Reporter 1

In some cases the issue is not so much delay in providing reports, but disputes about what documents should be handed over to the respondents. These procedural disputes are very time-consuming, but are not universal. Interviewees pointed out that in some parts of the country CFA documents are handed over to the legal representatives of the parents as a matter of course. It is obvious that the more issues that are contested, the longer a case will go on and the worse relations between social workers and the parents will become.

When an adjournment takes place it is only of the application under Section 18 of the Act (full care order). Each hearing normally also involves a renewal of the interim care order, which has preceded the care order application, so the adjournment in practice means that the child remains in care. This means that the CFA does not have an incentive, in terms of the outcome of the case, to hasten the production of reports. Yet their late arrival has a major impact on the respondents and potentially children.

“You go in and you have taken really, really brief instructions, somebody with cultural differences or cognitive problems or mental health problems and that adds to the difficulty of the consultation process because you have to go extra slowly. You just simply don’t have enough time to get their version of events.

“Things should be slowed down, the only chance these people get is to counteract each and every allegation. If the whole point is that somebody has low cognitive functioning then they’re not going to be as fast as other people at responding ... I think more time needs to be given in such cases.” Reporter 2

3.2 Parental Problems

Cognitive disability on the part of the parents was identified by all the reporters as a recurring issue, raising questions about the training of social workers to identify

levels of cognitive disability and tailor supports accordingly. They acknowledged that in some cases it would be difficult to provide enough support to parents to protect the children, but stressed the importance of conducting the proceedings in a way that preserved good relations between the parents and CFA staff, in order to help maintain an ongoing relationship between the parents and children.

Reporters only see what happens in court, and, unless it is referred to, are not aware of the engagement of the CFA with the family before proceedings are initiated. However, three of the reporters formed the impression from the hearing that more engagement with the family could have averted the proceedings, or allowed for an application for a supervision order instead of a care order. This was felt to be the case particularly where there was a big cultural or social gulf between social workers and the family. One reporter referred to a case where the family was described as “homeless” when in fact they had been living with a succession of relatives; another referred to an African family whose children were taken into care on the basis of physical chastisement, but there was little evidence of engagement with them, explaining that this was not appropriate.

“It highlighted the fact that the CFA didn’t have enough staff or resources with that background of experience, or people from their country of origin, to be able to advise them on what the norm was for them in order to educate them.” Reporter 4

However, there were also examples of very good practice, where social workers sought expert advice on how to deal with unfamiliar situations.

“For example, the social workers had a girl who was in a forced marriage arrangement, she was 17, they went in and effectively spoke to the girl but didn’t speak to the parents at all because that was what they were advised from the UK. It was interesting because they’d never had this type of a case before and they sought support and managed it themselves and brought the girl into care through an *ex parte* application and it seemed to be a very good, positive case that they managed well.” Reporter 6.

3.3 Child Sexual Abuse

All the reporters had observed a number of cases where sexual abuse was alleged, and all agreed that such allegations made cases much more contested and complex. Difficulties in obtaining assessments of the children for child sex abuse either in a timely fashion or sometimes at all, and a lack of support for social workers who have to deal with such allegations were identified as issues. Social workers, especially in certain areas outside Dublin, often found themselves faced with disturbing behaviour from children, indicative of sexual abuse, but had little

expert support. Yet an allegation of even a suspicion of sexual abuse could escalate a case and make it much more contested.

“Once the spectre of sex abuse has come into the case that changes the ball game completely... terms like sexualised behaviour have certain connotations ... in these types of cases [it] almost has the connotation of sexual abuse.” Reporter 2

This reporter felt there should be more precision used in such terms, so that the court knew exactly what the child was doing to cause concern, and so that the behaviour could be analysed by an appropriately qualified person. Another reporter referred to a case where a girl was allegedly displaying sexualised behaviour in that she was touching herself, yet an expert witness stated that this was a common occurrence in children of that age who were experiencing anxiety, and that it was soothing behaviour rather than a sexual act.

Another reporter put this down to the lack of specialist training for social workers in identifying and dealing with sexual abuse. In a case (not referred to in our analysis) outside Dublin the social worker told the court she did not have any experience in dealing with sexual abuse, but when she sought specialist support from a Dublin unit she had been told that there was no assistance available because her area was outside the catchment area for such support.

The fact that criminal law, and therefore the State machinery for criminal prosecution, is likely to become involved when child sex abuse is alleged serves to greatly increase delays and complexity as two separate State agencies are now involved in the investigation, for two different purposes. In parallel to a Garda investigation, one of the few specialist child sex abuse units in the State may also be involved in carrying out a credibility assessment of the child as part of the child protection proceedings, and in order to prepare the child for therapy. This results in repeated interviews on the same allegations, which has been criticised by experts from outside the jurisdiction.

“[In one case] the repetitive questioning, the suggestions by the Garda interviewers, the overlap between [the unit’s] and the Garda interviews, essentially was torn apart by [two experts] brought over from the UK. They tore apart the Garda interviews to the extent that I don’t think they could be used in a criminal investigation in any case.” Reporter 5

The fact that a criminal prosecution may arise also alters the dynamics of the case, as the parents are highly likely to deny the allegations on the assumption that any concession could compromise their defence in a criminal trial. This will intensify the adversarial aspect of the proceedings, and may overshadow the centrality of the welfare of the child. The reporters who had gone on to work in child protection

cases as barristers were very sensitive to the pressures on parents' legal representatives in such a situation.

“It’s very hard to blame the legal representatives of the parents, it’s very hard to avoid it becoming like a criminal trial because all your instincts from the point of view of a counsel are to try and defend your client and disprove the allegation.” Reporter 1

This can give rise to legal tactics which focus on undermining the witnesses for the CFA rather than establishing what would be the best outcome for the child. In one case the foster mother to whom a child made disclosures of abuse was cross-examined robustly and at length by counsel for the parents, but some of the focus of the cross-examination was on whether she had closely followed reporting procedures, not whether there were sufficient grounds to take the children into care.

3.4 Hearsay Evidence

In four of the eight sexual abuse cases discussed above disclosures of sexual abuse were made by children to their foster carers whom they had come to trust, in one the allegation was made to a carer in a residential unit, while another child in the family made an allegation to a teacher. This raises the issue of bringing these disclosures to court. No-one seriously contends that children should give evidence directly in court, facing cross-examination by their parents' legal representatives, so the issue then is how their evidence to a third party, which is hearsay evidence, can be brought to court.

Provision is made for this in Section 23 of the Children Act 1997, but the Act also states that the court must consider the circumstances of each case. Therefore in most cases where there are disclosures of sexual abuse Section 23 applications are made, but even detailed and written rulings in one case cannot be used to clarify the law for application in other cases. Some cases have had multiple Section 23 applications, greatly lengthening the proceedings. The admission of hearsay evidence from children does not solve disputes about who might give the evidence – the person to whom the disclosure was made, or the social worker who was then informed – and this can give rise to further disputes and delay. All these issues were observed by the reporters who attended such cases.

“I think [children’s evidence] should be verbatim as far as possible because if they paraphrase what the child has said ... the wording is so important, a tiny change in the wording can create a huge impact in terms of ... subsequent reports.” Reporter 2

3.5 Experts

Because of the fact that certain parts of the country have very limited access to specialist child sex abuse units, the lack of specialist social worker training in sexual abuse and concerns expressed in court about the professional standards in some of the sex abuse clinics and those of Garda interviewers, experts are often brought in to assist in evaluating the child's disclosures. Concern about the manner in which their evidence was managed, especially if there were experts for both the CFA and the respondents, was expressed by a number of reporters.

"It would be so helpful if they could meet beforehand and agree what they agree on and what they disagree on, rather than both expert witnesses having to go through the whole of the other expert witness's report sentence by sentence... It went on for days." Reporter 3

Another pointed out that sometimes cases were adjourned so that another expert could be brought into the case. This was an example of poor case management – in cases in the higher courts experts are lined up in advance. However, it was acknowledged there are no facilities for case management in the District Court.

3.6 Court Practice and Procedure

This raises the issue of whether the District Court, as presently constituted with very limited resources for case management, is the appropriate jurisdiction for more complex cases. This matter was raised by a judge in one of the cases examined above, as well as by four of the reporters.

"I wonder if there is something [to be considered] about the District Court dealing with certain cases but once you start getting multiple witnesses it needs to go the High Court where it is better managed." Reporter 6

"I don't think it's fair to expect all judges to be experts in child care law and to be making decisions about the future of children up to 18." Reporter 1

As the CCLRP has commented in its Final Report, there are wide variations in the time and attention given to child care cases in different parts of the country. While the focus of this study is on lengthy and complex cases, the reporters also expressed concern about cases being heard in a perfunctory manner, sometimes in the judge's chambers where the Digital Audio Recording (DAR) system did not operate, where there was no table for the lawyers to put their papers and where it was difficult for them to examine the witnesses properly.

On the other hand, in some lengthy cases a lot of time is taken up with procedural matters, where the cases are adjourned while the lawyers seek to agree on the order of witnesses or the production of documents.

“Some judges in my view are spending too much time trying to reach a legal consensus among the legal representatives because they fear being judicially reviewed ... in about four days we heard about a day and a half of evidence and the rest of the time we were standing outside of court while the representatives were discussing among themselves what they wanted to do next.” Reporter 1

There was a consensus that the Dublin Metropolitan District Court Practice Direction, outlining time-lines and procedures for child protection cases, while it has helped, is not consistently followed, and does not operate outside of Dublin, though a modified version is in use in some places. There was agreement among all the reporters that the lack of a national case management framework, adequately resourced, was a major contributing factor to the unnecessary lengthening of many cases.

However, they did not see one single reason why some cases become extremely protracted. They saw many elements combine:

- the approach the CFA takes to the case;
- the extent to which the CFA and its witnesses are well-prepared;
- delays in the production of reports and in the disclosure of documents;
- adjournments and the problems they give rise to;
- respondents' problems, including cultural, mental health and cognitive difficulties;
- the impact of allegations of child sex abuse;
- the involvement of multiple state agencies;
- weaknesses in social worker training, especially in giving evidence;
- difficulties in balancing the best interests of the child with the right of the parents to family life and their good name;
- poor management of expert witnesses;
- differences in approach between different judges;
- lack of case management

The consensus among the reporters who had attended these hundreds of cases was that better preparation of cases, more focused reports delivered in a timely manner, a nation-wide specialist service for assessing and dealing with child sex abuse, operating to the best international standards and that would serve both the criminal and child protection courts, rigorous case management and specialisation in the courts, would all go a long way towards ensuring that complex cases were dealt with as speedily as possible, to the benefit of children and their families, and indeed of the professionals working with them.

Chapter 4: Social Workers' Experience

Court proceedings give only a very partial and truncated picture of social workers' engagement with families, which can have gone on for years prior to the initiation of care proceedings. They also give little insight into the work that continues after the conclusion of the proceedings, except in those cases where the cases return to court for review. Social workers differ from the other participants in child protection proceedings, in that such proceedings only make up a small proportion of their work, while for the judges, lawyers and even guardians *ad litem* they form a major part.

The literature documents the frustration social workers feel when facing court proceedings, and their sense that they are at the bottom of the court pecking order. In Ireland this is compounded by pressure on court resources, the underdeveloped nature of child sex abuse investigation and follow-up, and delays in access to ancillary supports, like assessments of both parents and children.

One of the issues that emerges from this study's interviews with social workers is the extent to which they feel they are on trial in court proceedings, and the level of stress they experience as a result. This echoes the findings of Burns *et al* [2018], where social workers were highly critical of the adversarial nature of child protection proceedings, feeling that the child gets lost in them.⁸³

Social workers are the face of the State when it initiates proceedings to remove children from their parents, one of the most serious measures the State can take in relation to any citizen, depriving that citizen of a core constitutional right, the right to family life. Yet such a measure is taken, not as a punishment for wrong-doing, but in order to protect a child from parents deemed unable to nurture or protect that child. It is a grave decision taken very seriously by the court, and parents naturally tend to resist it very strenuously. They are rightly afforded legal representation in doing so, usually at the expense of the State through legal aid.

Both the parents' legal representatives and the judge have a duty to interrogate closely the case being put forward by the State through its social workers, and to defend the constitutional presumption that the welfare of a child is normally best assured within his or her birth family. It is the job of social workers to rebut that constitutional presumption in the specific case being heard, and inevitably they can feel their judgment and professionalism are on trial during such proceedings.

Thirteen social workers involved in one or more of the complex cases analysed in Chapter 2, and one social worker specialist in child sex abuse who is now an academic, were interviewed for this study. The areas covered included Dublin and

83 Kenneth Burns and others (n 7).

three other regions. Despite them coming from four different areas, there was a broad degree of consensus among them on the main issues they faced in such cases.

Each interview started by asking the interviewee to describe a typical case that did not become unduly protracted, and then asked to discuss the specific aspects of the case under discussion that contributed to the difficulties encountered in it.

4.1 Stress of Court Proceedings

The issue that cropped up most frequently in interviews was that of the stress generated by highly contested court proceedings. This is not unique to Ireland, and Burns *et al* quote Taylor (2007)⁸⁴ in describing it as “one of the most nerve-racking experiences a children’s social worker can face.” All the interviewees reported being stressed, and in addition some referred to colleagues who experienced such a high level of stress that they went on stress leave during cases or left child protection altogether. There were at least five instances of social workers going on stress leave in the cases examined in this study, which in turn contributed to the duration of cases. Even very experienced social workers found court work stressful.

“You are absolutely petrified [in court]. Ninety-nine per cent of social workers hate to be called before court. Anyone who gets a bit of experience moves away.” Social Worker 1.

“I’ve been eight years in child protection and I’m getting used to the court system and I’ve had a number of final hearings, and I still hate it. Really, when I go into court, I hate it.” Social Worker 3.

The fact that courts outside Dublin sometimes attempt to deal with the pressure on court time by sitting late into the night can further exacerbate the stress social workers and other witnesses are under, and a number of respondents described spending up to 12 hours in the witness box, leading to exhaustion and further stress.

A number of the social workers felt that their professionalism was questioned, citing as evidence the growing use of experts in areas they considered within their expertise. This contributed to the stress they felt.

“It diminishes the confidence of social workers in the court that our evidence and our observations weren’t acknowledged or respected ... [the judge] was

84 Amy Taylor, ‘Prepare for the Dock’ (*Community Care*, 1 November 2007) quoted in Kenneth Burns and others (n 7).

implying that social workers, even if they observe something, don't have the expertise to analyse it sufficiently. That's quite a knock-back, that our critical analysis isn't being listened to. It was a very stressful period for everyone involved ... For staff well-being, staff retention, it had a huge impact on the service, a lot of social workers left." Social Worker 9.

Burns *et al* also found that social workers felt their professionalism was not sufficiently respected in court, but added that this view was not substantiated by their interviews with the other professionals in the system, judges and lawyers, who expressed admiration for the work done by social workers.⁸⁵

However, another social worker acknowledged that sometimes social worker's evidence does not meet the necessary standard.

"Sometimes I think [the lack of respect] is warranted. There's a whole lot of us that go and let ourselves down a bag-full and you know you can't wing something that's in court, you just can't, you have to put the work in and put the time in. Families deserve it, [and] it always shows when you don't have it done, or when you're trying to word things in a way as to say, 'I'll get it done'. It doesn't work." Social Worker 3.

Some of the issues that arise in court, and for which social workers are criticised, are outside the control of the Child and Family Agency, particularly accessing appropriate assessments and therapies for children and parents, which is a source of frustration for the social workers. Many of the services that are necessary for both children and their families are under the control of the Health Service Executive (HSE), over which the CFA has no control, as Social Worker 3 makes clear.

"I also think at times we're unfairly criticised and unduly punished for things that are beyond our control. Things like waiting lists for psychology, for child and family mental health, you're waiting for assessments and you're sitting there going, 'Judge, if I could have it I would have it.' ... Everywhere has waiting lists, everywhere. Before we had a bit more weight when we were in the HSE, we could say to CAMHS (Child and Adolescent Mental Health Service) we have six weeks, you've got to see the child within six weeks, there was a whole agreement there." Social Worker 3.

The stress of court proceedings referred to above could be exacerbated by the approach taken by lawyers to social worker witnesses. Some social workers reported bad experiences in court at the hands of lawyers, adding to their sense of being under attack.

85 Kenneth Burns and others (n 7).

“[The mother in another case] had a criminal barrister. Oh, my God, he was horrendous ... It just felt [she] was being bullied into fighting with us for no apparent reasons. She was coming in here and saying ‘my solicitor is telling me to do this and I don’t want to do this,’ then you go down and he’s roaring and shouting at the social worker across the table.” Social Worker 10.

In another case where the parents were represented by a legal team that mainly works in criminal law, the social worker also felt this changed the way the case was run.

“It doesn’t actually help your child protection case when you’re just trying to attack the other side, the child gets lost and it doesn’t always show the parents in the best light either because they’re willing to attack the child to prove themselves innocent, so it’s not showing that they are putting their children first either, so I don’t think it helps the parents get their children back. I don’t think the criminal people coming in understand that.” Social Worker 13.

4.2 Resources

The lack of resources to deal adequately with preparation for and participation in courts proceedings, while managing large case-loads, was a recurrent theme. This reflects the resourcing difficulties experienced by the CFA at its inception as an entity separate from the HSE in the depths of the economic crisis. This had an impact on the quality of social work reports, their production in a timely manner, the preparation of social workers for the proceedings themselves, the lack of time and resources for training and on the stress they experienced. This has improved somewhat in the last year with the provision of additional resources for the CFA, which is reflected in some of the comments below, but many of the problems remain.

“I think that the level of detail that’s required now for the courts and the level of detail that goes into the proceedings, and the amount of allocations that a social worker has aside from the one case is huge – [you have to] have your accesses, your court reports, all your correspondence with your legal team, your multiple efforts to engage and facilitate families, [in order] to present that one case to court. If that’s all you had to do, fabulous, but when you have a really, really large case load of demanding files, possibly this case could be one of them, and you have others ...” Social Worker 8.

“Social workers need time to work through these cases as well. If workloads are heavy we’re not given the time to look through our evidence to make sure it stands up to the scrutiny of the courts and certainly around that period of time [in a specific case] we were having difficulty in terms of resources

and managing our cases. A lot has changed in the department since then, we have a case-load management structure.” Social Worker 9.

This inevitably had an impact on preparing reports in a timely manner, as required by the Dublin Metropolitan District Court Practice Direction, which is now being applied in a number of other court Districts.

“We were told they should be in a week in advance and we were good at it for a short period but it just wasn’t sustainable. That’s a systemic thing, a Tusla thing, we’re absolutely out the gap with work.” Social Worker 7.

4.3 The Challenge of Child Sex Abuse

Eight of the ten cases examined involve allegations of child sex abuse, all strenuously contested by the parents. This is a very difficult area, and proving to a court that sexual abuse has occurred requires skilled investigation and careful presentation of the evidence. Hoyano and Keenan point out that a child’s description of abuse is one of the most important pieces of evidence that can be offered to the court that sexual abuse has taken place, since sexual abuse is rarely witnessed (490).⁸⁶ They write:

“There can be no doubt that conducting a forensic interview of a young child witness as part of an investigation into alleged wrongdoing is an extraordinarily difficult task. The interviewer will be constrained by the linguistic, cognitive, motivational and emotional characteristics of the child.” (491)

A social worker who specialised in child sexual abuse, now an academic, was very aware of the challenges an allegation of child sex abuse posed for social workers.

“It’s a perfect storm in ways, because children are not as good witnesses as adults, because they have cognitive development issues that childhood brings, because they’re still only developing their language, their memory, their ability to recall ... children can be very good at giving specific details but they’re not good at giving times, dates, exact places ...

“The reality of interviewing is that it isn’t an exact science, you have questions and the question style can have a role in how the child gives an account.” Social worker sex abuse expert.

However, as the recent report from the Garda Inspectorate points out, the facilities for carrying out such interviews in Ireland are severely limited, and do not follow

86 Laura Hoyano and Caroline Keenan (n 47).

international best practice, with child care cases sometimes coming to court without the children having been interviewed by a specialist interviewer either from the Garda Síochána or from the CFA or HSE.⁸⁷ This will make such cases particularly challenging for the social workers dealing with them. Despite the fact that the Inspectorate recommended in 2012 that joint interviews between trained social workers and Gardaí be conducted, this is not happening.

In order to examine best practice, the Inspectorate visited Northern Ireland, Scotland, the West Midlands, Norway and the Netherlands as part of its review of Garda policy and practice in relation to child sexual abuse. Northern Ireland, Scotland and the West Midlands operate Public Protection Units (PPUs), dedicated investigation units that deal with child sexual abuse and vulnerable adult-based crimes. There only specially trained officers can take statements from children. These units liaise with multi-agency groups so that referrals are made to relevant child protection agencies. In the Netherlands and Norway also only specially trained officers, in specialist units, conduct interviews with victims of child sexual abuse. The Inspectorate report pointed out that highly trained interviewers in Norway were able to obtain evidence from children as young as two that was used as evidence.

In contrast, the Inspectorate found that in Ireland only a minority of Garda interviews with victims of child sexual abuse are carried out by specially trained interviewers. Since 2007, 90 Gardaí and 20 social workers were trained as specialist interviewers in the Garda College, and initially some joint interviewing between Gardaí and social workers took place, but this was discontinued due to the lack of availability of trained social worker interviewers, of whom there are now only 16 nationally. This means that there can be at least two interviews with the child, one by the Gardaí and further interviews by social workers or a sex abuse unit. The latter usually initially carries out what is known as a “credibility assessment.” The Inspectorate commented:

“This can lead to a determination by the unit as to whether the child’s story is credible or not. On occasions, there can be conflict between a Garda interviewer’s assessment of the strength of the evidence gathered and a credibility assessment by St Clare’s that has established a different determination.” (157)

The lack of specialist child sex abuse units that could assess the children’s experience, leaving this up to the social workers who had only limited training in the area, was revealed in some of the cases examined by the CCLRP. Two such units, under the control of the HSE and focusing on therapy for sex abuse victims, exist in Dublin and cater for the surrounding area. A CFA sex abuse assessment

87 Garda Inspectorate (n 74).

unit exists in Cork and serves the Munster area, with an outreach unit in Waterford, and there is also an independent paediatrician-led centre in Galway. But many parts of the country have no access to any unit, and social workers have to make their own assessments. In one case there was a six-month delay between the children's disclosures being made and them being interviewed by a specialist unit, because they were outside its catchment area. The social workers felt they had been lucky to get the children assessed at all.

"I feel we don't have the skills. We were not trained in college [in assessing child sex abuse]. I had a placement in [a named specialist sex abuse unit] and that was grand. But it was 20 years ago. While it was a good placement it didn't suffice for me to be able to stand over extensive cross-examination in relation to the area of credibility." Social Worker 4.

"We don't have people we can call upon in this area. We might have had two or three lectures in college. That makes the process very difficult and it continues to do so with on-going cases. We are hoping to get [a specialist from Belfast] to come in here as a consultant and upskill us. She was brought into this case to deal with the issue of retractions and she put it to bed and she greatly assisted with that matter and we learned from her knowledge and expertise, but we need more of that type of support." Social Worker 5.

The issue is further complicated by the fact that, as highlighted by the Garda Inspectorate, there is no consistency of policy surrounding cooperation with a Garda investigation when it takes place in parallel with the child protection investigation. This can have an impact on the support offered to the child who has suffered trauma.

"In this case (not included in this study) there was joint interviewing but in other cases since there hasn't been because no trained social worker was available. Hence the Gardaí have undertaken full responsibility for Section 16.1 b interviews but their remit is more information-gathering, it does not look at the impact the abuse has on the child, which is why social workers are key to this process, so that support can be sought [for the child]." Social Worker 5.

In the absence of specialist interviews with the child, UK-based specialists have been brought in to assess the nature of the disclosures made by the children to foster carers, guardians *ad litem* or social workers.

"The complexity of the case was around the protection factor in relation to Mum and whether she'd been involved [in abuse] in any way, because the child had made statements after going into care that her Mum and Dad had

been involved in photographing her vaginal area ... but we couldn't prove that as fact apart from what the child said. That's why [the UK-based forensic psychologist] came over, to look at the child's statements and give opinion on that." Social Worker 9.

This specialist has been used in a number of cases which feature in our case analysis above, and his evidence has been decisive in allowing the court to make findings. In addition, the existing sex abuse units, which fall under the responsibility of the HSE, have been criticised by this and other experts as failing to adhere to modern best practice. These findings suggest an urgent need for upskilling at least a selection of social workers in the CFA in the assessment of child sex abuse and in accessing timely therapeutic intervention for victims.

4.4 Understanding Thresholds

While the assessment of child sex abuse poses particular difficulties in child protection proceedings, social workers also revealed confusion about the thresholds required to justify applications for the different orders under the Child Care Act, and spoke of the need for greater training both in this area and in the preparation of evidence for court. Social work reports that are unfocused or unclear can be subject to criticism from the judge and expose the social worker to sustained cross-examination from lawyers for the respondents and the guardian *ad litem*, which prolong proceedings and increase the stress referred to above. However, the social workers interviewed were not always clear on what was expected of them when presenting evidence in court.

Indeed, a number of them described the contested court proceedings as important learning experiences, finding they provided clarity on the standards of evidence they had to meet.

"We learned a lot during these proceedings in terms of the debates in court around the judge's need to be satisfied as to a Section 18 (care order) hearing, as opposed to the probability and different thresholds there are for an Interim (care order). Those kinds of things weren't very clear to us but became clear throughout the course of the proceedings, so I suppose social workers aren't necessarily aware of that and again it's got to do with resources in the department as well ... We're not given the time to look through our evidence to make sure it stands up to the scrutiny of the courts ..." Social Worker 9.

While the CFA (Tusla) has prepared a lot of documentation on thresholds and court practice and procedures in recent years, its use does not appear to have been integrated fully into day-to-day social work practice, with some social workers reporting finding documents useful, while others were more sceptical.

“I know Tusla do have a thresholds document but I certainly wouldn’t be particularly *au fait* with it. It’s not that easy to use, it’s quite a complicated document so in terms of daily practice it’s not that user friendly ... There is an official template, a Tusla template, but not all of us, including me, used it because we didn’t find it helpful. It’s repetitive in places and when you’re under immense pressure it just doesn’t work.” Social Worker 7.

This raises questions about policy implementation within Tusla, and most of the social workers interviewed felt the need for increased and more systematic training in understanding thresholds and in preparing evidence for court. They recalled receiving some education in the Child Care Act in university, but for many this took place years ago and there had been little priority given to in-service training in developments in the law that might impact on social work practice. There was a sense from the social workers that professional development was not sufficiently prioritised by management and that, while some training was offered, this could clash with the day-to-day demands of the job.

“Social work is so frantic. We don’t have the luxury of having the opportunity to read judgments etc. Definitely there needs to be more of an appetite from the top down to give us the opportunity to learn more about this side of things.” Social Worker 5.

“We do get training [on preparing reports], they make available training on trying to get more analytical in our court reports, but I haven’t done it, particularly because of the various clashes in our schedule, trying to get things done ... We were never clear was there one framework that we needed to use, there are three or four frameworks that we can choose from.” Social Worker 7.

Many of the respondents were acutely aware of the weaknesses in their preparedness for court, and the flaws in social work reports.

“A serious flaw in social work is the lack of ability to analyse. Saying, ‘this happened, that happened,’ is not enough. What does this mean for this child in this family? That is where great difficulties arise in court. A lot of information is given in court but it is not clear. There is training, but it is weak, to say the least. It is about how you dress, present yourself, etc. Training should be about analysis and how to present that in court, so that the judge knows what the story means for this child at this time.” Social Worker 2.

A practice exists in some parts of the country where the solicitors who act for the CFA, in conjunction with the local CFA training team, provide training for new social workers in preparing for court, and this was very much appreciated by the social

workers who were able to avail of it. However, it is not generalised and does not appear to be part of national CFA policy.

4.5 Guardians *ad litem*

In certain cases there are differences of opinion between social workers and guardians *ad litem* about the needs of the children, who are usually in care on interim care orders, and how to meet them, and these issues end up disputed in court, which adds a further layer of complexity and causes further delays. Some social workers were resentful of what was perceived as unwarranted criticism from GALs, and felt the issue should not have been brought to court.

“You got a guardian’s report only that morning [of court] and you thought, ‘that’s not accurate’. Why could the guardian not pick up the phone to me? ... There was lack of communication. The gap seemed to widen as the case went on.” Social Worker 4.

In general, though, social workers felt the role of GALs in the proceedings was positive, even where they did not fully agree with aspects of their analysis. In the vast majority of cases seen by the CCLRP the GAL supported the CFA application, sometimes adding a further dimension to the presentation of the case against the parents.

“We worked very closely with the GAL [in another case] [though] she had her own views, we did not agree with some of her views.” Social Worker 9.

Even where the GAL did not support the position of the CFA, the social workers in a case where the GAL presented an alternative proposal to their long-term care order application felt he brought a fresh eye to the case that ultimately benefited the children and allowed a breakthrough.

“He was able to put forward a neutral position. Relationships had become quite difficult between the family and social work staff. He was very helpful to us, especially after [the end of the case].” Social Worker 1.

“He was forward thinking, he could see what the rest of us could see – you know what, these are good parents ... Whatever happened, happened. And he said, ‘sure we’ll never know, it doesn’t matter, we need to work on what we have now and move forward’... In the end he brought balance and perspective for [the judge].” Social Worker 3.

None of the social workers interviewed felt that the role of the GAL was a superfluous one, though they were sometimes frustrated by their relationships with individual guardians.

4.6 The Role of the Judiciary

Many social workers commented that the courts were now more demanding in terms of the evidence required in child protection cases than had previously been the case. This increased the time cases took. While in general social workers welcomed a rigorous examination of the basis for seeking to take children into care, they wanted recognition of the additional demands this placed on the social work service.

“There are more and more requirements from the courts. It’s not enough any more just to have social work reports. You need psychological assessments and an array of other assessments.” Social Worker 5.

“There’s an awful lot expected of you from the court, and rightly so, I think it keeps you on target. Now things like assessments might still not be done for six or seven months because you don’t have control over other agencies, but I do think there’s more of a focus [on what’s needed].” Social Worker 3.

Social workers outside Dublin expressed considerable frustration with the fact that different judges had different approaches. The problem arises from the fact that in certain Districts where it seems likely a case will take up a lot of time the local sitting judge will request a “moveable” judge to hear it, as he or she doing so would disrupt the usual work of the court. The “moveable” judge may have a different approach to the sitting judge and, indeed, to another moveable judge. The difference in approach may occur between the hearing of interim care order applications and the hearing of the full care order. Some of the comments from social workers revealed a lack of understanding of the different thresholds for an interim and for a full care order, but also the fact that different judges take different approaches to thresholds.

“We had our local district judge here in this case for a year [renewing interim care orders] and no indication throughout that whole time that our evidence didn’t meet the threshold. The judge who sat for the Section 18 [full care order] hearing took a whole different viewpoint. It’s the lack of consistency ... In some instances a care order is granted in the space of 20 minutes or half an hour and others take years. It’s just the inconsistency from one care order to another.” Social Worker 9.

This arose in an area where, due to pressure on judicial resources, “moveable” judges are brought in to hear lengthy cases. This was a source of frustration, as social workers (and their lawyers) could not be familiar with the expectations of the judge that would hear the case, and this might differ from one case to the next.

“There are differences between judges and what they will take from us. Some read reports, some don’t. Because of that the way of preparing the case depends on the judge. It becomes adversarial. The judge is listening, but not having read the report interjects before the social worker finishes her examination in chief ... If we are expected to have a threshold met the opportunity to present that information should be afforded to us in the first instance. If we have a standard to which we work there should be a standard to hearing that evidence. It should not be different depending on the area or the judge.” Social Worker 2.

Social workers also felt that some judges did not have sufficient understanding of child protection and social work principles and practice. Those who had worked in Dublin, where there is a cadre of specialist judges highly knowledgeable in child welfare and protection, expressed surprise that in many other parts of the country there was no judge with specific expertise in family and child law. They expressed the view that there should be more training for judges in this area.

“It’s very difficult to explain to the court that there’s a fostering social work team as well, that you’re not responsible for them and you cannot speak to certain things ... because you’re [in] the child protection role.” Social Worker 8.

“I feel judges need more of an understanding as to what we do because I don’t think they all know what we do or what we’re supposed to do.” Social Worker 3.

A further criticism of the courts and the judiciary was how some cases were run, including frequent and lengthy adjournments. In one case this was accompanied by short working days, with the late arrival of the judge, lengthy breaks, and an early end to the court day. However, at the other end of the scale there have been cases which continue long into the evening, with exhausted witnesses giving evidence for hours in an attempt to get the case finished.

This is compounded by delays in obtaining the assessments necessary to progress the case. Assessments are usually conducted by professionals outside the CFA, and sourcing the appropriate person, getting agreement from all the parties to their appointment and getting funding from the CFA, can all cause delays.

“The CO (care order) date was set for September, then it was adjourned to October, then it was adjourned to June, then it was going to get heard and then it didn’t, something else happened and it didn’t all get heard. Then we had to go and wait for assessments to be finished and that was kind of what prolonged all of that.” Social Worker 11.

“From getting funding to getting independent people that everybody was happy with ... that was a huge factor [in delay].” Social Worker 1.

4.7 Court Practice and Procedures

In areas where there are no dedicated child care days child care applications jostle with other District Court business, which is typically hurried. The court system and court procedures, and particularly the pressure on court time, could make the timely processing of child care proceedings more difficult.

“The CFA and the court system work on parallel tracks. As long as that continues we will have that problem ... Adjournments of interim care orders can be the responsibility of the social work department. Or you can have a social work department that can make decisions quickly and then you can't get a court date for six months.” Social Worker 2.

The lack of case-management was also an issue in prolonging cases. A Practice Direction spelling out what is required of the various parties exists in Dublin, though it does not appear to be always fully adhered to. It does not apply outside of Dublin, and there is a separate Practice Direction for moveable judges. In addition, some local district judges use a modified version of it, but others do not apply any practice direction.

“The other element in case management, for experts to get together in advance and agree what they're going to agree and outline what they're not going to agree ... If two psychologists have more or less reached the same conclusion, there's no need then for that to be given in great detail. That can be a joined position, so there's a lot of things like management of witnesses that can be expedited.” Social Worker 10.

There was a general welcome for the long-promised specialist Family Court where specially-trained judges would hear child care cases without the need for multiple adjournments due to the difficulty in finding dates for lengthy cases.

“I think that certainly having a court that's specifically for family law would be so useful because it would avoid that inconsistency, the judge would specialise in child care cases, so that we're not continually repeating the same things every four weeks.” Social Worker 9.

4.8 Family Characteristics

Not all delays could be attributed to what took place in court. Certain characteristics of the families themselves contributed to lengthy cases becoming very protracted. This included the advantages enjoyed by people from more middle class backgrounds with higher levels of education than most of those who face child protection proceedings, the difficulties created by parents with mental health problems which inhibited their ability to engage with services, and the impact of exceptional levels of deprivation.

Social workers are aware there those facing child protection proceedings are not operating on a level playing field.

“If this was a working class family from a working class area this [protracted case] would never have happened ... They would have succumbed to the pressure from the CFA ... It’s a horrendous thing. If the parents had less intelligence, less resources, those children would have been taken into care.” Social Worker 2.

In one case there were also concerns about the mother’s mental health, which contributed to the behaviour that gave rise to concerns about the safety of the children. However, adults cannot be forced to seek either diagnosis or treatment for mental health problems. Even if they do seek such services, they are not within the power of the CFA to provide. The issues that gave rise to the child protection concerns in this case and which contributed to the mother’s obstructive behaviour in court were unresolved and the children taken into care. A social worker also felt that the mother’s level of education contributed to the prolongation of the case.

“She would have gone to college and would have done well academically ... [she was] very manipulative, she would have appealed a lot of decisions as well and challenged the system.” Social Worker 6.

Not only can higher social status and higher education levels make cases more contested, exceptional levels of deprivation can also do so. This can be seen in cases involving Travellers and other marginalised groups. They may not come to the attention of child protection services until a crisis explodes, and this can then quickly develop into a high conflict situation.

“This family ... developed their own way of living and were forgotten. There’s no way what was being seen [in terms of neglect] would have been tolerated elsewhere. There was sporadic contact, but nothing that showed that level of neglect. There was an attitude they were ‘only Travellers’...

“In social work there is almost a sense you let Travellers away with a little bit more ... There is a sense from the schools that absenteeism from school is acceptable. We didn’t get any referral [from] the particular school that the children attended in relation to the significant amount of days missed.” Social Worker 4.

This can then become an issue in the case.

“It was insinuated in court that we did not understand how the Traveller community lived and raised their children so we could not make a real judgment on how they could care for their children.” Social Worker 5.

In another case a breach of trust severely exacerbated conflict between the family and social workers. A reunification plan was considered but this was abandoned when the parents were found to have breached an agreement concerning access while the children were in voluntary care with relatives. From this time on the CFA sought Care Orders for the two very young children until they were 18, on the basis that they could not trust the parents to be truthful, though they acknowledged that up until one child suffered a serious injury they had appeared to be excellent parents.

“I don’t believe we ever saw the true couple, the true family, ever in our time with them ... We never had a true picture [of what went on].” Social Worker 3.

“There had to be a level of acknowledgement that there was stress. The frustration for us was we were never able to get behind that shield. It meant we could never have a realistic conversation.” Social Worker 1.

Lack of honesty was also a central issue in another case.

“It transpired that [the father] was not honest about not going back into his relationship and she was very, very controlling of him ... The difficulty was the dishonesty and the allegations being made and having to investigate them.” Social Worker 6.

There is no escaping the reality that many people who encounter the child protection system fear and mistrust social workers, which can lead to a reluctance to acknowledge their concerns and engage with them (Featherstone *et al*, 2014)⁸⁸. This may arise from a misunderstanding of their role and their responsibility to ensure that, as far as possible, the health, development and welfare of children are

88 Brid Featherstone and others, *Re-Imagining Child Protection: Towards Humane Social Work with Families* (Policy Press 2014).

not put at serious risk by their parents' behaviour. Nonetheless, such misunderstandings need to be countered and the perceived imbalance in power between the State, in the form of the Child and Family Agency, and often marginalised parents, needs to be addressed. One social worker put this very succinctly.

“I think court reminds us of the level of power we have. That shouldn't be the case. How do families feel about what we represent? I think there should be a service independent of us that would support families in court. It's my job and your job, but it's their life.” Social Worker 2

In summary, social workers were very aware that their practice had shortcomings, many of them due to pressure on resources both in the CFA and among the other State agencies they relied on for additional assistance. The response to child sex abuse, in particular, revealed the deficits in the necessary collaboration with other State agencies, notably the Garda Síochána. Social workers also pointed to problems in the way the courts operated that did not serve the welfare of children and their families when they faced care proceedings, and which they felt powerless to deal with.

Chapter 5: Lawyers' Experience

Fourteen lawyers were interviewed for this study, four who worked for the Child and Family Agency, five who usually worked for guardians *ad litem* and sometimes for the CFA, and four who usually worked for parents, either as Legal Aid Board solicitors or private practitioners. One represented all three from time to time. Among the lawyers who normally represented the CFA, two worked in areas which generally did not have protracted cases, and their insights were very illuminating as to how this could be avoided. The private practitioners were more likely to have significant criminal law experience, which inevitably coloured their approach to the cases. One barrister had wide experience of working for the CFA, GALs and for parents, but most of the interviewees spoke from the perspective of representing one side. Nonetheless, there was considerable agreement about many of the issues that prolonged cases and made them more difficult for parents and children alike. What emerged from all the professionals interviewed, including social workers and GALs, is that child protection work has become more complex and more contested.

Lawyers come to child protection proceedings from a fundamentally different perspective than do social workers. Court is their milieu, not an uncomfortable additional dimension to their work. Their involvement with the family at the heart of the proceedings is bounded by the proceedings themselves. In contrast, social workers have normally been involved, sometimes for lengthy periods, with the family beforehand and are likely to be involved afterwards in access and ongoing welfare issues. For lawyers, the length and complexity of the cases are not a problem *per se*, as they are paid each day they work, and if they were not working in this case they would be in another one. Social workers, however, were resentful of the time taken from their other work by lengthy court proceedings. Their perspectives on the proceedings, and the difficulties experienced in certain cases, are therefore inevitably different. Yet some commonalities in experience and outlook exist.

5.1 Relations with Parents

One issue that prolonged proceedings was a high level of conflict between parents and the CFA social work department, as was referred to in Chapter 4. A failure or refusal to cooperate with the CFA is often cited as a basis for concern for the children, but one lawyer pointed out that this could arise from a legitimate disagreement and another, who frequently represents the CFA, suggested that social workers may sometimes misunderstand something about a family.

“It’s very much if you don’t cooperate with the CFA you’re found to be not cooperating, but when ... it’s because you actually don’t agree with

something they say is in the best interests of your child, you just don't agree." Lawyer 1.

"Social workers like to be collaborative, they go into a family and say look, you've got these problems, we're here to help. The possibility the social worker could be wrong is very rarely something that enters into their head. Possibly they might have misjudged something, misjudged somebody, picked something up incorrectly ... They think that's what's in a child's best interests is relatively clear, they conduct their assessment using their assessment tools, that is the best interests world in which they function and they don't understand why parents aren't just getting on board." Lawyer 10.

Conflict between the CFA and parents can be caused by psychological or personality problems on the part of the parents, or even occasionally personality clashes between parents and social workers. Mental health difficulties on the part of the parents can make their meaningful engagement with the proceedings very difficult. Lawyers cited certain types of mental health issues, for example personality disorders, where the parent views all the participants in the proceedings as part of a conspiracy against them, as particularly challenging. It was striking that this attitude was shared by lawyers who usually represent the CFA and those who usually represent parents.

"Mental health cases are probably the most difficult ... there is no way of making an adult go for treatment if they don't want to. I have a number of mothers who would have paranoid personality disorder where they believe that everybody is out to get them: the judge, the social worker, the guardian, the solicitors. So it's very hard to work with them because they're never going to accept what you say." Lawyer 3

"Personality disorders are generally treated as problems for which there is no solution or healing and the displayed behaviours include lack of empathy, lack of contrition, lack of insight, to a dangerous level ... I can't think of any input that the CFA could have made to improve the family situation. Nor can I think of any management device by the courts, respectful of respondents' legal rights, that would have shortened the process." Lawyer 4.

Sometimes no mental health issue is involved, but relations between the family and social workers just break down. The lawyers appeared helpless in this situation, as the acrimony in one particular case increased and the case spiralled into greater and greater conflict.

"I think part of it was that relations had broken down completely between the social work team and the parents with absolutely no trust. I think there was a failure on the part of the CFA to step back from it and say well what is the

objective here and what can we do to achieve that rather than simply relentlessly pushing every little problem that arose ...” Lawyer 13

“And as it went on over a period of months then there were more meetings with the parents, more acrimony with the parents, more distrust between the parents and [the social workers] and more ammunition to use in court and so every single visit was outlined in court.” Lawyer 12

5.2 Nature of Proceedings

Social workers often express frustration with the adversarial nature of child protection proceedings and feel that the child can become lost in them as the CFA and the parents contest every issue that arises. For lawyers, however, it is inevitable that, once parents oppose the application to take their child into care, the proceedings become adversarial as that is the nature of our legal system. However, both social workers and lawyers who habitually work for the Child and Family Agency emphasise the inquiry nature of child protection proceedings.

“I’m not trying to prove innocence or guilt, I’m there to protect the child and I think that’s the difference. What the Child Care Act does is it puts the welfare of the child first and the State or CFA has that obligation to step in and put the children’s welfare first, their welfare is paramount and that’s really the basis of what we do ... we’re here to protect the children and we will afford fair process and fair procedures to the parents and we won’t catch anybody short, but ultimately our duty is to these children and it’s not to the parents.” Lawyer 3.

However, respondents’ lawyers point to the High Court judgment that defined such proceedings as hybrid in nature, in that the CFA must prove that the threshold for State intervention has been reached, and the parents are entitled to test the evidence brought to justify the application. They point out that it is very difficult for parents to see the case as an inquiry, when its outcome could be their loss of their children until the age of 18.

“Some contests cannot be resolved by collaboration. Sometimes fundamentally you get to a point where the CFA are saying this child should be in care and the parents are saying the child should not be in care and once you get to that stage, that is now an adversarial contest ... because you have at its core a binary dispute.” Lawyer 10.

Not only are such cases likely to be contested, it was pointed out that certain cases are of their nature complex, and it will not be possible to remove much of that complexity. The cases grow as more and more issues emerge after the initial intervention. In cases where a lot of issues arise, the court will also be asked to

approve a care plan for the child, including potentially contested matters like access, and that can also prolong the hearing.

“Some cases by their nature are evolving, so at the beginning it’s a case about neglect, as it progresses it suddenly becomes clear that [the] child has been sexually abused but you’ve no clear disclosures telling you by whom and then as the case progresses further, interim care orders go on, the children get better verbal abilities and then they say by whom ...

“You’re not just litigating to get a care order but also to ensure a basis for the best care plan, with the power to deal with access appropriately ... when you consider all of those and the risks involved, there is a greater likelihood that the cases can become more complex.” Lawyer 7.

5.3 Impact of Child Sex Abuse Allegations

When allegations of child sex abuse are made, cases go into a different gear. The stigma associated with child sex abuse, the implications for the parents in terms of access to the children, the likelihood of care proceedings for any subsequent children and the possibility of a criminal prosecution all make it inevitable such cases will be very hard fought. Parents usually react very strongly to an allegation of sexual abuse against them or a close member of their household.

“Because of the stigma the parents automatically thought they were on trial for this, that they were there to answer the allegations and it took a lot of focus from the children ... the parents were trying to defend allegations that were brought up.” Lawyer 8.

When sexual abuse of a child is alleged this is usually reported to the Gardaí, who should then initiate an investigation. As the Report of the Garda Inspectorate, *Responding to Child Sexual Abuse*,⁸⁹ pointed out, the manner in which this is carried out varies around the country, and rarely involves close cooperation with the CFA. Sometimes the Gardaí resist sharing information from their investigation with the CFA, while sometimes also they attempt to use the child protection proceedings to collect evidence for their own investigation. The lack of a protocol for cooperation, including joint interviewing, adds to the length and complexity of such cases.

“The fact that there were parallel proceedings or possibly a parallel investigation by the Gardaí I think complicated things considerably. In addition there were clearly evidential issues with regard to information that

89 Garda Inspectorate (n 74).

the Gardaí had collected which were clearly matters that needed to be released [requiring separate applications].” Lawyer 5.

“When you have a criminal case in the background you’ve got detectives and sergeants sitting in the back of the court, [though] they were put out, and [then Gardaí] pulling people in the lobby of the court to bring them in for Garda interviews in the middle of child care proceedings. It was very unhelpful, those cases are hard enough at the best of times.” Lawyer 9.

The prospect of criminal proceedings also made it more likely that criminal lawyers, rather than lawyers who specialise in child protection, would represent the respondents in the case and this in turn has an impact on how the case is run. Lawyers who specialise in child protection are aware of the need to focus the case on the best interests of the child, while also representing parents who are contesting the care order application. Criminal lawyers, on the other hand, have been trained to force every allegation to be proved beyond reasonable doubt, if necessary by questioning the credibility of the person making the allegation, sometimes including the child. This is likely to prolong the proceedings, though it may not alter the outcome.

“The counsel and lawyers engaged by the respondent are quite a big criminal practice ... the approach that was taken was to challenge practically every line in the report, social workers were days upon days in the witness box under cross-examination On a few occasions the CFA counsel had to remind them that the proceedings were supposed to be in the nature of an inquiry as opposed to adversarial.” Lawyer 2.

But, as Ms Justice O’Malley has pointed out (see Chapter 2), this may not be the case for parents. A lawyer who usually represents parents said:

“I think it’s very hard [for parents] to differentiate between what’s an inquiry and what’s a court case. They’re held in courtrooms the majority of the time, so from a client’s point of view [they’re a court case], keeping in mind a lot of these clients have been through the court system, [they’re] very used to the court procedure so they’re coming to you and saying ‘why aren’t you asking this and why aren’t you asking that’, and they don’t really see it as an inquiry.” Lawyer 8.

Sexual abuse of a child is a serious criminal offence and should be reported to the Gardaí. However, the CCLRP has seen no case where sexual abuse against a child was alleged and a successful criminal prosecution followed, despite the involvement of the Gardaí in the case. This echoes the findings of the Garda Inspectorate, which wrote in its report: “The Inspectorate found limited evidence of

urgency to obtain victim and witness statements and often there were significant and unexplained delays in doing so.” (Garda Inspectorate, 2017, 50)

Lawyers interviewed for this report were dissatisfied with the existing system for investigating allegations. Where specific allegations are made and the Gardaí do interview the child they record the interviews on DVDs. Because they are doing this in order to prepare a criminal prosecution, the District Court hearing the child protection matter does not have automatic access to these DVDs. While joint interviewing by specially trained Gardaí and social workers was agreed as best practice, this did not happen in the cases seen by the CCLRP and the Garda Inspectorate has stated there is “inconsistent adherence to the national policy for joint interviewing”. This means that the child is also interviewed by social workers or one of the child sex abuse units, thus being repeatedly interviewed about the same events.

“Joint interviewing is vital. It think [lack of it] adds to complexity because you have two sets of people going over the same stuff very often. The guards (sic) will say our purpose is to establish what happened. I do accept that [the units] are also concerned with therapeutic implications ... but they do other stuff, like the trauma symptom check list for young children.” Lawyer 7

Child sex abuse can also be difficult to prove, especially if the child has not made specific disclosures and the CFA is relying on inferences from the child’s behaviour, usually exhibiting inappropriately sexualised behaviour and behaviour indicative of trauma. Even where there is access to sex abuse units, it may come a considerable time after the child has exhibited the behaviour or made a disclosure, and the issue of sex abuse will already be part of the case before the assessment. In addition, doubt has been cast on the methodology and expertise of the sex abuse units in Ireland by experts from outside the jurisdiction and indeed by Irish writers.⁹⁰ The Garda Inspectorate noted the absence of standards for forensic examination of victims. (2017, 61). All of this poses very difficult problems for the courts in assessing the evidence. Some of the difficulties in assessing the credibility of allegations were outlined by one lawyer:

“We all know that when [children] are making disclosures in a sense they are at their most vulnerable, and that’s when they can be at their most testing ... Sometimes it happens they’re more likely to be disregarded.” Lawyer 6.

“A child with a high degree of sexualised behaviour – first of all establishing that makes it clear there has been sexual abuse, that’s one piece of work,

90 Eimear Guckian and Michael Byrne, ‘Best Practice for Conducting Investigative Interviews’ [2010–2011] *The Irish Psychologist* 69.

but it doesn't identify a perpetrator. And again, if you establish that behaviour was clearly in place at the time that child came into care that suggests a failure to protect, at a minimum, in the home if the parents can't provide an explanation for it, you can see how I'd be satisfied ultimately that the child should be in care ... the difficulty in proving sexual abuse, that's inherent in the nature of sexual abuse, it's committed usually with some element of control over the child." Lawyer 10.

It can also be difficult for some professionals to believe that some extreme forms of sexual abuse exist, or can be inflicted on very young children, and this can add to the intensity of the questioning of the CFA evidence.

"It was very hard to believe that abuse of that nature actually took place ... but it was quite clear that these two children, given their age, couldn't have invented it because they shouldn't have the knowledge, even of the words, never mind the sensory disclosures that they made." Lawyer 2.

5.4 Section 23 Applications

Disclosures by children of sexual abuse often lead to Section 23 applications, where the admission of hearsay evidence under Section 23 of the Children Act 1997 is debated. Disclosures of abuse by a child, or evidence of sexualised and traumatised behaviour of a child, will invariably be conveyed to the court by a social worker, foster carer or expert. This evidence comes up against the general common law prohibition on hearsay evidence – that a person against whom allegations are made can test those allegations against the person who made them. There is an exception to the hearsay rule in the Children Act 1997 where Section 23 states that hearsay evidence can be admitted if the child is unable to give evidence by reason of age or the giving of evidence would not be in the interest of the welfare of the child. This is subject to "interests of justice" and the Act states these matters should be considered before admitting the evidence.

Normally the child has made a disclosure to an adult he or she has come to trust, often a foster carer. This raises the issue of calling the foster carer to give evidence, which is often opposed by the Child and Family Agency. The agency takes the view that having to give evidence and face cross-examination in court could lead to the breakdown of the child's placement to the detriment of the child, and more broadly to a reluctance among families to become foster carers. This issue of calling the foster carers then becomes a battle in court, which can go on for a considerable time, with different approaches from different judges. Some lawyers feel that calling the foster carer, who is the only person that can give evidence as to the circumstances of the disclosure and the demeanour of the child, is necessary.

“Judges tend to take different views; that is not something that is entirely settled law ... From the point of view of the law of evidence of the adversarial system based on oral testimony, these are things that need to be made available, but from a foster carer’s point of view they didn’t sign up to be cross examined by some smart-alec like me and that’s not why they want to be fostering children, but at the same time it is necessarily the case that children who make disclosures of sexual abuse make it to a trusted person ... so I think a decision needs to be taken early by the CFA on whether they’re going to call the foster carer. It shouldn’t be a decision that’s made during the hearing.” Lawyer 10.

The 1997 Children Act does set out a procedure for dealing with hearsay evidence from children, where under Section 23 a hearsay statement from a child may be admitted in the specific circumstances of the case, and under Section 25 the parents are entitled to introduce evidence to challenge the credibility of the hearsay statement. The provisions of this Act have given rise to a number of cases where there is a “hearing within a hearing” on the admissibility of hearsay evidence. Because the District Court does not establish legal precedent, the decisions of the judges in these cases, even when written and closely argued, do not bind any other judge or any other case, though some new legal developments may assist in bringing some uniformity.

“People don’t actually want children to come to court to be cross-examined. And yet you have these days and days of hotly contested hearings in relation to hearsay ... It’s important to look at hearsay in the context of the [recently adopted EU] Victims’ Directive [recognising the special vulnerability of child victims].” Lawyer 6.

Many of the lawyers interviewed felt that the issue has become unnecessarily over-litigated. One pointed out that there is also provision in the 1997 Act for hearsay evidence to be admitted, but for the judge then to consider the weight to be given to it in the light of all the circumstances. Section 23 of the Act provides a system for admitting hearsay evidence from children and vulnerable adults, while Section 24 provides for the court to then decide the weight to be attached to that evidence.

“You see under S.24 that the court in estimating the weight to be attached, if any, in any statement, in weighing they can decide to give it no weight or lots of weight and some of the factors are set out there, the court has a wide discretion to consider whether it involves multiple hearsay, or the circumstances around it, the lot. So when you admit hearsay, the court has the discretion, even when it admits it, to give it no weight.” Lawyer 7.

It was also pointed out that a recent Law Reform Commission report on the Law of Evidence (LRC 2007) recommended that there is a presumption in favour of

admitting out of court evidence from children, “in public and private proceedings involving the welfare of a child, or in any family law proceedings, subject to safeguards as to weight and a residual discretion to exclude where the interests of justice so require.”⁹¹

However, in the absence of a definitive ruling on the matter by the High Court, or legislation spelling out when and in what forms hearsay evidence from children may be admitted, there are likely to be more cases where this is argued out between lawyers for days on end.

5.5 Other Evidential Issues

Child sex abuse is not the only area where the presentation of evidence can give rise to delays. Some cases concern families where there has been social work involvement for a considerable period, and something happens that gives rise to a decision to seek a care order. The history of social work involvement, short of any court order, is likely to be given to the court, but much of it may be contested by the parents. It may also not be directly relevant to the order being sought.

“Social workers have a tendency to put in a lot of detail historically that may be denied. You’re going, ‘well, actually my client doesn’t think her kid fell off a chair 10 years ago and wasn’t brought to the doctor, that didn’t happen.’ ... The fact that history is recounted where there has never been a finding of fact that [the event] actually happened, that actually gives rise to long-running cases where they’ve been known to social workers for a long time. There has to be a different way of putting before the court what’s agreed and what’s not.” Lawyer 1.

But a lawyer who usually represents the CFA disagreed:

“All the information needs to be brought before the court and what weight the court affords to it is a determination for the judges themselves ... Ultimately the decision is based on the oral evidence...” Lawyer 3

However, there was a wide consensus that it would be helpful to seek to narrow the areas of disagreement, so that not everything was being fought over. This is the practice in some courts, where there is a more collaborative approach between the lawyers, though not in the cases we examined.

“It might be easier from a procedural point of view, if you know what evidence [there is] and you might be able to narrow it down ... A lot of the time it was so repetitive and we were going around in circles ... there was a

91 Law Reform Commission, *Consolidation and Reform of Aspects of the Law of Evidence* (2016) 47.

legal team for the CFA, a legal team for the GAL and a legal team for each of the parents, so you have your evidence being given, say, by the social worker and three people cross-examining ... If there was more of a case management system before the hearing it might cut down on the actual amount of time that the case is in for hearing.” Lawyer 8.

This raises the issue of the need for case management, so that some facts can be agreed between the parents and the CFA in advance of the hearing, and among the disputed facts those that go to the threshold for the order sought can be winnowed out and evidence on them presented in court, with disputed facts that are not directly relevant not brought into the proceedings.

5.6 Resources

A big issue for lawyers for both the CFA and respondents is the lateness of social work reports. For respondents’ lawyers in particular this means they do not have the time to go through the reports thoroughly with their clients, some of whom may have cognitive or language difficulties, and therefore to take meaningful instructions. They may have to request an adjournment in order to do so, which will also lead to delay.

Most of the lawyers in child protection cases do understand that resources are an issue, social workers are under a lot of pressure, often leading to stress, and that this means that reports may not be produced in a timely way. They are then not passed on to the respondents’ lawyers until hours or minutes before the court is due to start. One lawyer who works for the Child and Family Agency explained:

“Basically we get the reports, they’re quite late ... It’s not a criticism of [the social workers] as such, it’s just that it would be lovely if they had the time so we could be prepared, because we’re not ... It’s just that they don’t have the time, they’re running to supervise access, it’s a very difficult job, invariably they’re furiously trying to get court reports done in the middle of six other crises that are happening around them in terms of children in care.” Lawyer 2.

The impact of this is described by a lawyer representing respondents:

“I know it’s not the fault of the CFA solicitor, they would do their best to get them to us as quickly as possible, but sometimes they might be emailed to you the day before ... More times than not we were getting it the morning of court but I think that’s all down to resources, because unfortunately some of the GALs and social workers were only able to meet with the children and prepare the reports in the days leading up to the adjourned hearing.” Lawyer 8.

However, even when reports are delivered in time, respondents' lawyers may have difficulty in obtaining instructions from their clients in a timely way due to the fact that their clients already have difficulties in leading ordered lives, let alone in understanding complex legal proceedings. This can also cause delays.

5.7 Experts

Cases involving alleged sexual abuse and non-accidental injury frequently require evidence from experts relating to the credibility of the disclosures, if made, concerning the existence of physical evidence of abuse and evidence of psychological damage. Most of the expert evidence is brought in by the CFA, though sometimes guardians *ad litem* recommend an expert. Relevant experts include paediatricians, psychologists, psychiatrists and people from various disciplines working with the specialist child sex abuse units. Parents have the right to call their own experts, and occasionally do, though the constraints of the Legal Aid Board budget mean that this rarely happens in legally-aided cases. The calling of expert witnesses will prolong a case, and is often necessary, but may not be decisive in the outcome. The choice of an appropriate expert may itself become a cause of dispute in the case.

“There are experts who are seen as being pro-parent and there are experts that are seen as being anti-parent and certainly when I'm acting for a parent I know what experts I want, if I'm acting for the CFA or a guardian I'll know what experts I want. And that is the nature of the basic tactical to and fro of lawyers.” Lawyer 10.

“Once you involve a series of experts then you really are pushing out timeframes in terms of getting an FCO hearing concluded and so long as the parents are OK with that, they have a right to have their case heard as soon as practicable, the children require stability in terms of whether it is long term care or not... That would be the only concern, once you engage experts you've no control over timelines and so on.” Lawyer 2.

One of the main reasons why expert evidence prolongs cases considerably is that they do not meet beforehand or share their findings. It was widely agreed that this would be very helpful in clarifying the issues in dispute and reducing the length of cases, and it raises the issue of the need for close case management of child protection cases in the District Court.

“I mean experts given the report weeks in advance of a hearing, given a chance to comment on one another's reports in writing ... that would truncate the evidence dramatically and instead of experts being in the witness box for two or three days at a time you'd like to think that you could get through the conflicting experts in a day.” Lawyer 10

This happens in other jurisdictions, and one lawyer who works both in the Republic and in Northern Ireland was surprised that it did not happen here.

“All the experts come together and they distil down what the issues are, whoever’s side they’re on, it’s almost like what we call a Scottish schedule, in arbitration, where you distil down what’s agreed and what’s not agreed, but everyone participates in that meeting, it’s minuted, the minutes are circulated to everyone, it is generally chaired by the guardian and there is an agreed agenda in advance.” Lawyer 5

5.8 Guardians *ad litem*

The court appointed guardians *ad litem* in all the contested cases attended by the CCLRP, and in all of them they played an important role. Generally their presence is seen as helpful in focusing attention on the child and their needs, and as sometimes crucial in getting necessary services for the child. But their presence is not always seen as positive, and two lawyers reported negative experiences of GALs.

“It really was a case of the GAL attacking the social work department and they felt they were being micromanaged and criticised at every stage and they really still hold that belief, they’re very sore about the whole thing to this day ...” Lawyer 2.

“There are a few guardians and they are exceptional, who will make a call to a colleague in England who will talk about some input, some assistance that might be useful in a particular case and that livens us all up whether it is a particular service or a type of service or a model of behaviour or a model of access, [but] they are few and far between.” Lawyer 4

The law governing the role of guardians *ad litem* is skeletal (it is currently being developed by the Department of Children and Youth Affairs and has also recently been examined by the High Court⁹²) and different GALs understand it differently. Some judges regard the role of guardians as expert witnesses for the court in relation to the views and welfare of the child, which means they have a lesser role in the proceedings. One lawyer is very clear – they must be advocates for the child.

“I have refused to act for guardians who do not regard themselves as an advocate for the child, in my view if you’re not an advocate for the child you have no business being in the proceedings.” Lawyer 6.

92 A O’D -v- O’Leary & ors [2016] IEHC 555.

5.9 Consistency in the court

Clarity on the part of the court about the thresholds required to grant one of the orders provided for in the Child Care Act, and consistency across the different District court areas, could greatly reduce the length and complexity of cases, according to lawyers who work in areas which see very few lengthy cases.

“I think one of the reasons (for cases running smoothly) was [having a] permanent judge, the one judge dealing with cases, so that the parties who appear before him know where the thresholds in his court lie and the cases are often confined to those points in conflict rather than having to hear every aspect of the case ... The judge has granted interims and as the case progresses he has returned the child if he is not satisfied as to the higher thresholds of Section 18.” Lawyer 11.

“The focus on thresholds in the evidence has to be very strong, like the difference between a S.17 order and a S.18 order, and ultimately if you’re going for an 18 order what are your grounds, this is what I keep saying to social workers. So on what grounds are we seeking a full Care Order? What is the evidence in respect of each of those allegations?” Lawyer 14.

5.10 Proposals for Change

All the lawyers interviewed thought there were many ways in which the existing system could be improved. One of the main proposals was greater use of case-management techniques. It was acknowledged that the Practice Direction drawn up by the President of the District Court for Dublin, and in operation in whole or in part in some other districts, would be very helpful if used universally and fully. That Practice Direction is currently being updated by the President of the District Court, in consultation with the practitioners.

“If everyone showed their hand a bit sooner, the cases are put down for hearing months in advance very often ... but the case has been set down for hearing without necessarily establishing what really is in dispute ... If people were clearer on the facts early on - was there neglect, was the child hit - if people could be clear early on as to what they’re agreeing to, that would help.” Lawyer 7.

The different approaches taken by different judges were cited by a number of lawyers outside Dublin as a factor increasing the difficulties in child law cases.

“The difficulty is we never know which judge we’re going to get, who’s going to be sitting. A lot can be determined in terms of who is assigned and their approach.” Lawyer 2.

Training for social workers was also high on the agenda of lawyers who worked for the CFA.

“Definitely [we need] more training for social workers: the general concepts in terms of thresholds, in terms of how to present the case, and legal training in terms of principals and thresholds and what is expected in terms of the Act and the Constitution.” Lawyer 2.

The existing structure of the courts and the lack of a Family Court are also seen as an issue. The District Court is a court of local and summary jurisdiction and in parts of the country does not have the time and resources to devote to complex cases. Certain cases, because of the issues involved, must take time. This raises the issue as to whether the District Court, especially where a local District Court is not in a position to allocate a specific judge and specific days to child care cases, is the most appropriate court to hear very contested cases.

“I would be of the view that those cases should be dealt with as expeditiously as possible with the appropriate allocation of court time ... In England and Northern Ireland those cases would not be dealt with at District Court level, they would be dealt with at High Court level. The problem is not about the ability of judges, the problem is about the allocation of time.” Lawyer 5.

There was a considerable amount of convergence between the views of the lawyers and those of the reporters about the need for flexibility in the courts, so that more complex cases could go to a higher court if necessary, and about more and more consistent case management. They, along with social workers, considered that child sex abuse allegations not only made cases more complex, they revealed serious deficits in the systems for dealing with them. They sympathised with fact that social workers were battling limited resources, and observed they sometimes lacked the knowledge and training to present evidence in a clear and focused manner. No lawyer saw any simple answer to the problems posed by complex cases, but all felt that the situation could be greatly improved.

Chapter 6: Guardians' *ad litem* Experience

The role of guardians *ad litem* in child protection proceedings is currently the subject of proposed legislation from the Department of Children and Youth Affairs, so some of the observations in this chapter are likely to be overtaken by legislative events, and should be read in that light.

In all the cases we attended the court appointed a guardian *ad litem* to advise on the views and welfare of the child or children. According to our 2015 Final Report the appointment of guardians *ad litem* in cases varied across different parts of the country, but in general where a case is strongly contested a guardian will always be appointed. In all the cases analysed here the GALs were granted legal representation. In three cases they were represented by a solicitor alone and in seven by both a solicitor and a barrister. There was no discussion about the nature of their legal representation in court.

Guardians *ad litem* are almost invariably qualified social workers with a minimum of a decade's experience. Some of them have additional qualifications. Of the six interviewed for this study, two were also legally qualified, one has a postgraduate diploma in forensic psychology and two are qualified supervisors and trainers. Unlike social workers, they work in different parts of the country and become familiar with different practices both within the CFA and between different courts. They are therefore in a position to compare different practices and see both the strengths and weaknesses in different areas. Four of the six had worked for considerable periods of time, or still worked, in another jurisdiction and also brought that experience to bear in their comments on cases here. They also often bring a broader view to the case. However, due to the lack of clarity in the Child Care Act concerning their role, inevitably different GALs emphasised different things.

6.1 Role of GALs

Most of the guardians *ad litem* saw themselves having a role in planning the case, becoming involved at an early stage and assisting the CFA in sifting the information and presenting a coherent case to the court for the order being sought. One GAL stressed the importance of examining the file without assumptions about the family, analysing the information from the perspective of a clean slate. Another stressed the importance of comprehensive discussions with the social workers in advance of the case in order to establish what was in the best interests of the child. Yet another saw part of her role as ensuring that the right order was made, in the right way.

“I would much rather that the orders made were safe and proper than that they get overturned on appeal.” GAL 4

Another GAL thought that her role was bringing a fresh eye to the case, isolating the issues that were central to it, assisting in the analysis of the information available to the case in order to bring clarity to the issues.

“How about having a bit of case management very early on and the guardian ... could play a role to offer some guidance ... in the early days to say ... this is what needs to happen over the next three months, six months and it might not exactly go to that but it just gives people a general idea of where you’re going and how far off track you go if you do go off track...

“You read the file from A to Z forensically, you can see that all the information is there, we don’t need any more information, we don’t need any more expert opinion because actually there’s tons of information here, we just need to use it and analyse it correctly.” GAL 5

They often made reference to practice in England or Northern Ireland, where four of them had experience, and it is relevant that the High Court of Northern Ireland (Family Division) adopted a guide to case management, dealing with the role of the guardian, which emphasised the guardian having a role at an early stage in synthesising the evidence in a case.⁹³

6.2 Social Work Practice and Training

The GALs interviewed were uniformly sympathetic to the difficulties faced by social workers, but were often critical of current social work practice. They shared the views expressed by reporters and some lawyers that the CFA does not always present its case in a satisfactory manner. One guardian who held this view stressed the importance of the role of a strong team leader.

“My view is [that] the critical factor in social work practice isn’t the social workers, it’s team leaders. I’ve seen brand new social workers carry the most complex of cases and do a fantastic job with courageous and experienced team leaders.” GAL 3

However, there was also concern that young and inexperienced social workers are sometimes thrust into court proceedings without adequate knowledge or preparation, resulting in the case not being presented clearly to the court.

“[When] the state agency doesn’t present their case in a coherent way or a competent way that’s very concerning for everybody and very, very frustrating and again it’s the people on the ground who are instructing the lawyers ... because you’ve a judge trying to grapple with this, you have

93 Florence McT & Ors (Proposed guide to case management: role of Guardian) [2009] NIFam 13 (22 June 2009).

respondents trying to work out what case they have to meet and you also have a child you need to protect in the middle of it, so it gets very, very difficult.” GAL 5

GALs saw one of the main weaknesses in social work practice lying in analysis, a view shared by some social workers themselves (see Chapter 4).

“It’s how to take the information, it’s the analysis that social work departments always get criticised for. They gather lots of information without really making sense of what it means and how that then should be presented and you definitely get into a deficit-driven route very quickly where it’s very easy to look for the evidence to support the position you’re in now rather than really thoroughly analysing it and looking at where the strengths and limitations have grown and diminished along the way.” GAL 6

Specific examples were given of weak analysis.

“It isn’t the drug use *per se*, or the alcohol *per se*. If you want to get locked at the weekend, you just make sure your kids are in your parents’ house. Can you get up at 8 o’clock in the morning, get the breakfast ready and get them out to school? Do you bring strangers into the house? The depth of that analysis in social work training is absent.” GAL 3

“Now sometimes again you don’t have the staff to do that analysis, one of the most basic things a social worker needs to do is read the file, write a chronology, identify the patterns, there’s always patterns and it’s being able to make that analysis.” GAL 5

They endorsed the observation of a number of reporters that there was sometimes a reluctance on the part of the CFA to acknowledge positive aspects of the parents.

“Looking at parental strengths isn’t the strength of the CFA once they get into a court process ... That doesn’t mean that the concerns and the deficits weren’t valid.” GAL 6

This highlights again the issue of social work training, both initially and in-service. Some of the GALs recalled this as a problem when they worked with the HSE child protection services (now the CFA), and were particularly concerned at the demands placed on young social workers with only a few years’ experience when faced with the complexities surrounding allegations of serious harm, without adequate supervision or pre-placement training.

“They’re poorly equipped when they come out of college. Not that they should have forensic training but that they understand the concept of open

ended questions, leading questions. It's a simple concept, it would be used in all kinds of social work assessment and the basics of those kinds of things need to be included in social work training ...

"Their legal training is shocking, you can't ask a social worker to go up in a witness box with no training." GAL 3

Providing pre-placement training for young social-workers was seen as essential to prepare them for the challenge of working in child protection, and having to face court proceedings.

6.3 Geographical Inconsistencies

The GALs were in a position to see different practices in different parts of the country, and commented that practice varied widely both in social work and in the courts.

"There's massive inconsistency across the country and between practitioners and between teams, there are some amazing social workers on the ground, they are ahead of the trend, really get it and can follow a very coherent methodology in their work and then there's some that's the opposite." GAL 5

"We work nationally, the social work departments work locally, they have a local practice, they know their local judge but just practices develop in certain areas in certain courts with certain judges that wouldn't happen elsewhere." GAL 4

6.4 Assessments

One of the issues observed during the cases analysed was delays in having children, and sometimes their parents, assessed. As has been commented elsewhere, this is not always the fault of the CFA as it lacks paediatric, psychological and psychiatric services. However, delays in assessments both cause delays and exacerbate delays due to other factors, and it was stressed that the required assessments should be known and in progress in advance of any hearing. The lack of such assessments could lead to frequent applications in court for GALs seeking to have such services provided, sometimes by private practitioners. The GALs stressed that the appropriate assessments should be under way before a child comes into care.

"I think what's shocking is the deficit with regard to supports for the parents. Social workers can make their assessments but if you think this child is suffering from a degree of trauma, post-traumatic stress, then they need

access to a psychologist and therapy and it's not there because now any child who comes into care can only access services on a public basis and the waiting lists for those services are a year and a half to two years long. Equally for the parents there are not services out there to ameliorate the situation and that is appalling." GAL 1

"Children that are the subject of proceedings in this jurisdiction, the length of time it seems to take to get to any type of progress for assessments to be completed heavily, heavily flies in the face of the need for really robust consideration of reunification at that early stage ... and it's doing the children such a disservice ..." GAL 6

Not only are assessments often delayed and difficult to access, the quality varies around the country, and, as the Garda Inspectorate pointed out, there is also geographical variation in who carries out assessments of allegations of sexual abuse.

"Geographically there's no consistency across the country how allegations are assessed, whether or not you've got [child sex abuse] assessment units and the standards of assessments by those units and the willingness of those units to give evidence [and] to stand over their assessments under cross examination [vary].

"In the area that we were in social workers now no longer interview with the guards because there's a fight about who does the transcribing of interviews." GAL 4

6.5 Experts

Some assessments are carried out by experts, though one GAL thought that sometimes experts were sought when they were not really necessary.

"One of the things I find is that when a particular team managing a case are anxious about their threshold they scuttle about getting loads of assessments done where in actual fact they have the expertise, they need to sit down and formulate a plan and a strategy for the case, often the knowledge is within the team and you have to question what is added to the case by a series of external expert witnesses." GAL 3

The GALs interviewed saw wide variation in the standard of the experts used.

"I think it's a mixed bag, I've seen some so-called experts and they've been appalling, they've cost an arm and leg, and I don't think their assessments have been thorough, and others then have been excellent." GAL 1

One of the issues raised by GALs was that experts were often brought into a case in the middle of it, rather than being planned for at the outset, preferably from a central register of appropriate experts from which the court could draw. Bringing in experts in the middle of a case, sometimes on the basis of a word of mouth recommendation, in turn made it more difficult to manage their evidence and ensure that the court focused on what aspects of it were in dispute.

Echoing the views of some lawyers, the GALs stressed the lack of planning in the use of experts. Planning would identify in advance what experts would be required and give notice to parents so that, if they wished, they could commission their own expert. The experts could then meet or exchange their reports in advance and isolate the points of disagreement. It could also reduce the adversarial nature of the proceedings.

“I think that one of the things about having numerous experts is that it makes it all far more adversarial. Parents if they feel they’ve got the social workers, who tend to travel at least in twos, their lawyers, a bundle of experts, the guardian and they’re facing in on their own as Mr Joe Soap against multiple expert evidence, that’s pretty daunting.” GAL 4

Another GAL thought it necessary to be clear about the purpose of bringing in an expert, as the needs of the court proceedings and the needs of the child were often not sufficiently distinguished.

“Are they being brought in for the Court [to assist in its decision-making] or are they being brought in to identify the needs of the children and how to meet them. Those are two different questions.” GAL 3

6.6 Child Sex Abuse

Guardians were acutely aware of the many problems thrown up by the issue of child sex abuse arising in a case, where confusion can arise between assessing the needs of the child and amassing evidence in order to mount a criminal prosecution. One GAL pointed out that a social worker can believe a child has been traumatised and seek to plan for that child’s future, without evidence having established that the child has been sexually abused.

The involvement of the Gardaí complicates such cases and can make the evidence more problematic. Because of the lack of coordination between the Gardaí and social workers both in the CFA and in the specialist child sex abuse units, as attested to by the Garda Inspectorate report, repeated interviewing occurs and risks the re-traumatisation of the child and the contamination of the evidence, as was seen in Chapter 3 above.

“The Gardaí are saying well we need to interview, you have this tussle that’s inevitable between the Gardaí and [the unit] and as you know in the cases I’ve been involved with we’ve had repeated interviews from [the unit], repeated interviews from the Gardaí and then experts from the UK that then all of that re-interviewing, the suggestibility, we’ve had days of evidence on the suggestibility, all that kind of stuff, contaminating the evidence.” GAL 5

Most GAL interviewees contended that the involvement of the Gardaí led to delays in the case, with delays of many months before the Gardaí interviewed the child, and further delays before they interviewed the suspect, potentially leaving other children at risk. Again, the Garda Inspectorate report, which found a lack of urgency in investigating sex abuse allegations in many areas of the Garda Síochána, supports this view.

“I feel the investigation process is extraordinary, the length of time it takes the Gardaí to complete, even the fundamental investigation, the interviewing process, the gathering of that evidence. It would be my experience [in another jurisdiction] that when a child makes an allegation of sexual abuse they have the opportunity to make a statement, whether that be on video [or] in a question and answer format, within days.

“My experience in this context [in this jurisdiction] is that there can be many months before the child is given the opportunity to make that statement and that in itself is counterproductive in reaching any kind of conclusion. GAL 6

This criticism has been made in relation to cases in various parts of the country, raising the urgent need for a national policy for coordination between different state agencies in relation to child sex abuse, so that children can be protected while suspects’ rights are respected and the prospect of a successful prosecution is not undermined.

“There’s a need for really coordinated work between the two arms of the State, the childcare and CFA arm and the Gardaí, to manage the investigation in a prompt way that fits with the children’s needs and also in accordance with due process. What frequently I find happening is that the Gardaí won’t want social workers to intervene with parents unless or until they have interviewed parents and they want to be the first people to put the allegations to parents. It impacts on how the childcare system proceeds and therefore the timeframes and the coordination.” GAL 4

6.7 The Adversarial System and the Role of Legal Professionals

Like the other professionals, the GALs saw the importance of rigorous examination of the evidence in child care cases, and the upholding of the rights of all parties. But one also recognised the inherent tension between the discipline of social work and that of the law. She stressed the need to ensure that the skills of the social worker and the needs of the child were not lost in the legal proceedings.

“Law is a very different field to social work, you’re going in with dates, times, events, facts with law and with social work you’ve concepts of the arena of human relationships and interaction which isn’t easily tied down to facts and dates.” GAL 3

What was of great concern to GALs was the wide variation in the way in which child care cases were treated in different parts of the country. Inconsistency in the way in which cases are managed and in the role played by individual judges in the case was identified as a problem across the country.

“In some courts it’s forensic micromanagement and in some courts it couldn’t be more opposite and you go into chambers and it’s just - who’s even here? No evidence and it’s just stamp and it’s done, and that’s not right either so the variety in terms of the quality of time that’s given to the cases is vast.” GAL 5

“One judge will say they’re implementing the DMD Practice Direction and another judge in the same area will say he’s not; another judge will say he’s going to operate the Limerick rule, it’s terribly difficult ...” GAL 4

While GALs recognised the need for fair procedures, they felt that the adversarial system could exacerbate existing conflicts, and shared the views of some social workers that this could be made worse by respondents’ lawyers and even judges on occasion.

“I’ve seen certain judges crucify social workers, crucify them, that’s not right either, there has to be a duality of respect ... you have to somehow do the best that you can maintain your relationship with the parents, whatever the outcome, and if social workers get annihilated by the judge, it’s terribly difficult to then go out and work collaboratively with a parent ...” GAL 4

“I’ve been in court where you may have a parent who’s already got intellectual difficulties and the lawyer has made the decision that they’re not competent to give instruction. When I’ve had a conversation with that parent and asked them what their views are etc., it may be totally different to what comes out at the other end in court.” GAL 2

Joint training of social workers and lawyers, and joint planning of cases, could help, according to another guardian.

“I think social work planning and legal planning really need to take priority in any case ... One of the things I have always been recommending is joint training between social workers and the legal profession in this arena and I do think social workers sometimes do confuse criminal proceedings with social work assessment and proceedings ... We need to be developing policy and planning in that interface.” GAL 3

Because of their experience throughout the country and sometimes in other jurisdictions, guardians are able to compare different courts and different systems.

“[In other jurisdictions complex cases are] moved from a District Court level, straight up to a higher court, where they’d be in a Circuit Court or High Court where there’s a lot more expertise in terms of judges or the rest of it, also those courts can offer more time, rather than have a bitty kind of hearing.” GAL 2

Many of the problems in child protection cases are due to the lack of resources in the courts, including a sufficient number of judges to hear cases and to be able to devote the time necessary to do so. Not all judges are comfortable with complex child protection cases, and there is no obligatory training for those who conduct them. However, several GALs acknowledged that many of the judges hearing child protection cases had great expertise and knowledge in child protection and were extremely committed.

“Some [problems] are down to government because judges weren’t being appointed. There needs to be joined up thinking. Don’t talk to me about children’s voices and children’s rights and the Constitution, you’ve judges with a list of 80 cases in front of them and not a hearing date in sight. It’s shocking, and then the whole backlog, I’m appointed to cases I should have been out of ages ago but for the want of a hearing date.” GAL 3

6.8 Case Management

Case management features as a major issue for this group of professionals as well as the others, who cited examples of cases which needed case management and others which benefited from it.

“If you can think that the High Court can run a very complex criminal trial in a fraction of the time. The longest criminal trial was the Anglo one, wasn’t it, that was 12 weeks, whereas when you’re heading into 60 odd days [in this case], there’s something going wrong ...” GAL 4

“The judge in one case got very frustrated and said everybody sit down and have a case management discussion and see if you can find a way forward, there were particular reasons for that. If people sit down and take ownership and responsibility I think it’s very helpful and it became a catalyst for shifting things forward.” GAL 6

Chapter 7: Conclusions and Recommendations

The lengthy and complex cases examined here, and the interviews with the professionals involved, cast light not only on these specific cases, but on complex cases in general and indeed all child care proceedings. They illustrate the difficulties in reconciling the system of law and court practice with the process involved in child protection. The law requires precision and detailed analysis of facts within the framework of legislation and case-law, based on an assumption of competent and rational actors, while social work relies on relationships as well as training, using experience and judgment to consider past facts and likely future outcomes, sometimes involving actors with limited capacity. When these different approaches are combined with limited judicial resources, lengthy court lists and lack of case-management support on the one hand, and heavy case-loads, lack of back-up services and poor inter-State agency cooperation on the other, serious problems are inevitable.

This study shows that issues including the early identification of complicating issues in a case, careful preparation of cases by the CFA for court, the need for coordination between different State agencies involved in the welfare and protection of children and the conduct of cases by the District Court, all require attention by the various State agencies.

The prolonged and complex cases examined here share certain features. These include allegations of very serious harm to a child or children, involving the likelihood of a criminal investigation; lack of coordination between State agencies concerning the allegations made; the involvement of a substantial number of expert witnesses; the requirement that there be professional assessments of the children and sometimes also of the parents; delays in obtaining such assessments; and disputes between experts as to the findings of the assessments. Seven of the prolonged cases, and all except one of those that took over a year, were heard outside Dublin, with six of them heard by moveable judges.

The Final Report (2015) of the first phase of the Child Care Law Reporting Project highlighted inconsistencies between different parts of the country in the numbers of applications brought and in the outcome of these applications. This second phase has confirmed this finding of inconsistency, both in the practice of the CFA and in the courts. Some parts of the country are more likely to see very lengthy cases than others, though in this report the areas in which these cases were heard are not being identified because of the danger of thus identifying the families. According to the Final Report of the CCLRP, however, it is clear that where there is a single judge consistently hearing child care cases on dedicated child care days, very lengthy and multiply-adjourned cases are rare.

7.1 International Experience

It must be acknowledged that reducing the time spent on complex child protection cases can prove difficult, and there is no magic bullet. In England and Wales an attempt was made to do so by a Public Law Outline (PLO), which was intended to keep the time spent on child protection proceedings to 40 weeks. However, a study of the representation of parents in these proceedings in the context of the PLO by Pearce, Masson and Bader, found that it had “failed to reduce the length of cases or number of hearings, or to impact on the underlying culture of care proceedings.”⁹⁴ They found that cases they examined lasted an average of 57 weeks, and were marked by the late service of documents, particularly by the local authorities making the application; this, combined with a failure to comply with directions, made it impossible for legal representatives to arrive in court with fully-fledged positions; and judges felt they had insufficient time to prepare properly for assertive case management. This is a salutary reminder that setting time targets for the completion of cases, without delving into the reasons for the time taken, will not succeed.

7.2 Reasons for Length and Complexity

There is no single reason why some cases have run for very many days spread over many months and in some cases years, and there is no single answer that could reduce the time, the stress for all concerned and the uncertainty for the children. This research indicates, however, that difficulties often start with the preparation of the case and continue with the manner in which it proceeds.

That can begin with relations between parents and the social work department. In some cases this may be due to the particular characteristics of the parents – in one case above the mother’s personality traits made it difficult for her to engage either with the social workers or the court, in another the parents were Travellers and were very suspicious of social workers and other state agencies. Much empathy and effort is required to overcome this and build a good relationship, based on trust, acknowledging the strengths as well as the challenges faced by families, especially those struggling with poverty, exclusion and disability. There is no guarantee that this will be successful.

The new “Signs of Safety” programme in the CFA offers opportunities to engage in a different manner with families where the children are thought to be at risk, but this programme is as yet in its infancy in Ireland. It may facilitate identifying cases that are likely to become complex, and if so this should be signalled to CFA management at an early state so that any necessary additional resources can be brought to bear on them.

94 Julia Pearce and others (n 36) 160.

7.3 Preparation of the Case

According to a number of social workers and guardians *ad litem*, there can be a lack of clarity about the reasons for a care order rather than a supervision order being sought and about the threshold required to prove its necessity to the court. This spills over into uncertainty about the evidence needed to demonstrate that this threshold has been reached and about the identification of witnesses, both social worker and expert, that need to be called to support this evidence, all of which should be done before a case is listed for hearing.

Where cases are routinely heard by the same judge who is very clear on what he or she requires it is much easier for the social workers and their legal team to focus on the threshold and the evidence needed to support it, as two of the lawyers who regularly represent the CFA explained above. Respondents' lawyers in such cases also know what case they have to answer. For logistical reasons within the court system not all child care cases are heard by a regular judge on dedicated child care days, leading to uncertainty and inconsistency in the presentation of cases.

In addition, there appears to be inconsistency in the legal strategy adopted by the CFA. In some parts of the country all documents and reports are routinely shared with respondents' lawyers, while in others the handing over of documents can be a cause of dispute in court. As we saw above, in some parts of the country foster carers regularly give evidence, while this is resisted in others. A unified national legal strategy on the part of the CFA, including a collaborative approach to respondents' lawyers seeking to establish agreement on matters of fact not in dispute, would reduce the adversarial and conflicted aspect of proceedings.

7.4 Social Worker Training and Policy Implementation

Perceived inadequacy of social worker training in a range of areas was identified by a large number of interviewees. This resulted in unfocused and repetitive reports. Specific training deficits related to the assessment of sex abuse symptoms and allegations; knowledge of the law involved in care proceedings, including the thresholds required for the various orders provided for in the Act, the constitutional protection of the family, the requirement that an intervention be proportionate and the right to fair procedures; and an ability to analyse all the information collected about a family and present it in a way that balances positive and negative aspects of the family, avoiding unnecessary repetition. Further training in these areas would give social workers more confidence about appearing in court, lessen the time spent in cross-examination and reduce stress.

Many of the social workers interviewed referred to the large amount of literature on these subjects, in the form of handbooks, assessment tools and protocols, made available by the CFA, but testified that their use is inconsistent and haphazard.

This has also been the experience of the CCLRP in court, where social workers have been cross-examined about their use of best practice guidance, but have told the court that abiding by the guidance is not mandatory. A national implementation strategy to cover the above areas, with clear and accessible material and clarity about its status, would assist social workers in preparing and presenting their evidence.

The pressure of work on social workers, with heavy case-loads and sometimes a high turnover, and the lack of priority given to adequate training and preparation for court, undoubtedly explain some of the shortcomings in the presentation of cases by the CFA and contributes to the stress experienced by social workers.

7.5 Guardians *ad litem*

The Department of Children and Youth Affairs is already engaged in reforming the guardian *ad litem* service, which exists within a legislative and regulatory vacuum, as revealed by the varying views of the GALs themselves as to their role. The General Scheme of the Child Care (Amendment) Bill 2018, providing for a national guardian *ad litem* service, has been published. According to this Scheme its purpose will be “to enable and facilitate the child’s views to be heard in proceedings (District, Circuit and High) under the Child Care Act 1991, to enhance the decision making capacity of the Courts regarding the child’s views and best interests”. It is to be noted that under the Scheme the guardian does not *represent* the child, although a High Court decision states that this is the guardian’s function. The Scheme also allows a child to be made a party to the proceedings without requiring that a guardian be discharged.

The Scheme states that it is intended that a panel of solicitors will represent GALs in child care proceedings, and approval must be obtained from the service-provider for the appointment of a legal representative. At the moment a guardian *ad litem* seeks the permission of the court to have legal representation, but this is normally a formality. The Bill has yet to be enacted, and further debate is likely.

Two judgments, one from the High Court and the other from the High Court of Justice in Northern Ireland, provide useful guidance on the role of guardians *ad litem* which would enhance that debate. In the High Court Ms Justice Baker put forward a nuanced view of the role of the guardian, dependent on the age and maturity of the child and the requirements of the court.⁹⁵ She stated: “The guardian *ad litem* in care proceedings in the District Court does not have the sole role of acting as expert with regard to questions of welfare ... I consider that the function of the guardian *ad litem* appointed under Section 26 is to represent the child in the litigation and to promote the interests of the child and the interests of justice,” which

95 A O'D -v- O'Leary & ors [2016] IEHC 555.

implies a right to legal representation. (*O’Dea and Ors –v- O’Leary and Ors*, October 2016, 16) However, she goes on to say that this does not mean the child is a party to the proceedings, “to characterise a person as a ‘party’ to litigation may not readily define that person’s role.”

Her judgment envisages a substantial role for the court in outlining what it requires from the guardian in the specific circumstances of the case. “The purpose for which a person is appointed guardian *ad litem* may inform the nature of the rights and obligations thus vested ... The role of the guardian *ad litem* may depend on the context of the appointment and the extent of authority vested by an order.” If integrated into the proposed legislation, the approach urged by Ms Justice Baker would leave to the discretion of the court the extent of the involvement of the guardian in the specific case, rather than laying down in legislation a prescriptive role that may not suit every case.

In the High Court of Northern Ireland (Family Division) Mr Justice Stephens outlined a new proposed guide to case management which emphasised early identification of issues with proactive involvement of the guardian *ad litem* at the earliest possible stage.⁹⁶ At the First Directions hearing a timetable should be set out and within 40 days a statement from the local authority on the threshold facts, along with a written response to this statement from the parents’ representative, should be provided. The guardian should then provide his or her analysis of these documents as guidance to the court. “Accordingly ... by at the latest day 45 the Guardian would have been proactively dealing with the ... foster placements ... the need for further assessments of the mother with a view to rehabilitation, together with concurrent planning.”

Mr Justice Stephens goes on to suggest strongly that guardian’s reports should integrate (but not repeat) the views of expert witnesses into the analysis presented to the court. These judgments are not contradictory, and both situate the role of the guardian *ad litem* firmly within the framework of the requirements of the court in the particular case being heard.

7.6 Assessments

Where children have suffered severe neglect impacting on their health and development, where they have experienced trauma or suffered sexual abuse (itself traumatic), the nature of the impact needs to be assessed and presented to the court. This does not always happen in a timely fashion, or sometimes at all. In certain cases the capacity of the parents to parent the child also needs to be assessed professionally, in the context of the parent’s general cognitive capacity and cultural background. Time and again we saw delays in obtaining appropriate

96 Florence McT & Ors (Proposed guide to case management: role of Guardian) [2009] NIFam 13 (22 June 2009).

assessments, including cognitive assessments for the parents, without which parenting capacity assessments will not be fair and will not be able to address deficits.

There is a lack of consistency in conducting parenting capacity assessments, some of which are carried out by psychologists, with others conducted by social workers. Delays in psychological and other reports on children, with consequent delays in accessing appropriate therapies, are endemic. Such delays cause cases to be adjourned while the assessments are awaited, leaving both children and parents in the limbo of interim care, and can give rise to disputes in court between GALs and the CFA about the appropriate services for the children at the centre of the proceedings in advance of a decision on their long-term care.

As the CCLRP stated in its Final Report 2015, and as has been pointed out by the CFA itself, the delays in obtaining such assessments are often not the fault of the CFA, which does not have the appropriate professional services, but is dependent on those of another agency, the Health Service Executive (HSE) or on private practitioners. Lengthy delays are the inevitable result. Resourcing appropriate services for vulnerable children and their families in such crises need to be prioritised.

7.7 Experts

Assessments are conducted by specialists in areas such as paediatrics, psychiatry and psychology and sub-specialisms in these disciplines. The appointment of such experts by the court does not follow a set procedure. Experts can be recommended by the CFA or the GAL in the case, and that might become a source of contention either between them or between one of them and the respondents. They can also be appointed in the middle of the case because an issue arises which the court decides requires specialist advice.

There is no consistent practice of identifying appropriate experts early in the preparation of a case, informing the respondents of their identity and area of expertise, establishing if the respondents will commission their own experts and, if so, arranging for them to meet and distil their evidence into what is agreed and what will be contested. This contrasts, not only with the practice in other jurisdictions, but in the higher courts in this jurisdiction.

7.8 Child Sex Abuse

Nowhere is this difficulty with expert assessments more apparent than in relation to child sex abuse. Child sex abuse is a highly complex area. A suspicion of abuse may be based on the child's behaviour, which can be open to multiple interpretations, or may be based on disclosures by the child. Hoyano and Keenan

point out how difficult investigation of child sex abuse can be. “There can be no doubt that conducting a forensic interview of a young child witness as part of an investigation into alleged wrongdoing is an extraordinarily difficult task. The interviewer will be constrained by the linguistic, cognitive, motivational and emotional characteristics of the child.” (Hoyano and Keenan, 2010, 491)

They also point out that therapeutic interviews, designed to enable a child to speak about abuse for the purpose of diagnosis and treatment, are often conducted on the assumption that the child has been abused, thus seriously impairing the evidential value of any disclosures. (Hoyano and Keenan, 495) Investigative interviewers, on the other hand, may fall into the trap of a preconceived notion of what has happened to the child, so that the interview becomes a single-minded attempt to gather only confirmatory evidence, and to avoid all avenues which might produce negative or inconsistent evidence. (Op cit. 496)

Both CCLRP reporters and other interviewees stressed the geographical lottery involved in obtaining timely and robust assessments for child sex abuse, with some parts of the country having no access to any specialist assessments, where they have to rely on the assessment of social workers who acknowledge having inadequate training in this area. There are only 16 social workers trained to interview child victims of sexual abuse, according to the Garda Inspectorate⁹⁷. (153)

The Child and Family Agency needs a clear national policy on child sex abuse allegations and how these are dealt with in the context of child protection proceedings. Because such allegations raise both criminal and child welfare issues, the Garda Síochána have an essential role in investigating the allegations. This will often include interviewing the child. However, such interviews are for the purpose of gathering evidence for a prosecution, not establishing the context in which the abuse occurred, its impact on the child, the implications for the child’s future family life and the child’s therapeutic needs.

The CCLRP has seen considerable confusion about the manner in which interviews with children are conducted and the purpose for which they are conducted, with trenchant criticism being voiced in court by experts from the UK and by judges of interviews both by members of the Garda Síochána and those working in specialist child sex abuse units.

The CFA has only one child and family unit, in Cork, that deals with child sex abuse and which has outreach facilities in two other cities. In other parts of the country it seeks the assistance of child sex abuse units run by the HSE, where it falls within their catchment area, or independent units. The focus of these units is not the

97 Garda Inspectorate (n 74).

investigation of sex abuse allegations in order to present evidence in child protection proceedings, and whose practice in attempting to do so sometimes falls short of international best practice. Lack of clarity as to the purpose of the assessment leaves it open to criticism or challenge in court.

As the Garda Inspectorate has pointed out, Garda interviews carried out for prosecution purposes are often not carried out in a timely manner, contrary to best practice, with delays of many months in some of the cases described above. They are also frequently not carried out by specialist interviewers, and children are sometimes not interviewed at all. As we have seen, there is no consistent cooperation between the Gardaí and child protection services in relation to collecting evidence on child sex abuse. The existing protocol for joint interviewing between members of the Garda Síochána and social workers was in little evidence in the cases attended by the CCLRP. One of the results is multiple interviewing, leading to increased trauma for the child and the danger of the contamination of the evidence.

These findings are echoed by the Garda Inspectorate in its 2017 report on the Garda response to child sexual abuse, released on February 27th 2018, in which it points out that many of the recommendations made in its report on the same subject in 2012 have yet to be implemented. The report paints a disturbing picture of inconsistency and delay, stating “there are still many inconsistencies in joint-working practices across Ireland and progress in driving improvements in joint-working arrangements has been slow.” (Garda Inspectorate 2017, 62) The report adds: “Some of these areas will require the assistance of other agencies such as the HSE, which provides medical examination and therapeutic services for child victims,” and in the cases attended by the CCLRP and examined above one of the features observed was difficulty and delay in obtaining assistance from HSE-run child sexual abuse units. This author endorses the statement from the Garda Inspectorate, “No one government department or agency can deliver all of the change necessary to improve the services delivered to victims and survivors of abuse.” (63)

A national unit or regional units within the CFA of social workers specially trained to assess child sex abuse, who could liaise with the Gardaí and specialist services and who could go to an area when allegations of serious sexual abuse arise to assist the local team, would contribute to greater consistency and more timely therapeutic interventions for the children.

This report endorses the recommendations made by the Garda Inspectorate in its report published on February 27th 2018, *Responding to Child Sexual Abuse*.

7.9 Evidential Issues

Two types of evidence in child sex abuse cases are particularly contentious: expert evidence and hearsay evidence. Expert evidence includes assessments of the credibility of sex abuse allegations and the impact of the alleged abuse on the child, as referred to above, but can also include physical evidence of abuse. An agreed procedure for the court's appointment of appropriate experts, the management of their evidence so that they share their assessments and present agreed evidence where possible, giving oral evidence on the areas of difference of opinion, would greatly expedite proceedings.

Hearsay evidence has bedevilled most of the cases involving child sex abuse, though the presence of hearsay evidence is by no means limited to such cases. In all the cases we attended allegations of sex abuse were only part of a wider case where either neglect or domestic violence was alleged and usually prompted the initial concerns of the social work department. This is in the nature of such cases – if a child makes a disclosure of having been sexually abused, it is very likely he or she will make it to a trusted person with whom the child feels safe. This will often be a foster carer, who will then report the disclosure to a social worker. The question then arises as to how to bring this information to court.

Very few lawyers want to bring children to court to face cross-examination about their allegation of having been sexually abused. This is explicitly acknowledged by the Children Act 1997, which provides for hearsay evidence from children to be brought to court by third parties or via video-link. Sections 23, 24 and 25 of that Act spell out the considerations that the court must take into account in permitting hearsay evidence to be admitted, the weight to be given to it, and the right of those challenging it to challenge the credibility of the child. The Act does not specify who can convey the hearsay evidence to the court, and this can become a matter of dispute.

Where the child makes a disclosure to a trusted person, and where that is followed up by a specialist sexual abuse assessment unit or the Gardaí, or both, the child is likely to be interviewed and that interview, or interviews, video-taped. The purpose of the interviews may be to establish credibility in relation to therapeutic need, or to assist in a criminal prosecution, but such video-tapes will be highly relevant to the child care proceedings. Where the Gardaí or a special unit opposes the release of the videos these matters then become issues to be tried in advance of hearing the substantive issue of whether or not the child or children should be in care. It is imperative that these videos are readily made available to the court, redacted if necessary where they may compromise a criminal investigation.

It is also imperative that there be a coherent national approach by the courts to Sections 23 and 24 of the Children Act. This will be provided for in legislation if the

recommendation of the Law Reform Commission, referred to in Chapter 5, is implemented, but in the meantime it would be very helpful if the courts found a way, perhaps through a Case Stated to the High Court, for guidance to be provided to all District Courts so that the issue is not constantly re-litigated.

7.10 Problematic Organisation of the Courts

A District Court judge hearing one of the cases described in Chapter 3 posed the question as to whether the District Court was the best place to hear very complex cases, and this question has also been raised by reporters, GALs and lawyers. The volumes of cases processed by the District Court, referred to in Chapter 1, is indicative of the challenges certain cases can pose. In Dublin Metropolitan District Court three judges are assigned on a fulltime basis to hearing child care law, and they have built up a huge amount of expertise. In certain other cities, notably Cork and Limerick, where the District Court has more than one sitting judge, one is allocated to child care cases and two days a week set aside to hear them. Again, the judges here have been able to build up expertise and can also allocate time to hear cases that may extend or prove complex. Even in some smaller towns where specific days are allocated to child care the cases can often be managed by the sitting judge, especially if he or she insists on tight case management.

The volume of cases heard in each district also plays a role, but under the legislation governing the District Courts they are courts of “limited and local jurisdiction”. “Local” means that they may only hear cases involving parties within their allocated area. Cases from a very busy area cannot be heard by a neighbouring court under less pressure. It seems anomalous that “limited” jurisdiction includes matters as grave as removing children from their families for the entirety of their lives, sometimes following a hearing which includes evidence alleging serious criminal offences, but this is what is provided for by law. In addition, each allocated District Court judge operates autonomously, so a Practice Direction issued in Dublin cannot be imposed elsewhere. The combination of limiting the District Court to a local jurisdiction, and forcing all child protection proceedings into this court, can lead to serious difficulties in the management of complex cases. Where there are very busy District Courts and no allocated child care days the sitting judge can, and usually does, seek the assistance of a “moveable” judge from the unallocated panel of District judges. It cannot be coincidental that the majority of the lengthy cases examined in this study were heard by moveable judges.

The District Court is under-resourced for the responsibility involved in child protection cases. There are not enough judges and they lack sufficient support services. Case management requires administrative support, and the District Court is the poor relation of the courts system in this regard. This is a false economy, as the vast amounts of court time taken up by the cases described in Chapter 2 above demonstrate.

Interviewees from all three professions highlighted the lack of case management in many of the lengthy cases. A Practice Direction drawn up by the President of the District Court, or a modified version of it, is used in Dublin and some other areas, but not in all, and it does assist in the management of cases. However, practitioners acknowledged that even where it is in use it does not always fully operate. That Practice Direction is currently being revised by the President of the District Court, in consultation with practitioners and the CFA, and should lead to greatly improved case management where it is used.

The establishment of a Family Court has been discussed for at least two decades. The heads of a Bill have been promised in the coming months. They are likely to contain proposals to have a division within the existing court system with judges who would acquire expertise in family law and hear family law cases, including child care law, for a specified period. They are also likely to provide for different levels of court, with some matters being dealt with at District Court level, while more serious or complex matters would be dealt with by the Circuit and High Court.

Even without the establishment of a Family Court division, which is likely to be some years away, there is much to be done. In the neighbouring jurisdictions of Northern Ireland and England and Wales child care cases are triaged at District Court level and the court decides on what court should have jurisdiction over the specific case, sending the more complex to a higher level. Already in our District Courts this happens in relation to criminal cases – judges regularly decline jurisdiction in criminal cases and send them to the Circuit Court. A similar provision in relation to child care, permitting the District Court to decline jurisdiction and send cases to the High Court which already hears certain cases under the Child Care Act, as amended, would give greater flexibility to the District Court. If combined with modifying the legislation on the geographical jurisdiction of the court so that cases were no longer limited to the court District in which the family live, it could reduce the number of complex cases heard by this court and ensure that such cases were always heard by an appropriate court, whether one of the specialist District courts in a major city, or by the High Court.

Careful preparation of cases by the CFA, a universal case management system, with deadlines for the production of reports and affidavits, the narrowing of the issues to those in dispute, the winnowing of witnesses so that only necessary evidence is given, meetings between experts so that they could present agreed evidence separately from what was disputed, would all help.

For the CFA, the development of a national legal strategy so that there is a single approach to issues like the calling of foster carers, the disclosure of all reports and documents, the appointment of experts and the admission of hearsay evidence, would give some predictability to cases and permit better case management. The allocation of adequate resources to the preparation of cases for court and the

prioritisation of training for social workers in the law surrounding State intervention in child welfare and protection and the giving of evidence would also help greatly reduce the time spent in court by social workers and the resources consumed by lengthy and complex court proceedings.

7.11 Education and Training of Legal Professionals

There have been a number of references made to the training of judges in relation to child protection. Already the current President of the District Court, through the Judicial Studies Institute, holds regular seminars on aspects of child protection, though attendance is not compulsory. The newly published Heads of the Judicial Council Bill provides for the ongoing education of judges, and Head 12 specifically mentions education in Information Technology and Sentencing.⁹⁸ It would be very useful if the final version of this Bill also included a reference to child protection and welfare.

Reference was also made by interviewees to the need for more specialist training for lawyers working in the area. This is not just an issue in Ireland – Pearce and Masson (2011, p 76), referring to child care proceedings in England and Wales, said many of their interviewees commented that having non-specialist lawyers could lead to delay because they lacked the knowledge of practice that specialist lawyers on the children’s panel had “absorbed” and the skills they had developed. The establishment of a panel of lawyers who specialise in private family law relating to children and in child protection, children’s rights and children before the courts on criminal-related matters, would contribute to the consolidation of a body of legal expertise.

In general, better preparation of cases, more focused reports delivered in a timely manner, a nation-wide specialist service for assessing and dealing with child sex abuse, operating to the best international standards and that would serve both the criminal and child protection courts, rigorous case management and specialisation in the courts, would all go a long way towards ensuring that complex cases were dealt with as speedily as possible, to the benefit of children and their families, and indeed of the professionals working with them.

98 The Heads of Bill are available at <<http://www.justice.ie/en/JELR/General%20Scheme%20Judicial%20Bill.pdf/Files/General%20Scheme%20Judicial%20Bill.pdf>> accessed 10 March 2018.

7.12 Summary of Recommendations

While this report was commissioned by the Department of Children and Youth Affairs, child protection proceedings involve the interaction of the child care system with the courts and the justice system, and solutions to the problems in child care proceedings involve them both. The problems in this interaction cannot be solved by the Department or the CFA alone. Government policy in relation to resourcing the judiciary and the courts, the priority given to services in other Government departments which bear on vulnerable children, along with legislation, policy and practice in child care and the courts, will all play a major role.

7.12.1 Child Care Act 1991

The Child Care Act is currently under review by the Department of Children and Youth Affairs. It is hoped that this report will assist in that review. In addition, the author is making a separate submission to the Department of Children and Youth Affairs, in response to its call for submissions.

7.12.2 Government Action

1. Consideration should be given to the appointment of a sufficient number of District judges to ensure that child care cases can be prioritised, with dedicated child care days, in all areas;
2. Consideration should also be given to the provision of resources to the District Court to enable District Court judges institute a national system of case management for child care cases.
3. All State agencies involved in providing assessments of children and parents in care proceedings should be adequately resourced so that that can provide them in a timely manner.

7.12.3 The Child and Family Agency/Tusla should consider:

1. The development of a strategy to identify early cases with potentially complicating features, so that they can be referred to an appropriate senior level within the CFA and the necessary resources brought to bear on them;
2. The development of a unified national legal strategy in child protection cases, covering such areas as the preparation of such cases for court, the identification of appropriate experts, the approach to the exchange of reports and documents, the approach to the issue of hearsay evidence, including the role of foster carers in proceedings where hearsay evidence from children arises, and including consideration of asking a District Court

to state a case to the High Court that would lay down guidelines on the hearsay matter;

3. The establishment of a specialism within the CFA to deal with child sex abuse, which, along with other appropriate agencies, could establish multi-agency centres available to assist all CFA areas when allegations of child sex abuse are made in the context of child protection proceedings;
4. The development, in cooperation with the Garda Síochána and the HSE, of a national child sex abuse assessment and intervention practice, following the recommendations in the Garda Inspectorate 2017 report *Responding to Child Sexual Abuse*;
5. The rolling out of a national training and implementation programme for social workers that would strengthen their analytic ability and cover areas such as the legal principles underlying the law on child protection, the thresholds required for various forms of State intervention and the giving of evidence in court;
6. The review of practice in the preparation of child protection cases to ensure that successive reports and reports from different social workers are not repetitive, that they are presented to respondents' legal representatives in a timely way, and that the agreed facts in the reports are distinguished from those in dispute.

7.12.4 The Department of Justice and Equality should consider:

1. The prioritisation of the publication and enactment of legislation for a Family Court, with different levels of jurisdiction depending on complexity, to deal with all aspects of private and public child and family law;
2. Consideration of an amendment to the Courts of Justice Act 1922 to permit child protection cases be considered by District Courts outside the immediate area of residence of the family concerned;
3. Consideration of legislation providing for District judges to decline jurisdiction in complex child care cases, and refer them to a higher court;
4. Consideration of including a reference in the forthcoming Judicial Council Bill to the need for the education of relevant judges in child protection;
5. Consideration of the immediate enactment of the recommendation of the Law Reform Commission report on the Law of Evidence in relation to hearsay evidence from children.

7.12.5 The courts should consider:

1. The establishment of dedicated child care days, heard by the same judge, in all District Court areas or in regions, if the geographical jurisdiction is modified;
2. The development of a case management template for all District Court areas, covering deadlines for the production and exchange of documents, the order of witnesses, cooperation between the parties on narrowing the issues, meetings between expert witnesses to establish areas of agreement and isolate the issues in dispute and such other relevant matters as decided by the District Court;
3. The provision of additional administrative resources to the District Court to assist in the rolling out of case management policy and practice;
4. Where child care cases are the subject of judicial reviews or cases are stated to the High Court, this court should consider prioritising such cases in its lists, so that these proceedings do not hold up the child care proceedings.

7.12.6 Legal Practitioners

1. The professional bodies should consider the establishment of a panel of specialist child care legal practitioners, with appropriate training.

Appendix I: Research Consent Form

Title of project: An examination of lengthy, contested and complex child protection cases in the District Court

Consent to take part in research

- I..... voluntarily agree to participate in this research study.
- I understand that even if I agree to participate now, I can withdraw at any time or refuse to answer any question without any consequences of any kind.
- I understand that I can withdraw permission to use data from my interview within two weeks after the interview, in which case the material will be deleted.
- I have had the purpose and nature of the study explained to me in writing and I have had the opportunity to ask questions about the study.
- I understand that participation involves being interviewed by the researcher concerning complex child protection cases in the District Court in which I have been involved.
- I understand that I will not benefit directly from participating in this research.
- I agree to my interview being audio-recorded.
- I understand that all information I provide for this study will be treated confidentially.
- I understand that in any report on the results of this research my identity will remain anonymous. This will be done by changing my name and disguising any details of my interview which may reveal my identity or the identity of people I speak about.
- I understand that disguised extracts from my interview may be quoted in the report on the research published by the Child Care Law Reporting Project and by Tusla, and in academic journals and conference presentations, seminars and other teaching.

Signed (Participant):
Date:

Signed (Researcher):

Table of Cases

A. -v- Health Service Executive [2012] IEHC 288.

A O'D -v- O'Leary & ors [2016] IEHC 555.

Child and Family Agency and C, judgment delivered by Judge Alan Mitchell 5th March 2015, unpublished

Child and Family Agency and L, Judgment delivered by Judge Colin Daly 27th March 2015, unpublished.

Child and Family Agency and LG and SK, decision delivered 9th May 2017, unpublished

Child and Family Agency -v- VR [2016] IEDC 16.

Florence McT & Ors (Proposed guide to case management: role of Guardian) [2009] NIFam 13 (22 June 2009).

Health Service Executive -v- O.A. [2013] IEHC 172.

Health Service Executive -v- JG & anor (Care Order - Physical Abuse) [2013] IEDC 16.

The North Western Health Board Plaintiff v. H.W. and C.W. Defendants [2000 No. 6348 P.; S.C. No. 321 of 2000] High Court 27th October 2000, Supreme Court, 8th November 2001.

Bibliography

- Becker H, *Tricks of the Trade: How to Think about Your Research While You're Doing It* (The University of Chicago Press 1998).
- Boele-Woelki K, Braat B, and Curry-Sumner I (eds), *European Family Law in Action, Volume III: Parental Responsibilities* (Intersentia 2005).
- Buckley H, Corrigan C, and Kerrins L, 'Report of an Audit of Child Protection Research, CAAB Research Report No 7' (Children's Acts Advisory Board 2010).
- Buckley H, Horwarth J, and Whelan S, 'Framework for the Assessment of Vulnerable Children and Their Families: Assessment Tool and Practice Guidance' (Children's Research Centre, TCD 2006).
- Buckley H, Carr N, and Whelan S, 'Like Walking on Eggshells: Service Users Views and Expectations of the Child Protection System' (2011) 16(1) *Child and Family Social Work* 101.
- Burns K, O'Mahony C, Shore C, and Parkes A, 'Child Removal Decision-Making Systems in Ireland: Law, Policy and Practice' in Burns K, Psvs T and Skivenes M (eds), *Child Welfare Removals by the State: A Cross-Country Analysis of Decision-Making Systems* (Oxford University Press 2017).
- Burns K, O'Mahony C, Shore C, and Parkes A, 'What Social Workers Talk about When They Talk about Child Care Proceedings in the District Court in Ireland' (2018) 23 *Child & Family Social Work* 113.
- Burns K, Psvs T and Skivenes M (eds), *Child Welfare Removals by the State: A Cross-Country Analysis of Decision-Making Systems* (Oxford University Press 2017).
- Cahillane L and Schweppe J (eds), *Legal Research Methods: Principles and Practicalities* (Clarus Press 2016).
- Centre for Effective Services, 'International Review of Childcare Legislation – Phase II Identified Areas of Interest' (2016).
- Child and Family Agency, 'Monthly Performance and Activity Data 2017: November 2017 (YTD)' (2018) <<http://www.tusla.ie/data-figures>> accessed 26 February 2018.
- Commission to Inquire into Child Abuse, 'Commission Report' (2009).
- Convention on the Rights of the Child (Adopted and Opened for Signature, Ratification and Accession on 20 November 1989) 1577 UNTS 3 (UNCRC). (2 September 1990).
- Corbett M, 'An Analysis of Child Care Proceedings Through the Lens of the Published District Court Judgments' (2017) 20(1) *Irish Journal of Family Law*.
- Corbin J and Strauss A, *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory* (SAGE Publications 2008).

- Corrigan C, 'Children's Voices, Adults' Choices: The Voice of the Child Through the Guardian AD Litem in Child Care Proceedings in the Irish District Courts' (Trinity College Dublin 2015).
- Coulter C with Colfer L, Healy K & MacMahon M, *Final Report, Child Care Law Reporting Project* (Child Care Law Reporting Project 2015).
- Courts Service, 'Courts Service Annual Report 2016' (no date).
- Doherty M, 'Getting Down and Dirty: The Case for Empirical Legal Research' in *Legal Research Methods: Principals and Practicalities* (Clarus Press 2016).
- European Union, 'Charter of Fundamental Rights of the European Union' (26 October 2012) vol 2012/C 326/02.
- Featherstone B, White S, and Morris K, *Re-Imagining Child Protection: Towards Humane Social Work with Families* (Policy Press 2014).
- Garda Inspectorate, 'Responding to Child Sexual Abuse: A Follow up Review from the Garda Inspectorate' (2017).
- Government of Ireland, 'Joint Committee on the Constitutional Amendment on Children, Third Report, Twenty-Eighth Amendment of the Constitution Bill 2007, Proposal for a Constitutional Amendment to Strengthen Children's Rights, Final Report' (2010).
- Guckian E and Byrne M, 'Best Practice for Conducting Investigative Interviews' [2010–2011] *The Irish Psychologist* 69.
- Health Service Executive, 'Court: Best Practice Guidance' (2013).
- Hiles M and Luger C, 'The Resolutions Approach: Working with Denial in Child Protection Cases' (2006) 25(2) *Journal of Systemic Therapies* 24.
- Hoyano L and Keenan C, *Child Abuse: Law and Policy Across Boundaries* (Oxford University Press 2007).
- Kilkelly U, *The Child and the European Convention on Human Rights* (Programme on International Rights of the Child (Series), Ashgate/Dartmouth 1999).
- Kilkelly U, *Childrens Rights in Ireland: Law, Policy and Practice* (Tottel 2008).
- Law Reform Commission, *Consolidation and Reform of Aspects of the Law of Evidence* (2016).
- Maxwell JA, *Qualitative Research Design: An Interactive Approach* (SAGE Publications 2013).
- McGhee J, '44 Years on - Reflections on the Scottish Children's Hearings System' in (International Conference on Child Protection and the Law, Dublin, Unpublished 2015).

- McGrath K, 'Protecting Irish Children Better – The Case for an Inquisitorial Approach in Child Care Proceedings' (2005) 5 *Judicial Studies Institute Journal*.
- O'Donovan D, 'Socio-Legal Methodology: Conceptual Underpinnings, Justifications and Practical Pitfalls' in Cahillane L and Schweppe J (eds), *Legal Research Methods: Principals and Practicalities* (Clarus Press 2016).
- O'Mahony C, Burns K, Parkes A, and Shore C, 'Representation and Participation in Child Care Proceedings: What about the Voice of the Parents?' (2016) 38(3) *Journal of Social Welfare and Family Law* 302.
- O'Mahony C, Parkes A, Shore C, and Burns K, 'Child Care Proceedings and Family Friendly Justice: The Problem with Court Facilities' (2016) 19(4) *Irish Journal of Family Law* 85.
- Parkes A, Shore C, O'Mahony C, and Burns K, 'The Right of the Child to Be Heard? Professional Experiences of Child Care Proceedings in the Irish District Court' (2015) 27(4) *Child and Family Law Quarterly* 423.
- Pearce J, Masson J, and Bader K, *Just Following Instructions? The Representation of Parents in Care Proceedings* (School of Law, University of Bristol 2011).
- Shannon G, *Child Law* (2nd ed., Thomson Round Hall 2010).
- Shannon G, 'Fifth Report of the Special Rapporteur on Child Protection: A Report Submitted to the Oireachtas' (2012).
- Shannon G, 'Seventh Report of the Special Rapporteur on Child Protection: A Report Submitted to the Oireachtas' (2014).
- Shannon G, 'Eighth Report of the Special Rapporteur on Child Protection: A Report Submitted to the Oireachtas' (2015).
- Shannon G, 'Ninth Report of the Special Rapporteur on Child Protection: A Report Submitted to the Oireachtas' (2016).
- Taylor A, 'Prepare for the Dock' (*Community Care*, 1 November 2007).
- Turnell A and Murphy T, *Signs of Safety: Comprehensive Briefing Paper* (4th edition, Resolutions Consultancy 2017).
- Tusla, Child and Family Agency, 'Alternative Care Practice Handbook' (2014).
- Ward P, *The Child Care Acts: Annotated and Consolidated* (Third Edition, Round Hall 2014).



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