

## The Developing Role of the Guardian Ad Litem under the Children (NI) Order 1995

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# The Developing Role of the Guardian Ad Litem under the Children (NI) Order 1995

Patricia O' Kane

*The Northern Ireland Guardian Ad Litem Agency was established consequent upon the implementation of The Children (NI) Order 1995. The role of the guardian has developed and become embedded in a changing socio-legal context. This paper will review the key influences that have impacted on predominant social work thinking. Anticipated legislative change and the challenges of managing the service in a climate of productivity indices and efficiency savings will be explored.*

## **The Guardian's Role**

The Guardian Ad Litem's role is encapsulated in the Northern Ireland Guardian Ad Litem Agency (NIGALA) Mission Statement:

To advise the Courts of children's wishes and feelings and independently represent and safeguard the interests of children in specified public law and adoption proceedings in Northern Ireland.

The role is dictated by the relevant legislation. In specified proceedings, under the Children (NI) Order 1995, the child has party status and the Guardian appoints a solicitor to represent the child. The child's welfare is paramount. By contrast under the Adoption (NI) Order 1987 the child is not a party in proceedings and the Guardian has no automatic entitlement to legal representation. The statutory duty of welfare gives first, but not paramount, consideration to the welfare of the child.

The inherent tensions and challenges of the Guardian's role, as a social work professional and an officer of the court, are played out during the course of their involvement in proceedings:

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the crucial importance of the Guardian's role is that it stands at the interface between the conflicting rights and powers of Courts, local authorities and natural and substitute parents in relation to the child. The Guardian has to safeguard the child's interests to ensure the most positive outcome possible for the child. The Guardian also has to make a judgement between the potentially conflicting demands of children's rights, children's rescue, the autonomy of the family and the duty of the state. (Timms, 1992, p. 112)

The distinctiveness of the Guardian role pertains to their specific mandate as:

- Independent professional.
- Children's representative.
- Officer of the court working in tandem with the solicitor.

### **Independent Professional**

The Guardian acts as an independent professional with dual accountability to the Court and the NIGALA. The parameters of the role are prescribed in the rules of court. The scope and conduct of Guardians' enquiries, with an emphasis on analysis and evaluation as distinct from duplication, is dictated by the requirement to ensure that the welfare of the child is promoted. Guardians relate that their review of the Trust case file is fundamental to having an overview of the Trust's involvement and actions. Frequently, patterns or themes emerge as to the child's circumstances and experiences of parenting that lead to a critical evaluation of the Trust's intervention. The Guardian's child focus and needs led perspective is, on occasion, at odds with the Trust's stance. Arguably the current structure of Trusts with clear lines of accountability, coupled with resource constraints, can potentially compromise professional judgement. Ever-increasing and competing demands, of necessity foster a crisis intervention ethos that is contrary to the aspiration of timely, targeted intervention in order to avoid recourse to statutory intervention.

The opportunity of shedding new light on what are invariably difficult, entrenched situations needs to be sensitively and constructively managed by the Guardian. Trusts can be enabled to critically reflect on their planning and decision-making and gain insight into the scrutiny of the court process, thereby avoiding defensive practice.

Likewise a number of Guardians are of the view that their independence carries influence with parents, who appreciate the objectivity, and can act as a catalyst for them to engage and address identified issues.

The perceived power and influence of the Guardian's role disguise the inherent isolation and responsibility of their position. Discussions with Guardians have revealed the range of facets of their role encompassing investigator, child's advocate, negotiator, resource broker and mediator. The generally high correlation between the Trust's recommendation, the Guardian's recommendation and the court outcome

often belies the added value of his/her role that is enmeshed throughout the process of their involvement.

### **Children's Representative**

Children's representation is the lynch pin of the Guardian's role. The welfare checklist contained in Article 3 (3) of the Children Order (NI) Order 1995 is a template for amplifying the child's views and circumstances within the Guardian's Court report. The focus on children has moved from that of simply representation to participation with an emphasis on the child's rights to be consulted and involved as enshrined in Article 12 of The United Nations Convention on the Rights of the Child (1990). There is a fine balance in reconciling the competing arguments in respect of advocating children's rights to full involvement and the adult's role as the safe guarder of their best interests.

The Guardian's task-focused, time-limited remit demands a clear delineation of the purpose and focus of their engagement with children. A consensus needs to be reached as to children's participation in court proceedings to ensure that it is meaningful and dictated by the particulars of the case and the child's capacity to manage the experience, as opposed to a piecemeal, inconsistent approach driven by the professionals' agenda.

### **Officer of the Court Working in Tandem with the Solicitor**

A sound understanding of the Rules of Court and legislative framework is essential to the conduct of the guardian's socio-legal role. The "tandem" model of representation, in which the child is represented by both the Guardian Ad Litem, presenting a view to the Court about the child's welfare, and the child's solicitor, acting as an advocate for the child and presenting a view about his rights or the justice of his case, has been described as:

a working synthesis of children's rights and children's welfare and establishes a framework of decision making between children and adults which respects both the rights of one and responsibilities of the other. (Timms, 1998, p. 25)

The quality of the representation of children in public law proceedings rests on an effective partnership between the Guardian and the child's solicitor, which capitalises on the combination of social work knowledge, practice wisdom and experience and legal knowledge and skills. When a young person is deemed to be competent to give instruction to their solicitor directly, the solicitor acts as their advocate. If the Guardian is at variance with the young person's stance, he/she may seek leave of the Court for separate legal representation to advise the Court about their determination in respect of the young person's best interests. The assessment of competence is a complex issue, which ultimately is adjudicated upon by the solicitor and is not contingent on chronological age but on the young person's level of intellectual ability and emotional maturity.

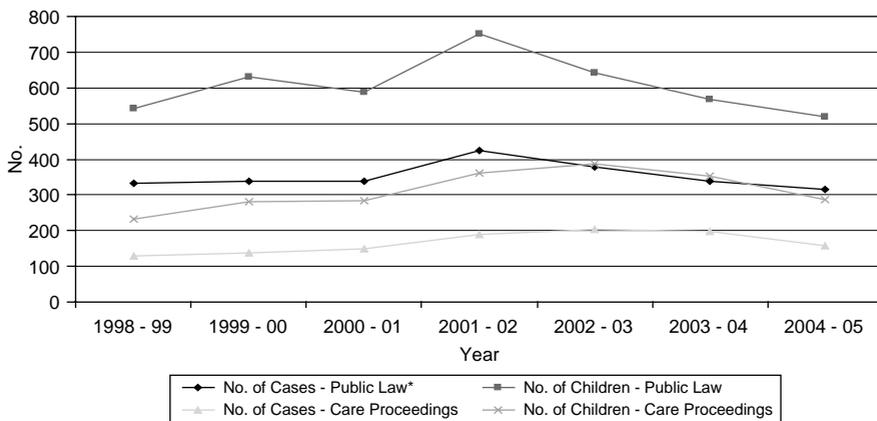
**The Evolving Legal and Social Work Context within which the Guardian Operates**

Having detailed the central tenets of the Guardian’s mandate as enshrined in legislation, I now want to reflect on the changes within social work and the legislation subsequent to the implementation of The Children (NI) Order 1995 that have impacted on the guardian’s role.

The Children (NI) Order was heralded as progressive legislation designed to bridge the divisions between safeguarding children and promoting their welfare between protection and prevention. The key principles of the legislation—the Paramountcy Principle, the No Delay Principle and the No Order Principle—reflected messages from research in relation to outcomes for looked after children (DOH, 1991). There was, however, uncertainty within the social work profession about how far the emphasis should shift from the child protection end of the spectrum to family support through working in partnership with parents. In 1997/98 there was perhaps an over-cautious approach that manifested itself in a reluctance to seek the authority of a Court Order. In the first five months of the implementation of the Order there were 54 appointments in specified public law proceedings; a year later, in the same five-month period (November 1997–March 1998), the figure had risen to 131.

Figure 1 charts the trends in Guardian appointments from April 1998 to March 2005. From 1998 there was an increase in cases year on year, plateauing in 2001. Thereafter there has been a gradual reduction in the volume of public law cases. There are no known regional trends or Trust indicators to account for the variation in court applications. The identified variations in applications highlight the inherent difficulties of managing a demand-led service in the absence of reliable indicators projecting the anticipated volume of court work year on year.

Guardians continue to encounter variations across Trusts, both in respect of the configuration of service provision and team structures. Some Trusts have resourced early intervention services while within other Trusts there is an emphasis on



**Figure 1** Guardian Ad Litem Appointment Trends for the period 1 April 1998–31 March 2005. *Note:* \*To include Emergency Protection Orders, Care Orders, Supervision Orders, Secure Accommodation, Care Contact and Art 56 cases.

resourcing permanency planning. Factors such as resources—staff, placement options, assessment/therapeutic services—and dominant thinking as to the respective merits of family autonomy versus statutory intervention also invariably influence practice.

Guardians' perceptions were supported by the findings of the Social Services Inspectorate (1999) Care Planning Inspection, which noted that decisions appeared at times to be influenced by:

- Resource limitations.
- Lack of in-depth knowledge of legislation.
- Over-optimism.

Difficulties in recruiting and retaining staff in family and childcare, as referenced by social work managers and supported by Northern Ireland Commissioner for Children and Young People (2004, p. 94) research, invariably results in lack of continuity and consistency in the management of cases. Of concern is the consensus of opinion, within the social work profession, about the negative impact of adversarial proceedings on the treatment of social workers in the courtroom when giving evidence, which is justified in the pursuit of being seen to afford parents a fair hearing. It is vital that the parlance of rights is extended to everyone in court with respect and courtesy being fundamental requisites in the quest for productive, inquisitorial proceedings. The importance of attracting and retaining staff in the interests of promoting requisite expertise and skills has to be recognised. The expansion of Senior Practitioner posts and the establishment of a pilot Principal Practitioner post are to be welcomed in this regard given the need for robust assessment, planning and decision-making underpinned by sound professional judgement. The implementation of a regionally agreed assessment framework would likewise assist in determining appropriate, consistent intervention (Department of Health, 2000).

### **Permanence Planning**

As the legislation was becoming embedded and experience was promoting confidence, the emphasis on permanency planning resulted in a further revision of predominant social work thinking and practice. A Departmental circular (Department of Health and Social Services, 1999, p. 1) proclaimed “adoption as an important and beneficial option for the care of children and is intended to bring adoption back into the mainstream of children’s services . . . there is a common misconception that every effort should be made and all possibilities exhausted to try to secure the return of the child to his family, no matter how long it might take. Such a conception lacks proper balance; time is not on the side of the child”. Confusion about and variation in interpretation as to what constituted permanence ensued. Departmental targets to secure adoption for at least 4% of the looked of

the population in 2000, currently set at 7%, led to adoption being perceived as the preferred option to secure permanence.

The tensions between the central tenets of The Children (NI) Order 1995 and The Adoption (NI) Order 1987 were played out in the court arena. Concurrent planning defined by Katz (1999) as “the process of working towards family reunification, while at the same time establishing an alternative permanent placement plan” (p. 71) emerged in practice. The advantages of placing infants with dual-approved carers assessed as having the capacity to foster and also adopt, if rehabilitation was ruled out, effectively safeguarded against disrupted care giving and the attendant problems for attachment formation. Likewise combining care and freeing proceedings was perceived as avoiding undue delay. In reality, freeing consolidated proceedings have been lengthy and the wisdom of evidencing threshold and extinguishing parental responsibility simultaneously has been called into question by Article 6 (the right to a fair hearing) of the Human Rights. Additionally, the relevance of freeing is questionable given the culture of openness created by the Children Order that has permeated adoption practice. The Social Services Inspectorate (2003) *Review of the Freeing Order Process* confirmed that delay is a serious problem and indicated the need for the Children Order and the Adoption Order to be “reviewed and aligned to allow a better balance to be struck between the welfare of the child and the rights of the parents” (p. 4).

Table 1 compares the number and duration of freeing and combined care and freeing proceedings for the period April 2000–March 2005.

### **The Endemic Problem of Delay**

The Children Order aimed to create a unified Court structure and dedicated Judiciary to hear cases at the appropriate level with the emphasis on reducing delay through effective case management. Post-Children Act 1989 research has cited reasons for inappropriate delay, despite the intent of the legislation.

Hunt, McLeod, and Thomas (1999, p. 194) found that:

Factors such as the introduction of more stringent threshold criteria, greater case complexity, a wider range of options to be explored, a requirement to produce written evidence and to produce more information and more detailed evidence, presence of more witnesses, greater legal representation of participants and more probing cross-examination due to advanced disclosure were found to be lengthening the process. Resource difficulties were found to have exerted a marked and pervasive impact.

Research undertaken in Northern Ireland (Mc Sherry, Iwaniec, & Larkin, 2004) focused on the costs of court proceedings, both directly on children in respect of decision-making not operating within the child's timescale and the indirect costs for Trusts in connection with the disproportionate amount of social work time spent on Court work relative to family support, intervention and prevention activities. The cost of the associated legal advice was placing financial strain upon already restricted

**Table 1** Freeing Proceedings: Period 1 April 2000–31 March 2005

Case type	Number of cases					Average days				
	2000–01	2001–02	2002–03	2003–04	2004–05	2000–01	2001–02	2002–03	2003–04	2004–05
Freeing	27	31	32	45	27	160	143	170	203	183
Freeing consolidated	10	21	30	22	4	402	360	399	498	473

Number and duration of stand-alone freeing proceedings and freeing consolidated proceedings for the period 1 April 2000–31 March 2005. It is of note that, contrary to expectations, the duration of freeing consolidated proceedings exceeded that of stand-alone freeing proceedings. Increased duration of proceedings in tandem with the Human Rights considerations resulted in a decline in the popularity of combining Care and Freeing proceedings. *Source:* NIGALA statistics.

family and childcare budgets. Excessive legal costs, it was argued, could be more usefully redirected to recruiting staff and developing resources devoted to early intervention and therapeutic services. Suggestions for improvement included “compulsory inter-disciplinary training, greater use of social work expertise, and use of concurrent placements, more parallel planning and pooling of resources”.

NIGALA is not immune to the impact of increasingly complex and protracted proceedings. In April 2003 the Agency was forced to instigate a waiting list for the appointment of Guardians to cases in the absence of sufficient recurrent additional funding from the Department of Health and Social Services and Public Safety. Efficient use of finite resources is closely regulated by the establishment of productivity indices and targets for efficiency savings by the Agency. The stringent financial climate that NIGALA and the Trusts operate within does not appear to impact on the legal aid budget that resources solicitors and barristers fees. NIGALA is currently not funding separate legal representation, the requirement for which arises when a young person who is deemed to be competent to instruct their solicitor directly is at variance with the guardian’s judgement as to what is in his/her best interests, as existing finances are inadequate to meet the associated costs.

The implementation of the waiting list was introduced with much reluctance in view of the detrimental impact on children’s rights, albeit that a Panel Solicitor was appointed in Children Order cases. The disadvantages associated with the Guardian’s inability, at the outset, to influence timetabling and determine the need for additional assessments or the appointment of an expert were evident. The solicitor’s scope to influence proceedings was compromised in the absence of a Guardian’s instruction.

Recognition of the detrimental impact on children of undue delay in the determination of Court proceedings was addressed in the Children Order Advisory Committee Best Practice Guidance April 2003. The guidance cites the roles and responsibilities of the range of disciplines involved in court proceedings with an emphasis on effective inter-disciplinary working. In the introduction the Honourable Mr Justice Gillen states:

clearly administration of justice in Children Order cases within the Court system requires clarity of focus by those involved in cases. In this context, it is important to set appropriate standards . . . case management is a worthwhile concept that could only be made to work effectively and expeditiously where the basic tenets of preparation and presentation are uniformly recognised and regularly observed. Defining issues and adopting agreed procedures at an early stage is the key to good practice and the removal of one of the fundamental causes of delay within the system. (Children Order Advisory Committee, 2003, p. 5)

In future it is anticipated that, in this jurisdiction, the Guardian’s role regarding advice to the court on timetabling will become that of a “co-ordinator” seeking consensus from all parties early in proceedings. There is also a desire to move the emphasis from advising the court on “attendance” of the child at court (as per the court rules) to ensuring that the potential for the child to participate is maximised.

## **Impact of the Human Rights Act 1998**

The significance of the Human Rights Act has come to prominence recently in Northern Ireland. Article 8, The Right to Respect for Private and Family Life, and Article 6, The Right to a Fair Hearing, are central to balancing what are often the competing rights and conflicting interests of parents and children. Case judgements establish precedents that inform practice. On 16 February 2005 the Court of Appeal, Northern Ireland delivered its Judgement *AR v Homefirst Community HSST* in respect of an appeal of a High Court decision to grant a Care Order pursuant to Article 50 of the Children (NI) Order 1995. The Court held that the Trust, as a public authority, had failed to recognise the parents Article 8 rights. While the ensuing debate caused confusion and anxiety, calm appears to have been restored by the clear message that the spirit of Article 8 needs to be embedded throughout the decision making processes. The Guardian, as an Officer of the Court, is charged with scrutinising the Trust's intervention to ensure Human Rights compliance.

The three questions:

1. Is the interference legitimate?
2. Is it necessary?
3. Is it proportionate?

permeate all areas of Trust intervention and provide a useful check and balance to inform the purpose and extent of Trust involvement. The human rights dimension echoes the adjustments to practice and determination of thresholds that were witnessed with the implementation of the Children Order. The dilemma remains that of evidencing due process while effectively managing child protection risks and ultimately securing good outcomes in a timely manner for children.

The importance of Human Rights compliance permeating the threefold dimension of assessment, planning and decision making needs to be supported by effective inter-agency and multidisciplinary collaboration from a needs-led perspective as distinct from a resource-driven response. Despite everyone's best efforts the reality remains that, for a minority of children, the courts will act as the arbiter in determining their best interests. It is incumbent on us all to work constructively in the knowledge that no one discipline has a monopoly of expertise or authority in resolving complex, finely balanced issues. The ultimate judge of our efficacy in terms of securing better outcomes will be the children that we are charged to protect.

## **What the Future Holds**

The journey, thus far, has been challenging and has required adjustments in practice as dictated by legislation and policy directives. We have witnessed monumental change in the family justice system over the past 10 years since the introduction of the Children (NI) Order 1995, an example of which is the impact of the Human Rights legislation: now further changes are on the horizon.

The Review of Public Administration is the first major examination in over 30 years of how public services in Northern Ireland are organised and delivered with a view to enhancing both political and financial accountability, as well as improving efficiency and cost effectiveness. The impact of the implementation of the Review of Public Administration remains to be seen in terms of the future configuration of Trusts and the ensuing service provision and management structures.

The implementation of The Adoption and Children Act 2002 has a number of innovative features, which it is anticipated will be incorporated in revised legislation in Northern Ireland. The most far reaching for NIGALA is the provision under s122 that adds residence and contact proceedings to the list of specified proceedings in which a Guardian may be appointed. The extension of the child's right to be represented in selected private law proceedings, in accordance with Article 12 of the United Nations Convention on the Rights of the Child (1990), is to be welcomed. The implications of this provision for NIGALA in terms of the volume of work, the criteria informing the appointment of a guardian and options for service provision cannot be underestimated.

The new range of provisions in the legislation recognise the significance of alternatives to adoption for the permanent placement of a child with a new family. The lifelong impact of adoption is reflected in the incorporation of the welfare principle and the welfare checklist in the context of adoption decision-making.

The existing provision for freeing is replaced by placement orders, the criteria for which are twofold; namely, the threshold criteria for the making of a care order have to be satisfied, and parental consent has to be dispensed with on the grounds that the welfare of the child requires it (Ball, 2005).

We might also anticipate the provision of special guardianship that recognises the needs of mainly older children, in care requiring a family for life or who are living with relatives or others, for legal security. The effect of special guardianship is to confer carers with a status similar to a Guardian, albeit that the parents are still alive, and restricts the birth parents exercise of their parental responsibility.

## **Conclusion**

While much has been achieved, we cannot afford to be complacent. The inevitability of change consequent upon the Review of Public Administration and the anticipated revisions in the legislation can be capitalised upon as opportunities to take stock. The pending children's strategy has the potential to provide an overarching framework within which to address and plan for meeting the diverse needs of children across disciplines in a coordinated manner.

Within the socio-legal context emphasis should be placed on joint training and inter-disciplinary working to foster greater mutual understanding of the respective roles and promote respectful, supportive working relationships. Resources need to be targeted to enable social workers to engage in family support and therapeutic activities as opposed to disproportionate time being spent on court related work.

For NIGALA the reality of increases in both the volume and complexity of cases not being matched with additional resources necessitates rationalisation of service provision. It is imperative that creative solutions are devised to achieve improved efficiency while safeguarding effective intervention. The Children and Family Court Advisory and Support Service in England and Wales has circulated a consultation paper setting out proposals for the delivery of a “prompt and proportionate service” with the overarching aim of retaining a focus on “the voice of the child, the experiences of the child and the aspirations of the child” (2005, p. 4). The proposals include:

- Guardian completes an initial assessment and formulates a “case plan” for the first directions hearing, setting out how the interests of the child can best be safeguarded and promoted aimed at, informing the direction that the judge or magistrate takes. It is envisaged that an emphasis on effective “case management” will realign the focus on the child and thereby diminish protracted and adversarial proceedings.
- Determination of the degree and type of case work that a case requires, subject to the quality of the available evidence. The proposal is that proportionately more professional time will need to be devoted to cases where the local authority’s care plans, both in construction and implementation, are hard to reconcile with the child’s best interests relative to cases where the child’s best interests are being well represented by the professionals. The emphasis is on avoiding duplication and ensuring that professional time is productively spent for the child.

NIGALA shares the aspiration of shaping services to maximise outcomes for the child and the courts within limited funding and awaits the outcome of the consultation.

The potential for capitalising on technological advances, such as use of video link as appropriate for directions hearings and a range of meetings, routine sourcing of literature and research on the Internet, and the electronic transfer of data, need to be embraced. Requisite capital investment, supported by comprehensive training, will undoubtedly pay dividends in terms of the delivery of a quality service. Ultimately, targeting scarce resources to ensure an efficient and effective child-focused service has to be a shared objective that permeates inter-disciplinary boundaries in the pursuit of timely and positive outcomes for the children that we serve.

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