The Welfare Principle; A useful though controversial test for Guardianship, Custody, And Access?

Illan Wall

1.1 Introduction

"The welfare of the children is of the first and paramount importance."[1]

The Welfare Principle is the guiding factor in how the Irish courts deal with custody, access and guardianship cases. I intend to examine the test with a view to review the inequities in one of the oldest pieces of family legislation still intact on the statute books. I will review the five welfares, examining in particular the issues of physical abuse, access to an abusive parent, and "Parental Alienation Syndrome."

2.1 Physical Welfare

In the test for physical welfare the following must be considered: health, bodily comfort, nourishment and hygiene – all self-explanatory concepts, however, the specific issue of physical abuse has proved to be contentious. A parent that abuses his child will not get custody, but how does the court decide where there has been violence, and what of access for a violent parent?

In J O'C v M O'C,[2] Kenny J described the use of physical punishment as a means of controlling the behaviour of ones child as

[1] Guardianship of Infants Act 1964, s.3
[2] (HC) unrep, August 1975

"a barbaric practice." Difficulty arises however, where either side contests an allegation of violence. The 1995 Family Law Act,[3] conferred jurisdiction on the Circuit or District Court to order a report, "on any question affecting the welfare" of the child. This report is to be compiled by the relevant health board.

In childcare cases the decision of the social worker is of the utmost importance and difficulty. Most investigations are made in a difficult environment where issues are rarely clear-cut. Helen Buckley[4] states that "a 'good' professional is one who is able to explain the basis for their decision. Cases that can be seen to be thoughtfully and carefully assessed are much more protective and ultimately safer for all involved."

Ireland has been fortunate in its social workers: we have certainly not seen anything like the "Cleveland crisis"[5] in the UK. There have however been cases where a social worker has been over-zealous in the diagnosis of abuse and consequently has been subject to legal action.[6] Shatter[7] points to District Judge William Early's comments in GH v AF,[8] where he was critical of a failure of professionals to comply with the prescribed procedures to investigate and validate allegations of child sex abuse in a custody and access case.

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[3] Family Law Act 1995, Section 47(1)
[4] Helen Buckley Ph.D, Risk assessment In Child Care Proceedings, ([2000] 1 IJFL)
[5] Parton N., (1991) Governing the Family: ChildCare, Child Protection and the State, London: Macmillan.
[6] The State (D&D) v Groarke and Others: [1988] IR 187.
[7] A J Shatter, Family Law, 4th edition, 1997, p626
[8] District Court, unrep, October, 1995.

Frequently there is a conflict between the court's duties, to ensure the welfare of the child and protect the constitutionally guaranteed rights (presumption of innocence, fair procedure), of an accused. The court must[9] place its duty toward the child (to seek to protect it from a potential abuser) before its duty to an alleged abuser. The circumstances under which a court ignores a welfare report are in practice very rare, especially when that report states that abuse has taken place.

The system acts quickly to remove the child from an abusive situation before criminal prosecutions are instituted. As was pointed out in State (D&D) v Groarke and Others[10] if the prosecutions fail there is nothing to stop the accused appealing the original order.

The Supreme Court in KC & AC v An Bord Uchtála[11] laid down guidelines for the courts to follow in applying the welfare principle. It stated that the courts must "carefully consider" whether the welfare of the child clearly requires its removal from the family home, in particular if as a result the child is removed from the custody of an "innocent parent." The courts must be very cautious about believing a welfare report without compromising the safety of the child.

2.2 Right of Access in Abuse Cases

In M v M[12] the English Courts stated that access is "the right of the child" to the companionship of the other parent. Wall J in Re P[13]

[9] Guardianship of Infants Act 1964, s.3
[10] Ibid.
[11] [1985] 5 ILRM 302 (SC)
[12] [1973] 2 AllER 81, per Wrangham J.

stated; "it is almost always in the interest of the child whose parents are separated that he/she should have contact with the parent with whom the child is not living."

The British Courts have sought to enforce this right to contact with a blind faith: their blinkered approach has been questionable in the extreme. In fact they are willing to impose custodial sentences on parents who refuse to honour the decisions[14]. In their article Felicity Kaganas and Shelley Day Sclater[15] question the presumption in favour of contact. They consider the inflexible approach of the courts to contact for violent fathers a hindrance not a help to a child's welfare and development.

In the decisions of A v L[16] and Re F (Minors)[17], it was decided that neither risks to a mother's health nor (until recently) serious violence on the part of the non-resident father were sufficient to justify a denial of contact. In Re M,[18] despite the fact that the father posed a potential risk to the child (he abused drugs, and alcohol, and lost control of his temper), he was still seen as essential to the child's welfare! I agree with Kaganas and Sclater that these decisions are dubious. I refer to Dr Sturge's expert report on domestic violence[19] where she states that intra-familial violence (that is between the father and mother) affects children "as much by exposure to [the] violence as to being involved in it."

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[13] [1996] 2 FLR 314, per Wall J.
[14] A v N [1997] 1 FLR 533
[15] Contact And Domestic Violence - The Winds of Change? [2000] Fam Law, 630
[16] [1998] 1 FLR 361
[17] [1993] 2 FLR 830
[18] [1998] 1 FLR 727

Alan Slade[20] states that while a very important role is fulfilled by supervised contact, it must be taken on a case by case basis, with judgements differing depending on the nature of the abuse and the effects on the child and on the abusee. I contend that it is essential that judges balance these effects with the child's need for access before coming to a decision. The British courts were incorrect in the cases of A v L, Re F (Minors), and Re M (contact: Supervision), they put too much weight on the right of the child to access. This precedent has been slowly eroded in the last five years with such decisions as Wall J in Re M (contact: Violent Parent)[21], where he stated (albeit obiter) that the serious risk that direct contact would destabilise the child's new family would alone have justified refusal.

We have seen in Britain a redressing of the balance in favour of the child. However, there are no Irish decisions on the issue of access for violent fathers. In O'D v O'D & Ors[22], Geoghegan J stated that a parent's access can be curtailed where there is reasonable suspicion of sexual abuse having occurred without such abuse having to be fully proved. I contend that this may be applied to domestic violence too. There is no ruling on whether it applies to abuse not directed at the child. It remains to be seen whether the Irish courts will correctly balance the right of access and the danger posed by an abusive parent.

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[19] Contact and Domestic Violence - The Experts' Court Report, [2000] Fam Law at p619
[20] Alan Slade, Supervised Contact between Children and Violent Fathers, [2000] Fam Law, 506
[21] [1999] 2 FLR 321
[22] [1994] 3 Fam LJ 81 (HC)

3.1 Intellectual Welfare

Intellectual welfare is construed as: emotional security, psychological stability, and education. Dr Sturge[23] states that the English Courts are correct to adopt Eekelaar's approach, under which the child is consulted and its wishes taken into consideration together with its age and understanding as well as the probable effect of a decision contrary to its wishes. I contend that the Irish model of informal interviewing is the correct one, provided they are not misled by the views of a coached infant.

3.2 Parental Alienation Syndrome

A new issue in the legal relationship between parent and child is the so-called "Parental Alienation Syndrome".[24] This is not recognised by either the American classification of mental disorders (DSMIV) or the International classification of disorders (ICD10). In fact in her expert court report, Dr. Claire Sturge[25], states that it is not a syndrome in the medical sense at all. Thus my reference to the term Parental Alienation Syndrome (PAS) is nothing more than a useful shorthand for an occurrence that is widespread. As it is rare in Irish reported cases, we must look to other jurisdictions such as the US and Britain.

[23] Contact and Domestic Violence- The Experts' Court Report, [2000] Fam Law, 615, at p621
[24] Mary Banotti laying Dirty in Custody Battles, Irish Times. Mon, Nov./16th/1998
[25] Contact and Domestic Violence- The Experts' Court Report, [2000] Fam Law, 615

3.3 The US

PAS is a term for the process whereby one parent alienates its child from the other. Dr. Richard Gardner[26] was first to outline the "syndrome." He states that many of the children who suffer from PAS "proudly state that their decision to reject their fathers is their own. They deny any contribution from their mothers." According to Gardner the rejection is fuelled by fear of their mothers anger and upset.

A move to enlist child custody in the so-called "Gender War" is underway. Campaigning for father's rights, Stan Hayward[27] suggests PAS occurs in most cases of access hearings in the US. He suggests that the court is wrong in not believing the father above both the mother and the child! What's more, on his website strategies are outlined to fathers on how to best plead PAS in court, the type of evidence to adduce, and in what form this evidence is most believable! The very ethos of the website is that mothers are vindictive and fathers are victims. The site treats the custody of the child as a prize, and consequently much of what it has to say must be distrusted. However the blatant chauvinism of many of the arguments for PAS should not blind us to the fact that it exists.

3.4 Britain

PAS came before the British Court of Appeal in F v F[28]. There, the children were violently unwilling to go to the contact hours with their father. The judge at first instance found that the mother never

[26] Dr. Richard Gardner; 'The Parental Alienation Syndrome' (P.74)
[27] Stan Hayward, A Guide to the Parental Alienation Syndrome. http://www.fact.on.ca

intended to comply with the order: "she never set about preparing the children in a way that was necessary... and she was confident the children would not go." He stated that she was under a duty to encourage. "The order having been made, it was up to her as a parent and a responsible person to work out for herself how she will go about complying." He stated: "the reality of this case is that, it is the mother who is refusing [the contact], and she is communicating her views about the father and her hostility towards contact, to the children." He then went on to order a fresh and specific contact order, but also issued a suspended committal sentence for the mother.

It was the latter that was appealed to the Court of Appeal. There the Court affirmed the first decision, saying; "there was... a clear obligation upon the mother to assist the children to come to terms with having contact with their father."

In her article Dr. Susan Maidment[29] states that PAS is a form of emotional abuse. She claims that while the higher courts in the UK have no problem making the tough decisions, the lower courts (which will be the ones dealing with the vast majority of the applications) cannot stomach them. She states simply that the decision in F v F is not being implemented by the judges in the inferior courts. In the face of wailing children and sobbing wives, the contact orders are not being enforced, but are being varied to the benefit of mothers. She finishes by saying that "as long as the judicial

[28] [1998] 2 FLJ 237
[29] Parental Alienation Syndrome-A judicial Response? [1998] Fam Law, 264

'bark' is louder than its 'bite', mothers will continue to flout contact orders to the detriment of their children."

3.5 Ireland

In S v S[30] the Irish Supreme Court dealt with the issue. There the mother made false sexual abuse claims and attempted to turn the children against the father. This was viewed as morally "reprehensible." However, it was not the deciding factor in the case, and so can't be viewed as a relevant ratio. I contend that the Irish courts would follow their British counterparts in taking a very dim view of PAS. However, I suggest they may stop short of ordering custodial sentences.

4.1 Social Welfare

The social welfare of a child is "the type of welfare which... is best calculated to make them better members of the society in which they live".[31] The major flaw with these criteria is the wide discretion available to judges. However the very nature of child law is that we must place our trust in the good judgement of our judges. I contend that the inclusion of social welfare as a criterion for the overall welfare of the child is essential. It is a necessary evil that there can be no hard and fast rule on this issue.

[30] S v S [1992] 12 ILRM 732 (SC)
[31] MB O'S v PO O'S (1974) 110 ILTR 57 (HC, SC)

5.1 Religious Welfare

The seminal decision of Tilson[32], established "a joint power and duty [of parents] in respect of the religious education of their children".[33] An essential case is In re May, Minors.[34] There the parties had brought up the children as Catholics for over ten years, but when the father became a Jehovah's Witness, he attempted to interfere with the children's beliefs. The Court implied an agreement to bring them up as Catholics, and so disallowed a reinstatement of the pre-Tilson law.

However they stated that in the absence of an agreement the pre-Tilson law applied, and it was the father's prerogative to raise the children in a religion of his choosing. This is a shocking lacuna in the present law. It implies that the father is the best one to decide about such notions as religion – surely a throwback to the nineteenth century.

Shatter[35] suggests that the court may not feel bound by In re May, Minors, as they may simply decide "that it is in the interests of the child's welfare to be educated in the religion of that parent in whose custody the child, for other welfare reasons, is to be placed." In the light of Shatter's solution to the lacuna, Tilson is best consigned to history along with rulings that enshrined sexism, chauvinism, and misogyny.

[32] In re Tilson, Infants, [1951] IR 1
[33] Ibid. at p34
[34] 92 ILTR 1 (HC)
[35] A J Shatter, Family Law (4th edition), Butterworths, at p553.

6.1 Moral Welfare

Possibly the most contentious issue in the welfare principle is the "moral" welfare of the child. When the test was first enacted the State was overwhelmingly Catholic. Unmarried couples were frowned upon. However in this increasingly liberal society, that which was originally unacceptable is becoming more and more a feature of everyday life.

The constitution recognises the marital family and only the marital family, by pledging to "guard with special care the institution of Marriage".[36] Thus the decisions of the seventies were inevitable, given that the marital family unit was the "natural primary and fundamental unit group of Society".[37]

In JJW v BMW[38] the parties lived in England. The wife left the family home with the two youngest children and went to live with another man. However the father regained custody. The father moved to Dublin to live with his parents. He could not afford to look after all of the children, so he placed the two eldest in a boarding school run by the Poor Clare Order.

In the High Court Kenny J decided that their religious moral and intellectual welfare were better served with the father. He said that their mother's irregular relationship was a corrupting example, but there were other considerations to be taken into account. He looked at their happiness, their ages, their sex, the fact that they were living outside of home, and that there was no unity among them. By doing

[36] Bunreacht Na hÉireann, article 41.3(1•)
[37] Bunreacht Na hÉireann, article 41.1(1•)

so he awarded custody of the three to the mother, concluding that the children's welfare was best served by being with her.

The Supreme Court overturned Kenny J's decision. They attached less weight to the evidence of the lack of unity, and far more to the fact that the mother was living in an "adulterous association." They ignored the fact that the mother's partner had obtained a divorce, that the mother had obtained a *decree nisi* for divorce in the English courts, and that the new relationship was both stable and long term. This is an example of the Supreme Court construing the situation according to Catholic mores and placing a greater value on moral welfare than that placed on all the other elements of the welfare principle.

The results of this case were seen in MB O'S v PO O'S[39], where Kenny J (having learnt his lesson from the previous occasion) placed the moral welfare of the children above the intellectual, physical and social welfare. However the Supreme Court on appeal did a U-turn. They said that there was no principle in JJW v BMW to be followed and like all of these unhappy cases, decisions must be made on the individual facts. The Court especially pointed out that there was particular evidence that the father's relationship was permanent, the woman having changed her name by deed poll. The question must be asked had the mother or her partner changed their names by deed poll in JJW v BMW , would the Supreme Court have decided

[38] (1971) 110 ILTR 49 (SC)
[39] (1974) 110 ILTR 57 (HC, SC)

differently? Is such a superficial alteration to decide the welfare of children?

More recently there is the case of S v S[40], where again the "adulterous" spouse was not granted custody. However, here the courts considered all the aspects of welfare and found that the father was the better custodian.

In a country where there is a constitutional protection granted to marriage, judges must look very disapprovingly on a lack of respect for the solemnity of marriage. In S v S, the wife continued in an adulterous relationship through the latter years of the marriage before the breakdown. This is not an example of judges taking moral welfare above all else, but *in conjunction with* all other types of welfare. This is how the test must be construed, no one aspect of welfare being superior to any or all of the others.

7.1 Conclusion

The Welfare Principle (as one of the oldest pieces of family law) still stands for two reasons: firstly, because it acknowledges the complexities of the situation while setting down definite criteria in which welfare can be assessed; but secondly, because the In Camera Rule conceals any controversies that occur. We must presume that the lower courts have ruled on such issues as "Parental Alienation Syndrome," access to an abusive parent, and moral welfare, but that they are being screened out by the Rule. Thus all one can say for

[40] S v S [1992] 12 ILRM 732 (SC)

Ireland is that the welfare principle *appears* to be working well in ensuring that the courts respect the complex relationships between parent and child.

BIBLIOGRAPHY

BOOKS

1. Bunreacht Na hÉireann
2. Guardianship of Infants Act [1964]
3. Parton, N., *Governing the Family: ChildCare, Child Protection and the State*, (1991) Macmillan, London.
4. Shatter, A. J., *Family Law*, Butterworths, (4th edition)

ARTICLES

1. Banotti, Mary, *Playing Dirty in Custody Battles*, Irish Times, 16th/Nov/1998
2. Hayward, Stan, *A Guide to the Parental Alienation Syndrome*, http://www.fact.on.ca
3. Helen Buckley Ph.D., *Risk assessment In Child Care Proceedings* [2000] 1 IJFL p6
4. Kaganas & Sclater, *Contact And Domestic Violence - The Winds of Change?* [2000] Fam Law, 630
5. Maidment, Dr Susan, *Parental Alienation Syndrome-A judicial Response?* [1998] Fam Law, 264
6. Slade, Alan, *Supervised Contact between Children and Violent Fathers.* [2000] Fam Law, 506
7. Sturge, Dr Claire, *Contact and Domestic Violence- The Experts' Court Report,* [2000] Fam Law, 615