THROUGH THE EYES OF THE CHILD: A CRITICAL ANALYSIS OF CHILD PARTICIPATION IN PRIVATE FAMILY LAW PROCEEDINGS IN IRELAND

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'***Mankind owes to the child the best it has to give***'[1]

A INTRODUCTION

Decisions are made in the Irish courts on a daily basis that drastically alter the future of many Irish families. Irish private family law is a complex and intricate area of law, wrought by emotions and tempered with clashes of personalities. At the heart of the court battles and custody conflicts, lies the person most affected by the decision of the court: the child.[2] The child's personal views are often cast aside in discussions centred on the best interests and the welfare of the child. Both young children and teenagers are not afforded the opportunity to ensure their views and opinions are given a rightful position of prominence in the decision making process.[3] The parties involved often focus on finding resolution as quickly as possible, with little regard to the impact an expeditious conclusion may have on the children affected by the court's decision. Child participation is 'a shifting target which has been described in various ways instead of being given a specific definition'[4] and is undoubtedly an ambiguous term in the Irish context. Hearing the voice of the child in private family law proceedings has been sporadic at best and has taken place on an ad hoc basis.[5] In order to increase the current levels of child participation, a fundamental reconstruction of how society views the rights of the child is needed. Children were treated as 'invisible members of

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[1] Preamble of United Nations Declaration of the Rights of the Child (1959) UN Doc A/4354.

[2] Gene Carolan, 'Their Day in Court: The Right of Children to be Heard in Judicial Matters Affecting Them' (2013) 31 Irish Law Times (ns) 103.

[3] Law Society of Ireland, *Submission to the Department of Justice, Equality and Defence Family Law- The Future* (2014) 4.2-05.
<http://www.lawsociety.ie/Documents/committees/Family/FamilyLawsubmission2014.pdf > accessed 16 December 2015.

[4] Gerison Lansdown, 'Can you hear me? The right of young children to participate in decisions affecting them' Working Paper 36 (The Hague, Bernard van Leer Foundation, 2005) 8.

[5] This approach has been criticised by Parkes. See Aisling Parkes, *Children and International Human Rights Law* (Abingdon, Oxon: Routledge, 2013).

society…[lacking] access to justice and complaints mechanisms'[6] and 'were recognised only as products of a marital family unit, instead of citizens in their own right'.[7] Carolan notes that the transformation of the legal status of the child from being the property of the marital family to the current interpretation has been 'slow and still poses a challenge to the legal systems of many societies'.[8] Ultimately, behind the 'lack of recognition of child's right to be heard is a lack of understanding that children have the capacities to contribute to decision making'.[9] Fundamentally, the creation of a system whereby children are actively involved in decisions that affect them involves 'a long and continued struggle and the challenges are indeed multiple'.[10]

Notwithstanding the magnitude of this endeavour, significant progress has been made in recent years. The United Nations Convention on the Rights of the Child (CRC)[11] places the voice of the child in private family proceedings at the epicentre of the decision making process. Article 12 highlights the need not only listen to children's views on the issues under discussion but also to factor in how best a child might be accommodated in expressing these views. In light of Article 12, many jurisdictions have taken progressive steps to include the values of the CRC in relation to child participation at both a fundamental level in constitutional provisions and legislation and at a more functional level in terms of best practice guidelines and training programmes.[12] In the Irish context, Article 42A has placed the right of the child to be heard in proceedings affecting them on a constitutional footing, cementing the significance and value of listening to what the child has to say theoretically and enforcing the need for legislative development in relation to child participation. The newly enacted Children and Family Relationships Act 2015[13] paves the way for further child participation in Irish private family law proceedings. Section 63 inserts a provision into the Guardianship of Infants Act 1964[14] which states:

> 'In proceedings to which section 3(1)(a) applies, the court may, by order, do either or both of the following: (a) give such directions as it thinks proper for the purpose of

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[6] ibid 1.

[7] Teresa Blake, 'The United Nations Convention on the Rights of the Child' (1991) 9 Irish Law Times 114 at 114.

[8] Carolan (n 2) 105.

[9] Barry Percy-Smith and Nigel Thomas, *A Handbook of Children and Young People's Participation: Perspectives from Theory and Practice* (New York, London, Routledge 2010) 15.

[10] ibid 21.

[11] United Nations General Assembly Convention on the Rights of the Child A/RES/44/25 (20 November 1989).

[12] Scotland have introduced training for volunteers on 'Children's Panels'. This shall be revisited in greater detail at a later point.

[13] Children and Family Relationships Act 2015 (2015 Act).

[14] Guardianship of Infants Act 1964 (1964 Act).

procuring from an expert a report in writing on any question affecting the welfare of the child; or (b) appoint an expert to determine and convey the child's views'.[15] The proceedings to which section 3(1)(a) relates involve the issues of 'guardianship, custody or upbringing of, or access to, a child'.[16]

This article intends to explore the issues surrounding the implementation of child participation under the 2015 Act. In doing so, the framework of the child participation in private family law proceedings as it currently stands shall be examined. Such an assessment shall establish how both constitutional and legislative provisions can be utilised in line with international obligations to allow further child participation. Furthermore, the potential barriers which may exist in terms of the implementation of the 2015 Act shall be analysed with a view to advancing how best to overcome these stumbling blocks. The article shall examine both direct and indirect methods of participation in order to identify the shortcomings of the current Irish family law system and determine how effective the 2015 Act will be in practice. A key consideration is the dearth of training available to legal professionals, particularly in the context of assessing the definition of an 'expert' under the 2015 Act. Child participation is not only a means of preparing the youth of today for their future role as adults but it is a right of the child and an important tool for 'enhancing the social and economic circumstances of children'[17] in their current day-to-day lives. Ultimately 'it is the child more than anyone else who will have to live with what the court decides'.[18]

B THE FRAMEWORK OF CHILD PARTICIPATION IN IRISH PRIVATE FAMILY LAW PROCEEDINGS

Child participation in Irish family law proceedings is a relatively new phenomenon. It has gathered considerable support in light of recent developments, both internationally and domestically. In setting out the potential effects of the 2015 Act, it is first vital to examine the current legislative foundations and the idealisms of the past which may potentially impact future development.

It is clear that within 'the sphere of child participation rights there lies an inherent conflict between the paramountcy of the child's welfare and their right to participate on

[15] As per section 63 of the 2015 Act which inserts section 32 into the 1964 Act.
[16] As per section 45 of the 2015 Act which amended to section 3 of the 1964 Act.
[17] Jason Hart, Jesse Newman, Lisanne Achermann and Thomas Feeny, *Children Changing their World: Understanding and Evaluating Children's Participation in Development* (London, Plan 2004) 4.
[18] *Re D* (2006) UKHL 51 [57] (Baroness Hale).

an individual level'.[19] This conflict has been a considerable hurdle in the race towards expansive child participation rights. An unfortunate reality follows; while those coming from a paternalistic mindset may believe they are assisting the child, they are in fact inhibiting the child from expressing their own views on the issues at hand. McWilliams and Hamilton note that 'on the one hand there is a rights-based view for greater self-determination for children and on the other, a welfare-based view that centres on the view that children need to be protected'.[20] The difficulty which arises 'is trying to integrate the child's desires into decision making, without foregoing their best interests and placing too much responsibility on them'.[21] Indeed, many of the concerns and reservations regarding more extensive child participation in private family law proceedings may be overcome with adequate legislative safeguards and proper up-to-date professional training. In order to establish what changes are necessary, it is first important to look back at recent developments to assess what tools are available to allow further child participation.

1 International Obligations

The CRC is a 'landmark in the history of the United Nations standard setting'[22] and sets out the minimum standards which Ireland should attain in order to fully meet its obligations in the realm of children's rights. The CRC represented a 'paradigm shift from the traditional welfare-based approach to a holistic rights-based approach'[23] when it came into force on 2 September 1990. It is 'an international instrument which is wholly dedicated to and promotes respect for the protection of children's rights and represents the starting point for the development of children in circumstances of freedom, dignity and justice'.[24] As Thomas notes, 'children's lives are structured by boundaries of time and place set by adults; their daily lives marked by permission seeking, negotiations and rules'.[25] Thus, children were seldom empowered to express their personal views and any facilitation of expression is often subject to adult approval

[19] Parkes (n 5) 18.

[20] Ann McWilliams and Claire Hamilton, 'There Isn't Anything like a GAL: The Guardian ad litem Service in Ireland' (2010) 1(10) Irish Journal of Applied Social Studies 32.

[21] Meg MacMahon, 'Can Anybody Hear Me? The Duty to Promote the Voice, Wishes and Interests of Children' (2014) 1 Irish Journal of Family Law 4.

[22] Marta Santos Pais, 'Child Participation' Documentaçâo e Direito Comparado nos 81/82 (2000) 93.

[23] Parkes (n 5) 1.

[24] Malfrid Grude Flekköy, *A Voice for Children* (United Kingdom, Jessica Kingsley Publishers 1991) 214.

[25] Nigel Thomas, *Children, Family and the State: Decision Making and Child Participation* (Bristol United Kingdom, Policy Press 2002) 139.

or permission. Article 12 is 'a core general principle'[26] which turns this 'old adage that children should be seen and not heard on its head'.[27] As a result, it has fundamentally 'challenged and prompted positive change in societal attitudes, traditional beliefs, laws and practices across the world'.[28]

Article 12 creates a twofold obligation.[29] First, the views of the child are ascertained, and secondly these are taken into consideration having regard to the age and maturity of the child. It is not concerned with the 'wishes' of the child per se (as appears in the legislative provisions of some jurisdictions[30]) but rather the opinion or views of the child on the matter concerned. Marta Santos Pais has identified Article 12 as an underlying value of the CRC which must influence the way each and every right of the child is ensured and respected.[31] In fact, Article 12 is a CRC right to which no country has made any express reservations.[32] The participation rights contained in CRC challenge 'traditional and tokenistic conceptions of childhood'.[33] Freeman notes that Article 12 results in the elevation of the child's status from the silent invisible minor to an individual with the capacity to contribute to the decision making process.[34] However, Article 12 is not without its flaws. Sawyer asserts that reading Article 12 in tandem with Article 3 gives rise to 'very practical difficulties where it is felt that giving children a voice may be detrimental to their welfare'.[35] The 'interpretations of the participation rights contained in the CRC depend on the viewpoints people have about childhood',[36] the traditional view of the family in the Irish context being a clear example of this. Thus far, there have been 'very cautious and limited' attempts to incorporate Article 12 of the

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[26] Claire O'Kane, *Children and Young People as Citizens: Partners for Social Change, Exploring Concepts* (Save the Children Nepal, 2008) 10.

[27] Parkes (n 5) 1.

[28] ibid.

[29] Art 12 of the United Nations General Assembly Convention on the Rights of the Child A/RES/44/25 (20 November 1989). The Article states: 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

[30] Children Act 2004 (UK) provides for 'ascertaining children's wishes' under s 53.

[31] Pais (n 22) 94.

[32] Parkes (n 5) 7.

[33] Daniel Stoecklin, 'Theories of Action in the Field of Child Participation: In Search of Explicit Frameworks' (2012) 20(4) Childhood 443.

[34] Ursula Kilkelly, *Children's Rights in Ireland: Law, Policy and Practice* (Sussex, Tottel 2008) 203.

[35] Caroline Sawyer, 'Conflicting Rights for Children: Implementing Welfare,Autonomy and Justice within Family Proceedings' (1999) 21(2) Journal of Social Welfare and Family Law 99, 100.

[36] Karl Hansan, 'Schools of Thought in Children's Rights' in Manfred Liebel and others (eds), *Children's Rights from Below: Cross Cultural Perspectives* (Basingstoke, Palgrave Macmillan 2012) 63.

CRC into Irish domestic law.[37] The Committee has repeatedly highlighted the failings of the Irish Government in relation to its obligations under the CRC. While the First Concluding Observations of the Committee in 1998 had concerns in relation to Article 12 generally,[38] the Second Concluding Observations[39] noted 'grave concerns for the lack of sufficient provision' for the use of a guardian ad litem.[40] It is reasonable to assume the lack of clarity surrounding the appointment of the 'expert' as per the 2015 Act in relation to private family law proceedings in Ireland will attract a similar response in the upcoming Concluding Observations on Ireland's Third and Fourth Periodic Reports following the examination by the Committee in January 2016. As will be explored extensively at a later point, section 63 of the 2015 Act does not outline the precise conditions for whenever an 'expert' is to be appointed nor does it set out the procedure to be followed when the court decides against the appointment of an 'expert'. The reference to the 'views of the child' in section 63 is a nod to Ireland's obligations as per Article 12, but the failure of the legislature to provide guidelines in this respect is disappointing. It is regrettable that twenty five years since the CRC was ratified, its provisions remain unincorporated in domestic law and while there have been some changes but these have been 'legislative changes of a piecemeal nature'.[41]

Some commentators have noted that it is disappointing that the CRC itself does not set the bar higher, it 'does not require that the child's decision be determinative at any stage',[42] it merely states that his/her views are given 'weight according to age and maturity' and that best interests of the child are respected.[43] There are many international instruments which have reinforced the CRC and while a full exploration of these instruments is outside the scope of the current article,[44] the UN Human Rights Council

[37] Aisling Parkes, 'Legal Analysis of the Children's Referendum: Article 42A.4.2°' (*Human Rights in Ireland*, 23 October 2012) <http://www.humanrights.ie/index.php/2012/10/23/legal-analysis-of-the-childrens-referendum-article-42a-4-2/ > accessed 16 December 2015.

[38] Concluding Observations of the Committee, *Ireland UN Document* CRC/C/15/Add 85 (4 February 1998).

[39] Concluding Observations of the Committee, *Ireland UN Document* CRC/C/IRL/CO/2 (29 September 2006).

[40] Ireland's use of the guardian ad litem (GAL) system shall be explored in section two.

[41] Aisling Parkes, 'Children Should be Seen and Not Heard? A Reflection on the Proposed Constitutional Amendment' (2008) 11(3) Irish Journal of Family Law 58.

[42] Carolan (n 2) 104.

[43] Sharon Detrick, 'A Commentary on the United Nations Convention on the Rights of the Child' (The Hague, Kluwer 1999) 215.

[44] Article 13 of 1980 Hague Convention on the Civil Aspects of International Child Abduction, Article 4(d) of the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption 1993 refer to the need to respect views of the child. The CRC has also been reinforced at regional level Article 4.2 of the African Charter on the Rights and Welfare of the Child 1990. Article 5 (1)(b) of the European Convention on the Adoption of Children (Revised) 2008 an adoption order shall not be granted without the 'consent of the child considered by law as having sufficient understanding, a child shall be considered as having sufficient understanding on attaining an age which shall be prescribed by

have been active in the area in recent years and have published a UN Resolution to ensure children's effective participation in justice proceedings through child-sensitive procedures and safeguards.[45] Ultimately, it is clear that there has been a global movement towards increased child participation in private family law proceedings, and a focus on the most effective methods of realising these obligations.

2 Regional Developments

Further to the international obligations which the Irish legislature must be cognisant of, there have also been developments on a European level in relation to child participation and children's rights more generally. While both the European Union institutions and the European Court of Human Rights (ECtHR) have been active in this area, it is 'only in recent years that there has been any significant activity at a European level in the area of children's rights as it was traditionally regarded as a domestic issue'.[46]

In 2006, the European Commission issued a communication entitled 'Towards an EU Strategy on the Rights of the Child which led to an action plan entitled EU Agenda for the Rights of the Child.[47] Building further on this, in November 2008, the Committee of Ministers of the Council of Europe adopted the 'Stockholm Strategy'.[48] The Council of Europe's 2010 Guidelines on Child-Friendly Justice[49] continued through a new Strategy on the Rights of the Child 2012-15. The Guidelines on Child-Friendly Justice offer some relevant guidance in relation to child participation. The guidelines are 'intended to help governments and professionals enhance children's access to justice by introducing a child-centred approach, with due consideration to a child's level of maturity and

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law and shall not be more than fourteen years'. Article 6 provides that in cases where the child's consent is not required under Article 5, the child shall be consulted and his/her views shall be taken into consideration in accordance with his/her age and maturity. There is a rebuttable presumption at fourteen years. However, the consultation process is not analogous to providing children with the opportunity to express their views. The child has to become actively engaged in the decision being made. The child's role in adoption proceedings is a much underdeveloped area of law in Europe. Adoption is among the most drastic and far-reaching orders that can be made regarding a child.

[45] See General Assembly United Nations Human Rights Council A/HRC/25/47 3 January 2014.

[46] Helen Stalford and Eleanor Drywood, 'Coming of Age? Children's Rights in the European Union' (2009) 46 Common Law Market Review 143.

[47] European Commission 'An EU Agenda for the Rights of the Child' COM (2011) 60 final.

[48] Council of Europe, *'Stockholm Strategy' Building a Europe for and with Children: Towards a Strategy for 2009-2011*(September 2008) <http://www.coe.int/fr/web/children/children-s-strategy> accessed 16 December 2015.

[49] Council of Europe, *The 2010 Guidelines of the Committee of Ministers for the Council of Europe for Child Friendly Justice* (November 2010) <http://www.coe.int/t/dghl/standardsetting/childjustice/Guidelines%20on%20child-friendly%20justice%20and%20their%20explanatory%20memorandum%20_4_.pdf> accessed 16 December 2015.

understanding and to the circumstances of the case.'[50] It is set out that 'particular attention should be paid to the access to the court and the judicial process, legal counsel and representation, the right to be heard and to express views, avoiding undue delay, the organisation of the proceedings and the use of a child-friendly environment and child-friendly language, as well as of evidence and statements provided by the children.'[51]

The decisions of the ECtHR relating to Article 6 of the European Convention on Human Rights (ECHR) have guaranteed children as legal rights holders under the ECHR and have affirmed a legal right to be heard in all proceedings affecting their civil rights and obligations as well as in criminal law matters. Article 6(3) further states that a child has the right to represent him/herself in person or through a representative of his/her own advice. However, there have been very few explicit guiding principles coming from ECtHR jurisprudence. The decision in *Nielsen v Denmark*[52] made the first tentative steps towards ensuring children's autonomous decision-making as part of their ECHR rights. In the case of *Sahin,*[53] the court was of the view that asking the child directly about his father would have been damaging. The ECtHR stated that while it 'would be going too far to say that domestic courts are always required to hear a child on the issues of access…[it depends] on the specific circumstances of each case, having due regard to the age and maturity of the child concerned'.[54] Kilkelly notes that this highlights the 'importance of judicial willingness to hear children and take their views into account'.[55] As will be examined at a later point, a level of commitment on behalf of the judiciary is key to fully implementing the provisions of the 2015 Act given the scope of judicial discretion granted.[56]

3 Constitutional Provisions

'The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights.'[57]

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[50] ibid.

[51] European Union Agency for Fundamental Rights, *Child-friendly justice: Perspectives and experiences of professionals on children's participation in civil and criminal judicial proceedings in 10 EU Member States* (Luxembourg, Publications Office of the European Union, 2015) <http://fra.europa.eu/sites/default/files/fra-2015-child-friendly-justice-professionals_en.pdf> accessed 16 December 2015.

[52] *Nielsen v Denmark*, App 10929/84 (Commission Decision, 12 March 1987).

[53] *Sahin v Turkey* ECHR 2005-X1 173.

[54] Kilkelly (n 34) 219.

[55] ibid 203.

[56] Section 63 of the 2015 Act provides that the 'court may' appoint an 'expert', granting the judiciary a high level of discretion in dealing with this matter. This area will be explored in section three.

[57] Article 42A.1 Bunreacht na hÉireann.

As the cornerstone of the Irish legal framework, the need for explicit acknowledgement of the rights of the child in Bunreacht na hÉireann is central to future legislative development. The importance of this affirmation and in turn, the need to put children's rights on par with those of the family, was highlighted by both the Constitutional Review Group and UN Committee on the Rights of the Child in 1998.[58] On foot of these recommendations, a referendum on the 31st Amendment to the Constitution was held on 10th of November, 2012, the results of which were subject to a High Court challenge.[59] The High Court's rejection of the challenge was confirmed by the Supreme Court on the 24th of April, 2015 and thus, the Article 42A was signed into law on the 28th of April, 2015.

While the inclusion of Article 42A has been welcomed by many,[60] it is the approach taken towards the issue that has not found favour across the academic circles. O'Shea notes that the amendment 'glaringly avoids the elephant in the room by leaving Article 41 intact'[61] and in order to 'give real sustenance to the issue of children's rights, the superior position of the marital family needs to be amended.'[62] Article 41 provides that 'the State recognises the Family as the natural primary and fundamental unit group of society' and 'guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.' The inclusion of this provision is reflective of 'the most important Irish social construct'[63], the family based on marriage. Indeed, before the 31st Amendment, the constitutional stance towards the marital family in itself had acted as an inhibitor to greater child participation. Ultimately, it is Article 41 which causes issues as it 'lacks a child focus…which fails to recognise the child as a juristic person with individual rights

[58] Carolan (n 2) 107.

[59] *In the Matter of the Referendum on the Proposal for the Amendment to the Constitution contained in The Thirty First Amendment to the Constitution (Children) Bill 2012* [2013] IEHC 458 and *Jordan v Minister for Children* [2014] IEHC 327.

[60] See Maria Corbett, 'The Children's Referendum is a Game-Changer for Children's Rights in Ireland' (2012) 4 Irish Journal of Family Law 95.

[61] Nikol O'Shea, 'Can Ireland's Constitution Remain Premised on the 'Inalienable' Protection of the Martial Family Unit without Continuing to fail its International Obligations on the Rights of the Child?' (2012) 4 Irish Journal of Family Law 87.

[62] ibid 92.

[63] Louise Crowley, *Family Law* (Dublin, Round Hall 2013) 2. The inclusion of such a definitive recognition of the stance of the marital family was driven by the strong Catholic influence over political individuals at the time of drafting.

to which separate representation must be given'.[64] While a full exploration of the constitutional status of the family based on marriage in Ireland is beyond the scope of this article, it is sufficient to note that in the years before the insertion of Article 42A, the Constitution itself acts as 'the biggest impediment to the recognition of legal status for children'.[65]

Some commentators note that Article 42A is of more cultural significance than anything else.[66] However, it is clear that Article 42A should pave the way for future legislative development. The Article states that provision 'shall' be made in law, not 'may'. The use of the phrase 'provision shall be made in law' in each of these sub-articles makes it clear that this constitutional obligation is to be implemented by way of legislation.[67] As Corbett notes we need to 'breathe life into the amendment to ensure that it will make a real and tangible difference to children's lives'.[68] It is interesting that while 'Article 42A.4.2° requires that the views of the child be ascertained, it is silent on the means by which this is to be achieved, 'leaving it to the legislature to decide'.[69] O'Mahony notes when Article 42A became law a number of obligations came into effect regarding the enactment of legislation governing private family law proceedings. The Sixth Report of the Special Rapporteur on Child Protection in 2013 recommended that legislation enacted to implement Article 42A.4 'should provide for a variety of mechanisms to be employed to ascertain the views of the child'.[70] The 'expert' in the 2015 Act is undoubtedly a recognition of this onus on the legislature. It is regrettable that the legislature in meeting its constitutional obligation did not expand further to provide guidelines as to when an 'expert' may or not be a suitable method of child participation. It remains to be seen how effective Article 42A will be in relation to private family law proceedings.

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[64] The Guardian Ad Litem Group, *Giving Children a Voice, The Case for Independent Representation of Children* (The Law Society of Ireland, Dublin, May 2001) 11.

[65] Sheila McGree, *The Child's Right to Be Heard in Judicial and Administrative Proceedings in Ireland National Report* (European Forum for Child Welfare Anti-Discrimination Project, August 2001) 20.

[66] Eoin Daly, 'Legal Analysis of the Children's Rights Referendum: Article 42A.2.1 Value Pluralism and the Children's Rights Amendment' (*Human Rights in Ireland*, 23 October 2012) <http://humanrights.ie/children-and-the-law/legal-analysis-of-the-childrens-referendum-article-42a-2-1/> accessed 16 December 2015.

[67] Conor O'Mahony, 'The Constitutionality of the Children and Family Relationships Bill' (2015) 18(1) Irish Journal of Family Law 3 at 5.

[68] Corbett (n 60).

[69] O'Mahony (n 67) 5.

[70] Geoffrey Shannon, *Sixth Report of the Special Rapporteur on Child Protection* (January 2013) < http://www.dcya.gov.ie/documents/Publications/SixthRapporrteurReport.pdf > accessed 16 December 2015) 141.

4 Domestic Legislation

The development of Irish legislation on child participation in private family law proceedings has moved at a glacial pace and it is only in recent months that signs of significant improvement have become apparent. Under section 28 of the Guardianship of Infants Act 1964 (as amended by section 11 of the Children Act 1997), a guardian ad litem may be appointed in parental responsibility, residence and contact proceedings 'if in special circumstances' it appears to the court 'necessary in the interests of the child to do so'. As progressive and welcomed as it was, this section of the Act has never been commenced. The most common approach today of the Irish courts in an attempt to ascertain the views of the child is to use the machinery of section 47 of the Family Law (Divorce) Act 1995 whereby the child is interviewed by a child psychologist who possesses expertise in the area.[71] However, using a child psychologist to prepare a report as to whether the child is considered mature enough to be involved lengthens the procedure and leads to excess delays.[72]

As previously set out, section 63 of the 2015 Act amends the 1964 Act to include section 32(1)(b) of the 2015 Act which provides for the appointment of an 'expert' in cases regarding the 'guardianship, custody, or upbringing of, or access to, a child'. It is wholly unclear what qualifications are to be expected of the 'expert' and what shall be expected of the judge when an 'expert' is not appointed as will be explored at a later point. Appointment is entirely at the court's discretion and the lack of clarity as to what exactly should happen in cases where the court decides not to appoint an 'expert' is undesirable. The qualifications and training requirements of the 'expert' are to be set out by the Minister.[73] The decision to implement guidelines in such a manner is also objectionable given the recent experience in relation to the appointment of the GAL in public proceedings. Section 227(1)(b) of the Child Care (Amendment) Act 2007 by substituting a new section 277 in the Children Act 2001, states that the Advisory Board shall 'publish guidance on the qualifications, criteria for appointment, training and role of any guardian ad litem appointed for children in proceedings under the Act of 1991'. However, it was not until May 2009 that the Children Acts Advisory Board in Ireland issued Guidance on the Role Criteria for Appointment, Qualifications and Training for guardian ad litem for children in Proceedings under the Childcare Act 1991.[74] While these guidelines

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[71] Law Society of Ireland (n 3) 4.2-02.

[72] ibid 4.2-06.

[73] s 32(10) of 1964 Act as amended by section 63 of the 2015 Act.

[74] Children Acts Advisory Board, 'Giving a Voice to Children's Wishes, Feelings and Interests: Guidance on the Role, Criteria for Appointment, Qualifications and Training of Guardians Ad Litem Appointed for Children in Proceedings under the Child Care Act 1991' (Dublin, May 2009) <

recognised broad principles as to qualifications, appointment or training necessary, there is no official legal definition for the role, leaving a lacuna in the legislative landscape. Perhaps the use of the 'expert' in the 2015 Act is recognition of the inherent flaws in the GAL system and an acknowledgement that the system is not sufficient to be utilised across the board for both public and private proceedings. The use of the term 'expert' will be explored in more depth at a later point, it is sufficient for now to note that the lack of clear guidance as to who the 'expert' is and when they are to be appointed is likely to lead to confusion and disarray in practice. This lack of guidance is of particular concern given the commencement of this section of the 2015 Act on the 18th of January, 2016.[75]

C THE IMPLEMENTATION OF CHILD PARTICIPATION

In terms of the full implementation of the 2015 Act, it is vital that potential issues in terms of child participation are addressed at the outset in order to find adequate solutions. Consideration thus must be given to the use of age limitations in appointing the 'expert' under the 2015 Act. It is regrettable that the legislation does not purport to set down guidelines as to when an 'expert' may be appropriate or when alternative forms of child participation may be utilised. Section 32(3)(a) as inserted by section 63 of the 2015 Act provides that in determining whether to appoint an 'expert', the 'court shall, in particular, have regard to the following: the age and maturity of the child'. It follows that the age of the child may be determinative in concluding whether the child is provided the opportunity to participate in proceedings, however no further guidance is given as to what age is considered appropriate. This raises a further issue in that judges may not consider themselves qualified to determine the maturity of the child before them. An assessment of these potential barriers is necessary in order to identify the key areas in need of reform.

1 Age Limitations

Much consideration has been given to the use of age limitations in determining whether a child is capable of participating in private family proceedings in a meaningful way.[76] Legally, age limitations provide certainty as a clear cut off threshold may be established.

<http://www.caab.ie/Publications/PDFs---Publications/Giving-a-Voice-to-Childrens-Wishes,-Feelings-and-I.aspx> accessed 15 December 2015.

[75] Part IV of the 2015 Act was commenced by Minister Frances Fitzgerald on the 18th of January, 2016 by way of the Children and Family Relationships Act 2015 (Commencement of Certain Provisions) Order 2016 S.I No.12 of 2016.

[76] See Oddbjorg Skjaer Ulvik, 'Talking with Children: Professional Conversations in a Participation Perspective' (2015) 14(2) Qualitative Social Work 193.

Some commentators argue that based on child psychological research, children are not capable of understanding the consequences of proceedings until a certain age.[77] In terms of cognitive development, Jean Piaget has advanced a developmental theory which demonstrates that between the ages of four to seven years, a child is not yet able to understand the principle cause and effect.[78] Applied to the private family law setting, this may indicate that would be difficult for a child to understand the result of the proceedings, and indeed the impact of their own views in relation to the future decisions of the court. Piaget has based this theory on the fact that children under seven cannot 'decentre'[79] meaning that they cannot view a situation from another perspective, thus inhibiting their ability to envisage the future impact of court decisions on their own lives. A child is generally only capable of reasoning hypothetically[80] after reaching the age of eleven and thus having a future focus will become easier from this point on.

While child psychology undoubtedly has a role to play in the development of an effective system of child participation, it is important that blanket assumptions are avoided. Placing a strict age limitation on a child's right to participate may create an arbitrary barrier. The discussion should not be centred on whether or not the child has a right to participate based on these assessments, but instead the child should be presumed to have the right as a starting point and information subsequently obtained from the child should be weighed by utilising child development theories and best practice. Rather than utilising child psychology as a barrier to participation, it should further facilitate children, allowing them to participate more fully and to the best of their abilities at a given age.

Internationally, the capacity of young children to participate has 'traditionally been underplayed by law, but developmental psychology has long argued for the recognition of the capacities of young children'.[81] A publication of the government of New Zealand indicates that the presumption that children under the age of seven 'lack intelligence and judgment' and that those between the age of seven and twelve or fourteen lack 'sufficient judgment to make rational choices' was inherited from Roman law, as

[77] Eilis Flood, *Child Development* (Dublin, Gill & Macmillan 2013) 105.
[78] Jean Piaget, *The Origins of Intelligence in Children* (New York, International University Press 1952).
[79] ibid 106.
[80] ibid 109.
[81] Aoife Daly, 'Considered or Merely Heard? The Views of Young Children in Hague Convention Cases in Ireland' (2009) 12(1) Irish Journal of Family Law 16.

incorporated into and perpetuated by common law.[82] The very use of age limitations requires recognition of a child's evolving capacities. The Guidelines on Child Friendly Justice state at Article 47 that 'a child should not be precluded from being heard solely on the basis of age'. Indeed, the use of age limitations as a barrier to participation has repeatedly been criticised by the Committee who have noted that 'state parties should presume that a child has the capacity to form his/her own views and recognise that she/he has the right to express them; it is not up to the child to first prove her/his capacity.'[83] In relation to Article 12 of the CRC, the Committee has observed that 'young children communicate their feelings, ideas and wishes in numerous ways long before they are able to communicate through the conventions of spoken or written language' and for this reason 'even the youngest children are entitled to express their views under Article 12'.[84] This stance has taken root from the 'fear of placing undue psychological burden on young people'.[85]

The assessment of maturity of the child may be a more effective method of determining the weight to be attached to a child's views rather than an arbitrary, strict age limitation. However, such a test requires a definition of the criteria needed to be considered 'mature'. Many national laws lack a clear statement of what constitutes maturity within the realm of civil proceedings. Commentators have suggested that EU Member States should introduce a clear legal definition of maturity.

The Committee has repeatedly rejected the use of age barriers. There are many European countries where age is the sole determinant in deciding whether child is capable of making autonomous decisions concerning adoption.[86] Indeed, many commentators advocate age limits with exceptions for capable children.[87] The starting point should be a presumption of capacity. The views ascertained from this point on may be weighted in relation to different relevant factors.

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[82] Ministry of Youth Affairs of New Zealand, *'Does Your Policy Need an Age Limit?'* (Wellington 2001) <https://www.crin.org/en/docs/Does_policy_need_age_limit> accessed 16 December 2015.

[83] United Nations Committee on the Rights of the Child General Comment No12 The Right of the Child to be Heard (2009) CRC/C/GC/12 para 20.

[84] United Nations Committee on the Rights of the Child General Comment No 7 (2005) Implementing Child Rights in Early Childhood CRC/C/GC/7/Rev1 para 4.

[85] Kieran Walsh, 'Young Children's Participation in Child Abduction Proceedings-Emerging Trends in Irish Case Law' (2013) 1 Irish Journal of Family Law 12.

[86] In Russia, the age limit is set at ten years old as per Article 132(1) Family Code 1995, in Belgium, it is twelve years old as per Article 348-1 Civil Code and in Luxembourg, it is set at fifteen years old as per Article 356 of the Civil Code.

[87] See Ann Smith, *Advocating for Children: International Perspectives on Children's Rights* (Dunedin, New Zealand, University of Otago Press 2000).

In the Irish context, the situation has been somewhat clarified in *RP v SD*[88] whereby there was held to be no prima facie presumption against hearing a child under six years old. However, it was the view of the court that matters of everyday life which would be relevant in assisting the court in reaching a prima facie determination on the maturity of the child 'probably do involve some element of abstract or reflective thinking by the child and an ability to form and express views on circumstances in which the child was or is living or his wishes in relation to living arrangements or contact with parents or others'.[89] In the case of *Cullen v Cullen*[90], concerning a fifteen-year-old child, the court held that a child should only be consulted where the child is of sufficient age and maturity to make this inquiry of assistance. The Law Society of Ireland believe Article 42A 'does not seem to go so far as to indicate that the voice of the child must be heard where children are not capable of forming their own views so it is probably confined to children over the age of seven.'[91] Irish courts seem wedded to age-based approaches, while having capacity as a starting point.

It is regrettable that the 2015 Act, in discussing the appointment of an 'expert', does not outline when an 'expert' may be most suitable, this issue shall be explored further at a later point. The use of age limitations should not be used as a gateway for the child to access the courts, instead they may act as guidelines as to how judicial discretion may be exercised in determining how best to ascertain the views of the child.

2 Professional Training

The lack of training provided to legal professionals who work in private family law proceedings in Ireland has been highlighted as an issue repeatedly.[92] Carolan notes that while there may be many situations in which it will not be in the child's best interests to follow the child's views, 'it is clear that it will never be in the child's interests not to attempt to gauge what these are'.[93] Much discussion has surrounded the issue of whether a child is best heard in private or in open court. Historically, the Committee has been very against the use of open court for giving evidence.[94] If the child's views are seen as

[88] *RP v SD* [2012] IEHC 188.
[89] ibid at paragraph 37.
[90] *Cullen v Cullen* (HC, 12 November, 1982).
[91] Law Society of Ireland (n 3) 4.2.08.
[92] Titti Mattsson,'*Participation and Flexibility for All? A Study of Modern Family Structures and Children's Rights*' in Ann Numhauser-Henning and Mia Rönnmar (eds), Normative Patterns and Legal Developments in the Social Dimension (Oxford, Hart Publishing Ltd 2013).
[93] Carolan (n 2) 119.
[94] Concluding Observations of the Committee (n 39) para 27.

traditional court evidence, this can be hugely problematic in terms of allowing full disclosure of what the child has said. There are mechanisms for obtaining the child's views without direct participation which have been endorsed by the ECtHR.[95]

Full implementation of Article 12 requires the development of awareness, skills and attitude among adults to listen to children and respect their individual points of view. It further requires adults to show patience and creativity by adapting their expectations to a young child's interest, levels of understanding and preferred ways of communicating. This involves 'active listening, including verbal and non-verbal communication and a range of approaches and methods such as play, art and the use of props and other equipment to communicate effectively with children'.[96] Herring states that 'a child's wishes are the child's voice; a child's needs are determined by others'.[97] Thus, it is important that in conveying the wishes of the child, the conveyor ensures the information is not tempered by their own personal views on the best interests of the child. In terms of choosing an appropriate medium through which the child may be heard, it is extremely difficult to establish a strict rule. O'Malley notes that the experiences and views of children and young people can contribute to better decision-making based on the reality of children and young people's lives 'not untested adult assumptions'.[98]

i Indirect Participation

Training is a key concern in relation to indirect participation whereby a person is appointed to convey the views of the child to the court. As specialised training for legal professionals who engage with children as part of the private family law system are not currently available in Ireland, it is of great value to assess the methodology used in other jurisdictions at this point. Reform of the Irish system with a specific focus on the 'expert' under the 2015 Act and judges shall be explored at a later point.

Specialised training is available in the United Kingdom through the Association of Lawyers for Children which promotes justice for children and young people within the legal system of England and Wales. In fact, most professionals support the idea of 'having one specifically trained professional acting as the child's main contact person and accompanying him or her throughout the proceedings'.[99] The Scottish Children's

[95] See *Sahin v Germany* (2002) IFLR 119.
[96] Kilkelly (n 34) 202.
[97] Jonathan Herring, 'The Human Rights Act and the Welfare Principle in Family Law - Conflicting or Complementary?' (1999) 11(3) Child and Family Law Quarterly 223.
[98] Kate O'Malley, 'Children and Young People as Citizens: Partners for Social Change' (Save the Children Nepal, 2003) 6.
[99] EUAFR (n 51) 115.

Hearing Rules contain various mechanisms through which the child can express his/her views.[100]

The availability of legal aid is a key concern right across EU Member States. The European Union Agency for Fundamental Rights has outlined that EU Member States 'should provide legal aid unconditionally to all children and ensure that clear guidelines on accessing legal aid be provided to all children and their parents/guardians and that specialised child lawyers be available to represent children in both civil and criminal proceedings.'[101] A lack of funding is a common obstacle to consistent and effective training. A key concern in relation to the appointment of an independent legal representative for the child is the financial costs which may be incurred in doing so. The Council Directive on Legal Aid[102] sets certain minimum standards for Legal Aid Schemes in the EU but applies only to cross-border disputes. Lack of resources and recent austerity measures have affected both public and non-governmental sectors.

The Council of Europe 2010 Guidelines make clear that to ensure children's effective participation, specialised and trained professionals should be in contact with them and inform, hear and protect them. [103] Bar associations sometimes offer training programmes for lawyers. In the Irish context, there is a definite need for a multi-faceted training programme, continuous training is needed which runs on an ongoing basis rather a short term programme.

Irish private family law is a labyrinthine area of the law even to adults who require legal assistance in the form of a legal representative to support and guide them through proceedings, could the same not be said of children who are at the heart of these disputes? There is currently insufficient training for legal professionals working with children and the lack thereof has the potential to act as a blockade to further child participation in Ireland.

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[100] These include writing, audio or video tape, through an interpreter or through the appointment of a so-called 'safeguarder'. Scotland have developed a special system of lay judges to hear children in civil cases and training is provided for these volunteers. These 'Children's Panels' seek to obtain views of the child. Children give their views prior to the hearing. If children are unable or reluctant to express themselves sufficiently, a 'safeguarder' may be appointed to report back. Some professionals consider the Scottish Children's Hearing System a good practice, because of children's active engagement and the mandatory training for professionals and volunteers.
See Children's Hearing Act 2011 (Scotland) and Linda Tyler, 'The Children's Hearing System and the ECHR' (2003) 3 Irish Journal of Family Law 6.

[101] EUAFR (n 51) 51.

[102] Council Directive: Legal Aid in Cross-Border Matters (2003/8/EC) 27 January 2003.

[103] Council of Europe (n 49) s IV A 4 and 5.

ii Direct Participation

The Council of Europe 2010 Guidelines state at Article 44 that 'judges should respect the right of the child to be heard in all matters that affect them or at least to be heard when they are deemed to have a sufficient understanding of the matters in question'.[104] In *AS (otherwise DB) v RB*[105], the previous history of a judge speaking directly to children was discussed. It was apparent that significant benefits may result from a direct participation approach, provided sufficient training is in place for the judges in question. Social professionals continue to have a big role to play where the judge does not feel that they are in a position to interview the child. The judge may appoint a social professional to conduct an assessment which in turn, lengthens the process. Comprehensive and continuous training for judges could reduce these potential delays.

Judges who speak directly to children are can make a substantial difference in a child's experience of participation. "Careful balancing of the competing interests" has led some jurisdictions to adopt interviews as another avenue for participation.[106] The former Chief Justice of the Family Court of Australia, the Honourable Alastair Nicholson has spoken with positivity of interviews.[107] Raitt notes that Australia made specific legislative provision in 2004 to ensure that 'judicial interviews were compatible with issues of due process and although interviews are not yet commonly used, at least they are one more available option under the Family Court Rules of 2004'.[108]

A flaw apparent in the legal system of many jurisdictions is that there is no requirement that 'the judiciary undergo any specialised training for dealing with children in cases of such a sensitive nature'.[109] While research shows that indirect participation will not be suitable for all children,[110] conventional wisdom is that indirect methods of informing the court of children's views are 'greatly superior to the judge interviewing children directly'.[111] Without proper and comprehensive training, judges may be unable to handle the issues which arise surrounding privacy; the right of the judge to repeat what the child has said and moreover, how to explain the decision to the child in circumstances where their views are not followed by the court.

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[104] Council of Europe (n 49) Art 44.

[105] *AS (otherwise DB) v RB* [2002] 2 IR 428.

[106] Fiona Raitt, 'Hearing Children in Family Law Proceedings: Can Judges Make A Difference?' (2007) 19(2) Child and Family Law Quarterly 204 at 206.

[107] ibid.

[108] ibid at 206.

[109] Parkes (n 5) 119.

[110] Kilkelly (n 34) 221.

[111] Patrick Parkinson and Judy Cashman, *The Voice of the Child in Family Law Disputes* (Oxford, Oxford University Press 2008) 49.

Particularly in light of the 2015 Act, judges need to be trained on how to use the new provision, how the 'expert' works and what the best course of action may be when court chooses not to appoint an 'expert' in order to ensure the voice of the child is still heard in these proceedings. The use of age limitations can facilitate child participation in the private family law process when guidelines are correctly set out in legislation. Further to this, the lack of professional training for individuals involved has the potential to negatively impact the effectiveness of the 2015 Act. While the area is in a state of flux at present, the need for reform is already glaringly apparent.

D REFORM OF CHILD PARTICIPATION IN IRISH PRIVATE FAMILY LAW PROCEEDINGS

In light of the above analysis, it is clear that the ideal approach to child participation in private family law proceedings in terms of satisfying Article 12 is to provide for both direct and indirect participation, utilising whichever method is most suitable depending on the circumstances of the case. As Walsh notes,[112] the right to participate has already been recognised as an unenumerated right in the decision of *FN v CO*.[113] In cases involving children, the welfare of the child is the paramount consideration in formulating decisions which may affect the child. However, children are not party to these proceedings. Thus, a separate and distinct obligation is imposed in respect of the children, not just upon the judge dealing with the proceedings but also on the legal representatives. This obligation to a non-party to the proceedings gives family law proceedings a distinct quality. Despite the fact that 'children are still largely invisible in Irish family law proceedings'[114], Fortin notes that generally children are 'overwhelmingly in favour of being consulted when parents separate'.[115] In order to hear the voice of the child, the 'expert' as per the 2015 Act must have adequate training and furthermore, judges will require training on the proper implementation of the 2015 Act and what suitable alternative methods may exist where an 'expert' is considered unsuitable.

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[112] Walsh (n 85) 11.

[113] *FN v CO* [2004] 4 IR 311.

[114] Kilkelly (n 34) 221.

[115] Jane Fortini, *Children's Rights and the Developing Law* (3rd edn Cambridge, Cambridge University Press 2002) 52.

1 Indirect Participation: Who Is the 'Expert'?

The lack of clarity surrounding the issue of what qualifications and training are considered necessary to act as an 'expert' as per the 2015 Act is regrettable, particularly in light of the recent commencement order.[116]

As previously stated, the decision not to follow suit and include private family law within the ambit of the GAL system is arguably recognition of the inherent flaws within the system. The guidelines on the qualification and training within the GAL system were introduced in a similar manner with a two-year delay between the enactment of the system in legislation and the publication of such guidelines.[117] Even then, while these guidelines recognised broad principles as to qualifications, appointment or the training necessary, there is no official legal definition assigned to the role. It is hoped the situation will not be repeated and that clear, definitive guidelines will be issues with regards to the 'expert' in due course. As guidelines have not yet been put in place to set out the necessary qualifications of the 'expert' under the 2015 Act, it is submitted that outlining the 'expert' to be a legal professional with specialised training in child psychology may be a welcome addition to Irish private family law proceedings.

There is currently no legal provision in force in Ireland allowing for children in private family law proceedings to be granted separate legal representation. The notion of separate or independent legal representation in family law proceedings is far from new and has been introduced in some jurisdictions as a means of representing the voice of the child in accordance with Article 12 of the CRC.[118] However, there are no universally accepted guidelines for child legal representatives and the Committee has not expressed any views as to how children should be facilitated in exercising this right.[119] Clear directions must be set out for the 'expert' to avoid the pitfall which has been experienced in many other jurisdictions whereby lawyers have been said to adopt a paternalistic rather than representational role when clear directions are not set out. Without establishing a clear direction as to the exact job description of the 'expert', there is a danger of them representing best interests which is more akin with the role of the GAL.[120]

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[116] Section 32 (10) of 1964 Act as inserted by section 63 of the 2015 Act states 'The Minister may, in consultation with the Minister for Children and Youth Affairs, by regulation specify (a) the qualifications and experience of an expert appointed under this section, and (b) the fees and allowable expenses that may be charged by such an expert.'

[117] Children Act Advisory Board (n 74).

[118] Rule 5.240 of the 2015 California Rules of Court.

[119] Parkes (n 5) 103.

[120] William J Keough, 'The Separate Legal Representation of Children in Australian Family Law: Effective Participation or Mere Rhetoric*?'* (2002) 19 Canadian Journal of Family Law 371.

In the Irish context, the current absence of 'a training programme aimed at equipping professionals who are representing children in family law proceedings has the potential to seriously limit'[121] the extent of child participation. There is no express statutory bar on a GAL seeking the approval of a court for the appointment of a lawyer to represent his/her views and in practice, they frequently do.[122] It is arguable that in the exchange of information between the GAL and the legal representative and vice versa, information is easily lost. A more effective method may be to combine the two professionals, having an 'expert' who is both skilled in child interview techniques and qualified to legally represent the views of the child in the courtroom.[123] The fundamental difference between a 'lawyer and a non-lawyer guardian is that a lawyer guardian can call and examine witnesses and make legal arguments to the court, while a non-lawyer guardian cannot.'[124]

The Committee on the Rights of the Child lists lawyers as one of several professional groups whom, by virtue of their work with children and young people, need systematic and ongoing training. No special training at present is provided by the Law Society of Ireland or the Bar Council on the special skills required in defending young people.[125] The prescribed training should cover not only communication skills with children, but also the psychological complexities that may arise in the course of the work taking into account recent developments in brain science with regards to the development of cognitive skills in children of different ages. Legal professionals having direct contact with children should also be trained in communication skills and stages of development, especially when dealing with children in situations of particular vulnerability. Until the Irish legal system can therefore provide 'the appropriate infrastructure to elicit the view of the child, the right to be heard, regardless of its constitutional status, will remain of little substantive value'.[126] The 2015 Act may hold the key to unlocking the door to full child participation in private family law proceedings, if it is utilised correctly. Already in Ireland, certain 'formal changes have been made to make family law proceedings more informal and less intimidating, for example, in relation to the attire of judges and legal representatives'.[127] While this progress is to be commended, it is but the first step on the journey towards the full realisation of child participation.

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[121] Parkes (n 5) 118.

[122] McWilliams and Hamilton (n 20) 32.

[123] Similar to the Californian model set out at Rule 5.240 of the 2015 California Rules of Court.

[124] Andrew Schepard, *Children, Courts and Custody* (Cambridge, United Kingdom, Cambridge University Press 2004) 143.

[125] Kilkelly (n 34) 220.

[126] O'Shea (n 61) 90.

[127] Law Society (2014) (n 3) 3.1.02.

2 Direct Participation: Provision for Judicial Training

Full implementation of child participation cannot be achieved through the 2015 Act without adequate judicial training on the new provisions of the Act. It could be stated that in disputes between parents, the judge, while impartial towards both parents, must in fact be 'partial towards the interests and welfare of the children'.[128] Under the current Irish legislative system, judges are under-resourced and receive no training dealing with issues surrounding the implementation of child participation.[129] There has been repeated calls for regional courts presided over by judges with appropriate expertise and experience.[130] Outside of Dublin, 'judges do not specialise in family law but instead preside in such cases as the necessity arises'.[131] The use of judicial interviews is dependent on whether the judge has the aptitude, skills and training to conduct such interviews. It is regrettable that Irish judges are not specifically trained to interview children in this way; many have indicated that they would not be comfortable with this.[132] Ultimately, Irish judges feel they have insufficient training.[133] While those appointed since 1995 receive some training, the Law Society recommends that judges who are to be assigned should be given comprehensive training in regard to issues which are particular to child care law.

In the case of *AS(otherwise DB) v RB*, Keane CJ urged caution that 'only evidence which a trial judge, in family law proceedings as in other proceedings, can receive is evidence on oath or affirmation given in the presence of both the parties or their legal representatives'.[134] He continued to highlight that:

> it has long been recognised that trial judges have a discretion as to whether they will interview children who are the subject of custody or access disputes in their chambers…depending on the age of the children concerned, [and that] such interview may be of assistance to the trial judge in ascertaining where the wishes [of the child] lie.[135]

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[128] ibid 3.1.03.

[129] Childwatch International Children's Participation in Family Law Proceedings (Otago, May 2007). < https://www.childwatch.uio.no/projects/thematic-groups/children-law/children-law-proceedings07.pdf> accessed 16 December 2015.

[130] The Sixth Report of the Working Group on a Courts Commission Pn6534 (The Denham Report) (Dublin, Government Publications 1999).

[131] Law Society (2014) (n 3) 1.01.

[132] Mr Justice Michael White, 'Current Challenges in the Family Law Courts' (29th May, 2013).

[133] ibid 4.

[134] *AB (otherwise DB) v RB* (n 117) 456.

[135] ibid.

Section 23 of the Children Act 1997 provides an exception to the hearsay rule and allows out-of-court statements made by a child to be admitted into evidence.

The decision of Abbott J in *O'D v O'D*[136] is of significant value. In stating he was fortunate to have training in this area, Abbott J outlined a number of guidelines.[137] While these guidelines are to be welcomed and are demonstrative of the key issues which judges must tackle on a day-to-day basis, the benefit of specific child-tailored judicial training in the area cannot be ignored, particularly in light of the new 2015 Act.

Additionally, in light of the changes introduced by the 2015 Act, training is needed to ensure the 2015 Act is utilised and engaged with correctly and to the highest standard possible. Research has found that approximately 60% of children who may require the services of a GAL were unlikely to have one appointed[138] due in a number of cases to the absence of a written referral due to unfamiliarity with the process on the part of some judges. The appointment of an 'expert' is entirely at the court's discretion, which O'Mahony notes is not necessarily a problem.[139] However, without training in the area, judges will be unable to utilise the new provisions effectively, particularly the 'lack of clarity in the [Act] as to what exactly should happen in cases where the court decides not to appoint an expert is undesirable'.[140] Provision should be made for what happens when the appointment of an 'expert' is not suitable in the circumstances.

In terms of choosing between direct and indirect participation, the decision may be dependent on the child involved, each case may be different in terms of the method most suited to a particular child. Generally, it seems activity-based communication makes it easier for children to talk about issues that concern them. No parent can be entirely objective. Children can express contradictory wishes to their parents, notwithstanding the strong argument that parents know their children better than anyone else. Parents are, generally speaking, not qualified to assess their child. Parents themselves may be under high levels of stress.

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[136] *O'D v O'D* [2008] IEHC 468.

[137] ibid para 10. The guidelines were set out as follows: 1. Judges should be clear on legislative framework. 2. Judges should never seek to act as an expert, reach conclusions from process as may be justified by common sense and own experience. 3. The principles of a fair trial and natural justice should be observed. 4. The judge should explain his/her role and assure the child that the child themselves will not be put a position where they themselves are making the decision. 5. The judge should explain development of convention and legislative background. 6. The judge must ascertain the child's age and maturity. 7. The judge should avoid a situation where the child speaks in confidence unless the parents have agreed.

[138] European Commission Children in Judicial Proceedings (1 June 2012). <http://www.childreninjudicialproceedings.eu/CivilAdmin/ComparativeData/ComparativeStatistics/Default.aspx#Theme_19_Children_with_court-appointed_guardians > accessed 16 December 2015.

[139] O'Mahony (n 66) 6.

[140] ibid 7.

The ideal sit7uation would be that the court will have to hear 'voice of the child even where there is no dispute between the parents in relation to custody or access issues'.[141] 'Rather than see the obligation to hear the voice of the child as a burden or procedural hurdle which must be addressed, the focus of the courts should perhaps be to make the child the genuine centre of focus'. [142] 'Professional conversations with children represent a special mode of adult-child communication and adult-child relationships where conversational partners belong to different social categories, "adult" and "children" having fluctuating cultural significance'.[143] Thus, an important task for the professionals in child welfare services to arrange conversations where children are assisted in forming views, articulate experiences and reflect upon what they want for their lives'.[144]

Research suggested that private family law system whereby older children are allowed discuss matters directly with the judge is extremely advantageous in terms of implementing child participation.[145] It is submitted that the 2015 Act provides the ideal opportunity to develop a nuanced approach to child participation in Ireland whereby younger children are represented by a legal professional with expertise in child development and psychology in the form of the 'expert' and older children are provided with the opportunity to discuss matters with a judge who is trained and qualified to sit in this capacity.

E CONCLUSION

'It is the child more than anyone else who will have to live with what the court decides.'[146]

Mr Justice White notes that historically, children's law was neglected in the Irish state, which 'together with the collective failure of our institutions to prioritise child protection, led to a difficult place for vulnerable children'.[147] Ultimately, the Irish legal system was concerned about undermining 'parental authority by empowering children'.[148] Though children were afforded 'inalienable and imprescriptible' rights through Articles 41 and 42 of the Constitution, these rights were 'exercised through the

[141] Law Society of Ireland (n 3) 4.1.02.
[142] ibid 4.1.03.
[143] Skjaer Ulvik (n 74) 195.
[144] ibid.
[145] Law Society of Ireland (n 3) 4.2-08.
[146] *Re D* [2006] UKHL 51 [57] (Baroness Hale).
[147] White (n 132) 1.
[148] Schepard (n 124) 139.

parents of the child'.[149] It is anticipated that Article 42A will be sufficient to pave the way towards future legislative developments encompassing the participation rights of the child.[150] While the 2015 Act is a welcome addition to the legislative tapestry of Irish private family law, it alone can provide for extensive child participation. At a fundamental level, child participation cannot be genuine if children have no opportunity to understand the consequences and the impact of their opinions. Standardised, detailed rules or guidelines help reduce the number of hearings and improve communication with the child. These promising practices can serve as points of reference and an 'exchange of guidelines and promising practices within and between EU Member States would help improving procedures'.[151] The European Union Agency for Fundamental Rights states that 'authorities should ensure a person of trust, independent of the child's parents, supports the child during all stages of judicial proceedings, particularly in informing and preparing the child for hearings and EU policy planning should also focus on training professionals and harmonising curricula'.[152] The 'expert' as per the 2015 Act may provide the ideal opportunity to bring this provision to life in private family law proceedings in Ireland but clear, detailed guidelines are needed to set out who precisely shall be considered qualified to act as an 'expert' when the court see fit. Making legal systems more child-friendly improves the protection of children, enhances their meaningful participation and at the same time improves the operations of justice.

The CRC was indeed the 'watershed in a global perspective',[153] and as the Committee continues to watch over the implementation of Article 12 in signatory states, it can be hoped that Ireland will continue to strive towards greater realisation of child participation rights. However, in terms of implementation of child participation, the lack of professional training fails to vindicate fully the participation rights of children and has the potential to greatly damper the success of new legislative provisions in the area. It is envisaged that the guidelines which will be issued by the Minister relating to the role of the 'expert' will address these issues and set out the clear and detailed training requirements for both prospective 'experts' and judges alike. It is submitted that the ideal system should provide for an 'expert' who is both a qualified legal professional and a specialist in child development whereby the child's views are conveyed directly to the court through their legal representative, the 'expert'. Additionally, judicial training is necessary both in relation to the use of the new provisions and in child development and psychology so as to prepare the judge to interview older children should the court see it

[149] Carolan (n 2) 103.
[150] EUAFR (n 51) 3.
[151] EUAFR (n 51) 51.
[152] ibid.
[153] Aisling Parkes, 'Children and the Right to Separate Legal Representation in Legal Proceedings in Accordance with International Law' (2002) 3 Irish Journal of Family Law 18.

fit. The Council of Europe 2010 Guidelines embrace the idea that courts can be a powerful tool to positively shape children's lives and at the same time recognise the reality that contact with the legal system is all too often more a source of additional trauma than a remedy for children. It is hoped that lessons can be learnt from the experiences of both other jurisdictions and previous endeavours in the Irish system such as the guidelines on the appointment of the GAL. Despite much progress in recent years, the Irish private family law system remains in a state of disarray in terms of adequately ascertaining the views of the child. In many instances, the child at the centre of a decision making process effectively remains invisible, as Emily Logan has noted there is no systematic attempt to consider 'the views of children at the heart of that process; their voices are not heard'.[154]

[154] Emily Logan, 'Childrens' Rights Must Be at The Heart of Major Decisions' *The Irish Times* (Dublin, 23 November 2011).