

**The role of the Guardian at Litem – to express a view on the child’s best interests or
to relay the views of the child?**

Freda McKittrick

Head of Service, Guardian ad Litem, Barnardos

The context of the Guardian ad Litem Service in Barnardos.

Barnardos is the leading child care agency with over 40 services working with 5900 children. Certain national services work with specific groups, such as the Bereavement and Adoption Services. A new service that is due to launch in September/October that I know will be of interest to many here today is the Contact Centre Service. This service will initially be launched in two pilot sites in North and West Dublin. It will allow children in care and children who are the subject of ongoing family law disputes to have contact with family members in a safe space.

Many of Barnardos services are community based, working across the age range of children, focussing on early intervention and prevention.

Prevention refers to strategies or programmes that prevent or delay the onset of the effects of living in disadvantage, while early intervention refers to strategies and programmes that reduce the harms and health, social and educational consequences of behaviours that have been initiated. Both aim to provide support to the protective factors within the family thereby minimising the impact of the identified risk factors that can perpetuate the cycle of poverty, disadvantage and neglect.

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Is comhlacht teoranta ag ráthaíocht é Barnardos Phoblacht na hÉireann,
Atá cláraithe ag Ceamóg Teampaill Chríost, Baile Átha Cliath 8

Company Registration Number: 141526. Registered Charity Number: 6015

**BARNARDOS
BEACON
GUARDIAN
AD LITEM
SERVICE**

4 Christchurch Square, Dublin 8

T. 353-1-708 0419 or 453 0355

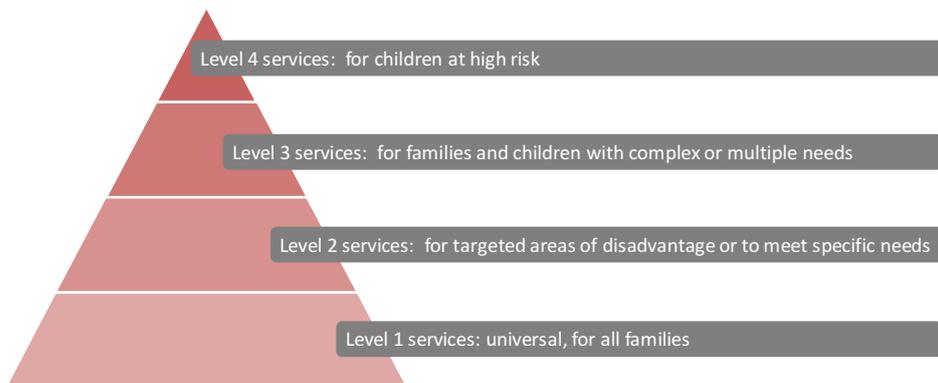
F. 353-1-453 0300

E. gal@barnardos.ie

www.barnardos.ie

For children disadvantaged by background or family circumstance, supports provided in the first years of life positively impact on their life chances by promoting the child's emotional and physical development. Further targeted interventions at key points during childhood and adolescence helps prevent the onset of problem behaviours and underachievement and provides an alternative to late, expensive treatment and crisis intervention. The Hardiker model differentiates between the level of need. It is a model designed to describe the level and nature of services that best fit the range of needs of families. Barnardos aims to reach children mostly from levels 2 – 4 of the Hardiker model, focussing on moving children down the levels so that their situations become safer and their life chances are improved.

Hardiker service model: level definitions



In Ireland today there are 6,122 children in care (April 2011) – level 4. We have more than 12,000 that are known to the care system – that is, where an expression of concern has been made to the HSE about their wellbeing. We know there are many other children where there are concerns held by family members and/or professionals but have not as yet been communicated to the HSE – level 3.

Many of the children have experienced more than two parental figures - all practitioners know of the many 'partner' figures, mostly men who have moved through the lives of children leaving a legacy behind them whether good or bad, but fundamentally the children learn about the transience of father figures in their lives. That lack of consistency can become the norm for them to expect. This in turn influences how they see and relate to other adults and situations – it is not safe to

become attached, to work at relationships, to work at doing well in education or anything because it all changes.

Many children entering care have the opportunity to have their life chances enhanced, in good quality foster care where they have meaningful contact with their families of origin. Some may not need to stay in care for lengthy periods as their parents are able to resume their care. Others are not so fortunate and when they experience lack of consistency as a norm, they can have seriously adverse long term consequences. A few will end up in the Special Care system as they are seriously at risk of causing harm to themselves or others.

Guardian ad Litem Service

The Guardian ad Litem service is unusual in that it has a specific purpose of representation. It is not a 'treatment' service. Generally the children that the Guardian ad Litem will work with are at Level 4: children who are at high risk children who have already suffered harm as a result of their circumstances. The Guardian does not themselves have a therapeutic role, their role is to ensure that the child's voice is heard (although by itself this could be argued to have a therapeutic impact) and that their interests are met by their caregivers, whether this is family, state, or both.

The service started in Barnardos in 1997 with a single 'pilot worker' working on four cases. By 2011 we are a team of 24 with more under recruitment, working from offices in Dublin and Cork with a Service Manager in Cork and the Head of Service based in Dublin. In 2010 we worked with 437 Children from 250 families: a significant increase, reaching 25% more children than in 2009. Up until May this year we have already accepted 25% more new referrals than at the same time in 2010. So the upward trend looks likely to continue.

The service operates on a 'stand alone' basis within Barnardos, as in the only activity it undertakes in Guardian ad Litem work.

Several commentators have noted the absence of policy and practice guidance in the administration and governance of the role of the *Guardian ad Litem* in the Irish context.ⁱ

In publishing the Guidance “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, the Chief Executive Aidan Browne commented: Our role did not extend to how the management or funding of the guardian ad litem service might be addressed. The Board is of the view however, that unless these issues are addressed any guidance offered to the sector cannot have the optimum effect. The Minister for Children and Youth Affairs has been advised of the Board’s view in this regard.

The Guidance remains only that, it has no statutory basis. The Childrens Act Advisory Board is now, effectively, no longer in existence.

We still have a situation where anyone can put a sign above the door stating “Guardian ad Litem”, and launch themselves into practice.

What type of cases do we undertake?

The majority of the work (around 70%) is in the District Court, in Child Care Proceedings under the 1991 Child Care Act: Applications for Care and Supervision Orders, both Interim and Final, and reviews and applications for Directions under Section 47. We deal with applications for detention of children under the Mental Health Act. We represent minor parents under Order 7 of the District Court Rules whose children are the subject of applications under the 1991 Child Care Act (a recent study by EPIC/IAYPIC noted that in a group of young people interviewed for a study on leaving care, 11 had children or were expecting. Of the 8 babies that had been born, 4 were already in care).

The next largest group of work is ‘Special Care’ where children are detained under the inherent jurisdiction of the High Court on welfare grounds in one of the state’s three – or four – detention centres: Ballydowd, Gleann Alainn or Coovagh House. A fourth unit is occasionally used on the Crannog Nua campus, but as Crannog Nua is designed to be

a High Support Unit and cannot use detention, this unit is only used in very specific or unusual circumstances.

Other work that we undertake on an occasional basis is carrying out social reports in Family Law proceedings, Adoption and Hague Convention.

However there is no obligation to appoint a Guardian ad Litem. Judge Gibbonsⁱⁱ notes: “The appointment of a GAL ought to be the norm rather than the exception. The High Court has clearly set out this principle in their jurisdiction and it is difficult to see why a similar approach is not utilised in the District Court. The child is a social and legal actor in society, legally they have independent rights but socially are dependent on their parents or others to survive and develop into adulthood.”

What’s the Role?

CAAB defines the Guardian’s role as to “independently establish the wishes, feelings and interests of the child and present them to the court with recommendations”. The guardian ad litem has a dual role, to inform the court of the child’s wishes and feelings and to advise on the child’s best interests.

The definition as stated in CAAB suggests that it is the duty of the Guardian to represent areas that are potentially in conflict. How is this done?

How can you represent a child that is perhaps preverbal, or who has difficulties with speech and language, or who has a profound learning disability?

In undertaking the work of the Guardian, there is a constant balancing exercise between wishes, feelings and interests. The Guardian must fully understand the child’s wishes and feelings and fully assess their interests. In doing so the Guardian must explore whether there is conflict, and balance it to come to recommendations.

Ultimately it is for the court to be the final arbiter on which is to prevail.

Can we assume that the child's wishes and their feelings are compatible? What of the child caught in marital conflict seeks to appease one parent at the expense of the relationship with the other? What of the child, clearly thriving in a relative foster placement with a grandparent, who insists that they can only be happy if they return to a parent who has frequently relied on that child to look after them while drunk or stoned? What of the youngster who wants to return home so that a brother or sister will come home?

The most common scenario for conflict is for a child to want to go home when there are clear assessments of risk that this is unsafe. However the child who has settled well into a placement may find it hard to trust that a parent has made changes such as splitting up from a violent partner, or that the parent no longer takes drugs or alcohol. Yet all the indicators are that the parent has made significant progress. In all cases Guardians have to sensitively explore the child's wishes, and hear how the child feels. Within this exploration, the Guardian can help the child understand the concerns that others may have. In doing so, the child themselves can either accept the concerns, or may indeed allay concerns and identify protections upon which the professionals can rely. The Guardian will bring the child's perspective into the professional process – note that this will also be done by a good social worker – but the Guardian does not have the agency constraints that social workers have to deal with. The child therefore is an **actor**, an active participant in their destiny, rather than a passive recipient of the concern of adults. Even when the child's view cannot be supported for reasons of their safety, they can be helped understand why decisions have been made in the way that they have and therefore know that they were meaningfully consulted.

For the older child, in particular the children we meet in special care, it is essential that the child is actively involved in their care planning. These children are highly effective at determining their own destinies, despite at times the best efforts of those around them.

Judith Timmis, who has written extensively on Guardian ad Litem in the UK, identified four key components of the Guardian's work, and we use these as 'pillars' for our

practice model. Any part of a Guardian's work should be able to be referenced to at least one of the four pillars: Information, Consultation, Advocacy and Representation.

Information

The gathering of information about the child's situation and giving information to the child. Explaining to the child the court process and the roles of the professionals and the family members within it. Explaining the Guardian's role, the parameters of the role and the limits of confidentiality. Reading case files, care home records, reports. Specialist reading where it is required.

Consultation

Meeting with child and others, ascertaining a child's wishes and feelings, consulting with social workers, parents, carers and others regarding the child, assessment of the child's situation and position, attending case conferences and reviews and other relevant meetings.

Advocacy

Promoting the welfare, best interests and wishes of the child, meetings in court and at case conferences and reviews etc., as relevant to the proceedings in hand. Looking at the needs of the child and seeking to ensure that these are met. Examining the Care Plan for the child and its fit with their needs, for older children, looking at the arrangements in place to support them as they leave care and afterwards.

Representation

Promoting the child's wishes, interests and rights within the court arena, attending court, ascertaining the need or otherwise of legal representation or consultation, the preparation of reports and giving of evidence etc.

Within Special Care, the role of a Guardian ad Litem was set out by McMEnamin J. in Health Service Executive v. DK, this is the clearest judicial statement as to the role of a Guardian ad Litem to date in Ireland. The guidelines set out at Paragraph 59 include the following:

- a. The function of the Guardian is two-fold:
 - i. Placing the **views of the child** before the court;
 - ii. Giving the Guardian's own views as to what is in the **best interests of the child**.
- b. The Guardian ad Litem should bring to the attention of the HSE **any risks** which he or she believes may adversely affect the best interests of the child; if the Guardian is not satisfied with the response, he/she should bring this to the attention of the court; generally, the Guardian should co-operate and share information with other care professionals engaged with the minor;
- c. A duty of the Guardian is **compliance with the minor's constitutional rights**; to this end, the Guardian should ensure that the minor has an avenue to make his/her views known;
- d. The Guardian fulfils the **dual role** of reporting to the court regarding the child's welfare and representing the child in court;
- e. The Guardian should **meet the minor as often as necessary** to be satisfied that the minor's wishes and views are adequately represented regarding his detention/care;
- f. The Guardian should **meet the minor's family** and/or carers in the community and be familiar with their views regarding the minor's detention and care;

- g. The Guardian should make himself/herself **aware of the minor's history** and the minor's interaction with the various social service agencies;
- h. The Guardian should **seek to interact in a positive way with HSE** staff charged with the minor's care while in detention; the Guardian should express his/her views at every case conference meeting held by the HSE to discuss the minor's care and should be familiar with the decisions reached at such meetings;
- i. The Guardian should **prepare a report** specifically addressing the above issues whenever the minor's case is listed for hearing;
- j. When the HSE moves to have a minor discharged from secure care, the Guardian should convey to the court the child's views (as well as the Guardian's own professional views) regarding **the child's onward placement**;
- k. Where a divergence of views exists between the HSE and the Guardian, the Guardian should try **to resolve this with the HSE**; where this is not possible, the Guardian should inform the court;
- l. Where a minor **absconds from secure care** and the Guardian is aware of this, the Guardian should be satisfied that steps are being taken to address the problem; if the issue persists, the Guardian should take steps to inform the court (having informed the HSE that they are about to do so);
- m. The Guardian should express a view to the court as to **how a case is best kept under review** after a minor is discharged from secure care; when a minor is discharged from such care the Guardian should confirm with the court whether they are to continue to remain involved in the proceedings.

And what else happens?

Some commentators have noted that the Guardian's work can provide a 'bridge', and can change the dynamic in a highly contested case. One notes: "It is the HSE that has brought the application for ECO, parents do not blame the Guardian for their children being in care - even if the GAL in his/her reports is every bit as clear on the need for

care as the HSE. They also do not believe that GAL decision making is resource driven, as they fear it can be with the HSE. They are therefore willing to communicate with the GAL even though they will not communicate with the HSE. There is a danger, of course, in the GAL acting as a mediator when in fact (s)he is an advocate for the best interests of the child. But a constructive and diplomatic role for the GAL can keep all the parties to the proceedings on a more rational footing.”

Other commentators take a different view and feel that parents can perceive that the GAL sides with the HSE and at times GALs assert a role and authority that is beyond their status, as a notice party only to the proceedings. (interestingly Gibbons notes: A GAL is like an expert witness but not an expert witness, is like an officer of Court but not an officer of court.)

Parents can feel that because the HSE bears the cost, the Guardian will go along with them. The suggestion is made – and I think it bears consideration – that now is the time to take the provision for Guardians out of the Child Care Act and place instead within Courts Services by way of a Courts Miscellaneous Provisions Act, to establish a statutory system which would deal with the following:

Accreditation which would include provision of service to vulnerable adults,

Appointment of the Guardian ad Litem

The legal representation of the Guardian ad Litem

Failing a new piece of legislation, the commentators have suggested that a Circular from the President of the District Court would deal on an interim basis with the appointment of the Guardian ad Litem.

Facilitating a child to attend court. A Guardian will canvas a child’s wishes about attending court, raise this with other parties, and advise the court that the child wishes to attend. I have not yet known a court to refuse such application, indeed Section 30 (2) of the 1991 Act states: *Where the child requests to be present during the hearing or*

a particular part of the hearing of the proceedings the court shall grant the request unless it appears to the court that, having regard to the age of the child or the nature of the proceedings, it would not be in the child's interests to accede to the request.

Judges have made arrangements to see the child either in chambers or in private within the court room. The court registrar and the Guardian will be present and from time to time another key person such as the social worker.

The Guardian will prepare the child beforehand and will support the child afterwards. I have found this to be a process beneficial both to the child and the judge in the case: the child feels that they really have been heard and understood and they no longer feel that the decisions being made about them are so impersonal. Judges have commented that they have had a better understanding of the child having met them, and often, are impressed by them.

In practice, it is older children of 10 plus who are able to go through this experience but there is no reason why it should not be considered for a younger child providing that proper preparation is undertaken.

Even where a Guardian and a child cannot reconcile their views on the child's interests, it is still crucial that the child's wishes are represented, clearly, and without interpretation. This is done by the inclusion in the Guardian's report of the child's words, as told to the Guardian and as reported to others. Where possible, a child may compose a letter which is appended to the Guardian's report. With older children, I will bring a laptop and encourage a young person to co-write sections of the report, or indeed, to write the section on their wishes and feelings directly.

The Impact of the Guardian Role.

Carmel Corrigan, PhD Student School of Social Work and Social Policy, Trinity College Dublin is undertaking a study of work in the field entitled:

The Construction and Impact of Children's Participation through the Guardian ad litem in Child Protection Cases: The Views of District Court Judges, Guardians ad litem and children.

Ms Corrigan's research brief is as follows:

"Under Section 24 of the Child Care Act 1991 children are afforded the opportunity to have their voices heard and their wishes taken into account in child protection and care cases before the courts, in accordance with the child's capability to form a view, their age and maturity. This opportunity is contextualised with regard to the best interests of the child being the first and paramount consideration of the court. Section 26 of the same Act allows the court to appoint, in the interest of justice and the best interest of the child, a Guardian ad litem to the case. The Guardian ad litem has therefore become a key mechanism for children's participation in cases that will determine their future care.

This legislation reflects a number of articles in the UN Convention on the Rights of the Child. Of particular relevance are Article 3, which establishes the best interest of the child as a primary consideration in decisions about children; Article 5, which addresses the evolving capacity of the child; and Article 12, which promotes children's right to have their voices heard in administrative and judicial matters affecting them and to have their views accorded due weight in accordance with their age and maturity.

The current study is concerned with the interpretation and implementation of Sections 24 and 26 of the Child Care Act 1991 in the context of the above three Articles. It seeks to explore understandings of key concepts such as capability to form a view, maturity, and due consideration, and to examine how having a voice relates to the construction of children and their participation in decisions that affect them. This will be examined in the light of relevant literature on children's rights, children's participation and the social construction of children and childhood.

The study is being undertaken with the co-operation of the Barnardos' Guardian ad litem service. All Barnardos Guardians will be interviewed and the participation of a number of children who have been users of this service is being sought with the consent of the HSE. A number of Family Court judges in the Dublin District Court who regularly appoint Guardian's ad litem have agreed to be interviewed and others across the country are also being approached to participate in the study."

What do the children say?

We had a young intern Rebecca Foley who spend some time with the service in 2007. She spoke to a number of young people who had been through special care and to professionals working in the area. She asked the professionals what they thought of the work of the Guardians, and the children what they thought of special care, their social workers and their Guardians.

Roger Killeen, Chair of the HSE's National Committee for Admissions and Discharge to Special Care, formerly CEO of SRSB/CAAB:

"If you have two arms, two legs, a head and you don't hit anyone, you have access to all the services. Once you are a little bent, it falls apart and society has trouble providing services."

"when a Guardian ad Litem is acting in the child's best interest, the child can sense that and trust them."

Of her social worker, 17 year old Mary said:

.....it is hard to be in care because so many people come into your life and you tell them your story, and then they leave and you have to tell it to someone new...

"I think she's a good social worker, but I've never really gotten on with any social workers, probably because they are social workers. It is their job to give the bad news. I don't think many people like their social worker. I may not get on with my social worker, but she does what she's supposed to do, even more. Don't tell anyone. I don't want her to know I like her."

Of their Guardians, the young people said:

Kelly (17) explained that a Guardian ad Litem “is someone to help me out with advice or if I don’t think my social worker is doing what she is supposed to be doing. A social worker is there to help if there is any problems with my family, to read my logs at my placement. A Guardian ad Litem goes by what I tell him.”

I want today to leave the last words to a young person in Rebecca’s study. If this is all that a Guardian does, then this is a job well worth doing:

Ally (16) said “if you can’t form the words that you want to say, they’ll help you do that. They just help to get done what needs to be done.”

Thank you

Freda McKittrick

ⁱ Gibbons, LECTURE FAMILY LAWYERS ASSOCIATION; 19th January 2010; ISSUES IN CHILD CARE COURT PROCEEDINGS

Carr, Nicola, Guiding the GALs: A Case of Hesitant Policy-making in the Republic of Ireland

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