

Children's Rights: An Overview

A briefing note

A child's best interests: who decides?

Almost everyone agrees that the best interests of the child must be to the forefront when decisions about children are being made. However, the key question is who should decide what is in a child's best interests, parents or a third party such as a State agency?

Most people will also agree that in the vast majority of cases it must be the parents. People will also agree that in cases of abuse or neglect the State must be allowed to step in and remove children from their parents where necessary.

Irish law, including the Constitution, already allows for State intervention in cases of abuse or neglect as testified to by the fact that more than 5,000 children are currently in the care of the State.

Should the State be given additional powers of intervention? Should it be allowed to override the wishes of parents for their children in a wider range of circumstances? What if this leads to over-intervention by the State as has occurred in other jurisdictions?

The experience of Britain: over-intervention and under-intervention

Over-intervention in families

Recently the new head of the Family Division of the High Court in Britain, **Lord Justice Wall**, made the following statement about social services in the UK: "[Social workers] are perceived by many as the arrogant and enthusiastic removers of children from their parents into an unsatisfactory care system, and as trampling on the rights of parents and children in the process."

He was commenting on a case that saw social services remove two children from their mother (Miss EH). The mother had not abused the children, but their father had broken the arm of the younger child. The mother and father separated but the mother still had contact with the father and social services intervened on this basis.

Justice Wall said this was unacceptable. He stated: "Here was a mother who needed and was asking for help to break free from an abusive relationship. She both needed and sought help and was quite improperly rebuffed by a local authority which had plainly prejudged the issue."

Another judge, **Lord Justice Aikens**, commented on another, similar case involving Miss S whose child had been removed from her and placed for adoption. He said of the action of the social workers: "This is more like Stalin's Russia or Mao's China than the west of England."

Under-intervention in families

On the other hand there have been clear examples of under-intervention by social services in the UK, one of the most notorious being the recent **Baby P** case. Baby P died as a result of violent abuse despite social service and police being well aware of his plight.

There was also the case of seven year old **Khyra Ishaq** who starved to death in her family home in Birmingham again despite contact between the family and social services.

How the concept of 'best interest' can be abused

The concept of a child's best interest can be used by the State to intervene in families where there is no abuse or neglect and no hint of either. A very clear example of this occurred in Quebec in 2008 when Quebec Superior Court overturned the decision of a father to prevent his 12 year old daughter going on a school trip because she was posting what he believed were inappropriate images of herself on the internet.

The judge in the case overruled the father's decision in the girl's 'best interest'.

This level of interventionism by the State almost certainly would not be permitted by the proposed constitutional amendment but nonetheless it is important to bear in mind how the concept of a child's best interests can be abused to give great power to the State to such an extent that the State can even interfere in the minutiae of family life.

Getting the balance right

In Britain there is no written constitution, no definition of the family, and marriage does not receive special status or protection as it does in Ireland. Therefore, in Britain there are not the same impediments to intervention in families by social services such as allegedly exist here.

However, this has not prevented poor judgments by social services such as cases where they should have intervened, but did not.

In addition, and as the two judges quoted above point out, it has led to cases of over-intervention.

What this means is that great care must be taken to ensure that the current legal balance between parents and the State is not altered in such a way as to lead to the sort of over-intervention such as occurs in the UK, while at the same time, paradoxically, not preventing instances of under-intervention such as the Baby P case.

Finally, it is worth quoting constitutional expert, **Professor Gerard Hogan** of Trinity College Dublin in this context. Speaking of the proposed amendment he told RTE in February 2010: "*I think the advantage of this (wording) is that it expressly restates the rights of the child in a modern and impressive way.*

"But what I disagree with is the suggestion that the present provisions haven't worked well, or that they don't strike the right balance, or are in some way responsible for lots of modern ills because I think that is just, with respect, a grotesque misstatement and misunderstanding of the present Constitutional provision."