CHILDREN IN SPECIAL CARE IN IRELAND

The Role of the Court in the Protection and Vindication of their Rights

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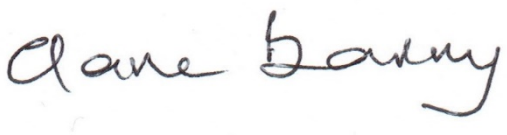

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ABBREVIATIONS

ACTS	Assessment Consultation Therapy Services
AGS	An Garda Síochána
CAAB	Children's Act Advisory Board
CAMHS	Child and Adolescent Mental Health Services
CFA	Child and Family Agency
DCYA	Department of Children and Youth Affairs
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
GAL	Guardian-Ad-Litem
HIQA	Health Information and Quality Authority
HSE	Health Service Executive
ISCO	Interim Special Care Order
PD	Practice Direction
RSC	Rules of the Superior Court
SCO	Special Care Order
SCRC	Special Care Referrals Committee
SCU	Special Care Unit
SRSB	Special Residential Services Board
UNCRC	United Nations Convention on the Rights of the Child

ABSTRACT

Children in Special Care in Ireland:
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Clare Barry

Special care is a unique form of state care specifically designed to provide secure accommodation, education and therapeutic supports for (adolescent) children with behavioural and conduct disorders. Although the provision of such care has evolved over time into a more structured and regulated form of care which is governed now by statute, this was not always the case. It was the lack of availability of any form of suitable care for children, generally adolescents, that resulted in cases being brought on behalf of children before the High Court, by way of judicial review, during the 1990s. The lack of a statutory framework resulted in the court exercising its inherent jurisdiction and ordering their civil detention to protect and vindicate their rights while having regard to their welfare needs.

This thesis provides the first comprehensive legal study in this area in Ireland and uses empirical data from attendance at court hearings. It seeks to evaluate from a rights-based perspective, how and to what extent the court protects and vindicates the rights of these children within that court process. The doctrinal and socio-legal element of the thesis contextualises the court observational empirical study. The empirical element provides a valuable insight and understanding of the operation of the court system, the jurisdictional bases of the court, the hurdles to be overcome by various parties to the proceedings and its consequential effect on the rights of detained children. This thesis identifies that the current statutory court process regarding the protection and vindication of the rights of children, remains primarily welfare-based as opposed to rights-based, thus prioritising welfare over rights. Consequently, vigilance is required from a rights-based perspective to ensure that rights are not at risk of being subsumed by welfare concerns.

Children in Special Care in Ireland:

The Role of the Court in the Protection and Vindication of their Rights

Chapter 1 Introduction

"How can you be so afraid of an eighteen year old?
Too much risk of finding her cold.
If there's truly no service, put a bespoke one in place.
Stop hesitating, because it's a disgrace.
My mood hasn't deteriorated and my suicide risk hasn't increased.
I'm only eighteen, I don't want to be pronounced deceased.
Just give me a chance to prove all that I have to give,
I have my whole life ahead of me yet to live,
stop hoping I will break under your bait,
please in me just have a little faith.
I have nothing over here,
nothing anyway that I hold dear.
No family or friends to comfort me,
just locked doors to which I don't hold the key.
This is not the kind of life I want to lead,
this is not the kind of treatment I need,
I miss my culture, the Irish dance,
let me come back, let me have a chance.
Please don't make me stay here another day,
this is all I have to say.
I hope you take the chance to listen to my concerns,
and put in place the plans for my return."[1]

[1] Written in May 2015 by a young person detained in a secure care facility in the UK pursuant to the inherent jurisdiction of the Irish High Court, appealing for permission to return home to Ireland; Irish Times 10 June 2015 https://www.irishtimes.com/news/crime-and-law/courts/high-court/woman-18-detained-in-uk-psychiatric-facility-makes-poetic-appeal-1.2244717? accessed 21 July 2021.

1.1. Introduction

Special care is accommodation for (adolescent) children, aged between 11-17 years who are in the care of the state; a defining feature of this alternative care is that the accommodation unit is secure.[2] Under the public law system adolescents are detained in special care units (SCUs) for welfare purposes because they are exhibiting high-risk taking behaviours. This behaviour, potentially underpinned by behavioural or conduct disorders, is so serious that it constitutes a threat to their life and/or welfare (and/or others), necessitating specialised treatment and therapeutic supports in a secure environment.[3] The secure nature of this care is the reason why the court's role in the protection and vindication of the rights of children is so critical.

While the only mechanism by which children can be detained in a SCU is by order of the High Court, it is important to be clear that children are not detained in SCUs in Ireland because they have committed a crime, or suffered mental health difficulties (as defined under the Mental Health Acts, 2001-2018), even though these may be features in their presentation.[4] They have a wide range of complex and severe issues which emanate from their behaviour as opposed to their environment.[5] The purpose of admitting a child to special care, which must be a measure of last resort, is primarily to address such complex needs in a concentrated safe environment with specialist skilled support services to bring about stabilisation within as short a time frame as possible.[6] The child then gradually transitions out of special care with the assistance of a support structure by moving to an 'onward placement' or a 'step-down facility'.[7] Occasionally, the child returns to the family home with a wrap-around support service.[8]

Children engaging in potentially life-threatening behaviours are also likely to be extremely vulnerable and this vulnerability is intertwined with their complex needs.

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[2] Mike Lindsay, 'Secure Accommodation: A Children's Rights Perspective on the Practice of Locking up Children within the Public Care System' (1991) 3 *Journal of Child Law* 66, 66-67; https://www.tusla.ie/services/alternative-care/special-care accessed 7 May 2019; in England, the placement of a child under the age of 13 years must be with the approval of the Secretary of State; The Children (Secure Accommodation) Regulations 1991, Regulation 4.

[3] *FN v Minister for Education & Ors* [1995] 1 IR 409 (HC); *Child and Family Agency v ML (Otherwise G) & Ors* [2019] IECA 109.

[4] *Health Service Executive v SS* [2007] IEHC 189; Child Care Act 1991 s 23 (CCA 1991); see generally Nicola Carr, 'Young People at the Interface of Welfare and Criminal Justice: An Examination of Special Care Units in Ireland' in Lalor, Ryan, Seymour, Hamilton (eds) *Young People and Crime: Research, Policy and Practice* (2007), Centre for Social and Educational Research Conference Proceedings (Dublin Institute of Technology) 47-51; Zoe Linnane, 'An Examination of the Special Care Service in Ireland: Balancing Welfare and Justice Issues in the Provisions of Care' (2013) *Critical Social Thinking Volume* 5, 247-261; Judge John O'Connor, 'Reflections on the Justice and Welfare Debate for Children in the Irish Criminal Justice System' (2019) 3 *Irish Judicial Studies Journal* 19-39.

[5] Tarja Poso, Manu Kitinoja and Taru Kekoni, 'Locking up for the Best Interests of the Child-Some Preliminary Remarks on 'Special Care'' (2010) 10 (3) *Youth Justice* 245, 249; CCA 1991 s 23F.

[6] https://www.tusla.ie/services/alternative-care/special-care accessed 7 May 2019.

[7] Terms are used interchangeably; chapter 6, 6.7.2 addressing exiting from special care.

[8] text to n 813 in chapter 7.

Herring states, in 'practice and legal regulation it is common to label a particular group of people as a vulnerable group'.[9] Herring notes that 'vulnerability' which he considers 'a vague term' is devoid of a definition and can mean different things within different contexts.[10] He also suggests an appropriate balance between protection and autonomy to safeguard against disproportionate interference to meet the needs of such persons as a mechanism of ensuring against an over-reliance on paternalism that can arise within the context of the 'notion of vulnerability'.[11] Although not addressing vulnerability within the context of special care either, Fineman considers that levels of vulnerability can be reduced (as opposed to eliminated) through specific configurations like institutions or programmes.[12] While Ireland's historic civil detention of children is now known to have had an adverse and damaging effect on many detained there,[13] the configurations of SCUs in Ireland which are currently under the control of the Child and Family Agency (CFA) could not be further away from the old industrial or reformatory schools. In addition, the Health Information and Quality Authority (HIQA) publicly report on and inspect various social care settings including special care facilities and like the CFA, adopts a rights-based child-friendly approach to same which reflect the change in approach to civil detention.[14] The tailor-made institutional programmes and subsequent support structures currently in place would, broadly speaking, theoretically seem to conform to the requirements under Fineman's vulnerability thesis while also addressing the complex needs of the child. They also have the potential to strike that proportionate balance between protection and autonomy as advocated by Herring to prevent an over-reliance on paternalism.

Civil detention within the context of special care first arose in this jurisdiction during the 1990s even though it had been in operation in England for some time prior to that.[15] Around the time when the last of the industrial and reformatory schools were being closed in the Republic of Ireland, the High Court was required to adjudicate upon a series of

[9] Jonathan Herring, *Vulnerable Adults and the Law* (Oxford University Press 2016) 29.
[10] ibid 5-6.
[11] ibid 35.
[12] Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 (1) *Yale Journal of Law and Feminism* 1, 9-10.
[13] Commission to Inquire into Child Abuse, May 2009 (Ryan Report).
[14] See generally, www.hiqa.ie; chapter 8, 8.5 discusses the humane aspect of SCUs and the significant efforts of the CFA.
[15] Martin Parry, 'Secure Accommodation-The Cinderella of Family Law' (2000) 12 *Child and Family Law Quarterly* 101, secure accommodation originally derived from the criminal justice system; Robert Harris and Noel Timms, *Secure Accommodation in Child Care Between Hospital and Prison or Thereabouts*? (Routledge Taylor & Francis Group 1993) 12-16; Robert Harris and Noel Timms, 'Children in Secure Accommodation' (1993) 23 *British Journal of Social Work* 597, 599-603 further trace the historical background; UK Children Act 1989 s 25 (UK CA) provides for secure accommodation orders.

judicial review applications which were brought on behalf of and to assist children.[16] These children had behavioural or conduct disorders and consequently were engaging in high-risk taking behaviour deemed to be such that there was a serious risk to their life. It was argued on behalf of children, that appropriate accommodation, or civil detention to receive specialised supports, was required to address this extreme behaviour.[17] The difficulty was that there was no statutory basis for civil detention. The Children Act, 1908 was the principal statute providing for the care of children for most of the 20th century until the commencement of the Child Care Act, 1991, but the 1991 Act did not provide for civil detention until the commencement of the Child Care (Amendment) Act, 2011 on the 31st December 2017.[18] The High Court in the mid-1990s, without a statutory framework, engaged in judicial activism by invoking its inherent jurisdiction to make civil detention orders to enable it fulfil its constitutional obligation to protect and vindicate the rights of these children.[19]

This novel mechanism by the court, of civilly detaining children to fulfil its constitutional obligations towards them, underpins and supports the rationale of this research. Although such cases are now governed by statute, the inherent jurisdiction can still be invoked in certain circumstances and thus still has a role to play.[20] This thesis explores the role of the High Court, in its protection and vindication of the rights of children civilly detained in SCUs in Ireland under both jurisdictional bases, i.e., initially the inherent jurisdiction and latterly under statute.

1.2. Research Question

The research question is: 'Children in Special Care in Ireland: To what extent does the court protect and vindicate their rights?' When this research commenced, all special care cases were heard under the court's inherent jurisdiction and this had been the position for period of over twenty years. Although statutory provisions had been introduced in 2001, they were inoperable due to the failure of the Minister to approve designated SCUs.[21] Therefore this thesis originally intended to explore the judicial approach within the context of the court's inherent jurisdiction in line with the protection and vindication of

[16] *FN v Minister for Education* (n 3); Children Act 1908 s 58 (CA 1908), prior agreement of the manager was required before a child could be sent there. By 1995, there were 2 industrial schools remaining for boys and none for girls.
[17] eg *FN v Minister for Education* (n 3).
[18] Part IVA substituted and inserted by the Child Care (Amendment) Act 2011 (19/2011) s 10 SI No 2017/634; Children Act 2001 s 16 inserted the original Part IVA into the CCA 1991 which, following commencement remained inoperable due to the Minister's failure to designate any units; *Child and Family Agency v TN & ors* [2018] IEHC 568 para 17.
[19] *FN v Minister for Education* (n 3)*;* UK CA s 25 permits a local authority detain a child for up to 72 hours within a consecutive 28-day period after which time a court order is required; there was and is no such mechanism in Ireland.
[20] *Child and Family Agency v MO'L & MM* [2019] IEHC 781.
[21] (n 18); Nicola Carr, 'Exceptions to the Rule? The Role of the High Court in Secure Care in Ireland' (2008) 11 (4) *Irish Journal of Family Law* 84-91.

the rights of children in civil detention. The commencement of the statutory provisions on the 31st December 2017 altered the jurisdictional basis of the court which consequently required consideration of the judicial approach within two jurisdictional bases and how this impacts the protection and vindication of rights by the court.[22]

The core aims and objectives of this thesis in answering this research question is threefold:

1. It analyses both the original inherent jurisdiction and the subsequent statutory jurisdiction of the court to make civil detention orders. This establishes the basis, parameters and limitations of the court's jurisdiction when adjudicating upon special care cases which affects how the rights issues are both managed and balanced against competing interests.
2. It identifies which children's rights are most impacted by civil detention. It considers this from a rights-based perspective, while acknowledging that children have both protective and assertive rights and establishes a theoretical rights-based framework for children in special care.
3. It considers the extent to which the courts are protecting and vindicating the rights of civilly detained children within the parameters and limitations of its jurisdiction, having regard to the theoretical framework.

1.3. Original Contribution to Existing Research

This research is original in three ways:

1. It is a doctrinal study which examines the inherent and statutory jurisdiction of the High Court in relation to children civilly detained in special care since the mid-1990s. It thematically reviews, through case law, the exercise of the court's inherent and statutory jurisdiction to date, as it relates to the rights of these children under the categories of civil and political, socio-economic and participatory rights, thus filling the literature gap in this area.
2. It proposes and promotes a theoretical rights-based child focused framework for children in special care.
3. It incorporates empirical analysis and conclusions arising from extensive court observations; this identifies the difficulties the court is faced with in its efforts to protect and vindicate those rights and how it addresses those difficulties within

[22] Chapter 3 considers both jurisdictional bases; chapter 8, 8.2 (overall framework) provides some concluding observations of both jurisdictional bases.

the parameters of its jurisdiction while having regard to the theoretical rights-based child focused framework for children in special care.

1.4. Methodology

This thesis engages mixed methods which serve to provide a unique understanding and analysis of the subject matter. The methods engaged are doctrinal analysis together with socio-legal and empirical analysis.

a. Doctrinal analysis

Doctrinal analysis engages an examination of legal rules which are generally found in primary (e.g. case law and legislation) and secondary (e.g. journal articles) sources; for the purposes of this research this also includes case reports published by the Child Care Law Reporting Project (CCLRP) which was established to undertake research and report on child care proceedings in Ireland.[23] Doctrinal analysis is a necessary component of legal research which states clearly and objectively what the law is in the absence of external considerations or influences.[24] It is often described as research *in* law.[25]

A doctrinal analysis provides the basis and parameters of the court's inherent and statutory jurisdiction which is essential to answering the research question. In addition, the doctrinal analysis of case law in special care cases provides an understanding as to the extent to which a court is prepared to protect and vindicate the rights of civilly detained children since the mid-1990s and also assists with determining which rights are most affected by detention.

b. Socio-legal analysis

Socio-legal analysis assists in analysing the law in context and in critiquing the law as it identifies how the law functions within society.[26] O'Donovan suggests that one of its 'major contributions' is to 'show the role which extra-legal factors or assumptions may play in putatively 'neutral' legal reasoning'.[27] Of further relevance within the context of this research, is the fact that socio-legal and doctrinal research interact with each other. For example, within the context of judicial decision-making, the ultimate answer of the

[23] Ian Dobinson and Francis James, 'Qualitative Legal Research' in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press 2007) 19. The Child Care Law Reporting Project (CCLRP) is in existence since 2012 and the project is funded since 2018 by the DCYA (now called the Department of Children, Equality, Disability, Integration and Youth), the CCLRP initially only reported on District Court child-care proceedings but since 2014 it has produced case histories on High Court special care cases too, see https://www.childlawproject.ie.
[24] Paul Chynoweth, 'Legal Research' in Andrew Knight and Les Ruddock (eds), *Advanced Research Methods in the Built Environment* (Wiley Blackwell 2008) 29-30.
[25] ibid 30.
[26] Darren O'Donovan, 'Socio-Legal Methodology: Conceptual Underpinnings, Justifications and Practical Pitfalls' in Laura Cahillane and Jennifer Schweppe (eds), *Legal Research Methods, Principles and Practicalities* (Clarus Press 2016) 109, 113.
[27] ibid 113.

court may not necessarily depend upon the scope of the statute, but on the available options within that context that fulfils the intentions of the legislature.[28]

More specifically, socio-legal analysis is inter-disciplinary and draws from the social sciences, such as sociology or social policy.[29] Whereas law is concerned with government through a system of rules and is therefore prescriptive and technical,[30] sociology is the study of human life, society and social groups,[31] or social phenomena (and thus producing social theories)[32] and is more explanatory and descriptive.[33] Although law and sociology are different disciplines with different methodological positions, they share some similar subject matter, namely, social relationships, composition of authority, social control and the development of human rights.[34]

Socio-legal research and sociological concepts are relevant in terms of answering the research question, primarily because they provide context. Without this context, the doctrinal aspect of the law would not be fully appreciated or understood. First, the sociological aspect explains how social relationships, and to an extent social control, have altered. For example, the concept of childhood has changed over time as has the adult view of children. The sociology of childhood is a recent phenomenon (the 1990s) and understanding this new paradigm provides a complementary basis for insights into children's rights, particularly when reflecting on questions relevant to rights, such as children's agency and social construction.[35] It was during the emergence of this sociological paradigm that the first of the special care cases emerged before the High Court by way of judicial review. Secondly and simultaneously, sociology is relevant for historical context. This is significant and instrumental in identifying the evolving position of the child in society and within the current legal framework and process. Thus, it provides context to the position of the child in society when these special care cases first arose during the 1990s.

[28] ibid 115.
[29] Reza Banakar and Max Travers, 'Law, Sociology and Method' in Reza Banakar and Max Travers (eds), *Theory and Method in Socio-Legal Research* (Hart Publishing 2005) 5.
[30] Roger Cotterrell, *The Sociology of Law, An Introduction* (Butterworths 1984) 5.
[31] Anthony Giddens and Philip W Sutton, *Sociology* (8th edn, Polity Press 2017) 4.
[32] Banakar et al (n 29) 12.
[33] Cotterrell (n 30) 5.
[34] ibid 5-6.
[35] Giddens et al (n 31) 345-346; Michael Freeman, 'The Sociology of Childhood and Children's Rights' (1998) 6 (4) *International Journal of Children's Rights* 433, 439-442.

c. Empirical analysis

Empirical legal research (qualitative court observational analysis) is a unique component of this thesis.[36] Court observations provide the mechanism to see and evaluate these doctrinal principles in operation. This is because the empirical research provides the opportunity to understand and consider the application of the law within the parameters and limitations of the court's jurisdiction. It thus provides an opportunity to analyse the rights of children in special care through the court process in a way that judgments or case reports cannot; this is because the focus of the analysis in this research concerns the judicial approach to the management of the rights' issues (as opposed to general reporting on a case) which is carried out systematically on every case before the court during the observational period.[37] Consequently, it is instrumental in terms of answering the research question. While judgments are available to appraise, they do not reflect the entire review process; nor does every case that comes before the court have the benefit of a written judgment. Court observations were extensive in that they were carried out over a fourteen-month period.[38] This provided the opportunity to observe and record repetitive practices and identify similar issues leading to consistency in validity of findings and eliminating any potential bias.

1.5. Thesis Outline and Structure

Chapter 2 considers children and the law in Irish society and touches upon the theory and sociology of childhood. Within this context it considers the historic civil detention of children, the development of rights for children and the new approach in Irish society towards children up to the mid-1990s, when the first special care cases came before the High Court. To contextualise the research question, it considers the socio-legal background that led to special care and from then to date.

Chapter 3 examines the authority and the power of the court to civilly detain a child under both the inherent jurisdiction and statute. The exercise of the inherent jurisdiction spanned more than twenty years thus providing a body of jurisprudence. The High Court's current jurisdiction to civilly detain a child is contained within the provisions of Part IVA of the Child Care Act, 1991 ("Part IVA"). As to whether and under what circumstances the inherent jurisdiction can still be invoked is also considered.

[36] Chapters 6, 7 details the empirical analysis; chapter 6, 6.4 provides background detail to the empirical research; see also Appendices 1-111.
[37] For example, court observations provide insight into how the wishes of the child are/not given effect; chapter 6, 6.7.5 considers 'Interaction with the Judge' and chapter 7, 7.5 considers 'Participatory Rights'.
[38] Chapter 6, 6.4 provides further background detail.

Understanding the jurisdictional basis of the court identifies the extent to which the court can protect the rights of those detained within the context of this research question.

Chapter 4 considers the various theoretical debates regarding children's rights and introduces a children's rights framework specifically developed for children in special care which emanates out of those theoretical perspectives. The framework considers, inter alia, the most prevalent and pressing rights, which fall under the categories of civil and political rights, socio-economic rights and participatory rights. It is against this framework that the protection and vindication of rights is later analysed.

Chapter 5 thematically examines the judicial approach in case law to date regarding the protection and vindication of the legal justiciable rights of children in special care in light of Ireland's human rights obligations under, inter alia, the Constitution of Ireland, 1937, the European Convention on Human Rights (ECHR) and the United Nations Convention on the Rights of the Child (UNCRC). This analysis is divided into two distinct phases: the first concerns the exercise of the court's inherent jurisdiction from the mid-1990s to the 31st December 2017; the second concerns the court's statutory jurisdiction from that date. The literature is interwoven primarily throughout these first five chapters.

Chapters 6 presents qualitative analysis which has been compiled through extensive court observations. It explains how the special care regime operates and how such proceedings are conducted within the court process. It analyses some general observations which are relevant to the protection and vindication of rights. It also provides statistical data, primarily to identify that the number of cases observed is comprehensive, and it identifies that the number of cases observed is sufficient in terms of validating the observations to demonstrate repetitive practices.

Chapter 7 also presents qualitative analysis compiled through extensive court observations, more specifically as it relates to the various rights at each stage of the court process. This presents a richer and deeper understanding of the issues in practice and sheds light on the weekly judicial decision-making process. It is against the theoretical framework in chapter 4 that the findings and trends are analysed. This analysis provides the foundation for answering the research question.

Chapter 8 concludes the thesis by answering the research question. It also considers some recommendations and proposals.

Chapter 2 Children and the Law in Irish Society

2.1. Introduction

To contextualise the research question, consideration must be given to the emerging paradigm of the sociology of childhood, together with socio-legal context (both societal and historic) as it provides the background to the development, understanding and current position of the child vis-à-vis the law. Societal context identifies the operation of social control and the composition of authority; this composition enlightens our understanding of the development of special care from the 1990s to date. This analysis reveals that perceptions of children have altered significantly, not just within the sociological context, but within the legal context too.

2.2. The Child in Irish Society & the Law

2.2.1. Law, Children, Childhood and Social Order

James et al consider the role law plays in children, childhood and social order.[39] Broadly speaking, they argue that law is instrumental in social change and is key in the 'production, regulation and reproduction of children over time'.[40] They suggest that the law not only constructs childhood and replicates social policy but also reflects the adult view of childhood which underlines the law.[41] Further, some laws address social order. It is therefore somewhat foreseeable that law will either fail to embrace or continue to control the contribution of the child in the construction of childhood.[42]

In terms of the regulation of secure care and the related social policy, Parry suggests that within the family law context in England and Wales, secure accommodation (now termed special care in Ireland) bodes well for the 'role of Cinderella of child law'.[43] Although social policies have changed requiring updated governing laws, this did not occur within the context of special care for over twenty years. Arguably therefore, the Cinderella tag applies in this jurisdiction also.

The legal regulation and legal 'control' over children requiring special care remained in the hands of whichever High Court judge was specifically assigned to the special care list

[39] Allison James and Adrian L James, 'Childhood: Towards a Theory of Continuity and Change' (2001) 575 *Annals of the American Academy of Political and Social Science* 25, 32.
[40] Allison James and Adrian L James, *Constructing Childhood, Theory, Policy and Social Practice* (Palgrave Macmillan 2004) 64.
[41] ibid 75.
[42] ibid.
[43] Parry (n 15) 114.

for a period of time, from the mid-1990s until the 31st December 2017 under the court's flexible inherent jurisdiction. Since then, their legal governance is contained within statute, even though the practice remains that one High Court judge is assigned to the list for a period of time.[44]

2.2.2. Theory and Sociology of Childhood

Understanding the theory and sociology of childhood provides a basis upon which it is possible to understand first, how children have been perceived over time, and second, how this has changed through external influences. The resulting more developed, broadminded approach towards children is encouraging insofar as it ought to be reflected in how the court protects and vindicates the rights of children in special care.

a. Theory of Childhood

While the concept of childhood has always been in existence, it has been constructed and reconstructed based on political, economic and familial patterns.[45] It is also influenced by cultural and temporal diversities and is arguably also influenced by one's environment.[46]

Archard suggests that conceptions (one understands the nature of the differences between adults and children)[47] of childhood vary depending on boundaries (when childhood ends), dimensions (the angle from which one identifies the differences between adults and children), and divisions (the planes of development and its subdivisions) as this affects how various cultures view childhood and prevailing views will be reflected in whatever concept has been embraced. On the other hand, the interrelation between boundaries, dimensions and divisions can give rise to certain conflicts which may adversely impact any benefit. Archard cautions that such difficulties affect conceptions and once there is an understanding of the gap between 'concept' (meaning that one accepts that children and adults differ)[48] and 'conception' (meaning that one understands the nature of those

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[44] (n 18); Diane Duggan, 'Child Care (Amendment) Bill 2009: How we got here' (2010*)* 15 (1) *The Bar Review* 11-15.
[45] David Archard, *Children Rights and Childhood* (3rd edn, Routledge 2015) 23, 28, 34-35; Hugh Cunningham, *The Invention of Childhood* (BBC Books 2006) 109-121; Alistair MacDonald, *The Rights of the Child: Law and Practice* (Jordan Publishing Ltd 2011) paras 1.4-1.9; Nigel Thomas*, Children, Family and The State, Decision-Making and Child Participation* (The Policy Press 2002) 6-10; Linda Pollock, *Forgotten Children From 1500-1900* (Cambridge University Press 1983); Kathryn A Kamp, 'Where Have All the Children Gone? The Archaeology of Childhood' (2001) 8 (1) *Journal of Archaeological Method and Theory* 3-8; Harry Hendrick, 'Constructions and Reconstructions of British Childhood: An Interpretative Survey, 1800 to the Present' in Allison James and Alan Prout, (eds), *In Constructing Childhood: Contemporary Issue in the Sociology Studies of Childhood* (Falmer Press 1997) 59-60. Broadly speaking constructions and reconstructions can be categorised as (1) the more 'natural' state of childhood (2) the role of the family-middle class domestic model in the early 19th century and (3) from then, the role of the state with the family together with the introduction of legislation for welfare services.
[46] James et al, Towards a Theory of Continuity and Change (n 39) 27; James et al*, Constructing Childhood* (n 40) 18-23, 70.
[47] Archard, *Children Rights and Childhood* (n 45) 32-33.
[48] ibid.

differences),[49] this will assist in understanding the different conceptions of childhood which generally suggest or infer different 'values, priorities and assumptions'.[50]

Archard's analysis is insightful as it relates to special care. The interrelation between two variables identified, i.e., 'boundaries' and 'dimensions', have the potential to cause difficulties. Although childhood under Irish law ceases at age 18 years under the Age of Majority Act 1985, that is an arbitrary age, as other significant legislation makes a determination before that, such as the right to consent to medical treatment at age 16 years or the right to contraceptives at age 17 years or younger if married.[51] Some children are in special care right up to their 18th birthday and are therefore, in law, children, up until that point.

The 'dimensions' aspect of Archard's theory considers the angle from which one identifies the difference between adults and children. That is a difficult hypothesis for the purposes of the much older child within the special care regime. Can a person who is 17 years and 11 months old who is detained in special care really be considered a child and treated as such? Do the various parties to the proceedings, who are all having their say in court about this child, view this person from the same adult/child perspective? The state may choose to view this person as a child as it has legal control and may wish to continue detention to assist the child for the next month. But what about the other parties (parents, Guardians ad Litem (GAL), social workers) to the proceedings? There is the potential for a diverse view.

So, the boundaries of when childhood ends, although set by law, does not mean that in practical terms the physical stages of development of the child or his/her environmental influences or surroundings (including prior to special care) follow that neat cut-off point. The lines are also blurred on the 'dimensions' aspect for the older child in special care. As such, there is a case to be made that under these circumstances, there may be different views on 'values, priorities and assumptions' between the various parties to special care proceedings, including by the child him/herself. In addition, when considering children in special care, regard must also be had to their unique features, specific attributes, and family dynamic. In such a scenario, the protection and the vindication of rights by the court becomes more complex.

[49] ibid.
[50] ibid 39-40.
[51] Non-Fatal Offences Against the Person Act 1997 s 23; Health (Family Planning) (Amendment) Act 1992 s 4.

b. Sociology of Childhood

It was not until the 1990s that a new paradigm emerged in the field of sociology, known as the 'sociology of childhood', out of which childhood studies grew. Before this, sociology paid little attention to children given their subordinate relegated position in society.[52] Prout et al summarise their understanding of the main tenets of this paradigm which are inter alia, that

- childhood is best understood as a social construction (not a universal concept)
- children's social relationships and culture merit independent analysis and
- children are not passive subjects.[53]

The relevant key elements of this paradigm (for the purposes of this thesis) are socialisation, being the mechanism by which children adapt to and thus internalise society[54] and social construction, whereby childhood is 'socially defined and created'.[55] This sees childhood as a structural form whereby children are social actors engaging with adults and others, thus enabling their contribution to the reconstruction of both society and childhood. This replaces the socialisation concept somewhat with what is known as 'interpretative reproduction', i.e. the evolving membership of children within their own space or culture, beginning naturally within the family and then branching out.[56]

As previously stated, this thesis concerns older children (adolescents) displaying behavioural/conduct disorders. Typically adolescents spend longer periods of time away from the family home and peers/peer influences become more relevant.[57] In addition, some adolescents are learning to cope with 'potentially risky behaviours'.[58] Even though such behaviours can 'occur episodically and experimentally' as opposed to being the norm,[59] this remains a vulnerable group of children, and while relatively small in number overall, they are arguably either forgotten about or not known about, within the context of the wider community. Therefore, regard must be had to the fact that the court was and still is, faced with a potentially different construct insofar as the background and

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[52] Thomas (n 45) 15-19; William Corsaro, *The Sociology of Childhood* (2nd edn, Pine Forge Press 2005) 6; Anne Smith, 'Children's Rights and Early Childhood Education, Links to Theory and Advocacy' (2007) 32 (3) *Australian Journal of Early Childhood* 1-8; Martyn Hammersley, 'Childhood Studies A Sustainable paradigm?' (2017) 24 (1) *Childhood* 113, 113-115.

[53] A James and A Prout, *Constructing and Reconstructing Childhood* (Falmer Press 1997) 4; Anne B. Smith, 'Children as Social Actors: An Introduction' (2007) 15 (1) *International Journal of Children's Rights* 1-4; Hammersley (n 52) 113-123 argues the paradigm has internal tensions rendering the framework inadequate (eg agency fails to consider it comes with responsibility); Giddens et al (n 31) 346.

[54] Corsaro (n 52) 7.

[55] Thomas (n 45) 5, 16.

[56] Corsaro (n 52) 44.

[57] Frank F Furstenberg, 'The Sociology of Adolescence and Youth in the 1990s: A Critical Commentary' (2000) 62 (4) *Journal of Marriage and the Family* 896, 901-902. Chapter 4, 4.4(b) considers adolescents, autonomy and developing competence in further detail.

[58] ibid.

[59] ibid.

wellbeing of each adolescent is relevant and determinative in how the issues are resolved. As part of the sociological paradigm, children ought to be viewed as social actors and subjects with rights to protect while respecting their different characteristics as individual people. However, a tension may also arise as serious welfare issues are at stake, potentially leading to a protectionist and paternalistic approach.

The emergence of the sociology of childhood occurred at a similar time (broadly speaking) as the development of the children's rights movement. Even though both disciplines may differ, they also complement each other insofar as sociology offers insights to those interested in the advancement of a rights-based perspective.[60] Common ground shared by sociologists of childhood and children's rights advocates comprise matters such as

- a greater research focus on children's agency
- both accept that children are people and not property
- both respect children's different characteristics as individuals and
- both accept the construction of childhood as 'protectionist'.[61]

From the perspective of the court protecting and vindicating the rights of children in special care, this suggests that children are not passive objects of protection but are individuals with a voice entitled to be heard. This suggests that children should be involved with the adults they encounter and arguably this includes legal representatives and the court. Recognising that childhood has been constructed as 'protectionist' serves as a warning to be cautious. It does not mean that children in special care do not require protection; it would be remiss even to suggest this. The issue is the extent to which protectionism or paternalism by the court and those involved in their care override rights. Thus, this positions the child within a rights-based framework, against which the protection and the vindication of the rights of the child within the court process can be analysed.

2.3. Ireland: Historic Civil Detention of Children

Although the precursor to the concept of institutionalisation was attributed to private philanthropical organisations,[62] the period from the 1850s to the 1970s is described by

[60] Freeman (n 35) 433, 439-442.
[61] ibid 436-437; Berry Mayal, 'The Sociology of Childhood in Relation to Children's Rights' (2000) 8 (3) *The International Journal of Children's Rights* 243-259.
[62] R Dingwall, JM Eekelaar, T Murray, 'Childhood as a Social Problem: A Survey of the History of Legal Regulation' (1984) 11 (2) *Journal of Law and Society* 207, 214-215.

Gilligan as one of 'institutionalisation and seclusion' of children.[63] Reformatory and industrials schools were established under the *Reformatory School (Ireland) Act, 1858* and the *Industrial Schools Act, 1868* respectively. The purpose of the industrial schools was to provide services for children who had not committed any criminal offence but were at risk of doing so due to their lifestyles.[64] By the 19th century there was a somewhat paradoxical image of the child. On one hand, he/she was seen as innocent/requiring protection but on the other, was seen as a potential threat to society requiring discipline/incarceration.[65] Because of the threat to social order, children became the 'focus for action', notwithstanding some interest in other aspects of their physical welfare.[66]

The governing legislation for most of the 20th century was the Children Act, 1908 which strengthened the legislation on neglect and cruelty against children. Although known as the Children's Charter, the Act was also subject to various adverse observations, such as its limited child protection clauses and its potential to be considered as a means of state paternalism.[67] Children could be committed to state-funded Church run industrial/reformatory schools under this legislation for either committing a criminal offence or other reasons, such as begging or having a parent/guardian not exercising proper control.[68] Essentially, this Act which provided for the control of children, also permitted the state to institutionalise children for something that was not their fault.

Childhood for most of this period was constructed around and dominated by, inter alia, economic and political factors[69] and narrow perceptions of childhood and what was best for children. Cahillane observes that there was little appetite for state intervention during the early part of the 20th century, possibly due to, amongst other things, deference towards the Church, inexperience in managing the Free State and a lack of resources.[70] This links

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[63] Robbie Gilligan, 'Residential Care in Ireland' in Mark Courtney and Dorota Iwaniec (eds), *Residential Care of Children, Comparative Perspectives* (Oxford University Press 2009) 3. The framework for the institutionalisation of children was in place by the end of the 18th century, particularly with the establishment of the Dublin Workhouses, see Maria Luddy and James Smith, 'Introduction' in Maria Luddy and James Smith (eds), *Children, Childhood and Irish Society, 1500 to the Present*, (Four Courts Press 2014) 18; see Denis O'Sullivan, 'Social Definition in Child Care in the Irish Republic: Models of the Child and Child-care Intervention' (1979) 10 (3) *Economic and Social Review* 209-229.

[64] Helen Buckley, Caroline Skehill, Eoin O'Sullivan, *Child Protection Practice in Ireland, A Case Study* (Oak Tree Press 1997) <http://hdl.handle.net/10147/250811> 4 accessed 9 May 2018.

[65] Luddy et al (n 63) 16.

[66] Dingwall et al (n 62) 223.

[67] William Duncan, 'The Child, The Parent and the State: The Balance of Power' in William Duncan (ed), *Law and Social Policy, Some Current Problems in Irish Law* (1987) *Dublin University Law Journal* 21.

[68] Children Act 1908 ss 57, 58, 97, 106; children could also be committed to industrial schools under the Health Act 1953 s 55; See generally Michael V O'Mahony, 'Legal Aspects of Residential Child Care' (1971) 6 (2) *The Irish Jurist* 217.

[69] Laura Cahillane, *Drafting the Irish Free State Constitution* (Manchester University Press 2016) 95.

[70] ibid.

with the 'socialisation theory', which is the mechanism by which children adapt to and are moulded into society. Although some children prior to entry into industrial schools had been subject to parental abuse and welcomed protection,[71] the Commission to Inquire into Child Abuse (Ryan Report) subsequently provided chilling accounts of life within those institutions where many children were cruelly treated and abused. The historic detention and negative treatment of children in those institutions draws attention to the child as an object (as opposed to a subject) which highlights their powerlessness.

Further, the arguments put forward by James et al, that laws as defined play a crucial role, not just in terms of social change and social order, but also regarding the regulation and control of children (vis-à-vis adults and vis-à-vis society in general), can be appreciated within this context. The institutionalisation/detention of children was regulated by statute which exercised significant control over children; it effectively policed social order, which contributed to the regulation of the concept and conception of childhood.

2.3.1. A New Approach Developing Towards Children in Ireland

The Cussen Commission was established to evaluate the school system, which it endorsed in its report in 1936 subject to the implementation of its recommendations,[72] many of which remained unimplemented.[73] The Children Act, 1941 made minor amendments to the Children Act, 1908.[74] In 1962-63, the Inter-Departmental Committee on the Prevention of Crime and Treatment of Offenders identified inadequate management, neglect and abuse in institutions.[75]

A 'developmental model of childcare' emerged during the 1960s which considered emotional and psychological aspects of welfare.[76] Social changes in Ireland during that time contributed to this change of perspective.[77] For example, Vatican 2 (1962-1965) within the Catholic Church promoted greater engagement with the community.[78] The

[71] Harry Ferguson, 'Abused and Looked After Children as 'Moral Dirt': Child Abuse and Institutional Care in Historic Perspective' (2007) 36 (1) *Journal of Social Policy* 123,123.
[72] Ryan Report (n 13), vol 4, chp 1, pt 4.
[73] Karen Smith, 'Constructing the Child in Need of State Protection: Continuity and Change in Irish Political Discourse, 1922-1991' (2016) 9 (2) *The Journal of History of Childhood and Youth* 309, 314; Ryan Report (n 13) vol 4 chp 1 highlights the recommendation to reduce the numbers to 250 children in Artane did not occur, para 1.62; certain recommendations on training, including industrial training did not occur, paras 1.89-1.96; lack of progress re aftercare, para 1.110.
[74] Smith (n 73) 311; *Re Doyle An Infant* (SC, 21 December 1955), Children Act 1941 s 10 struck down as it had the potential to permit the institutionalisation of a destitute child by court order for a time not necessarily limited by a parents' lack of ability to provide for that child; see Caranua, http://www.caranua.ie/history, accessed 3/9/2017, 1.
[75] Anthony Keating, 'Administrative Expedience and the Avoidance of Scandal: Ireland's Industrial and Reformatory Schools and the Inter-Departmental Committee of 1962-1963' (2015) 10 *Estudios Irlandeses* 95, 105.
[76] Buckley et al (n 64) 8-9.
[77] Gilligan, Residential Care in Ireland (n 63) 5.
[78] ibid.

decrease in numbers in industrial schools has been attributed to the Adoption Acts,[79] better living conditions and a reluctance by the court to commit children to institutional care. The decrease in numbers in reformatory schools has been attributed to a better welfare and probation system.[80] During the late 1960s, 14 industrial schools closed and there was a move towards smaller units.[81] Further, there was a move towards the 'professionalisation' of child-care practices with a greater reliance on lay staff.[82]

Gilligan categorises the period from the 1970s to the 1990s as one of 'professionalisation and deinstitutionalisation'.[83] This categorisation is evidenced in the Reformatory and Industrial Schools System Report of 1970 (Kennedy Report),[84] authored in response to increased criticisms of institutions.[85] Broadly speaking, the main recommendations of the report called for, inter alia, an alternative type of child care similar to family life, in small units with properly trained staff and children being properly educated and integrated into community life; a greater focus on family support to prevent family breakdown and it recommended greater departmental streamlining of responsibilities regarding childcare and education.[86] Smith posits that the Kennedy report had behind it the 'weight of scientific authority' as education and welfare matters were then being viewed more from a human sciences perspective.[87]

Gilligan attributes the Kennedy Report as sparking reform commencing with the launch of the first training programme in 1971 for those engaged in residential care.[88] Simultaneously, the Campaign for the Care of Deprived Children (CARE) was established and social workers (and non-governmental agencies)[89] pressed for change in child care services. The 1980 Report of the Task Force on Child Care Services to the

[79] Adoption Acts 1952 as amended; see generally Valerie O'Brien and Sahana Mitra,' An Overview of Adoption Policy and Legislative Change in Ireland' (2018); <Report_2_An_Overview_of_Policy_and_Legislative_Change_in_Ireland_1952_to_2017.pdf (aai.gov.ie)> accessed 23 January 2021.
[80] Eoin O Sullivan 'Child Welfare Services, 1970-80: from the Kennedy Committee to the task force' in Maria Luddy and James Smith (eds), *Children, Childhood and Irish Society, 1500 to the Present* (Four Courts Press 2014) 131.
[81] Buckley et al (n 64) 7; Maurice Devlin, 'Past Perspectives, Industrial Schools in Ireland, Irish Ecclesiastical Record (1884) (vol 4)' (2009) 4(1) *Youth Studies Ireland* 46, 46, at its height in 1898, there were 71 industrial schools in Ireland.
[82] Gilligan, Residential Care in Ireland (n 63) 5; Robbie Gilligan, 'The 'Public Child' and the Reluctant State' in Maria Luddy and James M Smith (eds), *Children, Childhood and Irish Society 1500 to the Present* (Four Courts Press 2014) 151-152.
[83] Gilligan, Residential Care in Ireland (n 63) 3-5.
[84] Kennedy Report, 1970, by Judge Eileen Kennedy; two other key reports were commissioned, Tuairim report 'Some of our Children' (1966), OECD publication 'Investment in Education' (1966).
[85] Smith (n 73) 316.
[86] Kennedy Report (n 84) 6-7; O Sullivan (n 80) 127.
[87] Smith (n 73) 316.
[88] Gilligan, Residential Care in Ireland (n 63) 8.
[89] O'Sullivan (n 80) 129.

Government supported the 'developmental model of child welfare' which was considered important for the eventual repeal of the Children Act, 1908.[90]

With the establishment of eight regional Heath Boards in 1970 (under the Health Act, 1970), the state started to play an important role in child care services.[91] The Kennedy Report highlighted an administrative mess, whereby childcare services were already being overseen by at least three separate government departments.[92] The report suggested that the Department of Health should assume all child care matters and the Department of Education should retain all educational matters.[93] However, O'Sullivan notes the lack of clarity as to what was the 'main responsibility' of the Minister for Health caused administrative issues for the following 30 years.[94]

This slow development was a process reflecting the cultural shift of the times. The relaxed approach of the legislature towards children during the 20th century is reflected in the fact that it failed to update in any real sense the provisions of the Children Act, 1908, until the Child Care Act, 1991 (which did not commence fully until 1996). Even then, when enacted, a vulnerable group of children, of whom the state was aware,[95] were not provided for.

2.3.2. Emergence of Rights for Children

The Constitution of Ireland, 1937 as originally enacted did not provide specifically for children save for education under Article 42 and the 'natural and imprescriptible rights of children' under Article 42.5; however the latter was within the context of state intervention when parents failed in their duty.[96] From a rights perspective, this must be considered alongside the impact of the court's interpretation of the family unit under Articles 41 and 42 of the Constitution and the position of children within that unit.[97] Broadly speaking, during the 1960s, 1970s and 1980s, case law determined that interference within the marital family unit (regarding children) would only occur in

[90] Buckley et al (n 64) 9-10.
[91] ibid 10.
[92] Kennedy Report (n 84) 26.
[93] ibid 6, 26-27; see also O Sullivan (n 80) 129.
[94] Eoin O' Sullivan, '*Residential Child Welfare in Ireland, 1965-2008: An Outline of Policy, Legislation and Practice: A Paper Prepared for the Commission to Inquire into Child Abuse'* Commission to Inquire into Child Abuse vol 4, 246.
[95] text to n 117-120.
[96] Article 42.5 states, 'In exceptional cases, where parents for physical or moral reasons fail in their duty towards their children, the State as guardians of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard to the natural and imprescriptible rights of the child.'
[97] In the *State (Nicolaou) v An Bord Uchtála* [1966] IR 567 (SC) the court held that an unmarried mother had the right to the care and custody of her child under Article 40.3 of the Constitution.

exceptional cases under Article 42.5.[98] This translated into married parents having virtually unchallengeable autonomy over their child(ren).[99] Despite this, some recognition of implied constitutional rights for children emerged in 1980, for example, in the case of *G v An Bord Uchtála.*[100] More recently, Article 42A was inserted into the Constitution of Ireland, 1937, which is more commonly known as the children's rights article.[101] Although the exercise of such rights by a child was primarily within the remit of the parents, on their child's behalf,[102] Article 42A.1, is now a stand-alone provision which recognises the 'natural and imprescriptible rights' of the child; how this is balanced against the constitutional rights of the parents may be case specific.[103]

Internationally, the issue of children's rights had been under review from the beginning of the 20th century. For example, both the Declaration on the Rights of the Child 1924[104] and the subsequent Declaration on the Rights of the Child 1959 have been commended while being simultaneously criticised on the basis of paternalism.[105] The 1924 Declaration, which has been described as 'brief and aspirational,'[106] is credited with reflecting the 'child-saving and compulsory education' period.[107] The 1959 Declaration is recognised as being instrumental in terms of the prevailing understanding of children's rights and their right to protection.[108] A significant criticism of these principled documents is that they are devoid of state obligations.[109] Despite their progressiveness as Declarations, this does not inspire confidence in terms of promoting children's rights.

The European Convention on Human Rights (ECHR) of 1950, (influenced by the Universal Declaration of Human Rights 1948) provides for civil and political rights; it

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[98] eg *Re JH* [1985] IR 375 (SC); see generally Estelle Feldman, 'Informed Consent: Should there be a Reasonable Parent Test?' in Ciaran Craven & William Binchy (eds), *Medical Negligence: Emerging issues* (First Law 2008) 185; see generally Nykol O'Shea, 'Can Ireland's Constitution Remain Premised on the "Inalienable" Protection of the Marital Family Unit Without Continuing to Fail its International Obligations on the Rights of the Child?' (2012) 15 (4) *Irish Journal of Family Law* 87.

[99] *North Western Health Board v HW & CW* [2001] 3 IR 622 (SC); *Re JH* (n 98); *N v HSE* [2006] IEHC 278; [2006] IESC 60; [2006] 4 IR 374.

[100] *G v An Bord Uchtála* [1980] IR 32 (SC) 44, 69, the court held that the child had, inter alia, 'the right to be fed and to live, to be reared and educated, to have the opportunity of working and of realising his or her full personality and dignity as a human being.' Further, during this time, the courts declared various unenumerated rights primarily for the benefit of adults, but children are also considered to have certain rights.

[101] Thirty-First Amendment of the Constitution (Children) Act 2012 signed into law on the 28 April 2015.

[102] Oran Doyle, *Constitutional law: Text, Cases and Materials* (Clarus Press 2008) paras 9-75; see also *AO & DL v Minister for Justice, Equality and Law Reform* [2003] 1 IR 1 (SC) 159.

[103] *CFA v ML* (n 3) considers Article 42A within the context of special care.

[104] Judith E Timms, *Children's Representation, A Practical Guide* (Sweet & Maxwell 1995) 43. The Declaration of the Rights of the Child emanated from Eglantyne Jebb (founder of the Save the Children Fund) who, in 1923, was of the view that certain rights ought to be claimed for children.

[105] Timms (n 104) 43; the UN replaced the League of Nations after the Second World War and in 1948 pronounced a Universal Declaration of Human Rights which was followed by the Declaration on the Rights of the Child on 20 November 1959.

[106] Jane Fortin, *Children's Rights and the Developing Law* (3rd edn, Cambridge University Press 2009) 37.

[107] Timms (n 104) 43.

[108] Ursula Kilkelly, *Children's Rights in Ireland, Law, Policy and Practice* (Tottel Publishing 2008) para 1.003.

[109] Timms (n 104) 43-44; Fortin, *Children's Rights and the Developing Law* (n 106) 37-38.

also provides for detention for education purposes, which is a socio-economic right. The United Nations Convention on the Rights of the Child (UNCRC) provides for civil and political rights ('derived from the inalienable 'rights of man'') and social welfare rights (emanating from the International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966).[110] The UNCRC is considered the most significant international legal instrument to influence 'international discourse on children and childhood'.[111] Fortin notes one of the main differences between this Convention and previous treaties/Declarations, is that the latter were concerned mainly with 'children's immaturity and care;' this Convention sought to include, in one document, a range of civil and political, socio-economic and participatory rights, for all under 18 years of age.[112] Provision has been made for the best interest principle to be *a* paramount consideration in all matters affecting children and for the growing autonomy of older children.[113] Although the UNCRC has not been incorporated into Irish law, relevant aspects of the Convention can be noted in some domestic legislation, particularly regarding the paramountcy of the best interest principle (Article 3) and child participation (Article 12)[114] in addition to Article 42A of the Constitution of Ireland, 1937.

The mid to latter part of the 20th century saw the emergence of more definitive rights for children followed by the recognition of the emerging paradigm of the sociology of childhood which sees the child as a social actor with a role to play in social construction. Credit has been afforded to the American civil rights movements (and some American Supreme Court decisions) for its role in fostering and encouraging a greater understanding of minority groups which include children and self-determination.[115] The emergence of children's rights domestically and internationally demonstrates that children are viewed to some extent, as persons in their own right. This development is significant for the purposes of the research question.

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[110] Fortin, *Children's Rights and the Developing Law* (n 106) 35-36, 38. Fortin notes that the 1959 Declaration provided for certain socio-economic rights which resurfaced in the UNCRC whereas the same Declaration was, for the most part, devoid of more mainstream civil and political rights for children. UNCRC was ratified in Ireland on 28 September 1992.

[111] James et al, *Constructing Childhood* (n 40) 81.

[112] Fortin, *Children's Rights and the Developing Law* (n 106) 39-40.

[113] ibid 40-42; chapter 4, 4.4 (b) considers adolescents, autonomy and developing capacity; chapter 4, 4.5.2 (a) considers the best interest and welfare principle.

[114] *HSE v SS* (n 4) para 50. The court in *SS* considered that cases such as *DG v Eastern Health Board* [1997] 3 IR 511 and the authorities identified therein reflect the rights contained in the UNCRC; see generally Aisling Parkes, *Children and International Human Rights Law: The Right of the Child to be Heard* (Routledge 2013) 51-52, Parkes argues that from an Article 12 UNCRC perspective, Article 42A is inadequate. Dáil Éireann Debate, Volume 776 Number 2, Thirty-First Amendment of the Constitution (Children) Bill 2012: Committee and Remaining Stages (Continued), 27 September 2012, 44, Deputy Ó'Caoláin observed the failure to directly incorporate the UNCRC into Article 42A.

[115] Fortin, *Children's Rights and the Developing Law* (n 106) 4; see generally Rebecca de Schweinitz, 'The 'Shame of America': Africa-American Civil Rights and the Politics of Childhood' in Jim Goddard, Sally McNamee, Adrian James and Allison James (eds), *The Politics of Childhood* (Palgrave Macmillan 2005) chapter 4.

2.4. Socio-legal background to special care: 1990s to date

Recognition of children's rights alongside an understanding of the sociology of childhood and the development of social care services resulted in protectionism, paternalism, and simply 'doing right by children', becoming cornerstones in later developments. Consequently, (arguably) with the assistance and interventionist approach of the High Court, models of high support and special care emerged for the purposes of addressing the needs of vulnerable children.[116]

Although it was the mid-1990s before special care cases were brought before the court, the state was aware towards the end of the 1980s, that the number of children presenting with either psychotic episodes or conduct disorders were increasing in number with little by way of supports.[117] A working group, sanctioned by the Minister for Health in 1988 into adolescent psychiatric services identified concerns regarding children with 'psychotic depressive illnesses' and the inappropriateness of placing children in adult facilities.[118] The increasing number of children presenting with and being referred to residential assessment centres with 'intractable conduct disorders' was also noted.[119] It was recommended that the Departments of Health and Education and the Eastern Health Board (EHB) ought to consider providing 'additional residential facilities' with appropriate supports.[120] At that time, children under the age of 16 years came within adolescent psychiatric services and it was emphasised that it was a matter of clinical judgment before a child was transferred to the adult services.[121]

By that stage, residential services were not able to cope with the specific needs of this age group and the 'recognition, development and escalation of problems such as substance misuse, increased violence, educational exclusion and changes in family structure' required 'new interventions'.[122] Further, the consequential behavioural challenges (such as violence, self-harm) and symptoms (such as depression and anxiety) became more

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[116] CAAB, *Thematic Analysis of Irish Literature on Children in Detention and Out of Home Care in Ireland* (2010) para 2.3.3. The difference between secure care and high support is the level of security provided; see also SRSB *'Definition and Usage of High Support in Ireland, Report to the Special Residential Services Board* (April 2003) 4.
[117] Department of Health, *Report of a Working Group on Child and Adolescent Psychiatric Services in the Eastern Health Board Area*, December 1989 http://hdl.handle.net/10147/575048 accessed 28 June 2019; SRSB, *Definition and Usage of High Support in Ireland* (n 116) 4.
[118] Department of Health Report (n 117) 23.
[119] ibid 24; E Healy, M Fitzgerald, Henry Marsch, 'A 16-year Follow-up of a Child Inpatient Population' (2000) 9 *European Child and Adolescent Psychiatry* 46-53, provides some data on Warrenstown House Residential Centre.
[120] Department of Health Report (n 117) 24.
[121] ibid 22.
[122] SRSB, *The Impact of Placement in Special Care Unit Settings on the Wellbeing of Young People and Their Families, A Summary Report* (2004) 15. The Centre for Social and Educational Research were commissioned by the SRSB to carry out this research.

obvious and this coincided with a greater awareness of children's rights.[123] These children were not getting appropriate care and some ended up in the criminal justice system.[124]

The result was the beginning of the raft of judicial review cases during the mid-1990s based on the failure of the state regarding decisions either made or not made, as they relate to the provision of services and thus the protection and vindication of the rights of vulnerable children.[125] Such failure amounted to neglect in the vindication of certain constitutional rights, namely 'accommodation, care and education'.[126] The judiciary, in the exercise of its function, is bound by constitutional imperatives and as it had been determined under Article 42.5 of the Constitution that there was an obligation on the state to provide for their needs,[127] it fell upon the judiciary, as agents of the state, to 'remedy this neglect',[128] thus vindicating the rights of such children. What this required was a proactive judge who was prepared to devise and implement an approach to achieve that purpose. Without an alternative, the High Court engaged in 'creative judicial action'[129] and developed a managerial-style approach to the issue; it invoked its inherent jurisdiction to civilly detain these children for the purposes of receiving appropriate supports and to vindicate their rights as they were suffering serious and urgent issues affecting their welfare. Maguire states that without a legislative basis, the court 'determined matters usually left to the executive'.[130] Consequently, a variety of orders were made under the court's inherent jurisdiction, which were and are still subject to regular court review through the adoption of what is now known as the weekly 'Minors' List'.

The state's initial argument that there was 'no constitutional obligation' for it to provide anything further than it already provided was rejected by the High Court.[131] Subsequently, the Department of Health and Children engaged a consultant for advice in this area. The tenet of two reports identified the following: [132]

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[123] ibid 16.
[124] ibid.
[125] *Health Service Executive v DK* [2007] IEHC 488 para 17, MacMenamin J stated: 'the court has a jurisdiction in proceedings brought by way of judicial review for the placement of young persons at risk in Ballydowd.' See also Raymond Arthur, 'Children and the Law, Duty of Care to Children in Care' (2001) (19) *Irish Law Times* 38-45, judicial review is one remedy for children failed by the health boards.
[126] Caitriona Maguire, 'Family and Personal Relations Law, The Living Constitution: Managing the Unruly Child' (1996) 14 *Irish Law Times* 63, 63.
[127] *FN v Minister for Education* (n 3).
[128] Maguire (n 126) 63.
[129] ibid.
[130] ibid.
[131] *FN v Minister for Education* (n 3) 415.
[132] SRSB*, Definition and Usage of High Support in Ireland* (n 116) 4; the reports were '*A Report on the Requirement and Necessity for Special Care and High Support Residential Child Care Provision in Ireland'* (1998), '*The Principles and Policies Underpinning the Development of Special Care and High Support Provisions in Ireland*' (2000). The former was referred to in *Health Service Executive v WR* [2007] IEHC 459 paras 49-50, 58.

- that the provision of such specialist services must be in response to the needs of that person
- the civil restriction of a child's liberty must be for as short a time as possible and only as a measure of 'last resort'
- there must be an integrated approach to the provision of services to ensure flexibility to enable adoption to changing circumstances.[133]

These proposals have assisted in the development of SCUs in this jurisdiction.[134] The reports further stressed that such interventions ought to be 'focussed', 'short-term and links with the family and other significant adults maintained'.[135] These propositions are for the most part evident in case law[136] and statute.[137]

In addition, improvements were made over time regarding the provision of services in the area of mental health notwithstanding the continued existence of certain deficiencies (such as services not operating at recommended levels).[138] Although the Children Act, 2001 made provision for special care, those provisions remained inoperable because of the Minister's failure to approve any SCUs and so the court continued to exercise its inherent jurisdiction to detain children to protect and vindicate their rights.[139] The Special Residential Services Board (SRSB) was established under the Children Act, 2001 to oversee the operation of all detention facilities and to develop a co-ordinated approach to care, education and therapeutic supports.[140] During the 2000s other external changes took place;[141] for example, there was more of a focus on children, their rights, and transforming the focus on children's rights into deliverables; the Office of the Ombudsman for Children was established in 2004;[142] the regional health boards were replaced by the Health Service Executive (HSE) in January 2005 and special care and high support came under their

[133]SRSB, *Definition and Usage of High Support in Ireland* (n 116) 4 referencing the Laxton Reports; see also SRSB, *Review of Admission Criteria and Processes for Special Care* (September 2005) para 11.
[134] SRSB, *Review of Admission Criteria* (n 133) para 12.
[135] SRSB, *Definition and Usage of High Support in Ireland* (n 116) 5 referencing the Laxton Reports; Manfeld Nowak, 'The United Nations Global Study on Children Deprived of their Liberty' (2019) 669.
[136] eg *HSE v SS* (n 4).
[137] CCA 1991 Pt IVA s 23.
[138] National Service Plan, Health Service Executive, *A Vision for Change, Report of the Expert Group on Mental Health Policy* (2006) 84-90.
[139] (n 18); Conor Power and Geoffrey Shannon, 'Practice and Procedure' (2004) 7 (4) *Irish Journal of Family Law* 21-23.
[140] SRSB, *The Impact of Placement in Special Care* (n 122); SRSB, *Definition and Usage of High Support in Ireland* (n 116) 2003); see also SRSB, *Review of Admission Criteria* (n 133); *HSE Review of Adequacy of Services for Children and Families* (2009); CAAB, Thematic Analysis of Irish Literature (n 116).
[141] eg European Convention on Human Rights Act 2003 provides that all laws must be interpreted in a Convention compliant manner; Treaty of the European Union (Lisbon Treaty) on 1 December 2009 elevated the status of the EU Charter on Fundamental Rights whereby Article 6 of the Treaty obliges Member States to protect rights when implementing EU law; see generally Handbook on European Law Relating to the Rights of the Child (2015) *European Union Agency for Fundamental Rights and Council of Europe* 20-30; principles such as best interest and child participation have been subsumed into the Charter having taken its lead from the UNCRC which the EU cannot incorporate as only states can accede to it.
[142] Ombudsman for Children Act 2002.

remit.[143] The SRSB was reconstituted as the Children's Act Advisory Board (CAAB) in July 2007[144] (although this was ultimately dissolved on the 8th September 2011 under the Child Care (Amendment) Act 2011);[145] the Department of Children and Youth Affairs (DCYA) was established in June 2011.[146] Further, there were numerous attempts made to promote the rights of children by constitutional amendment and this was finally achieved when the referendum was passed on the 10th November 2012.[147]

Just prior to the passing of the referendum, in September 2012, new protocols were put in place regarding the availability of mental health services for 16 and 17 year olds and by January 2014, all those under the age of 18 years who required mental health treatment and assessment would be under the remit of the Child and Adolescent Mental Health Services (CAHMS) which provides, inter alia, on-site services to those civilly detained and support for those re-entering the community.[148] Further, September 2012 saw the beginning of the operation of a new form of multi-disciplinary service ('clinical psychology, social work, speech and language therapy, counselling and social care') for children in special care, namely Assessment, Consultation and Therapy Services, known as ACTS.[149] Eventually, special care was placed again on a statutory footing by substituting a new Part IVA into the Child Care Act, 1991 on 31st December 2017[150] following the establishment of the statutory body, the CFA in 2013.[151] The CFA which currently has responsibility for the wellbeing of all children under the age of 18 years must have regard to the views and best interests of the child.[152]

However, having made efforts to streamline the services for children, it is notable that ACTS is under the remit of the CFA whereas CAHMS remains under the remit of the

[143] Health Act 2004; previously each SCU had its own admission/discharge committee; upon reorganisation, there would be one National Special Care Admission and Discharge Committee. Infrastructural changes were made in anticipation of the commencement of the original Part IVA, Social Information Systems Ltd, *Review of Special Care Applications* (July 2008) a report commissioned by CAAB 3-4.
[144] CAAB was established under the Child Care (Amendment) Act 2007, www.caab.ie.
[145] Child Care (Amendment) Act 2011 Pt 6.
[146] Since 2020, this is now called the Department of Children, Equality, Disability, Integration and Youth.
[147] (n 101); following the challenge in *Jordan v Minister for Children and Youth Affairs* [2015] IESC 33 it was brought into effect on 28 April 2015.
[148] HSE, *Fourth Annual Child and Adolescent Mental Health Service Report, 2011-2012, A Vision for Change, Advancing Mental Health* http://hdl.handle.net/10147/254906 accessed 28 June 2019, 5, 9. From 2006 a practice developed whereby CAHMS retained cases within the community setting for those over the age of sixteen years but without additional resources; in September 2012, the HSE approved a protocol to enable sixteen and seventeen years olds access such mental health services effective from 1 January 2013 in areas where it was limited to those to age sixteen. It was also noted that mental health disorders 'increase in frequency and severity' in children over the age of fifteen years and that CAHMS required extra resources to provide services to those up to the age of eighteen years; see also HSE, Vision for Change (n 138) 90 recommended that child and adult services should be available to up age eighteen years.
[149] HSE, *Review of Adequacy of Services for Children and Families* (2012) para 6.2.3; ACTS was established based on recommendations from the Ryan Report.
[150] (n 18).
[151] Child and Family Agency Act 2013.
[152] ibid s 9.

HSE, thereby adding a layer of complexity. For a child in need of special care who requires the services of both ACTS and CAHMS, clear procedures regarding the provision of services are required to ensure that no child falls through the gap.[153] The CFA and the HSE have a joint protocol for interagency collaboration.[154] Notably, this Protocol also states that:

> 'it is recognised that children with complex needs, particularly those with mental health issues and/or moderate, severe or profound disabilities, require additional specialist services and expertise which are not available in the Child and Family Agency.'[155]

The clear acknowledgment that a new statutory body, which was established for the sole purpose of addressing the needs of children, is deficient in terms of meeting the needs of all children is of concern, particularly for special care cases, where most children have 'complex needs'.

2.5. Conclusion

This chapter's overarching analysis forms an essential component for the purposes of contextualising the research question. In consideration of the law and children, it identifies that originally and for over 20 years, the failure of parliamentarians to address the legislative (and resource) deficiency in this area of law, resulted in the legal regulation (including the social order component) of children landing in the hands of one High Court judge at a time.[156] Thus how the court protected and vindicated the rights of children during that time is arguably somewhat shaped by the socio-legal changes and other developments that took place.

Even at that, most recently, legal challenges have questioned the interpretation of these statutory provisions by the state as it relates to the provision of services for such children together with policies enacted and its effect on children's rights.[157] It is within this complex development and imperfect system that this thesis analyses the extent to which the court protects and vindicates the rights of these children.

The civil detention of children for welfare purposes is a draconian measure, even if it is necessary. For this reason, the jurisdiction of the court to civilly detain children must be

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[153] text to n 565-566 in chapter 5.
[154] CFA and HSE, *Joint Protocol for Interagency Collaboration between the Health Service Executive and Tusla-Child and Family Agency to Promote the Best Interests of Children and Families* (March 2017).
[155] ibid 15.
[156] Duggan (n 44) 11-15.
[157] eg *AF v Child and Family Agency* [2019] IEHC 435 (which also refers to a decision of Faherty J dated 28 January 2019 para 4); *CK v Child and Family Agency* [2019] IEHC 635.

analysed as it is a significant power. This assists in the determination of its parameters and limitations which goes to the core of its ability to protect and vindicate rights. Thus, chapter 3 examines the authority and the power of the court under both its inherent and statutory jurisdiction.

Chapter 3 The Jurisdiction of the High Court

3.1. Introduction

Although courts settle disputes in different ways,[158] it cannot determine any matter without jurisdiction. Children requiring special care were detained initially under the High Court's inherent jurisdiction from the mid-1990s until the 31st December 2017 when statute altered the court's jurisdictional basis.[159] Despite this jurisdictional change, section 3.7 below outlines why the inherent jurisdiction remains relevant; this chapter therefore examines both jurisdictional bases.

3.2. The Inherent Jurisdiction and Special Care in Ireland

The inherent jurisdiction, which has a constitutional basis in Ireland, is generally understood to encapsulate a wide range of powers exercisable by High Court judges which can be engaged to address certain matters that are not otherwise provided for in law.[160] The flexible nature of the jurisdiction means that extracting a consistent definition or a defined set of principles is difficult.[161] One of the defined categories deemed part of the inherent jurisdiction is that of *parens patriae.*

The rationale underpinning the exercise of the inherent jurisdiction was articulated by Kelly J. in *TD & Ors. v Minister for Education & Ors.*,[162] when he stated that the court had to fill the 'vacuum' created by the 'failure of the legislature and executive'.[163] The applicants were relying on their constitutional rights for a remedy. The important question as to whether the court can, under its inherent jurisdiction detain someone (who lacks capacity), has not actually been determined by an appellate court.[164] There are two potential reasons for this: first, the inherent jurisdiction permits civil detention and there was no requirement for the court to adjudicate upon this principle, or second, as there was no other alternative to secure civil detention for children in dire need, the matter was

[158] Cotterrell (n 30) 226-227, eg encouraging mediation or addressing some points and encouraging the parties to do the rest.
[159] (n 18).
[160] Joan Donnelly, 'Inherent Jurisdiction and Inherent Powers of Irish Courts' (2009) 2 *Judicial Studies Institute Journal* 122, 122; Constitution of Ireland, Article 34.3.1 provides that the High Court is 'invested with full and original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal.'
[161] ibid; I H Jacob, 'The Court's Inherent Jurisdiction' (1970) 23 (1) *Common Legal Problems* 23-52; Marcelo Rodiguez Ferrere, (2013) 13 (1) 'The Inherent Jurisdiction and its Limits' *Otago Law Review* 107-143.
[162] *TD (a minor suing by his mother and next friend MD) and others v Minister for Education, Ireland, the Attorney General, Eastern Health Board, and by order, the Minister for Health and Children* [1998] IEHC 173, [2000] IEHC 21, [2000] 3 IR 62.
[163] ibid 66.
[164] *Health Service Executive v KW* [2015] IEHC 741 para 10.

simply not raised but was accepted as an appropriate mechanism by all parties to the proceedings in advance of the court hearings. The court can only adjudicate on an issue if it is brought before it to do so. In *DG v Eastern Health Board*,[165] it was accepted, simply because it was neither raised nor argued, that the High Court had an inherent jurisdiction to civilly detain children in secure or special care accommodation which by then had become an 'established practice'.[166]

For the purposes of this research therefore, there are two relevant aspects of the inherent jurisdiction; one is the power of the court in the exercise of its *parens patriae* authority over children and the other is the general inherent jurisdiction of the court under the Constitution of Ireland.

3.3. Parens Patriae

3.3.1. The Origins of *Parens Patriae*

Parens patriae, which is a royal prerogative and a discretionary power of the crown,[167] (formerly exercised by the Lord Chancellor), refers in law, to the protection of children and others whereby the state can then make welfare decisions.[168] Seymour and Custer, having carried out extensive research, identify the difficulty in ascertaining the true origins of the *parens patriae* jurisdiction.[169] They suggest it may stem from either a typographical error or simply a decision made in the absence of any authority.[170] Regardless, later courts built upon and later expanded the scope of this jurisdiction.[171]

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[165] *DG v EHB* (n 114).
[166] ibid 537-539.
[167] See generally William Blackstone, *Commentaries on the Laws of England* (16th edn, London 1825) 239; WS Holdsworth, *A History of English Law* (3rd edn, Methuen & Co 1923) 459; Noel Cox, 'The Royal Prerogatives in the Realms' (2007) 33 (4) *Commonwealth Law Bulletin* 611, 619.
[168] Donnelly (n 160) 133; see also Leslie Gerald Eyre Harris, *Law and Practice in Lunacy in Ireland 1930 A Treatise on the Law and Practice in Lunacy in Ireland* (Corrigan and Wilson 1930) 1-2; George Whitley Abraham, *The Law and Practice of Lunacy in Ireland* (Printed at University Press by E. Ponsonby and Weldrick 1886) 10-11. See also Kevin Costello, 'The Expulsion of Prerogative Doctrine From Irish law: Quantifying and Remedying the Loss of the Royal Prerogative' (1997) 32 (1) *The Irish Jurist* 145; *In Re Birch (A Lunatic)* (1892) LR1 274; *In the Matter of Mrs. Martha Godfrey, An Inmate of the Retreat Asylum, Armagh* (1892) LR1 278.
[169] John Seymour, 'Parens Patriae and Wardship Powers: Their Nature and Origins' (1994) 14 *Oxford Journal of Legal Studies* 159; Lawrence Custer, 'The Origins of The Doctrine of Parens Patriae' (1978) 27 *Emory Law Journal* 195.
[170] Custer (n 169); *Beverley's Case*, 4 Coke's Reports, 126b (London, 1610), (London, 1658) (English), (London, 1826) was decided circa 1603 but contained an error ('enfant' instead of 'ideot') which was not rectified until 1826; *Falkland v Bertie* (1696) 23 ER 814 the court held that certain matters fell under its care such as, 'infants, ideots, lunaticks etc' but its authority for this proposition is not clear.
[171] *Parens patriae* jurisdiction was confirmed in *Shaftsbury v Shaftsbury* (1725) Gilb Rep 172, 173; 25 ER 121 and in *Butler v Freeman* (1756) Amb 301; 27 ER 204; *De Manneville v De Manneville* (1804) 10 Ves Jun 52, the court declared "[i]n whatever principle that right is founded, it is unquestionably established." *R v Gyngall* [1893] 2 QB 232, 239, *parens patriae* was described as a 'paternal jurisdiction'; In *Re R (a minor) (wardship: medical treatment)* [1991] 4 All ER 177, 186 the court said the jurisdiction was wider than a parental jurisdiction.

3.3.2. *Parens Patriae* as part of Irish law?

The status of royal prerogatives within the Irish legal system is subject to paradoxical opinions and interpretations, both academic and otherwise, including in case law.[172] In Ireland, the Lunacy Regulation (Ireland) Act, 1871 brought those of unsound mind under the wardship jurisdiction. Following numerous enactments since then, the current position is that section 9(1) of the Courts (Supplemental Provisions) Act, 1961 provides that the jurisdiction in lunacy and minor matters which were formerly exercised by the Lord Chancellor, is exercisable by the President of the High Court who can assign any judge to exercise the jurisdiction.[173] Costello, while accepting the expulsion of the *parens patriae* doctrine, suggests that the expulsion potentially prejudices the legal basis of wardship.[174]

If it is the case that the *parens patriae* jurisdiction exists regarding wardship matters, then it arguably exists for children. Gwynn-Morgan suggests courts have two options regarding the controversy surrounding prerogatives, namely, either to discard what might be a potentially 'socially-useful right' or to develop an ad-hoc basis upon which a previous prerogative can be restored.[175] Seymour considers that when the court is faced with a set of circumstances where intervention is required to address the welfare needs of a child, it has never defined or delineated the jurisdiction.[176] Consequently, it remains an unresolved issue.

3.3.3. A reconstitution of the *parens patriae* jurisdiction?

The civil detention of children is more than just the exercise of a parental jurisdiction as parents cannot lock up their children; it is a protective paternalistic (or *parens patriae)* jurisdiction that is welfare-based and similar to the previous exercise of the court's inherent jurisdiction in special care cases.[177] So what jurisdiction was being exercised by

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[172] Thomas Towey, 'Hugh Kennedy and the Constitutional Development of The Irish Free State' 1922-1923 (1977) 12 (2) *The Irish Jurist* 355; JM Kelly, 'Hidden Treasure and the Constitution' (1988) 10 *Dublin University Law Journal* 5; David Gwynn-Morgan, 'Constitutional Interpretation Three Cautionary Tales' (1988) 10 *Dublin University Law Journal* 24; Niall Lenihan, 'Royal Prerogatives and the Constitution' (1989) 24 (1) *The Irish Jurist* 1; Costello (n 168) 145; Gerard Hogan, *The Origins of the Irish Constitution 1928-1942* (Royal Irish Academy 2012); GW Hogan, GF Whyte, D Kenny, R Walsh, *Kelly: The Irish Constitution* (5 edn, Tottel Publishing 2018) para 8.2.02-8.2.81; *Byrne v Ireland* [1972] IR 241 (SC); *Webb v Ireland* [1988] IR 353 (SC); *Geoghegan v Chartered Accountants* [1995] 3 IR 86 (SC); see also *Re Irish Mutual Insurance Association Ltd* [1955] IR 176 (SC)*; Cork County Council and Burke v Commissioners of Public Works* [1945] IR 561 (SC), these two early cases ruled that only the regal dimension of the prerogative did not pass in 1922.

[173] Anne Marie O' Neill, *Wards of Courts* (First Law 2004) 4; Tomkin and McAuley, 'Re A Ward of Court: Legal Analysis' 1995 1 (2) *Medico-Legal Journal of Ireland* 45.

[174] Costello (n 168) 6-7.

[175] Gwynn Morgan (n 172) 35.

[176] Seymour, Parens Patriae and Wardship Powers (n 169) 188.

[177] The language of *parens patriae* is not generally used in special care cases, save for one reference during oral legal argument during the observational period where a judge questioned counsel if '*parens patriae* should be disregarded' to which the response was no, that he would 'not go that far…'.

the court for over twenty years? Was it that extensive that it permits detention? And why does it matter?

Re R[178] saw an expansion of the original parental jurisdiction to a more protective jurisdiction with Seymour noting that the parental jurisdiction is subsumed into the protective jurisdiction, both of which emanate from the Crown's *parens patriae* jurisdiction.[179] Donnelly argues that the jurisdiction conferred on the court under Articles 40.3 and '40.2.5' is 'wider than the *parens patriae* jurisdiction' and is not limited to wardship matters.[180] The same analogy can apply with Articles 34.3.1, 40.3 and 42A.

The court needed to find a power to detain in the absence of statutory provisions and it is argued that the *parens patriae* prerogative was implicitly restored on an ad-hoc basis once again using various constitutional provisions. The court, in the exercise of what must be considered its protective jurisdiction, ordered the civil detention of children while engaging Article 42.5 and 40.3 to protect and vindicate rights.[181] Note also, that justification for detention was also found 'in the nature of the State as defined in the preamble and the text of the Constitution and ……..considerations of the common good'.[182] The purpose of common good considerations was for the prioritisation of rights when protecting life.[183] This ad-hoc development of a set of principles based on a jurisdiction to protect and vindicate rights avoids addressing the dubious origins of the *parens patriae* jurisdiction and its validity in Irish law; this is so even though its component elements are akin to that of the expanded *parens patriae* jurisdiction. Even if it was necessary to protect rights, civil detention for welfare purposes, is another level upwards in terms of protection and ought to have a clearer basis.

As to whether this basis was adequate to detain a child is a serious question that has never been argued before the court. Further, this aggregation of power by a High Court judge to themselves, in terms of civilly detaining a child under its inherent jurisdiction, means that the judge held the power over that child; this is an arbitrary power as it was not then

[178] *Re R (a minor) (wardship: medical treatment)* (n 171).
[179] Seymour, Parens Patriae and Wardship Powers (n 169) 162.
[180] Donnelly (n 160) 136.
[181] There is a difference between a protective *parens patriae* jurisdiction and a vulnerability jurisdiction in England and Wales; in this regard see Margaret Hall, 'The Vulnerability Jurisdiction: Equity, Parens Patriae, and the Inherent Jurisdiction of the Court' (2016) (2) 1 *Canadian Journal of Comparative and Contemporary Law* 185-225 explains and critiques how the inherent jurisdiction is the legal basis of a new 'vulnerability jurisdiction' which developed in England to plug the gap left by the revocation of the *parens patriae* jurisdiction post the Mental Capacity Act 2005; it is necessity based, developed for incapable adults to safeguard autonomy rights and is not protectionist in the *parens patriae* sense (it is separate from and does not replace the *parens patriae* jurisdiction). Sir James Mumby, 'Protecting the Rights of Vulnerable Adults and Incapacitous Adults-the Role of the Courts: an Example of Judicial Law Making' (2014) 26 *Child and Family Law Quarterly* 64, 77.
[182] *HSE v SS* (n 4) 72.
[183] ibid.

delineated by statute. This arguably raises questions over challenging the legality of detention under Article 40.4.1 which provides that 'no citizen shall be deprived of his personal liberty save in accordance with law'. The exact basis of the law which permitted the civil detention of children under the court's inherent jurisdiction to protect and vindicate rights is not entirely clear, meaning that any challenge to the basis of detention that may have been raised during that time may have been potentially problematic.[184]

This extraordinary power to detain a child which was in existence for over twenty years demonstrates the enormous flexibility and powers of the inherent jurisdiction. This gives rise to an expectation that the court's powers in terms of protecting and vindicating the rights of such children must be equally expansive, even currently.

3.4. Constitution of Ireland 1937 and the Inherent Jurisdiction to Vindicate Rights

Under Article 34.3.1 the High Court is vested with full original jurisdiction which permits it to hear all types of actions and declare rights and liabilities.[185] There is no exhaustive list of the circumstances concerning how the jurisdiction can be exercised.[186] Also, the inherent jurisdiction, originally a creature of English common law, transferred to the new independent legal system under Article 50 of the Constitution with its origins in *Cocker v Tempest*.[187]

Children's constitutional rights are sourced under Article 40.3 of the Constitution and before the introduction of Article 42A, rights were also sourced under Article 42.5. As Donnelly notes, whether the High Court can invoke its inherent jurisdiction under Article 34.3.1 'to assume functions analogous to the *parens patriae* prerogative at common law' requires examining the interactions of Articles 40.3 and '40.2.5' (now Article 42A) with Article 34.3.1.[188]

Article 40.3 provides that '[T]he State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.' In *Kinsella v Governor of Mountjoy Prison*,[189] Hogan J. emphasised that Article 40.3 protects 'not simply the integrity of the human body, but also the integrity of the human

[184] *Child and Family Agency v SMcG and JC* [2017] IESC 9 considered that only in exceptional circumstances that Article 40 may be appropriate in childcare proceedings (these tend to be custody as opposed to detention related); for further analysis of this case see Natalie McDonnell, 'No Single Bright Line' (2017) 22 (2) *Bar Review* 52-55; see generally Estelle Feldman (2017) 1 (1) 'Constitutional Law' *Annual Review of Irish Law* 95-194.
[185] Donnelly (n 160) 127.
[186] Hogan et al, *The Irish Constitution* (n 172) paras 6.2.03-6.2.08.
[187] Donnelly (n 160) 123-129; *Cocker v Tempest* [1841] 151 ER 864, 7 *Meeson and Welsby* 502.
[188] Donnelly (n 160) 135.
[189] *Kinsella v Governor of Mountjoy Prison* [2011] IEHC 284.

mind and personality'.[190] The original Article 42.5 provided for the intervention of the state to assume the parental role where parents failed in their duty while having regard to the rights of the child. In the context of *H(G) v Health Service Executive & ors*,[191] Hogan J. opined that the constitutional obligation to protect the person necessitates a holistic approach regarding the protection of the child's welfare/best interests which is underscored by Article 42.5.[192] In *Children's University Hospital v D(C) & F(E)*[193] the court held that it was an objective test as to whether parents had failed in their duty.[194] Regarding children in special care, MacMenamin J. in *HSE* v *SS*[195] opined, inter alia, that the source of the inherent jurisdiction emanated from the nature of the court being established under the Constitution.[196] Detention was considered justifiable by reference to, inter alia, Article 40.3,[197] and in prior special care cases the jurisdiction was invoked under Article 42.5.[198] On the basis of this argument, Article 42A.1 could be invoked together with Article 34.3.1 to protect and vindicate the rights of children.[199]

A simple acceptance that the inherent jurisdiction can be invoked over children under certain Articles of the Constitution of Ireland, 1937, does not provide any context regarding its basis. While Article 42.5 permitted the state to assume a parental role, detaining a child is not a parental power, it is a wider, more protectionist power. It is argued therefore, that by making civil detention orders, the court must have been exercising a protective, paternalistic *parens patriae* jurisdiction to vindicate rights; it must also be the case that the jurisdiction persists even though the actual detention order is now governed by statute. Consequently, it could be stated that the practice of the court is underpinned by these long-standing paternalistic tendencies and that the reconstituted *parens patriae* jurisdiction of the court is sufficiently flexible to adequately protect and vindicate rights, particularly if the statutory provisions are lacking in any respect.

[190] ibid para 9.
[191] *H(G) v Health Service Executive & ors* [2011] IEHC 297 para 15.
[192] ibid para 20.
[193] *Children's University Hospital v D(C) & F(E)* [2011] IEHC 1, [2011] 1 IR 665.
[194] ibid para 37; *In the Matter of JJ* [2021] IESC 1 paras 151-164.
[195] *HSE v SS* (n 4).
[196] ibid para 66.
[197] ibid para 72.
[198] ibid para 73.
[199] Article 42A.1 provides: '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.'

3.5. The Child Care Act 1991, Part IVA

The High Court had long formed the view that the use of the inherent jurisdiction to civilly detain children was not the preferred approach, suggesting that it was a matter for the Executive and ought to be addressed.[200]

On the 31st December 2017 the jurisdictional basis of the High Court to civilly detain children in special care altered from the inherent jurisdiction to a statutory basis.[201] Although this was long awaited by the court and legal practitioners, this momentous jurisdictional change slipped in virtually unnoticed.[202] The objectives of Part IVA are clearly set out in Dáil Debates, which are to permit the state 'apply to the High Court for special care orders to detain children in need of special care services'.[203] The prescriptive processes and procedures as set out under section 23 of the 1991 Act impose a positive duty on the state, i.e., it must apply to the court, for a special care order (SCO) when the criteria is met. Unlike the jurisdiction of England and Wales, the state has no authority to civilly detain a child without a High Court SCO.[204]

Once the state applies for an interim/full SCO (or any type of related application) the jurisdiction of the High Court is invoked.[205] The court must first be satisfied that the child is over 11 years of age, that the child's behaviour poses a risk to his/her life, health, safety, development or welfare, and having regard to the behaviour and the attaching risks, no other form of care is appropriate.[206] The High Court may then make a SCO.[207] The High Court has been afforded further discretion in that it may give directions or make certain provisions as it deems necessary to support the child's best interests.[208] As such,

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[200] *HSE v SS* (n 4) para 76.
[201] (n 18).
[202] Oral submission to the High Court highlighted that it was a bad start to the commencement of the statutory provisions as (1) no-one noticed the provisions had commenced (2) there was an error in the RSC (Order 65A); The error was in relation to r 13 which referenced section 29 (5) of the Child Care Act 1991 as though it applied to Part IVA of the same Act, which it did not. R 13 was subsequently deleted from Order 65A by SI 2019/422: RSC (Special Care of Children) 2019 (2nd September 2019).
[203] Dáil Éireann Debate, Tuesday, Child Care (Amendment) Bill 2009 [Seanad]: Second Stage, 5 October 2010, Minister of State at the Department of Health and Children (Deputy Barry Andrews); https://www.oireachtas.ie/en/debates/debate/dail/2010-10-05/20 accessed 4 December 2019.
[204] UK CA 1989 s 25; a local authority can detain a child for up to 72 hours in a 28-day period; in the UK, such orders can only be made for children over the age of 16 years if there is a care order in place or if the child is already being accommodated by the local authority for welfare purposes; Lindsay (n 2).
[205] CCA 1991 s 23H (SCO), s 23L (ISCO), s 23M (*ex-parte* ISCO), s 23N (extension of ISCO).
[206] CCA 1991 s 23H (1) (a)-(h). UK CA 1989 s 25, the court 'authorises' as opposed to 'requires' the local authority to keep the child in secure accommodation which has been interpreted as the 'person in charge of the accommodation may restrict the child's liberty to the extent that the person considers appropriate….'; *Re T (A Child)* [2018] EWCA Civ 2136 paras 72-73.
[207] CCA 1991 s 23H (1). In England children aged 10 years old can be placed in secure care, however, if under the age of 13 years, approval must be sought from the Secretary of State for Education under The Children (Secure Accommodation) Regulations 1991 Regulation 4; UK CA 1989 s 25(4) provides if the criteria are all satisfied, it is incumbent upon the court to make the order (not discretionary) but the court has discretion over the length of the order.
[208] CCA 1991 s 23H (2); s 23H (3), the court is given specific authorisation to make directions regarding the delivery of the child to the state and directing AGS to search for and deliver a child to the state.

the court has jurisdiction to review,[209] extend,[210] vary,[211] discharge orders[212] and make directions.[213] The High Court can also raise issues of its own motion.[214] Finally, the court retains jurisdiction over the child until he/she is discharged from special care. The prescriptive nature of the court's statutory jurisdiction is in direct contrast to the court's flexible inherent jurisdiction.

3.6. Inherent Jurisdiction versus the Statutory Jurisdiction

a. Children's rights

It is clear from the initial cases in the mid-1990s that children were detained under the inherent jurisdiction for the sole purpose of protecting and vindicating their rights, such as social welfare rights and their right to life.[215] Although discussions arose as to whether such rights were of a nature that the court could or ought to protect,[216] the jurisprudence of the High Court indicates that the state accepted it had such duties (to vindicate those rights) and proceeded to fulfil those duties as best as possible.[217]

The language of rights is absent from Part IVA of the Child Care Act, 1991 ("Part IVA"). The statute is procedural and streamlined whereby sequential steps must be followed while being framed from the perspective of the imposition of duties on the state.[218] The main objective of the legislation is to place civil detention on a statutory footing and to clarify the procedural requirements for the purposes of the child's welfare and protection.[219] Dáil debates during the Child Care (Amendment) Bill, 2009 refer to the delay in finalising the wording of Article 42A and express regret that the constitutional amendment was not in place for the purposes of debating the Bill,[220] thus indicating that

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[209] CCA 1991 s 23I.
[210] CCA 1991 s 23J.
[211] CCA 1991 s 23NE, s 23 NF.
[212] CCA 1991 s 23 NE.
[213] eg CCA 1991 ss 23G, 23H, 23I, 23J, 23L, 23M, 23N, 23NA, 23NB, 23NC, 23NF, 23NG, 23NJ, 23NK.
[214] eg CCA 1991 ss 23NE, 23 NK.
[215] *FN v Minister for Education* (n 3).
[216] ibid*; DG v EHB* (n 114); see also Ward P, *The Child Care Acts, Annotated and Consolidated* (3rd edn, Round Hall 2014) 81.
[217] text to n 131 in chapter 2; text to n 514-518 in chapter 5.
[218] eg CCA 1991 s 23 imposes a positive obligation on the state regarding the administration of SCUs; s 23D, the state is obligated to inform the court of criminal charges; s 23F, the state is obligated to make a determination (and hold consultations and family welfare conferences) and apply for a SCO if it satisfied that the child needs special care; s 23ND sets out the functions of the state when providing care; s 23D(3) is the only section that refers to the rights of the child and this is within the criminal context.
[219] Dáil Éireann Debate, Child Care (Amendment) Bill 2009 [Seanad]: Second Stage, 5 October 2010, Minister of State at the Department of Health and Children (Deputy Barry Andrews); https://www.oireachtas.ie/en/debates/debate/dail/2010-10-05/20 accessed 4 December 2019; Seanad Éireann Debate, Child Care (Amendment) Bill 2009 [Seanad Bill amended by the Dáil]: Report Stage, 20 July 2011, Senator Jillian van Turnhout was satisfied regarding the procedural clarity; https://www.oireachtas.ie/en/debates/debate/seanad/2011-0720/11 accessed 4 December 2019; Dáil Éireann Debate, Children in Care [Parliamentary] Question 559, 27 March 2018.
[220] Dáil Éireann Debate, Child Care (Amendment) Bill 2009 [Seanad]: Second Stage (Resumed), 7 October 2010, Deputy Caoimhghín Ó Caoláin; https://www.oireachtas.ie/en/debates/dail/2010-10-07/4/ accessed 4 December 2019; Dáil Éireann Debate, 5 October 2010 (n 219) Deputy Jan O'Sullivan.

children's rights would or could be strengthened if the amendment was in place. Clearly setting out statutory duties provides some level of protection, because the failure to comply with same brings the opportunity for judicial review. In effect however, the statutory provisions have somewhat reversed the position that existed under the inherent jurisdiction, in that it is a duty driven jurisdiction which indirectly protects rights, as opposed to imposing duties for the purposes of protecting rights.

b. Conduct of Proceedings

Under the inherent jurisdiction the High Court set the parameters having regard to precedent, the separation of powers and the limitations imposed by other constitutional provisions. It developed a set of principles over time on an ad hoc basis and these are examined in chapter 5. Statutory provisions enjoy a presumption of constitutionality.[221] Thus, the level of judicial activism brought about by the engagement of the inherent jurisdiction to protect rights, even if the protection of those rights is addressed paternalistically, is now streamlined by prescriptive procedural steps as set out in the legislative provisions. Although the court has various powers to make directions, for the most part, the statutory provisions entrust the court with a gate-keeper status, overseeing the statutory process, ensuring that duties are adhered to, that rights are protected, but yet the court has little say in terms of how the child is cared for or what supports he/she should have.[222] That is all in the hands of the state.

c. Criminal versus Civil Jurisdiction

Despite the flexible nature of the inherent jurisdiction, it also caused some difficulties for the High Court, such as different courts addressing other matters regarding the same children. For example, many children in special care were already under the civil jurisdiction of the District Court under childcare orders and/or under the criminal jurisdiction of the Children's Court.[223] Criminal detention is both punitive and punishment based, everything special care is not. MacMenamin J. in *HSE v SS* [224] noted and endorsed previous authorities, advocating that the criminal jurisdiction must not be

[221] Maria Cahill and Seán Ó Conaill, 'Judicial Restraint can also Undermine Constitutional Principles: An Irish Caution' (2017) 36 (2) *University of Queensland Law Journal* 259, 264; the authors in referencing 'inchoate judicial activism' and the court's interpretation of constitutional provisions, note that it is 'tempered by an instinct towards restraint which seeks to respect the position of the legislative branch of government' and one of the mechanisms is the presumption of constitutionality.

[222] Judith Masson, 'Re K (A Child) (Secure Accommodation Order: Right to Liberty) and Re C (Secure Accommodation Order: Representation): Securing Human Rights for Children and Young People in Secure Accommodation' (2002) 14 *Child and Family Law Quarterly* 77, 86-87 identify the somewhat limited role of the court in England.

[223] *HSE v SS* (n 4) paras 77-78.

[224] *HSE v SS* (n 4).

encroached upon by the civil jurisdiction.[225] Part IVA considers this jurisdictional issue in detail and provides that the civil jurisdiction proceeds until the criminal jurisdiction takes effect at which point the former accedes to the latter.[226] This is in line with the court's approach under the inherent jurisdiction.

3.7. Current relevance of the inherent jurisdiction

Although special care cases now have a statutory basis, a question arises as to whether the inherent jurisdiction can still be invoked. Special care is an exceptional form of care, and if an issue arises affecting constitutional rights which is not provided for under Part IVA, then arguably there is a role for the exercise of the inherent jurisdiction, as the court is duty bound to protect and vindicate constitutional rights.

A recent Supreme Court decision, namely, *AM v Health Service Executive*[227] is instructive on this point. Although this case concerned the Mental Health Act, 2001, an issue arose whereby the Act could not be put into practical effect.[228] Constitutional rights were at the heart of this case.[229] The Supreme Court accepted that there may be times (including where children are at risk) when there will be recourse to the inherent jurisdiction even though statutory provisions are in place. The reasons will be limited; for example constitutional rights must be at issue and where the statute fails to provide a remedy.[230] Although the Constitution takes precedence over legislative provisions, invoking the inherent jurisdiction cannot supplant those provisions and deference to other arms of government remains.[231] In the *CFA v MO'L and MM,*[232] the High Court considered whether it still had jurisdiction to review a case following the discharge/lapse of a SCO (which was routinely done under the inherent jurisdiction) as Part IVA was silent on this point. The court decided it retained such a jurisdiction and that it was doing no more than what is routinely done by courts when 'proceedings are spent'.[233] In any event, it is arguable that any legislative provision could, in reality, restrict the exercise of a constitutional mandate such as the inherent jurisdiction.

Therefore, even though the civil detention of a child is no longer reliant on the exercise of the inherent jurisdiction, there remains a role for the inherent jurisdiction alongside the

[225] ibid para 80.
[226] CCA 1991 ss 23D-23E.
[227] *AM v Health Service Executive* [2019] IESC 3.
[228] ibid para 2, 93 (the state could not locate a centre to carry out an assessment).
[229] ibid para 28.
[230] ibid para 104.
[231] Donnelly (n 160) 132-133.
[232] *CFA v MO'L* (n 20).
[233] ibid paras 131-134.

statutory provisions in special care cases, even though the circumstances identified so far are limited. On the basis that it can still be engaged, it would be preferable to have clarity as to the nature of the inherent jurisdiction that can be invoked, which may then lend itself to understanding its boundaries and the extent to which rights will be protected and vindicated, since previous reliance on its exercise had far-reaching consequences for children.

3.8. Conclusion

This chapter addresses the jurisdictional bases of the High Court to civilly detain children under both its inherent and statutory jurisdiction. During the mid-1990s the court exercised its inherent jurisdiction to take control of special care cases to protect and vindicate rights; it is argued this is effectively a reconstitution of the *parens patriae* jurisdiction. The jurisdiction to detain a child is still within the remit of the court but it now has a clear statutory basis. There is still a role for the inherent jurisdiction albeit in the limited circumstances as outlined. Although rights are not a prominent feature of the statutory provisions, (save that they are the corollary of imposed duties), this does not alter the fact that the court still has a constitutional duty to protect and vindicate the rights of children in special care.

Within the context of the court's jurisdiction, how it has been exercised regarding the protection and vindication of the rights of civilly detained children will be addressed in chapters 5, 6 and 7. Before that, chapter 4 considers the theoretical perspectives on the rights of children. Arising out of those perspectives, this thesis promotes a theoretical rights-based framework within the court context for children in special care. It is against this framework that the empirical research will be analysed in chapters 6 and 7.

Chapter 4: Theoretical Reflections and Framework

4.1. Introduction

To contextualise a framework against which the protection and vindication of the rights of the child can be analysed, it is necessary to speak to the overall theory and categorisation of children's rights, consider how rights are exercised and balanced, and characterise the role of other parties to the proceedings; this is reviewed in the first part of this chapter. The second part of this chapter then promotes a theoretical framework specifically developed for children in special care which is extrapolated from these original theoretical perspectives.

PART A: The Rights of the Child in Special Care: Theoretical Perspectives

4.2. Should Children Have Rights?

While some academic debate persists as to whether children have rights,[234] this thesis advocates that children/adolescents should have rights and adopts a rights-based, instead of a welfare-based approach for children in special care due to the deprivation of liberty. This research is concerned with justiciable legal rights due to their enforceability,[235] which gives way to transparency, fair procedures and advocacy,[236] even though they may function alongside paternalistic alternatives. Moral and legal philosophers consider rights are 'valuable because they serve important individual or social purposes, purposes not served, or at least not served as well, by duties alone'.[237]

4.3. Theory of Rights

Theories of rights consider both moral *versus* legal rights and will/choice *versus* interest theories. As this thesis is concerned with justiciable legal rights, the most controversial part of the debate concerns the choice *versus* interest theory.

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[234] See generally, Laura M Purdy, 'Why Children Shouldn't Have Equal Rights' (1994) 2 *International Journal of Children's Rights* 223, 224, 227; Aoife Daly, 'The Battle(s) over Children's Rights in the Irish Constitution' (2007) 22 (4) *Irish Political Studies* 495, 496-501; Michael Freeman, 'Why It Remains Important to Take Children's Rights Seriously' (2007) 15 *International Journal of Children's Rights* 5-23; John Tobin, 'Judging the Judges; Are they Adopting the Rights Approach in Matters Involving Children?' (2009) 33 (2) *Melbourne University Law Review* 579, 583; Helen Stalford and Kathryn Hollingsworth, 'Judging Children's Rights: Tendencies, Tensions, Constraints and Opportunities' in Helen Stalford, Kathryn Hollingsworth and Stephen Gilmore (eds), *Rewriting Children's Rights Judgments, From Academic Vision to New Practice* (Hart Publishing 2017) 17.

[235] Anne McGillivray, 'Why Children Do Have Equal Rights: In Reply to Laura Purdy' (1994) 2 *International Journal of Children's Rights* 243, 251; J Raz, 'Legal Rights' (1984) 4 *Oxford Journal of Legal Studies* 1, 21 discusses the 'general idea of a legal right'.

[236] Kilkelly, *Children's Rights in Ireland* (n 108) para 1.014-1.015.

[237] Carl Wellman, 'The Functions of Rights' (2011) 97 (2) *Archives for Philosophy of Law and Social Philosophy*, 169, 169.

The will/choice theory presupposes competence to exercise one's rights and in the absence of same, the interest theory permits the interests of that person to be protected by another.[238] For example, adults would be considered autonomous social actors who are competent to make their own choices (wise or unwise).[239] For compromised elderly persons, the interest theory may apply instead, potentially due to impaired judgment, or lack of autonomy for some reason.[240] The operation of the interest theory in such circumstances may not be overly complex as family members will be aware of that person's likes, interests, opinions and preferences because they will have expressed them by words or actions prior to incapacity.[241] For children who are growing in capacity and autonomy, the debate is more complex.

Hart and Feinberg, proponents of the will/choice theory,[242] identify that a child cannot be considered a rights' holder unless he/she can exercise a will or choice over that right. Proponents of this theory advocate that a proxy/parent/guardian can exercise the right on behalf of the child, until the child can exercise that right him/herself. [243] MacCormack, Raz and Campbell, proponents of the interest theory,[244] proclaim that a child has rights, exercisable by others to protect that child's interests.[245] A question arises as to whether this theory results in exposing the dependency of the right's holder.[246] Hollingsworth identifies that what concerns the proponents of the interest theorists, is 'whether the interest is important enough to justify imposing a duty on someone to protect it (or refrain from infringing it)'.[247] Because of the difficulties with the two basic theories, many modified arguments and classifications have been put forward.[248]

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[238] Fortin, *Children's Rights and the Developing Law* (n 106) 12-14.
[239] Robert E Goodin and Diane Gibson, 'Rights, Young and Old' (1997) 17 (2) *Oxford Journal of Legal Studies* 185, 186.
[240] ibid 186-188.
[241] ibid 192-199. The authors refer mainly to the 'mentally infirmed' older person and very young children, noting that the interest theory applies with relative ease for younger children based on their right to 'open future' as advocated by Feinberg.
[242] Fortin, *Children's Rights and the Developing Law* (n 106) 12; Joel Feinberg, *Rights, Justice and the Bounds of Liberty*, (Princeton University Press 1980).
[243] David Archard, *Children Rights and Childhood* (n 45) 59.
[244] Neil MacCormick, *Legal Right and Social Democracy: Essays in Legal and Political Philosophy* (Clarendon Press 1982); Joseph Raz, *The Morality of Freedom* (Clarendon Press 1986); Tom Campbell, 'The Rights of the Minor' in Philip Alston, Stephen Parker and John Seymour (eds), *Children, Rights and the Law* (Clarendon Press 1992); Fortin, *Children's Rights and the Developing Law* (n 106) 13; Hamish Ross, 'Children's Rights and Theories of Rights' (2013) 21 *International Journal of Children's Rights* 679-704.
[245] Fortin, *Children's Rights and the Developing Law* (n 106) 12-13; Lucinda Ferguson, 'Not Merely Rights for Children but Children's Rights: The Theory Gap and the Assumption of the Importance of Children's Rights' (2013) 21 *International Journal of Children's Rights* 177, 191.
[246] Ferguson (n 245) 195.
[247] Kathryn Hollingsworth, 'Judicial Approaches to Children's Rights in Youth Crime' (2007) 19 (1) *Child and Family Law Quarterly* 42, 46.
[248] John Eekelaar, 'The Emergence of Children's Rights' (1986) 6 (2) *Oxford Journal of Legal Studies* 161, 170-171, 'basic interest' refers to 'general physical, emotional and intellectual care', 'developmental interest' refers to the development of their capacity from the wider community and 'autonomy interests' refers to choosing one's own lifestyle; John Eekelaar, 'The Importance of Thinking That Children Have Rights' (1992) 6 (1) *International Journal*

How these various theories apply within the context of the civil detention of children in special care is less problematic. First, the original rationale for their detention was to protect and vindicate their rights which were at risk due to their behaviour. Second, for the will/choice theory to be effective, there is a presupposition that the rights' holder has capacity in relation to making a choice. Not all rights require an adolescent in special care to make a choice, such as the right to bodily integrity, the right to dignity, the right to education, or the right to protection from harm. Therefore, the issue for children in special care is not that the rights exist, but how they are exercised and enforced.

The interest theory may provide some value for children in special care. That is from the perspective of Hohfeld's proposition that rights can be realised by the correlative imposition of duties on others,[249] which in turn serves to protect the interests of those children. This demands three things: first, a clear recognition that children are rights' holders which automatically imposes duties on others which must be discharged; second, those in charge of these children must act altruistically, ethically and professionally; third, in the absence of the latter, they must be held to account for breach of that duty.

4.4. Categorisation of rights

Various categories of human rights have developed over time in line with historical and societal changes for those requiring protection against oppression.[250] Human rights, which are separate from legal rights, do not emanate from 'positive law', even though they are sometimes anchored in law.[251] The main categories which have emerged are civil and political rights and socio-economic and cultural rights.[252]

a. Categorisation of Rights qua child

Various theorists have categorised children's rights.[253] The categorisation that aptly describes the nexus at play in child law proceedings (and thus special care proceedings)

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of Law and the Family 221, 228-231; Tom Campbell, 'The Rights of the Minor: As Person, As Child, As Juvenile, As Future Adult' (1992) 6 (1) *International Journal of Law and the Family* 1-23. For example, Freeman advocates welfare, protective, social justice and those based on more autonomy, or Campbell where there are rights or interests relating to their status as a child, juvenile and future adult. Jane Fortin, *Children's Rights and the Developing Law* (n 106) 17; Ferguson (n 245) 195.

[249] Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 *Yale Law Journal* 16; Wesley Newcomb Hohfeld, 'Fundamental Legal Concepts as Applied in Judicial Reasoning' (1917) 26 *Yale Law Journal* 710; Daniel Simao Nascimento, 'Hohfeld on the duties in privileges and claims' (2018) 19 (2) *Filosofia Unisinos* 150, 151; Martin Guggenheim, *What's Wrong with Children's Rights* (Cambridge Harvard University Press 2005) 17 wherein he stated: '[a] young person's rights ultimately are inseparable from the duties…of the adults upon which they rely'.

[250] Rolf Kunnermann, 'A Coherent Approach to Human Rights' (1995) 17 (2) *Human Rights Quarterly* 323, 323.

[251] JK Mapulanga-Hulston, 'Examining the Justiciability of Economic, Social and Cultural Rights' (2002) 6 (4) *International Journal of Human Rights* 29, 31.

[252] ibid 32-37; Ton Liefaard, 'Child-Friendly Justice: Protection and participation of Children in the Justice System' (2016) *Child Friendly Justice* 905, 907-912.

[253] Fortin, *Children's Rights and the Developing Law* (n 106) 17; Campbell, Rights of the Minor (n 248) 1-23; theorists have engaged in other categorisations of rights for children, for example, Freeman (welfare, protective, social justice,

is that of Bevan's twofold classification of rights, i.e. 'protective and self-assertive'.[254] This encompasses a protective status while providing for independence and capacity.[255] Both the protective and self-assertive rights fall within the overall categorisations of civil and political, and socio-economic and cultural, rights which apply equally to children. It also provides for one further category of rights which are participatory rights.

b. Adolescents, autonomy and developing capacity

Children require varying degrees of 'protection and participation' as they progress through different developmental stages.[256] Applying the appropriate levels of protection is contingent on understanding same. At the outset, parental influences decrease as children strive towards autonomy,[257] to the extent that parental control over children is considered 'a dwindling right…….whereby it starts with a right of control and ends with little more than advice'.[258] Peer groups become increasingly influential, relevant and important for children during this time.[259] Further, their autonomy develops through developing relationships with others outside the family circle.[260] This naturally occurring developmental process whereby an older child (adolescent) tends to move away from his/her family and gravitates towards peers and others outside the family circle remains equally important for children in special care. The deprivation of their liberty does not halt or negate this developmental process but yet must impact it; the extent of the impact is likely to be contingent on the length of time the child is in special care and consequently there must be some recognition of this.[261]

Growing in independence, developing capacity, competence and autonomy are also developmental features of adolescence and this has a bearing on giving effect to their rights including within this context of protection and participation.[262] Independence and autonomy are different concepts; independence is about acting on one's own whereas the concept of autonomy also encompasses the 'ability to think, feel, make decisions' and is

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those based on autonomy), Wald (rights against the world, protection from inadequate care, rights to an adult legal status, rights versus parents), Campbell (rights or interests relating to their status as a child, juvenile, future adult); David Archard, 'Children, Adults, Best Interests and Rights' (1991) *Medical law International* 55, 62, Archard reflects that the literature categorizes rights as either welfare or liberty rights; HK Bevan, *Child Law*, (Butterworths 1989) para 1.14, Bevan posits a twofold classification of 'protective and self-assertive'.

[254] Bevan (n 253) para 1.14; Fortin, *Children's Rights and the Developing Law* (n 106) 17.

[255] Bevan (n 253) para 1.14.

[256] MacDonald (n 45) 23.

[257] Manuela Fleming, 'Adolescent Autonomy: Desire, Achievement and Disobeying Parents between Early and Late Adolescence' (2005) 5 *Australian Journal of Education and Developmental Psychology* 1, 3.

[258] *Hewer v Bryant* [1969] 3 All ER 578, 582, as endorsed in *D v Health Service Executive*, unreported High Court 9 May 2007.

[259] Esperanza Ochaita and M Angeles Espinosa, 'Needs of Children and Adolescents as a Basis for the Justification of their Rights' (2001) 9 *International Journal of Children's Rights* 313, 318.

[260] Fleming (n 257) 2.

[261] text to n 413-414; text to n 461-463 in chapter 5; text to n 931-933 in chapter 8.

[262] text to n 404-405.

an aspect of being independent.[263] Fleming posits, that autonomy during the adolescent phase develops through relationships with others, including peers and those outside the family structure.[264] Adolescence also embraces the 'development of the self', in other words, it is concerned with personal development, figuring out who they are and their place in the world.[265] This is achieved through engagement with others outside the family circle.

Adolescent autonomy is further subdivided into three categories, namely, behaviour, value and emotional autonomy. The latter encompasses emotions of a personal nature and a move towards emotional support from persons outside the family.[266] Understanding the developmental stage means that for children in care or in special care, relationships they form with their peers, their carers (including their social workers or GALs) are important. Despite this, Fleming posits that:

> 'autonomy has to be conquered by the adolescent (namely through disobeying parents' rules in order to alter/negotiate another one); this achievement is related with the assumption of the body and the conquest of a mental space to think by one self and to establish relationships outside the family.'[267]

It is curious to suggest that the pathway to autonomy, which is fundamentally a naturally occurring developmental process, must be 'conquered' to be realised. Therefore, the concept of autonomy and its underpinnings must form part of any framework which considers adolescence if it is to have any credibility.[268] This makes any resulting framework, especially one that considers rights, more adolescent/child-centric than adult-centric. Consequently, it impacts and potentially gives greater latitude in the adolescent's favour regarding the levels of protection and participation they can expect. James et al commented that it was the adult view of childhood which underlies the law,[269] therefore a change of mindset is required to ensure that laws enacted concerning adolescents reflect this concept of autonomy which is fundamental to their development.

Children, during the adolescent phase, are starting to make more autonomous decisions and some decisions may not necessarily be wise; some may engage in experimental behaviours. Steinberg et al provide some guidance on this: they suggest (1) distinguishing

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[263] Fleming (n 257) 2.
[264] ibid; text to n 461-463 in chapter 5.
[265] Laurence Steinberg and Amanda Sheffield Morris, 'Adolescent Development' (2001) 52 *Annual Review of Psychology* 83, 91.
[266] Fleming (n 257) 2.
[267] ibid 13.
[268] Chapter 4, Part B, 4.8 (overview).
[269] text to n 41 in chapter 2.

between those behaviours which are sporadically experimental versus those which demonstrate concerning patterns; (2) identifying the source of the issues (did they occur during adolescence or are they long-standing?); (3) many issues resolve easily due to their transient nature.[270]

In some children, psycho-social problems are evident which can be linked to 'risk or stress factors'.[271] The risk factors can be identified as encompassing parental conflict, socio-economic deprivation, breakdown in family relationships, abuse or low self-esteem.[272] The greater the number of risk factors, the greater the adverse consequences although not all children exposed to these or similar risk factors develop psycho-social problems.[273] Associations have been observed between strong peer associations, weak family associations and anti-social behaviour.[274] Such behaviours which are becoming more evident for some adolescents during this time include, inter alia, substance abuse, suicide ideation, self-harm and running away.[275]

Where life-threatening issues are at stake, theorists, while supporting autonomy, also support a paternalistic approach in protecting adolescents from destructive or harmful choices.[276] This has been described as either a type of 'justified paternalism' or 'liberal paternalism'.[277] Fortin's view is the favoured model ought to permit intervention for the purposes of preventing adolescents from making serious mistakes potentially affecting their life, but advocates against arbitrary restrictions which adversely affects the child's potential for autonomy.[278] Thus, any intervention must be fully informed, relevant, necessary to protect life, devoid from any element of arbitrariness and be short term.[279] Accordingly, protection and participation, or as Bevan describes it 'protective and self-assertive' classifications, appear fitting concepts for children (during the adolescent phase) in special care.

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[270] Steinberg et al (n 265) 86.
[271] Teresa O'Neill, *Children in Secure Accommodation, A Gendered Exploration of Locked Institutional Care for Children in Trouble* (Jessica Kingsley Publishers 2001) 45.
[272] ibid.
[273] ibid.
[274] ibid.
[275] Furstenberg (n 57) 901; Fortin, *Children's Rights and the Developing Law* (n 106) 170; chapter 6, 6.6 (c) see heading 'Reasons for Placement in Special Care.'
[276] Fortin, *Children's Rights and the Developing Law* (n 106) 28; Aoife Daly, 'No Weight for "Due Weight"? A Children's Autonomy Principle in Best Interest Proceedings' (2018) 26 *International Journal of Children's Rights* 61-92, Daly proposes the adoption of a 'children's autonomy principle' in legal proceedings where 'best interests' is the primary consideration save where such wishes result in 'significant harm'; Aoife Daly, *Children, Autonomy and the Courts. Beyond the Right to be Heard*, (Brill Nijhoff 2018), Chapter 1.
[277] Fortin, *Children's Rights and Developing Law* (n 106) 28.
[278] ibid 29.
[279] ibid.

In addressing the protective element of the categorisation, it must be noted that not all adolescents wish to receive treatment or accept it is needed,[280] nor can they waive their rights.[281] A concern arises over the ability and experience of adolescents to evaluate potential longer terms consequences of their decisions.[282] In consideration of the assertive element, certain rights do not require the ability to act autonomously. For example, the right to bodily integrity, education or access to family members is not dependent on capacity, competence or being autonomous. Therefore, this issue of evolving capacity and autonomy does not affect all rights themselves for children in special care, but it affects how rights are given effect due to their dependency on others.[283]

Children/adolescents who exhibit life threatening behaviours fall into the category of those requiring protection with participation. Protection has the capacity to bring extreme levels of paternalism but there is still a need for the active and ongoing exercise of participatory rights (self-assertive rights) to give a voice to one's concerns and to engage actively in the process itself. Further, the concepts of developing capacity, competence and autonomy do not fall into abeyance just because the adolescent exhibits high risk behaviour nor should the exercise of paternalism cloud recognition of developing competencies.

4.4.1. Rights: Civil & Political; Socio-Economic & Cultural; Participatory Rights[284]

There is no clear demarcation line drawn between these categorisations of rights because of their interaction and interdependence with each other. Civil and political and socio-economic and cultural rights both reflect respect for human life and dignity.[285] The separate categorisation illustrates their diverse nature and composition.[286] Although recognised as human rights requiring protection, socio-economic and cultural rights are considered subordinate to civil and political rights mainly because of their non-justiciable nature.[287] However, the practical reality as to how socio-economic and cultural rights are perceived does not accord with international perceptions which recognise human rights, however categorised, as indivisible, 'universal, equal and interdependent';[288] they also

[280] ibid 170.
[281] John Seymour, 'An Uncontrollable Child: A Case Study in Children's and Parents' Rights' (1992) 6 (1) *International Journal of Law and Family* 98, 107-108; Archard, Children, Adults, Best Interests and Rights (n 253) 63.
[282] Seymour (n 281) 108.
[283] MacDonald (n 45) 23; this is for giving effect to rights generally rather than children in special care, but it applies equally.
[284] Sources of rights are discussed in chapter 5, 5.2.
[285] Global Citizenship Commission, *The Universal Declaration of Human Rights in the 21st Century, A Living Document in a Changing World* (Open Book Publishers 2016) 64.
[286] Mapulanga-Hulston (n 251) 31.
[287] Claire-Michelle Smyth, *Social and Economic Rights in Ireland* (Clarus Press 2017) see generally chapters 1 & 2.
[288] Mapulanga-Hulston (n 251) 32.

complement each other. For children, these rights are best realised through active participatory rights.

a. Civil and Political Rights

Civil and political rights comprise rights such as the right to liberty, dignity, bodily integrity, freedom from inhumane and degrading treatment.[289] The Constitution and ECHR in particular provides that element of justiciability necessary for the protection and vindication of the rights of children in special care.

b. Socio-Economic and Cultural Rights

Socio-economic and cultural rights have always been somewhat generally contentious due to the cost to the state to uphold such rights. Questions have arisen as to whether such rights ought to be subject to constitutional or legislative protection and if the court is best placed to address such matters given its nexus with distributive justice.[290] It has already been determined that children are detained in SCUs to receive therapeutic supports (and secure accommodation and food) which are socio-economic rights; these are necessary to address the high risk and potentially life-threatening behaviour. Therefore, it must be the case that these children are entitled to have such socio-economic and cultural rights protected, vindicated and enforced regardless of the status of socio-economic rights generally.[291]

c. Participatory Rights

Participation can mean different things to different stakeholders depending on the role they play;[292] however, underpinning participation within the court decision-making process is hearing the voice of the child.[293] Aside from child participation bringing with it respect for the integrity of the child as an individual person,[294] participation in decision-making processes aids 'personal development' (such as improved self-esteem), while

[289] Civil and Political rights are generally considered less contentious than socio-economic rights primarily due to cost; however, the right to a fair trial (civil and political right) tends to contradict this argument.
[290] Smyth (n 287) see generally chapters 1, 2.
[291] Alan DP Brady, 'The Vindication of Constitutional Welfare Rights: Beyond the Deprivation of Liberty' (2017) 40 (2) *Dublin University Law Journal* 135, the notion of inferred constitutionalisation of welfare rights is considered.
[292] Paul McCafferty, 'Implementing Article 12 of the United Nations Convention on the Rights of the Child in Child Protection Decision-Making: a Critical Analysis of the Challenges and Opportunities for Social Work' (2017) 23 (4) *Child Care in Practice* 327, 328-333; Ganna G van Bijleveld, Christine W M Dedding and Joske F G bunders-Aelen, 'Children's and Young People's Participation within Child Welfare and Child Protection Services: A State-of-the-Art Review' (2015) 20 *Child and Family Social Work* 129-138.
[293] Distinctions have been drawn between 'wishes' and 'views' with wishes being suggestive of outcomes and views also incorporating concerns and feelings; Alan Campbell, 'I Wish the Views Were Clearer; Children's Wishes and Views in Australian Family Law' (2013) 38 (4) *Children Australia* 184, 185; Nicola Taylor, Pauline Tapp, Mark Heneghan, 'Respecting Children's Participation in Family Law Proceedings' (2007) 15 (1) *International Journal of Children's Rights* 61, 74; Ruth Sinclair, 'Participation in Practice: Making it Meaningful, Effective and Sustainable' (2004) (18) *Children & Society* 106, 113.
[294] McCafferty (n 292) 328.

simultaneously adding value to both the decision-making process and its outcomes.[295] It also conforms with the underpinnings of the sociology of childhood which sees children as active participants in their own development.[296] However the role that different stakeholders play will affect the implementation of effective participation measures.[297]

It is important to consider the most appropriate mechanism for effective implementation of such participation given the nature of the high-risk behavioural disorders of these children.[298] Participation is described as having 2 broad interpretations, namely, being part of the process or being an influencer in the decision.[299] Although various models of participation have been devised to reflect such propositions (such as Hart, Treseder, Shier or Lundy), Parkes suggests that such models could be considered 'too restrictive' as they refer to participation in specific settings as opposed to a model with more general application.[300] Franklin and Sloper note that some models have been criticised as their hierarchical nature ends with children being the ultimate decision-maker, while research indicates that children understand their limitations and their need for adult direction or guidance.[301]

This thesis promotes the Lundy Model of Participation as an appropriate participatory model. Although this model originated within the educational sphere,[302] McCafferty

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[295] ibid 329.
[296] ibid 328; chapter 2, 2.2.2(b) discusses the 'Sociology of Childhood'.
[297] McCafferty (n 292) 327-341; chapter 2, 2.2.2 (a) discusses this point in the 'Theory of Childhood'; see generally Sissel Seim and Tor Slettebo, 'Challenges of Participation in Child Welfare' (2017) 20 (6) *European Journal of Social Work* 882-893.
[298] Daly, No Weight for Due Weight (n 276) 61-92; Daly, *Children, Autonomy and the Courts* (n 276) see chapter 1.
[299] Anita Franklin and Patricia Sloper, 'Listening and Responding? Children's Participation in Health Care within England' in Michael Freeman (ed) *Children's Health and Children's Rights* (Martinus Nijhoff 2006) 14. Sinclair (n 293) 108, positing that a 'multi-dimensional' approach to participation incorporates four elements, 'the level of participation; the focus of the decision-making in which children may be involved; the nature of participation activity; and the children and young people involved.'
[300] Aisling Parkes, *Children and International Human Rights Law* (n 114) 25; See generally, Sherry Arnstein, 'A Ladder of Citizen's Participation' (1969) 39 (4) *Journal of the American Institute of Planners* 2216-224; Roger Hart, 'Children's Participation; From Tokenism to Citizenship' (1992) *UNICEF International Child development Centre* 1-39. Hart's model was inspired by Arnstein's model of citizen participation and comprises an eight-rung ladder: 'manipulation, decoration, tokenism, assigned but informed, consulted and informed, adult-initiated shared decisions with children, child initiated and directed and child-initiated share decisions with adults'. This was reformulated by P Treseder, *Empowering Children and Young People Training Manual: Promoting Involvement in Decision-Making* (Save the Children, London 1997) whose 5 degrees of participation comprise 'assigned but informed, consulted and informed, adult-initiated shared decisions with children, child-initiated shared decisions with adults, child-initiated and directed.' An alternative to Hart's Model was devised by Harry Shier, 'Pathways to Participation: Openings, Opportunities and Obligations, A New Model for Enhancing Children's Participation in Decision-Making, in line with Article 12.1 of the United Nations Convention on the Rights of the Child' (2001) 15 *Children & Society* pp 107-117 which comprises five levels of participation, 'children are listened to, children are supported in expressing their views, children's views are taken into account, children are involved in decision-making processes, children share power and responsibility for decision-making.' This is buttressed by 3 stages at each of those 5 levels, namely, 'openings, opportunities, obligations' which asks a series of 15 questions 'as a tool for planning for participation'. See also Nigel Thomas, 'Towards a Theory of Children's Participation' (2007) 15 (2) *International Journal of Children's Rights* 199-218, section 5.
[301] Franklin et al (n 299) 14-15.
[302] Laura Lundy, 'Voice Is Not Enough: Conceptualising Article 12 of the United Nations Convention on the Rights of the Child' (2007) 33 (6) *British Educational Research Journal* 927-942.

considers its applicability and suitability in general child welfare cases;[303] it has also been adopted as a participatory model in terms of criminal detention of children and has been referenced by the CFA in its participation strategy document.[304]

This chronological model which is underpinned by the two main elements of Article 12 of the UNCRC, (the child's right to express a view and the right to have such a view given due weight) comprises four clearly defined interrelated elements which are space, voice, audience and influence.[305] What makes this an all-encompassing model is that within that context it incorporates other components of the UNCRC to provide for effective and complete participation:[306]

Space: all children ought to be provided with an opportunity to express their views which is seen as a crucial part of the process;[307]

Voice: children ought to be permitted to express their view with assistance if required, regardless of 'capacity to express a mature view';[308]

Audience: children ought to have a 'right of audience' with an 'identifiable individual or body' who must listen;[309]

Influence: the decision-makers are open to being influenced.[310]

Lundy also proposes that children be informed as to the manner by which their views were considered/given due weight and given reasons for the decisions.[311] What makes this an appropriate model is that its holistic application is chronological and lends itself

[303] McCafferty (n 292) 333-338; DCYA, *National Strategy on Children and Young People's Participation in Decision-Making 2015-2020* (June 2015); CFA, *Child and Youth Participation Strategy 2019-2023* (June 2019); Department of Children, Equality, Disability, Integration and Youth (DCEDIY) Hub na nÓg, *Participation Framework, National Framework for Children and Young People's Participation in Decision-Making* (April 2021); Danielle Kennan, Bernadine Brady, Cormac Forkan, 'Space, Voice, Audience and Influence: The Lundy Model of Participation (2007) in Child Welfare Practice' (2019) 31 (3) *Practice: Social Work in Action* 205-218.

[304] Oberstown Children Detention Campus, *Care Education Health & Wellbeing, Strategy for the Participation of Young People In Decision-Making* (October 2017); CFA, *Towards the Development of a Participation Strategy for Children and Young People, National Guidance & Local Implementation* (April 2015).

[305] Lundy (n 302) 931-939.

[306] Article 2 (non-discrimination); Article 3 (best interest); Article 5 (guidance from adults); Article 13 (information); Article 19 (right to be safe); Lundy (n 302) 931-939.

[307] Lundy (n 302) 933-935.

[308] ibid 935-936.

[309] ibid 936-937; chapters 6, 6.7.5 considers direct interaction between the child and the judge; chapter 7, 7.5 considers the child's participatory rights within the court context.

[310] Lundy (n 302) 937-939; Helen James, David Lane, 'The Child's Guardian – Listening and Giving Weight to Children's Views' (2018) 26 (1) *International Journal of Children's Rights* 117-135; Aoife Daly, 'The Judicial Interview in Cases on Children's Best Interests-Lessons for Ireland' (2017) 29 (3) *Irish Journal of Family Law* 66-72, the author promotes direct interaction by children with the court.

[311] Lundy (n 302) 938-939. HIQA, *Report of a Designated Centre Special Care Unit, Coovagh House,* Unannounced Inspection 10 and 11 September 2019, 5, the children commented that even though they could participate in 'house meetings' at the SCU, they suggested that they 'should receive a decision or feedback on issues they raised during these meetings, as this was not happening'; Aoife Daly, Sandy Ruxton, Mieke Schuurman, 'Challenges to Children's Rights Today: What do Children Think?' *A desktop study on children's views and priorities to inform the next Council of Europe Strategy for the Rights of Children* (March 2016) 21, 26-28.

to being child-centric with decision-makers being placed in a position whereby they must give due consideration to the child's voice.[312]

Although there is a lack of clarity regarding how 'due weight' is afforded to the wishes of the child,[313] Daly argues that the mandate under Article 12 of the UNCRC to give due weight to the views of children having regard to age and maturity is not compatible within the context of judicial proceedings when consideration must be afforded to the best interest principle[314] which she argues is essentially 'substitute decision-making'.[315] Daly promotes the 'autonomy principle'[316] to enable children choose if and how (process autonomy) they are involved in judicial proceedings concerning them; this extends to the outcome (outcome autonomy) also, as long as their wishes do not lead to 'significant harm'.[317] Maintaining a focus on the concept of autonomy (as opposed to best interests) despite the high-risk behaviours upholds their visibility as subjects (with a voice) instead of recipients of paternalism.[318] Daly also argues in favour of a rebuttable presumption that children's wishes will be determinative, that a high threshold is required to rebut that presumption and that this requires the decision-maker to pay 'significant attention to children's autonomy'.[319] Although this goes a step further than the Lundy Model (in terms of space, voice, audience and influence), it is compatible with the Model and ought also apply to special care cases.

From the point of promoting participatory rights, Smith argues that it is imperative to consider participation with the relative sociocultural environment, together with the nature of support children receive when they are in the 'Zone of Proximal Development'

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[312] Chapter 4, 4.11 considers this within the context of participatory rights in the theoretical framework; chapter 7, 7.5. considers the child's participatory rights within the court context.

[313] Aoife Daly, 'Children's Participation in Youth Justice and Civil Court Proceedings: Have States Made Sufficient Progress?' in Ursula Kilkelly and Tom Liefaard (eds), *International Children's Rights Law* (Springer 2019); Daly, *Children, Autonomy and the Courts* (n 276) 347; Lothar Krappmann, 'The Weight of the Child's View (Article 12 of the Convention on the Rights of the Child)' (2010) 18 (4) *International Journal of Children's Rights* 501-513; Gerard Durcan, 'Hearing the Voice of the Child' (2012) 18 (1) *Medico-Legal Journal of Ireland* 21, 25.

[314] Daly, No Weight for "Due Weight" (n 276) 62.

[315] Daly, *Children, Autonomy and the Courts* (n 276) 23.

[316] ibid 347, Daly argues that some of the reasons for placing autonomy first in best interest decisions in 'the form of a presumption in favour of their wishes,' is due to a 'lack of clarity about what aspect of the child's decision is being 'weighed'-the competence of the child, the rationality of the decision, or how much the child's decision accords with the judge's determination of their 'best interests'. Further, 'there is no consistency or transparency in the weighing of children's wishes, and one gets the distinct impression that judges simply say that the child's wishes has been influential when those wishes accord with what the judge has already decided.' Daly, No Weight for "Due Weight" (n 276) 87, the author acknowledges this is not a panacea, for example, not all issues relate to children's wishes; chapter 4, 4.11 (b) considers this within the context of the theoretical framework.

[317] Daly, *Children, Autonomy and the Courts* (n 276) 30, 68, 387, "[i]s the outcome being determined by what is in the child's best interests? Does the child have a wish as to the outcome? Does the child want this wish to prevail? Is significant harm unlikely to result from following the wishes of the child?" if the answer to all questions is 'yes' then the outcome should be in favour of the wishes of the child.'

[318] Chapter 8, 8.3 (c) highlights that the concept of 'process autonomy' does not exist within the current system.

[319] Daly, *Children, Autonomy and the Courts* (n 276) 349. Chapter 4, 4.11(b),4.11(c) considers this point within the theoretical framework.

(ZPD).[320] The concept of 'scaffolding' applies within the ZPD whereby proficient adults provide necessary assistance or mentoring to a child facilitating their eventual mastery.[321] Although children in special care are generally (although not always) there for relatively short bursts of time, this is nonetheless a significant consideration as the sociocultural environment to which the children are subject for that period is intensive.[322]

Participatory rights are crucial rights for children in special care. Most importantly, this requires direct participation by each child during the court-decision making process as opposed to indirect participation where another person performs a delegated participatory function on the child's behalf.[323]

4.5. Exercise and Balancing of Rights

4.5.1. Exercise of Rights

The imposition of correlative duties upon the state may be the only effective way by which children in special care can exercise their rights, but is this an effective exercise? The theoretical justification for this approach can be sourced under the Hohfeldian 'incidents' whereby legal rights comprise 'privileges (or liberties), claims, powers and immunities'.[324] In terms of 'constitutional welfare rights as positive obligations' in cases such as special care, these rights have been more specifically termed 'legal claim rights' in this Hohfeldian sense which places 'a *duty* on the state to act'.[325] If this correlative duty exists, then the rights of those children are in effect being exercised, indirectly, by the state. For example, if there is a duty on the state to ensure that access to family members takes place, this means that the right of access to family members is being vindicated. The drawback is that the state may choose not to fulfil this duty fully or at all for a variety of reasons. This feeds into the concerns of the moral and legal philosophers regarding the inadequacy of duties alone, when considering rights.[326] The default position must be judicial oversight.[327]

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[320] Anne B. Smith, 'Interpreting and Supporting Participation Rights: Contributions from Sociocultural Theory' (2002) 10 *International Journal of Children's Rights* 73, 78, 84; ZPD is a Vygotskyain concept which is described 'as the difference between what individuals can do alone and what they can do in collaboration with others'.
[321] Taylor et al (n 293) 65.
[322] Chapter 4, 4.8, provides an overview of the theoretical framework and considers the concept of 'relational autonomy'.
[323] Chapters 6, 6.7.5 considers direct engagement between the child and the judge; chapter 7, 7.5 considers the participatory rights of the child within the court process.
[324] Hohfeld 2013 (n 249); Hohfeld 1917 (n 249); Nascimento (n 249) 151.
[325] Brady (n 291) 135.
[326] Wellman (n 237) 169.
[327] text to n 393 considers this an integral part of the theoretical framework.

4.5.2. Balancing of Rights

The state has a role to play in balancing the rights of children in special care as it will have to consider matters such as its duty of care to all children and its budget capacity.

To ensure that rights are proportionately balanced however, the court must also engage in an appropriate balancing exercise as it is the ultimate defender and protector of rights. Regarding this balancing exercise, three factors must be considered. First, the welfare and best interest principle; second, the role of parents; third, the role of the state as it is usurping the role of the parent while simultaneously assuming responsibility for the child's deprivation of liberty alongside its duties to protect and vindicate their rights.[328]

a. Best interest and welfare principle

The long-standing best interest and welfare principles have historic origins based in the 18th Century Enlightenment period[329] and therefore precede the main developments in human rights. The best interest principle, although a nebulous concept, is a key factor when courts are adjudicating on matters affecting children.[330] Mnookin labelled the best interest principle 'indeterminate,'[331] while others such as Herring and Archard view indeterminacy positively as it provides for flexibility.[332] Eekelaar notes how competing rights are weighed to give effect to the child's best interests.[333] However, Daly posits that although decisions made in the best interests of the child are 'substitute decisions,'[334] it also means that it is the best interests of the child and not others which ought to be determinative.[335] Stalford and Hollingsworth suggest the best interest principle mandates 'transparent, rigorous, systemic, even forensic, deliberations'.[336] Consequently, a meticulous assessment to demonstrate transparency of decision-making would be required to justify any encroachment on rights.

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[328] Chapter 4, 4.8 (a) considers the balancing of rights as part of the theoretical framework.
[329] John Eekelaar, 'Beyond the Welfare Principle' (2002) 14 *Child and Family Law Quarterly* 237, 240; Article 42A.4 of the Constitution of Ireland 1937, the best interests of the child shall be the paramount consideration in all proceedings brought by the state.
[330] Stalford et al, Judging Children's Rights (n 234) 33, 64; Raymond Arthur, 'Protecting the Best Interests of the Child: A Comparative Analysis of the Youth Justice System in Ireland, England and Scotland' (2010) 18 *International Journal of Children's Rights* 217-231, Arthur argues that, for various reasons, the best interest principle as a primary consideration is disregarded in respect of young offenders as their interests are balanced against other concerns.
[331] John Eekelaar, 'The Interests of the Child and The Child's Wishes: The Role of Dynamic Self-Determinism' (1994) 8 (1) *International Journal of Law and the Family* 42, 45 referring to Robert Mnookin, 'Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy' (1975) 39 *Law & Contemporary Problems* 226.
[332] Jonathan Herring, 'Farewell Welfare?' (2005) 27 (2) *Journal of Social Welfare and Family Law* 159, 160; Archard, Children, Adults, Best Interests and Rights (n 253) 57.
[333] John Eekelaar, 'The Role of the Best Interests Principle in Decisions Affecting Children and Decisions about Children' (2015) 23 (1) *International Journal of Children's Rights* 3-26; a distinction is drawn between matters 'directly' (focus on best outcome) or 'indirectly' (focus on best solution) affecting children.
[334] Aoife Daly, *Children, Autonomy and the Courts* (n 276) 72
[335] ibid 112.
[336] Stalford et al, Judging Children's Rights (n 234) 65; See also David Archard and Marit Skivens, 'Balancing a Child's Best Interests and a Child's View' (2009) 17 (1) *International Journal of Children's Rights* 1, 7-8.

Eekelaar suggests that decisions made while having regard to the welfare principle should be 'justified from the point of view of a judgment about the child's interests'.[337] Herring, in support of the welfare principle, posits that the court must anticipate potential positive outcomes as best as possible.[338] He suggests that the welfare principle appreciates children's vulnerabilities.[339] Arguably, there is more emphasis on the child's vulnerabilities when engaging the welfare principle in special care cases. In this regard, it is worth being cognisant of the words of Eekelaar wherein he cautions that 'the very ease of the welfare test encourages a laziness and unwillingness to pay proper attention to all the interests that are at stake in these decisions and, possibly, also a tendency to abdicate responsibility for decision making to welfare professionals'.[340] Further, Poso et al caution against a strong welfare framework expressing concern of a potential lack of vigilance.[341] Being alert to the possibility of curial deference[342] and lack of vigilance is important for children in special care, as the abdication of responsibility through over-reliance on age-old concepts such as the welfare (or best interest) principles has the potential to unfairly tilt the balancing of rights, in favour of protective rights, at the expense of assertive rights.[343]

Special care cases, by their nature, requires consideration of both the best interest and the welfare principle alongside the rights of the child.[344] That said, all elements overlap, particularly in special care as all such elements are engaged. Fortin considers that judicial determinations which actively promote children's rights are not restrained from intervening to prevent children from engaging in unwise choices.[345] For example, although the right to protection from harm is arguably part of the welfare principle which a judge may consider for children in special care, this right to protection from harm is also implicit in the protection of the right to life due to the potentially detrimental effect of the high-risk taking behaviour of children in need of special care. That said, it might also be the case that the behaviour of the child is not such that it poses a threat to his/her own life, but poses serious harm to oneself. It is argued that in the circumstance of special care, such a right should be distinguishable from welfare rights or the welfare principle

[337] John Eekelaar, Beyond the Welfare Principle (n 329) 240.
[338] Herring, Farewell Welfare? (n 332) 160.
[339] ibid 168; text to n 9-12 in chapter 1.
[340] Eekelaar, Beyond the Welfare Principle (n 329) 248; *TD v Minister for Education* [2001] IESC 101, [2001] 4 IR 259 at 314 per Denham J 'a duty to guard fundamental rights should not be shirked or abdicated'.
[341] Poso et al (n 5) 245.
[342] For example, chapter 7, 7.3(b) 'analysis', considers this briefly within the context of further restrictions on liberty.
[343] Chapter 4, 4.8 (overview) seeks to redress an imbalance between rights and welfare.
[344] text to n 375-379.
[345] Jane Fortin, 'Children's Rights: Are the Courts Now Taking Them More Seriously' (2004) 15 (2) *The King's College Law Journal* 253, 258-261.

in the child's best interests and for the promotion of a rights-based approach; this ensures greater transparency regarding the protection of this right and ought to safeguard against curial deference and abdication of responsibility on the basis of welfare. It also affirms that the nexus between the best interest and welfare principle is reconcilable for promoting the rights of children in special care.[346]

That said, Daly expresses concern regarding the inadequacy of the right to be heard in terms of giving respect to the child's autonomy when determinations are made within the context of the best interest principle.[347] Any restriction on assertive rights for the promotion of the welfare principle in the child's best interests must be transparent and articulated to ensure a suitably proportionate balancing exercise has ensued.[348] The application of the Lundy Model with reasons given to a child for decisions made, regardless as to whether their views were determinate, increases the transparency element of the balancing exercise.

b. Parents

Parental autonomy over the family unit is not absolute.[349] State interference in the family unit is permissible where parents fail in that duty.[350] When focusing on the relationship between the state and the parents of children who need special care, that balancing act can be less problematic when parents of out of control children seek state assistance.[351] Parental control over children this age is already diminishing.[352] When a child is placed in special care, parents and parental rights are relegated into a subordinate position. That does not mean that they have been fully ousted, but the primary carer for the child is now the state.[353]

c. State

Fineman reminds us of the multifaceted organisational make-up of the state and how the state constitutes itself through the establishment of statutory bodies which it regulates.[354] This must be borne in mind when considering the following: first, the state has

[346] Chapter 7, 7.3(b) (interim phase) considers how the the nexus between the welfare and best interest principle can be operationalised.
[347] Aoife Daly, *Children, Autonomy and the Courts* (n 276) 112.
[348] text to n 393.
[349] Karen M. Smith, *The Government of Childhood, Discourse, Power and Subjectivity* (Palgrave MacMillan 2014) 31.
[350] ibid 31; *In the Matter of JJ* (n 194).
[351] During the observational stage, some parents/legal guardians sought and were relieved with state assistance.
[352] text to n 258-60, 399.
[353] *VQ v Horgan & anor* [2016] IEHC 631 para 26, the judge stated 'residual constitutional rights of parents are not displaced' when a care order is in place and quoted from *Western Health Board v KM* [2001] IESC 104, [2002] 2 IR 493 which clarifies that under a care order the 'majority of the powers of the parent or guardian' are transferred to the Health Board. This must be the case too for SCOs.
[354] Fineman (n 12) 6. Under the Constitution of Ireland 1937, there are three institutions, legislature (Articles 15-27), executive (Article 28), the judiciary (Articles 34-37).

responsibility for these children; second, it established the statutory body responsible for depriving the children of their liberty, with responsibility for protecting their interests. Sund and Vackermo opine that it is insufficient that decisions made by social authorities are simply made in the child's short/long term best interests but suggest that decisions made ought to have a 'legal' and 'analytical base'.[355]

Detaining people against their will in various residential/institutional settings conjures up images of imposed discipline. Disciplinary power in the Foucauldian sense operates through hierarchical observation, normalisation and examination:[356]

> ''power becomes more anonymous and more functional'; the focus is on those who are targeted by power, rather than on those who wield authority. Consequently 'the child is more individualized than the adult', representing both the focus and the product of the various forms of knowledge, expertise, techniques and practices which have been developed to monitor and manage individual well-being and development.'[357]

It is without argument that a child who is the subject of a specific special care regime is the 'focus' and the 'product' and the power of the state is 'functional'. This is supported by the observations of Seymour. He identifies what underpins the legislation dealing with what he calls 'uncontrollable children' in child welfare cases.[358] He considers that the primary purpose of the legislation is to put appropriate procedures in place to deal with at risk children whereas its secondary purpose is that of a control mechanism over troublesome children.[359] Seymour bluntly states that '[u]ncontrollability laws fulfil broad social functions'.[360] This focus on the child however, ought not detract from the role of the state. It holds extensive power and control over civilly detained children justifying judicial oversight.[361]

The balancing of rights by the court includes consideration of the best interest and welfare principle, the role of parents and the role of the state.[362] In addition, it requires having respect for the child's autonomy, developing competence/capacity and their wishes; it

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[355] Lars-Goran Sund and Marie Vackermo, 'The Interest Theory, Children's Rights and Social Authorities' (2015) 23 (4) *International Journal of Children's Rights* 752, 761-762.
[356] Michael Foucault, *Discipline and Punish, The Birth of the Prison* (Penguin 1977) 170-230; Foucault suggests that control can be exerted over people through observation and reform of the individual is encouraged in line with acceptable societal norms. Foucault considers Bentham's 'panopticism'; its major effect is to 'induce in the inmate a sense of conscious and permanent visibility that assures the automatic functioning of power' (p 201).
[357] ibid 193; Smith (n 349) 20.
[358] Seymour, An Uncontrollable Child (n 281) 103.
[359] ibid.
[360] ibid.
[361] text to n 396-398 (within the context of the theoretical framework).
[362] Chapter 7, 7.6, the empirical research considers this further.

also must have regard to established principles such as the doctrine of the separation of powers, the doctrine of precedent, and being mindful of avoiding curial deference. Finally, given the impingement on liberty, the application of the doctrine of proportionality in all matters relating to civil detention, whereby the least restrictive option must be engaged when encroaching on legal rights, becomes a significant factor.

4.6. Role of the Judge and Judicial Decision-Making

Understanding how judges decide cases generally brings with it a whole jurisprudential line of authority ranging from, inter alia, the positivists to American legal realists to Ronald Dworkin's theory of adjudication and 'hard cases'.[363] Indeed, Posner acknowledged nine intellectual theories which feed into the judicial decision-making process.[364]

Moving from the general jurisprudential line to that of children, it is clear that judges perform a key role in terms of protecting, promoting and vindicating children's rights, particularly when others fail in their responsibility.[365] Tobin points out the extent to which this is successfully achieved is borne out by the prominence of rights within judgments.[366] Having considered a number of select judgments and sample cases he categorises the approach of judges to children's rights as either a tendency to 'overlook, marginalise or misappropriate children's rights'.[367] He identifies six different approaches by judges to children's rights, namely, 'invisible' (non-existent in the dispute),[368] 'incidental' (peripheral to the dispute),[369] 'selective' (where only parts of the UNCRC are selected to justify the decision),[370] 'rhetorical' (where 'children are told that their autonomy will be respected when a welfarist approach is adopted'),[371] 'superficial' (where children's rights form part of the court's analysis but without any deliberation on the scope, nature or balancing of rights),[372] and 'substantive' (where there is proper

[363] JG Riddall, *Jurisprudence* (Oxford University Press 2005); MDA Freeman, *Lloyd's Introduction to Jurisprudence* (8th edn, Sweet & Maxwell 2008).
[364] Richard Posner, *How Judges Think* (Harvard University Press 2010) 19; Posner identified the 9 intellectual theories as attitudinal, strategic, sociological, psychological, economic, organizational, pragmatic, phenomenological and legalist theory. Certain projects have rewritten judgments from varying perspectives such as: Rosemary Hunter, 'The Power of Feminist Judgments?' (2012) 20 *Feminist Legal Studies* 135-148 which considers two feminist judgment-writing projects (Women's Court of Canada and Feminist Judgments Project in England) which both reject in part and consider Carol Smart's feminist critique of the law. Common to both projects is that the they 'attempt to appropriate the power of law to qualify feminist knowledges, to provide alternative accounts within legal discourse, and to change legal doctrine' 146-147. Helen Stalford, Kathryn Hollingsworth, Stephen Gilmore (eds), *Rewriting Children's Judgments, From Academic Vision to New Practice* (Hart Publishing 2017).
[365] Stalford et al, Judging Children's Rights (n 234) 21.
[366] Tobin (n 234) 580.
[367] ibid 593. Tobin's selection of cases is based on a small number of important cases at international/national level.
[368] ibid 593-595.
[369] ibid 595-597.
[370] ibid 597-599.
[371] ibid 599-601.
[372] ibid 601-603.

engagement with the rights issues).[373] The categories provide a constructive framework within which to consider children's rights issues in special care cases.[374]

What must also be considered is the role of the best interest and welfare principles within the context of the protection and vindication of rights;[375] this is complex as 'tensions exist between welfare and rights' in public law cases.[376] For example, when judges are deciding cases, are these historic principles now subsumed into rights considerations, or do the principles require separate consideration to rights and which takes precedence?[377] Judges in this jurisdiction have ascribed to themselves the role of protector and vindicator of children's rights.[378] Therefore, it would be expected that rights would be prominent in judgments relating to children even though best interest and welfare principles have existed for a long time. Although judges must consider rights, the existence of the best interest principle in particular, brings with it a concern that this principle will always take priority over rights resulting in the language of rights being either invisible (as the best interest provision justifies the decision) or superficial (meaning that rights have been considered but it is simply 'rights' talk' without any significant meaning) in judgments. Tobin notes that the adaptation from the earlier welfare model (and children as the property of their parents) to children as rights' holders 'has not been universally embraced by judges, and the legacy of the parental possession doctrine remains'.[379] This also raises a serious question as to whether judges during the decision-making process can truly protect and vindicate rights if priority must be afforded to the best interest/welfare principle; it is difficult to envisage how they can do so while operating within such an historic paternalistic framework.

Constraints can hinder the judge's approach during the decision-making process which may be 'structural' or 'individual'.[380] The structural constraints comprise adherence to the doctrine of the separation of powers (and distributive justice), the doctrine of precedent and to constitutional and legislative provisions.[381] The individual constraints

[373] ibid 603-919.
[374] The right's framework is considered in chapters 5, 5.3.1, 5.5.1, 5.6; 7, 7.6 (analysis).
[375] Chapter 4, 4.5.2(a) considers the best interests and welfare principles.
[376] James et al (n 310) 127.
[377] Chapter 4, 4.5.2 (a) considers the best interests and welfare principles.
[378] text to n 497-501 in chapter 5.
[379] Tobin (n 234) 593.
[380] Stalford et al (n 234) 41.
[381] ibid; Neil Vidar, 'The Psychology of Trial Judging' (2011) 20 (1) *Current Directions in Psychological Science* 58-62.

which relate to the judge's own personal characteristics are more difficult to address and evaluate.[382]

Special care cases comprise contributions from other professional actors during the court process, such as psychologists, psychiatrists, social workers, and GALs.[383] Although judges have extensive knowledge of the law, they are unlikely to be trained in matters of child development,[384] and are likely therefore to be guided by professional opinion.[385] The role of other professional actors must be considered in terms of their influential capacities and expertise in the judicial decision-making process with caution to be expressed in terms of curial deference.

In any event, whatever principles, constraints or expert influences the judicial decision-making process may be subject to, it ought not be such that it is detrimental to the protection and vindication of the rights of children in special care; this arguably requires engagement in a substantive analysis and balancing of children's rights.[386]

4.7. Conclusion

When considering a theoretical framework for the rights of children in special care, certain matters are brought into focus. Children in special care are vulnerable adolescents, growing in capacity, who have been acting as autonomous beings even though some of those autonomous decisions may have been unwise. The imposition of duties on the state may not adequately protect their rights, so therefore a rights-based framework is the favoured approach, with judicial oversight while holding the state to account if required.

[382] Stalford et al (n 234) 41.
[383] Chapter 6, 6.7.7 identifies that these proceedings are dominated by experts unlike in other civil proceedings.
[384] Leen Cappon, 'Who Decides? The Decision-Making Process of Juvenile Judges Concerning Minors with Mental Disorders' (2016) 46 *International Journal of Law and Psychiatry* 7, 8.
[385] Chapter 6, 6.7.7, considers this within the context of reports prepared for the court.
[386] See chapters 4.8(b); 7,7.6.

PART B: The Rights of Children in Special Care: A Theoretical Framework

4.8. An Overview

Perceptions of children have altered within the legal context, but how that is operationalised is another matter. It is argued that in fact little has changed as to how rights have been conceptualised or operationalised in the last twenty-five years; because of the evolution and language of children's rights, it is time to ensure that any legal framework which considers children is within the context of a rights-based approach. Because of the draconian nature of civil detention, children in need of special care require a tailored child/adolescent-centric theoretical framework appropriate to their circumstances, interests and needs. As adults are 'only dependent and independent relative to the circumstances in which they find themselves',[387] the same must be true of children, especially older children growing in autonomy, capacity, competence with specific developmental interests.[388] Relational autonomy has been described as 'conceptions of autonomy grounded on the social nature of people's lives'.[389] As Ells et al note, 'in relational accounts of autonomy, having opportunities and developing skills for autonomy go hand in hand'.[390] As such, for children in special care, autonomy and agency is best viewed within a relational context. This concept of relational autonomy takes account of context and influences surrounding these older children. Therefore, the theoretical framework must consider a rights-based framework within the context of relational autonomy and the child's vulnerability and interests.[391]

This thesis proposes a theoretical relational children's rights-based framework within a tripartite structure. The purpose of the rights-based approach ensures that the focus is on a child who is developing in capacity and competence who has rights and happens to have welfare issues, and not vice versa. The tripartite structure comprises the child (taking into account their capacity, competence, needs and interests), the parents (even though their authority is dwindling but from the point of a supportive role only if apt), and the state (who for the period of civil detention, becomes the corporate parent), all of which is subject to judicial oversight. The rights-based framework comprises rights most at risk arising from civil detention. The deprivation of liberty for the purposes of the protection of life highlights the importance of other rights within the 3 main categories of (i) civil

[387] Carolyn Ells, Matthew R. Hunt, Jane Chambers-Evans, 'Relational Autonomy as an Essential Component of Patient-Centred Care' (2011) 4 (2) *International Journal of Feminist Approaches to Bioethics* 77, 86; John Christman, 'Relational Autonomy and the Social Dynamics of Paternalism' (2014) 17 (3) *Ethical Theory and Moral Practice* 369, 374.
[388] Chapter 4, 4.4(b) considers adolescents, autonomy and developing competence.
[389] Ells et al (n 387) 85.
[390] ibid 87.
[391] text to n 9-12 in chapter 1.

and political rights: right to life (which in this instance subsumes the right to protection from harm), right to liberty, right to bodily integrity (when considering restrictions on movement), right to privacy (as part of the wider framework of the right to private life and personal development) and the right to access family members (only if children so choose), (ii) socio-economic and cultural rights: right to healthcare, right to education, and (iii) participatory rights: right to be heard including the right to information, make complaints and challenge decisions.[392]

Within the court process, the special care regime progresses through three main stages - all of which ought to be subject to judicial oversight and full transparency;[393] first, the initial entry into special care; second, an interim phase, during which stabilisation of behaviour occurs; and third, exiting special care. The length of each phase, particularly the interim phase, will vary depending on each child's specific issues. While welfare considerations are expected to be prominent at the point of entry into special care, rights still exist during this stage too. It would be expected that a greater emphasis on rights would be evident during the interim and exit phase. The exit stage of the process ought to mean that the protective element has almost eroded, signifying that restriction on rights is minimal, if at all.

Two of the main threads that are of equal relevance for each stage of the process relate to the balancing of rights and the role of the judge in the decision-making process.

a. Balancing of Rights

The balancing of rights incorporates a threefold process and applies at every stage in the process while having regard to the concept of relational autonomy and the child's age, developing competence, vulnerability and interests.[394] First, the judge must balance the competing rights of the child. Second, those rights must be balanced against those of the parents and duties on the state. Third, the judge must balance those competing interests against the structural and individual constraints.[395]

Under the first balancing exercise, protective and assertive rights ought to be balanced against one another to ensure that welfare (or best interests) does not dominate at the expense of rights. In view of the indeterminacy of the best interest and welfare principles, forensic deliberations must be provided to ensure transparency and proportionality on any

[392] Chapter 5, 5.2 considers the sources of these rights.
[393] text to n 327.
[394] Chapter 4, 4.4(b) considers this within the context of adolescents, autonomy and developing capacity; chapter 4, 4.5.2 considers matters to be balanced within the context of judicial decision-making.
[395] Stalford et al (n 234) 41.

restriction of rights for two reasons: (1) to ensure that the overarching best interest principle is not engaged to justify a decision in the absence of a substantive engagement with rights and (2) to ensure that there is no abdication of responsibility to professional opinion.[396] The latter point does not mean that professionals are not entitled to make decisions; it means that such decisions are open to judicial examination.[397] At each stage of the court process, the judge must ensure that the detention remains an ongoing imperative. This means that the judge should identify that the child's behaviour remains high-risk, that appropriate services are available to meet the needs of the child in relation to those risks, that the child is engaging with those services and that the child is benefitting from such engagement; this should safeguard against preventative detention.[398] If one of those tenets is missing, the lawfulness of the child's detention must be questioned.

Regarding the second balancing exercise, the court must have regard to the supportive nature of the parental role, if one exists, with due regard for their dwindling rights.[399] Further, the state owes duties to the child and ought to be answerable for any failure to comply with same.[400]

The third balancing act comprises balancing those competing interests against structural and individual constraints.[401] While structural constraints such as the doctrine of the separation of powers and legislative provisions may not be possible to overcome, the visibility of a substantive engagement with the rights issues must form part of the decision-making process.

b. The Role of the Judge in the Decision-Making Process

Arguably, judges, while exercising independent judgment, have the most significant role to play due to their constitutional duty to protect and vindicate rights.[402] When it comes to the protection and vindication of the rights of children, the role of the judge must be even more robust because of the existence of the indeterminate best interest and welfare principles. Theoretically, substantive engagements with the rights issues and these indeterminate principles at each stage of the process would be suggestive of an engaged rights-based approach.[403] Having regard to the age of children in special care, particularly those approaching the age of majority, at a very minimum, some acknowledgement of

[396] text to n 340-343.
[397] ibid.
[398] ibid.
[399] text to n 258-260, 352.
[400] text to n 354-355.
[401] text to n 380-382.
[402] text to n 497-501 in chapter 5.
[403] text to n 373.

autonomy and developing competence ought to be evidenced; this can be achieved in part by reference to the weight of the child's views, wishes and interests.[404] Moreover, in promoting a rights-based approach and when making determinations, paternalism ought to be avoided where possible.[405] Regard ought to be had to the level of risk, the extent of the child's level of vulnerability and the relational aspect of autonomy for the benefit of the child in terms of the decision-making process. Finally, although professional and expert opinions are insightful and necessary, they ought not be immune from judicial scrutiny.[406]

4.9. Civil and Political Rights

a. Initial Stage

At the outset, the theoretical framework acknowledges that welfare dominates at this stage of the process but that is not without regard to rights. This initial intervention must be fully informed and necessary to protect the child's right to life and welfare. Due to the draconian nature of civil detention, it must be implicit when determining if special care is required in the first instance, that the behaviour of the child is so high-risk, as to automatically imply that the child's right to protection from harm is vindicated through the deprivation of liberty and must be devoid of any element of arbitrariness. The nature of the high-risk behaviour can be such that the child places him/herself at risk of serious harm, or their high-risk behaviour towards others is such that it is likely to precipitate retaliation from others, thus placing themselves at risk of serious harm from others.

Thus, the rights most affected at the start of the process are civil and political rights, principally the right to life and liberty: the right to life as the high-risk taking behaviour demonstrates that there is a risk to the child's life necessitating immediate and urgent intervention which also protects them from further harm; and the right to liberty, as it is being restricted in a controlled environment to address welfare issues, thus vindicating the right to life and the right to protection from harm, to whatever extent that may occur.[407]

Pragmatically, courts cannot micro-manage any case. The day-to-day care of children in SCUs is within the control and management of the state. How the SCO is being implemented ought to be brought before the court to ensure its implementation does not disproportionally or unjustifiably impinge further than necessary on any rights (e.g. the

[404] text to n 313-315.
[405] Daly, *Children, Autonomy and the Courts* (n 276) 282.
[406] text to n 341-343.
[407] Chapter 5, 5.2.1(a) and 5.2.1(b).

right to bodily integrity) in the advancement of the child's welfare. Any restraint used or any further infringement of the rights of the child ought to be discussed, appropriately justified, scrutinised and adjudicated upon by the court.[408]

The right to privacy is also invoked.[409] This is due to the level of sensitive and personal detail contained in legal documents and court reports, all of which goes to the heart of the child's personal and private life. Incorporated in private life are different aspects of the child's identity and physical, psychological and moral integrity, all of which must be considered within the context of the child's care.[410] Practically, this information must be available to the court to ensure that the threshold for civil detention has been reached. Therefore, there must be respect for the overall private life of the child. This mandates anonymisation of court reporting and only permitting the release of court documents to a named person, with court authority when absolutely justified in the child's best interests and with appropriate redactions.

The restriction on civil and political rights is potentially justified based on welfare needs, but infringements cannot be disproportionate, which justifies judicial oversight to ensure this does not occur.

b. Interim Stage

The justification for the continued deprivation of liberty must persist during the court review process (substantive safeguard) as a precaution against preventative detention. This includes the necessity for the continued protection of the right to liberty, the right to life and the right to protection from harm from one's own actions and actions towards others within the SCU, which may precipitate adverse reactions from other residents. All evidence to the court ought to be sworn either orally or on affidavit.

As with the initial stages of the process, any variations in the level of restrictions, which is greater or less than envisaged in the court order, must be examined given its impact on other rights (e.g. the right to bodily integrity/the right to dignity). Either way the court ought to be appraised of such variations to ensure there is an appropriate and proportionate balance between rights and welfare. Greater freedom of movement is expected during this phase as opposed to intense confinement and tighter controls. Access to family members is a right of the child that ought to be exercised and exercisable,

[408] Chapter 5, 5.2.1 (b) and 5.3.2 (a) 'greater restrictions on liberty'.
[409] Chapter 5, 5.2.1(d).
[410] Council of Europe, *ECHR Guide on Article 8 of the European Charter Rights, Right to Respect for Private and Family Life, Home and Correspondence* (Updated on 31 August 2020) 21-54.

if the child chooses. Any denial of this right to access of the child ought to be justified to the court.[411]

As welfare needs are addressed during this stage, it is envisaged that the child will interact to a greater extent with a variety of professionals and thus the issue of privacy and confidentiality of expert professional records becomes a live issue.[412] At the outset, it ought to be possible for a child to read those reports and if necessary, have any inaccuracy rectified. The sharing of expert reports must be weighed against the nebulous 'best interests' principle. Is it in the child's best interests that this data is divulged to a third party? Who requires the data and for what purpose? This is a decision for the court to determine as part of the balancing of rights for that child. Any potential breach of confidentiality, privacy rights or data protection laws ought to be weighed in the balance against other rights at issue and against the duties of the state; at a minimum the views of the child ought to be sought and with a rebuttable presumption that those views are determinative. Divulging any confidential personal (or sensitive) data ought to be specified and limited by the court. The child ought to be made aware of any release of confidential reports with reasons.

The right to privacy encompasses positive 'personality rights;'[413] this age group naturally gravitates towards peers and their autonomy (a naturally occurring developmental process) develops through relationships with other people (e.g. care staff) and that includes peers and the outside world. Detention in a SCU does not halt this process even though it potentially impacts its progression. As it is instrumental to their development, some evidence of how this is promoted ought to be visible to ensure that the child does not have to conquer this also.[414] This goes to the heart of respecting the child's right to a private life and promoting their personal development.

c. Exit

Exiting special care requires careful robust planning. It is predicated upon the understanding that the child is returning to liberty and has ceased engaging in high-risk taking behaviours while in special care, for the most part, at least. With the reinstatement of liberty, other rights are no longer impinged. As part of the planning process, it cannot be the case that a child with serious welfare needs goes from a concentrated confined environment with constant support to complete freedom. Therefore, in the lead up to

[411] Chapter 5, 5.2.1(c); 5.3.2(b).
[412] Chapter 5, 5.2.1(c) and (d).
[413] text to n 461-463 in chapter 5; Council of Europe, Guide on Article 8 (n 410) 21-55.
[414] text to n 267.

exiting special care, it would be anticipated that the child would be availing of increased unsupervised free movement outside the SCU. As such, it would be expected that some positive interaction with the outside world is being promoted, either through engagement with adults on work placements, in educational facilities or with care staff. Importantly, there is a fine line between preventative detention where a child remains in special care and where the same child avails of regular outings. Striking that balance can be challenging and judicial scrutiny is required to oversee that evaluation.[415] Access to family members should not pose any difficulties for the court given the age profile of the child.

Finally, the child should be secure in the knowledge that all records and medical files held remain confidential, and will not be shared with others, as the child ought to be permitted to move on from the process. Any requests to disclose any files, reports or personal data ought to be addressed in the limited circumstances as identified above.

4.10. Socio-Economic Rights

a. Initial Stage

Theoretically, and with consideration for the rationale of civil detention, the most pertinent socio-economic and cultural rights are the child's right to healthcare (including therapeutic supports) and education.[416] This is because the initial and ongoing detention of a child is lawful on the basis that he/she is provided with a concentrated therapeutic environment with educational supports; consequently the court ought to be informed regarding the services provided and the child's engagement within the context of both healthcare and education. In relation to healthcare, the child's presentation may highlight other health-related issues, physical or psychological, which ought to be addressed holistically. It is also anticipated that the child will have a bespoke programme devised specific to his/her needs, which may take time to formulate. Accordingly, this may feed into the interim phase.

Education, whether mainstream or informal, is considered to assist detained children in terms of overall emotional wellbeing and it can foster positive results.[417] It also assists in terms of the child's personal development. Although formal education has a lesser role to play at the initial stage given the more immediate concerns then, a broad flexible and

[415] Chapter 5, 5.3.2(a) (leaving special care).
[416] Chapter 5, 5.2.2(a) and (b).
[417] Ben Byrne, 'Troubled and Troublesome Children, Education, Participation, and Restoration' in Diahann Gallard, Katherine Evans and James Millington (eds), *Children and Their Education in Secure Accommodation, Interdisciplinary Perspectives of Education, Health and Youth Justice* (Routledge 2019) 12.

adaptable educational programme ought to be available at the outset to entice, encourage and support children in their educational pathway, personal development and developing autonomy.

b. Interim Stage

Active engagement with therapeutic supports is necessary to address high-risk behaviours and so the provision of supports remains an essential tenet justifying the detention. The absence of services and continued engagement by the child ought to give rise to a question by the court as to the lawfulness of the continued detention.

Education is generally associated with formal education, which does not suit everybody. It also includes learning essential life skills or learning a trade.[418] Although children come into special care from different backgrounds, it would be expected their cognitive abilities would be assessed, around which an appropriate programme of education or skill ought to be developed or where existing skills and interests can be nurtured and encouraged.

The child's engagement is required to maximise the therapeutic and educational benefit. Even though a child cannot waive their right to healthcare or education,[419] the corollary applies, in that a child cannot be made engage. That said, it is anticipated that the concentrated environment of a SCU is conducive to some level of engagement at least which will be useful for future continued work in this area. Non-engagement ought to question the validity of the detention.

c. Exit

The right to healthcare and the right to education remain prominent features for a timely exit from the SCU. During this phase it is expected that all high-risk taking behaviours have settled to the extent that detention is no longer required. A child deemed ready to leave special care, ought to have all assessments (health and education) completed with a clear plan going forward. While the risks related to vulnerability may always be present, albeit to a lesser extent, these may require a risk-assessment (with action to be taken) to maximise the efforts made by the child in special care.

[418] Chapter 5, 5.2.2(a).
[419] text to n 281 referencing Seymour which considers that children, unlike adults, cannot waive rights generally.

4.11. Participatory Rights

a. Initial Stage

Up to the point of admission to special care, the experiences of children may be diverse, and unless they have been in a criminal detention facility or in special care prior, they will have little experience of a contained environment. Therefore, regard must be had to the sociocultural environment within which participation occurs.[420] Nevertheless, if a child chooses not to exercise his/her participatory rights, that is his/her choice once the mechanisms are in place for involvement in the court process should they so choose. It is a matter for the child to choose how and to what extent they wish to be involved.[421]

The Lundy Model of Participation ought to apply generally from the commencement of the special care process and this stage of the process is primarily about the provision of information. Advance notice of being placed in special care may be potentially unwise, but this is dependent upon the risks involved and therefore needs to be individually risk-assessed for each child. On the other hand, once the child is taken into special care, it would be expected that the child would be informed as to what is happening and why. The child ought to be informed also, that he/she has an entitlement to attend decision-making conferences/reviews and related court applications and that he/she will have a right to voice an opinion in all matters that affect him/her.

b. Interim Stage

Participatory rights ought not be so narrowly construed to merely presenting wishes (including what interests them) or views to the court by a third party. The presentation to the court by others of the child's views has the potential to dilute advocating for those views/wishes, particularly if those views are not shared by the child's advocate (generally a GAL). Unless the child's voice is unambiguously placed before the court, the child's voice and wishes are potentially diluted out of the process.

Whether and how the child chooses to take part in the court decision-making process ought to be a matter for him/her to decide (process autonomy). In such circumstances, the child will require support and may require legal representation. At a minimum, the opportunity ought to be available for the child to express his/her view directly to the judge; but there ought to be an effective procedure in place, whereby these children can

[420] text to n 320-322 (ZPD); text to n 387-391 (relational autonomy); both ZPD and the concept of relational autonomy recognise the importance of having regard to one's sociocultural environment which is essential when considering the draconian nature of civil detention for children.

[421] text to n 316-317, process autonomy, considers the concept of enabling children choose if and how they can be involved in judicial proceedings concerning them.

attend court proceedings, either in person, or through video-link, to see how matters affecting them are decided by the court, while being able to actively participate. Further, the provision of a GAL or one's own legal representation is not a basis for the exclusion of a child from the court decision-making process,[422] unless they so choose.

It ought to be clear to the child as to how his/her views are considered and what weight is attributed to those views. The extent to which a child may influence or persuade a decision-maker at this stage is questionable; however, the existence of a rebuttable presumption that those views are determinative means that greater care will be taken in relation to the evaluation of those views, which ought to result in a level of influence to some extent. Although it is unlikely any confined child will be able to have their wish to be discharged honoured, there is no reason why some wishes could not be considered to be determinative where they will not result in any harm (never mind significant harm), such as educational preferences; any such wish of a child which is not held to be determinative, ought to be justified. Further, engagement at this early stage permits the opportunity for challenging decisions and children ought to be continually updated by the disclosure of all information to them, unless it is damaging to their welfare (which must be demonstrated and independently assessed).

c. Exit

As the child is leaving special care, decisions must be made regarding the management of aftercare matters (e.g. where the child will live/go to school/work/what supports are in place). The implementation of the Lundy Model of Participation ought to place the child in a position whereby he/she will be an active participant in all such decisions, through space, voice and audience while having the greatest ability to influence at this end stage of the process. The influence element would be best met by viewing those wishes as determinative but with a rebuttable presumption.[423] Children were acting autonomously prior to special care, so they are most likely going to continue to do so, but in the hope of making better decisions that do not place their lives at risk. Any outstanding complaints ought also to be concluded before the child finally exits special care.

[422] text to n 292-297, 316-317; Masson (n 222) 87.
[423] text to n 319.

4.12. Conclusion

There is no doubt that the special care regime has welfare considerations. Therefore, the issues must be evaluated from a justiciable rights-based perspective while simultaneously considering the importance of the provision of space for the child's developing autonomy and their need to interact with others (aside from parents and family) as part of their personal development.

The composition of the tripartite structure and the roles played by those within that structure are subject to judicial oversight, where rights, duties and welfare matters are balanced against each other during the judicial decision-making process. This applies during the initial, interim and exit stages. The theoretical framework requires an element of flexibility which accepts that the initial stages are more concerned with welfare issues that decrease, albeit sedately, as time progresses, while correspondingly, the emphasis on rights increases as time progresses towards exiting the system. This framework seeks to ensure that rights remain part of the process at all stages and are not eclipsed entirely by welfare issues, while having regard to the child's vulnerabilities within the relational context. Given that special care cases have been before the court now for approximately a quarter of a century, the next chapter thematically analyses the relevant case law for the purposes of examining the framework adopted by the High Court when protecting and vindicating rights.

Chapter 5: A Thematic Analysis of Case Law and Statute

5.1. Introduction

The objective of this chapter is to thematically analyse, primarily through case law, how judges have protected and vindicated the rights of children in special care. The case law is divided into two sections; the first concerns the exercise of the court's inherent jurisdiction; the second concerns the court's statutory jurisdiction which commenced on the 31st December 2017[424] and analyses the statutory provisions to contextualise the limited case law during this phase.

5.2. Sources of Rights

This judicial approach to justiciable rights is examined having regard to Ireland's human rights obligations under the Constitution of Ireland, 1937, case law, statutory provisions, the ECHR and jurisprudence from the ECtHR. The ECHR became relevant at domestic level when the European Convention on Human Rights Act, 2003 commenced. In addition, the relevant provisions from the UNCRC are considered.

5.2.1. Civil and Political Rights:

a. Deprivation of the Right to Liberty to Protect the Right to Life

McGee v Attorney General[425] originally established the unenumerated right to life; it is also protected under Article 2 of the ECHR and Article 6(1) of the UNCRC. Article 40.4.1. of the Constitution provides for the right to liberty. The deprivation of liberty in special care is justified to protect the right to life and this is sourced primarily under the Constitution particularly where those rights cannot be harmonised.[426] The right to liberty is protected under Article 5 of the ECHR,[427] while Article 5(d) permits the detention of children only for educational supervision or to bring a child before a competent legal authority. Further, Article 37(b) of the UNCRC provides that a child shall not be unlawfully or arbitrarily deprived of their liberty as it is a 'measure of last resort'.[428] More expansively, Part IVA of the 1991 Act imposes positive obligations on the state to bring an application for the civil detention of a child where there is 'reasonable cause to believe that the behaviour of the child poses a real and substantial risk to his/her life, health,

[424] (n 18).
[425] *McGee v Attorney General* [1974] IR 284 (SC).
[426] *HSE v SS* (n 4) para 45.
[427] See Council of Europe, *European Court of Human Rights: Guide on Article 5 of the European Court on Human Rights: Right to Liberty and Security* Updated 31 August 2020 for a comprehensive overview of Article 5.
[428] Article 2 of the EU CFR provides that 'everyone has the right to life'.

safety, development or welfare'.[429] The corollary of this positive duty implies that no child's life or welfare or safety ought to be compromised; in other words, this indirectly protects the child's right to life and the right to protection from harm. However, it is important to be mindful that the construction of this provision alongside the purposive interpretation of this remedial statute, is markedly broad. The Committee on the Rights of the Child condemns civil detention 'for children in need of protection'.[430]

b. Bodily Integrity and Dignity

The right to bodily integrity was originally established as an unenumerated right in *Ryan v Attorney General*[431] and was subsequently endorsed for children in *G v An Bord Uchtála*.[432] In addressing the right to bodily integrity in *The State (C) v Frawley,*[433] the court held that where the executive imprisons someone, then a logical follow on is that it cannot 'without justification or necessity, expose the health of that person to risk or danger'.[434] Similarly, the right to be treated with dignity (and dignity of the person) was held to be an unenumerated right in *Re a Ward of Court* (No.2).[435]

If a child is subject to restraint or isolation when detained, a breach of the child's right to bodily integrity is potentially engaged.[436] Justifying the use of restraint may be necessary and serve to protect their rights and interests, but regulation is necessary.[437] Although section 69 of the Mental Health Act, 2001 provides for the use of restraint, Part IVA makes no such provision.[438] Detention in unsuitable facilities may also give rise to potential breaches of the right to bodily integrity and dignity; therefore the standards of institutionalised care as provided for under Article 3(3) of the UNCRC should apply.[439]

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[429] CCA s 23; text to n 916-919 in chapter 8 which considers the inquisitorial, remedial statute status of the CCA 1991.
[430] Peter Newell and Rachel Hodgkin, *The Implementation Handbook of the Convention on the Rights of the Child* (3rd edn, UNICEF 2008) 562. EU CFR A6 protects the right to liberty and security; Nowak (n 135) 664; UN General Assembly Guidelines for the Alternative Care of Children A/RES/64/143 18 December 2009.
[431] *Ryan v Attorney General* [1965] IR 294 (SC).
[432] *G v An Bord Uchtála* (n 100) 536.
[433] *State (C) v Frawley* [1976] IR 365 (HC); No breach of bodily integrity in this case.
[434] ibid 374, in considering freedom from torture, inhumane and degrading treatment the court held '[i]t is to me inconceivable to associate it with the necessary discharge of a duty to prevent self-injury or self-destruction'. Applying this to special care cases indicates a high bar is set for a finding against the state on the grounds of a breach of a child's rights to freedom from torture, inhumane and degrading treatment. Consequently, this case is also relevant for the right to protection from harm.
[435] *Re a Ward of Court* (No. 2) [1996] 2 IR 79 (SC).
[436] Carr, Exceptions to the Rule (n 21); See https://www.irishtimes.com/news/wicklow-home-for-disturbed-children-still-under-review-1.316977 accessed 5 February 2018; a child detained in Newtown House, under a SCO, ran away and was found dead circa August 2000, having overdosed. Inspection report post death negatively highlighted certain practices including re restraint. *Salford City Council v NV, AM and M* [2019] EWNC 1510 (Fam) para 77 noted that although restraint is lawful, it must restrict rights and freedoms as little as possible, be proportionate, the minimum required for safety purposes and respect the child's dignity.
[437] The United Nations Rules for the Protection of Juveniles Deprived of their Liberty (The Havana Rules) para 63-64 calls for a prohibition on restraint but where in exceptional cases it is required as a measure of last resort, its use should only be 'authorised and specified by law and regulation'.
[438] text to n 599-600.
[439] Articles 3(3) (standards), Article 25 (periodic reviews); MacDonald (n 45) paras 8.159-8.166.

c. Family and Access

Two issues arise regarding family and access; the right of the parents, as legal guardians, to be involved in the process and the right of the child to have access to family members.

Article 41 of the Constitution recognises the importance of the family unit with cautious interference where parents fail in their duty or in the interests of the common good.[440] With effect from the 28th April 2015, regard must be had to the provisions of Article 42A of the Constitution. Although section 3(2) of the Child Care Act, 1991 provides for the paramountcy of the child's welfare, it is with due regard to the rights and duties of parents. Article 8 of the ECHR also provides for respect for family life and a level of protection for the *de facto* family.[441] One such procedural requirement, although not absolute, relates to 'parental involvement in the decision-making process' and having all relevant information to make informed contributions.[442] Further, there must be substantial justification for the exclusion of any parent from the process (or from access), given the potential impact on family life.[443] This is all reinforced by Articles 5, 9 and 19(1) in particular of the UNCRC.[444]

Although the CFA is obliged to facilitate access, the right of access is generally considered a right of the child as opposed to a right of the parent.[445] *Johansen v Norway*[446] is authority for the proposition that when a child is in care, any deprivation of contact must be justified.[447] Case law has determined that contact must be maintained for a successful reunification,[448] and any restrictions must be justified and proportionate and in the child's best interests.[449] If an older child in special care does not want to exercise their right to see their parents, it is difficult to see how he/she can be made engage with them. This is one right over which an older child has greater control.[450]

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[440] *NWHB v HW* (n 99); *In the Matter of JJ* (n 194).
[441] MacDonald (n 45) see generally chapter 8.
[442] Kilkelly, *Children's Rights in Ireland* (n 108) paras 8.133-8.140.
[443] ibid paras 8.133-8.140.
[444] MacDonald (n 45) paras 8.33, 8.5-8.8, noting that family life can take many forms; Article 9 provides for the right not to be separated from one's parents though there is provision for state interference in the child's best interests; Article 19 makes provision for intervention in family life if required for welfare purposes; Article 20 provides for the right to alternative care such as residential placements 'if necessary'.
[445] CCA 1991 s 37 provides that the CFA must obtain a court order to deny denied; Kilkelly, *Children's Rights in Ireland* (n 108) paras 5.067-5.070. *MD v GD* (HC, 30 July 1992), *EG v DD* (HC, 9 July 2004), *McA v McA* (HC, 17 December 2002), (these are private family law access/custody disputes); MacDonald (n 45) para 8.202.
[446] *Johansen v Norway* (1996) 23 EHRR 33.
[447] ibid para 74; text to n 411 in chapter 4.
[448] Kilkelly, *Children's Rights in Ireland* (n 108) para 9.010 citing *Johansen v Norway* (n 446). The obligation is to take 'reasonable steps' towards reunification *R & H v United Kingdom* App no 35348/06 (ECtHR, 31 May 2011) 88.
[449] Kilkelly, *Children's Rights in Ireland* (n 108) para 9.010 citing *Eriksson v Sweden* (1989) 12 EHRR 183; *Andersson v Sweden* (1992) ECHR 1, (1992) 14 EHRR 615.
[450] text to n 257-261 in chapter 4 considers the dwindling rights of parents.

d. Privacy and Private Life

Although there is a constitutional right to privacy,[451] MacDonald notes that little consideration has been given to this right generally regarding children, most probably because of the over-arching rights of the family unit.[452] He considers it a 'cardinal right of the child' and 'crucial to the child's growth as a human being'.[453] Court files/reports of children in special care would be expected to contain sensitive data going to the heart of the child's personal life which justifies their privacy rights being treated as a significant right. Despite its importance, privacy is not considered adequately under Part IVA, save for section 23NH (which provides that court proceedings must be heard 'otherwise than in public') and a reference to the maintenance of records under the Regulations.[454]

Article 8 of the ECHR, which protects one's privacy, 'protects a person's right to be let alone' is a 'negative right to be free from arbitrary interference'.[455] Van der Sloot explains however, that the ECtHR has expanded the scope of Article 8 from being simply a 'privacy right' to include 'personality rights' which 'means that potentially every aspect of one's personal development may be protected, provided that it does not violate the rights of others'.[456] Consequently, this is a 'positive right' imposing 'positive obligations' on the state.[457]

Privacy under Article 8 of the ECHR therefore includes, inter alia, a general right to personal privacy, privacy in correspondence, personal information and data.[458] This incorporates data held by the state and on matters of child protection.[459] Privacy extends to court proceedings and balanced against Article 6(1) (the right to a fair trial) in an appropriate case, may justify the exclusion of the public and or the press in the interests of justice.[460]

Although the right to personal development is now subsumed within the context of Article 8 of the ECHR, the right to development for adolescents highlights further the importance and expanding significance of the right to privacy. As far back as 1976, the Commission held that respect for private life 'comprises also, to a certain degree, the right to establish

[451] Article 40.3.1; *McGee v AG* (n 425).
[452] MacDonald (n 45) para 9.1.
[453] ibid; chapter 4, 4.9 (a) and (b) includes the right to privacy as part of the theoretical framework.
[454] Health Act 2007 (Care and Welfare of Children in Special Care Units) Regulations 2017, SI 2017/634, s 20.
[455] Bart van der Sloot, 'Privacy as Personality Right: Why the ECtHR's Focus on Ulterior Interests Might Prove Indispensable in the Age of "Big Data"' (2015) 31 (80) *Utrecht Journal of International and European Law* 25, 25-26.
[456] Ibid 26.
[457] Ibid 27.
[458] MacDonald (n 45) para 9.32-9.47; *Andersson v Sweden* (n 449), telephone call between parent and child was considered 'correspondence' under Article 8.
[459] MacDonald (n 45) para 9.46.
[460] ibid paras 9.49-9.50; *B v United Kingdom* (2001) 2 FCR 22, *P v United Kingdom* (2001) 2 FLR 261.

and to develop relationships with other human beings, especially in the emotional field for the development and fulfilment of one's own personality'.[461] This coincides with an older child's naturally occurring developmental process whereby an older child (adolescent) tends to move away from his/her family and gravitates towards peers and others outside the family circle.[462] Regarding children in special care, this can be considered within the context of the right of the child to establish relationships with peers and others outside the family and with the outside world during the period of civil detention.[463] As adolescents' horizons naturally expand as part of a developmental process both in terms of interactions with a wider circle and life experiences generally, it is expected that their requirement for privacy increases including keeping some matters private, even from family members. It is the case that this expansive interpretation of Article 8 by the ECtHR coupled with the child's naturally occurring developmental process lends itself to a greater need for such a right to privacy; this identifies the extent and significance of the positive obligations on the state to ensure that this is considered as part of any programme of civil detention.

Further, Article 16 of the UNCRC protects the child's right to privacy. The General Comment on Adolescent Health and Development in the Context of the UNCRC advocates, inter alia, privacy and confidentiality regarding advice, counselling on matters relating to health, together with mandating an obligation of confidentiality regarding medical information, the disclosure of which must be with the permission of the adolescent.[464] Regarding data stored about them, MacDonald posits that children have a right to know that such data exists, how it is stored, who can access same and that there must be a limitation placed on same.[465] This accords with some of the principles established under the General Data Protection Regulation (GDPR) and the Data Protection Act, 2018 which also apply to children as data subjects.

5.2.2. Socio-economic Rights:

a. Education

Children's education is provided for under Article 42 of the Constitution. *Crowley v Ireland*[466] interpreted the corollary of the duty on the state to provide education as a right

[461] van der Sloot (n 455) 34-35 referencing *X v Iceland* App no 6825/74 (Commission Decision, 18 May 1976).
[462] text to n 257-259 in chapter 4; text to n 931-933 in chapter 8.
[463] Council of Europe, Guide on Article 8 (n 410) para 231.
[464] CRC General Comment No. 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child; Adopted at the Thirty-third Session of the Committee on the Rights of the Child, on 1 July 2003; *CRC/GC/2003/4* (General Comments) para 7. Human Rights Committee, General Comment No.17
[465] MacDonald (n 45) para 9.18; Havana Rules (n 437) para 19.
[466] *Crowley v Ireland* [1980] IR 102 (SC).

of the child to receive it.[467] Although the court initially defined education in the scholastic sense,[468] it later adopted a wider definition of education which essentially was to enable any child maximise their potential within the parameters of their limitations.[469] This approach, particularly regarding constitutional duties owed, was endorsed in *GL v The Minister for Justice & ors*,[470] one of the first special care cases.[471]

Although the Education Act, 1998 provides for the rights of children (and others) to education,[472] Part IVA of the 1991 Act adopts the language of Article 5(d) of the ECHR regarding the provision of 'educational supervision' during the detention period.[473] The jurisprudence of the ECtHR has determined that this should not be narrowly construed to equate with traditional classroom formalities but should be broadly construed 'as embracing other aspects of local authority care'.[474] More recently, the ECtHR in *Blokhin v Russia*[475] determined that 'educational supervision' includes schooling being 'in line with the normal school curriculum' even when detention is short-term to ensure continuity.[476] The court further re-iterated that 'educational supervision' was a prerequisite for a Convention compliant detention.[477] Articles 28 and 29 of the UNCRC also provide for education.[478]

The foregoing provides the basis for educators of children in special care to craft a constructive individualised programme to meet the needs of the children detained there and to promote and nurture their specific interests which having regard to their personal development.[479]

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[467] ibid 122.
[468] *Ryan v AG* (n 431) 350; See also *O'Donoghue v Minister for Health* [1993] IEHC 2; [1996] 2 IR 20 (27 May 1993) s 4.
[469] *O'Donoghue v Minister for Health* (n 468) section 5. See also Raymond Byrne and William Binchy, 'Constitutional Law, Education' (1993) 7 (1) *Annual Review of Irish Law* 150-158, more recent research led to the conclusion that children with severe needs responded well to formal educational settings.
[470] *GL v Minister for Justice & ors* (HC, 24 March 1995).
[471] ibid 4.
[472] Education Act 1998 s 6.
[473] CCA 1991 s 23C.
[474] Jacobs, Whyte & Ovey, *The European Court on Human Rights* (5th edn, Oxford 2010) 229; *Bouamar v Belgium* (1988) Series A no 129, (1989) 11 EHRR 1, *Koniarska v United Kingdom* App no 33670/96 (ECtHR, 12 October 2000). Masson (n 222) 90-91, the author argues a more beneficial interpretation of 'education supervision' would be to ask why secure care is required and only authorise it if the proper services are in place.
[475] *Blokhin v Russia* [GC] App no 47152/06 (2016)
[476] ibid para 170; Council of Europe, ECHR Guide on Article 5 (n 427) 23.
[477] *Blokhin v Russia* (n 475) para 171. This reinforces the dicta in *DG v Ireland* (2002) 35 EHRR 1153; Ursula Kilkelly, 'Children's Rights-DG v Ireland: Protecting the Rights of Children at Risk-Lazy Government and Unruly Courts' (2001) 24 (1) *Dublin University Law Journal* 268-290.
[478] UNCRC, General Comment No. 1 (2001) Article 29 (1): The Aims of Education, CRC/GC/2002/1.
[479] Chapters 4, 4.10 (a) and (b) conders the role of education within the theoretical framework; text to n 861-863 in chapter 7.

b. Health

The right to health/healthcare does not have constitutional status.[480] Civil detention in special care cases, regardless of the jurisdictional basis, is contingent upon the provision of accommodation, education and therapeutic supports. Therefore, the usual justiciability arguments over socio-economic rights tend to be absent from these cases.[481] Further, it is not entirely clear that the provision of therapeutic supports is included as part of 'health' under Part IVA;[482] either they are or the jurisprudence of the inherent jurisdiction regarding therapeutic supports persists. In any event, given that part of the rationale for detention is to receive a therapeutic benefit, it would be difficult to envisage any argument against the provision of such supports, particularly when it was within the contemplation of the parliamentarians that children in special care would receive such supports.[483]

5.2.3. Participatory Rights

Article 42A.4.2[484] is a constitutional mandate for the Oireachtas to provide a statutory mechanism, in certain proceedings brought by the state, for the voice of the child to be heard in all matters affecting that child once the child can form a view. It is arguable that taking the views of the child into account is a procedural right under Article 40.3 (and/or Article 42A.1) of the Constitution. In *FN & ors v CO, HO & ors*[485] the court held that taking into account the views of a child (of a certain age and understanding) as mandated under section 25 of the Guardianship of Infants Act, 1964 in relation to various applications under that Act, was in fact a procedural right under Article 40.3.[486] Given the constitutional nature of the right of the child to be heard under Article 40.3, Durcan suggests that this right must apply in all proceedings which involve important decisions affecting children and not just those governed by the 1964 Act.[487]

The 1991 Act provides for the voice of the child to be heard by making the child a party to the proceedings or through the appointment of a GAL.[488] Further, the ECtHR has determined that Article 8 rights incorporate hearing the views of the child in family law

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[480] Kilkelly, *Children's Rights in Ireland* (n 108) para 11.015; General Comment No. 4 Adolescent Health (n 464) para 25, the concepts of 'health and development' are considered to include, inter alia, Article 24 which incorporates 'adequate treatment and rehabilitation for adolescents with mental health disorders' and the 'right to be treated and cared for' in, inter alia, an institutional setting.
[481] Unlike in *Sinnott v Minister for Education* [2001] IESC 63, [2001] 2 IR 545; *O'Reilly v Limerick Corporation* [1989] ILRM 181 (HC).
[482] CCA 1991 ss 23F, 23H.
[483] eg Seanad Éireann Debate, Child Care (Amendment) Bill 2009: Second Stage, 2 February 2010 https://www.oireachtas.ie/en/debates/debate/seanad/2010-02-02/10/ accessed 4 December 2019.
[484] (n 101).
[485] *FN & ors v CO, HO & ors* [2004] IEHC 151.
[486] ibid para 29.
[487] Durcan (n 313).
[488] CCA 1991 ss 25, 26 respectively.

matters, certainly within the judicial context.[489] This too incorporates procedural protections such as the views of the child being properly placed before the relevant decision-maker.[490] Although Article 12 of the UNCRC provides for the participatory rights of the child, such provisions have not been fully incorporated into Article 42A.[491]

Arguably participatory rights are the most significant rights given the impact on loss of liberty both within the court process and within special care itself.[492] Further, participatory rights afford the child in special care the opportunity to voice their interests and potentially influence their position. As discussed previously, children this age are growing in autonomy and part of that is achieved through developing relationships with peers and others outside the family unit.[493] The more expansive scope of Article 8 generally provides for respect for private life in unexhaustive terms such as the child's physical right to personal development and developing relationships.[494] These rights fit within the context of the child's naturally occurring developing capacity and autonomy. *Gillick* competence has not been endorsed in this jurisdiction and even if it were, it is unlikely that any child in special care would be regarded as *Gillick* competent because of the serious nature of welfare issues.[495] But that does not mean that the child is not growing in autonomy or that the developmental process for developing relationships has been suspended while in special care. Not only is participation in decision-making processes important because it aids personal development, it is also essential for developing relationships and one's autonomy.

5.3. The Inherent Jurisdiction

5.3.1. The Court's Overall Framework: Rights, Duties and Safeguards

The court's overall framework of rights, duties and safeguards developed incrementally and was influenced by various factors including the urgency of cases necessitating an immediate response, the behavioural challenges of the children and the absence of a statutory basis.[496]

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[489] Kilkelly, *Children's Rights in Ireland* (n 108) paras 7.018-7.023 referencing *Sommerfeld v Germany* [GC] (2004) 38 EHRR 35 and *Sahin v Germany* [GC] (2003) 36 EHRR 565; ECHR Article 6 (the right to participate in one's right to a fair trial); Article 24 (1) of the EU CFR provides for child participation.
[490] MacDonald (n 45) para 6.80.
[491] Dáil Éireann Debate, Volume 775 Number 3, Thirty-First Amendment of the Constitution (Children) Bill 2012, Second Stage (Continued), 25 September 2012, 38.
[492] Chapter 4, 4.11 considers participatory rights an important part of the theoretical framework.
[493] Chapter 4, 4.4(b) considers adolescents, autonomy and developing capacity; text to n 413-414 in chapter 4; text to n 461-463; text to n 931-933 in chapter 8.
[494] Council of Europe, Guide on Article 8 (n 410) 21-55.
[495] *Gillick v West Norfolk and Wisbech Health Authority* [1986] AC 112,173; *DH & Ors, v Child and Family Agency* [2019] IEHC 459 para 36.
[496] Department of Health, *Report of a Working Group on Child and Adolescent Psychiatric Services in the Eastern Health Board Area* (n 117); a review of adolescent psychiatric services identified increasing referrals to residential

The court has the power to do whatever is necessary to vindicate rights[497] and for many years, judges have concerned themselves with protecting and vindicating rights. Case law identifies that judges view their jurisdiction as being sufficiently flexible to achieve this;[498] an approach subsequently endorsed in special care jurisprudence.[499] Such is the importance of protecting fundamental rights, Denham J. (dissenting) in *TD v Minister for Education*[500] opined that 'such a duty to guard fundamental rights should not be shirked or abdicated'.[501]

In *The People v Shaw*[502] the court considered that this obligation fell on each arm of the state having regard to Article 40.3 of the Constitution.[503] In her dissenting judgment in *TD,* Denham J. considered that the court had an additional function, that being the constitutional duty to protect fundamental rights.[504] Murray J. opined that mandatory orders to vindicate rights could only be made where the state acted in 'conscious and deliberate' breach (alongside 'bad faith or recklessness') of its obligations.[505] The majority decision of the Supreme Court in *TD* has been criticised for the lack of weight that ought to have been attributed to children's rights and is illustrative of deference to the separation of powers at the expense of fundamental rights.[506] Regardless of this latter point and of the extent to which responsibility falls on each arm of government, what is clear is that the court accepts that it has a role to play and a duty to fulfil regarding the protection and vindication of constitutional rights.[507]

MacMenamin J. noted the child's best interests and particularly the child's constitutional rights underpin the overall framework in the exercise of the inherent jurisdiction.[508] In *HSE v SS,*[509] the court held that SCOs are underpinned by a therapeutic and educational

assessment centres of children with conduct disorders; it further noted the need for services to assist those with 'acute psychotic disorders'.

[497] *DG v EHB* (n 114) 522; *The State (Quinn) v Ryan* [1965] IR 70 (SC), 122 where the court held '[a]s a necessary corollary, it follows that no one can with impunity set these rights at nought or circumvent them, and that the Courts' powers in this regard are as ample as the defence of the Constitution requires', a proposition endorsed in *DB v Minister for Justice* [1999] 1 IR 29, 40.

[498] *The People v Shaw* [1982] IR 1 (SC); *G v An Bord Uchtála* (n 100); *MF v Superintendent, Ballymun Garda Station* [1990] 1 IR 189 (SC) 205 (detention to protect life/health for the vindication of rights is permissible); Blánaid Ní Bhraonáin, 'Children's Accommodation and the Irish Courts-Part 1' (2019) 37(4) *Irish Law Times* 54-57; Blánaid Ní Bhraonáin, 'Children's Accommodation and the Irish Courts-Part 11' (2019) 37(5) *Irish Law Times* 70-72.

[499] *HSE v SS* (n 4) para 60-72.

[500] *TD v Minister for Education* (n 340).

[501] ibid 314; text to n 340-343 in chapter 4.

[502] *The People v Shaw* (n 498).

[503] ibid 62.

[504] *TD v Minister for Education* (n 340) 312.

[505] ibid 337.

[506] Kilkelly, *Children's Rights in Ireland* (n 108) paras 8.117-8.121

[507] *WHB v KM* (n 353) 510.

[508] *HSE v SS* (n 4) para 38; Estelle Feldman, 'Children's Rights, Children in Care' (2007) 2 1(1) *Annual Review of Irish Law* 100-106.

[509] *HSE v SS* (n 4).

rationale.[510] Although the court has determined that rights are exercised by others on behalf of the child due to their 'legal disability',[511] the courts have called for a prioritisation of rights if a 'harmonious' balancing of rights is not possible.[512] It has been determined that the right to life and welfare may trump the right to liberty, albeit temporarily, where such rights cannot necessarily be harmonised.[513]

Duties and obligations owed to children in special care have been described in more general terms, particularly in relation to welfare. If the child's needs are not being met by the parents/guardians, the state is constitutionally obligated under Article 42.5 to provide for those children.[514] Although no right is absolute, the court refrained from determining the extent of the duty owed to the children by the state.[515] That said, the court has noted the state has a statutory and a constitutional duty to promote the child's 'psychological', 'physical' and 'emotional welfare'.[516] The duties on the state regarding education and its purpose are more easily discernible, in that the state is under a constitutional duty in the provision of education,[517] which ought to provide the opportunity to make the best of one's potential.[518]

Safeguards determined by the court are that SCOs are 'protective not punitive', must be short term and subject to review, to ensure rights continue to be properly balanced and appropriately prioritised.[519] Further, for the purposes of vindicating rights, the court called for the close monitoring of such cases vis-à-vis the length of detention and considered that this may result in affording the minor child the full range of procedural rights as in *Re Haughey*.[520]

Children's rights appear central to the court's framework. Further, the safeguards identify that each case is subject to systematic judicial oversight. How this interacts with the duties on the state is considered within the context of a more in-depth analysis of the rights themselves.

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[510] ibid paras 22-23.
[511] *TD v Minister for Education* [2001] 3 IR 69, 81; The exercise of rights was addressed within the context of locus standi.
[512] *DG v EHB* (n 114) 536.
[513] *HSE v SS* (n 4) para 45.
[514] *FN v Minister for Education* (n 3) 416; *DT v Eastern Health Board* (HC, 24 March1995) 2.
[515] *FN v Minister for Education* (n 3) 416
[516] Children Act 1997, ss 3, 24; *HSE v SS* (n 4) para 27; *Kinsella v Governor of Mountjoy Prison* (n 189) the court held that Article 40.3 protected the mind and personality.
[517] *GL v Minister for Justice* (n 470).
[518] *O'Donoghue v Minister for Health* (n 468) 38.
[519] *HSE v SS* (n 4) paras 22, 90-96.
[520] ibid 93; *Re Haughey* [1971] IR 217 (SC)

5.3.2. Civil and Political Rights

a. Detention: Deprivation of the Right to Liberty to Protect the Right to Life

Case law demonstrates many aspects to detention. Some general overall conclusions can be drawn such as:

- there must be an appropriate justification for detention orders (running away is not a justification)
- in the absence of a continuing therapeutic basis, there is no jurisdiction to detain
- if there is a more appropriate statutory mechanism under which a child could be detained, that ought to be invoked[521] and
- a risk of future harm does not justify detention.[522]

These overall propositions respect the right to liberty by ensuring that any restriction on the right is warranted.

Detention Abroad

During the development of the special care process in Ireland, the support services were sometimes inadequate and facilities with greater resources were sourced abroad.[523] The mechanism by which some children were transferred abroad was under Article 56 of Council Regulation 2201/2003 or as its commonly known, Brussels II (*bis*). The requirement to address all procedural matters, including appropriate consents and declarations, had to be addressed prior to the child being permitted to physically transfer;[524] this process had to be repeated for each renewal of the order. To circumvent this, orders were made for longer than required,[525] the purpose of which was to avoid a 'bureaucratic procedural hurdle'.[526] Having been placed abroad, other issues arise, for example, accommodating those complex needs upon return to Ireland (or when they reach the age of majority).[527] Consequently, it has occurred on occasion that children were left abroad in a different cultural context, away from family under a detention order, while a

[521] *HSE v K* (n 125) para 52-54.
[522] *HSE v TM* [2016] IEHC 593 para 75, the court relied on the dicta of O'Donnell J in *DPP v Anthony McMahon* [2011] IECA 94.
[523] *Health Service Executive v JJB* (HC, March 2010); *Eastern Area Health Board v M(P) & P(M)* (HC, 5 February 2002) Finnegan J, the High Court held that the District Court could direct that a child be placed in residential care abroad. CFA, *Review of Adequacy of Services for Children and Families* (2015) para 4.2.8 identified that needs are prioritised over location.
[524] Case C-92/12 PPU *Health Service Executive v SC, AC and Attorney General* (Second Chamber, April 26 2012) paras 95, 133 (preliminary ruling); UK authorities must first provide their consent to take the child and a declaration that the Irish High Court order will be enforced is also required.
[525] ibid paras 140-146; Eltin Ryle, 'Duration of Secure Care Placements-The "S.C." Case' (2013) 16(2) *Irish Journal of Family Law* 41-48. When a child reaches the age of majority, an application must be made to the Court of Protection in the UK under their Mental Capacity Act 2005 (Part 4 of Schedule 3) for an order seeking both recognition and enforcement of the Irish High Court Order-in this regard *Health Service Executive v JB* [No. 2] [2016] IEHC 575.
[526] Ryle, Duration of Secure Care Placements-The "S.C." Case (n 525) 47-48.
[527] *HSE v KW* [2015] IEHC 215; *HSE v KW* [2015] IEHC 741; *Health Service Executive v TN* [2016] IEHC 593, *HSE v JB* (n 525).

step-down facility was being sourced, even though there was no longer a therapeutic benefit to their detention.[528] There are obvious risks to rights with this process:

1. The legal basis of detention if there is no therapeutic benefit to that 'holding' detention becomes questionable
2. It is unclear how the court can protect and vindicate rights when the child is in another jurisdiction
3. There is a risk of preventative detention when detention orders are made for longer than required for the purposes of addressing procedural issues.

In addition, the court, in *GH v HSE*[529] held, that detention under the specific circumstances of this case in St. Patrick's detention centre, while awaiting transfer abroad, was the 'least worst solution'.[530] It is more likely than not, that concern for the child's welfare would justify such potential breaches. While this may be a transferable argument to other aspects of the issues raised, a proposition such as 'this is the best we can do for now and so be it,' cannot be said to be a true protection and vindication of a child's right.

Suitability of Detention Facilities

A lack of suitable facilities generally to detain, potentially impacts the right to bodily integrity. This is so even though the lawfulness of such unsuitable placements was, for the most part, accepted in earlier case law.[531] The impact of detention in inappropriate facilities has been considered unacceptable due to its impact on inter alia, the right to liberty/bodily integrity but it is sourced primarily in dissenting opinion.[532] Just because an unsuitable institution might be the best available option out of a poor range of options, does not mean that the right to bodily integrity is not impacted.

Greater Restrictions on Liberty

This arises within the context of placing a child in structured time (or single separation or single occupancy) away from others within the detention centre.[533] Although it would

[528] *Child and Family Agency v CM* [2017] IEHC 224 para 12. Although this case was mainly about costs, it is illustrative of the difficulty of a transition to Ireland from abroad.
[529] *H v HSE* (n 191).
[530] ibid para 20.
[531] *DG v EHB* (n 114); *FN v Minister for Education* (n 3) 414-415 where the court accepted, for the most part, the criticisms of counsel regarding the proposed detention unit; *GL v Minister for Justice* (n 470); *DT v EHB* (n 514); *DD v Eastern Health Board & ors* [1995] 5 JIC 301; *DB v Minister for Justice* (n 497); *H v HSE* (n 191) paras 17-20.
[532] *DG v EHB* (n 114) 538, dissenting opinion of Denham J.
[533] CFA Policies and Procedures for Special Care Services Booklet, 11 November 2014, 'structured time away' refers to 'time away from peers with intense staff intervention based on an individualised programme' and can only be done if there is no less intrusive measure available and only if it is in the child's best interests; DCYA, *A National policy on Single Separation Use in Secure Accommodation for Children: Special Care and Oberstown* (2016) <https://www.dcya.gov.ie/documents/publications/20180109NationalPolicyOnSingleSeparationOberstown.pdf> accessed 19 July 2019; *Child and Family Agency v Q* [2016] IEHC 335 paras 72-75, 'single separation' is a measure

appear from case law that children are occasionally subject to such time away from other occupants within the special care facility, the extent to which this happens, or for how long, is not apparent, save for one case in particular, *CFA v Q.*[534] The court pronounced that the extent of the deprivation of liberty in this case was not one envisaged by its order, which was exacerbated by the fact that neither the court nor the GAL had been informed of same.[535] There was no declaration by the court of *Q*'s breach of rights in this case, and there is nothing in this lengthy judgment to suggest that an application was brought on her behalf seeking any such declaration, or any other remedy.

This decision is in stark contrast to the analysis of a somewhat similar issue (separation and deprivation of contact from peers), albeit within a criminal context, in *SF v Director of Oberstown Children's Detention Centre & ors.*[536] The court called for and emphasised the importance of procedural safeguards to ensure a proportionate response, and to ensure that the child is not being harmed by this measure.[537] Aside from ensuring that separation ought only be for as long as required, such minimum safeguards comprise:

- a formality regarding the decision taken
- periodic reviews by senior persons
- a notification and information to the child regarding the length of the separation or
- what the child needs to do to bring the separation to a close (if that is within their power)
- space to be made for the voice of the child within the decision-making process and
- appropriate monitoring to avoid harm.[538]

If this level of procedural requirement is what is expected for children who are detained for having committed a criminal offence (who are also 'both vulnerable and dangerous at

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of 'last resort where the young person is separated from peers and staff members for their safety' and is reviewed every half hour; 'single occupancy' is where a child is 'placed living on their own with no other young people for a specified period of time and staff work alongside them. This should be done with the agreement of the care team, the clinical team and the guardian ad litem.'

[534] CFA *v Q* (n 533).

[535] ibid paras 7-89; GAL gave evidence of *Q* being locked up for lengthy periods, the Gardai had interviewed and cautioned her, she did not have enough toilet paper, furniture or stimulation and *Q* was described as 'dishevelled, pale, withdrawn and bored'. Although accepting that *Q* was liable to self-harm and the staff had a difficult job, the GAL was of the view that something went 'very wrong', evidence that was accepted by the court.

[536] *SF v Director of Oberstown Children's Detention Centre & ors; LC v Director of Oberstown Children's Detention Centre & ors; TG v Director of Oberstown Children's Detention Centre; PMcC v Director of Oberstown Children's Detention Centre* [2017] IEHC 829

[537] ibid para 118.

[538] ibid paras 116, 119; para 122 the court conceded that it is within 'the margin of appreciation' of the Executive regarding the necessity to continue the detention as they are best placed to assess the risk.

the same time'),[539] similar/modified safeguards ought to be evident within the context of court proceedings for children civilly detained.[540]

Leaving Special Care

Discharging a child from special care must be a carefully managed to ensure that the good work done in special care does not unravel and to ensure that the rights of the child continue to be protected and vindicated.[541] CCLRP case reports identify cases where children appear to have been detained because, inter alia, there are no proper follow-up services available into which they can transition, thus requiring an extension of a SCO.[542] This potentially amounts to preventative detention.[543] In *HSE v H*[544] the court noted that some of the remedial work done in special care was being undermined by an early move out of the process and formed the view that this practice appeared to prioritise liberty over welfare.[545] Arguably, this also arises where the therapeutic benefit of detention has stagnated or fails to produce any result whereby detention has become counter-productive.[546] It must be recognised however, that this may only be visible retrospectively. This illustrates the complexity and challenges for the court in terms of trying to strike the balance between ensuring against preventative detention and avoiding early release from a rights-based perspective (as against welfare needs). The court deals with these issues through ongoing monitoring, even after the child has been discharged from special care.[547]

b. Family and Access

Although parental powers are in abeyance during the special care process, case law identifies and acknowledges that parents do have rights and parental involvement is welcome once it is beneficial to the welfare of the child; although it also notes that it is not uncommon for parents to be absent from the proceedings for a variety of reasons.[548] Although there is limited reporting on this issue, it appears the court makes inquiries of

[539] ibid para 2; Carr, Young People at the Interface of Welfare and Criminal Justice (n 4) 47-51, Carr posits that services ought to be structured by reference to the needs of the child as opposed to welfare and justice.
[540] *Salford City Council v NV* (n 436) para 77; DCYA, *A National Policy on Single Separation Use in Secure Accommodation for Children* (n 533); text to n 408 in chapter 4.
[541] CAAB, *Thematic Analysis of Irish Literature* (n 116) para 10.6.3 where 'the absence of aftercare and throughcare was identified as seriously undermining the work of SCU'.
[542] CCLRP, 'High Court Hears Boy Cannot Return to Ireland because of Lack of Services' (2015) 1 (4); CCLRP, 'No After-Care Plan for Older Teenager with Mental Health Needs' (2017) 1 (3) and (2017) 2 (15).
[543] text to n 415 in chapter 4.
[544] *Health Service Executive v H* [2009] IEHC 406.
[545] ibid para 5.
[546] *HSE v TM* (n 522); *HSE v JB* (n 525).
[547] For example *HSE v K* (n 125).
[548] *TD & ors v Minister for Education & ors* [2000] IR 62, 66; *HSE v SS* (n 4) paras 82-89; MacMenamin J 'The State, the Courts, and the Care of Minors at Risk' http://www.ihrec.ie/download/pdf/paper20161014_childlaw_macmenamin.pdf accessed 26 July 2017, 13-14.

the professionals regarding the most appropriate way to address any impasse with parents.[549]

c. Privacy

Privacy under the inherent jurisdiction is considered within the context of court hearings and court papers/professional reports. In terms of court proceedings, the child's right to privacy is balanced against the hearing of cases in public (Article 34.1 of the Constitution) by imposing reporting restrictions under section 27 of the Civil Law (Miscellaneous Provisions) Act 2008; breaches of these statutory provisions carry heavy penalties. It is not clear from the limited case law addressing privacy of professional reports, what safeguards or specific procedures are in place regarding the release of documents,[550] although these reports are covered by the in camera rule.

A question arises as to whether the in camera rule protects the child or the experts. The *ex-tempore* judgment of Twoomey J. in the *HSE v B and Baby B*[551] (not a special care case) held that the purpose of the in camera rule was not to protect those who give expert evidence (oral evidence in this case) but to protect minors (which in this case would have been from potentially harmful publicity).[552] Yet in *HSE v SC*[553] the court afforded more consideration to the right of professionals to express themselves freely (in written reports) and without being compromised.[554] While acknowledging that privacy/family rights were engaged, the court did not 'find it necessary' to address all matters in detail, including those specific rights of the child/now adult.[555] Although the court did not grant permission at that time for the release of the documents,[556] it left the possibility open. That said, in another case, the young person (having reached the age of majority and transitioned back to Ireland), wanted to maintain confidentiality over her medical records.[557] The court opined that a 'broad outline of her progress and treatment' could be reported to her parents given their concern about her welfare.[558]

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[549] CCLRP, 'Child "Votes with Feet" to Return Home from Step-Down Placement' (2017) 1 (4), 3-4 is illustrative of issues that can arise.
[550] *CFA v Q* (n 533) para 131, the court detailed the documents to be compiled in advance of an application which would be shared with various person; the discretion afforded to the social worker does not seem to have inbuilt safeguards regarding privacy rights.
[551] *Health Service Executive v B and Baby B* [2016] IEHC 605.
[552] ibid paras 31-36.
[553] *Health Service Executive v SC* [2013] IEHC 516.
[554] ibid para 10.
[555] ibid para 9.
[556] ibid, the court expressed concern about the fact that the child-care proceedings were over and the broad terms of the request.
[557] *Health Service Executive v KW* [2015] IEHC 215.
[558] ibid para 72.

This demonstrates the difficulty in vindicating the right to privacy. Principles have not been established in case law to protect the child's right to privacy, save for court hearings. Although the child's personal data can be transmitted to third parties if in the child's best interests, that does not negate the need for the establishment of appropriate safeguards, ensuring that only those who require the data receive the minimum they require, and use it for a specified purpose, which should be with the knowledge of the child.[559]

5.3.3. Socio-economic Rights

a. Education

Case law demonstrates two things regarding education: first, it identifies glimmers of children engaging with educational programmes where they have had limited engagement prior to special care; second, it shows the emphasis and importance the courts place on education for children in special care.[560] Case law demonstrates that a judge can take a pro-active role in terms of education if required, for example, by ordering educational assessments.[561] Where children express a view in terms of education/training, the court's vision is that this ought to be supported.[562] What is not evident from case law is the criticism of Ms. Justice Bronagh O' Hanlon in submissions made elsewhere, where she took the opportunity to express dissatisfaction with the Department of Education's imposed ratio of 6:1 in one special care school; a concern emanating from the 'age mix and security level risk'.[563] Although the court takes the right to education seriously, the nature, standard or extent of education provided is not visible in case law.

b. Health

The issues surrounding the provision of health-related services in case law are more systemic than concerning the individual right of the child to a health-related service. The importance of the provision of therapeutic supports has been accepted almost from the start of the emergence of the cases. What is evident from case law and other reporting is that sometimes there are difficulties regarding the provision of therapeutic services either from a resource/bureaucratic perspective or where the appropriate steps have simply not

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[559] Chapter 4, 4.9 (a), (b), (c) consider this within the context of the theoretical framework.
[560] *HSE v R* (n 132), despite the issues, the child's plan was to sit the leaving certificate examination; SRSB, *The Impact of Placement in SCU Settings* (n 122) 39, noted '[e]ducational disadvantage and generally negative educational experiences are a significant problem area for young people in need of placement in special care'. Chapter 7, 7.4 (b), 7.6 discusses education further and empirical research identifies that this remains the case; see generally Conor O'Mahony, 'Education, Remedies and the Separation of Powers' (2002) 24 (1) *Dublin University Law Journal* 57-95.
[561] *CFA v Q* (n 533) para 139.
[562] *HSE v JB* (n 525) paras 119-120, though over eighteen years of age, his education suffered periods of interruption; see chapter 4, 4.10 (b) and (c).
[563] Ms. Justice Bronagh O' Hanlon, 'Submissions from Ms. Justice Bronagh O' Hanlon in relation to the survey concerning a policy approach to the reform of the *guardian ad litem* arrangements in proceedings under the Child Care Act 1991 to the DCYA' < http://bit.ly/2kDo9wf> accessed 8 February 2017 para 6 under 'Further Conclusions.'

been taken.[564] Some of these issues tie in with the earlier cases which identified the absence of appropriate facilities in the first instance in terms of providing the relevant services to children. More laterally, a bureaucratic obstacle has emerged which is that of the two main providers of services to children, one is under the control of the HSE (CAHMS) and the other is under the control of the CFA (ACTS), leading to a child falling through the gap.[565] This matter was subsequently addressed through a joint protocol between the two agencies.[566]

5.3.4. Participatory Rights

GALs are usually appointed in special care cases as a mechanism for the voice of the child to be heard.[567] Although unregulated by statute,[568] judges consider that they play a crucial role[569]- not just for litigation purposes but also in respect of 'checks and balances' for a child in special care.[570] The dual responsibility of the GAL (reporting the child's wishes and what it in the child's best interest) may conflict;[571] this is unsurprising as when they conflict they are irreconcilable duties. The statute provides that a child may have a GAL or personal representation, but not both.[572] That said, one case identifies a young person having both legal representatives and a GAL, even though she had just reached the age of majority.[573] This case is most useful as it demonstrates that although her wishes were portrayed to the court, the GAL pursued and advocated for her 'best interest' and 'vulnerable' status and her continuing need for treatment/detention; her own legal team argued she had capacity, could therefore not be detained and should be returned to Ireland in line with her express wish.[574] This must raise a question regarding the either/or scenario, but particularly for older children who are growing in capacity. This is not something upon which the court expressed a view.[575]

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[564] CCLRP, 'Suicidal Teenage Girl Transferred to Specialise Unit Abroad' (2017) 2 (9) where a child had been detained for nine months in special care in the absence of a psychiatric assessment 'despite repeated requests from her mother'.
[565] *CFA v Q* (n 533) paras 30-31, 125-126.
[566] CFA and HSE, *Joint Protocol for Interagency Collaboration* (n 154).
[567] RSC, Order 15; CAAB, *Giving a Voice to Children's Wishes, Feelings and Interests* (May 2009) provides an overview/ recommendations regarding the role of the GAL; Conor Dignam, Diane Duggan, Natalie McDonnell, 'Cherishing the Children?' (2016) 21(1) *Bar Review* 21-24.
[568] Aoife Daly, 'Limited Guidance: the Provision of Guardian ad Litem Services in Ireland' (2010) 13(1) *Irish Journal of Family Law* 8-11; Nicola Carr, 'Guiding the Gals: A Case of Hesitant Policy-making in the Republic of Ireland' (2009) 12 (3) *Irish Journal of Family Law* 60-71; Child Care (Amendment) Bill 2019 (lapsed) sought to regulate the position of the GAL.
[569] For example, MacMenamin J The State, the Courts, and the Care of Minors at Risk (n 548).
[570] *CFA v Q* (n 533) para 122.
[571] *HSE v DK* (n 125) para 59 considers the role of the GAL.
[572] CCA 1991 ss 25, 26.
[573] *HSE v KW* [2015] IEHC 215; *HSE v KW* [2015] IEHC 741.
[574] ibid.
[575] Chapter 4, 4.11, the theoretical framework argues for meaningful participatory rights during the court process.

Apparent also, (more particularly from CCLRP reporting as opposed to case law), is the direct communication between children and the judge. For example, an inquiry held by the court into the psychiatric services in a SCU was prompted by a letter from a detained child which the judge took to be a letter of complaint. The inquiry resulted in a protocol regarding the provision of therapeutic services to children in special care.[576] Such scenarios demonstrate the willingness of the court to hear and listen to what the child is saying.[577] The extent to which this is given traction, save for the limited reporting, is difficult to identify.

5.3.5 Limits on Judicial Power

In analysing the role of the court (when dealing with issues such as policy and rights), de Blacam suggests that in default, the duty to vindicate rights ought to take precedence over deference.[578] *VQ v Judge Horgan & CFA*[579] is illustrative of the difficulty that can arise when dealing with what might be considered policy considerations. In this case, the High Court considered the extent of the District Court's jurisdiction under section 47 of the 1991 Act.[580] The court drew a clear distinction between a policy-based decision, and one based on an individual case, which can impact state resources.[581] The court noted that the policy considerations had already been determined by the Oireachtas including, inter alia, by 'vesting a wide jurisdiction in the District Court under s. 47' and that the relevant funds had already been allocated. What was required was a determination regarding the 'interest of the child' which may have resulted in the disbursement of already allocated funds.[582] Further, in *Cronin v Minister for Education*,[583] the court granted mandatory interlocutory orders regarding the provision of tuition to a young child with special needs. The court held that it did not 'fall foul of *TD'* as the relief that was being granted was

[576] CCLRP, 'High Court Judge Refuses to Place a Child in Secure Care Unit Pending Inquiry into Psychiatric Services' (2015) 4 (3); CCLRP 'High Court Conducts Inquiry into Provision of Psychiatric Services in Secure Care Unit' (2016) 1 (4) Phase Two; CCLRP 'Protocol on Special Care Processes Approved in High Court' (2016) 1 (5) Phase Two; CCLRP, 'Child "Votes with Feet" (n 549) whereby the child wrote to the judge indicating that 'access to her father was central to her wishes' to which the court responded, inter alia, that it was 'essential her wishes are borne in mind today'.
[577] Aoife Daly, 'Hearing Children in Family Proceedings-What we can Learn from Global Practice' (2016) 26 *Seen and Heard* 42; although within the context of family law, issues raised re hearing the child and due weight has relevance.
[578] Mark de Blacam, 'Children, Constitutional Rights and The Separation of Powers' (2002) 37(1) *The Irish Jurist* 113-142 under 'The Separation of Powers Reconsidered.'
[579] *VQ v Horgan* (n 353).
[580] ibid para 5; CCA 1991 s 47 permits the court make directions on questions affecting the welfare of a child in state care; Sinead Kearney and Eltin Ryle, 'The Allocation of Scarce Resources: The Limits of Section 47 of the Child Care Act 1991' (2015) 18 (4) *Irish Journal of Family Law* 89-94.
[581] *VQ v Horgan* (n 353) para 48.
[582] ibid paras 50-52.
[583] *Cronin v Minister for Education* [2004] IEHC 255.

specific to this particular child's needs and 'merely extends a programme….already sanctioned'.[584]

The court must uphold and protect constitutional rights. Even though policy matters may arise, cognisance can be taken of the decisions in *VQ* and *Cronin*, bearing in mind that funds have been allocated for the provision of special care in the first instance.

5.4. Article 42A and the Statutory Jurisdiction

Article 42A of the Constitution came into effect on the 28th April 2015.[585] Article 42A.1 'recognises and affirms the natural and imprescriptible rights of all children' which the state shall as far as possible, by its laws, protect and vindicate. Article 42.4 mandates 'provision shall be made by law' for consideration of the paramountcy of the best interest principle in certain proceedings brought by the state, including special care. Constitutional rights exist regardless of whether the Oireachtas legislates for those rights, but when it does legislate, there is an onus to respect and vindicate such rights and to do so in line with Article 42A.

The provisions contained under Article 42A are incremental to those under Article 40.3.1,[586] however, enough time has not yet elapsed to fully evaluate the effectiveness of these principles.[587] Older case law identifies the subordinate position of children under the Constitution vis-à-vis their parents, which explains why it is important that the amendment is implemented effectively.[588] At a minimum, it would be expected that Part IVA would reflect the changes mandated by Article 42A. Notwithstanding the fact that the Child Care (Amendment) Act, 2011 (which introduced the new Part IVA) was enacted prior to the constitutional amendment, the debates were occurring around the same time.

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[584] ibid paras 37-38; the court reporter noted that although this decision was appealed, the Supreme Court made a consent order; Conor O'Mahony, 'A New Slant on Education Rights and Mandatory Injunctions' (2005) 27(1) *Dublin University Law Journal* 363-367.

[585] (n 101).

[586] Dáil Éireann Debate, Volume 776 Number 2, Thirty-First Amendment of the Constitution (Children) Bill 2012, Committee and Remaining Stages (Continued), 27 September 2012, 44.

[587] Alan DP Brady,' Children's Constitutional Rights: Part, Present and Yet to Come', *Children's Rights Alliance Seminar*, 6 December 2018 para 1; *In the Matter of JJ* (n 194).

[588] *CC v Ireland* [2005] IESC 48, [2006] 4 IR 1; *A v The Governor of Arbour Hill Prison* [2006] IESC 45 (striking down of strict liability in cases of statutory rape); *Re JH* (n 98); *N & anor v Health Service Executive & ors* [2006] IEHC 278, [2006] IESC 60; See generally Frank Martin, 'Parental Rights to Withhold Consent to Medical Treatment for their Child; A Conflict of Rights?' (2001) 19 *Irish Law Times* 114; Raymond Arthur, 'Medical Treatment; The Welfare of the Child v The Wishes of the Parents' (2002) 5 (1) *Irish Journal of Family Law* 20; Ursula Kilkelly and Conor O'Mahony, 'The Proposed Children's Rights Amendment: Running to Stand Still? (2007) 10 (2*) Irish Journal of Family Law* 19-25; Daly, The Battle(s) over Children's Rights in the Irish Constitution (n 234) 501-513; Feldman, Informed Consent (n 98) 185; Máiréad Enright, 'Interrogating the Natural order: Hierarchies of Rights in Irish Child Law' (2008) 11 (1) *Irish Journal of Family Law* 3; O'Shea (n 98); Children's Rights Alliance, *Children's Referendum: A Legal and Policy Overview* September 2012; Gene Carolan, 'Their Day in Court: The Right of Children to be Heard in Judicial Matters Affecting them -Part 1' (2013) 31 (7) *Irish Law Times* 103-106; Gene Carolan, 'Their Day in Court: The Right of Children to be Heard in Judicial Matters Affecting them -Part 11' (2013) 31 (8) *Irish Law Times* 117-120; Gene Carolan, 'Their Day in Court: The Right of Children to be Heard in Judicial Matters Affecting them -Part 111' (2013) 31 (9) *Irish Law Times* 135-137.

Therefore, with the issue of children's rights on the agenda and foremost in the minds of the parliamentarians, some traces of rights would be expected in the Child Care (Amendment) Act, 2011 as it relates to Part IVA.

According to Dáil and Seanad debates, underpinning Part IVA is a desire to statutorily regulate the special care processes and procedures while safeguarding the best interests of children who need care and protection.[589] The debates demonstrate that there were concerns which touched upon the rights of children, such as the effectiveness of the voice of the child, the mandatory provision of aftercare, a preference for debating the Bill with the children's rights Article in place, and a suggestion that the 2004 Regulations governing the operation of special care ought to be incorporated into primary legislation.[590] Despite this, Part IVA has a court-oriented framework (focussing on procedure and process) with the state being entrusted with far-reaching powers to 'control' the child and the care he/she receives. Consequently, Part IVA is prescriptive, protectionist and paternalistic.[591] This result reflects Seymour's view exactly; the primary purpose of the legislation is to put appropriate procedures in place and its secondary purpose is a control mechanism over troublesome children.[592]

Rights are not part of the language of Part IVA.[593] As it has not been amended to reflect the provisions of Article 42A, it is arguably not compliant with Article 42A. For example, Article 42A.4.1 provides for the paramountcy of the best interest principle in certain proceedings brought by the state (such as special care proceedings) which is unqualified. Part IVA does not provide for the 'paramountcy' of the best interest principle. What it does provide for, is upon being satisfied of certain matters, the court can make a detention order for the purposes of providing special care, if it 'is in the best interests' of the child.[594] This dilutes the 'paramountcy' principle. Although the Child Care (Amendment) Bill 2019 makes provision for the 'paramountcy' principle (and the views of the child), this Bill has lapsed.[595] In addition, Part IVA does not make provision for a child who requires special care to protect his/her constitutional rights and welfare needs while on a waiting list for special care, even though 'the natural and imprescriptible

[589] eg see Dáil Éireann Debate Child Care (Amendment) Bill 2009 [Seanad]: Second Stage (Resumed), 7 October 2010 <https://www.oireachtas.ie/en/debates/debate/dail/2010-10-07/4/4/> accessed 4 December 2019.
[590] eg Dáil Éireann Debate, Child Care (Amendment) Bill 2009 [Seanad]: Second Stage (Resumed), 7 October 2010 <https://www.oireachtas.ie/en/debates/debate/dail/2010-10-07/4/4/> accessed 4 December 2019; Seanad Éireann Debate, Child Care (Amendment) Bill 2009: Second Stage, 2 February 2010 https://www.oireachtas.ie/en/debates/debate/seanad/2010-02-02/10/ accessed 4 December 2019.
[591] eg CCA 1991 s 23ND identifies the extent of the 'control' the CFA can exert over the child.
[592] text to n 358-360 in chapter 4.
[593] Save for CCA 1991 s 23D within the criminal context.
[594] CCA 1991 s 23H (1)(h) which grounds the court's jurisdiction to make a SCO.
[595] Child Care (Amendment Bill) 2019, ss 4, 5, https://www.oireachtas.ie/en/bills/bill/2019/66/

rights' of children are protected under Article 42A.1. The rationale for their exclusion is unclear, however, parliamentary debates highlight the then Minister stating, that there were no children on waiting lists for special care, and that 'any child in need of special care is receiving it'.[596] This does not marry with the fact that the HSE and more recently the CFA have stated that there is a long-standing tradition of operating a triage system to select the children most in need of special care.[597] As it stands, if a child requires special care, he/she is reliant on a parent/guardian to institute judicial review proceedings.

Most strikingly, the absence of rights and the deficiencies of Part IVA as it relates to Article 42A can be contrasted with the Mental Health Acts, 2001-2018. Both pieces of legislation provide for the admission of children to residential treatment centres for therapeutic/mental health related treatment and care. Section 4A of the Mental Health (Amendment) Act 2018 makes provision for the paramountcy of the best interest provision; it provides that due regard must be given to the 'need for every child to have access to health services'; it makes specific reference to the voice of the child and for the child to receive the 'least intrusive treatment'; it also specifically references the child's right to have decisions made with due regard to his/her right to 'dignity, bodily integrity, privacy and autonomy'.[598]

Further, section 69 of 2001 Act sets out how 'bodily restraint and seclusions' are to be addressed and this applies to children also. Such restraint or seclusion is for defined purposes, where it is necessary for treatment or to prevent injury (to oneself or others) and must comply with the rules set out by the Mental Health Commission (contravention of which carries penalties).[599] There are absolutely no comparable provisions contained anywhere under the primary legislation which civilly detains children. This is a significant failing under Part IVA. They are however addressed under section 11 of the Regulations under the heading '*positive behaviour support (including restraint and single separation)*'.[600] The framing of restraint and seclusion of a child under the guise of positive reinforcement is completely inadequate as part of a statutory framework. It may be somewhat adequate to frame it this way in a handbook for children to enforce the idea of positive behaviour, but the reason it is entirely inadequate within the context of a

[596] Dáil Éireann Debate, Child Detention Centres [Parliamentary] Question 6, 13 February 2013.
[597] Oral legal submissions during a judicial review hearing during the observational period.
[598] Mental Health Act 2001 s 4; Mental Health (Amendment) Act 2018 inserts a new 4A which comprise guiding principles in respect of children but has not yet commenced.
[599] Mental Health Act 2001 s 69.
[600] SI 2017/634 (n 454).

legislative framework is because it detracts from the seriousness of the act of physical restraint and seclusion.

Despite the above, safety and welfare have always been at the heart of the court decision-making process since the mid-1990s and decisions taken have always been in conjunction with the child's best interests. Encouragingly, the court in *CFA v TN*,[601] declared that Article 42A recognises the 'natural and imprescriptible rights of the child' and the paramountcy of the best interest principle in care matters.[602] The Court of Appeal in *CFA v ML (Otherwise G) & ors*[603] also opined that Article 42A.1 is an 'explicit acknowledgement' of such rights which must be considered when engaging in an appropriate balancing act while noting the paramountcy of the best interest principle.[604]

Regarding special care cases, it behoves the Oireachtas to reconsider how Part IVA might be reconfigured 'by its laws' as provided for and for the purposes of bringing it in line with Article 42A. Part IVA is so prescriptive that as it stands, the rights of civilly detained children are being protected and vindicated through the prism of the imposition of duties alongside constitutional and Convention rights.

5.5. Child Care Act, 1991

5.5.1. The Framework: Rights, Duties and Safeguards

The same wealth of jurisprudence is not available to analyse the judicial approach under the statutory provisions, as they have only been in effect for three years at the time of writing. Nevertheless, an analysis of the statutory provisions within a similar framework provides the background to understanding the judicial approach in the empirical chapters. This will be supported by the limited case law available to date and it is notable that the Court of Appeal in the *CFA v ML (Otherwise G) & ors*[605] considered previous jurisprudence in this area to be of assistance regarding the interpretation and construction of one of the provisions under Part IVA (section 23H).[606]

Rights are addressed by reference to statutory duties on the state. For example, there is a mandatory duty on the CFA to bring an application (including variation/extension where necessary) where there is 'reasonable cause to believe that the behaviour of the child

[601] *CFA v TN* [568] (n 18).
[602] ibid paras 53-54; see also *AOD v Judge Constantine G O'Leary* [2016] IEHC 555 para 90.
[603] *CFA v ML* (n 3).
[604] ibid paras 127-128.
[605] ibid paras 102-102; this case determined also that the 'remedial statute' status of the of the CCA, 1991 which is 'interpreted purposively' applies to Part IVA.
[606] ibid paras 108-115; see generally Meg McMahon, 'Secure Care of Children in Ireland' (2018) 21 (1) *Irish Journal of Family Law* 3-8; Brian Barrington and Meg McMahon, 'Update to the Law on Special Care in Ireland' (2018) 21 (2) *Irish Journal of Family* Law 42-47.

poses a real and substantial risk to the child's life, health, safety, development or welfare' such that special care is required.[607] As discussed above, this is in direct contrast to the Mental Health Acts 2001-2018 which provide for children's rights and for decisions to be made with regard to 'dignity, bodily integrity, privacy and autonomy'.[608] Although children have constitutional and Convention rights, it seems there are different classes of rights for children civilly detained and the strength of those rights would appear to depend on whether the child is detained under mental health or welfare legislation.

The Regulations accompanying the current Part IVA provide detail regarding the rights of children and address matters such as a programme of care, positive behavioural supports, guidance regarding the use of restraint, health care, education, family contact, privacy, accommodation, food and nutrition, information, complaints mechanisms, record keeping and child participation.[609] The Regulations also provide for the appropriate training and education of staff.[610] While a child may have a consequent and legitimate expectation that his or her rights will be protected and vindicated, it can be argued that such provision would 'by its laws' be part of primary legislation.

Notwithstanding the absence of a rights-based approach under Part IVA, the Court of Appeal in *ML* considered that this Part IVA became operative post the referendum on Article 42A, reflecting 'the legislature's intent to give substantive effect to certain of the rights enshrined in Article 42A'.[611] The court noted that this legislation must also be considered in line with the ECHR and the UNCRC.[612] This reinforces the proposition that statutory provisions do not exist in a rights vacuum, and so must be considered alongside the rights of the child which are sourced under a variety of legal instruments.

There are numerous statutory safeguards contained under Part IVA. As under the inherent jurisdiction, regular reviews and short-term detention orders are fundamental; although the statutory provisions mandate that court reviews must take place every four weeks when a SCO is in being (statutory court review), the judge is not precluded from reviewing any aspect of a case at any other time ('court review' as opposed to a 'statutory court review').[613] A specific time frame is set out for the length of SCOs; although

[607] CCA 1991 s 23F; *AF v CFA* (n 157); *CK v CFA* (n 157).
[608] (n 598).
[609] SI 2017/634 (n 454).
[610] ibid Pt 2, s 11(3)-(6); Pt 3, 8.
[611] *CFA v ML* (n 3) para 9. At para 127 the Court of Appeal opined that the wording of Article 42A.1 'operates as an explicit acknowledgement that each child has vested in him "natural and imprescriptible" rights to which regard must be had….'and that there must be a balancing exercise between the rights of the child and accommodating hearing his/her wishes while having regard to the paramountcy of the best interest principle.
[612] ibid para 16.
[613] ibid para 145 referred to this as a 'robust safeguard'; CCA 1991 s 23I provides for statutory court reviews.

provision is made for interim SCOs, full SCOs are of three months duration and this can be extended twice (each time for a further three months) after the expiry of which, if a SCO is still required, a fresh application must again be made for a full SCO to recommence this process.[614] So although a child can be detained for nine months on foot of a SCO (and this may in fact be longer if an interim SCO had also been granted), the mechanism exists to re-apply to re-commence the process; so although SCOs are meant to be short-term in duration, they can in fact be in place for extended periods of time. That said, the court must be satisfied that the threshold has been met before it makes/extends the order, thus leaving the final say with the court.[615] While the CFA has wide-ranging powers and control over children,[616] at other times the authority of the court is required, for example, if the CFA wishes to vary or discharge the order.[617] Further, a child can only be 'released' from a SCU for specific reasons with the authorisation of the court.[618] The rationale of court authorisation was with the intention of limiting the powers of the HSE (now the CFA), as the powers were described by Deputy Flanagan as being 'wide-ranging in nature and, in some instance, [are] too far-reaching'.[619] Although the concern was primarily in relation to a child being removed from the jurisdiction without judicial authority, the 'policy intention' seems to be that final authority rests with the court over a variety of matters because of the wide-ranging nature of the extensive powers held by the state.[620] Further, the court can give directions on any matter affecting the welfare of the child including of its own motion.[621] This statutory authority to give directions is not limited and is unqualified. The Court of Appeal in *CFA v ML (Otherwise G) & ors*[622] noted that a SCO comprises safeguards and 'requires ongoing judicial scrutiny' which collectively provide the required level of protection as mandated by

[614] See chart at chapter 6.2; CCA 1991 ss 23H (3 months), 23J (extend twice for 3 months), 23L (interim SCO, maximum for 14 days prior to an initial three month order), 23M (ex parte, maximum 8 days prior to an initial three month order), 23N (extension of an interim order, maximum 21 days, prior to an initial three month order). *HSE v H* (n 544) para 11, evidence was given by the Director of Ballydowd SCU that one of the difficulties facing children (under the inherent jurisdiction) was not knowing how long they would be detained whereas if they had committed a crime they would know when they were being released.
[615] CCA 1991 ss 23H; 23J (extension of a SCO); 23L (ISCO); 23N (extension of an ISCO). In England, under the CA 1989, s 25, the court is obliged to make the order once the statutory criteria have been met thus removing any element of discretion.
[616] CCA 1991s 23ND.
[617] CCA 1991 s 23NE.
[618] CCA 1991 s 23NF, namely, accommodating the child in a residential placement or permitting the child reside abroad with a relative for a specified period, the provision of certain treatment and examination, the provision of such treatment and examination outside the state, compassionate grounds, educational and recreational facilities, promoting welfare.
[619] Dáil Éireann Debate, Child Care (Amendment) Bill 2009 [Seanad]: Report and Final Stages, 18 January 2011 https://www.oireachtas.ie/en/debates/debate/dail.2011-01-18/18/ accessed 4 December 2019.
[620] ibid.
[621] CCA 1991 s 23NK.
[622] *CFA v ML* (n 3).

Article 5 of the ECHR.[623] Having these collective safeguards rooted in statute enhances the protection which was afforded to the child under the inherent jurisdiction.

5.5.2. Civil and Political Rights

a. Detention: Deprivation of the Right to Liberty to Protect the Right to Life

Under Part IVA, civil detention is permissible where there is 'reasonable cause to believe that the child's behaviour poses a 'real and substantial risk to his or her life, health, safety, development or welfare'.[624] Not all five components need to be simultaneously engaged. Under those circumstances, the base for bringing a child into special care is more expansive than reported cases under the exercise of the inherent jurisdiction.[625] Further the Court of Appeal in *ML*[626] held that violence perpetrated on another person by a child in need of special care (or in special care) 'poses a real and substantial risk of harm' to that child's own 'life, health safety, development or welfare'.[627] This expansive interpretation of the statutory provisions protects and vindicates not only the child's right to life, but more particularly, the right of the child to protection from harm.

There is no provision under Part IVA for placing a child in single separation or mandating the use of physical restraint (unlike section 69 of the Mental Health Act, 2001) whereas provision is made to 'release' the child from the SCU for, inter alia, recreational outings which also require court authorisation.[628] It is not clear where the legal authority under primary legislation might be sourced that permits the use of physical restraint which affect the right to dignity.[629] Further, authority has been given to the CFA to 'take all steps that are reasonably open to it to prevent the child from absconding from the special care unit…' and this does not require court authorisation either.[630] This could potentially justify the use of restraint and seclusion but only for the purposes of preventing a child running away. At a minimum, the lack of a clear statutory basis for further restraint, the lack of specific statutory safeguards when restraint occurs and the lack of statutory

[623] ibid para 148.
[624] CCA 1991 s 23C.
[625] Rob George, 'The Inherent Jurisdiction and Child Protection' (2015) 37 (2) *Journal of Special Welfare and Family Law* 250-252, a local authority considered how to keep a 17 year old girl who was a 'repeated victim of sexual exploitation' in secure accommodation for safety reasons; statutory provisions in England differ but the point is that it is now arguable that a child in this jurisdiction in similar circumstances may fall within the parameters of a SCO.
[626] *CFA v ML* (n 3).
[627] ibid para 129.
[628] CCA 1991 s 23NF; SI 2017/634 (n 454) Part 2, s 11 addresses restraint and single separation.
[629] *SF v Director of Oberstown* (n 536) paras 111-122, the court considered the legal basis of the Director of Oberstown to impose separation; the judge concluded that the power emanated from the Children Act 2001 s 180(1) which gives him overall responsibility. It may be the same under Part IVA but that is not clear.
[630] CCA 1991 s 23ND; it would be anticipated that the managers of the unit may have to act urgently.

judicial oversight for such specific purposes is most concerning, particularly in light of *CFA v Q*.[631]

Although there are differences underpinning detention under both jurisdictional bases, there are also comparable underpinnings such as: neither jurisdiction identified a maximum length of time for which a child can be detained;[632] the child's best interests must be considered;[633] civil detention is a measure of last resort; no other form of care is available to address the needs of the child; the child must not qualify as being detainable under the Mental Health Act;[634] permitting detention for anticipated risk of harm or detention (or on the sole grounds of running away) is not provided for. Even though regular court review was a feature under the inherent jurisdiction, the monthly statutory court review mechanism as provided for under section 23I requires the state and the court to ensure that there are persisting grounds for detention. However this can be contrasted against the decision in the *CFA v TN,*[635] which addresses the need for and the difficulties with (and thus the negative consequential impact on rights) the lack of available and appropriate step-down facilities resulting in SCOs being unnecessarily extended.[636] Arguably, this amounts to preventative detention.

Aside from the provisions of Brussels II (*bis*), and the fact that historically courts do not appear to have any difficulty transferring children abroad to other jurisdictions for treatment or care, the detention of a child abroad is an important matter that is not adequately addressed under Part IVA, which provides limited and specific grounds for the transfer of a child to another jurisdiction (for example, to be placed in a residential centre, or to reside with a relative or for the provision of certain assessments/treatment).[637] The provisions of Part VIA do not clearly set out whether a child may be transferred to a psychiatric hospital or another special care facility abroad for extended and lengthy periods of time. Committee and Dáil debates are somewhat useful to establish what was within the contemplation of the Oireachtas,[638] with section 23NF envisaging that children

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[631] *CFA v Q* (n 533).
[632] SCOs can be extended twice and fresh orders sought again thereafter.
[633] CCA 1991 ss 23H (making the order), 23I (reviews), 23J (extension of an order), 23N (extension of an interim order), 23HE (variation and discharge of an order).
[634] CCA 1991 s 23H.
[635] *Child and Family Agency v TN & anor* [2018] IEHC 651.
[636] ibid para 1.
[637] CCA 1991 s 23NF, specifies 'medical or psychiatric examination, treatment or assessment'; for example, *WHB v KM* (n 353) 23-27, the Supreme Court in a consultative case stated held that the District Court could transfer a child under a care order (as opposed to a SCO) out of the state but only having considered certain evidenced factors; see chapter 6, 6.7.4(b).
[638] Select Committee on Health and Children Debate, Child Care (Amendment) Bill 2009: Committee Stage, 11 November 2010 www.oireachtas.ie/en/debates/debate/select_committee_on_health_and_children/2010-11-11/2/> accessed 4 December 2019; Dáil Éireann Debate, Child Care (Amendment) Bill 2009 [Seanad]: Report and Final

may be detained abroad in similar circumstances as under the inherent jurisdiction. Deputy Flanagan specifically referred to the 'practice in recent times' meaning 'the removal of children from the jurisdiction' to places such as the USA, Northern Ireland and other European countries. He wanted further information regarding, inter alia, costs and facilities there and asked why such facilities were not available in Ireland. Minister Andrews responded by stating '[T]here would be specific needs where the provision of that service in the State would not be justified by the volume of need…It is protected here by High Court supervision at all times.' The Minister confirmed that an application must be made to the High Court under section 23NF for court authority to transfer a child to another jurisdiction for this purpose, whereupon the High Court will vary the order made to give effect to the transfer, if appropriate.[639] The committee debate establishes two things; first, that sections 23ND and 23NF are meant to provide the mechanism to transfer a child out of the jurisdiction as was done under the inherent jurisdiction; second, the High Court must have the final say in the removal of the child out of the jurisdiction. This is a 'policy intention'.[640]

b. Family and Access

Part IVA makes mandatory provision for the inclusion of parents at various stages through the process, which in part is limited to the custodial parent (unless 'dead, missing or cannot be found') and as long as it is the child's best interest.[641] However this does not mean that a non-custodial parent cannot be contacted. There is also provision for persons other than parents to be part of the process, such as a guardian, or a person acting in *loco parentis*, or another relative (if appropriate),[642] thus reflecting that not all children coming into special care are in a traditional family environment.

Consultation with parents is mandated under the Act when special care in being proposed,[643] when applying for a SCO,[644] and when an application is being made for an extension of an order.[645] The custodial parent also has liberty to apply to the court for various determinations,[646] including seeking a discharge of the SCO,[647] directions on any

Stages, 18 January 2011 <https://www.oireachtas.ie/en/debates/debate/dail/2011-01-18/18/> accessed 4 December 2019.

[639] Select Committee on Health and Children Debate, Child Care (Amendment) Bill 2009 (n 638).

[640] Dáil Éireann Debate, Child Care (Amendment) Bill, 2009 [Seanad] (n 638), Minister Barry Andrews stated that the 'policy intention which the Deputies have attempted to capture in the wording of these amendments is already intrinsic to the Bill'.

[641] For example, CCA 1991 ss section 23F (3), 23G (1) refer to a 'custodial parent' whereas s 23NK refers to 'a parent'.

[642] CCA 1991 s 23F (3).

[643] CCA 1991 s 23F; this can be dispensed with in the child's best interests; justification must be notified to the court.

[644] CCA 1991 s 23G and parents will then be aware of the review dates before the court.

[645] CCA 1991 s 23J.

[646] CCA 1991 s 23NA.

[647] CCA 1991 s 23NE.

matter affecting the welfare of the child[648] and an appraisal of the provision of special care.[649] The custodial parent also has the right to be informed where the state proposes to transfer the child from one SCU to another[650] or where the child has been released temporarily from special care for specific purposes.[651] Furthermore, the custodial parent is to be provided with information by the state regarding the provision of special care, the child's special care requirements, together with details of his or her behaviour and the risks posed.[652] That said, to provide special care, the state has assumed 'control' over the child, with resulting responsibility to give relevant consents regarding inter alia, passports, and authorising medical treatment without any statutory obligation or duty to inform the custodial parent.[653] The jurisprudence of the ECtHR,[654] namely, that there must be substantial justification for parental exclusion from the process, and for the denial of access, are incorporated within the provisions - for example, exclusion of parents from the consultation process or family welfare conference must be justified to the court;[655] and the CFA cannot unilaterally stop access without a court order.[656]

The foregoing demonstrates that Part IVA provides for procedural fairness for parents, whether through the exercise of parental rights, or indirectly through the imposition of duties. In terms of the balance re parents vis-à-vis children, parental rights are safeguarded but overall, the child's welfare trumps parental rights where deemed necessary; this is consistent with the inherent jurisdiction jurisprudence.

c. Privacy

While section 31 of the Child Care Act 1991 prohibits the publication/broadcast of any matter likely to identify a child, section 23NH of the Act goes further and provides that court proceedings in special care cases 'shall be heard otherwise than in public'. A strict interpretation of this provision is in contrast to cases heard under the inherent jurisdiction.[657] This has however been interpreted as not imposing 'a mandatory obligation' regarding the in camera rule; certain persons can attend court once the child's right to privacy is respected which is generally achieved through anonymisation of

[648] CCA 1991 s 23NK; CCA 1991 s 37, the CFA is obliged to facilitate access to a child by a parent, one acting in *loco parentis*, a guardian or any other persons who in the CFA's opinion has a *bona fide* interest in the child. See Ward (n 216) 175-177 although access must be facilitated, the nature of access is a matter for the CFA.
[649] CCA 1991 s 23NN.
[650] CCA 1991 s 23ND.
[651] CCA 1991 ss 23NF, 23 NG.
[652] CCA 1991 s 23NM.
[653] CCA 1991 s 23ND (1)-(4).
[654] Kilkelly, *Children's Rights in Ireland* (n 108) paras 8.133-8.140.
[655] CCA 1991 s 23F.
[656] CCA 1991 s 37, Ward (n 216) 176.
[657] CCA 1991 s 23NH; CCA 1991 s 29 (5) does not apply to Part IVA; cases heard in public under the inherent jurisdiction were subject to reporting restrictions under the Civil Law (Miscellaneous Provisions) Act 2008 s 27.

reporting.[658] Although court records are covered by the in camera rule, Part IVA does not address the issue of privacy/confidentiality of documentation. The Regulations consider the administrative steps regarding care records to be held in 'perpetuity'.[659] Save for the decision in *SC*,[660] no challenge has been brought regarding the transmission/long-term retention of data relating to children in special care.

5.5.3. Socio-economic Rights

a. Education

The right to education is sourced under Article 42 of the Constitution and the Education Acts.[661] For children in special care, section 23C of Part IVA incorporates the provision of both care and 'educational supervision'. The term 'supervision' (not defined in the Act),[662] which is in line with the language of Article 5 of the ECHR is arguably of a lesser status than under the Constitution.[663] A child can also be 'released' from special care for the purposes of educational outings.[664] Further, education can be provided by the state where it forms part of the aftercare package and this can remain in force potentially until the child is twenty-three years old, depending on the case.[665]

The Regulations address, inter alia, educational components that should be available to each child, including educational facilities, supports and services suitable to their needs and requirements; those nearing the age of majority should have a programme to assist them in achieving their goals as part of their aftercare plan.[666] The inclusion of education in Part IVA corresponds to some extent with prior jurisprudence whereby detention was justified based on the provision of (therapeutic) care and education. That said, reliance

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[658] *CFA v TN* [568] (n 18) paras 55-57; *Child and Family Agency v KB & anor* [2018] IEHC 513.
[659] CCA 1991 ss 23NM, 23NN provides for certain information pertaining to the child (eg behaviour, risks, incidents, care requirements) to be distributed to persons such as a custodial parent, guardian or relative. SI No 2017/634 (n 454), Part V addresses inter alia, care records, the maintenance of records, and the maintenance of a register of children detained there.
[660] *HSE v SC* (n 553).
[661] Education Act 1998 as amended; ECHR Article 2.1 P; UNCRC Article 28; Under the Education Welfare Act 2000 the minimum age for leaving school is sixteen years or where the child has completed three years of second level education, whichever is the later. On the assumption that a child in special care meets the criteria, and no longer wishes to be in education, the child's time can be otherwise engaged in developing practical life skills or working towards an apprenticeship.
[662] CCA 1991 Part V11A addresses 'Supervision of Early Years Services' and provides for certain definitions regarding education. As one the grounds of civil detention is education, it is curious that there is no definition or guidance as to what is expected to be provided under 'educational supervision'.
[663] ECHR Article 5(1)(d) provides for educational supervision for a detained minor. This has been interpreted broadly so that it need not 'equate rigidly' with classroom teaching (*P and S v Poland* App no 57375/08 (ECtHR 30 October 2012); *Ichin and Others v Ukraine* App nos 28189/04 and 28192/04 (ECtHR, 21 December 2010); *DG v Ireland* (n 477); It was more recently held that 'educational supervision' must contain a core schooling element in line with the school curriculum in *Blokhin v Russia* (n 475).
[664] CCA 1991 s 23NF.
[665] CCA 1991 s 45. This right to education can be contrasted with difficulties identified in terms of finding a school placement upon discharge from special care as such children have in the past been termed 'troublesome', in this regard see SRSB, *The Impact of Placement in SCU Settings* (n 122) 70.
[666] SI 2017/634 (n 454) s 9 (1), (2). This is also qualified by 'in so far as it is practicable and reasonable'.

on constitutional provisions may be required to ensure that the child's right to education is properly protected and vindicated.[667]

b. Health

Although the Act makes provision for 'care requirements' (including inter alia medical assessments) and 'educational supervision',[668] there is no specific statutory provision for therapeutic services which underpinned detention under the inherent jurisdiction. It must therefore be presumed that therapeutic supports are either subsumed within the child's care requirements[669] or rely on prior jurisprudence. Dáil and Seanad debates demonstrate that therapeutic supports were within the contemplation of the legislature as being part of special care detention,[670] however, where they are specifically grounded is not entirely clear.

The provision of 'health' services under the Act demonstrates a more holistic approach towards medical and psychiatric care.[671] The Regulations flesh out what the child in special care can expect from a healthcare perspective, namely, 'a health screening assessment, general practitioner and psychological services,' referrals to 'medical, psychiatric, dental, ophthalmic or other specialist services' as required.[672] This affirms that when considering life, health, safety, welfare and development, a holistic approach to the child's health and wellbeing is being adopted thus protecting and vindication their right to healthcare. Section 9(5) of the Regulations provide that the child ought to be permitted to participate in matters relating to such care. It also provides that the child's privacy and dignity will be respected regarding, inter alia, professional consultations.[673] Presumably this includes medical consultations. The reality, however, is that privacy regarding health cannot be guaranteed as the professionals and staff working with the

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[667] *Blokhin v Russia* (n 475) arguably increases the duty from a broad concept to one more in line with what might be expected under the Constitution.

[668] CCA 1991 s 23C; In England, UK CA 1989 s 25 does not make provision for 'educational supervision' but the Court of Appeal in *Re K (Secure Accommodation Order: Right to Liberty)* [2001] 1 FLR 526 resolved this difficulty by noting that education was provided for under the Education Acts 1996 (to age 16 years) and followed the decision in *Koniarska v UK* (n 474) which interpreted 'educational supervision' broadly, thus declaring that section 25 of the 1989 Act and Article 5 ECHR were not incompatible; MacDonald (n 45) paras 14.122-14.125 cautions against reliance on this decision.

[669] CCA 1991 s 23C, state's care requirement 'includes medical and psychiatric assessment, examination and treatment'.

[670] Seanad Éireann Debate, Child Care (Amendment) Bill 2009: Second Stage, 2 February 2010, the Minister of State at the Department of Health and Children identified that '[S]pecial care involves the civil detention of a child in the interest of his or her welfare and protection in a special care unit where education and therapeutic supports are provided to the child in a secure environment' https://www.oireachtas.ie/en/debates/debate/seanad/2010-02-02/10/> accessed 4 December 2019; similarly in Dáil Éireann Debate, Child Care (Amendment) Bill 2009 [Seanad]: Second Stage, 5 October 2010 <https://www.oireachtas,ie/en/debates/debate/dail/2010-10-05/20/> accessed 4 December 2019.

[671] CCA 1991 s 23C includes 'medical and psychiatric assessment, examination and treatment'; s 23ND places a positive duty on the CFA to promote and protect the child's, inter alia, health.

[672] SI 2017/634 (n 454) s 8. Note that section 7 addresses a Programme of Care which includes inter alia, a therapeutic plan, psychiatric treatment and an intervention plan.

[673] SI 2017/634 (n 454) s 9.

child will need to be aware of any diagnosis to establish and design appropriate supports. This aspect of the Regulations cannot be anything other than aspirational.

5.5.4. Participatory Rights

Part IVA appears to exclude the child directly from many parts of the process, and where there is provision for child participation, it tends to provide an opt out clause for the CFA to exclude the child, if they form the view that it is not in the child's best interests. For example, when the CFA makes a determination that a SCO is necessary, it is then required to consult with the child, and hold a family welfare conference with the child included, unless it forms the view that it is not in the child's best interests.[674] A child is excluded from the notice of an application to the High Court for a SCO,[675] though this is somewhat understandable due to the child's high-risk presentation and the nature of the risk.[676] A child is not on notice either of statutory court reviews or extension applications, although the GAL is.[677] While it is likely that a child will be informed of such applications by the GAL (or parent or social worker), it is not clear why a child would not be notified under these sections as the risks are less than when the initial application was made. Provision is also made for the 'release' of a child from special care for specific purposes, and for the transfer of a child to another facility, but without the child or the GAL being on notice, although the custodial parent/other legal guardian is.[678] Regarding the discharge or variation of an order, applications of this nature are only open to being made by a parent/guardian, a person *in loco parentis*, the CFA, or the court may do so of its own motion, and are not open to being made by the child or his/her GAL.[679] Further, the 'release' of a child from special care for specific purposes is on notice to, inter alia, a custodial parent or legal guardian and the GAL, but there is no statutory obligation to tell the child.[680] Curiously, neither a child nor a GAL can bring an application for directions under section 23NK, whereas the state, parent/guardian or relative (or the court of its own motion) can.[681]

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[674] CCA 1991 s 23F.
[675] CCA 1991 s 23G; similarly, for ISCO order applications and extensions under ss 23L, 23M and 23N respectively.
[676] *HSE v DK* (n 125); this was an inquiry carried out regarding a child who died in tragic circumstances prior to the execution of a SCO; CCA 1991 ss 23G(3), 23H(3)-(5) members of AGS are on notice for an efficient execution of the order; similar provisions under s 23L(4)-(5) ISCO. Supplemental provisions under CCA 1991s 23NA permitting AGS to search, find and deliver to the CFA, a child missing from special care; CAAB, *Review of Special Care Applications* (n 143) 165 noted that making an application for a SCO without the child's knowledge, 'may have significant children's rights implications' advising the HSE to consider the legal and practical implications of same.
[677] CCA 1991 ss 23I, 23J respectively.
[678] CCA 1991 s 23ND (5)-(8).
[679] CCA 1991 s 23NE (3).
[680] CCA 1991 s 23NF; a child can be 'released' for examination/assessment, on compassionate grounds, educational/ recreational outings.
[681] This can be in relation to any matter of concern, for example, access.

The participatory rights of the child contained under Part IVA are at best haphazard while being simultaneously confusing and inconsistent. It is difficult to understand the thought-process behind them. The provisions presuppose that a GAL will always be present, and while this may be the situation in almost all cases, it is open to the child to be separately represented, although it is not clear how the child is informed of this. Under those circumstances the child is technically excluded from participation in a number of respects; for example, he/she is not on statutory notice of the initial application (which as stated earlier is understandable given the risks); nor on statutory notice regarding reviews or extensions of applications; nor on notice of (their) temporary release or (their) transfer (which impacts them); nor is the child provided with a voice in terms of applying for a variation/discharge of the order, or to bring an application for directions.[682] From the perspective of the Act, under those circumstances, the participatory rights of the child are less than satisfactory. One explanation might be because the parliamentarians seemed to consider that a child would be represented by a GAL in all special care cases, and simply never considered that a child may be at odds with their GAL, and may want their own representation instead.[683] It is also curious, given that proposals for the new Part IVA occurred around the same time as discussions were underway for Article 42A.[684]

Of course, the fact that none of these participatory rights are evident in the Act does not preclude the child being given a voice, as it is not specifically ousted by the legislative provisions either.[685] By contrast the Regulations are more participatory rights friendly,[686] but they are not primary legislation. Therefore, the statutory participatory rights of the child as it relates to giving him or her a voice, ensuring that the child has all the relevant information to make an informed decision including challenging administrative or court decisions are somewhat lacking, leaving the child in a position of dependency. It is a weak proposition from the perspective of a rights-based approach for a child.

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[682] Barrington et al (n 606) under 'Notification Requirements'.

[683] eg Seanad Éireann Debate, Child Care (Amendment) Bill 2009: Second Stage, 2 February 2010 https://www.oireachtas.ie/en/debates/debate.seanad.2010-02-02/10/ accessed 4 October 2019; Dáil Éireann Debate, Child Care (Amendment) Bill 2009 [Seanad]: Second Stage, 5 October 2010 https://www.oireachtas.ie/en/debates/debate/dail/2010-10-05/20/ accessed 4 October 2019; Dáil Éireann Debate, Child Care (Amendment) Bill 2009 [Seanad]: Second Stage (Resumed), 7 October 2010 https://oireachtas.ie.en/debates/debate/dail/2010-10-07/4/> accessed 4 October 2019; Dáil Éireann Debate, Child Care (Amendment) Bill 2009 [Seanad]: Report and Final Stages, 18 January 2011 https://www.oireachtas.ie/en/debates/debate/dail/2011-01-18/18/> accessed 4 December 2019.

[684] Dáil Éireann Debate, Child Care (Amendment) Bill 2009 [Seanad]: Second Stage, 5 October 2010, Deputy Jan O'Sullivan recommended that it would be preferable to discuss the Bill with the children's rights amendment in situ, noting at that time some of the proposed wording and suggesting that that proposed wording was stronger that what was being proposed in the Bill with reference to the voice of the child; https://www.oireachtas/ie/en/debates/debate/dail/2010-10-05/20/ accessed 4 December 2019.

[685] Child Care (Amendment) Bill 2019 (lapsed), s 5 provides for the views of the child.

[686] SI 2017/634 (n 454), s 9(5)(a),(c),(d), the registered provider must ensure that the child participates in care decisions and is informed of his or her rights; s 29 provides a complaints and appeals mechanism for complaints made by a child.

The Child Care (Amendment) Bill 2019, now lapsed,[687] sought to amend section 24 of the Child Care Act 1991 to reflect Article 42A but was very much welfare rather than rights based. It provided for the 'paramountcy' of the best interests of the child (including guiding factors) and for the views of the child. It also provided for the statutory appointment of a GAL in every special care case, (without recourse to the views of the child) and removed the party status of the GAL in the proceedings, thus diluting the voice of the child further.[688]

The Court of Appeal decision in *CFA v ML (Otherwise G) & Ors*[689] is instructive in terms of how the child's participatory rights can be given effect. This case concerned an appeal of a SCO by *G* who was seventeen years old at the time. All other parties were in favour of the SCO being made. In this case *G* was afforded the rights of a party and thus instructed a solicitor, a junior and senior counsel, as in the original High Court proceedings.[690] The Court of Appeal noted that the High Court judge took note of *G's* strong opposition to the order being made,[691] that she considered all submissions made including those of *G's* legal team, the fact that the court heard directly from *G* during the course of the High Court hearing by video link and three separate letters were also written by *G* personally to the High Court judge.[692] Although submissions by counsel for the GAL reinforced the threshold standard for special care and that special care was in *G's* best interests, 'the importance of the child's views were emphasised'.[693] The court considered that a balancing act was required between the rights of the child, protecting and vindicating those rights while having regard to the views of the child.[694] The Court of Appeal then considered the weight given to her views, and concluded that in acceding to her wishes, she would be denied 'vital intervention' in circumstances where the facts and statutory threshold justified the making of such an order, in her best interests.[695] It

[687] https://www.oireachtas.ie/en/bills/bill/2019/66/
[688] Child Care (Amendment) Bill 2019, Part VA, ss 35B(2), 35(E)(9). See also Maria Corbett, Carol Coulter, Child Care (Amendment) Bill 2019, *Observations to the DCYA on behalf of the CCLRP*, 2 October 2019,< https://www.childlawproject.ie/wp-content/uploads/2019/10/CCLRP-Observations-on-Child-Care-Amendment-Bill-2019-revised.pdf> accessed 29 August 2020
[689] *CFA v ML* (n 3).
[690] ibid paras 1-4, 64, 70.
[691] ibid para 64.
[692] ibid para 71-73.
[693] ibid para 101.
[694] ibid para 127.
[695] ibid paras 156-160. See also Mary Donnelly, 'Responding to Adolescent Mental Health Difficulties: Irish Law through a Gendered Lens' (2019) 66 *International Journal of Law and Psychiatry* 1, who considers that there is greater participation in special care cases than mental health cases; Caitriona Moloney, 'Mental Health Act 2001: A Child Rights Assessment of the Current Legal Framework and its Proposed Reform-Part 1' (2016) 19 (2) *Irish Journal of Family law* 28-34; Joanna Ralston, 'Admission of Children to Approved Centres in Ireland; Is the Voice of the Child Being Heard? Part 1' (2014) 17 (3) *Irish Journal of Family Law* 86-92; Joanna Ralston, 'Admission of Children to Approved Centres in Ireland; Is the Voice of the Child Being Heard? Part 2' (2014) 17 (4) *Irish Journal of Family Law* 112-115.

is hard to envisage how *G's* participatory rights, procedural or otherwise, could have been given any greater effect. Even though participatory rights are not hugely visible within the parameters of Part IVA, a proactive approach was taken by the state, the court and the GAL in this case to ensure effective participation.

5.6. Judicial Decision-Making Process and Balancing of Rights: Inherent Jurisdiction versus Part IVA

The most comprehensive overall analysis under the inherent jurisdiction is contained in *HSE v SS.*[696] The main case under Part IVA to date, to engage in a balancing act is the Court of Appeal decision in *CFA v ML (Otherwise G) & Ors.*[697] Aside from the statutory procedural requirements which are relevant to the latter case, so too are considerations of the impact of Article 42A.

MacMenamin J. in *HSE v SS*[698] made general propositions regarding the balancing of rights within the inherent jurisdiction framework. The court opined that the powers of the court are 'as ample as the defence of rights under the Constitution' requires. Further, orders will only be granted where there is an 'urgency' for same, affirming that they are not punitive but are underpinned by an educational or therapeutic rationale.[699] Importantly, in terms of balancing rights, the right to life and welfare, once 'proportionate and justifiable' can be placed 'in a superior position in the constitutional hierarchy'.[700] Other factors determine the duration of the order (such as inter alia, capacity, age, place of detention and facilities available).[701] Safeguards, including a review mechanism must be inbuilt to review the lawfulness of the detention.[702] Regarding other stakeholders, due regard must be paid to the substantive rights of parents who should have a role to play in each stage of the process as long as it is in the child's best interests.[703]

The Court of Appeal in *ML*[704] noted that under the inherent jurisdiction, the court developed its jurisprudence in a constitutional and ECHR compliant manner which 'informs the exercise of construing the evidential burden imposed on the CFA by s.23H(1)'.[705] In addition, the court also considered the approach in inter alia *DG v EHB*[706]

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[696] *HSE v SS* (n 4).
[697] *CFA v ML* (n 3*)*.
[698] *HSE v SS* (n 4).
[699] *HSE v SS* (n 4) paras 60-67.
[700] *HSE v SS* (n 4) at para 71.
[701] ibid.
[702] ibid paras 71, 90-95 (for constitutional and Convention compliance).
[703] ibid paras 82-89.
[704] *CFA v ML* (n 3).
[705] ibid para 107; CCA 1991 s 23H bestows the statutory jurisdiction on the High Court to make a SCO.
[706] *DG v EHB* (n 114) (where the court held that the welfare of the child took precedence over liberty).

and *DG v Ireland.*[707] The Court of Appeal opined that to vindicate the child's rights under Article 42A, it must engage in a balancing act between the child's natural and imprescriptible rights with due regard as to how best to protect and vindicate those rights while considering the views of the child and the paramountcy of the best interest principle.[708] Further, procedural safeguards must remain in place which includes 'independent judicial scrutiny' and the court must be further satisfied that the order is necessary and proportionate.[709]

Penultimately, the Court of Appeal in *ML* acknowledged and considered within the context of this case the evolving developmental process of children in this age group, in particular their emotional development where 'the individual adolescent is amenable to change and character formation'.[710] Although there were serious welfare concerns in this case, it is an encouraging acknowledgement of this developmental process.

Finally, it is clear from case law that the balancing of rights, no matter what the jurisdiction is, concerns itself with balancing the child's competing interests and rights while having regard to the constitutional rights of the parents (which do not necessarily outweigh those of the child) and managing those propositions within the constitutional and/or statutory framework. This Court of Appeal decision affirms that notwithstanding the statutory provisions, their interpretation, in the balancing, vindication and protection of rights is subject to the overarching constitutional principles that shaped the jurisprudence under the inherent jurisdiction. If this were not the case, given the prescriptive non-rights complaint nature of Part IVA and the 'box-ticking' exercise the court must engage in to ensure that the statutory proofs are met, there is a concern that on its own, this 'box-ticking' by the court would not be rights-compliant. The judicial decision-making process in special care cases is anything but straight-forward having regard to the complexities of the issues. Nonetheless, these cases identify a substantive engagement with the rights issues.[711]

[707] *DG v Ireland* (n 477) (the rational for detention was 'educational or therapeutic and with no punitive element……to vindicate the convention rights of the minor').
[708] *CFA v ML* (n 3) paras 126-130.
[709] ibid paras 148-149.
[710] ibid paras 131-139.
[711] text to n 365-373 in chapter 4.

5.7. Conclusion

This chapter examined the judicial approach in case law and considered the new statutory provisions as they relate to the rights of children in special care.

It is possible to draw some conclusions from case law even though many cases are for the most part, fact and rights specific. There is no doubt that the process is welfare based which emanates from the complex, grim and grave circumstances of the children.[712] Therefore, the safeguards set by the court, particularly regular court reviews and judicial oversight, are essential. The cumbersome process of detaining children abroad is potentially open to breaches as is the lack of specificity regarding restraints and structured time away (within the court process) and privacy. The process of leaving special care contains elements of 'trial and error' demonstrating the difficulty in protecting rights at the expense of welfare. There is little to evaluate in terms of the right to education and health or the child's participatory rights.

Part IVA contains numerous deficiencies arguably emanating from its lack of a rights-based approach. The prescriptive nature of process and procedure ensures that welfare is the primary consideration with lots of opportunity for substituted decision-making by the state. The focus is on the child as an object of protection requiring state control identifying that this significant power imbalance requires ongoing judicial scrutiny.

Chapters 6 and 7, based on court observations, seeks to shed greater light as to how the court protects and vindicates the rights of these children within the context of the prescriptive, protectionist and process orientated Part IVA, which sits alongside its constitutional and Convention rights framework and with a body of principled jurisprudence which informs the decision-making process of the court.

[712] Carr, Young People at the Interface of Welfare and Criminal Justice (n 4) 47-51: Carr argues that services ought to be structured based on the needs of the child as opposed to justice versus welfare.

Chapter 6: High Court Analysis

6.1 Introduction

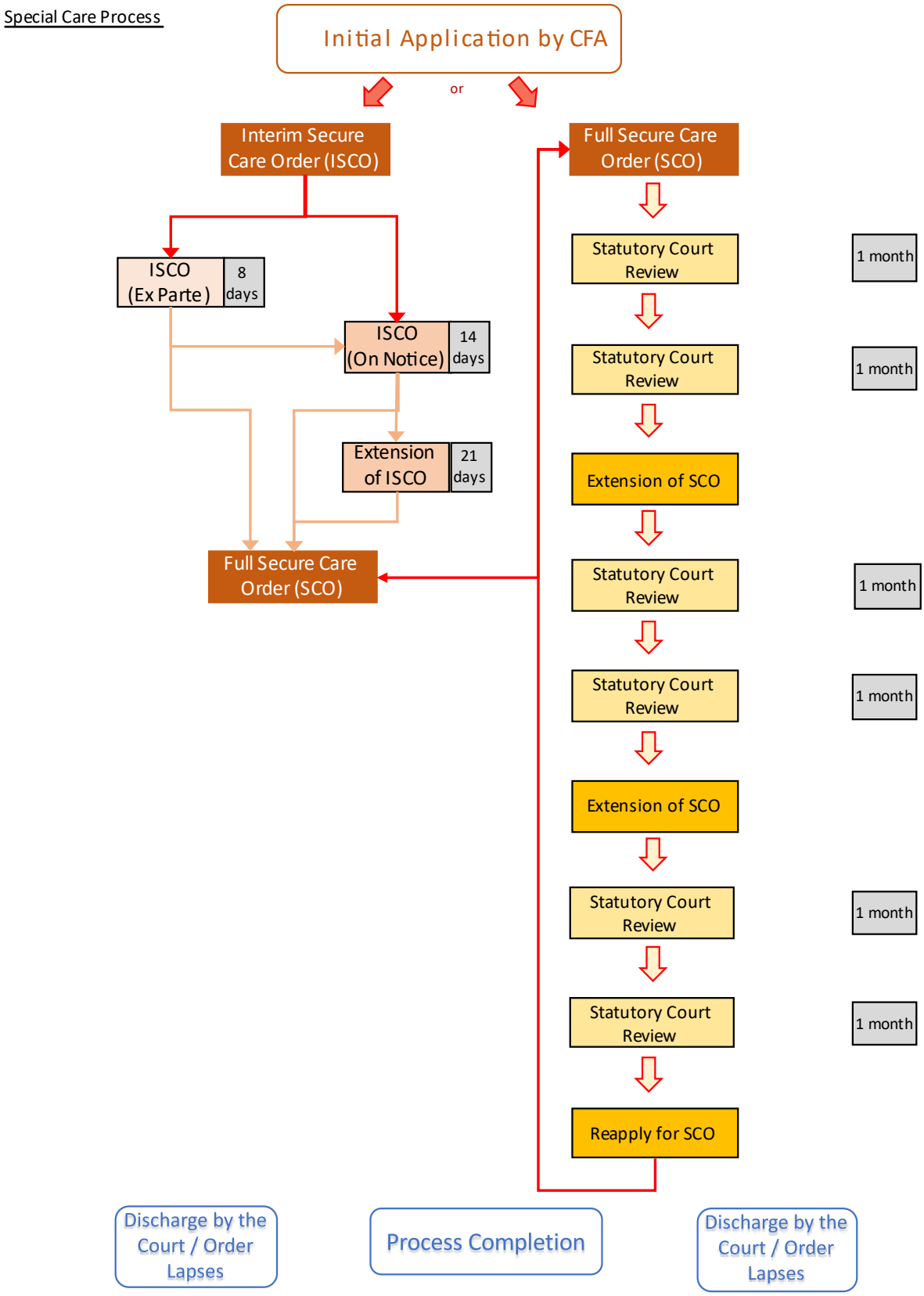
Through court observations, this chapter provides the necessary background for an examination of how the court protects and vindicates the rights of children in special care. First, this chapter outlines the operation of the special care regime within the court process. It then considers how special care proceedings are conducted which incorporates the judicial role in the overall management of these cases. Second, it considers general observations arising out of the empirical research which are relevant to the rights of children and contextualises the court decision-making process which is addressed in chapter 7. Statistical data is included which identifies that the number of cases observed is comprehensive by using an opportunistic sampling method. It identifies that during the observational period the average length of time children spent in special care was less than six months. In addition, other statistics, derived primarily from the CFA's publications, provides background data and trends of relevance, which are supported by the findings of this research.

6.2 The Operation of the Special Care Regime

All applications for special care are brought by the CFA. The Special Care Referrals Committee, (SCRC) of the CFA, an expert panel comprising senior social workers, special care management with an independent chairperson, receives referrals from social workers when they form the view that a child requires special care.[713] If appropriate, the SCRC makes a recommendation to the Service Director for Residential Care, who must then make a statutory 'determination' after which an application will be made to the High Court for a SCO.[714] The CFA can apply initially for an interim SCO (ISCO) if no formal 'determination' has yet been made or for a full SCO where a 'determination' has been made that special care is required. If the court is satisfied a SCO is warranted, then it can make the order committing the child to the care of the CFA within one of its SCUs. SCOs are for three months duration, with a mechanism to extend that order twice with each extension lasting three months; the process re-commences if special care is still required

[713] CFA, Interim Guidelines for Referrals to Special Care, 12 July 2019, 4.
[714] ibid; CCA 1991 s 23F.

thereafter. Statutory court reviews must occur at four-week intervals during the life of a SCO. The flow-chart below explains this process:



See CCA 1991 ss 23F-23NA

Primary question before the Court: Is a further order needed and/or does child still requires Secure Care?

Note: Any order above may lapse (if no further application made) or could be discharged by the Court

Each year, the CFA publishes statistical data regarding children in its care in its "Annual Review on the Adequacy of Child Care and Family Support Services Available". The statistics illustrate that the number of children in special care represents a very small proportion of the total number of children in care – typically ~0.25% at the end of each year.

Children in care by placement type[715]

Placement type	2015	%	2016	%	2017	%	2018	%	2019	%
General foster care	4,100		4,102		4,041		3,970		3,913	
Relative foster care	1,832		1,715		1,661		1,586		1,548	
General residential	327		304		338		365		394	
Special care	16	*0.3%*	12	*0.2%*	12	*0.2%*	14	*0.2%*	15	*0.3%*
Other ***	113		125		137		94		115	
Total	**6,388**		**6,258**		**6,189**		**6.029**		**5,985**	

At present there are three mixed gender SCU's in the country: Ballydowd (Lucan), Coovagh House (Limerick) and Crannóg Nua (Portrane), which opened in November 2017. The number of beds per SCU in recent years are as follows:[716]

	Number of beds						Gender
Unit	2015	2016	2017	2018	2019	Location	mix of unit
Ballydowd	10	10	10	10	7	Lucan, Co. Dublin	Mixed
Coovagh House	4	4	4	4	4	Limerick	Mixed
Gleann Alainn	4	4	4	4		Glanmire, Co. Cork	Female
Crannóg Nua			3	3	7	Portrane, Co. Dublin	Mixed
	18	18	21	21	18		

[715] CFA, Quarterly Performance Reports, accessed 8 November 2020:
<https://www.tusla.ie/uploads/content/Q4_2015_Integrated_Performance_and_Activity_Report_Final.pdf> 23-24.
<https://www.tusla.ie/uploads/content/Q4_2016_Integrated_Performance_and_Activity_Report_Final_V2_Table_8_Amended_08Mar2017.pdf> 26.
<https://www.tusla.ie/uploads/content/Q4_2017_Service_Performance_and_Activity_Report_Final.pdf> 27.
<https://www.tusla.ie/uploads/content/Q4_2018_Service_Performance_and_Activity_Report_Final.pdf> 33.
<https://www.tusla.ie/uploads/content/Q4_2019_Service_Performance_and_Activity_Report_V2.pdf> 35.
See generally CFA, 'Annual Review on the Adequacy of Child Care and Family Support Services Available' 2014-2019;
Note, summary numbers provided by the CFA in other reports (including Annual Reports) differs slightly from above dataset in some years and from each other, for example, the number of children in care at the end of 2017 per the 2017 Annual Report was 6,190, while it was 6,116 in the Review of Adequacy Report for 2017. However, these differences are not material and do not impact the overall conclusion and statements made in relation to the children in special care as a proportion of total children in care. In addition, the CFA periodically makes relatively minor changes to the definition and calculation of children in care, without restating all prior year comparatives. Data from the period 2015 is not comparable with data for previous years due to a definitional change in the metric; from 2015 (inclusive) children in respite care from home are no longer included in the figure. Note also, that ***Other (in the chart above) includes children in supported lodgings, at home under a care order, in a detention school/centre other residential centre such as a disability unit or drug and alcohol rehabilitation centres

[716] CFA, *Overview of Special Care Admission and Discharge Service Delivery Reports* 2015, 2016, 2017, 2018, 2019, provided directly by the CFA; the number of places available for children in special care increased by 3 in 2017 to 21 places, by converting the high support unit at Crannóg Nua into a SCU. It became clear that Gleann Alainn would not meet the requirements for mandatory HIQA registration; consequently, it ceased to operate as a SCU and closed on 31 December 2018. The gender breakdown for each year/unit is not available in published reports.

Since the 31st December 2018, Gleann Alainn sometimes accommodates children transitioning out of special care. Occasionally, as circumstances permit, additional beds may become available. Alternatively, there may be a reduction in the number of beds available. For example, in 2015 and in 2016, some SCUs operated at a lower capacity due to a variety of factors, such as the risk profile of some children, staffing issues and construction work in one of the units.[717] The SCUs have varying degrees of security, which was not clear from court observations.[718]

It is important to bear in mind that children are civilly detained to receive therapeutic supports and education. The framework for the provision of therapeutic services is governed by the Well Tree Model of Care.[719] This model of care (which is 'informed by principles relating to attachment/trauma, risk management and the promotion of each young person's wellbeing as defined by the National Outcomes')[720] was initially introduced into Ballydowd and Coovagh House in November 2018 and was fully implemented in all SCUs by February 2019.[721] Its focus is wellbeing and outcomes, and indicators monitor the child's progression through a scoring system which assist in identifying areas requiring more therapeutic work.[722] This scoring model of therapeutic care also assists in determining planning and discharge of children within the special care regime, and is a core part of the multi-disciplinary care planning.[723] This Model of Care

[717] CFA, *Overview of Special Care Admission and Discharge Service Delivery* 2015, 2016, 2017 (n 716).
[718] Restrictive practices have been reduced in both Ballydowd and Coovagh House SCUs. At the time of writing, Ballydowd has three units; unit 3 is where the children attend for an initial assessment (doors are open and children are free to visit the grounds; bedroom doors are not locked at night unless the risks posed requires otherwise and if this occurs it is for a minimum period; children have supervised access to the internet for, inter alia, Netflix or shopping on line and can access the kitchen area); This unit is designed to cope with challenging behaviour and is the most robust unit. Unit 2 is less restrictive, eg children moving to this unit will be engaged in their programme, have regular outings away from the site and will have some access to a mobile phone; the décor of the unit will be reflective of mainstream services (normal fixtures/fittings/furniture); Unit 1 is the least restrictive and is occupied by those transitioning out of special care, but the mechanism is in place to provide a robust structure if necessary. Coovagh House is modelled along the same lines in terms of restrictive practices as Ballydowd albeit in more limited terms as there is only one unit on site. This information was provided by the Director of Ballydowd and Coovagh Special Care Services Children's Residential Services through the CFA, High Court Liaison Officer 26 November 2019; HIQA *Report of a Designated Centre SCU, Coovagh House*, Unannounced Inspection 10 and 11 September 2019; HIQA *Report of a Designated Centre SCU, Ballydowd,* Unannounced Inspection 29 and 30 July 2019; HIQA *Report of a Designated Centre SCU, Crannóg Nua*, Unannounced Inspection 27 and 28 August 2019.
[719] CFA, First International Symposium on Special Care, June 2019.
[720] ibid.
[721] Per the Director of Ballydowd and Coovagh Special Care Services Children's Residential Services through the CFA, High Court Liaison Officer 21 October 2019; Stuart Mulholland (Director and Child Care Consultant from Scotland) introduced the Well Tree Model of Care into the SCUs; <www.welltree.info/our-team/> accessed 7 October 2019.
[722] CFA, International Symposium (n 719); the six indicators of wellbeing (each of which has a placement plan sub-headings) namely, active and healthy physical and mental wellbeing (psychiatric, psychological emotional, health); achieving full potential in all areas of learning and development (activities, interests, hobbies, education, training, work); safe and protection from harm (safety, family relationships, contact); economic security and opportunity (preparing for leaving care, independent living skills); connected, respected and contributing to their world individual an society, social skills); hope; 'each area contains a number of different indicators to monitor a young person's progression based on a lower-higher confidence which in turn allows them to progress to the next scoring level (Developing 0-2, Consolidating 3-4, Flourishing 5-6).'
[723] CFA, International Symposium (n 719).

is unique in that it responds to each child as an individual;[724] although children need to be active participants in the process.[725]

ACTS (which is under the remit of the CFA) is a multi-disciplinary team of skilled professionals.[726] It is part of the Well Tree Model of Care[727] and is on site in all three SCUs to assist children (and their families) in special care through the provision of therapeutic services. The team devises individual therapeutic plans (ITP) and supports children when they are transitioning out of special care into their onward placement.[728]

Educational facilities are available on site for all children in SCUs.[729] Each child's ability is assessed to facilitate the formulation of an educational programme. The educational programmes offered are broad and holistic in that they range from support in basic literacy and numeracy skills to practical skills to preparing children for state examinations. Aside from the provision of education, the schools also play a role in the child's rehabilitation.[730]

A comprehensive document incorporating policies and procedures regarding the provision of special care services is in place which cover matters such as the care of the child (referred to as a young person), child protection and the management of behaviour. Broadly speaking, this includes informing children of their rights, consulting with them on a continuous basis, assisting them in contacting family/friends where appropriate and dealing with mobilities and restraint.[731]

The welfare role of SCUs combined with the conduct of court proceedings determines how children's rights are managed by the court.

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[724] CFA, International Symposium (n 719).
[725] ibid; Stuart Mulholland, who brought the Welltree Model of Care to SCUs in Ireland is a Director and Child Care Consultant from Scotland,<https://www.welltree.info/our-team/> accessed 25 November 2019.
[726] CFA, ACTS Annual Report 2014, Service Plan 2015, 7; skilled professionals include psychologists, speech and language therapists, addiction counsellors, social workers and social care workers.
[727] CFA, International Symposium (n 719).
[728] ibid; the role of ACTS is to manage risk during transitioning to an onward placement but there is 'no magic solution'. See also CFA, ACTS Annual Report 2014 (n 726) 5, 19, ACTS teams also participate in child in care reviews and clinical planning.
[729] All three schools are under the patronage of the CFA; the schools at Ballydowd and Crannóg Nua are governed by the Education Training Boards and Coovagh House is governed by the Department of Education and Skills per the Director of Ballydowd and Coovagh Special Care Services Children's Residential Services through the CFA, High Court Liaison Officer 21 October 2019.
[730] National Council for Special Education, *The Education of Students with Challenging Behaviour arising from Severe Emotional Disturbances/Behavioural Disorders,* NCSE Policy Advice Paper No 3 August 2012, 35, 43; alternatives are available such as Youth Reach which provides an educational facility for children between the ages of 15-20 years who maybe unemployed or left school early; it provides a tailored educational programme with core areas and supports those wishing to further their prospects; See also Department of Education and Skills Inspectorate, *Education of Children in Detention and Care, Schools at High Support Units, Special Care Units and Children Detention Centres, A Composite Report Based on Evaluations Conducted from 2013-2015* (2017).
[731] CFA, Policies and Procedures Booklet (n 533).

6.3 Conduct of Special Care Court Proceedings and Judicial Management of Cases

The conduct of court proceedings differs to other forms of litigation.[732] Special care cases are listed before the High Court every Thursday morning at 10am in what is known as 'The Minors' List' and has specifically designated dates over vacation periods. The urgency of some cases means that not all applications for a SCO can wait until the following Thursday. Therefore, they are addressed immediately by another judge but are listed back again for review in the Thursday morning Minors' List before the assigned judge.

A specific judge is assigned to this list and remains *in situ* for an extended period of time.[733] It is fair to say that any judge assigned to the list rapidly develops a familiarity with the operation of the special care regime, the services provided, the management of the units themselves and most importantly, the children who are detained. Thus, there are many benefits to this:

- There is consistency in approach within the court process
- The judge gets to know each child and develops a familiarity in terms of their progress/regressions
- It gives the judge the opportunity to identify any systemic issues thus providing the opportunity to seek an overall resolution which benefits all children (including children yet to come within the process).[734]

The benefit from a child's perspective is arguably through the exercise of participatory rights. The child develops a familiarity with the judge too, arguably building the child's confidence in expressing their voice directly to a decision-maker.[735] During the observational period a new judge was assigned to the list and there was no apparent or obvious detriment during or post the change-over period.

The Minors' List on Thursday mornings commences with a 'call-over' of the list of cases. The court Registrar invites practitioners to identify why each case is listed, starting at the top of the list. This affords the judge and the legal practitioners the opportunity to address and dispose of short matters early on. After that, the first case is called and the court room is cleared of all people not involved in that case, although in practice, legal

[732] Empirical research was carried out pre-Covid 19.
[733] Duggan (n 44) 13.
[734] *CFA v TN* [651] (n 635).
[735] Chapter 6, 6.7.5 considers the direct interaction between the child and the presiding judge.

practitioners from other cases are permitted to remain in court for the entirety of all proceedings.[736]

Applications for interim, full, extension, variation or discharge of SCOs, must follow the statutory criteria in accordance with Part IVA.[737] The facts, which also address the statutory provisions are set out on affidavit, which is sworn by the principal social worker, with the relevant reports appended (such as social work, GAL reports). Other relevant papers may include, inter alia, individual therapeutic plans, educational plans, certain health assessments, reports from therapists such as psychologists, occupational therapists or speech and language therapists. Usually the relevant papers will be filed with the court prior to the hearing which gives the judge the opportunity to read them in advance. Following the making of SCOs, all special care cases must be reviewed (monthly at least per statute) by the High Court to ensure that the continued detention is warranted and that the child continues to benefit from special care.[738] All parties to the proceedings have permission ('liberty to apply') from the judge to come to court at any time and without notice, should the need arise, concerning the welfare of any detained child.[739]

6.4 Observations in the High Court

Before the commencement of the empirical element of the research, formal approval was required from the Research Ethics Committee in Dublin City University (granted on the 13th December 2017, Appendix A). The court, at the start of the empirical research process, was exercising its inherent jurisdiction and as such, all special care cases were heard in public, but subject to reporting restrictions.[740] Although there was nothing prohibiting attendance at court, permission to access court files was required in case clarification was needed on any matter arising out of the court process. Following advice from the Department of Justice, I wrote to the then President of the High Court, Mr. Justice Peter Kelly who granted access to court files subject to a protocol being devised in conjunction with the Chief Registrar of the High Court.[741] Both the President of the High Court and the High Court judge presiding over special care cases were informed, as a matter of courtesy, that this research was being carried out and accordingly, court observations commenced thereafter.

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[736] *CFA v TN & Ors* [568] (n 18), para 55; CCA 1991 s 23NH does not 'impose a mandatory obligation that such proceedings be held in-camera'; Covid Restrictions apply at the time of writing.
[737] (n 18).
[738] CCA 1991 s 23I.
[739] For example, if a child goes missing in care.
[740] Civil Law (Miscellaneous Provisions) Act 2008 s 27.
[741] The legal basis altered soon after, thus rendering the legal basis of my permission to access court files moot.

Subsequently, the statutory provisions commenced, thus altering the court's jurisdictional basis. The statutory provisions provided that all special care cases were to be heard 'otherwise than in public' and did not provide a statutory mechanism for researchers or the media to attend same.[742] I no longer had a valid legal basis to observe for research purposes but the presiding High Court judge invited the Child Care Law Reporting Project (CCLRP) and I to make an application to court for the purposes of being permitted to continue to observe cases for research purposes. The court heard legal submissions (in advance of the case of the *CFA v TN*)[743] from myself, legal representatives of the CCLRP, and all other parties to those proceedings.[744] Following the conclusion of the submissions, the court announced that it would be appropriate to address this matter by way of a written judgment. The court, in *CFA v TN*,[745] acceded to the application determining that there was no 'mandatory obligation' for the cases to be heard in camera and that it was also in the child's best interests, subject to their privacy rights, that such cases be reported.[746] The court also granted access to court files.[747] Court observations recommenced at a point thereafter for twelve months. Therefore, court observations were carried out for fourteen months in total, two months under the court's inherent jurisdiction and twelve months under the court's statutory jurisdiction. All attendees at court were made aware of the judgment. During the observational period, some matters were subject to a complete reporting embargo by the judge and no notes were taken of any of these matters.[748]

During the observational period, I attended court on Thursday mornings, at the specially fixed vacation hearings and at other times when it was made known that applications/hearings would be before the court. Overall, the research involved observation of fifty-four cases (to varying degrees depending on the stage the case was at during the observational period) over a total period of fourteen-months.

Upon conclusion of the observations, only relevant data was collated and transferred onto an excel spreadsheet and anonymised (Appendix B). Generic data was recorded for general statistical analysis as set out below. Separately, observations as they relate to the

[742] CCA 1991 s 29 which permits researchers attend in camera proceedings does not apply to Part IVA.
[743] *CFA v TN* [568] (n 18).
[744] At that time, I was a practicing barrister and did not need to engage legal representatives to act on my behalf.
[745] *CFA v TN* [568] (n 18).
[746] *CFA v TN* [568] (n 18) paras 55-57; See generally Clare Craven-Barry, 'Transparency in Family and Child Law Proceedings: Disentangling the Statutory Techniques and Terminology' (2019) 3 *Irish Judicial Studies Journal* 88.
[747] See generally Practice Direction HC86, SC20 re access to court files has since been introduced; See Appendix C, Protocol for Court Observations and Court Files.
[748] Empirical research was carried out with due regard to data protection legislative principles. Specific dates were made available for the examination of the thesis and removed subsequently to enhance anonymity.

classification of rights as identified in chapter 4 were transferred onto an excel spreadsheet and anonymised. The cases viewed almost in their entirety were then categorised together by both rights and the stage in the proceedings, from which observations, critical analysis and conclusions are drawn against the benchmark of the theoretical framework; this is supported by the remaining cases observed.

6.5 Limitations

There are several limitations which must be factored into this empirical research. First, special care cases are inquisitorial proceedings which are subject to regular review. Further, the fluidity of special care cases demonstrate that a matter may be before the court for one or two specific issues only, or to update the judge on something specific. Therefore, not all matters referred to by the court address rights issues specifically, nor would it necessarily be required. That said, depending on the circumstances of the case at that time, some updates may still relate to rights. For example, issues may arise regarding the difficulties in ascertaining a health-related service or the judge may wish an update on the progression of a complaint made by a child. While these are simply updates as opposed to a wider discussion on rights when they arise, they are relevant as they relate to the vindication of children's rights, albeit in an ad-hoc form. Second, special care cases have an element of fluidity because welfare concerns emanate from the child's behaviour and conduct which can be unpredictable. Thus, any serious concerns over risks potentially eclipses other matters. Third, as legal papers and reports are (generally) sent/handed to and read by the judge in advance of each hearing, not all rights issues are necessarily discussed at each application. It must therefore be surmised that if an issue is not raised orally during the court process, then there is no issue from the perspective of the parties or the judge. In the alternative, it can be surmised that there may be an issue, but it is overtaken by bigger issues and when balanced against the behaviour, welfare and best interests of the child, that it is of lesser significance in the whole scheme of things.[749] Fourth, sometimes applications are brought before the court on an emergency basis (outside of the allocated Thursday morning listing) or outside the legal term of which this researcher would not be aware and so there is a possibility that there are gaps in data collection. Fifth, the loss of a number of months in the collection of observational data while waiting for the court's ruling as detailed above rendered the observations under the inherent jurisdiction of lesser value; in addition the number of cases I was able to observe from the beginning to conclusion was reduced.[750] Despite the limitations identified, the

[749] Chapter 8, 8.2 'Case Management' further explains this position.
[750] Chapter 7, 7.7 considers 'Other Jurisdictional Configurations' including observations under the inherent jurisdiction.

empirical research successfully captures the operation of the court system overall and identifies how matters are addressed.

6.6 Court Observations – Statistical Data

During the observation periods, a total 54 cases were observed involving a total of 428 appearances.[751]

a. All cases observed

The observational period spanned cases heard under the High Court's inherent and statutory jurisdiction. The jurisdiction of cases observed is analysed as follows:

Jurisdiction	# of cases	Comments
Statute	31	
Inherent Jurisdiction	14	
Statute & Inherent Jurisdiction	4	
Judicial Review	1	
In camera	1	Embargo placed on reporting by the judge
Other	3	Includes combinations of statute, inherent jurisdiction, wardship and judicial review
Total cases observed	**54**	

The stage of cases observed is analysed as follows: The 'beginning' of a case is categorised as the point where an interim or full SCO is made (and the child is commencing time in special care); the 'end' of the case is categorised by the start of the phased physical transitioning process of a child out of a SCU to a step-down unit or onward placement unit and the ultimate discharge or lapse of the SCO (and including review post-discharge); the time in between is categorised as the mid or interim phase when stabilisation is in process and this length of time naturally varies from child to child.

Stage of case observed	# of cases		Comments
Whole		11	
In part:		40	
Partial (mid-to-end)	20		
Partial (mid)	12		
Partial (beginning to mid)	8		
Post discharge		2	No special care order in place
N/A		1	In camera - reporting not permitted
Total cases observed		**54**	

The exclusion period (number of months while awaiting the court's ruling), number of appearances and length of time (beginning to end) for a case meant that while many cases

[751] 54 cases included readmissions.

were observed, it was not possible to see a higher proportion of cases all the way from initial application to post discharge review.

In these 54 cases observed, slightly more than 50% of children were male:

Gender of child observed	# of cases	%
# Male	30	*56%*
# Female	24	*44%*
Total cases	**54**	

The statistics indicate that consistently the percentage of males being referred for a decision on special care is higher than that of females;[752] unsurprisingly this results in more males than females ending up in special care:

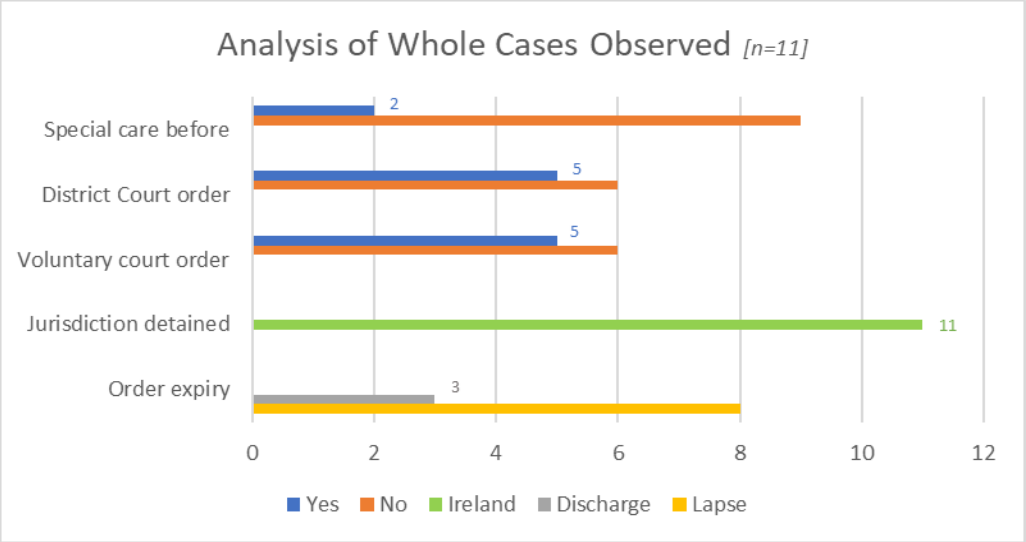
Gender of children	2015	%	2016	%	2017	%	2018		2019	%
# Male	36	*49%*	28	*54%*	35	*63%*	25	*64%*	29	*67%*
# Female	38		24		21		14		*14*	

The gender split reported by the CFA is in relation to referrals to the SCRC only and not in relation to the children detained. Even so, the gender split observed is consistent with the data reported by the CFA.

b. Cases Observed in their Entirety

All 11 cases observed in their entirety were under the High Court's statutory jurisdiction; detention orders were granted in every case and all 11 children were detained within Ireland; 2 of whom were in special care before. There was a total of 116 appearances for these cases and the children spent at average of 5 months in special care.

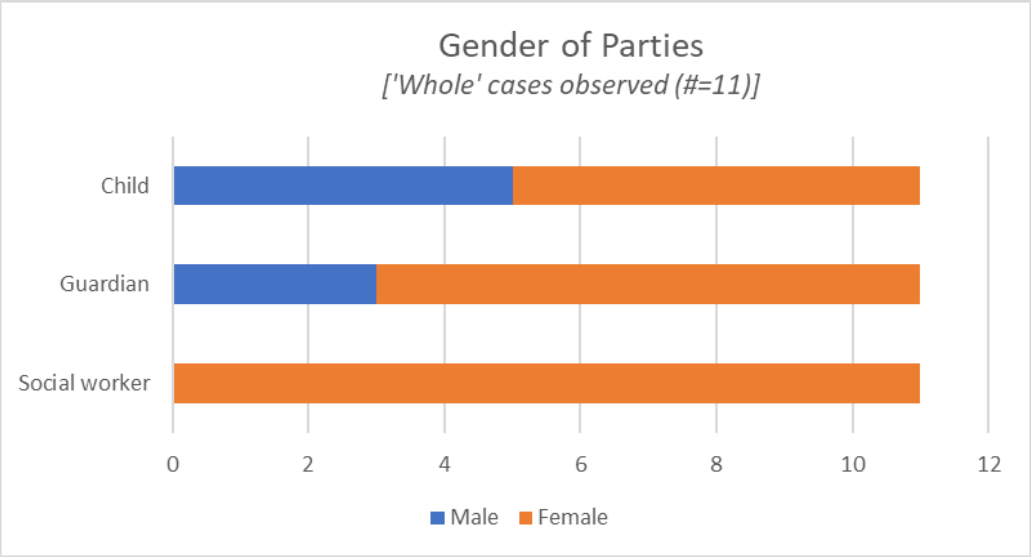
[752] CFA, *Overview of Special Care Admission and Discharge Service Delivery Reports*, 2015-2019 (n 716); data prior to 2015 is not quoted by the CFA.



SCOs are of three months duration and can be extended twice with each extension lasting three months. This means that a child can be detained for nine months under a SCO. This does not consider the fact that the CFA may first bring an application for an ISCO, in which case a child can be detained for longer. Of the 11 cases, orders were extended as follows:

# times order extended	# of cases
0	4
1	6
2	1
Total cases	**11**

Gender data

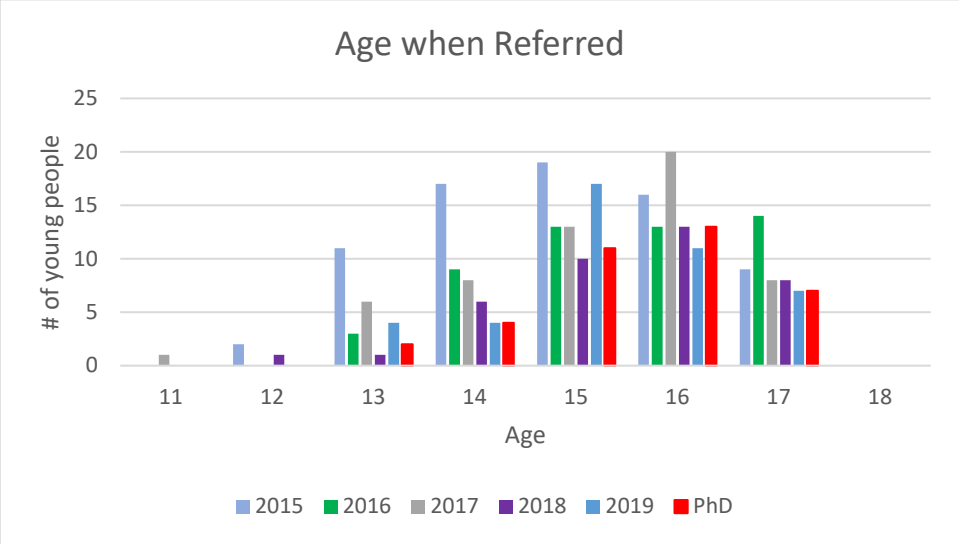


c. Primary Data set ("Assessed Population")

The primary data set for my observations relates to cases heard under statute. 31 cases were observed to varying degrees under statute as detailed above, a further small number (4) of cases began under the inherent jurisdiction of the court and later continued under statute; a further 3 cases heard under statute also involved combinations of inherent jurisdiction, wardship hearings and/or judicial review. Consequently, my primary population consists of 38 cases.

Demographics

A child under the age of 11 years cannot be placed in special care.[754] Since the commencement of reporting of data by the CFA in 2015, the average age of children being referred has remained fairly constant at approximately 15 years old (2019: 15.3 years old; 2018: 15.5; 2017: 15.2; 2016: 15.5; 2015: 14.9). The average age for children observed in my primary data set which relates to admission (as opposed to referral) was consistent with this data at 15.5 years. A breakdown of the numbers and ages of children being referred by the CFA is as follows:[755]



Gender

The gender split of the 38 children observed across 367 appearances is also consistent with gender split of the CFA as it relates to referrals of cases to the SCRC:

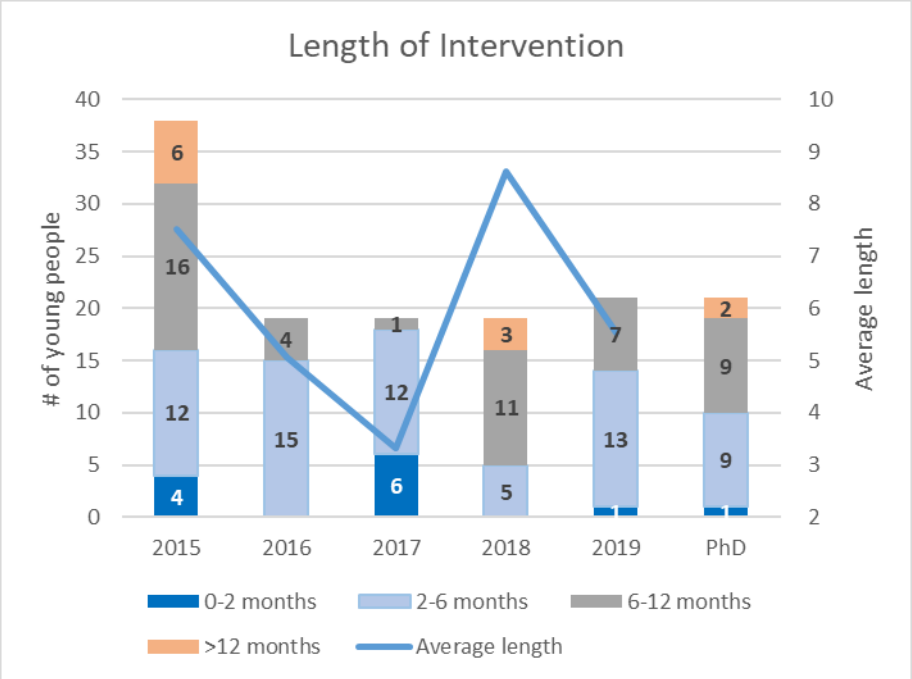
Gender of child observed	# of cases	%	# of appearances
# Male	21	*55%*	185
# Female	17	*45%*	182
Total cases	**38**		**367**

[754] CCA 1991 s 23H.
[755] CFA, *Overview of Special Care Admission and Discharge Service Delivery Reports*, 2015-2019 (n 716); (data prior to 2015 not provided).

Of these 38 cases, 36 were detained solely within Ireland, 2 were detained both in Ireland and subsequently abroad, and 7 had been in special care previously.

Time in Special Care

The CFA reports show that the average length of time children spent in special care fell between 2015 and 2017 but increased significantly in 2018 before falling again in 2019.[756] I observed 23 cases (out of 38) to completion and obtained the length of time that the child spent in special care in all but one of these 23 cases; my data showed a slight reduction in time in special care compared with the 2018 data reported by the CFA, with a greater proportion of children (11 children or 50%) spending less than 6 months in special care:



Extension orders/Process completion

# times order extended	# of cases
0	10
1	15
2	9
3	1
N/A	3
Total cases	**38**

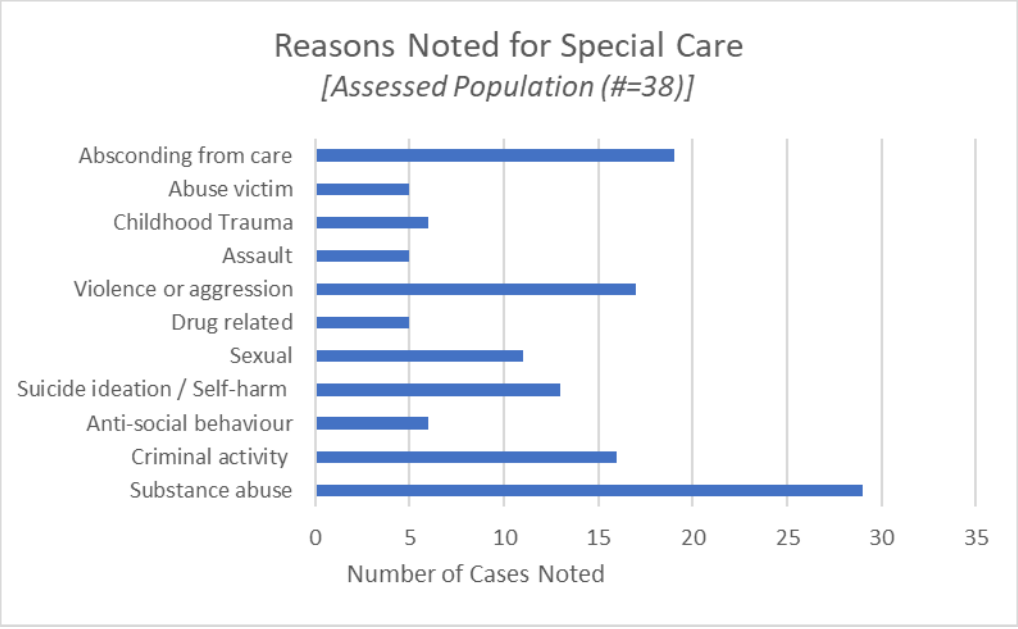
[756] ibid.

The data above identifies that in one case the order was extended three times. By way of clarification, that means a fresh SCO was applied for after the expiry of two extensions of the original SCO and one extension was sought on the fresh SCO, totaling three extensions over two SCOs. SCOs are extended primarily due to ongoing challenging behaviour and to oversee the child's safe transition to an onward placement.

Completion of SC process	Discharge	Lapse	Ongoing	Total
# cases	8	17	13	38

In 8 of the 38 cases, the CFA brought an application to discharge the SCO in circumstances where it formed the view that the child no longer needed special care. Extensions of SCOs are often sought to cover the transition period from a SCU to a step-down unit. Where such extensions are sought, a practice has developed whereby the CFA seeks the extension on an undertaking to the court to bring an application for the discharge of the order as soon as the criteria for special care is no longer met. In 17 of the cases, the SCO automatically lapsed or expired in circumstances where the CFA was of the view that an extension or a fresh application for a SCO was not required. 13 of the 38 cases were ongoing when the observations ceased, and SCOs remained in effect at that point.

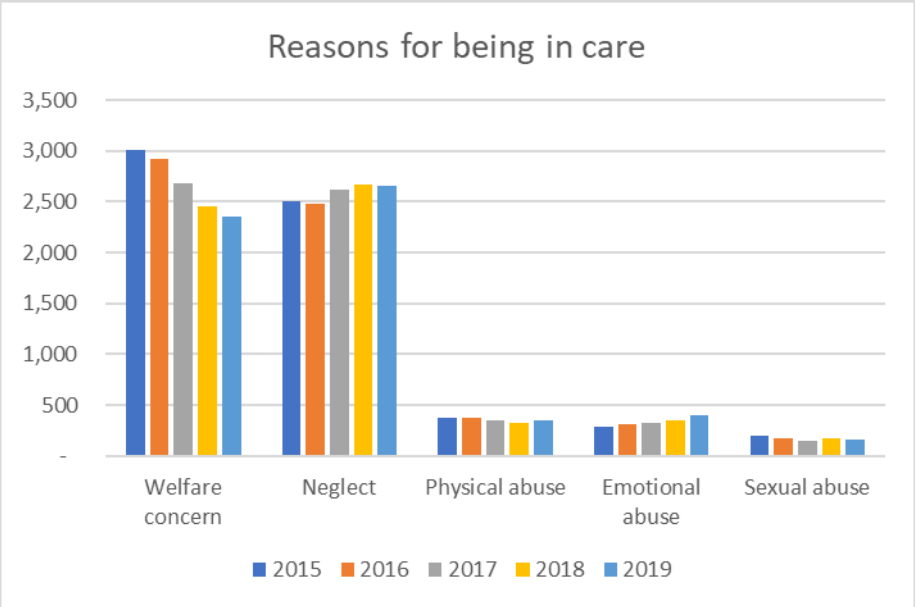
Reasons for Placement in Special Care



Through my observations, I collated general data on the reasons underlying the high-risk taking behaviour of children requiring special care; these are varied and serious. It is possible that there may be other concerns that were not clear during the observational process in a case, or were addressed at an emergency application of which this researcher

would not have been aware, or it may also be the case that some of the underlying reasons are of greater concern than others that may not have been mentioned during the period of observation. What is clear however, is that the range of behaviour emanating out of children who are deemed to require special care, is such that they are placing themselves at serious risk, thus engaging their protective rights. These rights, such as the right to life and/or the right to protection from harm, can only be protected and vindicated by a proactive interventionist approach, by others on their behalf.

While the subset of children being placed in special care is only a fraction of the total number of children in care, many of the reasons associated with placing these children in care are common. In its Review of Adequacy Report for 2019, the CFA identifies that neglect and welfare concerns account for 85% of all children in care.[757]

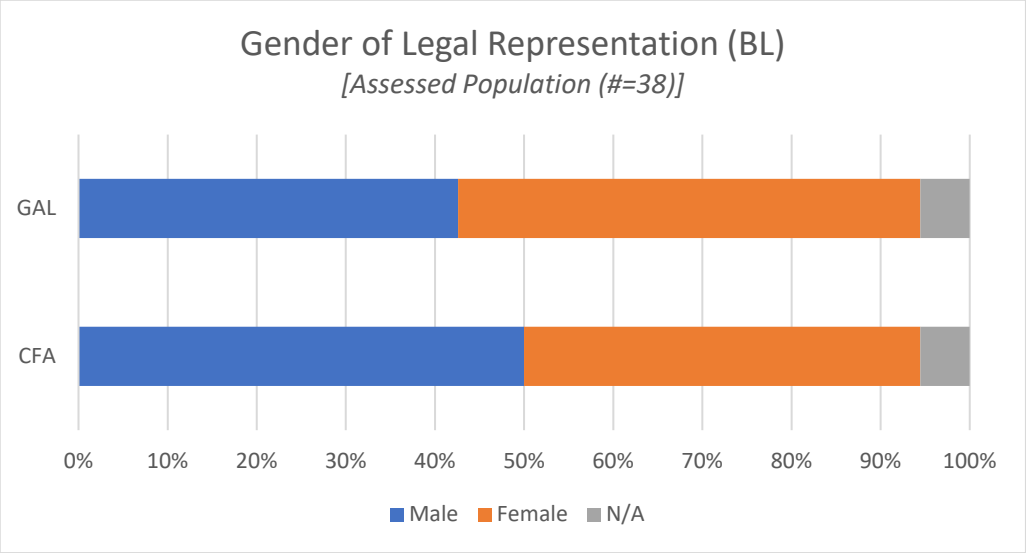


This data highlights the importance of the welfare of the child and how welfare concerns are addressed by the CFA. Some are placed in care (foster care, residential or community care settings) and others are candidates for special care. There is a clear distinction between the two. It is the child's behaviour which potentially places a child in special care, whereas it is the environment to which a child is subject that is damaging to his/her welfare that potentially places a child in foster care (or other care settings other than special care). Yet some of the reasons giving rise to welfare concerns in the first instance and which lead to the child being placed in care, remain some of the reasons as to why a child is placed in special care, all of which give rise to 'welfare concerns'. This raises an

[757] https://www.tusla.ie/uploads/content/Review_of_Adequacy_Report_2019.pdf, 62 accessed 3 January 2021.

interesting question outside the scope of this thesis, which is to what extent does the child's early environment to which he/she is exposed within/outside the family unit, impact and lead, to such high-risk taking behaviours in the first place?

Legal representation



While the GAL and the CFA were relatively well and proportionately represented by women, some other points of observation are noteworthy: of these 38 cases, senior counsel was engaged by the CFA on 14 occasion and in all 14 instances, senior counsel was male. Male junior counsel represented the interests of mothers on 20 occasions.

6.7 General Observations

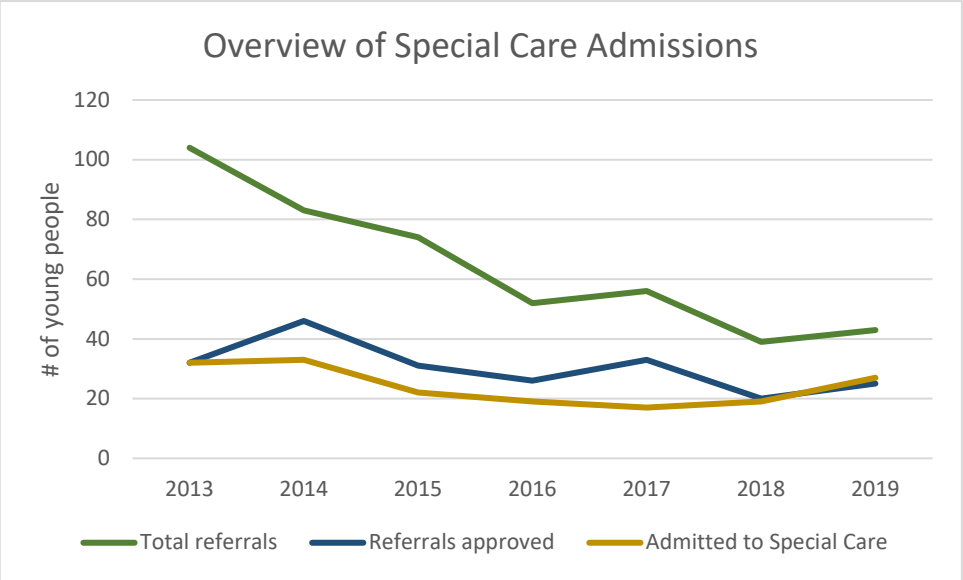
In advance of addressing the qualitative data as it refers to the rights of civilly detained children, it is interesting to note some general observations relevant to rights. Although not in fact rights issues themselves, the issues impact the judicial decision-making process.

6.7.1 Entry into Special Care

The number of children being referred to the SCRC has fallen significantly in recent years, although the proportion of referrals being approved has increased slightly. During 2016, the three units were forced to operate at a reduced capacity due to the risk profile of some children, the progression of building works at Ballydowd SCU and difficulties in recruiting staff. The same reasons resulted in the National Manager for Special Care reiterating the recommendation that the units continue to operate at reduced capacity in 2018.[758] Consequently, and as the courts seem to rarely deny an application for admission

[758] CFA, *Overview of Special Care Admission and Discharge Service Delivery Reports* for 2015-2019 (n 716).

to special care, the number of children being admitted has fallen over the past few years as shown in the chart below:[759]



This demonstrates that virtually all approved referrals are admitted to special care and the numbers admitted correlates to the number of beds available. This supports the view that this is a resource driven service, with the number of approved referrals potentially being determined by the number of beds available. Therefore, the fundamental structure of the operation of the system by the state must be regarded as deficient in terms of the rights of children who need special care.

Once certain statutory criteria have been fulfilled, the CFA are under a statutory duty to bring an application for a SCO.[760] During the observational period, no application for special care was refused by the court, which is unsurprising given the compelling nature of all cases observed. A 'triage system' has been in operation for many years by the HSE/CFA which means that there is a priority listing operated by the SCRC and therefore the child most in need tops the list.[761] That list changes from week to week as the needs of children vary and this is informed by weekly updates from the social work department. If a 'determination' has been made by the Service Director (which gives rise to an obligation to apply for a SCO), it can be revoked[762] should a more needy child appear on the list. In one judicial review hearing which challenged the delay in making a 'determination' in the first place (thus negating the obligation to bring an application for

[759] ibid; CFA, Annual Review of the Adequacy of Child Care and Family Support Services Available 2014, see https://www.tusla.ie/uploads/content/Annual_Review_of_Adequacy_Report_2014_V1_June_2016.pdf 106 accessed 3 January 2021.
[760] CCA 1991, s 23F.
[761] Oral legal submissions during a judicial review hearing during the observational period.
[762] CFA, Interim Guidelines for Referrals to Special Care (n 713) 4.

a SCO), some factual matters were identified which explained how this is so, such as, the demand for special care beds outstripping availability; it was also noted that the HSE, which addressed special care before the CFA, had always operated a triage system of priority due to changing needs and behaviours.[763] It was further clarified by the state that there was a misunderstanding of the resource issue. There was no issue regarding the deployment of resources (financial); the issue relates to staff and their retention, due to the challenges they face in the SCUs.[764] Indeed, the National Director of Residential Services confirmed this difficulty in oral evidence when he explained that SCUs were highly intensive environments requiring staff of a 'particular mettle and skill to deal with children and their challenges'.[765] While acknowledging the weight to be given to decisions made by the SCRC given its 'specialist knowledge' and also in terms of risk, the court held that the policy of delaying making a statutory determination was unlawful, and that the emphasis must be on the level of risk to the child.[766]

Although this thesis is concerned with the rights of those detained, the determinations in the judicial review proceedings remain relevant, as they affect the operation of the whole special care system in terms of entry into and exit out of detention; they impact on rights and affect children in need of, and not getting, special care. This also affirms that, unlike the court, the CFA is concerned with the needs of many children and consequently ends up balancing the interests and competing needs of children against each other to provide for those most in need. It further illustrates the potential ability of the statutory provisions to back the state into a corner in terms of the provision of services and the enforcement of duties (which protects rights). Significantly, these children are outside the remit of the court and therefore it cannot make orders to protect and vindicate their rights.[767]

6.7.2 Exit out of Special Care

Paving the way for an exit from special care is a complex process for three reasons. The first two are interlinked which are ascertaining the optimum time for discharge and the identification of a step-down placement; third, the legal mechanism for transitioning out of special care is not specifically provided for within the statutory provisions.

[763] Oral legal submissions during a judicial review hearing during the observational period.
[764] ibid.
[765] This was during the hearing of one special care case.
[766] *CK v CFA* (n 157); See also CFA, The Interim Guidelines for Referrals to Special Care (n 713) 5 which states '[T]here will be no application for an interim special care order unless there is a vacancy in special care'.
[767] text to n 593-597 in chapter 5.

The delay in identifying appropriate step-down facilities has a negative impact on some children.[768] The judgment in *CFA v TN*[769] highlights the challenges and difficulties facing the CFA regarding children transitioning out of special care, namely, the recruitment and retention of staff.[770] Further, a child cannot transition until the behaviours are somewhat under control, but a child who is frustrated by the delay in leaving special care is liable to engage in risky behaviour and refuse to participate with the services provided. This difficulty with sourcing and having available onward placements or appropriate step-down facilities simply exacerbates the difficulties and frustration for children ready to transition out of detention. Although unintentional, these difficulties have the potential to breach (at a minimum) the right to liberty and the right to bodily integrity.

The absence of a legal mechanism for leaving special care (other than a lapse or discharge of an order) has seen a practice develop whereby full SCOs remain in place until the child has transitioned out of special care. If the child has not fully transitioned out and the SCO lapses, an extension (or a fresh order depending on the stage of the proceedings) is sometimes applied for by the CFA to oversee the transition, with an undertaking by them to apply for a discharge of the order at the earliest opportunity. There are no specific provisions under Part IVA of the Child Care Act, 1991 to oversee the move from detention to liberty or to provide for an absence for the purposes of transitioning.[771] So, if the transition goes badly wrong, the SCO is still in place and the CFA can return the child to the SCU. If a child is moving on from special care, it would be naïve to assume that the risks have gone, but they have diminished insofar as they are not at the same level as upon entry into special care because otherwise the child would not be transitioning. It is also clear that the transition out of special care must be appropriately managed, but from the child's point of view, the question must be asked is if it is appropriate that the child is still subject to a full SCO. Similarly, having that order remain in place is questionable when the extent of the risks that justified special care are diminishing. Securing a safe exit is a different process and arguably requires a different kind of order or specific provisions within the context of that order to manage the transition phase. To extend a SCO, the court must be satisfied that the risk of harm still exists, which is

[768] HIQA, *Report of a Designated Centre Special Care Unit, Ballydowd*, Announced Inspection 30 June to 2 July 2020, 5 identifies that the issue persists; HIQA, *Report of a Designated Centre Special Care Unit*, *Coovagh House*, Announced Inspection 20-22 July 2020, 6-7.
[769] *CFA v TN* [651] (n 635).
[770] ibid paras 7-9.
[771] CCA s 23NF, a child can be 'released' for specific purposes, eg placement in a residential centre/with a parent/relative. Mental Health Act 2001, ss 26-28 provide for absence with leave, absence without leave, discharge of patients, respectively.

challenging, when the child is in the process of moving out of the SCU, albeit slowly. This must be contrasted with the decision in a case before the court where a child remained the subject of a full SCO in circumstances where he/she had already fully transitioned out of special care. Despite the risks and continued serious welfare concerns, this identifies a paternalistic approach.

For a variety of reasons, it appears overall that the special care service is primarily service led as opposed to being led by the needs (and rights) of the child from the perspective of entry into and exit out of the special care system. The court cannot protect and vindicate the rights of a child in need of and on a waiting list for special care as it lacks jurisdiction in the absence of an application. That child is reliant on others (parent/guardian) to bring a judicial review application to have the matter placed before a judge. Further, the systemic difficulties in operating smooth transitions out of special care identify the constraints on the judicial decision-making process. Registration of facilities or staffing difficulties are not matters upon which the court can rule within the context of special care applications, yet they impinge on the court's ability to adequately protect and vindicate the rights of children within the special care system during this transitional process.

6.7.3 Transitional Provisions for the Jurisdictional Change

Transitional provisions are set out under section 48 of the Child Care (Amendment) Act, 2011.[772] They provide that where a child was detained in special care prior to the commencement of the Act, 'section 23B(2)…of the Principal Act shall not apply to the child who is the subject of that High Court order for the remainder of the period specified in that High Court order'. This may suggest that once the remainder of the current order under the inherent jurisdiction ends (e.g. if there were two weeks left out of a four week order), it could not be renewed under the inherent jurisdiction or section 23B(2) could not be relied upon for the remainder of the entire proceedings and that a fresh application would have to be brought under the statutory provisions. Although that was not adjudicated upon, it is open to interpretation.

The first case heard under the statutory provisions was in March 2018. This case had been before the court since at least January 2018 and a SCO was made during February 2018 under the inherent jurisdiction.[773] It was confirmed for the court during that month,

[772] Barrington et al (n 606) under 'Transitional Provisions'.
[773] *CK v CFA* (n 157) para 5.

following a legal opinion prepared for the court, that the statute had in fact commenced.[774] The High Court was informed that notwithstanding this, children detained under the inherent jurisdiction were not unlawfully detained and that section 23(B)(2) was a 'catch-all that accommodates that' and reliance was placed on the phrase 'or the High Court has otherwise ordered'. Over one year later, the High Court (*obiter*), rejected the argument that section 23(B)(2) (and section 23NJ(6)) could be so construed.[775] Although Part IVA of the Act did not specifically oust the exercise of the inherent jurisdiction in such cases (and a question arises as to whether it could) and despite the *obiter* comments, it means that there is arguably a question mark over the legality of the detention of children detained in SCUs between the commencement of the statutory provisions and the date of regularisation under statute, if orders were renewed or sought under the inherent jurisdiction during that time. In any event, each child's legal position was regularised under Part IVA of the 1991 Act and it was clear that both the court and the legal representatives were working to ensure this was done expeditiously and in line with the statutory provisions.

6.7.4 Moving Children

a. Moving Children from One Unit to Another

The court, under the inherent jurisdiction, did not accept that the practice of moving children from one SCU to another was always appropriate and considered it was a 'dangerous precedent'.[776] In considering the negative effect such a move could have on the child in one case, the court considered that the only reason the application was being made was to vacate a bed to facilitate a fresh special care application that day for another child of which the court was aware. The court took a dim view of the application, which was ultimately refused, and told the state that the court should never be put in a position where it was being asked to balance the best interests of one child against another. This highlights the fact that the court considers the best interests of the child whose case is before it to the exclusion of other cases on the list, whereas the CFA has the responsibility to consider and ultimately weigh the best interests of many children, most likely against each other, to ensure that it maximises the special care services for as many children as possible in whatever way it can. It is interesting that it was the court and not the GAL (or any other party to the proceedings) who challenged the proposed move in circumstances where the court noted appropriate assessments had not been carried out, all options had

[774] Commencement of the statute had been mentioned prior, but clarification was sought on a technical legal point.
[775] *CFA v MO'L* (n 20) paras 73-77.
[776] It is not clear why this practice was in place or how often it happened under the inherent jurisdiction.

not been exhausted and the perceived benefits of a transfer to a new unit were speculative; the judge did not say why it was 'dangerous precedent' although it may be that the concern emanated from a potentially de-stabilising effect of a transfer for the reasons outlined. This case is also instructive in terms of the significance and importance of independent judicial oversight.

Part IVA has determined that it is within the remit of the CFA to transfer a child to another SCU but only with prior court approval. In effect what is required from the court is a variation of the original SCO under section 23NE of the 1991 Act and it is only once the order is varied that the child can be transferred. The court must be satisfied that the proposed move is in the child's best interests having regard to that child's behaviour and risk of harm. This was observed in a case where the CFA identified the need for the transfer and why it was in the child's best interests. While acknowledging that the child would have to get used to, inter alia, a new unit and people, the court was persuaded by the arguments raised in favour of a move and acceded to the application. This identifies that the way forward under the Act for a transfer to another unit is subject to judicial oversight and approval which is not guaranteed to be granted. This judicial oversight is reflective of the policy intention of the Oireachtas.[777]

b. Moving Children Abroad

Chapter 5 outlined the rationale and the legal position in terms of transferring a child abroad under the inherent jurisdiction and Part IVA.[778] In two cases observed, children were transferred abroad through the mechanism of wardship while in one of those cases legal argument expressed concern over the use of European Regulations given the uncertainties at that time over Brexit. Regardless of such well-founded concerns, it is curious nonetheless that the transfer of a child abroad occurred without legal argument as to whether the provisions of Part IVA permitted the transfer abroad. The point is that the governing legislation for special care is specifically Part IVA, which instead of providing clarity, seems to have caused legal uncertainty regarding its use as a mechanism for the transfer of children abroad for medium to long term stays.[779] Aside from the legal uncertainty as to whether section 23NF is the appropriate mechanism for the placement of children abroad, the unit abroad must also comply with the definition of a 'secure care

[777] text to n 620 in chapter 5.
[778] Chapter 5, 5.3.2 (a) ('Detention Abroad' under the inherent jurisdiction, text to n 523-530 in chapter 5); 5.5.2 (a) ('Detention' under Part IVA, text to n 637-640 in chapter 5).
[779] It was submitted that there was nothing contained in the legislation permitting a transfer out of the jurisdiction for a medium-term placement and on that basis an application would have to be made for wardship. This is at odds with the Dáil debates, see text to n 637-640 in chapter 5.

unit' per section 23A of the 1991 Act which is '….secure residential accommodation….'. As to whether a psychiatric hospital falls within its scope is a matter still to be argued and determined. One of the main issues as far as children are concerned is that all the safeguards specifically put in place to protect vulnerable children under Part IVA fall away if another jurisdiction is invoked.[780] For this reason at least, circumventing statutory provisions ought to be subject to robust legal argument with a *legitimus contradictor* to establish the boundaries and parameters of both. It would be fair to surmise that this is likely to be a recurring issue and one of the concerns now is that a precedent has been set which is that wardship is the established mechanism for the transfer abroad of children in need of special care.

6.7.5 Interaction with the Judge

Although detained children do not attend at court, many, if not all, have met or personally interacted with the judge. This occurs in different ways, either through the judge visiting the SCU,[781] meeting with the judge in court (on a pre-arranged day and time and in private most likely with the GAL and the court Registrar present) or the child can write a letter to the judge.[782]

It can be surmised as to why a High Court judge might want direct engagement with the children; they are vulnerable and are detained and a court must satisfy itself that all is in order and being managed appropriately. Further, it permits the judge satisfy him/herself regarding the child's maturity; it enables the judge to get to know the person over whom they are making an order; it gives them an opportunity to understand the intensity of their views.[783] This can be achieved by direct communication. It is not clear what the motivation is for a child in terms of speaking to or communicating directly with the judge; it too can be surmised that it may be because they form the view that they are not being listened to by other professionals; or that their views are not being taken seriously and that the only way they can be truly heard is by voicing their views to the person who makes the detention order; or they form the view that the judge can counteract the powers

[780] For example, reviews under wardship are every six months; although the wardship jurisdiction for minors is outside the scope of this thesis, see generally The National Safeguarding Committee, *Review of Current Practice in the use of Wardship for Adults in Ireland* (2017) which is critical of certain aspects of the wardship jurisdiction as it relates to adults.

[781] For example, the judge variously reported: that they had met the child in the SCU and 'it was very helpful'; having met a particular child noted, 'I have a name to the face which is very important'. It was reported also to the court that the child in question was 'very motivated' by a visit from the judge.

[782] The judge expressed thanks at receiving a letter; CFA Policies and Procedures Booklet (n 533*)* s 2, Policy 2.18 addresses Legal and Court Work procedures for young people in special care.

[783] See Judy Cashmore and Patrick Parkinson, 'What Responsibility do Courts Have to Hear Children's Voices?' (2007) 15 (1) *International Journal of Children's Rights* 43, 52.

of others.[784] Whatever the motivation is for both the court and the child, direct participation, is a long standing practice and one that satisfies both the court and the child and fits within the parameters of the theoretical framework.[785] A child's request to meet with the judge was never refused during the observational period.

6.7.6 Guardian ad Litem

As identified, the role, function and irreconcilable duties of the GAL, which remain unregulated, have developed on an ad-hoc basis; the GAL must tell the court what the child's wishes are and advocate for their best interests.[786] The role may in fact be more expansive in special care proceedings, as GALs tend to form the view that certain assessments ought be carried out or that certain arrangements ought be put in place.[787] It is arguable that by making such broad-ranging recommendations, the GAL is monitoring, overseeing or acting in a supervisory role over the exercise of the CFA's statutory function in its role as caretaker of the child's welfare. This can be contrasted with the role of the GAL in the jurisdiction of England and Wales where it has been held that their role in special care cases is to assist the court regarding issues raised and not to oversee the exercise of the statutory functions of the local authority.[788] The dividing line is not so clear in this jurisdiction, but what is clear is that the court is and must be regarded as the final arbiter in all matters where children's rights are concerned, while exercising independent judgment.

6.7.7 Reports

The decision-making process impacts rights. Therefore, issues of curial deference and reliance on expert opinion mainly in professional reports cannot be ignored given they impact the decision-making process. These proceedings are dominated by experts unlike in other civil proceedings. Due to the complexity of the issues affecting children and the level of expertise required to address those issues, it is reasonable to assume that the concept of curial deference will apply to some extent at least,[789] i.e., where the court will

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[784] ibid 51; Aoife Daly, The Judicial Interview (n 310), Aoife Daly, 'The 'Judicial Interview'-A Right of the Child?' (2017) for the *Magistrate's Association Journal*; Elaine O'Callaghan, Conor O'Mahony, Kenneth Burns, '"There is Nothing as Effective as Hearing the Lived Experience of the Child": Practitioner's Views on Children's Participation on Child Care Cases in Ireland' (2019) 22(1) *Irish Journal of Family Law* 2-8.

[785] Chapter 4, 4.11.

[786] text to n 567-572 in chapter 5.

[787] Concerns raised were taken on board by both the CFA and the court.

[788] *Birmingham City Council v M* [2008] EWHC 1085 (Fam) (Family Division; McFarlane J; 3 June 2008).

[789] Paul Daly, *A Theory of Deference in Administrative Law* (Cambridge University Press 2012); *CFA v Q* (n 533) para 52, the judge stated, 'the following is the accepted description of events from the various reports provided to the Court although it should be noted that not all of the following were subject to evidential scrutiny before the Court'; *HSE v H* (n 544) para 14, the court ended its judgment with 'needless to say the above remarks are based on the assumption that the reports presented to this Court accurately reflect the apparently exemplary manner in which secure care institutions are managed and run by the HSE'; *CK v CFA* (n 157) paras 60, 76, the court noted that those appointed to the SCRC had skill and expertise that the court did not, but, the manner by which they came to their decisions had to be lawful;

defer to the decision of ACTS experts or those engaged by the CFA who have assessed the complex care needs of the child. There is a difference between considering expert opinion and using that as a basis for making an informed independent decision and abdicating all responsibility in favour of such expert opinion. As the High Court is the body with ultimate responsibility for the protection and vindication of the rights of such children, it is imperative that the decision-making process does not involve abdication of responsibility but examines the expert views in reports and makes an independent assessment.

Court observations demonstrate that such expert reports are relied upon by the court to provide accurate and fair updates to assist in all stages of the decision-making process. Their accuracy is pertinent particularly during the statutory court reviews where reports are simply handed into court (and are therefore not sworn evidence) and oral submissions are made by legal representatives. During court observations, issues arose in a small number of cases regarding the content of such reports. In the first case, a report was criticised for not being written up properly. The point made was that such reports must be written with the child's best interests being core and not in defence of CFA inaction. In the remaining cases, reports were variously criticised for either repeatedly including concluded historic allegations or drawing negative inferences to which some family members took exception. A common denominator for the latter observations identifies a lack of fair procedures. It is incumbent upon the authors of such reports to ensure that a balanced, accurate and fair report is made available to the judge, particularly when judicial reliance is placed on those unsworn reports. The same principles ought to apply to any information contained in reports about the children themselves.

6.7.8 Civil versus Criminal Jurisdiction

There is a clear distinction between children detained for welfare purposes and those detained for punitive/punishment purposes. This is primarily evidenced by the fact that children are separately accommodated,[790] and by the conduct of court proceedings. This is despite the language engaged in Part IVA[791] and government publications, which

further, it noted that decisions and determinations of the Committee have consequences for a child, including consequences for their fundamental rights.

[790] Carr (n 4); Linnane (n 4).

[791] For example, CCA 1991, 'detention orders' (s 23A), 'abscond' (s 23NA), 'release' (s 23NF); repeated calls were made during Dáil and Seanad debates to change the word 'detention' because of its criminal overtones; the Minister explained that legal advice was to leave 'detention' in place as the use of some other word might mislead and result in uncertainty for all parties within the process. Eg Dáil Éireann Debate, Child Care (Amendment) Bill 2009 [Seanad]: Report and Final Stages, 18 January 2011 https://www.oireachtas/ie/en/debates/debate/dail/2011-01-18/18/ accessed 4 December 2019; Dáil Éireann Debate, Child Care (Amendment) Bill 2009 [Seanad]: Report and Final Stages, 14 July 2011 https://www.oireachtas.ie/en/debates/debate/dail/2011-07-14/15/ accessed 4 December 2019; Seanad Éireann

connect restrictive practices in special care with those in Oberstown criminal detention centre as opposed to connecting it with children also civilly detained but under the Mental Health Acts.[792]

Although there is clear evidence of such a distinction within the court process, the use of some terminology in court of language most associated within the criminal context arguably contradicts this. Language engaged within the court process refers to children 'absconding' (as opposed to consistently engaging the phrase 'missing in care'), that the child cannot 'be released' back into the community yet (for welfare purposes, as opposed to saying the child's liberty cannot yet be restored), or the child breached a curfew (instead of saying that maybe the child breached the rules of the unit in the following ways).[793] Whereas those who attend court understand the use of such language within a civil context, it is easy to see how children in special care may view their detention as punishment if the same terminology is utilised with them, particularly when their outings from special care are further curtailed (they may view this as a punishment) because of an 'absconsion'. Even when the child has regained liberty and is in a residential or community placement, there is talk of 'missing his curfew' or 'absconding'. Absconding relates only to one whose liberty is denied, but when there is no SCO in place and the child is in residential/community care, the child is really a child missing in care.[794] It is important to be consistent with and mindful of the language (terms/words) used, which ought not to be couched in overtones of the language most associated with criminal behaviour. Although the use of such language does not affect a specific right, nor does it reflect on the decision-making capacity of the court, it is important that the child understands, by the use of appropriate language, that special care is not for punishment purposes and is separate to the processes of criminal detention.

6.7.9 Gender

As judgments in recent years have undergone analysis from a feminist perspective when examining the role of gender within the wider parameters of 'legal and non-legal discourse',[795] it merits consideration as to whether there is any discernible difference in the treatment of children within the court process having regard to their gender. Research

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Debate, Child Care (Amendment) Bill 2009: Second Stage, 2 February 2010 https://www.oireachtas.ie/en/debates/debate/seanad/2010-02-02/10/ accessed 4 December 2019.

[792] DCYA, *A National Policy on Single Separation Use in Secure Accommodation for Children* (n 533).

[793] Lindsay (n 2) 67 noted the term 'absconding' applied to escaped prisoners, inmates who escape from mental institutions and deserters from the army.

[794] Chapter 8, 8.4 (d) ('language') suggests reviewing the use of certain terminology.

[795] Rosemary Hunter, 'Analysing Judgments from a Feminist Perspective' (2014); <Rosemary_Hunter_Analysing_Judgments_from_a_Feminist_Perspective_LIM.pdf (sas.ac.uk)> accessed 20 November 2020.

carried out by the SRSB in 2004 identified that some professionals were of the view that girls, more likely than not, would be brought into special care out of child protection concerns whereas for boys such concerns arose out of their involvement in aggressive behaviour or criminality.[796] As a result, some identified 'a bias' within their field resulting in alternatives being sought for girls and that the boys were considered more high-risk.[797] The social care workers and managers noted that girls would also engage in aggressive behaviour, however, with a lower level of aggression and with a greater likelihood to inflict harm on themselves.[798] These views are somewhat comparable to a small scale study carried out in Scotland which considers how risk-assessment practices are 'influenced by gender discourse'.[799] The findings demonstrate, in line with other research, the 'at-risk' profile of females is defined by 'being at-risk sexually' whereas males are considered 'offenders' who 'pose a risk to others'.[800] Roesch-March quoting Hooper noted that victimisation remains 'culturally feminized' and 'offending is masculinised' resulting in risk assessments being framed within this context.[801] Although this is a study carried out in another jurisdiction, it is important to be alive to the issue of this female/male dichotomy so that a more holistic approach is adopted in terms of understanding the influence of the 'wider environment' on the risks posed to this group of children.

Overall, during the court observational period, it cannot be said that there was such a clear-cut demarcation in the rationale for civil detention between males and females in line with the foregoing. This may be because all matters had to be presented to the court in line with the statutory provisions which must consider, inter alia, life, health, safety, development and welfare. This lends itself to a more holistic evaluation based on the child's specific vulnerabilities. That said, even though the statutory provisions appear to appeal to a more holistic interpretation of a child's overall welfare, decision-makers ought to be alive to this dichotomy to ensure that this holistic approach is not compromised by this 'gender-based' discourse. The reason why this is important, is because the framing of the legislative provisions arguably facilitates the civil detention of children on grounds based on this dichotomy. That does not detract from the fact that during the observational

[796] SRSB, *The Impact of Placement in SCU Settings* (n 122) para 4.5.3.
[797] ibid.
[798] ibid.
[799] Autumn Roesch-Marsh, 'Risk Assessment and Secure Accommodation Decision-Making in Scotland: Taking Account of Gender?' (2014) 23 *Child Abuse Review* 214-226.
[800] ibid 221; Carr, Exceptions to the Rule (n 21) under the heading 'secure from whom?'
[801] ibid 222, quoting CA Hooper, 'Gender Maltreatment and Young People's Offending' in Brid Featherstone, Carol-Ann Hooper, Jonathan Scourfield, Julie Taylor (eds), *Gender and Child Welfare in Society* (John Wiley & Sons Ltd 2009) 61-93.

period there were cases that could be said to fall into those categories when children were being taken into special care. For example, concerns regarding those being at risk sexually were more referable to females than males. Violence and aggression were more referable to males than females as was anti-social behaviour and drug-taking (though not in any way exclusive to males). A more exact science as to whether this dichotomy exists, would be more referable to the CFA; does the dichotomy form part of the terms of reference, even subconsciously, when determining which child is going to get the next available bed in special care, or is it just simply based on the level of risk, whatever that might be and regardless of whether the child is male or female?

6.8 Conclusion

This chapter sets out the background and general propositions of special care within the context of the court process which is necessary to evaluate how the court protects and vindicates rights. Although not always entirely clear from court observations, the research demonstrates that although bed capacity is low within this service led system, the managers of the units have autonomy in relation to the level of restrictions within the secure facilities. The facilities themselves operate a scientific Model of Care known as the Well Tree Model, with the ACTS team at their disposal, even though psychiatric services, which may be required, must be provided by the HSE. Education is also available either on site or close to the units. All this gives rise to an expectation that the facilities required to ground detention are in place and therefore, there must be an expectation that the rights of the child will be properly protected and vindicated. Further, the court has updated (unsworn) reports at its disposal, a GAL who regularly reports upon the wishes and the best interest of the child and the judge has direct communication with each child. With all these mechanisms in place, it looks as though the judicial decision-making process is straight-forward, however, in practice this is not the case.

Within this framework, there are limitations in terms of vindicating the rights of the child. The issues identified regarding the entry into and exit out of the system demonstrate that the court is somewhat thwarted in what it can achieve as policy issues underpin some of the difficulties, for example; it cannot assist children on a waiting list; it cannot control retention of staff; it cannot control provision of some services of the HSE which may be required and they are not party to the proceedings; it cannot control the lack of services in this jurisdiction resulting in some children being sent abroad. The court is also obstructed in terms of having no option but to make full SCOs to safely cover a

transitional period as there is no alternative statutory mechanism to do so. This all impinges, one way or another, on the judicial decision-making process.

Highlighting these issues also demonstrates that history is repeating itself. First, there are still bureaucratic hurdles to overcome within the organisational framework vis-à-vis inter-agency issues; for example, the CFA is reliant on the HSE (and others) for the provision of certain mental health services to these children. Second, some important points are not being raised for legal argument; for example, it was not argued as to whether Part IVA permitted the transfer of a child abroad on a medium-long term basis, when the parliamentary debates demonstrate that the practice was within their contemplation.[802] This can be compared to High Court time being set aside (with legal submissions), on what could only be described as a legislative error, as to whether researchers could attend special care hearings following the commencement of Part IVA. If important legal points are not being raised, argued and adjudicated upon by the court, there is a risk that the framework within which the judicial decision-making process operates will not adequately protect and vindicate the rights of children in special care. This overview provides a comprehensive background when examining the management of special care cases as it relates to rights in chapter 7.

[802] text to n 637-640 in chapter 5; (n 779).

Chapter 7: Rights' Analysis

7.1 Introduction

Having regard to the methodology, limitations, data set and peripheral issues identified in chapter 6, this chapter examines, through court observations, how the High Court manages the rights of children detained in SCUs alongside serious welfare concerns. It also considers how it marries with the theoretical perspectives set out in chapter 4.

7.2 The Special Care Process

The rights-based theoretical framework in chapter 4 proposes that although regard must be had to rights, welfare dominates initially; that rights are prominent with less welfare concerns at the exit stages; and the interim phase is denoted by a balance between the two as stabilisation occurs. The justiciable rights at issue are civil and political rights (right to life (including the right to protection from harm), liberty, family rights and privacy), socio-economic/cultural rights (education and health) and participatory rights (hearing the voice of the child which facilitates involvement in the decision-making and the complaints process). Also considered as part of the theoretical framework are other parties to the process, i.e., the parents and the state. This entire process is overseen by the court and theoretically its role is similar regardless of the stage of the process.

7.3 Civil and Political Rights

a. The Restriction on Liberty to Protect Life

Initial Phase

All statutory applications observed for an interim/full SCO were in line with the statutory provisions.[803] Once the proofs are met, an element of discretion remains with the court as to whether it will/will not make the order. During the observational period, every application for an interim/full SCO was acceded to. The implicit nature of the CFA's duty to bring such an application inversely protects the child's right to life (including the

[803] CCA 1991 s 23H, the court tends to grant orders permitting assistance from AGS to seek out and return a child to a SCU; Children Missing in Care, A Joint Protocol between An Garda Síochána and the Health Service Executive Children and Family Services, version 3.10.12, 19 confirms that nearly all High Court orders granted under the inherent jurisdiction included 'a command to the Commissioner of An Garda Síochána to search for, arrest without warrant, detain and return to the Special Care of the Health Service Executive any child who absconds or is taken while in the Special Care of the Health Service Executive on foot of a Detention Order'.

right to protection from harm) and welfare – consistent with Hohfeld's proposition on the realisation of rights by the imposition of duties.[804]

Once liberty was constrained, even at the initial stages, court observations reveal that efforts are made to ease that constriction by what is termed 'mobilities'.[805] This is where children are permitted time away from the unit, by themselves, or with support staff, whether around the grounds of the SCU or further afield. According to the court, such matters are for determination by the professionals and are independently reviewed by the court. This requires a delicate balancing of rights which not only protects the child's life, health, safety, development and welfare in line with the statutory provisions, but also ensures that whatever mechanisms are in place, protects the child from harm, which may be either self-inflicted or inflicted by others as a result of repercussions from the child's own behaviour, in the first instance. It is therefore somewhat foreseeable that a protectionist approach will be evident initially. Despite this initial protectionist approach, this easing of restrictions on liberty arguably recognises the benefit of some freedom alongside protectionist concerns, which demonstrates the nexus between the best interest and welfare principles.[806]

Interim Phase

Court observations demonstrate that the statutory process and proofs for an extension of a SCO are addressed prescriptively during this phase. At no time during the observational period was any application for an extension of a SCO refused. Statutory court reviews also occurred in every case during this phase. During the statutory court review process the court is provided with social work and GAL reports (generally in advance and with other professional reports if required) and hears oral submissions from legal representatives. This evidence (during the statutory court review stage) is rarely sworn unless there is a contest between the parties. Under statute, the court needs to be satisfied that the child continues to require special care. In all cases observed, the court never determined at the review stage that special care was no longer required.

'Mobilities' are regularly referred to during this phase and their implementation rests with the manager of the SCU.[807] The withdrawal of privileges also rests with the manager of the unit but are independently reviewed by the High Court during the statutory court

[804] text to n 249 in chapter 4.
[805] CFA, Policies and Procedures Booklet (n 533), policy 1.19 identify that mobilities are a mechanism for 'rehabilitation and re-integration into the community'.
[806] text to n 344 in chapter 4.
[807] The CFA confirmed that mobilities were at the discretion of the manager (of the SCU) and 'should be at their discretion' in the child's best interests. The judge appeared to accept this point.

reviews.[808] That said, if issues arise regarding lack of mobilities, despite evidenced concerns, the court takes proactive steps while keeping the matter under close review and continues to review the matter at intervals it deems appropriate.[809] The issue with mobilities was the exception rather than the norm; that said, the proactive approach by the court regarding mobilities demonstrates the importance of the right to liberty while having regard to the right to protection from harm that a child may face when granted mobilities.

The importance of mobilities, which are risk assessed, cannot be understated in terms of the positive effect it can have on a child, and efforts are made by the SCUs to facilitate them having regard to the children's interests. It also enables the professionals evaluate the coping mechanisms of the children in the community and partly assist in terms of determining when a child may be ready to move out of special care.[810] Essentially, their purpose is two-fold; the children are enabled to do something fun that they are interested in and the SCU gets to test their readiness. Therefore, good mobilities equals good outcomes; special care is about stabilisation and moving on and therefore mobilities play a key part in this process. At the statutory court reviews, the CFA reports to the court whether outings have taken place and if they went well.[811] If the professional staff have serious misgivings about permitting mobilities, appropriate structures are put in place to strike a balance between protecting the child's welfare, and more particularly, protecting the child from harm (either self-inflicted or through a retaliation on them as a result of their behaviour), and letting the child have some level of freedom. Further, children are sometimes moved to a less restrictive part of the SCU where they have more freedom.

Although the child's liberty has been restricted, talk of reinstatement of liberty permeates this phase of the process. The process of identifying an onward placement post special care commences early because structuring a tailor-made aftercare package takes time. Court observations identify that the formulation of the aftercare package is dependent on a variety of factors, such as, the needs of the child, their risk profile, the availability of facilities, the risk profile of other residents in the proposed after-care facility and it is also dependent on various assessments. Occasionally, these plans are paused, for example, if

[808] CCA 1991 s 23I; according to the court, such matters are for determination by the professionals and independently reviewed by the court; the court also opined that mobilities will have to be carefully managed, but that if there was scope at all for mobilities to occur, then they should, but the court confirmed that it does not make those decisions, that is within the discretion of the person in charge.
[809] Although the CCA 1991 s 23I provides that court reviews must be carried out every four weeks for the duration of SCOs, this does not preclude the judge from bringing the matter back for review at any stage.
[810] Updated appraisal from the Manager of Ballydowd SCU through the High Court Liaison Officer 23 November 2020.
[811] Although the details of where children go on their outings is not discussed in detail, it is clear that such outings constitute fun activities, such as, unit holidays, trips to the cinema, shopping, or visits to family members.

serious behavioural issues arise requiring further exploration, as such behaviour can affect the onward placement.

The phrase regularly engaged throughout section 23 of the Child Care Act, 1991 is that there must be 'reasonable cause to believe that the behaviour of the child poses a real and substantial risk of harm to his or her life, health, safety, development or welfare'. It does not state that the child must be benefitting therapeutically, just that the child is benefitting from special care, which can occur if receiving education or other health treatment. Therefore, a child could be detained in special care if the behaviour poses a risk of harm to that child's safety. A small number of cases demonstrated minimal engagement with the therapeutic services although benefitted from special care in other ways. This brings to mind the words of MacMenamin J. when he spoke of the concept of 'mission creep'; a concept worth remembering to ensure that detention under special care remains grounded in its original purpose.[812] This is because it raises a question regarding the child's right to protection from harm; just because a child is need of protection from harm does not mean they should be civilly detained. Civil detention is not a panacea for the protection and vindication of the rights of all children – but it may be required for a very small number of children with very specific issues. If it is the case that the child is not benefitting therapeutically from special care and remains in need of protection from harm, then the obligation falls on the state to protect and vindicate that right and the other rights of that child in some other way.

Exit Phase

Court observations demonstrate that the process of leaving special care is complex. Although occasionally children return home with a wrap-around support service, the process involves the identification of an onward placement, ascertaining if the child is ready to transition, and having a SCO in place as its legal mechanism for children exiting the process.[813] The more challenging the behaviour the greater the complexity of the transition.[814] Legally, the child does not revert to liberty until the SCO lapses or is discharged.

Although the process is not an exact science, for the most part, the pace is to an extent, driven by the needs of the child.[815] Occasionally, some children require a slow transition;

[812] MacMenamin J, 'The State, the Courts, and the Care of Minors at Risk' (n 548).
[813] Further applications for SCO were made to facilitate the slowing down of a transition plan to suit the child's needs; negative behaviour may be caused by a child's growing levels of frustration regarding an onward move.
[814] Occasionally bespoke placements are required.
[815] A quicker transition occurred in one case in part because the child was approaching the age of majority.

in one case, it was submitted that an extension of an order was sought to slow down the transitional process and to allow the space for an investigation to take place; one party submitted that the application for an extension of the SCO was brought because of the child's 'absconsions'. Orders are not meant to be extended solely for such purposes and it is likely that these issues may have formed part of a wider welfare issue. In another case, a transition was set to progress with the location of the onward placement in line with the child's wishes, who had a change of mind, leading to further delays in sourcing a suitable placement. Judgment was handed down in another case observed, *CFA v TN*,[816] which identified systemic issues regarding the shortage of step down placements for children transitioning out of special care; such scenarios have the potential to raise issues regarding preventative detention. Other cases observed demonstrate that a child's behaviour deteriorates occasionally following discharge from special care, thereby requiring readmission. This is not an exact science and is fact/risk dependent.[817]

Analysis

All applications and extensions for a SCO were granted due to the compelling nature of the welfare issues. This is unsurprising as there are a limited number of beds available in what is a resource driven service and it is likely the most compelling cases are placed before the court in the first instance. Court observations demonstrate that such welfare concerns automatically trump liberty rights. Permitting the child have outings attempts to redress this balance and while this is within the competence of the CFA, court observations demonstrate that judicial oversight is crucial where issues arise. The justification for continued detention during statutory court reviews is primarily based on unsworn evidence and oral submissions, which it is argued does not respect the gravity of detention orders. Further, although planning the exit from special care is a complex matter, the preparedness to slow down a transition process purely to suit the child is encouraging, as it respects the child's autonomous preferences.[818] This identifies that the exit strategy is more in tune with the needs of the child than the entrance into special care which is based on resources.

[816] *CFA v TN* [651] (n 635).
[817] Although some parties to the proceedings argued in favour of readmission, the CFA for various reasons did not agree based on its therapeutic value.
[818] text to n 256, 262, 265, 276-279 in chapter 4.

b. Further Restrictions and Bodily Integrity

Initial Phase

During the initial observational period there were instances where further restrictions were placed on some children at this early stage. This was reported to the court in only a few cases in particular circumstances: a staff member was assaulted (child was placed in structured time away); another child caused damage (child was physically restrained); another child refused to comply with part of the admissions policy (child was placed in seclusion/structured time away). The issues leading up to the restraint or seclusion in these cases were safety issues. Given the blend of behaviour of children detained in the units and the nature of the infractions, it is understandable why such measures were invoked, as overall safety was prioritised and this includes the safety and protection of that child.

Interim Phase

Similarly, during this phase, court observations demonstrate that the practice of restrictions on liberty tends to occur after a period of what is reported to the court as, inter alia, aggression, incidents of harm, assaults and property damage. For example, in one case it was reported to the court that the child had been placed in single separation and restraints following the escalation of numerous incidents; no detail was given as to how long the child was in single separation, the nature of the restraint or for how long the child was restrained. In another case, a child was placed in single occupancy following an 'absconsion' which was reviewed at particular intervals. In another case, a parent was of the view that his/her child viewed the structured time away as a punishment, asked that staff encourage the child to understand the issues and explain the action taken was for the child's own safety. The court encouraged that to be done. This last case demonstrates the nexus between best interests and welfare; due to welfare issues the child needed structured time away, which also coincided with what was in the child's best interest. It is important to note that structured time away or single separation is not always portrayed so negatively. Following a period of 'instability' after a SCO was extended, a child ended up in single separation and although there was a plan going forward, it was reported the child was happy there and found it helpful.

Exit Phase

Further restrictions on liberty such as seclusion or restraint did not feature during this observational stage.

Analysis

Court observations identify, in the circumstances outlined above, that welfare trumps the right to bodily integrity; however, regard must also be had to the child's right to protection from harm. The action taken on foot of welfare concerns is arguably also action taken in the child's best interests, which is a mandatory guiding principle under Article 42A.4.1 of the Constitution, and to protect the right of the child to protection from harm. It is argued that the welfare principle supplants a rights discussion, which may not necessarily be the case if greater regard was had to viewing the right to protection from harm as separate and distinct from welfare principles or rights.

From an observational perspective, it is not possible to identify the nature of restraint engaged, nor to conclude how long any child was separated from peers or restrained. Although these matters are governed by protocols[819] and are expected to be included in court reports, it is curious given the nature of the restrictions, that these matters were mentioned without further comment. While it is logical that the professionals who care for children with diverse and complex needs make immediate judgment calls between risks, safety and restrictions, it is important to ensure that curial deference does not replace examining such matters particularly as it has the potential to affect the right to bodily integrity.[820] The duty on the state, who controls and holds power over the child to ease or further restrict their movement is, in the instances described, devoid of judicial scrutiny in open court, while the focus remains on the child's welfare and behaviour.[821] It is argued that from a rights-based perspective, it would be more appropriate that an independent assessment of such practices be examined in open court; this would ensure complete transparency, thereby supporting an appropriate balance between rights and welfare.[822] The current system of addressing this matter falls short of what is promoted in the theoretical framework.[823]

c. Family Inclusion/Access

Initial Phase

Court observations demonstrate that an all-inclusive approach is adopted towards those parents who wish to engage, once it is in line with the child's best interests.[824] Therefore

[819] CFA, Policies and Procedures Booklet (n 533) s 3
[820] text to n 339-343 and 383-385 in chapter 4.
[821] text to n 356-361 in chapter 4.
[822] Chapter 8, 8.3 (d) 'Analysis' considers this point further; HIQA, *Report of a Designated Centre Special Care Unit, Ballydowd,* Announced Inspection 30 June to 2 July 2020, 5, identified a child informing an Inspector that that staff 'restrain too much'.
[823] text to n 408 in chapter 4.
[824] Chapter 4, 4.5.2(a) considers the best interest principle.

family inclusion is part of the court process even though parental involvement can be quite varied.[825] Some parents are supportive from the initial application, others are not, others are not told of the initial application in case it may jeopardise matters; some parents are unable to care for their child due to the child's needs or the parent's own issues/vulnerabilities, and even where the parent/child relationship has broken down, some parents still regularly attend court. Access to family members can occur quite quickly after the initial detention, and if this occurs, the court is generally informed.[826] An order is occasionally though rarely made suspending parental access in the child's best interests.[827]

Interim Phase

Attendance at court by parents was sporadic during the observational period.[828] Few faithfully attended and others did not for various reasons.[829] One of the difficulties facing some parents is the knowledge that their child does not want to be in special care and trying to be supportive while recognising the risks of their behaviour. Extensions of SCOs were rarely opposed by parents, and in the limited cases where there was opposition, the opportunity was provided to contest it if they wished, though it did not alter the outcome. Notwithstanding this inclusionary approach, sporadically court observations identified that parents/legal guardians were not kept up to date by the CFA. In the cases observed this could be categorised as an oversight more so than any kind of a deliberate act, simply because any time the matter was raised, it was addressed without any difficulty. This illustrates the importance of court reviews.

Access is at the discretion of the manager of the SCU (or other professionals in certain cases) and for the most part tends not to require court intervention.[830] While some children have very good familial relationships, others do not. Sometimes children are angry at their parents/legal guardians or have a volatile relationship with them and do not want to see them. Where family relationships are fractured, the GAL and the ACTS team tend to promote therapeutic interventions to address the relationship breakdown, because a familial support structure is considered important for the child. Periodically, access with parents is supervised or suspended (though contact can be maintained through letters

[825] Chapter 5, 5.2.1(c) considers the legal position of the role of the family.
[826] This can include personal/telephone access.
[827] Though access may continue with other family members.
[828] text to n 548 in chapter 5.
[829] For example, work/family commitments; distance from home to the court; some do not want to be a part of the process but remain in contact with the CFA for updates; parent cannot be located; in other cases parents were not always in court but at least one parent was engaged in the process.
[830] For example, the judge formed the view that directions were not required but suggested that the SCU might note the parent's difficulty and seek to accommodate same.

and gifts),[831] generally in the child's best interests. In a couple of cases, the failure to either supervise or suspend access was argued and accepted as being potentially detrimental to the welfare of the child and the child's progression with therapeutic supports. One further case observed demonstrated that access must be structured to focus on the wellbeing of the child and not on the wellbeing of others.

Exit Phase

The views of family members are provided to the court when the transition plan is being scrutinised,[832] or where the matter is before the court by way of post-discharge review.[833] More particularly, some parents are concerned at the end of the process that special care is still required. Other concerns expressed by parents related to the appropriateness of the identified onward placement and the testing of boundaries by the child. Court observations demonstrate that great weight is attached to professional/clinical opinion (including that of the GAL) regarding the timing and management of a transition plan (as well as discharge of the order) as opposed to much weight, if any, being afforded to the concerns of parents, even though they are noted and commented upon, when it comes to weighty matters.[834] Access between the child and family members is still within the remit of the CFA but is also led by the wishes of the child.[835] For the most part, this did not cause difficulties. Overall, court observations demonstrate that parents are a welcome part of the process, but at the exit phase, more weight is attached to the views of professional staff.[836]

Analysis

Access to parents is primarily driven by the special care team in conjunction with the child. Intervention by the court was limited during the observational period to suspension of access as opposed to making access orders. Due to the ages of children in special care, there is no point in making an access order as a child cannot be made comply. That said, many children in special care managed to maintain ongoing relationships with parents, even if those relationships were mercurial at times. Similarly, granting an order suspending access will not guarantee that a child will not seek out his/her parents.

[831] Although contact can be maintained through letters, gifts etc, a suspension of access brings with it a risk that the child will seek parental access by leaving the SCU without authorisation for a visit with them.
[832] Family supports persist at this stage; concerns expressed that the educational plan was deficient was a central component in an aftercare plan; a mother expressed concern regarding certain aspects of the new unit.
[833] A parent detailed what he/she considered the deficiencies in the transition process.
[834] text to n 383-385 in chapter 4.
[835] text to n 352-353 in chapter 4.
[836] text to n 383-385 in chapter 4.

Respecting a child's autonomous decision regarding familial access identifies a rights-based approach. If it is determined that access to parents is not in the child's best interest, particularly where the child wants to see their parents, welfare prevails leading to a conclusion that the welfare/rights equilibrium is recalibrated back towards prioritising welfare, and autonomous preferences are relegated behind welfare concerns. This identifies that the right of the child has the capacity to prevail as long as it is not ousted by welfare and best interest concerns, thus endorsing the protectionist approach.[837] Having greater regard to the relational autonomy principle (and agency) within a rights-based framework may yield a different result, depending on a risk-assessment.[838]

Although a child does not have a legal justiciable 'right' to have access to friends (including boy/girlfriend) it must be noted that developmentally, this age group are more concerned with their peers than with parents. That said, the more expansive interpretation by the ECtHR of Article 8, now incorporates the right to establish and develop personal relationships.[839] There was limited reporting on the issue of peers and relationships with others, save that in a small number of cases reference was made to the fact that children had good relationships with the staff, that relationships were being maintained in former residential centres where the children lived prior to special care (to assist with a smooth transition back to their former placement following special care), and access visits also took place between other family members such as siblings, or grandparents. Meeting friends was rarely touched upon save in the odd case, where negative peer relationships were highlighted, and parents expressed concern that their child may eventually re-engage with the same peer group. It is not clear how children in SCUs interacted with each other or the extent to which they get to see their friends if at all, however, it is provided for in the special care policies and procedures.[840]

What this highlights, is that the constitutional and statutory framework, within which the court operates, sees the child as part of a family structure, which he/she still is, but it fails to consider that parental rights are dwindling, their wishes are not that significant any more when dealing with adolescents and that developmentally, adolescents need to engage with peers and others. To truly appreciate the naturally occurring developmental process of children this age, it is important to recognise that there needs to be a greater

[837] text to n 375-376 in chapter 4.
[838] Chapter 4, 4.8 ('overview') considers relational autonomy within the context of the theoretical framework.
[839] text to n 461-463 in chapter 5.
[840] CFA, Policies and Procedures Booklet (n 533), s 2.9.

awareness within the legal framework of the developing competence and autonomy of children vis-à-vis their parents.

d. Privacy

Initial Phase

The issue of privacy arose within the context of media reporting of special care cases which respects the privacy rights of the child. While the CFA conceded that in the past, when cases were heard under the inherent jurisdiction, many people were not happy regarding the reporting of cases, it was also argued that regard must be had to broader issues which sometimes exist, such as the welfare of the child or even the operation of the criminal justice system. The court directed that such cases must be reported with less level of detail including refraining from naming the SCU where that person is being detained.[841]

Interim Phase

During this phase, the court gave very clear directions numerous times that any reporting should not be such that any child/person is identifiable through descriptions, locations or specific facts. A concern was raised that a child may be able to identify his/herself post special care.

Occasionally, reports containing sensitive information about the child need to be circulated to other agencies. During the observational period, the CFA sought the lifting of the in camera rule to liaise with An Garda Síochána (AGS) to put them on notice of an issue. Although it cannot be expected that the court would micro-manage the content of every letter, it is surmised that in this instance little data would have been given due to the purpose of the letter. This can be contrasted against another case whereby the CFA again sought to lift the in camera rule to provide AGS with a report which they requested for a specific purpose. The court in this case ruled that the report could be viewed by a member of the force, but that it was not to be handed over and it was only for the purposes they had raised. The court further stated that it was the child's report and reiterated that it was not to be distributed.

Exit Phase

The issue of divulging information to an educational facility was considered with the sole purpose of identifying additional supports which may be required for a child following special care. The child's views were not canvassed in court regarding the disclosure of

[841] Other factors were prohibited from reporting and were case specific.

this information. The court directed the 'disclosure of information as may be required to assist the educational plan' and the in camera rule was lifted to facilitate that disclosure. It was not clear from the court process what was going to be disclosed nor was it discussed; that decision appeared to have been left to the professionals to decide.

Analysis

The issue of the release of reports or information to third parties does not appear to have a consistent approach. While the approach adopted regarding the release of information to AGS was in line with the theoretical framework, the release of information to assist with an educational plan was not as tight.[842] Any information being disclosed to third parties, for the benefit of the child ought to be minimal, specific and serve a specific purpose. The number of reports that are prepared (for the benefit of the court) for each child are voluminous over the course of special care and the data contained in these reports is highly sensitive. Although children in special care are under the age of majority, they are also adolescents and there is no reason why their views cannot be canvassed if reports are to be shared.[843] If the child objects to their disclosure, the court is the final arbiter in the child's best interests anyway. As noted by MacDonald the right to privacy is a 'cardinal right' and 'crucial to the child's growth as a human being'.[844]

7.4 Socio-Economic Rights

a. Health

Initial Phase

Court observations identify that even at this early stage, where possible, the court is updated regarding assessments. Further, if a GAL has been representing a child's interests before (e.g. in District Court care proceedings), they may be in a position to make recommendations and suggestions for certain assessments/evaluations to take place. Unsurprisingly, some children do not want to be in special care and may initially refuse to engage. In one readmission case, the GAL submitted to the court that just because a child chooses not to avail of the help provided does not mean that the child should not have the opportunity to engage, a point accepted by the court.

Interim Phase

Overall, observations demonstrate that the health packages for children in special care are comprehensive, holistic and tailored to each child. This includes a range of medical

[842] Chapter 4, 4.9 (a) (third paragraph).
[843] Chapter 4, 4.4(b) identifies that children this age are already starting to make autonomous decisions even if some are potentially unwise.
[844] text to n 453 in chapter 5.

matters such as dental/orthodontic work, optical care, vaccinations, medication, and seems to incorporate any outstanding physical healthcare matter.[845] Further, the structure of special care identifies that some children engage in healthy physical activity such as, inter alia, going to the gym, cycling, swimming, tennis, gaelic football or fishing.[846]

Broadly speaking, children are assessed to identify their underlying issues. ACTS play a crucial role in the provision of therapeutic supports, but referrals are also made for other professional assistance (CAHMS or more specialist services such as forensic psychiatrists, attachment or a trauma specialists).[847] The CFA does not have control over any third-party provider and this can be problematic.[848] Further, the benefits from such health and therapeutic care presupposes engagement by the child, which does not always occur. This non-engagement occasionally gives rise to delays in carrying out assessments. Under those circumstances, addressing the complex needs of the child can be slow and challenging and ultimately lead to an extended time in detention.

The issue of capacity arises if there are concerns regarding behaviour and if the child is approaching the age of majority. This is because if a determination is made that the child has capacity at aged eighteen years, then the SCO lapses. If the corollary applies, then an application for wardship will have to be made to continue detention. Therefore, forward planning is required to address the complex issues during this phase

Exit Phase

The availability of all health-related services and/or referrals to appropriate support services tends to be addressed at this point. Before the transition takes effect, ACTS may make recommendations to be included as part of the forward planning and to assist staff in the onward placement. It is not unusual for the GAL to work with the CFA regarding implementing recommendations where appropriate. Even though the availability of services does not necessarily imply engagement by the child, any lack of engagement can potentially jeopardise the new placement.

Where the provision of services is outside the remit of the CFA, it loses some control. Post special care, but while still under review, certain specialist services were required for a child; one branch of the service provider declined to offer their services as the child was not in their area and the other branch declined to assist because the child was not in

[845] Chapter 5, 5.5.3(b) considers the legislative provisions regarding the provision of healthcare under Part IVA.
[846] This lends itself to personal development, see chapters 4, 4.10 and 5, 5.2.1 (d).
[847] text to n 154 in chapter 2 (joint Protocol between the HSE and the CFA).
[848] text to n 155 in chapter 2 (the Protocol identifies that the CFA does not have all the resources it requires for extreme cases).

their area for the relevant time frame; the court held that there is no role for 'administrative red tape' when a vulnerable child is involved and essentially told the CFA to sort it out, which somehow, it did. Separately, (during another post-discharge review stage) the court requested that the HSE come to court to explain itself re the provisions of one of its services, even though the HSE was not a party to the proceedings.

Analysis

The above demonstrates the importance of the right to healthcare for children and its positive effects, notwithstanding its status as a socio-economic right; importantly, the nature of the healthcare provided to children in special care, such as therapeutic supports and mental health services, assists these children in terms of managing their behaviour, handling risky situations and developing coping mechanisms.[849] Therefore, it is argued that this is an essential component in terms of protecting and vindicating their right to protection from harm, albeit, indirectly. It is fair to say that the CFA's approach is one that favours having at its disposal all necessary resources even though it is hindered in terms of such accessibility.[850] This begs the question as to why limitations were placed on the CFA in the first instance in terms of the provision of healthcare services, particularly since case law demonstrates that this is a long-standing issue.[851] Further, the success of addressing the behaviours requires the willing engagement of the child and this is something the CFA does not have control over; many of these children have been making autonomous decisions for some time (even though they may have been unwise decisions).[852] That said, court observations demonstrate that the professionals make enormous efforts to encourage engagement.

These issues are problematic for the court in its role as the ultimate protector and vindicator of rights. A number of matters arise: under the court's inherent jurisdiction, the court viewed its jurisdiction as being expansive as was required to vindicate rights and that its jurisdiction was sufficiently flexible to achieve this;[853] the inherent jurisdiction remains in certain circumstances alongside the statutory provisions;[854] the statutory jurisdiction provides for the provision of healthcare (although undefined);[855] any orders the court may make do not necessarily fall foul of policy decisions as the policy

[849] Chapter 5, 5.2.2(b) considers health and its socio-economic status; text to n 719-725 in chapter 6 considers the Well Tree Model of Care and its significance.
[850] text to n 154-155 in chapter 2 identifies a shortcoming in the Protocol in terms of its resources.
[851] Chapter 5, 5.3.3(b) highlights this long-standing issue, more particularly text to n 564 in chapter 5.
[852] Chapter 4, 4.4(b) considers adolescents, autonomy and developing capacity of the child.
[853] text to n 497-501 in chapter 5.
[854] Chapter 3, 3.7 and in particular text to n 227- 233 in chapter 3.
[855] CCA 1991 s 23C.

has already been made by the Oireachtas in the provision of healthcare for children in special care; the court is simply considering the interests of detained children which may result in the disbursement of already allocated funds.[856] There is no reason as to why any child's right to healthcare cannot be properly vindicated by the court; the fact that the HSE or other providers of services are not parties to the proceedings does not justify why some children may not be getting the appropriate required service which happens to be outside the control of the CFA. It explains why it legally happens, but it does not justify it. The state chose to reconstitute itself through the establishment of statutory bodies which it regulates;[857] it cannot be to the detriment of children it civilly detains for a specific purpose and for the provisions of a specific service.

b. Education

Initial Phase

A common thread amongst children entering special care is that most of them have disengaged from education for some time prior to special care. Even though welfare and behaviour are more a focus at this stage, court observations demonstrate that many children re-engage rather quickly with education. Some children show an interest in sitting state examinations even at this stage. For other children, identifying an educational direction can be challenging.

Interim Phase

Court observations during this phase establish that school is available to all children and they are encouraged to attend. It is during this time that the court is informed of their academic or other strengths and preferences. Some observations include:

- An interest in sitting or repeating state examinations
- Pursuing a profession
- Preferences for Youth Reach or an apprenticeship
- Others showed great interest and abilities in hobbies such as baking, singing, music, working with animals.

Further, it is not unusual for some children attending at school there to be assessed as 'very bright' or have significant attendance; one case identified glowing academic reports of engagement, which had a stabilising influence. That said, school holds either little or

[856] Chapter 5, 5.3.5, in particular text to n 581-582 in chapter 5.
[857] Fineman (n 12) 6; text to n 354 in chapter 4. Under the Constitution of Ireland 1937, there are three institutions - the legislature (Articles 15-27), executive (Article 28), the judiciary (Articles 34-37).

nothing of interest for other children. This is in line with High Court jurisprudence under the inherent jurisdiction.[858]

Indicators from cognitive assessments and input from education/professional staff assist in developing the child's educational pathway post special care. Where there is the potential for a child to return to mainstream school post special care, that is flagged to the court with the need to develop a strategy to assist the child reintegrating into mainstream school. The professionals evaluate and identify that not all children are suited to academia. Other options such as Youth Reach may be more suited to the child's personality, development and learning style and the professionals make the necessary enquiries accordingly.[859] Although some children engage well in education at the start of special care, sometimes, as time progresses, they then disengage and thereafter their relationship with education can be sporadic.[860]

Exit Phase

There is a stronger emphasis on education or training at this point. While some children return to mainstream school, excelling at education is also perceived as a measure of how well a child is doing. Some children prepare for state examinations while expressing an interest in options thereafter. Occasionally, children simply refuse to engage or engage sporadically despite a variety of educational mechanisms and apprenticeships being available. If an impasse occurs, other options are considered. Of course, the provision of educational services does not imply that the child will attend or engage.

That said, things do not always work out as expected. In one case which received much court time, a previously agreed education plan fell apart. The case remained under review in relation to the educational aspect only. An alternate plan brought the matter to a conclusion. The court expressed its disappointment that the original educational proposals did not work out.

Analysis

Court observations sit well for the most part within the theoretical framework, which is that a pragmatic approach is taken regarding education when children are within the special care process.[861] The approach to education is broad, flexible and adaptable in line with ability. Cognisance is also taken of the fact that some children are not suited to

[858] text to n 560 in chapter 5.
[859] (n 730).
[860] Patterns of engagement and non-engagement in education were sometimes linked with difficulties over mobilities.
[861] Chapter 4, 4.10 identifies that the theoretical framework advocates a pragmatic approach towards education.

academia, but have other strengths and interests and where possible, this is explored.[862] While submissions to court in relation to education and talents were for the most part, brief, education plans are submitted to the court. It can be surmised from court observations that engagement in education or an apprenticeship not only serves its obvious purpose but that it gives structure to a day, which is conducive to productive engagement with something positive, while assisting in detracting from negative or anti-social behaviour; this appears to serve its purpose of promoting emotional wellbeing.[863] No issues were raised at any stage about the standard of education provided or potential issues in the schools in terms of overall attendance or the behaviour or mix of the children who attend there or the difficulties for the staff, if any.[864] Even though the schools seem to undergo evaluation by the Department of Education, their findings do not form part of any concerns/issues regarding education.[865] In any event, there is no doubt that the right to education is an essential part of the special care process, and is available to all children there.

7.5 Participatory Rights

a. The Wishes of the Child

Initial Phase

Children's wishes/views are presented to the court primarily by the GAL but also by the CFA and the parents. For the most part, the views presented were brief and negative towards detention, with several children stating that they did not want to be in special care. Others

- did not think that it was required
- were upset or simply shocked at having ended up there
- expressed anger at being there, wondering if they 'keep their head down' would they get out
- felt that the detention was unfair and would rather be detained in a criminal detention centre
- expressed upset when certain personal possessions were removed.

Some positive comments have been observed such as vowing to make the best of time spent there, expressing an interest in returning to school, or understanding the difficulties

[862] ibid.
[863] ibid.
[864] Jane Fortin, *Children's Rights and the Developing Law* (n 106) 622 referenced the need then to 'focus on the poor standard of educational facilities offered' in the UK's equivalent of SCUs.
[865] For example, Department of Education and Skills, *Follow-Through Inspection, Ballydowd High Support Special School*, Date of Evaluation 15 October 2018 which identified areas still to be addressed, such as records of attendance being incomplete (attendance at school was an issue), no literacy/numeracy policy.

in terms of keeping oneself safe. While it can be suggested that these are relatively innocuous and predictable views, they give some indication as to how children are processing the fact that they have been removed from their own uncontrolled and unstructured environment and placed into one that is replete with control, structure and constant supervision. Whatever they may or may not say is not going to alter or outweigh the need for action to protect their welfare.

Interim Phase

In two cases out of the eleven (whole) cases observed, the child's wishes were neither mentioned nor advocated before the court during this interim stage, while the main tenet of the child's wishes advocated in six out of the eleven cases, was that the child wanted to get out of special care, or did not want the order extended, or wanted to know what they needed to do to get out, or identified that they had done what was asked and therefore wanted to get out. On balance, the nature of the wishes relayed to the court also included the child wanting to know where they were going after special care, their desire (or not) to return to their old placement. Other wishes advocated during the court process included the child's educational desires. The remainder of the cases observed identify similar patterns. Some children were anxious regarding moving on and were relieved when no onward placement is found, while struggling with the uncertainty of the future. Others simply expressed a wish to move on and expressed frustration when things did not go as planned or when an order was extended.

Exit Phase

The children's wishes tend to reflect their views on onward placements. What is clear is that it is not unusual for the child to want to leave the SCU and simply move on, but yet express some level of anxiety about the proposed move and/or their future. Occasionally, children make specific requests for certain support services. The court does not make orders for their provision, but when they are requested by a child, the court tends to look favourably on that request, suggesting that such services ought to be provided. The court keeps the matter under review for updates. The delivery of the child's wishes in one case only for a support service was done by counsel for the GAL in such compelling detail that it brought into focus the usual generic routine delivery of the wishes or views of children.

What is Important to Children?

Within the context of a rights-based framework, it is important to consider what is important to children during this process from an adolescent-centric approach. This is

given effect by permitting them express their wishes and by giving effect to those wishes to the extent possible (outcome autonomy) while having regard to risk. As identified, preferences which are brought to the court's attention, such as interests in pursuing an apprenticeship or a particular course, pursuing a hobby, preferences for a specific step-down facility, access with certain persons, concerns over criminal charges, are promoted by the court and given effect to the extent possible once it is not contrary to their welfare. Honouring the wishes of children is not simply a matter of letting them have what they asked for, it is about considering matters that are important and possibly all-consuming for them within the context of relational autonomy and it is about having regard to and providing the opportunity for them to continue to progress relationships, friendships and develop interests beyond what they may have been exposed to previously, even if welfare issues prevail.

Analysis

Theoretically, broadly applying the Lundy Model of Participation, 'space' is set aside within the court process to hear the 'voice' of the child in front of the judicial decision-maker. The child has many opportunities and options regarding direct communication with the judge, so aside from 'space' and 'voice' within this context, the 'audience' tenet is very much engaged.[866] The 'influence' factor is tempered by welfare concerns and the extent to which that voice is persuasive within the decision-making process is addressed within the context of the judge and the balancing of rights at paragraph 7.6.

b. Involvement in the Decision-Making Process and Challenging Decisions

Initial Phase

In all cases observed, the GAL supported all applications for an interim/full SCO; this included one case where the GAL never met the child, the reason being, there was a concern the child would get suspicious that there was something imminent and would adversely react. The making of one SCO was challenged and this was reported in *CFA v ML (otherwise G) & ors.*[867] Court observations reveal that this case and how it was managed is the exception rather than the norm.

Interim Phase

Most, if not all children communicated directly with the judge. This ranged between meeting the judge when he/she visited the SCU or when letters were handed into court. While this arguably benefits both sides (i.e. the judge and the child) this is not the same

[866] text to n 312 in chapter 4; text to n 781-785 in chapter 6.
[867] *CFA v ML* (n 3); see chapter 5, 5.5.4.

as being involved in the actual court decision-making process.[868] It can be argued that children are part of the decision-making process through the appointment of the GAL, but the role of the GAL is not to advocate for the wishes of the child, but to advocate for what is in the child's best interests (or the GAL's interpretation of that). Regarding the eleven cases seen from the beginning to the end of the process, it was difficult to identify any meaningful involvement by the child him/herself in the decision-making process, aside from the involvement of the GAL. For example, in one case, the GAL advised the court that the child wanted a written account as to what was required to secure an exit and in another the child wanted sight of certain care plans. As to whether this constitutes involvement in the decision-making process is arguable; the children in these cases are simply requesting sight of documented decisions and perhaps this ought to be more properly construed as expressing a wish.

Although personal legal representation was limited to one case only during the observational period, the level of involvement in the decision-making process was more evident. The child's counsel was an active part of the proceedings in defence of the child's position. Even though it is arguable that having one's own counsel made no difference to the overall result, the difference was the child's presence was evident throughout the process. A cynic may question that given the overall result was no different, how can the legal costs and use of court time be justified? That is not the point. This is a rights issue of a detained child and just because it may have made little difference to the outcome, does not mean that there are no benefits to the child being part of the process.[869]

Legal representation was unsuccessfully requested in another case during the observational period; this was opposed by the CFA who advocated that it was not appropriate as the child was younger in this instance, that the child's views were being put forward they were just not agreed with, and finally there was the question of competence to instruct. It was further suggested that the difficulties would be compounded by inter alia, the deprivation of a GAL. It was argued that one of the dangers of allowing separate legal representation was that it created 'a parallel list' and there are consequences of appeals/releases with that and questioned (rhetorically) if this was envisaged by statute? The CFA stated that the child's views were always placed before

[868] Chapter 4, 4.4.1(c) considers the right to participation; chapter 4, 4.11(b) promotes greater direct participation by the child in the court decision-making process; chapter 6, 6.7.5 identifies the informal indirect communication between the child and the judge.
[869] text to n 294-297 in chapter 4 briefly identifies some benefit to a child being part of the process.

the court which were contrary to recommendations and were not in the child's best interests. According to the GAL, it appeared the child was not convinced that they were doing enough, leading to the request for personal representation. The net argument is the denial of a right to direct participation in the court decision-making process of an adolescent civilly detained who is growing in autonomy, (autonomy principle) in favour of welfare and perceived best interests.[870] Later, there was a 'blanket refusal' by the child to meet the GAL; months following the request for legal representation, the child maintained the same belief of not being heard and requested to meet the judge again; however the judge was satisfied that the child's views were properly before the court.

Exit Phase

At this stage, the main decision of the court is whether to accede to a discharge of a SCO. The court never refused a discharge of an order requested by the CFA. If the order lapses, the court only retains jurisdiction, under its inherent jurisdiction, to review the case subsequently. Although (somewhat unsurprisingly), no child objected to the discharge of the order, one child took issue with the fact that the court was continuing to review the matter but did not specifically oppose it. This may have been borne out of the fact that the child did not wish to return to special care and was concerned that if matters did not go well, that may occur.

Analysis

It is within the court context that decisions are made and although the child's wishes are present, they are diluted, thus reducing the child's participatory rights within the process.[871] Court observations demonstrate that a child can have the rights of a party, without being a party, and retain a GAL, but only in exceptional cases; this appears to be tied into age. Therefore, the statutory framework and the court's preference for the GAL's input, lends itself to relegating direct involvement by the child in the court decision-making process behind the rights of a GAL, acting in the child's best interests.

'Process autonomy' exists to the extent that the child can meet or liaise with the decision-maker but the involvement in the court decision-making process is limited. As a matter of course the current system does not encourage children to attend at court proceedings personally (even through video link).[872] Children in special care who must present at the Children's Criminal Court do so with relevant supports and risk-assessments, so there is

[870] ibid.
[871] Chapter 4, 4.4.1 (c) considers the child's participatory rights.
[872] *CFA v ML* (n 3) para 71.

no reason as to why a child cannot be part of the High Court proceedings personally if they wish, in one form or another. Finally, the visibility of the child in the court process was absent during the observational period when compared to the visibility of the child in the court process when separately legally represented. Greater visibility of the child within the court process is what the theoretical framework calls for together with authentic 'process autonomy', particularly when the child is developing in competence and capacity, even with regard to the behavioural issues. The current system embraces a welfare and substituted decision-making process with vague regard to developing competences and capacities.[873] It also minimises the 'influence' factor of the Lundy Model within the court context, even though the child's wishes have been directly delivered to the judge.

c. Complaints

Initial Phase

Children in special care can make complaints and are assisted in doing so when required. This was observed in two cases (an external and an internal complaint); although it was not evident at the initial hearing stages that complaints were being taken seriously and investigated, it was clear later in the court process, that this was in fact the case.

Interim Phase

During the observational period, there was little to trouble the court by way of complaints. All complaints made were subject to the internal complaints process by the time the matter was aired before the court.[874] It is not clear whether the complaints were all satisfactorily resolved as neither the details of (most of) the complaints nor the conclusions were addressed during this stage of the court process; although it is expected that they were included in court reports.[875]

Exit Phase

There was little to trouble the court by way of complaints. One further case indicated that complaints made were still being investigated but not concluded by the time the case was removed from the High Court list.[876]

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[873] text to n 591-592 in chapter 5.

[874] A child was informed of the outcome of one complaint while the other was still under investigation; in another matter the court advised that a matter needed to progress urgently; there were complaints under investigation by the CFA and AGS; another child was assisted in lodging a complaint with the appropriate authority.

[875] HIQA, *Report of a Designated Centre Special Care Unit, Ballydowd*, Announced Inspection 30 June to 2 July 2020, 14-17 considers complaints against staff; HIQA, *Report of a Designated Centre Special Care Unit, Coovagh House*, Announced Inspection 20 July-22 July 2020, 7-9.

[876] Some of the issues were outside the control of the CFA.

Analysis

From a participatory rights-based perspective, taking complaints seriously as occurred in these limited instances, means the child has been listened to and those concerns have been acted upon, even if not fully concluded when the court process ends. The investigation and pursuit of complaints sits within the theoretical framework that all such complaints by a child must be taken seriously - but it is not clear how these are concluded if they have not been resolved before the case is taken out of the High Court list.

7.6 Judge: Decision-Making and the Balancing of Rights

Initial Phase

Court observations demonstrate that once the threshold and statutory proofs for special care have been met, the court tends to exercise its discretion in favour of making the SCO. The bar is set high to challenge an order successfully and the court held that it does not make these orders lightly. Consequently, the established jurisprudence that detention trumps liberty,[877] and arguably all other rights too, persists in the child's best interests.[878] Although parental input is welcomed by the court, their views, while taken on board, are not determinative. The court has accepted or acceded to a practice whereby the implementation of the order is a matter for professional staff as they retain discretion over the granting of mobilities/outings and the placement of further restrictions on liberty. The public reporting of proceedings was addressed by the court in terms of being more explicit in terms of what is not permissible to report, based purely on the welfare and best interests of the child and in defence of their right to privacy.

Even though the child's views are noted, considered and listened to, they are not a determinative factor when weighed against those of the facts and the professional opinion and the child's best interests. That said, where it is possible to give effect to the wishes of the child, the court will inquire as to whether this can be achieved. For example, in one case, the judge noted that the child wished to return to a specific location when eventually transitioning out of special care and the CFA was asked to see how this could be managed. Where children are older, and their time is limited, the court tends to impress upon the state at the start of the process, the need to progress matters effectively to maximise their time in special care.

[877] text to n 513 in chapter 5.

[878] The court confirmed that the suspension of parental access was in order and in the child's best interests and based on the principle of proportionality pending receipt of other reports. The court had regard to the submissions of the CFA and a clinical report.

Although early in the process, it can be surmised from observations that the court operates a case management style over special care cases, with little to balance due to the nature of the risks. The behaviour and the risks attaching to that behaviour as identified by professional opinion support this and any substantial analysis of rights is unlikely to achieve an alternate outcome.[879] Theorists do not have any difficulty with the denial of autonomy where there is a risk of significant harm and the transparency of the decision to detain is evident by adhering to the statutory proofs.[880]

Interim Phase

Statutory court reviews are an update for the court by way of reports and oral legal submissions. How the matters are addressed depends on what the issue is. For example, in one case the court made directions to assist in progressing a resolution of complaints made by the child sometime prior; in the same case, a health matter needed to be addressed and the court ordered the CFA to write to the relevant person to have the matter expedited, whereas with family access, the approach was pragmatic as the judge was of the view that the issues were not beyond resolution. This case gives a flavour of the overall judicial management style in terms of protecting and vindicating the child's rights, which is that some matters require the weight of the court to make progress, and other matters can be addressed by encouragement to deal with the issue.

Although welfare and the child's best interest remain paramount considerations during this stage, the court is mindful of the child's right to liberty. Although a comprehensive review must be undertaken to ensure that the continued detention is justified when an order is being extended, the court has also made it very clear that the 'period of extension of a special care order should only be dictated by the needs of the child and not by the frailty of the system'. The court of its own motion in another case held that just because there is nowhere for a child to transition to, is not a basis for an order; the court later held that the child could not be held under a detention order if it was not required, reminded the CFA of the child's views regarding an onward placement and asked them to review their efforts as to how the child's views could be accommodated.

Although the judge never commented on matters such as seclusion or separation from peers, mobilities were regularly mentioned before the court. Observations demonstrate that the court is satisfied to leave this issue to the professionals and the manager of the SCU who must also balance risks. This can be countered against restrictive practices

[879] text to n 375-379 in chapter 4.
[880] text to n 276-279 in chapter 4.

undertaken regarding mobilities where protective concerns dictated minimum mobilities. These were kept under close scrutiny by the court until the matters were regularised to the court's satisfaction. This identifies that although mobilities are managed locally, the court is proactive if an issue arises to ensure that any measure taken is proportionate in the child's favour. This maintains a focus on liberty and protecting the right of the child to some liberty within the context of a detention order, while having regard to the right of the child to protection from harm.

The ultimate move out of special care requires planning which is most evident during this stage of the process. It is important that the child has a timely transition out of special care and all transition plans are reviewed by the court and must be to its satisfaction. However sourcing such placements can be problematic;[881] this was evident during court observations and explains why the court kept abreast of this matter early in the process.[882] The court pays careful regard to the wishes of the child in relation to their new placement, the effect it is having on the child (regarding any concerns they have themselves) and where possible, seeks to have their views accommodated. Underpinning this rationale is maintaining the focus on liberty and safeguarding against preventative detention.

One of the drawbacks for children in special care is that some of the services they require are outside the remit of the CFA.[883] This is problematic as the judge can do little more than keep the matter under regular review and tell the CFA to impress upon the other provider the importance and urgency of getting such assessments done. In one case, the judge refused to make a direction regarding a medical appointment or funding and simply stated, 'the agency knows what it has to do'. Court observations demonstrate that the GAL regularly makes recommendations regarding health aspects of the child's care which are often taken on board by the court. The court also notices the positives in cases where the child's physical health care has been attended to and where there has been engagement with therapeutic supports. It can be surmised that the court is mindful of the importance of the progression of all health-related matters in a timely manner; however concerns have been raised before the court about the length of waiting lists for particular assessments.

[881] In various cases: the judge suggested that the CFA ought to bear in mind that a placement may not work; the court held that given the length of time the child had been in special care, it required a plan to be in place regarding the step-down facility and expected 'substantial progress' on the next review date; the court repeatedly stressed the urgency regarding specialist reports (required for identification of an onward placement).
[882] The judge noted that one of the issues was that there was no stepdown facility and encouraged the parties to meet in the hope that its identification would provide a focus for the child regarding regulation of behaviour.
[883] text to n 152-155 in chapter 2.

As identified in case law, engagement in education (and its consequential confidence building in a child) comes across as an extremely important factor for the judge who regularly notes when children have re-engaged in education and notes their strengths and likes.[884] The judge also takes the time to note their educational achievements and educational aspirations. While suggesting that an education plan is ultimately for the professionals to decide upon, the judge expects appropriate educational plans to be put in place.

Court observations demonstrate that the judge has great interest in hearing directly from children in special care.[885] In one case, the judge, having met the child in the SCU, noted that the child was very invested in the unit and looking for various facilities, which the court viewed very positively. The weight the court affords to the child's views depends on the stage of the process, the progress made and the composition of those wishes.[886] For example, in another case the court noted the constant theme in the reports was that the child held a preference for a particular type of onward placement which the court wanted addressed in detail. In the same case, from an educational perspective, the court noted the child had expressed an interest in many things and the court was anxious that the child's needs and wishes were met, expected progress when the matter returned before the court, and wanted those opportunities made available. If the court is not aware of the child's views on a matter, it seeks them out.[887] It can be surmised that the court affords great weight to the child's views in circumstances such as this. The corollary also applies whereby the court hears and understands that the child may wish to leave special care but that the behaviours have not improved sufficiently as the child refuses to engage in the relevant services. In noting the circular position, the child's best interest (and their continued right to protection from harm) and welfare prevails over the child's wishes to leave special care.[888] That said, in this case the court urged progress on the issue of an onward placement and noting the suggestions of the GAL, directed a meeting be held so that the court might be better informed regarding the placement after special care. The court held that inter alia, the identification of an onward placement may help focus the child's mind. The court is also alive to the level of distress that children are sometimes

[884] text to n 560-562 in chapter 5.
[885] Chapter 6, 6.7.5 considers 'Interaction with the Judge'.
[886] The court noted the child's opposition to an extension of a SCO but considered the benefit of special care outweighed such opposition; at a later review, the court opined that the child would have a role in the transition plan.
[887] The court wanted the child's views on educational preferences.
[888] The court noted that the child wanted to be out of special care, but therapeutic supports were still required even though the child had made strides in engaging with the services.

under and while not able to micro-manage issues, suggests how the issue might be addressed.

Having balanced the competing interests of the child, the court takes a measured approach and balances that against the rights and duties of other parties. Parents willing to engage all have a voice in the proceedings which the court takes on board noting, inter alia, that their child has their support. The court also encourages their input. While the positive involvement of parents is welcome, negative, obstructive, or unhelpful behaviour or failure to engage will not be permitted to halt the child's progress in a manner that is detrimental to their welfare or best interests. The issue of access is also within the remit of the professionals and the manager of the SCU.[889] From the point of view of the balancing of rights, the court is not deterred by the lack of instructions from a parent to have other matters relating to the health of the child from being progressed. In balancing the rights of parents against those of the children, it is clear from the court's perspective that the rights of the parents will be facilitated to the extent possible, unless and until it impinges upon what is best for the child's welfare; this is consistent with case law. Further, denial of access must be justified.[890] From the point of view of the state, the court defers to the expertise of the professionals and this is clear particularly in terms of mobilities, access arrangements, education and health as the CFA is now under a statutory duty regarding the welfare of the child in special care.[891]

Thus, the court's case management style oversees the appropriateness of decisions made. One of the benefits of this management style is that it removes constraints such as separation of powers and policy issues. The corollary is the potential to unwittingly defer to welfare professionals. This can be ameliorated however, through vigilance in oversight.[892]

Exit Phase

Determination as to whether the child is ready to start the transitioning process leading to the lapse or discharge of a SCO is one that is made by the CFA. In the first contested

[889] In various cases: the court considered a direction was not required at that time; the court noted another child's disappointment when access by a parent was not honoured; the judge opined in a different case that the child was entitled to see his/her parent unless it caused issues and stated that it would be left to the 'good sense' of the parties to deal with the issues arising; the CFA temporarily suspended parental access in a case; in another case the court noted there was a professionals meeting later that month addressing the issue of access and if the matter was not decided then, it would fall to the court to deal with the matter; the judge further stated that the CFA is alert to the fact that access is very important.

[890] text to n 447 in chapter 5.

[891] text to n 249 in chapter 4, (Hohfeld's theory that rights are realised through the imposition of duties); CCA 1991 s 23.

[892] text to n 393 in chapter 4, oversight is considered integral in the theoretical framework.

application to discharge a SCO, the court noted that the balancing exercise was between what was in the child's best interests and the risk of harm, and the risks must be balanced against the progress made.

Court observations identify that an important part of the exit strategy is a robust transition plan. The judge holistically addresses the main welfare issues as it relates to that child, addresses any outstanding matters that need to be addressed in terms of supports, considers the concerns and position of the parents, articulates the wishes of the child and considers whether they are such that they can be implemented. The court being satisfied that special care is no longer required is concerned about how the child's day will be structured (through engagement with education or an apprenticeship) and what services (welfare and health-related) will be available to the child, according to each child's needs. Further, the court does not appreciate delays in a child moving out of special care even when the delays are unintentional and tends to make that position very clear.

The extent to which the child's views or wishes are given weight or are fulfilled varies, depending on their nature. For example, court observations demonstrate that if the child wants the order discharged, that is unlikely to happen, particularly when the CFA and GAL are leaning in favour of letting the order expire naturally; however, if it relates to an educational path or a support service, then this is something the court tends to promote. But the judge is not always able to give effect to the child's wishes; for example, occasionally a child expresses a wish for semi-independent living.

Other competing rights of the child are balanced at this exit stage, for example, balancing welfare against the right to privacy and the right to education. Regarding the right to privacy, the court directed disclosure of information for educational purposes which was considered in the child's best interest, to enable the child flourish. Regarding balancing welfare against education, the court views an educational path as providing the necessary structure to a child's day. Education provides a focus for the day and if it is absent, a concern arises that the child will disengage and potentially revert to prior high-risk taking behaviour, thus jeopardising welfare. The court expects a proper education plan to be executed commensurate with the child's strengths (particularly if an ability has been identified or if evaluations have determined that certain elements ought to be part of an educational plan going forward), and one that is consistent with what was put before the court previously. Not all children are suited to mainstream education and under those circumstances an apprenticeship, which is of a more permanent nature than some work

experience, is promoted, or whatever inclination interests the child.[893] If the child is unwilling to engage, that becomes a different issue.

For the most part, parental or family access does not trouble the court too much, save for an occasional suspension of parental access, in the child's best interests. Sibling access is encouraged and particularly so if the request is made directly to the judge. How parental rights are addressed is similar to how the court addresses the wishes of the child; that is, it depends on what the court is being asked to do. For example, the court did not accede to a parental request not to discharge an order, but was satisfied to accede to parental requests for a written support plan, or to move the location of access, in the child's best interests. Occasionally, parents do not agree with their child's wish regarding their next placement following special care. Under those circumstances the court may need to balance those competing interests (wishes of the parents and wishes of the child). For example, notwithstanding 'unresolved issues', the court noted (per the GAL report) in one case where a child wished to return to a prior placement (which the mother opposed) as they regarded it as their 'home'. The judge specifically stated that a definitive finding on that step-down placement would not be made, but instead urged the mother to gain more insight into the views of the child.

Post-discharge

Following the expiry of a SCO, the court retains jurisdiction to review the case in the child's best interests.[894] Court observations demonstrate that post-discharge reviews broadly serve three functions; first, it ensures that the transition plan is progressing along its expected path; second, it ensures that any outstanding matters are being attended to; third, it facilitates the retention of the GAL which assists in terms of the implementation of the transition plan.[895] Simply put, if a core service is not in place that is essential for the well-being of the child, the court keeps the matter under review until the matter is satisfactorily resolved; however, if the matter is concurrently under review in the District Court due to care orders being in place, then the judge may decide to take the case out of the special care list as it will have judicial oversight in the District Court.

Things do not always progress smoothly. Although the court accepts that matters need to settle down during that early phase after the discharge/lapse of the order, that patience

[893] text to n 469 in chapter 5 identifies that the wider definition of education has been interpreted to enable a child maximise his/her own potential.
[894] There are no specific number of post-discharge reviews, it is case and fact dependent; however, if the child reaches the age of majority, no further reviews are carried out.
[895] Technically, once the SCO is no longer in being, the role of the GAL comes to an end, unless the child is also under a District Court Order and the GAL has been appointed under that order.

only goes so far. For example, the judge was critical in a case, where the support structure fell apart and retained the matter for close review. In essence, the court must be satisfied that judicial oversight is no longer required. However, the court and the professionals can only do so much; it is also up to the child to engage with the services which are key to the success of special care and the transition process.

Analysis

Although court observations demonstrate that the language of rights is not a major part of the proceedings, it is implicit that the court is taking those rights into consideration. In particular, the court balances the child's right to liberty, including the child's continuing right to protection from harm (given the nature of the high-risk taking behaviour), with other rights' issues as they affect socio-economic and participatory rights. Where possible the court gives effect to the wishes of the child once the welfare of the child is not compromised, which arguably amounts to paternalism. Welfare permeates all stages of the process and the issues remain a cause of concern for the court to varying degrees. The theoretical framework envisages a greater move towards rights than welfare as the child progresses through the process, however, the reality is that welfare continues to play a substantial role. This is arguably explained by the nature of the high-risk behaviours of this group of children. It resonates with Fineman's vulnerability thesis whereby she considers that those who are vulnerable always carry a risk of harm, though the level of vulnerability can be reduced.[896] Therefore, that risk will most likely always be there for children exiting special care, and the issue then is managing that risk through various programmes. This emphasises the importance of distinguishing the right to protection from harm from welfare generally. It enables the shifting of the focus onto the management of the risk of harm from a rights-based approach which requires greater transparency than a welfare-based approach, which in turn can give rise to a concern regarding curial deference and abdication of responsibility.

As a matter of course, the court tends not to interfere in clinical decision-making. The only time a judge may be called upon to make a decision in this regard would be in the event of a difference of opinion between professionals. Further, the implementation of the order regarding greater or fewer restrictions on movement is also for professionals to decide, although the court is informed of this. While there may be elements of deference, there is also an element of trust in specialist professional opinion contained in reports and in the governance of the special care system insofar as the state is going to do what it said

[896] text to n 12 in chapter 1.

it would do and what it is obligated to do; in addition the judge visited the SCUs many times and has first-hand experience of how they are managed. That said, the theoretical perspective envisages greater levels of transparency in terms of oversight in matters such as seclusion or separation from peers and greater consistency in terms of privacy of documents.

The child's rights are balanced against positive parental involvement whereby parental behaviour that has the potential to destabilise the child is managed having regard to the best interest principle. The rights' framework therefore is useful to redress the constitutional imbalance between the rights of children and parents, but when rights are discussed, it is paternalistic. In terms of the state, it controls the whole process. Foucault comments that the child represents 'both the focus and the product of various forms of knowledge, expertise, techniques and practices which have been developed to monitor and manage individual well-being and development';[897] this is evident within the context of special care. However, those who hold the power, in this case the state, managed to escape any adverse finding against it (save in judicial review cases) during the observational period despite the imperfect system which is in place.[898] Finally, the court did not appear to be constrained by structural constraints such as separation of powers issues; however, the court was somewhat stymied due to the CFA's lack of access to proper resources which it required to address the welfare needs of the children in its care. Therefore, finding the 'right answer' to address those issues adds to the complexity of the challenging nature of these cases in the first instance.

7.7 Other Jurisdictional Configurations

Inherent Jurisdiction Only

Fourteen cases were partly observed under the inherent jurisdiction. Although court observations were more limited, a noteworthy observation was that more information tended to be submitted orally to the judge during the statutory process. This may be because the statutory proofs require a certain level of detail to ensure the threshold for special care is met and the fact that these proceedings are now heard privately. Under the inherent jurisdiction cases were heard in public with reporting restrictions only. Although not a direct observation, a sense that legal practitioners were more cautions in terms of what was disclosed was evident under the inherent jurisdiction, perhaps due to the public nature of the hearings. That level of discretion is also present with cases heard under

[897] text to n 357 in chapter 4.
[898] ibid.

statute; it is as though legal practitioners were and are understandably, cognisant of the sensitivities surrounding these cases.

Inherent Jurisdiction to Statute

Of the four cases observed spanning both the inherent and statutory jurisdiction, two of those cases were disposed of early within the statutory observational period. Although the cases spanned two jurisdictions, the nature of how those cases were addressed within the court process from a rights' perspective is not far removed from the observations of cases heard under the statutory provisions.

Inherent Jurisdiction, Statute, Wardship

Two cases observed saw the transfer of two children abroad in circumstances where the facilities abroad were more suited to their needs. These cases arguably demonstrate that the special care system is not in a position to address the needs of all children requiring special care. Whereas the format of the cases followed the trajectory of the above cases, the main issue was the suitability of facilities in this jurisdiction in terms of catering towards their needs, both of whom required considerable supports. Both children were between thirteen and sixteen months in special care by the time they were made wards of court.

Although these cases were the exception rather than the norm during the observational period, it nonetheless highlights the difficulties faced by all stakeholders but particularly for children who are detained for considerable periods of time before the most suitable facility is sourced. Although it was acknowledged in one case that the Irish unit was 'very good,' and while accepting that to be the case, it must also be the case that neither was it most suited to the child's needs, or else the transfer abroad would not have been necessary. While acknowledging the efforts of the CFA to source these facilities and being cognisant of the length of time the process takes to get agreement from the other facility abroad, of concern is the extent and length of time the deprivation of liberty continued before the most suitable facility was located. Sending vulnerable children out of the jurisdiction simply because there are no appropriate facilities here is a long-standing practice. That said, it is fair to comment that the appetite is not there to put this more expansive service in place by the parliamentarians. It was stated by Minister Barry Andrews that 'there would be specific needs where the provisions of that service in the

State would not be justified by the volume of need'.[899] This translates into a further failure by the state to put in place adequate mechanisms to enable the CFA carry out its statutory function. It is almost certain under those circumstances, that the rights of this small group of children are not going to be adequately protected.[900]

7.8 Conclusion

This chapter examined the rights issues and the judicial decision-making process during special care court proceedings. The court operates a case management style process regarding the protection and vindication of children's rights which is fed into by its inquisitorial process. Overall, it is fair to conclude that the court system in place is protectionist and welfare based and is now steered by a duty-based statutory framework. Most of what was observed in terms of issues and how cases are dealt with are comparable to case law; for example, the complexities surrounding exiting special care are somewhat consistent as is the management of parental involvement, the importance placed on education and the provision of health and therapeutic supports. Privacy of documents was not really addressed in case law, nor was the issue of restraint and separation from peers. Whereas the views of the child are contained in case law, it is the reporting of the CCLRP which identifies the willingness of the judge to meet children in special care, which is also consistent with court observations.

The rights-based theoretical framework favours a greater focus on rights, however welfare consistently permeates the entire process, even at the exit phase when observations demonstrate that the situation can be rather fragile. Further, all matters are predicated primarily upon the long-standing historic best interest and welfare principles alongside professional opinion (including that of the GAL) all of which is shaped by the duty-bound statutory provisions. Although special care itself is not a panacea capable of rectifying, in a short period, possibly years of damage to children, children do have rights. The language of rights is not clearly visible during the court process; however, their visibility, protection and vindication exists hidden somewhere behind the contours of these other significant legal principles. Therefore, the examination of children's rights needs to be viewed inversely through the layers of that prism.

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[899] Select Committee on Health and Children Debate, Child Care (Amendment) Bill 2009: Committee Stage, 11 November 2010 http://www.oireachtas.ie/en/debates/debate/select_committee_on_health_and_children/2020-11-11/2 accessed 4 December 2019.

[900] For example, the child is immersed in a different culture, the educational system is somewhat different, access with family members (and the GAL and social worker) will be less frequent and court reviews under the wardship system are not as frequent.

What all this indicates, is that notwithstanding the strides made regarding children's rights, together with a general understanding of the universal developmental stages of adolescence (including the sociology of childhood) and the more progressive nature of special care itself, fundamentally, the legal system within which this process operates has not actually changed in twenty-five years. Although returning the child to liberty is one of the end results of special care cases, arguably, from a right-based perspective, the process in terms of getting to that conclusion, is deficient.

Chapter 8: Conclusion

8.1. Introduction

Special care cases are all very challenging and there are no exceptions. From a practical perspective there are many variables which contribute to the complexity in answering this research question which simply cannot be avoided. First, a court cannot micromanage any case; second, within the context of judicial decision-making, the ultimate answer of the court may not necessarily depend upon the scope of the statute, but on the available options within that context to fulfil the intention of the legislature;[901] third, the answer may also depend on what the law actually says; fourth, the emergence of a case management style approach has been adopted as the norm in determining these issues,[902] and there are many difficulties which form part of that process which are discussed further below; [903] fifth, context is also important in terms of the operation of law within special care, particularly sociological concepts that take account of childhood, how the theory of childhood continues to evolve, how social relationships work and how social control over children has altered.[904] These concepts together with the development of children's rights are best integrated into the court process, however, where serious welfare concerns are central to all such court applications, this also adds to the complexity in terms of implementing a more child/adolescent-centric progressive approach.

The right to liberty carries such importance that it has a specific place in the Constitution.[905] The civil detention of children is a draconian power and although this thesis does not consider the merits of civil detention within the context of special care, it advocates a rights-based approach (with regard to relational autonomy and developing competence) as opposed to a welfare-based approach within the court process in addressing the complex issues. This rights-based approach has regard to and incorporates these serious welfare concerns; it is within that context that this chapter considers the extent to which the court protects and vindicates their rights.

[901] text to n 28 in chapter 1.
[902] text to n 919.
[903] Chapter 8, 8.2.
[904] text to n 34 in chapter 1.
[905] Article 40.

8.2. General Observations

Overall Framework

The expansive power to detain a child under the court's inherent jurisdiction gives rise to an expectation that the court's powers in terms of protecting and vindicating the rights of such children must be equally expansive.[906] Under what must be a reconstituted paternalistic *parens patriae* inherent jurisdiction, the High Court developed a set of principles (having regard to precedent, the separation of powers and the limitations imposed by other constitutional provisions) which identifies that children's rights and best interests underpin an overall framework which has an educational and therapeutic rationale.[907]

The current position under Part IVA is that this statutory framework is a court-oriented process expressly devoid of matters relating to rights.[908] It has somewhat reversed the position that existed under the inherent jurisdiction in that it is a statutory duty driven jurisdiction which potentially indirectly protects the child's constitutional and other rights.[909] The statutory provisions entrust the court with a gate-keeper status[910] which co-exists alongside constitutional and Convention principles. The net point is that rights were a focus under the inherent jurisdiction but are not under the statutory provisions. The court is bound by the prescriptive steps contained within these provisions (even though there is room for judicial discretion) which consequently yields towards increased deference by the court to the parliamentarians in fulfilling its role as set out in the provisions; this is less than satisfactory as this occurs even though the court's primary responsibility is to uphold the Constitution and protect and vindicate rights. While on one hand, the statutory provisions have backed the CFA into a corner in terms of its duties and responsibilities, on the other hand, this increased deference and adherence to the statutory provisions has resulted in the court considering these cases through a different prism, which is one that gives effect to the wishes of the parliamentarians, unless it is detrimental to a child. It is not clear where that dividing line lies. Within this context, it is necessary to consider further problems faced by the court as it impacts upon the exercise of its jurisdiction, which can potentially disadvantage children.

[906] Chapter 3, 3.3.3 (last paragraph).
[907] text to n 508-510 in chapter 5.
[908] text to n 591-593 in chapter 5.
[909] Chapter 3, 3.6 (a).
[910] Chapter 3, 3.6 (b).

Resources, Service-Led and Issue-Led System

Special care is a resource driven service, with the number of referrals potentially being determined by the number of beds available.[911] Therefore, this system is driven by the resources allocated to it from government/by the CFA and implicitly determined by the experts who operate within this area of care. To protect and vindicate the rights of a child in need of and not receiving special care, an application must be brought before the court by way of judicial review; however, this is an entirely different legal process which only looks at the lawfulness or otherwise of the decision-making process within the CFA in respect of that child's case. If the decision is found to be unlawful and depending on the facts of the case, the matter will have to be reconsidered by the CFA. At the other end of the scale, the lack of step-down placements is also a resource issue which has led to preventative detention as children ended up staying in special care longer than necessary.[912] The court has jurisdiction to address this latter concern.

ACTS is under the control of the CFA and CAHMS is under the control of the HSE. Both provide essential services to children in special care and have agreed an inter-agency Protocol. It is clear from this Protocol that in some cases the CFA does not have all the resources it needs to provide the appropriate services to children with complex needs.[913] Consequently, this causes delays in terms of sourcing the most appropriate service which disadvantages children. The difficulty is that the court cannot make an order against a body/person that is not party to the proceedings. In addition, the parliamentary debates identified and accepted that some children would have to go abroad for treatment as it was not cost effective to establish the services in this jurisdiction.[914] Consequently, the CFA does not have at its disposal what it requires to address the needs of the most extreme cases it comes across.

Occasionally, during the observational period issues arose regarding the funding of certain services for children or there was a delay while funding was being approved for certain services. These delays are not acceptable when children are under civil detention orders, particularly when they are there for relatively short periods of time and are only meant to be there for as short a time as possible. Policy decisions have already been made to fund a special care system and therefore it ought to operate smoothly as the funds have already been allocated. Resource issues also exist in relation to the recruitment and

[911] Chapter 6, 6.7.1 (first two paragraphs).
[912] text to n 922-924.
[913] text to n 153-155 in chapter 2.
[914] Select Committee on Health and Children debate, Thursday, 11 Nov 2010, Child Care (Amendment) Bill 2009 (n 638).

retention of staff. This issue was documented in the decision of Reynolds J. in *CFA v TN*,[915] and the judge directed that a copy of the judgment be delivered to the Minister.

It speaks for itself that the issues outlined are going to have a detrimental impact on children as it relates to special care. The question now is, is this where the line is between adherence to the statutory provisions, deference to the parliamentarians and the detrimental impact the issues have on children and their rights? It is argued that it is. The court has maintained a position generally and not just in relation to children, that it protects and vindicates rights; this is where the line is for the court to take such proactive steps to protect and vindicate children's rights in special care. Issues such as the ones highlighted have a negative impact on children, and the court is managing the process. Therefore, these problems ought not be a bar to the court protecting and vindicating rights due to administrative difficulties and the same applies within the court system. Permitting these issues to take hold over or direct the process to the detriment of civilly detained children, is an abdication of responsibility in the protection and vindication of rights, in favour of strict adherence to statutory provisions and deference to the parliamentarians.

Specialist Knowledge within an Inquisitorial Court System

The issues that arise before the court are often complex. As the state's child protection body, the CFA has developed a multi-disciplinary approach over time to address these cases and it would be expected that the CFA has a 'specialist knowledge' in this area. On the other hand, judges are trained in law and cannot be expected to have a comparable level of expertise, particularly since it is a multi-disciplinary approach. While their expertise is crucial to progressing matters on behalf of children, the current system is not just driven by experts and professional opinion but dominated by them, and there is a reluctance by the court to interfere with such clinical or professional opinion and this raises the question of curial deference.

Where there is a difference of professional/clinical opinion and the parties cannot agree, it would be a matter for the court to arrange a full hearing of all expert evidence and then rule on the matter. As there was no specific disagreement (on clinical matters) brought before the court during the observational period, there was no contest for the court to resolve. This is primarily because the parties to the proceedings (which includes the GAL as opposed to the child him/herself being a direct participant) make efforts to agree substantive matters to the extent possible prior to the commencement of the list each week

[915] *CFA v TN* [651] (n 635).

or matters get resolved during the hearing. While the contents of those reports and recommendations are discussed with the judge, a question arises as to whether this case management style process gives rise to proper judicial oversight.

All of this occurs within an inquisitorial as opposed to adversarial process[916] which lends itself to the judge asking probing or difficult question. Further, the Child Care Act, 1991, of which Part IVA is an essential component, has 'remedial statute' status which is 'interpreted purposively'.[917] Heimanson explains that 'remedial statutes should, as a law; be broadly interpreted'.[918] The issue as to whether any statute which civilly detains a child ought to be construed broadly or purposively is questionable and was not debated; however, when a child is being taken into special care, a literal approach ought to be (and is) adopted having regard to the abridgement of significant rights. Consequently, the gate-keeper role of the court over special care cases means that it has a more managerial role within this inquisitorial process, which can bring a measure of informality.[919]

Within the wardship process, an independent medical visitor can be appointed by the court to make a capacity assessment on any proposed ward. This is independent of whatever professional reports have been submitted to the court by the parties to the proceedings. Inquisitorial proceedings permit the judge question and probe and satisfy itself that it has all the information it requires before making any determination. While it must be accepted that evaluating the needs of children in special care from a multi-disciplinary perspective is a complex task, there is nothing to prevent a judge, if he/she so chooses or needs additional assistance, from having this independently evaluated to ensure proper independent oversight which would also minimise curial deference while having due regard for professional opinion. This does not occur at all in special care cases. [920]

Case Management

As part of the case management process, judges read all the legal papers and reports in each case prior to the relevant hearing each week. During the observational period, if a report was not filed in advance but was instead handed in to court during the hearing, the

[916] *A(K) v Health Service Executive* [2012] IEHC 288, [2012] 1 IR 794; *HSE v OA* [2013] IEHC 172, [2013] 3 IR 287; *CFA v ML* (n 3) para 102-103, the court accepted the inquisitorial approach applied to Part IVA.
[917] *CFA v ML* (n 3) paras 102-103.
[918] Rudolph H Heimanson, 'Remedial Legislation' (1962) 46 (2) *Marquette Law Review* 216, 218.
[919] Conor Power, Geoffrey Shannon, 'Practice and Procedure' (2008) 11 (1) *Irish Journal of Family Law* 22, 24 where it was stated that 'there is a large degree of informality to the High Court method, not in procedures, but in substantive matters'. Where substantive matters (like rights) are not provided for in statute, it is likely that this 'informality' may continue.
[920] Chapter 8, 8.3(d).

judge always took time to read the report in chambers before going any further with the case. Because all the information is contained within the reports, it is not always necessary for the judge to comment. This management style identifies that the judge is monitoring, regulating and supervising the case overall through a regular ongoing liaison with all the relevant professionals and stakeholders, thus capturing the rights at issue through this process. The protection and vindication of the rights of children sit within this system permitting the judge to become more tuned into the needs of each child as the need arises.

Observations also demonstrate that issues and concerns tend to dictate what is raised by practitioners in court (aside from adhering to statutory proofs when necessary). While this may be due to the fluidity of behaviour of children detained, some issues take precedence and need to be brought to the attention of the court as a matter of urgency, eclipsing other rights matters not predominant at that time. Other matters are simply progressing and do not need to be discussed and therefore are not raised. The judge is not precluded from raising any matter or questions having read the reports. If issues are not raised by the judge, it can be presumed that there are no issues of concern.[921]

8.3. The Extent of the Protection and Vindication of Rights by the Court

a. Civil and Political Rights

Detention

The main issue where there is a potential for a breach of the child's right to liberty occurs at the exit stage of the process and this is explained in *CFA v TN*.[922] The court stated that 'the period of detention of minors in Special Care was being unnecessarily extended due to the lack of onward placements'.[923] This amounts to preventative detention, which was acknowledged in that judgment,[924] and translates as a breach of the right to liberty. During the observational period, orders were also extended to facilitate other matters prior to discharge, such as providing the space to facilitate an investigation.[925] This may have been well-intentioned and there may have been other welfare issues in this case that were simply not addressed at the time in open court; that said, it once again raises issues regarding preventative detention. Arguably, and practically, all such potential breaches of the right to liberty can be justified on welfare grounds as the alternative is to let the child out of special care and then he/she would potentially be at risk of harm. Such a

[921] text to n 749 in chapter 6; this system explains the limitations in the research methods.
[922] *CFA v TN* [651] (n 635).
[923] ibid 1.
[924] *CFA v TN* [651] (n 635).
[925] See Chapter 7, 7.3(a), (Restriction on Liberty to Protect Life – Exit).

scenario would never be permitted to arise in the child's best interests and therefore the justification for the detention could arguably be for the purposes of protecting and vindicating the child's right to protection from harm; this demonstrates the issue that can arise when the right to protection from harm is seen as a welfare issue as opposed to being separately distinguished as a right. This potential justification does not negate the fact that there are incidents of preventative detention, thus breaching the right to liberty. Therefore, close attention ought to be paid to the manner by which this right to protection from harm is being protected as a right, as opposed to simply being employed as justification for what is in fact preventative detention on welfare grounds.

Although the theoretical framework accepts the difficulty of balancing preventative detention against the timing of a discharge/lapse of an order, it must be remembered that the court has already made clear that a child cannot be detained 'due to the frailty of the system'.[926] Arguably, therefore, the court could give greater weight through visibility in its judgment regarding the child's right to liberty, even if eclipsed by welfare concerns, after which adverse findings could be made against the CFA.

Further Restrictions on Liberty

There was no discussion or argument in court during the observational period regarding restrictive practices in terms of justification or proportionality of same while having regard to the child's right to bodily integrity as recommended in the theoretical framework.[927] There is no suggestion that there was an issue or that the staff acted inappropriately - as the court had access to court reports – but it is curious that there was no oral examination of these issues during the observational period. Therefore, it is not possible to state whether there was/not a breach of a child's right to bodily integrity (or dignity), but it can be posited that this right is not necessarily protected either; this right could be better safeguarded and protected with open judicial scrutiny and with reference to a rights-based approach.

Family

Access to family members during the observational period did not cause issues for the court for the most part, even though access was suspended in a few cases. The suspension of access was disputed in only one case, but welfare prevailed, and the order was made. The court oversees the child's right to access in such cases and is mindful that links can

[926] Chapter 7, 7.6 (interim).
[927] text to n 408 in chapter 4.

be maintained with family members through letters and gifts where access is paused.[928] As such, it appears that during the observational period, for the most part, the child's right to access family members was protected while having regard to the child's wishes, but only as long as it was in the child's best interests and there were no welfare concerns.

Privacy

Regarding the public reporting of special care cases, it is fair to say that the court has clearly set out to protect and vindicate the right to privacy during the observational period. Judgment was delivered in the case of *CFA v TN*[929] directing the protection of the child's right to anonymity. Further, directions were issued by the court during the observational period regarding media (newspaper) reporting on more than one occasion. Although issues subsequently arose during the observational period regarding media (newspaper) reporting, the court can only adjudicate on the issue if an application is brought before it, which gives it jurisdiction to make a determination; that did not occur during the observational period and it is not clear why. It is worth considering if a child was legally represented separately would the result have been any different? That said, the directions given by the court regarding media publication were very clear and protected the child's right to privacy and anonymity.

Sharing court reports (between Government Departments, AGS or educational facilities), which only occurred a few times during the observational period, indicates that different approaches are adopted. The preferred approach of permitting sight of the report to a named person, with appropriate redactions and only if justified in the child's best interests, is in line with the theoretical perspectives which occurred in one case. There is nothing to suggest that there was any specific breach of the right to privacy, but it is argued that the approach suggested in the theoretical framework would safeguard against any potential breach and provide for greater protection to the right to privacy over one's personal (including sensitive) data. It ought not be assumed that another entity has an automatic entitlement to such reports. Any access sought to such reports requires judicial scrutiny and approval, as they are court reports,[930] which contain personal and sensitive data primarily about the child.

Regarding 'personality rights', HIQA reports highlight the positive relationships between the staff and children.[931] This corresponds with references during the observational

[928] Chapter 7, 7.3 (c) (Family Inclusion – Interim).
[929] *CFA v TN* [568] (n 18).
[930] Court Officers Act 1926 s 65 (3).
[931] HIQA, *Report of a Designated Special Care Unit, Ballydowd,* Unannounced Inspection July 2019, 9.

period that relationships were being maintained with staff in former placements to assist the children when they eventually moved on from special care. So although relationships are encouraged and maintained, there is relatively little known about the bonds that form between the children and the adults in the SCUs and others, which go towards the child's right to personal development.[932] This may in part be explained by the staffing and recruitment difficulties most recently documented in one HIQA report.[933] In any event, personality rights as defined are not given adequate consideration during the court process.

b. Socio-Economic Rights

Health

One of the main issues arising regarding health is systemic in nature. Although this is potentially a structural constraint in terms of the court protecting and vindicating the rights of children in need of healthcare (therapeutic services), it has declared that where vulnerable children are concerned, there is no place for bureaucracy. So although the CFA is hindered in its approach due to not having certain services at its disposal, it is to an extent under pressure from the court to address the issues, which are sometimes brought back before the court in advance of the one month statutory court review for updates. These extraneous factors make it challenging for the court to protect or vindicate the rights of the child. Regardless of the explanation as to why this occurs, this management system falls short of adequately vindicating this right by the reluctance of the court to issue directions or make findings against the CFA as the responsible body.

Education

The court is very vested in the child's educational path, actively encouraging that whatever can be done ought to be done thus promoting their interests. The court expects a properly formulated individualised plan to be in place when a child is leaving special care. In any case where the court was aware of the child's interests or aspirations regarding a career path, the issue was raised with the professionals to ascertain how this could be achieved. This proactive approach seeks to protect and vindicate the rights of the child, not just to education, but to a tailor-made educational programme. The extent to which this plays out thereafter is dependent not only on engagement by the child but on the CFA in ensuring that the appropriate funding is in place to operationalise the plan. The former is something over which the court has little control, and while the latter is

[932] text to n 257-261 in chapter 4; text to n 461-463 in chapter 5; text to n 976-978.
[933] HIQA, *Report of a Designated Centre Special Care Unit, Ballydowd,* Announced Inspection 30 June- 2 July 2020, 7-13, 14.

addressed by way of applying pressure to progress the matter, there seems to be a reluctance to argue in favour of making mandatory orders based on the decision in *VQ,* which articulates the fact that the policy decision has already been made and is therefore not a separation of powers issue.[934] The provision of education and healthcare are cornerstones under Part IVA and it is not clear why the boundaries of these already-made policies have not been tested.

c. Participatory Rights

It is fair to conclude that the court was always aware of the views or wishes of the child and if there was something specific the court wanted the child's views on, they were asked for. There is no doubt that each child in special care has direct access to the judge and has the opportunity to have both their views and wishes heard and thus would appear to conform to the first three components of the Lundy Model of Participation (space, voice and audience). Only glimmers of conversations between the judge and the children were made known in open court during the observational period and while on one hand it is difficult to evaluate the extent to which those (unknown) wishes (during those direct communications) were given effect, on the other hand, the inquisitorial nature of the proceedings meant that the judge did not have to tell everyone what was discussed either. From the child's perspective, this respects the child's right to have a private conversation with the decision-maker.

As a matter of course, the child's views were, for the most part, reported to the court by the GAL (and also by other parties to the proceedings) and it is clear from the court's deliberations that where possible, the court sought to ensure that the child's wishes were granted, unless it was contrary to their welfare.[935] Arguably, this approach has regard to the concept of relational autonomy, whereby the child, within the context of a SCU, is being permitted to avail of and voice preferences that go towards developing their skills for autonomy. Those skills are being developed having regard to context and the influences which surround them and while having due regard to their vulnerabilities. That said, their views were not determinative when weighed against those of the professionals

The concept of 'process autonomy' does not exist within the context of special care court proceedings and this is due in part to precedent and in part due to the configurations of the statutory provisions. Each child has a GAL assigned to him/her and it was the exception rather than the norm if a child did not want to engage with their GAL. Special

[934] *VQ v Horgan* (n 353).
[935] Chapter 7, 7.6 (Analysis – see first paragraph).

care cases are different to other forms of civil litigation involving (or about) children, insofar as these children can have direct communication with the presiding judge if they wish, in addition to having access to a court-appointed GAL. Judges are generally removed from the necessity of direct contact with children involved in civil legal proceedings (or civil legal proceedings about children) when an expert like a GAL has been appointed; this is because the voice of the child is heard through the reporting of the child's wishes by the GAL to the court. Further, although the judge may have direct communication more than once with a child during their time in special care, the updated wishes of the child (including the GAL's view of what is in the child's best interests) are more regularly reported to the court by the GAL at each court review. In addition, it was the exception rather than the norm for a child to have his/her own legal representatives. Leaving that aside, there is little choice in terms of meaningful 'process autonomy' in the decision-making aspect of the court process, which is promoted by the theoretical framework.

It cannot be said that there was any breach of the child's participatory rights based on the law as it stands, and this is primarily because of the direct line of communication between the child and the judicial decision-maker. That said, the existence of the concept of 'process autonomy' would strengthen the participatory rights of the child during the actual court process, ensuring greater engagement at all stages as per the Lundy Model; from the perspective of the theoretical framework, that includes the option of having one's own legal representation.

d. Analysis

A judge cannot micro-manage any case but is empowered to oversee this special care court process, which is resource driven, service led and dominated by professional opinion, even though the CFA is stymied by resource demands (both in terms of staffing levels and proper powers to procure required services), while also having regard to the rights of the child and the welfare and best interest principles. This operates within the context of an inquisitorial court process, now based on paternalistic statutory provisions which are devoid of rights, which is to be interpreted broadly and purposively. A court will always err on the side of caution when it comes to vulnerable children and arguably any potential breach of rights would be justified on welfare grounds. There is no doubt that at present the statutory provisions are directing the court down the welfare route; the court also spends time considering the deficiencies within the imperfect system trying to ensure and satisfy itself that children are getting the appropriate services they require,

which justifies detention in the first instance, and with a view to ensuring a timely exit out of special care.

Some matters are however within the control of the court which would give greater regard to the rights of children, such as interrogating any restrictive practices in open court and tightening the release of reports in line with the proposals in the theoretical framework more consistently. In conjunction with this, the court could also demand that all reports are submitted by way of affidavit, so that all the evidence before the court is sworn. It could also consider making adverse findings against the CFA for their failure to honour proposals in a timely fashion (notwithstanding their own difficulties) or direct that the Minister be advised of certain matters (as it did in *CFA v TN)*[936], or alternatively demand that a representative of the Minister come to court. The court could also seek out its own independent evaluations on the expert reports submitted generally during the special care process and in addition it could test the boundaries regarding the making of mandatory orders to vindicate healthcare and education rights on the basis of *Cronin* and *VQ*.[937] The worst that can happen is that the decision may be overturned by a higher court and that might be an argument worth having, because the basis for the order would be for the protection and vindication of justiciable legal rights of civilly detained children with welfare needs, which is underpinned by the long standing best interest principle. It is also within the power of the court to permit children to be legally represented if they make such an application, however, it is anticipated that robust argument would be raised once more against such a practice becoming the norm, due to the fact that such proceedings would be more likely to become adversarial and consequently demand more court time and increase legal costs. Unfortunately, an argument can also be made that such a proposal may make little difference as welfare concerns will always be present in special care cases.

It is important to start testing the boundaries again and tightening up the protection and vindication of the rights of children in special care; this can only be done if the focus is on rights with welfare concerns instead of welfare concerns with rights tagged on. What is the point in declaring that children have justiciable legal rights if they cannot be adequately protected or enforced? Children do not need 'rights-talk' and aspirational ideologies, they need their rights protected, vindicated and enforced. Therefore, the more

[936] *CFA v TN* (n 635).
[937] *Cronin v Minister for Education* (n 583); *VQ v Horgan* (n 353).

effective way of addressing rights' issues would be, in addition to the above, through making the appropriate amendments to Part IVA from a rights-based perspective.

8.4. Recommended Amendments Part IVA

Although constitutional and Convention rights exist alongside statutory provisions, it is clear from court observations that there is much focus on ensuring that the detailed statutory provisions and thresholds are met, before granting a detention order. Although the statutory duties imposed on the CFA mean that the rights of these children are protected to some extent, it is argued that this does not satisfy a rights-based approach which ought to apply when draconian measures are being unilaterally enforced on children. To ensure a rights-based approach is adopted and implemented by the court system, the statutory provisions need to reflect that position, as that is the only way to guarantee that rights remain a focus for a child with serious welfare issues and to encourage a substantive engagement with rights.

a. General

As Article 42A.1 'recognises and affirms the natural and imprescriptible rights of all children' it behoves the Oireachtas to ascertain how this might be best reflected under Part IVA. As identified in chapter 5, rights are absent from Part IVA as it is prescriptive, protectionist and paternalistic.[938] At a minimum from a rights-based perspective, it should be reflected in Part IVA that all decisions made ought to be made with due regard to the rights of the child and in particular the child's right to 'dignity, bodily integrity, privacy and autonomy' as reflected in the Mental Health Acts, 2001-2018.

Article 42A.4.1 provides for the paramountcy of the best interest principle in certain proceedings brought by the state, such as special care proceedings, and this is also absent from Part IVA. The paramountcy principle ensures that it is <u>the</u> best interests of that child that is determinative of the issues, as opposed to the child's best interests being one of a range of factors for consideration. Although the High Court has recognised the paramountcy of this principle in *CFA v TN*,[939] this should be provided for in statute so that it aligns with constitutional principles.

Part V of the Children and Family Relationship Act, 2015, entitled 'Best Interests of the Child' provides a non-exhaustive guidance list for the court to consider when dealing with applications brought under that Act. It is not an onerous imposition to provide statutory guidance for the court in terms of what it ought to consider when considering the

[938] text to n 591 in chapter 5.
[939] *CFA v TN* [568] (n 18) paras 53-43; see chapter 5, 5.4.

application of this nebulous principle for civilly detained children.[940] This would ensure, to some extent at least, that a forensic assessment of the best interest principle stands up to the principles of transparency, and proportionality and does not infringe more than necessary on the rights of the child.[941] Further, it would assist in providing greater clarity for the child regarding the weight that is attached to their views, particularly when their wishes/views are not determinative of the issue while still having regard to the best interests principle.[942]

b. Civil and Political Rights

Access to special care: Section 4A of the Mental Health Acts, 2001-2018 provides that due regard must be given to the 'need for every child to have access to health services'. Similar provisions ought to be inserted into Part IVA (in mandatory form) to ensure that any child in need of special care receives it. It is a burden on parents or GALs on behalf of children to go through the judicial review process to try and have a child admitted into special care. It was confirmed in court that a triage system has been in operation for years whereby the child most in need obtains a bed in a SCU.[943] This means that there are children in need of special care who may not be getting that form of specialised care. Therefore their 'natural and imprescriptible rights' cannot be said to be protected or vindicated as envisaged by Article 42A as Part IVA does not protect children on a waiting list for special care.

Restraint: If restraint and separation from peers are necessary measures, then it is recommended that provision for same ought to be included in Part IVA (as opposed to the Regulations) with safeguards and deterrents.[944] Guidance for the provisions can be sourced as a starting point by reference to section 69 of the Mental Health Act, 2001 which specifies how 'bodily restraint and seclusions' are to be addressed.[945] Although section 69 of the 2001 Act permits the (Mental Health) Commission to make Rules for this purpose, there are inbuilt deterrents contained within this primary piece of legislation such that contravention of the section or of the Rules is a punishable offence. Any such similar provision inserted into Part IVA that permits the formulation of Rules in line with national policy ought to be freely available. Any restrictive practices should be addressed

[940] Chapter 4, 4.5.2 (a) considers the best interest and welfare principles.
[941] ibid.
[942] text to n 313-315 in chapter 4.
[943] Oral legal submissions during a judicial review hearing during the observational period.
[944] SI. 2017/634 (n 454) s 11.
[945] text to n 599-600 in chapter 5; HIQA, *Report of a Designated Special Care Unit, Ballydowd;* Unannounced Inspection July 2019, 12, identifies that restrictive practices, if required are engaged for the shortest time and are managed comprehensively.

by the court to ensure that any imposition of restraint and/or separation is proportionate[946] and preserves the child's right to bodily integrity.

Exiting special care: As identified in chapters 6 and 7, exiting special care is a challenge and not just in terms of resources, but in terms of optimum timing.[947] This is not a new issue;[948] balancing preventative detention against an early exit is delicate and must be tailored to suit the needs of the child. Irvine J. in considering the wardship jurisdiction for a young adult with serious welfare needs stated: 'people cannot be detained because of fears they may commit a crime'.[949] This is a reference to preventative detention. Despite this and although preventative detention is unlawful, there seems to be at some level, an acceptance of preventative detention under the guise of a therapeutic rationale to justify detention and for that reason it requires careful monitoring.

As Part IVA is silent on the matter of transitioning out of special care, the decision as to how this will be managed is primarily a matter for the professional staff to address, in line with court supervision. The options are a detention order (with 'release')[950] or no detention order. By contrast, section 26 of the Mental Health Acts, 2001-2018 provides for 'absence with leave'. Although this is at the discretion of the consultant psychiatrist, there is no reason why similar provisions could not be inserted into Part IVA which permit the court, upon application to it at the appropriate time, to alter (and re-name) a detention order for the transitional period. This period could cover the latter phase of the exit stage, instead of dealing with it by way of a detention order and mobilities/authorised 'release'.

Although there is no empirical research on the views of children regarding the specifics or mechanics of a detention order, it is arguably frustrating for a child about to be discharged from special care, or having transitioned out of the SCU, to be subject to a detention order. An order similar to 'absence with leave' is not a panacea for a resolution of this issue but it is suggested that framing the transitional order differently may have a positive impact on the child as it also legally acknowledges for them their progression out of special care.

Transfer abroad: If it remains the case that the state is not going to provide additional measures to enable the CFA deal with the extreme cases that arise and if the need persists

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[946] *Salford City Council v NV* (n 436) para 77.
[947] Chapter 6, 6.7.2; chapter 7, 7.3 (a) (exit phase).
[948] Chapter 5, 5.3.2 (leaving special care).
[949] < Homicidal teen will be set free as judge finds there is no legal basis to hold her - Independent.ie> accessed 25 November 2020.
[950] CCA 1991 s 23NF provides for the 'release' of a child from a SCU for certain purposes including to reside with parents/relatives but the SCO remains in effect.

to transfer children to special care facilities abroad, then this ought to be clarified within the provisions of Part IVA. This may also require an amendment to the definition section as to what type of unit or hospital (abroad) is acceptable under the provisions of Part IVA together with an explicit amendment of section 23NF of the 1991 Act identifying that medium/long term placements abroad are permissible.[951] This ensures that all children in need of special care are considered under the same set of statutory provisions which provides consistency in terms of how their cases are handled in court and it ensures that they can avail of the statutory safeguards as set out in Part IVA.

Review post-discharge: Part IVA is silent as to whether the court has a role in post-discharge reviews which were routinely carried out by the court under the inherent jurisdiction. This matter was determined by the court in *CFA v MO'L and MM,*[952] which held that the court had jurisdiction to carry out such reviews. Part IVA ought to be amended to permit statutory court reviews following discharge/lapse of a SCO and attention ought to be paid to the rationale in *MO'L*. Post-discharge court reviews ensure that all matters that ought to be addressed have been addressed and that the rights of the child continue to be protected and vindicated as they emerge from special care.

Privacy: Privacy was addressed in the thesis primarily in relation to court proceedings and court documents. It is recommended that section 23NH be amended in line with section 29 of the 1991 Act so that academic researchers (who are subject to University ethical standards) and entities such as the CCLRP can attend at court proceedings.[953] As identified in *CFA v TN*,[954] there is a public interest in knowing how statutory bodies carry out their functions, particularly in relation to the civil detention of children. It would be a retrograde step to revert to a strict interpretation of the in camera rule in such cases and would disadvantage children (the subject of these orders) as there would be no public scrutiny. Defining the legal term "otherwise than in public" would provide greater clarity and support the public interest element in terms of understanding the court process in such cases.

That said, media reporting was identified during the observational period as problematic at times.[955] Although section 31 of the Child Care Act, 1991 provides for a 'prohibition on publication or broadcast of certain matters', which applies also to Part IVA, a strict

[951] In addition, the impact of Brexit will require review.
[952] *CFA v MO'L* (n 20) paras 131-134.
[953] *CFA v TN* [568] (n 18).
[954] ibid.
[955] Chapter 7, 7.3 (d).

guidance for the public media reporting of cases ought to be formulated and inserted specifically into Part IVA given the specific sensitivities surrounding the facts of some special care cases, the low numbers of children in special care, the known location of SCUs and the contemporaneous nature of media reporting. Finally, access to court papers is intertwined with the child's participatory rights and their statutory right to information.[956]

c. Socio-Economic Rights

Therapeutic: There is no mandate for the provision of therapeutic supports under Part IVA which was a fundamental requirement of detention under the inherent jurisdiction. Either therapeutic supports are subsumed within the provisions of 'health' services under the Act or there is no requirement that detention is dependent upon the provision of therapeutic supports. Either way this requires clarification and it is recommended that therapeutic supports are provided for in statute, such that the child must be engaging with and benefitting from therapeutic supports to be lawfully detained.[957] The jurisprudence under the inherent jurisdiction clearly stated that without a therapeutic rationale, there was no jurisdiction to detain.[958] Given the more expansive base (life, health, safety, development or welfare) for bringing a child into special care under Part IVA, it is recommended that the original focus of the importance of therapeutic supports is clearly set out in statute.

Education: The provision of 'education supervision' is not defined under Part IVA. While being realistic and mindful of the jurisprudence and empirical data in terms of some children not engaging with education, it is recommended at a minimum that there is a definition as to what constitutes 'education supervision'.

d. Participatory Rights

Competence/Autonomy: It would be unfair to suggest that there was no cognisance taken of the age of children in special care during court observations, however, the arbitrary cut off age of eighteen years and the welfare needs of these children outweighed any serious discussion on growing competence and autonomy. The median age of children in special

[956] Maria Corbett and Carol Coulter, Child Care Proceedings: *A Thematic Review of Irish and International Practice, Submitted to the Department of the Children and Youth Affairs* (June 2019), 114-115; Practice Direction HC86, SC20 re access to court files.
[957] Chapter 4, 4.10 (b) considers engagement with therapeutic supports as an essential tenet justifying detention; Carr, Exceptions to the Rule? (n 21), Carr posits that 'a "therapeutic intervention" is after all a somewhat nebulous concept' which can 'be operationalised to form a justification for longer term detention, while the appropriate "dose" of therapy is administered'.
[958] *HSE v SS* (n 4).

care during the observational period was fifteen and a half years,[959] so the issue of autonomy and growing competence cannot be ignored, even it is outweighed by welfare needs. Part IVA does not make any provision for the growing competence of children; the Act permits the CFA 'control' them instead.[960] 'Control' is within the context of parental control; however, parents cannot lock up their children. Participatory rights can be given greater effect through a statutory acknowledgement of the child's growing capacity and competence and it is recommended that such a statutory acknowledgement is incorporated.

<u>*Participation*</u>: It is recommended that the respective approach adopted in CFA v *ML (Otherwise G)*,[961] which gave greater effect to the participatory rights of the child, ought to be the norm rather than the exception. If it is the case that a child 'is under a disability in Irish law,' then this approach may ameliorate this position.[962] Therefore, Part IVA ought to provide that children of this age have a statutory right to information regarding 'process autonomy', i.e. how and the extent to which they wish to be involved in the proceedings (including their own legal representation if they wish).[963] A retired GAL in the UK, Helen James stated '[m]ore often than not though, it is the professionals' views and recommendations that are the most powerful voices in terms of impact in relation to the final outcome of a case, rather than the child's own views, wishes and feeling.'[964]

Due to the age profile of children some consideration ought to be given to the fact that notwithstanding their welfare needs, some children may not wish to have a GAL. Although the court's view is that GALs play a crucial role,[965] from a child's participatory rights perspective, the dual and sometimes paradoxical role of the GAL relegates the voice of the child behind the best interests as advocated.[966] Therefore, it would be more

[959] Chapter 6, 6.6 (c) 'Demographics'.
[960] CCA 1991 s 23ND (1)(a); Corbett et al, Child Care Proceedings: A Thematic Review of Irish and International Practice (n 956) 114, although this was referenced more generally to the CCA 1991 as opposed to Part IVA specifically.
[961] CFA v *ML* (n 3), the child had separate legal representation, had direct contact with the judge on numerous occasions and appeared at one High Court hearing by video-link.
[962] *DH v CFA* (n 495) para 36.
[963] Corbett et al, Child Care Proceedings: A Thematic Review of Irish and International Practice (n 956) 114-115 (referenced more generally to the Child Care Act 1991 and not specifically Part IVA); eg UK CA 1989 s 25(6) mandates that the court cannot hear an application without the child being represented unless the child, having been made aware of his right to apply for legal aid has either refused/failed to apply for same; In *Re A (A Child) (No Secure Accommodation Available: Deprivation of Liberty)* [2017] EWHC 2458 (Fam) the court held that such procedural safeguards, including the right to representation, applied also to applications for secure care under the inherent jurisdiction of the court. Regarding children attending court, in *A City Council v T, J, and K* [2011] EWHC 1082 (Fam) the court held that the starting position ought to be an evaluation on attendance/non-attendance regarding the child's welfare (with various factors to consider) and the impact on the court managing proceedings fairly and in the instant case formed the opinion that there was nothing before the court to suggest that her attendance would be psychologically harmful to her.
[964] James et al (n 310) 127.
[965] text to n 569 in chapter 5.
[966] Chapter 7, 7.5 (b) 'Analysis'.

appropriate to have a GAL and separate legal representation (which provides safeguards) for the child as they fulfil different functions and not an either/or situation.[967] Consequently, the Act ought to provide that children should be on statutory notices of reviews, extensions of SCOs, temporary release and transfer applications and children ought to be able to apply for variations and discharge of SCO and ought to be able to apply for directions.

Language: Consideration ought to be given once again to the use of any language which has criminal overtones. Although the issue was debated previously and the legal advice seemed to advocate retention of the word 'detention' to avoid uncertainty, there is no reason why an overhaul of Part IVA could not reconsider this issue.[968] Even if the advice to retain the word 'detention' remained, other considerations could be given to using the word 'discharge' instead of 'release' and 'absent without permission'/ 'missing from care' could be used instead of 'abscond'. Although not determinative of a rights issue, it arguably goes towards the principle of respecting the integrity of the child.

Detention for Victims of Sexual Exploitation: Carr raised an interesting point following the judgment in *HSE v SS*[969] which was 'who is being secured from whom' in cases where children are subject to sexual predators.[970] The provisions of Part IVA are arguably wide enough to detain a child for safety reasons alone, such as these, as only one of the five components (life, health, safety, development and welfare) needs to be engaged to detain a child. In terms of the dichotomy that sometimes exists in gender-based discourse,[971] this cannot be ignored, and clarification ought to be provided within the statutory provisions to prevent an unintended expansion of the reasons and rationale for detention within the SCUs.

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[967] The arguments in favour of the statutory regulation of the GAL is long-standing and the regulation of same remains in abeyance with the lapsing of the Child Care (Amendment) Bill 2019; Ann McWilliams and Claire Hamilton, 'There isn't Anything like a GAL': The Guardian ad litem Service in Ireland (2010) 10 (1) *Irish Journal of Applied Social Studies* (2010) 31-39; Shane McQuillan, Andy Bilson, Sue White, *Review of the Guardian Ad Litem Service:* Final Report from Capita Consulting Ireland, In Association with the Nuffield Institute for Health (National Children's Office Dublin 2004) 79-80 which also promoted the 'dual representation' of children in public and private law proceedings but on a discretionary as opposed to mandatory basis; Aisling Parkes, 'Children and the Right to Separate Legal Representation in Legal Proceedings in Accordance with International Law' (2002) 5(3) *Irish Journal of Family Law* 18-22; Nicholas Bala, Rachel Birnbaum, Lorne Bertrand, 'Controversy About the Role of Children's Lawyers: Advocate or Best Interests Guardian? Comparing Practices in Two Canadian Jurisdictions with Different Policies for Lawyers' (2013) 51 (4) *Family Court Review* 681-697 where the authors posit that lawyers for children there can perform three different functions, (1) as an amicus curiae (2) best interests guardian (3) instructional lawyer (especially for older children); Cathy Donnelly, 'Reflections of a Guardian ad Litem on the Participation of Looked-After Children in Public Law Proceedings' (2010) 16 (2) *Child Care in Practice* 181-193.

[968] Chapter 6, 6.7.8.

[969] *HSE v SS* (n 4).

[970] Carr, Exceptions to the Rule? (n 21) 89-90.

[971] Chapter 6, 6.7.9 considers this dichotomy.

8.5. Concluding Thoughts on Special Care

The CFA as an entity has an enormous task in terms of the provision of special care. There is no doubt from the observational period that detained children have such a diverse range of complex needs that the CFA needs a variety of experienced professional and care staff at its disposal. Evidence was given in court regarding the difficulties in recruiting and retaining staff and this is partly because the care staff need to be of a strong disposition to address the breadth of issues that arise.

We can separate the CFA as an entity from the staff who care for these children, and while it must be acknowledged that the system is not entirely perfect, credit must be given to the professional and care staff and the Managers/Directors of the SCUs regarding the work they undertake. Further, the commendable efforts made by the Directors of the SCUs to manage and organise the units in such a way as to provide graded levels of freedom for the children within the confines of civil detention must be recognised and this was unexpected when the observations commenced.

It was also unexpected to observe the range of 'fun activities' (including a unit holiday) that are available to the children (at appropriate times and under supervision) and to hear about the various interests these children have. Efforts are made to ensure that both the needs and the interests of the children are incorporated into their personal tailor-made programme of care. While routine trips to the doctor and dentist must be made, the SCUs do whatever they can to ensure that mobilities are enjoyable for the children and that they help the children feel good about themselves. SCUs are moving away from using the word 'mobilities' to 'outings' because the children do not like the word 'mobilities'.[972] One of the SCUs is currently in the process of building a café and a beauty salon and training modules will be held for the children to learn barista and beauty skills which is hoped may lead to later employment opportunities.[973] Some children from the SCUs also choose to engage in the Gaisce awards.[974] This demonstrates that what is important to children of this age is being operationalised through mobilities.

In addition, the policies and procedures as set out by the CFA provide a holistic framework that is child-centric and includes building relationships and maintaining contact with friends, where appropriate.[975] The HIQA reports provide further positive insights into the involvement of children within the SCUs. While some children have

[972] Covid-19 has placed restrictions on the range of available outings.
[973] Updated appraisal from the Manager of Ballydowd SCU through the High Court Liaison Officer 23 November 2020.
[974] https://www.gaisce.ie; The President's Award; this is a self-development programme.
[975] CFA, Policies and Procedures Booklet (n 533) s 2.

made some negative comments, the reports highlight a child-centred approach, with less restrictive practices, greater levels of relationships between the children and staff and efforts made by staff to help the children develop what interests them.[976] Having a glimpse of what goes on in the SCUs such as is described is in stark contrast to the images one gets during the court process which is dominated by welfare and paternalism and children engaging in out of control behaviour. It is therefore prudent to be reminded that behind the court process exist SCUs that are being managed from a child/adolescent-centric position by committed people to the betterment of children in their care, notwithstanding the behavioural issues. Not only does this humanise a legal process, it also identifies children as social actors evolving within their environment as active participants, enabling as best as possible, their contribution to their own development and to society.[977]

There is a whole unexplored world in terms of children detained in Ireland in special care facilities and relatively little is known publicly about its day to day operations. It would be beneficial to have a website on SCUs, (in a format suitable to adolescents) which gives some information on what it does, the services it provides, its practices, policies and procedures; it could also include more information on the provision of education and the operation of the ACTS team and the Well Tree Model of Care. For example, Kibble in the UK has one such website.[978] So too does Oberstown Detention Centre.[979]

Although there have been enormous developments within special care since the mid-1990s, it is still a resource driven service with systemic issues. Further, not all children in need of special care are catered for within this jurisdiction. Even though this is the exception rather than the norm at present, it must impact hugely on the child who is detained abroad in a different cultural environment, in a different educational regime with access to family members and friends affected by this geographical divide. It seems appropriate to finally expand the special care system in terms of the range of services on offer to cater for children with more extensive needs. However, as it took the Oireachtas over twenty years to ensure that the relevant legislative provisions were commenced and operable (unlike the original Part IVA which commenced but were inoperable) it seems

[976] HIQA, *Report of a Designated Special Care Unit, Ballydowd;* Unannounced Inspection July 2019; HIQA, *Report of a Designated Special Care Unit, Crannóg Nua* Unannounced Inspection August 2019; HIQA, *Report of a Designated Special Care Unit, Coovagh House* Unannounced Inspection September 2019.
[977] text to n 52-56 in chapter 2.
[978] https://www.kibble.org/services/secure-care/
[979] https://www.oberstown.com/

highly unlikely that the necessary amendments to legislation or additional resources will be forthcoming.

8.6. Potential Areas of Further Research

If a child wishes to meet a judge, all he/she needs to do is make that known through any party to the proceedings. The extent to which the judge may have been influenced by any meeting with a child is unclear. While judicial interviews may have shed some light on this issue, this was not something that was originally anticipated and therefore was not included as part of the methodology. However, a separate research project could be undertaken to address this point alone from a participatory rights perspective within the court process and could include comparisons with both public and private family law proceedings.

Children are detained for both therapeutic and educational purposes. Chapter 1 identified that although children coming into special care do not have mental health difficulties as defined under the Mental Health Acts, 2001-2018, they may present with mental health difficulties.[980] The most recent statistics from the CFA[981] indicate that in 2019, 30 (or 70%) of the 43 referrals to the SCRC were unassessed but presented with mental health issues. Therefore research could be undertaken, even by desktop review of case files, of the percentage of children who were displaying mental health issues from an early age, the intervention they received if any, and how this impacted on their need for special care when they became adolescents. The research might consider if earlier mental health intervention reduced the need later for special care at all and if so, consider how this might be addressed going forward. A further research project could trace children following discharge from special care to evaluate trends having regard to the percentage who ended up within the adult mental health services (or the criminal justice system).

These latest statistics[982] also reveal that in 2019, only 5 children of the 43 referrals were in education at the time. Observations demonstrate that for the most part, most children engage at some level at least with the educational aspect of their care. A study could also be done to ascertain why so few are in education in the first instance, evaluate the extent to which they engaged in education within special care and if this made a difference to

[980] text to n 4 in chapter 1; Conor O'Mahony, *Annual Report of the Special Rapporteur* (2020) 152 endorsed the proposition of the CCLRP re the provision of greater services to assist in the areas of mental health in this jurisdiction including 'mental hospital care'; Lisa Colfer and Carol Coulter, 'High Court Oversight of Children's Complex Care Needs' (January 2020) at https://www.childlawproject.ie/publications/high-court-oversight-of-childrens-complex-care-needs/ accessed 3 January 2020.
[981] CFA, *Overview of Special Care Admission and Discharge Service Delivery* 2019.
[982] ibid.

the children post special care. This has broader implications also – for example, would some children with say speech and language difficulties or other issues fare better in a different model of education where there are smaller groups? Would this have made a difference? Are the smaller groups in the special care schools more in tune with their needs? Ascertaining what trends can be established may assist in evaluating the extent to which the nature of education provided within special care benefits the child and if early intervention with a different model of education would have made any difference.

There is little known about the success stories of children who have been in special care, or how they have progressed. A desktop review could also be carried out focussing on this aspect to the extent possible, with follow-up interviews if there were willing participants similar to the research carried out by Healy et al.[983] That review identified the need for greater support and services post-discharge as it is related to outcomes more so than the 'degree of disturbance at the point of admission or discharge'.[984]

8.7. Conclusion

Special care cases are unlike any other type of civil litigation that comes before a judge. It must also be very difficult for a judge to make an order for the civil detention of a child and there is no doubt that this would never be done lightly. The layers of complexity are very deep, and each child is a separate person with their own individual story, and each have their own set of complex needs. The intention of the legislature appears to have been solely to document the controllability laws in the statute books – and after over circa twenty years it finally managed to bring that into effect. The ultimate answer of the court, however, does not depend on the scope of the statute - the statute simply guides the court process and imposes duties on the state. So, although perceptions of children have altered within the legal context, its operationalisation is another matter. The statute is neither rights-based nor child/adolescent-based even though the statute only applies to a small group of children within a certain age group. The recently commenced statute reflects the adult view reinforcing how little has changed for children in special care within the court process since the mid-1990s.

To truly bring the process of special care in line with the development of children's rights and respecting their integrity as individual people with complex needs, a greater and more explicitly visible focus on rights is called for within the context of welfare as opposed to the converse.

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[983] Healy et al (n 119) 52.
[984] ibid.

"*Suggesting that a child's well-being is affected adversely is powerful in itself but ostensibly not as powerful as arguing that their human rights have been breached*."

(Lundy, 2014)

Appendices

APPENDIX A. APPROVAL OF DCU RESEARCH ETHICS COMMITTEE

Ollscoil Chathair Bhaile Átha Cliath
Dublin City University

DCU

Ms Clare Craven-Barry
Dr Brenda Daly

School of Law and Government

13 December 2017

REC Reference: **DCUREC/2017/181**

Proposal Title: **To what extent does the exercise of the inherent jurisdiction of the High Court protect and vindicate the rights of children in secure care?**

Applicant(s): Ms Clare Craven-Barry, Dr Brenda Daly

Dear Clare,

Further to expedited review, the DCU Research Ethics Committee approves this research proposal.

Materials used to recruit participants should note that ethical approval for this project has been obtained from the Dublin City University Research Ethics Committee.

Should substantial modifications to the research protocol be required at a later stage, a further amendment submission should be made to the REC.

Yours sincerely,

Donal O'Gorman

Dr Dónal O'Gorman
Chairperson
DCU Research Ethics Committee

DCU
Research & Innovation

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APPENDIX B. DATA COLLECTED FOR EMPIRICAL ANALYSIS

1. CASE DATA FOR EMPIRICAL ANALYSIS

Case Background Item	Noted Variables
Date observation commenced	
Date observation ceased	
Age at entry into special care	
Length of time in special care	
Jurisdiction	Inherent Jurisdiction Statute Combination of Inherent Jurisdiction & Statute Wardship Combination of Inherent Jurisdiction & Wardship Combination of Statute & Wardship Judicial Review In Camera
In special care before	Yes, No
Stage observed	Whole case Partial: from the Beginning Partial: Mid Partial: to the End Post Discharge Review
Number of appearances observed	
How often order extended	
Whether a new order was sought	Yes, No
Status of order	Discharged, lapsed, ongoing
Whether under a District Court Care Order	Yes, No
Whether under voluntary care order	Yes, No
Whether detained inside/outside jurisdiction	Inside, Outside, Combination
General Reasons noted for Special Care	Substance abuse, Criminal activity, Anti-social behaviour Suicide ideation or self-harm Sexual Drug related Violence or aggressive behaviour Assault Trauma Abuse Victim Absconding from care
Gender data	Child Guardian-At-Litem Social Worker
Gender data for legal representation	Junior/Senior Counsel for Mother Junior/Senior Counsel for Father Junior/Senior Counsel for the CFA Junior/Senior Counsel for Guardian-At-Litem Other Junior/Senior Counsel involved

2. OBSERVATIONS ON CASES AND ASSESSMENT OF RIGHTS

Case Background Item	Noted Variables
Date of case observation	
Gender of child	
Appearance Category	Interim Special Care Order Full Special Care Order Statutory Court Review Statutory FM Statutory Discharge Inherent Jurisdiction – Review Inherent Jurisdiction – For Mention Inherent Jurisdiction – Discharge Judicial Review Directions Extension Post Discharge Review
Jurisdiction of the case appearance	Inherent Jurisdiction Statute Combination of Inherent Jurisdiction & Statute Wardship Combination of Inherent Jurisdiction & Wardship Combination of Statute & Wardship Judicial Review In Camera
Stage observed	Whole case Partial: from the Beginning Partial: Mid Partial: to the End Post Discharge Review
Stage of Process	Beginning Interim Exit

A. OBSERVATIONS ON CIVIL AND POLITICAL RIGHTS

- Liberty
- Restrictions on Movement
- Family Inclusion / Access
- Privacy

B. OBSERVATIONS ON SOCIO-ECONOMIC RIGHTS

- Health
- Education

C. OBSERVATIONS ON PARTICIPATORY RIGHTS

- Views/Wishes of the Child
- Involvement in Decision-Making
- Complaints

D. OBSERVATIONS BY THE JUDGE AND ANY ADDITIONAL OBSERVATIONS

APPENDIX C. PROTOCOL FOR COURT OBSERVATIONS AND COURT FILES

DOCTORAL RESEARCHER: CLARE CRAVEN-BARRY BL, LLM

Background

The *in camera* rule was lifted in the case of *The Child and Family Agency v TN* [2018] IEHC 568 for the purposes of enabling this researcher (and the CCLRP) attend at court proceedings, access court documents if required and produce academic research subject to adherence to anonymity and respect for the privacy rights of the children.

Protocol

1. Specific measures will be adopted to ensure that any identifying data is anonymised, securely stored and destroyed within 30 days following the completion of the thesis:
    a. Handwritten notes will be taken only:
        i. Each case will be allocated a case number and initials of the child, family member or any other party referred to, will not be used;
        ii. No information will be recorded that identifies any person, including but not limited to the child, family members, authors of expert reports or persons named in the expert reports;
        iii. No information will be recorded that identifies any location including but not limited to where the child and his/her family is from, the location of the special care facility, the location of services or treatment centres, save that a location is either within or outside this jurisdiction;
    b. From handwritten notes, the data will be compiled and stored in a password protected document on an encrypted laptop and will be anonymised;
    c. Handwritten notes will then be destroyed in confidential shredders;
    d. No other person will be able to access this data or will be authorised to access this data nor will it be shared with any other person.
2. The utmost care will be taken to ensure that the completed research project will not contain any information that could lead to the identification of any child or any person involved in the proceedings.
3. The collected data will be limited to being adequate, relevant, limited to what is necessary for the purposes of this doctoral research.
4. Should access to court files be required, 1-3 applies. In addition
    a. The exact dates, times and frequency of accessing court files will be agreed in advance with the Court Registrar;
        i. Files will not be removed from the access location identified by the Registrar or court for viewing;
        ii. Copies will not be taken of any court files;
        iii. Access will be under the supervision of the court Registrar.

Date: 9th August 2021

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