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# Working Paper prepared for Discussion Forum on Parenting

1 October 2020

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## Abstract

This working paper will inform the Discussion Forum on Parenting on 1 October 2020. It will provide an overview of the Irish legal and policy landscape in which persons with disabilities experience parenting as well as the conditions within which medical, social and legal practitioners deliver their services. This working paper will be used to familiarise participants from different backgrounds of the context in which disabled people's experiences of parenting have occurred. Firstly, it will discuss international law relating to disabled people's rights as parents (with a focus on the UN Convention on the Rights of Persons with Disabilities and the European Convention on Human Rights). Secondly, it will explore the Irish context in terms of existing law (Constitution and legislation) and caselaw relating to disabled parents, with a specific focus on childcare proceedings. Finally, it will consider some relevant policies, programmes and practices and available statistical data on disabled parents in Ireland.

# Introduction

A key theme of the Re(al) Productive Justice project is parenting. Persons with disabilities may have already experienced barriers accessing fertility, contraception, abortion, pregnancy and childbirth services before becoming parents. People who acquire a disability after becoming parents may also experience unique barriers to exercising their parental rights. In this project, and working paper, we focus on the issues facing disabled parents, including disabled parents with disabled and non-disabled children. This paper sets out the international human rights law instruments which specify the right to family, jurisprudence from individual complaints to the UN Treaty Monitoring Body, caselaw from the European Court of Human Rights, Irish legislation, caselaw and policies.

## International Human Rights Law

International human rights law outlines fundamental human rights which are applicable to everyone without discrimination. Through ratification of international human rights instruments (Conventions) States agree to respect the rights contained within the Convention through their domestic laws and policies<sup>1</sup>. The UN Convention on the Rights of Persons with Disabilities (UNCRPD) is most pertinent to this research. This section will consider the protections for persons with disabilities to parent under the UNCRPD first and then outline how other human rights instruments promote the right to parenting also.

### UN Convention on the Rights of Persons with Disabilities

The UN Convention on the Rights of Persons with Disabilities has numerous provisions supporting the right to parent. The most relevant of these is Article 23. Article 23 respects family life for persons with disabilities, an explicit recognition that persons with disabilities have a right to family as they see appropriate. Article 23 provides detailed guidance preventing interventions in family life based on the disability of parents or the child. Article 23 (1)(b) requires states to respect *'The rights of persons with disabilities to decide freely and responsibly on the number and spacing of their children and to have access to age-appropriate information, reproductive and family planning education are recognized, and the means necessary to enable them to exercise these rights are provided;*

Article 23(2) further asserts *'States Parties shall ensure the rights and responsibilities of persons with disabilities, with regard to guardianship, wardship, trusteeship, adoption of children or similar institutions, where these concepts exist in national legislation; in all cases the best interests of the child shall be paramount. States Parties shall render appropriate assistance to persons with disabilities in the performance of their child-rearing responsibilities.'*

Article 23(4) reinforces that the best interest of the child must be paramount in judicial proceedings while affirming that the disability of the parent or the child cannot form the basis for separation of families. *'In no case shall a child be separated from parents on the basis of a disability of either the*

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<sup>1</sup> Office of the High Commissioner of Human Rights, International Human Rights Law, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx>

*child or one or both of the parents.’* Subsection 5 requires that *‘States Parties shall, where the immediate family is unable to care for a child with disabilities, undertake every effort to provide alternative care within the wider family, and failing that, within the community in a family setting.’* There are several other relevant articles of the CRPD which affect parents with disabilities. Article 12 recognises the equal right of persons with disabilities, including parents, to legal capacity. This right includes the recognition of parental responsibility, which should not be removed according to General Comment 1 based on assessments which directly or indirectly discriminate against persons with disabilities, including functional tests of mental capacity.

Article 19 recognises the rights of persons with disabilities, including parents, to live independently and be included in their communities. While the focus of this paper is on the rights and experiences of disabled parents, Article 18(2) CRPD clarifies that children with disabilities “have the right to know and be cared for by their parents.” This includes the right to be cared for by disabled parents. Parental rights are also linked to the right to privacy, provided for under Article 22. The privacy of parents with disabilities can be violated through measures which result in the separation of families by the state, and also by state interventions which stop short of separation, even if these are intended to be supportive in nature.

Article 28 safeguards the right to an adequate standard of living. Persons with disabilities in Ireland experience poverty at much higher rates than non-disabled persons<sup>2</sup>. This impacts on the standard of living which they can achieve, and this can adversely impact their family, triggering interventions from health and social services which could be avoided<sup>3</sup>. Income security is a key factor in ensuring that disabled parents can raise their children with dignity in a supportive environment. The following section will provide some further detail on how these articles of the CRPD can be fully realised to respect the rights of parents with disabilities in Ireland.

#### Guidance from the Committee on the Rights of Persons with Disabilities

Implementation of the Convention on the Rights of Persons with Disabilities by State parties is monitored by the Committee on the Rights of Persons with Disabilities. This Committee is comprised of 18 independent experts who review reports from states and civil society on a four year cyclical basis<sup>4</sup>. Based on the common themes emerging from examination of States, the Committee produces Article specific guidance to assist in adherence to CRPD obligations. These are referred to as ‘General Comments’ and those most relevant to the issue of parenting will be discussed here.

General Comment No. 3 highlights how the protection of the rights of women and girls with disabilities intersects with being able to choose the number and spacing of their children<sup>5</sup>. Barriers identified to reproductive justice for women and girls with disabilities include prejudicial attitudes regarding their ability to parent<sup>3</sup>, inaccessible information<sup>4</sup> and inaccessible services to enable them to parent.<sup>5</sup> The Committee acknowledges that decisions made by women about their reproductive health, including parenting, are frequently ignored or substituted either informally or by legally appointed decision making representative, in violation of their Article 12 rights to legal capacity<sup>6</sup>. General Comment No. 3 also recognises that women with disabilities are disproportionately

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<sup>2</sup> Banks, Grotti, Fahey and Watson, ‘Disability and Discrimination in Ireland: Evidence from the QNHS Equality Modules 2004, 2010, 2014’, October 2018, <https://www.esri.ie/system/files/publications/bkmnext363.pdf> at p.45

<sup>3</sup> Disability Federation of Ireland, Disability in Ireland: Some facts and figures’, <https://www.disability-federation.ie/assets/files/legacy/Disability%20FactSheet.pdf>

<sup>4</sup> Office of the High Commissioner of Human Rights, Committee on the Rights of Persons with Disabilities, Questions and Answers, <https://www.ohchr.org/EN/HRBodies/CRPD/Pages/QuestionsAnswers.aspx>

<sup>5</sup> Committee on the rights of Persons with Disabilities, General Comment No. 3,

overrepresented at child protection proceedings are at greater risk of having their children removed from their care when compared with non-disabled women<sup>7</sup>.

General Comment No. 5 notes the intersections with the Convention on the Rights of the Child for parents with disabilities to be provided with any assistance required to fulfil their child-rearing duties<sup>8</sup>. The range of supports to be provided to persons with disabilities to enable them to live independently includes supports to empower parenthood<sup>9</sup>. The equal rights and responsibilities between men and women to undertake parental roles is also highlighted as applying equally to disabled parents as non-disabled parents<sup>10</sup>. The Committee highlights that the right to independent living is intimately linked with right to family for both children and parents with disabilities.<sup>11</sup>

The intersections of equality with the right to parent is also highlighted in General Comment No. 6. The Comment recognises that parents with disabilities are perceived as inadequate but asserts that separation of children from parents based on either's disability is a violation of their right to equality<sup>12</sup>. The importance of community-based parenting support is also emphasised<sup>13</sup>.

Ireland has not ratified the optional protocol to the UNCRPD to enable complaints to be taken to the Committee on the Rights of Persons with Disabilities. To date, the UN Committee on the Rights of Persons with Disabilities has upheld one successful complaint under the Optional Protocol from a disabled parent regarding family reunification and the right to family life. The complaint of *Domina and Bendsten v Denmark*<sup>6</sup> centred around the refusal to grant citizenship to Domina's husband on the basis of his perceived inability to financially support himself due to his disability. The couple have a young child. In order to be granted citizenship there is a condition under Danish immigration law that the applicant must not have been in receipt of social welfare for three years prior to making the application. Mr. Bendsten was in receipt of disability linked financial support as a result of an acquired brain injury. The Committee on the Rights of Persons with Disabilities found a violation of the right to family life by the State's refusal to grant family reunification.

#### Protections for parenting within other international human rights instruments

Article 10 of the International Covenant on Economic, Social and Cultural rights asserts "the widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children". Ireland ratified ICESCR in 1989 but has not ratified the mechanism to allow complaints regarding violations of ESC rights to be taken to the Committee on Economic Social and Cultural rights<sup>14</sup>.

Article 17 of the International Covenant on Civil and Political Rights protects the family from arbitrary and unlawful interference. Ireland has ratified ICCPR since 1989 and the Optional Protocol enabling complaints to be made to the Human Rights Council has also been ratified. To date no complaints have been made to the Human Rights Council in relation to parenting with disabilities in Ireland<sup>15</sup>. For this right to be utilised by parents with disabilities it is imperative that domestic laws and policies of statutory agencies in Ireland do not discriminate based on disability.

The Convention on the Elimination of Discrimination Against Women outlines in Article 16(1d) that there are shared responsibilities between men and women in relation to parenting. This aims to shift the societal expectation of women being sole caregivers. It is especially pertinent in the conversation regarding reproductive justice as the male or fathering perspectives are often excluded from existing

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<sup>6</sup> CRPD Committee, Communication No. 39/2017, UN Doc. CRPD/C/20/D/39/2017 (2018).

disability research<sup>7</sup>. The UN Committee on the Elimination of Discrimination Against Women has only considered one communication regarding disabled parents in Finland. The case revolved around the liability of statutory social services in the event of the murder of a disabled mother and her children by the children's disabled father<sup>8</sup>. The case indicates the complexity of interventions in a case of domestic violence. The Committee found that the communication was inadmissible as the mother's parents who submitted the application had not exhausted all domestic remedies available to them.

The Convention on the Rights of the Child also offers protection which extends to parents. Article 8 protects the right of the child to their family without unlawful interference. Article 10 concerns the right to family reunification and to access to both parents where one may reside in another state. Children are also protected from unjust interference with their family by Article 16 of the CRC.

### European Court of Human Rights caselaw

There is a multitude of European Court of Human Rights (ECHR) caselaw relating to denial of rights of parents with disabilities. Where interferences by States with family life is based solely on the presence of a disability of the parent or child, this will be considered to violate the right to private life under Article 8 of the European Convention of Human Rights. The ECHR cases taken by disabled parents regarding separation from children under Article 8 generally fall into four categories: discrimination based on a label or diagnosis of disability, failure to provide reasonable accommodation to facilitate parenting by persons with disabilities, increased scrutiny which disabled parents are subjected to, and compounding socio-economic factors.

In some cases, a diagnosis or the existence of disability has been used to deprive persons with disabilities of parental rights without evidence that they have failed in their duties towards their children. For example, in *Kruskovic v Croatia*<sup>17</sup>, the State denied registration at birth of a father diagnosed with personality disorder to his biological child. The father had also experienced deprivation of legal capacity. The mother of the child had consented to recognise him as the father but the Birth Registry initiated proceedings to annul his recognition. This was deemed by the European Court to amount to a violation of Article 8 ECHR. Similarly, in *Kocherov and Sergeyeva v Russia*<sup>18</sup> the court recognised that the restriction of the father's parental rights had been made based on the grounds of mental disability, without of any evidence of failure in parental duties towards the child.

Contact with children and family reunification are also areas where the ECtHR has recognised disability discrimination to be a violation of Article 8. In *Cinta v Romania*<sup>9</sup> the Court found discrimination based on a father's mental health diagnosis restricted his contact with his daughter. During divorce proceedings the father applied to have regular contact with his four year old daughter in his own home. Contact was permitted in a public place and supervised based on medical information and reports from the estranged wife regarding his aggression. The father, the applicant, objected to this evaluation which he claimed was untrue. The ECHR found that the claims of being a danger to his child were unsubstantiated and that the restrictions on contact were based on his disability rather than any evidence of inability to care for his child. *Kiyutin v Russia*<sup>10</sup> concerned the refusal of a residence permit to a man whose daughter and family are Russian nationals based on his HIV status. The court determined that there had been a violation of Article 8 ECHR based on the man's HIV status.

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<sup>7</sup> KilKelly, 'Disabled Fathers: Identifying a Research Agenda', <http://www.fatherhoodinstitute.org/uploads/publications/304.pdf>

<sup>8</sup> Committee on the Elimination of Discrimination against Women Decision adopted by the Committee under article 4 (1) of the Optional Protocol, concerning communication No. 111/2017\*, 3 April 2020

<sup>9</sup> Application no. 3891/19

<sup>10</sup> Application no. 2700/10

Failure by domestic courts to consider reasonable accommodations for disabled parents can also amount to Article 8. For example in *Kacper v Poland*<sup>19</sup> a Deaf father's request for increased access to his son outside the mother's home was denied because the father communicated primarily through sign language (which the mother also understood) and his son did not understand sign language. The court found that Poland's failure to consider alternative arrangements which would enable parents with disabilities to have greater access to and contact with their children to amount to a violation of Article 8.

Socio-economic factors linked with disability have often resulted in the removal of children from disabled parents in a manner which has been deemed to violate human rights. The case of *A, K & L v Croatia*<sup>20</sup> concerned a mother with a mild intellectual disability who was deprived of parental rights and her son was placed in foster care. With support, she was able to secure better living conditions and then sought to have her parental rights reinstated. In the meantime, her son had been put up for adoption without her knowledge or consent. The ECHR found the placement of her son for adoption to be a breach of her Article 8 right to family life.

Similarly, in *Saviny v Ukraine*<sup>11</sup>, blind parents with limited income and who were in receipt of charitable and state benefits were considered to have an insufficient standard of living to provide for their children. The children were taken into state care and the ECHR found that this amounted to an unnecessary interference with their right to family life under Article 8 for the parents and children. In *Strand Lobben and Others v Norway*<sup>12</sup> a woman with an acquired brain injury and epilepsy who had an unwanted pregnancy, was denied an abortion and became a parent. Socio-economic factors including homelessness led her to accept a place at a parenting residential unit on a voluntary basis. Social work supports however deemed her parenting skills inadequate and the process for fostering was commenced. The mother had very limited contact with her child once fostered and ultimately the social work agency commenced proceedings to withdraw her parental responsibilities so that the child could be adopted by their foster parents. The court found that this removal of parental responsibility and making an order of adoption violated the Article 8 rights of the mother and the child.

The ECHR case law also shows how parents with disabilities seem to be subject to increased scrutiny of their parenting when compared with non-disabled parents. Where parents with disabilities have requested assistance for their children, especially in respect of disabled children, this can ultimately result in the removal of children from the family home, in violation of the right to family life under Article 8. One example is *Kutzner v Germany*<sup>21</sup> where two daughters of parents with mild intellectual disabilities were placed in separate foster care settings. The children had been receiving additional educational supports requested for them by their parents, but following a report of a social worker who expressed concern about the parents' intellectual capacities and described them as uncooperative, proceedings to move the children into foster care commenced. Court appointed psychology experts in Germany had further recommended that the children's grandparents could not offer sufficient support to meet their needs. In finding a violation of Article 8, the Court emphasised the damage which had been caused to the right to family life by placing the children in separate foster homes, without contact with each other, or their parents for the first six months, and the very restricted visiting rights which their parents had thereafter while the children remained in foster care.

However, the ECtHR does not always find a violation of Article 8 in cases where disabled parents have been separated from their children. One example of this is *SS v Slovenia*.<sup>13</sup> The mother in this case had 4 children, her eldest was in foster care, her second child had been adopted, her third child lived with

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<sup>11</sup> Application no. [39948/06](#)

<sup>12</sup> Application no. [37283/13](#).

<sup>13</sup> Application no. [40938/16](#)

his father in France and her fourth child was being considered for fostering or adoption. SS had a diagnosis of paranoid schizophrenia and was assessed as needing significant support to care for her children. Community nursing and domestic help services were provided to her at her mother's home, but social workers remained concerned that she was not able to care for her child, and orders were made to place the child for fostering. The ECtHR judgment in this case referred to the UNCRPD requirement to not discriminate on the basis of disability and to ensure that the best interest of the child is paramount<sup>14</sup>. The court found that in this case the intervention related to the best interest of the child and was not solely connected to mental ill health of her mother.

The ECtHR case law demonstrates that the removal of children from disabled parents or restriction of access based on discriminatory grounds is a violation of human rights. However, it also shows that where disabled parents already have children in care, and are provided with supports which do not improve their parenting skills, concerns about disability discrimination against parents do not outweigh the principle of the 'best interests' of the child. A key finding here for the Irish legal system is the need to recognise how disability discrimination manifests in the context of parental rights – including in the failure to provide adequate support to disabled parents to fulfil their parental responsibilities.

## Irish Law

Domestically, the Irish Constitution recognises the institution of the family under Article 41.1. as the 'fundamental unit group of society' but restricts this to families based on marriage under Article 41.3.1. 'The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack.' This strong emphasis on parental rights (albeit for married parents) was intended to be balanced by the addition of Article 42A.2.1, which recognises children's rights, including the role of the State to fulfil the natural and imprescriptible rights of the child where parents fail to do so: 'In exceptional cases, where the parents, regardless of their marital status, fail in their duty towards their children to such extent that the safety or welfare of any of their children is likely to be prejudicially affected, the State as guardian of the common good shall, by proportionate means as provided by law, endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.'

The main legislation governing parental responsibilities and state intervention in Ireland include the Civil Registration Acts, the Child and Family Relationships Act, the Guardianship of Infants and Child Care Acts, and the Adoption Acts. These will be considered further here as they relate to parents with disabilities.

According to Irish law, parents have a legal duty to register the birth of their child. While there is no evidence to suggest that there is any systemic issue with the non-registration of disabled parents on their children's birth certificates, the Civil Registration Act does provide for a 'qualified informant'<sup>15</sup> to register the birth if the parents are 'incapable through ill health' of complying with the legal requirement to register the child.<sup>16</sup> Legal recognition of the parentage of children born through Donor Assisted Human Reproduction is now also provided under the Child and Family Relationship Act 2015.

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<sup>14</sup> *Application no. 40938/16* References to UNCRPD are made at paras 64, 75, and 90, <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-187474%22%5D%7D>

<sup>15</sup> This includes a surviving parent, person who was present at the birth, guardian, or person having charge of the child.

<sup>16</sup> Section 19(1)(b), Civil Registration Act 2004.



Under Part 2 of this legislation donors of gametes – sperm or egg – who agree to have their donation used to assist human reproduction are not recognised as the parent of the child. Instead, the persons to whom the child is born, the intending parents, are recognised as the parents. Part 3 of this Act governs facilities providing Donor Assisted Human Reproductive services - medical professionals within facilities, consenting participants, maintenance of a register of donor conceived persons<sup>17</sup> and the provision of information to donors and donor conceived persons upon reaching the age of 18. Part 2 and Part 3 of this legislation was commenced in May 2020<sup>18</sup>.

The Guardianship of Infants Act 1964 provides the original legislative grounds for State intervention where parents are not discharging their duty of care to their children. The court can make orders for payment of maintenance and access to one or both parents. Under Section 14 the court can decline access to a child where parent has abandoned or deserted the child or otherwise not conducted themselves appropriately for custody. The Child Care Act 1991 outlines four main types of care orders which can be made in respect of children placed into care – voluntary care orders, emergency care orders, interim care orders and (long-term) care orders. This legislation is now administered primarily by TÚSLA, which was established in 2014 as the State’s designated Child and Family Agency.

Section 4 provides for voluntary care orders where the child is deemed not to have their welfare and safety needs met. Parents must provide their consent to their order and are consulted on the accommodations and supports put in place by the Child and Family Agency (TÚSLA) for their child<sup>19</sup>. The Child Care Law Reporting Project suggests that approximately 42% of child care orders are voluntary care orders<sup>20</sup>.

Section 13 provides for emergency care orders. Emergency care orders are made by the District Court where there is reason to believe the health and welfare of a child is not being provided for. Gardaí have powers to remove a child from their accommodation and take them into the care of Túsła for up to 8 days. Section 14 mandates that a parent should be notified that their child has been the subject of an emergency care order after the removal has occurred.

Section 17 governs interim care orders which can be made if there is a reasonable belief that the health and welfare of the child is not being met. Interim care orders require notice to the parent before the child is taken into care and can last up to 8 days, or longer where the parent or guardian consents to this.

Section 18 provides for the most onerous care orders which can potentially last until the child reaches the age of 18. The Act also provides powers for Gardaí to take a child to safety where necessary<sup>21</sup> and for social workers to periodically check on a child considered to be at risk of not having their needs met or to be subject to abuse<sup>22</sup>. The Act provides in section 26 for a Guardian Ad Litem to be appointed where the child is not a party to proceedings. The role of the Guardian Ad Litem in these cases is to

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<sup>17</sup> Sections 34-38 of the Children and Family Relationships Act 2015.

<sup>18</sup> Department of Health, Minister for Health commences provisions in the Children and Family Relationships Act 2015, 4<sup>th</sup> May 2020.  
<https://www.gov.ie/en/press-release/6e327d-minister-for-health-commences-provisions-in-the-children-and-family-/>

<sup>19</sup> Community Law and Mediation, ‘Children in Voluntary Care’,  
<https://www.pila.ie/assets/files/pdf/20170118160005.pdf>

<sup>20</sup> Child Care Law Reporting Project, [https://www.childlawproject.ie/wp-content/uploads/2015/11/CCLRP-Full-final-report\\_FINAL2.pdf](https://www.childlawproject.ie/wp-content/uploads/2015/11/CCLRP-Full-final-report_FINAL2.pdf) at p. 3

<sup>21</sup> Section 12.

<sup>22</sup> Section 19.

report to the Court on the views of the child and on what course of action would be in the best interests of the child.

Where a child is removed from the care of their parents by TÚSLA or the court, the Act sets out three main options for their placement: foster care (section 39), residential care settings (section 40) or placement with a family relative (section 41). In the longer-term, adoption may be considered as an option for alternative care for a child.

The Irish Foster Care Association defines fostering as ‘full-time or part-time substitute care of children outside their own home by people other than their biological or adoptive parents or legal guardians<sup>23</sup>.’ Children can be placed in foster care by a voluntary request to Túsła from the parents/ guardians or through a court order<sup>24</sup>. Applications for fostering can be made to Túsła or a private fostering agency. Before a formal application is made a social worker from Túsła or a private fostering agency visits potential applicants to determine whether to initiate the application to become foster parents. Garda vetting must be successfully completed for everyone in the household over the age of 16. Numerous other aspects are inspected including social work checks, child protection, school reports for existing children, medical exam from the applicants own GP, written personal and professional references. Individual circumstances might demand further enquiries<sup>25</sup>. This final check is the only potential check which the research team consider as a potential barrier to foster parenting. Túsła’s guidance clarifies that people with disabilities can become foster parents “provided your disability or medical condition does not prevent you from caring for a child”<sup>26</sup>. However, no specific campaigns encouraging disabled people to become foster parents have been developed by Túsła in Ireland, although specific campaigns have been designed for other groups, e.g. for Traveller foster parents for traveller children<sup>27</sup>.

Consent for adoption of a child must be provided by the mother or guardian in writing at two stages for an adoption to be completed<sup>28</sup>. Initially consent must be provided for Túsła or an adoption service to place the child for adoption. Consent is also then required for the making of an adoption order<sup>29</sup>. Similar to the requirement to be fully informed as a prospective adoptive parent, there is a requirement for counselling around placing a child for adoption to be undertaken before consent can be provided<sup>30</sup>. Where a mother or guardian of a child is a ward of court, section 14(5) of the Adoption (Amendment) Act 2017 states that ‘*his or her consent shall not be dispensed with, pursuant to an order under this section, except with the sanction of the court which granted the order for wardship.*’

The child to be adopted must be under the age of 18 have been in the custody of the adoptive parent(s) for two years or a specified time depending on the nature of the interim care arrangement. Section 13 of the Adoption (Amendment) Act 2017 reflects that where the father is a non-guardian,

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<sup>23</sup>Irish Foster Care Association, ‘What is foster care’, <https://www.ifca.ie/fostering/what-foster-care/>

<sup>24</sup> Department of Children and Youth Affairs, Foster Care, 14<sup>th</sup> March 2019, <https://www.tusla.ie/services/alternative-care/residential-care/what-are-childrens-residential-services/>

<sup>25</sup> Irish Foster Care Association, ‘What is foster care’, <https://www.ifca.ie/fostering/what-foster-care/>

<sup>26</sup> <https://www.tusla.ie/services/alternative-care/foster-care-old-page/becoming-a-foster-carer/can-i-foster/>

<sup>27</sup> <https://www.tusla.ie/traveller-foster-carers/>

<sup>28</sup> Citizens Information, Domestic Adoption, [https://www.citizensinformation.ie/en/birth\\_family\\_relationships/adoption\\_and\\_fostering/adopting\\_a\\_child.html](https://www.citizensinformation.ie/en/birth_family_relationships/adoption_and_fostering/adopting_a_child.html)

<sup>29</sup> Citizens Information, Domestic Adoption, [https://www.citizensinformation.ie/en/birth\\_family\\_relationships/adoption\\_and\\_fostering/adopting\\_a\\_child.html](https://www.citizensinformation.ie/en/birth_family_relationships/adoption_and_fostering/adopting_a_child.html)

<sup>30</sup> Citizens Information, Domestic Adoption, [https://www.citizensinformation.ie/en/birth\\_family\\_relationships/adoption\\_and\\_fostering/adopting\\_a\\_child.html](https://www.citizensinformation.ie/en/birth_family_relationships/adoption_and_fostering/adopting_a_child.html)

or there are other non-guardians of the child involved, every effort will be made to consult with them on the adoption of the child.

Section 39 of the Adoption Act 2010 outlines the criteria to be met by prospective parents in order to be eligible to adopt a child. The applicant must be a suitable person to have parental duties and rights in respect of a child, they must be of good moral character, in good health and of an age that they can reasonably expect to be able to fulfil their parental duties. These duties include supporting the child's well-being, safeguarding the child, provision of all necessary health, social and educational developments of the child, support the child's needs in relation to identity and their religious, ethnic and cultural background. Applicants must also have adequate financial means to support the child and must have been provided with appropriate information relating to adoption. As will be discussed further below, it is not currently known how many persons with disabilities in Ireland have successfully applied to adopt children, nor is it known how many biological parents with disabilities have had their children placed for adoption in Ireland.

Further changes to adoption law have been proposed in the Adoption (Information and Tracing) Bill 2018, although this has not yet been enacted. The Bill attempts to regulate the reunification of families who have been separated through adoption. However, it has been criticised by Adoption Rights Alliance for its continued failure to respect the human rights of adopted people<sup>31</sup>. The Adoption Rights Alliance recommends that the proposed legislation provides for the safeguarding of records, placing the National Adoption Contact Preference Register on a statutory footing; and the establishment of a statutory tracing service. Disabled people can be impacted by this proposed legislation as adopted children or birth parents. It is important that any statutory services to provide Information and Tracing for adopted people conduct their business in a manner which is fully accessible. This should include physical accessibility of infrastructure, accessibility of information, provision of sign language interpretation and any necessary supports to engage with Information and Tracing services.

Parents with disabilities might also be involved in childcare custody and access proceedings in the event of relationship breakdown or marriage dissolution. The District Court can hear proceedings where there is no marriage or civil partnership at issue while the Circuit Court can hear proceedings where a divorce or judicial separation is involved. The court will decide which parent will have custody of the child, with responsibility for their place of residence and day to day care and the non-custodial parent will be granted access to maintain direct contact with their child. Parents involved in these proceedings may be eligible for Legal Aid. At all times the best interest of the child is the paramount concern for the courts<sup>32</sup>.

Where a child is removed from their family and not placed in fostering or for adoption, they will be cared for in residential services. Children's residential services are provided by Túsła, with 142 residential centres nationally. These centres are staffed by social care workers, leaders and managers on a 24hr basis<sup>32</sup> and are regularly inspected and monitored by Túsła to ensure adherence to the Child Care Regulations<sup>33</sup>. Children are placed in residential care with cooperation from the family or on foot of a care order, discussed above. Placement in residential care is in accordance with Child Care (Placement of Children in Residential Care) Regulations 1995. As well as governing the health and safety standards of placement facilities, the regulations mandate the facilitation of reasonable access by the child to their parents and relatives where appropriate<sup>34</sup>.

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<sup>31</sup>Adoption Rights Alliance, Adoption Bill Update 2019 <http://adoption.ie/my-front-page/adoption-information-and-tracing-bill-2016/>

<sup>32</sup> Túsła, What are Children's Residential Services?, 14<sup>th</sup> March 2019, <https://www.tusla.ie/services/alternative-care/residential-care/what-are-childrens-residential-services/>

<sup>33</sup> Child Care (Placement of Children in Residential Care) Regulations 1995.

<sup>34</sup> Child Care (Placement of Children in Residential Care) Regulations 1995, Section 8.

Children aged 11-17 with high support needs can also be placed in special care units but given the deprivation of liberty associated with this care, placement within a unit can only be made by an Order of the High Court<sup>35</sup>. This is a short term therapeutic intervention for children with high support needs and for whom alternative care settings have been unsuccessful. The intensive nature of the therapeutic interventions may prevent parents of these children, who may or may not have disabilities, from having access to their child.

The National Advocacy Service frequently provide supports to parents with disabilities during child care interventions and related actions in court<sup>36</sup>. NAS has identified that parents with disabilities are disproportionately impacted by social service interventions for their children, inadequate supports are provided during child protection interventions and the lack of appropriate disability supports results in poverty and social exclusion for the families. Further, there is a lack of recognition of the potential positive impact for families by the provision of parental supports. In 2018 representation of parents with a disability amounted to 8% of the National Advocacy Service's work<sup>37</sup>. Case studies from NAS demonstrate that their work involves supporting individuals to understand legal and social work reports and proceedings, to encourage self-advocacy skills and to promote the inclusion of the individual in proceedings relating to the care of their child.

#### Irish Case Law

There is limited reporting on child care cases concerning disabled parents in Ireland, but where cases have been published, the following issues arise: capacity of disabled parents to consent to placing their children in voluntary care arrangements, the lack of disability-specific supports for disabled parents which could be used to avoid removal of their children, and securing access to justice for disabled parents whose children are being placed into care. Throughout the project we have tracked the judgments in cases where they are published – with particular focus on cases referenced in the Child Law Reporting Project and in the reports of the Special Rapporteur on Child Protection.

In *CFA v MC* the court engaged with the question of a parent's capacity to consent to the placement of their children in care.<sup>38</sup> The case related to two teenagers, who had been in care since infancy. The mother was described by the CFRA as having "an enduring and serious mental health illness and her functional capacity waxes and wanes however, she can become very unwell. She has periods of lucidity."<sup>39</sup> The children were placed in voluntary care until it was contested by the mother. Horgan P in her judgment noted that "a parent who has voluntarily relinquished day to day child care responsibilities for a child must still be consulted and their consent sought for many child rearing decisions."<sup>40</sup> The Guardian ad Litem representing the children stated that this created a fragmented situation for the children over an extended period of time, and that the "children's health, development and welfare were negatively impacted by the delay in seeking a care order in this case."<sup>41</sup>

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<sup>35</sup>Túsla, Special Care, <https://www.tusla.ie/services/alternative-care/special-care/>

<sup>36</sup> The National Advocacy Service Submission to Department of Children and Youth Affairs- Issues facing parents with disabilities in child protection cases (for Review of Child Care Act 1991 process). 26.11.18 [file:///Users/ainesperrin/Downloads/73959\\_75aa7e7889d041d18bfc5482a99255c6.pdf](file:///Users/ainesperrin/Downloads/73959_75aa7e7889d041d18bfc5482a99255c6.pdf)

<sup>37</sup>NAS Annual Report 2018 <https://advocacy.ie/app/uploads/2019/09/NAS-Annual-Report-2018-published-September-2019.pdf> at p.30.

<sup>38</sup> *Child and Family Agency v M.C.* [2015] IEDC 10

<sup>39</sup> *Ibid*, para. 2.

<sup>40</sup> *Ibid*, para. 16.

<sup>41</sup> *Ibid*, para. 18.

The initial consent form signed by the mother stated that voluntary care would continue for three months and was never updated or renewed. In her judgment President Horgan accepted evidence that the mother had sufficient functional capacity to sign the initial form of consent to voluntary care for her children, but that it had fluctuated in the intervening years. The court did not find that it had to answer the question as to the duty of the CFA to seek a formal childcare order.

In *SOTA v Child and Family Agency*,<sup>42</sup> Noonan J in the High Court raised the issue of the need to consider alternatives to removal of children from the care of a disabled parent on the basis of the ECHR. In this case, an emergency care order made in respect of a day-old baby was quashed as disproportionate. The mother had other children in care due to “mental health, domestic violence and neglect”. Previous care orders had not been opposed by the parents. In this case, the CFA obtained an emergency care order in respect of a day-old baby due to serious concerns of risk to his health and life if he was left with his mother. The mother, during her pregnancy, had missed several ante-natal appointments, but had 12 emergency room attendances. She made it clear that she thought the baby was possessed. A pre-birth case conference was held, but both parents failed to attend. At this conference, it was concluded that an immediate and serious risk to the health and welfare of the baby would be triggered as soon as the parents learned of emergency care order proceedings.

On foot of this order, the baby was removed from his mother at a maternity hospital. Noonan J. in the High Court found that when seeking the emergency care order, the CFA had provided no evidence it had even considered any alternative to forcible removal, such as detaining the baby in hospital for a few more days and permitting his mother supervised access. He stated there was “a world of difference” between that and the baby being forcibly taken from his mother and brought to an unknown location.<sup>43</sup>

The Court held that in seeking the emergency care order, this was a “nuclear option”<sup>44</sup> sought by the CFA and the granting of same was not constitutionally proportionate or compliant with the European Convention on Human Rights (ECHR). The court stated that it was clear that State authorities must consider all possible alternatives to the removal of the child from its family and the action taken must be proportionate. While, therefore, the Court noted that there was more than ample evidence of potentially very serious risk to the baby if the mother was allowed leave hospital with him, the taking of a new born baby into public care at the moment of its birth was regarded by the Court as an extremely harsh measure, hugely traumatic for mother and baby. The Court thus quashed the emergency care order as disproportionate.

Although he quashed the emergency care order, the judge did not find that the manner in which an interim care order was made two days later breached the rights to fair procedures of the parents. During this the court placed weight on the fact that one of the reasons why the parents in this case had little time to prepare for the interim care order hearing had been their steadfast refusal over years to engage with the CFA or disclose their addresses. Noonan J. noted that the parents had not disputed the CFA reports. The court thus upheld the interim care order under which the baby remained in foster care.

In another unnamed case cited in the Special Rapporteurs Report - the parents in a particular case had been identified as having learning disabilities and low cognitive functioning and were given a personalised parenting class over a number of weeks to help them grasp certain parenting skills. The judge commented that there seemed to be no connection between the parents’ disability and the parenting course that was being offered. The course was described as relatively complex and involved

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<sup>42</sup> *S.O.T.A. v Child and Family Agency* [2018] IEHC 714.

<sup>43</sup> *Ibid*, para. 74.

<sup>44</sup> *Ibid*, para. 71.

the teaching of new material every week. While the effort to provide parenting support through classes for disabled parents is welcome, it must be ensured that any classes offered are adapted to be accessible and meet the specific needs of the disabled parents in question.

In the *Child and Family Agency v. L.B. and Another*<sup>45</sup> the question of whether a judge could make an order for an assessment of the support needs of a disabled parent was considered. In the District Court, the CFA made an application for a two-year care order in relation to the respondents' child, born in December 2016. This application was opposed by the mother, who had a mild intellectual disability. They both stayed in a parent and infant unit between January 2017 and April 2017. The discharge report recommended that the child be made the subject of a long-term care order. The report stated that the mother had not been able to "demonstrate capacity to safely and consistently parent the child."<sup>46</sup> The conclusions of the discharge report were supported by a second psychologist.

In December 2017, the District Court made an order that the child be placed in care for a six month period. The O'Leary J in the District Court stated "that the female parent in this case is a loving concerned conscientious mother who on such limited evidence as is before me cannot, due to a mild intellectual disability among or in combination with other significant factors, provide adequate care for the child in the absence of either appropriate family support or an unascertained level of non-family support".<sup>47</sup>

The judge expressed concern on the impact of professional services on the emotional and other development of the child but made an order under S.47 of the Child Care Act 1991 as amended directing the Child and Family Agency to: "Ascertain the cost of carrying out an appropriate assessment as to what services, if any, would be required and suffice to enable the first-named Respondent to parent the child to the maximum of her ability"<sup>48</sup> and to "Provide such services as may be indicated by such an assessment, in the event that such assessment indicates that such services will enhance her capacity for parenting sufficiently to justify the provision of such services and that such parenting is in the interests of the child."<sup>49</sup>

The CFA argued that the Act required that the welfare of the child be directly engaged and no clear findings of fact in relation to the child's welfare had been made by the District Judge. It submitted that despite the fact that Article 42A expressly provides that the interests of the child are served by being with the parents, it is still necessary for there to be a finding of fact that the child's welfare is at risk prior to the allocation of resources to support the parents.

The CFA argued that "it is not sufficient for the District Judge simply to employ a constitutional presumption to justify the obtaining of a report – otherwise it might be deemed to so apply in every case."<sup>50</sup> The Mother argued that it was only in exceptional circumstances that the child should be removed from the family. On appeal, the High Court agreed with the CFA that because the case focused largely on the mother that the District Court Judge did not establish that carrying out an appropriate assessment of services and supports that would assist the disabled mother in fulfilling her parenting role was in the best interests of this child.

In *CFA v CH*, both parents were described as having a mild intellectual disability, which was felt by the CFA to impact upon their ability to parent their children.<sup>51</sup> A supervision order had initially been

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<sup>45</sup> [2018] IEHC 423.

<sup>46</sup> *Ibid*, para. 4.

<sup>47</sup> *Ibid*, para. 2 (ii).

<sup>48</sup> *Ibid*, para. 3(1).

<sup>49</sup> *Ibid*, para. 3(3).

<sup>50</sup> *Ibid*, para. 43.

<sup>51</sup> [2017] IEDC 4.

granted as well as a voluntary care arrangement in respect of some of the children. The CFA applied for a care order under section 18 on the basis of non-wilful neglect of the child. The CFA expressed concern that the parents, even with the assistance of their wider family and targeted community and social work supports, simply could not meet the child's needs. The CFA position was that the child's unmet needs required a care order to be made until the child would reach 18. The parents contested that the supports made available to them were inadequate and insufficiently tailored to their level of understanding, they stated that everything was being provided by child care workers who had no training in disability issues.

A clinical psychologist in the case, however, had recommended a systemic/family therapy approach adapted to the parents' level of understanding to assist the parents in acquiring better listening and communication skills. She gave evidence that in her view, work undertaken appeared to have been tailored to their level of understanding with tasks being broken down and employing the use of role play. Ultimately, the court was satisfied that the threshold under section 18 of the 1991 Act was met and granted a care order until the child was 18 years old.

A secondary issue was raised of the parents' capacity to consent to the pre-existing voluntary care arrangement also arose. The legal advisors for each parent raised the issue of fairness and submitted that there was an absence of true consent by the parents to the voluntary care agreement as they did not have support, even though their mild intellectual disability was well known to the CFA. Horgan P. stated that "social workers must actively consider the issue of capacity and take into account all the circumstances prevailing at the time, including the ability of the parents to weigh up all the relevant information".<sup>52</sup> She held that "parents may require special fair procedural measures in some cases to ensure that they are enabled to fully understand the matters at issue."<sup>53</sup> The Judge went on to express the view that this obligation would not be discharged by giving a parent a generic document unrelated to the factual matters in the particular case. In this case the Judge held that they had functional capacity to instruct their legal teams.

There are relatively few examples of Irish judgments involving a disabled parent where the court has refused to grant a childcare order. One such example is in a 2015 case,<sup>54</sup> where the Child and Family Agency applied for a childcare order in respect of two children aged 4 and 6 based on concern that the emotional welfare of the children was at risk due to the impaired insight of the mother into the impact of her mental ill health condition on the children. It was acknowledged that the mother could meet their basic needs, but the CFA argued that she could not meet their emotional needs. The mother had rejected the assistance of the CFA. There were questions of exposure to inappropriate behaviour, but nothing that the social worker identified as abuse.

Horgan P. found that the mother's mental health was stabilized and that she appropriately sought outside help in a crisis. She held that the children were not at risk on the basis of her mental health alone. That while the parents' relationship was troubled, they had worked out access, and were no different from many couples so the children were not at risk. Horgan P. also found that the level of Child and Family Agency visitation coupled with mental health visitation from 2013-2015 was perceived by the mother as cumulatively oppressive. While the mother perceived the visitation of the Mental Health Nurse as helpful, purposeful and beneficial she viewed the visitation of the Family Social Service and Social Work Department as oppressive and fault finding.

The court did find that there were evidence of concern with regard to the mother's parenting however; this fell far short of a conclusion that these children needed to be taken into care for this

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<sup>52</sup> Ibid, para. 48

<sup>53</sup> Ibid.

<sup>54</sup> Child and Family Agency v E.S. & A.J. (Interim Care Order Refused) [2015] IEDC 8.

reason alone. In the course of her judgment President Horgan found that whilst the nature and extent of the risk to the emotional health of the children had been set out to the court, “the nature of the risk to the children’s health or welfare, which requires them to be removed from the care of their mother at this time, is less clear.”<sup>55</sup> She stated that the Court must be satisfied that removal is a necessary proportionate interference with the child’s and other relevant persons’ rights under Article 42A and rights to private and family life as contained in Article 8 ECHR. On that basis the President refused the application for an Interim Care Order.

A finding that a disabled parent lacks ‘insight’ into their diagnosis appears more than once in this case law. In another 2014 case, the child of a single mother who did not accept she had a mild intellectual disability was subject to full care order until reaching the age of 18<sup>56</sup>. According to social workers and a GP report, due to the mother’s refusal to engage with disability support services and with her own family support the needs of the child would not be consistently met. Proceedings were adversarial with the mother becoming angry and denying the accounts of the social workers. The judge considered the possible role of informal family support but the extended family members indicated they could not provide the necessary support so the full care order was granted.

While, as discussed further below in this paper, there is provision in Irish law for disabled parents to have access to additional support in childcare proceedings, there is evidence that access to justice remains a barrier for many disabled parents in these cases. In *L.S.M. (A Minor) v. The Child and Family Agency*,<sup>57</sup> an Article 40.4 application was made for the release of the applicant child, L.S.M., from the custody of the CFA. In this case, the applicant child (L.S.M.) was born in June 2018. Her mother was aged 20 and had been in the care of the CFA herself as a child. The CFA cited a number of concerns regarding the mother’s “mental health issues” and “behavioural difficulties” as part of the justification for taking the child into care. Following the birth they resided in a mother and baby home.

Following an emergency care order, the CFA made an application for an interim care order. District Court rules make clear that notice of such an application was required to be given two days in advance of the hearing date. The mother’s solicitors, however, were only furnished with the CFA’s reports the day before the hearing. The child’s mother then issued the proceedings pursuant to Article 40.4 of the Constitution on behalf of the child seeking the child’s release from the care of the CFA. It was alleged that a fundamental denial of justice had taken place due to the late delivery of the materials - that the failure to furnish all reports two clear days in advance was a breach of the District Court Rules and was in breach of the applicant’s right to fair procedures in terms of dealing with the application.

Regarding the alleged fundamental denial of justice, the Court noted that the mother’s legal representative had not sought an adjournment in the District Court to deal with this material. At no point during proceedings was the mother’s disability brought into consideration, or was there consideration given for any supports she may need to meaningfully engage with the court system. The High Court held that the District Judge’s order, lasting only 12 days, was pragmatic and wise, and the Article 40 application was dismissed.

In *P.G. v The Child and Family Agency*,<sup>58</sup> the High Court upheld a complaint made by the applicant grandmother concerning the failure of the CFA to take action in the circumstances of her case. In 2013, she assumed responsibility for their care of her 3 young grandchildren, following an emergency case

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<sup>55</sup> *Ibid*, at para. 14.

<sup>56</sup> Case 20, Case Reports 2014, Vol. 1 <https://www.childlawproject.ie/publications/full-care-order-till-18-for-child-whose-mother-has-learning-disability/> Full care order till 18 for child whose mother has learning disability

<sup>57</sup> [2018] IEHC 500.

<sup>58</sup> [2018] IEHC 812.



conference. It was stated by the CFA that there was a “significant” and “imminent” risk posed to the children by their mother. The mother was facing significant difficulties including issues with addiction, “mental health problems”, and a relationship with an abusive partner.

In 2013, a child-protection plan was put in place. This placed the children in the care of the grandmother. If the mother was deemed able to parent them, that there would be a gradual transition to her care. No formal review of this took place between April 2014 and December 2018. There were applications made by the mother to the District Court in 2016 and 2017 seeking unsupervised overnight access. During those proceedings, the mother alleged that she had not agreed to the arrangement relating to the children. Her applications were dismissed on technical grounds. In 2018 the grandmother made an application under judicial review in order to address the failure of the CFA to apply for care orders on her behalf. The grandmother had no formal legal right to retain the children and would not have been in a position to prevent the mother from taking custody of them. The CFA claimed that the children were being cared for under a private care arrangement between the grandmother and the children’s mother. The High Court granted the relief sought by the applicant and directed the CFA to formally place the children in her care.

In some cases, while care orders are made, there is a recognition that parenting skills improve over time and a willingness to reconsider the necessity of such orders in respect of the children of disabled parents. One example of this is a 2014 case, where a care order was made for two children of parents with intellectual disabilities. It was determined that the parents were good people but unable to provide for their children’s emotional and social needs. The children were already under an Interim Care Order. The children had frequent visits, including overnight stays, with their parents. The parents recognised the children’s improved educational attainment while in care and the children had a positive relationship with their parents.<sup>59</sup> Advocates for the parents liaised with the court and the Child and Family Agency. The judge agreed for the Care Order to be reviewed in two years time instead of waiting to lift the order when the children reached the age of 18.

While most childcare proceedings involving disabled parents concern parents with intellectual or psychosocial disabilities, there are some exceptions. In a 2016 case, a care order was made by the District court in an urban area for the child of a mother with a physical disability and a father who consumed drugs<sup>60</sup>. The mother was a wheelchair user and had a mild intellectual disability. Despite efforts to fully engage with child care supports and training the court found that the parents were not equipped to care for the child who needed routine and consistency.

It is worth noting that in the 2016 Report of the Special Rapporteur on Child Protection, Geoffrey Shannon made specific recommendations to Túsla regarding the introduction of specific guidance in childcare proceedings concerning parents whose cognitive functioning is at issue in the case. He recommended that “social workers must be satisfied that a) there is sufficient capacity on the part of the parent to agree to proposals put forward by the social work department and b) social workers should also be satisfied that such consent is fully informed and that the parents fully understand the consequences of giving such a consent.”<sup>61</sup> He further noted that “where particular needs are identified by Tusla in dealing with a family, the supports or interventions that are put in place to respond to those needs must be specifically tailored to the individual circumstances of the parents, taking into account their level of cognitive impairment. Generic or standardised response programmes are not

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<sup>59</sup> Case 14, Case Reports 2014, Vol 3 <https://www.childlawproject.ie/publications/case-histories-2014-volume-3/parents-with-disability-agree-to-children-remaining-in-care/>

<sup>60</sup> Case 9, Care order for child of mother with disability, Case Reports 2016, Vol 2, <https://www.childlawproject.ie/publications/care-order-for-child-of-mother-with-disability/>

<sup>61</sup> Shannon, G. Eleventh Report of the Special Rapporteur on Child Protection (Dublin: 2016) p. 198.

appropriate in these cases and are unlikely to yield any improvements.”<sup>62</sup> From our research for this paper we were not able to source any specific guidance which has been developed by Túsła on these matters.

Overall, the available judgments paint a stark picture of the risks for disabled parents – predominantly parents with intellectual or psychosocial disabilities, in having their children removed from their care. It seems to be relatively rare for a care order to be refused in these cases, and for the most part, the children of these parents have already been in voluntary care arrangements for long periods before care orders are sought, which appears to strengthen the CFA’s arguments that the children need to be in care. Efforts to pause care proceedings until appropriate supports and alternatives to removal have been fully explored are not always approved by the courts – and disabled parents continue to face barriers in accessing justice in child care proceedings.

## Irish Policy landscape

Since the 1990’s Ireland has been expanding its policy focus on the well-being of children and family life, including parenting support<sup>63</sup>. Increasing government interest in parenting support as a policy issue has contributed to a range of stakeholder activity and engagement in the area, while the notion of parenting as a set of skills that can be learned is now widespread<sup>64</sup>. There has been a dramatic move to provide an integrated parenting support strategy, parenting programmes and support services over the past decade. The impetus for such a move stems from the creation of a Minister for Children and Youth affairs in 2011 within the Department of Children and Youth Affairs, which then published the first overarching national policy framework for children and young people and provided improved support for parents to enable them to feel more confident, informed and able in their parenting capacity: “Better Outcomes Brighter Futures 2014-2020”<sup>65</sup>.

There is very little reference to parents with disabilities in the framework. Throughout, disability arises in the context of children with disabilities rather than parents with disabilities. There is an emphasis on children with disabilities who might be transitioning from care or institutional services to independent living or that transitioning between school settings from primary to secondary can be more difficult under Goal 5<sup>66</sup>. This might have an impact on those children’s reproductive choices in their future but this is not the focus of this current research. Parents with disabilities including mental health difficulties are identified as a key risk factor in neglect of children and a cause of children entering the care system and are referenced alongside parents with drug and alcohol abuse issues<sup>67</sup>.

The Child and Family Agency – Túsła – is the dedicated State agency responsible for improving wellbeing and outcomes for children. The agency focuses on child protection, early intervention and family support services. From a search of publications on their website, Tusla has published very little

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<sup>62</sup> Ibid.

<sup>63</sup> Connolly, N. and Devaney, C., 2018. Parenting support: Policy and practice in the Irish context. *Child Care in Practice*, 24(1), pp.20.

<sup>64</sup> Connolly, N. and Devaney, C., 2018. Parenting support: Policy and practice in the Irish context. *Child Care in Practice*, 24(1), pp.15-28.

<sup>65</sup> <https://assets.gov.ie/23796/961bbf5d975f4c88adc01a6fc5b4a7c4.pdf>

<sup>66</sup> [https://www.dcy.gov.ie/documents/cypp\\_framework/BetterOutcomesBetterFutureReport.pdf](https://www.dcy.gov.ie/documents/cypp_framework/BetterOutcomesBetterFutureReport.pdf) at p.8

<sup>67</sup> [https://www.dcy.gov.ie/documents/cypp\\_framework/BetterOutcomesBetterFutureReport.pdf](https://www.dcy.gov.ie/documents/cypp_framework/BetterOutcomesBetterFutureReport.pdf) at p.27

information of direct relevance to disabled parents in Ireland. In Tusla's 2017<sup>68</sup> and 2016<sup>69</sup> annual reviews the only reference to disability is in relation to a national review initiative to prevent abuse by foster carers of young people with disabilities. In the annual report from 2015 there is no reference to disability at all, while the 2014 report merely highlights the need for interagency cooperation between Túsła and the HSE in the delivery of mental health and disability services<sup>70</sup>, presumably aimed at children rather than parents.

In line with the national framework above, Tusla has published a *Parenting Support Strategy*<sup>71</sup>. There are four levels of parenting supports outlined in this document: (i) A universal support service to all families forms the foundation for Túsła activities; (ii) this then progresses to low level intervention such as improving parental capacity through training at the second level; (iii) the third and fourth levels are more intense parental supervision and finally alternative care provision is identified where there is deemed to be a risk to the child<sup>72</sup>. Parents with disabilities are identified as potentially requiring second level interventions and above.<sup>73</sup> However, it would be preferable to ensure that adequate and appropriate support is offered to disabled parents at the earliest stage possible to prevent subsequent and more intrusive interventions.

### Programmes and practices

The Prevention, Partnership and Family Support Programme<sup>74</sup> within Túsła is operationalised at a local level using the LAP. This programme incorporates the focus of the Parenting Support Strategy, the work of the Family Resource Centres, the Toolkit for Parental Participation, and the maintenance of the Parenting 24 Seven website. Additionally, this programme is supported by the Child and Family Support Networks (CFSN's) which are collaborative networks of community, voluntary and statutory providers, intended to improve access to support services for children and their families. These networks operate in geographical areas that can be smaller than Agency areas or CYPSC areas<sup>75</sup>. The principles guiding the toolkit for parental participation includes that practitioners and services promote human rights and social inclusion around issues such as disability.

Túsła support 108 communities through the Family Resource Centre Programme. This programme delivers universal services to families in disadvantaged areas across the country based on a lifecycle approach. It ranges from the provision of information, advice, support and referrals to delivering education courses (including parenting programmes), training opportunities and the establishment and maintenance of community groups. In addition to Túsła, a range of public, private, community

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<sup>68</sup> [https://www.tusla.ie/uploads/content/Tusla\\_2017\\_Annual\\_Report\\_final\\_13.07.18.pdf](https://www.tusla.ie/uploads/content/Tusla_2017_Annual_Report_final_13.07.18.pdf)

<sup>69</sup> [https://www.tusla.ie/uploads/content/4153\\_Tusla\\_AnnualPlan\\_p08.pdf](https://www.tusla.ie/uploads/content/4153_Tusla_AnnualPlan_p08.pdf)

<sup>70</sup> [https://www.tusla.ie/uploads/content/Tusla\\_Annual\\_Report\\_-\\_English.pdf](https://www.tusla.ie/uploads/content/Tusla_Annual_Report_-_English.pdf)

<sup>71</sup> [https://www.tusla.ie/uploads/content/Tusla\\_Investing\\_in\\_Families\\_Parenting\\_Support\\_Strategy.pdf](https://www.tusla.ie/uploads/content/Tusla_Investing_in_Families_Parenting_Support_Strategy.pdf)

<sup>72</sup> Túsła, 'National Guidance and Local Implementation 2013, Investing in families: supporting parents to improve outcomes for families', [https://www.tusla.ie/uploads/content/Family\\_Support\\_CFA\\_Parenting\\_Support\\_Strategy.pdf](https://www.tusla.ie/uploads/content/Family_Support_CFA_Parenting_Support_Strategy.pdf), p.11.

<sup>73</sup> Túsła, 'National Guidance and Local Implementation 2013, Investing in families: supporting parents to improve outcomes for families', [https://www.tusla.ie/uploads/content/Family\\_Support\\_CFA\\_Parenting\\_Support\\_Strategy.pdf](https://www.tusla.ie/uploads/content/Family_Support_CFA_Parenting_Support_Strategy.pdf), at p. 12

<sup>74</sup>

[https://www.tusla.ie/uploads/content/Family\\_Support\\_CFA\\_Guidance\\_on\\_Prevention\\_Partnership\\_and\\_Family\\_Support.pdf](https://www.tusla.ie/uploads/content/Family_Support_CFA_Guidance_on_Prevention_Partnership_and_Family_Support.pdf)

<sup>75</sup> [https://www.tusla.ie/uploads/content/Parental\\_Participation\\_Toolkit\\_Dec\\_2015.pdf](https://www.tusla.ie/uploads/content/Parental_Participation_Toolkit_Dec_2015.pdf)

and voluntary service providers deliver parent support services in Ireland<sup>76</sup>. A National Practice Model called Meitheal has been introduced as a standardised approach to assessing the needs of children and families that have come to the attention of practitioners and community members because of a child welfare or safety concern<sup>77</sup>.

Parents with disabilities frequently encounter the obligation to demonstrate their parental capacity in the antenatal, perinatal or postnatal period. The HSE Child Protection and Welfare Practice Handbook<sup>78</sup> of 2011 references parents with intellectual disabilities alongside substance abuse in a section on risk factors in child protection. The updated version, The HSE Child Protection and Welfare Practice Handbook 2<sup>79</sup> published in 2018 maintains parental mental health and parental disability issues as key risk factors and states that appropriate supports available should be identified in the first instance to minimise interventions. Additionally, the updated version includes the NDA's statement on disability which outlines disability as context specific. In terms of parental intellectual disability the updated version recognises that while the best interest of the child is paramount, 'when working with families where a parent has an intellectual or learning disability, it is essential that professionals also consider the rights of the parent with the intellectual or learning disability'.<sup>80</sup>

Moreover, it states that having an intellectual disability is not a just cause to question parental capacity and although it does recognise the societal and socioeconomic factors that parents with intellectual disabilities may face, as well as the comprehensive support network that could be required to support a parent with intellectual disabilities, it sets out a number of factors to be considered where a parental intellectual disability is a concern. Key issues, it suggests, to keep in mind for assessment include: "Parent's cognitive functioning; co-morbidity; poor self-esteem; lack of positive role models; lack of support; adverse social conditions; parent's ability to anticipate risk to the child; managing diverse and complex situations; parent's thought processes may be rigid, thus making adaptation to change difficult"<sup>81</sup>. Additionally, it suggests examining the support system in place and the needs required for the child and family, presently, and into the future. While both handbooks note best practice for the use of interpreters in terms of alternative forms of oral or written communication, or where English is not the first language, it could also be suggested in relation to disabled parents.

Handbook 2 also considers parental mental health problems to be a risk factor for child wellbeing and includes some of the following 'messages from the research' for practitioners: 'Parental mental illness has an adverse effect on child mental health and development'<sup>82</sup> and 'Children of parents with an uncontrolled mental illness face a high risk of physical neglect'<sup>83</sup>. The Handbook suggests that assessing professionals consider a range of factors including whether the parent's behaviour impacts negatively on the child's treatment in the community (e.g. being bullied, excluded, ostracised) and whether there is consistent emotional warmth from adult caregivers. While the Handbook is understandably focused on child well-being, these statements regarding parental mental health are

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<sup>76</sup> Connolly, N. and Devaney, C., 2018. Parenting support: Policy and practice in the Irish context. *Child Care in Practice*, 24(1), pp.15-28.

<sup>77</sup> Connolly, N. and Devaney, C., 2018. Parenting support: Policy and practice in the Irish context. *Child Care in Practice*, 24(1), pp.15-28.

<sup>78</sup> [https://www.tusla.ie/uploads/content/CF\\_WelfarePracticehandbook.pdf](https://www.tusla.ie/uploads/content/CF_WelfarePracticehandbook.pdf)

<sup>79</sup> Tusla (2018) Child Protection and Welfare Practice Handbook 2, Dublin, Tusla. [https://www.tusla.ie/uploads/content/Tusla\\_Child\\_Protection\\_Handbook2.pdf](https://www.tusla.ie/uploads/content/Tusla_Child_Protection_Handbook2.pdf)

<sup>80</sup> Ibid, p. 17.

<sup>81</sup> [https://www.tusla.ie/uploads/content/CF\\_WelfarePracticehandbook.pdf](https://www.tusla.ie/uploads/content/CF_WelfarePracticehandbook.pdf) p.75

<sup>82</sup> Ibid, p. 13.

<sup>83</sup> Ibid, p. 14.

damaging and can reinforce negative stereotypes about parents who experience emotional distress and may engage with mental health services. While the recommendation to make appropriate referrals for parental support is important, there is a high risk that the services offered as 'support' may be experienced by parents as intrusive or unhelpful, and that this can be used as further evidence of parental incapacity, as reflected in the case law section above.

In 2010, TCD carried out research commissioned by the NDA that explored the strengths and weaknesses of publicly-funded health services in Ireland provided for women with disabilities in relation to pregnancy, childbirth and early motherhood.<sup>84</sup> Findings in relation to early motherhood include 'concerns where services were sourced and accessed opportunistically and on an *ad hoc* basis', for instance, where support would be provided by the PHN, however, a poorly resourced community service was unable to deliver such a service, or poor established referral links between statutory and voluntary agencies. Beyond specific community-based services such as DOMINO or ETH, the state makes provision for one statutory antenatal visit by the PHN, any further visits are at the discretion of the PHN often leaving women feeling powerless and unsupported (p. xiv/xxiii). The research recommended that maternity services strengthen 'inter-organisational communication to underpin service development if women with disabilities are to receive care that meets their individual needs' (p. xv). Although some staff attempted to source appropriate equipment for parents while in the hospital these types of support for independence were not always available once the mother and baby were discharged home (p. xv). Additionally, ineffective communication was a significant concern for women and frequently had a negative impact on their experience of care (p.xvi). Women recalled encounters with caregivers that were insensitive, inappropriate, stigmatising and discriminatory (as well as empathy and compassion), potentially due to lack of familiarity with the needs related to the specific impairment or disability. Women with physical disability, sensory impairment, a mental health issue or an intellectual disability felt their capacity to become a mother and care for their child was frequently questioned by health professionals, in some cases encouraging women with a physical disability to forego pregnancy rather than supporting them to become parents (p. xx).

## Statistical Data

Growing Up in Ireland is a national longitudinal research study funded by the government which began in 2006<sup>85</sup>. The focus of the research is on children but there is an aspect of the research which captured the health and presence of disability of the parent or guardian of the children involved in the study. Growing Up in Ireland focuses on two cohorts of children across different stages of their childhood. The Infant Cohort had research collected from their parent or guardian at three 'waves'. Wave 1 was collected at 9 months old. Wave 2 took place when the study child was 3 years old and Wave 3 took place when the child was 5 years old. The Child Cohort has had research collected from both the parent or guardian and the children themselves across four waves -Wave 1 at age 9, Wave 2 at age 13, Wave 3 when the children were aged approximately 17/18 and most recently Wave 4 as the children approach age 20. Data is available for all of the Infant Cohort waves and up to Wave 3 of the Child

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<sup>84</sup> Begley et al. (2010). The Strengths and Weaknesses of publicly-funded Irish health service provided to women with disabilities in relation to pregnancy, childbirth and early motherhood. [available at: [https://www.researchgate.net/publication/233415484\\_The\\_strengths\\_and\\_weaknesses\\_of\\_publicly-funded\\_Irish\\_health\\_services\\_provided\\_to\\_women\\_with\\_disabilities\\_in\\_relation\\_to\\_pregnancy\\_childbirth\\_and\\_early\\_motherhood](https://www.researchgate.net/publication/233415484_The_strengths_and_weaknesses_of_publicly-funded_Irish_health_services_provided_to_women_with_disabilities_in_relation_to_pregnancy_childbirth_and_early_motherhood)].

<sup>85</sup> Growing Up in Ireland, <https://www.growingup.ie/>

Cohort. Primary caregivers provided the most detail about the life of the child but secondary caregivers were also included in the study. For the Child Cohort, from 9 years upward, children were also given appropriately designed questionnaires to elicit their opinions on their health and wellbeing. The questions are focused solely on the child and not on their caregivers health or wellbeing so will not be considered in this research.

The research is statistical in nature and so responses about the extent of the experience of parenting with a disability is very limited. A select group of families were involved in qualitative research but there was no focus on parental health or disability<sup>86</sup>. The study is designed to be nationally representative and it does provide evidence that parents with disabilities were consistently represented as approximately 10% of the parents in the study reported having a disability or long term chronic illness. However, the data does not reflect the experiences of these parents in a manner which this project seeks to highlight.

## Conclusion

The legislative and policy frameworks around parenting for persons with disabilities in Ireland are complex. The focus of all law and policy in this field is the best interest of the child, which means that the rights of disabled parents are often a secondary consideration. While we can see the emergence of the notion that the best interests of the child are generally best served by being supported within their family of origin, this is often undermined for disabled parents when the supports they need to parent effectively are not available, and when the existence of a (perceived) disability is used as a justification for state intervention in family life. Jurisprudence from international bodies, the ECHR and Irish courts demonstrate that discrimination based on disability against parents in childcare proceedings occurs frequently. While there is recognition that disability cannot be the sole basis for interference with a family by external actors, the failure to provide reasonable accommodation and appropriate supports often results in the interference.

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<sup>86</sup> Researcher accessed transcripts from the qualitative research to determine whether parental health was discussed. Further, the Appendices to the Growing Up in Ireland Technical Report 1 includes the instructions for questioning parents in the qualitative research and there is no reference to parental health. [https://www.growingup.ie/pubs/BKMNEXT318\\_Appendices.pdf](https://www.growingup.ie/pubs/BKMNEXT318_Appendices.pdf)