

Relate

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The Children Referendum

A referendum will be held on 10 November 2012 to decide whether or not a new article on children should be put into the Constitution of Ireland.

The referendum proposal is contained in the Thirty-First Amendment of the Constitution (Children) Bill 2012. It is proposed to put a new Article 42A into the Constitution and remove the current Article 42.5.

The proposed new article is as follows:

Children Article 42A

1. 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.
2. 1° 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.

2° Provision shall be made by law for the adoption of any child where the parents have failed for such a period of time as may be prescribed by law in their duty towards the child and where the best interests of the child so require.

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3. Provision shall be made by law for the voluntary placement for adoption and the adoption of any child.
4. 1° Provision shall be made by law that in the resolution of all proceedings:
 - i brought by the State, as guardian of the common good, for the purpose of preventing the safety and welfare of any child from being prejudicially affected, or
 - ii concerning the adoption, guardianship or custody of, or access to, any child

the best interests of the child shall be the paramount consideration.

2° Provision shall be made by law for securing, as far as practicable, that in all proceedings referred to in subsection 1° of this section in respect of any child who is capable of forming his or her own views, the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child.

You are being asked to vote yes or no to putting this article in the Constitution and removing the existing Article 42.5. There are a number of different elements to the proposal but you may vote only on the total proposal.

Constitutional rights of children

There has been considerable debate about exactly what children's rights are recognised by the Constitution at present. There is a clear statement in the Constitution recognising the personal rights of citizens (Article 40.3). Some of these personal rights (rights to life, person, good name and property) are named but many are in the category of *unenumerated* or unspecified rights. These rights have been recognised and developed by the courts in a series of cases over the years. A range of such rights has been identified, usually subject to various conditions, for example, the right to bodily integrity, to earn a living, to marry, to marital privacy, to access to the courts and to fair procedures.

There is no explicit general statement in the Constitution that children have rights. It has been established in some cases that they do indeed have rights, but the extent to which they have rights as children rather than as members of families and how their rights and the rights of parents are to be balanced have given rise to much debate.

The Constitution has articles dealing with the family (Article 41) and education (Article 42). Families have *inalienable and imprescriptible* rights. The Supreme Court has held that the reference to the family in these articles is to the family based on the marriage of a man and a woman. This has generally led to the conclusion that the rights of children born within marriage are different to the rights of those born outside marriage. Children born outside marriage do have constitutional personal rights but they do not belong to a family in the constitutional sense.

The article on education mainly deals with the rights and duties of parents to educate their children. It states that the State will provide for free primary education but parents are not obliged to avail of State-provided education.

The article on education also sets out the circumstances in which the State may intervene in the family lives of children where the parents have failed in their duty towards the children (Article 42.5). While this is in the article dealing with education, it has been established by the courts that it is not confined to situations where the parents fail in their duty to educate their children – intervention may occur where the parents fail in their duty to cater for the other personal rights of the child. It has also been held that this applies to all children, regardless of the marital status of their parents. This article refers to the “natural and imprescriptible” rights of the child who is involved in such intervention. Again, whether this reference applies more generally and applies more widely has been the subject matter of debate.

In general, most rights are not absolute in that their exercise has to be balanced with the exercise of rights by other people and with the requirements of the common good or the public interest. In many cases, issues arise about the balance between the rights of children and the rights of parents. While many laws provide that, when decisions are being made about children, the best interests or the welfare of the children must be the main consideration, there can sometimes be a conflict with the constitutional rights of the parents. In some cases, it has been held that the best interests of the children always rest within their birth family.

The constitutional rights of children that have already been identified by the courts include the right to be fed, to live, to be reared and educated, to have the opportunity of working and realising their full personality and dignity, to have their welfare and health guarded and to be guarded against threats directed to their existence.

Other rights that have been identified in court decisions are subject to parental rights. For example, it has been held that a child has a right to know the identity of his or her mother, but this right is not absolute and has to be balanced against the right to privacy of a natural mother. Children have a constitutional right to travel but that right is subject to the agreement of the parents. In some cases, it has been held that children have the right to have their interests regarded as the main consideration when decisions are being made about them but it is not clear that this applies if there is a dispute between married parents and others (for example, foster parents or the HSE).

There is also debate about whether or not it is open to the courts to recognise socio-economic rights. The arguments in relation to this are mainly concerned with whether those rights should be identified by the judiciary rather than the Oireachtas and the issues are not confined to cases involving children. In the case of children, there have been cases in which some judges have held that children with disabilities have a right to have special accommodation made for them but this has not been accepted as established law. In cases involving socio-economic rights and children, it is generally the case that parents are arguing on behalf of their children for these rights to be recognised.

What the proposed new article means

The proposed new article contains a specific recognition that children have rights that the State must protect and vindicate. It changes somewhat the circumstances in which the State may intervene in the lives of children where there is parental failure and the children are at risk. It provides for adoption in certain circumstances. It provides for a constitutional requirement that the best interests of the child be regarded as the main consideration when certain decisions are made and that the views of the child be taken into account in certain circumstances.

If the referendum is passed and this new article becomes part of the Constitution, it must be read together with the existing articles of the Constitution. The existing articles will remain in the Constitution with the exception of Article 42.5 – the article dealing with intervention in the lives of children who are at risk. If the referendum is not passed, there will be no change to the Constitution.

Recognition that children have rights

The proposed amendment involves an explicit statement that 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.

The State recognises these rights; it does not grant them. *Natural* rights are those that automatically belong to people as human beings. *Imprescriptible* means that they cannot be lost or abandoned. The phrase *as far as practicable* is also used in other articles of the Constitution, in particular in the article on personal rights.

The rights that are recognised and affirmed are not listed. As described above, the courts have already identified various rights that children have and, if the proposed amendment to the Constitution is agreed, the courts are likely to identify further rights as individual cases are heard. It is not possible to foretell the extent to which further rights will be identified. This is particularly so in relation to socio-economic rights.

Intervention where children are at risk

At present, Article 42.5 of the Constitution provides that the State may intervene in a child's life within the family if certain conditions occur. This article reads as follows:

“In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.”

If the proposed amendment to the Constitution is passed, this article will be removed and replaced in Article 42A by the following:

“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.”

Both the existing article and the proposed new article allow the State, as guardian of the common good, to intervene and try to supply the place of parents if certain conditions are met. These are:

- The cases are exceptional
- The parents fail in their duty towards their children
- The intervention must have due regard to the rights of the child

The differences between the existing article and the proposed new article are:

- The proposed new article states explicitly that it applies to all parents, whether or not they are married to each other. In practice, the courts have already held this to be the case but it is not so stated in the Constitution at present.
- The existing article looks at the reason why the parents failed in their duty and provides that it must be “for physical or moral reasons”. The proposed new article looks at the consequences of the failure and provides that the intervention may occur if the parents fail in their duty to such an extent that the child’s safety or welfare is likely to be prejudicially affected; in other words, the child is at risk.
- The existing article requires the State to use *appropriate* means to try to supply the place of parents. The proposed new article provides that the State’s intervention must use *proportionate* means which will be set out in law. Proportionate means that the State must do only what is necessary to resolve the problem; the intervention must not go beyond what is necessary to deal with the risk. The proportionate means must be set out in law. In practice the means of intervention has been set out in law but there is no constitutional requirement for this at present.

Current legal arrangements for children who are at risk

The Child Care Act 1991 as amended sets out the law governing intervention by the State in cases where children are at risk. The Act provides that the Health Service Executive (HSE) has a statutory duty to promote the welfare of children who are not receiving adequate care and protection.

Voluntary care

The HSE is obliged to take a child into care if that child needs care and protection and is unlikely to get it without being taken into care. Children who are placed in voluntary care may be orphans or abandoned children, or parents may themselves voluntarily place a child in care. There are no court proceedings involved. When children are taken into care in this way, the HSE is obliged to maintain them for as long as their welfare requires it and it must have regard to the wishes of the parents or guardians in the provision of that care. Children in voluntary care may be withdrawn from care by the parents or guardians at any time.

Involuntary care

The HSE has the power to apply to the courts for a number of different orders to deal with the problems of children at risk or in need of care. In all of these cases the courts have fairly wide powers to make other decisions – for example, about the sort of care to be provided and the access to be provided to the parents and other family members.

If a Garda has reasonable grounds for believing that there is an immediate and serious risk to the health or welfare of a child, and the child’s protection cannot await the making of an application for an *emergency care order* by the HSE, then the Garda may enter, if necessary by force, and remove the child to safety. The child must then be given into HSE custody as soon as possible. The HSE may apply for an emergency care order in respect of a child who is still in his/her home and must apply in respect of a child who has been removed by a Garda as described above. The District Court may make an emergency care order if it considers that there is an immediate and serious risk to the health or welfare of the child.

The HSE is obliged to apply for a *supervision order* or a *care order* if a child needs care and protection that he/she is unlikely to receive without the order. The District Court judge may make an *interim care order* pending the decision on a full care order.

An interim care order requires that the child be placed or maintained in HSE care for up to 8 days or longer if the HSE and the parents/guardians agree; this order can be extended.

A care order may be made, on the application of the HSE, where the court is satisfied that:

- The child has been or is being assaulted, ill-treated, neglected or sexually abused or the child's health, development or welfare has been, is being, or is likely to be avoidably impaired or neglected
- The child needs care and protection that he/she is unlikely to receive unless the court makes an order

A care order means that the child is in the care of the HSE for whatever period is set by the court or until he/she ceases to be a child.

If, when hearing an application for a care order, the court considers that it is not necessary or appropriate that a care order be made and that it is desirable that the child should be visited periodically by the HSE, then it may make a supervision order. A supervision order may be made either on the HSE's application, or as an alternative to a care order or pending the decision on a care order. It may be made if the court is satisfied that there are reasonable grounds for believing that

- The child has been or is being assaulted, ill-treated, neglected or sexually abused or the child's health, development or welfare has been, is being, or is likely to be avoidably impaired or neglected and
- It is desirable that the child be visited periodically by or on behalf of the HSE

A supervision order gives the HSE the authority to visit the child in order to satisfy itself as to the child's welfare and to give the parents or guardians any necessary advice. A supervision order remains in force for a maximum of 12 months but it may be renewed.

Decisions about children in care

When a child is taken into care, the HSE has the right to make significant decisions about the child, for example, about medical treatment or getting a passport. This continues when the child is placed in foster care. When the child is in foster care for a continuous period of five years, the foster parents may apply for a court order giving them the right to make many of these decisions. The HSE must consent to the making of such an order.

Children in HSE care

The HSE can provide care for children in a number of ways. It may:

- Place the child with a foster parent
- Place the child in residential care – either in a children's residential centre, in a residential home maintained by the HSE or in a school or other suitable place of residence
- Place the child for adoption, if eligible
- Make such other suitable arrangements, such as placing with a relative

There are approximately 6,250 children in care at present. The vast majority (91%) are in foster care. About a third of these are being fostered by relatives. There are about 4,000 children in general foster care (with non-relatives) and about 5% of these are placed with companies that provide private foster care services to the HSE. More than 2,000 children have been living with the same foster family for more than five years.

Residential centres are generally community-based houses accommodating between four and six children. High support units care for children with more specialised needs – at present, these units can cater for 10 children. There are three designated special care units where children are detained by order of the High Court for their own safety – they can cater for about 16 children. There are 11 hostels that provide emergency, crisis and short-term care to children who are homeless or in crisis. There are four centres offering care to young people preparing to leave care or aftercare.

Adoption

At present, the Constitution does not have specific provisions dealing with the conditions that apply to adoption. The proposed amendment has two provisions on adoption. One deals with adoption in the case of parents who have failed in their duty towards the children and the other allows married parents to voluntarily place a child for adoption.

Where parents have failed in their duty

The proposed amendment requires that laws must be passed allowing for the adoption of any child where the parents have failed for such a period of time as may be prescribed by law in their duty towards the child and where the best interests of the child so require.

Current adoption law

At present, adoption in Ireland is governed by the Adoption Act 2010. The Adoption Authority of Ireland (AAI) is the agency responsible for implementing the adoption laws. Website: aai.gov.ie.

The current law on matters such as who is eligible to adopt and foreign adoptions is not affected by the proposed amendment to the Constitution. The current law on adoption in the case of parental failure or absence of consent is affected.

At present, children who are orphans and children who are born outside of marriage may be placed for adoption and then adopted provided the mother or the guardians consent. The AAI may make adoption orders in these cases without court involvement (unless legal issues arise).

Children who are born within marriage and children in respect of whom there is no consent to adoption may be adopted by their foster parents if a number of conditions are met. The AAI cannot make adoption orders in these cases without the authorisation of the High Court.

The High Court may authorise the AAI to make an adoption order and dispense with the consent of any person whose consent would normally be required if it is satisfied that:

- It would be in the best interests of the child, having due regard for the rights, whether under the Constitution or otherwise, of the people concerned (including the natural and imprescriptible rights of the child) and
- The parents, for physical or moral reasons, have failed in their duty towards the child for a continuous period of not less than 12 months before the application is made to the High Court and
- It is likely that the failure will continue without interruption until the child reaches the age of 18 and
- The failure constitutes an abandonment on the part of the parents of all parental rights, whether under the Constitution or otherwise, with respect to the child, and by reason of the failure, the State, as guardian of the common good, should supply the place of the parents and

- The child must be in the custody of and have a home with the applicants and this has been so for a continuous period of at least 12 months immediately before the application and
- The adoption of the child by the applicants is an appropriate means by which to supply the place of the parents

Before making such an order, the High Court, in so far as is practicable, is obliged to give due consideration to the wishes of the child, having regard to the age and understanding of the child.

These rules mean that long-term foster parents may be able to adopt their foster child. There were 16 such adoptions in each of the years 2010 and 2011.

Proposed legislation on adoption

The Government has published the *General Scheme of Adoption (Amendment) Bill 2012* which outlines how it proposes to change the law on adoption if the proposed amendment to the Constitution is passed. This is draft legislation that may or may not be passed in this form. It has been published in order to inform voters of the Government's intentions.

The draft law proposes to allow foster parents to adopt a foster child under the new conditions which will be set if the amendment to the Constitution is passed. It sets the period during which the failure of the parents must have continued at 36 months, it requires that there be no reasonable prospect that the parents will be able to care for the child without putting the child at risk and the foster parents must have had custody of the child for 18 months.

The amendment to the Constitution does not confine the new adoption arrangements to adoption by foster parents but it is the Government's intention to introduce this new legislation of foster parent adoptions.

Rights of adopted people

The proposed amendment does not deal specifically with the rights of adopted people. The explicit recognition of the rights of children could possibly mean that the right to information about parental identity could become recognised but this will not become clear until a relevant case is taken.

The Minister for Children has said that she intends to publish legislation on adoption information and tracing. This will provide for the safeguarding and maintenance of records relating to adoption. The AAI will have responsibility for access to these records. It has not yet been decided what the access rules will be for adopted people or birth parents. It seems that non-identifying information will be made available, for example, information about medical history, but no decision has been made on the extent, if any, to which identifying information will be made available.

Voluntary placement for adoption

The proposed amendment includes a clause that would allow the parents of any child to voluntarily agree to the placement of that child for adoption. At present, the mother of a child born outside marriage may consent to the placement of her child for adoption. The parents of a child born within marriage may not do so. The proposed amendment requires that a law be passed enabling all parents to do so.

Taking account of child's best interests and views

The proposed amendment requires that laws be passed that set the best interests of the child as the paramount consideration when certain decisions are being taken. It also requires that the views of the child be taken into account in certain cases.

Best interests

The amendment requires that laws be passed that set the best interests of the child as the paramount consideration when decisions are being made in:

- Proceedings taken by the State for the purpose of protecting a child who is at risk – in effect in child care proceedings
- Proceedings in relation to adoption, guardianship, custody and access

Paramount means that the best interests of the child must be the main consideration; other considerations may be involved but, in any conflict, it must take precedence.

At present, there is legislation providing that the best interests or the welfare of the child be the paramount consideration. The proposed amendment would give this requirement constitutional status.

The Child Care Act 1991 requires that, when deciding on any application for care orders, the court must regard the welfare of the child as the first and paramount consideration. This Act also provides that the HSE, in its promotion of the welfare of children, must, having regard to the rights and duties of parents, whether under the Constitution or otherwise, regard the welfare of the child as the first and paramount consideration. The HSE must also have regard to the principle that it is generally in the best interests of a child to be brought up in his or her own family.

The adoption legislation provides that in any matter relating to adoption, the AAI and the courts must regard the welfare of the child as the first and paramount consideration.

Guardianship, custody and access are dealt with under the Guardianship of Infants Act 1964, as amended. This provides that in any proceedings for custody, guardianship or upbringing of a child the court must regard the welfare of the child as the first and paramount consideration. So, for example, if an unmarried father applies to the court to be made a guardian, the welfare of the child is the paramount consideration in the decision.

Views of the child

The proposed amendment requires that laws be passed whereby the views of a child who is capable of forming views must be ascertained and given due weight in the proceedings as described above. The weight to be given to the child's views must have regard to the child's age and maturity. The wording of this part of the proposal is similar to the wording on this issue in the United Nations Convention on the Rights of the Child. See: www2.ohchr.org/English/law/crc.htm.

The European Convention on Human Rights and Fundamental Freedoms provides that children have the right to be heard in all proceedings affecting their civil rights and obligations as well as in criminal law matters. Website: echr.coe.int.

Again, existing Irish legislation does provide for the views of the child to be taken into account in certain circumstances but the amendment proposes to give constitutional recognition to the child's rights in this respect.

The Child Care Act 1991 requires that, when deciding on any application for care orders, the court must, as far as is practicable, give due consideration to the wishes of the child, having regard to the age and understanding of the child. In doing so, the court must have regard to the right and duties of parents, whether under the Constitution or otherwise.

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Head Office

Ground Floor t 0761 07 9000
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Similarly, the HSE must give consideration to the wishes of the child.

Adoption law provides that, if making an adoption order in respect of a child over the age of seven, the AAI is obliged to give due consideration to the wishes of the child, having regard to his or her age and understanding.

Under the Guardianship of Infants Act 1964, the wishes of the child may be taken into account by the court having regard to the age and understanding of the child. It has been held that this does not mean that the court must make a decision in conformity with the wishes of the child.

The manner in which the views or wishes of the child are taken into account vary. Some judges personally interview the child while others ask a social worker, psychologist or psychiatrist to provide a report on the child's views. Some judges regard the age of seven as the age at which the child's views should be taken into account but this is not a universal practice.

Representation of the child's interests

Taking account of the views or wishes of the child is not the same as the child being party to the proceedings. If a child is made a party to proceedings then he or she may be entitled to legal representation and to legal aid depending on the circumstances.

Under the Child Care Act 1991, the court may order that the child be joined as a party to the proceedings if the interests of the child and the interests of justice require this. Effectively what this means is that the child has separate legal representation. The HSE must pay the costs of this representation but it may ask the court to order any other party to the proceedings to reimburse it.

If the child is not a party to the proceedings the court may appoint a guardian *ad litem*. This is an independent adult who can speak for the child in the proceedings. These provisions apply only to care proceedings; they do not apply to family law disputes. Guardians *ad litem* are generally employed by the non-statutory children's organisations or they may be self-employed.

Under the Adoption Act 2010, the child is entitled to be heard in an application to the AAI for an adoption order.

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