

Submission to the Joint Oireachtas Committee on Children and Youth Affairs

Re: General Scheme of the Child Care (Amendment) Bill

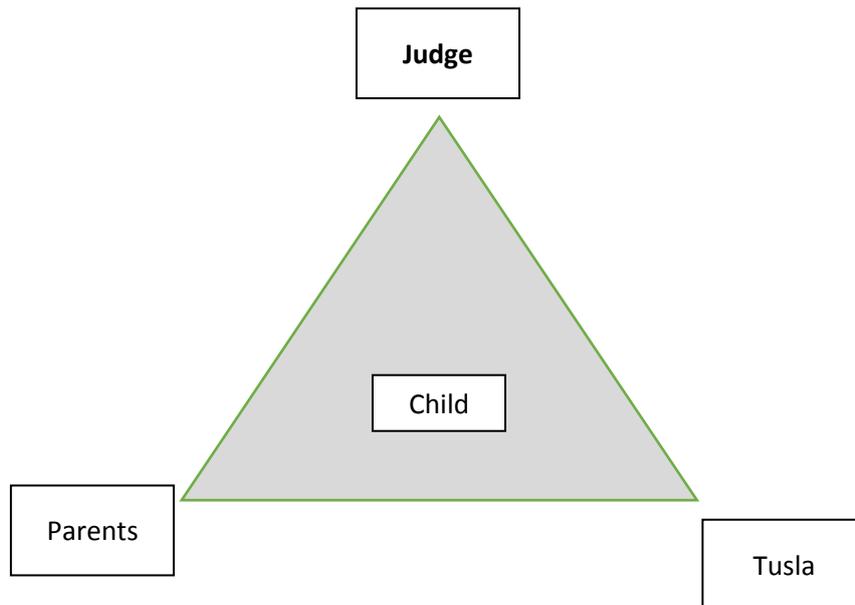
8th March 2017

Introduction

The Child Care Act 1991 provides the legal framework for the state to intervene in the lives of children not receiving adequate care and protection. The Act obliges the Child and Family Agency (CFA) “to promote the welfare of children in its area who are not receiving adequate care and protection” and where necessary to take such children into its care either with the consent of the child’s parents or by applying to the District Court for a care order.

The importance of the proceedings sought to be regulated by the proposed Heads of Bill in the lives of children cannot be underestimated. It is the children who are the primary objects of the judicial Orders granted and they are the persons most affected by them. Those Orders concern the fundamentals of the child’s life: who will they live with? Where will the child live? If not with parents, will the child live in a residential care home or in a family (foster family)? Where will the child be educated, and will the child be educated? When will the child have access with their parents, and will they have access (if in care)? Will that access be supervised by the State, or not? When will a child have access with siblings, if at all? What professional services will a child receive, and when? Where a risk has been identified, what protections will the State put in place, who is accountable? Should a child’s liberty be deprived for the child’s own welfare?

These are the issues that routinely arise in the legal proceedings the subject matter of the Heads of Bill. Tusla, on behalf of the state, is generally the applicant in proceedings under the Act. The parents are the respondents.

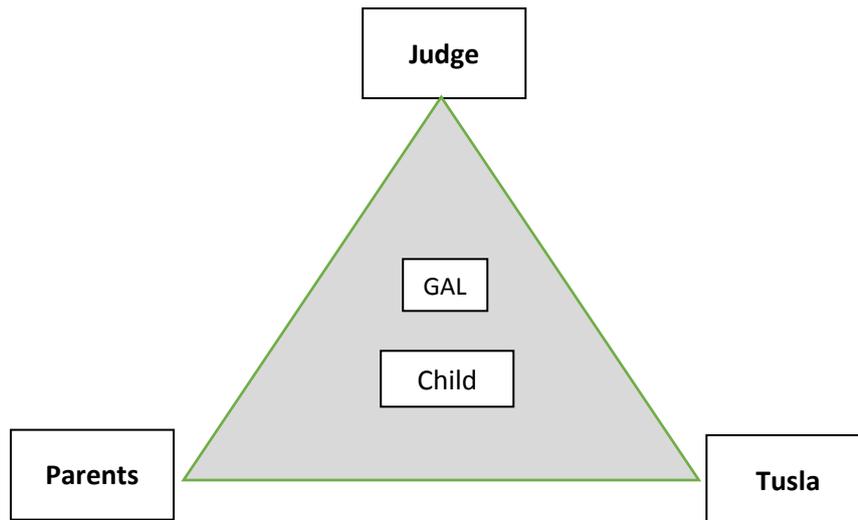


The parents and Tusla are parties to the proceedings and are represented by lawyers. The child is generally not a party although the proceedings are focused on the child: safety, welfare and development.

The outcome of the proceedings can profoundly affect the life course of the child: health, mental health, education, social relationships etc. As described by Judge Daly recently the court's powers under the 1991 Act are amongst the "most grave and far-reaching" powers available to a district court judge.

The 1991 Act provides that the court may appoint a guardian ad litem (GAL) if "it is in the interest of the child and in the interests of justice". The act does not elaborate on the role of the GAL but in practice, based on role in other jurisdictions, the function has become generally established as:

- Safeguard the child's interests within the proceedings
- Independently establish the views of the child and represent these views in the proceedings.
- Assess the child's best interests and make recommendations to the court in this regard.



Barnardos Guardian ad Litem Service

Barnardos has been managing a GAL service for 20 years and currently has a panel of 32 practitioners, working with over 800 children each year. We wholeheartedly welcome the reform of the sector and the government's intention to establish a single national service. In our submission to the Department of Children and Youth Affairs Consultation Paper in 2015 we noted that a national unitary system would allow:

- a transparent system for formal entry to the work;
- a system for quality standards, training and support;
- proper governance, accountability and value for money;
- development of shared knowledge, learning and support;
- a clear and fair referral and workload system;
- an ability to negotiate on a meaningful level with the key stakeholders, including courts, TUSLA and family groups in order to give and receive feedback and to develop mutually agreed protocols;
- an ability to contribute constructively to the understanding of the needs and interests of vulnerable children in order to improve outcomes for them.

The General Scheme of the Child Care (Amendment) Bill 2017 sets out the means by which the government intends to regulate provision and bring transparency and accountability to the sector. In addition, the General Scheme also has consequences for constitutional issues in respect of children's rights.

The General Scheme provides a framework for the development of:

- a national GAL service
- well-structured and managed
- with a defined role for GALs
- employing experienced, registered social workers and psychologists
- subject to public scrutiny and accountability.

This is very welcome. However we have concerns about some aspect of the proposed provisions in regard to:

- the function of the GAL
- discretion in respect of appointment
- status of child and GAL in proceedings
- the role of Tusla in the funding structure.

The legal imperative to hear the views of children

Article 42A of the Constitution protects the substantive rights of children but also regulates their constitutional justice rights in court proceedings. Article 42A provides that "... in the resolution of all proceedings brought by the State ... for the purpose of preventing the safety and welfare of any child from being prejudicially affected ... the best interests of the child shall be the paramount consideration ... (and) the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child."

Given the nature of child care and special care proceedings children are not directly represented in most cases. Also children are not generally party to proceedings and are rarely witnesses.

So in practice that challenge has been met, and fulfilled, in the recent past by the deployment of Guardians ad Litem. The Guardian is representative of the child in the proceedings, he or she owes their primary duties to the child, and the Guardian without fear or favour represents the child. The Guardian stands in the place of the child and vindicates the constitutional justice rights of the child to be heard, provide evidence and test evidence given by others. Where the child becomes a party to proceedings, the appointment of the Guardian ceases. In summary, the Guardian stands in the shoes of the child as his or her representative and advocate in proceedings. In this way the constitutional rights, such as a child being heard before orders are granted which greatly affect them, is vindicated.

However, the law needs to go further, therefore it is imperative that the Heads of Bill recognise that the role of the Guardian exists to vindicate those constitutional justice rights of the child, and not just as a resource for the Court.

Head 3 - Establishment of a national Guardian ad litem service

“(1) The Minister will establish a national Guardian ad litem service to enhance the decision making capacity of the courts regarding the child’s views and best interests in proceedings under the Child Care Act 1991.”

The focus here is on assisting the court – *enhance decision making capacity* – without reference to the state’s obligations in respect of article 42 and UNCRC article 12 to ensure the fullest participation of children in proceedings that affect them. We recommend a description of function here that focuses on the child and involves a positive obligation to the child.

We recommend that Head 3 (1) should be revised as follows:

- (1) The Minister will establish an independent national Guardian ad litem service to:
- Represent the best interests of children, as independently assessed by the Guardian ad Litem, in the specified proceedings.
 - Involve the child, taking into account their age, understanding and interests, in the proceedings that affect them.
 - Ascertain, as far as is practicable given the age and understanding of the child, the child’s views, wishes and feelings.
 - Represent, in the court proceedings, the views, wishes, and feelings of the child.

Head 4 - Arrangements with service providers

- *“(1) The Minister may enter into an arrangement with a person for the provision of a Guardian ad litem service to the courts in proceedings under the Child Care Act 1991.”*

Suggest editing this to read “person or body” as it would be more appropriate.

- *“(3) (a) assigning Guardians ad litem in proceedings where a court has ordered the appointment of a Guardian ad litem under Head 8”*

Barnardos particularly welcomes this section authorises the national service to choose the GAL for a case rather than the court. This is essential to enable the national provider to manage the service effectively.

Head 5 – Function of a Guardian ad litem

The functions of a Guardian ad litem must mirror the purpose of the service outlined in Head 3(1) which is to represent the views and best interests of the child and facilitate their involvement in proceedings.

Also the Bill needs to be edited to facilitate the GAL to have more scope and access to ensure he / she can fulfil their role in its entirety.

Therefore Head 5(1) (2) and (3) should be reworded slightly to read:

- (1) The function of a Guardian ad litem on his/her appointment by a court in proceedings under the Child Care Act 1991 will be to:
 - (a) Represent the best interests of children, as independently assessed by the Guardian ad Litem, in the specified proceedings.
 - (b) Involve the child, taking into account their age, understanding and interests, in the proceedings that affect them.
 - (c) Ascertain, as far as is practicable given the age and understanding of the child, the child’s views, wishes and feelings.
 - (d) Represent, in the court proceedings, the views, wishes, and feelings of the child.

(2) Without prejudice to the generality of subhead (1), in exercising his or her function, a Guardian ad litem will:

- (a) promote and facilitate the child's right to a voice and to have his or her views articulated and considered in the proceedings;
- (b) regard the best interests of the child as the paramount consideration;
- (c) ensure that the child is informed of matters relevant to the proceedings having regard to the child's age and maturity;
- (d) ascertain the views of the child, as far as practicable, having regard to the child's age and maturity, and inform the court of same;
- (e) provide the court with such assessment of the child's situation as it may request for the purpose of consideration and determination of the proceedings before it;
- (f) provide the court with a response to any specific question it has raised or any information, including opinion, it has sought in relation to the views and best interests of the child in the proceedings before it;
- (g) bring to the attention of the court any information or matter that s/he considers pertinent to the proceedings before the court; and
- (h) provide a written report and recommend to the court a course of action that, in the professional opinion and experience of the Guardian ad litem, would be in the best interests of the child.

“(3) In exercising his or her function under subhead (1), a Guardian ad litem may have access to all and any files, records or reports regarding the child and the child's welfare necessary for them to fulfil their duties:”

Head 6 – Status of a guardian ad litem

The question of status requires careful consideration. The status of the GAL is closely linked to the status of the child.

In its current iteration, the Bill imposes limitations on the GAL's role. Barnardos believes it is not in the interest of the children and young people they are serving if their GAL is precluded from full participation in the proceedings. In the majority of cases, the Guardians work collaboratively with all parties involved in the case to achieve the best outcomes for

children. However, where disagreements arise or where there is a need to challenge decisions around allocation of resources or poor practice the GAL must be free to address this.

The issue here is not simply about the ability to cross examine but rather the GAL, on behalf of the child, should have the same ability as the other stakeholders to enquire of and to challenge in the course of the proceedings and where necessary to make applications to the court.

The GAL is the primary agent by means of which the child can participate in and be included in the proceedings in accordance with the UNCRC. Article 12 of the UNCRC requires that:

1. State parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

There is an imbalance when parents and Tusla are parties to the proceedings and are generally represented by lawyers, while the child is generally not a party although the proceedings are focused on the child: safety, welfare and development. The outcome of the proceedings will profoundly affect the life course of the child: health, mental health, education, social relationships etc.

The challenge is to identify the appropriate legislative means by which the GAL can actively promote the child's best interests by ensuring the fullest participation of the child, in accordance with their age and ability, in the proceedings. The proposal in the Bill currently that the GAL will not be a party and shall not cross-examine will not achieve this.

Lessons can be learnt from systems in England, Wales and Northern Ireland where a GAL is appointed to children in all specified proceedings. The GAL then appoints a solicitor to represent the child – the tandem model. The GAL instructs the solicitor on behalf of the child with older children taking a fuller role in this regard.

Head 8 - Appointment and cessation of appointment of a Guardian ad litem by a court

- *“(1) Subject to subhead (7), the High Court will order the appointment of a Guardian ad litem in all proceedings under Part IVA of the Child Care Act 1991.”*

This should be amended as follows: (1) Subject to subhead (7), the High Court will order the appointment of a Guardian ad litem in all proceedings under Part IVA of the Child Care Act 1991 or pursuant to the inherent jurisdiction of the High Court.

In relation to proceedings under part IV or VI in the District or Circuit Courts, the explanatory note to subhead 3 makes clear that intention of the provision is that the appointment of a GAL will be the “norm”. However, subhead 3 outlines a range of considerations (consistent with section 32 of The Guardianship of Infants Act 1964 (as amended) that must be taken account of in determining whether to appoint a GAL.

The inclusion of such criteria will inevitably give rise to significant variation in the rate of appointment depending on the orientation of the particular court and that the stated intention of the General Scheme will not be achieved. The Child Care Law Reporting Project (CCLRP) attended hearings in respect of 1,194 cases across 37 District Courts (CCLRP 2015, p.2). Coulter reports that Guardians ad litem were appointed in 53 per cent of cases although significant regional variation is identified - the highest rate of appointment of 79.8 percent being in the Louth district and the lowest of 13.3 per cent in Galway (CCLRP 2015, p.80). Although the CCLRP attended only a sample of the total hearings, Coulter states that they were careful to ensure “that the information we collected was as representative as possible” (CCLRP, 2015, p.10).

In order to achieve the stated intention of the General Scheme, we recommend the following wording for subhead (2) and the removal of subhead (3): Subject to subhead (8), in all proceedings under Parts IV or VI of the Child Care Act 1991, the District Court or Circuit Court will order the appointment of a guardian ad litem save in exceptional circumstances.

- Subhead (10) states: “ Where, having regard to subhead (9), the court determines that the appointment of a Guardian ad litem will continue beyond the determination of the matters referred to in subhead (5), it shall state its reasons for doing so in open court. “

Where the GAL is retained, it is usually as a result of outstanding issues in respect of the child’s care plan or the need for specialist services. It is important that in the circumstances above that the continuing involvement of the GAL is clearly focused on and relevant to the proceedings. A practice has arisen in a number of courts whereby the GAL is discharged following the determination of the primary proceedings and the GAL is then re-appointed 6 weeks prior to the next hearing to carry out the functions outlined at head (3) above. We recommend that this approach is adopted in the Bill.

Head 9 – Fees of Guardian ad litem and legal fees

The intention of Head 5 appears to be that whereas the contract for service will be between the Minister and the service provider, the actual mechanism for discharging the fees to the service provider will be operated by Tusla. Head (9) provides for Tusla to continue discharging the costs of the GAL service out of monies provided by the Oireachtas.

22 of the 26 submissions to the DCYA consultation in November 2015 recommended that Tusla should no longer be responsible for discharging the fees of GALs. The primary reason was the question of independence and the perception of independence.

It is essential in the interests of independence and in recognition of the inevitable tensions that arise between Tusla and GALs in carrying out their respective professional roles that Tusla should have no role within the funding structure of the reformed service.

Notwithstanding the above we fully recognise the requirement for strict budgetary control and oversight of cost of a reformed GAL service. The proportionate use of available resources will need to be a guiding principle.

Head 10 – Provision of information to a Guardian ad litem

Head 10 (1) states that *“Where a Guardian ad litem appointed by a Court requests the provision of personal data including sensitive personal data relating to a child from the Child and Family Agency, the Agency, having satisfied itself that the data sought falls within the definition of ‘relevant purpose’ shall provide the data”*.

The information required in regard to the child, for the purpose of the GAL exercising their function, will generally involve sensitive information in regard to the child’s parents. The provision of this information is essential and we recommend the following insertion in Head 10 (1):

Where a Guardian ad litem appointed by a Court requests the provision of personal data including sensitive personal data relating to a child and the child’s parents from the Child and Family Agency, the Agency, having satisfied itself that the data sought falls within the definition of ‘relevant purpose’ shall provide the data.

Wider reform

Finally we wish to make some general points about the context in which reform of the GAL service is being considered.

The impetus for reform appears to be the following:

- Concern about the existing cost of GAL provision.
- Concern about the cost of legal representation for GALs
- Concern about the lack of regulation in respect of vetting, practice standards etc.

While we welcome the establishment of national service as outlined above, the opportunity should not be missed to engage in more far reaching reform.

The State’s obligations pursuant to the 31st amendment and the UNCRC require a far more fundamental re-assessment and re-calibration of all legal and administrative processes involving children – including private law.

This would require legislative and institutional reform including the establishment of specialist Family Law Courts – the GAL service could an integral part of this.

The overarching objectives of reform should be to ensure effective participation of children, improve decision making about children, ensure consistency and give a voice to all children in any proceedings that affect them. The proposals in the current Bill being discussed seek to 'fix' some elements of a broken system, but falls short of the objectives above.

APPENDIX 1 : Case Studies

Appendix 1

Case Study – Adam

Adam was taken into care at birth and placed with foster carers directly from hospital when he was 3 days old. He was a healthy baby, and developed well, meeting all his developmental milestones.

Adam's mother is 2nd generation Irish and his father is from London – both have children with other partners who are in care in the UK. The child protection concerns involving other children were very serious and some of the younger children had been adopted. The parents appear to have moved to Ireland in the hope that they could avoid their child being placed in care and ultimately placed for adoption.

Adam's parents worked closely with Social Work Department for the first few months as they wanted Adam returned to their care. His father then disappeared after an allegation of child abuse was made against him involving another child. Shortly afterwards his mother returned to the UK and wanted Adam returned to her care in that jurisdiction.

A Guardian ad Litem was appointed when Adam was 8 months old. A social work assessment of mother was ongoing and no decision had been taken at that time about whether or not it would be in Adam's best interests to be returned to UK Jurisdiction under Brussels 2.

The Guardian met with Adam and observed him in his foster family and assessed that Adam was thriving under their care and a strong bond between them was established. The Guardian travelled to the UK and carried out an independent assessment of his mother's circumstances in the UK – meeting with mum in her home; with extended family members including Adam's adult half siblings, met with half sibling's Social Worker and liaised with the CAFCASS Guardian

The Guardian actively pursued relevant information from the various Social Services areas who had been involved in UK– this had been an ongoing difficulty for Tusla as there were a number of Social Services areas involved.

She advocated for Adam that a timely decisions needed to be made by the Social Work Department regarding the jurisdiction issue and in parallel, their assessment of his mum must be decided so that long term plans could be made for Adam in a timely manner.

The Guardian liaised with Fostering Department regarding the Foster Carer's status and whether they were assessed as long term carers and whether they wanted to become Adam' long term carers and what support would be available to them to do this.

The Guardian was legally represented and ensured that there was liaison with Tusla legal team so that all reports and documentation from UK would be grounded by direct evidence in the Irish proceedings.

In Adam's case, the court accepted that the child protection concerns of the older children were of a seriously high level, and it was determined the mother did not have the capacity

to change. As Adam was securely attached to his foster carers the Guardian gave evidence that it would be detrimental to his mental and emotional health for him to be taken from them.

An application for Full Care Order was made. This was vigorously contested by mother but was granted after a full hearing.

Adam's mother has not kept up contact with him despite the best efforts of all professionals involved. It also came to light via Facebook that Adam's parents got married in UK after the Care Order was granted. Adam now has some contact with his half siblings who are in care in the UK.

Case Study Special Care - Sally

Sally's mum had alcohol and drug problems and placed Sally in to care when she was a toddler after the death of her dad. Sally's mum initially tackled her problems and Sally was returned to her care when she was 4 and the case was closed. There was no Guardian ad Litem involvement at this time.

When she was 6 years old, Sally was found alone outside a shop, late at night, cold, shaking and hardly able to talk. Her mum's addiction had spiralled out of control and she had abandoned Sally. Sally was taken into care and later made subject to a care order to the age of 18. She went back to the same foster carers as she had been with when an infant. Sally's mum turned up to see her on and off. Sally was always devastated when her mum was supposed to come but let her down.

Sally did well initially. However she stopped attending school, and started to self-harm when she was 12 and absconded with unknown males when she has 13. Her foster care placement broke down when Sally was 14 and she went in to residential care. Her foster carers still kept in touch with her but they could not cope with her increasingly risky behaviours. They said later that whatever had gone on between the ages of 4 and 6 had caused severe damage to Sally and she never really recovered.

Sally made numerous attempts to kill herself and was hospitalised on adult psychiatric wards. She took drugs, and took extreme risks with her behaviours. Her social worker, who had known her for many years, made the decision to apply for detention for her own welfare in a Special Care Unit for her when she was 16. Sally was placed in a Special Care Unit centre far from her home town and a Guardian ad Litem was appointed.

Initially Sally struggled while in Special Care. She continued to self-harm, even though the environment was as safe as it could be. On one occasion Sally nearly died when she tried to hang herself. The only way that she could access psychiatric care was to be taken to the local A&E. This put her at higher risk. She was deemed not mentally ill by the on-call doctor and was returned to the Unit.

The Guardian met her at the Unit but Sally rejected all attempts to talk to her.

She spent most of her time away from all other young people, in an empty corridor, for several days.

The Guardian brought the matter to the High Court to explain what was going on. She raised the lack of access to psychiatric care for this young person in crisis, and the long periods where Sally was kept in isolation. As a direct result, TUSLA and the HSE negotiated that on site psychiatric cover would be provided to the Unit to support them with Sally's care.

Sally recovered from her crisis and started to trust the care workers and therapeutic team looking after her. She opened up about the very serious abuse she had suffered when she

was a young child. She stopped self-harming, and started to think positively about her future.

When it came for Sally to leave Special Care, despite the best effort of the social work team, there was a shortage of placements, and the one proposed for her was not suitable – everyone working with Sally knew this. The Guardian brought her own concerns to the attention of the court, and sought evidence from the social work team about the suitability of the placement. It became obvious that there was no point in pursuing the arrangement that had been proposed.

A different placement was found near the Special Care Unit. Sally was reluctant to accept this placement as it was so far from her home area. The Guardian visited the placement with Sally and encouraged her to accept the placement on a short term basis, and reassured her that she would not be forgotten about. Sally accepted this reassurance from her Guardian as she saw her as 'outside the system' and she made the move successfully.

The Guardian negotiated additional outreach support from the Special Care Unit and Sally was able to continue school there and complete her Junior Certificate successfully. The Guardian visited Sally regularly at the new placement and kept her informed of progress. Sally did very well at this placement and it did her good to be away from the pressures of her home area after leaving Special Care.

Six months before her 18th birthday, Sally transferred to a specialist aftercare placement close to her home area and near her former foster carers. The Guardian had previous knowledge of the care team and was able to introduce them to Sally to help her transition. The Guardian negotiated that this placement would be available to Sally well beyond her 18th birthday to help give her a sense of security and stability as she prepared for adulthood.

Sally had many people working with her who helped her, especially her social worker who had known her for many years and who gave her immense support. However the Guardian was in the unique position of being able to challenge the care arrangements when necessary, and ensure that gaps were filled in order that Sally's care experience had the best outcome possible. Sally felt that she had an independent advocate on her side.

Case Study – Keith

Keith was taken into care when he was 13 years of age following an incident of physical abuse emotional neglect. His father was in a new relationship and had other children. Keith's mother is not Irish and her whereabouts were unknown. Keith was placed in relative foster care but was unhappy there.

There were complex dynamics at play within Keith's extended paternal family, his father and his new family. Keith was very often caught in the middle of the acrimonious relationships between significant people in his life.

A Guardian ad litem was appointed and remained involved until Keith was 18 years

The Guardian's initial assessment suggested that there might be some capacity for reunification to care of father. Keith deeply wanted this. This was tried over a period of a year but was unsuccessful as Keith did not get on with his father's new partner.

A Full Care Order was granted after 2 years subject to regular review. However ongoing contact and access with family members always a contentious issue. The guardian ad litem advocated that decisions were focused on Keith's best interests and that his wishes and feelings were taken into account.

Keith was placed in relative foster care with his paternal aunt but was unhappy. The Gal advocated a move to general foster care as Keith asked for this. This worked well for him.

The Guardian represented Keith's wishes, feeling and best interests in respect of Care Plans and Aftercare plans with the 6 different Social Workers he had during his care journey. Keith was very frustrated that he had so many new social workers who didn't stay in the job for very long so he never felt that he could trust them.

Keith was very interested in the legal proceedings and wrote letters to the Court for almost all hearings. He was also supported by Gal to meet the Judge when he was almost 18 years old.

Keith was denied contact with half siblings whom he desperately missed as the children's mother did not want him to have contact with them. Keith did not have contact with his father any longer as he had moved to another country for work.

The guardian ad litem mediated between Social Work Department and step parent and a contact agreement eventually agreed which lasted 2 years before breaking down due to acrimonious relationships within the extended family.

The guardian ad litem researched legal avenues open to seek access through the Courts. Eventually he found a means of doing this and liaised with TUSLA about this. TUSLA made the application supported by the guardian ad litem and a court order was granted allowing access between Keith and half siblings.

The Gal advocated for and represented Keith throughout his care journey. He ensured a robust aftercare plan was in place for Keith to ease his transition to adult life. The Guardian referred Keith to EPIC and facilitated introductory meeting so that he would get ongoing

independent support in Aftercare. Keith sought access to his files and the Gal supported him with this. He ensured a robust aftercare plan was in place for Keith to ease his transition to adult life when he reached 18 years.