The Practice of Social Work & Law in Care Proceedings

A thesis submitted in partial fulfilment of the requirements for the MSc in Child Protection & Welfare

Author: Mr. Barry Edward Fitzgerald
Supervisor: Dr. Helen Buckley
Date: 22-1-2016
Declaration

I affirm that this thesis is entirely my own work and that it has never been submitted as an exercise for any other university.

I agree that the library may lend a copy of this thesis on request.

Signed: _________________________

Date: ___________________________
Abstract

Against the backdrop of the proposed reform of care proceedings, this research examines the practice of social work and law in this context. Based on semi-structured interviews with professionals of both disciplines, the research finds convergence and divergence within and between the two professional groups studied in terms of their understanding of and approach to key aspects of the court process. These findings are the basis of recommendations for reform and further research in this area. Perhaps most fundamentally, the issues of threshold determination (whether a child should go into care or under supervision) and resource allocation (what services and resources children and families receive) emerge as the site of inter-disciplinary contradictions that point to the need for further research in this area.
Acknowledgements

The author gratefully acknowledges the assistance of Professor Robbie Gilligan, Aileen Fitzgerald, Tina Murphy and Luna Dolezal.
# Table of Contents

**Introduction** ................................................................................................................................................. 1

**Chapter 1 – Care Proceedings** ....................................................................................................................... 4
  1.1 Care Proceedings ......................................................................................................................................... 4
  1.2 Problems identified ....................................................................................................................................... 5
  1.3 Policy Considerations ................................................................................................................................. 7
  1.4 Conclusion .................................................................................................................................................. 9

**Chapter 2 – Interdisciplinary Practice** ........................................................................................................... 11
  2.1 Practice structures ....................................................................................................................................... 12
  2.2 Social Work & Law ...................................................................................................................................... 15
     (a) Evidence-based practice ............................................................................................................................ 15
     (b) Care and control ....................................................................................................................................... 17
     (c) Laws and Rules ......................................................................................................................................... 18
     (d) Courts and adjudication ........................................................................................................................... 18
  2.3 Conclusion .................................................................................................................................................. 20

**Chapter 3 - Methodology** ............................................................................................................................ 22
  3.1 Method ....................................................................................................................................................... 23
  3.2 Interdisciplinary Research .......................................................................................................................... 25
  3.3 Ethical Research ......................................................................................................................................... 26

**Chapter 4 –Inter-professional Practice** ......................................................................................................... 28
  4.1 Responsibilities & Competencies .............................................................................................................. 29
  4.2 Inter-professional Issues ............................................................................................................................. 32
  4.3 Court Structures ......................................................................................................................................... 34
  4.4 Adversarial Proceededings .......................................................................................................................... 35
  4.5 Combative Practice .................................................................................................................................... 37
  4.6 Uncertainty .................................................................................................................................................. 39
  4.7 Court Power ................................................................................................................................................. 41
  4.8 Resources .................................................................................................................................................... 42
  4.9 Conclusion .................................................................................................................................................. 43

**Chapter 5 – Conclusions & Recommendations** ........................................................................................... 45
  Recommendations .......................................................................................................................................... 50

**Bibliography** ..................................................................................................................................................... 51
Introduction

Care proceedings are a judicial process established by the Child Care Act 1991, in which the upbringing of a child may be taken over, or become subject to supervision, by the state. In 2013, in the aftermath of a number of significant changes in the area of child law and policy, the then Minister for Children, Frances Fitzgerald, announced that the next major target for reform in the field would be care proceedings. Citing in particular, the “exceptional adversarial system” currently in place, she stated that her Department was working with the Department of Justice towards the establishment of new specialized courts in this area. Furthermore, the Minister’s commitment to reform coincided with a loosening of access restrictions to allow for controlled access for academics and members of the press and the initiation of two large scale research projects in the area. These two projects were the Atlantic Philanthropy-funded, Child Care Law Reporting Project (CCLRP) and the University College Cork-based, Child Care Proceedings in the District Court Research Group (the UCC Research Group). In November 2015, following a lengthy period in which it was unclear whether any progress was being made in terms of steps towards reform, it was announced that the Department of Justice were preparing legislation for the establishment of specialised family law courts. Care proceedings thus seem to be at a crossroads, where political appetite and emergent empirical knowledge seem poised to crystallize around concrete proposals for change.

By responding to instances of child welfare risks at the more extreme end of the scale, care proceedings dovetail emphatically with the foundational aims of child protection. In some instances, care proceedings effect a transition in the upbringing of a child, wherein parental responsibility is superseded by state provision delivered in a foster home or residential centre, and thus forcibly and fundamentally reconstitute the lives of the families at their focus. Alternatively, in cases where such an intervention is deemed unnecessary, the court process can result in a child or children being left in a situation where serious abuse or neglect has been alleged. Occurring, therefore, at a juncture between the protection of a vulnerable child from significant harm and the coercive breakup of a family, the ethical stakes in cases of this kind may be exceptionally high. Considered within a variety of conceptual frameworks, including those informed by human rights, constitutional law, and developmental psychology, the implications of care proceedings for children and families involved is profound, and the question of their reform is of correlative importance. All elements of its execution therefore require to be rigorously examined.

---

1 This announcement was made at a symposium 'Embedding a Children’s Rights Approach into the new Child and Family Support Agency, 27 February 2013. Video at “https://www.youtube.com/watch?v=4V8hZTFI6fc”
2 See: http://www.childlawproject.ie/
4 Irish Times, Specialist family law courts to be set up through legislation, Tue, Nov 24, 2015
In approaching the issues raised by the prospective reform of care proceedings, one of the elements that need to be considered is the role of practitioners at the interface between proposed policy changes and the children and families that stand to be most affected by them. It is self-evident that whatever reforms are instituted need to be compatible with the knowledge and capacities of practitioners and the experienced realities of working in this context. Currently, the administration of care proceedings is largely the responsibility of social work practitioners and legal practitioners, with each of the key roles in the process predominantly or exclusively occupied by professionals of one or the other of these disciplines. However, while the studies of care proceedings referred to above have begun to shed light on many aspects of practice in child protection courts, neither is substantively concerned with the impact of professional identity in this context. Noting, therefore, the far-reaching responsibilities entrusted to practitioners of these two disciplines in care proceedings, the aim of this research is to address a significant gap in our understanding of the process by exploring the role of professional identity therein. This thesis thus investigates how social work and law as distinct professional practices combine towards the achievement of child protection goals.

The focus of this research is specifically connected to one aspect of care proceedings, namely the practice of social work and law therein. Nevertheless, the study aims to generate knowledge that is useful with regard to the proposed reform in the area. In order, therefore, to orientate this thesis in respect of the wider discourse to which it aims to contribute, Chapter 1 describes the basic structure of care proceedings, outlines the criticisms that are the backdrop to their proposed reform, and identifies the issues arising in contemplating such change. With respect to the issues arising, it is noted that while the implications of care proceedings for children and families involved provide the primary ethical underpinning of change in this area, the consequences of change for the wider child protection system, justice systems and public resources must also be considered. By identifying the underpinnings of the proposed reform and highlighting the range of considerations that need to be accounted for in instituting it, chapter 1 foreshadows some of the key issues that are addressed in this research.

Following the general introduction to care proceedings provided in Chapter 1, Chapter 2 considers the practice of social work and law in this context in some detail. It does this by examining the assumptions of professional competence that might be seen to underpin their work in this context from a number of angles. Firstly, it challenges an assumption that practice in this context is an uncomplicated mediation of professional expertise by highlighting the range of normative forces that shape practice in this context. Secondly, it challenges the assumption that either discipline
represents a discreet and fixed body of knowledge by showing that each is characterised by overlapping, fluid and inconsistent elements. Having thus established that the practices under examination involve a mixture of disciplinary knowledge and other normative factors, the chapter highlights the importance of studying these disciplines in the interests of successful reform of care proceedings.

The issues considered in Chapters 1 and 2 inform much of Chapter 3 which looks at the methodological issues that arose in this research. This chapter begins by describing the research methods used and the ethical challenges encountered. It is noted that, while field methods used for this research have a robust simplicity suited to the exploration of a previously unresearched subject matter, complexity arises from the inter-disciplinary nature of the research and the essentially value-based underpinnings of that which is studied. By confronting the consequences of disciplinary divides and the moral and political nature of issues arising, this chapter refines the epistemological and ethical position of the research.

Chapter 4 reveals the findings of the research. In it, the court process emerges a site of complex and, in some ways, paradoxical practices. The application of the disciplinary knowledge of social work and legal professionals in this context is shown to be strongly conditioned by the structure of the proceedings. In the ways in which disciplinary knowledge interacts with structural features of the process, several issues emerge. These include the inadequacy of court buildings and case management, the problematic courtroom demeanour of some legal professionals, inconsistency in social work presentation of evidence, the marginalised position of parents, and the inconsistency and questionably fairness of court-directed provision of services to families and children. However, perhaps more fundamentally, a disjuncture emerges between social work and legal professionals around the basis of decision making in this context. In this regard, the study shows that legal practice expect and demand a level of certainty in terms of the basis for decisions which social workers say is impossible to provide.

Chapter 5 briefly crystallises some of the key issues of the research. In doing so, some of the overall strengths and weaknesses of the court process are set out and the value of disciplinary knowledge and the ethical status of professional practice are briefly considered. The research report concludes by making recommendations for further research and policy and practice reform in this area.
Chapter 1 – Care Proceedings

And I think the next challenge... is to begin to examine more critically how our children are dealt with in our legal system. We have an extraordinary adversarial system for our children in this country. I don’t think it’s delivering the best possible outcomes for children and I think we need to start examining very seriously how we move to a more- a less adversarial system.

(Frances Fitzgerald as Minister for Children 27th of February 2013)

This research examines the practice of social work and law in care proceedings in the context of proposed reform of the process. While the focus of this research is, thus, on a specific aspect of care proceedings, it aims, as noted in the introduction, to generate knowledge that will shed light on wider questions raised by their reform. In order to familiarise the reader with the nature of the proceedings at issue and to situate this research in relation to the reform-orientated discourse to which it aims to contribute, the analysis of disciplinary practice in social work and law that follows in subsequent chapters is preceded in this opening chapter by a more general consideration of the court based process. This chapter, then, briefly outlines the structure of the court process; identifies the criticisms of the process that are the backdrop to proposed reform, and then looks at the complex considerations that arise in instituting policy change in this area. This chapter, by taking an overall look at the care proceedings, signposts fruitful avenues of inquiry and potential pitfalls arising in research of this area, and foreshadows key issues related to the reform of the court process that are considered later in this thesis in light of the data generated by this research.

1.1 Care Proceedings

Care proceedings are initiated in the District Court by application of the Child and Family Agency (CFA), on the basis that a child is in need of protection that he or she will not receive without court ordered care or supervision. This application is generally prepared and prosecuted by a social worker or team of social workers on behalf of the CFA. and answered by the parents of the child. When an application first comes before the court, a Guardian ad Litem (GAL), whose role is to represent the views and wishes and best interests of the child in the court process, is also appointed. In most cases, the CFA, parent, parents or guardian and GAL are each represented in court by a solicitor and, in some more complex cases, by a barrister or barristers also. The case is heard and determined by a judge. Unlike most court proceedings, care proceedings are not open to the general public, but may be accessed by researchers and members of the press. The purpose of this access restriction is to

---

5 See footnote 1 in the Introduction
protect the privacy of families and children whose personal lives may be subject to scrutiny in this context.

Although, care proceedings are initiated on the basis of a claim of necessity made by the CFA, they generally involve more than a straightforward adjudication of the veracity of this claim. Cases usually involve several court sittings over a period of several months (Coulter 2015). Between these sittings, owing to the dynamic nature of families’ and children’s lives, the welfare situation underlying the case may change. Indeed, the court itself may be an agent of change by issuing directions while a case is in train. Thus, parties to proceedings, at the direction of the judge, may be required to carry out, commission or undergo various assessments and interim interventions prior to final determination of the founding application. Most commonly, the agency succeeds in the applications it makes (ibid). In cases where a child is placed in care on foot of court proceedings, it is mostly in foster care (ibid), with children being placed in the care of relatives or in residential centres less frequently. Subsequent to the formal conclusion of proceedings, the court retains ongoing overarching responsibility in respect of children in care, and cases may be re-opened by parties or subject to scheduled review determined by the court at the time of the making of a Care Order.

In terms of their structure, care proceedings are formally adversarial, in that they proceed largely on the basis of applications made by parties which may be either contested or consented to by an opposing party. This formally adversarial structure of proceedings is also underpinned by the involvement of lawyers within the process, whose role involves achieving the best possible outcome for their client. However, in contrast to an archetypal adversarial approach, in which a judge is a detached and neutral observer, deciding on merits between two antagonistic arguments, the judge in care proceedings may issue directions and orders on his or her own initiative, and the court is guided not only by the arguments of parties but also by an overriding statutory imperative to promote the best interests of the child. Furthermore, legal professionals in care proceedings are explicitly encouraged to adopt a conciliatory approach. These procedural divergences from typical adversarial practices form the basis for the suggestion that care proceedings are an inquiry into the best interests of the child (Gibbons, 2007).

1.2 Problems identified

As noted in the introduction to this thesis, the initial announcement of the proposed reform of care proceedings was explicitly premised on the existing adversarial nature of proceedings. This was not the first time that adversity was characterised as a problem in care proceedings; a number of years prior to both this announcement and the commencement of empirical research in the area, it was alleged that in care proceedings the aims and priorities of child protection professionals become...
subverted to the dictates of the process itself in a way that is not child-centred, and that the adversarial nature of litigation unhelpfully exacerbates tensions and conflicts between parties. It was also argued also that excessive courtroom argument prolongs uncertainty regarding the future of the children at the centre of the process and prevents prompt and straightforward planning for their welfare, greatly increasing the costs involved in child protection. In advocating reform, reference was made to the less adversarial, inquisitorial approaches in other countries (McGrath, 2005).

However, if proceedings are excessively adversarial, this is not necessarily reflected in the way applications are heard and determined by courts. Court statistics from 2014 indicate that issues in care proceedings are often decided on consent (40% of issues coming before the court); and in cases where matters are contested, they are overwhelmingly decided in favour of the CFA., generally following short court appearances in which only one social worker presents evidence (Coulter, 2014). The apparent contradiction between these statistics and the allegation that proceedings are excessively adversarial may be partly overcome by the statistical focus on individual appearances of a case before court rather than entire child protection cases. In circumstances where a case may come before the court a number of times for the continuation of interim orders and issuance of directions relating to ongoing assessments and interventions, it may well be the case that the contestation arises inconsistently over the course of a case with more significant applications, say, for example, the hearing of the application for the care order itself, generating more contestation than more minor matters.

Even if one is to account for the potentially misleading nature of the statistics, however, concerns remain in respect of the meaningful participation of parents in the process. In a paper presented at the Law Society in 2015, it was noted that excessive workloads of Legal Aid Board solicitors charged with representing parents, and a lack of access to independent experts, may compromise parents’ ability to effectively participate in proceedings (O’Mahony, 2015). Such concern about the marginalisation of parents is exacerbated by the high incidence of cognitive impairments referred to above that impact upon their ability to instruct lawyers. Furthermore, although practice directions are in place in some areas that mandate the timely provision of court reports to parents, often parents have been found to receive inadequate advance notice of the position of the CFA, thus further compromising their capacity to participate effectively. Particular concerns can be seen to arise in relation to fathers, given the observation by the CCLRP that variation in number of respondents is not correlative with marital status of parents and the suggestion that courts do not routinely consider fathers’ capacity (Coulter, 2014). Also, it has been suggested that parents who
belong to minority ethnic groups may be at a disadvantage in this context, where integration policies and cultural mediation services may not be adequate (Coulter 2015).

Moreover, it is not only parents who may be disadvantaged within the process; representation of children in care proceedings has also been a focus of significant concern (Carr, 2009, Daly, 2010). The lack of regulation and of independent funding of the work of GALs are issues that have been raised over a number of years on the basis that quality and consistency cannot be assured, and that GALs’ independence may be compromised by their reliance on agency funding (Mc Quinlan et al., 2004). Concerns regarding the role of the GAL have been reiterated by the CCLRP, which has advocated, pending regulation of their work, the adoption of guidelines specifying what is required of the GAL, the elements to be contained in his or her report, the circumstances in which a GAL needs legal representation and the role of such a representative. Further to the role of the GAL, the question of whether children should be allowed to instruct their own legal representative has also been raised; currently, if a child is represented in proceedings, a Guardian will not simultaneously represent his or her interests, views and wishes (Bilson & White, 2005).

Another concern raised in relation to care proceedings relates to considerable variation in how cases are presented, heard and decided (Coulter, 2015). Partly based on a finding that such variation exists, the CCLRP has recommended that specialised courts need to be established as a matter of priority, and, pending the establishment of such courts, that practice directions currently in place for Dublin Metropolitan District Court be extended across the country. The CCLRP has also drawn attention to poor case management in the courts, with lengthy waiting times and repeated adjournments leading to waste of resources and deterioration in relations between parties. Finally, the CCLRP has highlighted the need for improved services around the court process. Services that have been identified as relevant in this regard include in particular

1.3 Policy Considerations

As the central aim of the court process, care proceedings need to be considered primarily in light of the ethical imperative, referred to earlier in this chapter, to respond to risks to the welfare of children in a way that is, at the same time, fair to their families. Notwithstanding, however, that empirically observed dynamics of child welfare and applicable law combine to make responding to risk both a moral and legal imperative, troubling dilemmas arise in endeavouring to so. When child protection concerns arise, the extent and implications of neglect or abuse may be difficult to assess and the success of proposed responses difficult to predict. Risk is thus, from an ethical point of view, something of a double-edged sword in child protection, providing a compelling basis for
intervention, while simultaneously leaving a level of uncertainty around the basis and prospective success of interventions proposed.

Risk is, by definition, concerned with likelihood rather than incontrovertibility. In assessing risk to child welfare as distinct from other risks, however, the level of uncertainty may be comparatively high, owing to the complexity involved, for example, the difficulty of predicting welfare outcomes in relation to service delivery across the child protection system where, for example, the merit of family support or child welfare programmes may be questioned on the basis that their impact on outcomes are unproven. If the uncertainty can be seen as a pervasive issue in child protection, however, in care proceedings the ethical hazard it creates is particularly pointed. In court situations, generally, the neglect or abuse suspected is particularly grave, the interventions considered are particularly Draconian and professionals’ assessments are formally opposed. The potential for uncertainty in other parts of the child protection system to cause ineffective service delivery or resource wastage, in the court process, becomes a potential for unwarranted familial break-up or a child being left in a seriously harmful situation. In approaching the questions raised by reform, however, the primary purposive function of care proceedings needs to be considered in the light of other issues impacted upon by care proceedings.

From a policy perspective, in circumstances where multiple children are the focus of child care proceedings each year, the intrinsic gravity of each individual case is amplified by multiplicity. Thus amplified, the ethical imperative to protect children is also complicated in a number of ways. One of these ways relates to resources. By absorbing and directing public finances, the efficiency of care proceedings falls to be considered in the context of other competing demands on the public purse. It is frequently highlighted that investment in children’s lives can ultimately save money by vitiating long term costs of childhood deprivation arising in diverse areas, including criminal justice, homeless services and healthcare. Furthermore, the widely-held sacrosanct image of children might be the basis of a view that, when it comes to at risk children, cost should be no object (Zelizer, 1985). Nevertheless, in as much as rhetorical distance can be put between the imperatives of child welfare and the cost of securing it, the two can never be wholly separated; in a context of finite resources, the financial repercussions of care proceedings inevitably have an ethical dimension.

Care proceedings impact upon the wider child protection system in other ways also that warrant attention. The dynamic and unpredictable nature of child protection means that from the moment a concern emerges practitioners in the field need to anticipate and accommodate the possibility of litigation, even in cases where it does not ultimately arise; because of this, care proceedings may thus play a powerful part in shaping professional practice throughout the system. In the UK,
significant research has been carried out on how the family justice reforms have impacted upon front line practice in social care. (Bowyer et al. 2015). While systemic differences preclude overly direct comparisons, such research illustrates that the significance of care proceedings reform extends beyond those children and families involved in them, to include those who come into contact with the wider child protection system.

Accommodation of care proceedings within courts of law gives rise to yet further consideration. The legal system, like child protection, is a complex one, whose operation gives rise to questions of effectiveness and efficiency. While some efficiency goals, however, such as minimising delay and costs, are widely articulated within discussions concerning the legal system, assessment of courts’ fitness-for-purpose is complicated by the complex and, to some extent, intangible functions of legal adjudication. Courts of law serve and embody fundamental civic values and their work is underpinned by understandings of fairness and justice. As long as care proceedings continue to occur within the court system, questions of reform need to be addressed with an eye to implications for both legal and child protection systems.

1.4 Conclusion

Many of the problems identified in care proceedings and noted above have consequences not only for individual children and families in care proceedings but for resource allocation and other systemic and societal issues too. In light of this, it needs to be acknowledged that the plurality of policy considerations affected by care proceedings not only broadens the discussion of the reforms that might best be instituted in this area but complicates it too. Reform measures instituted may affect the multiple domains of significance in different ways, with the result that changes intended to produce a certain result may have other unintended consequences. (Masson, 2015). The reality that issues outside of care proceedings may affect what happens within them and vice versa creates challenges and opportunities for both research and reform in this area. This is implicitly acknowledged by the CCLRP project in locating certain problems in care proceedings and their solutions in areas not neatly within the scope of the court process, such as the provision of services.

Later in this thesis, it will be argued that the open-ended nature of the issues raised by care proceedings reform has methodological and ethical consequences beyond the positivistic need for evermore data concerning an ever-widening range of relevant issues. Many of the areas affected by child care proceedings, such as the upholding of human rights; the protection of the vulnerable; the promotion of justice and the use of public resources, it will be noted, raise technically incommensurate questions that ultimately require answers that are moral and political in substance. Consequently, while research may offer important insights into the court process, it will be
suggested, with reference to supporting literature, that the questions raised by their reform are ultimately not fully amenable to technocratic resolution.

In light of the multiple significances of care proceedings outlined above, an appropriate goal within an expanded reform agenda is a process which would not alone be fair and effective in respect of children and families as its focus, but which would also promote positive child protection practice, allow for efficient management of resources within child protection and justice systems and exemplify wider moral and civic underpinnings of child protection and justice. The following chapter will look at the structure and disciplinary underpinnings of professional practice in care proceedings, with a view to considering how knowledge of professional practice could usefully shed light on the questions raised by the proposed reform of the court based process.
Chapter 2 – Interdisciplinary Practice

O chestnut tree, great rooted blossomer,
Are you the leaf, the blossom or the bole?
O body swayed to music, O brightening glance,
How can we know the dancer from the dance?

(WB Yeats, Among School Children.)

This research aims to critically examine the combined practice of social work and law in care proceedings with a view to considering how their application might be improved in a reformed judicial process. The research is thus challenged to conceptualise professional social work and legal practice in a way that has descriptive and critical value in relation to the central concerns of child protection. In a sense, this challenge can be seen as an invitation to consider the practice under investigation in terms of the classical ethical justification for professional status which involves an assumption of the suitability of a particular expertise in respect of the tasks entrusted exclusively to it. Thus, for example, in the same way that a physician might be permitted to carry out certain medical procedures on the basis that specialist expertise would allow him or her do it in a way less likely to cause injury and more likely to affect good, the involvement of social workers and lawyers in care proceedings seems to raise the question of the suitability of their specialist knowledge in respect of the responsibilities accorded to them in this context.

On a certain interpretation, this question of disciplinary fitness-for-purpose can be seen to point this research towards an audit of professional practice. The multi-dimensional and ultimately value-based significance of the work undertaken in this context, noted in the previous chapter, militates against such an approach. Nevertheless, in order to clarify the aim of this study in contradistinction with a practice audit, it is worth highlighting that the goal of this thesis is not simply to determine whether social work and law impact on the achievement of child protection goals; it also aims to investigate how they do so. In this regard, the research aims to generate a nuanced account of interdisciplinary practice, not from an assumed positon of ethical and instrumental omniscience but from a position that takes critical account of what disciplines themselves have to say about pertinent ethical considerations arising in the context under examination. In order to do this, the research engages with the classic conceptualisation of professional practice as involving the legitimation of power through specialist knowledge alluded to above, but it also reflexively and constructively questions the assumptions that underpin it.
In approaching the examination of disciplinary practice in care proceedings, the issue of responding to child risk, as noted in chapter 1, will be of primary significance although other consequences of practice should not be ignored. If uncertainty can consequently be seen as a central ethical issue for practitioners care proceedings, it should also be noted that for practitioners who work in this context, the inherent difficulty of assessing welfare risks may be overlaid with a range of operational challenges. Activities that underpin the court-based process such as home visits, meetings, negotiations and the courtroom presentation of evidence may be complicated by highly charged emotion, concealment, resource shortages and disagreement. For practitioners, these activities have been seen to demand not only analytical sophistication but a range of personal and inter-personal skills and sensitivities (Ferguson, 2011). While uncertainty is an important ethical issue in care proceedings, practice in this context should not be problematized therefore, solely in terms of risk calculation. Child protection involves a range of challenges that are connected with but not reducible to risk.

In approaching the question of how social work and law respond to these challenges, this chapter deals with two distinct issues. Firstly, the chapter considers the role played by disciplinary expertise in the professional practice under examination and notes, in this regard, that practitioners are subject to a range of factors that shape their work. Secondly, the chapter considers how the specialist knowledge of social workers and lawyers might be seen to influence their work in care proceedings and notes, in this regard, that the disciplines would seem to favour different approaches in respect of how the challenges of child protection are met. Having noted that professional knowledge and normative processes jointly operate that shape practice in this context and that the professional knowledge of social work and law can be seen to favour different but not necessarily mutually exclusive responses to ethical challenges of child protection, this chapter argues that an engagement with professional discipline is essential to successful reform in this area.

2.1 Practice structures

By investigating the child protection impact of legal and social work practice in care proceedings, it is implicitly hypothesised that disciplinary expertise applied in court proceedings affects child welfare outcomes. However, even if, as noted in the introduction, the structure of care proceedings, in according prominent responsibility to social workers and lawyers, prompts such a hypothesis, its confirmation should not be presumed. Definitional problems have long plagued the study of the professions (Adams, 2010). It might be considered fortunate therefore that the specificity of focus in this research on social work and law in a particular context means that is the fraught question of a generalizable definition of professional practice may be side-stepped. Nevertheless, while a
generalizable definition of professional practice is beyond the scope of this research, knowledge generated by sociological study of professions may be of use in it. In particular, observations concerning the way in which professional practice has become increasingly enmeshed in institutional and legislative structures, serve to warn us of an oversimplified view of practice as a straightforward mediation of professional expertise (Sarfatti Larson, 1977). Thus this section will consider the ways in which the practice of social work and law in care proceedings is facilitated and constrained by a range of normative structures.

The brief outline of its structure of care proceedings contained in the previous chapter of this thesis reveals that legal and social work practitioners in care proceedings do not carry out the tasks with which they are charged in an unfettered way. Their practice is shaped, rather, by normative forces which both facilitate and limit their freedom in the performance of their work. In social work and in law in recent decades, aspects of the normative and bureaucratic structuring of professional practice have been the focus of controversy. In child protection social work, for example, an increase in the use of procedural templates, assessment frameworks, performance indicators and other "managerial controls" has been seen to stifle the flexibility necessary for effective practice and suffocate relationship-based practice (Rogowski, 2011). In law meanwhile, in spite of what might be seen as a disciplinary pre-disposition to rules and structures, calls to provide for improvements in the representation of parents have been articulated in terms of distinctively legal principles of rights to representation and equality of arms (O'Mahony, 2015).

While these examples demonstrate that rules and normative frameworks may sometimes conflict with professional knowledge in a particular discipline, however, practice structures, however, should not invariably be defined in simple opposition to the professional disciplines they regulate. Disciplinary knowledge is not solely the product of individual practitioners. University departments, research institutes, training bodies, courts of law and professional affiliations are also implicated in the production and maintenance of disciplinary knowledge and power. These institutions may play an influential role not only in the education, training and regulation of practitioners but also may play a role in the development of law and policy and the negotiation of resource allocations in particular fields. This may result in practice structures that are not alone compatible with disciplinary knowledge but are based upon it. In a child protection context, it has been observed that the disciplines of social work and law powerfully shape the field not only through professional practice within the system but also by virtue of the influence of disciplinary knowledge in shaping law and policy (White, 1998, Dickens 2008).
Given that rules may be based on disciplinary knowledge, it should come as no surprise that practitioners may embrace them in certain instances. Social workers have been found to welcome certain practice prescriptions as integral to their own professional identity and as reflections of a commitment to fairness and service users’ rights (Evans 2012). Equally, however, rules may not only fail to find favour among the professionals’ whose practice they structure. Furthermore, in instances where practice structures and professional knowledge do not cohere, not only may there be, as in the above mentioned examples, criticisms of those their application may be distorted or frustrated by practitioners. In child protection it has been suggested that practitioners may enjoy “wriggle room” even in respect of the most apparently inflexible practice templates and that they may consequently resist regulation that does not accord with their disciplinary identity (ibid).

Notwithstanding, however, that practice structure and professional expertise both play a role in shaping professional practice in the context under examination, this practice cannot be understood solely in terms of their combined effect. This is suggested not only on the basis of the possibility that the combination of practice structures disciplinary knowledge may not speak to every practice issue, but also on the basis that literature suggests that in addition to rules and resource constraints that are explicitly directive of practice, a range of other less obvious influences may also influence practitioners in the performance of their work. Thus for, example, we might consider the effect within care proceedings of inquiries and public investigations following high profile failures within the system which have offered compelling, if not always methodologically rigorous, recommendations to reform practice in ways that seek to avoid past mistakes (Buckley, 2012). Or we might consider how the potential for adverse press scrutiny and associated public opprobrium affects practice in the specific context under investigation. In light of the many norms and influences that shape practice in the field, disciplinary knowledge takes its place alongside a range of factors that need to be accounted for in understanding professional practice in the context under examination.

Perhaps the most obvious consequence of considering professional knowledge in light of the normative forces attendant upon its implication is that it brings the issue of role differentiation into sharp focus. In care proceedings, the practice of both social work and law is divided into distinct roles that cross-cut the lines of professional identity in ways that must be accounted for in seeking to understand the application of social work and law in this context. It would seem to make little sense for example to speak of the practice of law in care proceedings without allowing for differences between the work carried out by a judge and a solicitor representing a party to proceedings, both of whom might self-identify as legal professionals. Equally, an account of social work practice in this
context would need to be sensitive to potential differences between for example, the work of a child protection social worker and that of a guardian ad litem notwithstanding their shared social work identity. In the formalized context of court proceedings, the differential effect of norms within the principal disciplines involved may mean that as much as one might speak of practice in either discipline, one might speak of a plurality of social work practices and legal practices.

2.2 Social Work & Law
The normative forces that shape how disciplinary knowledge is applied in practice situations provide an important qualification to images of professional practice as an application of specialised knowledge. Another qualification is provided by the nature of disciplinary knowledge itself. The discipline of social work has been characterized as a fluid and contested entity that may be constructed in various ways which emphasise either its cohesion or its differentiation within the diverse contexts in which it is practiced (Thompson 2005 pp1-9). Legal practice, meanwhile, has also been seen to differ significantly from one field of practice to another while its fundamental theoretical underpinnings are the focus of ongoing jurisprudential debate (Francis, 2011). Reflecting therefore, that this is a study not simply of professional disciplines in general terms, but of their application in a specific context, a rigid and generalised construction of either social work or law is eschewed here. Consequently, what is set out below is an attempt to investigate the disciplines of law and social work, not as generic fields of knowledge, but in terms of disciplinary characteristics that have particular bearing on the ethical and practical challenges of risk-based child protection practice.

(a) Evidence-based practice
Evidence-based practice is work that is underpinned by a form of structured enquiry capable of producing generalizable knowledge (Marsh & Fisher 2005 p16). On the basis that it holds the promise of more effective interventions in child protection, an approach to child protection involving the appropriate application of empirically validated knowledge has been widely advocated. Excessive work-loads, the absence of a research culture within organisations and a lack of local, relevant and clearly communicated research have meant that the use of research is not what it might be (Buckley & Whelan, 2012). Nevertheless, even if barriers remain in respect of its implementation, there is strong impetus towards evidence informed practice.

Social work has been noted to have a strong disciplinary affinity with social science (Thompson 2005, pp1-9). This affinity might be seen to render practitioners of this discipline well-suited to evidence-based practice. The same, however, cannot be said for law. Hostility to social research has been alleged to be a feature of legal practice, although the reasons offered for it are various. One
suggestion posits the inherent uncertainty in social scientific knowledge as the basis of legal scepticism; a thesis supported by law’s contrastingly enthusiastic embrace of the natural sciences. An alternative reason that has been put forward for legal resistance to social science is a lack of understanding among legal professionals (Cotterell, 1992). But if both these purported bases for legal resistance seem to offer the promotion of evidence-based practice within the system, it is worth noting that another view sees legal resistance in terms of social science posing a direct threat to a distinctively legal understanding of the world and social regulation within it.

Within this conception of legal knowledge, what might be dubbed the normative science of law might be contrasted at a fundamental level with social science in so far as legal knowledge presupposes a world that is malleable through human agency and normatively controllable by manmade rules whereas positivistic tendencies in social science presuppose a human world governed by its own scientifically discoverable principles (ibid.). In relation to how this alleged disciplinary stance of law in opposition to social science plays out in respect of risk, it has been pointed out that social regulation based on a precautionary approach to risk is anathematic in certain respects to liberal values that inform images of autonomy classically favoured in law (Lepsius, 2009). However, certain spheres of social activity such as food production and environmental regulation, law can be seen to adopt or at least fall into line with an approach to risk that is increasingly precautionary (Streinz 2008); Consequently, across a number fields, recent decades have witnessed a transition from a fault-based to a risk-based approach to social regulation often mandated by legislation, underpinned by empirical validation but affected by legal professionals [Erwin Deutsch- in intro to book on risk].

If recent developments in law suggest that its position in respect of social scientific knowledge is more nuanced than a simple rejection; it may equally be noted that the social work’s embrace of social science is not unequivocal. Far from a mechanical, procedural or impersonal process, social work acknowledges that evidence based practice involves “conscientious, explicit and judicious use of current best evidence” (Sheldon & McDonald, 2009 pp 68, Nevo & Slonim Nevo, 2011). Scientific knowledge is derived from a process of enquiry whose attention is inevitably selective and partial; its conclusions are theory dependent; and its lessons are often subject to cultural and discursive qualification (O’ Hear, 1989 p256). More specifically, the generalizability of scientific research relating to human subjects may be questioned on the basis of individuals’ capacity to exercise agency in respect of and in response to interventions (Trinder, 2008).
(b) Care and control
The position of social work with regard to evidence-based practice is further nuanced by its classic positioning at the crossroads of personal troubles and public ills (Mills, 1959). Social work practice has been seen in varying degrees to promote, on one hand, individual welfare needs and personal growth and on the other to promote the empowerment of marginalized groups in society (Payne 1997). In its characteristic concern with balancing care and control, social work has been defined as encompassing three distinct strains; a social justice strain, a therapeutic/personal empowerment strain, and a governmental strain (Payne, 2005). In light of these characterisations of social work practice, the disciplines purported affinity with social science is situated in a more multi-faceted context than simple risk calculation.

By contrast, a legalistic model of child protection social work has been seen to preclude relationship-based practice and stifle social work’s capacity to facilitate personal growth and positive change in the lives of service users (Howe, 1997); and an over-reliance on legal standards has been impugned as promoting narrow, reductive and rationalist practices in child protection (Parton 1997). Before, however, social work’s interest in balancing care and control is identified as a site of disciplinary opposition to law, it should be noted that social work’s concern with social justice is a matter of some contestation within the discipline itself. In accounts of social work practice, on one hand, we see the extent to which the pursuit of social justice on a societal scale is a central to social work being called into question (Mc Donald, 2006); on the other, we see impassioned articulation of social justice as the soul of social work practice (Rogowski, 2011). Against the backdrop of contestation regarding the essential nature of social work, an alleged impoverishment in social work practice should not perhaps be seen in terms of a straightforward cause and effect involving the discipline of law.

In this regard, it should also be noted that concerns regarding a legalistic approach to child protection have occurred in a context of increasing social inequality and impoverished welfare services. Consequently, a change in prevailing ideologies against welfare in favour of neo-liberalism emerges as a parallel or supplementary explanation of an alleged hollowing out of social work practice so that it becomes a sterile and punitive policing of the marginalised of society (ibid.). If law then plays a role in diminishing or marginalising social work’s capacity to ethically balance care and control in its practice, it should perhaps be understood in the light of internal contestation within the discipline of social work, the fragmented nature of social work across different practice contexts, changes in prevailing political ideologies and inadequate resourcing of practice.
(c) Laws and Rules
In a context where, as noted above, one of the differences noted to exist between law and social work is law’s preference for a normative approach, it is worth noting that the incorporation of rules has been seen to offer certain ethical advantages in risk management. In this regard, use of rule-based solutions in child protection can be seen to reflect trans-disciplinary studies of risk that have identified communicative and participatory strategies as important elements of ethical approaches to risk management in a context of ongoing uncertainty. Given their endorsement within a democratic system, rules of law might on a certain level be seen to be of particular ethical value in this regard. On the other hand, the participative and communicative credentials of legal rules in care proceedings might be argued to be of little more than formal value given the disenfranchised and marginalised status of children and families involved.

Equally, while rules may be an ethical sop to uncertainty in risk management systems, there are also dangers associated with an over-reliance on rules. Across a number of fields, those charged with the management of risk have been noted to adopt formulized approaches dictated as much by the secondary risks they themselves are exposed to in the task of risk management as the primary risks they are actually charged with managing. In child protection, as in other fields, risk-aversion has been identified as a cause of increasingly bureaucratised practice. By these accounts, it is the uncertainty inherent in risk-based practice combined with a culture of blame that causes legislators, managers and professionals to take refuge in increasingly regulated practice at the expense of potentially more successful approaches. This dynamic wherein professionals, in the face of uncertainty in managing risk defensively adopt increasingly procedural approaches, has been pithily characterised as a displacement of good practice by defensible practice (Roche and Stringer p77-78).

While the use of rules and practice prescriptions has been much maligned in child protection however, it is those imposed at organisational level rather than rules of law that have caused most controversy. It is interesting to note then that the law’s primary affinity for rules is not for rules in a general sense but specifically for rules of law. In circumstances, where social workers have been seen to oppose rules imposed at organisational level which are contrary to their view of how practice should be conducted, it might be wondered whether law might provide discursive ally in the context of care proceedings.

(d) Courts and adjudication
The discipline of law is not identifiable only by virtue of its affinity with rules, it also is connected with particular systems of adjudication. In the common law tradition, of which Irish law is part, the role of the court as a “finder” of law is considered central to law’s legitimation of power. While
courts are of seminal ideological importance within law however, many of the theoretical frameworks that have traditionally provided justification for their work have been rigorously challenged. Once seemingly secure images of judicial processes as neutral and objective, for example, must now share the stage with descriptions of legal adjudication as an activity marked by high degree of subjectivity and reflective of cultural and institutional biases offered initially by Legal Realism, then by Critical Legal Studies and more recently by Post-modernism, Feminism and other contemporary social theories (Davies, 2008). Perhaps more pointedly, courts have been subject to sustained criticism on the basis of their alleged inefficiency and cost-ineffectiveness. In this context, Ireland as elsewhere has instituted a number of specialised courts or issue-specific quasi-judicial bodies.

Criticisms of courts have not just been articulated in general terms; there has been local and issue-specific scrutiny of their work too. In child protection, although in a geographically uneven manner, such scrutiny of courts has made significant inroads in terms of both practice and theory on the international stage. With regard to practice, the Scottish Children’s Hearings System serves as a working embodiment of the view that child protection adjudication can be effected outside of the courts. In an academic context meanwhile, an area of study known as therapeutic jurisprudence concerned with the development of judicial practices and institutions more suited to the welfare needs of marginalised groups has emerged with much to say concerning child protection adjudication (Weiner & Brank, 2013). The proposed reform of the child protection courts and the discussion that surrounds it can thus be seen as another issue-specific challenge to the once hegemonic and unassailable adjudicative power of the courts.

In acknowledging that court reform is a challenge to elements of legal knowledge however, the threat to the power of law it poses should not be overstated. In a landscape of contestation and change, legitimation of power continues to be firmly buttressed by law. Thus if adjudicative reform can be seen to be founded upon challenges to certain aspects of legal knowledge, this is not to say that it is not also underpinned by images of neutrality, objectivity and fairness with distinctively legal foundations. In the context of past adjudicative reforms in Ireland, the enduring power of law is evidenced by the persistent dominance by legal professionals of bodies established with the explicit intention of minimising the role of lawyers (Morgan 2006). In respect of the proposed reform of care proceedings, meanwhile, it can be noted that relevant research projects are largely although not exclusively in the hands of legal academics (albeit working in interdisciplinary contexts)6 and what is currently envisaged is not taking child protection adjudication out of the court system but the

---

6 Both the UCC Research and the CCLRP are being carried out by groups containing a mix of legal and social science backgrounds.
creation of specialised division within the court system. Thus in accordance with the protean capacity of knowledge disciplines respond to challenges to their power, in child protection, the question of court reform has been assimilated by legal knowledge such that it has become a part of legal knowledge as much as a challenge to it.

2.3 Conclusion
In care proceedings, the involvement of social workers and lawyers in the same decision-making process raises the possibility that two disciplines may favour conflicting approaches in response to the same child welfare risk. Reflecting this, in the UK, findings of inter-disciplinary friction at practice level have been the basis of recommendations that greater understanding between social work and legal professionals should be promoted. In Ireland, while there has been no empirical findings explicitly related to inter-disciplinary friction, a view that collaboration between practitioners in care proceedings needs to be underpinned by greater cross-disciplinary understanding is suggested by the recommendations made by the CLRP that child protection training should be provided for legal professionals that work in the area while social work practitioners should adopt certain templates in court reports that are suited to the presentation of evidence in court (Coulter 2015).

However, while some measure of inter-disciplinary understanding may be helpful, it also should be noted that interdisciplinary friction between social workers and lawyers has been deemed desirable because practitioners of both disciplines challenge each other in areas of shared responsibility thereby raising standards overall (Dickens 2005). Thus the question of disciplinary interaction may not simply be a matter of ironing out creases but determining which creases are valuable and which are not. In light of this possibility, it can be noted that the analysis of the nuanced differences between social work and law outlined above raise compelling questions concerning the nature of their court based interactions. Are legal practitioners resistant to the use of empirically validated evidence? Is law, with its rule-based approach to social regulation, a contributory factor in the rise of more authoritarian social work practice in child protection? Does adversarial procedure allow for more rigorous and accurate decision making? How do lawyers respond to bureaucratic structuring of social work practice in care proceedings?

The prospect of policy reform in care proceedings necessarily implies that professional practice can be normatively changed. It does not, however, guarantee that changes made will be compatible with or supportive of the expert knowledge whose application they affect. This chapter has suggested that, by virtue of discretionary actions and the interpretation and application of rules, professional knowledge is a means whereby power may be mediated and resisted in care proceedings. On this basis, taking account of the disciplinary knowledge of practitioners emerges as a pragmatic
prerequisite of instituting change in this area. Furthermore, by setting out how professional knowledge works in combination with normative structuring of practice, the chapter raises the possibility that taking account of it expands the possibilities for reform; just as norms may be changed, practice within them may be changed, thus allowing for a creative figure-ground shift in terms of how particular issues might be addressed. Finally, given disciplinary knowledge was seen above to have distinctive ethical positions on particular issues, in addition to its instrumental value in meeting the challenges of child protection, it can be seen to have a descriptive value in attempting to understand them.
Chapter 3 - Methodology

This World is not Conclusion.
A Species stands beyond –
Invisible, as Music -
But positive, as Sound -
It beckons, and it baffles -
Philosophy, dont know -
And through a Riddle, at the last -
Sagacity, must go

– (Emily Dickinson, “373”.)

This chapter is concerned with methodological issues that arose in this research. It thus discusses methods used, methodological strengths and limitations, and ethical issues arising. This research was commenced prior to the commencement of the other studies of care proceedings mentioned in this paper. Consequently, there is simplicity in its research design that bears the mark of enquiry into a subject matter about which relatively little is known. If however, the field work for this research was straightforward; analysis of the data it yielded involved much nuance and careful consideration. As noted in chapter 1, the prospective reform of care proceedings gives rise to a wide range of issues which interact in complex ways, some of which are located outside of the court process. As noted in chapter 2, the disciplinary expertise of social workers and lawyers that is central to the concerns of this research is embedded in a range of structural and normative forces and is itself something that is fluid and contested. Both of these issues will be acknowledged in this chapter as complicating factors in terms of analysing data and drawing reliable conclusions from it.

Some of the methodological complexity of this research arose from issues already referred to in previous chapters; however, another layer of complexity has not yet been mentioned. Social work and law, as professional disciplines, constitute something that may be understood at but also, to a certain extent, ways of understanding. As will be described below, this dual aspect of social work and law gave the data collected in this research a slippery quality which necessitated a rigorous reflexivity on behalf of the author, particularly in light of his own background as a legal professional. In general, however, the methodological challenges attendant on the inter-disciplinary nature of the research were, as will be detailed below, reconcilable with the overall qualitative and constructivist approach of the research. Indeed given that the research was based on professional perspectives,
what was at issue was partly a mediation of their accounts of practice in light of relevant literature. Thus convergences, divergences, contradictions as well as silences in respect of particular issues were all used to gain a deeper understanding of the inter-disciplinary practice.

3.1 Method

This research is primarily based on semi-structured interviews with 8 participants all of whom had professional experience in social work or law in care proceedings. In selecting participants, disciplinary professional identity and the role customarily performed in the context under examination was taken into account. Thus the sample was managed not only to include 4 social workers and 4 legal professionals, but also to include a cross-section of the practice roles care proceedings. Consequently, the following professionals participated:

Social Work Professionals

* A child care manager
* A statutory social work team leader
* A statutory social worker
* A guardian ad litem (GAL)

Legal Professionals

* A judge
* A barrister
* A Solicitor who customarily represents the child protection agency (agency solicitor)
* A Solicitor who customarily represents parents (parents’ lawyer)

The motivation for making a selection based not only on the disciplinary identity but on the courtroom role of practitioners was to involve a cross-section of the professional roles that would be involved in a typical case. Particularly in light of the importance of normative shaping of practice highlighted in chapter 2, it was felt that by getting a variety of perspectives on the central inter-disciplinary interaction, perspectives could be triangulated in order to build a rich three dimensional image of it. The selection of a child care manager might be seen to be questionable in that this role might be seen to stand apart from those of the social worker or lawyer; indeed, it has been suggested that along with the two disciplines under examination in this study, managerialism is one
of the three most influential discourses in child protection (Lees et al. 2013). However, while the distinctiveness of the perspective of the child care manager was a factor that was taken into account in data analysis, in a context where the normative differentiation of disciplinary knowledge is one of the central interests of this study, a decision was taken not to exclude the manager on the basis of it.

All of the participants involved worked predominantly in Dublin or in nearby areas, notably the north east. Given that geographical variation has been found to be a feature of care proceedings (Coulter 2015), this can be regarded as a limitation in the research design. All participants were previously known to the author except for two that were “snowballed” from other participants. Prior acquaintance where it existed arose either from previous research the author had conducted with them or from contact the author had in his role as practicing a barrister. Given that it was a concern the author’s professional identity might colour the participants’ responses, the author’s status as a researcher was made explicit, casual dress was worn for interviews and interviews were conducted away from the courts in all cases bar one.

In advance of data collection, participants were provided with an opportunity to read through a description of the research and its aims. In this context, they were informed that they would not be identified by name in any publications arising from the research. In order to protect the privacy of children and families they were also asked to refrain from describing individual cases in a way that might give rise to the identification of those involved. Furthermore, in order to be fair to professionals who would not have an opportunity to reply, participants were asked, when identifying particular situations or practices, not to refer to professionals by name. The interview schedule used was the same for all participants. It consisted of three themes:

* What the participant considered good and bad legal practice in care proceedings,
* What the participant considered good and bad social work practice in care proceedings, and
* What the participant experienced as the merits and challenges of care proceedings.

The interview schedule was broadly reflective of the triumvirate concerns of the research, namely social work, law and care proceedings. The openness of the schedule facilitated the collection of extensive and varied data and allowed for a conceptual and theoretical openness suited to research of a previously un-researched topic. Crucially, it allowed participants to construct their own narratives rather than be constricted by overly constractive questions. Interviews lasted between 45 minutes and 1 hour. Upon completion, each interview was transcribed from an audio recording. All interviews were then read and reread. Summaries and reflective notes were also made. Interviews
transcripts were then analysed thematically. The themes used were selected with reference to the aims of the study and literature reviewed. These themes were sub-categorized accordingly.

3.2 Interdisciplinary Research

The inter-disciplinary nature of this research presented methodological challenges. The purpose of inter-disciplinary research is not to remain completely external to and free from any influence of the disciplines involved; it has been suggested, rather, that the benefit of interdisciplinary research is found in the interpenetration of disciplines in a way that transformatively redraws epistemic boundaries (Fuller, 2004) Forging a new path, however, in a terrain already heavily marked by disciplinary incursions of social work and law such a child protection was a challenge. In this context, the challenge of was met through reflexivity regarding disciplinary knowledge, careful mediation of data collected from practitioners of both disciplines, and a wide breadth of reading including, not only literature from the fields of social work, law and child protection but also, most notably, cross-disciplinary accounts of risk, sociological accounts of professional practice and methodological texts.

In conducting this research, the author’s background as a legal professional with experience of practice in care proceedings can be seen to have raised the possibility that his disciplinary identity and experience of the process under examination might colour analysis of the data collected. In this regard, in keeping with what has been seen to be a feature of qualitative research, it should be noted that complete avoidance of subjectivity was not insisted upon in conducting this research. Nevertheless, efforts were made to utilise the author’s knowledge while not allowing personal experience prejudice responses to the data collected. A rigorous reflexivity was thus adopted to ensure that the analysis carried out in this study of data in light of relevant literature was not distorted by disciplinary prejudices or specific experiences of court proceedings.

Many qualitative approaches looking at “law in action” used an ethnographical approach that was seen to be useful at bringing out disparities between professed or formal approaches and approaches espoused in practice. For this study however, an ethnographic approach was not used due partially to ethical considerations. Observation of the intensely private world of child care proceedings and the resulting intrusion into families lives would not be justified it was felt at this initial exploratory stage in studying child care proceedings; particularly, given the relatively diminutive scale of the study being undertaken. An ethnographical approach though might prove useful in a subsequent study of child care proceedings; particularly if such a study was supported by more quantitative data and further qualitative data encompassing the experiences of non-professionals in child care proceedings.
Ethical Research

Chapter 1 noted that the complexity of the overlapping and interdependent significances of care proceedings means that understanding and reforming the process requires a high level of analytical sophistication. The situated nature of the legal procedure in wider social structures means that the work of the court can neither be understood nor be treated as a discreet entity but needs to be considered with reference to a wide range of factors. On this basis alone, it can be suggested that research of the work of the courts in itself cannot offer water-tight solutions to the issues raised by care proceedings but that a much wider perspective needs to inform their consideration. It should not be assumed, however, on the basis of this positivist acknowledgement of the limitations of research of the court based process that the key to the resolution of all the problems of care proceedings is in more data from more research.

Care proceedings encounter and encompass diverse, and contested values that may be deeply embedded in societal norms, professional cultures, political ideologies, and personal convictions and experiences. Normative or theoretical frameworks can certainly be useful in critically evaluating care proceedings: recent criticisms of the process based on an analysis informed by a children’s rights analysis demonstrate this (O’Mahony et al). However, while empirical research has the valuable capacity to connect cause and effect, to validate or disprove particular claims made or demonstrate inconsistency; it cannot ascribe value to the particular ill that is the focus of the risk assessment nor the costs, social and economic, and indeed countervailing risks involved in managing the risk.

Fundamental questions like what is “good enough parenting”; what constitutes “serious harm” to a child’s welfare; at what point should family support be succeeded by mandatory state intervention may certainly be illuminated by research that connects cause, whether that be in terms of parenting or state intervention, and effect in terms of child welfare outcomes, but ultimately evade technocratic resolution. Thus it may be observed that the application of audit technologies in child protection practice, policy or research can lead to ongoing moral and political conflicts being papered over by the appearance of technocratic regularity. (Scherz 2011).

In acknowledging the essentially value-based nature of much of what is at issue in the reform of care proceedings, important ethical considerations arise in relation to inclusion of families and children. Contemporary social research has increasingly acknowledged and been interested in, the multifariousness of subject positions and experiences, albeit in a way that is not uniformly manifest across different disciplines and fields of enquiry. (Roseneil & Frosh 2012). An observation that child protection practice is fundamentally political may be seen to refer not only to its connection with the political organs of state but may be seen to reflect a broader political contingency wherein the
legitimacy of practice must be referenced within a range of “relationships and activities that reflect power and value differences” of a wide range of stakeholders [Reisch and Jayshree 2012]. In this regard, perhaps the most serious limitation of this research, and it might be added other research in this area, is the failure to thus far to substantively include the perspectives of children and families involved in care proceedings. The UCC research group has included consultation with parents and children in its plans for further research in this area (O’ Mahony et al. 2012). Given the ethical importance of the perspectives of those who will be most affected by reform in this area, it must be hoped that this research lacuna will soon be addressed.
Chapter 4 – Inter-professional Practice

It’s not like any other court. Nothing is black and white.

(Research participant)⁷

In examining the practice of social work and law in care proceedings, this research has both descriptive and critical aims. The descriptive aim, arising in a context wherein the impact of disciplinary practice in this context has not previously been explored, is to recount how the disciplinary knowledge of social work and legal practitioners is applied within particular normative contexts, with particular results in terms of child protection outcomes. The critical aim, arising in a context where the process is due to be reformed, is to apply the resulting improved understanding of disciplinary practice and care proceedings to the question of how both of these areas might be improved. This chapter, which describes the data collected in this survey, goes some way towards completing the first of these aims and thus also provides a basis for progress in the second.

Understanding professional practice within a particular discipline involves conceptually distinguishing professional knowledge from the elements of practice resulting from legal constraints, resource limitations and other contextual pressures arising in the field. However, the distinction drawn between disciplinary knowledge and practice structures cannot be total; normative frameworks and resource constraints are an inherent and constitutive part of professional practice; to ignore them entirely thus would be to construct an image with little descriptive value. Professional practice can thus be seen to give rise to a paradox in that many of its constitutive elements may be considered, in terms of its nominal identity, to be external to it. The difficulty of navigating this inherent tension is reflected in the observation made that social work and legal professionals working in child protection systems tend to blame one another for problems whose roots are, in fact, structural rather than disciplinary (Dickens 2008).

In the data collected for this research, the normative conditioning of the disciplines under examination was most clearly manifest in descriptions of the distinct roles performed by professionals in care proceedings. Within these roles, not only were the specific responsibilities of practitioners differentiated; data revealed that the application of disciplinary knowledge was also pointedly textured. Indeed, as will be referred to below, the tendency of certain roles in care proceedings to draw practitioners outside the normal framework of what would be expected from a professional of the relevant discipline was noted in some instances. If, however, the delineations of

---

⁷ This quotation is from the agency solicitor interviewed for this research.
disciplinary practice emerge within the data as somewhat fudged by normative forces, they are not, as will be seen, entirely obscured.

This chapter describes the practice of law and social work in care proceedings in three steps. It begins by looking at the different roles played by practitioners, setting out what participants saw as the key responsibilities and competencies associated with different roles. It then looks at some of the other structural aspects of their work, noting the specific effects of issues such as shared responsibilities, timetabling of cases, and court buildings within each discipline. It finishes by looking at disciplinary positions in relation to some of the more fundamental issues that arose in the data, such as the adversarial nature of proceedings, the problem of uncertainty in care proceedings and the nature and extent of court influence in child care cases that come before the courts. In dealing with these three aspects of disciplinary practice, not only does a clearer image of the practice of social work and law emerge, but fresh light is shone on many of the issues that are central to reform in this area.

4.1 Responsibilities & Competencies

The application of social work and law in care proceedings, as already noted in chapter 2, is filtered through role differentiation so that professionals of the same discipline have different responsibilities and are subject to different pressures in their work. The importance of this role differentiation was reflected in the data collected, in that participants in this research frequently referred to the particular roles played by professionals in the court process. Reflecting the prominence of role differentiation in the accounts of participants, an outline of what were viewed to be the key responsibilities and competencies associated with particular roles is set out in this section, with a more comprehensive account of these set out in Appendix One, as already stated. Its inclusion here is partly justified on the basis that it, in itself, enriches our understanding of the practice of social work and law in care proceedings by describing key elements of it. In this regard, particular priorities and understandings are revealed that add to images of practice that can be constructed from other sources. Perhaps more importantly, however, its inclusion provides the descriptive foundation for the analysis of the role played by disciplines in care proceedings that follows.

(a) Social Work Professionals

The chief responsibility of social work professionals in care proceedings was seen to involve “making a call” in respect of whether a child needs to be in care or under supervision. Ancillary to this, participants of both professional backgrounds spoke of the need for social workers to be able to provide a transparent account of their practice and a reasoned basis for their decisions; this was
connected with the ability to write good court reports and deliver oral evidence confidently and convincingly. Decisiveness and analytical thinking and a high level of organization were highlighted as crucial qualities in this regard. An up-to-date knowledge of research was also mentioned as a competency of the role.

(b) Agency social workers

Agency social workers, as principal instigators and prosecutors of cases, were acknowledged to be key figures in the process. In this, it was seen to be of primary importance that agency social workers be fair and impartial. In the view of the judge, the credibility of the entire child protection system rested on the integrity of statutory social workers. Personal qualities such as humility and empathy were also seen as important qualities. Experience was highlighted by a number of participants as a key determinant of successful interaction with parents.

The lawyer for the parents, however, criticized the assessments of statutory social workers as often reductive and biased in their descriptions of parents’ lives and capacities, citing young social workers as being, in spite of their inexperience, sometimes arrogant and condescending in their dealings with parents. Such an approach was alleged to exacerbate conflict between the parties and damage any possibility of working to improve the capacities of parents.

(c) The GAL

The GAL interviewed in this research self-identified as the “eyes of the judge on the ground” and stated that in writing a court report the intention was to speak directly to the judge. Like agency social workers, “making a call” was also deemed a key responsibility of the GAL; the GAL noted that, in certain cases, recommendations made had resulted in a complete turnaround from what the agency had sought in a case as a consequence of his/her important role in identifying and securing services for the family and children.

The role of the GAL was considered to be of the utmost importance by the judge and barrister interviewed. Central to their evaluation in this regard was the belief that independence allowed GAL’s to fully engage with the views and best interests of the child, without the effects of institutional constraints and pressures that arose for statutory social workers. Accordingly, the judge described the role of the GAL as holding up a mirror to the system.

In contrast with these positive accounts, the agency social work professionals, the lawyer who represented the agency and the parents’ lawyer expressed strong reservations about the role of the GAL. These reservations related to a range of issues related to GAL’s overstepping their role,
unreasonably seeking additional services in cases, unnecessarily using legal representation and adopting conservative and predictable positions.

(d) Solicitors and Barristers

The chief responsibilities of lawyers in care proceedings were seen to involve giving legal advice, preparing clients for court, negotiating with other parties and presenting evidence to the judge. In terms of competences, lawyers valued colleagues that were approachable and not under-handed in their dealings with the court. Social work professionals, meanwhile, valued lawyers that were well organized, would put their cases strongly and not be afraid to stand up to the judge. Some social workers also valued being represented by lawyers who would robustly test the strength of their position in pre-trial preparation.

“A good lawyer puts me through my paces; prepares me; challenges me.” (Guardian)

In general, lawyers were seen to be professional and well organized in carrying out their tasks, although some issues, which will be discussed in more detail below, were reported as problematic by other professionals, sometimes including a combative court room style and an intolerance of uncertainty in child risk assessments.

(e) Parents’ Lawyers

Owing to the multiple challenges often arising for parents, including mental illness, personality disorders, addiction, cognitive incapacity, literacy difficulties, and the traumatic prospect of losing their children, the task of representing parents was characterized as a particularly onerous one.

Within the court process, parents’ lawyers were seen not only to promote the interests of their clients; they were also noted to play a role in explaining the child protection process to their clients and in helping them to come terms with their situation. The barrister interviewed suggested that the work of parents’ solicitors went well beyond the role of lawyer, encompassing aspects of teaching, counselling and social work. Despite the universally acknowledged difficulty and importance of the practice of parents’ lawyers in care proceedings, some serious issues were reported in this area. These issues, which will be revisited, related to the resourcing of these lawyers who were seen to be often significantly overstretched in terms of workload and lacking access to expert evidence to support their clients’ cases.

(f) The Judge

The judge was generally recognized to hold a very influential position in the court process. Perhaps surprisingly, this influence was not primarily spoken of in relation to decision-making power in
respect of the outcome of cases, but in respect of influence on the general conduct and the prevailing atmosphere of a case. The judge interviewed for this research underlined the importance of listening in the role. Other participants referred to controlling the conduct of lawyers, controlling the scope of the inquiry as important responsibilities.

It was noted that judges should be impartial and decisive and promote a constructive and professional atmosphere around a case. Agency social work professionals strongly criticized the tendency of some judges to become emotive. They considered a calm and professional approach preferable. Being respectful to all parties was widely acknowledged as a laudable characteristic in a judge. The issue of emotive practice is considered in more detail below in the section that deals with adversarialism.

A great deal of concern was also expressed about inconsistency in the work of judges. In terms of their disposition towards parties, images of judges ranged from those who were seen to be prejudiced against the agency and disrespectful of social workers to those who were perceived to be a “push-over” for the agency. Some judges were held to be respectful of parents while others were not. This can be seen to resonate with the issue of inconsistent thresholds identified, as noted in chapter 1, by other research in this area (Coulter, 2015). It is revisited below in the section that looks at decision-making.

4.2 Inter-professional Issues
Some of the issues that were noted to arise between practitioners in care proceedings arose in respect of areas where their roles overlapped, intersected or where there was a lack of clarity regarding their role.

(a) Overlap
Between statutory social workers and their lawyers, friction was revealed to arise sometimes around legal advice. In this regard, statutory social workers reported that disagreement most commonly involved a difference of opinion regarding whether a legal threshold had been achieved in a particular case. In this regard, one social worker noted that the insistence of lawyers sometimes “blurred the line between giving legal advice and refusing to take instructions”. One of the things that was interesting in the data collected in this research was that risk aversion emerged as a factor in how these disputes were settled so while social workers were seen to stand their ground in instances where their lawyer felt a threshold had not been achieved in cases where the lawyer deemed a matter more serious than a social worker, it was noted that a case might be escalated.
From the point of view of this research, however, what is perhaps most interesting is that the overlap crossed the disciplinary divide. It is not simply two professionals offering competing views on the same matter, it is two disciplines. Such tension reflects an overlap in the responsibilities of lawyers and social workers in legal proceedings where both social work and legal knowledge lays a claim in determining whether a risk is of a certain magnitude.

(b) Intersection

Issues of great importance to practitioners were not only issues pertaining to where their attentions overlapped, but also to areas where their practices intersected. Among legal professionals, in this regard, particularly the judge and agency lawyer, the delivery of clear and concise court reports was considered to be of greatest importance in social work. The court report was highlighted as a key means by which social work becomes amenable to judicial scrutiny. Legal professionals expressed dissatisfaction regarding the quality of court reports. In this regard, their testimony presaged, to some degree, the recommendation of the CCLRP (Coulter, 2015) that reports should be tailored to the order sought. The judge, while appreciating that every report would not be the same in terms of its content, felt that standardization in terms of layout and content would be helpful.

Legal professionals interviewed emphasized the importance of the rules of evidence as a means of bringing social work assessments into a legal context. Consequently, they felt that a basic knowledge of these rules should be something that all social work professionals should have. In this regard, the recommendations of the C.L.R.P were again presaged. In addition to court reports, the ability to give oral evidence was cited by legal professional as a key social work competence. For social workers, meanwhile, these areas of intersection were important too, but in different ways. Thus, the social work professionals highlighted, as is discussed below, the negative effects of lawyers’ combative approaches when eliciting testimony and lawyers’ intolerance of uncertainty and ambiguity in evidence.

(c) Role Definition

In a certain sense, issues that arose in relation to instances of overlapping attentions between professionals might be seen to represent lack of clarity regarding role divisions. Indeed, as will be discussed in the next chapter, insofar as the overlapping attentions rose across disciplinary lines, they might be seen as manifestations of disciplinary jurisdictional conflict, as both social work and law assert their authority in the same area. This disciplinary overlap has been suggested, as will be seen, to be a positive friction within child protection. Lack of clarity in relation to role definition also arose, however, at a more structural level in this research, particularly with respect to the GAL.
One of the criticisms of the role of the GAL articulated by the agency lawyer, was that GALs consistently overstepped their role, and often tried to assume something akin to a case management position. Agency social workers also noted that the aims of GALs’ work, namely to represent the views and wishes and best interests of the child, was already encompassed within their role as agency social workers and thus constituted a systemic duplication. Social workers also complained that GAL s’ recommendation of services was affected by circumstances that took no account of resource availability, and so could result in inequity within the system. The GAL meanwhile looked upon the court as an important means of leveraging resources within the system and underlined the importance of recommending any service that would serve a child’s best interests.

The agency lawyer also questioned GAL s’ consistent use of legal representation in circumstances where (s)he felt it was not necessarily warranted. The view that GAL s did not always need a lawyer was echoed by the judge, although in this case it was felt it should be the choice of the GAL whether to engage a lawyer in a particular case. The legal representation of GAL s was also questioned by the parents’ lawyer who observed that “many believe it’s a bit of a cash cow. The GAL, meanwhile, attached great importance to having legal representation, in terms of testing and presenting evidence and advising on legal issues arising that were ancillary to the central child protection task.

4.3 Court Structures
In addition to the role differentiation and inter-professional practice which raised issues pertaining to disciplinary difference in care proceedings, participants universally spoke of basic structural defects, which, while standing somewhat apart from the issue of disciplinary practice in certain respects, certainly impacted upon it for both legal and social work professionals interviewed.

(a) Delay
When legal proceedings commence, it was noted that child protection practice becomes structured by timeframes associated with the judicial process. These timeframes were a significant talking point among participants, particularly social work professionals. In certain respects, social work professionals were neutral, or even mildly positive, about the way in which court process structures the progress of a case. Statutory social workers spoke about how successive interim orders could be useful in terms of securing the opinions of experts or setting goals with families. The Guardian ad Litem noted also that comprehensive assessment takes time.

However, legal proceedings were also seen to be the occasion of unhelpful delay. One delay was noted by social work professionals to result from lawyers becoming sidetracked in “technicalities” that were not central to the issue of a child’s welfare. Another delay, highlighted by practitioners
from both disciplines, arose in securing a date for a Care Order hearing; this delay was seen to have no child welfare basis, but was considered to be the result of administrative backlog within the court system.

Of all delays mentioned by participants, the issue of waiting to be heard on scheduled court days was what attracted most negative comment. In this regard, it was universally noted that court days frequently involved extensive periods of waiting in court buildings, without certainty that the case would ultimately be dealt with. Agency social work professionals in particular saw it as wasteful; one social worker stated that (s)he spent approximately 50% of working time in court, much of it waiting. The social worker in question drew attention to the cost implications of this and the impact on other service users. These periods of waiting were also noted to be very disrespectful to parents, and unreasonable and counter-productive for parents already struggling to cope now additionally being expected to manage the time demands involved.

(b) Court Facilities

It was suggested that occasionally time spent waiting could be put to use in negotiation. However, the facilities of court buildings were seen not to be facilitative of this. The Family District Court building in the Dublin Metropolitan District Dolphin House attracted particular criticism from participants. Here, windowless corridors without natural light or proper ventilation combined with a shortage of consultation rooms, to result in lengthy waits in over-crowded corridors.

“Court visits are fraught; with no interview rooms available; Sky News blaring in the lobby; not knowing if you’ll get on; hot airless corridors. The experience is long, complicated, emotionally draining. Parents would need a lot of stamina to be able to cope with a legal process so fraught with unpleasantness, tension, discomfort and frequent and long attendances at court.” (Parents’ Solicitor)

Outside of Dublin, the juxtaposition of child care matters with other cases was noted to compromise the privacy of families. This was especially noted in rural areas, where, for example, a road traffic list with a large number of local people in attendance could be held on the same morning as a child care case. A social worker noted that parents’ names had been announced over the PA in one court (s)he had worked in.

4.4 Adversarial Proceedings

In chapter 1, it was noted that the proposed reform to care proceedings was initially premised on their adversarial nature. In this research, however, the adversarial nature of proceedings, while being criticized in some respects, was also seen to have benefits in terms of improved child
protection standards. Furthermore, the way in which adversarial aspects of a case played out in practice emerged as being more complex than the formal structure of proceedings suggests. In this regard, one finding was that adversity most frequently arises in ancillary matters, rather than in the central care or supervision application; that lack of parental access to services, particularly after a full care order has been granted, is a contributory cause of increased adversity; that the combative style rather than substantive adversity is a significant issue for social work professionals; and that an adversarial approach is not strategically successful for lawyers and most commonly adopted by inexperienced practitioners.

In terms of the overall effects of the formal adversity of court proceedings on the relationship between agency social workers and families, the findings, admittedly, were unambiguously and unsurprisingly negative. Once court commences, it was suggested, matters often descend into an “us and them” situation, the chances of maintaining a good relationship are therefore compromised. Nevertheless, in spite of the destructive effect of bringing a case to court, social workers accepted, as did all of the other professionals interviewed, the necessity for some kind of judicial process to facilitate forcibly intervening in a family’s life to protect a child should the circumstances require. Furthermore, not only did participants accept the need for an adjudicative mechanism, but aspects of the adversarial process were specifically praised.

One participant, reflecting on the adversarial process, commented that the rigorous attention of the court “kept social workers at the top of their game”. Another suggested that cross-examination “rooted out woolly thinking” in child protection practice. Social work professionals interviewed noted that legal proceedings ensured that their practice was organized and transparent. Proceedings, it was noted, encouraged social work practice based on clear goals and measurable outcomes, an effect, which, as will be discussed below, while ambivalently viewed overall, was seen to have some therapeutic value for parents. The court process generally was also held to be hugely important for parents, in that they were listened to and respected in this context. As will be seen below, just as the way in which court proceedings were seen to improve practice was coloured by ambivalence, the way in which they were seen to benefit parents was also subject to important qualifications. However, overall, the existence of adversarial proceedings was acknowledged as necessary by participants and seen to have certain benefits in practice.

In terms of the overall outcome of cases, it was noted that the agency generally “wins” its cases. This, as noted in chapter 1, has been since borne out by quantitative data gathered by the C.L.R.P. The relative strength of the agency in court was not, however, necessarily seen by participants as an indication of the unfairness or futility of the process. For some participants, notably agency social
workers and the agency lawyer, the reason for this high rate of agency success in terms of the outcome of cases was the gravity of cases that come before the court. By this account, the H.S.E. wins cases because it generally brings the most serious cases before the court. Another narrative that emerged in the interviews that reveals the success rate of the H.S.E. in a particular light, however, was the suggestion that it is not always the overall result of a case that it is principally the focus of attention of professionals; frequently, rather, access arrangements, the placement of the child and the provision of services may be mainly what is at issue.

This suggestion that it was issues related to disposition of cases rather than to issues related to threshold determination that were often principally at issue in care proceedings was underlined by the observation, made by a number of participants, that trying to defeat the agency is often a strategic error in care proceedings. The agency social worker, for example, spoke of a gung-ho young barrister that, (s)he felt, was fighting the wrong fight on behalf of parents who were very vulnerable and needed a more nuanced approach. In this regard, rather than focusing on trying to get the child back directly, it was felt an effort to secure frequent contact with the child and services that might enable the parent to work towards increased contact or reunification might be more successful. In a way that resonated with this account of the agency lawyer, the parents' lawyer noted that a judge would almost never return a child home while risk remained. Consequently, the parents' lawyer noted, service provision, access arrangements and care order reviews often became the only ways for parents to continue some relationship with their children and leave the door open for a possible family reunification at a future point.

The parents' lawyer noted that a heavily contested case was not usually desired by parents or helpful to them. However, he nevertheless noted that a quick hearing could not always be advocated, as the parents were unlikely to receive further assistance or support once a care order was made. Thus, on this account, parents sometimes contest cases because the court process is the only chance they have.

“You could go for a quick hearing but in that case, the HSE (agency) would have to show a lot more generosity post-Care Order. Provide support for the family and potentially support and facilitate a re-opening of the case. But that's not the reality.” (Parents' lawyer)

4.5 Combative Practice

A negative aspect of the adversarial process that was widely observed by participants was that it sometimes encompassed a combative or over-dramatic style among some legal professionals. In this regard, a number of participants stated that the conduct of lawyers and judges was sometimes hostile, or even abusive, in court. Agency social workers spoke of being shouted at and threatened...
by judges and enduring unwarranted attacks on their integrity and honesty in cross-examination. In the account of two agency social workers interviewed, the excessively critical tone of some legal professionals, including judges, was associated with disrespect for their professional expertise or prejudice against them.

A number of participants characterized the use of a combative or excessively dramatic tone by legal professionals as an inappropriate cross-over from other areas of legal practice. Interestingly, a combative approach among solicitors and barristers was suggested, not only to be counter-productive in terms of child welfare, but usually strategically disadvantageous to those professionals who used it. One participant observed that such approaches were adopted most frequently by professionals who were not expert or experienced in child protection practice. Legal professionals with experience in the area were seen to have a more temperate, but also more effective, style.

“Good lawyers will not be combative- they’ll whisper you into a corner”. (Guardian)

Participants criticized the sometimes combative or over-dramatic tone of legal professionals, primarily on the basis that it was inherently disrespectful and counter-productive. It was also seen, however, to have a destabilizing effect on social work practice outside the court room. The child care manager suggested that social workers’ negative and unpredictable experiences of courts may have a chilling effect on their decision- to commence proceedings.

“It’s like… let’s wait ‘til it gets so bad the judge can’t argue with us.” (Child care manager)

While participants accepted, however, that a constructive and temperate tone was optimal, it was suggested that courtroom hostility was sometimes a response to unacceptable social work conduct towards parents or families. In this regard, the parents’ solicitor observed that arrogance, condescension or disrespect on the part of social workers could sometimes lead to courtroom confrontation. In situations where families had been badly treated, seeing the social worker getting a dressing-down in court, the parents’ lawyer noted, would allow parents to feel justice, if only for a moment, had been done. The judge admitted to sometimes “losing the rag”.

Even among the social work professionals that were at the receiving end of impugned conduct, ambivalence in respect of combative approaches was detected. Thus legal representatives were characterized as those who had to “fight their corner”, and criticized if they were seen not to be sufficiently partisan. Overall, it was acknowledged that the unacceptability of court behaviour was a question of degree. One participant, for example, noted that a robust process was necessary, and admitted that such a process would occasionally involve powerful exchanges; this participant also suggested, however, that some courtroom conduct went beyond an acceptable level. In terms of
how the correct balance should be struck, the judge, in particular, was seen to play a vital role. It was the attitude and practice of the judge that was seen as hugely influential in dictating the overall tone and conduct of a case.

4.6 Uncertainty
A feature of care proceedings universally criticized by social work professionals was an alleged failure by legal professionals to accommodate the uncertainty of child protection practice. This observation, made by social workers, is corroborated by the view of legal professionals already noted above, that the capacity of social workers to make their practice transparent in this way is a core competency in child protection practice. The difficulty, however, with this, in the view of social work professionals interviewed, was that the demand for reasons does not always accord with the nature of child protection practice, in which little is black and white. Cases involving neglect, as opposed to other forms of child abuse, were alleged to be particularly problematic in this regard. In neglect cases, reasons were less clear and the uncertainty levels were higher than in other types of childcare cases; thus, it was alleged that lawyers were particularly hostile to the accounts and assessments of social workers.

In the context of interdisciplinary friction around uncertainty, the use of “professional judgement” by social workers emerged as particularly contentious. Social work professionals interviewed expressed the view that using their professional judgement was essential, given the uncertainty that inevitably arose in the context of child protection practice. Lawyers, however, were seen by social workers to be hostile to the use of professional judgement as a basis for making decisions. Articulating this hostility in unambiguous terms, the parents’ lawyer expressed the view that professional judgement was used by statutory social workers to shield lazy practice from scrutiny. He questioned the extent to which social workers, inexperienced social workers in particular, could claim to have special insight that could not be explained to the court in rational terms.

Social work professionals noted the effects of how this judicial skepticism and hostility to uncertainty permeated their work, not just the work with families that came before courts. One practical reason for this was that the dynamic and unpredictable nature of child protection meant that it could not be predicted which cases would become subject to judicial scrutiny.

“*You must remember that you could start off working with a case that is at a very low level of seriousness; but a year down the road you could be in court. You could be giving evidence about what you were doing when you were working with that family at that low level.*” (Child Care Manager)
As was noted above, the court’s influence on child protection practice attracted positive comment from a number of participants, including social work practitioners. Judicial scrutiny was seen to promote a specific style of practice that was transparent and accountable, practice that “fitted court”. This style involved keeping of contemporaneous notes and detailed records. It also involved working with families in a way that was explicit, measurable and achievable over a specific timeframe. It was acknowledged that a transparent and accountable style of practice could be beneficial in many cases, as it allows client to see and to strive for goals set out by professionals. On this basis, the influence of judicial scrutiny was seen by one social worker to promote the pursuit of therapeutic goals in certain cases. While the influence of care proceedings was thus seen to be positive in certain respects, social work participants alleged that there was an unhelpful misfit between the clarity and predictability expected in legal proceedings and the way in which many aspects of child protection cases worked. Thus there was a great deal of ambivalence regarding this existing court-fit style of practice.

There is, as already noted in chapter 2, a strong impetus in policy and literature towards evidence-based practice as a means to improve standards in the field of child protection. Reflecting this, a number of research participants referred to the use of empirical knowledge when describing their practice in the context under examination. One lawyer, for example, identified familiarity with up-to-date research as a core competence of social workers. A social worker, meanwhile, noted that a court-friendly style of practice necessitated reference to literature in respect of certain decisions. The G.A.L said (s)he was “bookish” in approach and relied on theory in making decisions in the field. Overall, however, while the use of research knowledge was referred to by participants, its prominence in the data was more marginal than policy and literature might lead one to expect.

Furthermore, in so far as research knowledge and theory was referred to, much of what was said was critical of its use in the field. The parents’ lawyer suggested that research was often used by statutory social workers in a clichéd and reductive manner, without sufficient attention being given to the particular features of the case or the potential of individual parents. This view was partly corroborated by the GAL who characterized use of knowledge by social workers as sometimes lazy. In particular, attachment theory was seen by the GAL to be overused to the point where it lost explanatory value.

“Attachment this, attachment that, the dog’s attached, the cat’s attached... everyone’s attached!” (GAL)
In accounts of child protection social work, references to the use of empirical evidence stood alongside references to creative or imaginative practice. This reflected what a number of participants regarded as the benefits of trying different approaches with families. Such practice was seen to give parents a chance and to allow for new solutions to be devised that might not be standard, but which might be suited to individual families, parents and children. In this regard, the views of participants resonated with a wider and longer running discussion that seeks to cast social less as a science than an art (Gray & Webb, 2008)

4.7 Court Power
In terms of the interaction between court and wider child protection practice, a number of paradoxes emerged. Although court proceedings, as discussed above, were seen to play a significant role in influencing the nature of social work practice systemically, they were seen to have little power to substantively change the outcome of cases that came before them. This might seem paradoxical, given that the ultimate decision-making power in relation to a case rests with the court. Nevertheless, it was noted that what happens in child protection cases is dictated by events that to a large extent, lie beyond the control of the court. Mental illness, intellectual disability, and addiction were noted as customary factors in cases, and thus the availability of services was seen to be a key issue in the outcome of cases. Equally, the development of the relationship between the parents and the social worker was seen to be a key factor.

“The lawyers only get the tip of the iceberg. There’s a lot going on underneath; the case develops elsewhere really”. (Parents’ Solicitor)

The mercurial nature of the power of the court was seen to contribute to the marginalization of parents in care proceedings. Research has shown that parents experience serious difficulties with respect to the child protection system outside of the courts (Buckley et al., 2008) While the legal representation of parents was seen to be vital in assisting them navigate the court process, the lack of support on the ground was ultimately seen to work strongly against them in terms of outcomes. Thus, while the over-burdened nature of their legal representatives counted against them in court, an absence of meaningful support services outside the court process or access to expertise was regarded as a more serious problem for them. In this regard, the parents’ lawyer also criticized the role of GAL on the basis that the GAL ‘s overall position generally supported the agency, and rarely favoured the return of a child in circumstances where it was not also envisaged by the agency. Noting that the GAL was often a former agency social worker and noting that the agency still paid the GAL’s fees, the parents’ lawyer stated that the GAL’s report usually read like “just another social work report”.

41
In the context, of what in some respects was characterized as a marginal role and in other respects a central role, it was noted that the extent of court involvement in cases was often an issue of conflict in care proceedings.

“The balance between court monitoring and court intervention: that’s what a lot of court debates are about.” (Judge)

There was a feeling among social workers that the courts sometimes became diverted into side-issues that were only of marginal relevance the welfare of the child. Social work professionals spoke of how legal professionals can become absorbed in “technical” matters, perhaps at the expense of the family’s needs or the welfare of the child. This was highlighted as arising in “tricky” situations, such as occasions where a child was seen to require a specific service abroad. In such situations, in the view of social workers, lawyers became lost in the minutiae of an issue. This was seen to result in delay and expense, and often be of little benefit or perhaps some harm in terms of the welfare of the child or the family.

“It’s impressive. It’s thorough: dealing with the minutiae of an issue. And that would be fine, but I’m saying hold on a second, there’s a child here”(Guardian)

4.8 Resources
Perhaps the greatest area of contradiction and confusion that emerged in the data concerned the role of the courts in directing the use of resources in the child protection system. Although many participants recognized the general principal that courts do not or, legally, cannot, direct the use of public resources, many participants spoke of the astonishing power of the courts to leverage resources in child protection cases. Agency social work professionals and the child care manager, on one hand, stated that there was no limit to what a child would receive in the context of care proceedings; that because the legal standard was the child’s best interests, what was needed would be provided. On the other hand, it was stated that the courts would direct the provision of resources in accordance with what was reasonable, however, when one professional was questioned as to how “reasonable” would be determined, little clarity emerged.

In terms of the court’s power to leverage resources from the state on behalf of children, the power emerged as working in surprising ways. One of the ways in which it was alleged the court would succeed in leveraging resources was by threatening to have agency senior management come to testify in court. Sometimes, also, the child care manager or agency social workers would deliberately use the power of the court internally within the agency to leverage resources from senior management. Equally, however, it was noted that, sometimes, agency management would be
inclined to divert resources towards a particular child on the basis that a court had directed it, when
the agency social worker, team leader or child care manager would want to challenge the court.

Although the power of the courts in leveraging resources on behalf of at risk children was mentioned
by a number of participants, albeit in circumstances where there was some ambiguity about the way
in which this power works, a number also noted that the court, in some ways, was not well-
equipped to direct resources. The potential inequity of a guardian recommending the delivery of
particular services to a child was mentioned above. This inequity was seen to extend to the issue of
court-directed services, in that directing the provision of services to a particular child or family,
without any reference to or adequate knowledge of the overall availability of resources within the
system, was unfair to other children or families, not before the courts, who might be consequently
deprived of services.

4.9 Conclusion
The image of inter-disciplinary practice in care proceedings that emerges from this data is complex
and in some respects surprising. In this context, social workers and legal professionals were seen to
tacitly negotiate and compromise aspects of their respective professional identities. Thus, legal
professionals were seen to find themselves in facilitative roles and having to sacrifice single-minded
pursuit of a legal victory in favour of other aims and goals. Social workers, on the other hand, were
seen to adapt their practice to a court-friendly transparent and accountable style of practice. Role
differentiation also affected the manner in which inter-disciplinary sympathies would arise. Thus, the
agency social worker defended uncertainty in their practice while the parents’ lawyer who opposed
them criticized the same trait.

If child care proceedings are imagined to be a mosaic that is configured and reconfigured in
accordance with applicable norms and the demands of the specific child protection situation to
hand, the practice of legal and social work professionals might be considered as individual tiles,
mutually distinguishable by virtue of their distinct if variant colours, but which, depending on where
they are placed, serve a quite distinct role in terms of the overall mosaic. The analogy is admittedly
somewhat torturous; but it is, perhaps, aptly so. This chapter has demonstrated that in the practice
of social work and law in child care proceedings professional goals, professional roles, and
professional knowledge are configured in intricate and sometimes unexpected ways.

The prominence of role differentiation in participants’ responses to questions posed about
professional discipline suggests that professional discipline is thought of by professionals primarily in
terms of particular roles rather than directly in terms of child protection impact. Nevertheless,
professionals did have definite ideas about how professional knowledge connected with the process
and the how the process connected with child protection. In comparing the accounts of professional practice, the process and the goals pursued interesting lines of convergence and divergence emerged between social workers and lawyers, as distinctly disciplinary perspectives emerged.

In some instances, such as the criticism of court buildings and facilities, the disciplines spoke in unison. In other instances, such as with regard to combative courtroom demeanours or inconsistent court reports, each discipline had its own issue with the other. In further instances, such as around the issue of uncertainty, contrasting positions on the same issue were seen. Most interesting however, and almost certainly most disquieting, were instances, not where conflicts arose between disciplines, but instances where neither discipline had clear answers in respect of important questions. With regard to the issue of resources, it was not interdisciplinary conflict that that emerged, but a strange trans-disciplinary silence. In the next chapter, the convergences, divergences and silences in social work and legal accounts of care proceedings will be the basis of conclusions and recommendations for further research and reform in this area.
Chapter 5 – Conclusions & Recommendations

The two exercises for identifying perfectly just arrangements, and for determining whether a particular social change would enhance justice, do have motivational links but they are nevertheless analytically disjointed.

(Amartya Sen)\(^8\)

When a child is considered for care; the kind of care to be provided is necessarily at issue. However, the question of how much courts should be involved in choosing the manner in which a child will be cared for has long been a fraught matter. The case of HSE v O’Donnell decided that the court should have a supervisory role beyond the deciding the central question of whether a child goes into care or not, but the extent and nature of this role remains unclear. On analysis of the data collected in this research, although it was revealed that the limits of court’s role remains a contested matter, the conclusion can be drawn that wider considerations should be part of the adjudicative process.

On a formal level, as practitioners interviewed noted, the obligation of the court to decide the case on the basis of the child’s best interests implies that it satisfies itself that the arrangement that awaits it in care is an improvement on what is otherwise in place for a child. On this basis, examining care plans and other aspects of what is termed the disposition as distinct from the threshold aspects of a case are an integral part of courts’ statutorily-mandated work. However, beyond this formal authority, the court’s involvement in matters of disposition is also arguably supported by an analysis of the strengths and weaknesses of the process. The strength of the work of the courts is not after all, it seems from the data collected in this research, in its capacity to make perfect decisions on whether a threshold has been reached but in its capacity to subject the process of taking a child into care to rigorous scrutiny.

The question of the relative weakness of the court process in dealing with the issue of thresholds will be taken up below. But before it is, a difficulty with deciding on matters of a case’s disposition must be acknowledged. Although the question of threshold, with the uncertainty it brings, is difficult, at least it may be discretely answered. Should a child go into care may be answered with a yes or no. By contrast, the question of disposition is potentially infinitely open. In the context where the court lengthily embarking on tangential matters was identified in this research as a problem, the open-ended nature of case disposition is the basis of recommendations for further research into the causes of delay in care proceedings and the judge’s control of the scope of the work of the courts. The fluidity of the role of courts emerged as central to its rigour in that it could potentially take an

\(^8\) Amartya Sen The Idea of Justice Penguin Books 2009 at pp ix
interest in any part of a child’s welfare; so on that basis, norms or rules that restrict the role of the courts are not desirable. Research however, might identify flexible principles that would assist judges in deciding to what extent particular matters warranted court attention.

In respect of how the issue of thresholds (the question of whether the abuse or neglect is sufficiently seriousness in order justify taking a child into care or under supervision) is dealt with in care proceedings, the data collected in this research is worrisome. The CCLRP has already noted inconsistency in the area of thresholds and in this regard, the findings here tend towards confirmation of inconsistency. However, while inconsistency might be considered a bureaucratic reflection of regional differences between court districts or sections of the CFA, this research suggests that the problem may be more fundamental. In this research, lawyers were seen to look to social workers to provide reasons that social workers were unable to provide.

One of the chief points of difference (and tension) between the disciplines was seen to arise from law’s “need for certainty” (White 1998). It is questionable, however, whether a need for certainty is really a discursive peculiarity of law rather than a trans-disciplinary ethical concern. Social workers noted that the nature of the work is uncertain but, if this is so, perhaps the structure or nature of law’s engagement with it needs to be changed rather than suppressing or ignoring an inconsistency at the heart of the system. It has been observed that professionals need to be held to account but that intelligent systems of accountability need to be designed so that, in the words of Onora O’Neill, the assessment tail doesn’t begin to wag the dog (O’Neill, 2013). Significant work has been done in the area of child protection assessment in social work (Buckley et al., 2006). The data in this research prompts the conclusion, however, that this issue needs to be revisited from an inter-disciplinary perspective in order to investigate how assessment frameworks are used and can best be used in the context of care proceedings.

Overall, in this research, practice in care proceedings emerged as contingent upon wider systemic realities such that the court process, while important and influential in some ways, was, in other ways, marginal to the progress and outcome of cases. Again in this respect, the findings of this research can be seen to resonate to a certain degree with the CCLRP whose findings emphasized the provision of services outside of the court process as a way to improve what goes on within them. In this research, a number of participants noted the capacity of family support to help families out of the statutory child protection system or, in some cases, to ensure that they do not enter it in the first place. If this suggested a family’s crossing of a threshold was sometimes a matter of resources however, participants noted that this was not always the case. Cases of abuse and neglect that come
to court were noted to be at the extreme end of the scale and, in many cases, participants noted, resources would not vitiate the need for a care order.

As well as being potentially determinative of the outcome of cases, the availability of resources was also seen to be determinative of how they were conducted. Adversity in care proceedings was seen to be an issue connected with the availability of services. The UCC research, as already noted, identified the marginalisation of parents as a problem in care proceedings. This research found a direct causal connection between this marginalisation and adversity in proceedings with parents being seen to contest proceedings on the basis that once a child goes into care their prospects of support will effectively disappear. Again resonances can be noted here with the CCLRP finding that CFA should support parents after a care order has been imposed (Coulter 2015). It might also be added that in a context where participants characterized the benefit of the court primarily in terms of scrutiny and quality control, questions must be seen to arise in relation to children in voluntary care whose care is not subject to any external scrutiny.

Given that the provision of resources emerged as a crucial issue in care proceedings, it is worrisome to note that in the data obtained for this research, the role of the court and the statutory obligations of the agency relating to same were mired in confusion and contradiction. Courts were seen to powerfully leverage resources on behalf of children although it was stated by participants that to do so was beyond the powers of the court. In respect of what the limits on what would be provided to a child, testimony ranged from provision that was limitless in the face of a child’s needs, to provision that was in accordance with what was “reasonable”. The power of the court was seen to manifest in strange ways and agency professionals were seen to use the leverage of the court in strategic ways within their own institutions. The inequity of courts directing the provision of resources in particular cases without reference to the availability of resources overall was noted.

Returning to the issue of adversity, that was highlighted in the introduction as the initially articulated basis of reform in this area, the widespread recognition among participants of the importance of the existence of adversarial proceedings, notwithstanding the view that in individual cases court proceedings should be avoided when possible, is an important counterweight to other views on this matter referred to earlier in this research report. In circumstances where court adjudication emerged as heavily contingent on wider systemic issues, it is important to note that this research also found that if adversarialism is a problem in care proceedings, it may in some respects be a contextually responsive adversarialism. Parents’ contestation of cases reflected the unavailability of services or poor responsiveness from a social worker. In this regard, the adversarial structure of the
court process can be seen to offer something of an ethical safety valve by giving a voice, even if in some respects, a voice that is not powerful enough, to the marginalised.

In this regard, the existence of an adversarial process must be distinguished from its use. The data revealed that, overall, the initiation of proceedings impacts negatively in terms of child protection and family support. In this regard, the importance of structures around the court process that can divert cases from the court or mitigate its negative effects, such as support groups for parents or mediation services is highlighted. In these areas, we note that there are grounds for much hope. Although still quite localised, work is being done that is specifically designed to support parents in their experiences with the child protection system thus providing a model that can be expanded and improved (Clarecare, 2010, Lindley et al. 2001). Mediation also, long the Cinderella of family law must surely benefit from the institution of new family courts, just as mediation itself is increasingly refining its own position on child protection and welfare.

Despite the claims of the legal system to autonomy, it has been said that legal processes remain embedded in broader historical and social forces (Banakar, 2011). This embeddedness emerged with some force in this research. The contingent nature of care proceedings situates the ethics of professional practice therein in a complex narrative involving changing social values, changing values around the family, changes in the social legal economic families and attendant changes in the ethical status of children. It has been widely noted that popular views on welfare have been robustly reconstituted in recent decades such that welfare, rather than an expression of society’s insistence on social justice and solidarity, is frequently represented as an economically unsustainable disincentive to individual achievement (Rogowski 2011). Meanwhile, images of childhood that emphasize the vulnerabilities and dependencies of children relative to adults serve to extricate children from the moral paradigms that are routinely applied to adults who receive welfare while, high profile abuse scandals, major state inquiries and emotive and extensive media coverage have served to keep child abuse and neglect in the public eye and on the firmly on the political agenda.

The marginalization of parents and the diminution of the therapeutic and empowering potential of social work can be seen to ethically undermine professional practice in care proceedings in a way that is reflective of this fracturing of welfare ideologies. It will not always be possible for individual practitioners to compensate for every systemic short-falling in their individual practice (Marston & McDonald, 2012). However, this is not to say that disciplinary perspectives may not nevertheless provide powerful tools for ethical analyses of child protection issues. Reflexivity and advocacy in and through the range of institutions, such as university departments and professional bodies in which
disciplines are embedded and propagated may play an important role in promoting more ethical and just child protection.

The issue of uncertainty will arguably never be completely resolved in child protection. However, the ethical hazard posed by it may be mitigated. In terms of ethical practice in care proceedings, this research has suggested the availability of family support outside care proceedings may have a crucial bearing on the ethical legitimacy of what happens within them. Nevertheless, while the care proceedings might be rendered more ethical by changes effected outside of the process itself, this research has also pointed to the court process as the site of an interdisciplinary relationship which may not simply mitigate uncertainty but may also, in certain respects, suppress or deny it. On this basis, it seems a great deal of work remains to be done exploring and developing the relationship between the disciplines and the normative structures and resource constraints that shape it.
Recommendations

1. Decision making

Further inter-disciplinary research should be conducted into the compatibility of legal thresholds and social work assessments. This research should explore differences in understanding and approach between different disciplines and the appropriateness of statutory and organisational frameworks.

2. Systemic Transparency

Steps should be taken to make the availability of resources more transparent to courts.

3. Causes of Delay

Further research should be conducted into the causes and effects of delay in order to formulate flexible principles to guide professionals regarding an appropriate court attention in issues of case disposition.

4. Experiences of Families and Children

Further research needs to be conducted that focuses on the experiences of family and children in the court process.

5. User Friendly Courts

Facilities should be made fit-for-purpose and case management systems developed that are respectful of litigants and professionals.

6. The Role of the GAL

The role of the Gal needs to be clarified and structured.

7. Professional Training & Development

Social work professionals should receive training in rules of evidence and work should be done to standardise and improve court reports. Legal professionals should engage in training and development aimed at developing practice styles suited to the context.

8. Mediation and Parental Support

Opportunities for mediation in this area should be improved to support families and avoid litigation where possible. Independent advocacy and support groups should be established to assist parents and ensure that they are not marginalised and disempowered within the system.
Bibliography


Clarecare, (2010), “Listening to our Voices” (Clarecare, Limerick)


O’Hear, A. (1989), Introduction to Philosophy of Science, (Clarendon, New York)


Dr Conor O’Mahony, Caroline Shore, Dr Kenneth Burns, & Dr Aisling Parkes (2012) “Child Care Proceedings in the District Court: What Do We Really Know?” Irish Journal of Family Law Vol. 2, pp 49-56


Sheldon, B. & McDonald, G (2009), A Textbook of Social Work, (Routledge, Abingdon)


