



National Mens  
Council of Ireland

**Parental Rights and the Law**  
in the matter of  
**SCHOOLING**  
regarding Enrolment  
and the teaching of Religion/Morality, SPHE/RSE and CSPE\*

*\* Programmes developed by the Department of Education and Science  
in Religion/Morality; Social, Personal and Health Education/Relationship Sexuality Education;  
Civics, Social and Political Education*

An analysis by the

**Family Rights & Responsibilities Institute**

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# **Parental Rights and the Law**

## **in the matter of**

### **Enrolment & Religion/Morality\*, SPHE/RSE\*, CSPE\***

*\* Programmes developed by the Department of Education and Science  
in Religion/Morality;  
Social, Personal and Health Education/Relationship Sexuality Education;  
Civics, Social and Political Education*

One of, if not the most important duties of a parent is to educate their children - to impart to them a sense of their own value system which governs the way the Family functions and which prepares the children to be an honoured member of a civilised society.

Parents do this - according to their conscience - in a multitude of ways at home, especially in their own behaviour as a role model.

It has become the custom that parents also choose to send their children to a School where the child will have the benefit of receiving tuition from trained personnel with a special talent to impart knowledge in specified academic subjects.

Schools exist to facilitate such parents. As with other third parties in line with the NANO principle which states that where there is No Agreement No Involvement can take place, both parents in the Family founded on Marriage must wish for their child to go to the same school before the child can be lawfully admitted. The Constitution recognises this Natural law in Article 42. 3. 1 where it states,

*“ The State shall not oblige parents in violation of their conscience and lawful preference to send their children to schools established by the State, or to any particular type of school designated by the State.”*

In Law a school can only admit a child if it has the joint power and authority of the Family unit and that comes from an agreement and joint decision by both spouses.

Where a family decide to use the services of a school the Board of Management and teachers in that school act "in loco parentis" and literally are required to “occupy the place of the parents” for each child whilst under their care for instruction in academic subjects. The school never assumes any rights or responsibilities over any child, but agrees to carry out the wishes of each Family.

In specified academic subjects the wishes of parents are simply that their child is equipped by the school to understand concepts and be shown how to problem solve in an effort to become more numerate and literate. This is regarded as a universal wish of parents and it is accepted that, in this area of schooling, there is broad agreement.

If the school is to additionally take on the task of teaching our children "values" it is obviously vital that there is no clash or contradiction to the value system that the child has assimilated from their family at home.

Any deviation from the child's accepted home values will create turmoil in the mind of the child and will necessarily lead to the child to accept one set of values to the rejection of the other which will ultimately lead to serious problems at home or at school with discipline.

It is imperative that if the school is to attempt to teach "values" that every parent is satisfied that the "values" that the school is intending to teach are consistent with those held in their home.

This almost insurmountable difficulty makes one wonder why the schools would even attempt such a impossible task.

Given that there is an attempt to do so - and the core reason for having decided to do so must be questioned as to who assumed the authority to initiate such a national programme in the first place - there is a necessity for absolute transparency by the school as to their intentions and any proposed programme must be made fully available - including guidelines, teaching materials and resources - to every parent for their close scrutiny.

Before any programme can be started every parent must be satisfied that the values contained in the school's programme and all the teaching materials meet with their approval.

This fact is accepted by the Department of Education and has prompted them to require that every school set up a "Policy Committee" to co-ordinate the design of a policy for Religion-Morality/SPHE/CSPE that meets the approval of all the parents and the Board of Management.

It is the duty and responsibility of the Patron and the Board of Management to deliver and safeguard the designated Ethos of the school. In the case of a Roman Catholic School every parent has elected for that school so that their children would benefit from the accepted and traditional Roman Catholic Christian Ethos and it is the duty, first and foremost of the Patron and the Board of Management, to ensure that any programme which is intended to impart a set of "values" to our children is fully consistent with the teachings and Ethos of the Roman Catholic Church.

What needs to happen very quickly is that parents need to be given access to the teaching materials that the Principal and teachers have themselves chosen to deliver to our children and for the school and parents to create the "Policy Committee" to design a programme that everyone is happy with.

This should be possible by simply eliminating any aspects that any individual parent is unhappy with. The NCCA have confirmed that there is no obligation on any school to deliver all or any of the elements of any supplemental programme where they provide resource material for the assistance of schools.

Each school, necessarily governed by its particular Ethos and according to the plan drawn up by the "Policy Committee" is free to take whatever aspects of the programme they feel appropriate and reject any other.

The most important feature is that no parent should feel that any programme taught in their school should be in conflict with their own value system imparted at home and that it is fully approved by the Patron and every member of the Board of Management.

The suggestion that parents and their children should be sidelined by being forced to withdraw their child from the programme is unacceptable for many reasons including the following:

1. According to the NCCA the Religion-Morality/SPHE/CSPE programmes is designed to integrate with much of the rest of the curriculum. This means that it would be almost impossible for a parent or their child to know in advance when aspects of the programme were to be delivered. Withdrawing a child for considerable parts of the school day is too disruptive and upsetting for the child to be acceptable.
2. It is accepted that whenever a child is singled out for special treatment, as in the above scenario, it creates a high risk that the child will suffer as a result of bullying.
3. It is stated in the outline given to parents by the school that if a parent is unhappy with the "values" that the school is to impart that their only course of action is to withdraw their child and "teach the school's "values" (not their own) to the child themselves. This is obviously nonsense.
4. It is also stated in the outline that where a parent is unhappy with the "values" that the school is to impart that the parent has to look after the child themselves whilst the programme is being delivered. Almost all parents have heavy commitments to their employment or to the home and family and would find attending school for this purpose extraordinarily irksome. It begins to question why we send our children to school.

The main objection to the schools approach in the outline is that it could be interpreted as an attempt to bully parents into acquiescing with a programme they might well have serious objections to and this is bound to have very detrimental effect on school harmony.

Surely it is not the purpose of the school's Religion-Morality/SPHE/CSPE policy to alienate parents and their children from the body of the school. Any programme that would have that effect is not acceptable.

**To sum up.**

According to the Department of Education and NCCA and commonsense what needs to happen before any programme can be delivered is:

- A) The Patron and each member of the Board of Management must give assurances in writing that they are satisfied that any Religion-Morality/SPHE/CSPE programme is consistent with the Roman Catholic Christian Ethos that we all chose as the guiding principles for our school.
- B) That when these assurances are in place that a "Policy Committee" be set up in which all parents are invited to participate which will design a policy for the delivery of a Religion-Morality/SPHE/CSPE programme in school consistent with the wishes

of the parents and staff. For this to happen all parents will need to be issued with copies of all the teaching and resource materials proposed to be taught.

Parents send their children to school to be taught academic subjects. We have not signed up for the school to take over our roles as the moral guides to our children. That task remains the right and duty of every parent. If the school would like to do that it can only do so with the full approval of all the parents.

Until a policy of Religion-Morality/SPHE/CSPE is created which doesn't conflict with any one parent's home values the school is not at liberty to start teaching this programme.

For the school to proceed without securing the approval of every parent would be to isolate and exclude that parent's children from the school where no authority to do so exists in law. The school would, in effect, be forcing the parent to withdraw their child from the school, not just from a particular lesson.

Apart from being unlawful, isolating and excluding someone from a group is recognised as a particularly harmful form of bullying and would bring dishonour to any school that would engage in such behaviour.

God bless

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# Schooling and the Family

## How the law supports Parental Authority in Choice of School and in controlling the Curriculum

The Body of a school consists of all the parents and their children, the Board of Management including the Patron and the staff.

This body must at all times act in harmony.

It is anathema to the concept of a school for any part of the body to be in conflict with any other.

A school does not exist for the benefit of builders who want to make a living by providing the physical structures for learning. A school does not exist for the benefit of teachers who would like to earn a living by teaching. A school does not exist for the benefit of the current Minister for Education or the prevailing government so that they can indoctrinate students in their ideology. A school does not exist for the benefit of teachers unions who want to promote and protect the interests of their members.

A school exists simply for the benefit of parents who might like to engage specified adults in a controlled environment to impart elements of knowledge towards a child's education that the parent feels they are not in a position to do themselves for whatever reason. This is stated clearly in the Education Act, 1998 under Section 15(1) Functions of a board:

*15.—(1) It shall be the duty of a board to manage the school on behalf of the patron and for the benefit of the students and their parents and to provide or cause to be provided an appropriate education for **each** student at the school for which that board has responsibility.*

Note the emphasised word “each” in the section which ensures that the focus is on a child as being an individual with a set of parents who have authority and responsibility over that individual child. Simply this means that neither the school, nor the State through the Department of Education and Science, can treat children as a homogenous group and apply rules and regulations to them without receiving authority to do so for each child from its own parents.

It has perhaps been taken as a ‘gift’ of government and not fully realised that both national and international law have for centuries that parents are the primary educators and are free to educate their children according to their philosophical and religious convictions without fear of interference and scrutiny by a third party and free from political and social indoctrination by the government. Whilst this position is supported by Bunreacht na hÉireann, it is not confined to parents in Ireland. Indeed it is universal as can be seen by the United Nations’ Universal Declaration of Human Rights

*Article 26.(3) Parents have a prior right to choose the kind of education that shall be given to their children*

and the European Convention on Human Rights in Article 2 of Protocol 1,

*No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religions and philosophical convictions.*

This provision aims at safeguarding the possibility of diversity in education, which, the upper courts have said, is essential for the preservation of democratic society. This provision does not guarantee the right to certain kinds of education, but ensures that there should not be indoctrination through the school system especially in the provision of sex education through the school system, or health promotion strategies.

Furthermore every country in the world have signed up for the International Covenant on Civil and Political Rights which is fully enforceable

*Article 18*

*• The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.*

Nationally the “Objects of Education Act Education Act, 1998” are shown in Section 6 (a) as "to give practical effect to the constitutional rights of children as they relate to education"; these rights are enumerated in Article 42.1 of the Constitution where,

*"the State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children."*

(see below for these and other important legal references as well as a reference to The Family in the Social Teaching of the Church by William L. Saunders, Jr.)

These principles are also echoed in Catholic teaching whereby the Family exercises autonomy and a child's best interests are presumed to be found under the care, guidance and protection of its parents/Guardians exclusively.

Thus, in the Declaration on Christian Education, the Church asserted that (a) the parents are the primary educators of children, (b) that such education prepares children to take their place in society and the Church, and (c) that the role of the State is to assist parents in this task.

The Declaration on Religious Liberty (Dignitatis Humanae, Dec 7, 1965) echoed a theme from the Declaration on Christian Education.

*The parents “have the right to decide in accordance with their own religious beliefs the form of religious upbringing which is to be given to their children. The civil authority must therefore recognize the right of parents to choose with genuine freedom schools or other means of education....*

*Furthermore, the rights of parents are violated if their children are compelled to attend classes which are not in agreement with their religious beliefs of the parent or if there is but a single compulsory system of education from which all religious instruction is excluded.” (DH 5)*

Students of a school are the full responsibility of their parents/Guardians both at home and during school time and these students have no lawful right or need to be afforded any independent control over their education by the school whilst at school or outside. A child's signature, being of a minor until they reach the age of eighteen, has no weight in law and any requirement from a school that a child itself signs any document is unlawful. The child is always under the full and exclusive legal authority of their Guardians and a school is in error if it attempts to undermine that position. The parent/Guardians exclusively are fully liable for the actions of their children.

The children in a school remain 100% under the authority of their parents/Guardians who are not, in law, entitled to alienate (give away or transfer) their authority to any third party or body including a school or government department. To do so would be tantamount to failure and neglect of duties.

The school acts "in loco parentis", on behalf of the parents. In legal terms the school has no interest in the child's education separate to that of the Married parents. This means that the school has no authority over a child except where this is secured in advance by the written application of all a child's parents/Guardians. The Board of Management are an essential element of the management of the school. They can not override the authority of the parents/Guardians and must at all times understand their position as being an integral part of the body of the school that must remain in harmony. They obviously can not act independently contrary to the authority and wishes of a parent.

Furthermore if a school affirms that it operates under a specific ethos, say the Roman Catholic ethos, then what this will entail for a family must additionally be made absolutely clear in writing by the school to all prospective parent/Guardians considering enlisting the support of the school in their education of their child.

A parent/Guardian is entitled to know in advance, in writing, that a school accepts the aforementioned lawful relationship that must exist between the school and the parent before enrolling their child. By doing so the parent/Guardian and Board of Management are entrusting each other with the shared responsibilities necessary for the operation to work successfully.

One of the vital functions of a Board, as required by the Education Act, under Section 15 (1) d is to:

*publish, in such manner as the board with the agreement of the patron considers appropriate, the policy of the school concerning admission to and participation in the school,*

Therefore, for it to be considered lawful for a school to have a child on its premises the school enrolment form and any “permission slips” must clearly indicate that the school

will at all times respect the authority of the parent/Guardian in relation to their child and it must require the written consent and approval of all the child's Guardians.

Failure to secure this for all parents/Guardians and for the school to teach such a child is a crime. The law on what would be considered an abduction by the school is covered by the Non-Fatal Offences Against the Person Act, 1997 - Section 17 - which makes it an offence with a prison sentence of up to seven years where any person without lawful authority or reasonable excuse intentionally takes or detains a child so as to keep him or her out of the lawful control of any person entitled to lawful control of the child such as a parent/Guardian.

A Married parent is a Guardian jointly with their spouse. They are not entitled to act over any significant decision affecting the welfare of their child unilaterally. If they do they are no longer acting as a Guardian and a third party can not rely on one spouse's consent to lawfully do anything with the child. A third party is not entitled to refuse to hand over a child to the child's Guardian when requested. To do so is a crime. (see legislation below)

In the past a school could have relied on the consent of one parent being the representative of the family as a unit. Sadly this is no longer the case. Family breakdown due to the failure of the state to properly protect Marriage means that signatures of all Guardians are necessary. Often these days, following a situation where one parent has left their Marriage, they would have secured Orders from a Court dealing with how their child's upbringing might be shared between them and the other parent. These court matters are deemed "private law" in that they are relevant only to the members of the family exclusively. None of what goes on in family law is available to the public. Indeed it is an offence for a person to make public what happens in family law proceedings, including showing court documents, like orders and applications to any third party such as a school. Responsibility for their child's welfare remains exclusively within the control of the parents and any orders made in these private law matters have no bearing on the parental authority and autonomy of the parents in their dealings with third parties. (see below for Supreme Court precedents)

For a parent to try to eliminate the other parent from being treated with full respect as a parent/Guardian by a school is a very serious matter. For a parent to provide false information about the status of the other parent to a school is a very serious matter.

When a parent/Guardian or parents/Guardians in the case of a Married Family enrol their child they are giving their consent that the school can teach a curriculum which has been agreed by the Department of Education/NCCA and for which they are accountable to parents. We call this the mandatory curriculum and it consists of the core subjects of Maths, English, Irish, Geography, Science etc taught by the school using textbooks and workbooks approved by the Department of Education that can be inspected by parents. Under the Education Act of 1998 a school must teach this mandatory curriculum to qualify as a "recognised school" and be eligible for grants towards the salaries of teachers and equipment etc.

These core subjects, that form the mandatory curriculum, must not contain any contentious elements and must be universally acceptable as well as being open to challenge by any parent or body. They must be values-neutral and of a predominantly academic nature and contain no elements that might be considered verging on social engineering.

Any other matters which might be usefully presented to a child whilst at school are supplemental to the core subjects. They are, by nature, non-mandatory and this is how they are designated by the NCCA and by the Department of Education. (see below for reference to Department of Education official position)

The Department of Education does provide resources for certain supplemental programmes but stresses that parents are free to choose or reject any part or whole of them. The Department of Education also stresses that it does not approve of any textbooks or workbooks or teachers guides for any supplemental programmes such as Religion-Morality/SPHE/CSPE and other values-laden programmes.

The Department of Education is however guilty of dissimulation by incorporating these facts within its position papers but not making it much clearer to the casual reader that whilst Religion-Morality/SPHE/CSPE is part of the mandatory curriculum, the specific aspects that any school can teach are arbitrary and entirely subject to the wishes and approval of parents.

Thus any supplemental programme like Religion-Morality/SPHE/CSPE can not be contemplated by a Board of Management or a teacher or its union without it being approved by the parent body. As indicated the Department of Education are not entitled to propose any non-mandatory education and do not do so. This can only be initiated by a group within the body of the school.

If such a group exists within the body of the school who wish to propose that the school deliver a supplemental programme within the context of the school the group must clearly identify themselves. This group then becomes the 'sponsors' of the supplemental programme. These named individuals must then provide their reasons why they believe the programme would be of benefit to parents/Guardians. There is no question that the sponsors are approved by the Department of Education. The sponsors are accountable only as individuals for their proposals.

Parents/Guardians are then free to decide individually whether they approve of what the sponsors want to achieve and whether they believe the sponsors motives are ideologically and/or morally sound and whether the programme is necessary. Most importantly each parent/Guardian must be free to examine in detail the proposed programme to judge whether it might cause harm to their child by being in conflict with what they are taught at home.

The NCCA, Department of Education and its inspectorate suggest that this process could take place possibly by way of creating a policy committee. By this they mean that once a group of sponsors identify their position and indicate that they want the school to teach a specific programme that they, the sponsoring group themselves approve of, the school should, in fairness to the sponsors, provide a forum where all the issues can be properly discussed by the body of the school. Where a school

conforms with a pre-specified ethos the Board of Management must indicate at the earliest opportunity whether the sponsor's programme is, in their opinion, fully in conformity with that ethos. This must take place before the parents are troubled with having to decide themselves.

Only where the sponsoring groups proposals have passed that test and give proper respect to the authority of every parent/Guardian can any supplemental programme be considered. In practice this demands a very high level of commitment and co-ordination by the school and renders the sponsors open to public criticism of their position and wishes. It is very unlikely that the body of the school will ever agree to any programme save anything absolutely incontrovertible such as teaching of the faith of the school in accordance with its stated ethos and here the Board of Management, whose job it is to ensure that the ethos is properly administered, will be accountable for the programme's accuracy and conformity with that faith's doctrinal teaching.

When a parent enrolls their child in a school where there is a stated ethos that is under a particular Church there is a tacit understanding and acceptance by the parent that the school will teach according to the doctrine of that Church. A parent however, in keeping with their autonomy and authority, is entitled to subsequently choose not to avail of that programme for its child when it is offered. Where a school does not operate under a specific ethos or where the school's ethos may have been compromised, say by agreements made in the pursuit of an amalgamation with other schools and so can not be stated precisely, any delivery of the "ethos" is subject to the same rules as any other supplemental programme.

A seemingly insurmountable problem that sponsors face is to assure parents that the programme they personally endorse is accurate and without risk of harm to their children and with this comes the aspect of personal liability if the information that they claim is true turns out not to be.

An example of this is where a group of individuals within the body of the school teach a permissive attitude towards sex to their own children and want to press this approach on to all the other children in the school.

They must show that going against the tried and tested and moral teachings of chastity outside of Marriage is without risk to the personal health and safety of individual children but also to society as a whole. This is actually impossible with statistics now readily available showing that sex outside Marriage puts children at a very high risk of contracting Sexually Transmitted Diseases including AIDS which cause, amongst many other undesirable outcomes, infertility and cancers.

Another example is where a group of individuals may want to press upon the body of the school their own personal ideas about how best to protect a child. Again the facts are easily available and show very clearly that the worst outcomes for a child are to be brought up in the care of the state or in a household where Marriage has been shunned. Unless the proposed programme clearly advocates that children are best protected by being in the exclusive control of their parents within a Marriage the individual sponsors are leaving themselves liable for providing misinformation and potentially putting children at risk.

Whilst in a free society such a process of providing a mechanism for sponsors to propose supplemental programmes is technically acceptable and even laudable it is unlikely that in practice this process will ever work harmoniously and so is best avoided and instead schools would be better left to do with what parents universally want - for the schools to teach the core subjects to the best of their abilities - and resist any encouragement to be side-tracked by any such potentially divisive elements.

The position of the Parents Association within the body of the school provides a useful forum for parents to discuss all aspects of their child's education. It often does very valuable work in conjunction with the Board of Management in providing voluntary help and/or raising money for specific projects. It has no function with regard to decision-making for the body of the school other than for named individuals within the Association who wish to have their position stated publicly. The Parents Association has no democratic powers and no authority over individual parents and families.

Individual parental authority and family autonomy are not subject to any form of democratic process so no group within the body of the school, whether it is the Board of Management or the Patron or representatives of the Parents Association can 'vote', even by a large majority, that the school should have any policy which will bring the body of the school in conflict with a parent or family. Furthermore the Education Act, 1998 makes it absolutely clear that the Minister of Education is not at liberty to force any child, whenever the conscience of their parent is offended, to take part in any aspect of the National Curriculum. (see Section 30)

There is widespread misunderstanding of the process by which parents exercise this authority over their children's education. This leads to schools often stating that a parent has the right to have their child "exempted" or "withdrawn" from a lesson to be taught. The problem arises because "exempted" and "withdrawn" both mean, "freed from an obligation or liability imposed on others".

In the context of parental rights over their children's education this is fundamentally incorrect. Under the Constitution the Family is sovereign. They alone are responsible for their child's education. Schooling is but a subset of that education and consequently there can be NO OBLIGATION under the law requiring any child to be taught a specific curriculum or syllabus in a recognised school.

In fact there is a presumption that the child will NOT PARTICIPATE in a contentious class unless the school have secured the necessary permission in advance from the parents and this is acknowledged in Section 30 (2) (e) of the Education Act where it states, "The Minister shall not require any student to attend instruction in any subject which is contrary to the conscience of the parent of the student or in the case of a student who has reached the age of 18 years, the student."

These "conscience" lessons are specified in Section 9(d) where it states, "A recognised school shall provide education to students and it shall use its available resources to promote ... the moral, spiritual, social and personal development of students and provide health education for them, in consultation with their parents, having regard to the characteristic spirit of the school."

"Consultation" means informed consent. From these provisions it is clear that for parents to be in a position to provide this consent they must be in possession of the precise detail of every lesson in advance of it being taught.

This places the onus firmly on the school to secure the consent of EACH AND EVERY INDIVIDUAL GUARDIAN/PARENT OF A CHILD (which parent has custody is not relevant) BEFORE the school can teach any class to a child. The parent DOES NOT HAVE TO NOTIFY the school if they do not wish to have their child to participate in a class. The school is acting in error if they attempt to teach any such "conscience" class to a child without first securing the necessary permissions from all the Guardians/Parents.

This, of course, creates an administrative nightmare for Principals but is very good news for today's over-worked, and stressed-out parents as it means that they do not have to continually fend off the ever increasing attempts by bodies, like the HSE or Ombudsman for Children, to have their particular brand of social engineering foisted on our children.

Parents can now relax knowing that the onus is on the school to secure their consent in advance of any class where the subject matter might trouble their religious or philosophical convictions.

As a consequence of this knowledge Principals could easily find themselves forced to a "return to basics" and replacing many of these new optional "social" subjects with the safe core subjects of Maths, English and Science - and for this the majority of parents will applaud loudly.

It would of course be seen as an act of bullying for a Board of Management or a Parents Association of any school to seek to impose any such programmes, supplemental or otherwise, other than those strictly in conformity with its stated ethos, against the wishes of any individual parent.

God bless

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## REFERENCES

### **Bunreacht na hÉireann**

The Irish Constitution which governs the law in Ireland. All statutes are presumed to conform with the principles detailed in the Constitution. If they do not they are struck down as invalid. The relevant aspects of the Constitution concerning the authority of parents and autonomy of families are provided in Articles 41 and 42

### **THE FAMILY**

#### **Article 41**

1. 1° The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.
- 2° The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.
3. 1° The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack.

### **EDUCATION**

#### **Article 42**

1. The State acknowledges that the primary and natural educator of the child is the Family and guarantees that it will not interfere with the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.
2. Parents shall be free to provide this education in their homes or in private schools or in schools recognised or established by the State.
3. 1° The State shall not oblige parents in violation of their conscience and lawful preference to send their children to schools established by the State, or to any particular type of school designated by the State.
3. 2° The State shall, however, as guardian of the common good, require in view of actual conditions that the children receive a certain minimum education, moral, intellectual and social.
4. The State shall provide for free primary education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, when the public good requires it, provide other educational facilities or institutions with due regard, however, for the rights of parents, especially in the matter of religious and moral formation.
5. In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.

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## **Universal Declaration of Human Rights**

### **Article 26.**

(3) Parents have a prior right to choose the kind of education that shall be given to their children.

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### **Article 2 of Protocol 1 of the European Convention on Human Rights:**

“No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching is in conformity with their own religious and philosophical convictions.”

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### **Some precedents from the Courts in Ireland:**

#### **Supreme Court case of ‘B. v. B. [1975] I.R. 54 SC’.**

O’Dalaigh C.J. is quoted as stating,

“It only remains to repeat that the court's order in respect of the custody of the children is interlocutory in character; moreover, the court order does not diminish the duty of the parents to be concerned about the welfare and education of their children.

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#### **Finlay Geoghegan J. in FN and EB -v- CO[2004] 4 IR 305**

at p 323 where he states "The Court in considering the child's welfare is to have due regard for the natural and imprescriptible rights of the child, including the rights to be educated by the family and to be provided for by its parents with religious, moral, intellectual, physical and social education".

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## **NON-FATAL OFFENCES AGAINST THE PERSON ACT 1997**

### **SECTION 16 - Abduction of child by parent, etc.**

16.—(1) A person to whom this section applies shall be guilty of an offence, who takes, sends or keeps a child under the age of 16 years out of the State or causes a child under that age to be so taken, sent or kept—

(a) in defiance of a court order, or

(b) without the consent of each person who is a parent, or guardian or person to whom custody of the child has been granted by a court unless the consent of a court was obtained.

(2) This section applies to a parent, guardian or a person to whom custody of the child has been granted by a court but does not apply to a parent who is not a guardian of the child.

(3) It shall be a defence to a charge under this section that the defendant—

(a) has been unable to communicate with the persons referred to in subsection (1)(b) but believes they would consent if they were aware of the relevant circumstances; or

(b) did not intend to deprive others having rights of guardianship or custody in relation to the child of those rights.

(4) A person guilty of an offence under this section shall be liable—

(a) on summary conviction to a fine not exceeding £1,500 or to imprisonment for a term not exceeding 12 months or to both, or

(b) on conviction on indictment to a fine or to imprisonment for a term not exceeding 7 years or to both.

(5) Any proceedings under this section shall not be instituted except by or with the consent of the Director of Public Prosecutions.

## **SECTION 17 - Abduction of child by other persons.**

17.—(1) A person, other than a person to whom section 16 applies, shall be guilty of an offence who, without lawful authority or reasonable excuse, intentionally takes or detains a child under the age of 16 years or causes a child under that age to be so taken or detained—

(a) so as to remove the child from the lawful control of any person having lawful control of the child; or

(b) so as to keep him or her out of the lawful control of any person entitled to lawful control of the child.

(2) It shall be a defence to a charge under this section that the defendant believed that the child had attained the age of 16 years.

(3) A person guilty of an offence under this section shall be liable—

(a) on summary conviction to a fine not exceeding £1,500 or to imprisonment for a term not exceeding 12 months or to both, or

(b) on conviction on indictment to a fine or to imprisonment for a term not exceeding 7 years or to both.

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## **GUARDIANSHIP OF INFANTS ACT, 1964**

### **Rights of parents to guardianship.**

6.—(1) The father and mother of an infant shall be guardians of the infant jointly.

(4) The mother of an illegitimate infant shall be guardian of the infant.

### **Powers and duties of guardians.**

10.—(1) Every guardian under this Act shall be a guardian of the person and of the estate of the infant unless, in the case of a guardian appointed by deed, will or order of the court, the terms of his appointment otherwise provide.

(2) Subject to the terms of any such deed, will or order, a guardian under this Act—

( a ) as guardian of the person, shall, as against every person not being, jointly with him, a guardian of the person, be entitled to the custody of the infant and shall be entitled to take proceedings for the restoration of his custody of the infant against any person who wrongfully takes away or detains the infant and for the recovery, for the benefit of the infant, of damages for any injury to or trespass against the person of the infant;

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## **EDUCATION ACT, 1998 - Extracts pertinent to this discussion**

“AN ACT TO MAKE PROVISION IN THE INTERESTS OF THE COMMON GOOD FOR THE EDUCATION OF EVERY PERSON IN THE STATE AND TO ENSURE THAT THE EDUCATION SYSTEM IS ACCOUNTABLE TO PARENTS”

### **Objects of Act.**

6.—Every person concerned in the implementation of this Act shall have regard to the following objects in pursuance of which the Oireachtas has enacted this Act:

(a) to give practical effect to the constitutional rights of children, including children who have a disability or who have other special educational needs, as they relate to education;

(e) to promote the right of parents to send their children to a school of the parents' choice having regard to the rights of patrons and the effective and efficient use of resources;

(g) to promote effective liaison and consultation between schools and centres for education, patrons, teachers, parents, the communities served by schools, local authorities, health boards, persons or groups of persons who have a special interest in, or experience of, the education of students with special educational needs and the Minister;

(k) to promote the language and cultural needs of students having regard to the choices of their parents;

(m) to enhance transparency in the making of decisions in the education system both locally and nationally.

### **Functions of a school.**

9.—A recognised school shall provide education to students which is appropriate to their abilities and needs and, without prejudice to the generality of the foregoing, it shall use its available resources to—

- (a) ensure that the educational needs of all students, including those with a disability or other special educational needs, are identified and provided for,
- (b) ensure that the education provided by it meets the requirements of education policy as determined from time to time by the Minister including requirements as to the provision of a curriculum as prescribed by the Minister in accordance with section 30,
- (d) promote the moral, spiritual, social and personal development of students and provide health education for them, in consultation with their parents, having regard to the characteristic spirit of the school

### **Recognition of schools.**

10.—(1) On a request being made for that purpose, the Minister may from time to time designate a school or a proposed school to be a school recognised for the purposes of this Act.

(2) The Minister may designate a school or a proposed school to be a school recognised for the purposes of this Act where the Minister, on a request being made for that purpose by the patron of a school or a proposed school, is satisfied that—

(c) the patron undertakes that the school shall provide the curriculum as determined in accordance with section 30,

### **Withdrawal of recognition.**

11.—(1) Where the Minister is satisfied that the requirements for recognition of a school as provided for in section 10 (2) are not being met by a school, including a school recognised in accordance with 10 (3), or that the functions of a school are not being effectively discharged and is of the opinion that recognition should be withdrawn from that school, the Minister shall inform the board, the patron, the teachers, the student council where one exists and the parents of students in that school by notice in writing of that opinion and the reasons for the opinion.

### **Functions of a board.**

15.—(1) It shall be the duty of a board to manage the school on behalf of the patron and for the benefit of the students and their parents and to provide or cause to be provided an appropriate education for each student at the school for which that board has responsibility.

and to:

(d) publish, in such manner as the board with the agreement of the patron considers appropriate, the policy of the school concerning admission to and participation in the school, including the policy of the school relating to the expulsion and suspension of students and admission to and participation by students with disabilities or who have other special educational needs, and ensure that as regards that policy principles of

equality and the right of parents to send their children to a school of the parents' choice are respected and such directions as may be made from time to time by the Minister, having regard to the characteristic spirit of the school and the constitutional rights of all persons concerned, are complied with,

### **The Principal.**

(2) In addition to the functions of a Principal provided for in section 22, the Principal shall—

(c) be responsible for the creation, together with the board, parents of students and the teachers, of a school environment which is supportive of learning among the students and which promotes the professional development of the teachers,

(d) under the direction of the board and, in consultation with the teachers, the parents and, to the extent appropriate to their age and experience, the students, set objectives for the school and monitor the achievement of those objectives, and

(e) encourage the involvement of parents of students in the school in the education of those students and in the achievement of the objectives of the school.

### **Curriculum.**

30.—(1) The Minister may, from time to time, following such consultation with patrons of schools, national associations of parents, recognised school management organisations and recognised trade unions and staff associations representing teachers, as the Minister considers appropriate, prescribe the curriculum for recognised schools,

(2) Without prejudice to the generality of subsection (1), the Minister—

(b) shall have regard to the characteristic spirit of a school or class of school in exercising his or her functions under this section,

(e) shall not require any student to attend instruction in any subject which is contrary to the conscience of the parent of the student or in the case of a student who has reached the age of 18 years, the student.

### **Regulations.**

33.—The Minister, following consultation with patrons, national associations of parents, recognised school management organisations and recognised trade unions and staff associations representing teachers, may make regulations for the purpose of giving effect to this Act and, without prejudice to the generality of the foregoing, the Minister may make regulations relating to all or any of the following matters:

(a) the recognition of schools and the withdrawal of recognition from schools;

(g) admission of students to schools;

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## **The Family in the Social Teaching of the Church**

by William L. Saunders, Jr. (An extract)

### **Prior to Vatican II**

For the Catholic Church, the family is the very bedrock of society. Fissures in that bedrock will eventually result in earthquakes in society. It is, in fact, impossible to have a healthy society without healthy families. For families to be healthy, however, the members of the family must understand – and live out - the very meaning of what family is.

Certainly, it would be difficult for a faithful Catholic today to be unaware that the family is a frequent topic of the Holy Father's reflection. We will examine the Holy Father's teaching below, but teaching and reflection on the family did, not surprisingly, precede the pontificate of John Paul II. Indeed, while the Second Vatican Ecumenical Council provided the central teaching on the family, it was during the period prior to the Council that most of the guiding principles were laid out.

Modern Catholic social teaching was born in 1891 in *Rerum Novarum* ("On the Condition of the Working Classes"). While the role of the Church as teacher on "social issues" was not new (the Church has always and everywhere been, by virtue of its divine commission, teacher of faith and morals), it was in *Rerum Novarum* that it first systematically responded to the problems of the modern era. Indeed, a subsequent pontiff, Pius XI in *Quadregessimo Anno*, called it "the magna carta on which all Christian activities in social matters are ultimately based".

In *Rerum Novarum*, Pope Leo XIII set forth what has come to be recognized as the "social doctrine of the Church". Many principles were enunciated that, as we will see, would be subsequently developed by the teaching magisterium of the Church. For instance, the encyclical insisted on the right to marriage, the existence of the family prior to society, the obligation of the state to assist the family, the requirement that such state intervention be limited, the importance of parental authority, the understanding that property ownership was integral to the fulfillment of parental duties, and the dignity of work. For Leo, the family was "the society of the household". In Leo's own words -

"Rights of this kind (i.e., property rights) which reside in individuals are seen to have much greater validity when viewed as fitted into and connected with the obligations of human beings in family life...No law of man can abolish the natural and primeval right of marriage...Behold, therefore, the family, or rather the society of the household, a very small society, but a true one, and older than any polity!

For that reason it must have certain rights and duties of its own entirely independent of the State...Wherefore, assuming, of course, that those limits be observed which are fixed by its immediate purpose, the family assuredly possesses rights, at least equal with those of civil society, in respect to choosing and employing the things necessary for its protection and its just liberty...But if citizens, if families, after becoming participants in common life and society, were to experience injury in a commonwealth instead of help, impairment of their rights instead of protection, society would be something repudiated rather than to be sought after...To desire, therefore, that the

civil power should enter arbitrarily into the privacy of the home, is a great and pernicious error.

If a family perchance is in such extreme difficulty and is so completely without plans that it is entirely unable to help itself, it is right that the distress be remedied by public aid, for each individual family is a part of the community. Similarly, if anywhere there is a grave violation of mutual rights within the family walls, public authority shall restore to each his right for this is not usurping the rights of citizens, but protecting and confirming them with just and due care.

Those in charge of public affairs, however, must stop here: nature does not permit them to go beyond these limits. Paternal authority is such that it can be neither abolished nor absorbed by the State, because it has the same origin in common with that of man's own life." [18-21]

### **Vatican Ecumenical Council II (1963-65)**

Vatican II addressed the family in four important documents – the Declaration on Christian Education, the Declaration on Religious Liberty, the Decree on the Apostolate of the Laity, and the Pastoral Constitution on the Church in the Modern World.

In the Declaration on Christian Education (*Gravissimum Educationis*, Oct 28, 1965), the Council Fathers emphasized the irreplaceable role of parents in the education of children. "As it is the parents who have given life to their children, on them lies the gravest obligation of educating their family... The role of parents in education is of such importance that it is almost impossible to provide an adequate substitute."

The role of parents is to teach their children "to know and worship God and to love their neighbour". Such education prepares them for life in society. Indeed, "the family is "the principal school of social virtues which are necessary to every society."

Though "the task of imparting education belongs primarily to the family, "it requires the help of society as a whole." The civil and political authorities "should recognize the duties and responsibilities of parents... and provide them with the requisite assistance. In accordance with the principle of subsidiarity, when the efforts of the parents and of other organizations are inadequate, it should itself undertake the duty of education, with due consideration, however, for the wishes of the parents." (3)

Thus, in the Declaration on Christian Education, the Church asserted that (a) the parents are the primary educators of children, (b) that such education prepares children to take their place in society and the Church, and (c) that the role of the State is to assist parents in this task.

The Declaration on Religious Liberty (*Dignitatis Humanae*, Dec 7, 1965) echoed a theme from the Declaration on Christian Education. The parents "have the right to decide in accordance with their own religious beliefs the form of religious upbringing which is to be given to their children. The civil authority must therefore recognize the right of parents to choose with genuine freedom schools or other means of education...."

Furthermore, the rights of parents are violated if their children are compelled to attend classes which are not in agreement with their religious beliefs of the parent or if there is but a single compulsory system of education from which all religious instruction is excluded." (DH 5)

Extracts from:

## **Resource Materials for Relationships and Sexuality Education**

### **Social, Personal and Health Education at the Department of Education and Science**

The following extracts and text are taken directly from the Department of Education's booklet : **“First and Second Class Resource Materials for Relationships and Sexuality Education”**

This and similar booklets outlining suggested materials for the other years in primary level are available to download from the Department of Education website.

Note that they respect the lawful position of the family in its authority and constitution and stress that no aspect of the Religion-Morality/SPHE/CSPE resource material that they simply 'make available' but do not officially approve is mandatory and that the decision as to what, if any elements are to be taught is left up to the parents.

However this position is at odds with the myths that are prevalent which appear to assert that the Department of Education is insisting that Religion-Morality/SPHE/CSPE be taught and that parents exist merely to assist the teachers and the Board of Management in their important role.

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The resource materials presented here are based on the Interim Curriculum and Guidelines for Relationships and Sexuality Education prepared by the National Council for Curriculum and Assessment and approved by the Department of Education and Science.

They are not prescriptive, rather they provide a menu of options for classroom lessons from which teachers can choose in accordance with their school RSE Policy.

The materials have been prepared by experienced teachers under the guidance of the RSE Training Support Service for Schools. They have been evaluated by personnel from the Department of Education and Science, the RSE Training Support Service for Schools and classroom teachers in the Pre-Test Schools. The NCCA has been consulted in the development of these materials and has deemed them to be compatible with the Interim Curriculum and Guidelines.

It is the responsibility of those who are drawing on these resources to satisfy themselves that the content of materials which they use is appropriate to the needs of students and in line with their school RSE Policy and Programme.

#### Parent/Guardian involvement

These resource materials acknowledge parents/guardians as the primary educators of their children and provide assistance to teachers in their complementary and supportive role.

Parents/guardians will have access to classroom materials.

School policy will include provision for the rights of those who wish to withdraw their children from RSE.

# **Applicable Law on the Married Family as it relates to Education**

## **BASIC PRINCIPLES & how these continue in force even where the parents disagree or are living apart**

**Supported by citations from the Supreme Court**

The Family Subsidiarity Principle or Family Primacy Principle is that it is a presumption in law (in the Constitution and in the Natural Law and in Christian teaching) that the education and welfare of a child in a Family is at all times and in all circumstances under the exclusive control and authority of the Husband and Wife of the Marriage where they act as Guardians jointly.

It follows that a third party can never, at any time nor in any circumstance, control any aspect of the education or welfare of a child in a Family except where they have secured in advance the informed approval to do so by the Husband and Wife of the Marriage where they act as Guardians jointly.

However any implied or actual permission to so control a child on behalf of the Family vested in such a third party is immediately voided where either one of the Guardians is of the opinion that the third party is no longer worthy of their trust. In this instance the third party must immediately desist from any attempt to control the physical custody of the child and submit the child to either Guardian on behalf of the Family.

Once the child is returned to the physical custody of the Family it is up to the Guardians, through the domestic forum, to make any new arrangements which they believe are in their child's best interests.

Article 42. 5 of the Constitution allows for the State to rebut the presumption.

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

It has been established through the Superior Courts that the child's right and the Common Good necessitate a very high threshold of grounds for the presumption to be overturned.

The Subsidiarity principle is recognised in the Constitution in Articles 41 and 42 where it acknowledges the authority of parents to control the education and welfare of their children.

This inalienable and imprescriptible authority was confirmed and acted upon by the Supreme Court in *re Doyle, an Infant: State (Doyle) v Minister for Education and Attorney General*, Supreme Court 1955 which established that no person or body of persons could hold and educate a child in opposition to a Married parent and also that parents continue to have joint power and duty even where living apart, but that there could be circumstances where one parent might abandon their responsibilities as a Family member, which would then leave the Family authority vested in the remaining acting Guardian.

In *re Doyle*, Maguire CJ stated,

*“Article 42.2.3’ appears to us expressly to secure to parents the right to choose the nature of the education to be given to their children and the schools at which such education shall be provided and this right must be a continuing right.”*

Later in the judgement with regard to the contention that the Article of the Constitution does not apply in the case of a broken or disrupted family, the Supreme Court approved of the manner in which O’Dalaigh J dealt with this argument [in the High Court] when he said,

*“Here recital of these provisions is enough to demonstrate that desertion on the part of a mother without just cause leaves the authority of the family unimpaired and in no way diminishes the parental right with regard to the education of the children. It is true that in many cases the family authority and parental rights will be asserted by the parents jointly; but the assertion of that authority and of those rights cannot be less effective because of desertion on the part of one of them.”*

Moreover the duty and right of a parent to educate their child accrues from the right of the child as stated by Finlay Geoghegan J. in *FN and EB -v- CO*[2004] 4 IR 305 at p 323 where he states,

*“The Court in considering the child’s welfare is to have due regard for the natural and imprescriptible rights of the child, including the rights to be educated by the family and to be provided for by its parents with religious, moral, intellectual, physical and social education”*

In *B v B*, 1970 the Supreme Court laid down that Custody/Access orders made under the Guardianship of Infants Act, 1964 had no effect whatsoever on the joint power and duty of parents to control the educational welfare of their children.

In *B v B* O’Dalaigh C.J. noted,

*“It only remains to repeat that the court’s order in respect of the custody of the children is interlocutory in character; moreover, the court order does not diminish the duty of the parents to be concerned about the welfare and education of their children. The parents, whatever their own difficulties and differences, should be concerned to remain in closest consultation in all that concerns the welfare of the*

*children. Specifically, the parents should seek agreement with regard to their plans for the future education of their children to avoid the necessity of invoking the direction of the court”*

Later Walsh J stated,

*“It is also, in my view, quite clear from the provisions of s. 11 (not merely from their own content but when taken in context with the other sections of the Act and the relevant constitutional provisions upon which the Act is founded) that if one parent is given custody of an infant to the exclusion, whether total or partial, of the other parent, that does not mean that the parent who loses the custody is deprived of the other rights which accrue to him (or her) as guardian of the infant. A parent so deprived of custody can continue to exercise the rights of a guardian and, in my view, must be consulted on all matters affecting the "welfare" of the child which, by the definition of that word contained in s. 2 of the Act and taken verbatim from the Constitution, comprises the religious, moral, intellectual, physical and social welfare of the infant.”*

Finlay Geoghegan J. in FN and EB -v- CO[2004] 4 IR 305 at p 323 states,

*"The Court in considering the child's welfare is to have due regard for the natural and imprescriptible rights of the child, including the rights to be educated by the family and to be provided for by its parents with religious, moral, intellectual, physical and social education"*

In B v B, Walsh J also recognised that no order could be made under the Guardianship of Infants act extinguishing the Guardianship of a Married parent:

*“The main purpose of the Guardianship of Infants Act, 1964, was to give to both parents of an infant equal rights in guardianship matters. In doing so, it provided a statutory expression of the rights already guaranteed by the Constitution. Section 6 of the Act states the equality of the parents and recognises them as the guardians of the infant; there is nothing in any provision of the Act which purports to confer on the court or any other body the power to displace either one or both of the parents from the position of guardian or guardians.*

Plainly if the legislation were to disturb the authority of parents the Act would be repugnant to the rights enshrined in the Constitution and struck down on the same principles as in re Doyle.

B v B has been recently approved and reaffirmed in C. (R.) v. S. (I.) [2003] IEHC 86 (11 November 2003), where Geoghegan J stated,

*“The position of a non-custodial parent who remains a guardian of a child following separation of the parents was considered by the Supreme Court in B. v. B. [1975] I.R. 54. Walsh J. in considering the provisions of the Guardianship of Infants Act, 1964 (to which there has been since no relevant amendment)”*

Alan Shatter in his book “Family Law” which is respected by the Judiciary, clearly explains that Custody or Access or any other orders do not in any way disturb the authority of parents to control the education of their children where he states,

*“where it is necessary for a court to make a custody order determining with which parent a child should primarily reside, there should be a legal obligation imposed on the judge making such order to explain to both parents their rights and obligations as joint guardians of their child. Presently, neither custodial nor non-custodial parents always fully appreciate or understand their continuing entitlement to be involved in and consulted about the making of major decisions and the occurrence of important events affecting their child's upbringing and welfare, such as decisions about schooling, medical treatment, religious education etc. If this was always understood there is a possibility that custody orders would be viewed differently by some of those parents who continue to battle with each other over their children after a judge has made orders determining the dispute between them concerning their children's future”.*

Distinction between private and public law can be drawn from the recent case, D O'H - v- H S E in the Dublin High Court, heard before Mr Justice Abbott concerning the detention of children by, in that instance the HSE, wherein he states,

*“I consider that the application of this case relates to an issue of public law. Once I have decided that the consent was not bilateral, but was unilateral by the mother only, there remains an outstanding public law issue in relation to the detention of the children. If the consent had been bilateral, notwithstanding the fact that it might have been revoked by one party in the meantime, I would be inclined to hold with the submission very ably made on behalf of the respondent that the position would be one to be rectified in the District Court or in such other proceedings such as the special summons procedure regarding the dispute between the two parent parties.*

*This statement provides me with a further reflection, perhaps, which I should have dealt with earlier in the judgment, but which I have considered in the course of preparing it, and that is that the interpretation which given to the word “custody”, just central to the whole case, is an interpretation which bears in mind the fact that the legislation concerned in this application relates to public law. If the interpretation in this judgment of the word “custody” in the context of subsection (2) Section 4 [of the Child care Act, 1991] differs from other definitions posited, or workaday assumptions in relation to custody, then it differs from these definitions or workaday assumptions in the context of private law, and it is open to the court to draw that distinction as a further justification and rational for the conclusion it has reached, that the word custody is to be considered as public law matter and not to be conflated with private law definitions and understandings of custody as between the persons in the private law sense interested in the care and welfare of children primarily as between themselves and in relation to the issues that arise between*

*these private contracting parties to marital and non-marital relationships, such as they may be.”*

Regarding fatherhood, Alan Shatter, in “Family Law” provides, with supporting citations, the legal presumption which is “where a woman gives birth to a child during a subsisting valid Marriage that her Husband is the father of her child”

As the vast majority of children come from a Married Family and most children have two Guardians, any competent Board of Management of a school must know, as a basic principle, it has to receive a bilateral application from the Guardians of a child before considering the admission of that child into the school. It would only be in the most unusual circumstances that a child would have only one acting Guardian and a school must take great care to ensure that they have not transgressed the law when admitting such a child into the school. The school must have a policy to deal with such situations.

It is possible that a parent may be the only acting Guardian. For example: in the case of an unmarried mother where the father has not been appointed a Guardian, or where one of the Guardians is deceased and where no other has been appointed, or where, as in the Doyle case, one of the parents in a Family has abandoned their Family responsibilities leaving the remaining parent on their own with the task of making the decisions which will provide for a child’s education.

In any of these circumstances the school must be furnished with evidence that they can rely on to justify the admission of the child to the school on the authority of one Guardian only.

Any issue that arises that might refute that evidence immediately overturns the basis on which the child was admitted. As a school can not act as a tribunal to decide any such issue it has no option but to rescind its decision to allow the child admission to and participation in the school.

As the parents of children in the school form the electoral base for the election of parents on to the Board of Management, the Board of Management is in itself an unlawful body where the children are not lawfully admitted. Therefore the admissions and participation policy of any school is the foundation of its integrity.

## **In the event of private disagreements between parents as heads of the Family**

**Each parent in a Married Family holds the right of veto over the choice of a school and over any supplemental programme that is proposed to be taught by a school and this can not be challenged by a school or the Department of Education**

The law requires that before a school may teach a child or embark on the delivery of any supplemental programme to a child, such as Religion-Morality/SPHE/CSPE, it must consult the parents of that child.

*Article 42.3.4 of the Constitution*

*"The State shall provide for free primary education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, when the public good requires it, provide other educational facilities or institutions with due regard, however, for the rights of parents, especially in the matter of religious and moral formation."*

*EDUCATION ACT, 1998, Section 9.—A recognised school shall provide education to students which is appropriate to their abilities and needs and, without prejudice to the generality of the foregoing, it shall use its available resources to*

*—(d) promote the moral, spiritual, social and personal development of students and provide health education for them, in consultation with their parents, having regard to the characteristic spirit of the school,*

Where a child is a member of the Constitutional legal institution of the Irish Family founded on Marriage the school can only teach such a programme to a child where it is known to be the wishes of that Family unit.

The parents, the Husband and Wife, as heads of that Family have the joint duty and joint authority to determine all matters concerning the education and welfare of their children. They hold this joint power and authority, not as a parent per se, but as a consequence of their joint duty as a parent within the institution of the Family unit.

*Article 41*

*1. 1° The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.*

Decisions made jointly by such parents are then considered to be Family Decisions and carry the authority of the Family unit. These Family Decisions are superior to all positive law and can not be over-ruled by any Third Party, especially the State except where the threshold established by the Supreme Court has been reached and there is a finding that both parents have failed in their duty.

*Article 42.5.*

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

The State is, in such very narrow circumstances, entitled to make Orders under the public law Child Care Act to care for or supervise the provision of welfare to the child.

Where no such threshold has been reached the State is not entitled to over-rule the Constitution and Authority of the Family unit and Family Decisions freely entered into by both parents as heads of the Family.

Similarly where there is a finding that only one of the parents has failed in their duty the State is not entitled to over-rule the Constitution and Authority of the Family unit that remains in place.

It follows that a school is entitled to receive a Family Decision from either parent and act on it in good faith as representing the wishes of the Family unit.

However where there is no finding of a failure of duty by either parent any dispute between the parents is a private matter and as there is not unanimity to be able to provide a Family Decision on a proposed supplemental programme neither parent is allowed to involve the school in the dispute.

The corollary is that when it becomes known to a school that there is a private dispute between the parents and there is not unanimity to be able to provide a Family Decision on a proposed supplemental programme the school must not allow itself to be involved in the dispute at the invitation of either parent.

In particular it must not involve itself by acting on the invitation of one parent only where it is known that the other parent is not in agreement.

A school is in serious error if it acts at the behest of one parent whilst being aware of a private dispute between the parents:

- It violates the Family's authority and constitution and the principle of subsidiarity which states that the Family have primacy over all decisions affecting the Family unit
- It creates a public dispute where only a private dispute exists between the parents. In the course of running a Family such private disagreements are to be expected and even considered a necessary and potentially healthy part of making the best decisions possible for the Family as a unit
- It acts partially by collaborating with one parent against the other
- It discriminates against the parent who has no wish for the school to teach the child or deliver the supplemental programme
- By acting against the authority of one of its parents the child sees the school disrespecting its parent and this will shaken the child's respect for that parent's authority which will be seriously damaging
- The school assumes a legal interest in the child's education - where it lawfully has none - by becoming a party to the decision-making process

- It acts unlawfully as a tribunal by judging the merits of one parent's wishes against the other
- It isolates the parent who does not wish for the programme to be delivered to their child from the body of the school
- As every parent in the Constitutional legal institution of the Irish Family founded on Marriage has the inalienable and imprescriptible entitlement to the Custody of their children regardless of the status of the Marriage or any private law Court orders made which assist the Family by the distribution of certain aspects of the duties of parents between them, a school unlawfully violates this if it acts contrary to that parents wishes and renders the school liable for any harmful consequences that happen to a child as a result
- The school violates the Lawful Preference of a parent in the Constitutional legal institution of the Irish Family founded on Marriage guaranteed under Article 42. 3. 1° "The State shall not oblige parents in violation of their conscience and lawful preference to send their children to schools established by the State, or to any particular type of school designated by the State."

God bless

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## ADDITIONAL BOOKLET OF AUTHORITIES

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Judgement of Henchy, J in *G v AN BORD UCHTALA*, Supreme Court [1980] IR 32 at 52,

*“Rights and duties arising under those provisions are by the terms of their constitutional recognition confined to children of a family founded on marriage, and they are vested not in one or other parent but in the parents. Of course, where because of death, incapacity or unfitness, one of the parents is eliminated or debarred, it will be for the other parent to exercise and be subject to the constitutional right and duty, not simply by virtue of parenthood but by virtue of parenthood within a family”.*

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*B v B* [1975] IR54 O’Dalaigh C.J.

*“It only remains to repeat that the court's order in respect of the custody of the children is interlocutory in character; moreover, the court order does not diminish the duty of the parents to be concerned about the welfare and education of their children. The parents, whatever their own difficulties and differences, should be concerned to remain in closest consultation in all that concerns the welfare of the children. Specifically, the parents should seek agreement with regard to their plans for the future education of their children to avoid the necessity of invoking the direction of the court”*

*B v B* [1975] IR54 Walsh J,

*It is also, in my view, quite clear from the provisions of s. 11 (not merely from their own content but when taken in context with the other sections of the Act and the relevant constitutional provisions upon which the Act is founded) that if one parent is given custody of an infant to the exclusion, whether total or partial, of the other parent, that does not mean that the parent who loses the custody is deprived of the other rights which accrue to him (or her) as guardian of the infant. A parent so deprived of custody can continue to exercise the rights of a guardian and, in my view, must be consulted on all matters affecting the "welfare" of the child which, by the definition of that word contained in s. 2 of the Act and taken verbatim from the Constitution, comprises the religious, moral, intellectual, physical and social welfare of the infant.”*

*B v B* [1975] IR54 Walsh J

*“The main purpose of the Guardianship of Infants Act, 1964, was to give to both parents of an infant equal rights in guardianship matters. In doing so, it provided a statutory expression of the rights already guaranteed by the Constitution. Section 6 of the Act states the equality of the parents and recognises them as the guardians of the infant; there is nothing in any*

*provision of the Act which purports to confer on the court or any other body the power to displace either one or both of the parents from the position of guardian or guardians.*

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Supreme Court Judgment of O'Higgins C.J in Norris v Attorney General [1984] IR 36 (HC), (SC))

*“I think it proper to remind the plaintiff and others interested in these proceedings that the sole and exclusive power of altering the laws of Ireland is, by the Constitution, vested in the Oireachtas. The Courts declare what the law is – it is for the Oireachtas to make changes if it so thinks proper.”*

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In re Doyle, Maguire CJ and following pages citing the whole judgement

*“ Article 42.2.3' appears to us expressly to secure to parents the right to choose the nature of the education to be given to their children and the schools at which such education shall be provided and this right must be a continuing right.”*

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**In Re Doyle, An Infant: State (Doyle) v Minister for Education and the Attorney General:** Supreme Court 1955 No. 47 (*Maguire CJ, Lavery, Kingsmill-Moore, Maguire and Dixon JJ*) 21 December 1955.

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*Constitution - Children - Industrial school - District Court order that child be sent to industrial school - Father consenting to said order - Father subsequently seeking return of child - Minister refusing to order child's release - Whether provisions unconstitutional - Constitution of Ireland 1937, Articles 40, 42, - Children Act 1908 (8 Edw. 7, c. 67) s. 58 - Children Act 1941 (No. 12) s. 10*

**Facts** S. 10 of the Children Act 1941 amending s. 58 of the Children Act 1908 authorised a District Justice to order that a child be sent to an industrial school where that child was neither an orphan, nor over 15 years of age who was found destitute and whose parents were unable to provide for its support. Before making an order, the District Justice had to be satisfied that the child's parents consented to it being made, or, that one of them had consented and that the consent of the other could be dispensed with by reason of that parent's mental incapacity, desertion or imprisonment. The section also provided that where the parents of a child were able to satisfy the Minister for Education that they were able to support that child, the Minister was obliged to order its discharge. Evelyn Doyle was born in January 1946. In December 1953, whilst her father, Desmond Doyle, was unemployed, his wife deserted him and in January 1954, he consented to an order being made under s. 10 of the 1941 Act. His wife's consent was dispensed with by the District Court, and Evelyn Doyle was committed to the care of an industrial school until January 1962.

In August 1954, Desmond Doyle applied to the Minister for Education to have Evelyn Doyle discharged from care. The Minister refused to order the child's release, and Desmond Doyle took *mandamus* proceedings against the Minister which are reported at [1956] IR 217. Subsequently he commenced proceedings seeking an enquiry under Article 40.4.2° of the Constitution, challenging, *inter alia*, the constitutionality of s. 10 of the 1941 Act. The High Court, being satisfied that these provisions were invalid, stated a case for the Supreme Court under Article 40.4.3°.

**Held** by the Supreme Court (*Maguire CJ, Lavery, Kingsmill-Moore, Maguire and Dixon JJ*) in holding s. 10 of the 1941 Act to be invalid:

(1) At common law a parent could not be bound by any agreement which would have the effect of depriving him/her of the right to the control and custody of his/her children, either temporarily or permanently. *R v Barnardo* [1891] 1 QB 194 applied.

(2) This principle was preserved in Article 42.1 and 42.3.1° of the Constitution and is unaffected by the provisions of Article 42.5, the fact

that the child in question may be a member of a broken family, or any discretion vested in the Minister under the 1941 Act.

**Cases referred to in judgment**

*In re School Attendance Bill* 1942 [1943] IR 334; 77 ILTR 96

*R v Barnardo* [1891] 1 QB 194

*R v Clarke* 7 E & B 186

**Cases cited in legal argument**

*Attorney General v Southern Industrial Trust Ltd* (1957) 94 ILTR 161

*In re Frost, (Infants)* [1947] IR 3; 82 ILTR 24

*Marbury v Madison* (1803) 1 Cranch 137

*Meyer v Nebraska* (1923) 262 US 390

*National Union of Railwaymen v Sullivan* [1947] IR 77

*In re Offences Against the State (Amendment) Bill* 1940 [1940] IR 470; 74 ILTR 61

*Pierce v Society of the Sisters of the Holy Names of Jesus and Mary* (1925) 268 US 510

*State (Kavanagh) v O'Sullivan* [1933] IR 618; 68 ILTR 202

*State (Williams) v Markey* [1940] IR 421; 74 ILTR 237

*In re Tilson, Infants* [1951] IR 1; 86 ILTR 49

*Ex Parte Virginia* (1880) 100 US 339

*Thomas Connolly SC and Henry Barron for the prosecutor*

*John Kenny SC, James McMahon SC and William Finlay for the respondents*

**MAGUIRE CJ** (Lavery J, Kingmill-Moore, Maguire and Dixon JJ concurring) delivered his judgment on 21 December 1955 saying: This case comes before the court on a case stated by the High Court under Article 40.4.3° of the Constitution and raises for the consideration of the court the question whether s. 10 of the Children Act 1941 is invalid having regard to the provisions of the Constitution.

The section in question amends s. 58 of the Children Act of 1908 and authorises a District Justice to order to be sent to an industrial school a child apparently under the age of 15 years who is found destitute and is not an orphan and whom his or her parents are unable to support. The detention order may be for 'such time as to the court may seem proper for the teaching and training of the child' but not in any case beyond the time when the child will in the opinion of the court attain the age of 16 years (s. 65 (b)). It is however a necessary requirement contained in a proviso to s. 10 of the Act of 1941 that the child's parents consent or that of one of the parents consents and the court is satisfied that owing to mental incapacity or desertion on the part of the other parent or to the fact that the other parent is undergoing imprisonment or penal servitude the consent by one parent may be dispensed with.

It is furthermore provided that if the parents or the surviving parent or in the case of an illegitimate child the mother, at any time satisfy the Minister that they are able to support such child the Minister must discharge the child. Strangely, however, a parent whose sole consent is sufficient to justify an order for detention being made in the special circumstances mentioned has not the right to demand the discharge of his child even though his circumstances have so improved that he is able to support such child.

Evelyn Doyle, daughter of the prosecutor, was such a child. Her father who is the prosecutor here had availed of the provision of the section and on his application a District Justice had sent his daughter to a certified industrial school. His wife's consent was dispensed with on the ground of desertion. Some time later when the prosecutor claimed to be in a position to support his daughter he applied to the Minister for Education to discharge her. The Minister however declined to do so. Application for relief in the nature of an order of *mandamus* to the Minister to order her discharge failed on the ground that the Minister's power to discharge arose under s. 69 of the Children Act of 1908 and its exercise was discretionary. He then brought these proceedings claiming that the detention of his daughter was illegal on the ground that the section under which the child was detained was invalid as being repugnant to Articles 41 and 42 of the Constitution on the ground that it enables a parent to deprive himself of the right which by Article 41.1 of the Constitution is declared to be inalienable of providing according to his means for the education of his child.

The High Court has upheld the contention of the prosecutor that the section is invalid. Under Article 40.3 it has, however, referred the question of the validity of the section to this Court.

Article 42.1 appears to enshrine a principle of the Common Law which nowhere is more clearly stated than in *R v Barnardo* [1891] 1 QB 194. In that case a mother had voluntarily handed over her illegitimate child to the care of Dr Barnardo and had contracted that he should have custody and control of the child for twelve years. After 18 months the mother claimed the return of her child. Dr Barnardo refused to give up the boy. The order of the Queen's Bench directing the issue of a writ of *habeas corpus* was affirmed on appeal. The judgment contains many passages which assert, with emphasis, the right of a parent to the custody of a child of tender years. Lord Coleridge said that the law was 'too well settled to allow of much argument or controversy' (p. 195). Referring with approval to the admirable and exhaustive judgment in *R v Clarke* 7 E. & B. 186, he goes on to say:

The judges there had expressly held that a mother, by committing a child to anyone for the purpose of education has not lost her right to retake him.

Lord Coleridge adds:

This last position is as old as the Year Book (Mich. 8 Edw. IV, fol. 7, B.2, and is treated as law by Lord Chief Baron Comyns and Sir John Patteson.

We have been unable to trace the passage in the Year Book here referred to but in *Clarke's* case it is thus phrased.


If a Guardian by reason of nurture, delivers the infant to another for his instruction he may afterwards retake the infant.

Lord Esher MR, in the Court of Appeal at p. 207 said:

In the present case the child is in the actual care of Dr. Barnardo, being there of the mother's own free will. More than that, she has by an agreement undertaken not to take the child away. The law is perfectly clear that parents cannot bind themselves by any such agreement. No such agreement can deprive a parent of the right of absolute control over his or her own child. This applies precisely to the mother of an illegitimate child. She cannot, by any agreement, absolve herself from the duty of taking care of it. The existence of the agreement is therefore immaterial.

Had s. 10 of the Children Act 1941 been passed before the making of the Constitution it would appear in that portion of it which is here impugned to conflict with the Common Law principle that parents not alone have the right to control the education of their children but that they cannot surrender this right. The Common Law however would have had to yield before such a statutory enactment. It seems however to this Court that the makers of the Constitution by the provisions of Article 42 and particularly by sub-article 1 and 3.1° of that Article deliberately preserved this Common Law principle and have put it beyond the reach of ordinary legislation. Furthermore Article 42.2.3° appears to us expressly to secure to parents the right to choose the nature of the education to be given to their children and the schools at which such education shall be provided and this right must be a continuing right. Parents must be entitled to change and substitute schools as in their judgment they think proper and to hold that a choice once made is binding for the period of a child's education would be to deny such right.

Accordingly s. 10 of the Children Act in so far as it allows a parent in the position of the prosecutor to deprive himself of the control of his child appears to this Court to be repugnant to the Constitution.

Three grounds are however relied upon by the Attorney General which he argues save it from such apparent repugnancy. Although not argued in the order in which they are here stated the grounds are firstly—that this is an exceptional case within the provisions of Article 42.5 while it may well be that the provisions of s. 10 in so far as they permit the State to supply the place of the parents because of lack of means are protected by the sub-article it cannot be that the mere fact that parents are at a given time unable to support their child would entitle the parents to surrender and the State to accept a surrender of the parent's rights or would enable the parents by agreement with the State to rid themselves of the duty so plainly stated in Article 42.1. It seems clear that where such a surrender is sanctioned it can be for a period limited by the parents' inability to provide for the education of a child. It is submitted that once the detention of a child in an industrial school is permitted that it may well be that its detention over a lengthy period is essential in order to enable it to be properly educated. In the view of this Court however sub-Article 5 does not enable the Legislature to take away the right of a parent who is in a position to do so to control the education of his child, where there is nothing culpable on the part of either parent or child. 

The second ground is that the Article of the Constitution does not apply in the case of a broken or disrupted family. O'Dalaigh J dealt with this argument [in the High Court] in a manner of which this Court approves when he said:

{ Here recital of these provisions is enough to demonstrate that desertion on the part of a mother without just cause leaves the authority of the family unimpaired and in no way diminishes the parental right with regard to the education of the children. It is true that in many cases the family authority and parental rights will be asserted by the parents jointly; but the assertion of that authority and of those rights cannot be less effective because of desertion on the part of one of them. I therefore reject without hesitation the Attorney General's first submission.

The last argument with which it is necessary to deal is that as the Minister has the power under s. 69 of the Act of 1908 to discharge a child irrespective of any application by the parents or either of them he can set matters right by ordering the discharge of a child. He can, however, as Davitt P pointed out in his judgment [in the High Court] decline to do so—and in this case he did so decline—that being so, it seems clear that the provisions of s. 69 in so far as they might be invoked in the case of a child committed on an application under s. 10 of the Children Act, 1941 are inadequate to save the section for the same reasons as those given by this Court in *In re School Attendance Bill 1942* [1943] IR 334 for not accepting the contention that s. 4 saved the Bill from repugnancy. They were as follows:

In giving the opinion of the Supreme Court Sullivan CJ at p. 345 said: 'We must construe that section as we find it and try to ascertain its meaning and effect. We assume that the powers conferred upon the Minister by the section if passed into law will be exercised in a reasonable, conscientious and temperate manner. But, making this assumption, we are nevertheless of opinion that a Minister, construing the section in a reasonable manner, might require a higher standard of education than could properly be prescribed as a minimum standard under Article 42.3.2° of the Constitution. We are further of opinion that the standard contemplated by the section might vary from child to child, and, accordingly, that it is not such a standard of general application as the Constitution contemplates. In these respects we are of opinion that the proposed legislation exceeds the limits permitted by the Constitution and is repugnant to it'.

As the President puts it:

Since the Minister acting in a reasonable and conscientious manner within the provisions of the Children Act can still infringe Constitutional rights, the Act may in that respect, and to the extent which they permit him to do so, be repugnant to the Constitution.

Accordingly, this Court answers the question submitted to it by declaring that s. 10 of the Children Act 1941 is invalid as being repugnant to the Constitution inasmuch and in so far as it deprives a parent with whose consent a child has been sent to a certified industrial school the

consent of the other parent having been dispensed with for desertion—of the right to resume control of the child so as to provide for its education when that parent is willing and able to do so. This means that the whole of s. 10(1)(d) and (e) is invalid with exception only of the introductory words and paragraph (1). It is unfortunate that this declaration involves the invalidation of provisions which if they stood alone are quite in accord with the Constitution. They are however so inextricably entangled with the portion which we find repugnant to the Constitution that there is no way of avoiding this result.

**Solicitor for the prosecutor:**

**Solicitor for the respondents:** *Chief State Solicitor*

*A.M. Collins*  
*Barrister*

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EDUCATION ACT, 1998, Objects of Act.

6.—Every person concerned in the implementation of this Act shall have regard to the following objects in pursuance of which the Oireachtas has enacted this Act:

- (a) to give practical effect to the constitutional rights of children, including children who have a disability or who have other special educational needs, as they relate to education;
- (b) to provide that, as far as is practicable and having regard to the resources available, there is made available to people resident in the State a level and quality of education appropriate to meeting the needs and abilities of those people;
- (c) to promote equality of access to and participation in education and to promote the means whereby students may benefit from education;
- (d) to promote opportunities for adults, in particular adults who as children did not avail of or benefit from education in schools, to avail of educational opportunities through adult and continuing education;
- (e) to promote the right of parents to send their children to a school of the parents' choice having regard to the rights of patrons and the effective and efficient use of resources;
- (f) to promote best practice in teaching methods with regard to the diverse needs of students and the development of the skills and competences of teachers;
- (g) to promote effective liaison and consultation between schools and centres for education, patrons, teachers, parents, the communities served by schools, local authorities, health boards, persons or groups of persons who have a special interest in, or experience of, the education of students with special educational needs and the Minister;
- (h) to contribute to the realisation of national educational policies and objectives;
- (i) to contribute to the realisation of national policy and objectives in relation to the extension of bi-lingualism in Irish society and in particular the achievement of a greater use of the Irish language at school and in the community;
- (j) to contribute to the maintenance of Irish as the primary community language in Gaeltacht areas;
- (k) to promote the language and cultural needs of students having regard to the choices of their parents;
- (l) to enhance the accountability of the education system, and
- m) to enhance transparency in the making of decisions in the education system both locally and nationally.

*Functions of Minister.*

7.—(1) Each of the following shall be a function of the Minister under this Act:

- (a) to ensure, subject to the provisions of this Act, that there is made available

*to each person resident in the State, including a person with a disability or who has other special educational needs, support services and a level and quality of education appropriate to meeting the needs and abilities of that person,*

*(b) to determine national education policy, and*

*(c) to plan and co-ordinate—*

*(i) the provision of education in recognised schools and centres for education, and*

*(ii) support services.*

*(2) Without prejudice to the generality of subsection (1), each of the following shall be a function of the Minister:*

*(a) to provide funding to each recognised school and centre for education and to provide support services to recognised schools, centres for education, students, including students who have a disability or who have other special educational needs, and their parents, as the Minister considers appropriate and in accordance with this Act;*

*(b) to monitor and assess the quality, economy, efficiency and effectiveness of the education system provided in the State by recognised schools and centres for education, having regard to the objects provided for in section 6 and to publish, in such manner as the Minister considers appropriate, information relating to such monitoring and assessment;*

*(c) to lease land or buildings to any person or body of persons for the purpose of establishing a school without prejudice to the establishment by patrons of schools which are situated on land or in buildings which are not leased to them by the Minister, the extension and further development of such schools when established and the recognition of such schools in accordance with section 10;*

*(d) to provide support services through Irish to recognised schools which provide teaching through Irish and to any other recognised school which requests such provision;*

*(e) to perform such other functions as are specifically provided for by this Act or any other enactment, and*

*(f) to do all such acts and things as may be necessary to further the objects for which this Act is enacted.*

*(3) The Minister shall have all such powers as are necessary or expedient for the purpose of performing his or her functions.*

*(4) In carrying out his or her functions, the Minister—*

*(a) shall have regard to—*

*(i) the resources available,*

*(ii) the provision for education and training made by other agencies with funds provided by the Oireachtas,*

*(iii) the need to reflect the diversity of educational services provided in the State, and*

*(iv) the practices and traditions relating to the organisation of schools or groups of schools existing at the commencement of this Part and the right of schools to manage their own affairs in accordance with this Act and any charters, deeds, articles of management or other such instruments relating to their establishment or operation,*

and

*(b) shall make all reasonable efforts to consult with patrons, national associations of parents, parents' associations in schools, recognised school management organisations, recognised trade unions and staff associations representing teachers and such other persons who have a special interest in or knowledge of matters relating to education, including persons or groups of persons who have a special interest in, or experience of, the education of students with special educational needs, as the Minister considers appropriate.*

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GUARDIANSHIP OF INFANTS ACT 1964 - SECT 10 Powers and duties of guardians.

*10.—(1) Every guardian under this Act shall be a guardian of the person and of the estate of the infant unless, in the case of a guardian appointed by deed, will or order of the court, the terms of his appointment otherwise provide.*

*(2) Subject to the terms of any such deed, will or order, a guardian under this Act—*

*( a ) as guardian of the person, shall, as against every person not being, jointly with him, a guardian of the person, be entitled to the custody of the infant and shall be entitled to take proceedings for the restoration of his custody of the infant against any person who wrongfully takes away or detains the infant and for the recovery, for the benefit of the infant, of damages for any injury to or trespass against the person of the infant;*

*( b ) as guardian of the estate, shall be entitled to the possession and control of all property, real and personal, of the infant and shall manage all such property and receive the rents and profits on behalf and for the benefit of the infant until the infant attains the age of twenty-one years or during any shorter period for which he has been appointed guardian and may take such proceedings in relation thereto as may by law be brought by any guardian of the estate of an infant.*

*(3) The provisions of this section are without prejudice to the provisions of any other enactment or to any other powers or duties conferred or imposed by law on parents, guardians or trustees of the property of infants.*

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Section 17 of the Non-Fatal Offences Against the Person Act, 1997.

*Abduction of child by other persons.*

*17.—(1) A person, other than a person to whom section 16 applies, shall be guilty of an offence who, without lawful authority or reasonable excuse, intentionally takes or detains a child under the age of 16 years or causes a child under that age to be so taken or detained—*

*(b) so as to keep him or her out of the lawful control of any person entitled to lawful control of the child.*

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Section 29 of the Education Act, 1998 as amended, makes provision for complaints against decisions of a legitimate nature made by Boards of Management

*Appeals to Secretary General.*

*29.—(1) Where a board or a person acting on behalf of the board—*

*(a) permanently excludes a student from a school, or*

*(b) suspends a student from attendance at a school for a period to be prescribed for the purpose of this paragraph, or*

*(c) refuses to enroll a student in a school, or*

*(d) makes a decision of a class which the Minister, following consultation with patrons, national associations of parents, recognised school management organisations, recognised trade unions and staff associations representing teachers, may from time to time determine may be appealed in accordance with this section,*

*the parent of the student, or in the case of a student who has reached the age of 18 years, the student, may, within a reasonable time from the date that the parent or student was informed of the decision and following the conclusion of any appeal procedures provided by the school or the patron, in accordance with section 28, appeal that decision to the Secretary General of the Department of Education and Science and that appeal shall be heard by a committee appointed under subsection (2).*

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The Education Welfare Act, 2000, at section 17

*17.—(1) Subject to subsection (2), the parent of a child shall cause the child concerned to attend a recognised school on each school day*

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Education Act, 1998, the Functions of a Board of Management

*Section 15.— (2) A board shall perform the functions conferred on it and on a school by this Act and in carrying out its functions the board shall—*

*(d) publish, in such manner as the board with the agreement of the patron considers appropriate, the policy of the school concerning admission to and participation in the school, including the policy of the school relating to the expulsion and suspension of students and admission to and participation by students with disabilities or who have other special educational needs, and*

*ensure that as regards that policy principles of equality and the right of parents to send their children to a school of the parents' choice are respected and such directions as may be made from time to time by the Minister, having regard to the characteristic spirit of the school and the constitutional rights of all persons concerned, are complied with*

Citations from B v B (see above)

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C. (R.) v. S. (I.) [2003] IEHC 86 (11 November 2003), Geoghegan J,

*“The position of a non-custodial parent who remains a guardian of a child following separation of the parents was considered by the Supreme Court in B. v. B. [1975] I.R. 54. Walsh J. in considering the provisions of the Guardianship of Infants Act, 1964 (to which there has been since no relevant amendment)”*

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Alan Shatter at page 657 in “Family Law” 4th Edition,

*“where it is necessary for a court to make a custody order determining with which parent a child should primarily reside, there should be a legal obligation imposed on the judge making such order to explain to both parents their rights and obligations as joint guardians of their child. Presently, neither custodial nor non-custodial parents always fully appreciate or understand their continuing entitlement to be involved in and consulted about the making of major decisions and the occurrence of important events affecting their child's upbringing and welfare, such as decisions about schooling, medical treatment, religious education etc. If this was always understood there is a possibility that custody orders would be viewed differently by some of those parents who continue to battle with each other over their children after a judge has made orders determining the dispute between them concerning their children's future”.*

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D O'H -v- H S E [2007] IEHC 175, Mr Justice Abbott,

*“I consider that the application of this case relates to an issue of public law. Once I have decided that the consent was not bilateral, but was unilateral by the mother only, there remains an outstanding public law issue in relation to the detention of the children. If the consent had been bilateral, notwithstanding the fact that it might have been revoked by one party in the meantime, I would be inclined to hold with the submission very ably made on behalf of the respondent that the position would be one to be rectified in the District Court or in such other proceedings such as the special summons procedure regarding the dispute between the two parent parties.*

*This statement provides me with a further reflection, perhaps, which I should have dealt with earlier in the judgment, but which I have considered in the course of preparing it, and that is that the interpretation which given to the*

*word “custody”, just central to the whole case, is an interpretation which bears in mind the fact that the legislation concerned in this application relates to public law. If the interpretation in this judgment of the word “custody” in the context of subsection (2) Section 4 [of the Child care Act, 1991] differs from other definitions posited, or workaday assumptions in relation to custody, then it differs from these definitions or workaday assumptions in the context of private law, and it is open to the court to draw that distinction as a further justification and rational for the conclusion it has reached, that the word custody is to be considered as public law matter and not to be conflated with private law definitions and understandings of custody as between the persons in the private law sense interested in the care and welfare of children primarily as between themselves and in relation to the issues that arise between these private contracting parties to marital and non-marital relationships, such as they may be.”*

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Alan Shatter, page 430 in “Family Law” 4th Edition

*“There is a legal presumption that where a woman gives birth to a child during a subsisting valid Marriage that her Husband is the father of her child”*