The Irish Community Development Law Journal

The Irish Community Development Law is an online journal, published twice a year by Community Law & Mediation, (formerly Northside Community Law & Mediation Centre) in Coolock, Dublin. The journal seeks to offer a platform for interaction that encourages greater scholarly and academic collaboration in the areas of social policy, law and community development, promoting the practice of Community Economic Development (CED) law and policy in Ireland and learn about these initiatives in other countries.

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# The Irish Community Development Law Journal

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Welcome to Volume 4 Issue 1 of the Irish Community Development Law Journal. This issue focuses on rights and policy issues relating to elderly persons. Unfortunately, we are all too familiar with stories of elder abuse such as that which occurred in the Leas Cross nursing home, and more recently in relation to adults with intellectual disabilities in Áras Attracta. Certainly of late, this issue has been reacted to by the legislature in the form of the Criminal Justice (Withholding of Information on Offences against Children and vulnerable persons) Act 2012. However, the discourse of the rights of older persons is an area that is often left unexplored. Each article in this issue discusses the rights pertaining to the older person and the legal and policy issues flowing there from.

The issue is suitably opened by Moria Jenkins who discusses fundamental rights of older persons in the context of the residential care setting. The author addresses the question of whether these rights are vindicated from within that setting. The Health Care Act 2007 (Care and Welfare of Residents in Designated Centres for Older People) Regulations 2013 are examined by the author, who uses the example of the right to vote, in order to illuminate how the regulations operate to accommodate the elderly person in the exercise of a constitutional right. In this context, the meaning of the phrase “in so far as is reasonably practicable” falls to be examined by Ms. Jenkins, who asks whether, in reality, this means the vindication of the older person’s rights is as far as is practical for the residential unit. This article aptly opens the conversation on the rights of the elderly and their fundamental rights.

The second article in this issue examines the recognition of the older person’s right to make decisions and to have those decisions respected as well as exploring the rights of legal capacity, autonomy and self determination. Charles O’Mahony considers the implications of the UN Convention on the Rights of Persons with Disabilities and argues that the recognition of legal capacity of both older persons and persons with disabilities is crucial, as legal capacity is the “gatekeeper right” to the enjoyment of a range of other human rights. Mr. O’Mahony also explores the potential for the Assisted Decision-Making (Capacity) Bill 2013 to promote respect for the human rights of the elderly, alongside discussing the need for reform in order for Ireland to meet its obligations under international human rights law.

The penultimate article is written by Paul O’Mahoney of The Carers Association and examines reciprocal maintenance obligations towards parents and other ascendants by their children, in the EU and more specifically in Ireland. The historical, religious and possible constitutional origins of reciprocal obligations are described and discussed by the author. The question of the enforceability of such rights, if they exist, is also considered by the author. This article opens up an international conversation on the issue of reciprocal maintenance obligations and opens the door for discussion relating to the tensions between social need and legal necessity for such obligations.
Finally we have a case study by Stephen Spierin BL of the Law Library he discusses the importance of creating an Enduring Power of Attorney, and how the power operates. It will consider the differences and advantages, both cost and procedurally, an Enduring Power of Attorney holds over the consequential alternative of the wardship procedure. The test for capacity to execute an Enduring Power of Attorney will also be examined. In particular this paper will comment on two recent noteworthy High Court decisions relating to an Enduring Power of Attorney, namely, *In the matter of an application for registration of an Enduring Power of Attorney of SCR* - [2015] IEHC 308 (unreported, High Court, 20th May 2015, Baker J), and *AA v FF* [2015] IEHC 142 (unreported, High Court, 20th February 2015, Baker J).
Articles:
The Rights of Older Persons
Human Rights of Older People

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Abstract:
A platform of welcome legislative reforms and policy initiatives that should promote, safeguard and enhance well-being for the older citizen resident has emerged in the last 5 years. Particularly welcome is the legal regulation of all residential care settings for older people and, within that framework for the first time an acknowledgement of the important role of advocacy, independent from family or service provider, in advancing the agency of the resident to exercise her rights. The obligation on the registered provider to ensure the civil, political and religious rights of the resident and access to an independent advocate is qualified, however, “in so far as is reasonably practical”. How this qualification of “in so far as is reasonably practical” relates to the constitutional rights of the older person is considered in relation to the right to vote and resulting questions as to the distinction between formal and substantive equality in the exercise of human rights are posed. The practicality of ensuring access to an independent advocate is questioned in light of the current availability of such a service to the older citizen resident in the Republic of Ireland. If it may be impractical to ensure the civil, political and religious rights of the older resident then the need for alternatives to residential care and the involvement of older people in directing the development of those alternatives becomes urgent.

Keywords:
The rights of the older resident - Regulations 9(3)(e)&(f) – “in so far as is reasonably practical”- voting - access to independent advocacy.
Ensuring equal citizenship and the rights of Older People residents. Do new Regulations in the Republic of Ireland help to realise rights or than permit restriction of rights on uncertain grounds?

“An unenforceable right or claim is a thing of little value to anyone”.¹

United Nations Principles for Older Persons: Principle 14: Older persons should be able to enjoy human rights and fundamental freedoms when residing in any shelter, care or treatment facility, including full respect for their dignity, beliefs, needs and privacy and for the right to make decisions about their care and the quality of their lives.²

According to the most recent census, in 2011, “31,054 older people were receiving care or residing in ‘communal establishments’ The CSO (2011) defines a communal establishment as a religious community, nursing home, hospital, hostel or prison amongst others. The majority of older people identified as residing in a communal establishment are in the nursing home sector with 15% in the hospital sector (CSO 2012b). Approximately 6% of the population of people aged 65 years and older in Ireland are receiving residential care (McGill 2010, CSO 2012b).”³ An estimated 36% of people with a disability in Ireland are over 65. Some of them live in nursing homes and other designated residential centres.

In May 2005 an investigative report, ‘Home Truths’, into an Irish nursing home called Leas Cross was broadcast. In 2006 Professor Des O’Neill published a review of the deaths at this nursing home between 2002 – 2005 and recommended that nursing home legislation needed to be “urgently updated” placing the older person at the centre and to “adequately guide both the provision of quality of care and quality of life”.⁴ On 1st July 2014 regulations to govern ‘designated centres’ providing residential care for older people commenced.⁵

A platform of welcome legislative reforms and policy initiatives that should promote, safeguard and enhance well-being for the older citizen resident has emerged in the last 5 years including reform in vetting, the professionalisation of social care, public interest disclosure protections for workers, criminal sanctions for withholding information on offences against vulnerable persons and attendant developments in group advocacy and research, for example into elder abuse/protection of the older person. Whilst long overdue, the legislative basis for registration and regulation of all residential care settings for older people and, within that framework, for the first time an acknowledgement of the important role of advocacy is welcome. The structure of the Regulations in placing these two regulations together in a section on “Resident’s rights” hopefully reflects the aim that access to an independent advocate should assist with the realisation of the civil, political and religious rights of the older citizen resident but the meaning

⁵ S.I. No. 415/2013 - Health Act 2007 (Care and Welfare of Residents in Designated Centres for Older People) Regulations 2013.
and import of the regulations remain to be determined. What did we get? Crucially the regulations are complemented by Standards\(^6\) that emphasise the importance of access to advocacy, independent from family or service provider, in advancing the agency of the resident to exercise genuine choice and act on that choice. But the assertion of the rights of the older citizen resident is qualified and the extent and meaning of the qualification is legally unclear. The obligation on the registered provider to ensure the civil, political and religious rights of the resident and ensure access to an independent advocate is qualified “in so far as is reasonably practical”. Whether this qualification of “in so far as is reasonably practical” amounts to a constitutionally permissible discrimination is considered below but the inclusion of this requirement of ‘practicality’ engages wider questions as to the distinction between formal and substantive equality in the exercise of human rights by the older citizen resident.

The State has fundamental obligations under constitutional, European and international law to uphold the human rights of the older person, wherever resident and these obligations are arguably more demanding than ‘in so far as is reasonably practical’. This article does not attempt to critique the Regulations and HIQA Standards against the European Convention on Human Rights, the Convention on the Rights of Persons with Disabilities and other human rights obligations but merely to question what the new regulations mean in a domestic context, highlighting that civil and political rights are not subject to progressive realisation but have immediate effect. Should older people be placed in residential care if a centre may lack an ability to afford fundamental rights and freedoms to the resident older person that the person in the community could exercise without curtailment? Is this legislative possibility of interference of constitutional rights a waiver or an incidence of operation of the doctrine of necessity\(^7\) or just ageism? What is the reason for the potential restriction? Candour about the degree to which the rights of the older citizen resident are, can or will be upheld is required by residents, providers and staff but also for all of us in how we feel about ageing. Participatory research into older people’s understandings of elder abuse in Northern Ireland and the Republic of Ireland in 2011 concluded that older people identify an over-arching ‘personhood abuse’ wherein there was a ‘gradual withdrawal from older people of the characteristics that make them human with the same needs and rights as the rest of society”\(^8\) and many participants said their dread of going into a nursing home was such that they would see abuse in the home by their family as preferable. The challenge of ensuring equal enjoyment of fundamental and human rights throughout life and in all the places we live requires community development writ large as well as law reform. Advocacy can amplify voice but we need choice if ‘will and preferences’ are to be achievable.

The Northern Ireland Human Rights Commission concluded in 2012, following a review of the rights of their older citizen residents that - “Many if not all of the concerns identified in this report relate to the lack of an overarching framework to ensure the systematic application of human rights standards to all aspects of care provided to older people in nursing homes”\(^9\) but the Republic of Ireland does have at

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7 See argument as to the application of this common law doctrine underpinning admission and detention in nursing home care - Age Action. Overview of the Human Rights of Older People in Ireland July 2014. [www.ageaction.ie](http://www.ageaction.ie)

8 Age Action/CARDI (2011) “A Total Indifference to our Dignity” Older People’s Understandings of Elder Abuse Page 67.

least one such established overarching framework – a written Constitution with judicial review. How does the new criteria of “in so far as is reasonably practical” accord with the constitutionally protected rights of the older citizen?

**Regulation of residents’ rights:**

The long awaited *Health Care Act 2007 (Care and Welfare of Residents in Designated Centres for Older People) Regulations 2013*\(^{10}\) are complemented by the National Quality Standards for Residential Care Settings for Older People in Ireland 2009, published by HIQA. A consultation on new, draft standards was completed in October 2014 but at the time of writing the 2009 Standards apply.\(^{11}\) The glossary to the Standards defines “Standards and criteria”: “a standard is a measure by which quality is judged. It sets out an expected or desired level of performance. The criteria are the supporting statements that set out how a service can be judged to meet the standard”.

**Part 2 of the Regulations for Designated Centres is entitled Residents’ Rights**

“Regulation 9 (3): A registered provider shall, in so far as is reasonably practical, ensure that a resident—(a) may exercise choice in so far as such exercise does not interfere with the rights of other residents; (b) may undertake personal activities in private; (c) may communicate freely and in particular have access to—(i) information about current affairs and local matters, (ii) radio, television, newspapers and other media, (iii) telephone facilities, which may be accessed privately, (iv) voluntary groups, community resources and events; (d) may be consulted about and participate in the organisation of the designated centre concerned; (e) may exercise their civil, political and religious rights; (f) has access to independent advocacy services.”

In considering Regulations 9 (3) (e) & (f) this analysis asks who is responsible for ensuring the rights of the older person in residential care; whether the requirement that the person in charge shall ensure civil and political rights ‘in so far as is reasonably practical’ involves an interference with the constitutional rights of the older person; if that interference is justified in terms of a legitimate aim; if any interference is proportionate and necessary; and what access to independent advocacy ‘so far as is practical’ means in the context of available, current advocacy services?

Important law reform debates on capacity, supported decision making and securing equal recognition before the law continue, but here the role of independent advocacy is taken to have wider value than, although including, supported decision making and supports for decision making to ensure equal recognition before the law and includes assisting the decision of the person once made to be heard, respected and actioned. Advocacy takes many forms but access to third party, representative, independent advocacy whether paid or voluntary is the form considered here. It is also asserted that third party advocacy should complement other supports and that self-advocacy is or should be the goal of all other forms of advocacy.\(^{12}\)

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\(^{10}\) Statutory Instrument No. 415/13. [www.irishstatutebook.ie](http://www.irishstatutebook.ie). Also [www.hiqa.ie](http://www.hiqa.ie)

\(^{11}\) National Quality Standards for residential Care Settings for Older People in Ireland 2009. HIQA. [www.hiqa.ie](http://www.hiqa.ie)

Regulation 9 (3) (e) and the right to vote

Whilst acknowledging the interdependence and indivisibility of all human rights it is useful in an examination of the likely import of regulation 9 (3) (e) to focus on a concrete example of a civil and political right. The right to vote presents as an established and relatively uncontroversial example of a constitutionally enshrined political right enjoyed by the older resident (as opposed to debated rights such as liberty/deprivation of liberty) and one most people identify as a right. Article 16.1.2 provides that any citizen over the age of eighteen years, who complies with the law relating to the election of members of Dail Eireann, “shall have the right to vote at an election for members of Dail Eireann”. The only additional legislative requirements for entitlement to vote are that ‘on the qualifying date’ the person is a citizen and “ordinarily resident in that constituency”. Ireland is unusual, but not unique, in not excluding people with ‘mental incapacity’ from registering and voting – a study by Massicotte and colleagues in 2004 of the electoral laws of 64 democracies found that 94% had such exclusions, typically based on a guardianship order or residence in a psychiatric hospital, but four countries lacked such an exclusion – Canada, Sweden, Italy and Ireland. Therefore, if registered, the older person resident is entitled to vote and the only medical certification required is as to physical incapacity to attend a polling station if the person wishes to exercise her vote at the residential centre through the special voters register.

The inter-relationship of the right to vote and the fundamental constitutional rights of the citizen is probably agreed but is rehearsed as follows. Article 5 of the Constitution characterises the State as a democratic state – one where government by the people pertains and in which all citizens have equal political rights. It is accepted that the right to vote is an incidence of such an equal political right and the right to equality is one of the personal rights of the citizen: “…a “democratic state” denotes one in which all citizens have equal political rights. That the words should be given such a meaning in our Constitution seems to be supported by (Articles 16.1.4 and 40.1) as to the restriction of voting power to one vote per person and the equality of all before the law.”

In Kelly v. Minister for the Environment the Supreme Court upheld the decision of McKechnie J. in the High Court wherein he stated: “It now seems quite clear that the State must in its electoral laws have regard to the concept of equality and must ensure that with any provisions passed into law the guarantee of equality as contained in Article 40, section 1 of the Constitution will be respected. It cannot, therefore, by any provision of a statute, or by the manner and way in which it might implement such a provision, cause unjustified advantage to accrue to one person, class or classes of the community as against or over and above, another person or class of that same community. Equals must be treated equally.” Further Denham J. (as she then was) stated in TD v Eastern Health Board (2001) 4 IR 259 that “…democracy does not mean formal democracy alone, which is concerned with the electoral process in which the majority rules. Democracy also means substantive democracy, which is concerned with the defence of human rights in particular….” The right to vote is linked to the rights to freedom of expression (article 40.6.1.i) and freedom of assembly (article 40.6.1.ii) and freedom of association (article 40.6.1.iii), as it safeguards respect for pluralism of opinion in a democratic society. Like all other constitutional rights the right to vote is not absolute – conditions can be and are imposed and are permitted so long as they pursue a legitimate aim and are proportionate.

Accommodating the older resident voter

A robust and detailed legislative framework has been enacted to accommodate a voter with a disability (thank you Mrs Draper) including attendance at an alternative polling station, assistance of a companion or the presiding officer at the polling station, facilitation of postal voting for a person ‘at home’ unable to attend a polling station due to a physical disability and by a special voters register of people in hospital or residential care.17 The lack of exclusion on grounds of mental (in)capacity is refreshing and appropriate, a functional test wherein you need to explain the rationality of your voting decision before you are allowed to vote would be hard for most of the electorate to satisfy. Accessible and through information about the legislative procedure(s) is provided on the Citizens Information website with links to the various forms to be returned to the local authority. So it may be concluded that the State has, in this case, provided “so far as is reasonably practicable” for the personal right of the citizen, even with a disability and/or resident in a nursing home, to exercise her franchise. The resident has, at least, two clear options for exercising her right to vote. If physically able to do so she can attend the relevant polling station (or an alternative if more accessible) and there are provisions to allow her companion to assist her in completing the ballot paper if sight impaired or physically unable to do so (a companion can assist a maximum of two voters per poll in this way). Other than in the last two hours of polling, the presiding officer may also assist a person attending a polling station, with an intellectual disability or literacy problem for example, by communicating with the person in private and completing the ballot paper according to their instructions. This option for voting for the resident has clear benefits in terms of ‘social connectedness’ in facilitating the resident to participate in activity in the wider community – getting the vote out! Alternatively the resident can register on the special voters register and a special presiding officer and a member of the Gardaí will attend at the residential care facility on polling day at a pre-indicated time to enable the vote of a resident. This aspect of the system has similar attendant benefits of bringing the wider community into the residential setting in a tangible way, even for residents who chose not to vote.

There is no cost or financial charge to the voter, or registered provider, to register on the special voters register nor for the special presiding officer and Gardaí to attend the home. The practicalities involved in ascertaining the wishes of the resident with regard to voting generally and at the precise time of voting, the necessary and timely form filling, staffing issues if attending a polling station, medical certification as to inability to attend a polling station due to physical disability and, perhaps, a health and safety risk assessment could be argued to be additional burdens for a provider and whether the registered provider considers it ‘reasonably practical’ to ensure registration on the special voters register or to facilitate attendance of the resident at a polling station will therefore determine the exercise of the right to vote for many residents. Standard 5 of the 2009 Standards entitled ‘Civil, Political and Religious Rights’ requires in criteria 5.1 that the residential care setting “have a policy acknowledging rights and setting out the manner in which the resident is informed of and facilitated in the exercise of his/her rights” and criteria 5.4 “is facilitated to participate in the political process” and at 5.5 “facilitated to access legal advice”. But the standards are not law and whilst providing guidance to complying with regulation 9(3) (e) all of these are subject to the same criteria of “so far as is reasonably practical”.

17 See, for example, Department of the Environment, Community and Local Government (August 2013) Voting with a Disability; “Facilities for Voters with Disabilities” www.citizensinformation.ie Accessed 1 April 2015; “Voting” www.inclusionireland.ie Mrs Draper, a person with a physical disability challenging the lack of provision to facilitate people with disabilities to vote in Dail elections, as contrary to Article 40.1 on equality before the law, did not win in the Supreme Court in 1984 but now appears vindicated; Draper v. Attorney General 1984 IR 277.
Voting for the resident – practicable but may be not practical? Rights or discretionary

The question, therefore, as to the older citizen resident being able to vote is not about the capacity of the individual to exercise their right nor of the State’s reasonable accommodation of that right but rather and only about the capacity of the residential centre to afford and facilitate the exercise of the right.

What factors may influence a determination of ‘practicality’ by a registered provider with regard to a resident voting? The care plan for the resident and the required minimum four monthly reviews of implementation of the care plan allows opportunity for periodic ascertaining and recording of the resident’s wishes as regards voting in any poll they are entitled to register for. Of course - as with other voters - a resident may be registered and eligible to vote but decide not to vote on the day. So the burden is in terms of drafting and communicating of policy, administration – deadlines for registration on the electoral register or special voters register apply - and resourcing, as staffing will be an issue if the resident is able to attend a polling station and wishes to do so. Whilst the resident with access to the internet and other information sources may be able to register themselves many may require some assistance to do so whilst resident in a nursing home or hospital.

The constitutionality of Regulation 9(3)(e), voting for residents and proportionality tests

The State has made it ‘practicable’ for the older person resident to vote but a further requirement of it being deemed to be ‘practical’ by the registered provider has been imposed and regulation 9(3)(e) therefore appears constitutionally suspect. The meaning of ‘in so far as is reasonably practical’ is not apparent from the Regulations nor in the Standards/criteria. The Supreme Court ruled in O’Brien v. Manufacturing Engineering Co. (per Walsh J.) on the question of whether a constitutional right is infringed by an unreasonably restricted opportunity for its exercise: “Rights conferred by the Constitution, or rights guaranteed by the Constitution, are of little value unless there is adequate opportunity for availing of them: any legislation which would create such a situation must necessarily be invalid, as would any legislation which would authorise the creation of such a situation: see the decision of this Court in The State (Quinn) v. Ryan”.  

Is there a difference between “as far as is practicable” – the constitutional imperative on the State in Article 40.3 on the personal rights of the citizen – and “so far as is reasonably practical” for the older person resident in a designated centre? Was this just a drafting oversight? How is a criteria of ‘so far as is reasonably practical’ in accessing, for example, the service provided to enable voting on the grounds of age and residence in a designated centre justified? Regulation 9(3)(e) implies that it can be deemed ‘impractical’ for a resident to exercise their civil, political and religious rights, even where it is ‘practicable’, as exampled on the right to vote. The decision of whether it is ‘reasonably practical’ for a resident to exercise any of their civil, political or religious rights appears to be decided by the registered provider and whilst HIQA, as inspector of the regulations, can scrutinise and comment on the implementation of residents’ rights by the provider there is no appeal as to a decision in a single incidence. One opposite of practical is theoretical. Whilst Article 40.1 allows discrimination in treatment with regard to equality before the law due to ‘status’ this does not arise in the case of voting as the law does provide for equality of treatment. Voting for the resident is ‘practicable’ – capable of being put into practice, but it may or

18 The State (Quinn) v. Ryan (1973) IR 334 at 366.
may not be ‘practical’. The provision appears to leave it up to the provider to decide on unclear grounds, without appeal, whether the resident can exercise her rights.

What justifies or validates the potential restriction on constitutional rights inherent in Regulation 9(3) (e)? Whilst it is established constitutional law that none of the personal rights of the citizens are absolute and unqualified - “…the Oireachtas has to reconcile the exercise of personal rights with the claims of the common good and its decision on the reconciliation should prevail unless it was oppressive to all or some of the citizens or unless there is no reasonable proportion between the benefits which the legislation will confer on the citizens or a substantial body of them and the interference with the personal right of the citizen”\(^{19}\) - it is hard to see, now concerns about the secrecy of the ballot have been addressed, how this interference with the right of the older resident to vote is required in the interests of the common good. Regulation 9(3)(e) permits a restriction on rights on the grounds of impracticality but without clear delineation of what that means and therefore how can it amount to a non-arbitrary, justifiable intervention in the constitutionally protected personal rights of the citizen? If the argument is that the State is justified, through its delegation of regulatory power to HIQA under the Health Act, in imposing the limitation on the personal rights of the older person resident for a legitimate legislative purpose - because the common good, for example, requires provision of residential care for some (6%) older citizens - then what is the ascertainable scope of that limitation? If the intervention is not justified on a clear public interest ground then a proportionality test does not attach as no limitation is permitted. Assuming that an argument can be mounted that justifies any restriction of the rights of an older person resident in the interests of the public interest/common good the proportionality test still involves the notion of minimal restraint on the exercise of potential rights and it is unclear how the proportionality test can be applied when the criteria of ‘in so far as is reasonably practical’ is without definition or explanation. A person also has a constitutional right against vague and indefinite laws,\(^{20}\) an un-enumerated right sourced in the concept of justice expressed in the preamble, and in provisions relating to the dignity of the citizen and right to due process. The relief in finally getting enforceable regulations for residential care for older people 10 years after Leas Cross is clouded by the uncertainty as to the meaning of those safeguards. Other issues as to the right to an effective remedy, both under the Constitution in terms of due process and internationally, for example, under Article 13 of the European Convention of Human Rights and Article 47 of the European Charter, arise but are beyond the scope of this preliminary questioning of the meaning of the regulations.

Regulation 9(3)(e) may introduce a concept of justice for the older person resident ‘if not inconvenient’. Do we waive our constitutional rights when we become resident?

**Waiver, the doctrine of necessity and advocacy**

The Supreme Court has ruled that waiver of certain constitutional rights is possible\(^{21}\) (no waiver of inalienable constitutional rights is permissible) but it is only permissible where the waiver is based on full knowledge and consent. Therefore, arguably, any contract for or with the resident must make clear the possible limitation of constitutional rights on grounds of practicality whilst resident. Whilst the

\(^{19}\) Kenny J. Ryan v. Attorney General (1965) IR 294 at 312.

\(^{20}\) King v. Attorney General (1981) IR 233

courts have ruled that: “a consent motivated by fear, stress, anxiety or consent or conduct dictated by poverty or other deprivations cannot constitute a valid consent”\(^\text{22}\) that was in relation to waiver of a right to custody when a mother consented to placement of her child for adoption and Hogan and Whyte have observed that whether these “stringent conditions of waiver...are to be generalised over the whole field of fundamental rights, has not yet been judicially discussed.”\(^\text{23}\) That said the vagueness of the qualification is problematic in terms of waiver also – which rights am I waiving, to what extent, when? The issue of ready access to a legal procedure to review admission of older people to nursing homes without their consent or when consent is revoked, usually justified on grounds of the doctrine of necessity, is unavoidably engaged. The decisions of the European Court of Human Rights in *HL v. United Kingdom* (2005) and *Stanev v. Bulgaria* (2012) indicate that the lack of a legal procedure prior to admission and lack of review thereafter may amount to an unlawful deprivation of liberty. Is the older resident’s right with regard to liberty also subject to the criteria of “in so far as is reasonably practical”?

It has been argued by older people advocacy providers there are specific circumstances where *all* older people should have a right to access the support of an independent advocate, free of charge, if they so choose. One point is at hospital discharge if transition to residential care is being discussed, another is when being assessed for continuing care and/or community care services and finally at all reviews affecting continuing care services in hospital or residential placement.\(^\text{24}\) Independent advocacy for older people should make it harder for your will and preferences to be ignored but query what respect is afforded to the most clearly expressed wishes of older people. One geriatrician observed “‘Don’t put me in a home’ - probably the commonest advance directive.”\(^\text{25}\) We can add to that “I want to go home” as a repeated request of some older residents. Is that a revocation of any waiver agreed to on admission? What value attaches to my wishes? The reasons for not acting on my desire to go home (freedom of movement/self-determination/liberty) are usually practical and serious – there are insufficient supports for you at home, you will end up being readmitted, it took ages to get you this place and you could lose it, you could die at home. In addition to not being enabled to act on my wish I will also risk putting my capacity in question. Such a foolish decision must mean I do not understand the consequences.

The potential value of tenacious advocacy in this scenario, particularly if family disagrees with the resident or the resident has no natural support network is obvious. It is therefore important to look at the availability and accessibility of advocacy for the older person resident.

The *Assisted Decision Making (Capacity) Bill* 2013 proposes enhanced recognition of advance care directives and of the individual’s will and preferences “so far as practicable” but lacks: a) any form of support for the older person with, as yet unchallenged, capacity who lacks someone to appoint as an assistant decision-maker; b) “clarity and specificity” as to informal decision making under sections 53

\(^\text{22}\) Ibid.
and 54\textsuperscript{26} – although such substitute informal decision making would cover living arrangements, medical treatment and travel; c) automatic legal aid in any category of case. The graded ‘assisted’ decision making and substitute decision making (‘wardship-lite’) interventions would only be triggered when capacity is or shortly may be in question. The support needs of the older person in conflict with family and/or professional carers are not addressed in the Bill.

**Regulation 9(3)(f) and ensuring access to an independent advocate – not ‘practicable’ nor ‘practical’?**

The question of what is ‘practical’ in ensuring the civil, political and religious rights of the resident highlights the value of, and most welcome inclusion of, access to independent advocacy in Regulation 9 (3) (f) as a right of the resident. The resident with access to an independent advocate has support to have their wishes with regard to many aspects of their will and preferences (including voting) recorded and to be supported in negotiating the exercise of those rights and preferences. The 2009 Standards usefully define both ‘advocacy’ and ‘advocate’ in the glossary of terms as follows:

“'Advocacy': a process of empowerment of the individual which takes many forms; includes taking action to help people say what they want, secure their rights, represent their interests or obtain the services they need; it can be undertaken by older people themselves, by their friends and relations, by peers and those who have had similar experiences, and/or by trained volunteers and professionals. ‘Advocate': a person independent of any aspect of the service or any of the statutory agencies involved in purchasing or providing the service, who acts on behalf of, and in the interests of, the person using the service. In the context of residential care settings for older people, an advocate facilitates a resident, insofar as possible, to make informed choices regarding health care, social care and quality of life.”\textsuperscript{27}

Whilst the recognition of the role of the advocate supporter is welcome it is likely to have limited practical impact if people, including registered providers, do not have access to such an advocate. Where does the well-meaning, rights-conscious provider get one? As noted proposed law reform on capacity promises welcome legislative reform but there does not appear to be any proposal for legislative provision for a supporter for the person without a circle of support and with capacity. How best to provide a sustainable, credible source of independent advocacy to all older person residents now demands rigorous attention otherwise the ‘right’ will remain theoretical only. Three salient options are currently, theoretically, available...one in legislation that hasn’t been commenced and two in budget/ regionally limited services without statutory bases or powers. Other local services may be provided, and the following does not pretend to be an exhaustive list of options.

Legislation to provide a right to a personal advocate for a person with a disability, without other means of support, to access social services has been enacted but not commenced: section 5 Citizens Information Act 2007. This legislation, in relation to voting, would not provide a legislative entitlement to assistance


\textsuperscript{27} National Quality Standards 2009. Page 74. Glossary.
for the resident even if commenced. However for the resident who has resolved to leave residential care and return home and who is without a circle of support such a personal advocate would be vital in planning and arranging that ambitious move. In lieu of this statutory service being commenced, or coinciding in with its non-commencement, the National Advocacy Service was established under the rubric of the Citizens Information Board. This national paid, professional and supervised advocacy service employs approximately 50 advocates nation-wide who prioritise people with disabilities in residential care and could be utilised by a resident/registered provider, depending on availability. The calibre of advocates employed by NAS and the quality of advocacy they have provided to date is impressive but they work without statutory powers and the valuable criminal penalties for obstructing an advocate provided in the *Citizens Information Act* 2007. Access by NAS advocates to people in residential care is reported to be secured by other avenues in the absence of statutory requirement: “co-operation with NAS advocates has been made a requirement in HSE Service Level Agreements with various disability service providers – which should help to cement the role of the advocate and the responsibility of services to engage with the advocate as a representative of the person with disability”\(^\text{28}\) but that is not the same thing as criminal penalties for breach of statutory rights of not only of access to the person but also to information, including to care plans, and a right to represent the person when the resident so instructs.

Another key initiative to provide independent advocacy to older people residents was first trialled after the Leas Cross report of Professor O Neill in 2006 and re-launched as SAGE on 24 June 2014. The HSE Advocacy Unit initiated a pilot scheme in 2008 called the National Advocacy Programme Alliance (NAPA) to train and place citizen, volunteer advocates for older people in nursing homes to provide an “independent representative advocacy service to older people in residential care in order to enable them to effectively express their wishes, access their entitlements and assert their rights”.\(^\text{29}\) The pilot volunteer advocates were recruited and trained on a FETAC Level 6 module on advocacy provided by the National College of Ireland. A code of practice for the project entitled “Volunteer Advocacy Policy” (unpublished) was issued in 2009. NAPA then commissioned an evaluation of the programme by Dr Jane Pillinger in 2011.\(^\text{30}\) This review consisted of 25 interviews with external key informants, 15 interviews with volunteer advocates, 24 interviews with residential care staff including Directors of Nursing, 8 focus groups and 15 surveys completed by participating residential units and 59 surveys completed by volunteer advocates - no residents/older people resident were consulted. The conclusions noted that 133 volunteer advocates were providing advocacy in 67 residential units/homes at that time and that the pilot programme had received 385,000 euros in funding from the HSE between 2008 – 2010. Pillinger’s recommendations included that: a) independent advocacy and access to information for older people should be located within a robust legal framework; b) that the HIQA Standards include ‘robust’ regulatory standards on independent advocacy ensuring older people were clear on what they have a right to receive in residential care; c) the Advocacy Programme be “located in an organisation that is independent of the HSE”\(^\text{31}\) and d) that a dedicated and specialist ‘Dementia Advocacy programme’ be established with a corresponding specialist advocacy qualification for volunteers, developed in conjunction with the


\(^{31}\) Ibid. page 13.
Alzheimer’s Society.\(^{32}\) In 2011 the national voluntary organisation, Third Age, took over NAPA renaming it the Third Age National Advocacy Programme (TANAP), describing it, then, as “a partnership between a voluntary (Third Age), a not-for-profit (Nursing Homes Ireland) and a statutory body (the HSE).\(^{33}\) The 2012 Third Age Annual Report noted that 325 volunteers had been trained since the inception of NAPA and that, at that time, “approximately 130 remained in active practice”.\(^{34}\) In February 2014 Third Age advertised for a programme manager for ‘the Older People’s Advocacy Programme’ stating its mission to be informed by the statement of the Council of Europe on the rights of older people. The new service has the aim “to promote and protect the human rights and freedoms of older people and to promote respect for their inherent dignity through the development of a sustainable, independent, advocacy service for and with older people in and across care settings”. One of the responsibilities set was to “set out national standards for an independent advocacy service for older people”.\(^{35}\) Recruitment of 300 volunteer ‘representatives’ taking on one or more of the roles of advocate, facilitator and/or support person was completed in late 2014 with training commencing in January 2015. The application information requires a volunteer to agree to provide 2-4 hours of their time weekly and make a minimum two year commitment. Currently 120 SAGE advocates are available in 90 of the 431 registered public and private nursing homes in Ireland.\(^{36}\) The project is funded to 2017 by Atlantic Philanthropies and by the HSE.\(^{37}\)

SAGE offers assistance to residential care providers for older people providers on how to comply with the 2013 Regulations with regard to Regulation 9 (3) (f) and the stated ambition of the Third Age SAGE programme is to extend availability of advocacy beyond residential care and into both acute hospitals, community services for older people and to also be available to people at home. The ethos, aims, rights-focus and personnel all appear impeccable – in addition to the welcome recognition of the need of advocacy and support in acute hospital settings, at hospital discharge and in the community SAGE also has recruited for three types of representative or supporter – an advocate, a facilitator and a support person. The aims are broad, ambitious and justify the following lengthy quote:

“...Information and advice to nursing home managers about providing access to support and advocacy services and meeting HIQA standards on advocacy. A rapid response service where individuals urgently need support and local services are not yet developed. Independent facilitators for residents groups who are trained, supported and accountable. Support and advocacy with and on behalf of individual residents from Sage representatives who are trained, supported and accountable. Specialist backup for complex issues through a National Advisory Committee. Support in the use of the ‘Think Ahead’ resource for registering

\(^{32}\) Ibid. page 15.


\(^{34}\) Footnote 20 at page 15.

\(^{35}\) Job description for Programme Manager – Older People’s Advocacy Service. [www.thirdageireland.ie](http://www.thirdageireland.ie)

\(^{36}\) [www.thirdageireland.ie](http://www.thirdageireland.ie) Last accessed 22.02.15.

wishes and preferences in the event of an emergency, serious illness or death. Educational and personal development opportunities to potential leaders in care services who see the expression of residents opinions and concerns as a means of improving the quality of their services.” 38

There must be questions as to the capacity of SAGE to deliver on these expansive promises when less than a quarter of registered residential providers have a volunteer from TANAP/SAGE currently and, further, on how a volunteer advocate can deliver advocacy of an appropriate standard (yet to be set) when operating for 2 – 4 hours per week and for 12 – 15 people in environments not conducive to taking of instruction and for some people with complex needs.

Citizen, volunteer advocacy has a vital role in a spectrum of advocacy supports – perhaps particularly in specialised advocacy for people with dementia - but to rely purely on a charitable, volunteer service as the primary available source of service to meet a regulatory requirement for people in a situation of dependency seems naïve at best and cynical at worst. If HIQA/the Minister deem independent advocacy as crucial to a resident’s rights and a requisite regulatory burden on the provider then a paid, vetted, professional, supervised service should be established with statutory powers to access the resident and her records and represent her when she wishes, at least as a complementary service to citizen, volunteer provision. A memorandum of understanding with SAGE (and a leaflet on the noticeboard) may be interpreted to suffice as a provider having ensured “in so far as is reasonably practical” access to an independent advocate and exclude other more unwieldy options such as use of patient personal funds to employ a solicitor, for example. The issue of protecting independence and the appearance of independence arises – older people in residential care are dependent on the HSE or NHI providers for their day to day care. It is unclear what, if anything, would be the consequence of a nursing home refusing to enter into the memorandum of understanding with SAGE.

Simply put currently NAS and SAGE together currently provide approximately 62 fulltime advocate positions for the 613 residential centres in the country. How ‘practical’ can access be with this capacity to demand ratio?

Another final option for access to ‘independent advocacy’ within the definition provided in the Standards is for the older person resident to access legal advice. Standard 5.5 makes separate reference that the resident is to be “facilitated to access legal advice”. A group called “Solicitors for the Elderly” has been established and if the Law Society were to produce a list of solicitors prepared to act for and visit older people residents, together with a set charge for preliminary consultation, that could be valuable as a practical source of independent advocacy. The solicitor has a professional ethic of acting on client’s instructions required for advocacy partnership and a requisite understanding of legal and financial frameworks. They also have professional indemnity insurance so some of the finer distinctions between information, advice and advocacy can be avoided. On the other hand cost may be prohibitive and lawyers may not have the specialist training and experience to communicate with some residents. There is no indication yet of a pro bono task force of visiting elder lawyers.

38 SAGE. ‘What we do’ www.thirdageireland.com Accessed 22.02.15.
In conclusion the Minister for Health as author of the 2013 regulations, HIQA as author and inspector of the 2009 Standards, the HSE as party to service level agreements and organisations in receipt of public monies are all subject to the new public sector duty in section 42 of the *Irish Human Rights and Equality Act* of 2014 and hence all also have a positive responsibility to consider the extent to which the equal enjoyment of human rights by older person residents are protected or restricted. We finally got regulations – but what did we get? We need to ask and be honest about the capacity of the residential sector to afford the realisation of rights and in this regard the capabilities approach of Amartya Sen could be a useful philosophical mechanism. Sen notes: “The distinction between the ‘opportunity aspect’ and the ‘process aspect’ of freedom can be both significant and quite far reaching.” Recently the potential of the capabilities approach of Sen, Martha Nussbaum and Sandra Fredman in integrating equality and human rights has been identified by Niall Crowley in a paper for the Equality and Rights Alliance, “to focus action on realising the capabilities required by individuals and communities to flourish”. Sen sees the capabilities approach as a way of reflecting on the system ‘space’ provided for the capabilities of the individual or group “evaluating a person’s advantage in terms of his or her actual ability to achieve various valuable functioning’s as a part of living”. It is suggested the approach lends itself to asking these questions of the capability of institutions as well as of individuals: “The usability of the approach in egalitarian calculus depends on the plausibility of seeing individual advantages in terms of capabilities, and if that plausibility is accepted, then the same general perspective can be seen to be relevant for other types of social evaluation and aggregation. The potentially wide relevance of the capability perspective should not come as a surprise, since the capability approach is concerned with showing the cogency of a particular space for the evaluation of individual opportunities and successes.” Can residential care institutions ever provide sufficient ‘space’ for the equal enjoyment of the rights of the older citizen? If it may be impractical to ensure that a resident may exercise their fundamental rights then either the State should not financially or otherwise support placement in such ‘designated centres’ or must put in place a legal procedure with appeal to ensure that the person is aware of the restriction on their rights they are agreeing to.

The precise meaning of Regulation 9 (3) (e) awaits judicial interpretation – the distinction between ‘in so far as is reasonably practical’ and the more familiar ‘so far as is reasonably practicable’ looks like a legal minefield. It is hard to see how the provision furthers the realisation of the older resident’s human and constitutional rights more than it permits restriction of those rights on uncertain grounds. Whilst the regulatory recognition of the support role of an advocate is important, not least in terms of advancing credibility and parity of esteem for advocacy, the challenge to have the voice of the resident respected, even where amplified by an advocate, in the face of such a sweeping qualifying restriction is overwhelming.

39 Section 42 *Irish Human Rights and Equality Commission Act* 2014 “A public body shall, in the performance of its functions, have regard to the need to: a) eliminate discrimination, b) promote equality of opportunity and treatment of its staff and the persons to whom it provides services; and c) protect the human rights of its members, staff and the persons to whom it provides services”. Commenced 08.10.14 pursuant to S.I. No. 449/14.


Positive ageing, as reflected in the National Positive Ageing Strategy, requires a shift from the deficit model of decline to a recognition that over the life-course our losses are accompanied by growth, ensuring that ‘social connectedness’ continues and reasons to be confident that our rights will endure in scope and effect regardless of our age. Feeling better about growing old, not just fresh thinking about ageing, is the aim. Equal recognition before the law, access to justice and a right to independent living/self-determination are necessarily dependent on some degree of support in terms of information, counsel and advocacy whatever our age. What supports are wanted requires the direction of older people themselves. If there are compromises and prioritising involved in terms of trade-offs between freedom and security in both residential care and community care then robust participation of older people themselves is required in determining what is important in legal reform in that regard. This is not a new idea to community development workers – policy makers and legislators have much to learn about co-production.

There are reasons to be cheerful. The announcement of Community Healthcare Organisations, with a key worker for every person in the community with ‘complex needs’,\(^{43}\) sounds promising and a welcome move away from funding and needs assessment on the basis of silos of age/disability/mental health which has entrenched rather than loosened intersectional discriminations. Such a community based health and social care integration of health and social care provision could be complemented by the proposed roll out of the SAGE support and advocacy service to community settings by 2018.\(^{44}\)

A human rights-based approach to positive ageing requires imagination and participation to generate alternatives/choice including, for example, personal care budgets, supported family care and assisted living facilities to lessen the dependency on residential care as the sole option. The older citizen resident is not ‘other’, this is us.


Equal Recognition Before the Law: Legal Capacity as a Gatekeeper Right for Older Persons

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Abstract:
This article examines the recognition of the older person’s right to make decisions and have those decisions respected (legal capacity) in the Irish context. This article considers recognition of the legal capacity of older persons as a gatekeeper right to the recognition of other human rights. The relevant provisions of the UN Convention on the Rights of Persons with Disabilities (CRPD) on supported decision-making are outlined in the article and focuses on their application to older persons. The article then considers the current legal position in Ireland and the potential impact of the Assisted Decision-Making (Capacity) Bill 2013 to support older persons to make decisions about their own lives. There is critical discussion of the 2013 Bill and an evaluation of its compliance with the CRPD.

Keywords:
Older persons; human rights; decision-making; supported decision-making, UN Convention on the Rights of Persons with Disabilities, legal capacity.
Introduction

This article considers the recognition of the older person’s right to make decisions and have those decisions respected (legal capacity). The right of autonomy and self-determination are hugely important in allowing everyone to participate as members of society. However, legal capacity can only be achieved in circumstances where the law facilitates decision-making. Irish law does not sufficiently support older persons to make decisions and a person’s legal capacity can be restricted through the ward of court system and the commencement of an enduring power of attorney. This article will consider the implications of the UN Convention on the Rights of Persons with Disabilities (CRPD), which requires support to be provided to persons in order to exercise their legal capacity should they require it. The existing Irish law does not comply with the CRPD and it is hoped that when enacted the Assisted Decision-Making (Capacity) Bill 2013 will bring Ireland into compliance with the Convention. This article considers recognition of the legal capacity of older persons as a gatekeeper right to the recognition of other human rights and the potential of the 2013 Bill for promoting respect for the human rights of older persons.

Human Rights of Older Persons

It is recognised that the rights of older persons are not sufficiently set out in Irish law and that stigma and ageism are significant barriers that prevent older persons from realising their human rights. The invisibility of older persons and the failure to realise their human rights is a global issue. The United Nations General Assembly established an ‘Open-Ended Working Group on Ageing’ in 2010 by way of a resolution. The Working Group has to date met in 5 sessions with the task of considering the existing human rights framework for older persons and identifying gaps and how to fill these gaps. It may be the case that a specific UN Convention on the rights of older persons emerges in the future. Such a Convention may seek to address the failure to recognise the legal capacity of older persons. The Working Group identified a failure internationally to support the exercise of the legal capacity of older persons in respect of decisions about healthcare, property, inheritance and institutionalisation.


2 For the purposes of this article recognition of an older person’s legal capacity is considered a gatekeeper right. Failure to recognise an older person’s legal capacity may result in the restriction and denial of other human rights. Older persons and persons with disabilities are at risk of having their decision-making questioned by third parties. Therefore, the CRPD is relevant to older persons and the evolving understanding of Article 12 on equal recognition before the law (see below) is equally relevant to older persons and persons with disabilities. It should also be noted that a large number of older persons are persons with disabilities and come under the scope of the CRPD. In addition older persons who are discriminated against based on perceptions of disability will also come under the scope of the CRPD (see for example Article 5 on equality and non-discrimination).

3 See ‘Human Rights and Older People in Ireland’ (Dublin: Alzheimer Society of Ireland, December 2013).


In the absence of a specific UN convention on the rights of older persons the UN Convention on the Rights of Persons with Disabilities provides a useful source of law for understanding the right to legal capacity for older persons.\footnote{This is particularly the case as the CRPD is increasingly being used across the UN treaty monitoring systems to ensure a coherent approach to articulating human rights standards.}

As mentioned the recognition of the legal capacity of older persons is a critical issue. An international coalition of organisations representing older persons have argued for a specific UN convention on older persons rights, acknowledging that the recognition of legal capacity for older women and men subject to guardianship required urgent reform.\footnote{See ‘Strengthening Older Persons Rights: Towards a UN Convention’ (A resource for promoting dialogue on creating a new UN Convention on the Rights of Older Persons, 2010) at page 6. Available at: \url{http://www.cardi.ie/userfiles/UN%20NGO%20-%20Strengthening%20Older%20People’s%20Rights(3).pdf}} In Ireland recognition of the legal capacity of older persons was identified as one of the ‘critical gaps’ in Irish law with respect to the human rights of older persons.\footnote{See ‘Human Rights and Older People in Ireland’ (Dublin: Alzheimer Society of Ireland, December 2013).}

In particular, the absence of legislation that supports older persons to make decisions and have their decisions respected is recognised as a major flaw with Irish law.\footnote{Ibid.}

In its General Comment on Article 12 (legal capacity) the UN Committee on the Rights of Persons with Disabilities (the body with responsibility for monitoring State Parties compliance with the CRPD) noted that ‘[l]egal capacity has been prejudicially denied to many groups throughout history’.\footnote{‘General Comment No. 1: Equal Recognition Before the Law (article 12)’ (Geneva: UN Committee on the Rights of Persons with Disabilities, 11 April, 2014).} The Committee also recognised the importance of Article 12 as a gatekeeper right noting that recognition of legal capacity was ‘indispensable for the exercise of civil, political, economic, social and cultural rights’.\footnote{Ibid.}

The Committee noted that denial of legal capacity in respect of persons led to the denial of a range of other rights some of which are relevant for older persons whose legal capacity has been similarly denied. Examples of rights restrictions include denial of the right to vote, the right to marry and found a family, reproductive rights, parental rights, the right to give consent for intimate relationships, medical treatment, and the right to liberty.\footnote{Ibid.}

In its General Comment the Committee noted the interplay between recognition of legal capacity and independent living (Article 19). Article 19 of the CRPD recognises the right to live independently and be included in the community. The Committee noted that the right to independent living has been traditionally denied to persons with disabilities, who were forced to live in institutional settings, and a right that is often denied to older persons. The Committee interpreted Article 12 as ensuring that people ‘must have the opportunity to live independently in the community and to make choices and to have control over their everyday lives, on an equal basis with others’.\footnote{‘General Comment No. 1: Equal Recognition Before the Law (article 12)’ (Geneva: UN Committee on the Rights of Persons with Disabilities, 11 April, 2014) at page 11.} The Committee further noted the risk faced by persons with disabilities to be placed in institutional settings without their consent.
The recognition of the older person’s legal capacity means that they have the right to choose where and with whom to live a choice that is often denied to them. The synergy between Article 12 and Article 19 is a critical issue for older persons. A significant number of older persons have disabilities and those who require support in order to make decisions and live independently are particularly vulnerable to discriminatory treatment.\(^{15}\)

**Restricting Legal Capacity**

Traditionally there were three main approaches to restricting legal capacity: the status approach, the outcome approach and the functional approach.\(^{16}\) The status approach operates by assuming that a person lacks legal capacity as they are labelled, for example, as having a disability (in particular an intellectual disability or a diagnosis of dementia). Having a diagnosis of dementia may be sufficient to strip a person of their legal capacity and provide for the imposition of substituted decision-making by a third party. Under the status approach a person either has full mental capacity or lacks mental capacity entirely. The outcome approach is rooted in the belief that in circumstances where a person makes a bad decision or a number of bad decisions, that person should lose the right to continue to make decisions.\(^{17}\) This approach to capacity is now out-dated, as there is recognition that ‘we all have the right to make our own mistakes’ and that it is unjust to set the decision-making bar higher for persons with disabilities or indeed older persons.\(^{18}\)

The more modern approach is the functional approach, which involves a consideration of a person’s mental capacity to make decisions on an issue-specific basis. A person might not be considered able to make decisions of a financial nature but might be considered to have mental capacity to make personal care decisions. This approach rejects the status approach and outcome approach. The functional approach presumes that a person has mental capacity unless proven otherwise and may involve the provision of supports in order for the person to exercise decision-making.

However, Article 12 of the CRPD has superseded the functional approach. Article 12 requires a ‘paradigm shift’ away from these approaches to legal capacity to a supported decision-making model.\(^{19}\) As we will see the current legal position under Irish law is a mix of the functional, status and outcome approaches.\(^{20}\)

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\(^{15}\) ‘Relevance to Older Persons of the Convention on the Rights of Persons with Disabilities’ (The World Network of Users and Survivors of Psychiatry, 2013) at page 2.


\(^{18}\) Ibid.

\(^{19}\) Ibid.

\(^{20}\) See ‘General Comment No. 1: Equal Recognition Before the Law (article 12)’ (Geneva: UN Committee on the Rights of Persons with Disabilities, 11 April, 2014) and the developing jurisprudence of the UN Committee on the Rights of Persons with Disabilities through its concluding observations to State Parties to the Convention at:


\(^{20}\) The Ward of Court system operates from a status and outcome approach and the courts in Fitzpatrick v FK, The Attorney General [2008] IEHC 104 have developed jurisprudence on the functional assessment of mental capacity ( ).
It is widely recognised that the current legal position is at odds with Ireland’s obligations under international human rights law and law reform is urgently needed as it fails to meet the needs of persons with disabilities and older persons who require support to make decisions.\textsuperscript{21}

It is important to note the differences between the meaning of mental capacity and legal capacity. The UN Committee went to great lengths in its General Comment on Article 12 of the CRPD to underscore the difference between these separate and ‘distinct concepts’.\textsuperscript{22} The Committee defined legal capacity as ‘the ability to hold rights and duties (legal standing) and to exercise those rights and duties (legal agency)’.\textsuperscript{23} Mental capacity on the other hand was defined as ‘the decision-making skills of a person, which naturally vary from one person to another and may be different for a given person depending on many factors, including environmental and social factors’.\textsuperscript{24} The Committee definitively stated that Article 12 of the CRPD draws a distinction between the concepts of mental capacity and legal capacity and discriminatory terms such as ‘unsoundness of mind’ and other similar concepts are never legitimate reasons for the denial of legal capacity.\textsuperscript{25} As such as ‘deficits in mental capacity must not be used as justification for denying legal capacity’ for persons with disabilities and this equally applies to assessing the mental capacity of older persons.\textsuperscript{26}

### The United Nations Convention on the Rights of Persons with Disabilities

The United Nations Convention on the Rights of Persons with Disabilities was the first UN Convention of this millennium.\textsuperscript{27} It was felt that a specific Convention was needed to deal with the human rights of persons with disabilities as that the existing body of UN human rights framework was not inclusive of disability and insufficient in challenging national laws that excluded persons with disabilities from participating in society.\textsuperscript{28} The purpose of the CRPD was to clarify the existing human rights law as it

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\textsuperscript{22} ‘General Comment No. 1: Equal Recognition Before the Law (article 12)’ (Geneva: UN Committee on the Rights of Persons with Disabilities, 11 April, 2014) at page 3.

\textsuperscript{23} Ibid.

\textsuperscript{24} Ibid.

\textsuperscript{25} Ibid.

\textsuperscript{26} Ibid. In the general comment there is a recognition of the prejudicial denial of legal capacity to many groups throughout history. There was no specific mention of the denial of legal capacity to older persons in the general comment. However, it is clear that the denial of legal capacity on the basis of an older person’s physical, mental, intellectual or sensory impairment is prohibited (see page 2).


relates to persons with disabilities as opposed to the creation of new rights.29 Many of the rights contained in the CRPD clarify important aspects of human rights law and are relevant for older persons in particular Article 12 the right to equal recognition before the law. As Quinn has stated reform of legal capacity laws “… is probably the most important issue facing the international legal community at the moment.”30 Article 12 of the Convention deal with the capacity of persons to have rights and also with the exercise of those rights. Article 12 states:

1. ‘States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.

2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person’s circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person’s rights and interests.

5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.’

As discussed above recognition of the legal capacity of persons with disabilities and older persons is crucial as recognition of legal capacity is a gatekeeper right to the enjoyment of other rights. For that reason the United Nation’s Office of the High Commissioner for Human Rights stated in its guide for parliamentarians ‘[s]ince denying legal capacity to persons with disabilities has led to egregious violations of their rights, any law-reform process should address this issue as a matter of priority.”31 It was also recommended that parliaments examine existing domestic law to determine if there are any formal


limitations on legal capacity and whether national law complies with the Convention.\textsuperscript{32} It was further recommended that parliaments should consider whether legal capacity is realised in practice, despite formal guarantees.\textsuperscript{33} The guide specifically states that State Parties to the Convention are required to take appropriate measures to ensure that persons who need assistance to exercise their capacity receive that assistance.\textsuperscript{34}

It is clear from the examination of the wards of court system (see below) that the current safeguards for legal capacity fall well short of the standards set out in Article 12 of the Convention. The Wards of Court system leaves no space to reflect the rights, wills and preferences of persons subject to a wardship application. The normal court practice of not meeting with the person subject of a wardship application is not sufficient in safeguarding against conflicts of interests and the exertion of undue influence on the person subject to the application. In addition, the archaic and complex nature of the wardship system means that restrictions on capacity are not proportional or tailored to personal individual circumstances. The Wards of Court System also fails to comply with the requirement in applying restrictions on legal capacity for the shortest time possible and subject to regular review.

There is an evolving conversation around the concept of personhood and legal capacity.\textsuperscript{35} It is important to recognise that legal capacity makes personal choices possible. Issues such as the ability to enter into contracts and managing financial affairs are important expressions of freedoms, which recognition of legal capacity is required. While human rights requires the state not to intrude into a person’s personal life it correspondingly places an obligation on the state to prevent third parties interfering with the enjoyment of rights. The CRPD requires the state to protect the rights of persons whose decision-making has been questioned. The Convention requires the correct balance to be struck and that requires the abolition of laws that mandate substitute decision-making. Substitute-decision-making provisions need to be repealed and replaced with processes and provisions that support older persons and persons with disabilities to make decisions.\textsuperscript{36}

The introduction of national laws that comply with the requirements of Article 12 is very challenging. The Committee noted that there was a general misapprehension amongst state parties to the CRPD ‘... to understand that the human rights-based model of disability implies a shift from the substitute decision-making paradigm to one that is based on supported decision-making’.\textsuperscript{37} Many jurisdictions such as the United Kingdom considered that their guardianship laws such as the ones that operate in England and Wales (Mental Capacity Act 2005) complied with their obligations. However, the Committee have clarified that such ‘[s]ubstitute decision-making regimes can take many different forms, including plenary guardianship, judicial interdiction and partial guardianship’.\textsuperscript{38}

\textsuperscript{32} Ibid.
\textsuperscript{33} Ibid.
\textsuperscript{34} Ibid.
\textsuperscript{36} See ‘General Comment No. 1: Equal Recognition Before the Law (article 12)’ (Geneva: UN Committee on the Rights of Persons with Disabilities, 11 April, 2014) at page 3.
\textsuperscript{37} Ibid, at page 1.
\textsuperscript{38} Ibid, at page 6.
The Committee noted that such regimes shared characteristics such as allowing a substitute decision-maker make decisions ‘on what is believed to be in the objective “best interests” of the person concerned, as opposed to being based on the person’s own will and preferences as required by Article 12.

Legal Capacity and Irish Law

In the absence of progressive legislation the wards of court system is the current and exclusive mechanism for managing the affairs of persons considered to be lacking decision-making capacity in Ireland.39 The President of the High Court has responsibility for the Wards of Court system and the Registrar and staff of the Office of Wards of Court administer the system. The criteria for wardship and the procedure for bringing a person into wardship are set out in the Lunacy Regulation (Ireland) Act 1871 and Order 67 of the Rules of the Superior Courts 1986.40 Wardship proceedings are most commonly brought in respect of an adult who is considered to have substantially lost mental capacity through physical illness or mental illness, intellectual disability or injury and the person has a certain amount of money or property that requires protection and use for their maintenance.41 The Supreme Court has acknowledged that being made a ward has significant consequences. For example, in the Re A Ward of Court (No.2) the Supreme Court stated “[w]hen a person is made a ward of court, the court is vested with jurisdiction over all matters relating to the person and estate of the ward...”42 A person who is made a ward loses the right to make any decisions about their person and property and is a complete denial of their legal capacity.

The current position is that the Court will have regard to the views of the ward’s committee and family members and the Court will make decisions on the basis of the ‘best interests’ of the ward.43 However, as the Law Reform Commission noted there is generally no effort to consult the ward in relation to those decisions.44 The Law Reform Commission also noted that the “… criteria for wardship and the procedure for bringing a person into wardship are archaic and complex”.45 A significant issue with the wardship procedure is that it does not contain sufficient procedural safeguards in terms of protecting the human rights of the ward. In addition, to the archaic and complex procedure for wardship there are paternalistic concepts at the heart of the wardship system and these do not accord with human rights law and the more progressive understanding of legal capacity. The focus of the wards of court system is on the property and estate of a ward.46

39 The only form of advance planning for persons who fear impairment of their decision-making capacity in the future is provided for in the Power of Attorney Act 1996, which provides for a donor to create an enduring power of attorney.
40 S.I. No. 15 of 1986.
42 [1996] 2 IR 79.
43 The concept of ‘best interests’ developed in child and family law and is not a suitable concept to be applied to the decision-making of adults.
45 Ibid.
46 Often it is only when the issue of protecting the property of the ward becomes an issue that the person is made a ward of court and the focus form there on in is on the protection of property.
Another major deficiency with the wardship system is that an order of wardship is of indefinite duration. There is no requirement for the regular review of a ward or for periodic review of the ward’s welfare. Section 56 of the Lunacy Regulation (Ireland) Act 1871 merely provides that the President of the High Court can instruct a “Medical Visitor” to visit a person after they have been made a ward. The Registrar does have a power to require the Committee of the Person to provide details of the ward’s residence and physical and mental condition on a periodic basis. In practice, review of a wards situation is only likely to be examined when the Office of Wards of Court receives a specific complaint.

The High Court can discharge a person from wardship where satisfactory medical evidence is provided in relation to the ward’s mental capacity. If the court grants a discharge then a ward’s legal capacity and control of the person and property can be restored. However, this does not constitute an adequate review mechanism to address continuing detention in a long stay care facility or psychiatric residence.

As we saw from the discussion above the Wards of Court system is wholly inconsistent with Article 12 of the CRPD.

**New Irish Legislation**

The Irish Government have accepted for quite sometime there are significant deficiencies with the current legislative regime on capacity and have committed to introduce new legislation. Despite many commitments new legislation has not been enacted. The Department of Justice, Equality and Law Reform published the scheme of the Mental Capacity Bill in 2008. The heads of the bill were largely based on the Law Reform Commission of Ireland’s recommendations in its body of work in this area.

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47 When a Judge decides to make a person a ward it is normal practice to make an order appointing a Committee of the Ward. The Committee is the person to whom the supervision of the Ward’s person and affairs is committed is typically a family member of the ward. A Committee of the Estate can also be appointed, however, the same person is normally appointed to both roles.

48 “Consultation Paper on Vulnerable Adults and the Law: Capacity” Law Reform Commission (37) 2005 at page 91. The current regime does not make provision for the periodic review of the mental capacity or welfare of a person who has been made a ward.

49 See the judgments of the European Court of Human Rights in Winterwerp v the Netherlands (1979-1980) 2 EHRR 387 and Shtukaturov v Russia App. No. 44009/05, 27/06/2008. The Principles formulated by the Committee of Ministers of the Council of Europe, regarding the legal protection of incapable adults, support the concept of fair procedures (Council of Europe Recommendation R(99)4 of the Committee of Ministers to member states on principles concerning the legal protection of incapable adults). Principle 13 provides that persons “... should have the right to be heard in person in any proceedings which could affect his or her legal capacity.” Principle 15 recognises that provisional measures might be necessary in the case of an emergency. Under these circumstances the application of certain procedural safeguards, including the right to be heard in person, may be restricted but should be applicable as far as possible. The reality with the Wards of Court system is that persons subject to an application for wardship are rarely heard, as such the ward of court system is not consistent with the principles set out by the Committee of Ministers of the Council of Europe.

50 Article 12 of the Convention recognises that persons with disabilities have legal capacity on an equal basis with others. Article 12 (4) of the Convention requires the provision of effective safeguards relating to the exercise of legal capacity in accordance with international human rights law. These safeguards are required to respect the rights, will and preferences of the person and need to be free of conflict of interest and undue influence. There is also a requirement under Article 12 (4) that measures relating to the exercise of legal capacity are proportional and tailored to a persons circumstances and apply for the shortest time possible and are subject to regular review by a competent, independent impartial authority or judicial body.


The Scheme of the Bill is available from the Department of Justice Equality and Law Reform’s website. The 2008 Bill sought to reform the ward of court system in so far as it applies to adults and replace it with a guardianship system that would regulate decision-making of persons considered to lack mental capacity. The Government at the time considered that the 2008 Bill “…will give effect to the Convention in so far as it applies to the legal capacity issues in Article 12 of the Convention”. The draft scheme of the 2008 Bill sought to strike a balance between autonomy and protection. However, much of the commentary on the Scheme of the Bill suggested that it failed to strike the appropriate balance and fell significantly short of complying with the requirements of Article 12 of the CRPD.

A range of interest groups, professionals and other stakeholders were centrally involved in the law reform process through feeding into the Law Reform Commission’s consultation process and more recently through engaging in discussion with Government on the resultant legislation to repeal and replace the ward of court system. Amnesty International Ireland in partnership with the Centre for Disability Law and Policy at NUI Galway and a range of organisations and individuals representing the views of older persons and persons with disabilities came together in 2011 to impact the law reform process. The coalition engaged with the Joint Oireachtas Committee on Justice, Defence and Equality public hearings on 2008 Bill. This coalition of stakeholders also produced a document that set forth their views as to essential principles that ought to underpin and run throughout the new legislation. These principles were based on the emerging understanding of Article 12 of the CRPD as interpreted by the UN Committee on the Rights of Persons with Disabilities. The written and oral submissions made by civil society organisations on the Mental Capacity Bill 2008 had a significant impact as evidenced by the Oireachtas Committee’s Report on how the 2008 Bill needed to be reformulated.

The Committee acknowledged the need to move away from a substitute decision-making model as proposed in the 2008 Bill to a supported decision-making model as required by Article 12 of the CRPD.

The Government subsequently published the Assisted Decision-Making (Capacity) Bill 2013. There was a consensus amongst civil society organisations that the revised Bill represented a ‘significant improvement’ on the Mental Capacity Bill 2008. On publication of the 2013 Bill the then Minister for Justice Alan Shatter considered that the Assisted Decision-Making (Capacity) Bill 2013 was sufficiently

55 See for example ‘Submission on Legal Capacity to the Oireachtas Committee on Justice, Defence & Equality’ (Galway: Centre for Disability Law & Policy, NUI Galway, August 2011).
56 See ‘Report on Hearing in Relation to the Scheme of the Mental Capacity Bill’ (Dublin: Joint Oireachtas Committee on Justice, Defence and Equality, May 2012).
58 ‘Report on Hearing in Relation to the Scheme of the Mental Capacity Bill’ (Dublin: Joint Oireachtas Committee on Justice, Defence and Equality, May 2012).
59 Ibid.
‘framed to meet Ireland’s obligations under Article 12 of the Convention in line with the Government’s commitment in the Programme for Government to introduce this legislation’. However, the 2013 Bill has been described as ‘an interesting mix of supports ... and substitute decision-making’ falling short of the requirements of Article 12. While there has been support for the some of the positive amendments set out in the 2013 Bill, there is still concern that aspects of the Bill retain substitute decision-making (see for example the informal decision-making provisions discussed below).

It has been argued that such provisions may ‘undermine the positive support provisions’ in the legislation and its scope should be restricted. The Irish Human Rights Commission (IHRC) also expressed concern that the 2013 Bill does not sufficiently comply with the requirements of Article 12 of the CRPD. The IHRC described that the provisions in the Bill authorising substitute decision-making as a ‘repackaging’ of the present system.

While the 2013 Bill continues to provide for substitute decision-making, which are at odds with the CRPD there is explicit recognition in the guiding principles of the centrality of respecting the will and preferences of the person. This inclusion in the guiding principles reflects the paradigm shift in thinking required by Article 12 of the CRPD. In that regard it is important to recognise that the guiding principles do not contain the ‘best interests’ principle. This is a positive development that may facilitate interpretation of the legislation in a manner that recognises the legal capacity of all.

In addition the revised Bill contains a number of provisions that have the potential when enacted to support older persons and persons with disabilities to exercise their legal capacity. An important aspect of the 2013 Bill in the articulation of guiding principles that better reflect the requirements of Article 12 of the CRPD than those set out in the Mental Capacity Bill 2008. Reflecting Article 12(4) of the CRPD Section 8(7)(b) of the 2013 Bill specifically recognises the need to act in accordance with the ‘will and preferences’ of the person subject to the legislation.

It is outside the scope of this article to provide a detailed analysis of the different provisions of the Assisted Decision-Making (Capacity) Bill 2013. However, a number of provisions in the legislation have the potential to ensure that the legal capacity of older persons is not restricted and that they have access to support to make decisions and have those decisions respected.

The main provision on supported decision-making is contained in the sections on decision-making assistance in Part 3 of the Bill. Where an older person may like support to make decisions they can under the Bill appoint a third party; provided that they are considered to have the requisite mental capacity to make such an appointment. The role of the decision-making assistant is to assist in making decisions.

64 See Part 7 of the Assisted Decision-Making (Capacity) Bill 2013.
67 Ibid.
on financial or property matters or personal welfare decisions. Section 10 of the Bill sets out the procedure for a decision-making agreement, which requires that the Public Guardian (a new office to be created under the legislation) be notified of the agreement. The role of the decision assistant is to advise and explain relevant information to the ‘relevant person’ and support the person to communicate their will and preferences about a range of different decisions and endeavour to ensure that the person’s decisions are realised.

Another key provision on supported decision-making in the bill is the provision of co-decision making. Under the co-decision making provisions in the Bill the older person can jointly make an agreement specifying issues and decisions to be made. Under the bill an application has to be made to the court for a co-decision making order and a co-decision agreement has no legal basis without this order. In addition the court must approve any amendments to the order. There is potential that the provision on co-decision making may result in substitute decision-making. However, a number of safeguards are provided for in the bill to prevent against abuse.

The Bill also provides for decision-making by the court and the appointment of decision-making representatives. These provisions are based on substitute decision-making and are at odds with Article 12 of the CRPD. Where the person is deemed to lack mental capacity even with the assistance of co-decision maker the bill provides that the court can make decision if there is a pressing matter to be decided. The Court can also appoint a representative to make decisions on behalf of the older person. In circumstances where there is no suitable person available to act as a decision-making representative the court will be able to draw from a panel developed by the Office of the Public Guardian.

The provisions on informal decision-making have attracted much criticism for failing to comply with the CRPD. The 2013 Bill extends a wide range of powers to informal decision-makers without the same level of oversight as other substitute decision-making provisions in the proposed scheme. It has been suggested that there is ‘a risk that the wide scope of powers given to informal decision-makers could undermine the positive support provisions of the legislation’ such as assisted and co-decision making.

68 Decision-making assistance should generally be provided by a person that that the ‘relevant person’ knows and trusts. The functions and scope of the decision-making assistants are set out in section 11 of the 2013 Bill.

69 It is envisaged that enactment of the legislation the Minister for Justice will publish Ministerial regulations governing the content and form of these agreements so that there is clarity on both sides as to what is involved. See Alan Shatter ‘Speech by Minister for Justice, Equality & Defence at the Assisted Decision – Making (Capacity) Bill 2013’ (Dublin: Consultation Symposium, Printworks Conference Centre, Dublin Castle, 25 September 2013).

70 The provisions on co-decision-making are contained in Part 4, Chapter 4 of the Bill.

71 The provisions on decision making representative are contained in Part 4, Chapter 5 of the Bill.

72 See Part 4, Chapter 5, section 23. The 2013 Bill primarily vests power in the Circuit Court who will have responsibility for resolving issues and orders arising under the legislation when commended. However, the High Court will retain jurisdiction in relation to a number of issues where the person subject to the proceedings is considered to lack capacity. These narrow grounds include proceedings relating to non-therapeutic sterilisation, the withdrawal of artificial life-sustaining treatment or organ donation (section 4 of the Bill).

agreements. To offset this risk it has been recommended that the scope of the provisions on informal decision-making should be restricted and impose a greater duty to explore the use of supported and co-decision making as an alternative to this form of substitute decision-making.

The Bill will also include provisions that are currently provided for in the Power of Attorney Act 1996. Enduring power of attorney is a form of advance directive that facilitates the appointment of a person to make decisions in the future where the person is unable to make such decisions for themselves. One of the criticisms of the 1996 Act was the lack of supervision and safeguards when an enduring power of attorney was commenced. Crucially the new Bill contains much more robust safeguards than are currently provided for. Persons appointed, as attorneys will be supervised in the exercise of their duties by the court and by the Office of the Public Guardian. Under the proposed legislation the Office of the Public Guardian will be empowered to oppose the registration of a power of attorney where it is considered that the proposed attorney is unsuitable or where the consent of the older person to the creation of the power of attorney is in question. One of the other key modifications to the provisions in the 1996 Act is to extend the scope of powers of attorney to healthcare decisions. This extension in scope means that an older person will have greater confidence that their will and preferences in the context of medical treatment will be advocated for and will ward off to some extent substitute decision-making by medical professionals. While the strengthened safeguards around the power of attorney are to be welcomed the donor of the power of attorney can only amend the power of attorney where he or she is considered to have the mental capacity to do so. This is at odds with Article 12 of the CRPD as it operates under the old model of substitute decision-making.

The provisions on advance healthcare directives to be included in the legislation should also enhance the extent to which the will and preferences of the older person can be realised in the area of healthcare decision-making. The Department of Health subsequent to the publication of the 2013 Bill published a General Scheme for advance healthcare directives, which are to be added to the 2013 Bill at Committee stage. Advance healthcare directives are statements made by adults that set out their will and preferences in relation to the type and extent of medical treatments they want or do not want in the future should they not be considered able to make a decision. For older persons in particular these provisions will provide a greater say in how they wish to live the final stages of their lives.

75 The provisions on enduring powers of attorney in 2013 Bill for the most part replicate the existing provisions in the Powers of Attorney Act 1996. The provisions on enduring powers of attorney are contained in Part 6 of the Bill.
76 The High Court has the power under the Bill to revoke powers of attorney in circumstances where there is the exercise of undue influence over an older person or in circumstances where there is evidence of fraud or misconduct on the part of the attorney.
77 ‘Assisted Decision-Making (Capacity) Bill 2013 to include the Draft General Scheme of Legislative Provisions to Provide for the Making of Advance Healthcare Directives’ (Dublin: Law Society of Ireland submission to the Joint Oireachtas Committee on Justice, Defence and Equality, 4th April 2014).
**Conclusion**

Ireland was one of the first countries to sign the CRPD, when it opened for signature in 2007. However, Ireland has not ratified the Convention and has not signed the Optional Protocol to the Convention.80 Despite firm commitments from successive Governments the failure to progress the legislation to repeal and replace the ward of court system endangers the rights of older persons and persons with disabilities. The continued delay in enactment and commencement of the legislation frustrates older persons (in need of decision-making support) and their families leaving them at the mercy of a limited range of legal options. As discussed above recognition of the legal capacity of persons with disabilities and older persons is crucial as legal capacity is a gatekeeper right to the enjoyment of a range of other human rights. The publication of the Assisted Decision-Making (Capacity) Bill 2013 was a significant moment in the law reform process, representing a significant improvement on the Mental Capacity Bill 2008. Nevertheless the legislation falls short of its goal of complying with Article 12 of the CRPD. Nevertheless the 2013 Bill has many positive elements that have the potential to support older persons to make decision and have their decisions respected. While the provisions on substitute decision-making may undermine other positive provisions on supported decision-making, the guiding principles with their commitment to the will and preferences of the older person, may ensure that the paradigm shift required in Article 12 guides the implementation of the legislation.

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80 Ireland adheres to the common law tradition of not ratifying treaties until such time that it is considered that Irish domestic law is in general conformity with the treaty.
Reciprocal Maintenance Obligations to Ascendants in Ireland: The Contemporary European and the Historical National Context Examined

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Abstract:
The article examines provisions governing reciprocal maintenance obligations in Ireland both from a historical perspective and in comparison with contemporary provisions in the EU28. Ireland is in a minority among EU states in lacking any provision in law for the maintenance of elderly, infirm or indigent parents by adult children. Part I of the article, after some preliminary discussion of filial responsibility laws and select comparisons with other international jurisdictions, sets out first in summary form and then with select commentary the presence or absence of statutory or constitutional provisions for reciprocal maintenance of ascendants in the EU28. Part II examines the case of Ireland in depth, and shows that, historically, some form of such provision was the norm. Examination of indigenous archaic legal traditions, up to the pre-independence Poor Relief Act of 1838, outlines the scope and character of such provision. It further provides an account of the traditional philosophical, historical or religious bases for such claims. Considering the contemporary absence of maintenance obligations to ascendants from statute and the Constitution, it is argued that they could only be derived as an unenumerated right; it is further argued however that there is no stable basis for such derivation, and such obligations would never be compellable by a court. It is noted that, while the state commitment to support of the aged is constitutionally enshrined, correspondence shows that the obligations of descendants were assumed by the framers of the relevant Article. Given the choice not to enshrine these obligations, and the fact that no subsequent entity (most recently the Constitution Review Group) suggested their enshrinement, it is concluded that the Irish view has historically been and remains that filial obligations are a natural societal expectation but ought not to require enshrinement in law. In conclusion, it is suggested that such extralegal regulation may in some areas be more efficacious than formalised law and, on that basis, that Ireland has no pressing need to legislate for obligations to ascendants.

Keywords:
Maintenance Obligations; Obligations to Ascendants; Filial Responsibility; Eldercare; EU Law; Irish Constitution; Unenumerated Rights.
1. Reciprocal Maintenance Obligations in the EU28

1. Introduction.

Maintenance obligations toward parents and other ascendants are a feature of the legislation of the majority of EU states. Ireland is in the minority in this respect, solely enshrining obligations (both constitutionally and statutorily) of parents to children. As one might expect, obligations of maintenance to ascendants tend to be qualified in ways in which those to children are not; children have a necessary period of total dependency during which, in all EU states, provision of the means for their moral as well as physical development is in the first instance the responsibility and the privilege of their begetters. Responsibility for such provision is nonreciprocal and legally enforceable. With obligations to ascendants, on the other hand, even where not expressly stated in law it is clear that in every case the principle of reciprocity applies—meaning, simply, that a parent who has not supported a child can raise no claim against them for maintenance, no matter the need. Similarly, many but not all articulations of these obligations specify in some way the criterion of need; even where it is not specified, however, it is clearly enough implicit: any claim for maintenance must stem from genuine need and be reasonable in its scope; need cannot be recalibrated on the basis of substantial filial wealth, and in fact parents who evidently possess the means for subsistence have no basis for legal claims of maintenance (as adult children whose means barely meet the level of personal subsistence cannot be obliged to maintain others).

In Ireland (in common with Denmark, Finland, Romania, Sweden and the UK), there is no obligation of maintenance in national law, and it is unlikely recourse to extra-jurisdictional courts or EU law would ever result in the compelling of such. The provisions of the Hague Protocol on the Law Applicable to Maintenance Obligations (2007), to which the EU states except for the UK and Denmark are signatories, are focused in the main—almost exclusively—on the enforcement of maintenance obligations to children. While theoretically a habitual resident and citizen of Ireland who was the child of a resident national from an EU state which provided for maintenance obligations could be liable for maintenance—Article 3 of the Protocol states that applicable law will be “governed by the law of the State of the habitual residence of the creditor”—Article 6 gives solid grounds for contesting claims based on any relationship other than that of parent (creditor) and child (debtor). The specific grounds are the absence of such obligations in the state of habitual residence of the debtor. There is no reason to believe maintenance of ascendants would therefore be deemed enforceable.

As mentioned, some form of provision for such maintenance is a feature of most EU legislation (for example in those Civil Codes of France, Belgium, Luxembourg and the Netherlands, which are all derivative from the Napoleonic Code). Legal provision for such is also common worldwide, as a survey of a few major or representative comparators shows. In the United States, though not backed by any federal law, over half of the states oblige filial responsibility for elderly and indigent parents. Between 1922 and 1958,

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“all ten Canadian provinces and territories enacted filial responsibility laws”.4 Japan, where societal esteem for the elderly has always been significant, had until 1948 provisions in which obligations to ascendants superseded those to one’s second family; reform did not invert the priority but established parity of obligation.5 China, with similarly longstanding traditions obliging maintenance of elderly parents, today enforces reciprocal obligations on children which can take the form of cash payments or the more novel threat of reduced inheritance in cases of neglect or abuse.6 In 2007, India made it a requirement for children to maintain elderly parents via a monthly stipend.7 Singapore introduced laws which accorded courts the power to compel maintenance and prosecute those who failed to maintain elderly parents in need of assistance; though not particularly stringent by objective comparison with other states, they perhaps seemed so for the publicity surrounding their introduction. Under the Maintenance of Parents Act, proposed in 1994 and entering into force in 1996, any person over 60 unable to subsist on their own can claim maintenance from children capable of providing it. Critics dubbed the provision the “Sue Your Son Law” but the framer of the law defended it as “[kicking] in where filial piety fails”, and “providing a safety net where morality proves insufficient”, and expressed a conviction that the prospect of a public trial for failure to maintain needy parents would simply shame any defendant into compliance.8

Below we detail the presence or absence of maintenance obligations, statutory or constitutional, in the EU28. A summary of that data is first presented in section two. Section three provides more detail of and some select commentary on the applicable laws for each state. The aim here is simply to position Ireland comparatively within the framework of contemporary European legislation. Part II of the paper provides more in-depth discussion of the Irish position from a national social and historical context; it examines the historical and philosophical basis for such maintenance claims, and the implications and possible intent of their absence from Irish legislation.

4 Moskowitz (2002), 429.
5 Ibid., 440.
6 Ibid., 445–8. Chinese parent-child relationships continue to be regulated by the Confucian concept of xiào (filial piety), where deference is extended to elders generally.
8 W. Woon, “Honor Thy Father and Mother—or Else” The Wall Street Journal 28th June 1994. Cf. Moskowitz (2002), 440 on how societal pressure tends to regulate these matters in Japan, meaning the laws in place seldom require direct invocation or enforcement. Legal action can also be taken under the California Family Code § 4403 http://law.ojcie.com/california/family/4403.html
### 2. Summary: Reciprocal Maintenance Obligations to Ascendants in EU28 Countries

<table>
<thead>
<tr>
<th>Country (EU28)</th>
<th>Obligations (Y/N)</th>
<th>Constitutionally Enshrined (Y/N)</th>
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<td>Belgium</td>
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<td>Denmark</td>
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<tr>
<td>United Kingdom</td>
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<tr>
<td>Gibraltar</td>
<td>Yes (discretionally; see below)</td>
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### 3. Statutory or Constitutional Sources and Commentary

#### Belgium: Yes

Belgian Civil Code (Code Civil Belgique): Article 205.9

> Children have a duty of maintenance to their father and mother and other ascendants who are in need.

#### Bulgaria: Yes

New Bulgarian Family Code 2009 (Semeen Kodeks): Chapter 10, Article 141.10

This supersedes the Older Bulgarian Family Code, which also obliged such maintenance under Chapter 7, Articles 69 (2); 70 (1). The latter Code obliged care of elderly, sick or disabled parents, and help and respect of grandparents or other ascendants. The newer determines priority of obligation; parents are second (after equal priority of child and spouse), while last of six categories are grandparents and other ascendants.

#### Croatia: Yes (constitutionally)


Article 64 states that “Children shall be obliged to take care of their elderly and infirm parents”; Article 65 devolves responsibility for protection of children and the infirm on all citizens.

#### Cyprus: Yes


Parents must be unable to maintain themselves from income from suitable employment or property; Section 35 decrees that needy parents have a right to income from a property previously given to a child.

#### Czech Republic: Yes

New Czech Civil Code (Law 89/2012 Coll. Entered into force 01/01/2014) (Nový český občanský zákoník): Articles §§ 855 (1); 910; 915.13

Ascendants and descendants have reciprocal maintenance obligations.

#### Denmark: No Provision (constitutionally)

Uniquely, Denmark explicitly indemnifies descendants against maintenance claims, with the constitutional enshrinement of non-obligation in this respect. The relevant sections states that: “Children have no duty to support their parents. And parents have no duty to support children aged 18 or over. State assistance is established in social legislation.” Danish Constitutional Act (Danmarks Riges Grundlov) Chapter 8 Section 75 Subsection 2.14

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13 [http://www.czechlegislation.com/en/89-2012-sb](http://www.czechlegislation.com/en/89-2012-sb) (Note: though a reputable site, this is not an official English translation of the document; and at least some is done by machine translation; the relevant provisions are readily comprehensible however).

14 [http://www.thedanishparliament.dk/Publications/My_Constitutional_Act_with_explanations/Chapter%208.aspx](http://www.thedanishparliament.dk/Publications/My_Constitutional_Act_with_explanations/Chapter%208.aspx)
Germany: Yes

German Civil Code (Bürgerliches Gesetzbuch): Section 1601; Section 1605 (1); Section 1606 (1); Section 1609. 6, 7.\(^{15}\)

Lineal relatives are under obligation to provide maintenance and, to the extent that it is necessary to establish an obligation, may be required to provide information on income and assets to one another. Obligation of maintenance falls on descendants (who have reached majority) before ascendants. In the order of priority of obligation (Section 1609), parents and other ascendants are however of low priority—sixth and seventh of seven categories.

Estonia: Yes (constitutionally)

Constitution of Estonia (Eesti Vabariigi põhiseadus) Chapter II § 27
Estonian Family Law Act 2010 (Eesti perekonnaseadus): Chapter 8 Div. I §§ 96, 104, 105 (1); Chapter 9 §§ 113–15; cf. Chapter 6 § 80 (1) (definition of ascendants)\(^{16}\)

Descendants are obliged to provide maintenance before ascendants, and provision of information on assets and income may be compelled by a court. The Constitution of Estonia states simply: “The family has a duty to care for its needy members.”\(^ {17}\)

Ireland: No Provision

Greece: Yes

Greek Civil Code (Astikos Kōdikas): Chapter XI Articles 1507 & 1508.\(^{18}\)

Parents and children are under a reciprocal obligation of “assistance, affection and respect”, while a minor child for as long as it lives with and is provided for by its parents owes them what assistance it can provide in facilitating their professional or household work.

Spain: Yes

Spanish Civil Code (Código Civil de España): Articles 68, 143 & 144.\(^{19}\)

Ascendants and descendants are reciprocally obliged to support one another. Descendants precede ascendants in obligation to provide maintenance, but are preceded by a spouse. Article 68 states that care of parents and ascendants as well as children and other dependants will be shared by spouses, indicating obligations to parents-in-law during marriage.

France: Yes

French Civil Code (Le Code civil des Français): Articles 205–8, 367.\(^{20}\)

Children owe maintenance to parents and other ascendants who are in need. Similar obligations are owed to parents-in-law, but these cease where the spouse and their common children are dead. Article 367 declares reciprocal obligations between an adoptee and adopter.

\(^{15}\) [Link to German Civil Code](http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html)

\(^{16}\) [Link to Estonian Family Law Act](http://archive.equal-jus.eu/193/)

\(^{17}\) [Link to Constitution of Estonia](http://www.president.ee/en/republic-of-estonia/the-constitution/)

\(^{18}\) [Link to Greek Civil Code](http://ceflonline.net/wp-content/uploads/Greece-Parental-Responsibilities-Legislation.pdf)

\(^{19}\) [Link to Spanish Civil Code](http://www.wipo.int/edocs/lexdocs/laws/en/es/es122en.pdf)

\(^{20}\) [Link to French Civil Code](http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070721&dateTexte=20150209)
Italy: Yes

Italian Civil Code (Il Codice Civile Italiano): Book 1, Title XIII, Article 433.\(^{21}\)

Maintenance obligations are owed to parents by children, natural or adopted, and in their absence, by direct relatives in the descending line.

Latvia: Yes

The Civil Law of Latvia (Latvijas Republikas Civillikums): Article 188.\(^{22}\)

Article 188 states: “The duty to maintain parents and, in cases of necessity, also grandparents, lies upon all of the children equally. If the respective financial state of the children is unequal, a court may determine their duty of maintenance commensurately to the financial state of each child”.

Lithuania: Yes (constitutionally)

Constitution of the Republic of Lithuania: Chapter III Article 38
Lithuanian Civil Code (Lietuvos Respublikos civilinis kodeikas; entered into force 01/01/2000): Article 3.162.\(^{23}\). “Children shall owe respect to their parents and perform their duties by their parents diligently.”


The Constitution states that: “The duty of children is to respect their parents, to take care of them in their old age, and to preserve their heritage.”\(^{24}\)

Luxembourg: Yes

Luxembourg Civil Code (Code Civil de Luxembourg): Articles 205 & 206; Article 368 (adopted children).\(^{25}\)

Children, natural or adopted, owe obligations of maintenance to parents; obligations are owed to parents-in-law except where the spouse and common children are dead, or the parent-in-law enters a new marriage.

Hungary: Yes (constitutionally)

The Fundamental Law of Hungary (Magyarország Alaptörvénye), 2013 (= Hungarian Constitution): Chapter XVI (4).\(^{26}\)

The relevant law states that: “Adult children shall be obliged to take care of their parents if they are in need”.

Malta: Yes

Maltese Civil Code (Kodiċi Ċivili) Chapter XVI Title 1, Subtitle 2, §§ 5(1) 8, 12.\(^{27}\)

Under Section 8 of the Code, children are bound to maintain parents or other ascendants who are indigent; Section 12 specifies the priority of obligors, with adult children and descendants first in line for maintenance liabilities. Under Section 5(1), it is noted that as spouse has a prior claim to maintenance over parents and other ascendants.

\(^{21}\) http://www.ordineavvocatimelfi.it/Documenti/Codice%20Civile.pdf
\(^{23}\) http://www3.lrs.lt/pls/inter2/dokpajieska_showdoc_e?p_id=370997
\(^{24}\) http://www3.lrs.lt/home/Konstitucija/Constitution.htm
\(^{26}\) http://www.mfa.gov.hu/NR/rdonlyres/8204FB28-BF22-481A-9426-D2761D10EC7C/0FUNDAMENTALLAWOFHUNGARYmostrece
ntversion01102013.pdf
### Netherlands: Yes

Dutch Civil Code (Wetboek van Burgerlijke Rechtsvordering) Book 1, Title 1.17. *Section 1.17.1* Article 1:392. 1(b), 2.28

Children and children-in-law are liable for maintenance, but the obligation is owed only where real need exists.

### Austria: Yes

Austrian Civil Code (Allgemeines bürgerliches Gesetzbuch): §§ 137 (1); 234(1).29

Parents and children owe one another support and must regard one another with respect; a child owes to parents and grandparents maintenance in accord with his or her means.

### Poland: Yes

Family and Guardianship Code (Kodeks rodzinny i opiekuńczy) Title II Section III, Articles §§ 128, 129, 132.30

Lineal relatives owe maintenance obligations, which devolve upon descendants before ascendants. It is owed only where the obligee is in real need and cannot produce the means for subsistence.

### Portugal: Yes

Portuguese Civil Code (Código Civil português): Article 1874 (1), (2); 2000 [adopted children]; 2009 (1).31

Respect, assistance and maintenance are owed reciprocally between parents and children under Section 1874. Under section 2000, an adoptee owes maintenance to an adopter where there is neither spouse nor natural offspring to provide such; it also specifies that an adopter has priority over a natural parent. Section 2009 lays out the order of obligations: only spouses precede descendants as obligors.

### Romania: No Provision

### Slovenia: Yes

Marriage and Family Relations Act (Zakon o zakonski zvezi in družinskih razmerjih – ZZZDR): Article 124.32

Adult children are obliged to support parents where the latter cannot provide the means of subsistence; reciprocity is specified in the provision, by clarification that the obligation is not owed to a parent who did not provide subsistence to the child in its minority.

### Slovakia: Yes


Children who can support themselves owe maintenance to parents who cannot; maintenance will be obliged in accordance with the means of the child(ren).

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Finland: No Provision

Sweden: No Provision

United Kingdom: No Provision

Gibraltar: Yes (at discretion of Magistrates’ Court)

Maintenance Act 1961: Art. 31 (1) (d); Art. 37; Art. 39 (c).34

There is generally no obligation, in line with UK law, but maintenance is enforceable in exceptional circumstances by the Magistrates’ Court, to which application for maintenance must be made; the conditions for eligibility for maintenance are that a parent must be unable, by reason of old age or mental or physical disability, to maintain themselves.

4. Conclusion

As the foregoing makes clear, Ireland’s not legislating for reciprocal maintenance of ascendants places it in a definite minority within the EU. Its fellows in non-legislation are in the main Member States with highly developed welfare and social security systems (though an outlier here is Romania), as well as generally accessible if not optimally functioning healthcare systems. What is worth noting in this respect is that non-enshrinement of maintenance obligations to ascendants is arguably a departure from historical indigenous and imported tradition, from the earliest systems of Irish law and the influence of Christian and especially Catholic teaching, to the nineteenth-century Poor Relief Act. Below we detail such traditions, and draw what conclusions we can in regard to the absence of these obligations from contemporary Irish law.

II. The Social and Historical Context in Ireland

1. Introduction

A survey of the historical situation vis-à-vis maintenance obligations toward ascendants reveals some form of such to have been the norm in recorded law and custom. It was provided for explicitly in the tribal, Brehon laws on the lines of which Irish society was organised at least from the early medieval period up to centuries beyond their official outlawing in the fourteenth century (and which are certainly of far greater antiquity than recorded sources indicate). In the nineteenth century, the Irish Poor Relief Act was passed, which provided for the establishment and administration of workhouses in an attempt to solve or at least to ameliorate the problem of widespread impoverishment (passed in 1838, the system it established was expanded considerably in the crisis years of the famine which followed shortly afterward). The Act enjoined on children with sufficient means the maintenance of destitute parents; the relevant Section of the Act was not repealed until 1939, though one may conclude that it (though not all provisions in the Act) had by then ceased to carry force. Correspondence on the

subject of maintenance of the aged between drafters of the Irish Constitution reveals that the Act and its provisions in this regard were most likely neither taken account of nor even consulted for guidance. These older legal provisions will first be examined below. Afterward, we look at provisions for such maintenance in the Judaeo-Christian tradition, taking account of its influence not only in Irish history and society but directly on the original drafting of the Irish Constitution. The background to that document is then examined, with particular reference to the noted religious influence and to its explicit recognition of natural law as antecedent and superior to positive law. It is argued that, given the absence of explicit provision in the Constitution (or statutory law), maintenance obligations to ascendants could be derived from current legislation on only two grounds: either as an unenumerated right implicit in the Constitution (and modelled on established and recognised unenumerated rights), or as self-evidently derivative from the allegedly natural law which is recognised as governing family relations. We conclude that there are no grounds for such derivation, and that maintenance of ascendants could not be compelled by a court. By way of conclusion, we remind that regulation of a moral matter by cultural norms and societal expectation rather than by formal legislation may be as or more effective a guarantor of its upholding; and that it is unlikely that the legislature in Ireland will see fit to formalise in law the maintenance of ascendants.

2. Earlier Irish Law

Much of the legal framework of the Irish Free State was inherited wholesale from the British imperial system. There is an understandable tendency therefore to examine the latter in order to illuminate the former; given that we have seen above that the United Kingdom secures no guarantee of maintenance for ascendants, one might suppose in this case that the Irish position is ultimately among its legal inheritances from its neighbour. This would however be an error on numerous fronts. First, the fact that the Irish Free State chose to frame a written constitution in 1922 demonstrated its willingness to depart from one of the foundational features of the British system, precisely the lack of such, and therewith from the attendant doctrine and component principles of Parliamentary Sovereignty. This was formalised by the succeeding Constitution of Ireland of 1937; thus the judicial system, but not the legislative structure, remained an inherited one.35 (We mention this fact in particular because, as will be discussed below, the decision to formalise precepts in a constitution—or indeed in statute—need not mean that written law overrides or disqualifies unwritten custom or norms in a nation.) Second, Britain in fact guaranteed such maintenance until 1948 (incidentally the year in which Ireland left the Commonwealth), in laws which had their ultimate origin in the Elizabethan Poor Laws of 1598 and 1601.36 As part of the Union, Ireland indeed had a Poor Relief Act of 1838, modelled on that passed in England in 1834, which made children liable for maintenance of destitute parents, and such relief as was given by the state to the same recoverable by force of law from children with adequate means—a law which


36 Cf. Moskowitz (2002), 421–2 on the Poor Laws as “a direct precursor to modern American filial responsibility statutes”.

was not repealed until 1939, after the establishment of the Constitution.37 (1948 saw the repeal of the existing Poor Laws in England—part of a raft of post-war statutory amendments—in the passing of the National Assistance Act, which restricted obligations to maintenance of spouses and children.)38 Finally, the absence of obligations of maintenance toward parents is arguably at odds not only with extralegal custom in Ireland but with its indigenous legal traditions.

Early Irish law prescribed to a son “a duty to provide filial service and obedience (goire, lit. ‘warmth’) to his father”.39 The son who has fulfilled this obligation is known as a mac gor, a dutiful son; Kelly, following the work of D.A. Binchy, equates this with another term from the law texts, macc té (lit. “warm son”).40 The duty of goire41 could also extend to a daughter,42 but was primarily owed by a son to his father. Sometimes gifts from parent to child were considered to be in return for goire.43 The son who has failed to fulfil the obligation is a macc ingor, which Kelly, again following Binchy, equates with what in other texts is called a macc úar (“cold son”).44 One proclaimed as such had no legal standing, and it was forbidden even to the highest ranking members of society (nemed) to shelter him; to shelter fugitives from justice meant indeed that a nemed lost his status.45

37 Poor Relief (Ireland) Act 1838 Section 57. http://www.irishstatutebook.ie/1838/en/act/pub/0056/print.html Elements of this Act remain on the Irish statute books and, despite the context of the original Act (which provided for the establishment and administration of the notorious workhouses in Ireland), evidently are not simply dead letters; Section 71 was amended as late as 2013: http://www.oireachtas.ie/documents/bills28/bills/2013/2213/b2213.pdf The relevant Section 57 which mandated maintenance by children of indigent parents was one of the statutory provisions repealed as part of the passing of the Public Assistance Act, 1939: http://www.irishstatutebook.ie/1939/en/act/pub/0027/sched1.html. Its existence on the statute books at the time of the drafting of the Irish Constitution—this is evidenced by correspondence on the matter—does not explain the decision not to enshrine reciprocal maintenance obligations to ascendants there.


40 Ibid., 161, 232 n. 19.

41 Modern Irish retains goire (generally thought derived from gor, “heat”) as a stylised or literary word still meaning “filial piety, dutifulness, care, maintenance”. N. Ó Dónaill Focloír Gaelige-Béarla (Dublin: An Gúm, 1977) s.v. Gor is itself specified by Duinnín as “the heat of incubation”, and has the additional meanings “pleasure, laughter”. P. Ó Duinnín, Focloír Gaedhilge agus Béarla: An Irish-English Dictionary (Dublin: M. H. Gill, 1904) s.v.


43 Ibid., 121.

44 Ibid, 80 n. 95. Though long accepted in the literature, it bears mentioning that this derivation of macc gor/ingor, and their synonymy with macc té/macc úar, has been challenged by P. Schrijver. Schrijver accepts that macc gor means “the son who fulfils the duty of maintaining his parents in old age”. His analysis of the texts however concludes that, against Binchy’s interpretation, “no mention is made of the macc té being involved in maintaining his father in old age (rather, it seems, the macc té is maintained by his father).” His interpretation of the term is: “the ‘warm’ son, who is sheltered by his father’s legal protection, presumably because he is not yet of age and lives in his father’s house; he cannot conclude a valid contract without the consent of his father”. By the same token the macc úar is “undoubtedly the one who absconds from his father’s right to direct the son’s legal actions”. He is thus “the son ‘out in the cold’, who has left his father’s protection and home (either because he refuses to recognize his father’s authority or because his father has thrown him out, but this is not clear); he cannot make a valid contract because his father would (or is entitled to) annul it anyway”. Schrijver further contests the connection between gor,”pious, dutiful” and gor, “warm”. This is based on the derivation from the reconstructed Proto-Indo-European root *gʷer-*, cognate with Greek thermos, Latin formus, “warm”, and Sanskrit gharmd, “heat”, etc. He proposes an alternative PIE root *gʷer-* “with the approximate meaning ‘compensate, be worth something’”, aduding in support of the reconstruction cognate terms from Old Friesian, Gothic, Middle Welsh, Old High German and more, and positing a development from reconstructed Proto-Celtic *gwar-o*. “OIr. Gor, ‘Pious, Dutiful’: Meaning and Etymology” Éiriú 47 (1996), 193–204.

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The laws state that such children’s contracts are not valid, and no one who pledges or offers sureties on their behalf has legal support if a surety is not returned; they are also barred from their inheritance. This lack of status puts the son who fails to fulfil the duty of goire in the company of other outcast figures: foreigners and outsiders; those ejected from the kin group; a woman who is ‘an absconder from marriage’; the son of a prostitute; and a runaway slave. If the ungrateful son is killed, his kin receive only a quarter of his ordinarily payable ‘honour price’.

The majority of surviving Irish law texts are dated by linguistic analysis to the 7th–8th C. (and were compiled in the main between the 14th and 16th), but many of the laws, even those most obviously overlaid by Christian influence in the preceding three to four centuries, reference social institutions and reflect norms and beliefs which are evidently of far greater antiquity (dating in some cases to the Common Celtic period, c. 1000BCE), and for some of which Indo-European analogues are attested or conjectured. This remarkable antiquity is matched by their insistence: complaints were still being lodged through the fifteenth and sixteenth centuries in reports by English authorities of adherence (by prominent families) to Brehon Law, which had been outlawed by the 1366 Statute of Kilkenny.

3. Religious Traditions

If this indigenous archaic tradition were not sufficient, one could of course look equally to that Christian tradition which overlaid or usurped it. The preamble to the Constitution of Ireland begins with “In the Name of the Most Holy Trinity”, continuing by “humbly acknowledging”, on behalf of the Irish people, their “obligations to our Divine Lord, Jesus Christ”; Article 6 asserts that the powers of government derive from the people “under God”. This is sufficient to indicate the Christian orientation of the original Constitution (in this of course it is little different from many other existing EU constitutions). The Presidential oath of office (Article 12.8) and that sworn by members of the judiciary (Article 34.5.1°) invoke the presence and request the direction of God; the former invocation is also contained in the oath sworn by members of the Council of State (Article 31.4). Article 44.1 acknowledges the homage due to God and pledges to respect and honour religion. Again, the fundamentally and originally Christian complexion of the document is clear. (The Fifth Amendment to the Constitution, on January 5th 1973,

46 Ibid., 74, 80 n. 97, 95, 103, 105, 167.
removed the original 1937 Constitution’s reference to the special position of the Catholic Church.) Given this explicit acknowledgement of Christian tradition, and by implication the fundamentals of the Judaeo-Christian inheritance which is its basis, there is another clear tradition enjoining filial responsibility on which the framers of the Constitution might have drawn, a tradition most succinctly and resonantly articulated in the fourth commandment—which as is often observed is the only positive rather than prohibitive exhortation laid down in the Decalogue. The ‘honour’ due or enjoined to the mother and father is designated by the Hebrew kibbud. Gerald Blidstein, in a monograph on filial responsibility in the Jewish tradition, notes the word “is clearly rooted in k-b-d, that which is heavy and weighty. To honour a parent, then, means to make him a person of moment, to express your knowledge of him as a person of worth”. Kibbud is “a response to, recognition of, the weightiness of the person honoured, his worth”; its “fundamental motif” is “personal service”; to feed and clothe “requires, primarily, not the financial expenditure for food and clothing, though it may imply that as well, but the physical deed itself. Thus, the personal responsibilities of a son to his father are analogous to those of a servant to his master.” This indeed meant that some traditions of interpretation not only prioritised personal service and support, but suggested that direct financial support was not necessarily an element of filial rather than social responsibility. Blidstein writes however that in practical terms, “Jewish law always expects a son to

51 It may be noted, against prevailing views, that to characterise the compromises arrived at by the secular state with religious interests in the original framing of the constitution, especially the original accommodation which enshrined the special position of Catholic Church, as an obedient and sectarian cession of authority—a view aided by a popular vision today of John Charles McQuaid as a fusion of Grand Ayatollah and Richelieu—is most likely to misunderstand the popular perception at the time. It is also to disregard the force, scale and resonances of controversies surrounding the advocacy of Ultramontanism in nineteenth century Ireland, and difficulties posed by a considerable level of popular support marshalled for moral subordination to Rome. For the simplest indication of resistance on the part of state authorities to incorporation of Catholic principles, note that Fr. J.C. McQuaid had submitted a qualification of what eventually became Article 43.1.1° on Private Property, guaranteeing a “natural right” to “private possession of external goods”, which inserted the word “temporal” before “goods.” J.C. McQuaid to É. de Valera 16th February 1937 in G. Hogan, The Origins of the Irish Constitution, 1928 –1941 (Dublin: Royal Irish Academy, 2012), 307. For an account of de Valera’s rejection of much of the submission on the Constitution by the Jesuit Order under the direction of Fr. Edward Cahill, see D. Keogh & A. McCarthy The Making of the Irish Constitution 1937 (Cork: Mercier Press, 2007), 94–105, and further on the Order’s influence on its content, 113, 116–7, 157. Cahill’s submission is contained in Hogan (2012), 228–38, and cf. further draft suggestions for a Catholic Constitution from the Jesuits, 246–55. Hogan (223–7) also discusses some features of the Constitution commonly assumed Catholic in origin but more likely derived from secular comparators such as German Basic Law (Bunreacht na hÉireann is more literally the Basic Law of Ireland), the Weimar Constitution and the Constitution of Poland. He criticises the misperception that it was a fundamentally Catholic document in his “Foreword” to Keogh and McCarthy, 16–25, 33–4.

52 Ex. 20:12; Deut. 5:16; on the promise or exhortation contained, Eph. 6:2. This fourth in Catholicism and Lutheranism is the fifth in Calvinist and Reformed Evangelical traditions. One author has argued for the positive potential influence on caregiving roles of the concepts attending or underpinning the original Jewish context of the exhortation. C.K. Goldberg, “The Normative Influence of the Fifth Commandment on Filial Responsibility,” Marquette Elder’s Advisor 10.2, 221–44.

53 G.J. Blidstein, Honor Thy Father and Mother: Filial Responsibility in Jewish Law and Ethics (Jersey City: KTAV, 2005), xii.

54 Ibid., 43.
provide for the support of a parent”. The biblical tradition was evidently not only available to inform the content of the Irish Constitution (or the nation’s statutes), but was emphatically invoked. Within that tradition, service, honour and support are rendered to parents as a matter of course; repudiation of the parents is strongly condemned, and carried to its most extreme form, represented by striking or beating them, is punishable by death. (There is a parallel Greek abhorrence of filial repudiation of loyal parents, where similarly the striking of a parent figures as the extreme and can at least in proposed or purportedly divine laws incur the death penalty.)

4. Religion, Natural Law and the Background to the Constitution

All of which serves to emphasise that explicit or enshrined obligations to ascendants would have sat comfortably with the historical, legal, religious and political traditions of the country for which the constitution was being framed. The lack of such provision (in the original Constitution, in prior, post-independence or in subsequent statutory law) indicates on the part of those drafting it either oversight or intentional omission. The latter, given the care with which such documents are drafted, and which indeed surviving correspondence between those involved in its drafting evidences went into the Constitution of Ireland, is evidently the case. Despite two apparent nods early in the document to the privileged status of ascendants or ancestors (expressing the gratitude or affinity in neither case of the State, but of “the people” in the first and “the nation” in the second), the absence of provision for maintenance of the elderly by descendants or inheritors implies the willingness of the state to shoulder the burden of necessary care where the aged, disabled or infirm person endures a state of indigence.

Was this the intention? The matter is debatable, insofar as the fact of exclusion of the provision does not settle the issue without further ado. Article 45.4.1*, dealing with support of the aged, widows and orphans, states: “The State pledges itself to safeguard with especial care the economic interests of the weaker sections of the community, and, where necessary, to contribute to the support of the infirm, the widow, the orphan, and the aged”. The provision forms part of a section on Directive Principles of Social Policy (which, owing to their broad nature, are within the text of the Constitution explicitly provided for and restricted to guidance of the Oireachtas, and not cognisable by any court), and originated from submissions in response to the original Draft Constitution of 1937, after which Taoiseach Éamon de Valera through Maurice Moynihan communicated revisions to Ministers (the Directive Principles were

55 Ibid., xii.
56 Ex. 21:15; Lev. 20:9; Deut. 21:18–21; Prov. 28:24, 30:11, 30:17; cf. 1 Tim. 5:4.
57 E.g. Hesiod, Works and Days 182, 185–9, 331–2; Isaues, On the Estate of Ciron 8.32–4; Plato, Republic 465a–b, 574b–c; Crito 50c; Euthyphro 4a–b; Laws 877b, 878e, 879c-d, 880b, e, 881d; cf. Gorgias 456d; Euthydemus 298d–299a with Aristophanes, Clouds 1321ll.; Aristotle, Nicomachean Ethics 1163b18–27, 1165a21–24. Herodotus reports that the Persians consider the crimes of matricide and parricide so incomprehensible in their terribleness that Persian custom insists on their impossibility; in any apparent case of such, they maintain, sufficient investigation would reveal the murderer not to have been a natural child but a changeling. Histories I.137.2. 
58 The Preamble notes the sustenance of “our fathers” by Jesus Christ “through centuries of trial”, in their “heroic and unremitting struggle to regain the rightful independence of our Nation”. Article 2 meanwhile asserts that “the Irish nation cherishes its special affinity with people of Irish ancestry living abroad who share its cultural identity and heritage”.
originally Article 44). The basic wording of what became 45.4.1° seems to have been derived from a Memorandum of 24th April 1937 by James J. McElligott. The original revision which led to its insertion however seems to have stemmed in part from the impetus of Fr. John Charles McQuaid, later Archbishop of Dublin, whose role in the drafting of the Constitution is well known. In a letter to de Valera addressing what would become Article 45.4.1° (evidently then worded somewhat differently) he wrote:

*I beg to enclose the amendment dealing with widows, orphans and the aged. It will be noted that I have retained the word support, qualifying just claims, because it is unfair to expect, as so many do, that the State will do everything. It devolves on the family to support—where it can—its own aged members, in a spirit of charity.*

McQuaid, who (perhaps first) advocated for insertion of this provision for care and support of the aged, evidently envisioned it as supplementary to responsibilities devolving upon family members, trusting such as guaranteed by the spirit of charity. This was perhaps natural enough for a man apparently satisfied that the recourse to the invocation of natural law or natural right in the Constitution was sufficient guarantee of its Catholicity. By a line of reasoning even his Jesuit rivals might have shrunken from advancing, he informed de Valera: “Of course, once the State acknowledges God’s right to public worship, it cannot be secular, even if it be not Catholic. And when the State legislates according to natural law, of necessity, it legislates according to Catholicity, because the latter is the guardian of the natural law.” Recognition of the family in Article 41.1.1° “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” must for McQuaid have drawn the principles governing family relations away from secular deliberation and within the remit of Catholic teaching. The latter is quite clear in these matters. The Catholic Catechism even prescribes the duties of children to their parents before it details those of parents to children. The former are covered by Articles 2214–2220 of the Catechism, and some few extracts indicate their tendency: “Respect for parents (filial piety) derives from gratitude toward those who, by the gift of life, their love and their work, have brought their children into the world and enabled them to grow...” (Art. 2215); “As they grow up, children should continue to respect their parents... Obedience toward parents ceases with the emancipation of the children; not so respect, which is always owed to them” (Art. 2217). And most significantly for the subject under consideration:


60 Hogan (2012), 515.


62 Fr. J.C. McQuaid to É. de Valera, 8th March 1937 in Hogan (2012), 321. The letter is better known and more often quoted for its sequel, where McQuaid addresses the “most potent form of social agitation: the unsettled strike”, and the need to neutralise “the venom of Communism”. What McQuaid enclosed is not in the archive (see Hogan’s footnote).

63 Fr. J.C. McQuaid to É. de Valera, April 1937 in ibid., 459.
“The fourth commandment reminds grown children of their responsibilities toward their parents. As much as they can, they must give them material and moral support in old age and in times of illness, loneliness, or distress” (Art. 2218).

5. Natural and Unenumerated Rights

Of course, just as invocation of natural law as antecedent to, superior to and supportive of the positive law does nothing to guarantee the non-secular, not to say Catholic, nature of the document, so recourse to Catholic teaching or any other external tradition can never impute to or import into the Constitution what is not already in it. That which it is argued implicitly to guarantee must be convincingly shown to be derived from and dependent upon its explicit principles. A right of maintenance by descendants derived from the charitable or any other spirit would, were it to be argued provided for in the Constitution, have to be counted among the demonstrable unenumerated constitutional rights the guarantees of which have been accepted by the Irish courts. This issue of whether the fundamental rights guaranteed under Articles 40–44 entail unenumerated rights, and what these latter might be, is of course notorious. Hogan notes of Article 40.3 in particular that it “is, perhaps, the single most important provision in the entire Constitution”, and has “given rise to a colossal volume of litigation”. Some unenumerated rights have been definitively recognised, and even where not incorporated into the Constitution have been consecrated by statute. These include the right to bodily integrity, the right to marry and the right to earn a living. Its history is too large a subject to rehearse, but the controversial nature of the claim to unenumerated rights is understandable. The caution he expressed over the extension of personal rights (especially claimed economic, social or medical rights) notwithstanding, the most notorious and oft-cited comment relating to the issue is that of Kenny J who (while establishing the right to bodily integrity) asserted: “I think that the personal rights which may be involved to invalidate legislation are not confined to those specified in Article 40 but include all those rights which result from the Christian and democratic nature of the State.” Citing the examples of the right of free movement and the right to marry, he repeated this unfortunate formula in claiming: “there are many personal rights of the citizen which follow from the Christian and democratic nature of the State which are not mentioned in Article 40”. The formula is unfortunate because the asserted character of a state is at any time debatable and even if acceptably defined is quite obviously changeable. It can legitimately inform equitable adjudication, but

65 Hogan (2012), 277.
66 On these rights see J.M. Kelly, G. Hogan & G. Whyte, The Irish Constitution (3rd Edn.) (Dublin: Butterworths, 1994), 750, 755–61 (the right to bodily integrity), 778, 996 (right to marry), 761–6, 1062, 1120 (right to earn a livelihood).
67 For a useful recent summary of what the author calls “the rise and fall of unenumerated rights in Ireland” their “[rescue] from obscurity by Hogan J, see D. Kenny, “Recent Developments in the Right of the Person in Article 40.3: Fleming v. Ireland and the Spectre of Unenumerated Rights” Dublin University Law Journal 36 (2013), 322–41.
68 Ryan v. Attorney General [1965] IR 294, 312. Similar caution has traditionally been expressed in judgements and by commentators about establishment of unenumerated economic, social and cultural rights. In the final meeting of Ireland’s Convention on the Constitution—a 100-strong body comprising nominated members of the Oireachtas and randomly selected, putatively “representative” citizens—in February of 2014, however, 85% of the Convention’s members answered Yes on ballot to the question: “In principle, should the Constitution be amended to strengthen the protection of Economic, Social and Cultural rights?” Of those rights listed in a follow-up poll, the lowest support was for the right to social security (78%) and linguistic and cultural rights (75%), the highest for rights of people with disabilities (90%).
as a principle can hardly serve as a satisfactory foundation or reference-point for extra-constitutional statutes claimed implicit in a constitution.  

Little wonder, perhaps, that Hogan and Whyte opined that the “strictly legal justification for the Ryan innovation is not very satisfactory”. In an article arguing for application to the Constitution in this area of a “perfectly legitimate process of construction that can elicit from a document that which is implied in it but not explicitly stated”, Gerard Casey wrote of Kenny’s claim: “Whatever (if any) may be the rights that follow from what Kenny J calls ‘the Christian and democratic nature of the state’—whether and to what extent the state is or was either Christian or democratic is a moot point—they will have to derive their legal force from a source other than Bunreacht na hÉireann”. Legitimate and defensible, or demonstrable, unenumerated rights must, Casey reasons, be “logically implicit in the text”. The right to marry, for example, passes the test: “In the Constitution there is a right to found a family. Given this right, and the Constitutional definition of the family as being based on marriage, then it necessarily follows that there has to be a corresponding Constitutional right to marry”.  

There is nothing in the Constitution which could form (or inform) premises from which one could logically deduce the obligation of reciprocal maintenance of the elderly. Failing the test proposed by Casey, the reasonableness of which is evident, one must then, if seeking foundation or legal force for an obligation of maintenance to ascendants, search for it, in Casey’s words, in “a source other than Bunreacht na hÉireann”. One may suspect from the wording of McQuaid’s letter of 8th March 1937 quoted above that he was of the opinion that such obligation was inherent in the reciprocal bond between parent and child and perhaps that it ought not to be stated explicitly. The consequence of its not being made explicit is that to discover it implicitly would require appeal to a vague “spirit”, be that Christian, democratic, natural, charitable or whatever. No such “spirit” can be invoked without tension however. If one were to make recourse to dominant indigenous or imported traditions such as those outlined above (early Irish or Judaeo-Christian law and custom), the objections are obvious: it may fairly be said that such traditional laws mandate for attachments of a tribal nature which a whole array of modern phenomena, from population mobility and liberal individualism to the free market, egalitarian legislation and international peremptory norms, have made obsolete. Invocation of the spirit rather than letter of some traditional legal provision similarly lies open to the objection that the spirit of an individual provision is inseparable from and only comprehensible in the context of the totality of the legal system—which in these cases contain much that is anathema to contemporary sensibilities. The early Irish systems, like many archaic legal traditions, to a greater or lesser degree condone laws and institutions such as slavery, attainder, indentured labour, the non-answerability of nobility to laws and charges, the limited autonomy or even legal nonentity of women and monetary restitution in expiation of a crime.

70 To draw out more fully the precariousness of the principle implied by this claim: whatever rights were asserted by the courts to follow from the allegedly Christian nature of the state or Irish society would, in the hardly unforeseeable event of that society (and so the character of its supporting state apparatus) becoming decidedly unchristian, lose their force and foundation.

71 J.M. Kelly, Hogan & Whyte (1994), 757 n. 63. In a similar vein, meanwhile, the author of the volume long considered “the Irish political bible” cautioned on the uses of Article 40: “Innovative judgements, especially if they flow from seemingly vague or novel principles and are given in politically sensitive matters, might bring the judges who make them to the centre of the political stage with undesirable consequences...[and] this kind of judicial activism can have the effect of allowing politicians to leave politically sensitive issues to the courts to decide and thus relieve themselves of their responsibilities”. B. Chubb, The Government and Politics of Ireland, 3rd Ed. (London: Longman, 1993), 49–50.

One is left then with recourse to the notion of natural right. The phrase appears only once in the Constitution, in Article 43.1.1° relating to private property in which “The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods”. Outside of this statement, the closest to recourse to the notion or tradition of natural right or natural law are indeed Articles relating to the family. The family is recognised (Article 41.1 1°) as “a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law”.73 McQuaid, as noted above, had made Catholicity the guarantor and safeguard of the natural law; the remark is difficult to defend, but not impossible to argue for, and this points to one of the central problems of theories of natural law. The common anchoring of natural law in religion is not a coincidental aspect of the tradition, but a reflection of the difficulty of establishing any alternative foundation for the doctrine. The supreme advantage of viewing man as existing “under God” (as do the Irish people in the Constitution) is of course that it gives a basis to the position of his natural and fundamental equality, a view alien to much of the classical tradition.74 Natural law is in its scope and ambition certainly “catholic” in the root sense of the word, but it has also historically been rather Catholic in its complexion. Even revived natural law theory in the twentieth century has owed much to the impetus of French and later American neothomistic theorists such as Villey, Gilson, Maritain, Félicien Rousseau, Henry Veatch and Russell Hittinger.75 The greatest, most influential and also most controversial treatment of natural right in the twentieth century – which distinguished it from natural law – came from Leo Strauss, before whose book Natural Right and History (1953), in the words of one of the finest analyses of the book, the question of natural right had fallen into “a mixture of oblivion and fitful restoration”.76 For Strauss, classical natural right – which, contrary to the common anchoring of natural law doctrines in Stoic philosophy, was best articulated in the philosophy of Plato and Aristotle – was emphatically political, inseparable from the question of the best possible political regime, and based on a determinable hierarchy of ends in human life which, insofar as some were constitutionally unfitted for the highest pursuits, implied the fundamental inequality of human beings. Of natural law he wrote provocatively: “The notion of natural law presupposes the notion of nature, and the notion of nature is not coeval with human thought; hence there is no natural law teaching, for instance, in the Old Testament. Nature was discovered by the Greeks as in contradistinction to art (the knowledge guiding the making of artifacts) and, above all, to nomos (law, custom, convention, agreement, authoritative opinion). In the light of the original meaning of ‘nature,’ the notion of ‘natural law’ (nomos tês physeōs) is a contradiction

73 These rights, along with the references to the “inalienable right and duty of parents” in Article 42.1 and “the natural and imprescriptible” rights of the child in Article 42.5, are clearly enough intended to be portrayed, in issuing from a source superior and external to positive law, as natural law. See Constitution Review Group (1996), 225.

74 Perhaps the most prominent example of the establishment of fundamental equality rooted in the possession of a soul and what a later German tradition would call the “creatural” nature of man (kreatürliches, an idea popularised by one of the great books of the last century and one of the greatest ever works of literary criticism, Auerbach’s Mimesis) is the outcome of the 1550–51 Valladolid Debate.

75 J.M. Kelly has written that “The only place in the Western world where natural law in the Thomistic sense still survives outside (though certainly due originally to the influence of) the Catholic church is Ireland and the jurisprudence of the Irish courts”. A Short History of Western Legal Theory (Oxford University Press, 2003), 424–5. Kelly also provides useful summaries of the Roman precursory of Christian natural law doctrines, and the decline of natural law in the eighteenth century, 57–63, 258–77.

76 R. Kennington, “Strauss’s Natural Right and History” The Review of Metaphysics 35 (1981), 57. Kennington’s comments may be compared with those of P. Manent, who asserted that “political philosophy as originally understood owes its bare survival – fittingly unobtrusive to the point of secretiveness – to Leo Strauss’ sole and unaided efforts. Without him, the philosophy of history, or historicism of any stripe, would have swallowed political philosophy completely”. “The Return of Political Philosophy” First Things May 2000 http://www.firstthings.com/article/2000/05/the-return-of-political-philosophy
in terms rather than a matter of course.” Natural law theories must steer an uncomfortable course between the Scylla of doctrines with a religious basis for human equality and the Charybdis of non-egalitarian classical thought in which the human good is reflected in a hierarchy of ends which ground the doctrine of natural right.

This last possible recourse therefore also fails; no attempt to anchor reciprocal maintenance obligations to ascendants in natural law doctrine or a natural right teaching can work in respect of the Irish Constitution’s articulation and recognition of such. (And incidentally, considering the tradition outside of the document’s specific wording, I would number among those for whom there is no ultimately coherent doctrine of natural, never mind divine, law; I can recognise the former’s assertion and articulation in the Constitution therefore as having only the force of positive law, whatever the intent. It is a convenient and workable legal fiction, the content and intent of which one may admit as broadly comprehensible and acceptable.)

6 Conclusion

To make an end on’t, lest we stray too far from the subject under consideration: the conclusion of all the foregoing is that enforceable obligations of maintenance to ascendants could in Ireland only be derived from positive law; only as a result of a deliberative legislative act could such obligations be compellable. (They could not possibly be derived from the Articles on the family, not only because the obligation to children is specified, by which precedent unspecified obligations might be argued null, but because the subject of those Articles is the family unit and not its individual members.)

Whatever the moral opinion on the matter of those presiding over it, no court would entertain a claim for maintenance against a descendant. The corollary conclusion is that the state commits itself, where necessary, to assumption of the burden of care and support of the elderly. Perhaps this commitment was made implicit already by the inclusion of the aged with the infirm, widows and orphans, categories of person which have traditionally been and were at the time of the Constitution’s writing considered to have lost their natural sources of support (a category to which the childless aged traditionally belonged). The inclusion of widows in particular points to the state’s commitment to ensuring that mothers need not undertake economic activity outside of the home to the neglect of maternal and domestic duties. The aged are of course to be counted among the more vulnerable of a society, but their being grouped with those who in the state’s view cannot or ought not to be made to work has its own resonance. The absence or omission of reciprocal maintenance obligations from Irish law at its origin, and of any reference to enforceable filial responsibility, has arguably been granted continued approval on the principle qui tacet consentire videtur, or that one can infer from silence on the situation consent to it. Though many submissions to the Constitution Review Group in advance of its report on the family in the Constitution quoted the then-current United Nations definition of the family, including the characteristic that those who are part of a family “together assume responsibility for, inter alia, the care and maintenance of group members”, nowhere in the document was it suggested that maintenance obligations to ascendants ought to find a place in statute or the Constitution. The conclusion to which one is led is perhaps what was hinted at in McQuaid’s letter on the matter to de Valera: that the Irish view is that such obligations ought everywhere to be expected but not explicitly stated in law.

78 This was recognised by the Constitution Review Group in its report on the family, the recommendations in which included the deletion in their entirety of existing Articles 41.1.1°, 41.1.2°, 41.2.1°, 41.2.2° and 41.3.1°, and removal of adjectives such as “inalienable” and “imprescriptible” from Articles 41 and 42. Tenth Progress Report: The Family (Dublin: Oifig an tSoláthair, 2006), A293, A300–301 http://archive.constitution.ie/reports/10th-Report-Family.pdf

79 The Constitution makes no reference to widowers, but statutorily there has historically been a distinction between the rights of widows and widowers (the Constitution was preceded by The Widows’ and Orphans’ Pensions Act, 1935). Prior to O’G v Attorney General in 1985, a widower was eligible to adopt a child only if another child was already in his custody, while no such restriction was placed on widows. The case ruled the restriction unconstitutional, finding it to be “a denial of human equality and repugnant to Article 40.1”. See J.M. Kelly, Hogan and Whyte (1994), 1029. Article 40.1 of the Constitution states that “All citizens shall, as human persons, be held equal before the law”, and Article 15.4 1° that the Oireachtas “shall not enact any law which is in any respect repugnant to this Constitution or any provision thereof”.

80 Articles 41.2.1° and 41.2.2°, controversial from the first, assert that the State “recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved” and shall therefore “endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home”. The Constitution Review Group favoured their deletion as outdated, but felt it important “that there should continue to be constitutional recognition of the significant contribution made to society by the large number of people who provide a caring function within their homes for children, elderly relatives and others.” It proposed a reworded Article 42.2: “The State recognises that home and family life gives to society a support without which the common good cannot be achieved. The State shall endeavour to support persons caring for others within the home”. Constitution Review Group (2006), 119. This reformulation dates to the Group’s initial report on the Constitution. See Constitution Review Group (1996), 311–12.
A few words on this view: the activities encompassed by the political art in its broadest sense are manifold, but the business of legislation is its highest object and its natural end. For all that, legislation is in general a responsive or a reactive business: it is created and enacted as need arises. Even pre-emptive legislation invariably arises from analogy with precedent. There is little reason to expect that Ireland will, or will need to, enact legislation in this area bringing it into line with the majority of EU Member States. That an area might be governed by a norm, and regulated by societal expectation, need not make it any less effective than regulation through formal legislation; in fact, the efficacious norm might well be regarded as a higher and purer instance of “living law” than statute. (The former may indeed be a good deal more effective: to disobey a law, after all, may be contemptible, but it is merely criminal; to violate or flout a norm, on the other hand, is unbearably vulgar, and is to declare oneself anathema not only to the best-regarded and most productive elements of one’s society, but inevitably also to members of what Weberian sociology would call one’s “status group”.) There is no reason, therefore, to expect (or to advocate) that Ireland revise its laws.

This is as much as one can say on the matter in a study which is in the main intended as potentially preliminary to others; while it has been the purpose of this précis of European law in this area and examination of the case of Ireland only to illuminate and contextualise the issue, this descriptive exercise will, it is hoped, be available to inform further analyses, including those more prescriptive in nature.
Case Study:
The value in creating an Enduring Power of Attorney
The value in creating an Enduring Power of Attorney

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Introduction

Most people will be aware of the importance in writing a will, but few will have considered the importance in arranging a document (“the instrument”) called an Enduring Power of Attorney (“EPA”). This is a document which allows for someone (the attorney or donee) who a person has nominated (the donor) to make decisions on the donor’s behalf if and when they lose the ability to do so themselves. Why is this important? It is estimated that there are approximately 50,000 people with dementia in Ireland today. These numbers are expected to increase to over 140,000 by 2041 as the number of older people in Ireland increases (Launch of the Irish National Dementia Strategy, 17th December 2014). Dementia is just one example of a circumstance where individuals lose the ability to make decisions. Should this situation arise, it will become almost impossible to handle the person’s legal and financial affairs. Therefore the importance of planning to ease the burden on family members cannot be ignored.

Additionally, should a person not have an Enduring Power of Attorney executed and this person then becomes mentally incapacitated, the person’s family members will face a cumbersome and costly court application to attempt to have authority to manage their affairs and make important decisions for the person’s own benefit. In contrast the cost of setting up an EPA is relatively inexpensive, and can be done by a solicitor when drafting and executing a will.

It is important to note that a Power of Attorney is different to an Enduring Power of Attorney. A general Power of Attorney allows another specially appointed person (the attorney) to take actions on the donor’s behalf if he/she is absent, abroad or incapacitated through illness. This general power of an attorney lapses if the donor loses mental capacity, and should this occur, usually all of the person’s assets and property are frozen and cannot be used by anyone else unless they are jointly owned or, someone has an enduring power of attorney to deal with the property or money. In contrast, an enduring power of attorney must contain a statement by the donor to the effect that the donor intends the power to be effective only during any subsequent mental incapacity of the donor. It must be in the form prescribed in Statutory Instrument number 196 of 1996 and it does not come into force until it has been registered by the Registrar of Wards of Court.
The Powers of Attorney Act, 1996 ("the Act")

This legislation created for the first time the possibility in Irish law of executing a power of attorney which could continue to operate when the donor of the power is or is becoming mentally incapable. The enduring power created under the Act, enables a person to put in place a system by which a person or persons of their choice will manage their financial affairs during an anticipated or possible incapacity in the future.

It is important that someone trustworthy is chosen to act as an attorney, and before choosing someone, it is important that the appointment be discussed with them. As this is an extremely important role with significant responsibility, the proposed attorney should be informed and willing to take on the role. An attorney’s responsibility is to make all decisions in the donor’s best interest. Under the Act the donor can restrict or specify the types of decisions the attorney can make, or give a more wide ranging authority to allow them to make all decisions on the donor’s behalf.

Section 5 of the Act provides that an enduring power of attorney may permit the attorney to make personal care decisions on behalf of the donor, and may confine him or her to making such personal care decisions or may confer general authority. Section 6 of the Act deals with the scope of the authority of an attorney acting under an enduring power. The Act can confer general authority in relation to all or a specified part of the property and affairs of the donor, and/or conditions and stipulations can be attached to the authority given by the donor.

In addition to giving an attorney the power to make decisions relating to financial and legal matters, attorneys can be given power to make personal care decisions, for example:

- Where the donor should live and with whom should they live;
- Whom the donor should see and not see;
- What training or rehabilitation the donor should get;
- Diet and dress;
- Inspection of the donor’s personal papers;
- Housing, social services and other benefits for the donor.

The attorney as the donee of the power is given wide ranging authority in relation to the donor’s affairs, therefore legislation requires that the donees of the power certify by their signature the duties and obligations assumed by virtue of the appointment and both attorneys separately executed this part of the instrument in the presence of the solicitor who witnessed the execution of the power by the donor.

When the EPA has been executed the power does not become effective until it is registered, the requirement to register the EPA occurs when it becomes clear that the donor no longer has the ability to make their own decisions. It is necessary to prove this incapacity with a medical certificate from a doctor that the donor is or is becoming incapable of managing their affairs.
Section 9(1) of the Act states,

‘If an attorney under an Enduring Power of Attorney has reason to believe that the donor is or is becoming mentally incapable, the attorney shall, as soon as practicable, make an application to the court for registration of the instrument creating the power.’

A notice of the attorney’s application to register the EPA must be served on the donor and also on the people who were notified of the execution of the EPA and are named in it, usually this will be the donor’s family members, for example other sons/daughters who were not named to act as attorney. Any person served with this notice can object to the registration, for example it may be their view that the proposed attorney is unsuitable to act or unduly influenced the donor into appointing them. The grounds for objection must be sent to the Office of the Wards of Court within five weeks on receipt of the notice.

Once the attorney has applied for registration, they may act on the EPA, namely to take action under the power to maintain the donor and prevent loss to the donor’s property or savings. They may also make any personal care decisions that are authorised and cannot be deferred until the registration has been completed.

**The costly and restrictive alternative**

It has already been highlighted that should a person lose the ability to make decisions regarding their own welfare and does not have an EPA in place, an application can be made to President of the High Court to have that person made what is a called a Ward of Court. When a person is made a Ward of Court, a committee is appointed to look after this person’s affairs. Not only is such an application significantly more expensive than executing an EPA, the effect of it is far more restrictive. The recent High Court decision of **AA v FF [2015] IEHC 142 (unreported, High Court, 20th February 2015, Baker J)** is instructive in this regard, for it compared whether an EPA was akin to wardship.

This case examined the extent to which the attorney appointed by a registered power of attorney, that is a power which becomes operative by virtue of registration under the statutory provisions, may be supervised by the court, or is accountable to the court or to any other person who has the interests of the donor in mind. Specifically the issue to be decided was whether an attorney has an obligation to provide accounts of the donor’s financial affairs to the court or to family members who were not appointed an attorney.

Baker J suggested that

“one of the purposes of the introduction of a statutory scheme for the appointment of an enduring power of attorney was to avoid the necessity of application to court to take into wardship a person with limited or no power to manage his or her own affairs.”

The court further noted that the committee of a ward of court has an onerous obligation as an officer of the court. Further the committee is limited in the carrying out of powers and duties to any directions given by the judge in wardship, and the committee of the ward requires authorisation from the President of the High Court for the application of the monies of the ward, or to sell the ward’s property.
The committee is also required to provide annual accounts to the High Court and to further account at any times that may be directed by the Registrar. Moreover the President of the High Court has a supervisory jurisdiction with regard to any and all matters that arise in the wardship generally or that arise from the accounts. Therefore it can be seen that the Ward of Court procedure is quite restrictive.

In contrast Baker J stated that an attorney acting under an enduring power of attorney requires no authorisation from the court and the exercise of the power is subject only to any limitations and restrictions contained in the instrument itself. Importantly the Court said that the role, powers and limitations that exist in the case of a committee of a ward of court do not apply in the case of an attorney acting either with an enduring power or a general power of attorney and thus whatever the role of the court, it is not akin to the role the court takes in the management of a ward’s business, property or affairs.

The court concluded

“that the role of attorney acting under an enduring power of attorney is not as a matter of law akin to the role of a committee acting in wardship, and for the roles to be identical or broadly similar would be to ignore the fact that the legislature created in 1996 an alternative process by which the financial and other affairs of an incapable person could be dealt with.”

When considering the significance of appointing an attorney, the court posited that the decision is made at a time when the person has the ability and capacity to make an informed decision. Baker J stated:

“...it cannot be inconsequential that the procedure for the appointment of an attorney under the legislation provides for the nomination by the donor, at a time when his or her capacity was not in doubt, of the person or persons he or she chooses to act on his or her behalf. One must in that context assume that the persons chosen by the donor were chosen either because of their personal or emotional connection with the donor or because of a perception of their ability and willingness to manage his or her personal or financial affairs, and most attorneys appointed under an enduring power are family members who are entrusted by the donor to act in his or her best interests, and indeed to know what his or her interests and wishes might be.”

In comparison the court highlighted the fact that the committee appointed by the court on an application to take a person into wardship is not selected or chosen by the ward, but is chosen by the court in the light of a number of factors including the ward’s needs.

With regard to the actual issue at the root of this particular case, the Court held that if a legitimate query is raised by an interested party to the Court, for example the donor’s children, in relation to the attorney’s management of the donor’s financial affairs, then the attorney does have an obligation to furnish to the Court a report of the donor’s financial affairs.
Don’t leave it too late

Although the decision to appoint an attorney is usually done when a person has full mental capacity, it is not too late to arrange an EPA if a person has been diagnosed with an illness that will affect their cognitive ability. With regard to the capacity to make a will, it is accepted by the courts that the test for capacity is a legal test and not a medical test, and this has been reaffirmed in the recent High Court decision of *Scally v Rhatigan* [2011] 1 IR 639. However the test for whether a person has the capacity to execute an EPA is not as clear. This issue was examined in the recent High Court decision of *In the matter of an application for registration of an Enduring Power of Attorney of SCR* [2015] IEHC 308 (unreported, High Court, 20th May 2015, Baker J). This was a contested application pursuant to s. 10 of the Powers of Attorney Act 1996 to register an enduring power of attorney where the court considered whether the donor of the power had the capacity to execute the instrument creating the power.

In this case the donor executed an instrument creating an EPA in the statutory form in the presence of his solicitor and by the power he appointed his son to act as attorney for the purposes of the Powers of Attorney Act 1996, with general authority to act on his behalf. Notice of the execution of the power was required to be, and was, given to his two other children. An application was made by the attorney so nominated to register the power and notices of objections were received in each case, the eldest daughter of the donor, and from his younger daughter. The objections were made to the registration of the instrument on the grounds that:-

1. *The enduring power was not valid;*
2. *That the named attorney is unsuitable to act in that capacity;*
3. *That fraud or undue influence was used to induce the donor to create the power.*

The court held that the burden lies on the objector to prove that the donor did not possess the requisite capacity to execute the instrument and that the decision must be in favour of registration unless it is established that the donor lacked capacity to execute the instrument.

Having examined the medical evidence the Court held that the donor was suffering from dementia and his condition became progressively worse from the time he first displayed symptoms in December 2011. He had a clear diagnosis of moderate to severe dementia on the 30th August, 2013. He was lucid on the 10th September, 2013, and confused and incapable of understanding on the 8th October, 2013. The court accepted that a person with senile dementia has a progressive condition and that within the progression there may be periods of lucidity. At the time the donor executed the instrument he had already been admitted into a nursing home due to his inability to care for his everyday needs. The learned judge noted the suggestion that one reason for this was that the donor had a tendency to wander, but regarded the medical evidence as suggesting that the tendency to wander is an intrinsic element in the condition of senile dementia, and one which is suggestive of a broader spectrum of incapacity.

The Court then considered whether “best practice” was followed. The Law Society Guidelines 2004, in respect of the legislation suggest that the statement of capacity of the medical practitioner and the certificate of the solicitor “should ideally be completed within 30 days of the signing” of the instrument and that solicitors should keep an attendance note demonstrating the client’s understanding when a client is elderly or incapable to protect the donor and to inform the court.
In the circumstances the Court was satisfied that the solicitor did not follow the “best practice”. The operation of the rules of “best practice” or a “golden rule” were considered by Briggs J. *In re Key deceased* [2010] EWHC 408 (Ch):-

“The substance of the golden rule is that when a solicitor is instructed to prepare a will for an aged testator, or for one who has been seriously ill, he should arrange for a medical practitioner first to satisfy himself as to the capacity and understanding of the testator, and to make a contemporaneous record of his examination and findings...”

However, Briggs J. went on to say at p. 2023:-

“Compliance with the golden rule does not, of course, operate as a touchstone of the validity of a will, nor does non-compliance demonstrate its invalidity. Its purpose, as has repeatedly been emphasised, is to assist in the avoidance of disputes, or at least in the minimisation of their scope.”

Applying this statement the Court was satisfied in this case that best practice was not followed by either the legal or the medical practitioners who certified capacity on the 6th November, 2013, and that is not because of the gap of five days which occurred between the execution of the EPA by the donor and the date of that certificate, but rather because the evidence quite clearly points to a conclusion that the donor had at best a progressive condition which was capable of causing, and was in fact causing, him to be confused and disorientated.

The Court concluded that in the case of a power of attorney executed by a person who has fluctuating or deteriorating mental capacity simultaneous or near simultaneous medical assessment is desirable, and this is so because the fluctuating nature of the condition itself opens the possibility that the mental capacity of the donor be impaired. This is not to say that simultaneous legal and medical assessments are always required, and whether this is so will depend on the circumstances of the individual donor.

Notwithstanding the weight attached to the “golden rule” the Court stated that while best practice or professional guidelines are useful tools, they can do no more than act as a marker and the question of capacity must be determined as a matter of fact in the circumstance of the individual case. Laffoy J in Scally v. Rhatigan stated that:-

“Irrespective of whether the “Golden Rule” or best practice was followed in a particular case, it is a question of fact, which is to be determined having regard to all of the evidence and by applying the evidential standard of the balance of probabilities...”
The law on testamentary capacity and the classic statement of testamentary capacity is found in the old decision of *Banks v. Goodfellow* [1870] LR 5 QB 549, where Cockburn CJ considered the capacity to make a will and made the following statement, much quoted:-

“It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties—that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.”

More recently Laffoy J in *Scally v. Rhatigan* followed this test.

The court considered therefore that the question of cognitive capacity requires the court to make a legal assessment of such capacity and that the court ought not in the case of the execution of an instrument creating an EPA defer to a medical assessment, even one made following a contemporaneous or near contemporaneous assessment.

The Court considered the test for determining capacity to be whether, on the balance of probabilities and taking the evidence as a whole, the donor had sufficient cognitive capacity as a matter of fact to understand the nature and effect of the instrument he actually purported to execute. The test is a legal test and the Court was satisfied that notwithstanding that there exists a presumption that an instrument in the statutory form creates a valid EPA, once a valid objection is shown the court must determine the question, not on the basis of any artificial evidential test but rather on the entirety of the facts before it.

Having reached this conclusion the Court distilled the principles to be considered when determining what is required to establish if a person has capacity to execute an EPA. The Court noted that an EPA is one which will of course by its statutory nature become operative once the donor becomes mentally incapable. Therefore the Court was of the view that the donor should at the minimum understand and be capable of understanding the following:-

1. *The range of matters in respect of which the donee would have authority to act on his behalf.*
2. *That the power once registered could only be revoked by order of the court.*
3. *The limited power of the notice parties to object to decisions taken by the donee after registration.*
4. *That the authority of his chosen attorney will be to act on his behalf should he become mentally incapable.*
5. *That, subject to any limitations placed in the instrument itself, the donee of the power will be able to do anything with the donor’s property which the donor himself or herself could have done.*
Having considered the whole of the evidence and following an application of the distilled principles to the facts, the Court was satisfied on the evidence that the donor did not have cognitive capacity at the date he executed the instrument creating the EPA, for the Court was satisfied that the donor was suffering from moderate dementia which impaired his cognitive functions. The Court was not satisfied that the evidence as a whole shows that the donor was sufficiently lucid at the time he executed the instrument to understand its nature as a general power, nor was the court satisfied that the scope and purpose of the power was fully explained to him or understood by him. In the circumstances the objection to registration was sustained and the Court refused to register the power.

**Conclusion**

It is important to understand that an EPA is a serious and powerful document; consequently it is vital that legal advice be taken when seeking to create an EPA. For example if a donor does not wish to give a general power to the attorney, and is desirous of putting particular restrictions in place, the intricate drafting that is required can be quite complicated. If drafted incorrectly, the Power of Attorney could cause future legal issues or in extreme cases render the Power of Attorney invalid. Without legal advice, there is the danger of making errors of judgment in drafting the form that can make life unintentionally difficult for attorneys in the future, or which can cause the Office of the Wards of Court to reject it. Despite the benefits of setting up an EPA, it would be a mistake to give the impression that an EPA will solve all future problems for the loved ones of someone who becomes incapacitated. However proper planning in relation to financial, legal and care arrangements for when a person no longer has the ability to decide on these issues themselves, certainly makes things not only easier, but more cost efficient.
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