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The Legal Assimilation of Same-Sex Family Units in Ireland

PhD

2015

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Summary

This PhD thesis critically examines how Irish law can promote the effective assimilation of same-sex family units into Irish society. Initially, the thesis assesses the potential for marriage equality under Irish law. The major findings in this regard are that the Oireachtas could legislate for marriage equality in the absence of a referendum and because of the synergy between the constitutional and statutory understandings of marriage envisaged by Dunne J in the High Court case of *Zappone v Revenue Commissioners* [2008] 2 IR 417 such legislation might not be deemed unconstitutional by the courts. As emphasised in chapter one, this course of action was not adopted by the Oireachtas post-*Zappone* due to either a lack of appreciation of this aspect of the High Court judgement or the sheer political unwillingness to engage with it.

The subsequent analysis of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 in chapter two reveals that, despite the similarities between the civil partnership and marriage regimes, marriage equality for same-sex couples is preferable given the public interest arguments that support it and the disconnect between marriage law and morality. In relation to the redress scheme, when coupled with empirical evidence pertaining to cohabitation trends in Ireland, the statutory criteria that must be fulfilled before a cohabitant can qualify to benefit from this scheme indicate that it is likely to benefit few same-sex cohabitants in practice.

The analysis in chapter three on how precisely to facilitate same-sex parenting reveals that if Article 42A is ultimately inserted into the Constitution and if the General Scheme of the Children and Family Relationships Bill 2014 becomes law then the latter's assisted reproduction provisions may be constitutionally infirm for failing to effectively balance the intentions of prospective same-sex parents and the "natural and imprescriptible" constitutional rights of the donor-conceived child.

Finally, the discussion in chapters four and five reveals that although it has been granted some domestic effect, the European Convention on Human Rights 1950 (ECHR) has had no discernible impact in advancing the legal assimilation of same-sex family units in Ireland. Indeed, national developments in this area are rapidly outpacing the Convention.

Methodology

Initially, I engaged in a literature review of primary sources which state the law and secondary materials which analyse the law. The data required for this project was largely accessed through Trinity College Dublin's extensive copyright library. Outside of the library context where leading cases, textbooks and many journal articles relevant to my chosen topic were analysed, I had recourse to various online legal information aggregators in order to access further materials. In particular, a careful search of these databases enabled me to uncover a myriad of journal articles relevant to my research topic.

This doctrinal research methodology, which is grounded in qualitative data, involved library-based reading and rigorous textual analysis of the primary and secondary sources that I had gathered. These materials were weighed and synthesised based on authority and hierarchy in that any statements about what the law is were based on primary authority such as case law and legislation while secondary sources such as textbooks, journal and newspaper articles were employed to support a particular interpretation or critique of the law. The previous works of other scholars in the field greatly assisted me in developing my own critique of Irish law. I also found it useful to explore the context in which relevant legislation was drafted by examining Oireachtas debates.

Given the restrictive provisions in the Constitution pertaining to marriage and the family few jurisdictions are truly comparable with Ireland in this area. Therefore, while I had recourse to comparative primary sources as a means of making reform-oriented proposals in this area, comparative secondary materials were more readily invoked to contribute to the philosophical debate as to why reform is indeed currently necessary.

Of greater comparative import is the European Convention on Human Rights 1950 (ECHR) since it is an international human rights instrument that has been granted some domestic effect. I thoroughly explored the position of same-sex family units under the ECHR while bearing in mind its sub-constitutional status in Irish law and the restrictions on its domestic application as delineated by the European Convention on Human Rights Act 2003 and quite recently confirmed by the Supreme Court in *McD v L* [2010] ILRM 461.

Acknowledgements

I wish to thank my academic supervisor, William Binchy, for his support and encouragement throughout this project and for challenging me to produce the most rigorous thesis that I possibly could in this evolving area of the law. I would like to thank all those who supported me on this exciting yet sometimes arduous journey. I am grateful to my parents, Noel and Margaret, my brothers Damien and Jamie, and my aunt Maria and her husband Michael for unfailingly believing in me and my ability to see this project through to fruition: in particular I wish to thank my dad and my younger brother Jamie for allowing me to discuss with them many ideas that would ultimately be elaborated on in my thesis. Certain chapters are all the better for their input.

I wish to thank my BCL and LL.B family law students at NUI, Galway for their patience in allowing me to test certain hypotheses from this thesis on them as a student audience, and for so actively engaging with the material. I found their enthusiasm for the material encouraging and it helped me to question and refine my own perspective. I would like to acknowledge the support and encouragement of my friend and colleague, Professor Donncha O'Connell, Head of the School of Law at NUI Galway. I wish to thank my long-time friends and fellow academic lawyers Dr. David Prendergast and Dr. Desmond Ryan of the School of Law, Trinity College Dublin for their meticulous help with the laborious editing process.

A number of peer-reviewed articles based on chapters of this thesis have been published in the *International Journal of Law, Policy and the Family*, the *Irish Jurist* and the *Journal of Social Welfare and Family Law*: I am truly indebted to those who anonymously peer-reviewed these publications as their insightful and constructive comments enabled me to improve the coherence and academic rigour of the thesis.

Finally, I would like to thank the Joint Committee on Justice, Defence and Equality for recently inviting me to present some of my findings to the members of the Oireachtas; contributing to the policy debate in this sensitive area was a most satisfying experience that, for me, made much of the detailed critical analysis and reform-oriented recommendations contained herein feel current and worthwhile.

For Harry and Nora

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Introduction

I was quite disconcerted when I first became aware of the lack of legal recognition accorded to Irish same-sex couples as a family law student at Trinity College Dublin in 2004. In the years that followed I was intrigued by progressive developments taking place elsewhere in the area of same-sex relationship recognition, and I found myself developing a strong desire to research the most effective means of legally assimilating same-sex couples into Irish society, obviously with the prevailing constitutional framework in mind. I realised that no research project concerning same-sex couples would be complete without an examination of the most appropriate method for legally recognising the relationship between such couples and any children that they were either raising or hoping to raise together. Hence I framed my research question as follows: how can the law promote the effective assimilation of all same-sex family units into Irish society?

Chapter 1 critically examines the Irish constitutional and statutory understandings of marriage and the family in order to establish whether the introduction of marriage equality for same-sex couples is legally possible. The nexus between the constitutional concept of marriage and an aptitude for child-rearing is scrutinised. I argue that on its true interpretation the High Court judgement in *Zappone v Revenue Commissioners* envisages a synergy between the constitutional and statutory understandings of marriage and the family such that the Oireachtas could legislate for same-sex marriage absent a constitutional referendum and this would be deemed in conformity with Article 41 of the Constitution. I also endeavour to explain why this approach was not adopted by the then Irish Government in the aftermath of *Zappone*. Chapter 1 also examines why another legal challenge to our existing marriage law or a marriage equality referendum may not be the most viable means of attempting to bring about marriage equality in Ireland.

Chapter 2 analyses the essence of, and the pragmatic and symbolic effects of the marriage-like regime that is civil partnership, as introduced by the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010. This chapter acknowledges that functionally, civil partnership provides societal acknowledgement of and legal protection for same-sex unions.

However, it is argued that marriage equality would be a more suitable model of relationship recognition when one considers the widely recognised functional similarities between same-sex and opposite-sex couples, the public interest arguments that support its introduction, and the disconnect between Irish marriage law and Judeo-Christian morality. In addition, the oft-cited argument that marriage should be restricted to opposite-sex couples because optimal child development takes place in such unions is exposed as a mechanism that is employed by same-sex marriage opponents to mask their fundamental moral disapproval of gay and lesbian sexual activity.

Chapter 2 also scrutinises the cohabitation regime that was introduced via the 2010 Act. The formalities required to conclude a cohabitation agreement are analysed and the reasons for the possible unwillingness of Irish cohabitants to conclude such agreements are highlighted. However, the particular focus of the latter part of Chapter 2 is on the redress scheme that enables a financially dependent "qualified cohabitant" to apply to the courts for certain relief following the termination of the cohabiting relationship. The redress scheme is assessed in order to determine whether it really has "appropriate regard to the value of autonomy of private relations while providing a safety net to address the needs of particularly vulnerable persons." [1] The significance of the redress scheme for same-sex cohabitants is contemplated in light of statistical evidence on the number of such cohabitants and the existing empirical evidence pertaining to cohabitation trends in Ireland.

Chapter 3 explores the somewhat controversial issue of same-sex parenting. It begins by outlining and systematically diffusing the more prevalent arguments against such parenting. The chapter then assesses how Irish law might accommodate the desires of same-sex parents. The analysis proceeds on the assumption that the Children's Amendment, Article 42A, will be inserted into the Constitution in the near future. The amendment has a significant impact on the arguments advanced in this chapter, particularly in the context of assisted human reproduction. The General Scheme of the Children and Family Relationships Bill 2014 is the main focus of the chapter because it is the first piece of proposed legislation designed to grant parental status to same-sex couples in cases of assisted

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[1] Law Reform Commission, *Report on the Rights and Duties of Cohabitants* (LRC 82-2006) 21.

reproduction and to propose extending the right to apply for guardianship to a gay or lesbian social parent and extending the right to apply for a joint adoption order to same-sex civil partners. Chapter 3 assesses whether the proposals contained in the General Scheme are constitutionally sound. I expose a conflict between the provisions on assisted human reproduction and the "natural and imprescriptible" constitutional rights of the child conceived by a lesbian couple via self-insemination at home using the sperm of a known donor. However, I propose an innovative legislative solution that would equitably balance the rights of the child and its same-sex parents.

Chapter 3 also considers child-centric arguments for extending the right to apply for a joint adoption order to same-sex civil partners but questions whether the proposal contained in the General Scheme that would allow this to happen might be constitutionally infirm in the absence of any reform of the prevailing constitutional understanding of marriage and the family.

Since it has been granted some domestic effect, I thought it would be appropriate for my final chapters to focus on the impact of the European Convention on Human Rights 1950 in the areas of same-sex relationship recognition, same-sex parenting and same-sex marriage to determine whether this international human rights instrument can help promote the assimilation of same-sex family units into Irish society. Chapter 4 traces the evolution of the protections provided by the European Court of Human Rights (ECtHR) for gay and lesbian individuals and the Court's approach to same-sex couples under Articles 8 and 14 of the Convention as demonstrated by recent case law in this area. An analysis of the position of same-sex parents under these provisions is also undertaken. The potential domestic impact of any progressive decisions by the ECtHR in these sensitive areas is considered in light of Article 41 of the Constitution and the provisions of the European Convention on Human Rights Act 2003. Chapter 5 assesses the potential for the recognition of same-sex marriage under the Convention, and questions whether the ECtHR might provide Ireland with the impetus to embrace marriage equality under our domestic laws in the near future. The concluding chapter provides a brief recap of the major findings of this PhD thesis and is followed by a comprehensive bibliography.

When I commenced this thesis I could not have anticipated the wealth of developments that would take place at national and international level. More and more countries are legalising same-sex marriage with each passing year. Indeed, the Marriage (Same-Sex Couples) Act 2013 became law in our neighbouring jurisdiction, England and Wales, on 29th March 2014. In addition, both the U.S. Supreme Court[2] and the European Court of Human Rights[3] have even delivered their premier rulings on the issue.

In Ireland, the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 was in its infancy when I began my research, with the then Irish Government firmly ruling out making any provision for same-sex marriage. Today, not only has the abovementioned statute been enacted for quite some time, but Irish society already appears ready to move beyond it! The constitutional convention, a body comprised largely of members of the electorate, recently recommended by an overwhelming majority that provision should be made for same-sex marriage in the Constitution, and the present Irish Government has pledged to allow a marriage equality referendum to take place in 2015. Further, the General Scheme of the Children and Family Relationships Bill 2014, which aims to radically overhaul Irish family law and contains provisions that will benefit same-sex parents, is currently being subjected to pre-legislative scrutiny in the Houses of the Oireachtas, and I was honoured to recently have been invited to give evidence based on some of the findings in this thesis to the Joint Committee on Justice, Defence and Equality on 9th April 2014. Such positive socio-political change over a very short period of time is nothing short of astounding.

It is hoped that this thesis and the publications emanating from it will be something of an original contribution to the ongoing debate on same-sex marriage and the essence and effectiveness of the civil partnership and cohabitation regimes introduced under the 2010 Act. The thesis also endeavours to provide a worthy critique of the current position of same-sex family units under the ECHR and an analysis of the potential for this international human rights instrument to contribute to domestic change in the controversial areas of marriage equality and parenting by same-sex couples. Perhaps the most significant contributions to

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[2] *United States v Windsor* 133 S. Ct. 2675 (2013) (No.12-307).
[3] *Schalk and Kopf v Austria* App No 30141/04 (ECHR, 24th June 2010).

socio-legal debate made by this thesis can be found in chapter three where the shortcomings (from a child-centric point of view) of the proposals pertaining to assisted human reproduction in the General Scheme are critiqued. At the outset of this project I could not have imagined that even prior to completing it the analysis contained herein would be considered useful to the Oireachtas when considering the potential refinement of family policy before proceeding with detailed legislation, and I was honoured to have been invited to play a minor role in the pre-legislative scrutiny process. Hence I would like to think that my thesis has already had an impact beyond fuelling further academic debate because aspects of it have been considered relevant and instructive in the policy-making arena that is the national parliament.

Chapter 1

Same-Sex Marriage: The Irish Experience

Introduction

Marriage equality between same-sex and opposite-sex couples is perhaps the ultimate affirmation of the socio-legal assimilation of same-sex relationships into any society. Hence this chapter will explore the constitutional and statutory understandings of marriage in order to determine whether provision can be made for same-sex marriage in Irish law. Judicial *dicta* relating to marriage and the family will be examined in order to define the parameters of these constitutional concepts prior to Ireland's premier same-sex marriage case, the High Court decision in *Zappone v Revenue Commissioners*.[1] An analysis of this decision will reveal the various reasons why the High Court found that same-sex couples cannot currently avail of the constitutional right to marry. In addition to highlighting the significance of the prevailing statutory position on marriage, the relevance of child welfare to the constitutional notion of marriage will be scrutinised. The impact of both the constitutional equality guarantee and the harmonious approach to constitutional interpretation on the understanding of marriage and the family in Articles 41 and 42 will also be considered. Further, the circuitous approach to same-sex relationship recognition that has been adopted by the branches of Government since the *Zappone* decision will be discussed. Finally, the significance of the role of the Constitutional Convention in the same-sex marriage debate will be examined, as will the potential difficulties associated with the constitutional referendum that has been proposed by the Government to resolve this delicate and divisive issue in 2015.

The Contours of the Constitutional Family

Articles 41 and 42 of the Constitution of Ireland 1937 represent the basic law of the State pertaining to marriage, the family, and the education of any children therein, and "it is generally considered that these provisions were heavily influenced by

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[1] *Zappone v Revenue Commissioners* [2008] 2 IR 417.

Roman Catholic teaching and Papal encyclicals."[2] Article 41.1 delineates "the Family" as the "natural primary and fundamental unit group of society, and as a moral institution possessing inalienable and imprescriptable rights, antecedent and superior to all positive law." The State "guarantees to protect the Family in its Constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State." Article 41.3.1° places a parameter on the constitutional concept of "the Family", because "The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack."

Thus, while "Marriage" and "Family" are terms undefined by the Irish Constitution, the latter concept is solely founded on the former institution, as indicated by the insertion of the words "on which" in Article 41.3.1°. Hence, as Doyle affirms, marriage is a "necessary condition for a group of persons to constitute a family unit protected by Art 41"[3] and so the right to marry is recognised as being implicit from the terms of that provision.[4] Given the "clearly Catholic ethos"[5] of the Irish Constitution, the document's conflation of the concepts of "marriage" and "family" is understandable since, as Duncan observes "Roman Catholic social teaching emphasises the central importance to society of the family based on indissoluble marriage."[6] Thus, in order to understand what is meant by "Family", the meaning of "Marriage" under the Irish Constitution must first be ascertained. The common law definition of marriage, as stated by Lord Penzance in *Hyde v Hyde,* is "the voluntary union for life of one man and one woman, to the exclusion of all others."[7] An equivalent definition of marriage was adopted in this jurisdiction by Costello P in *B v R.*[8] Indeed, the institution of marriage has always been recognised in Irish case law as "the basis of the family

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[2] *Report of the Constitution Review Group* (Pn 2632, Stationery Office 1996) 319.

[3] Oran Doyle, *Constitutional Law: Text, Cases and Materials* (Clarus Press 2008) 225.

[4] *Zappone v Revenue Commissioners* (n 1) 505. However, in *Ryan v Attorney General* [1965] IR 294, 313, Kenny J referred to the right to marry as one of the unenumerated personal rights protected under Article 40.3.1°. In *O'Shea v Ireland* [2007] 2 IR 313, Laffoy J confirmed that the right to marry is protected by Article 40.3.1°.

[5] Eoin Carolan, 'Committed Non-Marital Couples and the Irish Constitution', in Doyle and Binchy (eds), *Committed Relationships and the Law* (Four Courts Press 2007) 256.

[6] William Duncan, 'Supporting the Institution of Marriage in Ireland' (1978) XIII Irish Jurist 215, 221.

[7] (1866) LR 1 P and D 130, 133 (Lord Penzance).

[8] [1995] 1 ILRM 491, 495; Costello J defined marriage as "the voluntary and permanent union of one man and one woman to the exclusion of all others for life."

and as a …union of man and woman".[9] The revered constitutional position occupied by this traditional, heterosexual concept of marriage has also been referred to in the case law on many occasions,[10] most recently by Murray J in *DT v CT* in 2003.[11]

Staines observes that there was no discussion on the meaning of "the Family" during Dáil debates on the Constitution.[12] However, it is clear from case law dating back over half a century that the marital "Family" envisaged by the Constitution is indeed nuclear and hetero-normative in nature. In *McCombe v Sheehan*, Murnaghan J had "no doubt" about the meaning to be attributed to the word "family" in Article 41, and found that it referred to "parents and children".[13] In *Jordan v O'Brien*, Lavery J, having considered Murnaghan J's earlier pronouncement on the term "family" in the Constitution, stated as follows:

> I will accept, without deciding, that the word as used in the Constitution does mean parents and children and does not include other relationships. Certainly the Constitution has primarily in mind the natural unit of society – parents and children – which it protects.[14]

Similarly, Kingsmill Moore J felt in *Jordan* that "Mr. Justice Murnaghan may have been correct in saying, as he did in *McCombe's Case,* that "family" in Article 41 of the Constitution means "parents and children"".[15] It is submitted that the narrow understanding which the courts have attributed to the "Family" in the Constitution is quite a plausible one, seeking to reflect social reality at a time when the norm was for opposite-sex couples to marry and found a family through procreation, leading in turn to the establishment of the parent/child relationship referred to above. However, in *Murray v Ireland*, Costello J held that a married couple without children can also form a constitutional "Family" because:

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[9] *Murphy v Attorney General* [1982] IR 241, 286 (Kenny J).
[10] See *N v K* [1985] IR 733, 754 (McCarthy J); *Murphy v Attorney General* [1982] IR 241, 266 (Hamilton J).
[11] [2003] 1 ILRM 321, 374. Murray J described marriage as "a solemn contract of partnership entered into between man and woman with a special status recognised by the Constitution."
[12] Michael Staines, 'The Concept of "Family" under the Irish Constitution' (1976) XI Irish Jurist 223, 224.
[13] *McCombe v Sheehan* [1954] IR 183, 190.
[14] *Jordan v O'Brien* [1960] IR 363, 370.
[15] ibid 375.

A married couple without children can properly be described as a "unit group" of society such as is referred to in Article 41 and the life-long relationship to which each married person is committed is certainly a "moral institution". The words used in the article to describe the "Family" are therefore apt to describe both a married couple with children and a married couple without children.[16]

While one may deem such an assertion promising for the possible recognition of childless same-sex marital families under Article 41, it must be remembered that Costello J was for the purposes of this case contemplating the right to procreate of a heterosexual married couple that was serving a sentence of life imprisonment. Further, homosexual behaviour between consenting male adults was still an offence at the time this case was decided, so Costello J was certainly not attempting to do anything so radical as to separate the institution of marriage from the concept of procreation in order to benefit same-sex couples at some point in the future. As Carolan so diligently observes "Costello J's understanding of the concept [of marriage] was clearly tied to notions of a heterosexual, procreative partnership"[17] because elsewhere in his judgment he states that:

> [t]he Constitution makes clear that the concept and nature of marriage, which it enshrines, are derived from the Christian notion of a partnership based on an irrevocable personal consent, given by both spouses which establishes a unique and very special life-long relationship. According to this concept the procreation and education of children by the spouses is especially ordained. By explicitly recognising and protecting *this concept of the institution of marriage*, it would follow that the right of each spouse to beget children is implicitly recognised and protected.[18]

This definition of marriage was later approved by the Supreme Court in *TF v Ireland*.[19] It is opined that Costello J's finding that a childless heterosexual married couple is a "Family" for the purposes of Article 41 is fully in keeping with the

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[16] *Murray v Ireland* [1985] IR 532, 537.
[17] Eoin Carolan (n 5) 252.
[18] *Murray v Ireland* (n 16) 536.
[19] *TF v Ireland* [1995] IR 321, 373.

traditional concept of a family already imputed to that provision by the learned justices in *McCombe* and *Jordan.* This is because those decisions recognised the familial parent-child relationship and in *Murray* Costello J recognises the relationship between childless heterosexual adults, and such persons are, *in principle*, potential parents, capable of the "procreation and education of children" which is "especially ordained".[20] On this analysis the gender of the parties is essential to the constitutional notion of the marital family because only opposite-sex couples are theoretically capable of establishing the "natural unit of society – parents and children".[21]

More recently, it would appear that procreation is indeed viewed as nonessential in the context of marriage under Irish law.[22] Nonetheless, the gender of the parties remains fundamental because although a couple's *child-bearing capacity* is being overlooked, their *child-rearing suitability* is not because the constitutional notion of marriage remains focussed on the archetypal parent-child relationship.[23] This recent judicial approach reiterates that "Articles 41 and 42 were drafted with only one family in mind, namely, the family based on marriage *with* children"[24] as the Constitution Review Group observed in 1996.

The Constitution and Same-Sex Marriage: Zappone v Revenue Commissioners

The nexus between marriage and child-rearing, the possibility of recognising same-sex marriage either under Articles 41 and 42 or by means of the equality guarantee contained in Article 40.1 of the Constitution, and the impact of the recent legislative provision pertaining to a couple's capacity to marry is best considered

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[20] *Murray v Ireland* (n 16) 536.
[21] *Jordan v O'Brien* (n 14) 370.
[22] In *Zappone v Revenue Commissioners* (n 1) 449, Dunne J observed that counsel for the State did not seek to justify the exclusion of same-sex couples from marriage on the basis that the nature of marriage is related to procreation. Thus, the learned justice did not need to consider the plaintiffs' submissions in respect of that argument. More recently, the Gender Recognition Advisory Group recommended that provision be made in Irish law to enable a transsexual and a partner of his/her biological sex to marry, even though, akin to a same-sex couple, such persons cannot procreate. See *Report of the Gender Recognition Advisory Group* (Department of Social Protection 2011) 3. Available at: **http://www.welfare.ie/en/Pages/Report-of-the-Gender-Recognition-Advisory-Group.aspx** (Accessed 1st June 2014).
[23] See the discussion below at pp.21-24 of *Zappone v Revenue Commissioners* (n 1).
[24] *Report of the Constitution Review Group* (n 2) 336.

through an analysis of Ireland's premier and to date only case dealing with same-sex marriage, *Zappone v Revenue Commissioners.*[25]

The Facts

Although the Irish courts' consistent and "conventional characterization of marriage evidently deprives homosexuals of access to this important social institution",[26] in 2006 a lesbian couple nonetheless appeared before the High Court seeking judicial recognition of their right to marry under the Constitution. The plaintiffs, Dr Katherine Zappone and Dr Ann Louise Gilligan, had married in Canada in 2003, following the opening up of the institution of marriage to same-sex couples in that country. Upon their return to Ireland they wrote to the Office of the Registrar General seeking confirmation that their marriage was legally binding, but they were informed by letter-response that a declaration on the validity of foreign marriages in this jurisdiction was a matter for the courts by virtue of family law legislation.[27] The plaintiffs also wrote to the Revenue Commissioners seeking the recognition of their marriage in order to obtain the tax benefits available to married couples. However, the Revenue Commissioners replied with an interpretation that confined the provisions of tax law relating to married couples to a 'husband' and a 'wife' only, citing the Oxford English Dictionary's gender-specific definitions of such terms.

The plaintiffs then sought and were granted leave to apply for judicial review of the Revenue Commissioners' restrictive decision. When the matter came on for hearing before the High Court, the plaintiffs argued that the Revenue Commissioners' decision was in breach of their rights under Articles 40 and 41 of the Constitution and their rights under Articles 8, 12 and 14 of the European Convention on Human Rights (ECHR).[28] They sought to have the impugned provisions of tax law declared unconstitutional for excluding same-sex marriages from their ambit.

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[25] [2008] 2 IR 417.
[26] Eoin Carolan (n 5) 242.
[27] Family Law Act 1995, section 29.
[28] Same-sex marriage and the European Convention on Human Rights will be considered in chapter 5.

The Decision

(i) The Prevailing Concept of Marriage under Irish Law

In the High Court, Dunne J recognised the question at the heart of the action: does the right to marry inherent in the Constitution encompass same-sex marriage? To address the issue, Dunne J had recourse to the approach to constitutional interpretation endorsed by Murray J in *Sinnott v Minister for Education.*[29] In *Sinnott,* Murray J had approved of guidelines suggested by Professor Kelly to achieve a balance between the "competing claims of the historical approach to constitutional interpretation and the contemporary or 'present-tense' approach."[30] Murray J outlined Professor Kelly's guidelines:

> The present-tense or contemporary approach, [Professor Kelly] suggested, is appropriate to standards and values. 'Thus elements like "personal rights", "common good", "social justice", "equality", and so on, can (indeed can only be) interpreted according to the lights of today as judges perceive and share them. He felt that on the other hand the historical approach was appropriate 'where some law-based system is in issue, like jury trial, county councils, the census. This [Professor Kelly] said, was not to suggest that the 'shape of such systems is in every respect fixed in the permafrost of 1937. The courts ought to have some leeway for considering which dimensions of the system are secondary, and which are so material to traditional constitutional values that a willingness to see them diluted or substantially abolished without a referendum could not be imputed to the enacting electorate'.[31]

Dunne J, adopting a historical approach, held that:

> [W]hat was always understood by the framers of the Constitution was the traditional understanding of marriage as exemplified in cases such as *Hyde*

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[29] *Sinnott v. Minister for Education* [2001] 2 IR 545.
[30] ibid 681.
[31] *Sinnott v Minister for Education* (n 29) 681.

> *v Hyde*...namely, the voluntary union of one man and one woman, to the exclusion of all others.[32]

Dunne J noted that such definition was reiterated in above-mentioned decisions such as *TF v Ireland*[33] and *DT v CT*[34], and that this latter decision "was given as recently as 2003".[35] Thus, Dunne J stressed that "the definition of marriage to date has always been understood as being opposite-sex marriage" and, consequently, this was not "some kind of fossilised understanding of marriage".[36] On this analysis it is arguable that, in marriage, the sexual dimorphism of the parties remains:

> [S]o material to traditional constitutional values that a willingness to see [this criterion altered] without a referendum could not be imputed to the enacting electorate.[37]

However, Dunne J recognised that the plaintiffs wanted the High Court to "redefine marriage to mean something which it has never done to date"[38] by arguing that the Constitution was a living instrument and, accordingly, the right to marry should be considered to have changed to embrace the concept of same-sex marriage due to the existence of a changing consensus. Hence Dunne J also sought to interpret marriage "according to the lights of today", and she began by having recourse to the *dicta* of Walsh J in *McGee v Attorney General*.[39] In *McGee*, Walsh J enunciated "the principle that the meaning of the Constitution is open to evolution through interpretation"[40] by stating that "[n]o interpretation of the Constitution is intended to be final for all time. It is given in the light of prevailing ideas and concepts."[41] However, Dunne J could not find a basis for the court to interpret or ascertain the prevailing ideas and concepts in the instant case. She noted the emergence of same-

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[32] *Zappone v Revenue Commissioners* (n 1) 501.
[33] [1995] IR 321.
[34] [2003] 1 ILRM 321.
[35] *Zappone v Revenue Commissioners* (n 1) 504.
[36] ibid. Indeed, in *HAH v SAA* [2010] IEHC 497, Dunne J reiterated that the constitutional notion of marriage remains concerned with parties of the opposite sex.
[37] *Sinnott v Minister for Education* (n 29) 681.
[38] ibid 505.
[39] *McGee v Attorney General* [1974] IR 284.
[40] Conor O'Mahony, 'Societal Change and Constitutional Interpretation' (2010) 1 (2) Irish Journal of Legal Studies 71, 74.
[41] *McGee v Attorney General* (n 39) 319.

sex marriage in but six jurisdictions globally. On that basis she held that it was difficult to see this "limited support for the concept of same-sex marriage… as a consensus, changing or otherwise."[42] Therefore Dunne J rejected the plaintiffs' argument regarding a "changing consensus", pointing out that "the consensus around the world does not support a widespread move towards same-sex marriage".[43] In a further attempt to give credence to prevailing ideas and concepts, Dunne J held that the reasoning adopted by Murray J in *Sinnott v Minister for Education*[44] was equally appropriate to employ in *Zappone.*

(ii) Constitutional Interpretation in *Sinnott v Minister for Education*

In *Sinnott*, the petitioner was a 22 year old male with severe autism. The State was appealing the High Court judgment in which it was held to have an open-ended duty to provide the petitioner with free primary education beyond the age of 18. Having first outlined Professor Kelly's guidelines, Murray J had recourse to the historical approach to extrapolate the meaning of primary education under Article 42.4 of the Constitution. This is a law-based system by virtue of the obligation placed on the State to provide for free primary education under this provision. Murray J concluded that primary education "has been traditionally understood as referring to the primary cycle in which children, as opposed to adults, are taught."[45] However, Murray J proceeded to embrace the present-tense approach because he then stated:

> That is not to say that the content or nature of the education to be provided for cannot be interpreted in the light of present day circumstances. The nature and quality of the primary education to be provided is a more abstract concept with connotations of standards and values.[46]

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[42] *Zappone v Revenue Commissioners* [n 1] 506.
[43] ibid.
[44] *Sinnott v Minister for Education* (n 29).
[45] ibid 680.
[46] ibid 681.

Murray J observed that historically children with severe mental or physical disabilities were incapable of benefitting from the kind of primary education that was traditionally available. Nonetheless, Murray J held that today, with:

> [g]reater insight into the nature of people's handicaps, the evolution of teaching methods, new curricula as well as new tools of education there is no doubt that the nature and content of primary education must be defined in contemporary circumstances.[47]

Accordingly, Murray J concluded that where children suffering from severe physical or mental disabilities are capable of benefitting from primary education, however defined, the State is under an obligation to ensure that it is provided free to them.[48] However, Murray J, and indeed a majority of the Supreme Court, held that such duty expires when a person reaches eighteen years of age, which is the age of majority set by legislation. Thus, Murray J proffered an expansive, contemporary understanding of primary education but he and the majority in the Supreme Court remained deferential to the Oireachtas on the issue of "the age to which a child is entitled to benefit from the constitutional obligation of the State to provide for free primary education."[49]

(iii) Constitutional Interpretation in Zappone

In *Zappone,* Dunne J held that:

> If one was to transpose [Murray J's reasoning in *Sinnott*] to the facts of the present case one would say that one looks at the concept of marriage as it was defined in the light of practice or understanding in 1937 and that *issues such as capacity must be understood in the light of prevailing law.*"[50]

However, by limiting the understanding of capacity to marry to that enshrined in prevailing law, Dunne J adopted a much narrower present-tense approach than

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[47] ibid 682.
[48] ibid.
[49] ibid.
[50] *Zappone v Revenue Commissioners* [2008] 2 IR 417, 505.

Murray J in *Sinnott*. Murray J had held that a child's capacity to enjoy primary education was amplified by contemporary understandings about physical and intellectual disabilities and evolved teaching methods and educational tools, yet it was capped by the age of majority as set by the Oireachtas at eighteen years. In contrast, Dunne J had no regard to present-day legal and psychological endorsements of homosexuality when examining the plaintiffs' capacity to marry. Instead, she roots her narrow present-tense approach to the understanding of marriage in law and fact by considering only the definitions prevalent in case and statute law (ie section 2 of the Civil Registration Act 2004, which expressly precludes same-sex marriage) and the limited international legal recognition of same-sex marriage to date. Dunne J fails to examine whether there have been developments indicating that same-sex couples might be as suited to the institution of marriage as their opposite-sex counterparts. Unlike Murray J in *Sinnott*, when interpreting the Constitution Dunne J fails to duly consider "the extent to which ideas and values prevailing at one period have been conditioned by the passage of time".[51]

Ultimately, Dunne J's approach in *Zappone* is similar to Murray J's in *Sinnott*, in that both judges respect the statutory bar placed on a fundamental constitutional right. However, prior to acknowledging the statutory position their methods differed significantly. In a sense it is quite disconcerting that Dunne J relied so heavily on the prohibition on same-sex marriage provided for in section 2 of the Civil Registration Act 2004 (hereafter the 2004 Act) in her present-tense analysis of marriage because, as we shall see, that provision was passed through the Oireachtas without any discussion of the contemporary meaning of marriage.

(iv) The Impact of the Civil Registration Act 2004

Section 2(2)(e) of the 2004 Act reiterates the common law exclusion of same-sex couples from marriage in the following terms: "For the purposes of this Act there is an impediment to a marriage if…both parties are of the same sex." This is the first statutory provision to define marriage as being between a man and a woman, and

[51] *TF v Ireland* [1995] IR 321, 335 (Murphy J) (High Court). Indeed, in O'Shea v Ireland [2007] 2 IR 313, Laffoy J had regard to modern day values and expanded the capacity to marry. She observed that because of the availability of divorce, legislation preventing a divorced woman from marrying her former husband's brother was inconsistent with the constitutional right to marry.

this fact is, of itself, rather curious given the year in which the provision was enacted. In 2003, Canadian courts had struck down the limitation of marriage to opposite-sex couples.[52] Consequently, Witzleb observes that in Australia, "the then Liberal/National Government became concerned that Australian courts might follow Canadian decisions"[53] and hence the Marriage Amendment Act 2004 was enacted to amend the Marriage Act 1961 so that section 5(1) now defines marriage as "the union of a man and a woman to the exclusion of all others, voluntarily entered for life." As Witzleb points out in the Australian context, "[t]he amendment gave the common law definition statutory force and thus put it beyond the reach of reform-minded courts."[54] In Ireland, subsection (2)(e) was inserted into section 2 of the Civil Registration Bill 2003 at about the same time as these developments were taking place in Australia, and that alone indicates that the then Irish Government *most likely* had similar concerns pertaining to same-sex marriage and judicial activism.

In any event, in the *Zappone* case Dunne J found it curious that the plaintiffs did not seek to directly challenge section 2(2)(e) of the 2004 Act, though counsel explained that this was because the Act came into force more than a year after the proceedings were initiated. Nonetheless, Dunne J alluded to section 2(2)(e). Such judicial deference is not unusual because, as O'Mahony clearly observes:

> [W]hen invited to re-interpret a provision of the Constitution from its original or established interpretation, deference theory states that the courts should look to the legislative position for guidance.[55]

Dunne J found that "the Act of 2004 is in force, is entitled to a presumption of constitutionality and is to my mind an expression of the

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[52] See *Halpern v Canada (Attorney General)* (2003) 65 OR (3d) 161 (CA); *EGALE Canada Inc v Canada (Attorney General)* (2003) 225 DLR (4th) 472 (BC CA).

[53] Normann Witzleb, 'Marriage as the 'Last Frontier'? Same-Sex Relationship .Recognition in Australia' (2011) 25 (2) International Journal of Law, Policy and the Family 135, 153-154.

[54] ibid 154. Unlike Ireland, Australia does not have a Bill of Rights. Thus, there is no constitutional protection for marriage that the courts could find to be in conflict with section 5 (1) of the Marriage Act 1961, as amended.

[55] Conor O'Mahony (n 40) 78.

prevailing view as to the basis for capacity to marry".[56] This author has stated elsewhere that:

> The explicit prohibition on gay marriage contained in section 2(2)(e) of the Civil Registration Act 2004 sealed its fate in the *Zappone and Gilligan* case because the Irish courts have…displayed a keen willingness to defer to the legislature where controversial constitutionally protected rights are at issue.[57]

This author was of course referring to the deference shown by the Supreme Court to the legislature's age-related cap on capacity to benefit from primary education in *Sinnott.* Dunne J's deference towards the 2004 Act's exclusive notion of marriage was never more apparent than when she posed the following question:

> Is [section 2(2)(e)] not *of itself* an indication of the prevailing idea and concept in relation to what marriage is and how it should be defined? *I think it is.*[58]

Therefore, Dunne J actually viewed section 2(2)(e) as *the* expression of the prevailing view as to the basis for capacity to marry. However, this author has argued that Dunne J's strict adherence to the approach to marriage enshrined in section 2(2)(e) of the 2004 Act is quite unsatisfactory when one considers the manner in which this provision came about.[59]

(v) The Legislative History of Section 2(2)

Subsection (2)(a-e) of section 2 of the 2004 Act was an amendment to the legislation, introduced at Committee Stage to clarify "what is an impediment to a

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[56] *Zappone v Revenue Commissioners* (n 1) 506.
[57] Brian Tobin, 'Gay Marriage – A Bridge Too Far?' (2007) 15 Irish Student Law Review 175, 179.
[58] *Zappone v Revenue Commissioners and Others* (n 1) 506. Emphasis added.
[59] See Brian Tobin, 'Same-Sex Marriage in Ireland: The Rocky Road to Recognition' (2012) 15(4) Irish Journal of Family Law 102. However, in treating the 2004 Act as evidence of a social consensus on marriage Dunne J could not have made herself aware of the unsatisfactory manner in which this provision came about because a judge is precluded from having regard to the parliamentary debates concerning a statutory provision: see *Crilly v Farrington* Ltd [2001] 3 IR 25.

marriage",[60] as explained by the then Minister for Social and Family Affairs, Mary Coughlan. During the Committee Stage, revisions of this amendment based on changes in the law and social perceptions were suggested. Deputy Penrose suggested that subsection 2(a) should be amended to take account of the availability of divorce law since 1996 so that there would no longer be an impediment to a marriage between a person and the divorced spouse of that person's sibling.[61] Deputy Neville, obviously aware of the contemporary, informed social perceptions of persons with impaired mental abilities, felt that the wording of subsection 2(d) was not appropriate for a modern piece of legislation because it rendered void the marriage of "lunatics".[62] At no point during the Committee's debate was the impediment to same-sex marriage contained in subsection 2(e) discussed. This is disappointing and ironic because, akin to the above amendments that were tabled, socio-legal changes had taken place which arguably necessitated debate as to whether it was justifiable to continue to ban same-sex marriage.[63] Such developments were indicative of an increasing acceptance of the normality of the sexual identity of homosexual persons. In 1973 the American Psychiatric Association dropped homosexuality from the classification as a mental illness in its diagnostic and statistical manual.[64] In 1993, in this jurisdiction, private consensual sexual activity between homosexual males had been decriminalised by legislative enactment "and legislative protections for gay and lesbian persons were subsequently imposed in the fields of insurance, employment, and goods and services".[65]

In light of this, one might ask why the Oireachtas did not see fit to debate the ban on same-sex marriage, possibly one of the greatest obstacles to the full assimilation of homosexual citizens into Irish society? It must be remembered that, when section 2(2) was being debated on 3rd February 2004, the global recognition of same-sex marriage rights was little more than embryonic. Merely two countries in the world had come to recognise same-sex marriage, in 2001 and 2003

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[60] Select Committee on Social and Family Affairs Deb 3rd February 2004, 4. Available at http://debates.oireachtas.ie/FAS/2004/02/03/00004.asp (Accessed 10th May 2013).
[61] ibid.
[62] ibid.
[63] Brian Tobin, (n 59) 103.
[64] *Zappone v Revenue Commissioners* (n 1) 429.
[65] Brian Tobin, 'EB v France: Endorsing Un-"Convention"-al Families?' (2008) 11(4) Irish Journal of Family Law 78, 79.

respectively.[66] Hence, even if the deputies had sought to contest the contemporary meaning of marriage, "it is not the case that the meaning of marriage has unequivocally shifted."[67] In addition, when the 2004 Act was being debated, the deputies did not have the benefit of the judgment in *Zappone,* which seems to accord the Oireachtas primacy in determining any amendments to the meaning of marriage. In fact, the deputies had quite the opposite. In 2003, in his judgment in *DT v CT*, Murray J proffered the understanding that "marriage itself remains a solemn contract of partnership entered into between man and woman with a special status recognised by the Constitution."[68] Thus, the deputies may not have felt the need to address section 2(2)(e) because they were aware of the role of the Oireachtas in enacting legislation in compliance with the Constitution and, as Doyle points out "marriage, as constitutionally defined by the Courts, is the union of a man and a woman."[69] On this analysis section 2(2)(e) as enacted was clearly in compliance with the Constitution, and it remains so, post-*Zappone*.

Nonetheless, given the abovementioned progressive developments in law and psychology that are respectful of the plight of the homosexual citizen, and the fact that a right to same-sex marriage was slowly gaining impetus globally, it is rather disappointing that the deputies did not engage in any debate whatsoever on section 2(2)(e) before passing it through.[70] Further, because section 2(2)(e) was never debated by the Oireachtas prior to its enactment, Dunne J's deference to the provision as representing the prevailing societal view on the capacity to marry was clearly unwarranted. As O'Mahony argues, section 2(2)(e) "did not represent a considered legislative judgment on the issue to which the court could defer."[71] Indeed, Foley has cogently emphasised that:

> The essence of deference, however, is deference to a *decision actually made*. If the legislature *does not actually* decide on matters of rights, then it

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[66] The Netherlands opened up marriage to same-sex couples in 2001 and was then followed by Belgium in 2003.
[67] Oran Doyle (n 3) 234.
[68] [2003] 1 ILRM 321, 374.
[69] Oran Doyle (n 3) 225.
[70] Brian Tobin (n 59) 103.
[71] Conor O'Mahony, 'Principled Expediency: How the Irish Courts can Compromise on Same-Sex Marriage' (2012) Dublin University Law Journal 198, 213.

starts to make less sense to 'defer' to its decisions because they *do not exist.*[72]

(vi) Section 2(2)(e): The Future

Section 2(2)(e) appears to be here to stay. This is not simply because the Oireachtas recently chose to introduce civil partnership over marriage for same-sex couples, but also due to the fact that a motion by the appellants, Zappone and Gilligan, to challenge this provision in their (now abandoned) Supreme Court appeal was dismissed by that court in October 2011. Macken J observed that arguments in relation to the constitutionality of section 2(2)(e) were not fully raised before the High Court and not considered in Dunne J's judgment, although the issue was "touched upon".[73] Macken J said the matter involved "a piece of constitutional and legislative history" and before such an issue could come before the Supreme Court, it had to be "fully ventilated" at High Court level. In this regard the learned justice noted that an application to amend the pleadings could have been made when the provision was enacted. This is correct, as the original High Court proceedings were commenced on 9th November, 2004 and section 2(2)(e) came into force on 5th December, 2005. However, the case did not come on for hearing before the High Court until 3rd October, 2006. Thus, counsel for the plaintiffs had almost ten months to amend the pleadings so as to challenge section 2(2)(e). In any event, Macken J held that it was now inappropriate to grant the application to amend the pleadings,[74] and thus section 2(2)(e) could not have been impugned in *Zappone and Gilligan's* Supreme Court appeal even if such action had been heard as planned in mid-2012.

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[72] Brian Foley, *Deference and the Presumption of Constitutionality* (Institute of Public Administration, 2008) 230. See also Conor O'Mahony (n 40) 92-93.
[73] 'Lesbian Couple Weigh Up Whether to Continue Appeal' *Irish Times* (Dublin, 22nd October 2011) 4.
[74] ibid.

(vii) Article 40.1 – A Vehicle for Same-Sex Marriage?

In *Zappone*, the plaintiffs argued that the Revenue Commissioners' decision not to recognise their Canadian same-sex marriage for taxation purposes was also in violation of the equality guarantee contained in Article 40.1. The constitutional equality guarantee states that:

> All citizens shall, as human persons, be held equal before the law.
> This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function.

The second sentence makes it clear that Article 40.1 explicitly permits the State "to treat equals equally and unequals unequally",[75] and this clearly conforms to the renowned Aristotelian formulation of equality. However, this author has examined elsewhere how the constitutional equality clause "might not fetter the recognition of a right to gay marriage in this jurisdiction if liberally construed".[76] For instance, an Irish court might not rule out a right to same-sex marriage on equality grounds due to a difference in moral capacity between same-sex and opposite-sex couples. This is because in *Zappone*, counsel for the State did not even argue before the High Court that marriage should be restricted to heterosexual couples for "moral reasons".[77] This indicates that in an Ireland where male homosexual activity has now been legal for over two decades, the State is unwilling to take a moral stand on the issue, and the courts would probably be just as reluctant. While there is the thirty year old authority of O'Higgins CJ in *Norris v AG* to the effect that "homosexual conduct is, of course, morally wrong, and has been so regarded by mankind through the centuries",[78] the then Chief Justice "failed to articulate the rationale or reasons underpinning his position."[79] Thus, Carolan concludes that "a

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[75] Oran Doyle, *Constitutional Equality Law* (Thomson Round Hall 2004) 94.
[76] Brian Tobin (n 57) 191.
[77] *Zappone v Revenue Commissioners* (n 1) 450.
[78] *Norris v AG* [1984] IR 36, 64.
[79] Eoin Carolan (n 5) 244.

court seeking to rely today on any asserted differences of moral capacity would have to expound a more sophisticated explanation of the basis of its decision."[80]

Further, it may not be pertinent for an Irish court to have "due regard" to a same-sex couples' difference of physical capacity or social function for the following reasons. In *Zappone,* it was not even suggested by counsel for the State that the justification for the exclusion of same-sex couples from marriage was their inability to procreate.[81] Further, a recent report on gender recognition for transsexual persons has proposed that legislation should be enacted allowing such individuals to marry in their acquired gender irrespective of their lack of procreative capacity.[82] Thus, the connection between marriage and procreation has effectively been assuaged and, consequently, a couple's "physical" or child-bearing "capacity" is no longer crucial. In *Zappone*, Dunne J recognised that the plaintiffs had "a long-lasting loving relationship of mutual commitment".[83] Therefore, same-sex couples possess "normative familial characteristics"[84] and it is opined that they could be deemed capable of performing the "social function" of marriage, *ie* the promotion of domestic and, ultimately, social stability.

(viii) Equality before the Law in *Zappone*

Despite the above positive exposition of the equality guarantee's potential in this area, it must be borne in mind that in those jurisdictions where same-sex marriage was recognised by virtue of a constitutional equality guarantee there was no conservatively-interpreted constitutional provision explicitly protecting the marital family.[85] In *Zappone,* Dunne J did not consider the potential for Article 40.1 to embrace same-sex marriage as this would have conflicted with the family provisions contained in Article 41. In response to the plaintiffs' equality argument, the learned justice simply stated that:

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[80] ibid 245.
[81] *Zappone v Revenue Commissioners* (n 1) 449.
[82] *Report of the Gender Recognition Advisory Group* (n 22) 3.
[83] *Zappone v Revenue Commissioners* (n 1) 501.
[84] Lisa Glennon, 'Fitzpatrick v. Sterling Housing Association Ltd – An Endorsement of the Functional Family?' (2000) 14 International Journal of Law, Policy and the Family 226, 236.
[85] The jurisdictions are Canada and South Africa, respectively.

> If there is in fact any form of discriminatory distinction between same-sex couples and opposite-sex couples by reason of the exclusion of same-sex couples from the right to marry, then Article 41 in its clear terms as to guarding the family provides the necessary justification.[86]

Thus, by holding that Article 40.1 occupies a subordinate position to Article 41, Dunne J essentially treated the constitutional equality guarantee as surplusage and was easily able to dispose of any egalitarian arguments supporting same-sex marriage. This arguably discriminatory strategy has previously found favour in Irish law. Indeed, a prime example of this judicial approach is to be found in *O'Brien v. Stoutt.*[87] Here Walsh J found that a discrimination against illegitimate children was justified by reference to the constitutional protection of the family based on marriage in Article 41 and, as Doyle observes, in doing so the learned justice "did not consider the possibility that Art. 40.1 might limit the constitutional protection afforded to the marital family."[88] Therefore, as Doyle observes, Irish case law clearly illustrates that:

> Equality-derogating classifications that are not justified by reference to a difference between the persons distinguished might nonetheless be legitimate where they support … another constitutional value.[89]

This approach is rather unsurprising when examined against the backdrop of the harmonious approach to constitutional interpretation. Although, as I have demonstrated above, Article 40.1 is perhaps literally capable of supporting a right to same-sex marriage, for the Irish courts to recognise this via such a general provision when Article 41.3.1° expressly protects the marital family, interpreted as heterosexual in nature by the Courts, would be repugnant to what Henchy J described in *Tormey v Ireland* as the:

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[86] *Zappone v Revenue Commissioners* (n 1) 507.
[87] *O'Brien v. Stoutt* [1984] IR 316. For a more thorough analysis of this case see Oran Doyle, (n 74) 75.
[88] Oran Doyle (n 75) 75.
[89] ibid 99.

> Fundamental rule of constitutional interpretation that the Constitution must be read as a whole and that its several provisions must not be looked at in isolation, but be treated as interlocking parts of the general constitutional scheme.[90]

In essence, for the courts to allow same-sex marriage via the back door of the equality guarantee would be to act in complete disregard of the express constitutional protection for marriage and the family contained in Article 41. Adherence to the harmonious approach necessitates the subordination of Article 40.1 in cases involving non-traditional family units due to the express provisions of Article 41 and their conservative interpretation by the courts. For an Irish court to recognise same-sex marriage via the constitutional equality clause would be as incongruous as the European Court of Human Rights (ECtHR) recognising this under a general provision such as Article 8 of the European Convention on Human Rights (ECHR), which guarantees to everyone a right to respect for private and family life. Indeed, the ECtHR recently declined to adopt such a course of action because it stressed that Article 12 explicitly protects the right to marry and to found a family.[91] Akin to the Irish domestic courts, the ECtHR adopted a harmonious approach and concluded that the ECHR:

> [i]s to be read as a whole and its Articles should therefore be construed in harmony with one another …since Article 12 does not impose an obligation on Contracting States to grant same-sex couples access to marriage, Article 14 taken in conjunction with Article 8, a provision of more general purpose and scope, cannot be interpreted as imposing such an obligation either.[92]

The ECtHR subordinated Article 8 to Article 12 in the same respective manner as the Irish courts tend to treat Articles 40.1 and 41 in cases involving marriage and the family. While Dunne J's judgment in *Zappone* may have been a source of disappointment by failing to recognise the equality guarantee as having any "substantive, egalitarian content which could weigh against other…provisions of

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[90] *Tormey v Ireland* [1985] IR 289, 295.
[91] *Schalk and Kopf v Austria* App No 30141/04 (ECHR, 24th June 2010).
[92] ibid [101].

the Constitution",[93] her approach was nonetheless necessary to amply achieve "the smooth and harmonious operation of the Constitution".[94]

(ix) Textual Restrictions in Articles 41 and 42

The Irish courts have also frequently adopted a harmonious approach to Articles 41 and 42, most likely "because of the close mutual connection of their subject matter."[95]As Barrington J opined in *WO'R v EH* "Article 42 of the Constitution is an extension of Article 41 and refers to parents and children within a family context."[96] In *Zappone*, the plaintiffs had not put forth an argument based on Article 42 as it did not hold any relevance in advancing their case; they sought to rely on Articles 40 and 41. Nonetheless, Dunne J adhered to the harmonious approach to Articles 41 and 42 and this led her to further conclude that marriage under the Constitution is solely an opposite-sex institution:

> The final point I wish to make in relation to the definition of marriage as understood within the Constitution is that I think one has to bear in mind all of the provisions of Articles 41 and 42 in considering the definition of marriage. Read together, I find it very difficult to see how the definition of marriage could, having regard to the ordinary and natural meaning of the words used, relate to a same-sex couple.[97]

It is difficult to argue with Dunne J's proposition. Article 41.2.1° refers to a "woman" and "her life within the home" as contributing to the "common good" and Article 41.2.2° then obliges the State to "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". In addition, Article 42.1 provides as follows:

> The State acknowledges that the primary and natural educator of the child is the family and guarantees to respect the inalienable right and duty of

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[93] Oran Doyle (n 75) 75.
[94] *Tormey v. Ireland* [1985] IR 289, 295.
[95] Gerard Hogan and Gerry Whyte, JM Kelly - *The Irish Constitution*, (4th edn, Butterworths 2003) 1830.
[96] *WO'R v EH* [1996] 2 IR 248, 282.
[97] *Zappone v Revenue Commissioners* (n 1) 506.

> parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.

It is clear that the family referred to in Article 42.1 is also that based on marriage, because in *The State (Nicolaou) v An Bord Uchtála*, Henchy J opined that "the rights guaranteed to parents by Article 42.1, arise only in cases where the parents and the child are members of the same family; and the only family recognised by the Constitution is the family which Article 41.3.1° recognises as being founded on marriage."[98] The upshot of Articles 41 and 42 when read in unison is perhaps best explained by the All-Party Oireachtas Committee on the Constitution:

> The traditional family enshrined in the Constitution is the nuclear family consisting of a married couple, a man (the breadwinner) and his wife (a mother concerned with her household duties) and their dependent children whose physical and moral development is based on the stable lifelong commitment of the parents and the values they transmit to their children. The traditional model is built on the lifelong union of a man and a woman, formalised in a marriage ceremony; in its primary form the man assumed the role of the head of the family while the wife, dependent upon him for physical maintenance, established primacy in the care and upbringing of the children; the children were expected to absorb the values of their parents and be subservient to them.[99]

When read in harmony, it is clear that Articles 41 and 42 conceive of marriage in traditional terms as an institution preoccupied with gender-determined roles and child-rearing. Textually, Article 41.2, which denotes a woman as a mother and a homemaker, and Article 42, which refers throughout to "parents", would appear to exclude a same-sex couple from the ambit of the constitutional family.[100]

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[98] *State (Nicolaou) v An Bord Uchtála*, [1966] IR 567, 623.

[99] All-Party Oireachtas Committee on the Constitution, *Tenth Progress Report: The Family* (Stationery Office 2006) 55-56.

[100] A proposition with which Ryan appears to agree: See Fergus Ryan, '21st Century Families, 19th Century Values: Modern Family Law in the Shadow of the Constitution' in Oran Doyle and Eoin Carolan (eds), *The Irish Constitution: Governance and Values* (Dublin: Thomson Round Hall, 2008) 377. See also Aisling Parkes and Simone McCaughren, 'Viewing Adoption through a

However, Article 41.2 has been described as being "outdated, stereotypical, biologically deterministic" and "insulting to women".[101] The Constitutional Convention recently recommended in its second report that the provision should be amended to appear in a gender-neutral form that would include other carers both in and outside of the home, and such report has been laid before the Houses of the Oireachtas for their consideration.[102] For these reasons it is submitted that Article 41.2, a provision which specified a particular enumerated safeguard for marriage that had in mind the majority of family types at the time, and which is clearly derided in modern Ireland, would not be interpreted by the courts as circumscribing any contemporary legislative conception of marriage within the 1937 ideal.[103]

The same might not be true of Article 42 as it clearly envisages a child-rearing role. Although counsel for the State in *Zappone* did not argue "that the justification for the exclusion of same-sex couples from marriage was on the basis that the nature of marriage is related to procreation",[104] it is clear from Dunne J's judgment that *for now*, marriage under the Constitution is an institution preoccupied with the typical parent-child relationship. I shall now consider this aspect of Dunne J's judgment and endeavour to highlight why the word "parents" in Article 42 *might* currently constitute a textual barrier to the recognition of same-sex marriage on a harmonious reading of Articles 41 and 42.

(x) Same-Sex Marriage and Parenting Intertwined

In *Zappone*, a great deal of evidence pertaining to parenting by same-sex couples was considered by the High Court. Dunne J felt that this issue was of "significant importance"[105] and that given the current, limited state of research in the area it was not possible to draw firm conclusions as to the welfare of children

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Children's Rights Lens: Looking to the Future of Adoption Law and Practice in Ireland' (2013) 16 (4) Irish Journal of Family Law 99, 100.

[101] ibid 106. For this reason it is submitted that Article 41.2, a provision which specified a particular enumerated safeguard for marriage which had in mind the majority of family types at the time and which is clearly can be read as circumscribing the evolving social conception within that ideal.

[102] *Second Report of the Convention on the Constitution* (Dublin: Convention on the Constitution, May 2013). Available at: https://www.constitution.ie/Meetings.aspx (Accessed 21st June 2014).

[103] I would like to thank Dr Eoin Daly for pointing this out to me.

[104] *Zappone v Revenue Commissioners and Others* (n 1) 449.

[105] ibid 499.

brought up in a same-sex partnership. Dunne J held that this was "surely"[106] a justificatory ground for excluding same-sex couples from the ambit of the right to marry because:

> Until such time as the state of knowledge as to the welfare of children is more advanced, it seems to me that the State is entitled to adopt a cautious approach to changing the capacity to marry *albeit* that there is no evidence of any adverse impact on welfare.[107]

Carolan makes the very astute observation that "Dunne J's judgment thus indicates that, even where the strict matter of the procreative act is discounted, the Irish Constitution continues to conceive of marriage as a child-oriented institution."[108] However, this is not necessarily a negative outcome because although Dunne J views the capacity to marry as being concomitant to the welfare of children, she does not give the State *carte blanche* in the area of marriage by doing so. The learned judge held that the State "is entitled" to restrict marriage to opposite-sex couples. Interestingly, she did not find that the State was obliged to take such a course of action and this indicates that there may indeed be judicial acceptance of any marriage equality legislation in the absence of a referendum, despite the children issue. Further, any cautious approach by the State to the capacity to marry may only continue "until such time as the state of knowledge as to the welfare of children is more advanced".[109] Therefore, if future scientific studies underpinned by a sound methodology conclude that children raised by same-sex couples are no worse off from any relevant perspective than the children of opposite-sex couples, an Irish court might be willing to forego its entitlement to be cautious in the area of marriage and finally open up this constitutionally revered institution to same-sex couples.[110] Hence, the child-centric approach to marriage that is evident from the

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[106] ibid 507.
[107] ibid.
[108] Eoin Carolan (n 5) 264.
[109] *Zappone v Revenue Commissioners* (n 1) 507.
[110] Brian Tobin, 'Law, Politics and the Child-Centric Approach to Marriage in Ireland' (2012) 47 (1) Irish Jurist 210, 212. However, in Chapter 3 I will demonstrate that there is already much evidence suggesting that same-sex parents are as capable at child-rearing as opposite-sex parents. Indeed, a significant study from Australia was produced after the *Zappone* judgement: see Elizabeth Short et al., Lesbian, Gay, Bisexual and Transgender (LGBT) Parented Families: A Literature

judgment in *Zappone*, although *possibly* a current barrier to the recognition of same-sex marriage under the Constitution, might one day serve to work in its favour and, by corollary, logically result in a constitutional notion of the family that would be more inclusive of atypical parenting.[111]

A further justification for Dunne J's guarded approach here can be found when one considers that the main object of Articles 41 and 42 was to:

> Protect the autonomy and privacy of the family and to repose key decision-making with regard to the education and welfare of children in parents, subject to the right of the State – as provided for in Art 42.5 – to intervene in the case of an objective failure on the part of parents.[112]

In *North Western Health Board v HW*,[113] Hardiman J described this constitutional dispensation in favour of the marital family as favouring "parental authority free of coercive intrusions by agents of the State." Further, Whyte has commented that "the constitutional model of education placed parents at the apex of the system, with the State in a supportive role."[114] The upshot of all this is that "the State may not generally dictate to parents how their children should be reared".[115] Further, following an analysis of relevant case law,[116] Enright has observed of the State's constitutional right to intervene under Article 42.5 that "where the children of married parents are concerned, the State is a default parent in those *limited circumstances where the child's natural parents fail desperately in their duties.*"[117] Article 42.5 may soon be replaced by Article 42A2.1, a somewhat

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Review prepared for The Australian Psychological Society (The Australian Psychological Society 2007).

[111] ibid.

[112] Gerard Hogan, 'De Valera, the Constitution and the Historians' (2005) XL Irish Jurist 293, 306. Article 42.5, which may soon be deleted, provides that: "In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child."

[113] [2001] 3 IR 622, 757.

[114] Gerry Whyte, 'Education and the Constitution: Convergence of Paradigm and Praxis' (1992-94) XXVII-XIX Irish Jurist 69, 73. See also Conor O'Mahony 'Children, Parents and Education Rights: A Constitutional Imbalance' (2004) 7 (3) Irish Journal of Family Law 3, 5.

[115] Fergus Ryan, 'Recognising Family Diversity: Children, One-Parent Families and the Law' (2006) 9 (1) Irish Journal of Family Law 3, 5.

[116] *North Western Health Board v HW* [2001] 3 IR 622; *N v HSE* [2006] IEHC 278.

[117] Mairead Enright, 'Interrogating the Natural Order: Hierarchies of Rights in Irish Child Law' (2008) 11 (1) Irish Journal of Family Law 3, 5. Emphasis added.

more child-centric provision which allows the State to intervene as a proxy parent only in those "exceptional cases" where the parents, regardless of their marital status, fail in their duty towards their children to such extent that the safety or welfare of any of their children is likely to be prejudicially affected.[118] Obviously, this new provision does not "alter the fact that it is the primary duty of parents to care for and protect their children", and hence "the State will step in to take a child into care only in exceptional circumstances."[119]

Thus, same-sex parents would indubitably enjoy significant autonomy over the development of their children if recognised as falling within the constitutional concept of the marital family because, as Enright forcefully emphasises:

> Irish constitutional law is a particular politics of the family written up. That politics draws on a conception of the natural order which perpetuates and legitimates the complete social dominance of parents over their children.[120]

However, while there are undoubtedly "extremely strong rights given to parents and the family in the Constitution" there may soon no longer be "the comparative lack of express constitutional rights for the child as against the parents."[121] This is because, if the legal challenge to the result of the Children's Referendum in November 2012 is unsuccessful, an express provision protecting children's rights, Article 42A, will be inserted into the Constitution.[122] We have seen that the language of Article 42A2.1 is somewhat more child-centric than that of the current Article 42.5. Nonetheless, Article 42A has not yet been inserted, let alone litigated, so it remains to be seen whether the courts will effectively balance the rights of the child therein should they come into conflict with the rights of his

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[118] If inserted, Article 42A2.1 of the Constitution will provide as follows: "In exceptional cases, where the parents, regardless of their marital status, fail in their duty towards their children to such an extent that the safety of welfare of any of their children is likely to be prejudicially affected, the State as guardian of the common good shall, by proportionate means as provided by law, endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child."

[119] Children's Referendum Information Booklet (Department of Children and Youth Affairs 2012) 9

[120] Mairead Enright (n 117).

[121] *Comerford v Minister for Education* [1997] 2 ILRM 134, 145, (McGuinness J).

[122] See *Jordan v Minister for Children and Youth Affairs* [2013] IEHC 625. This case is currently under appeal to the Supreme Court.

or her married parents under Articles 41 and 42, or if the child will remain "a mere incident to the controlling question of parental rights."[123]

In light of all of this, and the fact that "the phenomenon of parenting by same-sex couples is one of relatively recent history"[124] it does not seem wholly unreasonable for the Irish courts to deem the opening up of marriage to be dependent on adequate evidence as to the quality of same-sex parenting if the matter is viewed from a purely child-centric perspective where the best interests of the child are paramount.[125] However, I shall now examine how child welfare concerns appeared to play no role when the granting of marriage rights to another minority group via legislation was recently suggested by a government advisory group, and why any such legislation if enacted may be unconstitutional by virtue of *Zappone's* child-centric approach to marriage.[126]

Transgender People and the Child-Centric Approach to Marriage

In June 2011, the Report of the Gender Recognition Advisory Group (GRAG) was published. In May 2010 the GRAG was established by the Minister for Social Protection in order to advise the Government on legislation required to provide for the legal recognition of the preferred gender of transsexual persons. The group concluded that formal recognition should mean that a transsexual person's "changed gender is fully recognised by the State for all purposes – including the right to marry".[127] While this outcome is to be welcomed for both its progressiveness and its compliance with the European Court of Human Rights' decision in *Goodwin v United Kingdom,*[128] it is submitted that if the State acts on the group's recommendation and introduces legislation permitting transsexual

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[123] Mairead Enright (n 117).
[124] *Zappone v Revenue Commissioners* (n 1) 498.
[125] Although a growing body of evidence strongly suggests that same-sex parents are as capable of fulfilling their duties towards their children as opposite-sex parents: See Elizabeth Short et al., Lesbian, Gay, Bisexual and Transgender (LGBT) Parented Families: A Literature Review prepared for The Australian Psychological Society (The Australian Psychological Society 2007); Timothy J. Biblarz and Judith Stacey, 'How does the Gender of Parents Matter?' (2010) 72 (1) Journal of Marriage and Family 3; John Tobin and Ruth McNair, 'Public International Law and the Regulation of Private Spaces: Does the Convention on the Rights of the Child Impose an Obligation on States to Allow Gay and Lesbian Couples to Adopt?' (2009) 23 (1) International Journal of Law, Policy and the Family 110.
[126] Brian Tobin (n 110) 213.
[127] *Report of the Gender Recognition Advisory Group* (n 22) 3.
[128] *Goodwin v United Kingdom* (2002) 35 EHRR 18. This decision is discussed in chapter 5.

marriage, then this may be open to constitutional challenge. This is because Dunne J's judgment in *Zappone* clearly demonstrates that although child-bearing capacity may no longer be essential to marriage, child-rearing competence certainly is. If same-sex couples can be denied access to the constitutional notion of marriage on child-centric grounds because of limited evidence as to their capacity for child-rearing, the same might be true for transsexual persons.[129]

In its report, GRAG claims that "in considering its recommendations, the Group examined what is permitted within the parameters of the Constitution"[130] and that "any proposal for the recognition of the rights of transgender persons must take account of the special position that marriage enjoys in the Irish Constitution."[131] GRAG observed that in *Zappone*, Dunne J recognised "that "marriage", as referred to in the Constitution, is a traditionally understood concept that involves the union of one man and one woman, in principle for life, to the exclusion of all others".[132] It might be on this basis that the Group could not envisage any constitutional difficulty with legislation providing for the marriage of a male and a non-biological female or *vice versa*, because the parties will be, by virtue of a change of legal gender, of the opposite sex. Such an approach reiterates that the Irish notion of marriage is that of a union preoccupied with the parties' gender rather than the substance of their relationship. GRAG does not refer to the part of Dunne J's judgment that views the capacity to marry as being closely affiliated with child welfare, instead it just freely recommends legislation permitting a transsexual person and his/her partner to marry simply because their legal gender satisfies that of a traditional, constitutionally recognised marriage.[133] GRAG does not see any difficulty with such a couple falling within the terms of Articles 41 and 42 and being entitled to the familial and parental privileges contained therein. GRAG makes no reference to evidence indicating that the welfare of children raised by a transsexual and his/her partner is on a par with that in traditional opposite-sex marriages, even though Dunne J has made it clear that the constitutional notion of marriage is intertwined

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[129] Brian Tobin (n 110) 214.
[130] *Report of the Gender Recognition Advisory Group* (n 22) 30.
[131] ibid 31.
[132] ibid 30.
[133] It is important to note that a married/civilly partnered transsexual person will not be able to gain legal recognition of their preferred gender under the Gender Recognition Bill 2014 unless they dissolve their marriage/civil partnership. See section 8(2) of the Gender Recognition Bill 2014.

with the welfare of children.[134] Indeed, Dunne J was clearly not the first to do so when one takes into account the *dicta* of Hamilton CJ in *TF v Ireland* that:

> It is because of its close connection with the family that the institution of marriage receives the pledge of the State to guard it with special care and protect it against attack. It is clear, accordingly, that this pledge is given in recognition of the contribution made by the institution of marriage to the welfare of the nation and the State, and the pledge must be seen in this light. It is not concerned solely with marriage itself, or with the spouses in a marriage, but also with the common good. It is important to bear in mind also that a married couple is a family so that the guarantee given by the State to protect the family in its Constitution and authority is also a guarantee given to every married couple.[135]

This affirms that the constitutional notion of marriage extends beyond the parties to the marriage contract to embrace the other members of the marital family and the common good. On this analysis, the State's pledge appears *mainly* to be aimed at "ensuring, promoting, and supporting an optimal social structure within which to bear and raise children",[136] because it is only at the end of this passage that Hamilton CJ recognises that a married couple without children is "also" a "family" that is similarly protected by the State's pledge. Hence the welfare of any children that may be raised within a marriage can be viewed as highly relevant when determining the capacity to marry because this in turn contributes to the welfare of the nation, the State, and ultimately the common good.[137] Similarly, Baroness Hale has emphasised that marriage is "more than a mere individual contract" because a married couple's "relationship affects third parties, most notably their children".[138] Therefore, if the State enacts legislation that would make such a fundamental alteration to the institution of marriage by permitting transsexual marriage without ensuring that this is conducive to the welfare of any children that may be raised in such unions, the legislation could, in this author's opinion, be struck down as being

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[134] Brian Tobin (n 110) 214-215.
[135] [1995] 1 IR 321, 372.
[136] *Goodridge v Dept. of Public Health* (2003) 440 Mass. 309, 385 (Cordy J, dissenting).
[137] Brian Tobin (n 110) 215.
[138] Brenda Hale, 'Equality and Autonomy in Family Law' (2011) 33 (1) Journal of Social Welfare and Family Law 3, 4.

unconstitutional because the courts are undoubtedly "entitled" to adopt a "cautious approach" to marriage on child welfare grounds post-*Zappone*.[139] Indeed, Biblarz and Savci have observed that "academic research on transgender people and their family relationships is almost nonexistent".[140] The authors note that "the small existing literature" pertaining to transsexuals is preoccupied with "pressing issues" concerning the person's transition from one gender to the other:

> [S]uch that less work has been done studying transgender people in the context of the more traditional areas of family studies research, such as their dating behaviour and formation of intimate relationships in adulthood, *issues around their having children, parenting behaviours, and children's experiences with transgender parents*, family/work relationships, and so on.[141]

Indeed, the Australian Psychological Society has also noted that "research on parenting by … transsexual people is scant."[142] I have already demonstrated that, despite considering much evidence, the High Court in *Zappone*:

> [E]xpressed unwillingness to accept as unarguable that 'children of same-sex couples or raised by same-sex couples are no worse off from an emotional or any other perspective than the children of or raised by heterosexual couples.[143]

While some people who transition gender – especially later in life – may already have children from previous, or extant relationships, given the virtual dearth of evidence on parenting by transsexuals it is quite plausible that an Irish court would

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[139] Brian Tobin, (n 110) 215.
[140] Timothy J Biblarz and Evren Savci 'Lesbian, Gay, Bisexual and Transgender Families' (2010) 72 (3) Journal of Marriage and Family 480, 489.
[141] ibid. Emphasis added.
[142] Elizabeth Short, Damien W. Riggs et al., Lesbian, Gay Bisexual and Transgender (LGBT) Parented Families: A Literature Review prepared for the Australian Psychological Society (The Australian Psychological Society 2007) 11. However, it is not permissible to discriminate against a transsexual parent under Articles 8 and 14 of the ECHR on the grounds of his/her transsexualism. Nonetheless, in *PV v Spain* (ECHR, 30th November 2010) the ECtHR held that a restrictive contact arrangement between a parent undergoing gender reassignment and a child was not in breach of Articles 8 and 14 as it was in the best interests of the child to help him become accustomed to his father's gender reassignment.
[143] Eoin Carolan (n 5) 265.

be unconvinced that "firm conclusions can be drawn as to the welfare of children"[144] raised in marriages where one of the parties is transgender. Thus, the Irish courts could find that transsexual marriage constitutes an "attack" on the constitutionally protected "institution of marriage", which remains preoccupied with a traditional child-rearing structure.

Alternatively, the courts could, irrespective of the child welfare issue, defer to the legislature and uphold any legislation allowing transsexual marriage and/or same-sex marriage. This is because in *Zappone*, although Dunne J exercised the entitlement of the judicial arm of Government to refuse to recognise same-sex marriage under the Constitution, the learned justice nonetheless proceeded to grant a dispensation to the legislature to provide for this under statute, arguably without the need for a constitutional referendum or the prospect of a finding of unconstitutionality by the judiciary, as we shall see.[145]

The Upshot of *Zappone*

Dunne J's judgment in *Zappone* makes it clear that marriage, 'as understood by the Constitution, by statute and by case law'[146] remains an opposite-sex union. The traditional language of Articles 41 and 42, the existing case and statute law, and an equality guarantee which cannot be read in a way that would conflict with the express protection of the conventional marital family, all serve to render nugatory the recognition of same-sex marriage under the Constitution. However, Dunne J does not view the constitutional notion of marriage as being indefinitely stuck in the permafrost of 1937 because although she felt that same-sex couples can presently be denied entry to the institution of marriage because of concerns pertaining to the welfare of children, such concern may be alleviated by future developments in the area of same-sex parenting, which in turn might one day narrow the State's discretion regarding the capacity to marry.

In light of this, a referendum on same-sex marriage might currently seem to be the most viable way forward but, as I shall demonstrate later in this chapter, that process has its own significant shortcomings in this area. In any event, a

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[144] *Zappone v Revenue Commissioners* (n 1) 498.
[145] Brian Tobin (n 110) 216.
[146] *Foy v An t-Árd Chláraitheoir & Ors* [2002] IEHC 116[175].

referendum on the matter may not be necessary because of the synergy between any future legislation altering the capacity to marry and the constitutional right to marry that was envisaged by Dunne J in *Zappone.* Since Dunne J appeared to view section 2(2)(e) of the Civil Registration Act 2004 as cementing "*of itself*"[147] the concept of marriage as a union between two parties of the opposite sex, she "appears to be granting the Oireachtas primacy in this contentious matter".[148] Carolan's observation on this aspect of Dunne J's judgment now appears wholly apposite:

> The fact that Dunne J. relied so heavily on the Civil Registration Act 2004 as indicative of the nature of the existing social consensus suggests a pre-eminent role for the Oireachtas in determining the social (and thus constitutional) appropriateness of any future amendments to the meaning of marriage.[149]

Further, and perhaps unsurprisingly given her adherence to the legislative concept of marriage contained in section 2(2)(e) of the 2004 Act, Dunne J went on to state that "ultimately, it is for the legislature to determine the extent"[150] of the legal recognition to be accorded to same-sex unions. Thus, it is arguable that in this instance Dunne J appears to be indicating that, if the Oireachtas chooses to alter the capacity to marry by legislating for same-sex marriage, then the courts will abide by this and recognise any legislation as being in harmony with the Constitution. As Carolan points out, Dunne J:

> [a]ppears to posit the existence of a more complex and dynamic relationship [between the Oireachtas and the courts] in which statute in some way informs the meaning of the constitutional text.[151]

On this reading it would appear that same-sex marriage legislation could be introduced by the Oireachtas absent a constitutional referendum and it would not

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[147] Emphasis added.
[148] Brian Tobin, 'Recognition of Canadian Same-Sex Marriage: Zappone and Gilligan v. Revenue Commissioners and Others' (2010) 1 Irish Human Rights Law Review 217, 221.
[149] Eoin Carolan (n 5) 265–266.
[150] *Zappone v Revenue Commissioners* (n 1) 513.
[151] Eoin Carolan (n 5) 266.

be rendered unconstitutional for updating the meaning of marriage as understood in the Constitution. However, O'Mahony critiques this type of 'submissive deference' seen in *Zappone* because:

> [T]o constitutionalise a principle is to set that principle apart from ordinary politics; to defer to legislative judgment as to what that principle requires is to thrust that principle back into the arena which was initially deemed unsuitable for its determination.[152]

Another way of viewing the matter would be to acknowledge that Dunne J was merely giving "due respect to the superior institutional capacity of the Oireachtas to reflect public opinion, and its democratic primacy on matters of political controversy."[153] In any event, the fact is that Dunne J left remarkable leeway to the Oireachtas to determine the appropriate legal status for same-sex relationships. Hence I shall now try to deduce why the then Irish Government did not seek to take advantage of this judicial deference and proceed to legislate for same-sex marriage.[154]

Same-Sex Relationship Recognition post-*Zappone*

In 2007, with the *Zappone* judgment under appeal to the Supreme Court, a new Fianna Fáil/Green Party coalition government was formed in the Republic of Ireland. The coalition's Programme for Government contained a commitment to introduce civil partnership legislation for same-sex couples:

> Taking into account the Options Paper prepared by the Colley Group, and the pending Supreme Court case, we will legislate for civil partnerships at the earliest possible date in the lifetime of this Government.[155]

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[152] Conor O'Mahony (n 40) 115.
[153] Conor O'Mahony (n 71)226.
[154] Brian Tobin (n 110) 219-220.
[155] Programme for Government 2007-2012 (Stationery Office 2007) 87.

This statement on civil partnership legislation is interesting because the coalition claimed to be committing to its introduction in light of the Working Group on Domestic Partnership's Options Paper and the *Zappone* appeal. Granted, the Options Paper concluded that full civil partnership was the best mode of relationship recognition for same-sex couples because the introduction of same-sex marriage was likely to be vulnerable to constitutional challenge. However, this recommendation was published on 28th November 2006, a few weeks before the High Court decision in *Zappone* which seems to grant the legislature primacy in determining the meaning of marriage. Dunne J's judgment surely abrogates what might otherwise be a sound recommendation because "it certainly implies that a court should exercise considerable constraint in preferring its own perception of society's norms to that evinced in a statutory instrument."[156] Thus, it is unclear why the Government committed to civil partnership over marriage when one considers the High Court's judgment.[157] Nonetheless, the "pending Supreme Court case" is another reason why the Government claimed to be committing to civil partnerships. Although Dunne J's judgment leaves the issue of same-sex marriage to the legislature, such a pronunciation indicates that the Government is in turn waiting for the matter to be decided at Supreme Court level. Indeed, the upshot of all this circuitousness is that neither branch of government appears willing to be responsible for making what would undoubtedly be a significant social change.[158]

In 2006, prior to entering into Government with Fianna Fáil, the Green Party issued a policy on marriage and partnership rights in which it stated that:

> [t]he Green Party sees it as completely legitimate that the Oireachtas, as the body most appropriate to take decisions on social policy, should take the lead and seek to have the right of same-sex couples to marry guaranteed in legislation.[159]

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[156] Eoin Carolan (n 5) 266.
[157] Brian Tobin (n 110) 220.
[158] ibid.
[159] Green Party, *Valuing Families: A Policy on Marriage and Partnership Rights* (Green Party, 2006) 8.

Given the tenor of the High Court judgment, why then did this partner in Government not rally its Fianna Fáil colleagues and do just this when given the opportunity in 2007? In 2008, when civil partnership legislation was proposed, the then Minister for Justice, Dermot Ahern, claimed that the Government was acting on the advice of the Attorney General, Paul Gallagher, who was of the view that "anything that would provide, or try to replicate 'marriage' in this legislation would not stand constitutional scrutiny".[160] It is respectfully submitted that the Attorney General, and consequently the Government, failed to accord adequate weight to the statute-sensitive approach to marriage evident in *Zappone*. Hence, the non-introduction of same-sex marriage can either be attributed to a (perhaps inadvertent) lack of appreciation as to the ramifications of the High Court judgment or a lack of political will on the part of the coalition.[161]

Indeed, the Government may have been apprehensive about introducing same-sex marriage legislation because any Bill purporting to do so could have been referred to the Supreme Court by the President via the Article 26 reference procedure. Such a Bill could be deemed unconstitutional by the Supreme Court because marriage in Ireland has traditionally been opposite-sex in nature.[162] Thus, the highest court in the land could slam the door firmly shut on same-sex marriage, declaring it an "attack" on the age-old institution of heterosexual marriage which the State "pledges itself to guard with special care" in Article 41.3.1°.[163] On the contrary, if the Supreme Court replicated the High Court's approach to marriage in *Zappone* and "used statute rather than its own experience as evidence of the prevailing social view"[164] then a same-sex marriage Bill could pass muster. Indeed, in its policy on marriage and partnership rights, the Green Party claimed to anticipate the adoption of this manner of judicial approach to a same-sex marriage Bill:

> We believe that the Supreme Court would be unlikely to strike down such an expression of the democratic will of the Oireachtas on the grounds that

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[160] Mark Hennessy and Carl O'Brien, 'Bill to Grant Legal Protection to Same-Sex Couples', *Irish Times* (Dublin, 25th June 2008) 3.
[161] Brian Tobin (n 110) 221.
[162] See *DT v CT* [2003] ILRM 321, 374 (Murray J).
[163] Article 41.3.1°, Constitution of Ireland.
[164] Eoin Carolan (n 5) 266.

> marriage under Article 41 can only be defined in relation to Christian beliefs.[165]

The Irish superior courts have already affirmed that our understanding of marriage is largely founded on longstanding Christian beliefs. However, as a legal concept marriage is regulated by the Constitution and statute law; thus, it can be expanded beyond such beliefs.[166] In *TF v Ireland*, Murphy J in the High Court held that:

> It may well be that *'marriage'* as referred to in our Constitution derives from the Christian concept of marriage. However, whatever its origin, the obligations of the State and the rights of parties in relation to marriage are now contained in the Constitution and our laws.[167]

This reasoning was subsequently approved by the Supreme Court. Hence, why the Green Party failed to test its abovementioned belief while part of a coalition Government is unclear, though the author of its policy on marriage and partnership rights claims that its coalition partners Fianna Fáil stood opposed to the introduction of same-sex marriage when the Programme for Government was being negotiated.[168] However, the fact that the Green Party failed to remain true to its ideals in this area while in Government makes much of what is stated in its policy on marriage and partnership rights read like simple political rhetoric.[169]

A Referendum on Same-Sex Marriage?

In any event, a Fine Gael/Labour coalition Government came to power in February 2011 and established a Constitutional Convention to consider comprehensive constitutional reform. The Convention is a venture in participative democracy tasked with considering certain aspects of the Constitution to ensure that it is fully equipped for the twenty-first century. Once it has debated an aspect of the Constitution, the Convention prepares a report containing recommendations that

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[165] Green Party (n 159) 8.
[166] Brian Tobin (n 110) 222.
[167] [1995] 1 IR 321, 333.
[168] 'Green Party Decision', *Gay Community News* (February 2008) 2.
[169] Brian Tobin (n 110) 222.

will be considered by the Oireachtas. The Convention must report back to the Oireachtas on each aspect of the Constitution under its consideration within a twelve month period. The Convention is comprised of a chairman, 33 Oireachtas members and 66 citizens who were randomly selected by a polling company using the electoral register. The citizen members are broadly representative of Irish society and generally balanced in terms of gender, age, region, social class and occupational status.

The Convention was slow to begin its work, which led to the body being dubbed as the "'garden shed', a dumping ground for any issue likely to cause Coalition grief until it's safe to resurrect it – ideally, sometime in the next term."[170] Nonetheless, by now it has completed its work on the specific issues assigned to it. One such issue involved making provision for same-sex marriage in the Constitution. The Constitutional Convention recently voted by an overwhelming majority for constitutional provision to be made for same-sex marriage. Indeed, in the Third Report of the Convention on the Constitution it was reported that:

> [A] strong majority favoured amendment of the Constitution to provide for same-sex marriage. A similarly strong majority favoured *directive or mandatory wording* in the event of such amendment going ahead.[171]

Thus, rather than vote in favour of a permissive amendment providing that the State *may* enact laws providing for same-sex marriage, the vast majority of the Convention's members (78 out of 100) voted in favour of a directive amendment providing that the State *shall* enact laws providing for same-sex marriage.[172] The Third Report of the Convention on the Constitution, which contains this recommendation, was deposited in the library of the Houses of the Oireachtas in June 2013. Shortly thereafter the Fine Gael/Labour Coalition Government committed itself to holding a same-sex marriage referendum in 2015. Although allowing the people to ultimately decide in a referendum as to whether same-sex marriage should be granted constitutional protection is transparent (and

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[170] Kathy Sheridan, 'How Gay Marriage went Mainstream', *Irish Times* (Dublin, 14th July 2012) 2.
[171] *Third Report of the Convention on the Constitution: Amending the Constitution to Provide for Same-Sex Marriage* (Dublin: Convention on the Constitution, June 2013). Available at: https://www.constitution.ie/Meetings.aspx (Accessed 21st June 2014).
[172] ibid.

politically convenient), it is opined that the potential pitfalls associated with such a process should be heeded. In 2010, an opinion poll in the *Irish Times* indicated that just over two-thirds (67 per cent) of the Irish people believed that same-sex couples should be allowed to marry.[173] In 2011, Red C, a research and marketing group based in Dublin, conducted another opinion poll on same-sex marriage, which found that 73 per cent of the population was in favour.[174] The most recent *Irish Times* opinion poll indicates that 76% of the electorate now support the introduction of same-sex marriage.[175] All of these polls indicate that Irish people have adopted a more liberal attitude towards personal relationships and sexual behaviour. However, polls may not indicate that a constitutional referendum on this matter would result in a favourable outcome for same-sex couples since:

> [t]he idea that opinion polls amount to indicators of the "will of the people" is itself repugnant to democracy: they are cybernetic indicators based on scientific sampling techniques and devoid of democratic content or status.[176]

In addition, the All-Party Oireachtas Committee reported that in the submissions made to it as to whether the constitutional definition of the family should be extended in order to be capable of embracing same-sex marriage there was "a sharp division" and that many wished Articles 41 and 42 to remain unchanged as:

> They fear that any change would threaten the position of the family based on marriage. It would undermine the stability of the traditional family and all the enhancement of the common good that flows from it.[177]

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[173]Carl O'Brien 'Two-thirds support gay marriage, poll finds', *Irish Times,* (Dublin, 15th September 2010) 1.

[174]Report on Reasons Behind Voter Behaviour in the Oireachtas Inquiry Referendum 2011, 26. Available at: *per.gov.ie/wp-content/uploads/OIReferendum-Report-Final-2003-corrected.pdf* (Accessed 20th May 2014).

[175] Stephen Collins, 'Support for Same-Sex Marriage Increasing, Poll Finds' *Irish Times* (Dublin, 7th April 2014) 1.

[176] John Waters, 'Let Norris enter race – and be treated like anyone else', *Irish Times,* (Dublin, 16th September 2011) 16.

[177] See the All-Party Oireachtas Committee on the Constitution (n 99) 122.

This led the All-Party Oireachtas Committee to conclude in its Tenth Progress Report in 2006 that a proposed constitutional amendment to extend the definition of the family would cause deep and long-lasting division in our society and would not necessarily be passed by a majority of voters in a referendum. Indeed, the Gay and Lesbian Equality Network has noted that no referendum anywhere in the world has passed same-sex marriage.[178] Further, as the All-Party Oireachtas Committee has observed, the "Irish experience of constitutional amendments shows that they may be extremely divisive and that however well-intentioned they may be they can have unexpected outcomes."[179] This is true because, as Ryan points out, "[t]he removal of the ban on divorce, most notably, took two attempts, in 1986 and 1995, the ban eventually being discarded in 1995 by the tiniest of margins."[180] Instead of inviting "such anguish and uncertainty", the Committee recommended that the "principal developments" in the area of same-sex relationship recognition should be made at a legislative level and that this could take the form of civil partnership legislation. Notably, this recommendation was made prior to the High Court's judgment in *Zappone,* which would appear to countenance same-sex marriage legislation.[181] However, Keane was critical of the Committee for recommending legislation over a constitutional referendum on Article 41 because:

> [v]irtually every proposal to amend the Constitution provokes opposition from some quarters…[t]hat is an inevitable consequence of the democratic process: it is not a justification for leaving untouched the framework of [Article 41].[182]

Nonetheless, a referendum may be rather divisive because although questionable opinion polls may be indicative of a significant liberalisation of attitudes towards same-sex marriage, the Committee's conclusions suggest that this may be far removed from social reality, as traditional views on the marital family appear to

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[178]Kathy Sheridan (n 168).
[179] See the All-Party Oireachtas Committee on the Constitution (n 99) 122.
[180] Fergus Ryan (n 100) 374-375.
[181] Brian Tobin (n 110) 224.
[182] Ronan Keane, 'The Constitution and the Family: The Case for a New Approach', in Oran Doyle and Eoin Carolan (eds), *The Irish Constitution: Governance and Values* (Thomson Round Hall 2008) 355.

remain dominant in Irish society.[183] Perhaps this is unsurprising in a jurisdiction where even the most recent Census statistics indicate that over 84% of the population remain adherents of the Roman Catholic faith?[184]

Zappone and Gilligan's New Legal Action

While a referendum may not be the most viable method of introducing same-sex marriage,it is also worth noting that Zappone and Gilligan recently initiated a new High Court action. In May 2012 it was announced in the *Irish Times* that the long-awaited appeal of Ireland's same-sex marriage case, *Zappone v Revenue Commissioners,* was due to be heard by the Supreme Court in June 2012.[185] However, despite waiting almost six years for their case to go before the Supreme Court, a few weeks before the hearing the plaintiffs decided to drop their appeal and instead proceed with a fresh High Court challenge.[186] In the new High Court proceedings the plaintiffs are seeking to impugn section 2(2)(e) of the Civil Registration Act 2004. As we have seen, this provision went unchallenged in the original High Court proceedings. Macken J's abovementioned ruling in the Supreme Court in October 2011 rejecting a motion to amend the pleadings was most likely a significant factor in the plaintiffs' decision to forego their appeal and instead initiate a new High Court challenge incorporating section 2(2)(e) of the 2004 Act.[187]

Although it will be interesting to discover what arguments counsel for Zappone and Gilligan purport to advance to try to rebut the presumption of constitutionality that attaches to section 2(2)(e) in the new proceedings, it is uncertain whether these will be sufficient. Indeed, a challenge to this provision based on the constitutional equality guarantee in Art 40.1 would appear futile following the recent Supreme Court case of *D v. Ireland.*[188] The judgment of

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[183] The committee received 7,989 submissions on Art.41 and the family from members of the public and interested bodies: see Ronan Keane (n 182) 347.
[184] Census 2011, *This is Ireland: Part 1* (CSO 2012).
[185] 'Gay Couple in Supreme Court over Right to Wed' *Irish Times* (Dublin, 9th May 2012) 4.
[186] Charlie Taylor, 'Couple to Issue Renewed Legal Challenge to Civil Registration Act in Bid for Marriage' *Irish Times* (Dublin, 7th June 2012) 8.
[187] Brian Tobin (n 59) 102.
[188] [2012] IESC 10.

Denham CJ suggests that the equality guarantee will be subordinated to respect a decision of the Oireachtas on matters of social policy.

In *D v Ireland* the Supreme Court upheld the constitutionality of provisions of the criminal law that discriminated against young males.[189] Denham CJ held that, as regards sexual offences:

> Decisions on matters of such social sensitivity and difficulty are in essence a matter for the legislature. Courts should be deferential to the legislative view on such matters of social policy.[190]

Doyle observes that, in *D v Ireland* "the identification of the issue as falling within a zone of legislative discretion on social policy obviated the need for any scrutiny of the justification offered for the legislation".[191] He concludes that, as a result of this decision,

> Discrimination based on objectionable grounds is not subject to review under Art. 40.1 if the Oireachtas was legislating in an area that involves complex social issues. As discrimination based on race and sex is, by its nature, controversial and tends to occur in difficult areas of social policy, the courts may well always defer to the judgment of the Oireachtas. However if it transpires that that is the case, it becomes difficult to imagine in what circumstances a law could ever be struck down under Art. 40.1.[192]

The same logic could easily apply to the discrimination based on sexual orientation contained in section 2(2)(e) of the 2004 Act, as marriage is a complex area of social policy in that it affects the parties to the marriage, any children of the union, and society as a whole. Hence Article 40.1 is likely to be of little, if any, benefit to Zappone and Gilligan when challenging section 2(2)(e) in their fresh legal action.

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[189] Sections 3 and 5 of the Criminal Law (Sexual Offences) Act 2006.
[190] [2012] IESC 10 [50].
[191] Oran Doyle, 'Judicial Scrutiny of Legislative Classification' (2012) 47 (1) Irish Jurist 175, 183.
[192] ibid 184.

Civil Partnership: Sounding the Death Knell for Same-Sex Marriage under Article 41.3.1° of the Constitution?

It is opined that judicial deference toward a most recent Act of the Oireachtas in the highly sensitive area of same-sex relationship recognition could similarly cause the recognition of same-sex marriage under Article 41.3.1° of the Constitution to founder in Zappone and Gilligan's new legal action. In 2008, the Fianna Fáil/Green Party coalition Government proceeded to sanction civil partnership coupled with a redress scheme as the appropriate models of relationship recognition for Irish same-sex couples.[193] In 2011, the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 acquired the force of law in this jurisdiction. As suggested by its title, it enables same-sex couples to enter into a civil partnership or acquire certain rights and obligations in respect of one another when the relationship ends if they were cohabiting for a certain period of time and one party was financially dependent on the other. However, it is opined that the enactment of such legislation could sound the death knell for the recognition of a right to same-sex marriage under Article 41.3.1° of the Constitution. This is because in the new proceedings the High Court could display the same legislative deference as Dunne J in *Zappone* and consequently refuse to expand the current constitutional understanding that marriage is heterosexual in nature by finding that the 2010 Act represents the prevailing social consensus on the appropriate form of legal recognition for same-sex relationships.[194] O'Mahony has observed that the 2010 Act is really only in its infancy and that it therefore:

> [R]epresents a very recent legislative decision on how far to push the reform agenda, and has had little time to work on dispelling stereotypes and making the populace more familiar and comfortable with the legal recognition of same-sex partners as rights-bearers.[195]

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[193] Mark Hennessy and Carl O'Brien (n 160).
[194] Brian Tobin (n 59) 104.
[195] Conor O'Mahony (n 71) 219.

The High Court could further conclude that in any event this recent legislative initiative has in practice enabled same-sex couples to enjoy most of the benefits associated with marriage, albeit under a different nomenclature.[196]

Conclusion

The constitutional and statutory understandings of marriage remain narrowly rooted in the gender of the parties over the substance of their union. If Article 41 was interpreted by the judiciary as including same-sex couples within the notion of "Marriage, on which the Family is founded", they would be entitled to the parental privileges associated with this provision and its related provision, Article 42. Given the limited state of the evidence pertaining to the welfare of children that was adduced before the High Court, and that court's recognition of the correlation between marriage and parenting, it seems unlikely that the court will warrant an expansive interpretation of Article 41 that would encompass same-sex unions should Zappone and Gilligan's fresh legal action come before it in the not-too-distant future. In addition, the 2010 Act enables same-sex couples to enter into a marriage-like institution, and this recent legislation would undoubtedly carry significant weight in the High Court, albeit to the possible detriment of any constitutional recognition of same-sex marriage.

This chapter has demonstrated that, as regards same-sex marriage, there has been much "see-sawing" between the courts and the legislature, which implies that neither branch of Government is really that keen to champion its introduction. Same-sex marriage is a veritable political "hot potato", so it is unsurprising that the issue was passed to the Constitutional Convention to make reform-oriented recommendations on. In light of the Constitutional Convention's recommendations, the Fine Gael/Labour coalition has now committed to holding a referendum on same-sex marriage in 2015. While this development is to be welcomed, it is hardly an innovative proposal by the Government given that it came about as a result of recommendations made by a body comprised largely of members of the electorate. However, in light of the All-Party Oireachtas Committee's finding in its 2006 Report that "many of those who support the traditional model would see any

[196] Brian Tobin (n 59) 104.

change in the constitutional position of the family based on marriage as a deadly blow against the family"[197] it is uncertain as to whether the controversial issue of same-sex marriage will fare any better in this upcoming constitutional referendum, even though opinion polls might indicate that we live in a far more enlightened Ireland in 2014.

[197] All-Party Oireachtas Committee on the Constitution (n 99) 67-68.

Chapter 2

Relationship Recognition for Same-Sex Couples in Ireland: Civil Partnership and the Redress Model

Introduction

The previous chapter highlighted the interlocking and restrictive constitutional and statutory understandings of marriage in Ireland. Although same-sex couples could (arguably) have availed of the constitutional right to marry if the Oireachtas had taken advantage of the dispensation granted to it by Dunne J in *Zappone*, the previous chapter explained that the Fianna Fáil/Green Party coalition government chose to introduce civil partnership legislation instead. In addition, a redress model of relationship recognition for those opposite-sex and same-sex cohabitants who choose not to marry or register their partnership was tagged onto the legislation in order to benefit a financially dependent party when a cohabiting relationship ends. This resulted in the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (hereafter the "2010 Act"), which entered into force on January 1st, 2011 and has been hailed as "the most far-reaching reform of family legislation in a generation".[1] By this statute's very enactment the State has confirmed "a strong interest in the recognition, maintenance and protection of all *de facto* families that exist since they are inherently supportive units albeit unrecognised by the Constitution".[2]

This chapter will briefly discuss the law pertaining to cohabiting same-sex and opposite-sex couples prior to this statute's enactment. It will then critically analyse the civil partnership provisions of the 2010 Act, discussing: the essence of same-sex civil partnership vis-à-vis opposite-sex marriage; the rights and obligations of civil partners, and; nullity and dissolution of a civil partnership. The question as to whether civil partnership is an appropriate form of relationship recognition for same-sex couples will also be considered. Further, the redress model of relationship recognition for cohabitants will be scrutinised in order to

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[1] See Fergus Ryan, 'Civil Partnership – A Guide for Practitioners' (Conference on the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, Trinity College Dublin, 2 April 2011).
[2] *McD v L* [2008] IEHC 96.

determine whether it achieves an appropriate equilibrium between protection and paternalism. The likely impact of this scheme on Irish cohabitants and, in particular, same-sex cohabitants, will also be gauged in light of empirical evidence on the phenomenon of cohabitation in Ireland. Finally, constitutional concerns surrounding both the redress model and cohabitants' agreements, which are also recognised by the 2010 Act, will be examined to determine their validity, if any.

Non-Marital Unions and Irish Law

In Ireland, same-sex partnerships, like their non-marital opposite-sex counterparts, remain devoid of constitutional protection because it has been clear ever since the seminal case of *State (Nicolaou) v An Bord Uchtála* that the protection afforded to the family in Article 41 applies only to that which is based on marriage. Walsh J. outlined the provision's parameters:

> While it is quite true that unmarried persons cohabiting together and the children of their union may often be referred to as a family and have many, if not all, of the outward appearances of a family, and may indeed for the purposes of a particular law be regarded as such, nevertheless so far as Article 41 is concerned the guarantees therein contained are confined to families based upon marriage.[3]

This exclusive constitutional position is particularly harsh on same-sex unions because the understanding that the family based on marriage is heterosexual in nature was enunciated by Dunne J. in the *Zappone* case in 2006.[4] In the more recent case of *McD v L,* Denham J (now Denham CJ) made an *obiter* remark in the Supreme Court that "arising from the terms of the Constitution, "family" means a family based on marriage, the marriage of a man and a woman".[5]

However, the last chapter has cogently argued that the Oireachtas appears to have been granted leeway to alter this understanding, and the members of the

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[3] *State (Nicolaou) v An Bord Uchtála* [1966] IR 567, 643.
[4] *Zappone v Revenue Commissioners and Others* [2008] 2 IR 417.
[5] *McD v L* [2010] 1 ILRM 461, 488 (Supreme Court).

Constitutional Convention have recently voted in favour of provision being made for same-sex marriage in the Constitution. In any event, as matters stand, non-marital opposite-sex couples can avail of the constitutional right to marry and consequently obtain legal rights and responsibilities in respect of each other, whereas this option continues to remain off-limits for Ireland's committed same-sex cohabitants.

The Disparate Legislative Treatment of Non-Marital Couples

A phenomenal number of opposite-sex couples are now choosing to cohabit outside of marriage because the results of the 2011 Census indicate that there are 143,600 cohabiting heterosexual couples in Ireland, almost double the figure of 77,300 recorded less than a decade earlier in the 2002 Census.[6] As a result the legislature had, "increasingly, as a matter of policy"[7] extended protections ordinarily associated with marriage to such couples, but not to cohabiting same-sex couples (prior to the introduction of the 2010 Act). Some prime examples of this exclusionary approach included the Domestic Violence Act 1996, which provided that a barring order may be granted to an applicant who "has lived with the respondent as husband or wife"[8]; the Civil Liability (Amendment) Act 1996, which enabled the opposite-sex surviving partner of a person killed due to the negligence of others to sue for his/her wrongful death; the Residential Tenancies Act 2004, which allowed an unmarried partner who had been living with the deceased tenant "as husband and wife in the dwelling" for six months preceding the death to succeed to the tenancy,[9] and; section 11 of the Social Welfare Act 1993, which recognised as a couple for the purposes of social welfare law "a man and woman who are not married to each other but are cohabiting as husband and wife". Whatever the intention of the legislature may have been in enacting each of these provisions, the undeniable practical effect of each was to consistently exclude all cohabiting same-sex couples from their ambit. In fact, as concerns the Residential Tenancies Act 2004, the then-Minister for the Environment, Heritage and Local Government, Noel Ahern stated in Dáil Éireann that the provisions in the statute

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[6] See Census 2011, *This is Ireland (Part 1)* (CSO 2012) 27.
[7] Jim Nestor, *An Introduction to Irish Family Law,* (1st edn, Gill and Macmillan 2000) 9.
[8] Domestic Violence Act 1996, section 3.
[9] Residential Tenancies Act 2004, section 39.

"provide for security in the case of established, family-type relationships, rather than homosexual or other relationships."[10] An appreciation of any potential functional similarities between committed same-sex and opposite-sex relationships seems to have completely escaped the former Minister in this instance.

Civil Partnership: Opposite-Sex Couples Need Not Apply

Although Denmark made socio-legal history by becoming the first State in the world to introduce civil partnership for same-sex couples in 1989, the introduction of this mode of relationship recognition really only gained impetus in other EU Member States post-millennium, with Malta becoming the most recent jurisdiction to embrace it.[11] However, the need for Ireland to embrace civil partnership did not stem from an EU obligation or, as we shall see, a requirement under the European Convention on Human Rights (ECHR).[12] Rather, it was necessitated by the coming into force of the Civil Partnership Act 2004 in our neighbouring jurisdiction, the United Kingdom. As this author has pointed out elsewhere,[13] it was ironic that, on December 5th, 2005, the very date that this legislation entered into force and enabled same-sex couples in Northern Ireland to obtain a status akin to marriage, the Civil Registration Act 2004 also acquired the force of law in the Republic of Ireland and precluded same-sex marriage under section 2 (2) (e). It is submitted that the contrast between the legal position of same-sex couples on the island of Ireland was at its most stark at this point in time. This arguably placed the Irish Government in breach of the Good Friday Agreement, by virtue of which the Government undertook to provide in the Republic of Ireland at least an equivalent level of human rights protection as that pertaining in Northern Ireland. Ó Cinnéide argued that the introduction of the Civil Partnership Act 2004 in Northern Ireland and the failure to enact corresponding legislation in the Republic constituted a

[10] Dáil Deb 1st July 2004, vol 588, col 1043.
[11] Of the ten EU Member States other than Denmark that currently recognise civil partnership, all have only done so since 2001, with Malta being the most recent. Eight EU Member States (including, most recently, the U.K.) now recognise same-sex marriage, with eleven Member States still providing no legal recognition for same-sex couples.
[12] See Chapter 4.
[13] Brian Tobin, 'Same-Sex Couples and the Law: Recent Developments in the British Isles' (2009) 23 (3) International Journal of Law, Policy and the Family 309, 318.

"lack of equivalence" in breach of the Good Friday Agreement.[14] On this analysis, the introduction of Civil Partnership legislation in this jurisdiction was necessary to ensure the Government's continued compliance with the Good Friday Agreement.

Nonetheless, in 2006, both the All-Party Oireachtas Committee on the Constitution and the Working Group on Domestic Partnership recommended the introduction of civil partnership legislation for same-sex couples in Ireland. Bizarrely, the All-Party Oireachtas Committee also recommended civil partnership legislation for opposite-sex couples, even though this would most likely be constitutionally unsound. Civil partnership is very similar to the institution of marriage which occupies a special position under Article 41.3.1 of the Constitution. If introduced for opposite-sex couples it would constitute "a competing State-sponsored institution"[15] that may induce those couples who have ideological objections to marriage to shun it completely and opt to become civil partners instead. Hence, as Walsh and Ryan have observed, "too ready an equation between marriage and alternative family forms"[16], *ie* civil partnership, may constitute an "attack" by the State on the institution of marriage, which it "pledges itself to guard with special care" in Article 41.3.1°. It is perhaps with these concerns in mind that the Oireachtas proceeded to confine civil partnership in Ireland to same-sex couples only. Since same-sex cohabitants are currently excluded from the institution of marriage, the same constitutional concern obviously does not arise in their unique situation.

Indeed, the constitutionality of a civil partnership regime for same-sex couples in a jurisdiction that provides constitutional protection for marriage was tested before the German Constitutional Court a decade ago. Article 6 (1) of the German Constitution provides that "marriage and the family shall enjoy the special protection of the State". German legislation that allowed same-sex couples to register a "life partnership" was challenged as being contrary to Article 6 (1). However, the Constitutional Court held that because the concept of a "life partnership" was only available to same-sex couples, it was not in competition with

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[14] Colm Ó Cinnéide, 'Equivalence in Promoting Equality: The Implications of the Multi-Party Agreement for the Further Development of Equality Measures for Northern Ireland and Ireland' (Equality Authority and Equality Commission for Northern Ireland 2005).

[15] John Mee, 'Cohabitation, Civil Partnership and the Constitution', in Oran Doyle and William Binchy (eds.), *Committed Relationships and the Law* (Four Courts Press 2007) 204.

[16] Judy Walsh and Fergus Ryan, *The Rights of de facto Couples* (Irish Human Rights Commission 2006) 81-82.

the institution of marriage which, by definition, was available to heterosexual couples only.[17]

Progressing towards the Introduction of the 2010 Act

The last chapter highlighted that the High Court was willing to defer to the Oireachtas on the issue of same-sex marriage but that, due to a lack of political will or an inadvertent failure to appreciate this aspect of the *Zappone* judgment, in 2007 the Fianna Fáil/Green Party coalition Government proceeded to include plans to introduce civil partnership legislation for same-sex couples in the Programme for Government. Less than two months after the coalition was formed the Taoiseach, Mr. Ahern, committed the Government to implementing such legislation. On 16th July, 2007, while speaking at the official opening of a refurbished Outhouse, the gay community resource centre in Dublin's Capel Street, Mr. Ahern stated that "we will legislate for civil partnerships at the earliest possible date in the lifetime of this government."[18] In 2008, the General Scheme of the Civil Partnership Bill was unveiled and the Civil Partnership Bill was published in June 2009. Of the proposed legislation, Ryan stated that "it is clear from the heavy borrowing from current marriage legislation, that civil partnership is based largely on the same blueprint".[19]

Ryan observes that "the Bill had a relatively smooth and speedy passage through the Dáil", but that its passage through the Seanad "proved to be somewhat bumpier", largely because opponents of the Bill sought to include a conscientious objection clause that would enable persons who for reasons of religious conscience refused to facilitate a civil partnership from being sued or prosecuted in respect of their refusal.[20] It is submitted that, if the State was introducing same-sex marriage, such a clause would be necessary to enable *religious solemnisers* to abstain from presiding over a same-sex marriage. Indeed, this is the situation in Canada, South

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[17] Bundesverfassungsgericht (BVerfG - Federal Constitutional Court) Case No. 1 BvF 1/01, July 17, 2002, 105 BVERFGE 313, 345–46 (Ger.). See also the discussion in Gerard Hogan and Gerry Whyte, *JM Kelly - The Irish Constitution* (4th edn, Butterworths 2003) 1837.

[18] Alison Healy, 'Ahern Backs Legal Recognition of Gay Partners' *Irish Times* (Dublin, 17th July 2007) 3.

[19] Fergus Ryan, 'The General Scheme of the Civil Partnership 2008: Brave New Dawn or Missed Opportunity?' (2008) 11 (4) Irish Journal of Family Law 51, 52.

[20] Fergus Ryan, *Annotated Legislation: Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010,* (Thomson Round Hall 2011) 12-13.

Africa, and Norway, all of which have come to recognise same-sex marriage in recent years.[21] However, *civil registrars* are public servants and, as such, they are under a duty to perform marriage ceremonies in accordance with Irish law, irrespective of their personal religious views. In the Seanad, Senator Alex White encapsulated the fallacy of legislation that would allow a public servant to refuse to perform his duties because of a conscientious objection to doing so:

> It is simply inconceivable, however, that if someone is appointed to be a judge, for example, of the Circuit Court which administers the divorce legislation, he or she would refuse to make an order for divorce in circumstances in which he or she has a difficulty or objection to it on a personal basis or as a matter of conscience.[22]

The Senator described the campaign for a conscientious objection clause as "a contrivance masquerading as a basis for opposing legislation"[23] and this author would be inclined to agree. In any event, the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 was signed into law by the President on July 19th, 2010, and its provisions, except for section 5, came into force on January 1st, 2011.[24]

Essence of Civil Partnership

The parties who intend to register their civil partnership must legally be of the same sex, though their sexual orientation is irrelevant.[25] The couple must not fall within the prohibited degrees of relationship based on consanguinity.[26] Neither of

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[21] Macarena Sáez, 'Same-Sex Marriage, Same-Sex Cohabitation and Same-Sex Families Around the World: Why "Same" is so Different' (2011) 19 American University Journal of Gender, Social Policy and Law 1, 7-8.
[22] Seanad Deb 7 July 2010, vol 204, col 176.
[23] ibid.
[24] Section 5 came into force on January 13 2011 pursuant to SI No. 469 of 2010 – Civil Partnership (Recognition of Registered Foreign Relationships) Order 2010. This statutory instrument recognised certain foreign legal relationships (including same-sex marriages) as civil partnerships for the purposes of the 2010 Act.
[25] Civil Registration Act 2004, section 2 (2A), as inserted by section 7 (2) of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010.
[26] ibid.

the parties can already be party to a subsisting civil partnership or a marriage.[27] The couple must be aged 18 or over and give a free and informed consent at the time of registration.[28] The parties must give three months' written notice to a Registrar of Marriages before they will be allowed to register their civil partnership.[29] The parties must deliver such notice in person by their attendance at a registrar's office at least three months in advance of their intended union, and they usually make and sign declarations to the effect that there are no legal impediments to their civil partnership at this time as well. Like marriage, the parties to a civil partnership must make certain oral declarations before a civil registrar of marriages at a public venue in the presence of at least two adult witnesses. The registrar must be satisfied that the parties understand the nature of the civil partnership and of the declarations that they are required to make. The parties must then sign the registration form, followed by each of the witnesses. The registrar then countersigns the form, and at this point the parties are deemed to be civil partners.

However, Byrne and Binchy argue that, when compared to marriage, "the essence of civil partnership is less clear" because the latter legal concept:

> [C]annot involve procreation between the partners; nor does it involve sexual intercourse (though other acts of sexual intimacy can be envisaged). It does not necessarily require or envisage sexual exclusivity, or the continuity of the partnership for any particular period. Thus it would seem possible for one partner to intend to accept the other "as a civil partner in accordance with the law" without any particular commitment to sexual activity, sexual fidelity, intimacy or *continuity of commitment*.[30]

This author would respectfully disagree with Byrne and Binchy as regards the requirement of continuity of commitment by each civil partner. Section 59D (3) of the Civil Registration Act 2004, as inserted by section 16 of the 2010 Act, requires each civil partner to make an express "declaration of his or her intention to live with and support the other party". As section 59D (4) stipulates, this express declaration is one of the "substantive requirements for civil partnership

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[27] ibid.
[28] ibid.
[29] Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, section 59B.
[30] Raymond Byrne and William Binchy, 'Family Law', in Raymond Byrne and William Binchy (eds.), *Annual Review of Irish Law 2010* (Thomson Round Hall 2011) 387.

registration." This declaration is not made on marriage because, as Ryan observes, the obligations to live together and support each other "are implicit in the status conferred by marriage."[31] The fact that such a declaration is required at the time of entering into a civil partnership, which confers a new legal status, "arguably serves to clarify the nature of the obligations flowing from civil partnership, and in fact equates them to those that arise on marriage".[32] Thus, civil partnership does in fact require or envisage "continuity of the partnership" via an express declaration of intention on the part of each civil partner to live with and support (or indeed, to continuously commit to, albeit arguably in a non-sexual manner) the other for a "particular period", *ie* until the relationship is terminated via death or dissolution. In this respect the only difference between marriage and civil partnership is that with the former institution the aspect of continuous commitment to the relationship until it is terminated is culturally understood rather than being stipulated by domestic legislation. In addition, the 2010 Act provides that the maintenance and succession rights of civil partners can be vitiated where a civil partner is in desertion. Why would desertion be a relevant concept in these contexts if there was no statutory obligation to live together and support one another? Desertion is a vitiating factor in the maintenance and succession areas precisely because it is incompatible with one of the substantive requirements of civil partnership as provided for in section 59 of the Civil Registration Act 2004, as amended by section 16 of the 2010 Act, *ie* an intention to live with and support the other party.

Ryan observes that the 2010 Act is "notable in that at no point does it require any sexual relationship between the parties",[33] and Byrne and Binchy argue that neither does civil partnership necessarily require sexual exclusivity.[34] However, it is submitted that both sexual activity and exclusivity are *at least* envisaged. By requiring a prospective civil partner to make an express declaration of intention to live with and support one particular person on a continuous basis until the termination of the partnership, it is opined that the 2010 Act *strongly*

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[31] Fergus Ryan, 'Civil Partnership – A Guide for Practitioners' (n 1).
[32] Fergus Ryan, *Annotated Legislation: Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010* (n 20) 74.
[33] ibid 60.
[34] Raymond Byrne and William Binchy (n 30).

implies an analogous intention to commit to "sexual activity, sexual fidelity" and "intimacy" with that person alone in an ongoing manner.[35]

To further bolster the notion that civil partnership, like marriage, is concerned with fidelity and continuity of commitment, regard may be had to section 5 (1) of the 2010 Act. This provision enables the Minister for Justice, Equality and Law Reform to designate certain classes of foreign legal relationships between same-sex couples as civil partnerships in Ireland. Such relationships must be "exclusive" and "permanent", subject to dissolution by a court. Brazil points out that, as a result of section 5 (1):

> It is thus clear that exclusivity is a constitutive element of civil partnership as with marriage; furthermore, a civil partnership must be potentially life-long or permanent in nature which is also the case with marriage.[36]

Indeed, if these qualities are required of foreign legal relationships before they can be treated comparably to an Irish civil partnership, it would be anomalous if the Oireachtas did not also intend for such characteristics to be present in the domestic legal relationship that these foreign unions are largely required to mirror. In light of this, Byrne and Binchy's assertion that "civil partnership asks nothing of partners in relation to permanence of commitment"[37] cannot be deemed to fairly describe Irish civil partnership law.

An Overview of the Rights and Duties of Civil Partners

The following analysis of the rights and duties of civil partners could lead one to conclude that:

> [m]any of the deficiencies in the 2010 Act can be attributed to concerns that the legislation might be constitutionally vulnerable if it was deemed to

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[35] However, given the constitutional right to privacy under Article 40.3, it is arguable that the legislation could not be construed as requiring a person to engage in sexual activity and fidelity.
[36] Patricia Brazil, 'The Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010: Radical New Departure in Irish Law? (2011) Dublin University Law Journal 208, 210.
[37] Raymond Byrne and William Binchy (n 30) 389.

> trespass on the sacrosanct territory of the family based on marriage.[38]

Part 4 of the 2010 Act establishes protection for the "shared home" which is the "dwelling in which the civil partners ordinarily reside".[39] In the case of separated couples the term "shared home" also refers to a property in which the civil partner whose protection is at issue resided prior to leaving his/her partner. The protection provided under this part of the legislation is similar to that awarded to spouses under the Family Home Protection Act 1976. The reason the 2010 Act refers to the civil partners' dwelling as a "shared home" rather than copying the term "family home" from the 1976 Act is probably to avoid constitutional challenge. The provisions of Part 4 prevent the shared home from being sold, leased or mortgaged by one civil partner without the prior written consent of the other. This consent can only be dispensed with by the court in circumstances where the non-owning civil partner has suitable alternative accommodation available to him/her, having regard to the respective degrees of security of tenure in the shared home and the alternative accommodation.[40] Ryan argues that the protection afforded to the shared home by virtue of the 2010 Act is no longer as necessary today as it was in 1976, a time when homes were regularly bought, registered and sold in the name of the husband. He observes that the practice of couples buying a house in the sole name of one of the spouses/civil partners is increasingly rare, but that:

> [t]he provisions relating to the family home and shared home may remain relevant, however, where that home was bought by one of the parties prior to the relationship and the other party moved into that home following marriage or civil partnership.[41]

Parts 5 to 7 of the 2010 Act are concerned with maintenance between civil partners. The provisions therein have been culled from existing legislation, namely the Family Law (Maintenance of Spouses and Children) Act 1976. Like spouses, civil partners are under a legal obligation to maintain each other financially, subject to

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[38] Patricia Brazil (n 36) 219.
[39] Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, section 27.
[40] Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, section 29 (2) (b).
[41] Fergus Ryan, *Annotated Legislation: Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010* (n 20) 89.

the needs and resources of each partner. If one civil partner fails in this regard, the other can apply to the court for a periodical payments order, secured if necessary, or a lump sum order requiring a once-off lump sum payment. Part 6 of the 2010 Act makes provision for attachment of earnings orders, which enables a court to order that maintenance be taken directly at source, *ie* by an employer from an employee civil partner's earnings. However, Brazil notes a "crucial difference" between marriage and civil partnership that is patently evident from Parts 4 to 7 of the 2010 Act, and this is the absence of provision for children:

> Thus, in the context of shared home protection, no regard may be had to the accommodation needs of any children, whilst in respect of maintenance no provision is made for periodical payments by a civil partner in respect of a child who has been raised by the civil partners, but to whom the civil partner is not biologically related.[42]

Nonetheless, Parts 10 and 11 of the General Scheme of the Children and Family Relationships Bill 2014 will, if enacted, remedy these situations by amending the 2010 Act so as to extend maintenance liabilities for a child to a non-biological civil partner parent of the child and allowing for the accommodation needs of any dependent children to be taken into account in the context of shared home protection.

Succession and Civil Partners

In the area of succession the non-biological child of a deceased civil partner has no right to inherit from his/her estate where provision has not been made for him/her in the deceased's will. In contrast, the biological or adopted child (or children) of a civil partner can fare better than a child (or children) of married parents in this context by virtue of the 2010 Act. The Succession Act 1965 has been amended by Part 8 of the 2010 Act to grant succession entitlements to a person on the death of his civil partner which largely mirror the existing succession rights of a surviving spouse. Part 8 of the 2010 Act provides a surviving civil partner with the virtual

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[42] Patricia Brazil (n 36) 211-212.

equivalent of a spouse's security against disinheritance because, irrespective of the terms of the deceased's will, the surviving partner is entitled to one-half of his/her estate, or one-third where he/she has issue.[43] However, a surviving civil partner's legal right share can be affected where a child of the deceased brings a section 117 application, and this creates a statutory inequality between surviving spouses and surviving civil partners. Section 86 of the 2010 Act amends section 117 of the 1965 Act by inserting subsection (3A). Section 117 enables the court to make provision for a child where a parent has failed in his 'moral duty to make proper provision for the child in accordance with his means'. As enacted, section 117 (3) of the 1965 Act provides that a court order under section 117 is not to affect the legal right of a surviving spouse. However section 117 (3A) of the 1965 Act, as inserted by section 86 of the 2010 Act, provides that:

> An order under this section shall not affect the legal right of a surviving civil partner unless the court, after consideration of all the circumstances, including the testator's financial circumstances and his or her obligations to the surviving civil partner, is of the opinion that it would be unjust not to make the order.

As Byrne and Binchy point out, "the effect of this provision is that the legal right of a civil partner (in contrast to that of a surviving spouse) may be affected by an order under section 117."[44] In cases of intestacy, the surviving civil partner can inherit the deceased partner's entire estate where he/she dies intestate and has no issue. Where a civil partner dies intestate and has issue, the surviving partner is entitled to two-thirds of the estate, and the remaining one-third will be distributed equally amongst the deceased's issue. However, section 67A (2) of the 1965 Act, as inserted by section 73 of the 2010 Act, enables the court to order that provision for a child be made out of the intestate's estate, and this would obviously have the effect of reducing the entitlement of the intestate's surviving civil partner. Similar to an order under section 117 (3A), the court will only make this type of order if it would be unjust not to do so after considering all the circumstances of the case.

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[43] Succession Act 1965, section 111A, as inserted by the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, section 81.
[44] Raymond Byrne and William Binchy (n 30) 391.

Other Remedies

The 2010 Act also extends the provisions of the Domestic Violence Act 1996 to civil partners to enable one to obtain barring orders, safety orders and protection orders against a civil partner.[45] One can also now sue for the wrongful death of his or her civil partner under section 47 of the Civil Liability Act 1961, as amended by section 105 of the 2010 Act. Part 4 of the 2010 Act also amends section 39 of the Residential Tenancies Act 2004 to enable a civil partner to succeed to a tenancy in which the couple lived following his/her partner's death.[46] Part 10 of the 2010 Act provides that civil partners will be treated the same as husband and wife for the purposes of determining pension entitlements and treatment under equality legislation.[47] Civil Partners and cohabiting same-sex couples are now recognised for the purposes of social welfare law by virtue of the Social Welfare and Pensions Act 2010, while the Finance (No.3) Act 2011 deals with civil partners in the same way as spouses for most taxation purposes.[48]

Partnership Termination

Akin to married couples, civil partners can enter into separation agreements to settle their affairs, but their civil partnership, like a marriage, can only be dissolved through the courts. Generally, a civil partnership can be brought to an end in the same way as a marriage by the granting of a dissolution, and the same court-ordered remedies, which include property and financial relief, can be obtained by the civil partners following termination. These remedies may be sought at the time of dissolution or at any time thereafter, and this is identical to the "no clean break" policy that applies to heterosexual divorcing parties. Hence a former civil partner who has not married or entered into a new civil partnership may seek certain court-ordered remedies long after the civil partnership has been dissolved. Part 12 of the 2010 Act enables the court to grant a dissolution where the parties have been living apart for two out of the previous three years, and where "proper provision" has

[45] Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, sections 90-96.
[46] Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, section 40.
[47] Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, sections 100, 102 and 103.
[48] Fergus Ryan, *Annotated Legislation: Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010* (n 20) 18-20.

been or will be made for each of the civil partners.[49] It should be pointed out at this juncture that heterosexual parties must be living apart for four of the previous five years before they can obtain a divorce under Irish law and, on a practical level, at least the 2010 Act does not stipulate that such a hefty waiting period should equally apply to the dissolution of a civil partnership. In addition, when seeking a divorce, Article 41.3.2° of the Constitution and section 5 of the Family Law (Divorce) Act 1996 require the parties to show that there is "no reasonable prospect of reconciliation". However, this is not required of separating civil partners under the provisions of the 2010 Act. It is opined that the omission of this requirement, plus the shorter time frame required by the Act before dissolution of a civil partnership can be sought by the parties holds symbolic significance. It indicates that Irish law does not place the same value on same-sex civil partnerships as constitutionally-protected opposite-sex marriages. Whereas divorce proceedings can only be commenced once the parties' solicitors certify that they have advised their clients regarding all the alternatives to divorce, this is not required in the case of civil partnership. While it is clear that Irish law does not deem civil partnerships worthy of any salvage attempts before dissolution proceedings are commenced, it is interesting to note that section 111 of the 2010 Act enables the court to adjourn dissolution proceedings to enable the civil partners to attempt, if they both so wish, to reconcile. Thus, the potential for the partners' reconciliation even when dissolution proceedings are in progress is at least *acknowledged* under Irish law.

In any event, it is possible that the importance of attempts at reconciliation before divorce proceedings are commenced is linked to the fact that marriage breakups affect children, and thus their parents' reconciliation might often be in their best interests. We have seen in the last chapter that the constitutional concept of marriage is preoccupied with the welfare of children being raised by married parents, hence a provision like Article 41.3.2° is not at all unusual in a Constitution like ours, and section 5 of the 1996 Act merely reflects this.

While *some* civil partners may also be raising children who would equally be affected by a breakup, the 2010 Act largely views the couple in an individualistic rather than a child-focused manner. Indeed, this is evident from the fact that Part 12 of the 2010 Act only requires "proper provision" in the case of the

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[49] Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, section 110.

civil partners and not in respect of any children that may be living with them.[50] When children are taken out of the equation, perhaps the Oireachtas felt that a reconciliation requirement would be superfluous for two childless adults whose relationship is very much over given that they have been living apart for two years?

Nullity of Civil Partnership

Section 107 of the 2010 Act sets out the grounds for granting a decree of nullity of a civil partnership, and these are largely similar to marriage. The effect of a decree of nullity means that not only is the civil partnership declared not to have existed, but the parties are not entitled to avail of the various ancillary orders applicable on termination of a civil partnership. It should be noted that a civil partnership cannot be avoided for non-consummation, most likely because consummation involves a single act of heterosexual intercourse. Further, a civil partnership cannot be avoided where one of the parties is unable to form and sustain a normal and caring marital relationship, a ground upon which reliance has been placed to seek nullity of marriage in Ireland for decades.[51] Ryan appears to welcome the exclusion of this ground for nullity in the case of civil partnership. He argues that the parameters of this ground are too vague and that the circumstances in which some annulments have been granted pursuant to it suggest that the threshold for obtaining a decree is not particularly exacting. Ryan believes that the appropriate remedy in such cases is arguably a divorce or dissolution.[52]

Separate, but Equal?

It is first worth extolling the various benefits of civil partnership before analysing whether same-sex marriage would be a more appropriate form of relationship recognition for same-sex couples. Whether one is a proponent of civil partnership or not, in the U.S. context Johnson observes that "[f]or committed same-sex

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[50] Although Head 75 of the General Scheme of the Children and Family Relationships Bill 2014 will, if enacted, require that proper provision be made for any dependent children before the civil partnership can be dissolved.

[51] See further Fergus Ryan, 'When Divorce is Away, Nullity's at Play': A New Ground for Annulment, its Dubious Past and its Uncertain Future' (1998) 1 Trinity College Law Review 15.

[52] Fergus Ryan, *Annotated Legislation: Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010* (n 20) 178-179.

couples who need the many benefits and protections marriage offers, civil union can provide immediate relief while the battle for same-sex marriage continues".[53] Indeed, Eskridge points out that in the U.S., "*[f]unctionally*, [civil partnership] ameliorates rather than ratifies a sexuality caste system".[54] These analyses are equally applicable in Ireland where civil partnership has undoubtedly improved the practical legal situation of committed same-sex couples who hitherto were shunned by the State. On a symbolic level, Chan observes that the U.K.'s Civil Partnership Act 2004 provides,

> [A]n official statement of acceptance: by approving the recognition of marriage-like relationships, the [2004 Act] endorses a form of life, a loving and committed relationship. It endorses that relationship with the authoritative voice of the State, throwing public weight behind the partners' membership of, and integration with, the community.[55]

Indeed, the same could be said of the impact that the 2010 Act has had in this jurisdiction. However, offering same-sex couples most of "the rights, privileges and benefits of the institution of marriage"[56]under the nomenclature of civil partnership is "a version of the separate but equal doctrine"[57] and this falls short of true equality. As the Massachusetts Supreme Court has stated:

> The dissimilitude between the terms "civil marriage" and "civil union" is not innocuous; it is a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual, couples to second-class status.[58]

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[53] Greg Johnson, 'Civil Union, A Reappraisal' (2005) 30 Vermont Law Review 891, 894.
[54] William N. Eskridge, Jr., 'Equality Practice: Liberal Reflections on the Jurisprudence of Civil Unions' (2001) 64 Albany Law Review 853, 863.
[55] Winnie Chan, 'Cohabitation, Civil Partnership, Marriage and the Equal Sharing Principle' (2013) 33 (1) Legal Studies 46, 50.
[56] *Halpern and Ors v. AG of Canada* (2002) CanLII 42749 (ON S.C.D.C.) [187].
[57] ibid [192] (LaForme J, quoting Linden JA in *Egan v. Canada* [1993] 3 F.C. 401).
[58] *Opinions of the Justices to the Senate*, 802 N.E.2d 565, 570 (Mass. 2004). The Justices were disapproving a civil union bill drafted by the Massachusetts legislature in response to the Massachusetts Supreme Court's finding that the ban on same-sex marriage violated the State's Constitution.

Indeed, it has been argued that granting partnership as opposed to marriage rights leaves a "lingering odour of homophobia".[59] However, one might contend, in response to this, that registered civil partnership is quite acceptable for now because it is most likely an *interim* measure on the road to same-sex marriage. Each of the eight EU Member States that have come to recognise same-sex marriage initially had some form of civil partnership legislation.[60] This suggests that civil partnership ordinarily results in the legalisation of same-sex marriage. However, the transition from civil partnership to civil marriage can take considerable time: Denmark introduced a civil partnership regime for same-sex couples in 1989 and only introduced same-sex marriage a staggering twenty three years later, on 15th June 2012. Thus, it is not unreasonable to conclude that, in many European jurisdictions civil partnership laws for same-sex couples might predominantly "have been passed for a very negative reason: avoiding the opening up of legal marriage to same-sex couples".[61] One might argue that "civil partnership represents a consolation prize of sorts, detracting attention from the exclusion of same-sex couples from marriage".[62] Speaking in the context of the United Kingdom, Cretney believes that by arguably meeting the needs of the gay and lesbian community with registered civil partnership laws, the British Government "no doubt thought it would avoid the demands" for same-sex marriage.[63] Indeed, it did not, and same-sex marriage became legal in England and Wales (but not Scotland or Northern Ireland) on 29th March 2014.[64] Scotland will follow suit shortly as the Marriage and Civil Partnership (Scotland) Act 2014 was passed by the Scottish Parliament in February 2014 and the first same-sex marriages are expected to take place there in the Autumn of 2014.[65]

However, is the enactment of civil partnership legislation really conferring

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[59] Lucy Crompton, 'Civil Partnership Bill 2004: The Illusion of Equality' (2004) 34 Family Law 888, 889.

[60] These States are France, the United Kingdom, Belgium, Denmark, Spain, Portugal, Sweden and the Netherlands.

[61] Robert Wintemute, 'Marriage or 'Civil Partnership' for Same-Sex Couples: Will Ireland Lead or Follow the United Kingdom?', in Oran Doyle and William Binchy (eds.), *Committed Relationships and the Law* (Four Courts Press, 2007) 97.

[62] Fergus Ryan, 'The General Scheme of the Civil Partnership 2008: Brave New Dawn or Missed Opportunity?' (n 19) 51.

[63] Stephen Cretney, 'Comment: Sex is Important' (2004) 34 Family Law 777.

[64] The Marriage (Same-Sex Couples) Act entered into force on 29th March 2014 and applies to England and Wales.

[65] See Mark Hennessy, 'Scotland changes same-sex marriage law: First marriages set to take place later this year following free vote in parliament' *Irish Times* (Dublin, 5th February 2014) 11.

an unequal, second-class status on committed same-sex couples? Perhaps the answer to this question depends on an analysis of the sociological concept of the "functional family" in order to determine whether same-sex couples are in an analogous situation to heterosexual married couples. As Millbank points out, the kernel of 'functional family' claims in law is that rights should flow from the way a relationship functions rather than being limited by its legal form.[66] Ryan observes that this approach involves "referring not to the respective characteristics of the parties to the relationship but rather to the characteristics of the relationship itself".[67] Glennon believes that the functional family model has "the capacity to transcend discriminatory assumptions based on sexual orientation."[68] The functional family approach to same-sex relationships was prominent in cases in the U.K. involving challenges to provisions of the Rent Acts by a same-sex partner seeking the right to succeed to his deceased partner's tenancy as either his 'spouse' or a member of his 'family'. In *Fitzpatrick v Sterling Housing Association,* the House of Lords held that the homosexual plaintiff was entitled to succeed to the tenancy as a member of his deceased partner's 'family'.[69] Their Lordships came to this conclusion by having recourse to the 'functional family' model. Lord Nicholls observed that whether sexual partners are heterosexual or homosexually orientated:

> There is the scope for the intimate love and affection and long-term commitment which typically characterise the relationship of husband and wife.[70]

Lord Slynn recognised that same-sex unions can have the hall marks of a familial relationship, such as "a degree of mutual interdependence, of the sharing of lives, of caring and love, of commitment and support."[71] In the later rent-control case of *Ghaidan v Godin-Mendoza,*[72] which involved an identical claim but where the

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[66] Jenni Millbank, 'The Role of 'Functional Family' in Same-Sex Family Recognition Trends' (2008) 20 (2) Child and Family Law Quarterly 155.
[67] Fergus Ryan, 'Sexuality, Ideology and the Legal Construction of Family: Fitzpatrick v. Sterling Housing Association' (2000) 3(3) Irish Journal of Family Law 2, 6.
[68] Lisa Glennon, 'Fitzpatrick v Sterling Housing Association Ltd – An Endorsement of the Functional Family?' (2000) 14 (3) International Journal of Law, Policy and the Family 226, 245.
[69] [1999] 4 All ER 705.
[70] ibid 720.
[71] ibid 714.
[72] [2004] 2 AC 557.

plaintiff was found eligible to succeed to his partner's tenancy as a 'spouse', Baroness Hale further endorsed the functional equality between intimate, stable opposite-sex and same-sex relationships by stressing that "homosexual couples can have exactly the same sort of inter-dependent couple relationship as heterosexuals can" filled with the love, warmth and "sense of belonging to one another which is the essence of being a couple".[73]

In Ireland's premier same-sex marriage case, *Zappone v Revenue Commissioners,* Dunne J found that the lesbian couple seeking recognition of their Canadian marriage under Irish law clearly had "a long-lasting loving relationship of mutual commitment".[74] More recently, in *Schalk and Kopf v Austria,* the first same-sex marriage case to come before it, the European Court of Human Rights acknowledged "that same-sex couples are just as capable as different-sex couples of entering into stable committed relationships" and as a result they have a "need for legal recognition and protection of their relationship".[75] All of these analyses could lead one to conclude, as Ward LJ did in the Court of Appeal in *Fitzpatrick v Sterling Housing Association*, that "[n]o distinction can sensibly be drawn between [same-sex and opposite-sex] couples in terms of love, nurturing, fidelity, durability, emotional and economic interdependence."[76] Therefore, on this analysis the introduction of civil partnership instead of same-sex marriage by the Fianna Fáil/Green Party coalition government appears manifestly arbitrary and unfair.

However, there are judges and academics who do not subscribe to the concept of the "functional family" and hence for them civil partnership is an adequate mode of same-sex relationship recognition because the issue remains what a couple *is*, not what it *does*. This is true of Lord Millett, who dissented in *Ghaidan v Godin-Mendoza*. His Lordship felt that the pending Civil Partnership Act 2004 in the U.K. was a logical separate but equal form of relationship recognition for same-sex couples because he expressly stated that:

> Persons cannot be or be treated as married to each other or live together as husband and wife unless they are of the opposite sex. It is noticeable that, now that Parliament is introducing remedial legislation, it has not sought to

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[73] ibid 608.
[74] *Zappone v Revenue Commissioners and Others* (n 4) 501.
[75] *Schalk and Kopf v Austria* App No 30141/04 (ECHR, 24th June 2010) [99].
[76] [1998] 1 FLR 6, 39.

> do anything as silly as to treat same-sex relationships as marriages, whether legal or *de facto*. It pays them the respect to which they are entitled by treating them as conceptually different but entitled to equality of treatment.[77]

Lord Millett did not elaborate as to why, in his view, it is essential to marriage that the parties are of the opposite sex and consequently his strict adherence to a form over substance approach to marriage is rather unsatisfying from a theoretical perspective. Similarly, the U.S. academic Lynn D. Wardle is of the opinion that "the heterosexual dimensions of the relationship are at the very core of what makes 'marriage' what it is",[78] and he proceeds to explain why marriage is unique:

> It is the *integration* of the universe of gender differences (profound and subtle, biological and cultural, psychological and genetic) associated with sexual identity that constitutes the core and essence of marriage... [t]hus, cross-gender uniting in marriage is not merely a matter of arbitrary definition or semantic word-play; it goes to the heart of the very *concept* or *nature* of the marriage relationship itself.[79]

Hence for Wardle, "form reflects substance".[80] However, it is respectfully submitted that Wardle's reasoning here is thin, and that a (slightly) more plausible ground for differentiating between same-sex relationships and heterosexual marriage based on this notion of the "complementarity of the sexes" is that of the "unique procreative potential" ordinarily associated with male-female unions.

(i) The Public Interest Argument for Privileging Opposite-Sex Marriage

While we have seen that procreative potential is irrelevant in the context of civil marriage, Stith nonetheless makes a compelling *public interest* argument for the

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[77] [2004] 2 AC 557, 589 (Lord Millett, dissenting).
[78] Lynn D. Wardle, 'Form and Substance in Committed Relationships in American Law', in Oran Doyle and William Binchy (eds.), *Committed Relationships and the Law* (Four Courts Press, 2007) 61, 76.
[79] ibid.
[80] ibid 86.

continued legal restriction of marriage to heterosexual couples only:

> Sexual relations between women and men may generate children, beings at once highly vulnerable and essential for the future of every human community. The good of those children as well as the common good thus require that the State do all it can to channel such relations into stable and secure relationships.[81]

Stith argues that marriage enables children "to know who their true father is and thus to know on whom they have a legal and moral claim for support" and "to have their true father at home, where he can do them the most good."[82] Further, he states that because of the time and effort involved in responsible childrearing and the eventual benefits of this for the whole community through the production of "educated and disciplined citizens" it makes sense for the State to provide concrete rewards to married couples in the form of tax and social security benefits. He concludes that "the child-centred reasons for channelling heterosexual intercourse into exclusive and stable unions do not apply to sexual acts between persons of the same sex, since such acts can never generate children."[83] If we accept that the public interest in the State's approval of and support for sexual relationships through its marriage laws is child-centred, then perhaps civil partnership is an adequate form of relationship recognition for same-sex couples because, according to Stith, there "is no possible child-related reason why the public community should care when [same-sex unions] are formed or dissolved."[84]

Stith's espousal of a *historical*, allegedly child-centric public interest in establishing and maintaining marital relationships is meritorious, but the author's argument here appears to be based more on a moral repugnance of same-sex sexual activity than any genuine child-centric public interest in promoting the formation

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[81] Richard Stith, 'On the Legal Validation of Sexual Relationships' in Scott Fitzgibbon, Lynn D. Wardle and A. Scott Loveless (eds), *The Jurisprudence of Marriage and Other Intimate Relationships* (W.S. Hein & Co. 2010) 143, 147.

[82] Marriage encourages men to remain with women for the good of the children of the union and therefore the institution is arguably a state-imposed means of disciplining sexuality. See further Murray, "Marriage as Punishment" (2012) 112 (1) Columbia Law Review 1.

[83] See also the discussion in Robert John Araujo, S.J., 'Same-Sex Marriage-From Privacy to Equality: The Failure of the "Equality" Justifications for Same-Sex Marriage' in Scott Fitzgibbon, Lynn D. Wardle and A. Scott Loveless (eds), *The Jurisprudence of Marriage and Other Intimate Relationships* (W.S. Hein & Co. 2010) 195, 202-203.

[84] Richard Stith (n 81) 154.

and maintenance of opposite-sex marriages. Indeed, Stith's true position is later revealed when he *overtly* employs a moral argument to discourage any legal recognition of same-sex marriage.

(ii) The Moral Argument for Restricting Marriage to Opposite-Sex Couples

Stith argues that civil partnership is a more appropriate form of relationship recognition for same-sex couples, even those with children, because the term "marriage" carries with it a moral meaning that is inappropriate and misleading in the context of same-sex couples.[85] This is because the term "marriage" connotes a sense of new-found moral approval for sexual acts that take place within such a committed union (most likely because such acts can lead to the birth of children in a stable familial environment) and the same cannot be said for same-sex sexual acts that take place within marriage.[86] Stith believes that "traditional natural law morality argues that our sexual fulfilment lies in engaging in only the sort of sex acts for which we are designed in mind and body, namely intercourse within committed different-sex marriage."[87]

However, to argue that all same-sex couples should be denied access to marriage because the sexual acts between the partners in a same-sex marriage would lack the new-found moral approval that society is *perceived* to grant to the partners in an opposite-sex marriage seems absurd. It is similar to arguing that no couple should be allowed to divorce because there exists in society some moral disapproval of such a practice. Why then, does the law allow the marital partners to dissolve their marriage through divorce? The law permits divorce regardless of any moral view on the subject because it has been recognised that some marriages can in fact become irreparably damaged over time and may no longer carry the hallmarks of mutual love and commitment generally associated with marriage. Indeed, it is arguable that the establishment of a "no fault" divorce regime by the Oireachtas actually flies in the face of the traditional or "moral" view of when divorce is legitimate. Bailey argues that "by enacting no-fault divorce statutes the

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[85] Richard Stith (n 81) 154-155.
[86] ibid 154.
[87] ibid 159.

State is violating the principle laid down by God that divorce be based solely on adultery."[88] Hence Irish divorce law is uncoupled from any Christian moral approval of divorce, just as Irish marriage law should now evolve beyond any Christian moral approval of marriage as espoused by Stith. The Oireachtas legislated for divorce because the people in a referendum recognised the reality that marriages can and do break down and lack many essential features associated with marriage, so it would be more pragmatic for the parties to divorce rather than remain married. By analogy, the Oireachtas should now allow the people to decide by referendum if same-sex marriage should be provided for under Irish law because, as the overwhelming support of the members of the Constitutional Convention for same-sex marriage seems to indicate, the people appear ready to accept the reality that same-sex relationships can and do contain many of the essential features associated with marriage.

Further, there are indeed *contemporary* and, in some instances, child-centric public interest arguments for embracing same-sex marriage. Clearly, the fact that same-sex couples "are willing to embrace marriage's solemn obligations of exclusivity, mutual support, and commitment to one another is a testament to the enduring place of marriage in our laws and in the human spirit."[89] Ryan observes that "marriage represents an identification with, and a symbolic reaffirmation of, prevailing social understandings and moral norms".[90] Wallbank and Dietz have pointed out that the British Prime Minister, David Cameron "supports gay marriage not *in spite* of being a conservative, but *because* he is a conservative – and believes in the values of commitment and its power to strengthen society."[91] Further, given that the substance of same-sex relationships is now widely understood to be analogous with that of opposite-sex marital relationships, Cox is correct to acknowledge that:

[I]t is quite simply unfair that something so important both socially and

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[88] Les Bailey, 'No-Fault Divorce – Beyond Good and Evil' (1972-1973) 4 Colonial Law Review 10, 16.

[89] *Goodridge v Department of Public Health* (2003) 798 NE2d 941, 965.

[90] Fergus Ryan, 'From Stonewall(s) to Picket Fences: The Mainstreaming of Same-Sex Couples in Contemporary Legal Discourses' in Oran Doyle and William Binchy (eds.), *Committed Relationships and the Law* (Four Courts Press 2007) 1, 58.

[91] Julie Wallbank and Chris Dietz, 'Lesbian Mothers, Fathers and Other Animals: Is the Political Personal in Multiple Parent Families?' (2013) 25 (4) Child and Family Law Quarterly 451, 457.

> personally and, at its best, so wonderful, should be denied to people simply because their love in order to be properly expressed and explained is directed towards someone of the same gender.[92]

Therefore, since same-sex couples are "not seeking to destroy the institution of marriage, but to share in its benefits and protections"[93] and embrace everything that it stands for, it is submitted that there is a contemporary (albeit not necessarily a child-centric) public interest in opening up the institution to embrace same-sex marriage. Marriage equality would actually help to further assimilate same-sex couples into our society, and surely that is of benefit to the common good?

Second, some same-sex couples are raising the biological child of one of the partners from a previous heterosexual relationship and same-sex couples can also choose to have children via recourse to assisted human reproduction. There is nothing to suggest that they cannot raise these children to be responsible citizens who benefit the community at large. Although none of these children are generated by the sexual acts between the same-sex partners, the fact is that children can be brought into a same-sex household and for the good of the normative development of these children and indeed the common good surely it would be "good social policy to give gay relationships the ultimate seal of approval"[94]by allowing them to be recognised as marriages?

Thus there are *contemporary,* and in some cases child-centric, public interest arguments for recognising and supporting same-sex marriages. It is submitted that Stith's public interest argument, while meritorious, must now evolve to encompass these equally logical public interest arguments in favour of permitting same-sex marriage.

(iii) The Child-Centric Argument for Restricting Marriage to Opposite-Sex Couples

Wardle proffers a further argument against permitting same-sex marriage, one that

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[92] Neville Cox, 'A Question of Definition: Same-Sex Marriage and the Law' in Oran Doyle and William Binchy (eds.), *Committed Relationships and the Law* (Four Courts Press 2007) 104, 123.
[93] Mark E. Wojcik, 'Wedding Bells Heard Around the World: Years from Now, Will we Wonder why we Worried about Same-Sex Marriage?' (2003-2004) 24 Northern Illinois University Law Review 589, 680.
[94] Neville Cox (n 92) 121.

is (allegedly) based on same-sex parenting and child development:

> Until the research clearly and honestly shows no significant increase in potential for harm of the children, it would be irresponsible to give legal status and benefits to other 'committed relationships' comparable to that accorded to married conjugal parents.[95]

However, this author cannot help but feel that, in light of a growing body of affirmative evidence pertaining to same-sex parents and child development,[96] the child welfare argument put forward by Wardle to discourage the global introduction of same-sex marriage is really nothing more than a stalling mechanism designed to mask an underlying moral disapproval. Indeed, Wardle's absolute disdain for same-sex relationships is evident in much of his writing.[97] He castigates all same-sex relationships, stating that:

> [P]romiscuity, infidelity, multiple sexual partners, and dangerous sexual practices are the behavioural norms among gay couples (and also, to a lesser extent, lesbian couples) rather than monogamy and self-control which are the norms fostered by and nurtured in heterosexual marriages.[98]

He cautions against legalising same-sex marriage because "redefining marriage to include gay and lesbian couples will have a profound impact upon sexual morality and public health in society".[99] Indeed, his moral disapproval of same-sex marriage

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[95] Lynn D. Wardle (n 78) 79.

[96] See Elizabeth Short et al., Lesbian, Gay, Bisexual and Transgender (LGBT) Parented Families: A Literature Review prepared for The Australian Psychological Society (The Australian Psychological Society 2007); Timothy J. Biblarz and Judith Stacey, 'How does the Gender of Parents Matter?' (2010) 72 (1) Journal of Marriage and Family 3; John Tobin and Ruth McNair, 'Public International Law and the Regulation of Private Spaces: Does the Convention on the Rights of the Child Impose an Obligation on States to Allow Gay and Lesbian Couples to Adopt?' (2009) 23 (1) International Journal of Law, Policy and the Family 110.

[97] Lynn D. Wardle, 'The Boundaries of Belonging: Allegiance, Purpose and the Definition of Marriage' (2011) 25 Brigham Young University Journal of Public Law 287, 315; Lynn D. Wardle, 'Gender Neutrality and the Jurisprudence of Marriage' in Scott Fitzgibbon, Lynn D. Wardle and A. Scott Loveless (eds), *The Jurisprudence of Marriage and Other Intimate Relationships* (W.S. Hein & Co. 2010); Lynn D. Wardle, 'The Attack on Marriage as the Union of a Man and a Woman' (2007) 83 North Dakota Law Review 1365, 1374.

[98] Lynn D. Wardle, 'The Attack on Marriage as the Union of a Man and a Woman' (2007) 83 North Dakota Law Review 1365, 1374.

[99] ibid 1377.

is so intense that Wardle will even resort to lurid sensationalism to discourage legislators worldwide from providing for marriage equality. He solemnly warns that "[a]s goes marriage so goes the family, and as goes the family so goes the nation, and the world."[100] Consequently, child-related interests are not really at the top of Wardle's agenda and one is more inclined to agree with Pennings' assertion that:

> The basic position against homosexual parenting is not determined by the expected outcome on the welfare of the children but by moral repugnance and a belief in the inherent wrongness of homosexuality.[101]

On balance, it would have been more appropriate for Irish law to embrace same-sex marriage rather than civil partnership, though as we have seen in Chapter 1 there may be a number of reasons as to why this did not occur in 2007-2008. The functional similarities between same-sex and opposite-sex couples are well documented above, and I have also proffered some contemporary, logical public interest arguments for allowing same-sex couples to marry. Further, I have demonstrated that the law does not concern itself with any moral view on divorce, and so it should be as regards marriage: the law now needs to embrace same-sex marriage to aid the assimilation of same-sex relationships into Irish society and for the good of those children being raised by committed same-sex couples. Same-sex couples should no longer only be allowed to enter into civil partnerships and remain relegated to second-class status in Ireland.

Civil Partnership: Assimilating Homosexuality into Society?

In the Seanad, Senator Fidelma Healy Eames spoke of the "exclusion, bullying and homophobia" experienced by young gay and lesbian people who consequently became early school leavers because "they were not understood or accepted because of their sexuality".[102] The Senator felt that the enactment of civil

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[100] Lynn D. Wardle, 'The Boundaries of Belonging: Allegiance, Purpose and the Definition of Marriage' (2011) 25 Brigham Young University Journal of Public Law 287, 315.
[101] Guido Pennings, 'Evaluating the Welfare of the Child in Same-Sex Families' (2011) 26 (7) Human Reproduction 1609, 1610.
[102] Seanad Deb 7 July 2010, vol 204, col 177.

partnership legislation in Ireland would "go a long way towards normalising their sexual identity".[103] While one hopes that the 2010 Act "will lead to greater social acceptance of same-sex relationships and thus, ultimately, cultural change",[104] this may not necessarily be the outcome. A recent study on homophobia and discrimination on grounds of sexual orientation in the Netherlands is of interest in this respect. In 1998, the Netherlands introduced civil partnership legislation and a mere three years later, in 2001, it became the first country in the world to allow same-sex partners to marry each other. In 2006, the Netherlands Institute for Social Research carried out research into the social acceptance of homosexuality in the Netherlands.[105] The researchers found that homosexuality is widely accepted, but that young people, religious people and immigrants tend to adopt a negative attitude towards it. Further, the researchers concluded that homosexuality remains a private matter: people expect more 'reserved behaviour' from homosexuals than from heterosexuals out in public. In addition, incidents of physical violence against homosexual persons are on the increase.[106]The Netherlands has only provided formal recognition for same-sex unions for sixteen years, so perhaps greater assimilation of homosexual relationships into society will take somewhat longer to gauge. Therefore, it is submitted that the impact of the 2010 Act on the normalisation of homosexuality in Ireland is best left to be assessed decades from now.

The Regulation of Cohabitation under the 2010 Act: Achieving an Appropriate Equilibrium between Protection and Paternalism?

The difficulty with the State's opt-in registration models of marriage for opposite-sex couples and now civil partnership for same-sex couples has been amply identified by Walsh and Ryan:

> [A]n inherent problem with using registration as the sole means of ameliorating the position of *de facto* couples is that it neglects the position

[103] ibid.
[104] *Civil Partnership: A Framework for the Legal Recognition of Same-Sex Couples* (DTI, Women and Equality Unit, 2003) [1.5].
[105] EU Fundamental Rights Agency - Fralex, *The Social Situation Concerning Homophobia and Discrimination on Grounds of Sexual Orientation in the Netherlands* (Vienna: Fralex, 2009) 4-5.
[106] ibid.

> of people that are not party to a formalised relationship.[107]

Thus back in 2006 the Law Reform Commission recommended in its *Report on the Rights and Duties of Cohabitants* that it would be wise to have a "registration model and redress model" operating in conjunction with one another because "rather than being mutually exclusive" they could logically co-exist together with the latter system acting "as a safety-net or default system for those couples who have not opted in" to the former regime.[108] In light of this pertinent recommendation and given the sheer numbers involved, it is perhaps unsurprising that the Oireachtas sought to make some legal provision for cohabitants in Part 15 of the 2010 Act. The 2006 Census highlighted that there were 121,800 cohabiting opposite-sex couples in Ireland, an almost quadruple increase on the figure of 31,300 recorded in the 1996 Census.[109] Indeed, the 2011 Census records that the number of such couples now stands at 143,600.[110] In addition, the number of cohabiting same-sex couples has almost doubled in five short years. The 2006 Census indicated that there were 2,090 such couples in Ireland; the 2011 Census states that there are 4,042 same-sex couples, and of the 230 of these couples that have children, the vast majority are female.[111] However, some academic commentators have voiced concern over the introduction of a statutory regime for Irish cohabitants. Ryan observes that while spouses and civil partners enter into formal unions by consent:

> By contrast, cohabitants do not formally commit to legal rights and obligations, and as such, some caution must be exercised in imposing obligations on cohabitants in the absence of agreement.[112]

Mee advocates further research and urges legislative caution in the sphere of cohabitants' rights:

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[107] Judy Walsh and Fergus Ryan (n 16) 137.
[108] Law Reform Commission, *Report on the Rights and Duties of Cohabitants* (LRC 82-2006) 19.
[109] Census 2006, *Principal Demographic Results: Commentary* (CSO 2007).
[110] Census 2011, *This is Ireland (Part 1)* (n 6).
[111] ibid.
[112] Fergus Ryan, *Annotated Legislation: Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010* (n 20) 16.

> In relation to cohabitation outside marriage/civil partnership, it is important to guard against the naïve assumption that immediate legislation is the appropriate response to any complex social phenomenon...prior to attempting to develop a new scheme for cohabitants, it would be highly desirable to commission empirical research on the social phenomenon of cohabitation, rather than attempting to shape a legislative scheme on the basis of guess-work as to the reality of cohabitants' lives.[113]

Similar concerns were voiced by Hörster when a legal framework for cohabitation was being debated by the Portuguese legislature in the 1990's. Hörster recognised that while cohabitation legislation might constitute a "well-intentioned" attempt to protect cohabitants, "[l]egislators should avoid taking protective measures (or paternalistic ones) before collecting enough reliable information".[114] These concerns may be valid in the Irish context when one considers the four different stages of cohabitation ably outlined by Kiernan:

> Simplifying, in the first stage cohabitation emerges as a deviant or avante-garde phenomenon practised by a small group of the single population, whilst the great majority of the population marry directly. In the second stage cohabitation functions as either a prelude or a probationary period where the strength of the relationship may be tested prior to committing to marriage and is predominantly a childless phase. In the third stage cohabitation becomes socially acceptable as an alternative to marriage and becoming a parent is no longer restricted to marriage. Finally, in the fourth stage, cohabitation and marriage become indistinguishable with children being born and reared within both, and the partnership transition could be said to be complete.[115]

Based on the findings outlined in Census 2011, Ireland would currently appear to be at the second of the four stages described by Kiernan. Census 2011 indicates

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[113] John Mee, 'A Critique of the Cohabitation Provisions of the Civil Partnership Bill 2009' (2009) 12 (4) Irish Journal of Family Law 83, 90.

[114] Heinrich Ewald Hörster, 'Does Portugal Need to Legislate on *de facto* Unions?' (1999) 13 (3) International Journal of Law, Policy and the Family 274, 279.

[115] Kathleen Kiernan, 'The Rise of Cohabitation and Childbearing Outside Marriage in Western Europe' (2001) 15 (1) International Journal of Law, Policy and the Family 1, 3.

that "cohabitation is often a precursor to marriage in Ireland" and that 57.8% of cohabiting couples have no children.[116] Thus, as Ireland is not a country at stage four where cohabitation and marriage are virtually interchangeable, a sensitive approach to cohabitants' rights would currently seem appropriate.[117] Indeed, in our neighbouring jurisdiction, the United Kingdom, the approach to cohabitation has been characterised by dynamism and caution. Six years ago the Scottish Executive forged ahead and introduced a redress scheme for cohabitants via the Family Law (Scotland) Act 2006.[118] McCarthy asserts that the Scottish cohabitation provisions had a "somewhat elephantine gestation period", having first been proposed in a different form in the Scottish Law Commission's *Report on Family Law* in 1992.[119] This is in clear contrast to Ireland, where:

> [T]he idea of legislative reform seems to have gained traction simply because of an awareness of the fact that the social phenomenon of cohabitation was increasing in importance…and of the fact that legislative reform had been implemented, or was under consideration, in cognate jurisdictions.[120]

Further, the Scottish statute stipulates no minimum period of cohabitation before one cohabitant can seek redress from the other and this is irrespective of whether there are children of the relationship. A similar scheme was recommended by the Law Commission of England and Wales in a report on the phenomenon of cohabitation in 2007,[121] and while that body recommended no minimum duration period where there is a child of the relationship, it nonetheless proposed a minimum requirement of between 2-5 years cohabitation for childless cohabitants, but left this for the Westminster Parliament to decide. However, the British Government decided to exercise caution and to await the outcome of research by

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[116] Census 2011, *This is Ireland (Part 1)* (n 6).
[117] Brian Tobin, "The Regulation of Cohabitation in Ireland: Achieving Equilibrium between Protection and Paternalism?" (2013) 35 (2) Journal of Social Welfare and Family Law 279, 281.
[118] Family Law (Scotland) Act 2006, section 28.
[119] Frankie McCarthy, "Cohabitation: Lessons from North of the Border?" (2011) 23 (3) Child and Family Law Quarterly 277, 280.
[120] John Mee, "Cohabitation Law Reform in Ireland" (2011) 23 (3) Child and Family Law Quarterly 323, 326.
[121] Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown,* Law Com No 307 (HMSO 2007).

the Scottish Executive before taking any steps towards implementing the Law Commission's proposals in England and Wales. The British Government hoped to extrapolate from the Scottish Executive's eventual findings the "cost of such a scheme and its efficacy in resolving the issues faced by cohabitants when their relationships end".[122] In 2011, the British Government announced that the findings of the research into the Scottish legislation did not provide a sufficient basis for a change in the law of England and Wales, and therefore it would not be taking forward the Law Commission's recommendations in the present Parliament.[123] Thus, Miles, Wasoff and Mordaunt observe that "while reform is not ruled out, England and Wales must continue to wait."[124]

Although the Oireachtas decided to proceed with statutory regulation for cohabitants in Part 15 of the 2010 Act, it is submitted that the approach adopted therein achieves an equitable balance between the competing concerns of undue paternalism and providing protection for a vulnerable cohabitant.[125] First, cohabitating relationships are only recognised for redress purposes once they have ended by means of death or dissolution. Therefore, unlike marriage or civil partnership where parties 'opt-in' at the outset, cohabitation in Ireland is recognised retrospectively, and only then if certain criteria are fulfilled. These criteria comprise the statutory time period(s) applicable before one cohabitant can seek redress from the other at the end of their relationship and the requirement that the applicant must be financially dependent on the respondent. In addition, cohabitants can choose to 'opt-out' of the statutory redress scheme by agreement. As we shall see, Ireland's recently introduced cohabitation regime appears to have "appropriate regard to the value of autonomy of private relations while providing a safety net to address the needs of particularly vulnerable persons."[126]

Who is a Cohabitant under the 2010 Act?

Section 172 (1) defines a cohabitant as one of two adults (whether of the same or

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[122] Brian Tobin (n 14) 326.
[123] Jo Miles, Fran Wasoff and Enid Mordaunt, "Cohabitation: Lessons from Research North of the Border? (2011) 23 (3) Child and Family Law Quarterly 302, 322.
[124] ibid.
[125] Brian Tobin (n 117) 282.
[126] Law Reform Commission, *Report on the Rights and Duties of Cohabitants* (n 108) 21.

the opposite sex) who live together as a couple in an intimate and committed relationship and who are not related to each other within the prohibited degrees of relationship or married to each other or civil partners of each other. Section 172 (2) provides that when determining whether or not two adults are cohabitants, a court must take into account all the circumstances of the relationship and in particular have regard to the following, including: (a) the duration of the relationship; (b) the basis on which the couple live together; (c) the degree of financial dependence of either adult on the other and any agreements in respect of their finances; (d) the degree and nature of any financial arrangements between the adults including any joint purchase of property; (e) whether there are one or more dependent children; (f) whether one of the adults cares for and supports the children of the other; and (g) the degree to which the adults present themselves to others as a couple.[127]

The redress model of relationship recognition, designed to accord legal protection to opposite-sex and same-sex cohabitants who do not marry or enter into a civil partnership, now also forms part of Irish law by virtue of Part 15. This model provides that once cohabitants who satisfy the above definition have been living together for five years, or two years where there is a dependent child of the relationship, they become "qualified cohabitants", after which a "financially dependent" cohabitant can apply to the court for certain reliefs upon termination of the relationship. Such reliefs can include a compensatory maintenance order, a pension adjustment order or a property adjustment order where proper provision cannot be made for the applicant through other forms of ancillary relief. Section 195 provides that an application for relief must "save in exceptional circumstances, be instituted within two years of the time that the relationship between the cohabitants ends, whether through death or otherwise". A qualified cohabitant can also seek an order that provision be made out of the net estate of a deceased cohabitant where inadequate or no provision has been made for him/her in the deceased's will or under the rules of intestacy.[128] If the qualified cohabitants were in a relationship immediately prior to the death then the applicant does not need to establish financial dependence; otherwise this requirement is applicable. This is

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[127] All cohabitants who satisfy this definition have the right to make cohabitation agreements, to succeed to a residential tenancy and to sue for wrongful death (subject to a requirement of three years' cohabitation). The 2010 Act did not address cohabitants and domestic violence, but Section 60 of the Civil Law (Miscellaneous Provisions) Act 2011 extends barring and safety orders to cohabitants.

[128] Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, section 194.

logical because, as Mee points out:

> [t]his reflects the fact that, in such cases, neither party ever withdrew his or her commitment to the relationship and so there seems to be a 'qualitative difference' from those cases where the relationship ended in acrimony.[129]

It should be noted that the provisions of Part 15 are partially retrospective in nature. While the 2010 Act came into force on January 1st, 2011, section 206 nonetheless provides that:

> An order for redress referred to in section 173 shall only be made if the application for it is made with respect to a relationship that ends, whether by death or otherwise, after the commencement of this section but the time during which two persons lived as a couple before the commencement date is included for the purposes of calculating whether they are qualified cohabitants within the meaning of this Part.

Since periods of cohabitation pre-dating the coming into force of the 2010 Act may be reckonable in calculating the qualifying cohabitation period of two or five years, Brazil argues that the retrospective application of the statute may give rise to future challenge.[130]

It is important to note that an adult cannot be a qualified cohabitant if one or both of the adults is or was, at any time during the relationship concerned, married to someone else and, at the time the relationship ends, has not lived apart from his or her spouse for at least four of the previous five years.[131] Nonetheless, once this period has passed, a person may simultaneously hold the status of spouse and qualified cohabitant. Most likely to comply with Article 41.3.1° of the Constitution, section 173 (5) of the 2010 Act nonetheless prevents a court from making an order for redress in favour of a qualified cohabitant that would affect any right of any person to whom the other cohabitant is or was married.

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[129] John Mee, 'The Property Rights of Cohabitants under the 2010 Act' (Conference on the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, Trinity College Dublin, 2 April 2011).
[130] Patricia Brazil (n 36) 218.
[131] Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, section 172 (6).

Intimate and Committed Relationship

The requirement of an "intimate and committed relationship" is noteworthy for two reasons. First, in the Law Reform Commission's *Consultation Paper on The Rights and Duties of Cohabitees*, one of the documents from which the concept of a redress model for Irish law was derived, it was recommended that the redress model should be triggered once cohabitants had been living together "in a 'marriage-like' relationship" for a statutorily specified period of time.[132] However, in its later *Report on the Rights and Duties of Cohabitants*, the Commission decided to avoid any marriage analogy and changed its recommendation so that the redress model would instead apply to two persons who had been living together in an "intimate relationship".[133] This latter, more guarded wording was eventually largely adopted by the Oireachtas. The most likely explanation for this change is that the Oireachtas may have wanted to attempt to protect Part 15 of the 2010 Act from any future constitutional challenge, hence the omission of any reference to "marriage". However, such wording also sends out a symbolic message to cohabitants because it helps to dissuade the fear that the State may be extending the obligations of marriage to them. This is important because, as Chan points out:

> [E]xtending marriage rights and obligations to *de facto* partners would not be tolerant. It would be intolerant. It would take away a meaningful option of cohabitation from those who do not want to marry, and who do not want all the implications of marriage.[134]

Second, as far as same-sex unions are concerned, the requirement that a cohabiting relationship must be "intimate and committed" is also symbolically important as it recognises that same-sex relationships are akin to conjugal unions, unlike non-sexual relationships like those between two brothers or cousins who live together; this also precludes persons in non-sexual relationships from being governed by the redress model because intimacy is only a feature of human relationships with a sexual dimension. Indeed, section 172(3) makes it clear that sexual intimacy is

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[132] Law Reform Commission, *Consultation Paper on the Rights and Duties of Cohabitees* (LRC CP 32-2004) [1.07].
[133] Law Reform Commission (n 108) 2.
[134] Winnie Chan, 'Cohabitation, Civil Partnership, Marriage and the Equal Sharing Principle' (n 55) 55.

envisaged by the term "intimate relationship", and that such intimacy must have been present in the beginning in order for a relationship to qualify under Part 15 of the Act. However, as Ryan points out, "the term 'commitment' is not susceptible to easy calibration",[135] so the notion of a "committed relationship" is unclear. Indeed, Byrne and Binchy argue that in the context of two adults who live together in a sexual relationship outside marriage (or presently, civil partnership) the very nature of commitment is obscure.[136]

During the passage of the Act through the Houses of the Oireachtas, some politicians considered non-sexual relationships to be as worthy of legislative protection as intimate unions. However, Bala observes that globally, adults residing together in non-conjugal relationships are not seeking a legal status remotely akin to spousal. He acknowledges that amongst such persons "[i]n particular, there seems to be no interest or expectation that there should be any obligations, such as support claims, extending beyond the termination of cohabitation."[137] Indeed, Graycar and Millbank observe that there is "no empirical evidence to demonstrate an unmet legal need for broadly based recognition of non-couple relationships, nor any form of political or social mobilising by non-couples."[138] Hence one is inclined to agree with the view expressed by Doyle that "people in such relationships do not aspire to the same exclusivity that is generally accepted as the ideal in sexual relationships".[139]

Financial Dependency

As mentioned, a cohabitant will only be entitled to relief under Part 15 of the Act if s/he was "financially dependent on the other cohabitant". Mee is critical of this requirement because "it provides no remedy for claimants who have suffered major

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[135] Fergus Ryan, *Annotated Legislation: Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010* (n 20) 273.
[136] Raymond Byrne and William Binchy (n 30) 394.
[137] Nicholas Bala, 'Controversy over Couples in Canada: The Evolution of Marriage and Other Adult Interdependent Relationships' (2003) 29 Queen's Law Journal 41, 98.
[138] Reg Graycar and Jenni Millbank, "From Functional Family to Spinster Sisters: Australia's Distinctive Path to Relationship Recognition" (2007) 24 Journal of Law and Policy 121, 153. See also the discussion in Oran Doyle, "Sisterly Love: The Importance of Explicitly Assumed Commitment in the Legal Recognition of Personal Relationships" in Scott Fitzgibbon, Lynn D. Wardle and A. Scott Loveless (eds), *The Jurisprudence of Marriage and Other Intimate Relationships* (W.S. Hein & Co. 2010).
[139] Oran Doyle, 'Moral Argument and the Recognition of Same-Sex Partnerships', in Oran Doyle and William Binchy (eds.), *Committed Relationships and the Law* (Four Courts Press, 2007) 155.

financial loss during the relationship but have not become "financially dependent" as a result".[140] Mee considers how a cohabitant who has sacrificed a career to work in the home caring for the family would likely be "financially dependent" and entitled to a remedy under the Act. However, such a person would be disallowed a remedy if s/he suffered the same economic loss but inherited from a parent and thus was not rendered financially dependent upon the termination of the cohabitation. Mee believes that in the latter situation a cohabitant could be "equally deserving" of a remedy. Mee argues that the financial dependency criterion:

> [a]ttempts to restrict the scope of the scheme so that it will not go too far in creating rights for cohabitants against each other, resulting in a half-hearted approach that leads to indefensibly arbitrary results.[141]

This author fails to see how it is "indefensibly arbitrary" to deny the claimant in the latter scenario outlined by Mee the best of both worlds (*ie* an inheritance *and* a statutory remedy)?[142] In a cohabitation situation this type of claimant should be disentitled to any statutory remedy, because in enacting cohabitation legislation a State's legislature must be respectful of the fact that cohabitants have not made a life-long commitment to one another as with a marriage or a civil partnership and that citizens largely choose to cohabit to avoid any financial obligations extending beyond the cessation of their cohabitation.[143] Indeed, when proposing the redress model, the Law Reform Commission stressed that "not all cohabitants warrant legal redress" [144]and that:

> The objective of reform in the particular context of ancillary relief on breakdown of the relationship is to provide a default scheme of redress that would ensure relationships, in respect of which economic dependency existed and have resulted in some form of vulnerability on termination of the relationship, are protected.[145]

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[140] John Mee, 'The Property Rights of Cohabitants under the 2010 Act' (n 129).
[141] John Mee, 'A Critique of the Cohabitation Provisions of the Civil Partnership Bill 2009' (n 113) 83.
[142] Brian Tobin (n 117) 283.
[143] ibid.
[144] Law Reform Commission, *Report on the Rights and Duties of Cohabitants* (n 108) 3.
[145] ibid.

Further, when the 2010 Act was being debated, the Minister for Justice, Equality and Law Reform, Dermot Ahern stated that the purpose of the redress scheme provided for in Part 15 is to "protect a financially dependent person who may be left *high and dry* if a couple split up".[146] Hence a cohabitant who has sufficient means should not be entitled to seek relief from the other cohabitant at the end of a relationship.[147] Mee gives another example of a cohabitant who would fall foul of the financial dependency requirement because s/he has transferred a valuable family home into joint names and included an express declaration of the beneficial interests to ensure that his/her partner would acquire the intended joint beneficial interest.[148] Again, in this type of scenario the cohabitant transferor has a joint share in a "valuable" family home to rely on once the cohabitation ends. Why should such a claimant also be entitled to statutory relief against the other cohabitant? Yes, the other cohabitant has gained a property interest because of a generous yet arguably unwise choice that was made by his/her partner, but that was the latter party's *choice*, and it has not left him/her financially dependent.[149] In 2002, in the case of *Nova Scotia (Attorney General) v Walsh*, Justice Bastarache, speaking for the majority of the Canadian Supreme Court, stressed the importance of the concept of "freedom of choice" in intimate relationships: "[c]hoice must be paramount…All cohabitants are deemed to have the liberty to make fundamental choices in their lives".[150] Thus, it is opined that the requirement of financial dependency in the 2010 Act arguably achieves as equitable a balance as possible between the competing aims of protecting a truly vulnerable party once cohabitation ends and avoiding undue interference with what is perhaps a fundamental attribute of cohabitation, "the freedom of living according to one's own criteria".[151] Cohabitation is after all synonymous with "an individualistic outlook on intimate relations"[152] and "comes with the ethic that a relationship

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[146] Dáil Deb 1st July 1 2010, vol 714, col 353. Emphasis added.
[147] Brian Tobin (n 117) 284.
[148] John Mee, 'A Critique of the Cohabitation Provisions of the Civil Partnership Bill 2009' (n 113) 86.
[149] Brian Tobin (n 117) 284.
[150] *Nova Scotia (Attorney General) v. Walsh* [2002] S.C.J. No. 84 (QL), 32 R.F.L. (5th) 81. See the discussion of this case in Nicholas Bala, (n 137) 51.
[151] Heinrich Ewald Hörster (n 114) 274.
[152] Jane Lewis, 'Debates and Issues Regarding Marriage and Cohabitation in the British and American Literature' (2001) 15 (1) International Journal of Law, Policy and the Family 159, 171.

should be ended if either partner is dissatisfied".[153]

Nonetheless, once a cohabitant satisfies the financial dependency requirement the court may grant him/her relief if it is "just and equitable" to do so. Section 173 (3) enables the court to consider numerous factors in this regard, including "the financial circumstances, needs and obligations" of each qualified cohabitant, and "the duration of the parties' relationship, the basis on which the parties entered into the relationship and the degree of commitment of the parties to one another", "any physical or mental disability" of the applicant cohabitant, and "the conduct of each of the cohabitants, if the conduct is such that, in the opinion of the court, it would be unjust to disregard it". Consequently, Mee observes that the court can make "whatever order is 'just and equitable' in light of a wide-ranging list of factors" and such order can go far beyond rectifying an applicant's financial dependency as no limitation on the court's power is stipulated in the legislation. Mee concludes that the 2010 Act thus contains:

> [a] dissonance between the trigger for the remedy (financial dependence) and the criteria for granting a remedy (what is just and equitable by reference to a general list of criteria, with no reference to eliminating financial dependence).[154]

Constitutional Concerns

Further, although Mee is (arguably unfairly) critical of the financial dependency criterion, he nonetheless argues that it would be unworkable to simply discard it as a filter and allow the numerous factors listed in section 173 (3) to be determinative of a claimant's case on their own. This is because these factors mirror those applicable in the context of ancillary relief upon divorce, judicial separation or dissolution of a civil partnership and if an opposite-sex qualified cohabitant could seek relief solely by reference to them then qualified cohabitation would be more akin to the institution of marriage and could possibly be unconstitutional as a result. If an opposite-sex cohabitant could seek ancillary relief upon the termination

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[153] Andrew Cherlin, *Marriage, Divorce and Remarriage,* (Harvard University Press 1981) 15-16.
[154] John Mee, 'A Critique of the Cohabitation Provisions of the Civil Partnership Bill 2009' (n 113) 85.

of a cohabitating relationship after as little as two years where there is a child of the relationship, without any strict filter and by reference to virtually the same criteria applicable on divorce or judicial separation, then this would place such a person in a better position than a spouse, who must be living apart from the other spouse for four out of the previous five years before s/he can seek a divorce and the ancillary reliefs attendant upon it. Such a legislative dispensation might very well constitute an "attack" on the institution of marriage which the State pledges itself to guard with special care under Article 41.3.1° of the Constitution.[155] As Walsh and Ryan point out, it is well established "that any legislative arrangement which serves to give preferential treatment to *de facto* couples over their married counterparts is generally inconsistent with the Constitution".[156]

Thus, the financial dependency requirement ensures that the redress model "does not attempt to create ancillary relief as it applies to spouses".[157] Instead, it acts as a necessary springboard for only the most vulnerable cohabitants to have their case decided by reference to the "just and equitable" requirement and the criteria outlined in section 173, and this in turn helps to maintain the balance between a "safety net" approach and making qualified cohabitation another substantive legal institution which may not withstand constitutional scrutiny.[158]

Indeed, constitutional concerns might be part of the reason why qualified cohabitation is a concept only recognised at the end of a relationship, because in a jurisdiction where marriage enjoys special protection under the Constitution, with the type of redress scheme in the 2010 Act "the State is effectively saying that non-marital partnerships are only deserving of recognition once they are over", [159] and only then if the statutory financial dependency criterion and the requisite time frame for seeking relief have both been satisfied. In light of all the statutory restrictions associated with it, the redress model for cohabitants would appear very much in line with the Constitution. In *Nicolaou*, Walsh J implied that cohabitants "may indeed for the purposes of a *particular law*"[160] be regarded as a "family" by the Oireachtas. As we have seen, the redress model for cohabitants' relationships

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[155] Brian Tobin (n 117) 285.
[156] Walsh and Ryan (n 16) 81. See *Murphy v Attorney General* [1982] IR 241.
[157] Law Reform Commission, *Report on the Rights and Duties of Cohabitants* (n 107) 69.
[158] Brian Tobin (n 117) 285.
[159] Oran Doyle (n 139) 154.
[160] *State (Nicolaou) v An Bord Uchtála* [1966] IR 567, 643.

certainly does not confer familial status on cohabiting couples in a general way. Rather, it only regards cohabiting couples as a family (though the term "family" is not expressly used) "for the purposes of a *particular law*", ie the redress scheme, once their relationship has ended and the criteria have been fulfilled.

The Impact of the Statutory Time Frames for Qualified Cohabitation

In addition to the requirement of financial dependency, the Irish cohabitation regime is limited by the statutory time frames applicable before a cohabitant can qualify to seek relief from the courts against his/her partner. While an opposite-sex cohabitant can apply for relief after two years where there is a child of the relationship, the majority of opposite-sex cohabiting couples are childless family units. Further, since *both* qualified cohabitants must be the parents of the "child of the relationship" all same-sex couples would seem to be precluded from applying for relief after two years because *both* parties simply cannot be the biological and/or legal parents of any child born during their cohabitation.[161] Although all other cohabitants can apply for relief after five years or more, Kiernan observes that in most European countries "one in two cohabitations had converted into marriages by the fifth anniversary of the union".[162] Similarly in Ireland, research indicates that there is likely to be a much smaller pool of cohabitants by this time. Halpin and O'Donoghue estimate that in Ireland, 70% of cohabiting relationships last for at least two years, with the average duration of a cohabitation being a little over two years.[163] Further, the authors estimate that only 25% of couples cohabit for six years or more.[164] This low statistic is possibly because for many Irish heterosexual couples, "cohabitation is functioning increasingly as a common route into marriage",[165] with over 40% of new marriages being preceded by a period of cohabitation.[166] Thus, Ryan's observation seems quite apposite:

> Many cohabitants, in other words, are on a "marriage trajectory", and while

[161] Brian Tobin (n 117) 285.
[162] Kathleen Kiernan (n 115) 7.
[163] Halpin and O'Donoghue, *Cohabitation in Ireland: Evidence from Survey Data* (University of Limerick Working Paper 2004-01).
[164] ibid.
[165] ibid.
[166] Census 2011, *This is Ireland (Part 1)* (n 6).

> some cohabitants may split up before marriage, cohabitation is not generally entered into as a long-term rejection of marriage.[167]

Therefore, the number of heterosexual couples satisfying both the five-year time frame *and* the financial dependency requirement is statistically unlikely to be all that significant.[168] One is inclined to agree with Mee's observation:

> In the context of couples without dependent children, it is relatively difficult to envisage cases where one party makes himself or herself 'financially dependent' on the other as a result of the relationship....[169]

One wonders if same-sex cohabitation will now similarly begin to increasingly act as a forerunner for entry into a civil partnership, and if such partnerships will largely come about within five years of the parties' cohabitation? If so this hypothesis, when coupled with the five year cohabitation requirement in section 172 (5) (b) and the financial dependence criterion in section 173 (2), not to mention the minute number of same-sex couples listed in *Census 2011*, would appear to indicate that the redress model provided for in the 2010 Act is in practice also likely to benefit very few same-sex cohabitants in Ireland.[170]

Cohabitation Agreements

A further restriction on the potential efficacy of the redress scheme is to be found in section 202 of the 2010 Act, as this allows cohabitants to enter into enforceable agreements "to provide for financial matters during the relationship or when the relationship ends". The upshot of this is, as Byrne and Binchy observe:

> [t]hus parties contemplating cohabitation may first enter a cohabitants' agreement, excluding financial implications, if they so wish, just as parties in some jurisdictions may validly enter prenuptial agreements with similar

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[167] Fergus Ryan, 'Out of the Shadow of the Constitution: Civil Partnership, Cohabitation and the Constitutional Family' (2012) 47 (2) Irish Jurist 200, 203.
[168] Brian Tobin (n 117) 286.
[169] John Mee, 'The Property Rights of Cohabitants under the 2010 Act' (n 129).
[170] Brian Tobin (n 117) 286.

unromantic intent.[171]

One might wonder how aspiring cohabitants can validly conclude such an agreement since they surely cannot satisfy the definition of cohabitant in section 172 of the 2010 Act because they do not yet "live together as a couple in an intimate and committed relationship"? Nonetheless, section 202 (5) allays any potential anomaly by stipulating that "an agreement that meets the other criteria of this section shall be deemed to be a cohabitant's agreement under this section even if entered into before the cohabitation has commenced." Section 202 (3) states that a cohabitants' agreement may exclude either cohabitant from seeking an order for redress under section 173 or an order for provision from the estate of their partner, although section 202 (4) enables a court to set aside a cohabitants' agreement "in exceptional circumstances, where its enforceability would cause serious injustice". Therefore, cohabitants can contractually 'opt-out' of the redress scheme provided for in Part 15 and avoid being subjected to certain rights and obligations that are associated with it. However, in order to be valid a cohabitants' agreement must comply with certain formalities. In particular, before signing the agreement each cohabitant must receive legal advice independently of the other or, if the parties have not been so separately advised, they must have been advised together and waived in writing their right to independent legal advice.[172] In unison with section 202 of the Irish legislation, the Law Commission of England and Wales recommends that cohabitants should be able to choose to disapply its proposed redress scheme by entering into a private 'opt-out' agreement. However, in contrast to the Irish approach, the Law Commission does not require cohabitants to obtain independent legal advice prior to entering into such an agreement.[173] Perhaps this is preferable, as Mee deems the formalities required in the Irish context by virtue of the 2010 Act to be "onerous and expensive".[174] However, compliance with such formalities does help to support a conclusion that the cohabitation agreement was entered into fairly. As the Law Reform Commission has stressed, "[a]greements must limit opportunities for the exercise of undue

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[171] Raymond Byrne and William Binchy (n 30) 398.
[172] Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, section 202.
[173] Law Commission (n 121) Part 5.
[174] John Mee, 'A Critique of the Cohabitation Provisions of the Civil Partnership Bill 2009' (n 113) 90.

influence on the party who potentially stands to lose more as a result of the agreement."[175] It is arguable that the stringent criteria required in the Irish context also ensure that an agreement is less likely to be struck down by the courts where one of the cohabitants has a change of heart and seeks to challenge the arrangement later on because "the more criteria required, the less opportunity there should be for the courts to overturn it".[176]

Nonetheless, irrespective of the fact that they can disapply the redress scheme, cohabitants' agreements appear unlikely to become the norm in Ireland because they "are primarily designed to regulate economically based relations and transactions where each party acts primarily in his or her own economic interest".[177] Schrama argues that such agreements do not reflect "the love-based nature of the relationship" which dominates the parties' financial behaviour.[178] Indeed, Sutherland points out that "people meet, fall in love (or lust or convenience), begin to live together and life goes on"[179] and "new relationship optimism makes it unlikely that [the parties] will conclude a contract."[180] Consequently, as Bala has pointed out:

> People are generally not psychologically prepared to make contracts about their personal relationships, and the evolving roles and expectations of the partners in non-marital relationships in any event tend to make contracts problematic when dealing with familial rights and obligations.[181]

At this juncture a constitutional *caveat* should be noted regarding cohabitation agreements. In *Ennis v. Butterly*, Kelly J in the High Court refused to enforce such an agreement, finding that:

> Given the special place of marriage and the family under the Irish Constitution…the public policy of this State ordains that non-marital

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[175] Law Reform Commission, *Report on the Rights and Duties of Cohabitants* (n 108) 41.
[176] ibid.
[177] Wendy M. Schrama, 'The Dutch Approach to Informal Lifestyles: Family Function over Family Form? (2008) 22 (3) International Journal of Law, Policy and the Family 311, 321.
[178] ibid.
[179] Elaine E. Sutherland, "From 'Bidie-In' to 'Cohabitant' in Scotland: The Perils of Legislative Compromise" (2013) 27 (2) International Journal of Law, Policy and the Family 143, 145.
[180] ibid 146.
[181] Nicholas Bala (n 137) 54-55.

> cohabitation does not and cannot have the same constitutional status of marriage.[182]

Consequently, Ryan is somewhat apprehensive about the future enforceability of cohabitants' agreements in the Irish courts because:

> [I]n allowing such agreements, s.202 clearly departs from the verdict in Ennis v Butterly…Given the strong constitutional underpinning to Kelly J.'s judgment, there may certainly be some cause for concern as to whether the provisions of s.202 are in fact constitutional.[183]

The Law Reform Commission has nonetheless observed that the agreement in *Ennis v. Butterly* "did not merely involve financial and property affairs but appeared to replicate a marital contract".[184] In contrast, section 202 of the 2010 Act restricts cohabitants' agreements to "financial matters" and clearly signals an intention on the part of the Oireachtas that, once validly concluded, these contracts should be upheld. However, "the spectre of Ennis v Butterly nonetheless lingers, giving rise to uncomfortable doubts"[185] so one cannot be certain that the judiciary will agree, though "it is at least arguable that judicial deference to the legislature will prevail"[186] as this has happened recently in other policy areas that are of social sensitivity.[187]

Conclusion

Merely a decade ago same-sex relationships were virtually unknown to Irish law, and opposite-sex cohabiting relationships were recognised for very limited purposes. The Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 "definitively challenges the well-worn Irish legal tradition of treating couples outside of marriage as strangers at law".[188] Despite some academic

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[182] *Ennis v Butterly* [1996] 1 IR 426, 438.
[183] Fergus Ryan (n 167) 245.
[184] Law Reform Commission, *Report on the Rights and Duties of Cohabitants* (n 107) 39.
[185] Fergus Ryan (n 167) 247.
[186] ibid.
[187] *D v Ireland* [2012] IESC 10.
[188] Fergus Ryan, 'The General Scheme of the Civil Partnership 2008: Brave New Dawn or Missed Opportunity?' (n 19).

confusion, civil partnership for same-sex couples substantively mirrors marriage for opposite-sex couples, and it endows them with most of the rights and remedies thereto. Nonetheless important symbolic differences remain, most notably the withholding of the name marriage from committed same-sex unions, and the absence of provision for any dependant child/children of a civil partnership, although legislation has recently been proposed to remedy this latter deficiency.[189] Hence civil partnership really "does not eliminate inequality so much as narrow the gap".[190]

The regulation of cohabitation under the 2010 Act may be somewhat premature given the limited state of research relating to this phenomenon.[191] However, by virtue of the financial dependency criterion the statutory approach arguably manages to effectively balance the need to protect the vulnerable cohabitant while respecting the autonomy of the other cohabitant when a relationship ends, and it also keeps the redress scheme in compliance with Article 41 of the Constitution.[192] In any event, when coupled with the empirical evidence on cohabitation trends in Ireland, the strict criteria that apply before one can be deemed a qualified cohabitant entitled to seek statutory redress indicate that this scheme is likely to benefit few cohabitants in practice.[193] In conclusion, despite any actual or perceived shortcomings in the 2010 Act, it is undeniable that:

> [T]he net effect is that, increasingly, domestic law is moving beyond the constitutional firewall that divides the "constitutional family" from units formerly regarded as irregular and "beyond the pale".[194]

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[189] See the General Scheme of the Children and Family Relationships Bill 2014.
[190] ibid.
[191] Brian Tobin (n 117) 287.
[192] ibid.
[193] ibid.
[194] Fergus Ryan (n 167) 201.

Chapter 3

Same-Sex Parents and Irish Law

Introduction

This chapter examines the position of prospective and extant same-sex parents under Irish law. Initially, I will assess the more prevalent arguments in favour of and against same-sex parenting. The current law pertaining to the parent-child relationship will then be analysed in order to highlight its deficiencies in the context of same-sex couples and children raised in such unions. Subsequently, I will examine the impact of the Supreme Court's decision in *McD v L* on the parentage of a child raised by a lesbian couple but conceived with sperm from a known donor. However, a significant focus of this chapter will be on the General Scheme of the Children and Family Relationships Bill 2014, which proposes to radically reform Irish family law for, *inter alia*, the benefit of both prospective and extant same-sex parents. If enacted, the General Scheme will extend the right to apply for guardianship in relation to a child to a same-sex civil or cohabiting partner and, quite significantly, it will introduce into Irish law the intention-based parental status model for same-sex civil and cohabiting partners in the context of assisted human reproduction. However, this model has to be enacted against the backdrop of the Constitution of Ireland, which implicitly protects the rights of the child and may shortly do so in an express fashion. Although the General Scheme claims that the welfare and best interests of the child are central to its endeavours to govern familial relationships,[1] I will critically assess the veracity of this assertion in the context of assisted human reproduction.

Finally, I will discuss the proposal contained in the General Scheme to amend the Adoption Act 2010 in order to render civil partners eligible to apply to jointly adopt a child. Irrespective of whether this proposal becomes law, I will demonstrate why the prevailing legislative ban on joint adoption by same-sex couples can no longer really withstand scrutiny in light of highly persuasive decisions from the United Kingdom such as *Re P* and *The Northern Ireland Human Rights Commission's Application*, and I will assess the potential impact of the

[1] General Scheme of the Children and Family Relationships Bill: Policy Rationale (Department of Justice, Equality and Law Reform 2013). Available at: http://www.justice.ie/en/JELR/Pages/PB14000027

children's amendment in this area if it is inserted into the Constitution in the near future.

The Arguments for and against Same-Sex Parenting

Prior to considering the position of same-sex parents and their children under Irish law and reforms that might improve the current situation, it is first worth analysing the various arguments for and against same-sex parenting in general. It has been argued that growing up in gay or lesbian families is potentially hazardous for a child because of the prevalence of psychiatric disorders among homosexual people.[2] Indeed, a number of studies have suggested that homosexuality is associated with increased suicidality and mental health problems.[3] In a survey of psychological well-being among gay and lesbian persons in the United Kingdom, it was discovered that approximately 43% of the survey's participants (556 out of 1285) had a psychiatric disorder. In addition, a relatively large proportion of these participants had considered or attempted suicide.[4] Another study from the United Kingdom found that gay and lesbian persons are more prone to psychological distress and self-harm and are more likely to consult mental health professionals for emotional difficulties than their heterosexual counterparts.[5] In Ireland, as recently as 2007, Monica Hynds, the then chairwoman of Outhouse, Dublin's LGBT community resource centre, informed the media that "despite the positive changes in society, many in the community still grapple with low self-esteem, isolation and suicidal ideation."[6]

However, it is quite possible that increased rates of depression and suicidality amongst homosexual people are caused by societal oppression. Bailey

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[2] Dean Byrd, 'Gender Complementarity and Child-Rearing: Where Tradition and Science Agree' (2004) 6 (2) Journal of Law and Family Studies 213, 220.

[3] John Michael Bailey, 'Homosexuality and Mental Illness' (1999) 56 Archives of General Psychiatry 883; David Michael Ferguson et al., 'Is Sexual Orientation Related to Mental Health Problems and Suicidality in Young People?' (1999) 56 Archives of General Psychiatry 876; Theo G.M. Sandfort et al., 'Same-Sex Sexual Behaviour and Psychiatric Disorders' (2001) 58 Archives of General Psychiatry 85.

[4] James Warner and Eamonn McKeown, 'Rates and Predictors of Mental Illness in Gay Men, Lesbians and Bi-sexual Men and Women' (2004) 185 British Journal of Psychiatry 479.

[5] James Warner and Michael King, 'Mental Health and Quality of Life of Gays and Lesbians in England and Wales' (2003)183 British Journal of Psychiatry 552.

[6] Alison Healy, 'Ahern Backs Legal Recognition of Gay Partners' *Irish Times* (Dublin, 17th July 2007).

believes that this is "an eminently reasonable hypothesis" and that "it would indeed be surprising if anti-homosexual attitudes were not part of the explanation of increased suicidality among homosexual people".[7] Further, the authors of the abovementioned UK studies concluded that the high rates of psychiatric disorder, self-harm and suicidality among gay and lesbian persons may indeed be linked to social discrimination.[8] In *Zappone v Revenue Commissioners*, Professor Kennedy, Professor of Forensic Psychiatry at Trinity College Dublin, informed the High Court that the social perception of homosexuality is such that stigma attaches to it.[9] He added that such stigma can give rise to distress, shame, embarrassment and loneliness, and these reactions to the stigma can in turn cause illnesses such as depression and anxiety.[10] Therefore, it is most likely that the homophobic attitudes encountered by gay and lesbian people living in a heterosexual world provoke mental illness. Indeed, Pennings has argued that the disadvantage experienced by homosexual people "is almost completely due to hostile reactions from a homophobic society."[11]

Another argument is that growing up in gay or lesbian families is potentially harmful for a child because of the higher rate of dissolution associated with same-sex unions when compared to their opposite-sex counterparts.[12] Indeed, there is some international evidence to support the argument that same-sex relationships are prone to greater rates of dissolution.[13] In a study comparing same-sex and opposite-sex unions in the UK from 1974-2004, Lau concludes that the higher dissolution rate amongst same-sex couples is explainable because:

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[7] John Michael Bailey (n 3) 884.

[8] See James Warner and Eamonn Mckeown (n 4), and James Warner and Michael King (n 5).

[9] *Zappone v Revenue Commissioners* [2008] 2 IR 417, 429.

[10] ibid.

[11] Guido Pennings, 'Evaluating the Welfare of the Child in Same-Sex Families' (2011) 26 (7) Human Reproduction 1609, 1610.

[12] Lynn D. Wardle, 'The Boundaries of Belonging: Allegiance, Purpose and the Definition of Marriage' (2011) 25 Brigham Young University Journal of Public Law 287, 309.

[13] Gunnar Andersson et al., 'The Demographics of Same-Sex Marriages in Norway and Sweden' (2006) 43 Demography 79; Charles Q. Lau, 'The Stability of Same-Sex Cohabitation, Different-Sex Cohabitation, and Marriage' (2012) 74 Journal of Marriage and Family 973.

> [T]he lack of legal and social institutionalization of same-sex couples may lead same-sex couples to perceive fewer barriers, fewer rewards, and more alternatives to their unions, leading to higher rates of dissolution.[14]

Lau observes that in the U.K. "the lack of legal marriage for same-sex couples and greater difficulty having children means that there is not a logical endpoint for same-sex relationships" in the way that there is for opposite-sex couples.[15] Thus, for the same-sex couples surveyed by Lau, because civil partnership, same-sex adoption and assisted human reproduction legislation permitting both same-sex partners to be registered as the parents of a child born through sperm donation or surrogacy was unavailable in the UK from 1974-2004, there were certainly "fewer barriers" to exiting and "fewer rewards" from entering into and staying in a same-sex relationship during that time period.[16] Also, the prejudice experienced by same-sex couples undoubtedly led to quite a number of gay and lesbian people deciding to discontinue their relationship and instead opting for the safer, more socially accepted alternatives such as life in an opposite-sex marital or cohabiting relationship or life as a single person. Hence there are perfectly reasonable socio-legal explanations for the correlation between same-sex couples and high rates of union dissolution.

It should be noted that all of the abovementioned mental health studies (and the statements of Ms Hynds and Professor Kennedy) related to gay and lesbian persons as a class of individuals and not committed same-sex couples who either are, or wish to be, parents. In addition, Lau notes that one of the methodological "limitations" of his study on rates of union dissolution among same-sex and opposite-sex couples is the use of "small samples".[17] Lau's study does not encompass same-sex couples that were raising children from 1974-2004, most likely because of the small sample size discussed in his study and the fact that

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[14] Charles Q. Lau, 'The Stability of Same-Sex Cohabitation, Different-Sex Cohabitation, and Marriage' (2012) 74 Journal of Marriage and Family 973, 984.

[15] ibid.

[16] Indeed, the authors of a study comparing dissolution rates amongst opposite-sex and same-sex married couples (and same-sex couples in registered partnerships) in Norway and Sweden concluded that "a higher propensity for divorce in same-sex couples may not be too surprising given this group's relative non-involvement in joint parenthood and its lower exposure to normative pressure about the necessity of life-long unions." See Gunnar Andersson et al., 'The Demographics of Same-Sex Marriages in Norway and Sweden' (2006) 43 Demography 79.

[17] Charles Q. Lau (n 14) 985.

same-sex parenting was most uncommon during that period. Consequently, it is submitted that all of these studies are of little import to the question of whether the members of a committed same-sex couple are, or are likely to be, effective parents.

However, the fact that a same-sex couple has to *plan* to have a child is a strong indicator of the stability associated with those same-sex unions in which children are being raised. Both of the options that may be available to a same-sex couple who wish to have a child (joint adoption and assisted human reproduction) can be quite lengthy and expensive procedures: this suggests that same-sex couples are highly unlikely to commit to either process on a whim, which in turn is indicative not only of the stability of their relationship, but of the strength of their desire to have a child and the warm and supportive familial environment in which that child will be raised.

A further argument is that children of same-sex parents will be less likely to enter into a normative sexual relationship upon maturity.[18] Pennings observes that this argument "presupposes that being homosexual is a mental illness, a pathology or, at least, a type of harm."[19] While the Australian Psychological Society has observed that research on the sexual orientation of children raised by same-sex parents is "fairly scant", findings to date suggest that children of same-sex parents may feel more comfortable to either have or to consider the possibility of having a same-sex relationship.[20] Thus, the evidence would appear to suggest that same-sex parents may have some impact on the adult sexual orientation of their children. This is of no real significance for two reasons. First, since the vast majority of gay and lesbian persons are raised by opposite-sex parents or a single heterosexual parent it is not unreasonable to reach the exact same conclusion in relation to such parents' impact on the adult sexual orientation of their children. Second, if a child raised by opposite-sex parents, same-sex parents or a single parent identifies as gay or lesbian in adulthood and proceeds to enter into same-sex relationships, why that

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[18] Lynn D. Wardle, 'The Potential Impact of Homosexual Parenting on Children' (1997) University of Illinois Law Review 833; Lynn D. Wardle, 'Form and Substance in Committed Relationships in American Law', in Oran Doyle and William Binchy (eds.) *Committed Relationships and the Law* (Four Courts Press 2007) 61, 78.

[19] Guido Pennings (n 11) 1610.

[20] Elizabeth Short et al., Lesbian, Gay, Bisexual and Transgender (LGBT) Parented Families: A Literature Review prepared for The Australian Psychological Society (The Australian Psychological Society 2007) 11.

should be deemed such a negative outcome in a world where homosexuality is becoming increasingly assimilated into societies is puzzling.

Finally, it has been argued that same-sex parenting is detrimental to child welfare because of a child's need for dual-gender parenting.[21] Wardle argues that because of the differences between how mothers and fathers nurture, care for and interact with their children, "a child raised by two women or two men is deprived of extremely valuable developmental experience and the opportunity for optimal individual growth and interpersonal development."[22] Wardle notes the more physical and tactile play between fathers and children when compared to the more gentle play between mothers and children.[23] He observes that infants whose fathers are actively involved in their lives not only have greater mental development at six months old but are more socially responsive and better able to withstand stressful situations than infants "relatively deprived of substantial interaction with their fathers".[24] Wardle stresses that when children are raised in same-sex family units they "must cope with the loss of example, counsel, and experience that living with the missing-gender parent would have provided". Thus for Wardle the "biological differentiation in the roles of mothers and fathers makes it rational to encourage situations in which children have one of each."[25]

Even if one agrees with Wardle's argument that the nuanced differences in parenting technique commonly adopted by opposite-sex parents contribute to optimal child development, this certainly does not defeat the argument in favour of promoting same-sex parenting because Biblarz and Stacey have observed that "no research supports the widely held conviction that the gender of parents matters for child well-being." [26] Further, the Australian Psychological Society has noted that an abundance of research since the 1970's has indicated that it is family *processes*

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[21] Lynn D. Wardle 'The Potential Impact of Homosexual Parenting on Children' (n 18) 863. See Kyle D. Pruett, 'The Paternal Presence' (1993) 74 (1) Families in Society 46; Robert H. Bradley, 'Fathers and the School-Age Child' in Shirley M.H. Hanson & Frederick W. Bozett (eds.), *Dimensions of Fatherhood* (Sage 1985).

[22] ibid.

[23] ibid 857.

[24] ibid 858.

[25] Brief for Respondent BLAG, *United States v Windsor* No. 12-307 (U.S. Jan. 22nd 2013) 48. Available at: http://www.clearinghouse.net/chDocs/public/PB-NY-0017-0015.pdf

[26] Timothy J. Biblarz and Judith Stacey, 'How does the Gender of Parents Matter?' (2010) 72 (1) Journal of Marriage and Family 3, 17.

rather than family *structures* that contribute to determining children's well-being and outcomes:

> Specifically, and regardless of family structure, children are likely to do well in a family environment characterised by an absence of conflict; high levels of co-operation, trust, ease and cohesion; high levels of warmth and care; and high levels of social connection and support.[27]

Research suggests that these positive familial processes are as much at work in same-sex family units as in their opposite-sex counterparts. Following a comprehensive review of the literature pertaining to same-sex parenting, Tobin and McNair concluded that there is no credible evidence that same-sex parents cause harm to the development of their children by virtue of their sexual orientation and that there is in fact an overwhelming and growing body of evidence to suggest that such parents are just as capable of fulfilling their duties and responsibilities towards their children.[28]

Thus, even if we accept the argument that dual-gender parenting is the most ideal form of parenting to ensure optimal child development, the weight of the evidence now clearly suggests that being raised by same-sex parents does not adversely affect a child. Hence the law should move to embrace same-sex parenting because it is by no means detrimental to the welfare of the child. In light of this, it is opined that the "reasonable welfare standard" advocated by Pennings seems an appropriate model to endorse in the context of same-sex parenting. Pennings has advocated the use of this standard in the context of assisted human reproduction:

> [R]eproduction is acceptable when there is no high risk of serious harm, or put in a more positive way, when there is a reasonable chance that the future person will have the abilities and possibilities to realize those dimensions and goals that make human lives valuable.[29]

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[27] Elizabeth Short et al. (n 20) 8.

[28] John Tobin and Ruth McNair, 'Public International Law and the Regulation of Private Spaces: Does the Convention on the Rights of the Child Impose an Obligation on States to Allow Gay and Lesbian Couples to Adopt?' (2009) 23 (1) International Journal of Law, Policy and the Family 110, 127.

[29] Guido Pennings (n 11) 1612.

This analysis could equally apply to same-sex parenting in view of the aforementioned evidence. Hence the remainder of this chapter will examine the methods by which Irish law could come to recognise same-sex relationships "for what many will think the most important purpose of regulating family relationships: providing for the care and upbringing of the next generation."[30]

Parents under Irish Law

In Ireland, parents have different legal rights in relation to their children depending on whether they are married or unmarried. Since same-sex couples are prevented from marrying and only one member of the union can be the child's biological and/or legal parent, such couples find themselves in a unique predicament as regards the position of a second-parent. Where children are born to married parents or indeed where their parents subsequently marry, Irish law confers equal and joint rights of guardianship on both the father and the mother. This complies with the constitutional protection of the marital family under Article 41.3.1°. In contrast, where a child is born to unmarried parents, only the natural mother enjoys an automatic right of guardianship. However, this is a personal right under Article 40.3 rather than a familial right under Article 41 because in *State (Nicolaou) v An Bord Uchtála* the Supreme Court stressed that:

> The mother of an illegitimate child does not come within the ambit of Articles 41 and 42 of the Constitution. Her natural right to the custody and care of her child, and such other personal rights as she may have…fall to be protected under Article 40, section 3.[31]

The natural father has no constitutional rights. He has the right to apply to be appointed a guardian of his child under section 6A of the Guardianship of Infants Act 1964 (hereafter the 1964 Act), as inserted by section 12 of the Status of Children Act 1987. However, in *JK v VW*, Finlay CJ in the Supreme Court made it clear that the unmarried father does not enjoy an automatic right to such an appointment and that "although there may be rights of interest or concern arising

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[30] Brenda Hale, 'Homosexual Rights' (2004) 16 (2) Child and Family Law Quarterly 125, 134.
[31] *State (Nicolaou) v An Bord Uchtála* [1966] IR 567, 644.

from the blood link between the father and the child, no constitutional right to guardianship in the father of the child exists."[32]

Shannon observes that the simplest procedure for an unmarried father to become guardian of his child is that delineated in section 2 (4) of the 1964 Act, as inserted by section 4 of the Children Act 1997.[33] This allows the mother and father by agreement to make a statutory declaration conferring upon the father the status of guardian. However, there is no mechanism whereby *both members* of a same-sex couple can become the legal parents of a child of their relationship. In a lesbian relationship, where the child is conceived through sperm from an anonymous or known donor and born to one of the partners, that person will enjoy rights under Article 40.3. Her partner, the child's co-mother, cannot be appointed as a guardian of the child by law. The situation is even more complex where a male homosexual couple engage a surrogate to have a child for them, as the surrogate will enjoy the rights of the natural mother under Article 40.3. Nonetheless, provided that one member of the homosexual couple is the child's biological father he and the surrogate can utilise the procedure in section 2 (4) of the 1964 Act to succeed in granting him the status of guardian. Irish law does not permit the other member of the male homosexual couple who is a non-biological parent to apply for a right of guardianship. It should be noted that a non-biological social parent may be able to acquire a right of access to a child s/he has been raising in the event of relationship breakdown or, in the event of the death of his/her partner, such a parent may be appointed guardian of the child.

(i) Persons in loco parentis

Traditionally only a parent or guardian of a child could apply for access to a child. This situation was altered by what is now section 11B of the 1964 Act, as inserted by section 9 of the Children Act 1997. This provision allows persons such as a relative of the child or someone who has acted in *loco parentis* to the child (a gay or lesbian social parent) to apply to the court to be granted access to

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[32] *JK v VW* [1990] 2 IR 437, 447. However, in *W'OR v EH* [1996] 2 IR 248, at 269-270, Hamilton CJ suggested that "where the children are born as a result of a stable and established relationship and nurtured at the commencement of life by father and mother in a *de facto* family as opposed to a constitutional family, then the natural father, on application to the Court under s. 6A of the Guardianship of Infants Act, 1964, has extensive rights of interest and concern."

[33] Geoffrey Shannon (ed), *Children and the Law*, (Round Hall Sweet and Maxwell 2001) 120.

the child. In *Hollywood v Cork Harbour Commissioners*, O'Hanlon J described in *loco parentis* as "any situation where one person assumes the moral responsibility, not binding in law, to provide for the material needs of another."[34] The application is a two-stage process and an applicant must first be granted leave by the court to make such an application: only then will the substantive application be heard.[35] In deciding whether to grant leave the court will have regard to all the relevant circumstances including but not restricted to the applicant's connection with the child, the risk of any disruption to the child's life which would harm the child, and the wishes of the child's guardian(s). In principle, section 11B renders possible some continuation of the parent-child relationship between a non-biological social parent and a child following the breakdown of the relationship between the same-sex couple. However, this must be in the child's best interests because the right of access is viewed by the courts in this jurisdiction as a basic right of the child and any order in this respect will be made strictly on the basis of the welfare of the child in question.

(ii) Testamentary Guardianship

A gay or lesbian biological parent who is the guardian of his/her child can appoint his/her same-sex partner to take his/her place as a guardian of the child in the event of his/her death. This is known as testamentary guardianship and it is made by deed or will. On the death of the child's biological parent, the testamentary guardian shall act together with any other surviving guardian. However, a surviving parent can object to such an appointment and this might possibly occur where the surviving parent was in a previous relationship with the homosexual biological parent and resents the appointment of their former partner's same-sex partner as a testamentary guardian. In such a case the testamentary guardian must apply to the court for an order permitting him/her to act as a joint guardian with the surviving parent or indeed to the latter's exclusion.

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[34] *Hollywood v Cork Harbour Commissioners* [1992] 1 IR 457, 465.

[35] Head 48 of the General Scheme of the Children and Family Relationships Bill 2014 proposes to replace this two-stage process with a simpler process which would no longer require a relative of the child or a person who has acted in *loco parentis* to first seek the leave of the court before making an application for access.

The Supreme Court, Lesbian-Led Families and Known Sperm Donors: *McD v L*

The recent case of *McD v L* sends out a powerful message to lesbian co-parents who utilise the sperm of a known donor in order for one of them to conceive a child: akin to any other natural father the known sperm donor will be eligible to apply for rights of guardianship and access under the abovementioned existing law.[36] The case involved a known donor whose sperm was utilised by one member of a lesbian couple to conceive a child. She and her partner intended to raise this child with the known sperm donor acting in a more limited role akin to that of a "favourite Uncle." This was agreed by all of the parties in a sperm donation contract prior to the birth of the child. Following the birth of the child the known donor, as the biological father, sought guardianship of and access to the child by virtue of the provisions of the Guardianship of Infants Act 1964. There had been limited contact between the sperm donor and the child following the birth and so a limited attachment had been established. In the High Court, Hedigan J denied him both guardianship and access but on appeal the Supreme Court granted him access to the child.

The Supreme Court held that the sperm donation agreement was not enforceable, but that some weight could attach to it insofar as it was in the best interests of the child. It is therefore clear that a lesbian couple cannot contractually preclude a known donor from pursuing a parental role in relation to the child. Further, the Supreme Court regards the situation of a known sperm donor as akin to that of a natural father because throughout the judgment the applicant is referred to as "the father", and Denham J makes it quite clear that:

> The father, who was a sperm donor, has rights as a natural father, as provided for in s.6A of the Guardianship of Infants Act 1964, as amended, to apply to be appointed guardian of the child.[37]

Consequently, as Fennelly J acknowledges, "it is not suggested, in the present case, that the father is any less the biological father of the child by reason of being a

[36] [2010] 1 ILRM 461 (SC).
[37] ibid 493.

sperm donor".[38] Denham J also recognised the appellant as "the biological father" and, adopting a child-centric approach, she concluded that "there is benefit to a child, in general, to have the society of its father".[39] Fennelly J noted that psychiatric opinion favoured a child having knowledge of its father:

> [F]rom the point of view of the child, the psychiatrists were in agreement that a child should normally have knowledge, as part of the formation of his or her identity, of both parents, in the absence of compelling reasons to the contrary.[40]

Denham J further noted that since the lesbian couple was not a family under the Constitution their relationship could not "be weighed in the balance against the father."[41] She and the other members of the Supreme Court refused the appeal on the issue of guardianship but they allowed it in relation to access.

By acknowledging that the known sperm donor's statutory rights are akin to those of other natural, unmarried fathers, the Supreme Court's decision emphasises that the genetic link alone is sufficient for a biological father to seek both guardianship of, and access to, his child. In the recent case of *MR and Another v An tArd Chláraitheoir*, Abbott J acknowledged that it was clear from *McD v L* that "the concept of blood relationships or links are paramount in deciding parenthood" [42]and that "the male input into the make-up of the child makes him a parent just because he gave the genetic material."[43] Leonard-Kane is nonetheless critical of *McD v L*:

> Whilst the decision is undoubtedly a significant development in the context of non-marital fathers' rights, it has completely undermined the stability and autonomy of lesbian families conceived using donor sperm.[44]

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[38] ibid 523.
[39] ibid 494.
[40] ibid 524.
[41] ibid 494.
[42] *MR and Another v An tArd Chláraitheoir* [2013] IEHC 91 [102]. Indeed, this case reinforces the significance of genetic parentage in Irish law.
[43] ibid [42].
[44] Megan Leonard-Kane, 'Lesbian Co-Parenting and Assisted Reproduction: In an Age of Increasing Alternative Family Forms, Can Ireland Continue to Ignore the Need for Legislative Boundaries to be Placed on "Fertile" Ground?' (2010) 13 Trinity College Law Review 5, 23.

However, Ryan is not so critical of *McD v L* because:

> While the Supreme Court went out of its way to deny the couple's formal claim to be a family, the reality of the decision is that by denying the father guardianship, and thus excluding the father from a decision-making role in respect of the child, the Supreme Court implicitly endorsed the couple's central role in the child's upbringing.[45]

While it is notable that the appeal was dismissed insofar as it related to guardianship, this author does not entirely share Ryan's optimism as regards the Supreme Court's tacit endorsement of lesbian-led family units because elsewhere in the judgment it becomes apparent that the couple's fundamental role in the child's upbringing could quite easily be diluted by the courts in the not-too-distant future. The members of the Supreme Court made it clear that the known sperm donor father in this case stands every chance of being granted guardianship at a later date should the evolution of his relationship with the child warrant it.[46] Denham J felt that "there should be no order of guardianship made in relation to the father *at this time*. As in all family law matters, issues may be re-addressed in changed circumstances."[47] Fennelly J also held that "it is, of course, possible that a time will come when [a guardianship] application might be renewed in the High Court in different circumstances."[48] Hence the Supreme Court judges seem to envisage that, if the access arrangements put in place result in the child establishing a strong attachment to its father over time, then an application for guardianship could very well be approved by the High Court one day.[49]

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[45] Fergus Ryan, 'Are Two Irish Mammies (even) Better than One? Heteronormativity, Homosexuality and the 1937 Constitution' in Eoin Carolan (ed.), *The Constitution of Ireland: Perspectives and Prospects* (Bloomsbury 2012) 425, 440.

[46] Hence it is respectfully submitted that Mulligan was not necessarily correct to state in relation to *McD v L* that "[f]or the Supreme Court, the applicant in this case…was eligible to apply for access, but not for guardianship." See Andrea Mulligan, 'Constitutional Parenthood in the Age of Assisted Reproduction' (2014) 49 (1) Irish Jurist 90, 101.

[47] *McD v L* (n 36) 494. Emphasis added.

[48] ibid 533.

[49] In *A v B&C* [2012] EWCA Civ 285 [48], another case involving a known sperm donor seeking access to a child being raised by lesbian parents, Black LJ recognised that "*the role of the father in the child's life will depend on what is in the child's best interests at each stage of the child's childhood and adolescence.* As with any other child, the father/child relationship may turn out to be

Nonetheless, the access arrangements put in place by Hedigan J when the matter was referred back to the High Court could very well hamper the success of any future guardianship application by the known sperm donor father.[50] The lesbian couple had moved to Australia with the child and although Hedigan J held that the father was to have direct access to the child there, this was conditional on him not revealing his biological paternity to the child. This revelation was to be left to the couple to make when in their discretion they considered the child to be of an appropriate age. The access arrangement was also conditional on the father not seeking to play a parental role in the child's upbringing and acknowledging and respecting the familial integrity of the couple and the child.[51] Such a restrictive access arrangement may be insufficient to help establish a familial bond with the child strong enough for the father to renew guardianship proceedings in the High Court, as envisaged by the members of the Supreme Court. One cannot help but feel that Hedigan J was most determined to protect the integrity of the lesbian-led family in this case by whatever means. Since he was rebuked by the Supreme Court for trying to do so in law via a rather questionable interpretation and application of Article 8 of the ECHR,[52] he was determined to do so in practice through the granting of such an access arrangement.

Since the Supreme Court's decision in this case recognised the known donor as being in an identical legal situation to any natural father, the Law Reform Commission's subsequent recommendations aimed at improving the legal standing of natural fathers would also (albeit unintentionally) have embraced the known donor and significantly increased his parental rights to the detriment of lesbian co-parents, as we shall see.

Parenting in Ireland: Recommendations for Reform

In December 2010, the Law Reform Commission (hereafter LRC) launched its *Report on Legal Aspects of Family Relationships*.[53] The extension of automatic

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close and fulfilling for both sides, it may be no more than nominal, or it may be something in between." Emphasis added.

[50] *McD v L* [2010] IEHC 120.

[51] *McD v L* [2010] IEHC 120 [11].

[52] See the discussion of the High Court judgment in *McD v L* in Chapter 4.

[53] Law Reform Commission, *Report on Legal Aspects of Family Relationships* (LRC 101 - 2010).

guardianship rights to non-marital fathers was recommended, because "the Commission is of the opinion that all parents should be treated equally in respect of their relationship with their children regardless of gender or marital status."[54] The Commission was referring solely to all *biological* parents because it later recommended the enactment of legislation that would provide both the mother and father of any child with automatic joint parental responsibility (guardianship) and require compulsory joint registration of the birth of a child. The Commission went on to explain that "compulsory joint registration of the birth…means that the law would require two names to be present on the birth certificate of every child, subject to very limited exceptions."[55] Thus, if the Commission's recommendations were eventually legislated for by the Oireachtas, Irish law would ensure that each *biological* parent of a non-marital child would automatically become a guardian of the child upon its birth. This is identical to the situation of married couples.

It should be noted that the Commission's recommendations in this regard were largely made to bolster the legal position of unmarried fathers who, as we have seen, have no automatic right to guardianship of their children and depend on an agreement with the child's mother or a court order to achieve this. Further, the Commission acknowledged "the difficulties associated with the formation of families through alternative methods of conception" but stated that "the legal rights and responsibilities of parties in the context of assisted human reproduction are outside the scope of this project."[56] However, in a situation akin to *McD v L*, involving a known sperm donor father, a biological lesbian mother and a co-mother, the Commission's recommendations would have the (albeit unintended) effect of "valorizing distant biological fathers over mother-led family units"[57] if they were ever placed on a statutory footing.

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[54] ibid 16-17.

[55] ibid 19. The compulsory joint registration of both the mother and the father of a child is required under the Welfare Reform Act 2009 in the U.K. (See section 56 and Schedule 6).

[56] ibid 3.

[57] Jenni Millbank, 'The Limits of Functional Family: Lesbian Mother Litigation in the Era of the Eternal Biological Family' (2008) 22 (1) International Journal of Law, Policy and the Family 149.

Intention, Functionality and Lesbian-Led Families

Generally, in lesbian-led families one of the partners is the child's biological mother and the other is intended as its co-mother. In a situation like that in the recent case of *McD v L*,[58] where the biological mother conceives through sperm from a known donor, the LRC's recommendations would appear to favour granting "the two biological progenitors whose gametes fuse to create the child"[59] with automatic joint guardianship and require the presence of both their names on the child's birth certificate to the exclusion of the co-mother. Horsey argues against allowing a genetic link to determine parental status in such circumstances:

> Where a same-sex female couple use a sperm donor to enable one of them to bear a child that they both intend to raise, without the input of a man, recognising the genetic donor as the father of the child would be entirely unrealistic.[60]

Horsey advocates that the notion of "'intention' should operate as the pre-birth determinant in 'awarding' parental status when a child is born following surrogacy or assisted conception"[61] as this "would more precisely reflect the expected outcome for *all* parties concerned."[62] The "expected outcome" of course being that the co-mothers are the parents of the child and the known donor does not have any parental role. Indeed, few known sperm donor fathers might appreciate being awarded automatic joint guardianship of a child that they intended to be co-parented by a lesbian couple once born. Many such fathers might much prefer the "favourite Uncle" status that was envisaged under the parties' agreement in *McD v L*, or a more limited role (if any) in relation to the child.[63]

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[58] [2009] IESC 81; [2010] 1 ILRM 461 (SC)

[59] Therese Callus, 'A New Parenthood Paradigm for Twenty-First Century Family Law in England and Wales?' (2012) 32 (3) Legal Studies 347, 350.

[60] Kirsty Horsey, 'Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements' (2010) 22 (4) Child and Family Law Quarterly 449, 466.

[61] ibid 455.

[62] ibid 472.

[63] However, there is an increasing amount of case law which suggests that known sperm donor fathers who are of a homosexual orientation would indeed like to acquire parental status in relation to their children. See *McD v L* [2009] IESC 81; *P&L (Minors)* [2011] EWHC 3431; *A v B&C* [2012] EWCA Civ 285; *S v D&E* [2013] EWHC 134 (Fam).

The (albeit unintended) effect of the LRC's recommendations is to emphasise that a co-mother's legal status is of secondary importance to the status of the biological parents. Hence for those lesbian couples that are hoping to start a family together the LRC has failed to recognise that "because of the family that is *intended*" such couples "are unlikely to be content with the mother/father paradigm"[64] envisaged under its recommendations. The LRC has failed to accord appropriate weight to the intentions of lesbian parents, as well as to the related concept of functionality. Millbank has recognised that these concepts are intertwined in lesbian-led family units, in that:

> [A co-mother] is a parent not just because she acts as a parent but because she and the birth mother both intended her to be one and because they chose to conceive a family together.[65]

She recommends that on the birth of a child born to a lesbian couple via donor insemination "legal presumptions of parental status embodying the *likely* intentions of most parents in lesbian-led families should apply automatically."[66] Millbank suggests that, where two women are in a committed relationship (whether formalised or cohabiting) and the non-birth mother consents to her partner's attempt to conceive through assisted conception, she is the second parent of the resulting child or children.[67] Further, the biological sperm donor father (whether known or unknown) is not a parent since "biology alone does not make men parents."[68] Millbank states in relation to her proposal that "parental status here follows the family form rather than a genetic link; the birth mother and co-mother are equally parents" and "a genetic link does not automatically accord parental status" to a known sperm donor father.[69] Why should the law favour a person's intention to become a (non-biological) parent over the genetic link between the

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[64] Kirsty Horsey (n 60) 456. Emphasis added.

[65] Jenni Millbank (n 57) 153.

[66] ibid 165.

[67] Indeed, this is what the General Scheme of the Children and Family Relationships Bill 2014 provides for under Head 10.

[68] Jenni Millbank (n 57) 166-167.

[69] ibid 167. Nonetheless, Millbank does recommend that an additional parent such as a biological known sperm donor father may be added on through an "opt-in" process. This would require the consent of the birth mother and the co-mother and entail a form of child's best interests inquiry before parental status could be awarded.

sperm donor and the child? The answer is that *but for* the women's "pre-conception intention to have a child, and to initiate the process with which that child is to be brought into the world",[70] the child would simply never come into existence. Indeed, all children born via donor insemination will be fully intended by the lesbian couple because Millbank points out that "for lesbian families the genesis of children is always *conceiving of* children; it is the intention to have children together that is the essence of family formation."[71] On this analysis the attempt to conceive can be deemed a parental project[72] or joint enterprise between the two women and the known sperm donor is only *indirectly* responsible for the conception of the child. The situation is described by Henstra as follows:

> The donor does indeed provide the genetic material with the idea that it will be used to beget a child, but it is [the lesbian couple] who prior to the actual conception of the child decide to proceed. This makes the biological father (donor) no longer directly responsible for the coming into being of the child, which means that something changes in the attribution of parental responsibility.[73]

Henstra's argument for the attribution of parental status is indeed a compelling one, and it is reinforced by Millbank's observation that sociological research pertaining to lesbian co-parents has indeed indicated that:

> In the vast majority of lesbian-led families these intentions as to the family form are followed through by actual family function after birth, so intention

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[70] Kirsty Horsey (n 60) 472.

[71] ibid 150.

[72] This is what such an arrangement is referred to as in the Quebec Civil Code, which recognises the intention-based parental status of co-mothers in Art 538. See Robert Leckey 'Where the Parents are of the Same Sex: Quebec's Reforms to Filiation' (2009) 23(1) International Journal of Law, Policy and the Family 62, 67.

[73] Machteld Vonk, 'One, Two or Three Parents? Lesbian Co-Mothers and a Known Donor with "Family Life" under Dutch Law' (2004) 18 (1) International Journal of Law, Policy and the Family 103, 113, citing A.E. Henstra, Van afstammingsrecht naar ouderschapsrecht. Een beschouwing over de positie van sociale en biologische ouders in het familierecht, Utrecht: Boom Juridische Uitgevers, PhD thesis.

> and functionality are linked elements of a continuum rather than dichotomous modes of recognition.[74]

Hence the co-mother's parental status in relation to the child is arguably doubly justified. Unlike the situation in the United Kingdom, there is *currently* no legislation in place for the regulation of assisted reproduction in Ireland. Therefore, if the LRC's recommendations favouring unmarried fathers' rights were legislated for in the absence of a statutory framework for assisted reproduction, a known sperm donor father's rights would indeed trump those of the child's lesbian co-mother. However, a recent, significant legislative development indicates that this may not be the case.

The General Scheme of the Children and Family Relationships Bill 2014

On 30th January 2014 the General Scheme of the Children and Family Relationships Bill 2014 was published and, if enacted, this legislation could favour co-mothers over known and anonymous sperm donors in an assisted human reproduction context. The Bill does so first by introducing under Heads 31 (3) and 37 automatic joint guardianship rights only for those unmarried fathers who have cohabited with the child's mother for at least twelve consecutive months before the child's birth, which cohabitation ended (if applicable) less than ten months before the child's birth. Unlike the LRC's recommendations this provision would appear to preclude a known sperm donor father from obtaining automatic joint guardianship rights because it is highly unlikely that he will have cohabited with the child's biological mother for the requisite time period. One criticism of this aspect of the Bill is that it makes *any* unmarried father's automatic guardianship rights in relation to his child dependant on the strength of his relationship with the child's mother.

The Bill further ousts the known sperm donor father by providing under Head 8 that a person who donates human reproductive material (sperm or an ovum)

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[74] Jenni Millbank (n 57) 165. It is hugely ironic that Millbank should make such an assertion in an article where she analyses 75 cases involving disputes between separated co-mothers and states that "the great majority [of the case law] involved mothers separating when the children were under the age of two."

for use in assisted reproduction without the intention of using that material for his or her own reproductive use is not, by reason only of the donation, a parent of the child. In addition, Head 10 provides that the parents of a child born as a result of assisted reproduction will be its mother and her husband or civil partner or a person in an intimate and committed relationship with her who consented to be a parent of the child and did not withdraw that consent before the child's conception. Head 2 provides that for the purpose of the legislation, if a child is born as a result of assisted reproduction, the child's conception is deemed to have occurred at the time when the procedure was performed that resulted in the implantation of the human reproductive material or an embryo. This provision is significant because it appears to clarify that it is only where a child is conceived via an implantation procedure in a clinical setting that its parents will be its mother and her consenting husband, civil partner or cohabitant. Therefore, Head 10 does not appear to prevent a known donor from seeking parental rights in respect of a child where the child is conceived outside of the controlled setting of an IVF clinic, *ie* via self-insemination by the biological mother in a non-clinical setting. Indeed, the explanatory notes which accompany Head 10 also appear to indicate that the intent of the Oireachtas is solely to regulate those assisted reproduction procedures that occur in the setting of a licensed fertility clinic:

> The husband, civil partner or cohabitant of the mother is considered to be the other parent of the child if he or she has *given a consent which remains valid at the time the procedure leading to implantation takes place.*[75]

Thus, the husband, civil partner or cohabiting partner of the mother will not be considered to be the other parent of the child in the context of self-insemination because the explanatory notes seem to envisage that a consent will have been "given" in some sort of formal manner, and that it has not been formally withdrawn prior to the "procedure leading to implantation". This language is more apposite to an IVF procedure in a clinical setting than self-insemination and it appears that this latter method of assisted reproduction is outside the ambit of Head 10. Therefore, it appears that the only known donor who is excluded from being deemed a parent of

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[75] Emphasis added.

the child is one whose sperm is used to fertilise an ovum in a clinical setting,[76] not one whose sperm is used to self-inseminate. Thus, a known sperm donor father such as the applicant in *McD v L* should still be able to seek rights of guardianship and access in relation to his child because the Bill does not seem to be attempting to abrogate the Supreme Court's decision in that case. Head 5 makes it clear that where the provisions on assisted human reproduction do not apply, "the parents of a child are his or her birth mother and biological father" *ie* a known donor.[77]

(i) Ousting the Known Donor in the Context of Self-Insemination?

As I explained to the Joint Committee on Justice, Defence and Equality during pre-legislative scrutiny of the General Scheme of the Children and Family Relationships Bill 2014, an alternative interpretation of Heads 2 and 10 is entirely possible, and such interpretation would indeed preclude the known donor from being deemed a parent of the child in all assisted human reproduction scenarios.[78] There is no definition of the broad term "procedure" in the General Scheme and consequently, under Head 2, self-insemination could arguably be interpreted as the performance of a "procedure…that resulted in the implantation of the human reproductive material or an embryo." Granted, this method of assisted reproduction would not lead to or result in implantation as quickly as the clinical method would, but it would lead to fertilisation and eventually result in the embryo's implantation. This could plausibly constitute "conception" for the purposes of Heads 2 and 10 of the Bill. However, one might argue that, even if this is so, Head 10 nonetheless seems to envisage the giving of a formal consent on the part of the biological mother's husband, civil partner or cohabitant that is more apposite to an assisted reproduction procedure in a clinical setting. This may be the case but, if it is, then

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[76] However, the sperm used in Irish fertility clinics comes from anonymous donations made overseas so this situation should never arise in practice: See Joint Committee on Justice, Defence and Equality Deb 9th April 2014, 11. Available at: http://oireachtasdebates.oireachtas.ie/Debates%20Authoring/DebatesWebPack.nsf/committeetakes/JUJ2014040900011?opendocument (Accessed 1st June 2014).

[77] However, the known donor will have to apply to court for a declaration of parentage before he can seek to apply for parental rights in relation to the child: see Head 7 of the General Scheme of the Children and Family Relationships Bill 2014.

[78] See Joint Committee on Justice, Defence and Equality Deb 9th April 2014, 3-4.

Head 10 contains an internal contradiction because, bizarrely, subsection (6) provides as follows:

> Unless the contrary is proven, a person is presumed to have consented to be a parent of a child born as a result of assisted reproduction if the person was married to or in a civil partnership with or cohabiting in an intimate and committed relationship with the child's birth mother.[79]

Thus, there is no need whatsoever for a formal consent on the part of the co-parent, because consent is to be presumed by virtue of his or her being in a registered or unregistered relationship with the child's biological mother. Head 10 (6), when coupled with the abovementioned possible alternative interpretation of 'conception' for the purposes of Heads 2 and 10 seems to allow informal assisted human reproduction via self-insemination to come within the ambit of the General Scheme, and thus in its current form the scheme abrogates the Supreme Court's decision in *McD v L*.

As we have seen, Head 8 provides that a person who donates sperm for use in assisted reproduction without the intention of using that material for his or her own reproductive use is not, by reason only of the donation, a parent of the child. Thus, if a dispute as to the child's parentage arose between a lesbian couple and a known donor where the child was conceived via self-insemination, Heads 2 and 10 would appear to very much work in favour of the lesbian co-parents but could they establish that the known donor did not intend to use the sperm for his own reproductive use? They could certainly try to do so by arguing that the very fact of donating the sperm to them is highly indicative of an intention not to use such sperm for his own reproductive use, or perhaps they could attempt to rely on the terms that purport to delineate parentage in a formal sperm donation agreement, á la *McD v L*?

In essence, the language used in Heads 2, 8 and 10 seems broad enough to permit the regulation of assisted human reproduction that occurs through fertility treatment at a licensed clinic *and* where lesbian partners conceive through self-insemination at home. If this is so, then it may not be possible for a known sperm

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[79] General Scheme of the Children and Family Relationships Bill 2014, Head 10 (6).

donor father to be deemed a parent of the child and to seek to acquire rights of guardianship and access in any circumstances and thus the upshot of the Bill is to completely oust him as a parent. Indeed, the final paragraph of the explanatory notes that accompany Head 10 lends credence to this interpretation because:

> It is acknowledged that this could limit the rights of a known donor who wishes to establish a legal connection with a child. However, there is a balance of rights to be achieved and the best interests of the child are likely to be served by having legal certainty and security in his or her family unit.[80]

The fact that the explanatory notes acknowledge that the provisions of Head 10 could limit the rights of a *known donor* strongly indicate that it is the intention of the Oireachtas to regulate the self-insemination scenario in the General Scheme.

If this is not the actual intent of the Oireachtas then, as this author advised the Joint Committee on Justice, Defence and Equality, it needs to amend Heads 2 and 10 of the Bill.[81] Head 2 (2) of the Bill could perhaps be clarified to establish that in the context of assisted human reproduction conception can only occur via the performance of a *clinical* or *medical* procedure that results in the implantation of the embryo. Head 10 (6) should simply be deleted because in any event Head 10 (8) provides that regulations may specify the form of any consent of an intended parent and the circumstances in which that consent is deemed to be withdrawn. It would be far better for ministerial regulations to clearly specify the form of a valid consent in cases of assisted human reproduction than for consent to simply be presumed due to the fact that the intended parent is in a relationship with the biological parent. Indeed, in its report on assisted human reproduction in Ireland, the Commission on Assisted Human Reproduction (CAHR) envisaged that an intended parent would give a formal "legal commitment to be recognised as the child's parent."[82] These minor amendments would not only help to ensure that informal methods of assisted human reproduction are wholly excluded from the

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[80] General Scheme of Children and Family Relationships Bill 2014, Head 10 (Notes).

[81] See Joint Committee on Justice, Defence and Equality Deb 9th April 2014, 3-4.

[82] *Report of the Commission on Assisted Human Reproduction* (Department of Health 2005) 47. Available at: http://www.dohc.ie/publications/pdf/cahr.pdf (Accessed 21st May 2014).

ambit of the General Scheme but, as I shall demonstrate, they would also prevent the General Scheme from being susceptible to constitutional challenge.

The Dichotomy between Intention-based Parental Status and the Rights of the Child under the Irish Constitution

Unless the General Scheme is amended so as to emphatically preclude the provisions on assisted human reproduction from applying in a non-clinical setting, it would be unwise to assume that self-insemination does not fall within the ambit of the General Scheme. Therefore, assuming that the decision in *McD v L* is abrogated and a known sperm donor father is intended to be ousted under the Bill, it is submitted that Heads 2 and 10 of the Bill may be constitutionally unsound because, as this author has pointed out, the provisions favour "the intention-based parental status model…over the constitutionally protected and, perhaps, soon expressly constitutionally protected rights of the child"[83] in a situation where the known donor may not have formally waived parental rights. While I have outlined above, and indeed I agree with, the logic of the intention-based parental status model from the parents' perspective, it has one major hurdle to contend with in Ireland: the constitutionalisation of children's rights. Millbank herself has pointed out that the intention-based model for awarding parental status to lesbian couples is "parent rather than child-centred"[84] and in post-Children's Referendum Ireland this may prove to be constitutionally unsound. Children's rights may shortly be explicitly placed on a constitutional platform if the Supreme Court appeal of *Jordan v Minister for Children and Youth Affairs* proves unsuccessful.[85] The outcome of the appeal will determine whether the "children's amendment", Article 42A, is inserted into the Irish Constitution or not. For the purpose of the argument I am making here, I am going to assume that the appeal will be unsuccessful and that express protection for children's rights will be incorporated into the Irish

[83] See Joint Committee on Justice, Defence and Equality Deb 9th April 2014, 4.
[84] Jenni Millbank (n 57) 170.
[85] *Jordan v Minister for Children and Youth Affairs* [2013] IEHC 635.

Constitution in the near future.[86] If inserted, Article 42A.1 will guarantee as follows:

> [T]he State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights.

Shannon explains that in Article 42A.1 "the description of the rights of the child as being "natural and imprescriptible" clearly introduces a natural law philosophy into the interpretation of such rights."[87] Similarly, Doyle and Feldman observe that Article 42A.1 places the "natural and imprescriptible" rights of the child "front and centre" and the authors also point out that:

> The verbs "recognise and affirm" and the adjectives "natural and imprescriptible" all confirm that Article 42A does not itself create these rights but instead is taken to be an acknowledgement of rights that pre-exist the Constitution as a matter of political morality or natural law."[88]

Indeed, the very use of the word "natural" in Article 42A.1 implies that the child's "natural and imprescriptible" rights include rights in relation to those persons from whom he *naturally* results; in other words, his biological parents. Shannon suggests that a child may enjoy a "natural constitutional right to family life pursuant to Article 42A.1"[89] and if this is so it is submitted that denying the known donor, the child's genetic father, the legal status of parent in circumstances where he has not formally waived his parental rights would be in flagrant breach of Article 42A.1.[90] This is because there is much to suggest that, *where possible*, a child has a natural constitutional right to family life with his biological parents. In *G v An Bord*

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[86] A challenge to the result of the 1995 Divorce Referendum was unsuccessful: see *Hanafin v Minister for the Environment* [1996] 2 ILRM 61.

[87] Geoffrey Shannon, *Child Law* (2nd edn, Round Hall 2010) 35.

[88] Oran Doyle and Estelle Feldman, 'Constitutional Law' in Raymond Byrne and William Binchy (eds), *Annual Review of Irish Law 2012* (Thomson Round Hall 2013) 130.

[89] Geoffrey Shannon (n 87) 36.

[90] Where the known donor has waived his parental rights the child's natural constitutional rights cannot be vindicated because, like all constitutional rights, such rights are not absolute and sometimes they must yield to the rights of others, in this instance the donor's right to privacy. Indeed, Article 42A.1 makes it clear that the rights of the child shall only be protected and vindicated by the State "as far as practicable".

Uchtála, Walsh J suggested that among the child's natural rights is an entitlement "to be supported and reared by its parent or parents, who are the ones responsible for its birth" and these rights "exist for the benefit of the child."[91] In addition, Article 7.1 of the United Nations Convention on the Rights of the Child (UNCRC) provides that a child has "from birth…as far as possible, the right to know and be cared for by his or her parents." The importance to a child's welfare of being nurtured by the "natural family" where possible was strongly emphasised by Hardiman J in *N v Health Service Executive*:

> [T]he presumption mandated by our Constitution is a presumption that the welfare of the child is presumptively best secured in his or her natural family…*the child has a right to the nurture of his or her natural family where that is possible*.[92]

Hardiman J's reason for favouring a child's natural parents in the first instance was as follows:

> Though selflessness and devotion towards children may easily be found in other persons, it is the experience of mankind over millennia that they are very generally found in natural parents, in a form so disinterested that in the event of conflict the interest of the child will usually be preferred.[93]

These natural constitutional rights of the child have also been acknowledged in recent High Court cases such as *E and AHE v Minister for Justice, Equality and Law Reform*[94] and *KI v Minister for Justice, Equality and Law Reform*.[95] In the former decision, Irvine J declared that the child had a constitutional right under Article 40.3 "to the support, company and care of both of his parents following

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[91] [1980] IR 32, 67-68.

[92] [2006] 4 IR 374. Emphasis added. However, this case concerned an application for the return of custody of a child from prospective adopters to its biological *married* parents so Hardiman J's *dicta* may not be applicable to unmarried natural parents.

[93] [2006] 4 IR 374, 501-502.

[94] [2008] IEHC 68.

[95] [2011] IEHC 66.

upon his birth."[96] Such a right was once again affirmed by Hogan J in the latter case, and the learned justice held that constitutional rights such as this "must, of course, where possible be construed in a way 'as to give them life and reality.'"[97] It is submitted that such a right of the child could shortly be subsumed under Article 42A.1. The Irish courts would not be breathing "life and reality" into this constitutional right of the child if they decided to uphold Heads 2 and 10 of the General Scheme of the Children and Family Relationships Bill 2014 in their current form. Any legislation according parental status to a biological mother's lesbian partner over a known biological sperm donor father *immediately* upon the birth of the child would appear constitutionally unsound because, as Hardiman J stated in *N v Health Service Executive,* the Constitution "prefers parents to third parties, *official or private*".[98] Indeed, the importance of genetic parentage has also been emphasised by Geoghegan J in *N v Health Service Executive* [99] and most recently by Abbott J in *MR v An tArd Chláraitheoir.*[100] Writing extra-judicially Baroness Hale, the Deputy President of the Supreme Court of the United Kingdom, has also extolled the benefits of genetic parentage by highlighting that it could:

> [B]ring a special sense of love and commitment from the parent which would benefit the child, as well as the knowledge of origins and lineage important to developing a sense of self, and possibly the love and commitment of the wider family.[101]

In view of this, it is surely a "natural and imprescriptible" right of the child to know, *where possible* (and in the case of a known donor it is possible) who his or her father is, and to have at least the possibility of being cared for by him, and the State may shortly be constitutionally required to "protect and vindicate" such a right. Hence any attempt by the Oireachtas to enact Heads 2 and 10 in their current

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[96] ibid.

[97] [2011] IEHC 66 [25], citing *Buckley v Attorney General* [1950] IR 67, 81 (O'Byrne J).

[98] [2006] 4 IR 374, 501. Emphasis added.

[99] *N v Health Service Executive* [2006] 4 IR 374, 547: Geoghegan J stated that "[m]any people, I suspect, would consider that there is an appreciable advantage for a child to be reared within a natural family and having real parents and real aunts and uncles."

[100] *MR and Another v An tArd Chláraitheoir* (n 42).

[101] Brenda Hale, 'New Families and the Welfare of Children' (2014) 36 (1) Journal of Social Welfare and Family Law 26, 30.

form and potentially oust a known donor who has not formally waived his parental rights would most likely be constitutionally unsound. The child could, before its birth, be denied the opportunity of ever knowing or enjoying "the society of" its biological father because of a legislative preference for intention-based parental status no matter what the circumstances of the child's conception, and this would appear contrary to the rights of the child under Article 42A. As Mulligan emphasises, a proposed legislative framework for assisted reproduction in Ireland:

> [M]ust be careful to respect constitutional rights, and ensure that they are adequately protected in the scheme of regulation. As well as failing to show sufficient regard for the Constitution, a framework that did not give enough weight to constitutional rights would be vulnerable to constitutional challenge.[102]

Where there is a *known* sperm donor it may be unconstitutional to award statutory recognition to the intention of lesbian partners as to *their* preferred allocation of parentage in relation to the child in the way that Heads 2 and 10 seem to. Such intention would likely have to yield to the "natural and imprescriptible" constitutional right of the child under Article 42A.1 to the development of its sense of identity through knowing and possibly having "the society of its father"[103] should he choose to play a parental role in its life by seeking the acquisition of guardianship or access rights in the courts. Admittedly, the insertion of the word "natural" in Article 42A may serve to "denigrate alternative and unorthodox family forms"[104] but it should also amount to a robust protection of the child's right to the knowledge, and possibly even the society, of both its biological parents. If any justification is required (other than a constitutional one) for favouring the rights of

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[102] Andrea Mulligan, 'From Murray v. Ireland to Roche v. Roche: Re-Evaluating the Constitutional Right to Procreate in the Context of Assisted Reproduction' (2012) Dublin University Law Journal 261, 261-262.

[103] *McD v L*(n 36) 494 (Denham J).

[104] Mairead Enright, "Interrogating the Natural Order: Hierarchies of Rights in Irish Child Law" (2008) 11 (1) *Irish Journal of Family Law* 3, 7. Indeed, words such as "natural" arguably serve to "articulate homosexuality's deviant status": see the discussion in Lauren Schwartzreich, "Restructuring the Framework for Legal Analyses of Gay Parenting" (2005) 21 Harvard Blackletter Law Journal 109, 112.

the child over the reproductive liberty of adults in an assisted human reproduction scenario, then a logical justification is provided by Bainham:

> If a justification is needed, it might reside primarily in the power imbalance which exists between children and the adults with whom they are in a relationship. Nowhere is this disparity in power more clearly demonstrated than in the fact of birth and its implications over which, self-evidently, the child concerned has no choice or control.[105]

Furthermore, in the recent case of *A v B&C*, Thorpe LJ in the English Court of Appeal recognised that while a lesbian couple may have:

> [T]he desire to create a two parent lesbian nuclear family completely intact and free from fracture resulting from contact with the third parent...such desires may be essentially selfish and may later insufficiently weigh the welfare and developing rights of the child that they have created.[106]

In the Federal Magistrates Court of Australia, Brown FM emphasised in the case of *H & J* that:

> [A] biological parent can be significant to a child, in the sense of being important to that child, notwithstanding he or she has no involvement at all in the care of that particular child. In that case, the importance arises as a result of the particular child having a shared genetic inheritance with the parent.[107]

Indeed, the Supreme Court has recognised that it is important for a child to have knowledge of its biological parentage in the absence of "compelling reasons to the contrary."[108]As Bainham argues, in order to respect *their* personal autonomy, all children should be allowed:

> [T]o take their own decision about whether or not biological links are important to them. They are not required to give any reason for this. It is not

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[105] Andrew Bainham, 'Arguments about Parentage' (2008) 67 (2) Cambridge Law Journal 322, 324.
[106] *A v B&C* [2012] EWCA Civ 285 [27].
[107] *H&J* [2006] FMCA fam 514 [61]. See further Jenni Millbank (n 57) 159.
[108] *McD v L* (n 36) 524.

> for the State, or their parents or anyone else to dictate whether biological parentage is, or is not, important to them. It is fundamentally an individual choice which ought to be respected.[109]

Bainham argues that the child's choice must be "meaningfully protected *during childhood*" and consequently the State should be under a "positive obligation to establish and conserve biological heritage in as many cases as possible."[110] Thus, Article 42A.1 of the Constitution arguably prohibits any attempt to statutorily exclude the child's father from being deemed a parent of the child in circumstances *where the child's father is known to its mother and he has not formally waived his parental rights*, because this could be contrary to the constitutional rights of the child. Corbett has emphasised the importance of Article 42A:

> The inclusion of a stand-alone Article dedicated to children, Art 42A – both the rights it contains and the presence of the Article itself – sends a clear message that Ireland values children and that this should be reflected in our laws and court decisions.[111]

If the possible interpretation of Heads 2 and 10 of the General Scheme that was enunciated earlier in this chapter is correct and the known donor is ousted whether the assisted reproduction "procedure" takes place in a clinic or in the home, is the Oireachtas sending out a clear message that Ireland values children first and foremost or is the real inference that the desires of adults will incontestably be catered for no matter what the cost?

A Known Donor's Right to Apply for Access?

The known donor may not be completely deprived of enjoying access to the child even if he is denied the status of parent under the General Scheme. This is because Part 7 of the General Scheme, which deals with Guardianship, Custody and Access,

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[109] Andrew Bainham (n 104) 347.
[110] ibid.
[111] Maria Corbett, 'The Children's Referendum is a Game-Changer for Children's Rights in Ireland' (2012) 15 (4) Irish Journal of Family Law 95, 96.

does not appear to exclude the known donor from applying to the court for access to the child as a "relative of a child."[112] Although a definition of "relative of a child" which does not expressly include the known donor is provided under Head 31, the list is not exhaustive. It is arguable that the definition of "father" in Head 31 might have some bearing on the courts' interpretation of the term "relative", but it is nonetheless submitted that a known donor, the child's blood relative, might indeed be able to acquire a right of access *in certain circumstances*, similar to what has occurred in the United Kingdom, as the following analysis will demonstrate.

Assisted Human Reproduction and Same-Sex Couples in the United Kingdom

The Human Fertilisation and Embryology Act 2008 regulates assisted reproduction in the United Kingdom and sections 42-45 are somewhat similar to Heads 2 and 10 of the General Scheme. Section 42 states that a civil partner who consents to her civil partner's donor assisted conception will be treated as a parent of the child irrespective of whether the donor is known or anonymous and whether assisted reproduction takes place at a clinic or via self-insemination. Section 43 provides that a cohabiting female partner of a woman who conceives via sperm provided only by a licensed fertility clinic will be treated as a parent of the child if the 'agreed female parenthood' conditions set out in section 44 are complied with. These conditions are that the cohabiting parties must sign consent forms prior to conception electing for the co-mother to be treated as a parent of the child. Section 45 provides that "where a woman is treated by virtue of section 42 or 43 as a parent of the child, no man is to be treated as the father of the child."

Clearly, Heads 2 and 10 of the General Scheme could on this author's latter interpretation mirror sections 42 and 45 of the 2008 Act by encompassing self-insemination and ousting the known donor from acquiring any parental rights. However, as stated, if Heads 2 and 10 are in fact an Irish equivalent of sections 42 and 45 then they may be unconstitutional.[113] Obviously, the UK Parliament did not

[112] General Scheme of the Children and Family Relationships Bill 2014, Head 31.

[113] It is interesting to note that Head 10 possibly goes further than section 42 by also allowing the mother's consenting, *cohabiting* female partner to be recognised as a parent of the child where there is a known donor and assisted reproduction takes place via self-insemination, assuming that this author's interpretation is correct.

have to concern itself with the constitutional rights of the child given that there is no written constitution in operation in that jurisdiction. However, in the UK, even where a woman in a civil partnership with the birth mother is treated as a second female parent of the child by virtue of section 42, the courts have held that a known donor may still be able to obtain a contact (access) order in certain circumstances.

In *S v D&E*, Baker J acknowledged that the effect of sections 42 and 45 of the Human Fertilisation and Embryology Act 2008 was to preclude a known sperm donor from being treated as a parent of the child born to lesbian civil partners for any purpose, and that "the policy underpinning these reforms is an acknowledgement that alternative family forms without fathers are sufficient to meet a child's need."[114] However, the learned justice held that a known sperm donor father who had been "deprived of the status of legal parent by the 2008 Act"[115] could still apply to the court to be granted leave to apply for a contact order under section 8 of the Children Act 1989. Baker J came to this conclusion because if Parliament had intended that a known donor was to be prevented from acquiring a contact order then it would have expressly disqualified him from even seeking the court's leave to apply for one under section 10 of the 1989 Act.[116]

The main factor which led Baker J to grant the two known sperm donor applicants, S and T, leave to apply for contact orders in respect of their biological children was "the connection that each applicant was *allowed* by the respondents to form with the child."[117] Essentially, Baker J held that, if lesbian civil partners in whom parental responsibility is vested by virtue of the 2008 Act consciously choose to exercise "their parental responsibility to facilitate some sort of relationship between their children and their biological fathers",[118] then it is appropriate for a court to grant the known donors leave to apply for contact orders. Baker J acknowledged that the 2008 Act:

> [D]enies the biological father the status of *legal* parent, but it does not prevent the lesbian couple, in whom legal parenthood is vested, from

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[114] *S v D&E* [2013] EWHC 134 (Fam) [113].
[115] ibid [115].
[116] It is possible that this was in fact an oversight on behalf of the U.K. Parliament when enacting the 2008 Act.
[117] *S v D&E* (n 112) [132]. Emphasis added.
[118] ibid [118].

> encouraging or enabling the biological father to become a *psychological* parent.[119]

The decision in *S v D&E* appears entirely equitable. Lesbian civil partners who use known donors to conceive children should not be allowed to have their cake and eat it, so to speak, as this would be detrimental to their children. Baker J's decision is ultimately child-centric because a child whose co-mothers have allowed it to build a relationship with its biological father through "regular and frequent contact"[120] should not then be allowed to assert their legal parental status to try and prevent the father from having any further contact with the child. Notably, Baker J makes it clear that those lesbian civil partners who do not encourage a relationship to develop between the known donor and the child from the time of its birth will have their parental autonomy respected. He concluded,

> Each case is, however, fact specific, and on the facts of [*S v D&E*], having considered all submissions from all parties, I find that the most important factor is the connection that each applicant was *allowed* by the respondents to form with the child.[121]

As stated, Part 7 of the General Scheme does not appear to preclude a known donor who has been denied the legal status of parent by virtue of Heads 2 and 10 from applying to the court for access to his child as a "relative of a child." This is to be welcomed because if Heads 2 and 10 prevent the known donor from being deemed a legal parent of the child and thus disentitled to apply to the court for guardianship rights, at least he may be able to apply to the court to be granted access to his child under Head 48. Indeed, in circumstances similar to those in *S v D&E,* where the lesbian couple has permitted regular contact and allowed a relationship to develop between the known donor and the child, it is submitted that Article 42A (if inserted) would require that the right of the child to contact with its biological and, in such circumstances, psychological parent is properly vindicated by the Irish courts.

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[119] ibid.
[120] ibid.
[121] ibid [132]. Emphasis added.

Anonymous Sperm Donors and Licensed Facilities

As stated, there is currently no statutory regulation of assisted human reproduction in Ireland, but legislation giving effect to the intention-based parental status model where a licensed facility is used and the sperm donor is consequently unknown should not prove constitutionally unsound. In this instance the child should be deemed the child of the commissioning couple because the biological parents will be unknown to each other. All of the sperm used in Irish fertility clinics comes from anonymous donations made overseas (though as we shall see this practice impinges on the child's right to knowledge of its identity). Further, the anonymous donor may have donated his sperm to a licensed facility for monetary recompense and had an opportunity to formally declare that it is not his intention for the sperm to be used for his own reproductive use.[122] Admittedly, the child would not enjoy a right to be cared for by its father in these circumstances but, as we shall see, legislation could at least provide for the donor-conceived child's right to know the identity of its biological father. Hence the Oireachtas could seek to vindicate the rights of the child *as far as possible* in this type of assisted reproduction scenario. In any event, the child should be deemed the child of the commissioning couple because the nexus between the biological parents that exists in the known donor scenario is not present and the unknown donor will have formally waived any parental rights in respect of the child. Thus, in these circumstances Head 10 is not constitutionally infirm in allowing the biological mother's civil or cohabiting partner to be declared a second female parent of the child. Indeed, this is what the Commission on Assisted Human Reproduction (CAHR) recommended in its report on assisted human reproduction (AHR) in Ireland in 2005. The *Report of the Commission on Assisted Human Reproduction* made the following recommendations regarding the use of licensed facilities:

> 24. In donor programmes, the intent of all parties involved – that the donor will not have any legal relationship with the child and that the woman who gives birth to the child will be the child's mother – should be used as the basis for the assignment of legal parentage.

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[122] This is a necessary safeguard for the Irish commissioning couple as it prevents the anonymous donor from later seeking to assert parental rights, which he would otherwise have simply by virtue of the blood link between he and the child: see *McD v L* (n 36).

25. In cases involving sperm donation, there should be a requirement that the partner, if any, of the sperm recipient also give a legal commitment to be recognised as the child's parent.[123]

Male Same-Sex Couples and the Intention-based Parental Status Model

Horsey advocates the adoption of the intention-based parental status model in surrogacy cases, and the General Scheme does indeed purport to give effect to intention-based parental status in this context provided that at least one of the intending parents has a genetic link to the child.[124] However, the General Scheme creates some difficulty in the case of two prospective male parents who intend to be equal co-fathers and utilise a surrogate to bear a child for them. First, Head 2 of the General Scheme makes it clear that "traditional surrogacy", in which a woman becomes pregnant using her own eggs with the intention of giving up the child to commissioning parents, is excluded from its scope.[125] Hence if a male same-sex couple utilise a family member of the intended parent who is not providing the sperm or a close friend to give birth to a child for them the legal situation will simply remain the same as it is at present. The parties may all intend that the surrogate is simply to be inseminated with one of the men's sperm and bear a child that will be raised from the moment of its birth by the co-fathers. The parties may conclude an agreement to that effect, but akin to the sperm donation contract in *McD v L*, a surrogacy agreement, though not illegal, is not enforceable in an Irish court.[126] The surrogate will be the child's legal mother, though she can make a statutory declaration under section 2(4) of the 1964 Act making the male who provided the sperm a joint guardian of the child as he is the child's natural father. However, if the provisions of the General Scheme are

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[123] *Report of the Commission on Assisted Human Reproduction* (n 82) 46-47.

[124] Kirsty Horsey (n 60) 455. See the General Scheme of the Children and Family Relationships Bill 2014, Heads 12 & 13 for the proposals relating to parentage in cases of surrogacy.

[125] However, the Joint Committee on Justice, Defence and Equality has recommended that traditional surrogacy should be legislated for: see Joint Committee on Justice, Defence and Equality, *Report on hearings in relation to the Scheme of the Children and Family Relationships Bill* (Joint Committee on Justice, Defence and Equality 2014) 4. Available at: http://www.oireachtas.ie/parliament/oireachtasbusiness/committees_list/jdecommittee/reports/

[126] See *MR and Another v An tArd Chláraitheoir* (n 42) [105]. Surrogacy arrangements are also unenforceable in the U.K.; see section 1 of the Surrogacy Arrangements Act 1985.

ultimately enacted, in cases of traditional surrogacy the child's intended, non-biological co-father will not be completely excluded from acquiring any rights in relation to the child. This is because Head 39 provides that a person who is not a parent of the child can apply to the court to be appointed a guardian of the child. He must be married to or in a civil partnership with or cohabiting for over three years in an intimate and committed relationship with the parent of the child and have shared with that parent responsibility for the child's day-to-day care for a period of more than two years.

However, this is far from ideal because not only must the non-biological co-father apply to the court to gain guardianship rights in respect of his intended child but he can only do so more than two years after the child's birth. Further, once he does acquire such rights he and his civil or cohabiting partner, the child's biological father, will be two of three adults with guardianship rights in respect of the child because, irrespective of whether she wants them, the biological surrogate mother has constitutional rights of 'care and custody' in respect of the child under Article 40.3 and is a guardian of the child.

It is unclear as to why 'traditional surrogacy' is not regulated by the General Scheme. It is less complicated than 'gestational surrogacy', the type of surrogacy arrangement that is regulated under the General Scheme, whereby a donor egg must be infused with sperm from one member of the male couple and then implanted in the surrogate in a clinical setting. Indeed, Dr. Mary Wingfield of the Institute of Obstetricians and Gynaecologists has emphasised that "there are increased risks in pregnancy if a woman conceives using donated eggs. Her body will not reject the eggs but there are immunological changes that can happen."[127] Traditional surrogacy is also far less expensive as it can involve self-insemination of the sperm by the surrogate. Moreover if, following the child's birth, the General Scheme purported to allow guardianship of the child to be transferred to the co-fathers to the exclusion of the biological surrogate mother in a traditional surrogacy arrangement, this would appear unlikely to fall foul of the Constitution because it was held in *State (Nicolaou) v An Bord Uchtala* that a natural mother's personal rights in relation to her child under Article 40.3 are alienable, since "there is no provision in Article 40 which prohibits or restricts the surrender, abdication, or

[127] See Joint Committee on Justice, Defence and Equality Deb 9th April 2014, 6.

transfer of any of the rights guaranteed in that Article by the person entitled to them."[128]

However, the General Scheme states that there are "compelling public policy reasons" for excluding traditional surrogacy arrangements from the ambit of its provisions because "the effect would be to allow the woman to "contract out" of her parental responsibility for a child which is clearly hers both by genetics and by birth."[129] If this is prevailing public policy in Ireland, why then, do we allow an unmarried mother to place her child for adoption because surely she too is abdicating her parental responsibility in respect of her biological child?

Nonetheless, in cases of gestational surrogacy, where a surrogate gives birth to a baby created with a donor egg and the sperm of one of the intended male parents, Head 12 provides that, upon application to it, a court may declare that the surrogate is not a parent of the child and that the legal parents are the child's biological father and his wife, civil partner or the person with whom he is in an intimate and committed cohabiting relationship. Such an application may be made by the surrogate, the child's biological father or the father's wife, civil or long-term cohabiting partner. It can only be made 30 days after the child's birth in order to allow the surrogate "sufficient time to recover from the rigours of pregnancy and childbirth before participating in proceedings."[130] An application must be accompanied by evidence of the genetic relationship of one of the intended parents to the child and evidence that the surrogate is not the genetic mother of the child. The consent of the surrogate to the court's legal assignation of parentage is essential; otherwise she will be the child's legal mother. Once satisfied that the surrogate consents and that one of the intending parents has a genetic link to the child, a court can make a declaration that the same-sex couple are the child's legal parents. As this author made clear to the Joint Committee on Justice, Defence and Equality, one unsettling aspect of all this is that if the gestational surrogate does not consent she will be the child's parent and guardian and the intending parents are left with no legal remedy.[131] This would be more understandable in the case of a traditional surrogate who is a genetic parent of the child, but allowing a gestational

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[128] *State (Nicolaou) v An Bord Uchtala* [1966] IR 567, 644.

[129] General Scheme of the Children and Family Relationships Bill 2014, Head 2 (Notes).

[130] General Scheme of the Children and Family Relationships Bill 2014, Head 13 (Notes).

[131] See Joint Committee on Justice, Defence and Equality Deb 9th April 2014, 10.

surrogate who has no genetic connection to the child to keep what is essentially (and genetically) someone else's child is nothing short of absurd. Shannon makes the valid point that at least the child will not be without a legal guardian,[132] though that is perhaps small comfort to the commissioning same-sex couple, one of whom will be the child's genetic father.

Gestational Surrogacy and the Rights of the Child

It is opined that, *when examined from the viewpoint of the child*, Head 12, which can allow for a child to be 'motherless', is largely unproblematic. We have already seen that the Irish superior courts recognise the constitutional right of the child to the care and support of both biological parents and that such right will likely soon be subsumed under Article 42A. However, such right is dependent on the willingness of a biological parent to actually care for and support the child through to adulthood. In *G v An Bord Uchtála,* Parke J stressed that a child does not have a constitutional right to have parental duties discharged by its natural parents.[133] Indeed, Article 42A.1 makes it clear that the rights of the child shall only be protected and vindicated by the State "as far as practicable". Further, we have seen that the Constitution enables a birth mother to transfer her parental rights. Therefore, if a gestational surrogate was to *freely choose* to transfer her rights of parentage and guardianship to a male same-sex couple, then it is no longer practicable for the child to enjoy a right to the care and support of its mother. This is virtually identical to what occurs when a mother decides to sanction her child's adoption.

Although Irish adoption law and the proposed surrogacy provisions enable a birth mother to transfer her parental status and rights to others, the child is left with one important right. Hamilton CJ stated in *IO'T v B and Others* that "the right to know the identity of one's natural mother is a basic right flowing from the natural and special relationship which exists between a mother and her child"[134] and thus a child has a right to at least know the identity of its birth mother, though Hamilton CJ made it clear that such a right was not absolute and had to be weighed

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[132] ibid.
[133] [1980] IR 32, 68.
[134] *IO'T v B and Others* [1998] 2 IR 321, 348.

against the birth mother's constitutional right to privacy. The General Scheme is silent as to how a child whose birth mother is a gestational surrogate might be able to ascertain her identity upon reaching the age of majority, but guidance can be drawn from the approach adopted in the United Kingdom.

Section 54 of the Human Fertilisation and Embryology Act 2008 Act is similar to Head 12 of the General Scheme: it gives effect to the intention-based parental status model in a surrogacy context by allowing a parental order to be made in favour of an opposite or same-sex couple *six weeks* after the child's birth. The parental order has the effect of transferring parental status and responsibility for the child from the surrogate to the male homosexual couple provided one member of that couple is the genetic father. The surrogate cannot validly consent to the making of the order until six weeks after the child's birth so there is a cooling-off period during which she may change her mind. Although all parental rights are transferred from the surrogate to a male same-sex couple, the original birth certificate naming the mother remains in existence and can be accessed by the child once he or she reaches the age of eighteen. A similar approach should be adopted in Ireland particularly given the constitutional importance of the child's right to know the identity of its birth mother as espoused in *I'OT v B and Others*.[135] If the U.K. approach was embraced by the General Scheme then an order under Head 12 in favour of the child's father and his same-sex partner would not unduly hamper the child's constitutional right to know the identity of the woman responsible for giving birth to him/her.

The Constitutional Rights of the Child in Cases of Dispute between the Gestational Surrogate and the Intended Parents

As seen, Head 12 establishes that the gestational surrogate can refuse to consent to a legal assignation of parentage in favour of the intended parents. However, if the gestational surrogate adopts this course of action and seeks to retain custody of the child, could it be argued that she is breaching the child's natural constitutional right to family life under Article 42A (if inserted)? It is submitted that where the genetic parents are an opposite-sex married couple and both members of the couple have

[135] ibid.

provided the genetic material, *ie* the female has provided the ovum and the male has provided the sperm, this argument could hold significant weight indeed. This is because by refusing to consent a gestational surrogate would be denying the child its right to know and be reared by its genetic, married parents. This would appear contrary to Article 42A (if inserted), and the rights of the married family under Article 41 could also be invoked because there is a constitutional presumption that the welfare of a child is best secured with its natural, married parents.[136] Thus, one envisages that, if a dispute should arise between a gestational surrogate and genetic married parents in the future, Head 12 will undoubtedly be placed under a constitutional spotlight.

However, where a gestational surrogate refuses to consent to the making of an order in favour of a male same-sex couple under Head 12, the argument that the child's natural constitutional right to family life is being breached may hold less weight in the courts. This is because only one member of the same-sex couple will be the child's genetic parent, and even if the gestational surrogate sought to retain the child the natural father could seek to establish family life with the child by applying for guardianship or access rights in the courts. This might satisfy the child's constitutional right to know and be cared for by its parent. Unlike their married opposite-sex counterparts, the male same-sex couple would be unable to rely on the protection afforded under Article 41.[137] Thus a male same-sex couple deprived of a child that they intended to raise together would be unlikely to establish any breach of constitutional rights caused by the surrogate's actions because they constitute a family unit that is presently devoid of any constitutional protection.

In these circumstances it is also unlikely that the natural father's same-sex partner, the child's intended co-father, would be appointed a guardian by the court under Head 39. Head 39 allows a person who is not a parent of the child to apply to the court to be so appointed, but it envisages that such a person will have shared with the child's parent responsibility for the child's day-to-day care for a period of more than two years and where a gestational surrogate has retained custody of the child the natural father's same-sex partner will be unable to establish this.

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[136] See *Re JH* [1985] IR 375, and *N v Health Service Executive* [2006] 4 IR 374.

[137] Although there is a referendum on same-sex marriage proposed for 2015.

The Child's Right to Know the Identity of its Parents

Same-sex couples who choose to have children via recourse to methods of assisted reproduction should not underestimate how important it can be for a donor-conceived child to have knowledge of its biological parentage. Kilkelly believes that children should be able to choose whether or not to access identifying and non-identifying information about their donors because:

> Supported by considerable research and the development of best practice across the world, the strong consensus emerging is that it is without a doubt not only in children's interests to know the full details of their history (and indeed that of their family) but that an overwhelming number of them request, want and need that information.[138]

Similarly, Cowden recognises the importance that a child can attach to its biological family and that "the evidence is growing that access to identifying information regarding one's genetic parents is essential to a child's mental health."[139] In *McD v L*, the Supreme Court recognised that "[t]here is natural human curiosity about parentage."[140] Further, the ECtHR has recognised "the importance to children of accessing information about their identity"[141] and it appears to require some State intervention to facilitate this.[142] In light of all this, it is perhaps disappointing that the General Scheme lacks any provision enabling a donor-conceived child to acquire identifying or non-identifying information about

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[138] Ursula Kilkelly, 'Complicated Childhood: the Rights of Children in Committed Relationships' in Oran Doyle and William Binchy (eds), *Committed Relationships and the Law* (Four Courts Press 2007) 215, 234.

[139] Mhairi Cowden, ''No Harm, No Foul': A Child's Right to Know their Genetic Parents' (2012) 26 (1) International Journal of Law, Policy and the Family 102, 110-111. As authority for this statement, the author cites J.E. Scheib, M. Riordan and S. Rubiri, 'Choosing Identity – Release Sperm Donors: The Parents' Perspective 13-18 Years Later' (2003) 18 Human Reproduction 1115.

[140] *McD v L* (n 36) 524.

[141] Ursula Kilkelly (n 138) 237.

[142] *Gaskin v United Kingdom* (1989) 12 EHRR 36; *Mikulic v Croatia* App No 53176/99 (ECHR, 7th February 2002); *SH v Austria* App No 57813/00 (ECHR, 1st April 2010). Indeed, Kilkelly believes that the ECtHR could interpret Article 8 so as to prohibit anonymous gamete donation: see Ursula Kilkelly, 'The Best of Both Worlds for Children's Rights? Interpreting the European Convention on Human Rights in the Light of the UN Convention on the Rights of the Child" (2001) 23 (2) Human Rights Quarterly 308.

the sperm donor, its biological progenitor, upon maturity. Blyth and Frith have observed that "[w]orldwide, jurisdictions that are passing laws on the issue of assisted human reproduction tend to recognise the right of donor-conceived people to learn the identity of their donor."[143]

Indeed, twelve jurisdictions worldwide now prohibit anonymous sperm donation and "beyond banning anonymity, these jurisdictions have established systems to assist donor-conceived people to discover the identity of their donor(s)."[144] In each of these jurisdictions a prospective donor must explicitly agree to the release of his identity to a donor-conceived child who requests this information, prior to donating his sperm for use in assisted reproduction procedures. Further, the licensed fertility clinics in each of these jurisdictions are required "to keep records of their procedures and to forward these to a body charged with maintaining a donor register."[145] In the UK the Human Fertilisation and Embryology Authority is the body responsible for maintaining the donor-conceived register. Donor-conceived children there have the right to obtain non-identifying information at the age of sixteen and, for those children born after 1st April 2005 identifying information such as the donor's name and address can be obtained once they reach the age of eighteen.[146] Identifying information will first be released to donor-conceived children in the UK in 2023.

Thus, contrary to progressive developments elsewhere, the General Scheme actually renders the right of the donor-conceived child to knowledge of its biological parentage nugatory, even though in its 2005 report the Commission on Assisted Human Reproduction recommended that donor-conceived children "should, on maturity be able to identify the donors involved."[147] However, one should not be too critical of the Oireachtas' failure to champion this right in the General Scheme when one considers the fact that "there is no sperm

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[143] Blyth and Frith, 'Donor-Conceived People's Access to Genetic and Biographical History: An Analysis of Provisions in Different Jurisdictions Permitting Disclosure of Donor Identity' (2009) 23 (1) International Journal of Law, Policy and the Family 174, 188.

[144] ibid 175. These jurisdictions are the Australian States of Victoria, New South Wales and Western Australia, New Zealand, Germany, Sweden, Switzerland, Norway, The Netherlands, Finland, Austria and the United Kingdom.

[145] ibid 178.

[146] Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations 2004, SI 2004/1511, available at www.opsi.gov.uk/SI/si2004/20041511.htm (Accessed 29th May 2014).

[147] *Report of the Commission on Assisted Human Reproduction* (n 82) 46.

bank in Ireland" and all of the sperm used in Irish fertility clinics is "donated anonymously",[148]having been imported from countries such as Spain where donor anonymity is guaranteed. Hence the biological progenitors of Irish donor-conceived children will remain anonymous. Blyth and Frith disapprove of such clinical practices for not adequately protecting the interests of donor-conceived children and they are steadfastly of the view that "donor conception should not be practised at all if …it cannot be practised non-anonymously."[149]

The current practice of Irish fertility clinics presents a significant practical difficulty when trying to vindicate the child's right to knowledge of its biological identity. Without a national sperm bank and the continued use of imported sperm from countries that permit anonymous donation how can an Irish equivalent of the UK's donor-conceived register that would enable identifying information about the sperm donor to be accessed by the child when he or she turns 18 even be established?

Thus, there is arguably a very pragmatic reason as to why the General Scheme does not contain any provision vindicating the child's right to knowledge of its genetic identity in the context of assisted reproduction - it is virtually impossible to guarantee this right.[150] The Oireachtas is undoubtedly faced with a difficult task in a jurisdiction that has hitherto never legislated for assisted reproduction but, absent the establishment of a national sperm bank and a provision in the legislation prohibiting anonymous donation, the continuation of current practice in the area of using imported sperm from anonymous donors means that a donor-conceived child's right to knowledge of its biological parentage will continue to be rendered ineffective. However, even if an Irish sperm bank was set up, the establishment of a donor conceived register and the proposed prohibition on donor anonymity might discourage sperm donation and lead to a shortage of sperm

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[148] Joint Committee on Justice, Defence and Equality Deb 9th April 2014, 11. See also Brian Tobin, 'Why Ireland needs to set up a sperm bank' *Irish Times* (Dublin, 27th June 2014) 14.

[149] Blyth and Frith (n 143) 184.

[150] It is most likely that the child's right to knowledge of genetic parentage is a in fact constitutional right, an extension of the right to know one's natural mother that was enunciated in *I'OT v B and Others* [1998] 2 IR 321. See Andrea Mulligan (n 46)121.

donors in Ireland. Indeed, this is exactly what occurred in a number of jurisdictions that adopted this policy.[151] However, Cowden has forcefully emphasised that,

> Even if there was a shortage in gamete donations, there is a strong argument that this outcome is more acceptable than knowingly creating individuals who will never be able to know their genetic parents.[152]

Same-Sex Parenting: The Way Forward

The General Scheme of the Children and Family Relationships Bill 2014 contains some flaws that need to be addressed if the ultimate legislation is to withstand constitutional scrutiny and accord due weight to the best interests of the child. It is submitted that assisted reproduction via self-insemination should be plainly excluded from the ambit of Head 10, and this can be done through the simple deletion of Head 10 (6) and the provision of a clear definition for the term "procedure" under Head 2. This would ensure that the Supreme Court's decision in *McD v L* is respected and that the constitutional rights of the child are *actually* at the forefront of the legislative scheme.

However, the reality is that lesbian couples may continue to have recourse to known sperm donors when attempting to realise their ambition to become parents. If the General Scheme is altered so as to exclude the self-insemination scenario, and it would appear that this is necessary so that it does not fall foul of the Constitution, I would propose a solution aimed at providing a child born in such circumstances with greater certainty than simply leaving the law as it is, whereby the birth mother will be the child's only legal guardian upon birth and the known donor will have to apply to the court for rights of guardianship and access as a natural father.

I propose a fairer process that would more effectively balance the constitutional rights of the child and the intentions of prospective lesbian parents and a known sperm donor. Automatic guardianship rights should be granted to all

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[151] The removal of donor anonymity in the Netherlands and Norway led to a shortage of donors. See Ilke Turkmendag and Robert Dingwall, 'The Removal of Donor Anonymity in the UK: The Silencing of Claims by Would-Be Parents' (2008) 22 (3) International Journal of Law, Policy and the Family 283, 288.

[152] Mhairi Cowden (n 139) 121.

unmarried fathers (irrespective of a specific cohabitation requirement as currently provided for under Head 31 (3)).[153] This measure, coupled with the possibility for the known donor to effect a legal transfer of parentage in the same way that a gestational surrogate can under Head 13 would effectively balance the rights of all parties - child, birth mother, second female parent and known donor. This would vindicate the child's rights to know the identity of, and possibly be cared for by, both of its biological parents upon birth. Indeed, the child would enjoy the society of its father indefinitely should the known sperm donor father have a change of heart and decide to continue acting as a parent at the end of a specific statutory cooling-off period. I propose that the 30-day statutory cooling-off period should be granted to the known donor in the same way that it is currently proposed for a gestational surrogate under Head 13. Should the known donor refuse to transfer his rights, this would not leave the lesbian co-parent without the possibility of obtaining those rights necessary to enable her to look after the child because if it is enacted Head 39 (3) will enable the birth mother's same-sex civil or cohabiting partner to apply to the court for appointment as a guardian, but only after she has shared with the birth mother responsibility for the child's day-to-day care for a period of more than two years.

The proposed cooling-off period would nonetheless recognise that "human emotions are powerful and inconstant"[154]and that "the blood link, as a matter of almost universal experience, exerts a powerful influence on people."[155] Indeed, as Fennelly J stated in *McD v L*:

> The father, in the present case, stands as proof that participation in the limited role of sperm donor…does not prevent the development of *unforeseen but powerful paternal instincts*.[156]

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[153] In cases of dispute the child's mother would have the right to apply to the court for a declaration that the man claiming automatic guardianship rights is or is not the biological father of the child, and the court can order DNA testing to establish parentage: see Head 7 of the Children and Family Relationships Bill 2014.

[154] *A v B&C* [2012] EWCA Civ 285 [27] (Thorpe LJ).

[155] *McD v L* (n 36) 524 (Fennelly J).

[156] ibid.

Wallbank and Dietz have emphasised that "emotions can run high once a child is born and what was intended before conception can seem completely inappropriate afterwards."[157] Nonetheless, should the known donor not feel paternal by the end of the cooling-off period, because his situation would come within Head 13, he would have the right to *choose* to transfer all of his parental rights in relation to the child to its biological mother's same-sex partner. In the vast majority of cases this would permit the realisation of the intention of all parties to the sperm donation arrangement and the ensuing parental order would enable the child to have the reality of its intended same-sex family structure recognised by law.

My proposal would ensure that biological and intended parents are all appropriately recognised and it is child-centric because it initially provides the child with the possibility of knowing and being raised by its biological parents, something that may arguably be constitutionally required if Article 42A is inserted, but it also allows the intended family structure of two lesbian parents and guardians to be realised where the known donor does not want to fulfil his parental duties in relation to the child. Thus the child never loses out in this situation because its constitutional rights are being respected as far as possible and it will at all times have two parents and guardians. Some might disagree with this proposal to grant a known donor automatic guardianship rights and to allow him to be the child's father should he choose not to consent to a legal assignation of parentage after the 30-day cooling-off period, but is this really as incongruous as allowing a gestational surrogate who has no genetic connection to the child to be its mother if she refuses to consent to the making of an order under Head 13?

Extending Guardianship to a Civil or Cohabiting Same-Sex Partner

It should be noted that there is another means by which a gay or lesbian co-parent can obtain legal rights in relation to their partner's biological child, and that is via the legislative extension to such co-parents of the right to apply to the court to be appointed a guardian of the child. Indeed, Bainham argues that this is more appropriate: he believes that a same-sex partner should not be declared a parent of the child because:

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[157] Julie Wallbank and Chris Dietz, 'Lesbian Mothers, Fathers and Other Animals: Is the Political Personal in Multiple Parent Families?' (2013) 25 (4) Child and Family Law Quarterly 451, 467.

> The concept of parentage should rather be confined, to reflect as far as possible the unique position of biological parents and, through the child's filiation with them, the wider kinship links to the extended maternal and paternal families.[158]

Instead, Bainham proposes that a same-sex partner should be appointed as the child's guardian:

> [T]he true claim which same-sex partners and other social parents have is that they should be given the legal powers which are necessary to enable them to look after a child properly and it is the status of possessing parental responsibility which is best designed to achieve this.[159]

There is merit in this argument and it is aligned with this author's abovementioned child-centric proposal for legislating for the self-insemination scenario whereby the child's biological father would be a parent and guardian should he refuse to transfer these parental rights after the proposed 30-day cooling off period, but the mother's partner would be permitted to apply to the court for guardianship rights that would enable her to care for the child properly. Due to the likely constitutional constraints that could result from the insertion of Article 42A, my proposal accords significant weight to biological parentage though I acknowledge the non-biological parent's right to apply for guardianship. However, Bainham strictly views the concept of parentage as being the sole preserve of biological progenitors and guardianship as the only logical option for gay or lesbian social parents. My proposal is more equitable in that it acknowledges that in the majority of self-insemination scenarios 'a sperm donor may simply wish to be just a sperm donor and transfer his [parental] rights at the first legally available opportunity'[160] and this would enable the social parent to obtain the legal status of *parent and guardian* after the requisite cooling-off period.

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[158] Andrew Bainham (n 104) 349.

[159] ibid 348. Guardianship is referred to as parental responsibility in the United Kingdom.

[160] Joint Committee on Justice, Defence and Equality, *Report on hearings in relation to the Scheme of the Children and Family Relationships Bill* (n 125) 44 (quoting a section of this author's written submission to the Joint Committee concerning the provisions of the General Scheme).

In any event, Head 39 of the General Scheme provides a welcome legal mechanism for the recognition of the familial relationship between a social parent and the child they are raising. It enables a civil partner or a same-sex partner who has been cohabiting with the child's biological parent for over 3 years in an intimate and committed relationship to apply to the court to be appointed as a guardian of the child. The same-sex civil or cohabiting partner must have shared with the biological parent responsibility for the child's day-to-day care for a period of more than two years to be eligible. By allowing a long-term cohabiting partner to apply to be appointed as a guardian of the child Head 39 goes further than the Law Reform Commission recommended in its *Report on Legal Aspects of Family Relationships*.[161] The Commission only recommended the possible extension of the right to apply for guardianship to a co-parent who was in a civil partnership with the child's biological parent and not to a long-term cohabiting same-sex partner.

Head 39 provides a useful mechanism for those same-sex couples that are currently raising children conceived via assisted reproduction in that the non-biological parent will be able to acquire guardianship rights in relation to the child. Indeed, Head 39 of the General Scheme permits a child to have up to three legal guardians. A child from a previous heterosexual marriage or cohabiting relationship that is now being raised by its mother and her same-sex partner for example, will already have two parent-guardians[162] and may have a third guardian if the mother's lesbian partner is appointed pursuant to Head 39. A child over the age of 12 will have to consent to the making of a guardianship order in favour of their social parent, and the consent of each existing guardian is also required. However, the court can dispense with the need for the consent of an existing guardian if satisfied that such consent is being unreasonably withheld. Further, Head 39 provides a safety net for a same-sex partner who is left raising the biological child of his or her partner in the event of their partner's desertion or death, because an adult who has provided for a child's day-to-day care for a continuous period of more than 12 months can apply to be appointed as a guardian of the child where the child has no parent or guardian who is willing or able to exercise the powers, rights and responsibilities of guardianship in respect of the

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[161] Law Reform Commission, *Report on Legal Aspects of Family Relationships* (LRC 101 - 2010).

[162] This is provided that the father of a child from a previous cohabiting heterosexual relationship has been appointed a guardian by court order or agreement with the mother.

child. Obviously a same-sex partner would only need to apply for such an order in the event of the death of the child's biological parent if that person had not appointed them as a testamentary guardian by will.

The Eligibility Criteria for Adoption under Irish Law

So far I have considered the legal position of same-sex couples who choose to have children through methods of assisted human reproduction or those couples who are raising the biological child of one of the partners. We shall now turn to examine the situation of same-sex couples who may wish to apply to jointly adopt a biologically unrelated child. The eligibility criteria for adoption are set out in section 33 (1) of the Adoption Act 2010. This provides that among the categories of persons that can apply for an adoption order are a married couple, the mother or father or a relative of the child or a person who satisfies the Adoption Authority that, in the particular circumstances, the adoption is desirable and in the best interests of the child. The latter part of this section makes it clear that a single person/sole applicant can apply to adopt a child and this includes single gay and lesbian persons. In chapter 4 I will demonstrate how the effect of the ECtHR's decision in *EB v France* was to prevent the Adoption Authority from discriminating solely on the basis of sexual orientation when considering a single gay or lesbian person's application for authorisation to adopt a child. If this organ of the State were to discriminate in such a manner, such an applicant could claim before the Irish courts that his/her rights under Articles 8 and 14 of the ECHR had been breached. This is because section 3 of the European Convention on Human Rights Act 2003 allows for the ECHR's provisions to be directly applicable in the Irish courts where an applicant is suing an organ of the State.

Ryan argues that one member of a same-sex couple that has entered into a civil partnership may apply for an adoption order under the 2010 Act.[163] This view may well be correct but if the Adoption Authority permits this then such practice may be open to constitutional challenge. To allow a civil partner to adopt and consequently become the legal parent of a child who will be raised by him and his civil partner in their registered same-sex relationship that is largely akin to

[163] Fergus Ryan, *Annotated Legislation: Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010* (Thomson Round Hall 2011) 24.

marriage would seem rather dubious. This is not the same as allowing one member of a married couple to adopt because, while the child in that situation will also have only one legal parent, it will be raised in the constitutionally preferred registered relationship that is an opposite-sex marriage. Indeed, when the Civil Partnership Bill 2009 was passing through the Houses of the Oireachtas this author anticipated that the legislation would prohibit adoption by one member of a civil partnership in order to remain firmly on the right side of the Constitution:

> [I]n order for them to jointly parent a child, an Irish same-sex couple will initially have to refrain from becoming civil partners because one of them will have to apply for authorisation to adopt as a single person.[164]

Until recently, this was the situation in Northern Ireland, where Article 15 of the Adoption (Northern Ireland) Order 1987, as amended by section 203 (4) of the U.K.'s Civil Partnership Act 2004, expressly prohibited one member of a civil partnership from adopting. However, in *The Northern Ireland Human Rights Commission's Application,* Treacy J declared Article 15 of the 1987 Order unlawful. The learned judge was critical of Article 15 as:

> [T]he present legislation essentially entails that a gay or lesbian person must choose between being eligible to adopt, or affirming their relationship in public via a civil partnership ceremony. In pursuance of public expression of their commitment to one another they lose the legal opportunity that they had previously enjoyed.[165]

In any event, there is nothing in the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 that similarly qualifies the categories of single persons that may be able to adopt under the Adoption Act 2010, so Ryan's view on this matter appears valid and one member of a same-sex couple, whether party to a civil partnership or not, has the right to apply for authorisation to adopt. However,

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[164] Brian Tobin, 'Same-Sex Couples and the Law: Recent Developments in the British Isles' (2009) 23 (3) International Journal of Law, Policy and the Family 309, 324. An identical view was recently expressed by Aisling Parkes and Simone McCaughren, who stated that "many same-sex couples are left with having to choose whether to formalise their relationship in the eyes of the State or, indeed, remain single whereby one of the couple is eligible to apply to adopt": see Aisling Parkes and Simone McCaughren, 'Viewing Adoption through a Children's Rights Lens: Looking to the Future of Adoption Law and Practice in Ireland' (2013) 16 (4) Irish Journal of Family Law 99, 101.

[165] *Northern Ireland Human Rights Commission's Application* [2012] NIQB 77 [79].

for committed same-sex couples, single person adoption by one member of the union is far from ideal because the adopter alone will be the child's legal parent and his/her same-sex civil or cohabiting partner will not acquire any rights in relation to the child. In the words of Senator Norris:

> It is idiotic to say we accept there are people in same sex relationships, each of whom can individually adopt a child but that the person not involved in the adoption has no relevance whatever in the situation.[166]

Re P and the *Northern Ireland Human Rights Commission's Application*

As seen, section 33 of the 2010 Act makes it clear that Irish law precludes adoption by unmarried couples, whether same-sex or opposite-sex. Article 14 of the abovementioned Adoption (Northern Ireland) Order contains an identical blanket ban on adoption by unmarried couples. However, Northern Ireland's restrictive adoption laws were declared invalid in the House of Lords in the case of *Re P* and, very recently, in a judicial review action by the Northern Ireland Human Rights Commission at the High Court of Justice in Northern Ireland.

In *Re P*, the applicants were an unmarried opposite-sex couple seeking to adopt the biological child of the female partner in the relationship.[167] While the child was not the biological child of the male partner in the relationship, the couple had in fact been together since before the child was born – over 11 years. The couple was prevented from applying to adopt as a couple by Article 14 of the Adoption (Northern Ireland) Order 1987. They argued that this was in breach of their rights under Articles 8 and 14 of the European Convention on Human Rights (ECHR). The House of Lords agreed and declared that Article 14 of the 1987 Order was unlawful discrimination as it resulted in the applicants being rejected as prospective adopters only on the ground that they were unmarried.

However, the requisite authorities in Northern Ireland subsequently failed to implement the House of Lords' decision in *Re P*, and this eventually led to the Northern Ireland Human Rights Commission seeking judicial review of the prevailing status quo. In *The Northern Ireland Human Rights Commission's*

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[166] Seanad Deb 4 March 2009, vol 194, col 351.

[167] *Re P* [2008] UKHL 38.

Application, the applicant organisation provided contextualisation for its judicial review application via the affidavit evidence of Ms. C, one member of a committed lesbian couple.[168] Ms. C and her partner had been together for three years, and had cohabited for one year. They had a son who was the biological son of Ms. C's partner and whom they wished to adopt as either a cohabiting couple or as civil partners, as they were contemplating entering into a civil partnership to signify commitment to each other. Ms. C discovered that she and her partner were precluded from adopting as an unmarried same-sex couple by virtue of Article 14 of the 1987 order and that if they became civil partners they would also be precluded from adopting as a couple by virtue of this provision. In the High Court of Justice in Northern Ireland, Treacy J declared Article 14 of the 1987 Order unlawful:

> [U]nmarried couples are suffering an ongoing breach of their Article 8 rights read together with Article 14 by the continued denial to them of the legal opportunity to apply to adopt jointly which is available to those who enjoy the status of being married.[169]

However, the ECtHR itself has recently found that national laws restricting joint adoption to married couples are not in violation of Articles 8 and 14 of the ECHR because of the "special status" that marriage confers on the parties to it.[170] While the decisions in both *Re P* and *The Northern Ireland Human Rights Commission's Application* have gone further than Strasbourg itself is currently willing to go in this area, the reasoning employed to declare unlawful the ban on joint adoption by unmarried couples in these cases is of relevance when considering the validity of section 33 of the Adoption Act 2010.

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[168] *Northern Ireland Human Rights Commission's Application* (n 165) [14-23].

[169] ibid [75]. This ruling was later upheld by the Court of Appeal: see *Northern Ireland Human Rights Commission's Application* [2013] NICA 37. More recently, the Supreme Court of the United Kingdom refused to grant the Northern Ireland Health Minister permission to appeal this decision: see 'Poots loses Gay Ban Case' *Belfast Newsletter* (Belfast, 23rd October 2013) 9.

[170] *X and Others v Austria,* App No 19010/07 (ECHR, 19 February 2013).

Joint Adoption by Unmarried Couples and the Best Interests of the Child

In *Re P*, Lord Hoffmann believed that a 'bright line' rule against adoption by unmarried persons constituted an irrebuttable presumption of unsuitability that defied everyday experience. Such rule could not be justified on the basis of the needs of administrative convenience or legal certainty because Article 9 of the Adoption (Northern Ireland) Order 1987 required the best interests of each child to be examined on a *case-by-case basis*. Similar to Article 9 of the 1987 Adoption Order, section 19 of the Adoption Act 2010 stipulates that the best interests of the child are of key concern:

> In any matter, application or proceedings before the Authority or any court, relating to the question of the arrangements for the adoption of a child, for the making of an adoption order or for the recognition of an intercountry adoption outside the State, the Authority or the court, in deciding that question, shall regard the welfare of the child as the first and paramount consideration.

Lord Hoffman capably demonstrated the inadequacy of a 'bright line' rule in an adoption setting:

> Eligibility to *apply* for an adoption order is…only the first step on the road to adoption. The applicants must then be thoroughly scrutinised to satisfy the court that adoption by them is in the best interests of the child and, among many other things, that they will be able to provide the child with a stable and harmonious home. But the effect of Article 14 is that even if the court considers that an applicant couple pass all these tests – that adoption by them is plainly in the best interests of the child, that the child wishes to be adopted, that their relationship is loving, stable and harmonious – their virtues else, be they as pure as grace, as infinite as man may undergo – nevertheless, the court is bound to refuse the order and take a course which, *ex hypothesi*, is not in the best interests of the child on the sole ground that the applicants are not married.[171]

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[171] *Re P* (n 167) [11].

Lord Hope observed that in an adoption setting "eligibility simply opens the door to the careful and exacting process that must follow before a recommendation is made"[172] and that the interests of the child require that the eligibility criteria to apply for an adoption order should be made as wide as reasonably possible:

> Otherwise there will be a risk of excluding from assessment couples whose personal qualities and aptitude for child-rearing are beyond question. To exclude couples who are in an enduring family relationship from this process at the outset simply on the ground that they are not married to each other would be to allow considerations favouring marriage to prevail over the best interests of the child.[173]

Hence, as Treacy J stated in *The Northern Ireland Human Rights Commission's Application, "Re P* has shown that the purpose of the 1987 Order is hampered by the current eligibility criteria."[174]

(i) The Potential Future Impact of Article 42A of the Constitution

The abovementioned criticisms are equally applicable to the Adoption Act 2010 in Ireland. By restricting joint adoption to married couples, section 33 of the 2010 Act is identical to Article 14 of the 1987 Order in that it allows marriage to prevail over "the first and paramount consideration" of "the welfare of the child." If Article 42A is inserted into the Constitution it is submitted that the preference in the 2010 Act for joint adoption only by married couples may no longer withstand constitutional scrutiny. In Article 42A.1 the State "recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights." Further, Article 42A.4.1° provides that "provision shall be made by law that in the resolution of all proceedings…concerning the adoption, guardianship or custody of, or access to, any child, the best interests of the child shall be the paramount consideration." Article 42A4.2° states that "provision shall be made by law for securing, as far as practicable, that in all proceedings referred to in subsection 1 of this section in

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[172] ibid [54].
[173] ibid.
[174] *Northern Ireland Human Rights Commission's Application* (n 165) [75].

respect of any child who is capable of forming his or her own views, the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child."

An analysis of the South African Constitutional Court's decision in *Du Toit v Minister for Welfare and Population Development and Others* should help to highlight the impact that the express constitutional protection of children's rights can have on restrictive adoption legislation.[175] The South African Constitution contains express protection for children's rights similar to that which may be incorporated into the Irish Constitution, and the South African Constitutional Court has, on the basis of this children's rights guarantee, declared unconstitutional legislation precluding same-sex couples from eligibility for joint adoption. In *Du Toit* the court held that excluding same-sex partners from adopting children jointly when, if not for their sexual orientation, they would otherwise be suitable to do so, was contrary to section 28 (2) of the Constitution, which provides that "a child's best interests are of paramount importance in every matter concerning the child." The court concluded that the exclusion of same-sex couples from the adoption process was not in a child's best interests, as it:

> [D]efeats the very essence and social purpose of adoption which is to provide the stability, commitment, affection and support important to a child's development, which can be offered by suitably qualified persons.[176]

However, it should be noted that the court was *also* mandated to reach this conclusion by virtue of section 9 (3) of the South African Constitution, which expressly prohibits discrimination on the grounds of, *inter alia*, sexual orientation. Indeed, the court observed that "our Constitution requires that unfairly discriminatory treatment of [same-sex] relationships cease."[177] While the South African and Irish Constitutions certainly differ in this significant respect, it is submitted that the Constitutional Court's invocation of section 28 (2) to strike down the legislative ban on same-sex adoption could be transposed to the Irish situation if Article 42A is inserted into the Constitution in the near future.

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[175] *Du Toit v Minister for Welfare and Population Development and Others* [2002] ZACC 20.
[176] ibid [21].
[177] ibid [32].

If an unmarried Irish couple of the same (or opposite) sex were to seek judicial review of a decision by the Adoption Authority denying them the right to apply for a joint adoption order they may soon be able to argue that the blanket ban on unmarried adopters in section 33 of the 2010 Act stands contrary to Article 42A.4.1. After all, it is not in the best interests of the child to deny all unmarried couples the opportunity to be assessed as to their suitability to adopt and provide a child in need with "a loving, permanent, stable home" that is "infinitely preferable to growing up in care."[178] In 2012, the Department of Children and Youth Affairs confirmed that there were 6,250 children in care placements, with over 91% of such children in placement with a foster family.[179] Thus, as Skweyiya AJ stated in the *Du Toit* case, "adoption is a valuable way of affording children the benefits of family life which might not otherwise be available to them."[180] In *The Northern Ireland Human Rights Commission's Application,* Treacy J was undoubtedly correct in stating that:

> [E]xcluding persons from the whole adoption process on the sole basis of their relationship status can only serve to narrow the pool of potential adopters which cannot be in the best interests of children.[181]

The State could seek to counter-argue that the best interests of the child under Article 42A.4.1 are best served by its adoption into the marital family unit that is guarded with special care under Article 41.3.1 of the Constitution because marriage is "an indicator of stability" which justifies a preference for married couples over unmarried couples as potential adopters. Indeed, when the Adoption Bill 2009 was being debated in the Seanad, the Minister for Health and Children, Deputy Barry Andrews, argued that "marriage is preferable to cohabiting for adoption purposes because of the *obvious permanence*."[182] It is submitted that this is a rather weak justification for the total exclusion of unmarried couples from eligibility to participate in the adoption process because in any event "the rigorous scrutiny and

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[178] *Northern Ireland Human Rights Commission's Application* (n 165) [82].
[179] Children's Referendum Information Booklet (Department of Children and Youth Affairs, 2012) 16.
[180] *Du Toit v Minister for Welfare and Population Development and Others* [2002] ZACC 21 [18].
[181] *Northern Ireland Human Rights Commission's Application* (n 165) [80].
[182] Seanad Deb 4 March 2009, vol 194, col 361.

assessment of suitability will ensure that only persons capable of providing a loving, safe and secure adoptive home will ultimately be considered."[183] However, gauging a couple's suitability for adoption is arguably not that straightforward. Pennings argues that factors such as "a strong desire for parenthood and warm and supportive relationships…are difficult to operationalize and measure."[184] Nonetheless, the exacting adoption process should ordinarily result in only the most stable couples being allowed to adopt a child regardless of their relationship status or sexual orientation. In addition, as Treacy J so pertinently observed in *The Northern Ireland Human Rights Commission's Application*:

> [N]o relationship is perfect and while there are benefits to an adopted child in entering a relationship where a web of legal rights exists between the parents, that web is no guarantee of a lifelong, stable, committed relationship.[185]

(ii) Adoption by Civil Partners

If the State deems marital families the best units in which to place an adopted child because of the permanence usually associated with them, then why not enact legislation allowing same-sex civil partners to apply for authorisation to adopt? After all, civil partnership is a registered relationship largely synonymous with marriage, and in *The Northern Ireland Human Rights Commission's Application*, Treacy J stated that, for adoption purposes "the commitment evinced by choosing to enter a civil partnership ought to be similar to marriage in indicating the security of that relationship."[186] In the Seanad Senator Bacik proposed such an amendment to the Adoption Bill 2009, sensitive to the understanding that in the best interests of children the Adoption Authority may want evidence of a couple's commitment in the form of a legally binding relationship. She proposed that section 33 should be amended to include within the definition of "married couple" a same-sex couple that had entered into a registered civil partnership with each other.[187] Indeed, Head 79 of the General Scheme of the Children and Family Relationships Bill 2014

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[183] *Northern Ireland Human Rights Commission's Application* (n 165) [80].
[184] Guido Pennings (n 11) 1613.
[185] *Northern Ireland Human Rights Commission's Application* (n 165) [82].
[186] ibid [76].
[187] Seanad Deb 4 March 2009, vol 194, col 348.

provides for this and, if enacted, civil partners will be eligible to jointly adopt a child. However, Head 79 may be constitutionally unsound because to date adoption law has complied with the Constitution by only allowing married couples to adopt. After all, in constitutional terms a family can only be founded on marriage, not civil partnership or any form of cohabitation. By allowing same-sex adoption, the Oireachtas is really allowing the adoptive familial parent-child relationship to be founded on civil partnership, a registered relationship virtually akin to marriage though not recognised by the Constitution, and the validity of this is questionable from a constitutional standpoint. It is submitted that the better course of action would be to wait for the outcome of the same-sex marriage referendum because, if successful, existing adoption legislation could validly encompass same-sex married couples.[188] While laudable, one cannot help but feel that Head 79 is a back-door, fast-track attempt to legalise same-sex adoption so that arguments against permitting same-sex parenting (via the introduction of same-sex marriage) will have no legal validity during the upcoming referendum campaign as civil partners will already be eligible to apply to jointly adopt a child. Nonetheless, it remains to be seen whether Head 79 will even become part of our domestic law.

(iii) The Unique Predicament of Same-Sex Couples

The above-mentioned child-centric arguments for widening the pool of potential adopters to include unmarried couples are quite compelling. Circuitously, a same-sex couple seeking to challenge their exclusion from the eligibility criteria for joint adoption would likely encounter child-centric arguments justifying their exclusion. I have already demonstrated that in *Zappone v Revenue Commissioners,* the High Court was unwilling to expand the constitutional notion of the marital family under Article 41 to embrace same-sex marriage because of child welfare concerns. Dunne J felt that the issue of same-sex parenting was of "significant importance" and that:

> [T]he phenomenon of parenting by same-sex couples is one of relatively recent history. The studies that have taken place are consequently of recent

[188] See Aisling Parkes and Simone McCaughren (n 164) 100.

> origin. Most of the studies have been cross-sectional studies involving small samples and frequently quite young children. I have to say that based on all of the evidence I heard on this topic I am not convinced that such firm conclusions can be drawn as to the welfare of children at this point in time. It seems to me that further studies will be necessary before a firm conclusion can be reached. *It also seems to me that having regard to the criticism of the methodology used in the majority of the studies conducted to date that until such time as there are more longitudinal studies involving much larger samples that it will be difficult to reach firm conclusions on this topic.*[189]

Thus it is by no means certain that an Irish court would agree that the best interests of the child would be well served by opening up the eligibility criteria for joint adoption to same-sex couples. Dunne J is clearly of the opinion that same-sex parenting should not be embraced by Irish law until such concept has proven its worth through more satisfactory studies that are underpinned by a sound research methodology, and this reasoning could prove fatal to a challenge to section 33 (1) of the 2010 Act. In 2009, when the Adoption Bill was being debated in the Seanad, Senator Norris criticised this type of approach to same-sex parenting as being something of a reversal of the burden of proof by deeming same-sex couples "guilty until they are proven innocent."[190] Nonetheless, in *Zappone* Dunne J did emphasise "that none of the studies carried out to date have demonstrated any adverse impact on the children involved in the particular studies."[191] As explained earlier in this chapter, it is positive family processes that contribute to children's well-being, and the research suggests that these are as evident in same-sex family units as they are in their opposite-sex counterparts.[192]

In addition, a same-sex couple seeking to argue that their right to respect for private or family life under Article 8 is being infringed on the basis of sexual orientation contrary to Article 14 by virtue of their exclusion from eligibility to adopt under Irish law would likely prove unsuccessful. This is because in *Gas and Dubois v France*, which dealt with adoption by a second female parent in a civil

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[189] *Zappone v Revenue Commissioners* (n 9) 498-499. Emphasis added.
[190] Seanad Deb 4 March 2009, vol 194, col 363.
[191] *Zappone v Revenue Commissioners* (n 9) 499.
[192] See the discussion on pages 6-7.

partnership, the ECtHR observed that because opposite-sex couples who were either in a civil partnership or cohabiting were also precluded from second-parent adoption there was no discrimination on grounds of sexual orientation contrary to Article 14.[193] The same could be said of section 33 of the 2010 Act. Further, while the impugned French law in *Gas and Dubois* discriminated on grounds of marital status by allowing second-parent adoption where the child's parent was married to the adopter, this was deemed acceptable by the ECtHR, which held that marriage confers a "special status" on those who engage in it. [194] In the Court's view, unmarried couples seeking to adopt a child were not in a legal situation comparable to that of married couples. The Court found it appropriate to "repeat and confirm" this view in the more recent case of *X and Others v Austria*.[195] Again, section 33 would likely withstand scrutiny because its preference for married couples is aligned with the current position under the ECHR. In addition, it is worth noting that, in *Re P*, Baroness Hale made reference to Article 41.3.1° of the Constitution of Ireland and stated that:

> [I]t is possible that Strasbourg would regard the special constitutional protection of the marital family under that Constitution as justifying the continued restriction of joint adoption to married couples.[196]

Thus an unmarried couple of the same-sex or opposite-sex would be unlikely to succeed with a challenge to section 33 of the 2010 Act based on the provisions of the ECHR at the present time.

The Oireachtas Debates and the Adoption Act 2010

The Adoption Act 2010 was debated in and passed by the Oireachtas prior to the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010. It was argued in the Seanad that the Irish experience should mirror that of the United Kingdom, where the Adoption and Children Act 2002 opened up eligibility for adoption to unmarried same-sex and opposite-sex couples prior to the enactment of the Civil Partnership Act 2004. Consequently, Senator Bacik argued

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[193] *Gas and Dubois v France,* App No 25951/07 (ECHR, 15 March 2012).
[194] ibid [68].
[195] *X and Others v Austria*, App No 19010/07 (ECHR, 19 February 2013).
[196] *Re P* (n 167) [115].

that "a precedent therefore exists for providing for eligibility for same-sex couples in adoption rather than civil partnership law."[197] However, the then Minister for Health and Children, Deputy Barry Andrews, argued that because the United Kingdom does not have a Constitution it was not restricted from legislating in this area. He observed that, while marriage continues to be defined as it is in the Irish Constitution, adoption would not be available to same-sex couples. Deputy Andrews stated that the (then upcoming) Supreme Court appeal in the *Zappone* case would be informative as to where the family stands constitutionally.[198] Such appeal has since been dropped by the appellants in favour of a fresh High Court action. However, as detailed in chapter one, the constitutional convention was tasked with considering whether provision should be made for same-sex marriage in the Constitution and, by an overwhelming majority, the members of the Convention voted in favour of same-sex marriage. If the institution of marriage is opened up to same-sex couples as the result of a referendum brought about by the Convention's findings (and it is uncertain as to whether this will occur), then married same-sex couples (though not cohabiting couples) should be eligible to adopt children by virtue of section 33 of the 2010 Act.

Senator Mullen argued that adoption should not be extended to same-sex couples because "allowing for same-sex adoption would deny children the acknowledgement of their right to a mother and a father, where possible."[199] He firmly believed that "it is the child's right to be in the optimum circumstances"[200] and therefore, in the adoption context the Oireachtas should legislate with the "needs and just desserts of children in mind."[201]There is nothing wrong in theory with *acknowledging* a child's right to a mother and a father, but *guaranteeing* that right in practice is however a very different matter. Senator Mullen seems to be overlooking the fact that there are some 6,250 children languishing in care. 2,000 of these children have been living with the same foster family for over five years.[202] One of the main reasons for legislating for same-sex adoption would be to

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[197] Seanad Deb 4 March 2009, vol 194, col 349.
[198] Seanad Deb 4 March 2009, vol 194, col 361.
[199] Seanad Deb 4 March 2009, vol 194, col 354.
[200] Seanad Deb 4 March 2009, vol 194, col 369.
[201] Seanad Deb 4 March 2009, vol 194, col 356.
[202] Children's Referendum Information Booklet (Department of Children and Youth Affairs 2012) 16. However, expanding the pool of potential adopters does not mean that the majority of these

expand the pool of prospective adopters so as to get some of these children out of the care system and into a family unit that has been properly assessed as suitable by the Adoption Authority, irrespective of the sexual orientation or marital status of the parents. Even if one takes the view that adoption by heterosexual married or unmarried couples is preferable, then where there are simply not enough of these couples available or willing to adopt, adoption by a same-sex couple *is* fulfilling the child's right to be in the "optimum circumstances". It is better for that child to be in a loving, supportive family unit rather than the alternative, the long-term institutional care of the HSE or numerous fostering arrangements. Senator Mullen surely does not consider either of these latter scenarios to be the "just desserts" for the most vulnerable children in the State?

Conclusion

In the aftermath of the rather persuasive, child-centric reasoning advanced in decisions such as *Re P* and *The Northern Ireland Human Rights Commission's Application*, as well as the (soon-to-be) express provision for children's rights in Article 42A, it is opined that the legislative exclusion of same-sex couples from eligibility to apply for joint adoption has become increasingly difficult to justify. Nonetheless, in the absence of any reform of the constitutional understanding of the family, legislation extending adoption privileges to unmarried opposite-sex and same-sex couples would undoubtedly be open to challenge. Indeed, by proposing to extend eligibility to apply for a joint adoption order to civil partners, Head 79 of the General Scheme appears to be constitutionally suspect. The constitutional protection of children's rights could, however, be invoked to justify the necessity for such progressive adoption legislation in an Ireland where a large number of children are in care or placed with foster families long-term.

The intention-based parental status model is a logical means of establishing parentage in cases of assisted human reproduction but it cannot be allowed to proceed untrammelled due to the constitutional protection afforded to children's rights. The Oireachtas cannot enact Heads 2 and 10 in their current form and

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children would be eligible for adoption, and the number of adoption orders made annually for non-family adoptions is minute. In 2009 there were 42 such adoptions and in 2010 there were 35 such adoptions: see Parkes and McCaughren (n 164) 107.

exclude the known donor from seeking to obtain parental status and acquire parental rights in relation to the child because affording such a dispensation to the child's same-sex parents would be constitutionally unsound from a children's rights perspective. However, this author has proposed legislative reform that would give effect to intention-based parental status for lesbian couples who use known donors in the majority of cases without unduly subjugating the constitutional rights of the child. This could be achieved by amending the General Scheme so as to extend the presumption of paternity and automatic guardianship rights to all unmarried fathers and allowing the known donor to transfer such parental rights to the child's intended, non-biological co-parent after a satisfactory cooling-off period, virtually identical to what the gestational surrogate can do under Head 13.

However, it could be argued that this author's recommendations are denigrating to the concept of same-sex family units because rather than recognise the co-mother as one of two *intended* parents party to the child's initial theoretical conception I recognise her as an *additional* parent who can subsequently be added on, and only if the known donor chooses to effect a legal transfer of his parental rights in her favour at the end of the cooling-off period. However, it is opined that this author's proposal is *proportionately* respectful of the intentions of prospective lesbian parents in an assisted human reproduction context. This author does recognise the non-biological co-mother as one of two intended parents *but* also acknowledges that Article 42A.1 would (if inserted) seem to dictate that upon birth a child should first have at least the option of enjoying "the society" of both its biological parents where they are clearly known to each other. Nonetheless, this author has proposed a mechanism by which the intentions of prospective lesbian parents can be fully realised in due course, once the "natural and imprescriptible" constitutional rights of the child are adequately respected in the first instance. Indeed, even in those instances where the known donor may refuse to transfer his parental rights, Head 39 of the General Scheme could alleviate the situation somewhat as it enables the non-biological co-mother to apply to the court to be appointed a guardian after two years of sharing responsibility for the child's day-to-day care with the birth mother.

Undoubtedly, there will be opposition to some of the provisions contained in the General Scheme when it eventually becomes a Bill and begins its passage through the Oireachtas. Whether that Bill will incorporate (or ignore) the child-

centric amendments to the General Scheme that have been recommended to the Oireachtas by this author remains to be seen but, if it does, it will likely face opposition from those in society who favour legislation according the utmost weight to adult autonomy in the area of assisted human reproduction. However, such persons and groups would be wise to remember that, on November 17th, 2012, the Irish electorate engaged in the democratic process of a constitutional referendum and chose to place the rights of the child on a constitutional pedestal. This chapter has endeavoured to explore legislative options that would accommodate same-sex parenting bearing in mind that crucial fact.

Chapter 4

The Position of Same-Sex Families under Articles 8 and 14 ECHR

Introduction

The following chapter will consider the impact of Articles 8 and 14 of the European Convention on Human Rights 1950 (hereafter ECHR) on Irish same-sex family units. I shall begin by examining the standing of this international human rights instrument in Irish law as a result of the enactment of the European Convention on Human Rights Act 2003 (hereafter the 2003 Act), the scope of Articles 8 and 14, and how decisions of the European Court of Human Rights (hereafter ECtHR) in which these provisions were invoked have helped to engender domestic change for gay and lesbian individuals in certain areas. The Irish courts' approach in *McD v L*[1] to the position of same-sex family units with children under Article 8 of the ECHR will be closely scrutinised, and the question raised by that case as to the appropriate division of labour between the ECtHR in Strasbourg and the national courts when expansively interpreting the ECHR so as to embrace same-sex family units will be examined in-depth. I will further analyse the possible future impact for same-sex families and Irish law of the ECtHR's recent decision in *Schalk and Kopf v Austria*.[2] The chapter will conclude with a discussion of the position under Articles 8 and 14 of both single homosexual persons and same-sex couples who wish to either establish or have recognised their existing "family life" with a child under domestic law.

The Relationship between the ECHR and Irish Law

The ECHR is a product of the Council of Europe (CoE), which was founded in the aftermath of World War II in order to ensure respect for democracy, the rule of law and human rights and which currently comprises 47 Contracting States. All 28 of the European Union's Member States are parties to the ECHR. Although Ireland was one of the first States to ratify the ECHR in 1953, this international human rights instrument was not granted any domestic effect

[1] *McD v L* [2008] IEHC 96; [2010] 1 ILRM 461 (Supreme Court).
[2] *Schalk and Kopf v Austria* App No 30141/04 (ECHR, 24th June 2010).

here until half a century later with the enactment of the European Convention on Human Rights Act 2003. This is because Article 29.6 of the Irish Constitution provides in clear terms that "no international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas." Article 29.6 provides for a dualist approach to the relationship between international law and national law in that an international treaty to which the Irish State is party can only be given effect to by national law and to the extent that national law, rather than the international instrument itself, specifies. Thus, prior to the enactment by the Oireachtas of the 2003 Act an individual could not claim before an Irish court that the State had breached its Convention obligations because the ECHR had not been granted any domestic effect in this jurisdiction. As Murray CJ pointed out in *McD v L:*

> This is still the position subject to the special exceptions of a claim against an 'organ of the State' as defined in s.3 of the Act of 2003 or a claim for a declaration of incompatibility pursuant to s.5 of that Act.[3]

Section 3 provides that, subject to any statutory provision or rule of law, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the ECHR. Indeed, in *Zappone v Revenue Commissioners*[4] the plaintiffs claimed that the defendant organ of the State, by its failure to apply the provisions in tax law pertaining to married couples to them as a same-sex couple that had married in Canada, had violated their right to respect for private and family life under Article 8 and their right to marry under Article 12 ECHR. This case was apt for the plaintiffs to seek to rely specifically on section 3 of the 2003 Act but instead they based their claim more loosely on the two abovementioned provisions of the ECHR. In any event the same result would have been achieved because Articles 8 and 12 were found not to embrace same-sex married couples so the Revenue Commissioners were not acting in breach of the Convention or their statutory duty under section 3 by denying the applicants certain tax benefits.[5]

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[3] *McD v L* [2010] 1 ILRM 461, 471 (Murray CJ).
[4] *Zappone v Revenue Commissioners* [2008] 2 IR 417.
[5] In addition, the Revenue Commissioners were acting in accordance with section 2(2)(e) of the

Section 5 allows a Convention provision to be relied upon for a court, either of its own motion or on application to it by a party, to make a declaration that a statutory provision or rule of law is incompatible with the State's obligations under the ECHR. Such declaration does not affect the validity of the impugned statutory provision or rule of law. The first declaration of incompatibility between the ECHR and Irish law was granted in *Foy v An t-Ard Chláraitheoir*[6] where McKechnie J held that, in failing to recognise an individual's reassigned gender, Irish law was incompatible with Article 8. Hence it would be wrong to assert that the Convention has been *incorporated* into Irish law by the ECHR Act 2003 as apart from sections 3 and 5 the ECHR "is not generally part of domestic law and is not directly applicable".[7] The Oireachtas has made it clear that the ECHR is to be used by the Irish courts as an interpretive tool in the interpretation of Irish law because section 2 (1) of the ECHR Act 2003 states as follows:

> In interpreting and applying any statutory provision or rule of law, a court shall, in so far as possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions.

This provision is subject to the limitations that "in exercising its jurisdiction pursuant to s.2 a court must identify the statutory provision or rule of law which it is interpreting or applying"[8] in light of the Convention's provisions, and such interpretation and application must be in accordance with the established canons of construction and interpretation. This complies with a fundamental aspect of Irish jurisprudence, which is that whenever possible, legislation must be interpreted in a manner consistent with the Constitution. Hence even where a court has identified a statutory provision requiring interpretation in light of the

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Civil Registration Act 2004, which prohibits same-sex marriage. Thus, it is arguable that even if the Convention had recognised same-sex marriage at the time there would have been no obligation for the Revenue Commissioners to do so as their duty to act in a Convention-compliant manner is under section 3 expressly "subject to any statutory provision" such as section 2(2)(e) of the 2004 Act.

[6] *Foy v An t-Ard Chláraitheoir* [2007] IEHC 470.

[7] *McD v L* [2010] 1 ILRM 461, 473 (Murray CJ) (Supreme Court).

[8] ibid 471.

Convention, if the Convention-compliant interpretation conflicts with one that is in accordance with the Constitution then the latter interpretation must be preferred. In fact this is in accordance with the sub-constitutional domestic effect given to the ECHR in the preamble to the 2003 Act, which provides that its human rights provisions are subject to the supremacy of the Irish Constitution. The Constitution's fundamental rights provisions will therefore take precedence over the Convention's human rights provisions in cases of conflict between the two. Thus, section 2 of the ECHR Act 2003 sets out the narrow means by which Irish law may be interpreted and applied by the courts in light of the State's ECHR obligations. We shall see that this section had a major impact on the outcome in a highly-publicised appeal concerning the situation of a lesbian couple raising a child conceived with sperm from a known donor.

The Margin of Appreciation

Once all domestic remedies have been exhausted an applicant can, because of the right of an individual to make an application, proceed with his/her case to the European Court of Human Rights in Strasbourg, where the Contracting States are answerable at the international level. The ECtHR has repeatedly stressed that "the Convention is a living instrument, to be interpreted in the light of present-day conditions",[9] but success by a homosexual applicant has often been dependent on the margin of appreciation, a phrase that signifies the area of discretion or 'elbow room' afforded to the Contracting States when an alleged infringement of a Convention provision is being assessed. Brown points out that:

> Although it is certainly true that the [ECtHR] takes a broader and less marriage-centred view of family life than the Irish Constitution, the margin of appreciation has the potential to mitigate against more radical judgments by the Strasbourg Court.[10]

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[9] *EB v France* (2008) 47 EHRR 21; *Schalk and Kopf v Austria* (n 2).

[10] Eimear Brown, 'Committed Relationships and the Law: the Impact of the European Convention on Human Rights' in Oran Doyle and William Binchy (eds), *Committed Relationships and the Law* (Four Courts Press 2007) 279.

The margin of appreciation is "a principle which distributes responsibility between the international and national levels".[11] This leeway is considered appropriate because the "national authorities are better able than Strasbourg to assess what restrictions are necessary in the democratic societies they serve." [12] Van Dijk and Van Hoof observe that there are no "hard and fast rules governing the scope of the margin of appreciation",[13] yet the ECtHR has made it clear in the case law that the Contracting States' margin will be broad where there is no European consensus, "particularly where the case raises sensitive moral or ethical issues".[14] However, the converse of this is also true and "consensus has therefore been invoked to justify a dynamic interpretation of the Convention".[15] The ECtHR has also stated that "the margin will tend to be narrower where the right at stake is crucial to the individual's effective enjoyment of intimate or key rights"[16] or "where there is a difference in treatment based on...sexual orientation".[17] This stringent approach to the margin of appreciation doctrine can perhaps best be illustrated by reference to a case like *Karner v Austria.*[18] The "right at stake", which the homosexual individual was refused on grounds of "sexual orientation" contrary to Article 14, was the right to succeed to his deceased partner's tenancy, and this was "crucial" to the applicant's "effective enjoyment" of an "intimate or key" Article 8 right, namely respect for his home. The ECtHR castigated the State's denial of the right to succeed to a tenancy, finding it in breach of Articles 8 and 14, two provisions of the ECHR that I will now turn to discuss in some detail.

Article 8

Article 8(1) of the Convention provides that: "everyone has the right to respect for his private and family life, his home and his correspondence."

Article 8(2) nonetheless permits the curtailment of this right by the State if this is:

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[11] *Re P* [2008] UKHL 38 [127] (Lord Mance).
[12] ibid [118] (Baroness Hale).
[13] P Van Dijk and JGH Van Hoof, *Theory and Practice of the European Convention on Human Rights* (3rd edn, Kluwer, 1998) 87.
[14] *A, B and C v Ireland* App No 25579/05 (ECHR,16th December 2010) [232].
[15] ibid [234].
[16] *Connors v United Kingdom* App No 66746/01 (ECHR, 27th May 2004) [82].
[17] *Karner v Austria* (2003) 38 EHRR 528 [49].
[18] ibid.

> [i]n accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The ECtHR has frequently pronounced that the notion of "private life" under Article 8 is a "broad concept" which encompasses, *inter alia*, the right to establish and develop relationships with other human beings, the right to "personal development"[19] and, perhaps most importantly for present purposes, both sexual life and sexual orientation, which are "a most intimate part of an individual's private life".[20] In considering "family life" under Article 8 the ECtHR has held that this concept does not safeguard the mere desire to found a family; it presupposes the existence of a family and it "is not confined solely to families based on marriage and may encompass other *de facto* relationships".[21] Thus the Court has adopted the view that "the existence or non-existence of 'family life' is essentially a question of fact depending upon the real existence in practice of close personal ties".[22] It is opined that the ECtHR's approach might best be summed up as follows, in that:

> [t]he term family … should not be rigidly restricted to those people who have formalized their relationship by obtaining … a marriage certificate…but instead should find its foundation in the reality of family life.[23]

As a result Article 8 of the Convention recognises not only a wide range of *heterosexual family units* but, as we shall see, has recently come to embrace same-sex family units with children. It contains a rather liberally-interpreted notion of respect for family life that now "stands in almost complete

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[19] *Bensaid v United Kingdom* (2001) 33 EHRR 205.
[20] *Smith and Grady v United Kingdom* (2000) 29 EHRR 493 [89].
[21] *X, Y and Z v United Kingdom* (1997) 24 EHRR 143 [36].
[22] *K & T v Finland* App No 25702/94 (ECHR, 12th July 2001) [150].
[23] *Braschi v Stahl Associates Company* [1989] NYS 2784, 2788-9.

contrast to the Irish constitutional definition"[24] of the family contained in Article 41, as this only affords protection to *heterosexual marital families.*

Article 14

Article 14 of the Convention provides that:

> [t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Although sexual orientation discrimination is not explicitly referred to by the drafters, the ECtHR has oft-declared that this notion is indeed "covered by Article 14 of the Convention" because the list set out in the provision is "illustrative and not exhaustive, as is shown by the words 'any ground such as'".[25] As is apparent from the wording of the non-discrimination provision, it is not free-standing; it can only be relied upon when another Convention right is being pleaded. Therefore, as we shall see, Article 14 has assisted homosexual individuals challenging national discriminations based on sexual orientation when coupled with Article 8. Furthermore, the following principle is now "well entrenched" in ECtHR case law:

> The prohibition of discrimination enshrined in Article 14…extends beyond the enjoyment of the rights and freedoms which the Convention and the Protocols thereto require each State to guarantee. It applies also to those additional rights, falling within the general scope of any Convention Article, for which the State has voluntarily decided to provide.[26]

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[24] Kilkelly, 'Complicated Childhood: the Rights of Children in Committed Relationships' in Oran Doyle and William Binchy (eds), *Committed Relationships and the Law* (Four Courts Press, 2007) 215, 216.

[25] *Fretté v France* (2002) 38 EHRR 438 [32].

[26] *EB v France* (n 9) [48]. In *EB v France*, the ECtHR observed that Article 8 guarantees neither the right to found a family nor the right to adopt, and that while it is silent as to the question of adoption by single persons, the Contracting State's adoption legislation expressly granted such persons the right to apply for authorisation to adopt a child and established a procedure to that end. Thus, the court held that because the State had gone beyond its Convention obligations in creating such a right

Nonetheless, the ECtHR has often reiterated that differential treatment is only discriminatory for the purposes of Article 14:

> [i]f it has no objective and reasonable justification, which means that it does not pursue a 'legitimate aim' or if there is no 'reasonable proportionality between the means employed and the aim sought to be realised.[29]

The Court has also stated that "if the reasons advanced for such a difference in treatment were based solely on considerations regarding the applicant's sexual orientation this would amount to discrimination under the Convention."[27] However, the margin of appreciation also plays a role in the ECtHR's Article 14 assessment and, as we shall see, an applicant's sexual orientation has indeed been found to justify different treatment in law when coupled with a lack of European consensus in an area.[28]

An Overview of Actions taken to Strasbourg by Homosexual Males

In 1988 the ECtHR held that the Irish legislation criminalising private homosexual activity between consenting male adults was in breach of the right to respect for one's private life guaranteed by Article 8.[29] Indeed, Northern Irish legislation penalising such activity had already been deemed contrary to Article 8 of the ECHR in *Dudgeon v United Kingdom* in 1980.[30] It is indubitable that the applicant's success in *Norris v Ireland* was instrumental in paving the way for the legalisation of private homosexual activity between consenting male adults in this jurisdiction and the explosion in legislative protection for gay and lesbian persons that followed. In 1993, five years after the *Norris* decision, the Criminal Law (Sexual Offences) Act came into force abolishing the offences of buggery and gross indecency between males, and legislative protections for gay and lesbian persons were subsequently imposed in the fields of insurance,[31]employment[32] and

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which fell within the ambit of the right to respect for private life under Article 8 it could not, in the application of that right, take discriminatory measures under Article 14.

[27] *EB v France* (n 9) [93].

[28] *Fretté v France* (n 25).

[29] *Norris v Ireland* (1988) 13 EHRR 186.

[30] *Dudgeon v United Kingdom* (1982) 4 EHRR 149.

[31]Health Insurance Act 1994.

goods and services.[33]

The ECtHR might have come to protect homosexual intimacy between adults, but the next logical step, recognition of committed same-sex relationships as an aspect of "family life" under Article 8, was not taken by the Court until two decades later. In fact, merely a decade ago, in *Mata Estevez v Spain*,[34] the ECtHR held that the Spanish Government's refusal to grant the applicant a survivor's pension after his male partner's death was permissible as this benefit was predominantly available to heterosexual married couples. A cohabiting heterosexual partner was only eligible to claim this benefit following a partner's death if the parties were unable to marry because of the lack of Spanish divorce laws prior to 1981. The Court found that marriage constituted an essential precondition for eligibility for a survivor's pension and that even in the situation of the non-marital heterosexual partner it was a notional condition for recognition of eligibility, which under Spanish law at the time it was not for same-sex couples. Although the applicant claimed that the Spanish authorities were acting in breach of his right to respect for "family life", the ECtHR pronounced that because there was little agreement between the Contracting States on the issue of same-sex relationship recognition, this was an area where they still enjoyed a wide margin of appreciation and accordingly "long-term homosexual relationships between two men do not fall within the scope of the right to respect for family life guaranteed by Article 8 of the Convention."[35]

The Court further held that any discrimination between same-sex couples and married couples was justified under Article 14 because the Spanish Government was pursuing a "legitimate aim", *ie* protection of the family based on marriage bonds. As to whether the statutory restriction interfered with the applicant's right to respect for his private life, the ECtHR acknowledged that his emotional and sexual relationship was indeed protected under this tier of Article 8. Nonetheless the Court simply held that if there was any interference then this was justified under Article 8 (2) of the ECHR, though the Court failed to identify which aspect of this provision the discriminatory treatment was saved by in its opinion.

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[32]Employment Equality Act 1998.
[33]Equal Status Acts 2000-2004. For a thorough analysis of the statutory protections afforded to homosexual individuals by the Oireachtas in recent years see Fergus Ryan 'Sexual Orientation Discrimination' in Cotter and Moffatt (eds), *Discrimination Law* (Cavendish 2005) Chapter 7.
[34] *Mata Estevez v Spain* App No 56501/00 (ECHR, 10th May 2001).
[35] ibid.

In contrast, in *Karner v Austria*,[36] decided in 2003, the ECtHR stipulated that where domestic legislation allows a non-marital opposite-sex partner yet precludes a same-sex partner from succeeding to a tenancy, it will be in breach of the ECHR. This is because such a situation would result in an interference with a homosexual individual's right to respect for his home under Article 8 on the grounds of sexual orientation contrary to Article 14. Since the Court decided the case under the respect for one's home limb of Article 8 it did not have to consider the notions of private life or family life contained therein. The Government had submitted that the discrimination was justified because the impugned statutory provision had an "objective and reasonable justification", namely protection of the traditional family. The ECtHR cited its previous decision in *Mata Estevez* and accepted that "protection of the family in the traditional sense is, in principle, a weighty and legitimate reason which might justify a difference in treatment."[37] However, the Court went on to demonstrate a most stringent and inquiring approach to sexual orientation discrimination by stating that:

> [t]he aim of protecting the family in the traditional sense is rather abstract and a broad variety of concrete measures may be used to implement it. In cases in which the margin of appreciation afforded to Member States is narrow, as is the position where there is a difference in treatment based on sex or sexual orientation, the principle of proportionality does not merely require that the measure chosen is in principle suited for realising the aim sought. It must also be shown that it was necessary in order to achieve that aim to exclude certain categories of people – in this instance persons living in a homosexual relationship – from the scope of application of section 14 of the Rent Act.[38]

The Court found that because the Austrian Government had not proffered convincing and weighty reasons justifying a narrow interpretation of this statutory provision that excluded the surviving partner of a same-sex couple from its ambit there had been a breach of Articles 8 and 14 of the ECHR.

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[36] *Karner v Austria* (n 17).
[37] ibid [40].
[38] ibid [41].

Bamforth has argued that in *Karner* "the Court's decision made it hard to see how the denial in *Estevez* that same-sex couples enjoyed family rights when it came to claiming social security entitlements could easily be distinguished."[39] However, it is respectfully submitted that the two decisions are not inconsistent. *Karner* was an easier case for the Court to deal with because, unlike *Mata Estevez*, where the relief sought was arguably more controversial since the Court has held that the Convention does not guarantee, as such, any right to a pension,[40] the right to respect for the home is expressly protected under Article 8. This obviated the necessity to make pronouncements on the existence or non-existence of family life between homosexuals. In any event, it is submitted that had the Court considered whether family life exists between homosexual persons in *Karner* it would have reached the same conclusion as in *Mata Estevez* because there had been very little movement in the *interim* towards providing for legislative recognition of same-sex relationships amongst the Council of Europe's Contracting States.

Further, because the discrimination in *Karner* was between the surviving member of a married or unmarried heterosexual couple who was entitled to succeed to a tenancy, and the survivor of a same-sex couple who was not so entitled, it was clearly based on sexual orientation alone. In *Mata Estevez*, subject to a minor exception, only the survivor of a married heterosexual couple was entitled to claim a survivor's pension so unmarried couples, whether of the same or the opposite sex, were predominantly treated the same in law. Hence the discrimination in that case was really between married and unmarried couples. As Clayton and Tomlinson observe, it is well-established in the case law that "the Convention confers preferential status to the traditional marriage" and consequently "married couples are…not treated as being in an analogous position with unmarried couples in relation to their right to found a family or where complaints of discrimination are made."[41]

An interesting result of *Karner* is that the ECtHR really adopted a middle ground as regards same-sex relationships. It had recognised the sexual relationship

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[39] Nicholas Bamforth, 'Families but not (yet) Marriages? Same-Sex Partners and the Developing European Convention 'Margin of Appreciation'' (2011) 23 (1) Child and Family Law Quarterly 128.

[40] *Mata Estevez v Spain* (n 34).

[41] Richard Clayton and Hugh Tomlinson, *The Law of Human Rights: Volume 1* (2nd edn, OUP, 2009) [13.71]. See also Nicholas Bamforth (n 39).

between homosexual persons as an aspect of private life over twenty years earlier and, as we shall see, it would recognise long-term same-sex relationships as amounting to family life seven years later.[42] In *Karner*, by requiring Contracting States to permit a homosexual individual to succeed to the tenancy of his deceased same-sex partner the Court was really obliging States to enact or amend existing legislation that would retrospectively recognise committed same-sex relationships for the purpose of protecting a homosexual individual's expressly recognised right to respect for his home under Article 8. An apt summation of all of the abovementioned cases is that in situations where Articles 8 and 14 are pleaded by homosexual applicants, the ECtHR:

> [s]eems almost to be saying that lesbians and gay men may readily secure Convention protection when it comes to sexual activity or matters related to their private lives as individuals…but not when their deeper emotional and familial relationships are directly in issue.[43]

Article 8 and the Right to Respect for One's Home in the UK and Ireland

The reactions in England and the Republic of Ireland to the *Karner* decision could not have been more different. In England the judicial and legislative arms of Government responded swiftly. In *Ghaidan v Godin-Mendoza*[44] the House of Lords confirmed the Court of Appeal's interpretation of Schedule 1 of the Rent Act 1977 as embracing both an opposite-sex and a same-sex partner's right to succeed to a tenancy, despite the fact that this provision allowed only a 'wife' or a 'husband' or a person living with the original tenant as such to succeed.[45] Their Lordships held that one could succeed to a tenancy if one was living with the original tenant as if they were his or her wife or husband, *ie* cohabiting in a committed relationship. Their Lordships so acted in order to bring the statute in line with the UK's post-*Karner* obligations under the Convention. Lord Millett dissented, arguing that the terms 'husband' and 'wife' in

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[42] See *Dudgeon v United Kingdom* (n 30) and *Schalk and Kopf v Austria* (n 2).
[43] Nicholas Bamforth, ' 'The Benefits of Marriage in All but Name?' Same-Sex Couples and the Civil Partnership Act 2004' (2007) 19(2) Child and Family Law Quarterly 133, 142.
[44] [2004] 2 AC 557.
[45] See the discussion in Fergus Ryan, 'Case Note: Ghaidan v. Godin-Mendoza' (2005) 27 (3-4) Journal of Social Welfare and Family Law 355.

the statute were gender specific and that in order to succeed to the tenancy the homosexual appellant would have to demonstrate that he had been living with the tenant in an opposite-sex relationship as if he was the tenant's wife because a man cannot have a husband.[46] A more satisfactory solution to this dilemma came about in December 2005 when the Civil Partnership Act 2004 (hereafter CPA) came into force. This is because Schedule 8 of this statute amended Schedule 1 of the Rent Act 1977 so that a homosexual cohabitant can now succeed to his partner's tenancy if they were living together "as if they were civil partners". Since civil partnership in the UK is only open to persons of the same-sex this provision makes it clear that persons cohabiting in committed same-sex relationships can succeed to a tenancy and the courts will no longer have to strain the ordinary meaning of opposite-sex terms so as to bring about Convention-compliance in this area of the law.

However, in clear contravention of *Karner* and the State's resulting obligations under the ECHR stood the Irish Residential Tenancies Act 2004. The gender-specific language contained in section 39 enabled only a person who was living with the tenant as 'husband and wife' in the dwelling for 6 months prior to his death to succeed to the tenancy.[47] Indeed, when this statute was making its passage through the Oireachtas, the then Minister for the Environment, Heritage and Local Government, Noel Ahern, stated that its provisions were to 'provide for security in the case of established, family-type relationships, rather than homosexual or other relationships'.[48] The Irish government's insensitivity to the functional similarity between non-marital opposite-sex and same-sex relationships and to the State's obligations under the ECHR now appears to be a thing of the past. The Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 has adequately amended the 2004 Act so that in addition to a spouse or an opposite-sex cohabitant, a civil partner or same-sex cohabitant may succeed to a tenancy.[49]

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[46] [2004] 2 AC 557 [80] (Lord Millett).
[47] Residential Tenancies Act 2004, section 39.
[48] Dail Deb 1 July 2004, vol 588, col 1043.
[49] Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, ss. 40, 172 and 203.

McD v L– an Expansive Irish Approach to Family Life under Article 8

Despite the fact that the ECtHR had in the 2001 decision of *Mata Estevez* determined that same-sex relationships could not amount to "family life" under Article 8 Hedigan J in the Irish High Court adopted a different view in *McD v L* in 2008.[50] PL and BM were a lesbian couple who entered into an agreement with JMcD, a homosexual male friend of theirs, for sperm donation. This agreement purported to govern the relationship which JMcD would have with the resulting child borne by PL. It acknowledged that PL and BM were to be the child's parents fully responsible for its upbringing and JMcD would be at most a "favourite Uncle". However, following the birth of the child JMcD sought rights of guardianship and access as the infant's biological father under ss.6A and 11 (4) of the Guardianship of Infants Act 1964 respectively. He further claimed that respect for his family life with his child under Article 8 of the ECHR required the award of these rights by the Irish courts. PL and BM claimed that JMcD was acting in betrayal of the terms of the agreement but the High Court, and the Supreme Court on appeal, found such agreement to be unenforceable because the issues of guardianship and access fell to be determined by reference to "the welfare of the child, as the first and paramount consideration."[51]

In the High Court, Hedigan J, in determining whether to grant rights of guardianship and/or access in favour of the applicant, JMcD, had regard to the position of the *de facto* family unit consisting of PL, BM and the child. Hedigan J observed that Irish law was silent on the question of homosexual *de facto* family units so he looked to the ECHR "mindful of the fact that it is the Constitution that prevails in Ireland and that therefore any rights that this Court finds to arise under the Convention can only be applied by the Court absent a constitutional conflict."[52] Hedigan J noted the ECtHR's broad approach to the notion of a family under Article 8 and he cited the following passage from *X, Y and Z v United Kingdom* in order to determine what constitutes "family life" under this provision:

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[50] *McD v L* [2008] IEHC 96.
[51] ibid.
[52] ibid.

> When deciding whether a relationship can be said to amount to 'family life', a number of factors may be relevant, including whether the couple live together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together or *by any other means*.[53]

PL and BM's relationship would factually seem to fit these criteria as they had been cohabiting in a long-term same-sex relationship since 1995 and had formalized their union by means of a civil partnership in the UK in 2006. They also had a child 'by any other means' after PL became pregnant by means of artificial insemination from sperm donated by the applicant, JMcD. Hedigan J quoted further from the *X, Y and Z* case where the ECtHR emphasised that:

> *[i]n the present case, the Court notes that X is a transsexual who has undergone gender reassignment surgery. He has lived with Y, to all appearances as her male partner, since 1979.* The couple applied jointly for and were granted, treatment by A.I.D. to allow Y to have a child. X was involved throughout the process and has acted as Z's 'father' in every respect since the birth. In these circumstances, the Court considers that *de facto* family ties link the three applicants. It follows that Article 8 is applicable.[54]

The case of *X, Y and Z v United Kingdom* involved a post-operative female-to-male transsexual, his female partner and their child born through means of donor insemination. The ECtHR observed that in prior proceedings before the European Commission on Human Rights it was stated that "the relationship between X and Y could not be equated with that of a lesbian couple, since X was living in society as a man, having undergone gender reassignment surgery."[55] The ECtHR then held that because of this the situation of X, Y and Z was "indistinguishable from the

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[53] *X, Y and Z v United Kingdom* (1997) 24 EHRR 143 [36]. Emphasis added.
[54] ibid [37].
[55] ibid [35].

traditional notion of 'family life'" under Article 8.[56] The Court further equated X and Y's union with a long-term opposite-sex relationship by observing that not only had X "lived with Y, to all appearances as her male partner, since 1979" but he had been acting in the gendered role of "father" to the child, Z. Accordingly, the ECtHR held that "*in these circumstances*...de facto family ties"[57] linked all three applicants and Article 8 was applicable.

Granted, at the time of this decision X and Y were legally considered to be of the same sex under UK domestic law. However in 2002, four years after this case was decided, the ECtHR held in *Goodwin v United Kingdom*[58] that the Contracting State's failure to legally recognise a post-operative transsexual's change of gender was in breach of such an individual's right to respect for his/her private life under Article 8 of the ECHR. Hence today the ECtHR would consider X and Y to be an opposite-sex couple in both factual *and* legal terms and Z would be a child raised by such couple. As a result this decision cannot be seen as a sound authority for the proposition that a same-sex couple and their child can enjoy respect for family life under Article 8. Nonetheless, Hedigan J asserted that he was:

> [u]naware of any case to date in which the European Court of Human Rights has found that a lesbian couple living together in a committed relationship enjoy the status of a *de facto* family relationship to which Article 8 is applicable. *However X, Y and Z cited above seems to demonstrate a substantial movement towards such a finding...[i]t is this Court which has the primary responsibility to interpret and apply Convention provisions*...[t]o that end I have come to the conclusion that where a lesbian couple live together in a long-term committed relationship of mutual support involving close ties of a personal nature which, were it a heterosexual relationship, would be regarded as a *de facto* family, they must be regarded as themselves constituting a de facto family enjoying rights as such under Article 8 of the ECHR. Moreover, where a child is born into such a family unit and is cared for and nurtured therein, then the child itself

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[56] ibid. Emphasis added.
[57] ibid [37]. Emphasis added.
[58] *Goodwin v United Kingdom* (2002) 35 EHRR 18.

is part of such a de facto family unit.[59]

Hedigan J refused the orders of guardianship and access in favour of the applicant because, weighing considerations in addition to the paramount interest of the child, he felt that on the evidence it was highly probable that the same-sex family unit which he had identified as having rights under Article 8 "would be seriously and even possibly fatally broken by such orders in this case" and "such a possibility must also bear heavily upon the welfare of the child."[60] Furthermore, Hedigan J refused to find that a sperm donor father such as the applicant had a right to respect for family life with his child under Article 8 given the European Commission on Human Rights' admissibility decision in *G v Netherlands*.[61]

(i) The Sperm Donor and Article 8

Kilkelly has argued that Hedigan J's approach to the rights of a sperm donor father under Article 8 is dubious because, although the ECtHR itself has not yet ruled in this particular area, its case law subsequent to the Commission's abovementioned admissibility decision appears to have moved toward a presumption that family life exists between fathers and their children in all circumstances.[62] However, O'Mahony observes that later case law establishes that this presumption only applies to married parents and that unmarried natural fathers bear the burden of establishing a sufficient degree of commitment to their children before they can enjoy family life under Article 8.[63] Further, O'Mahony argues that in the limited case law on sperm donor fathers:

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[59] *McD v L* [2008] IEHC 96 (High Court).
[60] ibid.
[61] (1994) 16 EHRR CD 38. The European Commission on Human Rights examined the admissibility of cases and if the cases referred to it were deemed admissible it examined their merits with a view to reaching a friendly settlement or some other arrangement. If such a conclusion was impossible the Commission could refer the case on to the ECtHR for a final decision on its merits. The Commission and the ECtHR were part-time bodies. Protocol No. 11 to the ECHR replaced them with a full-time ECtHR and thus the Commission ceased to function on 1st November 1999.
[62] Ursula Kilkelly, "Child and Family Law", in Ursula Kilkelly (ed.), *ECHR and Irish Law,* (2nd edn, Jordan Publishing, 2009) 141. The author cites the cases of *Boughanemi v France* (1996) 22 EHRR 228 [35] and *Ciliz v Netherlands* [2000] 2 FLR 469 [60] to support her proposition.
[63] Conor O'Mahony, "Irreconcilable Differences? Article 8 ECHR and Irish Law on Non-Traditional Families" (2012) 26 (1) International Journal of Law, Policy and the Family 31, 32. The author cites *Lebbink v Netherlands* App No 45582/99 (ECHR, 1st September 2004) and *Khan v United Kingdom* App No 47486/06 (ECHR, 12th January 2010) to support his proposition.

> [I]t would seem clear that the Commission and the Court, in determining the existence of family ties between a father and child, have been influenced to a significant degree by the existence at some point of a relationship between the child's parents and in the absence of the parents ever enjoying a marriage-like relationship, the father will bear a heavy burden in establishing the existence of family ties.[64]

(ii) A Critique of Hedigan J's Decision

In *McD v L,* Hedigan J extended the concept of "family life" under Article 8 beyond the existing Strasbourg jurisprudence so as to embrace the respondents and the child, and this had a significant impact on the outcome for the applicant, JMcD. Hedigan J believed that the national courts were at liberty to broaden the meaning of Convention provisions as they were "in the front line" and only upon their failure to secure the rights contained in the Convention should the ECtHR step in. Also, to his mind the ECtHR seemed to be progressing towards his interpretation of Article 8 as a result of its decision eleven years previously in *X, Y and Z v United Kingdom.* Hedigan J did not mention or take into account the decision in *Mata Estevez* in 2001. He held that the familial relationship between PL, BM and the child "seems to me to clearly comply with the requirements of the European Court of Human Rights as set out in *X, Y and Z v UK*"[65]

As outlined above, the parties' relationship would due to the longevity of the cohabitation between PL and BM, the formalizing of their union via civil partnership and the birth of Z by means of artificial donor insemination constitute "family life" according to the ECtHR in *X, Y and Z v United Kingdom*, but the Court in that case was dealing with a couple who were factually of the opposite sex and as we have seen this appears to have been a significant factor in its ruling. Therefore Hedigan J's pronouncement that the relationship between the lesbian couple and the child in this case clearly complied with the requirements set out in *X, Y and Z v United Kingdom* is somewhat baffling since the parties were not of the opposite sex by birth or gender re-assignment surgery. Furthermore the ECtHR held four years after the *X, Y and Z* case that same-sex couples do not enjoy a right

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[64]ibid 33.
[65] *McD v L* [2008] IEHC 96.

to respect for family life under Article 8 in *Mata Estevez v Spain,* though it is worth noting that the couple in that case was childless.

(iii) Judicial Notice under Section 4 of the ECHR Act 2003

In the aftermath of the High Court's decision this author opined that it should not be readily accepted as permitting the inclusion of long-term same-sex relationships within the scope of the right to respect for "family life" under Article 8 of the Convention when one considers the Irish judiciary's statutory obligation contained in section 4 of the ECHR Act 2003.[66] This section provides that when an Irish court is interpreting and applying the Convention's provisions, "due account" shall be taken of the principles laid down by any "declarations, decisions, advisory opinions, opinions and judgments" of the ECtHR.[67] In *McD v L*, Hedigan J. proffered an expansive interpretation of Article 8 through improper interpretation of *X, Y and Z v United Kingdom* and without having recourse to the ECtHR's admissibility decision in *Mata Estevez v Spain.*[68] Thus Hedigan J's decision stands contrary to the jurisprudence of the ECtHR which he was statutorily obliged to take into account and as a result this author felt that it might be deemed erroneous when the applicant's appeal was heard by the Supreme Court. This author believed that the better view in 2008 was that Article 8 still did not encompass same-sex couples within the right to respect for "family life".[69]

Leonard-Kane disagreed with this author, asserting that Hedigan J's decision "was in harmony both with Strasbourg's well-established intolerance for sexual discrimination and its expansive vision of what constitutes 'family life'".[70] Ironically, like Hedigan J she too comes to this conclusion by citing *X, Y and Z* as an example of the ECtHR's "expansive vision" of family life, with which she believes the High Court decision to be "in harmony", even though this author has demonstrated that such authority was unsound for

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[66] Brian Tobin, "Same-Sex Couples and the Law: Recent Developments in the British Isles" (2009) 23 (3) International Journal of Law, Policy and the Family 309, 311.
[67] European Convention on Human Rights Act 2003, section 4.
[68] *Mata Estevez v Spain* (n 34).
[69] Brian Tobin, (n 66).
[70] Megan Leonard-Kane, "Lesbian Co-Parenting and Assisted Reproduction: In an Age of Increasing Alternative Family Forms, Can Ireland Continue to Ignore the Need for Legislative Boundaries to be placed on Fertile Ground?" (2010) 13 Trinity College Law Review 5, 21.

Hedigan J to rely on in finding that PL, BM and the child were entitled to protection under the family life aspect of Article 8. Furthermore, the three recent cases which she cites in support of the ECtHR's "intolerance for sexual discrimination" certainly displayed a strict approach to sexual orientation discrimination but the applicants were homosexual individuals.[71] Although the applicants in these cases had been cohabiting in same-sex relationships, in none of the decisions did the ECtHR recognise the existence of "family life" between same-sex couples with or without children nor was it necessary to do so. Further, Leonard-Kane does not consider the decision in *Mata Estevez* and the ECtHR authorities which she utilises to support her assertion that a domestic expansion of Article 8 was "in harmony" with established Strasbourg jurisprudence might be considered somewhat selective, reminiscent of what Justice Scalia describes as looking "over the heads of the crowd and picking out [one's] friends".[72]

In any event the Supreme Court adopted a similar position to this author when it issued its appeal in *McD v L* on 10th December, 2009. Fennelly J, having considered *Mata Estevez* and *X, Y and Z v United Kingdom,* held that:

> [t]he existing case-law of the European Court seems clearly to be to the effect that a *de facto* family of the sort claimed does not come within the scope of Article 8. Thus, insofar as judicial notice is accorded, by virtue of section 4, to the case-law of the European Court, it tends to the opposite conclusion to that adopted by the High Court.[73]

This statement is somewhat misleading as there was at the time no ECtHR case law pertaining to the position of same-sex family units with children under Article 8. In *Mata Estevez* the Court held that a childless same-sex couple cannot amount to a family for the purposes of Article 8. However, Fennelly J might have had *X, Y, and Z* in mind when he stated that the ECtHR case law stood opposed to the High Court's interpretation of 'family life', because that case made it clear that

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[71] Leonard-Kane cites *Salgueiro da Silva Mouta v Portugal* (2001) 31 EHRR 47; *Karner v Austria* (2003) 38 EHRR 528 and *EB v France* (2008) 47 EHRR 21 to support her proposition.
[72] *Roper v Simmons* (2005) 543 US 551, 617.
[73] *McD v L* [2010] 1 ILRM 461, 529 (Supreme Court).

only sexually dimorphic *de facto* family units with children could constitute a family under Article 8. However, in two quite recent cases the ECtHR was called on to recognise the right to respect for family life of a same-sex couple raising the biological child of one of the partners and, as we shall see, it made such a finding.[74] This is perhaps unsurprising because Wintemute points out that "[t]he Court almost always finds "family life" when children are present in the family unit".[75] If this is the case one might justifiably ask if it really matters that Hedigan J in *McD v L* pre-empted the ECtHR by a few years? In a jurisdiction with a contrary (if restrictive) constitutional understanding of the family, it most certainly does. Hedigan J's interpretation of family life in Article 8 clearly conflicts with the constitutional notion of the family in Ireland.

(iv) Families under Irish Law

Hedigan J cannot have been attempting to accord such an expansive interpretation to Article 8 so as to harmonise it with Irish law because this does not recognise a same-sex family unit like that of PL, BM and the child.[76] Article 41.3.1° of the Constitution states that:

> The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack.

This 77 year-old provision has consistently been interpreted by the Irish courts as recognising and protecting only the rights of marital families and the non-marital family, whether heterosexual or homosexual, is devoid of its protection.[77] Thus in *McD v L* Denham J (now Denham CJ) in the Supreme Court held that Hedigan J's novel interpretation of "family life" under Article 8 would indeed conflict with Irish law because "under the Constitution it has been established that

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[74] *Gas and Dubois v France* App No 25951/07 (ECHR, 15th March 2012); *X v Austria* App No 19010/07 (ECHR, 19th February 2013).
[75] Robert Wintemute, "Same-Sex Couples in Secretary of State for Work and Pensions v. M: Identical to Karner and Godin-Mendoza, yet no Discrimination?" (2006) 6 European Human Rights Law Review 722, 726.
[76] See Chapter 1.
[77] See *State (Nicolaou) v An Bord Uchtala* [1966] IR 567; *WO'R v EH* [1996] IR 248.

the family in Irish law is based on a marriage between a man and a woman".[78] Such a family can consist of a heterosexual married couple with or without children.[79] I have previously outlined how Irish law would govern a situation like this given the ECHR's sub-constitutional incorporation. Denham J emphasised that "there is no institution in Ireland of a *de facto* family" and that the term '*de facto* family' merely arose "as a shorthand method of describing circumstances where a couple have lived together in a settled relationship for some time with a child".[80] Fennelly J emphasised that neither the Constitution nor statute law in Ireland "recognise persons in the position of [PL and BM] as constituting a family with the natural child of one of them".[81] This remains the case because although the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 is now in force and grants a childless same-sex couple many rights akin to marriage, it does not adequately recognise the familial ties between same-sex parents and any child that they might be raising together.[82] It is submitted that while his legal basis for interpreting family life under Article 8 may be rather unsound, Hedigan J's rather pragmatic approach to this provision is nonetheless commendable on one level as at the time there were some 2090[83] same-sex couples in Ireland vying for Convention protection and the learned justice did at least attempt to grant that to them and, by extension, their children.

(v) Interpretive Obligations under Section 2 of the ECHR Act 2003

In McD v L, Murray CJ felt that the High Court judgment could be set aside without having recourse to section 4 because Hedigan J had acted in contravention of the interpretive obligation contained in section 2 of the 2003 Act. No issue arose under sections 3 or 5 so Hedigan J had no authority to interpret and directly apply Article 8 as he did.[84] This is because the learned judge had not identified any statutory provision or rule of law requiring interpretation in

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[78] *McD v L* [2010] 1 ILRM 461, 492 (Supreme Court).
[79] *Murray v Ireland* [1985] IR 532. See the discussion in Chapter 1.
[80] ibid., 488.
[81] ibid., 530.
[82] See further Fergus Ryan, *Annotated Legislation: Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010,* (Thomson Round Hall 2011) 24-25.

[83] Census 2006, *Principal Demographic Results: Commentary* (CSO, 2007).
[84] *McD v L* [2010] 1 ILRM 461, 475 (Murray CJ) (Supreme Court).

light of the ECHR for the purposes of section 2. As Denham J pointed out, the statute at issue was the Guardianship of Infants Act 1964 which addresses the matter of the welfare of the child without reference to the relationship between the parties. She held that the issue to be determined by Hedigan J was whether it was in "the best interests of the child that the father should have guardianship and/or access."[85] Thus, irrespective of the adequacy or otherwise of his interpretation of Article 8, Hedigan J had no jurisdiction to even consider, let alone directly apply this Convention provision to the facts of the case and find that the relationship between PL, BM and the child was a factor to be weighed in the balance against the applicant.

Furthermore, Fennelly J held that even if Hedigan J had identified a statutory provision or rule of law that required interpretation against the backdrop of the Convention he would have had to have recourse to section 4 of the 2003 Act in interpreting and applying the ECHR.[86] Having considered all the circumstances of the case the Supreme Court refused the applicant's appeal on the issue of guardianship but allowed such appeal on the matter of access and remitted the case back to the High Court for determination.

Hence the Convention's role in Irish law could be deemed quite restricted as a result of the ECHR Act 2003 and the Supreme Court's decision in this case. Where sections 3 or 5 of the 2003 Act do not apply a court must, for the purposes of utilising section 2, identify a law requiring interpretation in light of the ECHR, and even then that law must be interpreted in strict accordance with existing ECtHR case law due to the requirements laid down in section 4 of the statute. Further, if a possible interpretation of such law accords with the Convention but is incompatible with the Irish Constitution, the latter interpretation must prevail, though a declaration of incompatibility could ensue.

The Division of Labour between National Courts and the ECtHR – Whose Duty is it to expand the Provisions of the ECHR so as to embrace the Rights of Same-Sex Family Units?

In *McD v L*, Fennelly J in the Supreme Court was resolutely of the opinion that:

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[85] ibid 490.
[86] ibid 529.

> [t]he European Court has the prime responsibility of interpreting the Convention…it is important that the Convention be interpreted consistently. The courts of the individual states should not adopt interpretations of the Convention at variance with the current Strasbourg jurisprudence.[87]

Thus, it would appear that where the ECtHR has placed a limit on a Convention right in its case-law an Irish court should respect that limit under section 4 and not seek to move beyond it via a broader interpretation of an ECHR provision. Section 2 of the UK's Human Rights Act 1998 is most similar to section 4 and the English courts had already adopted an identical approach to the interaction between the national courts and the ECtHR. In 2004, Lord Bingham had pronounced in *R (Ullah) v Special Adjudicator* that:

> [t]he European Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg Court… *[t]he duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.*[88]

Scherpe strongly agrees emphasising that "it also cannot be otherwise: the very lifeblood of the European Convention is its uniform interpretation."[89] Wintemute disagrees with this type of reasoning and argues that the uniformity of interpretation of Convention rights between States is not required by the ECtHR, nor does it bring any benefit.[90] He believes that the domestic courts should be free to expansively interpret Convention rights so as to meet local needs and conditions because national "judicial interpretations of Convention rights do not have to circulate, or need to be recognisable or ready for use or "purchased" (other than voluntarily), in other Council of Europe Member States."[91] As Baroness Hale points out, writing extra-judicially, in relation to national

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[87] ibid 530.
[88] *R (Ullah) v Special Adjudicator* [2004] 2 AC 323 [20]. Emphasis added.
[89] J.M. Scherpe, "Family and Private Life, Ambits and Pieces – M v. Secretary of State for Work and Pensions" (2007) 19 Child and Family Law Quarterly 390, 399.
[90] Robert Wintemute, (n 75) 728.
[91] ibid.

interpretations of the ECHR, "anything we decide here is not likely to have any effect in other Member States."[92] Indeed, Wintemute contends that innovative domestic interpretations could even "be a source of persuasive authority for the ECtHR and the courts of other Council of Europe Member States".[93] However, Baroness Hale believes that "[other Member States' courts] probably pay about as much attention to how we interpret the Convention rights as we pay to how they do, which is hardly any attention at all."[94]

While Wintemute's argument is forceful, it is problematic for various reasons. First, although Article 53 of the ECHR does not require uniformity of interpretation it does provide that "nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party." This suggests that, while the Convention itself provides a floor of rights, if States want to advance their protection of certain human rights and metaphorically speaking move towards the ceiling then they are free to do so under domestic law. Second, the ECtHR itself would appear to require uniformity of interpretation. It is opined that the Court's discussion of the right to marry under Article 12 in *Parry v United Kingdom* is informative in this regard:

> While it is true that there are a number of Contracting States which have extended marriage to same-sex partners, this reflects their own vision of the role of marriage in their societies and does not, perhaps regrettably to many, flow from an interpretation of the fundamental right as laid down by the Contracting States in the Convention in 1950.[95]

This statement would seem to reinforce the notion that Contracting States are at liberty to extend rights by virtue of their own domestic laws because, as the aforementioned Article 53 demonstrates "it is of course open to Member States to provide for rights more generous than those guaranteed by the

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[92] Brenda Hale, "*Argentoratum Locutum:* Is Strasbourg or the Supreme Court Supreme?" [2012] 12 (1) Human Rights Law Review 65, 71.
[93] Robert Wintemute, (n 75) 728.
[94] Baroness Hale, (n 92) 71.
[95] *Parry v United Kingdom* App No 42971/02 (ECHR, 28th November 2006).

Convention"[96], just not as a result of their own "interpretation of the Convention…since the meaning of the Convention should be uniform throughout the States party to it."[97] In *Parry*, the ECtHR clearly views its role as one of interpreting and expanding the numerous fundamental rights that are included in the Convention. If the floor of Article 12 is to be elevated towards the ceiling somewhat so as to embrace same-sex marriage, then that is a decision for the ECtHR alone to make. In *EB v France* Judge Costa, joined in his dissent by Judges Turmen, Ugrekhelidze and Jociene, stated that the role of the ECtHR "under the Convention is to interpret and ultimately apply it."[98] Interestingly, the statement does not read "ultimately interpret and apply it" which suggests that the national courts are not envisaged by the Court as having an interpretative role in relation to the ECHR.[99] Hence the learned ECtHR judges seem to view the Court as the sole interpreter and, once all national remedies have been thoroughly exhausted, the final body that will apply the provisions of the ECHR.

Thus I would agree with Wintemute that it is difficult to see any benefit to uniformity, but I would disagree by saying that it seems as if this concept is at least preferred if not required by the ECHR and the ECtHR. It would appear that a more expansive interpretation of rights laid down in the ECHR can only be proffered by the ECtHR and that the national courts "cannot interpret the scope of Article 8 of the European Convention in line with their own understanding of family and family life."[100] As Lord Hope pronounced in *N v Secretary of State for the Home Department*:

> [The domestic court's] task, then, is to analyse the jurisprudence of the Strasbourg court and, having done so and identified its limits, to apply it to the facts of the case … [i]t is for the Strasbourg court, not for us, to decide whether its case law is out of touch with modern conditions and to determine what further extensions, if any, are needed to the rights guaranteed by the Convention. *We must take its case law as we find it, not*

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[96] *R (Ullah) v Special Adjudicator* [2004] 2 AC 323 [20].
[97] ibid.
[98] *EB v France* (n 9) (Judges Costa, Turmen, Ugrekhelidze and Jociene, dissenting).
[99] Irish courts can only interpret *Irish law* in light of existing ECtHR case law.
[100] J.M. Scherpe, (n 89) 398.

as we would like it to be.[101]

However, what about a situation where there is no existing case law because the ECtHR has simply never been called upon to adjudicate on a certain dilemma? In 2008, this was the case in *Re P*[102], where the House of Lords had to consider whether legislation from Northern Ireland, which prohibited adoption by unmarried couples, infringed the rights to respect for private and family life of a *de facto* couple that was seeking to adopt the natural child of one member of the union. There was no Strasbourg case law on the issue, and the majority recognised that if called on to do so the ECtHR could state that the matter fell within a Contracting State's margin of appreciation. Lord Hoffmann held that if this occurred the considerations outlined by Lord Bingham in *Ullah* would not apply. This is because, by having recourse to the margin of appreciation, the ECtHR would be declining to lay down an interpretation of Article 8 for all Contracting States, and "that means that the question is one for the national authorities to decide for themselves and it follows that different Member States may well give different answers".[103] Accordingly, the majority held that the impugned legislation violated unmarried couples' rights under Articles 8 and 14 of the ECHR as interpreted for the United Kingdom in the absence of any Strasbourg case law. Kavanagh endorses this expansive approach where no Strasbourg authority exists and argues that in such a situation the interpretation of Convention rights is "a collaborative venture between the Strasbourg and domestic levels".[104]

The approach of the House of Lords in *Re P* seems a justifiable method of allowing deviation from the principle established by Lord Bingham in *Ullah*. This is because their Lordships were essentially saying that if a case involving a sensitive issue such as unmarried adopters comes before the ECtHR, and the Court exercises judicial self-restraint by utilising the margin of appreciation, then in these circumstances the national courts should feel free to adopt a more liberal approach to the issue via reliance on the ECHR provision that

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[101] *N v Secretary of State for the Home Department* [2005] 2 AC 296, 306. Emphasis added.
[102] *Re P* [2008] UKHL 38.
[103] ibid [31 & 36-37] (Lord Hoffmann).
[104] Aileen Kavanagh, "Strasbourg, the House of Lords or Elected Politicians: Who decides about rights after Re P?"(2009) 72 Modern Law Review 828, 836.

the Court itself has declined to interpret in an expansive manner. However, while this approach is quite pragmatic it is difficult to square with the above discussion of Article 53 ECHR and the judgments from the recent cases of *Parry v United Kingdom* and *EB v France*, all of which indicate that increased human rights protection should, absent a pronouncement from Strasbourg, result from Contracting States' own laws. Indeed, subsequent case law from the UK Supreme Court indicates that its members have opposing views as to whether a *Re P* or an *Ullah* approach is preferable where Strasbourg has not yet passed judgment. In *Ambrose v Harris*,[105] Lord Hope cited Lord Bingham's "famous dictum in *Ullah*",[106] and Lord Dyson appears to agree with this cautious approach by affirming that "there exists a supranational court whose purpose is to give authoritative and Europe-wide rulings on the Convention."[107] Only Lord Kerr favoured a *Re P* approach.

Irrespective of the question as to the appropriateness of national courts proffering their own interpretations of ECHR provisions where no case law exists, we have seen that there is one "insuperable obstacle" in this jurisdiction, *ie* the supremacy of the Irish Constitution. Hedigan J's interpretation of Article 8 flew in the face of Article 41.3.1° of that document which is the primary source of human rights protection in Ireland.

However, in the future *Re P* could very well represent a persuasive authority demonstrating a viable approach that can be taken to the interpretation of ECHR provisions in areas likely to be subjected to a margin of appreciation analysis by the ECtHR where no case law is in existence and, most importantly in the Irish context, where an expansive interpretation of the ECHR would not in fact conflict with any of the provisions of the Irish Constitution. However, since the Supreme Court in *McD v. L* only endorsed the more restrictive approach in *Ullah* as part of Irish law we will have to wait for an appropriate case to arise to discover whether the Irish courts are willing to adopt a *Re P* approach or if the judiciary are as sceptical of it as their UK counterparts were in *Ambrose*.

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[105] *Ambrose v Harris* [2011] UKSC 43.
[106] Mads Andenas and Eirik Bjorge, "Ambrose: Is the Ullah Principle Wrong?" (2012) Law Quarterly Review 319, 320.
[107] *Ambrose v Harris* [2011] UKSC 43 [105].

Same-Sex Couples and Family Life under Article 8 ECHR

Merely six months after the Irish Supreme Court's decision in *McD v L,* the ECtHR had to consider the position of a same-sex couple under Article 8. In *Schalk and Kopf v Austria*, the applicants, a cohabiting same-sex couple living in a stable *de facto* partnership, queried whether same-sex marriage could be embraced by Article 12 and, if not, whether a right to marry could be derived from Article 8.[108] If this latter interpretation was possible they claimed that their exclusion from the institution of marriage by Austrian domestic law amounted to sexual orientation discrimination contrary to Article 14. The ECtHR reiterated that the relationship of a same-sex couple like the applicants' fell within the notion of "private life" under Article 8 and for the first time it found that such a union could also constitute "family life" for the purposes of Article 8 because in the nine years since the decision in *Mata Estevez v Spain*[109] a rapid evolution of social attitudes towards same-sex couples had occurred in many States and this had resulted in a large number granting legal recognition to such couples.[110] The Court observed that certain provisions of EU Law also reflect a growing tendency to include same-sex couples in the notion of "family".[111] However, the Court held that the Convention "is to be read as a whole and its Articles should therefore be construed in harmony with one another" and accordingly because:

> Article 12 does not impose an obligation on Contracting States to grant same-sex couples access to marriage, Article 14 taken in conjunction with Article 8, a provision of more general purpose and scope, cannot be interpreted as imposing such an obligation either.[112]

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[108] *Schalk and Kopf v Austria* (n 2). The potential for same-sex marriage under Article 12 of the ECHR will be examined in Chapter 5.

[109] *Mata Estevez v Spain* (n 34).

[110] *Schalk and Kopf v Austria* (n 2) [93]. Indeed, in the later case of *Vallianatos v Greece* App Nos 29381/09 & 32684/09 (ECHR, 7th November 2013) [73] the ECtHR recognised the right to respect for family life of stable same-sex couples who lived apart: The Court held that "the fact of not cohabiting does not deprive the couples concerned of the stability which brings them within the scope of family life within the meaning of Article 8."

[111] ibid.

[112] ibid [101]. The Article 12 aspect of *Schalk and Kopf* and the potential for same-sex marriage under Article 12 ECHR will be considered in the next chapter.

Therefore since a same-sex couples' right to marry is not encompassed by Article 8 then Article 14 simply cannot be engaged by that provision in this instance.[113] This is because, as I have demonstrated, the non-discrimination provision has no independent existence in that there can be no room for its application unless the facts at issue fall within the ambit of one or more of the Convention's substantive provisions or Protocols. At the time of their application the applicants had further claimed that by denying them the right to have their relationship recognised in law other than through marriage, the Austrian Government was discriminating against them on the grounds of sexual orientation which was contrary to Article 14 taken in conjunction with Article 8. However, since registered civil partnership laws had been enacted in Austria six months prior to this case being heard, the ECtHR held that it no longer had to examine whether the lack of any means of legal recognition for same-sex couples was in violation of Articles 8 and 14. The Court did consider whether the Austrian Government should have introduced the partnership laws to benefit persons like the applicants any earlier than it did and, interestingly, it found that "[t]hough not in the vanguard, the Austrian legislator cannot be reproached for not having introduced the Registered Partnership Act any earlier."[114] The majority of the ECtHR was of the opinion that:

> [t]here is an emerging European consensus towards legal recognition of same-sex couples. Moreover, this tendency has developed rapidly over the past decade. Nevertheless, there is not yet a majority of States providing for legal recognition of same-sex couples. The area in question must therefore still be regarded as one of evolving rights with no established consensus, where States must also enjoy a margin of appreciation in the timing of the introduction of legislative changes.[115]

It is most patronising of the Court to recognise that same-sex couples are entitled to "respect for…family life" under Article 8, yet proceed to state that Member States can *gradually* roll out such respect through legislation because of a lack of

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[113] This reflects the Court's finding in *Parry v United Kingdom* App No 42971/02 (ECHR, 28th November 2006) that "Article 12 is the *lex specialis* for the right to marry."
[114] ibid [106].
[115] ibid [105].

consensus. If that is so, why did the Court bother to recognise same-sex couples' rights under the family life aspect of Article 8 at all here? Why not wait for what it feels is a satisfactory European consensus on the matter as it did with the transsexual dilemma?[116]

Finally, the Court considered the applicants' argument that, if a State chooses to provide same-sex couples with an alternative means of relationship recognition, it is obliged to confer a status on them which – though carrying a different name - corresponds to marriage in every respect. The Court was not swayed by the applicants' argument and it considered "on the contrary that States enjoy a certain margin of appreciation as regards the exact status conferred by alternative means of recognition."[117] The ECtHR observed that the Austrian Registered Partnership Act gave the applicants "a possibility to obtain a legal status equal or similar to marriage in many respects."[118] While the Court noted that there were substantial differences between marriage and civil partnership in respect of parental consequences it nonetheless held that this corresponded on the whole to the trend in other Member States. In conclusion, the Court did not see "any indication that the respondent State exceeded its margin of appreciation in its choice of rights and obligations conferred by registered partnership."[119]

Thus it appears from the judgment in *Schalk and Kopf* that the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (2010 Act) would more than pass muster if subjected to an Article 8 analysis in Strasbourg. Similar to the Austrian legislation Irish partnership law does not really recognise same-sex parenting and it seems that this is well within our margin of appreciation. Furthermore Ireland, like Austria, was not "in the vanguard" in introducing civil partnership legislation on 1st January 2011. However given that this is an area of "evolving rights with no established consensus" it is obvious that if no such laws were in existence even now we would not fall foul of the Convention given our margin of appreciation as to the "timing of the introduction" of legislative change, though admittedly the Court's decision gently nudges States to move in the direction of relationship recognition for gay and lesbian people.

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[116] See the discussion in Chapter 5 of *Goodwin v United Kingdom* (2002) 35 EHRR 18.
[117] ibid [108]
[118] ibid [109].
[119] ibid.

The ruling in *Schalk and Kopf* is quite narrow. The Court merely acknowledges that childless same-sex couples have a right to respect for family life but that such right need only be recognised across the Council of Europe's Contracting States as and when they see fit to introduce legislation. Scherpe's observation seems apt here, as "[t]he Contracting States still have a margin of appreciation; there is no obligation to recognise same-sex relationships as family life (yet)."[120] Any legislation can be quite limited as "States enjoy a certain margin of appreciation"[121] as to the exact status it confers on same-sex couples in their jurisdiction. Hence the Contracting States may not even need to introduce civil partnership, let alone marriage laws, to accord same-sex unions respect for family life. It is possible that a redress model of relationship recognition might even suffice. This was recently introduced in Ireland in Part 15 of the 2010 Act and it merely allows a financially dependent cohabitant of the same or opposite sex to seek certain relief from the other cohabitant upon termination of the relationship. Such relief can be in areas like succession, financial support, wrongful death, etc.[122] However, Doyle argues that this model does not provide for relationship recognition at all as it only retrospectively recognises unions for the purpose of deciding the entitlements of a former cohabitant.[123] So, would this model be enough to satisfy the ECtHR that a State was complying with its Article 8 requirements? It is opined that it possibly would at present due to the Court's extensive references to the application of the margin of appreciation doctrine in this rather sensitive area. However, the ECtHR emphasised in the later case of *Vallianatos v Greece* that:

> [A] trend is currently emerging with regard to the introduction of forms of legal recognition of same-sex relationships. Nine member states provide for same-sex marriage. In addition, seventeen member states authorise some form of civil partnership for same-sex couples.[124]

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[120] JM Scherpe, (n 89) 399.
[121] *Schalk and Kopf v Austria* (n 2) [108].
[122][122] See the discussion in Chapter 2.
[123] Oran Doyle, "Moral Argument and the Recognition of Same-Sex Partnerships", in Oran Doyle and William Binchy (eds), *Committed Relationships and the Law* (Four Courts Press 2007) 154.
[124] *Vallianatos v Greece* App Nos: 29381/09 and 32684/09 (ECHR, 7th November 2013).

Hence 55% of the Contracting States now recognise same-sex unions via marriage and/or civil partnership. Most of them have done so in the past decade alone and more are likely to follow their lead in the not-too-distant future. Hence the European consensus is really evolving towards marriage or marriage-like relationship recognition. It is submitted that any country that might only introduce a limited redress model of relationship acknowledgement could in the not-too-distant future be found in violation of a same-sex couples' right to respect for family life under Article 8. Scherpe is most likely correct in observing that any legal framework introduced by a Contracting State for same-sex couples "will for the most part have to be a true and full functional equivalent of marriage" so as not to risk falling foul of the ECHR.[125]

Gay and Lesbian Single Parents and Articles 8 and 14

The ECtHR has not yet been called on to pronounce on the situation of a same-sex couple that wishes to apply for joint authorisation to adopt a child where domestic law restricts this privilege to married couples. The Court has recently held that a same-sex couple that is raising the biological child of one member of the union can enjoy respect for family life under Article 8, but the non-biological parent's inability to apply for an order allowing him/her to adopt his partner's child and share parental responsibility with his/her partner was found not to be in breach of Article 8.[126] However, homosexual persons who are either single-parents to a child born as a result of a previous heterosexual relationship and homosexual individuals who aspire to become single-parents through adoption have in recent times fared well in Strasbourg.

In *Salgueiro da Silva Mouta v Portugal*,[127] the applicant had been denied custody of his child in favour of his ex-wife on the grounds of his homosexuality, and he claimed that this was contrary to his right to respect for family life under Article 8, and the non-discrimination provision contained in Article 14.
The ECtHR noted that in *Hoffmann v Austria*[128] it had held that the former

[125] JM Scherpe, "The Legal Recognition of Same-Sex Couples in Europe and the Role of the European Court of Human Rights" (2013) 10 The Equal Rights Review 83, 92.
[126] *Gas and Dubois v France* App No 25951/07 (ECHR, 15th March 2012).
[127] *Salgueiro da Silva Mouta v Portugal* App No 33290/96 (2001) 31 EHRR 47.
[128] *Hoffmann v Austria* App No 12875/87 (1993) 17 EHRR 293.

provision applies to decisions awarding custody to one or other parent after divorce or separation. The Court found that there was a difference in treatment between the applicant and the child's mother which was based on his sexual orientation. The Court proceeded to determine that such discrimination was invalid within the meaning of Article 14 because, although the Portuguese authorities pursued a legitimate aim, namely the protection of the health and rights of the child, by making a distinction based on the applicant's sexual orientation, there was no reasonable relationship of proportionality between the means employed and the aim sought to be realised.

Hence the ECtHR championed the *preservation* of filial ties between a child and a biological parent of homosexual orientation. However until very recently it was not so keen to promote the *establishment* of such ties between a potential gay or lesbian single-parent and a child, as we shall see. An analysis of both *Fretté v France* and *EB v France* will show how the position of a prospective homosexual adoptive parent evolved over the course of six short years.

The Position of a Prospective Gay or Lesbian Adopter under the ECHR

In *Fretté v France*[129] the ECtHR had to pronounce on the validity under the ECHR of the Contracting State's rejection of the single homosexual applicant's application for authorisation to adopt a child on the grounds of his sexual orientation. Although the ECtHR held that "the Convention does not guarantee the right to adopt"[130], Article 8 was engaged because the right of a single person to apply for adoption was authorised under French domestic law and this in turn was an aspect of one's private life. Article 14 was relevant as the applicant had experienced a difference in treatment when the French administrative and judicial authorities had refused him authorisation to adopt because of his "choice of lifestyle". The ECtHR found that this criterion "implicitly yet undeniably made the applicant's homosexuality the decisive factor".[131] However, the Court found that the discrimination was justified and that there had been no violation of Article 14 taken in conjunction with Article 8. This was because the Contracting State had

[129] *Fretté v France* (n 25).
[130] ibid [32].
[131] ibid.

pursued a legitimate aim, namely the protection of the health and rights of children deemed eligible for adoption, and given the paramountcy of children's best interests, the means employed to realise that aim, namely the refusal to allow adoption by the homosexual applicant, had not infringed the proportionality principle. The Court further held that the matter was within the wide margin of appreciation accorded to the Contracting States given that there was no common ground on the issue of parenting by homosexual persons. In addition, the Court observed that:

> [t]he scientific community – particularly experts on childhood, psychiatrists and psychologists – is divided over the possible consequences of a child being adopted by one or more homosexual parents, especially bearing in mind the limited number of scientific studies conducted on the subject to date. [132]

The Decision in *EB v France* —no Need to Fret over Fretté any Longer

As in *Fretté* the applicant in *EB v France*[133] was of avowed homosexual orientation. She alleged that at every stage of her application for authorisation to adopt she had suffered discriminatory treatment based on sexual orientation contrary to Article 14, and that this had interfered with her right to respect for private life under Article 8. Article 8, and consequently Article 14, came to be engaged here for the same reasons as they were in the *Fretté* case, namely the provision for single-person adoption under French domestic law and the difference in treatment experienced. The Contracting State's reason for refusing the applicant authorisation to adopt as a single person was based on two grounds: first, lack of a paternal referent and second, the ambivalence of her *de facto* partner's commitment to her adoption plans. In relation to the first ground, the ECtHR held that, by requiring the applicant to establish the presence of a referent of the other sex among her family and friends, it ran the risk of rendering ineffective the right of single persons to apply for authorisation to adopt. There were systematic references by the various domestic authorities to the lack of a paternal referent in Ms EB's

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[132] ibid [42].
[133] *EB v France* (n 9).

case. In the Court's view the first ground might thus have led to an arbitrary refusal and served as a pretext for rejecting Ms EB's application on the grounds of her sexuality. The Court noted that the Government was unable to produce statistical information on the frequency of reliance on this ground according to the declared or known sexual orientation of persons applying to adopt. This alone could have provided an accurate picture of administrative practice and established the absence of discrimination when relying on that ground.[134] Considering the second ground, the Court noted that the applicant's long-standing and declared partner did not feel committed by her application to adopt a child, and that:

> [t]he question of the attitude of [the applicant's] partner … is not without interest or relevance in assessing her application. It is legitimate for the authorities to ensure that all safeguards are in place before a child is taken into a family.[135]

The Court held that the second ground had nothing to do with the applicant's sexual orientation but was based on a simple analysis of the known *de facto* situation and its consequences for the adoption of the child. However, the Court held that the two grounds formed part of an overall assessment of the applicant's situation and that because they should not be considered alternatively but concurrently, the illegitimacy of one of the grounds had the effect of contaminating the entire decision. The Court reached the "inescapable conclusion" that the applicant's sexual orientation was consistently at the centre of deliberations in her regard and omnipresent at every stage of the administrative and judicial proceedings.[136] The Court held that the reference to the applicant's homosexuality was, if not explicit, at least implicit, and therefore it found that her sexual orientation was a decisive factor resulting in the decision to refuse her authorisation to adopt a child.[137]

In considering whether the Government had demonstrated the pursuance of a "legitimate aim" or if there was "reasonable proportionality between the means employed and the aim sought to be realised" for the purposes of Article 14, the ECtHR could have followed *Fretté* and found that the means employed,

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[134] ibid [74].
[135] ibid [76].
[136] ibid [88].
[137] ibid [89].

ie disallowing adoption by homosexuals, was suited to realising the aim sought, *ie* protection of children placed for adoption. However, since *Fretté* was decided the Court had consistently adopted a strict approach to sexual orientation discrimination,[138] and in continuing with this it enunciated that:

> [w]here sexual orientation is in issue, there is a need for particularly convincing and weighty reasons to justify a difference in treatment regarding rights falling within Article 8."[139]

The ECtHR concluded that the Government had not advanced such reasons and that by rejecting the applicant's application for authorisation to adopt a child, the authorities had made a distinction based on sexual orientation, "a distinction which is not acceptable under the Convention", and this was contrary to Article 14 taken in conjunction with Article 8.[140]

(i) Was there really Sexual Orientation Discrimination?

The dissenting judges rightly observed that the first ground should have been recognised by the domestic courts as being illegal under French law because if the law allows a single person to adopt it is against the law to require that person, be they a man or a woman, to have a "referent" of the opposite sex among their circle of family and friends. The dissenters argued that a single person cannot be required to artificially rebuild a "home" for the purpose of being able to exercise a statutory subjective right; otherwise a "single" person would have to be single in name only in order to adopt.[141] However, the dissenters did not feel that the first ground should be confused with homophobic discrimination, a stance with which this author would be inclined to agree. This is because, whether or not the applicant had been homosexual, the Contracting

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[138] In 2000, such approach was evident in *Smith and Grady v United Kingdom* (2000) 29 EHRR 493 but the Court abandoned it in the subsequent case of *Fretté v France* (2002) 38 EHRR 438. Since 2003, it has consistently resorted back to it in *SL v Austria* (2003) 37 EHRR 39, *Karner v Austria* (2003) 38 EHRR 528, *EB v France* (2008) 47 EHRR 21, and *Schalk and Kopf v Austria* App No 30141/04 (ECHR, 24th June 2010).

[139] *EB v France* (n 9) [91].

[140] ibid [96].

[141] ibid (Judges Costa, Turmen, Ugrekhelidze and Jociene, dissenting).

State's authorities would still have refused her—or could still have refused her—authorisation to adopt on the ground of the lack of a "referent" of the opposite sex. Therefore, the dissenting judges concluded that the first ground was not discriminatory on the basis of sexual orientation and that it did not suffice to contaminate the entire decision. In the view of Costa J:

> The Grand Chamber could have solemnly declared that a refusal of [the authorisation to adopt a child] could not be based on homosexuality without violating Articles 14 and 8, and thus given an important leading judgment, while dismissing [the applicant's] application because in this case it was not her homosexuality that had prevented her from obtaining authorisation.[142]

(ii) Unsound from a Child-Centric Perspective?

The dissenters also pointed out that under French administrative law, where a decision is based on a number of grounds as in Ms EB's case, it is sufficient for one of the grounds to be legally acceptable in order for the decision as a whole to be valid.[143] Indeed the relevant section of France's adoption legislation expressly states that:

> [t]he conditions in which the applicant is proposing to provide a child with a home must meet the needs and interests of an adopted child from a family, child-rearing and psychological perspective.[144]

Thus taking account of the paramountcy of the child's best interests as expressed in the law of the Contracting State the dissenters rightly felt that the second ground, the ambivalence of the applicant's partner's commitment to her adoption plans, was a "sufficient and relevant reason alone for refusing to grant the applicant authorisation".[145] Mularoni J opined that:

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[142] ibid.
[143] ibid (Judge Loucaides, dissenting).
[144] Article 4 of Decree no. 98-771 of September 1st, 1998, establishing the arrangements for appraising applications to adopt a child in State care.
[145] *EB v France* (n 9) (Judge Mularoni, dissenting).

> [w]here a single person seeking to adopt is in a stable relationship with another person, who will inevitably be required to contribute to providing the child with a suitable home, the administrative authority has the right and the duty to ensure…that the conduct or personality of the third person, considered on the basis of objective considerations, is conducive to providing a suitable home.[146]

The dissenters observed that if, in Ms EB's particular case, authorisation to adopt had been granted it was very unlikely that the guarantees required for the child's best interests under the Contracting State's adoption legislation would have been met. They felt that it was not for the ECtHR to step outside of its general supervisory role and decide otherwise as it is neither an appellate court nor a court of cassation. However, this is what the majority judgment actually does by contenting itself with the well-foundedness of the first ground to quash the decision and remit the case. It is opined that the outcome gives rise to concern from a child-centric perspective. After all, as Zupanèiè J so ably observes:

> The non-represented party, whose interest should prevail absolutely in such litigation, is the child whose future best interests are to be protected. When set against the absolute right of this child, all other rights and privileges pale.[147]

It is submitted that the encompassment of protection for a prospective gay adoptive parent's rights under the Convention shows that it is indeed a "living instrument", and while the principle established in *EB v France* is undoubtedly an admirable one, one cannot help but feel that in this particular case the court by its reasoning was making a "somewhat gratuitous" assertion that accords too much weight to the applicant's right to apply for authorisation to adopt and not enough to the best interests of the child.[148] In the words of Zupanèiè J:

> If in custody matters we maintain that it is the best interests of the child that

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[146] ibid.
[147] ibid (Judge Zupancic, dissenting).
[148] Brian Tobin, ""EB v France: Endorsing Un-"Convention"-al Families?" (2008) 11 (4) Irish Journal of Family Law 78, 81.

> should be paramount-rather than the rights of the biological parents-how much more force will that assertion carry in cases such as this one where the privileges of a potential adoptive parent are at issue?[149]

It is opined that the ECtHR should have heeded its pronouncement in the *Fretté* case:

> Adoption means 'providing a child with a family, not a family with a child', and the State must see to it that the persons chosen to adopt are those who can offer the child the most suitable home in every respect.[150]

Adoption legislation is aimed at being "child-oriented, and thus, the best interests of the child are of the utmost importance."[151]

***EB v France*: Putting the Cart before the Horse?**

This author has previously said of *EB v France* that "while the decision of the ECtHR does it justice, its reasoning does not".[152] We have seen that in *Fretté* the Court utilised the argument that, because there was a lack of scientific evidence pertaining to the impact of same-sex parenting on children, Contracting States were entitled to a broad margin of appreciation in this area and the right to disallow same-sex adoption. The lack of international scientific agreement in this area still remains yet nowhere in *EB v France* was it adverted to as a possible factor that might have an impact on the Court's Article 14 assessment. The Court simply ignored this argument. Similarly, the Court had held in *Fretté* that because of the lack of a European consensus in this area States were to be accorded a wide margin of appreciation. That lack of common ground remains yet it too was ignored by the Court in *EB.* Given that "the existence of a consensus has long played a role in the development and evolution of Convention protections", Curry-Sumner rightly argues that the Court "was under a duty in *EB* to explain why the 'lack of

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[149] *EB v France* (n 9) (Judge Zupancic) (dissenting).
[150] *Fretté v France* (n 25) [42].
[151] Ian Curry-Sumner, "EB v France: a Missed Opportunity?" (2009) 21 (3) Child and Family Law Quarterly 356, 365.
[152] Brian Tobin (n 148).

consensus' argument is either no longer valid or no longer relevant."[153]

Practical consequences for Ireland

Section 33 (1) of the Adoption Act 2010 sets out the criteria for adoption in Ireland:

33 (1) – The Authority shall not make an adoption order, or recognise an intercountry adoption effected outside the State, unless —

(i) the applicants are a married couple who are living together,

(ii) the applicant is the mother or father or a relative of the child, or

(iii) the applicant, notwithstanding that he or she does not fall within *subparagraph ii,* satisfies the Authority that, in the particular circumstances, the adoption is desirable and in the best interests of the child.

Section 33(1)(iii) makes it clear that single persons may be deemed eligible for adoption. Thus, the decision in *EB v France* sends out an important message to the Irish Adoption Authority in that, when presented with a single person's application for authorisation to adopt, sexual orientation must be absolutely discounted when assessing whether or not it "is desirable" to grant such a person an adoption order, or this organ of the State will be acting in breach of Articles 8 and 14. This is because section 3 (1) of the ECHR Act 2003 stipulates that every organ of the State shall perform its functions in a manner that is compatible with the State's obligations under the Convention provisions. Contravention of this section can entitle an individual who has suffered injury, loss or damage as a result to institute court proceedings to recover damages. While in theory it has always been possible for a single homosexual person to adopt a child and welcome it into the home in which he/she cohabits with his/her same-sex partner, now if the applicant is of avowed homosexual orientation this cannot factor into the equation when the

[153] Ian Curry-Sumner (n 151) 364.

Adoption Authority is deciding whether to allow he/she to adopt. The practical result of this is that there should be no impediment to the establishment of a same-sex family unit consisting of two same-sex parents and a child, though only one of the adults will have a legal standing in relation to the child. In situations where a single homosexual applicant is part of a same-sex relationship, and provided that his/her partner is a suitable co-parent unlike the partner in Ms EB's case, then there is no reason for the Adoption Authority to refuse authorisation to adopt, because surely "in the particular circumstances" it "is desirable and in the best interests of the child"? In 2008, this author found it somewhat paradoxical that the ECtHR failed to recognise extant homosexual family units under the "respect for… family life" aspect of Article 8, yet by its bolstering of the gay or lesbian individual's "right to respect for…private life" under this very provision in *EB v France* it was arguably promoting the establishment of un-"Convention"-al families consisting of two same-sex parents and a child throughout those Contracting States that provide for single person adoption.[154]

Adoption by Same-Sex Couples under Articles 8 and 14

(i) Childless Same-Sex Couples

The ECtHR has not yet been called on to decide whether domestic legislation which restricts joint adoption to married couples is in breach of a childless same-sex couple's right to respect for private or family life under the ECHR. It is opined that the Court could simply declare such a claim inadmissible because it has often stated that "the provisions of Article 8 do not guarantee either the right to found a family or the right to adopt."[155] Although the Court has recognised an *individual's* right to apply for authorisation to adopt as an aspect of his/her right to respect for private life under Article 8, it is important to remember that it only did so in both *Fretté* and *EB* because "French legislation expressly grants single persons the right to apply

[154] Brian Tobin (n 148) 82.
[155] *EB v France* (n 9) [41]; *Fretté v France* (n 25) [32].

for authorisation to adopt and establishes a procedure to that end."[156] France had "gone beyond its obligations under Article 8 in creating such a right" and, since this came within the ambit of Article 8, France could not "in the application of that right, take discriminatory measures within the meaning of Article 14".[157] Similarly, as we shall see below, the ECtHR only examined the issue of second-parent adoption by a same-sex partner in *X v Austria* because "Austrian law allows second-parent adoption in unmarried different-sex couples."[158] However, the court emphasised that "there is no obligation under Article 8 to extend the right to second-parent adoption to unmarried couples".[159] In the words of Baroness Hale in *Re P*:

> Article 8 does not require that States provide a legal mechanism of adoption, any more than it requires the State to provide people with a home. But if they do so, they must provide it without unjustified discrimination on one of the Convention grounds.[160]

Hence Contracting States which do not provide childless unmarried couples with the right to apply for authorisation to adopt under domestic law simply may not be held accountable before the ECtHR because, unlike the case of single-person or second-parent adoption, they have not undertaken any statutory obligation to which Articles 8 and 14 can be held to apply.[161] Thus an application by a childless same-sex couple could logically be dismissed by the ECtHR as incompatible *ratione materiae* with the provisions of the ECHR, an option available to it under Article 35.

However, in *Evans v UK* the ECtHR asserted that the decision to have or

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[156] *EB v France* (n 9) [49].
[157] ibid.
[158] *X v Austria* App No 19010/07 (ECHR, 19th February 2013) [136].
[159] ibid.
[160] *Re P* [2008] UKHL 38 [106] (Baroness Hale).
[161] It is submitted that the Court's assertion in the recent case of *X v Austria* App No 19010/07 (ECHR, 19th February 2013) strongly supports this proposition. At paragraph 136 the ECtHR held that "there is no obligation under Article 8 of the Convention to extend the right to second-parent adoption to unmarried couples." It was only because the Austrian legislature undertook to allow second-parent adoption in the case of unmarried opposite-sex couples that the Court "*therefore* has to examine whether refusing that right to (unmarried) same-sex couples serves a legitimate aim and is proportionate to that aim.": See [136], emphasis added. This indicates that had the Austrian legislature confined second-parent adoption to married couples the Court would not have engaged in an Article 14 assessment. Indeed, the Court had earlier noted, at paragraph [107], the "special regime" created by Austrian law for married couples in respect of adoption.

not to have a child falls within the scope of respect for private life under Article 8.[162] While that case concerned parenting via methods of assisted human reproduction, surely the ECtHR's reasoning could equally apply to parenting by way of adoption? It is somewhat ironic that the decision to have a child via such a modern means of reproduction benefits from the protection of Article 8 when the decision to do so by means of adoption, which is "an age-old procedure that is known throughout most countries in the world",[163] currently fails to attract Convention protection. As Curry-Sumner rightly points out:

> In recognising that adoption is a method through which individuals and couples are able to realise their wish to raise a child and thus provide a child in need with a familial home, is not this decision equally deserving of the protection laid down by the Convention as the desire to raise one's own genetic child?[164]

Indeed, in *EB v France* Judge Mularoni did not "see any strong arguments in favour of a difference of treatment" in such situations.[165] Nonetheless, until the Court realises that, irrespective of the inclusiveness or otherwise of national legislation "the time has come for [it] to assert that the possibility of applying to adopt a child under domestic law falls within the ambit of Article 8"[166] those challenging the application of eligibility criteria within which they fall may, like Ms EB and Ms X, be able to plead Articles 8 and 14 of the Convention, whereas a childless same-sex couple challenging their absolute exclusion from the eligibility criteria may be unable to petition the Court claiming a breach of the ECHR.

(ii) Same-Sex Couples Raising Children Together: *Gas and Dubois v France* and *X v Austria*

Gas and Dubois v France

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[162] *Evans v UK* (2007) 46 EHRR 728.
[163] *EB v France* (n 9) (Judge Mularoni, dissenting).
[164] Ian Curry-Sumner, (n 151) 364.
[165] *EB v France* (n 9) (Judge Mularoni, dissenting)
[166] ibid.

So far, I have been discussing the situation of a childless same-sex couple that might be seeking joint authorisation to adopt, but recently, in *Gas and Dubois v France,*[167] the ECtHR had to consider the case of a civil partner who sought to adopt the biological child of her civil partner. The child was conceived by means of artificial insemination from an anonymous donor and she had been raised by the civil partners, her mother and her co-mother, since her birth in the year 2000. In 2006, Ms Gas applied for a simple adoption order so as to obtain parental rights in relation to her non-biological child. In France simple adoption enables a second legal parent-child relationship to be established in addition to the original parent-child relationship based on blood ties. Essentially, it results in the sharing of parental responsibility between the biological parent and the second parent, *but only* if such parties are husband and wife. In the case of adoption by civil partners, whether same-sex or opposite-sex, and cohabiting opposite-sex or same-sex couples, a simple adoption by a second parent would result not in the sharing but in the transfer of parental responsibility to that parent, thus extinguishing the original parent-child relationship.[168]

Therefore, the Nanterre tribunal de grande instance refused the order because in this instance the adoption would have legal implications which ran counter to the applicant's intentions and the child's best interests. This conclusion was later upheld by the Versailles Court of Appeal. Ms Gas and Ms Dubois argued before the ECtHR that the French authorities' refusal of a simple adoption order breached their right to respect for private and family life under Article 8 in a discriminatory manner contrary to Article 14.

The Decision

This situation would have been far more difficult for the Court to declare inadmissable than the aforementioned hypothetical scenario involving a childless same-sex couple because the child here was already part of the same-sex family unit. The Court had already held that 'family life' can exist between an unmarried couple of the opposite sex (by birth or gender reassignment surgery) raising the

[167] *Gas and Dubois v France* (n 74).
[168] See Article 365 of the French Civil Code.

biological child of one member of the union[169] and in this case, the Court, following an examination of the applicants' situation, deemed Article 8 applicable because "family life" was present between the same-sex civil partners and the child of their union.[170] Given this, the outcome was disappointing. *Gas and Dubois* involved direct discrimination on grounds of marital status, yet the ECtHR found that the applicants were not discriminated against in comparison with opposite-sex married couples. The Court held that the applicants' situation as regards second-parent adoption was not comparable to that of a married couple in view of the "special status" of marriage and the (rather nebulous) concept of the "social, personal and legal consequences" that are associated with that institution.[171] Further, the Court reiterated its earlier findings in *Schalk and Kopf v Austria* that the ECHR does not require the Contracting States to grant same-sex couples access to marriage and that they enjoy a certain margin of appreciation in determining the exact status conferred on such couples by any alternative means of legal recognition.[172] In other words, when enacting civil partnership laws the Contracting States are in no way obliged to grant same-sex couples all the rights usually linked to marriage, such as the right to apply for a simple adoption order and share parental responsibility in relation to each other's children.

The Court also found that there was no difference in treatment based on sexual orientation because an opposite-sex couple who had entered into a civil partnership was also prohibited from obtaining a simple adoption order. The applicants argued that an opposite-sex couple could circumvent the prohibition by marrying but in response the Court simply reiterated its conclusions regarding access to marriage for same-sex couples. Although there was no direct discrimination on the basis of sexual orientation, indirectly there was because French law permitted an opposite-sex couple with a child in exactly the same situation to marry and make the *de facto* family they formed a real family in the eyes of the law, whereas a same-sex couple like Gas and Dubois could not avail of this option. Nonetheless, the ECtHR concluded that there had been no violation of Article 14 taken in conjunction with Article 8.

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[169] *Emonet v Switzerland* (2009) 49 EHRR 11; *X, Y and Z v United Kingdom* (1997) 24 EHRR 143.
[170] *Gas and Dubois v France* (n 74) [37].
[171] ibid [68].
[172] ibid [66].

The ECtHR: Uncomfortable with the Social Reality of Same-Sex Parenting?

The child at the centre of *Gas and Dubois* had been raised in a committed same-sex relationship since her birth. Since she had been conceived via artificial insemination from an anonymous donor and thus had never established a familial relationship with her biological father, second-parent adoption by Ms Gas was indubitably in the child's best interests. The ECtHR's ruling in this case stands contrary to its pronouncement in *Kroon v Netherlands* that "where the existence of a family tie with a child has been established the State must act in a manner calculated to enable that tie to be developed and legal safeguards must be established that render possible *the child's integration in his family*".[173] The ECtHR should have examined the matter of second-parent adoption from the viewpoint of the child. As O'Mahony observes,

> The strongest argument in favour of creating a positive obligation to recognise [family ties between a child and its non-biological parent] is to look at the issue as one of children's rights rather than parents' rights – ie, that it is in the best interests of a child, whose relationship with a non-biological parent qualifies as family life within the meaning of Article 8, to have that family life legally recognised in domestic law.[174]

Indeed, in *Gas and Dubois*, Judge Villiger (dissenting) believed that parental authority was best shared in the interests of the child because all children, regardless of the situation of their parents, should receive the same treatment in law. He felt that the reasoning of the majority, justifying discrimination vis-à-vis children because marriage confers a "special status" on adults was unconvincing.[175] Judge Villiger felt that because of this insufficient justification for the discrimination at issue there had been a violation of Article 14 taken in conjunction with Article 8. This author would agree with Judge Villiger, adding that the ECtHR's decision would appear somewhat at odds with the Grand Chamber's earlier pronouncement qualitatively equating civil partnership with marriage

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[173] *Kroon v. Netherlands* (1995) 19 EHRR 263 [32].
[174] Conor O'Mahony (n 63) 40.
[175] *Gas and Dubois v France* (n 74) (Judge Villiger, dissenting).

in *Burden v United Kingdom.*[176] In *Burden,* the Grand Chamber of the ECtHR held that the legal consequences of marriage and civil partnership "set these types of relationship apart from other forms of cohabitation".[177] Consequently, the Grand Chamber concluded that:

> [T]here can be no analogy between married and Civil Partnership Act couples, on one hand, and heterosexual or homosexual couples who choose to live together but not to become husband and wife or civil partners, on the other hand.[178]

Scherpe observed that following *Burden*, it appeared that "in the eyes of the ECtHR opposite-sex marriage and same-sex civil partnership are to be considered the same *type* of relationship".[179] *Gas and Dubois* makes it clear that this is not the case once children enter the equation.

Some guidance as to why the ECtHR offered such weak justifications for the discrimination against same-sex couples and did not examine the matter from a child-centric perspective can be found in the concurring opinions of Judges Spielmann and Costa. Judge Spielmann felt that "fundamentally" the case concerned a matter on which there was no emerging consensus at a European level. He acknowledged that, as of February 2011, second-parent adoption by a same-sex partner was possible in only ten of the forty-seven Council of Europe Contracting States. Judge Costa observed that the issue of same-sex marriage is a matter of democratic debate in many European countries. He stated that it was "largely for this reason" that the ECtHR in *Schalk and Kopf* left such matter to be decided by the Contracting States for themselves.[180] Judge Costa felt that a similar approach was justified in the present case. Thus, for Judges Spielmann and Costa there was not enough European consensus on adoption by same-sex partners. However, both judges believed that, although there was no violation of the ECHR,

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[176] *Burden v United Kingdom* (2008) 47 EHRR 51.
[177] ibid [65].
[178] ibid.
[179] J. M. Scherpe (n 125) 89.
[180] *Gas and Dubois v France* (n 74) (Judges Costa and Spielmann, concurring).

it would be wise for the French Parliament to revisit the issue and adapt the law on simple adoption to "contemporary social realities".[181]

Historically, the reason behind the severance of the existing legal relationship between the adopted child and its biological parent was to provide for certainty and avoid any conflict of interest that might arise for the adopted person as a result of his or her new legal status as a child of the adoptive parents. However, such reasoning is not valid in the case of adoption by a co-parent who is married to or in a civil partnership with the child's biological parent. Hence the reason why the child's relationship with its biological parent is not extinguished where the adoptive parent is married to the child's mother or father. There appears to be no valid reason why legislation cannot similarly provide for same where the adoptive parent is in a civil partnership with the child's biological parent.[182] Although the ECtHR chose not to engage with such a controversial issue on this occasion it is submitted that the national authorities should take heed of the suggestion by Judges Spielmann and Costa that the contemporary social reality of same-sex parenting should be legislated for.

A Comparison with Emonet v Switzerland

The decision in *Gas and Dubois v France* is difficult to reconcile with the Court's earlier decision in *Emonet v Switzerland.*[183] This case demonstrates what could have happened if a simple adoption order had been granted in favour of Ms Gas. Mr Emonet had already adopted the disabled adult daughter of his long-term cohabiting opposite-sex partner when the parties learned that this had the effect of extinguishing the legal mother-child relationship and making the woman Mr Emonet's daughter. Under Swiss law, the mother-child relationship would have survived the adoption process if Mr Emonet had been married to the child's mother. The mother and daughter objected to the termination of their legal relationship and requested that it be restored, but the Swiss authorities refused to do so. In Strasbourg, the applicants claimed that their right to respect for family life

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[181] *Gas and Dubois v France* (n 74) (Judges Costa and Spielmann, concurring).
[182] However, where the child is not conceived via sperm from an anonymous donor but from a previous heterosexual relationship legislation would have to adequately balance the rights of the child, his/her biological father and his/her co-mothers.
[183] *Emonet v Switzerland* (n 169).

had been breached by the Swiss authorities and, in contrast to the *Gas and Dubois* case, here the Court found that there had in fact been a breach of Article 8 of the ECHR. In reaching this conclusion the ECtHR had regard to the Revised European Convention on the Adoption of Children. This was unsurprising as the Court has previously had recourse to other relevant Council of Europe Conventions in decisions pertaining to the family under Article 8.[184] Nonetheless, it ignored this Convention in the later case of *Gas and Dubois*, even though the human rights instrument had entered into force since 1st September 2011 and the case was decided in March 2012. Article 7(1) provides that a child can be adopted by two persons of different sex who are married to each other or have entered into a registered partnership together, or a child can be adopted by one person. In addition, Article 7(2) provides that:

> States are free to extend the scope of this Convention to same-sex couples who are married to each other or who have entered into a registered partnership together. They are also free to extend the scope of this Convention to different sex couples and same sex couples who are living together in a stable relationship.[185]

Article 11(1) allows for the termination of the legal relationship between the adopted child and its biological parents, but this is subject to Article 11(2), which states that:

> The spouse or registered partner of the adopter shall retain his or her rights and obligations in respect of the adopted child if the latter is his or her child, unless the law otherwise provides.

Following a consideration of Article 11(2), the ECtHR made something of an overstatement by deeming the provision "a sign of growing recognition in the Council of Europe's Member States for adoptions such as that at the origin of this

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[184] In *Johnston v Ireland* (1987) 9 EHRR 203 [74] the ECtHR had recourse to the Preamble to the European Convention on the Legal Status of Children born out of Wedlock in arriving at its decision that Ireland had breached the right to respect for family life of an illegitimate child by failing to provide a legal mechanism that would allow her to have her relationship with her natural, unmarried parents recognised.

[185] Revised European Convention on the Adoption of Children, Article 7(2).

case".[186] Article 11(2) is not concerned with sanctioning the retention of the existing legal parent-child relationship in adoptions by unmarried persons like Mr. Emonet; it is rather more limited as it only sanctions such retention in contractual relationships like marriage or registered civil partnership. However, it is arguable that Article 11(2), when coupled with Article 7(2), enables future recognition in Member States for adoptions such as those at issue in *Emonet* and *Gas and Dubois*. However, in *Gas and Dubois*, rather than make an overstatement in relation to the significance of Articles 11(2) or 7(2), the Court failed to consider these provisions, even though Ms Dubois was the *registered partner* of the potential adopter, Ms Gas. Further, the Court in *Emonet* held that:

> [R]espect for the applicants' family life required that biological and social reality be taken into account to avoid the blind, mechanical operation of the provisions of the law to this very particular situation for which they were clearly not intended.[187]

In contrast, in *Gas and Dubois,* while the applicants were also entitled to respect for their family life the ECtHR did not accord weight to "biological and social reality" and ultimately find in their favour. Hence "the blind, mechanical operation" of the law prevailed in that case. Ironically, in *Emonet* the ECtHR emphasised that "it should be remembered that the aim of the Convention is to guarantee not rights that are theoretical or illusory but rights that are practical and effective."[188] This aim of the ECHR was not realised by the Court's conclusion in *Gas and Dubois*. Where was the Court upholding a practical, effective right to respect for family life of the applicants or the child at the centre of that case?

The *Emonet* case differs from *Gas and Dubois* in another important respect, because the ECtHR was of the view that it was:

> [N]ot necessary in this case to examine whether the applicants were subjected to discriminatory treatment within the meaning of Article 14 of the Convention compared with a married couple, as that allegation was

[186] *Emonet v Switzerland* (n 169) [84].
[187] ibid [86].
[188] *Emonet v Switzerland* (n 169) [77].

> never made before the domestic courts.[189]

Nonetheless, the Court proceeded to proffer its opinion as to whether any difference in treatment between married and unmarried adopters was justified at the national level in modern times:

> In the eyes of the Court the Government's argument that the institution of marriage guaranteed the adopted person greater stability than adoption by an unmarried couple who lived together is not necessarily relevant nowadays.[190]

One wonders whether the Court would have made such a progressive statement if Mr Emonet and his partner were of the same sex, or if it would instead have agreed with the Government's argument and stressed the difference between unmarried adopters and their married counterparts because of the somewhat abstract "social, personal and legal consequences" associated with marriage, just as it later did in *Gas and Dubois*? The case that I now turn to discuss, *X v Austria,*[191] is also instructive in this regard.

X v Austria

The facts of this case are somewhat similar to *Gas and Dubois* in that Ms X sought to adopt the biological child of her cohabiting same-sex partner. However, the child in this situation had not been born via assisted reproduction but had a biological father with whom he had maintained regular contact. The child had been raised by his mother and Ms X since the age of five.[192] The child's father would not consent to the child's adoption by Ms X., but she and the child's mother asked the courts to override the need for his consent. Similar to the situation in *Gas and Dubois*, the Austrian authorities refused to allow second-parent adoption by Ms X, so she and her partner claimed before the ECtHR that they were being discriminated against in the enjoyment of

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[189] ibid [81].
[190] ibid.
[191] *X v Austria* (n 158).
[192] At the time of the hearing before the ECtHR in February 2013 the child was 17.

their family life as protected by Article 8. Such discrimination was on the grounds of sexual orientation contrary to Article 14.

Building on its earlier, progressive pronouncement in *Gas and Dubois*, here the ECtHR held that the relationship between Ms X, her long-term cohabiting same-sex partner and the child constituted "family life" under Article 8.[193] Hence the ECtHR has made it clear that a same-sex couple in either a civil partnership or a long-term cohabiting relationship, raising the biological child of one member of the union, whether that child was born through assisted reproduction or as a result of one partner's previous heterosexual relationship, enjoy a right to respect for their "family life" under Article 8 of the ECHR.

We have already seen in *Gas and Dubois* that where second-parent adoption is only available to married couples there will be no violation of Articles 8 and 14 because of the "special status" of marriage. Thus the Court merely reiterated this conclusion in the instant case and once again eschewed its finding in *Emonet* that the argument for favouring marriage over cohabitation in an adoption context was "not necessarily relevant nowadays."[194] In this respect the decisions in both *Gas and Dubois* and *X v Austria* are rather interesting because when presented with same-sex partners seeking to adopt children marriage becomes "special", something that it was not in *Emonet v Switzerland* when an unmarried heterosexual adopter was at issue.

However, because Austrian Law permitted second-parent adoption by an unmarried opposite-sex partner Ms X's case could be distinguished from *Gas and Dubois*. The Court observed that although "there is no obligation under Article 8 to extend the right to second-parent adoption to unmarried couples…Austrian law allows second-parent adoption in unmarried different-sex couples."[195] Thus, as in the *Fretté* and *EB* cases Article 8 was therefore deemed applicable. The ECtHR proceeded with an Article 14 analysis and examined whether refusing second-parent adoption to unmarried same-sex couples served a legitimate aim and was proportionate to that aim. First, the Court observed that the Austrian Government:

> [D]id not adduce any specific argument, any scientific studies or any other

[193] ibid [96].
[194] *Emonet v Switzerland* (n 169) [81].
[195] *X v Austria* (n 158) [136].

> item of evidence to show that a family with two parents of the same sex could in no circumstances adequately provide for a child's needs.[196]

Second, the Court noted the incoherence of Austrian adoption law because single-person adoption by gay or lesbian persons, even those in registered or cohabiting same-sex relationships, was possible, and:

> [T]he legislature therefore accepts that a child may grow up in a family based on a same-sex couple, thus accepting that this is not detrimental to the child. Nevertheless, Austrian law insists that a child should not have two mothers or two fathers.[197]

The Court also found force in Ms X's argument that in Austria "*de facto* families based on a same-sex couple exist but are refused the possibility of obtaining legal recognition and protection."[198] In this regard the Court observed that:

> [I]n contrast to individual adoption or joint adoption, which are usually aimed at creating a relationship with the child previously unrelated to the adopter, second-parent adoption serves to confer rights viv-à-vis the child on the partner of one of the child's parents.[199]

Consequently, the Court concluded that:

> All the above considerations – the existence of *de facto* family life between the applicants, the importance of having the possibility of obtaining legal recognition thereof, the lack of evidence adduced by the Government in order to show that it would be detrimental to the child to be brought up by a same-sex couple or to have two mothers and two fathers for legal purposes, and especially their admission that same-sex couples may be as suited for second-parent adoption as different-sex couples – cast

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[196] ibid [142].
[197] ibid [144].
[198] ibid [145].
[199] ibid.

> considerable doubt on the proportionality of the absolute prohibition on second-parent adoption by same-sex couples.[200]

The Court also considered the impact of the margin of appreciation in the sphere of second-parent adoption by same-sex couples. Unusually, the Court held that because it was dealing with the issue of a difference in treatment between unmarried opposite-sex couples and same-sex couples in respect of second-parent adoption, only those ten Council of Europe Member States which allowed such adoptions could be used as a basis for comparison. The Court noted that within that group, six States treated opposite-sex and same-sex couples in the same manner as regards second-parent adoption, while four adopted the same exclusive position as Austria. This led the ECtHR to conclude that "the narrowness of this sample is such that no conclusions can be drawn as to the existence of a possible consensus among Council of Europe Member States."[201]

The Court's reasoning in Ms X's case goes some way toward explaining why it did not have recourse to the Revised European Convention on the Adoption of Children in *Gas and Dubois*. The Court noted that "given the low number of ratifications so far, it may be open to doubt whether the Convention reflects common ground among European States at present."[202] Nonetheless, the Court found that Article 7(2) of the Convention "does not mean that States are free to treat heterosexual and same-sex couples who live in a stable relationship differently." The Court concluded that there had been a violation of Articles 8 and 14 of the ECHR because the Austrian Government:

> [F]ailed to adduce particularly weighty and convincing reasons to show that excluding second-parent adoption in a same-sex couple, while allowing that possibility in an unmarried different-sex couple, was necessary for the protection of the family in the traditional sense or for the protection of the interests of the child.[203]

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[200] ibid [146].
[201] ibid [149].
[202] ibid [150].
[203] ibid [151].

An Analysis of *X v Austria*

The decision in *X v Austria,* while not without flaws, is certainly an improvement on the Court's earlier ruling in *EB v France*. We have seen that in *EB* the ECtHR's "contamination theory" largely ignored the position of the child in finding that there was sexual orientation discrimination. Clearly, Ms EB's partner would not have been a suitable co-parent yet the court grouped this ground for refusal with that requiring a referent of the opposite sex and found in favour of the applicant. This led to the Court acting in an appellate rather than a supervisory capacity. In contrast, although it would appear that Ms X may have been trying to displace the child's biological father through the mechanism of second-parent adoption, the ECtHR emphasised the following point:

> [T]he Court deems it appropriate to stress the fact that the present case does not concern the question whether or not the applicants' adoption request should have been granted in the circumstances of the case. Consequently, it is not concerned with the role of the [child's] father or whether there were any reasons to override his refusal to consent. All these issues would be for the domestic courts to decide, were they in a position to examine the merits of the adoption request.[204]

It is almost as if the Grand Chamber in *X* was highly conscious of the shortcomings of its decision in *EB* five years earlier, and that it now wanted to make it clear that while it was concerned with considering the validity under the ECHR of the national law relating to second-parent adoption by an unmarried partner, it was solely for the domestic courts to balance the rights of the parties – the child, his biological parents, and his co-mother, Ms X. The Court was not only being deferential to the national authorities in doing so, but it was also showing due regard for the right to respect for "family life" under Article 8 of both the child and the biological father.

However, the decision is not a major step forward from *Gas and Dubois*. The Court made it quite clear that it was only adjudicating on the issue of second-parent adoption here because the domestic authorities had gone beyond their ECHR

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[204] ibid [132].

obligations in making such adoption an option for unmarried opposite-sex couples: hence Ms X's Article 8 rights were engaged and the Austrian authorities could not disallow second-parent adoption in a discriminatory manner contrary to Article 14. The Court was keen to emphasise that:

> Although the present case may be seen against the background of the wider debate on same-sex couples' parental rights, the Court is not called upon to rule on the issue of second-parent adoption by same-sex couples as such, let alone on the question of adoption by same-sex couples in general. What it has to decide is a narrowly defined issue of alleged discrimination between unmarried different-sex couples and same-sex couples in respect of second-parent adoption.[205]

Nonetheless the Court's ruling is significant, no matter how much it tries to taper it. In finding that a Contracting State that permits second-parent adoption must make it available to both an opposite-sex and a same-sex partner, the ECtHR has emphasised that a child can have two *legal* parents who are of the same sex. The ramifications of such a ruling may well be significant because it begs the question, if the court has no qualms about same-sex couples parenting children, then what is so "special" about marriage that justifies the continued exclusion of same-sex couples and their children from that institution as it is understood under Article 12?

Same-Sex Couples, Parental Responsibility and Article 8

There is an alternative to challenging the inadequacy of domestic adoption laws as a means of permitting a non-biological co-parent to obtain parental rights. A same-sex couple raising the biological child of one member of the union could come before the ECtHR claiming that a Contracting State is in breach of their rights to respect for private and family life by its failure to enact legislation that would enable a homosexual (or heterosexual) co-parent to be vested with parental responsibility for (or guardianship over) the child s/he is helping to raise.

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[205] ibid [134].

Indeed, Irish law currently fails to allow this, although change may be on the way.[206] Limited guidance may be drawn from the Commission's admissibility decision in *Kerkhoven, Hinke & Hinke v the Netherlands*[207] where such a claim was declared inadmissible because, although a stable same-sex relationship between two women came within the private life aspect of Article 8, it did not constitute family life. The ECtHR's decision in *Schalk and Kopf* establishes that such a relationship is now protected under both limbs of Article 8, while also acknowledging the functional similarities that exist between same-sex and opposite-sex relationships.[208] This was reiterated by the ECtHR in the more recent case of *Vallianatos v Greece*:

> As the court has already observed, same-sex couples are just as capable as different-sex couples of entering into stable committed relationships. Same-sex couples sharing their lives have the same needs in terms of mutual support and assistance as different-sex couples.[209]

However, would the Commission's finding twenty-two years ago in *Kerkhoven* that, "as regards parental authority over a child, a homosexual couple cannot be equated to a man and a woman living together"[210] find favour with the ECtHR today if it was faced with the argument that the Oireachtas' failure to enact legislation extending the right to apply for guardianship to married and unmarried co-parents was in breach of Article 8 of the ECHR? As a result of *Gas and Dubois* and *X v Austria* the ECtHR would most likely take a dim view of the Oireachtas' failure to enact legislation extending parental responsibility to a step-parent who is in a heterosexual marriage with the child's biological parent given the "special status" of marriage under Article 12 of the ECHR. However, one cannot be certain that it would take a similar view of the failure to enact similar legislation for an unmarried opposite-sex co-parent or a same-sex co-parent who is cohabiting or in a

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[206] Head 39 of the General Scheme of the Children and Family Relationships Bill 2014 purports to extend the right to apply for guardianship to a non-biological co-parent.
[207] *Kerkhoven, Hinke and Hinke v The Netherlands* App No 15666/89 (European Commission on Human Rights, 19th May 1992).
[208] In *Schalk and Kopf v Austria* (n 2) [99] the Court recognised "that same-sex couples are just as capable as different-sex couples of entering into stable committed relationships."
[209] *Vallianatos v Greece* App Nos 29381/09 & 32684/09 (ECHR, 7th November 2013).
[210] *Kerkhoven, Hinke and Hinke v The Netherlands* (n 207).

civil partnership with the child's biological parent, especially when one considers the decision in *Gas and Dubois*. Thus, the ECtHR has really only moved from a distinction based on gender to one based on marital status. It is submitted that a finding in favour of a same-sex couple seeking to challenge a Contracting State's failure to extend parental responsibility to a gay or lesbian step-parent seems rather unlikely at present, provided of course that the State in question does not make this available to an unmarried opposite-sex co-parent.[211]

Conclusion

Over a thirty-year period the ECHR has moved from recognising private homosexual activity between consenting adults as an aspect of private life under Article 8 to acknowledging the desire for Contracting States to accord same-sex couples a degree of respect for their family life. In the *interim* same-sex relationships were arguably indirectly, retrospectively recognised when the Court held that a homosexual man was entitled to succeed to his deceased partner's tenancy because of an individual's right to respect for his home under Article 8. The establishment and maintenance of single-parent gay or lesbian family units has also been endorsed by the Court, and it has recently held that national law should allow a child to have two legal gay or lesbian parents where this option is available to a child of opposite-sex unmarried parents. However, in its eagerness to facilitate gay parents the Court has not always been cognisant of the best interests of the child.[212]

The next significant step for the Court to take will be to recognise a childless same-sex couple's right to apply for authorisation to adopt as an aspect of their right to respect for private or family life where national legislation does not permit joint adoption by a same-sex couple, though given its very 'hands off' approach in the areas of relationship recognition and parenting by same-sex couples, one does not envisage such a radical decision by the Court in the near future. Indeed, this chapter has demonstrated that while the ECtHR has, over time, done much to progress the rights of gay and lesbian individuals, more recently it has taken a back seat, preferring to leave it to the Contracting States to advance the

[211] *Vallianatos v Greece* (n 209).
[212] *EB v France* (n 9).

legal position of same-sex couples within their jurisdiction. In any event, should the Court decide to become more activist in this area, the potential impact of any progressive decision that it could make in relation to same-sex family units and Article 8 could simultaneously be countered at the international level by its application of the consensus-focused margin of appreciation doctrine. At the national level the English courts might, in the aftermath of *Re P*, go beyond a future ECtHR decision that invokes the margin of appreciation in this area. However, an Irish court would be unable to do so as any broad domestic interpretation of the rights of *de facto* families under the ECHR would find itself in conflict with Article 41.3.1° of the Constitution.

Given that there was no real impetus from Strasbourg, it is quite remarkable that in recent times successive Irish Governments have not only legislated for civil partnership and a redress scheme for same-sex couples, but have even initiated legislation which, if enacted, will extend guardianship rights to a same-sex partner and enable joint adoption by same-sex couples. Irish law is no longer lagging behind progressive developments in Strasbourg á la *Norris v Ireland* and *Karner v Austria*; in 2014 the tables have turned and the ECHR is now being outpaced by national developments pertaining to family law and sexuality.

Chapter 5

The Potential for Same-Sex Marriage under Article 12 ECHR

Introduction

The previous chapter highlighted that same-sex couples' committed relationships have recently been recognised under the respect for family life limb of Article 8 of the ECHR, though that provision does not necessarily oblige Contracting States to introduce civil partnership, nor does it encompass a right to marry for same-sex couples. It is thus imperative to consider the express right to marry and to found a family which is contained in Article 12 of the ECHR, and its relevance for Irish same-sex couples. This chapter will trace the evolution of the European Court of Human Rights' (hereafter ECtHR) case law pertaining to Article 12 and it will examine the attitude of the High Court to the modified approach to this provision that was adopted by the Strasbourg court in *Goodwin v United Kingdom* in 2002.[1] I shall proceed to critically analyse the recent case of *Schalk and Kopf v Austria*[2], the ECtHR's premier decision concerning same-sex marriage delivered on 24th June 2010, and its possible future ramifications. The potential challenge posed by civil partnership laws to the recognition of same-sex marriage under the ECHR will be discussed, as will the possible applicability of Article 12 to the legislative diminution of foreign same-sex marriages to civil partnership status in various Contracting States. I will conclude by alluding to an interpretation of Article 12 of the ECHR that could wholly encompass same-sex marriage while adequately consigning the historical argument favouring the traditional marriage only to the annals of history.

The Evolution of Article 12 ECHR: 1986-1998

Article 12 of the Convention does not define marriage but it nonetheless stipulates that:

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[1] *Goodwin v United Kingdom* (2002) 35 EHRR 18.
[2] *Schalk and Kopf v Austria* App No 30141/04 (ECHR, 24th June 2010).

> Men and women of marriageable age have the right to marry and to found a family, according to national laws governing the exercise of this right.

Originally, in a succession of cases taken to Strasbourg by post-operative transsexuals, the applicants were continually precluded from enjoying the right to marry because the ECtHR refused to recognise their re-assigned sex. Thus a male-to-female transsexual could not marry a male under Article 12 because this would amount to a marriage between persons of the same biological sex. Indeed, in the earliest case where the substantive issue was considered by the ECtHR, *Rees v United Kingdom,*[3] it was held that because there was little common ground between the Contracting States in the area of gender identity disorder the United Kingdom enjoyed a wide margin of appreciation. Hence the United Kingdom had not violated Article 12 by refusing to allow post-operative transsexuals to marry a person of their biological sex because:

> In the Court's opinion, *the right to marry guaranteed by Article 12 refers to the traditional marriage between persons of opposite biological sex.* This appears also from the wording of the Article which makes it clear that *Article 12 is mainly concerned to protect marriage as the basis of the family*...[f]urthermore, Article 12 lays down that the exercise of this right shall be subject to the national laws of the Contracting States. The limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired. However the legal impediment in the United Kingdom on the marriage of persons who are not of opposite biological sex cannot be said to have an effect of this kind.[4]

The ECtHR's reasoning here is ripe for criticism. First, the ECtHR tries to buttress its assertion that marriage under Article 12 is solely for persons of the opposite

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[3] *Rees v United Kingdom* (1986) 9 EHRR 56. This was the second transsexual case to go before the ECtHR. *Van Oosterwijck v Belgium* App No 7654/76 (ECHR, 6th November 1980) was the first case taken to Strasbourg by a post-operative transsexual but the ECtHR refused to hear the merits of the case because the applicant had failed to exhaust all available domestic remedies.

[4] ibid [49-50]. Emphasis added.

biological sex by emphasising the age-old link between heterosexual marriage and procreation. This is unconvincing because there are heterosexual couples who cannot or do not want to procreate and yet they can and do marry. Indeed in his dissent in the later case of *Cossey v United Kingdom* Judge Martens criticised the reasoning employed by the majority of the ECtHR in *Rees* by asserting that:

> [I]t cannot be assumed that the stated purpose of the right to marry (to protect marriage as the basis of the family) can serve as a basis for its delimitation: under Article 12 it would certainly not be permissible for a Member State to provide that only those who can prove their ability to procreate are allowed to marry.[5]

Furthermore, it is far from clear why the ECtHR in the *Rees* case felt that UK domestic law, by precluding marriage between persons of the same biological sex, did not impair the very essence of the right to marry guaranteed by Article 12. After all, surely the very essence of the right is impaired for all post-operative transsexuals who may be psychologically incapable of marrying a person of their opposite biological sex and may have only ever been capable of marrying a person of their biological sex? The very essence of the right is also impaired for all gay and lesbian persons who from a psychological viewpoint may only be capable of marrying a person of the same sex.

In the next case dealing with transsexuals, *Cossey v United Kingdom*,[6] the ECtHR elaborated as to why it did not feel that UK domestic law impaired the very essence of the male-to-female transsexual's right to marry. In what is possibly some of the most misguided reasoning in the Court's history it held that:

> [t]he applicant's inability to marry a woman…does not stem from any legal impediment and in this respect it cannot be said that the right to marry has been impaired as a consequence of the provisions of domestic law…As to her inability to marry a man, the criteria adopted by English law are in this

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[5] *Cossey v United Kingdom* (1990) 13 EHRR 622 [4.4.3] (Judge Martens, dissenting).
[6] (1990) 13 EHRR 622.

> respect in conformity with the concept of marriage to which...Article 12 refers.[7]

The ECtHR's misunderstanding of the nature of transsexualism is disappointing. Miss Cossey may not be capable of marrying a woman because, as Eicher[8] points out, transsexuals are heterosexual (though not all transsexuals identify as such)[9]; thus, the right to marry of a male-to-female transsexual who is attracted to males was undoubtedly impaired by UK domestic law. The ECtHR's reasoning here is most patronising and quite unaware of the psychology of human sexuality. What the court is saying is akin to stating that a gay man's right to marry under Article 12 is not impaired because he can marry a woman under the provisions of Irish law.

Interestingly, in the next case taken by post-operative transsexuals against the UK government in the summer of 1998, *Sheffield and Horsham v United Kingdom*,[10] the ECtHR reiterated that the legal impediment on marriage between persons who are not of the opposite biological sex in the Contracting State did not impair the very essence of the right to marry but did not state, as it had done in *Cossey,* that this was because a transsexual was legally capable of marrying a person of their opposite biological sex. Given that the ECtHR repeated *verbatim* its decision in *Rees* relating to Article 12 it is curious that it omitted this assertion. Perhaps the ECtHR felt that it was disingenuous to state that the essence of the right to marry was not impaired for post-operative transsexuals for this reason because despite the margin of appreciation that it continued to accord to the Contracting States in this area the ECtHR was now actually aware that the physiological reality for post-operative transsexuals was such that "denying [them] in absolute terms the right to marry a person of their previous sex while marrying a person of their newly-acquired sex is no longer an acceptable option would amount to excluding them from any marriage."[11]

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[7] ibid [45].
[8] Wolf Eicher, *Transsexualismus,* (Gustav Fischer, Stuttgart & New York, 1984) 167.
[9] See David Schleifer, 'Make Me Feel Mighty Real: Gay Female-to-Male Transgenderists Negotiating Sex, Gender, and Sexuality' (2006) 9 (1) Sexualities 57. The author interviews five female-to-male transsexuals who identify as men and enjoy sexual relations with biological men.
[10] *Sheffield and Horsham v United Kingdom* (1998) 27 EHRR 163.
[11] ibid [8] (Judge Van Dijk, dissenting).

Despite the fact that the ECtHR had since *Rees* afforded a wide margin of appreciation to the Contracting States as regards meeting the demands of post-operative transsexuals it had always claimed to be conscious of the seriousness of the problems facing these individuals and the distress that they suffered. Hence the majority had repeatedly advised the Contracting States to keep the need for appropriate legal measures in the area of transsexualism under review having regard to scientific and societal developments. Although these assertions were castigated by Judge van Dijk in his dissenting opinion in *Sheffield and Horsham* as being "rather gratuitous"[12] it would become clear in the new millennium that the ECtHR had indeed expected them to be taken seriously, and the UK's failure to do so would ultimately help to reduce its margin of appreciation and usher in a new era for post-operative transsexuals and the right to marry under Article 12 ECHR.

Goodwin v United Kingdom: A Modified Article 12 for a New Millennium

On 11th July 2002 the Grand Chamber of the ECtHR handed down judgment in the landmark case of *Goodwin v United Kingdom.*[13] Christine Goodwin was once again a post-operative transsexual seeking recognition of her right to marry under Article 12 and on this occasion the applicant was successful. The ECtHR observed that even at the time of *Sheffield and Horsham* there was an emerging consensus within the Contracting States on providing legal recognition for post-operative transsexuals as demonstrated by the detailed study submitted by the UK NGO Liberty in that case. Liberty had examined thirty-seven of the then forty Contracting States and it had found that thirty-three of these jurisdictions now provided for such legal recognition. The UK, the Republic of Ireland, Albania and Andorra were the four Contracting States that continued to expressly prohibit change.[14] In *Goodwin* Liberty again submitted a survey which demonstrated that although there had not been a statistical increase in countries providing full legal recognition for post-operative transsexuals within the Council of Europe, there had

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[12] ibid [7] (Judge Van Dijk, dissenting).
[13] *Goodwin v United Kingdom* (2002) 35 EHRR 18.
[14] *Sheffield and Horsham v United Kingdom* (n 10) [35].

been developments in this direction in other jurisdictions.[15] There was now statutory recognition of gender re-assignment in Singapore, Israel, South Africa, Canada, Australia, New Zealand and all except two of the States in the U.S.A. The ECtHR noted that while there was no common European approach as to how to address the repercussions of the legal recognition of gender re-assignment, "the lack of such a common approach among forty-three Contracting States with widely diverse legal systems and traditions is hardly surprising"[16] and hence the Court attached:

> [l]ess importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed than to the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of [their] new sexual identity.[17]

Liberty had submitted a further survey in *Goodwin* which showed that post-operative transsexuals had been accorded the right to marry in their acquired gender in 54% of the Contracting States as well as in the countries of Australia and New Zealand.[18] There was clearly no common European approach to transsexual marriage given that a bare majority of the Contracting States provided for it and there was only slight evidence of an international trend in this direction submitted by Liberty in the case. Indeed the ECtHR itself acknowledged that:

> [f]ewer countries permit the marriage of transsexuals in their re-assigned gender than recognise the change of gender itself. The Court is not persuaded however that this supports an argument for leaving the matter entirely to the Contracting States as being within their margin of appreciation. This would be tantamount to finding that the range of options open to a Contracting State included an effective bar on any exercise of the right to marry. The margin of appreciation cannot extend so far. [19]

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[15] *Goodwin v United Kingdom* (n 1) [56].
[16] ibid [85].
[17] ibid.
[18] ibid [57].
[19] ibid [103].

It is clear from this and the passage below that the ECtHR finally had a clear appreciation of the psychology behind gender identity disorder. In fact the Court criticised the reasoning that had been employed in the *Cossey* case twelve years earlier by finding that:

> [i]t is artificial to assert that post-operative transsexuals have not been deprived of the right to marry as, according to law, they remain able to marry a person of their former opposite sex. The applicant in this case lives as a woman, is in a relationship with a man and would only wish to marry a man. She has no possibility of doing so. In the Court's view, she may therefore claim that the very essence of her right to marry has been infringed.[20]

As a result the ECtHR went all the way and decided that not only does a post-operative transsexual's right to respect for private life require that his or her re-assigned gender be recognised under the Contracting States' laws but he or she should also be allowed to marry a person of the sex opposite that of his/her re-assigned sex by virtue of Article 12. Thus, the Court expanded the definitional confines of the right to marry under Article 12 by holding that a non-biological woman could marry a man, or indeed *vice versa.* The ECtHR held, in relation to Article 12, that:

> It is true that the first sentence refers in express terms to the right of a man and woman to marry. The Court is not persuaded that at the date of this case it can still be assumed that these terms must refer to a determination of gender by purely biological criteria.[21]

One might ask what became of the more traditional reasoning in the previous cases where the right to marry was concomitant with the ability of a man and woman to found a family, something that only persons who are of the opposite biological sex are capable of doing? The Court divorced the former from the latter by holding that the right to marry is no longer reliant on the ability of "any couple to conceive or

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[20] ibid [101].
[21] ibid [100].

parent a child."[22] This constituted a remarkable departure from the earlier judgments concerning the right to marry because by separating it from the ability to found a family the ECtHR was undoubtedly rejecting the argument that the institution of marriage is primarily designed to facilitate the procreation of children and by doing so it arguably abolished any future necessity for the parties to a civil marriage to be of the opposite sex. Indeed in a sense the Court was permitting same-sex marriage because if the male-to-female transsexual applicant in *Goodwin* chose to marry a man this would be a union of parties who are of the same biological sex even though they are by virtue of gender re-assignment surgery of the opposite sex at the time of entering into marriage. This author was intrigued by the potential implications of *Goodwin* for same-sex marriage,[23] as indeed were same-sex couples seeking access to the institution of marriage in the British Isles because they subsequently pleaded Article 12 before the domestic courts as being capable of embracing a right to gay marriage. It is now apt to consider the domestic courts' interpretation and application of *Goodwin* to the facts of two high-profile same-sex marriage cases in the UK and the Republic of Ireland which reached identical conclusions on the issues pertaining to Article 12.

Reactions to Goodwin in the UK and the Republic of Ireland's Superior Courts

In 2006 two important domestic cases were taken by lesbian couples seeking recognition of their Canadian same-sex marriages. Miss Wilkinson and Miss Kitzinger sought to have their foreign same-sex marriage recognised under U.K. law and Dr Zappone and Dr Gilligan wished for theirs to be recognised under Irish law. The plaintiffs' claimed that the refusal of each respective Contracting State to recognise their foreign same-sex marriage under domestic law contravened Article 12 of the ECHR because the ECtHR in *Goodwin* had "recognised that there is under the Convention an entitlement of two people who both by birth and biology are of the same sex to have the right to marry."[24] Since Dunne J in the Irish High

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[22] ibid [98].
[23] Brian Tobin, 'Same-sex Couples and the Law: Recent Developments in the British Isles' (2009) 23 (3) International Journal of Law, Policy and the Family 309, 316-17.
[24] *Zappone v Revenue Commissioners* [2008] 2 IR 417 [249].

Court case of *Zappone v Revenue Commissioners*[25] simply followed the judgment of Potter P in the English High Court (Family Division) case of *Wilkinson v Kitzinger*[26] in relation to the Article 12 argument it is proposed to analyse this latter decision prior to considering its impact on the former.

In *Wilkinson v Kitzinger* counsel for the plaintiffs argued that the ECtHR's decision in *Goodwin* cut free the traditional approach to marriage which was "rooted in biological determinism",[27] and this now made it possible for an English court to interpret Article 12 as a "living instrument" which recognised the right to marry of two persons of the same, as well as of the opposite, sex. However this argument was refuted by Potter P who felt that the ECtHR took but an incremental step in widening the breadth of the right to marry because although its reasoning no longer requires that the parties are of the opposite biological sex at the time of entering into a civil marriage their relationship must still by virtue of gender re-assignment surgery be sexually dimorphic in nature. Potter P held that the ECtHR merely recognised "the phenomenon of *re-assigned gender* whereby the applicant became eligible to marry, *as a woman*, a man of her choice."[28] In the *Zappone* case Dunne J, in considering Article 12, relied heavily on the judgment of Potter P in *Wilkinson v Kitzinger* because she felt that it "set out clearly the position in relation to the right of marriage as identified by the European Court of Human Rights"[29] in *Goodwin v United Kingdom.* Dunne J found Potter P's decision in respect of the Article 12 argument in that case to be "compelling"[30] and she proceeded to endorse it without hesitation in the case before her. Thus the U.K. and Irish superior courts interpreted the ECtHR's approach to Article 12 in *Goodwin* as meaning that the parties must still be of the opposite sex at the time of marriage even though they may not strictly speaking be of the opposite biological sex. This reading is correct when one remembers that factually the case before the ECtHR involved a post-operative transsexual's right to marry and not that of a same-sex couple. Furthermore in the more recent case of *Parry v United Kingdom* in 2006 the ECtHR reiterated that Article 12 "enshrines the traditional concept of marriage as being between a man and a woman" and this is so whether the parties' gender

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[25] ibid.
[26] *Wilkinson v Kitzinger* [2007] 1 FLR 295.
[27] ibid [60].
[28] ibid [61].
[29] *Zappone v Revenue Commissioners* (n 24) [250].
[30] ibid.

"derives from attribution at birth or from a gender recognition procedure. Same-sex marriages are not permitted."[31] Thus Baroness Hale is correct to emphasise that "permitting transsexuals to marry in their reassigned gender is of course quite different from permitting same-sex marriage".[32]

Article 12 – Is the Wind of Change Strongest in Strasbourg?

In neither of the two domestic cases was there any discussion of the *Goodwin* decision's likely impact on the future understanding of marriage under the European Convention. The English and Irish superior courts appeared keen to taper the decision's significance by continuing to subscribe to an orthodox notion of marriage under Article 12 which seems somewhat unsupportable in its aftermath. In *Wilkinson v Kitzinger* Potter P asserted that:

> If marriage is by longstanding definition and acceptance a formal relationship between a man and a woman primarily (though not exclusively) with the aim of producing and rearing children…and if that is the institution contemplated and safeguarded by Article 12 then to accord a same sex relationship the title and status of marriage would be to fly in the face of the Convention as well as to fail to recognise physical reality.[33]

In *Zappone* Dunne J quotes this statement of Potter P's in full, and she would therefore appear to endorse his questionable understanding of Article 12.[34] Potter P, by his "equation of marriage with the sexual reproduction of children"[35] appears to be overlooking the fact that the ECtHR's vibrant reinterpretation of Article 12 allows for the recognition of marriages contracted between parties who cannot procreate. It is submitted that what he and Dunne J refer to as "marriage" is, post-*Goodwin*, no longer the exact "institution contemplated and safeguarded by Article 12". Indeed Eekelaar has argued that Potter P may have gone too far by stating that the recognition of a right to same-sex marriage under English domestic law would

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[31] *Parry v United Kingdom* App No 42971/02 (ECHR, 28th November 2006).
[32] Brenda Hale, 'Homosexual Rights' (2004) 16 (2) Child and Family Law Quarterly 125, 132.
[33] *Wilkinson v Kitzinger* (n 27) [120].
[34] *Zappone v Revenue Commissioners* (n 24) [254].
[35] Nicholas Bamforth, ''The Benefits of Marriage in all but Name?' Same-Sex Couples and the Civil Partnership Act 2004' (2007) 19 (2) Child and Family Law Quarterly 133, 150.

"fly in the face" of the Convention.[36] Eekelaar's assertion is undoubtedly correct because "it is of course open to Member States to provide for rights more generous than those guaranteed by the Convention"[37] via their domestic laws. The Contracting States can do so by virtue of Article 53 which provides that "nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party" and thus Norway, Spain, Portugal, The Netherlands, Sweden, Belgium, Iceland, Denmark (and recently France, England, Wales and Scotland) have not in any way breached Article 12 of the Convention by extending marriage to same-sex couples. In 2006, months after Potter P's decision the ECtHR itself stated in *Parry v United Kingdom* that:

> [w]hile it is true that there are a number of Contracting States which have extended marriage to same-sex partners, this reflects their own vision of the role of marriage in their societies and does not, perhaps regrettably to many, flow from an interpretation of the fundamental right as laid down by the Contracting States in the Convention in 1950.[38]

However, the following analysis of *Schalk and Kopf v Austria* illustrates that a right to same-sex marriage can now indeed flow from an interpretation of Article 12, but Contracting States with traditional views on marriage like Ireland are not for the moment being obliged to abandon their current approach to give effect to such a right in order to comply with their Convention obligations, though this may change at some point in the future.

Schalk and Kopf v Austria – the ECtHR's Premier Ruling on Same-Sex Marriage

On 24th June 2010 the ECtHR gave its premier ruling on same-sex marriage. In *Schalk and Kopf v Austria* the Court acknowledged that it had "not yet had an opportunity to examine whether two persons who are of the same-sex can claim to

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[36] John Eekelaar, 'Why People Marry: The Many Faces of an Institution' (2007) 41 (3) Family Law Quarterly 413, 426.
[37] *R (Ullah) v Special Adjudicator* [2004] UKHL 26 [20]. See the discussion in Chapter 4.
[38] *Parry v United Kingdom* (n 31).

have a right to marry."[39] The applicants sought to test whether Austrian law's refusal to allow them to enter into a same-sex marriage violated Article 12. Notably, the ECtHR affirmed its earlier separation of the rights under Article 12 by stating that "Article 12 grants the right to marry to men and women…furthermore, Article 12 grants the right to found a family."[40] The applicants argued that the text of Article 12 did not necessarily have to be read in the sense that a man could only marry a woman and *vice versa*. In response, the ECtHR made an observation that may one day have far-reaching consequences for the interpretation of the right to marry under the ECHR by stating that "looked at in isolation, the wording of Article 12 might be interpreted so as not to exclude the marriage between two men or two women."[41] Although the ECtHR recognised the provision's literal potential for same-sex marriage it then qualified this by stating that the reference to "men" and "women" in Article 12 must in fact be regarded as deliberate because:

> All other substantive articles of the Convention grant rights and freedoms to "everyone"…[m]oreover, regard must be had to the historical context in which the Convention was adopted. *In the 1950s marriage was clearly understood in the traditional sense of being a union between partners of different sex.*[42]

It is disappointing that the ECtHR had recourse to history and tradition in order to avoid a progressive literal interpretation of Article 12. It is opined that in 1950 the drafters of Article 12 may not have decided to deny same-sex couples access to marriage by stipulating in accordance with the then norm that "men" and "women" could marry, but rather the issue may not have entered into their minds as homosexuality, like gender identity disorder, was viewed as an "ethical problem, but certainly not a legal issue."[43] This is also a possible explanation as to why sexual orientation discrimination was not expressly included in Article 14 of the ECHR. In 1950 marriage was hardly understood as being between a post-operative transsexual and a person of his/her opposite re-assigned gender because when

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[39] *Schalk and Kopf v Austria* (n 2).
[40] ibid [54].
[41] *Schalk and Kopf v Austria* (n 2) [55].
[42] ibid. Emphasis added.
[43] *Cossey v United Kingdom* (n 5) [4.4.2] (Judge Martens, dissenting).

drafted, Article 12, by referring to regulation of "this right" by the national authorities envisaged such a union between the right to marry and to found a family that the right would be restricted to those relationships where parenthood was at least possible *in principle*. However, we have seen that the Court embraced the notion of transsexual marriage by dynamically reinterpreting Article 12 in *Goodwin*, where the historical context in which this provision was drafted was insignificant to a most progressive outcome. Hence its reliance here on "marriage…in the traditional sense" to skirt the request to recognise same-sex marriage seems more than a little disingenuous because in the context of Article 12 as it was understood in 1950:

> [I]t is at least questionable whether [transsexual marriage] can be called a more "traditional" marriage than the one between two same-sex partners, as also in this relationship parenthood is biologically impossible.[44]

Furthermore we have seen that the ECtHR in *Goodwin* separated the two limbs of Article 12 by stating that although this provision secures the fundamental right of a man and woman to marry and to found a family:

> [T]he second aspect is not however a condition of the first and the inability of any couple to conceive or parent a child cannot be regarded as *per se* removing their right to enjoy the first limb of this provision.[45]

Wintemute believed that such language left "the door open to acknowledge same-sex marriage at some point in the future".[46] This author was inclined to agree, arguing that the Court's reasoning was significant on more than one level.[47] First, the Court used a broad, gender-neutral construction by referring to "any couple" rather than a man and a woman, and second, the Court's reasoning, while

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[44] Graciela Faffelberger and Stefan Huber, 'Marriage between Homosexuals: Equal Treatment and Right to Marriage' (2008) 2 (1) Vienna Online Journal on International Constitutional Law 61, 64. Available at: http://heinonline.org.elib.tcd.ie/HOL/Page?handle=hein.journals/vioincl2&id=60&collection=journals&index=journals/vioincl#60 (Accessed 1st June 2014).

[45] *Goodwin v United Kingdom* (n 1) [98].

[46] Robert Wintemute, 'The Massachusetts Same-Sex Marriage Case: Could Decisions from Canada, Europe, and South Africa Help the SJC?' (2004) 38 (3) New England Law Review 505, 510.

[47] Brian Tobin (n 23) 316-17.

applicable to post-operative transsexuals who cannot "conceive" children, could equally apply to same-sex partners who also cannot reproduce and in various Contracting States are also unable to jointly adopt and consequently "parent" children yet, under the *Goodwin* test, could nonetheless enjoy the right to marry. However in *Schalk and Kopf* the ECtHR was quick to point out that this previous divesting of marriage from procreation/parenting in *Goodwin* did not "allow any conclusion regarding the issue of same-sex marriage."[48] Given that the Court had already held that same-sex marriage is possible on one literal interpretation of Article 12 it is unclear as to why it was adamant that its previous disjunctive reading of this provision supports transsexual marriage but not same-sex marriage when in this author's opinion such reasoning appears apt to engender both.

In *Schalk and Kopf* the Court expanded upon its previous analysis in *Goodwin* of an analogous provision guaranteeing the right to marry and the right to found a family, Article 9 of the Charter of Fundamental Rights of the European Union. In *Goodwin* the Court had observed that Article 9 departs "no doubt deliberately" from the wording of Article 12 of the ECHR in removing the reference to men and women.[49] It is also intriguing that the ECtHR's dynamic reinterpretation of Article 12 in *Goodwin* brought it very much in line with Article 9, which states that "the right to marry *and* the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of *these* rights".[50]

As this author has observed elsewhere, the rights to marry and to found a family are separate and distinct rights under Article 9, as under Article 12 post-*Goodwin*.[51] In *Schalk and Kopf* the Court went further and made Article 12 more akin to Article 9. The Court quoted from the commentary to Article 9 which acknowledges that although the provision poses no obstacle to the recognition of same-sex marriage "there is however no explicit requirement that domestic laws should facilitate such marriages". Interestingly, in light of this the ECtHR held that:

> Regard being had to Article 9 of the Charter, therefore, the Court would no longer consider that the right to marry enshrined in Article 12 must in all

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[48] *Schalk and Kopf v Austria* (n 2) [56].
[49] *Goodwin v United Kingdom* (n 1) [100].
[50] Charter of Fundamental Rights of the European Union, Article 9. Emphasis added.
[51] Brian Tobin (n 23) 316-17.

> circumstances be limited to marriage between two persons of the opposite sex. Consequently, it cannot be said that Article 12 is inapplicable to the applicants' complaint. However, as matters stand, the question whether or not to allow same-sex marriage is left to regulation by the national law of the Contracting State.[52]

Hence the Court reiterates that Article 12 is capable of recognising same-sex marriage, like the analogous Article 9 of the EU Charter, but it remains deferential to the national authorities by providing that regulation of the matter is for now best dealt with by them as "Article 12 of the Convention does not impose an obligation on [Contracting States] to grant a same-sex couple…access to marriage."[53] I shall now examine why the Court, having declared that same-sex marriage was indubitably within the ambit of Article 12, proceeded to accord the Contracting States a wide margin of appreciation on this matter.

The Margin of Appreciation and Same-Sex Marriage in *Schalk and Kopf v Austria*

In *Schalk and Kopf* the recognition of a right to same-sex marriage under Article 12 seems largely to have foundered because of the margin of appreciation doctrine. We have seen with the transsexual predicament that where the law and practice differ widely amongst the Contracting States individual countries will be afforded a wide margin of appreciation when an alleged infringement of a Convention provision is being assessed by the ECtHR. It is clear that at this point in time there is no visible agreement amongst the forty-seven Contracting States in relation to the controversial issue of same-sex marriage. The ECtHR noted that to date only six Council of Europe countries (ten since the time of judgment)[54] have passed laws providing for same-sex marriage within their jurisdictions and thus "there is no European consensus regarding same-sex marriage".[55] As Bamforth points out,

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[52] *Schalk and Kopf v Austria* (n 2) [61].
[53] ibid [63].
[54] Same-sex marriage became legal in Iceland on June 27th 2010, merely three days after the ECtHR's judgment in *Schalk and Kopf v. Austria*. See 'Iceland PM Weds Same-Sex Partner', *Irish Times* (Dublin, 29th June 2010) 10. In 2012, same-sex marriage became legal in Denmark and in 2013 it became legal in France and the United Kingdom.
[55] *Schalk and Kopf v Austria* (n 2) [58].

> *Schalk and Kopf* provides an almost text book illustration of the extent to which the Court's interpretation of key rights of the European Convention on Human Rights can turn on its analysis of the 'margin of appreciation', something which often rests on its perception of whether there exists a consensus among signatory states concerning the legal treatment of the issue in question, especially when that issue is of a socially sensitive nature.

This approach also helped to effectively debunk the argument advocating the recognition of same-sex marriage under Article 12 in the English and Irish domestic cases. Potter P held in *Wilkinson v Kitzinger* that the phenomenon of same-sex marriage:

> [c]annot be said to be an area where there is a Europe-wide consensus on the subject, by reason or reference to which the Convention should be treated as having evolved and expanded its scope to encompass same-sex relationships within the concept of marriage. [56]

As we have seen, In the *Zappone* case Dunne J followed the judgment of Potter P in *Wilkinson v Kitzinger* in respect of the Article 12 argument before the High Court. Having quoted the above passage from Potter P's judgment in full Dunne J held that "clearly, there is a wide margin of appreciation given to Contracting States in [the area of marriage]".[57]

In *Schalk and Kopf* the ECtHR opined that such a broad margin of appreciation was permissible since same-sex marriage could be distinguished from transsexual marriage which was recognised in *Goodwin* because in the latter decision "the Court perceived a convergence of standards regarding marriage of transsexuals in their assigned gender."[58] This is not accurate as the Court actually perceived a convergence of standards regarding the legal recognition of transsexuals in their assigned gender and observed that only 54% of the Contracting States permitted the marriage of transsexuals.[59] Regardless of the lack of consensus the Court nonetheless forged ahead and recognised transsexual

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[56] *Wilkinson v Kitzinger* (n 26) [62].
[57] *Zappone v Revenue Commissioners* (n 24) [255].
[58] *Schalk and Kopf v Austria* (n 2) [59].
[59] See the discussion on page 6.

marriage under Article 12 because it was aware that there was in the Contracting State an effective bar on any exercise of the transsexual's right to marry. By its failure to recognise same-sex marriage in *Schalk and Kopf* the Court has allowed such bar to remain in place in many Contracting States as far as gay and lesbian persons are concerned because they may be wholly incapable of marrying a person of the opposite sex yet they are legally precluded from marrying a person of the same sex, whom they are capable of entering into an intimate, committed relationship with on both a physical and psychological level.

It is important to note that the existence/non-existence of consensus in an area is but one factor and may not be decisive of the scope of the margin of appreciation. Another significant factor may help to either reinforce or counterbalance this factor. In *Schalk and Kopf*, once the lack of consensus had been established, this reality would appear to have been buttressed by the fact that:

> [t]he European Court of Human Rights has consistently declared itself to be slow to trespass on areas of social, political and religious controversy where a wide variety of national and cultural traditions are in play and different political and legal choices have been made by the Members of the Council of Europe.[60]

Coherent with this philosophy the Court held that:

> [m]arriage has deep-rooted social and cultural connotations which may differ largely from one society to another. The Court reiterates that it must not rush to substitute its own judgment in place of that of the national authorities, who are best placed to assess and respond to the needs of society.[61]

In *Cossey*, Judge Martens opined that the Contracting States do not enjoy "a margin of appreciation as a matter of right, but as a matter of judicial self-restraint."[62] This is because the Court, as an international tribunal, is cautious when

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[60] *Wilkinson v Kitzinger* (n 26) [44].
[61] *Schalk and Kopf v Austria* (n 2) [62].
[62] *Cossey v. United Kingdom* (n 5) [3.6.4] (Judge Martens, dissenting).

called on to develop the law in an area as sensitive as marriage and consequently it will:

> [n]ot fully exercise its power to verify whether States have observed their engagements under the Convention, but will find a violation only if it cannot reasonably be doubted that the acts or omissions of the State... are incompatible with those engagements.[63]

This is true of the Court's approach to the margin of appreciation in *Schalk and Kopf* because although it literally identified the potential for same-sex marriage under Article 12 the Court then retreated and found that there was no obligation on States to recognise same-sex marriage given the lack of a European consensus on the issue and the differing social and cultural perceptions of marriage among the forty-seven Contracting States. This author would agree with Judge Martens:

> [t]hat the Court, at least as far as family law and sexuality are concerned, moves extremely cautiously when confronted with an evolution that has reached completion in some Member States, is still in progress in others but has seemingly left yet others untouched.[64]

It is evident that only ten Contracting States provide for same-sex marriage, a further seventeen have the possible *interim* measure that is civil partnership while a considerable number of jurisdictions currently offer no legal protection to same-sex couples. Hence in *Schalk and Kopf* the Court's invocation of the judicial restraint mechanism that is the margin of appreciation doctrine is in some ways quite understandable, though one cannot help but feel that the ECtHR "by nevertheless exercising judicial self-restraint, sadly failed its vocation of being the last resort protector of oppressed individuals."[65] This is because the ECtHR by its decision permitted the very essence of the applicants' right to marry to remain infringed. By analogy with the reasoning in *Goodwin*, the applicants' in this case cohabit as men; they are in a relationship with each other and would only wish to marry each other.

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[63] ibid [3.6.3].
[64] ibid [5.6.3].
[65] ibid [3.6.4].

They have no possibility of doing so. Given that Article 12 is applicable, surely the very essence of the applicants' right to marry is being infringed under Austrian domestic law?

The Fallacy of *Schalk and Kopf v Austria*

In the last chapter we have seen that in *Schalk and Kopf* the Court recognised when deciding the issue under Article 8 of the ECHR "that same-sex couples are just as capable as different-sex couples of entering into stable committed relationships" and as a result they have a "need for legal recognition and protection of their relationship".[66] Thus the Court recognised that same-sex relationships can in essence be marriage-like and this led it to conclude that such unions must now be regarded as falling within the right to respect for family life under Article 8. It is submitted that there is an internal contradiction in the Court's reasoning because the upshot is that same-sex couples can form non-marital family units that are worthy of protection under the ECHR but not marital family units even though the stability and commitment which the Court deems them capable of are self-evident characteristics of both types of familial relationship. So same-sex couples in an analogous situation to different-sex couples are being treated differently on the basis of sexual orientation by the Court itself which has previously warned Contracting States that "differences based on sexual orientation require particularly serious reasons by way of justification"[67] so as not to fall foul of Article 14. However what is the Court's justification for allowing one couple that is inherently capable of entering into a long-term monogamous relationship to avail of the right to marry yet denies this fundamental right to another couple of recognised equal ability because of their sexual orientation? The Court cannot properly rely on the over-used margin of appreciation doctrine to justify granting same-sex couples protection under Article 8 rather than Article 12 because by its own admission there "is not yet a majority of States providing for legal recognition of same-sex couples".[68] However that lack of consensus coupled with the subject-matter of marriage with its "deep-rooted social and cultural connotations" which differ from

[66] *Schalk and Kopf v Austria* (n 2) [99].
[67] *Karner v Austria* (2004) 38 EHRR 24 [37].
[68] *Schalk and Kopf v Austria* (n 2) [105].

State to State enabled the Court to allow a broad margin of appreciation, side-step the issue and continue the discrimination against same-sex couples regardless of any situational analogy. It is submitted that Judge Martens' comments, uttered two decades earlier when transsexual persons were being denied access to marriage, seem particularly apt here:

> It is hardly compatible with the modern, open and pragmatic construction of the concept of "family life" which has evolved in the Court's case-law…to base the interpretation of Article 12 merely on the traditional view according to which marriage was the pivot of a closed system of family law. On the contrary, that evolution calls for a more functional approach to Article 12 as well, an approach which takes into consideration the factual conditions of modern life.[69]

Civil Partnership: A Thorn in the Side of Same-Sex Marriage?

Schalk and Kopf is a welcome decision in that it at least establishes that same-sex marriage falls within the ambit of Article 12. However civil partnership legislation which in a small number of countries has proven to be but a stepping-stone on the road to same-sex marriage might nonetheless preclude the remainder of the Contracting States from being obligated to grant same-sex couples access to civil marriage in order to comply with the Convention for decades to come. This is because in many of the ten Contracting States where same-sex marriage resulted from existing civil partnership laws it certainly did not occur expeditiously. Of the ten jurisdictions that have evolved from civil partnership to same-sex marriage one took twenty three years to do so, another took sixteen years, three took fourteen years, two took nine years, one took seven years and the remaining two countries took three years to make the change.[70] Interestingly, with the exception of Portugal,

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[69] *Cossey v United Kingdom* (n 5) [4.4.3] (Judge Martens, dissenting).

[70] Denmark introduced civil partnership legislation in 1989 and same-sex marriage in 2012; Norway introduced civil partnership legislation in 1993 and same-sex marriage in 2009; Sweden legislated for civil partnership in 1995 and same-sex marriage in 2009; Iceland introduced civil partnership legislation in 1996 and same-sex marriage earlier this year in 2010; In France, the PACS was introduced in 1999 and same-sex marriage was legalised in 2013; Portugal legislated for civil partnership in 2001 and for same-sex marriage in 2010; England, Wales and Scotland legislated for civil partnership in 2004 and same-sex marriage in 2013/2014; Spain introduced civil partnership in 1998 and same-sex marriage in 2005; Belgium moved from civil partnership legislation in 2000 to

the States that took the longest to make the transition, nine to twenty three years, had confined their civil partnership legislation to same-sex couples only whereas the other States had made it available to both same-sex and opposite-sex couples. There are currently twelve jurisdictions in the Council of Europe with civil partnership laws alone[71] and if the eight of these that have similarly restricted such laws solely to same-sex couples are tardy in moving from civil partnership to marriage legislation then a state of European consensus on same-sex marriage mirroring the 54% consensus on transsexual marriage seen in *Goodwin* may take decades to reach. However the degree of convergence required for the Court to countenance same-sex marriage may be considerably less given that, in *Schalk and Kopf* same-sex relationships were brought with the ambit of "family life" under Article 8 even though in 2010 a minority of the Contracting States recognised such unions either through civil partnership or same-sex marriage.

In any event, in some jurisdictions same-sex marriage may not just be a long way off but it may not even be borne from the States' civil partnership laws at all because these laws might possibly represent the apex of same-sex relationship recognition. Take Denmark, not only the first Council of Europe Contracting State to introduce civil partnership legislation for same-sex couples but the first country in the world to do so, twenty-one years ago, in 1989. Over two decades later, on June 15th 2012, the Danish Government finally moved to extend civil marriage to same-sex couples. In 2007, when the then Irish Minister for Justice, Equality and Law Reform, Brian Lenihan, announced his Government's plans to introduce what is now the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 he ruled out same-sex marriage as being in conflict with the Constitution.[72] If other countries are similarly as reluctant to evolve beyond civil partnership laws is it unreasonable to surmise that the wide margin of appreciation now afforded by the ECtHR to the Contracting States on the controversial issue of same-sex marriage could continue for decades to come?

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same-sex marriage in 2003; and the Netherlands introduced civil partnership in 1998 and became the first Council of Europe Contracting State to introduce same-sex marriage a mere three years later in 2001.

[71] Some jurisdictions, such as the U.K., have both civil partnership and same-sex marriage, and their inclusion would raise the number of jurisdictions with civil partnership laws to seventeen.

[72] Stephen Collins, 'Same-Sex Couples to get Legal Recognition Next Year' *Irish Times* (Dublin, 1st November 2007) 1.

Article 12 and the Foreign Same-Sex Marriage/Domestic Civil Partnership Conundrum

The ECtHR has not yet had an opportunity to pronounce on the application of Article 12 to a case where the applicants are seeking to have their same-sex marriage which has been contracted outside of the forty-seven jurisdictions party to the Council of Europe recognised by law in one of those States that permit same-sex couples to enter into civil partnerships yet forbid them from marrying. Many such States usually provide by statute for the foreign same-sex marriage to be downgraded in status to a civil partnership.[73] Some guidance as to whether the States' failure to place foreign same-sex marriages on a par with domestic opposite-sex marriages amounts to a failure to secure the right to marry contained in Article 12 may be found in the judgment of Potter P in *Wilkinson v. Kitzinger.*[74] At the time of this judgment it was unclear as to whether Article 12 could even be engaged by this scenario given its application by the ECtHR only to cases involving a difference of gender either by virtue of birth or gender re-assignment surgery. Nonetheless Potter P adopted a broad approach to this provision and held that such a situation could fall within its ambit because it represented a limitation on the right of an individual to marry the partner of his/her choice.[75] Potter P. felt that the non-discrimination provision contained in Article 14 of the ECHR was also engaged as this difference in treatment was based on sexual orientation and thus:

> The question is whether it can withstand scrutiny and this depends on whether it has a legitimate aim and whether the means chosen to achieve that aim are appropriate and not disproportionate in their adverse impact.[76]

Potter P held that the downgrading of foreign same-sex marriages to civil partnerships in the United Kingdom had a legitimate aim, *ie* protection of the traditional marital family. He held that the means chosen to achieve that aim were reasonable and proportionate because the UK Parliament had taken steps "by

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[73] In Ireland section 5 (1) of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 provides for this. In the U.K. section 215 of the Civil Partnership Act 2004 provides for same.
[74] *Wilkinson v Kitzinger* (n 26).
[75] ibid [110].
[76] ibid [115].

enacting the Civil Partnership Act to accord to same-sex relationships effectively all the rights, responsibilities, benefits and advantages of civil marriage save the name".[77] Potter P held that such actions fell within the Contracting States' margin of appreciation, though why he stated this is not clear. Bamforth rightly observes that such an assessment is one that only the ECtHR, as an international court, "is qualified to make".[78]

With the enactment of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 an Irish court may one day be faced with the same challenge as the legislation reduces foreign same-sex marriages to civil partnership status in Ireland.[79] In light of *Schalk and Kopf* it would not be open to an Irish court to claim that Article 12 is not engaged given that the ECtHR held that it can apply to same-sex couples. Thus an Irish court might be wise to endorse Potter P's broad approach to the provision. Nonetheless an Irish court might simply come to the same conclusion as Potter P did, upholding such a discriminatory measure because it not only supports the marital family which has the added advantage of constitutional protection in Ireland but in any event civil partnership legislation grants same-sex couples rights largely akin to marriage save for the ability to jointly adopt children. Similarly the ECtHR might not deem this downgraded status to be in breach of Article 12 should the matter reach Strasbourg because in *Schalk and Kopf* it not only held that States are not obligated to provide for same-sex marriage as matters currently stand, but it recognised that civil partnership provides same-sex partners with "a possibility to obtain a legal status equal or similar to marriage in many respects".[80] Although the Court observed that there can be some substantial differences between the two institutions in respect of parental rights "this corresponds on the whole to the trend in…Member States"[81] of the Council of Europe. Hence the ECtHR might say the same of the Irish Civil Partnership Act's downgrading of a same-sex marriage to civil partnership status because this is in sync with similar legislation in other Contracting States and may thus fall within Ireland's margin of appreciation.

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[77] ibid [122].
[78] Nicholas Bamforth (n 35) 151.
[79] See Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, section 5 (1).
[80] *Schalk and Kopf v Austria* (n 2) [109].
[81] ibid.

Article 12 post-*Schalk and Kopf*

Same-sex marriage has certainly received a more favourable first hearing in Strasbourg than transsexual marriage did way back in 1986. In the latter situation the Court in *Rees* was unwilling to even entertain the notion that Article 12 could apply to anyone other than persons of the opposite biological sex, whereas in *Schalk and Kopf* the Court moved to the other end of the spectrum and affirmed that the provision could indeed apply to persons of the same biological sex. However this reasoning was not followed through for various reasons including the drafters' circumscription of Article 12 to traditional marriages by stipulating that men and women enjoy the right to marry. Nonetheless it is opined that although the Court cannot overcome the historical argument favouring traditional marriage by simply making the gender-specific Article 12 of the ECHR the true doppelganger of Article 9 of the EU Charter of Fundamental Rights through de-gendering its language, it could dispose of such rationale in a novel way by having recourse to international developments much as it did in *Goodwin* when it identified the global trend towards legally recognising gender re-assignment. Therefore in a future case the Court could expand the scope of Article 12 of the Convention by embracing the innovative approach of the South African Constitutional Court when it reinterpreted Article 16 of the Universal Declaration on Human Rights of 1948 so as to encompass same-sex marriage. Both of the above provisions are virtually identical, most likely because "the text of Article 12 was based on that of Article 16".[82] Thus, perhaps the ECtHR could one day assert that the drafters' reference to "men and women" in Article 12 was descriptive of an assumed reality in 1950 (*ie* persons of opposite biological sex) rather than prescriptive of a normative structure for all time just as the South African Constitutional Court did in relation to Article 16.[83] This reasoning would allow the court to fully embrace the liberal interpretation of Article 12 briefly touched upon in *Schalk and Kopf* and state that men and women do not have to only marry each other under the ECHR. After all it is the 21st century and one cannot help but concur with Sachs J that "as ideas of

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[82] *Johnston v Ireland* (1986) 9 EHRR 203 [52].

[83] *Minister of Home Affairs v Fourie and Another* (2006) 3 BCLR 355 (C.C.) [100]. Article 16 (1) of the Universal Declaration on Human Rights provides that "men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution."

justice and equity evolve, so do concepts of rights take on new texture and meaning".[84] In any event the Court is unlikely to adopt such an interpretation until there is a greater consensus on the issue of same-sex marriage throughout the Council of Europe's Contracting States because, as we saw in the earlier transsexual cases "Article 12 tends to follow rather than to lead the way."[85]

However even if the ECtHR eventually decides that Article 12 embraces same-sex marriage the Contracting States may be slow to follow suit in their domestic laws. In Ireland we have yet to embrace transsexual marriage even though the ECtHR obliged States to do so twelve years ago in *Goodwin*. In 2010 the Irish Government set up a Gender Recognition Advisory Group to propose similar legislation to the UK's 2004 Act. This body first met on May 6th, 2010 and, although it published a report in June 2011 which recommended statutory recognition of a transsexual person's re-assigned gender for various legal purposes including marriage, to date no legislation has been enacted.[86] Thus it is undeniable that, in the area of providing recognition for transsexual marriage "Ireland as of now is very much isolated within the Member States of the Council of Europe."[87] In light of this it is opined that, although an interpretation of Article 12 that fully encompasses same-sex marriage may indeed be possible and may not be too far off the horizon, when the time comes, Irish law could indeed lag just as far behind as it has done to date on the transsexual dilemma. However, should the same-sex marriage referendum that is proposed for 2015 have a successful outcome, the relevance of the ECHR in this area will largely be rendered moot because national legal developments will have outpaced Strasbourg yet again.

Conclusion

Little more than a decade ago the right to marry under Article 12 of the ECHR was preoccupied with biological sexual dimorphism and a couple's procreative capacity. The consistency of the case law since *Rees* implied that a liberal interpretation of this provision that would encompass the marriage of a post-

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[84] ibid [102].
[85] Nicholas Bamforth (n 35) 147.
[86] The General Scheme of the Gender Recognition Bill 2013 was published in July 2013 but to date no significant progress has been made with the legislation.
[87] *Foy v An t-Ard Chláraitheoir*[2007] IEHC 470 [100] (McKechnie J).

operative transsexual and a partner of his/her biological sex seemed distant. In 2014 not only has such interpretation long-since been endorsed but the Strasbourg court has even stated that the language of Article 12 can allow for same-sex marriage, though for the time being it is for the Contracting States to decide whether to provide for such marriage under domestic law. However the margin of appreciation may narrow against these states in the not too distant future because in *Schalk and Kopf* the Court acknowledged the marriage-like qualities of long-term same-sex relationships, and in the thirteen years since same-sex marriage was first introduced in The Netherlands in 2001 it has gained a steady impetus in the Council of Europe with ten of the Contracting States now providing for it. Indeed five such jurisdictions introduced same-sex marriage in the last five years alone.[88]

Nevertheless in the last thirteen years civil partnership legislation has also gathered momentum but because the majority of Contracting States that have enacted it have restricted it solely to same-sex couples we have seen that this might impede a reduction in the margin of appreciation in favour of same-sex marriage. Furthermore, civil partnership legislation might hamper any requirement for States to recognise foreign same-sex marriages as a result of their obligations under Articles 12 and 14 due to the comparability of the marriage and civil partnership regimes and the prevailing practice amongst the States.

Still, it is most likely a case of when, not if, Contracting States will be required by the ECtHR to provide for same-sex marriage by virtue of their Convention obligations. Whether such a future development will have any relevance for Ireland depends on the outcome of our same-sex marriage referendum next year because it is only if that process is unsuccessful that Article 12 of the ECHR will continue to hold significance. However, if the referendum fails and Zappone and Gilligan's fresh legal action comes before the High Court in the years that follow it will be interesting to see how that court treats the ruling in *Schalk and Kopf* because, while Dunne J in the original High Court proceedings somewhat surprisingly saw marriage under Article 12 as being unduly linked to procreation post-*Goodwin*, it is submitted that now the Irish courts "cannot continue to subscribe to a Judeo-Christian notion of marriage and ignore the

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[88] Same-sex marriage became legal in Norway on January 1st 2009, in Sweden on 1st May 2009, in Portugal on June 5th 2010, in Iceland on June 27th 2010, in Denmark in 2012 and in France and the U.K. in 2013.

direction in which Article 12 appears to be heading, and the destination that it may soon reach."[89]

[89] Brian Tobin, 'Gay Marriage – a Bridge Too Far?' (2007) 15 Irish Student Law Review 175, 196.

Conclusion

Despite the judicial deference shown to the Oireachtas in *Zappone* to update the constitutional understanding of marriage through legislation, it appears that the political determination to do so simply did not exist at the time.[1] Although the political will now exists to hold a referendum on marriage equality, the Fine Gael/Labour government should not be lauded for this development; it really only resulted from the recommendations of the constitutional convention, a reform-oriented forum comprised mainly of members of the electorate. In any event, this thesis has cautioned that the successful outcome of a referendum is by no means guaranteed, so what then for marriage equality? The government would be unlikely to commit to a second referendum in the near future and there would be no impetus from Strasbourg to do so given the ECtHR's reticence in the areas of same-sex relationships, parenting and marriage.[2] Irish marriage law would be out of sync with our nearest neighbours given the recent introduction of same-sex marriage in countries such as England and Wales, Scotland and France. However, Zappone and Gilligan are mounting a legal challenge to the statutory prohibition on same-sex marriage contained in section 2(2)(e) of the Civil Registration Act 2004. The introduction of marriage equality via a legal challenge would be unlikely to prevail because although there is a somewhat greater international consensus on the issue the courts are highly deferential to the Oireachtas in areas of social policy. [3] Since the essence of the civil partnership regime that was so recently introduced via the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (2010 Act) is virtually identical to that of the institution of marriage, one surmises that the courts would deem this policy choice appropriate and again emphasise that it is up to the Oireachtas to push the reform agenda any further. In addition, the courts appear to equate access to marriage with an aptitude for child-rearing and despite the increasing amount of positive evidence pertaining to

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[1] See Brian Tobin, 'Law, Politics and the Child-Centric Approach to Marriage in Ireland' (2012) 47 (1) Irish Jurist 210.

[2] See *Schalk and Kopf v Austria* App No 30141/04 (ECHR, 24th June 2010); *Gas and Dubois v France* App No 25951/07 (ECHR, 15th March 2012); *X v Austria* App No 19010/07 (ECHR, 19th February 2013).

[3] See *D v Ireland* [2012] IESC 10.

same-sex parenting and child development the courts might continue to retain a degree of scepticism in this area á la Dunne J in *Zappone*. As this author has stated elsewhere, "[i]n Ireland, the road to legal recognition for same-sex marriage is most definitely a rocky one."[4]

However, because of the functional similarities between same-sex and opposite-sex relationships, the evidence suggesting that same-sex couples are as apt for child-rearing as opposite-sex couples and the fact that same-sex couples are eager to embrace all that marriage stands for, both of the above outcomes would be disappointing for marriage equality advocates. Nonetheless, in spite of its lack of symbolic appeal for same-sex couples, the practical benefits of registered civil partnership should not be underestimated. As discussed, the essence of same-sex civil partnership is virtually identical to that of marriage and if the reforms proposed in the General Scheme of the Children and Family Relationships Bill 2014 are enacted civil partnership will have much to recommend it to those committed same-sex couples with and without children who are seeking legal affirmation of, and protection for, their union.

The redress scheme for qualified cohabitants that was introduced via the 2010 Act achieves a rather equitable balance between the competing concerns in a cohabitation context of allowing people to live according to their own criteria and providing protection for a truly vulnerable cohabitant once a relationship ends. However, the most recent census indicates that there are a minute number of same-sex couples in Ireland and the empirical evidence pertaining to Irish cohabitation trends suggests that most cohabiting relationships are likely to be short-term. These factors, when coupled with the five-year statutory time frame and the financial dependency criterion that must be met before a gay or lesbian cohabitant can qualify to apply for relief indicate that, in practice, the redress scheme is likely to benefit very few same-sex cohabitants. Further, few cohabitants are likely to enter into cohabitation agreements not merely because of the expense involved in complying with the requisite formalities but because "the love-based nature of the

[4] Brian Tobin, 'Same-Sex Marriage in Ireland: The Rocky Road to Recognition' (2012) 15 (4) Irish Journal of Family Law 102, 105.

relationship"[5] means that cohabitants are generally not psychologically prepared to enter into contracts regarding their relationship.

The proposals contained in the General Scheme of the Children and Family Relationships Bill 2014 regarding the assignation of parental status in an assisted reproduction context are laudable for their endorsement of same-sex parents but problematic insofar as they do not accord sufficient weight to the constitutional rights of the donor-conceived child. If this author's interpretation of the General Scheme is correct then allowing a lesbian co-mother to legally be regarded as a parent of the child in circumstances where the child's birth mother has conceived via self-insemination with sperm from a known donor fails to adequately respect the "natural and imprescriptible" constitutional rights of the child which will be placed "front and centre"[6] if Article 42A is ultimately inserted. This author recently proposed a more balanced approach to the Oireachtas based on the findings in this thesis but it remains to be seen whether the proposed legislation will be amended during its passage through the Houses of the Oireachtas or whether the reproductive liberty of adults will be allowed to take precedence over the rights of the child in this context.

Further, while there are valid, child-centric arguments for extending the right to apply for a joint adoption order to same-sex civil partners, the General Scheme's proposal to do so seems constitutionally suspect given the current constitutional understanding of marriage and the family and the court's scepticism regarding same-sex parenting. However, it remains to be seen whether this proposal will even come to fruition.

In conclusion, the assimilation of same-sex relationships through marriage is a path fraught with difficulty and uncertainty. Despite its negative symbolic connotations civil partnership provides a pragmatic solution for those same-sex couples seeking recognition and protection of their relationship in the *interim*. The redress scheme respects the autonomy of cohabiting relationships but also provides a safety net for vulnerable same-sex cohabitants even if evidence suggests that very few are likely to avail of it. The current legislative proposals that would recognise same-sex parents are laudable in many ways but nevertheless

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[5] Wendy M Schrama, 'The Dutch Approach to Informal Lifestyles: Family Function over Family Form?' (2008) 22 (3) International Journal of Law, Policy and the Family 311, 321.

[6] Oran Doyle and Estelle Feldman, 'Constitutional Law' in Raymond Byrne and William Binchy (eds), *Annual Review of Irish Law 2012* (Thomson Round Hall 2013) 130.

constitutionally infirm in certain respects and thus further refinement is necessary before any legislation is enacted in this area. The legal assimilation of same-sex family units in Ireland is undoubtedly an on-going and somewhat delicate process.

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