

# CFLQ

## Articles

### The (d)evolving nature of guardianship rights for unmarried fathers under Irish law?

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Brian Tobin\*

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Guardianship – parental responsibility – unmarried fathers – Ireland – England and Wales – European Convention for the Protection of Human Rights and Fundamental Freedoms 1950

#### Example3Begin

*This article analyses the initial judicial unease with guardianship applications by unmarried fathers following the commencement in 1988 of legislation allowing such fathers to apply to the court to be appointed a guardian of their child, and it examines the courts' more recent, child-focussed attitude towards these applications. The article demonstrates that subsequent statutory innovations in the area of guardianship have given rise to a legislative approach that favours the acquisition of post-birth guardianship rights without the necessity for court intervention only for those unmarried fathers who have an amicable relationship with, or are cohabiting with, the child's mother. The article argues that this reticent legislative approach is largely aligned with the early, conservative judicial attitude to guardianship applications that endorsed differentiating between unmarried fathers depending on the strength of their relationship with, and commitment to, the child's mother. The article concludes that the prevailing legislative approach to guardianship rights for unmarried fathers is insufficiently child-focussed because it fails to have due regard to the Children's Amendment, Article 42A of the Irish Constitution, and the contemporary, child-focussed approach to guardianship applications in the courts, as well as the more flexible legislative approach to acquiring parental responsibility in England and Wales.*

Example3End

## Introduction

In Ireland, an unmarried mother is automatically a guardian of her child once it is born, but the same legal privilege does not apply to a father who is not married to the child's mother (hereafter the 'unmarried father'). The unmarried father can only obtain guardianship rights after the birth of the child, and even then he can only do so if he is cohabiting with or on good

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terms with the child's mother – otherwise he must apply to the court in order to be appointed a guardian.<sup>1</sup> This article demonstrates that the unmarried father's ability to make such a court application largely came about as a statutory response to international pressure from Strasbourg in the 1980s.<sup>2</sup> The article then analyses the initial judicial unease with guardianship applications by unmarried fathers in the years post-1987,<sup>3</sup> and the courts' more recent child-focussed attitude towards such applications. The article also demonstrates that further statutory innovations in the area of guardianship over the past 20 years or so have promoted the acquisition of guardianship rights for unmarried fathers without the necessity for court intervention, but success depends on the strength of their relationship with, or commitment to, *the child's mother*. The article argues that the prevailing legislative approach to guardianship rights for unmarried fathers is largely aligned with the early, conservative judicial approach and is therefore insufficiently child-focussed in nature. It fails to have due regard for the Children's Amendment, Article 42A of the Irish Constitution, and the child-centric approach to guardianship applications now adopted by the courts. The article concludes by examining legislative innovations concerning the acquisition of parental responsibility in England and Wales, and discusses whether similar legislation could be transposed to the Irish context.

## Guardianship under Irish law – married and unmarried parents

The concept of guardianship relates to the rights and duties of a person as regards making decisions about a child's overall welfare.<sup>4</sup> A person who is a guardian of a child has the right and duty to decide how the child generally will be raised. A guardian makes decisions about the most significant aspects of a child's upbringing, such as where the child will live and be educated, health requirements, religion and so forth. In Ireland, natural parents have different legal rights in relation to their children depending on whether they are married or unmarried. 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 mother and the father. This statutory equality between married parents in the context of guardianship is provided for under the Guardianship of Infants Act 1964,<sup>5</sup> and it complies with the state's obligation to 'protect the marital family in its constitution and authority'<sup>6</sup> under Article 41 of the Irish Constitution. However, as Harding observes, 'such constitutional rights of family integrity do not apply to the non-marital family'<sup>7</sup> and, therefore, where a child is born to unmarried

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<sup>1</sup> See s 6A of the Guardianship of Infants Act 1964, as inserted by s 12 of the Status of Children Act 1987.

<sup>2</sup> *Johnston v Ireland* (Application No 9697/82) (1986) 9 EHRR 203.

<sup>3</sup> The Status of Children Act 1987 was signed into law by the President of Ireland on 14 December 1987, and all sections of the Act were commenced by 14 June 1988.

<sup>4</sup> Guardianship is the equivalent of 'parental responsibility' in England and Wales. Shannon observes that 'effectively there is no practical difference between this concept and the concept of guardianship': see G Shannon, *Child Law* (Thomson Round Hall, 2nd edn, 2010), 726.

<sup>5</sup> Guardianship of Infants Act 1964, s 6(1). This section provides that 'the father and mother of an infant shall be guardians of the infant jointly'.

<sup>6</sup> M Harding, "'Best Interests" as a Limited Constitutional Imperative' in *International Survey of Family Law 2019* (Intersentia, 2019), 139, 140.

<sup>7</sup> *Ibid.* The marital family unit is the only family recognised under the Irish Constitution. Article 41.3.1 provides 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' (emphasis added).

parents, only the natural mother enjoys an automatic right of guardianship.<sup>8</sup> The unmarried father is expressly excluded from enjoying the same by virtue of the 1964 Act.<sup>9</sup> The unmarried mother's right to automatic guardianship of her child is recognised under the 1964 Act and as a personal right under Article 40.3 of the Constitution.<sup>10</sup> The unmarried father does not enjoy an automatic statutory or constitutional right of guardianship in respect of his biological child at the time of the child's birth, and this remains the case despite legislative amendments to the law in this area over the past 30 years or so. Indeed, the first of these legislative amendments, which improved the unmarried father's position by enabling him to at least apply to the court to be appointed a guardian of his child, resulted from ongoing legal proceedings in Strasbourg.

## *Johnston v Ireland* – impetus for change

In *Johnston v Ireland*, the applicants were an unmarried cohabiting couple and their daughter challenging Ireland's constitutional ban on divorce as being in breach of their rights under various provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (hereafter ECHR).<sup>11</sup> The family's complaint was first considered, and in part upheld, by the European Commission on Human Rights (hereafter the Commission) before being referred to the European Court of Human Rights (hereafter ECtHR). Mr Johnston had married a Miss M in 1952. The couple had three children but their marriage had irretrievably broken down by 1965. Mr Johnston began cohabiting with his partner, Janice, in 1971, and their daughter Nessa Williams-Johnston was born in 1978. However, because of Ireland's long-standing constitutional prohibition on divorce, Mr Johnston was unable to divorce his estranged wife, marry his partner, Janice, and form a marital family unit with their daughter, Nessa. Irish law viewed Mr Johnston as an unmarried father and at the time the only way such men could obtain guardianship rights in relation to their child was by marrying the child's mother. However, the prevailing law prevented unmarried fathers in Mr Johnston's situation from becoming a guardian of their child both because he could not divorce his wife and marry the child's mother and, *even if he could*, section 1(2) of the Legitimacy Act 1931 precluded a child from being 'legitimated' by the subsequent marriage of his or her parents in circumstances where they could not have been lawfully married to each other either at the time of the child's birth or during the preceding ten months. Further, as a child of unmarried parents, Nessa had no right to succeed to her father's estate.

The applicants lodged their complaint with the Commission in 1982. They complained of the

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<sup>8</sup> The definition of guardianship adopted by Finlay Geoghegan J in *RC v IS* [2003] 4 IR 431 is that it 'describes the group of rights and responsibilities automatically vested in the parents of a child born within marriage and in the mother of a child born outside marriage in relation to the upbringing of a child'. This useful definition was adopted by Finlay Geoghegan J from A Shatter, *Family Law* (Bloomsbury, 4th edn, 1997), 531.

<sup>9</sup> The definition of 'father' in s 2 of the 1964 Act does not include the natural father of a child born outside of wedlock. Therefore, such a father cannot fall within the ambit of s 6(1).

<sup>10</sup> *State (Nicolaou) v An Bord Uchtála* [1966] IR 567. Under the Constitution, it is but a personal right under Art 40.3 rather than a familial right under Art 41 because in *State (Nicolaou) v An Bord Uchtála* [1966] IR 567, at 644, Walsh J in the Supreme Court stressed that 'the mother of an illegitimate child does not come within the ambit of Arts 41 and 42 of the Constitution'.

<sup>11</sup> *Johnston v Ireland* (Application No 9697/82) (1986) 9 EHRR 203. As enacted in 1937, Art 41.3.2 of the Constitution of Ireland provided that 'no law shall be enacted providing for the grant of a dissolution of marriage'. The Johnston family complained that this was in breach of, inter alia, Art 12 (right to marry) and Art 8 (right to respect for private and family life) of the ECHR.

absence of legal provision in Ireland for divorce and for the recognition of the family life of persons who, after the breakdown of the marriage of one of them, are living in a relationship outside marriage.<sup>12</sup> The Commission declared the applicants' complaint admissible in 1983 and, in 1985, the Commission found that there was no breach of Articles 8 and 12 in that the right to divorce and subsequently re-marry was not guaranteed by Article 12 as an aspect of the right to marry, nor was it guaranteed by Article 8 as an aspect of the right to respect for family life.<sup>13</sup> The Commission also found that there was no breach of the right to respect for family life under Article 8 because, although 'family life' existed between the applicants, there was no obligation on the part of Ireland to establish for unmarried couples a legal status analogous to that of married couples.<sup>14</sup> However, the Commission found that there was a breach of Article 8 because the legal status of the third applicant (Nessa) under Irish law failed to respect the family life of all three applicants.<sup>15</sup> The Commission appears to have been swayed by the arguments put forward by the applicants regarding Nessa's situation under Irish law, including, inter alia, the impossibility for Mr Johnston to be appointed as her joint guardian as well as the third applicant's lack of succession rights vis-à-vis her father.

The European Court of Human Rights subsequently affirmed the Commission's decision. However, the court did not conclude that Ireland should permit the introduction of divorce in order to improve the legal situation of the third applicant and thus respect the 'family life' of all three applicants under Article 8.<sup>16</sup> Indeed, the ECtHR held that 'it is not the Court's function to indicate which measures Ireland should take' to remedy the breach of Article 8.<sup>17</sup> The court was most cognisant of the fact that Ireland 'proposed to improve the legal situation of illegitimate children, whilst maintaining the constitutional prohibition on divorce'.<sup>18</sup> The court observed that the Status of Children Bill 1986 had recently been laid before the Irish Parliament and, if enacted, it would enable the father of a child born outside marriage to apply to the court for an order making him a guardian of the child jointly with the mother.<sup>19</sup> In addition, the proviso qualifying the possibility of legitimation by the parents' subsequent marriage would be removed by the repeal of section 1(2) of the Legitimacy Act 1931 and, for succession purposes, no distinction would be made between children based on whether or not their parents were married to each other.<sup>20</sup>

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<sup>12</sup> Ibid, (38).

<sup>13</sup> Ibid, (39).

<sup>14</sup> Ibid, (68).

<sup>15</sup> Ibid, (70). Bainham has said of *Johnston v Ireland* that 'the Court does at least appear to have accepted that parents and children have *mutual* rights to respect for their family life' and 'the decision captures well the mutuality or reciprocity inherent in parental relations with children'. See A Bainham, 'When is a Parent not a Parent? Reflections on the Unmarried Father and his Child in English Law' (1989) 3(2) *International Journal of Law, Policy and the Family* 208, 215.

<sup>16</sup> *Johnston v Ireland* (Application No 9697/82) (1986) 9 EHRR 203, (75).

<sup>17</sup> Ibid, (77).

<sup>18</sup> Ibid, (75).

<sup>19</sup> Indeed, s 12 of the Status of Children Act 1987 inserted s 6A into the Guardianship of Infants Act 1964 and ultimately made this a reality for unmarried fathers.

<sup>20</sup> *Johnston v Ireland* (Application No 9697/82) (1986) 9 EHRR 203, (74) and (36). Section 7 of the Status of Children Act 1987 repealed s 1(2) of the Legitimacy Act 1931, and Part V and s 3 of the 1987 Act ensure that all children are treated equally under the Succession Act 1965 such that reference to a testator's 'children' or 'issue' in a will is now construed as referring to children born within and outside of marriage. Further, where a parent dies intestate, the child born outside marriage has the same intestacy rights as a child born to married parents. A child born outside marriage also has the same right as a child born within marriage to make an

## European pressure and the Irish response

The application made to the Commission by Mr Johnston, his cohabiting partner and their daughter spurred the then Irish Government into action, and ultimately had a profound impact on the development of family law in Ireland. The following timeline of events illustrates how developments at the European level in relation to the Johnston family's complaint were largely met with remarkably swift and apt responses at the national level from 1982–1986. The Johnston family's application was lodged with the Commission in February 1982. In September 1982, the Irish Law Reform Commission published a *Report on Illegitimacy*.<sup>21</sup> This development was quite unremarkable; the Law Reform Commission had committed to examining the law on illegitimacy in its *First Programme for Examination of Certain Branches of the Law with a View to their Reform* – this document was published in 1976.<sup>22</sup> However, it is striking that the Commission declared the application by the Johnston family admissible in October 1983 and, *later that same month*, the then Irish Government announced that it had decided the law pertaining to illegitimacy should be reformed, and that reform should be concentrated on eliminating discrimination against persons born outside marriage, and on recognising the rights and obligations of their fathers.<sup>23</sup> Subsequently, a Joint Oireachtas Committee was established to examine, inter alia, the problems that follow the breakdown of marriage.<sup>24</sup>

In March 1985, the Commission gave its opinion on the application by the Johnston family which, as seen, found Ireland in breach of Article 8.<sup>25</sup> *Later that same month*, the Joint Oireachtas Committee finally published its *Report on Marriage Breakdown* in which it concluded that the parties to stable relationships formed after marriage breakdown and the children of such relationships lacked adequate legal status and protection under Irish law.<sup>26</sup> The Joint Committee expressed the view that a referendum on divorce should be held.<sup>27</sup> In May 1985, the Johnston family's case was referred by the Commission to the European Court of Human Rights.<sup>28</sup> The then Irish Government was clearly concerned by the Commission's findings just two months previously and was obviously anticipating this development in light of such findings because, *also in May 1985*, the Minister for Justice laid before the Oireachtas a Memorandum entitled 'The Status of Children', indicating the scope and nature of the main changes to the law relating to persons born outside marriage and the rights and

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application under s 177 of the 1965 Act alleging that a parent who died testate failed in his/her moral duty to make proper provision for that child in his/her will. See A Shatter, *Family Law* (Bloomsbury, 4th edn, 1997), 1006–1007.

<sup>21</sup> Law Reform Commission, *Report on Illegitimacy*, LRC 4-1982 (LRC, 1982). In December 1982, the Law Commission of England and Wales also published a *Report on Illegitimacy*, Law Com No 118 (HMSO, 1982).

<sup>22</sup> See Law Reform Commission, *First Programme for Examination of Certain Branches of the Law with a View to their Reform* (LRC, 1976).

<sup>23</sup> *Johnston v Ireland* (Application No 9697/82) (1986) 9 EHRR 203, (39) and (35). However, the then Irish Government claimed to be committing to this course of action in light of the Law Reform Commission's *Report on Illegitimacy*, published over one year previously, in September 1982.

<sup>24</sup> A Joint Oireachtas Committee consists of members of the Dáil (Chamber of Deputies) and Seanad (Senate). Oireachtas is the word for 'Parliament' in the Irish language.

<sup>25</sup> *Johnston v Ireland* (Application No 9697/82) (1986) 9 EHRR 203, (39).

<sup>26</sup> *Ibid*, (34).

<sup>27</sup> See the *Report of the Joint Committee on Marriage Breakdown* (TSO, 1985), 120. In Ireland, it is necessary to hold a referendum in order to amend the Constitution. See the Constitution of Ireland, Article 46.

<sup>28</sup> *Johnston v Ireland* (Application No 9697/82) (1986) 9 EHRR 203, (1).

obligations of their fathers. A draft Bill to deal with these matters was annexed to the above-mentioned Memorandum.<sup>29</sup>

In May 1986, the then Irish Government was clearly cognisant of the fact that the oral hearings relating to the Johnston case were to be heard in Strasbourg on 23 and 24 June 1986, so the Status of Children Bill was introduced into the Houses of the Oireachtas.<sup>30</sup>

International pressure from the Commission and the Court between 1982–1986 undoubtedly contributed to the introduction of this Bill. As discussed, Ireland's efforts were subsequently recognised in Strasbourg because, although the ECtHR agreed with the Commission that there had been a breach of Article 8, it acknowledged Ireland's wide margin of appreciation in this area and held that the state was on course to remedy the situation via 'the Status of Children Bill recently laid before Parliament'.<sup>31</sup>

## Guardianship applications by unmarried fathers post-*Johnston*

The Status of Children Act 1987 was signed into law by the President of Ireland on 14 December 1987 and, inter alia, it amended the Guardianship of Infants Act 1964 and granted an unmarried father the right to apply to the court to be appointed a guardian of his child.<sup>32</sup> However, it was for the court to decide whether an unmarried father making such an application should be appointed as a guardian. In the early case law following the introduction of this statutory entitlement, the Irish superior courts treated the unmarried father with a high degree of circumspection.<sup>33</sup> In *JK v VW*, Finlay CJ in the Supreme Court made it clear that the unmarried father does not, as a result of the 1987 Act, enjoy an automatic legal right to be appointed a guardian; he merely has the right to *apply* to be so appointed.<sup>34</sup> Finlay CJ also stated that 'although there may be rights of interest or concern arising from the blood link between the father and the child, no constitutional right to guardianship in the

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<sup>29</sup> Ibid, (36).

<sup>30</sup> It is noteworthy that the then Irish Government tried to remove the constitutional ban on divorce because, in the same month that the Status of Children Bill was introduced, the Fine Gael–Labour coalition also introduced the Tenth Amendment of the Constitution Bill 1986, which was passed by the Oireachtas later that month. The Bill proposed to delete the constitutional ban on divorce (Article 41.3.2) and replace it with a new Article 41.3.2 which would permit divorce in certain limited circumstances. The referendum was held on 26 June 1986 and the proposal to amend the Constitution was defeated by a majority of voters – 63.1% (Yes) to 36.3% (No). One can only speculate as to whether the Johnston family's success before the European Commission on Human Rights in 1985 and the imminent oral hearings pertaining to their case before the European Court of Human Rights in June 1986 was in part responsible for the introduction into the Oireachtas of the *Tenth Amendment to the Constitution Bill 1986* in May 1986. It is noteworthy that the referendum was held on 26 June 1986, a mere two days after the conclusion of the oral hearings relating to the Johnston family's case in Strasbourg. An analysis of the various factors that contributed to the holding of the first divorce referendum in Ireland is beyond the scope of this article, but for a detailed discussion see P Prendiville, 'Divorce in Ireland: An Analysis of the Referendum to amend the Constitution, June 1986' [1988] *Women's Studies Int Forum* 355. In 1995, a second divorce referendum was held in Ireland and the proposal to amend the Constitution so as to permit divorce in certain circumstances was passed by a tiny majority – 50.28% (Yes) to 49.72% (No). In 2019, a referendum to reduce the waiting time before which the parties can apply for a divorce from 'living apart' for four out of the previous five years to 'living apart' for two out of the previous three years was passed by a significant majority of voters – 82.07% (Yes) to 17.93% (No).

<sup>31</sup> *Johnston v Ireland* (Application No 9697/82) (1986) 9 EHRR 203, (74).

<sup>32</sup> Section 12 of the Status of Children Act 1987 inserted s 6A into the Guardianship of Infants Act 1964.

<sup>33</sup> See *JK v VW* [1990] 2 IR 437; see also *WO'R v EH* [1996] 2 IR 248.

<sup>34</sup> *JK v VW* [1990] 2 IR 437, 446 (Finlay CJ).

father of the child exists'.<sup>35</sup> Finlay CJ made it abundantly clear that the outcome of an unmarried father's guardianship application could vary significantly depending on the extent of his relationship with the child's mother:

'The range of variation would, I am satisfied, extend from the situation of a child conceived as a result of casual intercourse, where the rights might well be so minimal as practically to be non-existent, to the situation of a child born as a result of a stable and established relationship and nurtured at the commencement of his life by his father and his mother in a situation bearing nearly all of the characteristics of a constitutionally protected family, when the rights would be very extensive indeed.'<sup>36</sup>

Thus, the early judicial approach to guardianship applications was to equate the probability of success regarding such applications as being dependent on the strength of the relationship between the child's unmarried parents. In his judgment, Finlay CJ really seems to regard only those unmarried fathers in a relationship akin to a marriage with the child's mother as deserving of success in the courts. It would appear that an unmarried father's application for guardianship could easily have been dismissed by the court where the child was not conceived as part of a parental project, but merely as the result of casual intercourse.

This type of scrutiny of unmarried fathers is also oft-employed at the international level. The ECtHR has placed emphasis on the strength of the relationship between the parents when deciding whether unmarried fathers are deserving of having their right to respect for family life with their child vindicated under Article 8.<sup>37</sup> In *Keegan v Ireland*, the ECtHR adopted a similar approach to that in *JK v VW* by examining the nature of the relationship between the unmarried father and the child's mother.<sup>38</sup> The parents had been in a two-year relationship which included one year of cohabitation and an intention to have a child and to marry, but their relationship ended before the child's birth. The court found that the parents' relationship had the 'hallmark of family life' – thus it followed that from the moment of her birth 'family life' under Article 8 existed between the unmarried father and his daughter.<sup>39</sup> Therefore, placing the child for adoption without the father's knowledge interfered with his right to respect for family life under Article 8. Margaria observes that the court in *Keegan* 'approached fatherhood as the by-product of the applicant's (failed) parental project with the

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<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

<sup>37</sup> Indeed, in *Johnston v Ireland* (Application No 9697/82) (1986) 9 EHRR 203, at (72) and (75) the court focussed on the mother–father relationship, emphasising that the case concerned 'parents who have lived, with their daughter, in a family relationship over many years' and that there was a 'close and intimate relationship' between the family members: consequently, the court extended its findings in *Marckx v Belgium* (Application No 6833/74) (1979) 2 EHRR 330 beyond the sphere of mother–child relations and held that its observations 'on the integration of a child within his family (in *Marckx*) are equally applicable to a case such as the present': see [72]. In *Marckx*, the court held that 'as envisaged by Art 8 ..., respect for family life implies in particular, in the court's view, the existence in domestic law of legal safeguards that render possible as from the moment of birth the child's integration in his family': see *Marckx v Belgium* (Application No 6833/74) (1979) 2 EHRR 330, at (31). Therefore, in *Johnston*, the court concluded that 'the normal development of the natural family ties between the [unmarried parents] and their daughter requires, in the court's opinion, that she should be placed, legally and socially, in a position akin to that of a legitimate child': see (74). Since Irish law did not allow for this, the court found that the legal situation of the child under Irish law gave rise to a violation of Article 8 as regards all three applicants (the child and her unmarried parents).

<sup>38</sup> *Keegan v Ireland* (Application No 16969/90) (1994) 18 EHRR 342. It is interesting to note that *JK v VW* [1990] 2 IR 437 is the earlier domestic ruling in the *Keegan* case.

<sup>39</sup> *Keegan v Ireland*, *ibid*, (45).

child's mother'.<sup>40</sup> However, more recent case law demonstrates that in determining whether there has been a breach of Article 8 the court is not as preoccupied with the nature of the parents' relationship, but rather with the father's willingness and ability to care for his child.<sup>41</sup>

Similarly, in recent times the Irish Supreme Court has radically altered its position and moved away from the necessity for a stable cohabiting relationship in guardianship cases. Instead, the court predominantly analyses guardianship cases through a child-focussed lens. Indeed, in *McD v L*,<sup>42</sup> the court was even open to the possibility of appointing as a guardian a man who never even had sexual intercourse with the child's mother and who had only formally agreed to act as a sperm donor in order to facilitate conception of the child, because this might one day be in the child's best interests. As will be discussed, the strength of a man's relationship with the child's mother no longer poses a significant obstacle to a potentially successful guardianship application – it is now his commitment to *the child* that would appear crucial to success before an Irish court.<sup>43</sup>

## Legislative reforms from 1997–2015: one step forward, two steps back?

Although the reform introduced by the 1987 Act enabled an unmarried father to apply to the court to be appointed a guardian of his child, this meant that all unmarried fathers had to endure the time and expense of a court application, even those unmarried fathers who were in the courts' preferred, committed, 'marriage-like' relationship with the child's mother. Therefore, section 4 of the Children Act 1997 inserted section 2(4) into the Guardianship of Infants Act 1964 and by doing so it introduced a rather straightforward procedure to allow an unmarried father to become a guardian of his child.<sup>44</sup> This reform obviated the need for an application to the court by enabling the mother and father by agreement to make a statutory declaration conferring the status of guardian on the father.<sup>45</sup> However, the obvious drawback associated with this reform is that the child's mother has to consent to the making of the statutory declaration appointing the father as guardian. Therefore, the unmarried father must have an amicable relationship with the child's mother. Another drawback is that many fathers are not aware that they can make a statutory declaration and do not use this mechanism.<sup>46</sup> A

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<sup>40</sup> A Margaria, *The Construction of Fatherhood: The Jurisprudence of the European Court of Human Rights* (CUP, 2019), 86.

<sup>41</sup> See *Görgülü v Germany* (Application No 74969/01) [2004] 1 FLR 894; *KAB v Spain* (Application No 59819/08) 10 April 2012. See also Margaria, *ibid*, 86–89. Margaria observes that in *Görgülü*, 'biology was presented in conjunction with the applicant's caring intentions and potential'.

<sup>42</sup> [2009] IESC 81.

<sup>43</sup> *MR v SB* [2013] IEHC 647; *McD v L* [2009] IESC 81.

<sup>44</sup> This was identical to a reform introduced in England and Wales eight years previously; see the Children Act 1989, s 4(1), which provides for parental responsibility agreements.

<sup>45</sup> Commenting on this earlier, identical reform in England and Wales, Douglas states that 'the process was also perhaps envisaged as a way of "nudging" unmarried fathers to take greater interest in their children by providing them with an easier way of acquiring parental rights than having to take court proceedings': see G Douglas, 'Commitment-Based Parenting: Parental Responsibility in English Law' in G Douglas, M Murch and V Stephens (eds), *International and National Perspectives on Child and Family Law – Essays in Honour of Nigel Lowe* (Intersentia, 2018), 39, 41.

<sup>46</sup> See the comments on this made by the Minister for Justice and Equality in *Dáil Deb*, 12 March 2015, vol 871: <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2015031200028?open document>, last accessed 1 July 2020.

key point, however, is that while the parties must be on good terms for this method of acquiring guardianship to be effective, there is no requirement for them to be cohabiting.

Arguably, the most recent reform in this area, while welcomed by some,<sup>47</sup> is regressive because it makes the acquisition of ‘automatic’ guardianship rights for the unmarried father dependent on a 12-month cohabiting relationship with the child’s mother. Section 43 of the Children and Family Relationships Act 2015 amended section 2 of the 1964 Act by inserting subsection (4A) to provide for ‘automatic’ guardianship in the case of an unmarried father who has cohabited with the child’s mother for a period of 12 months, including cohabitation of *at least* 3 months after the birth of the child.<sup>48</sup> *Thus, the unmarried father’s right to guardianship under the 2015 Act largely depends on his having enjoyed a somewhat lengthy and durable cohabiting relationship with the child’s mother prior to the birth of the child.* This commitment to cohabiting with the mother must continue for at least 3 months subsequent to the birth of the child, although during this period he is also demonstrating his commitment towards developing ties with the child.

Shannon asserts that this specific reform introduced via the 2015 Act means that ‘[f]or the first time in Irish law, a non-marital father will *automatically* be the guardian of his child’.<sup>49</sup> However, it is not really ‘automatic’ guardianship when the privilege is only acquired *at least* 3 months after the birth of the child, rather than immediately upon birth, and this could have significant consequences where the parents are in disagreement about important decisions that need to be made in relation to the child’s welfare before the father acquires guardianship. The original guardianship proposal contained in the General Scheme<sup>50</sup> of the Children and Family Relationships Bill 2014 was far more favourable to those unmarried fathers who are cohabiting with the mother of the child. Part 7 of the original General Scheme provided that an unmarried father who was cohabiting with the child’s mother for at least 12 consecutive months *before* the child’s birth, which cohabitation ended (if applicable) not less than 10 months before the child’s birth, would, akin to the mother, acquire automatic guardianship rights immediately upon the birth of the child.<sup>51</sup> While this proposal would only have benefitted unmarried fathers cohabiting with the mother, at least that particular cohort would have acquired automatic guardianship rights upon the birth of the child if it had been enacted. Since 1997, any statutory reform of the law on guardianship that was designed to make it somewhat easier for an unmarried father to become a guardian of his child by obviating the need for a court application has stopped short of equating his position with that of the unmarried mother by granting him automatic guardianship rights upon the birth of the child. Further, his right to become a guardian under the reforms introduced by the 1997 and 2015

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<sup>47</sup> See G Shannon, *Children and Family Relationships Law in Ireland: Practice and Procedure* (Clarus Press, 2016), 58; See also L Crowley, ‘Daddy of Them All: Bill Finally Offers to Fill Gap in Family Law’ *Irish Examiner*, 5 March 2015, 15.

<sup>48</sup> Section 43 was commenced on 18 January 2016 by virtue of the Children and Family Relationships Act 2015 (Commencement of Certain Provisions) Order 2016. This section also provides that an unmarried father who satisfies this 12-month cohabitation period is also automatically recognised as the ‘father’ of his child. Thus, parentage and guardianship can both be ‘automatically’ recognised in law 3 months after the child’s birth.

<sup>49</sup> G Shannon, *Children and Family Relationships Law in Ireland: Practice and Procedure* (Clarus Press, 2016), 58. Emphasis added.

<sup>50</sup> In Ireland, a ‘General Scheme’ is essentially a draft Bill.

<sup>51</sup> See Part 7 of the General Scheme of the Children and Family Relationships Bill 2014: [www.justice.ie/en/JELR/General%20Scheme%20of%20the%20Children%20and%20Family%20Relationships%20Bill.pdf/Files/General%20Scheme%20of%20the%20Children%20and%20Family%20Relationships%20Bill.pdf](http://www.justice.ie/en/JELR/General%20Scheme%20of%20the%20Children%20and%20Family%20Relationships%20Bill.pdf/Files/General%20Scheme%20of%20the%20Children%20and%20Family%20Relationships%20Bill.pdf), last accessed 25 April 2020.

Acts is very much dependent on the quality of his relationship with the child's mother – indeed, the latter reform, by requiring a significant cohabiting relationship between the parties, is actually a rather regressive step when compared to the previous reform. In England and Wales, Bainham has argued in the context of parental rights that it is not 'self-evident that failure to cohabit with the mother is an indication of a lack of responsibility on the man's part'. He adds that:

'it has been too readily assumed that valid distinctions may be drawn between cohabiting fathers (who are impliedly defined as responsible) and non-cohabiting fathers (who are tacitly regarded as irresponsible).'<sup>52</sup>

Nonetheless, speaking in the Dáil on the guardianship reform introduced by the 2015 Act, the then Minister for Justice and Equality, Frances Fitzgerald, made it clear that 'the approach in the Bill is to require a *committed relationship*, with a couple living together for three months after the birth of the child'.<sup>53</sup> The Minister stressed that the guardianship reforms contained in the Bill 'reflect existing constitutional protection for marital fathers and are the consequence of legal advice'.<sup>54</sup> The Minister appeared to be suggesting that, in relation to guardianship, the legal position of married and unmarried fathers could not be equalised by legislation because of a perceived need to respect the paradigm married family in Article 41. Indeed, to allow an unmarried father who has cohabited with the mother to acquire guardianship rights automatically on the birth of the child as provided for under Part 7 of the General Scheme of the Children and Family Relationships Bill 2014 might have left the ultimate 2015 Act open to constitutional scrutiny. Walsh and Ryan point out that, as regards legislating for unmarried couples, 'too ready an equation between marriage and alternative family forms'<sup>55</sup> might constitute an 'attack' by the state on the institution of marriage, which it 'pledges itself to guard with special care' in Article 41.

The upshot of the 1997 and 2015 reforms is very much to align the legislature's approach to guardianship with the circumspect judicial approach to approving guardianship applications decades earlier in 'the situation of a child born as a result of a stable and established relationship *and nurtured at the commencement of his life by his father and his mother*', as stated by Finlay CJ in *JK v VW* in 1990.<sup>56</sup> The legislative reforms introduced in 1997 and 2015 only benefit unmarried fathers insofar as they are on good terms with/are cohabiting with the child's mother, and therefore these reforms, while beneficial to some, still leave a large number of deserving unmarried fathers having recourse to the courts in order to acquire guardianship rights in relation to their child. It is important to note, however, that even if he is not a guardian, an unmarried father can seek custody and access rights. Section 53 of the Children and Family Relationships Act 2015 amended section 11(4) of the Guardianship of Infants Act 1964 to provide that a non-guardian parent can apply to the court 'regarding the custody of the child and the right of access thereto', and section 11(2) of the 1964 Act, as

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<sup>52</sup> A Bainham, 'When is a Parent not a Parent? Reflections on the Unmarried Father and his Child in English Law' (1989) 3(2) *International Journal of Law, Policy and the Family* 208, 231.

<sup>53</sup> *Dáil Deb*, 12 March 2015, vol 871:

<http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2015031200028?open document>, last accessed 26 April 2020. Emphasis added.

<sup>54</sup> *Dáil Deb*, 12 March 2015, vol 871:

<http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2015031200028?open document>, last accessed 26 April 2020.

<sup>55</sup> J Walsh and F Ryan, *The Rights of de facto Couples* (IHRC, 2006), 81–82.

<sup>56</sup> *JK v VW* [1990] 2 IR 437, 447 (emphasis added).

amended by section 53 of the 2015 Act, states that the court may ‘give such directions as it thinks proper regarding the custody of the child and the right of access to the child of each of his or her parents’. Thus, depending on the circumstances of the particular case, *an unmarried father may not need to acquire guardianship*, he may be content with a court-ordered right of access and, even if he is not a guardian of the child, this does not prevent him from seeking custody of the child.<sup>57</sup> While custody and access arrangements are clearly viable options for many non-guardian unmarried fathers, the symbolic status of parent and guardian holds significant relevance for many others who may wish to have their paternity acknowledged by court order and play a key decision-making role in respect of their child. In Ireland, court applications for a declaration of parentage and appointment as a guardian are usually made *in tandem*, which is indicative of the importance to many unmarried fathers of the status of parent and guardian.

The prevailing statutory approach to guardianship rights for the unmarried father seems rather out of sync with other progressive legislative developments concerning guardianship. The Children and Family Relationships Act 2015 extended to non-biological parents the right to apply to the courts to be appointed a guardian.<sup>58</sup> A spouse, civil partner or cohabitant<sup>59</sup> of the child’s natural parent can now apply to be appointed a guardian once they have shared with the natural parent responsibility for the child’s day-to-day care for a period of more than two years.<sup>60</sup> Further, Parts 2 and 3 of the 2015 Act purport to regulate, inter alia, parentage and guardianship rights in relation to a child born via donor assisted human reproduction (DAHR).<sup>61</sup> In this context, the unmarried father is treated even less favourably than the non-biological, intended parent of a child born through DAHR. Where a woman conceives a child through DAHR and her husband or same-sex civil partner is not a biological parent of the child but has consented to parentage under the provisions of the 2015 Act, then he/she will be a second, automatic legal parent and guardian of the child once it is born. In particular, the guardianship reforms for the non-biological intended parent of a child conceived via a DAHR procedure that were introduced under the 2015 Act serve to accentuate the unfairness of the natural father’s position. These reforms endorse automatic guardianship rights for non-biological intended parents because of their relationship status with the child’s mother (marriage or civil partnership). In contrast, the 2015 Act *prima facie* discriminates against the

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<sup>57</sup> Joint custody is now the option preferred among judges: see A Egan, ‘Are Fathers Discriminated against in Irish Family Law? – An Empirical Study’ (2011) 14(2) *Irish Journal of Family Law* 38. However, Crowley observes that, in practice, despite an order for joint custody, the children tend to reside with one parent whilst exercising access rights with the other parent: see L Crowley, *Family Law* (Thomson Round Hall, 2nd edn, 2013), 178. Nonetheless, Coulter argues cogently that in those cases where a father seeks a more even time-sharing arrangement by having the children stay with him half the time, it is ‘most often’ granted by the judge: C Coulter, *Family Law in Practice: A Study of Cases in the Circuit Court* (Clarus Press, 2009), 103. As regards access, Egan (above) found that ‘for the most part, those parents who applied for access were granted some form of contact with their children’.

<sup>58</sup> Children and Family Relationships Act 2015, s 49 (inserting s 6C into the Guardianship of Infants Act 1964).

<sup>59</sup> A cohabitant must be cohabiting for over 3 years with the child’s biological parent in order to be eligible.

<sup>60</sup> Although, arguably, even though they are not the child’s biological parent, these persons are deserving of this statutory entitlement because they are in a relationship with the child’s mother that is either a constitutionally protected marriage or a registered civil partnership/stable, long-term cohabiting relationship of over 3 years that closely mimics the paradigm constitutional marital family unit. It should be noted that such persons may not be granted *all* the rights and responsibilities of a guardian: see s 6C(9) of the Guardianship of Infants Act 1964, as inserted by s 49 of the Children and Family Relationships Act 2015.

<sup>61</sup> Parts 2 and 3 of the 2015 Act entered into force on 4 May 2020. In Ireland, it should be noted that a ‘DAHR procedure’ can only take place at a ‘DAHR facility’, ie a clinical setting. Non-clinical DAHR remains unregulated. See Children and Family Relationships Act 2015, s 4.

natural unmarried father by denying him automatic guardianship on the birth of his child no matter how great his caring intentions may be, because, by not being part of a state-sanctioned registered relationship, he lacks a formalised relationship status with the mother.<sup>62</sup>

## Contemporary guardianship applications in the courts

It is disappointing that the Children and Family Relationships Act 2015 did not go further and reduce the subsisting, *prima facie* gender discrimination by largely equating the position of the unmarried father with that of the unmarried mother as regards guardianship, especially when one considers the recent liberalisation of the judiciary's attitude towards guardianship applications that have come before the courts pursuant to section 6A of the 1964 Act.<sup>63</sup> Nowadays, not only are the vast majority of unmarried fathers successful in their guardianship applications before the courts,<sup>64</sup> but recent case law demonstrates that the courts are even open to appointing as guardians men who merely envisaged themselves as sperm donors at the time of the child's conception<sup>65</sup> or, *in certain exceptional cases*, men who have acted in *loco parentis* for a significant period of time but who in fact have no biological connection to the child, where this outcome would be in the best interests of the child.

The case of *McD v L* involved a known sperm donor<sup>66</sup> who entered into an agreement with a female same-sex couple to provide sperm that would enable the couple to have a child.<sup>67</sup> It was agreed between the parties in the sperm donation contract that the female same-sex couple would be the child's 'parents' and the known sperm donor would act in a more limited role akin to that of a 'favourite uncle'.<sup>68</sup> Subsequently, the known donor supplied sperm, and this was used by one member of the female same-sex couple to conceive a child via a non-clinical method of assisted human reproduction known as 'home insemination'. Following the birth of the child the parties had a falling out and the known sperm donor, *as the natural father*, sought guardianship of and access to the child by virtue of the provisions of the Guardianship of Infants Act 1964.<sup>69</sup> There had been limited contact between the sperm donor

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<sup>62</sup> Under the 2015 Act the unmarried father's position as regards automatic guardianship is identical to that of a cohabiting, non-biological intended parent in a DAHR scenario. A cohabitant of the mother of the child in a DAHR scenario who has consented to parentage will be a guardian of the child where he/she and the mother have cohabited for 12 consecutive months, including at least 3 months after the birth of the child. See Children and Family Relationships Act 2015, s 49 (inserting s6B into the Guardianship of Infants Act 1964).

<sup>63</sup> See Guardianship of Infants Act 1964, s 6A (inserted by Status of Children Act 1987, s 12).

<sup>64</sup> In 2014, 2,121 guardianship applications by unmarried fathers were granted, with a mere 46 being refused. 526 applications were withdrawn/struck out. See *Courts Service Annual Report 2014*, at 46: [www.courts.ie/Courts.ie/library3.nsf/\(WebFiles\)/76D5C7C737385EFF80257E91002F3D7A/\\$FILE/Courts%20Service%20Annual%20Report%202014.pdf](http://www.courts.ie/Courts.ie/library3.nsf/(WebFiles)/76D5C7C737385EFF80257E91002F3D7A/$FILE/Courts%20Service%20Annual%20Report%202014.pdf), last accessed 25 April 2020.

<sup>65</sup> See *McD v L* [2009] IESC 81.

<sup>66</sup> A known sperm donor is a man known to the child's natural mother and its non-biological intended parent. He may be a friend, neighbour, colleague, acquaintance, etc. A non-anonymous sperm donor is a man who is not known to the child's natural mother and its non-biological intended parent. However, identifying information about this man will be recorded by a DAHR facility when he donates gametes and such information can usually be accessed by the child upon reaching adulthood.

<sup>67</sup> *McD v L* [2008] IEHC 96 (High Court); [2009] IESC 81 (Supreme Court).

<sup>68</sup> The superior courts held that the sperm donation contract was unenforceable. Thus, it would appear that in Ireland a known donor cannot be contractually excluded from pursuing parental rights in relation to the child.

<sup>69</sup> See Guardianship of Infants Act 1964, s 6A (inserted by Status of Children Act 1987, s 12), and s 11. As the natural father, he was entitled to assert his rights under the 1964 Act. Ireland has no legislation regulating the method of assisted human reproduction known as 'home insemination'. The man who donates his sperm so that

and the child following the birth and so a limited bond had been established. Previous judgments of the superior courts had indicated that such a limited bond between a natural father and his child was likely to be anathema to a ruling in his favour in a guardianship application before the courts.<sup>70</sup> Indeed, in the High Court, Hedigan J denied the applicant both guardianship and access rights but, on appeal, the Supreme Court granted him access to the child and even embraced the possibility of his one day being appointed a guardian of the child *in changed circumstances*.

The Supreme Court regarded the situation of a known sperm donor as akin to that of a natural father because throughout the judgment the appellant, Mr McD, was referred to as ‘the father’, and Denham J made 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.’<sup>71</sup>

Consequently, as Fennelly J acknowledged, ‘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 sperm donor’.<sup>72</sup> Fennelly J regarded the appellant as a ‘parent’ of the child. Denham J also noted that since the same-sex couple was not a family under the Constitution, their relationship could not ‘be weighed in the balance against the father’.<sup>73</sup> 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 rights.

By acknowledging that the statutory rights of a man who intended to act as a known sperm donor prior to the child’s conception, and who had limited contact with the child post-birth, are akin to those of other natural, unmarried fathers, the Supreme Court’s decision emphasises that the genetic link *alone* is sufficient for a natural father to seek both guardianship of, and access to, his child. In this respect, the decision heralded a significant development for unmarried fathers in the context of legal parental rights. However, the decision is also child-focussed. While it is notable that the appeal was dismissed insofar as it related to guardianship, elsewhere in the judgment the members of the Supreme Court emphasised that the known sperm donor ‘father’ could be granted guardianship at a later date, *if the evolution of his relationship with the child warrants it*.<sup>74</sup> Denham J held that ‘there is benefit to a child, in general, to have the society of its father’.<sup>75</sup> Denham J concluded 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’.<sup>76</sup> Fennelly J also held that ‘it is, of course, possible that a time will come when [a guardianship] application

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a child can be conceived in this manner is recognised as being akin to the natural father under the 1964 Act.

<sup>70</sup> See *JK v VW* [1990] 2 IR 437; *WO’R v EH* [1996] 2 IR 248.

<sup>71</sup> [2010] 1 ILRM 461, 493 (emphasis added). Denham J seems to be acknowledging here that the father was initially intended by all parties to be no more than a sperm donor. However, in the absence of any laws regulating the parentage of children conceived through non-clinical donor-assisted human reproduction, he was entitled to alter his position after the child’s birth and assert his rights as a natural father under the 1964 Act.

<sup>72</sup> *Ibid*, 523 (emphasis added). Fennelly J also appears to be acknowledging the original intent of all parties.

<sup>73</sup> *Ibid*. The couple were in a same-sex civil partnership. Non-marital families have no constitutional protection.

<sup>74</sup> 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 A Mulligan, ‘Constitutional Parenthood in the Age of Assisted Reproduction’ (2014) 49(1) *Irish Jurist* 90, 101.

<sup>75</sup> *McD v L* [2009] IESC 81, [81] (Supreme Court).

<sup>76</sup> *Ibid* (emphasis added).

might be renewed in the High Court in different circumstances'.<sup>77</sup> 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 a guardianship application might one day succeed.<sup>78</sup>

The judicial approach to unmarried fathers and guardianship in *McD v L* stands in stark contrast to the legislative approach under the Children and Family Relationships Act 2015. Whereas the 2015 Act remains concerned with the strength of a cohabiting relationship between a child's unmarried parents for quite some time before and after birth in order for guardianship rights to be awarded to the father, the Supreme Court in *McD v L* was open to the possibility of appointing as a guardian a man who had in fact never cohabited with the child's mother and had merely donated his sperm for use by the child's mother and her same-sex partner in a 'home insemination' assisted human reproduction scenario, because this might one day be in *the child's best interests*.

An equally flexible approach to guardianship was taken in the more recent case of *MR v SB*,<sup>79</sup> where Abbott J appointed as a guardian of two children a man who had no biological connection to them, but had acted 'very strongly in a position of *loco parentis*',<sup>80</sup> in circumstances where the children's mother had abandoned them and their non-guardian fathers did not have an active role in their upbringing. The children's mother was seeking their return and the applicant, who had previously been in a relationship with the children's mother and who had been left raising them, wished to be appointed as their guardian.<sup>81</sup> Abbott J observed that section 16 of the Guardianship of Infants Act 1964 provided that where a parent has abandoned or deserted a child or allowed a child to be brought up by another person at that person's expense, the court can decline to return the child to that parent. Abbott J was of the view that, in such cases, the party who has successfully resisted the return of the child is, in effect, the parent of such a child and it would be a dereliction of the duty of the courts not to treat him as such to the detriment of the interests of the child.<sup>82</sup> A corollary of this finding was that the court could appoint the man in this case as a guardian of the two children in his custody, even though he had no biological link to them. However, Abbott J acknowledged the 'exceptional circumstances' of the instant case.<sup>83</sup> Therefore, unlike the recent legislative approach, the judicial approach to guardianship is no longer tied

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<sup>77</sup> *Ibid.*

<sup>78</sup> In *A v B and C* [2012] EWCA Civ 285, [2012] 1 WLR 3456, [48], a case in England and Wales 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 close and fulfilling for both sides, it may be no more than nominal, or it may be something in between' (emphasis added).

<sup>79</sup> *MR v SB* [2013] IEHC 647. For an analysis of this case see 'Family Law' in R Byrne and W Binchy (eds), *Annual Review of Irish Law 2013* (Thomson Round Hall, 2014), 324–325.

<sup>80</sup> *MR v SB*, *ibid.*, [2] (Abbott J). In *Hollywood v Cork Harbour Commissioners* [1992] 1 IR 457, 465, 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'.

<sup>81</sup> This case was decided prior to the enactment of s 49 of the Children and Family Relationships Act 2015 (inserting s 6C into the Guardianship of Infants Act 1964), which enables a person other than a child's parent to apply to the court to be appointed as a guardian where they have provided for the child's day-to-day care for a continuous period of more than 12 months and the child has no parent or guardian who is willing or able to exercise the rights and responsibilities of guardianship.

<sup>82</sup> *MR v SB* [2013] IEHC 647, [19] (Abbott J).

<sup>83</sup> *Ibid.*, [24] (Abbott J).

to a man's relationship status with the child's mother or, *in certain exceptional cases*, even to his biological connection to the child. The current judicial approach to awarding guardianship is firmly child-centric in nature.

## The Law Reform Commission's recommendations on guardianship laws

In 1982, in its *Report on Illegitimacy*, the Law Reform Commission (hereafter LRC) first recommended that both parents of a child should be joint guardians under Irish law, whether a child is born within or outside of marriage.<sup>84</sup> A similar recommendation was made by the LRC in its more recent *Report on the Legal Aspects of Family Relationships* in 2010.<sup>85</sup> The LRC felt that 'all parents should be treated equally in respect of their relationship with their children regardless of gender or marital status'<sup>86</sup> – it recommended that legislation be enacted by the Oireachtas to provide for automatic joint guardianship of both the mother and the father of a child born outside of marriage. The LRC noted that unmarried fathers were the only group excluded from automatic recognition 'of the relationship between a parent and a child, which brings with it significant responsibilities and the correlative rights'.<sup>87</sup> The LRC was influenced in its approach by provisions contained in the Welfare Reform Act 2009 in England and Wales and recommended that an unmarried father's automatic guardianship rights could be triggered by the compulsory joint registration of the birth.<sup>88</sup> The LRC considered that this approach was generally in the best interests of the child. Despite the LRC's recommendations, the Children and Family Relationships Act 2015 did not embrace this egalitarian approach to automatic joint guardianship rights for unmarried parents on the birth of the child, as discussed above.

In its 2010 Report, the LRC also recommended that the adult-centric terms 'guardianship', 'custody' and 'access' used in Irish legislation be replaced with the more child-centric terms 'parental responsibility', 'day-to-day care' and 'contact' in any future domestic legislation. This did not occur due to the 'Children's Amendment', Article 42A, which was subsequently inserted into the Constitution of Ireland. Article 42A provides express constitutional recognition and protection for children's rights. Article 42A.4.1 requires that 'provision shall be made by law that in the resolution of all proceedings concerning the ... guardianship or custody of, or access to, any child, the best interests of the child shall be the paramount consideration'. It is most likely due to the way in which Article 42A was drafted and the fact that it inserts the terms guardianship, custody and access into the Constitution that subsequent legislation retained these terms. Article 15.4.1 of the Constitution of Ireland provides that '[t]he Oireachtas shall not enact any law which is in any respect repugnant to this Constitution or any provision thereof'. While legislation utilising the terms 'parental responsibility', 'day-to-day care' and 'contact' would most likely not be 'repugnant' to the

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<sup>84</sup> Law Reform Commission, *Report on Illegitimacy* LRC 4 (1982), 177. This recommendation was most progressive at the time when compared to that contained in the Law Commission's *Report on Illegitimacy* (Law Com No 118) published a mere three months later. The Law Commission did not go as far as to recommend automatic guardianship rights for unmarried fathers – it recommended that such fathers should be able to obtain full parental authority *by court order* where this was in the child's best interests (Law Com No 118), 86–87.

<sup>85</sup> Law Reform Commission, *Report on the Legal Aspects of Family Relationships* (LRC 101–2010), 18.

<sup>86</sup> *Ibid*, 16–17.

<sup>87</sup> *Ibid*.

<sup>88</sup> *Ibid*, 19–20. However, Sch 6 to the Welfare Reform Act 2009, which influenced the LRC's recommendations, has yet to be commenced in England and Wales.

Children’s Amendment, Article 42A of the Constitution, it would be inconsistent with the terminology used in that provision of the Constitution, and perhaps that is why the Oireachtas retained the terms ‘guardianship’, ‘custody’ and ‘access’ in the Children and Family Relationships Act 2015. Admittedly, this leaves Irish family law out of sync with the more progressive terminology that is used in international instruments, and in the domestic laws of other jurisdictions.

## An analogy with the law on parental responsibility in England and Wales

As the situation stands, the unmarried father remains the subject of *prima facie* discrimination because of his relationship status (or lack thereof) when it comes to obtaining automatic guardianship rights under Irish law. However, Irish law is not unique in this regard. In England and Wales, the unmarried father is not automatically vested with parental responsibility on the birth of the child.<sup>89</sup>

In contrast to the legal situation in Ireland, the unmarried father can acquire parental responsibility shortly after the child’s birth, if the mother consents to registering him as the father on the child’s birth certificate.<sup>90</sup> This relatively straightforward mechanism whereby an unmarried father who is in agreement with the mother can acquire parental responsibility in relation to his child via birth registration was introduced by section 111 of the Adoption and Children Act 2002, which entered into force in December 2003.<sup>91</sup> Regarding this reform, Douglas observes that:

‘Now, therefore, unmarried fathers have parental responsibility simply by virtue of their name appearing on the birth certificate. This is based on an assumption that all fathers must be treated alike regardless of their commitment to the mother, so long as they are prepared to have their biological link to the child made public. Their possibly minimal degree of personal commitment to the child suffices for and justifies their being given the “stamp of approval” of full parental responsibility.’<sup>92</sup>

However, [s]ince under English law, unmarried fathers have no unilateral right formally to

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<sup>89</sup> Children Act 1989, s 2.

<sup>90</sup> See Adoption and Children Act 2002, s 111 (amending s 4(1) of the Children Act 1989). Similarly, in New Zealand, s 18 of the Care of Children Act 2004 provides that an unmarried father who was not living with the child’s mother at any time during the period beginning with the conception of the child and ending with the birth of the child can become a guardian of the child if his particulars are registered on the child’s birth certificate. He and the child’s mother must *both* notify a Registrar of the child’s birth in accordance with s 9 of the Births, Deaths, Marriages, and Relationships Registration Act 1995. In Ireland, placing the unmarried father’s name on the child’s birth certificate *does not* grant him guardianship rights; it simply means that the *presumption of paternity* applies to him: see Status of Children Act 1987, s 46.

<sup>91</sup> See Adoption and Children Act 2002 (Commencement No 4) Order 2003 (SI 2003/3079).

<sup>92</sup> See G Douglas, ‘Commitment-Based Parenting: Parental Responsibility in English Law’ in G Douglas, M Murch and V Stephens (eds), *International and National Perspectives on Child and Family Law – Essays in Honour of Nigel Lowe* (Intersentia, 2018), 39, at 51. It is respectfully submitted that Douglas seems somewhat critical of the procedure introduced by the 2002 Act. She appears to favour something more substantial establishing an unmarried father’s *commitment* to the child before the ‘stamp of approval’ of parental responsibility is given via registration on the birth certificate. However, it is perhaps arguable that because the mother must consent to registering the father’s name on the birth certificate, this constitutes something of a safeguard, because a responsible mother would only agree to do so if satisfied that the father had shown a satisfactory degree of commitment to raising the child post-birth.

register themselves as the father, registration must be done either by the mother or with her written authorization'.<sup>93</sup> The effect of Schedule 6 to the Welfare Reform Act 2009 would be 'to reduce a mother's control over birth registration and thus over acquisition of parental responsibility'<sup>94</sup> since it would impose a duty upon a mother to disclose information about the father to the Registrar when registering the birth of the child, subject to certain exceptions.<sup>95</sup> However, this reform, now over a decade old, is yet to be implemented.

The unmarried father can also acquire parental responsibility via a 'parental responsibility agreement' with the child's mother.<sup>96</sup> This is virtually identical to what was later provided for in Ireland under section 2(4) of the Guardianship of Infants Act 1964, as amended by section 4 of the Children Act 1997. Nonetheless, these methods of acquiring parental responsibility only benefit unmarried fathers who are on good terms with the mother – otherwise, akin to Ireland, the unmarried father must apply to the court for a parental responsibility order in relation to his child.<sup>97</sup> The statutory reforms in England and Wales allowing unmarried fathers to apply to the court for such an order were introduced at about the same time as those introduced in Ireland,<sup>98</sup> but the early judicial approach to granting parental responsibility orders appears to have differed greatly between the two jurisdictions. Douglas points out that in England and Wales:

'It has been held that there are three material factors for the court to consider as part of the overall welfare test when deciding whether to make an order: the degree of commitment which the father has shown towards the child; the degree of attachment that exists between the father and child; and the father's reasons for seeking the order.'<sup>99</sup>

Thus, the judicial approach in England and Wales was more concerned with the father's commitment *to the child*, rather than the mother.<sup>100</sup> This stands in sharp contrast to the

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<sup>93</sup> See NV Lowe, 'The Allocation of Parental Rights and Responsibilities – The Position in England and Wales' (2005) 39 *Family Law Quarterly* 267, 270, and the Births and Deaths Registration Act 1953.

<sup>94</sup> See S Gilmore and L Glennon, *Hayes and Williams' Family Law* (OUP, 6th edn, 2018), 399.

<sup>95</sup> Schedule 6 to the Welfare Reform Act 2009 would insert ss 2A and 2B into the Births and Deaths Registration Act 1953.

<sup>96</sup> Children Act 1989, s 4(1).

<sup>97</sup> *Ibid.* Parental responsibility in England and Wales is the equivalent of guardianship in Ireland. Shannon observes that 'effectively there is no practical difference between this concept and the concept of guardianship': see G Shannon, *Child Law* (Thomson Round Hall, 2nd edn, 2010), 726. It is worth noting that in England and Wales, an unmarried father's parental responsibility can be removed by an order of the court: see Children Act 1989, s 4(2A). Similarly, in Ireland, an unmarried father's guardianship rights can be removed by an order of the court: see s 8 of the Guardianship of Infants Act 1964, as amended by s 51 of the Children and Family Relationships Act 2015.

<sup>98</sup> Under s 4 of the Family Law Reform Act 1987, an unmarried father in England and Wales could acquire 'all the parental rights and duties with respect to the child' via an order of the court. Section 4 of the Children Act 1989 enabled him to acquire 'parental responsibility for the child' by means of a court order.

<sup>99</sup> G Douglas, 'Commitment-Based Parenting: Parental Responsibility in English Law' in G Douglas, M Murch and V Stephens (eds), *International and National Perspectives on Child and Family Law – Essays in Honour of Nigel Lowe* (Intersentia, 2018), 39, at 41. The author cites the decision of the Court of Appeal in *Re H (Minors) (Local Authority: Parental Rights) (No 3)* [1991] Fam 151, 158. See also *M v M (Parental Responsibility)* [1999] 2 FLR 737.

<sup>100</sup> However, Gilmore points out that 'it is unclear whether the child's welfare should be dominant in decision making on parental responsibility' in England and Wales because although the welfare focus arises primarily from judicial assertion that the paramountcy of child welfare in s 1(1) Children Act 1989 applies to a Parental

judicial approach in Ireland during the same era, where a successful guardianship application was quite often largely determined by the father's level of commitment to the child's mother.<sup>101</sup>

Nonetheless, the means by which an unmarried father can acquire parental responsibility under legislation in England and Wales *without going to court* all depend on the quality of his relationship with the child's mother, albeit there is no statutory cohabitation requirement. The Irish approach to legislative reform in this area is arguably more restrictive, with the most recent reform being rather regressive.<sup>102</sup>

## The potential of Article 42A to promote guardianship law reform

The 'Children's Amendment', Article 42A, was inserted into the Constitution of Ireland following a successful referendum in 2012.<sup>103</sup> Article 42A.1 provides express constitutional recognition and protection for children's rights:

'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.'<sup>104</sup>

The guardianship provisions in the 2015 Act, while deferential to the constitutional primacy of the married family unit under Article 41, appear to have insufficient regard for the potential of the Children's Amendment which, from a child-centric perspective, would surely serve to temper the protection afforded to 'marital fathers', and would instead favour equating the position of all fathers *à la* guardianship? However, when it comes to a conflict between protecting the integrity of the marital family and vindicating the rights of the child, it appears that the latter constitutional obligation might indeed be subordinated to the former. Indeed, when the Thirty First Amendment of the Constitution (Children) Bill 2012 was

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Responsibility Order (PRO) application, it is debatable whether that provision applies to s 4 of the Children Act 1989. Further, Gilmore argues that 'the judiciary's insistence that fathers must demonstrate positively, by reference to criteria such as commitment and attachment, that they are worthy of the status of parental responsibility, may not accord with the policy behind the introduction of the PRO', which was to accord parental responsibility to fathers who are not unmeritorious: see S Gilmore, 'Parental Responsibility and the Unmarried Father – A New Dimension to the Debate' [2003] CFLQ 21.

<sup>101</sup> See *JK v VW* [1990] 2 IR 437; see also *WO'R v EH* [1996] 2 IR 248.

<sup>102</sup> The Irish approach is more restrictive because interparental cohabitation is never required in England and Wales in order to acquire parental responsibility. However, the Irish approach is less restrictive in the sense that fathers who cohabit for the requisite time period gain automatic guardianship rights which do not require a formal agreement with the child's mother or a court application.

<sup>103</sup> Notwithstanding the success of the Children's Referendum in November 2012, where 58% of the electorate voted in favour of the *Thirty First Amendment to the Constitution*, Article 42A was only inserted into the Constitution in 2015, following an unsuccessful legal challenge to the outcome of the referendum. See *Jordan v Minister for Children and Youth Affairs* [2014] IEHC 327. A discussion of this case and the legal challenge to the result of the referendum is beyond the scope of this article.

<sup>104</sup> Article 42A.4.1 requires that 'provision shall be made by law that in the resolution of all proceedings concerning the ... guardianship or custody of, or access to, any child, the best interests of the child shall be the paramount consideration'. Thus, Article 42A requires that in guardianship proceedings before a court, the best interests of the child shall be the paramount consideration, but only where this is provided by law. Therefore, as Harding points out: 'Article 42A.4.1 does not create a constitutional best interests principle. It merely requires that statutory provision is made to ensure that the best interests of children is the paramount consideration' in the resolution of the types of proceedings mentioned above: see M Harding, "'Best Interests" as a Limited Constitutional Imperative' in *International Survey of Family Law 2019* (Intersentia, 2019), 139, 149.

introduced by the then Minister for Children and Youth Affairs, Frances Fitzgerald, she emphasised that the government's intention in proposing Article 42A was to ensure that:

*'the rights and protections enjoyed by children are to be enjoyed by all children, irrespective of the parents' marital status, while continuing to respect and preserve the rights of the family as set out in the existing Article 41.'*<sup>105</sup>

Thus, it would appear that the need to 'respect and preserve' the constitutional family can indeed be invoked to justify a difference in treatment between marital and non-marital children (and the unmarried father) under legislation. Article 42A.1 even envisages that the state, 'by its laws' need only protect and vindicate children's rights 'as far as practicable'.<sup>106</sup> Although Shannon has suggested that all children might enjoy a 'natural constitutional right to family life pursuant to Article 42A.1',<sup>107</sup> the upshot of the guardianship provisions in the 2015 Act is that, once again, the state is placing the need to protect the constitutional integrity of the marital family, established as far back as 1937, above the need to vindicate 'as far as practicable by its laws' this cardinal constitutional right of the non-marital child.<sup>108</sup>

It is submitted that a more measured way for the state to balance the constitutional position of marital fathers under Article 41 and the constitutional rights of the non-marital child under Article 42A.1 in its legislation would be to preserve the automatic guardianship rights that arise for married fathers upon the birth of the child, while facilitating the acquisition of such rights for unmarried fathers as quickly and as easily as possible after the child's birth, irrespective of any cohabitation with the child's mother. This could be achieved by the introduction via legislation of automatic guardianship rights for all unmarried fathers in those situations where the mother consents to registering him as the father on the child's birth certificate, akin to the law in other common law jurisdictions like England and Wales, and New Zealand.<sup>109</sup> Arguably, this reform would not equate unmarried cohabitation too closely with marriage and, by enabling all unmarried fathers to obtain guardianship rights soon after the child's birth irrespective of a cohabiting relationship with the child's mother (but subject to the mother's consent)<sup>110</sup> it would affirm that the state is truly committed to promoting the

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<sup>105</sup> *Dáil Deb*, 25 September 2012, vol 775: [www.oireachtas.ie/en/debates/debate/dail/2012-09-25/26/](http://www.oireachtas.ie/en/debates/debate/dail/2012-09-25/26/), last accessed 30 June 2020. Minister Fitzgerald also stated that the Bill did 'not diminish the recognition given to the family under the Constitution'.

<sup>106</sup> O'Shea believes that recognising the rights of the family in Article 41 'as antecedent and superior to all positive law' means that they will continue to reign supreme when read in conjunction with a requirement to vindicate children's rights 'as far as practicable' under Article 42A.1: see N O'Shea, 'Can Ireland's Constitution Remain Premised on the "Inalienable" Protection of the Marital Family Unit Without Continuing to Fail its International Obligations on the Rights of the Child?' (2012) 15 *Irish Journal of Family Law* 87, 92–93.

<sup>107</sup> G Shannon, *Child Law* (Thomson Round Hall, 2nd edn, 2010), 36.

<sup>108</sup> Prior to the insertion of Article 42A, the child's personal rights were implicitly recognised under Article 40.3. However, in cases of conflict, the Supreme Court had a strong tendency to favour the constitutional rights of married parents under Article 41 over the rights of the child. See *North Western Health Board v W* [2001] 3 IR 622; *N v Health Service Executive* [2006] IEHC 278. Harding observes that this remains the case, because in the Irish courts 'children's rights are not given any greater weight in rights balancing exercises than before the amendment': see M Harding, "'Best Interests" as a Limited Constitutional Imperative' in *International Survey of Family Law 2019* (Intersentia, 2019) 139, 149.

<sup>109</sup> See Adoption and Children Act 2002, s 111 (England and Wales). See also Care of Children Act 2004, s 18 (New Zealand).

<sup>110</sup> This reform would enable men who cohabit with the mother and men who never cohabited with the mother but demonstrated caring intentions towards the child, to obtain automatic guardianship rights where the mother consents to registering his name on the birth certificate. The need for the mother's consent to trigger guardianship rights should also help to alleviate concerns surrounding the automatic acquisition and abuse of

‘natural constitutional right to family life’ of *all* children as soon as possible after birth.<sup>111</sup>

In Ireland, it is often the case that whenever the Oireachtas has a moral discomfort about legislating in a controversial area it hides behind the smokescreens of ‘legal advice’ and the need to respect the ‘constitutional position’. In 2008, when civil partnership legislation was proposed for same-sex couples, the then Minister for Justice, Dermot Ahern, claimed that the Government was legislating for civil partnership instead of same-sex marriage because the legal advice was that ‘anything that would provide, or try to replicate “marriage” in this legislation would not stand constitutional scrutiny’.<sup>112</sup> In fact, same-sex marriage legislation would likely have been constitutionally compliant.<sup>113</sup> Similarly, in light of Article 42A, legislation extending automatic guardianship rights to unmarried fathers in a measured way would also most likely be in harmony with Article 41 of the Constitution, as discussed. In 2015, the Oireachtas was clearly as uncomfortable with extending guardianship rights to unmarried fathers as it was with extending marriage rights to same-sex couples in 2008.<sup>114</sup> It seems that Irish policy-makers will rush to justify their conservative stance on an issue by claiming that they are acting on legal advice coming from the Attorney General’s office, and trying to respect the constitutional position. Nonetheless, in 2015, Minister Fitzgerald did commit to a review of the legislation in two years.<sup>115</sup> However, in September 2017, her successor as Minister for Justice and Equality, Charles Flanagan, stated in the Dáil that he had ‘no plans at present for further amendment of the Guardianship of Infants Act 1964 to provide for automatic guardianship for unmarried fathers’.<sup>116</sup>

## Conclusion

Despite calls for reform dating back to 1982, the unmarried father remains the subject of *prima facie* discrimination on the grounds of relationship status as regards the acquisition of guardianship rights via statute in Ireland. This reticent approach by the legislature is disappointing when one considers that initial judicial unease when deciding unmarried fathers’ guardianship applications has more recently given way to a very flexible, inclusive and child-focussed approach by the judiciary. The prevailing judicial attitude to guardianship applications looks beyond the unmarried father’s relationship with the child’s mother and, in certain exceptional cases, even a man’s biological connection to a child in his care. Ireland is not alone in failing to provide automatic guardianship rights for unmarried fathers, although

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guardianship rights by those fathers who would use such rights to interfere in the mother’s life. However, it is equally acknowledged that such fathers might harass the mother so that she might record their name on the child’s birth certificate in the first place.

<sup>111</sup> It would also demonstrate the state’s commitment to promoting the rights of the child under Article 7 of the United Nations Convention on the Rights of the Child 1989. Article 7 states that: ‘The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents’.

<sup>112</sup> M Hennessy and C O’Brien, ‘Bill to Grant Legal Protection to Same-Sex Couples’ *Irish Times*, 25 June 2008, 3.

<sup>113</sup> See generally B Tobin, ‘Marriage Equality in Ireland: The Politico-Legal Context’ (2016) 30(2) *International Journal of Law, Policy and the Family* 115.

<sup>114</sup> See n 48 above.

<sup>115</sup> *Dáil Deb*, 12 March 2015, vol 871: <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2015031200031?open document>, last accessed 26 April 2020.

<sup>116</sup> *Dáil Deb*, 20 September 2017, vol 959: [www.justice.ie/en/JELR/Pages/PQ-20-09-2017-324](http://www.justice.ie/en/JELR/Pages/PQ-20-09-2017-324), last accessed 26 April 2020.

England and Wales provides a straightforward mechanism for the swift acquisition of such rights post-birth via the mere placing of the father's name on the birth certificate.<sup>117</sup> As discussed, such a means of acquiring guardianship rights shortly after the child's birth would most likely be constitutionally compliant if introduced via future legislation in Ireland, as it would respect the primacy of the constitutional marital family unit while demonstrating that the state views unmarried fathers, and their children, as comparable rights-holders. However, given that significant statutory reform in this area took place as recently as 2015, and in light of statements made by the Minister for Justice and Equality in the Dáil in 2017, it is highly unlikely that the Oireachtas will be willing to revisit the question of whether to legislate for a similarly equitable and efficient means of enabling cohabiting and non-cohabiting unmarried fathers to acquire automatic guardianship rights in the near future.

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<sup>117</sup> See the Children Act 1989, s 4(1), as amended. See also the Care of Children Act 2004, s 18 (New Zealand).