**Love Makes a Family? The Status of the Children of Civil Partners in Irish Law**

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The Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 heralded as "one of the most important pieces of civil rights legislation to be enacted since independence"[2] passed into law in July this year.[3] The first Irish civil partnerships will take place this April. While legal recognition of same sex relationships is a tremendous step forward for Ireland, a great many countries from Argentina and Canada to South Africa and Spain have already extended full civil marriage to same sex couples. Indeed, seven EU member states have already done so. Whilst the passing of civil partnership legislation in Ireland was a cause for celebration there are significant *lacunae* in the Act. Civil partnerships are not equal, they don't travel,[4] and the children of civil partners are not legally protected.

Irish civil partnerships have been estimated to be over three hundred statutory rights short of civil marriage.[5] As an entirely new creation, the entire corpus of common law developed with reference marriage is, subject to any future judicial interpretation to the contrary, for the most part inapplicable to civil partners. Civil partners are not recognised by our courts as having *de facto* family ties[6] and unlike married couples, civil partners are not constitutionally a family. Civil partnerships do not protect children.[7] Whereas, marriage is largely the same everywhere, no two civil partnerships are alike and as a result even countries which have a civil status for same sex couples such as France (*pacte civil de solidarité*) or Spain (civil marriage) will almost certainly not recognise Irish civil partnerships. The implication for civil partners is the loss of civil status and often the full gamut of tax, pensions, inheritance, family law, immigration and other protections once they cross a frontier.

The failure of the legislation to protect children is the most critical. The only reasonably comprehensive treatment of children in the Act arises in the context of conflicts of interests in public office and commercial matters, wherein much care has been taken to ensure that civil partners are equally subject to the law.[8] Mention of genetic children is found in the context of maintenance, dissolution and succession. However, from a reading of the Dáil Debates this is more congruent with a concern that the children of a prior marital relationship be given due

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[2] Dermot Ahern, Dáil Debates, source: http://www.justice.ie/en/JELR/Pages/Ahern, last visited on the 6th of December 2010.

3 As of the 13th of January 2011 Ireland now recognises same-sex relationships from 27 other States.: S.I. No. 649 of 2010, Civil Partnership (Recognition of Registered Foreign Relationships) Order 2010.

[4] Irish civil partnerships will be recognised in few if any other EU member states. Even countries which have opened full civil marriage to same sex couples like Spain do not recognise civil partnerships. Countries, like France which have their own form of recognition (*pacte civil de solidarité*) may not be able to recognise foreign partnerships because each country's legislation is unique.

[5] Source: Marriage Equality Audit, forthcoming 2011.

[6] See *McD v. L & Anor* [2007] IESC 81.

[7] Subject to minor exceptions discussed *infra.*

[8] In fact, 46 of the 102 the consequential amendments to other acts set out in the schedule deal exclusively with conflicts of interest, for example for purposes of ethics in public office legislation or the Companies Acts.

regard, than an expression of genuine concern for the children of civil partners.[9] Same sex couples are raising children conceived through assisted human reproduction or surrogacy (neither of which are regulated in Ireland), children from prior relationships or children adopted by one of their same sex parents. In each of the above cases the child's relationship with their social parent is not legally recognised. Such parents owe few if any legal duties to their child. The relationship of the child to their non-genetic parent is legally nothing short of precarious. In fact, the social parent cannot be recognised as the child's guardian while their spouse/partner is still alive.[10] As Ireland has not regulated assisted human reproduction and a donor may apply, to be appointed as joint guardian with the child's biological mother,[11] while their social parent remains a stranger in law.[12]

Same sex couples raising children are particularly disadvantaged as they cannot legally marry, and only married couples can adopt jointly. While, the children of civil partners are particularly vulnerable, they are not alone - thousands of Irish children are raised by families which are not constitutionally protected. The Constitutional guarantee in Article 41.3.1°; "The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack" has in effect legitimated the unequal treatment of different families and consequently unequal treatment of children depending on their family status. Given the diverse family arrangements in Ireland; single parent families, blended families, same sex couples or different sex cohabiting couples it is abundantly clear that a root and branch reform of family law is urgently required. The proposed child's rights referendum will be little more than window dressing so long as our understanding of 'family' fixed in the permafrost of 1937.

Given the rather limited reach of Civil Partnerships one might ask why not simply repeal Article 2(2)(e) of the Civil Registration Act 2004 which provides that it is an impediment to marriage if both parties are of the same sex. The answer may be found in the near originalist interpretation of marriage given in certain judicial *dicta*. In 1966 in *The State (Nicolaou) v. An Bord Uchtála*[13] marriage was described as deriving from the Christian concept of, "…a partnership based on *an irrevocable* personal consent given by both spouses which establishes a unique and very special *life-long relationship*" (emphasis added).[14] It is clear that this definition is no longer accurate. Marriage is no longer for life and divorce and judicial separation have been legal in Ireland since 1996 and 1989 respectively. One wonders at how the Christian concept of marriage is present at Hindu, Muslim or civil ceremony. Of course, there is also plenty of judicial support for the contrary view, namely that the definition of marriage is simply a question for the legislature. In the same case, Justice Walsh opined that:

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9 http://www.glen.ie/civil_partnership/Dail%20Debates%20-%20Final.pdf.

10 Under section 7 of the 1964 Act a guardian may, by will, make any other person a guardian in case of her death. This is known as testamentary guardianship.

11 See *McD v. L & Anor* [2007] IESC 81.

12 Section 6A of the Guardianship of Infants Act 1964, (inserted by the Status of Children Act, 1987.

13 *The State (Nicolaou) v. An Bord Uchtála* [1966] IR 567 at 643.

14 *Murray v. Ireland* [1985] I.R. 532 at p.536, in the High Court, Costello J.

> It was quite clear … that the family referred to in [Article 41] is the family which is founded on the institution of marriage and, in the context of the Article, marriage means valid marriage under the law for the time being in force in the State …

In *Zappone & Gilligan v. Revenue Commissioners*, Justice Dunne held that whist; "It is to be hoped that the legislative changes to ameliorate these difficulties will not be long in coming. Ultimately, it is for the legislature to determine the extent to which such changes should be made." This is not a convincing proposition. The role of the judiciary in a constitutional republic includes protection of minorities and to ensuring that the personal rights of the citizen are protected and vindicated.[15] To date, the legislature has proved unwilling to act until the courts pronounce favourably on the constitutionality of marriage equality and in turn, the courts have declined to rule in favour of marriage equality until the legislature acts.[16] Given the current impasse it seems that progress towards marriage equality is contingent upon legal minds coalescing around the view that our constitution, which does not define marriage, does not prohibit access by same sex couples to civil marriage. The alternative would be a hotly contested referendum in which the right to civil marriage and with it, the right to family life of a long vilified and often unpopular minority would be subjected to a vote, the outcome of which would be quite uncertain. Of course, this is predicated on the possibility that a minority of such small size could persuade the government to hold a referendum in the first place.

It has been suggested that protection of other family forms is *ipso facto* an attack on the Article 41 family, for example, in *The State (Nicolaou) v. An Bord Uchtála*[17] Henchy J. opined that; "For the State to award equal constitutional protection to the family founded on marriage and the 'family' founded on an extra-marital union would in effect be a disregard of the pledge which the State gives in Article 41.3.1° to guard with special care the institution of marriage." This approach is one of the reasons why Irish civil partnerships are the poor relation of their altogether more equal English counterpart. Cases concerning civil partners and children have already come before the courts. In *McD v. L & Anor*[18] a dispute between a gay sperm donor father and a lesbian couple, who had entered a civil partnership in the United Kingdom, and conceived a child with the applicant, regarding access to the child. The Supreme Court ruled in that the concept of *de facto* family recognised European Court of Human Rights does not form part of Irish law. In her judgment in *McD v. L*, Justice Denham in allowing the appeal, and remitting the matter to the High Court, concluded as follows:

> …I am satisfied that the learned trial judge fell into error in his analysis of the case law which has arisen under article 8 of the Convention and in the European Court of Human Rights, in treating the respondents and the child as a family. However, even if this is not so, the Irish law would conflict with such a scenario and would govern the

[15] Honohan, *Republicanism in Theory and Practice*, (Routledge UK) 2006 p. 115.
[16] *Zappone & Gilligan v. Revenue Commissioners*, [2008] 2 IR 417.
[17] [1966] I.R. 567 at p.622.
[18] *McD v. L & Anor* [2007] IESC 81.

situation. Under the Constitution it has been clearly established that the family in Irish law is based on a marriage between a man and a woman.

It must be noted that the Supreme Courts' decision pre-dates the decision of European Court of Human Rights in *Schalk & Kopf v. Austria*[19] in which it was held that a same sex couple without children were a *de facto* family with a right to private and family life pursuant to Article 8 of the Convention. The European Convention on Human Rights Act 2003 gave the European Convention on Human Rights sub-constitutional status in Irish law. Whilst there is an interpretive obligation in Section 2 of the 2003 Act, which provides that "a court shall insofar as is possible, subject to the rules of law relating to interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions", it applies only to the interpretation of "any statutory provision or rule of law". Section 3(1) of the Act is arguably broader and requires that "every organ of the State shall perform its functions, subject to any statutory provision or rule of law, in a manner which is compatible with the State's obligations under the Convention." However, Section 3(1) read in conjunction with Section 2 does not give the Convention primacy over Irish constitutional law.

However, the Supreme Court's jurisprudence can and should evolve. Hogan & Whyte have suggested that one of the unenumerated rights found in *Bunreacht na hÉireann* 1937 is a right to marry.[20] The authors aver that; "That the whole constellation of rights expressed or clearly implied by Articles 41 and 42 in the field of the family and the upbringing and education of children must, one would have thought, necessarily include a right to marry, since Article 41 specifically commits the State to guarding 'with special care the institution of marriage [and protecting] it against attack". They note that in *Ryan v. Attorney General*,[21] Justice Kenny mentioned the right to marry as an example of the personal rights latent in Article 40.3; and that Chief Justice FitzGerald in *McGee v. Attorney General*[22] (albeit in a dissenting judgment) located the right to marry in Article 40.3, as a right recognised in "most, if not all, civilized countries for many centuries". The then Chief Justice suggested that the right had not been "conferred" by the Constitution. This suggests that the right to marry is an unenumerated constitutional right located within the unspecified personal rights of the citizen protected by Article 40.3. As the constitution does not define marriage, the definition of same is a matter of judicial or legislative interpretation. The following questions may be of assistance:

1. Does the plain language of the constitution prohibit same sex marriage?

2. Did the common law understanding of marriage change over time?[23]

[19] [2010] 30141/04 (24 June 2010).
[20] See Hogan & Whyte, *J.M. Kelly: The Irish Constitution* 3rd ed, (Butterworths 1994) .
[21] [1965] IR 294.
[22] [1974] IR 284.
[23] The three most striking changes are; divorce and judicial separation, women are no longer property and marital rape is now a crime.

3. Would the inclusion of same sex couples in civil marriage constitute an attack on marriage and if so, how?[24]

4. Are cases which pre-date the de-criminalisation of homosexuality in 1993 persuasive authorities on the question of whether same sex marriage would be constitutional today?

5. Is there a constitutional right to marry? If such right exists is the denial of marriage on the basis of sex or sexual orientation constitutional?

6. Does the exclusion of same sex couples from civil marriage advance constitutional equality?[25]

I find United States Supreme Court Justice Antonin Scalia's dissent in *Lawrence v. Texas*[26] quite compelling, although not for the reasons the learned Judge might hope. In *Lawrence v. Texas* the US Supreme Court took the unusual step of *overruling* its earlier decision in *Bowers v. Hardwick* (1986)[27] and held that intimate consensual sexual conduct was part of the liberty protected by substantive due process under the Fourteenth Amendment to the US Constitution. The Court struck down the Texas ban on sodomy and in so doing effectively de-criminalised homosexuality in the United States. Scalia's quite animated dissent concluded that:

> If moral disapprobation of homosexual conduct is no legitimate state interest, for purposes of proscribing that conduct…what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising '[t]he liberty protected by the Constitution...?' Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry.

Indeed, what justification can be advanced for the unequal treatment of same sex couples, other than the view that they are socially or morally inferior? The oft repeated justification that marriage should be different sex only because of its role in child rearing is dubious at best, not least of all because same sex couples can and do have children. Privileging marriage above other family arrangements is generally justified on the basis that children fare better when their parents are married to each other. Leaving aside the veracity or otherwise of this assumption, this is an argument in favour of allowing same sex couples to marry. We should also consider whether same sex couples can be excluded from marrying because of a concern that will not make good parents.[28] The answer to this question is threefold; Firstly, the

[24] A rather trite analogy might be offered; did universal suffrage constitute an attack on the vote, and if so, how?

[25] Approximately 18 per cent of all family units in the State consist of non-marital couples (one third of whom have children) and that Ireland has 190,000 one parent-families CSO, Census 2006, Principal Demographic Results, (Dublin: CSO, 2007) at p. 64. See www.cso.ie.

[26] *Lawrence v. Texas* 539 U.S. 558 (2003).

[27] *Bowers v. Hardwick* 478 U.S. 186 (1986).

[28] The Irish Government does not share this view and seek out same sex couples to foster children through advertisements in the GCN (Gay Community News). Individual lesbian or gay people may adopt, but joint

consensus among expert bodies[29] is that "there is no scientific basis for concluding that gay and lesbian parents are any less fit or capable than heterosexual parents, or that their children are any less psychologically healthy and well adjusted"[30]; secondly there is a consensus that; "...the children of same sex couples will benefit if their parents are allowed to marry."[31] Ireland has never restricted marriage to people who are considered 'good parents' and in any case, same sex couples will raise children regardless of whether their relationships are legally protected. Indeed there are already quite a number of adult children of same sex parents in Ireland.[32] Excluding same sex couples from marriage does not prevent them from becoming parents but merely prevents such families from enjoying the legal protections afforded to other families. There are as many approaches to constitutional interpretation as there are judges and lawyers. While marriage has traditionally been interpreted in a manner that is reflexive of the mores of yesteryear, there is no good reason why the Article 41 family cannot reflect the values of today. The late Professor John Kelly identified an approach to constitutional interpretation which he termed, the "present-tense approach". He argued that is appropriate whenever the courts are called to consider "*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 the judges perceive and share them. The same would go, as Walsh J. says in the context of the private property guarantees of Article 40.3 and 43 for concepts like 'injustice'.[33]

In February 2011 the Supreme Court will have an opportunity to consider the constitutionality of marriage equality in *Zappone & Gilligan v. Revenue Commissioners*.[34] The Supreme Court may choose between providing an understanding of family which reflects the lights of today or they can continue to cloak the family in the mores of 1937.

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adoption is restricted to married couples.

[29] These include the American Psychological Association, The American Psychiatric Association, The California Psychological Association and the American Association for Marriage and Family Therapy who submitted an *amicus* brief in support of the plaintiff couples in *Perry v. Schwarzenegger* 704 F. Supp. 2d 921 (N.D. Cal. 2010) available at http://www.ca9.uscourts.gov/datastore/general/2010/10/27/amicus29 .pdfhttp://www.ca9.uscourts.gov/datastore/general/2010/10/27/amicus29.pdf, last visited, 8th December 2010.

[30] *See, e.g.*, J. Stacey & T.J. Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 Am. Soc. Rev. 159 (2001); Perrin & Committee, *supra* note 29; C.J. Patterson, *Family Relationships of Lesbians and Gay Men*, 62 J. Marriage & Fam. 1052 (2000); N. Anderssen et al., *Outcomes for Children with Lesbian or Gay Parents*, 43 Scand. J. Psychol. 335 (2002); J. Pawelski et al., *The Effects of Marriage, Civil Union, and Domestic Partnership Laws on the Health and Well-being of Children*, 118 Pediatrics 349, 358-60 (2006); J.L. Wainright et al., *Psychosocial Adjustment, School Outcomes, and Romantic Relationships of Adolescents: with Same-Sex Parents*, 75 Child Dev. 1886, 1895 (2004).

[31] *Ibid.*

[32] A number of them have formed "Believe in Equality" to campaign for their parents to be allowed to marry.

[33] "The Constitutional Law: Law and Manifesto," in *The Constitution of Ireland 1937-1987* (Litton, ed., Dublin, 1988) at p. 215.

[34] [2008] 2 IR 417.