



# THE CASE FOR MARRIAGE

As 2013 plays out, all eyes will be on the constitutional convention and whether it recommends a referendum on marriage for same-sex couples to the government. But key to the process beyond any recommendation made is a new case being taken to the High Court by married couple, Senator Katherine Zappone and Ann Louise Gilligan, directly challenging a ban on gay marriage that was inserted into the 2004 civil registration act. Senator Zappone tells **Brian Finnegan** why this new case was needed, and how she thinks the next steps on the road to marriage equality will play out.

**I**n November 2004, Katherine Zappone and Ann Louise Gilligan were granted leave by Ireland's High Court to pursue a claim to have their September 2003 Canadian marriage recognised for the filing of joint tax returns in Ireland. It is probable that this landmark case was the first key step on the journey that led to civil partnership in Ireland, but not for the reasons you might think.

At the exact same time as the couple were told their case could be heard, the Civil Registration Act of 2004 was being prepared. Nowadays, with gay marriage so high on the western agenda, it is hard to believe that a ban on marriages for same-sex couples was

written into the act without mass discussion or any reporting to the general public at all, but according to Katherine Zappone, who has since been appointed by the Taoiseach Enda Kenny to the Senate, that's exactly what happened. This led to civil partnership being introduced in Ireland because our statute books contained a ban on marriage for same-sex couples.

"There were various amendments to the Civil Registration Act going through the Dáil at the time, largely to enable marriage ceremonies to take place in more locations," she explains. "Somehow, in the middle of the night it seems, and Mary Coughlan was the Minister for Social Protection at the time, somebody inserted Section 2.2.E, which states: 'For the purposes of this act there is an impediment to marriage if... both parties are of the same sex.'

"Someone who did research for a PHD on this contacted myself and Ann Louise and she's talked to various parliamentarians who were around at the time. She says they didn't see it, that they didn't notice it. There was a little bit of debate when Brian Hayes raised some questions in the Dáil about it, but there was limited awareness from our public representatives at the time and no public awareness at all. Nobody put forward a challenge to this. It was just included and passed without any proper discussion."

The Zappone/Gilligan case received a judgment the High Court in December 2006, where Justice Elizabeth Dunne rejected their argument that the institution of marriage under the Irish Constitution is open to same-sex couples. She also found that the refusal to permit same-sex couples to marry in Ireland did not breach the European Convention on Human Rights.

The following February Zappone and Gilligan lodged appeal papers to the Supreme Court and said they were hoping their case would be heard at the end of the year.

"We waited five years before we were given a date in June 2011, which was way too long," says Senator Zappone. "But at least we knew we were going, so we began the strategy again of preparing an argument. Our legal team decided that in light of Justice Dunne's judgement, it would be probably strategically better if we directly challenged the constitutionality of Section 2.2 E of the Civil Registration Act, which we didn't know about when we filed our first case.

The Supreme Court met with Zappone and Gilligan in 2010, five months before their due court date, and turned down their motion to include a direct challenge. "Justice Liam McKechnie, who was the judge to grant us permission to take our case to the High Court initially, was on the bench that day and he said

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the best thing to do would be to go back to the High Court to make that direct challenge," Senator Zappone explains.

Rather than going back to the High Court to simply insert the direct challenge, because of the way the Irish legal system works, the couple had to go back to square one to pursue a new High Court case.

"We had to file new proceedings in order to effectively make the same bottom line argument that we should have the human right to marry in Ireland and that the constitution does not exclude that right," says Senator Zappone. "The first thing we did was write to the registrar requesting the right to get married here. Our submission to the court begins, however, with the fact that we are legally married under the laws of Canada."

As well as challenging Section 2.2E of the Civil Registration Act, Zappone and Gilligan will be challenging two sections of the Civil Partnerships Act. "When we applied to get married, the registrar also referred to Section 5 of the Civil Partnership Act which covers recognition of registered foreign relationships. It indicates that marriages which take place in other jurisdictions, such as Canada, will be recognised as a civil partnership here.

"We are married, we've been married for nine years. Is it right that Ireland has the right to unmarry us?"

"There are some arguments saying that civil partnership is an incremental step towards equal marriage, but the fact is that in the Civil Partnership Act there is a section that specifically downgrades the marriages of same-sex couples. So myself and Ann Louise are considered to be civil partners here, whether we want to be or not.

"Another part of the civil partnership act says it's an impediment to marriage if you are in a civil partnership. Our case will challenge the constitutionality of those aspects as well, because the civil partnership act as it stands bars same-sex couples from marrying in this jurisdiction. So there are two bans. That's the way the law has transpired."

Of course, while Katherine and Ann Louise pursue a hearing of their case next year, the constitutional convention will be discussing same-sex marriage and making a recommendation to the government on whether a referendum on the constitution should be held.

"In most jurisdictions there are three paths taken to get to get marriage equality," says Senator Zappone. "One has to do with the lawmakers, another path has to do with the courts, and the third path is the people. I think Ireland has to be one of the first jurisdictions in the world where the three paths are being pursued simultaneously.

"The fact that marriage for same-sex couples is in the constitutional convention, which is the path of the people and the politicians, has to do with the work of advocates such as Marriage Equality and LGBT Noise, and it's also to do with us and our case."

However, if the convention recommend a referendum, Senator Zappone believes the government will have no choice but to say they're not sure if it's needed or not. "They made their decision that it's unconstitutional to have marriage for same-sex couples on the basis of Attorney General's opinions and the judgment of the High Court," she says. "The Supreme Court is the absolute arbiter of what's allowed and not allowed in the context of the constitution. Until we have that judgment, we won't know whether we require a referendum on marriage for same-sex couples or not."

In the meantime, if the polls are to be taken into account, the people of Ireland are overwhelmingly positive about equal marriage. 73% say they're in favour of it and in a recent Ipsos MRBI poll asking 'if there was a referendum on same-sex marriage how would you vote', 55% said yes.

"Plus there has been marriage for same-sex couples introduced in many other jurisdictions since we took our case, so that all works in our favour," adds Senator Zappone.

"I believe we will have to wait for an outcome from our case, and that this will be the recommendation of the government. I don't want to preempt the democratic deliberations of the citizens or the politicians, but that is my opinion.

"Should we win, there will be no referendum. Our lawmakers would simply have amend the Civil Registration Act of 2004 and get rid of the ban on marriage for same-sex couples that was so quietly introduced. If the Constitutional Convention make a recommendation that our constitution should allow same-sex couples to marry, then the politicians should have no fear to do the right thing finally – the three paths coming together with the one goal."