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# THE FAMILY

## The Scope of Family Law

Despite the various meanings given to the word ‘family’ in modern society, Irish family law is mainly concerned with the family unit of husband and wife and their children, if any. Family law embraces the rights and obligations which flow from marriage. The traditional importance attached to the institution of marriage is illustrated by the vast number of rules that have been developed, both by the Courts and the legislature, to govern the formation, functioning and dissolution of marriage. Family law is also concerned with the transfer of a child from one family to another by means of adoption, and the acquisition of parental rights by persons outside the family by way of guardianship, custody and wardship. Other social issues, such as domestic violence, the so-called ‘one-parent family’, children in need of care and protection and the rights of cohabittees, have come to be the concern of Courts administering family law.

## The Family Defined

Despite the fact that ‘the family’ is referred to in Articles 41 and 42 of the Constitution, nowhere in these Articles is the term defined. Accordingly, it has been left to the Courts to come up with a definition. The decided cases on the matter, most notably the *State (Nicolaou) v. An Bord Uchtála* (1966), make it clear that ‘the family’ referred to is that based on marriage (the nuclear family). This definition excludes the natural family or the family outside marriage. Nicolaou, as the natural father of a non-marital child, had challenged the constitutionality of the Adoption Act 1952, which allowed for the adoption of his child without his consent. The Supreme Court rejected his claim on the basis that he had no constitutional rights to his child. Accordingly, a cohabiting couple and their children, if any, are not to be regarded as a family under Irish law. In *G. v. An Bord Uchtála* (1980), O’Higgins CJ stated that Article 41 ‘refers exclusively to the family founded and based on the institution of marriage’. In *Sinnott v. The Minister for Education* (2001) Denham J described Article 41 as ‘an Article of our times’ which should be interpreted in the light of prevailing ideas and concepts. The family remains ‘the core unit of our society’. While the nature of the family is evolving in society, ‘as a constitutional unit the family remains grounded on marriage’.

Despite the ruling of the European Court of Human Rights in *Keegan v. Ireland* (1994), that the State was in breach of Article 8 of the European Convention on

Human Rights and Fundamental Freedoms (which embraces both marital and non-marital families), in failing to protect an unmarried father's 'right to respect for his private and family life' by providing that he be consulted in the adoption process, the Supreme Court's definition of 'the family' in *Nicolaou* continues to be the law on the matter. It should be noted that the Adoption Act 1998 now provides for consultation with the natural father in certain circumstances. This topic is considered in detail in Chapter 16.

The Courts have interpreted Article 41 as conferring rights on the family as a unit and not on the individuals who make up that unit. In *Murray v. Ireland* (1985), Costello J said that the rights referred to in Article 41 'belong to the institution itself as distinct from the personal rights which each individual member might enjoy by virtue of membership of the family'. Similarly, in *L. v. L.* (1992), Finlay CJ emphasised that Article 41 does not 'grant to any individual member of the family rights . . . against other members of the family, but rather deals with the protection of the family from external forces'.

In *N. and Anor. v. Health Service Executive and Others* (2006) the Supreme Court rejected the suggestion that the provisions of Articles 41 and 42 of the Constitution constitute 'an adult centred dispensation' or prefer the interests of parents to those of the child. The Constitution does not prefer parents to children, and 'it would be quite untrue to say that that the Constitution puts the rights of parents first and those of children second'. The Constitution fully acknowledges the natural and imprescriptible rights and the human dignity of children, but equally recognises 'the inescapable fact that a young child cannot exercise his or her own rights'. The Court made it clear, however, that the Constitution prefers parents to third parties, 'as the enablers and guardians of the child's rights'. This preference has its limitations, and parents cannot, for example, ignore the responsibility of educating their child. More fundamentally, the Constitution provides for the wholly exceptional situation where, for physical or moral reasons, parents fail in their duty towards their child. Then, indeed, the State must intervene and endeavour to supply the place of the parents, always with due regard to the rights of the child.

## **The Family and Human Rights**

### ***The European Convention on Human Rights***

Family law now operates in an international dimension. The significant role played by the European Convention on Human Rights in shaping our attitude to family policy should not be minimised. The European Convention on Human Rights Act 2003 gives effect to the Convention at sub-constitutional level (see Chapter 3). Article 8 of the Convention provides that everyone has the right to respect for his private and family life and sets out the exceptional circumstances in which the State can interfere with the enjoyment of these rights. The concept of 'family life' is much wider than the notion of 'family' as envisaged by the

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Constitution. In *Keegan v. Ireland* 1994, the European Court of Human Rights held that Ireland was in breach of Article 8 in allowing Keegan's non-marital child to be placed for adoption without his involvement in the adoption process. The Court held that the notion of family is not confined solely to marriage-based relationships and may also encompass other *de facto* 'family ties' where families are living together outside marriage. A child born out of such a relationship is part of the family unit from the moment of birth and by the very fact of it. Thus, there exists between the child and the parents a bond amounting to family life. In *Neilsan v. Denmark* 1988 the Court held that in the context of Article 8, 'the exercise of parental rights constitutes a fundamental element of family life'.

There is no predetermined model of family or family life to which Article 8 has to be applied. Families differ widely in their composition and in the mutual relations that exist between the members. The existence or non-existence of family life is essentially a question of fact depending on the real existence in practice of close personal ties (see *K. and T. v. Finland* 2001). Whenever the issue is down for decision, the facts of the particular case are crucial (see *EM (Lebanon) v. Secretary of State for the Home Department* 2008). In this regard, a number of factors may be relevant, including whether the couple lives together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together or by any other means (see *X, Y and Z v. United Kingdom* 1997). Although cohabitation may be a requirement for such a relationship, other factors may also serve to demonstrate that a relationship has sufficient constancy to create *de facto* family ties. Such factors include the nature and duration of the parents' relationship and in particular whether they had planned to have a child; whether the father subsequently recognised the child as his; contributions made to the child's care and upbringing; and the quality and regularity of contact (see *Joseph Grant v. The United Kingdom* 2009). In *T. v. O.* 2007 the Supreme Court held that an unmarried couple and their two children constituted, at all relevant times, a *de facto* family within the meaning of Article 8. The couple had lived their lives in a fashion similar to a married couple for over three years and intended to get married at some subsequent date.

Where the protection of family life under Article 8 is invoked in respect of a relationship that is wider than that of the marital tie and the blood tie between parent and child, the existence of family life is dependent on a careful consideration on a case-by-case basis of the specific characteristics of the tie asserted. The more remote the tie or connection and the lower the level of personal bond or dependency, the less likely it will be that a measure of State intervention which disrupts the lives concerned will amount to an unlawful interference which infringes Article 8. In the past the Court of Human Rights has interpreted the concept of family life as capable of including relationships wider than those based upon immediate relationships of blood and marriage. Family life can include the relationship of grandparent and grandchild (*Marckx v. Belgium* 1979)

and the relationship between uncle or aunt and nephew or niece (*Boyle v. UK* 1994). In *Kozac v. Poland* 2010, the Court of Human Rights held that in its choice of means designed to protect the family and secure respect for family life, the State must take into account developments in society and changes in the perception of social, civil status and relational issues, 'including the fact that there is not just one way or one choice in the sphere of leading one's family or private life'. As regards same-sex couples, in the recent case of *Schalk and Kopf v. Austria* 2010, the Court of Human Rights held that the relationship of the applicants, a cohabiting same-sex couple without children 'living in a stable *de facto* partnership', fell within the notion of 'family life', just as the relationship of a different-sex couple in the same situation would (see also *P.B. and J.S. v. Austria* 2010). In the context of assisted human reproduction techniques, the Court made it clear in *J.R.M. v. Netherlands* 1992 that the biological link between a sperm donor and a child born to a lesbian couple was insufficient to found a claim for family life between donor and child for the purposes of Article 8 of the Convention.

### ***The Charter of Fundamental Rights of the European Union***

The Treaty of Lisbon, which came into effect in December 2009, gives legal effect to the Charter of Fundamental Rights. The Charter becomes an integral part of EU law and has the same legal value as the Treaties. It covers social and economic rights and principles, among them the right to family life, the right to marry and children's rights. The Charter does not create new general rights under national law and only applies when national governments are implementing EU law. Where Charter rights correspond to those set out in the European Convention on Human Rights, the Lisbon Treaty provides that the meaning and scope of those rights would be the same. In effect, this means that the interpretation of fundamental rights developed by the case law of the European Court of Human Rights can be relied on for the purposes of the rights set out in the Charter. Article 7 of the Charter guarantees the right to respect for private and family life. It guarantees the protection of the person against the intervention or interference of the public authorities in the private sphere. Such interference is tolerated only insofar as it is lawful and necessary to maintain law and order. In this respect, the provisions of Article 8.2 of the European Convention on Human Rights apply to Article 7 of the Charter. Article 9 of the Charter provides that 'the right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights'. This reference to national legislation is meant to take account of the diversity of national laws in that some States recognise marriage between persons of the same sex and the founding of a family other than within marriage. Where it is the case in national legislation, this gives the Article broader scope than the corresponding provisions of Article 12 of the European Convention on Human Rights (see also Chapter 2).

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In the area of children's rights, the Charter represents a significant step forward for children's rights in EU policy making. For the first time, children's rights will be recognised in the fundamental legal texts of the EU, on which everything the EU does is based: Article 24. Specifically, children shall have the right to such protection and care as is necessary for their well-being and they may express their views freely. Such views shall be taken into consideration on matters that concern them in accordance with their age and maturity.

### **The Family and Immigration**

Immigration is a permanent and positive reality in Irish society. The situation of asylum seekers coming to Ireland seeking refugee status has become an issue of considerable public interest as well as a topic for much public debate. In the case of refugees and asylum seekers, a failed application for permission to stay in this country will result in deportation. Compulsory deportation may disrupt family life, as immigrant parents and their Irish-born citizen children are a family for the purposes of Article 41 of the Constitution. Where an application for asylum made by the parents of a family includes the children of that family and no separate grounds of application have been identified by the parents in respect of any child in their company, the Minister has no obligation to consider each child separately from his consideration of the parent's application, since in effect there is nothing separate to consider: *N. (L.) and Ors v. The Minister for Justice, Equality and Law Reform and Anor 2004*. Because of the adverse consequences for an Irish-born child of a decision to deport his non-national parents, the High Court held in *Bode v. Minister for Justice, Equality and Law Reform 2006* that every Irish-born child has the right to appeal his parent's deportation or failure to be granted asylum.

The Nationality and Citizenship Act 2004, which gives legislative effect to the 27th amendment to the Constitution, provides that a person born in Ireland, North or South, to non-national parents, either of whom has been lawfully resident in the island of Ireland for at least three out of the four years immediately preceding the birth, will have an entitlement to Irish citizenship. The Supreme Court held in *Lobe v. Minister for Justice 2003* that children born in Ireland who are Irish citizens have a right to reside here and have a right under the Constitution to the society, care and company of their parents. However, the right to reside here is not absolute. The Court emphasised that it is the right and duty of a State to control immigration in the interests of the common good. It is parents who make decisions on matters like place of residence for dependent children, and the right of citizen children to the society of their parents may be protected by residence elsewhere. The State is not bound by the choice of residence that a couple may make for themselves and their family. Where necessary, the State reserves the right to expel the non-national parent of a citizen child for substantial reasons associated with the common good, even though this

has the necessary consequence that the child will leave the State. However, in light of the Supreme Court decision in *Fajujonu v. Minister for Justice* 1990, the right of citizen children to the society of their non-national parents within the State, particularly where the non-national parents have lived here for an 'appreciable time', might be contravened only for grave and substantial reasons associated with the common good. The Fajujonu family had been in Ireland for eight years by the time their case came before the Court. See also *Cirpaci (nee McCormack) and Anor v. Minister for Justice* 2005.

The recent decision of the European Court of Justice in the case of *Ruiz Zambrano (European citizenship)* 2011 will have a considerable impact on Irish immigration policy. The case involved Columbian parents and the two children born to them in Belgium while they were seeking to regulate their residency status. The Court held that Article 20 of the Treaty on the Functioning of the European Union is to be interpreted as meaning that a non-EU national parent of a dependent EU citizen child has a right not only to reside within the Member State of residence and nationality of that child, but also to be granted a work permit so as to ensure that the EU citizen child can benefit from his rights as an EU citizen. The Court acknowledged that it was for the various Member States to lay down the conditions under which EU citizen status can be acquired. Belgian nationality law provides that any child born in Belgium who has not reached the age of majority and who would otherwise be stateless will be a Belgian citizen.

Despite the significance of the *Zambrano* judgment in the context of immigration into the EU, it would be wrong to overstate its impact for this country. There is no question of opening the floodgates to irregular immigrants flocking to our shores. From a purely Irish perspective, the number of people who are likely to benefit from the application of this decision is limited. This is because of the relatively strict conditions prescribed by the Nationality and Citizenship Act 2004 for the acquisition of Irish citizenship, as set out above. It is significant that in the course of a hearing in the High Court on 9 March 2011, involving a Nigerian father of two Irish citizen children who is seeking leave to appeal a deportation order, Cooke J said that in light of the *Zambrano* judgment, it is 'highly likely' that an Irish case or cases would have to go to the European Court of Justice to provide additional clarity on the specific rights of the parents of Irish citizen children (see *Irish Times*, 10 March 2011).

The relationship between non-national parents and their Irish-born citizen children amounts to family life for the purposes of Article 8 of the European Convention on Human Rights. The deportation of non-national parents amounts to an interference with the exercise of their right to family life and can only be justified where it is 'necessary in a democratic society', in that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued. Whether or not a decision to deport is



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disproportionate is to be judged by reference to the impact of the removal of the deportee on the immediate family and not by reference to the circumstances of others, however numerous, to whom residence has been granted.

In the case of a citizen child, in considering whether it is permissible to remove or deport a non-citizen parent where the effect would be that the child would also have to leave, the overarching issue for the Court is to consider the weight to be given to the best interests of the child who is affected by the decision. It is not enough to say that a young child might readily adapt to life in another country which he did not know and where he would be separated from a parent. In *Ojobuike [a minor] and Anor v. MJELR* 2010, the High Court was satisfied that in deciding to deport the father of a seven-year-old girl, 'all of the facts and factors relevant to the personal and family circumstances of the father and his daughter' had been identified and considered by the Minister. In the Court's judgment, no factor pertinent to the child's personal or family rights under the Constitution or her right to respect for private and family life under the Convention had been distorted, exaggerated or omitted from consideration. Having regard to those circumstances and to the personal history of the family members, 'it cannot be tenably maintained that the Contested Decision is either unreasonable or disproportionate'. Despite the ruling in the *Zambrano* case, above, in *Lofinmakin (A Minor) and Ors v. MJELR and Ors* 2011, the High Court held that a Member State may still deport a parent of a citizen child, where such deportation is reasonable and proportionate in accordance with the test laid down by the Supreme Court in *Ogukwe and Ors v. Minister for Justice Equality and Law Reform* 2008. In arriving at its decision in *Lofinmakin*, the High Court placed reliance on the opinion of Advocate General Sharpston to the Court of Justice in *Zambrano*, that the relevant Treaty articles which confer the right of residence as a citizen of the Union do not preclude a Member State from refusing a derived right of residence to a parent of a citizen of the Union, 'provided that the decision complies with the principle of proportionality'.

As to potential conflicts between the respect for family life and the enforcement of immigration controls, the House of Lords held in *R (Mahmood) v. Secretary of State for the Home Department* 2001 that the removal or exclusion of a family member from a State where other members of the family are lawfully resident will not necessarily infringe Article 8 of the Convention, provided that there are no insurmountable obstacles to the family living together in the country to which the excluded member is to depart, even where this involves a degree of hardship for some or all members of the family. The notion of such an insurmountable obstacle is not confined to clear-cut legal impediments to relocation. It may also include practical considerations that render it either physically impossible or grossly unreasonable to expect the family members to exercise a choice in favour of accompanying the deportee. In *S. and Anor v. MJELR* 2011 the High Court described the Minister's decision to refuse to halt the deportation of a Nigerian

woman, who is married to an Irish man with an intellectual disability and bipolar disorder, as 'both disproportionate and unreasonable in law'. Having regard to the special facts of the case, the husband could not realistically be expected to live in Nigeria with his wife were she to be deported from this State. The husband is a person wholly dependent on disability benefit. Moreover, his medical needs are such that he is also dependent daily on a complex range of medication which would simply not be available (or, at the very least, not reliably available) in Nigeria. The decision of the Minister 'condemned this couple to the effective limbo of permanent separation' and 'struck at the essence and substance of the applicants' family rights under Article 41 of the Constitution' (see *Boultif v. Switzerland* 2001 and *N. and Ors v. MJELR and Ors* 2010). Even where there are no obstacles to relocation, Article 8 is likely to be violated by the expulsion of a member of a family that has been long established in a State if the circumstances are such that it is not reasonable to expect the other members of the family to follow the member expelled (see *Fajjonu v. Minister for Justice*, above). In *Bode v. Minister for Justice, Equality and Law Reform*, above, the High Court held that the Minister has a duty under the European Convention on Human Rights Act 2003 to make administrative decisions in a manner compatible with the Convention.

The Convention, in principle, does not prohibit the Contracting States regulating the entry and length of stay of aliens. The problem of immigration and residence of foreigners is a very important issue, and there is no doubt that restrictions are unavoidable. As a matter of well-established international law and subject to its Treaty obligations, a State has the right to control the entry of non-nationals into its territory. Therefore, Article 8 cannot invalidate immigration controls in themselves. However, the case law of the European Court of Human Rights makes it clear that a proper balance has to be achieved between the competing rights of the non-national parents to respect for their family life, and the right of a Contracting State to protect the integrity of its immigration and residence policy. See *Abdulaziz, Cabales and Balkandali v. United Kingdom* (1985) and *Berrehab v. The Netherlands* (1989).

## **Constitutional Protection**

Article 41 of the Constitution recognises the family 'as the natural primary fundamental unit group of society', and as a 'moral institution possessing certain inalienable and imprescriptible rights' which are 'antecedent and superior to all positive law'. In *Ryan v. Attorney General* (1965), Kenny J said that 'inalienable' meant 'that which cannot be transferred or given away' and that 'imprescriptible' meant 'that which cannot be lost by the passage of time'. In Article 41.1.2. the State guarantees to protect the family in its constitution and authority 'as the necessary basis of social order and as indispensable to the welfare of the Nation and State'. Article 42 acknowledges that 'the primary and natural educator of the child is the Family'.

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In *North Western Health Board v. H.W. and C.W.* (2001) Keane CJ said that the family referred to in Articles 41 and 42 'is endowed with an authority which the Constitution recognises as being superior even to the authority of the State itself', and that 'the Constitution firmly outlaws any attempt by the State to usurp the exclusive and privileged role of the family in the social order'.

In recent years, there has been a number of constitutional challenges to legislation on the grounds that certain provisions of the impugned legislation amounted to a failure by the State to honour its pledge in Article 41 to protect the family. In *Dennehy v. The Minister for Social Welfare* (1984), the High Court rejected the claim of a deserted husband that certain sections of the Social Welfare (Consolidation) Act 1981, which made provision for deserted wives but not for deserted husbands in similar circumstances, were unconstitutional. Barron J held that the more favourable treatment of deserted wives was justified both by the provisions of Article 41.2, which assigns to woman a special role as wife and homemaker, and Article 40.1, which recognises a difference in capacity and social function. The Supreme Court finally got the opportunity to address the issues raised in the *Dennehy* case in *Lowth v. The Minister for Social Welfare* (1999). The facts were similar and much the same legal submissions on the constitutionality of the Social Welfare (Consolidation) Act 1981 were made in both cases. The evidence presented in the High Court in *Lowth* showed clearly how women in employment at the material times mentioned in the case were at a financial disadvantage in comparison to men. The Supreme Court held that it is settled law that Article 40.1 does not require that all citizens be treated equally, and that there were ample grounds for the Oireachtas to conclude that deserted wives were, in general, likely to have greater needs than deserted husbands so as to justify providing social welfare payments to meet such needs. In *T.F. v. Ireland* (1995), the Supreme Court rejected the contention that section 2(1)(f) of the Judicial Separation and Family Law Reform Act 1989, which allowed for judicial separation on a no-fault basis, constituted an attack on the institution of marriage on which the family is based. See Chapter 6.

The effectiveness of the State's guarantee in Article 41 to protect the family based on marriage is aptly demonstrated by the Supreme Court decision in *Re Article 26 and the Matrimonial Home Bill 1993* (1994). The Court, on a referral to it by the President under Article 26, ruled that the Bill, which purported to give each spouse automatic joint ownership of the matrimonial home and the household effects, was repugnant to Article 41, as it was a disproportionate intervention by the State in the rights of the family and constituted a failure by the State to protect the authority of the family. The Court went on to stress that the right of a married couple to make a joint decision as to the ownership of the matrimonial home is a right possessed by the family and that the exercise of this right is an important part of the authority of the family.

## **The Marital Family**

Although the Constitution guarantees the family's rights, it does not enumerate these rights. Again, it has been left to the Courts to spell out exactly what these rights are. Some examples are discussed here, but this should not be considered an exhaustive list – the rights of the family are constantly the subject of interpretation by the Courts.

### ***Marital Privacy***

The right to marital privacy was recognised in *McGee v. Attorney General* (1974). In that case, the Supreme Court upheld the plaintiff's claim that section 17(3) of the Criminal Law Amendment Act 1935, which prohibited the importation of artificial contraceptives, was repugnant to Article 41 as it interfered with the authority of the family, in this instance the right of the husband and wife to decide how many children, if any, they might have. In the course of his judgment, Walsh J said that a decision by a husband and wife to limit their family or to avoid having children by the use of contraceptives 'is a matter peculiarly within the joint decision of the husband and wife and one into which the State cannot intrude unless its intrusion can be justified by the exigencies of the common good'.

### ***The Right to Procreate***

The right of a married couple to procreate, a personal right protected by Article 40.3.1, was recognised in *Murray v. Attorney General* (1985). The plaintiffs in that case were both serving life sentences for the murder of a member of the Garda Síochána. They claimed that the prison authorities had a duty to allow them to consort together for the purposes of procreation. In rejecting their claim, the High Court held that the right to procreate could be suspended while they served their sentences, as constitutional rights in general were not absolute and could be suspended in the interests of the common good. In the context of a separated husband refusing to consent to the use of frozen embryos by his estranged wife, the Supreme Court held in *Roche v. Roche* 2009 that there is 'an equal and opposite right not to procreate'. The exercise of a right not to procreate by the husband was 'a proportionate interference' in all the circumstances of the case to the right of the wife to procreate. If the embryos were implanted, he would be the father of any subsequent children, with constitutional rights and duties (see also Chapter 15).

### ***Income Tax***

The right of a married couple to be treated no less favourably for income tax purposes than a cohabiting couple was recognised in *Murphy v. Attorney General* (1982). The Supreme Court held that the provisions of the Income Tax Act 1967, which provided for the aggregation for income tax purposes of the income of a

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married couple while not requiring aggregation in the case of a cohabiting couple, were repugnant to Article 41. Such treatment, the Court held, could be regarded as 'a breach of the pledge by the State to guard with special care the institution of marriage and to protect it against attack'.

### ***Consortium***

An important right possessed by a married couple, which is guaranteed by Article 41 of the Constitution, is the right to consortium. Consortium was described by Kingsmill Moore J in *O'Haran v. Devine* (1966) as 'the sum total of the benefits which a husband and wife may be expected to confer on each other, such as, help, comfort, companionship, services and all the amenities of family and marriage'. In that case, the Supreme Court held that a husband was entitled to damages for loss of consortium in respect of his separation from his wife for a period of 42 weeks while she recovered in hospital and recuperated from injuries sustained in a motor accident. In *McKinley v. Minister for Defence* (1992), the Supreme Court held that the common law right of a husband to sue for loss of consortium was, by virtue of the principle of equality enshrined in Article 40 of the Constitution and the special recognition afforded to marriage by Article 41 of the Constitution, extended to a wife. In *Coppinger v. Waterford County Council* (1996), the High Court awarded £60,000 to a wife for the loss of consortium of her husband as a result of serious injuries sustained by him in a motor accident.

### ***Guardianship and Custody***

The right to guardianship (parental rights and duties in relation to a child) and custody (the right to physical care and control of a child) of children is conferred jointly on married parents under section 6 of the Guardianship of Infants Act 1964, as amended. The Act merely gives legislative expression to the constitutional right to guardianship and custody enunciated in Articles 41 and 42. See Chapter 17.

### ***Education***

The right of the marital family to provide for the education of the children of their union is provided for in Article 42.1 of the Constitution as follows:

The State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.

Article 42 of the Constitution focuses on the primacy of the family and the rights and duties of parents in relation to the education of their children. Article 42.1 guarantees the inalienable right of parents to provide 'for the religious and moral,

intellectual, physical and social education of their children'. In this regard, parents can educate their children at home, or in private schools, or in schools recognised or established by the State. In *O'Shiel v. Minister for Education* (1999) Laffoy J described Article 42 as being 'imbued with the concept of parental freedom of choice'. The State is permitted to intervene directly in the education of children to ensure that children receive 'a certain minimum education'. Under Article 42.5, where parents for physical or moral reasons fail in their duty towards their children the State, as guardian of the common good, is obliged by appropriate means to supply the place of parents: *Re Article 26 and the School Attendance Bill 1942* (1943). In *Best v. A.G.* (2000) the Supreme Court held that, before a Court was satisfied that a child being educated at home was receiving a sufficient level of education to satisfy the constitutional requirements, the Court should have before it expert evidence opinion on the matter.

In *Re Tilson* 1951, the Supreme Court confirmed that the parents have 'a joint power and duty' in respect of the education of their children. If they together make a decision and put it into practice, it is not in the power of either parent to revoke such a decision against the will of the other party. However, if parental authority is to be exercised jointly, then where that is not possible, either parent may seek the assistance of the Court to resolve the matter. Ultimately, the Court must resolve the matter by reference to the best interests of the children concerned.

In *L v. Judge Haughton and Ors* 2007 the parents had entered into a pre-nuptial agreement as to the religious education of their children. The children were being educated at home until unhappy differences arose between the parents, resulting in the mother petitioning for judicial separation. In particular, the parents differed as to what was the most appropriate form of education for their two younger children. At a certain point in their relationship, the mother became concerned about the father's fundamental manifestation of religion. She became more and more anxious about the children's home schooling and her apprehension that her husband was 'overwhelming and alienating' the children by inculcating in them his 'unusual and extreme Roman Catholic religious views'. In an application by the mother under the Guardianship of Infants Act 1964, as amended, the District Court made an interim order that the children attend a certain national school pending the finalisation of composite proceedings between the parties under the 1964 Act, the Child Care Act 1991 and the Domestic Violence Act 1996 (see also Chapters 12, 18 and 19).

The Education (Welfare) Act 2000 gives statutory expression to the right of parents to educate their children at home, while at the same time guaranteeing that children will receive 'a certain minimum education' within the meaning of Article 42. Section 14 of the 2000 Act provides for the establishment of a register of children receiving education in a place other than a recognised school. A parent wishing to educate a child at home must apply to the Education Welfare Board set up under the Act to have the child concerned registered in the register.

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Following an assessment by an authorised person as to the adequacy of the facilities to provide a home education, a report shall be made to the Board. If the Board is satisfied from the report, and any representations made by the parent, that the child is receiving a certain minimum education, it shall register the child in the register. If the Board is not so satisfied, it may register the child subject to the parent undertaking to comply with any requirements of the Board, or it may refuse to register the child. Where a parent refuses to consent to an assessment, the Board may refuse to register the child in the register. The decision of the Board may be appealed within 21 days to an appeals committee established under section 15 of the 2000 Act. The appeals committee shall consist of a district judge, an inspector and an independent person appointed by the Minister.

Where parents decide not to educate their children at home, they have the right to have them educated in schools provided by the State. Article 42.4 requires the State to provide for free primary education. In *Sinnott v. Minister for Education* (2001) the Supreme Court held that the State's constitutional obligation to provide free primary education is age-related, and cannot continue past the age of 18. In *O'Donoghue v. Minister for Health* (1996) the Supreme Court declared that the State's constitutional obligation to provide free primary education extended to persons with disabilities.

### **Medical Treatment**

The requirement of consent to medical treatment is an aspect of a person's right to bodily integrity under Article 40 of the Constitution: *Ryan v. Attorney General* 1965. If medical treatment is given without consent, it may be a trespass to the person in civil law giving rise to an action for damages and it may also result in a criminal prosecution. In *Re a Ward of Court* 1995 the Supreme Court held that there is a constitutional right in a competent person to refuse medical treatment, even if it results in death. As Denham J pointed out in that case, medical treatment may be refused for reasons other than medical reasons or reasons most citizens would regard as rational, but 'the person of full age and capacity may make the decision for their own reasons'. However, the right to refuse treatment is not absolute and may be restricted in the interests of the common good. In exceptional circumstances, such as a medical emergency or in the case of contagious diseases, a patient may be treated against his wishes. In *Fitzpatrick and Anor v. K. and Anor* 2008 the High Court held that the hospital acted lawfully in sedating and administering a blood transfusion to a woman against her will in order to save her life. She had lost an estimated 80 per cent of her blood while giving birth to her first child. She had refused the transfusion because of her religious beliefs (see also *Fitzpatrick v. FK* 2006).

The age of consent to medical treatment is 16 years: section 23 Non-Fatal Offences Against the Person Act 1997. In the case of a child under the age of 16, the consent of the child's parent or guardian is necessary before any treatment or

intervention can take place. As a parent's rights and duties include the care of a child who is ill, a parent is entitled to information about the medical care a child is receiving so that he may make appropriate decisions for the child. In *McK. v. The Information Commissioner* 2006 the Supreme Court held that there is a presumption that a parent is entitled to access information about the medical treatment a child is receiving. In the overwhelming majority of cases, the best judges of a child's welfare are his parents. The parents not only have a right, but it is also the duty of parents to give consent on the child's behalf if it is in the best interests of the child to do so. If parents refuse to consent to having their child medically treated, a Court must decide whether it is in the best interests of the child that he should have the necessary treatment. The importance of obtaining a Court order to override the objections of parents was emphasised by the European Court of Human Rights in *Glass v. United Kingdom* 2004. In that case the administration of drugs to a severely physically and mentally disabled child, against his mother's wishes and without a Court order, was held to constitute a violation of Article 8 of the European Convention on Human Rights. In *M.A.K. and R.K. v. the United Kingdom* 2010 the Court of Human Rights could find no justification for the decision to take a blood test and intimate photographs of a nine-year-old girl against the express wishes of both her parents while she was alone in hospital.

In reaching a decision as to whether to override the decision of parents in any given case, the Court is bound by the principle, enunciated by the Supreme Court in *North Western Health Board v. H.W. and C.W.* 2001, that in matters relating to the welfare of the children of a family, the parents know best. However, the Court made it clear that where parents refused to consent to medical treatment for their child, in exceptional circumstances the State could become 'a default parent, and override the decisions of parents for the purposes of giving the required consent'. In arriving at its decision, the Court must weigh in the balance the reasons against the treatment that might be held by a reasonable parent on much broader grounds than the clinical assessment of the likely success of the proposed treatment. In *A. and B. v. Eastern Health Board* 1998 (the 'C' case) the parents of a 13-year-old girl who had become pregnant as a result of being raped had refused to give their consent to the girl travelling to England for a termination of her pregnancy. The Court overruled the parents' refusal to consent, as the welfare of the child required that she be allowed to have her pregnancy terminated (see also *D v. Attorney General*, High Court, 9 May 2007). Where parents refuse medical treatment for a child on religious grounds, the Court is required to balance the constitutional right of the parents to raise their children in accordance with their own religious and philosophical views (Article 44) and the vital interest of the State in ensuring that children are protected. In *Temple Street v. D and Anor* 2011, the High Court sanctioned the administration of a life-saving blood transfusion to a critically ill three-month-



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old baby despite the objections of his Jehovah Witness parents. In reaching its decision, the Court interpreted Article 40.3.2 of the Constitution as committing the State to protecting as best it could by its laws the life and person of every citizen. For that reason, the Court was of the view that it was 'incontestable' but that the Court was given 'a jurisdiction (and, indeed, a duty)' to override the religious objections of the parents where adherence to these beliefs would threaten the life and general welfare of their child.

The emergence in the UK of the *Gillick* competent child concept, so called as a result of the decision of the House of Lords in *Gillick v. West Norfolk and Wisbech Area Health Authority* 1985, raises the question of children under the age of 16 being competent to make decisions on health matters of a particularly personal nature. Obvious examples might be young girls seeking advice on contraceptives or boys or girls wishing to be treated for substance abuse without the knowledge or consent of parents. In *Gillick*, the Court held that in certain circumstances, a child under 16 can give a valid consent to medical treatment 'when he reaches a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision'. There is no analogous *Gillick* test in Ireland and the Courts have yet to address the question of whether a child's personal rights and capacity to make a decision on medical treatment could take precedence over a parent's decision. In the absence of legislative or judicial guidelines in the matter, doctors must be guided by Medical Council Guidelines, which provide that before treating the patient who is under 16, the individual doctor should encourage the patient to involve his parents in the decision, bearing in mind the paramount responsibility of the doctor to act in the patient's best interests.

### **The Non-Marital Family**

Irish society has undergone some radical changes in modern times, of which the introduction of divorce is but one example. An increasing number of people choose to live together and have children outside the institution of marriage. What is the legal position of a man and woman who live together without marrying? If they live together ostensibly as 'husband and wife', the relationship is often referred to as a 'common law' marriage. This concept, however, is not recognised under Irish law, as is evident from the judgment of Henchy J in *Nicolaou* where he stated: 'I am satisfied that no union or grouping of people is entitled to be designated a family for the purposes of the Article if it is founded on any relationship other than that of marriage', and later where he added:

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.

The term '*de facto* family' is often used to describe the situation where a couple lives together in a settled relationship outside marriage. However, as Denham J made clear in *McD v. L and Anor* 2009, there 'is no institution in Ireland of a *de facto* family'. The term is invariably used as 'a shorthand method of referring to the circumstances of a settled relationship in which a child lives'. In overturning a decision of the High Court, the Supreme Court held that the lesbian couple and the child, conceived as a result of sperm donation, were not a family for the purposes of Article 41 of the Constitution. Such a relationship would now come within the scope of 'family life' for the purposes of Article 8 of the European Convention on Human Rights (see *Schalk and Kopf v. Austria* 2010 above).

In view of the fact that the non-marital family is not protected by Article 41, the natural father and natural mother and their children, if any, must look elsewhere for constitutional protection.

### ***Natural Father and Child***

It is clear from the judgment of Walsh J in *Nicolaou*, where he stated: 'It has not been shown to the satisfaction of this Court that the father of an illegitimate child has any natural right, as distinct from legal rights, to either the custody or society of that child', that the natural father has no constitutional rights to his child. In *J.K. v. V.W.* (1990), the Supreme Court repeated the position espoused in *Nicolaou* that the natural father did not have any constitutional rights to his child. While the Court recognised that there may be rights of interest or concern arising from the blood link between the father and the child, the father did not have a constitutional right to guardianship. Although the natural father does not have any constitutional right to his child, Walsh J stated in *G. v. An Bord Uchtála* (1980) that the child has a natural right to look to his natural father for support.

The natural father has a number of statutory rights regarding his child. He has a defeasible statutory right under section 6A of the Guardianship of Infants Act 1964 (which was inserted by section 12 of the Status of Children Act 1987) to apply to the Court to be appointed guardian of his child. In *W.O'R. v. E.H.* (1996), the Supreme Court endorsed the finding of the Court in *J.K. v. V.W.*, and held that the rights of interest or concern that existed between a natural father and his child were matters that could be taken into account in determining the welfare of the children when the father applied for guardianship, custody of or access to the children. Under section 4 of the Children Act 1997 the natural father may now become guardian by agreement with the mother. The Adoption Act 1998 provides that in certain circumstances the natural father must be consulted and afforded the opportunity of applying to the Court to be appointed guardian of his child. The natural father, who has not become guardian by Court order or agreement with the mother, may apply under section 10 of the Adoption Act 1991 to adopt his own child.

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The position of a sperm donor father and the child conceived and born with his sperm was considered by the Supreme Court in *McD v. L and Anor* 2009. While the father 'is no less the biological father of the child by reason of being a sperm donor', he has, as a non-marital father, no constitutional right to guardianship or custody. He has the status of a father under the 1964 Act, as amended. He has the legal right to apply to the Court to be appointed guardian. It is for the Court to exercise its discretion in all the circumstances of the case, with the welfare of the child as its first and paramount consideration. However, in the context of the assessment of rights of interest and concern that might exist between father and child, it seemed likely that in any application to a Court for guardianship, the sperm donor 'would be placed quite low, certainly by comparison with the natural father in a long-term relationship approximating to a family'. As regards the position of a sperm donor under Article 8 of the European Convention on Human Rights, the Court referred to a decision of the European Commission in *JRM v. The Netherlands* 1992, to the effect that the donation of sperm only 'to enable a woman to become pregnant through artificial insemination does not of itself give the donor a right to respect for family life with the child'.

The father in the *McD.* case entered into an agreement with the mother and her lesbian partner that purported to govern the role and relationship which he, as sperm donor, would have with the child. It was agreed that the lesbian couple would have full care and custody of the child, effectively as if both were in the position of parents. They were to be the child's parents, fully responsible for his upbringing. The father's role was to be that of a 'favourite uncle' and he agreed that he would not have any responsibility for the child's upbringing. Of course, any such agreement which in effect 'seeks to control the development of any relationship between the child and his father' by making it absolutely dependant on the discretion of the mother and her partner is not legally enforceable under Irish law. Nevertheless, the Court deemed it relevant insofar as it showed the intent of the parties at the time. While the agreement is not enforceable, it may be a factor to consider insofar as it reflects the best interests of the child. 'A settled and non-contentious scheme of caring for a child, when the parents do not live together, is an important factor.' However, the relationship between the father and the child must ultimately be dictated by the best interests of the child.

### ***Natural Mother and Child***

The position of the unmarried mother in relation to her child was considered by the Supreme Court in *G. v. An Bord Uchtála* (1980). In his judgment O'Higgins CJ said that the mother, who had sought the return of her child, whom she had placed for adoption, 'is not the mother of a family, in the sense in which that term is used in the Constitution', but acknowledged that she 'is a mother and, as such, she has rights which derive from the fact of motherhood and from nature itself'. The Chief Justice identified these rights as among her personal rights under

Article 40.3.1 which the State is bound to respect, defend and vindicate, and acknowledged that the mother 'had a natural right to the custody of her child who was an infant'. Section 6(4) of the Guardianship of Infants Act 1964, as amended, provides that the mother of a non-marital child is its sole guardian, while section 10(2)(a) of the Act confirms her right to custody of her child.

The unmarried mother has a constitutional right to privacy, such a right being identified in *Kennedy v. Ireland* (1987) as one of the fundamental rights of the citizen. However, the right to privacy is not unqualified. Its exercise may be restricted by the constitutional rights of others and by the requirements of the common good. The right of a natural mother to privacy and confidentiality in circumstances where she gives her child to a voluntary agency for placement with foster parents, on the understanding that her identity would be kept confidential, was recognised by the Supreme Court in *I.O'T. v. B.* (1998). The natural mother has a number of legal rights, most notably the right to consent, or withhold consent, to adoption. As will be seen, her consent can only be dispensed with by order of the High Court in the best interests of the child.

### ***Non-Marital Children***

The child of parents who have not married is not regarded as a member of a family under Article 41 of the Constitution and his father and mother are not regarded as 'parents'. However, such a child has a natural right to support from his mother under Article 40, as well as a guarantee as to his other personal rights, both specified and unspecified. These rights include the right to life, to be reared and educated, to liberty, to work, to rest and recreation, to the practice of religion, and freedom of conscience. Although it was established in *Nicolaou* that a natural father does not have any natural right to the custody of his child, Walsh J in his judgment in that case said that a non-marital child 'has a natural right to look to his father for support'. The courts have emphasised on many occasions that children born outside marriage and children born to married parents have equal constitutional rights. Section 3 of the Status of Children Act 1987 established the principle of equal legal rights for all children whether born within or outside marriage. In *G. v. An Bord Uchtála* (1980), Walsh J said that the child born out of wedlock had 'the natural right to have its welfare and health guarded no less well than that of a child born in lawful wedlock'. In the same case, O'Higgins CJ referred to the obligation imposed on the State under Article 42.5 to provide for a child born into a family where the parents fail in their duty towards that child for physical or moral reasons, and stated:

In the same way, in special circumstances the State may have an equal obligation in relation to a child born outside the family to protect that child, even against its mother, if her natural rights are used in such a way as to endanger the health or life of the child or to deprive him of his rights.

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In my view this obligation stems from the provisions of Article 40.3 of the Constitution.

That the non-marital child has the same 'natural and imprescriptible' rights to education under Article 42 as a child born in wedlock is evident from the judgment of Gavan Duffy P *In Re M. an Infant* (1946) where he stated:

Under Irish law, while I do not think that the constitutional guarantee for the family (Art. 41 of the Constitution) avails the mother of an illegitimate child, I regard the innocent little girl as having the same 'natural and imprescriptible rights' (under Art. 42) as a child born in wedlock to religious and moral, intellectual, physical and social education, and her care and upbringing during her coming, formative years must be the decisive consideration in our judgment.

The status of a child conceived from an artificial insemination procedure and born into a same-sex relationship has not been defined for the purposes of Irish law. Unlike children of heterosexual couples, Irish law does not recognise the birth mother's same-sex partner as a parent of the child, even though the partner has agreed to the birth mother having the procedure and to acting as a parent to the child. Children being raised in these situations are consequently excluded from the protection and legal obligations of their non-biological parent towards them in terms of inheritance, maintenance and other benefits. In *McD v. L and Anor* 2009 the Supreme Court decided not to examine in any detail the relationship between the lesbian couple who were raising a child born to one of them as a result of sperm donated by the father. The Court decided that the key relationship was that between the child and its birth mother. The Court made it clear that the mother's partner had 'no legally or constitutionally recognisable family relationship with the child'. While the mother's partner had no specific rights, her position in the child's life was one of the factors to be taken into account in considering the best interests of the child. The relationship between the couple and the child was also a factor to be taken into account when considering the child's welfare. When the case was before the Supreme Court on a previous occasion in interlocutory proceedings to prevent the couple from removing the child from the jurisdiction (*McD. v. L.* 2007), Fennelly J said that it was important to identify the 'radically different legal and constitutional positions' of the man and the child's mother. The mother's female partner was 'outside those considerations', as she had only such rights as arose from the mother's interest in her child. As a person in a same-sex union with the mother, and having no natural relationship with the child, she appeared to the learned judge to have only such rights as arose from the mother's interests in relation to her child.

In *I.O'T. v. B.* (1998) (see above), the Supreme Court held that a person has an unenumerated right by virtue of the provisions of Article 40.3.1 of the Constitution to know the identity of his natural mother. In the words of Hamilton CJ such a right 'is a basic right flowing from the natural and special relationship which exists between a mother and her child . . .' It is not an absolute or unqualified right, and its exercise may be restricted by the constitutional rights of others and by the requirements of the common good. Its exercise is restricted in the case of children who have been lawfully adopted under adoption legislation. In addition, the constitutional right to know the identity of one's natural mother may be restricted by the constitutional right to privacy and confidentiality of the natural mother who, as in the present case, gave her child to the society for placement with foster parents on the understanding that her identity would be kept confidential and would not be disclosed without her express consent. Where there is a conflict between the constitutional rights of a child and its natural mother, the Court must attempt to harmonise such rights having regard to the provisions of the Constitution. If the Court cannot harmonise those conflicting rights, it has to determine which right is superior having regard to all the circumstances of the case. In reaching its decision, the Court should consider, *inter alia*, the circumstances giving rise to the natural mother relinquishing custody of her child, the present circumstances of the natural mother and the effect thereon (if any) of the disclosure of her identity to the child, the attitude of the natural mother to the disclosure, the respective ages of the natural mother and her child, the reasons why the child wants to know the identity of the natural mother and to meet her, the present circumstances of the child, and the views of the foster parents, if alive.

### ***Limited Legal Recognition for Extra-Marital Relationships***

An increasing number of couples choose to live together and have children outside marriage. While such extra-marital relationships do not qualify for constitutional recognition, increasingly, as a matter of policy, the law has had to recognise that it would be unfair to treat a cohabiting couple as though they were strangers to each other. As a result, some of the benefits and obligations of matrimony have been extended to them. For example, a party to a *de facto* marriage may, in certain specified circumstances, invoke the protection of the Domestic Violence Act 1996, and child benefit is payable to an unmarried mother on the same conditions under which payment is made to a married parent. On the other hand, a party to a *de facto* marriage may not claim an interest in property under section 36 of the Family Law Act 1995. The Family Home Protection Act 1976, which prevents a spouse disposing of an interest in the family home without the prior written consent of the other spouse, cannot be invoked by cohabitantes.

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The benefits and obligations of matrimony, which have been extended to cohabiting couples by various statutes, are largely confined to unmarried heterosexual couples. In this regard, it is significant that the Social Welfare (Miscellaneous Provisions) Act 2004 provides that only a spouse, within the meaning of the Social Welfare (Consolidation) Act 1993, shall be entitled to receive benefits, such as free travel and fuel allowance, as a partner of a recipient. The term 'spouse' is defined in the 1993 Act as a married couple who are living together, or a man and woman who are not married to each other but are cohabiting as husband and wife. The Residential Tenancies Act 2004, in describing family members as spouses, children, and unmarried partners who cohabited with the tenant 'as husband and wife' in the dwelling for six months preceding the death of the tenant, excludes same-sex couples from its security of tenure provisions. Other examples of legislation favouring cohabitants living in heterosexual relationships are the Civil Liability (Amendment) Act 1996, the Non-Fatal Offences Against the Person Act 1997 and the Parental Leave Act 1998.

This difference in treatment, based on the sexual orientation of cohabiting couples, may amount to discrimination for the purposes of the European Convention on Human Rights. There must be weighty justification for any difference in treatment to be justified under Article 14 of the Convention. In *Karner v. Austria* (2003), the European Court of Human Rights held that a man was entitled to succeed to a tenancy after the death of his male partner, as he would have been so entitled if his partner had been female. By differentiating between heterosexual and same-sex couples, Austria was in breach of Articles 8 and 14 of the Convention. Subsequently, in *Ghaidan v. Godin-Mendoza* (2004) the House of Lords held that the Rent Act 1977 should be read so that it embraces couples living together in a close and stable homosexual relationship as much as couples living together in a close and stable heterosexual relationship. Any difference in treatment of cohabiting heterosexual and same-sex couples, for the purposes of succession to a tenancy under the 1977 Act, could not be justified under the Convention. In *E.B. v. France* 2008 the Court of Human Rights held that the treatment of a lesbian whose application to adopt a child had been turned down by the domestic authorities amounted to discrimination, contrary to Article 14 of the Convention (see Chapter 13).

# THE STATUS OF CHILDREN

## Position at Common Law

The legal effect of the relationship between parent and child is sometimes dependent upon whether the child was born to married or unmarried parents. Historically, the common law discriminated against the child born outside marriage (the 'illegitimate' child), particularly in the areas of succession and maintenance. A child born to unmarried parents had no rights against his father and, to begin with, no rights even against his mother. The 'illegitimate' child was regarded in law as *a filius nullius* (nobody's child). This treatment of the non-marital child was justified on the basis that to afford equal treatment to children born inside and outside marriage might be seen to promote promiscuity. The discrimination against the 'illegitimate' child was gradually eliminated by statutory intervention. For example, the Legitimacy Act 1931 conferred limited rights of succession on a non-marital child on the death intestate of his mother. By section 9 of that Act, where the mother of a non-marital child died intestate and was not survived by any marital children, the non-marital child would take any interest to which he would have been entitled had he been a marital child. However, in the areas of succession and maintenance, the unequal treatment of children depending on the marital status of their parents continued right up to the coming into force of the Status of Children Act 1987.

The main purpose of the 1987 Act was to equalise the rights of children and amend the law relating to their status. The Act abolished the concept of illegitimacy and established the principle of equal treatment of all children, whether born to married parents or not. We now refer to children who were formerly regarded as illegitimate as 'children whose parents have not married each other'. As this description is somewhat cumbersome, such children are referred to elsewhere in this text as non-marital. Whereas it should no longer be necessary to distinguish between marital and non-marital children, in practice it is sometimes necessary to so distinguish. It is mainly in the context of a father's rights to his child that some differences remain. In particular, the law on adoption distinguishes between children born within and outside marriage. The father of a non-marital child does not automatically become his joint guardian with the mother although, as will be seen later on, he has a defeasible right to apply to court to be appointed guardian and may become guardian by agreement of the mother.



## **New Rule Of Construction**

Section 3 of the 1987 Act provides that for the purposes of the Act and all subsequent legislation, whenever a relationship between two persons is referred to, it will be traceable through both the father and mother regardless of whether or not they have married each other, unless a contrary intention appears. An adopted person's relationship shall be traced through his adopted parents from the date of the adoption order. This new rule of construction means that children born to unmarried parents will no longer have to be included expressly in a provision. If it is deemed necessary to distinguish between marital and non-marital children in any document or instrument having legal effect, then the person drafting the particular document or instrument will have to expressly designate which category of children is excluded.

The practical application of the new rule can best be seen in the area of succession. The old rule of construction meant that any reference to children in a will or other legal document meant only children born within marriage, unless it was expressly stated otherwise. One practical consequence of this rule was that section 117 of the Succession Act 1965, which enables the High Court to make provision for a child where a parent has failed in a 'moral duty to make proper provision for the child in accordance with his means', was not available to a child whose parents were not married to one another. Since the coming into force of the 1987 Act, the discrimination which previously existed against children born outside marriage has been completely abolished, and any reference to children or issue will include children born outside marriage, unless expressly stated to the contrary. In the area of succession, this means that on the death intestate of either parent, all children are treated equally for succession purposes, and the facility available to children under section 117 of the 1965 Act is now available to all children regardless of their status.

## **Legitimacy**

At common law, there was a rebuttable presumption that a child conceived or born to parents who were validly married to each other, was legitimate. The burden of proving that such a child was illegitimate was a heavy one, i.e. proof beyond a reasonable doubt as in criminal cases. Section 44 of the 1987 Act provides that any presumption of law as to legitimacy or illegitimacy has been abrogated. However, certain presumptions of paternity and non-paternity are contained in section 46 of the 1987 Act, as follows:

- (a) where a woman gives birth to a child during a subsisting marriage to which she is a party, or within ten months of the termination of such a marriage by death or otherwise, the husband of the marriage shall be presumed to be the father of the child unless the contrary is proved on the balance of probabilities;

- (b) in the case of a married woman who is living apart from her husband under a decree of judicial separation or a separation deed, where any child is born to her more than ten months after the decree was granted or the deed was executed, her husband shall be presumed not to be the father of the child unless the contrary is proved on the balance of probabilities;
- (c) despite the presumption at (a) above, where the birth of a child is duly registered and the name of a person is entered as father of the child in the register, the person whose name is so entered shall be presumed to be the father of the child unless the contrary is proved on the balance of probabilities.

It is to be welcomed that the standard of proof 'beyond reasonable doubt', which was the norm at common law, has now been replaced by the balance of probability rule, which is the normal standard required in civil proceedings generally.

The rule in *Russell v. Russell* (1924), which prevented a married couple from giving evidence that they did not have access to each other at the time of conception for the purpose of proving that a child born during their marriage was illegitimate, has been abolished by section 47 of the 1987 Act, which provides that 'the evidence of a husband or wife shall be admissible in any proceedings to prove that marital intercourse did or did not take place between them during any period'.

### **Determination and Declarations of Parentage**

The determination of parenthood may be important for many reasons. Motherhood is rarely an issue. However, paternity frequently has to be determined and, unless it is admitted, it must be proved. The question of paternity generally arises in the context of matrimonial, guardianship or maintenance proceedings, or sometimes in disputes over wills.

The blood link, as a matter of almost universal experience, exerts a powerful influence on people. In *McD. v. L. and Anor* 2009 the Supreme Court acknowledged the importance of the blood link between a sperm donor father and the child born with his sperm. In declaring that the father was entitled to access to the child, the Court accepted the views of the psychiatrists in the case who were in agreement that from the point of view of the child, in the absence of compelling reasons to the contrary, 'a child should normally have knowledge, as part of the formation of his or her identity, of both parents'. The right to know the identity of one's parents has been identified by the European Court of Human Rights in cases such as *Mikulić v. Croatia* 2002, below. However, such a right is not an absolute one. In *S.H. v. Austria* 2010 the Austrian Government argued that permitting ova and sperm donation for *in vitro* fertilisation would run counter to the legitimate interest that children had in being informed about their actual

descent. With donated sperm and ova, it would be impossible in most cases to trace descent, as the actual parentage of a child would not be revealed in the births, marriages and deaths register. However, the Court held that it should be possible for the Austrian legislature to find 'an appropriate and properly balanced solution' between the competing interests of donors requesting anonymity and any legitimate interest of a child in obtaining information about his descent. With a view to reinforcing the right of a child to know his parents, one of the recommendations in the Law Reform Commission's *Report on Family Relationships* (2010) is that there should be automatic joint registration of both parents on a birth certificate.

Medical and scientific developments in assisted human reproduction have raised serious issues in relation to the determination of parentage. The widening of the frontiers of human existence, by the use of assisted reproduction technologies, has raised new questions about how the legal relationships that result from their use is to be identified. As a result of these developments, a person who is the natural parent of a child might not be a legal parent. For example, under the English Human Fertilisation and Embryology Act 1990, the anonymous donor who donates his sperm or her eggs is the natural progenitor of the child, but not his legal parent. The husband of a mother who gives birth as a result of donor insemination is for virtually all purposes a legal parent, but may not be any kind of natural parent.

In the absence of legislation regulating assisted human reproduction in this country, Courts here are likely to rely on precedents from other jurisdictions where reproduction technologies are used to determine parentage. As the determination of parentage comes within the scope of Article 8 of the European Convention on Human Rights, which guarantees respect for private and family life, Irish Courts will be guided by the case law of the European Court of Human Rights in the matter. In *Mikulić v. Croatia* (2002) the Court held that there was a direct link between the establishment of paternity and the applicant's private life. In *M. v. Netherlands* (1993) the Court held that the biological link between a sperm donor and a child born to a lesbian couple was insufficient to found a claim to family life under Article 8. For a more detailed consideration of the issue of assisted human reproduction, see page 283.

Paternity can be established in a number of different ways. A man may formally acknowledge that he is the father of a particular child, or may be registered as the father in the Register of Births. There is a rebuttable presumption that a child born to a married woman is that of her husband. In *EP v Judge Thomas Ballagh* (1999) Smith J said that where a child is born to a married woman, her husband is presumed to be the father of the child until a successful application is made to the Circuit Court pursuant to section 35 of the 1987 Act. Evidence of paternity may consist of proof that a couple were cohabiting at the time of conception, as in *G.N. v. K.K.* (1998), where corroborative evidence by a third party that the

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mother and putative father of a child slept together in the same bed at the time the child was conceived, was regarded by the Court as significant in establishing paternity. However, none of these factors is conclusive and may or may not be accepted in any given case. Blood testing is now commonly used in determining paternity. The advent of 'DNA fingerprinting' has made a significant contribution to blood testing as a reliable method of establishing paternity.

In the course of custody and access proceedings in *M.D. v. G.D.* (1992), the wife alleged that her husband was not the father of her child. The husband submitted that the fact that the wife could have raised the matter at the commencement of the proceedings, or at a later stage, rendered the issue of paternity *res judicata* (an adjudicated issue that cannot be re-litigated). Alternatively, by virtue of the fact that she had entered a separation agreement and issued maintenance proceedings in relation to the child, she was *estopped* from raising the issue of paternity. In rejecting the husband's submissions, the High Court held that, because the presumption of paternity under section 46 of the 1987 Act is not irrebuttable, the evidence relating to blood tests was admissible. When the issue of paternity is at stake in any particular case, the Court must ensure that the truth shall prevail. 'If the husband is not the father of his wife's child, that is a truth which should be established.'

The question of paternity can also be dealt with as an issue in its own right. Section 35 of the 1987 Act enables a person, other than an adopted person, to apply to the Circuit Court for a declaration that a person named in the application is his father or mother, as the case may be, or that both the persons named therein are his parents. An application may be made under section 35 even though the person named in the application as the father or mother is not alive. The Court will make the appropriate declaration where the application is proved on the balance of probabilities.

In *I.O'T. v. B.* (1998) the Supreme Court held that the right conferred on a person (other than an adopted person) under section 35 was clear, explicit and limited. It was the right to apply to the court for a declaration that 'a person named in the application' is his father or mother. In delivering his judgment Hamilton CJ stated, 'The right is a limited right to be exercised against a named person. The section cannot be interpreted to include a right to a declaration against an unnamed person, or to a right to be informed as to the identity of his/her natural parents'. The Chief Justice referred to the judgment of Keane J in the case where he stated, 'The Oireachtas has erected a barrier to the obtaining of a declaration under section 35, where the applicant cannot identify the putative parent or parents in respect of whom the declaration was sought'.

Part VII of the 1987 Act provides for the carrying out of blood tests in any civil proceedings where parentage is in question. Section 38 enables the Court to order blood tests of its own motion or on the application of any party to the proceedings. The Court may, at any time, revoke or vary a direction previously

given by it under the section. Consent to the taking of blood samples is required under section 39.

Section 40 provides that any blood samples taken to give effect to a direction of the Court under section 38 of the Act shall be tested under the control of such person as agreed by the parties to the proceedings, or in the absence of agreement, under the control of a person directed by the Court. The Blood Tests (Parentage) Regulations 1988 (S.I. No. 215/1988), made in exercise of powers vested in the Minister under section 41 of the 1987 Act, regulate the taking, identification and transport of blood samples.

Generally, a blood sample may only be taken from a minor if the person having charge of or control over the minor consents. If more than one person has charge of or control over the minor and they cannot agree as to whether consent should be given, the minor shall be treated as not having consented. Where the Court considers that a person who is not of full age is capable of giving or refusing the necessary consent, it may accept that person's consent or refusal directly. Where a person is suffering from a mental disorder and cannot validly consent, the person who has care and control may consent to a blood test on his behalf. The patient's doctor must certify that the taking of the sample will not prejudice his care or treatment. Failure to comply with a direction on blood tests enables the court to draw such inferences, if any, from that fact as appear proper in the circumstances – section 42.

In *J.P.D. v. M.G.* (1991), a case involving a custody dispute between parents under the Guardianship of Infants Act 1964, the wife claimed that the husband was not the father of her two children, even though they were born at a time when the parties were lawfully married. In the course of the proceedings, the wife sought an order pursuant to section 38 that both the children and herself and the husband submit to genetic fingerprinting (DNA testing). The High Court made the order and the husband appealed to the Supreme Court. McCarthy J, in delivering the judgment of the Court, stated that judicial discretion was required to be exercised in considering matters touching on the welfare of children whose parentage is in question. He held that the trial judge had considered all the relevant matters and that his discretion was properly exercised.

In *G.N. v. K.K.* (1998) the plaintiff sought a declaration under section 35 of the 1987 Act that P.K., a party named in the proceedings, was his father. As P.K. was no longer alive, the Court directed that blood samples be taken from the defendant, who was a brother of P.K. Despite the fact that the procedure was to be at the expense of the plaintiff, the defendant refused to consent to the taking of a blood sample. In the absence of the cold scientific evidence of DNA profiling and comparisons, the Court proceeded with the taking of evidence. The plaintiff's mother gave evidence of her relationship with P.K. and the circumstances which led to the conception and birth of the plaintiff. There was ample corroborative evidence from a number of people who knew P.K. and the plaintiff's mother.

The Court was particularly impressed by the evidence of E.O., a sister-in-law of the plaintiff's mother, who stated in evidence that P.K. and the plaintiff's mother were often together in her house where they stayed overnight in the one bed in her guestroom. This was around the time the mother became pregnant in April 1974. E.O. further stated that she had known that P.K. was the father of the plaintiff, as he was the only person with whom the mother was going out. There was evidence from P.W., a brother-in-law of the plaintiff's mother, that he had helped her to cash a cheque for £600 she had received from P.K. after the plaintiff's birth. The Court was satisfied on the balance of probabilities that P.K. was the plaintiff's father and made a declaration accordingly.

Counsel for the defendant had submitted in *G.N. v. K.K.* that section 35 of the 1987 Act did not apply as it did not have retrospective effect, since the Act had not come into effect until 14 June 1988 and the putative father had died on 21 November 1987. Budd J rejected this contention, stating that taking past events into account did not amount to applying legislation retrospectively. It is worth noting that Budd J gave consideration to the making of an exhumation order for the purpose of obtaining a tissue sample from the putative father. However, he deemed such a course unnecessary, since the mother and brother of the putative father were alive. The learned judge noted that exhumation orders had been made for the purpose of obtaining samples in a Northern Ireland case.

## **Assisted Human Reproduction**

Assisted human reproduction is a positive development in reproductive medicine. It offers the possibility of parenthood to infertile people. There are various assisted reproduction technologies, including *in vitro* fertilisation (IVF treatment), sperm and egg donation, embryo donation, artificial insemination and surrogacy. In the absence of legislation governing human infertility treatment in this country, the only regulation of the practice is the code of ethics of the Medical Council, which does permit *in vitro* fertilisation and various techniques associated with it. The code allows for the donation of embryos, but does not permit any experimentation on embryos.

The Report of the Commission on Assisted Human Reproduction 2005 recommended the establishment of a regulatory body to regulate assisted human reproduction in the State, register clinics offering assisted reproductive services and lay down guidelines for the regulation of these services. These guidelines should cover the storage and freezing of human sperm, ova and embryos. The Report emphasises the importance of providing adequate factual information before treatment, to ensure that patients fully understand the treatment options available to them. Counselling should also be available from appropriately qualified counsellors before, during and after treatment. The full and free consent of patients should be obtained before a service provider commences treatment. Significantly, in the context of a regulatory framework being put in place, the

Commission suggested that the embryo should not attract legal protection guaranteed to the unborn until implantation in the mother's womb.

In *Roche v. Roche* 2009 the Supreme Court held that three frozen embryos were not 'unborn' for the purposes of Article 40.3.3 of the Constitution and therefore were not entitled to constitutional protection. The word 'unborn' in Article 40 referred to a child within the womb and not pre-implantation embryos. It was not the function of the Courts to address the issue of when human life begins. This was a matter for the legislature or the people in a referendum. Indeed, the Court was of the view that the failure of the legislature to address the matter in legislation was 'arguably contrary to the spirit of the Constitution'. Interestingly, the Court pointed out that the fact that the embryos in this case did not attract constitutional protection did not mean they should not be treated with respect as entities having the potential to become a life in being. The case involved an attempt by a wife, who was separated from her husband, to have frozen embryos implanted in her womb against the wishes of her estranged husband. The embryos were created after the couple had embarked on a course of fertility treatment resulting in the birth of a child. Three embryos not required for the treatment were frozen. The Court was satisfied that the consent of the husband to the IVF treatment and to the freezing of embryos was not an agreement to the implantation, years later, of the surplus frozen embryos. There was no agreement, express or implied, between the wife and the husband as to the use of the surplus embryos. Even if there was an agreement, such an agreement 'would not be irrevocable'. Furthermore, in the particular circumstances of the case, the equitable principle of *estoppel* did not apply to prevent the husband from refusing to give his consent to the implantation of the frozen embryos.

In a European context, there is no consensus on the scientific and legal definition of the beginning of life. In *Vo v. France* 2004 the European Court of Human Rights said that in the absence of such consensus, the issue of when the right to life begins was a question to be decided at national level. At the date of the judgment, the nature and legal status of the embryo and/or the foetus were not defined in France (see also *A., B. and C. v. Ireland* 2010). In *Evans v. United Kingdom* (2006), the facts of which resemble the *Roche* case, the European Court of Human Rights held that the applicant's right to family life under Article 8 of the Convention could not override her ex-partner's withdrawal of consent. The Court stated that embryos have no independent right to life under Article 2 of the Convention, and that each Contracting State has the right to define when it considers life to begin. A subsequent appeal by the applicant to the Grand Chamber of the Court was unsuccessful – see *Evans v United Kingdom* 2007.

### **Surrogacy**

Surrogacy is the process whereby a woman agrees to be artificially inseminated or to have an embryo transferred to her womb in order to become pregnant.

She then carries the child to term with the intention of giving the custody of the child to the person/couple with whom she has made the agreement. In the typical surrogate arrangement, a surrogate mother carries a child for another person or other persons in pursuance of an arrangement made before she began to carry the child and made with a view to any child carried in pursuance of the arrangement being handed over to the other person(s). Surrogacy may be full, involving both egg and sperm donation by the commissioning parents and IVE; or partial, where the surrogate is fertilised with the commissioning father's sperm, which is the more common method. Surrogacy has no legal basis in Irish law. It is neither legal nor illegal. It is a grey area without any legal rules or guidelines. The surrogate (birth) mother would be viewed as the mother of the child and her name will appear on the birth certificate. To make matters more complicated, if the surrogate (birth) mother is married, then her husband is presumed to be the father of the child. The donor(s) on whose behalf the surrogacy was carried out would thus have to legally adopt the child in order to raise it as their own. The citizenship of a surrogate child born outside the State may also prove problematic. *The Report of the Commission on Assisted Human Reproduction* (2005) recommended that surrogacy should be permitted and should be subject to regulation by a regulatory body.

In the UK, the practice of surrogacy is regulated by the Surrogacy Arrangements Act 1985, as amended by the Human Fertilisation and Embryology Acts 1990 and 2008. Amongst the guiding principles underpinning the legislation is the rule that no money or other benefit (other than expenses reasonably incurred) may be paid to the surrogate. Negotiating a surrogacy arrangement on a commercial basis is a criminal offence. Where a mother changes her mind and decides to keep the child, thereby reneging on the surrogacy agreement, the Court must resolve the dispute between the mother and the persons she has agreed to carry the child for on the basis of the welfare of the child. In *Re P (Surrogacy: Residence)* 2008 the Court of Appeal applied the principle that the test when choosing between two competing residential parental regimes was in which home was the child most likely to mature into a happy and balanced adult and to achieve his fullest potential as a human. In *C.W. v. N.T. and Anor* 2011 the mother became pregnant by Mr W. and received several thousand pounds from Mr and Mrs W. During the pregnancy, however, she changed her mind and at the child's birth she refused to hand over the baby as agreed. Having considered the evidence of the parties and the guardian, the Court concluded, on balance, that the child's welfare required her to remain with her mother. The Court was satisfied that there was 'a clear attachment between mother and daughter'. To remove her from her mother's care would cause a measure of harm. The Court found the mother to be better able to meet the child's needs, in particular her emotional needs, and was satisfied that the mother would foster contact and a close relationship between the child and her father. The Court was less confident



that Mr and Mrs W. would respect the relationship between the child and her mother were they to be granted residence. As regards the conduct of the mother as a factor relevant to deciding the welfare issue, the Court did not believe that she entered the surrogacy arrangement with the fixed intention of keeping the baby and accepted her evidence that she changed her mind about this matter during the course of the pregnancy.

## **Legitimation**

Section 1 of the Legitimacy Act 1931 provides that a non-marital child is legitimated by his parent's subsequent marriage, provided the father is domiciled in Ireland at the time of the marriage. If at the time of the marriage the father was domiciled abroad, it must be shown that the law of the father's domicile recognised the legitimation – section 8 of the 1931 Act. Section 8 of the Status of Children Act 1987 has removed the requirement in section 1(2) of the 1931 Act that had made it a condition of legitimation that the father and mother could have been lawfully married to each other at the time of the birth of the child or at some time during the previous ten months. It should be noted, however, that where the mother of a non-marital child marries a man other than the child's father, her husband has no rights or duties towards the child. The natural mother and her husband could apply to adopt the child, subject to the requirement that the natural father be consulted under the Adoption Act 1998, and his consent obtained where he had been appointed a guardian either by agreement with the mother under the Children Act 1997 or by order of the court under the 1987 Act.

Legitimation has the effect of placing the legitimated child in much the same position as a marital child. It was held by the Supreme Court in *K.C. and A.C. v. An Bord Uchtála* (1985), a case considered in more detail in Chapter 17, that a child legitimated by the subsequent marriage of its natural parents is to be regarded as the child of a family for the purposes of Articles 41 and 42 of the Constitution. In *Re J.* (1966) Henchy J, describing the status of a child legitimated by his parents' subsequent marriage, stated:

I find it impossible to distinguish between the constitutional position of a child whose legitimacy stems from the fact that he was born the day after his parents were married, and that of a child whose legitimacy stems from the fact that his parents were married the day after he was born.

He expressed himself satisfied that section 1 of the 1931 Act operated to endow the child in the case with membership of a family founded on the institution of marriage.

## **Registering the Birth**

The Civil Registration Act 2004 now regulates the registration of births. Section 19 of the Act provides that the parent(s) of a newborn child must, within three months of the birth, attend in person before a Registrar of Births to register the birth. The parent(s) must give particulars of the birth to the Registrar and sign the Register in his presence. The registration may be carried out at a birth registration office anywhere in the country, and not necessarily in the district where the birth took place. Where the parent(s) fail to register the birth, a 'qualified informant', who may be a guardian of the child, a person present at the birth, or the hospital or other institution where the birth took place, can register the birth.

If the parents are not married to each other, the father's name will not appear on the child's birth certificate. Where both parents want the father's name registered, section 22 of the 2004 Act provides the following procedure for doing so:

- both parents may go to the Registrar's office and jointly request him to do so in writing, and give to him a declaration in writing of the father acknowledging his paternity; or
- the mother alone may go to the Registrar's office and request him to do so in writing, and give him a declaration made by her in writing acknowledging the paternity of the father, and a statutory declaration of the father acknowledging his paternity; or
- the father alone may go to the Registrar's office and request him to do so in writing, and give him a declaration in writing that he is the father of the child, and a statutory declaration of the mother acknowledging the paternity of the father; or
- the mother or the father may go to the Registrar's office and request him to do so in writing, and produce to him a certified copy of a court order in which the father is named as father of the child, e.g., an order appointing him guardian, or a maintenance order made against him.

## **Re-Registering the Birth**

Section 24 of the Civil Registration Act 2004 provides for the re-registration of a legitimated person whose birth is already registered. It is the duty of the parents of a legitimated person, within three months of the date of their marriage, to furnish to the Registrar concerned the necessary information with a view to obtaining the re-registration of the birth of that person. Should the parents fail to re-register the birth, the Registrar may, by notice in writing, require them to furnish such information as may be necessary for the purpose of the re-registration. The failure of the parents to re-register the birth of a legitimated person will not affect his legitimation.