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Out of the shadow of the Constitution: civil partnership, cohabitation and the constitutional family

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Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (Ireland)

**Irish Jurist 201* “A family: two or more persons who share resources, share responsibility for decisions, share values and goals, and have commitment to one another over a period of time. The family is that climate that ‘one comes home to’ and it is that network of sharing and commitment that most accurately describes the family regardless of blood, legal ties, adoption or marriage.”

Bivens, G. et al., “Home Economics: New Directions II”

(1975) 67 *Journal of Home Economics* 26-27.

“There is no institution in Ireland of a *de facto* family.”

Denham J., *JMcD v PL and BM* [2010] 2 I.R. 199 at 270.

Families by their very nature do not easily lend themselves to legal regulation. The very idea that family formation can be marshalled by the law is itself highly problematic. Families are intrinsically organic and dynamic entities, expanding and contracting over time, founded on, enriched by and in some cases destroyed by emotions and sentiments that escape legal regulation and confinement.¹ Nevertheless, our forebears saw fit to deal with the family in no less elevated a legal format than the Constitution of Ireland 1937. Although acknowledging the family as the “natural ... unit group of society” and “as a moral institution ... antecedent and superior to positive law”,² the Constitution is nonetheless quite prescriptive in what it does and does not recognise as a family for constitutional purposes. The only family that is constitutionally recognised is that which is predicated on the existence of a legally sanctioned union--namely marriage.³ The courts have consistently maintained that the family envisaged and protected by Art.41 of the Constitution is thus confined and that, outside the frame of marriage, Arts 41 and 42 do not recognise family life.⁴ Initially this prescriptive stance was further complicated by a **Irish Jurist 202* constitutional ban on the dissolution of a marriage, a stance that effectively conferred a “mandatory life sentence” for marriage. While this ban has since been removed,⁵ the net effect of Art.41 is that a sizeable minority of families are not afforded the status of family under the supreme law of the land.

The purpose of this article is to examine the extent to which these prescriptive constitutional tendencies remain realistic in light of increased family diversity and the popularity of new family forms. This question is all the more pertinent given the recent introduction of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (the “2010 Act”).⁶ In January 2011, this Act came into force, creating three new legally recognised statuses--civil partnership, cohabitation and qualified cohabitation. These new legal concepts reflect the growing prevalence of new family forms based outside marriage, and a legislative concern--despite constitutional limitations--to regularise the legal situation of non-marital couples, in particular of same-sex couples.

The outcome is that both social trends and legislative developments are outpacing the Constitution, pushing well beyond the boundaries of the prescriptive notion of “family” posited therein. As a result, the Constitution now seems increasingly out of step with social developments and legislative responses to these developments. Equally, one might say that recent legislative reforms may fray the boundaries of what is constitutionally permissible in terms of legal recognition of non-marital unions. Certainly, some care has been taken to ensure that these legislative responses remain sensitive to

constitutional restrictions--in particular by avoiding the label "family" for households that are not based on marriage. Nonetheless, the net effect is that, increasingly, domestic law is moving beyond the constitutional firewall that divides the "constitutional family" from units formerly regarded as irregular and "beyond the pale". The question posed here is whether these social and legal developments can proceed beyond the shadow of the constitutional provisions on the family without changes to the latter provisions.

MARRIAGE AND FAMILY DIVERSITY

The Constitution, in defining the family in restrictive terms, takes a firmly prescriptive approach to family formation.⁷ The implication of Art.41 is that, whether or not the ideal reflects the social reality for all families, the ideal of the family based on marriage is worth promoting. The view might be taken **Irish Jurist 203* that a society is entitled to promote this ideal, and to reward and encourage those who meet the ideal by according to the family based on marriage special privileges that do not attach to other unions and relationships.

It might be assumed that, in so doing, couples will be encouraged to marry rather than live together outside marriage. Nonetheless, efforts to contain the legal recognition of households outside marriage have not in fact served to curtail the formation of family units outside the context of the marital family. Cohabitation rates have risen significantly since the 1990s,⁸ with the number of cohabiting couples more than doubling between 1996 and 2002⁹ and increasing by 58 per cent between 2002 and 2006.¹⁰ The 2011 census enumerated 143,561 cohabiting couples, almost 42 per cent of whom had one or more resident children.¹¹ That said, the 2011 figure suggests that rates of cohabitation are levelling off. While higher in numerical terms than the 2006 statistic, the proportion of family units made up of cohabiting couples has remained broadly static since 2006, at 11.6 per cent of all family units in 2006 and 12.1 per cent of all family units in 2011 (though the proportion of cohabitants with children and the average number of resident children increased in the interim years).

Meanwhile, in the years since 1999 approximately one-third of children born each year have been born outside marriage. Many children live, moreover, in one-parent families.¹² While many of these families are the product of separation, divorce and widowhood, a sizeable proportion are headed by parents who were never married. The constitutional preference for marriage has not prevented the formation of these families. Indeed, despite the significant legal advantages attached to the married state, couples are opting in significant numbers to live together and to parent outside marriage.

Looking at these figures, one might be tempted to herald the demise of marriage, though in Ireland, at least, the narrative of marriage in decline is misleading. Marriage rates reached their zenith in the 1970s and have since tapered downwards,¹³ though marriage rates in Ireland remain among the highest in Europe, while Irish divorce rates are comparatively low by international standards. The 2011 census enumerated 820,334 households **Irish Jurist 204* containing married couples (with and without children), making up just under 70 per cent of all family units in the State. Notably the marriage rate (the number of marriages per year expressed per 1,000 of the population) in 2007 (5.2) was only marginally lower than the figure for 1950 (5.4). Marriage rates dipped in the mid to late 1990s (to 4.3 in 1995) but increased again in the 2000s with 2000-2008 figures averaging between 5 and 5.2 per 1000. The rates dipped again in 2009 (to 4.8) and 2010 (to 4.6), though this may reflect the current economic constraints that may lead to couples deferring nuptials, rather than an ideological swing away from marriage.¹⁴

Indeed, a deeper analysis of cohabitation patterns reveals that while some cohabitants choose not to marry in the long term, most envisage marriage at some point in time.¹⁵ This is supported by the fact that such couples, on average, are much younger than their married counterparts.¹⁶ Meanwhile, the average age at which couples marry has increased in recent decades.¹⁷ Many cohabitants, in other words, are on a "marriage trajectory", and while some cohabitants may split up before marriage, cohabitation is not generally entered into as a long-term rejection of marriage. Marriage, in the main, is being delayed rather than abandoned. As Lunn, Fahey and Hannan point out, "[m] ostly, cohabitation appears to be a prelude to marriage" though they caution that "the increase in cohabiting couples with children suggests that a minority of cohabitantes may prefer continued cohabitation".¹⁸ The campaign for same-sex marriage emphasises this point; far from eschewing marriage as the preferred model for family life, the campaign for equality of access to marriage arguably affirms the institution of marriage as a desirable entity for the sustenance of family life.

**Irish Jurist 205* That said, it cannot be denied that marriage is no longer the only model for the

formation of family life. The fact that 42 per cent of cohabiting couples enumerated in the 2011 census had co-resident children (and an increasing number have more than one child living with them) suggests that the model of family posited by the Constitution no longer tallies with the reality of family formation for many couples. While not rejecting marriage outright, couples increasingly see alternatives or preludes to marriage as both viable and socially acceptable. The ideological preference for marriage and the constitutional and legislative advantages attached to marriage have not prevented the growth in family diversity. As Claire Archbold has observed (in relation to Northern Ireland):

“Marriage is no longer the only, or even the preferred life choice for enormous numbers of people ... and if our legal system ignores these trends, it risks becoming irrelevant, and worse, providing no protection to people who may be in great need of it.”¹⁹

WHEN IS A “FAMILY” NOT A “FAMILY”?

The Constitution accords to the family very significant privileges and rights. Though they are not in fact absolute,²⁰ these rights are quite heavily entrenched, giving the family a strong degree of autonomy over its affairs.²¹ While the definition of the family to which it applies is restricted, the rights and privileges attaching to that family, once constitutionally recognised, are extensive. The zone of autonomy enjoyed by the constitutional family is, while not without limits, generously expansive. Particularly in relation to children, the Constitution leans heavily in favour of granting extensive prerogatives and privileges to the family based on marriage.²² While this approach has led to some legitimate concerns that the rights of children in such units may **Irish Jurist 206* be subordinated to the interests of parents,²³ the respect accorded to the family is overall to be commended. Claude Lévi-Strauss has pointed out that intermediating bodies--of which the family is possibly the most important--provide a significant bulwark against overbearing State power.²⁴ He suggests that the bond between citizen and State is imperfect and impersonal compared with the bond between individuals and families and other relatively small communities of interest. Charting the rise of the Nation-State in the late 1700s, he notes the suspicion that the rulers of this new order had of intermediating institutions, such as churches and guilds--bodies that threatened to detract from the loyalty “owed” to the central authority. The concern of the newly emerging Nation-States was to liberate individuals from these “intermediate” organisations so that their loyalty to the State would be complete. Seen from this perspective, the family may be viewed as an important bulwark against excessive State power in the lives of individuals.

The difficulty, however, is that in so far as the Constitution is concerned, the constitutional safeguards available to the family apply only to the family based on marriage. In linguistic terms, the term “family” can have many diverse meanings.²⁵ In *Re Brewis; Brewis v Brewis*²⁶ (an Australian case) O’Byrne J. of the Supreme Court of Victoria observed that “... the word ‘family’ is a word of most uncertain import. It can mean many things according to its context and in some contexts it is impossible to say in what particular sense it is used”.²⁷ The family of which the Irish Constitution speaks, however, is of a very specific kind, Art.41.3.1° confirming that the family with which the Constitution is concerned is the family based on marriage:

“The State pledges itself to guard with special care the institution of Marriage, *on which the Family is founded*, and to protect it against attack.” (Emphasis added)

**Irish Jurist 207* The manner in which this pledge is phrased indicates that the linkage between marriage and the family is not so much expressly stated as taken for granted by the Constitution. The unavoidable implication--confirmed by the courts on multiple occasions--is that marriage (and marriage *alone*) “makes” a family.

The outcome is not merely that the family based on marriage is privileged over other types of family. The Constitution recognises--as case law confirms--no other type of family. As I have observed elsewhere, “... marriage is constitutionally posited not merely as an ideal but quite simply as the only option for the inception of a constitutionally recognised family”.²⁸ This is perhaps unproblematic when social practices match the legal norm. Curiously, in the 1930s the proportion of the population that was single was very high. Indeed, Fahey and Field note that “marriage avoidance among young adults today [in 2008] is as common as it was in the 1930s”, though they clarify that:

“... it has very different significance for family formation. Prior to the sexual revolution of the 1960s and 1970s, marriage was the gateway to sex and reproduction: pre-marital sex and, even more, non-marital childbearing were strongly disapproved of and, as far as we can tell from the available

evidence, occurred at a relatively low rate. Thus, the low level of marriage in the 1930s entailed a similarly low level of family formation. Today, marriage has lost much of the gateway function it possessed in the past: sex and childbearing before marriage are now more or less accepted as normal."²⁹

Thus, in a modern-day context, where a significant number of couples cohabit outside marriage, many with children, the Constitution's blindness to the lived reality of family diversity becomes problematic. The question arises whether the law can address this lived reality without falling foul of the Constitution and, if so, to what extent. The question is especially pertinent in the context of same-sex couples, given that the latter cannot legally marry.³⁰

A further--and not so widely recognised--reality is that the model of family to which the Constitution refers is the narrow model of the nuclear family as opposed to the more extended family model of pre-industrial times. This is confirmed implicitly by Art.42, which refers to the rights and duties of parents in respect of their children. In *McCombe v Sheehan*³¹ Murnaghan J. concluded that the meaning of "family" in Art.41 of the Constitution was restricted to **Irish Jurist 208* parents and children. It followed, he added, that the term "family" when used in rent control legislation must necessarily bear the same meaning (though he appeared to admit of some flexibility in saying that this would be the case "unless the contrary intention appeared").³² In *Jordan v O'Brien*³³ the Supreme Court overruled *McCombe* on this specific point, ruling that the term "family" when used in rent control legislation could bear a wider meaning than the term "family" in the Constitution, though Lavery J. conceded nonetheless that Murnaghan J. "may have been correct" in his conclusion that the constitutional meaning of family is confined to parents and children.³⁴

This point is borne out in relation to grandparents who, even when they have taken on a parental role, have no constitutional rights in respect of their grandchildren.³⁵ Legally, they have a right only to apply for access in respect of their grandchildren,³⁶ and no express right to seek custody. This appears to reflect a rather tidy, confined and atomised understanding of the constitutional family that jars with more fluid, popular notions of what or who is "family". Indeed, in general, outside the specific context of adoption, social or "de facto" parenthood (as opposed to biological parenthood) enjoys no constitutional recognition and scant legal protection, a point emphasised by the verdict in *McD v L* discussed below.

The centrality of marriage as the foundation of family is further emphasised by the fact that the Constitution recognises married couples without children as a "family" for constitutional purposes.³⁷ As such, somewhat counter-intuitively (given that in ordinary language couples who wish to have children speak of a desire to "start a family"), children do not necessarily make a constitutional "family". Everything depends on the marital status of their parents. A couple with children, if the couple are unmarried, are not a family for constitutional purposes, though a married couple with no children are.³⁸ The lack of procreative capacity or intention is no barrier to a valid marriage,³⁹ though, notwithstanding this fact, marriage is still confined to heterosexual couples.

The exclusive emphasis on the marital family gives rise to a curious paradox at the heart of Art.41. On the one hand, Art.41 affirms the "natural" character **Irish Jurist 209* of the family. It is an entity, moreover, that is "antecedent and superior to positive law". Yet, the foundation stone of the constitutional family--and what distinguishes a family from a "non-family"--is itself a status accessible only by compliance with measures stipulated by positive law. Absent a legally recognised marriage between the adults who head up the institution, a household is not a "family". This point is emphasised by *Re J an Infant*,⁴⁰ where the High Court concluded that the marriage of the parents of a child subsequent to the birth of their child rendered the parents and child a family for constitutional purposes.⁴¹

In essence then, the constitutional family--which is regarded as a natural unit group existing independently of man-made law--is itself dependent for its existence on compliance with formalities and requirements as to capacity that are laid down in legislation.⁴² The resulting paradox is that the family is seen as a natural institution yet one that comes into being only when a legal status is conferred, the acquisition of which is determined by conditions laid down in legislation.

This paradox is resolved in part by reference to the constitutional right to marry, as affirmed in *O'Shea v Ireland*.⁴³ In that case, the High Court confirmed that a law preventing a divorced woman from marrying her ex-husband's brother infringed the constitutional right to marry, given that the ban could not be rationally justified as necessary in light of modern conditions. Laffoy J. confirmed that there is a right to marry protected by Art.40.3 that, while not absolute, can be restricted only where necessary to

safeguard other rights, to uphold the integrity of marriage, or to promote (in a proportionate manner) a particular legitimate purpose. In *Ryan v Attorney General*,⁴⁴ Kenny J. intimated (obiter) that the right to marry was a personal right that “flowed from the Christian and democratic nature of the State”, and thus was a right protected by Art.40.3 of the Constitution. The existence of this constitutional right (which notably confers an entitlement only to marry a person of the opposite sex)⁴⁵ **Irish Jurist 210* underlines that marriage itself, like the family, may be regarded as a natural institution.

It remains the case, however, that access to marriage and thus to family status is predicated on compliance with legally ordained requirements and formalities. This underlines the deepest difficulty with the constitutional approach--that it attempts to impose an ordered, legally sanctioned route into family life that ignores, fundamentally, the organic manner in which familial ties are formed. (It could, of course, be argued that marriage helps to cement these ties, though no amount of laws will force a couple to love or respect each other or to sustain such ties in the wake of a relationship breaking down). Indeed, the best evidence of this lies in the fact that, notwithstanding the significant privileges attaching to marriage, many couples now cohabit outside marriage, and a growing number of children are born to unwed parents. In other words, if the purpose of confining the constitutional definition of the family is to ensure family formation takes place within the confines of marriage, the experiment has, at least in part, failed.

THE NON-MARITAL UNIT IN THE COURTS

The Supreme Court, nonetheless, has been nothing if not consistent in its insistence that the family unit envisaged by the Constitution is that based on marriage. In the *State (Nicolaou) v An Bord Uchtála*⁴⁶ the court first emphasised that the rights accorded by Art.41 were confined to marital families. Mr Nicolaou and his former girlfriend, Ms Donnelly, were natural parents of a daughter, born in 1961. The couple had cohabited briefly in London, and were in a committed relationship, though the couple later split, due primarily, it seems, to religious differences.⁴⁷ On the birth of their daughter, Ms Donnelly arranged to place her for adoption, which was finalised in 1961. Mr Nicolaou, however, objected to the adoption, arguing that it was arranged without his consent and without giving him an opportunity to be heard in relation to the matter. Both the High Court and Supreme Court confirmed that he had no legal right in the particular circumstances either to veto the adoption or to demand that he be heard by the Adoption Board prior to its decision.⁴⁸ Both courts also rejected Mr Nicolaou's contention that the failure to grant him a veto over the adoption or a right to be consulted in relation to it infringed his constitutional rights.⁴⁹ **Irish Jurist 211* In particular, the courts concluded that Mr Nicolaou was not a member of a family protected by Art.41. Henchy J., in the High Court, remarked that:

“... [N]o union or grouping of people is entitled to be designated a family for the purposes of [Art.41] if it is founded on any relationship other than marriage. If the solemn guarantees and rights which the Article gives to the family were held to be extended to units of people founded on extra-marital unions, such interpretation would be quite inconsistent with the letter and spirit of the Article.”⁵⁰

He went on to conclude that the conferral of constitutional protection on extramarital families would be in breach of the special position conferred on marriage by Art.41.3.1°:

“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.”⁵¹

In the Supreme Court, Walsh J. agreed, observing that:

“It is quite clear from the provisions of Article 41, and in particular section 3 thereof, that the ‘family’ referred to in this Article is the family which is founded on the institution of marriage and, in the context of the Article, marriage means valid marriage under the law for the time being in force in the State.”⁵²

Doyle has argued convincingly that these dicta do not necessarily preclude *legislative* recognition of the relationships based outside marriage.⁵³ A close reading of the passages from *Nicolaou* cited above indicates that the judges' concern was with the interpretation of Art.41, the clear import being that Art.41 cannot be read as affording constitutional rights or recognition to non-marital units. This is borne out by further comments of Walsh J., who intimated (in **Irish Jurist 212 Nicolaou*) that the exclusive character of Art.41 did not necessarily preclude recognition of non-marital unions in other legal contexts:

“While it is quite true that unmarried persons cohabiting together and the children of their union may often be referred to as a family and have many, if not all, of the outward appearances of a family, *and may indeed for the purposes of a particular law be regarded as such*, nevertheless so far as Article 41 is concerned the guarantees therein contained are confined to families based upon marriage.”⁵⁴ (emphasis added)

This suggests that the constitutionally restricted understanding of family does not necessarily prevent legislative recognition. The reference to “a particular law”, however, may indicate that the Oireachtas may act in specific contexts only, and that general schemes that confer family status on non-marital unions may not be permitted. That said, these statements underline that the legislature is not necessarily hamstrung in its recognition of family relationships outside marriage.

While non-marital units do not enjoy any recognition under Art.41, the relationship of a child and its mother attracts separate constitutional protection. The Supreme Court in *Nicolaou* acknowledged that the mother of a child born outside marriage enjoyed constitutional rights in respect of the relationship with her child, albeit under Art.40.3 and not Art.41.⁵⁵ In 1980 the Supreme Court in *G v An Bord Uchtála*⁵⁶ confirmed that a non-marital child had personal constitutional rights under Art.40.3 of the Constitution to the care of its mother.⁵⁷ A majority of the judges ruled, moreover, that the non-marital mother also had constitutional rights under Art.40.3 in respect of her child. This means that a non-marital mother--in respect of her child--has a constitutional right to custody (though it is one that is not so heavily entrenched as the right of the marital parent: it may, in particular, be waived). Nevertheless, O'Higgins C.J. re-emphasised that:

“... the mother is not the mother of a family, in the sense in which the term is used in the Constitution. Article 41 of the Constitution ... refers exclusively to the family founded and based on the institution of marriage.”⁵⁸

***Irish Jurist 213** The passage of time has not dented this perspective.⁵⁹ Walsh J., in the *People (DPP) v JT*,⁶⁰ again confirmed that the family based outside marriage was not a family as envisaged by Art.41. In *WOR v EH*,⁶¹ the Supreme Court reiterated this point, Hamilton C.J. noting that “... [a] *de facto* family, or any rights arising therefrom, is not recognised by the Constitution or by any of the enactments of the Oireachtas dealing with the custody of children”.⁶² Later, the same judge observed that “The concept of a ‘*de facto*’ family is unknown to the Irish Constitution”,⁶³ though aspects of the judgment suggest that the court may have regard in practice to the existence of *de facto* family arrangements.

In *O'B v S*⁶⁴ the constitutional preference for marriage in Art.41.3.1° was read as permitting legislative discrimination against children born outside marriage. The court found that measures that denied a non-marital child any right to succeed to her father's estate on his intestacy (in circumstances where children born inside marriage would have had such a right) did not infringe the constitutional guarantee of equality as they could be justified as upholding the special position of marriage under Art.41.3. Thus, although the courts have confirmed that non-marital children have constitutional rights equivalent in quality and scope to those of children born inside marriage,⁶⁵ the State, in maintaining the institution of marriage, is entitled, though not, it would seem, obliged, to discriminate in a manner prejudicial to non-marital children. Given that a child has no control over the marital status of its parents, it is unclear how penalising the child can feasibly be seen to promote the institution of marriage. If the aim is to encourage parents to marry, favouring the marital child over the non-marital is arguably a misdirected methodology. As a result of the Status of Children Act 1987, the legal rights of children born outside marriage now are largely equivalent to those of marital children. The point remains, however, that non-marital children are afforded such equal treatment by virtue of legislation only, and not by the Constitution.

The Constitution Review Group in 1996 suggested that, while marriage should continue to be constitutionally favoured, the constitutional definition of family life should be expanded to include units that exist outside the frame of marriage.⁶⁶ The legislature has, however, proved rather unenthusiastic in relation to redefining family life. A 2006 Joint Oireachtas committee report cautioned ***Irish Jurist 214** against changing the constitutional definition, observing that a referendum on the topic would likely prove divisive, would not necessarily be guaranteed to pass and might yield unforeseen outcomes.⁶⁷ In particular, the Committee noted that it would not be “practicable to provide constitutional recognition for all family types while at the same time maintaining the uniqueness of one”.⁶⁸ The Committee instead favoured a legislative response conferring rights on non-marital couples, recommending partnership legislation for same-sex and opposite-sex couples and a presumptive scheme that, curiously, would have applied only to opposite-sex couples.⁶⁹

SAME-SEX COUPLES IN THE COURTS

Though ostensibly in a similar constitutional position in that neither is treated as a family for the purpose of Art.41, same-sex couples may be distinguished from unmarried opposite-sex couples in two important respects. The first is that in the case of same-sex couples there is the added dimension of the historical stigma attached to homosexual relationships. Unmarried opposite-sex couples historically were discriminated against because they were not married; same-sex couples, by contrast, were primarily stigmatised not because of lack of legal status but due to the much more profound, innate factor of their sexual orientation.⁷⁰ Similarly, while unmarried opposite-sex couples have it within their power to remedy the absence of constitutional protection by marrying, same-sex couples cannot, as they are precluded from marrying.⁷¹ The result is invidious, to say the least. Same-sex couples cannot become “families” in the **Irish Jurist 215* constitutional sense without marrying, but in turn cannot marry.⁷² They and their families are thus denied the important constitutional protections afforded by such constitutional status, leaving it to legislators to determine what rights and obligations will be afforded such couples.

This “Catch-22” situation might suggest that the courts would have taken a more nuanced approach to same-sex couples, though this has not been the case. Same-sex couples are no more entitled than opposite-sex couples outside marriage to constitutional recognition as “families”. In *JMcD v PL and BM*⁷³ a unanimous Supreme Court concluded that a lesbian couple and the biological child of one of the women were not a “family” enjoying recognition as such under either the Constitution or the European Convention on Human Rights. The plaintiff in this case had agreed to assist a lesbian couple to have a child by donating his sperm to one of the couple. In doing so, he agreed in writing that while he would be allowed to visit the child and play some part in its life, he would not undertake a parental role. The plaintiff originally acknowledged that the lesbian couple would be considered as the child's parents, the plaintiff agreeing to a role as “favourite uncle”. When the child was born, however, his attitude changed. In spite of the agreement, he sought a more extensive role in the life of the child. As relations between the plaintiff and the lesbian couple deteriorated, the plaintiff sought guardianship and access in respect of the child.

Although the plaintiff initially succeeded in obtaining an interim injunction preventing the couple from moving to Australia, the High Court ultimately denied him either guardianship or access. Hedigan J. placed particular emphasis on what he considered to be the rights of the couple and their child as a family under art.8 of the European Convention on Human Rights. He ruled that the couple and their child constituted a de facto family that attracted the protection of art.8.⁷⁴ While acknowledging that the European Court of Human Rights **Irish Jurist 216* had (at that time) not yet recognised a lesbian couple residing with a child as a “family” for this purpose,⁷⁵ Hedigan J. relied on the verdict of the European Court of Human Rights in *X, Y and Z v United Kingdom*.⁷⁶ This decision, he believed, evidenced a “substantial movement”⁷⁷ in the direction of recognising same-sex families under the Convention.⁷⁸ Hedigan J. thus concluded that:

“... where a lesbian couple live together in a long term committed relationship of mutual support involving close ties of a personal nature which, were it a heterosexual relationship, would be regarded as a de facto family, they must be regarded as themselves constituting a de facto family enjoying rights as such under article 8 of the European Convention on Human Rights. Moreover, where a child is born into such a family unit and is cared for and nurtured therein, then the child itself is a part of such a de facto family unit. Applying this to the case here it seems clear that between the respondents and the infant there exist such personal ties as give rise to family rights under article 8 of the ECHR.”⁷⁹

He added that the Constitution's silence as to the existence of such families did not preclude judicial recognition of the de facto family, pointing to instances where the courts recognised the existence of such families (such as *WO'R v EH* discussed below).

Based on this view, Hedigan J. refused to grant either guardianship or access to the father, reasoning that to do so would undermine the settled family life of **Irish Jurist 217* the couple and their child. This conclusion was supported by an independent psychiatrist's report to the court which had emphasised the disruption to the child should the father be granted any legal remedy in respect of the child.⁸⁰

The Supreme Court profoundly disagreed with the High Court conclusion. Although it also declined the plaintiff's application for guardianship, it overturned the refusal of access, ruling that the child's interests would be best served by contact with its father.⁸¹ Most notably, the Supreme Court ruled that

the High Court had erred in considering the couple and their child to be a family for the purpose of Irish law. While acknowledging that the context in which the child was being raised was a relevant factor, the Supreme Court concluded that Hedigan J. had overemphasised the position of the lesbian couple at the expense of considerations relating to the child's right to a relationship with his father. Although reiterating that the father had no constitutional rights in respect of his child, (and no Convention rights given that his role was confined to that of a sperm donor⁸²) the court nonetheless ruled that the child had a right to contact with his father.

The High Court's reliance on the European Convention on Human Rights was, the Supreme Court concluded, ultimately misguided. Article 8 of the Convention requires the State party to respect (among other things) the right to family life. In this context, the concept of family life is given a wide, organic meaning, based on the quality of family relationships, rather than the form that they take. Thus, provided there is evidence of family ties, the court will recognise a wide diversity of relationships, including that between an unmarried mother and child,⁸³ an estranged father and his child,⁸⁴ an unmarried father and his child,⁸⁵ and a cohabiting couple and their child.⁸⁶ The emphasis ***Irish Jurist 218** in Convention jurisprudence is on the quality of the relationship, and the extent of family ties forged between the parties. For instance, a genetic link on its own may not be sufficient to give rise to recognised family ties,⁸⁷ although, if a parent has taken an interest in his or her child (even if there had been no cohabitation), family life may be established.⁸⁸

Nonetheless, as ECHR jurisprudence stood at that time, a lesbian couple and their child were not treated as a family for the purpose of art.8, Hedigan J. having effectively (as Fennelly J. indicated) "outpace[d] Strasbourg" in so ruling.⁸⁹ This was certainly true at the time, though, as since the Supreme Court verdict, ECHR jurisprudence has progressed to recognise same-sex couples as being encompassed by the "family life" protected by art.8.⁹⁰ Yet, even if ECHR jurisprudence had at that point recognised same-sex couples with children as enjoying family rights, the outcome may have been the same: to the extent that the definition of family in the Convention would bring the Convention into conflict with the Constitution, the Constitution would, as a matter of domestic law, prevail.⁹¹

Furthermore, one may only rely on the Convention in the Irish courts by invoking the specific and somewhat limited provisions of the European Convention on Human Rights Act 2003. As Doyle and Feldman have written, the Act "... did not give general effect to the Convention but rather imposed certain obligations related to the Convention, in certain circumstances".⁹² Emphasising the dualist nature of Irish law, Murray C.J. (in the Supreme Court) noted that the Convention could be applied in Irish law only to the extent permitted by the Act itself. In the High Court, Hedigan J. had erroneously applied the Convention as if it was itself directly part of Irish law, a stance not permitted by the Act.⁹³

***Irish Jurist 219** As regards the definition of family, Murray C.J. cautioned that the silence of the Constitution as regards non-marital families did not mean that the Constitution was neutral as regards such families.⁹⁴ The court reiterated that, in so far as the Constitution is concerned, the family recognised in Irish law is the marital family. As Denham J. noted, "... arising from the terms of the Constitution, 'family' means a family based on marriage, the marriage of a man and a woman".⁹⁵ "There is", she added:

"... no institution in Ireland of a de facto family. Reference has been made in cases previously, as set out earlier in this judgment, to a de facto family, but it is a shorthand method of referring to the circumstances of a settled relationship in which a child lives."⁹⁶

Geoghegan J. agreed, adding that he found "nothing wrong with the rather useful expression 'de facto family' provided it is not regarded as a legal term or given a legal connotation. But as the Latin makes clear it connotes merely a factual situation and not a legal concept."⁹⁷ Fennelly J. also concurred, noting: "Neither the Constitution nor the law in force in Ireland recognise persons in the position of the respondents as constituting a family with the natural child of one of them."⁹⁸

RECOGNISING THE "LIVED REALITY"

In certain respects these dicta appear to go beyond what has been stated to date. While earlier judgments focus on the constitutional definition of family, some of the dicta in *McD v L* appear to suggest that, in Irish law generally, the "family" is similarly confined. The judges, however, may simply have been describing the reality of Irish law as it stood at that time rather than precluding legislative reform. Fennelly J., for instance, hints at the possibility of legislative reform conferring rights on non-traditional families, noting that:

***Irish Jurist 220** “None of the foregoing means that the present legal situation will continue unaltered at either international or national level. National legislation may address these difficult problems. Changes in the Strasbourg jurisprudence are to be expected.”⁹⁹

Likewise in *JMcB v LE* ¹⁰⁰ MacMenamin J., while affirming that a de facto family was not legally a “family” for the purpose of Irish law, observed that:

“In the national legal order, the identification of this constitutional line of demarcation does not, of course, operate as a complete bar to recognition of long term relationships outside marriage.”¹⁰¹

This seems to leave the door open to legislative changes that may enhance the position of the de facto family. Indeed, in several respects *McD v L*, while refusing emphatically to regard the lesbian couple as a family for the purpose of Irish law, nonetheless indicates that both the courts and the legislature are entitled to have regard to the “lived reality” in which a child is being raised. In particular, all of the judges in *McD* acknowledged that the environment in which the child was being raised was a factor to which the court should attach some weight. In the course of his judgment, Murray C.J. observed that although the couple was not a family for the purpose of Irish law,

“... that is not to say that the de facto position of BM [the mother's partner] could or should be totally ignored in considering the issues in this case since so much turns on the ultimate interests of the child. BM's relationship with PL [the mother] and their relationship with the child are among the factors to be taken into account in that context.”¹⁰²

He went on to note that the situation of persons other than the natural parent of a child--including grandparents and foster parents--and in particular the relationship between those persons and the child, was a “material factor in determining the custody and associated rights of the child”.¹⁰³

At several junctures, Denham J. (as she then was) also emphasised the relevance of the settled and loving environment in which the child was being raised. Indeed, despite the emphatic conclusion that the couple and child were not a family, Denham J. suggests that Hedigan J.'s error on this point had “little significant effect on the analysis in the circumstances of this case of what is in the best interests of the child”.¹⁰⁴ Indeed, Denham J. suggests that the de facto situation was an important factor to be given weight in this context:

***Irish Jurist 221** “... the circumstances of the case show that the respondents have lived together for years in a loving relationship and that they provide a settled and loving home for the child. These factors are critical and of importance in assessing the welfare of the child.”¹⁰⁵

Denham J. (though concluding that Hedigan J. had placed excessive emphasis on this factor) thus attached “significant weight” to the “loving environment” in which the child was being raised.¹⁰⁶ Murray C.J. and Geoghegan J. both agreed that while the family in which the child was being raised did not enjoy constitutional or Convention rights, the factual context of the child's upbringing is one of the factors to be considered in assessing what conclusion is in the best interests of the child. The verdict indeed reflects this, the court agreeing that the father should not be awarded guardianship.

The decision thus presents a rather equivocal, nuanced picture. For one, while precluding recognition of the couple and child as a family, it does not close the door to considerations of the “lived reality” of the child's life. The case emphasises at several junctures the disempowered position of the mother's partner,¹⁰⁷ but nonetheless acknowledges the value to the child of the loving environment in which the mother and her partner were raising the child. Thus, despite the emphatic rejection of the suggestion that the family as an entity was entitled to recognition under either the Constitution or the Convention, the Supreme Court nonetheless did have regard to the de facto “lived reality” of the child's upbringing.

A policy of judicial deference

The tenor of these comments appears to suggest that while neither the court nor the legislature may redefine the *constitutional* meaning of family, this does not preclude *legislative* recognition of parenting arrangements not based on marriage. Indeed, in this regard, as elsewhere, the courts will more than likely be inclined to defer to the legislature when it comes to matters of social policy. The Supreme Court has regularly acknowledged that matters of social and economic policy are peculiarly within the province of the legislature, and that they will be slow to intervene where the Oireachtas enacts legislation to address particular social issues in accordance with its preferred policy.¹⁰⁸ ***Irish Jurist 222** For instance, in *MD (A minor) v Ireland*,¹⁰⁹ the Supreme Court examined an exemption

from age of consent laws that meant that where an underage girl has sexual intercourse with an underage boy (the age of consent being 17) the boy may be prosecuted,¹¹⁰ but the girl may not.¹¹¹ A challenge based on the constitutional guarantee of equality and the right to a fair trial failed. Speaking for the court Denham C.J. reasoned that the framing of sexual offences legislation involved difficult social policy choices and that “[t]he fundamental constitutional question is whether it falls to the Court or to the Oireachtas to make the judgment as to whether the risk that the female will become pregnant justifies exempting her, but not her male counterpart, from prosecution”.¹¹² This was, she concluded, a matter within the particular province of the Oireachtas: “decisions on matters of such social sensitivity and difficulty are in essence a matter for the legislature. Courts should be deferential to the legislative view on such matters of social policy.”¹¹³

The decision of Dunne J. in *Zappone and Gilligan v Revenue Commissioners*¹¹⁴ supports the view that in the context of recognition of same-sex couples, at least, the courts may be inclined to defer to the Oireachtas, though to what extent is unclear. That decision confirms that a foreign same-sex marriage is not recognised as a marriage in Irish law.¹¹⁵ Adopting an historical approach to the interpretation of the Constitution, Dunne J. concluded that the term “marriage” as used in the Constitution (as well as in legislation and at common law) meant a heterosexual marriage and did not support the plaintiffs’ contention for a constitutional right to same-sex marriage. The general understanding of marriage had not, she added, changed in the intervening years since 1937 to allow an “updated” construction of the term “marriage”. Indeed aspects of Dunne J.’s judgment appear to suggest that, although certain constitutional rights, particularly unenumerated rights, may be interpreted in a dynamic manner in line with changing values, the meaning of the term “marriage” could not be: the historical constitutional understanding of marriage as a **Irish Jurist 223* heterosexual union was fixed. This appears to intimate--though the point is unclear--that the introduction of same-sex marriage in Ireland might possibly require a referendum so as to change the constitutional understanding of the meaning of marriage. Certainly, the judgment reveals a significant unease with the proposition that the constitutional understanding of marriage could be redefined judicially. Notably, Denham J. in *JMcD v PL and BM*¹¹⁶ remarked (albeit obiter) that “arising from the terms of the Constitution, ‘family’ means a family based on marriage, the marriage of a man and a woman”.¹¹⁷ Later in the same judgment she reiterates this point, noting that “[u]nder the Constitution it has been clearly established that the family in Irish law is based on a marriage between a man and a woman”.¹¹⁸ Certainly, an argument could be made that so far-reaching a change to the longstanding understanding of marriage would require popular endorsement from the people in a referendum.

On the other hand, Carolan, Tobin, O’Mahony¹¹⁹ and Daly¹²⁰ have all cogently argued that there is no constitutional impediment to same-sex marriage. O’Mahony, for instance, notes the pronounced tendency of the Irish superior courts to defer to the legislature on matters of “intense political controversy”,¹²¹ viewing the Oireachtas as the more democratically legitimate forum in which to address law reform. O’Mahony thus concludes “that while the vague provisions of Articles 40 and 41 of the Constitution do not guarantee same-sex marriage, they equally do not preclude it--the choice is a matter for the Oireachtas, which is free to reflect changing consensus in society by legislating for same-sex marriage without a referendum”. Notably, Dunne J. in *Zappone* references the passage by the Oireachtas of the Civil Registration Act 2004 (which prevents marriages between two people of the same sex from being solemnised) in support of her view that there was no social consensus in favour of same-sex marriage at that time. This reference to the legislature may imply that, should the legislature change its mind on the point, the courts would likely defer to its will. Dunne J.’s verdict could thus be read simply as reflecting a judicial reluctance to redefine marriage rather than imposing a legislative bar in relation to the definition.

The decision does suggest that it would be open to the legislature to address the particular position of same-sex couples through legislation. Addressing the **Irish Jurist 224* denial of legal recognition in cases of death or illness of a same-sex partner, Dunne J. indicated that it was within the power of the legislature to address the issue:

“... It is to be hoped that the legislative changes to ameliorate these difficulties will not be long in coming. Ultimately, it is for the legislature to determine the extent to which such changes should be made.”¹²²

It is unclear whether this means that the Oireachtas may redefine marriage to include same-sex couples. The judge’s earlier conclusion, that the constitutional understanding of marriage is confined to heterosexual marriage, might suggest that her comments were directed to some form of civil partnership rather than marriage, although the point is unclear.¹²³ Certainly, the prevailing view among governments past and present appears to be that a constitutional amendment is required in order to

introduce same-sex marriage, although, as O'Mahony and Daly have observed, this view may be erroneous. Yet, whatever about marriage, the decision certainly suggests that it is constitutionally open to the legislature to pass civil partnership legislation to address the particular situation of same-sex couples, and that the courts would defer to the legislature as regards the social policy choices made in that context.

De facto recognition of de facto families

Indeed, despite the stance of the Constitution, both the courts and the legislature have recognised relationships not founded on marriage, albeit not in the context of Art.41. The Supreme Court has confirmed, for instance, that children born outside marriage have personal constitutional rights equivalent to those of children born within marriage.¹²⁴ Though this does not (as *O'B v S*¹²⁵ illustrates) preclude legislative discrimination against non-marital children, it does offer some constitutional foothold for children born outside marriage. The legislature has also proved amenable to the child born outside marriage, the Status of Children Act 1987 having removed the status of illegitimacy from the statute books, and in most respects has equalised the legal position of marital and non-marital children. The Government, moreover, proposes in 2012 to seek an amendment of the Constitution that, inter alia, would confer enhanced constitutional rights on children, on an equal footing and regardless of the marital status of a child's parents.

In *State (Nicolaou) v An Bord Uchtála*¹²⁶ the Supreme Court observed that the mother of a child born outside marriage has constitutional rights under Art.40.3 in respect of her child. In *G v An Bord Uchtála*¹²⁷ three Supreme **Irish Jurist 225* Court judges (though on different sides of the ultimate outcome) agreed that this was the case.¹²⁸ Unmarried fathers¹²⁹ have fared less well. The courts have consistently confirmed that non-marital fathers have no constitutional rights either to custody or guardianship in respect of their children.¹³⁰ This results in a curious situation. While the mother of a child born inside marriage has heavily entrenched rights, these must be shared on an equal footing with her husband, *Tilson v Attorney General*¹³¹ having confirmed that husbands and wives have equal decision-making rights in respect of their children.¹³² The mother of a child born outside marriage, however, while enjoying somewhat less entrenched constitutional rights in respect of her child,¹³³ has potentially more autonomy, not having to share her constitutional position with the father. By contrast with the position of the marital father, the unmarried father's role constitutionally is emphatically subordinate to that of the child's mother.

That said, legislation confers on all unmarried fathers a right to apply for custody and access.¹³⁴ The position of the non-marital father has gradually been improved, though automatic guardianship for non-marital fathers (as twice recommended by the Law Reform Commission)¹³⁵ remains elusive. The Status of Children Act 1987 extended a right to unmarried fathers to apply for guardianship. This new provision--contained in s.6A of the Guardianship of Infants Act 1964--does not confer an automatic right of guardianship on the father. Whether guardianship will be granted depends primarily on what would be in the best interests of the child.¹³⁶ Since 1997, it has also been possible for **Irish Jurist 226* a father to share joint guardianship with the mother of a non-marital child on foot of a statutory declaration signed by both father and mother.¹³⁷

In determining applications for guardianship, the courts, in practice, have regard to the context into which the child was born. In particular, the courts have stipulated that where the child was born to parties in a committed cohabiting relationship, this will militate in the non-marital father's favour. In *JK v VW*¹³⁸ the Supreme Court confirmed that, under s.6A, an unmarried father had only the right to apply for guardianship, and no guarantee of success in that context.¹³⁹ The primary consideration in determining such applications was whether it would be "desirable for the child to enjoy the society, protection and guardianship of its father, even though its father and mother are not married". The court, in making its determination, may look to the blood link between father and child, though this will not in itself be decisive.¹⁴⁰ The outcome will depend significantly on the level of involvement and interest the father has had in his child's life. The court confirmed that the unmarried father has rights of interests and concern (though not constitutional in character) but the extent of these rights in any given case depended on the particular circumstances. As Finlay C.J. observed:

"The extent and character of the rights which accrue arising from the relationship of a father to a child to whose mother he is not married must vary very greatly indeed, depending on the circumstances of each individual case. The range of variation would, I am satisfied, extend from the situation of the father of a child conceived as a result of casual intercourse, where the rights might well be so minimal as practically to be non-existent, to the situation of a child born as the result of a stable and

established relationship and nurtured at the commencement of his life by his father and mother in a situation bearing nearly all of the characteristics of a constitutionally protected family, when the rights would be very extensive indeed.”¹⁴¹

***Irish Jurist 227** Thus, where the child had been born to parents in a stable relationship, the weight to be attached to the father's position may be very extensive indeed. By contrast, where the father had not had any involvement beyond his role in the conception of the child, the position of the father would be much weaker.

This approach was followed by the Supreme Court in *WO'R v EH* ¹⁴² In his ruling, Hamilton C.J. confirmed the principles set out in *JK v VW* and reiterated that the father's prospects of being granted guardianship might be enhanced where the child was born into a stable family unit:

“... where the children are born as a result of a stable and established relationship and nurtured at the commencement of life by father and mother in a de facto family as opposed to a constitutional family, then the natural father, on application to the Court under s.6A of the Guardianship of Infants Act, 1964, has extensive rights of interest and concern. However, they are subordinate to the paramount concern of the court which is the welfare of the children.”¹⁴³

This suggests that a father with strong ties to his child may have good prospects of success in making an application. What both cases suggest is that despite the rhetoric of non-recognition, the courts in practice will look to the quality of de facto relationships outside marriage and that the quality of these relationships is in fact relevant in practice. In *WO'R v EH* Hamilton C.J. intimated that although the courts could not confer constitutional recognition on non-marital de facto families, this did not mean that the courts were required to ignore the existence of such unions. He noted that in the earlier decision of *JK v VW* the Supreme Court had “recognised the existence of ‘de facto families’ and also the fact that a natural father who lived in such a family might have extensive rights of interest and concern ...”.¹⁴⁴ Murphy J. in *WO'R* also noted:

“For better or for worse, it is clearly the fact that long-term relationships having many of the characteristics of a family based on marriage have become commonplace. Relationships which would have been the cause of grave embarrassment a generation ago are now widely accepted.”¹⁴⁵

***Irish Jurist 228** This is not to say that the absence of a relationship between the parents will be fatal to the father's case. While the judges in *McD v L* cited with apparent approval the principles set out in *JK* and *WO'R*, the Supreme Court found in the father's favour in relation to access. Nonetheless, the case law suggests that in practice the courts do take account of the de facto living arrangements of the parents. This gives rise to something of a paradox: while such families are denied constitutional status, the courts in practice will look more favourably on the father where the child is born as a result of “a stable and established relationship”. In other words, despite the official line, the courts are willing to have regard to non-traditional relationships.

NON-MARITAL COUPLES AND THE CONSTITUTION

The legal position of non-marital couples *inter se* prior to 2011 was fairly stark. Outside very specific and narrow contexts, cohabiting non-marital couples were not recognised as such in law and inhabited largely the same legal territory as flatmates.¹⁴⁶ For instance, non-marital couples enjoyed no protection on a partner's intestacy, while former partners could not claim maintenance from each other, in their own right.¹⁴⁷ For certain limited purposes--such as domestic violence,¹⁴⁸ compensation for wrongful death¹⁴⁹ and automatic succession to residential tenancies¹⁵⁰--non-marital couples were recognised, though often subject to minimum co-residence requirements and other restrictions. Notably, the gendered wording of these measures implicitly appeared to exclude same-sex couples. For instance, while couples cohabiting outside marriage were recognised for the purpose of most social welfare entitlements, recognition was, prior to 2011, confined to opposite-sex couples¹⁵¹ (a stance that often worked to the benefit of same-sex couples, given that recognition of cohabitation can in some cases result in reduced social welfare payments and denial of access to others). Likewise, provisions conferring recognition on non-marital couples in the context of domestic violence, wrongful death and residential tenancy rights seemed to be worded in such a way as to require an opposition of gender.¹⁵²

***Irish Jurist 229** The enactment of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 has significantly changed the situation of non-marital couples. The bulk of the Act creates a substantial new legal status, called civil partnership, for same-sex couples who register

their relationships in accordance with the Act. Cohabitants, both same-sex and opposite sex, who are not married or in a civil partnership are automatically conferred with limited rights by Pt 15 of the Act, while long-term cohabitants, called qualified cohabitants, have enhanced rights and remedies in cases where a relationship ends, either by death or otherwise, though subject to conditions and some limitations.

It will be immediately apparent that these measures confer legal rights--in the case of civil partnership, very extensive rights--that formerly were confined exclusively to families based on marriage. The question arises whether these steps conform to the constitutional position that privileges marriage. Although the Constitution does not recognise the family based outside marriage, that is not to say that the *legislature* is necessarily precluded from conferring rights and obligations on persons in non-traditional family units. It is certainly clear from *O'B v S*¹⁵³ that measures that treat members of the marital family more favourably than those of the non-marital family may be justified by the constitutional preference for marriage. This does not mean, however, that the legislature cannot legislate for the children of non-marital unions. In *O'B v S* Walsh J. noted that "... the decision to change the existing rules of intestate succession and the extent to which they are to be changed are primarily matters for the Oireachtas",¹⁵⁴ a statement that appears tentatively to suggest that the courts will likely defer to the Oireachtas in relation to such matters.¹⁵⁵ In *Nicolaou*, the same judge had observed that:

"An illegitimate child has the same natural rights as a legitimate child though not necessarily the same legal rights. Legal rights as distinct from natural rights are determined by the law for the time being in force in the State. While the law cannot under the Constitution seek to deprive the illegitimate child of those natural rights guaranteed by the Constitution it **Irish Jurist 230* can, as in the Adoption Act, 1952, secure for the illegitimate child legal rights similar to those possessed by legitimate children."¹⁵⁶

Both statements seem to suggest that while the State was not obliged to treat non-marital children the same as marital children, it is probably not unconstitutional for the legislature to treat marital children the same as non-marital.

It is correspondingly clear from *Murphy v Attorney General*¹⁵⁷ that the State cannot generally favour unmarried couples over married. In that case taxation measures that potentially placed a higher tax burden on double-income married couples than on their similarly placed unmarried counterparts were found to be in breach of the Constitution. The rationale for this decision, as explained by Finlay C.J. in *Muckley v Ireland*,¹⁵⁸ was that the tax code had penalised married couples for being married, and had thus failed to "guard with special care the institution of marriage" as required by Art.41.3.1°. ¹⁵⁹ The Supreme Court in *Muckley* rejected the suggestion that measures would be unconstitutional *only* if they induced people who might otherwise marry not to do so.¹⁶⁰ This appears to support the view that measures that recognise unions outside marriage may be constitutional provided that married couples are not penalised or treated less favourably as a result of such measures, even if they do not dissuade couples from marrying.

The decision in *MhicMhathúna v Ireland*¹⁶¹ suggests a somewhat different though reconcilable approach. In this case, the plaintiffs challenged taxation and social welfare measures that favoured lone parents and in particular unmarried mothers parenting alone. They claimed that these measures discriminated against intact married couples and thus constituted an attack upon the institution of marriage contrary to Art.41.3.1°. In her High Court decision, Carroll J. appeared to entertain the argument that measures that favoured non-marital unions might be unconstitutional if they provided an inducement not to marry, though in this particular case she rejected the suggestion that such an inducement existed. Noting the particular financial and practical challenges facing persons parenting alone, Carroll J. concluded that the measures in question did not constitute an attack on the institution of marriage. She rejected the proposition that the measures in question might induce a person who was otherwise minded to marry not to do so, or that they would encourage births outside marriage, concluding that the measures constituted a policy response to the very particular financial strains faced by one-parent families. She noted, in particular, that the extra support provided was "child-centred" and directed to alleviating the extra burden involved in **Irish Jurist 231* parenting alone. The Supreme Court on appeal upheld this verdict, approving Carroll J.'s reasoning.¹⁶² Her decision suggests that the courts may still be willing to consider a measure unconstitutional if it induces a party not to marry, though a reading of *MhicMhathúna* alongside *Murphy* and *Muckley* would suggest that the absence of an inducement not to marry does not necessarily render the legislation constitutional if it otherwise penalises the married state.¹⁶³

Doyle cautions against too readily extrapolating general principles relating to systematic partnership

recognition from cases that did not address such schemes.¹⁶⁴ Nevertheless, neither of these decisions would appear to preclude the extension of selected marriage-like rights to non-marital couples. In summary, provided that the legislation in question did not grant more favourable rights to unmarried couples to the point where married couples were penalised for being married, or, as an alternative, did not provide an “inducement” not to marry, the legislation will likely be constitutional. This point is discussed further below in relation to civil partnership.

The High Court decision in *Ennis v Butterly*,¹⁶⁵ however, suggests a more stringent approach that may limit the scope for recognition. This case involved a cohabiting couple, both of whom were married to other people. They had lived together for over eight years before their relationship ended. The plaintiff claimed that, during their relationship, the defendant had promised to support her for life. She sought damages for breach of this promise. Kelly J. concluded, however, that even if such a promise had been made, it was unenforceable. To enforce such an agreement would, he concluded, equate cohabitation with marriage, giving the agreement “a similar status in law as a marital contract”.¹⁶⁶ Kelly J. found support for his conclusion in the fact that the legislature at that time had not seen fit to impose a mutual obligation of support on cohabitants. He added that in taking this stance the legislature “accepts that it would be contrary to public policy, as enunciated in the Constitution, to confer legal rights on persons in non-marital unions that are akin to [the rights of] those who are married”.¹⁶⁷ In coming to this conclusion, Kelly J. placed a heavy emphasis on the constitutionally privileged position of marriage, suggesting that the terms of Art.41.3 leaned heavily against the enforcement of cohabitation agreements.

“Given the special place of marriage and the family under the Irish Constitution, it appears to me that the public policy of this State ordains that non-marital cohabitation does not and cannot have the **Irish Jurist 232* same constitutional status as marriage. Moreover, the State has pledged to guard with special care the institution of marriage. But does this mean that agreements, the consideration for which is cohabitation, are incapable of being enforced? In my view it does since otherwise the pledge on the part of the State, of which this Court is one organ, to guard with special care the institution of marriage would be much diluted. To permit an express cohabitation contract (such as is pleaded here) to be enforced would give it a similar status in law as a marriage contract.”¹⁶⁸

While granting legal recognition to non-marital couples would not of itself alter the *constitutional* status of such unions, the overall impression conveyed by the judgment is that constitutional policy and public policy are intimately linked, such that recognition of non-marital unions may of itself infringe the Constitution, even if it neither penalises married couples nor induces couples away from marriage. This seems, however--as Doyle has suggested--to conflate extending constitutional rights to non-marital couples (which is not permitted) with conferring *legal* rights thereon.¹⁶⁹ Earlier judgments, such as *Nicolaou*, suggest that the courts were concerned with confining constitutional rights under Art.41 to the marital family, and were not necessarily ruling out conferring legal rights by *legislation*.

The question that thus arises is whether and to what extent the three new statuses conferred by the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (the “2010 Act”) would stand up to constitutional scrutiny. At what point would equating the rights of non-marital couples with those of marital couples infringe the Constitution? Given that marriage is afforded a privileged position in the Constitution, it is arguable that a direct and generally applicable equation between marriage and non-marital unions--to the point where it made no difference whether a person was married or not--would likely infringe the special position of marriage, particularly if it applied to heterosexuals. However, the argument is less easily made in the context of same-sex couples, to whom we now turn.

CIVIL PARTNERSHIP¹⁷⁰

The introduction of civil partnership is a most remarkable development in Irish law. It is of course not unique to Ireland but reflects instead a now significant trend in western democracies in favour of affording legal recognition to same- **Irish Jurist 233* sex couples. What is perhaps most remarkable in the Irish context is that the adoption of so comprehensive a civil partnership regime has come a mere 17 years after the decriminalisation of male homosexual acts.¹⁷¹ It arrives also in a context where, prior to its enactment, unmarried couples, and particularly same-sex couples, had next to no legal rights or obligations in respect of their relationships.¹⁷²

Civil partnership is closely modelled on marriage. Many of the provisions of the 2010 Act either replicate similar provisions applying to spouses¹⁷³ or amend existing legislation so as to extend to civil partners rights and responsibilities previously conferred only on spouses.¹⁷⁴ While there are certainly

differences, some quite crucial, it is hard to escape the conclusion, looking at civil partnership, that the intention of the legislature was to equate civil partnership as closely as was politically and constitutionally possible to marriage. Like marriage, it is an exclusive union,¹⁷⁵ potentially for life, though subject to dissolution. It is open only to adults aged 18 or over¹⁷⁶ (though unlike marriage, no provision is made for exceptions to the minimum age requirement) who are not closely related to each other.¹⁷⁷ Although it is not confined to gay or bisexual persons, the parties must be of the same sex, though the implication of the consanguinity bar is that it is envisaged primarily as a relationship formed through romantic attraction rather than any pre-existing family relationship.

From a constitutional perspective, the confinement of civil partnership to same-sex couples is quite deliberate. If the charge were to be laid that civil partnership undermines the institution of marriage, the first line of defence might well be that it is quintessentially aimed at those couples who are not able to marry each other. Thus, no couple who might otherwise marry is being dissuaded from marriage in favour of civil partnership.¹⁷⁸ The charge might **Irish Jurist 234* be levelled that such persons might marry people of the opposite sex if civil partnership were not available, though this is not likely; even if it were, it is arguably not conducive to the integrity of marriage or the well-being of married people that gay or lesbian people should be encouraged into life-long heterosexual unions.¹⁷⁹

The 2010 Act does not create--in civil partnership at least--a rival to marriage, given that it applies only to couples who cannot marry. It could hardly be argued that civil partnership "penalises" married couples in the sense envisaged in *Murphy* and *Muckley*. The 2010 Act does not affect or diminish the rights of married couples. In fact, at several junctures great care is taken to ensure that the rights of new spouses of former civil partners are preserved notwithstanding the enactment of civil partnership.¹⁸⁰ Nor could it be said that civil partnership dissuades couples who might marry from so doing (the inducement argument posited in *MhicMhathúna*), as same-sex couples cannot marry. Even hypothetically, the inception of civil partnership is unlikely to steer those otherwise inclined to a heterosexual marriage to opt for civil partnership with a person of the same sex.

By contrast, John Mee argues that full or even limited civil partnership for *opposite-sex* couples would more than likely have been unconstitutional.¹⁸¹ Civil partnership for opposite-sex couples would inevitably create a parallel system of relationship recognition that would draw opposite-sex couples, who might otherwise marry, away from marriage. Even a limited form of opposite-sex civil partnership would, he concludes, more than likely be found unconstitutional on the basis that couples might be attracted away from marriage by the less rigorous obligations associated with such unions. Mee argues that, given the exclusion of same-sex couples from marriage, such contentions cannot be made in respect of a regime of civil partnership confined to those of the same gender. Mee does countenance the situation of bisexual persons "whose sexual preferences make it possible for them to have a committed relationship with someone of either sex", hypothesising that civil partnership might remove the incentive to marry in such cases.¹⁸² He concludes however that:

**Irish Jurist 235* "... it does not seem that the institution of marriage is benefited if the fiscal and other societal benefits associated with marriage induce a person to marry someone other than (and of a different gender to) the person to whom he or she would otherwise have committed himself or herself."¹⁸³

Indeed, he suggests that the institution of marriage is potentially "harmful by the painful breakdown of opposite sex marriages where one of the parties is homosexual and would not have entered into the marriage if society had been willing to recognise same-sex civil partnership".¹⁸⁴ On that basis, Mee surmises that civil partnership, if confined to same-sex partners, would likely be upheld as constitutional.

Marriage's (non-identical) twin

The similarities between marriage and civil partnership are striking. The process for entering into a civil partnership is overwhelmingly the same as for the solemnisation of a marriage, the main exception being that religious ministers may not officiate at a civil partnership.¹⁸⁵ The rules and procedures for seeking maintenance are identical save that a person cannot be compelled to support a child of his or her civil partner.¹⁸⁶ (A step-parent--the spouse of a parent--may by contrast be obliged to support his spouse's child if, knowing he is not the parent of the child, he accepts the child as a child of the family.)¹⁸⁷ For the purpose of succession law, civil partners and spouses are largely treated identically, although the child of a civil partner is in a slightly stronger position vis-à-vis his parent's estate.¹⁸⁸ Likewise, the remedies available on dissolution, **Irish Jurist 236* and the criteria

for granting such remedies,¹⁸⁹ are largely identical in the case of divorce and civil partnership dissolution, the key exception being that civil partnership dissolution does not require or facilitate provision for children by the civil partner of a parent.¹⁹⁰

Taxation rules and social welfare law have also been amended such that civil partners and spouses are now treated alike for these purposes.¹⁹¹ Likewise, civil partners of Irish citizens are now treated the same as spouses of Irish citizens for the purpose of obtaining citizenship,¹⁹² while in practice, government policy ordains that civil partners be treated the same as spouses in the context of immigration.¹⁹³ Spouses and civil partners have identical rights in the context of domestic violence,¹⁹⁴ and are treated the same as spouses for an extensive variety of legal purposes, the 2010 Act altering a multitude of separate pieces of legislation so as to equate the position of spouses and civil partners. In the context of pensions, civil partners must be treated the same as spouses,¹⁹⁵ while changes to the Employment Equality Act 1998 and the Equal Status Act 2000 require that persons not be discriminated against in the context of employment and the supply of goods and services, accommodation and education on the basis that they are or were civil partners.¹⁹⁶

Not a “family”

Provisions similar to those of the Family Home Protection Act 1976 have been applied to civil partners on a like basis,¹⁹⁷ though in deference to the Constitution the term “shared home” is used in preference to “family home” where civil partners are concerned. Indeed, despite the extensive rights conferred on civil partners, throughout the 2010 Act a studious effort has been made generally to avoid the use of the term “family” as a description for civil partners (one isolated exception being in the context of employment equality, where “member of a family” is redefined to include civil partners).¹⁹⁸ This is undoubtedly a consequence of the confinement of family in the Constitution **Irish Jurist 237* to the family based on marriage. The use of “shared home” is probably the most obvious example, though there are other instances where the 2010 Act deliberately avoids redefining the term “family” to describe civil partners. Another example is provided by the amendment of the Non-Fatal Offences Against the Person Act 1997,¹⁹⁹ which addresses certain conduct directed against members of a person's family.²⁰⁰ For these purposes “member of the family” is defined widely, and includes children (marital and non-marital), parents and step-parents, grandparents and grandchildren, siblings and half-siblings, uncles, aunts, nephews and nieces. Notably it also includes “any person cohabiting or residing with” the person. Yet, instead of including civil partners within the definition of “members of the family” of the person, the 2010 Act simply added a separate reference to civil partners in each of the relevant sections. While the net effect is the same, the implication is that civil partners are not family members but in a category *sui generis*.²⁰¹ This is all the more bizarre given the already very extensive definition of family members; peculiarly, a same-sex cohabitant would be treated as a family member under this section, but not a civil partner. A similar approach is generally taken to the word “relative”, the overall picture being that despite the new status conferred by the 2010 Act, civil partnership does not confer the status of “relative” on a person in respect of her civil partner's family members.²⁰²

Given the decision of the Supreme Court in *Jordan v O'Brien*²⁰³ this may be an overly restrictive approach. In that case, the Supreme Court, overturning the earlier dictum of Murnaghan J. in *McCombe v Sheehan*,²⁰⁴ concluded that the term “family”, when used in legislation, did not necessarily have to bear the same meaning as it did in the Constitution.

“It seems to me that Mr. Justice Murnaghan may have been correct in saying, as he did in *McCombe's Case*, that ‘family’ in Article 41 of the Constitution means ‘parents and children’: but where a word has a number of recognised meanings the use of it in one such meaning in the Constitution does not seem to me to warrant any presumption that the same meaning is to be given to it in a statute which is not *in pari materia*.”²⁰⁵

**Irish Jurist 238* This appears to suggest that the Oireachtas may have been overly cautious in its approach in the 2010 Act. That said, there may certainly be a substantive difference between treating persons as members of each other's family for certain limited purposes as opposed to situations where a statute confers an extensive family status generally on unmarried persons. While isolated recognition may be constitutionally sound, greater caution may be required with a measure generally conferring extensive rights and obligations.

Children

The main gap in legislative provision in the 2010 Act relates to the position of children being raised by civil partners.²⁰⁶ The main difficulty is that the 2010 Act provides no mechanism to secure legal rights and impose obligations in respect of the child on the civil partner who is not a biological parent of the child. Although the 2010 Act does reference children in some contexts,²⁰⁷ the overwhelming tendency of the 2010 Act is to ring-fence the civil partners and to ignore the legal position of children being raised by civil partners. Civil partnership dissolution, for instance, may be granted without reference to the needs of children,²⁰⁸ though crucially, in granting maintenance and remedies post-dissolution, the court must have regard to the obligations of each civil partner towards his or her biological or adoptive children.²⁰⁹ Consent to a disposition of the shared home may also, in theory, be dispensed with by a court without having regard to the needs of children.²¹⁰

Civil partners, moreover, cannot jointly adopt a child, even a biological child of one of the civil partners. Nor is there any mechanism allowing the biological parent to share guardianship rights with his or her civil partner (though the Law Reform Commission has recommended allowing the spouses and civil partners of parents to acquire shared guardianship, either by court order or by agreement with existing guardians).²¹¹ While a person may seek access in respect of his or her civil partner's child where the person has been in loco parentis in respect of the child,²¹² he or she has no express right to seek custody. The non-biological parent, moreover, cannot be obliged to maintain the child, while the child has no right to succeed to or claim any part of the estate of a parent's civil partner on the latter's death, unless expressly provided for by will.

In certain respects, the civil partner is in the same position as a step-parent (a step-parent does not, by marrying the parent of a child, thereby acquire **Irish Jurist 239* parental rights) though two significant differences apply. First, a spouse of a parent may, together with the parent, jointly adopt a child, providing a facility whereby the couple may share guardianship of a child of one of the parties.²¹³ Secondly, a spouse of a parent (who is not herself a parent of the child) may be obliged to support the child if, knowing that she is not a parent of the child, treats the child as a child of the family.²¹⁴ By contrast, even where a person, A, consciously agrees to an arrangement whereby her civil partner, B, becomes pregnant, A cannot be obliged to maintain that child.

It is unclear to what extent such differentiation is constitutionally required. Given that the legislature has extended the right to seek guardianship to unmarried fathers, the constitutional preference for marriage could hardly be said to require non-recognition of the social parent. Certainly, some care is required to ensure that any recognition of the parent's civil partner is not at the expense of a party with constitutional rights to guardianship, such as a mother or marital father. None of this, however, would appear to preclude recognition of social parenthood, subject to the preservation of existing rights, particularly where the child has been born outside marriage. Indeed, the Minister for Justice and Equality has conceded that reform in this area is required, and has promised to introduce legislation addressing the legal relationship between children and the civil partners of their parents.²¹⁵

Dissolution and other remedies

Outside the context of parenting, the differences between civil partnership and marriage are generally quite minor, though they are underpinned in some cases by a distinct unease about the constitutional status of civil partnership. Indeed, it is arguable that at least some of the differences between civil partnership and marriage were deliberately included to provide a firewall against constitutional challenge.

Notably, the rights conferred on engaged couples by the Family Law Act 1981 have not been extended to same-sex couples contemplating civil partnership. Likewise, various common law rights, such as the right to sue for loss of consortium and the marital privilege, have not been applied to civil **Irish Jurist 240* partners. The most notable difference, however, applies to dissolution. While both civil partnership and marriage may be dissolved without establishing fault, the grounds for dissolution are notably less stringent for civil partners than for spouses. A marriage may be dissolved only where the couple have been living apart from each other for four of the previous five years and where there is no reasonable prospect of reconciliation.²¹⁶ As a precondition to divorce, the Constitution requires, moreover, that proper provision is made for both spouses and for any children of either or both of them.²¹⁷ Solicitors for each client, moreover, are required by legislation (as a precondition to applying for divorce) to advise their clients of the alternatives to litigation and divorce.²¹⁸

The conditions for civil partnership dissolution²¹⁹ are significantly less exacting. First, the required period of living apart for dissolution of a civil partnership--two of the previous three years--is two years

shorter than the period for divorce. Furthermore, there is no requirement that the parties demonstrate that there is no reasonable prospect of reconciliation. Nor is there any obligation on a solicitor advising civil partners to discuss alternatives to litigation. Finally, while proper provision must be made for each civil partner, there is no requirement that proper provision be made for the children of either party and no facility allowing a court to impose liability for the child's maintenance on the non-biological parent.

Thus, while the remedies available on dissolution are largely identical to those available on divorce, an exit from civil partnership appears much more easily and quickly attainable than a termination of a marriage. The shorter timeframe for dissolution of a civil partnership may in fact be constitutionally necessary. John Mee has indicated that the constitutional right to marry may preclude measures that render it unduly difficult to exit a failed civil partnership where one of the partners wishes to marry a person of the opposite sex.²²⁰ Citing *O'Shea v Ireland*,²²¹ where legislation barring a woman from marrying her ex-husband's brother was declared in breach of the constitutional right to marry, Mee argues that a measure that unduly delays or fetters a person from entering a marriage following a failed civil partnership cannot be upheld if not "justified either as being necessary in support of the constitutional protection of the family and the institution of marriage or having regard to the **Irish Jurist 241* requirements of the common good".²²² While *O'Shea* involved a prohibition on remarriage rather than a delay thereto, Mee suggests that a four-year living apart requirement in the case of civil partnership dissolution would likely have been unconstitutional as imposing an excessive and unnecessary restriction upon the right to marry.

Many might argue that the timeframe for civil partnership dissolution is more reasonable than the constitutionally mandated requirements for divorce. When coupled with the absence of a "no reasonable prospect of reconciliation" requirement, however, the overall implication is that, while divorce should be a last resort, granted only when all hope is lost (a stance underpinned by the constitutional rigour attaching to divorce), civil partnership dissolution is not so great a tragedy and may be granted more liberally. That said, for many prospective divorcé(e)s, anxious to draw a curtain over a long-ended marriage, it may reasonably seem that civil partners have the better deal. It is tempting to suggest that this in fact makes civil partnership more favourable than marriage.

Another notable difference is the absence of provision for judicial separation for civil partners. While the 2010 Act implicitly indicates that civil partners may enter into binding separation agreements,²²³ the terms of the Judicial Separation and Family Law Reform Act 1989 remain confined to married couples.²²⁴ This may well reflect the fact that the requirements for dissolution of a civil partnership are more easily satisfied than for marriage. It is arguable that there would be little benefit in a couple obtaining a judicial separation if they can dissolve the union after two years' separation. At any rate, an applicant could seek relief under the maintenance provisions of the 2010 Act while waiting for dissolution.

Additionally, the grounds for annulment (though similar in many respects to those for marriage) are somewhat less extensive. The prohibited degrees of relationship for civil partnership, for instance, are narrower than those that apply to marriage. For the purposes of marriage, the prohibited degrees **Irish Jurist 242* are based both on consanguinity (addressing blood relatives) and affinity (concerning persons related through marriage). By contrast, the prohibited degrees in relation to civil partnership are confined to blood relationships.²²⁵ This may reflect a growing disfavour for prohibitions based on affinity, as illustrated by the decision of the European Court of Human Rights in *B and L v United Kingdom*,²²⁶ finding that a prohibition on the marriage of a man to his daughter-in-law (unless both of their former spouses were deceased) infringed the right to marry under art.12 of the European Convention on Human Rights. It may also reflect a concern to emphasise that civil partnership does not itself create relationships of affinity.

Similarly, the grounds rendering a marriage voidable have not been extended to civil partnership, namely inability to consummate (logically enough, given that consummation entails an act of heterosexual intercourse) and inability to form and sustain a normal and caring marital relationship. Indeed, a notable feature of civil partnership is that the 2010 Act is entirely silent on the sexual dimension in the partners' relationship. In fact, theoretically, it would appear that two heterosexuals of the same sex could contract a civil partnership, provided both did so with full informed consent. This may well reflect the general "retreat from the bedroom" favoured by modern liberal discourses, signalling that the legislature is not concerned with what consenting adults do in the privacy of their own homes.²²⁷

Constitutional recognition

From a constitutional perspective, of course, a civil partnership cannot be the foundation of a constitutional “family”. It is in this regard that civil partnership is most profoundly different from marriage. However extensive the legal rights conferred on civil partners, civil partners are not constitutionally protected in their capacity as civil partners. Whatever rights are conferred are enjoyed by virtue of legislation only. Thus, although same-sex civil partnership may well be constitutionally sound, this comes at the expense of denying same-sex couples access to the entrenched rights conferred on families by the Constitution. The implication is that civil partnership could be abolished without constitutional difficulty. The same could clearly not be said for marriage.

COHABITATION

The creation by Pt 15 of the 2010 Act of the new status of cohabitant, while not as extensive in terms of rights and obligations as civil partnership, potentially affects a much wider constituency than civil partnership, potentially as many as 143,000 couples.²²⁸ It confers important, if somewhat limited, rights on this **Irish Jurist 243* wide category. Perhaps more significant than the rights is the status that it confers. Non-marital couples are recognised as having a definitive legal status that will likely be a touchstone for future developments.²²⁹

The 2010 Act has a further consequence of conferring enhanced rights and obligations on a particular category of long-term cohabitants called “qualified cohabitants” who may, subject to certain conditions, seek remedies on the ending of the relationship, whether by death or otherwise.

A “cohabitant”, for the purpose of the 2010 Act, is one of two adults, who are not within the prohibited degrees of relationship²³⁰ and who are living together “in an intimate and committed relationship”.²³¹ The couple may be of the opposite sex or of the same sex.²³² The status is conferred automatically, and does not require (or facilitate) registration. The 2010 Act sets out various criteria for determining whether a couple are cohabitants,²³³ though there are undoubtedly grey areas. For one, it may not always be clear whether a relationship—particularly when a couple are experiencing relationship difficulties—is “intimate and committed”. Although s.172(3) of the 2010 Act clarifies that the absence of an ongoing sexual relationship does not mean that the couple are no longer cohabitants, the question may well be asked whether a partner who is having an affair is “committed” to the relationship, or whether a couple who no longer communicate with each other inhabit an “intimate” relationship. The rather subjective nature of the definition is compounded when one considers the difficulties that may arise in determining whether a couple are cohabiting. What would be the case, for instance, if a couple had separate residences but stayed together at weekends and on holidays?

The definition of “qualified cohabitant” is somewhat more concrete. A couple will be treated as qualified cohabitants if, at the end of their relationship, they have cohabited together for at least five years, though the minimum qualifying period is only two years if the couple have one or more dependent children in common.²³⁴ The children need not live with the couple, but both cohabitants must share biological parenthood of the relevant children. In all cases, however, **Irish Jurist 244* a couple will not be treated as qualified cohabitants if either party is married to another person, unless the married couple have been living apart for four of the previous five years.²³⁵ This would appear to be drafted with the Constitution in mind, the 2010 Act permitting a person to be treated as a qualified cohabitant only from the point where he or she would be entitled to a divorce. Indeed, even where parties are treated as qualified cohabitants, the rights of spouses of either party prevail over those of the qualified cohabitants.²³⁶

The rights and obligations of cohabitants per se are not particularly extensive. Indeed, many of the rights extended to cohabitants replicate several rights already in place for opposite-sex non-marital cohabitants, though extending them also to same-sex cohabitants. The 2010 Act confers on cohabitants a right to sue for wrongful death,²³⁷ a right to succeed to a residential tenancy on the death of a cohabitant tenant²³⁸ and various remedies for domestic violence.²³⁹ Cohabitation is also the touchstone for determining entitlement to certain social welfare payments.²⁴⁰

Qualified cohabitants have more extensive rights and duties, though nowhere near as comprehensive as those that apply to civil partners or spouses. Where qualified cohabitants separate, a qualified cohabitant who is financially dependent on the other qualified cohabitant, where this dependence “arises from the relationship or the ending of the relationship”, may seek various remedies from the court against the other qualified cohabitant.²⁴¹ These remedies (collectively referred to as the “redress

scheme”) are available only on the ending of the relationship and not while it subsists. The remedies are similar to some of those available on divorce. The qualified cohabitant may for instance, seek a maintenance order against her former partner.²⁴² If this is not sufficient, a pension adjustment order may also be made, allowing the splitting of an existing pension to make provision for the qualified cohabitant or the earmarking of a portion of one qualified cohabitant's pension for the benefit of the other qualified cohabitant.²⁴³ Finally, if neither maintenance nor a pension adjustment order is sufficient to support the financially dependent qualified cohabitant, the court may reallocate property of either partner by means of a property adjustment order.²⁴⁴ Where a qualified cohabitant dies, moreover, the survivor may make a claim against the deceased's estate if the survivor can show that the deceased failed to make proper provision for the survivor, by will or otherwise.²⁴⁵

***Irish Jurist 245** Significant as these rights may sound, they are in fact curtailed in several important respects. First, in general, these remedies are available only to a qualified cohabitant who is financially dependent on the other qualified cohabitant where such dependence *arises from the relationship or the ending of it*.²⁴⁶ The only exception to this rule applies to a survivor seeking provision from a deceased qualified cohabitant's estate where the couple were cohabiting at the time of death: if the couple were still together at the time of death, financial dependence need not be demonstrated.²⁴⁷ In all cases where the relationship ended before death, none of these redress scheme remedies are available to a qualified cohabitant with independent means. The requirement that the financial dependence must arise from “the relationship or the ending of it” may further curtail the availability of relief. The implications of this caveat are as yet unclear, though it may well be interpreted as requiring not simply that the applicant is financially dependent but that that state of dependence itself is a product of the relationship or its demise rather than of factors that would have arisen regardless of the relationship (such as unemployment or illness).

It is clear also that any right to relief is subject to the rights of spouses and civil partners of either party. In granting a remedy under Pt 15 of the 2010 Act, the court must have regard to the rights and entitlements of any spouse or former spouse, civil partner or former civil partner or dependent child or child of a previous relationship.²⁴⁸ Section 173(5) expressly precludes the court from granting an order that would affect any right of a person to whom a qualified cohabitant is or was married, thereby prioritising the rights of spouses and former spouses. In the case of provision on death, the survivor may only claim from the “net estate” of the deceased, the portion that remains after provision has been made to satisfy the Succession Act rights of the deceased's spouse or civil partner.²⁴⁹ Indeed, the 2010 Act expressly ring-fences the legal right share of spouses on the death of a qualified cohabitant.²⁵⁰ In practice, this collectively means that the qualified cohabitant of an otherwise married spouse may have limited recourse against the latter.

It is clear also that the type of relief envisaged for qualified cohabitants is not the “proper provision” required in respect of civil partners and spouses, but is much more limited. Section 172 requires that the relief be such that the court considers “just and equitable ... in all the circumstances”. While the 2010 Act requires that the court have regard inter alia to the needs and obligations of the parties, their financial circumstances and their contribution to home and family, the 2010 Act does not reference the parties' pre-separation standard of living (divorce and civil partnership dissolution provisions do). The cumulative implication is that the extent of the remedies made available to dependent qualified cohabitants may be much more limited than those afforded to spouses and civil partners.

***Irish Jurist 246 Cohabitation agreements**

A particular innovation of the 2010 Act lies in the introduction of an express right for cohabitants generally to make agreements governing the financial and proprietary affairs of the couple. Section 202 of the 2010 Act allows cohabitants to enter into such agreements, though certain formalities must be followed. The agreement must be in writing and signed by both parties following independent legal advice, though the couple may opt to waive their right to independent advice and instead seek joint legal advice. Under such agreements the couples may opt out of the redress scheme available to qualified cohabitants, allowing the parties to avoid the imposition of remedies on the break-up of a relationship. That said, a court may supersede any of the terms of such an agreement where its enforcement would cause a serious injustice.

In allowing such agreements, s.202 clearly departs from the verdict in *Ennis v Butterly*,²⁵¹ which determined that cohabitation agreements were contrary to public policy and thus not enforceable in law. Given the strong constitutional underpinning to Kelly J.'s judgment, there may certainly be some cause for concern as to whether the provisions of s.202 are in fact constitutional. The better view,

however, may well be that, provided such agreements are confined to the financial and proprietary affairs of the couple--and do not otherwise seek to emulate the consequences of marriage--they may be constitutionally sound. The Law Reform Commission, for instance, took the view that *Ennis v Butterly* did not preclude agreements between cohabitants generally, only those that sought to confer a quasi-marital status on the couple.²⁵² As such, provided an agreement "... does not attempt to replicate the marriage contract, or does not have an immoral purpose, but restricts itself merely to regulating the financial and property affairs of the parties", it is likely, the Commission suggests, to be upheld.²⁵³

There is a wider constitutional concern regarding cohabitation. While married couples and civil partners may fairly be said, by their voluntarily entering into such unions, to have assumed obligations of support to their partners, the same cannot arguably be said for qualified cohabitants. In the case of spouses, attempts to challenge the extensive ancillary remedies available on judicial separation and divorce have failed in, respectively, *TF v Ireland*²⁵⁴ and more recently in *LB v Ireland*.²⁵⁵ A similar challenge against the ancillary remedies available to qualified cohabitants may stand a greater chance of success. In particular, a qualified cohabitant might fairly say that, by choosing not to marry, he or she has deliberately opted not to take on the obligations of support usually conferred on married couples and civil partners, and that the award of an ancillary remedy may thus constitute an unjust attack on the qualified cohabitant's property rights. Given, however, the very limited scope **Irish Jurist 247* for relief in the 2010 Act, it is very possible that such a challenge would fail. For one, relief is predicated on financial dependence arising from the relationship or the ending of it. The implication is that the respondent has acted in a manner that has encouraged or caused this dependence by, for instance, having a child with the applicant or encouraging the applicant to give up a job to look after the couple's family or to assist the respondent in his career. It is likely that a court would consider the imposition of financial responsibility a proportionate response to the situation, particularly where the applicant is responsible for the birth of children.

CONCLUSION

Although ostensibly a straightforward word used commonly in daily discourse, the term "family" has attracted significant ideological controversy. The ideological debate regarding the boundaries of the family has sometimes found its way onto the statute books, as in the case of the since repealed s.28 of the Local Government Act 1988 (England and Wales), which sought to paint same-sex unions as "a pretended family relationship".²⁵⁶

The constitutional position on the family remains rigid and exclusive, denying the benefits of Art.41 to families not based on marriage. The pending enactment of a constitutional amendment to address the position of children may partly soften this stance. The wording propounded by the Joint Oireachtas Committee on the Constitutional Amendment on Children, if adopted, would affirm the primacy of children's rights.²⁵⁷ The amendment would, in particular, secure equal rights and recognition to children born inside and outside marriage. Even in advance of such reforms, the Oireachtas, as discussed above, has already acted to secure greater rights and recognition for couples living together outside marriage and, in particular, for same-sex couples. The rights and obligations conferred on civil partners, though extensive, are likely to withstand any constitutional challenge given that they are confined to same-sex couples and unlikely to dissuade people from entering into an opposite-sex marriage. In the case of both civil partnership and qualified cohabitation, great care has been taken to ensure that the rights of spouses are not prejudiced by measures in the 2010 Act, such that the measures could not be said to penalise marriage or married people.

The very limited nature of the rights and obligations conferred on cohabitants and the restrictions on relief for qualified cohabitants, moreover, may render it less likely that constitutional difficulties will arise in relation to the provisions addressing cohabitation and qualified cohabitation (though, in the absence of a judicial challenge, one cannot be definitive on this point). It might be argued that the less onerous nature of the obligations of qualified cohabitants **Irish Jurist 248* might induce some people, anxious to avoid legal responsibility, to remain unmarried rather than marry. Logically, if that were the case, one might equally say that conferring no rights at all on unmarried couples is unconstitutional as it would make non-marital cohabitation especially attractive to such persons. In sum, the measures adopted in this context appear to be a proportionate and relatively focused response to the plight of potentially vulnerable parties who have become dependent within a relationship. The better view may be that such measures will be considered to be constitutionally sound.

Certainly, the spectre of *Ennis v Butterly* nonetheless lingers, giving rise to uncomfortable doubts. It is at least arguable, however, that judicial deference to the legislature will prevail. The courts have increasingly insisted that social policy matters and, in particular, issues of political and social controversy are primarily the preserve of the Oireachtas, and that the courts will intervene only where a constitutional breach is very clearly established. The most likely outcome, therefore, is that provided there is no penalty imposed on married couples and no inducement not to marry, the relevant schemes will be upheld.

Even if this is so, however, the point remains that couples outside marriage cannot claim the extensive and heavily entrenched protections offered by Art.41 of the Constitution. The result is that such couples depend on legislative goodwill: any rights and obligations that are legislatively conferred upon such couples may just as easily be removed by the legislature, with no constitutional consequences. Thus, while Art.41 does not appear necessarily to preclude recognition by the legislature of non-marital unions, it offers no protection to such couples. This is especially problematic in the case of same-sex couples, who cannot legally marry. Given the historic stigma attached to homosexuality, and the past (and often current) discrimination and ill-treatment faced by gays and lesbians, the lack of constitutional protection for same-sex unions is especially indefensible. This places such unions in a precarious position, though likewise the Constitution itself is compromised. Absent reform, the likelihood is that the constitutional position will remain increasingly out of line with the lived reality of family life in modern Ireland, undermining the Constitution's claim as a vibrant, organic and dynamic document, capable of change in line with changed times and values.²⁵⁸

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1. See John Dewar, "The Normal Chaos of Family Law" (1998) 61 M.L.R. 467, arguing that family law is "chaotic, contradictory and incoherent", but only because "it engages with areas of social life and feeling--namely love, passion, commitment and betrayal--that are themselves riven with contradiction and paradox" (p.468).
2. Article 41.1.1° of the Constitution of Ireland 1937.
3. Article 41.3.1° of the Constitution of Ireland 1937.
4. *State (Nicolaou) v An Bord Uchtála* [1966] I.R. 567; *G v An Bord Uchtála* [1980] I.R. 32; *O'B v S* [1984] I.R. 316; *WO'R v EH* [1996] 2 I.R. 248; and *JMcD v P and BM* [2010] 2 I.R. 199. See also *Mokrane v Minister for Justice, Equality and Law Reform*, unreported, High Court, Roderick Murphy J., June 28, 2002, and *GT v KAO* [2008] 3 I.R. 567 at 600.
5. By the Fifteenth Amendment of the Constitution Act 1995.
6. Regarding which, see generally Fergus Ryan, *The Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010: Round Hall Annotated Legislation* (Dublin: Round Hall, 2011).
7. See the discussion in Fergus Ryan, "Sexuality, Ideology and the Legal Construction of 'Family'; *Fitzpatrick Sterling Housing Association*" [2000] 3 I.J.F.L. 2 at 9.
8. Ironically, one of the arguments posed in favour of introducing divorce in Ireland was that the absence of divorce fostered increased cohabitation outside marriage, as separated spouses in second unions following marital breakdown could not remarry. On that basis one would have thought that cohabitation would have decreased following the introduction of divorce, though precisely the opposite occurred.
9. From approximately 31,300 in Census 1996 to approximately 77,000 in Census 2002.
10. From approximately 77,000 in Census 2002 (8.4 per cent of all family units) to approximately 121,800 in Census 2006 (11.6 per cent of all family units).
11. Central Statistics Office, *This is Ireland: Highlights from Census 2011, Part 1* (Dublin: CSO, 2012), p.27.
12. The 2011 census enumerated 215,300 families headed by a lone parent with children of any age. Approximately 40 per cent of these parents were single, 25 per cent widowed and 32 per cent divorced or separated. Approximately 89,000 families comprise lone parents with children all of whom are under 15 years of age. Central Statistics Office, *This is*

Ireland: Highlights from Census 2011, Part 1 (Dublin: CSO, 2012), p.27.

13. See: www.cso.ie/en/statistics/birthsdeathsandmarriages/numberofbirthsdeathsandmarriages/ [Last accessed August 20, 2012].
14. Figures for the second and third quarters show no improvement in the rate. See: www.cso.ie/en/media/csoie/releasespublications/documents/vitalstats/2011/vstats_q22011.pdf and www.cso.ie/en/media/csoie/releasespublications/documents/vitalstats/2011/vstats_q32011.pdf [Last accessed August 20, 2012].
15. Tony Fahey and Catherine Anne Field, *Families in Ireland: An Analysis of Patterns and Trends* (Dublin: UCD/Department of Social and Family Affairs, 2008), p.18; and Pete Lunn, Tony Fahey and Carmel Hannan, *Family Figures: Family dynamics and family types in Ireland, 1986-2006*, (Dublin: FSA/ESRI, 2010). See also, Brendan Halpin and Cathal O'Donoghue, "Cohabitation in Ireland: evidence from survey data" (University of Limerick Dept of Sociology Working Paper, No. WP2004-01, 2004) available at www.ul.ie/sociology/pubs/ [Last accessed August 20, 2012].
16. The average age of cohabitants recorded in the 2011 census was 35.1 years; the equivalent average for married people was 50.4 years. Central Statistics Office, *This is Ireland: Highlights from Census 2011, part 1* (Dublin: CSO, 2012), p.27.
17. The average age of a groom marrying for the first time in 2009 was 34, 31.8 for the bride. www.cso.ie/en/newsandevents/pressreleases/2012pressreleases/pressreleasereportonvitalstatistics2009/ [Last accessed August 20, 2012]. In 1996, the equivalent figure for males was 30.2 and 28.4 for females. This, however, masks more complex developments in the past 60 years. The average age of first marriage was, in 1957, more or less equivalent to what it is today. In the intervening years, the average age dropped steadily until 1977 (when the average age was 26 for men and 24 for women) but since that date has climbed back to rates only a little higher than those of 1957. See Central Statistics Office, *That was then, This is now: Change in Ireland, 1949-1999* (Dublin: CSO, 1999), p.54.
18. Pete Lunn, Tony Fahey and Carmel Hannan, *Family Figures: Family dynamics and family types in Ireland, 1986-2006*, (Dublin: FSA/ESRI, 2010), p.viii.
19. Claire Archbold, "Divorce--The View from the North" in Shannon (ed.), *The Divorce Act in Practice* (Dublin: Round Hall, 1999), p.50.
20. Although described as "inalienable and imprescriptible rights", the rights of the family may be curtailed in the interests of the common good: *Murray v Ireland* [1985] I.R. 352, *In the Matter of Article 26 and the Adoption (No. 2) Bill 1997* [1989] I.R. 656 and *L & O v Minister for Justice, Equality and Law Reform* [2003] 1 I.R. 1. Indeed, in the recent Supreme Court decision in *Nottinghamshire Co. Co. v B* [2011] IESC 48, O'Donnell J. suggested that the current restrictions on the adoption of marital children in the Adoption Act 2010 (they may only be adopted under s.53 in cases of total abandonment of the child) may not be constitutionally mandated.
21. See, for instance, *McGee v Attorney General* [1974] I.R. 284 and *In the Matter of Article 26 and the Matrimonial Home Bill 1993* [1994] 1 I.R. 305.
22. See *North-Western Health Board v HW* [2001] 3 I.R. 622 and *McK v Information Commissioner* [2006] 1 I.R. 260. In custody disputes between married parents and third parties, a presumption arises that a child's best interests lie in being returned to its married parents, unless the circumstances are exceptional or there are compelling reasons to do otherwise. See *Re JH*; *KC v An Bord Uchtála* [1985] I.R. 375, *N and N v Health Service Executive (The "Baby Ann" case)* [2006] IESC 60.
23. The Kilkenny Incest Report concluded that "... the very high emphasis on the rights of the family in the Constitution may consciously or unconsciously be interpreted as giving a higher value to the rights of parents than to the rights of children". *Kilkenny Incest Investigation Report* (Dublin: Stationery Office, 1993), p.96. A wording for a proposal to amend the Constitution to strengthen the rights of the child has been made by the Joint Oireachtas Committee on the Constitutional Amendment on Children. If adopted, the wording would emphasise the primacy of children's rights. See the Joint Oireachtas Committee on the Constitutional Amendment on Children, *Third Report* (Dublin: Stationery Office, 2010).
24. Lévi-Strauss, "The Family" in *The View from Afar*, translated by Neugroschel and Hoss, (London: Penguin, 1987).
25. For a more detailed discussion of the definition of family see Fergus Ryan, "Sexuality, Ideology and the Legal Construction of 'Family': *Fitzpatrick v Sterling Housing Association*" [2000] 3 I.J.F.L. 2-9.
26. [1946] V.L.R. 199.
27. Fn.27 at202. See also *Charlottetown v Charlottetown Association for Residential Services* (1979) 100 D.L.R. (3d) 614 (Prince Edward Is., Canada) where McQuaid J. noted that the term "family" is "an elastic term, having various meanings in various circumstances" (at 621-622). See also *Green v Marsden* 1 W.R. 512 at 513, where Kindersly V-C. described the term "family" as "a word of a most loose and flexible definition".
28. Fergus Ryan, "Recognising Family Diversity: Children, One Parent Families and the Law" [2006] 1 I.J.F.L. 3.
29. Tony Fahey and Catherine Anne Field, *Families in Ireland: An Analysis of Patterns and Trends* (Dublin: UCD/Department of Social and Family Affairs, 2008), p.18.

30. Section 2(2)(e) of the Civil Registration Act 2004 precludes the solemnisation of marriages between two people of the same sex. In *Zappone and Gilligan v Revenue Commissioners* [2008] 2 I.R. 417 the High Court ruled that, as used in Art.41, "marriage" means a heterosexual union. This has long been the position at common law--see *Hyde v Hyde and Woodmansee* (1866) L.R. 1 P. & D. 130 at 133, where Lord Penzance defined marriage as "... the voluntary union for life of one man and one woman, to the exclusion of all others".
31. [1954] I.R. 183.
32. [1954] I.R. 183 at 190.
33. [1960] I.R. 363.
34. [1960] I.R. 363 at 375. Earlier, at 271, Lavery J. observed: "I will accept, without deciding, that the word [family] as used in the Constitution does mean parents and children and does not include other relationships. Certainly the Constitution has primarily in mind the natural unit of society--parents and children--which it protects."
35. See *A and B v Eastern Health Board* [1998] 1 I.R. 464 at 478.
36. Section 11B of the Guardianship of Infants Act 1964, as inserted by s.9 of the Children Act 1997.
37. *Murray v Ireland* [1985] I.R. 352.
38. In *G v An Bord Uchtála* [1980] I.R. 32 at 70, however, Walsh J. suggested (albeit obiter) that orphans whose parents were (prior to their death) married to each other would still enjoy constitutional protection under Art.41, though their parents were deceased. Separated spouses may also continue to enjoy constitutional recognition as a family, as occurred in the case of a deserted married father in *Re Doyle* [1956] I.R. 217, repr. in [1989] I.L.R.M. 277.
39. *Baxter v Baxter* [1947] 2 All E.R. 886 at 890.
40. [1966] I.R. 295.
41. Section 1 of the Legitimacy Act 1931 renders a child born outside marriage "legitimate" on the marriage of its parents. Section 24 of the Civil Registration Act 2004 allows the child to be re-registered on the marriage of its parents. As Henchy J. observed: "I am satisfied that s.1 of the Legitimacy Act, 1931 [which renders a child born outside marriage 'legitimate' on the marriage of its parents] operated to endow the child in this case with membership of a family founded on the institution of marriage. It is an example of the way in which certain constitutional rights--for example, citizenship and rights founded on citizenship--may be conferred by the operation of an Act of Parliament." [1966] I.R. 295 at 307. Henchy J. added a caveat: "It is, of course, essential that such a statutory provision should not offend against the Constitution; but there is no suggestion in the present case that s.1 of the Legitimacy Act 1931, is unconstitutional."
42. While, prior to the commencement of the Civil Registration Act 2004, marriages could be celebrated at common law, any marriage celebrated since then depends for its efficacy on compliance with conditions laid down in legislation, namely the aforementioned 2004 Act.
43. [2007] 2 I.R. 313.
44. [1965] I.R. 294 at 313.
45. *Zappone and Gilligan v Revenue Commissioners* [2008] 2 I.R. 417.
46. [1966] I.R. 567.
47. Ms Donnelly wished to raise their daughter as a Roman Catholic. While Mr Nicolaou was Greek Orthodox, he had expressed his willingness to convert to Roman Catholicism.
48. In particular, both courts determined that he was not, at the relevant time, a person with "charge of or control over" the child, which would have entitled him to veto the adoption and to be heard in relation to the adoption. The court also found that Mr Nicolaou had delayed unreasonably in pursuing his challenge against the adoption.
49. Some debate ensued in the High Court as to whether Mr Nicolaou, as a non-Irish citizen (he was a British subject of Greek Cypriot origin), in fact enjoyed constitutional rights; Henchy J. ruled that he did not, though Teevan J. appeared to intimate that, depending on the particular circumstances, a non-Irish citizen may be entitled to rely on certain rights recognised by the Constitution. While not expressing any conclusive opinion on the matter, Teevan J. observed that, given that the fundamental rights recognised by the Constitution "do not owe their existence to the Constitution ... I do not think it follows that we are obliged to deny the constitutional protection of those natural rights enshrined in the Constitution to every non-citizen merely on the ground of his non-citizenship ..." [1966] I.R. 567 at 599. In the Supreme Court Walsh J. addressed the constitutional arguments on their merits, putting the issue of non-Irish citizenship aside for another, more appropriate case. Subsequent decisions appear to favour Teevan J.'s approach: see James Casey, *Constitutional Law in Ireland*, 3rd edn (Dublin: Round Hall Sweet and Maxwell, 2000), pp.444-449.
50. [1966] I.R. 567 at 622.
51. Fn.51 at 622.

52. Fn.51 at 643.
53. Oran Doyle, *Constitutional Law: Text, Cases and Materials* (Dublin: Clarus Press, 2008), p.232.
54. [1966] I.R. 567 at 643.
55. Per Walsh J. [1966] I.R. 567 at 644.
56. [1980] I.R. 32.
57. See also the earlier High Court decision of Gavan Duffy J. in *Re M, An Infant* [1946] I.R. 334, where the judge remarked: "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" (at 344).
58. [1980] I.R. 32 at 54-55. See also Parke J. who notes, at 99, that the rights of an unmarried mother in respect of her child "... do not arise under Article 41 of the Constitution because the family there recognised as the natural primary and fundamental unit group of society is that which is based upon the institution of matrimony".
59. See, for instance, *Mokrane v Minister for Justice, Equality and Law Reform*, unreported, High Court, Roderick Murphy J., June 28, 2002, where the High Court concluded that the planned deportation of an unmarried father did not engage the provisions of Art.41, as Art.41 applied only to families based on marriage. See also *GT v KAO* [2008] 3 I.R. 567 at 600.
60. (1988)3 Frewen 141.
61. [1996] 2 I.R. 248.
62. Fn.62 at 265.
63. Fn.62 at 270.
64. [1984] I.R. 316.
65. Gavan Duffy J. in *Re M, An Infant* [1946] I.R. 334 and *G v An Bord Uchtála* [1980] I.R. 32.
66. *Report of the Constitution Review Group* (Dublin: Stationery Office, 1996).
67. All-Party Oireachtas Committee on the Constitution, *Tenth Report: The Family* (Dublin: Stationery Office, 2006).
68. Fn.68, p.122. I have suggested elsewhere that the high volume of correspondence that the Committee received opposing reform coupled with a looming general election most likely dissuaded most of the Committee members from recommending wholesale constitutional reform. Fergus Ryan, "From stonewall(s) to picket fences: the mainstreaming of same-sex couples in contemporary legal discourses" in Oran Doyle and William Binchy (eds), *Committed Relationships and the Law* (Dublin: Four Courts Press, 2007), p.52.
69. The Committee reasoned that, while one might be entitled to assume that two people of the opposite sex living together are cohabiting as a couple, the same assumption cannot as readily be made in respect of two co-residents of the same sex. Ryan has suggested that this preferential treatment of opposite-sex couples would infringe art.14 of the European Convention on Human Rights where read alongside art.8, as it would treat cohabitants differently in respect of their home life on the basis of sexual orientation: Fergus Ryan, "From stonewall(s) to picket fences: the mainstreaming of same-sex couples in contemporary legal discourses" (see fn.69 above), p.52. John Mee, "Cohabitation, Civil Partnership and the Constitution", in Doyle and Binchy (see fn.69 above), pp.183-188 also criticises the reasoning of the Committee.
70. Ryan, fn.69, p.33.
71. Section 2(2)(e) of the Civil Registration Act 2004. In *Zappone and Gilligan v Revenue Commissioners* [2008] 2 I.R. 417 the High Court concluded that, as a matter of Irish law, marriage meant a heterosexual union, such that a Canadian same-sex marriage could not be recognised as a marriage in Ireland.
72. Walsh and Ryan tentatively suggest that the confinement of rights to married couples, together with the denial of the right to same-sex marriage, indirectly serves to discriminate on the basis of sexual orientation. While there is no internationally or constitutionally recognised right to same-sex marriage, excluding same-sex couples from marriage in circumstances where the rights and obligations attached to marriage are not extended to non-marital couples has the inevitable effect of discriminating against same-sex couples. Judy Walsh and Fergus Ryan, *The Rights of De Facto Couples* (Dublin: IHRC, 2006), p.130.
73. [2010] 2 I.R. 199.
74. See also *GT v KAO* [2008] 3 I.R. 567, where a somewhat different approach was taken in a situation concerning alleged child abduction. The question that arose was whether an unmarried father who had applied to court for

guardianship and custody had “custody rights” that would allow him to object to his children's removal from the State. Section 2 of the European Convention on Human Rights Act 2003 requires that Irish law, to the extent that it is possible to do so, be interpreted in a Convention-compliant manner. Observing that the rights of an unmarried father in Irish law had “been established with near certainty”, McKechnie J. concluded that, “it would not be possible in my opinion to enlarge or re-interpret these rights in accordance with s.2 of the Act of 2003, so as to reflect any influence which the European Convention on Human Rights may have on such rights ... To do so would be doing violence to the established principles of law which have been set out by the Supreme Court” (at 593). He thus declined to conclude, as a matter of Irish law, that the father had custody rights in the absence of a court order to that effect. While the judge did proceed to interpret the Brussels II bis Regulation in light of art.8 as conferring on the father rights of custody for the purpose of child abduction proceedings, the Supreme Court confined itself to concluding that the removal of children from Ireland while guardianship and custody proceedings were pending infringed the custody rights of the District Court. The verdict in *JMcB v LE* [2010] IEHC 123 and the outcome of a reference in that case to the European Court of Justice indicates that art.8 does not in fact confer custody rights on a father independently of provisions of national law.

75. See *Kerkhoven, Hinke and Hinke v Netherlands*, Applic. No. 40016/89, European Court of Human Rights, May 19, 1992 and *Mata Estevez v Spain*, Applic. No. 56501/00, European Court of Human Rights, May 10, 2001. Since the judgment in *McD v L*, however, the European Court of Human Rights has recognised same-sex couples as falling within the scope of the family life provisions: see *Schalk and Kopf v Austria* [2010] ECHR 30141/04 (June 24, 2010). The court has also found that same-sex couples and their children may constitute a family for this purpose: *Gas and Dubois v France*, Applic. No. 25951/07, Admissibility decision, August 31, 2010 (which involved a same-sex couple and their child).
76. (1997) 24 E.H.R.R. 143. In this case, the European Court of Human Rights found that a transsexual man, his female partner and the child of the latter were a family for the purpose of the Convention.
77. [2010] 2 I.R. 199 at 235.
78. See also Ursula Kilkelly, “Child and Family Law” in Ursula Kilkelly (ed.), *ECHR and Irish Law* (Bristol: Jordan Publishing, 2004), p.113, who suggests that the decision in *X, Y and Z* pointed towards the possibility of recognition for same-sex families in the future. See also the discussion in Fiona de Londras, “The Law that Dare Not Speak its Name” [2006] 2 I.J.F.L. 20.
79. [2010] 2 I.R. 199 at 235-236.
80. On appeal, the Supreme Court ruled that the High Court had placed excessive emphasis on the report of an expert psychiatrist addressing what would be in the child's best interests. Hedigan J.'s stance, that the expert's report should invariably be followed unless there were “grave reasons” for not doing so, was, the Supreme Court concluded, an effective abdication of the court's decision-making role to a witness, which, however expert he may have been, was not appropriate.
81. The case was returned to the High Court, where Hedigan J. made an order for access, though, given that the couple had moved to Australia, much of the access granted was “virtual”. J. McD. was, however, granted permission to visit the child in Australia.
82. Compare *JRM v Netherlands*, Applic. No. 16944/90, (Commission Decision, February 8, 1993).
83. *Marckx v Belgium* (1979) 2 E.H.R.R. 330.
84. *Berrehab v The Netherlands* (1988) 11 E.H.R.R. 322, which involved a divorced father.
85. *Keegan v Ireland* (1994) 18 E.H.R.R. 342.
86. *Johnston v Ireland* (1987) 9 E.H.R.R. 203. In *Johnston* the court determined that the failure on Ireland's part (prior to the enactment of the Status of Children Act 1987) to provide a mechanism whereby a cohabiting father's bond with his daughter could be legally recognised, constituted a violation of the child's rights and those of her parents under art.8. Notably, the court found that the cohabiting couple and their daughter constituted a family for the purpose of the Convention. Although the court declined to rule that the non-recognition of the couple constituted a breach of the Convention, the father had no means of acquiring guardianship rights in respect of his daughter, a situation that the court ruled constituted a failure to respect the family life of both the child and her parents. See also *Wakefield v UK* (1990), Applic. No. 15817/89--a relationship between an engaged couple may constitute family life if sufficiently well established.
87. *G v Netherlands* (1993) 16 E.H.R.R. 38 and *JRM v The Netherlands*, Applic. No. 16944/90, (Commission Decision, February 8, 1993).
88. See *Lebbink v Netherlands* (2005) 40 E.H.R.R. 18.
89. [2010] 2 I.R. 199 at 317.
90. *Schalk and Kopf v Austria* [2010] ECHR 30141/04 (June 24, 2010). The court has also found that same-sex couples and their children may constitute a family for this purpose: *Gas and Dubois v France*, Applic. No. 25951/07, Admissibility Decision, August 31, 2010.
91. Indeed, Hedigan J. himself acknowledged this: “I do so mindful of the fact that it is the Constitution that prevails in Ireland and that therefore any rights that this court finds to arise under the Convention can only be applied by the court

absent a constitutional conflict" ([2010] 2 I.R. 199 at 234). Denham J. also seemed to indicate, at 274, that in cases of conflict, the Constitution would prevail: "... I am satisfied that the trial judge fell into error in his analysis of the case law which has arisen under article 8 of the Convention and in the European Court of Human Rights, in treating the respondents and the child as a family. However, even if this is not so, the Irish law would conflict with such a scenario and would govern the situation. Under the Constitution it has been clearly established that the family in Irish law is based on a marriage between a man and a woman."

- [92.](#) Oran Doyle and Estelle Feldman, "Constitutional Law" in Ray Byrne and William Binchy (eds), *Annual Review of Irish Law 2009* (Dublin: Round Hall, 2010), p.202.
- [93.](#) For instance, to the extent that it is possible to do so, s.2 requires that national law must be read in a Convention-compliant manner. (On which see *WS v Adoption Board*, unreported, High Court, O'Neill J., October 6, 2009, and *GT v KAO* [2008] 3 I.R. 567). Section 3 requires organs of State (other than the Oireachtas, the President and the courts) to abide by the Convention, providing remedies in cases of breach. Section 5 entitles the courts, where a Convention-compliant interpretation of Irish law is not possible, to declare a provision of Irish law "incompatible" with the Convention, though this does not have the effect of invalidating the provision in question.
- [94.](#) Murray C.J.: "Although it may not be necessary to do so, I should add that the mere fact that the law could be said to be silent as regards a specific situation does not necessarily mean that it is unaffected by the law or the Constitution. Silence of the law may speak volumes for the legal status to be accorded or not to be accorded to a particular subject matter or situation." [2010] 2 I.R. 199 at 255.
- [95.](#) [2010] 2 I.R. 199 at 270. She repeats the point again at 274.
- [96.](#) Fn.96 at 270.
- [97.](#) Fn.96 at 278.
- [98.](#) Fn.96 at 316-317.
- [99.](#) Fn.96 at 317.
- [100.](#) [2010] 4 I.R. 433.
- [101.](#) Fn.101 at 464. He added: "Any question of change in the law is one for the legislature or, where necessary, the people of Ireland speaking through a referendum on any constitutional provisions engaged."
- [102.](#) [2010] 2 I.R. 199 at 255-256.
- [103.](#) Fn.103 at 256.
- [104.](#) Fn.103 at 270.
- [105.](#) Fn.103 at 275.
- [106.](#) Fn.103 at 275.
- [107.](#) For instance, Fennelly J. remarked (at 320) that "[the mother's partner] has no legally or constitutionally recognisable family relationship with the child". Indeed, Murray C.J. suggests (at 255) that legally recognising the mother's partner would potentially "trammel" the mother's own constitutional and legal rights (an approach that appears artificially to pit BM against PL, despite their solid relationship).
- [108.](#) See, for instance, *MhicMhathúna v Ireland* [1995] 1 I.R. 484 and *TD v Minister for Education* [2001] 4 I.R. 259 and the discussion by David Langwallner, "Separation of Powers, Judicial Deference and the Failure to Protect the Rights of the Individual", Ch.14 in Eoin Carolan and Oran Doyle (eds), *The Irish Constitution: Governance and Values* (Dublin: Round Hall, 2008), pp.256-276.
- [109.](#) [2012] IESC 10.
- [110.](#) Though where the offence is one of defilement of a child under the age of 17 and the alleged offender is also under that age, the prosecution may proceed only with the consent of the Director of Public Prosecutions (see s.3(9) of the Criminal Law (Sexual Offences) Act 2006).
- [111.](#) See s.5 of the Criminal Law (Sexual Offences) Act 2006.
- [112.](#) [2012] IESC 10 at para.49.
- [113.](#) Fn.113 at para.50.
- [114.](#) [2008] 2 I.R. 417. See also, Brian Tobin, "Same Sex Couples and the Law: Recent Developments in the British Isles" (2009) 23 I.J.L.P.F. 309; and Brian Tobin, "Recognition of Canadian same sex marriage: *Zappone and Gilligan v Revenue Commissioners and others*" (2010) 1 I.H.R.L.R. 217.
- [115.](#) Though, as a result of s.5 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, certain

designated classes of legal relationship conferred abroad between couples of the same-sex may be recognised in Ireland as civil partnerships. To date, 39 classes of relationship have been recognised, including same-sex marriages in 19 jurisdictions: See S.I. No. 649 of 2010--Civil Partnership (Recognition of Registered Foreign Relationships) Order 2010, and S.I. No. 642 of 2011--Civil Partnership (Recognition of Registered Foreign Relationships) Order 2011. These same-sex marriages, however, are recognised in Ireland as civil partnerships rather than marriages.

- [116.](#) [2010] 2 I.R. 199.
- [117.](#) Fn.117 at 270.
- [118.](#) Fn.117 at 274.
- [119.](#) Eoin Carolan, "Committed Non-Marital Couples and the Irish Constitution", in Doyle and Binchy (eds), *Committed Relationships and the Law* (Dublin, Four Courts Press, 2007); Brian Tobin, "Law, Politics and the Child-Centric Approach to Marriage in Ireland" (2012) 47 *Irish Jurist* 210; and Conor O'Mahony, "Constitution is not an obstacle to legalising gay marriage", *Irish Times*, July 16, 2012, available at: www.irishtimes.com/newspaper/opinion/2012/07/16/1224320203659.html [Last accessed August 20, 2012].
- [120.](#) Eoin Daly, "Same sex marriage doesn't need a referendum", July 15, 2012, available at: www.humanrights.ie/index.php/2012/07/15/same-sex-marriage-doesnt-need-a-referendum/ [Last accessed August 20, 2012].
- [121.](#) See for instance *MhicMhathúna v Ireland* [1995] 1 I.R. 484, *TD v Minister for Education*, [2001] 4 I.R. 259, and *MD v Ireland* [2012] IESC 10 at para.49.
- [122.](#) [2008] 2 I.R. 417 at 513.
- [123.](#) The prior reference to circumstances in which a partner dies or becomes ill may suggest that she had in mind relief specific to these circumstances.
- [124.](#) *Re M, An Infant* [1946] I.R. 334 and *G v An Bord Uchtála* [1980] I.R. 32.
- [125.](#) [1984] I.R. 316.
- [126.](#) [1966] I.R. 567 at 644.
- [127.](#) [1980] I.R. 32.
- [128.](#) See also *MO'C v Sacred Heart Adoption Society* [1996] 1 I.L.R.M. 297, and *Northern Area Health Board v An Bord Uchtála* [2002] 4 I.R. 252.
- [129.](#) By this is meant specifically fathers who are not married to the mother of their children.
- [130.](#) *State (Nicolaou) v An Bord Uchtála* [1966] I.R. 567; *JK v VW* [1990] 2 I.R. 437; *WO R. v EH* [1996] 2 I.R. 248; and *McD v L* [2010] 2 I.R. 199. See also, *GT v KAO* [2008] 3 I.R. 567. Non-marital fathers do, however, have a right to apply for guardianship, custody or access under the Guardianship of Infants Act 1964 (as amended).
- [131.](#) [1951] I.R. 1.
- [132.](#) This is reflected in guardianship arrangements for married couples. Section 6 of the Guardianship of Infants Act 1964 confers joint and equal guardianship rights and responsibilities on the mother and father of a child where they are married to each other. The right of the father survives divorce: see s.10(2) of the Family Law (Divorce) Act 1996.
- [133.](#) The rights of marital parents are deemed to be inalienable and imprescriptible in Art.42 of the Constitution. This does not mean that they are absolute--see *In the Matter of Article 26 and the Adoption (No. 2) Bill 1997* [1989] I.R. 656 and *Nottinghamshire Co. Co. v B* [2011] IESC 48--but these rights are heavily entrenched such that very exceptional circumstances are required to displace them. By contrast, the constitutional rights of the unmarried mother, while extensive, are addressed by Art.40.3, the terms of which require that rights be defended and vindicated "as far as practicable", a formula that suggests that the rights are more easily displaced than those addressed by Art.42.
- [134.](#) See s.11(4) of the Guardianship of Infants Act 1964. Where the child has been born to parents in a stable relationship, the weight to be attached to the non-marital father's position may be very extensive indeed. By contrast, where the father has not had any involvement beyond his role in the conception of the child, the position of the father would be much weaker.
- [135.](#) *Report on Illegitimacy* (LRC 4-1982) and *Report on Legal Aspects of Family Relationships* (LRC 101-2010). See also the Labour Party's Guardianship of Children Bill 2010.
- [136.](#) See *JK v VW* [1990] 2 I.R. 437 and *WO'R v EH* [1996] 2 I.R. 248.
- [137.](#) See s.2(4) of the Guardianship of Infants Act 1964, as inserted by the Children Act 1997.
- [138.](#) [1990] 2 I.R. 437.

- [139.](#) In *JK v VW* the Supreme Court expressly rejected the test set out by Barron J. in the High Court, a test that appeared to create a presumption in favour of granting non-marital fathers guardianship unless there were solid reasons for not doing so. Nonetheless, in practice, it appears that the courts do in fact lean in favour of fathers who make such applications. In 2008, while 2,448 applications were made under s.6A, 1,802 (approx. 75 per cent of applications for that year) were granted, and only 283 (12 per cent) refused (the remainder were withdrawn or struck out). See Court Service, *Court Service Annual Report 2008* (Dublin: Court Service, 2009), p.79. This suggests that in practice the courts have considerably softened their attitude to fathers of children born outside marriage, with the result that guardianship is comparatively rarely denied.
- [140.](#) Later decisions place somewhat more emphasis on the blood link between the father and child--most notably in *McD v L*, where the mother and father had never been in a relationship with each other. That said, Denham J. nonetheless distinguished the father's case from that of an anonymous sperm donor, noting that it was anticipated at all times that he would have contact. [2010] 2 I.R. 199 at 266.
- [141.](#) [1990] 2 I.R. 437 at 447.
- [142.](#) [1996] 2 I.R. 248.
- [143.](#) Fn.143 at 269-270. Denham J. makes a very similar statement at 272-273: "The basic issue for the trial judge is the welfare of the children. In so determining, consideration must be given to all relevant factors. The blood link will be one of many factors for the judge to consider, and the weight it will be given will depend on the circumstances as a whole. Thus, the link, if it is only of blood with the absence of other factors beneficial to the children, or in the presence of factors negative to the children's welfare, is of small weight and would not be a determining factor. But, where the children are born as a result of a stable and established relationship and nurtured at the commencement of life by father and mother in a *de facto* family as opposed to a constitutional family, then the natural father on application to the court under s.6A of the Guardianship of Infants Act, 1964, has extensive rights of interest or concern. However, they are subordinate to the paramount concern of the court which is the welfare of the child."
- [144.](#) Fn.143 at 270.
- [145.](#) Fn.143 at 286.
- [146.](#) The law as it applied to non-marital couples prior to 2011 is described in Judy Walsh and Fergus Ryan, *The Rights of De Facto Couples* (Dublin: IHRC, 2006), Ch.4. The specific position of same-sex couples is discussed in detail by John Mee and Kaye Ronayne, *Partnership rights of same-sex couples* (Dublin: Equality Authority, 2000).
- [147.](#) Though a parent may apply for maintenance to support a child of the respondent parent: see s.5A of the Family Law (Maintenance of Spouses and Children) Act 1976, as inserted by s.18 of the Status of Children Act 1987.
- [148.](#) Domestic Violence Act 1996.
- [149.](#) Civil Liability (Amendment) Act 1996, amending s.47 of the Civil Liability Act 1961.
- [150.](#) Residential Tenancies Act 2004 s.39.
- [151.](#) Social Welfare Consolidation Act 2005 s.3(10) and (11), ss.142(4)(a), 144(3), 152(b), 197(2)(a), 217(3), 227 and 262, and Sch.3 Pts 1 and 3, each of which referred to "a man and woman who are not married to each other but are cohabiting as husband and wife", thereby expressly excluding same-sex couples. (These provisions have since been amended to include all cohabitants, including those of the same sex. See the Social Welfare and Pensions Act 2010.)
- [152.](#) The Acts in question tended to refer to persons who, though unmarried, were "living together as husband and wife". Although the point is debateable, the gendered quality of this formula appeared to be designed to apply only to opposite-sex couples. See *Fitzpatrick v Sterling Housing Association* [2001] 1 A.C. 27. But see contra the decision in *Ghaidan v Godin-Mendoza* [2004] UKHL 30. Discussions in the Oireachtas during the passage of the Residential Tenancies Act 2004 support the view that the intention was to address, by the use of this formula, only opposite-sex couples. See also the discussion in Fergus Ryan, *The Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010--Round Hall Annotated Legislation* (Dublin: Round Hall, 2011), pp.8-9.
- [153.](#) [1984] 1 I.R. 316.
- [154.](#) Fn.154 at 336.
- [155.](#) Though it is important to note that neither party in the case had claimed otherwise. As Walsh J. remarked: "It is not claimed in the present case that there are any particular limitations placed upon the ability of the Oireachtas by legislation to allow intestate succession by children to their parents when the children are born outside marriage, and this Court is not called upon to express any opinion at this time on what limitations may exist in respect of any such legislative ability" (at 334).
- [156.](#) [1956] I.R. 567 at 642.
- [157.](#) [1982] I.R. 241.
- [158.](#) [1985] I.R. 472.

- [159.](#) In a similar vein see *Hyland v Minister for Social Welfare* [1989] I.R. 629 and *Greene v Minister for Agriculture* [1990] 2 I.R. 17. In each case measures that treated married couples less favourably than similarly placed unmarried couples were deemed in breach of Art.41.
- [160.](#) [1985] I.R. 472 at 485.
- [161.](#) [1989] I.R. 504 (High Court) and [1995] 1 I.R. 484 (Supreme Court).
- [162.](#) Finlay C.J. emphasised that fiscal policy and social welfare were matters peculiarly within the province of the Oireachtas, and that the courts would be reluctant to intervene in this context.
- [163.](#) See generally the discussion in Oran Doyle, *Constitutional Law: Texts, Cases and Materials* (Dublin: Clarus Press, 2008), pp.226-230 and in John Mee, "Cohabitation, Civil Partnership and the Constitution" in Doyle and Binchy (eds), *Committed Relationships and the Law* (Dublin: Four Courts Press, 2007), pp.204-206.
- [164.](#) Doyle, *Constitutional Law: Texts, Cases and Materials* (fn.164), p.226.
- [165.](#) [1996] 1 I.R. 426.
- [166.](#) Fn.166 at 439.
- [167.](#) Fn.166 at 439 (Emphasis added).
- [168.](#) Fn.166 at 438-439.
- [169.](#) Doyle, *Constitutional Law: Texts, Cases and Materials* (fn.164), pp.231-232. See also the discussion of these cases in Eoin Carolan, "Committed Non-Marital Couples and the Irish Constitution", in Doyle and Binchy (eds), *Committed Relationships and the Law* (Dublin: Four Courts Press, 2007).
- [170.](#) See generally Fergus Ryan, *The Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010--Round Hall Annotated Legislation* (Dublin: Round Hall, 2011); and Patricia Brazil, "The Civil Partnership and certain Rights and Obligations of Cohabitants Act 2010: Radical New Departure in Irish Law?" (2010) 34 D.U.L.J. 208.
- [171.](#) The Criminal Law (Sexual Offences) Act 1993 abolished the offences of "buggery" and gross indecency between males, though both were replaced with analogous provisions banning anal intercourse and gross indecency where one of the parties was under the age of 17 or mentally deficient.
- [172.](#) See John Mee and Kaye Ronayne, *Partnership rights of same-sex couples* (Dublin: Equality Authority, 2000).
- [173.](#) Examples of this can be seen in Pt 4 of the 2010 Act, which extends protection to civil partners in respect of their shared home in terms that largely replicate the provisions of the Family Home Protection Act 1976, and Pts 5-7, which replicate in large part the provisions of the Family Law (Maintenance of Spouses and Children) Act 1976.
- [174.](#) See Pt 8, which amends the Succession Act 1965 so that civil partners are treated largely identically to spouses, and Pt 9, which treats spouses and civil partners identically in the context of domestic violence.
- [175.](#) See s.2(2A)(b) and (f) of the Civil Registration Act 2004, as inserted by s.7(3) of the 2010 Act. See also s.107(a)(ii) and (iii) of the 2010 Act.
- [176.](#) See s.2(2A)(c) of the Civil Registration Act 2004, as inserted by s.7(3) of the 2010 Act. See also s.107(a)(i) and (iii) of the 2010 Act.
- [177.](#) See s.2(2A)(a) of the Civil Registration Act 2004, as inserted by s.7(3) of the 2010 Act. See also s.107(d) of the 2010 Act and Sch.3 to the Civil Registration Act 2004, as inserted by s.26 of the 2010 Act.
- [178.](#) See the comments of John Mee, "Cohabitation, Civil Partnership and the Constitution" in Doyle and Binchy (eds), *Committed Relationships and the Law* (Dublin: Four Courts Press, 2007), p.208, discussed further below.
- [179.](#) A point emphasised by the decision in *UF v JC* [1991] I.L.R.M. 65, where the Supreme Court found that a homosexual orientation may render a party unable to form and sustain a normal and caring marital relationship with an opposite-sex spouse. See also the comments of John Mee, fn.179, p.208, discussed further below.
- [180.](#) One example relates to the new family home of a spouse who was formerly a civil partner. In proceedings taken by a former civil partner for relief following dissolution, the new family or shared home of a former civil partner and his or her new spouse or civil partner is ring-fenced such that it cannot be the subject of an order in favour of the applicant. See ss.118(9) and 119(3) of the 2010 Act. Notably, the same protection does not extend to the shared home of civil partners in the Family Law (Divorce) Act 1996. While the family home of new spouses is ring-fenced and cannot be affected by an ancillary order made on divorce, the shared home of a former spouse and his or her new civil partner is not afforded such protection. This may be because it was considered unconstitutional to protect the new civil partner at the expense of a former spouse.
- [181.](#) John Mee, fn.179, pp.201-207.
- [182.](#) Fn.179, p.208.

- [183.](#) Fn.179, p.208.
- [184.](#) Fn.179, p.208.
- [185.](#) See Pt 3 of the 2010 Act amending the Civil Registration Act 2004.
- [186.](#) Parts 5-7 of the 2010 Act.
- [187.](#) See the Family Law (Maintenance of Spouses and Children) Act 1976 (as amended) and the Family Law (Divorce) Act 1996.
- [188.](#) Part 8 of the 2010 Act. While a child is not automatically entitled to any set portion of a parent's estate where a parent dies testate, a child may apply to court under s.117 of the Succession Act 1965, seeking provision from the estate of a deceased parent, provided the parent died testate or partially testate. A court may grant such an application if it believes that the parent had failed in her moral duty towards the child to make proper provision for the child in accordance with the parent's means. An order under s.117 cannot, however, reduce the legal right share of the deceased's surviving spouse. If the surviving spouse is a parent of the child, moreover, an order under s.117 cannot affect any devise or bequest to that spouse. By contrast, the legal right share of the deceased's civil partner can be reduced in exceptional cases in order to make provision for a child under s.117, though only if it would be unjust not to grant such an order in the child's favour. Uniquely, a child of a civil partner may also seek additional provision from the estate of a parent who dies intestate over and above that normally available to the child of an intestate parent, thus reducing the surviving civil partner's interest. This is a facility that is not available to children of non-civil partners. (See ss.73 and 86 of the 2010 Act). The rationale behind these measures seems to be to ensure that a child in need of support is not prejudiced by his parent's civil partnership, though it is unclear on what basis a child of a civil partner should have enhanced rights.
- [189.](#) See s.129 of the 2010 Act. The factors that a court must take into account when granting remedies following civil partnership dissolution are almost identical to those that apply in respect of divorce (see s.20 of the Family Law (Divorce) Act 1996).
- [190.](#) See Pt 12 of the 2010 Act.
- [191.](#) In the case of taxation the changes to the tax code have required extensive amendments. The process began in the Finance (No. 3) Act 2011 and was continued by the Finance Act 2012. Though some minor differences remain, civil partners and spouses are treated largely the same under tax law. Under the Social Welfare and Pensions Act 2010, civil partners are treated the same as spouses for the purpose of social welfare entitlements. Same-sex cohabitants outside civil partnership are now treated, since the beginning of 2011, the same as opposite-sex cohabitants.
- [192.](#) Civil Law (Miscellaneous Provisions) Act 2011 s.33, amending s.15A of the Irish Nationality and Citizenship Acts 1956-2004.
- [193.](#) See: www.inis.gov.ie/en/INIS/Pages/CivilPartnership [Last accessed August 21, 2012].
- [194.](#) Part 9 of the 2010 Act.
- [195.](#) Sections 99 and 100 of the 2010 Act.
- [196.](#) Sections 102 and 103 of the 2010 Act.
- [197.](#) Part 4 of the 2010 Act.
- [198.](#) See s.102 of the 2010 Act.
- [199.](#) See s.170 of the 2010 Act and Pt 5 of the Sch. to the 2010 Act.
- [200.](#) Section 9 prohibits a person from using violence, threats of violence or intimidation directed at another person or a member of the latter's family to make someone do what he or she lawfully is entitled not to do, or to refrain from doing what he or she may lawfully do. Section 11 makes it an offence to make demands for the repayment of a debt that "by reason of their frequency are calculated to subject the debtor or a member of the family of the debtor to alarm, distress or humiliation".
- [201.](#) A similar approach was taken in the 2010 Act to the amendment of s.6 of the Prosecution of Offences Act 1974 and s.41 of the Criminal Justice Act 1999. See s.170 of, and the Sch., Pt 5 to the 2010 Act.
- [202.](#) See for instance the amendments made to Pt 9 of the Health Act 2004 by s.170 of, and the Sch., Pt 5, to the 2010 Act.
- [203.](#) [1960] I.R. 363.
- [204.](#) [1954] I.R. 183.
- [205.](#) [1960] I.R. 363 at 375.
- [206.](#) Census 2011 enumerated 230 same-sex couples residing with children, the overwhelming majority being female couples. The total number of same-sex couples counted in the Census was 4,042, of which 2,321 were male couples

and 1,721 female couples.

- [207.](#) These are discussed in more detail in Fergus Ryan, *The Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010: Round Hall Annotated Legislation* (Dublin: Round Hall, 2011), pp.27-28.
- [208.](#) Section 110 of the 2010 Act.
- [209.](#) Section 129(2)(1) of the 2010 Act.
- [210.](#) Section 30 of the 2010 Act.
- [211.](#) *Report on Legal Aspects of Family Relationships* (LRC 101-2010).
- [212.](#) Section 11B of the Guardianship of Infants Act 1964 as inserted by s.9 of the Children Act 1997.
- [213.](#) This entails the birth parent ceding his or her rights and then adopting the child with his or her spouse. This may only be possible, however, where the child was born outside marriage, unless the child has been abandoned by its parents, which is unlikely if the parent is wishing to adopt the child together with the new spouse. Where the other parent has guardianship rights, he or she may veto the adoption.
- [214.](#) See the definition of a “dependent child of the family” in the Family Law (Maintenance of Spouses and Children) Act 1976 (as amended) and the Family Law (Divorce) Act 1996.
- [215.](#) See the address by the Minister for Justice, Equality and Defence, Mr Alan Shatter TD at the sixth European Gay Police Association Conference, Dublin Castle, June 28, 2012: “Our Civil Partnership legislation enacted in 2010 provides for the civil union of same-sex couples and confers on them most of the rights and obligations of civil marriage. It did not address issues relating to the children of civil partners and I hope, in the not too distant future, to publish legislation addressing this omission.” See: www.justice.ie/en/JELR/Pages/SP12000196 [Last accessed August 21, 2012].
- [216.](#) Article 41.3.2° of the Constitution of Ireland 1937 as amended by the Fifteenth Amendment to the Constitution Act 1995. See also s.5 of the Family Law (Divorce) Act 1996.
- [217.](#) This would appear to include children who are no longer dependent: see *RC v CC* [1997] 1 I.R. 334. The Family Law (Divorce) Act 1996 requires specifically that provision be made for any dependent children of the family, which includes adopted children and children in respect of whom either or both spouses are in loco parentis. It also includes children in respect of whom one spouse is a parent (biological or adoptive) or in loco parentis where the other spouse, knowing he is not a parent, has treated the child as a child of the family.
- [218.](#) See ss.6 and 7 of the Family Law (Divorce) Act 1996.
- [219.](#) See s.110 of the 2010 Act.
- [220.](#) Mee, “Cohabitation, Civil Partnership and the Constitution” in Doyle and Binchy (eds), *Committed Relationships and the Law* (Dublin: Four Courts Press, 2007), pp.208-210.
- [221.](#) [2007] 2 I.R. 313.
- [222.](#) Mee, fn.221, p.209.
- [223.](#) The 2010 Act does not expressly confer a right to enter into separation agreements, though ss.48 and 129(3) of the 2010 Act refer to such agreements entered into between civil partners, the implication being that such agreements would be recognised on the same basis as separation agreements between married couples.
- [224.](#) Adultery—one of the grounds for judicial separation—could not logically be applied to civil partners given that it entails an act of heterosexual sexual intercourse outside marriage. Homosexual acts outside marriage, however intimate, do not amount to adultery. See *Dennis v Dennis* [1955] 2 All E.R. 51 and *Orford v Orford* 1921 58 D.L.R. 251 (Ontario Supreme Court), in the latter of which the court observed: “The fact that it has been held that anything short of actual sexual intercourse, no matter how indecent or improper the act may be, does not constitute adultery, really tends to strengthen my view that it is not the moral turpitude that is involved, but the invasion of the reproductive function. So long as nothing takes place which can by any possibility affect that function, there can be no adultery; so that, unless and until there is actual sexual intercourse, there can be no adultery. But to argue, from that, that adultery necessarily begins and ends there is utterly fallacious. Sexual intercourse is adulterous because in the case of the woman it involves the possibility of introducing into the family of the husband a false strain of blood. Any act on the part of the wife which does that would, therefore, be adulterous.”
- [225.](#) See s.26 of the 2010 Act inserting a Third Schedule into the Civil Registration Act 2004.
- [226.](#) Applic. No. 36536/02, September 13, 2005.
- [227.](#) Compare *McGee v Attorney General* [1974] I.R. 274 and *Norris v Ireland* (1988) 13 E.H.R.R. 186.
- [228.](#) The number of cohabitants enumerated in Census 2011.
- [229.](#) It has already been adopted as a criterion in determining eligibility for certain social welfare entitlements: see the Social

Welfare and Pensions Act 2010.

- [230.](#) The prohibited degrees of relationship for same-sex and opposite-sex couples are different. In particular the grounds of affinity that apply to marrying couples do not restrict same-sex couples entering into a civil partnership. This means that some same-sex couples may qualify as cohabitants in circumstances where their opposite-sex counterparts would not, though these situations would likely be rare.
- [231.](#) Section 172 of the 2010 Act.
- [232.](#) Section 172(1) of the 2010 Act makes this clear, though there is a drafting error in s.172(4), which states that two persons will be within the prohibited degrees of relationship if “they would be prohibited from marrying each other in the State”. Read literally, this technically excludes same-sex couples, and couples one or both of whom are married to other people, though a harmonious, purposive reading of s.172 suggests that neither is the case. In particular, s.172(1) expressly references same-sex couples as being potential cohabitants which would mean that same-sex couples can be treated as cohabitants.
- [233.](#) Section 172(2) of the 2010 Act.
- [234.](#) See s.172(5) of the 2010 Act read alongside s.171.
- [235.](#) Section 172(6) of the 2010 Act.
- [236.](#) See, for instance, ss.173(5) and 194(10) of the 2010 Act.
- [237.](#) Section 204 of the 2010 Act amending s.47 of the Civil Liability Act 1961.
- [238.](#) Section 203 of the 2010 Act amending s.39 of the Residential Tenancies Act 2004.
- [239.](#) Civil Law (Miscellaneous Provisions) Act 2011 s.60.
- [240.](#) See the Social Welfare and Pensions Act 2010.
- [241.](#) Section 173 of the 2010 Act.
- [242.](#) See ss.175-184 of the 2010 Act.
- [243.](#) See ss.187-192 of the 2010 Act.
- [244.](#) Section 174 of the 2010 Act.
- [245.](#) Section 194 of the 2010 Act.
- [246.](#) Section 173(2) of the 2010 Act.
- [247.](#) Section 194(5) of the 2010 Act.
- [248.](#) Section 172(3)(b), (c) and (d).
- [249.](#) Section 194(1) and (11) of the 2010 Act.
- [250.](#) Section 194(10) of the 2010 Act.
- [251.](#) [1996] 1 I.R. 426.
- [252.](#) *The Rights and Duties of Cohabitants* (LRC 82-2006) (Dublin: Law Reform Commission, 2006).
- [253.](#) Fn.253, para.3.07, p.39.
- [254.](#) [1995] 1 I.R. 321.
- [255.](#) [2008] 1 I.R. 134.
- [256.](#) See the discussion in Fergus Ryan, “Sexuality, Ideology and the Legal Construction of ‘Family’; *Fitzpatrick Sterling Housing Association*” [2000] 3 I.J.F.L. 2 at 8.
- [257.](#) Joint Oireachtas Committee on the Constitutional Amendment on Children, *Third Report* (Dublin: Stationery Office, 2010).
- [258.](#) *State (Healy) v Donoghue* [1976] I.R. 325 per O’Higgins C.J.; and *McGee v Attorney General* [1974] I.R. 284 per Walsh J.