REPUBLIC OF IRELAND

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A. New Developments in the field of Divorce (since September 2002)

Introduction

Article 41.3.2 of the Irish 1937 Constitution provided that 'no law shall be enacted providing for the granting of the dissolution of marriage'. Following a referendum on 24 November 1995 the Fifteenth Amendment to the Constitution Act 1995 was passed.[1] As a result, Article 41.3.2 of the Constitution was replaced and the Family Law (Divorce) Act 1996 was introduced enabling the Irish courts to grant a decree of divorce. That said, it is often forgotten in the Irish context that from 1922 to 1937 there was no specific prohibition on the granting of divorce decrees in Ireland.

Since the last national report, there have been very significant changes in Irish family law in general, and the divorce jurisdiction in particular.

Same-sex marriage

The Irish Constitution was assumed to contain an implicit prohibition on same-sex marriage. The Thirty-fourth Amendment of the Constitution (Marriage Equality) Act 2015 (previously Bill No. 5 of 2015) amended the Constitution of Ireland to permit marriage to be contracted by two persons without distinction as to their sex.[2] It was approved by a referendum on 22 May 2015 by a margin of 62% of voters on a turnout of 61%. This was the first time that a state legalised same-sex marriage through a popular vote.

At a practical level, same-sex marriage was introduced in Ireland in November 2015 by the Marriage Act 2015, which came into force on 16 November 2015.[3] The first same-sex marriage ceremony was celebrated the next day in Clonmel, County Tipperary. Due to the availability of same-sex marriage, civil partnerships ceased to be an option for same-sex couples.

The Marriage Act 2015 contains numerous amendments to the Judicial Separation and Family Law Reform Act 1989,[4] the Family Law Act 1995[5] and the Family Law

1 See www.irishstatutebook.ie/eli/1995/ca/15/enacted/en/html.
2 See www.irishstatutebook.ie/eli/2015/act/35/enacted/en/html.
3 See www.irishstatutebook.ie/eli/2015/act/35/enacted/en/html.
4 See www.irishstatutebook.ie/eli/1989/act/6/enacted/en/html.
5 See www.irishstatutebook.ie/eli/1995/act/26/enacted/en/html.

(Divorce) Act 1996,[6] which reflect the fact that marriage in Ireland is now a contract between two persons without regard to their gender.[7] This has the resulting effect that each of the mechanisms and grounds for termination of a marriage, as well as the orders for ancillary relief which can be made, are available equally to marriages between parties of the same gender.

New divorce law

Following a further referendum on 24 May 2019, in which the people of the Republic of Ireland voted to amend the Constitution to remove from Article 41.3.2 of the Constitution the minimum living-apart period for spouses seeking a divorce; and to replace the text of article 41.3.3 on foreign divorces,[8] the minimum living-apart period for spouses seeking a divorce was reduced by the Oireachtas from four of the previous five years to two of the previous three years in section 3(1)(a) of Family Law Act, 2019,[9] which came into operation on 1 December 2019.[10] Article 41.3.2 now states that:

> 2° A Court designated by law may grant a dissolution of marriage where, but only where, it is satisfied that –
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> i. there is no reasonable prospect of a reconciliation between the spouses,
> ii. such provision as the Court considers proper having regard to the circumstances exists or will be made for the spouses, any children of either or both of them and any other person prescribed by law, and
> iii. any further conditions prescribed by law are complied with.

Before a court can grant a decree of divorce, the applicant spouse must prove that he or she has lived apart from the other spouse for the relevant period at the date of the institution of the proceedings. The two-year period, therefore, must have expired prior to the actual issuing and the serving of the grounding summons. This contrasted with the requirement under section 2 of the 1989 Act.

The Family Law Act 2019 has harmonised the concept of 'living apart' for spouses living in the same dwelling in the context of applications for both judicial separation and divorce. In particular, the phrase 'living apart' is clarified in the context of spouses who still live under the same roof and they will be considered as living apart from one another if the court is satisfied that, while so living in the same dwelling, the spouses do not live

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6 See www.irishstatutebook.ie/eli/1995/act/26/enacted/en/html.

7 Article 41.3.1 of the Constitution states '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'.

8 See www.irishstatutebook.ie/eli/cons/en/html#article41.

9 See www.irishstatutebook.ie/eli/2019/act/37/section/3/enacted/en/html.

10 See S.I. No. 585 of 2019.

together as a couple in an intimate and committed relationship.[11] This change in the definition of living apart has made it easier for couples residing together, though living apart, to apply for a divorce.

The retention of a similar structure to the original Family Law (Divorce) Act 1996 – the parties must have lived apart for 2 of the previous 3 years rather than simply 2 years apart – is important in that it permits periods of reconciliation during the 3 years to be disregarded so long as the parties have been living together for 2 years during the previous 3 years. McCracken J. in *McA v McA* explains the significance of this approach under the original 1996 Act as follows:

> '....in my view the whole purpose of the provision in section 5(1)(a) of the 1996 Act is to the effect that the parties must have lived apart from one another for at least four years during the previous five years is to allow for the situation where the parties may come together for a short time in an attempt to become reconciled, and indeed has been inserted to encourage possible reconciliation. The fact that the section in effect allows the parties to live together for one year out of five and then separate again without affecting the rights under the section, seems to me to make it quite clear that it was the view of the Legislature that it was necessary to make such provision as otherwise parties who attempted but did not attain reconciliation would not be able to avail of the Act if they lived together for a short time during the preceding five years.'[12]

Moreover, section 3(1)(b) of the Family Law Act 2019 introduced a new subsection into section 5 of the Family Law (Divorce) Act 1996. It states that a relationship does not cease to be an intimate relationship merely because it is no longer sexual in nature.

In summary, under the new divorce law, when applying for a decree of divorce the spouses must have lived apart from one another for a minimum period of two years during the three years preceding the institution of divorce proceedings. Where spouses have lived apart from one another for two years during a three-year period the fact that during that time they have lived together for brief periods or indeed for longer periods will not prevent either spouse being granted a decree of divorce. This allows the couple to make efforts to reconcile or sort out their differences during the relevant periods.

The reduction in the living apart requirement from four of the previous five years to two of the previous three years has resulted in an increase in the number of

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11 See new section 5(1A)(a) of the Family Law Divorce Act 1996 as inserted by section 3(1)(b) of the Family Law Act 2019.

12 [2000] IEHC 6.

applications for divorce and a reduction in the number of applications for judicial separation. Whether this is a short-term or long-term phenomenon will be interesting to watch.

The elaboration on the meaning of 'living apart' will make it easier for those living under the same roof to prove that they were living apart. This is an important change and reflects the reality of contemporary family life in Ireland where many spouses and couples continue to cohabit until an agreement is reached regarding separation/divorce or the dissolution of a civil partnership.

Mediation

Solicitors in Ireland are now obliged to file a Statutory Declaration in divorce proceedings which sets out that they have advised their clients on mediation as a mechanism to resolve their marital difficulties. These new requirements now apply since the commencement of the Mediation Act 2017.[13]

B. New Development in the field of Maintenance between Former Spouses (since September 2002)

Introduction

There have been substantial changes in the area of maintenance since September 2002 with further change likely in the coming years. Much of the practical changes occurred with the commencement of the Children and Family Relationships Act 2015.[14]

The Children and Family Relationships Act 2015 introduced significant changes to family law in Ireland and attempts to reflect the social reality of contemporary family life in Ireland. The 2015 Act must also be viewed in the context of a changed constitutional landscape. The Irish President signed the Thirty-first Amendment to the Irish Constitution into law on 28 April 2015. This new constitutional order places children's rights within explicit constitutional parameters. The 2015 Act was a central part of the legislative programme to materially realise the changed constitutional understandings of child and family life, and the new legal obligations on the State, brought about by the Thirty-first Amendment. The Thirty-fourth Amendment to the Constitution (signed into law by the President on 29 August 2015) also expands constitutional recognition of the marital family to include same-sex relationships.[15]

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13 See www.irishstatutebook.ie/eli/2017/act/27/enacted/en/html.

14 See www.irishstatutebook.ie/eli/2015/act/9/enacted/en/print.html.

15 See http://www.irishstatutebook.ie/eli/2015/ca/34/enacted/en/html.

Part 6 of the Children and Family Relationships Act 2015 sets out certain provisions concerning child maintenance. This part of the Act extends maintenance liabilities for a child to certain persons who are not the biological or adoptive parents of the child. Such liabilities already existed for spouses in relation to a child who was treated 'as a child of the family'. That said, cohabitants and civil partners were not liable to maintain children of the family who were not their biological or adopted child.

Section 140 of the 2015 Act amends section 45 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 to allow one civil partner to seek maintenance from the other civil partner for the support of any dependent child of the civil partners.[16] A 'dependent child of the civil partners' in relation to a couple who are civil partners is described at section 135 of the 2015 Act and is a dependent child of both civil partners, or adopted by both civil partners or in relation to whom both civil partners are *in loco parentis* or; of either civil partner, or adopted by either civil partner or in relation to whom either civil partner is *in loco parentis*, where the other civil partner being aware that he or she is not the parent of the child, has treated the child as a member of the family. For civil partners, these maintenance obligations continue until the dependent child reaches the age of 18, or 23 if in full-time education. Therefore, civil partners may be liable to provide maintenance for the child of their civil partner, if the circumstances above apply.

The extension of maintenance liabilities to civil partners for their dependent children pursuant to section 140 was commenced on 18 January 2016.

Section 45(3) sets out the factors that the court must consider when making a maintenance order and they are identical to the factors included in the Family Law (Maintenance of Spouses and Children) Act, 1976.[17] It is worth noting that, where a person other than the other civil partner is caring for the dependent child of civil partners, that person has the right under the Act of 2010 to apply for maintenance from the civil partner for the dependent child pursuant to section 45, as amended.

Order 54A,[18] Rule 5(1) of the District Court (Children and Family Relationships Act 2015) Rules 2016 provides that an application by a civil partner for a maintenance order under section 45(1) of the 2010 Act is to be made on notice to the respondent. Section 146 of the 2015 Act inserts two new sections, 52A and 52B, into the Act of 2010, which provide that the maintenance debtor's failure to make payments due under an order will be a contempt of court. The new subsections are identical to the subsections

16 See http://www.irishstatutebook.ie/eli/2010/act/24/section/45/enacted/en/html#sec45.
17 See http://www.irishstatutebook.ie/eli/1976/act/11/enacted/en/html.
18 See http://www.irishstatutebook.ie/eli/2016/si/17/made/en/print.

inserted into the Act of 1976 by the Civil Law (Miscellaneous Provisions) Act 2010[19] and ensure that a maintenance debtor under the Act of 2010 is subject to the same enforcement regime as a maintenance debtor under the Act of 1976. Order 57 of the District Court (Children and Family Relationship Act 2015) Rules 2016 reflects this new position regarding enforcement.[20]

Sections 5B and 5C of the Family Law (Maintenance of Spouses and Children) Act, 1976 (as inserted by section 73 of the Children and Family Relationships Act 2015) provide for maintenance liabilities in respect of dependent children of cohabitants. They were similarly commenced on 18 January 2016. These sections place maintenance obligations on a cohabitant of a person who is a parent of, or who is *in loco parentis* to, a dependent child who is under 18 years, where the cohabitant is not the parent of the dependent child and is a guardian of the dependent child. Some reservations have arisen about the concept of cohabitants being possibly obliged to pay maintenance for a non-biological child. Obviously, where the cohabitant is the biological parent of the child, it is proper that he or she has a maintenance obligation to the child. However, arguably only biological parents should be held liable for maintenance unless the aforementioned cohabitants have entered into the commitments of marriage or civil partnership. That said, in order to be liable to maintain the child, the cohabitant must be a guardian of the dependent child, appointed under section 6C of the Guardianship of Infants Act 1964.[21] To be so appointed, the cohabitant will be required to make an application to court and will only be eligible if he or she has cohabited with the parent of the child for over 3 years and has shared parental responsibility for the child's day-to-day care for a period of more than 2 years. In this way, while the cohabitant has not entered into the commitment of marriage or civil partnership with the parent of the child, it can be said that he or she has made a real and serious commitment to the child by being appointed his or her guardian.

The factors outlined in sections 5B and 5C therefore seem to achieve a balance whereby cohabitants will be fixed with a maintenance liability only where the relationship between the cohabitant and child reflects the parent-child relationship and the cohabitant is a guardian of the child, having met the abovementioned time periods of cohabitation and parental responsibility. It should also be noted that, pursuant to section 74 of the 2015 Act, a maintenance order made under section 5B or 5C shall stand discharged when the person for whose benefit the order was made attains the age of 18 years. This is because guardianship of the child ends at 18 and therefore

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19 See http://www.irishstatutebook.ie/eli/2011/act/23/enacted/en/html.

20 See http://www.irishstatutebook.ie/eli/2016/si/17/made/en/print.

21 See http://www.irishstatutebook.ie/eli/1964/act/7/section/6/enacted/en/html#sec6.

maintenance responsibilities of the cohabitant will also cease then. In summary, for spouses and civil partners, maintenance obligations may continue until the child reaches the age of 23, if in full-time education, whereas for cohabitants, their liability will automatically cease upon the dependent child turning 18.

Under section 5B of the 1976 Act, where it appears to the court, upon an application by a maintenance applicant, that the applicant's cohabitant has failed to provide such maintenance as is proper for a dependent child, the court may order the cohabitant to make to the maintenance applicant periodical payments for the child's support. While an applicant under section 5B is the cohabitant of the maintenance debtor, an application under section 5C can be made by any person caring for the child who is alleging that the relevant cohabitant has failed to provide proper maintenance. Order 54,[22] Rules 4(4) and 4(5) govern applications for maintenance made under sections 5B and 5C of the 1976 Act respectively. Both applications are made on notice to the respondent. Any maintenance order made under these provisions will be sent to the maintenance debtor. This order must contain an endorsement warning the debtor that failure to make a payment due under the order may render him or her liable to imprisonment for contempt of court. It will also advise the debtor to apply for a variation of the order should the debtor believe a material change of circumstances arises and should he or she be concerned that he or she may not be able to comply with the terms of the order.

C. New Developments in the field of Parental Responsibilities (since December 2004)

Introduction

There have been very significant changes in the law governing parental responsibilities in Ireland since 2004. At that time, family life in Ireland was synonymous with marriage. However, since then increasing recognition of marriage breakdown, changes in relationship formation patterns, economic change and the influence of international law have all contributed to the increasing fluidity and diversification of family forms in Ireland.

A seismic change has occurred in Irish society since December 2004 in terms of the structure of the modern family. This is demonstrated in statistics, which show that, in the second quarter of 2014, 36.1% of registered births were outside marriage.[23] These include situations where a child is born to a lone, unmarried parent; an unmarried

[22] See http://www.irishstatutebook.ie/eli/2016/si/17/made/en/print.

[23] Central Statistics Office, Vital Statistics – 14 December 2014, available online at: http://www.cso.ie/en/releasesandpublications/ep/p-vs/vitalstatisticssecondquarter2014/#.VcyBj1NViko (visited 13 August 2015).

couple who are living at the same address; blended families – for example where the parents who have become separated, divorced or widowed and formed a new relationship, the child lives with one parent and that parent's new partner; a child living with grandparents or other family members; or a child living with their parent and non-biological civil-partnered parent. According to the figures available,[24] 215,300 children live with a lone parent, 49,005 children (under the ages of 15 years) live with cohabiting, unmarried parents, and there are 230 same-sex couples with children.

While the constitutional preference for families based on marriage remains intact, the Children and Family Relationships Act 2015 now provides legal certainty on parental responsibilities for all families, whatever their official status. It offers greater protection for children in all family types, including step-parent families, families headed by cohabiting couples, gay or lesbian couples, or by other extended family members.

The new framework implemented following the commencement of key provisions of the 2015 Act in January, 2016 served to not only radically overhaul many pre-existing rules, it created new rights for both biological and social parents, and, most critically, for children. The Children and Family Relationships Act 2015 was fully commenced on 5 May 2020 and provides different pathways to parentage. All families deserve recognition, security, and equity.

A central feature of the 2015 Act is its incorporation of the requirements of Article 42A.4.1˚ of the Irish Constitution, namely that the 'best interests' of the child will be the legal norm in the legal framework regulating interactions between the State and the children of Ireland, in safety and welfare proceedings, and proceedings concerning the adoption, guardianship or custody of, or access to, any child.[25] Article 42A.4.1˚ expressly establishes the 'best interests' principle as the primary legal norm in a large part of the State's interactions in child and family affairs.

The 2015 Act addresses a number of distinct areas of child and family law, including parental rights of children living in diverse family arrangements; the definition of the 'best interests' principle with regard to children; guardianship for non-marital fathers; joint adoption for civil partners and cohabiting partners; application for guardianship for certain persons and access entitlements for a wider range of people.

New Provisions on Parental Responsibilities

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[24] Census 2011: This is Ireland (Cork: Central Statistics Office, 2012).

[25] See http://www.irishstatutebook.ie/eli/cons/en/html#article42A.

All proceedings involving guardianship or custody of, and access to, children in Ireland are now subject to the express master constitutional norm of 'best interests' contained in Article 42A.4.1°, and the additional express constitutional right of the child to be heard contained within the new Article 42A.4.2° of the Irish Constitution.[26] Significantly, the new Article 42 retains the references to 'guardianship, custody and access'. The meaning of the terms in the context of the constitutional amendment is clear and reflects the language used in legislation at the time of the referendum.

Guardianship, custody and access are dealt with in Part 4 of the 2015 Act. These provisions were commenced on 18 January 2016. The 2015 Act envisages a system based on two general types of guardianship; ordinary and court-appointed guardianship. Ordinary guardianship is provided where parents satisfy various conditions. This form of guardianship recognises non-marital or de facto parents and confers them with rights and responsibilities. Court-appointed guardianship is also provided for and is guided by due attention to the best interests of the child.

Guardianship

The 2015 Act includes some far-reaching provisions. One area of major development since the last national report is the law relating to guardianship. For the first time, non-marital fathers cohabiting for a specified period with the child's mother are entitled to automatic guardianship. Further, under section 49 of the 2015 Act, a parent or another eligible adult can apply to court for guardianship. An eligible adult is a person who is married to or in a civil partnership with a child's parent, or has cohabited with the child's parent for three years and shared responsibility for the child's care for a two-year period. Persons who have cared for the child for one year, where no other parent or guardian is able or willing to fulfil the rights and duties of the role, may also be eligible to apply for guardianship. This, therefore, allows grandparents and other adults who provide day-to-day care for children to apply for guardianship. The legal ability to formalise the relationship between a child and their de facto parent is critical to ensure security, fairness and clarity in the child's life and upbringing. This also gives material effect to the obligations on the State to respect the 'best interests' of the child in its dealings with that child, under Article 42A.4.1°. In addition, the 2015 Act enables temporary guardians to be appointed, replacing the provisions relating to substitute guardians which were included in the Heads of the Bill.

Automatic guardianship

Until the commencement of the Children and Family Relationships Act 2015 in Ireland, the married father and mother of a child, including an adopted child, were automatically the child's joint guardians. Where an unmarried woman gave birth to

[26] See http://www.irishstatutebook.ie/eli/cons/en/html#article42A.

a child, she was the child's sole guardian. Guardianship for unmarried fathers, therefore, was not automatic in Irish law. They could only become a guardian either through a court order, upon an application to court under section 6A of the 1964 Act,[27] or following the execution of a statutory declaration by the mother. Where guardianship was granted, the unmarried parents were then regarded as joint guardians. Section 2(4A) of the Guardianship of Infants Act 1964 provides for automatic guardianship for an unmarried mother and father who have resided together for at least one year, three months of which has been since the birth of the child.

For the first time in Irish law, a non-marital father could automatically be the guardian of his child, provided this cohabitation requirement has been satisfied. If the cohabitation requirement is not satisfied, he still retains his right to apply to the court for guardianship under section 6A of the 1964 Act.

Step-parent guardianship

Under section 6C of the Guardianship of Infants Act 1964, a person who is in a marriage or civil partnership with a child's parent, or has cohabited with him or her for three years, and has shared responsibility for the child's care for a two-year period, can apply to be the child's guardian. This enables step-parents to seek guardianship and is an important reform, in that it provides an avenue through which a person can attain parental responsibility without having to resort to adoption and thereby extinguishing the relationship with the other parent.

Example: Mary and John have been married for 5 years. Sean is Mary's son. His biological father Joe works abroad but has no parenting role in his life. John has acted as his father on a day-to-day basis. John's application for guardianship must be on notice to Joe. Sean's views must be ascertained in respect of the matter.

A person may be eligible to apply for guardianship where he or she cared for the child for one year, and no other parent or guardian is able or will fulfil the rights and duties of the role. This is an important provision in that it allows grandparents to be appointed as guardians after a twelve-month period.

Example: Mary and John are Sean's parents. They have chaotic lives and suffer from poly-substance abuse. Sean is placed with Mary's mother. The parents call to see Sean occasionally but he lives with his Granny. Granny can now apply for guardianship of Sean. Both John and Mary must be put on notice of the application. The Court must also put the Child and Family Agency on notice of the application.

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[27] See http://www.irishstatutebook.ie/eli/1964/act/7/section/6/enacted/en/html#sec6.

When determining whether or not to appoint someone as a guardian under section 6C, the court is required to ascertain the child's views having regard to the child's age and maturity. The court is also required to consider the number of persons already guardians of the child and the degree to which they are involved in the child's upbringing. This type of order may be made on consent. That said, if the child's existing guardians do not consent, the court may still make the order where it is satisfied that this consent is unreasonably withheld and it is in the best interests of the child to make the order. Section 6C might also specifically require the court to consult the parents, (where possible), and not merely other guardians. If only guardians are consulted, fathers who are playing a very significant role in their child's life but do not wish to pursue the mother through the court system for guardianship may not be consulted.

Limiting duties under section 6C

Where a person who is not a parent is appointed as a guardian under section 6C, the provisions on guardianship have been modified to mitigate risks of undermining the guardianship rights of a parent. It appears that, in practice, the powers of court-appointed guardians will generally be limited to decisions on day-to-day matters other than where the court gives them full guardianship powers, if deemed in the child's best interests.

Pursuant to section 6C of the 1964 Act (as inserted by section 49 of the Children and Family Relationships Act 2015), where one or both of the parents of the child are still living, the non-parent guardian appointed under section 6C will enjoy certain rights and responsibilities only where the court expressly so orders and to the extent, or subject to such limitations, as are specified in the court order.

Foreign Orders

Section 6D of the 1964 Act provides that a person shall be the guardian of a child where he or she has rights and responsibilities equivalent to guardianship arising in another state.

Alternative forms of guardianship

The 2015 Act proposes that provision be made for alternative forms of guardianship, including temporary guardianship and testamentary guardianship. Section 6E of the 1964 Act (as amended by section 49 of the Children and Family Relationships Act 2015) provides that a qualifying guardian can nominate a temporary guardian in the event that the qualifying guardian becomes incapable through serious illness or injury of exercising his or her rights and responsibilities of guardianship. This nomination must be in writing. A 'qualifying guardian' is defined under the Act

as a person who is a guardian of a child and who is either (a) the parent of the child and has custody of the child or (b) not being the parent, has custody of the child to the exclusion of any living parent of the child.

Section 6E(2) allows the qualifying guardian to impose limits on the rights and responsibilities of guardianship that the temporary guardian, if appointed, may exercise. These limitations may be specifically enumerated by the qualifying guardian in the nomination.

In appointing a temporary guardian, the court must be satisfied that the qualifying guardian is incapable, through injury or illness, of exercising the rights and duties of guardianship, that the nominated person is a fit and proper person to exercise those duties and that it is in the best interests of the child and the child's views are considered. The order of the court granting temporary guardianship must specify any limitations imposed on the rights and responsibilities of guardianship and, in imposing these limitations, the court will have regard to the limitations specified by the qualifying guardian in his or her nomination.

Declaration that a person is or is not a guardian
Under section 6F of the 1964 Act, as inserted by section 49 of the 2015 Act, an application to court may be made for a declaration that a person is or is not a guardian by virtue of the circumstances set out in section 2(4A) or 6B(3) of the 1964 Act. This essentially enables the court to determine whether or not the requirements set out in the aforementioned sections, namely that the parents have cohabited for 12 months, 3 months of which have taken place after the child's birth, have been met, thereby automatically bestowing guardianship on the person concerned.

It appears from the foregoing that the court is limited in its powers of investigation to a consideration of whether the cohabitation period has been satisfied. It does not seem possible for the court, for example, to undertake an examination as to whether the granting of the declaration would be in the best interests of the child concerned.

Custody and Access
In any order relating to custody, it is important that the court spell out, with reasonable precision, the terms of the order, to avoid confusion and the need for the re-entry of proceedings to seek clarification, or to avoid the belief that joint custody implies the existence of a default time sharing position.[28]

[28] A comprehensive review of the research literature, which recommends against legislating for presumptive shared time, is Belinda Fehlberg, Bruce Smyth, Mavis Maclean, and Ceridwen Roberts, "Legislating for Shared Time Parenting after Separation: A Research Review" (2011) 25 *International Journal of Law, Policy and the Family* 318.

Section 57 of the Children and Family Relationships Act 2015 considerably broadens those eligible to apply for custody of a child, inserting section 11E into the Guardianship of Infants Act 1964. Under Irish law, a parent of a child may apply for custody of the child under section 11 of the 1964 Act. Section 11E now permits relatives to apply for custody. A 'relative' is defined as being a grandparent, brother, sister, uncle or aunt of the child, whether of the whole or half blood. In addition, step-parents and persons who are *in loco parentis* to the child with whom the child resides may also make such an application to court for custody if they are or were married or in a civil partnership with the parent of the child or have been cohabiting with the parent for a period of over 3 years and they have shared with that parent responsibility for the child's day-to-day care for a period of 2 years. Furthermore, those persons who have, for a continuous period of more than 12 months, provided for the child's day-to-day care, where the child has no parent or guardian willing or able to exercise guardianship rights, may make a custody application under section 11E.

Best Interests Test

Section 63 of the 2015 Act deals with the determination by a court of what is in the best interests of a child in determining the provisions on parental responsibilities, inserting a new Part V into the Guardianship of Infants Act 1964. Eleven factors are set out in the new section 31(2) of the 1964 Act, which the court shall regard in assessing the best interests of a child. These factors are as follows:

(a) the benefit to the child of having meaningful relationships with each of his or her parents and with other relatives and persons who are involved in the child's upbringing;
(b) the views of the child;
(c) the physical, physiological and emotional needs of the child;
(d) the history of the child's upbringing and care;
(e) the child's religious, spiritual, cultural and linguistic upbringing and needs;
(f) the child's social, intellectual and educational upbringing and needs;
(g) the child's age and any special characteristics;
(h) any harm which the child has suffered or is at risk of suffering, including harm as a result of family violence and the protection of the child's safety and psychological well-being;
(i) proposals made for the child's custody, care, development and upbringing and for access and contact, having regard to the desirability for parents or guardians to agree proposals and co-operate with each other in relation to them;
(j) the willingness and ability of each of the child's parents to facilitate and encourage a close and continuing relationship between the child and the other

parent, and to maintain and foster relationships between the child and his or her relatives;

(k) the capacity of each person in respect of whom an application is made under the Act to care for and meet the child's needs, to communicate and co-operate on issues relating to the child and to exercise the relevant powers, responsibilities and entitlements to which the application relates.

It is worth noting that section 31(4) provides, in determining the best interests of a child, the court may only consider a parent's conduct to the extent that it is relevant to the child's welfare and best interests.

The reference to 'household violence' in section 31(2)(h) above is defined in section 31(7) as including behaviour by a parent or guardian or a household member causing or attempting to cause physical harm to the child or another child, parent or household member, and includes sexual abuse or causing a child or a parent or other household member to fear for his or her safety or that of another household member.

Section 31(5) of the 2015 Act provides that, in any proceedings where the court is assessing the best interests of a child, it shall have regard to the general principle that unreasonable delay in determining these proceedings may be contrary to the best interests of the child. This principle is reflected in the rules of court, which set out how to realise speedy scheduling. Previously, an applicant under the Guardianship of Infants Act 1964 could have to wait approximately 3 months for the hearing of their application. This lengthy waiting time could potentially have detrimental consequences for the child concerned, particularly in circumstances where access to the non-custodial parent was not taking place.

Other Reforms in the 2015 Act

The changes introduced in the Children and Family Relationships Act 2015 have significantly benefited families in Ireland, while at the same time increasing the recognition and implementation of children's rights. Children's best interests and their right to participate appropriately in proceedings concerning them are central to all facets of the 2015 Act.

Three principles which emphasise the rights of the child are reflected in the 2015 Act. The first is the paramountcy principle, which is set out in section 45. This provides that the best interests of the child are of paramount importance in guardianship, custody and access proceedings. It allows for a more structured definition of what must be considered in this context by requiring the best interests of the child to be determined in accordance with Part V of the Guardianship of Infants Act 1964. The welfare checklist is the second principle highlighting children's rights. A more defined

checklist for courts to apply in determining best interests is now set out in section 63 of the 2015 Act, inserting Part V into the 1964 Act. Finally, the third principle to protect children is the delay principle. This is recognised in the new section 31(5) of the 1964 Act, which provides, as a general principle, that unreasonable delay in determining any parental responsibilities proceedings involving the welfare of a child may be contrary to the best interests of the child.

The 2015 Act embodies the accurate assertion that Irish law cannot continue to recognise only one type of family. By giving formal recognition to the many varying relationships between children and their de facto parent, security, clarity and fairness in the child's life and upbringing are ensured. It is submitted that while the 2015 Act formalises these other important relationships between children and their care-givers, the constitutional preference for families based on marriage remains intact.[29] Applying the two-pronged test established by the Irish courts in determining the constitutionality of such legislative provisions,[30] it is submitted that the Act neither penalises the position of marriage nor creates an inducement for people not to marry. The Children and Family Relationships Act can be distinguished from the type of legislation at issue in *Murphy v Attorney General*. Providing unmarried couples with certain rights and responsibilities regarding children cannot be viewed as an attack on marriage and cannot be said to induce persons not to marry.

Overall, the Children and Family Relationships Act 2015 adopts a comprehensive human rights-based approach to children's human rights and, since fully commenced, on 5 May 2020 removes several roadblocks within the legal system that stood in the way of children having the best possible family life.

Same-Sex Couples

Other major developments include the Adoption (Amendment) Act 2017,[31] which allows same-sex couples, both civil partners and cohabiting couples, to adopt a child jointly subject to the requirement that they are suitable adopters. The provisions on adoption broadly seek to equate civil partners and cohabiting couples with married couples. Under the Act, civil partners are permitted to adopt children jointly and the same criteria apply to them as applies for married couples. The Act renders civil partners eligible to adopt as a couple, provided they are civil partners of each other and are living together. The Act renders cohabiting couples eligible to adopt, provided they are cohabiting for a period of 3 years. This, of course, is subject to the requirement in

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[29] Article 41.3.1˚ of the Constitution requires the State to '…guard with special care the institution of marriage…and protect it against attack'.

[30] In the case of *Murphy v Attorney General*, the court held tax provisions that placed married couples at a distinct fiscal disadvantage compared to unmarried couples to be unconstitutional.

[31] See www.irishstatutebook.ie/eli/2017/act/19/enacted/en/html.

section 34 of the Adoption Act 2010 that the couple be suitable to be adopters, giving statutory effect to the requirements of Article 42A.4.1°. It amends section 58 of the Adoption Act 2010 and states that a child adopted by civil partners or a cohabiting couple will be treated as a child of each of them. While the Adoption Act 2010 allowed for an adoption by a sole applicant, joint adoption was only possible where the adopters were married to each other.

D. New Developments in the field of Property Relations between Spouses (since August 2008)

There have been no important new developments in this area since the last report.

E. New Developments in the field of De Facto Partnerships (since February 2015)

Family law in Ireland changed dramatically on 1 January 2011 with the commencement of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010. There has been no major legislative reform in this area apart from the reforms referenced in earlier questions which focus on children of de facto partners.

The phrase intimate and committed relationship was used in the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 when defining a cohabitant in section 172(1) as one of two adults (whether of the same or the opposite sex) who live together as a couple in an intimate and committed relationship. The 2010 Act contains a number of factors that the court must take into account when determining whether two adults are cohabitants. The factors set out in section 172(2) of the 2010 Act are all the circumstances of the relationship and the following:

(a) the duration of the relationship,
(b) the basis on which the couple live together,
(c) the degree of financial dependence of either adult on the other, and any agreements in respect of their finances,
(d) the degree and nature of any financial arrangements between the adults, including any joint purchase of an estate, or interest in land, or joint acquisition of personal property,
(e) whether there are one or more dependent children,
(f) whether one of the adults cares for and supports the children of the other, and
(g) the degree to which the adults present themselves to others as a couple.

However, in addition to the potential relevance of the factors in the 2010 Act, outlined above, there is assistance to be found in the case law regarding the 2010 Act such as the

judgment in *DC v DR*.[32] In that case, Baker J. states:

> 'The scheme of the Act envisages the court looking at the seven identified factors in s.172(2) not as conclusive to the nature of the relationship but as indicative of that relationship and how it is to be properly characterised. I consider that the test requires the court to determine whether a reasonable person who knew the couple would have regarded them as living together in a committed and intimate relationship, and that the individual and many factors in how they are perceived must be taken into account.'

The Family Law Act 2019, referenced in Section A of this update, amends section 172(3) of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 which states that a relationship does not cease to be an intimate relationship for the purpose of this section merely because it is no longer sexual in nature. In analysing this section, Baker J. in *DC v DR* opined:

> '… having regard to s.172(3) it is clear that a relationship must have been at some point in time a sexual relationship for intimacy to be found. The intimacy that is intended is a sexual intimacy and not merely the intimacy of close friendship.'

What constitutes living together was considered in the Irish Court of Appeal decision of *MW v DC*.[33] It concluded that the legal concept of living together as a couple for the purposes of section 172 does not require the couple to physically live together at all times in the same shared property:

> '…notwithstanding that a couple may not be physically living day by day in the same residence, during the two-year period immediately prior to the end of the relationship, Section 172 envisages that a court may decide on all the relevant facts that they, nonetheless continued to live together as a couple during that period.'

A further relevant and instructive case is ***XY v ZW.***[34]

[32] [2015] IEHC 309, paragraph 83.
[33] [2017] ICEA 255.
[34] [2019] IEHC 257.