The Iona Institute

Response to the Law Reform Commission consultation paper: 'Legal Aspects of Family Relationships'

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The Iona Institute
23 Merrion Square
Dublin 2

info@ionainstitute.ie
www.ionainstitute.ie

Telephone: 01 6619 204

Introduction

Family life in Ireland has undoubtedly undergone far-reaching changes over the last number of decades. (See below). These changes have seen a move away from the family based on marriage as the almost universal norm towards a more diverse range of families. While the family based on marriage still remains by far and away the most common type of family in Ireland, other forms of the family have also come more common, especially single-parent families.

One result of this is that many children now grow up without a father present and active in their lives. In some cases the father wants a closer relationship with his child but for legal and other reasons this can be difficult to achieve. In other cases, the father wants no such relationship regardless of the wishes of the child, or of the other parent.

A breakdown in the relationship between the parents of a child(ren) can also have implications for other adult relatives of the child, including grandparents who can find their grandchild(ren) effectively cut out of their lives regardless of their wishes.

In the light of these and other realities, there is no doubt that family law in Ireland must be reviewed in order to take account of the changing nature of family life today.

However, it is critical that this be achieved without unduly affecting the status of marriage which is the family structure that, on average, produces the best outcomes for children.

The facts: growing family diversity, growing family breakdown.

Before proceeding we should consider the following facts concerning family life in Ireland. (All of the information that follows is taken from census data).

1. Marriage breakdown in Ireland has increased fivefold since 1986. In 2006, 200,000 adults had suffered a broken marriage.

2. The number of lone parent families is up by 80 percent since 1986 and the total now stands at 190,000. This represents 18 percent of all families. However, 21 percent of all children are raised in single-parent households.

3. Marriage is still the norm. In 2006 married couples accounted for 70.5 percent of all family units. However, this is down from 85.8 percent in 1986.

4. Cohabitation is now much more common than it was. Almost 12 percent of family units now comprise a cohabiting couple. Five percent of children are raised by cohabiting parents according to census figures.

5. One third of all births are outside marriage.

6. Significantly, the number of children being raised outside of the marital family has more than doubled since 1986 from 12.8 percent to 26 percent. This is close to US and UK levels.

The meaning of these changes and the importance of marriage

It is possible to look at these changes to the Irish family in a number of ways.

1. One is to **welcome them** as a breaking away from restrictive traditional norms, as a move towards greater levels of autonomy as adults become freer to form different types of families.

2. Another is to regard the changes **pragmatically** and to judge them as neither good nor bad but merely to accept them and adapt social policy, attitudes and law accordingly.

3. A third view, the one favoured by The Iona Institute, is to regard the changes as **mainly detrimental**, especially from the point of view of the child.

As the above figures show, an increasing percentage of children are raised outside the marital family, meaning they are not being raised by a mother and father who have made a formal, public commitment to one another.

Our view is that it is foolish in the extreme to either welcome this change, or even to view it pragmatically. The reason for this is that abundant research shows that, in general, children fare best when raised by a married mother and father.

For example, here is a quote from the non-partisan organisation, Child Trends in the US: *"Research clearly demonstrates that family structure matters for children, and the family structure that helps the most is a family headed by two biological parents in a low-conflict marriage...There is thus value in promoting strong, stable marriages between biological parents."*. ('Marriage from a child's perspective: How does family structure affect children, and what can we do about it?' - June 2002)

> *"To those who argue that this goal promoting marriage] is old-fashioned or inconsistent with modern culture, we argue that modern culture is inconsistent with the needs of children."*
>
> **- Haskins and Sawhill**

Here is a similar quote from a new report published by the Brookings Institute in the US, a liberal think-tank with close ties to the Democratic Party. The book is called 'Creating an Opportunity Society'. The relevant quote is as follows: "*There is a growing consensus that having two married parents is the best environment for children. Marriage brings not only clear economic benefits but social benefits as well, enabling children to grow up to be more successful than they might otherwise be."*

The authors of the report, Ron Haskins and Isabel Sawhill, recommend pro-marriage policies as one key way to help the poor, especially their children, climb out of poverty.

The authors anticipate the criticism that pro-marriage policies are now outmoded in view of the changing nature of family life. Their response to this criticism is as follows: *"To those who argue that this goal [promoting marriage] is old-fashioned or inconsistent with modern culture, we argue that modern culture is inconsistent with the needs of children."*

This is very telling. When pro-marriage advocates are accused of being 'unrealistic', or 'nostalgic', the best response to this is to the point to the evidence. The evidence, as summarised in the quotes from 'Creating an Opportunity Society', and Child Trends is clear; marriage is the family form that is most beneficial for children, on average. Therefore, if family policy and family law is to be truly pro-child, if it is to take account of the evidence, if it is to be 'realistic', then it must be pro-marriage as well.

The view of the Law Reform Commission?

In its consultation paper the Law Reform Commission quite rightly says that the best interests of the child must be its main guiding principle. It is with a note of apparent regret that it acknowledges it must also take into account the rights of parents as these rights are enshrined in the Constitution and in other legal instruments as well.

A word is in order here with regard to the highly malleable concept of a child's 'best interests'. When we speak of 'parents' rights' what we chiefly mean is the right of a parent to decide what is in the best interests of their child. In other words, the rights of parents are inseparable from the rights of children. They go together and parents have the right – a natural right – to decide what is in the best interests of their children because they know them best and they have a right to raise them according to their own view of what is best for them.

Therefore, when deciding what is in a child's best interests there should be a strong presumption that the parents of a child are best placed to decide this, and this presumption should only be overruled in exceptional circumstances.

If there is not such a presumption, then the power of third parties such as the State to decide what is in a child's 'best interests' will grow enormously as will their power to override the wishes of parents for their children in non-exceptional circumstances.

It is unfortunate that the Commission never asks itself whether there is a form of the family that generally produces the best outcomes for children and to address the evidence concerning the family based on marriage. This is a very sizeable lacuna on its part and it should be addressed in future papers.

Instead it ignores this evidence and it appears to take either the rosy view or the pragmatic view of family diversity. It is perhaps for this reason that through the years the Commission has produced a series of reports in this area (some quite laudable, for example its 1982 Report on Illegitimacy) none of which has aimed to strengthen marriage. All have been aimed at strengthening alternatives to marriage.

What should be the main guiding principle of family law reform?

It is true that the main guiding principle of family law reform should be the best interests of the child, but if this principle is to have any real meaning it is a serious mistake to overlook the manner in which the family based on marriage serves the best interests of children so well.

Therefore, allied to considerations of the best interests of the child, must be a related guiding principle, namely consideration of the best interests of marriage.

Therefore, before embarking on any reform of family law two key questions at the very minimum should be always be asked:

1. What is in the best interests of children?

2. What is in the best interests of marriage?

These questions cannot be separated and to do so automatically serves children badly. Unfortunately, family law reforms in Ireland, as elsewhere in the West, have frequently separated these questions often in pursuit of an ideology of family diversity which sees pro-marriage policies as a form of 'discrimination'.

Generally, if a proposal will have the effect of eroding the distinctiveness of marriage as a social institution, then we should be very hesitant about adopting it. As a paper issued by the Institute for Marriage and Public Policy in the US puts it: *"The harder it is to distinguish married couples from other kinds of unions, the harder it is for communities to reinforce norms of marital behaviour and the more difficult it is for marriage to fulfil its function as a social institution."* (Marriage and the Law: A Statement of Principles).

While the above questions must always be front and centre in any debates about family law reform, it must also be borne in mind that this does not have to be a 'zero-sum game', meaning it is not a question of supporting marriage to the total exclusion of all other family forms, nor is it a question of destroying the legal, financial and social distinctiveness of marriage by taking an extreme family diversity view.

In the light of the foregoing discussion we will now consider some of the specific recommendations contained in the LRC consultation paper.

The specific recommendations of the LRC

1. The LRC recommends that "instead of the current legal terms 'guardianship', 'custody' and 'access', the law should use the terms 'parental responsibility', 'day-to-day care' and 'contact'."

We would prefer that these terms be used inter-changeably with the present terminology. The recommended terms lack the legal specificity of the current terminology and do not

properly convey the reality that a legal relationship has been created between parents and child and which have certain rights attached to them.

2. The LRC recommends that "there should be a statutory presumption that a non-marital father be granted an order for guardianship (parental responsibility) unless to do so would be contrary to the best interests of the child or would jeopardise the welfare of the child. The Commission also invites submissions on whether automatic guardianship (parental responsibility) for all fathers should be introduced."

We agree with the recommendation of the Commission in this regard. We believe that a child has a natural right to have contact with his or her father, and vice versa, and that a father should not have to fight to secure this right. Instead it should be up to those who would deny him such a right to demonstrate why it should be denied.

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The main argument against granting automatic guardianship is that, unlike a married man, an unmarried father has not formally demonstrated a commitment either to his partner or to his child. Upon being married both men and women take on both rights and responsibilities. The very act of marrying indicates, and it is taken to indicate, that they understand this.

The commitment of an unmarried father to his child is much more uncertain than this. This being so it would seem unwise to grant a father automatic guardianship rights. It would also undermine marriage in that the rights of married fathers could be obtained without being married.

For this reason a father should have to apply for guardianship because this would demonstrate a wish on his part to play some role in the life of his child and to accept some of the responsibilities. But to repeat, there should be a presumption in his favour.

3. The LRC recommends that "the distinction between birth registration and the allocation of guardianship (parental responsibility) should remain. This would be accompanied by provisions to encourage greater joint registration of births."

We agree with both of these recommendations. The second recommendation is especially important in view of a child's right to know the identity of his or her father. The growth in the number of birth certificates that do not contain the name of the child's father is a very regrettable and worrying trend. It is another consequence of the decline of marriage as a social institution, especially in disadvantaged areas.

4. The LRC recommends "the removal of the current two stage procedure for applying for access (contact) by members of the extended family. The Commission also invites submissions on whether the categories of persons who can apply for access (contact) should be expanded to include persons with a genuine (bona fide) interest.

5. The LRC recommends that "persons other than parents should be able to apply for custody (day-to-day care) of the child where the parents are unwilling or unable to exercise their responsibilities.

We are taking four and five together because the principles at stake in both proposals are very similar if not identical.

We agree with the proposal to remove the two stage procedure. However, we should be extremely hesitant to expand the range of people who can apply for access to a child beyond the extended family other than in exceptional circumstances such as the absence of anyone in the immediate or extended family of the child being willing or able to look after the child.

The reason for this is that once you allow categories of adults other than members of the extended family to apply for access the number of people who can exercise this newly created 'right' becomes potentially ever larger.

For example, should a mother's former partner who is not biologically related to her child be permitted to apply for access? Similarly, if the father has custody, should his ex-partner be allowed to apply for access?

What happens if the parent then forms a new relationship which lasts for two or three years during which the child forms an attachment to the parent's new partner also? (Let us assume for the purposes of the exercise that the couple is unmarried). Should the new partner also be allowed to apply for access or even custody? How many 'parent-figures' does the child then have?

Biological parenthood and kinship, and legal parenthood and kinship, must remain as closely attached as possible and should be deliberately sundered by the State only in extreme circumstances.

In other jurisdictions there are even proposals to recognise up to five parents for the one child. For example, in New Zealand it has been proposed that a child's egg donor mother, the sperm donor father, the surrogate mother and the one or two people raising the child all be recognised as the parents of the child for the purposes of the birth certificate.

In Britain, Canada and Spain, two women or two men can now be registered on a birth certificate as the parents of the same child.

These developments are taking place despite Article 7 of the UN Convention on the Rights of the Child which states that "the child shall...have the right to know and be cared for by his or her parents."

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Of course, marriage has traditionally been the way in which society has sought to attach biological parenthood to legal parenthood. This is exactly what is under threat from the law's growing ideological attachment to 'family diversity', something that is very much to the detriment of children given the importance of the married family for children.

The more we deliberately detach biological parenthood from legal parenthood, creating a new category of 'social parent', the more the State gets to decide who is and who is not a parent or 'parent figure'. This would represent a very remarkable expansion in the power of the State to redefine the most basic relationships between human beings.

At the risk of labouring the point, we stress once again that the often deliberate weakening of marriage as a legal and social institution, and at the very least the undervaluing of marriage despite the evidence testifying to its great importance, is precisely what is leading us to consider creating whole new categories of 'social parents'.

We would feel far less need to do this were it not for the fact that more and more children are now being raised outside marriage and are being entered into a 'Brave New World', a social experiment, of fragmenting and shifting relationships between the various adults that enter and leave their lives as a direct result of the relative decline of marriage.

6. The LRC invites submissions on "the inclusion of a specific requirement that the wishes of the child be considered in making a decision on an application for access (contact) by a member of the child's extended family.

In practice this is likely to mean the appointment by court of a legal representative for the child and therefore the intrusion of a third party into family decision-making. This is unlikely to be in a child's best interests particularly in view of the fact that the child will find themselves having to make decisions (with the help of a lawyer or counsellor) they may not be competent to make or willing to make in view of the feelings of their parents.

The question of competence is important because prior to the age of majority it has always been left up to a parent to decide when a child is competent enough to have a major input into decisions that will affect him or her. If third parties are allowed to make this decision (and someone must make it), then once again we are faced with a very considerable expansion in the power of the State to intrude into family decision-making in a manner that will be of dubious and arguable benefit for the child, especially in view of the fact that the State will be at least as prone to making flawed decisions as the average parent.

This is why to date the State has only been allowed to intrude into family decision-making in exceptional cases.

7. The LRC invites submissions on "whether it would be appropriate to develop a procedure to extend guardianship (parental responsibility) to a step-parent."

Again, this should only be permitted in exceptional circumstances for the reasons listed under four and five above.

Concluding remarks

Ironically, the recommendations contained in the LRC's paper on family relationships arise precisely from the relative decline of marriage in our society. For example, the recommendation to strengthen the guardianship rights of unmarried father only arises because there are now so many unmarried fathers. We are concerned about grandparents losing contact with their grandchildren because marriage and relationship breakdown is much more common than it once was.

Certainly it is a reality that family breakdown, failure of family formation in the first place, and 'family diversity' are on the increase and this is creating situations that must be catered for.

The Law Reform Commission should devote at least as much of its energies to finding new ways to strengthen marriage as it does to giving new legal rights to families not based on marriage.

However, it would be disastrous if this caused us to overlook the reasons why societies worldwide have traditionally valued and promoted marriage. It is precisely marriage which ties legal parenthood to biological parenthood for fathers and encourages them to commit both to their child and the mother of their child.

The Law Reform Commission should devote at least as much of its energies to finding new ways to strengthen marriage as it does to giving new legal rights to families not based on marriage. To date it has completely failed to do this.

It would be quite incorrect to argue that 'hankering after' a society in which marriage is the overwhelming form of the family is mere nostalgia. Marriage has declined because of very deliberate changes in social attitudes and social policies which have prioritised adult autonomy over a child's need for a mother and a father who have made a formal commitment to one another.

To quote Ron Haskins and Isabel Sawhill once again: *"To those who argue that this goal [promoting marriage] is old-fashioned or inconsistent with modern culture, we argue that modern culture is inconsistent with the needs of children."*

This is a statement all those who are involved in shaping family law and family policy need to take to heart. Growing family breakdown, growing family diversity, rarely serves the best interests of children. Strong marriages do. Marriage needs to be strengthened as a social institution. To the extent we fail to do this, we fail children. To deny the importance of marriage is, in fact, a form of reality-denial caused by an over-attachment to notions of adult autonomy.

The challenge before the LRC is not simply to recognise and take account of the reality of growing family diversity, it must also take account of the vital importance of marriage for the well-being of children.

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