



LAW REFORM
COMMISSION/COIMISIÚN UM
ATHCHÓIRIÚ AN DLÍ

REPORT

LEGAL ASPECTS OF FAMILY RELATIONSHIPS

(LRC 101-2010)



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Law Reform Commission

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LAW REFORM COMMISSION'S ROLE

The Law Reform Commission is an independent statutory body established by the *Law Reform Commission Act 1975*. The Commission's principal role is to keep the law under review and to make proposals for reform, in particular by recommending the enactment of legislation to clarify and modernise the law. Since it was established, the Commission has published over 160 documents (Consultation Papers and Reports) containing proposals for law reform and these are all available at www.lawreform.ie. Most of these proposals have led to reforming legislation.

The Commission's role is carried out primarily under a Programme of Law Reform. Its *Third Programme of Law Reform 2008-2014* was prepared by the Commission following broad consultation and discussion. In accordance with the 1975 Act, it was approved by the Government in December 2007 and placed before both Houses of the Oireachtas. The Commission also works on specific matters referred to it by the Attorney General under the 1975 Act. Since 2006, the Commission's role includes two other areas of activity, Statute Law Restatement and the Legislation Directory.

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Full responsibility for this publication lies, however, with the Commission.

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Welfare Reform Act 2009	2009, c. 24	Eng

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Hollywood v Cork Harbour Commissioners	[1992] 1 IR 457	Irl
M.D v G.D	High Court, 30th July 1992	Irl
R.C v I.S	[2003] IEHC 86; [2003] 4 IR 431	Irl

INTRODUCTION

A Background to the Project

1. This Report forms part of the Commission's *Third Programme of Law Reform 2008-2014*,¹ and follows the publication in 2009 of the Commission's *Consultation Paper on Legal Aspects of Family Relationships*.² The project also involves a continuation of the Commission's long-standing work on reform of family law.³ The Consultation Paper made provisional recommendations for reform in respect of a number of related aspects of family relationships. Following the Commission's usual consultation process, this Report contains final recommendations together with a draft *Children and Parental Responsibility Bill* to implement these recommendations. The draft Bill also proposes to consolidate, and reform, the legislative framework in place concerning the legal aspects of family relationships.

2. The Commission is especially appreciative of the enormous interest shown in this project, including through the large number of submissions received on the provisional recommendations in the Consultation Paper. These have greatly assisted the Commission in its deliberations leading to the preparation of this Report.

3. This project and Report involves the important and sensitive issue of how the law deals with the relationship between children and their parents; and, increasingly, how the law deals with the relationship between children and other adults who have – or have taken on – parental responsibility for children. The Commission's consideration of reform of the law concerning the position of fathers (notably non-marital fathers) in the parenting role of their children

¹ *Report on the Third Programme of Law Reform 2008-2014* (LRC 86 – 2007), Project 23.

² *Consultation Paper on Legal Aspects of Family Relationships* (LRC CP 55 – 2009). This is referred to as the Consultation Paper in the remainder of this Report.

³ *Report on Aspects of Intercountry Adoption* (LRC 89 – 2008); *Report on the Rights and Duties of Cohabitants* (LRC 82 – 2006); *Report on the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption 1993* (LRC 58 – 1998); *Report on Family Courts* (LRC 52 – 1996); *Report on the Hague Convention on the Civil Aspects of International Child Abduction and Some Related Matters* (LRC 12 – 1985); *Report on Illegitimacy* (LRC 4 – 1982).

requires an analysis of the rights of both children and fathers, as well as the responsibility of fathers as adults in this relationship. Similar considerations arise in the context of the Commission's analysis of the wider family relationships discussed in this Report.

B Guiding Principles

4. In approaching the preparation of this Report, as in all matters concerning children, the Commission regards the welfare and the best interests of the child as a primary consideration. In that respect, the Commission refers to the Constitution of Ireland and the UN 1989 Convention on the Rights of the Child (UNCRC) as benchmarks against which to measure its recommendations. The Commission recognises that children have rights and that these rights must be respected and protected. The Commission also acknowledges that both the Constitution and the UNCRC place the rights of children against the background of responsibilities and rights of parents. Therefore all recommendations made in the Report require due respect for these competing rights and responsibilities.

C Scope of the project

5. There are two main aspects to this project and Report. The first is the law as it relates to non-marital fathers and their children. The second is the law applying to members of the extended family - for example civil partners and step-parents - who may not be biological parents of the child, as well as grandparents and other relatives and persons who are not related to the child but who play a significant role in the life of the child.

6. It is also important to note the limits the scope of this Report. It is not possible to deal with every issue that arises in the context of family relationships, which are complicated and multi-faceted. The aim of the Report is to provide, within the remit of the project, a coherent and modern legislative framework which recognises the changing nature of families in Ireland as far as possible.

7. As to the responsibilities and rights of fathers, the focus is on non-marital fathers and their legal relationship with their children. The Report does not examine the operation of the current law concerning disputes about day-to-day care (currently called custody) or contact (access) in the context of marital breakdown.⁴ Nor does the Report examine issues concerning adoption law,

⁴ This was also stated to be outside the scope of the *Consultation Paper on Legal Aspects of Family Relationships* (LRC CP 55 – 2009) at paragraph 14 of the Introduction.

child abduction or the operation of the various Hague Conventions on children's rights. The Commission has examined these issues in previous Reports.⁵

8. The Commission is aware of the difficulties associated with the formation of families through alternative methods of conception and the limited legal recognition of the responsibilities and rights of members of such families. The legal rights and responsibilities of parties in the context of assisted human reproduction are also outside the scope of this project. Under the *Third Programme of Law Reform 2008 to 2014*, the Commission has begun a project on assisted reproduction and these matters, along with related issues, will be considered in detail in that project.⁶

D Outline of this Report

9. In Chapter 1 the Commission makes final recommendations on the appropriate terminology to be used in the context of family relationships. In the Consultation Paper the Commission noted that the current terminology in use in Ireland, namely guardianship, custody and access, appears focused on the rights of the adults involved.⁷ This was compared with the terminology in use in other states and in international legal instruments.⁸ The Commission provisionally recommended that the terms parental responsibility (in place of guardianship), day-to-day care (in place of custody), and contact (in place of access) be adopted.⁹ The Commission confirms these recommendations in this Report. The Commission also provisionally recommended that these terms

⁵ *Report on Aspects of Inter Country Adoption* (LRC 89 – 2008); *Report on the Hague Convention on Protection of Children and Co-operation in Respect of Inter Country Adoption 1993* (LRC 58 – 1998); *Report on the Hague Convention on the Civil Aspects of International Child Abduction and Some Related Matters* (LRC 12 – 1985)

⁶ *Report on the Third Programme of Law Reform 2008-2014* (LRC 86 – 2007), Project 31, Legal Aspects of Assisted Human Reproduction.

⁷ *Consultation Paper on Legal Aspects of Family Relationships* (LRC CP 55 – 2009) at paragraph 4 of the Introduction.

⁸ *Consultation Paper on Legal Aspects of Family Relationships* (LRC CP 55 – 2009) at paragraphs 1.25 to 1.37.

⁹ *Consultation Paper on Legal Aspects of Family Relationships* (LRC CP 55 – 2009) at paragraph 1.39.

should be statutorily defined¹⁰ and Chapter 1 also makes final recommendations on this issue.

10. In Chapter 2 the Commission examines the issue of automatic parental responsibility (currently, guardianship) rights for non-marital fathers. The Commission is aware of the significance of any recommendations made in this regard. In the 1982 *Report on Illegitimacy*¹¹ the Commission recommended that non-marital fathers be granted full automatic guardianship rights. In the Consultation Paper the Commission noted that the 1982 recommendation had met with considerable opposition at the time and ultimately it was not implemented.¹² In light of this the Commission determined that the best approach was to re-open the issue for consultation and discussion. The Commission therefore invited submissions on whether it would be appropriate to introduce automatic parental responsibility (guardianship) for all fathers in Ireland.¹³

11. The Consultation Paper also discussed the possibility of joint registration of the birth of a child as a means of securing parental responsibility (guardianship) and invited submissions on this issue.¹⁴ The vast majority of submissions received by the Commission were in favour of equality between parents regardless of marital status. In light of this, and having particular regard to the rights of children in the Constitution and the 1989 UN Convention on the Rights of the Child, the Commission recommends that automatic parental responsibility should attach to both parents of a child and should be linked to compulsory joint registration of the birth of the child. Chapter 2 therefore includes a discussion of the procedural reforms that will be required to give effect to this recommendation. This also deals with other matters that were examined in the Consultation Paper in the context of the law on birth registration.¹⁵

¹⁰ *Consultation Paper on Legal Aspects of Family Relationships* (LRC CP 55 – 2009) at paragraphs 1.54, 1.56 and 1.58.

¹¹ *Report on Illegitimacy* (LRC 4 – 1982).

¹² *Consultation Paper on Legal Aspects of Family Relationships* (LRC CP 55 – 2009) at paragraph 3.03.

¹³ *Consultation Paper on Legal Aspects of Family Relationships* (LRC CP 55 – 2009) at 3.21.

¹⁴ *Consultation Paper on Legal Aspects of Family Relationships* (LRC CP 55 – 2009) at paragraphs 3.22 to 3.29.

¹⁵ The Commission also makes recommendations in relation to the operation of the presumption of paternity in the context of married couples.

12. In Chapter 3 the Commission discusses its final recommendations in respect of the responsibilities and rights of members of the extended family. In the Consultation Paper the Commission acknowledged the growing diversity of family formation and relationships in Ireland and the need to ensure that the best interests of the child are recognised within the relevant legal framework. This Report takes account of the enactment by the Oireachtas of the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010* in the context of the rights of children and the responsibilities and rights of civil partners and step-parents.¹⁶

13. In the Consultation Paper, the Commission provisionally recommended that where, for example, grandparents apply to have some contact with (access to) a grandchild, they should not have to go through the current two-stage court process involving an initial application (the leave stage) followed by the actual hearing of their case.¹⁷ The Commission confirms this view in the Report. The Commission also confirms the approach taken in the Consultation Paper to extend the entitlement to apply for day-to-day care (custody) to persons other than parents or guardians of the child, where the parents are unwilling or unable to exercise their responsibilities.¹⁸

14. Chapter 4 is a summary of the recommendations made by the Commission in the Report.

15. The Appendix to this Report contains a draft *Children and Parental Responsibility Bill* which is intended to give effect to the Commission's recommendations for reform made in the Report. The draft Bill also consolidates, with amending reforms, current statutory provisions in this area, notably those originating in the *Guardianship of Infants Act 1964*, which has been amended and otherwise affected substantially by a large amount of related legislation in the 46 years since it was originally enacted.

¹⁶ In the Consultation Paper the Commission invited submissions on whether it would be appropriate to extend guardianship/parental responsibility to step-parents. *Consultation Paper on Legal Aspects of Family Relationships* (LRC CP 55 – 2009) at paragraph 4.65.

¹⁷ *Consultation Paper on Legal Aspects of Family Relationships* (LRC CP 55 – 2009) at paragraph 4.35.

¹⁸ *Consultation Paper on Legal Aspects of Family Relationships* (LRC CP 55 – 2009) at paragraph 4.56 and 4.57.

CHAPTER 1 TERMINOLOGY

A Introduction

1.01 In this chapter this Commission makes final recommendations in relation to updating the terminology currently in use in Ireland in the context of parental responsibilities and rights. Part B makes final recommendations in relation to changing the current terminology and developing statutory definitions for the proposed terms. The Commission recommends that the term “parental responsibility” should replace the term “guardianship,” that “day-to-day care” replace “custody” and that “contact” should replace “access.” In Part C the Commission makes final recommendations on the need for a statutory requirement to consult with other parties in the exercise of parental responsibility.

B Updating and defining terminology for parental/child relationships

1.02 At present the terms generally used to describe family relationships in Ireland are guardianship, custody and access. This terminology pre-dates the formation of the State in 1922 and is, therefore, language inherited from English common law. There is no statutory definition of any of these terms, although the Commission noted in the Consultation Paper that the terms appear to be well understood among practitioners and academics working in the family law area. In other jurisdictions which share a common law heritage, such as Australia, New Zealand and the United Kingdom, the terminology has been altered to reflect the growing emphasis on the interaction between rights and responsibilities.¹ The terms “parental rights and duties” and “parental responsibility” are also in use within the framework of Irish family law. Each of the terms is briefly outlined in this Chapter.

1.03 In the Consultation Paper the Commission provisionally recommended that the terms “parental responsibility,” “day-to-day care” and

¹ For a discussion on the terminology used in these jurisdictions see the *Consultation Paper on Legal Aspects of Family Relationships* (LRC CP 55 – 2009) at paragraphs 1.25 to 1.38.

“contact” should replace the terms “guardianship,” “custody” and “access.”² The Commission was of the opinion that this would ensure greater accuracy, clarity and consistency. In general this recommendation was widely welcomed in the submissions received. An issue was raised as to whether the term “parental rights and responsibilities” would be a preferable replacement for the term guardianship as it recognised the parental rights in operation. The Commission has concluded that the emphasis should be on the responsibilities associated with caring for a child and that the existence of the rights necessary to exercise the responsibilities will be clear from the proposed statutory definition of the term parental responsibility.

(1) Parental Rights and Duties

1.04 The term “parental rights and duties” is used in the Constitution with reference to the family, although this is specifically in the context of the family as an educator. Article 42.1 recognises the family as the “primary and natural educator of the child” and goes on to note that the State:

“guarantees to respect the inalienable *right and duty* of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.”³

This reference to right and duty appears to amount to a constitutional acknowledgment that parental rights do not exist without concomitant duties or responsibilities.

1.05 The slightly different term “rights and duties of parents and children in relation to each other” is used in section 58 of the *Adoption Act 2010*, which states that on the making of an adoption order “the child concerned shall be considered, with regard to the rights and duties of parents and children in relation to each other, as the child of the adopters.” Section 58 of the 2010 Act applies to both domestic and intercountry adoption, and the 2010 Act implements the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption. The 1993 Convention uses the term “parental responsibility” in connection with the effect of an intercountry adoption order, and the Commission discusses this phrase below.

(2) “Guardianship” to be renamed “parental responsibility”

1.06 Guardianship is the term currently used to describe the rights and responsibilities associated with raising a child, giving rise to the title of the main legislation in this area of family law, the *Guardianship of Infants Act 1964*. The

² *Consultation Paper on Legal Aspects of Family Relationships* (LRC CP 55 – 2009) at paragraph 1.39.

³ Emphasis added.

general understanding is that it includes both responsibilities and rights and allows a guardian to make important decisions relating to the child. Guardianship is often associated with the right to decide where the child will live, the right to apply for a passport and the right to decide in what religion the child will be raised. Section 10(2)(a) of the *Guardianship of Infants Act 1964* sets out the role of the guardian and states:

“as guardian of the person [the guardian] shall, as against every person not being, jointly with him [or her], a guardian of the person, be entitled to the custody of the infant and shall be entitled to take proceedings for the restoration of his custody of the infant against any person who wrongfully takes away or detains the infant and for the recovery, for the benefit of the infant, of damages for any injury to or trespass against the person of the infant.”

1.07 As already seen in the Commission’s reference to section 58 of the *Adoption Act 2010*, different terminology has recently been used by the Oireachtas in describing the key roles and responsibilities of parents and their relationship to children. The term parental responsibility is already part of Irish law, through the implementation in the 2010 Act of the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption. The 1993 Hague Convention reflects terminology used in many other international instruments on family law. Thus, the 2003 EU Regulation commonly known as Brussels II *bis*,⁴ Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility, which repealed and replaced the previous 2000 Council Regulation (EC) No 1347/2000 on matrimonial matters, Brussels II,⁵ also uses, as the title of the 2003 Regulation indicates, the term parental responsibility. The term parental responsibility is defined in Article 2 as:

“all the rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgment, by

⁴ “Bis” refers to the 2003 Regulation being the second version of the previous 2000 Regulation, Regulation (EC) No 1347/2000 on matrimonial matters, “Brussels II”, on the same topic.

⁵ In relation to Council Regulation (EC) No 1347/2000, Kilkelly *Children’s Rights in Ireland* (Tottel 2008) at 51 notes that the original 2000 Brussels II Regulation dealt with parental responsibility in the context of matrimonial matters only, and therefore applied to marital children only. This created a hierarchy, with non-marital children being excluded from the protection of the Regulations. Brussels II *bis* remedies that, as it applies to all children.

operation of law or by an agreement having legal effect. The term shall include rights of custody and rights of access.”

Rights of custody are defined in Article 2(9) of the 2003 Regulation as including “rights and duties relating to the care of the person of a child, and in particular the right to determine the child’s place of residence.” Article 2(10) defines rights of access as including “in particular the right to take the child to a place other than his or her habitual residence for a limited period of time.” The *European Communities (Judgments in Matrimonial Matters and Matters of Parental Responsibility) Regulations 2005*⁶ facilitate the operation of the provisions of Brussels II *bis* in Ireland.

1.08 It is important to note the use of the term parental responsibility in Brussels II *bis*, as this has the effect of introducing the concept directly into Irish family law. Therefore at present parental responsibility and guardianship are terms that exist within Irish law to describe the legal rights and responsibilities associated with raising a child. The Commission believes that, where appropriate, it is helpful to ensure consistency in the terms used. The Commission acknowledges the continued use of the terms custody and access in Brussels II *bis* but the Commission believes there are other compelling reasons for modernising these terms in Ireland and these were set out in the Consultation Paper.⁷

1.09 In the Consultation Paper the Commission discussed two options for a statutory definition of parental responsibility.⁸ The first was a broad general definition which allowed scope for development and the second was a detailed statutory definition outlining the precise scope of parental responsibility. The Commission provisionally recommended adopting a broad statutory definition. This was generally regarded in the submissions received as the preferable approach, and the Commission has also concluded that a broad definition would allow for sufficient flexibility concerning the scope of the concept while also providing general legislative guidance that matches current understanding. The Commission accordingly recommends that the term “guardianship” be replaced with the term “parental responsibility.” The Commission also recommends that parental responsibility should be defined in legislation as including the duty to maintain and properly care for a child, the right to apply for a passport for the child and the right to make decisions about where a child will

⁶ SI No. 112 of 2005.

⁷ *Consultation Paper on Legal Aspects of Family Relationships* (LRC CP 55 – 2009) at paragraphs 1.13 and 1.14.

⁸ *Consultation Paper on Legal Aspects of Family Relationships* (LRC CP 55 – 2009) at paragraphs 1.40 to 1.54.

live, a child's religious and secular education, health requirements and general welfare.

1.10 *The Commission recommends that the term "guardianship" be replaced with the term "parental responsibility." The Commission also recommends that parental responsibility should be defined in legislation as including the duty to maintain and properly care for a child, the right to apply for a passport for the child and the right to make decisions about where a child will live, a child's religious and secular education, health requirements and general welfare.*

(3) "Custody" to be renamed "day-to-day care"

1.11 The High Court has noted that custody is generally understood as the right of a parent to exercise care and control over the child on a day-to-day basis.⁹ A guardian is entitled to custody as against all other persons who are not also a guardian of the child. Therefore married parents are entitled to shared custody of their child as joint guardians. The mother of a non-marital child is entitled to sole custody of the child if the father has not been made a guardian of the child. A non-marital father who is not a guardian can, however, apply for custody of and access to the child.¹⁰ The absence of a statutory definition of custody has led to confusion between the rights associated with guardianship and those associated with custody. Often joint custody orders are made by the courts or agreed between parties,¹¹ but the reality is that the child will generally have his or her primary residence with one party and spend time with the other. The right to custody of the child does not amount to the authority to make significant decisions affecting the child, such as applying for a passport or consenting to medical treatment, as this is covered by parental responsibility (guardianship). The Commission accordingly recommends that the term "custody" be replaced with the term "day-to-day care." The Commission also recommends that day-to-day care should be defined in legislation as including the ability of the parent, or person in loco parentis, to exercise care and control over a child on a day-to-day basis, to protect and to supervise the child.

1.12 *The Commission recommends that the term "custody" be replaced with the term "day-to-day care." The Commission also recommends that day-to-day care should be defined in legislation as including the ability of the parent, or*

⁹ *R.C v I.S* [2003] IEHC 86; [2003] 4 IR 431.

¹⁰ Section 11(4) of the *Guardianship of Infants Act 1964*, as inserted by section 13 of the *Status of Children Act 1987*.

¹¹ This was explicitly provided for in section 11A of the *Guardianship of Infants Act 1964*, as inserted by section 9 of the *Children Act 1997*.

person in loco parentis, to exercise care and control over a child on a day-to-day basis, to protect and to supervise the child.

(4) “Access” to be renamed “contact”

1.13 Access is described as the right to visit with and spend time with the child. Again there is currently no statutory definition of the term. Access is usually granted to the party who does not have custody of the child. In cases of joint custody arrangements usually have to be made to facilitate contact between the child and the person that the child does not live with on a daily basis. The term “access” gives the impression that the parent with custody of the child is in a position of power and can regulate the amount of contact between the child and the non-custodial parent. This terminology is not helpful in the context of family relationships. It is more helpful to consider access, or contact, as a right of the child. Recognising access as being in the best interests of the child is in accordance with Article 9 of the 1989 UN Convention on the Rights of the Child (UNCRC), which provides that the state should respect:

“the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests.”¹²

Having regard to these factors, the Commission accordingly recommends that the term “access” be replaced with the term “contact.” The Commission also recommends that contact should be defined in legislation as including the right of the child to maintain personal relations and contact with the parent or other qualifying person on a regular basis, subject to the proviso that contact must be in the best interests of the child.

1.14 *The Commission recommends that the term “access” be replaced with the term “contact.” The Commission also recommends that contact should be defined in legislation as including the right of the child to maintain personal relations and contact with the parent or other qualifying person on a regular basis, subject to the proviso that contact must be in the best interests of the child.*

1.15 The legislative framework currently in place, beginning with the *Guardianship of Infants Act 1964*, has become quite difficult to follow because the 1964 Act been amended a number of times in the 46 years since it was enacted, including by the *Status of Children Act 1987*, the *Child Care Act 1991* and the *Children Act 1997*. As a result, the Commission provisionally

¹² In 1992, Ireland ratified the UN Convention on the Rights of the Child without reservation. The terms of the Convention have not, however, been formally enacted into Irish law.

recommended in the Consultation Paper the enactment of a single Act on this area that would incorporate the proposed changes to the relevant terminology and incorporate the substantive reform proposals made by the Commission. The Commission reiterates this as a final recommendation in this Report, and therefore recommends the enactment of a *Children and Parental Responsibility Act* (in respect of which the Commission has prepared a draft Bill appended to the Report), which would consolidate the *Guardianship of Infants Act 1964*, as amended, and would incorporate the changes in terminology and other reforms recommended in this Report.

1.16 *The Commission recommends the enactment of a Children and Parental Responsibility Act (in respect of which the Commission has prepared a draft Bill appended to the Report), which would consolidate the Guardianship of Infants Act 1964, as amended, and would incorporate the changes in terminology and other reforms recommended in this Report.*

C Consultation in the exercise of parental responsibility

1.17 In the Consultation Paper the Commission provisionally recommended that a broad statutory definition of parental responsibility be adopted in Ireland. The Commission also invited submissions on whether any such definition should include a requirement to consult with any other parties who have parental responsibility for the child. The Commission stated in the Consultation Paper that it was “of the opinion that a consultation requirement is appropriate. However, this should not operate to stifle the exercise of guardianship/parental responsibility by either parent.”¹³ The Commission also noted the opinion of the English Law Commission on this issue in its 1988 *Report on Family Law, Review of Child Law, Guardianship and Custody*¹⁴ that it was important to recognise the equal status of both parents and the power to act independently unless a court ordered otherwise. The English Law Commission was not of the opinion that a statutory duty to consult would increase co-operation between parents.¹⁵ The Commission also noted that in England and Wales there is a requirement to obtain the consent of all parties in circumstances where the child is being adopted¹⁶ and in Scotland consent of the

¹³ *Consultation Paper on Legal Aspects of Family Relationships* (LRC CP 55 – 2009) at paragraph 1.52.

¹⁴ *Law Commission Report on Family Law, Review of Child Law, Guardianship and Custody* (Law Com. No. 172 of 1988) at 7.

¹⁵ For further discussion see *Consultation Paper on Legal Aspects of Family Relationships* (LRC CP 55 – 2009) at paragraphs 1.43, 1.49 and 1.52.

¹⁶ Section 2(7) of the *Children Act 1989*.

other party with parental responsibility is necessary to remove the child from the jurisdiction,¹⁷ although there is no general requirement to consult. By way of comparison the statutory framework in New Zealand includes a specific requirement for consultation between parties with guardianship where it is practical to do so.¹⁸

1.18 The submissions on this issue were divided. Some noted the practical difficulties that could arise, for example if consent to medical treatment was delayed because of the necessity to consult. This could probably be dealt with by the inclusion of a proviso that any such duty to consult would be where it was practical to do so and where it would not impact of the welfare or best interests of the child. Other submissions noted the difficulties that could arise with a requirement to consult in circumstances of domestic violence. The Commission wishes to emphasise the importance of communication between parents and parties exercising parental responsibility as this is in the best interests of the child. Having considered the matter in preparing this Report, the Commission does not consider that a general statutory requirement to consult should be included in the proposed legislation dealing with parental responsibility. The Commission considers, however, that it should be clarified that irreversible non-essential medical procedures¹⁹ require the consent of all parties with parental responsibility for the child.

1.19 *The Commission recommends that a general statutory requirement to consult should not be included in legislation concerning parental responsibility. The Commission recommends that the consent of all parties exercising parental responsibility be required for the purpose of consenting to irreversible non-essential medical procedures on behalf of the child.*

¹⁷ Section 2(3) and section 2(6) of the *Children (Scotland) Act 1995*.

¹⁸ Section 16(5) of the *Care of Children Act 2004*.

¹⁹ For example if a person with parental responsibility was to consent to cosmetic surgery for a child.

CHAPTER 2 RESPONSIBILITIES AND RIGHTS OF NON-MARITAL FATHERS

A Introduction

2.01 The Commission examined the issue of the responsibilities and rights of non-marital fathers in its *Consultation Paper on Legal Aspects of Family Relationships*.¹ This included discussion of previous recommendations made by the Commission in the 1982 *Report on Illegitimacy*² and also set out the framework that currently exists to grant legal rights to non-marital fathers in Ireland.³ In the Consultation Paper the Commission explored the possibility of granting automatic parental responsibility to all parents.⁴ Ultimately the Commission did not make a provisional recommendation on this but instead sought submissions on whether it would be appropriate to introduce such a provision into the Irish legislative framework governing family relationships.⁵ This approach was adopted to ensure that the final recommendations of the Commission on this important, and previously controversial, issue would be fully

¹ See Chapter 3 of the Law Reform Commission's *Consultation Paper on Legal Aspects of Family Relationships* (LRC CP 55 – 2009).

² The Commission's 1982 *Report on Illegitimacy* (LRC 4 – 1982) recommended that a legal relationship should arise between parent and child regardless of the circumstances of the conception of the child and "should not be subject to any exceptions or prior conditions." The Commission also recommended that a non-marital father should automatically be a joint guardian of the child with the child's mother. These recommendations were not implemented.

³ This is by way of application to court under section 6A(1) of the *Guardianship of Infants Act 1964*, as inserted by section 12 of the *Status of Children Act 1987*, or by making a joint statutory declaration with the mother of the child as provided for in section 2(4) of the *Guardianship of Infants Act 1964*, as amended by section 4 of the *Children Act 1997*.

⁴ *Consultation Paper on Legal Aspects of Family Relationships* (LRC CP 55 – 2009) at paragraphs 3.18 to 3.20.

⁵ *Consultation Paper on Legal Aspects of Family Relationships* (LRC CP 55 – 2009) at paragraph 3.21.

informed by the consultation process. The Consultation Paper also examined joint registration of the birth of a child as a possible mechanism for securing guardianship/parental responsibility to non-marital fathers.⁶ The Commission provisionally recommended retaining the distinction between joint registration of the birth of a child and allocating parental responsibility,⁷ but the Commission also invited submissions on this. The reasoning behind retaining the distinction was to encourage more parents to place both names on the birth certificate of the child in circumstances where there was confusion about the consequences of registration, particularly in respect of social welfare payments.⁸ This chapter revisits the provisions in place for the allocation of responsibilities and rights to non-marital fathers in light of the submissions received and sets out the final recommendations of the Commission.

2.02 Part B of this chapter sets out the principles which underpin the final recommendations of the Commission. Part C outlines the Commission's recommendation that both parents of a child should have joint parental responsibility. Part D outlines the procedural reforms which will be required to give effect to the substantive recommendation of the Commission. Part E deals with the related procedural issue of the need to reform the current operation of the presumption of paternity in the context of married couples.

B Principles underpinning the final recommendations

2.03 There are two core principles underpinning the final recommendations of the Commission on this issue. The first is that the rights and best interests of the child are the primary consideration in all matters concerning children. Throughout this project the Commission has referred to the Constitution and the 1989 UN Convention on the Rights of the Child (UNCRC) as the benchmark against which recommendations relating to the child are measured. Ireland has yet to incorporate the UNCRC into domestic law, although Ireland has signed and ratified the Convention.⁹ The second guiding principle is that of equality. The Commission is of the opinion that all parents

⁶ *Consultation Paper on Legal Aspects of Family Relationships* (LRC CP 55 – 2009) at paragraph 2.34.

⁷ *Consultation Paper on Legal Aspects of Family Relationships* (LRC CP 55 – 2009) at paragraph 3.29.

⁸ See *Consultation Paper on Legal Aspects of Family Relationships* (LRC CP 55 – 2009) at paragraph 2.13.

⁹ The 1989 Convention entered into force on 2 September 1990. Ireland ratified the Convention on 28 September 1992 without reservation.

should be treated equally in respect of their relationship with their children regardless of gender or marital status.

(1) *Rights and best interests of the child are the primary consideration*

2.04 In respect of the first principle the Commission recognises the right of the child to have accurate information available to him or her on his or her birth certificate. Article 7.1 of the 1989 UNCRC states:

“The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.”

The recognition of this right is important in ensuring that the child develops a sense of identity, which is in the best interests of the child. From a wider perspective the Commission considers that accurate registration of birth information is important for society.¹⁰

2.05 The Commission is also guided by Article 18 of the UNCRC which provides that:

“States parties shall use their best efforts to ensure recognition of the principle that *both* parents have common responsibilities for the upbringing and development of the child. Parents, or as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.”¹¹

It is in the best interests of the child to have a legal connection with both parents in so far as this is possible and subject to the proviso that it is not contrary to the welfare of the child. The Commission notes the emphasis in Article 18 on the responsibilities associated with the upbringing of a child. This is in accordance with the Commission’s final recommendations in Chapter 1 on the proposed terminology.

¹⁰ Birth registration serves a number of purposes. The first is to ensure that the State has accurate data on the numbers of people living in the country and their details. The second is to ensure that people know who their parents are and this ensures a sense of identity and is also important for succession law. It also means that people know who their relatives are which assists to prevent people within the prohibited degrees from entering into relationships with each other.

¹¹ Emphasis added.

(2) Equality between parents regardless of gender or marital status

2.06 In respect of the second principle, the Commission is conscious that the current legislative framework in Ireland does not treat unmarried mothers and unmarried fathers in the same manner, nor does it treat married and unmarried fathers in the same manner. The Commission is of the opinion that equality should be the guiding principle in reforming the law in this area. At present all mothers are automatic guardians of their children, as are married fathers. Non-marital fathers are the only group excluded from this automatic recognition of the relationship between a parent and a child, which brings with it significant responsibilities and the correlative rights. The Commission considers that recognising this relationship will ensure greater equality between parents and it is generally in the best interests of the child. As always, this is subject to the proviso that the welfare and best interests of the child are not put at risk.

C Final recommendations of the Commission on fathers and parental responsibility

2.07 In light of the above principles the Commission has concluded, and therefore recommends, that legislation should be enacted to provide for automatic joint parental responsibility (guardianship) of both the mother and father of any child.¹² Given the significant responsibilities and rights associated with parental responsibility the Commission also considers that it is necessary for the State, and for others dealing with the child and his or her parents, to have a clear record of those persons who have parental responsibility for a child. The Commission has thus also concluded, and therefore recommends, that automatic parental responsibility be linked to compulsory joint registration of the birth of a child.

2.08 The Commission believes it is appropriate to have a clear trigger mechanism, namely compulsory joint registration of the birth, to activate parental responsibility as there may be situations where a non-marital father does not become aware that he is the father of the child until sometime after the birth of the child. In these circumstances the Commission is of the opinion that it would not be appropriate to consider that the father had parental responsibility

¹² As noted in the Introduction to the Report, the scope of this project does not include children conceived by means of assisted human reproduction. Therefore the recommendations do not deal with the legal and ethical intricacies relating to children born as a result of donor sperm or born through surrogacy. These issues will be dealt with by the Commission in the context of Project 31 in the *Third Programme of Law Reform 2008-2014* (LRC 86 – 2007), which deals with legal aspects of assisted human reproduction. The Commission began scoping work on this project in October 2010.

from the moment of the birth of the child, as this could impact on decisions which have already been made in relation to the child. The Commission considers that a degree of certainty and consistency in decisions made about the child is in the best interests of the child. There is already a trigger mechanism in respect of marital fathers, as the act of getting married operates as a means of ensuring that a father has automatic parental responsibility. The Commission has determined that compulsory joint registration of the birth of the child is an appropriate method of achieving this in the context of non-marital fathers. This would ensure a clear publicly recorded means to verify the proposed automatic role for the father. It would also ensure that the non-marital father would have automatic parental responsibility in the vast majority of cases.

2.09 By compulsory joint registration of the birth the Commission means that the law would require two names to be present on the birth certificate of every child, subject to very limited exceptions. Registration could occur jointly or one or other of the parents could apply separately to have the name of the father entered on the birth certificate. There would be a delay to allow any dispute as to the accuracy of the information to be entered on the register to be determined.¹³ The details of the proposed procedural system are set out in Part D of this chapter.

2.10 The effect of the Commission's recommendation would be that where both parents are in agreement, as at present where a statutory declaration is made, and the names of both parents are given to the informant in the hospital following the birth of the child automatic parental responsibility would effectively apply from the moment of the birth of the child. The mother and father both have responsibilities in respect of that child and also rights to make core decisions on how the child will be raised.

2.11 The Commission notes that in the United Kingdom a similar approach has been adopted in the *Welfare Reform Act 2009*. Part 4 of the UK 2009 Act deals with amendments to birth registration legislation¹⁴ where the parents of the child are neither married to each other nor civil partners. The detailed amendments to various legislative provisions are set out in Schedule 6 of the

¹³ It is worth noting that section 65 of the *Civil Registration Act 2004* already provides for enquiries to be made by the Registrar General to determine if the particulars entered on the register in respect of a birth, stillbirth, death or marriage are correct and complete. The Registrar General may serve notice in writing on a person he believes may be able to provide him with relevant information and require the person to provide the information within 28 days in such manner as may be specified in the notice. On foot of this information the Registrar General may correct or complete the entry into the register.

¹⁴ The *Births and Deaths Registration Act 1953*.

2009 Act, which also provides for the making of Ministerial Regulations to further clarify the legal procedure to be put in place.¹⁵ Broadly speaking these provisions allow for a procedure, to be further clarified by Regulations, whereby a non-marital father can make a declaration to the Registrar of Births before the birth is registered that he is the father of the child and this information can be entered into the register following confirmation by the mother.¹⁶ The 2009 Act also provides that the mother can give the name of the “alleged father” to the Registrar and again this information will be entered in the register following confirmation.¹⁷ The UK *Welfare Reform Act 2009* also empowers the relevant Minister to make regulations which will allow for the re-registration of the birth of a non-marital child to record the name of the father where the birth has previously been registered with no information relating to the father on the birth certificate.¹⁸ The information on the identity of the father can be given by the person claiming to be the father of the child¹⁹ or by the mother of the child²⁰ and the information will be added to the register upon confirmation. These provisions have not yet (December 2010) been commenced in the UK, but are indicative of a general trend towards greater equality in the allocation of parental responsibility and the increased emphasis on compulsory joint registration of the birth of a child. On the basis of the principles outlined above the Commission is of the opinion that such an approach is appropriate in Ireland.

¹⁵ A non-marital father is a qualified informant under the new provisions in the UK where he jointly registers the birth of the child with the mother or where he has been confirmed as the father of the child through the use of a paternity test. This is set out in section 1(2) of the *Births and Deaths Registration Act 1953*, as amended by paragraph 2 of Schedule 6 of the *Welfare Reform Act 2009*. The effect of this is that the non-marital father who is a qualified informant can solely register the birth of the child in the event that the mother is dead or unable to act.

¹⁶ This is set out in section 2D of the *Births and Deaths Registration Act 1953*, as inserted by paragraph 4 of Schedule 6 of the *Welfare Reform Act 2009*.

¹⁷ This is set out in section 2C of the *Births and Deaths Registration Act 1953*, as inserted by paragraph 4 of Schedule 6 of the *Welfare Reform Act 2009*. Again this provision allows for further clarification by Ministerial Regulations.

¹⁸ Section 10B and 10C of the *Births and Deaths Registration Act 1953*, as inserted by paragraph 13 of Schedule 6 of the *Welfare Reform Act 2009*.

¹⁹ Section 10B of the *Births and Deaths Registration Act 1953*, as inserted by paragraph 13 of Schedule 6 of the *Welfare Reform Act 2009*.

²⁰ Section 10C of the *Births and Deaths Registration Act 1953*, as inserted by paragraph 13 of Schedule 6 of the *Welfare Reform Act 2009*.

2.12 *The Commission recommends that legislation be enacted to provide for automatic joint parental responsibility (guardianship) of both the mother and the father of any child. The Commission also recommends that automatic joint parental responsibility be linked to compulsory joint registration of the birth of a child.*

2.13 In the Consultation Paper the Commission provisionally recommended the introduction of a statutory presumption that a non-marital father be granted an order for guardianship unless to do so would be contrary to the best interests of the child or would jeopardise the welfare of the child.²¹ In light of the Commission's final recommendation on this, that provisional recommendation is no longer relevant.

D Procedural reforms to give effect to automatic joint parental responsibility

2.14 The Commission now turns to examine to what extent the *Civil Registration Act 2004*, the principal Act dealing with civil status (notably birth, marriage and death) should be amended to reflect the Commission's recommendation that both parents have joint parental responsibility for their child.

2.15 At present section 22(2)(a) of the *Civil Registration Act 2004* governs the registration of the birth of a child by both parents who are not married. This provides that the request for joint registration of the birth must be made to the Registrar in writing and the man must sign a declaration that he is the father of the child. Both parties must attend at the Registrar's office to sign the register. It is also possible to register both names of non-marital parents on the birth certificate if an application is made by the mother or the father and accompanied by a written declaration by the applicant that the man is the father of the child and a statutory declaration by the other party that the man is the father of the child.²² This can be contrasted with the procedure for registering the birth of a marital child which is more straightforward. There is a statutory presumption that the husband of a married woman is the father of the child, therefore, either the mother or the father of a marital child, or both together, can attend at the office of the Registrar to register the birth and to provide the necessary information.²³

²¹ *Consultation Paper on Legal Aspects of Family Relationships* (LRC CP 55 – 2009) at paragraph 3.09.

²² Sections 22(2)(b) and 22(2)(c) of the *Civil Registration Act 2004*.

²³ Section 19 of the *Civil Registration Act 2004*.

2.16 The Commission acknowledges that the procedure for jointly registering the birth of a non-marital child is more complex. In the absence of a presumption of paternity, however, it is not possible to register the birth of the child jointly without some documentation from both parties, if not present in the Registrar's office, to confirm that the man is willing to have his name entered on to the birth certificate as the father of the child. This will become even more important in light of the Commission's recommendation linking compulsory joint registration of the birth of the child with automatic parental responsibility. Under the UK *Welfare Reform Act 2009* a non-marital father is a qualified informant and therefore can solely register the birth of the child if he has a paternity test confirming that he is the father of the child.²⁴

2.17 The Commission proposes the following system for a non-marital father to register his name on the birth certificate of a child in the absence of agreement with the mother. The father can make an application to the relevant Registrar of Births to be entered on the birth certificate as the father of the child. The Registrar would record the application and inform the mother of the child that the application has been made. The mother would then have 28 days to object to the name of the man being entered on the birth certificate as the father of the child. If no objection was made, a final entry of the father's name would be entered on the birth certificate. If an objection was made by the mother the Registrar of Births would refer the matter to the District Court, whose only power would be to delete the entry if it was established by the mother that the man was not the father of the child.

2.18 *The Commission recommends that in the absence of agreement with the mother a non-marital father can register his name on the birth certificate of the child in the following manner:*

- *An application to the Registrar of Births to be entered on the birth certificate as the father of the child. This may require a statutory declaration.*
- *A note of the application to be taken by the Registrar followed by a notice to the mother of the child that such an application has been made.*
- *A 28 day waiting period to allow for an objection by the mother to the name of the applicant being entered on the birth certificate as the father of the child.*
- *If no objection is forthcoming, an entry to be made in the Register of Births recording the applicant as the father of the child.*

²⁴ Section 1(2) of the *Births and Deaths Registration Act 1953*, as amended by paragraph 2 of Schedule 6 of the *Welfare Reform Act 2009*.

- *If an objection is made by the mother the Registrar can require her to provide information on who is the father of the child. The applicant could also refer the matter to the District Court to determine the matter or to undergo a paternity test.*

2.19 The Commission also recommends that there should be a similar process to enable the mother of a child to enter the name of a man on the birth certificate as the father of the child without agreement. The mother can inform the Registrar of the name of the alleged father of the child. The Registrar would then contact the man and he would have 28 days within which to raise an objection to his name being entered on the birth certificate. Again, the District Court would, on appeal, determine the issue if there was a dispute.

2.20 *The Commission also recommends that there should be a similar process to enable the mother of a child to enter the name of a man on the birth certificate as the father of the child without agreement. The mother can inform the Registrar of the name of the alleged father of the child. The Registrar would then contact the man and he would have 28 days within which to raise an objection to his name being entered on the birth certificate. The District Court would, on appeal, determine the issue if there was a dispute.*

2.21 Assuming that the Commission's recommendation for joint parental responsibility (guardianship) is implemented, these two processes will clearly operate in respect of births that occur after the coming into force of any legislation implementing this recommendation. In respect of fathers of children at the time such implementing legislation is enacted, it will be necessary to provide for transitional arrangements to allow for joint parental responsibility (guardianship) in terms similar to those provided for the future. In that respect, many non-marital fathers are already joint guardians, either by virtue of an agreed declaration with the mother or by way of application to court in the absence of such agreement, so that these situations do not give rise to any difficulties in the transitional period. For those situations where there is not joint guardianship, the Commission has concluded that comparable procedures to those outlined in the recommendations made above (paragraphs 2.18 and 2.20) should be available to both the mother and father (or man who is asserted by the mother to be the father) to deal with any difficulties that arise during the transitional period.

2.22 *The Commission recommends that comparable procedures to those outlined in the recommendations in paragraphs 2.18 and 2.20 should be available to both the mother and father (or man who is asserted by the mother to be the father) to deal with any difficulties that arise during the transitional period after the implementation of the Commission's recommendation on joint parental responsibility (guardianship).*

2.23 The Commission accepts that it will be necessary to implement a mechanism to deal with situations where the mother does not know who the father of the child is or where there is a risk to the safety and welfare of the mother or the child. However, the Commission believes that the exceptions should be drawn narrowly, as the purpose of the recommendations is to develop a culture whereby it is widely and generally accepted that the birth certificate of a child should provide all necessary, available and accurate information on the origins of the child. Under the provisions of the UK *Welfare Reform Act 2009*, the Registrar General may make regulations requiring information in relation to the father to be provided in a prescribed form or manner where the mother is registering the birth of the child alone.²⁵ The mother may not have to provide this information relating to the father if she “makes in the presence of the registrar a declaration in the prescribed form stating that one or more of the following conditions is met.”²⁶ The conditions are:

- “(a) that by virtue of section 41 of the *Human Fertilisation and Embryology Act 2008* the child has no father,
- (b) that the father has died,
- (c) that the mother does not know the father’s identity,
- (d) that the mother does not know the father’s whereabouts,
- (e) that the father lacks capacity (within the meaning of the *Mental Capacity Act 2005*) in relation to decisions under this Part,
- (f) that the mother has reason to fear for her safety or that of the child if the father is contacted in relation to the registration of the birth, and
- (g) any other conditions prescribed by regulations made by the Minister.”²⁷

2.24 The conditions set out in the UK 2009 Act fit within a broader statutory framework regulating family relationships in that jurisdiction. Therefore some of them are not applicable in an Irish context. The Commission considers, however, that it is necessary to make provision for situations where the mother does not know who the father of the child is or where there is a risk to the safety

²⁵ Section 2B(2) of the *Births and Deaths Registration Act 1953*, as inserted by paragraph 4 of Schedule 6 of the *Welfare Reform Act 2009*.

²⁶ Section 2B(3) of the *Births and Deaths Registration Act 1953*, as inserted by paragraph 4 of Schedule 6 of the *Welfare Reform Act 2009*.

²⁷ Section 2B(4) of the *Births and Deaths Registration Act 1953*, as inserted by paragraph 4 of Schedule 6 of the *Welfare Reform Act 2009*.

and welfare of the mother and/or the child if the father is contacted in relation to the registration process.

2.25 The Commission is of the opinion that it is appropriate to require the mother to swear a statutory declaration to the effect that she does not know the identity or the whereabouts of the father of the child, or that the safety or welfare of her or the child are at risk. The swearing of a statutory declaration is provided for in the *Statutory Declarations Act 1938*.²⁸

2.26 *The Commission recommends that the Civil Registration Act 2004 be amended to provide that where a non-marital mother a) honestly does not know the identity of the father, or b) honestly does not know the whereabouts of the father, or c) where she fears for her safety and/or the safety of the child if the father were to be contacted in relation to the registration of the birth of the child, she shall make a statutory declaration to that effect.*

2.27 When a child is born in Ireland child benefit payments are activated on the registration of the birth. These payments are an extremely important source of income for many new parents. The Commission wishes to ensure that the recommendations contained in this Report do not impact negatively on the financial situation of non-marital parents as this may affect the welfare of the child. The Commission is also aware of the importance of ensuring that the information contained in the Register of Births is accurate and for this reason the Commission recommends a 28 day period to allow for an objection by the mother or the father of the child to the name of the alleged father being finally entered on the birth certificate of the child. This will have the effect of delaying the registration of the birth of the child and the issuing of a birth certificate. During this 28 day period the Commission is of the opinion that a certificate should be issued confirming that the birth registration process has commenced and that this certificate should activate child benefit payments.

2.28 *The Commission recommends that child benefit payments should be activated on the commencement of the birth registration process in circumstances where the Registrar is obliged to wait 28 days to determine if there is an objection to a final entry being made in the Register of Births. A certificate confirming the commencement of the registration process should be issued.*

2.29 In the Consultation Paper the Commission provisionally recommended that a central register should be established to keep account of the existence of statutory declarations agreeing parental responsibility

²⁸ The penalty for swearing a false declaration is set out in section 6 of the *Statutory Declarations Act 1938*, as inserted by section 51 of the *Civil Law (Miscellaneous Provisions) Act 2008*.

(guardianship).²⁹ The Commission sought submissions on whether this should be managed by the General Register Office and whether it should be publicly available to search. Assuming the implementation of the Commission's reform proposals, parents would no longer be required to make a statutory declaration agreeing parental responsibility (guardianship). While the Commission has, of course, recommended automatic joint parental responsibility, the Commission is equally of the opinion that, pending full implementation of this (and having regard to the need for transitional arrangements),³⁰ there may still be scope for a register of current statutory declarations.

2.30 *The Commission recommends that a Register of Statutory Declarations Agreeing Parental Responsibility (Guardianship) be established to be managed by the General Register Office. This would provide for the registration of statutory declarations agreeing parental responsibility (guardianship) which are in existence up until the date the proposed reforms introducing automatic parental responsibility and compulsory joint registration are enacted and become fully operational.*

2.31 *This register would merely be a record of the existence of such statutory declarations and the General Register Office would have no obligation to verify independently the accuracy of the information contained in the statutory declaration.*

2.32 In the Consultation Paper the Commission provisionally recommended that the distinction between birth registration and the allocation of parental responsibility (guardianship) should remain.³¹ As set out above the Commission's final recommendation differs from the provisional view in the Consultation Paper. Moreover, a number of provisional recommendations and invitations for submissions set out in the Consultation Paper were dependent on this distinction remaining, for example the invitation for submissions on the development of a statutory clarification that joint registration of a birth does not give rise to automatic guardianship/parental responsibility rights in relation to the child.³² The Commission also invited submissions on whether it would be appropriate to impose a statutory duty on a Registrar to make enquiries of a mother who comes in alone to register the birth of a child if she wishes to

²⁹ *Consultation Paper on Legal Aspects of Family Relationships* (LRC CP 55 – 2009) at paragraph 3.17.

³⁰ See paragraph 2.21 to 2.22, above.

³¹ *Consultation Paper on Legal Aspects of Family Relationships* (LRC CP 55 – 2009) at paragraph 2.18.

³² *Consultation Paper on Legal Aspects of Family Relationships* (LRC CP 55 – 2009) at paragraph 2.24.

include the father's details on the birth certificate.³³ These provisional recommendations are no longer relevant in light of the final recommendations already made in this Report.

E Reforming the operation of the presumption of paternity in relation to married couples

2.33 In the Consultation Paper the Commission discussed a difficulty with the operation of the current presumption of paternity as it applies to married couples and made provisional recommendations on this issue.³⁴ These were generally welcomed in the submissions received. Therefore the Commission includes final recommendations on the issue here in the context of procedural reforms to the *Civil Registration Act 2004*.

2.34 The law in Ireland operates a presumption that where a couple is married and the wife has a child, the husband is the father of that child. In the majority of cases this is an accurate reflection of the facts. The detail of the statutory presumption is set out in section 46(1) of the *Status of Children Act 1987*.³⁵

2.35 The effect of this provision is that if a child is born one month after a couple get married the husband is presumed to be the father. This will be the case even where the married couple did not know each other when the child was conceived. If the child is born more than ten months after the husband dies or the couple divorce, the presumption will not apply. In this situation the mother can register the birth in the same way as a non-marital mother,³⁶ but the

³³ *Consultation Paper on Legal Aspects of Family Relationships* (LRC CP 55 – 2009) at paragraph 2.29.

³⁴ *Consultation Paper on Legal Aspects of Family Relationships* (LRC CP 55 – 2009) at paragraphs 2.35 to 2.44.

³⁵ Section 46(1) of the 1987 Act states: "Where a woman gives birth to a child - (a) during a subsisting marriage to which she is a party, or (b) within the period of ten months after the termination, by death or otherwise, of a marriage to which she is a party, then the husband of the marriage shall be presumed to be the father of the child unless the contrary is proved on the balance of probabilities." The meaning of a "subsisting marriage" is further clarified in section 46(4) of the 1987 Act which states: "For the purpose of *subsection (1)* of this section "subsisting marriage" shall be construed as including a voidable marriage and the expression "the termination, by death or otherwise, of a marriage" shall be construed as including the annulment of a voidable marriage."

³⁶ Section 19 of the *Civil Registration Act 2004*.

Registrar will require that she produce the death certificate of her husband or a certified copy of her decree of divorce.³⁷

2.36 The presumption can be rebutted on the balance of probabilities. The presumption can be rebutted in two ways. First, if the mother can produce a statutory declaration signed by her husband stating that he is not the father of the child. Second, if the mother signs a statutory declaration stating that she comes within one of the statutory exceptions and this declaration is accompanied by the necessary documentation.³⁸

2.37 Section 46(3) of the *Status of Children Act 1987* provides that where the name of a man is recorded in the register of births as the father of the child then he is presumed to be the father. Shatter states that this presumption will prevail even where the mother is married and a person other than her husband is named as the father.³⁹ This could occur where the marital presumption was satisfactorily rebutted. The presumption that the man listed on the birth certificate as the father of the child is in fact the child's father will operate unless "the contrary is proved on the balance of probabilities."⁴⁰

2.38 The Commission recognises that there are benefits to the operation of the presumption of paternity, chief among these being that it removes the necessity for a man to prove he is the father of a child. This would be an extremely costly and time consuming process and for the most part it would merely serve to confirm that the husband, in the context of the marital presumption, is in fact the father of the child. Therefore, the Commission is not of the view that the presumption should be abolished completely. However, the operation of the marital presumption raises difficulties due to the narrow nature of the exceptions as they currently apply.

³⁷ Information leaflet provided by the General Register Office available at www.groireland.ie.

³⁸ Information leaflet provided by the General Register Office available at www.groireland.ie.

³⁹ Shatter *Family Law* (4th ed Butterworths 1997) at 430.

⁴⁰ Section 46(3) of the *Status of Children Act 1987* provides that: "Notwithstanding subsection (1) of this section, where – (a) the birth of the child is registered in a register maintained under the *Births and Deaths Registration Acts 1863 to 1987*, and (b) the name of a person is entered as the father of the child on the register so maintained, then the person whose name is so entered shall be presumed to be the father of the child unless the contrary is proved on the balance of probabilities."

(1) The current statutory exceptions to the presumption of paternity

2.39 The statutory exceptions to the presumption of paternity are set out in section 46(2) of the *Status of Children Act 1987*, which provides that:

“where a married woman, being a woman who is living apart from her husband under –

(a) a decree of divorce *a mensa et thoro*⁴¹ or

(b) a deed of separation,⁴²

gives birth to a child more than ten months after the decree was granted or the deed was executed, as the case may be, then her husband shall be presumed not to be the father of the child unless the contrary is proved on the balance of probabilities.”

2.40 In recognition of the introduction of a statutory form of judicial separation in 1989⁴³ and of divorce in 1996,⁴⁴ section 22(3)(b) of the *Civil Registration Act 2004* states that a person can be registered as the father of the child even if the mother is married to another person at the time, or was married during the period of ten months before the birth, where the mother produces to the Registrar:

“a statutory declaration of the mother, in a form standing approved for the time being by an tArd-Chláraitheoir [General Registrar], that she has been living apart from the person who is or any person who formerly was her husband during the period of ten months ending immediately before the birth of the child by virtue of a decree of divorce, a decree of divorce *a mensa et thoro*, a decree of nullity or a deed of separation.”

⁴¹ A divorce *a mensa et thoro* (a divorce “from bed and board”), in effect a judicial separation order rather than a dissolution of marriage, was available under the *Matrimonial Causes and Marriage Law (Ireland) Amendment Act 1870*. It was a fault-based decree, granted on the grounds of adultery, cruelty or unnatural practices.

⁴² This was how most separations were given effect to prior to the introduction of judicial separation in the *Judicial Separation and Family Law Reform Act 1989*.

⁴³ Judicial separations were introduced in Ireland in the *Judicial Separation and Family Law Reform Act 1989*, as amended by the *Family Law Act 1995*. Generally an application for judicial separation will be made under Part I of the 1989 Act and the ancillary orders will be in accordance with the provisions of the 1995 Act.

⁴⁴ Section 5 of the *Family Law (Divorce) Act 1996*.

2.41 The Commission understands that there are situations where a married couple have been separated for considerable periods and the woman may not even know where her estranged husband is. Yet, if there is still a legally subsisting marriage, and the husband has not signed a statutory declaration stating that he is not the father, the presumption applies and the husband's name will be entered on the birth certificate and into the register of births as the father of the child. This results in an absurd situation which denies the child the right to know his or her identity, attaches parental responsibility (guardianship) to a man who has no connection to the child and may not even be aware of the existence of the child, and denies the biological father of the child his legal relationship with the child. None of these consequences can be said to be in the best interests of the child.

(2) *Final recommendations of the Commission on the operation of the presumption of paternity for married couples*

2.42 In the Consultation Paper the Commission provisionally recommended that the presumption of paternity in the context of married couples should be retained, but that the existing statutory exceptions should be extended.⁴⁵ The Commission is of the view that this reform is necessary to ensure that the legislative framework reflects reality and that the register of births is as accurate as possible. This is in the best interests of all parties involved. At present the existence of a barring order will not trump the presumption of paternity, although the effect of this is intended to ensure that there is no contact between the parties. Similarly if a married couple are living separate and apart with the intention of obtaining a decree of divorce,⁴⁶ but the divorce has not yet been granted, the presumption that the husband is the father of a child will apply. The Commission recognises that the mere fact that there is a barring order in place or that a couple are living separate and apart with the intention of dissolving the marriage does not necessarily mean that the husband cannot be the father of any child. However, if the married woman provides evidence that she has not had contact with her husband for a minimum period of 10 months and signs a statutory declaration to the effect that her husband is not the father of the child then the presumption should not apply. There are also other circumstances where the presumption of paternity could be rebutted by evidence from the mother, for example where her husband has deserted her, is in prison, or has been abroad.

⁴⁵ *Consultation Paper on Legal Aspects of Family Relationships* (LRC CP 55 – 2009) at paragraph 2.44.

⁴⁶ Section 5 of the *Family Law (Divorce) Act 1996* provides that in order to obtain a divorce in Ireland the couple must be living separate and apart for a period of four years out of the preceding five.

2.43 *The Commission recommends that the presumption of paternity is rebutted where a married woman provides evidence that she has not had contact with her husband for a minimum period of 10 months and she makes a statutory declaration that he is not the father of the child.*

CHAPTER 3 RESPONSIBILITIES AND RIGHTS OF MEMBERS OF THE EXTENDED FAMILY

A Introduction

3.01 In the Consultation Paper the Commission focused on two issues in respect of members of the extended family. The first was continuing contact (access) between children and other family members in circumstances where the relationship between the parents had broken down. The second was the possible extension of parental responsibility (guardianship) or day-to-day care (custody) to a person other than the biological parent of the child where that person is fulfilling a parental role. Since the publication of the Consultation Paper, the Oireachtas has enacted the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010* which has introduced a recognised form of civil partnership for same-sex couples. The 2010 Act does not address the relationship between same-sex couples and their children, and the Commission considers that it is appropriate that this Report addresses these issues to the extent that they come within the scope of this project.

3.02 Part B of this chapter outlines the Commission's final recommendations in relation to the legislative provisions concerning applications for contact with a child by members of the extended family. Part C discusses the final recommendations in respect of the legal responsibilities and rights that should be available to civil partners and step-parents. Part D sets out the Commission's recommendations on expanding the categories of persons who can apply for day-to-day care of the child.

B Reforming the legislative provisions relating to applications for contact with children

3.03 The Consultation Paper included a discussion on the current legislative provisions facilitating contact between children and members of the extended family.¹ It also included a comparative analysis of the leave stage in applications for contact by members of the extended family in other

¹ *Consultation Paper on Legal Aspects of Family Relationships* (LRC CP 55-2009) at paragraphs 4.10 to 4.26.

jurisdictions.² This part of the chapter, therefore, outlines the current provisions followed by the final recommendations of the Commission on this issue. Again it is worth noting at the outset that Article 9(3) of the 1989 UNCRC recognises:

“the right of the child who is separated from one or both parents to maintain public relations and direct contact with both parents on a regular basis unless it is contrary to the child’s best interests.”

Contact is now generally understood as the right of the child rather than the right of the parent.³

3.04 Currently section 11B of the *Guardianship of Infants Act 1964*⁴ provides for access to a child by members of the extended family.⁵ The precise terms used in section 11B(1) of the 1964 Act are that it applies to any person who:

“(a) is a relative of the child, or,
(b) has acted *in loco parentis* to a child.”

The application is a two stage process and applicants must first satisfy a leave stage before the substantive application is heard. In deciding whether to grant leave the court will consider the applicant’s connection with the child, the risk of any disruption to the child’s life which would harm the child, and the wishes of the child’s guardians.⁶

3.05 Section 37 of the *Child Care Act 1991* sets out a separate statutory scheme to facilitate contact with children who have been taken into care by the Health Service Executive (HSE). Section 37 of the 1991 Act provides that:

“the [Health Service Executive] shall, subject to the provisions of this Act, facilitate reasonable access to the child by his parents, any person acting in *loco parentis*, or any other person who, in the opinion of the [Health Service Executive], has a *bona fide* interest in

² *Consultation Paper on Legal Aspects of Family Relationships* (LRC CP 55-2009) at paragraphs 4.27 to 4.34.

³ See *M.D v G.D.*, High Court, 30th July 1992 where Carroll J. stated that the court was concerned with the right of the child to “access,” not the right of the adult.

⁴ Section 11B of the *Guardianship of Infants Act 1964*, as inserted by section 9 of the *Children Act 1997*.

⁵ For example, a partner of the biological parent who was *in loco parentis* to the child, step-parents, grandparents, aunts and uncles, siblings.

⁶ Section 11B(3) of the *Guardianship of Infants Act 1964*, as inserted by section 9 of the *Children Act 1997*.

the child and such access may include allowing the child to reside temporarily with any such person.”

(1) Final recommendations on the categories of persons who can apply for contact and the application procedure

3.06 In the Consultation Paper the Commission invited submissions on whether it would be appropriate to include a statutory definition of the term *in loco parentis* as both the 1964 and 1991 Acts use the term. The Commission notes that there is an accepted understanding and usage of the term and that any attempt to define it narrowly in statutory form might restrict the scope of those who come within the meaning of the term. The term *in loco parentis* is generally understood as referring to an individual, not the parent, who assumes parental rights, duties, and obligations without going through the formal process of, for example, adoption of the child.⁷

The Commission considers that this definition provides a useful general definition that is not prescriptive but allows sufficient flexibility to be applied in different settings. The Commission accordingly recommends that the term *in loco parentis* be defined in general terms as a person who is not the parent of a child but who, acting in good faith, takes on a parental role in relation to the child.

3.07 *The Commission recommends that the term in loco parentis be defined in general terms as a person who is not the parent of a child but who, acting in good faith, takes on a parental role in relation to the child.*

3.08 In the Consultation Paper the Commission provisionally recommended the removal of the leave stage provided for by section 11B(2) of

⁷ In *Hollywood v Cork Harbour Commissioners* [1992] 1 IR 457 at 465, the plaintiff was the daughter and representative of all other children of a man who had been killed arising from the negligence of the defendants. The deceased had been married and had three children in that marriage. He later separated and then had a 30 year relationship until his death with a woman, with whom he had another five children. The mother of these five children had, initially, been involved in the proceedings, claiming she was a “dependant” of the deceased within the meaning of the *Civil Liability Act 1961*. She withdrew from the proceedings, O’Hanlon J noting that, because this was a novel claim, this was probably to save the delay and costs that would have arisen if the defendants disputed her claim. Nonetheless, O’Hanlon J suggested that she would have succeeded in her claim, and that the deceased could, in the circumstances, have been described as being *in loco parentis* to her, even though she was an adult. O’Hanlon J referred to *in loco parentis* as “any situation where one person assumes the moral responsibility, not binding in law, to provide for the material needs of another.”

the *Guardianship of Infants Act 1964*, as inserted by section 9 of the *Children Act 1997*. The reasoning behind this was that it unnecessarily complicated the application process and that the purpose of the provision, namely to prevent vexatious applications, could be achieved at the substantive hearing. This was widely welcomed in the submissions received during the consultation process.

3.09 *The Commission recommends the removal of the leave stage provided for by section 11B(2) of the Guardianship of Infants Act 1964, as inserted by section 9 of the Children Act 1997.*

3.10 The Commission invited submissions on whether the categories of persons who can apply for contact (access) under the *Guardianship of Infants Act 1964*, as amended, should be expanded to include persons with a *bona fide* interest in the child as is currently provided for by section 37 of the *Child Care Act 1991*. Again this was generally supported in the submissions. There was a concern that this would undermine the family unit. However, the Commission is of the opinion that the statutory framework should be broad enough to reflect the current diversity in family structures and to ensure that the welfare of the child can be promoted through facilitating the right of the child to have contact with important people in his or her life.

3.11 *The Commission recommends that the category of persons who can apply for contact with a child should be expanded to include persons with a bona fide interest in the child.*

(2) *Final recommendations on the role of the child in the application process*

3.12 In the Consultation Paper the Commission invited submissions on the possibility of extending the right to apply for contact to include the child. Linked to this the Commission invited submissions on whether it would be necessary to include a leave stage to determine the capacity of the child to make an application. The Commission also invited submissions on whether it would be appropriate to include a specific requirement in Irish law that the wishes of the child be considered in making a decision on an application for contact (access) by a member of the child's extended family.

3.13 In raising these issues the Commission had regard to Article 12 of the UNCRC which provides:

“1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings

affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.”

The Commission discussed in detail statutory provisions in England and Wales and Scotland which allow a child to make an application for contact.⁸ In the Consultation Paper the Commission also examined statutory provisions in Ireland,⁹ and in other jurisdictions,¹⁰ requiring the court to take account of the views of the child.

3.14 There was general support in the submissions received for the proposal that there be a statutory requirement to take account of the views of children when an application for contact was made by a member of the extended family or *bona fide* person with an interest. The submissions were mixed in relation to the suggestion that the right to apply for contact be extended to the child. There was a concern that the child could be placed in the middle of a conflict situation between adults and the right of the child to apply for contact could be manipulated. Issues were also raised about the enforceability of any contact order that a child would obtain and the mechanisms that would be required for a child to activate the right to apply for contact.

3.15 In light of the submissions received and following further consideration the Commission is of the opinion that it is not necessary to extend the right to apply for contact to the child in order to vindicate the right of the child to have his or her views taken into consideration. In this respect the Commission wishes to draw attention to the importance of appointing a *guardian ad litem* to represent the views and wishes of the child in legal matters concerning the child.¹¹

3.16 *The Commission recommends that a statutory requirement to take account of the views of the child be inserted into the proposed Children Bill*

⁸ *Consultation Paper on Legal Aspects of Family Relationships* (LRC CP 55-2009) at paragraphs 4.38 to 4.41.

⁹ *Consultation Paper on Legal Aspects of Family Relationships* (LRC CP 55-2009) at paragraphs 4.42 and 4.43.

¹⁰ *Consultation Paper on Legal Aspects of Family Relationships* (LRC CP 55-2009) at paragraphs 4.44 to 4.49. The Commission examined the provisions in England and Wales, Scotland and New Zealand.

¹¹ The *guardian ad litem* procedure was introduced by section 28 of the *Guardianship of Infants Act 1964*, as inserted by section 11 of the *Children Act 1997*.

which would correspond with section 11B of the Guardianship of Infants Act 1964, as inserted by section 9 of the Children Act 1997, relating to applications for contact (access) by members of the extended family.

3.17 The Commission does not recommend extending the right to apply for contact to include the child.

C Legal responsibilities and rights of civil partners and step-parents

3.18 In the Consultation Paper the Commission invited submissions on whether it would be appropriate to develop a procedure to extend parental responsibility (guardianship) to a step-parent. In addition to this the Commission invited submissions on whether there should be a minimum time period and whether the appointment would only be by agreement or if it should be possible for a step-parent to make an independent application to court for parental responsibility.¹² This followed a discussion on the provisions in England and Wales¹³ and New Zealand¹⁴ for appointing step-parents as special or additional guardians.

3.19 Since the publication of the Consultation Paper, the Oireachtas has enacted the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010*. This provides for civil partnerships between same-sex couples. Section 3 of the 2010 Act defines a civil partner as:

“either of two persons of the same sex who are-

- (a) parties to a civil partnership registration that has not been dissolved or the subject of a decree of nullity, or
- (b) parties to a legal relationship of a class that is the subject of an order made under section 5 [of the 2010 Act] that has not been dissolved or the subject of a decree of nullity.”

3.20 The Commission is of the opinion that by virtue of the status of being in a civil partnership with or married to the biological parent of the child and thereby being in a parental role in respect of the child it is reasonable to extend parental responsibility to persons in that situation. The Commission considers

¹² *Consultation Paper on Legal Aspects of Family Relationships* (LRC CP 55-2009) at paragraph 4.65.

¹³ *Consultation Paper on Legal Aspects of Family Relationships* (LRC CP 55-2009) at paragraphs 4.60 and 4.61.

¹⁴ *Consultation Paper on Legal Aspects of Family Relationships* (LRC CP 55-2009) at paragraph 4.62.

that the current situation, whereby a biological parent and his or her spouse have to adopt the child as a couple in order to confer guardianship on the step-parent, is unsatisfactory. This requires the biological parent to adopt his or her own child and severs the legal connection between the child and the other biological parent. The proposals outlined in the Report would not remove parental responsibility from the biological parents of the child, but would introduce a mechanism to extend parental responsibility to other persons in a parental role. The Commission believes the statutory framework should reflect the reality that in some circumstances a child may have more than two adults fulfilling parental roles.

3.21 During the Oireachtas debates on the *Civil Partnership and Certain Rights and Obligations of Cohabitants Bill 2009*, which was enacted as the 2010 Act, attention was drawn to the fact that the proposed legislative provisions did not deal with the relationship between same sex couples and their children. In the debate in the Seanad, an amendment was proposed to correct this.¹⁵ This would have involved inserting a new section 8A into the *Guardianship of Infants Act 1964*. The proposed wording was:

“(1) For the purposes of this section, “civil partner” means a person who is a civil partner as defined by *section 3* of the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010*;

“step-parent” means, in respect of a child, a person who is married to or is the civil partner of a parent of that child.

(2) Where a child’s parent (“parent A”) who is the guardian of a child is married to or is a civil partner of a person who is not the child’s parent (“the step-parent”)-

(a) parent A (or, if the child has more than one guardian, all persons who are guardians of the child) may by agreement with the step-parent provide for the step-parent to be a guardian of the child; or

(b) the court may, on the application of the step-parent, order that the step-parent be a guardian of the child, if the court is satisfied that such an order would be in the best interests of the child.

(3) An agreement under subsection (2)(a) is valid only if-

¹⁵ Amendment 37 proposed the insertion of a new section 90 into the Bill. This amendment was proposed by Senators David Norris, Ivana Bacik, Alex White, Dominic Hannigan, Phil Prendergast, Michael McCarthy, and Brendan Ryan.

(a) all persons who are guardians of the child at the time of the agreement and the step-parent-

(i) have each received independent legal advice before entering into the agreement, or

(ii) have received legal advice together and have waived in writing the right to independent legal advice, and

(b) all persons who are guardians of the child at the time of the agreement and the step-parent agree, in writing, that the step-parent will be, with effect from the date of the agreement, a guardian of the child,

(c) the agreement is signed by the step-parent and by all persons who are guardians of the child at the time of the agreement, and

(d) the agreement complies with the general law of contract.

(4) Where an application is made under subsection 2(b), the court shall consider-

(a) the views of the child himself or herself in relation to the application, as the court thinks appropriate and practicable having regard to the age and understanding of the child,

(b) the views of the guardian or guardians of the child in relation to the application, should the guardian or guardians wish to make such views known to the court, and

(c) the views of any other parent of the child in relation to the application, should the parent wish to make such views known to the court.

(5) An agreement under subsection (2)(a), or an order under subsection (2)(b), may only be brought to an end by an order of the court made on the application-

(a) of any person who is a guardian of the child; or

(b) with the leave of the court, of the child himself or herself.

(6) The court may only grant leave under subsection (5)(b) of this section if it is satisfied that the child is of sufficient age and has sufficient understanding to make the proposed application.

(7) A guardian appointed under subsection (2) of this section shall act jointly with any other person or persons who are, for the time being,

also guardians of the child, including, where relevant, a testamentary guardian appointed under section 7 of this Act.”

3.22 The wording of the proposed amendment is very similar to the provisions introduced in England and Wales by section 112 of the *Adoption and Children Act 2002*, which inserted section 4A into the *Children Act 1989*, providing for special guardians. This proposed amendment was not included in the final version of the 2010 Act as passed by the Oireachtas. While elements of the proposed amendment would no longer be relevant following the implementation of the Commission’s recommendations in relation to terminology and automatic parental responsibility for non-marital fathers, the general effect of the proposed amendment is in line with the Commission’s position on developing a legal framework recognising the parental responsibilities and rights of civil partners and step-parents.

3.23 The Commission has therefore concluded, and recommends, that legislation be enacted to facilitate the extension of parental responsibility to civil partners and step-parents. The Commission recommends that civil partners and step-parents could obtain parental responsibility by way of an agreement with the other parties who have parental responsibility for the child or by application to court. The Commission also recommends that where parental responsibility is extended by agreement all parties must have obtained legal advice prior to finalising the agreement. The Commission also recommends that where parental responsibility is extended by court order the court shall have regard to, among other factors, the wishes and best interests of the child and the views of other parties with parental responsibility.

3.24 *The Commission recommends that legislative provisions be introduced to facilitate the extension of parental responsibility to civil partners and step-parents. The Commission recommends that civil partners and step-parents could obtain parental responsibility by way of an agreement with the other parties who have parental responsibility for the child or by application to court.*

3.25 *The Commission recommends that where parental responsibility is extended by agreement all parties should have obtained legal advice prior to finalising the agreement.*

3.26 *The Commission recommends that where parental responsibility is extended by court order the court shall have regard to, among other factors, the wishes and best interests of the child and the views of other parties with parental responsibility.*

3.27 Where a person is *in loco parentis* in respect of a child but is not in a civil partnership with or married to a biological parent of the child he or she would not be in a position to apply for parental responsibility under the reforms

just recommended by the Commission. This situation could arise in circumstances where a person is co-habiting with the biological parent of the child but the couple (opposite or same-sex) has not formalised that arrangement. There may be a variety of reasons for this, for example because one party to the relationship is awaiting the finalisation of a divorce. In these circumstances the person *in loco parentis* has no legally recognised parental role in relation to the child, although he or she could apply for contact with the child if the relationship with the biological parent subsequently broke down. Under the Commission's recommendations he or she would also be able to apply for day-to-day care (custody) of the child if the biological parent was unwilling or unable to exercise his or her parental responsibilities in respect of the child.

3.28 The Commission wishes to draw attention to the ability of the biological parent in this situation to appoint his or her partner as a testamentary guardian to care for the child in the event of the death of the biological parent.¹⁶ This would ensure that, if it was the wish of the biological parent of the child, the person *in loco parentis* could continue to fulfil this role in respect of the child. The legal framework provides that a testamentary guardian acts jointly with the surviving parent of the child.

D Expanding the categories of persons who can apply for day-to-day care of the child

3.29 In the Consultation Paper, the Commission provisionally recommended extending the right to apply for day-to-day care (custody) to persons other than parents or guardians of the child where the parents are unwilling or unable to exercise their parental responsibilities. The Commission also provisionally recommended that parental responsibility (guardianship) should be linked to an order granting day-to-day care in these circumstances.

3.30 The effect of linking parental responsibility to an order for day-to-day care in these circumstances would be to allow the person with day-to-day care of the child to make all necessary decisions relating to the child, for example to consent to medical treatment or to sign school forms, for the duration of the court order. This is important to ensure that the person legally responsible for caring for the child has the necessary rights to fulfil that responsibility adequately. It would also ensure that there is consistency in decision making in respect of the child.¹⁷ However, this would not affect the existence of parental

¹⁶ Section 7 of the *Guardianship of Infants Act 1964* makes provision for the appointment of a testamentary guardian.

¹⁷ In the context of public law proceedings in respect of children section 43A of the *Child Care Act 1991*, as inserted by section 4 of the *Child Care (Amendment) Act*

responsibility on the part of the parents of the child. By way of comparison section 12(3) of the *Children Act 1989* in England and Wales provides that if a person, who is not a parent or guardian of the child, has parental responsibility by virtue of a residence order,¹⁸ he or she cannot consent or refuse consent to an application for the adoption of the child, consent or refuse consent to an adoption order, or appoint a guardian for the child. This ensures that a person with parental responsibility by virtue of an order for day-to-day care where the parents are unable or unwilling to exercise parental responsibility cannot make certain key decisions that would have the effect of alienating the parental responsibilities and rights of the parents.

3.31 In the Consultation Paper the Commission provisionally recommended that the right to apply for day-to-day care would be extended to the same category of persons who can currently apply for leave to apply for contact (access). The Commission also invited submissions on whether the category of persons who can apply for day-to-day care (custody) should be widened to include *bona fide* persons with an interest as currently provided for in section 37 of the *Child Care Act 1991* in the context of applications for contact (access). In light of the recommendation above¹⁹ the category of persons who can apply for contact will be expanded to include *bona fide* persons with an interest and therefore such persons would also be included in the category of those who can apply for day-to-day care.

3.32 In the submissions received this proposal was generally welcomed as being in the best interests of the child in circumstances where the parents of the child are not in a position to exercise parental responsibility and to provide the child with the necessary care. However, the importance of not removing the parental responsibility of the parents was emphasised. The Commission understands that in many instances a provision such as that proposed would have the effect of regularising and providing a statutory basis for what is already occurring in practice.

2007, provides that a foster parent or relative with whom the child has been placed for not less than 5 years can apply to court for certain attributes of guardianship. This application must be with the consent of the HSE and be in the best interests of the child. Such an order authorises the applicant “to have, on behalf of the HSE, the like control over the child as if the foster parent or relative were the child’s parent.” The legislation specifically states that an order under this section will empower the foster parent or relative to give consent for medical treatment for the child and to apply for a passport for the child.

¹⁸ Residence is the term used in England and Wales for day-to-day care (custody).

¹⁹ Paragraph 3.11

3.33 *The Commission recommends that the ability to apply for day-to-day care (custody) should be extended to relatives of a child, persons in loco parentis and persons with a bona fide interest in the child in circumstances where the parents are unable or unwilling to exercise parental responsibility.*

3.34 *The Commission recommends that where the court makes an order granting day-to-day care (custody) to a relative, person in loco parentis or a bona fide person with an interest, parental responsibility (guardianship) will attach to that person for the duration of the court order. This will not remove parental responsibility and the associated rights from the parents of the child.*

3.35 *The Commission recommends that a person exercising parental responsibility by virtue of a court order granting him or her day-to-day care shall not be permitted to make any decisions in relation to the adoption of a child or to appoint a testamentary guardian to care for the child.*

CHAPTER 4 SUMMARY OF RECOMMENDATIONS

This Chapter sets out the Commission's recommendations in this Report.

4.01 The Commission recommends that the term "guardianship" be replaced with the term "parental responsibility." The Commission also recommends that parental responsibility should be defined in legislation as including the duty to maintain and properly care for a child, the right to apply for a passport for the child and the right to make decisions about where a child will live, a child's religious and secular education, health requirements and general welfare. [Paragraph 1.10]

4.02 The Commission recommends that the term "custody" be replaced with the term "day-to-day care." The Commission also recommends that day-to-day care should be defined in legislation as including the ability of the parent, or person in loco parentis, to exercise care and control over a child on a day-to-day basis, to protect and to supervise the child. [Paragraph 1.12]

4.03 The Commission recommends that the term "access" be replaced with the term "contact." The Commission also recommends that contact should be defined in legislation as including the right of the child to maintain personal relations and contact with the parent or other qualifying person on a regular basis, subject to the proviso that contact must be in the best interests of the child. [Paragraph 1.14]

4.04 The Commission recommends the enactment of a *Children and Parental Responsibility Act* (in respect of which the Commission has prepared a draft Bill appended to the Report), which would consolidate the *Guardianship of Infants Act 1964*, as amended, and would incorporate the changes in terminology and other reforms recommended in this Report. [Paragraph 1.16]

4.05 The Commission recommends that a general statutory requirement to consult should not be included in legislation concerning parental responsibility. The Commission recommends that the consent of all parties exercising parental responsibility be required for the purpose of consenting to irreversible non-essential medical procedures on behalf of the child. [Paragraph 1.19]

4.06 The Commission recommends that legislation be enacted to provide for automatic joint parental responsibility (guardianship) of both the mother and

the father of any child. The Commission also recommends that automatic joint parental responsibility be linked to compulsory joint registration of the birth of a child. [Paragraph 2.12]

4.07 The Commission recommends that in the absence of agreement with the mother a non-marital father can register his name on the birth certificate of the child in the following manner:

- An application to the Registrar of Births to be entered on the birth certificate as the father of the child. This may require a statutory declaration.
- A note of the application to be taken by the Registrar followed by a notice to the mother of the child that such an application has been made.
- A 28 day waiting period to allow for an objection by the mother to the name of the applicant being entered on the birth certificate as the father of the child.
- If no objection is forthcoming, an entry to be made in the Register of Births recording the applicant as the father of the child.
- If an objection is made by the mother the Registrar can require her to provide information on who is the father of the child. The applicant could also refer the matter to the District Court to determine the matter or to undergo a paternity test. [Paragraph 2.18]

4.08 The Commission also recommends that there should be a similar process to enable the mother of a child to enter the name of a man on the birth certificate as the father of the child without agreement. The mother can inform the Registrar of the name of the alleged father of the child. The Registrar would then contact the man and he would have 28 days within which to raise an objection to his name being entered on the birth certificate. The District Court would, on appeal, determine the issue if there was a dispute. [Paragraph 2.20]

4.09 The Commission recommends that comparable procedures to those outlined in the recommendations in paragraphs 2.18 and 2.20 should be available to both the mother and father (or man who is asserted by the mother to be the father) to deal with any difficulties that arise during the transitional period after the implementation of the Commission's recommendation on joint parental responsibility (guardianship). [Paragraph 2.22]

4.10 The Commission recommends that the *Civil Registration Act 2004* be amended to provide that where a non-marital mother a) honestly does not know the identity of the father, or b) honestly does not know the whereabouts of the father, or c) where she fears for her safety and/or the safety of the child if the

father were to be contacted in relation to the registration of the birth of the child, she shall make a statutory declaration to that effect. [Paragraph 2.26]

4.11 The Commission recommends that child benefit payments should be activated on the commencement of the birth registration process in circumstances where the Registrar is obliged to wait 28 days to determine if there is an objection to a final entry being made in the Register of Births. A certificate confirming the commencement of the registration process should be issued. [Paragraph 2.28]

4.12 The Commission recommends that a Register of Statutory Declarations Agreeing Guardianship/Parental Responsibility be established to be managed by the General Register Office. This would provide for the registration of statutory declarations agreeing guardianship which are in existence up until the date the proposed reforms introducing automatic parental responsibility and compulsory joint registration are enacted and become fully operational. [Paragraph 2.30]

4.13 This register would merely be a record of the existence of such statutory declarations and the General Register Office would have no obligation to verify independently the accuracy of the information contained in the statutory declaration. [Paragraph 2.31]

4.14 The Commission recommends that the presumption of paternity is rebutted where a married woman provides evidence that she has not had contact with her husband for a minimum period of 10 months and she makes a statutory declaration that he is not the father of the child. [Paragraph 2.43]

4.15 The Commission recommends that the term *in loco parentis* be defined in general terms as a person who is not the parent of a child but who, acting in good faith, takes on a parental role in relation to the child. [Paragraph 3.07]

4.16 The Commission recommends the removal of the leave stage provided for by section 11B(2) of the *Guardianship of Infants Act 1964*, as inserted by section 9 of the *Children Act 1997*. [Paragraph 3.09]

4.17 The Commission recommends that the category of persons who can apply for contact with a child should be expanded to include persons with a *bona fide* interest in the child. [Paragraph 3.11]

4.18 The Commission recommends that a statutory requirement to take account of the views of the child be inserted into the proposed *Children Bill* which would correspond with section 11B of the *Guardianship of Infants Act 1964*, as inserted by section 9 of the *Children Act 1997*, relating to applications for contact (access) by members of the extended family. [Paragraph 3.16]

4.19 The Commission does not recommend extending the right to apply for contact to include the child. [Paragraph 3.17]

4.20 The Commission recommends that legislative provisions be introduced to facilitate the extension of parental responsibility to civil partners and step-parents. The Commission recommends that civil partners and step-parents could obtain parental responsibility by way of an agreement with the other parties who have parental responsibility for the child or by application to court. [Paragraph 3.24]

4.21 The Commission recommends that where parental responsibility is extended by agreement all parties should have obtained legal advice prior to finalising the agreement. [Paragraph 3.25]

4.22 The Commission recommends that where parental responsibility is extended by court order the court shall have regard to, among other factors, the wishes and best interests of the child and the views of other parties with parental responsibility. [Paragraph 3.26]

4.23 The Commission recommends that the ability to apply for day-to-day care (custody) should be extended to relatives of a child, persons *in loco parentis* and persons with a *bona fide* interest in the child in circumstances where the parents are unable or unwilling to exercise parental responsibility. [Paragraph 3.33]

4.24 The Commission recommends that where the court makes an order granting day-to-day care (custody) to a relative, person *in loco parentis* or a *bona fide* person with an interest, parental responsibility (guardianship) will attach to that person for the duration of the court order. This will not remove parental responsibility and the associated rights from the parents of the child. [Paragraph 3.34]

4.25 The Commission recommends that a person exercising parental responsibility by virtue of a court order granting him or her day-to-day care shall not be permitted to make any decisions in relation to the adoption of a child or to appoint a testamentary guardian to care for the child. [Paragraph 3.35]

**APPENDIX: DRAFT CHILDREN AND PARENTAL RESPONSIBILITY
BILL 2010¹**

¹ This draft Bill comprises, in effect, a consolidation with amendments of the *Guardianship of Infants Act 1964* (as amended). The Commission has incorporated into the draft Bill the changes in terminology and other recommendations for reform made in this Report. In drafting the Bill, the Commission has also, to the greatest extent possible and for ease of comparison, followed the sequence of sections in the 1964 Act, as amended.

DRAFT CHILDREN AND PARENTAL RESPONSIBILITY BILL 2010

ARRANGEMENT OF SECTIONS

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31. Definitions for Part 4
32. Safeguards to ensure applicant's awareness of alternatives to proceedings in respect of parental responsibility, day-to-day care and contact and to assist attempts at agreement
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34. Adjournment of proceedings to assist agreement on parental responsibility, day-to-day care or contact with child
35. Non-admissibility as evidence of certain communications relating to agreement
36. Orders in respect of day-to-day care or contact agreements
37. Social reports
- 38 Power to proceed in absence of child
39. Appointment of guardian *ad litem* for a child and provision for separate representation

40. Cost of mediation and counselling services

41. Jurisdiction

ACTS REFERRED TO

Adoption Act 2010
2010, No. 21

Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010
2010, No. 24

Civil Registration Act 2004
2004, No. 3

Family Law Act 1995
1995, No. 26

Family Law (Divorce) Act 1996
1996, No. 33

Family Law (Maintenance of Spouses and Children) Act 1976
1976, No. 11

Guardianship of Infants Act 1964
1964, No. 7

Health Act 1953
1953, No. 26

Health Act 2004
2004, No. 42

Judicial Separation and Family Law Reform Act 1989
1989, No. 6

Status of Children Act 1987
1987, No. 26

DRAFT CHILDREN AND PARENTAL RESPONSIBILITY BILL 2010

BILL

entitled

AN ACT TO CONSOLIDATE AND REFORM THE LAW CONCERNING CHILDREN AND PARENTAL RESPONSIBILITY, DAY-TO-DAY CARE AND CONTACT; TO REPEAL THE GUARDIANSHIP OF INFANTS ACT 1964, TO AMEND THE STATUS OF CHILDREN ACT 1987 AND THE CIVIL REGISTRATION ACT 2004; AND TO PROVIDE FOR RELATED MATTERS

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:

PART 1

PRELIMINARY AND GENERAL

Short title and commencement

1.—(1) This Act may be cited as the Children Act 2010.

(2) This Act comes into operation on such day or days as the Minister for Justice and Law Reform may appoint by order or orders either generally or with reference to any particular purpose or provision, and different days may be so appointed for different purposes or provisions.

Interpretation

2.—(1) In this Act, unless the context otherwise requires—

“Act of 1987” means the Status of Children Act 1987;

“adoption order” means—

(a) an adoption order within the meaning of the Adoption Act 2010, or

(b) an intercountry adoption effected outside the State and recognised under that Act,

and for the time being in force;

“child” means a person who has not attained full age;

“contact” includes the right of the child to maintain personal relations and contact with a parent (or other person with a *bona fide* interest in accordance with *section 21*) on a regular basis, except where that contact is not in the best interests of the child;

“day-to-day care” includes the ability of the parent, or person in loco parentis, to exercise care and control over a child on a day-to-day basis, to protect and to supervise the child;

“father” includes a male adopter under an adoption order;²

“*loco parentis*” in relation to a person means a person who is not the parent of a child but who, acting in good faith, takes on a parental role in relation to the child;

“maintenance” includes education;

“mother” includes a female adopter under an adoption order;

“parent” means a father or mother as defined by this subsection;

² The definition of “father” is intended to take account of the proposed reform in this Report concerning joint parental responsibility (contrast with the definition in section 2 of the *Guardianship of Infants Act 1964*, as amended by the *Children Act 1997*).

“parental responsibility” includes the duty to maintain and properly care for a child, the right to apply for a passport for the child and the right to make decisions about where a child will live, a child’s religious and secular education, health requirements and general welfare;

“person with testamentary parental responsibility” means a person exercising parental responsibility pursuant to an appointment by deed or will;

“relative” in relation to a child who is the subject of an adoption order includes—

- (a) a relative of the child’s adoptive parents,
- (b) the adoptive parents of the child’s parents, or
- (c) a relative of the adoptive parents of the child’s parents;

“welfare”, in relation to a child, comprises the religious, moral, intellectual, physical and social welfare of the child.

Welfare of child to be paramount

3.—Where in any proceedings before any court parental responsibility, day-to-day care, access, the upbringing of a child, or the administration of any property belonging to or held on trust for an child, or the application of the income thereof, is in question, the court, in deciding that question, shall regard the welfare of the child as the first and paramount consideration.

Wishes of child

4.—In any proceedings to which section 3 applies, the court shall, as it thinks appropriate and practicable having regard to the age and understanding of the child, take into account the child’s wishes in the matter.

Disputed parentage in proceedings

5.—(1) Subject to *subsection (2)*, where in any proceedings before any court on an application for an order under this Act (other than so much of any proceedings as section 15 of the Act of 1987 relates to) in respect of a child, a person (being a party to the proceedings) is alleged to be, or alleges that he is, the father of the child but that allegation is not admitted by a party to the proceedings, the court shall not on that application make any final order which imposes any obligation or confers any right on that person unless it is proved on the balance of probabilities that he is the father of the infant:

(2) This section applies only where the fact that that person is or is not the father of the child is material to the proceedings.

Repeal

6.— The Guardianship of Infants Act 1964 is repealed.

PART 2

PARENTAL RESPONSIBILITY, DAY-TO-DAY CARE AND ACCESS

Jurisdiction in parental responsibility matters

7.—(1) Subject to *subsection (2)*, the jurisdiction conferred on a court by this Part may be exercised by the Circuit Family Court or the District Court.

(2) The District Court and the Circuit Family Court, on appeal from the District Court, shall not have jurisdiction to make an order under this Act for the payment of a periodical sum at a rate greater than €190.50 per week towards the maintenance of a child.

(3) The jurisdiction conferred by this Part is in addition to any other jurisdiction to confer or remove parental responsibility from a person or as to the wardship of children or the care of children's estates.

Rights of parents to exercise parental responsibility

8.—(1) The father and mother of a child shall exercise joint parental responsibility for the child.

(2) On the death of the father of a child the mother, if surviving, shall exercise parental responsibility for the child, either alone or jointly with any person conferred with parental responsibility by the father or by the court.

(3) On the death of the mother of a child the father, if surviving, shall be exercise parental responsibility for the child, either alone or jointly with any person conferred with parental responsibility by the mother or by the court.

(4) In this section, where the mother of a child has not married the child's father, "mother" and "father" means those persons who are jointly registered as the parents of the child pursuant to the Civil Registration Act 2004, as amended by *section 10*.

Amendment of the Act of 1987

9. — The Act of 1987 is amended by the insertion of the following provision after section 46(2):

“(2A) Notwithstanding *subsection (1)* of this section, where a married woman, being a woman who is living apart from her husband gives birth to a child more than ten months after last contact with her husband, then her husband shall be presumed not to be the father of the child unless the contrary is proved on the balance of probabilities.”

Amendment of the Civil Registration Act 2004

10. — The Civil Registration Act 2004 is amended—

(a) by the insertion of the following after section 19(1) —

“(1A)(a) Where a mother reasonably believes that her safety or welfare or the safety or welfare of the child so requires

it, she may request the exclusion of the required particulars of the birth pertaining to the father.

(b) Such request shall be in writing to the Registrar and be accompanied by a statutory declaration setting out the reasons for the request.

(c) The Registrar shall comply with the request.”,

(b) by the insertion of the following after section 19—

“19A. Where section 31(2A) of the Status of Children Act 1987 applies, the Registrar may require the mother to provide a declaration in writing, in a form for the time being standing approved by an tArd-Chláraitheoir, that her husband is not the father of the child.”,

(c) by the insertion of the following after section 23(1) —

“(1A) (a) In the absence of the declaration referred to in *subsection (1)(b)(ii) or (c)(ii)*, the Registrar shall make a note of the application in a form for the time being standing approved by an tArd-Chláraitheoir;

(b) The Registrar shall by notice in writing, in a form for the time being standing approved by an tArd-Chláraitheoir, inform the mother or the father, as appropriate, of the application for re-registration;

(c) The mother or father may, within a period of 28 days and in writing, inform the Registrar of his or her objection to the re-registration.

(d) In the absence of such objection, the Registrar shall re-register the birth and the relevant provisions of this section shall apply for this purpose.

(e) Where an objection is received, the Registrar may require the mother or father to provide further relevant information in relation to the application.

(f) The mother or father may appeal any requirement or action of the Registrar under this section to the District Court.

(g) In determining an appeal under this section, the District Court may make such order or give such directions as it deems appropriate.”³

(d) by the insertion of the following after section 30—

“30A. The Registrar shall on request of the mother or father issue a certificate, in a form for the time being standing approved by an tArd-Chláraitheoir, confirming the commencement of the registration process under this Part.”.

Power of father and mother to appoint person to exercise testamentary parental responsibility

11.—(1) The father of a child may by deed or will appoint a person or persons to exercise parental responsibility for the child after his death.

(2) The mother of a child may by deed or will appoint a person or persons to exercise parental responsibility for the child after her death.

(3) A person exercising parental responsibility shall act jointly with the surviving parent of the child so long as the surviving parent remains alive unless the surviving parent objects to his so acting.

(4) If the surviving parent so objects or if a person exercising testamentary parental responsibility considers that the surviving parent is unfit to have the day-to-day care of the child, the person exercising testamentary parental responsibility may apply to the court for an order under this section.

(5) The court may—

(a) refuse to make an order (in which case the surviving parent shall exercise sole parental responsibility), or

³ See also paragraphs 2.21 and 2.22 of the Report in respect of transitional arrangements.

(b) make an order that the person exercising parental responsibility shall act jointly with the surviving parent, or

(c) make an order that he shall exercise parental responsibility for the child to the exclusion, so far as the court thinks proper, of the surviving parent.

(6) In the case mentioned in *subsection (3)(c)* the court may make such order regarding the day-to-day care of the child and contact between the child and the surviving parent as the court thinks proper, and the court may further order that the surviving parent shall pay to the person or persons exercising parental responsibility, or any of them, towards the maintenance of the child such weekly or other periodical sum as, having regard to the means of the surviving parent, the court considers reasonable.

(7) An appointment of a person to exercise parental responsibility by deed may be revoked by a subsequent deed or by will.

Appointment and removal by court of persons to exercise parental responsibility

12.—(1) Where there is no person to exercise parental responsibility for a child, the court, on the application of any person or persons, may appoint the applicant or applicants or any of them to exercise parental responsibility for the child.

(2) When a deceased parent has not appointed a person to exercise parental responsibility or a person so appointed dies or refuses to act, the court may appoint a person or persons to exercise parental responsibility jointly with the surviving parent.

(3) A person so appointed by the court to act jointly with a surviving parent shall continue to exercise parental responsibility after the death of the surviving parent.

(4) A person appointed by will or deed or order of court to exercise parental responsibility, may be removed from office only by the court.

(5) The court may appoint another person to exercise parental responsibility in place of a person so removed or in place of a person appointed by any such order who dies.

Provisions where two or more persons appointed to exercise parental responsibility

13.—(1) Where two or more persons are appointed to exercise parental responsibility they shall act jointly and on the death of any of them the survivor or survivors shall continue to act.

(2) Where persons are appointed by both parents to exercise parental responsibility the persons so appointed shall after the death of the surviving parent act jointly.

Appointment of step-parent to exercise parental responsibility

14. —(1) For the purposes of this section—

(a) “civil partner” is a person who is a civil partner within the meaning of section 3 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010;

(b) “parent” means a parent who is exercising parental responsibility for a child;

(c) “person exercising parental responsibility” includes a person appointed pursuant to *section 11*;

(d) “step-parent” means, in respect of a child, a person who is married to or is the civil partner of a parent of that child.

(2) (a) A parent or, if more than one person are exercising parental responsibility for a child, those persons acting together, may by agreement in writing with a step-parent, appoint that step-parent to exercise joint parental responsibility for the child.

(b) An agreement under *paragraph (a)* is valid only if all parties to the agreement have each received independent legal advice before entering into the agreement.

(3) (a) The court may, on the application of the step-parent, appoint a step-parent to exercise parental responsibility for a child.

(b) In deciding whether to grant an order under *paragraph (a)* the court shall have regard to all the circumstances, including in particular—

(i) the applicant's connection with the child,

(ii) the risk, if any, of the application disrupting the child's life to the extent that the child would be harmed by it,

(iii) the wishes and best interests of the child,

(iv) the views of any other persons already exercising parental responsibility for the child.

(4) An agreement under *subsection (2)(a)*, or an order under *subsection (3)(a)*, may only be brought to an end by an order of the court made on the application—

(a) of any person exercising parental responsibility for the child, or

(b) with the leave of the court, of the child.

(5) The court may only grant leave under *subsection (4)(b)* if it is satisfied that the child is of sufficient age and has sufficient understanding to make the proposed application.

Powers and duties of persons with parental responsibility

15.—(1) Every person exercising parental responsibility under this Act shall do so in respect of the person and of the estate of the child unless, in the case of a person appointed by deed, will or order of the court, the terms of his appointment otherwise provide.

(2) Subject to the terms of any such deed, will or order, a person exercising parental responsibility under this Act—

- (a) in respect of the person of the child, shall, as against every person not, jointly exercising parental responsibility with him, be entitled to the day-to-day care of the child and shall be entitled to take proceedings for the restoration of his day-to-day care of the child against any person who wrongfully takes away or detains the child and for the recovery, for the benefit of the child, of damages for any injury to or trespass against the person of the child;
- (b) in respect of the estate of the child, shall be entitled to the possession and control of all property, real and personal, of the child and shall manage all such property and receive the rents and profits on behalf and for the benefit of the child until the child attains the age of twenty-one years or during any shorter period for which he has been appointed to exercise parental responsibility and may take such proceedings in relation thereto as may by law be brought by any person exercising parental responsibility in respect of the estate of a child.

(3) The provisions of this section are without prejudice to the provisions of any other enactment or to any other powers or duties conferred or imposed by law on parents, persons exercising parental responsibility or trustees of the property of children.

Irreversible non-essential medical procedures

16. — The consent of all persons exercising parental responsibility is required for the purpose of consenting to irreversible non-essential medical procedures on behalf of a child.

Register of statutory declarations agreeing guardianship

17.— The General Register Office shall, in a form for the time being standing approved by an tArd-Chláráitheoir, establish and maintain a register of statutory declarations agreeing guardianship made prior to the commencement of this Act.⁴

⁴ See paragraph 2.29 of the Report in respect of transitional arrangements.

Applications to court

18.—(1) Any person exercising parental responsibility for a child may apply to the court for its direction on any question affecting the welfare of the child and the court may make such order as it thinks proper.

(2) The court may by an order under this section—

(a) give such directions as it thinks proper regarding the day-to-day care of the child and contact between the child and his father or mother;

(b) order the father or mother to pay towards the maintenance of the child such weekly or other periodical sum as, having regard to the means of the father or mother, the court considers reasonable.

(3) An order under this section may be made on the application of either parent notwithstanding that the parents are then residing together, but an order made under *subsection (2)(a)* shall not be enforceable and no liability thereunder shall accrue while they reside together, and the order shall cease to have effect if for a period of three months after it is made they continue to reside together.

(4) A reference in *subsection (2)(b)* to a child shall include a reference to a person who—

(a) has not attained the age of 18 years, or—

(b) has attained the age of 18 years and is or will be, or if any order were made under this Act providing for payment of maintenance for the benefit of the person, would be, receiving full-time education or instruction at a university, college, school or other educational establishment, and who has not attained the age of 23 years.

(5) The court may, of its own motion or on an application under this section, by an order under this section give such directions as it thinks proper to procure a report from such person as it may nominate on any question affecting the welfare of the child.

(6) In deciding whether or not to request a report under subsection (5) the court shall have regard to the wishes of the parties before the court where ascertainable but shall not be bound by the said wishes.

(7) *Subsection (2)(b)* shall apply to and in relation to a person who has attained the age of 18 years and has a mental or physical disability to such extent that it is not reasonably possible for the person to maintain himself fully, as it applies to a child.

(8) A copy of any report prepared under *subsection (5)* shall be made available to the barrister or solicitor, if any, representing each party in the proceedings or, if any party is not so represented, to that party and may be received in evidence in the proceedings.

(9) Where any person prepares a report pursuant to a request under subsection (5), the fees and expenses of that person shall be paid by such party or parties to the proceedings as the court shall order.

(10) The court may, if it thinks fit, or either party to the proceedings may, call the person making the report as a witness.

Day-to-day care may be granted to father and mother jointly

19.—The court, in making an order under *section 18*, may, if it thinks it appropriate, grant day-to-day care of a child to the child's father and mother jointly.

Other persons who may apply for day-to-day care of child

20.—(1) Any person to whom *section 18* does not apply but who—

(a) is a relative of a child, or

(b) acts *in loco parentis* to a child, or

(c) has a *bona fide* interest in the welfare of the child,

may apply to the court for an order granting that person day-to-day care of the child on such terms and conditions as the court may order.

(2) Before granting an order under this section, the court shall be satisfied that the parents of the child are unwilling or unable to exercise parental responsibility.

(3) In deciding whether to grant an application under this section the court shall have regard to all the circumstances, including in particular—

- (a) the applicant's connection with the child,
- (b) the risk, if any, of the application disrupting the child's life to the extent that the child would be harmed by it,
- (c) the wishes of the parents of the child,
- (d) the wishes of the child.

(4) Where an order is made under this section, the provisions of the Act relating to parental responsibility shall extend to the applicant for the duration of the order.

Other persons who may apply for contact with child

21.—(1) Any person to whom section 18 does not apply but who—

- (a) is a relative of a child, or
- (b) acts *in loco parentis* to a child, or
- (c) has a *bona fide* interest in the welfare of the child,

may, *subject to subsection (2)*, apply to the court for an order granting that person contact with the child on such terms and conditions as the court may order.

(2) In deciding whether to grant an application under this section the court shall have regard to all the circumstances, including in particular—

- (a) the applicant's connection with the child,

- (b) the risk, if any, of the application disrupting the child's life to the extent that the child would be harmed by it,
- (c) the wishes of any person exercising parental responsibility for the child,
- (d) the wishes of the child.

Operation of order not to be stayed pending appeal unless so ordered

22.—The operation of an order under this Act shall not be stayed pending the outcome of an appeal against the order unless the court that made the order or the court to which the appeal is brought directs otherwise.

Provision relating to orders under sections 18, 26 and 28

23.—In considering whether to make an order under *section 18, 26 or 28* the court shall have regard to whether the child's best interests would be served by maintaining personal relations and direct contact with both his father and mother on a regular basis.

Variation and discharge of court orders

24.—The court may vary or discharge any order previously made by the court under this Part.

PART 3

ENFORCEMENT RELATING TO DAY-TO-DAY CARE

Definitions for Part 3

25.—In this Part—

“the court” means the Circuit Family Court or the District Court;

“parent” includes a person with parental responsibility for a child and any person at law liable to maintain a child or having day-to-day care of the child;

“person” includes any school or institution.

Power of court as to production of child

26.—Where a parent of a child applies to the court for an order for the production of the child and the court is of opinion that that parent has abandoned or deserted the child or that the parent has otherwise so conducted himself or herself that the court should refuse to grant the parent day-to-day care of the child, the court may in its discretion decline to make the order.

Power of Court to order repayment of costs of bringing up child

27.—(1) Where, upon application by a parent for the production of a child, the court finds that the child is being brought up at the expense of another person, the court may, in its discretion, if it orders that the child be given up to the parent, further order that the parent shall pay to that person the whole of the costs properly incurred by the person in bringing up the child or such portion of those costs as the court considers reasonable.

(2) Where, upon application by a parent for the production of a child, the court finds that—

- (a) assistance has been provided for the child at any time under section 55 of the Health Act 1953,
- (b) the child has been maintained in the care of a health board under section 4 of the Child Care Act 1991 at any time before the amendment of that provision by the Health Act 2004, or
- (c) the child has been maintained in the care of the Health Service Executive under section 4 of the Child Care Act 1991 at any time after the amendment of that provision by the Health Act 2004,

the court may, in its discretion, if it orders that the child be given up to the parent, further order that the parent shall pay to the Health Service Executive the whole of the costs properly incurred by the health authority in providing such assistance or by the health board or the Executive in maintaining the child in care or such portion of those costs as the court considers reasonable.

(3) In determining the amount to be repaid under this section, the court shall have regard to the circumstances of the case including, in particular, the means of the parent.

Court in making order to have regard to conduct of parent

28.—Where a parent has—

(a) abandoned or deserted a child, or

(b) allowed a child to be brought up by another person at that person's expense, or to be provided with assistance by a health authority under section 55 of the Health Act 1953 to be maintained as described in section 15(2)(b) or (c) in the care of a health board or the Health Service Executive for such a length of time and under such circumstances as to satisfy the court that the parent was unmindful of his parental duties,

the court shall not make an order for the delivery of the child to the parent unless the parent has satisfied the court that he is a fit person to have the day-to-day care of the child.

Power of court as to child's religious education

29.—(1) Upon any application by a parent for the production or day-to-day care of a child, if the court is of opinion that that parent ought not to have the day-to-day care of the child, the court shall have power to make such order as it thinks fit to secure that the child be brought up in the religion in which the parents, or a parent, have or has a legal right to require that the child should be brought up.

Day-to-day care where parents are separated

30.— A provision contained in any separation agreement made between the father and mother of a child shall not be invalid by reason only of its providing that one of them shall give up the day-to-day care or control of the child to the other.

PART 4

SAFEGUARDING INTERESTS OF CHILDREN

Definitions in Part 4

31.—In this Part—

“the Act of 1976” means the Family Law (Maintenance of Spouses and Children) Act 1976;

“the Act of 1989” means the Judicial Separation and Family Law Reform Act 1989;

“the Act of 1995” means the Family Law Act 1995;

“the Act of 1996” means the Family Law (Divorce) Act 1996.

Safeguards to ensure applicant’s awareness of alternatives to proceedings in respect of parental responsibility, day-to-day care and contact and to assist attempts at agreement

32.—(1) In this section “the applicant” means a person who has applied, is applying or proposes to apply to the court for directions under *section 18, 20 or 21*.

(2) If a solicitor is acting for the applicant, the solicitor shall, before the institution of proceedings under *section 18, 20 or 21*, discuss with the applicant the possibility of the applicant—

- (a) engaging in counselling to assist in reaching an agreement with the respondent about the day-to-day care of the child, contact with the child or any other question affecting the welfare of the child and give to the applicant the name and address of persons qualified to give counselling on the matter,
- (b) engaging in mediation to help to effect an agreement between the applicant and the respondent about the day-to-day care of the child, contact with the child or any question affecting the welfare of the child, and give to the applicant the name and addresses of persons qualified to provide an appropriate mediation service, and
- (c) where appropriate, effecting a deed or agreement in writing executed or made by the applicant and the respondent and providing for the day-to-day care of the child, contact with the child or any question affecting the welfare of the child.

(3) If a solicitor is acting for the applicant—

(a) the original documents by which the proceedings under *section 18, 20 or 21* are instituted shall be accompanied by a certificate signed by the solicitor indicating, if it be the case, that the solicitor has complied with *subsection (2)* in relation to the matter and, if the document is not so accompanied, the court may adjourn the proceedings for such period as it considers reasonable to enable the solicitor to engage in the discussions referred to in *subsection (2)*,

(b) if the solicitor has complied with paragraph (a), any copy of the original document served on any person or left in an office of the court shall be accompanied by a copy of that certificate.

(4) The solicitor shall be deemed to have complied with *subsection (3)* in relation to the requirement of a certificate where the application under *section 18, 20 or 21* is made in proceedings for the grant of—

(a) a decree of judicial separation under the Act of 1989 and section 5(2) of that Act has been complied with by the solicitor, or

(b) a decree of divorce under the Act of 1996 and section 6(4) of that Act has been complied with by the solicitor.

Safeguards to ensure respondent’s awareness of alternatives to proceedings in respect of parental responsibility, day-to-day care and contact and to assist attempts at agreement

33.—(1) In this section ‘the respondent’ means a respondent in proceedings in the court under section 18, 20 or 21.

(2) If a solicitor is acting for the respondent, the solicitor shall, as soon as practicable after receiving instructions from the respondent in relation to proceedings under section 18, 20 or 21 discuss with the respondent the possibility of the respondent—

- (a) engaging in counselling to assist in reaching an agreement with the applicant about the day-to-day care of the child, contact with the child or any other question affecting the welfare of the child and give to the respondent the name and addresses of persons qualified to give counselling on the matter,
- (b) engaging in mediation to help to effect an agreement between the respondent and the applicant about the day-to-day care of the child, contact with the child or any question affecting the welfare of the child and where appropriate give to the respondent the name and addresses of persons qualified to provide an appropriate mediation service, and
- (c) where appropriate, effecting a deed or agreement in writing executed or made by the respondent and the applicant and providing for the day-to-day care of the child, contact with the child or any question affecting the welfare of the child.

(3) If a solicitor is acting for the respondent—

- (a) the memorandum or other documents delivered to the appropriate officer of the court for the purpose of the entry of an appearance by the respondent in proceedings under *section 18, 20 or 21* shall be accompanied by a certificate signed by the solicitor indicating, if it be the case, that the solicitor has complied with *subsection (2)* in relation to the matter and, if the document is not so accompanied, the court may adjourn the proceedings for such period as it considers reasonable to enable the solicitor to engage in the discussions referred to in *subsection (2)*,

- (b) if the solicitor has complied with *paragraph (a)*, any copy of the original document given or sent to the applicant or his solicitor shall be accompanied by a copy of that certificate.

(4) The solicitor shall be deemed to have complied with *subsection (3)* in relation to the requirement of a certificate where the application under *section 18, 20 or 21* is made in proceedings for the grant of—

- (a) a decree of judicial separation under the Act of 1989 and section 6(2) of that Act has been complied with by the solicitor, or
- (b) a decree of divorce under the Act of 1996 and section 7(4) of that Act has been complied with by the solicitor.

Adjournment of proceedings to assist agreement on parental responsibility, day-to-day care or contact with child

34.—(1) Where, in proceedings under *section 18, 20 or 21* it appears to the court that agreement between the parties on the subject matter of the proceedings may be effected, it may adjourn or further adjourn the proceedings for the purpose of enabling attempts to be made by the parties, if they wish, to reach agreement, with or without the assistance of a third party, on some or all of the issues which are in dispute.

(2) If proceedings are adjourned pursuant to *subsection (1)*, any party may at any time request that the hearing of the proceedings be resumed as soon as practicable and, if such a request is made, the court shall, subject to any other power of the court to adjourn proceedings, resume the hearing.

(3) The powers conferred by this section are additional to any other power of the court to adjourn proceedings.

(4) Where the court adjourns proceedings under this section, it may, at its discretion, advise the parties concerned to seek the assistance of a third party in relation to the effecting of an agreement between them on all or any of its terms.

Non-admissibility as evidence of certain communications relating to agreement

35.—An oral or written communication between any of the parties concerned and a third party for the purpose of seeking assistance to reach agreement between them regarding the day-to-day care of the child, contact with the child or any question affecting the welfare of the child (whether or not made in the presence or with the knowledge of the other party) and any record of such communication, made or caused to be made by any of the parties concerned or such a third party, shall not be admissible as evidence in any court.

Orders in respect of day-to-day care or contact agreements

36.—Where—

(a) the parties to a dispute relating to the welfare of a child enter into an agreement in writing that includes—

(i) a provision whereby one party undertakes, or both parties undertake, to provide day-to-day care of the child, or

(ii) a provision governing contact between the parties and the child,

and

(b) an application is made by any party to the court for an order making the agreement a rule of court,

the court may make such an order if it is satisfied that the agreement is a fair and reasonable one which in all the circumstances adequately protects the interests of the parties and the child, and such order shall, insofar as it relates to a provision specified in *subparagraph (i) or (ii) of paragraph (a)*, be deemed to be an order under *section 18(2)(a), 20 or 21* as appropriate.

Social reports

37.—For the purposes of the application of section 47 of the Act of 1995 to proceedings under this Act, “court” includes the District Court.

Power to proceed in absence of child

38.—(1) It shall not be necessary in proceedings under *section 18, 20 or 21* for the child to whom the proceedings relate to be brought before the court or to be present for all or any part of the hearing unless the court, either of its own motion or at the request of any of the parties to the proceedings, is satisfied that it is necessary for the proper disposal of the proceedings.

(2) Where the child requests to be present during the hearing or a particular part of the hearing of the proceedings, the court shall grant the request unless it appears to it that, having regard to the age of the child or the nature of the proceedings, it would not be in the child's best interests to accede to the request.

Appointment of guardian *ad litem* for a child and provision for separate representation

39.—(1) If in proceedings under *section 18, 20 or 21* the child to whom the proceedings relate is not a party, the court may, if satisfied that having regard to the special circumstances of the case it is necessary in the best interests of the child to do so, appoint a guardian *ad litem* for the child.

(2) Without prejudice to the generality of *subsection (1)*, in deciding whether to appoint a guardian *ad litem*, the court shall, in particular, have regard to—

- (a) the age and understanding of the child,
- (b) any report on any question affecting the welfare of the child that is furnished to the court under section 47 of the Act of 1995,
- (c) the welfare of the child,
- (d) whether and to what extent the child should be given the opportunity to express the child's wishes in the proceedings, taking into account any statement in relation to those matters in any report under section 47 of the Act of 1995, and
- (e) any submission made in relation to the matter of the appointment as a guardian *ad litem* that is made to the court by or on behalf of a party to the proceedings or any other person to whom they relate.

(3) For the purposes of this section, the court may appoint as a guardian *ad litem* the person from whom, under section 47(1) of the Act of 1995, a report on any question affecting the welfare of the child was procured, or such other person as it thinks fit.

(4) If having regard to the gravity of the matters that may be in issue or any other special circumstances relating to the particular case, it appears to the court that it is necessary in the best interests of the child that the guardian *ad litem* ought to be legally represented, the court may order that the guardian *ad litem* be so represented in the proceedings.

(5) The fees and expenses of a guardian *ad litem* appointed pursuant to subsection (1) and the costs of obtaining legal representation pursuant to an order under subsection (4) shall be paid by such parties to the proceedings concerned, and in such proportions, or by such party to the proceedings, as the court may determine.

Cost of mediation and counselling services

40.—The cost of any mediation or counselling services provided for an applicant or respondent who is or becomes a party to proceedings under this Act, or for the child to whom the proceedings relate, shall be in the discretion of the court concerned.

Jurisdiction

41.—(1) Subject to *subsection (2)*, the jurisdiction conferred on a court by this Part may be exercised by the Circuit Family Court or the District Court.

(2) Where the agreement referred to in section 36 is a separation agreement, the application for an order in respect of that agreement shall be made to the Circuit Family Court.

(3) Where an application is made to the court for an order under section 36, the court may, in the same proceedings, if it appears to it to be proper to do so, make an order under section 8 or 8A of the Act of 1976 without the institution of proceedings under that Act.

(4) Where an application is made to the court for an order under section 8 or 8A of the Act of 1976, the court may, in the same proceedings, if it appears to it to be proper to do so, make an order under section 36 without the institution of proceedings under this Act.



The Law Reform Commission is an independent statutory body established by the *Law Reform Commission Act 1975*. The Commission's principal role is to keep the law under review and to make proposals for reform, in particular by recommending the enactment of legislation to clarify and modernise the law.

This role is carried out primarily under a Programme of Law Reform. The Commission's *Third Programme of Law Reform 2008-2014* was prepared and approved under the 1975 Act following broad consultation and discussion. The Commission also works on specific matters referred to it by the Attorney General under the 1975 Act. Since 2006, the Commission's role also includes two other areas of activity, Statute Law Restatement and the Legislation Directory. Statute Law Restatement involves incorporating all amendments to an Act into a single text, making legislation more accessible. The Legislation Directory (previously called the Chronological Tables of the Statutes) is a searchable guide of legislative changes.

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The Law Reform Commission is a statutory body established by the Law Reform Commission Act 1975