SPEECH FOR THE PRESENTATION OF THE LRC CONSULTATION PAPER ON:

LEGAL ASPECTS OF FAMILY RELATIONS

9TH SEPTEMBER 2009

Good evening ladies and gentlemen, I am appearing before you today to give a brief description of the matters discussed and considered in the Law Reform Commission's Consultation Paper on the Legal Aspects of Family Relations. However, I would first just say a few words about the Commission itself.

The LRC was established by the Law Reform Commission Act of 1975, and its principle role is to review the law and make proposals as to reform, through the process of clarification and/or modernisation. Since its establishment it has published over 140 documents in the form of Consultation Papers, as in this case, and reports. As high as 70% of these have lead to significant reformations in legislation and the law in general. In the 80s and 90s, the Commission successfully recommended the removal of the concept of illegitimacy from our law (a point relevant in this Consultation Paper); and recommended reform of our criminal law, including the confiscation of the proceeds of crime. In more recent times the Commission has also reacted to changes in Irish society by recommending reform of the law on cohabitants (including same sex couples). Under the current 2008-2014 programme the Commission is considering many more important areas of law which require either reform or modernisation, including, *inter alia,* the legal system and public law, the law of evidence, criminal law (in particular homicide, defences and inchoate offences), land law, and even the issue of bioethics, and of course

not to forget the current paper on the rights of non-married fathers and grandparents; all of great utility to the public at large, lawyers, and also, I might add, the judiciary. Since 2006 the Commission's ambit has been widened to include Statute Law Restatement and the Legislation Directory. The former involves the administrative consolidation of all amendments to an Act into a single text. This is an especially valuable task, as it makes legislation more comprehensible, and where such text is certified by the Attorney General it can be relied on as evidence of the law in question. The Legislative Directory is also a very useful utility. Formerly the Chronological Table of the Statutes, it is a searchable and annotated guide to legislative changes. All in all the Commission has done sterling work over the last three decades and its continuation is vital to a society where ever-changing needs must be met and addressed. I know of no other coherent and well structured body which could carry out this work. It is specialised but responsible. It is transparent and accountable. It is, in a word, indispensable.

Moving on to the Consultation paper at hand, the *"Legal Aspects of Family Relationships"*, it involves an examination of the rights and duties of fathers, in particular unmarried and step-fathers, and the rights and duties (if any) of grandparents. The Commission notes at the outset that the welfare of the child is and must remain the primary consideration in this context; and so any legal instrument which also accords rights and responsibilities to parents must be balanced with the countervailing rights of the child. It is worth noting that under the Constitution these rights and responsibilities flow from Articles 41 and 42. However, these do not extend to non-marital families. This exclusion should obviously be viewed in the historical context of the Constitution. Both

the attitudes of the Irish people and the realities of Irish society in general have changed much since 1937. Even up until the 1980s non-marital families were, to some extent, frowned upon by society and positively discouraged. However, gladly, such times are behind us. The evolving and mobile nature of our society has seen the number of unmarried families increase significantly, and whatever views people may have on what is the best relationship structure, it is a fact that arrangements falling short of marriage now play a significant part in our social groupings. The law should now accommodate these arrangements; in particular in the interests of the child. The child's priority is to have parents, married or not, who will bring it up in a loving and stable environment. The law is coming to recognise this. However, the situation currently is by no means ideal. An unmarried father has no constitutional protection. Although he can acquire guardianship rights, either by agreement with the mother or by court order, such can be removed from him. This is not possible where the father concerned is a marital father. Given that the European Convention of Human Rights has been incorporated in Irish law, I agree with the Commission that it is important to re-examine the current position on the allocation of guardianship rights. Further, with regards to grandparents, in particular those who actively help parents in the upbringing of their children, of which there are an increasing number, they have few if any rights with regards to the child where a parent is still alive; this despite potentially having taken on many of the caring responsibilities. Such people should be commended for their efforts, but more than that, the law should afford them some rights with regards to decisions as to the child. The current situation can lead to great difficulties, in particular where consent is required for medical treatment, or where the child requires a passport to go aboard on holiday. Such problems can also face step-

parents, who are faced with the prospect of adopting of the child. This is unsatisfactory as not only does it require the biological parent to adopt their own child, but it eliminates the rights and duties of the other biological parent. In my mind serious questions could be raised as to the benefit this brings to both the parents and the child.

I will return to these issues later, but first I will outline the Commission's first proposal, which is to update the terminology currently in use in Ireland in the context of family relationships. The Commission recommends that the terms guardianship, custody and access be replaced with more accessible and clearly defined terms. It notes that there is currently no statutory definition of any of these terms. Further, the public would seem to misinterpret their legal meaning, in particular with regards to custody; sole custody being seen by many as being an exclusive entitlement to make decisions regarding the child – which is not the case in law. In place of this the Commission suggests that the term guardianship be replaced with "parental responsibility", custody with "day-to-day care" and access with "contact". This would bring greater accuracy, clarity and consistency to this area. Further their use and definition would seek to reinforce the notion that parental rights do not exist in a vacuum; with such rights come concomitant duties and responsibilities. Use of the term "parental responsibilities" would bring greater consistency with decisions of the European Court of Human Rights, and with other international Conventions, for example the 1984 Council of Europe Recommendation on Parental Responsibilities, Principle 1 of which states:

> *"For the purpose of this recommendation ... parental responsibilities are a collection of duties and powers which aim at ensuring the moral and material*

welfare of the child, by maintaining personal relationships with him and by providing for his education, his maintenance, his legal representation and the administration of his property."

There is an ever increasing body of European, common law and international law which is moving away from the idea that rights such as guardianship, custody and access are rights of the parents. Instead they are seen as being rights of the child. The child has a right to be looked after, and moreover has a right to contact with both parents in some form; such has long been recognised as being in the best interests of the child. England, Scotland, Australia and New Zealand have all entered into significant reform in this area in recent years, both through a change in the terminology used, its application, and through the introduction of statutory definitions; both broad and narrow. The Commission notes that in an Irish context such changes would:

"make it clear that those with guardianship/parental responsibility have a central role to play in making key decisions relating to the child, regardless of whether or not they are caring for the child on a daily basis. Similarly, the use of the term day-to-day care in place of custody is a more accurate description of what is involved. An order for day-to-day care of the child will mean that the child will live with the person in whose favour the order is made and he or she will be responsible for caring for the child on a daily basis. Important decisions regarding the child can be made by all parties with guardianship/parental responsibility. The use of the term contact in place of access is also a more positive term and places greater emphasis on contact as a right of the child as well as a right of the parent."

The Commission notes that the use of such terms should hopefully make the law more transparent to those who interact with the family law system. I would agree. With regards to guardianship, in particular, the Commission considers the position in other common law jurisdictions with regards to whether a broad or narrow statutory definition should be adopted. Although noting potential problems, it concludes that a broad definition should be utilised so as to allow flexibility, especially in light of the rapidity at which society can change. This would therefore permit allowance to be made for the future. The Commission also recommends statutory definitions of day-to-day care and contact, and the consolidation of legislation in this area so as to codify the rights of children and all parental rights and responsibilities.

In Chapter 2 of the Paper, the Commission considers the question the registration of births. Under the current regime the birth of every child in Ireland must be registered within three months of the birth of the child. While the details of both parents are listed in the schedule of the *Civil Registration Act 2004* as information to be recorded, there is no legal requirement to record the details of both parents. Where a woman is unmarried and does not wish to record the details of the father, for whatever reasons, there is no requirement for her to do so. This allowance is premised on the basis that to require such would be an invasion of the mother's privacy. However, this rationale does not consider the concomitant right of the child to know where they came from. The Commission, rightly I think, feels that the right of the child in this regard can counterbalance the right of the mother to privacy. It is important to note that no rights derive from the insertion of the father's name on the birth certificate. This point, the Commission notes, is much

misunderstood, with many mothers deciding not to register the father because they feel that this would give him rights over the child, which they may not want. Similarly some fathers believe that by not entering their details on the register they may avoid certain parental responsibilities. Neither of these is true. The rights and responsibilities of the parents of a child are independent of whether they are named on the birth certificate of the child. Further where the parents aren't married the procedure for the insertion of details relating to the father can be convoluted. If a person wishes to be registered as the father in those circumstances there are four options available. The first is for the mother and person to jointly register the birth. This request must be made to the Registrar in writing and the person must sign a declaration that he is the father of the child. The second is for the mother to request in writing that the person be registered. This must be accompanied by statutory declarations of both persons declaring that the person is the father. The third is for the father to make the request together with similar statutory declarations from both persons. And the fourth arises if the mother or father request registration on foot of a court order pursuant to proceedings under section 45 of the *Status of Children Act 1987*, relating primarily to applications for guardianship or maintenance. In this regard, the Commission notes:

> *"The effect of these provisions is that it is logistically complicated to register a birth to include the names of both parents in circumstances where the parents are not married. Either both parents must be available to attend at the Registrar's office, or both must be in a position to write and sign the necessary declarations. This may explain in part the significant numbers of non-marital births in Ireland which are not registered with the names of both parents."*

To give a few statistics, in 2008 of the 76,113 births registered, 4,102, or 5.4% of them, did not include the name of the father. This statistic includes both married and unmarried parents, and in fact when one looks at only unmarried parents, who account for a very significant 30% of parents, the percentage increases to over 20%. This is a significant number of children who don't have all the information relating to their heritage. As noted above, this statistic may in part be due to the misconception that the registration of a person as a child's father gives rise to either rights or duties in relation to the child.

The Commission questions whether it would be appropriate in the circumstances, therefore, to have compulsory registration of the father, except where such would be impossible, impractical or unreasonable. Such a proposal was made in England and Wales in a 2008 Government White Paper and has since been incorporate into Part 4 of the *Welfare Reform Bill 2009*, although the Bill has yet to be enacted. However, it was emphasised that sole registration would still be allowed in certain circumstances. It should be noted that in England and Wales the registration of a parent does give rise to rights and responsibilities, therefore of particular concern was the registration of a father in circumstances of rape, or if knowledge of the birth of the child could in some way endanger the mother or child. However, as the Commission notes, there is no reason that a child could not have been conceived by rape in marriage. Also should a father be allowed to register his paternity independently of the mother, where he can prove such? Although ultimately the Commission draws no conclusions on these issues, they raise important questions. The English Bill recognises the rights of fathers to independently register, but still allows for sole registration in a number of circumstances, *e.g.* if the

father lacks capacity within the meaning of the *Mental Capacity Act 2005*, or where there is an issue with regards to the safety of the mother and child. Interestingly provision is also made for sole registration where the child is deemed to have no father, within the meaning of the *Human Fertilisation and Embryology Act 2008*. It will be interesting to see how this area develops especially in light of the increased rights of same sex couples. Could two women register? Advances in medical science could one day make it not uncommon for two women to have a child to which they are both the biological parents. Who knows where such advances will take us?

With regards to registration I would finally note that where the mother is legally married, there is a presumption that the husband is the father of the child. This will be so even if in reality the parents have not been in contact for years. In order to rebut the presumption either the husband must sign a declaration that he is not the father, or else the mother must sign a declaration that she comes within one of the statutory exceptions to the presumption, *inter alia*, that the husband died, or there was a legal divorce, more than ten months prior to the birth. This can give rise to significant problems. The mother may not know where the husband is, or else he may refuse to sign a declaration. This is clearly an area which requires reform.

This leads nicely onto the next area considered in the Paper: the responsibilities and rights of non-marital fathers. As noted before, Irish law confers different rights on married and unmarried fathers. A martial father automatically has parental responsibility rights in respect of his child. These rights remain even if the father is no longer married to

the mother of the child. In contrast, an unmarried father is not entitled to automatic rights. In light of the changes in Irish society it is becoming more questionable whether such a vigorous distinction should be maintained in Irish law. Indeed, I myself considered the different meanings which could be ascribed the family unit in the case of *G.T. v. K.A.O.*, a Hague Convention and Brussels II *bis* case. I had to decide whether an unmarried father who had lived with the mother and their two natural twins for over three years had a right to make an application to prevent the removal of the children from this jurisdiction. I concluded that when an Irish Court is considering the question of wrongful removal from the state, the Court must interpret the phrase "rights of custody" under Brussels II *bis* independent of Irish law, and that in the circumstances of that case each parent, at the relevant times, had constituted a *de facto* family within the meaning of Article 8 of the ECHR. The father was therefore entitled to bring proceedings to prevent their unlawful removal from the state.

The question of unmarried fathers' rights can be logically linked to the issue of illegitimacy, which was abolished in by the *Status of Children Act 1987* on foot of the 1982 Commission report on this area. The Commission noted then that there was a body of case law, including for example *G v. An Bord Uchtála* and *W O'R v. EH and An Bord Uchtála*, confirming that illegitimate children were entitled to constitutional protection as children, even though his or her natural parents did not form a family within the meaning of Article 41 of the Constitution. It concluded that:

> *"so far as the rights of children are concerned, it is unjust for the law to distinguish between children on the basis of the marital status of their parents."*

The Commission also recommended at that time that in order for this protection to be anything other than "cosmetic" provision should be made for automatic rights of joint guardianship of the child for the unmarried father. However, this latter recommendation was not pursued at the time; the Commission expressly acknowledging that such was a radical proposal. Even in other jurisdictions there has been some reluctance to grant such automatic rights. The focus, it is argued, should be less on the biological relationship between the child and the father, but on a level of "commitment and fidelity" which distinguishes such "*de facto* relationships" from "other sexual relationships". Many countries have adopted various thresholds to identify fathers with an intention to parent for the purposes of allocating parental responsibility. For example New Zealand grants automatic guardianship rights to fathers in civil partnerships and in statutorily defined *de facto* relationships with the child's mother.

The Supreme Court here, in *W O'R v. EH and An Bord Uchtála*, considered the importance of the biological link between a child and its father, but concluded that this alone would not give rise to an order of guardianship. However, where the child resulted from a stable relationship and the child was cared for by both parents, the father would be in a strong position in any application for guardianship. Indeed, having outlined the statistics with regards to application for guardianship by non-married fathers between 2006 and 2008, the Commission concludes that:

> *"It would therefore seem that in practice the courts operate a presumption that a non-martial father who makes an application for a guardianship order should be*

successful, unless there are strong reasons why he should not be in the position of guardian."

It suggests that such a presumption should be placed on a statutory footing. There is certainly wisdom in such an approach. It is almost invariably in the interest of the child to be cared for by both parents, or at the very least to have the considered input of both parents, and such a presumption may encourage fathers to apply for such rights if they know they are likely to get them even if the mother objects.

In New Zealand, a jurisdiction it should be added that would appear from the Paper to be extremely progressive in the area of family law, in section 19(4)(a) of the *Care of Children Act 2004* provides that where an unmarried father applies for guardianship:

"the Court must appoint the father as guardian of the child, unless to do so would be contrary to the child's welfare and best interests."

The Commission notes that there is already a relatively straightforward procedure under the *Guardianship of Infants Act 1964,* as amended by the *Children Act 1997*, for the making of a statutory declaration by both parents conferring guardianship rights on the non-martial father. The parties are required to have made arrangements in relation to the custody of and access to the child, and the declaration must have been signed and witnessed by a practicing solicitor, Peace Commissioner, Commissioner for Oaths or Notary Public, but at present there is no central register for such declarations conferring guardianship rights. Quite rightly, the Commission feels this could lead to difficulties in situations where there is a dispute as between the parents as to the status of the fathers, and it is not possible to find a copy of the declaration. Further the absence of such a

register means that there are no statistics recording the number of such declarations. I would agree with the Commission that:

> *"it is important to encourage as many non-martial parents as possible to make a statutory declaration agreeing guardianship/parental responsibility. This is in the best interests of the child and also confirms the rights of the father in relation to his child."*

As noted above the Commission considered the question of automatic guardianship rights before in 1982, but recommendations in this regard were not acted upon. The main concern with the granting of such rights would appear to be a concern that this would guarantee rights to genetic fathers who play no role after the child's birth, but who would nonetheless have an effective veto on the decisions of the mother in relation to significant choices in the child's life. This could occur for example if the mother wished to marry another man and adopt the child. The unmarried father would be able to refuse consent to such an adoption. Even so, in circumstances where an unmarried father wishes to play an active role in the child's life, as many do, automatic guardianship rights would justifiably give significant rights to him.

In either case the Commission did not come to any conclusions in this regard, although it does note the interesting case of *McD v. L.* This case involved a lesbian couple who had conceived a child through the use of a sperm donor known to them. The parties had agreed that the donor would be known to the child as an uncle and could fulfil this role. Following the birth he attempted to increase his role, but the couple tried to distance him.

The couple decided to move to Australia, and the donor then applied for guardianship of the child and an injunction preventing the couple from travelling. Although an interlocutory injunction was granted pending trial, the donor was ultimately unsuccessful in his application; the Court deciding the case in due course in the best interests of the child. This is therefore a good illustration of the problems which could potentially arise were automatic rights granted to genetic fathers.

It will be interesting to see what other scenarios arise in the future. For example, how would the courts deal with a situation involving a surrogate? Does the surrogate mother have rights, even where she has no genetic link with the child? Personally, I am not sure how a case like that would pan out. Is it possible to contract out, or contract in, to rights over the child? Ultimately I would think that whatever the outcome, it would have to be decided in the best interests of the child. However, as will be noted in relation to step-parents, there is currently no provision for tripartite guardianship under Irish law; there can only be either one or two guardians, but no more.

The Commission concludes with regards to the linking of registration of the father and rights, that the distinction should be kept. This strikes the best balance between the rights of the child to know their lineage, and the rights of the parents to either be, or not be, guardians where they are not married. I would agree with this recommendation. It should be encouraged for mothers to provide information as to the father of a child, but they should not be discouraged from doing so because such registration would have significant legal consequences.

The final matter considered by the Paper is the responsibilities and rights of members of the extended family. Considerations in this regard can be split into two broad groups, namely, with regards to grandparents, and with regards to step-parents.

Currently both grandparents and step-parents can apply for access under section 11B of the *Guardianship of Infants Act 1964*, as inserted by section 9 of the *Children Act 1997*. The Commission notes that there are few applications made by grandparents, since it is often presumed that where an access order is granted in respect of a parent, access by the grandparents will also be facilitated. It is only where the relationship between the parents and the grandparents totally breaks down, or if the parent of the child no longer resides in the jurisdiction, is in prison, in hospital or otherwise unable to provide a connection, that such would be necessary. It should be noted that the European Court of Human Rights, in *Marckx v. Belgium*, held that the Article 8 right to family life does not merely cover parents but that;

> *"'family life' ... includes at least the ties between near relatives, for instance those between grandparents and grandchildren, since such relatives may play a considerable role in family life."*

This reflects a more child orientated approach to the issue. Such an approach has also been reflected in the decisions of the Irish courts in the context of parental applications for access. Indeed Carroll J., in *M.D. v. G.D.*, stated that the court was not concerned with the right of access of the adult, but of the child; this because the welfare of the child was the paramount consideration for the Court. By viewing access from the child's point of

view it becomes far more apparent why access should be available to a wider family group; such can only be in the child's best interests where such extended family wishes to have contact with the child, regardless of the wishes of the parents, and especially if the relationship between the parents has broken down.

Guardianship and custody may also arise in relation to grandparents where they are acting *in loco parentis*. This may occur where the parents are unable to provide for the children because of, *inter alia*, drug, mental, or physical health problems. In those circumstances the grandparent will not be able to be appointed as guardian, since the court may only appoint a guardian where a child has no existing guardian. In these circumstances the *de facto* parent would have no right to consent to medical treatment for the child, or to apply for a passport for the child. It is nonetheless clear that there are a number of grandparents, and other relatives, who are in this position in Ireland today. It only seems just that in such a situation where the grandparent has voluntarily accepted responsibility for the child, that they should have the usual concomitant rights which a normal parent would; at least until such time as one or more of the child's actual parents were willing or able to take care of the child.

With regards to step-parents similar issues can arise. They may be acting *in loco parentis*, or may, following the death or desertion of a spouse, have been left to look after the child. Yet as the law currently stands a step-parent cannot have guardianship rights over the child unless the child is jointly adopted with the biological parent. As stated before, this is also unsatisfactory as it ends the relationship between the child and the other

biological parent. However, even this is not possible where the child was born within marriage, even if the other biological parent has passed away. In this regard the Commission notes the position of "special guardians" in England and Wales, which allow the step-parent to gain parental responsibility, but without alienating the remaining parent who no longer resides with the child. However, it should be noted, that a mere co-habitee cannot avail of this measure. In Scotland the Court may make an order confirming that the child is to reside with the parent and step-parent, and confers rights on the step-parent while maintaining parental responsibility on the part of the non-residing parent. Both of these situations would be wholly preferable to the situation which now prevails in this country.

The Commission considers the merit in the linking of parental responsibility and residence; this would cover both situations. In England provision was made in the *Children Act 1989* for a person, who is not a parent or guardian of the child, and who obtains a residence order, to also have parental responsibility in respect of the child for the duration of that order. This ensures that the person who is legally responsible for the child also has all of the necessary rights to fulfil those responsibilities, although they do not have the right to make certain decisions which could have the effect of alienating the parental responsibility or guardianship of the parent. The Commission sees this situation as meriting serious consideration. It would seem only logical that where a person has the day-to-day care of a child, they should also have a certain level of parental responsibility in the interests of the child. Without such rights, the person *in loco parentis* will be

significantly encumbered in their care of the child, and the decisions which they may take.

What I have just said is a brief overview of the recommendations and considerations contained in the Commission's Consultation Paper. It is a very well researched and reasoned document, and I would encourage those of you interested in this area of law to study it carefully. It is not possible to say whether all of the recommendations will be acted upon in time, but there are a great many logical and beneficial recommendations which should be given due consideration. Both the changing nature of the traditional family in Irish society, and the shift away from a parent-centred to a child-centred system of family law, mean that it is of the utmost importance that the law keeps pace. In that regard I can honestly say that a review such as the one carried out in this Paper was both very welcome, and long overdue.

Finally, I merely hope that I have done at least a small amount of justice to the significant amounts of work and consideration that those involved have put into this paper, and I thank you all for listening.