



LAW REFORM
COMMISSION/COIMISIÚN UM
ATHCHÓIRIÚ AN DLÍ

CONSULTATION PAPER

LEGAL ASPECTS OF FAMILY RELATIONSHIPS

(LRC CP 55 – 2009)



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Law Reform Commission

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Births and Deaths Registration Act 1953	1953, c. 20	Eng
Births, Deaths, Marriages and Relationships Registration Act 1995	1995, No. 16	NZ
Births, Deaths, Marriages and Relationships Registration Amendment Act 2008	2008, No. 48	NZ
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European Communities (Judgments in Matrimonial Matters and Matters of Parental Responsibility) Regulations 2005	SI No. 112/2005	Irl

European Convention on Human Rights Act 2003	No. 20/2003	Irl
Family Law (Divorce) Act 1996	No. 33/1996	Irl
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Family Law Act (Northern Ireland) 2001	2001, c. 12	NI
Family Law Act 1995	No. 26/1995	Irl
Family Law Reform Act 1995	No. 167/1995	Aus
Guardianship Act 1973	1973, c. 29	Eng
Guardianship of Children (Statutory Declarations) Regulations 1998	SI No. 5/1998	Irl
Guardianship of Infants Act 1886	1886 (49 & 50 Vict.) c. 27	Irl
Guardianship of Infants Act 1964	No. 7/1964	Irl
Human Fertilisation and Embryology Act 2008	2008, c. 22	UK
Judicial Separation and Family Law Reform Act 1989	No. 6/1989	Irl
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S v S	[1983] IR 68	Irl
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W.O'R. v E.H. and An Bord Uchtála	[1996] 2 IR 248	Irl

INTRODUCTION

A Background to the project

1. This Consultation Paper forms part of the Commission's *Third Programme of Law Reform 2008-2014*,¹ and involves an examination of the rights and duties of fathers in relation to guardianship, custody and access to their children; and of the rights and duties (if any) of grandparents.²

2. The project involves a continuation of the Commission's long-standing work on reform of family law. The Commission has previously examined the rights and duties of cohabitants,³ family law courts,⁴ and the implementation in Ireland of a number of Hague Conventions in the family law area.⁵ In its 1982 *Report on Illegitimacy*⁶ the Commission recommended the abolition of the status of illegitimacy, under which non-marital children could not inherit in the same manner as marital children. This was implemented in the *Status of Children Act 1987*.⁷ Of particular relevance to this Consultation Paper, the Commission had also recommended in the 1982 Report that automatic guardianship rights should be granted to all fathers, regardless of marital status. This recommendation, which was not implemented in the *Status of Children Act 1987*,⁸ is re-examined in this Consultation Paper in the light of developments in Ireland and in other common law jurisdictions.

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

² *Ibid* at 15.

³ *Report on the Rights and Duties of Cohabitants* (LRC 82-2006).

⁴ *Report on Family Courts* (LRC 52-1996).

⁵ *Report on Aspects of Inter Country Adoption Law* (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 Illegitimacy* (LRC 4-1982).

⁷ The *Status of Children Act 1987* provides that, since 1988, non-marital children are to inherit in the same manner as marital children.

⁸ The *Status of Children Act 1987* inserted section 6A into the *Guardianship of Infants Act 1964*, which empowers a court to make an order awarding guardianship to a non-marital father on foot of an application. This was further

B Guiding Principles

3. As in all matters concerning children, the Commission regards the welfare and the best interests of the child as the primary consideration in the context of this Consultation Paper. To this end the Commission refers to the UN 1989 Convention on the Rights of the Child throughout the Consultation Paper as a benchmark against which to measure any proposals and recommendations. The Commission recognises that children have rights and that these rights must be respected and protected in so far as is possible. However, the Commission is also aware that the Constitution and other legal instruments accord rights and responsibilities to parents as well. Therefore any discussion on the legal aspects of family relationships requires a balancing of those rights.

4. When the best interests of the child are placed at the centre of a consideration of the law on guardianship, custody and access it is significant that all of the current terminology in use is framed in terms of the rights of the parents. The Commission proposes to refocus the terminology to emphasise the welfare of the child as the primary consideration. This is consistent with the proposed use of the terms parental responsibility, day-to-day care, and contact. Placing the child at the centre of the legal framework also allows scope to broaden the categories of persons who can apply to take care of the child. The allocation of guardianship/parental responsibility should not be confined to balancing the competing rights of parents, but should also be influenced by who is in the best position to care for the child. The Commission is of the opinion that in most cases this will be the parents of the child, but where that is not possible, the child's welfare should be a prime consideration.

C The current legal position

5. The law currently regulates who can be a guardian of a child, and who can apply for custody of and access to a child. Each of these concepts is briefly explained below.

(1) Guardianship

6. Where the parents of a child are married to each other both parents are automatic joint guardians of the child.⁹ This status is not affected by any

extended by section 4 of the *Children Act 1997*, but these changes stopped short of introducing automatic guardianship rights for all fathers.

⁹ Section 6(1) of the *Guardianship of Infants Act 1964*.

subsequent breakdown in the marriage.¹⁰ Guardianship permits a person to make all major decisions relating to the child, for example where the child will live, the right to apply for a passport for the child and in what religion the child will be raised. These parental rights and responsibilities flow from the Constitutional protection of the family set out in Article 41 and Article 42. However, the courts have held that these do not extend to the non-marital family.¹¹ In this situation the mother and father do not have equal rights in relation to their child. Where a child is born outside marriage the mother is the sole automatic guardian of the child.¹² This relationship between mother and child has been held to be protected under Article 40.3 of the Constitution.¹³ This is generally considered to be a weaker form of constitutional protection than that accorded to the marital family, but it is nonetheless significant. In contrast, the father and child relationship, where the parents are not married to each other, is afforded no constitutional protection.¹⁴ A non-marital father can acquire guardianship rights in relation to his child, either by agreement with the mother,¹⁵ or by court order.¹⁶ Where a non-marital father has acquired such rights both parties are joint guardians of the child. However a non-marital father can be removed as a guardian by court order.¹⁷ This is not possible where the

¹⁰ Section 10(2) of the *Family Law (Divorce) Act 1996* states that the granting of a decree of divorce does not in itself affect the right of either parent to act as a joint guardian.

¹¹ *State (Nicolaou) v An Bord Uchtála* [1966] IR 567 (SC); *G v An Bord Uchtála* [1980] IR 32 (SC); *JK v VW* [1990] 2 IR 437 (SC).

¹² Section 6(4) of the *Guardianship of Infants Act 1964*.

¹³ In *G v An Bord Uchtála* [1980] IR 32, at 55 O'Higgins CJ stated: "As a mother she has the right to protect and care for and to have the custody of her infant child... This right is clearly based on the natural relationship which exists between a mother and child."

¹⁴ In *State (Nicolaou) v An Bord Uchtála* [1966] IR 567 Walsh J at 643 stated "It has not been shown to the satisfaction of this court that the father of an illegitimate child has any natural right as distinct from legal rights, to either the custody or society of that child and the court has not been satisfied that any such right has ever been recognised as part of natural law."

¹⁵ Section 2(4) of the *Guardianship of Infants Act 1964*, as amended by, section 4 of the *Children Act 1997*.

¹⁶ Section 6A(1) of the *Guardianship of Infants Act 1964*, as inserted by, section 12 of the *Status of Children Act 1987*.

¹⁷ Section 8(4) of the *Guardianship of Infants Act 1964*, as inserted by, section 7 of the *Children Act 1997*.

father concerned is a marital father. This is a clear illustration of the different approach the law takes to different categories of fathers. There are a number of justifications offered for this approach which are discussed in greater detail in the Consultation Paper.¹⁸

7. The distinction between marital and non-marital fathers in Irish law has been challenged before the European Court of Human Rights (ECtHR) as a breach of the right to private and family life in Article 8 of the European Convention on Human Rights (ECHR). The understanding of family life within Article 8 includes *de facto* families and this was confirmed in *Johnston v Ireland*¹⁹ and in *Keegan v Ireland*.²⁰ In *Keegan* the ECtHR found that the fact that the couple had lived together for two years before the relationship ended went some way towards establishing the necessary family ties to bring the situation within Article 8. Article 14 of the ECHR also prohibits discrimination on grounds of birth.²¹ Given that the rights in the ECHR have been incorporated into Irish law through the *European Convention on Human Rights Act 2003*, it is important to re-examine the current Irish position on the allocation of guardianship rights.

8. Guardianship rights and responsibilities usually vest in the married parents of a child, in the unmarried mother of a child, and in the unmarried father of a child once certain criteria are met. However, other people can also be appointed guardian of a child. This usually occurs when a person is appointed a testamentary guardian or is made a guardian of a child by order of

¹⁸ One of the core reasons offered for the distinction between marital and non-marital fathers is the fact that a child born outside marriage can be fathered in circumstances of rape or incest and there is a belief that in these circumstances it is reasonable not to automatically accord the father significant rights in relation to the child. There are difficulties with this argument, in that children born to marital parents could also be the result of rape. This is discussed further in Chapter 3.

¹⁹ (1986) 8 EHRR 214. Here the ECtHR held that family life within the meaning of Article 8 existed between a heterosexual couple who had cohabited for approximately 15 years.

²⁰ (1994) 18 EHRR 342. The ECtHR held that a child born to a non-marital couple was a part of a family unit from the moment of birth.

²¹ Article 14 states “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

the court.²² The Commission considers that the law relating to testamentary guardians and court appointed guardians is satisfactory. There is an issue, however, where grandparents or other relatives are in the position of *de facto* guardians of a child during the lifetime of the child's parents. Where a grandparent or relative is exercising all the responsibilities of raising a child, he or she is not entitled to any of the rights associated with guardianship if the child's parents are still alive.²³ This can lead to difficulties, for example in the context of consent to medical treatment, or application for a passport to take the child on a holiday abroad. This is discussed in greater detail in Chapter 4.

(2) Custody

9. Custody refers to the day to day care and control of the child.²⁴ In this respect, custody is an exclusive right and responsibility of a guardian or guardians. Generally the parent or guardian with whom the child lives has custody rights and responsibilities in relation to the child. In the case of a marital family both parents will usually have joint custody of the child. If the married parents of a child are not living together, the parent with whom the child ordinarily resides is deemed to have custody of the child. The courts are empowered to make custody orders in respect of a child where there is a dispute about with whom the child should live.²⁵ In general it is only guardians of a child who can apply for custody. There is an exception, in that non-marital fathers who have not been appointed guardian may apply to court for a custody or access order in respect of a child.²⁶ The effect of this is that a grandparent or

²² Sections 7, 8, and 9 of the *Guardianship of Infants Act 1964* set out the rules in relation to the appointment of testamentary guardians and court appointed guardians.

²³ In this situation the grandparent is entitled to apply for child benefit or lone parent allowance. This is a recognition that the grandparent is in the position of a parent and exercising the necessary responsibilities. This is discussed in greater detail in Chapter 4.

²⁴ *J v C* [1970] AC 668; [1969] 1 All ER 788 cited with approval in *W O'R v EH* [1996] 2 IR 248.

²⁵ Section 11(2) of the *Guardianship of Infants Act 1964* states "The court may by an order under this section a) give such directions as it thinks proper regarding the custody of the infant and the right of access to the infant of his father or mother". Section 6 of the *Family Law Act 1995* and section 5 of the *Family Law (Divorce) Act 1996* also provide for the making of custody orders in the context of other matrimonial proceedings without the necessity to make a separate application under section 11 of the 1964 Act.

²⁶ Section 11(4) of the *Guardianship of Infants Act 1964*.

relative who is caring for a child on a full time basis is not entitled to apply for a custody order in respect of that child. It is important to be aware, however, that custody rights merely allow the person to have the child live with them and to care for the child. It does not include any of the significant decision making rights, as these are associated with guardianship.

(3) Access

10. Provision is also made in Irish family law for access rights.²⁷ Where one party has custody of the child it is generally considered to be in the child's interest to have contact with the other parent. This is the case even where one parent is deemed to be unsuitable to have custody of the child, and therefore there is provision in the legislation for the court to order conditional or supervised access.²⁸ Access rights allow the party having access to take the necessary steps to care for the child while he or she is with them, but the party with access must not usurp the position of the parent with custody of the child. Initially access was seen as a right of the parent. However, it is now considered more appropriate to describe access as the right of the child to have contact with the parent. Nonetheless, there is a perception that, where custody is awarded to one parent, access is often seen as a "consolation prize." However inappropriate this perception is, the reality is that this can result in poor uptake of access rights in certain circumstances. The Commission discusses possible options to overcome this difficulty in Chapter 1.

11. Access is not limited to parents. There is provision for third parties, including grandparents, to be granted access to children under section 11B of the *Guardianship of Infants Act 1964* as inserted by section 9 of the *Children Act 1997*.²⁹ This is a two stage process. The initial stage is an application for leave (permission) to apply for access. If the party making the application is granted leave, there is a substantive hearing in relation to access. The purpose of the two stage process is to filter out unmeritorious claims.³⁰ The necessity of

²⁷ Section 11(2) of the *Guardianship of Infants Act 1964*: see fn 25 above.

²⁸ In *O'D v O'D* [1994] 3 Fam LJ 81 the High Court ordered that the father have supervised access to his child in circumstances where there was a reasonable suspicion that he had sexually abused the child. See Shannon *Family Law Practitioner* (Thomson Roundhall 2001) at I-058.

²⁹ Section 9 of the *Children Act 1997*, states that an application for access may be made by the relative of a child, or a person who has acted *in loco parentis* in respect of a child.

³⁰ Shannon *Family Law Practitioner* (Thomson Roundhall 2003) at I31. See also the discussion in Kaganas and Piper "Grandparents and Contact: 'Rights v Welfare'

the two-stage process has been questioned in other jurisdictions where similar provisions exist.³¹ The Commission discusses the issue of access by members of the extended family to children in Chapter 4.

12. Having briefly outlined the current structure of the law in Ireland in respect of family relationships, the Commission turns to describe the scope of this Consultation Paper.

D Scope of the project

13. This Consultation Paper has two distinct elements. The first deals with the law as it relates to fathers and their children and the second deals with the law applying to members of the extended family. This has the potential to be extremely broad and therefore it is important to describe the scope of this Consultation Paper, including those areas not within the remit of this project.

14. As to the rights and responsibilities of fathers, the focus of the Consultation Paper is on modernising the law relating to non-marital fathers. As already mentioned, the Commission recommended extending automatic guardianship rights to all fathers in the 1982 *Report on Illegitimacy*.³² This was not implemented in the *Status of Children Act 1987*, although the Oireachtas did introduce a mechanism by which a non-marital father could apply for guardianship rights. This was further extended by the *Children Act 1997* under which non-marital fathers could obtain guardianship rights by agreement with the mother. This Consultation Paper re-examines this area. The Consultation Paper does not examine the current legal provisions relating to custody and access disputes in the context of marital breakdown. The Commission considers that the current legislative provisions in place are adequate to address this.³³

Revisited" (2001) 15 *International Journal of Law, Policy and the Family* 250 at 254.

³¹ See Kaganas "Grandparents' rights and grandparents' campaigns" (2007) 19(1) *Child and Family Law Quarterly* 17 at 20.

³² Law Reform Commission *Report on Illegitimacy* (LRC 4-1982).

³³ Applications for custody and access by parents and guardians are governed by section 11 of the *Guardianship of Infants Act 1964*, which also empowers the court to make orders in relation to maintenance. The court must consider the welfare of the child when making such an order. The Commission recognises that there may be difficulties with the operation of some of these provisions in practice, but these have been addressed by the Commission previously in its *Report on Family Courts* (LRC 52-1996) and therefore are not examined again in this Consultation Paper.

15. The various Hague Conventions on Children's Rights have been examined by the Commission previously on a number of occasions.³⁴ They are discussed to the extent that they impact on guardianship and custody.

16. The law on adoption has also been examined by the Commission in the past.³⁵ The *Adoption Bill 2009*, which proposes to consolidate and reform the law in this area, is currently before the Oireachtas. Therefore, adoption law does not form a core element of this Consultation Paper.

E Outline of this Consultation Paper

17. In Chapter 1 the Commission discusses the need to update the terminology currently in use in Ireland in the context of family relationships. The focus is on the terms guardianship, custody and access. The Commission examines the origins of the current terminology and the interpretation of those terms by the courts. The Commission then discusses the updated terminology in, for example, England and Wales, Scotland and New Zealand. The Commission also examines the terminology in the Council of Europe's 1984 Recommendation on *Parental Responsibilities*³⁶ and in the EU *Brussels II bis* Regulation.³⁷ The Commission then makes provisional recommendations as to the terminology that would be most appropriate in Ireland, namely, parental responsibility (in place of guardianship), day-to-day care (in place of custody) and contact (in place of access). The remainder of the Consultation Paper utilises this recommended terminology.

18. In Chapter 2 the Commission examines the law on registering the birth of a child. At present the birth of a child can be registered by the non-marital mother alone and there is no requirement for the name of the father to be included on the birth certificate or the general register of births. The Commission understands that there are significant numbers of children born each year in Ireland in respect of whom there is only a mother's name on the

³⁴ *Report on the Hague Convention on the Civil Aspects of International Child Abduction and Some Related Matters* (LRC 12-1985); *Report on the Hague Convention on Protection of Children and Co-operation in Respect of Inter Country Adoption 1993* (LRC 58-1998); *Report on Aspects of Inter Country Adoption Law 2008* (LRC 89-2008).

³⁵ *Report on Aspects of Inter Country Adoption Law 2008* (LRC 89-2008); *Report on the Recognition of Foreign Adoption Decrees* (LRC 29-1989).

³⁶ Council of Europe, *Parental Responsibilities*, Recommendation No. R(84)4, adopted by the Committee of Ministers of the Council of Europe on 28th February 1984.

³⁷ Council Regulation (EC) No 2201/2003.

birth certificate. The Commission explores various options to improve this situation. In this context it questions whether linking the registration of the birth of the child to guardianship/parental responsibility, as now occurs in the UK,³⁸ is appropriate. This chapter also explores the continuing operation of the statutory presumption that a woman's husband is the father of the child. While in most cases the presumption causes no difficulties, there are situations where it results in a legal fiction. To this end the Commission examines various options for reform.

19. In Chapter 3 the Commission revisits the issue of the allocation of guardianship/parental responsibility rights to non-marital fathers. The chapter begins with a discussion of the Commission's 1982 *Report on Illegitimacy* where it recommended that non-marital fathers be granted full automatic guardianship rights.³⁹ The chapter then examines in detail the current methods by which a non-marital father in Ireland can obtain guardianship/parental responsibility rights in respect of his child. Any shortcomings with this will be identified and discussed. The chapter then sets out the law in Australia (where all fathers automatically have parental responsibility) and other States where non-marital fathers do not have automatic parental responsibility, but where different thresholds are used to identify when non-marital fathers should be allocated parental responsibility. This discussion indicates that Ireland is not the only jurisdiction to have recommended automatic guardianship in the past but to have retained the distinction in law.⁴⁰ The Commission then sets out a number of possible options for further reform in this area.

20. In Chapter 4 the Commission examines the law in respect of members of the extended family. This begins with a discussion on the current provisions for access to children by members of the extended family. The core issue is whether it is necessary to retain the current leave stage in such applications. The second part of the chapter is focused on circumstances where the parents of a child are unwilling or unable to care for the child and a relative

³⁸ See Chapters 2 and 3 for further discussion.

³⁹ Law Reform Commission *Report on Illegitimacy* (LRC 4-1982).

⁴⁰ See Scottish Law Commission *Report on Family Law* (Scot Law Com No. 135 of 1992); English Law Commission *Family Law, Review of Child Law, Guardianship and Custody* (Law Com No. 172 of 1988); Lord Chancellor's Department *Consultation Paper on Court Procedures for the Determination of Paternity and the Law on Parental Responsibility for Unmarried Fathers* (March 1998); New Zealand Law Commission *New Issues in Legal Parenthood* (Law Com, Wellington, 2005); Ministry of Justice *Discussion Paper, Responsibilities for Children, especially when parents part- The Laws About Guardianship, Custody and Access* (Wellington, New Zealand, 2000).

or other person is in the position of a *de facto* parent. As the law currently stands the person caring for the child in these circumstances is unable to apply for guardianship and therefore cannot access all the rights associated with this status. It is also not possible in these circumstances to make an application for a custody order in respect of the child. The Commission explores the possibility of extending some form of guardianship/parental responsibility rights in this situation. This chapter also explores reform in the context of the position of step-parents.

21. Chapter 5 contains a summary of the provisional recommendations made in the Consultation Paper.

22. This Consultation Paper is intended to form the basis of discussion and therefore all the recommendations made are provisional in nature. The Commission will make its final recommendations on the subject of the legal aspects of family relationships following further consideration of the issues and further consultation with interested parties. Submissions on the provisional recommendations included in this Consultation Paper are welcome. To enable the Commission to proceed with the preparation of its final Report, those who wish to do so are requested to make their submissions in writing by post to the Commission or by email to info@lawreform.ie by **31 December 2009**.

CHAPTER 1 TERMINOLOGY

A Introduction

1.01 In this chapter, the Commission discusses the need to review the terminology currently in use in Ireland in relation to parental rights and responsibilities. In Part B the Commission sets out the current Irish terminology, principally guardianship, custody and access in legislation such as the *Guardianship of Infants Act 1964*. The discussion begins with a brief overview of the history of these terms. It then moves on to examine the terms which currently form part of Irish law. The Commission notes that there is no statutory definition of the terms guardianship, custody or access at present in Ireland. It also draws attention to the fact that the 2003 EU Regulation Brussels II *bis* introduced the term “parental responsibility” into Irish law. This has resulted in two distinct terms being used in Irish law to describe the rights and responsibilities associated with raising a child. In Part C the Commission examines the terminology used by the Council of Europe and the United Nations. The term parental responsibility has gained widespread acceptance throughout Europe and the Commission believes it is important to ensure the terminology used in Ireland is consistent with the European standard where appropriate. Part D briefly sets out the terminology used in other common law States to demonstrate the move away from the terms guardianship, custody and access. This includes the Commission’s provisional recommendation that the terms parental responsibility, day-to-day care and contact should be adopted in this State. In Part E, the Commission concludes the chapter with a discussion of the most appropriate format for a statutory definition of each term.

B The current Irish terminology

1.02 In this part of the chapter the Commission examines the development of the current terminology before discussing each of the terms that form part of Irish family law in this area.

(1) *Background to the terminology*

1.03 At present the terms 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. Significantly, the legislatures in England and Wales, Scotland, and

Northern Ireland have recognised the changing nature of family relationships and the growing emphasis on the interaction between rights and responsibilities and have altered the terminology used accordingly. This is also evident in other jurisdictions which share a common legal heritage, such as Australia and New Zealand. These are discussed in greater detail below. Irish law continues to use the terms guardianship, custody and access to describe the role of caring for and protecting a child within a family structure. Significantly, there is no statutory definition of any of these terms, although they appear to be well understood among practitioners and academics working in the family law field.

1.04 Before setting out the current understanding of each of the terms it is useful to examine briefly the history of the terminology. At common law the father was the sole guardian of a legitimate child.¹ The right to guardianship at the time also meant that the father had almost exclusive rights to custody of the child until the age of 21 in the absence of grave misconduct on the part of the father. According to Shatter the paternal right to custody was a corollary of the paternal duty to maintain legitimate offspring. However, he notes that "...whereas the former right was enforceable by the father, the machinery for enforcing the duties was almost wholly ineffectual."² Equity emphasised the welfare of the child to a greater extent with the result that courts exercising an equitable jurisdiction were more likely to deprive a father of custody in circumstances where there was no evidence of misconduct.³ However, the father remained a guardian of the child. During the father's lifetime, the mother of a marital child had no powers in relation to the child. If a father died without appointing a testamentary guardian, the mother was entitled to the custody of the child and all the father's rights and responsibilities. If a testamentary guardian was appointed by the father, the mother had no rights.

1.05 During the 19th century a number of legislative changes were introduced giving mothers rights in respect of their children. The *Custody of Children Act 1839* allowed a mother to seek custody of children under seven. However, the 1839 Act specifically provided that the mother was not to be granted custody if she had committed adultery. This highlights that the criteria for obtaining custody were not so much the welfare of the children as the good

¹ The concept of legitimacy was removed from Irish law by the *Status of Children Act 1987*. For further discussion of this see below in Chapter 3.

² Shatter *Family Law* (4th ed Butterworths 1997) at 534.

³ The *parens patriae* jurisdiction of the courts, derived from the prerogative of the Crown, allowed the equitable courts to act as supreme parent to all children. Shatter notes that while the father's rights were to be enforced, if they could be clearly shown to be contrary to the child's welfare, they were not implemented. Shatter *ibid* at 535.

behaviour of the parent. Custody was seen as a reward for good marital behaviour and as such was denied as a form of reprobation. The *Custody of Infants Act 1873* removed the provision in relation to adultery and allowed the court to award custody of a child up to the age of 16 to the mother. The *Guardianship of Infants Act 1886* stated that a mother could be awarded custody of children up to the age of 21 and for the first time required that the decision to award custody was to be decided having regard to the welfare of the child, as well as the conduct and wishes of both parents. The 1886 Act also provided that a testamentary guardian appointed by a father was to act jointly with a mother, rather than usurping her position. The 1886 Act empowered a mother to appoint a testamentary guardian on her death to act jointly with the father, but only “if it be shown to the satisfaction of the court that the father is for any reason unfitted to be the sole guardian of his children.” Therefore, the 1886 Act did increase the rights of married mothers, but not to the extent that they had equal rights to those of the father. Guardianship remained the sole preserve of the father.

1.06 At common law a child born to parents who were not married was described as illegitimate. The effect of this was that the legal rights and duties associated with being a family were not accorded to the child or his or her parents. According to Shatter “natural parents were neither the guardians of their child nor did they have any right to its custody.”⁴ This began to alter in the 19th century, and the rights of the natural mother were acknowledged. These rights were initially seen as a corollary of the duty imposed on mothers to provide maintenance for their children by the Poor Laws.⁵ A mother of an illegitimate child was not a guardian of the child, but it was accepted that there was a natural relationship between a mother and a child that gave rise to custody rights. This resulted in the mother’s wishes in respect of the child being followed unless they were contrary to the child’s welfare.⁶ Significantly, this prioritisation of the wishes of the mother only lasted for the lifetime of the mother and, if she was survived by the natural father, he was entitled to custody of the child as against any guardian appointed by the mother.⁷

1.07 The *Guardianship of Infants Act 1964* altered this and provided that the mother of an illegitimate child was the guardian of that child.⁸ She was also entitled to appoint a testamentary guardian to care for the child on her death.

⁴ Shatter *Family Law* (4th ed Butterworths 1997) at 980.

⁵ Shatter *ibid* at 981.

⁶ *In re Tamburrini* [1944] IR 508 (HC); *In re Cullinane, an Infant* [1954] IR 270 (HC).

⁷ *In re Kerr, an Infant* (1889) 24 LR Ir 59 (Appeal)

⁸ Section 6(4) of the *Guardianship of Infants Act 1964*.

Guardianship rights were not extended to non-marital fathers in the original provisions of the 1964 Act. However, it did provide for a non-marital father to apply for custody and access in relation to his child.⁹ This was significant as generally applications for custody and access were confined to guardians of the child.

1.08 The *Status of Children Act 1987* amended the 1964 Act to introduce a statutory mechanism whereby a non-marital father could be appointed a guardian by court order.¹⁰ This was introduced in response to the Commission's 1982 *Report on Illegitimacy*.¹¹ The *Children Act 1997* further updated the legal framework in Ireland to facilitate non-marital fathers becoming guardians. This can now also be achieved if the mother and father of the child agree to be joint guardians and complete a statutory declaration to this effect.¹² The adequacy of the current provisions on guardianship for non-marital fathers will be discussed in detail in Chapter 3. It is now necessary to examine the general understanding of the terms guardianship, custody and access.

(2) *An overview of current Irish legal terms relating to family relationships*

1.09 The terminology used to describe family relationships in Ireland comes from a variety of sources. These include the Constitution, domestic legislation and also EU Regulations. The most widely recognised terms in use are guardianship, custody and access. However, the term parental responsibility is also already in use within the framework of Irish family law.

(a) *Parental Rights and Duties*

1.10 The term "parental rights and duties" is used in the Constitution with reference to the family. Article 42.1 recognises the family as the "primary and natural educator of the child" and goes on to note that the State:

⁹ Section 11(4) of the *Guardianship of Infants Act 1964*.

¹⁰ Section 6A of the *Guardianship of Infants Act 1964*, as inserted by section 12 of the *Status of Children Act 1987*.

¹¹ Law Reform Commission *Report on Illegitimacy* (LRC 4-1982). The Commission recommended automatic joint guardianship rights for non-marital fathers. This recommendation was not adopted, but the provisions of the *Status of Children Act 1987* did improve the position of non-marital fathers.

¹² Section 4(4) of the *Children Act 1997*.

“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.”¹³

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

1.11 The term “parental rights and duties” is also used in section 24 of the *Adoption Act 1952*, which states that on the making of an adoption order “the mother or guardian shall lose all parental rights and be freed from all parental duties with respect to the child.” The correlative effect of this is that the adoptive parents assume all the parental rights and duties in relation to that child.

(b) Guardianship

1.12 Guardianship is the term used to describe the rights and responsibilities associated with raising a child. Shatter describes guardianship as encompassing:

“the duty to maintain and properly care for a child and the right to make decisions about a child’s religious and secular education, health requirements and general welfare.”¹⁴

Similarly, Shannon describes guardianship as entailing:

“both rights and duties, in particular the duty to ensure that a child is properly cared for and that decisions relating to the child are made with the latter’s best interests at heart.”¹⁵

It therefore appears that the general understanding of guardianship is that it includes both rights and responsibilities and allows a guardian to make important decisions relating to the child. As noted in the Introduction to this Paper, 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. Unfortunately, these indicative examples are not set down in legislation. 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, a guardian of the person, be entitled to the custody of the infant and shall be entitled to take proceedings for the

¹³ Emphasis added.

¹⁴ Shatter *Family Law* (4th ed Butterworths 1997) at 532. This was approved by Finlay Geoghegan J in *R.C v I.S* [2003] IEHC 86; [2003] 4 IR 431.

¹⁵ Shannon *Family Law Practitioner* (Thomson Roundhall 2003) at I-034.

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.”

Kilkelly is of the view that Irish law on family relationships, as it is recorded in existing legislation “reflects an outdated concept of parenting, one that focuses on the rights of parents, particularly in relation to the custody of their child, rather than their responsibilities towards their child.”¹⁶

(c) Custody

1.13 Custody is generally understood as the right of a parent to exercise care and control over the child on a day-to-day basis.¹⁷ Again, however, there is no statutory definition of what is entailed in having custody of a child. As noted above, a guardian is entitled to custody of a child 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. However, a non-marital father who is not a guardian can also apply for custody of and access to the child.¹⁸ 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,¹⁹ 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, as this is covered by guardianship. However, as Shannon notes “it is hard to shake the perception that custody is an ‘all or nothing’”.²⁰ This can result in acrimonious custody disputes based on a misunderstanding of what is involved in having custody of a child. This has led to calls for reform of the law to “ensure that all parties are clear about the orders being sought and ultimately made by the courts.”²¹ The Commission also notes that the term “custody” is often associated with the

¹⁶ Kilkelly *Children’s Rights in Ireland* (Tottel 2008) at 115.

¹⁷ *R.C v I.S* [2003] IEHC 86; [2003] 4 IR 431.

¹⁸ Section 11(4) of the *Guardianship of Infants Act 1964*, as inserted by section 13 of the *Status of Children Act 1987*.

¹⁹ 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*.

²⁰ Shannon *Family Law Practitioner* (Thomson Roundhall 2003) at I-052.

²¹ Kilkelly *Children’s Rights in Ireland* (Tottel 2008) at 126.

criminal law and this is unhelpful in the context of the law regulating family relationships.

(d) Access

1.14 Access is generally understood as a right to visit with and spend time with the child. It is usually granted to the party who does not have custody of the child. In cases where joint custody is awarded, it may also be necessary to put access arrangements in place to facilitate contact between the child and the person that the child does not live with on a daily basis. Again, there is no statutory definition of access. Traditionally it was understood as a right of the parent. Kilkelly notes that:

“[a]lthough the law required such decisions to be based around what was consistent with the welfare of the child, both the language and the approach of the courts made it clear that the decision was being taken from a parent’s perspective.”²²

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. This approach was adopted by Carroll J in *M.D v G.D.*²³ This awareness of the importance of continued contact between children and their parents, and other close relatives, is reflected in the statistics on access which suggest that the vast majority of applications are granted. In 2006 there were 3,281 court applications for access, and 79 were refused.²⁴ In 2007 there were 3,475 applications and 75 were refused.²⁵ In 2008 there were 3,491 applications and 175 were refused.²⁶ 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, 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.”²⁷

²² Kilkelly *ibid* at 149.

²³ *M.D v G.D* High Court (30 July 1992).

²⁴ See the Courts Service *Annual Report 2006* at 130.

²⁵ See the Courts Service *Annual Report 2007* at 114.

²⁶ See the Courts Service *Annual Report 2008* at 79.

²⁷ Ireland ratified the UN Convention on the Rights of the Child on 28th September 1992 without reservation. However, the Convention has not been incorporated

Kilkelly suggests that recognition of a right of the child to have contact with his or her parents would be a welcome addition to Irish law in this area.²⁸ The discussion here has focused on contact between children and their parents. However, access by other relatives is also an issue that comes within the scope of this Consultation Paper and will be discussed in greater detail in Chapter 4.

(e) Parental Responsibility

1.15 The 2003 EU Regulation commonly known as Brussels II *bis*,²⁹ Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility, repealed and replaced the previous 2000 Council Regulation (EC) No 1347/2000 on matrimonial matters, Brussels II.³⁰ As can be seen, the title of the 2003 Regulation uses the term parental responsibility, and the term 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 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*³¹ facilitate the operation of the provisions of Brussels II *bis* in Ireland.

1.16 Kilkelly notes that there are difficulties with Brussels II *bis* from a children’s rights perspective, as the 2003 Regulation is very parent focused.

into Irish law and therefore it has no direct legal standing in Ireland, because of Article 26 of the Constitution.

²⁸ Kilkelly *Children’s Rights in Ireland* (Tottel 2008) at 150.

²⁹ “Bis” refers to the 2003 Regulation being the second version of a previous 2000 Regulation on the same topic.

³⁰ In relation to Council Regulation (EC) No 1347/2000, Kilkelly *ibid* at 51, notes that Brussels II only dealt with parental responsibility in the context of matrimonial matters, and therefore only applied to marital children. 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.

³¹ SI No. 112 of 2005.

She points out that the draft version of Brussels II *bis* contained a recognition of the right of the child to maintain contact with his or her parents and the child's right to be heard on matters of parental responsibility "but this was dropped due to concerns that the Regulation would impose on member states substantive change regarding children's rights."³²

1.17 For the purposes of this Consultation Paper 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. In this respect, the Commission notes that the term parental responsibility is growing in general acceptance internationally, and further examples of this are discussed in Part C. 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 are discussed below.

C The influence of international legal instruments on the appropriate terminology

1.18 This chapter explores the possibility of modernising the current terminology in use in Ireland. Therefore, it is helpful to examine the terms used in international law provisions to which the State is party. The Commission now turns to these with a view to assisting in exploring suitable options for reform.

(1) Council of Europe Conventions and Recommendations

(a) European Convention on Human Rights

1.19 The rights in the European Convention on Human Rights (ECHR) were incorporated into Irish law by the *European Convention on Human Rights Act 2003*, under which the provisions of the ECHR must be taken into consideration by the Irish courts.³³ While the ECHR as originally drafted does

³² Kilkelly *Children's Rights in Ireland* (Tottel 2008) at 52.

³³ Section 2(1) of the *European Convention on Human Rights Act 2003* requires that in so far as is possible the Irish courts should interpret and apply statutory provisions and rules of law in a Convention-compatible manner. Section 4 provides that judicial notice shall be taken of the Convention provisions and of the case law of the European Commission of Human Rights and of the European Court of Human Rights.

not have a specific provision referring to children's rights,³⁴ Article 8 guarantees respect for family life.³⁵ Kilkelly states that the case law of the European Court of Human Rights (ECtHR) "has long-since viewed contact between parent and child as integral to the maintenance of their family life relationship."³⁶

(b) Protocol 7 to the European Convention on Human Rights

1.20 Article 5 of Protocol No.7 to the European Convention on Human Rights (1984), which forms part of the Convention Rights incorporated into Irish law by the 2003 Act, states that:

"Spouses shall enjoy equality of *rights and responsibilities* of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution. This Article shall not prevent States from taking such measures as are necessary in the interests of the children." (italics added)

(c) 1984 Recommendation on Parental Responsibilities

1.21 The 1984 Council of Europe Recommendation No. R (84)³⁷ on *Parental Responsibilities* states that the aim of the Council of Europe is to ensure greater unity between member states by promoting the adoption of common rules in legal matters. For the purpose of this Consultation Paper it is important to note that the Recommendation uses the term parental responsibility. Principle 1 states:

³⁴ Article 1 of Protocol 12 to the European Convention on Human Rights (2000) prohibits discrimination in the enjoyment of rights set forth by law, and specifically mentions discrimination on the grounds of birth status. See also the discussion below of Protocol 7 to the Convention.

³⁵ Article 8 states: "1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

³⁶ Kilkelly *Children's Rights in Ireland* (Tottel 2008) at 150. See *Andersson v Sweden* (1992) 14 EHRR 615, para 72.

³⁷ This was adopted by the Committee of Ministers of the Council of Europe on 28th February 1984.

“For the purpose of this recommendation: a) parental responsibilities are a collection of duties and powers which aim at ensuring the moral and material welfare of the child, in particular by taking care of the person 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;”.

The Recommendation does not examine the issue of custody or access to any significant extent, although Principle 8 does state that:

“[t]he parent with who the child does not live should have at least the possibility of maintaining personal relationships with the child unless such relationships would be seriously harmful to the interests of the child.”

(d) 2002 Convention on Contact concerning Children

1.22 In 2002, the Council of Europe adopted a *Convention on Contact concerning Children*.³⁸ The use of the term contact is significant as it highlights the move away from the terminology that remains in place in Ireland. The aim of the 2002 Convention is to improve the right of children to maintain regular contact with both parents. This includes an attempt to develop safeguards to ensure proper exercise of contact and to establish co-operation between central authorities and other bodies involved in the implementation of contact orders. At the time of writing (September 2009), Ireland is not a state party to the Convention and has not signed or ratified it.³⁹ Kilkelly notes that “there is much to be done to bring law and practice into line with its provisions.”⁴⁰ Nevertheless it is worth briefly mentioning the core provisions of the Convention. The Convention states that children and parents have a right to contact with each other and that this should only be restricted where it is in the interests of the child to do so. Where unsupervised access is not possible other forms of contact should be considered. The Convention requires judicial authorities to ensure that parents are informed of the importance of maintaining regular contact and to ensure that they have sufficient information when making decisions in the best interests of the child. The views of the child are also to be given due weight, provided that the child is considered to have sufficient understanding, unless that would be manifestly contrary to the child’s best

³⁸ ETS No 192. The Convention came into force on 1st September 2005.

³⁹ The list of signatories is available on www.coe.int.

⁴⁰ Kilkelly *Children’s Rights in Ireland* (Tottel 2008) at 159. Kilkelly suggests that “it would appear to be the absence of any mechanism to facilitate and enforce the implementation of contact arrangements... that is impeding the ratification process” at 160.

interests. The Convention does not deal with situations where the contact arrangements have been breached, and in these circumstances other applicable international Conventions and EU law would apply.⁴¹

1.23 Although the provisions of the 2002 Convention do not have legal force in Ireland it is worth noting, in the context of this discussion on terminology, that the term “contact” is the accepted term used by the Council of Europe. This is in accordance with a more child centred approach to family law, and the Commission supports this approach.

(2) United Nations 1989 Convention on the Rights of the Child

1.24 The terms parental responsibility and contact are also to be found in other international law provisions that impact on Irish law. Ireland has yet to incorporate the UN 1989 Convention on the Rights of the Child into domestic law, although Ireland has signed and ratified the Convention.⁴² Nevertheless, it is worth briefly mentioning the relevant sections of the Convention. Article 5 provides that:

“States Parties shall respect the responsibilities, rights and duties of parents...to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognised in the present Convention.”

Article 9 of the Convention refers to the need to respect the right of the child to ongoing contact with both parents.⁴³ This highlights that the terminology used in Irish law is not in line with the language used in another key international instrument in this area.

D A brief overview of the terminology used in other common law jurisdictions

1.25 In addition to looking at the terms in use in international instruments it is also helpful to consider the terminology used in other common law

⁴¹ For example the 1980 *Hague Convention on Civil Aspects of International Child Abduction* (implemented by the *Child Abduction and Enforcement of Custody Orders Act 1991*) and the 2003 Brussels II *bis* Regulation.

⁴² GA res 44/25, annex, 44 UN GAOR Supp (No 49) at 167, UN Doc A/44/49 (1989), entered into force 2nd September 1990. Ireland ratified the 1989 Convention on the Rights of the Child on 28th September 1992 without reservation.

⁴³ Article 9 states “State parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parties on a regular basis, except if it is contrary to the child’s best interests.”

jurisdictions with a similar legal framework. The following discussion focuses on the terms parental responsibility, guardianship, residence, day-to-day care, and contact.

(1) Parental Responsibility/Guardianship

1.26 Section 3(1) of the English *Children Act 1989* introduced the concept of parental responsibility rights into English law and defined it as “all the rights, duties, powers, responsibilities and authority which by law a parent has in relation to the child and his property.”⁴⁴ This was first mooted and recommended in the English Law Commission’s 1988 *Report on Family Law, Review of Child Law, Guardianship and Custody*.⁴⁵ The Law Commission noted that the statute book contained a number of different terms to describe the role of parents in respect of their children, such as “parental rights and duties”,⁴⁶ “powers and duties”,⁴⁷ or “rights and authority.”⁴⁸ However, it was felt that “to talk of parental “rights” is not only inaccurate as a matter of juristic analysis but also a misleading use of ordinary language.”⁴⁹ The decision of the UK House of Lords in *Gillick v West Norfolk and Wisbech Area Health Authority*⁵⁰ was cited in support of the understanding that the powers that parents have to make decisions for their children are merely the “necessary concomitant of their parental duties.”⁵¹ In light of this the English Law Commission recommended the introduction of a new concept of “parental responsibility” into the law. It was stated that this “would make little difference in substance but it would reflect the everyday reality of being a parent and emphasise the responsibilities of all who

⁴⁴ This is discussed in greater detail below in Part E.

⁴⁵ English Law Commission *Family Law, Review of Child Law, Guardianship and Custody* (Law Com. No. 172 of 1988).

⁴⁶ Section 85(1) of the *Children Act 1975*; Section 12(1) and (2) of the *Adoption Act 1976*; section 3(1) of the *Child Care Act 1980*.

⁴⁷ Section 10(2) of the *Child Care Act 1980*.

⁴⁸ Section 1(1) of the *Guardianship Act 1973*.

⁴⁹ This was stated by the Law Commission in the *Report on Illegitimacy* (No. 118) of 1982 at para. 4.18, and reiterated in the Report on *Family Law* at 5, para 2.4.

⁵⁰ *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112; [1985] 3 All ER 402.

⁵¹ Law Commission *op cit* fn 45 at 5.

are in that position.”⁵² The English Law Commission highlighted that the term parental responsibility would also be applied to a child in the care of the local authority.

1.27 The English Law Commission decided against providing a detailed definition of what would be entailed in the concept of parental responsibility. It stated that it would be impractical to do so, given that the list would have to change to meet different needs and circumstances depending on the age and maturity of the child.⁵³ It did, however, note that parental responsibility would refer to all “rights, claims, duties, powers, responsibilities or authority, which statute and common law for the time being confer upon parents.”⁵⁴ The English *Children Act 1989*, which was the legislative response to the Law Commission’s 1988 Report opted not to adopt a detailed definition of the term. As discussed below, other jurisdictions have provided a more detailed definition of the concept of parental responsibility.

1.28 Scottish law has also opted for the terms parental responsibility, residence and contact. The *Children (Scotland) Act 1995* includes a very detailed definition of parental responsibilities and rights. This is discussed in greater detail in Part E of this chapter. The shift in terminology in Scotland followed extensive consultation and a 1992 Report by the Scottish Law Commission.⁵⁵ The Scottish Law Commission concluded that a statutory definition of both parental responsibilities and rights would be advantageous for the following reasons:

“it would make explicit what was already implicit in the law, it would counteract any impression that a parent had rights but no responsibilities, and it would enable the law to make it clear that parental rights were not absolute or unqualified, but were conferred in order to enable parents to meet their responsibilities.”⁵⁶

This reasoning appears to be consistent with the principles in the UN 1989 Convention on the Rights of the Child.

⁵² Law Commission *op cit* fn 45 at 6. It was also seen as bringing English law in line with the 1984 recommendation of the Council of Europe on Parental Responsibilities discussed above.

⁵³ English Law Commission *Family Law, Review of Child Law, Guardianship and Custody* (Law Com. No. 172 of 1988) at 6.

⁵⁴ Law Commission *ibid* at 6.

⁵⁵ Scottish Law Commission *Report on Family Law* (No. 135 of 1992).

⁵⁶ Scottish Law Commission *ibid* at 3.

1.29 Australia is another common law country that has adopted the term “parental responsibility.” This is defined in section 61B of the *Family Law Reform Act 1995* (Commonwealth) as “all the duties, powers, responsibilities and authority which, by law, parents have in relation to children.” This definition is similar to that in the English *Children Act 1989* in that it is very broad. Again, there is clear emphasis on the duties and responsibilities of parenthood in addition to the rights.

1.30 New Zealand is unusual among the common law States examined in this chapter in that it has retained the term guardianship rather than opt for the term parental responsibility. The New Zealand Parliament has included a statutory definition in the *Care of Children Act 2004*. This is an extremely detailed definition and refers not only to guardianship rights, but also emphasises the responsibilities inherent in the role of guardian. Therefore, the responsibility element of caring for a child is given due recognition, even if this is not explicitly contained in the term used. The definition of guardianship in New Zealand is discussed in greater detail in Part E of this chapter in the context of proposals for statutory definitions of the terminology in Ireland.

(2) Residence/Day-to-day care/Custody

1.31 The use of custody orders was also examined by the English Law Commission in its 1988 Report and, as in other jurisdictions (including Ireland), it became apparent that there were difficulties with the use of this term. The English Law Commission noted that “parents not unnaturally think that a sole custody order puts the custodial parent in sole control.”⁵⁷ The Law Commission also noted that in practice, parental responsibilities “run with the child” and for the most part are exercised when the child is with that parent. There was a feeling that by focusing on rights the issue became how one parent could control what the other was doing when the child was not with them, rather than focusing on properly meeting his or her responsibilities when the child was with him or her.⁵⁸ Therefore, the English Law Commission proposed replacing custody and access orders with a variety of orders to include a “residence order” and a “contact order.”⁵⁹ The English Commission stated that the effect of a residence order would merely be to settle where the child is to live. If any other conditions were needed, they would have to be specified.⁶⁰ However,

⁵⁷ Law Commission *Family Law, Review of Child Law, Guardianship and Custody* (Law Com. No. 172 of 1988) at 22.

⁵⁸ Law Commission *ibid* at 24.

⁵⁹ Law Commission *op cit* fn 57 at 24. There would also be a specific issues order and a prohibited steps order.

⁶⁰ Law Commission *op cit* fn 57 at 25.

there were a number of core exceptions to this. The Law Commission specifically recommended that it would be a condition of all residence orders that the child's surname should not be changed without either the written consent of both parties with parental responsibility or the leave of the court.⁶¹ Also, the child could not be taken outside the jurisdiction for more than a month without the consent of those with parental responsibility or the leave of the court. The English Law Commission also recommended that if a non-marital father obtained a residence order in his favour in circumstances where he did not already have parental responsibility by court order or by agreement, then the effect of the residence order would also be a parental responsibility order.⁶² These provisions were enacted in the English *Children Act 1989* and are discussed in greater detail below.

1.32 It is clear from the 1992 Report of the Scottish Law Commission that the reasoning behind the shift in terminology from "custody" to "residence" in that jurisdiction was similar to the difficulties faced in Ireland; namely, a lack of understanding among the general public as to the effects of an award of custody.⁶³ It was felt that parents who were given sole custody appeared to think that this gave them *all* the parental rights in respect of the child, to the exclusion of the other parent, when in fact this was not the legal position. The confusion was not helped by the fact that there was no statutory definition of "custody" within Scottish law. In light of this, the Scottish Law Commission recommended the introduction of a "right of a parent to have the child living with him or her, or otherwise to regulate the child's residence."⁶⁴ This highlights that this right relates solely to the child's residence and does not affect the continued operation of the rights and responsibilities of the non-resident parent. This was enacted in the *Family Law (Scotland) Act 1995*.

1.33 Australia has also moved from the concept of custody orders and the *Family Law Reform Act 1995* refers to "parenting orders" which determine where the child shall live and who the child will have contact with.

1.34 While New Zealand has retained the term guardianship, the concept of the "custody order" has been replaced with the "parenting order" and custody is now referred to as the "day-to-day care" of the child. A parenting order comprises directions in relation to where the child will live, and with whom, and

⁶¹ Law Commission *op cit* fn 57 at 25.

⁶² Law Commission *Family Law, Review of Child Law, Guardianship and Custody* (Law Com. No. 172 of 1988) at 26.

⁶³ Scottish Law Commission *Report on Family Law* (No. 135 of 1992) at 9.

⁶⁴ Scottish Law Commission *ibid* at 10.

also the arrangements for contact between parents and children. The legislative detail on this is contained in the *Care of Children Act 2004*.

(3) Access/Contact

1.35 In England and Wales the proposed contact order was distinguished from the access order on the basis that an access order allowed the non-custodial parent to “have access”, whereas a contact order would allow for the child to visit and possibly stay with the parent. During the time the child was having contact with the non-resident parent, that parent would be in a position to exercise all parental responsibilities necessary to care for the child. From the above discussion it is clear that the purpose of the English Law Commission in recommending a change in terminology was to ensure that it was clearer and in accordance with international best practice.

1.36 Continued use of the term “access” was rejected by the Scottish Law Commission as it was felt that it “seemed to suggest something like access to property and which did not indicate that what was involved was continued parenting.”⁶⁵ In place of “access” it recommended that there be a right to maintain personal relations and direct contact with the child on a regular basis. The Scottish Law Commission noted that they received a number of suggestions that the right of contact should also be a right of the child. This would be in accordance with the provisions of the UN 1989 Convention on the Rights of the Child. While not explicitly providing for such a right, the Scottish Law Commission stated “we have attempted to meet this suggestion by recommending above that the maintenance of personal relations and direct contact should be a parental responsibility as well as a parental right.”⁶⁶ It could be argued that while it is useful to include the concept of contact within the definition of parental responsibilities as well as rights, this is still very far removed from being a right of the child to contact with both parents.

1.37 As noted above in the discussion on the change from custody to residence or day-to-day care, both Australia and New Zealand have opted to have a single “parenting order” which determines not only who will have care of the child on a daily basis but also the contact arrangements in respect of the child. The generally accepted term is contact, rather than access.

1.38 On the basis of this review of relevant international instruments and comparative analysis of the law in other comparable States, the Commission has provisionally concluded that the terms parental responsibility, day-to-day care and contact should be used in relevant Irish family law legislation in place of the terms guardianship, custody and access. The terms recommended are a

⁶⁵ Scottish Law Commission *op cit* fn 63 at 11.

⁶⁶ Scottish Law Commission *op cit* fn 63 at 11.

more accurate reflection of what is entailed in each of the concepts and would, therefore, ensure greater clarity in the law. Their use would also ensure that the terminology used in Ireland is consistent with that used in EU legislation, by the Council of Europe, and in the various international instruments to which Ireland is a party.

1.39 *The Commission provisionally recommends that, to ensure greater accuracy, clarity and consistency, the terms “parental responsibility,” “day-to-day care” and “contact” should be used in relevant Irish family law legislation in place of “guardianship,” “custody” and “access”.*

E Options for reform

1.40 At present the Commission considers that there is confusion among members of the public as to the distinction between guardianship and custody, with many interpreting an order for joint custody as a joint parenting order. The proposed change in terminology will 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 hopes that the new terminology will go some way towards making the operation of the family law system more accessible to those who use it.

(1) Possible formats for introducing a statutory definition of parental responsibility in Ireland

1.41 As noted throughout this chapter there are currently no statutory definitions of the terms guardianship, custody and access in Ireland. As part of the Commission’s recommendations to clarify the terminology used in this area, the Commission also proposes to include statutory definitions of the suggested new terms, namely parental responsibility, day-to-day care and contact. Consideration must be given to the most appropriate format that the statutory definitions should take. From the survey of other jurisdictions it is clear that Scotland and New Zealand have opted for a very detailed definition of parental responsibility and guardianship, while England and Wales and Australia decided to adopt a broader definition, leaving the detailed interpretation to the courts. It is helpful to look at these different styles and to analyse the reasoning behind them before considering a format for the statutory definition in Ireland.

(a) The broad approach

1.42 Section 3(1) of the English *Children Act 1989* defines parental responsibility as “all the rights, duties, powers, responsibilities and authority which by law a parent has in relation to the child and his property.” As noted above in Part D, the English Law Commission had recommended that a more detailed definition should not be included, to allow for flexibility. Kilkelly suggests that this is a “somewhat circular definition,” but is still preferable to the concept of guardianship which it replaced.⁶⁷ Section 3(5) of the 1989 Act also states that:

“A person who–

(a) does not have parental responsibility for a particular child; but

(b) has care of the child,

may (subject to the provisions of this Act) do what is reasonable in all the circumstances of the case for the purpose of safeguarding or promoting the child’s welfare.”

This is a child focused approach in that it prioritises responsibility towards the child even in circumstances where the person who has care of the child is not formally entitled to parental responsibility.

1.43 The English Law Commission, in its 1988 Report addressed the issue of the requirement to consult between persons with parental responsibility.⁶⁸ It noted that at the time the law was not clear on whether there was a right to act independently. The Law Commission was of the opinion that it was important to recognise the equal status of both parents and the power to act independently unless a court ordered otherwise. The Law Commission rejected the suggestion that a duty to consult on major matters affecting the child would result in increased co-operation between parents. It stated:

“a legal duty of consultation seems both unworkable and undesirable.

The person looking after the child has to be able to take decisions in the child’s best interests as and when they arise.”⁶⁹

The Law Commission identified that the child’s interests may be placed at risk if a parent is delayed in making decisions due to the disapproval of the other parent, or if there are difficulties contacting him or her. The issue of what is or is not a major decision relating to the child would also have the potential to

⁶⁷ Kilkelly *Children’s Rights in Ireland* (Tottel 2008) at 115.

⁶⁸ Law Commission *Report on Family Law, Review of Child Law, Guardianship and Custody* (Law Com. No. 172 of 1988) at 7.

⁶⁹ *Ibid* at 7.

become a source of tension between the parties.⁷⁰ The English Law Commission therefore recommended that:

“the equal and independent status of parents be preserved and, indeed, applied to others (principally guardians) who may share parental responsibility in future.”⁷¹

The Law Commission did specifically clarify, however, that this would not affect the requirement for the consent of each parent in the context of the adoption of the child. This recommendation was given effect to in section 2(7) of the 1989 Act which states:

“Where more than one person has parental responsibility for a child, each of them may act alone and without the other (or others) in meeting that responsibility; but nothing in this Part shall be taken to affect the operation of any enactment which requires the consent of more than one person in a matter affecting the child.”

1.44 While the inclusion of parental responsibility in the English 1989 Act is an attempt to place greater emphasis on the responsibility element of parenting, the statutory definition does not provide effective guidance as to what is required of a person exercising parental responsibility in respect of a child. Therefore, it is useful to examine a statutory definition which attempts to do this, while still allowing scope for the fact that parenting must be tailored to the specific circumstances that prevail in a particular family.

(b) The detailed approach

(i) Scotland

1.45 The *Children (Scotland) Act 1995* includes a very detailed statutory definition of parental responsibilities and rights. The statutory framework adopted is based to a significant extent on the recommendations in the Scottish Law Commission’s 1992 Report discussed above in Part D. The definition places responsibilities to the forefront, and includes the responsibility to maintain contact with the child within the definition of parental responsibility. It is worth noting that the definition specifically states that the parent has the responsibility to provide direction and guidance to the child in an age appropriate manner.⁷² This is an attempt to deal with the objections raised in

⁷⁰ Law Commission *op cit* fn 68 at 7.

⁷¹ Law Commission *op cit* fn 68 at 7.

⁷² The Scottish Law Commission’s 1992 *Report on Family Law* (No. 135 of 1992) was attuned to the importance of an awareness of the age and maturity of the child, and the effect that this has on the relationship between parent and child. See pages 5-6 and 11 of the 1992 Report.

England and Wales to a detailed statutory definition, namely that what would be appropriate parental behaviour in respect of a young child would not be the same as what would be required in relation to an older child.⁷³ Section 1 of the *Children (Scotland) Act 1995*, headed “Parental Responsibilities,” states:

- “(1) Subject to section 3(1)(b) and (3) of this Act, a parent has in relation to his child the responsibility-
- a) to safeguard and promote the child’s health, development and welfare;
 - b) to provide, in a manner appropriate to the stage of development of the child-
 - i) direction;
 - ii) guidance, to the child;
 - c) if the child is not living with the parent, to maintain personal relations and direct contact with the child on a regular basis; and
 - d) to act as the child’s legal representative,
- but only in so far as compliance with this section is practicable and in the interests of the child...”

1.46 The use of the term “development” in the definition of parental responsibility and the omission of the term “care” was the result of discussion in the Scottish Law Commission’s 1992 Report. It was felt that a reference to care in the definition might convey the impression that the parent with whom the child was not living and therefore not being cared for by on a daily basis somehow had less responsibility in respect of the child.⁷⁴ Section 1(d) of the 1995 Act refers to the responsibility to act as the child’s legal representative. This was seen as replacing the traditional function of a legal guardian. The Scottish Law Commission noted that “it was odd to define the parent’s role in terms of the guardian’s role, given that parenthood was the primary relationship. Guardians are substitute parents, not the other way around.”⁷⁵ The effect of this is that parenthood is the primary concept, and distinctions are then drawn between parents and those acting *in loco parentis*.

1.47 The definition is also very clear in stating that any rights that parents possess in respect of a child are in order to fulfil their responsibilities. This is indicative of a much more child centred approach than the current terms used in Ireland. Section 2 of the 1995 Act, headed “Parental Rights,” states:

⁷³ Law Commission *Report on Family Law, Review of Child Law, Guardianship and Custody* (Law Com. No. 172 of 1988) at 6.

⁷⁴ Scottish Law Commission *Report on Family Law* (No. 135 of 1992) at 4.

⁷⁵ Scottish Law Commission *ibid* at 8. Footnotes omitted.

“(1) Subject to section 3(1)(b) and (3) of this Act, a parent, in order to enable him to fulfil his parental responsibilities in relation to his child, has the right-

- a) to have the child living with him or otherwise to regulate the child’s residence;
- b) to control, direct or guide, in a manner appropriate to the stage of development of the child, the child’s upbringing;
- c) if the child is not living with him, to maintain personal relations and direct contact with the child on a regular basis; and
- d) to act as the child’s legal representative.”

1.48 As can be seen from the above discussion many of the rights are corollaries of the responsibilities. Section 2(a) provides a right to have the child reside with the parent. Section 2(b) states that the parent has a right to “control, direct, or guide” the child in an age appropriate manner. This can be contrasted with section 1(b) which states that the parent has a responsibility to provide “direction and guidance.” The reason for this apparent discrepancy is connected to the fact that what is appropriate parenting depends on the age of the child. Therefore, younger children may have to be controlled, but perhaps direction and guidance would be more fitting for an older child. The difference is also attributable to the different age limits that apply to parental responsibilities and parental rights in Scotland. Parental rights only apply to children under the age of 16. Parental responsibilities apply to children under the age of 16, with the exception of section 1(b)(ii), which is the responsibility to provide guidance, which applies to persons under the age of 18. The Scottish Law Commission acknowledged in its 1992 Report that the existence of different age limits had the effect of making the law less tidy. However, it stated “we think that the reality of family life is that certain parental responsibilities of a supportive, protective or advisory nature continue after the child attains the age when he or she has considerable legal capacity and freedom of action.”⁷⁶ This appears to this Commission to be fully in accord with the UN 1989 Convention on the Rights of the Child.

1.49 Finally, it is worth noting section 2(2) of the Scottish 1995 Act which states that where two or more persons have parental rights in respect of a child:

“each of them may exercise that right without the consent of the other or, as the case may be, of any of the others, unless any decree or deed conferring the right, or regulating its exercise, otherwise provides.”

⁷⁶ Scottish Law Commission *Report on Family Law* (No. 135 of 1992) at 6.

The exception to this is the decision to remove a child from the jurisdiction, which requires consent.⁷⁷ The Commission is of the opinion that there are other matters, outside of removing the child from the jurisdiction that would come within the terms of parental responsibility which ought not to be done without consulting with any other party with parental responsibility. Examples of this would be a decision to change the child's name or religion or to move the child to another school. Failure to require some consultation with the other party in the exercise of significant aspects of parental responsibility could create unnecessary tension.

(ii) New Zealand

1.50 Scotland is not alone in adopting a very detailed definition of parental rights and responsibilities. As noted above in Part D of this chapter New Zealand has retained the term guardianship. However, the statutory definition of the term included in the *Care of Children Act 2004* is extremely detailed, and highlights the corollary between rights and responsibilities in the context of parenting. For this reason it is briefly set out at this point.

1.51 Section 15 of the *Care of Children Act 2004* states:

- “For the purposes of this Act, guardianship of a child means having (and therefore the guardian of a child has), in relation to the child,-
- a) All duties, powers, rights and responsibilities that a parent of a child has in relation to the upbringing of the child;
 - b) Every duty, power, right, and responsibility that is vested in the guardian of a child by any enactment;
 - c) Every duty, power, right, and responsibility that, immediately before the commencement, on 1st of January 1970, of the Guardianship Act 1968, was vested in a sole guardian of a child by an enactment or rule of law.

Section 16 of the 2004 Act states:

- “(1) The duties, powers, rights, and responsibilities of a guardian of a child include (without limitation) the guardian’s—
- (a) having the role of providing day-to-day care for the child (however, under section 26(5), no testamentary guardian of a child has that role just because of an appointment under section 26); and
 - (b) contributing to the child’s intellectual, emotional, physical, social, cultural, and other personal development; and
 - (c) determining for or with the child, or helping the child to determine, questions about important matters affecting the child.
- (2) Important matters affecting the child include (without limitation)—

⁷⁷ Section 2(3) and section 2(6) of the *Children (Scotland) Act 1995*.

- (a) the child's name (and any changes to it); and
 - (b) changes to the child's place of residence (including, without limitation, changes of that kind arising from travel by the child) that may affect the child's relationship with his or her parents and guardians; and
 - (c) medical treatment for the child (if that medical treatment is not routine in nature); and
 - (d) where, and how, the child is to be educated; and
 - (e) the child's culture, language, and religious denomination and practice.
- (3) A guardian of a child may exercise (or continue to exercise) the duties, powers, rights, and responsibilities of a guardian in relation to the child, whether or not the child lives with the guardian, unless a Court order provides otherwise.
- (4) Court order means a Court order made under any enactment; and includes, without limitation, a Court order that is made under this Act and embodies some or all of the terms of an agreement to which section 40(2) or section 41(2) applies.
- (5) However, in exercising (or continuing to exercise) the duties, powers, rights, and responsibilities of a guardian in relation to a child, a guardian of the child must act jointly (in particular, by consulting wherever practicable with the aim of securing agreement) with any other guardians of the child."

1.52 This definition of guardianship is even more detailed than the definition of parental responsibility included in the Scottish 1995 Act. It is notable that section 16(5) specifically mentions the requirement to consult with other guardians of the child where it is practical to do so. This is not included in the other statutory definitions examined. As noted above the Commission is 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.

1.53 Having examined the various approaches taken in other jurisdictions, the Commission has provisionally concluded that a broad statutory definition of parental responsibility should be adopted in Ireland. In terms of the specific elements that would be associated with this term, the Commission invites submissions on whether this should include a requirement to consult with other parties who have parental responsibility for the child where it is practical to do so. The Commission also invites submissions on whether there should be a single parenting order to determine who should have day-to-day care of the child and who should have contact with the child.

1.54 *The Commission provisionally recommends that a broad statutory definition of parental responsibility should be adopted in Ireland. The Commission invites submissions on whether this should include a requirement*

to consult with other parties who have parental responsibility for the child where it is practical to do so. The Commission also invites submissions on whether there should be a single parenting order to determine who should have day-to-day care of the child and who should have contact with the child.

(2) Statutory definitions of day-to-day care and contact

(a) Day-to-day care

1.55 At present a custody order determines who will be responsible for the day-to-day care of the child. The proposed change in terminology from “custody” to “day-to-day care” is intended to make this clear and to remove any current confusion between custody and guardianship. As noted above there is currently no statutory definition of the term “custody” in the family law context. The Commission is of the opinion that it would be beneficial to include a statutory definition of “day-to-day care” within the legislative framework.

1.56 *The Commission provisionally recommends that a statutory definition of day-to-day care should be adopted in Ireland. The Commission invites submissions on the precise wording of the definition.*

(b) Contact

1.57 There is currently no statutory definition of “access.” In line with the provisional recommendations set out above the position of the Commission is that it would be beneficial to include a statutory definition of the proposed replacement term, namely “contact.” A statutory definition of contact should give effect to the current understanding of contact as a right of the child rather than of the parent. It may also be helpful for the purpose of clarity if the definition of contact clearly stated that contact included both direct and indirect contact between the child and the parent without day-to-day care.

1.58 *The Commission provisionally recommends that a statutory definition of contact should be adopted in Ireland. The Commission invites submissions on the precise wording of the definition.*

1.59 In light of the above discussion on the need to update the terminology in use in Ireland and the requirement to introduce a statutory definition of parental responsibility, day-to-day care and contact into Irish law, the Commission notes that the *Guardianship of Infants Act 1964* has already been amended a number of times, notably by the *Status of Children Act 1987* and the *Children Act 1997*. This has resulted in a complex legislative framework, which would benefit from the enactment of a single Act that would incorporate the terminology changes made in this Paper. In these circumstances the Commission has provisionally concluded that it would be beneficial if the recommendations made in the Consultation Paper were incorporated into a consolidated *Children Act*, which would replace the

Guardianship of Infants Act 1964, as amended. This would contribute to the aim of making the law governing the legal aspects of family relationships more accessible.

1.60 *The Commission provisionally recommends that the changes recommended in this Consultation Paper be incorporated into a consolidated Children Act, which would replace the Guardianship of Infants Act 1964, as amended.*

CHAPTER 2 REGISTRATION OF THE BIRTH OF A CHILD

A Introduction

2.01 All births in Ireland must be registered with the General Register Office under the *Civil Registration Act 2004*. This ensures that there is an independently verifiable record of all children born in the State. 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. This is useful for planning purposes. The second is to ensure that people know who their parents are, and therefore have a sense of identity. This also has implications for succession law. Linked to this is an understanding that an accurate register of births ensures that people are aware of their relatives, which assists to prevent people within the prohibited degrees entering into relationships with each other. Entry of details onto the register of births is also a trigger for a number of other factors, such as the payment of child benefit allowance.¹ A birth certificate is also required to apply for a passport. Part B of this chapter examines the current procedure for registering the birth of a child in Ireland. Part C discusses possible amendments to the process of birth registration which would promote the right of the child to know his or her identity and simplify the current procedure. Part D examines the operation of the presumption of paternity in the case of a married couple. The Commission notes that, at present, the relevant statutory provision is drawn too narrowly with the result that inaccurate information is on occasion knowingly entered into the register of births.

B The current procedure for registering a birth in Ireland

2.02 Under the *Civil Registration Act 2004*, the birth of every child in Ireland must be registered within three months.² The primary duty to do so rests with the parents, but if the parents are dead or unable to register the birth due to

¹ When the birth of a child is registered this triggers a claim for child benefit in the Department of Social and Family Affairs. The parent is contacted automatically in respect of this payment following registration.

² Section 19(1) of the *Civil Registration Act 2004*.

ill health, a qualified informant can provide the necessary information.³ Registration requires attendance in person at the office of a Registrar of births, deaths and marriages, to give the necessary information, and to sign the register in the presence of the Registrar.⁴ The Commission understands that certain preliminary details are taken from the mother in the hospital, such as her name and the sex of the child.⁵ These are passed on to the office of the Registrar and operate as an independent verification of the birth of the child and that the woman registering the birth in fact gave birth to the child.

2.03 The *Civil Registration Act 2004* contains the details to be recorded in the register of births. These include the name, address and occupation of the mother and the father, and any former surname(s) of both parents. It also requires that the Personal Public Service (PPS) numbers of the child, the mother and the father be recorded.⁶ While the details of both parents are listed in the schedule as information to be recorded, the mother's details do come first in the list and there is no legal requirement to record the details of both parents. If a woman who is not married wishes to register the birth of her child and chooses not to provide information in relation to the father, there is no requirement for her to do so. The Commission understands that in these circumstances a woman is asked no questions in relation to the father of the child, on the basis that to do so would be an invasion of her privacy. Whether this practice requires reform is examined further in Part C.

³ In addition to the parents of a child other qualified informants are: a guardian of the child, a person present at the birth, a person having charge of the child, if the birth occurred in a dwelling, any other person who was in the dwelling at the time, and if the birth occurred in a hospital or institution, the chief officer of that institution: see section 19(6) of the *Civil Registration Act 2004*.

⁴ Section 19(1) of the *Civil Registration Act 2004*.

⁵ This is referred to as a Birth Notification Form (Form BNF/01) and is completed by a doctor or midwife in the case of a home birth. See the information leaflet provided by the General Register Office *Information for Parents on the registration of a birth and a guide to the content of a Birth Certificate*, which is available in the office of the Registrar and also online at www.groireland.ie.

⁶ Part 1 of the First Schedule to the 2004 Act sets out the other particulars to be recorded including the date and place of the birth, the time of birth, the sex of the child, the forename and surname of the child, the date of birth and marital status of both parents, and the birth surname of the mother's mother and of the father's mother. The name, qualification, address and signature of the informant must also be recorded. The register must then be signed and dated by the Registrar.

2.04 Once the birth of a child is registered an entry appears on the register of births. It is from this general register that the information on birth certificates is taken. In the past it was only possible to obtain a copy of a birth certificate in the county where the birth was originally registered. However, following the centralisation and computerisation of the register of births, it is now possible to obtain a copy of a birth certificate from the office of any local Registrar. However, the procedure is somewhat different in relation to children who have been adopted. Original copies of a birth certificate are not issued to persons who have been adopted.⁷ Instead a certificate is issued which provides the information entered on the Adopted Children Register. For legal purposes this has the same status as a birth certificate⁸ and provides the date of birth and the names and addresses of the adoptive parents of the child. The Adopted Children Register is maintained by the General Register Office in accordance with section 22 of the *Adoption Act 1952*.⁹ A certified copy of an entry into the Adopted Children Register can only be obtained from the General Register Office and not from any other local Registrar's office. Concerns have been raised that this operates to discriminate against people who are adopted, as they alone are required to make an application to the central office.¹⁰ However, the rationale for this position is that the security and confidentiality of the information contained in the register is paramount and this can best be guaranteed by continuing the statutory scheme whereby the Registrar General has sole responsibility for this information.¹¹ The Commission notes that the

⁷ However, the Commission understands that in most cases the birth of the child would have been registered in the usual way prior to the child being placed for adoption and therefore it would be possible to obtain a birth certificate for the person provided he or she had the relevant details, such as the name of the biological mother.

⁸ Section 22(11) of the *Adoption Act 1952*.

⁹ Section 22(5) of the *Adoption Act 1952* requires the General Register Office to maintain an index to ensure traceability between each entry in the Adopted Children Register and the corresponding entry in the register of births.

¹⁰ Vol. 685 *Dáil Debates* No. 4 (24 June 2009, Written Questions).

¹¹ In response to the parliamentary question referred to *ibid* fn 10, the Minister for Social and Family Affairs set out the governing legislation and the role of the Registrar General in maintaining the Adopted Children Register. She also stated “[w]hile it is appreciated that this may cause a degree of inconvenience in certain instances, the security and confidentiality of the Adopted Children Register is of paramount importance and it is for this reason only that the restriction on availability exists. For this reason also, there are no plans to amend the legislation to change the current arrangements in relation to this matter.”

Adoption Bill 2009 is currently (September 2009) before the Oireachtas and therefore proposes not to make any recommendation on this matter at present.

2.05 Where the parents of a child are married there is a statutory presumption that the husband is the father of the child. The operation of this presumption is discussed in greater detail below in Part D of this chapter. In these circumstances either the mother or the father of the child, or both together, can attend at the office of the Registrar to register the birth and to provide the necessary information. Due to the operation of the presumption, most marital births registered include the names of both parents.

(1) *Registering the birth of a child where the parents are not married*

2.06 A more complicated procedure applies where the parents of the child are not married and wish to include the names of both parents on the birth certificate and in the register of births. Section 22(1) of the *Civil Registration Act 2004* states that a father who was not married to the mother of the child “at the date of his or her birth or at any time during the period of 10 months before such birth shall not be required to give information under this Act about the birth.”

2.07 If a person¹² wishes to be registered on the birth certificate of a child as the father there are four options available. The first is for the mother and the person to jointly register the birth.¹³ The request for joint registration 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 a written declaration of the mother that the person is the father of the child and a statutory declaration by the person that he is the father of the child.¹⁴ The third option is for the person to make an application in writing to the Registrar, accompanied by a declaration that he is the father and a statutory declaration from the mother stating that he is the father of the child.¹⁵ The fourth option arises if the mother or the person request in writing that the person be registered as the father of the child on foot of a court order finding that the person is the father, in which case

¹² The term “person” is used here to ensure clarity and to avoid excessive repetition of the term “father”. “Person” is also the term used in section 22 of the *Civil Registration Act 2004* in this context.

¹³ Section 22(2)(a) of the *Civil Registration Act 2004* states “if the mother of the child (“the mother”) and the person jointly so request the registrar in writing and give to him or her a declaration in writing of the person that he is the father of the child.”

¹⁴ Section 22(2)(b) of the 2004 Act.

¹⁵ Section 22(2)(c) of the 2004 Act.

the person will be registered as such.¹⁶ This provision states that the court order must relate to proceedings referred to in section 45 of the *Status of Children Act 1987*. This primarily relates to applications for guardianship or maintenance.¹⁷ The party making the application must produce a certified copy of the court order to the Registrar. In these circumstances the Registrar is required to notify the other party of the application.¹⁸ The Commission understands that the practice currently in place is to allow a 28 day period for the other party to make submissions before the birth is re-registered with the additional details of the other parent.¹⁹ Such submissions may be to the effect that the decision of the court is under appeal. If the birth of the child is registered in accordance with one of the above mentioned procedures, then the register is to be signed by the mother if she has made, or joined in the making of the application, and the father, if he has made or joined in the making of the application.²⁰

2.08 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. This is discussed in further detail in Part C.

2.09 The above provisions apply where the father wishes to be registered as such at the point of initial registration of the birth. It is also possible for a birth to be re-registered to include the details of the father where this information was

¹⁶ Section 22(2)(d) of the 2004 Act.

¹⁷ Section 45 of the *Status of Children Act 1987* also makes reference to section 215 of the *Social Welfare (Consolidation) Act 1981*. This provides for the recovery of contributions by the Department of Social Welfare from persons liable to maintain a person granted supplementary welfare allowance. The information leaflet provided by the General Register Office also refers to a court order under the *Social Welfare (Consolidation) Act 1993* naming the man as the father of the child as being sufficient for the registrar to re-register the birth. The 1981 and 1993 Acts have been replaced by the *Social Welfare Consolidation Act 2005*.

¹⁸ Section 22(4) of the *Civil Registration Act 2004*.

¹⁹ The 28 day period is not a statutory period but an internal practice within the General Register Office. At one point, the period for submissions was 21 days, but this was altered to ensure consistency in the practices of the General Register Office, as section 65(2) of the *Civil Registration Act 2004* provides for a 28 day period for the giving of information to the Registrar.

²⁰ Section 22(5) of the *Civil Registration Act 2004*.

not provided when the birth was first registered. This may occur if, for example, the mother initially registered the birth alone in order to ensure prompt payment of social welfare because the father was not available to attend the Registrar's office, and subsequently the couple wish to include his details on the register. Re-registration is provided for in section 23 of the *Civil Registration Act 2004*. The procedures are the same as those where a birth is initially registered by parents who are not married. However, a re-registration requires the approval of a Superintendent Registrar. The Commission understands that where a birth is re-registered the original entry in the register remains, but all copies of birth certificates are written from the new entry with the names of both parents, and possibly also the new surname of the child.

2.10 If a birth is re-registered in accordance with section 23 of the 2004 Act it cannot be further re-registered. The one exception to this is where the child is legitimated as a result of the parents getting married. This is provided for in section 24 of the 2004 Act, which also allows for a re-registration of the birth if the birth was previously registered solely with the mother's name. There is a duty on the parents to provide the Registrar with the information necessary to re-register the birth within three months of the date of the marriage.²¹ The Registrar must be satisfied that he or she has sufficient information to re-register the birth, and any such re-registration must be with the consent of a Superintendent Registrar. If the parent or parents fail to re-register the birth following the marriage, the Registrar can require them to attend at the office of the Registrar within 14 days of receipt of notification to re-register the birth where he or she believes that the child has been legitimated.²² However, section 24(6) specifically states that a failure by the parents to re-register the birth will not affect the legitimation of the child. The effect of legitimation for the father is that he would then have automatic guardianship/parental responsibility rights in relation to the child, although this is in no way connected to the act of re-registering the birth to include his name on the birth certificate.

2.11 Having set out the legal requirements for registering the birth of a child and noting some of the difficulties with the procedure in place, the Commission turns to examine these difficulties in greater detail and to explore some possible options to improve the current provisions.

²¹ Section 24(4) of the *Civil Registration Act 2004*.

²² Section 24(5) of the *Civil Registration Act 2004*.

C Discussion of the difficulties which have been identified with the process of birth registration

2.12 There is a significant level of confusion surrounding the consequences of registering the birth of a child. In the context of non-marital births there continues to be a belief that placing the name of the father on the birth certificate will result in the father being made guardian (having parental responsibility) in respect of the child. Although this is not accurate, the Commission understands that in many cases it is the reason why mothers, and also some fathers, elect not to put the father's name on the birth certificate. Some mothers do not wish the father to have guardianship rights/parental responsibility in relation to the child, believing that it weakens their rights, and some fathers do not wish to take full responsibility for the child, in particular financial responsibility. The Commission is of the view that neither of these reasons is sufficient to deny the child the right to know his or her identity.

2.13 There is also a belief that putting the father's name on the birth certificate will affect social welfare payments to the mother. In fact, however, child benefit allowance will be paid to the mother of the child with or without the father's name on the birth certificate. The potential impact on social welfare payments appears to be an area of concern in many cases when parents are registering the birth of a child. The Commission understands that there are situations where neither parent has any objection to the father's name being recorded on the birth certificate, but that this is not done when the birth is initially registered because the father is not present at the time, and the mother wishes to complete the registration as soon as possible in order to activate social welfare payments, such as child benefit. In these circumstances it may well be the intention of the parties to register the father's name at a later date, but they never do so. One-parent family allowance is payable to a parent bringing up a child alone without the support of a partner. If a couple is co-habiting there is no entitlement to one-parent family allowance. If a couple is not co-habiting there is a requirement that the parent with day-to-day care of the child seeks maintenance from the other parent before qualifying for one-parent family allowance. The presence of the name of the father on the birth certificate of the child will not in itself mean that a parent will not obtain one-parent family allowance.

2.14 The numbers of births registered in Ireland without the father's name appearing on the birth certificate is quite high. In 2008 76,113 births were registered in total and 4,102, or 5.4%, of these did not include the name of the father. However, these figures refer to all births registered, and so include births registered by married parents, where it is less common for the father's name not to be on the birth certificate. On average in Ireland 30% of all births are to non-marital parents and the Commission understands that among this group the numbers of birth certificates without the father's name is much higher, although

statistics on the exact numbers are not available. The Commission understands that the figure is generally estimated at 20% of non-marital births which are registered with only the name of the mother. This is a significant number of children who do not have all the information in relation to their heritage.

2.15 The Commission considers that a child has a right to know his or her identity and part of this is being aware of who his or her parents are. In order to ensure that as many children as possible have this opportunity it is necessary to encourage people to include both the name of the mother **and** the father on the birth certificate of a child when registering the birth.

2.16 Recent legislative developments in family law in England and Wales,²³ Scotland²⁴ and Northern Ireland²⁵ have resulted in the introduction of a link between the registration of the birth of a child and parental rights and responsibilities. In each of the UK jurisdictions if both parents who are not married jointly register the birth of the child, the father will have automatic parental responsibility rights and responsibilities. The detail of the relevant statutory schemes in operation is discussed in Chapter 3 in the context of a discussion on the responsibilities and rights of non-marital fathers. It is worth noting that these provisions were introduced in recognition of the fact that most non-married couples in the UK were already jointly registering the birth of a child in the understanding that this conferred rights on the father. The aim was to bring the law in line with what was happening in practice. For example, the numbers of births registered with only the mother's details in England and Wales is approximately 7%, which is considerably lower than the estimated 20% in Ireland.

2.17 The Commission understands concerns that any move to link birth registration with guardianship/parental responsibility in Ireland could result in even greater numbers of sole registrations. At present the unfounded belief that registration is linked to rights and responsibilities is one of the primary reasons that both names are not placed on the birth certificate. This is undesirable as it is not in the best interests of the child and does not respect the right of the child,

²³ Section 111 of the *Adoption and Children Act 2002* amended section 4 of the *Children Act 1989* to provide that where a non-marital father jointly registers the birth of the child with the mother, he will obtain parental responsibility.

²⁴ Section 23 of the *Family Law (Scotland) Act 2006* introduced parental responsibility on joint registration of the birth.

²⁵ Section 1 of the *Family Law Act (Northern Ireland) 2001* amended section 5 of the *Children (Northern Ireland) Order 1995* to ensure that a non-marital father could obtain parental responsibility for his child following the joint registration of the birth.

as expressed in international instruments, to know his or her identity. In this context the Commission is of the opinion that, for the time being at least, it is appropriate to retain the distinction between birth registration and the allocation of guardianship/parental responsibility.

2.18 *The Commission provisionally recommends that the distinction between birth registration and the allocation of guardianship/parental responsibility should remain.*

(1) Possible options to encourage joint registration of the birth

2.19 As already indicated, the Commission's justification for retaining a distinction between birth registration and the allocation of guardianship/parental responsibility is a pragmatic one, to prevent greater numbers of births in Ireland being registered with only the mother's details. The Commission is of the view, however, that if the distinction is to remain, greater efforts must be made to encourage joint registration of the birth of a child in order to provide some practical expression of the right of the child to know his or her identity. Three proposals to achieve this are set out below.

(a) Statutory clarification that registration of a birth is not linked to the allocation of guardianship/parental responsibility.

2.20 In Ireland the presence of the name of the father of the child on the birth certificate confers no rights or responsibilities on him. Guardianship/parental responsibility is allocated to non-marital fathers by court order²⁶ or by agreement with the mother and the signing of a statutory declaration.²⁷ This is discussed in greater detail in Chapter 3. However, there is no requirement for the father's name to be on the birth certificate of the child prior to making an application to court for guardianship/parental responsibility or before signing a statutory declaration.

2.21 The *Civil Registration Act 2004* is silent on the fact that the registration of the birth of the child does not result in guardianship/parental responsibility. The General Register Office provides an information leaflet, which is also available online, setting out the procedure involved in registering a birth and the function of a birth certificate.²⁸ The leaflet does not contain any statement that the joint registration of the birth of the child does not lead to

²⁶ Section 6A(1) of the *Guardianship of Infants Act 1964*, as inserted by, section 12 of the *Status of Children Act 1987*.

²⁷ Section 2(4) of the *Guardianship of Infants Act 1964*, as amended by, section 4 of the *Children Act 1997*.

²⁸ General Register Office *Information for Parents on the registration of a birth and a guide to the content of a Birth Certificate* at www.groireland.ie.

automatic guardianship/parental responsibility for the non-marital father. Equally, there is no statutory requirement for the Registrar to inform a person of the consequences of the registration of a birth and the Commission understands that there is no practice in place requiring a Registrar to provide this information to a parent registering the birth of a child.

2.22 In the context of significant numbers of births being registered without the father's name on the birth certificate, the Commission considers that it may be helpful to include a clarification in the statutory provisions to the effect that there is no link between joint registration of a birth and the allocation of guardianship/parental responsibility. It is not unusual for a statute to contain such statements and clarifications. Section 47 of the *Status of Children Act 1987* includes a clarification that a spouse can give evidence that sexual intercourse did not take place for the purpose of rebutting the presumption of paternity. This was included as the common law previously did not allow for such testimony. Similarly, section 11A of the *Guardianship of Infants Act 1964*, inserted by section 9 of the *Children Act 1997*, states:

“For the avoidance of doubt, it is hereby declared that the court, in making an order under section 11, may, if it thinks it appropriate, grant custody of a child to the child's father and mother jointly.”

2.23 If there was a statutory statement to the effect that joint registration of a birth did not give rise to guardianship/parental responsibility, this could also be included in information leaflets. The inclusion of such a statement in the legislation may also draw attention to it as an issue to be addressed by Registrars when a parent comes in to register the birth of a child. The Commission therefore invites submissions on whether this clarification should be put in place.

2.24 *The Commission invites 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.*

(b) *Statutory requirement for the Registrar to make enquiries in relation to the identity of the father*

2.25 At present a birth to a married couple can be registered by either parent alone, or both jointly. A birth to a couple who are not married can be registered by both jointly, or by one or the other, provided there is written evidence of the consent of the other party. A non-marital mother can register the birth of a child on her own, and without entering the details of the father on the birth certificate. A non-marital father cannot do this. There is no requirement for a mother to provide information on the father of the child. In some cases the mother may not be aware of who the father is, or may not be able to provide all the necessary information required by Schedule 1 of the *Civil Registration Act*

2004. However, in most cases the mother of the child is aware of who the father of the child is.

2.26 Given that the statutory provisions allow a non-marital mother to register the birth on her own, there is no requirement for the Registrar to make enquiries in relation to the details of the father. The Commission understands that there is also no practice in place within the General Register Office to the effect that a mother would be asked if she wished to record the father's name on the birth certificate. The Commission understands that this is on the basis that to do so would be an invasion of the mother's right to privacy. The Commission considers that there is, in fact, a need to balance the privacy rights of the mother with the right of the child to know his or her identity. On this basis, the Commission is of the view that asking a mother who comes in alone to register the birth if she wishes to include the father's details on the birth certificate would not involve skewing the balance too far in favour of the rights of the child to the detriment of the privacy rights of the mother. If this question was coupled with a brief explanation of the consequences of registration, namely that it will not result in parental responsibility rights but that it is in the best interests of the child to know both parents, it may operate to encourage greater numbers of joint registrations.

2.27 At present it is possible for a birth that was initially registered with only the mother's name to be re-registered subsequently to include the name of the father.²⁹ The Commission understands that this provision is not brought to the attention of a mother who is registering the birth alone at the time of initial registration. In 2008 4,102 births were registered without the details of the father. In the same year 1,003 births were re-registered to include the father's details, although 508 of these re-registrations were births that had originally been registered pre-2008. Therefore 495 births which were originally registered with just the mother's details were re-registered within the same year to include the father's details. The Commission understands that in many instances couples are informed of the importance of including the father's name on the birth certificate by, for example, public health nurses or groups such as the Citizen's Information Board, Treoir (the National Federation of Services for Unmarried Parents and their Children) and the Free Legal Advice Centres (FLAC). The Commission understands that the General Register Office does not send a follow up letter to the parent of a child who has only one name on the birth certificate reminding them of the possibility of re-registering the birth.

2.28 In this respect, the Commission considers that it may be appropriate to impose new duties on the General Register Office but, at this point, has not reached a view on these matters and therefore invites submissions on them.

²⁹ Section 23 of the *Civil Registration Act 2004*.

2.29 *The Commission invites 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 include the father's details on the birth certificate. The Commission also invites submissions on whether there should be a statutory duty on a Registrar to inform the mother of the option of re-registering the birth at a later stage to include the father's details.*

(c) *The introduction of compulsory registration of the names of both parents*

2.30 There are currently proposals in England and Wales to introduce compulsory joint registration of a birth. This was first set out in a 2008 Government White Paper *Joint birth registration: recording responsibility*³⁰ and has since been incorporated into Part 4 of the *Welfare Reform Bill 2009*.³¹ The 2009 Bill has not yet been enacted, but the core provisions are briefly set out below.

2.31 The 2008 White Paper states that every year in England and Wales up to 45,000, or 7%, of birth registrations do not contain the name of the father.³² In order to increase the numbers of joint registrations it was proposed that joint registration would be a legal requirement for all unmarried parents unless this was deemed to be "impossible, impracticable, or unreasonable."³³ The reasoning behind this proposal was a belief that joint registration promotes child welfare and parental responsibility.³⁴ However, it was emphasised that sole registration would still be permitted and that the concerns of vulnerable mothers and children would be taken into consideration. It is important to be aware that the consequences flowing from joint registration in England and Wales are more significant than in Ireland. Joint registration of the birth of a

³⁰ Department for Work and Pensions *Joint birth registration: recording responsibility* (June 2008, CM 7293).

³¹ At the time of writing (September 2009), the *Welfare Reform Bill 2009* has passed the House of Commons and completed Committee stage in the House of Lords on 7th July 2009. The Report Stage in the House of Lords is scheduled for the 22nd, 27th and 29th October 2009.

³² This can be contrasted with Ireland where the figure is estimated at 20%.

³³ White Paper *Joint birth registration: recording responsibility* (June 2008, CM 7293) at 3.

³⁴ White Paper *Joint birth registration: recording responsibility* (June 2008, CM 7293) at 3.

child in England and Wales leads to automatic parental responsibility for the father.

2.32 The existing legislation in England and Wales provides for non-marital fathers to be registered on the birth certificate with the co-operation of the mother or with a court order confirming paternity.³⁵ This is similar to the situation in Ireland. The expectation is that the majority of births will continue to be joint registrations where the parents are co-operating.³⁶ However, in recognition of the fact that this is not always possible, the *Welfare Reform Bill 2009* would expand the ways a non-marital father could be registered without the consent of the mother, including where a paternity test carried out by an accredited body confirms that he is the father.³⁷ The 2009 Bill proposes that a mother will generally be required to provide the father's details to the Registrar, the Registrar will then contact the father and confirm that he is the father and register his details.³⁸ The 2009 Bill would also allow a non-marital father to independently provide his details to the Registrar, and subject to the mother acknowledging that he is the father his details would be entered on the register. The detail of the operation of the procedure is to be included in regulations.

2.33 The 2009 Bill continues to allow for sole registration by the mother where the father has died, where she does not know the identity of the father of the child, or his whereabouts. The Bill also provides for sole registration by the mother where the father lacks capacity within the meaning of the *Mental Capacity Act 2005* and also where she fears that her safety or the safety of her child would be compromised were the father to be contacted.³⁹ There is also a provision for a sole registration where the child is deemed to have no father within the meaning of section 41 of the *Human Fertilisation and Embryology Act 2008*. The Commission has not, as yet, reached a view on this matter but invites submissions on whether it would be appropriate to introduce compulsory joint registration of the birth of a child in Ireland; and on whether a non-marital father should be able to provide his details independently to the Registrar, to be registered once it is confirmed that he is the father.

³⁵ *Births and Deaths Registration Act 1953* and the *Children Act 1989*.

³⁶ This is stated in the explanatory memorandum accompanying the *Welfare Reform Bill 2009*.

³⁷ This is contained in section 2 of schedule 6 of the Bill as a proposed amendment to the *Births and Deaths Registration Act 1953*.

³⁸ This is contained in section 4 of schedule 6 of the Bill, which proposes to insert section 2B into the *Births and Deaths Registration Act 1953*.

³⁹ The detail of the exceptions are to be inserted into section 2B(4) of the *Births and Deaths Registration Act 1953*.

2.34 *The Commission invites submissions on whether it would be appropriate to introduce compulsory joint registration of the birth of a child in Ireland. The Commission also invites submissions on whether a non-marital father should be able to provide his details independently to the Registrar, to be registered once it is confirmed that he is the father.*

D The operation of the presumption of paternity in relation to married couples

2.35 Most of the discussion in this chapter has focused on the procedure to register both parents on the birth certificate where they are not married to each other. As noted at the beginning of the chapter, the legal requirements are more straightforward where the parents are married to each other. However, complications arise where the mother is married, but not to the father of the child. 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 provided for by section 46(1) of the *Status of Children Act 1987* which states that:

“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.”

2.36 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,⁴⁰ but the

⁴⁰ See the discussion above.

Registrar will require that she produce the death certificate of her husband or a certified copy of her decree of divorce.⁴¹

2.37 The presumption can be rebutted using the civil standard of proof, the balance of probabilities. Prior to this the common law required proof “beyond a reasonable doubt” that the husband was not the father.⁴² 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.⁴³

2.38 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.⁴⁴ 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.”⁴⁵

⁴¹ Information leaflet provided by the General Register Office available at www.groireland.ie.

⁴² Shatter *Family Law* (4th ed Butterworths 1997) at 430. This was further complicated by the rule in *Russell v Russell* [1924] AC 687 (HL) which prevented spouses giving evidence about their sexual relationship that would have the effect of rendering a marital child illegitimate. The continuing application of this rule in Irish law was questioned in *S v S* [1983] IR 68. Section 47 of the *Status of Children Act 1987* now expressly provides for the giving of such evidence.

⁴³ Information leaflet provided by the General Register Office available at www.groireland.ie.

⁴⁴ Shatter *Family Law* (4th ed Butterworths 1997) at 430.

⁴⁵ 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.”

2.39 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.

(1) Statutory exceptions to the presumption of paternity

2.40 The statutory exceptions, set out in section 46(2) of the *Status of Children Act 1987*, provide that the presumption will not apply where:

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

- a) A decree of divorce *a mensa et thoro*⁴⁶ or
- b) A deed of separation,⁴⁷

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.”

2.41 Both of the statutory exceptions set out above are no longer in widespread use following the introduction of divorce⁴⁸ and judicial separations.⁴⁹ In recognition of this 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

⁴⁶ 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.

⁴⁷ 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*.

⁴⁸ Section 5 of the *Family Law (Divorce) Act 1996*.

⁴⁹ 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.

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.”

2.42 The existence of a barring order will not trump the presumption, although the effect of this is intended to ensure that there is no contact between the parties. If a married couple are living separate and apart with the intention of obtaining a decree of divorce,⁵⁰ but the divorce has not yet been granted, the presumption that the husband is the father of a child will apply. If the woman's husband has deserted her, is in prison, or has been abroad for a ten month period he will nevertheless be presumed to be the father. The Commission understands that it is currently the practice that, where the mother of the child informs the Registrar of Births that her husband is not the father and that another man is in fact the father, the Registrar will enter the husband's name on the birth certificate unless the presumption is rebutted in accordance with the statutory exceptions or where the husband signs a statutory declaration that he is not the father.

2.43 The Commission understands that there are situations where a married couple have been separated for considerable periods, as long as 20 years, 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,⁵¹ 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 a situation (a legal fiction) which denies the child the right to know his or her identity. It also denies

⁵⁰ 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 4 years out of the preceding five.

⁵¹ The Commission understands that in some situations the mother does not wish to inform her estranged husband that she has had a child with another man due to concerns for her safety. In other cases the mother may not know where her husband is or how to contact him in order to get him to make a declaration in relation to paternity. The Commission also understands that there are situations where the estranged husband may refuse to sign the statutory declaration when requested to do so.

the biological father of the child his right to apply for guardianship/parental responsibility in respect of the child. In many of these cases the Commission understands that the biological father of the child is involved in the child's life. Furthermore, the current operation of the presumption attaches guardianship/parental responsibility to a man who has no connection to the child and may not even be aware of the existence of the child. None of the above consequences can be said to be in the best interests of the child. The Commission has provisionally concluded in this respect that the presumption of paternity in the context of married couples should be retained, but that the existing statutory exceptions should be extended, and invites submissions on the detailed nature of the extensions.

2.44 *The Commission provisionally recommends that the presumption of paternity in the context of married couples should be retained, but that the existing statutory exceptions should be extended, and invites submissions on the detailed nature of the extensions.*

CHAPTER 3 THE RESPONSIBILITIES AND RIGHTS OF NON-MARITAL FATHERS

A Introduction

3.01 As noted in the Introduction, Irish family law confers different rights and responsibilities on marital fathers and non-marital fathers. A marital father automatically has guardianship/parental responsibility rights in respect of his child. These rights and responsibilities remain even if the father is no longer married to the mother of the child. In contrast, a non-marital father is not entitled to automatic guardianship/parental responsibility. There are provisions in place to extend guardianship/parental responsibility to non-marital fathers: by court order¹ or by agreement with the mother in the form of a signed statutory declaration.² The retention of this distinction between marital and non-marital fathers is a fundamental issue in the context of a discussion on family relationships, and the Commission examines the core arguments for and against this below. Part B of this chapter briefly sets out the previous work of the Commission which made recommendations on the rights of non-marital fathers. In Part C the Commission discusses the current provisions for non-marital fathers to obtain guardianship/parental responsibility in Ireland. Following this, the Commission examines possible options for extending guardianship/parental responsibility to non-marital fathers. Part D discusses the Australian system of automatic parental responsibility for all parents. Part E examines joint registration of the birth of the child as a means of securing guardianship/parental responsibility. This has been adopted in a number of common law jurisdictions in recent years.

B Previous recommendations by the Commission

3.02 The Commission's 1982 *Report on Illegitimacy* recommended that the concept of illegitimacy should be removed from Irish law and, as already mentioned, this was implemented through the enactment of the *Status of*

¹ Section 6A(1) of the *Guardianship of Infants Act 1964*, as inserted by, section 12 of the *Status of Children Act 1987*.

² Section 2(4) of the *Guardianship of Infants Act 1964*, as amended by, section 4 of the *Children Act 1997*.

Children Act 1987. The Commission noted that there was a body of case law confirming that illegitimate children were entitled to constitutional protection as children.³ This existed even though an illegitimate child and his or her natural parents did not form a family within the meaning of Article 41 of the Constitution.⁴ The Commission 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.”⁵

The Commission recognised that the effect of this would be to impact on the law relating to guardianship as it was then formulated. The Commission recommended that a legal relationship should arise between parent and child regardless of the circumstances of conception⁶ and “should not be subject to any exceptions or prior conditions.”⁷ The Commission also noted that if the abolition of the concept of illegitimacy was to be meaningful “rather than cosmetic” it was necessary to enact a provision by which a non-marital father would automatically become a joint guardian of the child with the child’s mother.⁸ The Commission acknowledged the counter-arguments⁹ but ultimately

³ For example *G v An Bord Uchtála* [1980] IR 32 and *W O’R v EH and An Bord Uchtála* [1996] 2 IR 248. These rights can arise under either Article 40.3 or Article 42 of the Constitution.

⁴ Article 41.3.1 states “The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack.” Shannon *Family Law Practitioner* (Thomson Roundhall 2003) at para A-029 notes that “[t]he pre-eminence of the family based on marriage... is not so much asserted as assumed. However, true such an assumption may have been in 1937, more recent social trends have diluted the pre-eminence of marriage.”

⁵ *Report on Illegitimacy* (LRC 4-1982) at 85.

⁶ *Ibid* at 88. The Commission gave the examples of children born as a result of adulterous or incestuous unions. The Commission stated that the “law should face the reality of the child’s origins in such cases: the proper solution does not appear to be for the law to deny the reality of the relationship.”

⁷ *Op cit* fn 5 at 88.

⁸ *Op cit* fn 5 at 145.

⁹ That it would not be in the best interests of the child or the mother of a child born as a result of rape or incest for the father to have automatic rights in respect of that child. There would also be practical difficulties in the context of adoption if all fathers had automatic guardianship where the father was unknown or could not be contacted.

recommended that “both parents of children should be joint guardians of the children, whether they are born within or outside marriage.”¹⁰ This was a very strong declaration in favour of the rights of non-marital fathers and was recognised by the Commission as a radical proposal.¹¹

3.03 While the Commission’s key recommendations in the 1982 Report on ensuring equal treatment for children born to parents who were not married were enacted in the *Status of Children Act 1987*,¹² the recommendation on automatic guardianship rights for all parents has not been. This reluctance to extend full parental rights and responsibilities to all fathers regardless of marital status has been echoed in other countries. Both the English and Scottish Law Commissions recommended automatic guardianship rights for non-marital fathers in the past, but to date these recommendations have not been implemented.¹³ The view underpinning this was articulated in the 2005 Report of the New Zealand Law Commission *New Issues in Legal Parenthood*. It notes that:

“a marriage, civil union or a statutorily defined *de facto* relationship has a level of commitment assumed within it, which distinguishes it from other sexual relationships. Their greater permanence suggests more commitment and fidelity, and hence reliance can be placed on a presumption (of paternity).”¹⁴

¹⁰ Law Reform Commission *Report on Illegitimacy* (LRC 4-1982) at 147.

¹¹ Law Reform Commission *ibid* at 1.

¹² Such as the abolition of the concept of illegitimacy. This was given effect to by sections 3 and 4 of the *Status of Children Act 1987*.

¹³ English Law Commission *Family Law, Review of Child Law, Guardianship and Custody* (Law Com. No. 172 of 1988); Scottish Law Commission *Report on Family Law* (Scot Law Com No. 135 of 1992); See also the Lord Chancellor’s Department *Consultation Paper on Court Procedures for the Determination of Paternity and the Law on Parental Responsibility for Unmarried Fathers* (March 1998).

¹⁴ New Zealand Law Commission *New Issues in Legal Parenthood* (Law Com. Report 88 of 2005) at 30. The English Lord Chancellor’s Consultation Paper on *The Law on Parental Responsibility for Unmarried Fathers* (March 2008) also notes at 16 that there is “a fundamental issue as to whether an unmarried father needs to be accepted as a ‘meritorious’ parent before being able to acquire parental responsibility for his children. There is no such requirement for mothers, or for married fathers, who in practice may or may not be ‘responsible’ parents.”

3.04 Thus, many countries have adopted various thresholds to identify fathers with an intention to parent for the purposes of allocating parental responsibility. England and Wales,¹⁵ Scotland,¹⁶ Northern Ireland¹⁷ and New Zealand¹⁸ have opted for joint registration of the birth of the child. New Zealand has also extended the automatic guardianship that applies to married parents to fathers in heterosexual civil partnerships and to fathers in a statutorily defined *de facto* relationship with the child's mother.¹⁹ Australia is an exception in that it provides for automatic parental responsibility for all parents,²⁰ and therefore does not distinguish between fathers or operate a threshold requirement. Each of these is discussed in greater detail below. The issue under discussion by the Commission in this chapter is whether Irish law should continue to distinguish between categories of fathers for the purpose of parental responsibility and, if so, what criteria must a non-marital father satisfy in order to obtain legal rights and responsibilities in respect of his child.

C Current provisions for securing guardianship/parental responsibility for non-marital fathers in Ireland

3.05 There are currently two procedures in place to secure guardianship/parental responsibility for a non-marital father. Where both parents are in agreement they can sign a statutory declaration. If the issue of guardianship/parental responsibility is contentious, the father can apply to court for an order granting him guardianship rights. Guardianship rights arising from either of these procedures can be revoked by court order. This is another distinction between marital and non-marital fathers. The guardianship rights of a marital father cannot be removed even if he has been shown to be unsuitable to have custody/day-to-day care of the child or to have unsupervised contact/access. This distinction also exists in England and Wales. The UK Lord Chancellor's Department, in the course of recommending automatic parental responsibility for all fathers, questioned whether a procedure should also be introduced to allow parental responsibility to be removed from marital parents. It was argued that as long as this distinction remained there would continue to be discrimination against non-marital fathers. However, this suggestion was rejected as being undesirable.

¹⁵ Section 111 of the *Adoption and Children Act 2002* (England and Wales).

¹⁶ Section 23 of the *Family Law (Scotland) Act 2005*.

¹⁷ Section 1 of the *Family Law Act (Northern Ireland) 2001*.

¹⁸ Section 19 of the *Care of Children Act 2004* (New Zealand).

¹⁹ Section 17 of the *Care of Children Act 2004* (New Zealand).

²⁰ Section 61C of the *Family Law Reform Act 1995* (Commonwealth).

(1) Court order

3.06 The right to apply to court for an order of guardianship is set out in section 6A of the *Guardianship of Infants Act 1964*, as inserted by section 12 of the *Status of Children Act 1987*. It is important to highlight that this is a right to apply for guardianship and does not amount to a right to be appointed a guardian of the child. This was confirmed by the Supreme Court in *J.K. v V.W.*²¹ The court will take a number of matters into consideration when deciding whether to grant an order of guardianship. In *W.O'R. v E.H. and An Bord Uchtála*²² the Supreme Court considered the importance of the genetic link between the father and the child, but concluded that this alone would not give rise to an order of guardianship. However, the Court suggested that where the birth resulted from a stable relationship and the child was cared for by both parents the father was in a strong position in respect of an application for guardianship. Shannon states that:

“[t]he blood link, combined with the interest and concern that arose from the father’s close connection to the child, might give rise to more substantial rights in respect of the child.”²³

Among the factors that the court will consider in an application for guardianship are: “the circumstances surrounding the birth of the child; the relationship between the parents; the way in which parental responsibilities have been shared to date; and the history of access up to the date of the application.”²⁴ However, Shannon notes that there are no clear statutory guidelines in place to inform non-marital fathers or their legal advisers of the factors that will be taken into account by the court in deciding whether or not to make a guardianship order.²⁵

3.07 In 2008, there were 2,448 applications for guardianship by non-marital fathers.²⁶ This was up from 1,962 such applications in 2007.²⁷ Of those

²¹ [1990] 2 IR 437. Finlay C.J. at 447 noted that “...[t]he discretion vested in the Court on the making of such an application must be exercised regarding the welfare of the infant as the first and paramount consideration.”

²² [1996] 2 IR 248.

²³ Shannon *Family Law Practitioner* (Thomson Roundhall 2003) at para I-038.

²⁴ Shannon *ibid* at para I-038.

²⁵ Shannon *op cit* fn 23 at para H-045.

²⁶ Courts Service *Annual Report 2008* at 79, available at www.courts.ie.

2,448 applications 1,802 were granted. Of the 646 remaining applications, 363 were withdrawn or struck out by the court. The figure for applications which were refused by the court stands at 283 or 11.56% of all applications by non-marital fathers for guardianship.²⁸ This is an increase on the figures for 2007 where only 51 or 2.59% of applications were refused, and in 2006 the figure for applications refused was 42 or 3.31%. It is not clear why there were a greater percentage of refusals in 2008. Nevertheless the general trend illustrates that although there is not an absolute right on the part of non-marital fathers to guardianship of a child, for the most part where a non-marital father does indicate a desire to parent the child and to play a significant role in the life of the child, this will be possible even if the mother objects.

3.08 It would therefore seem that in practice the courts operate a presumption that a non-marital 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 a guardian. The Commission suggests that it would be helpful to place this operational presumption on a statutory footing. In New Zealand section 19(4)(a) of the *Care of Children Act 2004* provides that where a non-marital father makes an application for guardianship:

“the Court must appoint the father as a guardian of the child, unless to do so would be contrary to the child’s welfare and best interests.”

This reflects the statement of Inglis J in the New Zealand Family Court in *W v R* that a father whose relationship with the mother:

“has been more than fleeting and who wishes to play a part in the child’s life can ordinarily be expected to be appointed as a guardian unless he is for some grave reason unfit to be a guardian or unless he is unwilling to exercise the responsibilities of a guardian and subject to the paramount considerations of the welfare of the child.”²⁹

This judicial pronouncement from New Zealand appears to describe the practice in the Irish courts in relation to this matter. The Commission has accordingly provisionally concluded that a statutory presumption that a non-marital father be granted an order for guardianship/parental responsibility should be introduced,

²⁷ Courts Service *Annual Report 2007* at 28, available at www.courts.ie. These figures were also produced in *Family Law Matters* Vol 2, No. 3, Winter 2008.

²⁸ Courts Service *ibid* at 114. In 2006 there were 1,742 applications. 1,268 of these were granted, 432 were withdrawn or struck out, and 42 applications were refused. This amounts to 3.31% of applications which were refused.

²⁹ (5th April 1989) FC NAP FP 041/055/89, cited at 17 of *New Issues in Legal Parenthood*.

unless to do so would be contrary to the best interests of the child or would jeopardise the welfare of the child

3.09 *The Commission provisionally recommends the introduction of a statutory presumption that a non-marital father be granted an order for guardianship/parental responsibility unless to do so would be contrary to the best interests of the child or would jeopardise the welfare of the child.*

(2) Statutory declaration

3.10 Where the couple are in agreement that the father should have guardianship/parental responsibility, there is a straightforward system in place to secure this status. Section 2(4) of the *Guardianship of Infants Act 1964*, as inserted by section 4 of the *Children Act 1997*, provides for the making of a statutory declaration conferring guardianship rights on the non-marital father. The procedures for making the declaration are set out in the *Guardianship of Children (Statutory Declarations) Regulations 1998*.³⁰ The parties are required to have made arrangements in relation to the custody of and access to the child.³¹ The statutory declaration must be signed and witnessed by a practicing solicitor, a Peace Commissioner, a Commissioner for Oaths or a Notary Public. If there is more than one child of the relationship it is necessary to make a separate statutory declaration in respect of each child.³²

3.11 At present there is no central register of statutory declarations conferring guardianship rights. On the face of the statutory declaration, attention is drawn to the fact that it is “an important document and on completion should be kept in a safe place.” However, there is no independently verifiable process to discover if a non-marital father has guardianship of his child by virtue of an agreed statutory declaration. This could cause difficulties in situations where there is a dispute between the parties as to the status of the father, and it is not possible to locate a copy of the signed declaration. The absence of such a register also means that there are no statistics recording the numbers of statutory declarations agreeing guardianship in existence.

3.12 In 2009, the Courts Service’s Family Law Reporting Project Committee recommended the development of a central register for joint

³⁰ SI No. 5 of 1998.

³¹ Section 2(4)(d) of the *Guardianship of Infants Act 1964* as inserted by section 4 of the *Children Act 1997*.

³² This is stated in paragraph 2 of the explanatory note accompanying the 1998 Regulations.

guardianship agreements.³³ The Committee stated that a central repository of these agreements would serve three purposes. First, it would ensure that an official copy of the agreement could be obtained when necessary. Second, it would provide proof that such an agreement was made and that the non-marital father had guardianship/parental responsibility if the parents' copy was lost or destroyed. Thirdly, it would be a useful source of information for policy makers on the number of fathers who obtain guardianship/parental responsibility through making a statutory declaration.³⁴ Therefore the Committee recommended that the *Civil Registration Act 2004* be amended so that such a register could be created. The Committee also suggested that this register would be maintained by the General Register Office.

3.13 The Commission understands that some concern may arise if the General Register Office was to be given responsibility for a central register of statutory declarations agreeing guardianship/parental responsibility if the system was an optional one. The primary purpose of the General Register Office is to keep an independent record of facts relating to births, deaths and marriages and there may be a difficulty in confirming the evidential basis of an optional register of statutory declarations.

3.14 England and Wales also operates a system of parental responsibility agreements. This is provided for by section 4(1)(b) of the *Children Act 1989*. The agreement must be in a prescribed form and it must be recorded in a prescribed manner as set out in the *Parental Responsibility Agreement Regulations 1991*.³⁵ Initially the system was relatively informal, merely requiring that the agreement be signed by both parents, witnessed, and filed in the Principal Registry of the Family Division. However, it was noted that there were difficulties with this, with some agreements being filed with forged signatures.³⁶ Therefore a new procedure was introduced by which the parents must take the completed form to a local family proceedings court, or a county court, or to the Principal Registry. At this point a justices' clerk or an authorised court officer will witness the parents' signatures and will sign the certificate of the witness. The completed form, with two copies, must then be submitted to the Principal Registry. Sealed copies of the form are returned to the parents, and the record

³³ *Report of the Family Law Reporting Project Committee* (2009) at 32. The Committee was chaired by Kearns J.

³⁴ *Report of the Family Law Reporting Project Committee* at 33.

³⁵ SI 1991/1478, as amended by the *Parental Responsibility Agreement (Amendment) Regulations 1994*, SI 1994/3157. The Regulations were also amended by SI 2005/2088 to apply to agreements with step-parents.

³⁶ Lowe and Douglas *Bromley's Family Law* (10th ed Oxford University Press 2007) at 413.

is open to public inspection. There is no fee for the formal recording of the statutory agreement, but there is a fee for those who wish to inspect the record.

3.15 The Commission believes it is important to encourage as many non-marital 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. Therefore the Commission is hesitant to recommend any measure which would have the effect of making it more difficult for parents to do so. The procedure currently in place in England and Wales appears to be extremely formal, which might operate as a disincentive to many parents. This is probably not a matter of concern in England and Wales following the introduction of joint registration of the birth as a means of securing parental responsibility.³⁷ However, the existence of a central register of such agreements has much to recommend it.

3.16 The Commission has provisionally concluded that a central register should be established in Ireland to keep account of the existence of statutory declarations agreeing guardianship/parental responsibility. The Commission also considers that the development of a targeted awareness programme would assist in increasing the numbers of parents making statutory declarations agreeing guardianship/parental responsibility. In this respect, the Commission has already provisionally recommended (see Chapter 2) an increased role for Registrars of Births in providing information to new parents seeking to register the birth of a child. Information on the existence of and effects of making a statutory declaration could also usefully be provided at this point. The Commission invites submissions on whether the proposed register should be managed by the General Register Office and also whether it should be publicly available to search.

3.17 *The Commission provisionally recommends that a central register should be established in Ireland to keep account of the existence of statutory declarations agreeing guardianship/parental responsibility. The Commission invites submissions on whether the proposed register should be managed by the General Register Office and also whether it should be publicly available to search.*

³⁷ According to Lowe and Douglas *Bromley's Family Law* (10th ed Oxford University Press 2007) at 411 the understanding was that the numbers of non-married couples making statutory agreements conferring parental responsibility would reduce significantly following the introduction of automatic parental responsibility on joint registration of the birth.

D Automatic parental responsibility for all parents

3.18 As noted in part A of this chapter, the Commission previously recommended extending automatic guardianship rights and responsibilities to all parents in Ireland, regardless of marital status. The reasoning underpinning this was that all fathers, and by extension all children, should be treated equally under the legal framework. Automatic guardianship for all parents was also seen as the logical next step following the abolition of the status of illegitimacy. This recommendation met with considerable opposition at the time, and was not enacted. It is worth noting that, in Australia, reform of the law relating to family relationships began with the removal of the status of illegitimacy. Virtually alone among common law States, Australia has also enacted legislation providing for automatic parental responsibility for all parents. Section 61C of the *Family Law Reform Act 1995* (Cth) states:

“(1) Each of the parents of a child who is not 18 has parental responsibility for the child.

(2) Subsection (1) has effect despite any changes in the nature of the relationships of the child's parents. It is not affected, for example, by the parents becoming separated or by either or both of them marrying or re-marrying.

(3) Subsection (1) has effect subject to any order of a court for the time being in force (whether or not made under this Act and whether made before or after the commencement of this section).”

3.19 The existence of automatic parental responsibility for all parents in Australia is now well established. The consequence of this is that there is very little current literature on the subject of the rights of non-marital fathers in Australia.³⁸ That is not to suggest that there are no difficulties in the operation of this aspect of family law in Australia. In a review of the operation of the *Family Law Reform Act 1995* three years after implementation, significant difficulties were identified with the practical operation of joint parental responsibility between married parents who had separated.³⁹ However, the fact that all parents automatically had parental responsibility did not feature as a significant concern. It will become apparent from the discussion in the rest of this chapter that the issue of the extent of the rights of non-marital fathers and how best to

³⁸ Truex “Why Just ‘Parental’ Responsibility? Why Not ‘Family’ Responsibility? Musings from a multi cultural family lawyer,” A paper presented at the 10th Australian National Family Law Conference, Melbourne, March 2002, available at www.internationalfamilylaw.com.

³⁹ Rhoades, Graycar, and Harrison *The Family Law Reform Act, the first three years* (University of Sydney and the Family Court of Australia 2000).

secure those rights is a recurring concern in a number of other common law jurisdictions.

3.20 One of the reasons given for not extending automatic guardianship/parental responsibility to non-marital fathers in Ireland and in other common law countries is a concern that this would guarantee rights to genetic fathers who play no role in the child's life following conception. The existence of these automatic rights, however, would ensure that the genetic father had an effective veto on decisions that the mother might wish to make with regard to the child in the future.⁴⁰ This could become an issue, for example, in circumstances where the mother was in a new relationship and wished her new partner to adopt the child, as the father could refuse consent to the adoption even where he had had no contact with the child or the mother following conception. It is important to note the distinction between non-marital fathers who have no connection with the child from conception or birth and who play no role in the child's upbringing, and fathers who, although not married to the mother, are in a committed relationship with the mother of the child and play a significant role in raising the child. In the former situation the extension of automatic rights and responsibilities might be seen as not being in the best interests of the child. However, where the child is born into a stable family unit, it seems reasonable that the father would be entitled to significant rights, and that the existence of such rights would be in the best interests of the child. The issue for consideration is whether such rights should accrue automatically to fathers in these circumstances. While the Commission acknowledges that its previous recommendations on this issue were not implemented by the Oireachtas, and that the provisions in the Australian 1995 Act represent an exception to the statutory arrangements in many common law jurisdictions, it nonetheless seems worthwhile to invite submissions in the context of this

⁴⁰ See *McD v L* [2008] IEHC 96; [2008] 1 IR 417 (SC). This case involved a lesbian couple who had conceived a child through the use of a sperm donor known to them. The agreement between the parties stated that the applicant donor would be known to the child and would be in the role of an uncle. Following the birth of the child the applicant sought to increase his role, and the respondent couple attempted to distance him. The respondent couple then decided to move to Australia for a year with the child, and the applicant applied for guardianship of the child and an injunction preventing the couple from travelling. The injunction was granted pending the decision in the substantive matter, namely the guardianship application. The applicant was not successful in his application, and the case was decided in the best interests of the child, but the case indicates the consequences which could possibly flow from automatic rights based solely on a genetic link.

project as to whether it would be appropriate to introduce automatic guardianship/parental responsibility for all fathers in Ireland.

3.21 *The Commission invites submissions on whether it would be appropriate to introduce automatic guardianship/parental responsibility for all fathers in Ireland.*

E Joint registration of the birth as a means of securing guardianship/parental responsibility

3.22 In spite of the reluctance to introduce absolute equality between all fathers, most States wish to accord parental responsibility as efficiently as possible to fathers who have demonstrated an intention to parent. This has resulted in parental responsibility rights being linked to joint registration of the birth of the child in a number of States. The various provisions giving effect to this are discussed below. Northern Ireland, England and Wales, and Scotland operate similar systems, but the precise statutory provision introducing the system in each jurisdiction is set out below. In Chapter 2 the Commission examined the law relating to the registration of the birth of a child in Ireland and this included a brief discussion on the procedure for joint-registration in England and Wales. The discussion in this Part expands on the brief outline in Chapter 2.

(1) England and Wales

3.23 Section 4 of the *Children Act 1989*, as amended by section 111 of the *Adoption and Children Act 2002* provides that where a non-marital father jointly registers the birth of the child with the mother, he will obtain parental responsibility.⁴¹ The amendment applies to fathers who jointly registered the birth of a child after 1st December 2003.⁴² Lowe and Douglas⁴³ note that although parental responsibility is conferred automatically on registration, it does not put unmarried fathers in exactly the same position as married fathers. This is because parental responsibility will only date from the time of registration, rather than the time of birth. If the mother dies before the birth is jointly registered the non-marital father can only acquire parental responsibility

⁴¹ This was in response to the Lord Chancellor's Department *Consultation Paper on Court Procedures for the Determination of Paternity and the Law on Parental Responsibility for Unmarried Fathers* (March 2008).

⁴² Registration for the purpose of the Act must be in accordance with either section 10(1)(a)-(c) or section 10A(1)(a)-(c) of the *Births and Deaths Registration Act 1953*.

⁴³ Lowe and Douglas *Bromley's Family Law* (10th ed Oxford University Press 2007) at 411.

by court order, or by being appointed guardian, as he cannot register the birth alone. In addition, parental responsibility acquired by joint registration can be removed by the court and there is no provision to remove parental responsibility from a married father.⁴⁴ At the time the 2002 Act was introduced in England and Wales 80% of births outside of marriage were jointly registered, with 75% of those parents living at the same address.⁴⁵ It was therefore hoped that the majority of non-marital fathers would acquire parental responsibility through joint registration. Pickford notes that many non-marital fathers believed that by having their name on the birth certificate they were entitled to significant rights in respect of their children.⁴⁶ Thus, the legislative amendment gave effect to what many already believed was the situation.

(2) Scotland and Northern Ireland

3.24 Section 23 of the *Family Law (Scotland) Act 2006* introduced parental responsibility on joint registration of the birth.⁴⁷ As in England and Wales this is not retrospective. In Scotland most births occurring outside marriage were already jointly registered and therefore, as in England and Wales, the legislation reflected the common held belief among non-marital fathers that this gave them rights.⁴⁸

3.25 Section 1 of the *Family Law Act (Northern Ireland) 2001* amended section 5 of the *Children (Northern Ireland) Order 1995* to ensure that a non-marital father could obtain parental responsibility for his child following the joint registration of the birth. The registration must be in accordance with the provisions of the *Births and Deaths Registration (Northern Ireland) Order 1976*.

(3) New Zealand

3.26 Section 17 of the *Care of Children Act 2004* in New Zealand provides for automatic guardianship rights for the majority of parents.⁴⁹ However, not all

⁴⁴ Lord Chancellor's Department, *op cit* fn 41.

⁴⁵ Lowe and Douglas *Bromley's Family Law* (10th ed Oxford University Press 2007) at 411.

⁴⁶ Pickford "Unmarried Fathers and the Law" in Bainham, Day Sclater and Richards (eds) *What is a Parent? A Socio-Legal Analysis* (Hart Publishing 1999).

⁴⁷ The birth must be registered in accordance with section 18(1)(a)-(c) and section 20(1)(a) of the *Births, Deaths and Marriages (Scotland) Act 1965*.

⁴⁸ Dey "Mixed Messages: Parental Responsibilities, Public Opinion and the Reforms of Family Law" (2006) 20 *International Journal of Law, Policy and the Family* 225.

⁴⁹ Section 17(1) states that "The father and mother of a child are guardians jointly of the child unless the child's mother is the sole guardian of the child because of subsection (2) or subsection (3)." These subsections provide that the mother will

parents are covered by the automatic scheme.⁵⁰ Therefore, section 18 of the *Care of Children Act 2004*, as substituted by section 47 of the *Births, Deaths, Marriages and Relationships Registration Amendment Act 2008*, states that a father who is not a guardian by operation of section 17 becomes a guardian of his child if “his particulars are registered after the commencement of this section as part of the child’s birth information because he and the child’s mother both notified the birth as required by section 9 of the *Births, Deaths, Marriages and Relationships Registration Act 1995*.” Section 9 of the 1995 Act states that both parents of a child born in New Zealand are required to jointly notify a Registrar of the birth. A sole registration is only permissible where:

“(a) the child has only one parent at law; or (b) the other parent is unavailable; or (c) requiring the other parent to sign the form would cause unwarranted distress to either of the parents.”⁵¹

This linking of birth registration to guardianship in a system where there is a legal requirement to jointly register the birth of the child aims to ensure that the vast majority of non-marital fathers in New Zealand will be guardians.

3.27 The Commission recognises the difficulties surrounding linking registration of the birth of a child to the allocation of legal rights and responsibilities, as there is a concern that this would discourage people from providing as much information as possible at the time of registration. However, in circumstances where a couple who are not married are jointly registering the birth of the child, the Commission considers that the registration form could contain an **optional** additional section which would replicate the statutory declaration form. This would allow the parents to register the birth of the child and confirm the legal rights and responsibilities of the father at the same time, if they so wished. This would be a more efficient system for parents who are in agreement in relation to both registration of details of the birth and the sharing of parental responsibility. This could only occur where a couple jointly registers the birth and attends at the Registrar’s office together, as the signature of both parties must be witnessed for the purposes of the statutory declaration. This would complement the provisional recommendation in Chapter 2 that the

be sole guardian if she was not married to or in a civil union with the father at anytime between the conception of and birth of the child, nor was she living with the father in a *de facto* relationship at the time the child was born.

⁵⁰ If the father was not married to, in a civil union with, or living with the mother of the child in a *de facto* relationship for any period between the conception and the birth of the child he will not be automatically entitled to guardianship.

⁵¹ Section 9(2) of the *Births, Deaths, Marriages and Relationships Act 1995* (New Zealand).

General Register Office would maintain a central register of all statutory declarations securing guardianship/parental responsibility to non-marital fathers.

3.28 In conclusion, the Commission does not consider that linking joint registration of the birth of the child to guardianship/parental responsibility rights is desirable in Ireland at this time. This is consistent with the discussion and conclusions reached in Chapter 2 on the low number of non-marital fathers whose names are recorded on birth certificate in Ireland. In order to ensure that the right of the child to know his or her identity is respected, therefore, the Commission has provisionally concluded that it is better to maintain a distinction between birth registration and the allocation of guardianship/parental responsibilities.

3.29 *The Commission provisionally recommends that there should be no link between joint registration of the birth of a child and guardianship/parental responsibilities. However, the Commission invites submissions on this issue.*

CHAPTER 4 THE RESPONSIBILITIES AND RIGHTS OF MEMBERS OF THE EXTENDED FAMILY

A Introduction

4.01 In this chapter, the Commission turns to the rights and responsibilities of members of the extended family, including step-parents and grandparents.¹ In this respect, the Commission deals with two issues: first continuing access/contact² between children and other family members in circumstances where the relationship between the parents has broken down; and, secondly, the possible extension of guardianship/parental responsibility³ or custody/day-to-day care⁴ to a person other than the parent of the child where that person is in the position of a *de facto* parent. This chapter examines a very broad range of situations where persons other than the biological parents of a child may be enabled to apply for rights in relation to a child. This broad scope reflects the growing diversity of families in Ireland. It is also in line with the underlying principle of the Consultation Paper that the best interests of the child are the primary concern. In Part B, the Commission outlines the current legal position of extended family members in Irish family law. In Part C, the Commission examines whether the existing process concerning contact should

¹ This is in line with a particular policy focus on grandparents' rights to contact and parental responsibility in England and Wales and Scotland. For further discussion on the positive and negative aspects of this approach see Kaganas "Grandparents' rights and grandparents' campaigns" (2007) 19(1) *Child and Family Law Quarterly* 17.

² Currently the legislative term in place is "access". As the Commission has provisionally recommended in Chapter 1 altering the term to contact, both terms are used throughout the chapter.

³ Currently the term in use in the legislative provisions is "guardianship". However, the Commission provisionally recommends altering the term to parental responsibility, and therefore both terms are used in the chapter. For a more detailed discussion on the issue of terminology see Chapter 1.

⁴ The Commission provisionally recommends replacing the term "custody" as it is currently used with the term day-to-day care. Both terms are, therefore, used in the chapter.

be amended. In Part D, the Commission discusses whether the law on guardianship/parental responsibility and custody/day-to-day care requires reform as it applies to step-parents and members of the extended family.

B Current legal position of members of the extended family in Ireland

4.02 This chapter deals with two issues concerning the position of members of the extended family. The Commission begins by examining the current legal position in relation to contact by extended family members. The Commission then discusses the circumstances in which extended family members are currently given guardianship/parental responsibility or custody/day-to-day care of children where the parents are unwilling or unable to exercise their responsibilities.

(1) Access/Contact

4.03 Access/contact by members of the extended family is currently provided for in Ireland by section 11B of the *Guardianship of Infants Act 1964*.⁵ Section 11B applies to:

- Step-parents
- Grandparents
- A partner of the parent where the partner was *in loco parentis* to the child
- Aunts and uncles, and
- Siblings

4.04 The Commission understands that access/contact is granted to step-parents and grandparents by the courts. In respect of grandparents the Commission understands that the numbers applying for access/contact are quite small, as in most cases if the parent without custody/day-to-day care of the child is granted access/contact, the court will presume that contact with the grandparents will be facilitated during these periods. Often stand alone applications by grandparents only become necessary if the relationship between the parent with access/contact and his or her extended family has broken down. It may also be appropriate if the parent of the child no longer resides in the jurisdiction, is in prison, in hospital or otherwise unable to provide a connection through which his or her family members can have contact with the child. The Commission also understands that an even smaller number of

⁵ Section 11B of the *Guardianship of Infants Act 1964*, as inserted by section 9 of the *Children Act 1997*.

applications under this provision are made by other relatives, such as aunts, uncles and siblings.

4.05 The context in which an application for access/contact is made by a person who has been in *loco parentis* to the child, for example a step-parent or previous partner of the parent of the child, is very different to an application by a grandparent or other relative. In these circumstances the process contained in section 11D of the 1964 Act is the only mechanism available for the person to have contact with the child if the parent is refusing. A common scenario is where a couple get married, but one or other partner has a child from a previous relationship. In these circumstances the child is usually being raised as a child of the family, with both adults taking responsibility for the child. If the relationship between the couple subsequently ends the non biological parent has very limited rights in relation to the child. Despite the significant parental role he or she may have played in the life of the child up until that point, he or she is now treated the same as all other relatives of the child. The Commission understands that applications for access/contact by step-parents and previous partners of parents are becoming more frequent due to the increasingly diverse nature of families in Ireland.

4.06 The application under section 11B of the 1964 Act is in the form of a two stage process. Applicants must first satisfy a leave stage before the substantive application for access/contact is heard. This is discussed in greater detail in Part C.

(2) Guardianship/Parental responsibility and custody/day-to-day care

4.07 The second element of the chapter is a discussion on the extension of guardianship/parental responsibility or custody/day-to-day care to a person other than the parent of the child where that person is in the position of a *de facto* parent. There are two distinct issues to be discussed. The first is where a parent is unwilling or unable to exercise guardianship rights. In this circumstance a person who is caring for the child on a full time basis during the lifetime of the parent has no legal rights in respect of that child. This is because the court can only appoint a guardian where a child has no existing guardian, which would rarely be the case while one or both parents are alive.⁶

⁶ It could occur where the non-marital mother of the child died without appointing a testamentary guardian and the non-marital father had not secured guardianship rights either by agreement or court order. However, in those circumstances the non-marital father could still secure the necessary rights. The situation would be more complicated where the non-marital mother died without appointing a testamentary guardian and the non-marital father had been appointed guardian on foot of an application under section 6A of the *Guardianship of Infants Act 1964*

4.08 The Commission understands that there are situations where grandparents and relatives are caring for a child because the parent with guardianship is unable or unwilling to care for the child, for example as a result of drug addiction or because he or she has a mental disorder. In these circumstances the relative in the position of a *de facto* parent has no legal right to consent to medical treatment for the child or to apply for a passport for the child. It is clear, however, that there are grandparents and relatives in Ireland who are guardians of the children in their care. This can occur in two ways. First, if a parent dies and appoints the relative as a testamentary guardian. Second, if the parent dies and either does not appoint a testamentary guardian, or appoints a person as testamentary guardian who is dead or who refuses to act. In this circumstance where the child has no guardian the court can appoint a guardian.⁷ Once the relative is a guardian of the child he or she has custody/day-to-day care of the child to the exclusion of everyone but another guardian. This demonstrates that there is currently a procedure in place to allocate guardianship/parental responsibility to persons other than parents in Ireland. However, it is very limited in scope.

4.09 The second issue arises where a step-parent enters a family. In this context the non-biological parent has no parental rights in respect of the child. There is no provision to allow a step-parent to make an application for guardianship/parental responsibility or for the biological parent or parents of the child to confer guardianship/parental responsibility on the step-parent. The Commission understands that there are couples who adopt the child in order to ensure that both parents are guardians of the child. However this is not satisfactory as it requires the biological parent of the child to adopt his or her own child and it severs all legal connection between the other biological parent and the child. This procedure also cannot be used where the child is a marital child.⁸

but was subsequently removed in accordance with section 8 of the *Guardianship of Infants Act 1964*, as amended by section 7 of the *Children Act 1997*. In this situation there would be a parent alive but he would not be a guardian of the child, and it is unlikely he would be successful in another application.

⁷ Section 8 of the *Guardianship of Infants Act 1964*.

⁸ When adoption was first introduced in Ireland a marital child could not be adopted. Sections 2 and 3 of the *Adoption Act 1988* provided that a marital child could be adopted but only in circumstances where the court finds that the parents “for physical or moral reasons...failed in their duty towards the child.”

C Applications for access/contact

4.10 Traditionally in Ireland “access” was seen as the right of the parent. In fact in many cases it was looked upon as a consolation prize for the parent who was not awarded “custody” of the child. However, this is no longer the position and access/contact is now understood as the right of the child. Article 9(3) of the UN 1989 Convention on the Rights of the Child 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.”

4.11 While the provisions of the Convention on the Rights of the Child have not been incorporated in Irish law, this remains an important benchmark against which to measure the progression of Irish family law. The introduction of procedures to facilitate contact between a child and members of the extended family is also in accordance with the right to family life protected by Article 8 of the European Convention on Human Rights (ECHR) which has been held not to be confined to the traditional nuclear family.⁹ In *Marckx v Belgium*¹⁰ the European Court of Human Rights (ECtHR) held that:

“‘family life’, within the meaning of Article 8, includes at least the ties between near relatives, for instance those between grandparents and grandchildren, since such relatives may play a considerable part in family life.”

4.12 The shift in focus to a more child centred approach is also reflected in the decisions of the courts in Ireland in the context of parental applications for access/contact. In *M.D v G.D*¹¹ Carroll J. stated that the court was concerned with the right of the child to “access”, not the right of the adult. This was because the welfare of the child was the paramount consideration of the court.

⁹ Article 8 states that:

“1) Everyone has the right to respect for his private and family life, his home and his correspondence.

2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

¹⁰ (1979-1980) 2 EHRR 330 at para 45.

¹¹ High Court, 30th July 1992.

This was reinforced by section 11D of the *Guardianship of Infants Act 1964*, as inserted by section 9 of the *Children Act 1997*, which states:

“In considering whether to make an order under section 6A, 11, 14 or 16 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 or her father and mother on a regular basis.”

4.13 When access/contact is recognised as a right of the child, it is appropriate that this right should extend beyond a right of contact with the child’s parents. The reasoning behind this is that, particularly in circumstances where the relationship between the parents has broken down, the child can benefit from a stable relationship with another family member.¹² Ideally this would be achievable without recourse to an application to court, but this is not always possible. To this end the *Children Act 1997* introduced a legislative provision to facilitate access/contact with members of the extended family. The procedure requires that leave of the court be obtained prior to the application on the substantive matter.

4.14 Viewing access/contact as the right of the child also raises considerations in relation to the role of the child within applications for access/contact. If the child has a right to access/contact, should he or she be able to make an independent application for access/contact with family members? This is closely linked to the right of the child to be heard in proceedings which concern him or her as set out in Article 12 of the UN Convention on the Rights of the Child.

4.15 The Commission now turns to examine, first, the current provisions in Ireland on applications for access/contact and the ongoing need for a two stage process; and, secondly, the place of the child in applications for access/contact.

(1) Discussion of the statutory scheme in Ireland

4.16 As noted above the term currently in use in Ireland is “access” which is generally understood as a right and duty of visitation. Contact, the proposed replacement term, is a more accurate description of what is involved - it is the

¹² See Kaganas “Grandparents’ rights and grandparents’ campaigns” (2007) 19(1) *Child and Family Law Quarterly* 17 for a discussion on the inadequate research in relation to the benefits associated with contact between grandparents and grandchildren. She notes that in spite of this the rhetoric that contact with grandparents is beneficial to a child has become part of the family law policy in the UK. She suggests this is in part because the grandparents “movement” has allied itself with the fathers’ rights movement, and also because an increased role for family members is in line with government objectives because it removes some financial and care-giving burdens from the State.

right of the child to have contact with his or her family members. The use of the term contact also highlights the central position of the child in the process.

4.17 The current provisions in relation to access/contact between parents and children have been set out in the Introduction to the Paper and in Chapter 1. An application for access/contact is generally made by the parent who does not have custody/day-to-day care of the child.¹³ A non-marital father is entitled to apply for access/contact even if he does not have guardianship/parental responsibility in respect of the child.¹⁴ This was significant at the time it was introduced in 1964, as prior to that only guardians of a child could apply for access.

4.18 Section 11B of the *Guardianship of Infants Act 1964*¹⁵ provides that:

“(1) Any person who-

- (a) is a relative of a child, or,
- (b) has acted *in loco parentis* to a child,

and to whom section 11¹⁶ does not apply may, subject to subsection (3), apply to the court for an order giving that person access to the child on such terms and conditions as the court may order.

- (2) A person may not make an application under subsection (1) unless the person has first applied for and has been granted by the court leave to make the application.
- (3) In deciding whether to grant leave under subsection (1), 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 applicant disrupting the child’s life to the extent that the child would be harmed by it,
 - (c) the wishes of the child’s guardians.”

4.19 This provision is quite broad, in that it covers not only relatives of the child, including step-parents and grandparents, but also any adult who has been

¹³ Section 11(2)(a) of the *Guardianship of Infants Act 1964*.

¹⁴ Section 11(4) of the *Guardianship of Infants Act 1964*.

¹⁵ Section 11B of the *Guardianship of Infants Act 1964*, as inserted by section 9 of the *Children Act 1997*.

¹⁶ Section 11 of the 1964 Act provides a right to apply for access to parents and guardians of a child.

in loco parentis in respect of that child. This covers a situation where the non-biological parent of a child of a same-sex couple wishes to apply for access/contact. It would also cover foster parents. Section 11B (1) provides that the court may order access/contact in such terms and conditions as it sees fit. This allows the court to make an order for indirect access/contact. This could consist of phone calls, emails, letters, cards or online video communication. This is important, as in certain circumstances there may be a difficult relationship between the parent of the child and the person applying for access/contact. The ability to order indirect access/contact may be the best way of ensuring that a relationship continues between the child and the other party while causing the minimum amount of tension between the other parties involved. This respects the right of the child to such contact while at the same time recognising that children do not exist in a vacuum and that, particularly in relation to young children, the co-operation of the parent may be required to facilitate contact with other relatives.

4.20 Section 11B(2) of the *Guardianship of Infants Act 1964* provides that an application for access/contact under this provision is a two stage process. A family member or a person who has been *in loco parentis* to the child cannot apply for access/contact without first applying for leave of the court to make the substantive application. The rationale behind the inclusion of a leave stage appears to be to ensure that frivolous or vexatious applications are identified as early as possible in the process. The Commission understands that the application for leave in these matters is very rarely refused which raises questions on the continuing necessity for a leave stage. Presumably the court would be equally capable of identifying a frivolous application during the course of the substantive hearing, and could refuse the application on that basis. The practical effect of the leave stage may be to increase the expense, complexity and duration of the application. There is a possibility that this reduces the numbers of genuine applications made under this provision. The Commission has been unable to determine the breakdown between parental applications and applications by members of the extended family for access/contact.

4.21 Section 11B(3) of the 1964 Act sets out the criteria that the court must take into account in deciding whether to grant leave to apply. These are the applicant's connection to the child, any risk posed to the child, and the wishes of the guardian. The requirement to have regard to the applicant's connection to the child assists in establishing that there was a family life in existence within the meaning of Article 8 of the ECHR. The Commission is of the opinion that these are the factors that would also be considered by the court in determining the substantive application for access/contact. The Commission understands that a practice developed following the introduction of the two stage procedure that the substantive matter would be heard in the course of the

application for leave. If this remains the case, it again raises the issue of whether there is in fact a need for the initial leave stage.

4.22 There is a separate statutory scheme in place in Ireland to facilitate contact with children who have been taken into care by the Health Service Executive (HSE). This is set out in section 37 of the *Child Care Act 1991* which provides:

“(1) Where a child is in the care of a health board whether by virtue of an order under *Part III or IV* or otherwise, the board 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 board, has a *bona fide* interest in the child and such access may include allowing the child to reside temporarily with any such person.

(2) Any person who is dissatisfied with arrangements made by a health board under *subsection (1)* may apply to the court, and the court may-

(a) make such order as it thinks proper regarding access to the child by that person, and

(b) vary or discharge that order on the application of any person.

(3) The court, on the application of a health board, and if it considers that it is necessary to do so in order to safeguard or promote the child’s welfare, may-

(a) make an order authorising the board to refuse to allow a named person access to a child in its care, and

(b) vary or discharge that order on the application of any person.”

4.23 The categories of person entitled to apply for access/contact in the 1991 Act are broader than those contained in section 11B of the *Guardianship of Infants Act 1964*. Although relatives are not explicitly included in the 1991 Act, they clearly come within the scope of *bona fide* persons with an interest in the child. However, this is also broader than relatives and so could include a close family friend or a neighbour who had been caring for the child. The Commission understands that this broader category has proved useful in ensuring that where possible there is consistency in the arrangements put in place to care for a child and that the child is not unnecessarily taken away from a familiar environment.

4.24 The statutory scheme contained in section 37 of the *Child Care Act 1991* also does not include a leave stage for applications for access/contact. The Commission understands that this has not resulted in significant numbers

of vexatious applications being heard by the court and practitioners appear to regard the section as operating efficiently.

4.25 It is worth briefly noting that there is no statutory definition of what amounts to being *in loco parentis*, yet the term is used in both section 11B of the 1964 Act and in section 37 of the 1991 Act. There is, however, a common understanding of what amounts to being *in loco parentis* in respect of child, which is:

“a person who is not the parent of a particular child but takes on himself parental offices and duties in relation to the child.”¹⁷

The Commission considers that there is probably little to be gained from including a statutory definition of this term in the legislative provisions, and that there is in fact a benefit to having a flexible understanding of what amounts to being *in loco parentis*. It may not be in the best interests of the child if the category of those who are considered to be *in loco parentis* for legal purposes was drawn too narrowly. The Commission nonetheless invites submissions on this matter.

4.26 *The Commission invites submissions on whether it would be appropriate to include a statutory definition of the term in loco parentis in the legislation governing family relationships.*

(a) Comparative analysis of the leave requirement

4.27 The existence of a leave stage in applications for access/contact is not unique to Ireland. England and Wales and New Zealand also operate a leave requirement in applications for contact by certain categories of person. In England and Wales the requirement for leave is intended to act as a filter to ensure that the child and his or her parents are not subject to unnecessary interference while at the same time protecting the rights and interests of the child. The English Law Commission stated that leave would prevent outsiders with no obvious connection with the child from impacting on the exercise of parental responsibility. Generally, the closer the link between the applicant and the child the easier it will be to obtain leave. This is reflected in the 1988 Report of the English Law Commission where the leave requirement was characterised as being “scarcely a hurdle at all to close relatives such as grandparents, uncles

¹⁷ Murdoch *Murdoch's Dictionary of Irish Law* (4th ed Lexis-Nexis 2004) at 543. This is consistent with a number of sources, including *Stroud's Judicial Dictionary of Words and Phrases* (Sweet & Maxwell 2000), Vol.2, pp.1496-7. Murdoch also cites O'Hanlon J in *Hollywood v Cork Harbour Commissioners* [1992] IR 457 at 465 where being *in loco parentis* was described as “Any situation where one person assumes the moral responsibility, not binding in law, to provide for the material needs of another.”

and aunts, brothers and sisters who wish to care for or visit the child.”¹⁸ In accordance with this statement there appears to be a judicial presumption in place that leave ought to be granted to grandparents.¹⁹

4.28 Those who have argued in favour of reform of the law in respect of grandparents in England and Wales have nevertheless argued for the removal of the leave requirement on the basis that it causes delay and increases costs. To date this has not occurred, the reasoning being that while most applications would be genuine, it would be naïve to assume that all such applications would be so.²⁰ It is also the case that an application may be genuine and well intentioned, but that does not necessarily mean that the impact on the child would be positive. The leave stage was designed to provide some level of protection against such consequences. However, in March 2005 the Constitutional Affairs Committee examining the workings of the Family Courts in England and Wales recommended the abolition of the leave requirement.²¹ Kaganas suggests that while campaigns by grandparents’ groups may not have succeeded in increasing the legal rights available they have resulted in the development of a non-legal policy norm favouring contact between grandparents and grandchildren.²²

4.29 Kaganas and Piper suggest that were the leave stage to be challenged as an interference with Article 8 of the ECHR such a challenge would most likely fail. This is because the leave stage could be justified as necessary to protect the rights of the nuclear family and the welfare of the child. The procedure is a proportionate measure to achieve the aim of identifying vexatious applications. Given that the ECtHR has upheld the differential

¹⁸ English Law Commission *Report on Family Law Review of Child Law, Guardianship and Custody* (Law Com. No. 172) at 33, para 4.41.

¹⁹ Kaganas “Grandparents’ rights and grandparents’ campaigns” (2007) 19(1) *Child and Family Law Quarterly* 17 at 21.

²⁰ Lord Mackey LC (503 HL Official Report (5th series) col 1342) referenced in Lowe and Douglas *Bromley’s Family Law* (10th ed Oxford University Press 2007) at 547.

²¹ House of Commons Constitutional Affairs Committee *Family Justice: The operation of the family courts* Fourth Report of Session 2004-5 Vol 1 (TSO, 2005).

²² Kaganas “Grandparents’ rights and grandparents’ campaigns” (2007) 19(1) *Child and Family Law Quarterly* 17 at 18 refers to the requirement in parenting plans in use in England and Wales and Scotland that parents give serious consideration to contact with grandparents. There is also a charter for grandchildren in Scotland which promotes contact between grandparents and grandchildren.

treatment of marital and non-marital fathers as in accordance with Article 8²³ it would be extremely difficult for grandparents or other family members to successfully argue that they should have the same right to apply for contact as parents and guardians.

4.30 New Zealand also has a leave stage in applications for contact. The role of the extended family is particularly important in Māori culture and there is a strong recognition of this in the legislative provisions in place. Section 5 of the *Care of Children Act 2004* sets out the principles that are relevant in determining the child's welfare and best interests. Section 5(b) states:

“there should be continuity in arrangements for the child's care, development, and upbringing, and the child's relationships with his or her family, family group, whānau,²⁴ hapu,²⁵ or iwi,²⁶ should be stable and ongoing (in particular, the child should have continuing relationships with both of his or her parents).”²⁷

4.31 A parenting order empowers the court to make an order “determining the time or times when specified persons have the role of providing day-to-day care for, or may have contact with, the child.” A parenting order determining contact may specify the nature of the contact (direct or indirect), the duration of the contact, and any arrangements necessary to facilitate the contact.²⁸ A parenting order determining day-to-day care may specify “that the person has that role- a) at all times or at specified times; and b) either alone or jointly with one or more persons.”

²³ *McMichael v United Kingdom* (1995) 20 EHRR 205.

²⁴ The whānau is “the extended family, which has been the basic social unit of Maori society. It usually includes grandparents or great-grandparents and their direct descendants.” This definition appears in the report of the Law Commission of New Zealand on *New Issues in Legal Parenthood* (Report No 88 of 2005).

²⁵ A hapu is a sub-group within an iwi (tribe) made up from a number of whānau groups.

²⁶ An iwi is “a regionally based kin group, which claims descent from a single distant ancestor; a tribe.” Law Commission of New Zealand on *New Issues in Legal Parenthood* (Report No 88 of 2005).

²⁷ This is further reinforced by section 5(d) which states that “relationships between the child and members of his or her family, family group, whānau, hapu, or iwi should be preserved and strengthened, and those members should be encouraged to participate in the child's care, development, and upbringing.”

²⁸ Section 48(3) of the *Care of Children Act 2004* (New Zealand).

4.32 An application for a parenting order can be made by an “eligible person.” This is defined in section 47(1) of the *Care of Children Act 2004* and includes parents, guardians, and the spouse or partner of a parent of the child. For the purpose of this discussion the most relevant categories are:

“d) any other person who is a member of the child’s family, whānau, or other culturally recognised family group, and who is granted leave to apply by the Court, and

e) any other person granted leave to apply by the Court.”

Section 47(1)(d) of the New Zealand *Care of Children Act 2004* is similar to the provisions in Ireland and England and Wales in that it provides for family members and persons who were *in loco parentis* to apply for leave to apply for contact. Given the particular cultural conditions and Māori heritage in New Zealand the understanding of the extended family is broader than in the other jurisdictions discussed. However, section 47(1)(e) of the 2004 Act is extremely broad, in that it allows “any other person” to apply for leave to apply for contact with a child. It is unclear if this would cover the child as an applicant for contact.²⁹

4.33 Section 47(2) of the *Care of Children Act 2004* removes the leave requirement for grandparents, aunts and uncles and siblings of a child in certain specified circumstances. These are where the parent of the child has died or has been refused contact with the child by a Court, or where a parent who is entitled to have contact with a child is making no attempt to exercise that contact. Where this happens the parents of that parent, the siblings of that parent, and the siblings of the child concerned become eligible persons and do not have to obtain leave from the court prior to making an application for a parenting order. This reflects an understanding that where there is contact between a child and a parent, that should be sufficient to ensure contact with family members. It is for this reason that a leave requirement is in place to prevent vexatious applications which may conflict with the wishes of the parent. However, where there is not a functioning relationship between parent and child, the legislature in New Zealand is more open to applications by members of the extended family, as reflected in the removal of the leave stage. This appears to be in accordance with what occurs in practice in many cases in Ireland.

4.34 Having reviewed the various regimes in place in different jurisdictions, the Commission has reached the provisional view that 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*, should be removed. While it was

²⁹ For further discussion see below in relation to applications for contact by a child.

enacted to prevent frivolous or vexatious applications, the Commission notes that the absence of such a requirement in the other jurisdictions reviewed here has not given rise to such frivolous or vexatious applications. As to whether the categories of persons who can apply for access/contact should be expanded to include persons with a bona fide interest, as is currently provided for by section 37 of the *Child Care Act 1991*, the Commission has decided at this point to invite submissions on the matter.

4.35 *The Commission provisionally 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. The Commission invites submissions as to whether the categories of persons who can apply for access/contact should be expanded to include persons with a bona fide interest as is currently provided for by section 37 of the Child Care Act 1991.*

(2) The role of the child in applications for access/contact

4.36 There are two core considerations when examining the role of the child in applications for access/contact. First, that contact is the right of the child. As the Commission has already noted, this is set out in Article 9 of the UN 1989 Convention on the Rights of the Child and it has been declared as such in the Irish courts. Second, that the child has a right to be heard in applications concerning him or her. Article 12 of the UN Convention on the Rights of the Child provides that:

“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.”

4.37 Currently there is no provision in Ireland to allow a child to apply for access/contact with a relative. Given that access/contact is expressed as a right of the child, it may be worth considering if such a provision ought to be introduced. As discussed below, there are procedures in place in England and Wales and Scotland to allow a child to make such an application. However, the right of the child to be heard in matters concerning him or her can be protected without extending the right to apply for access/contact to the child. There are provisions to require the court to take account of the wishes of the child in a number of jurisdictions which are discussed below.

(a) Right of the child to apply for access/contact

4.38 Section 8 of the English *Children Act 1989* introduced a variety of orders regulating family relationships. These are collectively known as “section 8 orders” and include contact orders, prohibited steps orders, residence orders and specific issue orders.³⁰ A contact order requires “...the person with whom the child lives, or is to live, to allow the child to visit or stay with the person named in the order, or for that person and the child otherwise to have contact with each other.” Lowe and Douglas state that by providing for the child to visit or stay with the person named in the order the emphasis is on the child rather than the adult.³¹ As in Ireland, the English courts regard contact as the right of the child.³²

4.39 Section 10(1)(a) of the English *Children Act 1989* provides for parties other than the parents of a child to seek leave of the court to apply for any section 8 order.³³ Relatives, a body, authority or organisation professionally concerned with the child, and the child him or herself, require leave of the court to make an application for contact.³⁴ The inclusion of the child in this category reflects the provisions of Article 12 of the UN Convention on the Rights of the Child. Section 10(8) of the 1989 Act sets out the criteria for leave where the applicant is the child concerned,³⁵ and states that “the court may only grant

³⁰ In making an order under section 8 the court also has supplemental powers under section 11(7) to make directions or attach conditions to an order under section 8. This ensures maximum flexibility in the operation of the orders provided for. Lowe and Douglas *Bromley's Family Law* (10th ed Oxford University Press 2007) at 514.

³¹ Lowe and Douglas *Bromley's Family Law* (10th ed Oxford University Press 2007) at 521.

³² This was expressed by Wrangham J in *M v M (Child: Access)* [1973] 2 All ER 81.

³³ A parent, guardian or a person with a residence order in his or her favour are entitled to apply for contact without leave.

³⁴ An exception to this is a person who is or was, for a period of six months prior to the application, a local authority foster parent. Such a person requires the consent of the local authority prior to making an application for leave. According to Lowe and Douglas *Bromley's Family Law* (10th ed Oxford University Press 2007) at 544 this additional requirement was introduced to ensure that an application by such a foster parent would not interfere with the local authority's plans to promote stability in the child's life.

³⁵ There is some discussion as to whether section 10(8) or section 10(9) of the *Children Act 1989* applies if the applicant is a child other than the child

leave if it is satisfied that he has sufficient understanding to make the proposed application for a section 8 order.” Where leave is being sought by a child the application must be made to the High Court.³⁶ The function of the leave stage in this context is very different to the leave stage in applications by other family members and this is why different criteria apply. The leave stage in respect of the child is to determine the capacity of the child to make the application, as opposed to identifying if the application is merely frivolous or vexatious.

4.40 The law in England and Wales has further strengthened the right of the child to contact by the inclusion of contact enforcement provisions in the *Children and Adoption Act 2006*. Section 11J of the *Children Act 1989*, as inserted by section 4 of the *Children and Adoption Act 2006*, provides that a person who has failed to comply with a contact order, without reasonable excuse, can be required to perform unpaid work or to pay compensation to another person for losses incurred as a result of the breach. The application for such an order can be made by the person the child lives with, the person with whom the child should have contact, and the child concerned. If the child is making the application, the court must first grant leave on the basis that the child has sufficient understanding to make the application. In making an enforcement order the court must have regard to the welfare of the child who is the subject of the order.³⁷ The effectiveness of such a mechanism is open to question, as indeed is the benefit to be obtained from forcing people to have contact with each other.

4.41 Section 11(5) of the *Children (Scotland) Act 1995* provides that the child concerned is qualified to apply for a contact order as a person with an interest. As in England and Wales the inclusion of such a provision is in keeping with the requirements of Article 12 of the UN Convention on the Rights of the Child.

(b) Statutory requirement to take account of the views of the child

4.42 In Ireland, section 11B(3) of the *Guardianship of Infants Act 1964* sets out the criteria to be considered in granting leave to apply for access/contact with a child. Section 11B(3)(c) specifically states that the wishes of the child’s guardian be considered. This could in some circumstances conflict with the court’s duty to make a decision in the best interests of the child. This is because the wishes of the guardian and the interests of the child may not

concerned. See Lowe and Douglas *Bromley’s Family Law* (10th ed Oxford University Press 2007) at 545.

³⁶ *Practice Direction (Application by Children: Leave)* [1993] 1 FLR 313.

³⁷ There are further conditions attached to the making of an enforcement order set out in sections 11K and 11L of the *Children and Adoption Act 2006*.

always be compatible. The wishes of the child were not listed as a factor to be given particular attention under section 11B(3) of the 1964 Act. Section 11 of the *Children Act 1997* inserted a number of new provisions into the *Guardianship of Infants Act 1964*. Section 25 of the *Guardianship of Infants Act 1964*, as inserted by section 11 of the 1997 Act, states:

“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.”³⁸

Section 3 of the *Guardianship of Infants Act 1964* refers to proceedings before a court concerning the “custody, guardianship or upbringing of an infant.” It could be argued that the reference to upbringing of the infant would cover applications for access/contact by members of the extended family. However, given that the wishes of the child’s guardian are explicitly mentioned as a factor to be considered in applications for access/contact by members of the extended family, it may be more consistent with a child-centred approach to provide clearly the requirement to consider the wishes of the child in proceedings under section 11B.

4.43 The age and maturity of the child are factors to be considered by the court in taking the views of the child into account, as the older the child the more weight that should be given to his or her wishes. In *M.N v R.N.*,³⁹ in the context of an application for the return of a child under the provisions of the 1980 Hague Convention on Child Abduction,⁴⁰ Finlay Geoghegan J stated that there was a distinction between the decision of a court to hear a child and the weight to be given to the views expressed by the child.⁴¹ In that case Finlay Geoghegan J found that there was a mandatory requirement to hear the child under Article 11(2) of Council Regulation 2201/2003, the Brussels II *bis* Regulation on Matrimonial Matters, unless “this appears inappropriate having regard to his or her age or degree of maturity.” The court held that the primary consideration of the court in determining whether to hear the child was if, on the available evidence, the child appeared *prima facie* to be “of an age or level of

³⁸ The new section 25 of the *Guardianship of Infants Act 1964* came into force on 9th January 1998.

³⁹ [2008] IEHC 382; [2009] 1 ILRM 431.

⁴⁰ Hague Convention on the Civil Aspects of International Child Abduction 1980, which was implemented in Irish law by the *Child Abduction and Enforcement of Custody Orders Act 1991*.

⁴¹ *Op cit* fn 39 at 437.

maturity at which he is probably capable of forming his own views.”⁴² On the facts of the case it was found that the six year old child was capable of forming his own views and therefore should be heard by the court.

(i) England and Wales

4.44 In England and Wales where the application for leave is not made by a child, section 10(9) of the *Children Act 1989* lists the criteria to be considered in granting leave. The court is required to have regard to: the nature of the proposed application for a section 8 order, the applicant’s connection with the child, any risk that the application would disrupt the child’s life to such an extent that the child would be harmed, and where the child is being looked after by a local authority, the authority’s plans for the child’s future and the wishes and feelings of the parents of the child. The welfare of the child is a factor to be considered in determining whether to grant leave, but at the leave stage it is not the paramount consideration.⁴³ The wishes and opinions of the child are not referred to. Lowe and Douglas state, however, that the criteria set out in section 10(9) of the *Children Act 1989* are not to be considered as exclusive guidelines and therefore the court is not prevented from considering the views of the child.⁴⁴ It would be more in keeping with the spirit of Article 12 of the UN Convention on the Rights of the Child if the wishes of the child were explicitly included as a factor to be considered by the court, particularly when the wishes of the parents or guardians are mentioned. Scotland and New Zealand have included statutory provisions to this effect.

(ii) Scotland

4.45 Section 11 of the *Children (Scotland) Act 1995* provides that a court may make a range of orders regulating rights and responsibilities in respect of a child. Section 11(2)(d) allows for an order:

“regulating the arrangements for maintaining personal relations and direct contact between a child under that age [16] and a person with whom the child is not, or will not be, living (any such order being known as a “contact order”).”

4.46 An application for an order under section 11 of the 1995 Act can be made by a person with parental responsibility, but also by a person who “not

⁴² *Op cit* fn 39 at 438.

⁴³ Lowe and Douglas *Bromley’s Family Law* (10th ed Oxford University Press 2007) and Kaganas and Piper “Grandparents and Contact: ‘Rights v Welfare’ Revisited” (2001) 15 *International Journal of Law, Policy and the Family* 250 at 254.

⁴⁴ Lowe and Douglas *Bromley’s Family Law* (10th ed Oxford University Press 2007) at 546.

having, and never having had, parental responsibilities or parental rights in relation to the child, claims an interest.” Most relatives of a child and a person that was *in loco parentis* would qualify as a person with an interest and therefore can apply for contact or residence.

4.47 In deciding whether to make a contact or residence order the court is obliged to have regard to a number of factors. These are set out in section 11(7) of the 1995 Act and include the welfare of the child as the paramount consideration. Significantly, section 11(7)(b) of the 1995 Act states that the court:

“taking account of the child’s age and maturity, **shall** so far as is practicable-

- i) give him an opportunity to indicate whether he wishes to express his views;
- ii) if he does so wish, give him an opportunity to express them; and
- iii) have regard to such views as he may express.”⁴⁵

This is followed by section 11(10) of the 1995 Act which provides that, without prejudice to the above, a child over the age of twelve shall be presumed to be of sufficient age and maturity to form a view for the purposes of making a decision in relation to an order under section 11. This is a clear commitment to respect the right of the child to be heard.

(iii) New Zealand

4.48 Section 48(1) of the *Care of Children Act 2004* provides for the making of parenting orders. These include directions relating to day-to-day care and contact. Section 6 of the 2004 Act states that in any decision relating to guardianship, day-to-day care, or contact, a child must be given reasonable opportunities to express his or her views, and these views, which can be given directly or through a representative, must be taken into account.

4.49 Section 7 of the 2004 Act provides that the court may appoint a lawyer to act for a child who is the subject of, or who is a party to, proceedings under the *Care of Children Act 2004*. The section goes on to state that:

“unless it is satisfied the appointment would serve no useful purpose, the Court **must**⁴⁶ make an appointment under subsection (1) if the proceedings-

⁴⁵ Emphasis added.

⁴⁶ Emphasis added.

- a) involve the role of providing day-to-day care for the child, or contact with the child; and
- b) appear likely to proceed to a hearing.”

This ensures that the right of the child to be heard in accordance with Article 12 of the UN Convention on the Rights of the Child is respected while not going so far as the legislatures in England and Wales and Scotland and extending the right to apply for such orders to children.

4.50 In conclusion, the Commission sees some merit in the view that it may be appropriate to extend the right to apply for access/contact to include the child, as this could further strengthen the position that access/contact is a right of the child. The Commission intends to invite discussion on this and on whether it would be necessary to include a leave stage to determine the capacity of the child. The Commission also invites submissions on the inclusion of a specific requirement that the wishes of the child be considered in making a decision on an application for access/contact by a member of the child’s extended family

4.51 The Commission invites submissions on the possibility of extending the right to apply for (or to apply for leave to apply for) access/contact to include the child. The Commission also invites submissions on whether it would be necessary to include a leave stage to determine the capacity of the child; and to include a specific requirement in Irish law that the wishes of the child be considered in making a decision on an application for access/contact by a member of the child’s extended family.

D Discussion on reforming the law on guardianship/parental responsibility and custody/day-to-day care

4.52 As already noted, there are two distinct situations where it could be in the best interests of the child to make provision for persons other than parents to exercise guardianship/parental responsibility and custody/day-to-day care. The first of these is where the parent is unwilling or unable to care for the child and another person, usually a member of the extended family, is already exercising these functions in practice. The Commission understands that this occurs quite frequently. The second situation is where a step-parent is caring for a child, and to all intents and purposes is a social parent for the child. Presently there is no provision to allow a step-parent to have guardianship/parental responsibility for the child unless the child is jointly adopted by the biological parent and the step-parent. Adoption of a child in these circumstances is also unsatisfactory as it ends the relationship between the child and the other biological parent. However, even this option is not available where the child is a marital child and the biological parents are no

longer together as a result of divorce or the death of one parent. In England and Wales, Scotland and New Zealand, provisions are in place to ensure that persons caring for a child on a full time basis, either in the position of step-parents or as *de facto* parents, are able to access and therefore exercise the associated rights. There are two core mechanisms used to achieve this. These are the linking of parental responsibility to residence or day-to-day care and the allocation of parental responsibility to a step-parent by agreement or on application to court. The various schemes in place are discussed in greater detail below.

(1) *The linking of residence and parental responsibility*

4.53 In England and Wales the legal rights associated with caring for a child are not limited to parents and guardians. Section 8 of the *Children Act 1989* also provides for the court to make an order setting out where the child is to live. “Residence” was the term chosen in the UK to replace custody, and therefore a person with a residence order is also responsible for the day-to-day care of the child. Applications for a residence order are not confined to the parents of the child. Parents, special guardians⁴⁷ and certain other persons are eligible to apply for a residence order without leave. Eligible persons include any person that the child has lived with for a period of three years, any party to a marriage (whether subsisting or not) where the child is a child of the family, and any person who has the consent of those with parental responsibility for the child.⁴⁸ If the child is in the care of the local authority then any person who has the consent of the local authority can apply for a residence order in respect of the child. This removes the requirement for a leave stage in applications for a residence order where there is agreement with those who have responsibility for the child that he or she should be in the care of the person making the application. Outside of those who satisfy the criteria as an eligible person an application for a residence order must be preceded by an application for leave. The criteria for the granting of leave are the same as those set out above in the context of applications for contact.⁴⁹

4.54 Section 12(2) of the *Children Act 1989* states that where a residence order is made in favour of a person who is not a parent or guardian of the child,

⁴⁷ See below for a discussion on special guardians.

⁴⁸ Section 10(5) of the *Children Act 1989*.

⁴⁹ The criteria are: the nature of the proposed application for a section 8 order, the applicant’s connection with the child, any risk that the application would disrupt the child’s life to such an extent that the child would be harmed, and where the child is being looked after by a Local Authority, the Local Authority’s plans for the child’s future and the wishes and feelings of the parents of the child.

then that person shall also have parental responsibility in respect of the child for the duration of the residence order. However, section 12(3) of the 1989 Act provides that if a person who is not a parent or guardian has parental responsibility by virtue of a residence order, 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 provision ensures that a person with the legal responsibility for caring for the child also has the necessary rights to fulfil those responsibilities appropriately, but he or she cannot make certain key decisions which could have the effect of alienating the parental responsibility rights of the parent or guardian. Nevertheless the extension of the general parental responsibility rights would be important in situations where consent was required for medical treatment for the child and the child is residing with a person who is not a parent or guardian. This extension of parental responsibility to a person with a residence order in respect of a child does not affect the existence of parental responsibility on the part of the parents of the child.⁵⁰ Where a non-marital father who would not otherwise have parental responsibility is granted a residence order then section 12(1) states that the court must also make an order under section 4 of the 1989 Act granting him parental responsibility. Again this recognises that a person who is providing for and caring for a child requires the necessary legal rights to enable him or her to do so effectively.

4.55 The legislative framework in Scotland also links parental responsibility to residence. Section 11(12) of the *Children (Scotland) Act 1995* provides that where a residence order is made in favour of a person who does not have all the parental responsibilities and rights provided for in the statute in respect of the child,⁵¹ then that person:

“shall, subject to the provisions of the order or of any other order made under subsection (1) above, have the relevant responsibilities and rights while the residence order remains in force.”

The linking of the exercise of parental responsibility with the day-to-day care of a child for persons who are not parents or guardians of the child appears to be an attempt to balance the reality of the situation with a desire to ensure that, for the most part, parents have the primary responsibility for caring for their children.

⁵⁰ Section 2(6) states that a person with parental responsibility “shall not cease to have that responsibility solely because some other person subsequently acquires parental responsibility for the child.”

⁵¹ See Chapter 1 for a discussion on the detailed definition of parental responsibility contained in the Scottish legislative provisions.

4.56 *The Commission provisionally recommends extending the right to apply for custody/day-to-day care to persons other than parents or guardians of the child where the parents are unwilling or unable to exercise their responsibilities. The Commission also provisionally recommends that guardianship/parental responsibility should be linked to an order granting custody/day-to-day care in these circumstances. The Commission provisionally recommends that such rights would be extended to the same category of persons who can currently apply for leave to apply for access/contact.*

4.57 *The Commission invites submissions on whether the category of persons who can apply for custody/day-to-day care 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 access/contact.*

(2) *The allocation of guardianship/parental responsibility to step-parents*

4.58 The English Law Commission *Report on Family Law Review of Child Law, Guardianship and Custody*⁵² noted that a tentative proposal in the Law Commission *Working Paper on Guardianship*⁵³ to the effect that parents would be able to appoint step-parents as guardians to share parental responsibility had attracted little support. This suggests that the concept of a child having more than two persons with parental responsibility was not acceptable at the time. This was reflected in the *Children Act 1989* where step-parents had no special status, and step-parents were required to apply for a joint residence order to secure parental responsibility. A similar situation was introduced in Scotland with the Scottish Law Commission stating the:

“availability of a non-exclusive package of parental responsibilities and rights, conferred in a way which is as non-threatening to the absent parent as possible, could be particularly useful for step-parents.”⁵⁴

4.59 Rather than requiring the step-parent and biological parent to apply to adopt the child, with the effect that all ties with the other biological parent are severed, this provision allowed for an application confirming that the child is to reside with the parent and step-parent. This conferred parental responsibilities and rights on the step-parent while maintaining parental responsibility on the

⁵² (Law Com. No. 172) at 34, para 4.45.

⁵³ (1985) No. 91 at paras 4.15-4.19.

⁵⁴ Scottish Law Commission *Report on Family Law* (Scot Law Com No. 135) at 58, para 5.39.

part of the non-resident biological parent.⁵⁵ However, if the residence order in favour of the step-parent is subsequently removed he or she will no longer have parental responsibility. The Scottish Law Commission recognised that this may not be the perfect solution for all step-parents but felt that it would be a sufficient answer to the problems faced in many cases.⁵⁶ This is no longer the position in England and Wales following the introduction of a procedure for the appointment of special guardians, without always having recourse to the courts. New Zealand has also introduced provisions for the appointment of additional guardians. To date Scotland has not introduced provisions specifically directed towards securing parental responsibility for step-parents without the need for a court order.⁵⁷

(a) Special guardians in England and Wales

4.60 Section 112 of the *Adoption and Children Act 2002*, inserted section 4A into the *Children Act 1989*, which states that a person who is married to or in a civil partnership with a parent who has parental responsibility for the child can obtain parental responsibility by agreement or with a court order. Section 4A(1) of the *Children Act 1989* provides:

“Where a child’s parent (‘parent A’) who has parental responsibility for the 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 other parent also has parental responsibility for the child, both parents may by agreement with the step-parent provide for the step-parent to have parental responsibility for the child; or

⁵⁵ This would also be useful in Ireland in a situation where one spouse in a married couple died and the surviving spouse remarried. In these circumstances there is no option for the parent and step-parent to jointly adopt the children as they are marital children. If the court was in a position to make an order that the couple were to have joint day-to-day care of the child, which in turn ensured parental responsibility for the step-parent, there would at least be a procedure in place to strengthen the position of the step-parent in respect of the children.

⁵⁶ Scottish Law Commission *Report on Family Law* (Scot Law Com No. 135) at 58, para 5.39.

⁵⁷ For a discussion of proposals that were considered in Scotland in relation to this issue, but not ultimately included in the legislative provisions, see Dey “Mixed Messages: Parental Responsibilities, Public Opinion and the Reforms of Family Law” (2006) 20 *International Journal of Law, Policy and the Family* 225.

- b) The court may, on the application of the step-parent, order that the step-parent shall have parental responsibility for the child.”

4.61 It is not open to a person who is co-habiting with the parent of the child to make an application under this provision. Lowe and Douglas note that the purpose of the procedure is to provide an alternative to adoption of the child by the step-parent and the parent.⁵⁸ The Explanatory Notes accompanying the 2002 Act clarify that the special guardian procedure was favoured because it does not remove parental responsibility from the other biological parent nor does it prevent the child retaining contact and a legal relationship with the members of the extended family of the other parent.⁵⁹

(b) Additional guardians in New Zealand

4.62 Most parents of a child in New Zealand are guardians of that child.⁶⁰ However, guardianship is not limited to biological parents and a child can have more than two guardians. The *Care of Children Act 2004* makes provision for the appointment of an eligible spouse or partner of a parent as an additional guardian of a child. In order to be eligible for appointment the spouse or partner must have shared responsibility for the day-to-day care of the child for a least one year.⁶¹ If both parents of the child are guardians an additional guardian can only be appointed by both parents. If the mother is a sole guardian merely because the father was not married to, in a civil union with, or living with the mother for any period between the conception and birth of the child, then the appointment of an additional guardian requires the consent of the father. If a parent is a joint guardian of the child along with a testamentary guardian then the appointment of an additional guardian must be made by both the parent and the testamentary guardian. When appointing an additional guardian the guardian(s) of the child and the proposed additional guardian must make a statutory declaration to the effect that he or she is of the opinion that it is in the best interests of the child, and that he or she has taken all reasonable steps to

⁵⁸ Lowe and Douglas *Bromley's Family Law* (10th ed Oxford University Press 2007) at 423.

⁵⁹ Explanatory Notes to the *Adoption and Children Act 2002* at para 268.

⁶⁰ See Chapter 3 on the responsibilities and rights of non-marital fathers for a discussion on the allocation of guardianship in New Zealand.

⁶¹ The person must also never have been a respondent in domestic violence proceedings, have been convicted of an offence involving harm to a child, or have been involved in previous proceedings under the *Care of Children Act 2004*, or a former corresponding act, or Part II of the *Children, Young Persons , and their Families Act 1989* involving the child concerned.

ascertain and consider any views expressed by the child on the matter.⁶² The appointment of an additional guardian requires the approval of a Registrar of the Family Court in New Zealand.

(c) Court orders granting parental responsibility to step-parents in Scotland

4.63 It was stated above that Scotland has not yet introduced procedures for allocating parental responsibility to step-parents by agreement. However section 11 of the *Children (Scotland) Act 1995* provides that a court may make an order granting parental responsibility, and applications for such an order are not limited to the parents of a child. It also includes a person who:

“not having, and never having had, parental responsibilities or parental rights in relation to the child, claims an interest.”

This allows for applications to court by step-parents who wish to secure parental responsibility for the child. The advantage that this has over an application for a joint residence order is that the step-parent will continue to have parental responsibility for the child if the joint residence order is no longer in effect. The distinction between the Scottish provisions and those in operation in England and Wales and New Zealand is that there is no mechanism for agreeing parental responsibility for a step-parent without recourse to the courts. The proposals to introduce a procedure to agree parental responsibility for step-parents were rejected in Scotland on the grounds that it would be difficult to ensure that any such agreement was in the best interests of the child. It was also felt that if the authority to extend parental responsibility to step-parents was to lie solely with the court there would be a greater likelihood of the wishes of the child being given due consideration.

4.64 The ability to appoint a special guardian or an additional guardian recognises the increasingly common situation where a child is born to a couple who are not married, and subsequently one or both parents form new relationships. When this happens the child is often part of two family units and may well be cared for primarily by a person who is not a biological parent. The Commission understands that this can cause difficulties for the spouse or partner of the biological parent who is fulfilling the role of a parent without the associated rights. A very clear example of this is where a step-parent wishes to apply for a passport for a child but is not legally entitled to sign the application form. Irish law to date has not been open to the possibility that a child may have

⁶² The guardian must also declare that to the best of his or her knowledge the proposed additional guardian has not been convicted of an offence of the kind referred to in section 23(2)(d) of the *Care of Children Act 2004* and that there is no other reason why the proposed additional guardian is not eligible.

more than two active guardians at any stage. The Commission is of the view that, in light of the changing nature of family relationships in Ireland and the growth in the numbers of second families, it is appropriate to consider the possibility that more than two people could have guardianship/parental responsibility for a child and invites submissions on this.

4.65 *The Commission invites submissions on whether it would be appropriate to develop a procedure to extend guardianship/parental responsibility to a step-parent. The Commission also invites 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 guardianship/parental responsibility.*

CHAPTER 5 SUMMARY OF PROVISIONAL RECOMMENDATIONS

The Commission's provisional recommendations in this Consultation Paper may be summarised as follows:

5.01 The Commission provisionally recommends that, to ensure greater accuracy, clarity and consistency, the terms "parental responsibility," "day-to-day care" and "contact" should be used in relevant Irish family law legislation in place of "guardianship," "custody" and "access". [Paragraph 1.39]

5.02 The Commission provisionally recommends that a broad statutory definition of parental responsibility should be adopted in Ireland. The Commission invites submissions on whether this should include a requirement to consult with other parties who have parental responsibility for the child where it is practical to do so. The Commission also invites submissions on whether there should be a single parenting order to determine who should have day-to-day care of the child and who should have contact with the child. [Paragraph 1.54]

5.03 The Commission provisionally recommends that a statutory definition of day-to-day care should be adopted in Ireland. The Commission invites submissions on the precise wording of the definition. [Paragraph 1.56]

5.04 The Commission provisionally recommends that a statutory definition of contact should be adopted in Ireland. The Commission invites submissions on the precise wording of the definition. [Paragraph 1.58]

5.05 The Commission provisionally recommends that the changes recommended in this Consultation Paper be incorporated into a consolidated Children Act, which would replace the Guardianship of Infants Act 1964, as amended. [Paragraph 1.60]

5.06 The Commission provisionally recommends that the distinction between birth registration and the allocation of guardianship/parental responsibility should remain. [Paragraph 2.18]

5.07 The Commission invites 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. [Paragraph 2.24]

5.08 The Commission invites 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 include the father's details on the birth certificate. The Commission also invites submissions on whether there should be a statutory duty on a Registrar to inform the mother of the option of re-registering the birth at a later stage to include the father's details. [Paragraph 2.29]

5.09 The Commission invites submissions on whether it would be appropriate to introduce compulsory joint registration of the birth of a child in Ireland. The Commission also invites submissions on whether a non-marital father should be able to provide his details independently to the Registrar, to be registered once it is confirmed that he is the father. [Paragraph 2.34]

5.10 The Commission provisionally recommends that the presumption of paternity in the context of married couples should be retained, but that the existing statutory exceptions should be extended, and invites submissions on the detailed nature of the extensions. [Paragraph 2.44]

5.11 The Commission provisionally recommends the introduction of a statutory presumption that a non-marital father be granted an order for guardianship/parental responsibility unless to do so would be contrary to the best interests of the child or would jeopardise the welfare of the child. [Paragraph 3.09]

5.12 The Commission provisionally recommends that a central register should be established in Ireland to keep account of the existence of statutory declarations agreeing parental responsibility/guardianship of children. The Commission invites submissions on whether the proposed register should be managed by the General Register Office and also whether it should be publicly available to search. [Paragraph 3.17]

5.13 The Commission invites submissions on whether it would be appropriate to introduce automatic guardianship/parental responsibility for all fathers in Ireland. [Paragraph 3.21]

5.14 The Commission provisionally recommends that there should be no link between joint registration of the birth of a child and guardianship/parental responsibilities. However, the Commission invites submissions on this issue. [Paragraph 3.29]

5.15 The Commission invites submissions on whether it would be appropriate to include a statutory definition of the term *in loco parentis* in the legislation governing family relationships. [Paragraph 4.26]

5.16 The Commission provisionally 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*. The Commission invites submissions as to whether the categories of persons who can apply for access/contact should be expanded to include persons with a bona fide interest as is currently provided for by section 37 of the *Child Care Act 1991*. [Paragraph 4.35]

5.17 The Commission invites submissions on the possibility of extending the right to apply for (or to apply for leave to apply for) access/contact to include the child. The Commission also invites submissions on whether it would be necessary to include a leave stage to determine the capacity of the child; and 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 by a member of the child's extended family. [Paragraph 4.51]

5.18 The Commission provisionally recommends extending the right to apply for custody/day-to-day care to persons other than parents or guardians of the child where the parents are unwilling or unable to exercise their responsibilities. The Commission also provisionally recommends that guardianship/parental responsibility should be linked to an order granting custody/day-to-day care in these circumstances. The Commission provisionally recommends that such rights would be extended to the same category of persons who can currently apply for leave to apply for access/contact. [Paragraph 4.56]

5.19 The Commission invites submissions on whether the category of persons who can apply for custody/day-to-day care 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 access/contact. [Paragraph 4.57]

5.20 The Commission invites submissions on whether it would be appropriate to develop a procedure to extend guardianship/parental responsibility to a step-parent. The Commission also invites 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 guardianship/parental responsibility. [Paragraph 4.65]



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