

# PUBLIC CONSULTATION - CITIZENS' ASSEMBLY ON GENDER EQUALITY 2020

## QUESTIONNAIRE

CA30205	Treoir: The National Federation of Services for Unmarried Parents and their Children
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### Theme 1: Gender norms and stereotypes

#### Gender norms and stereotypes as barriers to gender equality

Fixed ideas about what women and men should do in the home or at work are learned by girls and boys in early childhood and throughout their lives. These ideas or gender stereotypes affect their choices in school and as they enter careers and contribute to a lack of progress toward equality between women and men. This limits not only the jobs that women and men consider or are available to them, but also can exclude women and men from social roles and tasks.

- Please outline what you see as the key barriers/ obstacles and challenges to gender equality under this theme in law, policy and practice.

Treoir was founded in 1976 to improve the position of unmarried parents and their children in Ireland. Treoir, in partnership with its member agencies, promotes the rights and best interests of unmarried parents and their children through providing specialist information, support services, training and advocating for their rights. Since our foundation Treoir has continuously advocated for gender equality. Treoir recognises that women continue to be the primary carers of children and have historically borne the burden of care of children, particularly in the unmarried family. To achieve gender equality in the family framework, the burden of care needs to be shared more equally between both parents. Treoir promotes shared parenting and seeks to address the barriers that remain to the full participation of both parents in parenting their children.

The roots and reproduction of gender inequality are complex, multifaceted and dynamic in nature. Gender operates in tandem with other key organising categories such as race, class, and definitions of the family, all of which cut across each other to produce a range of inequalities.

In the Irish context the state is a key player in shaping gender norms and stereotypes and thus the lived experience of men and women's lives. This is particularly the case when it comes to childcare, parenting and parental responsibility, labour market participation, the family law system, and economic wellbeing. When it comes to unmarried parents all of these issues produce different yet significant gender inequalities. Treoir advocates on behalf of the latter so the issue of gender inequality will be discussed as it pertains to this specific group.

In terms of legislation in Art.41.1.1 of the Constitution, the State recognises the Family as "the natural primary and fundamental unit group of Society ... possessing inalienable and imprescriptible rights, antecedent and superior to all positive law". The Constitution does not provide a definition of "Family" but in Art.41.3.1, it commits

the State to guard with special care the institution of Marriage “on which the Family is founded”.

In 1966 a landmark Supreme Court Case found “that the family referred to in [Article 41] is the family which is founded on the institution of marriage”. By implication, the non-marital family is not a Family for the purpose of Articles 41 and 42 of the Constitution and therefore does not enjoy the same inalienable and imprescriptible rights attributed to the marital family.

Ireland’s demographic and socio-economic landscape has changed dramatically over the last forty years. These changes have had implications for the nature of Irish families both in terms of composition, and the issues they face.

The provisions of the Constitution dealing with the family and children have been amended in ways that mark a break with Catholic social teaching as a philosophical influence on the Constitution.

The legislative and cultural changes since the adoption of the Constitution imply that non marital parents of both sexes enjoy inherent constitutional rights in relation to their children. Yet, inequalities still exist.

In 2017, 62,053 new births were registered in Ireland. Of these, 23,340 children were born into non-marital families, making up 37.6% of the total number which is the highest on record and is indicative of the trend over the last 20 years that more children are being born to unmarried parents year on year.

In Article 2 of the United Nations Convention on the Rights of the Child (1989) it states that children have the right to be protected from discrimination irrespective of the marital status of their parents.

Despite Ireland’s ratification of this UN Convention and the progression of rights for families following the Children and Families Relationships Act (2015), unmarried fathers continue to have restrictions imposed on them in relation to guardianship compared to an unmarried mother and married parents. Currently, married parents, of the opposite sex, will both enjoy the same rights and responsibilities for their children from the moment of birth.

When a child is born outside of marriage, the mother is automatically the sole legal guardian. An unmarried father whose name is on his child’s birth cert does not have guardianship rights in respect of his child.

An unmarried father can obtain guardianship of his child at any time following the birth by signing a witnessed statutory declaration with the mother. In the absence of an agreement, it is necessary for an unmarried father to apply to the Court to be appointed joint guardian of his child.

The Children and Family Relationships Act provides that unmarried fathers can acquire automatic guardianship rights by virtue of cohabiting with the child’s mother for 12 months, three months of which must be post birth.

Both the statutory declaration and the co-habiting condition depend on the father’s relationship with the mother and not the child.

- Please identify the steps to be taken to address the issues raised and who should address them (e.g. the state, private sector, education system etc.)

Whether elevated to constitutional status or introduced by legislation, Treoir favours an end to the current situation where unmarried fathers who are involved in the welfare, care and maintenance of their children have less rights to the guardianship of their children than the mother.

There is no reason to make a distinction based on marital status in relation to the rights of unmarried fathers vis a vis mothers. The recognition of the family based on marriage, has given rise to the gender discrimination faced by unmarried fathers. In particular, guardianship rights should flow to fathers on the establishment of paternity subject always to the discretion of the courts to remove those rights in circumstances where this is warranted, as in the case of married parents. This could be achieved through legislation.

A first step to address this issue would be for the Minister for Justice to immediately issue a commencement order for Section 97:27A (Amendment to the Civil Registration Act 2004) of the Children and Family Relationship Act 2015, whereby Registrars may take and receive statutory declarations of guardianship agreed between unmarried parents of a child.

Section 97: 27A read as follows:

“A registrar may, during the period of 14 days immediately following the date on which the birth of a child is registered or re-registered, take and receive a statutory declaration made under section 2 (4)(e) or 6B(4)(c) of the Guardianship of Infants Act 1964 in respect of the child.”

Commencement of the above section would make it easier for an unmarried father to become a guardian (if the mother is in agreement) and raises awareness amongst parents that an unmarried father’s name on a child’s birth certificate does not confer any rights of guardianship.

Treoir recommends that a Central Register for joint guardianship agreements be established to ensure that an official copy of an agreement could be obtained as and when required.

Article 41.1. confers rights on the family unit as distinct from the rights of individual members of the family and are therefore distinct from personal rights protected by the Constitution. Treoir recommends that parental rights and responsibilities apply equally to all parents, mothers, fathers, married or unmarried and be subject to the principle that children’s rights are paramount.

## **Theme 2: Work: Occupational segregation by gender, gender discrimination and the gender pay gap**

Women and men are often concentrated into different kinds of jobs and within the same occupations, women are often in work that is less well paid and has less opportunities for career advancement. Women often work in areas where they can work part-time so

as to fit in with their caring responsibilities. While many men work in low paid jobs, many professions dominated by women are also low paid, and professions that have become female-dominated have become lower paid. This worsens the gender pay gap (the average difference between the wages of women and men who are working).

- Please outline what you see as the key barriers/ obstacles and challenges to gender equality under this theme in law, policy and practice.

Women are over-represented in sectors and jobs with endemic low pay and insecurity, like health and social care, childcare, cleaning and retail. They are twice as likely as men to be working part-time and in want of more hours. When you include part-time work in the calculation the gender pay gap becomes much starker. This is because women do more part-time work than men, and, crucially, because part-time work is paid less hour per hour — two facts which are not unrelated.

When we rely on individuals' personal choice to make decisions about labour patterns in this way, it tends to be women, not men, who opt for part-time and flexible work to meet care needs, reinforcing existing care-related gendered labour inequalities. In reality "choice" over working hours and contracts is predetermined by socio-economic class, income levels and gender. Thus the over concentration of women in part-time, precarious, low paid work with limited security and protections not only reproduces gender inequality but is itself a product of an unregulated labour market, poor workers' rights, and an out of date welfare regime.

- Please identify the steps to be taken to address the issues raised and who should address them (e.g. the state, private sector, education system etc.)

Pay inequality is a structural, not an individual issue. Legislative and policy solutions at the level of the state are needed to counter the biases and imbalances that currently exist in the jobs market.

1. In terms of public policy a generous social security system and universal access to decent public services is of critical importance in addressing the feminization of poverty and labour market accessibility. In this regard, the constitutional distinction (Article 41.3) between the marital and non-marital family should be revised. Families be they cohabiting, or headed by a lone parent should be protected in law and their needs addressed in social welfare and taxation regimes that are fit for purpose in 21<sup>st</sup> century Ireland. Such a regime must also ensure that lone parent households, who in the main are headed by women, are not penalised for working outside of the home.
2. It is of critical importance that models of childcare delivery that embed childcare in the social fabric of communities, neighbourhood and workplaces are resourced and introduced. The aim must be a model of childcare that is publically funded, ensures universal access and is essentially a public service. The current model of childcare as provided for through the National Childcare

Scheme does not meet these requirements as it is dependent on the private market for provision.

### **Theme 3. Care, paid and unpaid, as a social and family responsibility**

#### Care -- the social responsibility of care and women and men's co responsibility for care, especially within the family

Women remain disproportionately responsible for unpaid care and often work in poorly paid care work. For working parents or lone parents, balancing paid work with parenting and or caring for older and dependent adults presents significant challenges. Women are most disadvantaged by these challenges, yet men also suffer from lack of opportunities to share parenting and caring roles. Despite recent legislation and policy initiatives to support early years parental care, inequalities in the distribution of unpaid care continue between women and men. The cost of childcare has been identified as a particular barrier to work for women alongside responsibilities of caring for older relatives and dependent adults.

- Please outline what you see as the key barriers/ obstacles and challenges to gender equality under this them in law, policy and practice.
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There are significant challenges for unmarried parents to establishing and sustaining shared parenting relationships of their children. In 2018 Treoir commissioned research into the Barriers Unmarried fathers face to shared parenting. The research found that the lack of information, support and financial resources to assist unmarried fathers to stay involved in their children's lives in a significant way is a key obstacle to them sharing the parenting of their children.

There is evidence of the existence of official, professional and cultural biases, which serve to construct fathers as being of lesser importance and value where children are concerned. The research shows that there is scope for the development of a stronger legislative, policy and practice infrastructure in Ireland which is conducive to the normalisation of shared parenting arrangements in unmarried families.

[https://www.treoir.ie/wp-content/uploads/2018/12/Booklet\\_Version\\_Executive-Summary-An-Examination-of-the-Barriers-to-Shared-Parenting.pdf](https://www.treoir.ie/wp-content/uploads/2018/12/Booklet_Version_Executive-Summary-An-Examination-of-the-Barriers-to-Shared-Parenting.pdf)

As already noted the lack of access to properly resourced and publicly funded childcare contributes to gender imbalance in terms of caring for children. The state has also failed to invest in any meaningful way in the promotion of shared parenting or in educating men, particularly young men, about the responsibilities and practicalities of being a parent.

Demographic changes, dramatic changes in family formation and structure, and significant cultural shifts are collectively putting pressure on families and public services. Ireland's public services especially in relation to housing, access to justice (legal aid), family supports, mediation and the family law system are inadequate for today's society. All of the above impact gender relations and put pressure and stress on relationships between unmarried parents and their children, and additional family members.

Kinship care is the full time parenting of children by grandparents, older siblings, aunts and uncles, other relatives or friends of the family. It occurs for many reasons, for example, death of a parent, parental substance misuse, abandonment, illness or imprisonment.

Grandparents, aunts, and adult siblings, the majority of whom are women are now increasingly rearing children (sometimes very young children) with little if any support from the state. This unrecognised, unpaid and often taken for granted work by Kinship carers, is highly gendered and seriously impacts one's ability to participate in the labour market. Kinship carers may apply for a Guardians payment and may receive child benefit. However they do not receive additional supports, such as parenting support, counselling or therapeutic support, when it comes to the children in their care, a significant proportion of whom may be traumatised and have additional needs.

- Please identify the steps to be taken to address the issues raised and who should address them (e.g. the state, private sector, education system etc.)

4. It is of critical importance that alternative models of childcare delivery that embed childcare in the social fabric of communities, neighbourhood and workplaces are resourced and introduced. The aim must be a model of childcare that is publically funded and that ensures universal access.
5. Treoir recommends that the state resource and implement shared parentings courses throughout the country and that a national programme aimed at parenting and the provision of supports for unmarried fathers (especially young fathers) be rolled out.
6. Treoir recommends that cross departmental and agency supports and services be put in place to support kinship carers and this is enshrined in legislation.

#### **Theme 4: Women's access to, and representation in, public life and decision making**

##### Ensure women's participation and representation in decision-making and leadership in the workplace, political and public life

Women are systematically underrepresented in leadership in economic and political decision-making. Despite the introduction of a candidate gender quota (through the

system of party funding) for national political office, and initiatives to support women’s access to corporate decision-making roles, men continue to dominate leadership positions. There are also issues to be considered around how media represents women and men.

- Please outline what you see as the key barriers/ obstacles and challenges to gender equality under this theme in law, policy and practice.

- Please identify the steps to be taken to address the issues raised and who should address them (e.g. the state, private sector, education system etc.)

**5. Where does gender inequality impact most?**

To conclude we would be interested in your response to the following question: In which area do you think gender inequality matters most?

Please rank the following in order of importance, 1 being the most important:

- Paid work \_\_ 3 \_\_
- Home & family life \_\_ 1 \_\_
- Education \_\_ 4 \_\_
- Politics and public life \_\_ 6 \_\_
- Media \_\_ 5 \_\_
- Caring for others \_\_ 2 \_\_
- Other – please elaborate \_\_\_\_\_

- Please outline the reasons for your answer below:

Childcare is a huge issue for all families but particularly for lone parents, low paid workers and disadvantaged cohabiting couples. Thus far successive governments have failed to invest adequately in parenting supports or in the promotion of shared parenting. There is an urgent need for a national parenting support programme that is targeted specifically at fathers (especially young fathers) and for an education

programme and information campaign around the rights and responsibilities of unmarried parents.

- Please include any further comments or observations you may have here.

The recommendations of the Oireachtas Justice Committee Report on Reform of the Family Law System 2019 should be fully implemented, especially recommendation 35. In recognition of the significant imbalance in terms of guardianship rights for fathers who are married or unmarried, the Committee recommends creating a central register of guardians to ensure that there is a record of legal guardians in the system. The Committee is also of the view that serious consideration ought to be given to granting automatic guardianship rights to unmarried fathers.

[https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint\\_committee\\_on\\_justice\\_and\\_equality/reports/2019/2019-10-24\\_report-on-reform-of-the-family-law-system\\_en.pdf](https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint_committee_on_justice_and_equality/reports/2019/2019-10-24_report-on-reform-of-the-family-law-system_en.pdf)

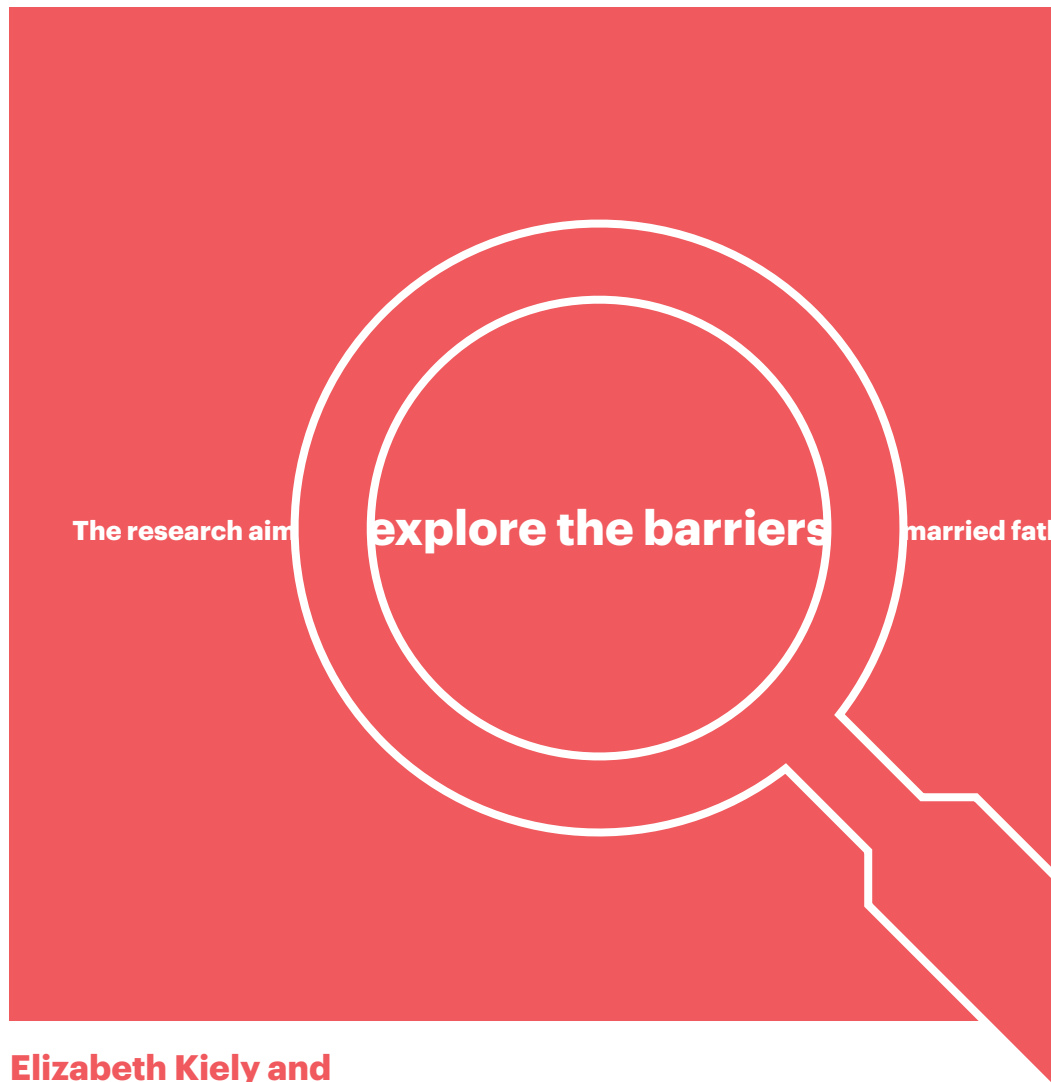




**Unmarried Fathers in Ireland:  
An Examination of the Barriers  
to Shared Parenting**  
**Executive Summary**

**treoir**

information for unmarried parents



**Elizabeth Kiely and  
Robert Bolton**

Researchers and Authors of the  
full report and Executive summary



Commissioned by Treoir and  
funded by the Community  
Foundation of Ireland



Full Research report is available on the  
treoir web site [www.treoir.ie](http://www.treoir.ie)

## Aim

The research aimed to explore the barriers to unmarried fathers' involvement in the sharing of parenting. There were five overall aims:

- To review the literature relating to the broader Irish context of shared parenting.
- To review the literature on shared parenting in unmarried families, with a particular focus on the impediments to unmarried fathers' involvement in shared parenting.
- To identify, describe and review shared parenting interventions in the international context designed to facilitate / support unmarried fathers and any evaluations of these interventions.
- To identify interventions and projects in Ireland that are relevant to the aims of the research and to review evaluations of these.
- To interview a number of unmarried fathers to explore their day to day experiences of sharing parenting or seeking to share parenting.

***Shared parenting is not easily defined (Feinberg, 2003; Van Egeren and Hawkins, 2004). For the purpose of the research shared parenting was conceptualised in broad terms as referring to substantive (though not necessarily equal) shared responsibility and care of children by parents and which requires parents to support each other and to work together in the best interests of their child(ren) regardless of the status of their own relationships to each other.***

# Rationale for the Research

*Shared parenting is more likely to happen in higher income rather than low income families and among parents who work out their own parenting relationship rather than have it imposed on them after their romantic / intimate relationship ends (Bala et al 2017; Smyth and Chisholm, 2017).*

It is recognised as a parenting arrangement that can present significant challenges to achieve for unmarried parents and particularly poorer unmarried parents (McLanahan, 2009; Tach et al, 2010). Shared parenting has been given little academic or research attention in Ireland. The first national survey of shared parenting was undertaken by One Family (2017b) in 2016.

Nationally and internationally, most of the research conducted has been concerned with shared parenting after divorce or separation after marriage (Mahon and Moore, 2011; Maldonado, 2014; Pearson, 2015). The focus on unmarried fathers in this research emerged from the knowledge that in Ireland, it is these fathers, who for different reasons are more likely to be the parents not involved in their children's lives and who may particularly lose contact over time (Corrigan, 2014).

The research sought to explore how shared parenting between unmarried parents can be supported and sustained when it is assessed as being in the best interests of children.

# Methodology

The study involved a national and international review of the literature, desk based research to review legislation, policies and practice based interventions as well as face to face / telephone interviews with a small number of unmarried fathers.

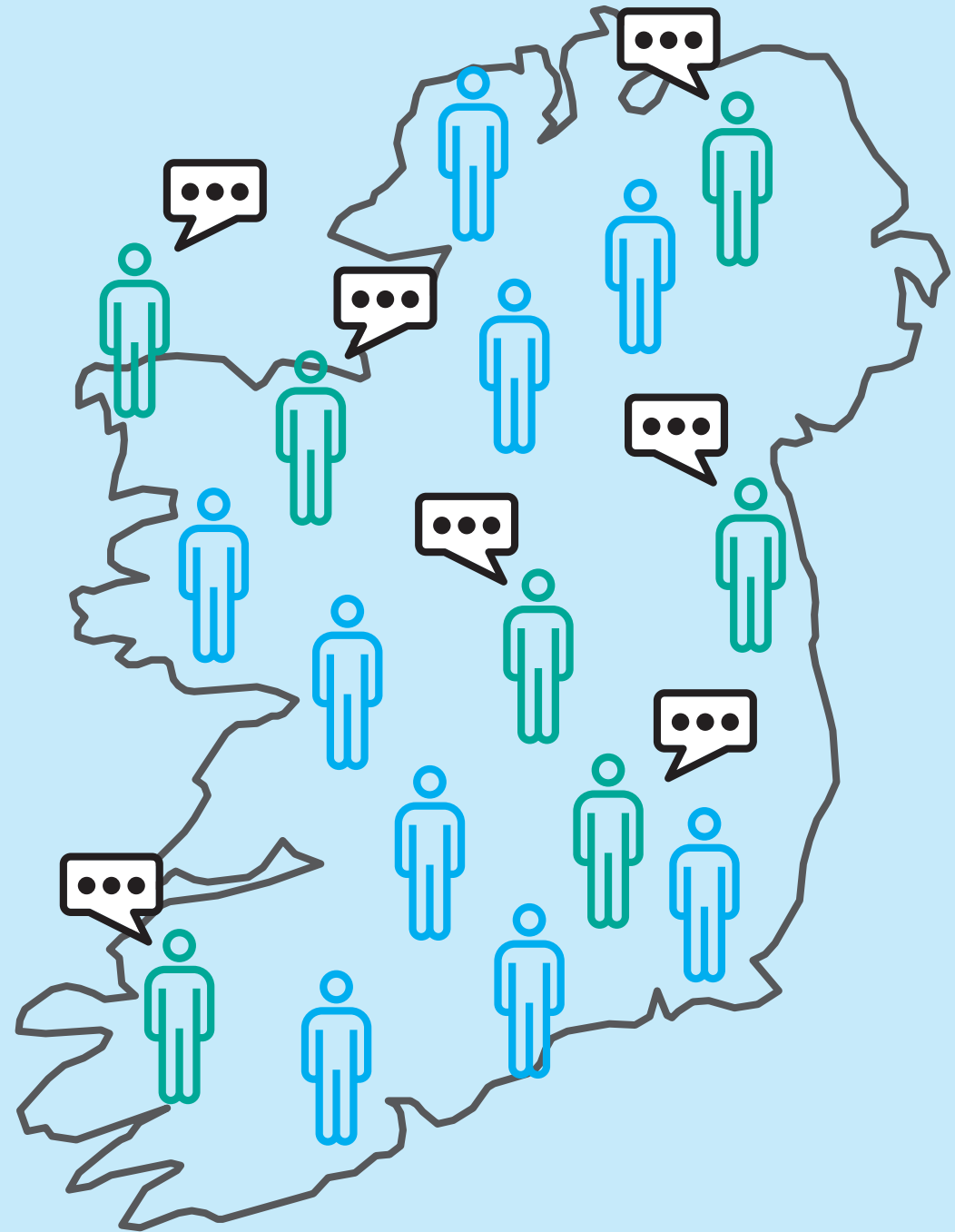
## Research Design

<b>Setting</b>	Ireland
<b>Timeframe</b>	March - July 2018
<b>Population</b>	Unmarried fathers in Ireland with experience of shared parenting or seeking to share parenting
<b>Secondary Research Components</b>	Literature Review  (a) International and national research studies on unmarried fathers' participation in shared parenting and the related opportunities and barriers  (b) Shared / co-parenting interventions and programmes nationally and internationally and evaluations of these  (c) Irish legislative, policy and practice context pertaining to non-marital families, unmarried fathers and shared parenting
<b>Desk based research</b>	Online research and contacting organisations to access information on Irish support services etc. assisting parents and specifically unmarried fathers sharing parenting.
<b>Primary Research Component</b>	In-depth face to face and telephone interviews with 7 unmarried fathers willing to share their views and experiences of sharing parenting or seeking to share parenting. Callers to Treoir who fit the research criteria were invited for interview and other interviewees responded to a call for research respondents posted on the Treoir Facebook page.

Out of 16 fathers who enquired about the research or left their contact details with Treoir, 8 agreed to be interviewed. One father interviewed subsequently withdrew from the research. The remaining seven fathers interviewed were diverse in age, status, number of children, residential location in Ireland, engagement in day to day childcare and degree of conflict / co-operation in their relationships with ex-partners.

All fathers interviewed were Irish, involved with their children and their relationships with their children's mother had ended or was suspended. Two fathers had experience of the family courts service and five had established parenting arrangements informally. Transcribed interviews were used to present condensed accounts / case studies based on what fathers said in interview, followed by a brief discussion of the significant features of each account.

Pseudonyms were used and personal details altered where required to protect fathers' identities. An ethical protocol was devised to guide the research. The study carried out was reviewed and approved by University College Cork Social Research Ethics Committee in spring 2018.



# What did the Research Show?

The research evidence is strong on the benefits of father involvement in children's lives (Buckley and Schoppe-Sullivan, 2010; Lamb, 2010; Tamis-Le Monda et al 2004). The challenges to establishing and sustaining shared parenting relationships between parents who are unmarried can be greater than for other family forms for various reasons. Nationally and in other country contexts, research, information and services are more oriented to the needs of families who divorce or who separate after marriage (Bronte-Tinkew and Horowitz, 2010; Goldberg and Carlson, 2015; Maldonado, 2014; Pearson, 2015).

In Ireland unmarried fathers are not recognised by law as automatic guardians unlike their married counterparts with children or the mothers of their children. For fathers interviewed, this emerged as the single most important problematic issue where sharing parenting is concerned.



The lack of information, support and financial resources to assist unmarried fathers to stay involved in their children's lives in a significant way, was also identified by fathers interviewed as a key obstacle to them sharing parenting.

There is a lack of accessible community based supports (e.g. shared parenting programmes, child parent contact programmes, practical assistance with parenting plans and family maintenance) for unmarried families to help them share parenting in Ireland.

The secondary research and the interview data points to the existence of official, professional and cultural biases, which serve to construct fathers as being of lesser importance and value as parents than mothers, where children are concerned.

The research shows that there is scope for the development of a stronger legislative, policy and practice infrastructure in Ireland, which is conducive to the normalisation of shared parenting arrangements in unmarried families.

## Key Findings and Related Recommendations

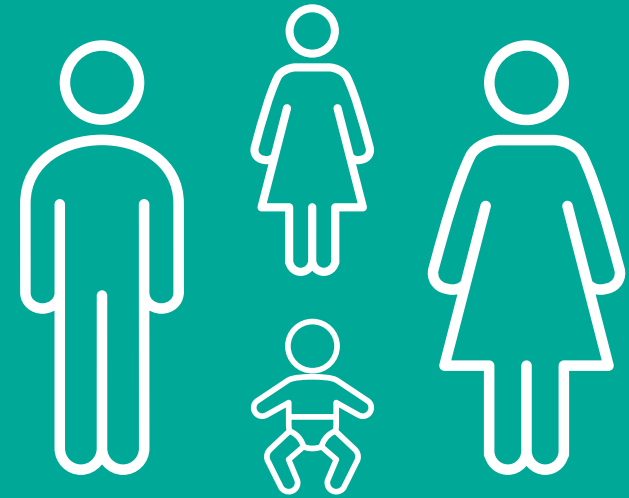
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### Terminology

'Shared parenting', 'co-parenting'/coparenting', 'parent involvement' 'equal parenting' 'joint physical custody' are all terms used in this field of research and are often ill-defined and used interchangeably with each other. 'Primary parenting', 'parallel parenting' and 'social parenting' are other terms used to refer to diverse kinds of parenting relationships and practices.

In Ireland, the concept of shared parenting is fairly commonly used and in this study, shared parenting was understood broadly as parents' shared responsibility and caregiving, which is substantive, though not necessarily equal between parents and when the parents work together in the best interests of their children, regardless of what is happening or has happened in their relationships. This is what fathers also understood as shared parenting when interviewed and a few (predominantly) younger fathers perceived shared parenting to be shared if it is gender equal parenting or proximate to equal parenting.



### Recommendations

- We recommend that any concepts (e.g. shared parenting, co-parenting) used when referring to parenting arrangements in non-marital families are clearly defined when used in research studies and in other contexts for the purpose of clarity.
  - As a consequence of this study we recommend the adoption of a definition of shared parenting as constituting parents' shared responsibility and caregiving, which is substantive, though not necessarily equal between parents and when the parents can and do work together in the best interests of their children, regardless of what is happening or has happened in their relationships with each other.
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## Abandoning terms not conducive to shared parenting

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Considering that the child's right to have contact and a relationship with their parents is the key influence in Irish judicial decision making, the concepts of 'guardianship' 'custody' and 'access' are parent focused rather than child focused terms. They do little to convey that the best interests of children are being served and they are not conducive to shared parenting as they propagate unequal relationships between parents.

The traditional language of guardianship, custody etc. has been replaced in other countries with terms like 'residence', 'contact' etc. (e.g. Australia, Canada and the UK).



### Recommendation

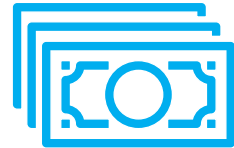
As recommended by the Law Reform Commission (2010) terms such as 'guardianship' 'custody' and 'access' should be replaced in Irish family law discourse with terms such as 'parental responsibility' 'day-to-day care' and 'contact'.

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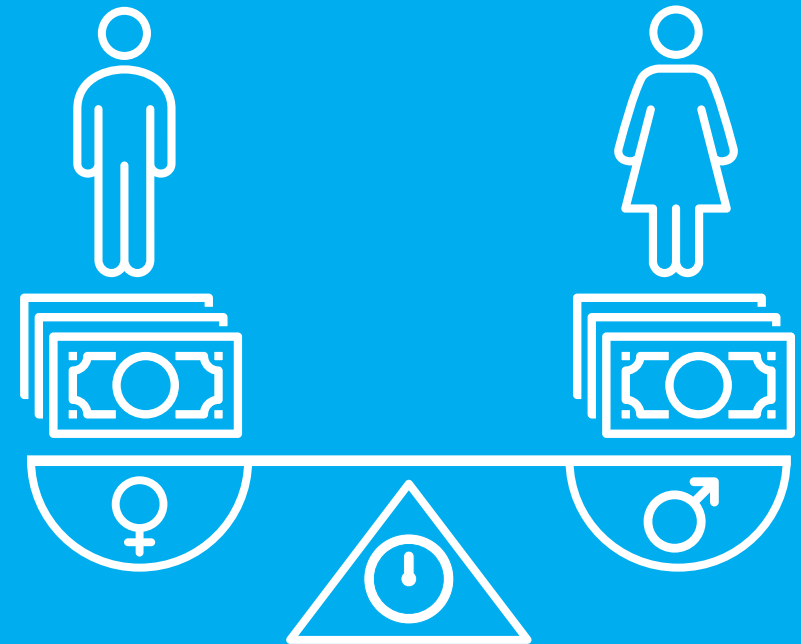
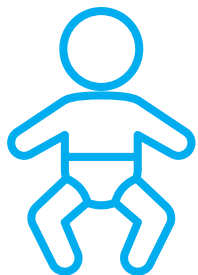
## Gender Equalising Paid and Unpaid Child Care

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As in other jurisdictions, as fathers' involvement in the care of their children continues to increase in Ireland, it is likely that shared parenting arrangements will become increasingly normative socially and culturally and by order of court, through mediation or as a result of couples putting their own parenting plans in place. The fathers interviewed in this study highlighted the ways in which child rearing is still feminised in Ireland with significant implications for men engaged in primary or shared care of their children.

The empirical evidence also indicates that men / fathers do more household work and child rearing than they did in the past but they still do significantly less than women in Ireland and their counterparts in many other countries (Samman et al 2016). In other countries, Governments put legal requirements in place for childcare employers to recruit more men to enhancing a more gender balanced childcare workforce. Greater gender convergence and equalisation in childcare is likely to provide a strong stimulus for shared parenting.



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### Recommendation

Toward enhancing father involvement in children's lives and shared parenting, the Department of Justice and Equality should adopt a strategy aimed at gender equalising paid and unpaid care work in Ireland as part of a broader gender equality framework.

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## Providing For Automatic Guardianship for Unmarried Fathers

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While in Irish society unmarried fathers have received more legal recognition, the research conducted shows that fathers still confront significant challenges when they are not afforded an automatic right to guardianship as is afforded to unmarried fathers in other contexts, including Northern Ireland. The research suggests that unmarried fathers' lack of automatic guardianship is discriminatory as this is afforded to their married counterparts. The cohabitation requirement in the legislation is unfair to non-resident fathers (some of whom may be young fathers) and it does not uphold their children's right to contact with them.

The status quo serves to reinforce the message to unmarried couples that they are not equal where their children's right to contact with them is concerned and that mothers have a greater right to determine how fathers (who wish to have a relationship with their children) parent and involve themselves in their children's lives.

Unmarried fathers may be unaware that they are not guardians and the implications of this for their children, or they may not always be a position to seek or gain the agreement of mothers to become joint guardians. This clearly undermines a parent together forever principle, which according to Weiner (2016), should be culturally conveyed to parents from the time of a child's birth. The interviews conducted for this study show that the lack of automatic guardianship for unmarried fathers is perceived by them to be a practical and symbolic obstacle to their involvement with their children and to shared parenting.



### Recommendations

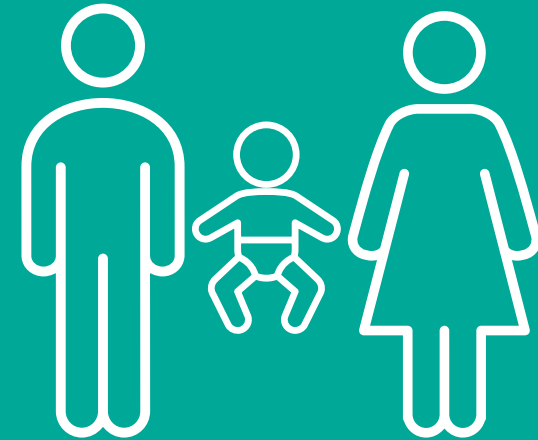
- As recommended by the Law Reform Commission (2010) automatic joint parental guardianship of children of non-marital fathers should be provided for in law. If necessary, the circumstances in which automatic guardianship would not be authorised should be identified.
  - The research findings lend support to the Treoir recommendation that at the time of the registration of the child's birth, the General Registrar Office and the local Civil Register Offices should inform unmarried parents of the law on guardianship so that a father can apply to become a joint guardian in a timely way with the agreement of the child's mother.
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## The Evidence in Support of Shared Parenting

In Ireland studies of public attitudes show that there is much support for men and women sharing parenting and for legislative and policy measures to enable shared parenting (Fine-Davis, 2011). There is a significant body of research internationally supporting children's right to develop a relationship with both their mothers and their fathers and a significant amount of research highlighting the benefits of father involvement in children's lives when inter-parental violence and consistent high conflict are not a feature of their parents' relationships. There will be instances where the safety of children and their parents will require parenting time not to be equalised or shared, but rather to be managed, restricted, supervised or ended.

An evaluation of the family law changes in Australia in 2006 (Kaspiew et al 2009) designed to support more shared parenting arrangements, reported that children in these arrangements fared better than children in maternal residence only, except in situations where mothers reported safety concerns. It is also very important that equally or close to equally shared parenting time and responsibility will have to work in the best interests of children and not their parents. It is unlikely that equally shared parenting should be equal or can be equal, particularly when parents also have commitments outside the home in education, paid work and commitments which change over time etc.

The merits of joint physical custody / shared hands on care has been the subject of debate and particularly for very young children, but there is also increasing emphasis on the importance of parallel attachments for children and a small but growing body of evidence (for example in Sweden, where the joint parental custody arrangement is more normative; Australia and Canada also) showing the positive effects for children of continuing day to day parental relationships after parents' relationships end (Bergström et al 2015; Bergström et al 2018; Fransson et al 2016; Kaspiew et al 2009; Turunen, 2017).



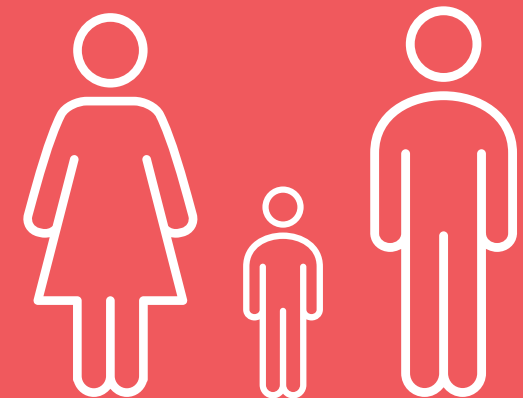
### Recommendation

Considering that the evidence at the time of writing is limited but positive as to the outcomes of shared care arrangements for children, Treoir should continue to review the evidence of outcomes for children as the arrangements become more normative in different jurisdictions.

## The Importance of Early Support for Unmarried Parents to Facilitate Shared Parenting

When a baby is born to an unmarried couple, that there is a strong desire held by both parents for the father to be involved into the future (Gaskin-Butler et al, 2012; Tach et al 2010). There is evidence that despite unmarried couples' very strong intentions to stay together at the time of their child's birth, that the likelihood the relationship will have ended by the age the child is 5 years is high (McLanahan, 2009; Osborne and Ankrum, 2015; Tach et al 2010). While unmarried fathers are at risk of being stereotyped as uninvolved fathers relative to other categories of fathers, there is research which highlights the unfairness of this stereotype (Tach et al 2010) and research which documents the variety of factors that can militate particularly against the involvement of fathers (e.g. incarceration, alcohol and drug use, limited income and educational attainment, abusive behaviour)(Bronte-Tinkew and Horowitz; 2010; Kiernan, 2006; Maldonado, 2014; Waller and Swisher, 2006).

Re-partnering by a father and particularly a mother is shown to correlate with the likelihood that the biological father will have less or no contact with his child (Osborne & Ankrum, 2015; Tach, et al 2010). Some fathers interviewed expressed concerns about the possible implications for themselves or the mothers of their children re-partnering for their relationships with each other and their relationships with their children. There is a strong case emerging from the empirical studies reviewed and from some of the interviews conducted that providing information, relationship and shared parenting interventions for unmarried parents as early as possible is the optimum time for interventions (Cox and Shirer, 2009; Cowan et al 2010; Weiner, 2016). As early involvement by a father in a child's life is known to correlate with later involvement by the father (Kiernan, 2006; Osborne and Ankrum, 2015), professionals in services engaging with unmarried parents pre-conceptions are ideally placed to assume, encourage and support shared parenting. The Australian Psychological Society advocates for information and training for primary health care providers in the protective and risk factors for children and parents undergoing a family transition and knowledge of the appropriate pathways for referral (McIntosh et al 2009).



### Recommendations

- As recommended by the Law Reform Commission (2010) automatic joint parental guardianship of children of non-marital fathers should be provided for in law. If necessary, the circumstances in which automatic guardianship would not be authorised should be identified.
  - The research findings lend support to the Treoir recommendation that at the time of the registration of the child's birth, the General Registrar Office and the local Civil Register Offices should inform unmarried parents of the law on guardianship so that a father can apply to become a joint guardian in a timely way with the agreement of the child's mother.
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## Accessible Community Based Supports for Shared Parenting



Well-resourced community based facilities (e.g. family relationship centres in Australia) which are physically and financially accessible to couples, are in a position to provide a suite of relationship and shared parenting information and supports for unmarried parents (e.g. professional counselling and /or mediation services). Early intervention and ongoing support for parents and children experiencing family transition may help along the early establishment of a co-operative shared parenting relationship.



### **Recommendations**

In the Irish context, family centres / family resource centres should explore the feasibility of developing and providing a comprehensive service to unmarried parents including professional assistance (pre-court family mediation, programmatic interventions etc.) with shared parenting.

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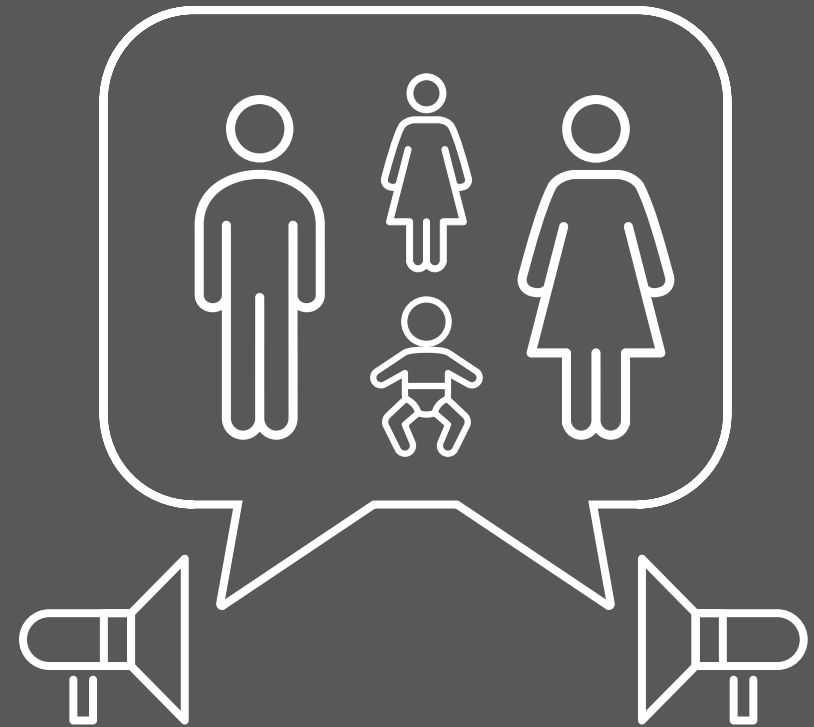
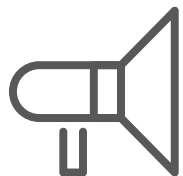


## Overall Policy Approach to Support Shared Parenting



The lack of any discourse on shared parenting in current Irish family policy was highlighted in this research. The lack of any attention given to the specific challenges confronting unmarried parents in the fields of parenting and family support was also noted. The absence of shared parenting programmes or programmes / supports tailored for unmarried parents was identified in the study and was also an observation made by fathers interviewed.

Early years parenting interventions have grown in number with the policy objective of improving parenting knowledge and behaviour to enhance child outcomes. While enhancing positive shared parenting would fit with this wider policy agenda, the evidence reviewed for this research suggests it is not a significant feature of this agenda. All of this highlights the lack of an overall policy approach supporting shared parenting arrangements for non-marital families.



### **Recommendations**

The Government Department of Children and Youth Affairs in conjunction with Tusla (Child and Family Agency) should devise a strategy to endorse and support shared parenting for unmarried parents. Treoir, and other stakeholders should campaign for such a strategy.

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## Specific Policies Needed To Support Shared Parenting

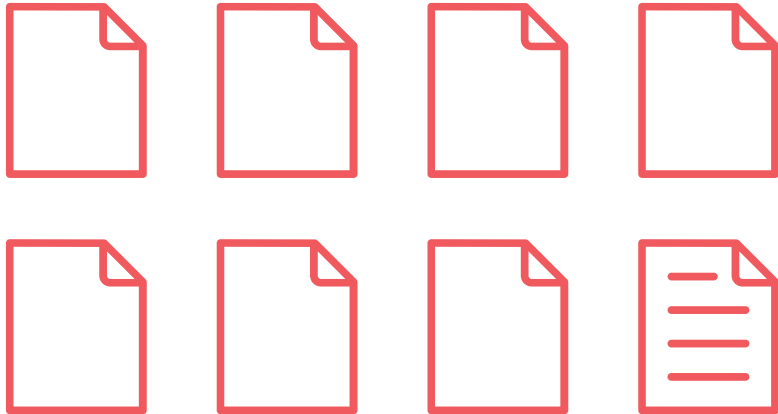


Legislation, policy and practice can promote / incentivise shared parenting arrangements or hinder them. Some of the ways in which shared parenting is hindered by Irish legislation / policy were identified in the research (e.g. the replacement of the One Parent Family Tax Credit with the Single Person Child Care Tax Credit). The following recommendations are designed to ensure that shared parenting is more strongly endorsed by Irish legislation, policy and practice.

### Recommendations

- If non-residential parents /fathers are engaged in shared parenting, this should be taken into account by local authorities in assessments of their housing / accommodation needs.
- The parenting responsibilities of students need to be taken into account when providing student grants to ensure they are sufficient.
- The Department of Employment Affairs and Social Protection (in co-operation with the Departments of Justice and Equality and Children and Youth Affairs) should develop a child maintenance service that places the child at the centre, that promotes transparency and fairness and that ensures child maintenance can function as an effective child poverty reduction strategy. It should empower parents to work out (with the assistance of information, online resources etc.) privately if they wish, an appropriate payment in their particular circumstances without having to resort to outside intervention. The Nordic systems (e.g. Norway or Sweden) or the recently reformed British or Australian systems provide models useful for the reform of the Irish system. To make it work better for shared parenting arrangements, parents should not be encouraged or required by state agencies to pursue the other parent through the courts to obtain maintenance, rather it should be the responsibility of the state to look after families until maintenance is secured and to pursue parents if required. In other countries, a state agency is charged with this responsibility.
- Maintenance and parent contact should be addressed conjointly in courts and in other settings where parents may be sorting out their arrangements, thus validating and supporting fathering beyond its narrow provider role.
- Tax credits should be paid to both unmarried parents engaged in shared parenting and other ways of incentivising and supporting shared parenting should also be devised on the basis of the association between fathers' income levels and their likelihood of sharing parenting.
- New / changed Government policies should be proofed to identify their implications for shared parenting and adjusted accordingly or abandoned.

## A Shared Parenting Research Led Service Agenda



Non-marital families transitioning from relationship breakdown are neglected in research and service provision and can comprise a more disadvantaged group relative to families transitioning from divorce and separation nationally and internationally (Pearson, 2015; Maldonado, 2014).

Shared parenting in the unmarried parent subset specifically has not been given any attention in Ireland and with the exception of a One Family National Survey of Shared Parenting (2017b), shared parenting itself has been subjected to very little research. There is a need for a research agenda, which fills important gaps in our knowledge about shared parenting in non-marital families.



### Recommendations

- Relevant State Agencies should provide funding for research to
    - o Follow up with a cohort of family law litigants to explore whether court ordered parenting arrangements have held up over time or have changed in accordance with the needs of families etc.
    - o Access the views and experiences of children and the outcomes for them of different kinds of contact arrangements (including shared parenting) with parents / fathers and how they change over time.
    - o Identify international interventions showing promise / success in addressing maladaptive parental gatekeeping and conflict in inter-parental relationships.
    - o Follow up families who move on from child contact centres, from the Teen Parent Support Programme, from the family law courts and mediation etc. to explore how they fare in relation to parenting arrangements over time.
  - The Irish Census of Population and other relevant large-scale studies should include questions which request information about family transitions and contact arrangements, shared parenting arrangements etc.
-

## Need for More Information and Father Inclusive Service Provision

All fathers interviewed would welcome more information and support throughout their lives as parenting issues and their concerns change, but for some fathers, this was particularly at the stage when they are transitioning into and becoming accustomed to a parenting relationship during antenatal care, birth and postnatal care.

The usefulness of accessible information provided for unmarried parents at locations such as GP surgeries / primary care clinics, maternity hospitals, local health centres, was recommended by a number of fathers interviewed. The need for more information for unmarried fathers was a prominent theme in interviews conducted. The research findings emphasise the need for a comprehensive information service for fathers to meet their needs and for services provided to families to be more father inclusive in their orientation.

Considering that some fathers interviewed, reported getting messages from their children's mothers and some professionals that it is their financial contribution to their child, which is required of them more than their time and attention, this has the effect of reinforcing traditional gender norms and impeding active / shared parenting on the part of unmarried fathers.



### Recommendations

- Treoir should review its information service for unmarried fathers and identify how it can be enhanced so that fathers know of Treoir from the outset and can easily access reliable information as they need it.
  - Treoir should advocate for and support professionals in family support, health and welfare services to have a father inclusive approach when engaging with non-marital families.
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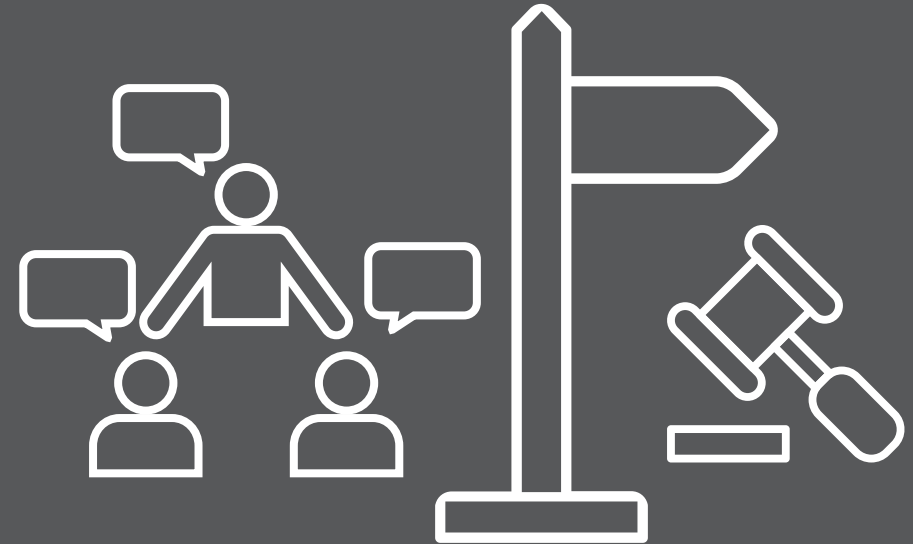
## Alternative Dispute Resolution



There is not enough being done to ensure Alternative Dispute Resolution (ADR) is the default route for families in dispute about issues pertaining to establishing and sustaining shared parenting. Ireland lags behind other countries in this regard.

There are many good reasons why ADR rather than courts should become the default route for couples who need assistance. In the Australian context, a study suggests that mandatory mediation and expanded relationship support services can be credited with generating a steady increase in shared parenting much more than the legislation introduced in 2006 designed to increase the incidence of shared parenting (Smyth and Chisolm, 2017).

It was found that such services have helped parents to become more positively disposed to shared parenting when it is of value for the children (Smyth and Chisolm, 2017).



### Recommendations

- Following countries such as Australia, Canada and Sweden, more effort should be made via legislation, policy and practice to divert persons from adversarial courts towards other options where feasible and practicable. Shared parenting would benefit from the role of community based supports, mediation and other services pre-court and at court stages being enhanced in Ireland so that the role of courts can be minimised.
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## Supporting Unmarried Fathers

There is a dearth of programmes and supports for fathers in Ireland and services provided to families which have a strong father inclusive focus are limited. There are no specifically tailored interventions for unmarried fathers and while there are parenting programmes in Ireland, few have shared parenting focus or are tailored to meet the needs of unmarried parents.

There is only a limited number of child contact centres in Ireland, which further restricts opportunities for facilitating children's right to contact with unmarried non-resident fathers. Perinatal mental health is in its infancy in Ireland and there is a risk that as it develops, the focus will be overwhelmingly on the mother unless there is a conscious effort to include fathers and to adopt a whole family approach.

The Teen Parent Support Programme is a vital component in the landscape of parenting support, given its father inclusive orientation. It could develop its offerings on shared parenting, which would be of benefit to young unmarried parents.



### Recommendations

- There is a need to enhance service provision for fathers and specifically unmarried fathers. This research provides support for the following service developments: the Department of Children and Youth Affairs to provide an increased number of child contact centres; the Department of Health to ensure the progress of a perinatal mental health strategy with a wider focus than mothers and TUSLA (the Child and Family Agency) to provide an enhanced Teen Parent Support Programme.

treoir

information for unmarried parents

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## Supplementary 2

Presented at the Treoir AGM 2017 by Professor Gerry Whyte – Trinity College Dublin

### **The Constitutional Status of the Unmarried Family and its Constituent Members**

#### ***Introduction***

By virtue of Art.41.1.1 of the Constitution, the State recognises the Family as “the natural primary and fundamental unit group of Society ... possessing inalienable and imprescriptible rights, antecedent and superior to all positive law”. The Constitution does not provide a definition of “Family” but in Art.41.3.1, it commits the State to guard with special care the institution of Marriage “on which the Family is founded” and to protect it against attack. This led the Supreme Court to conclude, in *The State (Nicolaou) v An Bord Uchtála* [1966] IR 567, “that the family referred to in [Article 41] is the family which is founded on the institution of marriage”. By implication, the non-marital family is not a Family for the purpose of Articles 41 and 42 of the Constitution and therefore does not enjoy the same inalienable and imprescriptible rights attributed to the marital family. Inalienable rights are rights that cannot be waived or surrendered; imprescriptible rights are rights that cannot be lost merely because they have not been exercised over a long period of time. However inalienable and imprescriptible rights may be forfeited in certain situations, e.g., if a married person is imprisoned, s/he will forfeit the right to procreate for the duration of the imprisonment.

The content of Articles 41 and 42, including the distinction between marital and non-marital families, was clearly informed by Catholic social teaching. However in the past twenty years or so, the provisions of the Constitution dealing with the family and children have been amended in ways that mark a break with Catholic social teaching as a philosophical influence on the Constitution. Thus in 1996, the constitutional ban on divorce was removed, while in 2015, a new provision dealing with children’s rights, Art.42A, that explicitly discounted the distinction between marital and non-marital families, was inserted into the Constitution and, most radically of all, the right to marry was extended to same sex couples.

Such a radical change in the philosophical foundations of the constitutional provisions relating to the family and children has led one High Court judge to suggest that non-marital families now enjoy more extensive constitutional rights than heretofore. In *IRM v Minister for Justice and Equality* [2016] IEHC 478 (29 July 2016), Humphreys J said, at para.99:

Previous decisions on the lack of rights for the non-marital family are largely creatures of their time, and society has transformed beyond all recognition since that chain of authority was put in motion. More fundamentally, the constitutional framework within which such decisions were generated has been subjected to massive transformation... [T]he 28th amendment [*relating to the Lisbon Treaty*] has required (rather than, as previously phrased, permitted - a fundamental change in entrenchment of European values at constitutional level) a commitment to membership of the European Union, which necessarily involves

recognition at constitutional level of the wider family rights recognised by arts. 7 and 33 of the EU Charter of Fundamental Rights, albeit in the context of the State's implementation of EU law. The 31st amendment recognises the natural rights of "all" children, which in context must have particular reference to the enjoyment of those rights without regard to the marital status of their parents. The 34th amendment has extended the availability of marriage to a range of same-sex relationships in contexts that would have been unthinkable when the Constitution was adopted. To regard this as a mere technical extension of the category of persons who may marry, rather than a quantum leap in the extent to which the Constitution is oriented towards respect and protection for a diversity of private family relationships, is to artificially separate literal wording from history, culture and society. Any one of these developments, and certainly all of them taken together, as well as the fundamental shifts in society since the adoption of the Constitution, in my respectful view warrant a recognition that members of a non-marital relationship, and non-marital parents of both sexes in particular, enjoy acknowledgement of inherent constitutional rights in relation to their children and each other on a wider basis than has been recognised thus far.

In *STE v Minister for Justice and Equality* [2016] IEHC 379, the same judge commented, in the context of the proposed deportation of the unmarried father of a child who was living with the child and the child's mother, that "the flexibility of living constitutional law should make one slow to accept the proposition that the Constitution should now be construed as less protective of the rights of the individual than international law." In the instant case, he held that a decision by the State to deport the unmarried father of a child while permitting the child's mother to remain in the State, in circumstances where they had all been living together as a family, would infringe their rights under Art.40.3 in the absence of compelling justification for the deportation order.

However thus far Humphreys J has been a lone voice on this issue and two counterarguments should be noted. First, the People have not amended the text of Art.41.1.1 and Art.41.3.1 which formed the basis for the reasoning of the Supreme Court in *Nicolaou*. Second, it could be argued that by providing for the right to re-marry in the case of divorced couples and by extending the right to marry to same sex couples, the People were implicitly endorsing the primary position of marital families in the constitutional order. In this context, it is worth noting that the Supreme Court recently held that the State could not recognise the second and subsequent relationships in a polygamous marriage, with Clarke J saying that marriage remains a fundamental aspect of the Irish legal order – *H.A.H. v S.A.A.*, Supreme Court, 15 June 2017. Taking this more conservative approach, I turn to consider the existing position of the non-marital family vis a vis the marital family and then consider the constitutional position of its constituent members.

### ***Right to protection of married family against attack***

*State cannot penalise the marital family*

As already noted, by virtue of Art.41.3.1, the State is obliged to guard with special care the institution of marriage and to protect it against attack and beginning in the 1980s, the courts have given growing attention to the rights of marriage. In the cases that I examine here, the courts considered how this obligation affected the manner in which the State treated marital and non-marital families.

The first occasion on which the status of marriage as an institution was specifically and successfully relied on was *Murphy v Attorney General* [1982] IR 241. Here the plaintiffs, a married couple each of whom earned an income, complained of the provisions of the Income Tax Act 1967, which treated their two incomes as a single income (thus pushing the joint income into higher tax-bands and so costing them, as a couple, more than if they had been unmarried and their incomes separately assessed and charged). The Supreme Court, upholding in this respect the judgment of Hamilton J in the High Court, said that:

‘the pledge [of Article 41.3.1<sup>o</sup>] to guard with special care the institution of marriage is a guarantee that this institution in all its constitutional connotations, including the pledge given in Article 41.2.2<sup>o</sup> as to the position of the mother in the home, will be given special protection so that it will continue to fulfil its function as the basis of the family and as a permanent, indissoluble union of man and woman.’ ([1982] IR 241 at 286)

Despite the many advantages that other parts of the law accorded to married people, which the Court was pressed to admit as counter-balancing this particular taxation disadvantage, the Court said:

‘the nature and potentially progressive extent of the burden created by s 192 of the Act of 1967 is such that, in the opinion of the Court, it is a breach of the pledge by the State to guard with special care the institution of marriage and to protect it against attack. Such a breach is, in the view of the Court, not compensated for or justified by such advantages and privileges.’ ([1982] IR 241 at 287)

The obligation on the State to protect the institution of marriage against attack was reaffirmed in *Muckley v Ireland*[1985] IR 472, [1985] ILRM 364, in which the Supreme Court rejected an attempt to restrict the principle in *Murphy v Attorney General* to situations where the effect of State policy would be to induce men and women to cohabit without entering a contract of marriage or, if married, to separate. At issue in this case was the constitutionality of s 21 of the Finance Act 1980, which required married persons, who in past years had not paid all or some of the tax levied on them pursuant to those provisions of the Income Tax Act 1967, declared to be invalid in *Murphy’s* case, to pay the same amount as if those provisions had not been invalid during those years. Although such retrospective provisions could not be regarded as constituting an inducement to people to behave in a particular way in the future, the Supreme Court declared them to be invalid because they penalised the married state.

In a number of subsequent cases, the courts have had to consider the implications of the constitutional protection for marriage in contexts other than that of tax law. Thus in *Hyland v Minister for Social Welfare* [1989] IR 624, [1990] ILRM 213 the Supreme Court applied this principle to invalidate a provision in the social welfare code—s 12(4) of the Social Welfare (No 2) Act 1985—which reduced the amount of unemployment assistance payable to a married claimant whose spouse was in

receipt of some other form of welfare. (In contrast to the response to *Murphy*, where the more favourable treatment enjoyed by cohabiting taxpayers was extended to their married counterparts, the immediate legislative response to *Hyland* was to extend the restriction on the payment of unemployment assistance to both married and cohabiting claimants: see the Social Welfare (No 2) Act 1989.) In *Greene v Minister for Agriculture* [1990] 2 IR 17, [1990] ILRM 364, Murphy J granted a declaration that administrative schemes designed to provide compensatory payments to persons farming in disadvantaged areas were invalid because the means test provided for the aggregation of certain income of married, but not cohabiting, claimants. In contrast, Keane J said, obiter, in the earlier case of *H v Eastern Health Board* [1988] IR 747 that, in the context of the means-testing of welfare claimants:

‘it is perfectly legitimate for the Oireachtas to distinguish between the income of a husband (other than social welfare allowances payable for his own support) and the income of a man with whom a woman happens to be cohabiting. In the former case, the husband is obliged both at common law and by statute to devote the appropriate part of that income to the support of his wife. No such obligation exists in the case of the unmarried cohabitee.’ ([1988] IR 747 at 755)

(In fact, social welfare means tests no longer distinguish between married and cohabiting couples in relation to means-testing and as a result of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, an unmarried cohabitee may be required to pay maintenance to his/her partner.)

#### *Judicial willingness to apply the ‘inducement test’*

The case of *MhicMhathúna v Ireland* ([1989] IR 504 (HC), [1995] 1 IR 484, [1995] 1 ILRM 69) raises the question as to whether the inducement test, rejected by the Supreme Court in *Muckley*, may yet have some limited role to play in this area. In *MhicMhathúna*, the plaintiffs sought to impugn aspects of both the tax and welfare codes which discriminated in favour of single unmarried parents when compared with their married counterparts on the ground, inter alia, that such policies infringed Article 41. The comparison drawn in this case was not the same as that in *Murphy*, *Muckley* and *Hyland*. In the latter cases, the courts were asked to compare the treatment of married persons with single persons in the same situation, the only pertinent difference between the two groups being the marital status of the parties concerned. Consequently there would appear to be no justification in social policy terms for any difference in treatment which discriminated against married persons, in which case the ‘penalty’ test of *Muckley* would seem quite appropriate. In the instant case, however, the court was invited to compare the treatment of married parents living together with that of an unmarried parent living alone. There are considerable factual differences here, particularly as far as the children are concerned, and such differences arguably justify a legislative policy designed to minimise the disadvantage suffered by children of one-parent families. Dismissing the plaintiffs’ claim, Carroll J in the High Court said that the policies in question—the payment of a social welfare allowance to unmarried mothers and the allocation of a special tax-free allowance to single parents—did not constitute inducements not to marry. Furthermore, ‘the extra support directed by the State to single parents ... is child centred and cannot in my opinion be designated as an attack on the institution of

marriage.’ In her judgment, Carroll J did not refer to Muckley and consequently offered no justification for the resurrection of the inducement test.

Nor was there any review of Muckley in the Supreme Court where the plaintiffs’ complaint of unlawful discrimination was dismissed on the ground that there were abundant grounds for distinguishing between the needs and requirements of single parents and those of married parents living together and that once such justification for disparity arose, the court could not interfere by seeking to assess what the extent of the disparity should be. It might be thought, however, that, in eschewing any role in reviewing the differential treatment of single parents and married parents living together, the Supreme Court was excessively deferential to the Oireachtas, and that while clearly the Oireachtas may pursue a policy of supporting one-parent families, there must be limits as to how far such a policy may go. In that context, there is much to be said for Carroll J’s inducement test, as it would enable the State to provide support for one-parent families while implying that there are limits to the extent of such support.

#### *Legislation may discriminate in favour of marital family*

Article 41, and in particular the State’s obligation to safeguard the family based on marriage, affords obvious protection to legislative or other policies that discriminate in favour of the marital family. This is evident from the Supreme Court decision in O’B v S ([1984] IR 316, [1985] ILRM 86) that ss 67 and 69 of the Succession Act 1965, which precluded a non-marital child from succeeding on intestacy to her father’s estate, were not contrary to the guarantee of equality in Article 40.1. The Court said:

‘It can scarcely be doubted that the Act of 1965 was designed to strengthen the protection of the family as required by the Constitution and, for that purpose, to place members of a family based upon marriage in a more favourable position than other persons in relation to succession to property, whether by testamentary disposition or intestate succession. In doing so, the Act of 1965 provided that, in the event of intestate succession, children of the deceased born outside marriage would not stand in the line of succession, although they could succeed to property by bequest—subject to the particular provisions for the benefit of a spouse of the deceased or his children born within marriage. Having regard to the constitutional guarantees relating to the family, the Court cannot find that the differences created by the Act of 1965 are necessarily unreasonable, unjust or arbitrary.’ ([1984] IR 316 at 335, [1985] ILRM 86 at 96)

The Court also noted that:

‘The provisions of Article 41 create not merely a State interest but a State obligation to protect the family.’ ([1984] IR 316 at 336, [1985] ILRM 86 at 98)

(See now the Status of Children Act 1987, s 29 which effectively abolished this particular discrimination in respect of intestacies arising after the commencement of Part V of the 1987 Act.)

Thus it would seem that, in order to fulfil its obligations to guard with special care the institution of marriage, the State must at least ensure parity of treatment as between marital and non-marital families and may, if it so wishes, discriminate positively in favour of the former.



### *Constitutionality of State support for non-marital families?*

An issue not yet been addressed by the courts is whether the Oireachtas can provide equivalent statutory protection for non-marital families, such as cohabiting couples or parties to polygamous marriages, as is currently provided for marital families. The issue here is whether or not the constitutional obligation to guard with special care the institution of marriage requires the State to maintain marital families in a privileged position in law, in which case the legislative promotion of alternative social units to such families might be unconstitutional. Support for this view might be gleaned from the description of the family based on marriage in Article 41.1.1<sup>o</sup> as, inter alia, the 'primary' unit group of society. Furthermore, in *The State (Nicolaou) v An Bord Uchtála* ([1966] IR 567, (1968) 102 ILTR 1) Henchy J said:

'For the State to award equal constitutional protection to the family founded on marriage and the "family" founded on an extra-marital union would in effect be a disregard of the pledge which the State gives in Article 41.3.1<sup>o</sup>, to guard with special care the institution of marriage...' ([1966] IR 567 at 622, (1968) 102 ILTR 1 at 31)

As against that, it could be argued that this constitutional obligation only requires the State to prevent any direct legislative attack on the marital family and that legislation regulating other types of household would not, by definition, affect the marital household. This was the view taken by the German Constitutional Court in July 2002 when it upheld the constitutionality of a law allowing same sex couples to register a 'life partnership'. (*Lifetime Partnership Act case*, BVerfG, 1 B v F 1/01 (17 July 2002)). The constitutionality of this law had been challenged on the ground that it was contrary to Article 6(1) of the German Basic Law which requires the State to provide special protection for the institute of marriage. The Constitutional Court held that since the concept of the 'life partnership' was only available to same sex partners, the institution of marriage, by definition available to heterosexual couples only, could not be affected and therefore the institute of marriage would not be damaged if the legislature defined rights and obligations for a partnership sui generis of same sex couples. In this context, it is worth noting that in *H.A.H. v S.A.A.*, Supreme Court, 15 June 2017, the two members of the Supreme Court who delivered judgments, Ms Justice O'Malley and Mr Justice Clarke, both indicated that the State could legislate to regulate the position of members of the second and subsequent marriages in a polygamous marriage even if such marriages could not be recognised in Irish law.

I turn now to consider the constitutional position of the constituent members of the non-marital family.

#### ***Non-marital children***

Even before the enactment of Art.42A dealing with children's rights, the Irish courts expressed the view on a number of occasions that non-marital children have the same constitutional rights as children born in wedlock. Thus in *Re M, an Infant* ([1946] IR 334, (1946) 80 ILTR 130) Gavan Duffy P said of a non-marital child the subject of a custody dispute that he regarded:

'the innocent little girl as having the same "natural and imprescriptible rights" (under Article 42) as a child born in wedlock to religious and moral, intellectual, physical and social education.' ([1946] IR 334 at 344)

The same view was expressed by the Supreme Court in *Nicolaou's case* ([1966] IR 567, (1968) 102 ILTR 1) and reiterated in *G v An Bord Uchtála*. ([1980] IR 32). In the

latter case, Walsh J noted that the non-marital child had the right to be supported and reared by its parent or parents. In *D.O.M. v Minister for Justice and Law Reform* [2014] IEHC 193 (8 April 2014), McDermott J said that non-marital children have a constitutional right under Art.40.3 to the care, support and society of their parents. However he went on to hold that the State had taken these rights into consideration before making a deportation order against the children's natural father and so he refused to quash that order. In *KI v Minister for Justice and Equality* [2014] IEHC 83, (21 February 2014), the same judge said that similar consideration should be given when assessing the effect of deportation on children whether the children are marital or non-marital.

Legislative discrimination against non-marital families is constitutionally permissible, but not mandated, and discrimination against non-marital children was abolished by the Status of Children Act 1987, thus bringing Irish law into line with our obligations under the European Convention on Human Rights. Note that Art.42A.1 recognises the constitutional rights of all children which would protect non-marital children from legislative discrimination against non-marital families that adversely affected the children.

### ***Natural mother***

While the natural mother has no rights under Articles 41 and 42, she does enjoy a constitutional right to the custody and care of her child pursuant to Article 40.3. In *The State (Nicolaou) v An Bord Uchtála* the Supreme Court, per Walsh J, said:

'For the same reason [ie the family of Articles 41–42 being that founded on marriage] the mother of an illegitimate child does not come within the ambit of Articles 41 and 42... Her natural right to the custody and care of her child, and such other natural personal rights as she may have (and this Court does not in this case find it necessary to pronounce upon the extent of such rights), fall to be protected under Article 40.3, and are not affected by Article 41 or Article 42 ... There is no provision in Article 40 which prohibits or restricts the surrender, abdication, or transfer of any of the rights guaranteed in that Article by the person entitled to them. The Court therefore rejects the submission that the [Act] is invalid in as much as it permits the mother of an illegitimate child to consent to the legal adoption of her child, and lose, under... s 24(b) of the Act all parental rights and be freed from all parental duties in respect of the child... It is the opinion of the Court that the parent referred to in Article 42.1 is a parent of a family founded upon marriage and this of itself disqualifies the appellant as a parent within the meaning of that term in Article 42.1...' ([1966] IR 567 at 644, (1968) 102 ILTR 1 at 42)

As the above quote indicates, the mother's rights under Article 40.3 may be waived or surrendered. They may also be forfeited and in *G(E) v. D(D)*, (9 July 2004, HC) Peart J. indicated that the courts had an inherent jurisdiction to take any step appropriate to ensure that the welfare of a child, the subject of a custody dispute, was not compromised in any way. (He signalled that the unmarried mother's drink problem might ultimately lead to a loss of custody.)

In *O'S v Doyle* [2013] IESC 60, the Supreme Court held that a natural mother had no constitutional right to veto the vaccination of her child in circumstances where the father, who had been appointed a guardian of the child, had obtained a District Court

order directing that the vaccinations be administered. In *IRM v Minister for Justice and Equality* [2016] IEHC 478 (29 July 2016), Humphreys J held, at para.53, that a natural mother has no constitutional right to have her partner present in the State for the birth if the partner has no legal entitlement to be present in the State at all.

### *Natural father*

The earliest case to consider the constitutional position of the natural father is *The State (Nicolaou) v An Bord Uchtála* ([1966] IR 567, (1968) 102 ILTR 1). Here the natural father of a non-marital child which had been adopted on foot of an adoption order made by the Board was seeking to have the adoption order quashed, on the grounds, inter alia, that the Adoption Act 1952, under which the order was made, infringed his own natural right as the child's father by permitting its adoption without his consent, and that the Act also violated Article 42 by purporting to allow the natural mother to surrender an inalienable constitutional right and by taking away the imprescriptible right of a non-marital child to the society and support of a willing parent. So far as the argument involved a claim of parental right in the sense of Articles 41 and 42 for the applicant or for the natural mother, it was rejected. In the High Court Henchy J said:

'It is clear that the rights guaranteed to parents by Article 42.1 arise only in cases where the parents and the child are members of the same family; and the only family recognised by the Constitution is the family which Article 41.3.1 recognises as being founded on marriage. In my opinion the [applicant] is given no rights over his illegitimate child by Article 42.1.' ([1966] IR 567 at 623, (1968) 102 ILTR 1 at 32)

Somewhat controversially, in coming to the conclusion that natural fathers had no constitutional rights in respect of their children, Walsh J refused to differentiate between those natural fathers who played a significant and positive role in the lives of their children and those who did not.

However since the 1990s, the interests of natural fathers in relation to their children have been afforded somewhat improved protection in law, even if they have not yet been afforded the status of constitutional rights. In *Re SW an infant, K v W*, (1990] 2 IR 437) the natural father had applied for guardianship and custody of his daughter pursuant to the Guardianship of Infants Act 1964, s 6A after his partner, from whom he had separated, had placed the child for adoption. In the High Court, Barron J interpreted s 6A to mean that the applicant should be appointed guardian if he was a fit person to be so appointed and provided that there were no circumstances involving the welfare of the child which required that he should not be so appointed. On appeal, this approach was rejected by a majority of the Supreme Court. Delivering the majority judgment, Finlay CJ said that Barron J's interpretation of s 6A was apparently inspired by a submission made on behalf of the applicant that he had a constitutional right, 'or a natural right identified by the Constitution' to the guardianship of the child and that s 6A simply declared or acknowledged that right. He continued:

'I am satisfied that this submission is not correct and that although there may be rights of interest or concern arising from the blood link between the father and the child, no constitutional right to guardianship in the father of the child exists. This conclusion does not, of course, in any way infringe on such

considerations appropriate to the welfare of the child in different circumstances as may make it desirable for the child to enjoy the society, protection and guardianship of its father, even though its father and mother are not married.

The extent and character of the rights which accrue arising from the relationship of a father to a child to whose mother he is not married must vary very greatly indeed, depending on the circumstances of each individual case.

The range of variation would, I am satisfied, extend from the situation of the father of a child conceived as a result of a casual intercourse, where the rights might well be so minimal as practically to be non-existent, to the situation of a child born as the result of a stable and established relationship and nurtured at the commencement of his life by his father and mother in a situation bearing nearly all the characteristics of a constitutionally protected family, when the rights would be very extensive indeed.' ([1990] 2 IR 437 at 447)

In the light of this understanding of the father's rights, and as s 6A only conferred on the father the right to apply to be appointed guardian, as distinct from a right to be guardian, the majority concluded that where the father's application for appointment as guardian is linked to an application for custody, the court should only consider the wishes of the father where it has first concluded that the quality of welfare which would probably be achieved for the infant with the prospective adoptive parents is not to an important extent better than that which would probably be achieved by custody with the father. (Thus the father would have to be able to match the quality of welfare provided by the adoptive parents before his claim could be considered by the courts.) The decision of the Court offers no guidance as to what factors might be taken into account in applying this test. However when the matter was referred back to him in the High Court, Barron J ruled that he was precluded by Article 40.1 from taking into account the socio-economic differences between the two competing homes and that he must apply the Supreme Court's test in the light of the dangers to the psychological health of the infant occasioned by a change of custody. These dangers were such that he could not hold that the quality of welfare likely to be achieved with the prospective adoptive parents would not be to an important extent better than that likely to be achieved by custody with the applicant, i.e. the child's welfare was likely to be better provided for by the adoptive parents. He also took into consideration the fact that adoption would enable the child to become a member of a family protected by Arts.41 and 42 and that, if the natural father succeeded in his case, the natural mother might then take legal proceedings seeking to recover custody. Accordingly, he could not take account of the father's wish to be involved in the guardianship of his child.

The father then instituted proceedings under the European Convention on Human Rights in which he alleged, inter alia, that the placing of his child for adoption without his knowledge or consent amounted to a violation of his right to respect for family life under Article 8. In *Keegan v Ireland*, ((1994) 18 EHRR 342) the European Court of Human Rights held that Article 8 was not restricted to families based on marriage and that relationship between the applicant and the child's mother had the hallmark of family life as it had lasted for two years and the conception of their child was the result of a deliberate decision. It followed that a bond existed between the applicant and his daughter amounting to family life. The fact that Irish law permitted the applicant's daughter to be placed for adoption without his knowledge or consent amounted to an interference with his right to family life for which no justification

relevant to the welfare of the child had been offered. Following on from this decision, the Oireachtas enacted the Adoption Act 1998 – see now the Adoption Act 2010 - providing for consultation with natural fathers in relation to the adoption of their children.

Notwithstanding these developments, and the Supreme Court decision in *Re SW an infant, K v W*, a degree of uncertainty remained about the juridical nature of the natural father's rights under Irish law in respect of his child. Could those rights possibly warrant constitutional protection or were they merely statutory or common law rights? The Supreme Court returned to this question in *O'R v EH* ([1996] 2 IR 248) in which a natural father applied, pursuant to s 6A of the 1964 Act, to be appointed guardian of his two children from a long term relationship that had recently broken up. In the context of deciding a case stated by the Circuit Court on certain questions arising out of this application, a majority of the Supreme Court re-affirmed that natural fathers had no constitutional rights in respect of their children. The majority also clarified that the rights and interests arising from the blood link between father and child were essentially factors to be taken into account by the courts in seeking to promote the welfare of the child where the father had exercised his statutory right to apply for guardianship, custody or access to his child. Counsel for the natural father had contended that the applicant had rights in regard to his children arising from the nature of the relationship he enjoyed with them and with their mother, which was described as being in the nature of a *de facto* family. However, according to Hamilton CJ:

'A *de facto* family, or any rights arising therefrom, is not recognised by the Constitution or by any of the enactments of the Oireachtas dealing with the custody of children.' ([1996] 2 IR 248 at 265)

(A similar view was expressed by Denham J at pp 271–272 and by Denham, Geoghegan and Fennelly JJ in *McD v. L* [2010] 2 IR 199, [2010] 1 ILRM 461, though it was accepted that the stability of a family environment in which a child was being reared would be an important factor to be considered in determining what was in the best interests of the child in the context of a guardianship application.)

Hamilton CJ in *O'R* went on to say that the decision in *Re SW infant, K v W* reinforced the view of the Supreme Court as expressed in *The State (Nicolaou) v An Bord Uchtála* that a natural father had no natural rights to the custody of his children. The rights and concerns referred to by Finlay CJ in the former case were not constitutional rights inhering in the natural father but rather were

'matters to be taken into account in determining the welfare of the children when the natural father avails of his statutory right to apply to the court for guardianship or custody of the children or access thereto.' ([1996] 2 IR 248 at 266)

Later in his judgment, he said that, in determining an application for guardianship, the basic issue for the trial judge is the welfare of the children. In so determining, consideration must be given to all relevant factors. The blood link between the natural father and the children will be one of the many factors for the judge to consider, and the weight it will be given depend on the circumstances as a whole. Thus, the link, if it is only a blood link in the absence of other factors beneficial to the children, and in the presence of factors negative to the children's welfare, is of small weight and would not be a determining factor. But

where the children are born as a result of a stable and established relationship and nurtured at the commencement of life by father and mother in a de facto family as opposed to a constitutional family, then the natural father, on application to the Court under s.6A of the Guardianship of Infants Act, 1964, has extensive rights of interest and concern. However, they are subordinate to the paramount concern of the court which is the welfare of the children.’([1996] 2 IR 248 at 269)

In her judgment, Denham J said that the kernel of the issue in the case was the welfare of the children and that the rights of interest and concern of the applicant were directly in proportion to the circumstances that exist in the case between the applicant and the children.

‘The greater the beneficial contact for the children there has been, the more important it is to the welfare of the children and so the higher the rights of interest and concern of the applicant.’ ([1996] 2 IR 248 at 272)

However those rights, no matter how extensive, were subordinate to the welfare of the child.

Murphy J also viewed the interests of the natural father as a factor that could impinge on the welfare of the child. He summarised the legal principles applicable to the issue before the court as follows:

- ‘1 What are described as ‘natural rights’ whether arising from the circumstances of mankind in a primitive but idyllic society postulated by some philosophers but unidentified by any archaeologist, or inferred by moral philosophers as the rules by which human beings may achieve the destiny for which they were created, are not recognised or enforced as such by the courts set up under the Constitution.
- 2 The natural rights aforesaid may be invoked only insofar as they are expressly or implicitly recognised by the Constitution; comprised in the common law; superimposed on to common law principles by the moral intervention of the successive Lord Chancellors creating the equity jurisdiction of the courts, or expressly conferred by an Act of the Oireachtas, or other positive human law made under or taken over by, and not inconsistent with, the Constitution.
- 3 The Constitution does not confer on or recognise in a natural father any right to the guardianship of his child (see *The State (Nicolaou) v An Bord Uchtála* [1966] IR 567 and *JK v VW* [1990] 2 IR 437).
- 4 The common law right of parents—and a fortiori the father—to guardianship and custody of their or his child was moderated by equitable principles (see *Re O’Hara* [1900] 2 IR 232).
- 5 Such rights as the family or father had in equity to guardianship of their or his child were supplanted by the provisions of the Guardianship of Infants Act 1964 (see *Lord Donovan in J v C* [1970] AC 668).
- 6 The undoubted statutory right of the natural father to apply for guardianship of his child carries with it the right to have the application properly considered by the court to which the application is made. That analysis will involve the consideration of a multiplicity of material facts varying with the particular circumstances of the case and in particular the

actual personal, financial and emotional relationship that has existed between the father and his child and, above all, the value to the child of that relationship being continued but only in the context of how such benefits would interact with all or any other relevant considerations.’ ([1996] 2 IR 248 at 294–5)

Though he agreed with the answers provided by the Supreme Court to the questions stated by the Circuit Court, the remaining member of the Court, Barrington J, (who had acted as counsel for Mr. Nicolaou) took a very different view of the constitutional position of the natural father. He considered that the reasoning in Nicolaou was fundamentally flawed because it failed to differentiate between different types of natural father.

‘[O]nce the Supreme Court [in Nicolaou] had accepted that the prosecutor was a concerned and caring parent it was not logical to justify his exclusion [from the category of “parent” for the purposes of the Adoption Act 1952] by a reference to natural fathers who had no interest in the welfare of their children. This was to fall into the logical trap ...[of] treating equally persons who were in different situations, and amounted therefore to unfair discrimination.

The logical flaw in the argument can more easily be seen if one reduces it to a syllogism:

- (1) Many natural fathers show no interest in their offspring and the State may exclude them from all say in their children’s welfare.
- (2) The prosecutor is a natural father.
- (3) Therefore the State may properly exclude him from all say in his child’s welfare.’ ([1996] 2 IR 248 at 280)

According to Barrington J, the Constitution derived from the blood relationship between parent and child a system of moral rights and duties which the law was obliged to respect. These moral rights and duties could be referred to as natural rights and duties or constitutional rights and duties, the comments of Kenny J to the contrary in *G v An Bord Uchtála* notwithstanding. The manner in which these rights and duties could be expressed would vary greatly with the circumstances. At one end of the spectrum, there were de facto families; at the other end, the circumstances attending the child’s conception or birth could be so horrific as to make it unthinkable that the parents should live together. He continued:

‘[I]llegitimate children are not mentioned in the Constitution. Yet the case law acknowledges that they have the same rights as other children. These rights must include, where practicable, the right to the society and support of their parents. These rights are determined by analogy to Article 42 and captured by the general provisions of Article 40, s 3 which places justice above the law. Likewise a natural mother who has honoured her obligation to her child will normally have a right to its custody and to its care. No one doubts that a natural father has the duty to support his child and, I suggest, that a natural father who has observed his duties towards his child has, so far as practicable, some rights in relation to it, if only the right to carry out these duties. To say that the child has rights protected by Article 40, s 3 and that the mother, who has stood by the child, has rights under Article 40, s 3 but that the father, who has stood by the child, has no rights under Article 40, s 3 is illogical, denies the

relationship of parent and child and may, upon occasion, work a cruel injustice.’  
([1996] 2 IR 248 at 283–284.)

However, notwithstanding this robust defence of the rights of the natural father, it is quite clear that a natural father has neither a constitutional nor a statutory right to guardianship. In *McD v. L* [2010] 2 IR 199, [2010] 1 ILRM 461 Fennelly J. summarised the legal position of the natural father as follows at para.76:

- ‘1. [The natural father] has no constitutional right to the guardianship or custody of or access to a child of which he is the natural father;
2. [he] has a statutory right to apply for guardianship or other orders relating to a child; this entails only a right to have his application considered;
3. the strength of the father’s case, which is described in the three judgments from which I have quoted as consisting of “rights of interests or concern,” will depend on an assessment of the entirety of the circumstances, of which the blood link is one element, whose importance will also vary with the circumstances; in some situations it will be of “*small weight*”;
4. both Hamilton C.J. and Denham J. spoke of *de facto* families in the context of an application for guardianship pursuant to the Act of 1964 and only in the sense of a natural father living with his child and unmarried partner in an ostensible family unit; a *de facto* family does not exist in law independent of the statutory context of an application for guardianship;
5. The father’s rights, i.e., right to apply, if any, are in all cases subordinate to the best interests of the child.’

(See also his comments to the same effect in *McB v. E* [2010] IESC 48, (30 July 2010) at para.33.)

In *McD*, the Supreme Court held, in light of the particular circumstances of the case, that a sperm donor should not have guardianship of his child conceived through artificial insemination but that the High Court should consider whether to grant access rights. (Denham and Fennelly JJ, with whom Murray CJ and Geoghegan J agreed, also rejected the contention that Irish law recognised the concept of a *de facto* family.)

To talk of the natural father having ‘rights’ in this context is potentially confusing inasmuch as it suggests that these rights inhere in him whereas in fact what appears to be at issue is the extent to which one needs to involve the father in securing the rights of the child. The greater the social bond between father and child, the greater this need. Conversely, where a natural father has had no or very little contact with his child, decisions concerning the welfare of the child can be made without reference to the father.

One might well question, however, whether the distinction drawn by the courts between natural mothers and natural fathers in the context of their rights in respect of their children is not too absolutist in its denial of constitutional rights to all natural fathers and specifically those who have made a commitment to their children. Barrington J’s critique of the reasoning in *Nicolaou* which led to this result is compelling and the current constitutional position clearly reflects a stereotypical image of the natural father that does not accord with the reality in a growing number of cases. In *T v O* [2007] IEHC 326 (10 September 2007), McKechnie J suggested, at para.50, that there should be greater protection of the rights of natural fathers who



nurture, protect and safeguard their children and, at minimum, that there should be some means readily available so that such a father could assert his rights where his children have been removed without notice. He also expressed the view, at para. 51, that the rights of a natural father who nurtures and cares for his child are derived from his relationship with his child and that such rights predate any application for guardianship.

Where a natural father has been appointed a legal guardian of the child, he acquires rights and duties in respect of the child and where there is a conflict with the views of the natural mother, the welfare of the child becomes the determining issue. Thus in *O'S & anor -v- Doyle* [2013] IESC 60, 19 Dec. 2013, the Supreme Court, per McMenamin J, rejected the natural mother's argument that she had a constitutional right to veto the vaccination of her child in circumstances in which the natural father, who had been appointed as a guardian of the child, had obtained a District Court order directing that the child be vaccinated.

#### *Impact of Article 8 of the European Convention on Human Rights*

While the Supreme Court has, on a number of occasions, stated that the concept of the de facto family does not exist in Irish law, such families may be protected by Article 8 of the European Convention on Human Rights which guarantees, *inter alia*, respect for private and family life – see, e.g., *Marckx v. Belgium* (1980) EHRR 330) and *Keegan v Ireland* (1994) 18 EHRR 342) As we have already noted, in the latter case, the European Court of Human Rights held that the fact that Irish law permitted the applicant's child to be adopted without his knowledge or consent in circumstances in which the bond between father and daughter was protected by Article 8 amounted to an infringement of that Article. In response to this decision, the Adoption Act 1998 provided for consultation with natural fathers in relation to the adoption of their children. In *S. v. An Bord Uchtála* [2010] 2 IR 530, O'Neill J. held that the existence of an Article 8 relationship between a natural father and his child was sufficient to oblige the Adoption Board to notify the father of a proposal to adopt his child unless the circumstances of the conception or the nature of the relationship between the father and the mother were of such extreme or exceptional kind as to have either severed the Article 8 family tie or to have justified a proportionate interference with the father's rights in the light of the circumstances, bearing in mind the paramount welfare of the child. In the instant case, he held that non-notification infringed the natural father's right to fair procedures and so he quashed the final adoption order, sending the matter back to the Adoption Board to be considered afresh.

In *O'B v. Minister for Justice, Equality and Law Reform*, ([2009] IEHC 423, (6 October 2009) HC) the same judge held that the failure of the State to provide for a register of guardianship agreements did not infringe the applicant's rights under Article 8 as there was no direct and immediate link between the harm to the applicant's interests that would result from the loss or destruction of a guardianship agreement and the introduction of such a register, given that the applicant could take practical steps himself to eliminate the risk of such loss or destruction.

In *McB v. E*, [2010] IEHC 48, (30 July 2010) SC, the Supreme Court, per Fennelly J, offered the view, at para.37 that

nothing in the jurisprudence of the European Court of Human Rights suggests that the provisions of Irish law with regard to the rights of custody of a natural father in respect of his child are incompatible with the Convention.

*EU Charter of Fundamental Rights*

Finally, as Humphreys J noted in *IRM v Minister for Justice and Equality* [2016] IEHC 478 (29 July 2016), arts.7 and 33 of the EU Charter of Fundamental Rights make reference to the right to respect for private and family life and the right of the family to legal, economic and social protection. Natural fathers (and other members of non-marital families) could rely on these provisions but only in a context in which EU institutions or member states are implementing EU law.