

THE CHANGING FACE OF FAMILY LAW IN IRELAND

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I. INTRODUCTION

In addressing the current state of Irish Family Law, many questions come to mind immediately. Is contemporary Irish Family Law in a state of chaos and crisis? Is the traditional legal certainty of the definition of “the family” itself under attack, thus creating a great deal of legal uncertainty for judges and legal practitioners, as well as other professionals who support families? A related legal question is whether or not the “marital” family should continue to be the most acceptable and privileged institution for those who plan to situate their inter-personal relationship in a legal context that offers the optimum socio-legal security for spouses and children. Is it perhaps now timely for the judiciary (in the absence of any action by parliament) to validate and give legal recognition to other “family” forms, models or paradigms?

Some commentators have suggested that the advent of a no-fault divorce was tantamount to promoting a “divorce culture,” which would inevitably have major ramifications for Irish society at large. A related question is whether we should revisit once again the fundamental issue of whether there should be specifically designated Family Courts and trained judges as was originally proposed in the 1996 Law Reform Commission Report on Family Courts. This clarion call for radical reform in the operation of the courts which deal with Family Law problems was reiterated more vigorously in Justice Susan Denham’s 1998 Sixth Report of the Working Group on a Courts Commission. The LRC Report on Family Courts had originally pointed out that: “Judges who deal with Family Law matters in Ireland are not by law required to have any special qualifications, training or experience in, or aptitude for, Family Law matters.” There has been considerable and substantial growth of statutory Family Law and, as revealed in the *2000-2004 Annual*

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Reports of the Courts Service,¹ there have also been large increases in the number of Family Law cases coming before the courts. It has also been recognised that an unhealthy two-tiered system of family justice has been developing in recent times in which the lower socio-economic groups, who are often unrepresented litigants, seek summary justice in the District Court, while the more affluent in Irish society seek legal remedies from the jurisdiction of the Circuit Court. Viewed overall, it can now be stated with a degree of certainty that the past twenty-five years have seen a striking development and transformation of substantive Family Law.

One of the legal hallmarks of Irish Family Law jurisprudence is that there is a great deal of judicial discretion in many of the Family Law statutes, which was the result of a deliberate policy decision by the legislators. In addition, Family Law cases present particular and special challenges which mean that a Family Law case could, potentially, require a Court to make a wide of decisions regarding children, maintenance, family assets and finance, occupation of the family home, etc. In other words, in the absence of agreement between the parties, the Court is obliged to redistribute the assets as a means of regularising the post-breakdown relationship situation. Family Law cases may be psychologically complex, requiring family assessment by social workers, psychiatrists or psychologists, particularly where there are children involved. Cases can also be financially complex, especially in what have come to be known as “ample resources” or “big money” divorce cases where the assets (financial and property) may involve millions of euro and where pension splitting may also be in question.

II. TOWARDS A DEFINITION OF “THE FAMILY”

The legal position of “the family” has regularly been the object of examination and analysis. Globally and nationally, the socio-legal boundaries and parameters of Family Law are being pushed out further and further not only from an international, or indeed a European Union, perspective, but also as a result of progressive domestic judicial jurisprudence which has sometimes

¹ <http://www.courts.ie>

been ahead of the Irish Legislature in terms of defining the nature and scope of legal principles in the area. One recalls Shatter's comment about the Irish Judiciary and their significant common law judicial activist role in developing and broadening the grounds for the granting of nullity decrees. On the activist role of judges in nullity cases and their consequent sophisticated jurisprudence, Shatter states that "[n]ullity law, more than any other area of law is today a juridical monument to the powerful impact of a dynamic judicial creativity."²

The linguistic vocabulary for Family Law is itself the source of much legal complexity. "The Family" might appear easy to recognise, but may not be susceptible to a definition that meets with universal acceptance legally or socially, no matter what culture is involved. What is agreed among academics, social scientists and lawyers is that, even in contemporary Irish society, "the family" is a concept open to multiple interpretations reflecting political or ideological sets of values. The textual heading of Article 41 in the Irish Constitution uses the noun with the definite article, i.e. "*The Family*." This would seem to connote a certain set of norms sanctioned by most if not all of society. One also finds the phrase, "The Lone-Parent Family" used regularly, particularly within the context of the social welfare/social security system of providing financial support for that unit. In Britain, the concept of the *Royal Family* is used to apply to a very defined and limited number of aristocratic persons related to each other by birth or marriage. Other popular non-exhaustive definitions of "the family" could include:

- (i) a set of relations involving especially children and parents
- (ii) a person's children
- (iii) a household
- (iv) descendants of a common ancestor (dynasty)
- (v) a group of similar and related things or people

² Shatter, A., *Family Law*, (Dublin, Butterworths, 4th ed., 1997) at p. 181.

Perhaps the first two are as close to a *popular*, as opposed to a *legal*, understanding of “the family” as one can get. Other contemporary related phrases and concepts have been used to describe either the definition of “the family” and/or the many functions in which this social unit operates and performs. The family unit may also be either “nuclear” or “extended.” A very modern focus of the definition of “the family” is the notion, indeed the reality, of the reconstituted family, (e.g., following divorce or separation) where the new partners and/or children replace the original partners/children. Another quite problematic conceptual understanding of “the family” is to regard it as synonymous with “a household.” As lawyers like to state, the plain ordinary everyday common meaning of “the family” is that it denotes “a form of belonging or association, whether through a blood tie, marriage, or membership of the same household.”³ Perhaps, the statistically most common form of “the family” in Ireland is the marital one, i.e., that based on marriage in which one or more persons in that same household/social unit are related to each other by birth, marriage or adoption. This classification of “the family” may also provide for the child who is located in this unit under a fosterage agreement operated through a local health authority. Yet it can be stated that all families are households, but that the reverse is not always the case. Take, for example, a collection monks or nuns who are united by a common religious interest; they could not be regarded as “a family,” but they could be classified as a “household.” On this limitation to the definition of “the family” as a household, Russell LJ stated in *Ross and Another v. Collins*:⁴

But two strangers cannot, it seems to me, ever establish... a familial nexus by acting as brothers or as sisters, even if they each call each other and consider their relationship to be tantamount to that.... Nor, in my view, would they indeed be recognised as familial links by the ordinary man.

³ Duckworth, P., “What is a Family? – A Personal View,” May [2002] *Fam Law* 367. In the 2000 U.S. *Census*, U.S. residents were asked to classify themselves into either of the following categories: (1) household meaning “all the persons who occupy a housing unit, whether a single family, one person living alone, two or more families living together, or any other group of related or unrelated persons who share living arrangements;” or (2) family, consisting of “a householder and one or more persons living in the same household who are related to the householder by birth, marriage, or adoption.”

⁴ [1964] 1 WLR 425 at 432.

The word “family” is one which it is difficult, if not impossible, to define. In one sense, it means all persons related by blood or marriage; in another, it means all the members of a household, including parents and children with perhaps other relations. Essentially, “the family” may be regarded as a basic social unit constituted by at least two people whose relationship can be categorised in various ways. First, the relationship may be that of husband and wife or two persons living together in a manner similar to heterosexual spouses. The large number of heterosexual people now cohabitating outside marriage has forced the law to take cognisance of this socio-legal phenomenon. Second, a family may be constituted by a parent living alone with one or more children. Third, brothers and sisters or other persons related by blood or marriage may be regarded as forming a family.

The 1996 *Constitutional Review Group* set about examining various models of the family which might find acceptance within the rapidly changing face of “the family” in Irish society. They canvassed the various alternative categories of families outside the normal orthodox view of the family. The *Constitutional Review Group* pointed out that Article 41 of the Constitution “was clearly drafted with only one family in mind, the family based on marriage.” The *Review Group* however, identified the following non-exhaustive “family type” relationships/units.

- the heterosexual married couple without a child
- the heterosexual married couple with a child either their own biologically or by adoption or in their foster care
- the unmarried lone parent (mother or father) of a child who either has custody of the child or access
- a lone parent household including those who have never married, divorced, widowed, or separated persons
- the cohabitating heterosexual couple with no adopted or biological child of either or both of the couple
- the cohabitating heterosexual couple who is looking after the child of either or both parents.

Other “family type” relationships could include the

cohabitating heterosexual couple, either of whom is already married to another person but living apart from their respective spouses. This would involve persons who have not availed of the legal remedies for regularising the separation from their spouse by means of a separation agreement, a decree of judicial separation, a decree of divorce or indeed who did not pursue the option of obtaining a nullity decree. Another example is the male homosexual couple who, in this jurisdiction, are prohibited from marrying or who, even if same-sex marriage were available, would not choose that option. Finally, there is the lesbian couple who, again, cannot marry given the common law definition of marriage as stated in *Hyde v. Hyde*⁵ as the union of one man and one woman to the exclusion of all others for life. This traditional common law definition of marriage has now been expressly approved by McKechnie J in the High Court case of *Foy v. The Registrar General and the A.G.* in which he stated that,

It seems to me that marriage as understood by the Constitution, by statute and by case law refers to the union of a biological man with a biological woman. Re-echoing *Hyde v. Hyde*, Mr Justice Costello in *B. v. R* (1995) 1 ILRM 491 defined marriage as ... the voluntary and permanent union of one man and one woman to the exclusion of all others for life. As a result of the Fifteenth Amendment of the Constitution 1995 and the Family Law (Divorce) Act 1996 the permanency aspect of marriage no longer applies.⁶

This common law definition has now been incorporated into statutory law by section 2(2)(e) of the Civil Registration Act 2004.

More controversially, there is another theoretical possibility that “a family” might comprise the following cluster of people in which a child could have four parents within the context of a reproductive technology mechanism. In brief, this could involve such persons as:

⁵ (1866) LR 1 P & D 130.

⁶ [2002] IEHC 116, 9 July 2002 at p. 130.

- (a) an egg donor
- (b) a sperm donor
- (c) a womb provider, and
- (d) one or more others who might claim to have custody of a child.⁷

According to the 2002 Irish Census, there were 77,600 family units which were described as cohabiting couples. This is in marked contrast to the 1996 Census which recorded that there were 31,300 cohabitating couples, an astonishing increase of over 46,300. This fact is clear, manifest and unambiguous evidence of the changing face of the Irish family, or rather the family in Ireland, since the latter phrase includes the multiplicity of persons of other nationalities who live in Ireland as a family in a cohabitating format. Also, in the 2002 Census, there were 1,300 same-sex cohabitating couples of whom over two-thirds were exclusively male couples. This development can be clearly distinguished from the 1996 Census, which recorded that there were 150 couples whose gender breakdown was not recorded. Statistically, this 2002 Census number of households headed by gay or lesbian couples is numerically small. The comparable figure is equally statistically small in both the US (0.5%) and the UK (0.2%).

In England, there have been some recent legal developments extending legal recognition to other family units albeit for very limited purposes. The majority decision (3 to 2) in the House of Lords case of *Fitzgerald v. Sterling Housing Association Ltd*⁸ is tangential legal authority for the extended definition of “the family” or “familial nexus,” specifically for the purposes of tenancy agreements in the private sphere. In this case, John Thompson and Martin Fitzpatrick began living together in a London flat in 1976 and had a “long-term monogamous sexual relationship.” Thompson was the tenant and Sterling Housing Association was the landlord. On Thompson's death in 1994, the tenancy agreement lapsed and Fitzpatrick applied to take over the tenancy. Problems arose and Fitzpatrick sought a determination from the court. The English

⁷ Other possibilities include what are known as the “nuclear” family and the “extended” family. In addition, there is also the “intact” family and the “dysfunctional” family or the “broken-down” family.

⁸ [2000] 1 FLR 271.

Housing Act 1988 required that for Fitzpatrick's tenancy request to succeed it was necessary to prove that there was: first, a person living with Thompson as "his wife or husband;" or second, a family member living with him for a two year period up to his death. The House of Lords unanimously found that Fitzpatrick could not succeed under the first heading that he was "living as husband and wife." However, their Lordships, by a majority, held that for the limited purposes of the housing legislation, and in light of contemporary changing norms and mores, the two men were indeed a "family,"⁹ and, in the process, explored and affirmed a broad functional definition of "family" as a concept with an array of component features which could be viewed in isolation or as a whole. In other words, the definition of "family" could be ascertained when one examines the putative functions performed within that unit.

It is submitted that there is some circularity to that reasoning. It assumes that one becomes a family member if one performs the functions which families perform. However, even sociologists have problems deciding what are the core and optional characteristics of the paradigmatic family unit. Judicial activism was clearly evident in Lord Slynn of Hadley's conclusion that "family," within the context of rent legislation, could be found where there is a "degree of mutual interdependence, of the sharing of lives, of caring for love, of commitment and support ... [I]n *de facto* relationships these are capable, if proved, of creating membership of the tenant's family." For Lord Nicholls of Birkenhead, the word "family" was not a term of art capable of flexible usage depending on the context and, consequently, he found that same-sex couples would not qualify as "a family" in housing legislation circumstances. Lord Clyde's judgment went considerably further in that his Lordship considered that, by common custom, the word "family" embraced homosexual couples in long-term relationships. For his Lordship, families are defined according to their bond of affection and love, best manifested by a sexual relationship. The two dissenting Lordships did not give any legal weight to the proposition

⁹ The county court judge held that Fitzpatrick could not succeed on both grounds and the Court of Appeal by a majority dismissed his appeal. In his dissenting judgment in the Court of Appeal, Ward LJ stated that: "The question is more what a family does than what a family is. A family unit is a social organisation which functions through linking its members closely together. The functions may be procreative, sexual, social, economic, and emotional. The list is not exhaustive. Not all families function in the same way." *Fitzpatrick v. Sterling Housing Association* [1998] 1 FLR 6 at 41.

that public opinion has now changed so significantly to the point where homosexual couples could now be regarded as “a family.”¹⁰

If the Irish judicial system were to follow this precedent, there would be significant issues to be confronted in relation to extending legal status to non-traditional familial type relationships. For example, at what time or event did Fitzpatrick become family? Was it on first moving into the house and/or the bedroom or after the first act of sex? What exact period of time was necessary in order to qualify as family? In addition, would the familial relationship automatically lapse if Fitzpatrick were ever unfaithful by taking another lover without the consent of Thompson? Irish family law practitioners need not be apprehensive about this judgment, which at first blush seemed to have been quite expansive in its ambit, for it is regarded as a legal response to the specific facts of that particular case, without creating a wider precedent.¹¹

Internationally, the legal concept of “the family” has not been susceptible to a uniform, cogent, succinct definition whether legal or otherwise. Many international legal human rights instruments have made either direct or indirect reference to the concept of “the family,” but have left the characterisation of the concept of the family to be interpreted by individual States according to their respective cultures, ideologies or political philosophies.

For example, the Universal Declaration of Human Rights (1948) takes special care to protect the family and to identify its role. In particular, Article 16 (3) of the Declaration states that, “[T]he family is the natural and fundamental unit of society and is entitled to protection by society and the State.”¹² This phrase is repeated regularly in other international instruments almost as a mantra. The Declaration’s references to “family” allude to a nexus of committed affiliations, rather than transient ones, and the declaration’s references to “marriage” allude to a solemn, committed and lasting bond between a man and a woman. Article 23 (1) of the

¹⁰ The dissenting judges affirmed an earlier House of Lords judgment *Carega Properties SA v. Sharratt* [1979] 1 WLR 928 in which a heterosexual couple in a close platonic relationship were deemed not to be a family. Love and commitment were held not to have sufficient features of a familial relationship in the absence of a sexual relationship.

¹¹ For further analysis of the same-sex familial membership, see Inglis, A., “We are Family? The Uneasy Engagement between Gay Men, Lesbians and Family Law” [2001] *Fam Law* 830 in which he argues authoritatively that the contemporary English legal system operates in an “illogical and discriminatory” manner against same-sex couples.

¹² Article 12 provides that “[n]o one shall be subjected to arbitrary interference with his... family.” Articles 23 and 25 contain protections for the family’s economic status and for motherhood and childhood.

International Covenant on Civil and Political Rights (1966) states that: “[T]he family is the natural and fundamental group unit of society and is entitled to protection by family and state.” Article 10(1) of the International Covenant on Economic, Social and Cultural Rights (1966) states that, “[T]he widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children.” The preamble to the U.N. Convention on the Rights of the Child (1989) states that, “[T]he family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community.” Article 8(1) of the European Convention on Human Rights provides that, “[E]veryone has the right to respect for his private and family life, his home and correspondence.” Finally, Article 16 of the European Social Chapter includes the statement that, “[W]ith a view to ensuring the necessary conditions for the full development of the family, which is a fundamental unit of society, the Contracting Parties undertake to promote the economic, legal and social protection of family life by such means as social and family benefits, fiscal arrangements, provisions of family housing, benefits for the newly married, and other important means.” Indeed, so important was the socio-legal concept of “the family” that the United Nations proclaimed in 1994 that that year would be designated as the “The International Year of the Family.” The objectives of the designation of that year were to encompass the following:

- Increase awareness of the importance of the family and family issues among governments, and the private sector;
- to enhance understanding of the functions and problems of families;
- to focus attention on the rights and responsibilities of all family members; and
- to strengthen national institutions to more effectively formulate, implement and monitor family-related policies

and programmes.¹³

Academics have also contributed to this significant debate regarding the nature, scope and functions of “the family” concept. Hodgson for example suggests that: “[T]he perceived role, form and functions of ‘the family’ have varied considerably through history and may differ from State to State, and even from region to region within a State, owing to varying cultural, religious, sociological and legal perspectives and individual preferences.”¹⁴ The essential problem for any academic legal exercise attempting to arrive at an acceptable politico-legal or deological definition of “the family” is that this almost inevitably requires “the intervention of law, the calling upon of the judicial gaze, which is necessary to bring ‘a family’ in law into being.”

It is clear that some legal systems, such as those in Ireland and the U.K., are involved in privileging one type of family to the clear disadvantage of others. In February 2004, the then Minister for Social and Family Affairs Mary Coughlan launched a Report on family life in Ireland, entitled, *Families and Family Life in Ireland: Challenges for the Future*. On the launch of the Report, she stated that the State policy should not favour one family form over another.

Given the major social and demographic changes that have occurred in Ireland in recent years, it is necessary now to bear in mind the different forms of family in developing policies to promote the well being of individual members and social cohesion.

Despite this Ministerial statement, privileging does in fact take place. This is manifestly obvious if one engages in a linguistic examination of the term “the family.” Take, for example, the commonplace linguistic phenomenon of qualifying the noun, “the family,” with an adjective, e.g., “the *non-marital* family.” The *non-marital* family is described negatively and is clearly in contradistinction to the classical traditional notion of the “marital

¹³ On 20 September 1993, the UN General Assembly declared that from 1994, May 15 of every year shall be observed as the “International Day of Families,” (Resolution 47/237).

¹⁴ Hodgson, D., “The International Recognition and Protection of the Family,” (1994) *Australian Journal of Family Law*, vol. 8 at p. 22.

family.” Douglas comments that describing the family as “*non-marital*” appears to mean that there is something particular about this family – that “it deviates from the norm.”¹⁵ It is always illuminating to canvass the legal views of other jurisdictions in order to ascertain what their understanding of the basis of “the family” is. In the Canadian Supreme Court judgment of L’Heureux-Dube, in the case of *Miron v. Trudel*, she states that “family means different things to different people.”¹⁶ An Irish academic, commenting recently that the concept of “the family” in Ireland is now susceptible to a plurality of meanings, notes that: “the legal construction of ‘the family’ is the site of considerable controversy and symbolic conflict”¹⁷ because of the multiplicity of family forms, in particular non-marital families, as well as lone-parent households.

In the past decade, there have been ample Irish Government Papers and Reports, Law Reform Commission Consultation Papers and Law Reform Commission Reports dealing directly and indirectly with Family Law and Child Law issues. There is a monotony about all these Reports, Papers and Submissions, largely because they are so rarely acted upon. The most recent (April 2005) socio-legal focus of the All-Party *Oireachtas* Committee on the Constitution has posed certain fundamental and radical questions which go to the core of the nature and scope of the Irish Family in the context of twenty-first century norms and *mores*. In November 2004, the All Party *Oireachtas* Committee on the Constitution began the process of inviting submissions as part of its process for examining the general and particular aspects of Articles 41, 42 and 40.3 of the Irish Constitution which provide for constitutional aspects of “the family” in Irish law. This *Oireachtas* Committee has been endeavouring to ascertain the extent to which these constitutional Articles associated with “the family” are serving the good of individuals and the good of the community and if constitutional changes are needed in order to bring about a greater balance between the good of the individual and the good of the community.

The *Oireachtas* Committee invited individuals and groups to make written and/or oral submissions to it, whether in general terms

¹⁵ Douglas, G., *An Introduction to Family Law*, (2nd ed., Oxford University Press, 2004,) at p. 1.

¹⁶ 2 SCR [1995] 418 at para. 102.

¹⁷ Ryan, F., “Sexuality, Ideology and the Legal Construction of Family: Fitzpatrick v. Sterling Housing Association,” [2002] 3 *Irish Journal of Family Law*, at p. 2.

or in terms of specific issues, such as:

- how should the family be defined?
- how should one strike the balance between the rights of the family as a unit and the rights of individual members [in that unit]?
- is it possible to give constitutional protection to families other than those based on marriage?
- should gay couples be allowed to marry?
- is the Constitution's reference to woman's "life within the home" a dated one that should be changed?
- should the rights of a "natural mother" have express constitutional protection?
- what rights should a "natural father" have, and how should they be protected?
- should the rights of the child be given an expanded constitutional protection?
- does the Constitution need to be changed in view of the UN Convention on the Rights of the Child?

It is unclear if these questions are ranked and weighted in order of socio-legal importance. Equally unclear is the issue of whether this parliamentary scrutiny of aspects of Irish family law is ultimately rooted in a certain degree of political pragmatism by the governing parties who are concerned with pandering to the more liberal sectors of their political supporters.

III. SOURCES OF IRISH FAMILY LAW

Essentially, contemporary Irish Family Law has five sources of law as the basis for its growing jurisprudence. First, there is the common law jurisdiction which is still utilised by the Irish judiciary. For example, the Irish law of nullity is an obvious area where the judiciary has been expanding the various grounds for the granting of judicial nullity decrees. Such judicial activism has not escaped academic criticism on the basis that an expansion of family law jurisprudence in this sensitive and core area can only lead to a degree of uncertainty as to the long-term status of the marriage contract.

Another area in which there has been common law judicial activism is in the context of conflicts of law, in particular the legal ground for the recognition of foreign divorce decrees. In a case involving the issue of recognition of a foreign divorce decree, the Irish Supreme Court set down certain legal principles in relation to retrospectively abolishing dependency domicile in the case of *W. v. W.*¹⁸ More recently, however, in *G.McG. v. D.W.*,¹⁹ and more controversially, Justice Catherine McGuinness has made some innovative steps towards recognising foreign divorce decrees on the basis of *residence* as opposed to *domicile* which, it is submitted, flies in the face of the long-established rules that recognition should only be based on the domicile rules which have long been associated with the law of conflicts rules. The parameters within which a foreign divorce decree would be recognised was expanded further by McGuinness J. in that she ruled that a divorce decree granted in England to an Irish couple based on the “*ordinary residence*” of the wife for more than one year should be recognised. As the English decree was granted prior to the coming into force of the Domicile and Recognition of Foreign Divorces Act 1986, the question of recognition had to be dealt with under the common law rules. The consequence of the decision in *G.McG v. D.W.* is that more flexible rules apply to recognition of a pre-1986 foreign divorce than to a post-1986 foreign divorce. Family Law, therefore, is also the beneficiary of judicial activism.

Another source of Family Law jurisprudence is to be found in the multiplicity of laws passed by the *Oireachtas*, especially since 1976, beginning with the introduction of the Family Home Protection Act 1996 and the Family Law (Maintenance of Spouses and Children) Act 1976.²⁰ Since then, there have been about 25 Acts of the *Oireachtas* dealing directly or indirectly with Family Law and Child Law. Mervyn Taylor, a former Minister for Justice, Equality and Law Reform, commented to this author that when he was studying law in Trinity College Dublin in the 1960s, there was no such subject as “Family Law.” In most Law Faculties in Irish Universities, the subject of family law gradually began to appear on their syllabi in the mid-1970s.

¹⁸ [1993] 2 IR 476.

¹⁹ (No 1) [2000] 1 ILRM 107; (No 2) [2000] 1 ILRM 121.

A further source of law for Family Law can be located in the Irish Constitution and, in particular, in Article 41 of *Bunreacht na hEireann* which has had, and will continue to have, a profoundly significant influence on the nature, scope and legitimacy of Irish Family Law. In Ireland, “the family” based on the institution of marriage has its constitutional status placed on a lofty pedestal with all the attendant constitutional protection which the Irish Constitution bestows on that fundamental family unit.²¹ Mr Denis O’Donovan, T.D., Chair of the All-Party *Oireachtas* Committee on the Constitution currently reviewing Article 41, stated recently that over 60% of almost 6,000 submissions to the All-Party Committee were vehemently opposed to any change in the constitutional definition of “the family” in the Constitution.

Family Law jurisprudence can also be located in the cluster of international Treaties, Agreements and Conventions which deal with Family Law and Child Law matters, and which have either a direct or indirect effect on Irish Family Law principles. Here, one might be mindful of the United Nations Convention on the Rights of the Child 1989. This has no effect under Irish law, but is merely of moral, and not persuasive, legal authority in Irish courts.²² The European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 is now more than ever a major potential source for Irish family lawyers, particularly since the *Oireachtas* passed the European Convention on Human Rights Act 2003 which incorporated the Convention.²³ It was signed into Irish law on 30 June 2003 and was effective from 31 December 2003. Essentially, the 2003 European Convention Act guarantees that Irish courts, in interpreting and applying any statutory provision or rule of law, shall, so far as is possible, do so in a manner that is compatible with the obligations of the State under the ECHR. Under the ECHR Act 2003, Irish courts are required to take judicial notice of the ECHR and its judgments where they are relevant. They do not have to follow them. Public bodies are bound to act in a “Convention compliant manner.” The problem remains that, while there is a remedy for the breach of a Convention right, the

²¹ For an extensive analysis of the 1937 *Dail Debates* on the Draft Irish Constitution see, Martin, F., “The Family in the Constitution-Principle and Practice,” in Murphy, T., and Twomey, P.,(eds) *Ireland’s Evolving Constitution:1937-1997 Collected Essays*, (Oxford, Hart Publishing, 1998) at pp. 79-95.

²² See <http://www.unicef.org/crc/>

²³ For the text and jurisprudence of the ECHR, see the following websites: <http://www.echr.coe.int> and <http://www.coe.fr/eng/legaltxt/5e/html>

victim can only sue the public body where no other remedy is available. Even then, the only remedy available is damages. The putative victim cannot seek, for example, a declaratory or a mandatory order. The ECHR Act also requires that legislation must be read, in so far as is possible to do so, in a Convention-compliant manner. However, even if Irish courts decide that this is not possible, and the court makes a declaration of incompatibility, the only requirement is for this to be laid before both Houses of the *Oireachtas* by the Taoiseach. There is no legal requirement on the government to change the law.

IV. FUNCTIONS OF FAMILY LAW

It is now generally agreed by judges, academics and family law practitioners that family law has *three* distinct, but nevertheless related and overlapping, functions.

- (a) Definition and alteration of legal status;
- (b) Resolution of disputes;
- (c) Economic and physical protection of spouses/cohabitees and children.

The “definition and alteration of legal status” was traditionally and continues to be one of the pivotal roles of Family Law because it is primarily concerned with the rights which an individual member of a family could assert over another family member or over another family member’s property. Married persons, through their marriage contract, are given a defined legal status and legal relationship. Marriage law gives one a status which flows from the marriage contract. Similarly, the children of married parents have their legal status automatically defined in relation to both their married parents. The parents are the automatic guardians of their child with associated custody and access rights. Allied to the definition of legal status function is family law’s function of altering status in certain defined circumstances. If marriage conveys a status of spousal relationship upon persons, it necessarily follows that, on the breakdown of that marriage, the law intervenes in order to regulate the breakdown in order to protect any vulnerable members

of that familial unit. In particular, by being granted a judicial separation decree, the spouses are relieved of the duty to cohabit and the assets, finances and marital property may be distributed between the parties by the courts.²⁴ One of the most important aspects of the *altering capacity of family law* is found in the courts' jurisdiction to grant a divorce decree. Such a decree terminates a marriage contract on the basis of a no-fault ground that the parties have lived apart for four years, that there is no possibility of reconciliation and that "proper provision" has been made for the children or any dependent members.²⁵ As a consequence of this divorce decree, the parties are free to remarry.

Equally significant in the context of the first function of defining and altering status is the court's jurisdiction to make an adoption order in relation to a child. The net effect of that adoption order is to terminate the guardianship relationship a parent or parents have in relation to a child and to create a completely new guardianship relationship with an adoptive parent or parents. In such a circumstance, the original parental/guardianship relationship is completely severed and replaced with another one with person(s) who were originally legal strangers to that child.

The second major function of Family Law focuses on its capacity to intervene, to resolve disputes and to regularise the attendant consequences. Family Law is littered with stories of unhappiness, sadness and sex (or its absence). The court's jurisdiction is invoked in order to resolve disputes between individual members of the family unit, particularly if it is in the process of breaking down. Very controversial issues are the maintenance obligations for spouses and children and access rights in relation to the child of the relationship. Invariably, both these areas have been fraught with difficulties, especially the issue of non-adherence to the orders of the courts. Maintenance defaulting levels have been very high, so much so that contempt of court proceedings are regularly invoked. Equally acrimonious has been the regulation or rather the non-enforcement of access orders in relation to children in Ireland as in the U.K. Clearly, non-custodial parents are at a

²⁴ Judicial Separation decrees are provided for by the Judicial Separation and Family Law Reform Act 1989 and the Family Law Act 1995. See <http://www.courts.ie> for statistics on numbers of judicial separation and divorce decrees granted annually, Courts Service Annual Reports 2000-2004.

²⁵ See Family Law (Divorce) Act 1996.

decided disadvantage when it comes to the exerciseability of their non-custodial right of access to their children or rather the children's access rights to either or both of their parents.

Third, Family Law functions in a paternalistic and patriarchal way by intervening in the private sphere of the family in order to protect vulnerable members of that family unit, particularly when the family unit begins to break down. Here, there are two defined protective roles: physical protection and economic protection. Physical protection on the civil law side operates through the provisions of the Domestic Violence Act 1996 as amended; by giving express protection to spouses or cohabitees and/or children whose safety or welfare (physical or psychological) is at risk and who require the courts to grant either a protection order, an interim barring order, a barring order or a safety order for a defined period of time. These non-molestation orders or exclusion orders give short-term relief to relationships that are invariably going in the direction of breakdown. The protective function of Family Law may often require the court to move from its jurisdiction of operating in the private law area to operating in the public law sphere to give immediate protection to children who may have been, are, or who might be in danger of being ill-treated, neglected or abused within the context of the family unit. This might and does require the child/children to be taken into care by the health board for a short or a longer-term period. Economic protection manifests itself when the family unit begins to cease and maintenance, either in the form of a lump sum or periodical payments, is required.

V. RECENT TRENDS

According to the 2002 Report of the Central Statistics Office,²⁶ there have been significant changes in the patterns of family life in Ireland since the previous Census. Of major significance is the fact that the number of separated people in Ireland more than doubled between 1991 and 2002 to 98,779.²⁷ The numbers of those divorced by means of a domestic Irish divorce decree obtained in an Irish court, as well as those who obtained a foreign divorce decree (which was recognised in this jurisdiction), more than trebled

²⁶ www.cso.ie

²⁷ The concept of "separated people" is quite broadly defined in that it includes those who have been formally (by means of a courts order) separated and those who have been informally separated by means of a voluntary agreement by consent or otherwise to separate.

between 1996 and 2002 to 35,100. In addition, statistics also indicate that there were 21,401 remarriages in Ireland following dissolution of a previous marriage.²⁸ In the jurisdiction of England/Wales, the longitudinal rate of divorce is about four in ten marriages. Demographically, there have been some significant changes in the pattern of births of children in Ireland. In 2003, the rate of births outside marriage was 19,313 which represented 31.4% of total births, numbering 61,517. This striking demographic change can be contrasted with 1995, when there were 10,788 births outside marriage, a figure that represented 22.2% of total births. In the third quarter of 2004, there were 5,100 births registered outside marriage. This accounted for 32.7% of total births and represented an increase of 1.4% on the third quarter of 2003. The highest percentage of births outside marriage occurred in Limerick (54%), while the county with the lowest percentage was Leitrim (19%).

The 2002 Census also revealed that there were 153,000 one-parent families, representing a total of 11% of the Irish population. The marriage rate in Ireland shows a sharp decline from a high of 20,778 (7.1% - i.e., rate per 1,000 of the estimated population) in 1970, which subsequently dipped to 15,604 (4.7%) in 1995. By 2003, the number of marriages was 20,302 - a rate of 5.1%. The *2003 Annual Report* of the Courts Service indicates that the Family Law business of the Circuit Court has significantly increased from a total of 4,928 cases in 2002 to 5,466 cases in 2003. Figure 1 below indicates that the annual rates of divorce and judicial separation decrees being granted by the Circuit Courts have increased with the rate of divorce decrees being the highest since 1997 and the rate of judicial separation decrees the highest since 1998.

Figure 1²⁹

	Divorce	Judicial Separation	Nullity
2002	2,571	940	40
2003	2,929	1,206	33
2004	3,305	1,226	20

²⁸ Remarriage following widowhood numbered 9,128. Other revealing statistics in the 2002 CSO statistics indicated the following: Female lone parents – 130,364; male lone parents – 23,499; lone parents who are widows – 47,343 and lone parents who are widowers numbered 12,057. For these and other similar more comprehensive general statistics on Irish Family Law see www.courts.ie.

²⁹ In 2003, there were a total of 3,733 divorce applications, 1,802 judicial separation applications and 52 nullity applications in the Circuit Courts. In 2004, there were 3,880 divorce applications, 1,654 Judicial Separation applications and 51 nullity applications in the Circuit Courts.

Some aspects of Irish Adoption Law are to undergo changes which will alter the nature of the closed adoption system prevalent in this jurisdiction since the first principal piece of legislation regulating Irish adoption law was introduced in Ireland, the Adoption Act 1952. As recently as March 2005, the Irish Adoption Board launched their “*National Adoption Contact Preference Register*” to assist (as a facilitator) adopted people and their natural families who are seeking to make contact with each other. Participation is on a voluntary and confidential basis. The register allows an adopted person, a natural parent or a natural relative of an adopted person (who must all be 18 years or over) to choose from the following range of contact options.

- Willing to meet
- Willing to exchange information
- Contact via phone/e-mail
- No Contact but willing to share medical information
- No Contact but willing to share personal background information
- No Contact at the moment

It is only when a “match” (which is not defined in the Adoption Board regulations) is made between two people who have joined the Register that the Adoption Board will initiate contact on a confidential basis. From a legal perspective, this change in post adoption procedures will have the potential to change the closed adoption models, with all the attendant aspects of secrecy, to one which could, in the long term, be less secretive and lead to a more open linkage with the child and her natural family. What are the implications for judges and legal practitioners who deal with adoption cases? Essentially, it means that the so-called closed adoption is no longer so absolutely closed, especially when the child is over 18. In a sense, it is also an acknowledgement that, from a child’s rights perspective, the right of the over-18 “child” to know both parents is improved, at least procedurally, from May 2005. It would also seemed to put an obligation on those who process the adoption system, such as social workers, counsellors, legal advisors,

etc., to advise their clients that the adoption process will no longer have that traditional absolute guarantee of no future contact between the natural parent and the child and visa versa.

VI. STATUS OF FAMILY LAW

One problem associated with contemporary Family Law in Ireland and in other common law jurisdictions, like Canada, New Zealand, Australia and the U.K., is what could be called “the delegalisation problem.” This is a major danger threatening the very foundations of Child and Family Law. Essentially, the delegalisation argument suggests that the Family Courts in their functions as family courts operate in an informal, non-adversarial way with the result that the legal practices and procedures are not rigorously applied. This informality (which includes the absence of wigs and gowns) threatens the very legal process itself.³⁰ According to Freeman, “[M]oves away from adversary justice and towards a family court are in affect moves towards the delegalisation of family dispute settlement.... [M]uch discussion of delegalisation is in the context of wresting law away from remote authorities and allowing the masses to participate in the processes of justice.”³¹

Dewar goes further and suggests that, in terms of sophistication of jurisprudence in the entire legal system, Family Law leaves a lot to be desired. How many judges show a preference for adjudicating on Family/Child Law cases? One suspects that the answer is not many. Dewar states that:

Family Law is a legal subject that is underconceptualised and fails to provide a coherent intellectual challenge. It has low esteem among academics as well as among practitioners who too easily regard it as an interesting supplement to property law. [Family Law] hangs together among certain hackneyed themes like “marriage and divorce.” Its ultimate disadvantage is that it possesses little or no black-letter law comparable or equivalent

³⁰ For a sophisticated analysis of this legal theme see, Freeman, M., “Questioning the Delegalisation Movement in Family Law: Do We Really Want a Family Court,” in Eekelaar, J., and Katz, S., (eds.) in *The Resolution of Family Conflict*, (Butterworths, Toronto, 1985) at pp. 7-25.

³¹ *Ibid.*, at pp. 14-15.

to Contract law which at least has an organisational concept at the centre of the subject.³²

Dewar also poses the pragmatic question as to whether Family Law has a unique substantive corpus of law and/or whether, in the final analysis, it is merely concerned with procedure. Another key question is whether Family Law shares the same traditional techniques of legal analysis as other areas of law. Dewar concludes that Family Law is governed by vague legal criteria and he suggests that one obvious example is the much-utilised concept of the “welfare principle” in Child Law. More alarming is the well-known fact that Family Law has been littered with too much and too wide-ranging judicial discretion by untrained and unsympathetic judges in the Family Courts. More problematic for family lawyers is that it is not perceived as having a sufficient body of doctrinal black letter law similar to, for example, Contract Law. On the supposed absence of a doctrinal basis to Family Law, Collier states that:

Yet for all its increased respectability the subject of family law continues to be perceived within the legal academy and profession as in many ways inferior to the “proper” doctrinal subjects such as contract, tort and criminal law.³³

VII. CONCLUSIONS

One of the questions asked at the beginning of this article was whether “chaos and crisis” characterise contemporary Irish Family Law. It is clear that the Irish legal system has come a long way since 1996 when the Law Reform Commission, in its Report on Family Courts, graphically describes it as a system in crisis in which “[T]he courts are buckling under the pressure of business. Long Family Law lists, delays, brief hearings, inadequate facilities and overly-hasty settlements ...are the order of the day...there is a negative ethos...The situation ...is chronic.” However, it is

³² Dewar, J., “Concepts, Coherence and Content in Family Law” in Birks, P., *Examining the Law Syllabus: Beyond the Core*, (1994, Oxford), at p. 81.

³³ Collier, R., *Masculinity, Law and the Family*, (London, Rutledge, 1995) at p. 47. Collier concludes that “family Law is, in short, inescapably political,” at p. 49.

respectfully submitted that the time has now come for a radical overhaul of the current court structure in Family Law matters.

In this context, one need look no further than the recommendations advanced by both the 1996 LRC Report and the 1998 Sixth Report of the Working Group on a Courts Commission. The options are as progressive now as they were then. First, the proposed establishment of Regional Family Courts (fifteen) has many advantages as they would operate as a division of the Circuit Court and would have a unified Family Law jurisdiction wider than the present Circuit Court and could provide for additional matters, such as proceedings under the Succession Act 1965, Wardship proceedings, Adoption proceedings under the Adoption Acts 1952-1998, and Child Abduction proceedings under the Child Abduction and Enforcement of Custody Orders Act 1991.³⁴

A second option would be to establish a dedicated Family Court structure similar to that which operates in Australia, where it is a separate entity with its own judges who are specially appointed for this work, as well as having distinctive procedures, personnel and appropriate support services to deal with Family Law matters. The Family Court bench comprises the Chief Justice of the Court, a deputy Chief Justice, judge administrators, senior judges and other judges. There is a comprehensive case management system and extensive support services such as counselling and mediation funded by the State. Perhaps as a first step towards a less radical restructuring of the court system in relation to Family Law matters, it could be possible to make improvements in the existing system by creating a distinctive Family Law Division which would include District, Circuit and High Courts and would have significant improvements in resources in staff and ancillary services. Judicial appointments to these Family Law divisions should be on the basis of a person's experience, legal knowledge and disposition. Whether these should be permanent appointments or restricted to a few law terms is a matter of detail.

Finally, Family Law cases can no longer be shrouded in mystery. If society believes in a rule of law, then citizens need to

³⁴ According to this model of court structure, the jurisdiction of the District Court would be limited to the making of emergency orders and interim orders in situations of emergency.

know what the law is. Therefore, Family Law principles in a democratic society must be promulgated and scrutinised in a public manner. The so-called *in camera* rule as applies to Family Law has gone too far to the point where it is regarded as the “sacred cow” of Irish Family Law. The Courts Commission Working Group acknowledged that it was conscious of the detrimental side effect of the *in camera* rule, the absence of knowledge of the workings of the Family Law courts. The philosopher Jeremy Bentham once remarked that “[P]ublicity is the very soul of justice. It is the ... surest of all guards against improbity.”

Section 40 of the Civil Liability and Courts Act 2004, effective since 31 March 2005, has introduced some minor changes to the absolutist nature of the *in camera* rule. In particular, it provides for limited reporting and publishing of Family Law cases, although the Act is silent on a definition of a “report” and is also silent on the class of person who may report a case. It would also appear from section 40 (2) of the 2004 Act that, although most Family Law statutes are covered by the relaxing of the rule, proceedings taken under the Guardianship of Infants 1964, the Child Care Act 1991, the Child Abduction and Enforcement of Custody Orders Act 1991 and proceedings under the Adoption Act 1952-1998 are probably still bound by the strict application of the *in camera* rule. Perhaps these exclusions were based on the paternalistic notion that children are a voiceless and vulnerable group who will always need the protection of the courts. Further liberalisation of the *in camera* rule is provided for in section 40(5) of the 2004 Act. In essence, this provision gives statutory recognition to the common law “*McKenzie friend*” principle which allowed lay litigants in Family Law proceedings to be assisted in court by a named party who attends court in a non active manner. Essentially, the Act now states that no person shall be denied the right to be accompanied in court by any other person, subject to the approval of the court and any directions given by the court in this regard. Thus, the admission of such a friend will not be deemed to violate the privacy of the court. In the final analysis, the judge will determine who can attend her/his court.

It is not an exaggeration to state that the Western world is

now involved in a struggle of considerable scope as regards the nature and meaning of *marriage* and *the family*. Belgium, the Netherlands and Canada now permit same-sex marriages. It has been suggested that the licensing of “marriages” between two men or two women and the possibility of homosexual couples rearing children represents a deconstruction of the very institution of “the family.” White and Hogan, in *J. Kelly: The Irish Constitution* (2004), have identified a fundamental problem for Irish Family Law as being rooted in the conservative ideology which underpins Article 41. In their view, this is the likely reason why aspects of Article 41 are arguably under more strain than many other provisions of the Constitution due to the increasing secularisation and liberalisation of Irish society. Irish Family Law has evolved incrementally and in a piecemeal fashion. Most of the statutory family laws are direct and indirect responses to crises which have affected either individuals in the family unit or the entire familial unit itself. In the final analysis, it can be stated that Family Law can be perceived as a mirror reflecting social, cultural, and political developments in the context of an ever-changing society. Douglas thus concludes that, given such a context for family law:

The lack of a consistent set of principles underpinning the law is hardly surprising, given the lack of consensus on the role of the law, the form of relationships deserving of its recognition, and the roles of the parties within these relationships. Ways must be found of conceiving family relationships and of managing their formation and termination, to achieve the ultimate goal of promoting and enhancing social and family stability... [A]ttitudes to family relationships are changing. The assumption that most people will marry and have children and that therefore the law can be predicated on this basis can no longer safely be made. The law, and family policies, may have to encompass a wider, and probably more volatile, range of family structures.³⁵

³⁵ Douglas, G., *Family Law*, (London, Butterworths, 2nd ed., 2004), at pp. 7 and 28-29.

There has been no shortage of public debate about matters affecting families, marriage and children. The public discourse on such controversial and ideologically laden topics has changed dramatically in the past five-years. A survey of the Irish national newspapers in 2005 reveals that no issue along the family-marriage spectrum is immune from public scrutiny. Newspaper headlines (*The Irish Times*) such as the following are now a feature of this discourse: “Homosexual couples demand right to adopt;” “Knights oppose same-sex unions being enshrined;” “Methodists want definition of family out of Constitution;” “Delicate task of defining partnership;” “Pleas to examine all options on marriage;” “The concept of family today;” “Constitution must put children first;” “Bishops say definition of family should be retained;” “State to challenge lesbian couple’s legal action;” “Men’s group calls for Constitution change on father’s rights;” “Gay marriage under focus in review of family rights;” and “Lone-parent families seek recognition under the Constitution.”

Divorce is now increasingly common. Over one-third of all births are to parents who are not married to one other and there has been a significant increase in the number of families headed by a lone-parent. Perhaps the time has arrived for Irish society to realise that, if the legislators continue to legislate within a constitutional framework incompatible with the changing family relationships of the 21st century, respect for the rule of law will diminish. Perhaps it will be left to the courts and the judiciary to interpret the laws in such a way as to give legal recognition and protection to both marital and non-marital families, thereby ensuring that the two-tiered system of rights for children in marital and non-marital families will no longer have the force of law.