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The Children's Rights Amendment and Family Law

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Waiting for family law reform is a bit like waiting for a bus. You linger forlornly for what seems likes an eternity, stoically weathering the elements. Then, just as you are about to give up, along comes a bus — and two more buses directly behind it.

In the past year, the Republic of Ireland has seen three major proposals for family law reform. The Civil Partnership Bill 2009, which is currently before the Dáil, promises a substantial new civil status for registered same-sex couples, with additional protective measures for cohabiting couples, same-sex and opposite-sex. The Law Reform Commission consultation paper, *The Legal Aspects of Family Relationships,* provisionally recommends some long overdue reforms to the law as it relates to guardianship, custody and access.

There is much to be welcomed also in the proposed constitutional amendment on children. For one, the proposed new Article 42 will apply to *all* children, and not just those born within marriage. The proposed amendment contains, in particular, a ground-breaking assertion that "[t]he State shall cherish all the children of the State equally." This will banish, one hopes, the spectre of *O'B v S*, [1984] IR 316, a Supreme Court decision that affirmed the constitutional validity of measures that discriminate against non-marital children. The Court concluded that the constitutional preference for marriage trumped the child's right to equality. This constitutional amendment would arguably reverse that stance.

The current iteration of Article 42 is notable for its strong emphasis on parental rights. As originally conceived, Article 42 was designed to ring-fence the family, protecting it against what was seen as undue state intervention. Children's rights are, by this philosophy, often subordinated to the interests of (married) parents. Additionally, the existing constitutional provisions often create a 'chilling effect', setting the bar for intervention too high when children are clearly at risk.

The 2010 amendment recasts the balance significantly. Notably, the proposal places on a constitutional footing the best interests principle, namely that in all disputes concerning the child, the child's welfare is treated as the first and paramount consideration. While acknowledging the rights and responsibilities of parents, the amendment also proposes the conferral of individual constitutional rights on children.

There will be some genuine concern that the amendment may serve to facilitate easier state intervention at the expense of parents. Parents may be reassured by the requirement that the State addresses parental failure by 'proportionate means', a stipulation that will serve to restrain inappropriate state intervention, though by precisely how much is unclear. The amendment notably continues to view parents as the primary carers and educators of their children. In particular, the proposed new Article 42.7 will preserve parental freedom of choice in relation to schooling.

The amendment will, on the other hand, make it easier to adopt the children of married parents. Currently, the 'inalienable' character of married parents' rights means that, as the law stands at present, a child of married parents may only be adopted in the most extreme of

circumstances envisaged by the Adoption Act 1988. The amendment will, by contrast, permit the adoption of children with the consent of their married parents, while it will also be easier to adopt children where their parents have failed in their responsibilities on an ongoing basis.

The current proposals represent a significant advance on the rather tentative amendment mooted in 2007. The latter was decidedly less emphatic in relation to children's rights and represented a more modest shift from the current position. The 2010 proposal is considerably more child-focussed and egalitarian. The 2010 amendment also uncouples the issue of children's rights in the civil law context, from child protection in the criminal law context, the 2007 proposal having conflated these separate issues, raising civil liberties concerns that detracted from the otherwise reasonable civil law measures proposed therein.

The current proposal raises some interesting issues for non-traditional families. The amendment, in Article 42.3, speaks of the central role played by 'parents' in the lives of their children. The immediate question that arises is whether this reference to parents includes the unmarried father and thus confers on him constitutional responsibilities and rights. Currently, an unmarried mother enjoys a personal constitutional right (under Article 40.3) to the care and company of her child. While legislation has gradually ameliorated the position of the unmarried father, he, by contrast, is not afforded any such constitutional right. The amendment potentially enhances the constitutional role of unmarried fathers, though to what extent it does so is unclear.

Even less obvious are the implications for other less traditional parenting arrangements. What would the position be where a lesbian couple 'commissions' a man to assist them in starting a family, the intention being that the couple would act as parents to the child? Though laudable in other respects, the Civil Partnership Bill does next to nothing to address the complex issue of gay and lesbian parenting, while the recommendations of the Commission on Assisted Human Reproduction remain firmly on the shelf. Admittedly one ought not expect this level of specificity in a constitutional provision. The question nonetheless arises whether the term 'parent', as used in this amendment, is wide enough to embrace social as well as genetic parenthood.

A broader concern arises. Like a racy new sports car parked beside a vintage 'old banger', the proposed new Article 42 will, if passed, coexist alongside Article 41. The latter continues to privilege the family based on marriage over all other family forms; indeed it fails singularly to recognise *any* alternative to the nuptial bond. Despite the significant diversification of family patterns in modern Ireland, the Constitution will continue to deny the 'lived reality' for a great many Irish families. In particular, notwithstanding the affirmation of the equality of all children, the families in which many of those children are raised will remain unrecognised, at least in the constitutional context.

Nonetheless, our bus has arrived. We're not quite sure where it will take us but we're glad, for the moment, to be on the road.