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School of Applied Social Studies,  
University College Cork,  
Ireland

## **The Rights of Unmarried Fathers in Ireland**

**Carmel Best, LL.M**

### **Abstract**

Ireland has a very lively social history when one considers the definition of the term 'family' and particularly so when considering the term in the context of the legal rights of parents and children alike. It is fair to say that the social upheaval in Ireland has been nothing short of incredible when one considers that it was once legal for an unmarried mother to have her child adopted without the consent of the natural father.<sup>1</sup> The treatment and social exclusion levied at single mothers and their descendant children in the past is a classic example of how the State failed to protect the rights of one of the most vulnerable sectors in our society. Ireland has developed significantly since the 1960's and has seen the many changes to family laws and family support services. Ireland has adopted the European Convention on Human Rights, which affords certain added protections from a European level. While these developments are welcome and in every respect monumental much attention and support has remained with the single mother and the single father has been to some degree sidelined. Many single fathers in Ireland choose to exclude themselves from the lives of their children however there are those fathers who wish to parent their children and yet continue to face exclusion. This article will examine the development of laws in Ireland pertaining to the unmarried

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\*LL.B LL.M, Solicitor, Best & Co Solicitors, [www.bestandco.ie](http://www.bestandco.ie)

1. See *The State (Nicolaou) v An Bord Uchtála* [1966] IR 567.

family and seek to determine if the rights of the unmarried father are protected enough or at all.

**Keywords:** Fathers' rights; Unmarried family; Single fathers

### **The interpretation of the term 'family' in Ireland and the consequences for unmarried fathers**

The Irish Constitution provides for the family at Article 41 which sets out as follows:

The State recognises the Family as the natural primary and fundamental unit group of society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.

The State therefore guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.

At a very early stage the Irish Courts determined that the use of the term 'family' within the constitution referred only to the family based on marriage. In the case of *The State (Nicolaou) v An Bord Uchtála*<sup>2</sup> the natural father of a non-marital child sought to have the adoption order quashed on the grounds that the legislation permitting his child's adoption without his consent infringed his own natural rights as a parent. Henchy J noted as follows;

It has not been shown to the satisfaction of the court that the father of an illegitimate child has any natural rights as distinct from legal rights, to either the custody or society of that child, and the court has not been satisfied that any such right has ever been recognised as part of the natural law.

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<sup>2</sup> *Ibid.* Article 14 ECHR also provides that the 'enjoyment of the rights and freedoms set forth in the convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

Nearly 30 years later an Irish case with identical facts came before the European Court of Human Rights in *Keegan v Ireland*<sup>3</sup> which found that an adoption by a mother of her non marital child without the consent of the natural father amounted to an interference by the State of the natural father's family rights as protected by Article 8 of the Convention.

Article 8 of the European Convention on Human Rights<sup>4</sup> provides that '*Everyone has a right to respect for his private and family life*'.

In particular the European Court found that the notion of the term 'family' was not confined to those solely based on marriage:

[T]he notion of 'family' in Article 8 is not confined solely to marriage based relationships and may encompass other de factor family ties, where the parties are living together outside marriage. A child born out of such a relationship is ipso facto part of that family unit from the moment of her birth, and by the very fact of it.

The European Court of Human Rights has however since the Keegan Case made several pronouncements on what is deemed a 'family' given that that society has changed rapidly in recent times.

In the case of *X, Y and Z v UK*<sup>5</sup> the European Court acknowledged a relationship based on a transsexual union as a 'family'. The Irish Courts however have not been so convinced and the Supreme Court made a determination regarding the issue in *J McD v L & Anor*<sup>6</sup> and rejected the idea of a de facto family founded upon a lesbian relationship as to recognise it would be in direct conflict with the Irish Constitution.<sup>7</sup>

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<sup>3</sup> 18 EHHR 342 1994

<sup>4</sup> See also Article 7 of the European Charter of Fundamental Rights

<sup>5</sup> [1997] 24 R.H.R.R 143

<sup>6</sup> [2009] IESC 81

<sup>7</sup> The fact that the Irish State has passed the Human Rights Act 2003 did not alter the decision of the Supreme Court. See '*The Human Rights of Same Sex Couples in Ireland and the Civil Partnership Act 2010*', Best C. *Critical Social Thinking 2<sup>nd</sup> Annual Conference 2011*.

Although the European Court of Justice has a much broader interpretation of the term 'family' it has also noted that each member state will have a 'margin of appreciation' when considering certain issues such as same sex marriage.<sup>8</sup> Therefore the Irish State in its interpretation and application of the Irish Constitution can continue to provide preferential treatment to those 'families' which are founded upon marriage.

The Irish State had brought about some legislative changes prior to the Keegan case<sup>9</sup> with the passing of the Guardianship of Infants Act 1964 and the Status of Children Act 1987. Prior to the coming into effect of the latter legislation the natural mother and not the natural father was the sole guardian of the child born outside marriage. The unmarried mother's right to automatic guardianship to her child is protected in the constitution by virtue of Article 40.3 as opposed to the Articles pertaining to the family. A guardian of a child has a right to be consulted on all matters affecting the upbringing of the child such as education, religious beliefs, medical treatment etc. Guardianship also bring with it duties such for example to ensure that a child is properly cared for and that any decisions made in relation to the child are made in the best interests of the child.<sup>10</sup>

Without Guardianship status the unmarried father does not have any automatic rights to their children. A common misconception amongst parents is that once the father's name appears on the birth certificate of a child then he has automatic rights concerning his child. This is not the case. If a father is not a legal guardian of his child he cannot give consent to medical treatment<sup>11</sup>, he has no right to medical information concerning his child, he has no right to visit the child in hospital without the mother's consent, he has no right to school information without the mother's consent and the child can be taken out of the jurisdiction without his consent.<sup>12</sup>

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<sup>8</sup> ECHR 30141/04

<sup>9</sup> *Op cit.*

<sup>10</sup> *Child Law* Shannon G., 2005 Thomson Roundhall, at Chapter 2

<sup>11</sup> See the Health Services Executive Guidelines 2009 which state that '*Only parents who are guardians...can give consent on behalf of their children.*'

<sup>12</sup> For passport applications where the non-marital father is a joint guardian his permission is required before a passport can be processed in respect of the child. If the non-marital father is not a joint guardian his permission is not required which is interesting given that the natural mother can take the child out of the jurisdiction without any consultation whatsoever with the natural father.

By virtue of the above legislation the natural father can make a court application to become a joint guardian and more recently by virtue of the Children Act 1997 which allows for a more simplified method of appointing a natural father as a joint guardian which involves the signing of a statutory declaration. Section 4 of the 1997 Act provides that the parties can enter into a statutory declaration, declaring that they are the father and mother of the child, that they agree to the appointment of the father as a guardian and that they have entered into arrangements regarding custody, access etc.

While the legislation is most welcome it does present practical difficulties for example once the declaration is sworn by the parties what does one do with it. There are no provisions that the declaration should be filed in court and if a natural father's name is not included on the birth certificate it is highly unlikely that the Registrar will accept the declaration in place of a Court Order.<sup>13</sup>

A court application to be appointed a joint guardian however remains necessary if the natural mother does not consent to the appointment. At the court hearing the views of both parties will be taken into account and the court will assess the circumstances of the case and the suitability of the natural father to be appointed a joint guardian. Interestingly however the suitability of the natural mother in this context is not questioned in the same fashion but rather given as of right upon the birth of her child<sup>14</sup>. If a mother is adamantly opposed to the appointment it will not necessarily follow that a court will refuse the application. The court may make the appointment either immediately or over time.<sup>15</sup>

The best interests of the child will be of paramount consideration to the court so much so that if a natural father has been appointed a joint guardian by consent via the statutory declaration method he can subsequently be removed as joint guardian if the court is of the view that it is not in the best interests of the child. The only way a natural mother can be removed as the guardian of her child is if the child is placed for adoption.

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<sup>13</sup> *Op Cit.* Shannon G at page 48.

<sup>14</sup> See Article 40.3 Irish Constitution

<sup>15</sup> In some cases a District Court Judge may decide to review a particular case before appointing the natural father a joint guardian and make a decision as to guardianship over time.

Despite the fact that a natural father can apply to be appointed a joint guardian the court is not obliged to grant the application. The case of *J.K v V.W*<sup>16</sup> involved the adoption of a non-marital child and the court noted that the 1987 Act did not in itself confer an automatic right of guardianship for the natural father of a non-marital child. Finlay CJ stated as follows:

[T]he discretion vested in the Court on the making of such an application must be exercised regarding the welfare of the infant as first and paramount consideration. The blood link between the infant and the father and the possibility for the infant to have the benefit of the guardianship by and the society of its father is one of the many factors which may be viewed by the Court as relevant to its welfare.<sup>17</sup>

The Court will look at a variety of factors such as the relationship of the mother and father, the circumstances surrounding the birth, and the history of access up to the date of the application.

If unmarried parents of a child subsequently marry then the natural father automatically becomes the guardian of the child. Therefore it is plain to see the emphases that the State places on relationships founded upon marriage as opposed to other types of relationship.

### **Legal and Social Barriers for Unmarried Fathers in Ireland**

According to the Central Statistic's Office<sup>18</sup> in 2010 over 44% of first births in Ireland were to unmarried parents and approximately 50% of births to unmarried parents were to couples who were living together.

Since the introduction of the Status of Children Act 1987 the State is obliged to give a natural father an opportunity to establish a relationship with his child. The European Court of Justice noted in particular in the Keegan case that where the existence of a

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<sup>16</sup> [1990] 2 I.R. 437

<sup>17</sup> *Ibid* at 447

<sup>18</sup> [www.cso.ie](http://www.cso.ie)

family tie with a child has been established the State must act in a manner calculated to enable that tie to be developed and legal safeguards must be put in place.<sup>19</sup>

The State has however only moved a small step forward in that regard by the introduction of the 1987 Act and in my view is not enough for the protection of unmarried fathers. This is none more apparent in the case of the recent case of *J. McB v L.E*<sup>20</sup> where the European Court of Justice ruled against an unmarried father whose partner took their three children to the UK without his consent.

The father J. McB was an Irish national and his partner L.E a British national was referred to as L.E. The couple had resided together for more than ten years and from November 2008 lived with their three children in Ireland.

L.E left the 'family home' in July 2009 and resided in a woman's shelter for two weeks with her three children before taking them to reside in the UK. Ten days before her departure the father attempted to secure his rights through the Irish Courts but as the proceedings were not served upon the mother before her departure he was under Irish Law then unable to secure his rights.

In November 2009 Mr McB attempted to secure the return of his children through the English Courts however it was held that he needed a declaration from the Irish Courts that their removal from the Irish State was wrong.

At the High Court it was noted that Mr McB had no rights of custody following the removal of his children from the jurisdiction. He naturally appealed the decision to the Supreme Court. It was necessary for the Supreme Court to consider the Hague Abduction Convention<sup>21</sup> which facilitates member states promptly returning a child wrongfully removed (or retained) in another member state. The Supreme Court also

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<sup>19</sup> *Op cit.*

<sup>20</sup> [2010] IESC 48

<sup>21</sup> The Convention is widely ratified and its main purpose is to seek to prevent the harmful effects of abduction and retention across international boundaries. This can only be achieved by each state securing and committing to the speedy return of the child to their place of habitual residence.

had to consider the 2005 Brussels II Regulation which was designed to complement the Hague Abduction Convention.

The Brussels II Regulation provides that the member states give recognition and enforcement to each other's marriages and divorces. The Regulation realises the free movement of people but for clarity where a cause of action is filed in one member state then that State will have original jurisdiction to adjudicate the matter and the other State is obliged not to exercise jurisdiction.

Both pieces of legislation share the founding principle that courts in the country where the child is habitually resident are best suited to decide custody issues<sup>22</sup>.

This became the first case to address the question as to whether an unmarried father has automatic rights of custody for the purposes of EU intra-child abduction. Mr McB argued that Ireland was compelled to recognise that an unmarried father can compel the return of his children to Ireland by virtue of the Abduction Convention and the Brussels II Regulation.

Mr McB also argued that Irish domestic law giving married fathers automatic custody rights whilst denying unmarried fathers the same rights violated Article 14 ECHR right to be protected from discrimination on the basis of marital status.

The argument was further advanced that Ireland had a positive obligation to ensure that his family life was respected and that Ireland's refusal to recognise his 'inchoate rights' of custody was in breach of that obligation.

The Supreme Court decided to refer the arguments posed by Mr McB under a new urgent procedure provided by Article 104b to the Court of Justice Rules of Procedure. The central question for the European Court of Justice was whether the Brussels II Regulation precluded a member state from requiring an unmarried father to apply for

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<sup>22</sup> For an in depth analysis see '*J. McB v L.E The Intersection of European Union Law and Private International Law in the Intra-European Union Child Abduction*' Dekar C. Fordham International Law Journal 2011



custody rights and whether those rights were and should be automatically recognised by the State.

The European Court also considered the human rights aspect of Mr McB's argument that failing to automatically recognise his custody rights was in direct breach of Article 8 of the ECHR and Article 7 of the European Charter.<sup>23</sup>

The court found that providing an '*application process*' for an unmarried father was sufficient and adequate protection of a natural father's rights of custody and access. Accordingly the removal of Mr McB's children from the Irish State was not wrongful in the circumstances and did not infringe his custody rights as he did not have any at this point in time. It was therefore open to Mr McB to apply to the UK courts for his custody rights.

The result is that the European Court is unwilling to force a member state to expand what it determines to be a 'family' within their own domestic laws. Consequently it is over to the Irish State to develop the term which is highly unlikely given the special constitutional protection afforded to relationships founded upon marriage.

One noteworthy argument from the European Court was that to introduce automatic rights via Brussels II would unjustifiably infringe on the natural mother's freedom of movement within the European Union. Interestingly therefore it is not right to restrict an unmarried woman's free movement but yet according to Irish domestic law if she were married with children yet separated she may be so restricted given the married father's automatic rights.

Legal barriers such as described above are however not the only barriers an unmarried father will face in Ireland. Noteworthy research in the area shows that other barriers are working just as effectively when considering how unmarried fathers are perceived in society.<sup>24</sup>

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<sup>23</sup> *Op cit.*

<sup>24</sup> See McKeon K. '*Families and Single Fathers in Ireland*' delivered by conference organised by Cherish: An Association of Single Parent Families, on the theme of The Changing Family in the New Millennium, Dublin 2000.

McKeon notes how the One Parent Family Payment actively excludes the unmarried father from parenting his child and is deeply undermining of family structures particularly in disadvantaged communities. For example, a crucial condition of the payment scheme is that the parent in receipt of the payment is parenting alone and the parties do not cohabit with one another. Consequently any financial contribution from the natural father serves nothing but to reduce the one parent family payment making it financially very risky for the natural mothers. This further makes the natural father's financial contribution redundant.<sup>25</sup>

Also noteworthy from McKeon's research is the absence of general support services for single fathers as opposed to single mothers. He notes that in social work as in family support, parenting is treated as synonymous with mothering and the single mother. The unmarried father consequently becomes side lined when there are no active strategies in place to include them in such support services.

### **Conclusion**

The Irish State however have not afforded any further protection to unmarried fathers since the passing of the Children Act 1997 and it appears that the state are not obliged to afford any further protections either by virtue of the Human Rights Act 2003 which transposed the European Convention on Human Rights into national law.

Advances in other areas such as the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 introduced the new status of a civil partner into Irish Law but it did not address the relationship and legal status between civil partners and their children.

The recent case of *McB v LE* the Supreme Court confirmed that it was not obliged to extend the rights of unmarried fathers any further either by virtue of the Hague Convention or the Brussels II Regulation.

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<sup>25</sup> *Ibid*

This case raises many issues and says much about not only the failure of the Irish State to protect unmarried fathers in certain situations but also about the lack of assistance from the European Court of Human Rights. The decision in *McB v LE* fails to recognise that there are certain fundamental rights which require positive steps to be taken for vulnerable members of society.

The LRC has recently examined the issue of the responsibilities and rights of non-marital fathers in its *Consultation Paper on Legal Aspects of Family Relationships*<sup>26</sup> and explored the idea of granting automatic parental responsibilities to all parents. The Consultation Paper also examined joint registration of the birth of a child as a possible mechanism for securing guardianship/parental responsibility.<sup>27</sup>

In its recommendations the LRC relied on two core principles and the first was that the best interests of the child are the primary consideration in all matters concerning children. The LRC referred in particular to the UN Convention on the Rights of a Child (UNCRC) and in particular to Article 7 which states as follows:

The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire nationality and, as far as possible, the right to know and be cared for by his or her parents.

The LRC also referred to Article 18 of the UNCRC which provides that a State shall use its best efforts to ensure the recognition of both parents in the upbringing and development of a child.<sup>28</sup>

The second principle relied upon by the LRC was that of equality between parents regardless of gender or marital status. The Commission is of the opinion that currently the Irish State does not treat married and unmarried parents equally and currently

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<sup>26</sup> LRC CP 55-2009 (First Published December 2010)

<sup>27</sup> *Ibid* at paragraph 2.34

<sup>28</sup> The 2012 constitutional amendment protecting the rights of children should also be noted in this context.

non-marital fathers are excluded from automatic rights of guardianship to their children.<sup>29</sup>

In its conclusions and in light of the above principles the Commission recommended that legislation should be enacted to provide for automatic joint parental responsibility (guardianship) of both the mother and a father of any child.<sup>30</sup> The commission further noted that automatic parental responsibility should be linked to compulsory joint registration of the birth of the child.<sup>31</sup>

This mechanism is however heavily dependent on both parties being present at the time of the registration of the birth and in agreement with one another which is not always possible, however it would be a step in the right direction.<sup>32</sup>

The commission further recommends that in the absence of agreement between a mother and non-marital father that the father can register his name on the birth certificate by making an application to the Registrar and to allow time for objection from the natural mother.

As the law stands in Ireland there is clear discrimination levied at unmarried fathers and they remain in my view unprotected until they are afforded automatic rights upon the birth of their child.

Whilst for the most part the Irish courts are more than willing to grant guardianship, access and custody the process can be delayed and frustrated easily by a natural mother who for example decides to take the children out of the jurisdiction. Whilst this

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<sup>29</sup> The LRC notes however that this should as always be subject to the proviso that the welfare of the child is not put at risk.

<sup>30</sup> The scope of this paper did not include children conceived by assisted human reproduction.

<sup>31</sup> See also Murray C. *Recognising the modern family: extending legislative Guardianship Rights in Ireland*, *Irish Journal of Family Law* [2012] 2.I.J.F.L.

<sup>32</sup> In the UK by virtue of the Welfare Reform Act 2009 a non-marital father is a qualified informant and he can either be jointly registered with the mother or he can be confirmed as the father by use of a paternity test.

is an extreme example it does serve to show that the legislation both at domestic and European level is currently not enough.<sup>33</sup>

The 2011 Programme for Government gave an undertaking to prioritise the Law Reform Commission recommendations on Guardianship however the current Civil Registration Amendment Bill (2012) does not deal entirely with the challenges and discrimination faced by unmarried fathers.

Despite all of the positive changes in Ireland since the 1960's dangers remain in the area of Adoption which can be seen from the recent case of *S v The Adoption Board*.<sup>34</sup> The case confirmed that under adoption legislation, those with a right to be heard before an adoption order can be made enjoy such right only if the Adoption Board decides to hear them and the legislation does not impose a strict obligation on the Board to seek out the listed persons in order to ask them if they would like to be heard in every application.

The recently passed Children Referendum will introduce an explicit statement in the Constitution recognising and affirming that children have natural and imprescriptible rights and that the State has an obligation to ensure that those rights are vindicated and protected.

This should include the right of a child to know and have a relationship with their natural father. Fathers should be given automatic guardianship rights with the mother while at the same time provide clear grounds on which those rights can be challenged or removed. Such is also the case with the natural mother and so there is no reason why the State continues to promote negative presumptions about the natural father as opposed to positive inclusive ones.

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<sup>33</sup> For an in depth analysis of how guardianship and access/custody applications work in practice see Egan Dr. *Are fathers discriminated against in Irish Family Law? An empirical study.* Irish Journal of Family Law [2011] 2 I.J.F.L

<sup>34</sup> The High Court, October 6<sup>th</sup> 2009

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