The Constitutional Status of the Unmarried Family and its Constituent Members

Introduction

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

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

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

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

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

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

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

Right to protection of married family against attack

State cannot penalise the marital family

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

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

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

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

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

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

In a number of subsequent cases, the courts have had to consider the implications of the constitutional protection for marriage in contexts other than that of tax law. Thus in Hyland v Minister for Social Welfare [1989] IR 624, [1990] ILRM 213 the Supreme Court applied this principle to invalidate a provision in the social welfare code—s 12(4) of the Social Welfare (No 2) Act 1985—which reduced the amount of unemployment assistance payable to a married claimant whose spouse was in receipt of some other form of welfare.(In contrast to the response to *Murphy*, where the more favourable treatment enjoyed by cohabiting taxpayers was extended to their married counterparts, the immediate legislative response to *Hyland* was to extend the restriction on the payment of unemployment assistance to both married and cohabiting claimants: see the Social Welfare (No 2) Act 1989.) In Greene v Minister for Agriculture [1990] 2 IR 17, [1990] ILRM 364, Murphy J granted a declaration that administrative schemes designed to provided compensatory payments to persons farming in disadvantaged areas were invalid because the means test provided for the aggregation of certain income of married, but not cohabiting, claimants.In contrast, Keane J said, obiter, in the earlier case of H v Eastern Health Board [1988] IR 747 that, in the context of the means-testing of welfare claimants:

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

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

Judicial willingness to apply the 'inducement test'

The case of MhicMhathúna v Ireland ([1989] IR 504 (HC), [1995] 1 IR 484, [1995] 1 ILRM 69) raises the question as to whether the inducement test, rejected by the Supreme Court in Muckley, may yet have some limited role to play in this area. In MhicMhathúna, the plaintiffs sought to impugn aspects of both the tax and welfare codes which discriminated in favour of single unmarried parents when compared with their married counterparts on the ground, inter alia, that such policies infringed Article 41. The comparison drawn in this case was not the same as that in Murphy, Muckley and Hyland. In the latter cases, the courts were asked to compare the treatment of married persons with single persons in the same situation, the only pertinent difference between the two groups being the marital status of the parties concerned. Consequently there would appear to be no justification in social policy terms for any difference in treatment which discriminated against married persons, in which case the 'penalty' test of Muckley would seem quite appropriate. In the instant case, however, the court was invited to compare the treatment of married parents living together with that of an unmarried

parent living alone. There are considerable factual differences here, particularly as far as the children are concerned, and such differences arguably justify a legislative policy designed to minimise the disadvantage suffered by children of one-parent families. Dismissing the plaintiffs' claim, Carroll J in the High Court said that the policies in question—the payment of a social welfare allowance to unmarried mothers and the allocation of a special tax-free allowance to single parents—did not constitute inducements not to marry. Furthermore, 'the extra support directed by the State to single parents ... is child centred and cannot in my opinion be designated as an attack on the institution of marriage.' In her judgment, Carroll J did not refer to Muckley and consequently offered no justification for the resurrection of the inducement test.

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

Legislation may discriminate in favour of marital family

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

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

The Court also noted that:

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

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

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

Constitutionality of State support for non-marital families?

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

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

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

regulate the position of members of the second and subsequent marriages in a polygamous marriage even if such marriages could not be recognised in Irish law.

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

Non-marital children

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

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

The same view was expressed by the Supreme Court in Nicolaou's case ([1966] IR 567, (1968) 102 ILTR 1) and reiterated in G v An Bord Uchtála. ([1980] IR 32). In the latter case, Walsh J noted that the non-marital child had the right to be supported and reared by its parent or parents. In *D.O.M. v Minister for Justice and Law Reform* [2014] IEHC 193 (8 April 2014), McDermott J said that non-marital children have a constitutional right under Art.40.3 to the care, support and society of their parents. However he went on to hold that the State had taken these rights into consideration before making a deportation order against the children's natural father and so he refused to quash that order. In *KI v Minister for Justice and Equality* [2014] IEHC 83, (21 February 2014), the same judge said that similar consideration should be given when assessing the effect of deportation on children whether the children are marital or non-marital.

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

Natural mother

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

> 'For the same reason [ie the family of Articles 41–42 being that founded on marriage] the mother of an illegitimate child does not come within the ambit of Articles 41 and 42... Her natural right to the custody and care of her child, and such other natural personal rights as she may have (and this Court does not in this case find it necessary to pronounce upon the extent of such rights), fall to be protected under Article 40.3, and are not

> affected by Article 41 or Article 42 ... There is no provision in Article 40 which prohibits or restricts the surrender, abdication, or transfer of any of the rights guaranteed in that Article by the person entitled to them. The Court therefore rejects the submission that the [Act] is invalid in as much as it permits the mother of an illegitimate child to consent to the legal adoption of her child, and lose, under... s 24(b) of the Act all parental rights and be freed from all parental duties in respect of the child... It is the opinion of the Court that the parent referred to in Article 42.1 is a parent of a family founded upon marriage and this of itself disqualifies the appellant as a parent within the meaning of that term in Article 42.1...' ([1966] IR 567 at 644, (1968) 102 ILTR 1 at 42)

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

In *O'S v Doyle* [2013] IESC 60, the Supreme Court held that a natural mother had no constitutional right to veto the vaccination of her child in circumstances where the father, who had been appointed a guardian of the child, had obtained a District Court order directing that the vaccinations be administered. In *IRM v Minister for Justice and Equality* [2016] IEHC 478 (29 July 2016), Humphreys J held, at para.53, that a natural mother has no constitutional right to have her partner present in the State for the birth if the partner has no legal entitlement to be present in the State at all.

Natural father

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

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

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

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

> 'I am satisfied that this submission is not correct and that although there may be rights of interest or concern arising from the blood link between the father and the child, no constitutional right to guardianship in the father of the child exists. This conclusion does not, of course, in any way infringe on such considerations appropriate to the welfare of the child in different circumstances as may make it desirable for the child to enjoy the society, protection and guardianship of its father, even though its father and mother are not married.
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> The extent and character of the rights which accrue arising from the relationship of a father to a child to whose mother he is not married must vary very greatly indeed, depending on the circumstances of each individual case.
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> The range of variation would, I am satisfied, extend from the situation of the father of a child conceived as a result of a casual intercourse, where the rights might well be so minimal as practically to be non-existent, to the situation of a child born as the result of a stable and established relationship and nurtured at the commencement of his life by his father and mother in a situation bearing nearly all the characteristics of a constitutionally protected family, when the rights would be very extensive indeed.' ([1990] 2 IR 437 at 447)

In the light of this understanding of the father's rights, and as s 6A only conferred on the father the right to apply to be appointed guardian, as distinct from a right to be guardian, the majority concluded that where the father's application for appointment as guardian is linked to an application for custody, the court should only consider the wishes of the father where it has first concluded that the quality of welfare which would probably be achieved for the infant with the prospective adoptive parents is not to an important extent better than that which would probably be achieved by custody with the father.

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

The father then instituted proceedings under the European Convention on Human Rights in which he alleged, inter alia, that the placing of his child for adoption without his knowledge or consent amounted to a violation of his right to respect for family life under Article 8. In Keegan v Ireland, ((1994) 18 EHRR 342) the European Court of Human Rights held that Article 8 was not restricted to families based on marriage and that relationship between the applicant and the child's mother had the hallmark of family life as it had lasted for two years and the conception of their child was the result of a deliberate decision. It followed that a bond existed between the applicant and his daughter amounting to family life. The fact that Irish law permitted the applicant's daughter to be placed for adoption without his knowledge or consent amounted to an interference with his right to family life for which no justification relevant to the welfare of the child had been offered. Following on from this decision, the Oireachtas enacted the Adoption Act 1998 – see now the Adoption Act 2010 - providing for consultation with natural fathers in relation to the adoption of their children.

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

Counsel for the natural father had contended that the applicant had rights in regard to his children arising from the nature of the relationship he enjoyed with them and with their mother, which was described as being in the nature of a de facto family. However, according to Hamilton CJ:

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

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

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

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

Later in his judgment, he said that, in determining an application for guardianship,

> the basic issue for the trial judge is the welfare of the children. In so determining, consideration must be given to all relevant factors. The blood link between the natural father and the children will be one of the many factors for the judge to consider, and the weight it will be given depend on the circumstances as a whole. Thus, the link, if it is only a blood link in the absence of other factors beneficial to the children, and in the presence of factors negative to the children's welfare, is of small weight and would not be a determining factor. But where the children are born as a result of a stable and established relationship and nurtured at the commencement of life by father and mother in a de facto family as opposed to a constitutional family, then the natural father, on application to the Court under s.6A of the Guardianship of Infants Act, 1964, has extensive rights of interest and concern. However, they are subordinate to the paramount concern of the court which is the welfare of the children.'([1996] 2 IR 248 at 269)

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

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

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

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

> ‘1 What are described as ‘natural rights’ whether arising from the circumstances of mankind in a primitive but idyllic society postulated by some philosophers but unidentified by any archaeologist, or inferred by moral philosophers as the rules by which human beings may achieve the destiny for which they were created, are not recognised or enforced as such by the courts set up under the Constitution.
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> 2 The natural rights aforesaid may be invoked only insofar as they are expressly or implicitly recognised by the Constitution; comprised in the common law; superimposed on to common law principles by the moral intervention of the successive Lord Chancellors creating the equity jurisdiction of the courts, or expressly conferred by an Act of the Oireachtas, or other positive human law made under or taken over by, and not inconsistent with, the Constitution.
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> 3 The Constitution does not confer on or recognise in a natural father any right to the guardianship of his child (see The State (Nicolaou) v An Bord Uchtála [1966] IR 567 and JK v VW [1990] 2 IR 437).
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> 4 The common law right of parents—and a fortiori the father—to guardianship and custody of their or his child was moderated by equitable principles (see Re O’Hara [1900] 2 IR 232).
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> 5 Such rights as the family or father had in equity to guardianship of their or his child were supplanted by the provisions of the Guardianship of Infants Act 1964 (see Lord Donovan in J v C [1970] AC 668).
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> 6 The undoubted statutory right of the natural father to apply for guardianship of his child carries with it the right to have the application properly considered by the court to which the application is made. That analysis will involve the consideration of a multiplicity of material facts varying with the particular circumstances of the case and in particular the actual personal, financial and emotional relationship that has existed between the father and his child and, above all, the value to the child of that relationship being continued but only in the context of how such benefits would interact with all or any other relevant considerations.’ ([1996] 2 IR 248 at 294–5)

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

> ‘[O]nce the Supreme Court [in Nicolaou] had accepted that the prosecutor was a concerned and caring parent it was not logical to justify his exclusion [from the category of “parent” for the purposes of the Adoption Act 1952] by a reference to natural fathers who had no interest in the welfare of their children. This was to fall into the logical trap …[of] treating equally persons who were in different situations, and amounted therefore to unfair discrimination.
>
> The logical flaw in the argument can more easily be seen if one reduces it to a syllogism:
>
> (1) Many natural fathers show no interest in their offspring and the State may exclude them from all say in their children’s welfare.
>
> (2) The prosecutor is a natural father.
>
> (3) Therefore the State may properly exclude him from all say in his child’s welfare.’ ([1996] 2 IR 248 at 280)

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

> ‘[I]llegitimate children are not mentioned in the Constitution. Yet the case law acknowledges that they have the same rights as other children. These rights must include, where practicable, the right to the society and support of their parents. These rights are determined by analogy to Article 42 and captured by the general provisions of Article 40, s 3 which places justice above the law. Likewise a natural mother who has honoured her obligation to her child will normally have a right to its custody and to its care. No one doubts that a natural father has the duty to support his child and, I suggest, that a natural father who has observed his duties towards his child has, so far as practicable, some rights in relation to it, if only the right to carry out these duties. To say that the child has rights protected by Article 40, s 3 and that the mother, who has stood by the child, has rights under Article 40, s 3 but that the father, who has stood by the child, has no rights under Article 40, s 3 is illogical, denies the relationship of parent and child and may, upon occasion, work a cruel injustice.’ ([1996] 2 IR 248 at 283–284.)

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

‘1. [The natural father] has no constitutional right to the guardianship or custody of or access to a child of which he is the natural father;

2. [he] has a statutory right to apply for guardianship or other orders relating to a child; this entails only a right to have his application considered;

3. the strength of the father's case, which is described in the three judgments from which I have quoted as consisting of "rights of interests or concern," will depend on an assessment of the entirety of the circumstances, of which the blood link is one element, whose importance will also vary with the circumstances; in some situations it will be of *"small weight";*

4. both Hamilton C.J. and Denham J. spoke of *de facto* families in the context of an application for guardianship pursuant to the Act of 1964 and only in the sense of a natural father living with his child and unmarried partner in an ostensible family unit; a *de facto* family does not exist in law independent of the statutory context of an application for guardianship;

5. The father's rights, i.e., right to apply, if any, are in all cases subordinate to the best interests of the child.'

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

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

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

One might well question, however, whether the distinction drawn by the courts between natural mothers and natural fathers in the context of their rights in respect of their children is not too absolutist in its denial of constitutional rights to all natural fathers and specifically those who have made a commitment to their children. Barrington J's critique of the reasoning in Nicolaou which led to this result is compelling and the current constitutional position clearly reflects a stereotypical image of the natural father that does not accord with the reality in a growing number of cases. In *T v O* [2007] IEHC 326 (10 September 2007), McKechnie J suggested, at para.50, that there should be greater protection of the rights of natural fathers who nurture, protect and safeguard their children and, at minimum, that there should be some means readily available so that such a father could assert his rights where his children have been removed without notice. He also expressed the view, at para. 51, that the rights of a natural father who nurtures and cares for his child are derived from his relationship with his child and that such rights predate any application for guardianship.

Where a natural father has been appointed a legal guardian of the child, he acquires rights and duties in respect of the child and where there is a conflict

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

Impact of Article 8 of the European Convention on Human Rights

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

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

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

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

EU Charter of Fundamental Rights

Finally, as Humphreys J noted in *IRM v Minister for Justice and Equality* [2016] IEHC 478 (29 July 2016), arts.7 and 33 of the EU Charter of

Fundamental Rights make reference to the right to respect for private and family life and the right of the family to legal, economic and social protection. Natural fathers (and other members of non-marital families) could rely on these provisions but only in a context in which EU institutions or member states are implementing EU law.