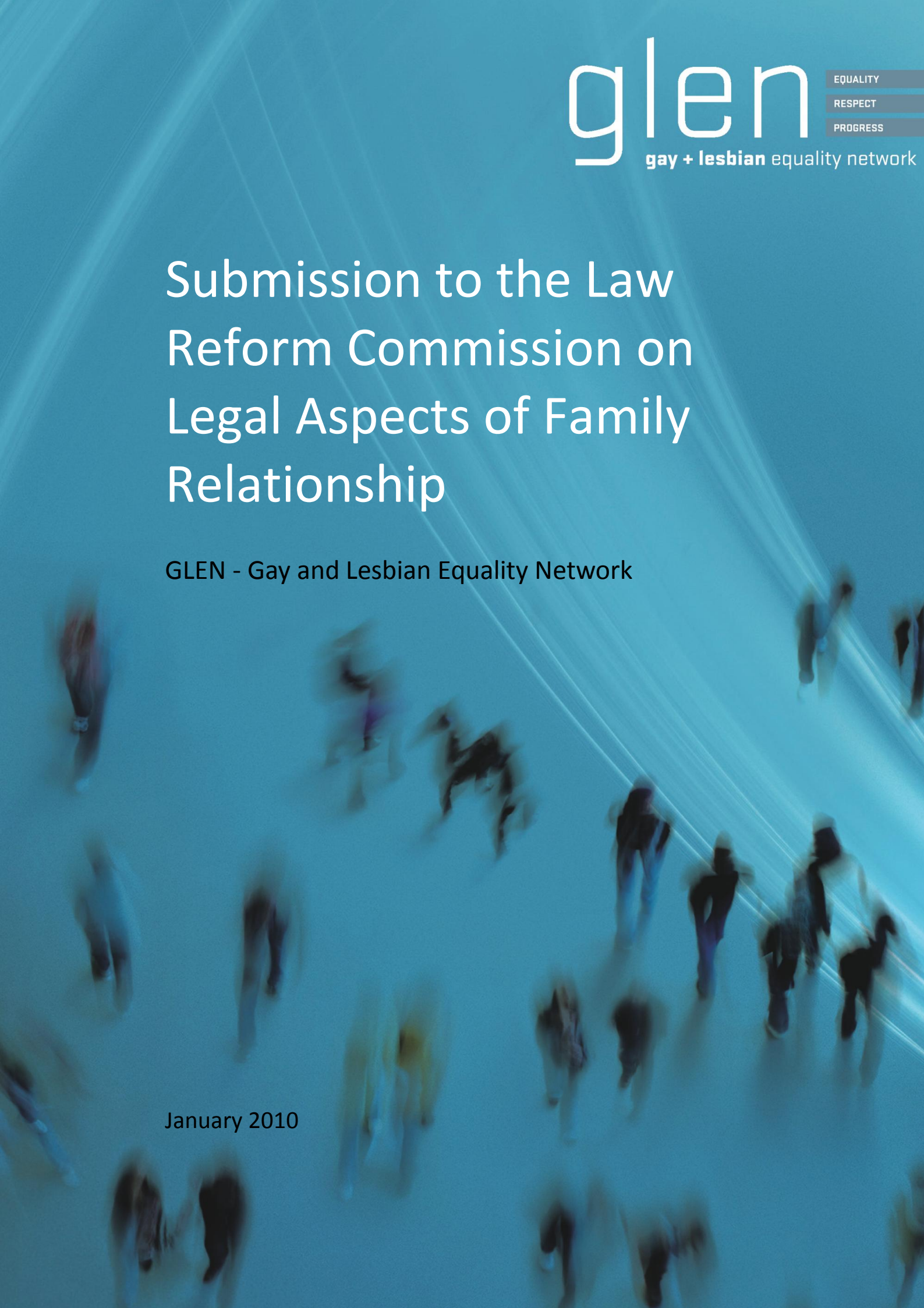
glen
EQUALITY
RESPECT
PROGRESS
gay + lesbian equality network

Submission to the Law Reform Commission on Legal Aspects of Family Relationship

GLEN - Gay and Lesbian Equality Network



January 2010

CONTENTS

GLEN – Gay and Lesbian Equality Network
2 Exchange Street Upper
Dublin 8
t: +353 1 6728650
e: info@glen.ie
w: www.glen.ie

Introduction

GLEN ~ Gay and Lesbian Equality Network ~ welcomes the opportunity to make a submission regarding the Law Reform Commission's (LRC) Consultation Paper on Legal Aspects of Family Relationships (henceforth referred to as the LRC Consultation Paper). The issues raised in the Consultation Paper are of enormous significance to many lesbian and gay people, and in particular the growing number of children being parented by same-sex couples. The importance of the issues raised has also been acknowledged by the Government in its commitment in the Renewed Programme for Government (October 2009) to review the legislation relating to guardianship, custody and access following the publication by the LRC of its final report.

This submission is set out in three sections:

1. The first section provides a brief overview of the circumstances giving rise to an increasing number of children being parented by same sex couples and the difficulties that can arise for children and their parents due to lack of legal recognition.
2. Section two outlines the progress that has been made in providing for legal recognition of same-sex couples and an outline of continuing gaps, particularly in relation to children being parented by same-sex couples.
3. The last section outlines suggestions for legal reform in response to the most relevant recommendations and questions for feedback identified in the LRC Consultation Paper.

We also attach a copy of a detailed analysis of the Civil Partnership Bill 2009 prepared for GLEN by Dr. Fergus Ryan, Head of the Department of Law in Dublin Institute of Technology. This current submission draws heavily on Chapter 8 of Dr. Ryan's report which focuses on the rights of children being parented by same-sex couples. It also draws on the report of the Government's Working Group on Domestic Partnership (2006), which looked at the issues arising for lesbian and gay couples and their children. We would be happy to meet with the LRC to elaborate on any of the issues identified.

1. Same-Sex Families and their Children

1.1 Family Formation

The past twenty years has been a period of unparalleled progress for lesbian and gay people in Ireland. A whole set of factors, including comprehensive equality legislation, has led to an increasingly open society where more and more lesbian, gay and bisexual (LGB) people and same-sex couples can live their lives openly, supported and acknowledged by family, friends, neighbours, work colleagues and by the wider community.

In this context, an increasing number of lesbian and gay couples, women in particular, are also parenting children, again, very often with the support of family, friends, schools and the wider community. This is happening, as highlighted by Fergus Ryan, in one of a number of diverse ways (Ryan, 2009):

- ***Children from a previous relationship.*** A common scenario is where one same-sex partner, who was previously in a married or unmarried heterosexual relationship, brings children from that marriage or unmarried relationship creating a step-family situation similar to other, heterosexual step-family arrangements. In many cases, the biological parents may have joint or shared parenting arrangements that involve both of the biological parents and, in practice, also involve the new same-sex partner.
- ***Conception and parenting through agreement with a known father or through access to professional fertility service***. It is possible for one or both partners of a lesbian couple to become pregnant through the donation of sperm through agreement with a known father or by means of professional fertility services. The involvement of the father can vary from no involvement at one end to shared parenting arrangements with the father (and possibly his partner) at the other. The recent Supreme Court Judgement in the case of JMcD v PL and BM centred on a dispute over one such agreement between a lesbian couple and a gay man.
- ***Adoption by one of the partners***. It is possible in Ireland for an individual who is in a same-sex relationship to adopt a child. However, a couple under Irish law may only adopt jointly if they are married to each other. This situation

will continue under the Civil Partnership Bill 2009 (as currently drafted), which does not allow for same-sex couples who register their partnership to be considered as potential joint adoptive parents.

- ***Fostercare***. Although same-sex couples are not entitled to jointly adopt a child, in practice there is nothing in law precluding a couple from fostering a child. The report of the Government's Working Group on Domestic Partnership (2006) noted that lesbian and gay couples who are fostering children form a small but significant group in terms of the overall numbers of same-sex couples parenting children. The success of lesbian and gay couples as foster parents of children entrusted to them by the HSE has also been acknowledged recently by the Minister for Children, Barry Andrews TD.
- ***Surrogacy.*** Though practically and legally more complex, it is possible for a couple (for example two gay men) to enter into a surrogacy arrangement, whereby a third party agrees to carry a child on the couples' behalf. As noted by Fergus Ryan, from virtually every perspective, practical, ethical, emotional and legal, this is a challenging option. The complexity around it is illustrated in the Report of the Commission on Assisted Human Reproduction (2005), which recommended (by a majority) legal recognition of surrogacy arrangements, provided certain strict conditions are met.

1.2 Issues Arising for Children and Parents

Lack of legal recognition and the implications of this for children and parents in the variety of circumstances just outlined, were highlighted in the report of the Government's Working Group on Domestic Partnership (chaired by Anne Colley) published in 2006. Colley noted two legal obstacles in particular:

- The first is that since joint adoption is restricted to married couples, same-sex couples who have children cannot provide those children with the protection this legal relationship ensures. The negative implications of this for children being parented by a same-sex couple are apparent in situations where adoption would be the most appropriate mechanism for investing both partners with legal rights and responsibilities. For example, Colley notes that

lesbian and gay couples who have jointly fostered a child and who subsequently become eligible to apply for adoption have to make an arbitrary decision as to which partner will apply for adoption and who will relinquish any legal connections to the child. Thus the child, who had two foster parents, is only entitled to one legal parent (2006: 18).

- The second key legal obstacle is that under current legislation, it is only possible for someone with a biological connection with a child to apply for legal guardianship of that child except on the death of the guardians. This means that although a same-sex couple might jointly and equally parent a child from birth, there is no mechanism to allow the non-biological parent to take on any of the rights and responsibilities attaching to the parental role (2006:17).

These limitations, Colley notes, pose many problems for lesbian and gay parents and their children. For example:

- Children are excluded from the protection and legal obligations of their non-biological parent towards them in terms of inheritance, maintenance and other benefits.
- In the event of the dissolution of a relationship or in the event of the death of the legal parent, the child/children can be separated from their second parent, who has no legal connection to their child/children but who may have co-parented the child/children from birth (2006:17). Equally, the child could be separated from the family of their non-biological parent, for example, this partner's parents, who may have played a significant role in the life of the child as de facto grandparents but who have no legal link or connection to their de facto grandchild.
- More day to day difficulties arise because the second parent has no legal connection with their child. For example, the non-biological parent may not be able to sign a consent form for medical treatment in the event of the other parent being incapacitated or unavailable. Similar issues arise in relation to registering a child for school and barriers to travel arising from non-recognition of the second parent. (2006:18).

These issues are the same as those highlighted in chapter 4 of the LRC Consultation Paper as applying to step parents who have taken on a parenting role but where

there is no provision for them to make an application for guardianship/parental responsibility or for the biological parent or parents of a child to confer guardianship on them.

The LRC goes on to note that there are couples who adopt the child in order to ensure that both parents are guardians but that this is not satisfactory as it requires the biological parent to adopt his or her own child and it severs all legal connection between the other biological parent and the child. This procedure also cannot be used where the child is a marital child.

This clearly applies to lesbian and gay couples and the children they are parenting in a number of the scenarios outlined in Section 1.1 above (for example, where children have been brought to the relationship from a previous heterosexual relationship). However, a critical difference is that same-sex couples cannot jointly adopt even where this might best suit the circumstances.

Colley recommended in this respect that:

> ***"Given that the welfare of the child is paramount, in principle, same-sex couples who are married or in a full civil partnership should be eligible for consideration to adopt any child who is eligible for adoption. It should be noted that, rather than confer a right to adopt, this would allow registered same-sex couples the right to be considered for adoption subject to the existing rigorous assessment process for married couples and single adopter already in place under the Adoption Acts"*** (Working Group on Domestic Partnership, 2006: page 50).

2. Legal Progress For Lesbian, Gay and Bisexual (LGB) People, Couples and families

The past two decades has been a period of rapid legal progress for lesbian, gay and bisexual (LGB) people. Less than 20 years after decriminalisation, the Government published the Civil Partnership Bill in June 2009, which completed second stage in the Dáil this January. The Bill extends many of the rights and obligations of civil marriage to same-sex couples who register their relationships. The Bill also provides for a redress scheme for cohabitants, opposite sex or same-sex, who do not marry or register their civil partnerships. However, the Bill makes very little change to the current legal situation of children living with same-sex partners.

The provenance of the Bill and the implications of the gaps regarding children are outlined in more detail as follows.

2.1 Extensive Analysis, Debate and Dialogue on Legal Recognition of Same-sex Couples and Families

The Civil Partnership Bill 2009 follows a period of extensive analysis, debate and consultation on legal recognition of same-sex couples and families. The Bill in particular follows detailed analysis and consultation undertaken by three bodies: the Government's Working Group on Domestic Partnership (chaired by Anne Colley) the Law Reform Commission (from its report on the Rights and Duties of Cohabitants 2006) and the Joint Oireachtas Committee on the Constitution in its 2005 report on the family.

Of particular significance in framing the registered civil partnership part of the Bill, has been the options proposed by the ***Colley Working Group*** in 2006. The Group was established in early 2006 by Michael McDowell, then Minister for Justice, Equality and Law Reform to propose legal options to Government on legal recognition of people across a range of relationships including same-sex couples.

In its report to Government, the Colley Group highlights access to civil marriage as the option that would deliver equality for same-sex couples. Should marriage be vulnerable to Constitutional challenge, the only other option for Government proposed by the Group was Full Civil Partnership, giving equivalent rights and obligations of marriage to same sex couples. The Group considered that this would address many issues for same-sex couples – although it falls short of equality, as it excludes same-sex couples and their families from the protection given to families under the Constitution.

The Colley Group, as outlined in the previous section, also highlighted the growing numbers of children being parented by same-sex couples. Lack of legal recognition of these relationships meant that children were excluded from the protection and legal obligations of their non-biological parent towards them in terms of inheritance, maintenance and other benefits. To address this issue the Group proposed that, as outlined above, that same-sex couples who register their partnership should be eligible for consideration as joint adoptive parents.

The cohabitation scheme in the Civil Partnership Bill is substantially based on the proposals put forward by the LRC in its 2006 report *The Rights and Duties of Cohabitants*. The main focus of this report had been on the vulnerabilities arising for couples, both opposite sex and same-sex, cohabitating outside of marriage. However, the report noted that as same sex couples cannot marry, “it is not possible to equate opposite sex and same sex cohabitants based on autonomous choice”. The report “acknowledges such a legal distinction and is aware of the danger in assuming that there is a single problem which can be addressed by a single solution” (2006:18). On this basis, the Commission, while not making any proposals regarding marriage or civil partnership for same-sex couples, noted the impending report of the Working Group on Domestic Partnership. It stated that any registration model proposed by the Working Group could “logically co-exist” with the redress scheme that Law Reform Commission proposed (2006:19).

The LRC also noted that cohabitants may have children who are not born of the relationship, where both cohabitants are social parents, but where only one person is a legal parent. A child of the parents or of one parent, it is noted, is a factor that is inevitably considered by the Courts on the breakdown of a spousal relationship. The Commission therefore considered that a cohabitant, of whom there is a child of the relationship but who is not the biological or adoptive parent of the child, should be

eligible as a qualified cohabitant (for the purposes of the redress scheme) where they have been together for two years, as opposed to three years where there are no children (2006: 34).

2.2 Omission of Children in Civil Partnership: Implications

The provisions of the Civil Partnership Bill 2009, as noted by Dr. Fergus Ryan in his analysis of the Bill for GLEN (2009), are very extensive. In particular, it replicates in most respects the obligations and entitlements that are conferred by law on married couples. However, insofar as children are concerned, civil partnership will make very little change in the current legal situation of children living with same-sex partners.

While a child has full rights in respect of a person who is his or her biological parent, neither the current law nor the Civil Partnership Bill, as currently drafted, provides the child with any substantial rights in respect of the civil partner of the child's biological parent who may have been involved in the planning for the child and its subsequent parenting since birth. For example:

- The child will not be able to seek maintenance from the non-biological parent following a breakdown of the relationship between the parents
- The child will have no rights of succession if the civil partner of the biological parent dies.
- The Bill does not recognise the interests of children in respect of the shared home of the civil partners.
- Unlike divorce, dissolution of civil partnership can be granted without regard to the interests of dependent children, though the court must consider the existing rights of children when making various orders after dissolution.
- The non-biological parent cannot seek guardianship or custody of the child during the lifetime of the other guardians.
- Civil partners will not be able to adopt a child jointly, though, as is currently the case, either partner may adopt as an individual.

It is difficult to see how these exclusions are in the best interests and welfare of the children concerned.

2.3 Emerging Case Law

In a recent judgement of the Supreme Court in the case of J.McD. v. P.L. & B.M. (10/12/2009, judgement available at www.courts.ie) a five judge panel of the Court unanimously reversed a 2007 judgement of the High Court which had found that a lesbian couple and their child constituted a *de facto* family under Article 8 of the European Convention on Human Rights.

The facts of the case illustrate the complex and difficult issues that can arise in the context of the arrangements that some lesbian and gay people make to conceive and subsequently parent children, but which have implications for children being parented in a wide variety of family circumstances. The Court found, inter alia that "there is no institution of a *de facto* family in Ireland" and the existence of such a family could not be weighted, in this case, against the father of a child conceived through agreement between the father, the mother and her lesbian partner (see main judgement of the Court delivered by Ms Justice Denham 10/12/2009).

3. Conclusions and Recommendations for Change

The judgement of the Supreme Court just referred to, indicates the complexity of the issues that arise as children are born and raised in new forms of families never before envisaged or recognised in the law. A significant issue for GLEN in relation to the case is that even though the Court found that the two women provided a loving and caring home for the child, the rights and obligations of the non-biological parent vis a vis the child she is parenting remain precarious. This is the reason many lesbian and gay people welcomed the judgement of the High Court that the lesbian couple comprised a de facto family, not to deny the rights of the father, but to invest rights and responsibilities in the person who may have no biological connection with the child but who has parented the child from birth. This is particularly difficult when viewed from the perspective of the child, who is denied the stability of a relationship with both its de facto parents and is also denied the status of living in a de facto family.

In his review of the Civil Partnership Bill (2009), Fergus Ryan notes that legal progress for children being parented by same-sex couples cannot be separated from the need for wider reform in family law that recognises diverse forms of family life more generally. The Commission's work on this issue provides an important opportunity to drive this necessary reform in aspects of the law most directly related to the complex issues involved.

In line with this and the analysis set out in the preceding sections, we suggest the following for inclusion and progress.

- **Identification of issues faced by children being parented by same-sex couples.**
  The Consultation Paper notes that provisions for *in loco parentis* in the Guardianship of Infants Act 1964 cover the situation where the non-biological parent of a child of a same-sex couple wishes to apply for access/contact. This is the only reference in the Paper to same-sex couples.
  We would urge the Commission to ensure that, as in the Colley Group report, the issues arising for children being parented by same-sex couples be

identified in more detail and depth in the consultation process and that this would be reflected in the analysis and recommendations of the final report.

- **Clarification on '*In loco Parentis*'**
  Although the Commission states that the phrase in loco parentis would embrace the partner in a same-sex couple who has lived with the child, for the avoidance of doubt it is recommended that this is made clear in any proposed statutory definition of the term in the legislation governing family relationships.

- **Recommendations on terminology**
  GLEN welcomes the proposals of the Commission for the use of the terms "parental responsibility", "day to day care" and "contact" in place of guardianship, custody and access respectively. These terms, as noted in the Consultation Paper, not only provide a more accurate sense of what is involved, they also place a greater emphasis on the rights of the child as well as the right of the parent.
  This has very significant resonance for same-sex couples parenting children, where a key concern in seeking legal recognition is to ensure that their children are not denied the company and care of their non-biological parent (and the responsibility of this de facto parent towards them) should anything happen to the legal parent or should the relationship be dissolved.

- **Extending the Categories of People Who Can Apply for Access/Contact**
  GLEN would welcome a proposal to expand the categories of persons who can apply for access/contact to include persons with a bona fide interest in the child as provided for by section 37 of the Child Care Act 1991. This could cover for example, the family of the non-biological parent, for example his or her parents, who may have a considerable role in the life of the child as de facto grandparents, but where there is no legal recognition of this role. Inclusion of such extended family would provide an important opportunity for a child to maintain contact with their extended family in this respect.

- **Extending the Categories of People Who Can Apply for Custody/Day to day care**
  GLEN would welcome the proposal to extend the categories of persons that can apply for custody/day to day care to those who can currently apply for leave to apply for access/contact. This provides an important extension of the rights of the child.

- **Procedures to Extend Guardianship/ Parental Responsibility to Step Parent**

  GLEN would strongly welcome the development of a procedure to extend legal guardianship/parental responsibility to a step parent, where the definition of step parent is inclusive of the same-sex civil partner as well as the spouse of a biological parent. This would provide important protections for children being parented by same sex couples, as it allows for the non-biological parenting partner to take on guardianship/parental responsibility.

  Based on the best interests of the child, GLEN proposes, as is the case in the UK, that guardianship could be extended by agreement or by application to the Court. These proposals are elaborated in detail by Dr. Fergus Ryan in his review of the Civil Partnership Bill under taken for GLEN (2009: pages 103-106).

References

Equality Authority, Implementing Equality for Lesbians, Gays and Bisexuals, (Dublin, 2002) www.equality.ie,

Irish Council for Civil Liberties, Equality for All Families (Dublin: ICCL, 2006)

Ronayne and Mee, Partnership Rights of Same-Sex Couples, (Dublin, Equality Authority 2000) www.equality.ie,

Ryan, F. Civil Partnership: Your Questions Answered. A Comprehensive Analysis of the Civil Partnership Bill. (Dublin, GLEN, 2009).

The All-Party Oireachtas Committee on the Constitution, Tenth Progress Report: The Family, (Dublin: The Stationery Office, 2006)

The Rights and Duties of Cohabitants, LRC-82-2006, (Dublin: Law Reform Commission, 2006),

Walsh and Ryan, The Rights of De Facto Couples, (Dublin: IHRC, 2006)

Working Group on Domestic Partnership, Options Paper, (Dublin: Department of Justice, Equality and Law Reform, 2006)

Background to GLEN

GLEN ~ Gay and Lesbian Equality Network ~ is a national NGO promoting equality for lesbian, gay and bisexual (LGB) people in Ireland. GLEN has funding from the Department of Health and the Atlantic Philanthropies.

GLEN's five year Building Sustainable Change Programme was launched by then Taoiseach Bertie Ahern TD in April 2006. The programme has a number of key strands in promoting equality including promoting equality in legal recognition of same-sex couples and families, addressing exclusion and harassment in education, and the development of community infrastructure for the LGB population. The Programme also aims to promote equality and inclusion in employment.

GLEN was represented on the Colley Working Group established by the Minister for Justice, Equality and Law Reform which proposed legislative options for Government on giving legal recognition to, inter alia, same-sex couples.

APPENDIX 1: Extract from Analysis of Civil Partnership Bill

The following extract is taken from the GLEN publication *Civil Partnership: Your Questions Answered* which is an analysis of the Bill commissioned from Dr. Fergus Ryan, Head of the Department of Law at DIT. The full analysis is available at www.glen.ie

This extract is Chapter 8: ***The Rights of Children Being Raised by Civil Partners.***

8.1 Surely by definition, same-sex couples can't have children?

Child-rearing in modern Ireland is certainly not confined to married couples. Just under 12 per cent of all family units in the State comprise non-marital couples, approximately one-third of whom live with one or more children.[1] Additionally, there are (according to the 2006 census) somewhere in the region of 190,000 one-parent families in the State (approximately 18 per cent of all family units in the State).

While it is currently difficult to discern with precision the numbers of lesbian and gay couples parenting children, it is clear from anecdotal evidence and the experience of various NGO organisations that the issue under discussion is far from a hypothetical one. The discussion of same-sex couples raising children is very often centred on the topic of adoption – should same-sex couples be allowed to adopt jointly? While this is a relevant question, the reality is that many same-sex couples already reside with children. This may happen in one of a number of diverse ways:

- *Children from a previous heterosexual relationship*. Possibly the most common scenario is where a person who has had children in a previous heterosexual relationship subsequently enters into a same-sex relationship. It is certainly possible and not all that uncommon for lesbians and gay men to transition to a same-sex relationship having previously been married or having been in an opposite-sex relationship. In many cases, the individuals involved will have become parents, and if they have custody of the child, may share parenting responsibilities with the new same-sex partner as well as with the other biological parent of the child. In many cases, the biological parents may have joint or

[1] CSO, *Census 2006, Principal Demographic Results,* (Dublin: CSO, 2007) at p. 64. See *www.cso.ie*.

shared parenting arrangements that involve both of the biological parents and, in practice, also involve the new same-sex partner.

- *Donor insemination.* It is possible for one or both partners in a lesbian couple to become pregnant through donor insemination. This may be arranged through an intermediary, though there is nothing to preclude a couple from making private arrangements with a known donor. Thus, while the donor may well be anonymous, it may equally be intended by all the parties that the father will be known to the child and will have some agreed involvement in the life of the child. Indeed, it may well be the case that a lesbian couple may make an arrangement with a gay male couple, sharing parenting arrangements as agreed. Although the law does not actively facilitate or promote this option, neither does it preclude donor insemination. The constitutional right to bear children has been confirmed in two cases concerning married couples,[2] the courts affirming that under normal circumstances the State is precluded from regulating family size (though it may of course prevent the termination of a pregnancy)[3]. While these decisions concerned married couples, it is very likely that an attempt to regulate the fertility of unmarried women and men would infringe the constitutional right to privacy, and if not, the privacy rights bestowed by Article 8 of the European Convention on Human Rights.
- *Surrogacy.* Though practically and legally more complex, it is possible for a couple to enter into a surrogacy arrangement, whereby a third party agrees to carry a child on the couple's behalf. From virtually every perspective, practical, ethical, emotional and legal, this is a difficult and challenging option. The consequences are particularly complex and require deep ethical and legal consideration, as well as legal clarification.[4]
- *Adoption by one of the partners.* It is possible in Ireland for an *individual* who is in a same-sex relationship to adopt a child.[5] Although the law does not preclude an individual from adopting, a couple may adopt jointly *only* if they are married to each other. It is important to note that there is no general right to adopt, even under the European Convention of Human Rights. However, once a state permits adoption by a person who is unmarried, it is precluded by the Convention from discriminating against a potential adopter on the grounds of

[2] *McGee v. Attorney General* [1974] I.R. 284, *Murray v. Ireland* [1985] I.R. 332, [1991] 1 I.L.R.M. 465.
[3] Constitution of Ireland 1937, Article 40.3.3, though see *Attorney General v. X*. [1992] 1 I.R. 1
[4] See the *Report of the Commission on Assisted Human Reproduction* (Dublin; Department of Health and Children, 2005), which recommended (by a majority) legal recognition and regulation of surrogacy arrangements, provided certain strict conditions were met.
[5] Section 10, Adoption Act 1991.

sexual orientation, a point affirmed in the recent decision of the European Court of Human Rights in *E.B. v. France*.[6]

- *Fostercare.* Although same-sex couples are not entitled jointly to adopt, there is nothing in law precluding a couple from fostering a child. In practice, in some cases same-sex couples already act as foster parents. The position of foster children is, however, legally precarious. If they have been voluntarily placed in care, they may be removed at any moment at the request of the child's parents. Even if placed in care at the behest of the HSE, they may still be moved or returned to their original family home. Under the Child Care (Amendment) Act 2007, however, foster carers can acquire rights and responsibilities equivalent to guardianship after the child has resided with them for 5 years.

The Minister for Children, Barry Andrews TD, has expressly acknowledged the value of such fostering arrangements and by implication has negated the view that the State disapproves of same-sex couples as parents:

"…Gay men and lesbians make very good parents. It must be made clear they always have and always will. We must also acknowledge that many same-sex couples foster children. They are entrusted to them by the State through the Health Service Executive proving the State does not have any set view on this matter. The argument that same-sex couples cannot be good parents is contrary to the case".[7]

Indeed, a number of important studies endorse the view that children being raised by same-sex couples are on average as well adjusted and as well cared for as children living with opposite-sex couples. In particular, in a policy statement from 2004, the American Psychiatric Association's Council of Representatives stated their view that "…beliefs that lesbian and gay adults are not fit parents have no empirical foundation".[8] There was no marked difference, they concluded, between lesbian women and straight women regarding their approach to child-rearing. In fact, in some cases, lesbian and gay parents were found to divide child-rearing tasks more equally than was the case with their opposite-sex counterparts.

By the same token they could find no evidence that the children of same-sex parents developed any less well than children residing with heterosexual parents, or had any

[6] Application 43546/02, 22 January 2008.
[7] In the Seanad, March 4,2009, discussing amendments to the Adoption Bill 2009 Seanad Debates, Vol. 194, No. 6. See: http://debates.oireachtas.ie/DDebate.aspx?F=SEN20090304.xml&Node=561#N561
[8] See http://www.apa.org/pi/lgbc/policy/parents.html

greater propensity to personality disorder or difficulties with their sexual identity. In sum, they concluded that "…results of research suggest that the development, adjustment and well-being of children with lesbian and gay parents do not differ markedly from that of children with heterosexual parents".[9] It thus called for an end to discrimination in the context of adoption, child custody and visitation foster care and reproductive health services.

In *Family Well-being – What Makes a Difference?* McKeown, Pratschke and Haase concluded that the type of family in which children are reared is generally less relevant to their well-being than is commonly assumed. The study indicated that:

"…the physical and psychological wellbeing of parents and children are shaped primarily by family process, particularly processes involving the ability to resolve conflicts and arguments, and by the personality traits of parents. The type of family in which one lives…has virtually no impact on wellbeing". [10]

As they noted:

"…once we controlled for a range of explanatory variables, we found practically no statistically significant variation in the well being of children in the four family types, indicating that the parents' marital status and the presence of one or two parents in the household do not, of themselves, affect the child's well-being".[11]

It is thus, they suggest, the *quality* of family relationships, and in particular the quality of communication between family members rather than the particular structure of the family or type of family that matters most in relation to the rearing of children.[12]

8.2 What rights (if any) will children have when they are being raised by civil partners?

As discussed above, many children already reside with a parent who is lesbian, gay or bisexual. In a growing number of cases the biological parent with custody of the child is living with a same-sex partner, who may in future, statutorily be recognised as a civil partner. While the latter may perform the *de facto* role of parent, currently there is no legal recognition of the child's relationship with that partner.

[9] Ibid.
[10] McKeown, Pratschke and Haase, *Family Well-being – What Makes a Difference?* (Shannon: Céifin Centre, 2003) at p. 12
[11] Ibid. at p. 11
[12] See also Golombok, *Parenting: What Really Counts?* (London: Routledge, 2000).

Insofar as it relates to adult relationships, the proposed Civil Partnership Bill is exceptionally comprehensive. In particular, it replicates in most respects the obligations and entitlements that are conferred by law on married spouses.

Insofar as children are concerned, however, the Bill as currently constituted would make very little change to the current legal situation of the child living with same-sex partners. Given the precarious legal position of such families, this is problematic, and arguably needs to be addressed squarely in any discussion of the proposals.

The Bill is not entirely silent in relation to children. Nonetheless, it largely proceeds by reference to the couple as a self-contained unit. There is relatively scant regard for any children who may reside with them. This appears to be deliberate – the Government, while content to acknowledge same-sex couples, seems reluctant to recognise the position of same-sex couples as parents. This is evident, in particular, in the continued reluctance to countenance civil partners jointly adopting children, even though a gay or lesbian person may do so as an individual.[13]

While marriage legislation generally requires the courts to have regard to the children in a family unit as well as the adults, the equivalent provisions in this Bill generally do not generally address the position of children. For instance:

- Unlike the equivalent provisions of the Family Home Protection Act 1976, the protections afforded to civil partners in respect of the shared home make no reference to the accommodation needs of dependent children as a relevant criterion. This means, theoretically, that decisions may be made by a court that ignore or even prejudice the interests of children.
- The dissolution of a civil partnership may be obtained, moreover, without having regard to whether proper provision has been made for any dependent children. By contrast, a divorce may only be granted where a court is satisfied that proper provision has been made for both spouses *and* for any dependent children.

[13] See section 10, Adoption Act 1991, which allows individuals to adopt, but only allows joint adoption where a couple is married. Notably, the Minister for Children in the Seanad debates on the Adoption Bill 2009 has indicated that the Government's continued reluctance to change the law to allow same-sex couples to adopt does not reflect a set policy against same-sex parenting. On the contrary, he stressed that "…[w]e do not want the message to go out from the House that with the route we are taking on adoption there is an adverse comment on sexual orientation. Through the fostering process, it is recognised that we have no problem with gay men and lesbians being parents or minding children." He suggested, however, that the matter would need to be considered further ("scoped…out clearly") before the law could be amended. In the Seanad, March 4, 2009, discussing amendments to the Adoption Bill 2009 Seanad Debates, Vol. 194, No. 6. See: http://debates.oireachtas.ie/DDebate.aspx?F=SEN20090304.xml&Node=561#N561

- Divorce legislation requires the court to have regard, in making any orders after divorce, to the contribution either spouse has made to the rearing of children, and to their care. The Family Law (Divorce) Act 1996 also requires the court to take into account the effect on a spouse's earning capacity and income where he or she has given up work outside the home in order to raise the spouses' children. These factors, by contrast, are not referenced in the Civil Partnership Bill. Indeed, ironically, the Bill allows the court to take into account the contribution a civil partner has made to the shared home of the partners. It may also have regard to the effect such a contribution has made to the other partner's career. The court may not, however, have regard to the contribution made to the care of children in the home.
- Additionally, no provision is made in the Bill for an order relating to custody or access to be made under section 11 of the Guardianship of Infants Act 1964 during proceedings for dissolution. A married couple may seek such an order as part of their divorce proceedings. The absence of a similar provision in this Bill means that separate proceedings will have to be instituted (at extra expense and with consequent delays) if the non-biological parent seeks access.

Theoretically, this means that a civil partnership may be dissolved in circumstances where a child of either party may be financially disadvantaged as a result. Similarly, in theory, a court could order the sale of a shared home of civil partners, without having regard to the impact of any sale on any resident dependent children. This is clearly at odds with the much-vaunted focus in Irish and international law on the best interests of the child.

8.3 Are the child's best interests being upheld by the Bill?

While legal discourse is often framed in terms of parental rights, it is clear that the proposed scheme also relieves one of the civil partners of obligations that might in fact be quite beneficial to the child and the State to recognise. Under the Bill, for instance, a child living with civil partners will not be able to claim maintenance from the civil partner who is not her biological parent. Nor will the child have any legal right to claim from that partner's estate on death (unless the latter made a will in the child's favour). Even with civil partnership, the couple will not be able to adopt jointly, while custody and guardianship rights, even with civil partnership, will still be denied to the non-biological parent. Similarly, a child will not be entitled to a death benefit for orphans in respect of the non-biological parent's death. Likewise, he will not be treated as a child of the civil partner for the purpose of any death-in-service benefits conferred by legislation on a deceased employee's family.

The civil partner who is not the biological parent of a child, moreover, is not entitled to seek custody of the child, though she may be entitled to seek access if she has been involved at some point in the raising of the child. Although the non-biological parent may be nominated in the will of the biological parent as a guardian, the non-biological parent cannot acquire guardianship during the lifetime of the biological parents.

This non-recognition is all the more problematic given that the child may have been born as a result of an arrangement made by the civil partners as a couple. The child, in other words, may have been born to one civil partner, but in circumstances where the other party may have agreed to or even encouraged the pregnancy. The non-biological parent may indeed have persuaded the biological parent to become pregnant. In such circumstances it would appear unfair to relieve the non-biological parent of responsibility for an initiative in which she may have been a joint and willing partner, or even the prime mover.

From the child's point of view, such non-recognition is contrary the child's best interests, the touchstone of child policy, which both the Guardianship of Infants Act 1964 and the UN Convention on the Rights of the Child 1989 uphold as paramount.

8.4 Does the Bill make any reference to the children of civil partners?

In fairness, the Bill is not entirely oblivious to children:

- In maintenance and dissolution cases the courts must take into account a civil partner's obligations towards his or her own biological children. In deciding the amount of maintenance to be awarded to a civil partner or in considering the remedies sought after a dissolution is granted, the courts are required to take into account these existing parental obligations. While this falls far short of requiring support for the child by the non-biological partner, it may indirectly lead to such an outcome. It means effectively that in determining the appropriate level of relief for each partner, the court will be obliged to consider that one of the partners has parental obligations, which may result in a greater diversion of resources to the biological parent.
- The overriding requirement that an order cannot be made on dissolution unless it would be in the interests of justice to do so arguably provides an important safeguard for children of civil partners. Clearly, a judge should not consider an

order as being in the interests of justice if the best interests of a child of either party are prejudiced thereby.

- Notably, a civil partner will be able to apply for an order under the Domestic Violence Acts with a view to protecting the dependent child of either civil partner, if the child is under the age of 18 or, in the alternative, disabled to such an extent as to prevent the child living an independent life. The applicant must either be the biological or adoptive parent of the child, or alternatively a person *in loco parentis* in relation to the child. Theoretically, this would allow a person to seek a barring order against his or her civil partner to protect either the applicant's biological child or that of the civil partner against whom the order is being sought.
- The relationship between a person and her civil partner's child is recognised for certain conflicts of interest and other ethical provisions.
- Section 206 of the Bill generally requires that when making any order under the Bill, the court shall have regard to the rights of any other person with an interest in the matter. This may feasibly include the child of either civil partner.

8.5 What are the Succession Rights of Children?

A child has no right to claim from the estate of his or her parent's civil partner or spouse (unless the latter is also the child's parent), though they may always make a claim against the estate of a biological parent.

There is, however, one important context in which a civil partner's child is granted significant rights that are not in fact extended to the children of married couples. As discussed above, any child may on the death of his or her parent, make a claim against the estate of the deceased parent. Such a claim cannot affect, however, either the legal right of a spouse or the portion of the estate to which the spouse will succeed if the deceased did not make a will. The Bill, however, does allow a court to grant the child a share in his late parent's estate, notwithstanding the fact that such provision eats into the portion of the estate to which a civil partner is otherwise entitled.

This differentiation appears to privilege spouses at the expense of their children. It also appears to confer stronger rights on the children of civil partners than apply to the children of married couples. The Bill, admittedly, generally operates to the detriment of the children of civil partners. It seems strange, however, that the Bill extends such rights to the children of civil partners and not to the children of spouses.

8.6 Conflicts of Interest involving the child of a person's civil partner.

The only context in which the Bill directly countenances a relationship between the child and the non-biological parent is for the purposes of ethics legislation. In this context, the relationship between a child and his parent's civil partner will generally be recognised, if the child is ordinarily resident with the civil partners. Ironically this requires the civil partner in his commercial and/or civic behaviour to avoid a conflict of interest arising from a relationship which the law otherwise does not recognise.

8.7 Adoption, Guardianship, Custody and Access.

While a civil partner may be able to adopt as an individual, the Bill does not permit joint adoption by civil partners. Only a married couple may adopt jointly.

A civil partner of the biological parent may only be conferred with a right of guardianship on the death of the child's parent. This does not occur automatically; though the right to succeed may be conferred by will of either biological parent or, in the alternative, by a court order on the death of a guardian. A civil partner of a biological parent cannot otherwise acquire joint guardianship, even with the consent of the other guardians and/or biological parents. While guardianship in respect of a child will be conferred by adoption of that child, civil partners may not adopt a child together. A biological parent who wishes her civil partner to adopt the parent's child would have to give up her own rights and obligations in respect of the child in order to give effect to such adoption. The civil partners will not be permitted jointly to adopt a child.

It is possible for the non-marital father of a child to be conferred with guardianship, either by agreement with the mother or by court order. Such a facility only applies to the biological father of the child and not to any other person (including the new spouse or civil partner of a biological mother).

Without guardianship, a person who is not the child's biological parent cannot apply for custody of a child. As against all other people not having guardianship of the child, moreover, a guardian generally will be entitled to custody of a child. This does not, however, prevent a court from refusing to return custody of a child to a guardian where another person is caring for the child, if the interests of the child would be best served by leaving the child in the custody of that other person. Nonetheless, the

circumstances in which a guardian would be refused custody as against a person who is not a guardian or other parent would likely be very rare indeed.

A child, however, has a right under international agreements binding on the State,[14] to have access to a parent from whom he or she is separated. Section 11B of the Guardianship of Infants Act 1964 also allows a relative of the child (*e.g.* a grandparent) or a person who is *in loco parentis* in respect of the child (i.e. in a position where he or she has acted as if he were a parent) to apply for access (visitation rights). Arguably the phrase *in loco parentis* would embrace a civil partner who has lived with the child. This would thus extend the child's right of access to a person who has jointly parented a child of their civil partner. For the avoidance of doubt, however, this should ideally be confirmed in legislation by explicitly allowing a civil partner to seek access in respect of a child with whom he or she has lived.

8.8 A missed opportunity?

Even with civil partnership as currently proposed, the legal position of a growing number of children living with same-sex couples will remain especially problematic. Despite the golden opportunity to address this issue, the Bill as currently constituted does little to ameliorate the legal position of children living with same-sex couples. This is ironic – arguably the law has a much stronger claim (or perhaps even *duty*) to intervene in support of families with children than families without children.

It is fair to say that even for children living with heterosexual parents, the law has often proved to be outdated and ineffective. The basic principles of Irish child law date back to 1964, when the phenomena being discussed here were not in general contemplation (and were indeed perceived as contrary to public policy). The failure to update and modernize the law clearly causes great stress to partners raising a child. It is particularly invidious however when viewed from the perspective of the child, who is denied the stability of a relationship with both its *de facto* parents. In particular, the moral obligations and entitlements of the non-biological parent who is rearing that child, are not reflected in law: legally that person has little or no legal responsibility towards the child, a situation that places the child in a very awkward legal situation.

It is indeed ironic to say the least to assert (as some do) that a lesbian or gay household does not provide a stable environment when the law itself militates

[14] UN Convention on the Rights of the Child 1989 and European Convention on Human Rights.

against such stability. These children are thus relegated to a second-class form of citizenship. As the American Academy of Paediatrics asserts "…[c]hildren deserve to know that their relationships with both of their parents are stable and legally recognised".[15]

8.9 Would the position be different if same-sex couples were entitled to marry?

It has sometimes been suggested that the best solution to the legal predicament of the child living with a same-sex couple, is to permit the couple to marry under the civil law. There is certainly considerable merit in the claim that same-sex couples should be afforded the right to marry. It is, however, not necessarily the case that the marriage of the partners would improve the legal situation in respect of the child or children of that family. In fact, absent significant legal reform, the introduction of same-sex marriage in and of itself would address only *some* of the issues raised in relation to the rights of children raised by same-sex couples. While the extension of marriage would facilitate, for instance, joint adoption by the couple, it would not in and of itself confer additional maintenance or succession rights on the child in respect of a spouse who is not his biological parent. Nor would the latter be entitled to guardianship by virtue of the marriage.

A husband and wife have joint and equal rights in respect of their children. In this respect, marriage considerably improves the position of the father relative to the position he would have been in had he not been married to the mother of his child. While an unmarried father has limited rights, (and in particular no automatic right to guardianship), a married father enjoys, by contrast, a co-equal right and responsibility to raise and care for his child.

The elevated position of the married father is attributable, however, not solely to his married state but also to the biological fact of fatherhood. This is illustrated by the fact that the legal position of a married man who is not the father of his wife's child is entirely more precarious than that of a married father. If it is established that he is not the father, he will not be entitled to guardianship, and may not be able to claim

---

15 AAP Policy Statement, "Coparent or Second-Parent Adoption by Same-Sex Parents", (Committee on Psychosocial Aspects of Child and Family Health), Pediatrics Vol. 109 No. 2 February 2002, pp. 339-340.

custody, though he may be required financially to support the child if, being aware of the child's true paternity, he treats the child as a child of his family.

Marriage does not of itself confer guardianship or custody rights on the new husband. In the normal course of events, he is not obliged to maintain the child unless, knowing he is not the father, he has agreed to treat the child as a child of his family. The child will not have any succession rights in respect of the new husband, though the step-relationship will be recognized for the purpose of Capital Acquisitions Tax, so that the aggregated tax exemption thresholds normally applied to transactions between biological parents and children also apply in respect of the husband and his step-child.

It is not possible to confer guardianship on the husband if he is not the father of a child otherwise than (1) by will, on the death of an existing guardian, (2) by court order, on the death of an existing guardian or (3) by adoption. The third option, which is probably the most feasible, is not straightforward. In order to effect an adoption, the biological parent must agree to give up her own child for adoption. The couple may then adopt the child jointly, though there are a number of reasons why this may not be possible in every case:

- Although unlikely, the Adoption Board may rule that the couple are not suitable to be made adopters as they fail to meet the standard suitability criteria set out in section 13 of the Adoption Act 1952;
- If the biological father of the child has been conferred with guardianship of the child, the biological father may veto the adoption, thus preventing it from occurring. (Any other guardians may also block the adoption);
- If the child is a child born to a husband and wife who were married, the adoption will only be possible where there has been complete abandonment of the child and the abdication of all duties in respect of the child, as required by the Adoption Act 1988. Thus, if the child is being cared for by its mother, it will not be possible to adopt the child, even with her consent and that of the biological father.

The position, in practice, would be even more difficult in the case of the wife of a man who already has children. In such a case, the biological mother of the child has an automatic right of guardianship, regardless of whether the child was born inside or outside marriage. She thus would have an automatic veto over any adoption.

Similar principles would apply if same-sex couples were permitted to marry. The simple fact of marriage does not confer parental responsibilities and rights on the

non-biological parent and the options in such a case are more limited than is sometimes supposed.

8.10 Possible Options for Recognition.

The path to reform thus requires change that is much more fundamental and far-reaching than the simple introduction of civil partnership or the extension of civil marriage to same-sex couples. Indeed, the great diversity of family life in Ireland today requires, arguably, a root and branch re-visitation of family law as it applies to children. In particular, such reform should not (indeed cannot legally) be confined to the legal position of the children of same-sex couples. It must take account of the growing prevalence of blended families (consisting of children from more than one relationship) as well step-parenting arrangements and relationships between unmarried opposite-sex couples and their children (particularly the rights of unmarried fathers).

A number of options for reform arise and are outlined, in summary, below. In setting out these options, it is the aim of the author to stimulate debate rather than to be prescriptive or definitive in relation to best path for reform. There is always, of course, as a first option, the option to do nothing, to leave things as they are. I hope, however, that it has become apparent that a failure to grasp this issue in a mature and considered fashion will result in considerable legal and financial uncertainty and injustice into the long term.

8.10.1 Guardianship by Agreement

Currently, section 2(4) of the Guardianship of Infants Act 1964 (as amended by the Children Act 1997) allows a mother and father who are not married to each other to agree that the father will – by means of a statutory declaration – be conferred with joint guardianship in respect of the child. The mother's right to guardianship is preserved.

Option: a similar provision could be adopted allowing the biological parents/existing guardians jointly to confer guardianship on a civil partner who is co-parenting. This could also be made to benefit the new (heterosexual) spouse of a biological parent.

Safeguards: the full, free and informed consent of all parties, including that of both biological parents, would be required, in writing. The biological parents' right to guardianship or to claim/acquire guardianship would be preserved.[16]

8.10.2 Guardianship by Court Order

Section 6A of the Guardianship of Infants Act 1964 (as amended by the Children Act 1997) allows an unmarried father – by means of a court order - to be appointed a guardian jointly with the child's mother. The consent of the mother is not required, though the court must be satisfied that the father's appointment as joint guardian is in the best interests of the child.

Option: A similar provision might be introduced to allow a civil partner or new spouse to be conferred with joint guardianship by court order, if this is considered to be in the best interests of the child. This would effectively amount to a co-parenting or joint-parenting order, conferring on the civil partner or new spouse joint parenting rights and obligations to be shared with existing guardians.

Safeguards: the court must be satisfied that this step is in the best interests of the child. The biological parents' rights to guardianship or to claim/acquire guardianship would be preserved. As a matter of natural justice, all parties (including the child and both of its biological parents) should be given the opportunity to be heard before a decision is made by the court.

8.10.3 Custody

Section 11(4) of the Guardianship of Infants Act 1964 allows an unmarried father, even if he is not a guardian, to apply for custody in respect of a child. This does not, of course, guarantee an order in favour of the father. The court must decide, in all the circumstances, what custody arrangements are in the best interests of the child.

Option: extend this right to a spouse or civil partner who has lived with the child as a member of his or her family for a minimum qualifying period.

Safeguards: The best interests of the child should be considered paramount. The biological parents' rights should in all cases preserved. As a matter of natural

[16] Notably, the conferral of guardianship on a person who is not a biological parent would not currently permit the child to claim from the estate of the new guardian (unless provided for in the guardian's will) or to claim an extra tax allowance in respect of property willed by that guardian. This means that the child is not placed at an unfair tax advantage vis-à-vis other children with only two guardians.

justice, all parties (including the child and both of its biological parents) should be given the opportunity to be heard before a decision is made by the court. As a matter of constitutional law, the Court would have to take into account the constitutional rights (if any) of the biological parents in making any decision that would be to their detriment. In particular, for constitutional purposes, it may be necessary to apply the presumption (which can be rebutted) that a child's best interests are served by remaining in the custody of its marriage-based family (if relevant).[17]

8.10.4 Adoption

Currently, two persons cannot adopt jointly unless they are married to each other, though a person in a non-marital relationship may adopt as an individual.

Option: extend the right to apply for joint adoption to civil partners.

Safeguards: the full, free and informed consent of the mother and guardian(s) are generally required before an adoption can take place. The biological father of the child must generally be consulted in respect of the adoption, though if he is a guardian, his consent is always required. As is always the case, the prospective adoptive parents must be deemed suitable to act as parents.

8.10.5 Recognition of surrogacy/donor agreements

Provided that full, free and informed consent has been obtained from all interested parties (following independent legal advice, if necessary), parenting agreements with a donor or surrogate should be recognised and enforced. These may allow, for instance, the waiver of rights and release of obligations of the donor or surrogate. Such agreements might be overridden, however, where deemed not to be in the best interests of the child.

Such agreements should not be lightly entered into. The ethical, social, moral and legal consequences are serious and long lasting. It is arguable thus that a counselling requirement should also be built in, together with a requirement for a period of reflection for all concerned parties.

[17] *Re J.H. (an Infant): K.C. and A.C. v. An Bord Uchtála:* [1985] I.R. 375, *N. v Health Service Executive* [2006] I.E.S.C 60.

8.10.6 A final note on these options.

Any legal reforms made could not (and indeed should not) legally be confined to same-sex couples. As such, the proposals above represent a possible path forward not only for lesbian and gay families but also for many heterosexual families and, in particular, blended families, as discussed above. In short, any discussion of the legal position of children must take place in a context that avoids 'ghettoising' children in lesbian and gay families. It should instead recognise that the legal position of such children reflects a widespread malaise in family law that requires root and branch reform.