

The Children and Family Relationships Bill 2014 - a Children's Rights Perspective

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1. Introduction

- 1.1 The Children and Family Relationships Bill represents the most significant change in family law in a generation and attempts to reflect the social reality of contemporary family life in Ireland. Until recent decades, family life in Ireland has been synonymous with marriage. However, increasing recognition of marriage breakdown, changes in relationship formation patterns, economic change and the influences of international law have all contributed to the increasing fluidity and diversification of family forms. It is no longer tenable to assert that Irish law should continue to recognise only one type of family. The constitutional preference for families based on marriage remains intact, but it is essential to provide legal certainty for all families, whatever their official status. The new framework that will be implemented following the passage of this Bill will not only radically overhaul many existing rules, it will create new rights for parents, both biological and social, and, most critically, for children. As a result, it represents an important milestone on the road to recognition of children as rights holders. The Minister for Justice, Equality and Defence, Alan Shatter TD, is to be commended for the development of the innovative legislative proposals under consideration.
- 1.2 The main provisions of the Bill will be examined in this paper and submissions will be set out as to how the Bill addresses the practical difficulties facing children and their families today, as well as suggestions as to how the Bill could better address those issues. While many provisions can be expected to bring about positive change, there are some provisions which require more critical scrutiny.
- 1.3 The issues that are addressed in the Bill include presumptions of paternity; determination of parentage; declarations of parentage; parentage and legal issues in the context of assisted human reproduction (“AHR”) and surrogacy; DNA testing to determine parentage; issues relating to guardianship, custody, access and maintenance; reform of court practices and adoption, among other issues.
- 1.4 Almost all of the proposals contained in the draft Bill are progressive and given that there has been only piecemeal reform to the law in relation to the family outside marriage since the Guardianship of Infants Act, 1964, this consolidated approach is to be welcomed and should considerably improve the position of the family outside marriage. Up until the enactment of the Status of Children Act, 1987 children born in this country to unmarried parents were considered illegitimate. The 1987 Act abolished the concept of illegitimacy. In just over 25 years, a seismic change has occurred in Irish society in terms of the structure of the modern family and the Children and Family Relationships Bill is a welcome step to ensure that the law keeps pace with the status of the modern family and the myriad of legal issues associated with it.

- 1.5 The Bill includes some far reaching provisions which will be examined below. These include
- the extension of automatic guardianship to non-marital fathers cohabiting for a specified period with the child’s mother.
 - the provisions on AHR and surrogacy which will be examined below.
 - Part 11 of the Bill allows same-sex couples to adopt a child jointly subject to the requirement that they are suitable adopters.
 - Part 7 of the Bill sets out various provisions by which a wider circle of people will be able to apply for guardianship, custody of, or access to a child.
 - Part 9 of the Bill sets out various provisions which aim to help make “parenting work”.
 - The law relating to child maintenance is amended so that all children will be treated equally regardless of the circumstances of conception and birth, when making child support/lump sum orders.
 - Mediation is encouraged to resolve disputes about children of estranged parents (Part 8).
 - A new definition of “the best interests of the child” is set forward in the Bill, which is to be welcomed.
- 1.6 It is suggested that in tandem with this welcome legislative development, structural reform should also take place. The establishment of a specific family court system is promised in the Programme for Government and is a necessary development for a fair and effective forum to vindicate the rights of children and families.

2. International Legal Framework

- 2.1 The importance of providing a comprehensive legal framework capable of effectively promoting and protecting the right of family life for all is recognised within international law, which has paid increasing attention to children’s and family issues over recent decades. Various branches of international law – including international human rights law, European Union law and private international law – deal with different aspects of family law. This section will provide an overview of some of the most important international instruments insofar as they impact on the present proposed legislation. It is vital that the opportunity be taken to bring Irish legislation into line with international best practice.
- 2.2 At United Nations level, the rights of children and families are recognised in the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR). Art 24 of the ICCPR is of central importance to the present legislation, in that it recognises the right of children to equality, the rights to a name and immediate registration of birth, and to a nationality.
- 2.3 Of particular importance, however, is the United Nations Convention on the Rights of the Child (CRC), which is supplemented by three optional protocols, and 17 General Comments. This Convention is essentially a policy framework around which states must construct their domestic legislation. Four articles – Articles 2, 3, 6 and 12 – have been identified by the Committee on the Rights of the Child as containing the guiding

principles of the Convention.¹ States must be guided by these principles to ensure implementation of the Convention as a whole.² These articles refer to the principles of non-discrimination (Article 2), regarding the best interests of the child as a primary consideration (Article 3), the right to life, survival and development (Article 6) and participation (Article 12). In the context of the present Bill, Arts 2, 3, and 12 are of primary relevance.

- 2.4 The Council of Europe has also had a significant impact on child and family law, primarily through the European Convention on Human Rights (ECHR), but also through a range of specialist human rights conventions such as the European Convention on the Exercise of Children's Rights, which was designed to supplement the participation rights outlined in Art 12 CRC, and the European Convention on Contact with Children, and the Revised European Convention on the Adoption of Children.
- 2.5 Under Art 8 ECHR, States are required to respect private and family life. These rights can only be interfered with in accordance with law, in the furtherance of a legitimate aim and only if necessary in a democratic society.³ Family life now extends far beyond the marital nuclear family to encompass relationships between couples with a variety of legal statuses, between parents and children, and between children and other family members. Central to the Court's approach is the initial question of whether a relationship comes within the meaning of family life. The Court will undertake an examination of the factual circumstances to determine whether there are sufficiently close ties of love and affection between the affected persons for them to be considered as enjoying family life. While married couples and their children will virtually always come within the ambit of this term, for all relationships outside of marriage, the court will effectively conduct a "functional-based analysis of intentionality" in order to discover how the parties themselves see the relationship.⁴
- 2.6 In terms of the obligations imposed on states, the key term in Art 8 is "respect" for family life. This has been understood as imposing positive obligations as well as mere negative obligations. In *Marcx v Belgium*, it was stated by the ECtHR that Art 8 "does not merely compel the state to abstain from ... interference. In addition to this primarily negative undertaking, there may be positive obligations inherent in an effective 'respect' for family life."⁵ Therefore, many specific obligations are imposed on states. Perhaps the best summation of the types of obligations that arise under this article is found in the decision of the Commission on Human Rights in *Z and E v Austria*, where the Commission stated that "in shaping the domestic law, the state must act in a manner calculated to allow those concerned to lead a domestic normal life."⁶ This does not imply that Art 8 contains a general right to establish family life, such as through an unlimited right to marry or to have children by any means.⁷ Nonetheless, the protections afforded to non-marital families by the ECHR, especially

¹ General Comment No 5 on General Measures of Implementation, [12].

² Ursula Kilkelly, *Children's Rights in Ireland: Law, Policy and Practice* (Tottell Publishing 2008) 26 - 27.

³ Art 8(2).

⁴ Shazia Choudhry and Jonathan Herring, *European Human Rights and Family Law* (Hart Publishing 2010) 170.

⁵ (1979) 2 EHRR 330.

⁶ Application No 10153/82, Commission Decision 01/10/1986.

⁷ There is, for example, no absolute right to adopt – see *Frette v France* (2002) 38 EHRR 438 and *Pini v Romania* (2004) 40 EHRR 312.

in respect of children's issues, are far more extensive under the ECHR than under Irish law at present.

- 2.7 Crucially, the European Union has also become involved in the regulation of family life. The Charter of Fundamental Rights (CFR) of the European Union, since the coming into effect of the Treaty of Lisbon, enjoys the same legal status as the Treaties.⁸ The Charter contains a number of provisions relevant to family and child law. Article 7 protects the right to respect for private and family life, home and communications. This effectively replicates the terms of Art 8 ECHR. Article 24 contains the main provisions relating to children. It stipulates that children shall have the right to such care and protection as is necessary to ensure their well-being as well as guaranteeing the right of children to participate in proceedings affecting them in line with their age and maturity.⁹ All public and private institutions are also obliged, in any action relating to a child, to regard the welfare of that child as a primary consideration.¹⁰ Finally, the Charter recognizes the right of a child to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.¹¹
- 2.8 The provisions of Art 52(3) are vitally important for family and child law. This provides that, in so far as a right contained in the CFR corresponds with a right guaranteed by the ECHR, "the meaning and scope of those rights shall be the same as those laid down by" the ECHR. This effectively provides that the level of recognition and protection afforded to a right under the ECHR shall act as a minimum standard. Additionally, it states that nothing shall prevent European Union law from providing more extensive protection. Taking the example of the right to respect for family life, it is clear that it is recognised in both Art 7 CFR and Art 8 ECHR. The level of protection afforded to that right under Art 7 CFR cannot be reduced below the level afforded by Art 8 ECHR, but nothing prevents the EU extending the right beyond the terms presently contemplated by Art 8. The EU has also enacted some significant legislation affecting children's rights and child protection. Among the most important measures are the Brussels II bis Regulation, which governs the recognition of family law orders across Member States and the Maintenance Regulation.
- 2.9 The above mentioned EU legislative measures cross over into the area of private international law, otherwise known as the conflicts of laws, which allows courts to determine issues such as the appropriate jurisdiction in which a case should be heard and when a foreign judgment should be recognised and enforced. This is vitally important for several aspects of the Bill under consideration. While private international law has traditionally been regulated by common law principles, there is increasing international cooperation in this area, as witnessed by the work of the Hague Conference on Private International Law which has produced three significant conventions relating to children – the 1980 Hague Convention on Civil Aspects of International Child Abduction, the 1993 Hague Convention on Protection of Children

⁸ This means that the Charter has equal status with the Treaties since 1 December 2009. See generally, Charter of Fundamental Rights of the European Union [2007] OJ C303/1; Explanations Relating to the Charter of Fundamental Rights [2007] OJ C303/17 and the reissued Charter, together with the Lisbon Treaty, [2010] OJ C83/2.

⁹ Article 24(1).

¹⁰ Article 24(2).

¹¹ Article 24(3).

and Co-operation in Respect of Intercountry Adoption and the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children – all of which have entered into force in Ireland.

3. Children’s Rights

The ‘Best interests’ principle

- 3.1 Among the most fundamental rights of the child is the right to have their best interests regarded as a paramount consideration in any decision affecting them. While this need not be the only consideration, its importance to decision making affecting children cannot be underestimated.
- 3.2 The Bill provides a new definition of best interests for Irish law. Head 32 states that it includes the physical, emotional, psychological, educational and social needs of the child including the child’s need for stability having regard to the child’s age and stage of development. It sets out the types of situations in which regard must be had to the ‘best interests’ principle¹². An explicit requirement for the courts to have regard to the best interests of the child when making decisions affecting them is to be welcomed.
- 3.3 These provisions are in line with Article 3 of the UNCRC which states that “in all actions concerning children whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” General Comment No. 14 (2013) on the Right of the Child to have his or her Best Interests taken as a Primary Consideration defines the best interest principle as a threefold concept. It is a substantive right, in that a child has a right to have his or her best interests taken into consideration when a decision is to be made.¹³ It is also a “fundamental, interpretative legal principle” in that law should be interpreted in the manner which “most effectively serves the child’s best interests” in accordance with the CRC.¹⁴ Finally, it is a rule of procedure. This means that when a decision is to be made that will affect an individual child, a group of children or children in general, an evaluation must be conducted as regards the possible impact of the decision on the child or children concerned.
- 3.4 It is emphasised in General Comment No. 14 that states are obliged to take all necessary measures for the full implementation of the right of children to have their best interests taken as a primary consideration in decisions affecting them. Three types of obligations for State parties are identified:

1. In every action taken by a public institution the obligation to consider and apply the best interest principle must be applied;

¹² Head 32(1) of the General Scheme of the Children and Family Relationships Bill 2014: “Where in any proceedings before any court, the guardianship, custody or upbringing of or access to a child or the administration of any property belonging to or held on trust for a child or the application of the income thereof, is in question, the court, in deciding that question, shall regard the best interests of the child as the paramount consideration.”

¹³ General Comment 14, at p.4.

¹⁴ *Ibid.* at p.4.

2. The application of the principle must be demonstrated, that is there must be a description of how the best interests have been examined and assessed, and of the weight ascribed to them in the decision;
3. States must ensure that the interests of the child have been assessed and have been a primary consideration in the actions of those in the private sector whose decisions concern or impact on a child or children.¹⁵

3.5 Though Ireland has enshrined the ‘best interests’ principle in legislation and the proposed Art 42A also makes reference to it, the principle has yet to be fully integrated in decision-making as regards policy. The UN Committee’s stipulation that in every action taken by a public institution the best interest principle must be considered and applied is not routinely observed in Ireland. Clearly the absence of the best interest principle in such decision-making has real and profound effects on children.

3.6 It is submitted that reference to the ‘best interests’ principle could be included throughout the Bill. There are already several other references to the concept. Head 35 of the Children and Family Relationships Bill mandates guardians to act in the best interests of the child. It is suggested that consideration be given as to whether Head 35 (2) should include a requirement that those in loco parentis act in the best interests of the child. Another significant reference to the best interests principle in the Bill occurs at Head 13(9) which is the provision that allows a court to make a declaration of parentage in favour of the intending parents in a surrogacy arrangement provided that the surrogate consents to the application *and* it is in the best interests of the child to do so. It is submitted that this is a positive affirmation of the ‘best interests’ principle and mandates that even if a surrogate mother consents to the assignment of parentage to the intending parents a court must still be satisfied that to do so would be in the best interests of the child.

3.7 However, the principle has not been enshrined everywhere it could have been. For example, Head 53 of the Bill which imposes an obligation on solicitors to discuss with their clients the possibility of counselling, mediation or the drawing up of an agreement in writing between the parties should include a requirement that in reaching any agreement regard must be had to the best interests of the child/children.

3.8 Head 32(3) sets out the factors that a court must have regard to when making a determination of what is in the best interests of the child. The court must have regard, in particular to:

- a) the benefit to the child of having a meaningful relationship with both of the child’s parents;
- b) the ascertainable views of the child concerned, giving due weight to such views having regard to the age and maturity of the child;
- c) the physical, psychological and emotional needs of the child including the child’s need for continuity and stability, taking into consideration the child’s age and stage of development and the likely effect on him of any change of circumstances;

¹⁵ *Ibid.* at p.5.

- d) the history of the child’s upbringing and care, including the nature of the relationship between the child and each of his parents and with other relatives and the desirability of preserving and strengthening such relationships;
- e) the child’s religious, spiritual, cultural and linguistic upbringing and needs;
- f) the child’s social, intellectual and educational upbringing and needs;
- g) the child’s age and any special characteristics;
- h) any harm which the child suffered or is at risk of suffering and the protection of the child’s safety and psychological wellbeing;
- i) any plans proposed for the child’s custody, care, development and upbringing and for access to and contact with the child having regard to the desirability of the child’s guardians and parents agreeing to such arrangements and co-operating with each other;
- j) the willingness and ability of each of the child’s parents to facilitate and encourage a close and continuing relationship between the child and other parent and to maintain and foster relationships between the child and relatives of the child.
- k) the capacity of each person in respect of whom an application is made under this part:
 - i) to care for and meet the needs of the child;
 - ii) to communicate and co-operate on issues relating to the child; and
 - iii) to exercise the relevant powers, responsibilities, entitlements to which the application relates; and
- l) any other fact or circumstance that the court regards as relevant.

3.9 These are rational and desirable criteria for a court to have regard to when hearing an application in relation to guardianship, custody, upbringing of or access to a child. This list permits the court to focus on various aspects of a child’s present and future well-being and accounts somewhat for the potentially vague nature of the best interest principle. As such, it is interesting to consider whether the criteria may develop into a more formal welfare checklist, such as that found in section 1 of Children Act 1989 in England and Wales. Head 32(3), by the use of the word “shall”, makes it mandatory for a court, when considering what orders to make in relation to guardianship, custody or access, to have regard to factors listed in that subsection. Any court that fails to do so would leave itself exposed to a possible judicial review. It is, on balance, perhaps better to enumerate some of the factors relevant to best interests as the Bill has done so as to assist courts in focusing the exercise of their discretion.

3.10 However, some of the factors listed at Head 32(3) may require further consideration, particularly in situations where a relationship has ended. For example, the requirements under Head 32(3)(i) and (j) might be difficult to achieve when parties are in obdurate conflict. As noted below, the importance of maintaining a meaningful relationship with both parents should not be seen as indicative of any presumption in favour of shared parenting time on separation. As outlined in greater detail below, the meaning of ‘best interests’ may be regarded as somewhat different in relocation proceedings. Consideration ought to be given as to whether the existing criteria ought to be amended to reflect this, or whether new statements ought to be added.

- 3.11 Consideration should be given as to whether explicit reference should be made in the Bill to the provisions of the UNCRC and General Comment No. 14 which provides a useful list of factors to have regard to when deciding what is in the child's best interests:
- (a) The universal, indivisible, interdependent and interrelated nature of children's rights;
 - (b) Recognition of children as right holders;
 - (c) The global nature and reach of the Convention;
 - (d) The obligation of States parties to respect, protect and fulfill all the rights in the Convention;
 - (e) Short, medium and long-term effects of actions related to the development of the child over time.¹⁶

While not all of these issues would be relevant in the context of clarifying the nature of best interests in the present proposal, attention should be paid to the nature of children's rights, the concept of children as rights holders, and the effects of actions on children's development in particular.

- 3.12 In terms of the proceedings to which the Head applies, Head 32(1) does not attempt to identify what constitutes the "upbringing" of a child. Consideration should be given as to whether this should be defined. Consideration should also be given as to whether the reference in Head 32(1) to the administration of property or the application of income are necessary and also whether reference should be made in the section to the intentions of a testator. Head 32(1) requires the best interests of the child to be taken as the paramount consideration in proceedings concerning guardianship, custody, access or the administration of property or on the application of income thereto. It is submitted that consideration should be given as to whether the best interests should be required to be paramount in all proceedings concerning children and not merely those referred to above.
- 3.13 Head 32(4) requires the court to have regard to any "family violence". This is a novel phrase and indicates that the child may not be directly experiencing violence but violence within the home or the family may be impacting on the child's "personal wellbeing, including the child's psychological and emotional wellbeing". This broad insight into the impact that witnessing violence can have on a child's wellbeing is a welcome factor to require the court to have regard to when determining what is in the best interests of the child.
- 3.14 It is also suggested that perhaps reference should be made in Head 32(4) to any addictions or illnesses that may affect any of the parties. Consideration could also be given as to whether it would be prudent to include in Head 32 a reference to the ability of the victim of violence to protect the child/children as this can often be a determinative factor in child care proceedings, as well as the capacity of the perpetrator of any violence to properly care for the child and the risk, if any, that the perpetrator poses to the child and to the child's parent.
- 3.15 Head 32(5) refers to a 'household member' but this is not defined and this section refers only to violence by a parent or guardian or household member and not for

¹⁶ UN Committee on the Rights of the Child, *General Comment No. 14 – Article 3: The Right of the Child to have his or her Best Interests taken as a Primary Consideration (CRC/C/GC/14)* (29 May 2013), at p. 6.

example violence perpetrated against a parent or guardian. It is submitted that such violence could also be included in the definition of family violence.

The Right to Participate

- 3.16 Various parts of the Bill refer to the ‘best interests’ principle as well as the right of the child to be informed of matters affecting him/her if the court is of the opinion that the child is of sufficient age and maturity¹⁷. The principle, which is a fundamental principle of international children’s rights law, needs to be properly incorporated at every relevant point of the Bill. The right of the child to be heard is enshrined by Article 12 of the UNCRC which states that: “States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.” The right to be informed of matters affecting a child is a component of the right to be heard. General Comment No. 12 (2009) by the U.N. Committee on the Rights of the Child on the right of the child to be heard¹⁸ at Article No. 25 states that “the realisation of the right of the child to express her or his views requires that the child be informed about the matters, options and possible decisions to be taken and their consequences by those who are responsible for hearing the child, and by the child’s parents or guardian.”
- 3.17 The provisions contained in the Bill relating to the right of the child to be heard and the right of the child to express himself/herself are to be welcomed in their desire to give a voice to the children the subject of judicial proceedings that affect them. It is, however, submitted that the right of the child to be heard could be contained in a stand-alone provision that would make it clear how important that right is. It is further submitted in relation to the above that the Children and Family Relationships Bill should set out clear safeguards and mechanisms to ensure that the child can express his or her views freely. Any mechanism that is put in place to elicit the views of the child should be accessible and child-friendly. Children should be provided with information on their right to participate and how they can assert this right in legal proceedings.
- 3.18 It is important at the outset, therefore, to ensure that children are entitled to participate in a manner which reflects their age and maturity. This requires that a variety of participation mechanisms be available, including court reports conducted by experts, judicial interviews with children, and representation by a guardian. Court procedures also need to be sufficiently child-friendly. The use of court reports and guardians *ad litem* is considered below. Consideration ought to be given to those admittedly very rare cases where it may be necessary for children to have separate legal representation, such as occurred in *Mabon v Mabon*,¹⁹ where it is necessary to allow children’s wishes to be expressed separately from those of their guardian.
- 3.19 Having said that, the emphasis must always be on furthering the child’s best interests. This means that children must be afforded a voice, but not necessarily a choice, in relevant proceedings. Empirical research makes it clear that outcomes for children are

¹⁷ See for example Head 58(4) of the General Scheme of the Children and Family Relationships Bill 2014.

¹⁸ U.N. Committee on the Rights of the Child, General Comment No. 12 (2009): The Right of the Child to be Heard (CRC/C/GC/12) (1 July, 2009).

¹⁹ [2005] EWCA Civ 634.

usually significantly better where children’s voices are incorporated into proceedings but they are reassured that they are not burdened with decision making responsibility.

- 3.20 Head 32(3)(b) states that the court should have regard to “the ascertainable views of the child, giving due weight to such views having regard to the age and maturity of the child”. Head 32(7) provides a mechanism to ascertain the views of the child: “in obtaining the ascertainable views of the child in accordance with subhead (3)(b) the court shall ensure that the manner in which such views are provided to the court facilitates the child freely expressing such views and in so far as is practicable that the views so expressed are not as a result of the undue influence of another, including a parent of a child.” Head 32 is silent on the manner in which the views of the child should be ascertained. This could allow the court discretion in deciding on a case by case basis how to ascertain the views of the child. It is submitted that provision should be made to outline examples of the situations in which the views of the child could be sought, be it through a report of an independent expert or by means of an interview with the judge. It is submitted that such a reference would serve to strengthen the requirement to have regard to the views of the child (a requirement under Article 12 of the UN Convention on the Rights of the Child) in determining what is in the best interests of the child.
- 3.21 As outlined below, certain provisions of the Bill provide that the consent of a child over the age of 12 is necessary in respect of certain orders relating to guardianship or custody. Although this consent requirement can be overridden in certain circumstances, it is a provision that requires further consideration. First, it departs from the flexible age and maturity standard and instead selects an arbitrary age. Given that Art 12 CRC and the General Comment each set their face against the selection of such arbitrary age thresholds, the provision should be reviewed. More fundamentally, requiring consent in such cases seems to be a novel development, without precedent internationally. While some jurisdictions require the consent of children in adoption cases, the often absolute nature of adoption, whereby prior parental interests are extinguished, may justify such a consent requirement. In this legislation however, giving young people an effective veto over guardianship and custody applications requires further consideration. It places them in the invidious position of having to make a choice. It is arguably more desirable that a young person’s views are considered and given due weight so that all relevant factors can be taken into account, and any court order can be structured appropriately.

4. Parentage

- 4.1 The Bill provides for some general provisions relating to parentage and paternity. Separate regimes govern general rules relating to parentage, parentage in cases of AHR, and cases of surrogacy. In general, a person’s parents are presumed to be their birth mother and father, unless the child is adopted or has been conceived through assisted reproduction.²⁰

²⁰ Head 5(2).

Presumptions of Maternity and Paternity

- 4.2 With respect to maternity, the woman who gives birth to a child is presumed to be the mother. Provisions relating to assisted reproduction cases are outlined below. Head 6 of the Bill reasserts the presumption of paternity as set out in section 46 of the Status of Children Act, 1987 (as amended). In effect, this means that where a child is born during a marriage, or where the child is born within 10 months of the termination of the marriage, the woman's husband is presumed to be the father.
- 4.3 The presumption of paternity under this Bill is expanded to take account of other non-marital relationships such as where the man has cohabited with the mother for at least 12 consecutive months prior to the child's birth and where the cohabitation ended less than 10 months before the child's birth, or he is the registered father of the child under the Civil Registration Act, 2004 at the joint request of himself and the child's mother, or he has been found by a court of competent jurisdiction to be the father of the child. It should be noted, however, that the requirement in Head 6(3) for the father and mother to be cohabiting does not necessarily mean that they are in an intimate and committed relationship.
- 4.4 Head 6(5) expands the grounds for the rebuttal of a presumption of paternity and allows a married woman to rebut the presumption of paternity where she can affirm that she and her husband have been separated for more than 10 months. This is to be welcomed in that it reflects the reality of situations where a couple has separated but lack a formal decree to that effect. Reference to a "deed of separation" and "separation agreement" at Head 6(4) could be removed, as it is submitted that reference to living apart for more than 10 months is a sufficient indicator that the couple are no longer together.
- 4.5 There is no reference in Head 6 as to the paternity of the father in cases of divorce; presumably this is because of the requirement that parties have lived apart for 4 years prior to being granted a divorce. It is suggested that the requirement of no contact, in presuming that a man is not the father of a child *i.e.* where there has been no contact between the man and woman for 10 months, at Head 6(5) may be unduly onerous given that when parties separate (and particularly where there are other children) there is bound to be some level of contact.

Genetic Testing

- 4.6 Heads 25, 26 and 27 to a large extent replicate sections 38, 39 and 40 of the Status of Children Act, 1987. Head 25 provides that a court may of its own motion or on an application by any party give a direction for the use of DNA tests for the purpose of assisting the court to determine whether a person named in the application or a party to the proceedings is or is not the parent of a person whose parentage is in question. Head 25(3) permits the court to order blood tests or non-intimate samples having regard to the overall circumstances of the case and the best interest of the child. Head 26 requires the consent of the person before taking any DNA samples. Head 29 allows a court to draw certain inferences where a person does not comply with a direction to undertake DNA testing. Head 30 imposes a penalty for any person who personates another for DNA test purposes (including the taking of non-intimate samples).

Declarations of Parentage

- 4.7 Head 7 of the Bill deals with declarations of parentage other than in cases of assisted reproduction, and replaces section 35 of the Status of Children Act, 1987. Unlike section 35(4) of the 1987 Act, the court has no discretion to refuse to hear an application for a declaration of parentage. The explanatory note to the Bill states that subhead 4 provides for information to be provided directly to a minor child if the court considers it appropriate. This is to be welcomed, and is in line with the decision of the High Court in *Z v Y*.²¹ This explanatory note further states that this is in line with the public policy goal of ensuring that a child of sufficient age and maturity should be informed of and where relevant consulted on legal proceedings affecting important aspects of his or her life. This rationale is a sound one and could be said to be a corollary of Article 12 CRC.
- 4.8 Head 7(3) provides for situations where any person named in the application as the father or mother or a parent “is not or may not be alive”. This subsection seems to anticipate the situation where a parent cannot be contacted or where their location is unknown. There is no explicit requirement in Head 7 for service of any such application other than Head 7(5) which states that “the court may direct that notice of any application under this Head shall be given in the prescribed form to such other persons as the court thinks fit.” Consideration, however, should be given as to whether a provision should be included dispensing with any requirement to serve notice of the application on any such person if, for example, they cannot be contacted.
- 4.9 It is suggested that reference in Head 7(6) and (7) to “testing” is arguably unduly vague and could be more clearly stated, for example by including a reference to DNA testing. It is submitted that consideration should be given as to whether reference should be made in Head 7 to section 117 of the Succession Act, 1965 in terms of who can make an application under that Act, *i.e.* someone who has established that the testator was their parent.

Effect of a Declaration of Parentage

- 4.10 Head 16 states that a declaration under Heads 7, 11 or 13 is proof that the person named in the declaration as the parent of a child is for all purposes the parent of that child and has all the legal rights, duties and obligations of a parent in relation to that child. At no part of the Bill are the rights and duties of parents, as distinct from guardians, set out.

5. Parentage in Assisted Reproduction (other than surrogacy)

- 5.1 The provisions relating to parentage in assisted reproduction are based on those related to parentage more generally, although they require some significant adaption. With respect to preliminary matters, Head 8 contains two important provisions. Head 8(2) stipulates that a person who donates gametes shall not, by reason of donation alone, be conferred with parenthood. Additionally, Head 8(3) states that the presumptions of parenthood shall not apply to a person who is married to, is the civil partner of, or is cohabiting with a person who acts as a surrogate.

²¹ [2008] IEHC 472.

- 5.2 Head 10 of the Bill sets out the proposed law on the issue of parentage in cases of assisted reproduction other than surgery. The birth mother remains as the mother of the child in every case. Head 10(2) provides for egg donation. This refers to the situation where the embryo is created using a donor egg and the intending father's sperm. In that case, the woman who gives birth will be the mother of the child and, if he consented to be the parent of the child and did not withdraw consent before the child's conception, the man will be the father. There is no mechanism set out as to how consent is to be established or indeed withdrawn. It is submitted that some reference should be made in Head 10 as to how such consent could be given or withdrawn.
- 5.3 Head 10(3) provides for the situation where the human reproductive material of the woman only is used (*e.g.* where there is a sperm donor). In that situation, the parents of the child will be the birth mother and the person who was married to or in a civil partnership with, or is cohabiting in an intimate and committed relationship with the birth mother at the time of the child's conception, if they consent to be a parent of the child born and did not withdraw that consent before the child's conception. There are similar difficulties in relation to the lack of clarity in respect of consent.
- 5.4 Head 10(5) states that where a child is born as a result of AHR without the use of human reproductive material or an embryo provided by a person for his or her own reproductive purposes (where both the egg and sperm have been donated) the parents of the child are the birth mother and the person who was married to or in a civil partnership with or cohabiting in an intimate and committed relationship with the birth mother at the time of the child's conception and consented to be a parent of the child.
- 5.5 Where both a man and woman make use of their own genetic material in the course of AHR treatment, Head 10(4) provides that each of them shall be regarded as the child's parents. There is no mention of marriage, cohabitation or civil partnership requirements due to each parent having a genetic connection with the child.
- 5.6 If the Bill is enacted in its present form a person with no biological connection to a child, albeit in an intimate and committed relationship with the child's mother (as referred to at Head 10(3) and (5) and Head 12(1) and (3)) will be the parent of the child if they consent whereas the biological but unmarried father of the child will only be presumed to be the child's father under Head 6 if he has cohabited with the child's mother for at least 12 consecutive months prior to the child's birth and, where applicable, the cohabitation ended less than 10 months before the child's birth or the circumstances at Head 6(3)(b) or (c) apply²².
- 5.7 Therefore, it is arguably easier for a person with no biological connection to achieve the status of a parent than it is for the unmarried biological father to do so. Consideration should be given as to whether Heads 10 and 12 of the Bill should be expanded upon to include a temporal requirement of cohabitation similar to that set out at Head 6 for the unmarried biological father of a child. Conversely, consideration

²² Head 6(3)(b): "where he is registered as the father of the child at the joint request of himself and the child's mother in a register maintained under the Civil Registration Act, 2004 or under similar legislation in another jurisdiction. Head 6(3)(c): "he has been found by a court of competent jurisdiction to be the father of the child for any purpose."

may be given as to whether Head 6 should be brought into line with Heads 10 and 12 and the cohabitation requirement for unmarried biological fathers be reduced. Either way it is submitted that the 12 month cohabitation period for unmarried fathers should be reduced so as to facilitate the recognition of family ties.

The Position of Donors

- 5.8 The sperm or egg donor has no parental rights under this Head. The child does not have any connection to the genetic father or mother. This position is in contrast to the stance taken by the Commission on Assisted Human Reproduction²³ which recommended that upon reaching the age of 18, a child born through AHR should be entitled to identify the donors. The situation is similar in the case of surrogacy in that a child born as a result of a surrogacy arrangement, where genetic material has been used that does not come from the intending parents, will not have any right to trace the person who provided the genetic material.
- 5.9 It is submitted that further consideration should be given as to whether children should have the right to information pertaining to their donor. In the United Kingdom, a system has been introduced by which a child conceived after 2005, is entitled on reaching the age of 16, to apply to the Human Fertilisation and Embryology Authority and receive the non-identifying information about the donor. Then at age 18, he/she can apply to receive identifying information. Access to donor material can be important for the person's development and health. Clearly it could be beneficial for a person born as a result of human reproduction to have access to their genetic information.

Consent

- 5.10 As indicated above, further consideration should be given in the General Scheme with respect to the question of consent. However, there are some provisions which describe the proposed regime governing consent issues. Head 10(6) lays down a rebuttable presumption of consent on the part of the mother's spouse, partner or cohabitant to becoming a child's parent. Any dispute would have to be ruled by a court of competent jurisdiction.
- 5.11 Head 10(9) stipulates that consent is not valid if the person dies. The policy intention of this provision is to explicitly not cater for posthumous declarations of parentage. It is submitted that there are situations where, with explicit written instructions, a parent who wishes their partner to be able to conceive and have a child should be able to do so, even after their death and consideration should be given as to whether this should be included in the Bill.
- 5.12 Head 10(8) provides that regulations may specify the form of any consent of an intended parent for the purposes of subheads (2) to (5) and the circumstances in which that consent is deemed to be withdrawn. It is suggested that such regulations should be drafted with the Bill and/or specified in an Appendix to the Bill.

²³ Department of Health, Commission on Assisted Human Reproduction, 2005.

- 5.13 Head 10 does not refer to same-sex couples but the explanatory note does so. It is probably unnecessary to include an explicit reference to same-sex couples given the wording of the Head which refers to “the person” who may be in a committed relationship with the child’s mother and is not gender specific. However, if it is felt necessary to ensure that same-sex couples are covered by this part, a clause to that effect could be inserted into Head 8.
- 5.14 Arguably a legislative framework is required to deal with all aspects of AHR as it relates to issues such as donor records, donor tracing and support for parents in disclosing origins to their children, as well as to broader regulatory issues relating to licencing of clinics and providing clarity on issues relating to the storage of genetic material, embryos, and research.
- 5.15 Overall, the Bill seeks to provide for the best interests of children by ensuring that the question of who the child’s legal parents are is clear. It also attempts to deal with as many situations as possible. The relationship between the birth family and the donor is also clarified, in that the donor will not be regarded as a parent. As indicated above, however, the question of the child’s relationship with the donor, in terms of access to identifying or non-identifying information in particular, requires attention.

6. Surrogacy

Definition of Surrogate

- 6.1 The Bill deals with surrogacy separately from other forms of assisted reproduction, and attempts to provide clarity over the legal relationships involved. Up until now there has been no Irish legislation governing surrogacy. Therefore, a legislative framework to govern this area is to be strongly welcomed.
- 6.2 The birth mother, that is the surrogate, will be the mother of the child. A surrogate is defined in Head 2 of the Bill as
“a woman who gives birth to a child as a result of assisted reproduction if, at the time of the child’s conception, she intended to relinquish that child to:
 - i) a person or two persons whose human reproductive material was used in the assisted reproduction or whose human reproductive material was used to create the embryo in the assisted reproduction or
 - ii) a person referred to in paragraph i) and the person who is married to or in a civil partnership with or is cohabiting in an intimate and committed relationship with that person but does not include a woman who gives birth to a child using her own reproductive material.”
- 6.3 The definition of surrogate expressly excludes women who use their own human reproductive material to become pregnant. The explanatory note in the Bill states the reason for this as being the public policy opposition to allowing a woman to “contract-out” of her parental responsibility for a child which is hers by genetics and birth. This is a sensible proposal, given that alternative legal mechanisms are available where a woman is unable or unwilling to care for her child.

Surrogacy Arrangements and other General Matters

- 6.4 The Bill establishes that surrogacy cannot be regulated entirely by agreement. The provisions relating to parentage and court applications, discussed below, may not be opted out of. Therefore, Head 17 provides that no surrogacy arrangement is enforceable by or against any person, unless enforcement relates to the exceptions provided for in the following clauses.
- 6.5 Head 17(2) provides that an arrangement can be enforced for pay or reimbursement of the birth mother's surrogacy costs, but only if the surrogacy arrangement is an arrangement made prior to the surrogate conception. Reference is also made to "reasonable costs" which include costs associated with becoming or trying to become pregnant, pregnancy and birth, and entering and giving effect to the arrangement. Further detail is provided by Head 17(4) and 17(5) which refer to several different categories of reasonable costs, including medical, travel and accommodation costs, loss of earnings, counselling costs and legal costs, which include both the costs of the advice received before entering the arrangement and any costs associated with being a party to proceedings for an order for parentage. Clarity needs to be provided in Head 17(2) as that provision does not use the phrase "reasonable costs" used later in the section. Apart from this, the provision appears to be sensible.
- 6.6 Further clarification about the non-commercial nature of surrogacy is provided in Head 18, which prohibits payment for surrogacy services. This prohibits payment not only to the birth mother, but also to any person facilitating the making of a surrogacy arrangement. Head 19 also prohibits surrogacy advertisements. This should also seek to prohibit advertising by commercial entities offering to act as intermediaries in surrogacies involving a foreign element. Consideration should be given to the question of criminal jurisdiction to cater for situations where a person may seek to claim that the Irish legislation does not apply to an agreement entered into abroad, or where the surrogate is resident abroad, or where the communication between an intermediary and a person resident in Ireland takes place online, whether that person is a potential birth mother or a potential intending parent. Such provisions are necessary to ensure that all parties – children, surrogates, and intending parents – are protected from exploitative practices by individuals or companies who seek to take advantage of uncertainty over jurisdiction.
- 6.7 Head 20 of the Bill sets out the requirements that a potential surrogate mother has to meet before she can enter a surrogacy arrangement. She must be at least 24 years old and interestingly she must already have at least one child of which she has custody. The policy rationale behind this requirement is that the mother will be aware of the physical and emotional effects of pregnancy, delivery and its immediate aftermath, and that by the age of 24 she will have a sufficient degree of life experience to make such a decision. These provisions are to be welcomed and it is submitted that they are sensible in the circumstances in their attempt to address the magnitude of the decision of becoming a surrogate mother. It is also recognised as important to ensure that a woman is not to be prevented from having a child of her own, which could potentially be impeded as a result of a complication which may arise during or after pregnancy or delivery.

- 6.8 An important saving measure is provided for in Head 20(2) which states that if an arrangement was entered into before the commencement of the Act, the birth mother must have reached 18 years of age. As the general age of majority, this would likely have been assumed to be the age at which a woman could enter into an agreement. Given the legal effects of such agreements, it is important that arrangements entered into in good faith by adults should not now be subject to retrospective revision solely because a higher age is set for future arrangements.
- 6.9 The minimum age for intending parents to enter a surrogacy arrangement is 21, as each of them must have attained this age. There is no definitive maximum age, although at least one of a couple seeking to enter an arrangement must be under the age of 45. Therefore, where a couple are seeking to avail of surrogacy, one of them may be older. For single people entering a surrogacy arrangement, 45 will be the effective maximum age limit. Further consideration should be given to Head 21 as to whether this is a permissible act of discrimination on age grounds.
- 6.10 Head 22 sets out a requirement that each party to a surrogacy arrangement obtain independent legal advice and states that the court, in any application before it, shall have regard to the fact that any party failed to obtain legal advice. It is also important that the person providing legal advice to the intending parents be independent from the practitioner advising the prospective surrogate. It is submitted that Head 22 be clarified so as to ensure that each party to a AHR arrangement (including each intending parent) receive independent and separate legal advice so as to alleviate any concerns that one person may feel pressurised into entering into such an agreement.

Parentage in Surrogacy

- 6.11 The birth mother of the child will be the mother of a child born through a surrogacy arrangement until she relinquishes that status pursuant to Head 13. In the case that she consents to a transfer of parentage, Head 12 sets out the manner in which parentage will be assigned depending on whether the child was born with the use of human reproductive material of the mother or father.
- 6.12 If the child was born with the use of human reproductive material of the woman, and an order is made under Head 13(9), the woman and the person to whom she is married or in a civil partnership with or cohabiting in an intimate and committed relationship with will be the parents of the child. If the child was born with the use of the human reproductive material of the father, and an order is made under Head 13(9), the parents will be the man and the person to whom he is married or in a civil partnership with or cohabiting in an intimate and committed relationship. In each case, the partner of the person who uses their own genetic material in a surrogacy must have consented to be a parent born as a result of a surrogacy arrangement and must not have withdrawn that consent before the conception. Where both a man and woman provide reproductive material to be used in a surrogacy, and an order under Head 13(9) is made, they will be the father and mother respectively of the child.

Court Applications following Surrogate Birth

- 6.13 Head 13 outlines the orders which a court may make following a surrogate birth, including declarations of parentage. The birth mother, in a surrogacy arrangement will be the mother and will retain guardianship rights of the child unless she consents to relinquish parentage under Head 13(9) and another person is appointed guardian of the child and her guardianship is terminated. Therefore if the surrogate changes her mind and refuses to give her consent, she will remain the mother and guardian of the child. If the mother refuses to give her consent to assign the parentage to the intending mother, the father (whose reproductive material was used) may apply to the court under Head 38 for guardianship of the child. There is no provision for an intending mother to make such an application (even if her eggs were used) as the birth mother will retain parentage status and guardianship rights in the event that she withholds her consent to relinquish these. Consent cannot be implied from the existence of a surrogacy arrangement. The consent of the surrogate may be waived by the court if she is deceased or cannot be found following reasonable efforts to do so.
- 6.14 According to Head 13(5), applications under Head 13 may not be brought within the first 30 days of the child's birth, and may not be brought once the child reaches 6 months of age. This, however, only applies prospectively. For births occurring before the commencement of the Act, Head 13(6) states that applications may be made not more than 2 years after the commencement of this Head unless the court is satisfied that there are special circumstances and it is in the best interests of the child or children concerned. In such cases, the court may extend the time for bringing applications. The Bill provides that the court shall not grant a declaration under this section that would result in the child having more than 2 parents, or where payments prohibited by the Bill have been made, or where the age limitations have been breached. Importantly, Head 13(14) provides that the Irish courts have jurisdiction where the child is born in the State, or where an alleged parent is ordinarily resident in, or is a citizen of, the State.

International Issues

- 6.15 Further consideration needs to be given to the international aspects of surrogacy, especially in light of the fact that the matter is being considered by the Hague Conference on Private International Law. It is worth considering whether 'altruistic surrogacy' arrangements (surrogacy arrangements for which the surrogate mother receives no fee other than compensation for expenses incurred due to pregnancy) should be made acceptable from countries which ban commercial surrogacy. It is submitted that these countries could be certified by order, in much the same manner as civil partnerships. This would allow individuals and families to benefit from surrogacy arrangements while maintaining the intended ban on commercial arrangements.
- 6.16 As outlined above, Head 13 provides that a court cannot make an order where the mother was under age, or where a payment is made outside those permitted under the Scheme. The effect of this is to deny parentage to the child. As a consequence, children may be denied a number of rights. First, the right to citizenship and nationality in Ireland flows from the nationality of the parents and thus if the child cannot prove Irish citizen parentage, it will be denied citizenship and may be without

secure rights of residence in the State. This in turn affects rights to family life including succession and descent (Head 9) and may deny such a child the same education and other rights as other children or indeed as the child's siblings. The current proposal is motivated by the need for a sufficiently serious penalty and disincentive. The unintended consequence of this is that the child is punished rather than the perpetrators of the offence contrary to the best interests of the child. It is suggested that the parents should be sanctioned instead of the child. It is further suggested that care should be taken to avoid harm to the child resulting from penalising its parents.

- 6.17 Consideration also needs to be given to ensuring the position of children born outside Ireland to a surrogate who has been engaged by a person or persons resident in Ireland. The Department of Justice has published a Guidance Document on citizenship, parentage, guardianship and travel documents issued in relation to children born as a result of surrogacy arrangements entered into outside the State. This document should be adapted to ensure compatibility with the proposed legislation and then placed on a legislative basis, so that all relevant rules and guidance on surrogacy can be readily available in a single document, thereby ensuring clarity for those involved. This Guidance Document covers situations such as the issuing by Irish officials of emergency travel certificates in respect of children born outside the state to a person acting as a surrogate. As this involves the exercise of discretion, it would be best if the factors that must be taken into account by the relevant officials be outlined in legislation.

7. Guardianship, Custody and Access

Introduction

- 7.1 Guardianship, custody and access are dealt with in Part 7 of the General Scheme. While some Heads effectively replicate existing provisions, there are some fundamental changes proposed, especially in respect of unmarried parents. While many of these changes are to be welcomed, further consideration should be given to certain aspects of the reform. In particular, the Oireachtas needs to be mindful of the need to respect family life under Art 7 CFR and Art 8 ECHR. These instruments adopt a largely functional approach to the recognition of family life, and so any provisions which may be said to impede the functioning of a family unit may be deemed incompatible with these rules.
- 7.2 As a preliminary point, it should be pointed out that the use of the terms “guardianship”, “custody”, and “access” should be reviewed. The Report of the Law Reform Commission on the Legal Aspects of Family Relationships²⁴ recommends that the terms “parental responsibility”, “day-to-day care” and “contact” should replace the older terms. While Art 42A.4.1(ii) of the Constitution, if and when it becomes law, retains the references to “guardianship, custody and access”, there is no reason why the proposed legislation should do so. The meaning of the terms in the context of the constitutional amendment is clear and reflects the language used in legislation at the time of the referendum.

²⁴ Law Reform Commission, *Legal Aspects of Family Relationships* (Law Reform Commission, 2010 at p.7).

7.3 However, the concepts of parental responsibility and day-to-day care more adequately reflect the reality of children and families in Ireland today, in that they encompass more broadly the various compositions of families such as blended families, where, for example, one parent (who may not be living with the other parent and the child) has parental responsibility, but the partner of the parent living with the child may be exercising day-to-day care of the child. These situations are provided for, and envisaged by the Bill²⁵. It is suggested that the terms guardianship, custody and access are replaced with references to parental responsibility and day-to-day care. These terms are already intermittently used in the Bill²⁶. Notwithstanding this recommendation, the traditional terms will be used in this paper so as to adequately reflect the language of the General Scheme.

Definitions of Mother and Father

7.4 Both “father” and “mother” are defined in Head 31 of the Bill. A mother is defined as the woman who gives birth to a child, unless one of two exceptions apply – first, it includes the female adopter of a child, and secondly, it includes a woman declared to be a parent under either Head 11 or Head 13 of the Bill.

7.5 The definition of father is more complex. A father includes a male adopter under an adoption order. It generally excludes men who are not married to a child’s mother unless he comes within the ambit of one of five exceptions which apply where: (a) an order, under Head 39, is in force which grants him guardianship in respect of the child; (b) the father and mother went through a ceremony of marriage which was later annulled (although certain criteria apply in respect of the timing of the ceremony); (c) the father and mother cohabited for at least 12 consecutive months prior to the birth, but, if applicable, the cohabitation ended not less than 10 months before the birth; (d) the agreements stipulated in subhead 4 are in place; (e) he has acquired parental responsibility corresponding to guardianship by operation of the law of another state.

7.6 A number of issues arise in respect of exception (c) above. As mentioned above a man will be considered to be a child’s father, notwithstanding the fact that he is not married to the child’s mother, if he has cohabited for at least 12 consecutive months with the mother before the child’s birth and (if applicable) that cohabitation ended not less than 10 months before the child’s birth. This temporal requirement of cohabitation may prove difficult to satisfy for couples who may be in a committed relationship but for whatever reason they are not cohabiting; this would include situations where the couple has been living separately for employment reasons or due to providing care to a relative.

7.7 It is suggested that the inclusion of a requirement for both cohabitation and the nature of a relationship should be consistent throughout the Bill. To preclude both members of a couple in a committed relationship from being regarded as their child’s parents

²⁵ See Head 39(3) which provides for the situation where a person who is not a parent of the child can apply for guardianship in certain circumstances.

²⁶ The Bill already refers to “parental responsibility” acquired by operation of the law of another State (Head 31(1)(e)) and “Parental Rights and Duties” for a child who is adopted (Head 84). In addition, “day-to-day care” is included in the definition of custody (Head 31(1)) and is specifically referred to in Head 36(6)(a), Head 39(3) and Head 47(2).

due to a failure to satisfy the cohabitation requirement alone may present difficulties in respect of compliance with the need to respect family life under Art 8 ECHR.

- 7.8 Where cohabitation is a necessary consideration, the Bill is not always clear on the definition of the term. Various parts of the Bill set out cohabitation requirements in relation to the acquisition of rights or the imposition of duties. Section 172 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 defines a cohabitant as “one of two adults (whether of the same or the opposite sex) who live together as a couple in an intimate and committed relationship and who are not related to each other within the prohibited degrees of relationship or married to each other or civil partners of each other.” Section 172(2) lays out criteria for determining whether two people are cohabiting for the purpose of the Act. Those include the duration of the relationship, the basis on which the couple live together, the degree of financial dependence of either adult on the other and any agreements in respect of their finances, the degree and nature of any financial arrangements between the adults including any joint purchase of an estate or interest in land or joint acquisition of personal property, whether there are one or more dependent children, whether one of the adults cares for and supports the children of the other and the degree to which the adults present themselves to others as a couple. Reference should be made to these criteria wherever necessary in the Bill so as to avoid the possibility that a person may be classified as a cohabitant in respect of issues related to their partner, but would not be so classified in respect of a child.
- 7.9 The time period required before a couple is regarded as cohabiting may also present problems. The 12 month cohabitation criterion is somewhat arbitrary and does not take account of various situations: for example, a couple may have had an unexpected pregnancy and commence living together at that time or any time after that. It is suggested that the period of required cohabitation might be reduced from 12 months to 6 months, and it is further suggested that cohabitation for a period of 6 months within a year of the birth of the child could also be taken into account. However, consideration should also be given to removing the temporal requirement, so that the father will be recognised as such irrespective of how long he has been living with the mother of the child.

Assigning Guardianship - Who May be a Guardian?

- 7.10 At present, the married father and mother of a child will be a child’s joint guardians. Where an unmarried woman gives birth to the child, she will be the child’s sole guardian. The 1964 Act, as amended, allows the father of that child to attain guardianship either through a court order, or following a statutory declaration by the mother.
- 7.11 Head 37 states that the marital father and mother shall be joint guardians of a child. Where the mother and father are not married, the mother shall alone be guardian, unless one of three scenarios pertains, whereby the terms of Head 31(3), Head 31(4) or Head 39(1)(a) apply.
- 7.12 Head 31(3) deals with cohabiting parents. Where the terms of this provision are satisfied, that is they have cohabited for at least 12 consecutive months before the child’s birth, which cohabitation ended (if applicable) not less than 10 months before

the child's birth, the couple will be joint guardians. This is an important and welcome change to the law relating to guardianship. This means that, for the first time in Irish law, a non-marital father will automatically be the guardian of his child (provided the cohabitation requirements have been satisfied). The Law Reform Commission in its report on the Legal Aspects of Family Relationships²⁷ recommends the extension of automatic guardianship rights to fathers on the birth of their child²⁸. The Commission also recommended that there be a clear record of those with parental responsibility for children and concluded that automatic parental responsibility be linked to compulsory joint registration of the birth of a child. The rationale behind the Law Reform Commission's recommendation of automatic guardianship was that of equal treatment of men and women, although it also took into account the best interests principle. This would justify the distinction between a man being recognised as the child's father without having to satisfy any cohabitation time period; the requirement of such a minimum period for the conferral of automatic guardianship ensures that there is a significant degree of stability to the relationship.

- 7.13 The remaining two provisions relating to unmarried parents outlined in Head 37 effectively replicate the present situation. Head 31(4) applies to situations where unmarried parents agree to act as joint guardians. In order for this provision to apply there must be a declaration by the father and mother that they are the child's parents, that they agree to the appointment of the father as guardian, that they have entered into agreements relating to custody and access and that they have made a statutory declaration in the prescribed form. According to Head 39(1)(a), a parent who is not a guardian may seek a court order for such an appointment. As such, unmarried fathers may become guardians by agreement or by court order, even where they do not fulfill the cohabitation requirements for the automatic conferral of guardianship.
- 7.14 Special rules apply in cases of AHR other than surrogacy, and are outlined in Head 38. Generally speaking, the provisions of Head 37 will apply to AHR cases. This will deal with the AHR cases involving opposite-sex couples, as guardianship will be determined by means of marriage, cohabitation or agreement. The following two provisions deal with female couples. Head 38(2) provides that where the parentage of a child is determined in accordance with Head 10 of the Bill, and the other parent so recognised is the civil partner of the mother, then the civil partner will be joint guardian along with the mother. Where the female couple are not civil partners but have cohabited for at least 12 consecutive months before the child's birth, which cohabitation ended (if applicable) not less than 10 months before the child's birth, the cohabitant and the mother will be joint guardians according to Head 39(3).
- 7.15 Head 39(4) applies to surrogacy situations, stipulating that the surrogate will be the child's sole guardian, until the court makes orders to the contrary. Three orders are required in such situations – a declaration under Head 13 that other persons, and not the birth mother, are the child's parents, an order under Head 39 appointing a person to guardianship, and an order under Head 44 for the termination of the surrogate's guardianship. Although burdensome, all three orders can be made in a single application and are necessary to ensure that the child is at no point without a guardian.

²⁷ Law Reform Commission, *Legal Aspects of Family Relationships* (Law Reform Commission, 2010 at p.18).

²⁸ The Law Reform Commission specifically excluded children born as a result of assisted human reproduction from its consideration in the context of its recommendations on guardianship rights for unmarried fathers.

Assigning Guardianship - Procedures

- 7.16 As indicated above, the Bill proposes to reform the law in respect of the automatic conferral of guardianship. Provision is also made for the attaining of guardianship by agreement. Contested guardianship applications are provided for in Head 39. This enables a parent who lacks guardianship rights or an eligible adult to apply to court for a guardianship order. An eligible adult is a person who is in a marriage or civil partnership with a child's parent, or has cohabited with them for three years, and has shared responsibility for the child's care for a 2 year period. This enables step-parents to seek guardianship and is an important reform, in that it facilitates the attainment of parental responsibility without needing to resort to adoption and thereby extinguishing the relationship with the other parent. Alternatively, a person may be eligible to apply for guardianship where they have cared for the child for one year, and no other parent or guardian is able or will fulfill the rights and duties of the role. This is an important provision in that it will allow foster parents to be appointed as guardians after a 12 month period, thereby ameliorating the present position.
- 7.17 There may be reasons for refusing a guardianship application. It must be in the child's best interests that a particular person be appointed a guardian. It should be recognised in the Bill that if an applicant has had an order made against them under the Domestic Violent Acts, this should be considered as a contra-indicator to a Court appointment of an individual as a guardian. An order made under the Child Care Acts may also serve as a contra-indicator in such applications.
- 7.18 Before a court makes an order under this section, the consent of each present guardian is required, as is the consent of the proposed guardian. A significant reform is provided in Head 39(4)(b), which requires that before a new guardian is appointed in respect of a child, if that child is over 12, he or she too must consent. This provision is worthy of further consideration. The intention behind the provision is to be welcomed, in that it provides for a significant level of participation by children in a vitally important application affecting them. However, the implementation of this reform requires further scrutiny. First, the adoption of a specific age criterion is unusual, as our international obligations are to ensure participation in line with the child's age and maturity rather than relying on a chronological age. This could be dealt with by amending the provision so that it reflects the language of Art 12 CRC, and including a rebuttable presumption that children over 12 are capable of full participation. This would also cover situations where the child, who is over 12, is not capable of exercising participation rights through disability, even with significant support structures. Additionally, the requirement of consent rather than participation may be problematic. Empirical research in several jurisdictions has consistently highlighted that children require a voice, but not a choice.²⁹ This research indicates that better outcomes for children are likely to result where children are relieved of the burden of having to choose the outcome, but at the same time are integrated into the decision making process by appropriate means, including by judicial interview. Consideration should be given to revisiting this provision.

²⁹ Rachel Birnbaum, Nicholas Bala, and Francine Cyr, "Children's Experiences with Family Justice Professionals in Ontario and Ohio" (2011) 25 *International Journal of Law, Policy and the Family* 398, Patrick Parkinson and Judy, *The Voice of a Child in Family Law Disputes* (Oxford University Press 2009).

Register of Guardians

- 7.19 At present where parents agree to make a non-marital father the guardian of his child, they are required to sign and have witnessed a statutory form.³⁰ This form does not, at present, have to be lodged or registered with any body. Head 31(4) of the Children and Family Relationships Bill deals with guardianship by agreement and states that the (unmarried) father and mother, where they agree to make the father a guardian of his child must make a statutory declaration to that effect in the form prescribed by the Minister. This may mean that new regulations will be introduced, replacing Statutory Instrument Number 5 of 1998 (allowing parents to agree to appoint a father as guardian of his child). It is submitted that a central register should be created in which such declarations are to be registered. This would provide a clear and accessible register of who the guardians of a particular child were. At present if a couple, agreeing to the unmarried father becoming a guardian of the child, lose the written statutory declaration to that effect, there is no record of that agreement having been made.
- 7.20 This was considered in the High Court decision of *O'B v Minister for Justice*.³¹ O'Neill J held that there was no positive obligation on the State to establish such a register, either under the Constitution or under Art 8 ECHR. However, given the likely proliferation of guardianship, and the need to facilitate the international recognition of guardianship, entry of the details of all orders and agreements would greatly facilitate both guardians and children's need for legal certainty.
- 7.21 Part 7 of the Bill does not place a limit on the number of guardians that may be appointed in respect of a child. Head 39(2) states that "without prejudice to other provisions in this Act, the appointment by the court under this Head of a guardian shall not affect the prior appointment of any person as guardian of the child under this or any preceding enactment unless the court otherwise orders." It is submitted that there should be a limit to the number of guardians that can be appointed in respect of a child, with the court retaining a discretion to extend that number in certain circumstances.

Rights and Duties of Guardians

- 7.22 Head 34(1) sets out the rights and duties associated with guardianship:

"For the purposes of this Act, guardianship of a child means having in relation to the child:

- a) all the duties, powers, rights and responsibilities that a parent of the child has in relation to the upbringing of the child;
- b) every duty, power, right and responsibility that is vested in the guardian of a child by any enactment; and
- c) every duty, power, right and responsibility, that immediately before the commencement of this Act was vested in the guardian of a child by any enactment or rule of law.

³⁰ Statutory Instrument No. 5 of 1998.

³¹ [2009] IEHC 423.

- 2) Guardianship also includes the rights, powers and responsibilities which a guardian of the child's estate has in relation to the child and his property.
- 3) The rights referred to in subhead (2) include, in particular, the right of the guardian to receive or recover in his own name, for the benefit of the child, property of whatever description and wherever situated which the child is entitled to receive or recover."

7.23 Head 35 sets out a requirement for the guardian of a child to act in his/her best interests. There is also a requirement imposed on a person, not a guardian of the child but who has custody or care of the child, "to do what is reasonable in all the circumstances of the case for the purpose of safeguarding or promoting the child's best interests."³²

7.24 According to Head 36(1), where a child has more than one guardian, all guardians are to act jointly. It is irrelevant whether the child lives with the guardian or not.³³ In acting jointly, the guardians, according to Head 36(3):

- (a) shall provide information to any other guardian relating to the exercise of powers, rights and responsibilities of guardianship, at the request of that other guardian;
- (b) shall use their best efforts to co-operate with one another in exercising their powers, responsibilities and entitlements of guardianship; and
- (c) may together enter into an agreement with respect to the allocation of powers, rights and responsibilities of guardianship.

7.25 Guardians are further entitled (a) to be informed of and consulted about and to make all significant decisions affecting the child in the exercise of the powers, rights and responsibilities of guardianship derived in subhead (5), and (b) to have sufficient contact with the child to exercise those powers, rights and responsibilities. The responsibilities in subhead (5) relate to nurturing the child's development and ensuring that the child is properly maintained and supported. The list of actions which each guardian may take in relation to the child could, in the absence of co-operation or consent from the other guardian, lead to confusion in the life of the child. This needs to be militated against.

7.26 A further list of the decisions that a guardian may take are outlined in Head 36(6). The powers recognised by this section include the power to

- (a) make day-to-day decisions affecting the child, including having custody and the day-to-day care and control of the child and supervising the child's daily activities;
- (b) decide the child's place of residence and to change the child's place of residence;
- (c) make decisions about the child's education, including the nature, extent and place of education and any participation in extra-curricular school activities;
- (d) make decisions regarding the child's religious, spiritual, cultural and linguistic upbringing and heritage;

³² Head 35(2) of the General Scheme of the Children and Family Relationships Bill 2014.

³³ Head 36(2).

- (e) decide with whom the child is to live and with whom the child is to associate;
- (f) consent to medical, dental and other health related treatment for the child;
- (g) grant or refuse consent where consent of a parent or guardian is required by law in any application, approval, action, proceeding or other matter;
- (h) receive and respond to any notice that a parent or guardian is entitled or required by law to receive;
- (i) subject to the relevant and applicable statutory and regulatory provisions, commence, defend, compromise or settle any legal proceedings relating to the child and compromise or settle any proceedings taken against the child;
- (j) receive from third parties health, education or other information that may significantly affect the child;
- (k) ensure the child's safety and protect the child from harm;
- (l) appoint a person to act on behalf of the guardian in an emergency or where the guardian is temporarily absent because of illness or any other reason;
- (m) exercise any other powers reasonably necessary to carry out the responsibilities of guardianship.

7.27 A guardian who exercises any of the powers referred to in subhead (6) shall do so in a manner consistent with the age and maturity and evolving capacity of the child. Finally, it is clarified that a guardian who is neither a parent of the child nor a person who is in loco parentis to a child has no legal duty to support the child from the guardian's own financial resources.³⁴

7.28 There is also provision made in Head 43 for the granting of powers to guardians to deal with the financial and property interests of the child. These largely replicate section 10 of the 1964 Act, and present no significant concerns.

7.29 As is clear, the provisions relating to the rights, responsibilities, powers and duties of guardians outlined in Part 7 are burdensome. Guardians living with a child make decisions relating to the child's day-to-day care on such a regular basis as would be impractical to have to relay information on every decision to another guardian who may not live with the child. The Bill mandates a co-operative and communicative approach between guardians which may not always meet the reality of broken relationships and communication breakdown. It is submitted that this provision is positive in its imposition of a requirement of guardians to communicate and keep each other informed in terms of the exercise of their powers, rights and responsibilities. However, there should be a limit placed on the number of guardians that can be appointed in respect of one child as it would be untenable to have multiple parties being required to work together and keep each other informed of day-to-day decisions.

7.30 Further, it is submitted that the inclusion of custody as a component of guardianship (unless otherwise limited by law or a court order) could lead to confusion as there are, of course, cases where someone could be a guardian of a child but would not be

³⁴ Head 36(8).

exercising day-to-day care over that child, and this situation does not necessarily have to come about by means of a court order (where for example the non-marital father is the guardian of the child by agreement).

- 7.31 It merits consideration whether such extensive elaboration needs to be given to the concepts which are quite succinctly outlined in Head 34. In the event that it is felt that there needs to be a clear legislative statement of all of the rights, responsibilities, powers and duties of guardians, they should be consolidated into a single section for ease of reference.

Alternative forms of guardianship

- 7.32 The Bill proposes that provision be made for alternative forms of guardianship, including substitute guardians and testamentary guardians. Head 41 of the Bill provides that parents can appoint substitute guardians if the parents themselves are unwilling or unable to fulfill that role. It is submitted that they should only be allowed to do so if the other parent is also unable or unwilling to act as guardian. This would avoid the possibility of guardians being appointed with the intention of creating conflict with the other parent. It would mean that parents unwilling to act as guardians to the child would retain obligations to provide for the child, and would also help to prevent instances of neglect and harm to children for whom both parents are uninterested and unwilling to perform the role. Head 41(2) allows the guardian to specify the period during which the substitute may act and any limitations they wish to impose on the substitute. Head 41(3) refers to situations where someone is mentally ill but it is submitted that there are cases where mental illness is such that the person is not capable of making a decision such as this and this should be reflected in the Bill.
- 7.33 A court may also appoint a substitute guardian. Under Head 41(6), the court may order that the substitute act jointly with any other guardian, or it may order that the substitute may act to the exclusion of the other guardian. The substitute guardian may also apply for orders under subhead 8 to clarify the position of the child's original guardian.
- 7.34 Subheads 10 and 11 clarify that where a substitute guardian is appointed, he/she must inform the Child and Family Agency within 14 days as if the appointment were a private foster care arrangement. This means that the information outlined in section 23Q of the Child Care Act 1991 will have to be provided to the Agency. In the event that a central guardianship register is created, the relevant details should also have to be entered in that register.
- 7.35 The substitute guardianship system is an innovative provision which is worthy of further consideration. As noted above, a guardian should arguably only be able to appoint a substitute guardian if the other parent is also unable or unwilling to act as guardian. While the legislation provides for the relationship between the substitute and other guardians, it does not outline the relationship with non-guardians. The appointment could prejudice the right of the other parent of the child to take custody of the child. Any such appointment should be with the consent of the other parent or, at the least, on due and proper notice being given to the other parent. Provision also needs to be made to ensure continuity of access arrangements.

- 7.36 Testamentary guardianship is provided for in Head 40. Largely based on the equivalent provisions of the 1964 Act, there are only minor changes which should be considered. Exceptions to the requirement of guardians to work together are contained in Head 40 and Head 41. Head 40(3) states that a testamentary guardian shall act jointly with the surviving parent of the child so long as the surviving parent remains alive, unless the surviving parent objects to his so acting. There is a provision for the testamentary guardian to apply to court if he/she believes that the surviving parent is unfit to have custody of the child. Head 41 similarly states that a substitute guardian shall act jointly with any other guardian of the child unless the other guardian objects to the appointment. Provision is made in Head 41(5) and (6) for a substitute guardian or a guardian to apply to court to exclude the other guardian. There is a similar provision under Head 40(4) and (5). It is suggested that under Head 40(4) the surviving parent should have a right to apply to have a testamentary guardian removed (for example if the guardian cannot be located). It is suggested that Head 40(7) should be amended to read “an appointment of a guardian by deed may be revoked by a subsequent deed or by will *or by order of the court.*”
- 7.37 A court may, under Head 42, appoint a guardian to act jointly with the child’s surviving parent where no guardian has been appointed by a deceased parent, or where a guardian so appointed dies or refuses to act. A court appointed guardian continues to act after the death of the surviving guardian. There are no new measures here, as there are equivalent provisions in the 1964 Act.

Termination of Guardianship

- 7.38 Head 44 deals with the duration and termination of guardianship. A court can make an order terminating the guardianship of a guardian provided there is a guardian in place or about to be appointed and if the court is satisfied that it is in the best interests of the child that the guardianship be terminated and the guardian whose guardianship is to be terminated either (a) consents or is (b) unwilling or unable to exercise the powers, responsibilities and entitlements of guardianship or (c) has failed in his duty toward the child to such an extent that the safety or welfare of the child is likely to be prejudicially affected if the guardianship is not terminated or (d) for substantial reasons that appear to it to be sufficient, the court considers it necessary or desirable to do so. Guardianship will cease when the child reaches 18 years of age, or marries, whichever occurs first.
- 7.39 A birth mother who is a surrogate will remain guardian of a child until she consents under Head 13(9) that she is not a parent of the child and her guardianship will be terminated if guardianship is assigned in those proceedings. Otherwise she will remain guardian until a guardian is appointed. This, it is submitted, is a sensible and practical approach which will avoid the situation where a child is left without a guardian. In all other circumstances, a birth mother will remain as guardian unless her rights are extinguished by the child’s adoption; therefore, they cannot be terminated under Head 44.

Head 45 Applications

- 7.40 Head 45 deals with applications to court concerning the welfare of a child. The court may under Head 45(1), upon an application by a guardian or any person or on its own

motion, review a significant decision of a guardian and provide advice and direction in respect of that decision. A significant decision is defined as one that could seriously damage or cause a serious risk to the health or safety of a child or is likely to have serious long term consequences for the child. This is a far reaching provision with a wide ambit as to the people that are entitled to make an application to the court. Technically someone with no connection at all to the child could make such an application, however unlikely it is that the application would succeed. Under Head 45(3), a guardian may apply for directions in respect of any matter affecting the welfare of the child, and so there is no need to prove that it is a “significant decision”.

- 7.41 While consideration may be given to limiting the class of persons entitled to apply under Head 45 to, perhaps, family members or those with a close connection to the child, it may be necessary to preserve the entitlement of a wide range of persons to apply for an order under this Head to cater for emergency situations, such as arose in *Children’s University Hospital v CD*.³⁵ This was an application for an emergency blood transfusion. While it may be possible in such circumstances to apply for an order following the granting of an emergency care order, or in reliance on the inherent jurisdiction of the High Court, the preservation of this wide standing requirement may remove any doubt over the possibility of such an application. Further, the section should explicitly refer to the best interests test and the criteria outlined in Head 32.
- 7.42 It is suggested that consideration be given to whether Head 45(1)(b) in particular is necessary in that it enables a court to provide advice and direction in respect of a decision made by a guardian. It is open to debate whether the court is the best placed forum to make such a determination, although the operation of specific issue orders in England and Wales demonstrates the value of such a provision where there is an issue of fundamental disagreement between the relevant parties. The value of such a mechanism has also been highlighted in this jurisdiction, in a case where the two guardians disagreed over the administration of an MMR vaccination to a child.³⁶ Therefore, consideration should be given to reviewing the specifics of this Head, although the essence of it should be retained.

Agreements

- 7.43 Head 52 provides that a provision contained in any separation or parenting agreement made between the parents of a child shall not be invalid by reason only of its providing that one of them shall give up the custody or care and control of the child to the other. While this replicates the terms of section 18(2) of the 1964 Act, consideration should be given to widening the scope for agreements more generally. In line with the courts’ approach to separation agreements in the context of divorce, it should be possible to state that a court should bear the terms of any agreement in mind when determining any matter relating to guardianship, custody or access matters, although such agreements cannot of themselves be completely binding. Consideration should also be given to enhancing the role of mediation in forming such agreements, rather than relying on legal advisers.

³⁵ [2011] 1 IR 665.

³⁶ *CO’S v Doyle* [2013] IESC 60.

Custody and Access

- 7.44 Head 31 defines “custody”, in relation to a child, as including the provision of day-to-day care of a child, to protect and supervise the child and the right to provide a residence for the child and may include providing such care for one or more specified days or parts of days. This is based on the concept of day-to-day care used in the Law Reform Commission’s Report, and consideration should be given to utilising that language. Additionally, the definition reflects the possibility of joint / shared custody where parents are separated. Access includes the right of the child to maintain personal relations and contact with a parent and relatives or other person with a bona fide interest in the child on a regular basis except where such access is not in the best interests of the child.
- 7.45 Head 46 governs the applications which may be made by a child’s parents regarding custody. Such applications may be made irrespective of guardianship.³⁷ Head 46(4) provides that the Court “shall” specify residential arrangements and access when granting custody to parents. It is submitted that this could be changed to “may”. This would allow for flexibility and discretion, and would allow the court to proceed in a more timely fashion with the important business of deciding custody. It could conceivably have the added benefit of reducing friction and resentment between the parents of the child, as they would have the opportunity to discuss and compromise on arrangements. However, it may also be possible to retain the present formulation, given that it applies specifically to joint custody cases. In such cases it is important that the court spell out, with reasonable precision, the terms of the order to avoid confusion and the need for the re-entry of proceedings to seek clarification, or to avoid the belief that joint custody implies the existence of a default time sharing position.
- 7.46 This latter point is important given the experience of other jurisdictions, and Australia in particular. In 2006, changes were introduced to the Family Law Act which provided that there was a rebuttable presumption that equal parental responsibility was in the best interests of the child in post-separation parenting cases. Secondly, courts were then mandated to consider whether it would be in the best interests of the child and ‘reasonably practicable’ to order equal time or substantial and significant time with both parents.³⁸ Significant problems followed the introduction of these provisions, which seems to elevate the quantity of parenting to a position of equal importance with the quality of parenting. The provisions were also highly adult-centred, rather than being child-centred.
- 7.47 As the present Heads of Bill stand, there is some scope for similar problems. Under the present and proposed law, separating parents who each have guardianship will retain this after separation. This in and of itself presents no problems. However, the statements in Head 32(3)(a), (c) and (j), while well intentioned could create the impression that a near equal division of time is presumptively in the child’s interests. This is bolstered by the present wording of Head 36(6)(a) which states that, unless the court orders otherwise, each guardian can make day-to-day decisions affecting the child, including having custody and the day-to-day care and control of the child. This

³⁷ Head 46(3).

³⁸ Family Law Act 1975, ss 61 DA and 65 DAA.

would seem to entrench the notion of shared custody which is not itself problematic, but is problematic where there are safety concerns, where there is high conflict between the parents, or where the children are very young.³⁹ To avoid the belief that there may be a default position of equal or near equal division of time, consideration should be given to clarifying these provisions.

- 7.48 Relatives or persons in loco parentis may also apply for custody orders under Head 47. Where the court grants joint custody to the child's parent and another person, the court is required to specify the residential arrangements in respect of the child where they are not agreed and specify the access and contact to take place between the child and any parent with whom the child is not primarily residing.
- 7.49 In terms of the rights of existing guardians Head 47(3) states that a court shall not make a custody order without the consent of each guardian of the child and the child if the child is over 12. The court, however, may dispense with this consent if to do so would be considered to be in the best interests of the child. As indicated above in relation to guardianship orders, the provisions for a child's consent are at variance with international best practice and should be reconsidered.
- 7.50 Head 48 permits applications to be made to court for access by a relative of a child or a person acting in loco parentis. The court, in hearing such an application, must have regard to the applicant's connection with the child and the significance of their relationship; whether it is necessary to make such an order to facilitate access, the risk, if any, of disruption to the child's life resulting from the granting of the application; the nature of the relationship between the child's guardians and the applicant and the wishes of the child's guardian and the views of the child. The courts must also, according to Head 48(3) for the avoidance of doubt, consider the effect that refusing access would have on the child. This could be incorporated into the list of factors outlined in Head 48(2). Importantly, this Head simplifies the present law, and adopts the recommendation of the Law Reform Commission that the present two-step approach, which involves an initial leave application, be abolished.
- 7.51 Head 49 confers a general authority on a court to include conditions in orders it makes in relation to guardianship, custody or access where it considers that it is in the best interests of the child. Head 50 permits a court to make interim custody or access orders. This is to be welcomed as it addresses the problem where parties may be waiting for a court date in circumstances where there is a dispute about custody and/or access and an applicant can be denied access for a period of time which can be disruptive and damaging to relationships.

Relocation

- 7.52 One further matter which is not mentioned in the General Scheme should be mentioned. The issue of international, or even internal, relocation has been omitted from the General Scheme, but clarification of the applicable principles would be welcome. Relocation cases involve disputes between parents which arise when one

³⁹ A comprehensive review of the research literature, which recommends against legislating for presumptive shared time, is Belinda Fehlberg, Bruce Smyth, Mavis Maclean, and Ceridwen Roberts, "Legislating for Shared Time Parenting after Separation: A Research Review" (2011) 25 *International Journal of Law, Policy and the Family* 318.

parent wishes to move with the child to a new geographic location. This means relocating to another part of the same country, or to a different country. It is one of the areas of child law that has elicited a significant amount of international research over the last number of years, but there are only a handful of reported Irish cases dealing with the issue. While the ‘best interests’ principle generally regulates relocation cases, exactly how to determine whether the relocation of a child is in their best interests is unclear. In order to achieve some international consensus, an international judicial conference held in 2010 adopted the Washington Declaration, a list of 13 factors which judges should bear in mind in relocation cases. These are:

- (1) the right of the child separated from one parent to maintain personal relations and direct contact with both parents on a regular basis in a manner consistent with the child’s development, except if the contact is contrary to the child’s best interest;
- (2) the views of the child having regard to the child’s age and maturity;
- (3) the parties’ proposals for the practical arrangements for relocation, including accommodation, schooling and employment;
- (4) where relevant to the determination of the outcome, the reasons for seeking or opposing the relocation;
- (5) any history of family violence or abuse, whether physical or psychological;
- (6) the history of the family and particularly the continuity and quality of past and current care and contact arrangements;
- (7) pre-existing custody and access determinations;
- (8) the impact of grant or refusal on the child, in the context of his or her extended family, education and social life, and on the parties;
- (9) the nature of the inter-parental relationship and the commitment of the applicant to support and facilitate the relationship between the child and the respondent after the relocation;
- (10) whether the parties’ proposals for contact after relocation are realistic, having particular regard to the cost to the family and the burden to the child;
- (11) the enforceability of contact provisions ordered as a condition of relocation in the State of destination;
- (12) issues of mobility for family members; and
- (13) any other circumstances deemed to be relevant by the judge.⁴⁰

7.53 The English Court of Appeal decision in *Payne v Payne* has also been highly influential.⁴¹ The two leading decisions from the judgment each emphasise that the applicable principle in all cases is the welfare principle, although there is some divergence between them. Thorpe LJ suggested the following “discipline” be adopted when deciding relocation cases:

- (a) Pose the question: is the mother’s application genuine in the sense that it is not motivated by some selfish desire to exclude the father from the child’s

⁴⁰ Washington declaration on international family relocation, International judicial conference on cross-border family relocation, Washington, DC, 23–25 March 2010. Available from: http://www.hcch.net/upload/decl_washington2010e.pdf. See generally, Matthew Thorpe, ‘Relocation development’ (2010) 40 Family Law 565.

⁴¹ [2001] EWCA Civ 166, [2001] 1 FLR 1052.

life. Then ask is the mother's application realistic, by which I mean founded on practical proposals both well researched and investigated? If the application fails either of these tests refusal will inevitably follow.

- (b) If however the application passes these tests then there must be a careful appraisal of the father's opposition: is it motivated by genuine concern for the future of the child's welfare or is it driven by some ulterior motive? What would be the extent of the detriment to him and his future relationship with the child were the application granted? To what extent would that be offset by extension of the child's relationships with the maternal family and homeland?
- (c) What would be the impact on the mother, either as the single parent or as a new wife, of a refusal of her realistic proposal? [Where the mother cares for the child or proposes to care for the child within a new family, the impact of the refusal on the new family and on the stepfather or prospective stepfather must also be carefully calculated.⁴²]
- (d) The outcome of the second and third appraisals must then be brought into an overriding review of the child's welfare as the paramount consideration, directed by the statutory checklist insofar as appropriate.

In suggesting such a discipline I would not wish to be thought to have diminished the importance that this court has consistently attached to the emotional and psychological well-being of the primary carer. In any evaluation of the welfare of the child as the paramount consideration great weight must be given to this factor.⁴³

7.54 The judgment of Butler-Sloss P is somewhat broader, and given its approval in later Irish case law, the relevant sections are again worth setting out in detail. She stated that:

In summary I would suggest that the following considerations should be in the forefront of the mind of a judge trying one of these difficult cases. They are not and could not be exclusive of the other important matters which arise in the individual case to be decided. All the relevant factors need to be considered, including the points I make below, so far as they are relevant, and weighed in the balance. The points I make are obvious but in view of the arguments presented to us in this case, it may be worthwhile to repeat them.

- (a) The welfare of the child is always paramount.
- (b) There is no presumption created by section 13(1)(b) [of the Children Act 1989] in favour of the applicant parent.
- (c) The reasonable proposals of the parent with a residence order wishing to live abroad carry great weight.
- (d) Consequently the proposals have to be scrutinised with care and the court needs to be satisfied that there is a genuine motivation for the move and not the intention to bring contact between the child and the other parent to an end.

⁴² This sentence was added by Thorpe LJ in *Re B (Removal from the Jurisdiction); Re S (Removal from the Jurisdiction)* [2003] EWCA Civ 1149 [11].

⁴³ *Payne*, [40]-[41].

- (e) The effect upon the applicant parent and the new family of the child of a refusal of leave is very important.
- (f) The effect upon the child of the denial of contact with the other parent and in some cases his family is very important.
- (g) The opportunity for continuing contact between the child and the parent left behind may be very significant.

All the above observations have been made on the premise that the question of residence is not a live issue. If, however, there is a real dispute as to which parent should be granted a residence order, and the decision as to which parent is the more suitable is finely balanced, the future plans of each parent for the child are clearly relevant. If one parent intends to set up home in another country and remove the child from school, surroundings and the other parent and his family, it may in some cases be an important factor to weigh in the balance. But in a case where the decision as to residence is clear as the judge in this case clearly thought it was, the plans for removal from the jurisdiction would not be likely to be significant in the decision over residence.⁴⁴

7.55 The last paragraph of Butler-Sloss P’s decision introduces a crucial distinction into relocation law – the distinction between those cases where there is a primary carer and a parent with contact, and those cases where care is shared between the parents.⁴⁵ At the outset, it is important to recognise that a case will be determined to be a shared care or shared residence case when the facts demonstrate that care is more or less split equally between two equally committed carers, and so the label which is attached to the care arrangements is not, of itself, important. It has been held that *Payne* is not applicable to genuine shared care cases, because the decision is premised upon the idea that it is the child’s primary carer who is seeking to leave the jurisdiction, although competing approaches were advanced in the judgments in *K v K*.⁴⁶ According to *Re Y (Leave to Remove from Jurisdiction)*,⁴⁷ the correct approach is simply to apply the welfare checklist.⁴⁸ However, *Re Y* was later seen as being consistent with the intention of *Payne*, and concern was expressed over the possibility that relocation disputes could become embroiled in a series of preliminary skirmishes over the categorisation of the case, which could lead to the generation of a “satellite jurisprudence”.⁴⁹

7.56 A further potential difficulty is seen in cases such as *Re F*, which was neither a primary carer relocation case, nor a shared residence case. Here, the applicant was the contact parent, and the respondent was the primary carer. This case held that the correct approach to adopt in this kind of situation is to apply the welfare checklist,

⁴⁴ *Payne* [85]-[86]. It has been stated that it is this, rather than Thorpe LJ’s decision, which provides the “best summary of the approach which judges are required to take to these difficult decisions” – *Re D (Leave to Remove: Appeal)* [2010] EWCA Civ 50, [2010] 2 FLR 1605, [18].

⁴⁵ On the question of alternatives to the *Payne* guidance, see Rob George et al, *Relocation: A Practical Guide* (Family Law 2013) 20-26.

⁴⁶ Thorpe LJ prompted the use of the welfare checklist *simpliciter*, while Black LJ felt that a modified form of the *Payne* guidance would be more helpful.

⁴⁷ [2004] 2 FLR 330.

⁴⁸ This is found in section 1 of the 1989 Act.

⁴⁹ See *K v K* [86], [87], [144], and *Re F (Child: International Relocation)* [2012] EWCA Civ 1364, [2013] 1 FLR 645 and Rob George, ‘International Relocation, Care Arrangements and Case Taxonomy’ [2012] *Family Law* 1478.

although the Court of Appeal did not think it inappropriate for the trial judge to have had regard to the *Payne* principles. The law in England, therefore, appears to be settled in respect of primary carer relocations, but in flux where other scenarios present themselves.

- 7.57 There is limited Irish authority on the question of relocation. The most comprehensive decision is *UV v VU*,⁵⁰ where MacMenamin J expressly disavowed the notion that a primary carer presumption was part of English law, while acknowledging that there had been some inclination towards such a position.⁵¹ The judgment of Butler-Sloss P in *Payne* and the Washington Declaration were also referred to in the course of this decision.⁵² In fact, the decision could be read as implicitly favouring the formulation of the law advanced by Butler-Sloss P over that advanced by Thorpe LJ.⁵³
- 7.58 In *UV v VU* the principles established by the Constitution were seen as critical to any relocation case. Article 40.3 contains the unenumerated right of the child to have decisions in relation to guardianship and custody taken in the interests of his or her welfare. MacMenamin J held that “the issue is the identification of the balance of rights between the individual parents who are in contention, and the rights of the children. In such a situation the rights of the children are, as a matter of constitutional law, to be the paramount consideration.”⁵⁴ Relating this constitutional principle to the discussion surrounding *Payne*, and even the relevance of *Payne* to joint custody cases, it was stated that very considerable weight should be attached to the views of the custodial parent, but there can be no actual *presumption* that the views of that parent should hold sway with a court. The children’s welfare is paramount. *A fortiori*, this observation applies in circumstances where (as here) the parents have joint custody. This is very far from determining that the children’s welfare is the only consideration. However, the rights of all parties must be weighed in accordance with the fact that the welfare principle is the overarching one. But a *presumption* raises issues of equality. All citizens are entitled to equal status before the law.⁵⁵
- 7.59 While *UV* added some clarity to the Irish law on relocation, greater clarity would be welcome. This is especially so in respect of the question of primary care versus shared care relocation cases, which have caused so much difficulty in the English courts. While the elaboration of what the best interests of the child means in Head 32 is welcome, some additional guidance could be provided for these specific cases, given the frequency with which they are beginning to emerge in the Irish courts.

8. Dispute Resolution and Court Procedures

Alternatives to Court-based Resolution of Disputes

- 8.1 Head 53 sets out provisions to ensure that an applicant is aware of alternatives to custody, access and guardianship proceedings and to assist attempts at agreement. Head 53 relates to individuals who have applied to court pursuant to Part 4 of the Bill

⁵⁰ [2011] IEHC 519.

⁵¹ *Ibid* [28]-[30].

⁵² See [38], [40], [45].

⁵³ See [40], [44].

⁵⁴ *UV v VU* [17].

⁵⁵ *Ibid* [18]. Emphasis in original.

in relation to any matter concerning guardianship, custody, upbringing or access to any child. It imposes a requirement on solicitors to discuss certain matters with their client. For example the solicitor is obliged to discuss the possibility of the applicant engaging in counselling to assist in reaching an agreement with the respondent in relation to custody, access or any other matter affecting the welfare of the child. The solicitor is also obliged to discuss the possibility of effecting a deed in writing made by the applicant and respondent in relation to the aforementioned matters.

- 8.2 Head 54 contains obligations similar to those contained in Head 53 but relating to respondents and requires the solicitor to inform the respondent of various alternatives to legal proceedings. It is noteworthy that the requirement under Head 53 and 54 is that the solicitor “shall...discuss with the applicant/respondent the possibility of...” rather than any mandatory obligation for the parties to the proceedings to engage in such services as mediation/counselling against their will. This is a sensible approach that will bring the possibility of mediation to the attention of parties without forcing them to engage in such a process against their will. Mediation can have very considerable benefits in allowing parties reach out of court agreements with the added advantage that positions may not have become as entrenched as they would in an adversarial court setting.
- 8.3 A further step, as regards Alternative Dispute Resolution (“ADR”) as it relates to the areas covered in this Bill, could be that mandatory mediation information sessions be introduced with compulsory mediation information certificates being issued to those who have attended such sessions. This would leave the ultimate decision of whether to engage in the process up to the clients but would ensure that the parties were fully informed of the potential benefits of mediation⁵⁶. It is suggested that this section be cross referenced with provisions of the Mediation Bill 2012.
- 8.4 Head 55 allows the court to adjourn proceedings to allow parties to try and reach an agreement. Head 55(2) permits a party, when proceedings have been adjourned, to return to court and request that the hearing of proceedings be resumed.
- 8.5 Head 56 provides that communications between parties to proceedings and a third party which occur in an attempt to reach agreement on custody, access or another dispute regarding the child are not admissible in court. This general exemption of communications between parties does not apply to any admission of abuse or disclosure of abuse. This is to prioritise child protection and comply with the Children First: National Guidance for the Protection and Welfare of Children (2011). This exception of admissibility of communications which occur in the context of dispute resolution is to be welcomed, as it will hopefully encourage more candid and frank communications between parties when seeking to resolve issues regarding their children.

Court Reports

- 8.6 Head 58 provides for the procurement of a report by the court on any question affecting the welfare of a child. The proposals in relation to Head 58 Reports

⁵⁶ Mandatory mediation information sessions have been in existence in England and Wales since the enactment of the Family Law Act, 1996. Many States in the United States also require mandatory mediation information meetings in relation to child custody and visitation matters.

contained in the Bill must be viewed in the context of the proposed constitutional changes to hear the voice of the child. The importance of child participation has already been discussed in some detail in this paper.

- 8.7 The inclusion of this provision cures the anomaly that exists at present whereby such a report can only be ordered to be procured pursuant to section 47 of the Family Law Act, 1995. At present the jurisdiction to order section 47 Reports is restricted to the Circuit and High Courts. The District Court does not have that jurisdiction at present. While that jurisdictional gap is not explicitly dealt with in the Head, it is clear from the explanatory note that the provision is intended to have effect in all Courts, including the District Court. That is very much to be welcomed.
- 8.8 It is also to be welcomed that the Bill provides for reports which are aimed at addressing any issue ‘affecting the welfare of the child’, as opposed to the existing section which refers to any question affecting the welfare of a party to the proceedings or any person to whom they relate. While in reality section 47 Reports have invariably been commissioned to look at issues affecting the welfare of children, it is to be welcomed that this is explicit in the Bill. Consideration should also be given to explicitly expand the terms of reference of reports to include reporting on the conduct of the parties or any other person insofar such conduct may affect the welfare of a child.
- 8.9 At present the use of section 47 Reports is quite limited and generally arises in cases where:
- There is obdurate conflict between parents in relation to issues of custody and/or access;
 - The court is unable to reconcile conflicting evidence between the parents as to what is in the best interests of the child;
 - The court believes that it is appropriate and helpful that the wishes/voice of the child should be heard in relation to the parental dispute;
 - The parties have the financial capacity to discharge the cost of such a report.
- 8.10 The most profound difficulty with the current section 47 reports is their cost. Typically that cost is often between €2,500 and €3,000. This considerable cost is a significant burden on litigants. Consideration should be given to establishing alternative mechanisms for funding reports. The current ad hoc system where access to such reports is entirely dependent on the financial status of the parents is unsustainable. Further, in the event that the ‘Children’s Rights’ referendum is ratified, there will be a constitutionally mandated requirement to hear the voice of the child in family law proceedings. That requirement could be argued to place a positive obligation upon the State to fund reports so as to vindicate the constitutional rights of those children whose parents cannot afford to fund an assessment or report privately.
- 8.11 At present, there are no guidelines as to who may carry out reports. Moreover, section 47 Reports are usually carried out by privately employed child psychologists or persons with related specialist expertise. Clarity needs to be provided in several areas

including the appropriate qualifications of persons to be appointed, the manner of appointment, the manner in which assessments will be carried out, and the duties and obligations of the assessor and the parties in the process. While the Bill provides at Head 58(1)(a) that a report may be carried out by a person nominated by the Child and Family Agency, or another person deemed suitable by the court, greater clarification could be provided over related matters. Indeed, the Child and Family Agency could establish and maintain a register of persons, approved by the Agency, to carry out such assessments and reports. Further it is recommended that the Agency draft, in conjunction with all relevant stakeholders (including the Judiciary) a set of guidelines around the preparation of reports, to include clear guidelines on the respective roles of the assessor, the parties and the Court.

- 8.12 The draft Head 58, as with section 47, provides that a copy of the report shall be given to the parties. This is not always the practice and is to be distinguished from section 20 Reports in child care cases which are not generally furnished to the parties. It should be considered whether it is appropriate to include discretion for the court, in limited cases, to order that the welfare report would not be furnished to the parties.
- 8.13 The draft Head 58, unlike section 47, makes specific reference to the court determining if the report should be furnished to a child. As a matter of practice this does not happen at present. Further it may be a cause of alarm for many parties and practitioners if such reports are to be made available to a child, irrespective of the child's age and maturity. As against that, it may be argued that this is a positive step in putting children at the centre of proceedings affecting their interests and empowering the child by the provision of information where appropriate. It should also be considered whether it is appropriate to include this provision. In the alternative, it may be that the provision should be amended to allow for a specially redacted or summarised report to be furnished to the child.

Guardian ad litem

- 8.14 Head 60 empowers a court to appoint a guardian *ad litem* (GAL) if satisfied that having regard to the special circumstances of the case it is necessary in the best interests of the child and in the interests of justice to do so. Head 60(2) sets out the factors that the court must have regard to when deciding whether to appoint a GAL. It is to be welcomed that the circumstances are set out which will aid the court in its decision to appoint a GAL. Head 60(2)(e) in particular should be commended as it vindicates the right of the child to be heard in judicial proceedings.
- 8.15 The duties and functions of the GAL are set out under Head 60. In particular Head 60(5) states that a GAL must, if satisfied that the adoption of a particular course of action is in the best interests of the child, make a submission to that effect to the court. This mandatory requirement on a GAL to put forward to the court any course of action which he/she believes is in the best interests of the child is to be welcomed.
- 8.16 Head 60(6) makes it clear that the GAL is an independent officer of the court and is not the child's legal representative and is not obliged to act on the child's instructions in relation to the proceedings. This imports a clear division between the functions of the GAL and any legal representative the child may have. Head 60(1), however, states that a GAL may only be appointed where the child to whom the proceedings relate is not a party. The express exclusion of GALs from cases where the child has

been made a party (and may have legal representation) appears to blur the distinction somewhat as to the separate role of a GAL and a legal representative of a child. In cases where a child has been made a party to the proceedings, there should still exist the possibility, if it is in the child's best interests, to appoint a GAL and Head 60 of the Bill should be amended accordingly.

- 8.17 Head 91 of the Bill dealing with regulations that the Minister for Justice may make for the purpose of giving effect to the Act are stated to include regulations which may provide for the regulation of guardians *ad litem* and may address issues including the eligibility to be a guardian *ad litem* and the nature of qualifications; the training of guardians *ad litem*; the establishment of a register of guardians *ad litem*; the detailing of work to be undertaken by guardians *ad litem* and prescription of the fee structure applicable to guardians *ad litem*. These regulations would be a welcome and necessary clarification on the qualification, role and function of guardians *ad litem* whose work is currently unregulated.

Costs

- 8.18 A provision should be inserted into Head 58 (procuring of reports), Head 60 (appointment of a guardian *ad litem*) and Head 61 (costs of mediation and counselling) to allow parties to make an application to the court to direct the Child and Family Agency to discharge the costs in certain circumstances. It is submitted that a similar application be permitted under Head 6 of the Bill (testing to establish parentage). The court should be required, in hearing any such application, to have regard to the means of the parties. Head 61 refers to the cost of mediation or counselling services and it is stated that the cost of any mediation or counselling services provided to someone who becomes a party to proceedings under Part 7 or for the child to whom the proceedings relate shall be at the discretion of the court.

9. Making Parenting Orders Work and Enforcement

- 9.1 Part 9 of the Bill deals with the issue of parenting orders and the mechanisms by which those can be ordered and enforced. It is an innovative and welcome addition. Head 62 of the Bill sets out the definitions used in Part 9. It is suggested that it would be worth considering whether the qualifications of a family counsellor should be outlined here. The reference to a "post separation parenting program" implies (from the spelling of programme) that these provisions are extracted from a U.S. model. Head 62 states that a "post separation parenting program" means a programme that is, inter alia, provided by an organisation designated for such purposes under this Act. The fact that such a programme will only be considered as a parenting programme for the purposes of the Act may result in difficulties and logistical hurdles in ensuring parties use the correct services.
- 9.2 Head 63 of the Bill sets out a procedure for the making of enforcement orders by a court where a guardian or parent of a child has been held to have unreasonably denied the applicant parent custody of or access to the child. This is a novel provision in that it attempts to address the current situation where custody and access arrangements are made and then routinely not complied with. The explanatory note in the Bill states that the policy intention is to address this non-compliance by means of a less drastic

response than contempt of court proceedings. Nonetheless, it is submitted that the provisions contained in Head 63 are far reaching.

- 9.3 Head 63(2) permits a court to order one party to give security for the future performance of the obligation to enforce the order. It also gives a court the power to require one party to reimburse the other for expenses incurred in attempting to exercise access. These provisions are welcome, although the financial circumstances of the parties may themselves create problems of implementation. It is suggested that such a provision would be applied only in appropriate cases. It is unclear whether the subsection envisages the payment of legal costs of the applicant (the argument being that the applicant incurred these costs while attempting to exercise custody or access). An order can also be made requiring the respondent to give the applicant compensatory time. This is an innovative and welcome provision.
- 9.4 An enforcement order under Head 63 may contain a direction that one or both parties either individually or together attend a post-separation parenting programme or counselling session or that they engage in mediation concerning the issues in dispute. This, it is submitted is quite a far-reaching provision in that it lays down an express statutory provision allowing a court to direct parties to engage in parenting programmes, counselling or mediation.
- 9.5 This ostensibly practical provision may, however, violate the basic foundational principles of mediation. Mediation arises from the parties involved freely and decisively choosing it as a process that might resolve their dispute. Unwilling parties cannot therefore reach a genuine compromise.
- 9.6 As the LRC stated in its Consultation Paper on Alternative Dispute Resolution, there is an important distinction to be noted between mandatory *attendance* at an information session about any alternative dispute resolution (ADR) process (including mediation) and voluntary *participation* in an ADR process. The General Scheme of the Mediation Bill 2012 does not make provision for mandatory information mediation sessions.
- 9.7 It is instead suggested that the court could compel attendance at information sessions for mediation only, with the final decision on whether to engage in it being left to the parties themselves. However, the Report of the *Family Law Reporting Committee* recommended the following exemptions from mandatory mediation information sessions:
- i. Where the proceedings involve an application for a safety order, a barring order or a protection order under the Domestic Violence Act, 1996;
 - ii. Where a party satisfies the court that his or her personal safety, or the safety of his or her children is or are at risk.
- 9.8 The LRC further recommends that the person providing the information session may give those attending the information session a certificate stating that the person did not attend the information session or a certificate stating that the person attended the information session. Courts could also be encouraged to suggest mediation as a viable and beneficial course of action.

- 9.9 A recent High Court decision is worthy of consideration. In *F.H. & Others v. Staunton & Others*,⁵⁷ the High Court held that a District Court judge could not direct the parents to engage in therapy (as a condition of a supervision order) as the relevant statute (section 19(1) of the Child Care Act, 1991) did not expressly provide for that. Hogan J noted that it is fundamental to our legal order that something akin to medical treatment (such as, for example, psychotherapy) represented a voluntary choice on the part of the prospective client and that very clear express language would be required before it could be assumed that the Oireachtas intended to give the District Court a power to impose such a condition. While it is unclear whether any of the services contemplated by Head 63 could be said to be akin to medical treatment, the Bill provides a statutory basis, in express terms, which would allow a court to direct an individual or a couple to engage in a parenting programme, counselling or mediation.
- 9.10 Enforcement orders will not be made in all circumstances. Head 63(4) states that if the court is of the opinion that the denial of custody or access was reasonable in particular circumstances the court may refuse to make an enforcement order or make the enforcement order that it considers appropriate in the circumstances.
- 9.11 Head 63(6) provides that the provisions contained in Head 63 are without prejudice to the law as to contempt of court and a person shall be deemed to have been given or shown a copy of an order made under this Act if that person was present at the sitting of the court at which such order was made. This means there is a very significant onus on the judge and/or legal representatives (where present) to explain very clearly the terms of the Order. It is worth considering whether such a requirement should be explicitly stated in the Bill.
- 9.12 Consideration should be given, in relation to Head 63 as to whether there should be provision in this Head to explicitly state that in extreme cases where custody or access is denied, without reasonable cause, that an early application to vary current custody or access arrangements, by order of the court or otherwise could result in custody or access being reversed in favour of the parent who has been denied custody or access if to do so would be in the best interests of the child.

Supplementary enforcement orders and sanctions

- 9.13 Head 64 allows a court to impose a supplementary enforcement order where enforcement orders are breached. It is proposed, under Head 64, to make it a criminal offence to breach an enforcement order handed down under Head 63. This is a punitive measure and consideration should be given as to whether attendance at a parenting course or some other similar direction would be a more suitable sanction, although this option should already have been explored during initial enforcement proceedings. A monetary penalty can be imposed on someone who breaches an enforcement order (Head 64(2)(a)) as well as a direction that someone in breach of an enforcement order undergo community service (Head 64(2)(b)). Head 64(2)(c) states that a supplemental enforcement order can contain “where the court is satisfied based on the respondent’s history of preventing or disrupting custody or access or based on other reasonable and probable grounds that a denial of custody or access will occur, a

⁵⁷ [2013] IEHC 533.

provision directing a member of An Garda Síochána to act in accordance with Head 66.”

- 9.14 Head 66 sets out the manner in which a member of An Garda Síochána may enter a house to “give assistance to the applicant, comply with the directions of the court and take all reasonable steps to find the child to whom the enforcement order relates and to bring the child to the applicant.” The explanatory note in the Bill states that it is envisaged that this remedy be available as a last resort where the access and custody rights of the applicant are persistently breached and the court considers that this is the only effective enforcement mechanism. Head 66(3) states that a member of An Garda Síochána is not required to bring the child to whom the enforcement order relates to the applicant if the member determines that, in the immediate circumstances, it is not in the best interests of the child to do so. It is submitted that a member of An Garda Síochána (who has probably no knowledge of the facts of the case before they are brought in to assist with the enforcement order) is not the best-placed individual to determine what the best interests of the child are. It is not clear from Head 66(3) as to what steps should be taken by the member of An Garda Síochána who decides not to bring a child to the applicant.
- 9.15 Head 66(4) permits a member of An Garda Síochána who is authorised to enter the premises where the child is to do so by such force as is reasonably necessary. Head 64(4) states that “a provision referred to in subhead 2(c) may be included in an enforcement order only if the court is satisfied that none of the other provisions provided for in subhead (2) or Head 63 would be effective.” Head 66(6) provides for immunity from suit for a member of An Garda Síochána or a person giving assistance under subhead (4) by reason of anything done by any of them in good faith in exercise of any power conferred under Head 66.
- 9.16 It is submitted that a forceful entry of the house may be disproportionate reaction to the breach of an enforcement order (particularly where the breach of that order is anticipatory rather than actual). It is further submitted that Head 64 and Head 66 contain sanctions relating to the criminal law that may not be appropriate in proceedings involving children.
- 9.17 Head 67(1) refers to a report by a member of An Garda Síochána which shall be made “in accordance with regulations to be made under this Act”. It is suggested that Regulations need to accompany the Bill or the format of such a report needs to be included in an Appendix to the Bill. Head 67(4) states that a member of An Garda Síochána who has provided a report as set out above will not be required to attend proceedings brought in relation to the enforcement order unless the court orders otherwise. This is a departure from the rule against hearsay and this will result in automatic admissibility of a Garda report without challenging the content, veracity or completeness of same.
- 9.18 This provision could be amended to the effect that the Applicant must first apply to the court to seek the assistance of An Garda Síochána. It would be better if a court first heard the extent of any alleged breaches of an Enforcement Order and that An Garda Síochána would only be compelled to assist the Applicant if requested to do so by the court. The reasoning behind this is that some breaches of an enforcement order may be relatively minor yet as currently drafted An Garda Síochána must assist the

Applicant. This may involve An Garda Síochána in relatively minor disputes between parents and it would be better if a court first heard the nature of the alleged breaches of the Enforcement Order before An Garda Síochána get involved in enforcing the Enforcement Order.

10. Maintenance

- 10.1 Part 10 of the Bill sets out certain provisions concerning child maintenance. This part of the Bill extends maintenance liabilities for a child to certain persons who are not the biological or adoptive parents of the child and creates maintenance liabilities for a cohabitant or civil partner who has treated the child of the other cohabitant or civil partner as a “child of the family.” Such liabilities already exist for spouses in relation to a child who is treated “as a child of the family”. This phrase is used in Part 10 and a dependent child of the family is a child of both spouses or adopted by both spouses or in relation to whom both spouses are in loco parentis or of either spouse or adopted by either spouse or in relation to whom either spouse is in loco parentis where the other spouse being aware that he or she is not the parent of the child, has treated the child as a member of the family.
- 10.2 This definition also applies to cohabitants but is slightly different in relation to civil partners, where a dependent child is described at Head 68(b) as a child of both civil partners or to whom both civil partners are in loco parentis or of either civil partners or in relation to whom either civil partner is in loco parentis where the other civil partner has treated a child as a member of the family. Notably the reference to a child being adopted by either civil partner is absent in the definition of dependent child as it relates to civil partners. It is suggested that this anomaly be rectified so as to include, in the definition of dependent child, any adopted child of either civil partner who has been treated as a member of the family.
- 10.3 Head 69 provides for maintenance liabilities in respect of dependent children. Some reservations arise about the concept of cohabitants being possibly obliged to pay maintenance for a non-biological child. Obviously where the cohabitant is the biological parent of the child it is proper that he/she has a maintenance obligation to the child as heretofore. However, arguably only biological parents should be held liable for maintenance unless the aforementioned cohabitants have entered into the commitments of marriage or civil partnership. That said, the factors outlined in Head 69(2) seem to achieve a sensible balance whereby cohabitants will be fixed with a maintenance liability only where the relationship between the cohabitant and child reflects the parent-child relationship.

11. Conclusion

- 11.1 The reforms proposed by the Children and Family Relationships Bill will significantly benefit families in Ireland while at the same time increasing the recognition and implementation of children’s rights. Children’s best interests and their right to participate appropriately are central to all facets of the Bill.

- 11.2 The proposed clarifications relating to the assignment of parentage, including for cases of AHR and surrogacy are important so that all involved can have certainty as to the legal relationships involved. While some further clarifications are required, the present proposals are innovative and progressive. The provisions relating to guardianship, custody and access will bring a diverse range of family types in from the cold.
- 11.3 Moving away from the onerous enforcement mechanisms of enforcing court orders currently based on contempt is crucial from an access to justice perspective. In this respect, the new provisions in relation to ADR, the role of guardians ad litem and welfare reports are welcome. While some changes need to be made to these provisions, it is also important to realise that they will be most effective within a revised family court structure.
- 11.4 The Children and Family Relationships Bill 2014 adopts a comprehensive human rights based approach to children's human rights and, when enacted, will remove several roadblocks within the legal system that stand in the way of children having the best possible family life.

Overview of recommendations

General

1. The criteria referred to in the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 that are used to determine whether a couple are cohabiting should be referred to or inserted into the General Scheme of the Children and Family Relationships Bill 2014.
2. The wide reaching reforms as set out by the Children and Family Relations Bill should be accompanied by the proposed setting up of a specialist family court structure.
3. Consideration should be given to legislation providing a clear regulatory framework for the use of assisted reproduction which would complement the provisions of this legislation.

Children's Rights

4. Head 32(1) requires the best interests of the child to be taken as the paramount consideration in proceedings concerning guardianship, custody, access or the administration of property or on the application of income thereto. It is submitted that consideration should be given as to whether the best interests should be required to be paramount in all proceedings concerning children and not merely those referred to above.
5. Consideration should be given as to whether explicit reference should be made in the Bill to the provisions of the UNCRC and General Comment No. 14.
6. Consideration should be given as to whether the term "upbringing" should be defined. Consideration should also be given as to whether the reference in Head 32(1) to the administration of property or the application of income are necessary and whether reference should be made in the section to the intentions of a testator.
7. It is also suggested that reference should be made in Head 32(4) to any addictions or illnesses that may affect any of the parties. Consideration could also be given as to whether it would be prudent to include in Head 32 a reference to the ability of the victim of violence to protect the child.
8. It is submitted that reference to the best interests principle could be included in other parts of the Bill. For example, Head 53 of the Bill which imposes an obligation on solicitors to discuss with their clients the possibility of counselling, mediation or the drawing up of an agreement in writing between the parties should include a requirement that in reaching any agreement regard must be had to the best interests of the child/children.
9. Consideration should be given as to whether the criteria outlined in Head 32 ought to be amended to provide for specific types of court application, or whether new statements ought to be added.

10. The right of the child to be heard could be contained in a stand-alone provision that would make it clear how important that right is. It is further submitted in relation to the above that the Children and Family Relationships Bill should set out clear safeguards and mechanisms to ensure that the child can express his or her views freely. Any mechanism that is put in place to elicit the views of the child should be accessible and child-friendly. Children should be provided with information on their right to participate and how they can assert this right in legal proceedings.
11. Provision should be made to outline examples of the situations in which the views of the child could be sought, be it through a report of an independent expert or by means of an interview with the judge, or any other suitable means.
12. Consideration ought to be given to cases where it may be necessary for children to have separate legal representation.

Parentage

13. Reference to a “deed of separation” and “separation agreement” at Head 6(4) could be removed, as it is submitted that reference to living apart for more than 10 months is a sufficient indicator that the couple are no longer together.
14. It is suggested that the requirement of no contact in presuming that a man is not the father of a child at Head 6(5) may be unduly onerous.
15. Consideration should be given as to whether a provision should be included dispensing with any requirement to serve notice of an application for a declaration of parentage on a person if, for example, he/she cannot be contacted.
16. It is suggested that reference in Head 7(6) and (7) to “testing” requires further consideration and could be more clearly stated, for example by including a reference to DNA testing.
17. Consideration should be given as to whether reference should be made in Head 7 to section 117 of the Succession Act, 1965 in terms of who can make an application under that Act.

Parentage in Assisted Reproduction

18. Consideration should be given as to whether Heads 10 and 12 of the Bill should be expanded upon to include a temporal requirement of cohabitation similar to that set out at Head 6 for the unmarried biological father of a child. Conversely, consideration may be given as to whether Head 6 should be brought into line with Heads 10 and 12 and the cohabitation requirement for unmarried biological fathers be reduced. Either way it is submitted that the 12 month cohabitation period for unmarried fathers should be reduced so as to facilitate the recognition of family ties.
19. Further consideration should be given as to whether children should have the right to information pertaining to their donor.

20. Consideration should be given to providing for situations where, with explicit written instructions, a person wishes their partner to be able to conceive and have a child after their death.
21. Regulations pertaining to consent should be drafted with the Bill and/or specified in an Appendix to the Bill.
22. Consideration should be given to Head 11(7) which states (in relation to directions as to parentage in cases of assisted human reproduction other than surrogacy) that “there shall be no appeal from a declaration under subhead (6), nor shall the court hear and determine any application under Head 7 in relation to a child after a declaration is made under subhead (6).” It is submitted that consideration should be given to this limitation on the right to appeal and to its constitutionality as well as the State’s obligations under the European Convention on Human Rights (right to an effective remedy (Article 13)).

Surrogacy

23. A limit should be placed on the number of guardians that can be appointed in respect of a particular child.
24. It is submitted that altruistic surrogacy arrangements could be certified by order and could be made acceptable from countries which ban commercial surrogacy, in much the same manner as civil partnerships. This would allow individuals and families to benefit from surrogacy arrangements while maintaining the intended ban on commercial arrangements.
25. Parents who take part in commercial surrogacy arrangements abroad should be sanctioned rather than the children who might be denied citizenship.
26. Consideration should be given as to whether a provision should be included in Head 14 that would enable a court to hear a maintenance application at the same time as it hears an application under Heads 7, 11 or 13.
27. It is suggested that consideration be given to Head 15(4) in relation to the awarding of costs where any costs are incurred by the Attorney General. It is suggested that this provision which allows a court to make any costs order which appears just may act as a deterrent to applicants in seeking the assistance of the court under Heads 7, 11 or 13.
28. It is submitted that Head 22 be amended so that provision is made to ensure that each party to a AHR arrangement receive independent and separate legal advice so as to alleviate any concerns that one person may feel pressured into entering into such an agreement.
29. Clarity needs to be provided in Head 17(2) as that provision does not use the phrase “reasonable costs” used later in the section.
30. Consideration should be given to the question of criminal jurisdiction to cater for situations where a person may seek to claim that the Irish legislation does not apply to an agreement entered into abroad, or where the surrogate is resident abroad, or where

the communication between an intermediary and a person resident in Ireland takes place online, whether that person is a potential birth mother or a potential intending parent.

31. Consideration also needs to be given to ensuring the position of children born outside Ireland to a surrogate who has been engaged by a person or persons resident in Ireland.
32. The Department of Justice Guidance Document on citizenship, parentage, guardianship and travel documents issued in relation to children born as a result of surrogacy arrangements entered into outside the State should be adapted to ensure compatibility with the proposed legislation and then placed on a legislative basis.

Guardianship, Custody and Access

33. It is suggested that the terms guardianship, custody and access are replaced with references to parental responsibility, day-to-day care and contact.
34. It is suggested that the inclusion of a requirement for both cohabitation and the nature of a relationship should be consistent throughout the Bill. To preclude both members of a couple in a committed relationship from being regarded as their child's parents due to a failure to satisfy the cohabitation requirement alone may present difficulties in respect of compliance with the need to respect family life under Art 8 ECHR.
35. It is suggested that the period of required cohabitation might be reduced from 12 months to 6 months, and it is further suggested that cohabitation for a period of 6 months within a year of the birth of the child could also be taken into account. However, consideration should also be given to removing the temporal requirement, so that the father will be recognised as such irrespective of how long he has been living with the mother of the child.
36. If an applicant has had an order made against him/her under the Domestic Violent Acts, this should be considered as a contra-indicator to a Court appointment of a parent as a guardian. An order made under the Child Care Acts may also serve as a contra-indicator in such applications.
37. Consideration should be given to revisiting the requirement that the appointment of a guardian requires the consent of children over 12.
38. A central register of guardians should be created.
39. A limit should be placed on the number of guardians that can be appointed in respect of one child.
40. It is submitted that the inclusion of custody as a component of guardianship (unless otherwise limited by law or a court order) could lead to confusion.
41. It is submitted that parents should only be allowed to appoint substitute guardians if the other parent is also unable or unwilling to act as guardian. This would avoid the possibility of guardians being appointed with the intention of creating conflict with

the other parent. It would mean that parents unwilling to act as guardians to the child would retain obligations to provide for the child, and would also help to prevent instances of neglect and harm to children for whom both parents are uninterested and unwilling to perform the role.

42. It is submitted that the word “shall” in Head 46(4) should be changed to “may”. This would allow for flexibility and discretion, and would allow the court to proceed in a more timely fashion with the important business of deciding custody. It could conceivably have the added benefit of reducing friction and resentment between the parents of the child, as they would have the opportunity to discuss and compromise on arrangements.
43. It is suggested that under Head 40(4) the surviving parent should have a right to apply to have a testamentary guardian removed (for example if the guardian cannot be located). It is suggested that Head 40(7) should be amended to read “an appointment of a guardian by deed may be revoked by a subsequent deed or by will *or by order of the court.*”
44. While the legislation provides for the relationship between the substitute and other guardians, it does not outline the relationship with non-guardians. The appointment could prejudice the right of the other parent of the child to take custody of the child. Any such appointment should be with the consent of the other parent or, at the least, on due and proper notice being given to the other parent. Provision also needs to be made to ensure continuity of access arrangements.
45. In relation to Head 41(2) it is submitted that similar rules, regulations and safeguards should be included in the Bill as apply to powers of attorney. Head 41(3) refers to situations where someone is mentally ill but it is submitted that there are cases where mental illness is such that the person is not capable of making a decision such as this and this should be reflected in the Bill.
46. In line with the courts’ approach to separation agreements in the context of divorce, it should be possible to state that a court should have regard to the terms of any agreement when determining any matter relating to guardianship, custody or access matters, although such agreements cannot of themselves be completely binding. Consideration should also be given to enhancing the role of mediation in forming such agreements, rather than relying on legal advisers.
47. It is submitted that the manner in which Part 7 of the Children and Family Relationships Bill sets out the rights, duties and definitions of guardianship could benefit from greater clarity.
48. To avoid the belief that there may be a default position of equal or near equal division of time in post-separation parenting, consideration should be given to clarifying the relevant provisions.
49. Greater clarity as to the principles applicable in relocation cases would be welcome. This is especially so in respect of the question of primary care versus shared care relocation cases, which have caused so much difficulty in the English courts. While the elaboration of what the best interests of the child means in Head 32 is welcome,

some additional guidance could be provided for these specific cases, given the frequency with which they are beginning to emerge in the Irish courts.

Dispute Resolution and Court Procedures

50. Mandatory mediation information sessions should be introduced with compulsory mediation information certificates being issued to those who have attended such sessions.
51. Consideration should also be given to explicitly expand the terms of reference of reports to include reporting on the conduct of the parties or any other person insofar as such conduct may affect the welfare of a child.
52. Provision should be made for the public financing of welfare reports.
53. Clarity needs to be provided over the appropriate qualifications of persons to be appointed to carry out welfare reports, the manner of appointment, the manner in which assessments will be carried out, and the duties and obligations of the assessor and the parties in the process.
54. It should be considered whether it is appropriate to include discretion for the court, in limited cases, to order that the welfare report would not be furnished to the parties.
55. Consideration needs to be given to the provision of welfare reports to children.
56. In cases where a child has been made a party to the proceedings, there should still exist the possibility, if it is in the child's best interests, to appoint a GAL and Head 60 of the Bill should be amended accordingly.
57. It is submitted that a provision should be inserted into Head 58 (procuring of reports), Head 60 (appointment of a guardian *ad litem*) and Head 61 (costs of mediation and counselling) to allow parties to make an application to the court to direct the Child and Family Agency to discharge the costs in certain circumstances. It is submitted that a similar application be permitted under Head 6 of the Bill (testing to establish parentage). The court should be required, in hearing any such application, to have regard to the means of the parties.

Making Parenting Orders Work and Enforcement

58. It is suggested that the court could compel attendance at information sessions for mediation only, with the final decision on whether to engage in it being left to the parties themselves.
59. Exceptions should apply where the proceedings involve an application for a safety order, a barring order or a protection order under the Domestic Violence Act, 1996 or where a party satisfies the court that his or her personal safety, or the safety of his or her children is or are at risk.
60. Clarity should be provided over the obligation to explain the effect of orders in relation to Head 63.

61. Consideration should be given, in relation to Head 63 as to whether there should be provision in this Head to explicitly state that in extreme cases where custody or access is denied, without reasonable cause, for an early application to vary current custody or access arrangements.
62. Consideration should be given to revising the penalties available under Head 64.
63. It is submitted that a forceful entry of the house may be disproportionate reaction to the breach of an enforcement order (particularly where the breach of that order is anticipatory rather than actual). It is further submitted that Head 64 and Head 66 contain sanctions relating to the criminal law that may not be appropriate in proceedings involving children.
64. Head 67(1) refers to a report by a member of An Garda Síochána which shall be made “in accordance with regulations to be made under this Act”. It is suggested that Regulations need to accompany the Bill or the format of such a report needs to be included in an Appendix to the Bill.
65. Head 67 could be amended to the effect that the Applicant must first apply to the court to seek the assistance of An Garda Síochána.

Maintenance

66. The definitional anomaly found in Head 68 should be rectified.