

Major Reforms to Irish Family Law

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Introduction

2015 was a momentous year for Family Law in Ireland.¹ This article focuses on three 2015 Acts: the Marriage Act ('MA'), the Children and Family Relationships Act ('CFRA') and the Gender Recognition Act ('GRA').

Same-sex Marriage

The Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 introduced a marriage-like registration scheme for same-sex couples.² Marriage, however, remained an exclusively heterosexual institution in Ireland,³ and the 2010 Act did not ensure either formal or substantive equality with heterosexual marriage for same-sex couples.⁴ For example, it failed to facilitate same-sex adoption.

In *Zappone and Gilligan v Revenue Commissioners* Dunne J found it 'very difficult to see how the definition of marriage could, having regard to the ordinary...meaning of the words used [in the Constitution], relate to a same sex couple'.⁵ Following a 'Constitutional Convention',⁶ a referendum on same-sex marriage was held in May 2015, and 62% of voters were in favour of a change to the Constitution so that it provides that '[m]arriage may be contracted in accordance with law by two persons without distinction as to their sex'.⁷ The MA, which removes the impediment on same-sex couples marrying, was commenced in November 2015. Civil partnership is to be

¹ Sloan, The Changing concept of "family" and challenges for family law in Ireland, in Scherpe (ed), European Family Law: Volume II, 2016.

² Scherpe/Sloan, Civil Partnership und nichteheliche Lebensgemeinschaften in Irland, FamRZ 2011, 1451-1453.

³ Civil Registration Act 2004, s 2(2)(e).

⁴ Ryan, "Benchmarking" Civil Partnership: Comparing Civil Partnership with Marriage and Considering the Legal Position of Children' in The General Scheme of the Civil Partnership Bill, 2009.

⁵ [2006] IEHC 404.

⁶ Convention on the Constitution, Convention on the Constitution Votes in Favour of Same Sex Marriage, 2013.

⁷ <http://www.referendum.ie/>; Constitution, article 41.4.

abolished for new entrants,⁸ and existing civil partners will be able (though not required) to become spouses without first dissolving their partnerships.⁹ Given the controversy that same-sex marriage causes for some religious groups, the Act does not oblige ‘a religious body to recognise a particular form of marriage ceremony’ or ‘a religious solemniser to solemnise a marriage in accordance with a form of marriage ceremony which is not recognised’ by his or her religious body.¹⁰

Reforms to Child Law

The Constitution ‘recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law’.¹¹ The result, as Shannon put it before recent changes to recognise the individual rights of children, was that ‘the family unit...ha[d] autonomy over and above that of the individual members of the family’, and that ‘the individual rights of the constituent members of the family [were] both directed and determined by the family as an entity’.¹² Marriage was central to the legal relationships between parents and their children. One writer claimed that for the purposes of the Constitution a father and mother who have not married ‘are not regarded as “parents”’ under the pre-2015 law.¹³

Due to an amendment delayed until 2015 for procedural reasons,¹⁴ the Constitution now asserts *inter alia* that ‘[t]he State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights’.¹⁵ The Thirty-First Amendment of the Constitution (Children) Act 2012 also facilitated several changes *inter alia* to ensure that there is ‘no discrimination between children based upon the marital status of their parents when it comes to child care proceedings, family law proceedings, access to adoption and consideration of their best interests and views’.¹⁶

⁸ MA, s 8.

⁹ MA, s 6.

¹⁰ MA, s 7.

¹¹ Constitution, article 41.1.1°.

¹² Shannon, *Child Law*, 2nd edn, 2010, [1-06].

¹³ Nestor, *An Introduction to Irish Family Law*, 4th edn, 2011, 20. Cf Constitution, article 42A.2.1°.

¹⁴ *Re Referendum Act & re Jordan and Jordan v Minister for Children and Youth Affairs* [2015] IESC 33.

¹⁵ Constitution, article 42A.1.

¹⁶ *Department of Children and Youth Affairs, Thirty-First Amendment of the Constitution (Children) Bill 2012: Explanatory Memorandum*, 2012.

In addition, the CFRA (much of which was commenced in January 2016)¹⁷ regulates parenthood in cases of assisted reproduction¹⁸ and addresses issues connected with same-sex and cohabitants' parenting and adoption.¹⁹ Parenthood following surrogacy was to be the subject of specific legislation for the first time,²⁰ but was omitted from the Act.

Under the pre-CFRA Guardianship of Infants Act 1964 ('GIA'), fathers not married their children's mothers could obtain 'guardianship' (equivalent to parental responsibility) only through a statutorily declared agreement with the child's mother²¹ or an order of the court.²² The CFRA provides that an unmarried father will be a guardian if he 'and the mother of the child...have been cohabitants for not less than 12 consecutive months occurring after the date on which [the relevant] subsection comes into operation, which shall include a period, occurring at any time after the birth..., of not less than three consecutive months during which both the [parents] have lived with the child'.²³ The new provision is an improvement on the current law, though it still places much control for the automatic granting of guardianship in the hands of the mother.

The previously formulated Constitution share the blame for the discriminatory treatment of unmarried fathers, which continues in spite of the equality statutorily granted to children born outside marriage.²⁴ It should be emphasised, however, that the position has been improved by the CFRA.

Gender Recognition²⁵

Until 2015, the general legal position in Ireland was that biological indicators 'act[ed] as the governance in the determination of sex',²⁶ and that a person's gender was fixed at birth. The absence of a legal gender change mechanism was declared to be a breach of the European

¹⁷ Children and Family Relationships Act 2015 (Commencement of Certain Provisions) Order 2016.

¹⁸ CFRA, Part 2.

¹⁹ CFRA, Parts 11-12.

²⁰ Department of Justice and Equality, General Scheme of the Children and Family Relationships Bill Policy Rationale, 2014, 3.

²¹ GIA, s 2(4).

²² GIA, s 6A.

²³ GIA, s 6B(3), inserted by CFRA, s 49.

²⁴ Status of Children Act 1987, s 3.

²⁵ *Sloan*, The Legal Status of Transsexual and Transgender Persons in Ireland, in *Scherpe* (ed), *The Legal Status of Transsexual and Transgender Persons*, 2015.

²⁶ *Foy v An t-Árd Chláraitheoir* [2002] IEHC 116, [6].

Convention on Human Rights in 2007,²⁷ and the Gender Recognition Act 2015, which was brought into force in July 2015, eventually provided one.

Under the GRA, a person whose birth or adoption was registered in Ireland or who is ordinarily resident there²⁸ can apply to the Minister for Social Protection for a Gender Recognition Certificate by making a statutory declaration that he or she has ‘a settled and solemn intention of living in the preferred gender for the rest of his/her life’, that he or she ‘understands the implications of the application’, and that he or she ‘makes the application of his or her free will’.²⁹ If granted, the certificate would mean that from the date of the decision to grant it ‘the person’s gender shall...become for all purposes the preferred gender’³⁰ and he or she is entitled to a new birth certificate to that effect. That recognition takes effect ‘for all purposes, including dealings with the State, public bodies, and civil and commercial society’,³¹ although it remains subject to the rest of the Act, one of which states that ‘[t]he issue of a gender recognition certificate shall not affect the rights or liabilities of a person or consequences of an action by the person in their original gender prior to the date of issue of the certificate’.³²

It was originally proposed the Act would require a statement by the applicant’s ‘primary treating medical practitioner’ confirming that the applicant ‘has transitioned’ or ‘is transitioning’ to his or her ‘preferred’ gender,³³ and that the practitioner is ‘satisfied’ that the applicant ‘fully understands the consequences of his/her decision to live permanently in the acquired gender’.³⁴ Thankfully, the Government announced that the principle of self-declaration would be embraced and that the need for a statement from a medical practitioner would be removed.³⁵ Somewhat harshly, however, the onerous medical requirements have been retained in the case of 16- and 17-year-olds.³⁶

²⁷ *Foy v An t-Árd Chláraitheoir* [2007] IEHC 470.

²⁸ GRA, s 9(1). There is also provision for applications by those whose gender has been recognised in another jurisdiction: GRA, s 11.

²⁹ GRA, s 10(1)(f);

³⁰ GRA, s 18(1).

³¹ Department of Social Protection, Gender Recognition Bill 2014: Explanatory and Financial Memorandum, 2014, 5.

³² GRA, s 18(6).

³³ Gender Recognition Bill (February 2015) (‘GRB’), cl 10(1)(g)(ii)(I).

³⁴ GRB, cl 10(1)(g)(ii)(II).

³⁵ <https://www.welfare.ie/en/pressoffice/pdf/pr030615.pdf>.

³⁶ GRA, s 12.

The original Gender Recognition Act barred applications for a gender recognition certificate from those in a subsisting marriage or civil partnership.³⁷ Pleasingly, the Government announced that the bar would be ‘dropped’ because since ‘the marriage equality referendum has been passed there is no Constitutional barrier to a person in a marriage or civil partnership having their preferred gender legally recognised’.³⁸

It is noteworthy that in spite of the conservatism inherent in early proposals, the final Gender Recognition Act is one of the most liberal gender recognition regimes in the world.³⁹

Conclusion

Given that divorce was not possible in Ireland until the mid-1990s, the pace of family law reform in recent years, and in 2015 in particular, is little short of remarkable. Some controversial issues remain, but it is fair to say that Ireland has a family law fit for the twenty-first century.

³⁷ GRA, s 9(2)(b).

³⁸ <https://www.welfare.ie/en/pressoffice/pdf/pr030615.pdf>; Marriage Act 2015, s 24.

³⁹ *Scherpe* (ed), *The Legal Status of Transsexual and Transgender Persons*, 2015.