

Oral Hearings

Family Issues: Presentations.

Thursday, 28 April 2005

The Joint Committee met at 10.30 a.m.

MEMBERS PRESENT:

Deputy B. Andrews,
Senator M. Finucane,
Deputy J. Breen,
Senator D. Lydon,*
Deputy C. Cuffe,
Senator J. Tuffy,
Deputy J. Devins,
Senator K. Walsh.*
Deputy P. McCormack,
Deputy P. Power,

(*In the absence of Senators B. Daly and J. Dardis, respectively.)

In attendance: Deputy D. Neville.

DEPUTY D. O'DONOVAN IN THE CHAIR.

The joint committee met in private session until 10.33 a.m.

Family Issues: Presentations.

Chairman: I welcome the delegation from the organisation Unmarried and Separated Fathers of Ireland which is represented by Mr. Ray Kelly, Mr. Donnacha Murphy, Mr. Dave Carroll and Mr. Eamonn Quinn. Before we begin, I remind visitors that while members of the joint committee have absolute privilege, the same privilege does not apply to witnesses appearing before the committee. Members are reminded of the long-standing parliamentary practice to the effect that they should not

comment on, criticise or make charges against a person outside the House, or an official, by name or in such a way as to make him or her identifiable.

Committee members have received a copy of the delegation's presentation. In view of the time constraints under which the joint committee operates, I ask the delegation to synopsise the important features of its submission in respect of issues relating to the Constitution and relevant legislation, following which members may put questions to it.

Mr. Ray Kelly: I thank the joint committee for the great honour and pleasure of representing the organisation Unmarried and Separated Fathers of Ireland at this meeting. I am a proud unmarried father of three children. My beautiful children were taken from me ten years ago because of a failing of the Constitution in regard to guardianship. The four members of the delegation are the fathers of ten children and our rights have been violated as a consequence of constitutional issues relating to guardianship and the right of access to our children. Throughout this session we will outline various legal, moral and emotional issues.

There was no help and support available to us when we founded this group ten years ago. For the past decade our members have struggled, fought and done everything in their power to obtain access to and guardianship of their children. I have gone to court 42 times in an attempt to secure this basic right because I love my children deeply. I have been subjected to humiliation to the point where I have been suicidal. I ended up in an extremely poor state as I found that the State had denied me a fundamental and God-given right.

My children went to bed at night without a "good night" from their father. Not once in the past decade have I had the opportunity to wish them a "Happy Christmas" on Christmas Eve or Christmas Day. As a proud Irishman, I came to realise that the State was failing my children by allowing them to suffer such pain and emptiness. The tears my children cry are a consequence of the imprisonment in which I have been placed by society. Unmarried and separated fathers have no constitutional rights to their beloved children.

Unmarried and Separated Fathers of Ireland was established in Tallaght as a support group. Although the law does not support us, we have protested and demonstrated peacefully and have remained at all times within the parameters of the law. On Christmas Day for the past six years we have stood, cold, weary and tired, on O'Connell Bridge to protest our situation. We have buried members of the group who died because they had been denied access to their children.

On behalf of the ten children for whom our delegation speaks, I beg the joint committee and all citizens of the State to heed our requests. We are obliged to take responsibility for our children in regard to maintenance but with responsibilities come rights. On behalf of my three children, I ask that I be given my rights. Let us love and care for our children as is our God-given right.

Mr. Eamonn Quinn: I am secretary of Unmarried and Separated Fathers of Ireland. The Government has failed to protect the human rights of unmarried and separated fathers, rights which should be embodied in the Constitution. Article 8 of the

European Convention on Human Rights upholds our right to our family and to know, love and care for our children. The Constitution should be amended to ensure the area of family law is included in the proviso that all are equal before the law. Our system of family law operates behind closed doors and there are problems with a system where judges can override fathers' rights without accountability.

Many men are denied the right to life embodied in the Constitution, as is evident from the national incidence of male suicide. This represents a fundamental breach of our rights under the Constitution. All relevant provisions should include the words "mother-father", "husband-wife" and "he-she". It must adhere strictly to the UN Convention on the Rights of the Child. It is the right of the child to know, to love and to be cared for by his or her father. This is the responsibility of both parents. Both parents, for too long, have been denied an equal opportunity to share parenting.

We want joint responsibility. We want fathers to have equal guardianship to that of the mother. We want to stop the hurt in the family law courts, where the burden of proof is on a man to come along and prove that he is a good father without proper State intervention, State surroundings and family environment. There is a need to take family law out of the courts and give people their constitutional rights. People do not have the strength, determination, know how or money to challenge the authorities on the breaches of their constitutional rights. Open forums should be set up for people to address these issues without a monetary value being imposed.

Chairman: I take it from the submission that the group has two issues. One is that the Constitution should be changed to become gender neutral, that in other words it would not give emphasis to the female over the male. This point has been made to the committee by a number of other groups. The other issue, as I understand from the submission, is that the group would like to see the rights of the child enhanced. Some of the groups have stated to the committee in their submissions that if the child were elevated as the central axis of the family, that might help to resolve the problems of all other types of family - the family based on marriage, separated fathers as in the case of this group, single mothers or cohabiting couples. Would that be a fair assessment?

Mr. R. Kelly: The position is that there is automatic guardianship. If we look at the Hague Convention on Child Abduction, the Keegan case in Europe and various other cases that have been challenged, we find a clear indication that a father does not have that right. When speaking to the Minister for Justice, Equality and Law Reform, he clearly indicated to us that an unmarried father does not have any constitutional rights to his child. In a case I dealt with, for example, where a gentleman and a lady had a child and the mother died after the pregnancy, the child had to be taken into care, which means the State looked after it, because the father did not have any constitutional rights or, crucially, guardianship rights.

If a mother has an illness of some kind or a problem with drugs or drink, the father cannot intervene immediately and therefore the child is left in the care of the State. This is causing a serious burden on the State, and also of course on the child.

The paternal grandparents do not have guardianship rights either. The difficulty extends to the grandparents and the extended family. Grandparents who have voiced their opinion state that they need the right to love and care for these children too.

In 2005 the position is that we are lacking in the area of recognition of family, whether a couple is married or unmarried. There are many more fundamental issues that need to be addressed.

Mr. Quinn: The family should be defined in the Constitution as a couple with a child or children. We should be guaranteed constitutional rights as to marriage, during marriage and on its dissolution. If the family is defined as parents of a child, under the protection of marriage couples who cannot have children will still seek the protection of the Constitution as a family even though they do not have children. The concept of the family being defined as adults and 2.4 children must be eliminated. The protection of one and all, as to marriage, during marriage and on its dissolution, should be enshrined in the Constitution.

Deputy Andrews: I welcome the delegation to the committee. It is a valuable submission. The conventional wisdom is that the Keegan case, dating back 20 years, would be decided differently today. The delegation members might give their views on that.

I noted that in the submission the group touches on some fathers' rights issues which arose at the committee over the past couple of weeks. For example, the submission states that judges' discretion is causing many of the problems and that some constitutional protections are there for fathers. I have heard this anecdotally, that much of the problem is that District Court judges perhaps are not properly trained. Although it is controversial to say this, they have the power to grant access and guardianship under the Constitution but they tend not to do so; in other words, there is no constitutional bar and, in fact, this matter could be dealt with by legislation rather than putting a provision into the Constitution. Anecdotally, can the delegation bear that out?

The name of the group is Unmarried and Separated Fathers of Ireland. Is it the group's experience that unmarried fathers are discriminated against to a greater degree than separated fathers?

Mr. Dave Carroll: I am the office manager in our head office in Tallaght. I am an unmarried father. I consider myself a home parent, where my ex-partner was out working, getting a career together, etc., and I minded and raised three kids. I did everything for them that my mother did for me. From their first breath in the morning until their last smile at night, I did absolutely everything for them. After the separation, I had to go to court to be recognised in law as the father of my own children. I think that is a disgrace.

Mr. Donncha Murphy: The Deputy referred to the Keegan case. In the Keegan case, it was held that a child born out of a loving relationship had a right to family life. The State, due to current legislation, is in great danger of being taken to the European Court of Human Rights again. This is not being put across in the courts.

One of the issues with the courts is that the family law courts are held in camera and there are no reports on what happens inside the courts. Although the Minister for Justice, Equality and Law Reform implemented the Civil Liability and Courts Act 2004, it did not state how reporting would be carried out. We have no information on what happens inside the courts.

On the point about judges being specifically trained in family law, at present a judge who deals with a criminal case one day will be in a family law court the next. Obviously this bears weight in the proceedings in the court.

As to the unmarried father, the only right the unmarried father has is the right to apply to the court for an application for guardianship or access, a right that is not guaranteed. The Guardianship of Infants Act 1964, if challenged in the Supreme Court, would be deemed unconstitutional under the current law and the European Convention on Human Rights. The Constitution provides equality but the legislation is not equitable.

Deputy Andrews: Would legislation cure it?

Mr. Murphy: Legislation would definitely cure it.

Mr. R. Kelly: The CEDAW report from the Department of Justice, Equality and Law Reform gave a clear indication to Europe that an unmarried father would not have any guardianship or custody rights to his child. This is fundamentally wrong. We asked a question about the difficulties of an unmarried and a separated father. Both are treated like second class citizens because they are born as males. According to the statistics in our possession, 87% of custody cases are found in favour of the mother. Why do we live in a State that feels, and cannot prove, that mothers are better than fathers? There is no statistical evidence on the fact that fathers can be the nurturers. We must get away from the old view, where the mother stayed at home and the father went to work. We live in a state of equality where we should encourage mothers to go out to work and encourage fathers to play an active role in the family. The social attitude also needs to change. That can be enshrined under Article 41.2.2° of the Constitution. The clear indications are that giving women all of these rights is putting the burden on women and lessening the areas of equality.

Senator Finucane: I was struck by Mr. Kelly's emotive contribution. Obviously, he lived with his children for a period before the separation. The same may be said of the other contributors. What would they say to a biological father whose contribution to rearing the child has been minimal and who almost adopts an à la carte approach in the belief he can come whenever he wants to assert his rights in that regard? One could not equate such a man with the members of the delegation in terms of how they feel about their position.

Mr. R. Kelly: This issue arose when I gave a talk to a group from a drug rehabilitation programme in Dublin. It has arisen many times. If we help and support men, encourage and train them and stop discriminating against and dehumanising them, we will receive a clear indication but I have yet to see a project which helps and supports. When we go to the maternity hospital where our partner gives birth, it is all about the woman. No help and support are given to the man.

When my first child was born, I had to take a great deal of responsibility. I had to try to provide a home. I had to try to provide a lot of stuff which, with no help, was exceptionally difficult. Since the foundation of the State there has been no support for unmarried fathers, other than from Unmarried and Separated Fathers of Ireland which has worked on a small budget, as the joint committee can see from our reports. I ask the Oireachtas and the Government to look at this and put an educational programme in place to encourage fathers to become involved in the upbringing of children. In 1992 there were 47 men with sole custody. In 2002 there were 2,002. Therefore, one can see a clear indication that fathers want to play an active role. Ten years ago no father would have asked for custody because it would not have been granted. Today one sees an organisation like ours trying to help and support. That is where we need the backing of the Government. If we can secure constitutional recognition to enable fathers to take up that role and stop the discrimination in the family law courts, we can encourage, help and support the next generation.

Mr. Murphy: In the Law Reform Commission's 1982 report on legitimacy Professor William Binchy suggested that when the child was born, the father had an automatic right as the natural father and that the burden of proof that the father was unfit should lie with the mother. This was rejected by the Government at the time. If the burden of proof lay with the mother, would it reverse the position? The delay in family law court proceedings is running at between three and four months. Applications are made mostly by fathers for guardianship because the mother has an automatic right. This delay implies that fathers who do care are making court applications. If the burden of proof was shifted to the mother, the father would have the right to provide for and protect the child.

Deputy P. Power: I thank Mr. Kelly for his powerful contribution. Any father would have a natural empathy with the position in which he finds himself but the joint committee is charged with the responsibility of determining if the Constitution ought to be changed and if it is the cause of the obvious difficulties being experienced.

I will direct my question to the delegation's legal adviser, Mr. Murphy. This follows directly from the line of questioning followed by Deputy Andrews. The point has been made that there is no constitutional protection for fathers in the areas of guardianship and access to children. I put it to Mr. Murphy that there is no constitutional presumption that mothers ought to be given guardianship. There is no constitutional protection for mothers in the areas of guardianship and access. There is equality. The Constitution is silent on the issue.

If Mr. Murphy were to introduce an amendment to the Constitution giving rise to a presumption in favour of the father, would it be a case of two wrongs not making a right? What I am getting at is this. Is the Constitution really at issue? The matters the group has correctly raised such as the burden of proof, the delays in the courts and the in camera rule are causing enormous difficulties. I put it to Mr. Murphy, however, that the position could be changed tomorrow morning by way of legislation if the Oireachtas was minded to do so and that a change in the Constitution is not necessary to alleviate the difficulties about which the group is complaining.

Mr. Murphy: Under the Constitution and current legislation, the mother has an automatic right. That is enshrined.

Deputy P. Power: On what basis does Mr. Murphy make that assertion?

Mr. Murphy: It is based on the protection of marriage within the Constitution combined with the Guardianship of Infants Act 1964. The married father has a right but the unmarried father has none under the Constitution.

Deputy P. Power: We shall stick with married fathers for the moment. There is nothing in the Constitution which causes this discrimination.

Mr. Quinn: Article 41.2 of the Constitution clearly states there is special protection for the mother within the home. This should be changed to protect the parents in the home. As fathers are equally involved in parenting, the gender bias must be removed. Terms such as “father-mother”, “he-she” and “husband-wife” should be used. These are the amendments we need to Articles 40 to 44 of the Constitution.

Deputy McCormack: One must be careful in the form of words used in the Constitution as has been found in several attempts to improve it. If one inserts the wording suggested by Mr. Quinn on the protection of the father in the home, how does one protect the natural father who is not in the home? One could do more harm than good in the changing the wording used in the Constitution.

The submission is a good one and worthwhile. Many groups specified the way they would like the Constitution to be amended to accord with their line of thinking. I note that the group represented this morning did not do this.

Mr. R. Kelly: We are all volunteers and involved part time. I apologise. We have a lot of material and there was confusion. We spoke to the Chairman this morning about various other reports we had submitted. There is other documentation to be submitted which offers solutions. We are not experienced in family law, although Mr. Murphy is a trainee barrister.

Our knowledge has been gained from what we have seen and from those who have come to us to state, for example, that Article 41.2.2° gives this clear indication on the protection of the mother. If we want to provide protection, why not specify the protection of parents? From the point of view of grandparents, protection of the extended family should also be considered. We use the word “paramount” in the Constitution which is self-explanatory. There are, however, clear indications that there is discrimination against non-marital fathers who are not in any way acknowledged as parents. If we want gender balance, we need to examine the wording we use and ask why, in some cases, we include women. I do not disparage women who have a very important role. However, fathers also have an important role. If we had gender balance, we would be more successful and not exclude anybody. The issue of those who are not in the family home can be examined not through the Constitution but perhaps through legislation.

Mr. Quinn: It will be noted that our submission suggests the Constitution should state the State pledges to guard with special care the family, including cohabitants

with children, on which the State is founded, and to protect it against attack. Some of the sections should be amended to state men and women, by their life within the home, give to the State a support without which the common good cannot be achieved. Article 12 refers to the President as “he”. We still have not got around to amending it to take account of the fact that today we have women Presidents.

Deputy McCormack: When the Constitution was written the word “he” was meant to include “he or she”.

Mr. Quinn: Why is the word “he” not interpreted as meaning “he or she” in the context of a mother and father?

Chairman: We acknowledge that the submission is sincere and genuine and based on the first-hand experience of each member of the delegation. We also acknowledge that they are not experts on the Constitution. We are here to listen about the problems in society. This is the first time a committee comprising politicians from every party has sat down to analyse this aspect of the Constitution. The Constitution review group examined the issue in 1996 and made recommendations but its job was different from ours.

I thank the delegation for its submission. The joint committee will take on board the points made when drawing its conclusions and hopes to produce a report, probably in September, which it will present to the Government. We cannot guarantee that any recommendations we make will be acted upon. However, we were asked by the Taoiseach to embark on this study which we began last November. We are glad groups such as Unmarried and Separated Fathers of Ireland have come here to enlighten us. We learn something new every day. I was also touched by the emotive stories of the members of the delegation. The committee will discuss the issues at length. We are aware that Unmarried and Separated Fathers of Ireland is a voluntary organisation. We thank the delegation for taking the trouble to prepare two submissions and coming here today to make an oral presentation.

Sitting suspended at 11.05 a.m. and resumed at 11.20 a.m.

Chairman: I welcome the representatives of Age Action Ireland, Mr. Robin Webster and Mr. David Stratton. Before we begin, I must remind visitors that while members of the joint committee have absolute privilege, the same privilege does not apply to witnesses appearing before the committee. We have received the submission which we welcome and would like one of the delegates for six to eight minutes to outline the important aspects the delegation would like to stress before the committee in its submission, after which we will have some questions and answers.

Mr. David Stratton: I am sorry that my colleague, Mr. Robin Webster, cannot be here but Ms Mary Colclough has come in his place to provide moral support.

The joint committee has received the submission, copies of which I have made available. There is just one amendment. In the submission I mentioned the European convention but for the sake of clarity I have added the words “on Human Rights” in the second paragraph.

Age Action Ireland recognises family diversity and has worked with the Equality Authority to combat discrimination across the nine grounds covered in equality legislation. In making our submission to the Joint Committee on the Constitution we are conscious that other groups will make suggestions regarding family diversity. As a national organisation dealing with older people, we have confined our submission to highlighting certain issues of concern to grandparents that may not be addressed in other submissions to the committee.

The issues that we highlight could be addressed through legislation but we felt it was important to highlight to those drafting amendments to the Constitution that the rights of grandparents should not be overlooked. Although the Constitution affords a special place to grandparents regarding citizenship, it is a concern that legislation does not adequately deal with the issue of grandparents' access to their grandchildren, thereby raising the issue of whether legislation would need the impetus of a constitutional amendment in order that grandparents' rights might be more fully protected in law.

The issues that we highlight in our submission on the rights of grandparents to have access to their grandchildren were referred to in an address by Ms Ita Mangan at a seminar organised by Age Action Ireland last year as part of Positive Ageing Week. In research undertaken on behalf of Age Action Ireland by Dr. Francesca Lundstrom in 2001 on grandparenthood in modern Ireland the issue of access was also raised. The reports are available on our website at www.ageaction.ie if anyone wishes to refer to them again.

More research is necessary to inform future policy. Age Action Ireland has made a submission to the Department of Social and Family Affairs for a follow-up to Dr. Lundstrom's work in the shape of a national survey of grandparenthood which would further inform our position. Among the concerns raised in the research on grandparents was the lack of knowledge about their rights, the lack of mediation services for grandparents in cases of family breakdown, and fears on the part of some grandparents who had non-legal custody of their grandchildren that they would be taken from them. Those who had been denied access to their grandchildren wished for a less adversarial and more equitable and affordable legal system for them and their children.

The best interests of the child should be paramount in all legal and familial disputes, above those of parents or grandparents. It should also be recognised that children have a right to know their extended family. I will give an example of how grandparents still hold an important place in society. My wife recently gave birth and I saw a notice outside a special care baby unit denying access to all visitors except parents and grandparents. I thought it was interesting that in our society we still had special recognition of their place.

Age Action Ireland would like to see grandparents' rights of access to their grandchildren being upheld. We believe it has become more urgent, given the changing composition of families in Ireland today.

Deputy P. Power: I thank the delegation for attending and providing us with a written submission which is very helpful to our deliberations.

I share the sentiments expressed in the penultimate paragraph. The same policy applies in the crèche that my children currently attend. It is a clear recognition of our changing country and society. More often than not, it is the grandparents rather than the parents who bring and collect children from crèches and child care facilities. That is a concrete example of how practical and real the issue being raised today is; it is not merely of academic concern.

My question concerns the protection the delegates seek. Are they looking for automatic rights of access? What situation do they have in mind specifically? Should grandparents be given a specific right to go to court for access, custody or guardianship? We would like a better idea of exactly what rights Age Action Ireland seeks. Second, have they taken any advice on whether that would require legislative or constitutional change?

Mr. Stratton: It is difficult to obtain information on family law cases from the courts. We are merely highlighting the issue in the event of changes that might lessen the recognition accorded to grandparents. The practice is that the rights of the child are the primary concern in decision-making but who decides what is in the child's best interests? That is where the issue becomes more complicated. Is it the parents or the grandparents who decide? In cases where the best interests of the child are disputed by grandparents, it is unclear where the latter stand in terms of the legislation. I have no particular recommendation in this regard but I wish to highlight the difficulties involved.

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The All-Party Oireachtas Committee On The Constitution,
Fourth Floor,
Phoenix House,
7-9 South Leinster Street,
Dublin 2, Ireland.

Telephone: +353 1 662 5580

Fax: +353 1 662 5581

Email: info@apocc.irlgov.ie

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