

The case being brought by Katherine Zappone and Ann Louise Gilligan is about fairness and equality for all members of this society – its fundamental emphasis is the respect of the rights of both married and non-married people to share their lives in an atmosphere of social and economic stability. Although their case calls for the State’s recognition of their valid marriage abroad, the implications of such recognition is far-reaching for partnership legislation in Ireland.

Currently in Ireland there are numerous co-habiting couples, same-sex and straight, who’s human and civil rights to acknowledgment of their partnership are denied by the State’s agencies and laws. Their numbers are growing annually (see Background). Activity is gathering pace aimed at ensuring sensible, reality-based legislation for the future.

There is no partnership recognition here which confers full equivalence to that of the ‘married’ status for these couples and families. Cohabiting couples are treated as strangers in the eyes of the law – their property rights, tax status and medical records, for example, do not reflect their true life situation. For same-sex couples the discrimination runs deeper, where, critically, there is no option to change their status from ‘single’ to ‘married’.

A legal mechanism to provide for a partnership status of full equivalence with marriage or for the right to enter civil marriage should be instituted by the State, to promote and protect the rights and responsibilities of all its citizen couples – straight and same-sex - in financial and familial issues.

1. The KAL case

Dr. Katherine Zappone and Dr. Ann Louise Gilligan are both women and Irish citizens. They live in Ireland. Dr. Zappone is a public policy research consultant and member of the Human Rights Commission. Dr. Gilligan is an academic and works as a lecturer at St. Patrick’s College, Dublin. They have lived together as a *de facto* couple for 23 years, and are both salaried income earners and joint owners of a family home and one other property in Ireland.

In April, 2001 Katherine and Ann Louise decided to seek legal recognition of their life partnership. As at present, no such legal recognition existed in the country and there was little public debate about partnership rights for same-sex couples. With extensive research and legal advice they were considering taking a constitutional challenge against the Irish State.

Another route opened up when a British Columbia High Court opened the Canadian institution of marriage to same sex couples in June of 2003. On 13th September of that year they married in a civil ceremony in Vancouver, British Columbia, Canada. Their marriage is legally valid for all purposes in Canada.

On their return to Ireland, the couple wrote to the Revenue Commissioners (the Irish tax authorities) informing them of their marriage and seeking to claim the various tax allowances and advantages to which married couples are entitled in Ireland.

The Revenue Commissioners responded by informing the two women that they would not allow their claim for allowances. This decision was made on the basis that although the Taxes legislation does not define husband or wife, the Oxford English Dictionary defines ‘husband’ as a married man, and ‘wife’ as a married woman.

Katherine and Ann Louise wished to challenge this interpretation. They consulted their legal team (Phil O’Hehir of Brophy Solicitors, and their barristers Ivana Bacik BL and Gerard Hogan SC), who, in November 2004, brought proceedings on their behalf to the High Court, challenging the decision of the Revenue Commissioners not to recognise their Canadian marriage. This challenge was brought using the legal procedure of ‘Judicial Review’ – where the High Court has the power to review decisions of public bodies (like the Revenue Commissioners) if those decisions have been made in breach of constitutional rights.

It was argued before the High Court that Katherine and Ann Louise had a constitutional right to equality; a right to marry; property rights; and family rights under the constitutional protection of the family in Article 41. They argued that these rights had been breached by the failure of the Revenue Commissioners to recognise their marriage. They also argued that the failure to recognise their marriage breached their rights under the European Convention on Human Rights.

Leave (permission) to take the challenge was granted by the High Court (Mr. Justice McKechnie) on 8th November 2004. The first stage in the case had been successful.

The Revenue Commissioners and the State filed a defence to the case in May 2005.

The case is now placed in a list for hearing, and it is hoped that a hearing date will be obtained within the next year.

At the hearing of their action, Katherine and Ann Louise will seek various remedies. In particular, they are seeking a declaration that in failing to recognise their Canadian marriage, and in failing to apply the tax law provisions relating to married couples to them as a married couple, the State and the Revenue Commissioners have acted unlawfully, in breach of their constitutional rights, and in breach of the European Convention on Human Rights. They are also seeking a declaration that the relevant provisions of tax law are unconstitutional and void. If they do not get recognition of their Canadian marriage, they are alternatively seeking a declaration that they are entitled to marry each other in Ireland.

2. Background to the KAL case

Recent Changes in Family Structures

In recent years there has been enormous change in family structures in Ireland. In particular, the numbers of those co-habiting have increased dramatically. In 1996, co-habiting couples made up 4% of all family units (31,300), but by 2002 this figure had more than doubled, to just over 8% of all family units – a total of 77,600 couples.

Divorce and remarriage rates are also increasing since divorce legislation was introduced in 1996; the number of divorced persons has more than trebled in six years, increasing from 9,800 in the 1996 census to 35,000 in the 2002 census. The numbers of those who are either separated or divorced has risen from 87,800 in 1996 to 133,800 in 2002.

The number of children living with co-habiting parents rather than married parents has also increased significantly; from 23,000 children in 1996 to 51,700 children in 2002. The percentage of births outside marriage now stands at just over 31%, that is, almost one-third of births, compared with just over one-quarter (25.3%) in 1996.

No Legal Recognition for Social Change

Despite these immense social changes, the marital family remains the only officially recognised unit in Irish law. In the 1937 Constitution, the family is recognised in Article 41 as the ‘natural primary and fundamental unit group of society.’ But this has been interpreted to mean only the marital family – the family based on marriage. Single parent families and co-habiting heterosexual or same-sex couples are excluded from this definition. The law is out of touch with the immense social change that has occurred over the last decade.

The non-marital family lacks any constitutional status or legal protection. Lack of legal recognition creates fundamental problems and disadvantages for unmarried co-habiting partners on a whole range of critical personal issues: child custody; adoption; healthcare; taxation; maintenance; citizenship; property and inheritance rights. Joint adoption of a child by a couple is only possible where that couple is married and living together; co-habiting or same-sex couples may not jointly adopt a child. A co-habiting partner who is not the natural parent of their partner’s child may not obtain parental leave from work to look after that child.

When unmarried parents separate, there is no legal provision for seeking financial maintenance. Under pension and death benefit schemes, non-marital partners are generally excluded from benefits, and a same-sex partner or unmarried heterosexual partner has no right to a legal share in the estate of their deceased partner. Married partners, on the other hand, are entitled to many advantages in taxation of their income and assets, entitlements which are not available to non-married partners. Finally, non-nationals involved in non-marital relationships with Irish citizens may not acquire citizenship on the basis of their relationships – immigration policy generally is heavily weighted in favour of the married couple where one partner is an Irish citizen.

Signs of Change in Policy

The need for change is slowly being recognised at a policy level. In 1996, the Government-appointed expert Constitution Review Group (CRG) observed that:

‘The family in Ireland has been profoundly affected by social trends since 1937... The traditional Roman Catholic ethos has been weakened by various influences including secularisation, urbanisation, changing attitudes to sexual behaviour, the use of contraceptives, social acceptance of premarital relations, co-habitation and single parenthood, a lower norm for family size, increased readiness to accept separation and divorce, greater economic independence of women. ... These social changes call for amendments in the Constitution, some of which raise difficult issues that require the achievement of delicate balances for their resolution.’

The CRG recommended that the Constitutional Articles giving the marital family special protection should be deleted, and that family rights should be protected on a more inclusive basis. They recommended adopting the approach of the European Court of Human Rights, which grants every person respect for their ‘family life’, including non-marital family life, but requires the existence of ‘family ties’ between the mother and the father in cases where fathers seek child custody.

In 1998, a Government-appointed Commission on the family remarked further that ‘Cohabitation is an important subject for social research’ (Strengthening Families for Life, Final Report of the Commission on the Family, 1998).

In 2002 a new series of family forums was announced by the Minister for Social and Family Affairs, Mary Coughlan TD, to take place around Ireland and to investigate how the State can best support families.

A Government-sponsored report by Mary Daly (Families and Family Life in Ireland, February, 2004), found that most people do not want the traditional nuclear family as a model for policy-makers – that the nuclear family itself is effectively a myth.

The State’s Law Reform Commission published a Consultation Paper on the Rights and Duties of Co-habitees in 2004, pointing out all the advantages in law derived from marital status. The Commission pointed out that Article 41 does not prevent legislation being passed to protect co-habitees. The Commission also took the view that ‘marriage like’ relationships may be between persons of the same sex or of opposite sex.

In 2005, Senator David Norris introduced a private member’s bill in the Seanad, the Civil Partnership Bill, seeking to provide a means for co-habiting gay and heterosexual couples to register their relationships legally. That Bill is still before the Seanad.

The All-Party Oireachtas Committee on the Constitution is currently carrying out a review of the articles of the Constitution dealing with the family, and has held public hearings with a range of groups representing many diverse forms of family. It is due to report in late 2005.

Conclusion

Clearly a new legal framework is required that recognises the changing forms of family, and that can accommodate those forms. There are many political lobby groups attempting to bridge the gap between the rigid Constitutional model and the diverse types of family in Irish society today. Some NGOs have launched a new family diversity initiative to campaign for recognition for forms of family that do not fit the traditional model.

Other groups are lobbying for recognition for same-sex partnerships, whether through a form of civil partnership or through legal recognition for same-sex marriage. The case being taken by Katherine and Ann Louise is an important challenge to the failure of the State to recognise the growing diversity in family forms in a changing Ireland.