

# Response of



to the

## **Law Reform Commission's Consultation Paper on Legal Aspects of Family Relationships**

**2010**

***Treoir***  
**National Federation of Services for Unmarried Parents and their  
Children**

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## **Background to Treoir**

Founded in 1976, Treoir is the national federation of services for unmarried parents and their children. Its main aim is to promote the rights and welfare of unmarried families in Ireland. Membership of Treoir is open to professional agencies providing services to unmarried parents and comprises both statutory and non-statutory bodies, including specialist agencies, HSE, maternity hospitals, adoption societies, self-help groups.

The following are the core principles by which Treoir operates:

- \* Treoir recognises the diversity of family life in Ireland
- \* Treoir recognises that all families, including unmarried families, have the same rights to respect, care, support, protection and recognition
- \* Treoir supports and promotes the rights of all children as outlined in the United Nations Convention on the Rights of the Child
- \* Treoir believes that all children have a right to know, be loved and cared for by both parents.

Current activities of Treoir:

- \* A national, confidential, comprehensive and free information service for unmarried parents and those involved with them
- \* A wide range of publications
- \* Outreach information workshops to parents and those working with them
- \* Conferences and meetings
- \* Networking with other groups
- \* Policy development
- \* Promoting research
- \* Providing support for workers with young parents through the National Resource Centre for those Working with Young Parents
- \* Coordinating the Teen Parents Support Programme.

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## **Summary of Recommendations**

### **Terminology**

*Treoir agrees with the Commission's recommendation that the terminology pertaining to Guardianship, Access and Custody should be changed and that the terms should be defined. In relation to the term 'parental responsibility', Treoir is of the view that the definition should be detailed but non-exhaustive.*

### **Registration of the birth of a child/Encouraging Joint Registration**

*Treoir supports the introduction of a statutory clarification to the effect that the registration of a birth is not currently linked to the allocation of guardianship/parental responsibility.*

*Treoir does not at present support the introduction of compulsory registration of the names of both parents.*

*Treoir supports the imposition upon the GRO of the duty to make enquiries of a mother in relation to naming the child's father on the birth certificate.*

### **The Responsibilities and Rights of Non-Marital Fathers**

*Treoir believes legislation should be introduced to protect children's rights to have a father as a guardian and ensure that safeguards are put in place for those situations in which these rights could be abused.*

*Treoir does not support the introduction of a system of automatic acquisition of guardianship/parental responsibility based on a genetic link only, for reasons outlined in the submission. However, Treoir believes further research and discussion is required on this issue and the Commission should review again the law as it pertains to unmarried fathers and assess its Convention compatibility.*

*Treoir considers as very sensible the recommendation by the Commission that the birth registration form could contain an additional section which would replicate the statutory declaration form which would allow the parents to register the birth of the child and confirm the legal rights and responsibilities of the father at the same time, if they so wished.*

*Treoir welcomes the provisional recommendation of the Commission that a statutory presumption be introduced that a non-marital father be granted an order for guardianship/parental responsibility unless to do so would be contrary to the best interests of the child or would jeopardise the child's welfare.*

*Treoir welcomes the recommendation on the establishment of a Central Register to keep account of the existence of statutory declarations agreeing guardianship/parental responsibility and considers that it should be maintained by the CRO and should be subject to public search.*

### **The Responsibilities and Rights of Members of the Extended Family**

*Treoir supports the removal of the leave stage of applications on behalf of grandparents to gain access/contact with their grandchildren. Treoir also supports the possibility of extending the right to apply for access/contact to include the child.*

*Treoir supports the extension of some parental responsibilities to be conferred on step-parents or another person acting in loco parentis. However, Treoir is of the view that the species of rights which are allocated to a step-parent or another person acting in loco parentis would be of a lesser level than those of the parent who is a guardian. Similarly, the idea of linking guardianship/parental responsibility to custody/day to day care orders is supported on the proviso that it is possible to afford a lesser species of rights to the day to day carer.*

## **1. Introduction**

The Law Reform Commission is engaged in an examination of rights and duties of fathers in relation to guardianship, custody and access to their children and the rights and duties (if any) of grandparents.

Treoir welcomes the focus in the guiding principles of the study on the best interests of children and recognises the ground-breaking 1982 Report on Illegitimacy resulting in the Status of Children Act 1987. The Commission's focus on modernising the law relating to non-marital fathers is welcome and necessary.

In the context of this submission, Treoir will comment on the areas where the Commission has sought views on its recommendations or on those areas where it has not chosen to make a recommendation but is seeking input. At the outset, it is important to note that the central question for Treoir relates to the improvement in the law relating to guardianship of children and the rights of children born outside of marriage to have both parents as guardians where possible and as early as possible.

Related to this is the question of how these rights should flow. Treoir does not propose to make concrete recommendations in this regard but will make observations on the various models available. One such model is that adopted in the UK and other jurisdictions and involves responsibilities and rights flowing on birth registration.

Questions posed by the Commission in this work relating to options to encourage full and accurate birth registration will also be addressed and again it is important to stress that these observations are made in the context of whether rights and responsibilities will flow from birth registration.

Finally, observations will be made in relation to the rights and duties of other family members including grandparents and step-parents.

## **2. Terminology**

Given that there is no statutory definition of the terms guardianship, access and custody, family law terms inherited from British common law, the Commission is recommending a change in terminology. Treoir accepts the basis of the Commission's concerns in relation to the use of terminology and has no difficulty with the change of terminology as recommended by the Commission. It is desirable to re-focus the terminology to place the interests of the child at the centre. In relation to the extent to which these terms should be defined, in particular the concept of 'parental responsibility', it would seem that there is a need to include a definition which is detailed but non-exhaustive.

*Treoir agrees with the Commission's recommendation that the terminology pertaining to Guardianship, Access and Custody should be changed and that the terms should be defined. In relation to 'parental responsibility', Treoir is of the view that the definition should be detailed but non-exhaustive.*

## **3. Registration of the Birth of a Child**

Treoir views the registration of the birth of a child from a children's rights perspective. Children have a right to accurate information about their birth and genetic and other heritage. These are rights guaranteed in international human rights law, most clearly enunciated in the UN Convention on the Rights of the Child. Every effort must therefore be made to encourage the provision of full and accurate information and to encourage joint registration of the birth.

Treoir notes the Commission's provisional recommendation that the distinction between birth registration and the allocation of guardianship/parental responsibility should remain. Comment on this is reserved for the discussion on the reform of the law on substantive rights for fathers below.

#### **4. Options to Encourage Joint Registration of the Birth**

The Commission also recommends a statutory clarification to the effect that the registration of a birth is *not* linked to the allocation of guardianship/parental responsibility.

Views are also sought on whether to impose new duties on the General Register Office and the appropriateness of imposing on the GRO a duty to make enquiries of the mother of a child if she wishes to include the father's details on the birth certificate. In line with international best practice in this area, Treoir considers that this would be a good measure to introduce in the interests of ensuring accurate recording of the birth and parentage of the child.

Views are further sought on the introduction of compulsory registration of the names of both parents and whether a non-married father should be able to provide his details independently to the Registrar once paternity is confirmed. On the whole, Treoir does not support compulsion as a strategy for encouraging full and accurate birth registration details at present. There is a concern among Treoir members that placing such a burden on mothers could mean that they initially record the father as "unknown" subsequently causing problems for re-registration to include the correct details. In our experience, mothers often change their minds and go back to re-register the correct details – a practice which is much easier if no details at all are recorded initially.

Treoir also notes that the proposal to introduce compulsion in the UK has caused controversy with the NSPCC and Gingerbread in particular expressing concerns that the provision will allow perpetrators in violent relationships access to women who are at risk.<sup>1</sup>

*Treoir supports the introduction of a statutory clarification to the effect that the registration of a birth is not linked to the allocation of guardianship/parental responsibility.*

*Treoir supports the imposing upon the GRO the duty to make enquiries of a mother in relation to naming the child's father on the birth certificate.*

*Treoir does not at present support the introduction of compulsory registration of the names of both parents.*

#### **5. The Responsibilities and Rights of Non-Marital Fathers**

The Commission's report describes the manner in which guardianship rights can be obtained by an unmarried father in Ireland – i.e. by agreement with the mother or by Court order. As the Commission notes, some 2,448 applications for guardianship were made to the District Courts in this jurisdiction in 2008.

The current system is problematic in that it assumes that all unmarried fathers are in the same position *vis a vis* their child and the other parent and therefore treats an unmarried father cohabiting with the child's mother in exactly the same manner as a

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<sup>1</sup> [http://news.bbc.co.uk/2/hi/uk\\_news/education/6756381.stm](http://news.bbc.co.uk/2/hi/uk_news/education/6756381.stm)

father with little or no involvement. Given that approximately 50% of unmarried children are born to parents who are cohabiting, this situation is unsustainable.

Ursula Kilkelly, examining the statistics on the refusal of guardianship applications expresses concern that fathers have to seek recourse to the Courts stating at page 125 of her book on *Childrens Rights in Ireland* that:

“This highlights the urgent need to undertake reform to address the legal position of the father so that those seeking to be involved in their children’s lives, but frustrated in that process, enjoy access to an effective remedy which gives due consideration to their rights but, more importantly, to the rights of their children”.<sup>2</sup>

Several commentators have warned that the current situation pertaining to the treatment of unmarried fathers in Ireland could be in breach of the European Convention on Human Rights. For instance, Family Law expert Geoffrey Shannon claims that Irish law is not in line with the Convention due to the fact that the unmarried father is regarded as a legal stranger to the child, no matter how lengthy the relationship.

Mr Shannon is quoted thus: “We need to bring our laws into line with our international obligations before we are, yet again, brought before the European Court of Human Rights on this issue.”<sup>3</sup> McKechnie J. in *G.T. v G.A.O.* [2007] IEHC 326 summarised the relevant law applying to guardianship in this jurisdiction. The Judge surveyed the case-law including *SW, An infant, J.K. v. V.W.* [1990] 2 I.R. 437 in which the Supreme Court held that section 12 of the Status of Children Act did not confer any natural or Constitutional rights on an unmarried father, although there “may be rights of interest or concern arising from the blood link between the father and child”. It also held that the High Court was incorrect in that s. 6A did not, even *prima facie*, confer guardianship rights on an unmarried father. What the 1964 Act as amended, did, was to grant to him the ‘right to apply’ for guardianship but no more.

At Paragraph 48 of his judgment McKechnie J. noted that:

“the range of variation would, I am satisfied, extend from the situation of the father of a child conceived as a result of a casual intercourse, where the rights might well be so minimal as practically to be non-existent, to the situation of a child born as a result of a stable and established relationship and nurtured at the commencement of his life by his father and mother in a situation bearing nearly all of the characteristics of a constitutionally protected family, when the rights would be very extensive indeed.”

McKechnie J. also notes the dissenting judgment of McCarthy J., in *JK* at p. 449 of the report where he said:

“I find it difficult to accept that a loving father, who with the mother wanted to have a child, has no natural right to the society of the child.”

In *O.R. v E.H.*, [1996] 2 I.R. 248, Barrington J., gave a strong dissenting judgment in which he expressed the view that the reasoning in *The State (Nicolaou)* (see para. 47 (1)(a) *supra*) was fundamentally flawed due to the court’s failure to distinguish between natural fathers who, as Judge McKechnie put it, “had no interest in their children and those who devoted their entire existence to them”.

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<sup>2</sup> Kilkelly, Ursula 2009. ‘Children’s Rights in Ireland’

<sup>3</sup> <http://www.breakingnews.ie/archives/2005/0619/ireland/cwauqlideyau/#ixzz0YvxLxdTt>

The Honourable Judge goes on to conclude that “the institution of marriage may have little, if anything, to fear from this approach. In fact one might strongly argue that Society, as a ‘general rule’ should encourage non-marital fathers to act responsibly towards their child and of course towards their child’s mother. To acknowledge only a ‘right to apply’ could hardly be seen as dynamic in this regard”.

Michael McDowell SC, acting for “Mr G” raised significant questions in relation to the law governing guardianship for unmarried fathers and its compatibility with the European Convention on Human Rights. Quoted in an article in the Irish Times<sup>4</sup>. Having delivered a paper on the subject at a Bar Council conference on the European Convention on Human Rights, Mr McDowell “questioned whether existing Irish law on the rights of unmarried fathers, as represented by the 1966 Nicolaou judgment, was good Constitutional law any longer” He further stated that:

"There is a fundamental and stark difference in approach to family rights in the European Convention jurisprudence and in that of the Irish courts following from the Nicolaou decision,"

He went on to state that that the Nicolaou decision, made in 1966, was, the article states:

“based on the fundamental premise that the constitutional family was based on matrimony and that de facto families not founded on matrimony enjoyed no constitutional protections”. It is reported that Mr McDowell also noted that “the late John M Kelly exposed the weaknesses in the Supreme Court decision in his Fundamental Rights in the Irish Law and the Constitution, published in 1967”.

The United Nations Convention on the Rights of the Child in Articles 7(1)<sup>5</sup> 8(1)<sup>6</sup> and 18(1)<sup>7</sup> guarantees the right of children to have a relationship with their parents regardless of their marital status. Article 14 is also instructive in that it protects the rights of parents to provide direction to children in relation to the exercise of their rights to freedom of conscience, thought and religion<sup>8</sup>. The International Covenant on Civil and Political Rights also protects and furthers parental obligations and rights.<sup>9</sup>

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<sup>4</sup> <http://news.myhome.ie/newspaper/ireland/2008/0225/1203619388348.html> McDowell says fathers' rights can be sought under EU law” by Carol Coulter, Legal Affairs Editor. February 25<sup>th</sup> 2008

<sup>5</sup> (7) 1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

<sup>6</sup> (8) 1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

<sup>7</sup> (18)1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

<sup>8</sup> (14) 1. States Parties shall respect the right of the child to freedom of thought, conscience and religion  
2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.

<sup>9</sup> See in particular CRC General Comment 4 (Thirty-third session, 2003): Adolescent Health and Development in the Context of the Convention on the Rights of the Child, A/59/41 (2004) 102 at paras.



In his dissenting judgment in *W.O'R*, Barrington J. stated that “to say that the child has rights protected by Article 40.3 and that the mother who has stood by the child has rights under Article 40.3 but that the father who has stood by the child has no rights under Article 40.3 is illogical, denies the relationship of parent and child and may, upon occasion, work a cruel injustice” (At page 38).

Daniel Walshe quoting Ward sees the introduction of Section 5 of the 1997 Act as emphasising “ the legislative presumption of untrustworthiness of unmarried fathers by rejecting automatic guardianship.” In England, the Lord Chancellor’s Department has, he says, rejected that particular presumption:

“It is clearly not possible to assume that most unmarried fathers are irresponsible or uninterested in their children, and do not deserve a legal role as parents. [Lord Chancellor’s Department, Procedures for the Determination of Paternity and on the Law on Parental Responsibility for Unmarried Fathers (HMSO London 1998)].<sup>10</sup>

The original approach adopted in the UK was not to confer rights and responsibilities on fathers automatically because, according to the Lord Chancellor’s Department Consultation Paper of March, 1998 “of a perceived need to protect vulnerable unmarried mothers especially those whose children had been born as a result of violent or coercive relationships”.<sup>11</sup>

However, the system in England and Wales has since been changed to allow for the conferring of parental responsibility on the joint registration of a birth following a lengthy debate on the subject.<sup>12</sup>

Having engaged in a comprehensive discussion of the operation of the threshold criteria in other common law jurisdictions and the system of automatic parental responsibility operating in Australia, the Commission goes on to recommend neither option in this jurisdiction at present stating “this is consistent with the discussion and conclusions reached in Chapter 2 on the low number of non-marital fathers whose names are recorded on birth certificates in Ireland. In order to ensure that the right of the child to know his or her identity is respected, therefore, the Commission has provisionally concluded that it is better to maintain a distinction between birth registration and the allocation of guardianship/parental responsibilities”. Treoir is of the view that the fear that there will be a drop in the number of births duly and properly recorded is a valid concern but queries if it is a sufficient reason to preclude the allocation of responsibilities on this basis. It is noteworthy that the introduction of the acquisition of parental responsibility on joint registration of a birth did not result in a decrease in the numbers of births jointly registered in Britain.

The clear reason that many jurisdictions have opted to allocate parental responsibility on the registration of a birth is that it is one means of ensuring that the paternity of the father is established and that the father is interested in taking on a parenting role or

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7 and 16

<sup>10</sup> Walshe also quotes McKeown, Ferguson and Rooney thus: “There is a general consensus that the 1997 Act “represents a missed opportunity to review the whole area of children’s rights and their correlation with parental rights and interests so that the sum total of its effect would appear to be the tying up of loose ends and a minimum clarification of the law in certain areas”.

<sup>11</sup> See also Andrew Bainham. ‘The Unwed Father and Human Rights: Adopting a Positive Approach?’ *The Cambridge Law Journal*, Vol. 54, No. 1 (Mar., 1995), pp. 9-11

<sup>12</sup> See Sheldon, Sally (2001) ‘Unmarried Fathers and Parental Responsibility: A Case for Reform?’ *Feminist Legal Studies*. Volume 9 Number 2, August 2001 and Shazia Choudhry and Helen Fenwick (2005) ‘Taking the Rights of Parents and Children Seriously: Confronting the Welfare Principle under the Human Rights Act’ *Oxford Journal of Legal Studies* 25(3):453-492.

has demonstrated an intention to parent. As the Commission points out, the relevant legislation in New Zealand provides for parental responsibility for those parents who were married, in a civil union or a *de facto* relationship at any time beginning when the child was conceived and ending when it was born.<sup>13</sup> Section 18 of the relevant legislation allows for the allocation of parental responsibility rights on parents on the joint registration of the birth with certain exceptions to that registration including where a parent is a ‘one parent at law’ due to a conception following sperm donation, for example. Section 29 allows for the removal of a guardian by the court in circumstances where they are unfit to perform their role etc.

Treoir welcomes the provisional recommendation of the Commission that a statutory presumption be introduced that a non-marital father be granted an order for guardianship/parental responsibility unless to do so would be contrary to the best interests of the child or would jeopardise the child’s welfare. While this is certainly a step in the right direction, it falls short of what is required to bring about a substantive change in the law on fathers rights in Ireland. While it is a placing on a statutory footing of a practice which should be the approach of the Courts it leaves unaltered the current system whereby guardianship is at the behest of the mother at first instance in all situations.

Treoir also welcomes the recommendation on the establishment of a central register to keep account of the existence of statutory declarations agreeing guardianship/parental responsibility and considers that it should be maintained by the CRO and should be subject to public search. Treoir has long campaigned for the introduction of such a register and lobbied on this issue in the context of the preparation and enactment of the Civil Registration Act, 2004.

The Commission invites submissions on the question of whether it would be appropriate to introduce automatic parental responsibility for all fathers in Ireland. It appears that the term ‘automatic’ refers to rights flowing on the basis of the genetic link alone. Australia appears to be unusual in providing for such a system. While the Commission itself notes that there is very little literature on fathers rights issues in Australia, there is a dearth of material indicating that this system is problematic. As already outlined, New Zealand allows for automatic rights to be allocated where the parents are married, in a civil union or in a *de facto* relationship. Treoir considers that it could create very real problems allocating parental responsibility automatically on the basis of a genetic link in those cases where domestic and/or sexual violence is a factor or where the father sought to use parental responsibility as a form of control. The Commission itself notes that “the existence of these automatic rights, however, would ensure that the genetic father had an effective veto on decisions that the mother might wish to make with regard to the child in the future” in situations where he has no part in the parenting of the child. The Commission points to the case of *McD v L [2008] IEHC 96* in respect of which the Supreme Court has just handed down its judgment.<sup>14</sup> The Supreme Court upheld the High Court’s decision to refuse guardianship to a man who effectively acted as a sperm donor for a Lesbian couple but in respect of whom an agreement had been made that he would have a limited role in the child’s life, effectively as a ‘favourite uncle’. It is worth noting that the legislation in New Zealand discussed creates an exception to the allocation of parental responsibility on birth registration in cases of sperm donation. Treoir appreciates that finding the correct framework for protecting Childrens rights to have a father as guardian is no easy task. However, it should be possible to develop legislation to safeguard those women and children who are subject to abuse and to otherwise allow the acquisition of rights to flow.

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<sup>13</sup> Care of Children Act 2004, Section 17

<sup>14</sup> Judgment delivered on December 10<sup>th</sup> 2009

Treoir considers as very sensible the recommendation by the Commission that the birth registration form could contain an additional section which would replicate the statutory declaration form which would allow the parents to register the birth of the child and confirm the legal rights and responsibilities of the father at the same time, if they so wished. While this is a welcome step, it leaves unaltered the dynamic at play in the current system whereby the granting of guardianship rights and responsibilities to the father is dependant upon the agreement of the mother.

Worthy of note here is the fact that Ireland appears to be alone in its complete restriction on the allocation of rights to flow in respect of unmarried fathers either “automatically” or on birth registration. New Zealand provides for automatic guardianship in cases where the parents are unmarried but were or are cohabiting thus recognising that not all fathers can be considered irresponsible. Other common law jurisdictions, specifically Australia, New Zealand, England, Wales, Northern Ireland and Scotland all allow for the acquisition of parental responsibility automatically or on the registration of the birth of a child. Ireland is in the anomalous position among common law countries of retaining a blanket discrimination in relation to unmarried fathers.

Judgment has just been handed down by the European Court of Human Rights in the case of *Zaunegger v. Germany*<sup>15</sup> which lends support to those who argue that the lack of provision for guardianship on establishment of paternity breaches the European Convention on Human Rights. The Strasbourg Court found a breach of Article 14 of the Convention, which guarantees equal protection of Convention rights.

Although this case dealt specifically with German custody laws as opposed to those dealing with parental responsibility, the Court made firm pronouncements on differential treatment of parents in respect of their rights and responsibilities to their children born out of wedlock.<sup>16</sup>

In light of the foregoing, Treoir is of the view that the current situation is unsustainable in law and in practice. Reform such as the introduction of a register for guardianship agreements and the placing on a statutory footing the presumption that fathers making an application for guardianship should be granted it, save in certain specified circumstances, while welcome developments, do not go far enough. Given the enactment of the European Convention on Human Rights Act, 2003 and the accompanying obligations it entails, Treoir is of the view that the Commission should review again the law as it pertains to unmarried fathers and assess its Convention compatibility.

*Treoir does not support the introduction of a system of automatic acquisition of guardianship/parental responsibility based on a genetic link only, for reasons outlined in the submission. However, Treoir believes further research and discussion*

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<sup>15</sup> (*Application no. 22028/04*) Judgment delivered on 3 December 2009

<sup>16</sup> While accepting that it may be necessary to attribute parental authority to the mother in a non-marital situation at birth owing to the various situations in which conceptions of births outside marriage occurs the Court said at para. 56 that:

“there may exist valid reasons to deny an unmarried father participation in parental authority, as might be the case if arguments or lack of communication between the parents risk jeopardising the child’s welfare. However, nothing establishes that such an attitude is a general feature of the relationship between unmarried fathers and their children”.

The Court, while allowing a margin of appreciation especially in dealing with custody-related matters, also considered “the evolving European context in this sphere and the growing number of unmarried parents”

*is required on this issue and the Commission should review again the law as it pertains to unmarried fathers and assess its Convention compatibility. Treoir believes legislation should be introduced to protect children's rights to have a father as a guardian and ensure that safeguards are put in place for those situations in which these rights could be abused.*

*Treoir considers as very sensible the recommendation by the Commission that the birth registration form could contain an additional section which would replicate the statutory declaration form which would allow the parents to register the birth of the child and confirm the legal rights and responsibilities of the father at the same time, if they so wished.*

*Treoir welcomes the provisional recommendation of the Commission that a statutory presumption be introduced that a non-marital father be granted an order for guardianship/parental responsibility unless to do so would be contrary to the best interests of the child or would jeopardise the child's welfare.*

*Treoir also welcomes the recommendation on the establishment of a Central Register to keep account of the existence of statutory declarations agreeing guardianship/parental responsibility and considers that it should be maintained by the GRO and should be subject to public search.*

## **6. The Responsibilities and Rights of Members of the Extended Family – Access/Contact**

Treoir supports the removal of the leave stage of applications on behalf of grandparents to gain access/contact with their grandchildren. Treoir also supports the possibility of extending the right to apply for access/contact to include the child. However, it is not considered that a leave stage is necessary as courts are already *au fait* with the process of hearing a child and deciding how much weight to attach to their evidence.<sup>17</sup>

### **Extending Guardianship/Parental Responsibility**

Treoir considers that the Commission has raised a very important issue in highlighting the difficulties faced by those involved in *de facto* parenting of children, including step-parents, but who are hindered by a lack of any guardianship/parental responsibility rights. The Commission discusses this in the context of the Linking of Residence and Parental Responsibility and the allocation of Guardianship/Parental Responsibility to Step-Parents. The Commission notes that Section 112 of the Adoption and Children Act 2002 in England and Wales allows a person married to, or in a civil partnership with, a parent with parental responsibility to obtain parental responsibility by agreement or by Court order. Treoir accepts that step-parents should be afforded some means of exercising some of the rights associated with parental responsibility over children in their care. The current situation which demands that a biological mother adopt her own child in order to confer joint guardianship of her child on a step-parent is unacceptable.

Treoir also supports the recommendation by the Commission that those with residence orders in respect of a child should be able to exercise some level of parental

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<sup>17</sup> For example see *MN v RN*: High Court 2008 No. 35 HLC (Finlay-Geoghegan J.,) December 3, 2008 [2008] I.E.H.C. 383.

responsibility in respect of that child, provided that such rights and responsibilities do not adversely affect those of the parents.

However, Treoir is of the view that the species of rights which are allocated to a step-parent or another person acting *in loco parentis* should be of a lesser level than those of the parent who is a guardian. Similarly, the idea of linking guardianship/parental responsibility to custody/day to day care orders is supported on the proviso that it would be possible to afford a lesser species of rights to the day to day carer. This would acknowledge the practical reality that day to day carers need to make certain decisions in respect of a child in their care but limits the kinds of decisions envisaged by such a system. It would also ensure that in the event of a disagreement in relation to the important decisions in a child's life a greater power would remain with the child's legal guardians. Treoir notes that in England and Wales the legal rights associated with caring for a child are extended to those in respect of whom a residence order has been made by operation of Section 12(2) of the Children Act 1989. However, pursuant to the legislation that person cannot consent or refuse to consent to adoption or appoint a guardian for the child.

*Treoir supports the removal of the leave stage of applications on behalf of grandparents to gain access/contact with their grandchildren.*

*Treoir also supports the possibility of extending the right to apply for access/contact to include the child.*

*Treoir supports the extension of some parental responsibilities to be conferred on step-parents.*

*Treoir is of the view that the species of rights which are allocated to a step-parent or another person acting in loco parentis would be of a lesser level than those of the parent who is a guardian.*

*Similarly, the idea of linking guardianship/parental responsibility to custody/day to day care orders is supported on the proviso that it is possible to afford a lesser species of rights to the day to day carer.*

## **7. Conclusion**

Family relationships can be complex and sensitive and the Law Reform Commission must be congratulated on producing the Consultation Paper "Legal Aspects of Family Relationships". Treoir is confident that the impact of the report will be as powerful as was "Abolishing Illegitimacy" published by the Commission in 1982.

Since its foundation in the seventies, Treoir has advocated for the rights of children to *both* their parents, where parents are not married to each other. Legislative changes are required to give effect to this. It is essential that a system is introduced to protect children's rights to identity, to have contact with their fathers and in particular to have their fathers as guardians where possible.

The real challenge is to find a system that promotes rights and responsibilities of both parents in respect of their children but which, also, introduces safeguards for those situations in which there is abuse.