

# THE PERILS OF COHABITATION: THE UNMARRIED FATHER'S STRUGGLE FOR RIGHTS IN IRELAND

## I. INTRODUCTION

This Note enumerates the legal struggles of unmarried fathers in Ireland to gain equality of treatment in relation to their biological children in custody decisions, and the traditional and conservative forces at work in Ireland that keep those fathers from guardianship and custody of their children. The creation of Ireland's family law system has largely been a product of the unique social and political forces at work in the country. Most of the laws in place in Ireland are the result of its conservative Constitution,<sup>1</sup> and while Ireland's economy and people have modernized, its Constitution and laws lag behind. As a result, only as recently as 1996 did Ireland finally legalize divorce,<sup>2</sup> and only in 2007 did Ireland's courts produce a landmark case regarding the rights of fathers in child custody cases. Beginning with an in-depth study and discussion of the historical development of Ireland's child custody law through its Catholic influence and constitutional, statutory, and common laws, this Note will outline the state of the conservative law as it stands in relation to the rights of unmarried fathers. Following this, an analysis of the landmark 2007 case of *T. v. O.*<sup>3</sup> will suggest a readiness for a more progressive approach to Irish domestic law through the international documents that allowed the court to reach its momentous decision. This discussion will be followed by proposed solutions that focus on the alternative child custody regimes of other deeply religious countries such as Canada and Portugal, and will consider the implications of a more progressive approach to the rights of unmarried fathers.

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1. *See infra* Part II.B.

2. *See infra* note 27.

3. *T. v. O.*, [2007] I.E.H.C. 326 (Ir.), available at <http://www.bailii.org/ie/cases/IEHC/2007/H326.html>. The case, as described in detail below, deals with an unmarried father's requests for custody of his biological children with the natural mother, and his eventual victory of joint custody of his children.

## II. HISTORY

The Irish legal system is a common law system that traces its origins to England.<sup>4</sup> As such, most of the policies in place today are a reflection of the Constitution, statutes, and common law decisions by judges. The court system in Ireland is structured similarly to that of the United States, with a district and a circuit court, followed by a high court and a supreme court.<sup>5</sup> The circuit court has jurisdiction over family law matters, including child custody and guardianship issues, under the statutory provisions of the Guardianship of Infants Act of 1964<sup>6</sup> and the Status of Children Act of 1987.<sup>7</sup> The legal framework that was created, as control of the political and social landscape of Ireland changed from England to an independent country, shaped the way in which Ireland's laws reflected the conservative social values of the time.

### A. *The Role of Catholicism*

Catholicism has played an overwhelming role in the development of Irish law in general, particularly in the manner in which individual and private rights are defined in the main social institutions of the country and of the law.<sup>8</sup> Approximately eighty-seven percent of Ireland's population

4. See RAYMOND BYRNE & J. PAUL MCCUTCHEON, *THE IRISH LEGAL SYSTEM* § 1.06 (3d ed. 1996).

5. *Id.* § 2.64-70. These courts were created by the 1922 Constitution, which was replaced in 1937 by the present Constitution. Although the system remained largely the same, the actual court structure was not formally established until the Courts Act of 1961. *Id.* § 4.04. This Act formalized the specific requirements of each court in terms of jurisdiction and subject matter. *Id.* §§ 4.04-4.05. The Supreme Court consists of five judges, and is not only the final court of appeal, but also has jurisdiction over constitutional questions. The High Court has full original jurisdiction in all civil and criminal matters, but is also the appellate court for those matters that come from the circuit court or the district court. *Id.* §§ 4.26-4.56. In many respects, the Irish court system is similar to that of the United States, although the focus on individual rights is overshadowed by the social institution of the family.

6. Guardianship of Infants Act, 1964 (Act No. 7/1964), §§ 3, 5 (Ir.), available at <http://www.irishstatutebook.ie/1964/en/act/pub/0007/index.html> (last visited Feb. 5, 2010).

7. Status of Children Act, 1987 (Act No. 26/1987) (Ir.), available at <http://www.irishstatutebook.ie/1987/en/act/pub/0026/index.html> (last visited Feb. 5, 2010).

8. See, e.g., Ir. CONST., 1937, art. 41, available at [http://www.taoiseach.gov.ie/attached\\_files/html\\_files/Constitution of Ireland \(Eng\).htm](http://www.taoiseach.gov.ie/attached_files/html_files/Constitution%20of%20Ireland%20(Eng).htm) (last visited Feb. 5, 2010) (recognizing the fundamental place of the family and role of women in the home in Irish society). Catholic social teachings have influenced all of the core social policies and documents that are interpreted by modern courts. In the family law sphere, the theory that parental rights should be guarded carefully derives from the idea that parents should be able to raise their children with minimal state intervention in order to maintain individual freedom. See Paul Ward, *Life, Death and Divorce*, in *INTERNATIONAL SURVEY OF FAMILY LAW*: 2005, at 287, 309-11 (Andrew Bainham ed., 1997). The court in *T. v. O.* announced the state of Ireland's domestic law in the case of unmarried fathers according to the following principles: (1) a family based on marriage is the only one entitled to constitutional protection; (2) an unmarried natural

self-identifies as Catholic, and as a result of this longstanding religious tradition, the Constitution, statutes, and common law of the country can be seen as having a Catholic slant in terms of policy.<sup>9</sup> For instance, the Catholic Church strongly opposes divorce, and the Church's influence on Irish legislation led Ireland to legalize divorce only after 1995.<sup>10</sup> Further, the constitutional provisions that provide for the family as the central unit of Irish society and those that recognize the Catholic religion as deserving of deference clearly indicate the influence of Catholicism in Ireland.<sup>11</sup>

Certain canons of Catholicism are deeply rooted in the system of family law in Ireland. In the Catechism of the Catholic Church, the article devoted to the Sacrament of Matrimony describes the rigid requirements for marriage, as well as its sacred nature:<sup>12</sup>

The matrimonial covenant, by which a man and a woman establish between themselves a partnership of the whole of life, is by its nature ordered toward the good of the spouses and the procreation and education of offspring; this covenant between baptized persons has been raised by Christ the Lord to the dignity of a sacrament.<sup>13</sup>

This Sacrament firmly establishes that the primary reason for marriage is procreation, and demonstrates the central importance and dominance of the traditional family unit in Catholic teachings. In relation to divorce, the Catechism states, "[T]he matrimonial union of man and woman is indissoluble: God himself has determined that 'what therefore God has joined together, let no man put asunder.'"<sup>14</sup> This intense Catholic influence has affected Ireland immensely as is shown by the late legalization of divorce and the continuing trend of favoring the family unit over the

mother has some natural rights to provide custody and care to her child; (3) an unmarried natural father has no protected rights to his child; (4) non-marital children have the same rights as marital children; (5) married parents are considered joint and equal guardians of their children together; (6) the unmarried mother of a child is the sole guardian of the child unless the father has been appointed as a joint guardian by the court; (7) an unmarried father can apply to the court for questions affecting the welfare of the child, regardless of his guardian status; (8) according to the Hague Convention, an unmarried father does not have rights of custody to the child. [2007] I.E.H.C. 326 ¶ 47.

9. CENTRAL INTELLIGENCE AGENCY, *Ireland*, WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/ei.html> (last visited Feb. 5, 2010).

10. Ireland, Social Development, Encyclopedia of the Nations, 2009, <http://www.nationsencyclopedia.com/Europe/Ireland-SOCIAL-DEVELOPMENT.html> (last visited May 10, 2010).

11. See Ir. CONST., 1937, arts. 41, 44.

12. THE CATECHISM OF THE CATHOLIC CHURCH, part II, sec. II, ch. III, art. VII, ¶¶ 1601–1666 (Loyola University Press 1994) (on the sacrament of matrimony).

13. *Id.* ¶ 1601.

14. *Id.* ¶ 1614.

individual.<sup>15</sup> Overall, the “Church defines the family as the first unit of society whose mission is to be ‘the sanctuary of life,’” and that “the family is a basic unit on which all other social institutions depend.”<sup>16</sup>

In custody decisions before a court, when an unmarried father is applying for custody of his child, the judge uses the standard of the “best interests” test to determine what is appropriate for the child.<sup>17</sup> In these decisions, the courts have ultimately given significant attention to the religious upbringing of the child, and are “anxious not to disturb [its] religious and moral formation.”<sup>18</sup> The reliance by judges on the religious upbringing of the child as a dominant factor in a custody decision clearly reveals the tight hold on social policy that the Catholic religion continues to maintain.

### B. *The Irish Constitution*

The current Irish Constitution was enacted in 1937 to replace the 1922 Constitution of the Irish Free State.<sup>19</sup> It retained the separation of powers between the legislative, judicial, and executive branches that existed in the 1922 Constitution,<sup>20</sup> and instituted individual rights for the citizens of Ireland.<sup>21</sup> In the family law context, the 1937 Constitution recognized the

15. In *Lineamenta for Oceania*, the influence of the Catholic Church on Ireland’s laws is shown through the almost identical language used in both the *Lineamenta* and Ireland’s laws related to family. In speaking about the role of the family, the bishops describe the “family” as uncertain about its own nature and character in today’s world. In determining the problems that have led to these complications for families, they describe the “[m]others [who are] forced to work,” and the “attitudes and practices” that are becoming more commonplace, such as cohabiting without marriage, divorce, pre-marital sex, and “the large push to extend the institution of marriage to homosexual and lesbian couples.” SYNOD OF BISHOPS, SPECIAL ASSEMBLY FOR OCEANIA, JESUS CHRIST AND THE PEOPLES OF OCEANIA: WALKING HIS WAY, TELLING HIS TRUTH, LIVING HIS LIFE: LINEAMENTA, § 36 (1997).

16. *Id.* §§ 35, 36 (citation omitted).

17. Geoffrey Shannon, *Child Custody Law of the Republic of Ireland*, 39 FAM. L.Q. 353, 362 (2005).

18. *Id.* at 363. The “best interests” test allows the court to consider the interests of the child in the custody proceedings, but the manner in which this test is often applied gives a new twist to the traditional test. Usually, there is an overwhelming presumption that the natural mother in an unmarried relationship should have custody because this is biologically in the best interests of the child. *Id.* at 358. As Ireland has begun to finally realize, however, this is not always the case, and *T. v. O.* (also known as the “Mr. G case”) provides the perfect example of facts which suggest the biological father is actually the best caregiver for the children. *See infra* Part III.

19. BYRNE & MCCUTCHEON, *supra* note 4, § 15.17. The writer of the 1937 Constitution was Eamon de Valera, who was a devotedly religious man. Even as a rising legislator, he was decidedly pro-Catholic Church, and the Pope at the time was enthusiastic about his presidency. DERMOT KEOGH, *IRELAND AND THE VATICAN: THE POLITICS AND DIPLOMACY OF CHURCH-STATE RELATIONS, 1922–1960*, at 139–40 (1995).

20. BYRNE & MCCUTCHEON, *supra* note 4, § 15.20.

21. IR. CONST., 1937, arts. 40–43.

family as the most important unit in the country.<sup>22</sup> It states, “[T]he Family [is] the natural primary and fundamental unit group of Society, and [is] a moral institution.”<sup>23</sup> Furthermore, article 41 describes the family as the “basis of social order and as indispensable to the welfare of the Nation and the State.”<sup>24</sup> Notably, the Constitution reaches further into the personal sphere by detailing the role of women as mothers, and pledging not only to guard the institution of marriage, but also to protect the woman’s role in the home.<sup>25</sup> This conservative approach to the family and its importance to society manifest themselves in the regard courts give to family law issues including divorce, child guardianship, and custody.<sup>26</sup>

Ireland did not legalize divorce until 1996 after a narrowly won referendum.<sup>27</sup> The Irish Constitution, influenced heavily by the values of the Catholic religion, did not recognize divorce as a legal proceeding until the referendum forced a constitutional amendment.<sup>28</sup> *Divorce a mensa et*

22. *Id.* art. 41.1.

23. *Id.* For a comparison to the U.S. Constitution, see U.S. CONST.

24. Ir. CONST., 1937, art. 41.1.

25. *Id.* art. 41.2. Shannon thinks that it is “immediately evident that the ‘family’ the Constitution contemplates as deserving of such protection is that based on marriage alone.” Shannon, *supra* note 17, at 353. He concludes, “The Irish courts have remained steadfast in asserting the exclusivity of the constitutional ‘family.’” *Id.* Another commentator writing before the legalization of divorce indicates that “[t]he principle of family autonomy is supported by Articles 41 and 42 of the Constitution. The courts have developed a general principle of marital privacy requiring strong justification for state intrusion. In the area of child law, parental rights are jealously protected . . . .” William Duncan, *Decision Making Relating to Children in the Republic of Ireland—Restraints on Introducing New Models*, in *THE RESOLUTION OF FAMILY CONFLICT: COMPARATIVE LEGAL PERSPECTIVES* 389, 390 (John M. Eekelaar & Sanford N. Katz eds., 1984) (footnote omitted).

26. See *State (Nicolaou) v. An Bord Uchtála*, [1966] I.R. 567 (Ir.) (defining family as based solely on marriage); *Keegan v. Ireland*, Eur. Ct. HR. (ser. 4) (restating the proposition that the protections of traditional custody are only given to parents in traditional relationships). Since the courts and the constitution so clearly favor the woman’s role in the upbringing of her children and do not mention the unmarried father’s role whatsoever, one commentator considers the courts as primarily resources for women, married or unmarried. Henry Ferguson, *Men and Masculinities in Late-Modern Ireland*, in *A MAN’S WORLD?: CHANGING MEN’S PRACTICES IN A GLOBALIZED WORLD* 118, 129 (Bob Pease & Keith Pringle eds., 2002).

27. The total percentage of people voting for the legalization of divorce was just 50.28%, while the percentage voting no was 49.72%. There was a strong urban turnout that many credit for the passing of the referendum. Divorce Referendum Results, <http://adnet.ie/divorce.html> (last visited Feb. 4, 2009). The narrow victory for legalization was challenged in the High Court, but was upheld and confirmed on appeal to the Supreme Court. *McKenna v. An Taoiseach*, [1995] 2 I.R. 10 (Ir.). For more thorough studies of Ireland’s Divorce Referendum and past referendums that had failed to legalize divorce, see MICHELE DILLON, *DEBATING DIVORCE: MORAL CONFLICT IN IRELAND* (1993); Christine P. James, *Céad Mile Fáilte? Ireland Welcomes Divorce: The 1995 Irish Divorce Referendum and the Family (Divorce) Act of 1996*, 8 DUKE J. COMP. & INT’L L. 175 (1997); Karl Besel & Joe H. Brown, *Catholic NGOs Following the 1995 Referendum on Divorce in the Republic of Ireland*, 17 NONPROFIT MGMT. & LEADERSHIP 443 (2007).

28. One of the important consequences of the late legalization of divorce is the formation of social values and norms around the inability to divorce. Understandably, the people of Ireland needed

*thoro* or an annulment of the marriage were the only legal methods of separation prior to this amendment.<sup>29</sup> Currently, divorce is only allowed where the spouses have lived apart for at least four years, there is no reasonable prospect of reconciliation, and provisions have been made for the children or the spouses.<sup>30</sup> This harsh standard has been strictly applied in Irish courts, as the more conservative judges and politicians attempted to recognize the modernization of family law. The strict divorce laws have a sizable effect not only on the way courts consider child custody cases, but also on the way in which individuals choose to socially orient themselves.<sup>31</sup> More couples in Ireland are choosing alternative familial arrangements, including the most popular option of mere “cohabitation,” instead of marriage.<sup>32</sup> Although this is a good solution for couples who are

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a way to form modern relationships that fit their personal choices that also considered the legal disadvantages to actual marriage. One article suggests that the legislature should examine social attitudes in modern times to not only test the impact of family law on familial relationships, but also to find out what the consequences, intended or otherwise, are. In the case of the late legalization of divorce in Ireland, the unintended consequence was that many people chose alternative forms of relationships—including cohabitating as a family without the legitimization of legal marriage. Many consider this result the antithesis of what the Catholic government wanted. See Ian Dey & Fran Wasoff, *Mixed Messages: Parental Responsibilities, Public Opinion and the Reforms of Family Law*, 20 INT’L J.L., POL’Y, & FAM. 225, 245–46 (2006) (discussing importance of considering public opinion and consultation when crafting family law and policies).

29. *Divorce a mensa et thoro* was the form of judicial separation available prior to the referendum’s passage, which is currently still available, as is annulment. This type of separation allows courts to consider applications that would settle custody, financial support, and property issues arising out of a breakdown of the relationship. Ward, *supra* note 8, at 309–11.

30. IR. CONST., 1937, art. 41.3.2. Interestingly, Paul Ward says that the phrase “living apart” may include the concept of a couple being separated but still living in the same household, which would have interesting implications for the ability of partners who have not yet left the marital or cohabiting residence to still file for divorce. Ward, *supra* note 8, at 305. In addition, “the couple must have attempted a reconciliation and the Court will not grant a decree of divorce unless satisfied that proper provision has or will be made for the dependent spouse and children.” *Id.* (citations omitted).

31. *Id.* at 305–06. “Much emphasis is placed upon children and their rights in divorce proceedings. Section 4 [of the Constitution] sets the conditions for a decree of divorce, part of which entitles the Court to give directions as to welfare, custody or access of any child.” *Id.*

32. According to the Irish Council of Churches, one in four children are now born to unmarried parents, almost double the amount in 1986. David Quinn, Director, Iona Institute, The Future of Marriage and Family Law in Ireland—Notes from Irish Council of Churches AGM Address (Feb. 4, 2008), <http://www.irishchurches.org/files/FutureOfMarriageAndFamilyLawInIreland.pdf>. It is important to note that other countries are experiencing similar problems in adapting to non-traditional families and the parental responsibilities and roles of unmarried fathers. Scotland, for instance, recognized a need to update its laws “to reflect the way adults, in many instances with children, form and maintain relationships.” Scottish Parliament Justice 1 Committee (2005a) Family Law (Scotland) Bill: Policy Memorandum, § 4, available at <http://www.scottish.parliament.uk/business/bills/36-familyLaw/b36s2-introd-pm.pdf>. In discussing the reform of its Succession law the Scottish Law Commission emphasized, “the law no longer reflects current social attitudes nor does it cater adequately for the range of family relationships that are common today.” SCOTTISH LAW COMMISSION, SEVENTH PROGRAMME OF LAW REFORM § 2.22 (2005), available at [www.scotlawcom.gov.uk/downloads/rep198.pdf](http://www.scotlawcom.gov.uk/downloads/rep198.pdf). Although Ireland’s legislature has not approached the subject quite as bluntly

unwilling to go through the problems of marriage and divorce in strictly conservative Irish courts, it has obviously caused problems for the children of these arrangements when their parents choose to part ways.<sup>33</sup> Nevertheless, it is clear through article 41 of the 1937 Constitution that mothers have a special role in relation to their children that is inalienable and indispensable.<sup>34</sup> Although all fathers, married or unmarried, also have an inalienable right of guardianship, the rights of unmarried fathers to their children are less certain.<sup>35</sup>

### C. Statutes

The Guardianship of Infants Act of 1964 (“Guardianship Act” or “Act”) constitutes the legislature’s primary attempt to deal with the rapid rise in child custody disputes.<sup>36</sup> Although the Act states that both the mother and father are the de facto guardians of their child, in the case of an illegitimate infant, only the mother has guardianship rights over the child.<sup>37</sup> This statute leaves the father of the illegitimate child noticeably without rights.<sup>38</sup> Guardianship, however, must be distinguished from custody.<sup>39</sup> Guardianship includes only the right to determine large scale

as Scotland’s Parliament, the issues are similar enough to take note. For additional articles discussing this topic, see also N. V. Lowe, *The Meaning and Allocation of Parental Responsibility—A Common Lawyer’s Perspective*, 11 INT’L J.L., POL’Y, & FAM. 192 (1997) (suggesting that parental rights should be equally allocated to both parents regardless of marital status); Ros Pickford, *Unmarried Fathers and the Law*, in WHAT IS A PARENT?: A SOCIO-LEGAL ANALYSIS 143 (A. Bainham et al. eds., 1999).

33. The constitutional provisions relating to the family as a social unit have affected the lawmaking of Ireland’s legislative and judicial branches in a variety of ways. William Duncan, a family law scholar in Ireland, recognizes three distinct areas which have been affected by these constitutional provisions: (1) the interpretation and status of common-law traditions regarding parent-child relationships, (2) the drafting of legislation, and (3) the social work traditions of the country. Importantly, Duncan notes that the social work tradition has been to emphasize family support rather than family intervention. Duncan, *supra* note 25, at 390–91. Shannon, on the other hand, explains that there are two fundamental natural law arguments that provide protection only to the married parents or, alternatively, only to the unmarried mother. First, since article 41 of the Constitution describes the married couple as the ideal social unit, the courts read this to mean that unmarried couples have lesser rights according to the Constitution. Shannon, *supra* note 16, at 358. Second, parental authority is also derived from the biological and physical attributes of the mother as the child-bearer. *Id.* Without this natural connection or the bond of marriage, the unmarried father is left with little to no rights because of the dual natural law working against him.

34. Ir. CONST., 1937, art. 41.

35. Shannon, *supra* note 16, at 358.

36. See Duncan, *supra* note 25, at 389; Guardianship of Infants Act, 1964 (Act No. 7/1964) (Ir.).

37. Guardianship of Infants Act, 1964, § 6(4).

38. *Id.*

39. Shannon, *supra* note 17, at 356–57. Interestingly, although children are not considered parties to custody or application for guardianship cases, Shannon considers that the right of access belongs to the child, not to the parent. *Id.* at 357. However, it seems that courts have not considered allowing children to take part in the proceedings to a larger extent than they already do. See *id.* at 361.

decisions about the child, but custody includes the day-to-day care of the child's everyday needs.<sup>40</sup> Notably, the court has jurisdiction to appoint and remove guardians of the child; this can be done in a number of ways, including petition to the court or a formal contractual agreement between the two parents.<sup>41</sup> The Status of Children Act of 1987 amended the provisions regarding unmarried fathers slightly.<sup>42</sup> The amendment recognizes the court's ability to appoint the father as guardian of the child either by the consent of the mother or by the court alone, as long as the father is formally registered as the child's father.<sup>43</sup>

In applications for custody, rather than guardianship, the situation for unmarried fathers is even more difficult. Although the courts do not recognize the child as a "juristic person with individual rights," the courts do consider the child's welfare in all cases of custody rights.<sup>44</sup> The High

Alternatively, in the United States, children are sometimes given the opportunity to participate. Some United States family law practitioners are suggesting that approaches that limit children's role in proceedings, such as Ireland's, may be better for the mental and emotional well-being of the children since the impact of legal proceedings on children is worse than for adults. "[C]hildren are caught in high-conflict disputes that can take an emotional and psychological toll on them. . . . Although the severity of the impact of the dissolved family remains a subject of controversy, it is clear that the current process of creating the new family structure does not protect the children involved." Linda M. Rio & Amy J. Bouchard, *Representing Children in Custody Cases: Where We Are Now and Where We Should Go*, 23 CHILD. LEGAL RTS. J. 2 (2003). See also NIGEL THOMAS & JO CAMPLING, CHILDREN, FAMILY, AND THE STATE: DECISION-MAKING AND CHILD PARTICIPATION (2000) (exploring psychological impact of involving children in decision-making).

40. Shannon, *supra* note 17, at 356. "Any person who is a guardian of a child is entitled to custody of the child as against all other persons who are not guardians." *Id.* (footnote omitted).

41. *Id.* at 358–59. Guardianship is considered the "gateway" to custody of children. *Id.* at 357. All custody orders made by the court are temporary and subject to change according to the various needs of the child, but the unmarried mother, and not the unmarried father, has a "constitutional [] and statutory right to the guardianship and custody of her child." *Id.* at 357.

42. Status of Children Act, 1987 (Act No. 26/1987) (Ir.).

43. *Id.* § 12(1). "Where the father and mother of an infant have not married each other, the court may, on the application of the father, by order appoint him to be a guardian of the infant." The statute then clarifies that this appointment of guardianship of the unmarried father does not automatically change the rights of prior appointed guardians of the child. *Id.* § 12(2). Therefore, the mother still maintains her right to guardianship of the child, but the law non-explicitly provides that the court can order that guardianship be jointly shared with the father. Guardianship is a necessary prerequisite to custody, and therefore essential to the father's quest for at least partial custody of his child. The actual statutory language in the Guardianship of Infants Act is just as clear:

In the case of an illegitimate infant the right to make an application under this section regarding the custody of the infant and the right of access thereto of his father or mother shall extend to the natural father of the infant and for this purpose references in this section to the father or parent of an infant shall be construed as including him; but no order shall, on such application, be made under paragraph (b) of subsection (2).

Guardianship of Infants Act, 1964, § 11(4).

44. Shannon, *supra* note 17, at 354. "The unmarried father, by contrast, has no automatic right to the guardianship or custody of his child. . . . [T]he natural mother of a child is deemed automatically to be the child's guardian . . ." *Id.* at 358. In other words, the unmarried mother enjoys both



Court in *G. v. An Bord Uchtála* held that the unmarried mother has a natural right to the custody and care of her child, while the unmarried father has no automatic right to the guardianship or custody of the child under the statute.<sup>45</sup>

Section 11 of the Children Act of 1997 introduced measures to promote alternative dispute resolution in custody cases for unmarried couples.<sup>46</sup> There is a positive duty placed on the solicitor to discuss alternative means of resolution which would include entering into an agreement, counseling, or mediation.<sup>47</sup> In cases in which the parents are unable to agree privately or through the means of alternative dispute resolution, the court will have the ultimate authority to determine custody of the child.<sup>48</sup> Statutory authority allows courts to award joint custody to the unmarried parents in these custody cases, but courts have expressed reluctance to give joint custody when there is significant hostility.<sup>49</sup>

constitutional and statutory rights to guardianship and custody of her child, but the unmarried father's rights are left to decision-making by a court, and are only considered upon application. *Id.*

45. *G. v. An Bord Uchtála*, [1980] I.R. 32, 33 (Ir.).

46. Children Act, 1997 (Act No. 40/1997) (Ir.), available at <http://www.irishstatutebook.ie/1997/en/act/pub/0040/index.html> (last visited Feb. 13, 2010). The solicitor acting for his client must suggest

engaging in counselling to assist in reaching an agreement with the respondent about the custody of the child, the right of access to the child or any other question affecting the welfare of the child and give to the applicant the name and address of persons qualified to give counselling on the matter,

as well as suggesting mediation, or drafting agreements for the custody of the children. *Id.* § 11.

47. Solicitors who specialized in family law in Ireland have a Code of Practice that lays out detailed guidelines for representation in these types of cases. Solicitors are encouraged to use a "constructive and non-confrontational approach" and, "[i]f there are contentious issues concerning children, [to] advise [the] client that the court will, by law, prioritise [sic] the best interests of the child." The Code also suggests putting the child first in all negotiations and not showing favor for one parent over another, especially in hostile relationships. LAW SOCIETY OF IRELAND, A GUIDE TO PROFESSIONAL CONDUCT OF SOLICITORS IN IRELAND, app. 4 § 2 (2d ed. 2002), available at <http://www.lawsociety.ie/Documents/committees/conduct2.pdf>. This Code of Practice has garnered some attention from the Irish media, who recently reported that although the Code is not binding, the solicitors should consider the best interests of not only the child, but the family as a whole. The Code also requires separation of child custody issues and finances whenever possible, to ensure a fair resolution and emphasis on the appropriate issues. Carol Coulter, *Society Launches Code of Practice for Family Law: Children's Best Interests Must Come First*, IRISH TIMES, Nov. 14, 2008, <http://www.irishtimes.com/newspaper/ireland/2008/11/14/1226408634434.html>.

48. Shannon, *supra* note 17, at 359. Interestingly, "[i]n most cases of marital breakdown in Ireland the parents will agree between themselves as to custody arrangements, and invariably the court will respect such settlements. That said, the ultimate decision is that of the court." *Id.*

49. *Id.* at 365. The existence of hostility between the parents, however, is not an absolute bar to joint custody of the children. As always, the courts use the "best interests" test when considered what type of custody should be allowed. See also O'S (D.F.) v. A. (C.) [1999] I.E.H.C. 147, available at <http://www.bailii.org/ie/cases/IEHC/1999/147.html>. Although granting joint custody, Judge McGuinness noted that, "[a]s a general rule where there is deep hostility between the parents, I am

#### D. *International Child Custody Statutes*

Ireland has signed and ratified several international documents that facilitate the recognition of custody and access decrees from other nations.<sup>50</sup> The Hague Child Abduction and Luxembourg Conventions were incorporated into Irish law through the Child Abduction and Enforcement of Custody Orders Act of 1991, which allows for “applications for the return of children to their country of habitual residence.”<sup>51</sup> The Hague Convention allows “[a]ny person, institution or other body claiming that a child has been removed or retained in breach of custody” to apply for assistance in securing the return of the child.<sup>52</sup> It also provides for the recognition and enforcement of foreign custody orders.<sup>53</sup>

#### E. *Case Law*

Much of the existing case law in Ireland focuses on disputes between divorced couples, rather than custody battles between unmarried couples. Nevertheless, this case law provides a useful backdrop for the ways in which courts determine custody rights. Because of the often difficult consequences of the conservative laws in Ireland, many unmarried or divorcing couples may find it appropriate to make an arrangement between themselves regarding custody.<sup>54</sup> It is a rare occasion that the court will be

very reluctant to make an Order granting joint custody, due to the probable inability of the parents to co-operate in caring for the child.” *Id.* ¶ 61.

50. Shannon, *supra* note 17, at 368.

51. *Id.* See also Child Abduction and Enforcement of Custody Orders Act, 1991 (Act No. 6/1991) (Ir.), available at <http://www.irishstatutebook.ie/1991/en/act/pub/0006/index.html> (last visited October 16, 2008); Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, available at [http://www.hcch.net/index\\_en.php?act=conventions.pdf&cid=24](http://www.hcch.net/index_en.php?act=conventions.pdf&cid=24) (last visited Feb. 13, 2010) [hereinafter Hague Convention]; European Convention on Recognition and Enforcement of Decisions Concerning Custody, May 20, 1980, Europ. T.S. No. 105.

52. Hague Convention art. 8. The application must include information about the child, his or her habitual residence, and the grounds for the return of the child. *Id.* Articles 9–11 provide instructions for the Contracting States to aid one another in voluntary return of the child. It also requires that the courts involved shall make their decisions expeditiously so as not to harm the child’s welfare. *Id.* arts. 9–11.

53. *Id.* art. 3.

54. In the case of *C. D. v. P. D.*, [2006] I.E.H.C. 100 (Ir.), for example, the wife was applying for judicial separation and ancillary relief. Although collateral to the actual issue in the case, the court considered the custody agreement which was privately reached by the parties to be a useful factor for determining his ruling: “Happily there is a degree of agreement concerning the children. It is agreed that the parties should have joint custody of the children. . . .” *Id.* The court then outlined the access agreement between the parties, noting that they had provided for weekend visits, holidays, notice to the other party of vacations, and liberal telephone use. The detailed description of the custody agreement not only demonstrates that courts favor private custodial decisions, but also that the parties themselves favor private decision-making.

required to create an agreement between the parents, usually due to the existence of hostility between the parents.<sup>55</sup>

In the case of *DO'H v. HSE*, a non-married couple separated after having three children.<sup>56</sup> Once again, the terms of a custody agreement were reached privately by the parties, but the father then became concerned about the care of the children by their mother, who had primary custody.<sup>57</sup> Foster care was arranged by the parents, and a dispute arose when the father applied for custody of the children.<sup>58</sup> The High Court characterized the unmarried father's position by explaining that "the father, although in biological terms the natural parent of the child had little or no legal standing, except that under recent legislation he had a right [to] apply to the court to be appointed guardian of the three children."<sup>59</sup> The court also noted that there has been a progressive movement toward recognition of the unmarried father's rights of custody, and found that there were constitutional reasons to find that "having custody" has the same meaning for unmarried fathers.<sup>60</sup> The court recognized the "very high legal status of marital parents in relation to the rights they have to

55. In these rare circumstances, however, courts have made it clear that unmarried fathers have little to no rights in regard to their children. For instance, in *J. K. v. V. W.*, [1990] 2 I.R. 437 (Ir.), the court said that the Guardianship of Infants Act of 1964 did not confer any 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." *Id.* at 447. It further held that the act only conferred a right to apply to the court for guardianship, but not an inherent right to guardianship. *Id.* at 446-47. In another case, *W.O'R. v. E.H.* [1996] 2 I.R. 248 (Ir.), available at <http://www.bailii.org/ie/cases/IESC/1996/4.html>, the Supreme court referenced *J. K. v. V. W.* and added that, "[f]or better or worse, it is clearly the fact that long-term relationships having many of the characteristics of a family based on marriage have become commonplace." These comments provided at least some support for a modernization of the family-law practices.

56. [2007] I.E.H.C. 175 (Ir.).

57. *Id.*

58. *Id.*

59. *Id.* Interestingly, the judge in *T. v. O.* seemed to realize that he was modernizing the case law on the subject of unmarried fathers' rights. He commented,

Could I add 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 [sic] fathers to act responsibly towards their children and of course towards their children's mother. To acknowledge only a 'right to apply' [for guardianship] could hardly be seen as dynamic in this regard.

*T. v. O.*, [2007] I.E.H.C. 326 (Ir.), ¶ 51.

60. The High Court said that although the non-married father's position was that he had little or no legal rights to contact or even involvement in his child's life, the legislature has taken steps to remedy this issue. Notice the limitations on this progressive legislation: "the statutory amendment of the law was passed to enable the non-marital father to apply and give the non-marital father, not the right to guardianship, but the right to apply to court for guardianship, and thereafter, if given guardianship, the right to be a guardian." *DO'H v. HSE*, [2007] I.E.H.C. 175. The court ultimately concluded that this does not put the unmarried father on the same ground as the married father. *Id.*

their children,”<sup>61</sup> but ultimately concluded that the children should remain in foster care until another court provided an alternative solution.<sup>62</sup>

### III. THE LANDMARK DECISION OF *T. v. O.*

Although the background leading up to the *T. v. O.* decision of the High Court in September of 2007 is clearly against joint custody or any custody rights of an unmarried father, the court in this case took a slightly different approach that may have drastic consequences for Irish custody laws. In the case, the mother and father had lived together, unmarried, for approximately three years, during which time they had twin boys.<sup>63</sup> During their time cohabitating, the father was the primary caretaker and custodian of the children: he was responsible for getting them to school, feeding them meals, and for their general maintenance.<sup>64</sup> When the parents decided that they could not make their relationship work, the mother took the children to England against the wishes of the father, and he (“Mr. G. T.”) filed an application for return of the children to Ireland under the 1991 Child Abduction and Enforcement of Custody Orders Act.<sup>65</sup> The key issue in the case was that for the children to be returned under court standards, there had to be “wrongful retention,” which required a breach of the rights of custody.<sup>66</sup>

Therefore, the rights of an unmarried father to his children were directly implicated by the situation and the decision the court faced.<sup>67</sup>

61. *Id.*

62. The High Court recognized that there is a problem with defining the rights that should be given to unmarried fathers. Although acknowledging that “[normally], custody is to do with the care, the responsibility for the child, whereas access is most often a mere visitation right,” the court opined that the line between these two types of access blurs in the more cooperative cases where the mother and father mutually create an agreement. *Id.* The court also noted that the conclusion about what to do for the children can also be left to the parents as a private matter. *Id.* This case once again demonstrates that private agreements are favored among courts, especially in the case of unmarried couples.

63. *T. v. O.*, [2007] I.E.H.C. 326, ¶ 1.

64. *Id.* The court emphasized the father’s duties as primary caretaker, which included organizing his work schedule to care for the children, taking his child in for surgery when he had developmental concerns, and taking them to the doctor for regular checkups and immunizations. *Id.* ¶ 16. The court also made specific mention of the mother’s deficiencies in custodial care: working outside of the family home for three months, playing with her band at odd hours, and not taking responsibility for daily feeding, bathing, or education. *Id.* The fact that the court considered these factors as crucial for a fair determination of the best interests of the children is an essential change for the family law environment, which had previously relied on the mother’s biological tie to the child in order to determine the most appropriate custody award.

65. *Id.* ¶ 1.

66. *Id.* ¶ 4.

67. The court recognized, at this point, that “[a] debate has been ongoing for some time as to

There is obviously an overwhelming constitutional, statutory, and case law precedent that an unmarried mother is the natural and only guardian of her children. In this case, however, the court chose to emphasize the father's daily role in his children's lives and the de facto custodial role that he was playing.<sup>68</sup> The court maintained that "a person, who had no established rights, but who carried out duties and enjoyed privileges of a custodial or parental character, could, on a case by case basis, have rights which qualified as 'rights of custody' within the meaning of article 3 [of the Hague Convention]."<sup>69</sup> Reasoning that although prior policy arguments against allowing an unmarried father to have custody of his children include the fact that most unmarried fathers do not show an interest in their children, the court recognized the likelihood that unmarried fathers could care for their children in a significant manner as well.<sup>70</sup> The Hague Convention's language also aided the father in this case, because the court recognized that the Hague Convention did not distinguish between married and unmarried fathers to determine when a right of custody existed.<sup>71</sup> The court was forced to accept the language in the Hague Convention, thus making another step forward for the rights of unmarried fathers. In conclusion, the court recognized that Mr. G. T. had lovingly devoted himself to the day-to-day care of his children, and that their habitual residence was in Ireland. Therefore, it required the return of the children to Ireland and determined that the removal of the children from the family home was illegal under the Brussels Regulation and the Hague Convention.<sup>72</sup>

The High Court also cited other cases that called attention to a new definition of "family" as it is typically construed in the Constitution.<sup>73</sup> It noted that in *Keegan v. Ireland*, the European Court of Human Rights had

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what constitutes 'rights of custody' in this regard, particularly where the natural father has never married the natural mother." *Id.* ¶ 22.

68. *See id.* ¶¶ 16–17. For a commentary on the effects of separation on children and changes to the father's role, see JAN PRYOR AND BRYAN RODGERS, CHILDREN IN CHANGING FAMILIES: LIFE AFTER PARENTAL SEPARATION (2001).

69. *T. v. O.*, [2007] I.E.H.C. 326, ¶ 25. It is important to note that the court bases the decision for joint custody not on Ireland's domestic law, but rather on international regulations and their interpretations. For a discussion of the state of rights for families and unmarried parents, see *supra* note 8.

70. *Id.* ¶ 50. The court inquired: "[W]hat about a person who fathers a child within an established relationship, and who from the moment of birth, nurtures, protects and safeguards his child; sometimes to a standard which all too frequently married fathers fail to live up to." *Id.*

71. *Id.* ¶ 71. *See also* Hague Convention (no mention of disparate treatment of married or unmarried fathers).

72. *T. v. O.*, [2007] I.E.H.C. 326, ¶ 73.

73. *Id.* ¶¶ 54–56.

held that the notion of family should not be confined to the traditional married couple with children, but might also include the de facto family where parties are living together outside of marriage.<sup>74</sup> The judge in *T. v. O.* also noted that the European Convention on Human Rights permits no distinction between the guardianship rights of unmarried and married parents.<sup>75</sup>

#### IV. ANALYSIS AND ARGUMENT

##### A. *Potential Repercussions from the Case*

This case clearly marks a new precedent for the custody rights of unmarried fathers, but the scope of the effect is yet to be seen. First, the case has warranted coverage in many periodicals, and this suggests at least an interest in the custody issues.<sup>76</sup> The press has referred to the case as a landmark judgment for parental rights of unmarried men.<sup>77</sup> Further, the application of the Hague Convention and other international materials may lead Ireland to modernize family law practices. Unable to interpret the Hague Convention and other international agreements in any way other than their plain meaning, courts will be forced to recognize some rights of unmarried fathers that are not apparent in the Irish Constitution or legislation. The *T. v. O.* case demonstrates the sizable effect that the Hague Convention's equal treatment of unmarried men and women in custody battles will have in Ireland.

Since the issuance of the decision by the High Court, it has been challenged and appealed in the Supreme Court, which affirmed the lower court's decision on appeal.<sup>78</sup> Although controversial, the Supreme Court agreed with the High Court that unmarried men should not be singled out

74. *Keegan v. Ireland*, 18 Eur. H.R. Rep. 342 (1994). The court in *Keegan* continued, “[t]here thus exists between the child and the parents a bond amounting to family life even if at the time of the child’s birth the parents are no longer co-habiting or if their relationship has then ended.” *Id.* ¶ 2. The Keegan Court also cited the deliberateness with which the cohabiting couple had conceived their child to show that this should be considered a family unit.

75. *T. v. O.*, [2007] I.E.H.C. 326, ¶ 57.

76. “It was a legal first in Ireland, a predominantly Catholic country where divorce was legalized only a decade ago and courts today award the bulk of child-custody rights to mothers.” *Landmark Ruling on Fathers’ Rights*, RTÉ NEWS, Sept. 11, 2007, <http://www.rte.ie/news/2007/0911/mrg.html?rss>.

77. *Id.* An Irish Times/Behavioural Attitudes poll on Irish men reports that “[s]ome 85 percent of men believe single fathers should have equal rights, with levels of support strong across all age groups.” *Vast Majority of Men Say Single Fathers Should Have Equal Rights*, IRISH TIMES, Sept. 19, 2008, at 1.

78. *T. v. O.*, [2007] I.E.S.C. 55 (Ir.), available at <http://www.bailii.org/ie/cases/IESC/2007/S55.html> (last visited Feb. 13, 2010).

as a different class from unmarried mothers.<sup>79</sup> The social movement of individuals to favor cohabitation instead of marriage places an important social pressure on the courts, one that was finally recognized in *T. v. O.*<sup>80</sup> Although the case signals recognition of the modernization of the term “family” and perhaps a slight shift toward more progressive common law regarding custody in unmarried parent cases, the courts are far from affecting a significant shift in the policy toward unmarried fathers.<sup>81</sup> With Catholicism still strong in Ireland, it is unlikely that the modernization of Ireland’s people alone will be able to effect the change necessary.

But is this change really necessary? Although there is some debate regarding how conservative a country’s family law should be, a more progressive approach could work for Ireland’s people.<sup>82</sup> Studies and popular commentary have suggested that Ireland’s people may be moving away from the traditional Catholic regime because of Ireland’s increasingly progressive business and economic policies.<sup>83</sup> Although

79. *Id.*

80. Although it seems cohabitation was favored in Ireland for quite some time since before divorce was legalized, the lag in the response of courts can possibly be due to the precedent set by prior cases interpreting the roles of unmarried fathers as found in the Constitution.

81. The court’s consideration of the children’s best interests in the *T. v. O.* case is hardly surprising given that this factor is usually important because of the lack of representation that the children have in the court proceedings. See Shannon, *supra* note 17, at 361–62. On second glance, however, it seems that the traditional test of “best interests” of the child is given a surprisingly modern spin in the *T. v. O.* case. As discussed previously, the best interests test has been interpreted to assume that the mother of the child is the obvious and most appropriate caretaker. See *supra* note 18. In *T. v. O.*, however, the court considered each parent’s actual, not just traditional, role in the children’s lives. This shift in the best interests test emphasizes the actual roles of parents in their children’s lives, not just the stereotypical roles. Although the *T. v. O.* decision considers the actual roles of the parents, the large amount of precedent using the traditional best interests formulation will most likely be used in the lower courts.

82. Similar custodial issues are becoming prevalent for step-parents, grandparents, and adoptive parents regarding child custody issues as the traditional version of “family” becomes increasingly attenuated. Further, the new wave of same-sex partners interested in adopting children has created both religious and legal implications that are only beginning to have an effect on the laws. It is possible that as the Irish people demand recognition of living situations and relationships that are alternatives to the traditional married man and woman scenario, Irish courts will work to recognize their rights in the newly modernized Ireland. See Shannon, *supra* note 17, at 368 n.63. See generally Felicity Kaganas and Christine Piper, *Grandparents and Contact: ‘Rights v Welfare’ Revisited*, 15 INT’L. J.L., POL’Y, & FAM. 250 (2001); Róisín Ryan-Flood, *Contested Heteronormativities: Discourses of Fatherhood among Lesbian Parents in Sweden and Ireland*, 8 SEXUALITIES 189 (2005); Suzanne Shanahan, *The Changing Meaning of Family: Individual Rights and Irish Adoption Policy, 1949–99*, 30 J. OF FAM. HIST. 86 (2005).

83. For instance, although the Catholic presence is considered to be strong among individuals in Ireland and is definitely considered the overwhelmingly dominant religion, the number of priests ordained from Ireland has diminished drastically. One article notes, “[t]he decline of Catholic Ireland, for decades the Pope’s favourite bastion of faith in Europe, has been regularly predicted, as the economic successes of the Celtic Tiger brought growing secularisation.” David Sharrock, *Catholic Church Faces New Crisis—Ireland is Running Out of Priests*, TIMES (United Kingdom), Feb. 27,

ignored for a long time on the basis of the little economic interest that Ireland produced, Ireland came to be known as the Celtic Tiger, and a formidable and recognized business force.<sup>84</sup> These commentators and scholars suggest that Ireland is losing interest in the Catholic focus that has long dominated formation of social policy.<sup>85</sup>

One solution, albeit slow-moving, has already been suggested and implemented by the Irish people: private ordering. Throughout the court cases and even the landmark case of *T. v. O.*, courts have focused on the private ordering of families as a method of determining custody arrangements and solving parental issues.<sup>86</sup> The dearth of custody cases is representative of the fact that cohabiting couples who chose to separate often make arrangements among themselves for their children. This private decision-making can be seen as both a blessing and a curse. On the one hand, private custody arrangements provide unmarried fathers more leeway in determining how much presence they have in their child's life. On the other hand, if those custody arrangements fall through as the result of acrimonious relations between the parents, the courts will usually not protect the unmarried father's rights as vigorously as the mother's. This is the result of the traditional pressures that are the hallmarks of Ireland's family law regime. It is possible, however, that with private arrangements for custody and guardianship, courts will eventually choose to uphold

2008, <http://www.timesonline.co.uk/tol/comment/faith/article3441821.ec-e>. The article continues, "The Irish Catholic newspaper predicts that the number of priests will drop from the current 4,752 to about 1,500 by 2028." *Id.* Another article reports, "[t]oday, Ireland is prosperous, cosmopolitan and no longer so very Catholic." Tom Hundley, *How Catholicism Fell from Grace in Ireland*, CHI. TRIB., July 9, 2006, <http://www.chicagotribune.com/news/nationworld/chi-0607090342jul09,0,3397459.story>.

84. Ireland became known as the Celtic Tiger in the 1990s when its economy doubled in size as the result of aggressive economic policies by the government. Lizette Alvarez, *Suddenly Rich, Poor Old Ireland Seems Bewildered*, N.Y. TIMES, Feb. 2, 2005, at A4. Ireland's economic boom led to its place as the fourth most affluent country in the Organization for Economic Cooperation and Development ("OECD"). Landon Thomas, Jr., *The Irish Economy's Rise Was Steep, and the Fall Was Fast*, N.Y. TIMES, Jan. 3, 2009, at BU1. Like many other countries, however, Ireland's economy has been hard hit by the recent global recession, which led to a collapse of Ireland's housing market. *Id.*

85. One article notes that the "social problem of child abuse is a key site around which the reconfiguration of gender and power relations and masculinities has occurred." Henry Ferguson, *supra* note 26, at 123. The article goes on to explain that the series of clerical sexual abuse scandals has drastically weakened the "Church's moral authority." *Id.* at 123. This weakening of Catholicism's moral authority came, unfortunately for the Church, at a time of progress and modernization of Ireland's population, potentially exacerbating the distancing of the Irish citizens from the Catholic Church. It also came, incidentally, at the time when the Celtic Tiger economy was beginning to expand, and the Irish became overwhelmed with their newfound economic success, rather than relying on the Catholic priests to guide them in a faith that had let them down both morally and spiritually. This perfect storm of secular and financial changes to Ireland's economic landscape at a time of increasing global modernization ultimately resulted in a fundamental change in Ireland's dependence on Catholicism. See Sharrock, *supra* note 83; Alvarez, *supra* note 84.

86. See Shannon, *supra* note 17, at 359–60; Duncan, *supra* note 25, at 390; *supra* note 62.



those arrangements instead of favoring the natural mother just because the couple has chosen to remain unmarried.<sup>87</sup> Another offshoot of the progress and modernization of Ireland's people will be that they will demand more rights for unmarried men, especially as single-sex couples provide more support for liberal family laws.<sup>88</sup>

### B. Other Models

By way of example, one can consider Canada's significant reform of child support provisions in its Divorce Act.<sup>89</sup> Disputes about child custody and access are considered under the same "best interests" standard as in Ireland.<sup>90</sup> In Canada, the number of couples who cohabit has increased,

87. It is equally possible that courts will choose to interpret the Constitution in the traditional method: namely by providing the unmarried mother with far more inherent rights to child custody and guardianship than the father. The *T. v. O.* case, however, provides a jumping off point for judges to make the switch to a more progressive and modern system of custody decisions. If decisions made between the unmarried father and mother outside of the court system are to be upheld at all costs, then it seems that judges can carefully mold this premise into one that equalizes the rights of both mother and father, whether married or not. Furthermore, as Ireland continues the modernization and secularization of its society, the natural law model of interpretation championed by traditional conservatives will fade from view, as it may have already begun to do. See Shannon, *supra* note 17.

88. Importantly, social forces and community organizations are already lobbying for modernizing the Irish family courts in favor of more equal treatment for unmarried men, especially in child custody decisions. The Unmarried and Separate Fathers of Ireland ("USFI") organization has been created to achieve equality for unmarried fathers in custody and other legal contexts. The group references articles and commentary by notable Irish legislators and politicians in an effort to spark awareness of the inequality taking place. See USFI, <http://usfi.ie/> (last visited Feb. 28, 2010). Articles in the Irish Times indicate a small uprising against the treatment of unmarried fathers, as one article reports that a Family Lawyers Association member called on the legislature to make changes toward equalization of rights for unmarried mothers and fathers. Barry Roche, *Call for New Legislation to Help Unmarried Fathers*, IRISH TIMES, Nov. 30, 2007, at 7. Further, pressure from the European Convention on Human Rights has been suggested as one method of changing the current status for unmarried men. In one article, a commentator writes,

The European Court of Human Rights established that, if a child is born from an extramarital relationship which has lasted for a long period of time—when there has been a certain degree of commitment in that relationship—there always exists a presumption in favor of family life between father and son.

Susana Sanz Caballero, *Unmarried Cohabiting Couples before the European Court of Human Rights: Parity with Marriage?*, 11 COLUM. J. EUR. L. 151, 154 n.18 (2005). This is clearly a progressive stance on the issue of unmarried fathers' parental rights and responsibilities, and since it is embraced by the European Convention on Human Rights, it seems possible that this pressure might be what cracks the Irish legislature into reform. Acknowledging the de facto relationship as a modern version of marriage will be required in order to maintain decisions within the precedent set by the European Convention. See Ian Karsten, *Atypical Families and the Human Rights Acts: The Rights of Unmarried Fathers, Same Sex Couples and Transsexuals*, 2 EUR. H.R. L. REV. 195 (1999) (arguing that U.K. law must modify its treatment of atypical families to better conform to the European Convention).

89. Divorce Act, R.S.C. ch. 3 (2d Supp.) (1985), available at <http://laws.justice.gc.ca/PDF/Statute/D/D-3.4.pdf>.

90. Nicholas Bala & Rebecca Jaremko, *Non-marital Unions, Finality of Separation Agreements*

up to fourteen percent in 1996 from just six percent in 1981.<sup>91</sup> Further, Canadian courts have used the “Canadian Charter of Rights and Freedoms to virtually eliminate the legal differences between marriage and long-term opposite-sex cohabitation.”<sup>92</sup> Scholars recognize that although opposite-sex cohabiting couples and even same-sex couples have received more progressive treatment in the courts, same-sex cohabitation will continue to be a contentious subject in Canada, and that the road will likely be long before equal recognition of rights will be granted. Obviously, Ireland is plagued with the same problems, and, as in Canada, legislators will most likely not deal with the problem because of its controversial nature.<sup>93</sup> Therefore, although Canada’s progression toward recognition of opposite-sex cohabitation provides some hope for Ireland’s couples, Ireland has a long way to go before it can sustain a similar model.

Portugal provides another example of private modernization that has led to drastic changes in the family law system.<sup>94</sup> In Portugal, as in Ireland, the population is strongly religious, with 84.5% identifying themselves as Roman Catholic.<sup>95</sup> Referred to as a “de facto” relationship, the term is defined as a cohabiting couple who live in every respect as husband and wife without actually having married.<sup>96</sup> In Portugal, a treaty concluded in 1940 has made it more difficult to get a divorce: “[C]ouples married by the

*and Children’s Issues*, in *THE INTERNATIONAL SURVEY OF FAMILY LAW* 109, 124–26 (Andrew Bainham ed., 2002).

91. *Id.* at 110.

92. *Id.* at 111 (citation omitted). The article continues, however, that “no province has legislation recognizing property rights for non-marital partners.” *Id.* (citation omitted). Therefore, even if Canada’s reform can be used as a model for Ireland, Canada did not use legislation to enact it. In Ireland, with the legislation acting as the main interpretive form for the courts to enact more progressive decisions, this may not be the best choice. Scholars do recognize, however, that Canada’s fight for the rights of unmarried couples began over 30 years ago, and that the road has been arduous. See Winifred Holland, *Intimate Relationships in the New Millennium: The Assimilation of Marriage and Cohabitation?*, 17 *CAN. J. FAM. L.* 114, 127–28 (2000). The progressive nature of Canada’s reforms in relation to family law makes it an unlikely candidate for Ireland’s legislature to use as a model. Ireland’s emphasis on the conservative Constitution and on the family as the most important social unit make it stand out from most other progressive countries, including the United States with its individualistic laws.

93. See generally Bala & Jaremko, *supra* note 90. The problem is that the court is bound by precedent and requires a certain amount of guidance from the legislature, which it seems it will not get in this instance.

94. See Maria Clara Sottomayor, *The Introduction and Impact of Joint Custody in Portugal*, in *FAMILY LAW PROCESSES: PRACTICES, AND PRESSURES; PROCEEDINGS OF THE TENTH WORLD CONFERENCE OF THE INTERNATIONAL SOCIETY OF FAMILY LAW* (John Dewar & Stephen Parker eds., 2000).

95. Central Intelligence Agency, *Portugal*, *WORLD FACTBOOK*, <https://www.cia.gov/library/publications/the-world-factbook/geos/po.html> (last visited Feb. 28, 2010).

96. Sofia Oliveira Pais, *De Facto Relationships and Same-Sex Relationship in Portugal*, in *THE INTERNATIONAL SURVEY OF FAMILY LAW* 337 (Andrew Bainham ed., 2002).

Catholic Church after that year had to give up the right to divorce.”<sup>97</sup> Another issue in Portugal is that the Constitution grants all people the right to marriage and children, and disallows discrimination against children born to unmarried parents.<sup>98</sup> The Civil Code protects “de facto” relationships by conferring “a presumption of paternity when, during the period of legal conception, the partners lived in a stable relationship as husband and wife,” and “allows the joint exercise of parental power (in other words, joint custody) when the parents live like husband and wife.”<sup>99</sup> In Ireland, there is no presumption of paternity when the parents live together at the time of conception in a stable family relationship. Adopting such a presumption would no longer require an unmarried father to establish paternity and to apply for guardianship to the court.<sup>100</sup> Furthermore, allowing joint exercise of custody to parents who are living together could also be a step toward modernization that would better fit the actual lifestyles of Ireland’s people. Still, Portugal has not gone as far as might be desired, because the legislature has still not recognized unmarried fathers’ rights when the de facto relationship is dissolved.<sup>101</sup>

## V. CONCLUSION

Although Ireland’s treatment of its unmarried fathers seems archaic in some ways, the landmark decision of *T. v. O.* in 2007 represents a new take on an old Catholic classic. Working against the tide of the

97. *Id.* at 337 n.3. The article goes on to explain that these partners are not permitted to remarry, so many turn to de facto relationships as a solution to their problems. This situation once again illustrates the unintended consequences of a conservative approach to family laws in strictly religious countries. Although conservative policies may seem ideal on paper, it is clear from the examples of Ireland and Portugal that these conservative social policies only force citizens to find a way around their traditional familial roles to form new relationships.

98. *Id.* at 339.

99. *Id.* at 340. See also CÓDIGO CIVIL PORTUGUÊS [C.C.P] arts. 1871(1)(c), 1911(3) (Port.).

100. The implications of this small change could be major: if unmarried fathers were no longer required to vigorously prove and assert the paternity of their children, it might follow that courts would be more likely to infer inherent rights of the father into that relationship. The equalization of the first step in a child custody battle, namely the establishment of paternity of the unmarried father, could make applications for guardianship an unnecessary requirement. Essentially, if the father could easily establish paternity of his child, he could assert a natural and biological right to have guardianship over the child just as easily as the biological mother.

101. See Pais, *supra* note 96, at 344. Catholicism has had a distinct impact on Portugal’s recognition of unmarried fathers’ rights, one that was just as unforeseen as the consequences that sprang from Ireland’s refusal to recognize divorce until 1995. Since marriage is an essentially religious union in the social context, the legislature’s attempts at a more progressive family law stop short of actual equal recognition for unmarried fathers upon dissolution of the de facto marriage. Since Portugal’s society will not accept laws that allow dissolution without religious acceptance, it seems that they face many similar problems for modernization of the family law that Ireland does.

conservative Constitution, legislation, and case precedent, courts are slowly beginning to warm to the idea of equalized rights for unmarried fathers. This trend, spurred on by Ireland's more modern and secularized society and increased rights for unmarried fathers in the international context, should realize potential as it did in *T. v. O.*: with courts willing to recognize the equal rights that an unmarried father, especially one cohabiting with the mother, should have in terms of guardianship and joint custody of their child. With courts forced to recognize non-traditional forms of relationships, including same-sex couples and cohabiting but non-married couples, reform for Ireland's family law system and aid for unmarried fathers' rights will ultimately be demanded, not just requested.

*Jackie M. Burkhardt\**

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\* Jackie M. Burkhardt graduated from Washington University School of Law in May 2010 and currently resides in St. Louis.