Written Submission to the Joint Committee, on Justice, Home Affairs and Migration on the General Scheme of the Guardianship of Infants (Amendment) Bill 2025

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HEAD 2

It seems to me that this amending legislation should not be adding to the already ballooning section 6 of the 1964 Act by adding section 6G, but should instead add to section 8 of the 1964 Act, as this is the existing part of the Act which deals with the removal of guardianship in certain circumstances.

The first major error of Head 2 is to propose 'to remove a guardian', and the Scheme as a whole does not seem to understand the concept of removal, or the seriousness of what it is proposing in the context of constitutionally protected married parents, and mothers. **To date, a mother (whether married, a civil partner or unmarried) cannot be removed as a guardian by the court and neither can a father who is married to the mother of his child.**[1] The barrier to allowing these options for the complete removal of guardianship in the case of married parents, and mothers, is the Constitution itself. In *Northwestern Health Board v HW*, Keane CJ held that 'the rights acknowledged in Article 41 are both the rights of the family as an institution, *and the rights of its individual members*, which are also guaranteed in Article 42, under the heading 'Education''.[2] These constitutional rights of the family, and of the individual family members, are described in both Articles 41 and 42 as 'inalienable' which was interpreted by Kenny J in *Ryan v Attorney General* to mean they 'cannot be given away'.[3] Indeed, in the recent case of *Re JJ*, the Supreme Court stressed that 'the Constitution recognises the benefits to a child of being a member of a family. The dynamics of relationships are sensitive and important and should be upheld, *where possible,* as a child benefits in multiple ways from being a member of a family'.[4] Further, mothers are recognised as having an unenumerated constitutional right to the care and custody of their children in Article 40.3.[5] **These constitutional provisions, and their interpretation by the courts, are most likely the reason why section 8 of the 1964 Act does not allow for the removal of mothers, and married parents (mothers and fathers) as guardians of their children in any circumstances. The 'Family' protected under Article 41 of the Constitution is the married family unit. However, while the status of being a guardian cannot be removed from a married parent,**

[1] See Appendix 1 for a list of all types of guardians who can be removed by the court. However, although an unmarried father/unmarried parent of a DAHR-conceived child can be removed as a guardian by the court, this is a rare occurrence, and there are stringent statutory preconditions that must be satisfied before this can occur: see section 8 (7) of the Guardianship of Infants Act 1964, as inserted by section 51 (b) of the Children and Family Relationships Act 2015.

[2] *Northwestern Health Board v HW* [2001] 3 IR 622, 687 (Keane CJ).

[3] *Ryan v Attorney General* [1965] IR 294, 308.

[4] *Re JJ* [2021] IESC 1 [177].

[5] *O'S v Doyle* [2013] IESC 60, at [21]. This applies to all mothers, whether married or unmarried.

or a mother, there is a way to fully 'suspend', 'restrict' or 'prohibit' such parents from exercising any of the rights of guardianship by court order, a point I shall address later.

Head 2 (inserting section 6G (1) & (2) into the 1964 Act) proposes that a 'guardian or parent' convicted of certain offences can 'be removed from office' but where a parent who is not a guardian is convicted of any of these offences then there is no office to remove them from, so this part of Head 2 is confusing to say the least. Similarly, Head 2 proposes that a 'guardian or parent' so convicted can 'be confirmed' as the guardian of the child, but how can a parent who is not and has never been a guardian 'be confirmed' as the child's guardian by the court? For example, an unmarried father enjoys a presumption that he is the child's *parent* when he is named on the child's birth certificate, but he will not be a *guardian* of his child unless he acquires guardianship via a court order, a statutory declaration whereby the mother agrees to his appointment as a guardian, or by satisfying the 'cohabitation rule' where he has lived with the mother for 12 months, including a minimum of 3 months after the birth of the child, and automatically acquires guardianship once this 12-month temporal requirement is satisfied. The same is true for an unmarried female same-sex second parent of a child born via donor-assisted human reproduction (DAHR) as regulated by the Children and Family Relationships Act 2015. Although they will be a *parent* of the child by complying with the provisions of the 2015 Act, they can only be recognised as a *guardian* via any of the same 3 methods that apply to unmarried fathers, as clearly outlined above.

The General Scheme appears to conflate the concepts of legal parentage and guardianship. Suggestion: instead of stipulating 'guardian or parent' in the proposed section 6G (1) & (2), simply stipulate 'guardian' throughout, as this will encompass any parent who is a guardian.

The intention in the General Scheme does not appear to be the full suspension or complete restriction of *the exercise of guardianship rights* by the convicted guardian until such time as the court may determine; instead, it appears to envisage the complete removal of *the status of guardian* from such a guardian, even where such a guardian is a mother or a married parent, because Head 2 (inserting section 6G (6) (d) into the 1964 Act) provides that the court order removing guardianship may 'provide that the guardian so removed under subsection (4) be prevented from making an application under sections 6A, 6C, 6F, or 8' of the 1964 Act.

This is most significant, because section 6A of the 1964 Act enables *'a person who, being a parent of the child, is not a guardian of the child*'[6] to apply to the court to be appointed as a guardian, and section 6C enables a person who is not a parent or a guardian of the child to apply to the court to be appointed as a guardian where they satisfy certain eligibility criteria. In addition, section 8 enables a person to apply to the court to be appointed as a guardian in circumstances where a child has no guardian (which may be the case where the convicted

[6] Emphasis added. Thus, a person stripped of guardianship, but who remains a legal parent, cannot apply to re-acquire their guardianship under this provision, according to Head 2 of the General Scheme.

parent-guardian has killed the child's other parent-guardian). Further, section 6F enables a person to have their guardianship confirmed by the court by virtue of having satisfied the 'cohabitation rule', i.e. 12 months cohabitation with the child's mother, which must include a period of at least 3 months after the child's birth.

By preventing applications by convicted guardians who have been removed from office to later apply to the court to be appointed as a guardian under either section 6A, 6C or 8 of the 1964 Act, or confirmed as a guardian under section 6F, the General Scheme strongly indicates that the status of being a guardian will be removed from convicted guardians, and they cannot apply to the court to re-acquire that status. **Thus, removal of guardianship under the General Scheme would appear to result in the complete and irreversible extinguishment of one's status as their child's guardian, which is highly problematic in the case of constitutionally protected married parent-guardians and all mother-guardians.**[7]

However, further confusion arises because Head 2 (inserting section 6G (6) (a) into the 1964 Act) also states that the court order removing a person's guardianship may 'specify the period for which it shall remain in effect'. This is not consistent with the concept of removal, moreso with suspension or restriction of guardianship. Removal of guardianship is an irreversible measure, hence why the statutory threshold for removal in the case of unmarried fathers and other guardians is so high under section 8 of the 1964 Act. Further, if Head 2 does not intend for the removal of guardianship to be synonymous with extinguishment, then why does it prohibit a convicted guardian from making an application seeking to re-acquire the status of guardian (if it is only in abeyance for a certain period specified by the court, as suggested by section 6G (6) (a)) under the abovementioned sections 6A, 6C, 6F or 8 of the 1964 Act?

The General Scheme is confused and contradictory, and confuses the concepts of parentage and guardianship (not every parent is a guardian) and in some instances it uses the language of remove/removed when apparently referring to restriction or suspension of guardianship.

<u>Other Observations On, and Recommendations Regarding, the General Scheme:</u>

- For married parents and mothers, parentage and guardianship are synonymous.[8] Mothers and married parents automatically acquire the status of parent *and* guardian upon the birth of their child(ren). Although the need to prevent parent-guardians convicted of heinous crimes against their child(ren)'s other parent-guardian from

[7] While section 12 of the 1964 Act allows for the 'discharge' of any order made under Part II of the Act, including an order removing a guardian, this author is not aware of any instance in practice where an order for removal has been discharged; further, the effect of such a discharge by the court is difficult to contemplate because does this mean the 'removed' guardian is automatically reinstated as a guardian? Was the status of guardian removed from them at all, or was their guardianship in fact merely restricted?
[8] This is also true of married female same-sex parents who have complied with the DAHR provisions of the 2015 Act when a child is born to them via DAHR.

exercising their guardianship rights is pertinent, this can be done in a proportionate, constitutionally sound manner, without stripping such constitutionally-protected parent-guardians of the status of guardian that is intertwined with the status of parent.

- Head 2 (inserting section 6G (8) into the 1964 Act) incorrectly refers to the 'rights and responsibilities referred to in subsection 5' when it should instead be 'subsection 7'. Question: should a court-appointed guardian, most likely replacing a convicted parent-guardian in circumstances where the child's other parent-guardian is deceased, be given such an extensive power as to subsequently be able to solely place and consent to the adoption of a child from a married family? (see the proposed section 6G (8) (f)).

Victims and Prisoners Act 2024 and Prohibited Steps Orders

In England and Wales, Parental Responsibility (PR) is the legal equivalent of guardianship. Geoffrey Shannon observes that 'effectively there is no practical difference between this concept and the concept of guardianship'.[9] **The law is identical in that a married or civil partner parent's (and any mother's) Parental Responsibility cannot be removed by a court, but an unmarried father's Parental Responsibility can.**[10]

In England and Wales, section 18 of the Victims and Prisoners Act 2024 amended the Children Act 1989 through the insertion of sections 10A and 10B.[11] section 10A of the 1989 Act provides that where a parent who has parental responsibility for the child is convicted of the murder or manslaughter of the other parent, the Crown Court must make a **Prohibited Steps Order** when sentencing the offender.[12] The Prohibited Steps Order must "specify that no step of any kind which could be taken by a parent in meeting their parental responsibility for a child may be taken by the offender with respect to the child without the consent of the High Court or the family court" and "be made to have effect until the order is varied or discharged by the High Court or the family court".[13]

This is preferable to the approach adopted in the General Scheme, because the 2024 Act does not use the language of 'remove/removed', but instead *prohibits* a parent from exercising their parental responsibility (guardianship). **Thus, the convicted parent retains the *status* of being a holder of parental responsibility (guardian) but the Prohibited Steps Order prohibits them from *exercising* their parental responsibility (guardianship).** This strikes an appropriate

[9] See Geoffrey Shannon, *Child Law, Second Edition* (Dublin: Thomson Round Hall, 2010) 726. Indeed, in 2010 the Law Reform Commission recommended, in its *Report on the Legal Aspects of Family Relationships* (LRC 101-2010) that the term 'guardianship' used in Irish legislation be replaced with the more child-centric terms 'parental responsibility' in any future legislation. However, the term 'guardianship' was later constitutionalised when the Children's Amendment, Article 42A, was inserted.
[10] See section 4 (2A) of the Children Act 1989.
[11] These amendments are not yet in force.
[12] See section 10A of the Children Act 1989, as inserted by section 18 of the Victims and Prisoners Act 2024. This amendment is not yet In force.
[13] Ibid.

balance between protecting children from damage to their welfare as it prevents a convicted parent-guardian from remaining as a guardian, while also ensuring that the status of guardian is not removed entirely from such a parent-guardian, respecting the broader need to preserve the constitutional position of married parents/mothers. However, the ability to exercise parental responsibility can be restored, in whole or in part, through review leading to discharge or variation of the Prohibited Steps Order by a court, even in the context of a parent convicted of murder or manslaughter of the other parent.

In particular, where a parent is acquitted on appeal of the murder or manslaughter of the other parent, the relevant local authority at the time the verdict of acquittal is entered must make an application to the court to review the Prohibited Steps Order: see section 10B (4) of the Children Act 1989, as inserted by section 18 of the Victims and Prisoners Act 2024. In the General Scheme, there appears to be no obligation on the Child and Family Agency to apply to the court for any review of an order made under the proposed section 6G (4) in identical circumstances, which should be reconsidered.

Ireland is not alone as regards the irrevocable legal privilege it accords to married parents. The law in England and Wales does not permit Parental Responsibility (guardianship) to be removed from married parents and mothers either. In our neighbouring jurisdiction an 'overall social policy aim of affording priority to marriage and civil partnership in the community as a whole' was put forward by McFarlane P in *Re A (Power to Revoke Parental Responsibility)*.[14] For McFarlane P, 'affording priority to the establishment, and maintenance, of stable family life by commitment through marriage or civil partnership is what it is all about'.[15] Thus, for McFarlane P, registered relationships like marriage and civil partnership are legitimately deserving of irrevocable rules surrounding the acquisition of parental status and rights because of their overall benefit to society at large. Nonetheless, despite its inability to remove Parental Responsibility from a married parent, McFarlane P felt that 'the court can provide practical protection by making a prohibited steps order'.[16] Therefore, while McFarlane P acknowledged that the courts were powerless to remove the *status* of holding Parental Responsibility from the married father in this case:

'…the fact that the status remains does not mean that the ability of a court to make orders removing that status of all value is not an adequate remedy. In terms of protecting the mother and children from any future involvement of the father in their lives, the orders made in this case and similar cases is, indeed, an adequate remedy. The remaining status of being a holder of parental responsibility is but an empty vessel…'[17]

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[14] *Re A (Power to Revoke Parental Responsibility)* [2023] EWCA Civ 689, at [99].
[15] Ibid [101].
[16] Ibid [99].
[17] *Re A (Power to Revoke Parental Responsibility)* [2023] EWCA Civ 689, [96]; see also *Re B and Another (Change of Names: Parental Responsibility: Evidence)* [2017] EWHC 3250 (Fam).

Although rare, these sweeping Prohibited Steps Orders assist the courts in the UK in difficult cases involving married parents (even those that do not involve domestic homicide) where removal of Parental Responsibility is not an option.

Arguably, there is a constitutional justification and necessity for this policy approach in Ireland, where 'the State pledges itself to guard with special care the institution of marriage, on which the family is founded, and to protect it against attack' under Article 41.3.1. Indeed, given that the Thirty-Ninth Amendment to the Constitution was overwhelmingly rejected by the electorate in 2024, with 67.69% voting 'no', this constitutional pledge to protect only the married family unit remains firmly in place. The reasons for the failure of the Thirty-Ninth Amendment are likely to be many, varied and complex, but it is not unreasonable to surmise that the importance of marriage to the Irish electorate should not be under-estimated.[18] Thus, it is submitted that the version of the Prohibited Steps Order recently introduced in England and Wales via the provisions of the Victims and Prisoners Act 2024, could equally be introduced into Irish law under the legislation that ultimately results from the General Scheme. By restricting rather than removing guardianship, and with its built-in safeguards, this could represent a proportionate and constitutionally viable means of addressing concerns surrounding the ability of convicted parent-guardians to exercise guardianship rights over their children following conviction for serious offences.[19]

Section 6 or 8 of the 1964 Act could be amended to provide for the making of a sweeping Prohibited Steps Order by a court in those cases where a parent-guardian has been convicted of the murder or manslaughter of their child(ren)'s other parent-guardian, with appropriate legislative safeguards in place to protect the rights of the offender and the affected child(ren). **Given the extremely serious and difficult circumstances in which such a sweeping Prohibited Steps Order might be made, and the fact that it would reduce the exercise of guardianship to vanishing point, it is arguable that an Irish court, when considering the best interests of the child/having regard to all the circumstances, should place particular weight on ascertaining the views of the child, where possible.[20]**

Suggestion: all references to 'remove/removed/removing' in the General Scheme should be removed (pun intended) and replaced by the language of 'restrict/restricted/restricting', 'prohibit/prohibited/prohibiting' or 'suspend/suspended/suspending' to ensure the constitutional viability of the ultimate legislation.

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[18] However, there was also significant public confusion surrounding the concept of 'durable relationships': see 'Editorial: Referendum confusion is Government's fault' Irish Independent, 3rd March 2024, at https://www.independent.ie/irish-news/referendums/editorial-referendum-confusion-is-governments-fault/a671129585.html.

[19] See sections 10A and 10B of the Children Act 1989, as inserted by section 18 of the Victims and Prisoners Act 2024. These sections are not yet in force.

[20] The proposed section 6G (9) (d) does provide for 'the views of the child' to factor into the court's decision whether to make an order removing a person as a guardian.

The General Scheme or subsequent Bill should propose to amend s.5 (3) of the 1964 Act, which deals with jurisdiction in guardianship matters, by substituting 'to appoint, restrict/prohibit/suspend or remove' for the existing language of 'to appoint or remove'. Obviously, any one of the three choices of 'restrict/prohibit/suspend' would suffice here.

The legislation would proportionately achieve the dual goal of respecting and preserving the constitutional rights of married families while restricting/prohibiting/suspending the exercise of the specific right of guardianship in cases of domestic homicide or other serious offences by guardians that result in the incapacitation of another guardian of the child, where this is in the best interests of the child.

Finally, Article 42A (the 'Children's Amendment') supports legislation that tempers (but does not remove) the rights of married parents under Article 41, because Article 42A.4.1 requires that '*provision shall be made by law* that in the resolution of all proceedings…concerning the adoption, guardianship or custody of, or access to, any child, the best interests of the child shall be the paramount consideration'.[21] Article 42A.4.1 specifically mandates that the State 'shall' ensure via legislation that this principle is the main consideration in, *inter alia*, guardianship proceedings. This constitutionally required policy shift in favour of the best interests test was given effect to in section 45 of the Children and Family Relationships Act 2015, which inserted a new section 3 into the Guardianship of Infants Act 1964, and with it a statutory requirement that in any proceedings before any court, where, among other things, guardianship of a child is in question, a court, in deciding that question, shall regard the child's best interests as the paramount consideration. It is reassuring to see that the proposed section 6G (9) (a) requires the court, in deciding whether to make an order under section 6G, to have regard to the best interests of the child in accordance with section 3 of the 1964 Act.

Therefore, in light of the language of Article 42A.4.1*,* it would appear to be constitutionally sound for the Oireachtas to enact legislation making Prohibited Steps Orders (or an appropriately-named Irish equivalent) part of Irish law (even in private family law disputes that do not involve domestic homicide/serious offences), with the best interests of the child being the paramount consideration for the court, irrespective of the parents' marital status, in resolving these guardianship-related legal proceedings in a proportionate, child-centric manner that permits the restriction/suspension/prohibition of *any* parent's right to exercise guardianship, subject to review by the court at a later date.

Legislation that would temper (somewhat) the rights of married parents where this is in the best interests of the child would be consistent with the Supreme Court's pronouncement in *Re JJ*, that 'the Constitution has, since 1937, affirmed the central importance of the Family', but also that the Children's Amendment, Article 42A 'is an emphatic statement of the rights

[21] Emphasis added.

of the child'[22] which effected a 'wide-ranging, though subtle, change to the posture of the Constitution in relation to child and family matters'.[23]

I hope that this written submission is clear and concise, and I am at the committee's disposal should its members wish to consult with me further.

Dr Brian Tobin,
4th June 2025.

<u>See further:</u>

Brian Tobin, "Restricting the Guardianship Rights of Parent-Guardians: The Case for Prohibited Steps Orders" (2025) 45 (1) *Dublin University Law Journal* (forthcoming, July)

(Interview by Connor Beaton with Dr Brian Tobin on Constitutionality of 'Valerie's Law')
https://www.irishlegal.com/articles/warning-over-constitutionality-of-valeries-law-plan

(Op-Ed on 'Valerie's Law' by Dr Brian Tobin)
https://www.irishexaminer.com/opinion/commentanalysis/arid-41591332.html

Appendix 1 – Guardians who can be removed by the court under the 1964 Act

Section 8 (6) of the 1964 Act, as inserted by section 51 (b) of the 2015 Act, enables the court to remove the following persons as guardians: testamentary guardians appointed by will or deed under section 7 of the 1964 Act, unmarried fathers appointed under section 6A of the 1964 Act, step-parent guardians/family member guardians appointed under section 6C of the 1964 Act, any other guardian appointed by the court under sections 8 (1) or (2), unmarried fathers who acquired guardianship via a statutory declaration with the mother (see section 2 (4) of the 1964 Act), and unmarried fathers who acquired guardianship via cohabitation with the mother (see section 2 (4A) of the 1964 Act), persons who acquired guardianship or equivalent rights and responsibilities in another state (see section 6D of the 1964 Act), and unmarried parents of children born via DAHR who acquired guardianship via a statutory declaration with the mother under sections 6B (2) & (4) of the 1964 Act, and unmarried parents of children born via DAHR who acquired guardianship via cohabitation with the mother under sections 6B (2) & (3) of the 1964 Act.

[22] Ibid., [131].
[23] *Re JJ* [2021] IESC 1, [130].