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THE HIGH COURT

[2004 No.19616 P.]

BETWEEN

KATHERINE ZAPPONE AND ANN LOUISE GILLIGAN
PLAINTIFFS

AND

REVENUE COMMISSIONERS, IRELAND AND THE ATTORNEY GENERAL
DEFENDANTS

AND

THE HUMAN RIGHTS COMMISSION
NOTICE PARTY

Judgment of Ms. Justice Dunne delivered on the 14th day of December, 2006

The plaintiffs in this case are women who are Irish citizens and domiciled in this jurisdiction. They have lived together as a co-habiting couple in a lesbian relationship since their relationship began in 1981. Since 1983 they have lived together in this jurisdiction. The first named plaintiff is a Public Policy Research Consultant and a member of the Human Rights Commission. The second named plaintiff is an academic who works as a lecturer in St. Patrick's College Drumcondra.

On the 13th September, 2003, the plaintiffs married one another in Vancouver, British Columbia, Canada. In Canada recognition has now been given to same sex marriage. One of the issues in this case relates to the validity of that marriage in terms of Canadian law but more particularly in terms of Irish law. A number of statements of evidence were submitted to the court by the parties proffering different views on the validity of the marriage in Canada. Assuming that the marriage is regarded as valid in Canada, the question of the recognition of that marriage in this jurisdiction becomes an issue and if it is not entitled to recognition in this jurisdiction, then, the plaintiffs claim a right to marry in this jurisdiction. Throughout this judgment I will refer to the marriage of the plaintiffs as such – by doing so I do not purport to imply any conclusion as to its status either in terms of Canadian law or Irish law.

Subsequent to their marriage, the plaintiffs' solicitors wrote by letter dated 28th April, 2004, to Oifig an Ard-Chláraitheora seeking confirmation that their marriage was legally binding in Ireland. The response by letter dated 10th May, 2004, was: "the remit of the Registrar General does not extend to making a declaration on the validity of marriages that occur outside the State. This is a matter for the courts under s. 29 of the Family Law Act 1995."

A letter was also written by the plaintiffs to the first named respondents, the Revenue Commissioners, on 26th April, 2004. That letter requested that the plaintiffs should be able to claim "our allowances as a married couple under the Taxes Consolidation Acts." Enclosed with the letter was a certificate of marriage, an affidavit of Kenneth W. Smith, a Canadian barrister and solicitor, which dealt with capacity to marry in Canada and the validity of the marriage in Canada. The Revenue Commissioners responded by letter dated 1st July, 2004. It set out the effect of s. 461 of the Taxes Consolidation Act 1997. It went on to state as follows:-

"Section 1017 TCA 1997 provides for a husband being assessed on his and his wife's total income. Section 1019 provides for a wife being assessed on her and her husband's total income. The Taxes Act do not define husband or wife. The Oxford English Dictionary offers the following:

Husband – a married man especially in relation to his wife.
Wife – a married woman especially in relation to her husband.

Revenues interpretation of tax law is that the provisions relating to married couples relate only to a husband and a wife. Therefore I cannot allow your clients for allowances as a married couple."

Following the decision of the Revenue Commissioners, the plaintiffs herein sought leave to apply for judicial review in respect of that decision. The application for leave to apply for judicial review was granted by the High Court (McKechnie J.) on 9th November, 2004. The order directed the applicants to serve a plenary summons and statement of claim together with copies of the statement of grounds and verifying affidavit and of the order of the High Court on the Revenue Commissioners and the Attorney General. Thus the matter ultimately came on for hearing before the High Court by way of plenary proceedings on 3rd October, 2006.

In their pleadings, the plaintiffs referred to a number of provisions of the Tax Code and pointed out that they would benefit financially under the Tax Code, if recognised as a

married couple living together. Alternatively they say that they are disadvantaged financially in Irish tax law through the lack of recognition for their marriage. It is further pleaded that although the words married persons, spouses, husband and wife are used in the various tax legislation referred to by the plaintiffs, no definitions for any of these terms are contained in the Tax Code. It is also pleaded that there is no definition of married persons so as to exclude persons of the same sex. It is pleaded that the defendants wrongfully and in breach of the plaintiffs' constitutional rights interpreted tax law to mean that the provisions relating to married couples relate only to husband and wife. It is further pleaded that in their interpretation of tax law and the refusal to treat the plaintiffs as a married couple the defendants acted without lawful authority, subjected the plaintiffs to unjust and invidious discrimination and acted in breach of the constitutional rights of the plaintiffs under Article 40 and 41 of the Constitution with particular reference to the provisions of Article 40.1, Article 40.3.1, Article 40.3.2, Article 41.1, Article 41.3.1 and Article 43. The plaintiff seek to have the relevant provisions of the Tax Code declared invalid having regard to the provisions of the Constitution if as interpreted they confine tax benefits to marriages consisting of husbands and wives and exclude same sex marriages. Alternatively reliance is placed on the provisions of the European Convention on Human Rights and it is pleaded that in failing to recognise the marriage of the plaintiff and to apply the provisions in tax law relating to married persons to the plaintiffs as a married couple that the defendants have discriminated against the plaintiffs on the grounds of their gender and/or sexual orientation in breach of article 14 of the Convention and have violated their right to respect for their private and family life and their right to marry under articles 8 and 12 of the Convention. Various reliefs are then sought in furtherance of the matters claimed in the statement of claim.
The defence delivered herein was to a large extent a traverse of the plaintiffs' claim together with a plea that the legislative provisions and the acts and wishes of the defendants which are impugned herein are required by and/or valid having regard to the provisions of the Constitution of Ireland and the defence goes on to particularise the specific provisions relied on in this regard.

The Evidence

Katherine Zappone outlined her background, her meeting with Anne Louise Gilligan and the commencement of their relationship. She described how they exchanged "life partnership vows" with one another in October, 1982, in Rockport, Massachusetts. Subsequently they came to Ireland and have lived here together since then. On November 27th, 1995, she acquired Irish citizenship.
Dr. Zappone then outlined her concerns about the taxation implications in respect of the sale of any property they owned and in particular her concerns in relation to the taxation implications in the context of the death of one or other of them. She pointed out that she herself didn't have any pension provision. For that reason a second property was bought by the plaintiffs and intended to be a resource for her pension. She pointed out that because their marriage was not recognised the survivor would suffer a significant tax liability as compared to the survivor of a heterosexual married couple. She expressed a concern that a gift to her from Dr. Gilligan of an S.S.I.A. which had recently matured could carry tax implications for her.

Dr. Zappone was then asked about the circumstances in which she and Dr. Gilligan decided to go to British Columbia to get married. She pointed out that the social context was changing with regard to the understanding of the normality of her sexual identity. She opined that lesbian and gay people started to seek the same right to marry that heterosexuals had enjoyed. She said that the rights, responsibilities and benefits and obligations that come with the institution of marriage are extremely diverse and varied but within those obligations she described those as being to care for Dr. Gilligan in sickness or in health, to be faithful to her for the rest of her days and to live together as a couple. Although she said that at this point in their lives the issues relative to taxation and financial security had become more important they were secondary to the desire to make a life commitment to her partner and consequently to marry her. She pointed out that apart from some practical reasons of convenience the reason for choosing to get married in British Columbia was because that was the only place where they could marry as there was not a requirement for citizenship or for residency prior to marriage. She then gave evidence as to the correspondence with the Registrar General and with the Revenue Commissioners. As reference has already been made to that correspondence, it is not necessary to set it out again. She indicated her disappointment with the response of the Registrar General and her view that the lack of an opportunity to marry in this jurisdiction amounted to discrimination on the basis of her sexual identity. In relation to the correspondence from the Revenue Commissioners she indicated that she also experienced a sense of great discrimination. As a result of that correspondence it was decided by the plaintiff to take legal proceedings on the basis that they had experienced discrimination by virtue of the failure to recognise them as a married couple. She said that in the past Dr. Gilligan had suffered from breast cancer and accordingly she, Dr. Zappone, ceased working for a period of time to care for her partner. She pointed out the difference in tax benefits for a married couple in circumstances where one ceased, for whatever reason, to work for a period of time and someone in the position of the plaintiffs herein who would not benefit from the same tax regime. She confirmed that the proceedings were commenced in order to get recognition of what she described as her legally valid solemnised marriage in Vancouver, British Columbia. In the circumstances that the State declined to recognise that marriage the decision was made to commence these proceedings.

Dr. Zappone was then cross examined and she confirmed that as a result of legal changes in British Columbia the plaintiff made a decision to obtain legal recognition for their life partnership in British Columbia. They obtained legal advice from Mr. Kenneth Smith, a Canadian barrister and solicitor after their marriage there. They did not get legal advice in this jurisdiction prior to the marriage.
Before the marriage she had looked at the internet and at a document entitled “How to get married in British Columbia”. She saw the part of that document which advised that it was not necessary to be a British Columbia resident in order to be married there. She noted that the licence to marry was only valid in British Columbia. She didn’t see the part of the document that stated:-
“If you are coming to B.C., to get married, please contact the appropriate authorities in the jurisdiction where you are a resident to determine whether your marriage will be recognised.”

She was then questioned as to how the response of the Registrar General to the effect that the question of the validity of a marriage was one for the courts and not for that office amounted to discrimination. Notwithstanding her evidence that she experienced the response as discrimination she accepted that her solicitors did not subsequently take issue with the Registrar General as to whether the Registrar General could deal with such issues.

Dr. Zappone confirmed that she became aware of the Civil Registration Act, 2004, during the course of these proceedings. She indicated that she is now aware of the specific provisions of that Act to the effect that there is an impediment to a marriage if both parties are of the same sex.

She was further asked about her reaction to the response of the Revenue Commissioners to the correspondence referred to above. She confirmed that she did not think the reasons given in that correspondence, saying that the relief contained in the Taxes Consolidation Act were applicable to heterosexual married people only and not otherwise, was very satisfactory.

Dr. Zappone was then asked in some detail about changes in the situation of gay and lesbian people brought about through the political process and in particular by means of legislation protecting rights and ensuring no discrimination. She accepted that since the decriminalisation of homosexuality 13 years ago, that there was strong anti-discrimination legislation although she was of the view that certain aspects of equality legislation did not protect the plaintiff particularly in the light of the action they were currently embarked upon.

She was then asked briefly about the nature of these proceedings and she confirmed that the case as it started off originally sought the recognition of the Canadian marriage. (I should note that at this stage there was some discussion between Counsel as to whether or not part of the original relief sought in the judicial review proceedings included the right to marry in this jurisdiction. I will come back to that point later).

Dr. Zappone was then asked about the consequences of her proceedings in the event that she was successful. It was pointed out that amongst the reliefs sought was the striking down of various provisions of the Taxes Consolidation Act of 1997. She indicated that her understanding was that if those provisions were struck down on the basis that they are unconstitutional if they did not include the right to same sex marriage that they would be re-introduced with the inclusion of same sex couples. She conceded that she and Dr. Gilligan are not treated any differently in relation to taxation provisions from heterosexual cohabiting couples that were not married. She agreed that in 1937 when the institution of marriage was given constitutional protection the consensus as to what marriage involved was a marriage between people of the opposite sex. She believed that the view of society at that time was that homosexuals were of an inferior status and in that context were not allowed to participate in the institution of marriage. It was her belief that that view has now changed in that there is now a stronger consensus in relation to the acceptance of the normality of the sexual identity of people who are homosexual. Over time the understanding of marriage has changed and therefore the law has changed to reflect that. She expressed the view that in terms of recognising same sex marriages that the attitude or consensus as to same sex marriage is changing. Nonetheless she accepted that, although there had been changes in the law such as the Employment Equality Act in 1998 and the Equal Status Act in 2000 in terms of protecting the rights of individual gay

and lesbian people, the Civil Registration Act in 2004 imposed a statutory impediment to same sex marriage notwithstanding the changes in relation to the law for the purpose of bringing about greater protection against discrimination. She accepted that a Bill sponsored by Senator Norris was presented to the Houses of the Oireachtas in relation to civil partnership but she did not think that the same had any relevance to the facts of this case. Finally she accepted that the statistics from the 2002 census indicated that there were 77,000 cohabiting couples and approximately 1,300 of those are gay cohabiting couples.

Dr. Ann Louise Gilligan then gave evidence. She described her background. Her evidence did not differ in any material respect and thus it is not necessary to set it out. Following her direct evidence, Dr. Gilligan was not cross examined by the State.

The evidence of Dr. Zappone and Dr. Gilligan was not challenged to any significant extent. The only point to note was the concession made by Dr. Zappone that there is no difference in the tax treatment of cohabiting couples who are either heterosexual or homosexual.

At that stage it was agreed by counsel for the defendants that a witness statement from Mr. Cremins of Price Waterhouse Coopers in relation to taxation matters could be handed in to the court. The purpose of the report was to deal with the taxation issue raised in the case. The report was then submitted in evidence subject to one matter which was under discussion between the parties and upon which clarification may have been required. This was subsequently dealt with. The report was written into the court record without being read out in full. The summary of the report noted that whilst the income tax regime does not hold an immediate identifiable disadvantage for the plaintiffs in their current circumstances capital gains tax capital acquisition tax and stamp duty regimes could do. He pointed out that current capital gains tax, capital acquisition tax and stamp duty legislation impact adversely on the ability of one plaintiff to provide for the other plaintiff in the case of their death or as the case may be if the relationship were to break down, in comparison to a married heterosexual couple.

Professor Henry Kennedy, a Consultant Forensic Psychiatrist who is the Clinical Director of the Central Mental Hospital and Professor of Forensic Psychiatrist at Trinity College Dublin then gave evidence. In addition to his oral evidence a report was also furnished by Professor Kennedy. He noted that in all eras and all cultures, homosexuality has been described. At times homosexuality was unremarked upon and open and at other times a repressed manifestation associated with particular consequences of that such as being a sub-culture. The Napoleonic code decriminalised homosexuality at a time when it was not decriminalised in England and that in countries which adopted the Napoleonic code, generally, homosexuality was decriminalised. He pointed out that psychiatry and medicine became involved in homosexuality and its consideration because psychiatrists were called upon to provide evidence in mitigation or defence of those charged with homosexual offences which carried extreme penalties.

Asked to consider the past 30 years in terms of the modern view of homosexuality he described the work of the Wolfenden Committee in the United Kingdom and stated that it was informed by the psychiatric opinion of its day and took the view that the function of the law was not to intervene in the private lives of citizens. It defined the role of law in relation to sexuality thus:

"to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced or in a state of physical or economic dependents" …
and he went on to quote that it was not "the function of the law to intervene in the private lives of citizens". He noted that the American Psychiatric Association statement in 1973 was of a similar view as to homosexuality. Its diagnostic and statistical manual for what counts as a mental illness or mental disorder dropped homosexuality from the classification as a mental illness or disorder. This followed a review of scientific literature and consultation with experts in the field which found that homosexuality does not meet the criteria to be considered a mental illness. In 1992 the American Psychiatric Association noted:-
"Whereas homosexuality per se implies no impairment in judgment, stability, reliability or general social or vocational capabilities, the American Psychiatric Association calls on all international health organisations and individual psychiatrists in other countries to urge the repeal in their own country of legislation that penalised homosexual acts by consenting adults in private. And further the APA (American Psychiatric Association) calls on these organisations and individuals to do all that is possible to decrease the stigma related to homosexuality wherever and whenever it may occur."
Although homosexuality is no longer considered to be a mental illness or mental disorder, the stigma attached to it by social discrimination gives rise to mental illnesses in those who are subject to that stigma or discrimination. He commented that homosexuality is a feature of the human condition just as one can be young, old, right handed or left handed. It is an aspect of normality. He referred to the past when attempts were made to provide treatments, so called, to cure homosexuality. He pointed out that there is scientific literature showing that none of those treatments succeeded and he added that one would now say they did not succeed because there was not anything capable of being changed. He noted that in psychiatry there was now an awareness of the distinction between stigma and disability. The social perception of homosexuality is such that stigma attaches to homosexuality. He added that that stigma can give rise to distress shame, embarrassment and loneliness. In turn those reactions to the stigma can cause illnesses such as depression and anxiety. He quoted in particular from the Oxford Textbook of Psychiatry which offers an authoritative statement of the relationship between homosexuality and psychiatric disorder as follows:-
"Most homosexual men are as contented as heterosexual and have a stable relationship with a partner. For others, homosexuality can lead to difficulties at several times of life. In adolescence there may be distress as sexual orientation is recognised for the first time, and a decision has to be made as to whether to follow or suppress homosexual feelings. With the approach of middle age, sexual partnerships may become difficult to arrange; there may be loneliness and depression if a man does not have other relationships built on friendship. A few middle aged homosexuals find it increasingly difficult to obtain sexual partners of their own age, and so turn towards younger homosexual prostitutes. It is exceptional for these men to turn to pre-pubertal children. Homosexual men vary in personality as much as heterosexual men. In homosexual men (as in heterosexual men) disorder of personality is more likely to lead to difficulty with other people or with the

law, and more likely to lead to referral to a psychiatrist" (Oxford Textbook of Psychiatry, 3rd Edition 1996, p. 483).
Professor Kennedy went on to note that the consequence of any form of stigma and discrimination is the imposed limitation and adversity which can give rise to mental illness. He summarised his views by saying that from his point of view as a psychiatrist he found it useful to compare what he described as the rights perspective and the health perspective. From a rights prospective, inequality and discrimination lead to material adversity in careers and many other aspects of citizenship and social inclusion. These imposed handicaps, this stigma, lead to economic loss and they also lead to marginalisation and loss of social supports. These adversities which arise from inequality and discrimination have both direct and indirect effects on mental health. He went on to add that the direct effects of inequality and discrimination on mental health arise from adverse life events and difficulties and these are well established by research evidence as both the causes and the continuing factors for mental illness particularly depression. The indirect effects of inequality and discrimination leading on to mental illness arise from stigma and from denial of identity. Stigma leads to shame and loss of self esteem. He described this as a vulnerability factor for mental illnesses. He explained that in societies where there is stigma and discrimination, it is common for sub-cultures to arise as the only means of expressing openly the identity, in this case the homosexual identity, and with that goes the necessity of hiding the identity in broader society. It is that which gives rise to a continuing source of stress, distress and ultimately to mental illness.
In cross examination he agreed with counsel for the defendants that the effect of stigma that he described are the general effects of stigma or discrimination that might have effect on heterosexuals as well as homosexuals. In other words any form of discrimination or stigma could have those effects.
The next witness who gave evidence was a Professor Daniel Maguire, a professor of moral theological ethics at Marquette University, a Catholic Jesuit institution in the United States. Professor Maguire is a theologian. His evidence was admitted for a very limited purpose. It did not advance the Plaintiffs' case to any extent. For that reason I do not propose to refer to it again.
Following the evidence of Professor Maguire there was some discussion about the statement of evidence of Dr. Evelyn Mahon as to figures available from the census and other demographic information. That statement was handed in. An appendix setting out the position in other E.U. countries relating to the issue of recognition of same sex marriage together with the issue of recognition of civil partnerships was included with that statement.
Professor Richard Green then gave evidence. He is a psychiatrist and lawyer. He was asked to deal with the issue as to whether or not there was evidence to show that the children of a same sex couple or raised by a same sex couple are any worse off from an emotional or any other relevant perspective than they would be compared to children raised by heterosexual couples. He had prepared a written report setting out findings from studies he himself had conducted and other studies in this area. His evidence was to the effect that children raised by same sex couples are not disadvantaged in terms of their psychological development, their psycho-sexual development, their social relations and that the extent of positive effective parenting that they obtain from their parents is not significantly different from that of the male/female heterosexual couple. He outlined the

studies and research that have taken place in this area. Such research has now been ongoing for about 30 years. He himself published a paper in 1978. At the time, he assessed 11 boys and ten girls being raised by homosexual mothers. They were aged between five and 14 years and at the time of assessment they had lived with their lesbian mothers from between two and six years. Their psycho-sexual development was normal. Four of the children were old enough to report sexual interests in sexual partners and they recorded as being heterosexual. One of the concerns was to assess whether the children had been subjected to teasing by peers and three of the children had reported some teasing which had been of relatively brief duration. The other 18 children reported no teasing.

He conducted a further study with co-investigators in 1986, which was a study of lesbian mothers and their children compared to solo heterosexual mothers and their children. This study involved ten U.S. States and children aged between three and 11 years. There were 50 lesbian mothers and their 56 children and they were contrasted with 40 heterosexual divorced mothers and their 48 children. He pointed out that the mothers had lived as single parents for an average of four years. The majority of lesbian mothers lived with another female adult in addition to the children. He noted that with respect to peer group ratings of popularity there was no significant differences between the two groups of boys or the two groups of girls in the two family sets. No group differences were found on any indicators of the children's discontent with their own gender as boys or girls. On no measure of psycho-sexual development were any group differences found between the boys or girls in the two samples. He concluded that the quality of parenting by the parents of same sex couples or perhaps single mothers who were lesbian mothers did not have any significant difference as compared to the quality of parenting of heterosexual mothers and their children. He concluded that the findings of the study were that there was no evidence of detriment to the children or of compromised parenting to the children. He then referred to the findings from a longitudinal study carried out by Golombok and Others. Those involved were assessed in the mid 70's aged ten and reassessed 15 years later, in 1991/1992, aged on average 25. The conclusions of that study were that children from the lesbian mother families reported more positive relationships with their mother's female partners both as adults and during adolescents than the comparison group whose mothers had male partners. It was noted that if the mother had a stable long term same sex relationship at the time of the original study, the children were more likely to be accepting of their family background during their teenage years. Young adults from lesbian mother families were not significantly more likely than those from heterosexual backgrounds to report having been picked on by classmates although there was a small tendency to remember being teased about their own sexuality, particularly for the boys. However, he noted that the children were no more likely to report difficulty in bringing friends home and as a group they continued to experience good peer relationships. The conclusion of their researches with respect to the children's own sexual orientation was that there was no difference between the proportions of young adults who report at least some same sex attraction. Those from lesbian families were more likely to have had a same sex relationship; however 23 of the 25 were heterosexual.

He discussed the issue of the quality of mother child interaction. The study carried out by Brewaeys and Others, including Golombok reported on this issue in 1977. The children concerned were from lesbian mothers whose mothers did not have a male partner and

where the children had no contact with the biological father. These were pregnancies from donor insemination. The 30 homosexual mothers who were donor inseminated were compared with 38 heterosexual families. The children were aged eight years. The quality of mother/child interactions did not differ. The quality of interaction between the social mother, that is to say the lesbian mother's female partner, and the child was found to be superior to the father/child relationship in heterosexual families. Social mothers were regarded more as a parent than the fathers were. It was noted in that study that the children of lesbian mother families were well adjusted and their gender role development did not differ from the children in heterosexual families.

Professor Green then discussed the American Academy of Paediatrics Committee on psycho-social aspects on child and family health which reported their professional opinion on children of lesbian mothers in 2002. No substantial differences were found between the children raised by homosexual parents and heterosexual parents. It was noted that in the case of male homosexual parents, there were "more similarities than differences in the parenting styles of gay and non gay fathers". Lesbian mothers scored the same as heterosexual mothers in "self esteem, psychological adjustment and attitudes towards child rearing". None of the children had gender identity confusion, wished to be of the other sex or consistently engaged in cross gender behaviour. For older children in the study there were no differences in sexual attraction or self identification as homosexual. The children showed no differences in personality measure, peer group relationship, self esteem, behavioural difficulties or academic success. A number of other parts of that report were read to Professor Green and it may be helpful to quote those in full:

"A growing body of scientific literatures demonstrates that children who grow up with one or two gay and/or lesbian parents fare as well in emotional, cognitive, social and sexual functioning as do children whose parents are heterosexual. Children's optimal development seems to be influenced more by the nature of the relationships and interactions within the family unit than by the particular structural form it takes."

The summary at the end of the report states:

"The small and non representative samples studied and the relatively young age of most of the children suggest some reserve. However, the weight of evidence gathered during several decades using diverse samples and methodologies is persuasive in demonstrating that there is no systematic difference between gay and non gay parents in emotional, health, parenting skills and attitudes towards parenting. No data have pointed to any risk to children as a result of growing up in a family with one or more gay parents. Some among the vast variety of family forms, histories and relationships may prove more conducive to healthy psycho-sexual and emotional development than others."

The final sentence in the summary of that report stated as follows:

"Although gay and lesbian parents may not, despite their best efforts, be able to protect their children fully from the effects of stigmatisation and discrimination, parents' sexual orientation is not a variable that, in itself, predicts their ability to provide a home environment that supports children's development."

Professor Green noted that those passages accorded with his professional view as well. Finally Professor Green referred to an article in the Scandinavian Journal of Psychology by Anderssen and others, which was a review of studies published between 1978 and 2000 reporting on some twenty studies of children of lesbian mothers. The studies

concerned covered six hundred and fifteen children. They ranged in age from young childhood to adulthood. On outcomes of emotional functioning, sexual preferences, stigmatisation, gender role behaviour and behavioural adjustment, it noted that children raised by lesbian mothers did not systematically differ. They did not experience an adverse outcome.

Accordingly he summarised the situation by saying that there was great consistency in the findings from several studies conducted in the U.S., England and continental Europe spanning at least two decades. No clinically significant differences are found comparing boys and girls raised by lesbian mothers solo or with a female partner when compared with boys and girls raised by single heterosexual mothers or heterosexual mothers living with the father of their children. Sexual orientation data for the children do not differ. The quality of parenting between the groups is comparable. Peer group relations of the children, with minor exceptions, do not appear to be negatively impacted by the minority sexuality pattern of the children's mother. His overall conclusion was that studies of children being raised by gender or sexually atypical parents do not demonstrate adverse impact on the children. It is the quality of the parent/child relationship and not the typical versus atypical status of the parent that is the essential ingredient of effective parenting and the best interest of the child.

Professor Green was vigorously cross examined. He explained that the motivation for the research he had described was in part due to a recognition of the importance of family structure in terms of child welfare. The other motivation for the research carried out sprung from the fact the thirty years ago it was unusual for same sex parents or lesbian or gay parents to have children and to argue that they should be allowed to maintain the parenting relationship with their children. There was much more stigmatisation of homosexuality at the time, there was concern as to whether homosexuality was a mental illness and whether that might impact on children. There were other aspects that the behaviour of homosexual parents, which in many jurisdictions were then criminalised, would have an impact on the children concerned. Accordingly as there was concern about how the various influences would impact on the children, a number of investigators set about studying important parameters of the parent child relationship in terms of the child's development psycho-sexually and socially.

In terms of children's welfare one of the first issues to consider was the psycho-sexual development of children if one has a parent whose psycho-sexual development is atypical, in other words what impact would that have on the child or children. Accordingly one of the considerations was to measure the extent to which boys and girls would adopt conventionally boyish and girlish behaviour during childhood. For children who were old enough to acknowledge or experience their sexual orientation to male or female partners, it was examined whether those children would themselves be heterosexual, bi-sexual or homosexual. Various other criteria were used in measuring child welfare for the purpose of ascertaining the children's physical, mental and emotional health and development, such as the academic performance and levels of attainment of the children, the avoidance of crime and other forms of destructive behaviour and their functioning as adult in the areas of employment, citizenship and family formation. It was agreed that these were variables that might well be examined, though not necessarily in every single study.

Having identified various indicators that would be important to study in the context of child welfare, Professor Green accepted that there were indeed relevant indicators and that their importance would depend on the immediate focus of a particular research project.

He was cross examined extensively in relation to the methodology or scientific basis for carrying out the various studies referred to in his evidence. Without going into all of the detail, reference was made to the numbers involved in the types of studies carried out, the nature of those studies as to whether they were cross sectional studies or longitudinal studies, the nature of the indicators that were measured in the particular studies. In addition the manner in which the sampling for the various studies was done was examined. In this regard there was discussion as to the difference between probability sampling, snowball sampling and so on. It was put to Professor Green that there was controversy in the literature as to the ability to draw any meaningful conclusions at this stage of development as to the welfare effects on children growing up in lesbian households. Professor Green did not agree that there was such a degree of controversy, but accepted that there was a minority of those who wrote in this area who were of the view that it was too early to draw meaningful conclusions as to the welfare of children being brought up in households where the sexual orientation of the parents was homosexual. It was suggested that it was not appropriate to draw any long term reliable conclusion on the basis of the studies to date. The overall view of Professor Green was that there was such consistency in the various studies that the conclusions were reliable. He did not entirely agree with the proposition that there is a consensus amongst scientists who study family structures of the importance in terms of children's welfare of the presence of both biological parents. He agreed that that was important but was uncertain as to whether there was a consensus that that was the ideal family structure. Even if it was the consensus, he was of the view that that was not the relevant issue. The relevant issue is the quality of the parents. He pointed out that there was nothing guaranteed to promote a child's welfare simply by virtue of the presence of a mother and father in the home.

In re-examination, Professor Green was asked to refer to the report from the American Academy of Paediatrics. That report was a summary of research evidence on the topic of co-parent or second parent adoption by same sex parents. It noted at page 342 that

"The focus of research has been on four main topic areas. Investigators have concentrated on describing the attitudes and behaviours of gay lesbian parents and the psycho-sexual development, social experience and emotional status of their children"

The report noted that the small and non representative samples studied and the relatively young age of most of the children suggest some reserve and Professor Greene accepted that that was in essence the gist of the cross examination by Mr. Gallagher. The report went on to note

"The weight of evidence gathered during several decades using diverse samples and methodologies is persuasive in demonstrating that there is no systematic difference between gay and non gay parents in emotional health, parenting skills and attitudes towards parenting."

Having been referred to further studies, one of which entitled "Does the Sexual Orientation of Parents Matter?", was a critique of most of the research carried out in relation to the developmental outcomes of children raised by lesbian/gay parents,

Professor Green noted that that study was referred to by Golombok and Others in the Avon Study which he had described and in which it was stated:

"In a review of studies of children with lesbian parents, Stacy and Biblarz criticised researchers for down-playing any differences that had been identified between children in lesbian mother families and their counterparts in heterosexual homes. These authors concluded that children with lesbian parents do differ, particularly in relation to gender development. However by classifying studies and showing a difference, even in cases where this difference was true for only a small number of variables out of many and by failing to consider these curious differences that result from chance effects when large numbers of individual and variables are studied, these authors have over emphasised the differences that have been reported. In addition they make no distinction between core aspects of children's gender development such as gender identity and gender role behaviour on the one hand and children's attitudes, such as occupational preferences on the other. Instead, those authors treated children's attitudes towards gender related issues and the gender identity as equally important and meaningful indices of gender development. It is well established within the psychological literature that gender identity and gender role behaviour are relatively fixed and central to children's well being and self esteem, whereas attitudes are more open to parental influence and change."

It was Professor Green's conclusion in regard to those studies that the report of Stacey and Biblarz did not in any way compromise all the other research papers that have been published in the field. He did agree with one passage from the end of the Stacy and Biblarz study:

"Thus, while we disagree with those who claim that there are no differences between the children of heterosexual parents and the children of lesbigay parents, we unequivocally endorse their conclusions that social science research provides no grounds for taking sexual orientation into account in the political distribution of family rights and responsibilities."

That concluded the evidence on behalf of the plaintiff. At the opening of the case on behalf of the defendants, Mr. O'Donnell S.C. on behalf of the defendants handed in to the court a report entitled "Private International Law Affect of British Columbia Law" by a Professor Joost Blom, a Professor in the University of British Columbia. That report was submitted in evidence subject to the right of the plaintiff to submit further documentation by way of qualification. A discussion then ensued between the parties on the conclusions to be drawn from that report and from the position in Irish law in relation to the question of the validity and recognition of marriage where capacity is in issue. It was submitted by counsel for the defendants that the validity and recognition of the marriage where capacity is in issue is a matter where a court determines the issue according to the law of domicile. On that basis it was argued that there was no independent ground upon which the plaintiffs could succeed on foot of the British Columbian marriage as long as the law of Ireland is as set out in s. 2(2)(e) of the Civil Registration Act 2004, which precludes marriage by same sex couples. He submitted that the only basis upon which the plaintiffs could succeed is if they establish the right to marry which was the subsidiary claim made on their behalf in the submissions herein. In response Mr. Collins accepted that as it was clear that the plaintiffs did not have the capacity to marry under Irish law then for that reason, Irish law would not recognise the foreign marriage of the plaintiffs even if it was valid on every other ground and in every other respect, irrespective of what the position

may be under British Columbia law. For that reason he accepted that the argument about recognising the Canadian marriage is secondary to and dependant upon establishing first as a matter of Irish constitutional law or alternatively under the European Convention that there is a right to marriage that extends to same sex marriage. On that basis, the report from Professor Blom was received by the court.

Professor Patricia Casey was then called on behalf of the defendants. She is a well known Professor of Psychiatry at University College Dublin, and is attached to the Mater Hospital in Dublin. She described the fact that she had conducted considerable research on matters pertinent to her discipline. She explained that she had been involved in epidemiological research and surveys for a number of years. Epidemiological studies measure the prevalence and risk factors and outcomes of particular conditions. She indicated that she was very familiar with the methodology of conducting such large scale studies and to the significance which can be attached to the findings of such studies. She was then asked to comment on the evidence given by Prof. Kennedy. She agreed with his evidence to the effect that homosexuality is not a psychiatric illness and that it ceased being regarded as a psychiatric illness in the 1970's in America and in Europe. She commented that there is no definitive understanding of why it is that a minority of people are homosexual or bi-sexual. She referred to various theories as to why it should be so, but she observed that in truth nobody knows. She agreed with his evidence that where discrimination was present or experienced that it can have an effect on the psychiatric well-being of individuals. She accepted that that was so and that it was not something unique to homosexuals but was a reaction to discrimination generally. She referred to a number of studies in relation to the issue of discrimination as it contributes to emotional distress in the gay, lesbian and bi-sexual population and she commented that it was only one of the variables and that other variables also contribute, indeed sometimes contribute more, to such emotional distress.

Professor Casey was asked in more detail about the question of the methodology for conducting research. In this regard she was asked about an affidavit sworn in other proceedings by a Professor Steven Nock of the University of Virginia, which was relied on in two of the leading cases on same sex marriages in Ontario and in Vermont. Professor Nock is a sociologist in the United States and in the course of his affidavit he described the methodology of conducting sociological research and the conclusions that can be drawn from such research. Professor Casey explained that in the affidavit sworn by Professor Nock, he detailed in the first part of his affidavit the methodological approaches to be used in epidemiological research of the sort that is concerned with gay and lesbian parenting and the second part of his report dealt with individual studies published in that area and he critiqued each one pointing to the strength and weaknesses of the particular reports.

A long discussion then ensued as to the methodology involved in carrying out social research. The discussion ranged over probability samples, snowball sampling, cross sectional studies and longitudinal studies. There was an explanation as to the need for controls in relation to studies in order to avoid confounding factors. Reference was made to the study of which Professor Green was a co-author in 1986 in which it was noted that seventy-eight percent of the lesbian parents studied were living with a partner at the time and that only ten percent of the heterosexual mothers who were studied had partners living with them at the time. Professor Casey commented that this was an obvious

potential confounding factor for which one needed to have a control. It was also noted that so far as such studies have been conducted there appeared to be no studies conducted into the role of parenting by gay men.
Having referred to all of these matters, Professor Casey commented that the various studies cited by Professor Green do not meet the criteria required for good epidemiological studies. They did not use probability or random sampling, they were of small sample size by and large and there were confounding factors in some of the studies. Only one of the studies referred to was a longitudinal study. As a result she was of the view that one had to be very cautious in making broad generalisations about the findings of these studies in regard to the general population. A reference was made to the affidavit of Professor Nock to that effect and I quote:
"In my opinion the only accepted conclusion at this point is that the literature on this topic does not constitute a solid body of scientific evidence."
Having regard to the evidence as it now stands, she could not draw the conclusion that children were not affected by the consequences of a same sex partnership. She stated that the only conclusion she could draw is that we do not know and need studies that are more rigorous than those that are available at the moment. She also noted that the indicators of well-being referred to in the reports described by Professor Green appear to consist of a very limited range of well-being measures. She indicated that if one wanted to draw broader conclusions that there are many other matters that would require to be looked at than those which are dealt with in the various studies referred to.
Professor Casey was then cross examined. She confirmed that she herself had not carried out or published any studies on same sex relationships. She examined the studies referred to as a scientist who conducts similar types of research. Prior to giving evidence she had been furnished with the official journal of the American Academy of Paediatrics and the Nock affidavit together with a statement of Professor Green's evidence. She indicated further that she had read the Golombok Report namely the 1977 study and the 1986 follow on from that. She also referred to three studies which she described as being good studies on discrimination namely "The Midus Study" published in 2001 in the American Journal of Public Health, a study entitled "Mental Health and Quality of Life of Gays and Lesbians in England and Wales", King and Warner published in 2003 in the British Journal of Psychiatry and a study in relation to the health of people classified as lesbian and gay attending family practitioners in London published in 2006 in BMC Central, an on-line journal. Finally she referred to a study by Warner and King, (James Warner, McKeown and Griffin) entitled "Rates and Predictors of Mental Illness in Gay Men, Lesbians and Bi-sexual Men and Women" which were the results of a survey based in England and Wales and published in 2004 in the British Journal of Psychiatry. Three of those studies dealt with discrimination and the fourth study the last one, dealt with general health matters. It was an off-shoot of the other two studies by Warner and King and King and Warren. There was a general discussion of the findings of those particular studies.
She referred to the conclusions and comments made in the report referred to above in the American Academy of Paediatrics Publication to the effect that the weight of evidence gathered over the decades to the effect that there was no systematic difference between gay and non gay parents in emotional health, parenting skills and attitudes towards parenting and commented that her difficulty with that conclusion was not so much with

the conclusion as such but with the methodology of the studies upon which the conclusion was based. She disagreed with their conclusions because of the fact that she did not accept that the quality of the evidence on which that conclusion was based, was adequate, because there was only one longitudinal study referred to in that report. She was then asked about the conclusions contained in an article published in the journal of the American Psychological Association entitled "Legal Recognition of Same Sex Relationships in the United States" by Gregory M. Herek. Reference was made in the course of that particular article to the published data to the effect that same sex and heterosexual relationships do not differ in their essential psycho-social dimensions. It further noted that:

"that a parent's sexual orientation is unrelated to her or his ability to provide a healthy and nurturing family environment and that marriage bestows substantial psychological, social health and benefits. It is concluded that same sex children and their children are likely to benefit in numerous ways from legal recognition of their families and providing such recognition through marriage will bestow greater benefit and civil unions or domestic partnerships."

Having referred to the research the author of the article commented that it was necessary to note caveats on the interpretation and use of the research that have taken place in this area. One of the points made in the course of the article was the methodological constraint on empirical comparisons between same sex and heterosexual couples, Professor Casey agreed with that view. The second caveat identified by the author of that article related to the null hypothesis; the null hypothesis, consists of a statement that a certain population value (e.g. the percent of voters who will vote for candidate X) is equal to some given value. The author of that report added:

"A more realistic standard is the one generally adopted in behavioural and social research, namely, that repeated failures to disprove the null hypothesis are accepted provisionally as a basis for concluding that the groups, in fact, do not differ."

Having referred to these constraints, the author of that article went on, having pointed out the deficiencies in some of the individual studies concerned:

"This fact highlights the importance of examining the entire body of research rather than drawing conclusions from one or a few studies."

Professor Casey agreed with that view. The author of the article went on to say:

"In light of these caveats, the observed similarities between same sex and different sex couples are striking. Like heterosexuals, a large number of gay men and lesbians wanted to form stable long lasting committed relationships."

Much of the article written by Mr. Herek was put in detail to Professor Casey. However, she was not in a position to make much comment on the article and specifically was unable to comment on some of the studies described in that article, by virtue of the fact that she was not familiar with the same.

The attention of Professor Casey was then drawn to the study by Judith Stacey and Timothy Biblarz referred to above. In that article the two authors pointed out that the debate in the area of the sexual orientation of parents was to some extent polarised in that one side attempted to show that there was no difference between heterosexual and homosexual parents and the other side of the debate trying to show the converse. They concluded that it was necessary to carry out further study. Their comment was put to Professor Casey:

"Thus, while we disagree with those who claim that there are no differences between the children of heterosexual parents and children of lesbigay parents, we unequivocally endorse their conclusion that social science research provides no grounds for taking sexual orientation into account in the political distribution of family rights and responsibilities."

By way of response, Professor Casey indicated that there was not enough scientific work or research done and that there is not enough known about the effects of the new family styles on children to make such a huge leap at this point in time. Professor Casey was then taken through the four reports, she described as being good studies. There was some discussion as to the methodology employed in those particular studies.

In re-examination she was asked again about Professor Nock's affidavit and the reference in his affidavit to the null hypothesis and type two errors. Such an error was described in his affidavit as being where one falsely accepts the null hypothesis. In other words the null hypothesis is assumed to be true. She reiterated her view that it was difficult in relation to some of the studies to form firm conclusions given the relatively small samples involved and the methodology used. She was then asked to comment on a passage from the report by Mr. Herek to the following effect:

"Denying same sex couples the label of marriage – even if they receive all other rights and privileges conferred by marriage – arguably devalues and delegitimises these relationships. It conveys a societal judgment that committed intimate relationships with people of the same sex are inferior to heterosexual relationships and that the participants in the same sex relationship are less deserving of society's recognition than are heterosexual couples. It perpetuates power differentials whereby heterosexual have greater access than non heterosexuals to the many resources and benefits bestowed by the institution of marriage. These elements are the crux of stigma. Such stigma affects all homosexual and bi-sexual persons, not only the members of same sex couples who seek to be married."

Her comment on that passage was to the effect that it was an opinion based on a viewpoint, but she was doubtful if there was evidence to support that view. She described the statement as a campaigning statement rather than a scientific statement. Finally reference was made to a statement in Professor Green's evidence in respect of the Tasker and Golombok report which found an increased likelihood that children raised in lesbian families were more likely to have the same sex relationship. Reference was also made to the fact that there was no study in relation to families of gay men and on that basis it was put to her that there was some difference between families or between children raised in same sex relationships and those raised in heterosexual families. She agreed that that was so, but pointed out that the numbers involved in the Tasker and Golombok report was very small and she emphasised that there may be differences between families raised in a same sex relationship and those in a heterosexual relationship and that that possibility demonstrated all the more that bigger samples needed to be taken in respect of such research and further that such studies should be longitudinal studies. That concluded her evidence.

The final witness called on behalf of the defendants was Professor Linda Waite. She is the Lucy Flower Professor in Urban Sociology in the University of Chicago. Her main area of research and study is the family. She has studied marriage as a social institution

and has studied it in the context of co-habitation, divorce, working families and aging families. As a result of her studies and research on the family structure and the institution of marriage in the context of heterosexual marriage she has concluded that the evidence overwhelmingly supports the conclusion that the social institution of marriage changes the choices and behaviour of individuals and those around them in ways that make them better off, that improves their physical health, that improves their emotional health and improves outcomes for children. In relation to the benefits that accrue to children, she said that those involved emotional well-being and involved physical health; children raised in a two parent family are less likely to become ill when aged and less likely to die when they are post retirement age. She noted that children on average do better in school, they have fewer behaviour problems, they have higher academic achievement and are more likely to graduate from college and to have good occupations. She noted that they are more likely to form married families themselves and are less likely to have children while unmarried. She said that among scholars who have studied the heterosexual marriage as to the benefits she has described, that there has been a lot of debate over the last ten or fifteen years and that this is something which is still the subject of active debate, but that there was a general consensus as to the benefits she had described accruing to those involved in heterosexual marriage for the individuals themselves. She was specifically asked whether there was any relevance to the complimentarity of the sexes in respect of the benefits identified that accrue to children of a heterosexual marriage and she was of the view that there are studies which indicate that the literature suggests that in child rearing the father and the mother help children develop different sets of skills, that they tend to interact differently with children and that the different kinds of interactions benefit children in different ways. Asked whether there was similar research in relation to non heterosexual marriages, she stated that there was a very different kind of research. The research to which she referred in relation to the benefits of particular family structures was based on large scale survey research of many families and was in her view more persuasive and had stronger scientific evidence than research that has been done on gay and lesbian parents. None of that research to the best of her knowledge was based on survey research but rather was based on interviews or on very much smaller scale non random samples, therefore such research provides a much weaker basis for drawing scientific conclusions. She pointed out that research into heterosexual marriage has been ongoing for approximately one hundred years and that the period of time for such research is far greater than that which has been done on non heterosexual marriages or relationships. She also made the point that if the situation in which families are operating has changed very fundamentally, for example if attitudes have changed, if the economy has changed, if the legal structure has changed, then something that mattered in the past may not matter now and this needed to be taken into consideration in drawing conclusions.

She was then asked about the review carried out by Professor Steven Nock into research that was conducted in relation to children brought up by same sex couples. She explained that Professor Nock is highly regarded among fellow scientists. In the affidavit containing the review described above, she agreed that he explains and identifies the distinction between a correlation and a causal connection. She agreed with his views on that issue. He identified the presence or absence of random sampling of the subject of the study as important and relevant to the conclusions or the reliability of conclusions that

can be drawn from studies in this particular area and she agreed with his views in that regard. She pointed out that the use of random sampling if one wants to derive conclusions relevant to the population at large or applicable to the population at large is absolutely essential. She also noted that there are highly developed sets of techniques for the purpose of sampling those who represent the population as a whole and she agreed with the importance of the methodological procedures identified by Professor Nock in his affidavit in order to be able to draw a meaningful conclusion from any given study. Asked about Professor Green's testimony and his report, she indicated that she had considered same and insofar as he had expressed a view that one could draw meaningful conclusions from small samples of people of limited numbers, not selected on a random basis she was of the view that such studies could only be suggestive and that there were no conditions under which those studies could be affirmed to represent those processes or attitudes in the population as a whole.

She was also asked about the importance of longitudinal studies as opposed to cross sectional studies, she pointed out that if one looked at a particular family structure and examined children at a particular stage, that all it could do is tell you about the well being of children of that age, but it would not be possible to indicate anything about the effect of the family structure in the long run. She pointed out that there had been examples in recent times of the difficulty in predicting social outcomes by reference only to particular cross sectional studies. In the United States when there was debate in respect of changes in divorce laws it was firmly believed by child development specialists at the time, that as long as children had a loving parent, at least one, they would be fine if their parents divorced and that the children would get over it quickly and move on with their lives. She noted that over the last thirty or forty years, evidence has slowly emerged that this is not at all the case, that divorce plays a much larger role in children's lives, in their emotional well-being and in their career and personal accomplishments as adults which was not known or expected at the time of earlier studies. Such a state of knowledge has been made possible by the availability of longitudinal data in that the children were followed over long periods and very large numbers of children were studied under various circumstances over such long periods. She pointed out that when studying such family structures and the impact on children, that there were a wide range of possible indicators of well-being or welfare that would be studied. The more indicators available to measure presented a more balanced picture than any one indicator could possibly present. She was critical of Professor Green's 1986 study in relation to the outcome for children in terms of sexual identity and relationship to their peers which involved a comparison between children brought up by gay parents, seventy eight percent of whom had a partner, and children brought up by heterosexual parent of whom only ten percent had a partner and she commented that one could not do a comparison in such circumstances. She said that it was extremely important to have a full picture of the methodology used for a particular study and the controls used to exclude confounding or biased factors. Her comment was as follows:

"No one should pay any attention to studies that are poorly done. They are just some stories, they really are not science."

Finally she indicated that she did not come to her views from any kind of ideological viewpoint in relation to these issues.

In cross examination, Professor Waite was asked about a book she wrote with Margaret Gallagher entitled "The Case for Marriage". That book was written as an expansion of a speech given by the Professor to the Population Association. She and her co-author held a common view as to the value that marriage represents. In the book it was noted that she and Ms. Gallagher held differing views in relation to same sex marriage, in that Ms. Gallagher is opposed to same sex marriage, whereas Professor Waite expressed the view in the book that she was either neutral or in favour of same sex marriage. She explained that in fact her approach to the topic was that she was neutral and her reason for being neutral was that at this stage there simply was no evidence one way or another as to the consequences of same sex marriage. She saw her role as a scientist as evaluating the evidence and not telling people what to do. In response to the direct question, is there any reliable scientific evidence to support the proposition that children are worse off if their same sex parents are married as opposed to unmarried, she indicated that she knew of no evidence on that point. Having referred to the benefits of marriage that she had outlined, she indicated that she could not comment on whether such benefits could be enhanced for same sex couples if they were recognised by the State as entitled to marry. Her view was that it could be the case, it may not be the case. There simply is not any evidence one way or another.

Professor Waite was then asked for a number of comments in relation to the study by Stacey and Biblarz referred to previously. She was asked to comment on the conclusions drawn by Stacey and Biblarz from their summary of a number of studies to which they referred. As Professor Waite had not read the studies themselves she was not able to comment on the conclusion drawn by Stacey and Biblarz. A point was put to her from that study to the effect that two parents in a same sex marriage, if they are women, in the case of a lesbian relationship, have particularly good relationships with their children and that it may be the case that gender studies show that women have, for whatever reasons, better parenting skills than fathers do and having referred to a passage from their study, she was asked to comment on the view that women whatever their sexual orientation tend to be better at parenting than men. Her response was to comment that whilst she had not compared the parenting as between women and men she found the argument convincing. She noted that women do parent differently than men. She noted that there had been a number of recent studies on differences between step-fathers and biological fathers and between co-habiting biological fathers and married biological fathers that find significant differences in their investment in their children, in parenting and in the children's outcome for the various categories. These studies, although only a couple of studies, were done on large samples, but the studies suggest that it is not just important to have a biological father present but it is also important to consider the nature of his ties to the mother. Those particular studies to which she referred were not concerned with same sex parenting. She noted that there was no comparison between heterosexual parents and same sex parents. That concluded the evidence on behalf of the Defendants.

Plaintiff's Submissions

Michael Collins S. C. opened the submissions on behalf of the Plaintiffs. He submitted that this case raises a net point of Irish constitutional law and an issue as to compatibility with the European Convention on Human Rights (ECHR) in respect of the right to marry.

The point at issue is whether the right to marry can be limited or circumscribed to the extent that a category of persons such as the plaintiffs who are of the same sex are excluded from the right to marry.
It is accepted on behalf of the plaintiffs that one of the common law grounds of exclusion based on lack of capacity is that the two people seeking to marry are of the same sex. Further by reason of the provisions of the Civil Registration Act 2004, s. 2(2) (e) it is provided as follows:-
"(2) For the purposes of this Act there is an impediment to a marriage if –
(e) both parties are of the same sex."
Notwithstanding the common law exclusion based on lack of capacity and the express statutory provision, the argument made on behalf of the plaintiffs is that those limits on the right to marry are unconstitutional and incompatible with the ECHR. Accordingly, counsel on behalf of the plaintiff analysed what is meant by the right to marry under the Constitution and the Convention. The starting point of the plaintiff's argument is that under the Constitution and the ECHR there is a right to marry. It was submitted that there would not be any disagreement about that proposition. It was accepted by counsel that the State has a legitimate interest in circumscribing and regulating the occasions upon which people can marry one another. However, it was argued that to give meaning to the right to marry, it must encompass the right to marry the person that you love. If the state bars someone from marrying the person they love, it was argued that that was a *prima facie* infringement of the constitutional right to marry and the Convention right to marry. So far as the restrictions on the right to marry are concerned, it was accepted that there are compelling and justifiable reasons for some restrictions on the right to marry, for example, restrictions on marriage within the prohibited degrees of relationship or where the parties are under eighteen years of age (Family Law Act 1995). However it was contended that a restriction based on sexual orientation or gender was not justifiable. It was contended that two categories of persons have been created, which two categories are distinguished on the basis of either sexual orientation or gender, namely, a category of persons who are heterosexual and can marry the person they love and a category of persons who are homosexual who cannot marry the person they love. The difference between the two categories is based on sexual orientation. It was also argued that the creation of these two categories constituted a gender based discrimination. Counsel illustrated this by pointing out that "If John wants to marry Mary, he can do so. If John wants to marry Fred, he cannot do so." Accordingly the distinction between the two categories is also a gender based distinction. The significance of a classification based on gender or sexual orientation is that such a classification is regarded under Irish constitutional law, Convention jurisprudence and under Irish legislation as *prima facie* discriminatory grounds. As such they come within a category described as suspect. On that basis it was argued that there is a presumption under Irish constitutional law and under the Convention that the classification is such as to demand a justification by the State. To put that another way it was argued that the burden shifts to the State to show why the State is invoking this classification to eliminate a particular group from exercising a particular constitutional right.
It was pointed out that it was difficult to know from the pleadings in this case what particular justification was to be advanced by the State for the discrimination identified. It

is fair to say that the defence herein consists to a large extent of a traverse of the plaintiffs claim herein, but it does provide at para. 17 as follows:-
"Further and without prejudice to the foregoing pleas, if the legislative provisions and the acts and omissions of the defendants which are impugned herein interfere with the plaintiffs' rights, under the European Convention on Human Rights or the European Convention on Human Rights Act 2003, (which is denied), they do so in a manner which is proportionate and does not exceed the margin of appreciation which the State enjoys pursuant to that Convention."
A similar plea appears at para. 13 in the following terms:-
"Further and without prejudice to the foregoing, if the legislative provisions and the acts and omissions of the defendants which are impugned herein impinge upon the plaintiffs' rights under the Constitution, (which is denied), they do so in a manner which is proportionate, in accordance with the exigencies of the common good and valid having regard to the provisions of the Constitution."
On the basis that it was not clear from the defence filed as to what justifications would be relied on by the State herein, counsel for the plaintiffs proposed to analyse the essence of the right to marry and the justifications proffered by State authorities elsewhere as to why the right to marry is limited in those States to heterosexual couples. Four such potential justifications were identified.
The first potential justification is that the nature of marriage has something to do with procreation. In other words it was suggested that the argument could be that those who marry should be able to biologically procreate and that this is an essential feature of marriage. As such it is clear that a same sex couple lack the biological capacity to mutually procreate and that as a same sex couple would thereby lack an essential feature of marriage, such marriage is not really a marriage at all.
The second justification proffered to restrict same sex marriage is on the basis that the welfare of potential children of the marriage is better in a family relationship where the parents are heterosexual than in a relationship where the parents are homosexual.
The third justification offered is a definitional justification. In other words marriage is something between men and women and has always been. Thus marriage is defined in such as way as to exclude same sex couples. Therefore the right to marry while it exists under the Constitution and Convention only means the right of a man to marry a woman and vice versa.
The fourth justification sometimes relied on is based on the assumption that a majority in society disapprove either of homosexual people, homosexual relationships or homosexual conduct either on the grounds that the same is immoral or for religious reasons, philosophical reasons or for some other reasons and that the State is entitled to act on foot of that presumed majority view to prohibit same sex marriage. Accordingly, counsel proceeded to analyse the various justifications that have been advanced to support the restriction on same sex marriage in other jurisdictions.
It will be noted from the evidence outlined above, that it was not in fact suggested on behalf of the State that the justification for the exclusion of same sex couples from marriage was on the basis that the nature of marriage is related to procreation and therefore I do not propose to set out the submissions made in respect of that argument. Equally no argument was put before the court on behalf of the State to the effect that in restricting the right to marriage to heterosexual couples, the State was doing so on the

basis of a majority view either for reasons of religion, moral reasons or any other philosophical reason. Accordingly, I do not propose to deal with any arguments led by counsel on behalf of the plaintiffs in this respect.
In essence therefore the arguments on behalf of the plaintiffs were narrowed down to the definitional argument and the issue in relation to the welfare of children.
In the submissions, counsel on behalf of the plaintiffs examined extensively Irish case law, the jurisprudence on the European Convention on Human Rights and case law from other jurisdictions where the issue of same sex marriage has been considered by the courts of those jurisdictions.
The starting point of counsel's submissions in relation to the authorities began with those that deal with the definition of marriage. It was noted that neither in the Constitution nor the European Convention on Human Rights, nor in the revenue legislation is there a definition of marriage provided. At common law the classic definition of marriage was stated in the case of *Hyde v. Hyde* (1866) L.R. 1 P and D 130 at 133 by Lord Penzance as follows:-
"The voluntary union of one man and one woman, to the exclusion of all others."
In *Murray v. Ireland* [1985] I.R. 532 at 536, Costello J. had to consider the issue as to the meaning of the term "Family" in the context of a couple who wished to marry but were inmates in prison where clearly it was not going to be possible for them to consummate the marriage by way of sexual intercourse, consequently they were not going to have children within the marriage. Costello J. and ultimately the Supreme Court held that the fact that the couple in question were not going to have children did not necessarily mean that they did not constitute a family within the constitutional concept of the family. Costello J. stated at p. 536 as follows:-
"The concept and nature of marriage, was derived from the Christian notion of a partnership based on an irrevocable personal consent given by both spouses which establishes a unique and very special life-long relationship."
Whilst counsel accepted that the common understanding about many of the judicial definitions and discussions is that what was in contemplation was a heterosexual union, it was argued that the key ingredients that are identified in the various discussions are ingredients equally applicable to a same sex marriage. Thus reliance was placed on the use of the words "an irrevocable and personal consent given by both spouses establishing a unique and very special life long relationship" being the consent that is equally applicable to the plaintiffs in this case. Costello J. in the course of that case went on to say:-
"A married couple without children can properly be described as a"unit group" of society such as is referred to in Article 41 …. The words used in Article 41 to describe the "Family" are therefore apt to describe both a married couple with children and a married couple without children."
Thus in the view of Costello J. the right to have children was protected under Article 40.3 but had to be read as being subject to the power of the State to limit it in particular by the imprisonment of husband and wife which would therefore put an obvious limit on the abilty to have children. In the case of *T.F. v. Ireland* [1995] I.R. 321,the definition of marriage expressed by Costello J. was adopted by the Supreme Court. In *D.T. v. C.T.* [2003] 1 I.L.R.M. 321 Murray J. referred to marriage as:-

"A solemn contract of partnership entered into between man and woman with a special status recognised by the Constitution and that it was in principle for life."
Reference was also made to the decision in the case of *Foy v. An tArd Chlaratheoir* (Unreported, 2002, High Court, 9th July 2002) which concerned the legal status of a transsexual person. In the course of that case it was stated by McKechnie J. that:-
"Marriage as understood by the Constitution, by statute and by case law refers to a union by a biological man with a biological woman."
That decision was given prior to the decision of the European Court on Human Rights in the case of *Goodwin v. U.K.* [2002] 35 E.H.R.R. 447, which came to a different conclusion and disapproved of an earlier English case, *Corbett v. Corbett* [1971] Probate Report 83, which had been relied on by McKechnie J. It will be necessary to refer to some of these decisions again in more detail.
The next issue examined on behalf of the plaintiffs was the question of the formal requirement for contracting a valid marriage. As indicated earlier on behalf of the plaintiffs the State has a legitimate interest in circumscribing and regulating the requirement in respect of contracting a valid marriage. I do not think it is necessary to refer in detail to these matters but obviously one of the bases on which a marriage will not comply with the formal requirements for contracting a valid marriage is if one or other of the parties lacks the capacity to enter into a valid marriage. It was accepted that at common law there was a prohibition on same sex marriage. To put it another way it was a requirement at common law that both parties be of the opposite sex. The law on capacity has been changed from time to time by various statutes and most recently by the provisions of the Civil Registrations Act 2004, to which reference has already been made. Accordingly it was submitted that whilst the traditional exclusion of same sex couples from the institution of marriage is based upon a rule of capacity there is nothing in the Constitution that rigidly sets down what the rules of capacity are in terms of the entitlement to get married. In support of that contention, counsel referred to the then reserved judgment by Laffoy J. in the case of *O'Shea v. Ireland* which was a decision which related to lack of capacity in the context of parties who were within the prohibited degrees of relationship.
Since the conclusion of the hearing in this case, judgment has been given in that case but, I do not think it would be appropriate to comment further on that decision. Obviously the parties could not make any submissions on the outcome of that case and therefore I do not propose to make any other comment in relation to it save to note what was at issue in those proceedings.
Reference was also made to the recent decision of the High Court in the case of *N. and Another v. H.S.E., G. and Another* (Unreported, 15th September 2006) MacMenamin J, in which the rights of the birth parents as a marital family under the Constitution were considered. Since that judgment was given, the Supreme Court has ruled on an appeal from that decision. Again, the submissions made herein in relation to that particular case were based on the decision in the High Court. If I was of the view that the Supreme Court decision in that case could be of assistance in determining the issues before me in this case, I would have invited the parties to make further submissions before me but as I did not think that that was the case, I did not pursue that course. The purpose of referring to such decisions was to emphasise the fact that these and other decisions demonstrate that there has been a shift in the understanding of marriage.

Counsel for the plaintiffs then referred to a number of statutory provisions which gave recognition to the position of co-habitees and also to the Law Reform Commission's Consultation Paper on the rights and duties of co-habitees. Reference was made in addition to the provisions of a number of statutes which prohibit discrimination on the grounds of sexual orientation (see e.g. the Employment Equality Act 1998, the Equal Status Act 2000 and the Equality Act 2004).

Counsel then referred to relevant provisions of the Constitution and in particular to Article 41 of the Constitution.

The central pillar of the plaintiffs' arguments in this case is that in our jurisprudence and culture the concept of equality under the Constitution and by virtue of the ECHR is such that all persons have the same legal rights irrespective of their race, their national origin, their gender, their religion and their ethnic background. Yet it is argued that different treatment is applied to some people on the basis of their sexual orientation notwithstanding the view that generally all people have the same legal rights all other things being equal. The case made by the plaintiffs is that they are not arguing for special rights or extra rights by virtue of the fact that they are a lesbian couple, but on the contrary they are arguing for the same rights as everyone else has. In particular they say that they are entitled to enjoy the right to marry in the same way as the vast majority of people in this country exercise that right. They say that the right to marry is the right to marry the person of one's choice that one loves and with whom one wants to have a lifelong committed relationship of intimacy. Others can make that choice and the plaintiffs have made such a choice, but they are barred from entering the institution of marriage. The argument made is that the State cannot constitutionally prohibit one consenting adult from marrying another consenting adult on the basis of gender or sexual orientation. They say that two distinct classes have been created namely those who have the capacity to marry and those who lack the capacity to marry by reason of the fact that they are of the same sex. It is argued that in the creation of two classes the traditional test for such classes is that articulated in *Brennan v. Attorney General* [1983] I.L.R.M. 449 at 480, to the effect that a classification must be:

"For a legitimate legislative purpose… It must be relevant to that purpose, and… each class must be treated fairly."

It was submitted that the mere fact that many people might consider same sex marriage to be immoral or otherwise undesirable cannot in itself be a reason as to why the State would be justified in refusing to recognise a constitutional right to marry for same sex couples. In this regard reference was made to cases in the United States which dealt with the issue of inter-racial marriage which was prohibited in a large number of states under pain of criminal prosecutions. The reference to such cases was on the basis that one of the justifications that might be put forward on behalf of the State in this case possibly on the basis of a majoritarian view. As already pointed out, the State in this case has not sought to justify the prohibition on same sex marriage on the basis of a majoritarian view. However the point is made that there is a classification or distinction made between heterosexual people and homosexual people based on sexual orientation or gender. Such a classification is regarded in constitutional jurisprudence and under the Convention jurisprudence as a category that gives rise to a presumption that there is a breach of constitutional rights or indeed convention rights and accordingly the argument is that the

burden shifts to the State to demonstrate why there should be such a breach of the constitutional rights or convention rights concerned.
The argument of the plaintiffs was to the effect that there is a fundamental right under the Constitution to marry. It was accepted that that is not an express right but is a right implicit in the Constitution. It is an express right under the European Convention. So far as there may be legitimate restrictions placed upon the right to marry it was argued that the interference with the right to marry if based on a classification like gender or sexual orientation places the burden to justify that restriction on the State and becomes proportionately higher. It was pointed out that in the case of same sex marriage there is a complete ban or exclusion of the right to marry for a particular class of people. The judgment in *Brennan v. Attorney General* referred to above was examined in some detail. That case concerned the rateable valuation of land for farmers who were assessed to income tax on the basis of the rateable valuation of their land. The assumption was that the higher the rateable valuation of the land, the more valuable the land would be and therefore the income that the farmers had was likely to be higher and they should therefore pay a higher level of income tax. In other words income tax was assessed not by reference to actual earnings but by reference to the rateable valuation of land. The legislation concerned was struck down as being in breach of the equality provision of the Constitution and because the necessary relationship and proportionate relationship between the rateable valuation criteria and the income tax liability was not established. Barrington J. at p. 480 of his judgement referred to the concept of invidious discrimination. He stated:
"There is a sense in which to legislate is to discriminate. The legislature in its efforts to redress the inequalities of life or for other legitimate purposes may have to classify the citizens into adults and children, employers and workers, teachers and pupils and so on.
Pringle J. stated in *O'Brien Manufacturing Engineering Company* that such division of the citizens into different classes was envisaged by the second sentence of Article 40.1. He then added:
"Therefore, it would appear there is no unfair discrimination provided every person in the same class is treated in the same way."
No doubt this is true but it might be prudent to express what is perhaps implied in it, that the classification must be for a legitimate legislative purpose, that it must be relevant to that purpose and that each class must be treated fairly."
It was submitted that that case outlined the standard test under Irish constitutional law for legislation creating such a classification namely that there must be a legitimate legislative purpose. The purpose has to be actually identified and then it has to be established as to whether there is a legitimate purpose behind the particular classification or prohibition as in this case. Then it must be established that the prohibition or the creation of a separate class and separate treatment of that class must be relevant to that purpose. Reference was also made to the jurisprudence of the U.S. Supreme Court when dealing with equality issues. In that jurisdiction the level of scrutiny applied to legislation depends on the category of discrimination involved or the level of state interference with fundamental rights implicit in the U.S. Constitution. Without referring to in any great detail to the submissions made in this regard, I note that the point being urged on the court is that whilst the Irish Courts have not adopted the rigid categories of classification of strict scrutiny, intermediate scrutiny or heightened review used in the U. S., there is a

concept of suspect classification which carries a presumption of unconstitutional discrimination and which shifts the evidential burden of justification to the State. It was noted by the Supreme Court in *Re Article 26 and the Employment Equality Bill* [1997] 2 I.R. 321 at p. 347:

"The forms of discrimination which are, presumptively at least, proscribed by Article 40.1 are not particularised: manifestly, they would extend to classifications based on sex, race, language, religious or political opinions."

The categories of classifications were further considered in the case of *An Blascaod Mór Teo v. Commissioners of Public Works (No. 3)* [2000] 1 I.R. 6 in which Barrington J. stated at p. 19 of his judgment as follows:

"In the present case the classification appears to be at once too narrow and too wide. It is hard to see what legitimate legislative purpose it fulfils. It is based on a principle – that of pedigree – which appears to have no place (outside the law of succession) in a democratic society committed to the principle of equality. This fact alone makes the classification suspect. The court agrees with the learned trial judge that a constitution should be pedigree blind just as it should be colour blind or gender blind except where those issues are relevant to a legitimate legislative purpose. This Court can see no such legitimate legislative purpose in the present case and has no doubt but that the plaintiffs are being treated unfairly as compared with persons who owned or occupied and resided on lands on the island prior to November, 1953, and their descendents."

As can be seen, that was a case which involved a classification based on pedigree or lineage.

The argument of the plaintiffs is thus that the State has created two classes namely those who have the right to marry, namely, heterosexual people and those who are not entitled to exercise the right to marry because they are homosexual. The distinction is based on sexual orientation and indeed gender based and as such calls for a justification to be proffered by the State for making that distinction.

Counsel for the plaintiff then proceeded to look again in more detail at the four justifications that they anticipated would be relied on by the State in order to justify the State's view that the right to marry does not extend to same sex couples. It was submitted that it would be useful to consider in more detail what is meant by the right to marry and what are the key ingredients of marriage as an institution. Reference was made to the provisions of article 41.1 of the Constitution and I think at this point it would be useful to set out its provisions:

"Article 41.1

1˚ The State recognises that family as the natural primary and fundamental unit group of society, and as a moral institution possessing inalienable and imprescriptible rights antecedent and superior to all positive law.

2˚ The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the nation and the State.

Article 41.2

1˚ In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.

2˚ The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home.

Article 41.3
1˚ 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.

2˚ A court designated by law may grant a dissolution of marriage where, but only where, it is satisfied that –
(i) At the date of the institution of the proceedings, the spouses have lived apart from one another for a period of, or periods amounting to, at least four years during the previous five years…."
Counsel then considered a number of cases which refer to the right to marry and from which it can be inferred that the right to marry is one of the unenumerated personal rights flowing from the Constitution. Reference was made to the decision in the case of *Donovan v. The Minister for Justice* [1951] 85 ILTR 134, *Ryan v. Attorney General* [1965] I.R. 294 and a passage from the dissenting judgment of Fitzgerald C.J. in the case of *McGee v. Attorney General* [1974] I.R. 284 at p. 301 in which he stated:
"The right to marry and the intimate relations between husband and wife are fundamental rights which have existed in most, if not all, civilised countries for many centuries. These rights were not conferred by the Constitution in this country in 1937. The Constitution goes no further than to guarantee to defend and vindicate and protect those rights from attack."
Whilst that was a dissenting judgment, it is not a passage in the judgment of Fitzgerald C.J. which would have expressed a view different from the majority in that case. Apart from the constitutional provisions reference was made to three Articles under the European Convention on Human Rights which are, it is submitted directly relevant to the facts of this case, namely articles 8, 12 and 14. Article 12 is as follows:
"Men and women of marriageable age have the right to marry and to found a family according to the national laws governing the exercise of this right."
On that basis it is submitted that there is undoubtedly a right to marry but the question is what does that right consist of? It was pointed out by counsel that the State does not prevent people who are unsuited to marriage from exercising the right to marry, so for example a convicted criminal, or a person with a conviction for child abuse, a person who fails to make maintenance payments to children of a former marriage and so on can marry and raise children. In those circumstances it was submitted that the State must bear the burden of explaining why people in the position of the plaintiffs who would but for their gender or sexual orientation appear to be eminently suited to marriage can not get married. It was submitted on behalf of the plaintiff that the essence of the right to marry is the right to marry the person of your choice with whom you wish to make a lifelong commitment and who you love. Accordingly, again it was submitted that the State must bear the burden of answering the question why that right is denied to persons of the same sex.
In this regard counsel for the plaintiffs referred to a number of decisions dealing with the right to marry in the U.S. and elsewhere. The first case dealt with was that of *Loving v. Virginia* 388 U.S. 1 [1967], a case which declared unconstitutional a legislative ban on inter-racial marriage in Virginia and a number of other States. Reference was also made to the decision in *Zablocki v. Redhail* 434 U.S. 374 and the case of *Turner v. Safley* 482 U.S. 78. *Zablocki* was an important decision in emphasising the fundamental nature of

the right to marry. The *Turner* case was a case concerned with two prison inmates who challenged a regulation to the effect that two prison inmates could only marry with the prison superintendent's permission and that such permission could only be given where there were "compelling reasons" to do so without defining what compelling reasons might be. It was accepted in the course of the argument in that case that there was no possibility of acts of sexual intercourse or procreation occurring between the two prisoners and accordingly that case whilst dealing with some of the key attributes of marriage proceeded on the basis that the ability to procreate was not one of them. The state had argued that there was a legitimate interest in not jeopardising prison security but though there were legitimate security concerns, the regulation was struck down as an exaggerated response to those concerns.

On the basis of the Irish authorities referred to and the other authorities referred to above the submission on behalf of the plaintiff is that the right to marry is fundamental to every adult and permitted even to individuals whose fitness for marriage and or parenthood can be called into question.

Counsel then made lengthy submissions on a number of judgments dealing with the ECHR and in particular Article 12 thereof. The first of the cases referred to was the decision in the case of *Goodwin v. U.K.* [2002] 35 EHRR 447. In that case the European Court of Human Rights held that post-operative transsexual persons have the right to marry a person of the same birth sex. It was noted by the court in that case as follows: "Article 12 secures the fundamental right of a man and woman to marry, and to found a family; the second aspect is not however a condition of the first and the inability of any couple to conceive or parent a child cannot be regarded as *per se* removing their right to enjoy the first limb of this provision."

Reference was also made to the decision in the case of *I. v. U.K.* [2003] 36 EHRR 53. That case came to a similar conclusion as was reached in the *Goodwin* case. The issue in that case was whether the allocation of sex in national law to that registered at birth was a limitation impairing the very essence of the right to marry. The point of referring to those cases is that they establish that under the Convention there is an entitlement of two people who both by birth and by biology are of the same sex to have a right to marry under the Convention. It was accepted that the decisions do not themselves determine or conclude that there is a Convention right to same sex marriage but simply that the right to marriage is not confined to biological man and biological woman. However, the emphasis placed on these two decisions by counsel for the plaintiffs was for the purpose of enforcing the point that procreation was not one of the key issues in what is involved in the right to marry. I do not propose to deal with that aspect of those two decisions but it does seem to me that those decisions are of significance and in that regard I will refer to them subsequently.

Reference was also made to the decision in the case of *Karner v. Austria* [2003] EHRR 528. That case concerned article 8 and article 14 of the Convention. It was held by the court in that case under article 14 in particular that:

"A difference in treatment is discriminatory if it has not an objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised… just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification."

That was a landlord and tenant case where if there had been a cohabiting heterosexual couple in the tenancy then if one of them died the other had the right to remain on in the property. Because they were cohabiting but of the same sex it was argued they did not have the right to remain on and the landlord evicted the surviving male partner. Thus it was clear that the different treatment afforded to an unmarried same sex couple and an unmarried opposite sex couple was based on the criterion of the sexual orientation of the people concerned. Thus it had to be considered whether there were particularly serious reasons to justify that distinction. The court went on to say at paragraph 40 – 42:

"The court can accept that protection of the family in the traditional sense is, in principle, a weighty and legitimate reason which might justify a difference in treatment. It remains to be seen whether, in the circumstances of the case, the principle of proportionality has been respected. The aim of protecting the family in the traditional sense is rather abstract and a broad variety of concrete measures may be used to implement it. In cases in which the margin of appreciation afforded to Member States is narrow, as the position where there is a difference in treatment based on sex or sexual orientation, the principle of proportionality does not merely require that the measure chosen is in principle suited for realising the aim sought. It must also be shown that it was necessary to exclude persons living in a homosexual relationship from the scope of application of s. 14 of the Rent Act in order to achieve that aim. The court cannot see that the government has advanced any arguments that would allow of such a conclusion. Accordingly, the court finds that the government has not offered convincing and weighty reasons justifying the narrow interpretation of s. 14(3) of the Rent Act that prevented a surviving partner of the couple of the same sex from relying on that provision."

A similar position was taken in the English Court of Appeal in the case of *Ghaidan v. Mendoza* [2004] 4 All E.R. 1162 in which it was stated at paragraph 32:

"Sexual orientation is now clearly recognised as an impermissible ground of discrimination on the same level as the examples, which is all that they are, specifically set out in the text of article 14."

Article 14 does not expressly refer to sexual orientation, but it was argued that it is one of the categories included therein. What was pointed out is that it is no answer to say, that men and women are equally discriminated against because men cannot marry men and women cannot marry women. Counsel emphasised that that amounted to discrimination on the grounds of gender, in other words Dr. Zappone cannot marry Dr. Gilligan, but a man could marry Dr. Gilligan. This type of reasoning was struck down in the case of *Loving* referred to above. The State of Virginia in that case had argued that the ban on inter-racial marriage did not involve an unequal treatment of the races because white people were confined to marrying their own race just as much as black people are confined to marrying their own race and that therefore the races were being treated equally. That argument was unequivocally rejected by the Supreme Court of the United States. Accordingly, it was submitted that the prohibition on same sex marriage fails to withstand scrutiny under Article 40.1 of the Constitution and/or article 14 of the Convention because it constitutes a classification based on the criterion of gender which also lacks the necessary justification.

Reference was also made by counsel to a decision of the Supreme Court of Hawaii in a case of *Baehr v. Lowen*, 852 P. 2d 44 [1993], the significance of which, is that it was the first State in the United States in which a State Supreme Court came to the conclusion

that the prohibition on same sex marriage was a gender based discrimination. As such the burden rested on the state to justify the prohibition. A commentary on the dissenting judgment in that case was published by Professor Andrew Coppelman in New York University Law Review. Counsel for the plaintiffs referred to his comments as follows:-

"Despite Judge Heen's protestations, discrimination against gays must, as a purely analytical matter, be recognised as a kind of sex discrimination. As a matter of definition, if the same conduct is prohibited or stigmatised when engaged in by a person of one sex while it is tolerated when engaged in by a person of the other sex, then the party imposing the stigma is discriminating on the basis of sex. That is what the Hawaii statute does. That is what happens whenever gays are discriminated against. If a business fires Ricky, or if the State prosecutes him, because of his sexual activities with Fred, but these actions would not be taken against Lucy if she did exactly the same things with Fred, then Ricky is being discriminated against because of his sex. If Lucy is permitted to marry Fred, but Ricky may not marry Fred, then (assuming that Fred would be a desirable spouse for either) Ricky is being discriminated against because of his sex."

Accordingly it was argued that the right to marry is a right which extends to all persons by virtue of their dignity as human beings and that to prohibit same sex marriage is to discriminate on the basis of gender and on the basis of sexual orientation. Having made those submissions counsel again turned to the likely justification which they anticipated would be proffered to justify the prohibition on same sex marriage. In that context counsel looked again at a number of decisions which have been mentioned before namely *Murray v. Ireland* and *Foy v. An tArd Chlaratheoir.* Reference was also made to the *Mcgee* decision and counsel quoted extensively from that in the context of the procreation argument. I will be returning to these decisions later but as I have already pointed out the procreation argument is not one which I need to consider. I would however note that reference was made in addition to the decision of the U.S. Supreme Court in *Griswold v. Connecticut* 381 U.S. 479 [1954], which established in U.S. jurisprudence the unenumerated fundamental right to marital privacy. Counsel referred in particular to a passage from the majority opinion of the court delivered by Douglas J. as follows:-

"The present case then concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And concerned a law which, in forbidding the use of contraceptives rather than regulating the manufacture or sale, seeks to achieve its goals by means of having a maximum destructive impact upon that relationship … We deal with a right of privacy older than the bill of rights – older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political fates, a bi-lateral loyalty, not commercial or social projects. Yet it is in association for as noble a purpose as any involved in our prior decisions."

Further in the course of the arguments in the context of the issue of procreation as a fundamental aspect of the nature of marriage, reference was made by counsel for the plaintiffs to a number of decisions of the Canadian courts. Particular emphasis was placed on the decision of the Ontario Court of Appeal in the case of *Halpern and Others v. Attorney General of Canada* [2003] 65 O.R. (4) 161. Because of its relevance to the main issue, it would be helpful to refer to it at this point. In that case the court ruled in favour

of a number of lesbian and gay couples seeking a declaration as to whether the common law definition of marriage excluded same sex couples. The court answered yes but found in favour of the plaintiffs that in terms of the changing nature of constitutional interpretation the Canadian Constitution could not be frozen in its meaning as it was in 1867 and that it had to be considered in the light of modern developments. In that case it was stated:

"A law that prohibits same sex couples from marrying does not accord with the needs, capacities and circumstances of same sex couples. While it is true that due to biological realities only opposite sex couples can naturally procreate, same sex couples can choose to have children by other means such as adoption, surrogacy and donor insemination. An increasing percentage of children are being conceived and raised by same sex couples. Importantly no one, including the Attorney General, is suggesting that procreation and child rearing are the only purposes of marriage or the only reasons why couples choose to marry. Intimacy, companionship, societal recognition, economic benefits, the blending of two families to name but a few are other reasons that couples choose to marry. Same sex couples are capable of forming long, lasting, loving and intimate relationships. Denying same sex couples the right to marry perpetuates the contrary view, namely that same sex couples are not capable of forming loving and lasting relationships and thus same sex relationships are not worthy of the same respect and recognition as opposite sex relationships. Accordingly, in our view the common law requirement that marriage be between persons of the opposite sex does not accord with the needs, capacities and circumstances of same sex couples. This factor weighs in favour of a finding of discrimination."

The court went on to note in relation to an argument that civil marriage for same sex couples required a constitutional amendment by stating:

"The constitutional amendment argument is without merit for two reasons. First, whether same sex couples can marry is a matter of capacity. There can be no issue, nor was the contrary argued before us that parliament as authority to make laws regarding the capacity to marry … Second, to freeze the definition of marriage to whatever meaning it had in 1867 is contrary to this country's jurisprudence of progressive constitutional interpretation."

Thus the court proceeded to re-formulate the definition of marriage having regard to the equality rights of same sex couples under s. 15(1) of the Canadian Charter of Rights and Freedoms as "the voluntary union for life of two persons to the exclusion of all others". Counsel pointed out that in their argument they are saying that the term marriage as used in the Constitution and indeed under various statutory provisions for example in the tax code can be interpreted in a way that encompasses same sex marriage which does not involve any rewriting by the court of any statutory definition because there is no statutory definition and indeed no constitutional definition of "marriage" or the "right to marry" because the term "right to marry" is not expressly mentioned in the Constitution and therefore falls to be interpreted by the court as one of the unenumerated rights under the Constitution.

That decision was followed by other courts in Canada and ultimately it led to the acknowledgement of the right to same sex marriage throughout Canada. Whilst counsel for the plaintiffs referred to that case in the context of their argument on the issue of procreation it is clear that great reliance is placed on the decision in that case

by the plaintiffs in urging this court to interpret the right to marry as encompassing a right to marry a person of the same sex.
Similar issues also arose in a number of cases in the United States. One of those was the decision in *Baker v. Vermont* 744 A. 2d 864 (Vermont Supreme Court, 1999) firmly expressed a view that the supposed connection between the prohibition on same sex marriage and the objective of furthering the link between procreation and child rearing as an extreme logical "disjunction".
Counsel then referred to a number of other U.S. decisions. One of those was the case of *Lawrence v. Texas* 539 U.S. 558, in which the U.S. Supreme Court struck down an anti sodomy law in Texas as being unconstitutional. The decision was referred to because of the discussion by the Supreme Court of the nature of the same sex relationship. In turn it was followed by the decision in the case of *Goodridge v. The Department of Public Health* 440 Mass. 309, (Supreme Judicial Court of Massachusetts, 18th November 2003). The *Goodridge* case was referred to extensively by counsel for the plaintiffs. In the first instance that case dealt with the issue about procreation but it also deals with many of the other arguments put forward on behalf of the plaintiff in this case. It is a case that deals expressly with the issue of same sex marriage. In that case it was held that the same sex marriage ban failed the constitutional test both as a matter of equal protection and it also failed the due process clause requirement that nobody could be deprived of their liberty without due process of law. In dealing with that case it had been argued that the regulation of marriage was based on the traditional concept that marriage's primary purpose is procreation. Marshall C.J. stated that:-
"Our laws of civil marriage do not privilege procreative heterosexual intercourse between married people above every other form of adult intimacy and every other means of creating a family…
Fertility is not a condition of marriage, nor is it grounds for divorce. People who have never consummated their marriage, and never plan to, may be and stay married … People who cannot stir from their deathbed may marry …
it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children that is the *sine qua non* of civil marriage."
Relying on that authority, it was submitted that the substantive content of the right to marriage relates to the exclusive commitment that the marriage partners make to one another.
The next argument dealt with by the plaintiffs related to the possible justification for the ban on same sex marriage that children are better off if raised by a heterosexual couple. A great deal of the evidence in this case concerned the issue of research on this subject. I have already summarised the evidence of Professor Green in this regard, together with the evidence furnished by Professor Casey and Professor Waite on behalf of the State. The point made on behalf of the plaintiffs was that even if one accepted that the State could legitimately have as a public policy goal that children should for preference be raised in an opposite sex household rather than a same sex household, could it be argued that a prohibition on same sex marriage was reasonably related to the supposed legislative purpose of encouraging child rearing in opposite sex families while still treating each class fairly. It was argued that if the relevant justification invoked by the State is the welfare of the children, then the real question is whether the children of gay couples would somehow be better off by virtue of the prohibition on their parents being

legally married. It was submitted that clearly they are not better off. Indeed they may be worse off in certain material respects. The point was made that the real effect of the prohibition is simply to prevent children who are already being raised in same sex households from the protection and benefits of marriage. In other words the prohibition punishes the child for the "sins of the parents".

The third argument anticipated by the plaintiff and considered by them is that the definition of marriage by reference to history and tradition is a union between man and woman and that a constitutional right to marry cannot as a matter of definition encompass same sex marriage. This argument could be summarised by saying that although marriage is not defined by statute or by the Constitution it is nonetheless commonly understood that in common law jurisprudence the common understanding of marriage is that it is a union between a man and a woman. It was accepted that references through the centuries to marriage and the right to marry were in the context of marriage as a union of man and woman. Equally it was accepted that the framers of the 1937 Constitution in referring to marriage and the family, were thinking in the context of a union between man and woman. It was pointed out that many cases dealing with the question of marriage do so in that context because the point at issue did not involve any issue as to whether marriage could encompass same sex marriage. So for example in the case of *T.F. v. Ireland* referred to above, Hamilton C.J. at p.373 stated as follows:-

"As to how marriage should be defined, the Court adopts the definition given by Costello J. in *Murray v. Irealnd* [1985] I.R. 532 at p. 535:

'…the Constitution makes clear that the concept and nature of marriage, which it enshrines, are derived from the Christian notion of partnership based on an irrevocable personal consent, given by both spouses which establishes a unique and very special lifelong relationship.'

And in *N. v. K.* [1985] I.R. 733, McCarthy J. said in his judgment at p. 754:

"Marriage is a civil contract which creates reciprocating rights and duties between the parties but, further, establishes a status which affects both the parties to the contract and the community as a whole."

One of the reciprocating rights and duties is obviously that of cohabitation. It is an important element in marriage that the spouses live together. The unique and special lifelong relationship referred to by Costello J. could not be developed otherwise."

In the course of that judgment Hamilton C.J. at p. 372 also quoted with approval the passage from the judgment of Costello J. in *Murray v. Ireland* at p. 537:-

"A married couple without children can properly be described as a 'unit group' of society such as is referred to in Article 41 and the life-long relationship to which each married person is committed is certainly a 'moral institution'. The words used in the article to describe the 'Family' are therefore apt to describe both a married couple with children and a married couple without children. It is true that the rights and duties of a married couple with children are more varied than a married couple without children but each 'unit group' has the same nucleus and it is reasonable to assume that both were given the same constitutional protection."

One of the points made in referring to these passages by counsel for the plaintiffs is how the same language is equally applicable to a same sex marriage.

Counsel also referred to the decision of McKechnie J. in the *Foy* case referred to above where he stated as follows at p. 130 of his judgment:-

"It seems to me that marriage as understood by the Constitution, by statute and by case law refers to the union of a biological man with a biological woman. Re-echoing *Hyde v. Hyde* Law Reports (1856) Mr. Justice Costello in *B v. R* (1995) 1 I.L.R.M. 491 defined marriage as 'the voluntary and permanent union of one man and one woman to the exclusion of all others for life.'

As a result of the 15th Amendment of the Constitution Act 1995, and the Family Law (Divorce) Act 1996, the permanency aspect of marriage no longer applies. In *T.F. v. Ireland* [1995] 1 I.R. at 321 at 373, the court, in approving of the earlier definition of marriage given by Costello J. in *Murray v. Ireland* [1985] I.R. 532 at pages 535 – 536 said:-

"…the Constitution makes it clear that the concept and nature of marriage, which it enshrines, are derived from the Christian notion of a partnership based on an irrevocable personal consent, given by both spouses which establishes a unique and very special life-long relationship.

In this and in the neighbouring jurisdiction (see *Corbett v. Corbett*) it is crucial for legal purposes that the parties should be of the opposite biological sex. Indeed Article 12 of the European Convention on Human Rights is equally so predicated. All of its judgments above mentioned confirm this. Accordingly in my view there is no sustainable basis for the applicants submission that the existing law, which carries the impugned provision which prohibits the applicant from marrying a party who is of the same biological sex as herself is a violation of her constitutional right to marry."

That decision of McKechnie J. was followed two days later by the decision in the *Goodwin* case referred to above. In that case, the reference in the Convention to the right to marry was held by the European Court of Human Rights to be no longer capable of being interpreted by reference to a gender determination based on purely biological criteria and that "a test of congruent biological facts can no longer be decisive in denying legal recognition to the change of gender of a post-operative transsexual". Subsequently in the case of *I. v. U.K.* also referred to above, the decision of *Corbett v. Corbett* relied on by McKechnie J. was disapproved of. Notwithstanding that the *Foy* case is an authority against the proposition being contended for by the plaintiffs it was submitted that it could no longer be regarded as the controlling authority on the issue given that it relied upon *Hyde .v Hyde* and *Corbett v. Corbett*, decisions which in the light of Convention jurisprudence it was submitted could no longer stand.

In coming to this conclusion, counsel referred again to the case of *Ghaidan v. Mendoza.* The language used in the relevant English statute as to the right of a survivor to continue residing in rented accommodation following the death of the other was as follows:-

"A person living with a tenant as his or her wife or husband was to be treated as a spouse of the original tenant."

In that case even though the use of words in the statute was gender specific it was argued that it applied to a homosexual couple. In his judgment Buxton L.J. said at p. 1174 of his judgment:-

"Relationships (such as, for instance, sisters sharing a house, or long-term lodgers) because those relationships do not enjoy the marriage like characteristics… it is quite true… that the words husband and wife are in their natural meaning gender specific. They are also however in their natural meaning limited to persons who are party to a lawful marriage. Parliament, by paragraph 2(2), removed that last requirement. And parliament

having swallowed the camel of including unmarried partners within the protection given to married couples, it is not for this court to strain at the gnat of including such partners who are of the same sex as each other."

Reference was also made by counsel for the plaintiffs to another recent English case, *Wilkinson and Kitzinger v Attorney General*, a decision of the High Court (Unreported, 31st July, 2006). In that case, Potter J. rejected a claim by the plaintiffs therein that their marriage in British Columbia should be recognised in England under English conflict of laws rules. However, he accepted the arguments that there was in fact a discrimination and distinction drawn on the basis of sexual orientation against the plaintiffs but given that there was in English law the Civil Partnership Act 2004 which accorded same sex unions status as civil partnerships that the civil partnership, albeit not marriage, was within the margin of appreciation accorded to Convention states. It was submitted on behalf of counsel for the plaintiffs in this case that what was described as a gap within the margin of appreciation by Potter J. is a chasm in our jurisdiction because there is no equivalent of the Civil Partnership Act 2004 and either you are a heterosexual entitled to be married or you are a homosexual member of a same sex couple and not entitled to any form of recognition of that union. It was noted also that in considering the matter from the viewpoint of constitutional law there is not a concept of a margin of appreciation. It was accepted by counsel that the definitional argument does have a powerful appeal; the idea that marriage should be confined to heterosexual couples because that is what marriage has always been. However it was pointed out that constitutional interpretation cannot take place in a vacuum, in effect ignoring the changes in the cultural context, changes in the social morass of a society in which the court is called upon to interpret the Constitution. It was pointed out that the institution of marriage itself has undergone change over the centuries. Therefore the argument was made that one cannot simply rely on the concept that because marriage has always been defined as a union between man and woman that its boundaries must now be determined by that criterion alone. In that regard reference was made to a number of changes in the nature of marriage that have been recognised over the centuries. In this regard great emphasis was placed on the decision of the Supreme Court of Canada in the case of *Reference re Same Sex Marriage* [2004] 3 SCR 698. In that case it was held by the court that the definition of marriage is not constitutionally fixed. In that case it had been argued that the institution of marriage is fixed in its meaning. The court stated at paragraph 25 of the judgment as follows:

"Existing in its present basic form since time immemorial, it is not a legal construct, but rather a supra legal construct subject to legal incidents.In the *Persons* case, Lord Sankey L.C. writing for the Privy Council dealt with this very type of argument though in a different context. In addressing whether the fact that women never had occupied public office was relevant to whether they could be considered "persons" for the purposes of being eligible for appointment to the Senate, he said at p. 134:

"The fact that no woman had served or has claimed to serve such an office is not of great weight when it is remembered that custom would have prevented the claim being made or the point being contested. Customs are apt to develop into traditions which was stronger than law and remain unchallenged long after the reason for them has disappeared. The appeal to history therefore in this particular matter is not conclusive." Lord Sankey L.C. acknowledged, at p. 134, that "several centuries ago" it would have been understood that "persons" should refer only to men. Several centuries ago it would have been understood

that marriage should be available only to opposite sex couples. The recognition of same sex marriage in several Canadian jurisdictions as well as two European countries belies the assertion that the same is true today."

Relying on that authority, counsel then referred to a number of other authorities dealing with the issue of constitutional interpretation and whether or not it is frozen in time. Reliance was placed in particular on the judgement of Walsh J. in the case of *McGee v. Attorney General* referred to above at p. 319 where he stated:

"According to the preamble, the people gave themselves the Constitution to promote the common good with due observance of prudence, justice and charity so that the dignity and freedom of the individual might be assured. The judges must, therefore, as best they can from their training and their experience interpret these rights in accordance with their ideas of prudence, justice and charity. It is but natural that from time to time the prevailing ideas of these virtues may be conditioned by the passage of time; no interpretation of the Constitution is intended to be final for all time. It is given in the light of prevailing ideas and concepts."

Reference was also made to the decision in *Sinnott v. Minister for Education and Science* [2001] 2 I.R. 545. Accordingly, it was argued that the concept of marriage is not frozen by reference to what was understood by that term in 1937 or the prevailing values or standards of that time. Society's thinking and value on the issue of homosexuality has changed over the last 70 years and thus the validity of laws and traditions which restrict marriage to heterosexuals call for searching inquiry. Accordingly, the argument made was that the duty of the court to interpret the Constitution as a changing and living document means that the definitional argument could never constitute the type of justification necessary to survive or withstand scrutiny under Article 40.1 or the other provisions relied on by the plaintiffs herein.

In their conclusion it was noted by counsel for the plaintiff that marriage is something that most people strive for because it is a life altering and enhancing relationship for those who enter into it and who marry the person they love. It was submitted that the plaintiff have a constitutional right to marry one another. it was further submitted that public or moral condemnation by the majority could be no reason for the court not to vindicate their constitutional rights. That concluded the submissions on behalf of the plaintiffs.

At the conclusion of the plaintiffs case a document which was a draft statement of evidence from Professor Kathleen Lahey, a Professor in Queens University Kingston Ontario was furnished to the court. This related again to the issue of private international law. There was some objection to the document being handed in by counsel on behalf of the defendants although it was accepted that the matter could be furnished *de bene esse*. I received the document on that basis although it was accepted by counsel on behalf of the plaintiffs that the private international issues as such are not of real assistance in relation to the fundamental issue at the heart of this case namely whether there is capacity to marry in accordance with Irish law.

The Defendants' Submissions

Paul Gallagher S.C. opened the submissions on behalf of the defendants herein. He pointed out that in opening this case, counsel on behalf of the plaintiffs stated that the

first named defendants the Revenue Commissioners had acted unlawfully in interpreting the provisions of the Income Tax Code relating to a "husband", "wife" or spouses as not extending to the plaintiff in the present case and that that was wrong as a matter of law. He submitted that the suggestion that there was a mis-interpretation of the statute by the official of the Revenue Commissioners who responded to the letter addressed to the Revenue Commissioners was wrong. He stated that the ordinary and natural meaning of the words used in the relevant statutory provisions clearly relate to the union of a man and a woman and nothing was advanced to suggest that it should or could encompass the plaintiffs relationship in the present case or the relationship of other cohabiting persons. Counsel referred to the principles of statutory interpretation and made a number of points in that regard, namely:

1. The ordinary and natural meaning of the said words relate to the union of the man and a woman and on any analysis does not encompass the plaintiffs or their relationship.
2. It is clear from the scheme context and purpose of the impugned provisions that there is no basis for departing from the ordinary literal meaning of the words at issue.
3. When the words at issue are considered in context and in conjunction with other relevant words in the legislative provisions as they must it is impossible to construe the words at issue in encompassing same sex couples.
4. The conclusion that the terms upon which the plaintiffs rely do not encompass same sex couples or indeed heterosexual cohabiting couples is underpinned by the legislative history of the impugned legislation and the constitutional provisions in the light of which they must be construed.
5. There is no requirement to construe the impugned legislation in accordance with the asserted constitutional right to same sex marriage because quit simply, the Constitution does not guarantee or protect any such right.

Counsel referred to the history of the relevant provisions which were enacted to reflect the ruling of the Supreme Court in the case of *Murphy v. Attorney General* [1982] 241. In support of his argument counsel referred to the decision of the Supreme Court in the case of *McGrath v. McDermott* [1988] I.R. 258 in which it was stated by Finlay C.J. that "the functions of the courts in interpreting a statute of the Oireachtas is strictly confined to ascertaining the true meaning of each statutory provision". Accordingly it was argued that what the plaintiffs seek to do in this case is to re-write the statutory provisions as opposed to strictly speaking interpreting them. That amounts to amendment of the legislation. Counsel then referred to the provisions of s. 2 (2) (e) of the Civil Registration Act 2004 which provides that for the purposes of that Act "there is an impediment to a marriage if … both parties are of the same sex". It was noted that there is no challenge to the constitutional validity of that provision notwithstanding that *An tArd Chlaratheoir* in responding to the letter from the plaintiff applied the provisions of that Act. Counsel placed significant reliance on the fact that there was no challenge to the constitutional validity of that provision.

Counsel then proceeded to analyse carefully the manner in which the proceedings were first constituted and the way in which they have developed as the case proceeded. Counsel pointed out in the original statement of grounds in the initial judicial review application the plaintiffs had not sought a declaration that if the plaintiffs marriage in British Columbia was not entitled to recognition in the State, that the plaintiffs have a right to marry each other in the State. Such a right was sought for the first time in the

statement of claim herein. In essence what is now sought on behalf of the plaintiffs is to assert that there is a constitutional right to same sex marriage as opposed to the original issue raised in the pleadings to the effect that in failing to recognise the marriage of the plaintiff in Canada and to apply the provisions of the tax law relating to married couples to the plaintiffs that they had been discriminated against in an unconstitutional manner together with a declaration that the provisions of the tax code if it did not include same sex couples in references to husband wife spouse and marriage were unconstitutional. Counsel argued that the term marriage in the Constitution is emphatically confined to a union of a man and woman and does not encompass a relationship of two persons of the same sex. Accordingly in applying the established method of interpreting the Constitution it was argued that the plaintiffs do not have a right to marry which is protected either expressly or impliedly by the Constitution, the plaintiffs relationship does not constitute a marriage within the meaning of the Constitution and the fact that the impugned legislative provisions do not treat it as such does not entail any violation of any of the provisions of the Constitution. Accordingly it was argued that the plaintiffs claim should fail ad limine.

In addition it was pointed out that far from being a case which raised the issue of recognition of a foreign marriage, by virtue of the provisions of the Civil Registration Act 2004 it was clear that recognition could not be given to the marriage of the plaintiff. Counsel then dealt with the argument that the plaintiffs have been discriminated against and pointed out that such a contention would also fail on their argument that the right to opposite sex marriage is one which is deserving of constitutional protection and privacy and thus is a justification for any distinction between the position of the plaintiffs and married couples. It was pointed out that the plaintiffs are not treated in law any differently than any other non married couples. They are treated the same as cohabiting heterosexual couples in accordance with the manner in which the Tax Code has been formulated. Counsel expanded on these points in their written submissions. It was stated that the legislative provisions do not constitute an unjust attack on the plaintiffs property rights or discriminate against them on the grounds of gender or sexual orientation contrary to Article 40.1, 40.3, or 43 of the Constitution. The reasons given are set out hereunder.

(i) The distinction which underlines each of the impugned legislative provisions is as between married couples and all other relationships as the plaintiffs have accepted.
(ii) Moreover this legislative distinction is not only one which is contemplated by the Constitution; it is clearly authorised by it; see, in particular, Article 40.3.1 The impugned legislative measures distinguished between marriage an institution the state is obliged to guard with special care – and all other relationships.
(iii) The classification at issue in these proceedings were made for a legitimate constitutional purpose, they are relevant to that purpose and they treat each class fairly in the sense that all married couples (as distinct from all other persons) are eligible to receive the benefits in question.
(iv) The classifications at issue are clearly justifiable on the basis of the express entitlement which Article 40.1 confers on the state to have regard in its enactments to "differences of capacity, physical and moral, and of social function". It is well established in Irish constitutional jurisprudence that the social function of married couples is such as to entitle the State in its enactments to treat married couples differently from other types

of relationship for the purpose of Article 40.1. (See *Murphy v. Attorney General*).
(v) A difference in treatment between married couples and other relationships (sexual or otherwise) is expressly contemplated by Article 41 of the Constitution and cannot, therefore, constitute a violation of other provisions of the Constitution (see *Dillane v. Ireland* [1980] ILRM 167).
(vi) The ambit of the obligation which Article 41.3.1 of the Constitution imposes on the State brings into sharp focus the fundamentally misconceived nature of the plaintiffs claim that they are being unconstitutionally discriminated against and deprived of their property rights. In that context a number of decisions were relied on.
Counsel commented on the fact that the plaintiffs' contention is that because there is not a definition of marriage in the Constitution that permits or enables the court to apply some ill defined approach to extending the concept of marriage to include same sex couples. The legal basis for doing so has not been identified save to say that the Constitution is a living document that is not stuck in the permafrost of 1937 but there is no jurisprudential basis put forward which would enable the court to radically alter the concept of marriages provided in the Constitution save that it has been submitted on behalf of the plaintiffs that the consensus of what marriage means is changing. It was submitted that what the court was requested and asked to do was to rewrite the plain wording of Article 41. This is so notwithstanding that the legislature as recently as 2004 made it plain that in Irish law, statute law and common law marriage does not encompass same sex couples. It was pointed out that on the plaintiffs' case the Constitution when enacted did not protect any implied right to any same sex marriage. The height of the plaintiffs' case is that the plaintiffs are of the view that attitudes or the consensus in respect of marriage as a union between a man and woman is changing and that the Constitution should reflect such change. It is submitted by the defendants that the plaintiffs claim amounts to an application to the court to amend the Constitution and thus is misconceived.
Counsel for the defendants then dealt with the submissions of the plaintiff to the effect that the impugned legislative provisions are not compatible with Articles 8, 12 or 14 of the European Convention. Reference was then made to the recent decision in Wilkinson and Kitzinger v. Attorney General. Although the plaintiffs sought to distinguish that decision on the basis that in England there is provision for a form of civil partnership which is recognised and that that affords a wide margin of appreciation of compatibility with the Convention it is submitted that the right to marry protected by the Convention is the right to heterosexual marriage and not same sex marriage.
Counsel then indicated that an analysis of the decisions in the United States and in Canada would be undertaken. Before undertaking such analysis it was pointed out that those decisions deal with a different constitutional provision that those applicable in this jurisdiction particularly in terms of the institution of marriage. It was pointed out that the *Goodridge* decision to a large extent stands on its own and that a number of states have rejected the concept of same sex marriage both before and after the *Goodridge* decision. In the American context the issue being dealt with before the court arose in relation to the issue of due process and equality under the American Constitution.
Counsel then examined the provisions of the Constitution in relation to marriage in more detail. In particular reference was made to Article 41 and 42 of the Constitution. It was submitted that the position of marriage in society is that it is a social institution of profound significance. That this is so has been recognised in the Constitution. Indeed the

express terms of the Constitution are a measure of the significance and importance of the institution of marriage.

The point was made that even where the concepts contained within the constitution are not expressly delineated the court can undoubtedly interpret such abstract concept in accordance with prevailing ideas and mores. It was submitted this does not mean that the words of the Constitution can be divorced from their historical context. It was noted that the context in which recognition has been given to the institution of marriage is the context of the family which is described as the natural primary and fundamental unit group of society. It was submitted that in looking at ht provisions of Article 41 as a whole there could be no doubt that what is in mind is the family constituting a mother father and the children of a heterosexual marriage. It is in that context that the State guaranteed to protect the family in its constitution and authority as the necessary basis of social order. Counsel referred expressly to all of the provisions of Article 41 dealing with the family. It was pointed out that there was no dispute between the parties that in 1937 there was no doubt what was understood by the institution of marriage and the special protection that was given to marriage in the Constitution upon which the family is founded namely heterosexual marriage. Accordingly notwithstanding the contentions on behalf of the plaintiff that the Constitution now in 2006 means something quite different from what it was always understood to mean, it is submitted that to accept the submissions of the plaintiff would be in effect to turn the clear and unambiguous language of the Constitution on its head by judicial intervention on some ill defined basis because of a changing consensus as to what the Constitution should now mean. Counsel then proceeded to point the difficulties of interpreting the Constitution on the basis of a changing consensus. It was argued that the appropriate way to affect constitutional amendment was through a process of debate based on studies or science or whatever arguments are relevant for the purpose of convincing people that the Constitution ought to be changed. It was submitted that the court in effect is being requested to disregard what the Oireachtas as recently as 2004 provided for having regard to the understanding of marriage. For an example of the consensus as to the concept of marriage there could not be a more clear or unambiguous statement of the consensus than the enactment of that legislation in 2004, albeit, sometime shortly before the commencement of these proceedings.

Reference was made to an interesting commentary in an academic journal dealing *inter alia* with the provisions of the Constitution in the context of a study of legal recognition of same sex partnership published in 2001 and edited by Robert Wintemute and Mads Andenaes. Having referred specifically in the course of that document to the provisions of Article 41 the author of the contribution in relation to Ireland noted "while the family protected by the Constitution is not specifically defined therein, its contours can be fairly readily determined by looking at the provision as a whole".

Counsel on behalf of the defendant then proceeded to analyse a number of decisions of the European Court of Human Rights in the light of the ECHR. Reference was made at length in the decision of *Wilkinson and Kitzinger v. Attorney General.* The facts of that case are not dissimilar from the facts of the present case as the petitioner and the first respondent in that case who were then and remained domiciled in England went through a form of marriage, lawful and valid by the law of British Columbia which permitted and recognised as valid marriages between persons of the same sex. In that case it was argued

that the provision of s. 11(d) of the Matrimonial Causes Act 1973 and s. 1(1)(b) and Chapter 2 of Part V of the Civil Partnership Act 2004 were incompatible with the obligations imposed on the United Kingdom by the European Convention on Human Rights being contrary to Article 8, 12 and 14. The applicants in that case also sought to have their Canadian marriage recognised and referred to the fact that dealing with the marriage or equating the marriage to the status of a civil partnership was in effect down grading the status of her Canadian marriage. Accordingly and in effect what was sought was a declaration that the marriage was a valid marriage. As pointed out previously, their application was unsuccessful.

S. 11 of the Matrimonial Causes Act 1973 is in very similar terms to the provision of s. 2(2)(e) of the Civil Registration Act 2004. In the course of the judgment reference was made to the ordinary application of the rules of private international law to the effect that the capacity to marry of the parties in that case was governed by the law of England. It would be useful to refer at this point to the relevant provisions of the European Convention on Human Rights. Article 8 (right to respect for private and family life) provides:

1. "Everyone has the right to respect to his private and family life, his home and correspondence.

2. There should be no interference by a public authority with the exercise of this right expect such as is in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic well being of the country, for the prevention or disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Article 12 (Right to Marry) provides: "men and women of marriageable age have the right to marry and found a family, according to the national laws governing the exercise of this right."

Article 14 (Prohibition of Discrimination) provides:

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without the discrimination of any grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Particular emphasis was placed upon this decision of the High Court Family Division in the United Kingdom. In his judgment Potter, P. stated:

"44. Before proceeding with the detailed arguments of the parties as to the scope of Articles 8, 12 and 14, I pause to observe that the claim of the petitioner relates to an area of considerable social, political and religious controversy in respect of which there is no consensus across Europe. In such cases, there are certain principles which over arch the questions of interpretation of the Convention which are realised by the claimant. The European Court of Human Rights (ECtHR) has consistently declared itself to be slow to trespass on areas of social, political and religious controversy, where a wide variety of national and cultural traditions are in play and different political and legal choices have been made by the Members of the Council of Europe."

He then referred to the judgements of the ECtHR in *Estevez v. Spain* and *Karner v. Austria* (2003) 38 E.H.H.R 528

Potter P. then went on to analyse Article 12 at para. of the Convention. He stated as follows:

"55. Read in a straightforward manner it seems to me clear that the wording of Article 12 refers to the right to "marry" in the traditional sense (namely as a marriage between a man and a woman) according to the national laws governing the exercise of that right. As stated in *Rees v. United Kingdom* (1986) 9 EHRR 56 para. 49:
"In the courts opinion the right to marry guaranteed by Article 12 refers to the traditional marriage between persons of opposite biological sex. This appears also from the wording of the Article which makes it clear that Article 12 is mainly concerned to protect marriage as the basis of the family."
See also *Cossey v. UK* (1990) 13 EHRR 622 at 642 in which the ECtHR stated, in relation to the rights of transsexuals:
"Although some contracting states would now regard as valid a marriage between a person in Ms. Coffey's situation and a man, the developments which have occurred to date cannot be said to evidence any general abandonment of the traditional concept of marriage. In these circumstances the court does not consider that it was open to take a new approach to the interpretation of Article 12 on the point at issue".
56. So too, in Sheffield and Horsham v. UK (1998) 27 EHRR 163 at para. 66, the court stated:
"The right to marry guaranteed by Article 12 refers to the traditional marriage between persons of the opposite biological sex. This appears also from the wording of the Article which makes it clear that Article 12 is mainly concerned to protect marriage as the basis of the family. Furthermore, Article 12 lays down that the exercise of this right should be subject to the national laws of the contracting states. The limitations thereby instructed must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired. However, the legal impediment in the United Kingdom on the marriage of persons who were not of the opposite *biological sex* cannot be said to have an effect of this kind" (emphasis added).
57. The reference to "biological sex" italicised in the last sentenced quoted above can no longer stand in the light of the judgment in the court in *Goodwin v. UK* (2002) 35 EHRR 447 at 479."
Potter J. then went on to consider in detail the effect of the Goodwin decision on the right to marry. Having dealt with the submissions on this point, he concluded:
"67. Ms. Monaghan invites me to adopt an interpretation of Article 12 which serves to read it in a manner contrary to the meaning which I have no doubt it bore at the time the Convention was drafted and adopted, is contrary to the sense in which it is apparently understood and applied by all but three European States and which by Convention jurisprudence to date it continues to bear. I do not consider that to be a step which it would be proper or appropriate for me to take for the purpose of granting the declaration of incompatibility which the petitioner seeks."
Potter P. then went on to deal with other Convention arguments and I do not think it is necessary to refer to those at this point. Counsel relied very much on the analysis of the concept of family life under the Convention as set out in that judgment particularly having regard to the similar nature of the challenge taken in the United Kingdom to that in this jurisdiction.
Counsel then referred to the concept of marriage in our jurisprudence and in that regard referred to a number of specific cases. He referred to the decision in the case of *T. v. T.* [2003] ILRM 321, and in particular the judgment of the Chief Justice at p. 374, which he

argued was an unambiguous explanation by the Supreme Court of the special status of marriage and its meaning in the Constitution. He also referred to the decision in the case of *B. v. R.* [1995] 1 I.L.R.M. 491, a decision of the High Court, (Costello J.) as follows:
"Marriage was and is regarded as the voluntary and permanent union of one man and one woman to the exclusion of all others for life."
Reference was also made to the case of *Murphy v. Attorney General1982 I.R. 241* insofar as it dealt with the theme of marriage at p. 265 of the judgment. A number of other decisions were referred to insofar as they deal with the role of marriage under the Constitution. I do not propose to set those out in detail because reference was made to the same passages by counsel on behalf of the plaintiffs.
Having referred to those decisions, counsel on behalf of the defendants submitted that the inescapable fact is that so far as the plaintiffs are concerned whatever the principle of interpretation may be the institution of marriage has been repeatedly and consistently interpreted as involving opposite sex couples and not same sex couples. It was urged on the court that the contention of the plaintiff, that there is some right to marry distinct from the right to marry in the context of a marriage recognised by the Constitution, is unsustainable, without any authority whatsoever and inconsistent with the plain wording and meaning of the Constitution. The right to marry is a right to marry in the form recognised by Constitution and given the special protection contained in Article 41. No questions of recognition arise it was submitted and no questions of inequality arise because if the interpretation placed on the right to marry by the defendants is correct it is simply a right to marriage by heterosexual couples and not same sex couples and thus it is submitted the plaintiffs claim must fail on that ground.
Counsel concluded his submissions on behalf of the defendant by referring to a number of authorities which give guidance in relation to the interpretation of the Constitution and how one should approach the interpretation of the Constitution. I accept his submissions in that regard and as there was nothing of controversy in his submissions in that regard I do not propose to set them out.
The final point made was that since the criminal law has changed in 1993 in relation to homosexual acts between consenting males, a great deal of legislation has been passed dealing with the elimination of discrimination by reason of sexual orientation. Having referred to those legislative changes he noted that notwithstanding those changes, nonetheless the Civil Registration Act was enacted in 2004 reaffirming the position in relation to opposite sex marriage.
Donal O'Donnell S.C. then continued the submissions on behalf of the defendants. He looked in particular at the United States jurisprudence and in particular the equal protection clause of the 14th Amendment and the question as to whether in certain circumstances the standard of strict scrutiny, rational scrutiny or some other intermediate standard was applicable. Allied to that is the concept of suspect classifications. He pointed out that no Irish Court has adopted such a rigid mechanical approach in relation to fundamental rights analysis. He argued that there was no basis in the Irish Constitution for adopting such a system.
He made the point that if there was a right to marry the person one loves as suggested by the plaintiffs there would be no logical reason to maintain any of the other defining features of the law of marriage. He noted that there were three fundamental requirements of the law as to what marriage consists of in the Irish Constitution since 1937, namely

that it is the union between two people, man and woman and that the marriage was indissoluble. One of those components has been changed, but counsel emphasised that that change was brought about by referendum. He argued that if the second component namely the requirement that the parties be of opposite sex, then there was no logical reason why there should be any other limits on the right to marry. However he pointed out that the Constitution has made it clear that the institution of marriage is not simply about the private relationship between two people. It relates to the role of marriage in society and its relationship to the family and the family's relationship to the social order posited by the Constitution.

One of the issues highlighted by counsel was the manner in which these proceedings came before the court. Reference was made to the fact that when leave was originally given in the judicial review proceedings before McKechnie J. there was no claim as such before the court in the judicial review proceedings in which the right to marry was sought. The first time that that arose was in the statement of claim on the basis that if the Canadian marriage was not entitled to recognition then the plaintiffs sought a declaration that they had a right to marry in this jurisdiction. It was emphasised that in the defence to the statement of claim it was expressly pleaded:-

"It is denied that the plaintiffs were granted leave by the High Court to claim reliefs sought in subparagraph 4 and subparagraph 6 of para. 15. sub paragraph 6 seeks the declaration that the Plaintiffs have a right marry."

Undoubtedly on this particular issue there is a procedural difficulty but it seems to me that given that it was clearly accepted that there could not be a right to recognition without an existing right to marry I think it would be somewhat harsh to dispose of this case on such a limited and technical basis.

Counsel also identified as a problem the provisions of s. 2.2(e) of the Civil Registration Act, 2004, and that no challenge is made to the constitutionality of that provision. Counsel then referred to the text of the Constitution and in particular to Article 41 and Article 42. He referred again to the decision in the case of *Murphy v. The Attorney General* and to a number of the other Irish decisions which have been referred to previously namely *B. v. R., T.F. v. Ireland* and *T. v. T*. He also referred to the decision in the case of *Foy v. An tArd Claratheoir.* He noted that in the *Foy* decision at p. 130, McKechnie J. commented:

"However I would not like to decide this constitutional point in such a way. It seems to me that marriage as understood by the Constitution, by Statute and by case law refers to the union of a biological man with a biological woman …"

Counsel pointed out that although the *Goodwin* case decided subsequent to the decision in *Foy* came to different view, nonetheless, it did not undermine anything that has been said about the requirement that marriage should take place between members of the opposite sex. McKechnie J. noted at para. 177 of his judgment as follows:-

"In conclusion could I say that many of the issues raised in this case touched the lives in a most personal and profound way of many individuals and also are of deep concern to any caring society. These proceedings involve complex social, ethical, medical and legal issues. In my respectful view, such interrelated and interdependent matters are best dealt with by the legislature. The Oireachtas as a forum could fully debate what changes, if any, are required and then, if necessary, the scope and scale of such changes. All those who might be impacted by any such change could have their interest fully considered and

reputably debated. Accordingly could I adopt what has been repeatedly said by the European Court of Human Rights and urge the appropriate authorities to urgently review this matter."

Counsel commented that that statement had a resonance for this case. He pointed out that in *Wilkinson and Kitzenger* an argument had been made to the effect that the result of the Goodwin decision meant that the right to marry extended to people of the same sex and that the statements made by Mckechnie J. in the *Foy* case as to biological man and biological women now have to be revised in the light of the Goodwin decision.. Undoubtedly the reference to biological man and woman now has to be revised in the light of the *Goodwin* decision, but Potter J. rejected the argument in *Wilkinson and Kitzenger* to the effect that the Goodwin decision meant the right to marry extended to people of the same sex.

Counsel emphasised that the word marriage as used in Article 41 means the monogamous marriage of persons of the opposite sex and it was pointed out that there was nothing unusual in that. Indeed it was submitted that in other jurisdictions where the argument to the effect that the word marriage can mean same sex unions has been tried and failed even in cases which have favoured the concept of same sex marriage. For example in the case of *Halpern and Others v. Attorney General for Canada* [2003] 65 O.R. (4th) 161, a decision of the Ontario Court of Appeal, it was stated at para. 37:-

"In our view the Divisional Court was correct in concluding that there is a common law rule that excludes same sex marriage. This court in *Iantsis v. Papatheodorou* [1971] 1 O.R. 245 at 248, adopted the Hyde formulation of marriage as a union between a man and a woman. This understanding of the common law definition of marriage is reflected in s. 11 of the modernisation of Benefits and Obligations Act, which refers to the definition of marriage as 'the lawful union of one man and one woman to the exclusion of all others.' Further there is no merit to the submission that *M. v. H.* overruled by implication the common law definition of marriage."

However having ruled that the word marriage meant a union between a man and a woman the court then proceeded to deal with the constitutional consequences of that. He also noted that in the *Goodridge* decision which is heavily relied on by the plaintiffs in this case at p. 7 it was noted in the judgment of Marshall (who was one of the majority) in that case as follows:-

"We interpret statutes to carry out the legislatures intent, determined by the words of the statute interpreted according to 'the ordinary and approved usage of the language.' … the everyday meaning of 'marriage' is 'the legal union of a man and woman as husband and wife', … and the plaintiffs do not argue that the term 'marriage' has ever had a different meaning under Massachusetts law. … far from being ambiguous, the undefined word 'marriage' as used in GLC 207, confirms the general courts intent to hew to the terms common law and 'hidden meaning' concerning the genders of the marriage partners."

Finally reference was made to the decision in *Baker v. Vermont* in which the claim to same sex marriage as a constitutional right failed, but the court held there that there was an entitlement to a form of civil partnership. At p. 4 of the judgment the court held having considered a number of Vermont's marriage statutes noted at p. 6:-

"These statutes, read as a whole, reflect the common understanding that marriage under Vermont law consists of a union between a man and a woman. The Plaintiffs essentially concede this fact. They argue, nevertheless, that the underlying purpose of marriage is to

protect and encourage the union of committed couples and that, absent and explicit legislative prohibition the statutes should be interpreted broadly to include committed same sex couples."

That claim was rejected. However as indicated above the court went on to hold that there was an entitlement to a form of civil partnership. Accordingly marriage in the context of Article 41 and Article 42 means marriage between persons of opposite sex. Accordingly, he submitted that that was the end of the matter whilst counsel for the plaintiffs had criticised what was described as the definitional argument nonetheless the words used in the Constitution are clear, unambiguous and have had that understanding from the date of its inception to the present day.

Counsel then turned to deal with the issue under Article 40.1. Insofar as a distinction is made between married couples on the one hand and all other forms of relationships the distinction is not made on the grounds of sexual orientation or indeed gender. He made the point that insofar such a distinction exists it is a distinction that does not offend Article 40.1 because it is a constitutional distinction that is to say a distinction made by the Constitution itself. In regard to the particular issues raised by the plaintiffs in this case, it was pointed out that the tax benefits at issue are provided to married couples in contradistinction to any other couples be they co-habiting heterosexual unmarried couples, co-habiting siblings or co-habiting same sex couples. It was pointed out that in Article 40.3.1 the Constitution expressly requires the State to:

"guard with special care the institution of marriage, on which the family is founded and to protect it against attack."

In other words the legislative measures impugned in these proceedings are intended to support and protect the institution of marriage. A number of authorities were opened in support of that submission, namely *State Nicolau v. An Board Uchtala 1966 I.R. 567* in which a distinction in legislation between non-marital and marital parents was justified in the context of adoption legislation. It was noted in that case by Henchy J.:-

"For the State to award equal constitutional protection to the family founded on marriage and the 'family' founded on an extramarital union would in effect be a disregard of the pledge which the State gives in Article 43.2.1 to guard with special care the institution of marriage."

Reference was also made to the case of *G. v. An Bord Uchtala* and to the decision in the case of *O'B. v. S.* [1984] I.R. 316 in which Walsh J. at p. 333 noted

"The essential difference between the defendant and the other persons claiming as next-of-kin under the estate of the deceased is the fact that the defendant is not the child of a family based on marriage and the other next-of-kin are the issue of a family based on marriage. It has already been well established in the case law of this Court that the family recognised by the Constitution, particularly in Article 41, is the family based upon marriage - that is to say, a marriage which was a valid subsisting marriage under the law of the State. In that Article the State has undertaken, and has guaranteed, to protect the family in its constitution and authority as the necessary basis of social order …"

A similar finding was made in the *Murphy v. The Attorney General* case referred to above in respect of the Income Tax Act. Reference was also made to the decision in *Dillane v. Ireland* [1980] I.L.R.M. 167, in which a constitutional challenge to the validity of the District Court Rules which prevented a District Justice from awaiting costs against a

member of the Garda Siochána acting in discharge of his duties as a police officer was considered. The court noted at p. 170:-

"What happened when the plaintiff was denied his costs under the rule was categorically permitted by Article 40.1, so it cannot be part of the injustice which Article 40.3.2 was designed to prevent. In my judgment, this ground of constitutional attack also fails."

Accordingly it was submitted that a difference in treatment between married couples and other relationships, sexual or otherwise is expressly permitted by Article 41.3.1 of the Constitution and cannot therefore constitute a violation of other provisions of the Constitution.

The point was then made that in response to the arguments in respect of the right to marry and to Article 41 that one main argument was raised namely that the Constitution is a living instrument and can be adapted by interpretation to keep it relevant to changing times. In support of the argument made in that regard reference was made amongst other things to a passage from Kelly on the Irish Constitution 2003 at 24 to 25 where a discussion on the interpretation on the provisions of the Constitution was contained. It was stated as follows:-

"The process of historical interpretation is of some utility, especially where some law based system is in issue, such as the interpretation of the provisions concerning parliamentary privilege, or the guarantee of jury trial in Article 38.5. This need not mean that the shape of such systems must be fixed permanently by reference to 'the permafrost of 1937': the courts ought to have some leeway for considering which dimensions of the system are secondary and which are so material to traditional constitutional values that a willingness to see them diluted or substantially abolished without a referendum could not be imputed to the enacting electorate."

"Thus, it may be said that where the Constitution carefully defines certain powers, rights, privileges and procedures (as in the case, for example, of the powers of the President, the scope of parliamentary privilege, the regulation of Dáil and Seanad elections and definition of a money bill) the courts must follow the text carefully, aided, where necessary, by a historical understanding of what the framers sought to achieve. But it would equally seem that many fundamental concepts – trial in due course of law, equality before the law, personal liberty, property rights – were left deliberately vague and imprecise. One can only assume that the drafters intended that the ambit of these clauses would become clearer in the light of experiences they were applied, to novel and ever changing facts and circumstances. Indeed, as the Irish example is clearly shown, it is through the accretian of case law alone that such general clauses gather depth and meaning. Indeed the method of interpretation of these general clauses with frequent judicial warnings about the undesirability of a strict construction 'which would allow the imperfection or inadequacy of the words used to defeat or pervert any of the fundamental purposes of the Constitution' – tends to resemble a traditional common law method of adjudication (with its reliance on emerging doctrine from the case law) in contradistinction to any strict exegesis of the actual text of the Constitution."

In support of the argument counsel also referred to the decision in *McGee v. the Attorney General* and to the decision in the case of *Ryan v. The Attorney General* and in particular to an extract from the judgment in the *Sinnott v. The Minister for Education* case. At p. 681 of his judgment in that case Murray J. noted:-

"The late Professor John Kelly, writing in the constitution of Ireland 1937–1987 suggested guidelines to achieve a balance as between possible competing claims of the historical approach to constitutional interpretation and the contemporary or 'present-tense' approach. The 'present-tense' or contemporary approach, he suggested is appropriate to standards and values. Thus elements like 'personal rights', 'common good', 'social justice', 'equality', and so on, can (indeed can only be) interpreted according to the lights of today as judges perceive and share them. He felt that on the other hand the historical approach was appropriate 'where some law-based system is in issue, like jury trial, county councils, the census.' This, he said was not to suggest that the shape of such systems is in every respect fixed in the permafrost of 1937. The courts ought to have some leeway for considering which dimensions of the system are secondary, and, which are so material to traditional constitutional values that a willingness to see them diluted or substantially abolished without a referendum could not be imputed to the enacting electorate."

It was submitted that the living document argument is not something that allows the courts to depart from what the Constitution says or implies or was understood in 1937. In effect the argument was that the definition of marriage within the Constitution was so clear and so material and fundamental to traditional constitutional values that it was not possible to dilute or abolish or alter them without a referendum. In other words what the enacting electorate had decided in relation to a fundamental concept could only be changed by the enacting electorate. ie. in a referendum. Finally on this particular point, counsel referred to a quotation from a distinguished American constitutional lawyer Professor Cass Sunstein writing in the Harvard Law Review in 1996, in which he said at p. 58:-

"When a democracy is in moral flux, courts may not have the best or the final answers. Judicial answers may be wrong. They may be counterproductive, even if they are right. Courts do best by proceeding in a way that is catalytic, rather than preclusive and that is closely attuned to the fact that courts are participants in the system of democratic deliberation."

Counsel then dealt with the arguments based on the European Convention of Human Rights Decisions. Again it was reiterated that Article 12 of the European Convention refers to the rights of men and women in regard to the right to marriage and it was pointed out that the European Court of Human Rights has always interpreted that provision to mean that marriage is restricted to men and women; how to determine whether persons seeking to marry are indeed of opposite sex an issue that has arisen in the transsexual cases. In other words the right to marry is by the express terms of the provision confined to opposite sex marriage. Secondly it was argued that any distinction which distinguishes between married people on the one hand and other couples, whether heterosexual or homosexual on the other is not a breach of Article 14 even if it can be said to engage the right to marry, which it was submitted could not be so given the earlier definition contained in Article 12 because a distinction between marriage and all other unions is a distinction contemplated by the Convention itself. It was argued that the court has held that a State cannot make a distinction in matters which do touch upon Article 8 matters on grounds of sexual orientation and thus a line is drawn between legislation which limits itself to married couples, which is permissible, but legislation which gives a particular status to married couples or persons living as man and wife will be vulnerable

because it effects an unacceptable distinction between co-habiting heterosexual couples and co-habiting homosexual couples which is only a distinction based on sexual orientation. That type of distinction will be struck down because it is a distinction based on sexual orientation and not a distinction based on status or the status of marriage. In support of that contention reference was made to a number of decisions including *Wilkinson and Kitzenger v. Attorney General*, *Rees v. United Kingdom* and to a number of the decisions of the European Court of Human Rights.

In the context of Article 8 it was noted that the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities (see *Hannover v. Germany* 59320/00 (24th June 2004)), para. 57. Reference was made also to the decision in the case of *Johnston v. Ireland* [1986] 9 E.H.R.R. 203. That was a case in which the absence of a law permitting divorce in Ireland prior to the referendum in 1995 was challenged on the basis that it interfered with the right to marry, where those who sought the right were already married and were unable to marry because of the absence of divorce. The argument in that case was rejected by the court which stated at para. 52 and 53 of the judgment as follows:-

"The applicants set considerable store on the social developments that have occurred since the Convention was drafted, notably an alleged substantial increase in marriage breakdown.

It is true that the Convention and its protocols must be interpreted in the light of present day conditions. However the court cannot by means of an evolutive interpretation, derive from these instruments a right that was not included therein at the outset. This is particularly so here, where the omission was deliberate."

In other words it was submitted on behalf of the defendant that whilst one can interpret the Convention in the light of present day conditions the approach to be taken is constrained by the text and one cannot read into the text of the Convention that which was not included therein, particularly when the omission was deliberate. It was also noted in that case "there has been no interference by the public authorities with the family life of the first and second applicants: Ireland has done nothing to impede or prevent them from living together and continuing to do so." It was also noted that in the case of *Mata Estevez v. Spain* the Court of Human Rights rejected the notion that long term homosexual relationships fell within the scope of the right to respect core family life protected by Article 8 of the Convention. Finally in regard to this topic counsel referred in detail to the judgment of Potter P. in *Wilkinson and Kitzenger* in which he analysed at length a number of the decisions of the European Court of Human Rights. In concluding his submissions on the European Convention, counsel made the point having referred again to the judgment in *Wilkinson and Kitzenger* in which Potter P. noted that an English Court would decline to recognise or apply what might otherwise be an appropriate foreign rule of law when so to do would be against English public policy. He indicated that English public policy was demonstrated by s. 11(c) of the MCA and the relevant provisions of the CPA and counsel submitted that Irish public policy is also indicated and demonstrated by the terms of the Civil Registration Act 2004.

Finally it was submitted that the European Court jurisprudence does not bring the plaintiffs case any further because if anything the Convention is more explicit than the 1937 Constitution in that it refers expressly to the right of men and women to marry. Accordingly, those words in the Convention, can only mean opposite sex marriage.

Counsel for the defendants then turned to a consideration of a number of the decisions from the United States. He noted the reliance placed on *Loving v. Virginia*, the dissenting judgment of Mr. Justice Scalia in *Lawrence v. Texas* and in particular *Goodridge v. Massachusetts.* It was noted that prior to the decision in the *Goodridge* case there were a number of cases which rejected the concept of same sex marriage and that subsequent to the *Goodridge* decision a number of other decisions have declined to follow the approach taken in *Goodridge*. For example in the case of *Baker v. Nelson* 291 Minn. 310 the Supreme Court of Minnesota held that a Minnesota statute which did not authorise marriage between persons of the same sex did not offend the first, eighth, ninth or fourteenth amendment to the United States Constitution. A similar claim was rejected in the case of *Jones v. Halihan* 501 S.W. 2d 588 1973, on the basis that the female applicants in that case were not entitled to a licence to marry one another because marriage involves the union of a man and a woman and consequently they were incapable of entering into a marriage. In *Dean v. District f Columbia* [1995] 653 A. 2d 307 it was held by the court of appeals in the District of Columbia that a District of Columbia marriage statute which prohibited the clerk of the Superior Court from issuing marriage licences to same sex couples did not violate the equal protection clause of the U.S. Constitution. It was noted by Terry J. at p. 2 of the judgment in that case as follows:-

"It seems obvious that the remedy for the dilemma facing these appellants lies exclusively with the legislature. The Council of the District of Columbia can enact some sort of domestic partners law, bestowing on same sex couples the same right already enjoyed by married couples, whenever it wants to. But no court can order a legislature to enact a particular statute so as to achieve a result that the court might consider desirable, or to appropriate money for a purpose that the court might deem worthy of being funded. … Having concluded unanimously that it is impossible for two persons of the same sex to marry, this court cannot also conclude that it is – or even may be - a denial of equal protection to refuse to allow such persons to marry. The two conclusions are inherently inconsistent. If these appellants cannot enter into a marriage because the very nature of marriage makes it impossible for them to do so, then their quest for a marriage licence is a futile act and the District's refusal to issue a licence to them is legally and constitutionally meaningless. They are, or course, free to refer to their relationship by whatever name they wish. But it is not a marriage, and calling it a marriage will not make it one."

Counsel then examined the decision in the *Goodridge* case in some detail. In particular he referred to the judgments of Sosman J., and Cordy J. Sosman J. noted at p. 21 of his judgment that:-

"It is not, however our assessment that matters. Conspicuously absent from the courts opinion today is any acknowledgment that the attempts at scientific study of the ramifications of raising children in same sex couples households are themselves in their infancy and have so far produced inconclusive and conflicting results. Notwithstanding our belief that gender and sexual orientation of parents should not matter to the success of the child rearing venture, studies to date reveal that there is still some observable differences between children raised by opposite sex couples and children raised by same sex couples. … Interpretation of the data gathered by those studies then becomes clouded by the personal and political beliefs of the investigators, both as to whether the differences identified are positive or negative and as to the untested explanations of what

might account for those differences. This is hardly the first time in history that the ostensible steel of the scientific method has melted and buckled under the intense heat of political and religious patterns.
Even in the absence of bias or political agenda between the various studies of children raised by same sex couples, the most neutral and strict application of scientific principles to this field would be constrained by the limited period of observation that has been available. Gay and lesbian couples living together openly, and official recognition of them as their children so parents, comprise a very recent phenomenon and the recency of that phenomenon has not yet permitted any study of how those children fare as adults and at best minimal study of how they fare during their adolescent years. The legislature can rationally view the status of scientific evidence as unsettled on the critical question it now faces."
(Page 21) He went on to note at p. 23:-
"As a matter of social history, today's opinion may represent a great turning point that many will hail as a tremendous step towards a more just society. As a matter of constitutional jurisprudence, however, the case stands as aberration."
In his judgment Cordy J. considered and distinguished the decision in the *Loving v. Virginia* case, noting that it was principally concerned with white supremacy. Cordy J. noted at p. 30 of his judgment as follows:-
"Civil marriage is the institutional mechanism by which societies have sanctioned and recognised particular family structures and the institution of marriage has existed as one of the fundamental organising principles of human society. He noted certain features of the functions of marriage and that it has 'systematically' provided for the regulation of heterosexual behaviour, brought order to the resulting procreation and ensured a stable family structure in which children will be reared, educated and socialised."
He then noted:-
"The institution of marriage provides the important legal and normative link between heterosexual intercourse and procreation on the one hand and family responsibilities on the other."
He then noted:-
"It is difficult to imagine a state purpose more important and legitimate than ensuring, promoting and supporting an optimal social structure within which to bear and raise children. At the very least, the marriage statute continues to serve this important state purpose."
Cordy J. then referred to the studies in relation to the welfare of children raised by same sex couples. Having done so he commented on concerns as to the extent of the state of knowledge as a result of those studies and he commented:-
"The court recognises this concern but brushes it aside with the assumption that permitting same sex couples to marry 'will not diminish the validity or dignity of opposite sex marriage,' and that 'we have no doubt that marriage will continue to be a vibrant and revered institution,' whether the court is correct in its assumption is irrelevant. What is relevant is that such predicting is not the business of the courts. A rational legislature, given the evidence, could conceivably come to a different conclusion, or could at least harbour rational concerns about possible unintended consequences of a dramatic redefinition of marriage."
Finally Cordy J. concluded:-

"While the Massachusetts Constitution protects matters of personal liberty against Government incursion as zealously and often more so than does the federal Constitution this case is not about Government intrusions into matters of personal liberty. It is not about the rights of same sex couples who choose to live together, or to be intimate with each other, or to adopt and raise children together. It is about whether the State must endorse and support their choices by changing the institution of civil marriage to make its benefits, obligations and responsibilities applicable to them. While the courageous efforts of many have resulted in increased dignity, rights and respect for gay and lesbian members of our community, the issue presented here is a profound one deeply rooted in social policy, that must, for now be the subject of legislative not judicial action."

It should be noted that counsel referred at length to that judgment for two reasons: first, because the plaintiffs have placed such reliance on that decision and secondly, because subsequent decisions in other State jurisdictions have not followed it. In *Morrison v. Sadlier* 296821 Ne 2d 15 the Court endorsed the dissenting analysis in the *Goodridge* decision and added at p. 13:-

"We additionally found the *Goodridge* majority opinion is largely devoid of discussion of why the commonwealth of Massachusetts might have chosen in the first place to extend marriage benefits to opposite sex couples but not same sex couples. It may well be, as the majority stated, that for many people 'it is the exclusive and permanent commitment of marriage partners to one another, not the begetting of children, that is the *sine qua non* of civil marriage.' However that does not answer the question for why the Government may choose to bestow on one type of permanent commitment and not another. As we have identified, at least one of the reasons the Government does so is to encourage 'responsible procreation' by opposite sex couples."

The decision of the Court of Appeals of Indiana in that case found that the Indiana Constitution does not require legal recognition of same sex marriage. Similarly the Supreme Court of Oregon in the case of *Li v. State of Oregon* rejected the claim to same sex marriage and so did the Superior Court of New Jersey in *Lewis v. Harris*, 378 N.J. Supra 168. A similar view was taken by the New York Court of Appeals in *Hernandez v. Robles*, (Unreported, 6th July 2006.) In that case again it was held that the New York Constitution does not compel recognition of marriages between members of the same sex. Reference was made a p. 5 of the judgment as follows:-

"To support their argument, plaintiffs and *amici* supporting them referred to social science literature reporting studies of same sex parents and their children. Some opponents of same sex marriage criticised these studies, but we need not consider the criticism, for the studies on their face do not establish beyond doubt that children fare equally well in same sex and opposite sex households. What they show, at most is that rather limited observations have detected no marked differences. More definitive results could hardly be expected, for until recently few children have been raised in same sex households and there has been not enough time to study the long terms results of such child rearing."

A number of further observations were quoted from that particular judgment and I will just refer to one passage which was referred to me and which has echoes in a number of other cases. It appears at p. 9 of the judgment in that case:-

"The dissenters assent confidently that future generations will agree with their view of this case. We do not predict what people will think generations from now, but we believe

that the present generation should have a chance to decide the issue through its elective representatives. We therefore express our hope that the participants in the controversy over same sex marriage will address their arguments to the legislature; that the legislature will listen and decide as wisely as it can; and that those unhappy with the result – as many undoubtedly will be – will respect it as people in a democratic State should respect choices democratically made."

A number of other judgments for example, the case of *Anderssen v. King County,* 138 P. 3d 963, a judgment from the State of Washington made a similar comment about the limited role of a court when deciding constitutional challenges. At p. 30 of the judgment in that case it was noted as follows:-

"The appellate judges and justices in the highest courts of all the States, and justices of the United States Supreme Court, take an oath to uphold the Constitution and Laws. The issue presented today has been before many of these courts. The understanding of marriage expressed above and elaborated below has been continuously upheld, with only one notorious exception. A correct understanding of constitutional principles should not be determined by a numerical count of judges, but the fact our conclusion has been shared by all of these appellate judges and justices as to our certainty in the judgment today."

The final case referred to was the decision in the *Woo v. Lockyer and Others,* Court of Appeal for the State of California, 5th October 2006. Counsel referred to a number of passages in that particular case; in that case the court emphasised the role of the judiciary as being one which does not involve rewriting legislation to satisfy the courts view. It was emphasised that the court was being asked to recognise a new right in that case and the court expressed the view that it did not have the authority to do so, especially when doing so involved changing the definition of so fundamental an institution as marriage. The judgment in that case reiterated again that it is for the legislature to bring about change in this area rather than the courts.

Finally reference was made on this topic to a decision of New Zealand entitled *Quilter v. Attorney General.* In that case there was a challenge to a New Zealand statute which did not define marriage but described the institution of marriage and it was held that the Act was based on the traditional common law concept of marriage involving a man and a woman.

Based on all of those decisions, counsel referred to the written submissions of the plaintiffs where it was stated:-

"The jurisprudential and legislative tide across the world which increasingly recognises the right to same sex marriage as an ingredient of humanity's fundamental right to marry is not an accident."

Commenting on that sentence counsel disagreed fundamentally that there was a jurisprudential and legislative tide. On the contrary if there was a tide, it was going very strongly in the opposite direction. Reference was again made to Professor Sunstein's work to the effect that when democracy is in a moral flux courts may not have the best or the final answer. It was submitted that the arguments put forward by the plaintiffs were made on the basis of a superficial and selective examination of statements in cases and academic articles that favour the plaintiffs' case without examining the underlying burden of what has been said and decided in those cases not just the American case law but also fundamental provisions of Irish law.

Finally it was noted that there is a very active debate in Irish life on the appropriate response to and the appropriate method of dealing with the demands or needs of homosexual people for recognition of rights of partnership or rights of same sex marriage. It was submitted that the debate would be precluded or distorted by judicial determination at this point. Secondly, it was pointed out that the fact that there is a debate negatives any possible suggestion that there is a consensus because if there was a consensus on the topic of same sex marriage there would be no need for debate. Reference in that regard was made to a number of documents which supported the contention that this was the subject of widespread debate. Papers produced by the Law Reform Commission, the Human Rights Commission and by the Equality Authority were handed in. That concluded the submissions of the defendants herein.

Gerard Hogan S.C. dealt with the closing submissions on behalf of the plaintiffs. He made the point that contrary to what had been stated by Mr. Donnell this court is charged with the task of adjudicating on whether a fundamental right had been infringed. He pointed out that the plaintiffs come to the court to establish that they have a fundamental right to marry and that that fundamental right has been infringed. He pointed out that if the separation of powers argument, had been advanced on behalf of the defendants were successful then decisions such as that in the case of *McGee v. The Attorney General* would never have been determined.

Counsel then proceeded to deal with a number of specific issues. The first of those related to the provisions of the Civil Registration Act 2004. Although there was criticism of the plaintiffs for not referring to that Act in their proceedings, nor is it to be found in the defence filed on behalf of the defendants herein. Part 1 of the Act, which contains the provision relevant to this case came into force in December 2005, a year after the proceedings herein were commenced. In those circumstances there was no constitutional challenge to its provisions. He argued that if the plaintiffs were to succeed on their main argument the logical corollary would be that the section could not survive constitutional challenge.

Counsel then pointed out that certain provisions of the Constitution contain definitions, for example, Article 15.1 defines the Oireachtas and the composition of the Oireachtas. So far as marriage was concerned the only express provision in relation to it was the exclusion of the possibility of divorce. The other features of marriage were not defined and therefore not set in stone. He added that the Irish version of the Constitution did not advance the argument one way or another in relation to the definition of marriage. He also noted that in relation to a number of decisions of the courts in relation to marriage, for example, the most recent dictum of Murray J. in the case of *T. v. T.*, while that dictum was worthy of respect and deference nonetheless it was simply a dictum and is not and could not be binding on this court given that the issue of homosexual marriage was not before the court in that case. That was an observation true of a number of other decisions.

He referred to the arguments made in respect of the *Goodwin* decision and that Article 12 must now be read with the word biological in parenthesis. He argued that this was a fundamental change in the institution of marriage. Given that fundamental change in the nature of marriage, that has effected a change in the fundamental nature of marriage as it has existed since 1937.

Counsel then referred to the American cases and the analysis of those. He pointed out that whilst there have been subsequent decisions rejecting *Goodridge* on the merits, there were dissenting judgments in those cases and he made the point that there is by no means unanimity in the approach of the courts. Accordingly he argued that *Goodridge* is not a one off aberration. He pointed out that the consensus in the United States has been, apart from the decision in the *Goodridge* case and the cases involving the State of Vermont and Hawaii, have been on balance against same sex marriage but nonetheless the issue has been hotly disputed throughout the States which have rejected the concept of same sex marriage.

Counsel then noted one aspect of the evidence which he submitted was of critical significance. That related to the evidence of Professor Kennedy. In particular he highlighted the answer to one of the questions posed to Professor Kennedy and I quote:

"Q. Can you address the question that is sometimes phrased in terms of whether homosexuality is something normal or abnormal, can you comment on that?
A. The modern biological view is essentially that the condition of us all as human beings can be characterised in various ways; one can be young, one can be old; one can be right handed or left handed and homosexuality is one of those features of the human condition. It is an aspect of normality."

Counsel emphasised that Professor Kennedy's evidence was to the effect that homosexuality is an aspect of the human condition, it is perfectly natural; it is one of those things that happens. He submitted that it is against that background that the court should assess the case that is made by the defendants. He commented on the fact that in essence the case made against the plaintiffs was purely the definitional argument, coupled with arguments about the separation of powers and judicial abstinence and deference and not having fundamental change brought about by judicial decision. However, counsel pointed out that a number of changes have indeed occurred in relation to marriage. For example, the age at which one can marry has been changed since 1937, rules about consanguinity have been changed and most fundamentally, perhaps, the indissolubility of marriage has changed. Accordingly, he submitted that the framers of the Constitution did not intend to freeze marriage "in the permafrost of 1937". In other words counsel reiterated the importance of viewing the Constitution as a living instrument as opposed to a document fixed in time by the standards of 1937.

In that regard he referred again to the Canadian decision in the case of *reference Re: Same Sex Marriage* 2004 3SCR 698 at p. 7/11 where it was stated by the court:

"The arguments presented to this court in favour of a departure from the 'living tree' principle fall into three broad categories:

1. Marriage is a pre-legal institution and thus cannot be fundamentally modified by law;
2. Even a progressive interpretation of s. 91(26) cannot accommodate same sex marriage since it falls outside the natural limits of that head of power, a corollary to this point being the objection that s. 15 of the Charter is being used to amend s. 91(26); and
3. In this instance, the intention of the framers of our Constitution should be determinative.

As we shall see none of these arguments persuade."

Counsel then proceeded to consider a number of further passages from that judgment and in particular the court in that case went on to note at p. 713:-

"In determining whether legislation falls within a particular head of power, a progressive interpretation of the head of power must be adopted. The competing submissions before us do not permit us to conclude that 'marriage' in s. 91(26) of the Constitution Act 1867 read expansively, excludes same sex marriage."

Counsel noted that this was a fundamental constitutional document dating from 1867 where the same argument was being made. The court in that case said in response to an argument that the intention of the framers should be determinative in interpreting the scope of the head of power. Relying on a decision in an earlier case the court responded:-

"that case considered the interpretive question in relation to a particular constitutional agreement, as opposed to a head of power which must continually adapt to cover new realities. It is, therefore distinguishable and does not apply here".

Accordingly it was submitted that that decision showed that the word marriage is not to be fixed by reference to what it was understood to be in 1867 in Canada and it was argued by analogy that the same was so in Ireland. In other words the term marriage in the Irish Constitution is not to be fixed by reference to what it was understood to mean in 1937.

Further in support of the argument as to the Constitution being a living instrument, reference was made to a number of Irish decisions. In particular reference was made to the *Sinnott* decision.

Counsel then looked closely at Article 41 in detail. The question was posed as to how it could be said, because Article 41 provides that the family is the natural primary and fundamental unit group of society and is a moral institution possessing inalienable and imprescriptible rights, did that exclude same sex marriage. He submitted that no reasons are proffered by counsel for the defendants as to why this is so. Having referred to the fact that a homosexual couple would not have been contemplated as coming within the 1937 understanding of marriage, he argued that as medical science, psychiatry and other disciplines had shown the understanding of homosexuality as it existed in 1937 was wrong and therefore he submitted that the only reason why the plaintiffs in this case cannot be described as a unit group within the meaning of Article 41 is because of habit, custom and tradition.

In his concluding argument he urged the court to consider whether there was an objective justification for the restriction on same sex marriage. He referred again to the judgment in the case of *An Blascaod Mór* and he concluded by saying that the case put forward by the defendants is not that there is moral disapproval of same sex marriage, it is not that children would be better off in a particular environment but an appeal solely and exclusively to history. He submitted that having regard to the evidence of Professor Kennedy that this generation recognises that which a previous generation did not namely that homosexuality is a perfectly normal and ordinary human condition and thus he submitted that the restriction urged by the defendants cannot rationally stand.

Conclusions

Before dealing with the legal issues and arguments that were made before me, it would be prudent to deal briefly with the evidence. In her evidence Dr. Zappone conceded that she and Dr. Gilligan are not treated any differently in relation to taxation provisions from heterosexual couples that were not married. She also agreed that in 1937 when the institution of marriage was given constitutional protection the consensus as to what

marriage involved was a marriage between people of the opposite sex. She believed that that view has now changed to the extent that there is now an acceptance of the normality of the sexual identity of people who are homosexual.

I had the benefit of a report from Mr. Cremins in relation to the tax position. Subject to one matter which was later clarified, again, there was no challenge to the statement of evidence furnished by Mr. Cremins. In any event, it is accepted that there is no discrimination between homosexual co-habiting couples and heterosexual co-habiting couples so far as the tax regime is concerned.

Professor Kennedy's evidence was of assistance in dealing with the link between the medical and legal approach to the issue of homosexuality. So far as his evidence was concerned I accept his evidence and note that the psychiatric and medical view of homosexuality has advanced considerably in the last thirty years or so. Of the changes, the most significant change is clearly the fact that homosexuality can no longer be regarded as a mental illness or disorder.

The evidence of Professor Green was somewhat controversial. Certainly he was challenged extensively on the conclusions drawn by him as a result of the studies to which he referred. I think it is important to be clear as to the value and weight to be attached to his evidence. It is clear that in many of the U.S. cases and indeed in Canada, similar evidence has been given to the courts in those jurisdictions. It is also clear that such evidence has been vigorously contested there as well. Indeed the affidavit to which reference has been made from time to time sworn by Professor Stephen Nock was in fact sworn in the Canadian decision in the *Halpern* case. The purpose of the evidence furnished by Professor Green was to demonstrate that children of same sex couples or raised by same sex couples are no worse off from an emotional or any other relevant perspective than the children of or raised by heterosexual couples. In his evidence he outlined the details and findings of a number of reports which have carried out research in this area. On the basis of those studies he came to a conclusion to the effect that there was great consistency in the findings from the various studies that had been conducted in the U.S., England and Continental Europe spanning at least two decades. It was his view that no clinically significant differences are found comparing boys and girls raised by lesbian mothers solo or with a female partner when compared with boys and girls raised by single heterosexual mothers or heterosexual mothers living with the father of their children. As has been described earlier he was vigorously cross examined in relation to the methodology of the studies he relied upon and the ability to draw conclusions from those studies having regard to the methodology employed in the studies. That criticism extended not just to the studies he had reviewed but to those he himself had been involved in.

Having considered his evidence carefully, taking on board the evidence that I also heard from Professor Casey and from Professor Waite, I think that one must have some reservation in relation to the conclusions drawn by Professor Green. The phenomenon of parenting by same sex couples is one of relatively recent history. The studies that have taken place are consequently of recent origin. Most of the studies have been cross sectional studies involving small samples and frequently quite young children. I have to say that based on all of the evidence I heard on this topic that I am not convinced that such firm conclusions can be drawn as to the welfare of children at this point in time. It seems to me that further studies will be necessary before a firm conclusion can be

reached. It also seems to me having regard to the criticism of the methodology used in the majority of the studies conducted to date that until such time as there are more longitudinal studies involving much larger samples that it will be difficult to reach firm conclusions on this topic.

It is worth noting having said that, however, that none of the studies carried out to date have demonstrated any adverse impact on the children involved in the particular studies. Some differences have been noted. Some differences in the quality of parenting have been noted (I might add not adverse differences) and there was in one study some indication that there may be a slight effect on gender orientation. However, the sample in the particular study was so small that again one would be wary of placing any reliance or drawing firm conclusions from that particular study. I think however it is important to note that there was no evidence of any kind tendered to the court to demonstrate that children brought up by a same sex couple or a single homosexual parent are adversely affected by the family structure in which they are raised.

Professor Green himself did not demur from the comment in the American Journal Paediatrics already quoted above but worth repeating:-

"The small and non representative samples studied and the relatively young age of most of the children suggest some reserve."

Accordingly, so far as the evidence is concerned it seems to me that the research into this topic which is of significant importance is not developed to the extent that one could draw such firm conclusions as Professor Green has expressed.

The evidence of Patricia Casey largely dealt with the issue of the methodology employed in the various studies described by Professor Green. As is clear from my comments on the evidence of Professor Green, I accepted her evidence in relation to the question of methodology used for conducting the research relied on by Professor Green and commented upon in the affidavit of Professor Nock. It is not necessary to comment further on that issue. So far as the rest of her evidence is concerned I think it is fair to say that she agreed with the evidence given by Professor Kennedy to the effect that homosexuality is not a psychiatric illness and that in effect that has been the view in psychiatric medicine since the 1970's in America and in Europe. She also agreed with the evidence of Professor Kennedy to the effect that stigma or discrimination experienced by people can have an affect on their psychiatric well-being. She noted that this was not something unique to homosexuals but a reaction to discrimination or stigma generally. Professor Waite's evidence focused on her research on the family structure and the institution of marriage in the context of heterosexual marriage. She concluded that the evidence overwhelmingly supported the conclusion that the social institution of marriage is beneficial for those involved. Equally benefits accrued to children. I accept her evidence in this regard. She dealt with the affidavit of Professor Nock and the evidence given by Professor Green. When she was cross examined about the book she had written entitled "The Case for Marriage" she explained that she was neutral in relation to the issue of same sex marriage because the evidence simply was not there to indicate one way or another as to the consequences of same sex marriage. Having considered her evidence it reinforces the view that there is simply not enough evidence from the research done to date that could allow firm conclusions to be drawn as to the consequences of same sex marriage particularly in the area of the welfare of children.

I do not think it is necessary to comment in any way on the material that was furnished by

way of statements of evidence in respect of the position in relation to the validity of the plaintiffs' marriage in Canadian law.
The final matter I should briefly refer to at this point is the witness statement that was furnished by Dr. Evelyn Mahon a senior lecturer in the School of Social Work and Social Policy at Trinity College Dublin. Her statement of evidence was particularly interesting in that it included an appendix setting out information in respect of relationship recognition in European Union jurisdictions. From that appendix it appears that three countries in the European Union, namely Belgium, The Netherlands and Spain recognise and have a facility for same sex marriage. A number of jurisdictions have a registration scheme for co-habitees. Others give recognition of some kind to co-habitants of the same sex and the opposite sex without a registration scheme. Ten of the countries have no registration scheme or formal recognition for co-habitees of any kind. Ireland is included in that group. A number of countries have registration scheme for same sex couples only and a further number of countries have registration schemes for same sex and opposite sex couples. The one observation I would make is that there is no discernable pattern apparent from the approaches taken in the different jurisdictions.
The question of same sex marriage is one that has been the subject of considerable litigation in a number of jurisdictions around the world as is obvious from the various authorities cited to the court in the course of this hearing. It is a subject that has been debated, discussed and considered from philosophical, religious, medical, psychiatric and social points of view. It is also clear that it is a subject to which no single universal solution has been found. A small number of jurisdictions have provided for same sex marriage. A number have provided for some form of civil partnership. Many countries have no special arrangements in place. No doubt the differences can be explained by virtue of the fact that the phenomenon of same sex couples is of relatively recent origin as is the recognition of the rights of unmarried co-habiting heterosexual couples. One must remember that although this case has focused on the legal and academic arguments in relation to the concept of same sex marriage, there are two individuals at the heart of this case who have spoken eloquently of the sense of social exclusion they feel by virtue of being denied entry to the institution of marriage. It is clear that they have a long-lasting loving relationship of mutual commitment. They took advantage of changes in the law in Canada which resulted in their marriage in that jurisdiction and prompted the commencement of these proceedings.
It is necessary now to consider the issue that emerged clearly during the hearing of this action, namely, does the right to marry inherent in the Constitution encompass the right to same sex marriage? If not, is the traditional right as interpreted in the impugned provisions incompatible with the provisions of the European Convention on Human Rights?
It has been accepted in this case on behalf of the plaintiffs that one of the common law grounds of exclusion based on lack of capacity is that the two people seeking to marry are of the same sex. There is also now a legislative prohibition introduced by the Civil Registration Act of 2004. It was also accepted that insofar as the institution of marriage is described within the Constitution that what was always understood by the framers of the Constitution was the traditional understanding of marriage as exemplified in cases such as *Hyde v. Hyde* referred to above, namely "the voluntary union of one man and one woman, to the exclusion of all others." However the plaintiffs rely very much on the U.S.

and Canadian authorities to argue that the Constitution is a living instrument and that accordingly the right to marry should be considered to have changed so as to embrace the concept of same sex marriage by reason of the existence of a changing consensus. Particular emphasis was placed on the Canadian decision in the *Halpern* case as to the "living instrument" argument.

Counsel for the plaintiffs had referred to changes in our understanding of the nature of marriage and the fact that the institution of marriage as we now understand it has undergone changes over the years. In particular there have been changes in relation to capacity. As an example reference was made to the *Loving* case in the U.S. In that particular instance a justification for the criminal prohibition on inter-racial marriage was defended on the basis that the prohibition was part of God's plan to keep the races apart. It did not succeed. The point was made that the boundaries of the constitutional right to marry, should not be determined by an appeal to a conventional dictionary definition. Reference was also made to the decisions in the case of *McGee v. Attorney General* [1974] I.R. 284, where it was stated by Walsh J. at p. 319:

"The judges must, therefore, as best they can from their training and their experience interpret these rights in accordance with their ideas of prudence, justice and charity. It is but natural that from time to time the prevailing ideas of these virtues may be conditioned by the passage of time; no interpretation of the Constitution is intended to be final for all time. It is given in the light of prevailing ideas and concepts."

A similar approach was also expressed in the *Sinnott* case referred to above. In support of the "living instrument" argument, reference was made to the Massachusetts case of *Goodridge* in which Marshall C.J. had adopted that approach and then stated:-

"Certainly our decision today makes a significant change in the definition of marriage as it has been inherited from the common law, and understood by many societies for centuries. But it does not disturb the fundamental value of marriage in our society. Here the plaintiffs seek only to be married not to undermine the institution of civil marriage. They do not want marriage abolished. They do not attack the binary nature of marriage, the consanguinity provisions or any of the other gate-keeping provisions of the marriage licensing law. Recognising the right of an individual to marry a person of the same sex will not diminish the validity or dignity of opposite sex marriage, any more than recognising the right of an individual to marry a person of a different race devalues the marriage of the person who marries someone of her own race. If anything, extending civil marriage to same sex couples reinforces the importance of marriage to individuals and communities. That same sex couples are willing to embrace marriages solemn obligations of exclusivity, mutual support and commitment to one another is a testament to the enduring place of marriage in our laws and in the human spirit."

It was urged that this Court should adopt the same approach.

As I have already indicated, the defendants disagreed with the interpretation placed by the plaintiffs on the passage referred to above from the *McGee* case. It was pointed out that that case concerned the determination of unenumerated rights and "natural rights antecedent to positive law" as opposed to rights not otherwise identified in the Constitution. The process of considering the Constitution as a living instrument is not one which is available to the interpretation of the Constitution itself as opposed to the interpretation of legislation.

As reference has been made to the decisions in Canada in *Halpern* and to the *Goodridge* decision it may be of assistance at this point to refer briefly to some of the authorities from the United States. The *Goodridge* decision relied heavily on the *Loving v. Virginia* case to which I have referred above. In the *Loving* case Warren C.J. stated:-

"The freedom to marry has long been recognised as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the 'basic civil rights of man', fundamental to our very existence and survival. … To deny this fundamental freedom on so unsupportable basis as the racial classifications embodied in the statute, classification so directly subversive of the principle of equality at the heart of the fourteenth amendment is surely to deprive all the State citizens of liberty without due process of law. The fourteenth amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State."

It was noted by Marshall J. in *Goodridge* commenting upon *Loving* as follows:-

"The courts opinion could have rested solely on the grounds that the statute discriminated on the base of race in violation of the equal protection clause. But the court went on to hold that the laws arbitrarily deprived the couple of a fundamental liberty protected by the due process clause, the freedom to marry … Although *Loving* arose in the context of racial discrimination, prior and subsequent decisions of this court concerning the right to marry is of fundamental importance to all individuals."

The court in *Goodridge* then struck down the statute which contained the restriction on same sex marriage on the basis that it did not meet the rational basis test for due process or equal protection.

I have set out in some detail the analysis of the U.S. decisions conducted by Mr. O'Donnell on behalf of the defendants. It is clear that the judgment of the majority in the *Goodridge* case has not found wide favour. Indeed since that judgment a number of other States have come to a different conclusion, most recently, the court in the Californian case of *Woo v. Lockyer*. In that case one of the points clearly made was that the alleged discrimination was different to that which was found to exist in the *Loving v. Virginia* case. It was noted:-

"We are not dealing with a suspect classification such as race. Therefore, under the correct legal standard (rational basis review), we must uphold the opposite sex requirement for marriage if it is supported by any plausible reason. (see p. 57 judgment of McGuiness P.J.)"

These authorities are interesting in many respects. They are dealing with similar definitions of marriage and the assertion of a right to marry requiring a redefinition of the traditional understanding of marriage as is the case in these proceedings. However as I have already noted many of the decisions are based on equal protection clauses. Many of the arguments in those cases put forward on behalf of the proponents of same sex marriage have been relied upon in the arguments in this case also. There is a limit to the assistance that can be drawn from them given the different constitutional framework applicable in this jurisdiction but the approach taken to the proposed re-definition of the freedom to marry is of interest.

Nonetheless, I have a difficulty in this case in accepting the arguments of the plaintiffs to the effect that the definition of marriage as understood in 1937 requires to be

reconsidered in the light of now prevailing standards and conditions. The passage quoted above from the judgement of Murray J. at p. 681 of his judgement in Sinnott which approved of the suggested guidelines identified by the late Professor Kelly seems to me to indicate the appropriate course for the Court to adopt in interpreting the Constitution in the context of this case.

Marriage was understood under the 1937 Constitution to be confined to persons of the opposite sex. That has been reiterated in a number of the decisions which have already been referred to above, notably the decision of Costello J. in *Murray v. Ireland* . The Supreme Court decision in *T.F. v. Ireland* and the judgment of Murray J. in *T. v. T* The definition was reiterated in *Foy v. An tÁrd Claraitheóir* although there must be a caveat concerning the use of the words biological man and biological woman given the decision in the *Goodwin* case. That has always been the definition. Judgment in the *T. v. T.* case was given as recently as 2003. Thus it cannot be said that this is some kind of fossilised understanding of marriage. I fully appreciate that changes have been made; indeed, some far reaching changes have been made to the institution of marriage as it was understood in 1937. Changes in relation to capacity in respect of the marriage age have been made and the most fundamental change of all has been the change in relation to the indissolubility of marriage.

I accept that the Constitution is a living instrument as referred to in the passage from the judgment of Walsh J. relied on by counsel for the plaintiffs but I also accept the arguments of Mr. O'Donnell to the effect that there is a difference between an examination of the Constitution in the context of ascertaining unenumerated rights and redefining a right which is implicit in the Constitution and which is clearly understood. In this case the court is being asked to redefine marriage to mean something which it has never done to date.

If I were to take the words used by Walsh J. in the *McGee* case, "No interpretation of the Constitution is intended to be final for all time. It is given in the light of prevailing ideas and concepts", one would have to ask the question on what basis is the court to interpret or ascertain the prevailing ideas and concepts. It is interesting to note that in the *Sinnott* case which was also relied on by the plaintiffs in this context, the Supreme Court held that the concept of primary education must be interpreted in the light of practice in 1937 but a majority of the court held that the word "child" in Article 42 must be understood as extending up to eighteen years, that is the present age of majority. If one was to transpose that reasoning to the facts of the present case one would say that one looks at the concept of marriage as it was defined in the light of practice or understanding in 1937 and that issues such as capacity must be understood in the light of prevailing law. So, for example, as was pointed out in the submissions of the plaintiffs it could not be argued that because the marriage age in 1937 was twelve for girls and fourteen for boys that a law which raised the age to eighteen years was unconstitutional on that account.

The right to marry contained in the Constitution is undoubtedly not an express right but is clearly implicit from the terms of Article 41. It is not a case where the court requires to ascertain a previously unenumerated right as the right to marry falls squarely within the terms of the Constitution. The definition of marriage to date has always been understood as being opposite sex marriage. How then can it be argued that in the light of prevailing ideas and concepts that definition be changed to encompass same sex marriage? Having regard to the clear understanding of the meaning of marriage as set out in the

numerous authorities opened to the Court from this jurisdiction and elsewhere, I do not see how marriage can be redefined by the Court to encompass same sex marriage. The Plaintiffs referred frequently in the course of this case to the "changing consensus" but I have to say the there is little evidence of that. The consensus around the world does not support a widespread move towards same sex marriage. There has been some limited support for the concept of same sex marriage as in Canada, Massachusetts and South Africa together with the three European countries previously referred to but, in truth, it is difficult to see that as a consensus, changing or otherwise.

In this jurisdiction, as recently as 2004, s. 2(2)(e) of the Civil Registration Act was enacted. That Act sets out what was previously the common law exclusion of same sex couples from the institution of marriage. Is that not of itself an indication of the prevailing idea and concept in relation to what marriage is and how it should be defined? I think it is.

One of the curious aspects of this case is that the provision referred to in the Civil Registration Act 2004, has not been directly impugned or challenged in these proceedings. I know that that has been explained by counsel for the plaintiffs on the basis that the Act did not come into force until 5th December 2005. Nonetheless the Act is in force, is entitled to a presumption of constitutionality and is to my mind an expression of the prevailing view as to the basis for capacity to marry. I find it extremely difficult to comprehend how an assertion of a constitutional right to marry in these proceedings could incidentally have the effect of rendering unconstitutional an Act passed by the Oireachtas as recently as 2004. If the plaintiffs had brought a challenge to the constitutionality of that Act, of course it would have been necessary for them to rebut the presumption of constitutionality. The plaintiffs have not sought to do so. Apart altogether from the provisions of the 2004 Act, it was not suggested that prior to the decision of ECtHr in the *Norris* case, the understanding of marriage could encompass same sex marriage given the state of the criminal law.

The final point I wish to make in relation to the definition of marriage as understood within the Constitution is that I think one has to bear in mind all of the provisions of Article 41 and Article 42 in considering the definition of marriage. Read together, I find it very difficult to see how the definition of marriage could, having regard to the ordinary and natural meaning of the words used, relate to a same sex couple

I accept the arguments made by the defendants in relation to the issue of discrimination on the basis that the right to opposite sex marriage is derived from the Constitution and thus that is a justification for any distinction between the position of the plaintiffs and married couples. It was accepted in evidence that the plaintiffs are treated the same as cohabiting heterosexual couples in the manner in which the tax code applies to them. They are not treated in law any differently from any other non-married heterosexual couple. On this issue it is interesting to note how the Californian Court in the *Woo* case dealt with the issue of an alleged infringement of the right of privacy as a consequence of the exclusion of same sex marriage. At p. 48 of the judgment McGuinness P.J. stated:-

"Here, however, the state of California provides benefits for a relationship – civil marriage – and respondents are seeking access to these benefits. The state is not interfering with how respondents conduct personal aspects of their lives; rather, by limiting marriage to opposite sex couples, it is arguably affording its citizens unequal access to the tangible and intangible benefits marriage provides. This claim is most

appropriately analysed – like other unequal access claims, under equal protection principles."

The final point I would make on this topic is that if there is in fact any form of discriminatory distinction between same sex couples and opposite sex couples by reason of the exclusion of same sex couples from the right to marry, then Article 41 in its clear terms as to guarding provides the necessary justification. The other ground of justification must surely lie in the issue as to the welfare of children. Much of the evidence in this case dealt with this issue. Until such time as the state of knowledge as to the welfare of children is more advanced, it seems to me that the State is entitled to adopt a cautious approach to changing the capacity to marry albeit that there is no evidence of any adverse impact on welfare.

It is now necessary to consider the issues in respect of the European Convention on Human Rights. Counsel for the plaintiff had submitted that in the European Convention on Human Rights there was no definition of marriage provided. They then referred to the decision in *Goodwin* and noted that the court in that case recognised that there is under the Convention an entitlement of two people who both by birth and biology are of the same sex to have the right to marry under the Convention whilst accepting that the right to marriage is not confined to biological man and biological woman. Counsel for the defendants pointed out that Potter J. in the case of *Wilkinson and Kitzenger* had rejected that argument. I think that for the purpose of completeness it is necessary to refer at length to a number of passages from his judgement.

"58. The *Goodwin* case was concerned with the rights of a post-operative male-to-female transsexual. The court found that the approach in *Rees & Cossey* limiting the ambit of Article 12 to marriage between persons of opposite biological sex was too restrictive. It stated at 479:

'98. Reviewing the situation in 2002, the court observes that Article 12 secures the fundamental right of a man and woman to marry and to found a family. The second aspect is not however a condition of the first and the inability of any couple to conceive or parent a child cannot be regarded as *per se* removing their right to enjoy the first limb of this provision.

99. The exercise of the right to marry gives rise to social, personal and legal consequences. It is subject to the national laws of the contracting States but the limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired.

100. It is true that the first sentence refers in express terms to the right of a man and woman to marry. *The court is not persuaded at the date of this case that it can still be assumed that these terms must refer to a determination of gender by purely biological criteria.* There have been major social changes in the institution of marriage since the adoption of the Convention as well as dramatic changes brought about by developments in medicine and science in the field of transsexuality. The court has found above, under Article 8 of the Convention, that a test of congruent biological factors can no longer be decisive in denying legal recognition to the change of gender of a post-operative transsexual …

101. The right under Article 8 to respect for family life does not however subsume all the issues under Article 12, where conditions imposed by national laws are accorded a specific mention. The court has therefore decided whether the allocation of sex in

national law to that registered at birth is a limitation impairing the very essence of the right to marry in this case. In that regard, it finds that it is artificial to assert that post-operative transsexuals have not been deprived of the right to marry as, according to law, they remain able to marry a person of their opposite sex. The applicant in this case lives as a woman, is in a relationship with a man, and would only wish to marry a man. She has no possibility of doing so. In the court's view, she may therefore claim that the very essence of her right to marry has been infringed.'

59. Having found that in this respect the matter was not one to be left to a State's margin of appreciation, the court observed at para. 103:

'… while it is for the contracting State to determine *inter alia* the conditions under which a person claiming legal recognition as a transsexual establishes that gender reassignment has been properly effected or under which past marriages ceased to be valid and the formalities applicable to future marriages (including, for example, the information be furnished to intended spouses), the court finds no justification for barring the transsexual from enjoying the right to marry under any circumstances.

104. The court concludes there has been a breach of Article 12 of the Convention in the present case.'

60. Miss Monaghan has submitted that the decision in *Goodwin* and in particular, the observations at paras. 98 and 99 quoted above, coupled with the words italicised in para. 100, have cut free the traditional approach to marriage 'rooted in biological determinism', as she puts it, so it is now possible to interpret Article 12 of the Convention as a 'living instrument' and to interpret or extend it so as to recognise the unqualified right of a man or a woman to marry a person of the same a well as the opposite sex.

61. Ms. Mountfield, on the other hand, submits that such an approach is a step too far and is unjustified by the observations in *Goodwin*, read in the factual context of the case before the court. Indeed, she submits it is plain that the court was unwilling to take other than an incremental step in broadening the scope of Article 12. The breach of Article 12 found in the *Goodwin* case was based on the court's finding that gender can be determined by criteria other than simply biological factors (see paras. 100 and 103). The case recognised the phenomenon of reassigned gender whereby the applicant became eligible to marry, as a woman, a man of her choice. It was the effect of the national law in failing to recognise her gender reassignment and bringing her within the ambit of Article 12 which attracted the finding of the court that there had been a breach of her Article 12 rights.

62. I agree with the analysis of Ms. Mountfield. There are clear limitations to the 'living instrument' doctrine and it cannot be applied to bring within the scope of the Convention issues which are plainly outside its contemplation. As stated by ECTHR in *Johnston & Ors. v. Ireland* [1986] 9 E.H.R.R. 203 at para. 53:

'It is true that the Convention and its protocols must be interpreted in the light of present day conditions. However, the court cannot by means of an evolutive interpretation, derive from these instruments a right which was not included therein at the outset.'

As I have already made clear at para. 44 above, this cannot be said to be an area where there is a Europe-wide consensus on the subject, by reason or reference to which the Convention should be treated as having evolved and expanded its scope to encompass same sex relationships within the concept of marriage. A ready guide to the position in other European countries is to be found in the judgment of Lord Manse at para. 152 of the

recent House of Lords decision in *M v. Secretary of State for Work and Pensions* [2006] 2 W.L.R. 637 ('M'). While there has been a general move towards legal recognition towards same sex relationships across Europe in recent years, only Netherlands, Belgium and Spain have passed laws providing for same sex marriage. Outside Europe, it appears that only Canada and the U.S. state of Massachusetts and South Africa have given legal representation to same sex marriages."

I find the decision of Potter J. in respect of the arguments put before him on Article 12 to be compelling. I can see no reason for reaching any conclusion different from that which he reached in the *Wilkinson and Kitzenger* case. It seems to me to set out clearly the position in relation to the right of marriage as identified by the European Court of Human Rights in *Goodwin*.

Potter J. then went on to consider the role of Article 8 and Article 14 in combination with Article 12. He noted the role of Article 8 which concerns non-interference of the state with a person's private life, family and home. He commented in para. 87:

"However, any necessity to protect the private or family life of childless same sex couples does not extend to recognising them as married. The obligation to respect private or family life is not apt to bring within the ambit of Article 8 all government policy choices touching upon their status."

He did go on, however, to note that English law recognised the right of same sex couples to live in a close, loving and monogamous relationship and afforded them the benefits of marriage in all but name by virtue of the Civil Partnership Act, 2004. It was argued in this case that as there is no equivalent to the Civil Partnership act in this jurisdiction could Article 8 mean that in the absence of something akin to that Act that there is a breach of Article 8. Potter J. had himself noted at para. 86 of his judgment as follows:-

"The ECHR will not require Member States to establish particular forms of social and legal institution to recognise particular relationships especially in areas of social controversy. As made clear in *Johnston v. Ireland* (*supra*), Article 8 does not impose a positive obligation to establish for unmarried couples a status analogous to that of married couples and, in particular, couples who, like the applicant in that case, wished to marry but were legally incapable of marrying."

Johnston v. Ireland [1987] 9 E.H.R.R. 203 was the case in which the European Court of Human Rights rejected the applicant's complaint that there was a breach of Articles 8, 9 and 12 of the European Convention on Human Rights by virtue of the absence of a provision for divorce in Ireland. Given the approach of the European Court of Human Rights to Article 8 as outlined above, I cannot come to the view that Article 8 can avail the plaintiffs in the circumstances of this case. The Plaintiffs in this case could be said to be in a similar position to the parties in the *Johnston* case in that they wish to marry but are legally incapable of so doing.

Likewise, I cannot see that Article 14 can be relied on by the plaintiffs in the circumstances of these proceedings. The issue of Article 14 was also considered by Potter J. in the *Wilkinson and Kitzenger* case. He considered whether there was a justification for the distinction made between the opposite sex couple and the same sex couple in terms of the right to marry. At the heart of that case was the issue as to whether or not the Civil Partnership Act had downgraded the status of same sex couples compared to that of marriage. He noted as follows:

"117. Regrettable as the adverse effects have been upon the petitioner and those in her situation who share her feelings, they do not persuade me that, as a matter of legislative choice and method, the provisions of the CPA represent and unjustifiable exercise in differentiation in the light of its aims.
118. It is apparent that the majority of people, or at least of governments, not only in England but Europe-wide, regard marriage as an age-old institution valued and valuable, respectable and respected, as a means not only of encouraging monogamy but also the procreation of children and their development and nurture in a family unit … in which both maternal and paternal influences are available in respect of their nurture and upbringing.
119. The belief that this form of relationship is the one which best encourages stability in a well-regulated society is not a disreputable or outmoded notion based upon ideas of exclusivity, marginalisation, disapproval or discrimination against homosexuals or any other persons who by reason of their sexual orientation or for other reasons prefer to form a same sex union.
120. If marriage is by longstanding definition and acceptance, a formal relationship between a man and a woman, primarily (though not exclusively) with the aim of producing and rearing children as I have described it and if that is the institution contemplated and safeguarded by Article 12 then to accord a same sex relationship the title and status of marriage would be to fly in the face of the convention as well as to fail to recognise physical reality."
Accordingly, Potter J. rejected the argument that Article 14 was violated. I emphasise that in that case the alleged discrimination involved was the creation of the status of civil partnership as opposed to marriage. The lack of a civil partnership scheme in this jurisdiction at the moment does not seem to me to be a matter that brings into effect the provisions of Article 14. It is necessary to remember the clear terms in which Article 12 is expressed. It refers expressly that the right to marry is "according to the national laws governing the exercise of this right." Clearly, there is a wide margin of appreciation given to contracting states in this area which Potter J. in the judgement referred to above described as "an area of considerable, social, political and religious controversy, in respect of which there is no consensus across Europe." In the circumstances and having regard to the jurisprudence of the ECtHR as set out in the authorities opened in the course of this case of which the *Johnston* decision seems to me to be particularly apposite, I cannot see any violation of Article 14 rights. Accordingly, the legal provisions in relation to the right to marry and capacity to marry in my view in this jurisdiction are not incompatible with the ECHR.

I have touched very briefly in the last paragraph on the fact that civil partnership legislation is not available in this jurisdiction. Early on, in the course of evidence in this case Dr. Zappone noted that the plaintiffs were not seeking the introduction of civil partnership rights. She made it plain that the right sought by the plaintiffs was the right to marry. As I have explained above I do not think that it is a right which exists for same sex couples either under the Irish Constitution or under the European Convention. It is noteworthy that at the moment, (and some reference has been made to this in the course of submissions) the topic of the rights and duties of co-habitees is very much in the news. Undoubtedly people in the position of the plaintiffs, be they same sex couples or

heterosexual couples, can suffer great difficulty or hardship in the event of the death or serious illness of their partners. Dr. Zappone herself spoke eloquently on this difficulty in the course of her evidence. It is to be hoped that the legislative changes to ameliorate these difficulties will not be long in coming. Ultimately, it is for the legislature to determine the extent to which such changes should be made.

Having reached these conclusions, it is clear that the Plaintiffs' claim for recognition of their Canadian marriage must fail as must the challenge to the relevant provisions of the Tax Code.