A Guide to the Referendums on the Thirty-ninth and Fortieth Amendments to the Constitution

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What are these referendums about?

On 8 March 2024, voters will be asked to accept or reject the Thirty-ninth Amendment of the Constitution (The Family) Bill 2023 and the Fortieth Amendment of the Constitution (Care) Bill 2023.

The Thirty-ninth Amendment, if passed, would broaden the concept of the "Family" in the Constitution, and the Fortieth Amendment would remove the constitutional reference to the role of women in the home and insert a new Article recognising the provision of family care into the Constitution.

The Family Amendment

What is the current constitutional position?

Article 41.1.1º of the Constitution states:

> The State recognises the 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.

Article 41.3.1º of the Constitution states:

> 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.

The Supreme Court has considered the rights of the Family under Article 41 in various cases, and has found that they include the right to establish a family unit and to make decisions on family matters such as the education of children, free from state interference (see for instance *Gorry v. Minister for Justice and Equality* ([2020] IESC 55). The language used to describe the rights ("inalienable", meaning they cannot be given away and "imprescriptible", meaning they cannot be lost by lapse of time) have been held by the Courts to indicate a very high level of protection – though not absolute.

In the 1966 case of *The State (Nicolaou) v. An Bord Uchtála* [1966] IR 567, the Supreme Court held that the "Family" referred to under Article 41 of the Constitution is limited to the family based on marriage.

In the recent case of *O'Meara v Minister for Social Protection* [2024] IESC 1 the Supreme Court considered whether this was still the case. While a minority of the judges in the *O'Meara* case expressed the view that the interpretation of the "Family" as based on marriage in the *Nicolaou* case was wrong and that the "Family" under the Constitution extends to non-marital families, the majority judgment held that the Family referred to in Article 41 is confined to families based on marriage.

This does not mean that parents and children of non-marital families are not able to rely on the Constitution at all. The courts have found that certain other rights may apply in some situations. For instance, the courts have recognised an implied constitutional right of a mother to the care and custody of her child, and the right of a child to be supported and reared by their parent or parents, regardless of whether the parents are married (*G v. An Bord Uchtála* [1980] IR 32). The courts have also recognised the right of children to the care and companionship of their parents, regardless of their parents' marital status (though this is not an absolute right and may be affected by, for instance, a deportation decision where a parent is a non-citizen (see the recent case of *Odum v Minister for Justice and Equality* [2023] IESC 26).

The rights of children arise regardless of the marital status of their parents (this is clear from both case law and from Article 42A of the Constitution which was inserted into the Constitution in 2015 and recognises "the natural and imprescriptible rights of all children").

However, the *O'Meara* decision has confirmed that the particular rights that apply to the "Family" in Article 41 of the Constitution are currently limited to the family based on marriage.[1]

What will change if the referendum is passed?

If passed, Article 41.1.1º of the Constitution will be amended to add the underlined words:

[1] For clarity, while the Supreme Court held that the law being challenged in *O'Meara* was inconsistent with the Constitution, this was based on a different Article of the Constitution.

> The State recognises the Family, whether founded on marriage or on other durable relationships, 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.

Article 41.3.1º will be amended to delete the words "on which the Family is founded":

> 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.

If the amendments pass, the Constitution will still provide for protection of the institution of marriage; however, the concept of the "Family" under the Constitution will be expanded from the marital family to encompass families based on other kinds of "durable relationships". The "inalienable and imprescriptible rights" mentioned in Article 41.1.1º will therefore be afforded to both families based on marriage, and families based on "other durable relationships".

The amendment does not define "other durable relationships".

It will be a matter for the courts, in future cases, to decide which types of relationships come within this meaning (or for parliament to pass legislation specifying the types of relationships covered).

Article 41.4 provides "Marriage may be contracted in accordance with law *by two persons* without distinction as to their sex" (Emphasis added). The Supreme Court says that this "puts the question of the constitutional definition beyond doubt - marriage, as far as the Constitution is concerned, must in all cases be seen as a union between two people." (*HAH v SAA* [2017] IESC 40 [111]). It also says that Article 41 as a whole, when read in light of the guarantee of equality before the law in Article 40.1, requires this. [112] "[R]ecognition of an actually polygamous marriage would be contrary to a fundamental constitutional principle". [115] If the Supreme Court continues to maintain this, it seems unlikely that a polygamous marriage (or any other analogous relationship between more than two adults) would be treated as the foundation of a constitutionally protected family either. However, the Supreme Court also says that the Constitution does "not compel the State or its agents to deny all legal effect to polygamous marriages in all contexts. There is no particular reason why a marriage should not be given recognition for certain purposes, … [For example] the parties to an actually polygamous marriage may be denied the right to cohabit in a State without prejudice to the

possibility of recognition of … the economic interests of the spouses" [117] and "[i]n the area of immigration … it may well be desirable to have some regard to the reality of familial bonds … [for example] when considering an application for family reunification … to disregard the marital status of a child's parents." The Supreme Court stressed "that these are policy matters which are, primarily, for the Oireachtas to consider." [118]

If the proposed Thirty-ninth Amendment is made, it therefore is unlikely, on the law as it has currently been stated by the Supreme Court, that a polygamous marriage or any similar relationship would be treated as the basis of a family protected by the Constitution. It would therefore be difficult to argue that any subsidiary form of recognition of such relationships, such as those mentioned by the Supreme Court in *HAH v SAA,* would become constitutional entitlements rather than matters of policy either.

If this referendum proposal is rejected, then Articles 41.1.1° and 41.3.1° will remain the same, and the "Family" for the purposes of Article 41.1.1º will continue to be the family based upon marriage only.

The Care Amendment

What is the current constitutional position?

Article 41.2 of the Constitution states:

> 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.

The Article includes a recognition of the role of women in the home, and refers to an obligation on the State to "endeavour to ensure" that mothers are not obliged to work outside the home for economic reasons. No case has arisen to date directly on the issue of being obliged to work outside the home due to economic necessity, but the courts have considered Article 41.2 in a number of cases.

In the case of *L v L* [1992] 2 IR 77, involving a judicial separation, the High Court referred to Article 41.2 in taking into account work done in the home for the purposes of calculating a wife's share in the marital home, though this approach was subsequently rejected by the Supreme Court.

Article 41.2 has been referred to as a provision aimed at recognising the significant role played by wives and mothers in the home, while not being intended to exclude them from other roles (per Denham J in *Sinnott v Ireland* [2001] 2 IR 545; though this was a dissenting judgment).

This Article has also been cited as support for the view that caring work should be taken into account in deciding the question of whether proper provision had been made for a spouse in the context of a divorce application (*T v T* [2002] IESC 68).

The Article has not, however, been interpreted by the courts to impose a positive obligation on the State to provide economic support for mothers or other carers in the home.

In *O'Meara v Minister for Social Protection* [2024] IESC 1 the majority of the Supreme Court did not find it necessary to decide what Article 41.2 means, but it did make it clear that it remains to be decided whether "woman" and "mother" includes those who are unmarried [94] and that the general approach to be taken to this or other suggested interpretations of Article 41 is to ask "if it is what the People chose in 1937, and how the document has been repeatedly understood, [in which case] it is for the People to choose in what way that provision should be altered." [146]

What will change if the referendum is passed?

If passed, Article 41.2 of the Constitution will be repealed. A new Article 42B will be inserted into the Constitution, stating the following:

> The State recognises that the provision of care, by members of a family to one another by reason of the bonds that exist among them, gives to Society a support without which the common good cannot be achieved, and shall strive to support such provision.

This proposal was preceded by recommendations from a number of bodies (including the reports of the Convention on the Constitution in 2014; the Oireachtas Committee on Justice and Equality in 2018; the Citizens' Assembly on Gender Equality in 2020; and the Oireachtas

Joint Committee on Gender Equality in 2022) to amend the Constitution to recognise the role of carers in a gender-neutral way.

The proposed amendment first recognises the provision of care within families as contributing to the common good, regardless of gender, and second, provides that the State "shall strive to support" the provision of such care.

While it cannot be predicted with certainty exactly how such a new provision would be interpreted by the courts, the wording "shall strive to support" would not seem to indicate a new obligation on the state to provide economic support for carers either within or outside the home.

If rejected, Article 41.2 will remain the same.