

Lawyers for Yes

The Case For Marriage Equality

1. The Right to Procreate

Members of the No Campaign have argued that if same sex couples are allowed to marry, then they will enjoy a constitutional right to procreate. They say that because same sex couples cannot procreate without using donor assisted reproduction and/or surrogacy, married same sex couples must enjoy a constitutional right to use those services. They go on to argue that this would mean that the State could not limit access by married same sex couples to donor assisted reproduction and surrogacy, and could not treat them differently to opposite sex married couples. This argument is deeply flawed.

First, the Irish courts have never recognised a constitutional right to use donor assisted reproduction or surrogacy. The right to procreate has only ever been fully considered in one case: *Murray v Ireland*.¹ That case involved a husband and wife who were both in prison, and wanted to be allowed start a family. The Supreme Court recognised that the right to procreate existed, but that was a right to engage in natural procreation. The courts have never recognised that the right to procreate extends to using donor eggs or sperm, or to using a surrogate mother. There is no right to have a child using these techniques.

Second, just like every constitutional right, the right to procreate is not absolute. Even in *Murray* the court found that the State was entitled to deny the couple the right to procreate because they were in prison. The legislature is fully entitled to legislate for assisted reproduction and surrogacy, and the courts have made it very clear that they will not interfere in that. In *MR v An tÁrd Chláraitheoir*² the Supreme Court found that it was the job of the Oireachtas to regulate assisted reproduction and surrogacy, and that it had full power to do so. The Court expressly stated that it was inappropriate for the Court to interfere with this. The legislature will retain that power if the referendum passes.

Third, the No Side claims that after the referendum passes, the State will not be able to discriminate between same sex and opposite sex parents with respect to adoption, fostering, assisted human reproduction and surrogacy. In fact, the

¹ *Murray v Ireland* [1985] IR 532 (HC), [1991] ILRM 465 (SC).

² *MR v An tÁrd Chláraitheoir* [2013] IEHC 91, [2014] IESC 60.

legislature is entitled to make laws regulating all of these areas by reference to the best interests of children. Furthermore, this is now copper fastened by Article 42A. The No Side's analysis is fundamentally lacking because it fails to deal with the existence of Article 42A. Article 42A enshrines the best interests of the child as a constitutional principle. Article 42A.4.1 requires:

“in the resolution of all proceedings. . . concerning the adoption, guardianship or custody of, or access to, any child, the best interests of the child shall be the paramount consideration”.

Regardless of whether or not the marriage amendment passes, the legislature will retain the right to make laws that require decisions relating to children to be made by reference to the best interests of the individual child. The legislature has always had this power, and that power is enhanced by Article 42A.

2. The Biological Link Between Parent and Child

The No Side claims that if the referendum passes this will mean that children are deliberately brought into the world in circumstances where they do not know their biological parents, and that this change means severing the biological link between parent and child.

First, one crucial inaccuracy needs to be addressed in this claim: this is an argument about donor assisted reproduction and surrogacy in general, not about same sex couples in particular. Precisely the same issues arise for opposite sex couples. Assisted reproduction developed in response to the needs of infertile opposite sex couples, and it is still primarily opposite sex couples that use these techniques.

Beyond that, this is an argument about the ethics of parenting and the way in which new assisted reproductive technologies should be regulated throughout society, for gay and straight people alike. Donor assisted reproduction is now partly regulated by the Children and Family Relationships Act 2015. The Government has promised to establish a thorough legislative scheme for surrogacy. The indications are that that will be a very restrictive regime.

There is no doubt that the best interests of the child must be the primary focus of regulation for assisted reproduction and surrogacy. We emphasise two aspects of a child's best interests that must be guaranteed in regulation:

1. Children need loving supportive parenting.
2. Children have an essential human right to know their biological parents.

It is not the case, however, that children must be raised by their biological parents.

The Children and Family Relationships Act 2015 prohibits anonymous donation in its entirety. In fact, Ireland has established one of the world's strictest regimes for protecting the child's right to know their biological parents. All donor-conceived children and donors are entered on a National Donor Register. When a child over 18 seeks a copy of his or her birth cert, he will be able to find out that he or she was donor-conceived.

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