



UCD Constitutional Studies Group
UCD School of Law

A Guide to the referendum on the 31st Amendment to the Constitution

What is the proposed amendment about?

The amendment is designed to insert a specific section into the Constitution which deals with certain matters that are relevant to children.

For some matters, the amendment will make changes to the current law. For other matters, the amendment will clarify areas of uncertainty or give constitutional protection to what already occurs under the current law.

What does the Constitution say at the moment?

There are several parts of the current Constitution that are relevant to the proposed amendment. The most relevant include the following:

<p>Personal Rights Article 40. 3. 1° The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen. 2° The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.</p> <p>Article 41 The Family 1. 1° 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. 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.</p> <p>....</p> <p>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.</p>	<p>Education Article 42 1. The State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.</p> <p>2. Parents shall be free to provide this education in their homes or in private schools or in schools recognised or established by the State.</p> <p>3. 1° The State shall not oblige parents in violation of their conscience and lawful preference to send their children to schools established by the State, or to any particular type of school designated by the State. 2° The State shall, however, as guardian of the common good, require in view of actual conditions that the children receive a certain minimum education, moral, intellectual and social.</p> <p>4. The State shall provide for free primary education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, when the public good requires it, provide other educational facilities or institutions with due regard, however, for the rights of parents, especially in the matter of religious and moral formation.</p>
--	--

5. In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.

If the People vote ‘Yes, what will happen?’

Two changes to the Constitution will be made if the People vote ‘Yes’.

1. Article 42. 5 (underlined above) will be deleted.

2. A new Article 42A will be inserted into the Constitution. It will state that:

Children

Article 42A

1. The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights.

2.1° In exceptional cases, where the parents, regardless of their marital status, fail in their duty towards their children to such extent that the safety or welfare of any of their children is likely to be prejudicially affected, the State as guardian of the common good shall, by proportionate means as provided by law, endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.

2° Provision shall be made by law for the adoption of any child where the parents have failed for such a period of time as may be prescribed by law in their duty towards the child and where the best interests of the child so require.

3. Provision shall be made by law for the voluntary placement for adoption and the adoption of any child.

4. 1° Provision shall be made by law that in the resolution of all proceedings—
i. brought by the State, as guardian of the common good, for the purpose of preventing the safety and welfare of any child from being prejudicially affected, or
ii. concerning the adoption, guardianship or custody of, or access to, any child, the best interests of the child shall be the paramount consideration.

2° Provision shall be made by law for securing, as far as practicable, that in all proceedings referred to in subsection 1° of this section in respect of any child who is capable of forming his or her own views, the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child.

What would these changes mean for the law?

Background to the current law

To understand what the amendment involves, it may be helpful to refer to some of the decisions taken by the Irish courts under the current law.

It is important to emphasise that **the amendment does not necessarily mean that the cases described below would be decided differently in the future.** They are described here because they help to explain the current law and may assist in understanding the changes proposed by the amendment.

(i) The constitutional rights of the child

The courts have previously recognised that children, like all other citizens, enjoy the protection provided by various Articles of the Constitution, including Articles 40. 3, 43, and 44. Article 40. 3 protects “personal rights” which were interpreted by the Supreme Court in *G. v. An Bord Uchtála* to include the “right to be fed and to live, to be reared and educated, to have the opportunity of working and of realising his or her full personality and dignity as a human being”.

(ii) Married and non-marital families

State (Nicolaou) v. An Bord Uchtála [1966] IR 567: This case concerned a dispute between unmarried parents over the proposed adoption of their child. The Supreme Court found that Article 41 of the Constitution (set out below) refers only to marital families. Parents who were not married were unable to rely on Article 41 to claim the “inalienable and imprescriptible rights” described in Article 41. 1.

This means that the courts deal with cases concerning the children of married parents and unmarried parents in a different way.

(iii) The law on adoption

The current law allows for the adoption of the children of married parents in very narrow circumstances. For an adoption order to be made, the High Court must be satisfied that the parents of the child, for physical or moral reasons, have failed in their duty towards the child, that it is likely that such failure will continue without interruption until the child attains the age of 18 years, that the failure constitutes an abandonment on the part of the parents of all parental rights and that by reason of such failure, the State, as guardian of the common good, should supply the place of the parents.

This is a difficult test to satisfy. For example, it is difficult to prove that a failure of duty by the parents will continue without interruption until the child of 18.

It has been thought by many legal experts that any change to the law to make the adoption of children in this situation more feasible would be constitutionally suspect. This is not certain, however, as the courts have not had the opportunity to determine this.

(iv) The law on the best interests of the child

There are several decisions where the courts have considered how the law understands the ‘welfare’ or ‘best interests’ of the child:

Re JH [1985] I.R. 375: This case concerned a child who was placed in foster care one week after her birth, and was placed for adoption with a couple within 3 months of her

birth. The parents later married which, following *Re Nicolaou*, meant that they could rely on Article 41. 1. Both couples applied for custody of the child. Under the law, the court is required to treat the welfare of the child as the first and paramount consideration.

Following a hearing, the High Court decided that the child should remain with the adopting parents because the expert evidence showed there was “an appreciable risk of long-term psychological harm” from a transfer of the child.

On appeal, the Supreme Court overturned this decision. The Court said that, when dealing with married parents, the court should not decide the issue solely on the basis of the welfare of the child. The Court should presume that the welfare of the child requires that the child be in the custody of the married parents “unless the Court is satisfied on the evidence that there are compelling reasons why this cannot be achieved, or unless the Court is satisfied that the evidence establishes an exceptional case where the parents have failed to provide education for the child and to continue to fail to provide education for the child for moral or physical reasons.”

North-Western Health Board v. H.W (also known as the ‘*PKU test*’ case) [2001] 3 IR 635: This case concerned an application by the Health Board to carry out a diagnostic test on a child. The test a sample of blood, usually from the child’s heel. The parents of the child were opposed to the carrying out of the test.

The court felt that the test was “in medical terms ... unquestionably in the best interests of the infant”. However, it had not been established that this was an exceptional case, requiring State intervention to vindicate the child's constitutional rights where the parents had failed for physical or moral reasons, in their duty to the child. It was only in these cases that the State could intervene to act against the wishes of the parents.

In explaining the decision, several of the judges gave examples of the sort of case that would justify intervention under Article 42. 5. These included: an immediate threat to the health or life of the child (Denham J.); a degree of parental neglect constituting an abandonment of the child and all rights in respect of him (Murphy J.); an immediate and fundamental threat to the capacity of the child to continue to function as a human person, physically, morally or socially, deriving from an exceptional dereliction of parental duty (Murray J.).

N. v. HSE (also known as the ‘*Baby Ann*’ case) [2006] 4 IR 375: This case concerned a child who had been placed for adoption. The child was born in July, 2004 and was placed with prospective adoptive parents in November 2004. The child’s mother withdrew her consent in September 2005. The applicants married in January 2006 .

Once the parents married, the legal situation changed so that the proposed adoption could not have gone ahead. The married parents then sought custody of the child.

The High Court held that the expert evidence was that in the event of an abrupt transfer or one effected without cooperation or in circumstances where cooperation was likely to break down, there was a probability that the child would sustain psychological or emotional damage. The Court also found that the placing of the child for adoption could be regarded as a failure to meet the parental duty to provide day to

day care of the child. These provided a compelling reason which (following the test identified in *Re JH and HW*) satisfied Article 42. 5.

The Supreme Court overruled this decision. The judges felt that the placement of the child for adoption could not be described as a failure of duty “for physical or moral reasons”, which is the language used in Article 42. 5.

What changes will the amendment make?

1. The constitutional duty of the State to intervene to protect the welfare of the child will be changed in a number of ways.

(i) There will be no difference of treatment in law between the children of married or unmarried parents.

(ii) The definition of what constitutes a failure of parental duty will be changed. At present, the State may intervene where there has been a failure of parental duty for physical or moral reasons. If the proposal is approved, the State may intervene where there has been a failure of parental duty such that the safety or welfare of the children is likely to be prejudicially affected.

(iii) The State will only be entitled to intervene “by proportionate means”. This is likely to be interpreted to refer to the proportionality doctrine, which is a legal principle which means that an act can be undertaken only when it:

(a) is rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;

(b) impair the right as little as possible, and

(c) be such that their effects on rights are proportional to the objective.

Some of these proposed changes may increase the number of situations in which State intervention may be permissible. Other changes may impose new limits on the powers of the State to intervene. Intervention will still be permitted only in exceptional cases.

It is not therefore possible to state that the amendment will either make State intervention ‘easier’ or ‘more difficult’. It is more accurate to state that the amendment would change the situations where intervention may be permitted.

2. It will be clear that the Oireachtas is entitled to legislate to allow for the adoption of the children of married parents in situations where the parents have failed in their duty for a period of time identified by law and where the best interests of the child so require.

3. The Oireachtas will be required to introduce legislation which will require the views of any child who is capable of forming his or her own views to be taken into account in legal cases concerning proposed State intervention under Article 42A, or the adoption, guardianship or custody of, or access to the child.

4. The Constitution will specifically refer to the rights of children and will define those rights as natural and imprescriptible. These terms provide a particularly high level of protection. This is likely to mean that the rights of children under Article 42A will be treated as approximately similar in value to those of the Family under Article 41. 1.

What are the arguments for and against?

Arguments for a 'Yes' vote	Arguments for a 'No' vote
<p>The referendum is necessary to provide certainty on these matters.</p> <p>It is possible that a change in the law on the adoption of children of married couples would be in breach of the Constitution at present. This uncertainty is damaging and adversely affects the interests of children in this situation who cannot be adopted.</p> <p>The amendment will give the rights of children specific and standalone protection as “natural” and “imprescriptible”. This is a high standard of protection.</p>	<p>The referendum is unnecessary.</p> <p>It is not certain that the law could not be changed to make the adoption of children of married couples easier.</p> <p>The courts have already recognised that children have rights under the Constitution. There is uncertainty about precisely how the rights of children will be balanced with other rights such as those of the Family under Article 41.</p>
<p>The proposal will improve the law’s approach when the State may intervene in exceptional cases where there has been a failure of parental duty.</p> <p>A test which defines a failure of parental duty in terms of the effect of that failure on the welfare or safety of the child is more appropriate than a test which focuses on whether the parents failed for physical or moral reasons.</p> <p>The State will also only be allowed to intervene by proportionate means. This will restrict the power of the State to completely take over the role of the parents and will encourage less intrusive forms of State intervention.</p>	<p>The State will no longer have to show that there were physical or moral reasons for the parents' failure of duty before intervening in relation to the parents' child. The State will instead have to demonstrate that the safety or welfare of any of their children is likely to be prejudicially affected by the failure of the parents to fulfil their duty.</p> <p>This new approach to State intervention may allow intervention to occur in some situations where it would not be permitted under the current Article 42. 5.</p>
<p>The amendment will ensure that the law on State intervention will treat the children of married and unmarried couples in the same way in the future. This will provide the same level of protection to all children.</p>	<p>The amendment may, in some situation, allow intervention to occur with regard to the children of married parents where it would not be permitted under the current Article 42. 5.</p>
<p>The amendment will require the Oireachtas to legislate to allow the views of the child who is capable of forming their own view, to be heard in certain types of proceedings. This is necessary to respect the rights and wishes of the child.</p>	<p>It is possible that this may lead to some increased costs in litigation where the child must be heard.</p>