



*Green Party Policy Document*

# Valuing Families

*A Policy on Marriage and Partnership Rights*



# Introduction

In January 2005, the Green Party joined with thousands of individuals and organisations in making submission to the All-Party Oireachtas Committee on the Constitution, regarding reform of those articles of the Constitution relating to the Family. In our submission, we made a number of suggestions concerning expanding the definition of the family, enhancing individual rights within the family unit and in particular, enhancing the protection afforded to children. The recommendations contained within that submission would have entailed a number of amendments to our Constitution.

The document published today arises out of our submission to the All-Party Oireachtas Committee, but is more closely focused on the issues of Marriage and Partnership Rights. This document proposes solely legislative changes in the areas of marriage, partnership and co-habitees, and as such we argue that any of its recommendations would not require a constitutional referendum. However, while this document works within the current constitutional framework, we reaffirm our belief that amendments are required to those articles concerning marriage and the family to properly recognise and provide for the changes that have occurred within family life and within Irish society since 1937.

Much of the debate surrounding who should be entitled to avail of marriage and various partnerships has focused on financial matters. How should couples be assessed for tax? What way should property be divided? Who should be entitled to inherit? These are all crucial issues to many non-married couples irrespective of sexual orientation and are addressed at length within this document.

However, the Green Party believes that an even greater issue must be considered, that of whether we as a nation should offer recognition to the support that couples currently outside of marriage provide to the State and society? Some of these couples choose for their own reasons not to avail of marriage, but would nevertheless like to have some degree of protection. Some make no conscious choice on the matter, but by living as a married couple, should be entitled to receive back from the State some of the advantages that their marriage like arrangement has provided for society. Finally, there are those who wish to avail of marriage, but are denied the opportunity due to their sexual orientation.

The Green Party bases its approach to marriage and partnership rights on its principles. We respect the human person and the rights of minorities. Just as we welcome the diversity of life on the planet, we welcome human diversity and seek a State organised on the principle of pluralism. We

believe that social decisions should be taken at the lowest effective level. We believe that society should be guided by self-reliance and co-operation at all levels. We therefore believe that couples and families should have the opportunity to find their own ways of living together and that the State should intervene only to provide a legal framework to assist this and to protect the rights of the vulnerable.

It should be noted here that this document does not deal with the position of 'non-conjugal' relationships (i.e. two brothers living together, two friends living together). Many such relationships exist in Ireland, and require measures to be put in place to allay concerns surrounding succession and the ownership of property. However, we see these relationships as fundamentally different from the conjugal heterosexual or same-sex relationships dealt with in this document, and as such we make no proposals regarding non-conjugal relationships at this time.

# 1) Marriage

## 1.1 Introduction

The Green Party fully recognises the vital role marriage plays in our society. Marriage is an institution where long term care and support can be given and received between the two members of the couple, as well as amongst any children of the marriage. The fact that so much care and support is provided through marriage means that the State avoids a large financial burden that would otherwise fall upon it. Further, marriage, as an aspect of citizenship, allows two persons express their commitment to each other for life in a public manner.

In light of the important role we see marriage playing in society, in our submission to the All-Party Oireachtas Committee on the Constitution we recommended that the special position of marriage should be maintained within our Constitution. However, we firmly believe that giving recognition to other forms of family life which provide support to society does not in any way lessens the importance of marriage. Further, we do not think that broadening the scope of marriage to allow same-sex couples avail of it in any way detracts from the institution. Indeed, we argue the opposite. Marriage as an institution can only be strengthened by permitting access to it by those who truly wish to adhere to the rights and responsibilities that flow from it.

In this document, we also recognise that modern life places strain on marriage. Since we acknowledge the important benefits that marriage provides to society, we see it as proper that the State should offer assistance to people who are having difficulties in their marriage, especially when such difficulties may lead to family break-up, with detrimental consequences for children.

None of the proposals contained within this document would have any implications for the manner in which various religious denominations choose to recognise marriage within their own rites. The State would offer civil marriage in a registry office to same-sex couples as well as opposite-sex couples, and continue to recognise religious marriages as at present.

## 1.2 Providing for Same-Sex Marriage

Article 41 of the Constitution deals with marriage. Art 41.3.1 states

*The State pledges to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack.*

As can be seen, this statement does not define marriage as a union solely between a man and a woman. While this issue of gender and marriage has been alluded to in some cases before the Courts, we see no definitive conclusion having been reached - see Appendix I. As such, the Green Party proposes introducing a bill that would make all terms connected to marriage gender neutral, thus permitting same-sex marriage. Such a bill would almost certainly have to be referred to the Supreme Court to test its constitutionality. We believe that the Supreme Court would be unlikely to strike down such an expression of the democratic will of the Oireachtas on the grounds that marriage under Art 41 can only be defined in relation to Christian beliefs. We see there being no grounds for the Supreme Court to support such a theocratic interpretation of our Constitution. However, should the Supreme Court strike down such a bill that would extend the definition of marriage to same-sex couples, we would then support appropriate constitutional amendment.

## Contents

Introduction	
1. Marriage	
1.1 Introduction	
1.2 Providing for Same-Sex Marriage	
1.3 Marriage as a Human Right	
1.4 Adoption	
1.5 Supporting Marriage	
1.6 Actions	
2. Civil Partnerships	
2.1 Introduction	
2.2 Forming and Breaking Civil Partnerships	
2.3 Protections extended by Civil Partnerships	
i) Property	
ii) Succession	
iii) Maintenance	
iv) Social Welfare	
v) Pensions	
vi) Taxation	
vii) Medical Issues	
viii) Family Reunification	
ix) Children	
2.3 Recognition of Foreign Civil Unions	
2.3 Actions	
3. Co-habitees in a non-registered relationship	
3.1 Introduction	
3.2 Protections extended to non-registered relationships	
i) Property	
ii) Succession	
iii) Maintenance	
iv) Social Welfare	
v) Pensions	
3.3 Actions	
Appendix I - Uncertainty in the Definition of Marriage under the Irish Constitution	

### 1.3 Marriage as a Human Right

The Green Party believes that same-sex couples should have the opportunity to avail of the rights and responsibilities of marriage. We see no coherent argument to the contrary. The Irish Constitution mandates that all citizens must be treated equally under Art 40.1. Non-discrimination is a value recognised in all rights based documents. Marriage itself is recognised as a human right by the UNDHR, the ECHR and the Charter of Fundamental Rights of the European Union. Same-sex couples are permitted to marry in Holland, Belgium, Spain, Canada, the State of Massachusetts and the Republic of South Africa.

We reject the notion that a separate category of relationship similar to marriage needs to be created to cater solely for same-sex couples. If the Apartheid period in South Africa, Segregation in the southern US states and indeed, institutionalised discrimination in Northern Ireland have taught us anything, it is that separate does not mean equal. To relegate same-sex couples to some inferior marriage-like institution is to deny them their human rights, their dignity and their rights as citizens of this State.

### 1.4 Adoption

By permitting same-sex couples to marry, they become entitled to the rights and responsibilities of married couples. One such right is the right to seek to adopt a child together. It must be noted that no married couple, irrespective of sexual orientation, have a right to adopt. The decision as to whether any married couple should be permitted to adopt has always been and would continue to be one made solely by the Adoption Board. Such a decision is always based upon the 'best interests of the child'.

### 1.5 Supporting Marriages

The institution of marriage has for a long time acted as the basis for family life in Ireland. While in recent years, different family structures have emerged, the 2002 Census informs us that marriage continues to be the basis for the majority of families. Marriages aren't always easy. The stresses and strains of modern life can have a detrimental toll on both spouses, leading to tension within the relationship. We acknowledge the social support marriage provides, both through the raising of children, but also for its capacity to ensure that both spouses look after each other, where otherwise the State would have to intervene. In light of this, we see it as justifiable that the State should give some degree of support to those who choose marriage, particularly in times where the marriage may be in difficulty.

In light of this, we believe the State should develop a number of 'Family Centres' across the country. These would provide wide-ranging pre-marriage courses and also marriage counselling. They would be staffed by experts in mediation and arbitration to deal with family disputes. Such centres would work firstly to ensure both parties to the marriage were well prepared prior to the marriage, secondly to prevent marriage breakdown and finally, in the event that marriage breakdown is inevitable, work to ensure that a negotiated settlement regarding custody, property distribution and other matters could be arranged and as such avoid an acrimonious court struggle. As such, these centres would be an extension of the current Family Mediation Service and other existing family support services. The centres would also act in coordination with, and supplement the work of, existing pre-marriage courses delivered by religious or non-religious groups. Naturally, the use of such 'Family Centres' would be completely voluntary.

### 1.6 Actions

- The Green Party seeks legislation that would permit the removal of all gender specific terms from current legislation and regulations governing the granting of marriages. This would allow same-sex couples enjoy the equivalent rights and responsibilities of marriage to heterosexual couples, should they so choose.
- In recognition of the support that marriages give to society, the Green Party supports the creation of 'Family Centre' to assist in issues such as pre-marriage courses, marriage counselling, mediation and arbitration.

## 2) Civil Partnerships

### 2.1 Introduction

Marriage is not for everyone. Some object to the fact that the State, through the obligation to protect marriage contained in the Constitution, has such an active involvement in the manner in which two people choose to run their lives. Others wish to make some provision for themselves and their partner, but are dissatisfied with the rigid nature of the commitments and duties that a marriage entails. Up to now, those who do not wish to avail of marriage must live as co-habitees, with very few rights or protections. We believe that legislation should be drafted to create 'civil partnerships', available to heterosexual and same-sex couples, which would contain a defined and limited series of rights and responsibilities, but which would not be an equivalent institution to marriage.

### 2.2 Forming and Breaking Civil Partnerships

Civil partnerships would be formed by the two members registering their partnership on a newly created 'Register of Civil Partnerships'. Civil partnerships could be ended by one party informing the registrar by declaration that the partnership had ended. Such a declaration could be made unilaterally, but there must be evidence that the other partner had been informed. The partnership and all entailing rights and duties would be considered at an end after a period set out in legislation had elapsed, beginning at the making of the declaration.

Naturally, civil partnerships would not be available to those who are currently party to an existing civil partnership or an existing marriage. However, if the two parties to a civil partnership wished to marry each other, this should be permitted without them first having to dissolve their partnership.

### 2.3 Protections extended by Civil Partnerships

#### i) Property

The provisions of the Family Home Protection Act, 1976 would be extended to the partners in a civil partnership, which would prevent either partner secretly selling or using the family home for security.

The Family Law Act, 1995 should be amended to permit members of a dissolved partnership seek the relief's available under the Act in relation to property. This would apply to the family home and all family property.

#### ii) Succession

The provisions of the Succession Act, 1965 should be amended in a manner which would ensure that the partners in a civil partnership and any children would be treated in the same manner as spouses in a marriage in the event of intestacy. Otherwise, in recognition of the more flexible nature of civil partnerships, the legislation will not mandate specific shares which the surviving partner or any children are automatically entitled to. However, the surviving partner or any children of the partnership should have the right to apply to the court if they feel that inadequate provision has been made for them in the will. This can be decided upon by the courts on a case by case basis.

#### iii) Maintenance

We would suggest that the partners in a civil partnership have an obligation to maintain each other for as long as the partnership persists. In the event of the dissolution of the partnership, partners should have the right to seek maintenance, the courts ruling on this on a case by case basis looking at factors such as whether one partner sacrificed his/her career to act as a carer in the home etc.

#### iv) Social Welfare

Partners in a civil partnership would be treated in the same way as a married couple for as long as the partnership exists. This is currently the case with co-habiting couples.

#### v) Pensions

On the dissolution of a civil partnership, the parties will be permitted to apply to the courts to seek pension adjustment orders. These can be granted by the court in light of the circumstances of the case and regard being had to arrangements already in place concerning maintenance and the division of property. The right of one party to an interest in the pension of the other party would end in the event of the first party entering into a subsequent civil partnership or marriage.

#### vi) Taxation

The partners in a civil partnership will enjoy the equivalent tax advantages and responsibilities to a married couple for as long as the partnership is in existence.

#### vii) Medical Issues

Partners in a civil partnership will have reciprocal next-of-kin rights. They will have full rights of access and full power of consent.

#### viii) Family Reunification

Where one of the partners to a civil partnership is a foreign national, that partner will have a right to residency in Ireland if a) a valid civil partnership is in existence and b) there is evidence of a de facto relationship existing between the partners for at least two years.

On the dissolution of the partnership, any application for residency in his/her own right by the former partner who is a foreign national will be judged on factors including the length of the partnership, ties in Ireland, employment etc.

#### ix) Children

In light of the importance of stability in a child's life, we do not feel that the partners to a civil partnership, which is designed as a somewhat flexible institution, should be entitled to adopt a child as a couple. However, provision should be made for children in relation to civil partnerships. The Guardianship of Infants Act, 1964 would be amended to ensure both partners will be given joint and equal guardianship to any children born of the partnership. Partners would also be permitted to apply to become guardians of any children of the other partner who are not their own.

Provision would also be made for custody of and access to children in the event of civil partnerships breaking down.

### **2.4 Recognising Foreign Civil Partnerships**

A directive is currently being developed at EU level to mandate recognition for partnerships concluded in one EU Member State to be recognised in all other Member States. When this finally completed at Community level, we would recommend its swift transposition into domestic Irish Law.

### **2.5 Actions**

- The Green Party recommends the creation of a new category of 'civil partnership'. This would be an institution that could be created and dissolved with more ease than marriage. Partners in a civil partnership would have significant rights and responsibilities in the areas of property, succession, maintenance, social welfare, taxation, pensions, medical issues, family reunification and children.

### 3) Co-habitees in a non-registered relationship

#### 3.1 Introduction

Through extending the definition of marriage to include same-sex couples and providing for civil partnerships for any couple who decide that they do not wish to avail of the right to marry, this policy document seeks to both vindicate equal access to marriage as a right of citizenship and also provide greater degrees of security for those in relationships. However, it is accepted that not all couples will avail of either marriage or civil partnership. Should the State attempt to extend some degree of protection to these couples?

On the one hand, it could be argued that those who make the conscious choice not to avail of either marriage or civil partnership should not be compelled by the State into performing obligations that they never intended to undertake. On the other hand, there is the reality that many couples who do not make sufficient provision for themselves end up in that situation due to lack of information, rather than through choice. As such, our policy proposes the introduction of legislation that will create certain legal presumptions in a limited number of areas, when a couple have been co-habiting for 3 years or more, or where a couple have been co-habiting and there is a child of the relationship. The legislation would provide that this legal presumption could be rebutted by written evidence to the contrary.

#### 3.2 Protections extended to co-habitees in a non-registered relationship

##### i) Property Rights

We suggest that legislation should be introduced to provide for the courts granting property adjustment orders in cases where a couple co-habiting for 3 years or a couple co-habiting with a child of the relationship, breaks up. This would apply to the family home and all family property. Such property adjustment orders would take account of all direct and indirect financial and non-financial contributions made by both members of the couple. Non-financial contributions would include activities undertaken within the home by one member of the couple for the benefit of the family, for which that member of the couple had to sacrifice career options.

##### ii) Succession

Legislation should be introduced that allows the surviving member of a non-registered co-habiting couple of three years or the child of such relationship to apply to the courts if he/she feels that insufficient provision has been made for him/her by the deceased, whether via will or the rules regarding intestacy.

##### iii) Maintenance

The Law Reform Commission's Report on the Rights and Duties of Cohabitees points to the difficulties inherent in trying to create a scheme for maintenance payments when a non-registered couple split. We agree with the Commission's report that provision should be made for limited "compensatory maintenance" in the case where one of the cohabitees has sacrificed his/her career opportunities in order to take care of the 'family'.

##### iv) Social Welfare

Under current social welfare provisions, cohabitees living together are usually treated in the same manner as married couples, as to do otherwise has been held by the Courts to penalise marriage. We would recommend that the definition commonly used for non-married couples under the social welfare code - that of 'living together as husband and wife', be altered to 'living together as spouses' so as to make provision for unregistered same-sex couples living together.

##### v) Pensions

We agree with the findings of the Law Reform Commission's Report that public service pensions schemes for spouses and children should be amended to allow for the payment of a survivors pension to a financially dependent partner in circumstances where there is no legal spouse and where a valid nomination has been made.

#### 3.3 Actions

- The Green Party recommends increased protections for unregistered cohabiting couples in certain circumstances in the areas of pensions, social welfare, maintenance, succession and property rights, where certain conditions laid down in legislation have been met - co-habiting for 3 years or co-habiting with a child of the relationship.

## Appendix I - Uncertainty as to the Definition of Marriage under the Irish Constitution

In *B v. R (1995)*, a case dealing with bigamy, Costello J. in the High Court defined marriage as "the voluntary and permanent union of one man and one woman to the exclusion of all others for life".

In *Murray v. Ireland (1985)*, Costello J. in the High Court stated that "the Constitution makes 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." The implication of this statement would be that the Christian notion of marriage, as interpreted in the Constitution, would be restricted to one between two people of the opposite sex. These comments were quoted favourably in decision of the Supreme Court in *TF v. Ireland (1995)*. However, in that case the Supreme Court also noted that "marriage is a *civil contract* which creates reciprocating rights and duties between the parties" (emphasis added). This would seem to emphasise the civil rather than the Christian nature of marriage as defined under our Constitution. The *TF* case also saw the refusal of the Court to accept evidence given by a Catholic theologian as to the nature of marriage under our Constitution.

More recently, in the case of *Foy v. An t-Ard Chlaraitheoir (2002)*, a case dealing with the gender status of a post-operative transsexual, McKechnie J. in the High Court found that marriage must be between a male and a female, quoting the above mentioned extracts from *Murray and TF*. In *DT v. CT (2002)*, Murray J. in the Supreme Court stated that "marriage itself remains a solemn contract of partnership entered into between man and woman with a special status recognised by the Constitution". However, in that case he also stated that the Constitution had to be "interpreted as a contemporary document".

From these cases we draw some conclusions:

- a) While judges have made references to marriage being between a man and a woman, the issue of the constitutionality of same-sex marriage has never been specifically argued before the Irish Courts.
- b) The Supreme Court has never ruled that marriage as described in the Constitution, must be between and man and a woman.
- c) There is uncertainty surrounding to what extent marriage as described in the Constitution is a Christian ideal as opposed to what extend it is a purely civil notion.
- d) The Courts accept that the Constitution should be given a contemporary interpretation.

In light of the current uncertainty, the Green Party sees it as completely legitimate that that Oireachtas, as the body most appropriate to take decisions on social policy, should take the lead and seek to have the right of same-sex couples to marry guaranteed in legislation.



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