

Children born by surrogacy: navigating a legal minefield



Alison Kelleher examines the legal challenges surrounding guardianship and parental rights faced by children born through surrogacy, their parents and their treating doctors

GPS WILL BE WELL AWARE of the shortcomings in Irish legislation for families with children born through surrogacy, which is not currently regulated by law in Ireland. With no legislation or framework regulating surrogacy in this country, the legal status of the child and their parents is far from straightforward. The situation has faced widespread criticism, especially regarding the lack of equality for children and their parents and its impact on day-to-day family life

Draft legislation, The Health Assisted Human Reproduction Bill 2022¹ aims to regulate surrogacy arrangements from pre-conception planning to guardianship issues. However, this legislation has not yet been finalised and there is no indication as yet as to when it might be enacted.

Until legislation is enacted, families with children born through surrogacy are still left in a legal vacuum. This gives rise to day-to-day challenges for GPs regarding consent to treatment or even applications to the GMS scheme. Matters can be complicated further where a relationship breaks down before the legal status of a parent is regularised.

Current legal status of guardians

As the law stands in relation to guardianship:

- Birth mothers and their husbands are automatic guardians from birth
- An unmarried father will automatically be a guardian if he has lived with the child's birth mother for 12 months in a

row, including at least three months with the mother and child following the child's birth

- If the birth mother agrees, the father can become a joint guardian if both the birth mother and father sign a statutory declaration.
- As of 2020, legislation² allows for a statutory declaration to be signed by both a birth mother and a second parent to become joint guardians of a child born as a result of a donor-assisted human reproduction procedure in limited circumstances. For the first time this allows a second mother to be appointed a second guardian as well as the birth mother.
- A step-parent, civil partner or a person who has cohabited with a parent for not less than three years may apply to the court to become a guardian where they have co-parented the child for more than two years.
- A person who has provided for the child's day-to-day care for a continuous period of more than a year (such as a grandparent) may apply for guardianship if the child has no parent or guardian who is willing or able to exercise the rights and responsibilities of guardianship.

Rights of intending mothers as distinct from birth mothers

Currently, under Irish law, the woman who gave birth to the child is the legal mother of the child. It does not matter that the birth mother does not have any genetic link with the

child, a fact confirmed by the Supreme Court in the case of *MR v An t-Árd Chláraitheoir*,³ which found that despite the parties' intentions and a genetic link to the intending mother, the surrogate mother is the legal mother of the child.

The automatic legal father of the child is the man who is married to the woman who gave birth to the child. Therefore, if the surrogate mother is married, her husband is the legal father of the child.

In contrast, in some jurisdictions, such as Ukraine, from the moment the child is born, the intending parents are the legal parents.

Current legal regime for intending parents

At present there are large gaps in the law in relation to the legal status of intending parents. Families must rely on antiquated legislation and protracted legal applications to regularise their legal status.

A father of a child born through international surrogacy can apply to the High Court for a 'Declaration of Parentage' if he can prove that he is the genetic father. Alternatively, a surrogate mother can apply to have the genetic father declared a parent. Once satisfied, the Court can make a Declaration of Parentage, Guardianship and Custody by the genetic father.

The second intended parent (even if the second parent is the genetic mother of the child) cannot immediately establish a legal parental relationship with the child.

The second intended parent can, after she or he has shared the day-to-day care of the child with the biological father for a period of at least two years, apply to the Court to be a legal guardian.

The difficulty with being appointed a guardian rather than a parent is that this has a number of long-term implications, not least in relation to inheritance rights, as the legal guardianship relationship extinguishes at age 18.

Health Assisted Human Reproduction Bill 2022

This draft Bill, if enacted, will regulate domestic surrogacy in Ireland. Key features include:

- Establishment of the Assisted Human Reproduction Regulatory Authority (AHRRA) which will distribute licenses to clinics to carry out assisted human reproduction.
- Regulation of the end-to-end process including gamete and embryo donation, genetic research, preimplantation testing and posthouse reproduction
- Approving each domestic surrogacy arrangement in Ireland, including parental orders and the rights of the surrogate mother.
- The establishment of a National Surrogacy Register which will note the details of the child's birth and any parental order that was given or denied by the courts.

The Bill is a hugely complex piece of legislation which is now 200 pages long and was recently approved in the Dáil on May 31, 2024. Before it will become law, it must be approved through five stages in Seanad Éireann and thereafter be officially signed into law by the President. The Minister for Health has not given any indication as to when the Bill will be signed into law and concerns have been raised that it may not be fully implemented within the lifetime of this Government.

The proposed legal regime after enactment of the bill

The Bill will provide clarity as to the status of the surrogate

mother and the intending parents, giving more certainty as to the position of each person as it relates to guardianship of the child.

Some of the intended key features to regulate parentage will be:

- The intending parents can apply to the Circuit Court for a parental order in respect of the child born by surrogacy. Of note, the intending parents cannot apply to the court for a parental order until the child is at least 28 days old but no older than six months.
- To obtain a parental order, the intending parents must be able to provide evidence that
 - the embryo of the child was created with genetic material of at least one of the intending parents and
 - the egg used was not that of the surrogate mother.
 - The child must also reside with at least one of the intending parents.
- The surrogate mother must consent to the order for the court to grant it. In the absence of consent, it is likely that the Irish courts would follow the position adopted in the UK courts which have looked at the best interests of the child in deciding on parentage.

Once the above criteria are fulfilled, the Court can then make an order that the child will become the child of the intending parents and the surrogate mother will lose all parental rights and responsibilities. It is anticipated that this new Court process will streamline and simplify the process for intending parents.


Best interests of the child

GPs may encounter a scenario where intending parents have recently returned to Ireland with a new baby and have not yet regularised their parentage. In those circumstances it may be the case that neither intending parent is legal parent or legal guardian of the child.

It is indeed possible that the person who can legally give consent for the child's medical treatment is the surrogate who is thousands of miles away with no caring relationship with the child.

From an ethical perspective, in those circumstances, a GP should always act in the patient's best interests. A GP may wish to treat the patient as similar to a situation where a grandparent or childminder brings the child to a GP for routine issues.

However, from a legal perspective, the consent of the birth mother should be sought.

In some situations a letter from the birth mother gives the couple permission to provide consent on behalf of the birth mother. Common sense would be to have that consent verified. In all circumstances the parents and the GP should be encouraged to seek legal advice and GPs should contact their indemnifier for guidance. 

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References

1. No. 29b of 2022 or <https://www.oireachtas.ie/en/bills/bill/2022/29/>
2. S.I. No. 210/2020 – Guardianship of Children (Statutory Declaration) Regulations 2020 accessible at: <https://www.irishstatutebook.ie/eli/2020/si/210/made/en/print>
3. [2014] 3 IR 533. *MR v An t-Árd Chláraitheoir* accessible at: <https://ie.vlex.com/vid/r-v-an-tard-793962893>