

A SNAPSHOT OF SURROGACY IN IRELAND WITH A COMPARATIVE LOOK AT INTERNATIONAL PRACTICES

Abstract: This article outlines the developing law of assisted human reproduction, specifically surrogacy, in Ireland with a focus on the protections provided in the Children and Family Relationship Act 2015, the proposals contained in the General Scheme of Assisted Human Reproduction Bill 2017 and the procedures that have arisen from the failure to have appropriate legislation in place. In Ireland, surrogacy is largely unregulated, so this article also provides a comparative look at the regulations - or lack thereof - in other jurisdictions, namely the United Kingdom, United States and Ukraine, where Irish citizens have (and currently) seek services.

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Modern reproductive technology can allow a complete split between various parental roles that once were necessarily bound in most circumstances. A child created through assisted reproductive technology (ART) might have a genetic mother, a genetic father, any number of social/intended parents, and a gestational mother. Society is now faced with the question of who the child's parents are; mere biology can no longer answer that question. By allowing a person to become a parent regardless of his or her reproductive capacity, ART, in particular surrogacy arrangements, forces us to confront deeply held beliefs about what makes a 'mother' or a 'father,' and indeed, what makes a 'woman' or a 'man,' and perhaps most fundamentally, what makes a 'family'.¹

- Darra L. Hofman

Introduction

Assisted human reproduction (AHR) has been an ever-evolving area of biology since the first 'IVF baby', Louise Brown, born in the United Kingdom in 1978.² AHR technologies allow individuals to found families despite their reproductive struggles - in vitro fertilisation, artificial insemination, gamete donation and surrogacy arrangements are just a few of the mechanisms that allow individuals to reproduce children of their own likeness.³ Interestingly, commentators such as Mary O'Connor have noted that Irish legislation has traditionally not kept pace with the emerging medical developments relating to surrogacy.⁴ This statement, though relevant, has become less so as Ireland attempts to legislate for many AHR

* Ms. Justice Bronagh O'Hanlon would also like to thank Annette Hickey, Poe Kiely Lanigan Solicitors for consultation on this paper.

¹ Darra L. Hofman, 'Mama's Baby, Daddy's Maybe': A State-by-State Survey of Surrogacy Laws and Their Disparate Gender Impact' (2009) 35 William Mitchell Law Review 449, 450.

² See generally in relation surrogacy Craig Dashiell, 'From Louise Brown to Baby M and Beyond: A Proposed Framework for Understanding Surrogacy' (2012-2013) 65 Rutgers Law Review 851, 853 - 857.

³ See the Glossary provided by the Joint Committee on Health, *Report on Pre-Legislative Scrutiny of the General Scheme of the Assisted Human Reproduction Bill* (July 2019) 5 - 6. See also John Lawrence Hill, 'What Does it Mean to be a Parent - The Claims of Biology as the Basis for Parental Rights' (1991) 66 New York University Law Review 353, 389.

⁴ See Mary O'Connor, 'When is a Mother Not a Mother? - The Commissioning Mother of an Irish Surrogate Child' (2020) 23(1) Irish Journal of Family Law 14.

procedures through the Children and Family Relationship Act 2015 (2015 Act) and the proposed General Scheme of Assisted Human Reproduction Bill 2017 (General Scheme), while neighbouring jurisdictions are also in the process of reforming legislation – or creating new legislation – to appropriately regulate the unique issues that arise in AHR treatment. This article aims to provide an overview of assisted conception, a snapshot of surrogacy in Ireland, detail the necessary procedures for establishing parentage in the age of assisted conception and provide a brief analysis of surrogacy in the United Kingdom, parts of the United States, and Ukraine as a comparative analysis of various forms of regulation.

Procreation in The Irish Context

The ‘family’ is viewed as an institution of paramount importance with specific protections provided under Bunreacht na hÉireann (the Constitution). Notably, Article 41.1.1^o of the Constitution states that 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.’ Additionally, this fundamental group is described as ‘indispensable to the welfare of the Nation and the State.’⁵ Historically, there was the common belief that the concept of family was intrinsically linked to one’s ability to procreate and case-law throughout the years has discussed the rights (although not absolute) of married persons to procreate.⁶

The right to found a family was discussed in cases as varied as *McGee v Attorney General*⁷ and *Murray v Ireland*.⁸ In *McGee*, a case involving the criminalisation of contraceptives, O’Keefe P in the High Court found that ‘[t]he right to marry involves necessarily the right of each spouse to the society of the other and the right to decide whether to have a family or not; it involves a right to decide the extent or size of the family’.⁹ The Supreme Court took a similar view and justified the limitation of a family by reference to the importance of sexual relations between a martial couple under Article 40.3.¹⁰ It seems as though *McGee* may be viewed as an early glimpse of the Irish courts considering the possibility of individuals – as opposed to married couples - being actively involved in the process of regulating their family; a process going beyond the requirement of sexual intercourse.¹¹

In *Murray*, the plaintiffs (who were imprisoned) claimed a right to conjugal visits to allow them to procreate, as the longevity of their prison sentences may have prevented them having children in the future due to their age. McCarthy J recognised the fact that the ‘right to procreate children within marriage... is one of the unenumerated rights guaranteed by Article

⁵ Article 41.1.2^o of Bunreacht na hÉireann provides: ‘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.’

⁶ Note the reference to ‘mother’ in Article 41.2.2^o and ‘children’ in Article 41.3.2^o(iii).

⁷ [1974] IR 284 (HC).

⁸ [1991] ILRM. 465 (SC).

⁹ *McGee* (n 7) 296.

¹⁰ [1974] IR 284 (SC) (Walsh J) 312.

¹¹ See also Andrew Mulligan, ‘From *Murray v Ireland* to *Roche v Roche*: Re-Evaluating the Constitutional Right to Procreate in the Context of Assisted Reproduction’ (2012) 35(1) *Dublin University Law Journal* 261, 266 – 270.

40 as being essential to the human condition and personal dignity.¹² However, he found that this right is not absolute and could be restricted due to the nature of a prison sentence.¹³

Subsequently, the importance of one's active involvement in assisted procreation, and the potential for disagreement between individuals, arose in *Roche v Roche*.¹⁴ This case concerned the right to life of embryos which had been cryopreserved by a married couple who had since separated. While the plaintiff wished to have the remaining embryos implanted, her ex-husband (the genetic father) did not want this to occur. Considering this in the context of the right to life of the unborn, Denham J, as she then was, found that the word 'unborn' was not defined in the Constitution and that the frozen embryos did not have a right to life as:

[T]he balancing of the right to life described in Article 40.3.3° may only take place after implantation. Therefore an unborn under Article 40.3.3° is established after an embryo is implanted.

The concept of unborn envisages a state of being born, the potential to be born, the capacity to be born, which occurs only after the embryo has been implanted in the uterus of a mother.¹⁵

Denham J found that the embryos did not have a right to life under 40.3.3°.¹⁶ To have the remaining embryos implanted, the mother required the consent of her ex-husband. This case is a prime example of specific issues that may arise on the path to procreation through assisted conception.¹⁷ It is possible that the developing case-law, amendments to the Constitution and consequential evolving view of an 'Irish family' may have subtly paved the way for the introduction of legislation to regulate seemingly unconventional methods of procreation.¹⁸

The 2015 Act: The Regulation of DAHR Procedures

In Ireland, assisted conception and AHR treatments have become increasingly important to individuals who struggle to conceive. This is of no surprise considering the fact that infertility is on the rise, and it has been estimated that approximately one in six or seven Irish couples are infertile.¹⁹ The World Health Organisation has defined 'infertility' as a 'disease of the reproductive system defined by the failure to achieve a clinical pregnancy after 12 months or

¹² *Murray v Ireland* (n 9) para 61.

¹³ *ibid*, para 62. See *Dickson v The United Kingdom* (Application No. 44362/04) where the European Court of Human Rights considered whether a refusal to grant a prisoner access to artificial insemination facilities so that he could become the genetic father of his partner's child was a violation of his Convention rights. This case may be contrasted with *Murray* due to the use of a DAHR procedure, rather than traditional means of procreation.

¹⁴ [2010] 2 IR 321 (SC). See also *Evans v UK* (Application No. 6339/05).

¹⁵ *ibid* 371.

¹⁶ Article 40.3.3° was recently amended and now states: 'Provision may be made by law for the regulation of termination of pregnancy.' Additionally, the Health (Regulation of Termination of Pregnancy) Act 2018, which replaced the Protection of Life During Pregnancy Act 2013, now provides for the termination of pregnancy in Ireland.

¹⁷ See also *JMcD v PL and BM* [2008] 1 IR 417 (SC).

¹⁸ Article 41.4 of Bunreacht na hÉireann provides: 'Marriage may be contracted in accordance with law by two persons without distinction as to their sex.'

¹⁹ Department of Health, *Report of The Commission on Assisted Human Reproduction* (Department of Health, 2005) 6.

more of regular unprotected sexual intercourse.²⁰ This ‘disease’ often interferes with the possibility of founding a family, especially for those who are not in a position to adopt or foster (or for those who would like some genetic link to their child).

To regulate AHR, the Children and Family Relationship Act 2015 (‘the 2015 Act’) was introduced. Part 2 of the 2015 Act commenced on 4 May 2020 and includes several sections which are pertinent to AHR.²¹ The legislation defines a ‘DAHR procedure’ as:

a donor-assisted human reproduction procedure, being any procedure performed in the State with the objective of it resulting in the implantation of an embryo in the womb of the woman on whose request the procedure is performed, where—

- (a) one of the gametes from which the embryo has been or will be formed has been provided by a donor,
- (b) each gamete from which the embryo has been or will be formed has been provided by a donor, or
- (c) the embryo has been provided by a donor.²²

It is important to note that this definition of DAHR procedures limits DAHR procedures to those which are performed ‘*in the State*’, i.e. domestically and not internationally. S 5(5) and s 5(6) of the 2015 Act protect intending parents by stating that gamete or embryo donors are ‘not the parent of a child born’ and ‘[have] no parental rights or duties in respect of the child.’²³ Additionally, s 9 – 12 require the intending parents to consent to the parentage of any resulting children. S 7 prevents anonymous donations and s 19 prohibits financial compensation in excess of reasonable expenses associated with DAHR (such as travel costs, medical expenses, legal and counselling costs). These provisions appear to encourage a system of transparency and legitimacy for those wishing to pursue DAHR procedures. However, these provisions also have the effect of preventing the future use of commercialised or anonymously donated gametes/embryos, which were often used by Irish citizens in previous/current treatment. The prohibition on international procedures prevents Irish citizens seeking donations from outside of the State and this may cause problems as Ireland currently has no designated donation clinics - donor gametes/embryos are imported from various countries such as Denmark, Spain and the Czech Republic, which allow for anonymous donations.²⁴ Fortunately, s 26(5) and s 26(6) of the 2015 Act provides a saving grace, as these sections allow for previously acquired anonymously donated gametes and embryos to be used for up to 3 years post-enactment of s 26(1). The 3-year grace period allows individuals to seek national donations and utilize gametes/embryos that would otherwise be prohibited and left unused. Consequentially, this may make it possible for donor siblings to be born within this timeframe and allow families to complete their AHR journey

²⁰ Fernando Zegers-Hochschild and others ‘The International Committee for Monitoring Assisted Reproductive Technology (ICMART) and the World Health Organization (WHO) Revised Glossary of ART Terminology’ (2009) 24(11) *Human Reproduction* 2683, 2686.

²¹ Children and Family Relationships Act 2015 (Parts 2 and 3) (Commencement) Order 2019, SI 541/2019.

²² Children and Family Relationships Act 2015, s 4.

²³ Note that ss 33 - 37 of the 2015 Act provide for the creation of the National Donor-Conceived Person Register as there is a prohibition on anonymous donations to allow donor-conceived children to learn about their full genetic identity.

²⁴ ‘The Ethics of Fertility’ (Waterstone Clinic, 11 August 2016) <<https://waterstonedclinic.ie/the-ethics-of-fertility/#:~:text=Currently%2C%20many%20fertility%20clinics%20in,tries%20to%20ban%20anonymous%20donation.>> accessed 3 July 2020.

without the need to consider alternative routes in this often (and unfortunately) complicated and expensive process.

Surrogacy is not explicitly provided for in the 2015 Act, however, it appears as though these provisions effectively ban commercial domestic surrogacy as opposed to altruistic surrogacy. The failure to address surrogacy leaves single fathers, same-sex male couples, or women who cannot carry a pregnancy in legal limbo as they seek surrogacy without regulation. The 2015 Act was well-intentioned, but regrettably only caters for a limited number of situations and has been criticised for being too restrictive.

Surrogacy in Ireland

Katrina Trimmings and Paul Beaumont argue that the regulation of surrogacy may be divided into three categories:

- i) 'surrogacy friendly' jurisdictions;
- ii) 'anti-surrogacy' jurisdictions; and
- iii) jurisdictions with a relatively neutral approach to surrogacy.²⁵

Currently, surrogacy in Ireland operates in a 'grey zone' where it is unregulated, and *ad hoc* practices and procedures have been developed to bring some clarity to the situation. In a surrogacy arrangement, there are several different parties who are involved in providing the genetic material for the child, carrying the child and raising that child – so there are questions as to who legally is a 'parent' to a resulting child.²⁶ As previously mentioned, the 2015 Act provides certain protections in the use of donated gametes and embryos, but these protections do not extend to a surrogacy arrangement and the lack of governing legislation results in problems for those who wish to pursue this avenue.²⁷

The starting point when analysing case law surrounding surrogacy is the relatively recent Supreme Court decision in *MR and DR v An t-Ard Chláraitheoir*.²⁸ *MR* was a case in which the intending mother was unable to bear a child and therefore she and her husband engaged her sister to act as a surrogate.²⁹ The parties involved in the arrangement were *ad idem* in their intention that the children borne of the pregnancy would be brought up and reared as the children of the intending parents (who were also the genetic parents).³⁰ After the birth of the children, a request to have the intending mother recorded as the mother of the twins was refused. The State authorities considered the birth mother to be the mother who must be registered. In 2013, the High Court granted a declaration finding that the intending mother was the mother of the twins, pursuant to s. 35(8)(b) of the Status of Children Act 1987, and

²⁵ Katarina Trimmings and Paul Beaumont, *International Surrogacy Arrangements: Legal Regulation at the International Level* (Hart Publishing 2013) 443.

²⁶ Kirsty Horsey, 'Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements' (2010) 22 *Child and Family Law Quarterly* 449, 452.

²⁷ 'Surrogacy: A Route to Parenthood in Ireland, 2nd Edition' (Poe Kiely Hogan Lanigan Solicitors 2019) <<https://cdn2.hubspot.net/hubfs/3998938/Ebooks/PKHL%20Surrogacy-A%20Guide%20To%20Parenthood%20In%20Ireland.pdf>> accessed 8 October 2020.

²⁸ [2013] IEHC 91; [2014] 3 IR 533 (SC).

²⁹ *ibid* 540.

³⁰ *ibid* 541.

granted a declaration that she was entitled to have the particulars of her maternity entered on the Certificate of Birth.³¹

The State Authorities later appealed this judgment to the Supreme Court.³² The State Authorities relied on the principle of *mater semper certa est* (the mother is always certain).³³ Denham CJ allowed the appeal, noting that the Irish Constitution contained ‘no definitive definition of “mother”’.³⁴ Denham CJ commented that ‘[l]egislation to date in Ireland has not addressed the issues arising as a result of surrogacy arrangements. As a significant social matter of public policy it is clearly an area for the Oireachtas, and it is not for this court to legislate on the issue.’³⁵

Subsequently, the 2015 Act drew a distinction between ‘*mother*’ which is defined as ‘the woman who gives birth to the child’ and an ‘*intending mother*’ which, in relation to a DAHR procedure, is ‘a woman who requests the performance of the procedure for the purpose of her becoming the mother of a child born as a result of the procedure’. An ‘*intending parent*’ includes an ‘*intending mother*’ and is a person who ‘intends to be the parent...of a child born as a result of the procedure’.³⁶ This is so even if the child born to the surrogate mother is the genetic child of the intending mother (i.e. the ovum used in the pregnancy came from the intending mother and not the surrogate mother). Through the 2015 Act – though not explicitly addressing the issue of surrogacy – the Oireachtas effectively upheld the principle of *mater semper certa est* and failed to take the opportunity to consider the definition of a ‘*mother*’ in the age of AHR treatment.

Who Qualifies as a Parent in an Unregulated Surrogacy Arrangement?

The Development of Parental Rights

Parental rights and responsibilities are often nuanced with the universal understanding that parents play a significant role in the care and upbringing of their children, and it is quite difficult to interfere with such rights. In the Supreme Court case of *North Western Health Board v HW*, Murphy J stated that ‘[t]he failure of the parental duty which would justify and compel intervention by the State must be exceptional indeed.’³⁷ The significance of the rights and duties of a mother were highlighted by O’Higgins CJ in *G v An Bord Uchtála*,³⁸ when he said:

As a mother, she has the right to protect and care for, and to have the custody of, her infant child. ... This right is clearly based on the natural relationship which exists between a mother and child. In my view, it arises from the infant’s total dependency and helplessness and from the mother’s natural determination to protect and sustain her child.³⁹

³¹ [2013] IEHC 91.

³² *MR and DR v An tArd Chláraitheoir* (n 29) 540.

³³ *ibid* 549.

³⁴ *ibid* 556-557.

³⁵ *ibid* 565.

³⁶ Children and Family Relationships Act 2015, s 4.

³⁷ [2001] 3 IR 662 (SC) 732.

³⁸ [1980] IR 32 (SC).

³⁹ *ibid* 55.

Conversely, in the case of *State (Nicolaou) v An Bord Uchtála*,⁴⁰ Walsh J commented that it was ‘rare for a natural father to take any interest in his offspring’.⁴¹ This view of paternity has changed over time and more recently the Supreme Court recognised the importance of a ‘natural father’ in the case of *J McD v PL and BM*.⁴² The facts of this case were such that a same-sex female couple had a child using the sperm of their friend who originally wished to have no parental role in the child’s life but who subsequently changed his mind and sought guardianship and access to his genetic child. The Court observed that:

The blood link, as a matter of almost universal experience, exerts a powerful influence on people....[Additionally], the psychiatrists were in agreement that a child should normally have knowledge, as part of the formation of his or her identity, of both parents, in the absence compelling reasons to the contrary. There is natural human curiosity about parentage...⁴³

While these words were not made in the context of a surrogacy arrangement, it is easy to imagine the same thought process occurring in such contexts.⁴⁴ In this case, the genetic father was granted access to the child, but not guardianship. It would be interesting to see what application this would have in the context of surrogacy if a surrogate mother changed her mind about the arrangement as she would be entitled to seek access due to her status as the legal mother. Essentially, the case law and current legislation protects surrogate mothers and genetic fathers, potentially due to their ‘contributions’ to the child’s creation, rather than their continuing contributions to the child’s physical, social, and intellectual developments.

Current Court Procedures for Parentage

Article 42A of the Constitution provides a specific protection for the rights of all children. Article 42A.4.1° states that ‘the best interests of the child shall be the paramount consideration’ in proceedings ‘concerning adoption, guardianship or custody of, or access to, any child.’ The current court procedures for recognising parentage, guardianship, and custody – like many jurisdictions – do not directly apply to surrogacy; therefore, it is paramount that intending parents proceed with caution when contemplating surrogacy and that the child’s best interest is given priority.

In Ireland, parentage etc. is rooted in the Guardianship of Infants Act 1964 (as amended) and the Status of Children Act 1987. The genetic father of the child can apply to the Circuit or High Court to seek the following orders:

- a) Declaration of Parentage;
- b) Declaration of Guardianship;
- c) Declaration of Custody; and
- d) Dispensing with the necessity of consent of surrogate with passports.⁴⁵

⁴⁰ [1966] IR 557 (SC).

⁴¹ *ibid* 641.

⁴² [2008] 1 IR 417 (SC).

⁴³ *ibid* 81.

⁴⁴ Note that s.20(1)(d) – (f) of the 2015 Act allows for the recognition of parentage by a mother to the exclusion of the donor-father, if the donor was and remains unknown.

⁴⁵ *Poe Kiely Hogan Lanigan Solicitors* (n 27) 18.

a) *Declaration of Parentage*

The procedure for Declarations of Parentage is set out in s 35 of the Status of Children Act 1987 (as amended) where it is proved on the balance of probabilities, usually following a blood test establishing paternity,⁴⁶ that:

- (a) a person named in the application is or is not the mother,
- (b) a person so named is or is not the father or second parent, or
- (c) persons so named are or are not the parents,

of the person concerned, the Court shall make the declaration accordingly.⁴⁷

Domestic surrogacy agreements are not enforceable, and it is crucial that all parties involved in a surrogacy arrangement are *ad idem*. If the surrogate mother is married, there is a presumption that the surrogate mother's husband is the father of the child.⁴⁸ If the surrogate mother is unmarried, she is the sole guardian of the child.⁴⁹ The presumption that the surrogate's husband is the father can be rebutted by DNA evidence proving the genetic link between the intending father and the child. For this reason, it is essential that the intending father's gamete is used in surrogacy, and that surrogacy is not an option where this cannot be done (such as a single woman, infertile man/men, or same-sex female couple).⁵⁰ The legal father (with guardianship) of the child has responsibility for making all decisions pertaining to the child's welfare, including education, medical, physical, and psychological welfare.⁵¹ This responsibility stands in marked contrast to more archaic case law involving natural fathers and illustrates how the current process favours the genetic father.⁵²

Regarding international surrogacy – it is essential that intending parents properly consult with a solicitor to ensure they have full information regarding surrogacy in their chosen jurisdiction. It should also be noted that when pursuing international surrogacy, there may be issues arising such as citizenship and travel documents.⁵³ DNA testing, often overseen by a member of the Irish embassy/consulate in that country, proving the genetic link between the child and the intending father is often necessary to bring a child to Ireland.⁵⁴ Cross-border surrogacy arrangements indicate that there is still a strong preference for the existence of a genetic connection, despite the universal recognition that donors are not the legal parents of any resulting child. AHR treatments indicate a preference for social parentage, rather than

⁴⁶ See Blood Tests (Parentage) Regulations 1988.

⁴⁷ Status of Children Act 1987, s 35(8).

⁴⁸ Status of Children Act 1987, s 46.

⁴⁹ Note that the presumption of paternity arguably does not apply where the surrogate is in a same-sex relationship.

⁵⁰ *Poe Kiely Hogan Lanigan Solicitors* (n 27) 6.

⁵¹ It should be noted that in a DAHR procedure, ss 21 and ss 22 of the Children and Family Law Act 2015 permits the District/Circuit Court to make a declaration of parentage, with the proviso that no declaration shall be made if it is not deemed to be in the child's best interest. The first applications under s 21 of the 2015 Act were heard by District Court President Colin Daly (via TV link due to the COVID-19 pandemic) on the 21 and 22 July 2020 and all 46 of the applications made were granted.

⁵² *State (Nicolaou) v An Bord Uchtála* (n 40).

⁵³ See Irish Nationality and Citizenship Act 1956, s 6 and s 7.

⁵⁴ See for example *Poe Kiely Hogan Lanigan Solicitors* (n 27) 15; See also Department of Foreign Affairs, Citizenship, Parentage, Guardianship and Travel Document Issues in Relation to Children Born as a Result of Surrogacy Arrangements Entered into Outside the State <<https://www.dfa.ie/media/dfa/alldfawebstimedia/childrens-issues-surrogacy-guidance-document.pdf>> accessed 12 June 2020.

genetic parentage, but there is a failure to separate the concept of parenthood from biology in surrogacy arrangements. Understandably, the fear of the exploitation of surrogate mothers, resulting children and a state's sovereignty may be factors that contribute to the necessity to have a sense of 'normality' in a surrogacy arrangement – and a blood link satisfies the traditional understanding of parentage.⁵⁵ As discussed below, it may be worth considering the strength of international pre-birth orders to negate the need for a blood test to establish parentage.

b) *Declaration of Guardianship*

The genetic father, who is granted a Declaration of Parentage, is entitled to make a Declaration of Guardianship under s 6A of the Guardianship of Infants Act 1964 (as amended) ('the 1964 Act'), which provides: 'The court may, on an application to it by a person who, being a parent of the child, is not a guardian of the child, make an order appointing the person as guardian of the child.' This declaration does not impact the surrogate mother's rights, so the surrogate mother must consent to the genetic father having sole custody (see below). The intending mother or second parent cannot seek a Declaration of Parentage, but they may seek a Declaration of Guardianship under s 6C of the 1964 Act. To be eligible for such declaration, the person must have shared the day-to-day care of the child with the genetic/legal father for a period of at least 2 years, or if co-habiting, there must be 3 years of day-to-day responsibility before an application can be made.⁵⁶ S 6C(3) states that this application 'shall be on notice to each person who is a parent or guardian of the child concerned'. Therefore, the surrogate mother will have some involvement in subsequent applications.⁵⁷

c) *Declaration of Custody*

Custody is concerned with the physical care, control and upbringing of the child so, as previously mentioned, it is of paramount importance that the parties are *ad idem* prior to entering any arrangement to avoid subsequent custody disputes. Many relationships between intending parents, surrogates and resulting children have proven positive for a certain period post-birth, but there is no guarantee that the intending parents would want to sustain such relationship for a prolonged period, especially if there is the fear that the surrogate may grow attached to the child and seek custody due to the weak protections currently provided to Irish citizens seeking surrogacy.

⁵⁵ See *D & Ors. v Belgium* (Application No. 29176/13); *Mennesson v France* (Application No. 65192/11); *Paradiso and Campanelli v Italy* (Application No. 25258/12) on the issue of genetic links in cross-border surrogacy arrangements.

⁵⁶ Citizens Information, 'Surrogacy in Ireland' <https://www.citizensinformation.ie/en/birth_family_relationships/adoption_and_fostering/surrogacy.htm> accessed 10 June 2020.

⁵⁷ S 6C(4) of the 1964 Act (as amended) also requires the Child and Family Agency to be put on notice of any application and that the Court should have regard to the views (if any) of the Agency in deciding whether to make an order.

Once guardianship is determined, generally the parties are at liberty to decide custody arrangements.⁵⁸ If there is a breakdown in relationship between the unmarried parents – surrogate mother and legal father – and they cannot agree to custody arrangements, then the legal father may make an application to the District or Circuit Court under s 18A of the 1964 Act (as amended) for an enforcement order in relation to the custody of, or access to, the child. The court may give directions regarding the custody and the right of access to the child of each of his or her parents. Additionally, under s 11E, relatives and certain persons, such as a second parent provided for under s 6C of the 1964 Act, may apply for custody/access once they satisfy the criteria set out in this section. Sadly, if there is a breakdown in relationship between the legal father and the second parent prior to the second parent satisfying the s 6C requirement of 2/3 years of shared day-to-day responsibility of the child, then they will be left in a precarious position as they have very limited (if any) rights to the care and custody of their child.

d) *Dispensing with the Necessity of Consent of Surrogate with Passports*

Understandably, there is a strict regime in place for the granting of passports to those under the age of 18 years and there are certain restrictions in place when it comes to the removal of a child from their country of origin. As previously mentioned, the movement of children, or cross-border surrogacy, is quite complicated where countries do not have adequate procedures in place for the allocation of parentage in a surrogacy arrangement. Currently, there is no specific procedure in place to allow for the dispensing with the necessity of consent of a surrogate to the granting of a resulting child's passport. Presumably, based on the abovementioned procedures in relation to parentage and guardianship, it is envisaged that the child's father - once paternity is proven and sole guardianship is granted – may arrange for a passport to be issued from the Department of Foreign Affairs and Trade, as the department requires the consent of all guardians, or permits the issuance of a passport where there is a sole legal guardian (including sole adoption). Considering the principle of *mater semper certa est*, the (surrogate) mother is automatically a guardian of the resulting child, but she is not the sole legal guardian where:

- a) the mother and father are unmarried;
- b) joint guardianship has been obtained through a court order or statutory declaration; or
- c) the father (or intending mother) has continuously cohabitated with the child's legal parent in accordance with s 6C of the 1964 Act.⁵⁹

In the case of surrogacy, the unmarried father may seek sole guardianship, or alternatively may seek a passport with the consent of the surrogate legal mother. However, this arrangement will continue to cause issues for the intending parent who is not a guardian of the child as they would not be permitted to leave the country with the child without the consent of the legal father who has guardianship, or the legal mother, as this may lead to

⁵⁸ S 11A of the 1964 Act (as amended) provides: 'For the avoidance of doubt, it is hereby declared that the court, in making an order under s 11, may, if it thinks appropriate, grant custody of a child to the child's parents jointly'. See generally Guardianship of Children (Statutory Declaration) Regulations, 1998.

⁵⁹ 'Passports for Children and Guardian Consent' (Department of Foreign Affairs) <https://www.dfa.ie/passports/consent-for-children/#Sole> accessed 1 August 2020.

criminal proceedings, especially where there is a breakdown in relationship between the parents.⁶⁰

The General Scheme of the Assisted Human Reproduction Bill 2017

A further attempt to reform this area of law was made through the General Scheme of the Assisted Human Reproduction Bill 2017. This document proposes the creation of a comprehensive piece of legislation governing many issues that occur in assisted human reproduction, including *inter alia* surrogacy.⁶¹ This General Scheme, once finalised, will deal with issues such as the ‘minimum requirements to be a surrogate, the legal status of all involved, the regulation of any financial aspect of the surrogacy arrangement and the process of consent’.⁶² As the document has not been finalised, it is not clear what elements will become law, but it is worth noting the proposals and recommendations for reform.

The General Scheme has recently gone through pre-legislative scrutiny by the Joint Committee on Health and their report recommended that ‘further consideration be given to the provisions regarding surrogacy (Part 6), with specific attention to’:

- inconsistencies with (*sic*) may arise relating to international surrogacy arrangements and in particular to parentage issues with may arise for children born through [International Surrogacy Arrangements]
- the proposed ban on providing legal or practical advice to people who intend to enter into surrogacy arrangements other than those permitted under the proposed legislation
- only providing for gestational surrogacy within the provisions for surrogacy. The Committee notes the argument of stakeholders that the provision to only provide for this approach is too restrictive, excludes many people from accessing surrogacy arrangements and is not consistent with other provisions within the General Scheme.
- supporting international collaboration with the view of examining complex issues such as the transfer of parentage. The Committee also supports entering bilateral or multilateral agreements to recognise and introduce standards in relation to international surrogacy.⁶³

Significantly, Head 36 solely permits surrogacy which is domestic, gestational, non-commercial and completely transparent (as the surrogate’s personal details are recorded).⁶⁴ Much like s 9 – 12 of the 2015 Act, Head 39(4) requires each of the intending parents to provide an undertaking that they will apply for a Parental Order for any child born under the

⁶⁰ S 16 and s 17 of the Non-Fatal Offences Against the Person Act 1997 deal with international abduction of a child by their parent, or other persons; while Article 1 of the Hague Convention on the Civil Aspects of International Child Abduction aims: ‘a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.’ See also the Child Abduction and Enforcement of Custody Orders Act 1991.

⁶¹ Part 6 of The General Scheme of the Assisted Reproduction Bill 2017.

⁶² Citizens Information, *Surrogacy in Ireland* (n 57).

⁶³ Joint Health Committee (n 3) 7 – 8.

⁶⁴ Note that Head 40 explicitly prohibits commercial surrogacy agreements.

agreement. Again, the proposed legislation retains the presumption that the surrogate mother is the legal mother of any child born – along with her husband, if she has one – and the intending parent(s) must rebut this presumption through DNA evidence.⁶⁵ Once a Parental Order is obtained, the intending parents, under Head 46, will require the surrogate to consent to the child living with the intending parent (who has proven parentage). Interestingly, Head 46(2) envisages this consent as being akin to a private foster arrangement, as provided in Part IVB of the Childcare Act 1991 (if necessary to comply with existing laws). As discussed above, this method of determining parentage is a daunting prospect, especially for intending mothers or second parents, as they may be left in legal limbo for over 2 years. If there is a breakdown in relationship between the intending parents - or the intending parents and the surrogate - then it is unclear whether the intending parent, who cannot claim parentage, will have any standing. Intending mothers and second parents are vulnerable to their partner (genetic parent), surrogate, and surrogate's husband, if married.

Interestingly, Head 41 states that surrogacy agreements are not enforceable, unless they comply with the type of surrogacy envisaged in the General Scheme. Head 41 prevents the enforceability of commercial agreements, but it is questionable how workable this prohibition will be as the prohibition on commercial surrogacy in the United Kingdom has become more flexible through the courts recognition of payments which have gone beyond 'reasonable expenses.'⁶⁶ The payment of 'reasonable expenses' appears to be the only enforceable aspect of the General Scheme, as there is no explicit requirement to hand over any resulting children to the intending parents.

Head 36(2) prohibits the provision of technical, professional or medical services to facilitate a surrogacy agreement, which is not prohibited under this Bill, while Head 36(3) does not prohibit a qualified medical professional from providing medical treatment to a surrogate after she is pregnant. This places legal advisors in a compromising position as they cannot help clients who wish to pursue prohibited treatment nationally or internationally, despite the fact that they may have been consulting with their legal advisors for previous arrangements that were not prohibited prior to these changes.

The International Experience

The international surrogacy experience is relevant to the Irish experience for different reasons. The Irish legislature has relied on existing legislation in the United Kingdom to form future legislation for surrogacy in Ireland, while Irish citizens have sought surrogacy elsewhere. The United States and Ukraine have become popular choices for AHR treatment as they offer different forms of surrogacy that are attractive to Irish citizens. Many academics have recently highlighted various issues that should be taken into consideration in the regulation of surrogacy, such as the risk of exploitation, the availability of appropriate healthcare for surrogates, the discrimination of members of the LGBTQ+ community and

⁶⁵ See Head 44 of the General Scheme.

⁶⁶ Note the fact that despite the prohibition of commercial surrogacy, the UK courts have retrospectively recognised surrogacy arrangements that include finances beyond 'reasonable expenses' in *Re X and Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam), [2009] 1 FLR 733; *Re S (Parental Order)* [2009] EWHC 2977 (Fam), [2010] 1 FLR 1156; *Re L (Commercial Surrogacy)* [2010] EWHC 3146 (Fam), [2011] 1 FLR 1423; *Re J (Foreign Surrogacy Agreement Parental Order)* [2011] EWHC 921 (Fam), [2011] 2 FLR 646; *A v P (Surrogacy: Parental Order: Death of Applicant)* [2011] EWHC 1738 (Fam), [2012] 2 FLR 145; *J v G* [2013] EWHC 1432 (Fam), [2014] 1 FLR 297.

the fear of intrusive state control.⁶⁷ These factors appear to be taken into consideration in the following approaches to regulation, despite their differences.

The United Kingdom

The UK legislature reacted quite quickly to the commercialisation of surrogacy following a decision in *Re C (A Minor) (Wardship: Surrogacy)* ('Baby Cotton case').⁶⁸ This case concerned a traditional surrogacy arrangement in which a UK woman was commissioned to act as a surrogate mother for £6,500.⁶⁹ The commissioning couple were granted wardship by the courts and left the country with the resulting child, despite public outcry. Following this decision, the UK legislature quickly introduced the Surrogacy Arrangements Act 1985, and later, the Human Fertilisation and Embryology Act 2008. Under this legal regime, 'the surrogate is the child's legal mother at birth, and the intended parents must apply for a parental order after the birth of the child to become the legal parents of the child'.⁷⁰ This regime is identical to what has been proposed by the Irish legislature. However, the UK is currently undergoing a programme to reform its laws regarding surrogacy and the UK Law Commission recently released their consultation paper – *Building Families through Surrogacy: A New Law* – and are working with parliamentary drafters to produce a draft Bill reforming areas of the law relating to surrogacy.⁷¹ This draft Bill is expected at some point in early 2022.

The key proposals of the consultative phase are summarised by the Law Commission as follows:

- The creation of a new pathway to legal parenthood in surrogacy, which will allow intended parents to be legal parents from birth.
- Requirements and safeguards for the new pathway.
- A regulator for surrogacy and the creation of regulated surrogacy organisations, who will oversee surrogacy agreements within the new pathway.
- Removal of the requirement of a genetic link between the intended parents and the child, where medically necessary (in the new pathway, and potentially for all domestic arrangements, a genetic link is still required for international arrangements).
- Creation of a register to allow those born of surrogacy arrangements to access information about their origins.
- For international surrogacy arrangements operational reforms, unified guidance on nationality and immigration issues, and provision for recognition

⁶⁷ See discussions in Xinran 'Cara' Tang, 'Setting Norms: Protections for Surrogates in International Commercial Surrogacy' (2016) 25 *Minnesota Journal of International Law* 193; Sara L. Ainsworth, 'Bearing Children, Bearing Risks: Feminist Leadership for Progressive Regulation of Compensated Surrogacy in the United States' (2014) 89 *Washington Law Review* 1077; Martha C. Nussbaum, 'Whether from Reason or Prejudice': Taking Money for Bodily Services' (1998) 27 *Journal of Legal Studies* 693; Alex Finkelstein and others, 'Surrogacy Law and Policy in the US: A National Conversation Informed by Global Law-Making' (Columbia Law School Sexuality and Gender Law Clinic, 2016).

⁶⁸ *Re C (A Minor) (Wardship: Surrogacy)* [1985] FLR 846.

⁶⁹ See also a previous decision of the court in *A v C* [1985] FLR 445.

⁷⁰ Law Commission *Building Families through Surrogacy: A New Law – A Joint Consultation Paper* (Law Comm No 244, Scot Law Com No 167, 2019) para 1.1

⁷¹ *Ibid.*

of legal parenthood across borders, where appropriate, to help those who have had a surrogate child overseas to bring the baby into the UK.⁷²

The designation of parentage from birth and the removal of the requirement for a genetic link in certain circumstances are not envisaged in the Irish General Scheme, but it will be interesting to see whether Ireland looks to the UK's proposals in their reform of surrogacy laws in the later stages of the legislative process.

The United States

Much like Ireland, various jurisdictions within the United States have taken steps to regulate specific legal issues that arise in the realm of AHR, specifically surrogacy. Unlike Ireland, it has been noted that the commercial surrogacy market began in the United States in 1985, with women acting as surrogates earning between \$15,000 and \$30,000 per year.⁷³ These figures have drastically changed in recent times, with the average surrogate earning approximately \$20,000 - \$55,000 in the 21st century.⁷⁴ As previously mentioned, the Irish legislature has proposed to permit altruistic ('reasonable expenses') gestational surrogacy and this may create difficulties for those who often travel to the United States for treatment.⁷⁵ Interestingly, neighbouring States, New York and Massachusetts, have taken different approaches to the regulation of AHR treatment.

New York

Initially, New York, much like the United Kingdom, reacted quite quickly to the commercialisation of surrogacy following a decision of the Supreme Court of New Jersey in *In Re Baby M*.⁷⁶ In *Baby M*, the Supreme Court of New Jersey was faced with a compensated traditional surrogacy arrangement in which the surrogate did not want to surrender her parental rights to the resulting child. The Supreme Court appeared to uphold the principle of *mater semper certa est* as it determined that where the surrogate was both the genetic and birth mother of the child, she was the sole legal mother. No pre-birth order could issue as the maternity/paternity and adoption statutes did not apply to the unique scenario that arose in assisted conception.⁷⁷ Additionally, the New Jersey birth records regulations required the hospital to record the birth mother on the original birth certificate so the concept of pre-birth orders, without appropriate regulation, appeared impossible. Following this decision, New York, as well as many other states, prohibited any type of surrogacy arrangement.⁷⁸ Surrogacy was declared to be against public policy and void, with the possibility of being

⁷² Law Commission (n 70) 5.

⁷³ University of Chicago Law School - The International Human Rights Clinic, 'Human Rights Implications of Global Surrogacy' (2019) *Global Human Rights Clinic* 13.

⁷⁴ Council on General Affairs and Policy, 'A Study of Legal Parentage, and the Issues Arising from International Surrogacy Arrangements' (Hague Conference on Private International Law, March 2014) 61.

⁷⁵ Tang (n 68). Tang notes that countries prohibiting surrogacy arrangements, states where surrogacy is largely unregulated, states that expressly permit and regulate surrogacy and states that have a permissive approach to surrogacy form the foundations of the international surrogacy market.

⁷⁶ *In Re Baby M*, 537 A 2d 1227 (N.J. 1988).

⁷⁷ Differs to *MR* as the surrogate mother was not the genetic mother.

⁷⁸ S 122 of the NY Domestic Relations Law states that 'Genetic surrogacy parenting agreements are hereby declared contrary to the public policy of this state, and are void and unenforceable.' NB effective until February 15, 2021 <<https://www.nysenate.gov/legislation/laws/DOM/122>> accessed 12 June 2020.

subject to a fine for any party involved in a commercial surrogacy arrangement, while altruistic surrogacy agreements would not be enforceable. Despite these restrictions, surrogacy arrangements continued, and subsequent case law dealt with petitions for declarations of maternity for intending mothers, who were left in the dark following the precedent set in *Baby M* (much like *MR* across the pond).

In *Andres A v Judith N*, the Supreme Court of New York expressed its sympathy for the plight of the intending genetic mother who could not make a declaration of maternity as there was no legislation in place to permit such application, however the Court did note that the intending mother was ‘not without a remedy since she may seek to adopt the two children.’⁷⁹

However, in *Arredondo v Nodelman*, the Supreme Court of New York took a different approach to a similar situation, which concerned a petition for a declaration of maternity from the intending genetic mother. The Court ordered that the genetic mother, Mrs. Arredondo, be named on the birth certificate, as ‘genetic testing reveal[ed] that Nodelman could not be the mother of the children.’⁸⁰ Snyder and Byrne noted that the Supreme Court focused on the fact that all parties are *ad idem* and no one was contesting the order; a situation which did not arise in the Irish context.⁸¹ As with most jurisdictions, individuals found alternative routes to parenthood despite these prohibitions, and surrogacy continued.⁸²

In response to the growing calls for regulation, the New York State Senate recently passed the Child-Parent Security Act 2020;⁸³ a comprehensive piece of legislation that deals with an array of issues and attempts to appropriately balance the concerns of surrogates, intending parent(s) and resulting children, with specific protections for each party in a surrogacy arrangement.⁸⁴ This Act, which is due to take effect from the 21 February 2021, provides surrogates with:

- the sole right to make all health and welfare decisions regarding pregnancy;
- the right of independent legal counsel paid for by the intended parent(s);
- the right to have a comprehensive health insurance policy that covers pre- and post- pregnancy (12 months after) care, all paid for by the intended parent(s);
- the right to a life insurance policy pre- and post- treatment up to the maximum amount they would qualify for or \$750,000, whichever is lower, extending for 12 months after the end of pregnancy, to be paid for by the intended parent(s);⁸⁵ and
- the right to walk away from an agreement prior to pregnancy without penalty.⁸⁶

⁷⁹ *Andres A v Judith N*, 591 NYS 2d 946 (N.Y. 1992).

⁸⁰ *Arredondo v Nodelman*, 622 N.Y.S2d 181 (N.Y. 1994) 182.

⁸¹ Note that in *MR* the plaintiffs and the notice party were in agreement, while the respondents – An t-Ard Chlaraitheoir, Ireland and the Attorney General – opposed the motion. See comments in Steven H. Snyder and Mary Patricia Byrne, ‘The Use of Pre-Birth Parentage Orders in Surrogacy Proceedings’ (2006) 39 Family Law Quarterly 633, 658.

⁸² See generally Kiran M. Perkins and others, ‘Differences in the Utilization of Gestational Surrogacy Between States in the U.S.’ (2018) 5 Reproductive Biomedicine and Society Online 1.

⁸³ Alex Finkelstein (n 67) 46 – 53.

⁸⁴ See generally discussions of Tang; Ainsworth; Nussbaum; and Finkelstein and others (n 68).

⁸⁵ Note that this high figure may cause intending parents to seek surrogacy elsewhere, as highlighted by Tang (n 67).

⁸⁶ ‘The Child-Parent Security Act in New York’ (Family Equality)

<<https://www.familyequality.org/resources/child-parent-security-act-new-york/#cpsa-changes>> accessed 12 June 2020.

The Act provides the intending parent(s) with a secure legal relationship with their child from the moment of birth, ensures that gamete donors are not the parent of any resulting children, protects surrogates from exploitation and provides a sense of security for resulting children as the question of parenthood is dealt with prior to implantation – a procedure that is not proposed in the Irish General Scheme. It is unclear how effective this method of regulation will be, but it is a vastly different approach to the previous prohibition on surrogacy as single mothers, single fathers, unmarried couples, and same-sex couples may safely avail of surrogacy in New York.

Massachusetts

Considering the long-standing prohibition on surrogacy in New York, it was not unusual for intending parents to seek surrogacy in neighbouring states, such as Massachusetts, where a more lenient approach was taken to surrogacy arrangements, despite the fact that there was little regulation in place.⁸⁷ There is no legislation directly addressing the issues that arise in surrogacy arrangements; but legislation dealing with paternity and adoption, as well as evolving case law, have been used to recognise parental rights for intending parents in surrogacy arrangements.⁸⁸

In *RR v MH*, the Supreme Court of Massachusetts was first faced with the issue of the enforceability of a surrogacy agreement.⁸⁹ This case concerned a commercialised traditional surrogacy agreement in which the genetic father sought to have the defendant surrogate mother relinquish her rights to the resulting child. Their agreement provided that the surrogate could retain her rights to the child provided she forfeit payment and reimburse the plaintiff for any gain made prior to her change of mind. Following 6 months of pregnancy, the surrogate changed her mind and partially reimbursed the intended father. The plaintiff took proceedings to establish paternity, alleging breach of contract and requiring a declaration of parental rights. Initially, the lower court granted the intended father temporary custody of the child and permitted frequent visits for the surrogate mother. The Supreme Court was then faced with the appeal and ruled that compensation vitiated the mother's consent to custody. Like the Supreme Court in *MR*, the court called for legislative intervention by stating that:

A surrogacy agreement judicially approved before conception may be a better procedure, as is permitted by statutes in Virginia and New Hampshire. A Massachusetts statute concerning surrogacy agreements, pro or con, would provide guidance to judges, lawyers, infertile couples interested in surrogate parenthood, and prospective surrogate mothers.⁹⁰

Despite this call,⁹¹ no legislation was introduced and the Supreme Court was later faced with a petition for a pre-birth order in gestational surrogacy agreement in *Culliton v Beth Israel*

⁸⁷ See *Hodas v Morin*, 814 NE 2d 320 (Mass. 2004), 326.

⁸⁸ See MGL c.46 s.4B on artificial insemination for married couples; MGL c.210 s.2 on written consent of certain persons for adoption; MGL c.215 s.6 on courts and their jurisdictions.

⁸⁹ *RR v MH*, 689 NE 2d 790 (Mass. 1998).

⁹⁰ *ibid* 797.

⁹¹ See also *Smith v Bronn* 718 NE 2d 844 (Mass. 1999) on the call for legislation in relation to insurance cover for infertility treatments.

Deaconess Medical Centre.⁹² Much like *MR*, the parties were *ad idem*, but a third party – the Massachusetts’ hospital – took issue with the proposal for a pre-birth order. The hospital claimed that pre-birth orders would interfere with the regulations that required the recording of information in relation to mortality rates of infants and mothers, medical issues arising pre- and post- birth and trends in relation to ART, which would be used to prevent future incidents in maternity hospitals.⁹³ Despite this opposition, the Court ruled that pre-birth orders would provide ‘stability and protection to children born through such gestational surrogacy arrangements.’⁹⁴ Notably, the Supreme Court appears to be lenient to the prospect of pre-birth orders and securing parentage in a surrogacy arrangement, especially in situations where the parties are *ad idem* and there is a genetic connection to the resulting child, despite the lack of legislation in this area. Andrea E Stumpf notes that this method of regulation ensures that ‘initiating parents [are] responsible for a child that no one wants, and they should be entitled to a child that everyone wants.’⁹⁵ Undoubtedly, intention appears to be a significant determining factor.

Ukraine

Surrogacy in Ukraine lies at the heart of the Irish experience. Much like the United States, Ukraine has become increasingly popular - but often criticised - for the development of a lucrative surrogacy industry. The cost of a surrogacy arrangement in Ukraine is remarkably lower than the United States, which may be an attractive factor for Irish citizens who are of limited (considering the overall expense of AHR treatment) means. However, this notable price difference accompanies a higher risk of exploitation - at least from a Western perspective. Surrogate mothers have limited interaction with intending parents and this limited interaction creates a fear of possible exploitation.⁹⁶ It has been reported that Ukrainian women earn approximately \$10,000 - \$15,000 per year, which is only a fraction of what surrogates in the United States earn. This risk of exploitation and legal problems has been highlighted by Sergii Antonov, who mentioned the fact that - like Ireland - surrogacy in Ukraine lacks specific legislation and the law remains fragmented.⁹⁷ Article 123 of the Family Code of Ukraine and Article 281 of the Civil Code of Ukraine address assisted human reproductive technologies, but do not explicitly provide for surrogacy. Article 123 provides:

1. If the wife is fertilised by artificial procreation techniques upon written consent of her husband, and latter is registered as the father of the child born by his wife.
2. If an ovum conceived by the spouses is implanted to another woman, the spouses shall be the parents of the child.

⁹² *Culliton v Beth Israel Deaconess Medical Centre*, 756 NE 2d 1133 (Mass. 2001).

⁹³ *ibid* 1140.

⁹⁴ *ibid* 1139. See also Snyder and Byrne (n 83) 636 – 638, on the advantages of pre-birth orders.

⁹⁵ Andrea E Stumpf, ‘Redefining Mother: A Legal Matrix for New Reproductive Technologies’ (1986) 96(1) *Yale Law Journal* 187, 204.

⁹⁶ See Shany Noy Kirshner, ‘Selling a Miracle: Surrogacy Through International Borders: Exploitation of Ukrainian Surrogacy’ (2015) 14 *Journal of International Business and Law* 77.

⁹⁷ Sergii Antonov, ‘Methods of Legal Regulation for Surrogacy in Ukraine and Abroad’ (2020) *Law Ukraine Legal Journal* 139, 139.

3. Whenever an ovum conceived by the husband with another woman is implanted to his wife, the child is considered to be affiliated to the spouses.⁹⁸

Article 281 permits an ‘adult woman or man...to undertake medical treatment programs of supportive reproductive techniques per the procedure and conditions established by the legislation.’⁹⁹ These legislative provisions appear quite paternalistic and seem to centre AHR treatment around the consent of the woman’s husband. Article 123 also reinforces the fact that same-sex or single AHR treatment is not possible in Ukraine.

Gestational and commercial surrogacy arrangements pursued by heterosexual couples are permitted in Ukraine. For international couples, they require the surrogate to relinquish her parental rights to the child, which enables the intending parent(s) to bring the child back to their country of origin, provided they have proven paternity (see above). Unfortunately, the unprecedented COVID-19 pandemic has brought the inherent issues in cross-border surrogacy to the attention of the general public as the BBC recently reported that over 50 babies have been stranded in the BioTextCom Centre for Human Reproduction in Kyiv, Ukraine.¹⁰⁰ Like many jurisdictions, the Minister for Foreign Affairs has gone to great lengths to reunite intending parents with their children who have been born outside of the jurisdiction during these troubling times. This pandemic has highlighted just how important accessible, affordable, and sustainable fertility (and surrogacy) services are on a national level.

Conclusion

This article has emphasised the limited legal framework in which surrogacy exists in Ireland – despite the protections provided in the Children and Family Relationship Act 2015. Unfortunately, the current legislative limitations (and the proposed General Scheme) prevent Irish citizens seeking services on a national level and force them to look elsewhere for assistance. As previously mentioned, Irish citizens have sought surrogacy services in the United Kingdom, Ukraine and United States (as well as other jurisdictions) and may continue to do so. We are in a world where commercial surrogacy is on the rise and pre-birth orders have strengthened the concept of social parentage; but altruistic surrogacy and the requirement of a genetic link is catered for in Ireland. It appears as though the current limitations, along with looming international norms which interpret surrogacy in broader – and arguably more liberal - terms, indicate that we may well need to revisit the current system (or proposals contained in the General Scheme in the interim) to create a comprehensive piece of legislation to govern all aspects of AHR treatment and make appropriate provision for the unique nature of a surrogacy arrangement and the various family forms which may need assisted conception.

⁹⁸ See Family Code of Ukraine <http://jafbase.fr/docEstEurope/FAMILY_CODE_OF_UKRAINE.pdf> accessed 2 July 2020.

⁹⁹ See Book One – General Provisions (Civil Legislation of Ukraine) <http://teplydim.com.ua/static/storage/filesfiles/Civil%20Code_Eng.pdf> accessed 2 July 2020.

¹⁰⁰ Valeria Perasso, ‘Coronavirus Splits Couple from Baby Born through Surrogacy 8,000 Miles Away’ (BBC, 18 May 2020) <<https://www.bbc.com/news/world-latin-america-52706228>> accessed 1 July 2020.