

## **Pathways to Parenting: Proposals for Reform**

### **BRIEFING DOCUMENT**

#### **LGBT Ireland\***

#### **Introduction**

This Briefing Document addresses selected areas of significant concern to LGBT parents and their children in Ireland in the areas of donor-assisted human reproduction (“DAHR”) and surrogacy and proposes legal reforms to address those issues.

The reforms that are proposed in this Briefing Document are based on protecting the best interests of the child and are informed by reference to the rights of the child under the United Nations Convention on the Rights of the Child (UNCRC), the European Convention on Human Rights and Article 42A of the Irish Constitution. It is argued that the best interests of the child are met through laws that recognise the reality of life for the child and that ensure that the child can be fully cared for by the adults whom he or she regards as parents. For children raised in gay and lesbian families, this means that the children should have the opportunity of acquiring a legal relationship with both intended parents and those parents should have all of the legal tools necessary to care for the child. Moreover, it is argued that children who are born through DAHR or surrogacy must not be disadvantaged when compared to other children due to their mode of conception or due to their parents’ marital status or sexual orientation. Unfortunately, there are a number of provisions in Parts 2 and 3 of the Children and Family Relationships Act 2015 (“CFR Act”), once commenced, and the Assisted Human Reproduction Bill 2017 (“AHR Bill”), once enacted, that will operate to treat certain children less favourably than others. These issues are not only of concern to children born to same-sex parents, but to many other children who are born through DAHR and surrogacy.

It is acknowledged that the child’s right to identity is of upmost importance in DAHR and surrogacy and so the provisions of the CFR Act that allow children to access information about their origins provide important safeguards for the right to identity. However, it is important to acknowledge at the outset that upholding the child’s right to identity does not require that a

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gamete donor, who has no desire or intention to play any role in the child's life, should be recognised as a legal parent. The reality of the child's actual family relationships must be legally recognised and protected and should drive the legislative response. The reforms proposed in this Briefing Document are designed to achieve this.

### **KEY RECOMMENDATIONS:**

1. Where a child is conceived through non-clinical DAHR, procedures should be in place to recognise the second intended parent as a legal parent.
2. A retrospective application for a declaration of parentage in cases of DAHR under section 20 of the CFR Act should be possible where a known donor was used.
3. To ensure that the second intended parent is recognised as a legal parent in cases where she provides her egg to enable the conception of the child, the words “unless the donor of the gamete or embryo is the spouse, civil partner or cohabitant of the mother” should be added to all sections of the CFR Act that currently provide that “a donor of a gamete [or embryo] that is used in a DAHR procedure is not the parent of a child born as a result of that procedure.”
4. The Government should consider possibilities for recognising DAHR conducted abroad after Parts 2 and 3 of the CFR Act are commenced.
5. Provisions should be enacted to retrospectively recognise the legal parentage of children born through surrogacy before the AHR Bill is enacted.
6. The AHR Bill should provide recognition of the legal parentage of children conceived through surrogacy conducted outside of the State after the AHR Bill is enacted.
7. Pre-conception court orders should be provided for in the AHR Bill to provide approval of the surrogacy arrangement *and* to determine the parentage of the child before conception takes place with no requirement for a parental order to be obtained after the birth of the child.

LGBT Ireland is aware that there may be a perception that that adoption is a viable option to address some of the issues discussed in this Briefing Document. We do not share this view. Adoption was not designed to be used in cases of DAHR or surrogacy and does not accurately reflect the reality of the family relationships created through those processes. Adoption requires that the parents are assessed in terms of their eligibility and suitability to parent a child with whom they already have a parent-child relationship and when an adoption order is made, the

child is issued with an adoption certificate to replace the birth certificate. Moreover, the partner of the legal parent can only engage in second-parent adoption where the child has lived with the second parent and the birth parent for a continuous period of not less than two years.<sup>1</sup> As such, there is a two-year waiting period before second-parent adoption can be used. Where the child is less than two years of age, only joint adoption is possible whereby the birth parent would be required to give up his or her existing parental rights in order to jointly adopt with the second parent. This is an overly complicated and unnecessary process. For these reasons, adoption should not be seen as a “solution” to issues arising in DAHR and surrogacy: the appropriate way to address the issues is through amendment of the Children and Family Relationships Act 2015 (“CFR Act”) and/or the Assisted Reproduction Bill 2017 (“AHR Bill”).

**1) Known donor outside of a clinical setting:**

Non-clinical procedures are currently excluded from the parentage provisions in the CFR Act. The result is that children conceived through DAHR outside of the clinical setting do not have a legal relationship with the second intending parent at birth. Children conceived through DAHR outside of the clinical setting are therefore disadvantaged when compared to children conceived through DAHR in a clinic by virtue of the circumstances of their conception.

*a) Case Study:*

Elaine (birthmother) and Jenny conceived their baby girl at home, using sperm donated by Jenny’s brother. They had no problem conceiving and did not need any clinical intervention. Their donor is happy to give consent to both women being recognised as the legal parents.

As their baby is only 3 months old, Jenny is unable to seek guardianship under the CFR Act 2015 as the child is less than 2 years old. Therefore, as the law currently stands she has no legal relationship to her child and is unable to establish a legal relationship until her daughter is two years old.

*b) Possible Legal Solution*

Married opposite-sex couples currently benefit from a presumption of paternity in favour of the husband of the birth mother. There is no equivalent presumption for married same-sex couples. To accommodate married same-sex couples and civil partners and to ensure that they

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<sup>1</sup> Adoption Act 2010, s 37(b) as amended by Adoption (Amendment) Act 2017, s 18.

are not disadvantaged when compared to married opposite-sex couples, the Civil Registration Act 2004 should be amended to allow both intended parents to be registered as the legal parents of a child who has been born following a non-clinical DAHR procedure. This could be facilitated through a mechanism along the lines of that in section 22 of the Civil Registration Act 2004, as amended by section 6 of the Civil Registration (Amendment) Act 2014 (not yet commenced) allowing the joint registration of the intended parents in the following circumstances:

- a) The intended parents must provide the registrar with a statutory declaration stating that they are the mother and intended parent of a child born following a DAHR procedure; that they have recorded the identity of the gamete donor and transmitted the relevant information to the National Donor-Conceived Persons Register; that the donor did not intend to be recognised as a legal parent and that they have evidence exhibiting this which will be provided to the registrar.
- b) The female couple shall provide the registrar with the name and last known contact details of the gamete donor.
- c) Upon receiving the statutory declaration from the female couple, the registrar shall make all reasonable efforts to give notice in writing to the donor requiring him, within 28 days, to attend before a registrar, at the office of the registrar or such other (if any) convenient place in the registration area concerned, as may be specified by the registrar in the notice, and there to inform the registrar if he agrees that he is not the father of the child.
- d) The donor shall complete a statutory declaration agreeing that he is not the father of the child.
- e) Where the registrar receives both statutory declarations and is satisfied that details concerning the donor have been transferred to the National Donor-Conceived Persons Register, s/he shall register the intended parents as the legal parents on the child's birth certificate.
- f) Where the registrar is unable to make contact with the donor but is satisfied based on the statutory declaration provided by the intended parents that the donor is not the father of the child, s/he shall register the mother and second intended parent as the legal parents on the child's birth certificate.

For cohabiting couples (who are not married or civil partners), or where there is a dispute as to the parentage of the child in respect of the above, where a child is conceived through non-clinical DAHR, the second parent should be able to apply to court for a declaration of parentage after the birth of the child to establish his or her parentage. To protect the rights of the donor, he should be joined to the application and his consent required before the declaration can be granted (unless the consent is unreasonably withheld). The application should also be grounded on evidence establishing that the donor consented to the use of his or her gamete and did not intend to be recognised as a legal parent at the time of the DAHR procedure; and evidence that all relevant details concerning the donor and the procedure have been transmitted to the National Donor-Conceived Persons Register.

These procedures will allow the second parent to be legally recognised in cases of non-clinical DAHR but would also require the intended parents to take precautions to protect the child's rights and best interests at the time of the conception.

*c) Examples in other Jurisdictions*

Other jurisdictions have addressed the issue of non-clinical DAHR by extending a statutory presumption of parentage to some couples. In the United Kingdom, a statutory presumption of parentage operates in favour of same-sex married couples and civil partners (but not cohabiting couples) in cases of donor insemination. As such, the spouse or civil partner of the birth mother is automatically regarded as the child's second legal parent regardless of whether the procedure takes place in a clinical or non-clinical setting. The presumption applies unless it is shown that the second parent did not consent to the procedure at the relevant time.<sup>2</sup> In British Columbia, a person who is married to, or in a marriage-like relationship with, the child's birth mother at the time when the child was conceived is deemed to be the child's parent unless it is shown that he or she did not consent to be recognised as such.<sup>3</sup>

**2) Known donor in a clinical setting in respect of a child conceived before Parts 2 and 3 of the CFR Act are commenced**

For children who were conceived prior to the commencement of Parts 2 and 3 of the CFR Act, parentage may be retrospectively allocated to an intended parent not previously recognised as

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<sup>2</sup> Human Fertilisation and Embryology Act 2008, s 42.

<sup>3</sup> Family Law Act 2011, s 27.

a legal parent through application for a declaration of parentage under sections 21 or 22 of the Act. In order for the declaration to be granted, the donor must have been and remain unknown to the intending parents at the time of the application.<sup>4</sup>

The requirement that the donor must be unknown raises issues as “unknown” is not defined in the legislation. It is unclear whether it means that the donor must be unidentifiable or identifiable but not yet identified. This approach penalises couples who chose to use a known donor in order to safeguard their child’s right to identity. It means that where the child’s right to identity was prioritised, the child is subsequently deprived of his or her right to be cared for by the intended parents as the second parent cannot subsequently obtain the declaration of parentage.

*a) Case Study*

Jane (birthmother) and Sarah have an 18-month-old baby boy, Jake. Jake was conceived in a fertility clinic using sperm provided by an identifiable donor. Jane and Sarah want Jake to know about his origins and so they have obtained identifying information about the donor so that they can educate Jake about his genetic background in an age-appropriate manner as he grows up. The women have never met the donor but know his name and last known address. Jane is the birth mother of Jake and is recognised as the legal mother. After Parts 2 and 3 of the CFR Act are commenced, Sarah will be unable to obtain a declaration of parentage listing her as the second legal parent because a known donor was used.

*b) Possible legal solution*

Section 20(d) of the CFR Act should be amended to make it possible to apply for a declaration of parentage in cases where a known or identified donor was used. Where a known donor was used, the law should provide that s/he is to be joined to the application for the declaration of parentage and his/her consent required before the declaration can be granted. Where the donor cannot be located, the court should have the power to dispense with his/her consent. This could be facilitated by amending section 20(d) of the CFR Act to provide along the lines that:

“at the time referred to in paragraph (c) the person, other than the mother of the child, who provided a gamete that was used in the DAHR procedure, consents to the making of the

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<sup>4</sup> Children and Family Relationships Act 2015, s 20(1)(e).

declaration of parentage unless—

- (i) he or she is deceased or cannot be located, or the court finds that the consent is unreasonably withheld; or
- (ii) the person who provided the gamete was the spouse, civil partner or cohabitant of the mother and was the only intending parent of the child at the time that the DAHR procedure was performed.”

The court should only dispense with the donor’s consent where it is in the best interests of the child to do so. Where the child is capable of forming his or her own views, the views of the child should be ascertained and given due weight having regard to the age and maturity of the child in the application for the declaration of parentage.

### **3) Reciprocal IVF**

Reciprocal IVF (where a female couple conceive using the non-birth mother’s egg and a sperm donor) is not regulated under the CFR Act. As a result, it is unclear as to whether the partner of the birth mother would be recognised as a legal parent or whether she is classified as a donor.<sup>5</sup>

#### *a) Case Study:*

Ranae and Audrey have a two-year-old daughter Ava and are expecting a second child. Ranae is the birth-mum of Ava and is carrying their second child. Both children were conceived using Audrey’s eggs and donor sperm: “In our mind, that meant that the baby would truly be a part of both of us.”

As the birth-mother Ranae is the legal mother of Ava. Audrey will be unable to apply for a parental order under Section 20 of the CFR Act, as she is classified as a known donor under the Act. When their new baby is born she will be unable to establish guardianship of the child for 2 years.

#### *b) Possible Legal Solution*

To ensure that the second intended parent is recognised as a legal parent in cases where she

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<sup>5</sup> See further: Lydia Bracken, “In the Best Interests of the Child? The Regulation of DAHR in Ireland” (2016) 23 *European Journal of Health Law* 391.



provides her egg to enable the conception of the child, the words “unless the donor of the gamete or embryo is the spouse, civil partner or cohabitant of the mother” should be added to all sections of the CFR Act that currently provide that “a donor of a gamete [or embryo] that is used in a DAHR procedure is not the parent of a child born as a result of that procedure.” These words should be added to sections 5(5), 5(7), 6(3)(d), 7(b)(i), 9(3)(c)(i), 11(3)(d)(i), and 13(b)(ii) of the CFR Act and any other section where the latter phrase appears.

Where children have already been born following reciprocal IVF, the second parent should be able to apply for a declaration of parentage naming her as the second legal parent. In line with the recommendations under Heading 2 above, section 20(d) of the CFR Act should be amended to remove the requirement that the donor must have been and remain unknown in order for the declaration of parentage to be granted. Instead, the section should provide along the lines that

“at the time referred to in paragraph (c) the person, other than the mother of the child, who provided a gamete that was used in the DAHR procedure, consents to the making of the declaration of parentage unless—

- (i) he or she is deceased or cannot be located, or the court finds that the consent is unreasonably withheld; or
- (ii) the person who provided the gamete was the spouse, civil partner or cohabitant of the mother and was the only intending parent of the child at the time that the DAHR procedure was performed.”

This will mean that where a woman has provided her egg to enable the conception of a child that was carried by her spouse, civil partner or cohabitant, she can subsequently be recognised as the second legal parent.

*c) Examples in other Jurisdictions*

In the United Kingdom, paragraph 5 of Schedule 3 of the Human Fertilisation and Embryology Act 1990 provides that consent to donor insemination is not required for “the use of a person’s gametes for the purpose of that person, or that person and another together, receiving treatment services.”

**4) Fertility treatment accessed abroad**



Section 20 of the CFR Act provides that an application for a retrospective declaration of parentage may be made in respect of a child conceived before Parts 2 and 3 of the Act are commenced who was conceived by DAHR performed in the State or outside the State. For children born after Parts 2 and 3 are commenced, the procedure must be performed in the State.<sup>6</sup>

This provision raises particular issues for persons who already have a child conceived following a DAHR procedure performed in a foreign clinic in circumstances where the clinic is storing embryos for that couples' future use. Once Parts 2 and 3 of the Act are commenced, the parentage provisions in the CFR Act will not apply where the couple use the stored embryos to conceive a child as a result of a DAHR procedure conducted abroad.

*a) Case Study*

Sue and Teresa initially attended a Dublin clinic for AHR treatment, but when significant fertility issues were identified, they had to look abroad for further treatment options. They were very lucky, and their daughter was born in early 2018. As she was born before the CFR Act commences, Teresa will be able to apply for a retrospective declaration of parentage naming her as a legal parent. However, the couple have a number of embryos in storage in the UK clinic. If the couple use these embryos in order to conceive a genetic sibling for their daughter, they will not be able to apply for parentage under the CFR Act.

It is unclear whether it may be possible to apply for parentage if they transfer the existing embryos to an Irish clinic and carry out embryo transfer here. There would be a significant cost involved in this and it would mean leaving a clinic where they had a very positive experience, and a medical team with whom they have established trust, both very important elements within the AHR process.

*b) Possible Legal Solution*

The CFR Act recognises that couples who already have a child born through DAHR may wish to conceive a genetic sibling for the child. Sections 26(5) and 26(6) of the CFR Act allow Irish DAHR facilities to use gametes or embryos acquired prior to the commencement of Parts 2 and 3 even where the acquisition does not meet the criteria in sections 26(1) or 26(2)(a). Gametes

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<sup>6</sup> Children and Family Relationships Act 2015, s 4.

can be used for three years following commencement and there is no stipulated time limit for the use of previously acquired embryos. Where a couple has already engaged in a DAHR procedure in a foreign clinic, a similar three-year amnesty should apply to allow them to conceive a child through DAHR in the foreign clinic using gametes already acquired and there should be no time limit on the use of embryos stored at a foreign clinic. The couple should be able to apply for a declaration of parentage in Ireland to recognise their parentage following the birth of the child. This could operate along the lines of the existing sections 21 and 22 of the CFR Act.

In respect of future procedures, the Government should consider entering into bilateral agreements with countries that offer DAHR treatment to Irish couples whereby Ireland agrees to recognise the parentage of children conceived by DAHR to Irish couples outside the State so long as this meets criteria equivalent to that in the CFR Act. This will ensure that the parentage of children conceived through DAHR abroad can be established.

### **5) International Surrogacy**

Under the AHR Bill, only domestic surrogacy will be permitted after the legislation is enacted. There is no provision in place to recognise the parentage of children who were/are born through surrogacy before the Bill is enacted and commenced. It must be acknowledged that the exclusion of international surrogacy will not prevent couples from accessing services abroad. In these cases, Ireland must remain cognisant of the case law of the European Court of Human Rights which establishes that it is contrary to Article 8 ECHR to refuse legal recognition of children's legal relationships with their genetic parent in cases of international surrogacy, even where surrogacy is prohibited under domestic law.<sup>7</sup>

The child has no control over the circumstances of conception and should not be disadvantaged by virtue of the fact that he or she was conceived by surrogacy abroad. It is argued that it is in the best interests of the child for his or her relationship with the intended parents to be legally recognised. As the UK courts have acknowledged:

“is almost impossible to imagine a set of circumstances in which by the time the case comes to court, the welfare of any child (particularly a foreign child) would not be gravely

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<sup>7</sup> *Menesson v France*, app. no. 65192/11, 26 September 2014; *Labassee v France*, app. no. 65941/11, 26 September 2014.

compromised (at the very least) by a refusal to make an order [transferring parentage to the intended parents].”<sup>8</sup>

*a) Case Study*

Laurence and Eddie have six-year-old twins, which they conceived using a surrogate mother in the UK. Eddie is the legal parent of the twins. The woman who was the surrogate for the couple is in regular contact with the family and is happy to consent to Laurence being recognised the twins’ legal parent.

One of the children has significant health issues and needs regular medical attention, and while Laurence does have guardianship of both children this does not recognise his parental relationship to them, which has huge implications for the family, as Eddie explains here “I have a little boy with a rare genetic disorder which will mean he will need care AFTER his other dad’s guardianship ends when he’s 18.”

*b) Possible Legal Solution*

Retrospective:

Provisions should be enacted to retrospectively recognise the legal parentage of children born through surrogacy before the AHR Bill is enacted. These provisions should mirror those in sections 20, 21 and 22 of the CFR Act that allow for the retrospective recognition of legal parentage where children were conceived by DAHR before Parts 2 and 3 of the CFR Act were commenced.

Prospective:

The AHR Bill should provide recognition for the legal parentage of children conceived through surrogacy abroad after the AHR Bill is enacted. The provisions should allow the parents to apply for a declaration of parentage/ parental order in Ireland after the birth of the child so long as the foreign surrogacy meets conditions set out in the Irish legislation eg. that the surrogacy was gestational and non-commercial etc.

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<sup>8</sup> *Re X and Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam).

*c) Examples in other Jurisdictions*

The United Kingdom adopts a post-birth model of parentage in surrogacy whereby the surrogate is recognised as the legal mother at birth and the intended parents can later apply for a parental order to transfer parentage to them. As a result, the UK law does not recognise birth certificates issued abroad in cases of surrogacy that automatically allocate parentage to both intended parents. Instead, the intended parents must still apply for a parental order from the UK courts when they return to the jurisdiction with the child. The UK courts have adopted an approach whereby the parental order will almost always be granted (as it is in the best interests of the child to do so), unless there is the “clearest abuse of public policy”<sup>9</sup> in respect of how the international surrogacy arrangement was conducted. As Fenton-Glynn notes:

“In this way, the English courts have transferred legal parenthood to the commissioning parents, despite breaches of law including large payments to surrogate mothers, as well as to agents and mediators, applications outside the time limit, deception of the Foreign Office, and lack of truthful information about the surrogate mother.”<sup>10</sup>

The UK courts recognise that once the child has developed a relationship with the intended parents, it is almost always in the best interests of the child to transfer parentage to the intended parents.

**6) Domestic Surrogacy**

The AHR Bill proposes to introduce a post-birth model of parentage in surrogacy, similar to that in the UK, but with the additional requirement that the surrogacy must be pre-authorized by a new Assisted Human Reproduction Regulatory Authority. A major difficulty that arises with this delayed model of parentage is that, at the time of the child’s birth, at least one of the intended parents will not be recognised as a legal parent and cannot be recognised until the time that the parental order is granted. The application for the parental order cannot be made earlier than six weeks and not more than six months after the child’s birth.<sup>11</sup> This approach leaves the child in a vulnerable position as he or she is cared for from birth by the intended parents, one of whom will not have any legal parental responsibility or decision-making powers

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<sup>9</sup> *Re L (A Child)* (2010) 3146 (Fam).

<sup>10</sup> Claire Fenton-Glynn, “International surrogacy before the European Court of Human Rights” (2017) 13 *Journal of Private International Law* 546 at p 551.

<sup>11</sup> General Scheme of the Assisted Human Reproduction Bill 2017, Head 47.

for at least six weeks. Instead, the surrogate, as the legal mother, retains decision-making responsibility for the child until the time that the parental order is granted.

A post-birth model of recognition is currently adopted in the United Kingdom. Many experts and stakeholders have criticised the UK regulation of surrogacy and, as a result, the Law Commission of England and Wales is currently reviewing the area with a view to reforming the current surrogacy laws which were first enacted over thirty years ago.<sup>12</sup> Attitudes towards surrogacy have changed considerably in this thirty year period and so the Law Commission will propose reforms that are designed to accommodate surrogacy in the 21<sup>st</sup> century.

It might be assumed that the post-birth model of parentage offers protection to the surrogate by giving her the opportunity to change her mind about the transfer of parentage after the child has been born. A number of studies indicate that women who act as surrogates do not view the child as their own and do not struggle with the decision to transfer parentage to the intended parents.<sup>13</sup> It is also notable that in the United Kingdom, where the legislation gives the surrogate the opportunity to change her mind, there have only been three reported cases where disputes have arisen between the surrogate and the intended parents in relation to the transfer of parentage.<sup>14</sup> To give context to these figures, it should be noted that approximately 138 applications for parental orders were made in the UK between April 2011 and March 2012 alone, while 241 applications were made between April 2014 and March 2015.<sup>15</sup> Of course, there might be other disputes that do not come before the courts but these figures indicate that it is very rare that the surrogate will subsequently refuse to consent to the transfer of parentage. It should also be noted that a survey conducted in the UK in 2015 indicated that many surrogates do not want to be recognised as legal parents (with all of the responsibility that this carries) in the first place.<sup>16</sup>

Furthermore, the focus on protecting the surrogate in the Irish AHR Bill is inconsistent. Although the surrogate is given the opportunity to change her mind about the transfer of

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<sup>12</sup> Law Commission, “Surrogacy” <https://www.lawcom.gov.uk/project/surrogacy/>

<sup>13</sup> Vasanti Jadva, “Surrogacy: Issues, concerns and complexities” in Golombok and others, *Regulating Reproductive Donation* (Cambridge University Press, 2016) at p 128.

<sup>14</sup> Natalie Gamble, “A better legal framework for United Kingdom surrogacy?” in Golombok and others, *Regulating Reproductive Donation* (Cambridge University Press, 2016), at p 148.

<sup>15</sup> CAF/CASS, *Cafcass Study of Parental Order Applications made in 2013/14* (CAF/CASS, 2015)

<sup>16</sup> Surrogacy UK, *Surrogacy in the UK: Myth Busting and Reform: Report of the Surrogacy UK Working Group on Surrogacy Law Reform* (Surrogacy UK, 2015).

parentage to the intended parents, the requirement for her consent to be provided to the parental order can be waived by the court where it is in the best interests of the child to do so.<sup>17</sup> In addition, Head 46 of the AHR Bill *requires* the surrogate to consent to the child living with the intended parents after birth; she has no discretion not to consent. This dilutes the claim that the objective of adopting the post-birth model of parentage in the AHR Bill is to protect the surrogate's interests.

The pre-authorisation requirement as set out in the AHR Bill is cumbersome as it essentially means that the surrogacy agreement must be approved twice: before conception by the Regulatory Authority and after birth by the courts. This is a lengthy and expensive process.<sup>18</sup>

*a) Possible Legal Solutions*

A pre-conception model of parentage would better protect the rights of all stakeholders in the surrogacy process than the post-birth model. Pre-conception court orders would provide approval of the surrogacy arrangement *and* determine the parentage of the child before conception takes place. The order would provide that the intended parents are to be recognised as joint legal parents at the time of the child's birth and that the surrogate mother is not recognised as a legal parent. This would ensure that both of the intended parents have full legal powers to care for the child from the moment of the child's birth and ensure that the child is legally integrated into his or her family from the moment of the child's birth.

*b) Examples in other Jurisdictions*

In South Africa, under the Children's Act 2005, surrogacy agreements must be validated by the High Court before the surrogacy is undertaken. Where the criteria for validation are met, the intended parents will be treated as the legal parents from the moment of the child's birth.<sup>19</sup> The surrogate mother does not acquire any parental status.<sup>20</sup>

British Columbia operates a similar pre-conception model of surrogacy except the Family Law Act 2011 provides that the pre-conception agreement will only take effect where, *inter alia* the

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<sup>17</sup> General Scheme of the Assisted Human Reproduction Bill 2017, Head 48(2).

<sup>18</sup> See further Lydia Bracken, "The Assisted Reproduction Bill 2017: An Analysis of Proposals to Regulate Surrogacy in Ireland" (2017) 68 *Northern Ireland Legal Quarterly* 577.

<sup>19</sup> Children's Act 2005, ss. 292, 295, 297.

<sup>20</sup> See further Lydia Bracken, "The Role of the Best Interests Principle in Regulating Parentage in Surrogacy in Ireland" [2017] *International Family Law* 115.

surrogate “gives written consent to surrender the child to an intended parent or the intended parents” after the birth of the child.<sup>21</sup> The fact that the surrogate entered into the written pre-conception agreement to act as a surrogate or to surrender a child is not consent for the purposes of the post-birth surrender of the child but may be used as evidence of the parties' intentions with respect to the child's parentage if a dispute arises after the child's birth.<sup>22</sup> The surrogate is not recognised as a legal parent upon the birth of the child.

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<sup>21</sup> Family Law Act 2011, s 29(3)(b).

<sup>22</sup> Family Law Act 2011, s 29(6).