

# **A Guide to Surrogacy for Same Sex Couples:**

## **1. Introduction**

There comes a stage in most couples lives when they have a strong desire to have a child and start a family. Thanks to the miracle of assisted reproduction technology same sex couples for the first time have the opportunity to have a biologically related child. Today, surrogacy is an option for LGBT couples and individuals who want to complete their families. Surrogacy refers to an arrangement whereby a woman (the surrogate) agrees to conceive, carry and birth a child for the intended parent(s) to raise. In most ways, the surrogacy process is no different for same sex couples than it is for any other intending parent. When you work with an LGBT friendly surrogacy professional, you will complete all of the same steps and have the same options and choices throughout the process. The growing demand for infertility and services has meant reproductive medical science has advanced tremendously in recent years. Fortunately, in a progressive society, such as Ireland, people are now much more open and honest about their struggles to have a child and are likely to seek out help and advice from their doctor rather than suffering in silence for too long. Assisted Human Reproduction (AHR) is a major industry with same-sex couples in Ireland electing to go down this route in the hopes of having a child of their own.

Surrogacy is one option many same sex couples may choose to explore in their desire to become parents. There is currently no legislation in Ireland that deals with the legal issues arising from surrogacy. A huge move towards the development of legislation occurred when the Government published the General Scheme of the Assisted Human Reproduction Bill in October 2017. The General Scheme proposes to regulate gestational surrogacy in Ireland where the surrogacy meets the criteria set out in the Bill. As well as the legal implications associated with surrogacy in Ireland, there are also emotional, social and economic issues to consider if a person decides to embark upon surrogacy as a means to having a family.

This guide has been commissioned by Poe Kiely Hogan Lanigan Solicitors to shine a light on surrogacy for same sex couples in Ireland and the key factors for couples to consider if they decide to take this route to parenthood. Our purpose is to better inform and prepare readers for any decision they make towards parenthood in Ireland.

## **2. Types of Surrogacy: Traditional and Gestational**

Traditional surrogacy is not without its complexities due largely to the fact the baby is conceived using the surrogate's eggs and the surrogate is biologically related to the child they intend to handover to the intended parents (the people who will care and raise the child).

Gestational surrogacy is when the surrogate carries a baby conceived using an egg donor, embryo donor and/or the sperm from the intended father. This type of surrogacy requires medical intervention as this is the only way the intended mother's egg can be transferred into the surrogate's body. The procedure is a delicate one and will require In Vitro Fertilisation (IVF).

The risk of entering into an informal surrogacy agreement is that complex issues arise around parentage and guardianship of the child. In Irish law the surrogate is still considered the legal mother of the child and is therefore the child's legal guardian because she has given birth to the child. The legal father (whose parentage is established by DNA evidence) can apply to the Irish Court for a declaration of parentage, guardianship and sole custody of the child. When he is appointed guardian then he can make all decisions regarding the child's welfare including educational, medical and all matters relating to the child's physical and psychological wellbeing.

<b>TRADITIONAL</b>	<b>GESTATIONAL</b>
Surrogate's egg used with intended father's sperm or donor sperm	Intended mother's own eggs or donor eggs used with intended father's sperm or donor sperm.
Artificial Insemination (AI) is used	In Vitro Fertilisation (IVF) is used
Surrogate genetically related to baby	Surrogate not genetically related to baby
Surrogate is child's legal parent at birth	Surrogate is child's legal parent at birth (in Ireland)

### **3. International Surrogacy**

There are some countries where surrogacy is illegal, and others where it is legal but with some restrictions. For example, altruistic surrogacy is legal in some countries but commercial surrogacy is not. There are also countries, like Ireland, where surrogacy is not prohibited but not regulated either. It is also the case where some countries allow surrogacy but only for opposite-sex married couples and not same-sex couples. Even in countries where surrogacy is legalised, laws can vary from place to place. This is why it is so important for couples to do their own research and understand what the different laws are and if they would be willing to go to another country to find a surrogate.

Over the years a number of Irish same sex couples have chosen to go overseas to seek a surrogate in a country where surrogacy for same sex couples is legal. As with domestic surrogacy in Ireland, there is no legislation in Ireland that deals with the issues arising from international surrogacy for Irish residents.

Irish same sex couples have travelled to countries such as Canada and USA where surrogacy is legal. There are commercial surrogacy clinics abroad which facilitate surrogacy arrangements between intended parents and surrogates. The legalities of surrogacy arrangements will vary greatly throughout the world and from state to state in the USA and Canada. Some countries and states are more LGBT friendly than others. You will need to ensure your family is legally protected wherever you go. You should try to find out whether it is possible to obtain a pre-birth Order naming the intended parents as parents and where both parents names are listed on the birth certificate.

Aside from considering the costs, intended parents also need to be aware that issues of citizenship and guardianship will arise for a child born via a surrogate in another country. In Ireland, the woman who gives birth to the child is recognised as the legal mother. When it comes to heterosexual couples and same-sex male couples, guardianship will be based on DNA evidence from the father. As the laws in Ireland are at the moment, a single woman or same sex female couple cannot seek parentage or guardianship.

Whilst the legal complex legal issues involved with international surrogacy can be difficult to understand, successful strategies have been developed to enable couples to become parents. The right strategy may differ from case to case, and the involvement of experienced Irish solicitors is essential in choosing and implementing the best route to take.

### **Questions to ask a Surrogacy Clinic**

How long has the clinic been in operation?

Do you medically screen surrogates?

Do you offer psychological assessments for surrogates?

What is the fee payment structure?

How are surrogacy expenses handled?

To what extent is contact encouraged between the surrogate and the intended parents?

## **4. General Scheme of Assisted Human Reproduction Bill 2017**

For the first time in Ireland's history the General Scheme of Assisted Human Reproduction Bill 2017 presented a legal framework for domestic gestational surrogacy. The bill proposes to make altruistic surrogacy in Ireland legal and prohibit commercial surrogacy. Whilst not yet law in Ireland, it sets out rules and regulations that prospective intended parents should follow in order for a surrogacy agreement to be formally accepted.

The Bill outlines specific guidelines for intended parents to follow in terms of the surrogate they choose, the reasonable expenses they should provide to the surrogate, legal advice they must seek and the requirements for a Parental Order.

The key considerations of the Bill include:

### **a. The Surrogate**

The surrogate must be habitually resident in Ireland, have previously given birth to a child and be aged 25 and 47 years of age. Prior to the application for authorisation from the Regulatory Authority the surrogate must have been assessed and approved as suitable to act as a surrogate by a doctor and counsellor.

### **b. The Intended Parents**

There can be one or two intended parents who must be habitually resident in Ireland, aged between 21 and 47 years of age, who are either unable to gestate a pregnancy, unable to conceive a child for medical reasons, likely to have her health significantly affected by a pregnancy/ giving birth, unlikely to survive a pregnancy/ birth.

### **c. Reasonable Expenses**

Commercial surrogacy agreements are prohibited in Ireland, however, there will be an obligation under a surrogacy agreement to pay or reimburse the surrogate's reasonable expenses. These 'reasonable expenses' will be enforceable when the agreement is made prior to the transfer of the embryo to the surrogate and will include costs associated with the pregnancy or birth such as:

- pre-natal or post-natal medical expenses
- travel costs
- accommodation costs
- reimbursing the surrogacy for loss of earnings as a result of unpaid leave for up to two months during which the birth happened and any other period during the pregnancy when the surrogate was unable to work on medical grounds relating to the pregnancy or birth
- counselling expenses

- expenses associated with receiving independent legal advice in relation to the Surrogacy Agreement and in relation to the Parental Order.

#### **d. Independent Legal Advice and Counselling**

The surrogate and each intended parents shall receive counselling and independent legal advice at each stage of the surrogacy agreement being including before the agreement is signed, after the birth of the child and at the time of the application for a Parental Order.

#### **e. Parental Order**

An application can be made to the Court for a Parental Order no earlier than 6 weeks and no later than 6 months after the birth of the child. At the time of the application to the Court the home of the child must be with the intended parents. The application must be accompanied by evidence that at least one of the intended parents provided a gamete used for the child's conception and the surrogate's egg was not involved. The Court will require the surrogate (and her husband if she is married) to consent to the granting of the Parental Order unless the surrogate is deceased, hasn't the capacity to consent, can't be located or any other reason the Court considers relevant. The Court will grant a Parental Order once it is satisfied the child will become the child of the intended parents. It is also worth noting that the surrogate will remain the legal mother of any child she gives birth to under a surrogacy agreement until the Parental Order is granted. An application can be made to the Court for a Parental Order no earlier than 6 weeks and no later than 6 months after the birth of the child.

## **5. Returning To Ireland**

Under Irish Law it is the birth mother who is recognised as the legal parent of the child. If she is married her husband is presumed by law to be the father and a joint guardian. If the birth mother isn't married she is the sole guardian. Only the genetically related male parent can have his parental relationship with the child recognised by making an application to Court for an Order of Declaration of Parentage and as a parent he can also apply to the Court for a Guardianship Order, Order for sole custody and Order dispensing with the requirement to seek the consent of the surrogate to the issuance of a passport for the child.

**Guardianship:** Guardianship mean the right and duties in respect of the upbringing of the child. A guardian has the right to make all major decisions affecting the child's upbringing including choice of school, medical treatment, religious matters, health requirements and decisions about leaving the country.

**Custody:** Custody is the day to day physical care and control of the child.

The Attorney General represented by the Chief State Solicitors office are joined to the Court application in Ireland as a notice party. The Chief State Solicitors office requirements must be satisfied before their legal representative will confirm to the court that they do not object to the Court granting the Orders sought. The court proceedings are served on the Surrogate outside of the Jurisdiction and on her legal advisor. The Surrogate and her legal advisor will be required to swear Affidavits confirming that she is aware of the Court application pending in Ireland, that the effect of the Orders being sought have been explained to her by her legal advisor, that she understands the effects of the Orders and that she consents to the Order being granted by the Court.

## 7. In Summary

The journey to becoming a parent might not always be as straight-forward as we would like it to be. Assisted reproductive technology is an amazing vehicle to allow LGBT couples to create a family with a mix of professionals all collaborating to bring about the best outcome for the child. It is advised that you speak to your solicitor about what legal options are available for you as early as possible in your surrogacy journey to make sure you protect your rights to your child. The key is to do thorough research and fully understand all the legal, social, emotional and economic implications which could come into play.

Surrogacy in Ireland is legally complex and one which will require input from a qualified and experienced solicitor. Ideally, a couple should instruct a solicitor who has experience in surrogacy cases and can navigate a lot of the legal intricacies involved to achieve the best result possible for them and the future of their family.

We hope this guide to “Surrogacy for Same Sex Couples” has proven useful and informative. For more information about Assisted Reproductive Technology and Surrogacy for LGBT intended parents please contact us.

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