

## IRLANDE

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### I. DOES THE LAW OF YOUR COUNTRY ACCEPT MATERNITY FOR ANOTHER?

Not expressly. There is simply no legislation or legal precedent on this issue. In practice, maternity for another does occur and is governed by Irish Medical Council Guidelines<sup>1</sup>. In 2005, the Irish Commission on Assisted Human Reproduction recommended, with one member dissenting, that surrogacy should be permitted and should be subject to regulation by a regulatory body. No legislation is currently in place nor has a specific regulatory body been established.

### II. IF THE ANSWER IS YES, WHAT IS THE LEGAL SITUATION?

#### *1. Is Maternity for another under the control of a judge?*

In the absence of statute in the area, any dispute over guardianship or custody as the result of a surrogacy agreement would be up to a judge to resolve. This decision like any dispute about parenthood or custody would be resolved by reference to the best interests of the child under Section 3 of the Guardianship of Infants Act 1964<sup>2</sup>.

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<sup>1</sup> Irish Medical Council *A Guide to Ethical Conduct and Behaviour* (6<sup>th</sup> ed. 2004).

<sup>2</sup> “Where in any proceedings before any court the custody, guardianship or upbringing of an infant or the administration of any property belonging to or held on trust for an infant, or the application of the income thereof is in question, the Court in deciding that question shall regard the welfare of the infant as the first and paramount consideration”.

### 2. *Is it purely contractual?*

The contractual force of a surrogacy agreement has not been considered by the Irish courts. Unlike in the UK, there is not a specific statute ruling that such contracts are unenforceable<sup>3</sup>. It is possible that the Irish courts will consider such contracts to be unenforceable as against public policy. However, in a case where the court had to determine the issue of guardianship, like the English court, they would be less interested in the force of the contract and more interested in what solution would be in the best interests of the child<sup>4</sup>.

### 3. *What are the rights of the woman who carries the child?*

In Irish law, the gestational mother is considered to be the legal mother, although there is no case law expressly on point<sup>5</sup>. As the natural mother of the child, Irish law grants a constitutional right to the custody of her child to the woman who carries the child. This is a personal right under Article 40 of the Constitution<sup>6</sup>.

The natural mother is deemed automatically to be the guardian of the child. When considering an application for guardianship, custody or upbringing by any other person, the Irish courts must have regard to the welfare of the child under Section 3 of the Guardianship of Infants Act 1964. The Irish courts proceed on the presumption that the mother will act in the best interests of the child and the onus is upon any person alleging otherwise to prove to the court that it should intervene to remove the child from the natural mother<sup>7</sup>. It is thus a very strong right to custody of the child unless such rights are waived or forfeited.

The situation is more complex if the woman carrying the child is married. If this is the case the child when born will be considered to be part of a constitutional family under Article 41 of the Irish Constitution. Articles 41 and 42 of the Constitution grant inalienable rights to married parents in relations to their child. The Irish Supreme Court has determined that the welfare of the child is considered to be best served by remaining part of the marital family unless there are exceptional circumstances<sup>8</sup>. Thus, where the woman carrying the child is married, she would seem to possess a stronger

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<sup>3</sup> Surrogacy Arrangements Act 1985.

<sup>4</sup> *Re P (Minors) (Wardship: Surrogacy)* [1987] 2 FLR 421.

<sup>5</sup> It is likely that the Irish courts would be influenced by the English case of *Amphill Peerage Case* [1977] AC 547 in this regard.

<sup>6</sup> *G v An Bord Uchtála* [1980] IR 32, 55.

<sup>7</sup> *J McD v PL and BM* [2008] IEHC 96.

<sup>8</sup> *North Western Health Board v HW and CW* [2001] 3 IR 635.

right to custody of the child, particularly where the presumption that her husband was the father was not rebutted (see next section).

#### *4. What is the filiation of the baby?*

Again, there is no legal precedent or legislation that is specific to a surrogacy agreement. In general, where a mother is unmarried, the genetic father is considered to be the legal father<sup>9</sup>. He does not have automatic guardianship and would have to apply to court under s 6A of the 1964 Guardianship of Infants Act to have the status of guardian conferred upon him<sup>10</sup>.

Alternatively the natural father could make a joint statutory declaration with the gestational mother that he is the legal father of the child in the form prescribed by the Guardianship of Children (Statutory Declaration) Regulations 1998. In order to use this procedure he must have been registered as the father on the birth certificate for the child.

Where the surrogate mother is married, there is a legal presumption that her husband is the legal father of the child<sup>11</sup>. This presumption can be rebutted by evidence that proves that the husband is not the genetic father<sup>12</sup>.

#### *Who is the mother?*

It would appear to be the gestational mother, although there is no Irish case on point.

#### *Does the infant have one or several mothers?*

The infant will have one mother- the gestational mother.

#### *Is he adopted?*

Even in cases where no dispute arises between the commissioning parents and the surrogate parents it would be difficult to secure an adoption for the child by the commissioning parents.

Section 41(1) of the Adoption Act 1952 makes it illegal to make or receive any payment or other reward in consideration of an adoption. If the surrogacy arrangement involved the payment of money to the surrogate, this could be construed as in "consideration of an adoption" and thus illegal. This has yet to be tested by a court. The Commission on Assisted Human Reproduction is of the view that reasonable and legitimate expenses to the

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<sup>9</sup> Section 38, Status of Children Act 1987; *JPD v MG* [1991] ILRM 217, IESC.

<sup>10</sup> *K v W* [1990] ILRM 121.

<sup>11</sup> Status of Children Act 1987 s 46.

<sup>12</sup> *S v S* [1983] IR 68; Status of Children Act 1987, s 35.

surrogate mother would not be seen as contravening the Adoption Act<sup>13</sup>. There is also anecdotal evidence to suggest that such practices do happen in Ireland and are permitted by the Adoption Board<sup>14</sup>.

If the surrogate mother is married, the situation is different. Marital children can only be adopted if their parents have failed in their duty of care towards them<sup>15</sup>. This has proved an onerous burden of proof to discharge<sup>16</sup>. In order for the child of a married surrogate to be adopted by the commissioning parents they would have to prove that the husband was not the father of the child to the satisfaction of the Adoption Board. The child would also have to be placed for adoption by the surrogate mother.

*5. Is the situation the same when the carrying mother is a foreign person, or when the baby is born outside the Country?*

The problems with adoption of a child are the same even where the mother is a foreign person or the adoption happens abroad<sup>17</sup>.

If the child was born outside the country, Ireland would recognise a foreign adoption in certain cases<sup>18</sup>. Where the foreign adoption is not recognised either for lack of residency in that country or for reasons of public policy, the child would have to be re-adopted under Irish law. This may not be possible where the child is born to a married surrogate or where the surrogate's consent has not been validly procured.

It is unclear whether Irish law would recognise a foreign filiation order upholding a surrogacy agreement if such an order were challenged. It is possible that such an order would be construed as contrary to Irish public policy.

#### IV. IS YOUR LAW ABOUT TO CHANGE?

In 2005 the Irish Commission on Assisted Human Reproduction made recommendations regarding surrogacy<sup>19</sup>. The report has been assessed by the Oireachtas Joint Health Committee but no Parliamentary action has

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<sup>13</sup> And this was the view of the English courts in cases predating the Human Fertilization and Embryology Act 2008; *Re Adoption Application (payment for adoption)* [1987] Fam. 81.

<sup>14</sup> SILL & HEALY, "Building Irish families through surrogacy: medical and judicial issues for the advanced reproductive technologies", *Reproductive Health*, vol. 5, (2008).

<sup>15</sup> Section 3 Adoption Act 1988.

<sup>16</sup> *FO'D v An Bord Uchtála* [200] 1 IR 165.

<sup>17</sup> *TM and AM v An Bord Uchtála* [1993] ILRM 577.

<sup>18</sup> S6 Adoption Act 1991.

<sup>19</sup> 2005, Commission on Assisted Human Reproduction available online at <http://www.dohc.ie/publications/cahr.html>.

occurred to date. Many of the recommendations are to welcomed as they will bring clarity to this area of law.

The Commission recommended that donation of sperm, ova and embryos should be permitted and should be subject to regulation by the regulatory body. This is a similar system to that of the Human Fertilization and Embryology Act 2008 in the UK.

The Commission recommended that in the case of a child born through ovum donation and in the case of a child resulting from an embryo donation, the gestational mother should be recognised as the legal mother of the child. Her partner, if any, should be recognised as the child's second legal parent. This means that the common understanding that the gestational mother is the legal mother in Irish law would be retained. The rule that the genetic father is the legal father would be displaced in cases of artificial reproduction in favour of the intended second parent.

The majority of the Commission recommended that surrogacy should be permitted subject to regulation by a regulatory body. Surrogacy should not be a commercial arrangement but rather an altruistic transaction. The Commission recommended that women who decide to participate as surrogate mothers should be entitled to receive reimbursement of expenses directly related to such participation but not profit from the arrangement.

It further recommended that a child born through surrogacy should be presumed to be that of the commissioning couple. The Commission made this recommendation to ensure flexibility, stating that the presumption could be rebutted where the gestational mother had not properly consented or where the gestational mother was also the genetic mother of the child. However, it is unclear how this presumption would work in practice. In order for the presumption to come into play, some existence of the surrogacy arrangement would have to be presented. While this might function in a situation where the existence of the surrogacy agreement has been known to the regulatory body from the beginning of treatment it is unclear how this presumption would function in the case of a foreign surrogacy agreement or where all details of the surrogacy agreement were not clear in advance of treatment. It is submitted that the approach of the UK in the Human Fertilization and Embryology Act 2008 of letting the statutory rules of paternity apply, subject to a later parental order in favour of the commissioning parents is a preferable option.

The Commission recommended that a child born through surrogacy should be entitled to access the identity of the surrogate mother on reaching maturity. This is part of a general commitment to genetic truth in the report. It was also suggested that where donor gametes had been used the child should have access to the identities of his or her genetic parents on maturity.

