

# **Children and Family Relationships Bill 2013**

## ***Briefing Note***

The Children and Family Relationships Bill 2013 is intended to create a legal structure to underpin diverse parenting situations and provide legal clarity on parental rights and duties in diverse family forms.

Legal provision for the care and upbringing of children in Ireland is substantially outdated. The current law relating to guardianship, custody of and access to children is the Guardianship of Infants Act 1964. The law relating to paternity and matters relating to children born outside of marriage is the Status of Children Act 1987. The law providing for cohabitation and civil partnerships, the Civil Partnership and Certain Rights and Obligation of Cohabitants Act 2010, did not address the legal status of children in such relationships.

Various recommendations have been made in recent years to consolidate and modernise these laws and to address the legal issues in terms of parenting that arise for the increasing number of children born by means of assisted human reproduction or surrogacy arrangements or into diverse family types. These include the Report of the Law Reform Commission on “Legal Aspects of Family Relationships 2010” and the Report of the Commission on Assisted Human Reproduction 2005. These reports recognise the increasing complexity of contemporary family structures and the difficulties faced by courts and professionals working with children in supporting families at times of need.

The proposed Children and Family Relationships Bill 2013 provides for a contemporary legal architecture on guardianship, custody, access and the upbringing of children in diverse family forms. This includes married families, families that rely on the care of children by members of the extended family, families based on cohabiting couples and civil partnerships. The Bill also reflects the new constitutional provision relating to children arising from the 2012 Children Referendum. There is a need to provide better support to the courts in family law and childcare cases to provide improved access to welfare reports, and new mechanisms to ensure parental compliance with child maintenance and access.

This Bill also addresses issues that have arisen in the context of Assisted Human Reproduction and Surrogacy. There is growing concern around the practice of commercial surrogacy in Ireland and the use of international commercial surrogacy by Irish people. This has very serious implications for the birth registration of children in Ireland, as well as concerns relating to the possible exploitation of persons in commercial surrogacy arrangements. Questions related to surrogacy are currently before our courts, with the Supreme Court due to hear such a case in early 2014. The Bill will not address broader issues as to how assisted human reproduction may be regulated in Ireland. The proposals are not intended to constrain the Department of Health in developing a comprehensive policy approach to assisted human reproduction and its regulation.

In the context of this litigation and the constitutional changes arising from the Children Referendum that may come into effect shortly, it is essential that this bill be enacted during the course of 2014.

The Bill does not address matters related to adoption ( including same sex adoption) which is the policy area of the Minister for Children and Youth Affairs. The current law relating to adoption provides for the adoption of children by married couples, by single persons (irrespective of their sexual orientation), but not by cohabiting couples or by civil partners. However, there is a need to further consider this issue in the context of a decision in October 2013 by the United Kingdom Supreme Court to refuse to hear an appeal from the Northern Ireland Court of Appeal in “In the Matter of an Application by the Northern Ireland Human Rights Commission” which determined that the European Convention of Human Rights prohibited the discrimination between couples in adoption on the basis of sexual orientation. A law which permits the adoption of a child by an individual who is gay but excludes the adoption of a child by a same sex couple makes little sense and can properly be regarded as discriminatory.

The Bill is intended to:

- modernise the law and recognise the role played by the extended family.
- increase the number of non-marital fathers who are automatically guardians of their children by providing that a non-marital father is a guardian of his child if he cohabits with the child’s mother for at least a year before the child’s birth and the cohabitations ends (if applicable) less than 10 months before the child’s birth.
- allow civil partners, step-parents, those co-habiting with the biological or adoptive parent and those acting in loco parentis for a specified period to apply for **guardianship** of a child, provided that the child does not then have more than two guardians. (see further page 3) The majority of Irish domestic adoptions at present are adoptions by a biological mother together with her husband (the husband not being the biological father of the child). The Bill will facilitate husbands becoming joint guardians of children in such relationships where it is in the best interests of the child without mothers having to go through the artificial procedure of adopting their own child / children.
- establish that the **best interests of the child** are the paramount consideration in decisions on custody, guardianship and access and sets out additional guidance for the court as to what constitutes the best interests test.
- put in place a set of provisions on **making parenting work** and provide for penalties against parents who refuse to comply with access and maintenance orders.
- permit non-commercial **surrogacy** arrangements, but prohibit people or agencies from advertising surrogacy services or from persuading women to act as surrogates.
- set out how **parentage** is to be assigned in cases of assisted reproduction and surrogacy, enabling men and women to apply for declarations of parentage where children have been born to them through the use of their own genetic material or otherwise.

## Detail of provisions

### Guardianship, Custody and Access

It is proposed to repeal the Guardianship of Infants Act 1964, as amended, and re-enact a reformed and enhanced version.

Key proposed policy changes from the existing Act are as follows:

- the court will be mandated to regard the **best interests** (currently, “welfare”) of the child as the paramount consideration in making orders
- additional guidance will be given to the court as to what constitutes the best interests of the child, including the benefit of meaningful relationship with both parents, ascertainable views of the child, needs of the child, history of upbringing and care, religious, spiritual and linguistic needs, harm suffered or which the child is at risk of suffering, custody arrangements, capacity of applicants etc. In addition, the court must have regard to any **family / domestic** violence and its impact on both the safety of the child and other family members
- provision of a statutory description of the powers, responsibilities and rights of a guardian and the duty to exercise those in the best interests of the child
- a person who is not a child’s parent may apply for **guardianship**
  - if the person has shared responsibility for caring for the child with the child’s parent for at least two years and is married to or a civil partner of the child’s parent, or has lived with the child’s parent for at least three years, or
  - if the person has taken responsibility for caring for the child for at least a year and the child has no parent or guardian able and willing to care for her or him
- a person who has been in loco parentis to a child may apply for **custody** of the child in specified circumstances
- **access** provisions will be substantially simplified, including removing the current two-stage process for a person other than a parent (such as a grand-parent, former step-parent, etc) who is seeking access to a child
- a child over the age of 12 must be **consulted** in relation to applications for guardianship, custody and access orders, and may be entitled to refuse her or his consent
- where a “significant decision” has been made by a child’s guardian (i.e. a decision that could seriously damage or cause a serious risk to the health and safety of a child, or is likely to have serious long-term consequences for the child), another person may apply to court for a **review** or that decision and for advice and direction in respect of that decision.

### **Voice of the child / guardian ad litem**

Provisions are made in the Scheme for a new and changed “guardian ad litem” system in the private law arena. This part of the Scheme may be subject to potentially significant policy change in the short term depending on the outcome of a broad review being carried out by the Department of Children and Youth Affairs as to how the voice of the child should be conveyed more effectively in proceedings relating to the child.

### **Making Parenting-related orders work**

The policy proposal is to give the court a range of enforcement options where a parent or guardian refuses to comply with court orders entitling the other parent or guardian to custody or access to the child. These range from giving the applicant compensatory time to, in cases of persistent non-compliance, providing penalties to include fines and community service. At present the main option of the Courts is to imprison a parent. For practical reasons the Courts avoid so doing and effectively have no remedy they can utilise to compel a recalcitrant parent

to comply with orders providing for visitation / holiday rights of the non-custodial parent where the parent with custody refuses / fails to co-operate.

### **Child Maintenance**

The current child maintenance code is revised to reflect the parentage provisions (particularly where parentage is attributed to the civil partner of a child's parent), and also to ensure that there is no comparative disadvantage to a child born outside the constitutional marital family to one born within marriage. This change is not only required to ensure that all children are treated equally but is necessary as a result of proceedings taken against the State before the European Court of Human Rights which highlighted this issue.

### **Parentage, Assisted Reproduction and Surrogacy**

#### ***Parentage generally***

The presumption of paternity should be modified to include a "negative presumption" under which a husband will be presumed not to be the father of a child his wife gives birth to more than 10 months after the last occasion when there was contact between her and her husband.

#### ***Parentage in Assisted Reproduction***

Assisted human reproduction uses genetic material from the intending father or mother, or both of them. If one of the intending parents does not have viable genetic material, donor material is used. In practice, donated material is usually sourced commercially and the donors remain anonymous (and may be untraceable).

The proposed rules for assigning parentage in cases of assisted human reproduction (other than surrogacy cases) are as follows:

- (i) Where the genetic link is to the intending father, the parents are the birth mother and the genetic father,
- (ii) Where the genetic link is to the intending mother, the parents are the birth mother and her consenting spouse, civil partner or cohabiting partner,
- (iii) Where the genetic link is to the intending father and the intending mother, they are both the parents,
- (iv) Where there is no genetic link to either intending parent, the parents are the birth mother and her consenting spouse, civil partner or cohabiting partner.

#### ***Parentage in Surrogacy***

The bill will provide that in a surrogacy case, parentage may be legally assigned by the court on the basis of genetic connection to one of the intending parents and the spouse, civil partner or cohabiting partner of that person, on application by any of the relevant parties. The consent

of any surrogate is essential and she will be the legal mother of the child if she does not consent. The court will have jurisdiction to make the above declaration only if:

- a) the child is born in the State, or
- b) the alleged parent ordinarily resides in the State.

### ***Surrogacy Arrangements generally***

The bill will provide that:

- surrogacy arrangements are not enforceable by or against any person making such an arrangement
- payment for surrogacy is prohibited
- advertising surrogacy arrangements or to procure a surrogate is prohibited
- an obligation to pay or reimburse surrogacy costs is enforceable only if the surrogacy arrangement was made prior to the surrogate conception, and is limited to reasonable costs associated with a pregnancy (including medical and costs, travel and accommodation, loss of earnings)
- parties to a surrogacy arrangement must obtain legal advice concerning the surrogacy arrangement and its implications *before* the arrangement is made

It will be an offence for a person to receive payment for making or facilitating a surrogacy or advertising surrogacy arrangements.

Department of Justice and Equality  
5 November 2013