

# General Scheme of the Children and Family Relationships Bill

## Policy Rationale

### Overall

The aim of the General Scheme of a Children and Family Relationships Bill 2014 is to put in place a legal architecture to underpin diverse parenting situations and to provide legal clarity on parental rights and responsibilities in such situations.

Most children live in marital families with their biological parents. However, a significant minority of children live in other family types. Census 2011 indicated that there were 215,300 families headed by lone parents with children in Ireland in 2011; 44% of the parents had never been married. There were 49,005 households of cohabiting couples with children under 15 recorded in Census 2011. The number of children living in cohabiting households is rapidly increasing, rising by 41% between 2006 and 2011. This data indicates that a significant number of children may be living in households with step-parents or with their biological parents' cohabiting partners.

The significant proportion of children growing up in diverse family types has also been confirmed by the **Growing Up in Ireland** survey which indicates that 14% of the infants sampled are living with lone parents and that 24% of those lone parents with one child are living with the child's grandparent(s).

The National Policy Framework: Children and Young People 0-25 years old: 2014-2018, which is currently being finalised, sees 'supporting parents and carers' as a central objective. The Framework recognises the family as the fundamental group of society and the natural environment for the growth and well-being of children. It acknowledges that parents have the primary responsibility for their child's upbringing and development, and that the State has a duty to provide assistance to parents to fulfil their child rearing responsibilities.

The Children Referendum, if upheld, puts an obligation on the State to protect and vindicate the rights of children. It also requires that the best interests of the child shall be the paramount consideration in proceedings concerning a child's welfare or safety or on decisions concerning the adoption, guardianship or custody of, or access to a child.

In 2010, the Law Reform Commission addressed the issue of the legal aspects of family relationships and identified a need to modernise our laws, inter alia, by:

- Facilitating parental responsibility to be extended to civil partners and step-parents;
- Extending the ability for a child's relatives, persons in loco parentis or those with a bona fide interest in the child to apply for day-to-day care (custody);
- Providing for the presumption of paternity to be rebutted where a married woman provides evidence that she has not had contact with her husband for a minimum period of 10 months and declares that he is not the father of the child;
- Extending automatic guardianship to non-marital fathers;

- Updating the terminology of family law to replace ‘guardianship’ with ‘parental responsibility’, ‘custody’ with ‘day-to-day care’ and ‘access’ with ‘contact’.

It is evident also that increasingly those who are unable to have children themselves are using assisted human reproduction and surrogacy arrangements, at home and abroad, in a wide diversity of situations, methods and circumstances. These arrangements are giving rise to the birth of children in respect of whom the law must provide certainty, not only in respect of parentage. Also, increasingly, we are seeing these realities, for whatever reason, ending up in our courts with protracted and difficult disputes, often arising from assisted human reproduction or surrogacy matters, regarding parentage, guardianship, custody and access.

The Government believes that a legislative response is needed to support the parents and children living in family types whose needs may not be addressed adequately by current legislation. Accordingly it has made the following commitment in the Programme for Government to address this situation: ‘We will modernise and reform outdated elements of family law.’

The Children and Family Relationships Bill 2014 is proposed as the legislative response to many of the issues raised by the changing composition of Irish families. It is underpinned by two key principles:

- The welfare and best interests of the child must be central to legislation governing familial relationships;
- The effect of the provisions should be to promote the stability of families caring for children and to ensure that children are enabled to enjoy relationships of care and support with parents, guardians or those acting in loco parentis.

The key message is that the law must move to deal with, and provide for, the realities of the many different reproductive, familial, parental and parental-responsibility situations which are reflected in modern Ireland and cannot be left simply to cater for what might be regarded as the dominant or traditional configurations. Family types other than the married family may also provide the necessary stability in which to raise a child.

It is also proposed to extend eligibility to jointly adopt a child to civil partnered couples. Under our adoptions laws, since 1952 a single individual, regardless of sexual orientation, has been eligible to adopt, but presently only married couples are eligible to jointly adopt.

### **Part 1**

This Part sets out standard provisions which will apply under the Bill which include provisions relating to commencement, repeals and expenses. It sets out the definitions which will be applied under the legislation.

The definition of ‘surrogate’ is that currently applied in the Government’s guidelines on surrogacy. It specifically excludes any surrogacy in which a surrogate mother uses

her own genetic material. This is intended as a human rights measure to prevent a surrogate mother from being coerced into selling her own child.

## **Part 2**

The rationale for these provisions is to provide legal clarity as to a child's parentage. They provide for the court to make a declaration of parentage in disputed situations.

A presumption of paternity can be rebutted if the mother has been living apart from her husband for over 10 months prior to the birth. The Bill enables an unmarried father automatically to gain guardianship of his child if cohabiting with the child's mother for 12 months and not later than 10 months prior to the child's birth.

Part 2 does not apply to children born through assisted human reproduction or surrogacy. Separate detailed provision is made to take account of assisted reproduction and surrogacy in Part 3.

## **Part 3**

Part 3 outlines the provisions that are proposed to determine parentage in the context of assisted human reproduction and surrogacy. Children are currently being born to parents living in Ireland by means of assisted human reproduction and through international and domestic surrogacy arrangements, reflecting the scientific advances that have made it possible for a greater number of couples than ever before to have children.

The provisions proposed in the Heads in relation to assisted human reproduction and surrogacy seek to safeguard the welfare and best interests of the children born through these methods by affording them certainty in their legal relationships to their parents and by ensuring that they have secure rights in terms of maintenance and succession.

They provide a mechanism by which married couples, civil partners and cohabitants in a committed relationship can acquire legal recognition as parents if they have had children through assisted human reproduction and surrogacy. The Heads are restricted to the issue of parentage only. The policy proposed is that the mother in such situations is always the birth mother. In the context of surrogacy, she can consent to the transfer of parentage. The other parent is determined either by genetic connection to the child or by reference to his / her relationship to a biological parent.

### **Assignment of parentage in assisted reproduction**

In line with existing law and policy, the birth mother continues to be considered the mother of the child in all cases. The child's other parent is determined by genetic connection to the child or by reference to a committed relationship with the child's mother.

### **Assignment of parentage in surrogacy**

At present, assignment of parentage in cases of surrogacy is based on existing statutory provisions which enable the commissioning father to secure a court declaration of parentage on the basis of proof of the genetic link between father and child. However, there are no legislative provisions in place concerning surrogacy. The absence of such provisions means that there is a potential parental 'lacuna' in

surrogacy cases and there are no protections for the parties to any surrogacy arrangement or for the child concerned.

The policy now proposed in relation to surrogacy has three objectives:

- To safeguard the welfare of the child by putting in place a robust legal mechanism for transfer of parentage so that, at all times, the child will have a parent with parental obligations to him / her;
- To prevent a perverse public policy outcome which encourages requests for parentage arising from commercial or 'baby farming' surrogacy, thereby putting potentially vulnerable surrogate mothers at risk of exploitation, commodification of their bodies or human trafficking;
- To enable heterosexual couples with fertility difficulties or same-sex couples to have children who are genetically linked to at least one of the commissioning parents and to give such couples the right to be legally recognised as the parents of these children.

The provisions on surrogacy accordingly seek to establish a balance between the child's welfare, the need to protect the surrogate mother against exploitation and the legitimate desire of commissioning couples to have children. They consider that the child's welfare can best be safeguarded by ensuring that the child's parentage can be legally determined, that the child can then be secure in that parentage and that it cannot be challenged later by those potentially seeking to undermine the child's rights in terms of parental responsibility or succession. They respond to the needs of commissioning parents by providing a mechanism in which both parents can be legally recognised as the parents of the child. The protections proposed for the surrogate mother are outlined in Parts 3 and 5. Part 3 stipulates that the surrogate mother's consent is required for her to be declared not to be a parent of the child. This is a protective measure so that she cannot be forcibly coerced to transfer her parental responsibilities to the commissioning parents. Her consent may be dispensed with only if she is dead or cannot be traced.

#### **Part 4**

In order to ensure that a family can achieve stability as quickly as possible in the child's best interests, the Heads provide for procedures relating to parentage, guardianship and custody to be streamlined, and for court rulings to be binding on the State. These provisions are intended to avoid a situation in which a family is forced to undergo a lengthy period of uncertainty in terms of a child's parentage, guardianship and custody. In the interests of the child, the Heads propose that declarations of parentage are binding.

#### **Part 5**

The policy proposed in the Heads is that altruistic surrogacy should be permitted and that commercial surrogacy should be prohibited. This is in line with the policy of many countries such as the UK, Belgium, the Netherlands, Canada and Australia. It is considered that commercial surrogacy carries a high risk of exploitation of surrogate mothers and could encourage 'baby farming' and human trafficking. The policy on surrogacy maintains the balance between the respective interests of child, surrogate mother and commissioning mother in the following ways:

- It proposes minimum ages for surrogate mothers and commissioning parents to ensure that all have the necessary maturity to take a decision that could have profound implications for themselves and for the child born as a result of such arrangements. In surrogacy cases, it is also proposed that a maximum age should apply to at least one parent;
- It prohibits people or agencies from advertising surrogacy services or from persuading women to act as surrogates as a key measure to protect potentially vulnerable women from exploitation to avoid a situation in which our courts are being presented with requests for parentage orders in respect of children who have been born through patently exploitative surrogacy arrangements;
- It requires commissioning parents and the surrogate mother to get separate legal advice so that their respective interests can be protected.

### **Part 6**

As parentage will be established in many cases by reference to the genetic connection between parent and child, provisions are needed to regulate the process of DNA testing. The Heads build on the foundation provided by the Status of Children Act 1987 to provide a mechanism by which testing can occur and the genetic relationship between parent and child thereby established. In view of the importance of this genetic relationship as evidence of legal rights, they propose penalties for abuses of the testing process.

### **Part 7**

The Heads set out a policy in which the best interests of the child are made central to the court's determinations as to who will have responsibility for the major decisions affecting a child's life and for the day-to-day care of the child. The Heads provide a comprehensive definition of a child's best interests which include the benefit of a meaningful relationship with both parents, the range of the child's needs, the views of the child, the history of the child's upbringing and situation, the capacity of the child's parents and guardians to rear the child and the risk or otherwise of harm to the child. The prism of 'best interests' is to be applied to all decisions concerning guardianship, custody and access.

In line with existing policy, the Heads provide for the birth mother, married father and unmarried father cohabiting with the child's mother for a set period automatically to be a guardian of a child. However, the Heads seek to address the practical implications of children living in 'blended' families, with civil partners or with cohabiting parents by extending the categories of those who can apply to become the child's guardian to encompass those likely to be raising the child on a daily basis. The policy recognises that some children are, in practice, raised by one parent together with a step-parent, or the parent's civil partner or cohabiting partner. It addresses the difficulties that can arise when a person is caring for a child on a daily basis but has no right to make decisions even on medical emergencies. Accordingly, the policy approach adopted is that a person who is not the child's parent can apply for guardianship:

- if the person has shared responsibilities for caring for the child with the child's parent for at least two years and is married to, is a civil partner of, the child's parent or has been living with the child's parent for at least three years.

Recognising that some children are raised by members of the wider family if their parents are unable to take care of them, it is also proposed that a person may apply for guardianship:

- 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.

This recognises the reality that grandparents and other relatives are often undertaking daily and meaningful duties of care towards a child, particularly when a parent is not capable of doing so. Provision is accordingly made for a grandparent, relative or other person acting in loco parentis to apply for custody of a child.

The importance of enabling a child to maintain meaningful relationships with the wider family is recognised. As these relationships may be arbitrarily broken or blocked by parents, provision is made for grandparents, relatives or those undertaking day-to-day care for a child to apply for access to a child.

In the interests of securing the child's welfare in situations of crisis or tragedy, provision is made for parents to appoint testamentary guardians on the death of a parent or substitute guardians when temporarily unable to undertake the duties of parent. The duties and responsibilities of guardians are also defined.

### **Part 8**

The objective is to ensure that the focus is maintained on the child's best interests throughout court proceedings relating to the relationship breakup of their parents or guardians. Emphasis is placed on counselling and mediation as a means of achieving agreed solutions that respond to the child's best interests. As the child's best interests can be complex, particularly in a context of serious dispute between parents or crisis within the family, provision is made for experts to be appointed to advise on the child's best interests. The Heads also recognise the importance of ensuring that the child's voice is heard, where possible, and make provision for mechanisms to ascertain the views of the child.

### **Part 9**

Supporting parents to make parenting orders work is a central element of the policy priority to safeguard the best interests of the child. The objective is to ensure that both parents are enabled to maintain their relationships with the child in the child's best interests. The Heads propose a series of options to ensure parental compliance with access orders. These options are designed to become progressively more onerous if a parent persistently refuses to comply with court orders. The concern is to ensure that the child's relationship with one parent is not arbitrarily blocked or sundered by the other parent. The provisions do not apply in situations of abuse or domestic violence.

### **Part 10**

Children living in 'blended' families in which step-parents, or the civil partners or cohabiting partners of biological parents become de facto second parents to them need certainty that their interests can be safeguarded if the adult's relationship with the child's biological parent subsequently breaks down. Provision is made for the extension of maintenance liabilities for a child to a spouse, civil partner or cohabitant

of a child's parent where the child is a dependent child of the family. The maintenance liability will be determined by reference to the nature and duration of the relationship between the child and the person. Provisions are proposed to amend the Family Law (Maintenance of Spouses and Children) Act 1976 and the Family Law Act 1995 accordingly.

### **Part 11**

The purpose of this Part is to provide additional protection to children who are being jointly brought up by civil partners, especially on the dissolution of the civil partnership. The policy intention is that where the child is the child (biological or adoptive) of one civil partner and the other civil partner is in loco parentis and acts as a parent of the child, the court should be able to consider the position of that child when making orders where there has been some element of relationship breakdown, up to and including dissolution of the civil partnership. The provisions provide for account to be taken of a child in orders protecting the shared home, maintenance (which can be ordered whether or not the civil partnership is being dissolved), and the range of ancillary orders on dissolution.

This is to provide additional protection for the child concerned. It does not on its own confer any additional rights on the civil partner or deem that person to have a legal role as a parent. Parentage issues are separately dealt with under Part 3, and guardianship under Part 7.

### **Part 12**

Part 12 proposes to amend the Adoption Act 2010 to allow for civil partnered couples to be assessed jointly as a couple when applying to adopt a child. Civil partnered couples are currently excluded from adopting children as a couple, under the Adoption Act 2010, although a gay or lesbian individual has the entitlement to be assessed for suitability and eligibility to adopt a child as a sole adopter. The Heads propose that civil partnered couples would be eligible to apply for an adoption order or for recognition of an inter-country adoption. They also propose that the same criteria for assessment and the same conditions concerning eligibility and suitability would apply to civil partnered couples as to married couples.

Continuing the emphasis in the General Scheme on the welfare and best interests of the child, the Heads provide for the civil partnered couples to have parental responsibilities for a child once adopted by them and for the child to have the same relationship, and consequent property rights, with each of the adopters and their wider families as with a married adoptive couple.

### **Part 13**

Part 13 provides for the Circuit Court and the District Court to have jurisdiction, while specifying that applications relating to surrogacy are to be determined by the Circuit Court. They provide for proceedings to be on a different day from other proceedings, to be as informal as possible, and for costs to be at the court's discretion.