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How Irish Law Can Recognise Intending Parentage While Vindicating the Child's Right to Identity in Assisted Human Reproduction

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This is to certify that the work I am submitting is my own and has not been submitted for another degree, either at University College Cork or elsewhere. All external references and sources are clearly acknowledged and identified within the contents. I have read and understood the regulations of University College Cork concerning plagiarism and intellectual property.

Part One

Creating a Legal Framework for the Regulation of Parentage in Assisted Human Reproduction

Introduction

Assisted Human Reproduction (AHR) is the practice of using reproductive technologies such as insemination or embryo formation and implantation to assist an individual or couple to conceive a child. Most relevant for this thesis is that among these practices, includes the introduction of third parties, such as donors or surrogates, into the process of human reproduction. Historically, parentage in Irish law has been based on both the gestational and genetic link of the mother and the genetic link of the father. However, to continue to recognise only these aspects of parentage would be to expose same sex couples, those who experience infertility, and their children, to a difference of treatment and an exclusion from the legal recognition enjoyed by their fertile and opposite sex counterparts. To bridge the gap, any law that is focused on the regulation of AHR practices, as opposed to an outright ban, is focused on creating new pathways for parentage where these "traditional" links are absent. As the Chief Justice of the Irish Supreme Court has recently commented:

> *"[t]he outcome desired by the parties [in surrogacy] involves not merely the successful birth of a child but must also have legal consequences. It must be possible to both* exclude *any parental relationships duties, rights, or obligations which otherwise might arise on birth on the part of the surrogate mother, and indeed, any gamete donor, and at the same time* confer *the status of parent on the intended parent or parents which would not otherwise arise by operation of law".*[1]

AHR, being a planned and voluntary process, allows the parties involved to opt in and out prior to the conception of the child and before any responsibilities or restrictions are imposed. A legal framework regulating this process, in the first instance, facilitates and respects the autonomy and informed consent of those involved and their pre-conception decisions as to whether they choose to parent the resulting child. Where disagreement arises between the adult parties involved, the second aspect of this framework is to allow for an adjudication on any conflict that could arise between the pre-conception agreement and the post conception assignment of parentage. However, this recognition, driven by the adult voices at the negotiating table, could be seen to cast a long shadow over the child's rights, if not for a duty to regard the best interests of the child in any given situation as the paramount consideration, with particular focus on the vindication of the child's right to identity.

This thesis is primarily focused on assessing how to create a best practice model that balances the rights of the parties involved and ensures that any state interference is proportional and minimally invasive. However, a further question that arises within such a model is whether there are any factors or criteria that are important enough to deny a child the legal recognition of the parent or parents who care for them on a day to day basis. Therefore, this thesis shall also consider whether the most appropriate pathway to legal recognition is the removal of the necessity for absolute

[1] *Adoption Authority v C & D & Ors* [2023] IESC 6 at paragraph 18.

compliance with the prescribed criteria where the best interests of the child otherwise require the regularisation of that child's legal status within their family. In order to ground this exploration, this thesis focuses on three contexts of parentage:

1. Parent A is gestationally and genetically linked to the child and Parent B is genetically linked to the child ("natural conception"),
2. Parent A is gestationally linked to the child and Parent A and Parent B may be genetically linked to the child (Donor Assisted Human Reproduction (DAHR)), and
3. Neither parent A nor B is gestationally linked to the child and Parent A and Parent B may be genetically linked to the child (Surrogacy).

Chapter 1 of this thesis, which states the law as of 1 July 2023, explores the first context in order to establish the parameters of parentage and guardianship law outside of the AHR context. It will then consider these concepts as they have already been altered to include non-biological relationships together with any further proposed amendments. It will distinguish between the legal concepts of parentage and guardianship and investigate the extent to which the drafting and interpretation of primary legislation impacts on the substantive rights of those involved. This exploration will include a review of the legal recognition arising from the female genetic link in the context of AHR parentage, as well as the male genetic link in the context of guardianship. Chapter 2 explores the second context, that of donor conception, as it arises under the *Children and Family Relationship Act 2015.* It will consider those who are excluded in the application of the legislation and the bases for such exclusions. Finally, it will consider the legislative workarounds currently available for those who are excluded from the framework. Chapter 3 explores the third context, that of surrogacy, as it arises under the *Health (Assisted Human Reproduction) Bill 2022*. It will consider the legal position of the surrogate and any constitutional status owing to her, and the circumstances in which her consent may be dispensed with. It will also consider the surrogacy proposals against the jurisprudence of the European Court of Human Rights and assess whether Ireland is currently in compliance with its international obligations. Finally, the findings from the qualitative research study which was conducted within this thesis shall also be integrated throughout Chapters 2 and 3, in the context of the difficulties in accessing legal parentage.

While Part 1 explores the first half of this thesis's balancing exercise, that of the pathway to legal parentage for intending parents, Part 2 seeks to investigate the corresponding right of the child to their identity. While the child's interest in having legal recognition in respect of their intending parents is arguably an interest that also arises within the family unit, it is argued that the child's right to identity is a standalone right of the child that must be similarly vindicated. Chapter 4 is the first chapter of Part 2 of this thesis and explores the psychological studies carried out in relation to the disclosure of conception status and surrogate/donor identity to children born through AHR. It details studies spanning in excess of 20 years and considers the reasons espoused by participants for disclosure and non-disclosure. Such studies consider both child and adult participants who have been disclosed to and considers the impact that such disclosure had on them, having regard to the age

of disclosure. Chapter 4 also provides the results from part 2 of the qualitative study in which participants were asked their views on, and experience of, disclosure to their children born through AHR, against the findings of the pre-existing studies. This includes the views of one child on their experience of being donor conceived. Chapter 5 concludes the thesis and sets out the analysis of the current and proposed legislative frameworks of identity vindication against the right to identity under Irish law, the Convention on the Rights of the Child, and the European Court of Human Rights. This also encapsulates the Irish case law on the importance of the "truth" of the genetic link. It considers the importance of birth registration together with the various mechanisms which already provide a quasi-process of automatic disclosure to the child. Finally, it considers the constitutionality and workability of a mechanism to automatically disclose the nature of a child's conception to the child born through AHR, having regard to the impact of the introduction of Article 42A into the Irish constitution.

A Rights Based Framework

In examining the research questions, it was necessary to determine the lens through which the research within this thesis would be carried out. A number of rights and interests arise within the context of AHR, with varying levels of protection attached to each depending on the source and direct effect of the right or interest in Irish law. As Bracken has suggested, *"[i]ncreasingly, the language of human rights is used as a proxy for 'ethics' in discussions about surrogacy. As such, in searching for an 'ethical' surrogacy framework, it is useful to frame this in terms of upholding the human rights of all participants*."[2] In this regard, the Convention on the Rights of the Child (CRC) recognises the child's right to freedom from discrimination,[3] the right to have their best interests be deemed the paramount consideration in all decisions made in respect of them,[4] the right to be heard,[5] the right to identity,[6] the right to a nationality,[7] the right to have the common responsibilities for the upbringing and development of the child recognised,[8] the right to the highest attainable standard of health,[9] and the right to benefit from social security.[10] However, the CRC has no direct effect in Irish law and is not justiciable before the Irish courts, despite its international influence. Nonetheless, there are reporting mechanisms, oversight bodies, and now an individual complaints procedure which offers considerable

[2] L. Bracken, "Opening Statement to Special Oireachtas Committee on International Surrogacy on International Surrogacy and the Particular Issues Faced by Same Sex Couples, Both Male and Female, Entering International Surrogacy Arrangements and Achieving Parental Recognition" (28 April 2022), citing in part J. Tobin, 'To Prohibit or Permit: What is the (Human) Rights Responses to the Practice of International Commercial Surrogacy?' (2014) 63(2) *International and Comparative Law Quarterly* 317-352.

[3] Article 2 of the Convention on the Rights of the Child.

[4] Article 3 of the Convention on the Rights of the Child.

[5] Article 12 of the Convention on the Rights of the Child.

[6] Articles 7 and 8 of the Convention on the Rights of the Child.

[7] Article 7 of the Convention on the Rights of the Child.

[8] Article 18 of the Convention on the Rights of the Child.

[9] Article 24 of the Convention on the Rights of the Child.

[10] Article 26 of the Convention on the Rights of the Child.

guidance to States Parties in how to uphold their international obligations. The European Convention on the Rights of the Child (ECHR) provides all persons with:

- the right to respect for private and family life,[11]
- the right to freedom from discrimination,[12] specifically - the right to freedom from discrimination based on the circumstances of one's birth[13], sexuality[14] or state of health,[15]
- the right to identify their genetic parents,[16]
- the right to a legal process establishing their parentage in law,[17]
- the right to become a parent,[18]
- the right to respect for the decision to become genetic parents,[19]
- the right to conceive a child and to make use of AHR techniques,[20]
- the right to avail of pre-implantation genetic diagnosis (PGD),[21]
- the right to establish and develop relationships with other human beings,[22]
- the right to self-determination,[23] and
- the equality of rights and responsibilities of a private law character for spouses, in their relations with their children.[24]

The ECHR has been incorporated into Irish law through the *European Convention on Human Rights Act 2003* whereby a person can claim that a particular provision in

[11] Article 8 of the European Convention on Human Rights.
[12] Article 14 of the European Convention on Human Rights.
[13] *Marckx v. Belgium* Application no. 6833/74, 13 June 1979.
[14] *EB v France* Application No. 43546/02, 22 January 2008, X and Others v. Austria Application No. 19010/07, 19 February 2013.
[15] *Ryser v Switzerland* Application No. 23040/13, 12 January 2021.
[16] *Odievre v France,* Application No. 42326/98, 13 February 2003 and *Godelli v Italy* Application No. 33783/09, 18 March 2013.
[17] *Jaggi v Switzerland*, Application No. 58757/00, 13 July 2006, *Mikulic v Croatia,* Application no. 53176/99, 4 September 2002.
[18] *Evans v United Kingdom* (Application No. 6339/05). This case was very similar to the Irish case of *Roche v Roche* and involved an applicant who created embryos with her then boyfriend on account of her ovarian cancer and his subsequent refusal to allow her to implant them, following their break-up. The right to become a parent and the corresponding right not to become a parent was recognised by the court.
[19] *Dickson v United Kingdom* (Application No. 44362/04). This case involved a couple who wished to avail of AHR notwithstanding the intending father was in prison for the violent crime of kicking a drunken man to death. While the Chamber's judgment was quite critical of him as a man as prospective father, the Grand Chamber held that the Chamber had not sufficiently had regard to her right to become a parent.
[20] *SH v Austria,* Application No. 57813/00 (3 November 2011).
[21] *Costa & Pavan v Italy* (Application No. 54270/10). This case involved a couple who wished to avail of selective insemination to prevent the mother's hereditary disease from being passed onto the child. The law in Italy permitted abortion in the case of disability and the couple argued that the protection of the embryo was being held as more important that the protection of a foetus. The Court agreed and held that there had been a violation of Article 8.
[22] *Niemietz v Germany* Application no. 13710/88, 16 December 1992.
[23] *Pretty v United Kingdom* Application No. 2346/02, 29 April 2002.
[24] Protocol No. 7, Article 5 of the European Convention on Human Rights.

Irish law is incompatible with the ECHR[25] and so these rights perhaps carry more direct weight than those of the CRC which relate predominantly to children in somewhat of a "balance vacuum".[26] Within Irish law, there are constitutionally protected rights such as the right to identity,[27] the right to privacy and marital privacy,[28] the right to bodily integrity,[29] the right of the child to realise their full personality and dignity as a human being,[30] and the right to procreate.[31]

Within each of these Conventions and the Constitution, these rights are only "starting points" and are by no means absolute. It is a natural tenor of court proceedings that the pertinent questions relate to the balancing of the various rights between multiple persons, or where the issue is state interference, the proportionality of the interference. These are explorations with an undoubted infusion of subjectivity and can vary based on context, consensus, and circumstances. When the matter to be determined relates to a child with a social reality varying from the legal recognition, who was born through a process with tracked regulation from conception to court hearing, it is argued that it is not one right, or one absolute, that determines the outcome for that child. Therefore, the vast majority of Part 1 of this thesis shall be focused on exploring the necessity to remove any and all current or proposed immovable requirements in determining

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[25] As discussed in more detail in Chapter 3, the European Convention of Human Rights Act 2003 (the 2003 Act) provides that the Irish courts must, when engaging in an exercise of statutory interpretation must do so, insofar as possible, in a manner compatible with the State's obligations under the Convention provisions. Irish judges must stay abreast of the ECtHR's decisions, declarations, and any advisory opinions under Protocol No. 16. Furthermore, the Irish courts have the power to make a declaration of incompatibility in respect of a statutory provision or rule of law where there is no other legal remedy that is adequate or available. However, such a declaration does not affect the validity, continuing operation, or enforcement of the provision. Moreover, as a State Party, Ireland can itself be brought before the ECtHR for a complaint alleging a violation in respect of the applicant's rights under the ECHR.

[26] However, it is acknowledged that Article 5 provides that States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

[27] *I O'T v B* [1998] 2 IR 321.

[28] *McGee v Attorney General* [1973] IR 284. This case was brought to challenge the constitutionality of section 17 of the *Criminal Law Amendment Act 1935* which prohibited the sale and importation of contraception. Walsh J was emphatic in his finding that it is an exclusive matter for the husband and wife to decide how many children they wish to have, and it would be outside of the competence of the State to suggest otherwise. He also stated that the sexual life of a husband and wife is of necessity and by its nature, an area of particular privacy. The threshold of intervention was very clearly a breach of the public moral code that ran counter to the common good.

[29] *Ryan v Attorney General* [1965] 1 IR 294. Granted, this case related to the fluoride in the water.

[30] *G v An Bord Uchtala* [1980] IR 32 at 791.

[31] The right to procreate was held to exist in the case of *Murray v Ireland* [1991] ILRM 465, a case wherein married couple who had been convicted of capital murder and were restrained from having conjugal visits in prison. It was argued that this interfered with their right to beget a child. Mulligan argues that its extension to include assisted human reproduction was implicit in the judgment of Denham J (as she then was) in *Roche v Roche* [2010] 2 IR 321, A. Mulligan "From Murray v Ireland to Roche v Roche: Re-Evaluating the constitutional Right to Procreate in the context of Assisted Reproduction" (2012) DULJ 1.

parentage, while recognising that a best practice model should exist to guide intending parents towards a rights based framework for those involved. This does not dictate the ultimate legal recognition of intending parentage in all instances; however, it does seek to engage the paramountcy principle[32] and consider the circumstances that exist around that specific child. Within this assessment, it may well be appropriate to prefer one adult another; however, only when in service to the rights and interests of the child.

Methodology

This thesis analyses the existing and proposed frameworks of AHR legislation both critically and constructively. It incorporates doctrinal research through a considerable textual analysis of primary and secondary sources. The case law of the Irish Courts, European Court of Human Rights (ECtHR) and the decisions, reports and General Comments of the CRC are considered also. The research based on secondary sources was inter-disciplinary as it explores not only the legal context in which these issues arise but also an extensive array of psychological studies, primarily set out in Chapter 4. However, at its core, this thesis is approached through the lens of socio-legal research. Given the arguable tension between legal regulation and family formation and the ongoing legal reform which is its primary focus, this thesis follows the view of Thomas who has argued that "*empirically, law is a component part of the wider social and political structure, is inextricably related to it in an infinite variety of ways and can therefore only be properly understood if studied in that context*".[33] As O'Donovan has further opined, "*law is not viewed as an autonomous force to which society is subjected, but rather shapes and is shaped by broader social, political, and economic logics, contexts and relations*".[34] In addition, there is an element of positionality[35] within this methodology given the considered impact of AHR on particular groups, namely same sex couples and couples experiencing infertility. Furthermore, in terms of its methods, this thesis includes a qualitative and analytical research study in order to incorporate the voices of the end-users affected by the legislative frameworks proposed. This study was carried out through semi-structured interviews and the findings are laid out in Chapters 2, 3 and 4.

Research Study

As part of this thesis, this author conducted a qualitative study made up of semi-structured interviews with both parents of children born through DAHR or surrogacy

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[32] The paramountcy principle provides that in any particular decision to be made, the child's best interests shall be the paramount consideration of the decision maker.

[33] P Thomas, 'Curriculum Development in Legal Studies' (1986) 20 Law Teacher 112, as cited by D. O'Donovan, "Socio-Legal Methodology: Conceptual Underpinnings, Justifications and Practical Pitfalls" in L. Cahillane & J. Schweppe, *Legal Research Methods: Principles and* Practicalities (2016, Clarus Press) at page 31.

[34] D. O'Donovan, "Socio-Legal Methodology: Conceptual Underpinnings, Justifications and Practical Pitfalls" in L. Cahillane & J. Schweppe, *Legal Research Methods: Principles and* Practicalities (2016, Clarus Press) at page 33.

[35] O'Donovan has framed this type of methodology as querying *"[w]hat assumptions are made by law (or practice or analysis) about those whom it affects? Whose point of view do these assumptions reflect? Whose interests are invisible or peripheral? How might excluded viewpoints be identified and taken into account?'" ibid*, at page 37.

and sought to interview children also. The study is divided into two Parts, similar to the thesis itself. Part 1 focuses on the difficulties in obtaining legal recognition between children born through surrogacy or DAHR and their intending parents, be they the child's genetic parents or otherwise. Part 2 focuses on the breadth of disclosure carried out by the participants and the reasons for and against disclosure. This study underwent a considerable ethics review by the UCC Social Ethics and Research Committee who approved data protection notices, interview questions, consent forms and information documents provided to participants, and these are annexed to the thesis. The study included both adult and child friendly versions of each document. The desired participant was an individual or couple who had engaged in AHR treatment and had a child born to them, and children who had the nature of their AHR conception disclosed to them.

Participants were sought from a social media call for participants that gained 29,265 "impressions", which is the number of times the tweet was seen on Twitter. The author also directly contacted a number of organisations and/or Facebook Groups directly: LGBT Ireland, Irish Gay Dads, Equality for Children, Irish Families Through Surrogacy, Treoir, and Growing Families, as well as fertility clinics, and law firms who specialised in AHR law. The initial call went out in early January 2021 and continued until September 2022, with two further calls going out on Twitter in August 2021 and 2022.

Each participant engaged with the study through either a video call or, for one participant, a phone call. The interview was recorded with the participant's permission using Microsoft Teams and the author's personal phone. An interview guide, setting out the interview questions, was used to direct the interviews. Draft transcripts were then formulated using the Otter.ai website and updated to accurately reflect the final quotations by listening to the recordings and manually updating the text as necessary. The totality of the transcripts amounts to in excess of 180 pages of data, demonstrating over seven and a half hours of interviews. Of the 12 participants who took part in the study, six engaged in the study jointly with their spouse.

The data was manually coded using thematic analysis. While the author had completed training for the coding application NVIVO, this was ultimately not utilised. The reason for this was based on the small number of participants. While NVIVO would have been of assistance in coding in a manner that gave a cross description of themes by specific classifications and attributes, there were not enough participants for any particular conclusions to be made based on, for example, gender, sexuality, type of AHR. Therefore, the transcripts were colour coded within a Microsoft Word Document to identify themes arising from a discussion. These themes initially were simply coded by "identity" and "recognition". Once those passages of the transcripts had been divided and the aspects of the discussion, such as explanatory discussions regarding the study, conversational pleasantries, and irrelevant off topic discussions, were removed, the remaining data was coded. Every time a new theme arose, a new document was created which contained each reference to this theme. Every participant has been given a pseudonym where this has been requested, or where no preference as to their being identified was stated.

Potential Limitations

Unfortunately, the uptake in relation to child participants was minimal and this study includes only one child participant. Therefore, it is accepted that regrettably, this aspect of the study elucidates very little. Furthermore, the entire study ultimately only benefitted from the insight of 11 adult participants and in this regard, the reliability of the findings on a national scale is undoubtedly impacted by the small sample size. In July 2021, the Assisted Human Reproduction (AHR) Coalition invited this author to join their medico-legal sub-group, and in November 2021, this author became a member of the Steering Group of the AHR Coalition. As a result, this author had weekly interactions with members of key advocacy groups,[36] among whom there were many parents of children born through DAHR and surrogacy. In May 2022, this author contacted the steering group members directly requesting that they consider direct participation or promotion of the call for participants. This resulted in four of the 11 participants signing up. There is, therefore, the possibility of a limitation of the findings in this regard, whereby 36% of the participants in the study is made up of members of advocacy groups publicly calling for reform and prescribed frameworks. However, in the alternative, it could be considered that such participants are individuals who have thoughtfully considered the answers posed repeatedly over a long period of time.

There is also the possibility of advocacy bias as a result of the author's board membership within LGBT Ireland, the AHR Coalition and the LGBT+ Parenting Alliance;[37] however, this membership arises by virtue of the author's legal expertise, as opposed to being a parent advocating in this context. It could also be argued that the level of trust built up with the participants could be said to have increased the accuracy of the interviews conducted. Additionally, there is a minimal chance of selection bias, given that no interested and eligible participant was refused access to the study. Finally, there were additional controls for bias wherein this thesis has been supervised and the study's findings were considered against pre-existing research, where such was available, in order to triangulate any of the findings.

Demographics

Of the 11 adult participants, one was a single woman, four were married parents in an opposite sex couple and six were married parents in a same sex couple. Of the participants whose children had been born through surrogacy, four were fathers and three were mothers. Of those who had donor conceived children, all four were mothers. No opposite sex couples who engaged in DAHR, but not surrogacy, participated in the study. Therefore, the presumptions of paternity were not applicable to the participants in this study. There were three opposite sex couples that engaged in surrogacy. The mothers in these families had required surrogacy by virtue of either cancer or a genetic condition. Every surrogacy journey took place internationally and no surrogate lived in the same jurisdiction as the child. One mother asked her sister to act as a surrogate and another father asked a friend. In DAHR, one mother (who did not share a genetic link to the child) asked her brother

[36] LGBT Ireland, Equality for Children, Irish Gay Dads, National Infertility Service and Information Group, and Independent Living Movement Ireland and Irish Families Through Surrogacy.
[37] This alliance is made up of representatives from LGBT Ireland, Equality for Children, and Irish Gay Dads.

to be the donor, while another asked a friend. There were then three unknown but identifiable donors, and four previously unknown surrogates, two from the Ukraine, one from the UK and one from the US. Every surrogacy journey was gestational surrogacy only; no surrogate was genetically related to the child. Every DAHR conception took place in Ireland whereas only 50% of donor conceived children were born in Ireland.[38]

Legal Recognition

None of the participants who had gone through DAHR with their partner were jointly eligible for a declaration of parentage under the 2015 Act and the legal parentage that arose did so as a result of birthing the child. One mother through DAHR was the legal mother of the child she birthed, but not the legal mother of the two children birthed by her wife. In Irish law, two of the sperm donors are the child's legal fathers whereas, the third donor's parentage would arguably depend on the court's interpretation of the word "known", as he is identifiable at a later stage, but not at present. The one single mother who had engaged in DAHR had not taken the requisite court application to negate her US donor's parentage under Irish law.

None of the mothers who had gone through surrogacy were the legal mothers or guardians of their children at the time of interview. One of these mothers had a child already through "natural conception" and therefore, she was the legal mother of one child but not the other. None of these mothers had guardianship of their surrogacy born children at the time of the interview. Every surrogate was the legal mother in Irish law. One genetic father was the legal father of his children born through surrogacy, whereas his husband was not. Another participant was the genetic father to only one of his children; therefore, he was the legal father of that child, a guardian to another child and had no legal relationship with his youngest child.

Thematic Analysis

Among the themes arising from this study were: difficulties in accessing treatment, the emotional upheaval associated with the AHR process, the "othering" that the parents experienced, the lack of administrative policies to complement legal frameworks, the cost, and the considerable interferences with reproductive freedom. These shall be explored in turn throughout the thesis. For ease of reference, the research study carried out in the course of this thesis shall be referred throughout as the "O'Connell Study".

[38] This statistic does not take into account children born post interview but prior to the completion of this thesis. A higher proportion of donor conceived children of participants of this study prior to the completion of this thesis were born abroad.

Chapter 1: The Legislative Chaos of Parentage and Guardianship in the Age of Assisted Human Reproduction

Introduction

The primary question of this Part is what are the circumstances in which the legal parent-child relationship arising in the context of DAHR, and surrogacy, should be denied. This Chapter shall begin this exploration by considering the basis for the legal parent-child relationship in Irish law, which has historically been grounded in the concepts of parentage and guardianship. It will then consider how the framework for DAHR, and the proposals for surrogacy, would impact or deviate from these already established routes, focusing particularly on the splitting of motherhood, and the impact of the male and female genetic links on these legal statuses. As will be detailed throughout this Chapter, it is evident that the allocation of various legal statuses do not depend solely on what was intended by the legislature but also on the legislative anomalies that arise when AHR is not catered for within the Statute Book. The most significant difficulty in this regard, is that there are no universal definitions of parent, father, mother, or guardian in the *Interpretation Act 2005*, or otherwise. Therefore, the exact level of rights and responsibilities of a parent or a guardian, and the question as to who qualifies as a parent or a guardian is a convoluted process of statutory interpretation, dependent on the specific piece of legislation being considered. This Chapter will therefore look at the variances in rights and responsibilities between parents and guardians, together with the variances within each concept, as they apply across key pieces of legislation relevant to the AHR context.

The Non-AHR Framework for Legal Recognition

Before the *Children and Family Relationships Act 2015* (the 2015 Act), there were no automatic mechanisms, and very few legislative pathways for a non-biological parent to establish legal parentage and guardianship that displaced those with biological ties to the child.[1] However, the Court could provide enhanced powers to foster

[1] There is still the provision of a person acting in "loco parentis" which applies throughout over 80 pieces of legislation. However, it is not an automatic category and would have to be borne out by the facts, circumstances, and context of the person's behaviour in each case. It is a status of parental delegation afforded by the courts, as opposed to an established status interfered with by the courts. Certain pieces of legislation, such as the *Fatal Injuries Act 1956,* the *Rent Restrictions Act 1960,* the *Civil Liability Act 1961, the Redundancy Payments Act 1971* and the *Air Navigation and Transport Acts 1959, 1965 and 1988,* provided that a person acting in *loco parentis* to another shall be considered the parent of that other. There is no statutory definition of "*loco parentis*"; however, it was defined by O'Hanlon J in *Hollywood v Cork Harbour Commissioners* [1992] 1 IR 457 as referring "*to any situation where one person assumes the moral responsibility, not binding in law, to provide for the material needs of another*", at para. 30. He further surmised that previous cases, albeit, from the UK, accepted that "'*standing in* loco parentis' *had reference to a single circumstance*", that of making provision for another person, in terms of material needs and welfare, and "*did not refer to any of the other functions and duties, which devolved on a parent in the relationship of parent and child*", at paragraph 32. There is no explicit requirement that such a person have a biological connection with the child. Such persons can be a relative, partner to the biological parent or even the HSE. The Law Reform Commission have recommended that the term *"loco parentis"* be defined in general terms as

carers[2] and appoint guardians where the child had no other guardian.[3] Testamentary guardians could be appointed by will[4] and the Adoption Authority of Ireland could authorise adoption orders.[5] However, even within adoption, same sex couples could not jointly adopt, and a step-parent could not adopt a child without extinguishing the legal rights of the birth parent until the *Adoption (Amendment) Act 2017*.[6] Prior to the 2015 Act, there was no provision for the partner of the child's guardian, who was known by the courts not to have any biological connection, to apply for guardianship,[7] or to be considered a parent. The *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010* (the CPCROCA) originally ignored children and did not include any rights or responsibilities in respect of their civil partner or cohabitant parent. However, following amendments made by the 2015 Act, guardianship rights and maintenance obligations can now arise as a result of either relationship.[8] In relation to civil partners, this is recognised and accepted in the absence of a biological tie.[9] In this manner, civil partnered parents are treated more favourably that married same sex couples, in terms of available reliefs relating to

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a person who is not the parent of a child but who, acting in good faith, takes on a parental role in relation to the child, Law Reform Commission, *Report on Legal Aspects of Family Relationships* (LRC 101–2010) at page 35.

[2] Since 2007, non-biological foster parents could be provided with parent-like rights (without necessarily the corresponding responsibilities) under section 43A of the Child Care Act 1991, as inserted by section 4 of the Child Care (Amendment) Act 2007.

[3] Section 8(1) of the 1964 Act.

[4] Section 7(1) of the 1964 Act.

[5] See: Adoption Acts 1952 – 2010.

[6] This Act replaced the non-commenced Part 11 of the 2015 Act.

[7] However, outside of provisions for such partners, section 8(1) of the 1964 Act provides that the Court may appoint any person as a guardian where the child has no other guardian. There are also testamentary guardians which can be appointed pursuant to section 7(1) of the 1964 Act. Adopted couples also became joint guardians of the child automatically upon the adoption order being made – see: definition of "mother" and "father" under section 2(1) of the 1964 Act, as including a female or male adopter under an adoption order respectively.

[8] There is however a difficulty here. Cohabiting couples as a legal group are those who are unmarried and so when such persons have a child together, they are regulated by the provisions that govern all unmarried relationships. However, it is unclear what the application of the CPCROCA is in circumstances where one cohabitant has a child with another party as there is no definition for a "dependent child of the cohabitants". However, it is evident from section 5B and 5C of the 1976 Act that maintenance obligations arise in respect of cohabitants only where they are also guardians under section 6C of the 1964 Act.

[9] The CPCROCA defines "dependent child of the civil partners" as either the child of both civil partners where they have adopted the child or are acting in *loco parentis* of the child or, the child of either civil partner where the other partner, being aware that he or she is not the parent of the child, has treated the child as a member of the family. This Act provides for maintenance, birth and funeral expenses, financial compensation order, pension adjustment orders, property adjustment orders and domestic violence orders for the benefit of the civil partner and the dependent child of the civil partners. Section 110(1)(b) allows the Court to make provision for a dependent child upon the granting of the dissolution of a civil partnership. Under subsection (2) this extends to custody and access orders until section 11 of the 1964 Act. This is restated at section 119(1)(f). However, pursuant to section 108A of this Act, the Court may also deem the non-parent civil partner as unfit to have custody of the child upon the death of the parent civil partner, in the event that the Court nullifies the civil partnership. This also applies to dissolution by virtue of section 141A.

their children upon relationship breakdown.[10] The 2015 Act also broadened eligibility for guardianship and custody generally based on the relationship of the person to the parent of the child, together with the time spent caring for the child on a day to day basis.[11] The 2015 Act therefore, offered a paradigm shift in terms of expanding both parentage and guardianship to emerging family formations beyond marriage or biological connection, and introducing a DAHR framework. In summary, acknowledged non-biological legal ties are now recognised in adoption, civil partnership, cohabitation, testamentary appointments, and foster care. Therefore, where a child falls outside of the legal parent-child relationship within the DAHR or potential surrogacy frameworks, such concepts must act as "workarounds".

Parentage

It is a basic but important point that not every parent is automatically a guardian and not every guardian is a parent. While "parent" is the more commonly used term colloquially, it is perhaps the less substantive legal status by itself. It may well be the case that parents are treated, by way of social norm, as pre-requisite obstacles to decisions being made in respect of the child by schools, hospitals, and governmental departments. However, in actual fact, a person does not need to dispense with another parent's consent in respect of many of the primary welfare issues facing the child, where that parent is not a guardian. However, while guardianship provides individuals with decision making rights that would benefit the child in the event of certain situations arising, it is parentage that provides a child with automatic legal entitlements and is the more sustained and enduring status and, until the 2015 Act, parentage was the sole gateway to guardianship. The primary difference between a guardian and a parent is that parentage is perpetual, as opposed to guardianship, which extinguishes upon the death of the guardian, the marriage of the child or the child's attainment of the age of majority, whichever happens first.[12] A child cannot inherit from,[13] or become a citizen by virtue of, their guardian; those are rights that arise uniquely from a parent.[14] It could be argued therefore, that parentage is the more child centred status between the two. Furthermore, declarations of parentage and registrations on the birth certificate can be hard won battles that provide social

[10] However, it is acknowledged that no new civil partnerships can be registered since the commencement of the *Marriage Act 2015*; therefore the eligible applicants would have had to have registered between 1 January 2011 and 16 November 2015, but can avail of these provisions still.
[11] Section 6C and 11E of the 1964 Act.
[12] Section 8A of the 1964 Act.
[13] It may be perhaps more accurate to suggest that a child has default succession rights to their parent by virtue of the legal right shares afforded to children when a parent dies intestate. It is, of course, entirely possible that a parent may create a will and bequeath nothing to their child. In such an instance, a child could seek redress under section 117 of the Succession Act 1965 based on that parent's failure in their moral duty to make proper provision for them.
[14] See section 4A of the Succession Act 1965 for the applicable categories of succession rights holders and section 7(1) of the 1956 Act.

status, as well as legal status.[15] The main issue that arises, within this thesis, is that not all parental caregivers have a pathway to becoming parents or guardians.

Presumptions of Paternity

Parentage is presumed through two primary mechanisms. The first presumption of paternity provides that the husband of the woman who gives birth to the child shall be presumed to be the child's father.[16] The second presumption of paternity is that the man who is entered as the child's father on the child's birth certificate shall be presumed to be the child's father unless the contrary is proven on the balance of probabilities.[17] In relation to the latter, birth registration is carried out in relation to an opposite sex married couple without any routine requirement to provide proof of the genetic link, or on the basis of the mother's consent where they are unmarried.[18] In addition, the presumption of paternity based on marriage can be rebutted in the first instance by the mother's request, without any DNA evidence to prove the genetic link of the preferred "father".[19] These presumptions are gendered in a heteronormative manner and so would not apply to same sex female couples in DAHR nor to a same sex male couple in surrogacy.[20] This did not change with the introduction of the 2015 Act and the DAHR framework of parentage. This difference of treatment is particularly stark given the accepted shift towards the non-biological

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[15] The former Chief Justice has described legal status in the following terms: "*While legal status is not everything, it is important. The law cannot make parents love their children or vice versa. The law cannot alter the feelings which persons may have towards those with whom they share a close familial relationship irrespective of the presence or absence of a formal legal status to that relationship. However, many important legal rights and obligations are dependent in whole or in part on the legal status which a person has",* Clarke J at paragraph 420, page 679 of *MR & DR v an tArd Chlaraitheoir* [2014] 3 IR 533.

[16] Section 46(1) of the 1987 Act. This includes a man who was the woman's husband at a point within ten months between either party's death, the date of their separation, or the termination of their marriage, and the birth of the child. The date of separation can relate to the date of divorce, judicial separation, deed of separation, separation agreement or such other date as may be established by the woman. Section 46(2A) of the 1987 Act. This has only been the law since 18 January 2016.

[17] Section 46(3) of the Status of Children Act 1987.

[18] It is primarily the duty of the child's parents to provide particulars of the child's birth to the registrar within three months of the birth - section 19(1) of the 2004 Act. Alternatively, a qualified informant can register the birth. A married father will be registered upon request unless the mother provides a statutory declaration that he is not the father - section 19(1) of the 2004 Act. Where the mother and the father of the child are unmarried, they only have to provide the registrar with a declaration in writing that the person indicated is the father of the child, along with a request that he be entered as such on the child's birth certificate, and the registrar shall enter this name as requested - section 22(3) of the 2004 Act.

[19] Where the male spouse is already registered as the child's father, the mother may apply to re-register the child's birth through her husband providing a statutory declaration that he is not the father, or by her providing a statutory declaration that she was living separate from him for at least the ten months previous to the child's birth - section 22(2)(a) of the 2004 Act. In addition, this request may be made individually with a written request and declaration by the mother and a statutory declaration by the father that he is the father of the child, or the other way around. As an aside, this would appear to indicate that a birth certificate takes precedence as proof of male parentage over the marriage certificate, when proof is required for third parties.

[20] See L. Bracken, "Challenging Normative Constructions of Parentage in Ireland" (2017) 39(3) *Journal of Social Welfare and Family Law* 316. Bracken argues that the presumptions of paternity should apply to same sex female couples and also cohabiting couples, as opposed to spouses alone, at 328.

model of parentage and subsequent birth registration[21] that DAHR represents, the apparent acceptance of reciprocal DAHR within the Irish courts,[22] and the introduction of same sex marriage and civil partnership. Furthermore, a presumption of maternity is not unprecedented.[23] Nonetheless, parentage in Irish AHR law cannot be presumed; it has to be "earned" through proven compliance with the prescribed system under the 2015 Act, and the proposals under the 2022 Bill (albeit, only when enacted).

As a result of the legislative system and the presumptions of paternity, there is nothing to prevent an opposite sex couple from travelling abroad, conceiving a child in a foreign DAHR clinic, or self-inseminating using sperm purchased online, and registering the male as the child's father within the Irish system. Within DAHR, male partners, therefore, benefit from a system lacking proactive oversight whereas female partners must fit neatly into an onerous framework of the 2015 Act. It could be argued that a presumption of parentage within same sex couples would negate the need for compliance with the 2015 Act and proposed 2022 Bill. However, the counter argument, which is preferred in this thesis, is that it would be, like all other presumptions, rebuttable on the basis of a challenge to the compliance with the DAHR pathway to parentage. Furthermore, it is argued that there is less to lose in a system that recognises same sex parents on a birth certificate given that it will be immediately evident that there is no presumed genetic link to both persons registered. The presumptions therefore not only act in a discriminatory fashion; they also interfere with the child's access to their genetic truth.

While is it evident that the presumptions of paternity are historical in nature and demonstrate the supremacy of the marital union and promote the autonomy of the mother in deciding who is presumed to be a safe partner and father for the child,[24] in modern day, it can only be assumed that they act to alleviate an administrative

[21] Within the 2015 framework, a second parent can be registered on the child's birth certificate voluntarily (section 19A of the 2004 Act). However, there is no corresponding provision that equates such registration with a presumption of parenthood as section 46(1) of the 1987 Act applies only to husbands. Furthermore, this registration requires a statutory declaration from both parents and a certificate of compliance from the DAHR clinic under section 27(5) of the 2015 Act (section 19A(1), (2) of the 2004 Act).

[22] P Dunne, "Irish LGBTQ+ couple who conceived through IVF receive declaration of parentage" *Gay Community News* (7 October 2020).

[23] Section 42 of the UK Human Embryology and Fertilisation Act 2008 provides that the spouse or civil partner of the mother shall be treated as the parent of the child unless it is shown that she did not consent to the AHR treatment that resulted in the birth of the child. Similarly, in Norway, section 3 of the Children Act 1981 provides that the woman to whom the mother of the donor conceived child is married at the time of the child's birth shall be regarded as the co-mother of the child. This section requires that the DAHR take place in an approved health service and with the spouse's consent to the fertilisation. If the DAHR treatment takes place outside of Norway in an approved health service, the identity of the sperm donor must be known.

[24] Interestingly, head 6(3) of the *Children and Family Relationship Bill 2014,* expanded the presumptions of paternity. Those relating to marriage and birth registration were maintained but an additional presumption was introduced which mirrors the new automatic guardianship for unmarried fathers under the 2015 Act, that of cohabiting with the child's mother for at least 12 months prior to the child's birth, and at the latest point, less than 10 months before the child's birth. The stated purpose of this expansion is to help secure the child's right to their identity which is considered to be in the best interests of the child concerned.

burden. To remove the presumptions in the context of "natural reproduction", while maintaining the solitary proof of parentage (the genetic link), would require each person claiming parentage to submit a DNA test together with their application for registration to the civil registration office. The primary benefit of this is truth for all parties in terms of the existence or non-existence of a genetic link. This would appear to be a necessary, if not perhaps an unwelcome, awakening for some, in light of the suggestion that between 5% and 10% of all fathers registered on birth certificates,[25] and 35% of fathers who issue court proceedings, are not genetically related to their child.[26] This would avoid a situation where a man is deceived, whether intentionally or unintentionally, into thinking he is socially responsible to raise the child and legally responsible for maintaining the child and granting the child entitlements in succession and citizenship law.[27] Furthermore, as will be evident from Chapters 2 and 3, the State has created (and proposed) a highly regulated framework for those opting into DAHR and surrogacy, seemingly in order to maintain the integrity of the parentage system, and vindicate the rights and balance the interests of those involved. When viewed from this perspective, one DNA test does not seem unduly cumbersome or overly burdensome.[28]

State Oversight

In terms of State actions to counteract the practice of concealing a genetic link, there are very few safeguards. Aside from the penalties associated with the making

[25] In the Joint Committee on Health, *General Scheme of Assisted Human Reproduction Bill 2017: Discussion (Resumed)* (19 December 2018), Professor Deirdre Madden suggested that there were between 5-10% of father's registered on the birth certificate that are not the genetic fathers.

[26] In the Joint Committee on International Surrogacy, "Issues relating to International Surrogacy Arrangements and Achieving Parental Recognition: Discussion" (28 April 2022), Senator Mary Seery Kearney referred to a report published in 2008 by Ormond Quay Paternity Services which found that in 35% of its parentage testing in cases going through the Irish courts, the person who thought he was the father was not the father.

[27] This would also have the effect of denying the maintenance, succession, and citizenship rights of the child to perhaps a wealthier man and at least, in a shallow financial manner, disbenefit the child.

[28] It is also argued that in this context, that would only exist to create the legal tie by virtue of the genetic link, as opposed to negate it, parentage would be the "reward" sought by the person providing the genetic link, and so the issue of compellability of DNA sample does not arise. Such an issue more frequently arises where the social father does not want the genetic truth to extinguish his legal ties and where the putative father fears the parental responsibilities and therefore evades providing the sample. In each case, they are permitted to refuse to provide such a sample, which is non-invasive and can be provided through a cheek swab, hair sample or blood test, but inferences will be drawn. This has been found to be permissible at both Irish and ECtHR level. See: *N v K* [1988] IEHC 15, *D v G* [1991] 1 IR 47 and *Canonne v France* (Application No. 22037/13). The compellability of the child's DNA however was the subject to consideration by the ECtHR in *Mandet v France* (Application No. 30955/12) 14 January 2016, where the Court found no violation of Article 8 in respect of a family who essentially evaded paternity proceedings and refused to provide a sample from the child. However, it is envisioned that such DNA samples will only "newly" be sought from social and genetic fathers and so it is presumed such individuals would have the consent of the other parent, if any, to expose the child to such testing.

of false statutory declarations,[29] there is an offence for a person to provide a registrar with particulars or information which he or she knows to be false or misleading.[30] However, there is no published data as to how many, if any, prosecutions have been taken in respect of such an offence.[31] An tArd-Chláraitheoir may conduct their own enquiry as to whether the particulars in an entry are correct and complete, and may require a person to provide them with information in order to carry out such an enquiry.[32] Therefore, in circumstances where there is no person disputing the fact, and no court declaration proving otherwise, registration on the birth certificate will bestow a father with the rights of a parent. The only amendment of an entry in the register of births is done through a court order or as a correction of a clerical error or error of fact.[33]

Proceedings brought under section 35 of the 1987 Act allow any person, including the child, to rebut either presumption by applying to the Court for confirmation that they, or a named person, are or are not the child's parent.[34] The burden of proof in establishing parentage is the balance of probabilities,[35] and is in contrast to the "beyond a reasonable doubt" proof that previously applied to presumptions of

[29] Section 6 of the *Statutory Declarations Act 1938,* as substituted by section 51 of the C*ivil Law (Miscellaneous Provisions) Act 2008,* provides that where a person makes a statutory declaration which he or she knows to be false or misleading in any material respect shall be guilty of an offence and liable on summary conviction to a fine not exceeding €3000 or imprisonment for a term not exceeding 6 months or both. No proceedings in respect of this offence may be commenced later than 3 years from the date on which the offence was committed; however, generally it must be commenced within 12 months unless evidence arises that is sufficient to bring proceedings. After the evidence has become available, the proceedings must commence within 6 months.

[30] Section 69(3) of the 2004 Act. The penalty for such an offence is a maximum fine of €2,000 and a maximum term of imprisonment of 6 months on summary conviction or a maximum fine of €10,000 or a maximum term of imprisonment of 5 years on conviction on indictment – section 70(1) of the 2004 Act.

[31] This was confirmed to this author by the Office of the General Registrar by email on 27 October 2020. From a review of available case law, there are no evident cases involving such prosecutions.

[32] Section 65 of the 2004 Act. 220 birth records were amended following such an enquiry in 2021. These arose primarily from circumstances where it was proven that the man registered as the father was not the biological father of the child; where the identity of the parents requires to be regularised under Irish law; and where the registration particulars, typically historic, required correction. Department of Employment Affairs and Social Protection, *Annual Report of An tArd Chláraitheoir to the Minister for Social Protection on the operation of the Civil Registration Acts for 2021* (June 2022) at page 10.

[33] Section 63(2) of the 2004 Act.

[34] A declaration under the 1987 Act is binding only on those who are parties to the proceedings, unless the Attorney General is joined as a party to the proceedings, at which point the declaration will be binding on the State (section 35(9)). This provision applies regardless of whether or not the putative parent is alive and does not apply, nor has it ever applied, to adopted children - This even applies to *de-facto* adoptions, as confirmed in the case of *I O'T v B* [1998] 2 IR 321 where the applicant was *de-facto* adopted prior to 1952.

[35] Section 35(8) of the 1987 Act, as amended.

legitimacy.[36] As part of such proceedings, or any civil proceedings in which the parentage of any person is in question,[37] blood tests (now DNA tests) can be directed by the Court of its own motion or on the motion of any party to the proceedings. The evidential hierarchy in proving paternity begins with DNA testing to ascertain the existence of a genetic link, followed by other circumstantial proof around the relationship of the putative father with the child's mother and even, historically, the personal resemblance between the child and the alleged father.[38] Once a declaration has been made, an tArd Chláraitheoir must be notified so that the child's birth certificate will reflect the decision of the court.[39] While there is no corresponding statutory mechanism to notify the Department of Foreign Affairs, it was recently submitted on behalf of the Minister for Foreign Affairs that the State's position is that a child whose citizenship is based on their social father will lose that citizenship entitlement, once such a man is legally replaced by the genetic father.[40]

Parentage in Donor Assisted Human Reproduction

The Supreme Court has noted, when referring to contractual attempts to opt in or out of parentage, that:

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[36] The 1987 Act provides that any presumption of law as to the legitimacy or illegitimacy of any person is abrogated. This presumption was based on the idea that any child born to the married couple, is the progeny of those parties and could only be rebutted on strict grounds. It would not be sufficient to show that another person had sexual intercourse with the mother of the child at the relevant time, but instead, evidence as to the sterility of the father or either party's absence had to be provided - *Yool v Ewing* [1904] 1 IR 434 at pages 440-441. Evidence of physical absence, however, could not be provided by either party but rather, a third party would have to elucidate such evidence - Lord Summer, in his dissent in *Russell* drew attention to the classist distinction in the application of the rule whereby a "well-to-do man" could afford the search for a third party to prove his absence whereas a labourer could roam the country in search of work and only have his own word to prove it. The evidence of either party to a marriage as to the illegitimacy of the child born within the marriage was therefore inadmissible. This common law principle espoused in England, yet distinguished in Scottish law, was known as the principle in *Russell v Russell* [1924] AU 697; this case was accepted by the Court to be espoused from the judgment of Lord Mansfield CJ in *Goodright v Moss* [1777] 2 Cowp 591.

[37] In any proceedings before any court, where a person, who is a party to the proceedings, is alleged to be, or alleges to be the father of the child, and where the fact that that person is or is not the father is material to the proceedings, the Court shall not make any final order which imposes any obligation, or confers any right on that person, unless it is proven on the balance of probabilities that he is the father of the child - Section 3A of the 1964 Act, as inserted by the 1987 Act.

[38] *Bagot v Bagot* [1879] 5 LR IR 72. In this case, a medical witness gave evidence that "when I saw Mr Bagot sitting in the chair and beside him the child, I was very much struck by the likeness; there was an unmistakable resemblance. I said, 'That child is remarkably like you'". The judgment of Warren J based its authority on a passage from William Shakespeare's play Winter's Tale, Act 2, Scene 3 "Behold, my lords, Although the print be little, the whole matter and copy of the father: eye, nose, lip, the trick of his frown, his forehead; nay, the valley, The pretty dimples of his chin and cheek; his smiles; The very mould and frame of hand, nail, finger. And thou, good goddess Nature, which hast made it So like to him that got it, if thou hast The ordering of the mind too, 'mongst all colours No Mary i not; lest she suspect, as he does, Her children not her husband's!" as well as the preceding cases of *Day v Day* [1784] Gr. Ch. 549 527 *, Morris v Davies* [1837] 5 Cl. & Fin. 163*, The Townshend Perrage Case* [1843] 69 cc412-26.

[39] Section 36(5) of the 1987 Act and Section 22(1)(d) of the 2004 Act.

[40] *A, B & C v The Minister for Foreign Affairs and Trade* [2021 IEHC 785 at paragraph 16.

> *"a starting point…is the simple fact that Irish law does not permit the exclusion of parental rights arising from genetic connection or the conferral of parental status on the intended parent with no genetic link to that child…other than in specific circumstances [specified in statute]".*[41]

Every new standalone framework in AHR law, must create its own contexts within which the prescribed rules act, within the confines of that legislation. Parentage in DAHR law is based on the removal of the legal significance of the genetic link with a corresponding requirement for a gestational link to be present within the intending parental unit.

The 1987 Act Framework of DAHR Parentage (Prospective Declarations)

Prospective declarations of parentage depend entirely on an eligible intending parent's compliance with the DAHR framework as set out in Parts 2 and 3 of the 2015 Act. For ease, a compliant intending mother shall be referred to as a section 5(1)(a) mother and a compliant intending parent who has not birthed the child shall be referred to as a section 5(1)(b) parent. While a section 5(1)(b) parent can be registered on the child's birth certificate through furnishing the civil registrar with a certificate of compliance,[42] no presumption of parentage arises for a same sex female couple. Therefore, for a determinative declaration of parentage, a "second parent"[43] must apply to the Court under section 35(1)(b) of the 1987 Act. This declaration of parentage will be granted based on the person's compliance with the 2015 Act; however, the test for the Court is whether on the balance of probabilities the person is a parent for the purposes of the 2015 Act. Section 38 allows the Court to direct a section 5(1)(b) parent who provided a gamete to provide a DNA test for the purposes of determining parentage. It is unclear why this is required given that section 35 allows for a declaration based on compliance alone, regardless of the genetic link. It appears that notwithstanding the absence of a need for a genetic link in DAHR, it is still considered preferable for the Court to ascertain the genetic truth.

The 2015 Act Framework of DAHR Parentage (Retrospective Declarations)

In respect of DAHR that occurred before Parts 2 and 3 of the 2015 Act commenced, there are declarations available under section 21 and 22 of the 2015 Act. These declarations have only been available since 4 May 2020 but apply retrospectively to DAHR that took place before this date, when no DAHR legislation was in place. Section 21 deals with applications where both parents are consenting[44] whereas, section 22 deals with contested applications.[45] Either application, in order to

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[41] *Adoption Authority v C & D & Ors* [2023] IESC 6 at paragraph 18 (as per O'Donnell CJ).

[42] Section 19A of the 2004 Act.

[43] A "second" parent is defined under the 1987 Act twice, under sections 33 (as a parent under section 5(1)(b) and who does not have a declaration of parentage under section 21 or 22 of the 2015 Act) and 37 (a person who (i) provided a gamete that was used in the DAHR procedure that resulted in the child's birth and (ii) is the mother of the child or is a parent of the child under section 5(1)(b) of the Act of 2015)

[44] In such circumstances, the mother and intending parent can make an application (under section 21), grounded on an affidavit sworn by each applicant that the above circumstances are true and that they consent to a declaration of parentage being made.

[45] Interestingly, section 22 allows a child to apply for a declaration of parentage in respect of a third party, whereas section 21 does not.

succeed, must comply with a number of criteria set out in section 20(1):

- The child must have been born in the State, as a result of a DAHR procedure that was performed either in the State or outside of the State by an authorised person;
- The intending parent must have been the only intending parent of the child at the time of the procedure;[46]
- The donor must have been unknown, and remains unknown to the mother and the intending parent, and was not an intending parent of the child; and
- The mother of the child must have been recorded as the mother of the child in the Irish register of births and no person, other than the intending parent, can be recorded in that register as the child's father or parent.

Where the Court is satisfied that the above circumstances are met and, where the child has not attained the age of 18 years, it is in the child's best interests to make such a declaration, the Court shall make a declaration that the intending parent is a parent of the child.[47] It is important to note however that such a best interests assessment is an additional requirement, as opposed to a catch-all discretionary provision that facilitates the judicial forgiveness of any lack in compliance.[48] This shall be discussed in considerably more detail in Chapter 2. The effect of a declaration under sections 21 or 22 is that the person shall be deemed to be the section 5(1)(b) parent of the child.[49] It also has the effect that the gamete donor shall not be the parent of the child and shall have no parental rights or duties in respect of the child.[50]

The Application of the 2015 Act

A particularly concerning error appears to have arisen in terms of the scope of application of the 2015 Act. At present, it is unclear whether an intending parent who contributed their gamete is included in the legislation given that a donor is defined as a person who has consented to their gamete being used in a DAHR

[46] Intending parent here means a person, other than the intending mother of the child who, at the time the DAHR procedure is performed, was aware of the performance of the procedure and undertook to care for, and exercise responsibilities towards, any child born as a result of the procedure, as if he or she were the parent of the child.

[47] While section 21 requires the Court to proactively confirm that the declaration would be in the child's best interests, section 22 has a slightly different test, where the Circuit Court shall not make the declaration where such a declaration would not be in the best interests of the child under 18 years. However, given that both tests require a judicial assessment of best interests, it is submitted that this negative inflection, as opposed to positive, will not be of much significance in these applications.

[48] The best interests paramountcy principle is also notably missing from the 2015 Act, the 1987 Act and the 2022 Bill. This illuminates a common occurrence in AHR which is that Article 42A.4 of the Constitution applies only to proceedings brought by the State, or concerning the adoption, guardianship, or custody of, or access to, any child. It does not include parentage proceedings, and this could be considered an understandable exclusion given that when this Article was first proposed in 2012, at a time where the principles on parentage were not as discretionary or expansive in Irish law. These limitations were noted by M. Corbett, "The Children's Referendum is a Game-Changer for Children's Rights in Ireland" (2021) 15(4) IJFL 95 at 100.

[49] Section 23(a) of the 2015 Act.

[50] Section 23(b) of the 2015 Act.

procedure.[51] Bracken has argued that such persons cannot avail of the 2015 Act given that the donor must understand and consent to the fact that they shall not be a parent of the child by virtue of the donation. [52] This would on its surface indicate that there is an exclusion of reciprocal IVF, where a same sex female partner would donate her egg, as well as genetic fathers availing of the 2015 Act's DAHR framework.[53] In support of this suggestion, Tobin has argued definitively that reciprocal IVF is excluded from the 2015 Act; however, he suggests that it was unlikely that the Oireachtas intended to do so, given that the issue was not raised during pre-legislative scrutiny or any of the debates in the Oireachtas.[54] He notes that this may have been due to the fact that no Irish fertility clinic was offering reciprocal IVF at the time. This reading of the 2015 Act, would, in the event that the birth mother cannot produce her own eggs, require an egg donor, where the same sex female partner was available and willing, preventing the child from having a biological connection to both parents.[55] Each instance requires that a "donor" consents to not being a parent, while the same person, in their capacity as "intending parent" consents to be a parent. Bracken notes that this is evidently a result of unintentional and poor drafting given the inconsistency that arises in this regard.[56] In any event, despite the academic perspectives on this issue, news reports suggest that the Bray District Court has seen fit to overlook this fact, in granting a section 21 declaration, despite the donor being an intending parent.[57] Unfortunately, there is minimal reporting from this case, and it is unclear on what basis the Court allowed this. However, it is understood from one article that the parents of the child received a letter from the Office of the Attorney General detailing that it was the opinion of the State that reciprocal IVF is included in the

[51] Section 4 of the 2015 Act.

[52] L. Bracken, "In the Best Interests of the Child? The Regulation of DAHR in Ireland" (2016) 23 *European Journal of Health Law* 391 at 394. Bracken notes that this issue did not arise within the 2014 Bill, which in Head 8(2) provided that a person would not be categorised as a donor in circumstances where he or she provided genetic material "for his or her own reproductive use", at 395. See: section 7(b)(i) of the 2015 Act. Section 5(5) of the 2015 Act explicitly provides that a donor of a gamete or an embryo is not the parent of the child as a result of the procedure and has no parental rights or duties in respect of the child. Section 6(3)(d) of the 2015 Act also provides that the donor is aware that he or she shall not be the parent of any child born as a result of a DAHR procedure.

[53] There is an ECtHR case pending on the issue of reciprocal IVF currently. *RF v Germany (*Application No. 46808/16), lodged on 2 August 2016, involves a same sex couple engaging in reciprocal IVF whereby within the couple there was a split between the genetic and gestational mother. The domestic authorities have refused to register the genetic mother as the child's second parent. Among the questions posed to the parties were whether the genetic parent can claim victim status given the possibility of adopting the child and whether the refusal of the authorities to recognise the genetic mother's parent-child relationship constitutes a violation of Article 8.

[54] B. Tobin, "Assisted Reproductive Techniques and Irish Law: No Child Left Behind?" (2020) 64(64) *Irish Jurist* 138, at pages 143-144. He bases this on a reading of sections 5(5) and (7), 6(3)(d), 7(b)(1), 9(3)(c)(i), 11(3)(d)(1), and s.20(d) and (e).

[55] Indeed, it could be argued, that the intending mother who births the child falls foul of the same provisions where she consents to the use of her own gametes for use in a DAHR procedure. However, this is less well borne out given the definition of mother as the woman who gave birth to the child.

[56] *Ibid* at 394-395.

[57] Section 20(1)(d) of the 2015 Act requires that the donor be unknown to the intending parents at the time of the DAHR procedure and was not themselves an intending parent.

2015 Act.[58]

Parentage in Surrogacy

Surrogacy involves the diminishing of the gestational link in favour of a standalone framework dedicated to facilitating a legal transfer or assignment of parentage through a parental order.[59] The 2022 Bill, as currently drafted, provides only for domestic prospective parental orders; however, it is anticipated that whole parts shall be inserted to provide for retrospective declarations of parentage and parental orders arising from international surrogacy agreements.[60] The 2022 Bill proposes a post-birth parental order model for domestic surrogacy where a court application would be made to the Circuit Court at least 28 days after the birth of the child.[61] The 2022 Bill provides that the legal mother in a surrogacy agreement is the surrogate.[62] It makes no provision for the paramountcy principle or judicial discretion in determining whether to make the parental order in the event of lack of compliance or the surrogate's consent. In terms of the interaction of this surrogacy framework with the existing legal norms that pre-date AHR, the 2022 Bill, as currently drafted and unlike the 2015 Act, amends section 46(1) of the 1987 Act so that the presumption of paternity no longer applies to the surrogate's husband.[63] This amendment is welcome insofar as it removes one more obstacle from the intending parents pathway to parentage. This would imaginably be welcomed by Horsey and Gamble who have expressed concern that the law in this regard would create an artificial demand on unmarried mothers, regardless of whether they individually were most suitable to act as surrogates.[64] Similarly, Bracken has endorsed this approach calling it "*significant as it ensures that the surrogate's decision to enter into the surrogacy agreement is an autonomous one and does not affect, or depend on, the rights of her spouse*".[65]

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[58] P Dunne, "Irish LGBTQ+ couple who conceived through IVF receive declaration of parentage" *Gay Community News* (7 October 2020).

[59] In the recent case of *A, B & C v The Minister for Foreign Affairs and Trade & Ors* [2023] IESC 10, at page 6, footnote 2, the Court noted that the Applicants argued that the parental order applied retrospectively from birth. The Applicants brought in an expert witness as to English law who could not state that this was the case, and the State did not call their own witness to give evidence in this regard. The Court categorized this as the State being "deprived" of the opportunity to call evidence on this issue and as a result of this deprivation, it held that it was proceeding on the basis that the parental order operates as and from the date it is made but held that it was not a material matter to the case. Section 58 of the 2010 Act provides that adoption orders apply from the point of the order.

[60] Inter-Departmental Group, "*Policy Paper – International Surrogacy and Recognition of Past Surrogacy Arrangements*" (December 2022).

[61] Section 62 of the 2022 Bill.

[62] While the 2022 Bill does not actually contain any standalone provision naming the surrogate as the legal mother of the child, this is inherent in the information document under section 14 of the 2022 Bill notifying individuals seeking AHR that the surrogate is the legal mother upon the birth of the child, and section 64(1)(d) stating that the effect of a parental order is that the surrogate will lose all parental rights and is free from all parental duties in respect of the child.

[63] Section 59(1) of the 2022 Bill.

[64] K. Horsey & S. Sheldon, "Still Hazy after all these Years: the Law Regulating Surrogacy" (2012) 20 *Medical Law Review* 67 at 83, citing the Blog of N. Gamble, "Why Surrogacy Law Needs Reviewing".

[65] L. Bracken, "The Normative Underpinnings of Ireland's Proposed Regulation of Assisted Human Reproduction" (2022) 36(1) *International Journal of Policy and Family* 1 at 4.

The Female Genetic Link in Parentage

The 2015 Act focuses on the legal importance attached to the gestational link of the birth mother and allows for embryo donation whereby neither intending parent is genetically related to the child. Therefore, to an extent, the female genetic link is immaterial when an intending parental unit are able to meet the criteria set out in the legislation. However, where they fall outside the 2015 Act, there is a need to determine what legal status can attach itself to the genetic link of a female spouse or partner who engaged in reciprocal IVF, wherein she provided the egg, and her wife or partner carried the child. This is particularly noteworthy in light of the requirement under the 2015 Act that both egg and sperm donors must confirm that they will not be the parent of the child born through the DAHR procedure,[66] suggesting the egg donor has parentage which would otherwise arise. Secondly, the nature of surrogacy is that the gestational link will not be present within the intending parental unit. However, there are three elements of a surrogacy framework that relate to the level of legal significance attaching to genetics. The first is whether the surrogate should be inhibited from using her own ova, the second is whether a genetic link should be required within the intending parental unit and the third is whether the female genetic link by itself is sufficient to ground parentage. It is the third of these issues that the current section shall explore.

The public, policy and academic perception is undoubtedly that a genetic mother cannot access parentage through proceedings pursuant to section 35 of the 1987 Act,[67] and this arises from a view taken in respect of the Supreme Court judgment of *MR & DR v an tArd Chlaraitheoir.*[68] This case dealt with the splitting of the components as it relates to birth registration; however, it also discussed the genetic mother's application for a declaration of parentage under section 35. In order to dispel this misconception, it is important in the first instance to review the relevant section that assigns parentage, based on the genetic link, section 35 of the 1987 Act. Section 35(1) provided, at the time of the *MR* judgment, that a person may apply to the Court for a declaration that a person named in the application is their father or mother.[69] Section 35(8)(b) provides that where it is proven on the balance of probabilities that a person so named is the mother of the applicant, the Court shall make the declaration accordingly. Section 35 is therefore not gender exclusive and explicitly relates to "mother" in terms of who can be declared a parent.[70] As

[66] Sections 4, 6(3)(d), and 23(b) of the 2015 Act.

[67] Joint Committee on International Surrogacy, "Final Report of the Joint Committee on International Surrogacy" (July 2022) stated at page 25 that "There is currently no route for an intended mother to be recognised as a legal parent, even if her egg was used for conception, as she is the child's genetic mother." Department of Health, Department of Justice, Department of Children, Equality, Disability, Integration and Youth, *Issues Paper on International Surrogacy for Special Joint Oireachtas Committee January 2022* (2022) at page 4 states that "an intending mother of a child born through surrogacy, not being the mother of the child, is not entitled to apply for a declaration of parentage under the Status of Children Act 1987. This is the case even where the intending mother provided the egg used in the surrogacy arrangement and is the genetic mother of the child". This is reiterated in the Inter-Departmental Group, "*Policy Paper – International Surrogacy and Recognition of Past Surrogacy Arrangements*" (December 2022) at page 7.

[68] [2014] 3 IR 533.

[69] Section 35(4) accepts that applications may be taken by a child's "next friend".

[70] Section 35(2), (8)(b) of the 1987 Act (as enacted).

mentioned above, parentage under this section can be definitively determined by a DNA test.[71] A blood test, or DNA test, would only show a match between a genetic mother and her child; it would not confirm the existence of a gestational link.

Moving now, to the *MR* judgment, it should be noted at the outset that the members of the Supreme Court made particular efforts to make it clear that the judgment related to the issue of birth registration under the *Civil Registration Act 2004* (the 2004 Act) only,[72] yet nonetheless dealt with the 1987 Act, almost in tandem. This is understandable given that the reliefs sought included a declaration under section 35 for the genetic mother, which was granted by the High Court. However, it is submitted that this could have been dealt with rather summarily based on the assertion from O'Donnell J (as he then was) that the section 35 procedure had not actually been invoked; no DNA tests had been ordered in the case and no reports were sought pursuant to the 1987 Act. However, he explains that it was counsel for the Applicants who sought to make the issue solely about the "*true interpretation of the statutory provisions*".[73] The Court was not called upon therefore to assess the meaning of "mother" under the 2004 Act and then, under the 1987 Act but rather, the meaning of "mother" when the two acts were read together, with the 2004 Act taking precedent based on the question before the Court. Therefore, the Court did proceed into its analysis of the 1987 Act, and it is argued that there are three fundamental issues arising from this judgment of the Supreme Court and the public perception of its outcome. The first is that the

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[71] While the 1987 Act was updated by the 2015 Act to amend the references to blood tests with DNA tests, it is evident from the initial explanatory memorandum on the *Status of Children Bill 1986* that blood tests with the object of ascertaining inheritable characteristics would include such tests currently available as serological analysis, enzyme analysis, tissue typing and DNA profiling, Department of Justice, "Explanatory and Financial Memorandum of the *Status of Children Bill 1986"* at paragraph 43.

[72] Denham CJ stated that "*the core issue in this appeal is the registration of a "mother" under the Civil Registration Act 2004; and the declaration sought that the fourth applicant, the genetic mother, is entitled to have the particulars of her maternity entered on the certificate of birth, and that the twins are entitled to have their relationship to the fourth applicant recorded on their certificates of birth*", *MR & DR v an tArd Chlaraitheoir* [2014] 3 IR 533 at paragraph 60. Murray J stated that *"[t]he issue in this appeal concerns a question of statutory interpretation, namely, certain provisions of the 2004 Act. Central to that interpretative issue is the meaning of the word "mother" as used in the Act of 2004. This is not a case which gives rise, or could give rise, to the Court assuming the role of law maker and laying down some Paulen principle, or a series of principles, regulating the legal status that might be accorded to a "biological mother" or a "birth mother" where children are born to the latter arising from a surrogacy arrangement with the former. For reasons explained later in this judgment, to do so would be to usurp the role of the Oireachtas as the institution authorised by the Constitution to make laws*", at paragraphs 120-121. Hardiman J stated that [in relation to the trial judge favouring the genetic material as sole and determinative evidence of parenthood], "*I do not consider that the Court should address this question at all, for the reasons given in an earlier section of this judgment. But I would specifically depart from this finding of the trial judge because I fear that for the courts to express a specific view on this subject in advance of legislation might tie the hands of the legislature*", at paragraph 201. O'Donnell J stated "*I wish to make it as clear as is possible that this decision is limited to the question of immediate registration of birth: it should not be taken as deciding anything more*" at paragraph 243.

[73] *Ibid* at paragraph 231, "*Counsel for the applicants argued merely that on a true interpretation of the statutory provisions taken together "mother" in Irish law, for the purposes of registration on birth was, at least in cases of dispute, to be determined by reference to genetics rather than the fact of birth".*

judgment of the majority of the Court arises from this requested cohesive assessment as opposed to a standalone interpretation of the "mother" under the 1987 Act. The second, is had the Court been tasked with interpreting the 1987 Act by itself, it could have done so on a literal basis, as opposed to the purposive interpretation taken when considered together with the 2004 Act. Finally, the majority of the Court interchanged the historical position of the "birth mother" with the "gestational mother" who acted as the notice party in this case which confused the ultimate outcome of the majority judgments on this point.

MR: Imposing the Interpretation of the 2004 Act onto the 1987 Act

In the first instance, the Court had to determine who the "mother" under the 2004 Act was in the advent of the splitting of motherhood into the gestational and genetic components. It firstly noted the historical position of the "mother", who was a women who comprised of **both** the gestational and genetic link; where no splitting of these elements had taken place. Denham CJ held that "[*t]he words [*mater semper certa est*] simply recognise a fact, which existed in times gone by and up until recently, that a birth mother was the mother: both gestational and genetic*".[74] These sentiments were echoed by McKechnie,[75] O'Donnell[76] and Clarke JJ.[77] It is interesting perhaps that throughout his judgment, Murray J does not make the distinction between the historical conception of a "birth mother" with both gestational and genetic elements and a surrogate who contributes only the gestational link:

[74] *Ibid* at paragraph 115. She also held that "*[n]either science nor medicine allowed for a situation in which a woman other than the gestational mother was the genetic mother of a child*", at paragraph 92.

[75] He held that "*[u]p to the advent of IVF and other forms of assisted human reproduction, there was ever only one male and one female contributor to the entire human reproductive process: that is, from the provision of ovum and sperm to the creation of the zygote and embryo, to the growth and development of the foetus and to the resulting birth of a child. There was but one mother and one father. There was no possibility of a third party making any contribution whatsoever to this process. Therefore, there was a historical meaning to these terms which everybody understood and felt entirely comfortable with", ibid* at paragraph 263.

[76] He held that "*we know for the first time in human history that it is possible to separate the functions of reproduction and birth into at least two if not more parts which can be carried out by at least two, if not more, people", ibid* at paragraph 233.

[77] Clarke J (as he then was), in his dissent was satisfied that *"both the genetic mother and the birth mother have some of the characteristics of "mothers" as that term is currently used in our law. The term "mother", historically, referred to both, because both were, as a matter of then scientific fact, necessarily the same person. They are no longer now, however, necessarily the same person. But neither has, in my view, by reason of that scientific advancement, necessarily lost their status", Ibid* at paragraph 509.

> *"Since time immemorial, and perhaps more relevant, for most of the 20th century, the only mother known to society was a mother who gave birth to the child."*[78]

He at no point recognises the splitting of motherhood in the applicant and the notice party before him and any legal implications that may stem from each, as individual components. His judgment focuses on the historical "birth mother" and the surrogate being one and the same and this is the crux of his judgment.[79] While Denham CJ made only passing references to the issue of statutory interpretation,[80] and Hardiman J made none at all,[81] the majority of the Court essentially held that the interpretation as to who was the mother under the 2004 Act could not be determined under the assumption that the legislature had in fact considered the splitting of motherhood when drafting the framework for birth registration. Therefore, it could not accept an interpretation that favoured the genetic mother, when traditionally the woman who had both a gestational and genetic link was considered to be the mother under the 2004 Act. For the avoidance of any doubt, no issue is taken here with this finding insofar as it acknowledges that a surrogate, comprising of the gestational link only, cannot be considered the historical "mother" envisioned by the drafters.[82]

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[78] *Ibid* at paragraph 126. When speaking about the "fundamental truth" of the 1880 Act, he held that "*statute law was simply recognising what society recognised, that the only person who could or should be treated at birth as the mother is the mother who gave birth to the child*", at paragraph 167. He continues to state that the purpose and role of the 2004 Act is precisely the same as the 1880 Act, and that, its provisions refer to the particulars of birth and no express or implicit mention of the genetic link can be found within the legislation, at paragraph 169.

[79] Murray J held that "*I cannot conclude that the Act of 2004 was intended by the Oireachtas to regulate status and rights in such complex situations in the manner claimed by the applicants*", at paragraph 171. He held that if the Oireachtas intended to exclude the "birth mother" "*it would have made over and express provision for doing so*", at paragraph 172. He continued, "*In my view, the term "mother" in the Act of 2004 bears the meaning which it did in the preceding legislation….there is nothing in the terms of the Act of 2004 suggesting that the term mother should be not understood to mean what it has heretofore meant in law and fact*" at paragraph 173.

[80] Denham J held that the 1987 Act in its long title was described as equalising the rights of children born within and outside marriage but did not provide "*a statutory structure by which the alteration of maternal legal status in the situation of a surrogacy agreement can be achieved*", at paragraph 95. She neglected to mention that the long title also provided that the purpose of the 1987 Act was to "*provide for declarations of parentage and for the use of blood tests to assist in the determination of parentage*". Ultimately however, Denham CJ determined that neither the 1987 Act nor the 2004 Act addresses the issues arising on surrogacy birth of children, at paragraph 112, 116 and 119: *neither the common law nor the statutory law to date address the issue of registration of the [genetic mother] on the certificate of birth of children born by a surrogacy arrangement".*

[81] Hardiman J did not engage with the 1987 Act other than to say that he would depart from the finding of the High Court that the genetic mother be registered. However, he held that that was only for fear that it would tie the hands of the legislature when dealing with contexts beyond surrogacy such as DAHR, at paragraph 201.

[82] Denham CJ and Hardiman J held that this was an issue that had not dealt with by the legislature, Clarke J believed that both women comprised elements of motherhood and should recognised as such. As mentioned, Murray J did not acknowledge the splitting of motherhood as it applied to this issue and focused only on the historical understanding of a "birth mother". In terms of the remaining judgments, please see the next section: *MR: The Follies of Muddled Terminology.*

The Court then considered whether the 1987 Act did anything to change the interpretation of the 2004 Act. O'Donnell J (as he then was) held that the "mother" within the 2004 Act was the birth mother and that the 1987 Act did not change the understanding or meaning of the birth mother under the 2004 Act:

> *"the Act of 1987 was instead itself based on the assumption that blood testing could establish, at least negatively, parenthood, which in the case of a woman at the time of passage of the Act of 1987 meant the woman who gave birth…the 1987 Act did not alter the identity of the person* ***to be registered****. That was and remained, the person giving birth"* (emphasis added).[83]

This sentiment is echoed in the judgment of McKechnie J who held that "*given the historical position, it seems to me…one should accord to the word "mother", at least presumptively, the meaning which it was always understood to have*".[84] McKechnie J also felt that it could not be inferred that the splitting of motherhood was within the contemplation of the legislature when it drafted the 1987 Act.[85] This was despite his pointing out that if the respondents' submissions were preferred, section 35 would be redundant; such a finding would dictate that the genetic link is not the appropriate test and the blood tests would not find a match based on gestational link:[86]

> *"It is in my view beyond argument but that the Act of 1987 utilises, as the basis for determining parentage, the DNA link, or as used in the High Court judgment as a proxy, the blood link".*[87]

Murray J initially found that he did not consider the "*provisions of the Act of 1987 to have any bearing on the interpretation to be given to the Act of 2004*".[88] He continues, "*there is nothing in the Act of 1987 to suggest that the notion of father or*

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[83] *Ibid* at paragraph 239. The full quotation is as follows: "*If the interpretation of the Act of 1880 and the Act of 2004 as set out above is correct, then by that legislation the "mother" required to register the birth, and be registered as "mother", is the person giving birth. If so, then the Act of 1987 did not purport to change that understanding or meaning. The Act of 1987 was instead itself based on the assumption that blood testing could establish, at least negatively, parenthood, which in the case of a woman at the time of passage of the Act of 1987 meant the woman who gave birth. The assumption that blood testing would even negatively prove birth in all cases may have been falsified by the developments in the science of reproduction, but the 1987 Act did not alter the identity of the person to be registered. That was and remained, the person giving birth."*

[84] *Ibid* at paragraph 271.

[85] *Ibid,* at paragraph 321. He continued, *"[i]n view of these and other factors it would have required clear, precise and definitive language to have intended such a dramatic departure from the past understanding of the term mother, and in addition by only making a single and isolated provision to cover such rapidly advancing new scientific circumstances, the Act of 1987 would have created a void, of enormous proportions…I must conclude…that the Act of 1987 had not within its contemplation, and therefore does not cover, a divisible situation such as that applying in this case*".

[86] *Ibid* at paragraphs 287-288.

[87] *Ibid* at paragraph 283.

[88] *Ibid* at paragraph 175.

mother was to be considered anything other than that as traditionally understood".[89] He is finding here that there is nothing contained within the 1987 Act that would impose a reading of the 2004 Act that meant that the genetic mother should be registered. He does however, also state that "*there is nothing in the [1987] Act to suggest that the legal notion of mother is a reference to anyone other than the birth mother*". It is very difficult to accept this finding when relating to a section that readily determines parentage based on blood tests and inheritable characteristics.[90] Murray J held that "*in a surrogacy birth, the birth mother did not pass on any inheritable characteristics to the child born, but the genetic mother did",*[91] yet contended that blood tests were only to be of assistance under the 1987 Act, not determinative. This is also difficult to accept given that there is no reported case of proceedings under the 1987 Act whereby alternative evidence is favoured to a positive blood test determining the genetic link. There is no other "*assisting evidence*" prescribed by the 1987 Act. As O'Donnell J accepts "*the Act of 1987 plainly lays emphasis upon blood testing as a method of proving parentage*".[92] It should be said however that the tenor of Murray's judgment relates to the 2004 Act and a mere paragraph is spent on his justification for his findings in relation to the 1987 Act. It is argued that the real crux of his judgment, and that of the majority, is that when asked to interpret the two pieces of legislation together to find a cohesive definition of mother for the purposes of birth registration, the 1987 Act did not impose a new meaning on the 2004 Act. For example, McMenamin J similarly held that:

> *"In summary, the balance of legislative tradition weighs heavily in favour of the proposition that, **unless a contrary intention is expressed**, in legislation, the birth mother should be regarded as being "the mother" of the child. These considerations of purpose, intent and context weigh significantly against the construction of the Act of 1987 now urged on behalf of the applicants."* (emphasis added)[93]

Clarke J, the only member of the Court who granted the section 35 declaration found that:

> "*Undoubtedly, the Act of 1987 emphasises genetic connection and inherited characteristics. Equally, the Act of 2004 emphasises the*

[89] *Ibid.* Murray J somewhat unhelpfully continuously refers to the "birth mother" in his judgment without expanding to elucidate whether he means gestational or both gestational and genetic: "*statute law was simply recognising what society recognised, that the only person who could or should be treated at birth as the mother is the mother who gave birth to the child*", at paragraph 167.
[90] *Ibid* at paragraph 175.
[91] *Ibid* at paragraph 174.
[92] *Ibid* at paragraph 227.
[93] *Ibid* at paragraph 558.

woman giving birth. But neither does so in a way which establishes a clear intent to alter the legal definition of "mother".[94]

In summary, Denham CJ and Hardiman J did not express a view as to whether the "mother" within section 35 was the genetic or the gestational mother. Clarke J granted the section 35 declaration to the genetic mother. O'Donnell, McKechnie JJ and McMenamin JJ focused more on how the 1987 Act impacted the 2004 Act than the converse and Murray J was the only judge to explicitly find that the "mother" in section 35 was the woman who gave birth.

MR: The Follies of Muddled Terminology

A further difficulty arises when the majority of the court, in making this finding, referred to both the historical understanding of the definition, and the notice party to the case, the surrogate, as the "birth mother". While Denham CJ and McKechnie J[95] referred only to the "notice party" or the "gestational mother" throughout their judgment, the majority of the Court referred to the surrogate as the "birth mother" throughout their judgments.[96] Therefore, it would appear that their finding that the birth mother was the person envisioned to be registered on the birth certificate was synonymous with the surrogate being so registered. This, it is argued, does not take into account the splitting of motherhood, and the fact that the gestational link alone constituted a status that had yet to be determined. The surrogate notice party with no genetic link was not the "birth mother" envisioned by the legislature in 1880, 1987 or in 2004. Therefore, it is genuinely confusing as to whether in their determinations to uphold the appeal, the Court was proactively choosing the gestational surrogate to remain registered or simply allowing the default status prior to the High Court judgment to continue in the absence of any appropriate legislative framework. It is argued that the latter is by far the more correct view given the actual splitting of motherhood at issue in this case and the reasoning of the court, despite the regrettable overlapping in terminology.

This is not to say that the findings in relation to the 2004 Act are not otherwise a logical result. It could be argued and accepted that all things being equal, the task of the "mother" under the 2004 Act is to be the sole and primary person who is first and foremost obligated to register the particulars of the birth. There is provision for

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[94] *Ibid* at paragraph 486. Clarke J concluded, at paragraph 509, *"I am, therefore, satisfied that both the genetic mother and the birth mother have some of the characteristics of "mothers" as that term is currently used in our law. The term "mother", historically, referred to both because both were, as a matter of then scientific fact, necessarily the same person. They are no longer now, however, necessarily the same person. But neither has, in my view, by reason of that scientific advancement, necessarily lost their status"*.

[95] McKechnie explicitly stated that "*[i]n common parlance therefore…the notice party [can be described] as the birth mother or the gestational mother*" at paragraph 244.

[96] Murray J stated that "*for the sake of clarity, it is necessary to refer to…the notice party as the 'birth mother'*", at paragraphs 122 and 158. McMenamin stated that "*the notice party will be referred as 'the birth mother'*", at paragraph 521. Clarke J stated that "[*t]he notice party ("the birth mother") is the sister of the genetic mother*", at paragraph 400. O'Donnell J stated that "*[f]or ease of identification and reference, and without attributing any legal significance thereto, and indeed without intending any offence, I will in the course of this judgment hereinafter refer to the fourth applicant as the "genetic mother" or "commissioning mother" and to the notice party as the "birth mother" or "surrogate mother*", *ibid* at paragraph 207.

others to register particulars of the birth but that is only generally with the consent of the mother, i.e., the unmarried father, where there is a husband, which is not guaranteed, or where the mother has failed to register the particulars, the qualified informant.[97] Therefore, the woman who births the child can be singularly relied upon to be the person present at the birth of the child, and who has knowledge of the particulars, which was recognised by Clarke J.[98] She is attesting to the fact of birth, in a similar manner to the medical practitioner attesting to a death in a death certificate,[99] or a witness and solemniser attesting to a marriage in a marriage certificate.[100]

MR: Purposive Interpretation Vs Literal Interpretation

It is argued that the 1987 Act is clear enough in its wording to not require a purposive interpretation which required the Court's exploration of what was intended by the drafters. The applicable principles of statutory interpretation was set out in *CM v Minister for Justice:*[101]

> *"[I]f the objective intent of [the Oireachtas]…is self-evident from the ordinary and natural meaning of the words or phrases used, then the task is at an end, and the court's function has been performed".*[102]

Barrett J has recently surmised the position arising from previous case law that the starting point is the literal approach, and if the intention of the Oireachtas is not self-evident from statute then the Court moves to a purposive interpretation.[103] It is submitted that the literal approach was open to the Court in interpreting the 1987 Act given that the definition of "mother" was not suspended within the act, in search of a meaning.[104] There were 43 "mother" references in the 1987 Act, as enacted. 39 of these referred to other pieces of legislation, 36 of which were self-contained within amendments. Two were contained within section 3 which dealt with the marital status of parents and the final two references were contained within section

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[97] Section 19(1) of the 2004 Act.

[98] Clarke J commented that "it is argued that the term "mother" must, in that context, mean birth mother rather than genetic mother for, if they be different, the genetic mother might not necessarily even know of the birth so as to be in a position to meet the obligation to register", *MR & DR v an tArd Chlaraitheoir* [2014] 3 IR 533 at paragraph 484.

[99] Section 42(2)(b) of the 2004 Act.

[100] Section 49(1)(b), (c) of the 2004 Act.

[101] [2017] IESC 76. These were reiterated in *X v. Minister for Justice* [2020] IESC 30 and *A, B & C v The Minister for Foreign Affairs and Trade* [2021] IEHC 785.

[102] *CM v Minister for Justice* [2017] IESC 76 at paragraph 57.

[103] *A, B & C v The Minister for Foreign Affairs and Trade* [2021] IEHC 785 at paragraphs 10-11.

[104] However, there is an argument contained with the body of the text of the 1987 Act, namely that section 46 begins "(1) Where *a woman gives birth* to a child –" and is followed by the presumption of paternity of her husband. Therefore, it may seem clear from this section alone that the 1987 Act indicates by virtue of presuming her husband is the father of the child, that the woman named is evidently the corresponding parent, although this is not explicitly set out. However, it could also be argued that within the same act, the word "mother" is used repeatedly, albeit in various amendments, and that there was no evident need for the legislature to set out "where a woman gives birth to a child" instead of simply saying "mother" if not to distinguish. MacMenamin J engaged with this provision briefly, espousing that this constitutes a "strong implied contextual linkage between conception, gestation and birth", at paragraph 548. In doing so, he ultimately favours the former argument, albeit without considering the latter.

35. Section 35 stood to be interpreted and it did not say, for example, "the parent of the child is the mother"; it said, together with section 38,[105] and 40,[106] that a report based on blood tests shall be used to determine who is the mother. The test applied is the balance of probabilities where inferences can be taken by the Court in the event of a refusal to undergo a blood test.[107] It is therefore argued that the 1987 Act does not require an interpretation of the definition of "mother", as it creates a clear statutory test to ascertain who comes within this definition for the purposes of the 1987 Act. The status is created by virtue of the process of blood tests, not the historical or traditional understanding. The Court found the submissions of the genetic mother's counsel, who sought to rely on these blood tests, as "ingenious"[108] and "attractive"[109] arguments, yet ultimately undertook a purposive interpretation of the 1987 Act. Again, it is argued that perhaps McMenamin's judgment gives some insight into why that might be; he states that the applicants' submissions were predicated more on a process of statutory interpretation and thereby seemingly directing the Court down this line of inquiry.[110]

Furthermore, it is argued that despite the majority of the Court conflating the 1987 Act to complement the 2004 Act's interpretation, the two acts are not so closely aligned in context as to require a consensus in definition between them. The 1987 Act acts not in conjunction with the principles of the 2004 Act but operates in the event of a convergence; where there is a contest that had to be determined by court application. It does not follow that a definition applied in the 2004 Act for the specific context of birth registration, which facilitates the presumptions of parentage, flows into the 1987 Act which often rebuts parentage through the use of blood tests. It is submitted that as such, the interpretation of one act does not have to impose itself on another, where the secondary piece of legislation exists in a different context.[111] While the judgment of O'Donnell J notes that the 1987 Act and the 2004 Act are connected for the purposes of the registration on foot of a court declaration under section 35, this very clearly relates only to the re-registration of

[105] Section 38 allows for the directing of blood tests for the purpose of "assisting the Court to determine whether a person named in the application or a party to the proceedings, as the case may be, is or is not a parent".

[106] Section 40 provides that where blood samples are taken, they shall be tested under the control of someone who shall then provide the Court with a report which will contain the results as to whether the person tested is or is not excluded from being a parent.

[107] Section 42 of the 1987 Act.

[108] *MR & DR v an tArd Chlaraitheoir* [2014] 3 IR 533 at paragraph 239.

[109] *Ibid,* at paragraph 319.

[110] McMenamin J held that "*the applicants' submissions are, for this appeal, predicated more on a process of statutory interpretation…what is under consideration here is how, on balance, this should interpret the relevant sections of the Acts of 1987 and 2004, which are closely connected. This issue is not "science versus law" but rather how the statutes, as they now stand, should be understood and interpreted*", at paragraph 532.

[111] This was explicitly set out by McMenamin J at paragraph 540.

fathers on birth certificates.[112] While this would undoubtedly raise issues as to how a mother was supposed to be re-registered on foot of a section 35 declaration, this anomaly is not AHR specific and again, the wording of section 35 is clear. As noted by Clarke J,[113] the 2004 Act and the 1987 Act conflict with each other in terms of motherhood, and such an anomaly is to be expected in the absence of remedial legislation to deal with emerging family formations and reproductive and scientific developments.[114] However, he stated that just because scientific advances have rendered existing law obsolete does not mean that the courts can provide a ready solution. It is submitted that both acts combined in the wake of AHR were particularly ill-suited to meet the circumstances of the case as they favoured opposing aspects of motherhood as it was traditionally understood. However, it is argued that it was open to the Court to register the gestational mother on the birth certificate and declare the genetic mother as the parent, for the reasons set out above; an option which no member of the Court sought out. This would have been entirely unsatisfactory as an effective framework prospectively; however, it would have aligned with the unfavourable nature of a legislative framework that provides no self-evident and harmonious approach to the splitting of motherhood. As O'Donnell J found "*anomalous outcomes are possible whoever the Court decides is required to be registered on the birth certificate **initially***" (emphasis added).[115] Regardless of the outcome, it was clear that the Court was remitting the issue to the Oireachtas to establish a workable framework to deal with DAHR and surrogacy. The 2014 Bill was being updated by the Department of Justice and was enacted as the 2015 Act four months after the judgment. Therefore, it is submitted that even an unsatisfactory outcome such as is suggested here, could have been rectified relatively quickly within this legislation, albeit the surrogacy legislation remains in Bill form nine years later.

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[112] This initially arose under section 7 of the Births and Deaths Registration Act (Ireland), 1880, as inserted by section 49 of the 1987 Act, and replaced by section 23 of the 2004 Act. Both relate only to fathers. However, it should be noted that McKechnie J acknowledged this, and that no regulations had been made under the 1987 Act to enable such registration. Nonetheless, he noted that an tArd Chlaraitheoir will act on the declaration if made by the Court (at paragraph 260). Arguably, this would have been *ultra vires.*

[113] Clarke J stated that "*I have, therefore, come to the view that neither the Act of 1987 nor the Act of 2004 can be said to be couched in sufficiently clear terms to alter any previously existing common law definition of "mother". Undoubtedly, the Act of 1987 emphasises genetic connection and inherited characteristics. Equally, the Act of 2004 emphasises the woman giving birth. But neither does so in a way which establishes a clear intent to alter the legal definition of "mother*", *MR & DR v an tArd Chlaraitheoir* [2014] 3 IR 533 at paragraph 486.

[114] Clarke J held that *"A child having two persons who have some of the characteristics of a mother may be highly counterintuitive. But so is a child not being regarded as the offspring of the person who gives birth to them, but so equally is the person who has given such a child half of their genetic material not being regarded as the child's parent. Whatever the answer, in the absence of careful, detailed and sensitive legislation, the result will be counterintuitive, messy, create a whole range of legal difficulties and, undoubtedly, be very unsatisfactory from the perspective of many persons. But there just is no solution short of the sort of legislation which may now be contemplated. In the meantime, all a court can do is to declare the position as it currently stands and invite the legislature to take urgent action*", at paragraphs 510-511.

[115] *Ibid* at paragraph 225.

The Impact of the 2015 Act on the *MR* Judgment

Finally, it is contended that if arguments and findings based on the historical understanding of the "mother" and the intention of the drafters of the 1987 Act are accepted, such have now been subsequently unravelled by the introduction of the 2015 Act. There cannot be any suggestion that the amendments to the 1987 Act, by the 2015 Act, were not made with the purposive intention to deal with the issue of the splitting of motherhood. While it is accepted that the 2015 Act dealt with DAHR and not surrogacy, it is submitted that it was nonetheless open to the legislature to amend section 35 to clarify the issue of who is the mother under the 1987 Act, in recognition of the reproductive developments. Any amendments made alongside the introduction of a DAHR framework arguably negate the continuation of the traditional understanding of the "mother" as being the birth mother, as defined by the majority, from being applied. Furthermore, the 2022 Bill does not interact with section 35 at all, and there are no indications that this will be changed. Therefore, it is argued that the vast majority of the Supreme Court's findings in relation to the 1987 Act were moot once it was plainly understood that these amendments took into account the splitting of motherhood. Section 35, when considered by the drafters implementing a framework of DAHR in the light of the *MR* judgment, could be expected to remove the reference to blood tests in determining maternity; however, it did not, and the additional element of a "second parent" was introduced, as mentioned above.[116]

Even within the DAHR context, there is no test for a gestational mother to be granted a declaration of parentage under the 1987 Act; not even based on her compliance with the 2015 Act. The gestational link alone has no place under the 1987 Act. The mother's declaration of parentage remains subject to a bodily sample obtained for the purposes of a DNA test.[117] Therefore, notwithstanding public discourse that a genetic mother cannot be a parent of a child born through surrogacy, it is argued that it is open to a genetic mother to invoke section 35 of the 1987 Act and seek a declaration of parentage based on a positive DNA match with her child. Should the Court refuse to grant her declaration on foot of this, further submissions should be made in favour of a literal interpretation of the 1987 Act, and in respect of the impact of the 2015 Act on the drafter's intentions, as they relate to the definition of "mother".[118] Furthermore, it is argued that if a literal assessment of the 1987 Act once more concludes that the mother is both the gestational and genetically linked child, that is not to say that the 2022 Bill could not, separate to the surrogacy framework, confer legal status on the female genetic link, outside of a genetic intending mother's compliance with the legislation. While a surrogacy framework definitively offers parentage to a genetic mother who does not gestate the child, it does so on the same basis as every person who does not contribute a

[116] Section 35(1)(b) of the 1987 Act.

[117] Sections 37 and 38 of the 1987 Act.

[118] There was recently a case in the High Court wherein the applicants were seeking a declaration that the State had failed to allow for the legal recognition of the child's genetic mother and that this amounted to discrimination, as well as a breach of the child's rights under the Constitution and the ECHR, *Egan v Ireland* (2023- 33-JR). This was subsequently withdrawn based on the "progress" the couple saw in terms of the 2022 Bill, A. O'Loughlin, "Couple drop Surrogacy Case after being 'Encouraged' by Progress on Legislation" *Irish Examiner* (21 April 2023).

genetic link to the conception of the child. Therefore, the female genetic link, in and of itself, is at present considered to be an empty legal entity.

Guardianship

As mentioned above, it could be considered a common misconception that parentage is synonymous with the right to make decisions in respect of their children. There is certainly a lack of clarity in this area in law, and also in the reality of practical considerations. Many important decisions that arise throughout a child's life will naturally involve the consultation and consent of both parents under the policy of the individual relevant body or institution.[119] However, when there is disagreement, or court proceedings, the distinction will crystalise for those involved. In such circumstances, it will be the guardians, as opposed to parents, who have decision-making authority. The level of decision-making power varies between those who have automatic guardianship and those who are awarded guardianship though court order.[120] Automatic guardianship which applies to all mothers and to married fathers cannot be removed, even by the court, unless by adoption order,[121] whereas the Court can remove and replace any guardians who were appointed by will, deed or by the court.[122] However, both automatic and ordered guardianship rights can be interfered with, wherein the Court can make decisions where a conflict arises between two guardians,[123] and in certain circumstances, dispense with a guardian's consent.[124] Following a divorce, the guardianship bestowed through marriage continues,[125] and even if an interim care order, or indeed a full care order, is granted, this interference applies to custody, not guardianship and the decision-making power of such guardians survives the order.[126]

The *Guardianship of Infants Act 1964* (the 1964 Act) governs the guardianship, custody, and access laws in Ireland today and sets out who has the right to make decisions in relation to a child's welfare. It provides that the welfare of the child shall

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[119] There are administrative instances, for example, where the Child and Family Agency will not release information on a child without a copy of the child's birth certificate naming the requester as the child's parent. The housing allocation office in Dublin City Council, for example, requires proof that a person is the child's parent before including them in their housing application.

[120] For example, see section 6C(9) of the 1964 Act.

[121] However, all other types can be under section 8(6)(b) of the 1964 Act.

[122] Section8(4) and (5) of the 1964 Act.

[123] Section 11 of the 1964 Act.

[124] For example, section 31(3) of the Adoption Act 2010.

[125] Section 10 of the Family Law (Divorce) Act 1996.

[126] However, section 18(3) of the Child Care Act 1991 provides that where a full care order is in force, the Child and Family Agency (CFA) shall have the like control over the child as if it was the child's parent and allows it to do what is reasonable for the purposes of safeguarding or promoting the child's health, development or welfare. Specifically, the CFA can made decisions in relation to medical treatment and the child's accommodation and can give consent to the issuing of a passport for the child. Where a care order is made, the Court may also make a maintenance order in respect of the child's parents. It is not clear as to whether this parent like control runs concurrently with the parent's guardianship as there is no explicit reference to the extinguishment of the parent's guardianship. Section 18 does not refer to "replacing" these rights. It they compete with the parents' rights; this would result in the Court having to consider individual section 47 applications under the 1991 Act where the parents and the CFA disagree instead of providing the CFA with supremacy in terms of these decisions.

be the first and paramount consideration of the Court in the determination of any such proceedings.[127] There are a number of acts, explicitly set out in section 6C of the 1964 Act, that require the consent of a guardian;[128] however, this is a non-exhaustive list of various Acts that reference guardians. A more fulsome, albeit still non-exhaustive, list of guardianship powers includes the right to decide on the child's place of residence,[129] the right to make decisions regarding the child's religious, spiritual, cultural, and linguistic upbringing,[130] the right to decide with whom the child is to live,[131] the right to consent to certain medical, dental, and other health related treatment for the child,[132] and the power to apply to the Court in respect of a question of welfare relating to the child.[133] A guardian is also entitled to the custody of the child and can take proceedings against a non-guardian for the enforcement of this custody.[134]

Who is a Guardian under the 1964 Act, and Who Can Apply?

In terms of non-AHR specific provisions under the 1964 Act, the mother and the father of the child are automatically joint guardians.[135] A parent, who is not a guardian can apply to the Court for guardianship under section 6A of the 1964 Act. An unmarried father is a guardian if he:

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[127] Section 3 of the 1964 Act. Welfare, as defined under section 2, relates to the religious, moral, intellectual, physical, and social welfare of the child. This has subsequently changed to "best interests" of the child under section 3, as substituted by section 45 of the 2015 Act.

[128] Section 2A(2) of the Firearms Act 1925; section 5 of the Protection of Young Persons (Employment) Act 1996; sections 50 and 50A of the International Criminal Court Act 2006; sections 79 , 79A and 79B of the Criminal Justice (Mutual Assistance) Act 2008; section 14 of the Passports Act 2008 and the Criminal Justice (Forensic Evidence and DNA Database System) Act 2014 .

[129] Section 6C(11)(a) of the 1964 Act.

[130] Section 6C(11)(b) of the 1964 Act.

[131] Section 6C(11)(c) of the 1964 Act.

[132] Section 6C(11)(d) of the 1964 Act.

[133] Section 11(1) of the 1964 Act. Further rights explicitly set out by the 1964 act include the right to place a child for adoption and to consent to the adoption of that child (section 6C(11)(f)), the power to appoint (section 7(2)) and object (section 7(4)(a) and (5)) to a testamentary guardian , the power to apply for the removal of another guardian (section 8(6) - This does not apply to the removal of automatic guardianship), the entitlement to the custody of the child and to take proceedings for the restoration of the custody of the child against any person who wrongfully took or detained the child (section 10(2)), the entitlement to the possession and control of all property of the child until the child reached 18 years of age (section 10(2)), the power to object to persons having custody of a child (section 11E(3)), the power to apply for an enforcement order (section 18A), and the power to apply to the Court for reimbursement of any necessary expenses incurred by another guardian or parent as a result of that parent or guardian's failure to exercise their access or custody (section 18D - expenses can be travel expenses, lost remuneration and any other expenses the Court may allow).

[134] Section 10(2)(a) of the 1964 Act.

[135] Section 6(1)(a) of the 1964 Act. Automatic guardianship under section 6(1) of the 1964 Act which grants guardianship to married couples was expanded under the *Marriage Act 2015* to include a same sex married couple and under the 2015 Act, to include civil partners and cohabitants, where the couples adopted the child together. This provision demonstrates that automatic guardianship was firstly based on marriage and presumed or actual biological connection, and subsequently, through marriage and an adoption order, where there is an acknowledged lack of biological connection. Although this speaks to guardianship, instead of parentage, it demonstrates that guardianship, which historically has arisen automatically upon marriage, is not bestowed based on marriage alone. It is marriage plus genetic connection within one degree or at least, presumed genetic connection.

a) Has an order under section 6A,[136]
b) Married the child's mother and the marriage was subsequently nullified or was void and occurred after or within, ten months preceding the birth of the child, and he believed the marriage was valid[137]
c) Has a statutory declaration with the child's mother, stating that he is the guardian of the child,[138]
d) Has cohabitated with the child's mother for 12 months, three months of which must include cohabitation with the mother and child,[139] or,
e) Has been recognised as a guardian on foot of his acquisition of parental responsibility corresponding to guardianship in another state by virtue of Article 16 of the Hague Convention.[140]

Guardianship Arising from Donor Assisted Human Reproduction and Surrogacy

The definition of parent within the 1964 Act, on foot of the DAHR framework, now includes a section 5(1)(b) parent. Further to the 2015 Act's amendments to the 1964 Act, a person who is a section 5(1)(b) parent and married to the mother of the child shall automatically be the child's guardian.[141] Where such persons are unmarried, the section 5(1)(b) parent will be the child's guardian where such a parent has lived for 12 consecutive months with the child's mother, three months of which must involve cohabitation with the mother and the child.[142] Guardianship is also available where the parties declare that they are parents of the child, declare that that they agree to the second parent being appointed as the child's guardian and have made a statutory declaration to that effect.[143] Therefore the same eligibility applies to both "fathers" and the section 5(1)(b) parent.[144] The 2022 Bill proposes that guardianship be awarded to both intending parents by way of statutory declaration of the surrogate and the intending parent; however, this can only be made where the child has already been born and where the surrogate consents to it.[145] The 2022 Bill does not include any proposal for automatic guardianship to arise from the granting of the parental order. This is despite specific provision being deemed necessary in the

[136] Section 2(1)(a) of the 1964 Act.
[137] Section 2(1)(b), (3) of the 1964 Act.
[138] Section 2(4) of the 1964 Act.
[139] Section 2(4A) of the 1964 Act.
[140] Section 3(2)(e) of the Protection of Children (Hague Convention) Act 2000. The "Hague Convention" in this context is the Convention on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children, signed at the Hague on the 19th day of October 1996, and also Section 6D(1) of the 1964 Act which applies to both the Hague Convention and Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction.
[141] Section 6B(1) of the 1964 Act. When originally inserted, section 6B(1) applied to a "man" however, this was amended to "person" by section 16(1) the *Marriage Act 2015*.
[142] Section 6B(3) of the 1964 Act, this provision applies prospectively only from the date of commencement, 4 May 2020.
[143] Section 6B(4) of the 1964 Act.
[144] Aside perhaps from the void or voidable marriage provision under section 2(3) of the 1964 Act and the recognition of other state parental responsibility under section 6D.
[145] The proposed section 6BA(1) of the 1964 Act, as proposed by section 156 of the 2022 Bill.

context of guardianship arising from an adoption order, which is a similar mechanism to a parental order in terms of its transfer of parentage.[146]

Guardianship for Non-Biological Parents

The 2015 Act expanded the nature of guardianship to non-biological caregivers and created a separate standalone DAHR system for non-biological parentage. Now, when a same sex couple marries,[147] or where they enter into a civil partnership or cohabit for a period of three years,[148] and jointly adopt a child, they shall be joint guardians of the child. Should either of the parties in these relationships die, the other party shall remain as the guardian of the child, together with any testamentary guardian appointed by the deceased party or the court.[149] One of the most significant changes brought about by the 2015 Act was the new power of the Court to appoint a person other than a parent as a guardian under section 6C of the 1964 Act. This provision creates a pathway to guardianship for acknowledged non-biological caregivers where such caregivers meet finite and prescribed criteria. The conditions imposed are that the person is over the age of 18, and is married to, in a civil partnership with or has been cohabiting (for three years) with the parent of the child and has shared parental responsibility for the child's day to day care for more than two years.[150] Alternatively, the person must have been providing the child with day-to-day care for a continuous period of more than 12 months and the child must have no parent or guardian who is willing or able to exercise the rights and responsibilities of guardianship in respect of the child.[151] Such appointments under section 6C must be made with the consent of each guardian of the child unless such guardian's consent has been dispensed with by the court.[152] The Court may also impose variations and restrictions on the general guardianship powers assigned to such applicants.[153] Therefore, section 6C could offer some solace to intending parents who do not, or cannot, comply with the AHR frameworks. However, this section does not offer any immediate protections to the intending parent or the child upon birth and requires a continuous period of day to day care, which may not be possible of fulfilment where there is a relationship breakdown. Furthermore, should the child's parent die, prior to the two years, the intending parent could not be said to have shared parental responsibility with them. In such circumstances, the intending parent will have to parent the child for one year without any legal basis for doing so, unless they are appointed a testamentary guardian which naturally requires forethought.

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[146] Section 6(1)(b), (1A) of the 1964 Act.
[147] Section 6(1)(b) of the 1964 Act.
[148] Section 6(1A) of the 1964 Act.
[149] Section 6(3A), (3B) of the 1964 Act. See rule 5 of Circuit Court Rules (No. 1), 1990, S.I. No. 152/1990, subsequently annulled.
[150] Section 6C(2)(a) of the 1964 Act.
[151] Section 6C(2)(b) of the 1964 Act. This section could be more fitting to a surrogacy situation where the surrogate resides in another country, relinquishing all day to day care of the child. This is unlike section 8, which allows caregivers to apply at any time but only where the child has no other parent or guardian.
[152] Section 6C(6), (7) of the 1964 Act.
[153] Section 6C(9) of the 1964 Act.

Section 6E of the 1964 Act offers a further possible workaround for those that cannot comply with the AHR framework. This section enables a qualifying guardian[154] to nominate a person to be a temporary guardian of the child in the event that the qualifying guardian becomes incapable through serious illness or injury to exercise their rights and responsibilities of guardianship.[155] However, such nomination does not apply automatically, even with the consent of the qualifying guardian but rather, the nominated person or qualifying guardian must apply to court for the nominated person to be appointed.[156] The Court must be satisfied that the qualifying guardian is incapable, that the nominated person is a fit and proper person to act as such and that it is in the best interests of the child for the nominated person to be appointed.[157] The current process requires a court application at a time of potential urgency, where the child's care is left with a person whose capacity is in question.

This would apply where the section 5(1)(b) parent has not married, or entered into a civil partnership with, the child's mother, and cannot satisfy the cohabitation requirement or where no statutory declaration can be made due to the mother's incapacity. Equally, this would apply where a surrogate becomes incapacitated in the course of the birth and cannot execute the statutory declaration required to name the intending parents the joint guardians of the child.[158] Such scenarios leave a child with no person with legal responsibility for them when they have just been born and may require urgent medical decisions to be made. This process was introduced instead of what is argued to be a preferable process, that of nominating an "incapacity guardian", akin to a testamentary guardian that crystallises upon a particular moment or event, and which could be sanctioned by a medical practitioner. The current requirement for a court application in such circumstances ignores the agency and autonomy of a person to make a responsible and proactive determination in advance of their foreseeable incapacity, as well as the needs of a child where the incapacity is unforeseeable.

Custody and Access

The 1964 Act also governs the law on custody and access in respect of a child. Section 11(2) and (4) allow a court to make directions regarding the custody of the child, as well as directions on access, with respect to the child's parents.[159] Irish law

[154] A qualifying guardian means a person who is the guardian of the child who is the parent of the child and has custody of the child or is not the parent of the child but has custody of the child to the exclusion of any living parent of the child.

[155] Section 6E(1) of the 1964 Act. Limitations may be specified by the qualifying guardian under section 6E(2)(b) of the 1964 Act.

[156] Section 6E(3) of the 1964 Act.

[157] Section 6E(5) of the 1964 Act.

[158] There is nothing explicit in the 2022 Bill to suggest that this statutory declaration must be made before the birth of the child however, the current statutory declarations set out under the Guardianship of Children (Statutory Declaration) Regulations 2020 (S.I. No. 210 of 2020) require both the child's name and date of birth.

[159] Section 11(2)(a) of the 1964 Act. Such orders can also be made pursuant to divorce (section 15 of the Family Law (Divorce) Act 1996 or judicial separation (section 6 of the Family Law Act 1995) proceedings. The Court, in determining a custody application, must consider whether the child's best interests would be served by maintaining personal relations and direct contact with each of their parents on a regular basis. Section 11D of the 1964 Act.

recognises the child's mother as an automatic custodian,[160] as it does with married parents.[161] Custody has been defined by the judiciary as "*the right of a parent to exercise physical care and control in respect of the upbringing of their child on a day to day basis".*[162]

The 2015 Act expanded the law on custody whereby relatives[163] and certain other persons may now apply for custody.[164] Certain other persons must comply with the same provisions as laid out under section 6C guardianship.[165] This provision, like section 6C, is dependent on the person's relationship with the child's "parent" under the 1964 Act. Furthermore, intending parents who satisfy the criteria of the DAHR framework have equal access to provisions on custody and access as any other parent. However, under the 2022 Bill, there is no pathway for intending parents in a surrogacy arrangement to immediate legal custody from birth, despite it being required for the parental order to be made.[166]

The 2015 Act also expanded the parameters of access applications in allowing a relative,[167] or a person with whom the child resides or has formerly resided, to apply.[168] While the new provisions inserted by the 2015 Act have clarified the new categories of persons who can apply for access in relation to a child, the Irish courts, as far back as 1992[169] have confirmed that section 11(1) entitles the District Court to make access orders in respect of persons who are not the natural parents of the child and that in such applications; it is the child's welfare that is paramount, not the right of the adult.

A "Father" under the 1964 Act

The Supreme Court have recently held that:

> "*the man who provides the genetic material from which the child is formed is, as a matter of law, the father…this defines the* ***starting point***

[160] *G v An Bord Uchtala* [1980] 1 IR 32.
[161] *In Re J (An Infant)* [1966] IR 295.
[162] *WOR v EH* [1996 2 IR 248, as cited by L. Crowley, *Family Law*, (1st ed. 2013, Thomson Roundhall) at paragraph 3.69. Generally, the Court practice with regard to parents who do not reside with each other is to grant joint custody with primary care and control to one parent, unless there are good and sufficient reasons to deny a person custody of the child.
[163] Section 2(1) of the 1964 Act defines "relative" as a grandparent, brother, sister, uncle, or aunt of the child.
[164] Section 11E(1) of the 1964 Act.
[165] The person must be married, in a civil partnership, or cohabiting for 3 years, with the parent of the child and shared parental responsibility for the child's day to day care for over two years. This is reduced to one year if the child has no parent or guardian willing or able to exercise the rights and responsibilities of guardianship in respect of the child.
[166] Section 62(3)(b) of the 2022 Bill.
[167] Section 11B(4) of the 1964 Act defines a relative, in relation to a child who is the subject of an adoption order, as including a relative of the child's adoptive parents, the adoptive parents of the child's parents, or a relative of the adoptive parents of the child's parents.
[168] Section 11B(1) of the 1964 Act. In making its decision, the Court shall have regard to the applicant's connection with the child, the risk of any disruption in the child's life that might cause the child harm if access was allowed, the wishes of the child's guardian, the views of the child and the necessity of making the order. Section 11B(3) of the 1964 Act.
[169] *D v D* [1992] 7 JIC 3002.

for the interpretation of the noun 'father' where it appears in legislation" (emphasis added).[170]

From 1964 - 2020,[171] a "parent" under the 1964 Act was simply defined as a mother or father. "Father" under the 1964 Act, as enacted, included a male adopter but explicitly did not include the natural father of an "illegitimate" infant,[172] whereas the mother of an "illegitimate" infant was the automatic guardian of the child.[173] Concurrently, section 6(1) provided that the father and the mother of the child would be joint guardians. This was automatic and did not require a court order. Therefore, until the 1987 Act, the only "fathers" who could become the child's automatic guardian were men married to the child's mother and who had, or were presumed to have, a genetic connection with the child. There was no mechanism for an unmarried genetic father to be a guardian unless he subsequently married the child's mother or was appointed by the mother as a testamentary guardian upon her death. A person could apply to be the child's guardian where the child did not otherwise have a guardian, which would have created one avenue for an unmarried father; however, such persons did not have to be genetically related to the child.[174] Therefore, it is evident that historically, little value was placed on any "fatherhood" arising from the male genetic contribution to the child's conception alone.[175]

The 1987 Act then inserted section 6A into the 1964 Act which provided an avenue for unmarried fathers to apply for guardianship in the courts for the first time. Section 6A simply referred to a "father" making the application. At the same time, the definition of "father" was amended to exclude unmarried genetic male contributors unless they were (already) granted guardianship through section 6A or were a party to a marriage with the child's mother at the time of the birth or, in the ten months beforehand, that was subsequently voided (where he believed it was a valid marriage) or nullified.[176] Therefore, the 1987 Act would appear to have sought to create a pathway for a "natural father" to apply for guardianship but excluded such a man by virtue of the definition of "father" which was couched in terms of

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[170] *A, B & C v The Minister for Foreign Affairs and Trade & Ors* [2023] IESC 10 at paragraph 75.

[171] 4 May 2020 is the commencement date of parts 2 and 3 in the 2015 Act which set out the DAHR framework.

[172] Section 2 of the 1964 Act, as enacted.

[173] Section 6(4) of the 1964 Act, as enacted.

[174] Section 8(1) allowed any person to apply to the Court to be the child's guardian where the child had no other guardian.

[175] This is particularly interesting in light of the position prior to the 1964 Act. Prior to the 1964 Act, it was settled law that the father alone was the guardian of his children. The father could appoint a guardian which would replace his rights, to the complete exclusion of the mother. If no guardian was appointed, the mother then became a part-guardian. The *Custody of Infants Act 1839* provided the first opportunity for mothers to apply for custody of their children up until the age of 7 and access for older children. This Act was repealed by the *Custody of Infants Act 1873* which extended these rights to children under 16 years old, and also authorised deeds of separation which set out that the custody or control of the children lay with the mother. However, no court was required to enforce such an agreement if it was of the opinion that it would not be to the benefit of the infant. A mother was not automatically a guardian to her child upon the death of her husband until the *Guardianship of Infants Act 1886*. She could appoint a testamentary guardian, but such a person could only come into effect upon both her and her husband's death. The 1964 Act therefore was the first time that married fathers and mothers had the same rights in respect of guardianship and custody.

[176] Section 2(1), (3) of the 1964 Act, as substituted by section 9 of the 1987 Act.

men who already had guardianship. Section 6A was effectively a cyclical and useless provision whereby a person would have to already have guardianship in order to apply for guardianship. This is the first defective definition from which the modern-day errors originate and continue to apply.

The 1964 Act, as enacted, did not allow unmarried male genetic contributors the option to apply for guardianship but it did provide such "natural fathers" with the opportunity to apply for custody, access, and resolutions to questions of welfare in respect of the child under section 11. This exception owed itself to section 11(4) which explicitly provided that any references to "father" and "parent" under section 11, aside from any reference to maintenance obligations, could be construed as including a "natural" father. This meant that a natural father could apply for custody and access, and avoid paying maintenance, notwithstanding the fact that he was not married to the child's mother and not already a guardian of the child. It was his genetic connection that grounded his right to apply for custody and access, yet it was his lack of guardianship or marital status that saved him from discharging any maintenance obligations. However, with the 1987 amendments came a change to this section 11(4)'s inclusion of a natural father. The 1987 Act amended the words "natural father" to "father who is not a guardian of the infant". As aforementioned, the definition of father was confined to natural fathers who were already recognised as guardians, therefore, the issue that arose in respect of the definition of father now applied to section 11, rendering section 11(4) meaningless. While the 1987 amendments now made a "father" who is not a guardian of the infant liable to the mother's maintenance applications, the drafting issues similarly rendered this provision moot. The *Children Act 1997* did nothing to rectify the issue,[177] nor did the 2015 Act.[178]

While this drafting appears to invalidate an unmarried male progenitor's attempts to create legal ties to his child, daily life in the courts continued, and continues, unchallenged in spite of this, on the understanding that "father who was not a guardian" means genetic father. This was until a Court of Appeal case in 2015, *MS v*

[177] The 1997 Act once again amended the definition of "father" under the 1964 Act to include the "father" who makes a statutory declaration, together with the child's mother where they agree to the appointment of the "father" as a guardian of the child. Section 2(4) of the 1964 Act, as inserted by section 4 the 1997 Act. This definition also included the provision that both parties had to have entered into an agreement in relation to the custody of, and as the case may be, access to the child; however, this provision was deleted by the 2015 Act (section 2(4)(d)).

[178] The 2015 Act made the final amendment to the current definition of father (Section 2(4A) of the 1964 Act, as inserted by the 2015 Act.) which was to include an unmarried father who had been living with the child's mother for 12 months, which includes three months cohabitation with both the child's mother and the child after the birth of the child. It also included a father who is a guardian by virtue of section 6D. As previously referenced, this section covers a recognition of the acquisition of parental responsibility corresponding to guardianship in another state by virtue of Article 16 of the Hague Convention. The 2015 Act also amended section 11(4) to substitute the wording, "father who was not a guardian of the infant" to "a parent who is not a guardian of the child". Given that parent is not an independent definition but rather defined as a mother and a father, this did not cure the previously discussed mischief either.

MN.[179] This case revolved around the issue of a guardian's maintenance obligations. The appellant argued that the High Court did not have jurisdiction to make an order pursuant to section 11(2)(b) of the 1964 Act against him, as he had never married the children's mother and was not a guardian of the children. Finlay Geoghegan J noted that while this section relates to "fathers" and that an unmarried male who is the reproductive contributor to the conception of the child[180] is not included in the definition of "father" under section 2 of the 1964 Act. Therefore, the Court found that the appellant was not the "father" of his children for the purposes of section 11(2)(b) of the 1964 Act and the High Court had no jurisdiction to make the order in respect of him under that act. Counsel for the mother sought for the Court to re-assess having regard to Article 42A of the Constitution but the Court determined that such would be tantamount to a challenge to its constitutionality which was never raised before the High Court.

This case demonstrates the convoluted and confused nature of the legislation as the appellant was still found to constitute a "father" within the *Family Law (Maintenance of Spouses and Children) Act 1976* which allows for a maintenance order to be made irrespective of the marital status of the parents and does not otherwise define "father". Unfortunately, the impact, or lack thereof, of section 11(4), as substituted first by the 1987 Act,[181] was not discussed in this case, nor was the impending amendment by the 2015 Act mentioned.[182] Despite the judgment of *MS v MN,* no further amendments have been proposed to clarify this point. The 2015 Amendment presumably sought to, and did, include DAHR parents as eligible applicants for guardianship, custody, and access applications. Nevertheless, its actual effect was to allow for such, while still excluding unmarried male reproductive contributors and in so doing, placed intention above genetics. An unmarried section 5(1)(b) parent can apply for guardianship under section 6A, but an unmarried genetic father cannot.

While there are many pieces of legislation that do not define "parent" at all, the difficulties continue when other pieces of legislation apply the 1964 Act in their definitions. For example, the *Adoption Act 2010* (the 2010 Act) defines a "relevant

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[179] [2015] IECA 258. The father in this case was appealing against a decision of the High Court directing him to pay €5,000 in child maintenance per week in addition to his spousal maintenance. The parties had eight children together, six of whom were still dependent, but they never married.

[180] In circumstances where he has not made a statutory declaration with the mother, has not been granted guardianship under section 6A and had not gone through a ceremony of marriage which was subsequently void/nullified.

[181] It read: "(4) In the case of an infant whose father and mother have not married each other, the right to make an application under this section regarding the custody of the infant and the right of access thereto of his father or mother shall extend to the father who is not a guardian of the infant, and for this purpose references in this section to the father or parent of an infant shall be construed as including him".

[182] Section 53 of the 2015 Act was enacted on 6 April 2015, but not commenced until 1 January 2016. The *MS v MN* judgment was given on 19 November 2015. This amended wording read as follows: "(4) In the case of a child whose parents have not married each other — (a) a reference in subsection (2)(b) to a parent of that child shall be construed as including a parent who is not a guardian of the child, and (b) the right to make an application under this section regarding the custody of the child and the right of access thereto of each of his or her parents shall extend to a parent who is not a guardian of the child, and for this purpose references in this section to the parent of a child shall be construed as including such a parent".

non-guardian" in four categories, the first of which is a "*father of the child who is not a guardian of the child pursuant to the Act of 1964*".[183] As explained above, there are no "fathers" under the 1964 Act who are not guardians, given that "father" is defined under the 1964 Act exclusively in terms of guardianship. This has significant implications given that a relevant non-guardian can seek to be consulted in relation to any proposal to place the child for adoption or an application by the mother, step parent or relative to adopt the child.[184] Moreover, the relevant non-guardian can object to the placement of the child for adoption and the accredited authority must halt the placement so that such a person has a right to apply to the Court for guardianship of the child.[185] However, this again is a vicious circle of exclusion as he would not have standing to apply under the 1964 Act.[186]

Specifically, in the AHR context, there are couples or single male individuals who engage in surrogacy agreements and rely on the male genetic link to the child to ground their parentage and thus, their guardianship, custody, and access applications in respect of the child. Naturally, where the surrogate is recognised as the child's legal mother, the intending father will not be married to her and so will not benefit from any automatic assignment of guardianship. As mentioned above, there are four other avenues that could "cure" the issues raised above. The first is that the surrogate and the intending father could enter into a marriage subsequently declared void under section 2(3) of the 1964 Act. This is unlikely. The surrogate could declare that the intending father is a guardian under section 2(4). This is more likely but not guaranteed. The surrogate and the intending father could be living together for 12 months under section 2(4A) and he could have automatic guardianship by virtue of the cohabitation. This is unlikely. The intending father could obtain guardianship under the Hague Convention or Council Regulation (EU) 2019/1111.[187] However the Convention and Council Regulation essentially cover EU countries[188] and not countries like the USA or Canada which are popular destinations for Irish couples to travel abroad for surrogacy arrangements. Therefore, the most reliable and independent avenue for intending genetic fathers in a surrogacy arrangement to apply for guardianship and custody should be section 6A and section 11 (2) of the 1964 Act respectively and it is argued based on the above, that these avenues are in

[183] Section 3(1) of the *Adoption Act 2010.*
[184] Section 16(1) of the *Adoption Act 2010.*
[185] Section 17(3) of the *Adoption Act 2010.*
[186] There is, however, a High Court case from 2013 whereby a non-genetic father was granted guardianship, and this arose from both exceptional circumstances and the inherent jurisdiction of the High Court, as opposed to any particular section of the 1964 Act, *MR v SB* [2013] IEHC 647. For a discussion of this case and the rights of unmarried fathers see: B. Tobin, "Law and Parental Rights", in L. Black & P. Dunne, *Law and Gender in Modern Ireland* (Hart Publishing, 2019) at page 103.
[187] Section 3(2)(e) of the Protection of Children (Hague Convention) Act 2000. The "Hague Convention" in this context is the Convention on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children, signed at the Hague on the 19th day of October 1996, and also Section 6D(1) of the 1964 Act which applies to both the Hague Convention and Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction.
[188] See Protection of Children (Hague Convention) Act 2000 (Section 15) Order 2010 (S.I. No. 682/2010) and Protection Of Children (Hague Convention) Act 2000 (Section 15) Order 2019 (S.I. No. 458/2019); Council Regulations apply to all EU Member States.

fact closed to genetic fathers, albeit this does not appear to be common knowledge.[189] Furthermore, the sections that expand the access route for non-genetic and gestational parents to access guardianship and custody, sections 6C and 11E respectively, operate on the basis of the applicant's relationship with the child's "parent".[190] Given that parent includes a parent of a donor conceived children under the 2015 Act, the real issue arises for the male or female partner of the genetic father in a surrogacy situation. That genetic father is reliant on his court order under section 6A for his guardianship and thus, parentage for the purposes of the 1964 Act, and his partner is reliant on his parentage for their guardianship and custody.

There are therefore numerous children living, and being cared for, in Ireland at the moment on the strength of the precarious guardianship, and more importantly, custody of their genetic father. The only solace for such fathers, however, would be that their parentage is not dealt with by the 1964 Act. Their parentage is dealt with by the 1987 Act which does not include the same definitional issues. However, suffice to note that the variations in these two concepts which traverse two different legislative frameworks, causes significant opportunity for a fragmented legal status in relation to the child. These issues demonstrate the importance of a comprehensive and considered drafting process when the legislature intends to create standalone parental models based on gestation, genetics, and care, without grappling with historical legislative overhang.[191]

A "Mother" under the 1964 Act

While the "mother" in the contexts of registration and parentage have been discussed above, it is important to be mindful of the principles, as espoused by McKechnie J in *MR*, that "*an overarching constituent of [the exercise of statutory interpretation] is that 'context is everything'*",[192] and by MacMenamin J that *"[t]he meaning of a term in one statute will not always have the same meaning in another statute*".[193] The definition of "mother" has not changed since 1964 and is somewhat of a vague and non-expansive definition, and one which does not clarify the complexities arising from the gestational or genetic components of motherhood. It

[189] It is understood that this issue has only been raised publicly by this author in C. O'Connell, "The Aspirational Shortcomings of the Irish Legislative Proposals in Assisted Human Reproduction – Part 2" (2019) 22(1) IJFL 9 at 14.

[190] Section 6C(2)(a)(i) and Section 11E(2)(a)(i) of the 1964 Act both extend access to persons who are married, in a civil partnership or cohabiting for three years with the child's "parent".

[191] One final point, which is perhaps less well made out, is whether the drafting of the current definition of "father" lends itself to include married fathers, as was, and is, arguably the intention of the legislature. There has never been an explicit inclusion of the married father in the definition of "father". Originally the definition of father was a non-exhaustive definition as including a male adopter and expressly excluding an unmarried natural father. Therefore, it could be deduced that a natural married father was included through the drafting principle of *Expressio Unius Est Exclusio Alterius* - the explicit mention of one thing is the exclusion of another. However, the new definition distinguishes, at least on its face, between unmarried fathers who have guardianship and unmarried fathers who do not. This categorisation therefore removes married fathers from the understanding of "other" and replaces it with a type of unmarried father. However, should this ever be actually queried before the courts, it is envisioned that it will be argued that the historical progression of the drafting would demonstrate that it was clearly the intention of the legislature to include married fathers.

[192] *MR & DR v an tArd Chlaraitheoir* [2014] 3 IR 533 at paragraph 312.

[193] *Ibid* at paragraph 540.

does not explicitly exclude or include the genetic, gestational, or intending mother. Therefore, it is argued that it is open for a genetic mother as part of a surrogacy agreement to apply for guardianship of the child. In the aforementioned case of *MR & DR v an tArd Chlaraitheoir,*[194] MR sought an order for guardianship under section 6A in the absence of her being registered on the birth certificate. The Supreme Court (MacMenamin J) held that it was not convinced that it would be appropriate to appoint MR as a guardian under section 6A and noted that:

> "*the Act of 1964 does not, however, give an express power to appoint the fourth applicant (the genetic mother) as a guardian of the twins. Where the terms of a statute are fully clear, they cannot be construed otherwise. But the statute does not address a situation such as this one."*[195]

Nonetheless, MacMenamin J would have remitted the matter to the High Court to determine whether MR and her husband should be appointed the children's guardians, albeit he was the only judge to suggest such a relief.[196] This judgment was provided on the 7th of November 2014 and while the General Scheme of the *Children and Family Relationships Bill 2014* (the 2014 Bill) had been published in January 2014, it did not show any amendments to section 6A to extend the eligibility from "father" to "parent",[197] as now exists. However, the 2014 Bill did propose to change the definition of "mother" in the 1964 Act to include a female adopter, a woman named in a declaration of parentage in either DAHR or surrogacy, and otherwise, the woman who gives birth to a child.[198] In the absence of any such framework being enacted and commenced, it is unclear under what basis MacMenamin J anticipated that the genetic mother could be successful in her application for guardianship, at that time. However, subsequent to the judgment, the "parent" amendment to section 6A appeared in the *Children and Family Relationships Bill 2015* (the 2015 Bill) on the 19th of February 2015 yet the amendment to the definition of "mother" was removed. It would therefore appear that a conscious decision was made by the legislature not to distinguish between the two aspects of motherhood under the 1964 Act.

Therefore, the drafters, while legislating for DAHR as it impacts on "the mother" for the purposes of guardianship opted not to make any amendments, or perhaps more accurately for the purposes of this discussion, any restrictions. However, this argument could be unravelled slightly by reference to sections 6(1) and 6B. Following the 2015 Act, the "mother" and the "father" remain joint guardians under section 6(1) and section 6B sets out the circumstances whereby a section 5(1)(b) parent can be the guardian of their donor conceived child. If a "mother" included a genetic mother, then a genetic mother availing of reciprocal IVF in DAHR under the 2015 Act would not need section 6B. Ultimately however, it is argued that this argument falls on two fronts. The first is that, as discussed above, the intending parent who provides their own gamete is considered "a donor" for the purposes of

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[194] [2014] 3 IR 533.
[195] *Ibid* at 732.
[196] *MR & DR v an tArd Chlaraitheoir* [2014] 3 IR 533 at paragraph 581.
[197] Head 38(4) of the General Scheme of the *Children and Family Relationships Bill 2014* provided that the surrogate alone would be the guardian of the child.
[198] Head 33(1) of the 2014 Bill.

the 2015 Act. This rebuttal is less convincing as it seems this legislative anomaly arose from a drafting error. The second and more convincing argument, is that section 6B was required for non-genetic intending parents.

In summary, the "parent" who can apply for guardianship under section 6A now includes the definition of "mother" which is a non-exclusive definition which arguably opens the door to genetic mothers.[199] As the Chief Justice has recently held, guardianship under section 6C "*falls very far short of a recognition of the genetic connection*".[200] However for ultimate clarity and assurance, it is evident that the definition of "parent" under the 1964 Act and its interactions with its sub-definitions requires a total dismantling and replacement with specific categories and criteria to account for the segregation of the elements (namely, the gestational link, the genetic link and intent and consent prior to conception) in order for a comprehensive guardianship framework to operate.[201]

The "Child" in Irish Legislation

Given the advent of AHR legislation and the expanded acceptance of non-genetic links, it could be expected that the more generalised definitions, or enactments that lack any definition whatsoever for "parent" or "child" could lend themselves to a more inclusive interpretation in light of changing societal norms and more inclusive legislative frameworks.[202] This is perhaps left open by the lack of definition of "parent" in the 2005 Act and the only reference to "child" being one which includes an adopted child.[203] Unfortunately, this does not appear to be the case and the

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[199] This is in line with the dicta of the Supreme Court who, in considering the drafting of definitions, noted that the use of the word "means" and not the word "includes" limit the definition to expressed categories only - *X v Minister for Justice and Equality* [2020] IESC 30 at paragraph 34. This would restrict the definition of "parent" under the 1964 Act but not its sub-definitions of "father" and "mother", both of which are prescribed in terms of "includes". While this argument could be argued to cure the deficiencies in the definition of "father", this is not what is being suggested here. While "mother" under the 1964 Act is quite vague and the concept of motherhood can be split into genetic and gestational, the definition of "father" has such an expansive definition, with varying and considered parts. It is argued that given the drafting problems as outlined above, the word "includes" as contained in the definition of "father" cannot cure its defective limitations when the "natural father" was specifically previously referred to and the 1964 Act acknowledges the exclusion of such non-guardian genetic fathers in section 6, which provides that a mother and father are the joint guardians of a child, section 6(1)(a) of the 1964 Act.

[200] *Adoption Authority of Ireland v C & D* [2023] IESC 6 at paragraph 82.

[201] It is submitted that the definition of father should be substituted by the following: "father" means - (a) a male who is genetically related to the child and who is not - (i) a gamete donor under section 23(b) of the Act of 2015, or (ii) a relevant donor (G) under section 60(1) of the *Bill of 2022* (b) a male adopter under an adoption order under the Act of 2010, (c) a male parent of a donor-conceived child under section 5(1)(b) of the Act of 2015, or (d) a male parent named in a parental order under section 63 of the *Bill of 2022*

[202] Dodd argues that the *"case law reveals that the courts are more disposed to the purposive approach in respect of particular types of enactments. Remedial social statues, enactments relating to international or European law and paternal legislation, such as enactments relating to child welfare, are more readily interpreted in light of their purpose*" at para 6.51, S. Dodd, *Statutory Interpretation in Ireland* (2008, Bloomsbury).

[203] Section 18(1)(d) of the 2005 Act.

Supreme Court case of *X v The Minister for Justice and Equality,*[204] definitively negates such a suggestion. The High Court (Barrett J) had determined that in the absence of a definition of the term "child", the provision should be interpreted as including non-biological children given the *"wide diversity of familial structures".*[205] On appeal, the Minister relied on a number of cases in basing her arguments in statutory interpretation, namely, *BE v SS,*[206] *Hyland v Residential Tenancies Board,*[207] and *AC v Minister for Health,*[208] whereas the appellant made submissions as to the expansive definition of family, to be considered on a case-by-case basis, drawing support from the Committee on the Rights of the Child's General Comment No. 14 and the case law of the ECtHR under Article 8.[209] The Supreme Court (Dunne J) in its conclusions, focused on the legislative intent behind the relevant legislation. The Court found that, having considered the relevant provision, it appeared that child, as specifically relating to a biological child, was the natural and ordinary meaning of such words.[210] It held that had the Oireachtas intended to give it a broader meaning,

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[204] [2020] IESC 30. This case originated in the High Court and involved a man seeking family reunification with two children who he treated as his own but where questions arose as to the biological connection between them. The relevant provision was section 56(9) of the *International Protection Act 2015* which provided for applications for family reunification to be made in respect of one's child, who had not yet reached 18 and was not married.

[205] He held that *"[i]t is not unknown for a child to grow up addressing and thinking of a man who is not their biological father as 'Dad'; and it is not unknown for such non-biological fathers to be as devoted to such children as if they were their biological children. A 'cookie cutter' definition of children as embracing only biological children would doubtless be easier for the State to police, not least given the availability of DNA testing. But that is not what the [International Protection Act 2015] provides, perhaps because of an understanding that in a diverse society defining who is a child of someone is not always straightforward." X v Minister for Justice and Equality, Ireland and the Attorney General* [2019] IEHC 284 at paragraph 1.

[206] [1998] 4 IR 527. The Court determined that the definition of "child" within section 117 of the *Succession Act 1965* did not include grandchildren.

[207] [2017] IEHC 557. The High Court held that the use of the word "child", which was not otherwise defined within the *Residential Tenancies Act 2004* did not include a stepchild. Noonan J found as follows: "*The word 'child' in its natural and ordinary meaning can only refer to the biological offspring of a natural person. Such a person's son or daughter is a 'child' of that person. Of course, whether a person is the biological offspring of another is, with advances in medical science, perhaps a more complex question that it used to be. What is clear however is that a person who has no biological connection to another cannot be the latter's 'child",* at paragraph 17. Notably, section 39(3)(a)(iii) of the *Residential Tenancies Act 2004* made provision for a child and a stepchild, demonstrating a clear division between the two categories within the Act.

[208] [2019] IEHC 431. This case considered whether the definition of child within the *Hepatitis C Compensation Tribunal Acts 1997 -2006* entitled stepchildren of a person who died from Hepatitis C to compensation. The High Court (Barton J) held that "*at common law, a child is the begotten offspring or issue of its natural parents. An individual who has no biological connection to another cannot be that person's child*", at paragraph 58. The Court concluded that had the Oireachtas sought to confer the right to compensation on a step-child, it would have been necessary to do so expressly, at paragraph 90.

[209] *X v Minister for Justice and Equality, Ireland and the Attorney General* [2019] IEHC 284 at paragraph 102. The appellant argued that confining the definition of child to those who were biologically connected to the applicant excluded children born through surrogacy and stepchildren whose siblings may be able to be reunified with their family while they themselves were not. Finally, it limited itself to a Western cultured perspective on family in an international context.

[210] *X v Minister for Justice and Equality, Ireland and the Attorney General* [2019] IEHC 284 at paragraph 107.

it would have said so clearly. Of most relevance to this thesis was the Court's finding that while its judgment could have an anomalous outcome in relation to surrogate children,

> "*unfortunate though that may be, the fact that there may be anomalous situations created by the legislation does not in my view affect the interpretation of the statute*".[211]

This judgment clearly demonstrates that the Court is not willing to engage in a child's best interests get-out-of-jail-free card when it comes to statutory interpretation. The Court explicitly stated that it failed to see -

> *"how having regard to the "best interests" of the child can give rise to a broader interpretation of the word "child" when the natural meaning of the word in the context of this legislature is clear*".[212]

This case dashes any hopes of a broader acceptance of non-genetic parentage, and it is clear that any variation from the genetically related child will have to be subject to a sweeping provision updating the definition of child in the *Interpretation Act 2005*[213] or continued piecemeal updates in certain approved contexts such as DAHR or surrogacy.

Statutory Interpretation and Assisted Human Reproduction

Regrettably, however, even such piecemeal updates have proven insufficient. The 2015 Act provides that a reference in any enactment to a mother, father or parent of a child shall be construed as not including the donor.[214] There is also a provision that states that the mother and her spouse, civil partner, or cohabitant of a donor conceived child shall have all parental rights and duties in respect of a child.[215] In addition, in deducing any relationship for the purposes of *any* enactment, the relationship between every donor-conceived child and their parent(s) shall be determined in accordance with section 5.[216] Notwithstanding these provisions, the legislature then sought fit to insert the definition of "a section 5 parent", or a "parent of a donor conceived child", into choice pieces of legislation. The same issue befalls the 2022 Bill; section 64(1) of the 2022 Bill provides similar blanket applications of parentage upon the making of a parental order,[217] yet inserts a definition of parent in relation to a child born through surrogacy into the 2004

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[211] *Ibid*.
[212] *Ibid* at paragraph 108.
[213] There is also no corresponding definition of "parent" in the *Interpretation Act 2005*.
[214] Sections 5(7) and 23(3) of the 2015 Act.
[215] Section 5(3) of the 2015 Act.
[216] Section 5(4) of the 2015 Act.
[217] Section 64 of the 2022 Bill provides that where the Court grants a parental order in respect of a child—
(a) the child becomes the child of the intending parents (or, in the case of a single intending parent, that intending parent) named in the order, (b) the child is no longer the child of any person declared not to be a parent in the order, (c) the child will be considered, with regard to the rights and duties of parents and
children in relation to each other, as the child of the intending parents (or, in the case of a single intending parent, that intending parent) named in the order, and (d) the surrogate mother of the child will lose all parental rights and is freed from all parental duties in respect of the child.

Act.[218] Certain insertions are evidently used to distinguish based on the context; others are simply superfluous and gratuitously duplicate the reference, given that it has been established that a reference to a parent includes a section 5 parent or recipient of a parental order.[219] This is at best innocuous sloppy drafting and at worst, an opportunity for challenge wherein it could be argued that these insertions were necessary and purposeful and therefore, its exclusion in other contexts is telling.

This concern is borne out by the recent Supreme Court decision of *A, B & C v The Minister for Foreign Affairs and Trade & Ors*.[220] This case relates to the proper interpretation of section 7(1) of the *Irish Nationality and Citizenship Act 1956* (the 1956 Act). The section provides that a "*person is an Irish citizen from birth if at the time of his or her birth either parent was an Irish citizen or would if alive have been an Irish citizen*". The issue was whether a person had to be the parent of the child or an Irish citizen at the time of the child's birth.[221] Within the course of this judgment, the Supreme Court had cause to consider whether the reference to "parent" in section 7(1) included non-genetic parents. In determining this, it relayed the key provisions of both the retrospective and prospective frameworks of parentage under the 2015 Act; the prospective framework applying from birth.

While the Court determined that the UK parental order (following a surrogacy agreement) granted to the respondents (to the appeal) should be recognised in Ireland,[222] it further held that such recognition does not necessarily mean that a parent recognised under foreign law is a parent in all Irish legislative contexts: *"[w]hether or not they do depends on the proper construction of the relevant provision."*[223] In referring to *Heather Hill Management Company v an Bord*

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[218] Section 157 substitutes the definition of parent to the following: 'parent'— (a) in relation to a donor-conceived child, means the parent or parents of that child under section 5 of the Children and Family Relationships Act 2015, and (b) in relation to a child born as a result of AHR treatment provided pursuant to (or for the purposes of) a surrogacy agreement, means the parent or parents of that child under section 64 of the Act of 2022."

[219] For example, the 2015 Act amended the definition of the 1964 Act to mean: a mother and father as defined under the 1964 Act and, in relation to a donor-conceived child, the parent or parents of that child under section 5 of the Act of 2015. Section 2 of the Parent's Leave and Benefit Act 2019 defines "relevant parent" in terms of both a parent and a parent under section 5 of the 2015 Act. Section 3 of the Adoption Act 2010 (the 2010 Act) defines father as including a man who is a parent under section 5 of the 2015 Act. These would all seem superfluous. Furthermore, while there is no definition of parent of a donor conceived child in the *Succession Act 1965,* any relationship between a donor conceived child and their parents must be determined in accordance with section 5 of the 2015 Act. Section 4A(1A) of the Succession Act 1965. This provides that a child will not inherit from a donor and will be entitled to inherit from a section 5(1)(b) parent. This is a duplication of section 5(4) of the 2015 Act and appears to be redundant if not to set the 1965 Act apart from others.

[220] [2023] IESC 10.

[221] It was determined by the High Court that it had two interpretations, one in which the parent of the child had to be a parent at the time of the child's birth (the State's position) and one in which the parent of the child had to be a citizen at the time of the child's birth (the applicant's position). Given that there was more than one interpretation, the Court had to determine what the purposive interpretation would be; what was the intention behind the legislation, through use of the double construction rule.

[222] *Ibid* at paragraphs 65, 71.

[223] *Ibid* at paragraph 72.

Pleanala,[224], it held that "*language, context and purpose are potentially in play in every exercise in statutory interpretation*.[225] The Court, in considering how common law recognised only genetic paternity and the evolution in reproductive advancements only in the late twentieth century, found that the ordinary rules of interpretation would dictate that section 7(1) "*did not contemplate non-biological legal parentage*".[226] In referring to *MR,*[227] and *X v Minister for Justice and Equality,*[228] it held that the relationship between parent and child for the purposes of citizenship was based on the blood relationship, *jus sanguinis.*[229] It held that section 7(1) uses:

> "*the term 'parent' in its biological or genetic sense, and was not intended to include persons whose status as parents derives solely from legal provision and/or court order nor, for that matter, does it extend to* de facto *or social parent/child relations*".[230]

The Court's ultimate finding was that section 7(1) only applies to the genetic father and the birth mother despite the existence of the prospective DAHR framework of parentage wherein a declaration of parentage is available, but not necessary, under section 35 of the 1987 Act. This conclusion is particularly difficult to accept, given the Court's own rejection of the applicants' argument that a child is only entitled to the Irish citizenship of its genetic father once a declaration pursuant to section 35 is made. It held, "*in that situation, the child was always an Irish citizen, the effect of the declaration of parentage being to establish that this was the case"*.[231] The same can be said of the prospective framework of the 2015 Act wherein compliance with the framework, without a declaration of parentage, allows for the registration of a section 5 parent on the child's birth certificate without a court order, based on compliance with the 2015 Act.[232] The Court held that *"all s.5 of [the 2015 Act] shows is that the Oireachtas could, where it felt it appropriate so to do, expressly*

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[224] [2022] IESC 43.

[225] *A, B & C v The Minister for Foreign Affairs and Trade & Ors* [2023] IESC 10 at paragraph 73. It held that "*the starting point in the construction of a statute is the language used in the provision under consideration, but the words used in that section must still be construed having regard to the relationship of the provision in question to the statute as a whole, the location of the statute in the legal context in which it was enacted, and the connection between those words, the whole Act, that context, and the discernible objective of the statute. The court must thus ascertain the meaning of the section by reference to its language, place, function and context, the plain and ordinary meaning of the language being the predominant factor in identifying the effect of the provision but the others always being potentially relevant to elucidating, expanding, contracting, or contextualising the apparent meaning of those words."*

[226] *Ibid* at paragraph 76. The Court did stress that the question of whether parent includes the genetic mother was not before the Court. In addition, "*[w]hile I refer throughout the judgment to the provision as including the 'birth mother' this merely reflects the arguments advanced by the Minister. Those references should not be understood as a finding that the provision is exclusively concerned with the 'birth mother' to the exclusion of the genetic mother*", at footnote 13.

[227] *MR & DR v an tArd Chlaraitheoir* [2014] 3 IR 533.

[228] [2020] IESC 30.

[229] *A, B & C v The Minister for Foreign Affairs and Trade & Ors* [2023] IESC 10 at paragraph 77.

[230] *Ibid* at paragraph 93.

[231] *Ibid* at paragraph 94.

[232] A certificate under section 27(5) of the 2015 Act must be present to the registrar – section 19A of the 2004 Act.

align parenthood as envisaged by that Act with other legislative provisions (emphasis added)."[233]

Therefore, notwithstanding the fact that the 2015 Act prescribes:

1) that section 5 parents shall have all parental rights and duties in respect of their child, and
2) that the donor shall not be considered a parent for the purposes of any reference to a mother, father, or parent in any enactment, and
3) a prospective framework where DAHR parentage arises from birth,

the effect of this judgment is that, because the 2015 Act did not expressly interact with the 1956 Act, donor conceived children are not deemed entitled to their section 5(1)(b) parent's citizenship. It is argued that the Court's reference to "*expressly align",* corresponds to the selective insertion of definitions of parents of donor conceived parents in some enactments, but not others. The Court found that the 1956 Act is not specifically referenced in the 2015 Act, unlike the 2015 Act's amendment of the 2010 Act.[234] The Court negated the existence of a standalone framework of parentage that applies from birth, notwithstanding the lack of a biological link, despite finding that it would be difficult "*to envisage a legitimate or proportionate basis on which the State could constitutionally introduce legislation seeking to draw a distinction in respect of children born through surrogacy in the context of citizenship*".[235] It is argued that there is similarly no reason why donor conceived children should be treated differently, or as here, presumed to have been treated differently. The impact is a severe limitation on the rights of section 5 parents to the contexts of parental leave, adoption, guardianship, birth registration and succession only. If the Court's reasoning is followed, it cannot be presumed that any piece of legislation, predating 2015, had envisioned DAHR parentage without evidence of direct interaction, despite the explicit vesting of all parental rights and responsibilities in section 5 parents.

Conclusion

This Chapter sought to examine the concepts of parentage and guardianship, how they currently operate and how the introduction of non-biological ties through DAHR and more inclusive provisions inserted by the 2015 Act have affected these concepts. It is evident from this Chapter that the access of intending parents to full parental recognition depends as much on the drafting of the legislation as it does on the substantive policies held by the sponsoring governmental department and wider legislature. It is also argued that many of the key issues arising from the legislation are seemingly unintentional and that the underlying understanding of parentage and guardianship law as a whole is somewhat fragmented in the age of AHR. The most pressing conclusions arising from this Chapter are that children born through surrogacy in particular are in a precarious legal position with regards to the grounding decision making that arises from their genetic father's guardianship. This is all the more concerning in light of the position of the female genetic link in both

[233] *A, B & C v The Minister for Foreign Affairs and Trade & Ors* [2023] IESC 10 at paragraph 97.
[234] *A, B & C v The Minister for Foreign Affairs and Trade & Ors* [2023] IESC 10 at paragraphs 40 - 41.
[235] *Ibid* at paragraph 110.

parentage and guardianship which, at worst, is set at nought, and at best, requires a reconsidered application to be made to the Court in line with the arguments set out in this Chapter. The child in Irish law requires legislative frameworks to be introduced that tackle the primary welfare and relational contexts that are impacted by emerging family formations and reproductive technologies. At present, there is no sufficient clarity or understanding of the nuance of this legislative context.

Chapter 2: The Donor Assisted Human Reproduction Framework

Introduction

As noted in Chapter 1, the practice of DAHR, and the corresponding legal framework under the 2015 Act, monumentally shifted the pathway to parentage that has long since existed in Irish law and facilitates the recognition of legal parentage between caregivers and children beyond the "nuclear", or "natural", family. Notably, parentage can now be created and shared within female couples and individuals are no longer excluded from a pathway to parentage by virtue of their inability to produce their own gametes. In DAHR under the 2015 Act, it is uniquely the position that the historically recognised "default" parentage based on the genetic link no longer arises. With this break in tradition, comes the variations in the balancing of rights and interests of those involved. Therefore, the framework would be expected to set out a best practice model as guidance for intending parents and prevent the assignment of a legal status to donors who have abdicated their responsibilities and abrogated their rights. As mentioned in Chapter 1, the 2015 Act contains an assessment of the child's best interests but only as an additional requirement, not as the overall paramount consideration, as Article 3 of the Convention on the Rights of Child would dictate. Notably, this best interests assessment attaches only to the retrospective declarations of parentage, whereas the prospective declarations pursuant to section 35 of the 1987 Act contain no assessment of the child's best interests at all. This trenchant enforcement of each criterion therefore calls for a slightly skewed analysis of the 2015 Act, whereby the examination of the DAHR framework arises not in the context of whether the various criteria constitute best practice as a holistic framework, but rather, whether the refusal to grant a declaration of parentage due a lack of compliance with any one individual criterion, is in the child's best interests. This Chapter will therefore consider any wholesale exclusions of intending parents from the legislation based on the method or manner of the conception of the child. It shall also consider the legislative workarounds available for persons who fall outside of the DAHR framework, and whether they are sufficient to serve the best interests of the child. Finally, this Chapter will consider the views of participants in the O'Connell study and their experience in conceiving a child through donor conception.

The New System of Donor Assisted Human Reproduction

The 2015 Act sets out extensive requirements for the intending parents, the donor, and the operator of the DAHR facility. Failure to comply with the provisions will result in the judiciary having no alternative but to refuse intending parents their declarations of parentage, even where mistakes or circumventions of the framework result from the action or inaction of the operator, as opposed to the intending

parents.[1] This has a number of concerning implications. Firstly, the child will have a parental caregiver who has no legal rights in respect of them and in respect of whom they cannot inherit or claim citizenship. Secondly, the intending parent may not be able to access social welfare benefits or parental leave for the financial benefit of the child, cannot make urgent medical decisions for the child if the intending mother is incapacitated, and at the more extreme end of the scale, may not leave an unhappy home in the absence of legal recognition thereby potentially exposing the child to domestic violence. Thirdly, if the donor remains the legal parent in Irish law, they remain liable for maintenance, and such a donor, if chosen from a cryobank is likely to be prospectively identifiable, but otherwise unknown to the child for the purpose of service of proceedings. Therefore, it is argued from the outset that a refusal to grant a declaration of parentage should only be ordered where it is not otherwise in the child's interests to make the order, having regard to the circumstances as a whole and the far-reaching consequences of such a refusal. However, without prejudice to the generality of this argument, it remains necessary to examine the criteria in order to determine whether such an absolutist approach could be in the best interests of every child on a uniform basis.

The DAHR procedure

The first key definition under the 2015 Act is the DAHR procedure which must be performed in a DAHR facility,[2] by a registered medical practitioner or a registered nurse,[3] and in the State where the resulting objective is the implantation of an embryo in a consenting woman's womb. The procedure must involve an egg donation, sperm donation or both. The procedure cannot be performed without the collection of certain identifying information from the donor and intending parent,[4] and without the necessary consent.[5] The operator is under an obligation to ensure proper acquisition of donation and corresponding information, proper consent of all

[1] Compliance is proven under the 2015 Act through the provision of declarations of the parties affirming the fact that the pre-requisites were met, the information within the secondary registers as well as the Minister's power to require the operator of a DAHR facility to provide them with any information they require to determine that the operator is in compliance with their obligations (section 29). The Minister may also appoint authorised persons for the purposes of ensuring such compliance (section 30(1)). Such persons may enter and inspect a DAHR facility, require the operator or person in charge to provide them with information or assistance and take, inspect, and retain copies of any books, records, or other documents that they deem necessary for the purposes of their functions (section 31). A person who fails or refuses to comply with a request or requirement of the authorised person or, if they obstruct or interfere with the exercise of their powers, they will have committed an offence and would be liable upon conviction to a class A fine or a maximum term of imprisonment of 12 months (on summary conviction), or a maximum fine of €70,000 or a maximum term of imprisonment of 2 years (on conviction on indictment)(Section 31(5), (8)). Where the Minister is satisfied that the operator of a DAHR facility is not in compliance with their obligations, they may apply to the Circuit Court for an order prohibiting or restricting the performance of DAHR procedures at the DAHR facility, until such time as they comply (section 32).

[2] Donation facility is a place where a person provides or donates their gamete and includes a DAHR facility.

[3] Section 25(1) of the 2015 Act.

[4] Section 24(1), 26(1) of the 2015 Act.

[5] Section 26(1) of the 2015 Act, this consent is either section 6 consent or where, the gamete is acquired from outside the State, the donor has consented to the use of the gamete in a DAHR procedure, where that consent is substantially the same as section 6 consent.

parties and to inform all parties of the implications of their various actions under the 2015 Act.[6] They are also responsible for retaining the written consents, a record of any revocations of such consent and any information acquired or obtained in respect of the donor and intending parents.[7]

Intending Parents

An intending mother is a person who requests a DAHR procedure for the purposes of her becoming the mother of the donor conceived child. An intending parent includes an intending mother and is a person who intends to be a parent of a donor conceived child under section 5 of the 2015 Act. A donor-conceived child is a child born in the State after 4 May 2020 (the date of commencement) as a result of a DAHR procedure or, a child in respect of whom a section 21 or 22 declaration has been made. There is no definition of parent or father within the 2015 Act, but "mother" is defined as the woman, as opposed to the person,[8] who gives birth to the child. Section 5 of the 2015 Act provides that the parents of a donor conceived child are their mother and her spouse, civil partner, or cohabitant.[9] A person who is not cohabiting with the child's mother and is not married or in a civil partnership with her, such as a platonic co-parent, cannot be an intending parent.[10] Both intending parents must be at least 21 years of age, have received specified information and have made a declaration before the DAHR procedure is performed in the presence of a person authorised to do so by the operator.[11] This declaration must include a prescribed list relating to the confirmation of their receipt of certain information, consent to the provision of information to be provided to the child and the mother's agreement to inform the operator of the outcome of the pregnancy.[12] The declaration must also state that they understand that the donor is not the parent

[6] Section 13 of the 2015 Act.

[7] Section 28 of the 2015 Act.

[8] Despite the UK judgment of *TT* [2020] EWCA Civ 559 wherein the President of the Family Division held that "mother" is no longer a gender specific term, the definitions remain exclusive of transgender men. For further discussion see: A. Margaria, "Trans Men Giving Birth and Reflections on Fatherhood: What to Expect?" (2020) 34 *International Journal of Law, Policy and The Family* 225. See also more broadly in relation to the AHR Bill, L. Bracken, "The Normative Underpinnings of Ireland's Proposed Regulation of Assisted Human Reproduction" (2022) 36(1) *International Journal of Law Policy and the Family* 1.

[9] A cohabitant is defined by section 172 of the CPCROCA as two adults living in an intimate and committed relationship who are not married to each other, civil partners or related to each other within the prohibited degrees of relationship.

[10] For a detailed exploration of the reasons people enter into such co-parenting arrangements, see: S. Bower-Brown, S. Foley, V. Jadva & S. Golombok, "Grappling with Tradition: the Experiences of Cisgender, Heterosexual Mothers and Fathers in Elective Co-Parenting Arrangements" (2023) *Journal of Family Studies* 1. Within this study, the authors detail that "*deciding to co-parent could be challenging, as participants renegotiated their ideas of what families looked like, but also liberating, in allowing them to fulfil their parenting desires and ideals outside of a romantic relationship*", at page 15. However, they concluded that "*although co-parenting was generally a second-choice route to parenthood, participants aimed to approach co-parenting in a considered manner, choosing co-parents based upon shared values and managing their relationships with trust and friendship*", at page 19.

[11] Sections 9(1), 11(1) of the 2015 Act.

[12] Section 9(3), 11(3) of the 2015 Act.

and that they will be the mother and parent of the child. Such a person may also revoke their consent before the performance of the DAHR procedure.[13]

The Donor

In the 2015 Act, a donor is defined as a person who has consented to their gamete being used in a DAHR procedure. Such consent is prescribed within the 2015 Act.[14] The donor must be at least 18 years of age, have received specific information in a specified manner by the operator of the DAHR facility and sign a declaration to this effect. Before a donor makes their declaration, the operator of the clinic must inform them of a specified list of information including the child's access to the donor's information, their entitlement to seek the child's information, that they shall not be the parent of the child and that they can revoke their consent before their gamete is used.[15] Such a donor must also provide their identifiable information for the purposes of its registration with the National Donor Conceived Persons Register (NDCPR) and consent to its release to the child upon their reaching the age of 18.[16] The donor must understand and consent to the fact that they shall not be a parent of the child by virtue of the donation,[17] notwithstanding the fact that this consent is not what negates their parentage, the subsequent declaration of parentage is.

Analysis

From the criteria set out above, there is very little that could be considered controversial within the DAHR facility process itself, which is based on informed consent, the collection and registration of identifying information and medical oversight. However, as noted above, where there is no judicial discretion is relation to the declaration of parentage in respect of minor oversights, each criteria should be subject to the strictest scrutiny. For example, the age of an intending parent being 21 is questionable, given that the age of consent for medical treatment is 16

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[13] Sections 10, 12 of the 2015 Act.

[14] Such consent must either be provided in compliance with section 6 or section 26(1)(1)(b)(ii). Under section 6 of the 2015 Act, a donor must be 18 years of age, have received the information referred to in section 7 and have made a declaration. This written and dated declaration must be made before the donation and signed in the presence of a person authorised by the operator of the donation facility where the gamete is provided. The declaration shall include statements to the effect that the donor has received the information referred to in section 7, that they consent to the gamete being used in a DAHR procedure, that they understand their information shall be retained by the DAHR facility and may be made available to the child and that they understand that they shall not be a parent as a result of the DAHR procedure involving his or her gamete. Section 26(1)(b)(ii) of the 2015 Act provides for the consent of a donor from outside the State where the consent procedure is "substantially the same" as that provided for in section 6 of the Act. There is also separate provision for gametes donated before 4 May 2020 under section 26(5) which will be discussed in Part 2. There are also corresponding consent provisions for embryo donation under sections 14, 16, 26(1)(b)(ii) and 26(6).

[15] Sections 7, 8 of the 2015 Act.

[16] Section 7(b)(ii), 35 of the *2015 Act.* Section 24(3) provides that the information provided shall be his or her name, date and place of birth, nationality, the date the gamete was donated and contact details.

[17] Section 7(b)(i) of the *2015 Act.* Section 5(5) of the 2015 Act explicitly provides that a donor of a gamete or an embryo is not the parent of the child as a result of the procedure and has no parental rights or duties in respect of the child. Section 6(3)(d) of the 2015 Act also provides that the donor is aware that he or she shall not be the parent of any child born as a result of a DAHR procedure.

years of age for a person considered to have decision-making capacity.[18] The cohabitation requirement may run into difficulty with Article 8 of the European Convention on Human Rights which extends the right to respect for family life to non-cohabiting couples.[19] Furthermore, a strict requirement to adhere to prescribed criteria can result in costly and perhaps unnecessary legal proceedings such as in 2017, when the President of the UK Family Division, Sir James Munby, was faced with 34 parental order applications,[20] where all of the requirements of the UK framework were met by the intending parents, except the consent form had not been filled out correctly. As each party believed they had signed the forms as legally required, each parental order was awarded, as a matter of judicial discretion, which is again, notably absent from the 2015 Act. Furthermore, it should be noted that legal advice is not a pre-requisite to any donor providing what constitutes informed consent. There is nothing in the 2015 Act that suggests that donors are being placed on alert as to the possibility that the strict compliance of every other individual involved is what will determine whether they become a father or a donor in Irish law.[21] As the Supreme Court has recently held, "*parties cannot change or seek to confer status simply by placing a different label on that status in the course of a contractual document which they have mutually executed*".[22] The fact that a donor consents not to be a parent of the child, is not determinative of the matter and this oversight could arguably call into question the "informed" aspect of the consent provided. Indeed, Molas and Whittaker have also called into question the extent to which donors are informed about the long term impacts of donation, albeit focusing more on egg donors, than donors generally.[23]

However, ultimately, this thesis is not concerned with the existing framework insofar as it is a process based step by step best practice guide to DAHR within a clinic. The primary issue is the lack of judicial discretion and the absence of the paramountcy

[18] Health Service Executive, "National Consent Policy" (December 2022) at page 45, and section 23 of the *Non-Fatal Offences Against the Person Act 1997* provides a defence based provision for medical practitioners who offer medical, surgical or dental treatment to a patient over 16 years of age.
[19] *Oliari v Italy* Application no. 18766/11, 21 October 2015. The Court held that cohabitation was no longer a required factor in establishing a stable and committed relationship, stating that "*in the globalised world of today various couples, married or in a registered partnership, experience periods during which they conduct their relationship at long distance, needing to maintain residence in different countries, for professional or other reasons. The Court considers that that fact in itself has no bearing on the existence of a stable committed relationship and the need for it to be protected*", at paragraph 169.
[20] *Re AD, AE, AF, AG, AH* [2017] EWHC 1026 (Fam). Munby J stated that "*although I am acutely conscious of the stress, worry and anxiety burdening all the parents in these cases, and of the powerful human emotions that are inevitably engaged, each of these cases is, in terms of applicable legal analysis, straight forward and simple*".
[21] See: V. Jadva, T. Freeman, W. Kramer & S. Golombok, "Sperm and Oocyte Donors' Experiences of Anonymous Donation and Subsequent Contact with their Donor Offspring" (2011) 26(3) *Human Reproduction* 638. In this study, while 44.1% of sperm donors reported wanting to see the child but not being able to, 29.4% had concerns about the child contacting them and 26.5% feared legal changes that may lead to their identification. Therefore, it would appear evident that a clear demarcation between legal father and donor must take place for donors to feel safe in their choices.
[22] *Adoption Authority v C & D & Ors* [2023] IESC 6 at paragraph 48 (Hogan J).
[23] A. Molas & A. Whittaker, "Tempting Luck: Temporalities and risk Anticipation among Egg Donors in Spain" (2023) *Science, Technology & Human Values* 1-25.

principle. It is argued that such a principle does not insist upon, or prejudge, a particular outcome. In this regard, the Supreme Court has held that "*the best-interests guarantee contained in Article 42A is not to be seen as some form of interpretative Trojan horse which can undermine the intent of the Act*".[24] The purpose of the principle is not to undermine the requirements of the Act; however, it allows a judge to put a particular child front and centre in determining whether the declaration of parentage should be granted. Judicial discretion acknowledges that families do not lend themselves well to regulation and at the centre of the decision is a child who at times cannot advocate for themselves within the legal system and had no part in the circumstances which arose around them. As Ryan has convincingly argued:

> *"Families by their very nature do not easily lend themselves to legal regulation. The very idea that family formation can be marshalled by the law is itself highly problematic. Families are intrinsically organic and dynamic entities, expanding and contracting over time, founded on, enriched by and in some cases destroyed by emotions and sentiments that escape legal regulation and confinement."*[25]

Furthermore, within family law, where an applicant establishes their standing to make the application, generally by virtue of parentage or care periods, the Court has ultimate discretion in awarding guardianship,[26] custody,[27] access,[28] maintenance,[29] domestic violence orders,[30] points of welfare relating to the child,[31] adoption orders,[32] care orders,[33] orders relating to qualified cohabitants,[34] spouses,[35] civil partners[36] and so on. The absence of discretion in this context inhibits the Court from making the declaration of parentage where the process was ethical, caused harm to no one, recognised the autonomy of each adult and was ultimately in the best interests of each child.

The Exclusionary Nature of the DAHR System

Aside from the absence of judicial discretion, however, there are key exclusions of intending parents from the DAHR framework, and these shall be explored in turn. At the outset, it should be noted that there is only one published study in Ireland that

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[24] *G v North Area Health Board* [2018] IESC 30 at paragraph 113-114.
[25] F. Ryan, "Out of the Shadow of the Constitution: Civil Partnership, Cohabitation and the Constitutional Family" (2012) 48(2) *the Irish Jurist* 201 at 201.
[26] Section 3, 6A, 6C, 6E, 6F of the 1964 Act.
[27] Section 3, 11(2), 11E of the 1964 Act.
[28] Section 3, 11(1), 11B of the 1964 Act.
[29] Section 5, 5A, 5B, 5C of the 1976 Act, section 11(2)(b) of the 1964 Act.
[30] Section 5, 6, 7, 8, 9, 10 of the Domestic Violence Act 2018.
[31] Section 3, 11 of the 1964 Act; section 3, 47 of the Child Care Act 1991.
[32] Section 19, 31, 54 of the 2010 Act.
[33] Section 13, 17, 18, 19, 24 of the Child Care Act 1991.
[34] Section 172, 173, 174, 187, 196A of the CPCROCA.
[35] Section 12, 13, 14, 15, 16, 17, 18, 19, 20 of the Family Law (Divorce) Act 1996; section 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 23 of the Judicial Separation and Family Law Reform Act 1989.
[36] Section 45, 108A, 117, 118, 119, 121 of the CPCROCA.

has assessed the level of coverage families obtain from the 2015 Act, conducted by Dr Lydia Bracken.[37] This study was conducted only in respect of LGBT+ parents; however, as mentioned above, opposite sex couples can avail of the presumptions of paternity and therefore, their need to comply with the DAHR framework is considerably lessened.[38] Within this study, a survey of an estimated 195 parents was conducted. Of the responses, 67% had availed of DAHR.[39] Within this 67%, 65% stated that they are the legal parent of all of their children; however, only 50% of respondents indicated that both they and their partner were the legal parents of their children.[40] Of the respondents, 18% stated that they were not eligible to apply for a declaration of parentage despite the introduction of the 2015 Act, and a further 15% noted that they had not applied.[41]

The first exclusion within the 2015 Act is of all gay men who wish to have a child with their partner; however, this results from the nature of DAHR revolving around the inclusion of a gestational link amongst the intending parent(/s). Therefore, gay men require a framework on surrogacy, and this shall be discussed in detail in Chapter 3.

Commercialisation of Gamete Donation

The second exclusion is persons who provide payment in exchange for donations. Under the 2015 Act, the consent of the donor shall not be valid where it is given in exchange for financial compensation in excess of the "*reasonable expenses associated with the provision of the gamete concerned or the giving of consent under that section*".[42] In this section, which covers DAHR procedures only, reasonable expenses include travel costs, medical expenses and any legal or counselling costs.[43] The difficulty with this provision is that Ireland does not have its own sperm or egg bank. All of the sperm used in Ireland is imported mostly from foreign sperm banks

[37] L. Bracken, *LGBTI+ Parent Families in Ireland: Legal Recognition of Parent-Child Relationships* (University of Limerick, 2021)

[38] It is acknowledged that opposite sex couples who require an egg donation will require clinical intervention and will thereby be in "the system" and could not be said to then avail of presumptions where they otherwise do not comply with the 2015 Act.

[39] However, it should be noted that "some confusion as to legal terminology was observed in the survey responses. For example, the section on donor-assisted human reproduction (DAHR) included a definition of that term and specified that 'Surrogacy does not come within this definition. If your child was born through surrogacy, please select "no" to the first question on DAHR below to skip to the next section.' Still, 31% of parents through surrogacy selected 'yes' to indicate that their child had been conceived through DAHR when, in fact, this was not the case. This suggests that there is some uncertainty regarding the applicable legal terminology among some parents.", L. Bracken, *LGBTI+ Parent Families in Ireland: Legal Recognition of Parent-Child Relationships* (University of Limerick, 2021) at page 16.

[40] *Ibid* at page 22.

[41] *Ibid* at page 23. 6% of respondents did not specify.

[42] Section 19 of the 2015 Act.

[43] Section 19(3) of the 2015 Act.

located in Denmark and the European Sperm Bank.[44] These cryobanks are commercial in nature and therefore compensate their donors, which, if the 2015 Act is to be followed, would exclude all sperm donors available through cryobanks. Furthermore, it is understood from three participants in the O'Connell study that egg donation from the UK costs approximately €1,000 each.[45] This prohibition on payment is therefore in conflict with section 26(1)(b)(ii) of the 2015 Act which provides for the use of donors from outside the State where the consent procedure is "substantially the same" as that provided for in section 6 of the Act. Not only would these clinics have to provide for a similar procedure as has been laid out in the 2015 Act in terms of information, declarations, and registration, but they would also have to stop compensating their donors. This in turn requires the intending parents to use the sperm of altruistic foreign donors or men who are known to them and who would be willing to donate their sperm without payment.

The prohibition against payment for donations has also been the source of frustration amongst those who have carried out this practice for years, namely the Irish clinics themselves.[46] However, there may be a justifiable basis for the prohibition. Schenker argues that there are three main reasons to prohibit the payment for gametes. The first is that an increase in cost would exclude less wealthy intending parents from participating in AHR. The second is that it could follow that sperm donors with "high-demand characteristics" would be better compensated, thus, essentially marketing specific genetic or immutable characteristics. Finally, he

[44] Sims IVF state that the majority of sperm that they use is obtained from a Danish donor bank, mostly students from institutions of higher education. - https://www.sims.ie/fertility-treatments-services/donor-program/using-donor-sperm-faqs-what-you-need-to-know The Merrion Fertility Clinic states that it imports frozen donor sperm from two banks: Cryos Denmark and the European Sperm Bank. - https://merrionfertility.ie/donor-sperm-service/. Similarly, the Beacon obtains its sperm from the European Sperm Bank and while it offers intending parents the option of using known sperm donation, it notes it can only do so in one of their partner CARE fertility clinics in the UK (which would bring the intending parents outside of the scope of the 2015 Act) - https://www.beaconcarefertility.ie/treatments-services/donation/donor-sperm/, Section 4 of the 2015 Act defines a DAHR procedure in terms of any procedure performed in the State.

[45] Molas and Whittaker have also detailed how egg donors in Spain receive around €1,100 in cash per successful donation, "*and while the law on assisted reproduction states that it will strictly compensate physical inconveniences and expenses related to mobility and work (Law 14/2006), on the ground, the amounts are fixed, established by the clinics, with no justification needed*". A. Molas & A. Whittaker, "Tempting Luck: Temporalities and risk Anticipation among Egg Donors in Spain" (2023) *Science, Technology & Human Values* 1-25 at 2.

[46] Joint Committee on Health Debate, 17 January 2018, *General Scheme of the Assisted Human Reproduction Bill 2017: Discussion*. See comments made by the Chairman, Ms Geraldine Luddy and Dr Tony Holohan. In the following debate: Joint Committee on Health Debate, 28 February 2018, *General Scheme of the Assisted Human Reproduction Bill 2017: Discussion (Resumed),* Dr John Waterstone commented that the absolute ban on anonymous gamete donation and the ban on payment of any sort of financial compensation to donors, along with the provision to inform the child of identifying information regarding their donors against their parent's wishes is an "*unacceptable degree of coercion and is unconstitutional*". He continues, "*donor egg and sperm treatment are good things. They allow couples who would otherwise never have been able to enjoy the fulfilment of family life to have children and, as they are good things, we need to facilitate the process. We feel that in order to do so, some degree of slight financial compensation is allowable and justifiable for the donors concerned*". He also commented that he believed Parts 2 and 3 of the 2015 Act to be regrettable and a result of a lack of appropriate oversight in the Department of Justice and Equality.

posits that payment may incentivise higher numbers of donation with a corresponding overall lower level of understanding of the implications of donation.[47] It is argued that there are corresponding safeguards that could be imposed to offset these concerns, the first being the introduction of public funding for AHR treatments, the second is a set fee regardless of characteristics and the third simply requires further prerequisite informational sessions and other explanatory consent forms prior to donation. Furthermore, it is suggested that where AHR treatments can range from €800.00 - €9000.00 in Ireland, the additional couple of hundred for sperm donation is not what costs people out of the process. This prohibition would also appear to exclude online purchases of gamete donations;[48] however, the direct aspect of this purchase to the intending parents, as opposed to the DAHR facility would, in any event, exclude intending parents from the 2015 system.[49] Even if the intending parents procured the gamete and presented them to the DAHR facility, the DAHR facility would be unable to carry out its obligations in respect of informing the donor and requiring their declaration and will be unable to verify the similar consent process required under section 26(1)(b)(ii).

Therefore, only very limited options are available to the intending parents, namely male friends, family members or acquaintances who are willing to donate their sperm – "known donors". This could potentially lead to a situation similar to that of the Supreme Court case, *J McD v PL & BM*[50] where a male acquaintance of a lesbian couple made a written agreement that he, as the donor, would act as a favourite uncle and not in a parental role. Following the birth of the child, he sought more and more access which was resisted by the couple. The gestational mother then became unwell and wished to travel with her partner and their child to Australia. McD sought to block this travel and sought guardianship of the child. The Supreme Court, while refusing his guardianship application, remitted the matter to the High Court who eventually granted him access despite the child being extremely young and the absence of any attachment between the child and McD. While McD did not have decision-making rights, it is evident from the judgment that his interactions with, and attempts to impose himself on, the couple became quite unwelcome and

[47] J. G. Schenker, "Ethical Dilemmas in Assisted Reproductive Technologies" (De Gruyter, Inc. 2011) at 92-93.

[48] Concerns had been raised by social scientists regarding the use of online donations in terms of the personal, medical, and legal risks of private donation arrangements, without the regulatory protection of a licensed clinic, T. Freeman, V. Jadva, E. Tranfield & S. Golombok, "Online Sperm Donation: A Survey of the Demographic Characteristics, Motivations, Preferences and Experiences of Sperm Donors on a Connection Website" (2016) 31(9) *Human Reproduction* 2082 at 2083. However when the motivations of the donors were assessed, altruism was the most highly rated reason, then procreation, then motivations relating to personal experience or circumstance. Commercial gain was the least important motivation with 49.4% of donors rating this as "not important at all". Some motivations could be questioned, with 48.3% of straight donors preferring natural insemination as their preferred method of conception. However, it should be noted that 94.3% of conception was carried out by artificial insemination. In terms of preparation, most actual donors had engaged in medical screening (87.1%), had drawn up a legal agreement (52.9%), 30% of them had received legal advice and 21.4% had received counselling. 57.6% were open to disclosure, and a quarter of the donors had in fact met their donor offspring and were currently in contact with them; the vast majority of these men being either gay or bisexual men (66.7%).

[49] Section 24 of the 2015 Act.

[50] [2008] ILRM 81.

caused disharmony within the couple's relationship. Whether the donors are known, or unknown, does not affect the negation of their parentage under the 2015 Act; the issue is where the intending parents, or any other party to the process, for reason of mistake, ignorance or even perhaps wilful defiance fall outside of the framework and a contest as to parentage ensues. However, in the absence of judicial discretion, there would be no declaration of parentage available to the intending parents and the known donor could renege on their pre-conception consent, as McD did, and obtain a declaration under section 35 of the 1987 Act, with all the parental rights that arise as a result.

The 2015 Act appears to suggest a process whereby DAHR facilities obtain the donations, and the intending parents choose from their "bank of donors".[51] The use of such donors is in line with the identity release[52] provisions in the 2015 Act whereby parents can apply for non-identifying information under section 34 of the 2015 Act. There would be no need for such a provision if the 2015 Act intended to only avail of altruistic donors known to the intending parents. Therefore, it is submitted that this exclusion was an unforeseen consequence of the provision and an ill-thought through policy choice that should be remedied urgently to ensure that declarations of parentage are not refused due to non-compliance with such a prohibition, or that further non-compliance does not result in a sperm donor parent. In this regard, it is proposed that one remedy could be to include an exception in section 19 to ensure that a donor's consent shall not be deemed to be invalid by virtue of the payment of a nominal fee in addition to such reasonable expenses as defined in section 19(3), where the donation is made directly to the DAHR treatment facility without direct request from the intending parents.[53]

The prohibition on commercialisation is a restriction prospectively, as opposed to retrospectively. No consideration arises within section 21 or 22 as to whether the donor was paid for their donation. Among the DAHR participants within the

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[51] Even after the 2015 Act commenced, clinics describe the process as a hands off approach when it comes to donors. The Merrion Fertility clinic states that personal information about the donor will not be available to the intending parents, only to the donor-conceived person should they wish to contact the donor - https://merrionfertility.ie/donor-sperm-service/. Sims IVF note that "new legislation has been brought in that means donors must be identifiable. This does not mean that you as a parent will receive the donor's identifying information" - https://www.sims.ie/fertility-treatments-services/donor-program/using-donor-sperm-faqs-what-you-need-to-know

[52] This phrase is used to describe programmes within donor banks that are designed to give adults conceived through donor conception the option to learn their donor's identity.

[53] This author has proposed such a provision in a private members bill: The Children and Family Relationships Bill 2023: section 19 (1) Subject to subsection (2), the consent of a donor under this Part shall not be valid where it is given in exchange for financial compensation in excess of reasonable expenses associated with the provision of the gamete concerned or the giving of consent under this Part. (2) The consent of a donor under this Part shall not be deemed to be invalid by virtue of the payment of a fee in addition to such reasonable expenses as defined in subsection (3), where the donation is made directly to a cryobank, as declared by order of the Minister pursuant to subsection (4) or (5) of this section to be a designated cryobank for the purposes of this Part. (4) The Minister may, by order, declare that a cryobank is a designated cryobank for the purposes of this Part. (5) The Minister may, by order, amend or revoke an order under this section (including an order made under this subsection). (6) In this section, 'cryobank' means a bank, located within or outside of the State, which procures, cryopreserves, and makes available a database of, gamete donations for selection by intending parents.

O'Connell study, one mother had paid for her donation but fell within the retrospective framework. The donor of the three remaining DAHR mothers was known to them, as either a family member or friend; neither of whom were paid.[54] However, each of their children are not covered under the 2015 Act by virtue of one or both of the following two categories of exclusions.

DAHR Outside of a DAHR Facility

The next category of intending parents who are excluded from the 2015 Act are those who avail of self-insemination in the privacy of their own homes. The methods for the insemination of sperm into the woman's body include intrauterine insemination (IUI) and intracervical insemination (ICI). IUI is typically carried out in a DAHR facility given that the injection is made into the woman's uterus whereas ICI can be inserted directly into the cervix and is a process that can be carried out at home. IUI can cost from approx. €800.00[55] - €950.00[56] in a clinic and is therefore a costly and medically unnecessary procedure for couples who do not wish to conceive their child in such a sterile environment. This would appear somewhat counter-intuitive in a framework that prohibits payment for donations but yet imposes a requirement to commercialise the conception process. Furthermore, the intending parents have a right to privacy, as well as a right to marital privacy, where applicable, in conceiving a child, or in deciding not to conceive a child. This has previously been held as justification for allowing the use of contraception in *McGee v Attorney General.*[57] In his judgment, Walsh J found that:

> *"the sexual life of a husband and wife is of necessity and by its nature an area of particular privacy. If the husband and wife decide to limit their family or to avoid having children by use of contraceptives, it is a matter peculiarly within the joint decision of the husband and wife and one into which the State cannot intrude unless its intrusion can be justified by the exigencies of the common good…it is outside the authority of the State to endeavour to intrude into the privacy of the husband and wife relationship for the sake of imposing a code of private morality upon that husband and wife which they do not desire".*[58]

While Walsh J refers to "husband and wife", it can be assumed that the same protection applies to same sex married couples in light of the marriage equality referendum, together with the fact that the majority of the Court in *McGee* found the right to privacy to be a right held pursuant to Article 40.3.1, as opposed to

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[54] However, one participant, Ailbhe, described her experience with one clinic, that had sought to assist her and her wife by suggesting that their donor donate to one of the European Sperms Banks so that they could buy it from the bank and import it to the Irish clinic, describing just one example of how the 2015 Act, or its application at least, could be said to prefer procedure over substance.

[55] Price as quoted by Merrion Fertility Clinic, includes planning and coordination, all ultrasound scans and the IUI procedure.

[56] Price as quoted by Sims IVF Clinic, includes monitoring scans, return consult, subscription to Salve App, IUI procedure, pregnancy bloods and a pregnancy scan after seven weeks. The Beacon charges the same fee.

[57] [1974] IR 284.

[58] *Ibid*, at page 312.

Article 41. It is a personal right and not one which requires the individual to be married. Hogan also argues that this privacy "*necessarily extends to decisions in relation to matters of sexual intimacy as well as decisions regarding children*".[59] However, it could be argued that there are child's rights based arguments for requiring the conception of a child born through DAHR to take place in a DAHR facility. The first proposed benefit of the clinic requirement would be that the gamete donations are appropriately screened for genetic conditions or sexually transmitted diseases, as required by the Regulations of 2006.[60] Secondly, it could be argued that the operator of the DAHR facility is a "one-stop-shop" for compliance and direction of the process, including obtaining the identifying information of the donor for the child to access at a later date. In this regard, the Special Rapporteur has stated that the rationale for excluding non-clinical procedures is to ensure the child's right to identity,[61] wherein the operator of the DAHR facility is responsible for collecting and registering this information for the NDCPR.[62] Thirdly, it could be suggested that individuals, left to their own devices, would not be relied upon to comply with the necessary and appropriate safeguards prior to conception. Furthermore, AHR procedures outside of the DAHR facility are intertwined with the commission of online sperm donations.[63]

Bracken has argued, mindful of Article 24 of the Convention on the Rights of the Child,[64] that the child's right to health tips the balance,[65] when considering the

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[59] G. Hogan, "*Re-Examining McGee, Norris and the X Case",* Annual Distinguished Lecture in Law 2020, (NUIG, 3 December 2020). For a video of this lecture, see: https://www.youtube.com/watch?v=lZwSxsn1E6U

[60] The European Communities (Quality and Safety of Human Tissues and Cells) Regulations 2006 (S.I. No. 158 of 2006).

[61] Professor Conor O'Mahony, Special Rapporteur on Child Protection, "A Review of Children's Rights and Best Interests in the Context of Donor-Assisted Human Reproduction and Surrogacy in Irish Law" (2020) at page 12.

[62] *Ibid* at page 13. He has recommended that non-clinical DAHR should not result in a declaration of parentage, where information has not been provided to the NDCPR, but that guardianship should otherwise be immediately available to intending parents, and adoption should be made available in the normal course.

[63] See: V. Jadva, T. Freeman, E. Tranfield & S. Golombok, "Why Search for a Sperm Donor Online? The Experiences of Women Searching For and Contacting Sperm Donors on the Internet" (2018) 21(2) *Human Fertility* 112 wherein participants noted that the benefits of online donation was being able to meet and connect with the donor, fewer costs involved, availability of detailed information, choice of donor, access to genuine donors and access to anonymous donors. However, a third of users noted that there were also disadvantages to using the site with most stating that there were dishonest donors whose motivations were unclear, who did not respond, or who were simply looking for sex. In addition, participants noted that the lack of health checks was another big disadvantage to the site, as was the absence of information about sperm quality, the lack of legal protection, the cost, lack of anonymity and having to manage the vetting process themselves. In terms of identity, only 3% of recipients noted issues in relation to the child such as the availability of information.

[64] This Article sets out that the child has the right to the enjoyment of the highest attainable standard of health.

[65] L. Bracken, "In the Best Interests of the Child? The Regulation of DAHR in Ireland" (2016) 23 *European Journal of Health Law* 391 at 406. However, it should also be noted that Bracken points out the difference of treatment that arises in this regard between same sex and opposite sex couples and has suggested that a presumption of maternity in favour of the second parent would be equitable, albeit querying whether such would only reinforce the primacy of the marital family by seeking to assimilate others to the same ideal, at pages 406-407.

competing interests of conceiving a child within a DAHR clinic and the rights of both parents to their child born outside of a clinic. It is suggested however, that in the first instance, that is somewhat of a narrow view of health whereby a child whose mother experiences incapacity due to, for example, birthing complications, has no other person legally entitled to make decisions in relation to their own health. Such would arguably also hinder the child's Article 24 rights, albeit perhaps more in terms of decision making than provision of service. Furthermore, it is argued that each of the issues noted above can be offset by creating a framework that requires the same core elements for DAHR parentage but on a voluntary, opt-in, basis. The key components which support facilitating parentage are two-fold; the children involved benefit from having legal ties to their caregivers and the intending parents are taking all necessary precautions for the safeguarding of each party's rights and interests. The 2015 Act already allows for the use of donated gametes from outside the jurisdiction where the donor has provided consent in a substantially same manner as those within Ireland. The 2015 Act therefore already recognises that maintaining the substantive elements that render the conception ethical and vindicating of the rights involved is permissible despite such elements not being strictly established by an Irish DAHR facility. A system could be proposed whereby the intending parents can organise gamete screening,[66] organise the delivery of pre-requisite information and the corresponding consents through sworn statutory declarations prior to conception,[67] and voluntarily register the donor's information in the NDCPR.[68] An application could then be made for a confirmatory declaration of parentage to the courts that would ensure the "substantially similar" compliance with the necessary key elements of informed consent and registration of identifying information. Furthermore, it is also suggested that, in the same manner that it is

[66] However, there may be an arguable case that would not require gamete screening. While it is undoubtedly best practice and should be encouraged insofar as possible, it is argued that the absence of such screening should not be reason enough to refuse to grant a declaration of parentage. It is not required in non-AHR conception, and the Regulations of 2006 apply only to clinics.

[67] One suggested argument against the heavy reliance on statutory declarations is that there is no mechanism to register such declarations and intentions. However, it is argued that such declarations have long since been relied on to ground an unmarried father's guardianship when based on the consent of the mother. The lack of a guardianship register was the basis for the application in *O'B (A Minor) v Minister for Justice* [2009] IEHC 423 wherein the Applicant argued that the legal status of the agreement between mother and father is dependent on the preservation of a physical document and if such was lost or destroyed it would be the *de facto* denial to the child of the benefit of their guardian. They contrasted children of married and unmarried children in this regard and the former's ability to rely on the register of marriages. The Court (Peart J) concluded that "*it may very well be the case that the introduction of a public register for guardianship agreements would be a desirable social reform. Whether it is or is not is a matter solely for the executive and the Oireachtas*", at para 7.11. Subsequently, in its parallel report to the Irish reports to the Committee on the Rights of the Child, the Children's Rights Alliance recommended the inception of a guardianship register in light of the six types of guardianship now available under the 2015 Act, Children's Rights Alliance, "Are We There Yet? Parallel Report to Ireland's Third and Fourth Combined Report under the UN Convention on the Rights of the Child" (September 2015) at 51. It is submitted that a similar register could be established and maintained by the AHRRA which is currently proposed by the 2022 Bill.

[68] The proposal in relation to the voluntary registration of identifying information finds support in the Report of Professor Conor O'Mahony, Special Rapporteur on Child Protection, "A Review of Children's Rights and Best Interests in the Context of Donor-Assisted Human Reproduction and Surrogacy in Irish Law" (2020) at page 13.

proposed intending couples will seek pre-approval of a surrogacy agreement prior to conception from the Assisted Human Reproduction Regulatory Authority (the AHRRA), as discussed in Chapter 3, DAHR intending parents could similarly apply for pre-approval of home insemination or conception outside of the jurisdiction to ensure that there is pre-conception oversight.

At Home Conception within the O'Connell Study

It should be noted that of the 18% of the DAHR respondents from within Bracken's study who were ineligible for a declaration of parentage, 60% were ineligible due to conceiving their child at home.[69] Within the O'Connell Study, 50% of DAHR participants were ineligible due to this requirement. The other 50% of participants were mothers who had both the gestational and genetic link to their child. Therefore, the 2015 Act offered no additional protections to the participants.

Ailbhe and Yvonne had a number of unsuccessful attempts within a clinic over a period of a year, and so they decided to perform an ICI procedure at home. They have the child's identifying information, including medical information, and their child has met their donor. Both the birth mother and the donor underwent screening. All parties obtained legal advice. Therefore, it is argued that the lack of pathway to parentage constitutes a severe interference with their reproductive freedoms and the marital privacy that they are constitutionally guaranteed. Their interview demonstrated the double standard at play and the limitations imposed on their harmless reproductive practices:

> *"fertility treatment is for people who have fertility problems…same sex female couples, and the same with same sex male couples, don't necessarily need fertility treatments, they need fertility access. And that doesn't have to happen through private invasive, fertility treatments and medical treatment that's expensive and incredibly invasive and can be painful, and prohibitive…[ICI is] so much more accessible for so many people. It's faster, it's cheaper, and why shouldn't why shouldn't we be able to do it?"*
>
> - Ailbhe (DAHR)

Ailbhe and Yvonne subsequently sought to avail of another DAHR procedure following the commencement of the 2015 Act but this time, through a DAHR clinic. They eventually decided not to proceed to have another child having gone through a year of preparations involving counselling, numerous consultations, blood tests and various other medical examinations. They brought their donor over from his country of residence and he was tested in both countries. She spoke of the impact of an extra year delay in a woman's life in the timely process of reproduction and described being challenged with repeated barriers and hurdles to overcome. When asked if there was anything she would do differently, Ailbhe said:

> *"I would have got to where we got faster and wouldn't have bothered going through all of the medical clinical hoops. Because it was a waste of time."*

[69] L. Bracken, *LGBTI+ Parent Families in Ireland: Legal Recognition of Parent-Child Relationships* (University of Limerick, 2021) at page 24.

- Ailbhe (DAHR)

The exact same position applies to Sandra and her wife, who had two children at the time of interview, one child born to each mother. One child was born pre-commencement of the 2015 Act and the second child was born after. Both mothers made the decision to carry out the insemination outside of a DAHR clinic using a donor who is known to their children. She, her wife, and their children are not covered by the 2015 Act. Similar to Ailbhe and Yvonne, Sandra and her wife knew that they would not be covered by the 2015 Act, but they prioritised their own reproductive choices:

> *"with [my wife], it was about fertility, we just wanted to move as quick as we can on this, you know, the law will just have to catch up. And then with [our second child], we were like, why would we pay for a clinic, if it worked for us, by ourselves, then we don't have to get injections, we don't have to get whatever. And we get to have it in the privacy of our own space…I think it's very possible to have known donor home insemination and still be granted a parental order and [it] not being completely wild west stuff."*
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> - Sandra (DAHR)

Known Donors in Retrospective Declarations

A further exclusion is the use of known donors in cases where the Court is asked to make a declaration of parentage where the DAHR procedure took place prior to May 2020.[70] The 2015 Act in prohibiting donor anonymity prospectively placed a high premium on the child's right to identity yet penalised intending parents who had used a known donor, when there was no framework to adhere to. Furthermore, as a result of the significant delay in commencing Parts 2 and 3 of the 2015 Act, there was actually an incentive to use an unknown donor for the five years and one month between enactment and commencement of the prospective pathway to DAHR parentage. The primary issue with this exclusion is the seemingly mistaken perception which underlies the provision. In preparation for the Joint Oireachtas Committee on International Surrogacy that was established in February 2022, an issues paper was prepared jointly by the Department of Health, Department of Justice, and the Department of Children.[71] This paper stated that -

> "*prior to the 2015 Act, parentage could not be assigned if the gamete donor's identity was known. Prior to commencement of the 2015 Act, Ireland's legal framework did not recognise gamete donation, and therefore if a sperm donor's identity was known, he was considered in law to be the father of the resulting child. This was confirmed by the*

[70] However, it should be noted that the concept of being known or unknown has not been prescribed or publicly elaborated on by the courts; the question is whether "known" relates to the identifiability of a person, future identifiability of a person, or the ability to serve them with proceedings relevant to the welfare of the child

[71] This author is a member of the steering group of the AHR Coalition who were provided with a copy of this Issues Paper. As part of the Coalition's efforts, a meeting was conducted with Department of Health officials in June 2022, one of whom reiterated the sentiment contained in the Issues paper as the basis for the exclusion of known donors in retrospective declarations of parentage.

Supreme Court in the 2009 case of McD v L.*"*[72]

This is incorrect, and the known or unknown nature of the donor was not a point of exploration by the Court in *McD*,[73] which involved a sperm donor who sought guardianship, custody and access of the child born from his donation, when there was no DAHR framework in Ireland. As previously detailed, parentage of the father was based entirely on genetic link. This could not be transferred even if the identity of the genetic father was unknown. Another man could be presumed to be a parent based on marriage to the mother of the child, or birth registration but such presumption does not constitute a transfer.[74] This position is clearly endorsed by a recent Supreme Court judgment which held that "*the man who provides the genetic material from which the child is formed, is, as a matter of law, the father – even if his identity is not known*".[75] Ultimately, this exclusion penalises intending parents who believed that their child having a link to their genetic parent was important, in line with the policies of the prospective "best practice" provisions.

Known Donors within the O'Connell Study

It should be noted that of the 18% of respondents from within Bracken's study who were ineligible for a declaration of parentage, 40% were ineligible due to their having used a known donor.[76] Of the four DAHR mothers that participated in the O'Connell study, the two mothers who did not birth the child were ineligible for a

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[72] Department of Health, Department of Justice, Department of Children, Equality, Disability, Integration and Youth, *Issues Paper on International Surrogacy for Special Joint Oireachtas Committee January 2022* at page 11.

[73] *J McD v PL and BM* [2008] ILRM 81.

[74] This point was made clear in a letter to Minister McEntee by the Assisted Human Reproduction Coalition dated 22 March 2022, - "*Prior to the CFRA, parentage was assigned based on proven biological link or presumed based on registration on the birth certificate or marriage to the mother or accepted with the consent of the mother. The knowledge or lack thereof of the biological father's identity had zero bearing on the assignment of parentage to a third party in the absence of the other criteria. JMcD v PL and BM did not prove anything in relation to identity versus non/identity of the donor…This all occurred at a time when there was no DAHR legal framework. Identification of the sperm donor had nothing to do with it*." Admittedly, this point was made by this author; however, the Special Rapporteur subsequently agreed: "*To claim that McD v L establishes that it would be unconstitutional to retrospectively remove parentage from a known sperm donor (and that by the same token, it would be unconstitutional to retrospectively remove parentage from a surrogate mother) is a complete distortion of the judgment. In the absence of any legislation governing assisted human reproduction at the time of the judgment, the entitlement to parentage flowed solely from the genetic relationship between the father and the child. If an unknown donor were to have become aware of the identity of his child and applied to the courts for a declaration of parentage, he would have been equally entitled to this declaration as an unknown donor,"* at page 2, Professor Conor O'Mahony, "Opening Statement to the Joint Oireachtas Committee on International Surrogacy" (12 May 2022). The Special Rapporteur had previously recommended the removal of this requirement in the context of retrospective declarations of parentage, Professor Conor O'Mahony, Special Rapporteur on Child Protection, "A Review of Children's Rights and Best Interests in the Context of Donor-Assisted Human Reproduction and Surrogacy in Irish Law" (2020) at page 42. This was echoed by L. Bracken, *LGBTI+ Parent Families in Ireland: Legal Recognition of Parent-Child Relationships* (University of Limerick, 2021) at page 38, recommendation 4.

[75] *A, B & C v The Minister for Foreign Affairs and Trade & Ors* [2023] IESC 10 at paragraph 75.

[76] L. Bracken, *LGBTI+ Parent Families in Ireland: Legal Recognition of Parent-Child Relationships* (University of Limerick, 2021) at page 24.

declaration of parentage on account of their having used a known donor.[77] Ailbhe and Yvonne chose to ask Yvonne's brother to be their donor. He has at all times remained available to offer his consent to any legal abdication or transfer of parentage; but there is no pathway for him to do so. Ailbhe and Yvonne were in the very difficult position of conceiving their child after the enactment of the 2015 Act but before the commencement of the relevant provisions, five years later. Therefore, the legislation would have offered them a pathway to parentage had they used an unknown donor (and a DAHR clinic). Despite this, Ailbhe and Yvonne made the choice that was right for them, and their family:

> *"we felt that that decision was in the best interest of our child. You know, the best interests for us would have been to use an anonymous donor, but we felt it was in her best interest to use that donor*."
>
> - Ailbhe (DAHR)

Despite knowing that they wouldn't be covered by the 2015 Act, they nonetheless wished to incorporate a number of safeguards. In addition to the safeguards mentioned above, Ailbhe and Yvonne and their donor made an agreement as to every person's role in their child's life. They detailed how they had several discussions online and in person meetings about boundaries, naming rights, education, health decisions and the language being used. Their donor agreed to relinquish all parental decision making authority which, as Ailbhe and Yvonne detailed, was as much in his interest, as it was their's. In their interview, they spoke specifically of choice, as well as the difference of treatment:

> *"People should be allowed to choose their donor and the state shouldn't be saying you can pick from this list or this list, and no one else is allowed, like that is a ridiculous phenomenon. And if it was applied to the whole of society, it would be an outrageous thing to do. So why should it be applied to our marginalised community?...They [Ailbhe and the donor], should have walked into a clinic, years ago and said we're having trouble getting pregnant, we're married, there would have been no hoops, no anything, it just would have been great, come in when you're ovulating we'll take care of it".*
>
> - Yvonne (DAHR)

Ailbhe and Yvonne's interview demonstrated that there was no benefit to any of the parties, particularly their daughter, in their being denied their joint legal parentage. The same applies to Sandra who, together with her wife, had two children where their friend acted as the sperm donor for all of their children. Sandra, in her interview focused on the positives for her in realising her reproductive choices.

[77] However, the legal protection that would be offered to any partner of Aoife, who is a single mother, would be uncertain. Her child was conceived prior to 4 May 2020, and she had used a donor whose identity will be released once her child reaches the age of 18. Her donor is therefore prospectively identifiable but was unknown at the time of the conception. Arguably, this is a point that could be borne out by the courts given that there is little guidance as to what constitutes "known".

> *"I actually think, this is the best way. I'm so happy with how I chose to create my family…if I was advising other people or something, I'd probably tell them to do the same thing if all being equal, if the law was the same and you would get the same rights; I think this is nearly the preferred way to go. Not everyone's lucky enough to have a donor…that's such a great thing…we're really blessed like to have that, and I think it's better for children."*
>
> - Sandra (DAHR)

Jurisdictional Exclusions

There are two other exclusions which could be referred to as the "jurisdictional exclusions". The first excludes conception that takes place outside of the State but only prospectively. The second excludes children born outside of Ireland, regardless of whether the remainder of the criteria have been met. The first is perhaps the more concerning exclusion given that foreign conception has already been endorsed by the 2015 Act, within the retrospective framework, when performed by a person who was authorised to do so under the law of the place where the procedure was performed.[78] It could be argued that the key difference is the control that is maintained in an Irish DAHR facility that is subject to Irish regulation determined by an Irish legislature. However, again, there is a precedent in section 26(1)(b)(ii) that facilitates the recognition of consent of a donor that is substantially similar, albeit obtained in another jurisdiction. There is therefore an acceptance that even prospectively, "substantially similar" frameworks for key components can be accepted by the Irish courts. Different considerations however arise for the birthplace of the child. While in practical terms, this could appear like quite an unimportant aspect of the process, nonetheless, the birthplace of a child has considerable consequences in terms of the child's birth registration. The 2015 Act annotates the child's birth certificate to reflect that they are a donor conceived child;[79] and this is made available once the child turns 18 and requests their birth certificate.[80] Therefore, Irish birth registration is the basis for the only independent or pro-active mechanism for the disclosure of a child's conception status to them. Such a requirement could not be imposed upon a foreign system of birth registration. This is not to say that foreign births should be excluded from the DAHR framework, and a solution is proposed in the wider discussion on identity in Part 2. Suffice to say that where the Department of Health is intending to create a framework for international surrogacy, whereby children are both conceived and born abroad, as discussed below, it becomes unjustifiable for children born through DAHR to be subject to a difference of treatment.

Bracken in her study has noted that all respondents who engaged in DAHR since the 2015 Act had undergone their DAHR procedures in Ireland.[81] Regardless, she recommends that a mechanism should exist to legally recognise the parentage of a

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[78] Section 20(1)(b)(ii) of the 2015 Act.
[79] Section 39(2) of the 2015 Act.
[80] Section 39(4) of the 2015 Act.
[81] L. Bracken, *LGBTI+ Parent Families in Ireland: Legal Recognition of Parent-Child Relationships* (University of Limerick, 2021) at page 26.

child conceived through DAHR abroad from 4 May 2020.[82] Within the O'Connell study, Sandra and her wife both had their children born abroad. However, given their use of a known donor and at home insemination, this choice was strategic and purposeful. As a result of the lack of legal coverage for at home insemination, the couple were pushed further outside the boundaries of the 2015 act by travelling to Northern Ireland to give birth, in order to avail of the UK legislative framework. This framework presumes that the spouse of the woman who gave birth using DAHR is the mother of the child in law. Both Sandra and her wife were named on their child's birth certificate, which is not available to them in Ireland, across a border and an hour's drive away. Within her interview, Sandra spoke of the possibility of she and her family moving to the UK in order to regularise their family's legal status, if the donor became too involved or if it otherwise became complicated.

Impact of Non-Compliance and Workaround Laws

The 2015 Act has only been commenced relatively recently and most, if not all, applications are made in the District Court and Circuit Court where there is an absence of published judgments. Therefore, there is no public judicial exploration in Ireland of the various circumstances that could arise and whether a *de minimis* approach would be taken to lapses in procedure that could be post-facto corrected or, if not corrected, would not materially have affected the consent or safeguarding of those involved.[83] As mentioned above, the lack of discretion appears to shut down any prospect of intending parents benefitting from any wink-and-nod approach by the judiciary. It seems like the judiciary will have no choice but to apply the non-discretionary, strict approach of the 2015 Act, together with an adherence to the four key exclusions noted above. Creating a legal framework with blanket applications and no discretion will create, and as demonstrated through the O'Connell study, has created rigidity. Taking a protectionist and paternalistic approach will interfere greatly with the legal entitlements of children and the day to day practical realities of many people who simply wish to form a family and care for their children. As Dolgin has argued, as the disruptive potential of AHR technologies become increasingly apparent "*traditional understandings of the family as a universe grounded in inexorable truth begin to fall apart and as a consequence, some profoundly conservative impulse at the centre of culture asserts itself in opposition*".[84] However, Mulligan has cautioned that "*best interests is all too often co-opted as a cloak for the personal views and prejudices of individual judges*" and that more conservative members of the judiciary would opt for more "traditional"

[82] *Ibid* at page 38, recommendation 5.

[83] O'Hanlon, Winder, and O'Reilly note that the first applications under section 21 of the 2015 Act were heard by Judge Colin Daly on the 21 and 22 July 2020 and all 46 applications made were granted. However, it should be noted that such applications are on consent. O'Hanlon, Winder, and O'Reilly, "A Snapshot of Surrogacy in Ireland with a comparative Look at International Practices" (2020) 4(2) *Irish Judicial Studies Journal* 25 at 32.

[84] J Dolgin, "The 'Intent' of Reproduction: Reproductive Technologies and the Parent-Child Bond" (1994 26(4) *Connecticut Law Rev* 1261, 1313, as cited in K. Horsey & S. Sheldon, "Still Hazy after all these Years: the Law Regulating Surrogacy" (2012) 20 *Medical Law Review* 67 at 86.

understandings of parentage if given the chance.[85] The consequences suggested by Mulligan are possible, but without judicial discretion, the exclusion of families from the DAHR framework is certain. It is likely that due to ineligibility, mistake, ignorance, defiance, or omission, intending parents will fall outside the terminology and framework, ultimately resulting in their child being unable to access the full legal recognition of a familial unit, unless judicial discretion is incorporated into the DAHR framework.

Nonetheless, for those that fall outside the legislative framework, it is important to assess what workarounds might be available to them. DAHR encompasses three groups: single mothers, opposite sex couples and same sex female couples. The woman who births the child, in the absence of a contest, will be treated as the legal mother of the child. Therefore, in respect of a single mother who does not provide the genetic link to the child, it is argued that she could break every rule in the framework and be minimally affected as she is presumed to be both the child's parent and guardian unless challenged.[86] Perhaps, once the amendments to the *Civil Registration (Amendment) Act 2014* come into effect,[87] she could experience difficulty when explaining to the registrar that she cannot provide the father's details because he is an anonymous internet sperm donor but technically, there should be no issue with her registration, given that the proposed legislation allows for her to declare her ignorance of his identity.[88]

In terms of an opposite sex couple who do not comply with the 2015 Act, their access to parentage is perhaps only slightly more precarious than a single mother.[89] An intending father, if married to the mother, will be an automatic guardian and parent through mandatory birth registration and if unmarried, can be made a guardian and registered on the birth certificate by statutory declaration. Therefore,

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[85] She continues, "[*t]his is a recurring problem in child law but might be even more acute where the family formations are likely to be unorthodox. Best interests would allow a strong-minded judge to give priority to genetic parenthood, or two-parent families, or whatever version of parental rights he thought best promoted the child's welfare*", A. Mulligan, "Constitutional Parenthood in the Age of Assisted Reproduction" (2014) *The Irish Jurist* 1 at 10.

[86] As will be discussed in Chapter 3, it is argued here that the gestational link alone does not constitute parentage for the purposes of the 2015 Act. While the mother is defined as the woman who gave birth to the child, parentage is allocated by section 5 which prescribes specific consent and information requirements.

[87] Section 6 of the Civil Registration Amendment Act 2014 (not yet commenced) essentially sets out that unmarried fathers are no longer by default exempt from mandatory birth registration. The unmarried mother, if not registering the father on the child's birth certificate must provide furnish the registrar with a statutory declaration that either she does not know the identity of the father of the child, that she doesn't know his whereabouts of the father of the child or that she believes that providing the information is not in the best interests of the safety of the child.

[88] Section 22(1D)(a) of the 2014 Act, not yet commenced and as proposed by section 6 of the 2014 Act.

[89] However, a couple seeking egg donation in Ireland should be distinguished from a couple seeking sperm donation as the former will have to engage with a DAHR facility and their process will be "tracked" by the operator. The operator of a DAHR facility must obtain the identifying information of the donor and provide it to the Minister who in turn will register it with the NDCPR and notify an tArd Chláraitheoir, section 33(2), 39(1) of the 2015 Act. However, there is obviously nothing to stop them travelling abroad for the embryo transfer.

concealing non-compliant DAHR treatment for an opposite sex couple is facilitated by these mechanisms in Irish law. The biggest difficulty that could arise for an opposite sex couple would be where the intending, but non-genetic father decides that he no longer wishes to father the child or be held to his maintenance obligations or the child's succession entitlements. If he seeks a section 35 declaration that he is not the father, the lack of biological connection will allow him to evade the obligations of parentage in circumstances where they have not otherwise abided by the DAHR framework. This, however, assumes that the couple completely evade the DAHR framework and do not engage in court proceedings that would leave a trail of their failed assignment of parentage due to non-compliance.

Finally, a same sex female couple will face the most significant battle in that, the second mother will have absolutely no legal mechanism to be bestowed with parentage if it is deemed that the couple did not sufficiently comply with the 2015 Act. If for any reason the legal mother is incapacitated or endures medical hardship as a result of the birth, for example, there will be no person who has custody or guardianship in respect of that child unless the partner is appointed a temporary guardian. However, this would require forethought and court proceedings under section 6E of the 1964 Act. In the event of the mother's death, the second mother would rely on her being named as a testamentary guardian, section 6C guardianship (which would require the child being at least 1 years old), or section 8 guardianship (where the child has no other guardian). Such a mother could never be registered on their child's birth certificate.

From the child's perspective, they could experience health difficulties and have their mother unable to make decisions for them. They could have their doctors seeking to obtain legal advice on who in fact can make decisions in respect of them. If their mother dies in child birth having not appointed a testamentary guardian, the child is being looked after by a grieving parent who is awaiting a court hearing and struggling to manage financially because they did not qualify for maternity benefit or maternity leave. The child has no mechanism to obtain citizenship on foot of the second parent, nor can they inherit from them.[90] The child could be potentially stateless, where the child's birth mother was of a nationality that does not grant citizenship based on descent, and the identity of the donor is unknown. In addition, the child could certainly be rendered parentless. When they go to crèche, their caregiver may have issues applying for the National Childcare Scheme. If they do have two intending parents, they may live in a violent home where one intending parent is scared to leave the other for fear of a precarious pathway to custody. Therefore, it is evident that there is a spectrum of impact by virtue of this lack of legal recognition, and it is regrettable that the 2015 Act contains no "catch-all"

[90] Within the O'Connell Study, it should be noted that every mother had Irish citizenship and so each child was entitled as a result. There were two participants who had citizenship from another jurisdiction that their child was not entitled to, however this depends on the citizenship and parentage laws applicable in the foreign jurisdiction. No child was refused Irish parentage due to a lack of legal relationship with their second parent.

provision or ultimate discretion to the Court in awarding parentage, instead of a list of strict proofs and exclusions.

The Special Rapporteur has suggested that there exists a level of proportionality in a system whereby guardianship and adoption is otherwise available to intending parents, as a secondary mechanism to establish a legal relationship with the child.[91] However, there are a number of difficulties with this proposition. The first is that, as set out in Chapter 1, parentage, as opposed to guardianship, could be considered the more child focused status based on the automatic entitlements that derive from it. The second, as set out above, is that this proposal would disproportionately impact on same sex couples in circumstances where the presumptions of paternity persist in Irish law, and on persons with disabilities having regard to the assessments of suitability and eligibility in adoption.[92] The third, as the Special Rapporteur points out himself, is that neither guardianship nor step-parent adoption are available to intending parents from the birth of the child. He suggests that the framework would be more defensible if the wait periods for guardianship or adoption were not so lengthy.[93] The fourth is that while a strict regime could be argued to be a deterrent mechanism from other practices, or rather, an incentivising mechanism towards best practice, the refusal to grant a declaration of parentage is a blunt instrument that does not account for conduct, fault, or intentional or innocent defiance of the framework. It therefore penalises those even in the context of a post-facto correction or where the substantive integrity of the principles underpinning the framework have been met. Furthermore, a refusal of this nature, which does not encompass the paramountcy principle, cannot be said to be child centred as opposed to regulation focused. Finally, there is also the consideration of whether - in circumstances where parentage can be obtained by another route, namely adoption - the financial resources, time and energy that could be put into parenting the child are better put into lengthy administrative/legal proceedings in order to achieve the same result. Ultimately, it is argued that there is simply no way to impose hard and fast rules in relation to what is or is not in a particular child's interests; that must be a matter for judicial consideration and discretion.

The Legal Impact of Non-Recognition within the O'Connell Study

While it has been confirmed above that the exclusionary framework of the 2015 Act leaves many without recognition of the legal parent-child relationship, a secondary question explored by the O'Connell study is the extent to which this interferes with the day to day family life. The key themes that arose within the interviews in this regard were the difficult administrative elements of daily life, the feeling of being

[91] Professor Conor O'Mahony, Special Rapporteur on Child Protection, "A Review of Children's Rights and Best Interests in the Context of Donor-Assisted Human Reproduction and Surrogacy in Irish Law" (2020) at pages 12-13.
[92] See Selina Bonnie and Aine Sperrin, *Independent Living Movement Ireland Opening Statement to the Joint Oireachtas Committee on International Surrogacy* (5 May 2022).
[93] Professor Conor O'Mahony, Special Rapporteur on Child Protection, "A Review of Children's Rights and Best Interests in the Context of Donor-Assisted Human Reproduction and Surrogacy in Irish Law" (2020) at page 13.

othered or having to rely on the good will from person to person. Ailbhe summarised the position succinctly in stating that:

> *"What's it like day to day?...the majority of people are really, really kind, and good and compassionate…you might say, I can't sign it, and they'd say, oh, don't worry about that. You sign away, like, we're fine here, or you sign for her into creche, like, I know, technically Yvonne can't sign her into crèche or for the GP or things like that. But in practice, that's all happening, and society has moved on. The biggest worry and fear that I have is that it only takes one asshole in a vulnerable moment to really cause a very traumatic and dangerous experience for us. It just takes one nurse in an emergency department or one guard at border protection…to cause untold damage or danger to our family…all the power is in these strangers who are legally protected and we're not."*
>
> *"I think children in [our child]'s situation are being so unnecessarily burdened and treated unjustly…I suppose the rationale is protecting children, but it's not protecting her. All it's doing is putting her in a vulnerable situation. She has no other parents; we are her parents. So, by considering her to be the child of a single parent, is, in the government's own research, putting her in a more precarious situation unnecessarily. So, it serves no one and it harms many."*
>
> - Ailbhe (DAHR)

While both Yvonne and Sandra signed forms for administrative matters in relation to their children (with whom neither share a legal relationship), there was an evident level of discomfort but perhaps surprisingly, this was directed at persons who require parental consent but disregarded the strict legal position:

> *"I signed for one of [our child's] vaccines. There were no questions asked about that. And I figured…if something went wrong here, I would be the one going back and being like, you shouldn't have let me sign you know, you didn't do your proper check….They didn't ask any questions. So that was the one dodgy thing, I was like, oh, should I be doing this? Or should I be bringing her? But we've never been stopped doing anything."*
>
> - Sandra (DAHR)
>
> *"If I am in the GPs office…And I'm asked to sign a vaccination consent form. It's really conflicting, because the GP knows me and knows us and knows we're a same sex family. So technically, they should ask whether I have permission to do this or not. But it's such an awful gross situation that I just sign it, and then feel like, oh, that's wrong, I have no authority to sign that form for [our child]. And further, I could sue the GP. I would never sue the GP. But I could sue the GP or Ailbhe could for allowing [our child] to be vaccinated without proper…anyway, things like that when it comes up. It's terrible. But it's rare enough that I don't have to think about it too much."*
>
> - Yvonne (DAHR)

It was evident that while some female parents without legal recognition tested the boundaries at times, some parents explained that they had not encountered too many difficulties, on account of restricting their freedoms in some way, not travelling, letting the legal parent sign all of the forms, or having a healthy child etc.:

> *"[our child] is very healthy. We don't have a lot of vulnerable situations, yet. Like, even in things like, creches and whatever, most forms, I sign them all. But it's very easy for us to do that. We both kind of work from home. We're both around, for the most part. So we haven't had a situation where there's some kind of emergency and I'm not there."*
>
> - Ailbhe (DAHR)

> *"I haven't tried to travel internationally with her on my own yet."*
>
> - Yvonne (DAHR)

In terms of birth registration, one same sex female couple was registered on the UK birth certificate, only one mother of the second same sex female couple was registered on the Irish birth certificate (albeit, with both surnames), and for the single mother, there was no father registered. It was evident that there was a clear disparity between the same sex female couples and the single mother in terms of the administrative difficulties experienced.

Ailbhe spoke about how they "fly under the radar" to an extent given that they were able to register their child with both of their surnames. However, as she and Yvonne describe, it was not an easy process:

> *"To get a birth certificate, Ailbhe had to sign that evil affidavit to say I didn't exist. And then to get her name double barrelled. I basically was excluded from the process…it was just it was just a really awful, awful experience…even though we had a marriage certificate and said, here's our surnames and we want our child to be double barrelled."*
>
> - Yvonne

> *"We went down there together to the one in Dublin and it was a fucking shit show, to be honest. Like we got pulled into this room with a guy who was like, right we need the letter from your clinic. We said we didn't use a clinic, we have a known donor. But anyway, we have our marriage certificate. We're not asking for anyone to [be] put on the birth cert here. What we're asking is that…we can give her both our surnames, which we're entitled to do. 'Oh well, we need permission from the father'. We're like, she doesn't have a father, she has a donor. 'Well, we need his permission'. No, you don't, he is a donor, so he has no permission. 'Well, we need to confirm that with him'. No, we've also agreed that he wouldn't be contacted for these types of arrangements. So we're not giving you his email address or his phone number…But anyway, he's not on the birth cert. He's nowhere. And so you'll be just ringing a randomer like, how do you even know who that is? Like, he's not registered anywhere...If there's*

a registry, we'll put him on it. But there isn't one. So we could just give you anyone's number. Like this is ridiculous…So they wanted the agreement. And we said, well, that's our agreement. It's not a legal document, it's ours. And so we sent them a redacted version. It had to get escalated to the superintendent, several visits to the registrar later, an exception had to be made by the superintendent. In the end, we were allowed to give her both our surnames only if we gave them a copy of our donor agreement, which they have no right or entitlement to have."

- Ailbhe (DAHR)

"Yeah, it's horrifying to think about it being on file somewhere. With a lot of time and distance from the situation, I understand that it was unprecedented for them. They didn't know how to deal with it, they don't have the legal structure in place to follow. They don't have a process. They don't have a policy. It's all grey area for everybody in the state trying to work through these issues."

- Yvonne (DAHR)

"True but this was 2018, the CFRA had passed, and families like ours had already presented there. So, they had had time to develop those processes."

- Ailbhe (DAHR)

Sandra and her wife had an easier experience than Yvonne and Ailbhe; however, as mentioned above, they purposefully travelled to Northern Ireland in order to avail of the UK legal system, and avail of a jointly named birth certificate, which she described allowed her to bypass some of the administrative difficulties:

"[having to travel to Northern Ireland to give birth was] so complicated and upheaval and everything. But for us worth it. Like we have the document, it probably made a few things easier, like passports and things like that… We just proceeded as a normal passport application. And we were just like, here's her birth cert. And they were just like, yep, okay, here's the passport. They just, they didn't really ask them any questions."

- Sandra (DAHR)

For Aoife, she was in the same position as all single mothers where the father/donor is not involved and so the fact that she engaged a donor did not impact on her legal parentage. Therefore, her experience is incomparable to those who were not genetically or gestationally related to their children:

"What is annoying is every time she gets a passport, I have to get it signed by a solicitor."

"I remember [birth registration] was very straightforward…I think I said she's donor conceived. Or I've always been very open about it. That just always rolled off my tongue, you know. And so, I think I did say that, and they were

like, oh, yeah, grand, but it wasn't an issue. It certainly wasn't in any way awkward; it was just left blank."

- Aoife (DAHR)

It was therefore evident that a person's sexuality coupled with family status, and geographical choice of birth, was directly related to the level of administrative difficulties the participants experienced.

The Emotional Impact of Non-Recognition within the O'Connell Study

It is, however, not only the legal impact of non-recognition that was detailed by participants. Participants also spoke about how it felt to not be considered their child's mother in Irish law. Participants expressed hurt, sadness, and frustration but also asserted that the social reality was that they were both as hands on, involved, and for all intents and purposes, a parent to their children:

"If I think about [how I feel], really awful. So I don't think about it. But, you know, after Ailbhe finished her mat leave, I kind of took a lot of the caring responsibility over and I worked part time whereas she's working full time. So there's no feeling that I'm less than, or not a mother, obviously, you know, I've cleaned up as much puke as anyone. But things that we have had to go through have been really soul destroying."

- Yvonne (DAHR}

Sandra described the application process for guardianship in terms of the discomfort she feels personally. She described applying for guardianship as a moment that will "really suck", "I can't believe I have to do this" and that "this is as good as it gets for me". She talked about being officially recognised but on the "wrong level" because "it is my child, and she's been my child from the start", compared to adoption. She also spoke about the awkwardness in involving the donor in the application against his wishes. She described how the court office asked her for his address for the summons and he responded:

"why do you need this? And how involved am I going to be? And I don't want anything to do with this…I don't think he wants to be notified. I don't think he wants to have to give consent or anything, you know. And so that's kind of, yeah, it's just icky."

- Sandra (DAHR)

Sandra's interview, therefore, demonstrated that in reality, it is not just the creation of legal ties, but the dissolution of legal ties, that are important for those involved.

Conclusion

This Chapter sought to assess the DAHR framework under the 2015 Act and ascertain the pitfalls and discuss the exclusions where they arose, and whether a lack of compliance with any one individual criterion should negate the granting of a declaration of parentage. It is concluded here that any such absolute cannot be in the child's best interest. That is to say, whether or not any particular criteria was complied with or not, and it's corresponding impact on the integrity of the system as it ensures to vindicate the rights of those involved, should be a matter for the Court,

having regard to the totality of the circumstances of that particular child. In relation to the four key exclusions noted within this Chapter, it is evident that each can be incorporated into the DAHR framework through legislative amendments and safeguards in order to offset the policy concerns that their exclusion sought to achieve. In order to focus on the needs of the resulting child in an actual, as opposed to abstract, manner, refusals to legally recognise familial relationships should arise from actual harm or interference with the rights of the child as opposed to the blanket imposition of risk factors, not realised in reality. Depending on the circumstances, such refusals could have devastating, or simply unnecessary, consequences for all parties involved, no moreso than the child who had no hand in the nature of their conception.

The 2015 Act and the introduction of legal recognition of DAHR finally offered pathways to parentage to same sex female couples, those who were infertile and those who were considered ineligible or unsuitable for adoption. It was a substantive piece of legislation that was introduced in the month preceding the marriage equality referendum and ensured that the vote was not about whether or not same sex couples could have families; it recognised that they already did, albeit without the requisite legal protection. It is therefore disappointing that the principles of recognition and equality underlying, at least the intention behind, the 2015 Act, have such considerable limitations, deficits, and exclusionary policies. It is argued that the 2015 Act does not represent a principled or respectful approach to DAHR parentage that exudes trust in intending parents or recognises the private life of those involved. Ultimately, the 2015 Act is incomplete and unfinished. It was hoped that the legislature would take the opportunity to tackle the unsatisfactory and exclusionary DAHR framework through the 2022 Bill which provides for a framework on surrogacy; however, at the time of writing, no such substantive amendments have been proposed.[94]

[94] A Private Members Bill, "*The Children and Family Relationships Amendment Bill 2023*", drafted by this author has, however, been submitted to the Bills office by Ivana Bacik, TD and Leader of the Labour Party, and this has recently (8 May 2023) been approved by the Bills office for introduction to the Dáil in June 2023.

Chapter 3: The Surrogacy Framework

Introduction

Unlike DAHR, incomplete as it might be, there is currently no legal framework governing surrogacy in Ireland. This impacts on individuals who wish to have children but are unable to do so due to a host of medical issues[1] or a biological inability to conceive a child together with their partner or by themselves, i.e., single men or same sex male couples. Unlike other countries such as France and Italy, Irish law does not prohibit and criminalise surrogacy practices; instead, it is completely unregulated. This naturally results in Irish couples travelling abroad and a considerable lack of legal certainty upon the return to Ireland with the child, whose parentage is subject to "natural conception" principles. This Chapter shall consider the legal status now afforded to the gestational link in the context of surrogacy and the legal precedents for the transfer of parentage. This is important given the status transformation from "mother" to "surrogate" of the woman who gives birth in Irish law. This will be considered specifically having regard to the proposed surrogacy framework contained in the *Health (Assisted Human Reproduction) Bill 2022* (the 2022 Bill), together with the government proposals in relation to both international surrogacy and the recognition of past surrogacy agreements. The case law of the European Court of Human Rights shall also be considered, as will Ireland's compliance with same. Finally, this Chapter will consider the views of participants in the O'Connell study who have had a child born through surrogacy.

The Mother in Irish Law

The status of mother in Irish law is historically an important figure. She has a constitutional and legal right to automatic parentage, guardianship and custody of the child.[2] Where the mother is unmarried, she alone is responsible for registering the birth of the child.[3] She can also dictate the relationships the child has with other individuals, for example, through her ability to facilitate the registration of a man as the father of the child, despite any confirmation of biological connection, and through her agreement and statutory declaration.[4] Her constitutional rights can only be interfered with through the meeting of strict proofs in adoption law,[5] or through her prejudicing the welfare of the child which is arguably a less prescribed process.[6] However, the question remains, as to who can permissibly qualify as "the mother" in a surrogacy framework under Irish law. Under the 2015 Act, she is defined as the woman who gives birth to the child and otherwise complies with the criteria of the legislative framework. Under the 1964 Act, she is defined as including a female adopter despite "mother" not being defined in the *Adoption Act 2010* (the 2010 Act). There are no definitions of mother in the 2004 Act or the 1987 Act. Given that

[1] For example, the absence of a uterus (due to MRKH syndrome or a hysterectomy), significant uterine diseases (uterine or Mullerian duct anomalies such as severe endometriosis, fibroids, polyps and unstuck Asherman's syndrome).
[2] *G v An Bord Uchtala* [1980] IR 32, section 6 of the 1964 Act.
[3] Section 19(1) of the 2004 Act.
[4] Section 22 of the 2004 Act.
[5] Section 54 of the 2010 Act.
[6] Article 42A.2.1, section 18 of the Child Care Act 1991.

the 2022 Bill proposes that the surrogate is the legal mother at birth and that her consent to the parental order and the child's cohabitation arrangements is absolute, is it important to consider who is initially bestowed with legal recognition, on what basis, and whether this initial status can be transformed, transferred, or interfered with.

The Constitutional Rights of the Mother

The unmarried genetic father has no constitutional rights in respect of the child and in fact, his constitutional rights only arise under Article 41 by virtue of his marriage to the child's mother.[7] The mother on the other hand, has constitutional and statutory rights regardless of whether or not she is married to the child's genetic father. It had been stated in *Nicolaou,*[8] that while a mother of a child born outside marriage does not come within the ambit of Articles 41 and 42 of the Constitution, her natural right to the custody and care of her child, and such other natural personal rights as she may have, fall to be protected under Article 40.3. This was echoed by the seminal Irish case on a mother's natural rights that followed, *G v An Bord Uchtála.*[9] The Chief Justice in this case found that a mother has the right to protect and care for and to have custody of her infant child. The basis for these rights:

> "*derive from the fact of motherhood and from nature itself…based on the natural relationship which exists between mother and child. It arises in my view from the infant's total dependency and helplessness and from the mother's natural determination to protect and sustain her child*".[10]

He did note however, that the continuation and extent of the right as the child grows up was a question that was not going to be answered by the immediate case. While the majority of the Court were clear in holding that the unmarried mother has an automatic right to custody,[11] only a slim majority found that such a right vested in

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[7] See *Nicolaou v An Bord Uchála* [1966] 1 IR 567; *JK v VW* [1989] 2 IR 437; *W O'R v EH* [1996] 2 IR 248.

[8] *Nicolaou v An Bord Uchála* [1966] 1 IR 567.

[9] [1980] IR 32. The *G* case examined the nature of that natural right and its foundational basis through the lens of an unmarried mother who sought the return of her daughter who she had placed for adoption 3 weeks after the child began residing with the adopting parents. G had given birth to a child in 1977 while she was unmarried and two months later gave her consent to the child being placed for adoption. When she was pregnant, she did not tell any family or the father nor did she visit the doctor during the pregnancy. When the child was born, she placed her in a nursery under a false name and did not visit her after that. A few weeks after placing the child for adoption, she told the father and her family who told her they would support her, resulting in her writing to the adoption society expressing a wish to keep the child. Following proceedings in the High Court it was determined that the child should be returned to her however, this was then appealed to the Supreme Court when the child was 1 year old.

[10] *Ibid* at paragraphs 790-791. This passage has been cited with approval in numerous subsequent judgments namely, *J McD v PL & BM* at paragraph 76.

[11] In addition to the passage set out of the Chief Justice, Walsh J found that the natural rights between mother and baby "*spring from their relationship to each other*" at paragraphs 820-821. Parke J found that *"[t]he emotional and physical bond between a woman and the child which she has borne give to her, rights which spring from the law of nature and which have been recognised at common law long antecedent to the adoption of the Constitution*", at paragraph 901.

the mother by virtue of her own constitutional right, as opposed to the child's.[12] It is evident that there are references throughout the judgment to either the close physical bond between mother and child or the immediacy of the mother's caregiving from birth. It is a judgment very much focused on the child in their early life when they are developing their attachments. It is submitted that these considerations arose before the splitting of motherhood could have been envisioned. Therefore, the collective gestational and genetic elements were contained within one woman who had used both her inheritable characteristics and epigenetics to conceive and carry the child. She had naturally formed a relationship with the resulting child through the gestational period that continued afterwards. While the nature of that relationship can, over time, arguably depend on a myriad of circumstances, i.e., the planned nature of the conception, the individual's readiness to become a parent, the existence of any surrogacy agreement, the least that can be said is that such a relationship historically existed to the exclusion of third parties. Such a woman would have, to put it crudely, a first right of refusal and a first right of taking up responsibility. It is not therefore surprising that the Court determined that there is at least one person who safeguards the child, and that the child has one reliable stable base who is sufficiently safe from unjustifiable or disproportionate interference. However, this judgment did not only deal with the issue of the unmarried mother's constitutional rights, it also dealt with whether such rights could be abrogated or transferred, and how this could be achieved. This will be a particularly necessary consideration in any legislative framework that presumes or establishes that the surrogate is the legal mother of the child born through a surrogacy agreement.

The Transfer and Transformation of the Mother's Rights

In *G, e*ach member of the Court was clear that such rights were neither inalienable nor imprescriptible, unlike the rights of the family under Article 41. These rights can be transferred or lost if she abandons the child or abdicates her rights and duties. While it could be said that this reflects the position of the transfer of rights from an unmarried mother only, it is submitted that a surrogate, whose husband will not benefit from the presumption of paternity, will not be entitled to the protection of Article 41 in respect of the child with whom he shares no genetic link. Therefore, the reasoning is arguably applicable in the surrogacy context. Walsh J held that the

[12] Henchy J held that it is the **child's** constitutional rights that require that the mother be given custody, "*particularly in the case of a very young child…while the mother's own right to custody has a legal as distinct from a constitutional foundation…In my opinion, however, the mother's right in regard to the child, although deriving from the ties of nature, are given a constitutional footing only to the extent that they are founded on the constitutionally guaranteed rights of the child*", at paragraphs 868 – 870. As such, he held that the mother's rights must yield to the constitutional rights of the child and the Court shall regard the first and paramount consideration the religious, moral, intellectual, physical, and social welfare of the infant. Kenny J similarly did not agree that the mother has a constitutional right to the custody and control of the upbringing of her daughter. He held that *G* did not have a constitutional right of custody under Article 40.3 given that natural rights could be equated with constitutional rights as the word "natural" is so ambiguous. He held that "[i]*t may mean when used in connection with the relationship of mother and child, the link between them formed by the facts that she has conceived the child, that it issues from her body and is fostered and nurtured by her or it may mean that the theory of natural law on which so much of that part of the Constitution dealing with Fundamental Rights is based, recognises such a right", ibid* at paragraph 895.

transfer or surrender of her rights could only take place "*in a way in which the essential natural rights of the child in respect of its care, welfare, health and upbringing are not infringed*".[13] Similarly, Parke J was satisfied that the waiving or abandoning of the mother's rights was possible unless by doing so, she infringed or injured the constitutional rights of her child.[14] He then categorised these constitutional rights as follows:

> *"The child, of course, has personal rights, which are recognised by Article 40 of the Constitution to life, to be fed, to be protected, reared and educated in a proper way, but in my view a child has no constitutional right to have these obligations discharged by his or her natural parent,* ***and that if there are other persons able and willing to satisfy such requirements, then a child's constitutional rights are sufficiently defended and vindicated***" (emphasis added).[15]

Therefore, it is evident from the majority in this case that any potential surrogate would be entitled to forfeit her constitutional rights in respect of the child. However, this process thus far is couched in terms of the choice of the unmarried mother to do so; to consent to the process and so it might be considered that this withdrawal is only available with her permission.[16] However, this case dealt with an application under section 3 of the *Adoption Act 1974.* This section created a two tiered system of consent, where the child is first placed for adoption and secondly, the making of the adoption order itself. This tiered system is continued in the 2010 Act which applies today.[17]

It was evident throughout the judgment that consent is one of the key requisites before a transfer of parentage can arise. However, the nature of the two-step process is that the consent at step one to the placement process, if confirmed as being fully informed, free, and willing consent, shall have the effect of rendering the second consent capable of being dispensed with, in certain circumstances.[18] The consent to the placement of the adoption was therefore a "triggering event" for the subsequent potential displacement of the mother's constitutional rights. The first issue therefore is the nature of this initial consent, the second is the effect that

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[13] *Ibid* at paragraph 822.
[14] *Ibid* at paragraph 100.
[15] *Ibid* at paragraph 904.
[16] Walsh J held that he did not see any impediment in principle to a child's passing out of one family and becoming a member of another family in particular circumstances but that it must be necessarily based upon consent.
[17] The current placement process, under the 2010 Act dictates that the child cannot be placed for adoption until they are at least 6 weeks old - Section 13(1) of the *Adoption Act 2010.* There are informational pre-requisites that apply to a mother or guardian so as to allow them to give free and informed consent - Sections 14, 27 of the *Adoption Act 2010.* Once the child is placed for adoption, it is the accredited adoption body that will make the care arrangements for the child as well as being responsible for generally securing their welfare and arranging the appropriate care for the child - Section 15(1) of the *Adoption Act 2010.* As under the 1952 system, the consent of every child's mother and guardian or person having charge of or control over the child, is required before the adoption order can be made but this consent can be dispensed with, by order of the High Court - Section 26 of the *Adoption Act 2010.* Consent must be given only after the child is 6 weeks old and again within 3 months of the adoption application - Section 28(1) of the *Adoption Act 2010.*
[18] [1980] IR 32 at page 74.

consent has on the unmarried mother's constitutional rights and the third is what considerations must be attached to the court's determination in dispensing with the second consent.

The Initial Consent

Walsh J was of the opinion that a surrender or abandonment may be established by the unmarried mothers conduct, when it is such as to warrant the clear and unambiguous inference that such was her fully formed free and willing intention.[19] However, "*a consent motivated by fear, stress or anxiety or consent or conduct dictated by poverty or other deprivations does not constitute a valid consent*".[20] Before anyone can be said to have abandoned or surrendered their constitutional rights "*it must be shown that [s]he is aware of what the rights are and of what [s]he is doing*".[21] Therefore she must be informed of the possibility of the dispensing of her consent under statute in order for her consent to the placement to be informed.[22] While noting that there was no statutory definition of "placing the child for adoption", Walsh J held that it means either "*the handing over of the child for the purpose of its being adopted or even, if the mother retains the child, the giving of a clear and unambiguous indication that it is her desire to surrender her natural rights in respect of the child and that it be adopted*".[23] Therefore the placing mother does not maintain her limitless right to withhold her consent simply by virtue of her maintaining some level of care and control of the child following the triggering event. This will be relevant below given that the 2022 Bill as currently drafted foresees the cohabitation of the child after their birth being subject to the surrogate's consent.

The Transformation

The Supreme Court in both *G* and *M O'C v The Sacred Heart Adoption Society and An Bord Uchtala*[24] considered the transformation the mother's constitutional rights underwent by virtue of her consent to the placement. The former Chief Justice, O'Higgins CJ in *G* held that the placing of her child "*must contemplate a mother who has so agreed and acted in such a manner as to abrogate her constitutionally recognised rights to the custody of her child*".[25] If this were not the case, her right would not be "downgraded" to that of a statutory right which can be extinguished by the Court under section 3. In the minority, Henchy J stated that the consent provided by that mother at the placement of the child for adoption provides a temporary derogation or suspension of the mother's right to custody. It does not amount to a waiver or abandonment so as to destroy the mother's rights as only the adoption order can have that effect. He found that a consent to the placement for adoption could never in itself amount to an extinguishment of that right, "*for it amounts to no more than a consent by the mother to putting her rights in temporary*

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[19] *Ibid.*
[20] *Ibid.*
[21] *Ibid* at page 80.
[22] *M O'C v The Sacred Heart Adoption Society and An Bord Uchtala* [1996] 1 ILRM 297 at paragraph 22.
[23] [1980] IR 32 at page 74.
[24] [1996] 1 ILRM 297.
[25] [1980] IR 32 at page 57.

abeyance".[26] This minority found favour with the Supreme Court in *MOC* who held that consent to the placement for adoption can never amount, in itself, to an extinguishment of the mother's rights but noted that whether the remaining rights are categorised as constitutional or legal rights is the question. The Supreme Court in *MOC* found that the mother retains her constitutional rights, yet it is clear that those constitutional rights will have "undergone a modification" by virtue of the fact that she has placed the child for adoption, and her decision then becomes subject to the statutory framework under section 3. This section requires the Court to consider the constitutional rights of the parties in making its determination, yet these rights can evidently be extinguished by virtue of the "triggering event" and the criteria set out by the court. Such criteria was not established under the statute at the time and therefore it fell to be established by the court.

The Best Interests of the Child

O'Higgins J held that once a mother's consent to the placement permits the operation of section 3, *"the decision to grant or refuse the order sought must be taken on the sole test as to which is, in relation to the granting or refusing the order sought, in the "best interests of the child".*[27] He also set out specific considerations such as the circumstances of the mother, her reasons for refusing or withdrawing her consent and the prospects of how the child's future will be served by refusing the order sought.[28] However, within these factors, he held that it is the clear duty of the Court to ensure the child's rights are both recognised and protected without regard to the clashing claims and competing rights of others. Similarly, in the view of Walsh J in *G*, the High Court must use the "best interests" test in considering whether the Court should authorise the Board to dispense with the consent, and tangentially, to whom it should give custody for the intervening period. He held that *"[t]here is nothing in the Constitution to indicate that in cases of conflict [between the rights of the parent and the rights of the child,] the rights of the parent are always to be given primacy".*[29] Ultimately, the majority of the Court determined that the appropriate test to be applied was the best interests of the child, albeit with differing and subjective opinions on what relevant considerations applied within this principle.[30] This position was confirmed by the Supreme Court in *MOC* who favoured

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[26] [1996] 1 ILRM 297 at page 89.

[27] *Ibid* at page 58.

[28] *Ibid* at page 58.

[29] *Ibid* at page 846. This assertion, it is argued, instead of instilling hope in a rights based approach for children, suggests that the default is that the parent's rights will triumph but that it is possible that the child's rights will, on occasion, prevail. Enright describes this passage from Walsh J as a perceived high point of the recognition of children's rights in Irish law but suggests that modern cases take a much more restrictive view of the practicability of vindicating the child's rights where they conflict with those of the parents. M. Enright, "Interrogating the National Order: Hierarchies of Rights in Child Law" (2008) 11(1) IJFL 3 at 4.

[30] While Walsh J took into account the preferable financial circumstances of the adopting parents, the social disadvantage attached to a single unmarried parent and considered the actions of the mother in preventing a relationship from developing with the father, stating that there is nothing "*more injurious to a child than the possibility of a bad marriage between the parents of the child*", at page 65. He did not accept that the mother's consent can be displaced by the Court solely on the grounds of her misbehaviour or bad behaviour or her general lack of fitness to have custody of the child. Henchy

the best interests test, albeit with full consideration of the mother's "situation" (as opposed to rights).[31]

The Current Legislative Precedent for Dispensing with an Unmarried Mother's Consent

The ability to dispense with a birth mother's consent to adoption once she had placed the child for adoption was re-established in the Adoption Act 2010 (the 2010 Act). Unlike the 1974 process, the 2010 Act sets out criteria to which the High Court must have regard in determining whether the consent should be so dispensed with. These include the relationship between the child and the adoptive parents, the child and their mother or guardian,[32] the proposed care arrangement for the child by the parties involved, the constitutional rights of those involved, and any other matter which the Court considers relevant to the application.[33] Notwithstanding these criteria, it is noted that the 2010 Act provides that in any matter before the court, the best interests of the child shall be regarded as the paramount consideration in the resolution of any proceedings brought under the act.[34]

The Application of these Principles to Surrogacy Agreements

Regardless of any conscious focus of the splitting of motherhood within these cases, the Court nonetheless espoused a number of principles relevant to surrogacy. The first is that a new born child is naturally dependent and requires sustenance and protection. In the provision of this, it spoke of the "natural mother's determination" to meet these needs. Therefore, it is argued that this consideration evokes a model of immediate care and availability for the child; an early commitment to meet the basic needs of the child which could be easily said to be met by intending parents. In particular, the judgment of Parke J spoke of the child not having a constitutional right to have their needs met by their "natural parents". The second point is that the transfer of a child into a new family is entirely possible as long as the child's rights

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J held that the onus is on the adopters to show that it would be in the best interests of the child to dispense with the mother's consent. It is only exceptional cases that a mother should be shut out from the custody of her infant child or from having a say on a matter crucial to its future rights and duties. He held that it would have to be shown that there has been, or is, something in the conduct of the mother, in her physical, mental, or psychological capacity, or in the special needs of the child having regard to the religious, moral, economic, or other relevant circumstances that would justify the Court in passing over the *prima facie* valid claims of the mother.

[31] *M O'C v The Sacred Heart Adoption Society and An Bord Uchtala* [1996] 1 ILRM 297 at paragraph 22 provides *"[t]he High Court judge in deciding whether an order should be made dispensing with the consent must, of course, being all his or her experience and powers of intellect, as well as of heart, to bear on what will often be an excruciatingly difficult decision. In doing that the judge must always put at the forefront of all considerations what the best interests of the child require having regard to the terms of s. 3 of the 1974 Act. The best interests of the child will be served not by placing to one side in any respect the mother's situation but, on the contrary, having full regard to her and whatever may be advanced on her behalf in the matter".*

[32] And the efforts made by such persons to develop or maintain a relationship with the child.

[33] Section 31(4) of the 2010 Act.

[34] Section 19(1) of the 2010 Act. This provision also includes further factors to be considered as part of the best interests assessment: the child's age and maturity, the physical, psychological and emotional needs of the child, the likely effect of adoption on the child, the child's views on his or her proposed adoption, the child's social, intellectual and educational needs, the child's upbringing and care, the child's relationship with his or her parent, guardian or relative, as the case may be, and any other particular circumstances pertaining to the child concerned (section 19(2)).

are the first and paramount consideration, and that their care, welfare, health, and upbringing are not infringed. Indeed it is argued that it is the uncertainty as to the legal carer of the child, the necessity for court proceedings, increased administrative burdens and the feeling of being "othered" at the early stage in a child's life that could cause such an interference. It is considered that a person who is determined to parent a child and creates the circumstances in which that child is born, can be presumed, in the absence of intervening acts or rebuttal, to provide the necessary care from birth. Suffice to say that there is nothing in this judgment that would inhibit the recognition of both the genetic and gestational mothers in new reconceived frameworks of parentage as long as such frameworks provide for an immediate and automatic caregiver for the child who has rights and responsibilities in relation to that child.

Thirdly, a considerable aspect of this judgment deals with the circumstances in which an unmarried mother can have their consent dispensed with, perhaps where a surrogate may unreasonably withhold her consent to the parental order. It is evident that it requires a two-step process, the first of which is predicated on the mother's consent whether explicit or implied from her conduct. The benefit that such a person would have over *G* is that her decision to consent would take place before the conception of the child, as opposed to when she was already pregnant with a child she did not otherwise expect. This allows for considerably more forward planning and a decision to volunteer as a surrogate without any external pressures to do so. Furthermore, the 2022 Bill provides for its own two-step process, wherein a surrogacy agreement between the parties is approved by the newly introduced Assisted Human Reproduction Regulatory Authority (the AHRRA) prior to the child's conception.[35] It is therefore submitted that the engagement of a surrogate in a surrogacy agreement and her participation in an application to the AHHRA for pre-approval prior to the conception of the child constitutes a "triggering event" such as the placement process in adoption. It is argued that this event should be sufficient to "demote" her consent to the eventual parental order, which could then be dispensed with having regard to prescribed criteria, where such was in the child's best interests.[36]

The Splitting of Motherhood before the Irish Courts

This legal significance of the splitting of motherhood was fully ventilated in *MR and DR v an tArd Chlaraitheoir*,[37] albeit in a legislative vacuum. Within this case, there was no conflict between the parties in terms of parental assignment and the children were in the custody of their genetic parents from their birth. The gestational surrogate and the genetic father were initially registered as the child's parents. Subsequently, the genetic mother sought to correct the "error" of the surrogate being registered; however, this was refused. The impact of this judgment on the genetic link of the mother has been explored in considerable detail in Chapter 1 and

[35] Section 51 of the 2022 Bill.

[36] This is supported by the report of the Commission on Assisted Human Reproduction in its report in 2005. The Commission stated that the welfare of the child should be a primary consideration in the provision of AHR treatment. Commission on Assisted Human Reproduction, "Report of the Commission on Assisted Human Reproduction" (2005) at XIII.

[37] [2014] IESC 60.

therefore, this Chapter shall focus on the gestational link, what status could be attributed to it in and of itself from a reading of this seminal judgment. A substantial consideration faced by the courts was whether the Latin maxim, *"mater semper certa est",* ("the mother is certain") applies as an irrebuttable presumption in Irish law. If answered in the affirmative, it would mean that the woman who gives birth to the child is the mother in Irish law notwithstanding that she was not genetically related to the child. In the High Court,[38] Abbot J found that this maxim took prominence before the scientific developments in reproduction and the maxim merely expressed the facts of the situation and therefore could not be assumed to apply in situations where motherhood had been split. He noted that positive legislation on this area is totally absent.[39] The judgment of the learned judge, which granted the applications of the genetic mother, focused on the more scientific aspects behind the genetic and gestational components of motherhood,[40] which has been the subject of some criticism for constituting a reductionist approach.[41] The case was then appealed to the Supreme Court where there were two common themes; the *mater* maxim does not apply to surrogacy cases and urgent action by the Oireachtas is required to create a legislative framework on surrogacy.

The Chief Justice at the time, Denham CJ, echoed the sentiments of the trial judge and noted that the *mater* maxim reflects a different social approach to parenthood at a time prior to medical and scientific advances. She held that the maxim was reflected in common law cases but that there was no authority to suggest that the maxim is either an irrebuttable presumption or that it was enshrined in Irish

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[38] *MR & DR v an tArd Chlaraitheoir* [2013] IEHC 91.

[39] Despite this legislative lacuna, the Court found that while the input of a gestational mother is to be *"respected and treated with the care and prudence which the best medical practice dictates",* chromosomal DNA is determinative and *"the predominant determinant of the genetic material in the cells of the foetus permits a fair comparison with the law and standards of the determination of paternity. It would be "invidious, irrational and unfair to do otherwise*", ibid at paragraph 103. The Court held that the application of the maxim as an irrebuttable presumption is consistent with fair procedures under the Constitution and quoted S v S [1983] 1 IR 68. in support of this. Therefore, to "*achieve fairness and constitutional and natural justice for both the paternal and maternal genetic parents, the feasible inquiry in relation to maternity ought to be made by on a genetic basis*", (ibid, at paragraph 104) and on this being proven, the genetic mother should be registered as the mother under the 2004 Act.

[40] The High Court held that the influence of epigenetics was not significant enough to alter the overriding significance of chromosomal DNA "*for the purpose of determining identity and inherited characteristics leading to a conclusion of the paternity and genetic maternity".* In reaching this finding, Abbot J noted that epigenetics which arise from the environment as opposed to cellular chromosomes; are dependent on the mother's elective choice or neglect and are not sufficient to outweigh the significance of the inheritable characteristics of the child and are capable of correction.

[41] K. Christiansen, "Who is the Mother? Negotiating Identity in an Irish Surrogacy Case" (2015) 18(3) *Medical Health Care and Philosophy* 317 argued that *"[t[he absence of any commentary or reflection on the meaning and significance of experiential, existential or 'environmental/contextual' factors relating to the surrogate mother's own life during the pregnancy leaves the reader with an image of the surrogate as being a kind of container or vehicle devoid of personal interests, emotions, cultural preferences, social interactions, personal biography and individual biography*" at pages 322-323. Furthermore, she states that *"[t]he judge is thus proceeding in a fashion which claims value-neutrality and disinterestedness, whilst, in fact, making substantial value-judgments about the scientific importance of particular 'genetic' insights and leaving out numerous other important perspectives*", at pages 326-327.

common law as argued by the State.[42] Denham CJ noted that neither common law nor the 2004 Act, the 1987 Act nor any other legislation had addressed the issues which arise on surrogacy arrangements and that "*as a significant social matter of public policy it is clearly an area for the Oireachtas, and it is not for this Court to legislate on the issue".*[43] She concluded that there is nothing in the Constitution that would inhibit the development of appropriate laws on surrogacy and that such a lacuna should be addressed in legislation and not by the Court.[44] Denham CJ went on to review the two provisions of the Constitution which mentioned mothers, Article 40.3.3 and 41.2.2. Article 40.3.3 has since been repealed but she found that Article 41.2.2 was a much broader approach to mothers and clearly encompasses "*a more expansive view of mother. For example, it would include mothers who are neither the gestational nor genetic mother of the child. Thus, there is no definitive definition of mother in the Constitution*".[45] Denham CJ therefore allowed the appeal and quashed the orders made by the High Court.

O'Donnell J (as he then was), determined that the case before him did not involve the existence and scope of the maxim *mater semper certa est*, and to consider the existence and persistence of this Latin maxim in this context was an error; for him it was solely about statutory interpretation of the 2004 Act.[46] He did note however that generations of children have been born in Ireland through AHR into a "*legal half world*".[47] He stated that the need for legislation was urgent, but that this was a task for the Oireachtas, not the Court.[48] This was echoed by Hardiman J who held that:

> *"There is, at present, a serious disconnect between what developments in science and medicine have rendered possible on one hand, and the state of the law on the other. It is as if Road Traffic Law had failed to reflect the advent of the motor car. The failure to adapt the law in relation to developments in Embryology of course, affects far fewer people, but it*

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[42] *MR and DR v an tArd Chlaraitheoir* [2014] IESC 60 at paragraph 70.
[43] *Ibid* at paragraph 96.
[44] She held, "*[t]he issues raised in this case are important, complex and social, which are matters of public policy for the Oireachtas. They relate to the status and rights of children and a family. It is important that the right of the twins, the parent applicants, the notice party, and the family are vindicated pursuant to the law and the Constitution", MR and DR v an tArd Chlaraitheoir* [2014] IESC 60 at paragraph 118.
[45] *Ibid* at paragraph 114.
[46] *Ibid* at paragraph 233.
[47] *Ibid* at paragraph 210. He noted that the introduction of IVF treatment had immediate and enormous impact on the most intimate aspect of people's lives; however, it remained an area devoid of legislative guidance. The absence of legislation he noted, did not mean an absence of assisted reproduction; rather it meant an absence of regulation.
[48] While he noted that a court cannot abstain from determining a legal issue which is properly before a court and which requires to be decided, this did not mean that the Court can provide a legislative scheme. Instead, he held, a decision on a constitutional matter can be a frustratingly binary choice between upholding legislation or striking it down and leaving a gap which is for the other constitutional organs to fill. He held that, in the case of statutory interpretation, a court's function will be to declare what the law is, rather than what it ought to be, and that any such declaration that chooses genetics or gestation will exclude the other and apply to all cases, *ibid,* and at paragraphs 221-222.

affects them in a peculiar and intimate fashion which make statutory law reform in this area more than urgent"[49]

This was, he held, a matter entirely for the Oireachtas and held that the case was not one for judicial reform precisely because it requires significant policy choices and detailed provisions beyond the scope of the legitimate role of the Courts. In relation to motherhood, Hardiman J stated that this question could not be answered by any technical legal exegesis or even by any purely logical process. This is because the question raised "*is not a legal question or a purely logical question. It is a question of values and attitudes so deep that it is an understatement to call it a matter of policy"*.[50] He found that providing a declaration of motherhood in respect of the genetic mother, is not something that could be done within the confines of the doctrine of precedent, and to do so, would tie the hands of the legislature and would permanently exclude a woman who has given birth to the child using donor genetic material. McKechnie J referred to the full translation of the maxim and noted that in fact it referred only to conception, and not birth.[51] In relation to its application in Irish law, McKechnie J was satisfied that there was little authority to suggest that it ever formed part of common law of Ireland or Irish law.[52] He commented however, that the application of the principle was "entirely otiose" and simply had no application in the case before him, where motherhood had been split –

> "*The maxim, to use, a neutral term, was never intended to cover such an eventuality. Where circumstances fall within its original contemplation, I am quite satisfied to see its continuing application, for the situation cannot be otherwise. But where, as here, that is not the case, it must be disregarded.* ***To do otherwise is to pursue a line of absurdity and a journey of medical and scientific denial.*** *To disassociate the genetic donor from the child solely on the basis of mater semper certa est* ***is an exercise in delusional contradiction as it disowns her irrefutable contribution to the child's creation and thus to its very existence.***"[53] (emphasis added)

He concluded that "*intervention therefore by the Oireachtas is essential*".[54] McMenamin J similarly held that the maxim was not evident from either Irish statute

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[49] *Ibid* at paragraph 188.

[50] *Ibid* at paragraph 193. Hardiman J felt that it was better that the Law Reform Commission or others like it take a broad perspective in creating a framework, as distinct from what is discernible to the tunnel vision imposed by the facts of a single case.

[51] *Ibid* at paragraph 323.The full maxim is "*mater semper certa est, etiam si volgo conceperit: pater vero is est, quem nupitae demonstrant*", which the notice party translated for as "the mother is always known, even if she conceived out of wedlock, whereas the father is he whom marriage indicates.

[52] *Ibid* at paragraph 330. At paragraph 331, he continues, "*the endorsement of the maxim could in no sense be said to have elevated the presumption to an immutable rule of law either at the factual or legal level; much less that it should be applied for all time and for all purposes, irrespective of the medical and scientific changes which have taken place in the available methods of reproduction since then".*

[53] *Ibid* at paragraph 335.

[54] *Ibid* at paragraph 397.

or constitutional law.[55] In the minority, Murray J found that the maxim was reflected in the statutory provisions in the Act 1880, while nonetheless finding that the question of whether the maxim formed part of common law was an issue that distracted, rather than clarified the central question of interpretation of the case.[56] Finally, Clarke J (as he then was) noted that the common law position on "mother" was developed long before a separation of motherhood could have taken place. In this context, he held that the common law did not provide a definition of mother, nor did the 1987 Act nor the 2004 Act, nor the Constitution. He found that it was a:

> "*significant over-interpretation of the maxim to suggest that it sought to define mother as birth mother* ***as opposed to recognising that the genetic mother and birth mother were necessarily one and the same person*** *and that the identity of both the birth mother and the genetic mother could, therefore, be definitively determined by identifying the person who gave birth*".[57] (emphasis added)

Therefore, he held that the Constitution permits the State to regulate and that it is largely a question of policy for the Oireachtas to determine, within constitutional bounds, the precise parameters in determining when the gestational or genetic elements of motherhood should give rise to legal recognition.[58] In doing so, Clarke J recognised what he referred to as the child's "*principal constitutional entitlement…as part of their natural entitlement to human dignity*" to have:

> "*the State recognise their status by reference to such relationships as they may have, whether to parents, siblings, wider family members and within such family or families (however defined) as their status may place them. The State is, in my view, entitled, within bounds, to properly regulate the recognition of such status*".[59]

Clarke J was the only member of the Court to seek to confer status on both the gestational and genetic mothers, describing his conclusion as the "*least bad solution*".[60] However, he was in the minority and the default position that arose upon the upholding of the appeal by the majority was a return to the position before the High Court hearing, that of the gestational mother remaining registered on the birth certificate.[61] It is evidently clear however, that the Supreme Court in no way endorsed the perpetual preference for the gestational link in terms of legal recognition of motherhood and that it was primarily and urgently a matter for the

[55] *Ibid* at paragraph 551.
[56] *Ibid* at paragraph 165.
[57] *Ibid* at paragraph 467.
[58] *Ibid* at paragraph 496.
[59] *Ibid* at paragraph 494.
[60] *Ibid* at paragraph 512.
[61] As has been discussed at considerable length in Chapter 1 however, despite the unfortunate use of terminology, the Court determined that the "mother" envisioned by the 2004 Act was one which was both gestationally and genetically related to the child and it is quite arguable that neither woman should have been registered given the majority's approach in using statutory interpretation as the key mechanism to determine the question before it.

legislature to take a broad and nuanced look at how to give effect to the "principal constitutional entitlement" of the children involved.[62] The Court essentially held that the legislature has *carte blanche* in determining the consequences of the splitting of motherhood for the purposes of parentage and birth registration, subject to constitutional considerations.[63]

In summary, a considerable majority determined that the *mater* maxim was not part of the common law, constitutional or statutory law of Ireland, but rather it reflected the historical position, before scientific and reproductive developments allowed for a splitting of motherhood. Therefore, the Court did not find the maxim helpful in dealing with this fundamentally new context. This is, it is argued, commonly misreported amongst key public commentators,[64] which is particularly concerning given that the policy developers in this area are not legal experts and are relying on

[62] This was more recently reiterated by the Chief Justice in his Supreme Court judgment in *Adoption Authority v C & D & Ors* [2023] IESC 6 at para 17, "*Nothing in what follows, should be understood as restricting the freedom of decision making on the part of the Oireachtas…there are a significant number of issues and a range of possible decisions, in relation to domestic surrogacy arrangements and surrogacy arrangements effected by individuals abroad, whether Irish domiciled or not, but who wish for their parental status to be recognised in Ireland, which are for the Oireachtas to decide upon. This judgment does not purport to express any views on such options and should not be understood as doing so or in any way restricting the freedom of action of the Oireachtas in relation to legislating for the recognition and enforcement of surrogacy arrangements domestic or international, altruistic or commercial or in determining the appropriate conditions for such recognition and enforcement. These are properly matters for the Oireachtas*".

[63] Within these considerations, it should be noted that the historical "constitutional mother" is not the modern day context which now arises and in light of the repeal of the 8th amendment in May 2018, the only reference remaining of the constitutional mother is as suggested above by Denham CJ, "*mothers who are neither the gestational nor genetic mother of the child"*.

[64] Bracken in referencing the judgments of O'Donnell and McMenamin JJ submitted that "*ultimately, it was held that the existing law defined the mother in terms of parturition and so the Court concluded that the birth mother was to be regarded as the legal mother*", at L. Bracken, "Challenging Normative Constructions of Parentage in Ireland" (2017) 39(3) *Journal of Social Welfare and Family Law* 316 at 323. However, it should be noted that Bracken offers a more nuanced and arguably accurate accounting of the judgment's findings in L. Bracken, "The Normative Underpinnings of Ireland's Proposed Regulation of Assisted Human Reproduction" (2022) 36(1) *International Journal of Policy and Family* 1 at 7-8. Professor Conor O'Mahony, Special Rapporteur on Child Protection, "A Review of Children's Rights and Best Interests in the Context of Donor-Assisted Human Reproduction and Surrogacy in Irish Law" (2020) stated that the "*Supreme Court clarified in 2014 that legal parentage of children born in Ireland pursuant to surrogacy arrangements is determined by the common law presumption mater semper certa est*", at paragraph 3.2.1.

legal and academic research to bolster their reasoning.[65] As will be obvious from the proposals within the 2022 Bill, the Department of Health, as the sponsoring government department, have either felt it legally necessary that the surrogate is the legal mother upon the child's birth, or have chosen this position based on policy considerations.[66] It is submitted that both positions are flawed and if the latter, there has been little explanation of the basis for such a choice.

The "Mother" in Donor Assisted Human Reproduction

As O'Hanlon, Winder and Reilly note, the Oireachtas effectively upheld the *"mater"* maxim within a couple of months of the MR judgment being published and "*failed to take the opportunity to consider the definition of 'mother' in the age of AHR treatment*".[67] The 2015 Act defines "mother" as the woman who gave birth to the child; however, it is arguable that a woman who births the child, but who is not genetically related to the child, is not entitled to parentage of that child by virtue of the gestational link alone under this framework. The key basis for this assertion is that section 5(1), which names the mother and any intending parent as the parents of the donor-conceived child, is subject to the requirements under section 5(8) of the 2015 Act. This requires "the mother" to consent under section 9 of the parentage of the child, and for her spouse, civil partner, or cohabitant to do likewise under section 11.

It is therefore submitted that if she does not comply with these criteria, she is not the parent of the child by virtue of the gestational link alone. If, however, she does use her own egg, then she is the mother for all intents and purposes under the "natural conception" principles. In such an instance, her compliance with the 2015 Act is purely for the benefit of her partner, as she would not need to otherwise comply with the provisions. If considered pragmatically, a woman who cannot produce her own ova will require medical intervention and any DAHR facility licensed

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[65] Tobin, in his article accurately describes the outcome of the Supreme Court judgments in *MR* and also references an email received by him on 16 November 2016 from the bioethics unit of the Department of Health which states *"[t]the proposed legislation will take cognisance of the 2014 Supreme Court judgment in the MR & Another v An tArd Chláraitheoir (surrogacy) case, which found that the birth mother, rather than the genetic mother, is the legal mother*", B. Tobin, "The General Scheme of the Assisted Human Reproduction Bill 2017: A Hybrid Model for the Regulation of Surrogacy in Ireland" (2017) 4 IJFL 83 at 85. The Joint Committee on International Surrogacy, "Final Report of the Joint Committee on International Surrogacy" (July 2022) stated at page 26 that "*The principle of 'mater semper certa est', that the woman who gives birth is recognised as the legal mother of the child has usually been upheld in Irish law*". Department of Health, Department of Justice, Department of Children, Equality, Disability, Integration and Youth, *Issues Paper on International Surrogacy for Special Joint Oireachtas Committee January 2022* (2022) at page 3 states that "in Irish law, legal motherhood is based on birth rather than genetics". Inter-Departmental Group, "*Policy Paper – International Surrogacy and Recognition of Past Surrogacy Arrangements*" (December 2022) at page 6 reiterates the position of the January 2022 paper.

[66] The difficulties in having a Department of Health tasked with family law issues has been noted by Horsey, who stated that the UK Department was reluctant to consider radical change to the provisions regarding parenthood as they did not have central responsibility for law and policy relating to the family. K. Horsey & S. Sheldon, "Still Hazy after all these Years: the Law Regulating Surrogacy" (2012) 20 *Medical Law Review* 67 at 88.

[67] O'Hanlon, Winder, and O'Reilly, "A Snapshot of Surrogacy in Ireland with a comparative Look at International Practices" (2020) 4(2) *Irish Judicial Studies Journal* 25 at 30.

in this country will require compliance with the section 9 and if applicable, section 11 provisions. Therefore, the argument is slightly academic, but important in the analysis of the legal impact of the splitting of motherhood within the AHR context. Ultimately, it is submitted that this definition of mother is context specific; the DAHR context. No other piece of legislation, specifically those which deal with guardianship or parentage has defined the mother as the woman who birthed the child. Therefore, any suggestion that this definition of mother expands beyond this context, and specifically into surrogacy, is misguided. There were no amendments to any other pieces of legislation referring to the "mother as defined in the 2015 Act". The 2015 Act does not define mother for the purposes of the Irish Statute Book or *the Interpretation Act 2005*; it defines it for the 2015 Act and no other.

How to Comply with Article 8 in the Recognition of Foreign Parentage

In the absence of any independent international legal framework dealing with surrogacy agreements and the ancillary issues of parentage,[68] the European Convention of Human Rights (ECHR) through its adjudications within the European Court of Human Rights (ECtHR) offers a minimum standard that is, to an extent, enforceable in Ireland. The *European Convention of Human Rights Act 2003* (the 2003 Act) provides that the Irish courts must, when engaging in an exercise of statutory interpretation must do so, insofar as possible, in a manner compatible with the State's obligations under the Convention provisions.[69] Irish judges must stay abreast of the ECtHR's decisions, declarations, and any advisory opinions under Protocol No. 16.[70] Furthermore, the Irish courts have the power to make a declaration of incompatibility in respect of a statutory provision or rule of law where there is no other legal remedy that is adequate or available.[71] However, such a declaration does not affect the validity, continuing operation, or enforcement of the provision.[72] Moreover, as a State Party, Ireland can itself be brought before the ECtHR for a complaint alleging a violation in respect of the applicant's rights under

[68] There are, however, the Verona Principles: International Social Service, "Principles for the Protection of the Rights of the Child Born Through Surrogacy" (Geneva, February 2021). These have been supported by members of the UN Committee on the Rights of the Child and the UN Special Rapporteur on the Sale and Sexual Exploitation of Children (2012-2020). These principles begin from the premise that some level of regulation is needed in international surrogacy; they do not engage in ethical considerations about whether it should be permitted or prohibited. The principles focus on human dignity, the child as an independent rights holder, non-discrimination, the best interests of the child, consent, and identity. However, they act as guidance only and do not have direct effect in Irish law. The Hague Conference on Private International Law began its work in 2011 and expects to publish its final report to the Council on General Affairs and Policy in 2023. There is no Irish representative on the expert group which represents 24 countries. For further exploration of the need for an international approach to surrogacy, see: M. O'Connor, "An International Surrogacy Convention – The Way Forward" (2021) 24(2) IJFL 37, B. Ní Ghráinne & A. McMahon, "A Public International Law Approach to Safeguard Nationality for Surrogate-Born Children" (2017) 37(2) *Legal Studies* 324 and J. Tobin, "To Prohibit or Permit: What is the (Human) Rights Response to the Practice of International Commercial Surrogacy?" (2014) 63 *International and Comparative Law Quarterly* 317.

[69] Section 2(1) of the 2003 Act.

[70] Section 4(a) of the 2003 Act.

[71] Section 5(1) of the 2003 Act.

[72] Section 5(2)(a) of the 2003 Act.

the ECHR.[73] Therefore the Irish courts have an obligation to adhere to the principles as set out in the cases before the ECtHR.

There are, however, a number of limitations within the judgments of the ECtHR. The first is that there is a considerable threshold to be met before a matter will be deemed admissible.[74] Amongst these considerations are the victim status, the exhaustion of domestic remedies, time-limits, the merits, jurisdiction and whether a case is substantially the same to a matter already examined by the ECtHR. The second is that there is also a stringent test in determining whether or not a member state has violated an Article of the ECHR. In determining whether there has been a violation, the Court's first question is whether the right asserted is applicable to the facts of the case, whether the right has been interfered with, whether a legitimate aim exists, whether the interference was prescribed by law, and whether the level of interference was proportional to the aim. In order for the interference to be proportional, it would have to be minimally invasive, necessary in a democratic society and constitute a pressing social need.[75] The fourth difficulty is that the ECHR is a Convention which has been signed onto by 46 member states who all have varying national identities and independent public policies. Therefore, the ECtHR will often rely on the margin of appreciation in not finding a violation.

The margin of appreciation is essentially a discretion given to member states to deal with issues as they see fit and is a notoriously flexible instrument. Letsas has described it as the relationship between the ECHR and national authorities, "*rather than with the relationship between human rights and public interest*".[76] Furthermore, Bracken has suggested that, "*it could be said that the increased deference paid to the decisions of the national authorities by the European Court has led the Court to abdicate its role as a defender of human rights, in particular in the case of vulnerable groups such as children*".[77] The ECtHR has held that "*the State's margin in principle extends both to its decision to intervene in the area, and once it has intervened, to the detailed rules it lays down in order to achieve a balance between the competing public and private interests".*[78] The Court can deem the margin wide and narrow within the same case, elucidating conclusions supposedly

[73] Article 34 of the ECHR. It should be noted that other States Parties can also refer an alleged breach by Ireland to the ECtHR.

[74] See: Registry of the European Court of Human Rights, *Practical Guide on Admissibility Criteria,* (Updated 30 April 2022)

[75] See: Registry of the European Convention on Human Rights, "Guide on Article 8 of the European Convention on Human Rights" (Updated 31 August 2021) and S. Kingston & L. Thornton, "A Report on the Application of the European Convention on Human Rights Act 2003 and the European Charter of Fundamental Rights: Evaluation and Review" (July 2015). Such an approach is evident in the Canadian case of *R v Chaulk* [1990] 3 SCR 1303 as approved by Costello J. in *Heaney v Ireland* [1994] IR 593 at paras. 32-34 as follows: *"The means chosen must pass a proportionality test. They must: (a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations; (b) impair the right as little as possible, and (c) be such that their effects on rights are proportional to the objective".*

[76] G. Letsas, "Two Concepts of the Margin of Appreciation" (2006) 26(4) *Oxford Journal of Legal Studies* 705 at 721.

[77] L. Bracken, "Strasbourg's Response to Gay and Lesbian Parenting: Progress, then Plateau" (2016) 24 *International Journal of Children's Rights* 358 at page 367.

[78] *Knecht v Romania* (Application No. 10048/10, 2 October 2012), at paragraph 59.

on balance. It has been found to be wide given the moral, social, and ethical considerations of individual member states that are commonly recognised by the Court in cases relating to AHR,[79] and narrowed based on an important facet of the individual's identity, such as the legal parent-child relationship.[80] Ultimately, the ECtHR sets a minimum standard, as opposed to an optimal standard.

The relevant Article for the purposes of surrogacy arrangements is Article 8 of the ECHR which respects the right to respect for private and family life. Private life is a concept which arises in this context most often from the unmet expectation of a legal connection between parent and child. Family life is a concept which does not include the right of a person to a child prior to an adoption application or prior to conception; it is concerned with "*de facto"* family life involving close ties, commitment, and the enjoyment of one another as individuals within a familial setting. It also naturally covers the more traditional and established concepts of family, as established in any given state party. The Grand Chamber has previously held that the right of a couple to conceive a child and to make use of AHR techniques for that purpose is protected by Article 8, as such a choice is an expression of both private and family life;[81] however, as will be evident from the following sections, this has been narrowed to focus on the private life of the child who is joined as a party to the proceedings.

The Non-Genetic Intending Mother

The cases of *Mennesson v France,*[82] *CE v France,* [83] and *D v France,*[84] all considered the issue of international surrogacy agreements where only the intending father was genetically related to the child,[85] the latter two of which had the benefit of an

[79] *X, Y & Z v The United Kingdom* (Application no. 21830/93), 22 April 1997; *S.H. and Ors v. Austria* (Application 57813/00), 3 November 2011; *D and Others v. Belgium* (Application no. 29176/13), 8 July 2014.

[80] See: Grand Chamber of the European Court of Human Rights, *Advisory Opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother*, Request no. P16-2018-001 at paragraph 44, *Mennesson v France* Application No. 65192/11, 26 September 2014 and *Jaggi v Switzerland* Application No. 58757/00, 13 July 2006

[81] *SH v Austria,* Application No. 57813/00 (3 November 2011) at paragraph 82.

[82] Application No. 65192/11, 26 September 2014.

[83] Applications No. 1462 and 17348/18, 12 December 2019.

[84] Application No. 11288/18, 16 July 2020.

[85] The intending mother in *D v France* was in fact the genetic mother however, she did not bring this to the attention of the domestic courts at all, or to the ECtHR in time to be considered. Therefore, the judgment in this case acts as if she is not the genetic mother.

Advisory Opinion arising from Protocol No. 16 on the same issue.[86] A number of principles can be gleaned from these cases, and the advisory opinion, all arising in the French jurisdiction where surrogacy is prohibited. In each case, there was no finding of an Article 8 violation in respect of the intending parents. However, in *Mennesson,* there was a violation of the children's Article 8 rights on account of their genetic father not being legally recognised.[87] The ECtHR relied on the children's identity in its determination, which it held lay both in the legal parent-child relationship with their genetic father and in their French nationality given that they had lived in France for ten years. Brown and Wade have argued that the concept of identity was used to provide support for the outcomes that the law is seeking to achieve in each context.[88] However, this concept has not been prevalent within the judgments subsequent to the more prescriptive Advisory Opinion, as noted by Mulligan.[89] Bracken has argued that the *Mennesson* judgment allows the genetic link to obviate the need for a best interests assessment of the child who is born through surrogacy abroad and allows intending parents to circumvent prohibitive domestic

[86] Grand Chamber of the European Court of Human Rights, *Advisory Opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother*, Request no. P16-2018-001. The ECtHR received written observations before issuing this opinion from a number of countries which included Ireland, however unfortunately, these were not published. Article 1 of the Protocol No. 16 provides that the Highest courts and tribunals of a High Contracting Party, as specified in accordance with Article 10, may request the Court to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto. The requesting court or tribunal may seek an advisory opinion only in the context of a case pending before it. The requesting court or tribunal shall give reasons for its request and shall provide the relevant legal and factual background of the pending case.

[87] This judgment was distinguished however in the case of *SH v Poland* (Application Nos. 56846/15 and 56849/15, 16 November 2021), where the applicants sought the recognition of their parentage established in California for the purposes of obtaining citizenship in Poland in line with the genetic father's citizenship. The couple resided in Israel where their parentage was recognised and thus the Court deemed the Israeli recognition sufficient to vindicate the rights of those involved. Furthermore, in the case of *AL v France* (Application no. 13344/20) 7 April 2022, the ECtHR did find a violation of the genetic father's right Article 8 rights, albeit not due to the lack of recognition. The Court found that there was no issue with the State refusing to recognise his parentage as such would have the consequence of interfering with the only family the child knew for 6 years; it would impact on the custody and parental responsibility of the child's legal parents. However, the violation was based on the time taken to make the determination, on the basis that the passage of time had an impact on the concrete assessment of the facts of the case and as a result, the State had failed to fulfil the duty of exceptional diligence. Interestingly, this violation arose under Article 8, as opposed to Article 6, as it did in *Mikulic v Croatia.*

[88] A. Brown & K. Wade "The Incoherent Role of the Child's Identity in the Construction and Allocation of Legal Parenthood" (2022) *Legal Studies* 1-18. They argue that "*there is no coherent concept of identity which the rules attributing legal parenthood flow; rather, the concept is invoked to provide a veneer of normative support for decisions as to who the parents should be in different contexts*" at 16.

[89] A. Mulligan, "Anonymous Gamete Donation and Article 8 of the European Convention on Human Rights: The Case for Incompatibility" (2022) *Medical Law International* 1 at 21. Mulligan noted that the Advisory Opinion focused its rationale more on the child's welfare in a broad, practical sense, rather than in the child's right to identity. However, she argues that this should not be seen as a recanting of *Mennesson* and suggests that this focus arises from the more holistic view of the child's relationship with a non-genetic intending mother.

laws.[90] However, it could be similarly argued that the existence of such a genetic link has long since negated all other consideration of the child's best interests in determinations of parentage.

The Court, in determining whether there was a violation of the child's rights must focus on whether there are any means (as opposed to a particular mechanism, which remains within the margin of appreciation)[91] to recognise the "legal parent-child relationship" between the child and the intending mother.[92] In this regard, access to adoption shall satisfy the requirements under Article 8, where the uncertainty of the legal parent-child relationship is as short lived as possible, and where the adoption takes place as soon as the legal relationship between child and non-genetic mother becomes a practical reality. However, it is within the national authorities' discretion as to when "the concrete circumstances" of such a relationship becomes a practical reality.[93] Such adoption would naturally include a best interests assessment. There is no obligation on member states to automatically recognise legal recognition obtained abroad. In the cases of *CE* and *D*,[94] subsequent to *Mennesson,* the French authorities had registered the genetic father as the child's parent, had issued the children with certificates of French nationality (as opposed to birth certificates), and the intending mother could avail of adoption.[95] Therefore, there was no violation was found in respect of the children's Article 8 rights.

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[90] L. Bracken, "The ECtHR's First Advisory Opinion: Implications for Cross-Broder Surrogacy Involving Male Intended Parents" (2021) 21(3) *Medical Law International* 3 at 11, citing L. Bracken, "Assessing the Best Interests of the Child in Cases of Cross-Border Surrogacy: Inconsistency in the Strasbourg Approach? (2017) 39(3) *Journal of Social Welfare and Family Law* 368.

[91] Application No. 65192/11, 26 September 2014, at paragraph 51.

[92] The Advisory Opinion noted that the lack of legal recognition of an intending mother has a number of negative connotations in the life of a child, namely it places them in a position of legal uncertainty regarding their identity within society, the denial of that child's access to their intending mother's nationality which could impact their rights of resident and their right to inherit from the intending mother's estate would be impaired. In addition, their relationship with their intending mother is at risk where the intending parents separate, or the intending father dies. Grand Chamber of the European Court of Human Rights, *Advisory Opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother*, Request no. P16-2018-001 at paragraph 40.

[93] Application No. 65192/11, 26 September 2014 at paragraph 52.

[94] While the children were 3 and 7 years old in *CE*, this was not found to be a disproportionate interference. In *D,* it took 5 years for the possibility of adoption to arise in respect of the intending mother in 2017. However, the Court recalled that the Advisory Opinion setting out the need for a speedy mechanism upon the establishment of maternal bonds was only available in April 2019. This did not constitute the same protections for the member state in *DB v Switzerland (Application Nos. 58817/15 and 58252/15,* 22 November 2022*)* discussed below.

[95] Simple adoption was processed on average in 4.7 months and full adoption was processed in 4.1 months. The case of *Gas & Dubois v France* (Application no 25951/07), 15 March 2012 details the variances between simple and full adoption. A simple adoption order does not sever the ties between the child and his or her original family but creates an additional legal parent-child relationship. This order can be made irrespective of the age of the person being adopted however if the adoptee is a minor, all the rights associated with parental responsibility being removed from the child's mother or father in favour of the adoptive parent. However, there is one exception, when an individual adopts the child of his or her spouse. In this case, the husband and wife share parental responsibility. The adoptee retains some inheritance rights in his or her family of origin and acquires rights in respect of

States Parties are not required to recognise foreign birth certificates in the national register where such would constitute legal recognition, nor are they required to recognise the legal parentage *ab initio.*[96] Furthermore, the ECtHR found that each situation should be examined in the light of the particular circumstances of the case,[97] and that such legal recognition would not always be, in its opinion, in the child's best interests where its refusal would deter individuals from surrogacy arrangements, the "risks of abuse" they entail, and the interference with the possibility of knowing one's origins.[98] The Court, in its Advisory Opinion, deemed the child's best interests to "*entail the legal identification of the persons responsible for raising him or her, meeting his or her needs and ensuring his or her welfare, as well as the possibility for the child to live and develop in a stable environment*".[99] It acknowledged that the reality of the issues went beyond the child's identity and that essential aspects of the child's private life comes into play "*where the matter concerns the environment in which they live and develop and the persons responsible for meeting their needs and ensuring their welfare*".[100] The "general and absolute impossibility" of obtaining legal recognition of the relationship between a child born abroad and their intending mother was considered to be incompatible with the child's best interests.[101] Furthermore, such private life was said to apply with even greater force in circumstances where the intending mother provided her own ova to the surrogacy arrangement.[102]

The Non-Genetic Intending Father

While the cases mentioned above relate to intending mothers who are not genetically related to the children, Bracken has argued that the logical progression from these cases is the recognition of non-genetic fathers insofar as there is recognition of non-genetic mothers.[103] In this regard, the Court in both *Foulon and Bouvet v France,*[104] and *DB v Switzerland,*[105] did not find a violation in respect of the non-genetic intending father following France's failure to recognise an Indian and

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the adoptive parents, including rights to maintenance. A full adoption order can only be made while the child is still a minor and may be requested by a married couple or by a single person. It creates a legal a parent-child relationship which takes the place of the original relationship. A new birth certificate is drawn up and the adoption is irrevocable.

[96] Grand Chamber of the European Court of Human Rights, *Advisory Opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother*, Request no. P16-2018-001 at paragraphs 50, 52.

[97] *Ibid* at paragraph 42.

[98] *Ibid* at paragraph 41.

[99] *Ibid* at paragraph 42.

[100] *Ibid* at paragraph 45.

[101] *Ibid* at paragraph 44.

[102] *Ibid* at paragraph 47.

[103] L. Bracken, "The ECtHR's First Advisory Opinion: Implications for Cross-Broder Surrogacy Involving Male Intended Parents" (2021) 21(3) *Medical Law International* 3 at 15.

[104] (*Application No 9063/14 and 10410/14*, 21 October 2016).

[105] *(Application Nos. 58817/15 and 58252/15,* 22 November 2022). In this case, a same sex male couple whose relationship was recognised through a registered partnership, had a son through surrogacy with an anonymous egg donor. The couple had a Californian pre-birth parental order that they sought to have recognised in Switzerland. The domestic courts refused; however, when the child was 7 years 8 months old, the non-genetic father was able to adopt him.

Californian birth certificate respectively. In both cases however, the Court found a violation of the child's right to private life given the "*general and absolute impossibility of obtaining recognition*" of the parent-child legal relationship "*for a significant period of time*".[106] While the Court in *Foulon* dealt with the matter in quite a summary fashion,[107] the Court in *DB* elaborated on the relevance of the sexuality of the intending parents.[108] It found that the precedents set by *Mennesson* and the Advisory Opinion applied equally to same sex couples on two bases. The first was that the "*interest of the child cannot depend solely on the sexual orientation of the parents*".[109] The second was that "*it is appropriate to disregard any potential questionable behaviour of the parents so as to allow the pursuit of the best interests of the child, the supreme criterion in such circumstances*".[110] Therefore, while there is at the very least consistent findings in respect of the legal parent child relationship, regardless of sexuality, there is nonetheless little consideration for the difference at treatment faced by same sex couples as a distinct and separate issue.[111]

The Non-Genetic Intending Parental Unit

Throughout the aforementioned cases, there was a "genetic anchor parent" within the intending parental unit. The complete absence of such a genetic link has been treated considerably more unfavourably by the ECtHR in the case of *Paradiso and Campanelli v Italy.*[112] In this case, a clinic mistake resulted in there being no genetic link between the child and her intending parents. The intending father intended not only to be the father, but also the genetic father of the child. The intending mother named herself and her husband as the parents on the Russian birth certificate, thereby triggering the Italian authorities to initiate legal proceedings for fraud, declare the child stateless, strip the child of his identity and remove him from the applicants. Despite the intending parents being assessed and found to be loving caregivers, and the long term perceived damage that such separation could be done to the child, the Italian authorities left the child in care for a year and a half after which, he was adopted by another family. The Grand Chamber would not consider arguments in relation to the child's ECHR rights as it held that the applicants had no

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[106] *Ibid* at paragraph 89.

[107] The Court simply stated that it saw no reason to diverge from the case law of *Mennesson,* (*Application No 9063/14 and 10410/14*, 21 October 2016) at paragraphs 57-58.

[108] The lack of violation in *DB* arose from the intending parents having circumvented the domestic prohibition on surrogacy and therefore, the refusal to recognise the birth certificate was "*neither arbitrary nor unreasonable*", *DB v Switzerland (Application Nos. 58817/15 and 58252/15,* 22 November 2022 at paragraph 92. This was despite the Court finding that the applicants constituted "family life" for the purposes of Article 8.

[109] *Ibid* at paragraph 85.

[110] *Ibid* at paragraph 86.

[111] The Court in *DB* held that having determined the issue under the private life of the child, it did not feel it necessary to determine the joint complaint under 8 and 14 which was raised in respect of the difference of treatment based on the nature of the child's conception and also in being the child of a same sex couple, given that adoption was not available to them until 1 January 2018.

[112] *Paradiso & Campanelli* Application No. 25358/12, 27 January 2015. In this case, the applicants were a married couple who availed of a surrogacy agreement in Russian following 8 failed IVF attempts. They had been approved to be adoptive parents but having waited 4 years to receive a child, had reached the age limit at which they were no longer permitted to adopt. Only then, did they resort to surrogacy in Russia, which was illegal in Italy.

standing in relation to him, given the lack of social and biological link, despite both absences being due to circumstances beyond the applicants' control. While the Court held that while it could not ignore the emotional hardship suffered by those whose desire to become a parent has not or cannot be fulfilled, it could not show preference to the applicant's interest in their personal development by continuing their relationships with the child given the "public interests" at stake.[113] Legalising the relationship would have condoned an unlawful act that breached Italian legislation and therefore, the Court held that there had been no violation of Article 8.

While the *Paradiso* case arose in 2015 prior to the Advisory Opinion, similar circumstances arose in the 2021 case of *Valdis Fjolnisdottir and Others v Iceland*,[114] wherein neither mother had a genetic link to their child born through surrogacy. The domestic authorities refused to recognise their Californian birth certificate or the child's Icelandic citizenship. The child was considered to be a foreign national and unaccompanied minor.[115] Essentially, the applicants were treated like foster parents but the child was, unlike in *Paradiso*¸ allowed to remain with the applicants, albeit without the legal parent-child relationship.[116] Nonetheless, the couple faced numerous legal and bureaucratic obstacles in progressing their applications for parentage.[117] The ECtHR relied on the positive steps taken by the State to maintain the family bond between them through the fostering agreements. It found that the "*child's best interests, although of paramount importance, could not override the fundamental legal principles of parentage*".[118] Among other factors, the Court found that due to the quality of the ties formed and the "*close emotional bonds forged with the [child] during the first stages of life*",[119] the applicants enjoyed family life within Article 8 of the ECHR. However, it held that the interference with this family life was in service of a legitimate aim, that of protecting women from being pressured to engage in surrogacy and the child's right to their origins despite the surrogate having voluntarily relinquished all claims to parental rights and the

[113] *Ibid* at paragraph 215.
[114] (Application No. 71552/17) 18 May 2021.
[115] The child was not automatically entitled to Islandic citizenship given that he had been born in the USA and neither of his parents under Islandic law (the surrogate and the biological father) were Islandic.
[116] The "foster care" scenario was only supposed to continue until the applicants arranged their legal parentage, but this never came to fruition. This temporary foster care arrangement had to be revisited by the child welfare authorities every two years. The child's legal custody continued to rest with the child protection committee and a legal guardian, Ms M was appointed to him. Unlike the guardian appointed in *Paradiso* who supported the child being placed in care, Ms M was the person who lodged the application to the ECtHR on the child's behalf.
[117] The child eventually did obtain citizenship on foot of a direct Act of Parliament when he was two and a half years of age, as well as a residency permit, but the applicants were refused parentage in each court. When the child was nearly four, the applicants were formally denied parentage by the District Court. There were two reasons for this, the first was that the legal mother in Iceland was the surrogate and the second was that surrogacy in Iceland was prohibited and recognising the foreign parentage would be viewed as an authorised circumvention of that prohibition. The applicants had been assessed through a screening and evaluation process and were at all times found to have provided very good care to their son.
[118] *Valdis Fjolnisdottir and Others v Iceland* (*Application No. 71552/17,* 18 May 2021) at paragraph 21.
[119] *Ibid* at paragraph 62.

child being informed about the nature of his conception already. The Court held that the foster care arrangement allowed them to continue to lead a family life, uninterrupted by an intervention by the state.[120] It also took account of the possibility of adoption in its holistic examination of the necessity of the interference, notwithstanding that the applicants were unable to jointly adopt their child.[121] Ultimately, in finding that there had been no violation of the applicant's right to respect for family life,[122] the Court focused on the absence of "*actual, practical hindrances in the enjoying of family life and the general interest which the State sought to protect by the ban on surrogacy*".[123] It also found that Iceland had acted within the margin of appreciation.

While the judgment notes that the child had an application made on his behalf by his guardian,[124] it reads entirely as if responding to the claims of the intending parents. The Court did not include any assessment of the specific child's best interests in this case and the term "best interests" is not to be found in the Court's judgment. The perspective of the child was entirely lacking from this judgment which preferred instead to focus on the abstract and general interest of banning surrogacy. The child in this case did not have parents living in the same country, and his Californian surrogate was not his legal mother in her country of residence. He was therefore parentless, with no right of inheritance to any parent, no automatic right to the nationality of his intending parents, and it is unclear what the basis for his citizenship under the standalone Act of Parliament was. His guardian was a civil servant. While the child remained in their physical custody, the legal custody was held by the social work department and subject to change at any point. It was suggested by the Court that the fostering agreement "*must be considered to substantially alleviate the uncertainty and anguish cited by the applicants*"[125] despite there being no evidence of this, and the applicants pleading otherwise. It is perhaps interesting that adult children who maintain a desire to seek out their biological parents, as will discussed in particular detail in Part 2, are considered by the ECtHR to have mental and psychological suffering, even if this has not been medically attested, by virtue of their interest in discovering their parentage not

[120] *Ibid* at paragraph 71.
[121] The applicants sought to adopt the child but were informed that their application could not proceed when they had parentage proceedings pending. By the time they were refused their parentage, they had divorced and were therefore ineligible to divorce. While they applied in any event, this had gone unanswered for 6 months and they were relying on exceptional circumstances. The adoption authority also required the consent of the surrogate and her husband, as well as a statement from the applicants confirming that they had not paid any fee to the mother of the child for the adoption. They had made a payment to her as part of the surrogacy agreement.
[122] The Court found that the applicants' arguments in respect of their private life were in principle the same as those raised in relation to their family life. The applicants' application in relation to Article 14 was determined to be manifestly ill-founded with little explanation other than "*the material submitted to it does not disclose any appearance of a violatio*n", at paragraph 79.
[123] *Ibid* at paragraph 75.
[124] In *Paradiso*, the Court determined that it could not consider any claims on behalf of the child, due to the applicants not having standing as a result of the lack of biological link or family life, given that the child was almost immediately taken into State foster care. In this case, the Court had an application from a guardian and had established family life between the applicants and the child.
[125] *Valdis Fjolnisdottir and Others v Iceland* (Application No. 71552/17) 18 May 2021 at paragraph 71.

disappearing with age.[126] There does not appear to be a corresponding recognition of the exhaustive attempts of intending parents to recognise themselves as the child's parent,[127] in a manner that would require their recognition of the legal parent-child relationship, as opposed to a criticism of the time taken simpliciter.[128]

Family Breakdown in the ECtHR

It is also extremely fortunate that the child in *Valdis* had divorced intending parents who appeared to be able to co-parent.[129] However, neither party had a genetic link to the child; neither had legal parentage. Therefore, neither party had the legal "upper hand" which could act as a significant power imbalance in the access of that child to both intending parents, unlike the case of *AM v Norway,*[130] where the genetic father decided to cut all ties of access and custody with the non-genetic intending mother. The intending mother sought recognition of her maternity however, this was denied based on the prohibition on surrogacy in Norway. She sought to adopt the child but as the genetic father refused to give his consent, she was denied. She sought access with the child, and this was refused by the domestic

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[126] "*Whilst it is true that the applicant, who is now 69 years old, has been able to develop her personality even in the absence of certainty as to the identity of her birth mother, it must be acknowledged that an individual's interest in discovering his or her parentage does not disappear with age, quite the reverse. Moreover, the applicant has shown a genuine interest in ascertaining her mother's identity, since she has tried to obtain conclusive information on the subject. Such conduct implies mental and psychological suffering, even if this has not been medically attested*", *Godelli v Italy,* Application no, 33783/09, 18 March 2013, at paragraph 42.

[127] This is in circumstances where previous applicants have engaged in invasive medical procedures and assessments for adoption, faced financial debt, trusted another person to carry their child in an area of agonizing legal uncertainty, travelled abroad, spent their child's early life in temporary accommodations and been denied state reliefs and benefits, gone through countless administrative procedures, fought legal battles in their countries highest courts and by necessity, exhausted every domestic remedy available to them in order to appear before the ECtHR and ask for the same things, having been asking for years.

[128] See *AL v France*, (Application no. 13344/20) 7 April 2022. In this case, the surrogate told the intending parents that the child had died and sold the child to another couple, who were unaware of the surrogacy agreement, for €15,000. The child was "recognised" under French law twice, once by the genetic father and the surrogate before the birth of the child and once by the resulting parents 6 days after. The genetic father of a child born through surrogacy, albeit domestic surrogacy, was denied his parental recognition for a period of six years while the child lived with the resulting couple. The Court did not find a violation based on the lack of recognition, given the domestic courts assessment of the child's best interests but it did find a violation of Article 8 based on the time taken to reach its final decision. The passage of time had an impact on the concrete assessment of the facts of the case and as a result the State had failed to fulfil the duty of exceptional diligence imposed on it in the circumstances of the case.

[129] Following their divorce, the child then lived for one year with the first applicant and the next year with the second applicant. There is no mention of contentious access hearings within the body of the judgment and the fact that neither parent wanted to adopt the child to the exclusion of the other speaks to the quality of their shared care giving. The child currently resides under a permanent foster agreement with the first applicant and her new partner.

[130] (Application No. 30254/18) 24 March 2022. This case revolves around a separated couple who engaged in a surrogacy agreement together. Under Texan Law the intending mother was the legal mother who was not the genetic mother of the child. When the child was born, she stayed with the intending mother while the intending father visited daily for approximately two months. The intending parents then shared care of the child until they were 17 months old at which point, the genetic father decided to cut off all contact with the intending mother.

courts on account of the tension and conflict between the parties, who separated prior to the conception of the child.[131] However, as she had not raised the issue of access before the Supreme Court, this could not be raised before the ECtHR.[132] Furthermore, she could not invoke the rights of the child before the domestic courts; only the genetic father could do that. The Court held that the applicant's claim fell under the auspices of "private life" and deemed it unnecessary to consider whether the 17 months they spent together constituted "family life".[133] It ultimately determined that there was no violation of this private life, despite her having no mechanism to establish the legal parent-child relationship, as required under the Advisory Opinion. It was able to so hold given the domestic authorities consideration of the best interests of the child was considered to be "meticulous".[134] It found that it was not the State intervention, but rather the private intervention of the genetic father that ceased her having a relationship with the child, and this aspect contributed towards the proportionality assessment of the Court.[135] The child was not joined as a party to the proceedings and thus no violation at all was found in this case. While undoubtedly the reliance on the best interests test was the crux of the judgment, this should be placed in its context. There was no suggestion within the judgment that the tension and conflict arose from the intending mother alone, yet the genetic link of the intending father grounded his default parentage and

[131] They found that the intending parents operated within a constant level of conflict whereas the genetic father had entered into a new relationship within which he was expecting another child. The Courts considered that this new relationship offered the child a safe and "adequate" environment. It found that to grant the intending mother contact rights could not arise without a more substantial legal basis and it was the legal basis which could allow for interferences with the child's stability.

[132] Judge O'Leary held in her concurring opinion that *"[t]he Court had no other choice [other than to rule her claims re contact as inadmissible]. Had the applicant pursued the contact rights issue, the Chamber would have had to engage with what is probably one of the most difficult aspects of a case such as this case from the perspective of the respondent State, namely the possible legal response when a biological parent unilaterally cuts off all access between a child and a person with whom he sought to co-parent the child and who cared for and raised the child since birth*", at paragraph 10.

[133] *Ibid* at paragraph 111. It held: "*the Court bears in mind that it has been held that there is no valid reason to understand the concept of "private life" as excluding the emotional bonds created and developed between an adult and a child in situations other than the classic situations of kinship….Proceeding on the basis that the case concerns "private" rather than "family" life thus does not entail that the Court will not take into account the actual bonds that had been created between the applicant and [the child]*", at paragraph 110.

[134] *Ibid* at paragraph 133.

[135] *Ibid* at paragraph 121 and 133.

considerable power imbalance, and this was ardently criticised within the judgment's dissent.[136]

Commercialisation

Finally, the most recent ECtHR case of *KK v Denmark,*[137] specifically deals with the issue of the recognition of a foreign adoption order subsequent to a commercial surrogacy agreement. The Court held that States Parties are afforded a wide margin of appreciation in matters which raise "*delicate moral and ethical questions*", and that "*the quality of the parliamentary and judicial review of the necessity of a general measure…is of particular importance, including to the operation of the relevant margin of appreciation*".[138] The domestic court had indeed taken the best interests of the child into account; however, that assessment determined that the child's interest was best placed in not being treated as a commodity, as opposed to having their legal parent-child relationship with their intending mother recognised under Danish law.[139] The ECtHR held that such a determination would be in violation of Article 8 of the ECHR had there not been a best interests assessment of the child carried out.[140] The Court considered whether Danish law had offered another "means" of recognising the legal parent-child relationship such as those described in the Advisory Opinion.[141] Citing *AM v Norway*,[142] *Valdis v Iceland*,[143] *CE v France*,[144] *H*

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[136] By Judge Jelic, who referred to the right of every child to know their identity, which she determined should not be confined to biological connection alone, but should be broadened to encapsulate intending parents also, at paragraph 36. She referred to the ensuing consequences of the child finding out that the applicant existed and was unable to get to know her despite their close relationship from his birth. She also believed that the Court failed to take account of the lack of ties between the child and his surrogate. Furthermore, she pointed to the "imbalance of power" that arises when the genetic father can firstly end all contact, refuse to consent to the adoption order in respect of the applicant but could consent and endorse an adoption order between the child and his new partner who had no role in the conception of the child: "*[s]uch an imbalance of power not only leads to one person being able to make life-changing decisions over another person, it can also create a situation where this power can be misused in order to abuse an intended parent*", at paragraph 45. Furthermore, *"[a]warding such large powers to one person is not only discriminatory against the parent who was biologically unable to procreate, it also acts contrary to the intended purpose of surrogacy and the interest of the child*", at paragraph 46.

[137] Application No. 25212/21, (6 December 2022). In this case, the twins, born to a Ukrainian surrogate, obtained Danish nationality by virtue of their father's genetic link. The intending mother was also granted joint custody together with the intending father. The domestic Supreme Court had held that the Advisory Opinion applied to surrogacy where remuneration was paid and that the best interests of the children should always be taken into account. However, the applicant was seeking the recognition of a step parent adoption subsequent to a surrogacy agreement and there was an absolute prohibition on payments in adoption. Therefore, the Supreme Court held that a change in the law was required for them to recognise the intending mother as the legal parent in Danish law. At the time of the judgment, the law (section 15 of the *Adoption Act 1997*) was no longer applied in containing an absolute ban on stepchild adoption with regard to children born though a commercial surrogacy agreement.

[138] *Ibid* at paragraph 45-46.

[139] *Ibid* at paragraph 57.

[140] *Ibid* at paragraph 61.

[141] *Ibid* at paragraph 64.

[142] (Application No. 30254/18) 24 March 2022

[143] *Valdis Fjolnisdottir and Others v Iceland* (Application No. 71552/17) 18 May 2021.

[144] *CE v France,* (Applications No. 1462 and 17348/18), 12 December 2019.

v United Kingdom,[145] it held that:

> "'*another means' could be putting the child into foster care with the intended mothers, or issuing a court order for the exercise of joint parental responsibility, or jointly recognising a child who had a legal parent-child relationship only with the woman who had given birth."*[146]

However, this skews the position of the Advisory Opinion which was concerned solely with violations in respect of the child's Article 8 rights. In each of the cases cited, the child was not joined as a party to the case. Therefore, it was not the case that the means stated above are appropriate within the confines of the Advisory Opinion but rather, each of those cases found that there was no violation in respect of the adult applicants, as in all such cases before the ECtHR. Nonetheless, the Court concluded that once the intending mother in *KK* was refused her adoption application, she had no alternative means to recognise the "legal parent-child" relationship. Such a lack of recognition was held by the Court to have a negative impact on the child's right to respect for private life, in particular because it "*placed them in a position of legal uncertainty regarding their identity within society*".[147] Therefore, it was in the children's best interests to obtain the same legal relationship with their intending mother as they had with their father.[148] It found that having regard to the paramountcy principle and the consequently reduced margin of appreciation of the State,[149] the two factors which carried particular weight, Denmark had not:

> *"struck a fair balance between, on the one hand, the* ***specific*** *children's interest in obtaining a legal parent-child relationship with the intended mother, and, on the other, the rights of others, namely those who,* ***in general and the abstract****, risked negatively affected by commercial surrogacy arrangement".*[150] (emphasis added)

It followed that there had therefore been a violation of the children's right to respect for private life under Article 8 of the ECHR, but not the intending mother's.[151] The welcome development in this case, however, is the more concrete assessment of the individual circumstances of the cases coming before the ECtHR, as opposed to

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[145] *H v United Kingdom*, (Application No. 32185/20), 31 May 2022.
[146] *KK v Denmark,* (Application No. 25212/21), 6 December 2022.
[147] *Ibid* at paragraph 72. It held that while the intending mother could make a will to cure the inheritance issues, the children would not be heirs unlike other Danish children who have a legal parent-child relationship.
[148] *Ibid* at paragraph 74.
[149] *Ibid* at paragraph 75.
[150] *Ibid* at paragraph 76.
[151] The Court did not however, provide much of an exploration on this point. The Court deemed the domestic court to concentrate on the children's lives and "taken it for granted" that the intending mother's private life "*being her right to personal development through her relationship with the children, and her interest in continuing that relationship with them"* was outweighed by public interests, at paragraph 55. Nonetheless, it saw no reason to hold otherwise.

viewing the right *in abstracto* only.[152]

In Concreto, not *In Abstracto*

The rights of the intending parents, which are often argued in isolation to those of children, have been considerably minimised despite the consistent uncertainty faced by the family unit in terms of administrative othering and the heightened risk of a child being left without a decision-maker in key aspects of their lives. The lack of violation in relation to the intending parents in *Mennesson* was based on the fact that had not claimed the difficulties they experienced had not been "*impossible to overcome*".[153] In *Valdis*, the child was placed in a foster care arrangement with the intending parents, yet it was held that there was "*an absence of an indication of actual, practical hindrances in the enjoyment of family life*".[154] In *Paradiso*, the child was taken into foster care and adopted by another couple yet there was no violation. In *AM*, all elements of a social relationship between the child and the intending mother ceased and the genetic father refused to consent to her adoption of the child, and no violation was found. In *DB,* the child could not access the citizenship of the non-genetic father who had no right of representation in respect of the child,[155] yet again, there was no violation of his Article 8 rights with the Court deeming the issues he experienced not "*serious enough*".[156] These approaches would appear to be at variance with the sentiments in *AM* of Judge O'Leary who held that "*the child-parent relationship is a two-way street, refusal of recognition of the intended parent clearly has consequences for the rights, interests and social reality of the child*".[157] Furthermore, the difficulty with the approach taken in the cases above is that it seemingly requires the child to be put in a position of considerable precarity before a pro-active approach is taken to the recognition of the legal parent-child relationship.

In terms of the proportionality or necessity of the interferences, the Court has not historically placed importance on determining whether the risks associated with surrogacy as a whole, while legitimate, have been realised in the cases before it. For example, in *Mennesson,* the public policies of France were set out as the inalienable nature of the human body which could not become a commercial instrument and the concern that a child could be reduced to the object of a contract.[158] In *CE*, *D,* and

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[152] The ECtHR held that "it is not the Court's task to review *in abstracto* the compatibility with the [ECHR]", *KK v Denmark,* (Application No. 25212/21), 6 December 2022 at paragraph 70.

[153] *Mennesson v France* Application No. 65192/11, 26 September 2014 at paragraphs 92. The practical issues experienced by the Mennessons were being obliged to produce US civil documents accompanied by an officially sworn translation each time they were required to show proof of the legal parent-child relationship, they were sometimes met with suspicion or incomprehension, difficulties with registering for social security, enrolling them at the school canteen, an outdoor centre, and family allowances. The lack of French nationality complicated their travel and their right to remain in France.

[154] *Valdis Fjolnisdottir v Iceland* (Application No. 71552/17) 18 August 2021, at paragraph 75.

[155] He could not make decisions in respect of his son's nursery, kindergarten, school, no decision making power, and could only undertake trips abroad with the child with the prior consent of the genetic father. The child did not have Swiss nationality for four years, at paragraph 57-58.

[156] *DB v Switzerland* (Applications Nos. 58817/15 and 58252/15) 22 November 2022, at paragraph 93.

[157] *AM v Norway* (Application No. 30254/18) 24 March 2022.

[158] *Ibid* at paragraph 60.

AL the legitimate aims sought was the protection of the health, rights and freedoms of the child and the surrogate mother and the discouragement of the practice of surrogacy in French law. In *AM,* the legitimate aims proposed by the government were the protection of the rights of the child, and preventing disorder or crime, notwithstanding both the genetic father and the non-genetic intending mother circumvented Norwegian law in engaging in the surrogacy agreement.[159] In *CE,* the applicants rightly criticised these aims as "*abstract, ideological*" and ignoring the concrete reality of the interests of real children, in circumstances where the surrogate had voluntarily waived all rights and duty on the child. Furthermore, any level of reasonable investigation or consideration would result in the conclusion that the absence of regulation does nothing to cure such concerns. In this regard, Judge Jelic has held:

> *"No doubt [protecting women from exploitation and eradicating child trafficking] are valid interests which are protected by the respondent State, but nonetheless the authorities should have regard to the absence* ***of any indication of misuse of surrogacy involving exploitation in the present case****. It is thus questionable whether the general ban on surrogacy may serve as a legitimate ground to refuse the applicant recognition as the legal mother of the child.* (emphasis added)*"*[160]

She held that "*an individualised approach"* should be applied by authorities so as to take account of the diverging interests in each case, in "*sensitive areas subject to diverging circumstances*".[161] Furthermore, taking *AM* and *KK* together, it would appear that the ECtHR are more likely to find a violation of the child's rights if the child has been unable to have their parent-child relationship legally recognised in circumstances where it reflects a stable familial unit and social reality. This would appear to constitute an intrinsic protection of the family life created within these surrogacy agreements, despite the ECtHR routinely focusing on the private life of the child. While arguably perceived as child centred, this approach appears to take a view that children of parental relationship breakdown do not require the vindication of their rights by the ECtHR, given that the non-genetic parents cannot join the child

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[159] Judge O'Leary held that *"[b]y entering a surrogacy arrangement abroad which practice is not lawful in their own State, an intended parent embarks on a legally precarious journey. States cannot necessarily be held accountable for what may subsequently unfold and too often the cases before the Court reveal the risk that children become the victims of well-intentioned but desperate and at times conflictual parental projects. However, it is hard not to conclude, from the existing case-law of the Court, that the journey is particularly precarious for non-biological parents and even genetic (not gestational) mothers, in relation to whom the law has not kept apace either of social reality or of science*", *AM v Norway* (Application No. 30254/18, 24 March 2022) at paragraph 23.

[160] *Ibid* at paragraph 28.

[161] *Ibid* at paragraph 26. Judge Jelic argued that the Court engaged in a "review-based" assessment and criticised it for having not adequately determined the proportionality of the interference, having regard to the individual circumstances of the applicant before it, at paragraphs 28 and 32. She further refers to the excessive "*formalism*" and "*rigidity"* of the Norwegian authorities. In referring to the ECHR as a living instrument, adapting to "*new emerging social concepts",* she held that "[*i*]*nternalising this principle requires the Court to look beyond the process-based assessment followed by the domestic authorities, and instead to conduct a case-by-case analysis of the circumstances of a given case – and even more so where such crucial aspects as parenthood are in issue*", at paragraph 50.

to the proceedings. This approach is akin to a blanket presumption that stability attaches to the cohesive familial unit, which is, to a considerable extent, to ignore the reality of relationship breakdown, the faultless nature of infertility and the power imbalance that can exist, particularly within the context of domestic violence. Such decisions incentivise unhappy or subservient relationships continuing, to the detriment to the child. Therefore, this area of law deserves a considered and detailed examination of the situations that come before the Court to ensure that the periphery of life and circumstance is not missed due to an overly standardised perception of what the best interests of a child looks like.

Ireland's Compliance with the ECHR

ECHR law establishes that the child's right to respect for their private life will be violated if there is no mechanism to recognise or establish the legal parent-child relationship with their intending parent as soon as that relationship becomes the lived reality of the parties.[162] This applies regardless of the absence of a genetic link between the child and second intending parent, and the sexuality of the intending parents. The mechanism within which to achieve this, however, is within the States Parties discretion, as is the time at which it is determined that the relationship becomes the lived reality. There is no obligation on a State Party to create a framework of parental recognition arising directly from surrogacy agreements internationally, or to create a domestic surrogacy framework, as long as a means to recognise the parentage of the intending parents exists. In the first instance, it should be noted that the Irish courts have taken a considerably dimmer view of the impact of the day to day difficulties and uncertainty that intending parents and their children face:

> *"It is surely most clearly and profoundly wrong from the point of children born through an unregulated process into a world where their status may be determined by happenstance, and where simple events such as registration for schools, attendance at a doctor, consent to medical treatment, acquisition of a passport and even joining sports teams may involve complications, embarrassment and the necessity for prior consultation with lawyers resulting in necessarily inconclusive advice".*[163]

However, as noted a number of times within the judgment of *MR,* the appropriate framework for recognising parentage is a matter for the Oireachtas. In this regard, at a domestic level, step-parent adoption is available where a parent has already

[162] Notably, no violation was found in *Paradiso & Campanelli v Italy, CE v France, D v France, AL v France, AM v Norway* in respect of the intending parents lack of recognition of the legal parent-child relationship. None of these cases joined the child as an applicant to the proceedings. There was a violation of the child's right in *Mennesson and DB* where the child had been joined to the proceedings. There was no violation in *Valdis,* where the child had been joined; however, that couple had not sought an adoption order in respect of the child and that avenue was considered to remain open to them, albeit not joint adoption together (they had divorced).

[163] *MR & DR v an tArd Chlaraitheoir* [2014] 3 IR 533 at paragraph 211, as per O'Donnell J.

been established in Irish law through "natural reproduction principles".[164] However, there are no statistics recorded or published by the AAI as to whether there are any step-parent adoptions being processed in respect of relationships arising from surrogacy agreements.[165] It is entirely unknown as to whether Ireland is offering such an ECHR compliant mechanism, and such is further complicated by the lack of consideration by the ECHR of circumstances in which the genetic mother provides the biological connection in respect of the child. Such a person is undoubtedly considered by the AAI not to be a parent of the child and therefore no such step-parentage could arise on foot of her "parentage". Furthermore, the difficulty that existed in *AM v Norway* is also evident in Irish law, whereby there is no way for a step-parent adoption to be made, without the consent of the parent or guardian.[166] An intending mother in a surrogacy agreement does not automatically qualify as a "relevant non-guardian",[167] who is a person who must be consulted before a child is placed for adoption,[168] and her access to such a status depends on her living with the child and the child's legal parent for two years.[169] However, as noted above, no violation was found in relation to *AM* and the child was not permitted to be joined to the proceedings and as such, there is no violation of Ireland's ECHR obligations at present on foot of this specific legislative lacuna.

[164] Section 58A of the Adoption Act 2010. Section 58A(1)(a) requires that the adopter be the spouse, the civil partner or cohabitant of the person with whom they are adopting the child. It removes the parental rights of all mothers, guardians, and relevant non-guardians where such persons are not the intended adoptive parents to the child, as named in the adoption order.

[165] Statistics from 2012-2014 reflect that only one domestic adoption order was made on the foot of a surrogacy agreement, see: Committee on the Rights of the Child, List of Issues in relation to the third and fourth periodic consolidated report of Ireland: Appendices to the Reply of Ireland to the List of Issues, INT_CRC_ARL_IRL_22253_E (16 November 2015). Also see: Joint Committee on Health: General Scheme of Assisted Human Reproduction Bill 2017: Discussion (Resumed) (27 February 2019), comments of Ms Paula Fagan, CEO of LGBT Ireland: "*the Adoption Authority of Ireland is not processing second parent adoption where there is a donor assisted element to it*".

[166] The Court has two mechanisms under the 2010 Act in dispensing with the consent of a parent or guardian. The first is pursuant to section 31 which follows the parent or guardian placing the child for adoption. The second is pursuant to section 54 which relates to the failure of a parent or guardian in their duty. There is no such framework for dispensing with consent within a step-parent adoption.

[167] A relevant non-guardian is either a father who is not a guardian under the 1964 Act, a section 5 parent under the 2015 Act who does not otherwise have guardianship, a person appointed as a guardian under section 6C but who was not given the ancillary right to object to an adoption order, or a person appointed as a temporary guardian under section 6E of the 1964 Act.

[168] Sections 17 and 18 of the 2010 Act.

[169] Section 37(5) of the 2010 Act provides that a step-parent applying for adoption must have had a home with the child and the child's parent (also the applicant's spouse, civil partner, or cohabitant) for two years. However, section 37(6) provides that the AAI can, having regard to the particular circumstances of the case, may accept an application even where the two years have not been reached. Regardless, the ability of someone to have a section 6C guardianship of any kind requires the applicant to be living with the child and the child's parent for two years.

The second option for intending parents in the international setting is the recognition of foreign adoption.[170] Such a framework has a number of set criteria, with an element of discretion to refuse recognition on grounds of public policy.[171] The Irish courts have recently been called upon to consider the recognition of a foreign adoption order that arose subsequent to an international surrogacy agreement. In the case of *Adoption Authority of Ireland v C & D,*[172] the Supreme Court ordered that such an adoption order was worthy of recognition in Ireland notwithstanding that the surrogacy agreement was commercial in nature, the child's access to identifying information was at the discretion of their parents and the surrogate gave her consent to the transfer of parentage pre-birth. The Court's reasoning for such recognition included the following:

1. There is a strong public policy interest in recognising the status accorded to a person by the law of their domicile and/or habitual residence, and this arises particularly strong where the issue relates to the status in law of parents and their children;
2. The courts routinely "bend over backwards" to avoid leaving children parentless or stateless and the best interests of the child will militate towards recognition of the parent-child relationship, even where the surrogacy arrangement itself is considered to be problematic;

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[170] See section 57(2) of the 2010 Act, and section 1(b) of the *Adoption Act 1991.* Such a framework requires the child to be under 18 years of age, the law on adoption in the relevant jurisdiction to have been complied with, consent was obtained or dispensed with as necessary, the adoption has the same legal impact on birth parentage, an enquiry was carried out on the adopters, the child and parents or guardian, the adjudicative body gave due consideration to the interests and welfare of the child and the adopters have not given any payment or reward in consideration for the adoption. This last criteria is slightly at variance from the Hague Convention which requires that no consent can have been "induced" by the payment.

[171] This is a common position within respondent States Parties' submissions before the ECtHR. For example, in *SH v Poland* (Application Nos. 56846/15 and 56849/15) 16 November 2021, the domestic courts refused to recognise the genetic father's parentage due to the fact that surrogacy "ran counter to community life" in Polish law. However, it was also considered that Poland was not the domicile of the intending parents and the child who enjoyed recognition of their legal parent-child relationship in Israel, where they did reside. However, the ECtHR held that Article 8 does not automatically guarantee the right to acquire a particular nationality or citizenship. In determining the proportionality of the interference in refusing to recognise citizenship arising from a relationship with an intending parent, the Court considered it most appropriate to employ a "arbitrariness" test and a "consequence-based approach" for the applicants. It then concluded that any potential risk to the applicant's family life was purely speculative and hypothetical and the parties had legal recognition in their country of domicile (Israel), and therefore, did not require legal recognition in Poland, despite it being the origin state of the intending father.

[172] [2023] IESC 6. This case involved a same sex male couple who engaged in a Californian gestational surrogacy agreement with an egg donor. The parties obtained a UK parental order in 2019 yet did not have joint parental recognition in Ireland. The non-genetic father of the children was born in Northern Ireland and the genetic father was born in the UK. They were married in the US. It should be noted that the High Court (Barrett J) held that public policy has a "limited function and is confined to egregious cases", [2021] IEHC 785 at paragraph 44. Barrett J concluded that there was nothing "immoral or mercenary at play" in the proceedings before him, "*no prostitution, no trafficking, no child abuse issues presenting" – All that presents is the wholesome love of two men for each other and for their children. On the Family List one so often encounters unhappiness that it is, frankly, wonderful to be asked to adjudicate in a case where such an abundance of love and joy presents*", at paragraph 48.

3. Article 42A of the Constitution carries weight as the decision before the Court was deemed to be proceedings concerning adoption, thus the best interests of the child must be the paramount consideration; and
4. The decisions of the ECtHR dictate that the states must provide some level of recognition to, and protection for, the relationships established.[173]

However, a couple of difficulties arise, if attempting to duplicate the application of the *Adoption Authority* case to the recognition of foreign parental orders, where no subsequent adoption order has been made by the foreign court. The first and most blatant issue is that the Irish proposals within the 2022 Bill do not provide for any framework of recognition for foreign parental orders, as exists within the 2010 Act. However, it should be noted that a further judgment of the Supreme Court arose within two months after *Adoption Authority* that did consider Ireland's recognition of a UK parental order. In *A, B & C v The Minister for Foreign Affairs and Trade & Ors*,[174] the Supreme Court held that there was no reason why a UK parental order should not be recognised in Ireland, notwithstanding the lack of a domestic framework for surrogacy and evidently notwithstanding the lack of a standalone framework for the recognition of foreign parental orders.[175] This judgment has been discussed in Chapter 1; however suffice to say that recognition does not necessarily equate to equal recognition of substantive parental status in all legislative contexts. Such parentage depends on "*the proper construction of the relevant provision*".[176] It should be noted however that the recognition of the parental order was somewhat incidental to the key question in the case, demonstrating the first difficulty in the application of the *Adoption Authority* case. The application for recognition did not come before the Court as part of a standalone application pursuant to statute.[177] Therefore, there is no proactive element to this recognition. It would seemingly arise only within the context of a

[173] Other reasonings provided were that the 2010 Act creates a presumption in favour of recognition and the Attorney General submitted that public policy did not require the refusal of recognition, *Ibid* at paragraphs 87 - 91. In fact, the Attorney General for Ireland was the strongest advocate for the recognition of the adoption, submitting that "everything in this case was very much above board" and that the applicants "did everything absolutely by the book", and were "utterly compliant with the local law". There was no suggestion therefore from the State's legal officer that the fact that the surrogacy was commercial in nature and preceded the step-parent adoption delegitimised the process or was contrary to Irish public policy.

[174] [2023] IESC 10.

[175] *Ibid* at paragraph 71. The Court relied primarily on UK precedent: *In re Valentine's Settlement* [1965] Ch.831*,* as considered by the Irish courts in *MF v An Bord Uchtala* [1991] ILRM 399. It should be noted that at hearing, the Court, in particular Murray J (who authored the majority judgment), was at pains to have counsel for the State confirm his instruction as to whether the Irish State recognised the UK parental order. Throughout the two day hearing, which this author attended, counsel resisted answering this question and informed the Court on the second day that he would seek to take instructions on that point over lunch, despite the proceedings having been ongoing since the previous year. Eventually counsel maintained that the answer to the question was not relevant to their interpretation and so he would not be in a position to answer the Court on this issue.

[176] *Ibid* at paragraph 72.

[177] This question was whether a parent had to be the child's parent, or a citizen, at the time of the child's birth. If the parental order was not recognised, then the parties had no case regardless of the interpretation chosen by the Court.

refusal of recognition of parentage by a various body, agency, or authority etc. and the subsequent challenge of that refusal.

The second issue with the *Adoption Authority* case is that even if such a "bespoke" framework exists, such as those which apply to the recognition of foreign divorce,[178] foreign marriage[179] and foreign adoption,[180] it requires that intending parents travel only to jurisdictions that offer a legal framework for parental orders; the Irish Court must have something to recognise. Furthermore, Ireland's current system of recognition relies on an adoption order being made subsequent to the parental order and requires intending parents to go through two sets of legal proceedings. It is arguable that such could be considered to be "Ireland's mechanism" when it relies on a third party jurisdiction in this manner. The third is that a clear and considerable focus in the judgment to the applicant's domicile in determining their civil status, which would not be the case for intending parents domiciled in Ireland who travel to another country to avail of international surrogacy.

Finally, it is questionable as to whether this mechanism could be considered to be available to intending parents as soon as the legal parent-child relationship becomes a reality. The decision in the *Adoption Authority* case only arose in March 2023 and was arguably a "test case" pursued by the Adoption Authority of Ireland.[181] This would naturally infer that such circumstances had not been readily approved prior to this. This application took six years to be determined and significant financial resources; however, the financial accessibility of the mechanism has not been a facet of the ECtHR jurisprudence. Notably, the *Adoption Authority* judgment arose in circumstances whereby all parties gave clear, informed, and repeated consent to the legal status being sought or resisted by the relevant party. The Irish courts have also not considered the circumstances that might arise in the event of dispute between the surrogate and the intending parents within cross-border parentage arising from a surrogacy agreement; however neither has the ECtHR.

In summary, while the Supreme Court has recognised a foreign parental order, this is dependent on statutory interpretation and is not a standalone framework that can be relied upon by Irish intending parents. While the AAI are now processing applications for the recognition of foreign adoption, it is only as of this year.[182]

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[178] Section 5 of the Domicile and Recognition of Foreign Divorces Act 1986, Section 29(1)(d) of the Family Law Act 1995.

[179] Section 29(1)(d) of the Family Law Act 1995.

[180] Section 57 of the 2010 Act.

[181] It also sought clarification on the public policy relating to the absence of assured access of the child to identifying information relating to the egg donor and the surrogate, temporary limitations placed on the surrogate's personal freedoms in the course of the conception and pregnancy and the fact that consent was given by the surrogate to the transfer of parentage prior to the birth. However, while each were dealt with by the Court briefly, the focus was on Ireland's public policy as it related to commercial surrogacy.

[182] Arising from *DB v Switzerland* (Applications Nos. 58817/15 and 58252/15) 22 November 2022, it could be argued that Ireland could be found in breach of its ECHR obligations in respect of any

While step parent adoption is available in Ireland, there is no published data on whether the AAI are actually processing these applications where they arise from a surrogacy agreement. Therefore, Ireland's compliance with the ECHR is questionable at best and while it seems that the judiciary are cognisant of the decisions of the ECHR, this is undoubtedly an area of law where the legislature must take an active role in clarifying the roles of administrative bodies, such as the AAI, who could use their discretion to exclude surrogacy born children from step parent adoption without publicising such a policy.

Public Policy within the European Court of Justice

The issue of public policy was considered by the European Court of Justice (ECJ) in the case of *VMA v Stolichna Obshtina, Rayon Pancharevo.*[183] This case involved a female couple who lived in Spain and whose child had a Spanish birth certificate (but yet was not a Spanish citizen) recognising their parentage. The birth mother in this case was Bulgarian and sought a Bulgarian identity document for their daughter, naming both mothers, on the strength of the Spanish birth certificate. The authorities refused to issue the Bulgarian birth certificate on the grounds that they did not know the identity of the child's biological mother and that registering two females on a birth certificate was against Bulgarian public policy. The ECJ effectively held that the EU State was required to issue an identity document to the child in the manner sought, in order to enable the child to travel with both of her parents. The basis for this was founded in the right to free movement and travel for EU citizens, without impediment,[184] as opposed to a general imposition that all EU Countries had to recognise the parentage of another EU country. In terms of the arguments in relation to public policy, the Court reiterated that the concept of public policy is not one which can be relied upon by each member state in obscuring itself from the remit of the ECJ. It held that "*public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society*".[185] The Court determined that recognising a birth certificate naming two mothers in the context of the child's freedom of movement does not undermine the national identity or pose a threat to the public policy of Bulgaria.[186] The Court found that it would be contrary

children whose legal-parent child relationship was historically refused recognition even prior to the Advisory Opinion in 2019 which dictated the ECHR compliant requirements. In *DB*, the violation was found in respect of the child's right to respect for private life given that he was seven years old before adoption became available to same sex couples in 2018. It is notable that this violation was found in circumstances where the lack of recognition pre-dated the Advisory Opinion.

[183] (2021) C-490/20. This case involved a married female couple who reside in Spain, one of whom is a Bulgarian national (VMA), the other is a UK national (KDK) and their child whose Spanish birth certificate referenced each of the mothers as "mother" and "mother A".

[184] *Ibid* at paragraph 49.

[185] *Ibid* at paragraph 55.

[186] *Ibid* at paragraph 56. However, a member state does not need to recognise the child's parentage for any purposes other than the exercise of their rights under EU law. It referred to Article 7 of the Charter of Fundamental Rights and its right having the same scope and meaning as Article 8 of the ECHR and considered "family life" to exist in relation to the applicants. It also referred to Article 24 which is the CFR's best interests provision and to Article 2 of the CRC which is the principle of non-discrimination. The Court noted that such a principle applies to the CRC's Article 7 right to have their birth registered immediately, the right to a name and nationality, without discrimination on the basis of the sexuality of the child's parents.

to the rights of the child to be deprived of the relationship of one of her parents when exercising her free movement. What can be ascertained from this judgment is that where a child has been registered on an EU country's birth registrar, each EU country must recognise the details on that birth certificate as registered by the originating country insofar as is necessary for the vindication of the child's rights under the Treaty of the Functioning of the European Union (TFEU).

This does not however mean that one EU member state must recognise the parentage of a child established in another EU member state for the purposes of their own specific national laws, such as succession, maintenance, custody etc. However, in December 2022, the European Commission adopted a proposal to further the recognition of parenthood across member states, irrespective of how the child was conceived or born.[187] While guardianship is recognised across member states in certain situations, this recognition does not extend to parentage.[188] This proposal focuses on the harmonisation of jurisdiction within the EU, applicable law, and the recognition of court decisions, together with the establishment of a European Certificate of Parenthood. This Certificate is voluntary for families to opt into but would be a requirement for each member state to issue and accept. It should be noted that the proposed Regulation does not interfere with existing laws that allow grounds of public policy to justify a refusal of recognition; however, as can be seen from *VMA* this is a particularly high threshold when it comes to the exclusion of same sex couples. The scope of this instrument extends to the "civil matter of parenthood in cross-border situations", but does not extend to national laws on guardianship, maintenance, succession, recognition in a domestic civil register, or nationality.[189] It would therefore appear to be limited to the recognition of the establishment, as opposed to the entitlements, of parenthood which in practice is not a considerable advancement in the rights of children born through AHR. In terms of next steps, in order to come into effect, this proposal must be adopted unanimously by the European Council. From the Irish perspective, the Minister for Justice has recently advised that he had sought legal advice on the matter and had determined that Ireland would not take part in the adoption and application of the proposed regulation on the following basis:

> *"The principal issues of concern in relation to the proposed Regulation are the risk of undermining Government policy on surrogacy and donor assisted human-reproduction (DAHR), and existing and proposed legislation in these areas. Particular concerns are the protections existing, and to be provided for, in Irish law for the rights and welfare of children*

[187] European Commission, "Proposal for a Council Regulation on Jurisdiction, Applicable Law, Recognition of Decisions and Acceptance of Authentic Instruments in Matters of Parenthood and on the Creation of a European Certificate of Parenthood" 2022/0402 (NLE), 7 December 2022.
[188] The intending father could have their foreign guardianship recognised under section 6D(1) of the 1964 Act which applies to both the Convention on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children, signed at the Hague on the 19th day of October 1996, ("the Hague Convention") and Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction.
[189] *Ibid* at Article 3.

> *born through surrogacy or DAHR, including the rights of children to have access to information on their genetic origins; and the rights and welfare of surrogate mothers and other parties involved in international surrogacy or DAHR arrangements*."[190]

This position means that Ireland can negotiate in relation to the Regulation proposal but cannot vote on its adoption before the Council and is not bound by the measure once adopted. The Minister noted that the matter would be kept under review. However, it is argued that this decision would be more palatable if there was plans underway to create a domestic framework of recognition of foreign parentage that did marry with our considered public policy. However, as will be evident in the below exploration of the Government's proposals, no such framework is envisioned at this time. Most relevant however, is that in both courts, neither the ECHR nor the ECJ have imposed baseline prescriptive requirements that must be adhered to in AHR agreements in order for an order/administrative document already granted or issued in another jurisdiction to be recognised.

The Proposed Surrogacy Legal Framework in Ireland

The *Health (Assisted Human Reproduction) Bill 2022* (the 2022 Bill) seeks to regulate posthumous AHR, pre-implantation genetic diagnosis and sex-selection, embryo, and stem cell research and establish the Assisted Human Reproduction Regulatory Authority (the AHRRA).[191] This thesis, however, is primarily concerned with the manner in which legal parentage is assigned or transferred in surrogacy arrangements, and whether such a framework treats the child's best interests as the paramount consideration. It is argued that in any AHR legislative framework there should be a best practice model, inclusive of an ethical surrogacy agreement,[192] that respects and vindicates the rights and interests of those involved, namely the child, the surrogate, and the intending parents. A starting point for such a framework is informed consent and the registration of identifying information relating to the donor and/or surrogate. It is suggested that informed consent naturally requires the benefit of knowledge of the legal implications and potentially appropriate AHR counselling, where necessary. Further to the discussion of the 2015 Act in Chapter 2, it is also argued that frameworks of parentage should contain elements of judicial

[190] Vol. 1036, No. 1, Dáil Éireann Debate, *European Union* 28 March 2023, Parliamentary Question 576 posed by Deputy Jennifer Whitmore. Minister Harris who was the Minister for Justice at the time, stated that an opt-in under Protocol 21 to TFEU "in respect of the area of freedom, security and justice is required for Ireland to participate in the proposed Regulation". This requires the approval of both Houses of the Oireachtas under Article 29.4.7 of the Constitution. He was opting not to seek such approval.

[191] One noteworthy aspect of this is that under section 78(2)(h), the AHRRA shall undertake the functions assigned to the Minister under Parts 2 & 3 of the 2015 Act including maintaining the NDCPR.

[192] While there is no universally accepted definition of what constitutes "ethical", Finnerty has suggested relying on the four principles of Beauchamp and Childress which are used to aid clinical decision-making: autonomy, beneficence (the concept of promoting well-being), non-maleficence (persons have a duty to do no harm" and justice (achieving equal access to health care services by various subpopulations), S. Finnerty, "Who Profits from International Surrogacy? The Legal and Bioethical Ramifications of International Surrogacy" (2015) 21(2) *Medico Legal Journal of Ireland* 83.

discretion in any court proceedings, in order to ensure that a case by case assessment of each child's interests in determining whether to make the parental order.

Unfortunately, this is not the case under the 2022 Bill, which has not progressed significantly from the General Scheme of the Assisted Human Reproduction Bill 2017 (the 2017 Scheme), and does not appear to have taken considerable account of the pre-legislative scrutiny process, which took place from 2018-2019, culminating in a Report of the Joint Committee on Health in July 2019.[193] Nor has it followed the recommendations of the Special Rapporteur on Child Protection, contained within his report examining the context of AHR as it applies to children's rights and best interests, despite this report being commissioned by the Government.[194] Most substantially, the 2022 Bill does not include any provisions to address international surrogacy or parentage in circumstances where the child was born prior to the commencement of the proposed legislation. However, it is anticipated that these two legislative lacunas shall be addressed before the 2022 Bill reaches Committee Stage in the Dáil,[195] and proposals for these frameworks shall be discussed below.

The Proposals

This Chapter takes two key positions based on the above sections. The first is that the gestational link alone does not establish legal motherhood in the same manner as the combination of gestational and genetic links has historically. Therefore, the legal significance of the gestational link is open to legislative modification by the Oireachtas and subsequent judicial oversight on constitutional grounds. The second is that even if the Oireachtas, or the sponsoring government department, determines that the gestational link alone is sufficient to ground a default parental link at birth, there is a legal precedent to transfer this legal status, whether on consent or within a contested application by the intending parents. The 2022 Bill

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[193] Joint Committee on Health, "*Report on Pre-Legislative Scrutiny of the General Scheme of the Assisted Human Reproduction Bill*", (July 2019). The 2022 Bill appears to have accepted recommendation 3 (removed age limits from primary legislation, recommendation 4 (more than one embryo permitted to be implanted – still not subject to secondary legislation) recommendation 7 (legal advice is now mandatory but international surrogacy has not been addressed) and recommendation 8 (in relation to time limits for storage for gametes and embryos, not in relation to egg-sharing or availability of medical information where there is a predisposition to a certain disease). The 2022 Bill did not accept recommendations in relation to data gathering, the removal of the mandatory counselling (albeit this does not apply to donors), a review mechanism of the Act itself once enacted, the ethics committee, expanding on the welfare of the child (aside from the proposed section 16 which requires fertility staff to carry out risk assessments of intending parents), inconsistencies relating to international surrogacy, posthumous AHR being extended to surviving males and further powers for the AHHRA.

[194] As Professor O'Mahony pointed out to the Joint Oireachtas Committee on International Surrogacy, only two of his 27 recommendations were addressed in the 2022 Bill, Professor Conor O'Mahony, Special Rapporteur on Child Protection, "Opening Statement to the Joint Oireachtas Committee on Surrogacy" (7 April 2022). For the full report see: Professor Conor O'Mahony, Special Rapporteur on Child Protection, "A Review of Children's Rights and Best Interests in the Context of Donor-Assisted Human Reproduction and Surrogacy in Irish Law" (December 2020).

[195] Department of Health, "Government Approves Policy Proposals on international Surrogacy and Recognition of Past Surrogacy Arrangement" *Press Release* (4 January 2023).

accepts neither of these positions and its proposals will be explored in turn.

The Surrogate

Surrogacy under the 2022 Bill is only permitted if it is domestic,[196] gestational[197] and non-commercial.[198] It must be pre-approved by the AHRRA,[199] and surrogacy which does not comply with these requirements is prohibited.[200] It is an offence to engage in non-permitted surrogacy either as a surrogate or intending parent.[201] There is pre-requisite counselling,[202] mandatory legal advice,[203] information regarding risks,[204] and consent procedures that must be followed.[205] The surrogate, who is described as surrogate mother throughout the Bill, despite research demonstrating that surrogates were resistant to the term,[206] must also be assessed by a registered medical practitioner,[207] and an AHR counsellor.[208] She shall, before giving consent for the surrogacy agreement, be informed that she will be the legal mother of any child born as a result of the surrogacy agreement, confirm she has received the legal advice, the AHR counselling, the AHR information document and record her information in the National Surrogacy Register (NSR).[209] The surrogate's consent is required both to the parental order[210] and to the child living with the intending parents following the child's birth,[211] and she will be registered as the child's mother on the birth certificate.[212] In terms of demographics, she must be habitually resident in Ireland,[213] have previously given birth to a child[214] and be aged over 25.[215] Bracken has pointed out that this age limit does not apply to intending parents who only have to be 21 years of age, or to donors who only have to be 18 years of age under the 2015 Act.[216] She suggests that this requirement, coupled with the explanatory note, indicates that "*drafters of the Bill regard the people who act as*

[196] Section 49 of the 2022 Bill.
[197] Section 62(3)(a)(ii) of the 2022 Bill.
[198] Section 50(1)(c), 54 of the 2022 Bill.
[199] Section 51(2) of the 2022 Bill.
[200] Section 51(1) of the 2022 Bill.
[201] Section 147(3) of the 2022 Bill.
[202] Section 17 of the 2022 Bill.
[203] Section 58 of the 2022 Bill.
[204] Section 12 – 17 of the 2022 Bill.
[205] Section 18 of the 2022 Bill.
[206] Surrogacy UK Working Group on Surrogacy Law Reform "Surrogacy in the UK: Myth Busting and Reform" (November 2015) and Surrogacy UK Working Group on Surrogacy Law Reform, "Further Evidence for Reform" (December 2018) at 9.
[207] Section 52(1)(d) of the 2022 Bill.
[208] Section 17, 52(1)(c) of the 2022 Bill.
[209] Section 18 and 24 of the 2022 Bill.
[210] Section 63(1)(iii) of the 2022 Bill.
[211] Section 61 of the 2022 Bill.
[212] Section 157 of the 2022 Bill which proposes section 35B(2) of the 2004 Act. This provision does not facilitate the registration of the intending parents in the register of parental orders for surrogacy if the child's birth is not already registered.
[213] Section 49(a)(i) of the 2022 Bill.
[214] Section 52(1)(a) of the 2022 Bill.
[215] Section 52(1)(b) of the 2022 Bill.
[216] L. Bracken, "The Position of the surrogate in the Health (Assisted Human Reproduction) Bill 2022" (2022) 25(3) IJFL 45 at page 46.

surrogates as insufficiently mature to exercise their reproductive autonomy".[217] She argues that this is paternalistic and undermines the capacity of young people who can otherwise legally enter into virtually any other agreement once they are over the age of majority.[218] She recommends instead that such age limits are left to the judgment of the treating clinician based on their medical circumstances. However, this perhaps suggests that fertility specialists should have a role in assessing a capacity to parent, based seemingly on the maturity of the individual, without any specific expertise to do so.

Furthermore, the UK Law Commissions recently considered the requirement that a surrogate must have had a child before and ultimately determined that such should not be required under UK law.[219] Concerns had been raised within their consultation period in relation to the surrogate's lack of awareness of the implications of pregnancy on her mentally, psychologically, and physically. Indeed in this regard, the government's Inter-departmental Working Group[220] working on the issue of surrogacy in the Irish context suggested that this requirement is a "*critical aspect of informed consent*" and saw no compelling argument for excluding the requirement from the framework.[221] The UK Commissions found it compelling that such a requirement would constitute a paternalistic interference with a woman's bodily autonomy, inaccurately suggest that past pregnancies are a reliable predictor of future pregnancies and impose external values that a family is incomplete without children.[222] It determined that the concerns raised could be better met through individualised medical checks, screening, and implications counselling,[223] all of which is fully endorsed here.

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[217] *Ibid.*

[218] *Ibid.*

[219] Law Commission & Scottish Law Commission, *Building Families Through Surrogacy: a New Law, Volume II: Full Report,* (LC Report No. 411) (SLC Report No. 262) 28 March 2023, at pages 143-145.

[220] The Policy Paper of the Inter-Departmental Group (IGD) describes as follows "*An Inter-Departmental Group – with representation from the Department of Health, the Department of Justice and the Department of Children, Equality, Disability, Integration and Youth – was formed following the publication of the Final Report of the Oireachtas Joint Committee on International Surrogacy (JCIS) in July 2022. The purpose of the this group was to develop a Policy Paper on a recommended approach to establishing a system to allow the possibility of formal recognition by the State of surrogacy arrangements undertaken in other jurisdictions by Irish citizens or lawful residents and access to a legal route to parentage and guardianship under Irish law, which would seek, in so far as appropriate and possible, to implement the recommendations of the JCIS, Inter-Departmental Group",* "*Policy Paper – International Surrogacy and Recognition of Past Surrogacy Arrangements*" (December 2022).

[221] *Ibid* at page 17, section 4.1.

[222] Law Commission & Scottish Law Commission, *Building Families Through Surrogacy: a New Law, Volume II: Full Report,* (LC Report No. 411) (SLC Report No. 262) 28 March 2023, at pages 144-145.

[223] *Ibid* at page 145.

Intending Parents

A surrogacy agreement may involve either two intending parents together where they are married, civil partners or cohabitants, or a single intending parent.[224] Each intending parent must be over 21 years of age at the time of the submission of the application for authorisation of the surrogacy agreement to the AHRRA.[225] They must also be habitually resident in Ireland[226] and provide at least one gamete towards the embryo.[227] At least one intending parent must have an objectively reasonable expectation of living until the child is 18 years of age.[228] This, it is argued, is particularly counter-intuitive in a bill that provides for posthumous reproduction and emanates from a particularly ableist approach. An intending parent must be unable to gestate a pregnancy, unable to conceive for medical reasons, unlikely to survive a pregnancy or giving birth or be likely to have her health significantly affected by a pregnancy or by giving birth.[229] In terms of assessing eligibility and suitability, the 2022 Bill requires that AHR providers shall not provide AHR treatment to an individual unless it is satisfied that the person does not present a "potential significant risk of harm or neglect" to the child born through the AHR treatment, or any other child.[230] Such assessments are not required of the surrogate or her partner despite the fact that she has complete control over whether the parental order is made and whether the intending parents obtain physical custody of the child. Therefore, it is considered that such provision gives rise to a presumption that intending parents are the "bad actors" and the surrogate is unimpeachable.[231] As Bracken has suggested, *"[s]ome provisions of the Bill portray the surrogate as a vulnerable participant who is not trusted to make her own choices, while other provisions suggest that the surrogate is a deviant actor who must be constrained in order to protect the interests of society*".[232] As the UK Law Commissions have noted,

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[224] Section 7(1) of the 2022 Bill. As mentioned in relation to the same requirement within the 2015 Act, this requirement will potentially fall foul of Article 8 of the ECHR further to the case of *Oliari v Italy* Application no. 18766/11, 21 October 2015. The Court held that cohabitation was no longer a required factor in establishing a stable and committed relationship. Bracken has also commented that this "*restriction ignores the fact that there is no rule in any other family law statute that specifies that only married couples, civil partners or cohabitants can have children together*" - L. Bracken, "The Normative Underpinnings of Ireland's Proposed Regulation of Assisted Human Reproduction" (2022) 36(1) *International Journal of Policy and Family* 1 at 13.

[225] Section 53(2) of the 2022 Bill.

[226] Section 49(a)(ii) of the 2022 Bill.

[227] Section 53(3)(a) of the 2022 Bill. For a discussion on the Greek model where no genetic link is required within the intending parental unit, see: M O'Connor, "When is a Motion not a Motion? – The Commissioning Mother of an Irish Surrogate Child" (2020) 23(1) IJFL 14.

[228] Section 53(3)(b) of the 2022 Bill.

[229] Section 53(3)(c) of the 2022 Bill.

[230] Section 16(1) of the 2022 Bill.

[231] While accepting that such circumstances are a rare occurrence and that there are few reports of such conduct, in the case of *AL v France* (Application no. 13344/20) 7 April 2022, the surrogate informed the intending parents that the baby had died and then sold the child to another family for €15,000. In *Re P (Surrogacy: Residence)* [2007] EWCA Civ 1053, [2008] 1 FLR 198, the surrogate told the intending parents she miscarried and only when her eldest child alert the authorities was it discovered that the child had lived and was residing with her and her husband. The intending parents were not informed until the child was 18 months old.

[232] L. Bracken, "The Position of the Surrogate in the Health (Assisted Human Reproduction) Bill 2022" (2022) 25(3) IJFL 45 at page 50.

arising from their stakeholder engagement, the reality is that all parties to a surrogacy arrangement are vulnerable.[233] The intending parents may engage in a surrogacy agreement following a history of failed attempts at AHR and often have experienced considerable stress and emotional distress.[234] Similarly, it is argued that same sex couples have their experiences of being "othered" perpetuated through universal and considerably higher thresholds in becoming parents. It is also problematic that the AHR treatment provider and its staff are tasked with the responsibility of carrying out the assessments. It is not stated, or indeed expected, that such persons would have any level of qualifications in carrying out such an assessment.

Needless to say, this is not an assessment that is carried out outside of the AHR context, as noted by Tobin,[235] and the assessment is mandatory for every intending parent; there is no triggering event for such an assessment to take place. This is particularly concerning in light of the ECtHR case of *Dickson v United Kingdom,*[236] where the Court had to consider the level of state intervention permissible in circumstances where a prisoner, who had violently kicked a drunken man to death, was unable to engage in DAHR through provision of his gamete to his wife. The Grand Chamber found that becoming a parent was a particularly important facet of an individual's existence and identity; therefore, the margin of appreciation is restricted, and was exceeded in this case. The Court acknowledged that the State has a positive obligation to ensure the effective protection of children; however:

> "*that cannot go so far as to prevent parents who so wish from attempting to conceive a child in circumstances like those of the present case, especially as the [prospective mother] was at liberty and could have taken care of any child conceived until such time as her husband was released*".[237]

Bracken has also considered the issue of a pre-conception best interests assessment, as it was under the 2017 Scheme. She concludes that such an assessment must apply in order to offset the State's duty to protect children from being born into a highly

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[233] Law Commission & Scottish Law Commission, *Building Families Through Surrogacy: a New Law, A Joint Consultation Paper,* (LC Consultation Paper No. 244) (SLC Discussion Paper No. 167) 6 June 2019,
[234] *Ibid* at paragraph 3.24 - 3.25.
[235] B. Tobin, "The General Scheme of the Assisted Human Reproduction Bill 2017: A Hybrid Model for the Regulation of Surrogacy in Ireland" (2017) 4 IJFL 83, at page 86. He notes that while it could be permissible where a traditional surrogate in giving up her genetic child to persons unrelated to the child, it is unduly restrictive where at least one intending parent will be genetically related to the child.
[236] *(Application No. 44362/04).* It was argued by the Secretary of State that his wife lacked financial provision, that they could not sanction AHR that withheld a father's care from the child for their formative years (while he was imprisoned) and violent nature of the crime he committed together with the public harm arising from the circumvention of necessary deterrent and punitive elements of a prison sentence.
[237] *Ibid* at paragraph 76.

unsuitable environment, if harm was to occur.[238] However, she argues that such an assessment should explore minimum welfare only, as opposed to a maximum welfare assessment. This would mean focusing more on the basic care needs of the child, the immediate threat the prospective parents pose, as opposed to more subjective elements of parenting. She describes such an approach as "*the least we can do to protect children but also the most that can be feasibly achieved*".[239] Tobin has also agreed with such an approach, approving of assessments that consider whether the parental environment is safe, stable, and healthy, while not endorsing prescribed criteria in search of the "perfect parent".[240] Wade has suggested that such assessments are more readily justified when framed in terms of the "*possibility of a future child being wronged by particular decisions, as opposed to harm being caused to a particular child*".[241]

It is acknowledged that in adoption, the other primary state enforced mechanism of transfer of parentage, the Child and Family Agency carries out an assessment of eligibility and suitability.[242] However, there is no such corresponding assessment, or requirement to offset the risk of harm in the 2015 Act.[243] Therefore, intending parents are being differently on the basis of the nature of their infertility or, having regard to gay men, sexuality, and gender. However, that being said, this provision applies to all AHR treatment which, under the 2022 Bill, includes DAHR treatment. Therefore, it appears to be envisioned that this risk assessment will be imposed on couples under the 2015 Act notwithstanding the fact that this was not considered necessary in the drafting or legislative approval of that legislation. The second issue with such an assessment is that there is no statutory right to appeal the decision of

[238] L. Bracken, "The Pre-Conception Best Interests Assessment - Part 1: Suitability and Feasibility" (2019) 22(1) IJFL 16 at 21. However, she does consider that the "indeterminacy of the best interests principle could be used to justify discrimination against particular parents and to prevent subjectively "undesirable" patients from accessing services" and also points to the difficulties in understanding or know the realm or scope of harm of a child that is not yet an embryo, at 20.

[239] L. Bracken, "The Pre-Conception Best Interests Assessment - Part 2: Implications for the Irish Legal Framework" (2019) 22(2) IJFL 30 at 31.

[240] J. Tobin, "The Convention on the Rights of the Child: The Rights and Best Interests of Children Conceived Through Assisted Reproduction" (2004) LSRP No. 541 at 25.

[241] K. Wade, "The Regulation of Surrogacy: A Children's Rights Perspective" (2017) 29(2) *Child and family Law Quarterly* 113 at 117.

[242] Section 40 of the *Adoption Act 2010.* The Agency then prepare a report that is reviewed by an adoption committee which then makes a recommendation to the Adoption Authority which makes the ultimate decision.

[243] Indeed, the 2022 Bill has made a number of additional requirements to the 2015 Act. Specifically, the donor is now subject to upper age limits, must have their gamete tested in line with the Regulations of 2006, cannot have their gamete used in AHR treatment where such treatment results in children being born to more than four families, and gametes provided in AHR treatment are only permissible from one donor at a time. The donor must have received the AHR information document (sections 26, 36, 32(1)(a), 32(3) and 19(2)(a)). In relation to the upper age limits, it should be noted that the ECtHR recently found a violation of Article 8 (private life) in relation to the imposition of upper age limits on a couple who wished to engage in a second round of IVF, at their own expense, using their own gametes, where the intending mother was 43 years of age (*Liv v Malta* (Application No. 8709/20) 5 May 2022). It should be noted however, that the violation was based on the inconsistency of the application of the law considering the requirement that any interference is "as prescribed by law". The guidelines stated that it was "desirable" that the mother be 42 years old; however, this became a mandatory requirement of the Embryo Protection Authority.

the AHR treatment provider should they refuse to provide such treatment. This is particularly problematic in light of there being no option to judicially review the decision of a private fertility clinic. It is also unclear whether any centralised system will exist, perhaps through secondary regulations, to record such decisions, or whether intending parents can simply attend at another fertility clinic. Ultimately, it is argued here,[244] that the availability of the child welfare referral mechanism to the Child and Family Agency is sufficient should an issue or risk arise, under the *Children First Act 2015.*[245] This position has been endorsed by the AHR Professionals Working Group made up of doctors, nurses and other medical professionals working in the fertility field, who have called such assessments "unworkable" and have expressed concern that such assessments could "*lead to inappropriate discrimination against vulnerable groups*".[246]

Parental Order: Consents and Discretion

Under the 2022 Bill's proposals, the surrogate is the legal mother and the process by which her rights can be transferred is through a parental order granted by the Circuit Court.[247] Under the 2017 Scheme, the surrogate, or either or both of the intending parent(s) could apply for a parental order.[248] However, under the 2022 Bill, the surrogate is now excluded from being an applicant,[249] and the intending parents, when seeking pre-approval from the AHRRA must make an undertaking that they

[244] As it has been by this author in the following report: LGBT Ireland, Equality for Children, Irish Gay Dads, the National Infertility Support and Information Group and Independent Living Movement Ireland, "Policy Considerations of the Health (Assisted Human Reproduction) Bill 2022" (July 2022) at page 6.

[245] This option would see such DAHR employees be categorised as a "mandated person" under section 14, schedule 2.

[246] AHR Professionals Group, "Position Paper on Health AHR Bill 2022" (14 September 2022), at page 9. It should be noted that the IDG have now recommended that these assessments be carried out by the AHRRA for domestic surrogacy arrangements, "*Policy Paper – International Surrogacy and Recognition of Past Surrogacy Arrangements*" (December 2022) at page 40.

[247] Section 62 of the 2022 Bill.

[248] Section 47(2) of the 2017 Scheme.

[249] Section 62(2) of the 2022 Bill.

intend to apply for a parental order.[250] Bracken notes that the removal of a surrogate's standing to apply for a parental order "*seems likely to heighten any anxieties that she may have about the transfer of parentage and may lead to a situation where only surrogates with the closest, most trusting relationships with the intending parents are prepared to take on this legally precarious role*".[251] The child was never a potential applicant in either set of proposals, despite being able to bring an application for a declaration of parentage under section 22 of the 2015 Act or section 35 of the 1987 Act. The application must be accompanied by proof that the child born was not conceived using an ovum from the surrogate but was conceived using a gamete from at least one intending parent of the child.[252] This application should be made between four weeks and six months after the child's birth,[253] but this may be extended if the Court determines there are exceptional circumstances or if it is in the child's best interests to do so.[254] A parental order application can only be made if it includes all children born as a result of the surrogacy agreement.[255] The Court may grant the parental order if the surrogacy meets all of the requirements under the 2022 Bill, if the surrogate and the intending parent(s) consent to the order, and if the granting of the order is in the best interests of the child.[256] The Court has no power to dispense with the surrogate's consent other than where she is deceased or cannot be found after reasonable enquiries, [257] despite her having

[250] Section 53(4) of the 2022 Bill. The usefulness and enforceability of such an undertaking is questionable. It is argued that an undertaking is a particularly weak legal mechanism with a low level of incentive to comply. A person who breaches an undertaking may be held in contempt of court if the undertaking is made to the court. It is unclear what level of enforceability exists in relation to the undertaking made to a public body such as the AHRRA. Furthermore, it is submitted that the usefulness of imposing a further court procedure on intending parents who for their own reason have determined that they should not care for the child should be considered more fully. A child in those circumstances would arguably not benefit from the prolonged uncertainty of their care and parental arrangements. The case could arise where the child is placed in the care of the Child and Family Agency while the intending parents make an application for a parental order that must subsequently be severed by an adoption order, or a care order, as the case may be. This provision also has the potential to give rise to an unfairness for intending parents, given the corresponding provisions that allow for unenforceable surrogacy agreements and the absolute right of the surrogate to refuse to consent to the parental order, or to the child living with the intending parents, with no potential for dispensing with her consent (unless she is deceased or cannot be found). In these circumstances, an intending parent could be potentially penalised in not applying for a costly parental order, even where the surrogate is clear and absolute in her refusal. It is also the case that, should the parental order not be made, the genetic father would be responsible for maintaining the child, nonetheless, and would (drafting errors aside) have access to applications for guardianship, custody, and access of the child.

[251] L. Bracken, "The Position of the surrogate in the Health (Assisted Human Reproduction) Bill 2022" (2022) 25(3) IJFL 45 at page 49.

[252] Section 62(3)(a) of the 2022 Bill.

[253] Section 62(4) of the 2022 Bill.

[254] Section 62(5) of the 2022 Bill.

[255] Section 62(6) of the 2022 Bill. This follows the provision that permits the implantation of only one embryo at a time unless the woman receiving the transfer does not have a favourable prognosis, in which case the implantation of two embryos may be transferred (section 25 of the 2022 Bill).

[256] Section 63(1) of the 2022 Bill.

[257] Section 63(2) of the 2022 Bill.

obtained legal advice,[258] counselling,[259] medical assessment[260] and not having a genetic link to the child.[261]

This is particularly concerning in light of circumstances such as those which arose in the UK case of in *Re AB (Surrogacy: Consent)*,[262] In this case, the surrogate withheld her consent but also did not wish to look after the child herself, leaving the child in complete legal limbo with the judiciary powerless to do anything about it. It is also noted that this provision is harsher than that contained with the 2017 Scheme which allowed for the dispensing of the surrogate's consent "for any other reason the Court considers to be relevant". This had been described by Tobin as a "potential life-line to intending parents";[263] however, the 2022 Bill offers no such life-line and reverts to the position as set out in the 2014 Bill. It should be noted that the Inter-Departmental Group (IDG) have stated that the reason for the absence of any discretion to dispense with a surrogate's consent is based on the belief that to allow for this, would run counter to the non-enforceability of the surrogacy agreement.[264] However, it is argued that there is nothing inconsistent in suggesting that parties cannot privately contract out of their parental obligations yet a court can make a determination that echoes the sentiments intended from within such an agreement, having regard to the criteria within the framework and the best interests of the child.

Within the 2022 Bill, the surrogate is the sole legal mother, the sole automatic custodian,[265] and the sole automatic guardian of the child. She has the absolute right to withhold her consent to the child living with the intending parents, to their guardianship and to the making of the parental order, thereby dictating the outcome for all parties. The pre-conception intention, informed consent of all parties and every corresponding safeguard is set at nought. As Madden notes, the surrogate could even seek a court order for maintenance of the child against the genetic

[258] Section 58 of the 2022 Bill.
[259] Section 17 of the 2022 Bill.
[260] Section 52(1)(d) of the 2022 Bill.
[261] Section 62(3)(a)(ii) of the 2022 Bill.
[262] [2016] EWHC 2643 (Fam).
[263] B. Tobin, "The General Scheme of the Assisted Human Reproduction Bill 2017: A Hybrid Model for the Regulation of Surrogacy in Ireland" (2017) 4 IJFL 83, at page 86. Tobin has previously argued that such a provision could undoubtedly be subjected to constitutional challenge under Article 42A and Article 41 of the Constitution. B. Tobin, "A Critique of Re AB (Surrogacy: Consent): Can Ireland Learn from the UK Experience?" (2017) 20(1) IJFL 3 at 5. However, this suggestion is not considerably well borne out and relies on the generalised view that it would be a violation of the child's rights and could quite possibly be viewed as an attack on the marital family by virtue of the existence of the genetic link. He relies on broad passages from case law prior to the splitting of motherhood that refer to natural parental ties. That is not to say that he is incorrect, indeed, he is supported in some ways by other academics who have queried such a provision's compliance with the ECHR (M. Welstead, "Parental Orders and the Refusal of Consent" [2016] *Family Law* 1051) but rather, this is a new context of law that cannot necessarily rely on previous precedent on natural ties and as yet underdeveloped constitutional provisions such as Article 42A.
[264] Section 56 of the 2022 Bill. "*Policy Paper – International Surrogacy and Recognition of Past Surrogacy Arrangements*" (December 2022) at page 27. For further exploration of the enforceability of surrogacy agreements, see M. O'Connor, "Should Surrogacy Agreements be Enforceable?" (2020) 23(4) IJFL 93.
[265] Section 62(3)(b) of the 2022 Bill.

parents.[266] The 2022 Bill makes it possible for the surrogate to place the child for adoption or in foster care without the consent of the intending parents. Drafting issues aside, the genetic father could apply for guardianship to offset the adoption order and it is envisioned that the Child and Family Agency would consider the intending parents' fostering application; however, neither of these considerations should even arise given the significant level of foundational work required in a surrogacy agreement. As Bracken notes, "*giving the surrogate a veto regards the transfer of parentage and the residence of the child ignores the fact that most surrogates do not regard the child as their own and very few 'change their minds' about the transfer of parentage to the intending parents*".[267] This arguably places the rights and interests of the surrogate far beyond any other party involved, most particularly the child whose interests, it is argued, should be considered the paramount consideration in any parental order application.

Furthermore, it should be noted that even where the surrogate does consent, the best interests of the child consideration at parental order stage is an additional requirement, as opposed to a discretionary provision for the judiciary. Therefore, if all of the requirements[268] are not complied with to the letter, there is no consideration of whether the order is nonetheless ultimately in the best interests of the child, notwithstanding any lack of compliance with the legislation.[269] In this regard, the UK Courts, who do adhere to the paramountcy principle, have previously held:

> *"as the full rigour of [Parliament's policies] will bear on one wholly unequipped to comprehend it let alone deal with its consequences (i.e. the child concerned) that rigour must be mitigated by the application of a consideration of that child's welfare. That approach is both humane and intellectually coherent."*[270]

Without the authority to impose judicial discretion, it is clear that the Irish judiciary do not feel comfortable, nor are they entrusted, to create their own rules when left

[266] D. Madden, "Assisted Reproduction – What Needs to be Done Now?" (2021) 27(2) MLJI 68 at 69.
[267] L. Bracken, "The Position of the surrogate in the Health (Assisted Human Reproduction) Bill 2022" (2022) 25(3) IJFL 45 at page 46.
[268] As they relate to information registration, the surrogate, intending parent(s), the donor, consents, information documents, pre-approval with the AHRRA, age limits, gamete storage, genetic links, residency, payments, counselling, medical assessment and legal advice.
[269] Again, this would appear to continue to arise even where the intending parents did not knowingly fail to comply with the legislation and where they were, for example, mistakenly advised in relation to a certain requirement by legal, medical, or technical professionals, or where the AHR treatment provider made a mistake in the treatment process.
[270] Re X & Y (Foreign Surrogacy) [2008] EWHC 3030 at 24, as cited in K. Horsey & S. Sheldon, "Still Hazy after all these Years: the Law Regulating Surrogacy" (2012) 20 *Medical Law Review* 67 at 79.

in difficult situations; that is a matter for the Oireachtas.[271] Ultimately therefore, as with the 2015 Act, it is submitted that the only solution is a case by case assessment whereby the best interests of the child are the paramount consideration.

Pre- and Post-Birth Orders

As noted above, the 2022 Bill currently provides only for a post birth parental order application at day 28 after the child's birth.[272] There is an easy comparison between adoption orders and parental orders as proposed in the 2022 Bill. Both extinguish the parental rights of the persons named in the order and create parental rights in respect of the persons granted the order. Both orders operate to transfer parentage, as opposed to declare parentage. Consent to an adoption order only occurs after the birth of the child but there is no legal explanation for the principle underpinning this. Such a provision leaves the child with no legal recognition in respect of their intending parents from the point of birth. This requirement is arguably due to the fact that every opportunity should be given for a mother to make an informed decision, and that, in the view of the policy-makers, being so informed requires a mother to hold their baby following the birth and face the decision of being separated from the child. Indeed, this approach has previously been evident from the judgment of Murray CJ in *JMcD v PL and BM*:[273]

> *"a consent of a mother to adoption prior to the conception or birth of a child could not, in my view, be considered a full or valid consent...when faced after birth with the reality of a child, a person, who is his son or daughter, even if biologically in the sense of the facts of this case, may, quite foreseeably, experience strong natural feelings of parental empathy and identity which may overcome previous perceptions of the relationship*

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[271] *MR and DR v an tArd Chlaraitheoir* [2014] IESC 60, "*Whatever form of regulation is considered appropriate to prevent abuse, exploitation or other practises which may be considered to be undesirable, there is always the risk that a child will come into existence in circumstances which are a breach of those regulations. Such a situation will not be the child's fault. The law will have to deal with that child as that child is. Any legislation needs not only to deal with the proper regulation of practise and methodology in this area but also the proper recognition of the status of children who result from advances in modern science. In the context of new advances in science the law will have to deal with the problem of what to do in circumstances where, in breach of whatever regulation may be put in place, a new human being has come into the world. That is not an easy legislative task, but one thing is clear – the courts cannot make up the sort of detailed rules that are necessary to ensure a humane, workable, and coherent system*" at paragraph 681 (Clarke J).

[272] If it was accepted that the intending mother is the child's presumed legal mother and the surrogate is not, some reliance could be placed on the ECtHR case of *Marckx v. Belgium* (Application No. 6833/74), 13 June 1979. This case did not arise in the context of surrogacy however, it did arise in the circumstances where the child's unmarried mother had no automatic legal rights upon the birth of the child. Belgian law at the time required the child's mother to go through a recognition process 13 days following the child's birth, followed by an adoption application. The Court held that there was no doubt that family life existed between the child and her mother as the latter had cared for her child from birth. It held that here can be no discrimination on account of the nature of a child's birth and this is dictated by Article 8 in conjunction with Article 14. The Court found that there had been a violation of Article 8 in respect of the child, and her mother, given the need to have recourse to legal proceedings in order to establish her maternity from birth. In relation to the child specifically, the fact that the recognition and adoption options open to her mother were time consuming and risked Alexandra being removed from her mother in the interim period was particularly egregious.

[273] *J McD v PL and BM* [2008] ILRM 81.

between father and child arrived at in the more abstract situation before the child was even conceived. That such a change of heart would occur must also be foreseeable as at least a real possibility by parties in a position similar to that of the respondents."[274]

While this passage, which was not echoed by the other members of the bench, related to adoption, as opposed to surrogacy, it is apparent that the same concerns exist in the 2022 Bill. The 2022 Bill does not propose to allow for pre-birth transfers of parental responsibility despite insisting that any surrogates have previously had a child, undergo AHR counselling and obtain legal advice. It would appear that the legislature cannot separate themselves from the perceived natural tie that exists between surrogate and baby and the consideration that any woman in such a situation could not imaginably know their own mind before the birth of the child.[275] However, as Bracken notes, the explanatory memorandum for the 2017 Scheme explains that the waiting period is designed "*to allow the surrogate sufficient time to recover from the rigours of pregnancy and childbirth before participating in proceedings*".[276] However, this approach synonymises a surrogate's physical health with her legal capacity to consent. Regardless, it is argued that there is no legally stated basis for waiting for the consent to be dispensed with until after the child's birth and there is no legal precedent that prohibits the transfer of parentage in an order that crystallises upon birth or is stayed until shortly thereafter, for example, to allow for a period of objection by the surrogate, as the exception, as opposed to the rule.[277]

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[274] *Ibid* at page 244.

[275] In *G v An Bord Uchtála* [180] IR 32, Walsh J held that *"[o]ne can scarcely deny the great trauma and the medical, physical, and psychological effects of the birth of a child on an unmarried mother, particularly if she is young…It must be taken into account that not infrequently the mother of such a child at or around, and even months after, the time of the birth can have her judgment impaired. This is recognised as also being true in the case of the mother of a legitimate child*" at page 81. For an excellent examination of the conflation of pregnancy with motherhood see Z. Mahmoud & E. C. Romanis, "On Gestation and Motherhood" (2022) *Medical Law Review* 1.

[276] L. Bracken, "The Assisted Human Reproduction Bill 2017: An Analysis of Proposals to Regulate Surrogacy in Ireland" (2017) 68(2) NILQ 587 at 581. She notes that this approach is at the expense of other stakeholders, failing to respect the reality of the child's intended upbringing.

[277] While interviewing donors and surrogates was outside of the scope of the O'Connell Study, each participant was asked whether, in their experience, the surrogate or the donor expressed any regret or intention to refuse any orders sought. In each case, none of the surrogates or donors were detailed by the intending parents to have had a change of heart or seek further recognition. Out of the five surrogates that were involved in the participants' families, one surrogate had acted as a surrogate twice for the same family, two more had offered to carry another child for the family and out of the two remaining, one surrogate had health concerns about a further pregnancy. In relation to the fifth surrogate, who was the child's Aunt, no reason was sought or given as to why she was not acting in the families second surrogacy journey. The surrogates were described by the intending parents as fully recognising that the child they carried was not their own. For example, *"there is no genetic link. So, I think she seemed to be very cut and dry as well that she's doing this for us. They have their family; their family is complete"* - Paul (Surrogate and Egg Donor). *"She often referred to him as 'your little baby was kicking all night' you know and referring to the baby as ours from the start"* - Mary (Surrogacy). This echoes the statement of Gamble before the Joint Oireachtas Committee, "*In terms of the question about surrogates changing their minds, it is incredibly rare. Bearing in mind that I am a lawyer who practices in this area, so if people do have those sorts of problems, I am the first person*

This assertion finds support in the recent Supreme Court decision of *Adoption Authority of Ireland v C & D.*[278] In this case, Hogan J considered the requirement for post-partum consent within adoption law. In citing the adoption framework and the judicial responses to that legislative policy (referencing *G v An Bord Uchtala* specifically), Hogan J found that:

> *"[t]he context here is very different.*[279] ***Here the pregnancy has been planned in advance*** *and, crucially, the child will not have any genetic relationship to the gestational mother. The expressed intention of the parties is and at all times was that [the surrogate] will not be the mother of the children…****there is no evidence at all of any form of exploitation or undue pressure. There is, moreover, satisfactory evidence of independent legal, medical, and psychological assistance to [the surrogate]…****While it cannot be said that the timing of that consent is unimportant or that it is simply a technical detail of our existing adoption system, nevertheless provided that this consent is freely given I do not consider that the fact that…the consent can be given pre-partum is in itself a reason to refuse recognition on public policy grounds.* ***There is, at least in this context, nothing intrinsically wrong with an alternative way of obtaining consent provided it is free and informed*** [emphasis added]*."*[280]

This judgment provides a strong basis for, or at least a clear precedent for the facilitation of, a pre-birth parental order where there are sufficient safeguards to ensure the surrogate's consent is freely given. Furthermore, it is argued that a pre-birth order, at least by default, is in the best interests of the child. The making of a parental order with effect from birth has implications for the corresponding benefits provided by the State and that emanate from birth. A new-born requires the care and attachment from their caregivers early in their life and logically it follows that their caregivers need time off work in the form of maternity, paternity and parental leave, and the corresponding maternity and child benefit.[281] As will be explained further below, in the absence of any further legislative interaction with the *Irish Nationality and Citizenship Act 1956* (the 1956 Act), parentage from the point of birth also has important implications for the child's entitlement to citizenship. A pre-birth order, if granted, has the benefit of eliminating the need for legislative workarounds, which are still required in the intervening period between the child's

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that they call, but we have only had a very tiny handful of cases where that has happened. I am talking about possibly four or five cases out of thousands of domestic UK surrogacy arrangements over several decades." Joint Committee on International Surrogacy, "Surrogacy in Ireland and in Irish and International Law: Discussion (Resumed)" (20 April 2022).

[278] [2023] IESC 6.

[279] Hogan J was making a comparison to the context which arose in G in 1980: the "*context of an Ireland where extra-marital sexual activity was strongly discouraged and where it was not at all unusual for unmarried pregnant women presented with a crisis pregnancy to face an unyielding sense of societal disapproval as a result. In those circumstances the Oireachtas was plainly concerned that such women might be vulnerable to undue pressure to surrender her own child for adoption".*

[280] *Ibid* at paragraphs 95-97 (Hogan J).

[281] For further reading on the restriction on maternity benefits for mothers whose children are born through surrogacy see: C. Healy, " Once More with Sympathy but No resolution For Intended Mothers: the EU, Ireland and the Surrogacy Dilemma" (2017) 39(4) *Journal of Social Welfare and Family Law* 504.

birth and a post-birth parental order. Furthermore, there is no automatic guardianship for intending parents from birth and therefore crucial decision making power will only automatically reside with the surrogate.[282]

Bracken, however, has gone slightly further and recommends a pre-conception model of parentage in surrogacy.[283] Similarly, Tobin has argued that the requirement for a pre-conception approval of treatment, but not parentage, is quite remarkable given the rigorous requirements such as legal advice and counselling, and the mandatory genetic link of at least one intending parent.[284] Ultimately, he favours a pre-birth model where parental rights can be established and secured early on in the process, and believes that it will act as a greater incentive to intending parents to choose surrogacy as a viable means of AHR.[285] Furthermore, a pre-conception judicial model domestically has also been endorsed by the Special Rapporteur on Child Protection to discourage international surrogacy and also provide a mechanism to offer the child legal certainty, on foot of empirical data that confirms the rarity of a surrogate changing her mind.[286] While undoubtedly, a pre-conception model has the benefit of legal certainty for all parties involved, it has been argued by Gamble that this can be a particularly onerous process[287] and very difficult for parents who are unsuccessful in their surrogacy journeys where there has been an unsuccessful embryo transfer or an early term miscarriage. A pre-conception model of parentage could offset this concern however, if the approval by the Court could have continuous effect for a prescribed time period or number of transfers with the same conditions imposed.

It is submitted that there would be no legal impediment to Bracken's suggestion based on the judicial commentary in *MR.* However, ultimately, it is argued that it is important to have some level of oversight from conception throughout a considerable element of the gestational period. While this author is resistant in general to the harmful presumption that surrogacy as a process is exploitative, it is nonetheless accepted that it is a process that has nuanced ethical considerations

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[282] Specifically on this point, Bracken has noted that a surrogate who is not genetically related to the child may not be in a position to advise the medical team on family medical background and related matters. L. Bracken, "The Position of the surrogate in the Health (Assisted Human Reproduction) Bill 2022" (2022) 25(3) IJFL 45 at page 46.

[283] L. Bracken, "The Assisted Human Reproduction Bill 2017: An Analysis of Proposals to Regulate Surrogacy in Ireland" (2017) 68(2) NILQ 587 and also L. Bracken, "The Position of the surrogate in the Health (Assisted Human Reproduction) Bill 2022" (2022) 25(3) IJFL 45 at page 49.

[284] B. Tobin, "The General Scheme of the Assisted Human Reproduction Bill 2017: A Hybrid Model for the Regulation of Surrogacy in Ireland" (2017) 4 IJFL 83, at page 86. He has also argued elsewhere that the Greek model which applies prior to treatment "might facilitate greater acceptance of surrogacy in Ireland because it involves prior judicial scrutiny of the entire surrogacy arrangement and the parties are only permitted to proceed with treatment in a clinic when the Court has granted approval" B. Tobin, "A Critique of Re AB (Surrogacy: Consent): Can Ireland Learn from the UK Experience?" (2017) 20(1) IJFL 3 at 5.

[285] B. Tobin, "The General Scheme of the Assisted Human Reproduction Bill 2017: A Hybrid Model for the Regulation of Surrogacy in Ireland" (2017) 4 IJFL 83, at page 86.

[286] Professor Conor O'Mahony, Special Rapporteur on Child Protection, "A Review of Children's Rights and Best Interests in the Context of Donor-Assisted Human Reproduction and Surrogacy in Irish Law" (2020) at page 20.

[287] Joint Committee on International Surrogacy, "Surrogacy in Ireland and in Irish and International Law: Discussion (Resumed)" (20 April 2022).

and a judicial assessment of the child's best interests in the event of any unforeseen, yet undoubtedly rare, issues that would render the parentage untenable is not an undue burden on the parties. It is argued that the most appropriate model is one where the intending parents obtain approval from the AHRRA prior to conception in relation to key safeguards that have been actioned.[288] Further to the approval, the transfer of the embryo should take place and a court application could be made any time after 16 weeks in the gestation period. This is intended to give time to the Court to list the application for case management and then for hearing, with a sufficient amount of time to prove service, and allow submissions from the surrogate contesting the application, if necessary.[289] Such a model offers legal certainty to the child, a vindication of the intent and consent of all parties, confirmation that the surrogate's care and medical treatment was well managed, together with an independent assessment of the best interests of the child. It also allows the preparation for parentage to be front loaded prior to conception and it is anticipated that the Court process will therefore be a largely confirmatory process. Madden appears to agree in advocating for a "judicial pre-authorisation mechanism" that would approve reasonable payments during the pregnancy, ensure the surrogate's informed and voluntary consent and make the parental order prior to the birth.[290] However, as previously noted, none of the above suggestions have been accepted under the 2022 Bill and the public engagement from department officials[291] has not inspired confidence that the provisions under the bill will be dramatically altered in the manner proposed. As Madden has argued, the legislature has to have "*courage to make the right policy decisions...rather than pretend that surrogacy will simply wither on the vine*".[292] Without such courage, just as in the 2015 Act, parents engaging in AHR under the 2022 Bill will have to rely on legislative workarounds, and their children will remain in a legal "nether world".[293]

Custody

The next issue is the lack of any legislative mechanism or pathway vesting the legal custody of the child in the intending parents at birth, or indeed thereafter if the

[288] These would be safeguards such as donor consent and screening, surrogate consent to the transfer of the embryo, legal advice, AHR counselling, and the collection of identifying information in relation to both the donor and surrogate.

[289] The proposed model also includes a process whereby the parental order is granted but a stay is placed on the order which crystallises 7 days after the birth of the child. This allows for the surrogate to raise an objection at any point during the pre-birth court proceedings and post birth for a limited period of time. Such an objection would be raised by way of simple prescribed form, available on the courts.ie website, and time would then be allowed for full submissions and a hearing at a later date. The full framework has been drafted by this author as a proposed "Part 7A" to the 2022 Bill. This was submitted to the Joint Oireachtas Committee on International Surrogacy and remarked to be an "exceptional piece of work" by one Committee Member, Joint Committee on International Surrogacy, "Surrogacy in Ireland and in Irish and International Law: Assisted Human Reproduction Coalition" (21 April 2022).

[290] D. Madden, "Assisted Reproduction – What Needs to be Done Now?" (2021) 27(2) MLJI 68 at 69.

[291] Joint Committee on International Surrogacy, "Surrogacy in Ireland and in Irish and International Law: Discussion, (7 April 2022).

[292] D. Madden, "Assisted Reproduction – What Needs to be Done Now?" (2021) 27(2) MLJI 68 at 70.

[293] *Adoption Authority v C & D & Ors* [2023] IESC 6 at paragraph 6, as per Hogan J.

surrogate does not consent to the parental order.[294] In the context of adoption, under the 2010 Act, the Court may adjourn an adoption application and make an interim order for custody to the applicant for a probationary period of two years,[295] and even if the adoption order is deemed invalid by a Court, the Court may make an order of custody in favour of the adopting parents if it is in the interests of justice that the question of custody be answered within those proceedings.[296] There exists no such process under the 2022 Bill, aside from section 61 which provides that a child born as a result from AHR treatment may reside with the intending parents but only if the surrogate consents "in the specified form thereto".[297] The surrogate's consent is not required where she is deceased or cannot be located after reasonable efforts have been made to find her.[298] This appears to equate to a fabricated statutory right of residence pending the full hearing of their parental order application.

It is argued that this provision complicates matters unnecessarily and there are a number of concerns arising from this. This section exists outside of a court hearing, and it is presumed that such consent, even if provided, can be withdrawn by the surrogate without notice or cause. Therefore, it is argued that this results in the child living with the intending parents in complete legal precarity, not knowing when they may be removed from their intending parents care. Should the intending parentage be based in the intending mother's genetic link, there would be no basis under the 1964 Act for an application for custody within the intending parental unit, in the continued absence of any standalone legal protection attaching to such a link by itself. Should the intending parentage be based in the intending father's genetic link, there would be no basis under the 1964 Act for an application for custody within the intending parental unit, in the absence of updated definitions of "parent" [see Chapter 1].

It should also be noted that while some pieces of legislation interact with each other so that court proceedings can determine issues across different acts at the same time,[299] the 2022 Bill and the 1964 Act have no such interaction. Therefore, any custody proceedings would have to be initiated at the same time as proceedings for a parental order in the event of a conflict. It is therefore possible that District Court proceedings for custody and Circuit Court proceedings for a parental order would be ongoing at the same time. Within the parental order proceedings, the Court only has regard to the 2022 Bill and there would appear to be no power or discretion for that Court to grant interim or full custody to the intending parents within those proceedings. There could, therefore, be two court orders, one refusal of a parental

[294] Section 11E of the 1964 Act allows relatives, or partners of the parent, to apply for custody. Such partners can only apply if they are looking after the child for 2 years, or 1 year if there is no other person exercising their guardianship rights in respect of the child. While this could be open to an intending couple where the intending father has a genetic link, the accuracy of his being a father for the purposes of the 1964, as mentioned in Chapter 1, is questionable based on the current definitions.

[295] Section 44(1) of the *Adoption Act 2010.*

[296] Section 51 of the *Adoption Act 2010.*

[297] Section 61(1) of the 2022 Bill.

[298] Section 61(2) of the 2022 Bill.

[299] For example, see section 15 of the *Family Law (Divorce) Act 1996.*

order under a piece of legislation that gives the surrogate absolute discretion as to the child's living arrangements and a second that grants custody to the intending parents where a determination has been made that to do so would be in the best interests of the child. This absence of custody rights would perhaps be most relevant in the context of child abduction which requires a person's custody rights to have been breached before they could be successful in bringing child abduction proceedings.[300] Again, the 2022 Bill in affording no judicial discretion to consider the best interests of the child as the paramount consideration, places all of its focus on ensuring the surrogate is treated like the "historical mother", despite having an open legal mandate to transform this legal status as it applies to the gestational only link, in favour of the child. This is recognised by Madden, who has described the 2022 Bill quite aptly as following "*in the path of other pieces of complex legislation before it by over-complicating some matters and over-simplifying others by way of arbitrary policy decisions"*.[301]

The Genetic Link

The policy-makers behind the drafting of the 2022 Bill evidently do not believe that the female genetic link carries any legal significance that would justify the conferring of legal parentage.[302] Nevertheless, the 2022 Bill requires that the surrogate not provide her own gamete. The requirement to purposely split motherhood in this manner disproportionately affects male couples, single men, and opposite sex couples where the intending mother cannot provide eggs or gestate a pregnancy.[303] Requiring a surrogate to refrain from using her own egg, where there is no medical or regulatory reason opposing such use, naturally requires a more medicalised

[300] See Article 3 of the Convention on the Civil Aspects of International Child Abduction (the Hague Convention)(1980); the Child Abduction and Enforcement of Custody Orders Act 1991 and the Supreme Court case of *GT v KAO* [2008] 3 IR 567.

[301] D. Madden, "Assisted Reproduction – What Needs to be Done Now?" (2021) 27(2) MLJI 68 at 69. She also states that "[a] legislative framework based on knee-jerk reactions and political pragmatism is unlikely to achieve the objectives of being human rights focussed and child centred", at page 70.

[302] Department of Health, Department of Justice, Department of Children, Equality, Disability, Integration and Youth, *Issues Paper on International Surrogacy for Special Joint Oireachtas Committee January 2022* (2022) at page 4 states that "an intending mother of a child born through surrogacy, not being the mother of the child, is not entitled to apply for a declaration of parentage under the Status of Children Act 1987. This is the case even where the intending mother provided the egg used in the surrogacy arrangement and is the genetic mother of the child". This is reiterated in the Inter-Departmental Group, "*Policy Paper – International Surrogacy and Recognition of Past Surrogacy Arrangements*" (December 2022) at page 7.

[303] Madden has also criticised the allowance for gestational surrogacy only when it arose in the 2014 Bill on the basis of for example, a sister who acts as a surrogate, consents to the use of her own eggs and who could provide the child with a genetic familial link to the mother. She also focuses on the unnecessary and invasive nature of the embryo transfer as opposed to insemination for the surrogate. D. Madden, "An Analysis of Legislative Proposals for Parentage in Assisted Reproduction and Surrogacy" (2014) 2 IJFL 52 at 54.

process of reproduction not only for the surrogate,[304] but also the egg donor,[305] when the surrogate could otherwise be inseminated at home. Home insemination avoids unnecessary hormonal preparation and medical treatments in order to prepare the egg donor for retrieval[306] and a surrogate for embryo transfer.[307] Such a requirement also causes additional medical costs.[308] However, given that egg donors are required to be altruistic, this naturally leads to the likelihood that the egg donor will have to be a person who is known to the intending parent(s). Such a person will constitute an unnecessary third party and perhaps represent a further splitting of the child's perception of parenthood. However, it is hoped that this perception will have evolved with time. In addition, any suggestions that gestational surrogacy diminishes the surrogate's connection to the child is questionable in light of studies suggesting that traditional surrogates were found to be less likely to feel a special bond with the child, when compared to gestational surrogates.[309]

Moving next to the requirement of the genetic link within the intending parental unit, it is argued that this is a conflicting provision when considered against the availability of double donation under the 2015 Act, whereby whole embryos can be

[304] Dr Mary Wingfield has also previously alluded to medical issues that could arise for the surrogate in using door eggs, "*There is some medical evidence that there are increased risks in pregnancy if a woman conceives using donated eggs. Her body will not reject the eggs but there are immunological changes that happen. If the surrogate is using her own eggs, she will not have those increased risks."* Joint Committee on Justice, Defence and Equality Debate, "General Scheme of Children and Family Relationships Bill 2014: Discussion" (9 April 2014).

[305] It is important to note that egg retrieval is not an easy process for an egg donor. In A. Molas & A. Whittaker, "Tempting Luck: Temporalities and risk Anticipation among Egg Donors in Spain" (2023) *Science, Technology & Human Values* 1-25, the authors describe egg donation as "*an arduous process requiring screening and clinical tests, hormonal stimulations through multiple self-administered injections, monitoring, and eventual extraction of the oocytes in a clinical setting. It is a time-consuming, inconvenient, and at times very painful process. It also carries medical risks such as ovarian hyper-stimulation syndrome (OHSS); intolerance to or side-effects from the medication; abdomen operineal infection; haemorrhage following an accidental blood vessel puncture; abdominal pain; accidental puncture in another part of the body; and ovarian torsio*n", at page 3. The Irish Courts have also recognised this, with Hogan J recently noting that an egg donor must give herself multiple injections, which involves "super-cramps" and a surgical procedure, the recovery from which can be quite painful - *Adoption Authority v C & D & Ors* [2023] IESC 6 at paragraph 55.

[306] Generally, the process for egg donors begins with ovarian stimulation with follicle stimulating hormone, monitoring ultrasounds, then an ovulation trigger is given with a 36 hour wait period before the egg collection is performed under sedation and pain relief.

[307] However, the embryo transfer appears to be less invasive and is usually pain free. A catheter containing the embryo(s) is guided into the uterus, and the embryo is transferred into the surrogate's uterus.

[308] However, it is understood that clinics are paying above reasonable expenses for both sperm and egg donations, with the knowledge of the Department of Health. My thanks to Mary Wingfield, Chair of the AHR Professionals Working Group, for confirming this point.

[309] See, S. Imrie & V. Jadva, "The Long-Term Experiences of Surrogates: Relationships and Contact with Surrogacy Families in Genetic and Gestational Surrogacy Arrangements" (2014) 29 *Reproductive BioMedicine Online* 424. While one surrogate felt that the child was like her own, 60% of surrogates did not feel any special bond with the child and interestingly, this was significantly more likely to be the case where there was a genetic link between them.

donated.[310] Therefore, not only does the 2015 Act offer a pathway to parentage to partners who have no genetic link to the child, it also offers a pathway to parentage where the "anchor" parent does not have a genetic relationship with the child. In DAHR, it is the gestational link and the relationship to the person who has the gestational link, that grounds the parentage. In this regard, there is a fundamental reliance in the AHR legislation and proposals on the maintaining either a gestational or genetic element amongst the intending parents. It is accepted that this provides a "cleaner" approach to the standalone pathways to parentage and allows for key differentiators between AHR and "natural conception" or adoption. However, such an approach has the inevitable outcome of discriminating against individuals depending on what AHR framework they fit into, depending on their gender, sexuality, disability, and nature of their infertility. For example, an opposite sex couple who cannot produce gametes can avail of parentage through DAHR under the 2015 Act. A same sex male couple who cannot produce gametes have no pathway to parentage in DAHR or surrogacy. A single woman who cannot produce her own ova or carry a child does not have a pathway to parentage in AHR, yet a single woman who cannot produce her own ova yet can carry a child can avail of DAHR. Furthermore, the UK Law Commissions have suggested that this will further affect transgender persons who did not preserve their gametes before a medical transition.[311] This requirement also appears to run contrary to the very nature of AHR, the acceptance of parentage based on a social link, as opposed to genetic. As Bracken notes, the requirements for a genetic link is a "*somewhat ironic situation given that the same parents may be required to prove their infertility as an initial entry requirement to surrogacy*".[312] Furthermore, a longitudinal study conducted by

[310] Section 14 of the 2015 Act. Where supplementary embryos are created as part of DAHR procedure planning by a man and a woman, where such persons intended to become the intending parents, they may consent to the use of the embryos in a "further" DAHR procedure, being a procedure entered into by other intending parents. A man may consent to the use of the embryo being used by the intending mother, notwithstanding the fact that he is not the intending father. The requirement of such consent is in keeping with the Irish Supreme Court decision of *Roche v Roche* [2010] 2 IR 321 and the ECtHR case of *Evans v United Kingdom* Application No. 6339/05, 10 April 2007. The same provision of information, declaration, consent, and registration applies to such persons.

[311] Commission & Scottish Law Commission, *Building Families Through Surrogacy: a New Law, A Joint Consultation Paper,* (LC Consultation Paper No. 244) (SLC Discussion Paper No. 167) 6 June 2019 at paragraph 12.41.

[312] L. Bracken, "The Normative Underpinnings of Ireland's Proposed Regulation of Assisted Human Reproduction" (2022) 36(1) *International Journal of Policy and Family* 1 at 17.

Golombok confirms that the absence of a genetic, or indeed a gestational, link does not impact on parent-child relationships and psychological adjustment.[313]

Ultimately, however, the focus of this thesis is whether a child should be denied a legal relationship with their intending parents on the basis of the absence of this link, given the absence of any judicial discretion in the 2022 Bill. It is argued that to do so in the absence of any convincing empirical data, would be to impose an unjustifiable difference of treatment on intending parents and their children based on their sexuality, family status or health status.

The Genetic Link in International Surrogacy Agreements

A further issue that arises in relation to the genetic link is its imposition in the context of international surrogacy. It has been recommended that a genetic link should not be required in domestic surrogacy but should still be required in the international context.[314] Each time, it would appear that the sole reason is with regard to the risk of child trafficking. It is argued that this risk could be a valid basis for the genetic requirement if not for the fact that the genetic link requirement, or lack thereof, would exist, not in a vacuum but in a comprehensive, arguably excessively regulated, framework.[315] To take this position to its natural conclusion, for a child trafficker to avail of such a system, they would have to apply for pre-approval to the AHRRA and therefore engage a fertility clinic and/or agency to match them with a surrogate, engage in AHR counselling, legal advice, gamete testing and if

[313] S. Golombok, C. Jones, P. Hall, S. Foley, S. Imrie & V. Jadva, "A Longitudinal Study of Families Formed Through Third-Party Assisted Reproduction: Mother–Child Relationships and Child Adjustment From Infancy to Adulthood" (2023) 59(6) *Developmental Psychology* 1059. This study's findings suggest that "*the absence of a biological connection between children and their parents does not have a negative effect on the quality of mother–child relationships, or on the psychological adjustment of children, even when they have acquired an adult understanding of what it means to lack a genetic and/or gestational connection to their parents. Thus, the concerns that have been raised about the negative psychological consequences of third-party assisted reproduction were not borne out by the findings of this study when the children reached adulthood. Although in other family types in which children lack a biological connection to their parents—adoptive families and stepfamilies—raised levels of difficulties in parent– child relationships and child adjustment problems have been identified, families created through third-party assisted reproduction are not exposed to the same risk factors*", at page 1068. "*Moreover, this conclusion appears to hold whether children lack a genetic link to their mother or their father, or a gestational connection to their mother*", at page 1070. While this study did refer to negativity amongst non-genetic mothers, this arose from the mother, as opposed to the adult children's perceptions, "*possibly reflecting mothers' perceptions of poorer family functioning arising from their own insecurities as mothers*", at page 1069.

[314] Commission & Scottish Law Commission, *Building Families Through Surrogacy: a New Law, A Joint Consultation Paper,* (LC Consultation Paper No. 244) (SLC Discussion Paper No. 167) 6 June 2019 at paragraph 12.47. Professor Conor O'Mahony, Special Rapporteur on Child Protection, "A Review of Children's Rights and Best Interests in the Context of Donor-Assisted Human Reproduction and Surrogacy in Irish Law" (December 2020) at page 47. Joint Committee on International Surrogacy, "Final Report of the Joint Committee on International Surrogacy" (July 2022) at page 33.

[315] I would like to thank Elaine Cohalan for articulating this point so well in response to my broader arguments.

necessary, demonstrate their own inability to provide their own gamete or comply with age limits and/or storage requirements etc.[316]

Such a framework could easily require that the emergency travel certificate required to return to Ireland with the child is predicated upon the presentation of a pre-approval certificate from the AHHRA, at least as a default. Alternatively, if a pre-birth model for a parental order was accepted, then that would also require such traffickers to apply for a court order and legally become the child's parent in advance of returning to Ireland with the child. As Bracken argues, "*unless there is evidence to suggest that infertile individuals are more likely to commodify children or can more easily circumvent the law, applying different standards in the two situations appears to create an unjustified legal differentiation between them*".[317] It is also argued that Irish law has criminal sanctions in place for child trafficking by way of the *Child Trafficking and Pornography Act 1998*, and also the *Criminal Justice (Smuggling of Persons) Act 2021*, that act as deterrents to such actions.[318] Furthermore, there is scope to introduce a process of criminal background checks, in a similar manner to the UK,[319] to screen for any indications of such past behaviours. While assessments of intending parents were resisted in the preceding section, when considered in light of the otherwise exclusion of all persons from surrogacy on the basis of their inability to produce gametes, this, it is argued, would be a proportionate interference, if restricted to criminal offences indicative of causing harm to children.[320] Finally, it is submitted that the fear of such a risk would surely also apply in international adoptions, yet the 2010 Act recognises International adoptions under the Hague Convention,[321] and recognised them in common law prior to this, despite the absence of any genetic link. Such a requirement therefore, it is argued, is disproportionate and discriminatory.

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[316] It is argued that one possible safeguard would be to allow double donation only in circumstances where the infertility, or genetic condition or inability to comply with the age limits for example, are the basis for the need and could be proven by certification of registered medical practitioner.

[317] L. Bracken, "Surrogacy and the Genetic Link" (2020) 32(3) *Child and Family Law Quarterly* 303 at page 312.

[318] Furthermore, there have been a total of 34 formally identified children of child trafficking between 2013 and 2021, an average of 4.25 annually, albeit none of whom were identified in 2020 or 2021, S. Pollack, "Child Trafficking in Ireland: 'It wasn't fair forcing me to have a baby I didn't ask for'" *Irish Times* (22 October 2022). While there is undoubtedly a number of unidentified children, this issue is being tackled through the *Criminal Justice (Sexual Offences and Human Trafficking) Bill 2022.* See: Joint Committee on Justice, "*Report on Pre-Legislative Scrutiny of the General Scheme of the Criminal Justice (Sexual Offences and Human Trafficking) Bill 2022"* (March 2023).

[319] Criminal background checks of intending parents and surrogates are part of the processes of Surrogacy UK, Brilliant Beginnings, COTS and the British Surrogacy Centre, and the Code of Practice guide clinics to consider factors that are likely to cause a risk of significant harm or neglect to a child and these include convictions relations to harming children. Commission & Scottish Law Commission, *Building Families Through Surrogacy: a New Law, A Joint Consultation Paper,* (LC Consultation Paper No. 244) (SLC Discussion Paper No. 167) 6 June 2019, at page 314.

[320] It should be noted that the IDG have noted their intention to limit section 16 assessments to assessments such as checking for entries in the sex offenders register and vetting for criminal convictions, "*Policy Paper – International Surrogacy and Recognition of Past Surrogacy Arrangements*" (December 2022) at page 40.

[321] The Convention on Protection of Children and Co-operation in respect of Intercountry Adoption 1993.

The Genetic Link in Retrospective Declarations of Parentage

The Special Rapporteur has raised a concern relating to the genetic link when considering retrospective cases of surrogacy.[322] Imposing the genetic link retrospectively, he argues, would be difficult to justify given that such parents had no clear legal provision to guide them. However, if there is no requirement to be genetically linked to the child, an issue arises in relation to the difference of treatment faced by children born after the commencement of the legislation by comparison. The proposals of the IDG have sought to impose the genetic link for both prospective and retrospective recognition of parentage in surrogacy arrangements, yet no underlying basis is provided for this, nor is a consideration of the discriminatory impact of such a requirement set out in its policy paper.[323] Should the risk of trafficking be suggested once more, it would seem incredulous that someone engaged in such a level of criminal activity would open themselves up to such scrutiny before a judge of the High Court, particularly in circumstances where the voice of the child would be an anticipated independent mechanism within the process (albeit no such mechanism is mentioned within the proposals).

Commercialisation

Similar to the 2015 Act, it is prohibited under the 2022 Bill for a person to receive or agree to receive a payment or offer, make or give or agree to offer a payment for a donation,[324] or to facilitate the making of the donation.[325] Surrogacy agreements where the surrogate is given a payment are prohibited.[326] However, this does not extend to reasonable expenses which are, similar to the 2015 Act, defined as a person's travel expenses, medical expenses, counselling expenses and any legal expenses arising in relation to the donation process.[327] Certain reimbursements are also permissible where such expenses are associated with becoming or trying to become pregnant, the pregnancy or birth or the entering into and giving effect to a surrogacy agreement.[328] Previously, under the 2017 Bill, the surrogate's husband also benefitted from these expenses but interestingly, has been removed at the same juncture at which such men were precluded from the presumption of paternity in surrogacy agreements.[329] Such prohibition of payment follows the perception that to facilitate payment would be to commodify babies, and would encourage exploitation of women, instead of compensating women for elements of the gestational process, such as the risk involved.[330] It is notable that the 2022 Bill chooses to prohibit commercialisation, instead of criminalising exploitation.[331]

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[322] Professor Conor O'Mahony, Special Rapporteur on Child Protection, "A Review of Children's Rights and Best Interests in the Context of Donor-Assisted Human Reproduction and Surrogacy in Irish Law" (December 2020) at page 45.

[323] Inter-Departmental Group, "*Policy Paper – International Surrogacy and Recognition of Past Surrogacy Arrangements*" (December 2022) at page 37.

[324] Section 34(1)(a), (b) of the 2022 Bill.

[325] Section 34(1)(c) of the 2022 Bill.

[326] Section 54 of the 2022 Bill.

[327] Section 35(3) of the 2022 Bill.

It is argued that it is perhaps more workable to prohibit such payments in domestic surrogacy, than would be possible in the international context where the Irish state has little to no control. However, it would appear evident that there are not enough women in Ireland who wish to act as surrogates for the number of intending parents. While unfortunately there is no exact data to base this assertion, it has recently been noted that the UK, with a population of approximately 13 times that of Ireland, is struggling to match intending parents with surrogates.[332] Naturally, intending parents will travel abroad to countries where such payments are permissible, such as Ukraine (albeit more historically than in modern day), the USA, or countries, such as the UK, which operates a "reasonable expenses" system yet permits payments

[328] Section 55(2) of the 2022 Bill. The "reasonable expenses" associated with the pregnancy or birth include any pre-natal or post-natal medical expenses associated with the pregnancy or birth, any travel or accommodation expenses associated with the pregnancy or birth, the expense of reimbursing the surrogate for a loss of earnings for 6 months during which the birth of the child took place, or any other period during the pregnancy or thereafter (max. 12 months) where she was unable to work due to medical grounds related to the pregnancy or birth. The "reasonable expenses" associated with entering into and giving effect to a surrogacy agreement include the expenses associated with the surrogate receiving counselling in relation to the surrogacy agreement (whether before or after entry into the agreement), the expenses associated with the surrogate receiving independent legal advice in relation to the surrogacy agreement or a parentage order related to the surrogacy agreement, the expenses, including the reasonable travel and accommodation expenses, associated with the surrogate being a party to proceedings in relation to making a parentage order as a consequence of the surrogacy agreement.

[329] Under Head 41 of the 2017 Bill, the surrogate's husband was entitled to be reimburses from any expenses relating to independent legal advice, and reasonable travel and accommodation.

[330] As the UK Law Commissions have noted, pregnancy represents a significant life decision that may have serious and potentially damaging consequences for a surrogate's health. Such health problems and risk are noted as including "*cramps, feeling faint, pelvic pain, incontinence, constipation, morning sickness (hyperemesis gravidarum) and tiredness. Then there is the birth itself: women experience pain during childbirth and shortly after, particularly, for example if they have vaginal tearing, an episiotomy, or a caesarean section. Women may also suffer post-traumatic stress disorder ("PTSD") in pregnancy and after birth*." Law Commission, Thirteenth Programme of Law Reform (Law Com No 377) at paragraph 2.37.

[331] The UK Law Commissions define exploitation in terms of two elements: *"(1) that the surrogate might derive (or is at risk of deriving) an unfairly low level of benefit and/or suffers an unfairly high level of cost and harm from the arrangement; and (2) that the surrogate's consent to the arrangement is defective or invalid*", *ibid* at paragraph 2.47.

[332] Natalie Gamble in her evidence to the Joint Oireachtas Committee on International Surrogacy noted that *"[we did some research in 2018 with Cambridge University to look at the reasons people were going overseas because this was a group of parents that was very hidden in policy and research. We found the main drivers for UK parents going overseas for surrogacy was, first, the lack of access to professional matching services and certainty around when they would find a surrogate; second, the shortage of surrogates; and third, the lack of legal certainty in the UK*." Furthermore, Ms Gamble approximated that 50% of the 400 parental orders made annually in the UK related to international surrogacy. Joint Committee on International Surrogacy, "Surrogacy in Ireland and in Irish and International Law: Discussion (Resumed)" (20 April 2022).

above and beyond this threshold.[333]

The question which arises is whether consent should be invalidated by virtue of payment simpliciter or presumed to be invalidated by virtue of socio-economic status or geographical location.[334] It is argued that the latter is a harmful assumption which negates the autonomy and agency of women in determining what they wish to do with their bodies. It has also been suggested that altruistic surrogacy should not be considered synonymous with ethical surrogacy as there is also the potential for emotional exploitation which can occur between close acquaintances or family members who may act as surrogates.[335] It is further submitted that healthcare is universally commercial.[336] Specifically, within the AHR context in Ireland, couples and individuals are paying thousands of euros, in order to carry out IVF treatments in the absence of any public funding beyond tax credits.[337] Therefore, it has already been widely accepted that the conception of a child necessarily involves money. In relation to surrogacy, proponents of the prohibition of such payments must accept that the clinics, the donors, the agencies, the airlines, the legal representatives, and the judges are all paid, yet the surrogate is not.[338] It is argued that advocating that

[333] Under the UK system, only reasonable expenses are permissible; however, the Court has yet to refuse a parental order based on excessive payment. In *Re L (A Minor) (Commercial Surrogacy)* [2010] EWHC 3146 (Fam), Hedley J stated that "*it will only be in the clearest case of abuse of public policy that the Court will be able to withhold an order if otherwise welfare considerations support its making*". The court in this case authorised $27,000. In *X and Y (Children)* [2008] EWHC 3030 (Fam), a similar approach was taken and £27,405.22 was authorised by the court. In *J v G (Parental Orders)* [2013] EWHC 1432 (Fam), the surrogate was paid $53,000. In *Re C (Parental Order)* [2023] EWCA Civ 16, the surrogate was paid £8,812 and in *Re X and Y (Foreign Surrogacy)* [2008] EWHC 3030, the surrogate was paid $25,000. In each case, the parental order was made. It should also be noted that the UK have also offered an "egg sharing" financial incentive programme where women undergoing IVF can donate a portion of their eggs in exchange for reduced treatment costs. The outcomes, motivations, and feelings behind this process between donor and recipient are explored here: Z. Gurtin, K.K. Ahuja & S. Golombok, "Emotional and Relational Aspects of Egg-Sharing: Egg-Share Donors' and Recipients' Feelings about Each Other, Each Other's Treatment Outcome and Any Resulting Children" (2012) 27(6) *Human Reproduction* 1690.

[334] This point was particularly well made throughout the hearings of the Joint Committee on International Surrogacy and set out in its final report: Joint Committee on International Surrogacy "Final Report of the Joint Committee on International Surrogacy" (July 2022) at page 31. This point was also made 8 years previously by Madden, D. Madden, "An Analysis of Legislative Proposals for Parentage in Assisted Reproduction and Surrogacy" (2014) 2 IJFL 52 at 54.

[335] J. Y. Lee, "Surrogacy: Beyond the Commercial/Altruistic Distinction" (2022) *Journal of Medical Ethics* at 1. Bracken also suggests that where payments to surrogates are tightly controlled, this can cause a shortage of surrogates, which can place pressure on woman to act for family members or within friendship circles. L. Bracken, "The Position of the surrogate in the Health (Assisted Human Reproduction) Bill 2022" (2022) 25(3) IJFL 45 at page 50.

[336] This point was well articulated by the submissions of Senator Mary Seery Kearney throughout the hearings by the Joint Committee on International Surrogacy.

[337] However, as of April 2022, the Department of Health has advised that it intends to have a public model of funding for IVF treatment by 1 September 2023, R. Duffy, "Publicly-funded IVF to Begin in 2023 with 'Regional Fertility Hubs' Before That" *The Journal* (26 April 2022). C. Finn, "IVF Publicly Funded Through Private Clinics Won't Start Until September 2023" *The Journal* (28 September 2022).

[338] Bracken would appear to be in agreement with this point and suggests that arguably the risk of exploitation is greatest where the surrogate is not paid but everyone else is. L. Bracken, "The Position of the surrogate in the Health (Assisted Human Reproduction) Bill 2022" (2022) 25(3) IJFL 45 at page 50.

the surrogate should not be paid in order to "protect her" is deeply paternalistic and the commentary behind such a position is often concerningly pious and lacking legal credibility.[339] Furthermore, it is evident that surrogates are not engaging in surrogacy agreements in regulated countries for the payments. A 2014 study reported surrogates main motivation as "wanting to help a childless couple" (59%), with 9% wishing to help a relative and 6% wishing to help a friend.[340] 3% of surrogates cited payment as a motivator in subsequent surrogacy agreements but not in the initial agreement. The perception also considers the payment of money to be inherently commodifying, as opposed to what is argued here to be an offering, reward, or recognition. As Ordinaire has suggested, such payments to the surrogate are also likely to enable her to take better care of herself, thus ensuring the health and well-being of the child.[341] To prohibit payments in the absence of context as to who the intending parents are, who the surrogate is and what is the nature of the payment, is imposing a blanket wide regulation that presumes bad faith.[342] It is not submitted here that all payments should be permissible in all situations, but rather, an individual assessment should take place before a child is left without a parental order on foot of the prohibition.

It is acknowledged that the concern regarding payments is not based on the consent of the surrogate alone, but on the perception that such payments constitute the sale of children. In this regard, the Special Rapporteur on the Sale and Sexual Exploitation of Children (SRSSEC) prepared a report on this issue to the Human Rights Council in

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[339] For example, G. Lilenthal, N. Ahmad & Z. A. B. Ayub, "*Policy Considerations for the Legality of Surrogacy" (2015) 21(2) MLJI 88 describes how its critique will avoid the "administrative constrictions of stare decisis and black letter law, and instead examine the situation in its naked realities*". Such realities appear from the author's perspective to include that surrogacy is slavery, "*consent is the defence of choice for the coercer*" and describes how the "*female body was often seen as highly exploitable, while the male body was viewed as the magnificent prototype*". They posit that surrogates only engage in emotional and ideological views of their work to counter the effect of their "*dirty work*".

[340] S. Imrie & V. Jadva, "The Long-Term Experiences of Surrogates: Relationships and Contact with Surrogacy Families in Genetic and Gestational Surrogacy Arrangements" (2014) 29 *Reproductive BioMedicine Online* 424 at 431.

[341] L. Ordinaire, "Which of You is My Mother – Birth Registration Issues in Ireland and the Need for Well Designed Surrogacy Regulation" (2016) 19(1) IJFL 7 at page 11.

[342] The ECtHR has not however been as accepting of this principle, The concurring judgment in *Paradiso & Campanelli* Application No. 25358/12, 27 January 2015, made extreme statements on surrogacy itself and the child who it considered "a victim of human trafficking" who was "commissioned and purchased by the applicants". It also stated that: "*Both the child and the surrogate mother are treated not as ends in themselves, but as means to satisfy the desires of other persons. Such a practice is not compatible with the values underlying the Convention…Not everyone is capable of using their intellect, as this requires considerable intellectual efforts and life-long learning, which is a very difficult task. It is much easier to earn money using the body, especially if one takes into account that strong demand exists for bodies for the purpose of surrogacy, and this demand has been quite stable for centuries…Those who prefer to use their brains will continue to develop new technologies and science. In the situation of a radically increasing global population, it could be considered reasonable from an economic perspective, to exploit the body*". This passage is extremely insulting to surrogates who make great sacrifices on an altruistic basis. It creates the image of women who lack intelligence and therefore, only resorted to surrogacy because they had no other options. It equates intellect with success which is extremely misguided. This judgment also perpetuates the cycle it wishes to prevent.

2018,[343] and a periodical report specifically for Ireland in 2019.[344] The 2019 Report recommended that the Irish state enact legislation that would regulate surrogacy arrangements to ensure that the best interests of the child are protected,[345] and the 2018 Report suggests how to achieve this. It is submitted that this report is somewhat contradictory in nature; it argues that a child should not be discriminated against by virtue of the circumstances of their birth,[346] yet prescribes strict criteria that must be adhered to, in order to prevent what it considers to be the sale of children. The SRSSEC does not suggest what should happen in the event that the framework she proposes is not complied with; however it is evident that outside of the following suggested framework, commercial surrogacy[347] must be prohibited. She argues that commercial surrogacy constitutes the sale of children unless the "surrogate mother" is afforded the status of mother at birth and is under no obligation to transfer legal parentage of the child. All payments must be made to the surrogate prior to any transfer of parentage or physical custody of the child and must be non-reimbursable. Any transfer of parentage must be a gratuitous act, based on the surrogate's post-birth intentions, rather than on any legal or contractual obligation.[348] The framework must provide for a pre-birth suitability assessment of the intending parents, a post-birth assessment of the child's best interests, and the protection of the child's origins. The surrogate must also maintain her rights of informed consent in regard to health care decisions and freedom of movement and travel.[349]

There is no issue in terms of the best interests assessment, the bodily autonomy of the surrogate and the protection of the child's origins; however, it is submitted that it is the SRSSEC's approach to the parties involved that garners concern. While it must be accepted that the subject matter of her position naturally lends itself to quite a protectionist and severe viewpoint, she nonetheless, it is argued, proposes a framework that does not respect the intent, consent, and autonomy of the parties, and offers quite a reductionist view of the surrogate. As Tobin has noted, the

[343] Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material, "Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development" A/HRC/37/60 (January 2018).
[344] Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material, "Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development" A/HRC/40/51/Add.2 (November 2019).
[345] *Ibid,* at page 17, Part IV, B, para. 77(c).
[346] Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material, "Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development" A/HRC/37/60 (January 2018) at paragraph 70.
[347] Commercial surrogacy is defined as payments that go beyond reasonable and itemised expenses incurred as a direct result of the surrogacy arrangement, *ibid,* at paragraph 39.
[348] *Ibid,* at paragraph 72.
[349] *Ibid*, at paragraph 73.

purposes for which a child is "sold" in the Optional Protocol[350] "*clearly contemplates the exploitation and degradation of the child. In contrast the intended purpose of commercial surrogacy is non-exploitative and indeed it is anticipated that the intending parents will provide appropriate care and support for the child*".[351] The 2018 Report states that any pre-conception or pre-birth agreement that includes provision as to the transfer of parentage for the child, as well as a payment to the surrogate beyond reasonable expenses constitutes the sale of children.[352] She responds to arguments that intending parents are not "*buying*" their own children by stating that such intending parents are "*at a minimum paying for exclusivity*".[353] She cavalierly suggests that *"[t]he legal fiction of the "never-a-mother" gestational carrier is a legal concept which is used to justify denial of the surrogate mother's rights*".[354] It is submitted that this type of thinking is paternalistic and anachronistic in viewing every surrogate as a mother who is losing her child, instead of a woman who is choosing to make other families lives better and perhaps making her own better in the process also, while also notably being welcomed into families and remaining in contact subsequent to the birth.[355] For example, Gamble has referred to one of her cases where, a surrogate, who "*had a business that she ran with her husband, but it had been destroyed by flooding. The surrogacy enabled the family to restart that business and get back on their feet. That woman was incredibly proud that she could*

[350] Optional Protocol to the Convention on the Rights of the Child on the Sale Of Children, Child Prostitution and Child Pornography, A/RES/54/263, 25 May 2000. Article 3 provides that criminal law within the states parties should account for the offering, delivering or accepting by whatever means a child for the purpose of a) sexual exploitation of the child, b) transfer of the organs of the child for profit and c) engagement of the child in forced labour.

[351] J. Tobin, "To Prohibit or to Permit: What is the Human Rights Response to the Practice of International Surrogacy" (2014) 63(2) *The International and Comparative Law Quarterly* 317 at page 336.

[352] Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material, "Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development" A/HRC/37/60 (January 2018). "This report considers that the surrogate mother is being paid for the services of gestating the pregnancy and the transfer of the child…In commercial surrogacy arrangements, the promised and actual transfer of the child is usually of the essence of the arrangement and accompanying agreements and contracts, without which payments would be neither made nor promised", *ibid* at paragraph 51. "In general, the provisions relating to the transfer of the child are of the essence of the agreement, without which the intending parents would neither enter into the agreement nor pay the surrogate mother", *ibid,* at paragraph 60.

[353] *Ibid*, at paragraph 58.

[354] *Ibid*, at paragraph 57.

[355] See: L. Blake, N. Carone, J. Slutsky & E. Raffanello, "Gay Father Surrogacy Families: Relationships with Surrogates and Egg Donors and Parental Disclosure of Children's Origins" (2016) 106(6) *Fertility and Sterility* 1503. Surrogates were found to be more likely to have met the father's extended family (68%) and had attended family weddings (15%) or baby showers (19%). V. Jadva, L. Blake, P. Casey & S. Golombok, "Surrogacy Families 10 Years On: Relationship With the Surrogate, Decisions over Disclosure and Children's Understanding of their Surrogacy Origins" (2012) 27(10) *Human Reproduction* 3008 where most of the children (20/33) were in contact with their surrogate, with 25% of their mothers reporting that they would like their child to have more contact and the remainder seeing it as "just right". S. Imrie & V. Jadva, "The Long-Term Experiences of Surrogates: Relationships and Contact with Surrogacy Families in Genetic and Gestational Surrogacy Arrangements" (2014) 29 *Reproductive BioMedicine Online* 424 where 77% of surrogates remained in contact with the children. Where there was no contact between the surrogate and the child, over half still received photos of, and updates on, the child.

do that to help her family".[356] This one story demonstrates a case study of one woman who with one act helped her own family considerably and created another, yet the Special Rapporteur would consider this the sale of children if such a woman agreed to transfer the parentage of the child prior to conception.

The report does not discuss the nature of informed consent, or the benefits of each person's role being clearly defined before the child is even conceived. In fact, this clarity and determination between the parties is severely criticised throughout. Any reference to the consent of the surrogate is that which arises post-birth. However, it is argued that the surrogacy agreement offers an opportunity for a written understanding between all parties prior to conception and facilitates the surrogate's wishes as much as the parents. The report seems to require the surrogate's intention to transfer parentage only at a particular point, after the birth of the child. Bracken has noted that "*it seems tenuous to argue that the surrogate's post-birth consent is legitimate but her pre-conception consent amounts to a transaction*".[357] There is seemingly no permissible provision for dispensing with a surrogate's unreasonably withheld consent and there are evidently no number of safeguards or ethical requirements that could allow a surrogate to resist the legal status of "mother".

The Special Rapporteur on Child Protection has also raised an issue of inconsistency in relation to the Special Rapporteur's treatment of altruistic and commercial surrogacy, wherein she requires post-birth transfers of parentage for both.[358] It should be noted however that the Special Rapporteur for Child Protection ultimately recommends that only altruistic surrogacy should be permitted in the domestic framework of surrogacy, as this would "*achieve a higher level of compliance with children's rights standards*".[359] However, unlike the SRSSEC, he believes that such altruism, coupled with sufficient safeguards should allow the intending parent's parentage to arise from birth.[360] He also accepts that criminalising parents for commercial payments or leaving the child in "legal limbo" or in the child care system is not in the child's best interests.[361] It is argued here that any requirement for a court application naturally requires that both the surrogate and the intending parent be entitled to make submissions as to any unforeseen intervening events that impact on the resulting parentage of the child. The existence of such a process, therefore, is arguably a safeguard against pre-determined transfer of parentage, otherwise than

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[356] Joint Committee on International Surrogacy, "Surrogacy in Ireland and in Irish and International Law: Discussion (Resumed)" (20 April 2022).
[357] L. Bracken, *Same-Sex Parenting and the Best Interests Principle* (Cambridge: Cambridge University Press, 2020), p 231, as cited by L. Bracken, "The Position of the surrogate in the Health (Assisted Human Reproduction) Bill 2022" (2022) 25(3) IJFL 45 at page 50.
[358] Professor Conor O'Mahony, Special Rapporteur on Child Protection, "A Review of Children's Rights and Best Interests in the Context of Donor-Assisted Human Reproduction and Surrogacy in Irish Law" (December 2020) at page 21, "*the report recommended virtually the same safeguards for both altruistic and commercial surrogacy, notwithstanding the fact that the Rapporteur's concerns regarding sale of children were primarily directed towards commercial surrogacy*".
[359] *Ibid*.
[360] *Ibid* at page 23.
[361] *Ibid.*

in the best interests of the child. It could not therefore be said that any payment prior to the Court application constitutes the sale of children as no transfer of custody and parentage is guaranteed for such a payment.

While the 2022 Bill is currently compliant with the 2018 Report in most respects, there are two issues of inconsistency between them. The first is that the report recommends that any criminal sanction should focus on for-profit intermediaries, whereas the 2022 Bill chooses to criminalise the intending parents, the surrogate,[362] the donor[363] and the intermediaries.[364] More substantively perhaps for the purposes of this discussion, is that the definition of "surrogacy" under the 2022 Bill means "an agreement between a woman and the intending parents…under which the woman agrees to attempt to become pregnant, by the use of an egg other than her own, and, *if successful, to transfer the parentage of any child born as a result of the pregnancy to the intending parents…"*(emphasis added).*[365]* This would suggest a pre-conception intention to transfer parentage based on a successful procedure as being inherent in the surrogacy process.[366] However, regardless of the definition, no surrogacy agreement is enforceable under the 2022 Bill,[367] which also requires the surrogate's consent to the parental order and provides for a complete prohibition on commercial surrogacy. Therefore, it is clear that the consideration of the sale of children does not arise.

One final consideration is the recent Supreme Court judgment in *Adoption Authority of Ireland v C & D,[368]* which considered whether a foreign adoption order made subsequent to a commercial surrogacy agreement should be recognised in Ireland.

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[362] Bracken has suggested that it is difficult to comprehend how imprisoning or fining a surrogate due to her reproductive choices safeguards her rights. L. Bracken, "The Position of the surrogate in the Health (Assisted Human Reproduction) Bill 2022" (2022) 25(3) IJFL 45 at page 46.

[363] Section 51(1) of the 2022 Bill prohibits any person from participating in a surrogacy agreement other than a permitted surrogacy agreement as set out under the Bill.

[364] Section 50(2) of the 2022 Bill prohibits any person from providing a technical, professional, or medical service to give effect to a non-permitted surrogacy agreement.
Section 57 of the 2022 criminalises publishing advertisements for surrogacy. The word "publish" is defined quite broadly as "disseminate or provide access, by any means, to the public or a section of the public" and advocacy groups are considerably concerned that this would include for example, a group chat on Whatsapp or a Facebook group.

[365] Section 2(1) of the 2022 Bill.

[366] This is also noted by Bracken in L. Bracken, "The Position of the surrogate in the Health (Assisted Human Reproduction) Bill 2022" (2022) 25(3) IJFL 45 at page 50.

[367] Section 56(1) of the 2022 Bill.

[368] [2023] IESC 6. This case involved a same sex male couple who engaged in a Californian gestational surrogacy agreement with an egg donor. The parties obtained a UK parental order in 2019 yet did not have joint parental recognition in Ireland. The non-genetic father of the children was born in Northern Ireland and the genetic father was born in the UK. They were married in the US. It should be noted that the High Court (Barrett J) held that public policy has a "limited function and is confined to egregious cases", [2021] IEHC 785 at paragraph 44. Barrett J concluded that there was nothing "immoral or mercenary at play" in the proceedings before him, "*no prostitution, no trafficking, no child abuse issues presenting" – All that presents is the wholesome love of two men for each other and for their children. On the Family List one so often encounters unhappiness that it is, frankly, wonderful to be asked to adjudicate in a case where such an abundance of love and joy presents*", at paragraph 48.

This judgment arose subsequent to the publishing of the 2022 Bill.[369] The egg donor was paid $7,500 and the surrogate was paid in and around $50,000. While the US legal representatives attested to how these payments were compensation for time, medical and psychological risk, pain, suffering and inconvenience, the Court clearly did not accept that these were not "commercial payments".[370] However the Court found that these payments were "standard" and "unexceptional" in the context of the USA, where the surrogacy arrangement took place.[371] Hogan J held that:

> "*it must be recognised that if international surrogacy is to be facilitated or accommodated at all…then some element of commerciality is almost unavoidable, indeed inherent, in such arrangements"*[372] and that "*it seems clear that in practice a fee of some kind is generally paid to the gestational mother. This, after all, is the way in which international commercial surrogacy actually works and only the credulous or the naïve would suggest otherwise*".[373]

Notably, no issue was taken by the Court, or no suggestion was made, that the surrogate's consent was in any way sullied by the payment of money. Nonetheless, the Court held that commercial payments, such as those at play in the agreements with both the surrogate and egg donor, were in conflict with Irish public policy.[374] However, the Court made it clear that it was not endorsing this policy[375] and that determining public policy should not be an "*expression of opinion as to what public policy ought to be, rather than what it is*".[376] O'Donnell CJ further held that the Court's statement as to what it deemed the current policy did not mean that Irish public policy is incapable of change by the Oireachtas or

[369] However, the Minister for Health has confirmed to the author directly in a meeting on the 1st of June 2023 that there would be no change with regards to the position of the Department in prohibiting commercial surrogacy.
[370] [2023] IESC 6, at paragraph 61-62 (Hogan J).
[371] *Ibid* at paragraph 93 (Hogan J).
[372] *Ibid*.
[373] *Ibid* at paragraph 60 (Hogan J).
[374] *Ibid* at paragraph 64 (O'Donnell CJ). In reaching this conclusion, O'Donnell CJ relied on the prohibition against payments in adoption under domestic and international law, the recommended prohibition on payment for donors and surrogates from the 2005 Report of the Commission of the Assisted Human Reproduction, the prohibition on payments above reasonable expenses for donations provided for in section 19 of the 2015 Act, and the current 2022 Bill proposals which prohibit commercial surrogacy, *ibid* at paragraphs 65 – 79 (O'Donnell CJ).
[375] *"A court is not expressing any view as to the merits, wisdom, or desirability of this policy. It is quite possible to doubt the logic of seeking to draw a bright line between commercial and non-commercial surrogacies, for example. It is also apparent that public policy in this regard is not static, and a significant development in thinking can be detected. However, legislation can best be drafted and at a broader level, policy informed, if there Is a clear understanding of what the law currently provided, and how public policy, which will determine the recognition of foreign surrogacies, and adoptions, now stand", ibid* at paragraph 87 (O'Donnell CJ).
[376] *Ibid* at paragraph 59 (O'Donnell CJ) Hogan J also held that that the "*contours of that public policy are themselves elusive and appear to be possibly changing"* at paragraph 2 (Hogan J).

otherwise. [377] Ultimately, while it held that the public policy on commercial payments rendered the surrogacy agreement itself unenforceable,[378] the Chief Justice nevertheless determined that the foreign adoption order was deserving of legal recognition in Ireland.[379] This judgment would appear at the very least to instil a level of confidence in the policy makers that if payments were made in a context wherein all necessary safeguards had been imposed, then such payments would be judicially permissible in determining to make the parental order, particularly in the international surrogacy context. This judgment offers a clear preference towards the legal recognition and regularisation of the social reality of the child with their intending parents over endorsing the purported concerns associated with commercial surrogacy.

Financial Cost within the O'Connell Study

The issue of cost was a considerable theme amongst participants in the O'Connell Study, as it was within the Bracken study.[380] While it is argued that a general public narrative can revolve around the financial exploitation of women, it was evident that the costs involved were either prohibitive or a severe burden on the parents. The cost involved in AHR journeys arise from the medical treatment itself (including unnecessary medicalisation for socially infertile individuals/couples), the counselling, the legal advice, the travelling, the accommodation, the international transport of gametes and/or embryos, the payments to the surrogate and to the donors and the Court applications. Many of these expenses can arise across multiple jurisdictions, and many participants who experienced loss engaged in these processes and these expenses multiple times. This also includes participants who took time off work, did not apply for, or were not allocated, parental leave or benefits. While public IVF funding was announced in the Budget for 2023; at present and to date, the cost of these journeys must be met on an entirely private basis with only tax relief on the medical treatment as mitigation. It was clear that the lack of legal framework in Ireland caused higher costs and resulted in prohibitively expensive processes. As this study examined only parents who already had children through AHR, there is no way of knowing how many individuals have not become parents as a result of the costs involved.

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[377] *Ibid* at paragraphs 68, 82, 94 and 108 (O'Donnell CJ). Furthermore, it also did not mean that the surrogacy agreement was incapable of having legal effects and consequences; that a person could not legally enter into such agreements; and the subsequent step parent adoption order should not be recognised by the Irish courts.

[378] *Adoption Authority v C & D & Ors* [2023] IESC 6 at paragraph 64. This position could best be described as obiter comments as the Court had not been called upon to answer any questions as to enforceability of the agreement. "This Court is not being asked to enforce the contract which has, as it happens, long since been performed", at paragraph 69 (Hogan J).

[379] As mentioned above, the justification for this related to the child's best interests, the importance of domicile in the determination of applicable civil status, the precedent set down by the ECtHR and the support of the Attorney General for its recognition, *ibid* at paragraphs 87 - 91. There was no suggestion therefore from the State's legal officer that the fact that the surrogacy was commercial in nature and preceded the step-parent adoption delegitimised the process.

[380] L. Bracken, *LGBTI+ Parent Families in Ireland: Legal Recognition of Parent-Child Relationships* (University of Limerick, 2021) at page 31.

Cost of The Surrogacy Journey

For most participants, AHR was the only option for them to broaden their families and it came at huge financial sacrifice, often at the expense of other family needs. One couple advised that they could only afford their surrogacy journey because their own parent had sold their family home. Another couple put a considerable amount of their wedding savings into their surrogacy journey while another delayed the building of their own family home:

> "*Finances are the only thing stopping us from ever doing it in the future. We would do it in a heartbeat."*
>
> - Christine (Surrogacy and Egg Donation)

> *"It's a huge emotional and financial burden, like the whole thing. It's like, it's wild. But I think when you have infertility, or a fertility issue, you do anything, I see that watching other people as well, like, you really would do anything."*
>
> - Anna (Surrogacy)

Payments to the Surrogate

Payments to the surrogate have been said to constitute two key harmful practices, that of exploiting women in countries from lower socio-economic backgrounds and also constituting the sale of children. Neither of these practices are borne out by this study. Four participants described the actual payment process involving three surrogates. One couple paid their surrogate €16,000 in Ukraine, with a monthly allowance paid through the clinic. Mary viewed this payment as money to improve her quality of life throughout her pregnancy but also as allowing the surrogate to do more things with her family. The lump sum payment in Ukraine is generally made upon receipt of the birth certificate but as Mary and her husband's child was born at the beginning of the war, they had to leave without any birth certificate and Mary did not wish for their surrogate to have to wait to receive the payment *"we didn't want her to wait for her money and we trusted her".* Another couple in the UK paid their surrogate €14,000 as a lump sum on the day of the birth, as well as her expenses, including travel, loss of earnings and a periodic sum each month for her to purchase maternity wear, vitamins etc. A further couple's surrogate was a friend and so she did not want any payments, but she was compensated for reasonable expenses. Such expenses included compensation for her loss of earnings in her last few months of her "*draining*" pregnancy.

When asked how they viewed payments to surrogates above and beyond reasonable expenses, participants who provided a lump sum payment spoke of the opportunities they were able to offer the surrogate and the evident altruism of the surrogates:

> *"I think people are foolish if they think that people just do it for money. Like…anyone who's ever been pregnant or gone through anything to do with childbirth or anything, would realise that no woman is going to just do that for money, it's too big of a thing…because it's your body…I think that even if*

it is commercial, there is still always an altruistic aspect to it. I don't think that they have to be completely mutually exclusive."

- Christine (Surrogacy and Egg Donation)

"*We paid a lot extra. For two reasons. one, we think the surrogate is better catered for in the States. And two, because you have an awful lot more structure and support and everything is linear. We knew exactly what was going to happen. And that took an awful lot of stress away from us."*

- Paul (Surrogacy and Egg Donation)

"I just kind of looked at it like that was a life changing sum of money for her and just something that she would not have been able to achieve because of the economy and different things in the Ukraine…And then I suppose I think…that if I was a mum and money was tight, if I could do this for somebody else to be able to afford maybe a house for my family. I absolutely think that it's something that I would do as well so I always, you know, put myself in her situation."

- Mary (Surrogacy)

"I think they should allow compensation, because okay, it's not a business, but they are doing a huge thing for us…Without us being completely overcharged, because we have to pay the clinic, we have to pay the appointments, we have to pay the transport, even food, on the days that she's missing work and she's not being paid, we have to pay her for her loss of earnings."

"And I'm fine with all that, I think it's fair."

- James and Alex (Surrogacy and Egg Donation)

Payments to the Egg Donor

Between the two same sex male couples, one paid a registration fee to an agency of approximately €450.00; however, they paid €12,000 for 12 eggs and the other couple paid a set fee to the clinic for all expenses which one participant estimated included payment of approximately €5,000 - €10,000 for the egg donations. Paul and Christine who spent approximately €200,000 on their surrogacy journey in the US spoke about their level of discomfort around the different pricing structures for egg donors. They stated that that was the only part that felt like a financial transaction; the payment to the surrogate was not seen through the same lens. A higher fee was paid for egg donors who had proven success and Paul described that despite his discomfort, he did opt for a more expensive donation because of the donor's "*proven track record*", having been trying for 4-5 years.

Social Welfare Benefits

The 2022 Bill makes no allowances for social protection benefits or parental leave. This left many parents in a financially precarious position following the birth of their child with one non-genetic father having to pretend that he was unwell in order to

be given a doctor's certificate excusing him from work, having been refused paternity leave by his employer:

> *"I was 'sick' for almost a month…And I had to lie to [my employer]. And because they wouldn't accept it, I had to make myself very depressed and [pretend I had] mental health issues. And they were kind of insisting on medication...I felt very bad lying, of course, but it was the only way that I could have some time out."*
>
> - Alex (Surrogacy and egg donation)

Alex and his husband James decided that there was no way James could travel alone to bring their child home. James considered leaving his job but that would place them in further financial precarity. Two genetic mothers in surrogacy did not receive any maternity benefits but one mother was granted three months maternity leave, at the discretion of her employer. However, it was also a theme that many participants did not even apply for social welfare benefits. Anna and her husband, who had not yet obtained a declaration of parentage, and whose daughter had a foreign birth certificate in the name of the surrogate and her husband, did not apply for social welfare benefits, beyond child benefit. Similarly, Mary and her husband who did not have a birth certificate for their child, did not avail of either leave or benefits.

> *"Well, I didn't get any maternity leave. I work in the private sector too. So I don't get any money. I suppose, from a financial aspect, you know, it's a big loss to me, because I mean, I don't have an income, you know, when I suppose my husband, then he's kind of supporting the kids in the meantime. Parental leave, my husband didn't even look about parental leave, to be honest."*
>
> - Mary (Surrogacy)

> *"That's definitely something that needs to change. Because some companies like bigger companies, like the Googles, the whatever, you know, Facebook's and stuff, have surrogacy leave policies. Like there's nothing obligatory in law anywhere. And like that, that's not really right. Because you're becoming a parent, like?"*
>
> - Christine (Surrogacy and Egg Donation)

> *"It's incredibly hard to explain the amount of stress that infertility/cancer diagnosis/a surrogacy journey creates, and how much it impacts your day to day, that it has to be so complicated…I just find it baffling that we've all missed out on the state benefits. And if this does get sorted out, that we won't get back dated for it…like at the end of the day, we all have scraped together to do this…we've all missed out on this because we've been discriminated against for not giving birth ourselves. And it's so unfair that because the Court system is complicated and slow and all the rest, we're missing out on all of those leaves, like the amount of money that you have to earn to be able to spend it. I know it's not a huge amount, like the maternity benefit is quite low but still it's great, and it's supposed to be a time that you have that other income to support your family unit…There is so much admin to it, and you're*

like, you know what, I'm just busy being a mum…it really takes away from the time you have with your child".

- Anna (Surrogacy)

Anna also described how they waited for the passport for 6 weeks in the jurisdiction where her daughter was born and as a result her and her husband missed 6 weeks of work.

Cost in Obtaining Legal Recognition

It may perhaps be considered natural to presume that the strict adherence to legal frameworks and regulated processes, as expensive as it may be, is worth it in order to gain legal parentage of your child. However, it became very clear from this study that engaging in the process in order to avail of surrogacy is one thing, while being able to pay the legal fees in order to gain the parentage is another. While some participants spent all of their savings on the AHR journey itself, one couple in particular described how they then could not pay the legal costs involved in recognising their parentage:

"That whole legal side of it, we kind of put on the long finger….we just don't have that type of cash laying around after everything we've gone through. And it would take like a little bit of time to save up to do that. And just on the list of priorities with that type of finances, it's just not, like we have 100 things we'd rather do with the house."

- Paul (Surrogacy and Egg Donation)

"And I think that's kind of one of the main reasons that I feel like it having to get sorted out with this [AHR] Bill is because like, it's expensive for me to become [my child's] guardian. And it's going to be expensive for my husband as well to become her father."

- *Anna (Surrogacy)*

"My surrogate got €16,000 and the solicitor and the barrister took €16,000 for my husband's paperwork. And I just feel that they're talking about…surrogates being exploited, but I mean, we're being exploited in Ireland, because we'll pay €16,000 for fees, and I would have paid my surrogate €32,000 not a problem. Like I'd rather give her €32,000 because she deserves every single penny….this lady carries the most precious thing in my life and changed my life forever for what she got off me, €16,000, and then the solicitor gets the same kind of money. You know, it just makes me cross."

- Mary (Surrogacy)

Furthermore, an approach has been taken by some legal representatives to take cases in the High Court unnecessarily when less expensive applications to the District, or Circuit Court, could be made. This is to the extent whereby there is a standalone "surrogacy list" of case in the High Court, once a month, at present under Judge Jordan.[381] However, the common applications sought, are a declaration of

[381] See: http://legaldiary.courts.ie/high-court List: Family Law, Sub-title: Surrogacy.

parentage for the genetic father (Circuit Court), dispensing with a surrogate's consent for a passport to be issued and guardianship (District Court). Both of these courts provide mechanisms for serving a person outside of the jurisdiction and applications for substituted service. While there is currently no legal framework for parental orders in surrogacy in Ireland, none of the "workaround applications" require the High Court's jurisdiction, save for where an adoption order is being made without the consent of a parent or guardian or where there is an application for recognition of a foreign adoption. No such adoption orders were made in respect of the participants in this study.

The Joint Committee on International Surrogacy

The 2022 Bill, as currently published, does not include provision for international or retrospective surrogacy. In response to considerable concern following a news article[382] detailing this expectation prior to the 2022 Bill being published, the Minister for Justice, Minister for Health and the Minister for Children, Equality, Disability, Integration and Youth (the Ministers) established a Special Joint Oireachtas Committee on International Surrogacy in January 2022. The Committee had three months to complete their work and was expected to make recommendations. These were then to be considered by the three Ministers and any necessary legislative proposals would be submitted to Government. From April 2022 – June 2022, over 11 hearings, the Committee heard from advocacy groups, children born through surrogacy, surrogates, parents, children's rights experts, international and domestic legal experts, academics, fertility experts, and government officials. In July 2022, the Committee issued its report with a total of 32 recommendations. It noted that it drew its work from a number of key principles, namely that the State has no control over the actions taken or the birth registration in another jurisdiction, that people will continue to travel abroad to pursue international surrogacy agreements (ISAs) and that the biggest risk to the welfare and rights of children, surrogates and intended parents is the lack of regulation.[383]

Among its recommendations were that the 2022 Bill should implement a framework for international surrogacy which allowed for a two-step model for the transfer of parentage; a pre-approval process to the AHHRA and a post-birth court application where the intending parents are required to meet evidentiary proofs.[384] The post birth model is recommended by the Committee as it is said this would provide better safeguards against the sale and trafficking of children.[385] The Committee notes that while it would be desirable for ISAs to comply with the domestic framework, "it would also be almost impossible to enforce".[386] The surrogate and intending parents should receive independent legal advice, medical advice and counselling before the conception of the child.[387] The surrogate should be compensated for her reasonable

[382] D. Murray, "Government to Defer Legislating for International Surrogacy Services" *Business Post* (17 October 2021).
[383] Joint Committee on International Surrogacy, "Final Report of the Joint Committee on International Surrogacy" (July 2022) at page 14.
[384] *Ibid,* at recommendations 1, 2, 3, 18, 19, 23 and 32.
[385] *Ibid* at page 38.
[386] *Ibid,* at page 30.
[387] *Ibid,* at recommendations 7 and 8.

expenses but no payments beyond this is recommended, and these should be vouched, as should the fees paid by any agencies.[388] These payments should be made prior to the birth of the child and should be non-refundable.[389] The pre-conception AHHRA application should also include details of the surrogate's income and regular outgoings.[390] The intending parents must notify the Department of Foreign Affairs after the conception of the child to enable the necessary preparations for the emergency travel certificate (ETC).[391]

Retrospective recognition of parentage should be possible through a number of mechanisms, depending on what court applications have already been made, i.e., declaration of parentage for the intending father or section 6C guardianship for the other intending parent.[392] There should be no upper age limit for either the intending parent or the child for such an application, the base requirements of which should be that surrogacy was legal in the country in which it took place, and the intending parents were intending parents at the time of conception.[393] In both prospective and retrospective court applications, the Committee recommended that there should be judicial discretion and the Court should carry out a best interests assessment in each case in making its determination.[394] In terms of the surrogate's consent, the report reads as if it should be required by the Court for prospective applications and provides a time period between seven and 21 days after the birth of the child for her to provide such consent.[395]

Retrospectively, it was recommended that the surrogate's consent could be inferred from the intention contained in a surrogacy agreement and post birth affidavits. The Committee foresaw the possibility of a surrogate being absent from such a hearing years later and suggested that failure to appear should be sufficient to dispense with her consent.[396] The surrogate's bodily integrity and autonomy in making decisions in relation to her healthcare remains hers and this should be acknowledged in the written surrogacy agreement.[397] In relation to the child's origins, the Committee recommended that the application to the AHHRA should include a commitment to discuss the gestational and genetic origins with the child and a commitment to register with the National Donor Conceived Person's Register and National Surrogacy Register. It further recommended that identifying information relating to the donor and surrogate be made available at the age of 12.[398] On foot of this report, the Ministers met to discuss the prospective implementation of this report and established an Inter-Departmental Working Group who then authored a policy

[388] *Ibid,* at recommendations 12, 13, 14 and 15.
[389] *Ibid,* at recommendation 20.
[390] *Ibid,* at page 40.
[391] *Ibid,* at recommendation 21.
[392] *Ibid* at pages 46-47.
[393] *Ibid,* at recommendations 24 – 29.
[394] *Ibid,* at recommendations 5 and 30.
[395] *Ibid,* at recommendation 22.
[396] *Ibid,* at page 47.
[397] *Ibid,* at page 31.
[398] *Ibid*, at recommendations 16 and 18.

paper, which was approved by Cabinet. It is envisioned that this will form the basis for the amendments and new Parts introduced at Dáil Committee Stage.

The Policy Paper of the Inter-departmental Group on International Surrogacy and Recognition of Past Surrogacy Arrangements

In December 2022, the Inter-departmental Working Group[399] (IDG) produced a policy paper detailing its positions regarding the implementation of the Report of the Joint Oireachtas Committee on International Surrogacy. A number of recommendations of the Committee were not accepted.

There is somewhat of a difficulty between the Committee's report and the Policy Paper of the IDG. The Committee recommended that the Court should carry out a best interests test as part of the parental order application. It is unclear from the report as to whether it is intended that the paramountcy principle should be inserted into the 2022 Bill, which would allow for a parental order notwithstanding a requirement had not been met, or whether a best interests test would pose an additional requirement, such as in sections 21 and 22 of the 2015 Act and 63(1)(a)(v) of the 2022 Bill. There is certainly no reference within the report's recommendations to the paramountcy principle, albeit it provides within the body of the report that "*the rights and best interests of the child should be of paramount concern throughout the process*".[400] The position taken by the IDG is that a best interests test, inspired by section 19 of the Adoption Act 2010, shall be inserted into the 2022 Bill;[401] however, the IDG make no provision for judicial discretion where the necessary requirements have not been met, even in exceptional circumstances given that it was "*of the view that providing for such discretion would undermine the safeguards provided by the requirements*".[402] Furthermore, in terms of offering the child legal certainty from birth, the IDG refused to accept the Committee's recommendation that the hearing of the parental order application should take place in line with the due date of the child, within 7-21 days of the birth. The basis

[399] The Policy Paper of the Inter-Departmental Group (IGD) describes as follows "An Inter-Departmental Group – with representation from the Department of Health, the Department of Justice and the Department of Children, Equality, Disability, Integration and Youth – was formed following the publication of the Final Report of the Oireachtas Joint Committee on International Surrogacy (JCIS) in July 2022. The purpose of the this group was to develop a Policy Paper on a recommended approach to establishing a system to allow the possibility of formal recognition by the State of surrogacy arrangements undertaken in other jurisdictions by Irish citizens or lawful residents and access to a legal route to parentage and guardianship under Irish law, which would seek, in so far as appropriate and possible, to implement the recommendations of the JCIS, Inter-Departmental Group, "*Policy Paper – International Surrogacy and Recognition of Past Surrogacy Arrangements*" (December 2022).

[400] Joint Committee on International Surrogacy, "Final Report of the Joint Committee on International Surrogacy" (July 2022) at page 38.

[401] With the additional element of identity considered. Inter-Departmental Group, "*Policy Paper – International Surrogacy and Recognition of Past Surrogacy Arrangements*" (December 2022) at page 28.

[402] *Ibid* at page 27 and 40. This position is extended to retrospective parental orders, at page 40.

for this refusal is the time needed for the surrogate to recover and to confirm her consent.[403]

While the Committee recognised that imposing a list of criteria on another jurisdiction would be unenforceable, it did recommend that as long as the medical and safety conditions in the other jurisdiction are met, this should be sufficient. The IDG does not follow this recommendation and has essentially recommended the duplication of the domestic framework. It proposes that the relevant jurisdiction must allow intending parents to travel to their country for cross border surrogacy and the proposed surrogacy agreement itself must also be lawful. Where there is a variation, the Irish framework must be imposed above and beyond the relevant jurisdictions framework. The surrogacy agreement must contain particular details,[404] and confirm that the requirements for a surrogate[405] and intending parent[406] in Ireland and in the relevant jurisdiction have been met. The IDG propose that it must also contain a statement of all reasonable expenses paid, and anticipated to be paid, to the surrogate by a surrogacy agency. Confirmation of the itemised expenses are then to be provided to the Court at the time of applying for the parental order. In addition, while the Policy Paper suggests that certain countries, such as the US, would be "green-listed", it is argued that such a provision is futile when payments to surrogates, which are common in the US, are prohibited.

The IDG have been clear in the prohibition of commercial surrogacy wherein payments are made above and beyond reasonable and incurred expenses to the surrogate, while allowing for payments to intermediaries, as long as they have been

[403] However, the IDG do propose that "*in all cases, the Court shall have regard to the general principle that unreasonable delay in determining the proceedings may be contrary to the best interests of the child"*, Inter-Departmental Group, "*Policy Paper – International Surrogacy and Recognition of Past Surrogacy Arrangements*" (December 2022) at page 28.

[404] These include the name, address, telephone number, e-mail of the intending parents, the surrogate, and the donor. The AHR treatment provider is to give an undertaking that it will provide this info to the AHRRA. Also, the name, address, telephone number, e-mail, company registration/medical registration (as applicable) and contact name of any surrogacy agency/AHR provider. Also, the details of the country in which the international surrogacy agreement) is to take place.

[405] The surrogacy agreement must include a declaration that the surrogate has received independent legal advice in Ireland, as well as in the country where the surrogacy agreement is taking place, confirmation of AHR counselling, confirmation that she has been physically and psychologically approved to act as a surrogate and confirmation of her fully informed consent to attempting to become pregnant by the use of an egg other than her own.

[406] The surrogacy agreement must include a declaration that the intending parents have received independent legal advice in Ireland, as well as in the country where the surrogacy agreement is taking place, confirmation of AHR counselling, confirmation that they will make provision in respect of all necessary healthcare for the surrogate's pregnancy and that they will inform the child, at an appropriate age, that they were born as a result of AHR. The intending parent(s) who provide(s) the gamete(s) must comply with the 2006 Regulations in terms of medical screening. They must also make an undertaking that they will contact the Irish mission as soon as the agreement has been approved by the AHRRA, that they will apply for a parental order and that they will take all necessary steps to provide care and protection to, prevent harm or neglect to, and ensure the welfare of, any child born as a result of AHR treatment pursuant to the surrogacy agreement.

officially authorised to operate in the relevant jurisdiction.[407] However, notably, paying fees to agencies domestically is prohibited.[408] For the second time, the IDG have given an entirely lacking reasoning for its exclusion of commercial surrogacy internationally:

> *"The Bill explicitly prohibits commercial surrogacy in Ireland. This position follows a rigorous analysis of the issues raised by commercial surrogacy and the concerns relating to the welfare and commodification of the children involved, as well as the potential risks of coercion and exploitation of vulnerable women to act as surrogate mothers".*[409]

Such rigorous analysis has never been cited in the policy papers produced or discussed by the officials in their appearance before the Committee.

Furthermore, while the policy paper suggests that a memorandum of advices was commissioned by the Attorney General from external counsel, this similarly has not been published.[410] One salient insight was that the IDG stated that it ultimately did not agree with the use of step-parent adoption as an appropriate mechanism to regularise the parent-child legal relationship arising from a surrogacy agreement.[411] Notwithstanding this position, the IDG maintained that "*the existing current avenues for establishing some form of recognition of a legal relationship between an intending parent and a child would and should remain available to be pursued*."[412] Therefore, once more, the legislation will allow for guardianship, a status that bestows decision-making powers on an intending parent, but only allow for parentage, a status that bestows entitlements onto children, through an expensive and timely adoption procedure, in order to achieve the same substantive outcome. Finally, while extensive criminal sanctions have been proposed in the 2022 Bill, the IDG notes that seeking to provide for criminal offences arising from non-permitted international surrogacy arrangements "*is likely to involve complex issues relating to extra-territorial jurisdiction in relation to activities done outside Ireland which are lawful in the state where they were carried out. Further consideration and legal*

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[407] Inter-Departmental Group, "*Policy Paper – International Surrogacy and Recognition of Past Surrogacy Arrangements*" (December 2022) at page 29. It states that the focus of international surrogacy legislation should be on encouraging agencies oversea, in so far as is possible, to act in a fair and ethical manner, rather than seek to prevent Irish people from accessing their services altogether.

[408] Section 57 of the 2022 Bill. Horsey has pointed out the shortfalls in criminalising paid surrogacy agencies, where essentially "well-meaning amateurs" who volunteer at non-profit organisations do not have the knowledge, expertise, or resources to properly assist individuals in their AHR journeys, leaving them in a potentially vulnerable position when they seek their parentage. K. Horsey & S. Sheldon, "Still Hazy after all these Years: the Law Regulating Surrogacy" (2012) 20 *Medical Law Review* 67 at 74-75.

[409] Inter-Departmental Group, "*Policy Paper – International Surrogacy and Recognition of Past Surrogacy Arrangements*" (December 2022) at paragraph 8, page 11. This reiterates the exact same paragraph at 5, page 6 of the Department of Health, Department of Justice, Department of Children, Equality, Disability, Integration and Youth, *Issues Paper on International Surrogacy for Special Joint Oireachtas Committee January 2022.*

[410] *Ibid* at page 14.

[411] *Ibid* at page 5.

[412] *Ibid* at page 40.

advice will be necessary".[413] Therefore, it is clear from these positions and the lack of any incentives to remain in Ireland, that intending parents will be incentivised to travel abroad to potentially avoid criminal sanction. However, it is not envisioned that any considerable numbers of intending parents will be covered by these frameworks upon their return. Ultimately, the best possible option for intending parents and their children would therefore appear to be to travel to a regulated country where they can obtain a pre-birth parental order, obtain a subsequent step-parent adoption order, and seek to have it recognised here in Ireland.

Retrospective Recognition of Parentage

Initially, there was no provision in the 2022 Bill to recognise children who have already been born through surrogacy, either domestically or internationally. This would imaginably have earned the considerable ire of the Supreme Court,[414] who have commented that while citizenship and inheritance rights can be altered and the obligations of adults towards children may be defined or significantly influenced, the *"most important aspect of [surrogacy] that needed to be regulated was the ex-ante and ex post situations which are crystallised in legislation through retrospective and prospective provisions*". Clarke J (as he then was) stated that if the courts could only decide such issues on a case by case basis, this would be hugely costly both in "*human and monetary terms*".[415] As mentioned above however, this context was reported on by the Joint Oireachtas Committee on International Surrogacy and the recommendations have been detailed above. While the Minster for Health has recently announced that he has sought the advice of the Attorney General as to how to implement a retrospective framework by itself, without the establishment of the AHHRA,[416] it is argued that it cannot be viewed as such a discreet, independent issue. In such circumstances, it is argued that there would then be no defensible way in which to provide legal recognition for retrospective international surrogacy but not prospectively. Procedurally this would also be a precarious position to create, given that there will then be three categories of children, those born before the 2022 Bill commences, and then those who were born before and after the next piece of legislation that deals with international surrogacy. It would be creating subsets of standards for children, as a result of the Department's inability to grapple with the issues.

When considering a framework for retrospective recognition, it is argued that it is imperative to recognise the dearth of legislation that led intending parents to fend for themselves. By virtue of the absence of any level of regulation, it would be untenable to require intending parents to abide by any highly regulated system retrospectively. Therefore, it could be suggested that the longer there is no prospective system for international surrogacy, the more latitude that will naturally be given to intending parents who travel internationally prior to the commencement of a prospective framework. The IDG proposals provide that in order to be eligible for a retrospective recognition, an applicant must go to the High Court. The

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[413] *Ibid* at page 36.
[414] *MR & DR v an tArd Chlaraitheoir* [2014] IESC 60.
[415] *Ibid,* at paragraph 682.
[416] Vol. 1037 No. 3, Dáil Éireann Debate, *Final Report of the Joint Committee on International Surrogacy: Motion [Private Members]* 27 April 2023.

surrogate must provide her consent[417] and her identifying information must be registered in the National Surrogacy Register.[418] The intending parents must have intended to be the parents of the child at the time of the conception of the child. The surrogacy agreement must not have been unlawful in the relevant jurisdiction, and the intending parents must have complied with the legal framework of that jurisdiction. The child and surrogate must be a party to the proceedings, and all living siblings must be named in the same parental order application.

The granting of the order must be in the best interests of the child; however there is no judicial discretion for a lack of compliance.[419] While the Committee recommended that there be no time limit imposed on bringing an application, the IDG determined that an application must be brought within three years, within which at least one intending parent must have been habitually and lawfully resident in Ireland for not less than two years. This would potentially place an undue untimely burden on a family to be able to afford to discharge the legal costs involved of going to the High Court, which is generally the jurisdiction in contested adoption orders. The child must be residing with at least one intending parent unless the child is over 18 years of age.[420] There is to be no scrutiny of any payments to the surrogate, despite the heavy reliance on the prohibition of commercial payments prospectively. Finally, the surrogate must have not used her own gamete and the embryo used must have contained the gamete of at least one intending parent. These proposals appear to impose a level of restrictiveness on parents who essentially had no guidance or assistance from the State in forming their families and moreover, the prescriptive nature of these proposals fly in the face of the statements in the Dáil from the Minister of Health who stated,

> *"It has been my great honour and pleasure to meet with parents and their beautiful children as well as many others who want nothing more than to have children of their own…To these parents I say they must have full recognition and rights, under the law, as the parents of their children. Their children deserve, must have, and will have, the full protections of parental recognition and associated rights. That is what our new legislation does. The legislation we are finalising provides a full retrospective route for parents and for their children."*[421]

It therefore appears to be a question of whether the Minister for Health fully understands the implications of the framework he is proposing, one which is absent of any discretion and one which enforces strict views of the "right" way to have had a child when intending parents were left without supports or direction.

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[417] Unless she is deceased or cannot be found.

[418] Inter-Departmental Group, "*Policy Paper – International Surrogacy and Recognition of Past Surrogacy Arrangements*" (December 2022) at page 37, point 11.

[419] *Ibid* at page at 40.

[420] For a discussion of where the absence of such provision has caused issues see: *X v Z* [2022] EWFC 26 and A. Brown & K. Wade, "Everyone Remains the Child of Someone" A Parental Order for an Adult" (2022) *Journal of Social Welfare and Family Law* 1.

[421] Vol. 1037 No. 3, Dáil Éireann Debate, *Final Report of the Joint Committee on International Surrogacy: Motion [Private Members]* 27 April 2023.

International Surrogacy: Additional Legal Considerations

Unfortunately, there is no official source of data collection for the number of children in Ireland born through surrogacy, domestically or internationally. While one could review the numbers of emergency travel documents issued, this would not be categorised by conception type. In addition, there are countries, for example, such as certain states in the US, where intending parents are registered on the child's birth certificate and a passport is issued on foot of this.[422] Such a possibility therefore excludes the opportunity to accurately collate data on the number of children living in Ireland who were born through surrogacy abroad. Within the O'Connell study, all participants who had availed of surrogacy, had done so internationally. Within the family unit of each parental unit, there was a married couple, within which only one person was legally recognised as the child's parent.[423] The decision to go abroad was primarily based on the refusal of Irish clinics to work with the intending parents.[424]

> *"When we started to look into it, a lot of clinics weren't even keen to help us make [the embryos] because they felt they were going to send us on a bit of a dead end…they were kind of like, just to be clear, we can make them, but you can't do anything with them here. Most of them weren't even happy to have a conversation around it, they just found that it was too much of a grey area for them."*
>
> – Anna (Surrogacy)

> *"As a gay male same sex couple, who required the support of a surrogate to have our family, we couldn't be entertained within the Irish clinics. Popular*

[422] There are a couple of newspaper articles that point to a figure of 100 children born through surrogacy returning to Ireland between 2010 - 2017; O. Kelleher, "Over 100 Surrogate Babies Born in India, Ukraine and Thailand and Flown Back to Ireland with Parents in Last Decade" *Irish Mirror* (11 November 2017) and 160 in 2010 – 2018, L. Kelleher, "160 Irish Children Born via Surrogacy in Other Countries" *Irish Examiner* (8 October 2018). These do not take into account countries such as America or Canada. Furthermore, the Joint Committee on Health, "*Report on Pre-Legislative Scrutiny of the General Scheme of the Assisted Human Reproduction Bill*", (July 2019) states at 3.6.1 that "[t]here is no official data or reliable source recording the number of children born as a result of surrogacy arrangements in Ireland or born abroad and brought to Ireland." The following article states that Ireland has the second rate of surrogacy use out of 90 countries surveyed. However, this author has not been able to locate the original study that the statistic relates – L. Kelleher, "Ireland has Second Highest Rate of Surrogacy Use out of 90 Countries Surveyed" *Irish Mirror* (7 October 2018). Bracken (L. Bracken "LGBTI+ Parent Families in Ireland: Legal Recognition of Parent-Child Relationships" (October 2021)) has pointed to two data sources to state that there is no formal record of the number or structure of LGBTI+ families that exist in Ireland, the first is the CSO Census of Population 2016 – Profile 4 Households and Families. There is no AHR specific breakdown of these families. The second is the Oireachtas Statistical Profile of the LGBT+ Community, there is no breakdown for LGBTQI+ families who have children.

[423] In one opposite sex couple, the genetic father had instituted proceedings for a declaration of parentage under section 35 of the 1987 Act. This was granted shortly after the interview.

[424] In addition, it is evident from the O'Connell study that a lack of cohesion internationally impeded many of the participants AHR journeys. For example, two genetic mothers in surrogacy had to transfer their embryos to another jurisdiction which was a costly endeavour and one opposite sex couple had embryos in one jurisdiction, that they could not transfer, meaning they could not be used.

destinations like the Ukraine weren't open to us because they only facilitate heterosexual married couples…we did get told by a fertility clinic, look, guys, it's not an anti LGBT thing. We just don't supply this support to heterosexual or gay couples because there's no law to protect our business if, you know, if we went down that path of offering the service."

- Sean (Surrogacy and egg donation)

"The clinics don't support male same sex couples. We couldn't register with a clinic in Ireland."

"I contacted a few clinics, and they refused us, we had to go abroad."

- James and Alex (Surrogacy and Egg donation)

There are a number of difficulties that arise within the context of international surrogacy that do not arise in domestic surrogacy. Primarily, these relate to seeking to bring the child back home and subsequently navigating a legal system whereby perhaps the only established legal parent of the child lives in another country. As Hogan J has recently held, "*if children born abroad in this fashion are brought back into the State by their genetic or putative parents, it is in their interests that someone is recognised as their parent or parents*".[425]

Emergency Travel Certificates

For intending parents and children travelling home, the options are to obtain a passport for the child from Ireland or the foreign jurisdiction, travel between jurisdictions in a manner that does not require a travel document (for example, drive on the ferry back from the UK), or obtain an Emergency Travel Certificate (ETC) or visitor's visa. In 2012,[426] the Department of Foreign Affairs issued guidelines to intending parents on the issue of citizenship, parentage, guardianship, and travel document issues.[427] They essentially go through the various legislative workarounds available to the parties; however, they are steadfast in allowing only the parent or guardian of the child to apply for the child's passport. DNA evidence of the intending father's genetic link must be provided to the Department of

[425] *Adoption Authority v C & D & Ors* [2023] IESC 6 at paragraph 65.

[426] These guidelines followed a particularly onerous court application in *EP and Others v Attorney General and Others* [2011] IEHC 556. In this case, the genetic father sought a passport for his child born through surrogacy in India. He was provided with an emergency travel certificate to return home, but the Department of Foreign Affairs required him to obtain a section 35 declaration and an order dispensing with the surrogate's consent to the passport. The intending mother was a notice party only in the proceedings. The Circuit Court denied both of the father's reliefs and while he was successful in obtaining both orders in the High Court, the father was given leave to apply to the Circuit Court for another section 35 declaration "*in view of the necessity of same from the abundance of caution and the formal statutory and regulatory provisions relating to the declaration to be issued from the Circuit Court with the seal of the County Registrar*", at paragraph 23.

[427] Department of Foreign Affairs, "Citizenship, Parentage, Guardianship and Travel Document Issues in relation to Children born as a result of Surrogacy" (2012). These guidelines make clear that their use of terms such as "surrogate mother" and "commissioning adults" should not be interpreted as meaning that the Irish authorities consider that these terms have legal standing, or that the Irish authorities are not bound by Irish law.

Foreign Affairs (DFA) officials.[428] An ETC may be granted if the Irish Authorities are satisfied that the child is or *may be* an Irish citizen, that the application is being made by a parent or guardian, that the consent of all guardians has been obtained or dispensed with, that there are exceptional circumstances requiring the ETC and where it is in the best interests of the child to grant the ETC.[429] It states that the Irish authorities would generally not regard it in the best interests of the child to arrive into the State with adults who have no legally recognised relationship to the child. Therefore, they seek an undertaking from the intending parents that they will notify the Child and Family Agency of their presence in the state within two working days of their arrival, and from the father that he will seek a declaration of parentage and guardianship within 10 days of arriving home.[430] The guidelines also suggest that the intending parents make provision to remain in the country in which the child was born until the travel documents can be resolved. Again, it is argued that while understandably necessary to have safeguarding policies in the absence of a more considered framework that offers pre-birth parental order applications to the court, it is evident that the early weeks and perhaps months of a child's life is concerned primarily with administrative and legal processes that undoubtedly cause stress to their caregivers at a time where they are absorbing all around them. This is assuming the ETC is granted.

While officials from the DFA have confirmed that there has never been an instance of a surrogate being unavailable to consent to an ETC being issued,[431] and that citizenship issues of the parent have not been the cause of any delays,[432] there are nonetheless more worrying reports internationally.[433] The issue of ETCs has been

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[428] It should be noted that the IDG have stated that the consent of the surrogate, together with proof of the genetic link will remain a requirement for the issuing of emergency travel certificates, "*Policy Paper – International Surrogacy and Recognition of Past Surrogacy Arrangements*" (December 2022) at page 42. However, it does note that further consideration must be given to the issuing of ETCs based on the genetic link of the intending mother and where the genetic parent is not an Irish citizen, at page 42-43.

[429] Department of Foreign Affairs, "Citizenship, Parentage, Guardianship and Travel Document Issues in relation to Children born as a result of Surrogacy" (2012) at page 4—5.

[430] *Ibid* at page 5.

[431] Joint Committee on International Surrogacy, "Issues relating to International Surrogacy Arrangements and Achieving Parental Recognition: Discussion" (28 April 2022), Ms Siobhan Byrne, Director of the Passport Service, stated, in response to a question posed in relation to the impact on the issuing of an ETC by the father being unable to contact the surrogate or her spouse, *"[t]hat is a very particular scenario that I am not sure has ever been encountered. I do not think we have ever encountered that scenario, but we would look at cases on a case-by-case basis. As it has never been encountered, I cannot answer how that would be dealt with"*.

[432] *Ibid.* Ms Byrne advised the Committee: "*I am not aware of any case whereby a delay in a parent establishing citizenship has affected a surrogacy case. I am not aware of any case where this has occurred. When I said there had been cases previously it was more where the parent was not a citizen and, therefore, the child had no entitlement. There have been cases of this but not where it has been affected through a delay in the parent acquiring citizenship, through naturalisation or any other method*".

[433] See: S. Mohaptra, "Stateless Babies and Adoption Scams: A Bioethical Analysis of International Commercial Surrogacy" (2012) 30(2) *Berkeley Journal of International Law* 412 and S. Finnerty, "Who Profits from International Surrogacy? The Legal and Bioethical Ramifications of International Surrogacy" (2015) 21(2) *Medico Legal Journal of Ireland* 83.

considered briefly by the ECtHR in *D v Belgium*,[434] wherein the Belgian authorities refused an ETC for three months and 12 days. Regrettably this was not the best "test case" as the intending parents had delayed in providing the required documentation,[435] including verified proof of the genetic father's paternity. As soon as the intending parents provided the documentation, the passport was issued. The Court considered that despite its interruptions, there was no doubt that the applicants circumstances constituted family life and recognised that Article 8 can also encapsulate a planned family life.[436] The Court acknowledged that there had been an interference but that it was in service of the legitimate aim to fight against the trafficking of human beings and was reasonably foreseeable. It noted that the situation must have been extremely difficult for the applicants and that it is important for a child to maintain contact with one or more close people particularly in their first months of life in order to protect their psychological development. Nevertheless, it concluded that the time period involved was not unreasonably long and that the ECHR cannot oblige States Parties to allow persons to enter their jurisdiction with children born to other persons without the national authorities being entitled to carry out relevant legal checks.[437]

Citizenship

Once the hurdle of bringing the child into the county is surpassed through the issuance of an ETC, citizenship has to be established. Article 2 of the Irish Constitution, following amendment in 1999, provides that it is the entitlement and birth right of every person born on the island of Ireland to be part of the Irish Nation. It also states that there is an entitlement to all persons to be citizens of Ireland where they comply with the provisions of the legislative framework providing pathways to citizenship. Article 9 of the Constitution,[438] which was amended by referendum in 2004, provides that children must have at least one parent who is an Irish citizen or is entitled to Irish citizenship (by having legally resided in Ireland for three out of the previous four years immediately preceding the child's birth)[439] in order to be eligible for automatic citizenship, outside of the naturalisation process. Ireland therefore operates a citizenship system based on the *jus sanguinis* (right of blood) principle. Where a child was not born in Ireland, for example, in international

[434] Application No. 19176/13, 8 July 2014.
[435] The Belgian authorities had sought the certificate of pregnancy and a certificate of hospitalisation before issuing the child with a passport.
[436] Application No. 19176/13, 8 July 2014, at paragraph 49.
[437] *Ibid* at paragraphs 58-59.
[438] Article 9 provides that (1.1) On the coming into operation of this Constitution any person who was a citizen of Saorstát Éireann immediately before the coming into operation of this Constitution shall become and be a citizen of Ireland. (1.2) The future acquisition and loss of Irish nationality and citizenship shall be determined in accordance with law. (1.3) No person may be excluded from Irish nationality and citizenship by reason of the sex of such person. (2.1) Notwithstanding any other provision of this Constitution, a person born in the island of Ireland, which includes its islands and seas, who does not have, at the time of the birth of that person, at least one parent who is an Irish citizen or entitled to be an Irish citizen is not entitled to Irish citizenship or nationality, unless provided for by law. (2.2) This section shall not apply to persons born before the date of the enactment of this section. (3) Fidelity to the nation and loyalty to the State are fundamental political duties of all citizens.
[439] Section 6A of the 1956 Act.

surrogacy agreements, there is a pathway to citizenship if at least one parent was born in Ireland or had their foreign birth certificate registered with the Department of Foreign Affairs before the child was born. Furthermore, a child adopted by an Irish citizen is an Irish citizen.[440] However, if none of the above pathways are available to a child, the child's parent or guardian may apply for naturalisation on behalf of the child.[441]

Citizenship is one of the few vestiges of parentage when viewed distinctly from guardianship. It is a feature that can arise from intending parentage alone, once recognised, without any possible interference from the surrogate, or her consent. However, a passport, which is the entitlement of every Irish citizen can only be granted with the consent of either every guardian, or, where there are more than two guardians of the child, at least two guardians,[442] and only applied for by a parent or guardian.[443] While guardian is defined under the 2008 Act,[444] parent is not. Within the common scenario underpinning a surrogacy agreement, whereby the surrogate becomes an automatic guardian upon the birth of the child, her consent is therefore required for a passport, unless two intending parents have been granted guardianship.[445] However, unlike the residence decision or the parental order, her consent, just like every other guardian, can be dispensed with.[446] There is also a power bestowed on a court to direct the Minister to issue a passport without the

[440] Section 11(1) of the 1956 Act.
[441] Section 15(3) of the 1956 Act.
[442] Section 14(1) of the 2008 Act.
[443] Section 6(3) of the 2008 Act.
[444] Under section 2 of the 2008 Act, "guardian", in relation to a child, means a person who— (a) is a guardian of the child pursuant to the Guardianship of Infants Act 1964 , or (b) is appointed to be a guardian of the child by— (i) deed or will, or (ii) order of a court in the State, and has not been removed from office. If a parent of a child is not a guardian of the child, the Minister have regard to the circumstances of the case before issuing the passport without that parent's consent, section 14(2) of the 2008 Act.
[445] The 2022 Bill does propose that guardianship be awarded to both intending parents by way of statutory declaration of the surrogate and the intending parent; however, this can only be made where the child has already been born and there is no mechanism to dispense with the surrogate's consent - section 6BA(1) of the 1964 Act, as proposed by section 156 of the 2022 Bill.
[446] Section 11 of the 1964 Act and Section 14(3) of the *Passports Act 2008.* However, one considerable procedural issue that arises is the time consuming nature of serving a person outside of the jurisdiction. Varying rules apply to service within the EU and service outside of the EU. A court application for leave to serve a person outside of the EU is required before any service can be effected. At this juncture, it would generally be considered prudent to dispense with the formal service requirements i.e., though the foreign jurisdictions service authority (which may be an office or a court) and serve the relevant person by registered post. This would take a number of months to get listed, unless it was afforded a priority status whereby an affidavit of urgency was filed in the Court office, and once leave to serve, and substituted service was granted, the pleadings and corresponding extrajudicial letters would be sent, and an Affidavit of Service could only be filed after a further 10 days. It is most likely however, that the relief sought (dispensing with the surrogate's consent) would be one of many detailed in a Family Law Civil Bill. The time within which an Appearance to such proceedings must be filed extends to 28 or 35 days where the Respondent resides outside of the jurisdiction. To actually obtain the reliefs from a person refusing to consent to the orders sought would require that that period pass, a warning letter be served in addition to the initial pleadings before a Motion for Judgment in Default of Appearance could be issued and heard, and the matter move to the Judge's list for final hearing. This entire process would likely take upwards of a year.

consent of the guardians,[447] and the Minister can also issue a passport without a court application, to save the applicant residing outside of the state with the child to come to Ireland for the Court process.[448] Finally, the Minister may issue a passport without the consent of the guardian where a direction has been given by the authorities of the state of the child's ordinary residence, that a passport be issued, or where the legal requirements in terms of consent in the State in which the child resides have been fulfilled.[449] Therefore, the passport process is more amenable to circumstances that fall outside the prescribed path. However, as aforementioned, it only arises by virtue of the child's obtaining citizenship.

Section 7(1) of the *Irish Nationality and Citizenship Act 1956* (the 1956 Act) provides that a person is an Irish citizen from birth if at the time of his or her birth either parent was an Irish citizen or would, if alive, have been an Irish citizen.[450] There is no definition of "parent" within the 1956 Act.[451] In relation to a child born outside of Ireland where their citizen parent was not born in Ireland, there is an additional requirement wherein the citizen parent must first be registered in the foreign birth register or their parent's birth must be registered in the foreign births register.[452] Therefore, the fact that a child was born outside of Ireland is not fatal in terms of their own citizenship, as long as one of their parents is an Irish citizen. The difficulty that can arise however is where the non-genetic parent is the Irish citizen yet is named as a parent on the civil birth certificate of the State in which the child was born.[453] There has notably been no legislative interaction between the 1956 Act and either the 2015 Act or the 2022 Bill. However, it should be noted that the IDG have proposed that the 2022 Bill be amended to make clear provision for citizenship arising from both a declaration of parentage[454] and a parental order.[455]

While it could be argued, as it is here, that such interaction with the 2015 Act should not be strictly necessary, at least for prospective parentage,[456] this is not the position of the Supreme Court in the case of *A, B & C v The Minister for Foreign Affairs and Trade,*[457] as detailed in Chapter 1. This case dealt with whether citizenship could be extended to the son of a non-genetic Irish father who was a parent to the surrogacy born child by virtue of a UK parental order. The Supreme

[447] Section 14(4) of the 2008 Act.
[448] Section 14(5) of the 2008 Act..
[449] Section 14(5A) of the of the 2008 Act.
[450] Section 7(1) of the 1956 Act.
[451] However, section 5 of the 1987 Act declares that any reference to "mother", "father" or "parent" in the 1956 Act shall include unmarried fathers, mothers, and parents.
[452] Section 7(3) of the 1956 Act.
[453] Section 29A of the 1956 Act.
[454] Inter-Departmental Group, "*Policy Paper – International Surrogacy and Recognition of Past Surrogacy Arrangements*" (December 2022) at page 34.
[455] *Ibid* at page 35.
[456] Section 5(3) of the 2015 Act provides that parents of a donor conceived child under the 2015 Act shall have all parental rights and duties in respect of the child.
[457] [2021] IEHC 785, [2023] IESC 10. This case involves a male couple, one of whom is an Irish citizen and the non-genetic father of his child in respect of whom he was granted a parental order in the UK, together with his husband. This case primarily relates to the breach of the Minister's duty in failing to make a decision in relation to the applicant's passport for their child since 2017. This author attended this hearing over two days.

Court held that such parentage, based on the non-biological link was not intended within the scheme of the 1956 Act. Therefore, the non-genetic father was not a parent for the purposes of Irish citizenship law, in the absence of a standalone provision, expressly bestowing such an entitlement on the child.[458] Similarly, even if the non-genetic parentage was recognised for this purpose, it would only have applied had the parentage crystallised upon the child's birth, not subsequently upon the making of a parental order with only prospective effect.

There was no challenge to the constitutionality of section 7(1);[459] however, counsel for the applicants in the Supreme Court made submissions on the double construction rule, and how the principles of equality and marital supremacy in the Constitution would impact the interpretation taken by the Court. This was in circumstances where there were two children in this family, one who did have Irish citizenship, and the child in question, who did not. The Supreme Court considered that the intending parents were asking it to declare that "*the Oireachtas was constitutionally* required *to allow citizenship by descent*" because such was the effect of the UK Parental Order,[460] which it believed to present the "*prospect of an impairment of the State's sovereignty*".[461] Thereby, upholding Article 9 of the Constitution without considering Article 42A, for example.[462] It also held that to grant the child's citizenship would be to favour children domiciled abroad over children domiciled in Ireland and this, it held, would result in an illogical and unfair use of the principle of equality.[463] In this regard, it would appear that the principle of equality is better used to deny recognition of a legal parent-child relationship for the purposes of every surrogacy born child's entitlement to citizenship. This is particularly jarring when the Court held that to grant any relief, such as a declaration that the failure of the State to provide a pathway to citizenship for surrogacy born children in respect of their non-genetic parent breached the child's right under Article 40.1, 40.3, 41 and 42A of the Constitution, would be to stray outside the

[458] Such as section 11(1) of the 1956 that explicitly provides for citizenship arising from an adoption order. Section 18(d) of the *Interpretation Act 2005* also provides that a reference to a child shall include an adopted child.

[459] The Supreme Court held it could not make any ruling on unconstitutionality, or indeed, a declaration of incompatibility with the ECHR when the parties had not joined the Attorney General. As Hogan keenly noted, "*one of the particular difficulties in this case is that it has exposed the fault line between the application of the double construction test on the one hand and an actual declaration of unconstitutionality on the other*", *A, B & C v The Minister for Foreign Affairs and Trade* [2023] IESC 10 at paragraph 7 (as per Hogan J). The parents in this case argued that they did not need section 7(1) to be declared unconstitutional because the double construction rule, allowed the Court to interpret the section as constitutional, having regard to their proposed interpretation of it.

[460] *A, B & C v The Minister for Foreign Affairs and Trade* [2023] IESC 10 at paragraph 103.

[461] *Ibid* at paragraph 104.

[462] This was also noted by Hogan J, albeit, in reference to Article 41.4 and 40.1: "the failure of the Oireachtas to allow for citizenship by descent in a case of this kind where the Irish citizen's status as a parent of the child is or would be entitled to recognition under the law (including the private international law) of this State raises a constitutional issue having regard to the combined inter-action of Article 9.1.3 and Article 41.4 when read in conjunction with Article 40.1", *ibid,* at paragraph 21 (as per Hogan J).

[463] *A, B & C v The Minister for Foreign Affairs and Trade* [2023] IESC 10 at paragraph 104.

confines of the case before it.[464] Therefore, it appeared to confine itself to the case circumstances at hand in resisting the reliefs sought against the State, yet the children domiciled in Ireland, who were not before the Court, nonetheless factored into the determination not to recognise the rights of children domiciled outside of Ireland, who were before the Court.[465] Curiously, the Court concluded by adding:

> *"But more fundamentally – and self-evidently – this argument invites the Court to step into a significant policy debate, an exercise which could on no version be embarked upon without allowing the State the opportunity to adduce evidence relevant to the issues underlying the regulation of surrogacy – commercial or altruistic – and the legal recognition of the parental status of those who commission surrogacy arrangements. It is impossible to see how this can be done* ***at this stage of these proceedings****.* (emphasis added)"[466]

Setting aside the fact that this passage suggests that the Court can determine matters of policy, it is argued that should this have been a matter that troubled the Court, it had two days at hearing, and the benefit of advanced written submissions, High Court pleadings and transcripts, from which to raise it. Furthermore, the question of whether a child born through surrogacy and domiciled in Ireland should be entitled under the Constitution to the citizenship of their non-genetic intending parent, would not appear to be an issue that is deduced from a policy debate.

Citizenship and Travel within the O'Connell Study: Getting the Child Home

Within the O'Connell Study, citizenship arose for each child on foot of their legal parent's Irish citizenship. In every surrogacy family, there was a "grounding male parent" that provided the necessary genetic link.[467] However, such parentage had to be established, primarily through birth certificates. Four children had UK birth certificates where the genetic father and the surrogate were named on each birth certificate, one child had an American birth certificate naming both their intending parents, one had a New Zealand birth certificate with the surrogate and her husband

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[464] *Ibid* at paragraph 113. It noted that "*the applicants substantially based their claim on their domicile abroad and their status as parents under English law and their contention that as a result of that status C should enjoy citizenship by descent. The relief sought by IHREC seems to be directed to persons who are resident here as well as those who are domiciled abroad*".

[465] It should be noted however that Hogan J expressed considerable reluctance in allowing the appeal stating, *"The reality, of course, is that the effect of s. 7 of the 1956 Act in practice is to disadvantage homosexual married couples by treating them less advantageously than their heterosexual counterparts when it comes to passing citizenship by descent to their children. While, of course, heterosexual couples also have recourse to surrogacy arrangements, one may take judicial notice of the fact that, in the very nature of things, this will be a route more frequently availed of by homosexual couples who seek to have children of their own with a genetic link to one member of that couple*", *ibid,* at paragraph 14 (as per Hogan J). He continues, "*if Article 40.1 cannot be called in aid in a case of this kind, then one must respectfully wonder whether the principles of "high moral value" (Fleming) and "respect" for the individual (Donnelly) which underlie this provision are being realised in practice*", *ibid,* at paragraph 20 (as per Hogan J).

[466] *Ibid.*

[467] In one family, the Irish father was not yet legally recognised, albeit he has been since, but the child's citizenship arose from the child's Irish Aunt who acted as her surrogate.

listed, and one was awaiting a Ukrainian birth certificate which was anticipated to list the intending parents.

While geographical disparity accounts for a significant amount of the variations in treatment, two fathers described varying experiences of birth registration in the UK where the exact same circumstances arose, involving a UK surrogate, and an Irish genetic father seeking to be registered on the birth certificate. James explained that in order to offset the presumption of paternity in the UK, their surrogate's husband wrote a letter stating that he did not agree with the surrogacy (upon the advice from the Head Office in London) and therefore, James's name could be registered as the father without the need for DNA testing. This was achievable within ten days following the child's birth. However Sean's experience was more onerous, and he described how the registrar had not come across their situation before. The couple did not require court involvement but did have to instruct a solicitor to deal with the matter on their behalf stating:

> *"We weren't doing anything wrong. We were just trying to give the children the birth cert that reflected their genetic history…And the UK registrar dug in their heels. Anyway, after a couple of weeks of legal battles we got there."*
>
> - Sean (Surrogacy and Egg Donation)

In terms of travelling home, four children travelled from the UK without the need for a passport. One child travelled home using a foreign passport. However one child travelled home with a foreign passport in the name of her surrogate and her husband:

> *"We had to get a legal document written up and notarized to travel home with her, just in case we were stopped, to say that [the surrogate and her husband] had given us permission to travel home with this child…you do kind of go through passport control being like is someone going to stop us?...I don't know how it works, but I guess there are some names attached to her passport, and we're not those names".*
>
> - Anna (Surrogacy)[468]

Another child needed to be escorted with Department of Foreign Affairs (DFA) officials during the war in Ukraine.[469] Mary described being stopped by Ukrainian guards:

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[468] One considerable difficulty is that while Anna's husband had taken proceedings for him to be declared their child's parent in Irish law, that does not appear to have an impact on the foreign register of births and imaginably, for a corrected birth certificate to be registered, separate proceedings would have to be instituted in the foreign jurisdiction. Therefore, a court order, as opposed to a birth certificate, will need to be produced as proof of their child's parentage. At the time of interview, their child was two years of age and Anna did not yet have her guardianship, and her husband did not have his declaration of parentage, albeit their court date was within weeks.

[469] Mary and her husband travelled to Ukraine with DFA officials, albeit having to threaten media involvement on the Irish government due to their lack of assistance to date. Their child was born on Wednesday, they travelled to Romania on Friday, then onto Ukraine to collect their child, to Moldova on Saturday, touching down in Dublin on Tuesday. They were escorted by DFA officials and travelled in a mini bus, staying in hotels as they travelled.

"The Ukrainian guards stopped us for three hours. They weren't going to let us leave the country with the baby. Because obviously, we have no passport or birth cert for him because the government buildings were closed, they were trying to keep us, they needed a birth cert…we got an emergency travel certificate as soon as we got across the border."

- Mary (Surrogacy)

It should not be lost that most countries that offer regulated models of surrogacy are mostly at vast distances from Ireland across the globe. It was evident that the early life of their child and the practical hardships that arose in the international context were very difficult to manage:

"In another country, you and your partner are there, experiencing something you've never been through before, wondering are you going to have a connection to this child, and you have no family support around and nothing with you. You have the bare minimum stuff with you as opposed to, if the baby was born in Ireland, you know grandparents would call round, people could drop dinner, you could put the baby in the cot that you have in your house, but you don't have any of that stuff with you and then you have to do a long haul flight with a baby, that's a new-born, like it's insane. I travelled for 36 hours with her to get her home, with a six week old."

- Anna (Surrogacy)

"when our children were born, [our children's first house] was an Airbnb…it was fine. It was adequate, but like, it was small…it didn't have lots of facilities. So just having to do all of this stressful stuff in another jurisdiction is just adding a huge amount of unnecessary stress on something that's already pretty stressful….Then we had to…drive them to a car ferry. It was like a five hour journey where new born babies come across in a boat. There's just all sorts of crap that happens when you can't do it in your own country."

- Sean (Surrogacy and Egg Donation)

"Was there any benefit in going internationally? No I can't see any benefit, it's the opposite, it's traumatic."

"And even to bring the baby back to Ireland, we drove, it was stressful to bring a baby, ten days old, with Covid, and ferries, and boats, I didn't enjoy it."

- James and Alex (Surrogacy and Egg Donation)

The theme of participants wishing that surrogacy was accessible in Ireland was prevalent within the study for many reasons. For some, there was an evident indignation that their State had not provided for them and that they were made to leave their home to go to another jurisdiction:

"None of it was enjoyable, really, until the birth of the kids. What probably was the biggest gripe I had with the whole thing was that we couldn't do this in Ireland. Because, you know, Ireland is our home, we understand the legal system here, you know, not necessarily just in the AHR context, but we just

understand how the courts work, to some extent, we understand how laws are made, we understand the culture. Whereas when you're trying to do something that's so stressful, and so impactful, and so just bloody big, having to do it in another country, where you don't like, you know, if an Irish person answers the question, or a person working here in Ireland answers a question in a particular tone, or uses particular body language or whatever you generally kind of get what they're saying."

- Sean (Surrogacy and Egg Donation)

"You'd never choose to have your baby born across the world, and you would never choose to miss every scan, and not be there for the transfer and everything."

- Anna (Surrogacy)

Legislative Workarounds

Legislative workarounds will have to be relied upon by those who by reason of impossibility, mistake, or ignorance, fall outside of the legislative frameworks proposed. At the outset, it is important to note that the accessibility of such workarounds is significantly increased where the intending parent is genetically related to the child and where the surrogate is motivated to recognise the intending parent's parentage. Given the prohibition under the 2022 Bill on traditional surrogacy, the surrogacy model proposed is highly medicalised and therefore, an AHR treatment provider is naturally involved. It is proposed that the AHR treatment provider must comply with the requirements under the 2022 Bill,[470] and will make the application to the AHHRA on behalf of the intending parents and the surrogate. Therefore, there is very little prospect of deceiving the stakeholders involved like the AHRRA and civil registrars, for those who at least attempt to comply with the legislation, as opposed to those who disregard it completely.[471] While the 2022 Bill proposes that the surrogate can, by statutory declaration, name both intending parents as guardians from the child's birth, this expires if a parental order is refused.[472] Therefore even where the surrogate consents, workarounds are required.

Where the Surrogate is Consenting

While it has been argued in Chapter 1 that there is an arguable case for genetic mothers to apply for guardianship under section 6A, this argument becomes slightly more difficult to maintain when considered in conjunction with the consent provisions for guardianship under the 1964 Act. These prescribe that the mother can make a statutory declaration that the father is the guardian of the child,[473] or where they have cohabited together for 12 months, three months of which involves living with the child.[474] These provisions are gendered, binary and therefore exclude same

[470] Section 74 of the 2022 Bill.

[471] For example, an opposite sex couple can travel to America, obtain a birth certificate in their own names on foot of a pre-birth parental and would be treated for all intents and purposes as the parent of the child when they return to Ireland.

[472] Section 6AB(3) of the 1964, as proposed to be inserted by section 156 of the 2022 Bill.

[473] Section 2(4) of the 1964 Act.

[474] Section 2(4A) of the 1964 Act.

sex couples altogether.[475] Furthermore, including a genetic mother in the definition of "mother" would result in the female genetic link acting as the gateway to automation of rights for the male genetic link. It would certainly be gender discrimination that would be difficult to justify; however, that being said, the male genetic link is currently the basis for parentage whereas, the female genetic link is considered to be a legally empty status. Nonetheless, it is clear that if the surrogate was considered the mother, or one of two mothers, she could not declare the genetic mother to be the guardian of the child by virtue of the statutory declaration or cohabitation provisions. The surrogate could however register herself and any intending father (regardless of genetic link) as the child's parents on the birth certificate,[476] and the surrogate could also consent through statutory declaration that the intending father be appointed as a guardian of the child.[477] However, that would not provide co-parentage rights to his partner, nor would it divest the surrogate of her legal parentage and guardianship in respect of the child.

The surrogate could consent to the placement of the child for adoption in favour of both intending parents.[478] However, this has the potential drawback of making the intended parents feel less like established parents where they are the reason for the child's conception.[479] The child can also not be placed for adoption until six weeks after the child's birth[480] and the adoption process is notoriously lengthy.[481] It requires the child to be left in complete limbo in relation to their legal parentage; however, this does at the very least provide legal certainty for the child, albeit at a later stage, presuming that the adopting parents are approved as being suitable and eligible parents.[482] The surrogate could consent to step parent adoption,[483] where there is a pre-established legal parent within the intending parent unit; however,

[475] There is however a standalone provision for DAHR parents under section 6B of the 1986 Act that would apply to same sex female couples.
[476] Section 22(2), (3) of the 2004 Act.
[477] Section 2(4) of the 1964 Act.
[478] Section 26(1) of the 2010 Act.
[479] In *B v C (Surrogacy: Adoption)* [2015] EWFC 17 (Fam), Theis J stated that a parental order "*creates a legal parentage and removes the legal parentage of the birth family under the provisions of the [2008 Act]. Unlike adoption there is already a biological link with the applicants before the parental order application is made. Its purpose is to create legal parentage around an already concluded lineage connection. From the point of view of the child the orders are different. An adopted child is seen to have had a family created for it, whereas in a surrogacy arrangement the child's conception and birth has been commissioned by the parents, the child has a biological connection and the same identity as one of the parents…In surrogacy situations the Court by making a parental order settles the identity issue and does not leave other fictions to be resolved*" at page 70.
[480] Section 28(1)(a) of the 2010 Act.
[481] However, unfortunately the Annual Reports of the Adoption Authority of Ireland do not provide statistics on the length of time taken.
[482] For a personal recount of a disabled woman's refusal in international adoption see: Selina Bonnie and Aine Sperrin, *Independent Living Movement Ireland Opening Statement to the Joint Oireachtas Committee on International Surrogacy* (5 May 2022).
[483] Section 58A of the 2010 Act provides that the mother or guardian of a child who is subject to a step parent adoption shall lose all parental rights and shall be freed from all parental duties in respect of that child, unless they are within the adopting/parental unit.

this generally requires a two year cohabitation period.[484]

Where the intending father is genetically related to the child, regardless of the surrogate's consent, he can apply for a declaration of parentage under section 35 of the 1987 Act, for guardianship under section 6A of the 1964 Act and custody and access under section 11(2) of the 1964 Act (although this has been questioned in Chapter 1). The other intending parent could apply for guardianship under section 6C and custody under section 11E, but this only arises after two years of caring for the child day-to-day. In the event of a relationship breakdown prior to the two year person, the other intending parent could only be guaranteed their standing to apply for access under section 11(1) of the 1964 Act.[485] They could, however, nonetheless be potentially liable for maintaining the child by virtue of any shared cohabitation under the 1976 Act.[486]

Where the Surrogate is Not Consenting

Where the surrogate does not consent, and where there is no intending genetic father, there is no pathway to parentage unless the surrogate places the child for adoption or fails in her duty towards the child.[487] Where the consent of the surrogate is being withheld, it is presumed that there will have been no period where the child will have lived with the intending parent and therefore cannot avail of guardianship or custody under section 6C or 11E of the 1964 Act respectively. However, where the surrogate refuses to consent but does not wish to parent the child herself, a person other than a parent may be appointed as a guardian if they have provided for the child's day-to-day care for a continuous period of more than 12 months. However, this only applies if the child has no parent or guardian who is willing to exercise the rights and responsibilities of guardianship in respect of the child,[488] and where such person would consent to the order,[489] unless such consent is "unreasonably withheld".[490] Finally, if a surrogate wishes to parent the child, and the surrogacy arose in the international context, it is unlikely that an ETC would be granted.

Eligibility to Apply for Parentage within the O'Connell Study

As mentioned above, only Bracken's research study has examined the level of recognition acquired by AHR families through quantitative research.[491] In respect of

[484] Section 23(1)(b) of the 2010 Act. However there are exceptions to this under section 23(2) which allow the AAI to grant an adoption order notwithstanding the child has not been living with the step-parent for two years.
[485] In *D v D* [1992] 7 JIC 3002, the Court confirmed that section 11(1) of the 1964 Act entitles the District Court to make access orders in respect of persons not the natural parents of the child and that in such applications, it is the child's welfare that is paramount, not the right of the adult. While Section 11(2) is specific to parents, section 11(1) is more wide ranging.
[486] Section 5B, 5C of the 1976 Act.
[487] Sections 31 and 54 of the 2010 Act.
[488] Section 6C(2)(b) of the 1964 Act.
[489] Section 6C(6)(a) of the 1964 Act.
[490] Section 6C(7) of the 1964 Act.
[491] L. Bracken, *LGBTI+ Parent Families in Ireland: Legal Recognition of Parent-Child Relationships* (University of Limerick, 2021).

surrogacy families, all respondents to the survey were men in a same sex parental unit and of these, only 38% were a legal parent to their child.[492] Among the respondents, 92% had engaged in international surrogacy.[493] While Bracken's study was carried out through a survey, she included an open ended text box also. The consistent themes of these responses were the need for pathways to parentage, the need to be on the birth certificate and the excessive cost. It was also evident that respondents felt "othered", with one respondent stating that he felt "*less than, a headache for the passport office, and a 2nd class Irish citizen*".[494]

While it is envisioned that international surrogacy will be included in the 2022 Bill before it is enacted, and that there will be both retrospective and prospective frameworks, the O'Connell Study considered whether the current proposals would cover the participants within the current proposed framework, if each surrogacy journey was re-enacted after its commencement. All participants, at the present drafting of the Bill, are excluded by virtue of their travelling abroad and involving a surrogate from another jurisdiction. In addition, five participants paid their surrogates above reasonable expenses in terms of a lump sum, and on a very strict interpretation of the foreign jurisdiction's laws, another participant would be excluded on account of having provided a paid holiday to his surrogate*, "just to say, listen, you've changed our lives"*.[495] Only one participant could say that she had not paid her surrogate above and beyond reasonable expenses and that was due to her sister acting as her surrogate.

For those whose surrogate has offered to act for the parents again, and where payments for surrogates were the norm, the intending parent would not be able to make such a payment to the surrogate and expect to obtain a parental order under the 2022 Bill. This would require intending parents to make choices based on their hope for legal recognition, over their own personal reproductive choices. Within the study, no surrogate used her own egg, and all surrogates already had their own children in line with the current proposals. Every participant's family had contributed at least one gamete to the conception of the child. Therefore, while every participant would be excluded if they duplicated their surrogacy journey prospectively; each would appear to be eligible for a retrospective declaration of parentage under the current proposals. It should be noted that payments beyond reasonable expenses for donors are also prohibited under the 2022 Bill and therefore, five participants would be excluded on account of paying for their donor's eggs. However, the proposals for the IDG are silent on the point of payments for gametes.

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[492] 31% indicated that their current/former partner is a legal parent of all children. 23% of respondents indicated that they are a legal parent of one or more but not all children, and 15% stated that their current/former partner is a legal parent of one or more but not all children, *ibid,* at page 28.
[493] Of these respondents who specified where they went, 45% went to Canada, 36% went to the UK and 18% went to the USA.
[494] L. Bracken, *LGBTI+ Parent Families in Ireland: Legal Recognition of Parent-Child Relationships* (University of Limerick, 2021) at page 31.
[495] However, it should be noted that the UK Law Commissions have recently recommended that a paid holiday should constitute a permissible payment to the surrogate.

When asked if they thought they would try and change their reproductive choices in order to avail of legal recognition, participants expressed a significant desire to be able to remain home in Ireland but also doubt as to whether the restrictions proposed would ever allow that to happen:

> *"It will be wonderful that we can have that option but there is so much work to become an agent, for clinics to know what they are doing….I would love to be in the same country as my baby that's growing. And I would also love to [know that I] will definitely be there for the birth."*
>
> - Anna (Surrogacy)

> "*[not] unless it's a sister or whatever…I'm screwed because I don't have a sister. I suppose if there were surrogates available and they carried your child and it meant you got parentage then, you know I suppose, that may be something that sways me but in the Ireland we live in…It wouldn't justify it for somebody, I don't think, in Ireland whereas I think in the Ukraine, because of the amount of money, it's life changing amount for them, but to make something life changing for somebody in Ireland, you know, if it had to be a financial transaction, I would definitely be priced out of it anyway."*
>
> - Mary (Surrogacy)

As James and Alex had paid for their egg donations, they would, under the current drafting of the 2022 Bill, be unable to use those donations again and avail of a parental order, in the absence of any transitional provisions. When asked how they would feel about using an egg donor known to them, a likely requirement for altruistic donations, they had considerable misgivings:

> *"If we had to find an egg donor that we knew? No, I wouldn't like that."*
> *"I wouldn't like that, for me, I'm happy to be anonymous, anonymous."*
> *"Because we're the parents, and if we knew the mother…the genetic mother….no, no."*
>
> - James and Alex (Surrogacy and Egg Donation)

It is also the case that for those who travelled abroad and obtained a pre-birth parental order and a birth certificate in their own names, the legal certainty this offered was a considerable contributory factor in their choice to travel abroad. Neither is available domestically through the current 2022 Bill. However, as mentioned above, there is also no standalone framework proposed for the recognition of foreign parental orders.

Non- Legally Recognised Parents Approach to Administrative Issues

Participants were asked about the day to day interferences with the family life on account of the lack of legal parentage. Most described a level of discomfort in "passing off" as legal parents and a frustration that they were being allowed to, mirroring the mothers in DAHR. For example, Anna described bringing her child to the public health nurse:

> "*I find a frustration with the fact that I'm not recognised as her mother but it's still okay for her to live in the house with me, like I find that really frustrating, when I was filling out for us to do our DNA stuff, for guardianship, there were questions like have I brought my child for all the public health nurse checks, am I looking after her and am I suitable to be this child's guardian and I'm like anyone who had given birth naturally, through the traditional way, doesn't have any questions on them. It's like kicking people when they're down like, it's mad.*"
>
> - Anna (Surrogacy)

> *"Well, to be honest with you, nobody's really ever questioned it so far, and [our child] was in hospital, and both times, I took him to the hospital. You know, nobody's really questioned it, but any correspondence that came was always in [my husband's] name…the nurse asked me to sign [the consent form for the vaccine]. I signed it, you know? She didn't question…I'm not sure if a lot of people are aware…but so far I actually haven't [experienced being told I can't sign/act as my child's legal mother]"*

> **"***I'm the one that gets up at night, changes his bum."*
>
> - Mary (Surrogacy)

An extreme example of the difficulties in general administration that arose for participants was demonstrated from Mary's interview where, owing to the Ukrainian war she had not received her child's birth certificate and therefore, could not advance the more administrative aspects of her child's life in Ireland:

> *"Number one, we can't get any children's allowance for him…So, he's basically, he's non-existent in the State, really, there's no record of [our child] for hospitals and stuff like that. He has no PPS number for the free GP care. He's been seen by the doctor a couple of times, in the hospital a couple of times, but the doctors keep hounding me for his PPS number. I don't have it. I can't get it, they're still sending me emails saying we need to get the PPS number, I don't have the PPS number. I explained my situation, how he was born, and the reason we don't have the PPS number. But obviously, they're losing money because they're not getting paid for his vaccines, his GP calls…And when your hands are tied for getting a PPS number, you know, you just feel like powerless."*
>
> - Mary (Surrogacy)

Mary described how they had to organise an Apostille for the DFA, the "*long and tiring process*" and the "*to-ing and fro-ing of documentation*" and requiring a power of attorney to be executed so as to allow someone to sign on their behalf as necessary in Ukraine. Anna, similarly, experienced considerable difficulty with the basics. Her daughter's PPS number was attached to the surrogate who had to approve the application for child benefit going into the bank account Anna set up. She described getting child benefit as "*such a rigmarole*". While Anna applied for her daughter's under six GP card, she had to get it signed by the surrogate. While

Christine, who had a US birth certificate in her own name, had a different experience, not in terms of her legal recognition, but in terms of her child settling into the community:

> *"So then you come back here and, limbo, like what we've done is we've got him his PPS number, all that kind of thing. And then like we want to get him an Irish passport, but we haven't done that yet…. he gets the GP visits, he's in the system here, his name is down for waiting lists for schools".*
>
> - Christine (Surrogacy and Egg Donor)

For same sex couples, the difference in treatment and the othering they experienced was a common thread to their interviews.

> *"We didn't have any trouble getting their PPS numbers, we did have trouble getting child benefit, because we were applying as a set of parents to twins with no mother present in their lives. And the form doesn't really fit or look at families like ours…because it was two fathers and it was a surrogacy journey, we did get referred to the headquarter function up in Donegal, and they wanted to ask questions. They were very respectful. But of course they **had** to ask, well, not of course, but they **chose** to ask questions about how this had all happened. And it caused us a little bit of, I would say just slight distress because we had to get into details that maybe you should never have to get into with a civil servant because at the end of the day, we were presenting a birth cert that was a validly legal document from a jurisdiction that was very much recognised here by Irish authorities."*
>
> - Sean (Surrogacy and Egg Donation)

For James and Alex, they described a situation whereby they obtained all the necessary documentation but at each juncture, having to provide additional information beyond the norm, or having to write an additional letter. It was evident that they experienced *ad hoc* policies being applied to their family. James described researching the passport application to "*the nth degree*" and it came back within 10 days. At the time of interview, they had not received any response from the National Child Care Scheme, they were able to obtain child benefit allowance, the under six GP card, and their child's PPS number without any particular difficulty. However, again, it took another letter and another form that wasn't the "usual form", none of their applications occurring by "the normal route".

Feelings About the Lack of Legal Recognition

Finally, participants were asked how they felt about the lack of legal recognition resulting from their surrogacy journey:

> *"Obviously, it's not what you wanted….I wish it was just straight away when he's born, he belongs to us, he's biologically both of ours. I suppose it doesn't really matter if he wasn't, I think that you should be automatically entitled to full parentage of your child."*
>
> - Mary (Surrogacy)

"Like now that we have a child, we don't feel any difference, it's a hard way to get there and then when you get there, even though you do all of the things, you are a mother, but because I didn't birth her, you're not…it's just really frustrating because no one goes down these routes for the fun. It is everyone's last last option."

- Anna (Surrogacy)

"It was funny, because during the process, I was completely fine with that, it is what it is, the legal part is fine. But when, when [our child] was born, it was actually hard for me to be on the side. It took me time to kind of digest and accept the situation…during the beginning it's very about James like filing out the documents and being the legal dad and doing DNA tests and these kind of things. And as a dad, I'm a little bit on the side. And in the beginning, it was a shock for me, it was a kind of, I have a baby, but everything is about James and I'm kind of oh, okay. But with time, I kind of, I accept it and it kind of starts to be normal."

"It's not fair…..And from what I notice and witness every single day, and at 2am, there's no difference of connection between [our child] and Alex, same smile, same laughs…Maybe I signed the documents, like the ink, but like, the part that we brought drove the process on, we both made decisions, we, together, from start to finish, it was our process, start to finish."

- Alex and James (Surrogacy and Egg Donation)

When asked about the guardianship at the point of two years living with the child, Alex noted "*I hope I don't need to go to that route to be honest. It's...yeah, if it has to be, it has to be."*

Conclusion

This Chapter sought to explore the legal landscape that preceded the introduction of the 2022 Bill, as a backdrop to a critical analysis of the legislative provisions themselves. At first instance, this Chapter argued that the surrogate is not a legal concept known in Irish law and cannot simply be synonymised with the historical understanding of the mother. It argued that there is considerable legislative discretion in creating a surrogacy framework and this has been confirmed by the Supreme Court. It explored the ECtHR case law which allows for violations primarily in respect of a child who has been joined to the proceedings and in respect of whom, a legal parent-child relationship with their intending parent has not been recognised. It concluded that Ireland has been in contravention of its obligations under the ECHR having not provided a timely manner in which to recognise the parental relationship as soon as it becomes the social reality of the parties involved. The Chapter then reviewed the proposals for international surrogacy, for retrospective recognition of parentage and for domestic surrogacy agreements. The primary criticism of this system is that it does not place the child at the centre of the determination of the Court, given the absence of paramountcy principle and absence of judicial discretion.

Furthermore, it was argued that the provisions of the 2022 Bill are paternalistic in nature while, at the same time, confer complete legal autonomy to a surrogate in respect of the parentage of the child, despite considerable safeguards.

This Chapter argued in favour of a default system of parentage for the intending parents that includes provision for a pre-birth parental order, the recognition of the reality of commercial payments, judicial discretion to dispense with the surrogate's consent to the granting of a parental order, guardianship, and custody rights for the intending parents from birth and the insertion of the paramountcy principle. This Chapter is also particularly critical of the inclusion of the requirement for a genetic link within the intending parental unit, in considering the stated risks against the legal framework within which the parental order process operates.

Finally, this Chapter considered the views of families who have had children born through surrogacy. It was evident within the O'Connell study that those who go through the AHR process may firstly experience marginalisation based on sexuality, gender, or infertility. Many families then experience a lengthy and onerous process with the potential for huge setbacks and losses along the way. Such families experience considerable financial hardship in undertaking, sometimes numerous, surrogacy journeys and the corresponding legal recognition process, insofar as it is open to them. While all couples could arguably avail of the retrospective recognition of parentage, as currently proposed by the IDG, it is evident that couples who seek to replicate those previous journeys will not be eligible within the prospective process, particularly in the absence of judicial discretion. Such discretion would arguably allow families to be seen in their own contexts, as opposed to faceless end users who are subject to blanket policies being imposed on them and their children. As is evidenced from the O'Connell study, Irish families are being left in legal and practical precarity in their day to day lives, due to an overreliance on risk aversion and onerous safeguarding. It is therefore hoped that considerable amendments will be introduced at Committee stage to remedy these exclusionary policies through considered and proportionate safeguards.

Part 2
Vindicating the Child's Right to Identity

Chapter 4: Disclosure Studies

Introduction

Part 1 focused on the legal framework for parentage arising from AHR practices. The natural offset of the creation of such legal ties, is the severance or dissolution of the historically recognised bases for parentage; the gestational and the genetic link. It is argued that a balanced framework where the child's right to identity is vindicated, requires a level of legal recognition, as opposed to a legal imposition of rights and responsibilities, to be bestowed on these elements of descendant connection. The 2015 Act and the 2022 Bill both include provision for the recognition of the child's right to identity and this shall be explored in detail in Chapter 5. Fundamental to the child's realisation and exercise of the right to identity is knowledge; the knowledge of how they were conceived. This knowledge is first and foremost imparted at the discretion of the parents and exists on a continuum varying from the nature of their conception to information that identifies their surrogate and/or donor. In order to assess the practical implications of withholding or disclosing this information, this chapter shall explore the psychological studies conducted on parents, surrogates, donors, and children who have been involved in AHR. It shall assess the level of any disclosures and the resulting impact, for the purposes of assessing whether there is a benefit to any, and early, disclosure. This shall also include assessments of studies that seek to address, and often refute, reasons not to disclose. However, it is important to note that no such research studies have been conducted on this topic in Ireland.[1]

As mentioned in Part 1, within this thesis is a research study, "the O'Connell study", conducted with participants who had children through DAHR or surrogacy. The second half of this research study was the participants' feelings and opinions on disclosing their child's conception status to them, and the identity of the donor and/or surrogate. Regrettably, there was only one child participant in the study. All adult participants were asked if they would feel comfortable with their child being included in the study and 10/11 refused on the basis that the child(ren) were too young.[2] No parent refused on account of their children being unaware of their conception status. This Chapter seeks to intertwine the findings of this research study against the previously conducted research in order to ascertain any common themes or learnings for the legislature.

Limitations of Previous Research Studies

While much of the pre-existing research on the disclosure of identity focuses on adopted children or step-families, children born through donor conception differ in that they do not face many of the same challenges, such as parental divorce,

[1] This is despite the fact that the first in-vitro fertilisation (IVF) child in Ireland was born to a married couple in January 1986. D. Nowlan, "Test Tube Baby Girl Born in Dublin", *Irish Times,* Wednesday, 15 January 1986.

[2] All 10 participants who refused had children who were under five years old at the time of interview and thus, were, in any event, below the permissible age of a child participant as approved by the Social Research and Ethics Committee of UCC.

multiple family transitions or adversity in pre-natal or pre-adoption environments.[3] Therefore, they must be assessed on their own merit. Most of the studies that exist today arise from a research cohort led by Dr Susan Golombok who began a longitudinal study of AHR families in 1995. This project has assessed parents of varying family formations, using a variety of AHR technologies, and their children throughout their lives. While these studies were a necessary and welcome addition to the field by creating an evidence base for policy and legislative decisions, they are generally subject to limitations, the most commonly suggested of which is low participation numbers.[4] In addition, as the studies sought to assess parental attitudes and child responses on a longitudinal basis, it is only relatively recently that the children themselves were able to provide their views. Most results are gauged through the perceptions of the parents; therefore, it will be important to continue to review the published research of this cohort and ensure that similar studies are carried out in Ireland.[5]

[3] L. Blake, P. Casey, V. Jadva & S. Golombok, "I was Quite Amazed: Donor Conception and Parent-Child Relationships from the Child's Perspective" (2014) 28 *Children and Society* 425 at 425-426.

[4] Susan Golombok has addressed this within the Joint Oireachtas Committee on International Surrogacy in May 2022, stating "*Given the in-depth nature and reliability of the measures we used, we would certainly have picked up any moderate differences had they existed. You cannot really make blanket statements about what constitutes a large or small sample; however, for family studies that are as in-depth as ours, you would usually and ideally aim for about 50 families in each group. As it happened with the surrogacy ones, we managed to recruit only 42 within our sampling timeframe. However, the 42 were very representative because we were fortunate in that we were able to collaborate with the UK's Office for National Statistics, which is where parental orders are registered when the intended parents become the legal parents of the child. On our behalf, the Office for National Statistics approached the families, and we had a very high response rate. In some ways, the representativeness of the sample is more important than the number because, with volunteers, you might get only families with an axe to grind or families who are doing particularly well. Those who are not doing well might not want to take part in research. Representativeness is one big plus of the study, but I completely acknowledge it is but one study. The results have been positive, but it would be helpful to have more research focusing on larger samples, though then the methods would necessarily be less in-depth*." Joint Committee on International Surrogacy, "Potential Double Standards in Protections for Surrogate Mothers in Domestic Arrangements: Discussion" (26 May 2022).

[5] The need for replication and synthesis has been noted in an analysis of the limitations of social science research within the legal disciplinary by L. Bracken & C. O'Mahony, "The Child's Right to Family Life: Shifting Sands and Social Science" *European Yearbook on Human Rights* (2020) at 94.

Parent's Perspective

Rate of Disclosure

Historically, the position of states and the clinics operating within them was that of secrecy.[6] This was due to the belief that the child did not need to know, or due to concerns about the effect disclosure would have on family relationships.[7] It was also assumed that children who were aware of their donor insemination (DI) would be likely to develop identity problems if they could not subsequently identify their donor.[8] In addition, it was feared that extended family members would treat a non-genetic related child differently and this led to lower disclosure rates to family members, especially older family members.[9] These low rates existed, despite previous studies showing that a strong desire for parenthood appeared more important than genetic relatedness for fostering positive family relationships.[10] However, further research suggested that such secrecy would be detrimental to the family, would create boundaries and cause anxiety when related topics are discussed.[11] The thinking was that children would feel the secrecy or discomfort by osmosis. In particular, Papp has argued that children can sense when information is being withheld due to the taboo that surrounds the discussion of certain topics and that they may become confused and anxious, or even develop symptoms of psychological disorder, as a result.[12]

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[6] However, it has since been noted that low disclosure rates demonstrate a marked discrepancy from the current advice given by the UK Regulatory body, the Human Fertilisation and Embryology Authority which notes that secrecy is not in the child's best interests, F. MacCallum & S. Golombok, "Embryo Donation Families: Mothers' Decisions Regarding Disclosure of Donor Conception" (2007) 22(11) *Human Reproduction* 2888 at 2894.

[7] R. Cook, S. Golombok, A. Bish & C. Murray, "Disclosure of Donor Insemination: Parental Attitudes" (1995) 65(4) *American Journal of Orthopsychiatry* 549.

[8] K. Back & R. Snowden, "The Anonymity of the Gamete Donor" (1988) 9 *Journal of Psychosomatic, Obstetrics & Gynaecology* 191; K. Daniels, "Artificial Insemination using Anonymous Semen and the Issue of Secrecy: The views of Donors and Recipient Couples (1988) 9 *Society Science and Medicine* 1213; P. Mahlstedt & D. Annafield, "Assisted Reproductive Technology with Donor Gametes: The Need for Patient Presentation" (1989) 52 *Fertility Sterility* 908; E. Haimes, "Secrecy: What can Artificial Insemination Learn From Adoption?" (1988) 2 *International Journal of Family Law* 46; R. Snowden, "Sharing Information about DI in the UK" (1993) 12 *Political Life Science* 194.

[9] R. Cook, S. Golombok, A. Bish & C. Murray, "Disclosure of Donor Insemination: Parental Attitudes" (1995) 65(4) *American Journal of Orthopsychiatry* 549 at 553, 555. Also, C. Murray & S. Golombok, "To Tell or Not to Tell: The Decision-Making Process of Egg-Donation Parents" (2003) 6 *Human Fertility* 89 at 92.

[10] S. Golombok, R. Cook, A. Bish & C. Murray, "Families Created by the New Reproductive Technologies: Quality of Parenting and Social and Emotional Development of the Children" (1995) 66 *Child Development* 285.

[11] R. Cook, S. Golombok, A. Bish & C. Murray, "Disclosure of Donor Insemination: Parental Attitudes" (1995) 65(4) *American Journal of Orthopsychiatry* 549 at 550; but also N. Bruce, "On the Importance of Genetic Knowledge" (1990) 4(2) *Children & Society* 183; M. A. Karpel, "Family Secrets: I Conceptual and Ethical Issues in the Relational Context. II. Ethical and Practical Considerations in Therapeutic Management" (1980) 19 *Family Process* 295.

[12] P. Papp, "The Worm in the Bud: Secrets Between Parents and Children" in E. Imber-Black, *Secrets in Families and Family Therapy* (1st Ed., New York, Norton, 1993).

Variation Based on Family Formation

Opposite Sex Couples

Historically in studies from 1995 - 2010, there was a low level of disclosure in relation to both sperm,[13] egg,[14] and embryo[15] donation amongst opposite sex couples. This related to the disclosure of the use of donation, as opposed to the provision of identifying information. However in 2010, the trend begins to increase in favour of disclosure.[16] Disclosure of sperm donation varied from 0% in 1995 to 27.8% in 2011 and the disclosure of egg donation varied from 5% in 1999, to 41% in 2010. The first study to look comparatively at parents' disclosure decisions in DI, ED and surrogacy families was published in 2011.[17] While all surrogacy families had reported that they had disclosed to their children, this study revealed that there was inconsistency in what this meant across the various families. This ranged from informing the child that they were born through surrogacy to providing their surrogate's identity. In one family, the child was unaware that an adult that they already knew was their surrogate.[18] In 76.2% of traditional surrogacy (TS)[19] families, the child had not been informed that they did not share a genetic link with their mother.[20] Another study published only one year later however, focused on surrogate families with children aged ten years old and saw an increase in the disclosure rate.[21] A higher proportion of mothers who had availed of TS had informed the child of the surrogate's genetic link (58%) and 10% had decided not to

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[13] R. Cook, S. Golombok, A. Bish & C. Murray, "Disclosure of Donor Insemination: Parental Attitudes" (1995) 65(4) *American Journal of Orthopsychiatry* 549, within this study none of the parents had disclosed their use of a sperm donor.

[14] A. Brewaeys, S. Golombok, N. Naaktgeboren, J. K. de Bruyn & E. V.van Hall, "Donor Insemination: Dutch Parents' Opinions about Confidentiality and Donor Anonymity and the Emotional Adjustment of their Children" (1997) 12(7) *Human Reproduction* 1591, within this study, only 5% of parents had disclosed their use of egg donation. C. Murray & S. Golombok, "To Tell or Not to Tell: The Decision-Making Process of Egg-Donation Parents" (2003) 6 *Human Fertility* 89. Within this study, no parents had disclosed. V. Soderstrom-Anttila, M. Salevaara & A.M. Suikkari, "Increasing Openness in Oocyte Donation Families Regarding Disclosure Over 15 Years" (2010) 25(10) *Human Reproduction* 2535. This study showed no distinction depending on the use of a known or unknown donor.

[15] F. MacCallum & S. Golombok, "Embryo Donation Families: Mothers' Decisions Regarding Disclosure of Donor Conception" (2007) 22(11) *Human Reproduction* 2888. All couples had conceived using embryos donated anonymously. In terms of disclosure, only 9.5% of these families had already disclosed and the majority (43%) had decided never to tell the child.

[16] L. Blake, P. Casey, J. Readings, V. Jadva & S. Golombok, "Daddy Ran Out of Tadpoles: How Parents Tell Their Children that they are Donor Conceived, and What their 7 Year-Olds Understand" (2010) 25(10) *Human Reproduction* 2527.

[17] J. Readings, L. Blake, P. Casey, V. Jadva & S. Golombok, "Secrecy, Disclosure and Everything in-Between: Decisions of Parents of Children Conceived by Donor Insemination, Egg Donation and Surrogacy" (2011) 22 *Reproductive BioMedicine Online* 485.

[18] *Ibid* at 491.

[19] Where the surrogate was also the egg donor.

[20] J. Readings, L. Blake, P. Casey, V. Jadva & S. Golombok, "Secrecy, Disclosure and Everything in-Between: Decisions of Parents of Children Conceived by Donor Insemination, Egg Donation and Surrogacy" (2011) 22 *Reproductive BioMedicine Online* 485 at 491.

[21] V. Jadva, L. Blake, P. Casey & S. Golombok, "Surrogacy Families 10 Years On: Relationship With the Surrogate, Decisions over Disclosure and Children's Understanding of their Surrogacy Origins" (2012) 27(10) *Human Reproduction* at 3008.

do so. Overall, 91% of mothers had disclosed the surrogacy birth, with approximately half doing so before the age of three and the other half before the age of seven.[22]

Opposite sex couples, by their gender formation, may find it easier to conceal the nature of their child's conception. Children in this category of family may be subject to two notable disclosures; first, that they were born through a less common conception method than most children and secondly that an identifiable parent is not genetically related to them. By contrast, single mothers and lesbian couples must provide an explanation for a genetic absence once the child is able to understand basic reproduction. There is no "*false idea that needs to be confronted*".[23]

Lesbian Mothers

To assess how these families may differ in terms of disclosure, a study was conducted in 2003 which examined lesbian mothers who had both conceived naturally through previous opposite sex relationships and conceived through DI.[24] Out of the 38 families, ten children were conceived through DI. The vast majority of the children had been told that they had been donor conceived (90%) with the remaining mother intending to tell. In another study, all children from lesbian-couple families and single mother families were told by the age of 15 as opposed to 41% of opposite sex parents informing their child after the age of 15.[25]

Single Mothers

A comparative study was conducted to examine disclosure rates between 31 straight single mothers and 47 opposite sex couples who had also used an identifiable donor to conceive children, who were aged 4-8 years at the time of the study.[26] In terms of disclosure, 54.8% of single mothers had told their child about their conception, compared to 36.2% of partnered mothers.[27] No single mothers intended not to tell, unlike 17% of partnered mothers.[28] This study evidenced that disclosure is an ongoing matter, with conversations arising every three months for over 60% of both single and partnered mothers. Similar to TS families, the majority (58.8%) of partnered mother had disclosed the child's conception but had not yet informed

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[22] *Ibid* at 3011.

[23] M. Stevens, B. Perry, A. Burston & S. Golombok, "Openness in Lesbian-Mother Families Regarding Mother's Sexual Orientation and the Child's Conception by Donor Insemination" (2003) 21(4) *Journal of Reproductive and Infant Psychology* 347 at 359.

[24] *Ibid.* 38 lesbian families took part in the study; 20 were headed by a single mother and 18 were headed by a lesbian couple.

[25] V. Jadva, T. Freeman, W. Kramer & S. Golombok, "The Experiences of Adolescents and Adults Conceived by Sperm Donation: Comparisons by Age of Disclosure and Family Type" (2009) 24(8) *Human Reproduction* 1909 at 1912.

[26] T. Freeman, S. Zadeh, V. Smith & S. Golombok, "Disclosure of Sperm Donation: a Comparison Between Solo Mother and Two-Parent Families with Identifiable Donors" (2016) 33 *Reproductive BioMedicine Online* 592.

[27] *Ibid* at 595.

[28] *Ibid* at 596.

them that their donor was identifiable, and this is a recurring finding in studies.[29] In a 2017 study that interviewed single mothers, the participants explained that regardless of disclosure status, most still had discussions regarding the absence of the child's father figure.[30] These conversations were mostly initiated by the child as a result of social events (such as father's day) or comments by others and there was a variation in age at which point this occurred. Children would question why they did not have a father or why they only had a mother, with some children seeing their father as a gateway to achievement or affection. One child sought to improve his strength, and another sought someone to cuddle her mother, and both saw a father as fulfilling these roles.[31] In these families therefore, the disclosure process includes an additional layer, that of the explanation of a lack of any father, or second parent, figure.

Gay fathers

To assess the variance in same sex couples and disclosure, a UK study was published in 2016 that recruited 40 gay fathers who had availed of surrogacy primarily in the USA (95%),[32] and whose children were aged between 3-9 years old.[33] Of these arrangements, 90% were gestational agreements (94% previously unknown surrogates) and 10% were traditional (of which, 75% were previously unknown).[34] In terms of disclosure, 83% of fathers had begun to talk to their children about their origins using story like explanations. When disclosing, gay fathers face a particular challenge, similar to lesbian women, where they will have to disclose that only one parent provided the child's genetic link. In this study, the issue did not arise in any significant manner with one father stating that he would want to make it clear at a later stage that he was the genetic father and 21% of fathers disclosing their genetic status.[35] Similar to opposite sex couples however, the first stage of disclosure was the surrogacy and not necessarily the genetic link.

Analysis

It is particularly difficult to arrive at any definitive conclusions based on these studies, given the high level of variables at play. These include age of children, age of parent, country of residence and the year in which the study was conducted. The latter is perhaps the most relevant factor given the significant change in social attitudes to AHR techniques over the past couple of decades and the move towards

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[29] S. Zadeh, T. Freeman & S. Golombok, "What Does Donor Mean to a Four-Year-Old?: Initial Insights into Young Children's Perspectives in Solo Mother Families" (2017) 31 *Children and Society* 194. In this study, 47 children were interviewed from single mother families, whose ages ranged from 4-9 years old. Of these children, 57% had been informed about their conception, 16% had experienced partial-disclosure (whereby fertility treatment was discussed but donor sperm was not), 27% had not told their children and 24% of their parent's planned to tell them.

[30] *Ibid* at 197

[31] *Ibid* at 198.

[32] Two of the surrogacy arrangements were carried out in India.

[33] L. Blake, N. Carone, J. Slutsky & E. Raffanello, "Gay Father Surrogacy Families: Relationships with Surrogates and Egg Donors and Parental Disclosure of Children's Origins" (2016) 106(6) *Fertility and Sterility* 1503.

[34] *Ibid* at 505.

[35] *Ibid* at 1508.

identity release donation.[36] However, it is possible to deduce certain repeated behaviours. A significant increase in disclosure can be seen in ED families in more modern times and where higher sample sizes are utilised. Mothers are more likely to disclose than fathers where they lack a genetic link and embryo donation (EMB) families have stronger impulses not to disclose (followed closely by opposite sex DI families). While families who have availed of surrogacy report high levels of disclosure, it is important to ascertain what level of disclosure has been met. It appears that those who have engaged in gestational surrogacy (GS) only are more comfortable disclosing and families availing of TS are reluctant to disclose the lack of a genetic link between the child and their mother. Disclosure in gay, lesbian, and single parent households were all significantly higher than those in opposite sex couples; however, this appears to be due to the absence of a key biological collaborator that almost forces the conversation.

Adult Participation within the O'Connell Study

The initial consideration with each adult participant is whether they had information to share given that disclosure can occur on a spectrum from nature of conception to identifying information. In this regard, 100% of participants (7/7) who engaged in surrogacy knew their surrogate's identifying information and had maintained ongoing contact with her. Of the surrogacy participants, one woman in opposite sex relationships used donor eggs, two women in such a relationship used their own gametes (as did their husbands), the three gay male participants used donor eggs and no women in same sex couples required donor eggs (or engaged in surrogacy). No parents through surrogacy used donor sperm and none used a known egg donor; each egg donation was obtained from a clinic. Two of the surrogates were previously well known to the relevant participants and three surrogates were matched with the participants through an agency. In terms of donor sperm, one participant (single mother) obtained sperm directly from a US sperm bank, and three women in same sex marriages used a known donor who was either a close friend or family member. Therefore, amidst the participants, there are now five known surrogates, three identifiable egg donors, two known sperm donors and one identity release sperm donor. Interestingly, of the six donors and five surrogates, none lived within the jurisdiction of Ireland, nor were they habitually resident in Ireland at the time of donation, conception, or the birth of the child.

Every participant expressed their intention to disclose the conception method to their child(ren) or had already done so. One opposite sex couple stated that they would not disclose the egg donor's identity to their child given that that was what was agreed with her, but all other participants were open and active in disclosing their child's genetic and gestational origins.

Reasons Against Disclosure

While the rates of disclosure can provide a general indication of the effect of time passing, it is significantly more important to assess the reasons for, and against, disclosure. Where these reasons revolve around deep personal feelings and long standing biases, little may be done without legal intervention. However, where these

[36] This phrase is used to describe programmes within donor banks that are designed to give adults conceived through donor conception the option to learn their donor's identity.

reasons are based on misconceptions, it is necessary to confront these ideals and offer a pathway to disclosure. That being said, it is acknowledged that the nature of disclosure is family and child specific; no one approach will satisfy all scenarios and it is certainly an unpredictable science. However, as these studies will show, there are certain "best practice" models that offer an increased chance of successful resolution. In addition, it is also argued that a negative experience or reaction, if it arises, should not negate the opportunity to realise one's rights.

A recurring theme throughout the studies that follow, in terms of disclosure status, is the child's best interests. This was repeatedly given as both a reason to disclose and a reason not to. It could be argued that parents who cite this reason are split between those who favour children's own autonomy and their status as rights holders, and those who are more paternalistic in their thinking and who rely on their intuitive beliefs and fears. In an early study on DI,[37] where there was a particularly low disclosure rate, the reasons provided by parents for non-disclosure were:

- The need to protect the child from what they considered to be devastating news;
- The need to protect the father from the child's potential rejection;
- The need to protect the father from the judgement of others regarding his infertility;
- The fear of the child being ridiculed by their peers; and,
- The inability of the child to gain insight into the donor.[38]

At this time, neither identifying nor non-identifying information was available to the parents and by extension, the child. As a result, the insemination was perceived to be a private matter with one couple in particular stating that it was none of the child's business.[39] It was also clear that these parents were unsure about the appropriate timing and method of disclosure. There was a feeling that disclosure at a young age would run the risk of confusing a child who may not understand the complexity of the issue, but late disclosure would result in shock.[40] By contrast, none of the adoptive parents, who were used as a control group in the study, raised these concerns and the concerns of IVF parents were unrelated to age. These reasons will now be reviewed in depth.

Insecurity about Infertility

A common reason in opposite sex DI families for non-disclosure is the need to protect the social father from other individuals learning of his infertility. While an earlier study suggested that protection of the infertile intending parent is more

[37] Self-report questionnaires were conducted by 45 DI families, 41 IVF families and 55 adoptive families with children between the age of 4-8 years of age.

[38] R. Cook, S. Golombok, A. Bish & C. Murray, "Disclosure of Donor Insemination: Parental Attitudes" (1995) 65(4) *American Journal of Orthopsychiatry* 549 at 553. Interestingly, a study conducted in 2007 reported that children expressed sadness and asked question like "does this mean you are not my real mother/father?". However, the parents noted that the impact of these statements were not as painful as they had feared – K. MacDougall, G. Becker, J.E. Scheib & R. Nachtigall, "Strategies for Disclosure: How Parents Approach Telling Their Children that they were Conceived with Donor Gametes" (2007) 87 *Fertility and Sterility* 524.

[39] *Ibid* at 553.

[40] *Ibid* at 554.

prevalent in couples where there is male infertility,[41] a 2011 study suggests that this applies only to the intention to disclose; not actual disclosure which is more evenly split that previously suggested.[42] Another study published two years later included four DI couples where each intending father did not wish to disclose, but the mothers did.[43] 35% of DI parents who were not intending to disclose spoke about a threat to the father-child relationship or the need to keep the male infertility a secret. Significantly more fathers than mothers sought an anonymous donor.[44] Therefore, there is perhaps a causal link between stigma attaching to male fertility which results in not only the lack of will to disclose, but also the permanent decision to remove the identity of the sperm donor from the child's life. Interestingly, a Finnish study reported more protectionist views for non-genetic mothers than fathers;[45] with only one mother and two fathers stating that their partner did not want to tell.[46] There could therefore be a cultural element to this aspect of non-disclosure and the stigma attaching.

It has been suggested that egg donation is more socially acceptable than sperm donation.[47] This is based on the idea that the mother's experience of pregnancy and childbirth would make the absence of a genetic relationship less important, making mothers feel more confident about disclosure.[48] In a study involving ED families, there was an evident level of confidence whereby two of the disclosing mothers stated that there was no reason not to tell the child, as they had nothing to be ashamed of, and did not see the need for secrecy. [49] This echoed a study from 2003,

[41] S. Golombok & C. Murray, "Social versus Biological Parenting: Family Functioning and the Socioemotional Development of Children Conceived by Egg or Sperm Donation"(1999) 40(4) *Journal of Child Psychology and Psychiatry* 519.
[42] J. Readings, L. Blake, P. Casey, V. Jadva & S. Golombok, "Secrecy, Disclosure and Everything in-Between: Decisions of Parents of Children Conceived by Donor Insemination, Egg Donation and Surrogacy" (2011) 22 *Reproductive BioMedicine Online* 485.
[43] A. Brewaeys, S. Golombok, N. Naaktgeboren, J. K. de Bruyn & E. V.van Hall, "Donor Insemination: Dutch Parents' Opinions about Confidentiality and Donor Anonymity and the Emotional Adjustment of their Children" (1997) 12(7) *Human Reproduction* 1591.
[44] *Ibid* at 1594.
[45] V. Soderstrom-Anttila, M. Salevaara & A.M. Suikkari, "Increasing Openness in Oocyte Donation Families Regarding Disclosure Over 15 Years" (2010) 25(10) *Human Reproduction* 2535.
[46] *Ibid* at 2537. However, in the same study, most parents said that disclosure was unnecessary or could harm the child and 10.3% of mothers were concerned that the child would attach to the donor. However, in all cases, the parents considered the child their own, at 2539.
[47] E. Haimes, "Do Clinicians Benefit from Gamete Donor Anonymity?" (1993) 9 *Human Reproduction* 1518. However, this was not borne out by the study of C. Murray & S. Golombok, "To Tell or Not to Tell: The Decision-Making Process of Egg-Donation Parents" (2003) 6 *Human Fertility* 89, in which one third of ED mothers had experienced stigma associated with being infertile. It was suggested that the experience of infertility diminish such women's status as a "real woman", at 93.
[48] D.A. Annafield, D.G. Annafield, C.M. Mazure, D.L. Keefe & D.L. Olive, "Do Attitudes Towards Disclosure in Donor Oocyte Recipients Predict the Use of Anonymous Versus Directed Donation?" (1998) 70 *Fertility and Sterility* 1009.
[49] F. MacCallum & S. Golombok, "Embryo Donation Families: Mothers' Decisions Regarding Disclosure of Donor Conception" (2007) 22(11) *Human Reproduction* 2888.

four years earlier.[50] However, this confidence can cut both ways, as was evident within the same study, where the most common justification for non-disclosure was that the birth mother was the "real mother" and that there was no need for disclosure and that genetics is "by-the-by".[51] This is echoed in a 2011 study.[52] Interestingly, in terms of protectionist views, only one ED mother in one study cited protection of the donor as her reason not to disclose, at the request of the donor herself.[53] This mother had not disclosed any aspect of the child's conception to them.

The Impact of Infertility in the O'Connell Study

In this regard, within the O'Connell study, there were no male participants who did not use their own gametes due to male infertility and so this element cannot be assessed within the study. The only opposite sex couple who availed of egg donation in their surrogacy journey, were the only participants who were not willing to disclose her identity to their child. While Christine and her husband Paul advised that their donor had requested privacy, there was perhaps an element of insecurity otherwise evident in Christine's interview:

> *"And I guess to be completely honest, one of the reasons that we decided that he was going to be a boy was because I kind of didn't really want [the child] to look like the egg donor…I picked the egg donor that physically resembles me as much as possible…I didn't want to be reminded of it."*
>
> - Christine (Surrogacy and Egg Donation)

Christine and Paul described themselves being very much led by the donor in terms of their respecting her wishes. While Christine described a mechanism for them to be provided with the donor's medical or genetic updated information, the egg donor did not otherwise wish to be contacted. The pathway to contact therefore would be, using the agency as an intermediary and only at the discretion of the egg donor. When discussing disclosure however, unlike the studies detailed above, Christine placed more significance on the egg donor than her husband Paul and this was based seemingly on the fact that it was an element that she herself could not provide:

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[50] C. Murray & S. Golombok, "To Tell or Not to Tell: The Decision-Making Process of Egg-Donation Parents" (2003) 6 *Human Fertility* 89. 29% of ED mothers stating that there was no need to disclose, given their belief in the supremacy of their biological motherhood over genetic relatedness. By contrast, a minority of mothers (12%) sought to protect themselves and worried that disclosure would threaten the child's view of them.

[51] F. MacCallum & S. Golombok, "Embryo Donation Families: Mothers' Decisions Regarding Disclosure of Donor Conception" (2007) 22(11) *Human Reproduction* 2888.

[52] J. Readings, L. Blake, P. Casey, V. Jadva & S. Golombok, "Secrecy, Disclosure and Everything in-Between: Decisions of Parents of Children Conceived by Donor Insemination, Egg Donation and Surrogacy" (2011) 22 *Reproductive BioMedicine Online* 485 at 490.

[53] C. Murray & S. Golombok, "To Tell or Not to Tell: The Decision-Making Process of Egg-Donation Parents" (2003) 6 *Human Fertility* 89.

"We will explain to him, but I mean, like, we were much more kind of thinking about the connection, rightly or wrongly with his surrogate, the gestational carrier, because like they will definitely meet."

"That was [the egg donor's] wish, like she was kind enough to actually be part of this process. So we would do everything to honour that. Like it's not, it's not a thing like, whether or not it will be important to him later on, I would imagine he probably won't care." […]

"But it's still important."

"It is still important, but like, to my mind, that's something that's really on the periphery, it's like a two lines in a conversation and it's moved on."

"You see, I think [it's more important] because it's my…because of me…because it's eggs."

- Christine and Paul (Surrogacy and Egg Donation)

However, when asked if she would mind if her child asked to meet the donor, Christine answered, "*no because I'm his mother*". In fact this lack of insecurity being linked with open disclosure was a marked occurrence among women who had gone through surrogacy:

"I'd be happy to go for a holiday to Ukraine, to bring him to meet with her...at the end of the day, I feel I have such a strong bond with [my child] that I don't even think about surrogacy. I don't feel like I have any kind of insecurities, you know, about him meeting the surrogate, or anything like that."

- Mary (Surrogacy)

Protection of the Child

As noted above, the protection of the child was cited often as a reason not to disclose. A significant majority (82%) in one particular study from 1997 stated that DI disclosure would be a threat to the child's wellbeing and expressed concern that the child would find the information upsetting and that it would lead to insecurity.[54] In a study two years later, that focused on both ED and DI families, a substantive reason for their secrecy was a wish to protect the child.[55] A 2003 study of ED mothers reported that the desire to protect their child was their main reason for non-disclosure.[56] Mothers regarded uncertainty of outcome, confusion and isolation as

[54] A. Brewaeys, S. Golombok, N. Naaktgeboren, J. K. de Bruyn & E. V.van Hall, "Donor Insemination: Dutch Parents' Opinions about Confidentiality and Donor Anonymity and the Emotional Adjustment of their Children" (1997) 12(7) *Human Reproduction* 1591 at 1594.

[55] 49% DI; 69% ED - S. Golombok & C. Murray, "Social versus Biological Parenting: Family Functioning and the Socioemotional Development of Children Conceived by Egg or Sperm Donation"(1999) 40(4) *Journal of Child Psychology and Psychiatry* 519.

[56] C. Murray & S. Golombok, "To Tell or Not to Tell: The Decision-Making Process of Egg-Donation Parents" (2003) 6 *Human Fertility* 89.

reasons not to tell, along with the child's inability to comprehend the information. In a 2011 study of DI, ED, and surrogacy families,[57] ED families were more likely than any other AHR type to cite protection of the child (40%).[58] A similar viewpoint was also found in families who had availed of embryo donation.[59] As before, the disclosure status of the parents was dictated by what they believed to be protecting the child, with 64% of the non-disclosing mothers citing this as their reason. They believed the lack of genetic relation would confuse the child and cause a lot of insecurity and upheaval in their lives. Some mothers (43%) feared rejection by the child or felt that the child would feel isolated from the rest of the family.
No participants in the O'Connell Study cited protection of the child, or the child's best interests, as a reason not to disclose.

Apathy Towards the Rights of Children

A small number of earlier studies also focused on parental wishes and viewed the effect of disclosure on their children as secondary to its effect on themselves. In one study, 9% of respondents believed that the details of the child's conception were "of little importance".[60] In another, 85% of DI parents and 69% of ED parents, felt that there was no need to tell the child.[61] When ED, DI and surrogacy families were asked their reasoning for non-disclosure, most of those who planned not to tell their child stated that there was no need to tell or to protect the child.[62]

The Perceived Importance of the Surrogate Vs Egg Donor in the O'Connell Study

Within the O'Connell Study, there was an evident variation in importance placed on the surrogate, as opposed to the egg donor, with the latter status being treated with a notably lower level of significance in terms of disclosure. The comments made by Christine and Paul above should be reiterated here, together with the following comments from Sean:

> "*I would 100% attach more significance to the gestational surrogate than the genetic link that will come from the egg donor…I view the egg donor more as like, an essential ingredient but…the child will be largely formed by the environment in which they live, and the parents that they are brought up by in the domestic environment, the house here, the neighbourhood, the friends,*

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[57] J. Readings, L. Blake, P. Casey, V. Jadva & S. Golombok, "Secrecy, Disclosure and Everything in-Between: Decisions of Parents of Children Conceived by Donor Insemination, Egg Donation and Surrogacy" (2011) 22 *Reproductive BioMedicine Online* 485.
[58] *Ibid* at 489.
[59] F. MacCallum & S. Golombok, "Embryo Donation Families: Mothers' Decisions Regarding Disclosure of Donor Conception" (2007) 22(11) *Human Reproduction* 2888.
[60] A. Brewaeys, S. Golombok, N. Naaktgeboren, J. K. de Bruyn & E. V.van Hall, "Donor Insemination: Dutch Parents' Opinions about Confidentiality and Donor Anonymity and the Emotional Adjustment of their Children" (1997) 12(7) *Human Reproduction* 1591 at 1594.
[61] S. Golombok & C. Murray, "Social versus Biological Parenting: Family Functioning and the Socioemotional Development of Children Conceived by Egg or Sperm Donation"(1999) 40(4) *Journal of Child Psychology and Psychiatry* 519.
[62] J. Readings, L. Blake, P. Casey, V. Jadva & S. Golombok, "Secrecy, Disclosure and Everything in-Between: Decisions of Parents of Children Conceived by Donor Insemination, Egg Donation and Surrogacy" (2011) 22 *Reproductive BioMedicine Online* 485.

the school. So I think I just see a bigger role for the gestational surrogate than I do in the kids' lives than I do for the egg donor. And I also think that they won't be that interested in the whole egg donation piece really for quite some time, whereas I think the surrogate piece is kind of pending for [the two older children] they're definitely going to start asking a few questions around that in the next short period of time, I think."

- Sean (Surrogacy and Egg Donation)

It should be noted however that naturally the role and level of exposure to the intending parents varies considerably between surrogate and egg donor. While Christine and Paul were matched through an agency with their surrogate, Sean's surrogate was a very close family friend, "*on the periphery of the kid's lives*". Sean therefore noted that if the egg donor was emotionally or geographically closer to them, he probably would attach more significance to her role. Finally, it should be noted that the varying level of importance did not impact on Sean's intention to disclose the role of both women to his children.

Lack of Information on the Donor

A significant number of these studies took place before identity release programmes were available. Therefore, several couples believed that it was pointless to inform the child that they were donor conceived without further information about the donor. In a 1997 study,[63] all parents opting for disclosure stated that they would have preferred more information about the donor. In terms of the type of information sought, the major concern of the DI parents in this study was medical or genetic information and very few parents considered that the child would want to know more about the donor.[64] When DI, ED and surrogacy families were asked their reasoning for non-disclosure,[65] lack of information about the donor was a prominent factor with one DI mother trying to empathise with her child's response, "*that would be fine if I then had the means to actually find my father…but if there's no means then it just leaves a void in your life…and I don't think that's fair*". One DI father spoke similarly, stating that he would rather be happily ignorant than frustrated at not being able to find out more about the donor. This was also a reason mentioned by those in EBD families who stated that the lack of identifying information was considered to impede disclosure.[66] However, in another study involving ED parents,

[63] F. MacCallum & S. Golombok, "Embryo Donation Families: Mothers' Decisions Regarding Disclosure of Donor Conception" (2007) 22(11) *Human Reproduction* 2888.

[63] A. Brewaeys, S. Golombok, N. Naaktgeboren, J. K. de Bruyn & E. V.van Hall, "Donor Insemination: Dutch Parents' Opinions about Confidentiality and Donor Anonymity and the Emotional Adjustment of their Children" (1997) 12(7) *Human Reproduction* 1591 at 1594.

[64] *Ibid* at 1596.

[65] J. Readings, L. Blake, P. Casey, V. Jadva & S. Golombok, "Secrecy, Disclosure and Everything in-Between: Decisions of Parents of Children Conceived by Donor Insemination, Egg Donation and Surrogacy" (2011) 22 *Reproductive BioMedicine Online* 485.

[66] F. MacCallum & S. Golombok, "Embryo Donation Families: Mothers' Decisions Regarding Disclosure of Donor Conception" (2007) 22(11) *Human Reproduction* 2888.

40% of parents stated that the removal of donor anonymity would not impact their future disclosure intentions.[67]

The increasing use of identity release donor programmes was considered to have been caused by recommendations from DI practitioners, the cultural context around male infertility and acceptance of DI.[68] However, the increase in identity release programmes did not necessarily correlate to an increase in disclosure. In a 2003 study conducted by Gottlieb,[69] only 11% of Swedish parents had disclosed to their child; however, it was believed that this low level of compliance was due to open-identity not being voluntary and not reflecting cultural acceptance of DI as a method of conception.[70] Alternatively, when the identity release was made voluntary in New Zealand, 83% of couples stated that they would definitely or probably would tell their children about their DI origin. These couples had received counselling and had access to non-identifying information.[71] However, intention to disclose is not the same as actual disclosure, as has been observed by Golombok.[72]

Choosing a donor does not seemingly rely on identity alone, but rather, factors such as availability, financial issues or concerns about donor's motivations and characteristics.[73] The choice may also be an active choice or a forced situation in

[67] V. Soderstrom-Anttila, M. Salevaara & A.M. Suikkari, "Increasing Openness in Oocyte Donation Families Regarding Disclosure Over 15 Years" (2010) 25(10) *Human Reproduction* 2535.
[68] *Ibid* at 1116. The first identity release donor programme was set up in California in 1983 with only children able to avail of identifying information. This was only provided when they reached adulthood to eradicate the risk of custody issues between single and lesbian mothers and the donor. Open identity was legislated in Sweden in 1985, with similar legislation following in Austria, Switzerland, Victoria, and the Netherlands. All American, Swedish and New Zealander programmes offer open-identity donors only.
[69] C. Gottlieb, O. Lalos & F. Lindblad, "Disclosure of Donor Insemination to the child: the Impact of Swedish legislation on Couples' Attitudes" (2000) 15 *Human Reproduction* 2052.
[70] J. E. Scheib, M. Riordan & S. Rubin, "Choosing Identity-Release Sperm Donors: The Parents' Perspective 13-18 year later", (2003) 18(5) *Human Reproduction* 1115 at 1116.
[71] A. Purdie, J. C. Peek, R. Irwin, J. Ellis, F. Graham & R. Fisher, "Identifiable Semen Donors – Attitudes of Donors and Recipient Couples" (1992) 105 *New Zealand Medical Journal* 27.
[72] Findings from a longitudinal study of DI families found that those parents who were planning to disclose or who were undecided when their child was age 4-8, still had not done so by the time the child was approaching adolescence. R. Cook, S. Golombok, A. Bish & C. Murray, "Keeping Secrets: A Study of Parental Attitudes Towards Telling About Donor Insemination Families" (1995) 65 *Journal of Orthopsychiatry* 549; S. Golombok, F. MacCallum, E. Goodman & M. Rutter, "Families with Children Conceived by Donor Insemination: a Follow-Up at Age 12" (2002) 73 *Child Development* 952.
[73] D. A. Annafield, M.S.W. & S. C. Klock, "Disclosure Decisions Among Known and Anonymous Oocyte Donation Recipients" (2004) 81(6) *Fertility and Sterility* 1565 at 1565.

circumstances where intending parents have no one willing to act as their donor.[74] In terms of the information that was most sought after, in a 2004 study, the known donor's appearance was most important, followed by intelligence and personality whereas anonymous donors were chosen based on appearance, health, and intelligence.[75] While donors were labelled as anonymous, 93% knew the donor's medical history, 81.6% knew their blood type and over 90% knew their age, ethnicity, hair colour, education, height, and eye colour. However, only 38.6% had a photo of the donor. In terms of disclosure, there was no significant variance between unknown and known donors with only 10% of both groups having told their child, 49%/50% planning to tell, 31%/30% not telling and 10% unsure, respectively.[76] Those who intended to tell their children wanted to do so because they believed the child had a right to know and a right to their medical history.[77] Age was also a considerable factor with a variance in opinion as to what age is most appropriate.[78] The choice of known and unknown donors in this study, however, was based on

[74] In the study referenced in the preceding footnote, most women who chose known donors did so by preference, apart from two who felt that they had no other option. Those who chose their sisters (7/20) did so due to their genetic link, their similar physical characteristics, and the "willingness" with which they volunteered. Those who recruited identifiable donors did so because they wanted to meet the donor and their desire to provide their children with information about the donor. Those who opted for anonymous donors were equally divided between wanting such donors, to feeling they had no other option. Some had approached women who they knew and were either refused or felt too awkward about the prospect. Those who sought anonymity did so because they wanted neither themselves nor their child to have contact with the donor, and they wanted to avoid the future conflicts of parenthood. When asked about any concerns they had about the anonymity of their donors, most women cited the lack of medical information and family history but were otherwise satisfied with the amount of information they had, *ibid* at 1567.

[75] *Ibid* at 1568.

[76] *Ibid* at 1568-1569. Concern for the child's wellbeing was once again the primary reason to both disclose and not disclose. Similar sentiments were reiterated regarding the need to pre-empt the disclosure of others and comments were made regarding the stigmatisation of children and the risk to their self-esteem. Some spoke of their concerns of confusing the child and justified non-disclosure by stating that the children looked like family members so their conception would not be questioned. A certain level of defensiveness was evident, particularly by one mother who stated that disclosure could affect her relationship with her child who has "*always been more a part of me than anyone else except their father*."

[77] This was echoed a further 2003 US study J. E. Scheib, M. Riordan & S. Rubin, "Choosing Identity-Release Sperm Donors: The Parents' Perspective 13-18 year later", (2003) 18(5) *Human Reproduction* 1115. The most common answer in why parents used a known donor was that it gave the child the option of getting more information about the donor (97.3%), followed by wanting their child to have the option of knowing who the donor was and of meeting him (90%) and that it was the right thing to do (83.8%). Among the answers, 17.8% gave unique responses, the most common of which was that it would contribute to the child's sense of identity/heritage. When asked about their child potentially meeting the donor, none of the fathers in the heterosexual couples stated that they were looking forward to it but 50% stated that it was the right thing to do. Birth mothers on the other hand felt more positive with 83.3% of them feeling that it was the right option for the child, albeit with 52.4% admitting to feeling concerned and anxious about how events would unfold. Considerably more lesbian co-parents endorsed a possible meeting than opposite sex couples. The concerns of the minority that did not included worries that the donor would not live up to the child's expectations, that he would be homophobic, that he would not be willing to meet the child or that he would attempt to exert parental authority.

[78] Some believed five to be too young with another stating that eight was too young.

personal decisions and circumstances, not a state mandated insistence upon identity release.

Choosing a Donor in the O'Connell Study

In terms of whether to use a known donor, the benefits were acknowledged as having a full genetic and medical history "*in perpetuity*", and for one woman who asked her brother, it meant that her child had the same grandparents and cousins etc., and her being able to see herself in her child. Another participant whose friend acted as a donor described how she found their initial online search lacking:

> *"[there were] photos of them as a baby and loads of medical history there and everything. We still felt that it wasn't enough and that if our children asked who their donor was, then we want to be able to give them more than those answers would have allowed us. So ideally, for us, we wanted a sperm donor that we knew, not to help us parent, we felt like we could do the parenting ourselves, but just to be able to answer those questions."*
>
> - Sandra (DAHR)

However for Aoife, who obtained a sperm donation from a US sperm bank, while the identity of the donor was not known to her at the time of obtaining the donation, she received a booklet of approximately 35 pages that detailed interviewer notes, family, physical characteristics, personal characteristics, jobs, education, personal health, athletic history including section on muscles, bones and joints, skin, and neurology. There was a donor number and a baby photograph, and this donor was identity release meaning the child could contact the sperm back at the age of 18 and seek out his identifiable information. There was, however, an additional fee for identity release donations.

In terms of egg donation, there was a variation; some received photos, and some did not, and three participants had spoken to their donor, whereas two did not. Participants described obtaining the egg donor's medical history, genetics on maternal and paternal side, PPS numbers and ancestral origins. However, for one participant who had been trying for some years, his focus evolved into one of medical assistance which was prioritised over the known or unknown nature of the egg donor. Sean described how his preference was always for a known donor, but the reality was that the donors available to him and his husband were reduced based on being known/unknown and then reduced further based on those who actually were willing to go through with the donation. Eventually he described that out of 30 - 40 donors, the availability would have reduced to less than a handful who were not medically indicated as the best match.[79] Ultimately however, no participant was hindered in their disclosure by a lack of available information about the donor. All but one participant, Aoife, had the name and background information of their donor, and for three DAHR mothers, their donor was known to their child.

[79] However, as will be detailed later in the Chapter, Sean's egg donor later agreed to release her identity to them, and in turn, to the children.

Age and Maturity

The need for sufficient maturity was a recurring theme in responses from parents as to why they had not yet disclosed. The fears for many parents among the studies were that their children were too young to fully understand the reproductive concepts. Others saw their child's youth as synonymous with naivety and feared that it would result in an inadequate self-preservationist approach, whereby they would tell other people about their conception without perhaps understanding that this may lead to ridicule. This was most prevalent in one study involving lesbian mothers published in 2003.[80] One mother noted the fear of rejection of both her and her partner by her child whereas another was concerned that her child was too accepting and needed to realise that their family situation might not be something that he should be open about, for fear of bullying.[81] This prejudice was a recurring theme throughout the study with three of the children mentioning that they might need to hide their mother's sexual orientation for fear that she would be criticised or called names.[82] Two families in the study had experienced problems with negative comments from peers regarding their mother's sexual orientation.

For some DI recipients in a Swedish study published in 2016, early disclosure was preferable, as it provided the child with a sense of knowing the whole story from the outset.[83] Others even mentioned having another child through donor conception so that their child had a sibling with whom to share their story.[84] For other participants, the maturity of the child was a more influential factor and as such, it acted as an impeding force on disclosure in early age. Parents with this mentality did not think that their child would be able to understand or process the information and they feared overwhelming them.[85] Many spoke of the relief of their child finally grasping the information.[86] Some parents felt that by disclosing to the child, it would result in disclosure to everyone in their lives. In a UK study, of the ED and DI families who planned to tell but had not yet done so, most said the child was too young.[87] They were waiting for the child to engage in sex education before initiating the conversation. There was a variation in what age was deemed most appropriate with answers ranging from 10-21 years of age. Some parents felt that their child should be more settled, either socially within the family, or academically.[88] Again, there was also a strong urge to protect the child, and this arose from fear of confusing their child or the negative reactions that may arise from their child telling others. In 2017,

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[80] M. Stevens, B. Perry, A. Burston & S. Golombok, "Openness in Lesbian-Mother Families Regarding Mother's Sexual Orientation and the Child's Conception by Donor Insemination" (2003) 21(4) *Journal of Reproductive and Infant Psychology* 347.
[81] *Ibid* at 352.
[82] *Ibid* at 354.
[83] S. Isaksson, A. Skoog-Svanberg, G. Sydsjo & C. Lampic, "It Takes Two to Tango: Information-Sharing with Offspring Among Heterosexual Parents Following Identity-Release Sperm Donation" (2016) 31(1) *Human Reproduction* 125 at 127.
[84] *Ibid* at 129.
[85] *Ibid* at 127.
[86] *Ibid* at 129.
[87] J. Readings, L. Blake, P. Casey, V. Jadva & S. Golombok, "Secrecy, Disclosure and Everything in-Between: Decisions of Parents of Children Conceived by Donor Insemination, Egg Donation and Surrogacy" (2011) 22 *Reproductive BioMedicine Online* 485.
[88] *Ibid* at 491.

another study was conducted on 47 single mother families whose children ranged from 4-9 years old.[89] When asked about their child's understanding of the nature of their conception, the mothers perceived their child's level of understanding as limited. One mother in particular said that she did not believe her four year old understood gender and another whose child was six, spoke about her continually confusing "donor" with "donuts".[90]

A study published in 2017,[91] concluded that children who were disclosed to before the age of seven experienced more positive parenting and less conflict compared to those who had been disclosed to later in life.[92] This age group may be considered of some significance given that an earlier study found that it is not until the age of seven that children begin to show an understanding of biological inheritance.[93] They also experienced more maternal warmth and security, higher levels of acceptance, more positive family relationships and greater psychological wellbeing.[94] Interestingly, the study also suggested that these findings reflected that disclosure may have greater effect on mothers than on adolescents.[95] However, no differences were found between children told at age three, and those that had been told between ages 4-6. The study submitted that the more positive outcomes for children under seven could be attributed to the differences in socio-cognitive development that occur at that age. Overall, it should be noted that there were no differences between psychological wellbeing or the quality of family relationships between families who did and did not disclose.[96] One significant limitation of the study, however, was that adolescents who had not experienced disclosure could not be interviewed for ethical reasons and therefore, the comparison was conducted on the basis of the views of the mothers only.

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[89] S. Zadeh, T. Freeman & S. Golombok, "What Does Donor Mean to a Four-Year-Old?: Initial Insights into Young Children's Perspectives in Solo Mother Families" (2017) 31 *Children and Society* 194.
[90] *Ibid* at 200.
[91] E. Ilioi, L. Blake, V. Jadva, G. Roman & S. Golombok, "The Role of Age of Disclosure of Biological Origins in the Psychological Wellbeing of Adolescents Conceived by Reproductive Donation: a Longitudinal Study from Age 1 to Age 14" (2017) 58(3) *Journal of Child Psychology and Psychiatry* 315. This study hypothesised that children who were disclosed to at a younger age would show more positive mother-child relationships and lower levels of adjustment difficulties than those told later in life. It was also predicted that parents with more positive familial relationships would lead to earlier disclosure and to greater psychological wellbeing. The adolescents in this study were 14 years of age and were recruited from surrogacy families (24), ED families (16) and DI families (10), all of whom had disclosed, and controlled against natural conception (NC) families (54).
[92] *Ibid* at 319.
[93] E. Greeg, A. Soloman, S. Johnson, D. Zaitchik & S. Carey, "Like Father, Like Son: Young Children's Understanding of How and Why Offspring Resemble Their Parents" (1996) 67 *Child Development* 151.
[94] E. Ilioi, L. Blake, V. Jadva, G. Roman & S. Golombok, "The Role of Age of Disclosure of Biological Origins in the Psychological Wellbeing of Adolescents Conceived by Reproductive Donation: a Longitudinal Study from Age 1 to Age 14" (2017) 58(3) *Journal of Child Psychology and Psychiatry* 315 at 319-321.
[95] *Ibid* at 321.
[96] *Ibid.* There were no differences in adolescents' perceptions of maternal acceptance or control, or in mother-child interaction, according to age of disclosure. Similarly, there was also no difference in adolescents' psychological, emotional or behavioural problems, albeit, as perceived by mothers and their children only.

Age Appropriate: Disclosure on a Continuum within the O'Connell Study

Amongst the participants, their own openness to the general topic of AHR and to disclosure was evident. The difficulty for most, given that 91% of children involved were under five years old, was the children's understanding of, or their interest in, the information. For example, when asked if she would provide the booklet of donor information to her child, one mother said:

> *"Oh yeah, I would. She's just never shown any interest in it."*
>
> - Aoife (DAHR)

Sean described the experience of his twins coming over to meet their new baby sister upon her birth and meeting their shared surrogate. He explained how they knew who the surrogate was, and that she was carrying their sister but how they have only understood that information in relation to their sister, and not that they themselves are also surrogate born children. He also spoke of their short attention span and low level of sustained interest:

> *"He wanted to know more about where do babies come from, as opposed to where did he as a surrogate child come from. So, I told him a little bit about seeds and eggs and all that sort of thing. And them getting together. And that's what makes a baby. But once I answered that question, he changed the subject, as all three year olds do. His attention span was 30 seconds, I'd given him 30 seconds. He was happy with that information. And he was happy to plough on with the rest of his day."*
>
> - Sean (Surrogacy)

He stated that he and his husband were nonetheless ready to talk to their 3 year olds about their surrogacy journey, but found little benefit in talking about it to his 12 month old. Most participants focused on incorporating the identity piece into a child's self-narrative from a very early age. For example, Aoife described her daughter (5 years old) as having always known:

> *"She's always known. When she was a baby, I would have told her, like a small baby, you know, before she'd understand anything, I would say I used to be sad, because I really wanted a baby, and then I got some cells from a man in America, and then the nurse, put the cells in my tummy and mixed them up with my, with Mama's cells, with myself. And then this baby grew and grew and grew. And as she popped out, I was the happiest mom in the world…And she doesn't really know much more than that now."*
>
> - Aoife (DAHR)

For Yvonne and Ailbhe, they had already spoken to their four year old:

> *"But she's not very interested, it's not a very exciting story. And we don't have a book or anything, I think we will make a book at some point at some stage for her, but she knows that Uncle [X] is really special, she has*

*a very special relationship with him. We do tell her like he helped us to have you, but it's just like *woosh, over her head* like, no idea. Like, the concept of anyone not being exactly who they are right now is like, is beyond her. So, we already talked to her about it. And it's our intention to I suppose, at age appropriate stages, make that story more detailed, but she already knows. What we want for her is to never even remember having the conversation. It's just always part of her life."*

- Ailbhe (DAHR)

Similar to Yvonne and Ailbhe, Sandra's donor was already in the child's life albeit not necessarily known as the "donor" just yet:

"I think it'll be kind of like, age appropriately, as we go through…They will know they have a donor, and they will know who that is…they've obviously been introduced….they kind of know that he is someone that we go and visit, and I think he should be kind of like mom's friend and he did this for us. And like, you know, that was so nice of him. And maybe emphasising that relationship more than the relationship he has with them."

- Sandra (DAHR)

James and Mary had children under 1 years old but their commitment to disclosure was evident:

"We're going to be very open with [our child] about who her surrogate was, we have a picture book that we can go through where she came from, her journey, and then, they'll be able to contact each other, and we'll also let her know about the egg donor and where that came from as well, before she's even 18, as she grows up she'll get to know it."

- James (Surrogacy and Egg Donation)

"It's definitely not something I would ever, ever try and keep from him. You know, I definitely will tell him about mammy's tummy was sick, then this lady helped, mammy grew you in her belly…I just don't know how it would be, could be, possible to keep it from him…whenever he's old enough to understand, I want to try and tell him from a very young age so it's just the norm. And it's no big deal".

- Mary (Surrogacy)

Finally, early disclosure was also set out as offsetting a future harm:

"Yeah, because it's something like, if you find out something like that in your teenage years, for some people it'll be water off a duck's back. And some people, it could be just life shattering. So, whereas, you know, kids are really, really resilient. So, if they're like, oh, this is just the way it is? Yeah, they don't even blame you."

- Paul (Surrogacy and Egg Donation)

Did Not Know How

For many parents, there was no easy way in which to disclose either because they did not know how (one EMB mother)[97] or they were concerned about losing control of the conversation.[98] In a Swedish study, involving opposite sex couples, the child's maturity would dictate how they disseminated the information.[99] Parents who found it difficult to initiate the conversation often cited a lack of supportive tools or the fear that the child would ask difficult questions. They reported that finding the right vocabulary was a dissuading factor. There was also a significant level of variation in parents who had planned a conversation and those who seized the opportunity when their child initiated the discussion by querying where babies came from.[100] In fact, for many of the parents, the child's curiousness created the impetus to provide more information first about the nature of conception, then the existence of the donor and finally the donor's identity and means of contact. Where the child was non-reactive or uninterested, parents noted that this impeded further disclosure. One father described how his son had actively asked him to stop talking to him, viewing the disclosure process as "nagging".[101]

In the same study, three mothers had stated that they were waiting for the child to ask.[102] This arose throughout the studies with some parents feeling unable to disclose yet stating that they would be honest if directly asked by their children.[103] However this was unlikely for children at a young age, when they might be best served by disclosure. In one study, one child (DI) had initiated the conversation.[104] The extent of the information provided appeared in one study to be proportional to the child's age and many single and lesbian mothers had waited until the child initiated the conversation.[105] One child with an unknown donor commented at the age of three and a half that she "missed her daddy" which had prompted the conversation. Other mothers in the same study spoke of not wanting to make the disclosure into a bigger deal, cause the child to "switch off", or answer more questions than are being asked by the child.[106] In a study of single and opposite sex families, children were likely to be prompted by friends asking where their fathers

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[97] *Ibid*.

[98] S. Isaksson, A. Skoog-Svanberg, G. Sydsjo & C. Lampic, "It Takes Two to Tango: Information-Sharing with Offspring Among Heterosexual Parents Following Identity-Release Sperm Donation" (2016) 31(1) *Human Reproduction* 125.

[99] *Ibid.*

[100] *Ibid* at 128.

[101] *Ibid* at 129.

[102] S. Isaksson, A. Skoog-Svanberg, G. Sydsjo & C. Lampic, "It Takes Two to Tango: Information-Sharing with Offspring Among Heterosexual Parents Following Identity-Release Sperm Donation" (2016) 31(1) *Human Reproduction* 125 at 127.

[103] J. Readings, L. Blake, P. Casey, V. Jadva & S. Golombok, "Secrecy, Disclosure and Everything in-Between: Decisions of Parents of Children Conceived by Donor Insemination, Egg Donation and Surrogacy" (2011) 22 *Reproductive BioMedicine Online* 485.

[104] L. Blake, P. Casey, J. Readings, V. Jadva & S. Golombok, "Daddy Ran Out of Tadpoles: How Parents Tell Their Children that they are Donor Conceived, and What their 7 Year-Olds Understand" (2010) 25(10) *Human Reproduction* 2527 at 2530.

[105] *Ibid.*

[106] *Ibid* at 357.

were, with those realising they do not have one, leading them to ask how they were born.[107] Other concerns that arose from the studies were fears about whether they were telling the child in the best way possible, how much they should say, whether they were telling at the right time, the effect it would have on the child's future, their friend's reaction and whether they discussed donor conception enough with their child.[108] In terms of family type, for those who planned to tell, DI families were more likely to not know what to tell the child (50%).[109]

Disclosure concerns did not always arise from difficulty in communicating with the child. One mother described how the difficult nature of their fertility restricted her and her husband from talking about related topics, such as disclosure. In order to deal with this discomfort, she spoke out loud and explained the process to her child while changing nappies. Doing this allowed her to vocalise her sadness about her infertility so that she could construct a more positive disclosure story for when the child was older.[110] What is most evident from such studies is that these apprehensions, lack of preparation and guidance, or misunderstanding of the importance of such information and its integration into a child's development can be offset by resourced information sessions, publicly available books, and tips on life story work.

Intuition and Supports within the O'Connell Study

The findings of the preceding studies were not borne out within the O'Connell study where lack of supports or know how it hindered disclosure or the intention to disclose. Each participant expressed a clear proactive stance on disclosure, aside from the one couple who were not disclosing due to that having been the agreement with the egg donor. In terms of whether, when and how to disclose, there were two key themes, intuition and supports. In terms of intuition, participants described a symmetry between disclosure, and the confidence, or perhaps, the lack of shame or stigma felt around engaging in AHR (as opposed to infertility):

> *"I mostly think that it's about being comfortable with it yourself. Because, you know, children just pick up so much from their parents. And I'm so comfortable that I had a donor conceived child, and I'm so proud of it. And I never hide it from anyone or anything. And it's something that I'm proud of and so [my child] is proud of it."*

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[107] T. Freeman, S. Zadeh, V. Smith & S. Golombok, "Disclosure of Sperm Donation: a Comparison Between Solo Mother and Two-Parent Families with Identifiable Donors" (2016) 33 *Reproductive BioMedicine Online* 592 at 596 at 597. Of those that disclosed, eight of these conversations (47.1%) had been initiated by the child in single parent families and only two (11.8%) in partnered families.
[108] L. Blake, P. Casey, J. Readings, V. Jadva & S. Golombok, "Daddy Ran Out of Tadpoles: How Parents Tell Their Children that they are Donor Conceived, and What their 7 Year-Olds Understand" (2010) 25(10) *Human Reproduction* 2527 at 2531.
[109] J. Readings, L. Blake, P. Casey, V. Jadva & S. Golombok, "Secrecy, Disclosure and Everything in-Between: Decisions of Parents of Children Conceived by Donor Insemination, Egg Donation and Surrogacy" (2011) 22 *Reproductive BioMedicine Online* 485.
[110] S. Isaksson, A. Skoog-Svanberg, G. Sydsjo & C. Lampic, "It Takes Two to Tango: Information-Sharing with Offspring Among Heterosexual Parents Following Identity-Release Sperm Donation" (2016) 31(1) *Human Reproduction* 125 at 129.

- Aoife (DAHR)

> *"And even [my husband], I suppose, as the time came that he was approaching the birth, [my husband] found it a lot easier to speak to the people at work, because, you know, for men, it's hard. He's told people that really shocked me, that he did go into the detail like, and people have been really amazing…[and it's] definitely not something that I keep to myself."*
>
> - Mary (Surrogacy)

> *"I think that our, our parenting style is quite, you know, don't read up about it, just like look at our kids and see, like, what feels right, as you say, what you can manage, and what way you feel comfortable saying it. But at the same time, this is kind of an unusual situation, it's not something any of our friends have done or will have to do. It's not anything our parents…you know, so you have no real advice, or examples of it…So, this may be actually an area where we do need some help and kind of…like, reading books to them, or just different possibilities of how it can be done or how it can be phrased."*
>
> - Sandra (DAHR)

However, on the other hand, one male couple said "it was all up to ourselves" as to how to disclose. Another participant spoke of the general lack of support overall in surrogacy. However, it is important to note that these lack of supports did not hinder these participants in their wish to disclose to their children. Overall, participants were open about their use of AHR, and this did not differ based on sexuality or the existence on any infertility.

Reasons in Favour of Disclosure

Vindication of the Child's Right

While the numbers disclosing were not routinely high within the studies undertaken, among those that planned to disclose, or had disclosed, the child's right to their genetic origins was the primary reason to disclose. In a study of ED mothers, the majority (60%) stated that that they believed the child had a right to know about their genetic origins.[111] In another study, focused on ED mothers, one mother in particular stated that she feared her son thinking that there was something to hide or be ashamed of, if she was not the one to tell him.[112] For EMB families, one reason cited in favour of disclosure was the child's right to know the truth, particularly from a medical perspective (57%).[113] However, one study showed that single mothers (74.2%) were significantly more likely to consider their child's knowledge of their

[111] C. Murray & S. Golombok, "To Tell or Not to Tell: The Decision-Making Process of Egg-Donation Parents" (2003) 6 *Human Fertility* 89.
[112] *Ibid* at 92.
[113] F. MacCallum & S. Golombok, "Embryo Donation Families: Mothers' Decisions Regarding Disclosure of Donor Conception" (2007) 22(11) *Human Reproduction* 2888.

genetic origins to be extremely important than partnered mothers (46.8%).[114] Another study that looked at ED, DI and surrogacy families found that, of those who had disclosed, most DI families said that the child had a right to know (70%). By comparison most ED families said equally that the child had a right to know or that they wanted to be honest (76.9%), and half of the GS families stated they too wanted to be honest with the child.

When looking to another jurisdiction, a Swedish study focused on opposite sex couples,[115] reported that for many couples, disclosure was "self-evident", that the child had a right to know about their conception and that the children "owned" their own story. Overall, most parents in this study were not overly concerned with disclosure but focused more on assisting the child build a strong character and becoming a stable person. In terms of the donor, the parents felt grateful but ultimately, they felt it was a decision for the child as to whether he would be contacted.[116] The only concerns felt by parents were that the donor may not live up to the fantasy the children may have conjured up. However, it may be important to note that Sweden has been noted as being an extremely individualistic as a nation, with a high secular-rational and self-expression values, including a low recognition of traditional family values and a high recognition of freedom of choice.[117] Again, it may be that there is a strong cultural disparity, and for example, a further Finnish study found that only one mother out of 113 said that promoting the child's identity development was her reason for disclosure. [118]

The Child's Identity within the O'Connell Study

Above and beyond the positive feelings around disclosure set out above, those who disclosed, or wish to disclose, focused on the child not having to search, and how this is the child's right and "this is their information":

> *"That was a real big part of our thing, knowing that they'll have questions, and not wanting them to ever kind of waste any of their lives, like searching for more information on their biology, we never wanted that to be a big thing. So, we kind of figured, if we had as many answers as possible, and if we told them as soon as possible, it would just be like, okay, I'm different. That's part of my story. Not a big deal. I could ask anything I want, so that it doesn't become a problem in their lives."*
>
> - Sandra (DAHR)

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[114] T. Freeman, S. Zadeh, V. Smith & S. Golombok, "Disclosure of Sperm Donation: a Comparison Between Solo Mother and Two-Parent Families with Identifiable Donors" (2016) 33 *Reproductive BioMedicine Online* 592 at 597. More single mothers (74.2%) than partnered mothers (59.6%) were also more positive about the use of an identifiable donor.

[115] S. Isaksson, A. Skoog-Svanberg, G. Sydsjo & C. Lampic, "It Takes Two to Tango: Information-Sharing with Offspring Among Heterosexual Parents Following Identity-Release Sperm Donation" (2016) 31(1) *Human Reproduction* 125.

[116] *Ibid* at 129.

[117] *Ibid* at 130, World Values Survey Association, *World Values Research Papers* (2008, Uppsala).

[118] V. Soderstrom-Anttila, M. Salevaara & A.M. Suikkari, "Increasing Openness in Oocyte Donation Families Regarding Disclosure Over 15 Years" (2010) 25(10) *Human Reproduction* 2535 at 2539.

"We're definitely telling him, that was always a given".
"And we're going to tell him really early so that it's not a thing, it's just part of his identity, part of his story".
"We have little books that he can read from the age of two."

- Christine and Paul (Surrogacy and Egg Donation)

"We'd been hearing about [disclosure as part of the 2015 Act] in the media, and it changed our minds that really it wasn't our choice to make, you know, we thought we were doing the right thing by a prospective child by taking away that potential trauma in their lives. But really, for us, we decided that it wasn't our decision to make, and they could decide if they wanted that potential trauma or not. So, our minds really changed on that in that period."

- Ailbhe (DAHR)

One participant referred to a contact of hers who had engaged in DAHR previously and who had very much been an aspirational family dynamic for her. She respected her approaches, including her approach to disclosure:

"She had just thought, look, if I'm bringing a child into the world, it's not without a dad, that I think they have a right to know, their genetic identity. And I just wasn't threatened by it, I thought there was nothing to lose. And that that was right. And I just think here, the more choices you have, or the more doors you leave open, the better. And I had no idea of how the child would feel about it."

- Aoife (DAHR)

Fear of Disclosure by Others

This was the second most prevalent reason for disclosure and was closely linked with the number of individuals the parents had informed about their use of AHR.[119] It was clear from a 2011 study that fear of inadvertent disclosure by others was the biggest concern of parents with one mother describing how she had told a neighbour and then felt extremely vulnerable and like she had betrayed her partner.[120] The feelings were so strong that she hoped that her neighbour would move to a new house.[121] 85.9% of families in this study had told at least one person. Of the 47 parents who had not yet told their child, or did not plan to tell, 70.2% had already told someone else.[122] In a 2003 study involving ED mothers, most who had disclosed stated that it was a pre-emptive move, as they feared the child finding out from another

[119] S. Golombok & C. Murray, "Social versus Biological Parenting: Family Functioning and the Socioemotional Development of Children Conceived by Egg or Sperm Donation"(1999) 40(4) *Journal of Child Psychology and Psychiatry* 519. In this study, it was cited as the primary reason by both ED and DI parents who wished to disclose.
[120] J. Readings, L. Blake, P. Casey, V. Jadva & S. Golombok, "Secrecy, Disclosure and Everything in-Between: Decisions of Parents of Children Conceived by Donor Insemination, Egg Donation and Surrogacy" (2011) 22 *Reproductive BioMedicine Online* 485.
[121] *Ibid* at 490.
[122] *Ibid* at 491.

source.[123] Most (65%) of these couples had told a family member and the same percentage had told a friend. This was also the case in an EMD study published four years later,[124] where the need to avoid accidental disclosure by another was cited by 71% of mothers. Disclosure was limited in relation to family members and friends for fear that the child would find out or that the child would be treated differently. This fear made it difficult for infertile couples to create an effective support system during a difficult time in their lives. In terms of surrogacy families, most GS families stated equally that they wanted to be honest or that they wanted to avoid disclosure from others (66.7%) whereas most TS families focused solely on avoiding disclosure from others (78.9%).[125]

A Finnish study placed this concern in their top three reasons not to disclose.[126] In terms of disclosure to others, only 15% of mother and 14% of fathers described themselves as open in general with 17.7% of mothers and 28.6% of fathers having not told the medical team who delivered their baby. Of those that told others, 11.4% of mothers and 3.2% of fathers regretted having done so.[127] In one case, the doctor had inadvertently disclosed to the child before the parents had done so themselves.[128] Similarly, Swedish families have reported that they were fearful that someone else would disclose, despite several reporting that they experienced family secrets growing up and considered them a burden on the family.[129] However, in an interesting diversion from the usual narrative, this study's participants sought to involve their family members in the process so as to provide the child with a myriad of information outlets.[130] This would allow the child to hear their conception story from others and would also "de-dramatize" the situation so as to avoid gossip. In this way, parents sought to "normalise" the conception by the time the child was older, by allowing those around them to get any negative thoughts or opinions "out of their system" early on.[131]

Fear of Disclosure by Others within the O'Connell Study

No participant expressed this fear within the O'Connell Study; however one participant, Sandra, described the very understandable situation in which she and her wife had a varying level of openness in their social circle, for example, some people knew their children were donor conceived and some knew who the donor

[123] C. Murray & S. Golombok, "To Tell or Not to Tell: The Decision-Making Process of Egg-Donation Parents" (2003) 6 *Human Fertility* 89.
[124] F. MacCallum & S. Golombok, "Embryo Donation Families: Mothers' Decisions Regarding Disclosure of Donor Conception" (2007) 22(11) *Human Reproduction* 2888.
[125] J. Readings, L. Blake, P. Casey, V. Jadva & S. Golombok, "Secrecy, Disclosure and Everything in-Between: Decisions of Parents of Children Conceived by Donor Insemination, Egg Donation and Surrogacy" (2011) 22 *Reproductive BioMedicine Online* 485 at 489.
[126] V. Soderstrom-Anttila, M. Salevaara & A.M. Suikkari, "Increasing Openness in Oocyte Donation Families Regarding Disclosure Over 15 Years" (2010) 25(10) *Human Reproduction* 2535.
[127] *Ibid* at 2537.
[128] *Ibid* at 2538.
[129] S. Isaksson, A. Skoog-Svanberg, G. Sydsjo & C. Lampic, "It Takes Two to Tango: Information-Sharing with Offspring Among Heterosexual Parents Following Identity-Release Sperm Donation" (2016) 31(1) *Human Reproduction* 125 at 127.
[130] *Ibid* at 127-128.
[131] *Ibid* at 128.

was. This variation was concerning to Sandra as her priority was that the children know their information first and that they would not be told by others. There was an evident tension between wanting her children's donor conception story to be open and normalised but also keep that information for her children. Concealing the information restricted her from "practising" disclosure and she spoke of how she felt that it was like walking on eggshells. However, unlike the studies above, it was important to Sandra that her children knew before other people, as opposed to concealing the information altogether for fear of her children finding out.

How to Disclose: Supportive Tools and Terminology

As aforementioned, one reason why parents found it difficult to disclose to their child was the lack of a script and the uncertainty regarding how to answer the child's questions. It was clear from one early study in 1995,[132] that practical help was available for adoptive parents in the form of educational books whereas this was not available to AHR parents. While adopting parents received positive advice from social workers regarding disclosure, there was a practice of bias towards secrecy in fertility clinics at the time, with guidelines that encouraged matching the donor's characteristics to those of the intending father.[133] In addition, adoptive parents in the study usually had photos and information about the child's natural parents whereas DI parents received little or no information or advice.[134] Without any substantial direction or guidance, the AHR parents would often oscillate between two disclosure methods: the story book and the science lesson.

The majority of DI parents (90%) disclosed in a story-like manner of how they needed help to have a baby with the remaining parents giving a more detailed and scientific explanation that was more common in ED families (31%).[135] 50% of DI parents and 31% of ED parents had used books to explain the process.[136] In a comparative study between single and opposite sex couples, all partnered mothers used a book to aid their disclosure, a reduced number of single mothers (64.7%) had done so.[137] For gay fathers who had engaged in surrogacy,[138] the most commonly used story (76%) was that two dads need help to make a baby and babies are carried in women's tummies. A slightly lower number (70%) mentioned surrogacy specifically. The terminology used by parents appears to be weighted with social connotation and therefore, it is important to note that children will naturally use the

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[132] R. Cook, S. Golombok, A. Bish & C. Murray, "Disclosure of Donor Insemination: Parental Attitudes" (1995) 65(4) *American Journal of Orthopsychiatry* 549 at 553

[133] R. Cook, S. Golombok, A. Bish & C. Murray, "Disclosure of Donor Insemination: Parental Attitudes" (1995) 65(4) *American Journal of Orthopsychiatry* 549 at 558.

[134] *Ibid* at 557.

[135] L. Blake, P. Casey, J. Readings, V. Jadva & S. Golombok, "Daddy Ran Out of Tadpoles: How Parents Tell Their Children that they are Donor Conceived, and What their 7 Year-Olds Understand" (2010) 25(10) *Human Reproduction* 2527 at 2530

[136] *Ibid.*

[137] T. Freeman, S. Zadeh, V. Smith & S. Golombok, "Disclosure of Sperm Donation: a Comparison Between Solo Mother and Two-Parent Families with Identifiable Donors" (2016) 33 *Reproductive BioMedicine Online* 592.

[138] L. Blake, N. Carone, J. Slutsky & E. Raffanello, "Gay Father Surrogacy Families: Relationships with Surrogates and Egg Donors and Parental Disclosure of Children's Origins" (2016) 106(6) *Fertility and Sterility* 1503.

term chosen by their parent. In one study looking at both ED and DI families,[139] one couple (DI) described the donor as "another father" with the majority (70%) describing him simply as "another man".[140] Echoing previous studies, donors were described as kind people and gametes were described as tadpoles, fish, a special ingredient (30% of DI) or Easter eggs (8% of ED). Gay fathers referred to the surrogate as a "nice lady" or an "important person" who "helped" them. [141] This was similar to another study where most parents had used the "seed-planting" strategy to inform their children, using language such as "gift", "egg", "seed" or "nice person".[142] For lesbian and single mother families,[143] the terms "nice man", "kind nice man", "lovely person" and "nice chap" were used, as was the term "seed" to describe his genetic contribution.[144] With respect to all DI families, 54.8% called the donor, "the donor", 21.4% called him the biological/birth father and 14.3% called him "father/dad".[145] While single and lesbian parents varied between these options, opposite sex couples did not refer to the donor as father or dad.[146]

The impact of the use of phrasing and terminology in disclosure is evident from a study involving 46 single mothers which was published in 2016. In this study, two overarching themes were identified, that of "presence" or "absence".[147] Most mothers spoke about the donor as an absent presence (27/46) who was nonetheless symbolically important to family life.[148] These mothers described him as a "gift giver", "gene-giver" or "potential partner". There was also a considerable amount of gratitude for such donors with again, similar terminology being used ("kind man", "generous soul"), although many appeared wary of embellishing or creating a fantasy. Mothers in this cohort took great care to set the donor apart from a father figure. In terms of genetics, several mothers remarked on their increase in curiosity about the donor, especially as the child was growing up and where they did not recognise particular characteristics or mannerisms.[149] Others described seeing these traits as making the donor continually present in their lives. Few mothers spoke of the donor as a potential partner, yet one woman stated that she had asked the clinic

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[139] L. Blake, P. Casey, J. Readings, V. Jadva & S. Golombok, "Daddy Ran Out of Tadpoles: How Parents Tell Their Children that they are Donor Conceived, and What their 7 Year-Olds Understand" (2010) 25(10) *Human Reproduction* 2527 at 2530

[140] *Ibid* at 2530.

[141] L. Blake, N. Carone, J. Slutsky & E. Raffanello, "Gay Father Surrogacy Families: Relationships with Surrogates and Egg Donors and Parental Disclosure of Children's Origins" (2016) 106(6) *Fertility and Sterility* 1503.

[142] V. Soderstrom-Anttila, M. Salevaara & A.M. Suikkari, "Increasing Openness in Oocyte Donation Families Regarding Disclosure Over 15 Years" (2010) 25(10) *Human Reproduction* 2535 at 2539.

[143] M. Stevens, B. Perry, A. Burston & S. Golombok, "Openness in Lesbian-Mother Families Regarding Mother's Sexual Orientation and the Child's Conception by Donor Insemination" (2003) 21(4) *Journal of Reproductive and Infant Psychology* 347 at 359

[144] *Ibid* at 357.

[145] *Ibid* at 1122.

[146] J. E. Scheib, M. Riordan & S. Rubin, "Choosing Identity-Release Sperm Donors: The Parents' Perspective 13-18 year later", (2003) 18(5) *Human Reproduction* 1115 at 1121.

[147] S. Zadeh, T. Freeman & S. Golombok, "Absence or Presence? Complexities in the Donor Narratives of Single Mothers Using Sperm Donation" (2016) 31(1) *Human Reproduction* 117.

[148] *Ibid* at 119.

[149] *Ibid* at 120.

staff which one they would date if they had the choice, and another wondered if there would be a spark between them.[150] Those who spoke of the donor as absent (16/46) described the donor in more "unknown" terms and not incorporating him into their family narratives, despite six of these mothers having used an identity release donor.[151] One of these mothers in particular spoke about refusing a pen sketch of the donor, not wanting to know anything about him. Another spoke of actively deciding not to have any more children after the legislative introduction of mandatory use of identity release donors. Some mothers, who had used both anonymous and identity release donors, voiced their hope that their child would not be "bothered" in finding out any information about the donor.[152] Those who focused on the donor's absence, were more likely to offer a scientific explanation than a story; specifically describing the sperm itself, or the helpful nurse, instead of the donor himself.[153]

Terminology and Supports within the O'Connell Study

All participants mentioned supportive life-story books, with one participant purchasing a book on inclusive family formations for her child's classroom and attending sessions provided by NISIG (the National Infertility Support and Information Group), leading her to eventually deliver the sessions herself. Another participant bought books for her nieces and nephews, which included the child's donor-siblings, and the research they put into the process:

> *"Everything we've done, we first like researched what's best practices…we did some kind of search through forums and blogs and online to see what other people were doing, what people are suggesting. We talked to professionals, like medical and legal professionals."*
>
> - Ailbhe (DAHR)

Participants who have disclosed described the child friendly language used. One participant used the term "belly buddy" while another referred to the "kangaroo pouch":

> *"She knows that she was in [the surrogate's] tummy. She's two, she knows a lot though, two year olds, they take in a lot of information whether they understand it or not, they take it in a lot… kids are great. Like you tell kids things. They're like, okay, cool, deadly….She knows her belly button came from [the surrogate] and it didn't come from me. But like [my husband's] was attached to Granny X and mine was attached to Granny Y so like we kind of explain those different things."*
>
> - Anna (Surrogacy)
>
> *"I would kind of say…that all babies come from a little egg, like a chick or whatever. And that Mammy had a bit of difficulty and didn't have the*

[150] *Ibid* at 120.
[151] *Ibid* at 120.
[152] *Ibid* at 121.
[153] *Ibid* at 121.

same number of eggs as other people and needed somebody generous to help us out."

- Christine (Surrogacy and Egg Donation)

The most common word used to describe known donors or surrogates was "special", and where they are unknown, or previously unknown, participants describe the donors or surrogates as "kind", "amazing" and "keeping the child safe". However, one participant in particular described the importance of referring to the donor as "the donor" and ensuring that her children did not view him as an "absent father" and so the terminology in that regard was very important to her:

"And I suppose what I really want to protect the girls from is thinking they have a dad that isn't there for them. So I really want to label him and have him in their heads as a donor. Because if they think, if they say all my friends' dads live with them, all my friends' dads come for their birthdays, all my friends' dads do this. It's like yes, but you don't have a dad, you have a donor and donors don't do the same things as dads…we visit them, donors come for tea every once in a while, like you know, and then they won't be disappointed. That's my big thing…my preference is to call him a donor and to have that very clear."

- Sandra (DAHR)

Counselling

Counselling often received mixed reviews. A high majority (78.5%) in one study from 2004 reported that they had received counselling; however, most stated that the opinion, instruction or recommendation of any member of their treatment team would not have influenced their decision to disclose.[154] Also, despite the high rate of attendance, women in this study maintained that they did not feel prepared in their disclosure, and had a requirement for further educational materials.[155] However, in another study, one DI father discussed how a donor conceived network meeting had helped him not to feel so alone in his infertility.[156] In a 2010 study, 54% of mothers and 59% of fathers reported being satisfied with the amount of counselling they had received whereas 24% of mothers felt that the psychological support they received was insufficient and that it should continue after the birth of the child.[157] These mothers felt that there should be less focus on encouraging disclosure and more focus on navigating parental disagreements on disclosure issues.

[154] D. A. Annafield, M.S.W. & S. C. Klock, "Disclosure Decisions Among Known and Anonymous Oocyte Donation Recipients" (2004) 81(6) *Fertility and Sterility* 1565 at 1569.
[155] *Ibid* at 1569.
[156] L. Blake, P. Casey, J. Readings, V. Jadva & S. Golombok, "Daddy Ran Out of Tadpoles: How Parents Tell Their Children that they are Donor Conceived, and What their 7 Year-Olds Understand" (2010) 25(10) *Human Reproduction* 2527 at 2531.
[157] V. Soderstrom-Anttila, M. Salevaara & A.M. Suikkari, "Increasing Openness in Oocyte Donation Families Regarding Disclosure Over 15 Years" (2010) 25(10) *Human Reproduction* 2535 at 2538.

Counselling within the O'Connell Study

Very few participants noted that the clinicians they engaged with made any recommendations in relation to disclosure; however, it was common that the topic would be discussed in any counselling received in the more regulated jurisdictions:

> *"They do make sure that you've talked about that before you go through the process, because the psychological evaluation, they asked you what you plan to do in that respect, and kind of how you plan to handle it. And I think we were always thinking about that as well."*
>
> - Christine (Surrogacy and Egg donation)

> *"We had to sit down with the clinic's appointed psychologist, and go through the child's story and go through with them, how we would broach different topics with the child such as telling them about their genetic origins, how we would do that, when we would do that, etc…we were very open with talking to the psychologist and telling her about our fears, telling her about our ideas…we had kind of said 'well the kids will probably be five or six before they take an interest in their backstory'. She said no, you know, you're deluded, that will happen when they're like three or four at the latest, you'll start getting the first questions. So, to some extent, we were given some guidance, but there was no obligation on us to accept or implement any data, you know, there was no pressure applied to us. It was generally just assumed that we were capable parents and that they would give us their best advice that we could decide to not proceed with and do something else."*
>
> - Sean (Surrogacy and Egg Donation)

One participant however, who engaged in DAHR in an Irish clinic where counselling was mandatory expressed how she had "hoodwinked" the counsellor, saying all the right things:

> *"I do remember going to the counselling and saying, sort of like, I have so many people who will help me sure, Janey, I don't know if I'll ever get to hold this baby myself. They're all queuing up to help, which was not the case. And you know, money. Oh, I have loads of money. I've been saving for this for years….I just wonder, you know, could she see through me, but anyway, I just went in going oh, no, I have no questions at all, everything's sorted. So that was a big waste of time. Because I wasn't in any way honest with her. But I think I was afraid that she'd say, oh, no, you're not suitable, you know*."
>
> - Aoife (DAHR)

This experience could perhaps suggest that information or counselling sessions, that have no corresponding impact on the availability of treatment to the person might provide a more open space for the expression of doubts.

Parents Perception of Children's Response

A number of studies reported the parent's perception of how the child responded. A 2003 study reported that the most common reaction of the child, when informed, was neutral or no response (68.3%) with 53.1% of families attributing this to the young age of the child and their lack of understanding, 31.1% believing that the child had never known any different and 12.5% believing that it was because they were always honest with their child.[158] A relatively small number of parents (9.3%) perceived their child's reaction as being in response to knowing how "wanted" they were. In terms of their relationship with their child, 77.8% of birth mothers noted that disclosure had the effect of creating a sense of trust in the child and 90.9% of parents felt that disclosure either had a neutral or positive impact. In a study ten years later,[159] none of the parents reported that their surrogacy born child responded negatively to disclosure. Another study focusing on single mothers,[160] reported only one negative reaction from a child, with an unknown donor. However, this child was initially told at the age of three that his father had gone abroad but been told the truth at age six. His mother described him being upset with her for a long time and grieving the father whom he would never know.[161] The authors of this study noted that the children in this sample were otherwise being raised in open and receptive environments where they are listened to and their questions are answered.[162] They also noted that there were no difficulties associated with the lack of a father as long as parents had been open and honest.[163] Similar findings were found in a study comparing disclosure to children of single mothers and opposite sex parents.[164] Of those children who had been told, only one, born to an opposite sex couple, was perceived by their parent(s) to have had a negative reaction. In fact, most children born to both a single mother (76.5%) and a joint parental unit (88.2%) were perceived to have little interest in their donor.[165]

In a study focused on families where the DI child is seven years old, most parents recorded the child's reaction to disclosure as neutral or positive, with 23% of ED mothers describing how their child spoke openly about their conception to their friends and school.[166] One in particular remembered a school assembly where children were asked what made them special and her daughter had shot her hand

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[158] J. E. Scheib, M. Riordan & S. Rubin, "Choosing Identity-Release Sperm Donors: The Parents' Perspective 13-18 years later", (2003) 18(5) *Human Reproduction* 1115 at 1123.
[159] S. Golombok, L. Blake, P. Casey, G. Roman & V. Jadva, "Children Born Through Reproductive Donation: A Longitudinal Study of Psychological Adjustment" (2013) 54(6) *Journal of Child Psychology* 653. at 656.
[160] *Ibid.*
[161] *Ibid.*
[162] *Ibid* at 358.
[163] *Ibid* at 360.
[164] T. Freeman, S. Zadeh, V. Smith & S. Golombok, "Disclosure of Sperm Donation: a Comparison Between Solo Mother and Two-Parent Families with Identifiable Donors" (2016) 33 *Reproductive BioMedicine Online* 592.
[165] *Ibid* at 596.
[166] L. Blake, P. Casey, J. Readings, V. Jadva & S. Golombok, "Daddy Ran Out of Tadpoles: How Parents Tell Their Children that they are Donor Conceived, and What their 7 Year-Olds Understand" (2010) 25(10) *Human Reproduction* 2527 at 2531.

up and said, "*I'm special because I come from my Mummy's sister's egg*".[167] None of the children reacted negatively. In a study published in 2017,[168] children who had experienced disclosure often reacted with curiosity about the entire process, one mother had described the donor as a "*very kind man*" which led her son to ask, "*if he was so kind and nice, why cannot you just marry him?*".[169] Another mother recounted her son being more interested in what happened to the doctor that provided the treatment. Those who had been told, appeared very open in terms of disclosing themselves. One mother described an instance on the underground tube, when a man who was intoxicated said to her daughter not to lose touch with her father. The child simply responded by saying that her dad was a donor.

Effect of Non-Disclosure on Family Life

One of the consistent reasons for disclosure is the fear that another may tell the child about their conception. In addition, it has been hypothesised that children can sense when something is being kept from them.[170] In order to assess whether non-disclosure affects the quality of parenting, one study, published in 1995, compared DI parents who had not told their children but had told others and those who had not told others.[171] Although the majority of DI parents had decided not to disclose to their child, 50% had told a family member and 30% of DI parents had disclosed to their friends. However, despite this, no significant differences appeared in terms of parental anxiety, stress, depression, or marital satisfaction. There were also no differences in children's behavioural and emotional problems.[172] Similarly, no significant differences were found for parent-child dysfunctional interaction or parental difficulty with the child as assessed by the Parenting Stress Index. Thus, it was shown in that study that parents were not affected in the ways considered by earlier researchers. However, these children were still quite young; children of the same age were assessed two years later for emotional and behavioural adjustment.[173] When DI parents in this study were compared between those who disclosed or intended to disclose, and those who chose not to disclose, no evidence was shown of an association between secrecy and the emotional behavioural adjustment of the child.

A further study found no group differences for expressed warmth, parent-child interaction or emotional overinvolvement, the level of supervision or degree of

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[167] *Ibid* at 2531.
[168] S. Zadeh, T. Freeman & S. Golombok, "What Does Donor Mean to a Four-Year-Old?: Initial Insights into Young Children's Perspectives in Solo Mother Families" (2017) 31 *Children and Society* 194.
[169] *Ibid* at 200.
[170] P. Papp, "The Worm in the Bud: Secrets Between Parents and Children" in E. Imber-Black, *Secrets in Families and Family Therapy* (1st Ed., New York, Norton, 1993).
[171] R. Cook, S. Golombok, A. Bish & C. Murray, "Disclosure of Donor Insemination: Parental Attitudes" (1995) 65(4) *American Journal of Orthopsychiatry* 549.
[172] *Ibid* at 556.
[173] A. Brewaeys, S. Golombok, N. Naaktgeboren, J. K. de Bruyn & E. V.van Hall, "Donor Insemination: Dutch Parents' Opinions about Confidentiality and Donor Anonymity and the Emotional Adjustment of their Children" (1997) 12(7) *Human Reproduction* 1591.

criticism[174]. However, a significant difference was found, whereby non-disclosing mothers described their child as being more of a strain than disclosing mothers.[175] In addition, non-disclosing mothers, but not fathers, were found to argue more frequently with their child, with the arguments being classed as more severe.[176] Non-disclosing mothers also reported higher levels of conduct problems in their children; however, this was not observed by the child's father or teachers. Non-disclosing fathers did adopt a stricter supervisory role than disclosing fathers. There was however no disparity among the groups for emotional symptoms or peer problems, mother-child relationship, or father-child relationship.[177] This study reflects a more positive outcome where parents disclose to their children; however, it does note that an alternative explanation may be that mothers who are inclined towards openness may naturally adopt a more relaxed approach to parenting and may be less likely to perceive their children's behaviour as troublesome.[178] An important aspect of this study to note, is that the higher ratings obtained by non-disclosing families did not represent dysfunctional relationships but instead reflected particularly positive scores in the disclosing group.[179] These findings have been largely confirmed in subsequent studies.[180]

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[174] E. Lycett, K. Daniels, R. Curson, M.B., B. Chir & S. Golombok, "Offspring Created as a Result of Donor Insemination: A Study of Family Relationships, Child Adjustment and Disclosure" (2004) 82(1) *Fertility and Sterility* 172. This study assessed 46 families using questionnaires for the parents and a puppet interview and standardised test of cognitive abilities for the children (40 participants, aged 4-8). The puppet interview assesses children's perceptions of interpersonal processes within family and self-perceptions. Two identical puppets make opposing statements about themselves, and the child is then invited to describe themselves in response to the interviewer's questions "how about you?". This interview measures both verbal and non-verbal responses. The testing involves two performance tests: block design and geometric design; and three verbal tests: comprehension, vocabulary, and information.

[175] *Ibid* at 175.

[176] *Ibid* at 175-176.

[177] In terms of the children's assessments, three were found to have a psychological disorder. Two of these children were from non-disclosing families.

[178] *Ibid* at 178.

[179] *Ibid* at 179.

[180] See: S. Golombok, J. Readings, L. Blake, P. Casey, L. Mellish, A. Marks & V. Jadva, "Children Conceived by Gamete Donation: Psychological Adjustment and Mother-Child Relationships at Age 7" (2011) 25(2) *Journal of Family Psychology* 230. The child psychologist rated 3/122 children as having a definite or marked psychiatric disorder, all of whom were donor conceived. Of these three, two had been informed about their conception and one had not. Aside from this finding, no differences were found between family types in terms of maternal negativity; however, fewer positive interactions were shown by the donor conceived families in terms of mother-child mutuality and maternal positivity. The non-disclosing families obtained significantly lower scores than NC families for these factors whereas disclosing families were only marginally lower than NC families in terms of mother-child mutuality and did not differ from NC families in terms of maternal positivity. See also, S. Golombok, L. Blake, P. Casey, G. Roman & V. Jadva, "Children Born Through Reproductive Donation: A Longitudinal Study of Psychological Adjustment" (2013) 54(6) *Journal of Child Psychology* 653. The findings of the study showed that a higher level of distress was shown by mothers who had not told their child about their biological origins, indicating that non-disclosure is associated with a mother's negative mental state. In addition, children who were aware of their biological origins showed higher levels of adjustment problems than those who had not been disclosed to. However, this was attributed to their mother's emotional problems which left such children feeling less secure.

A 2012 study examined the consequences of secrecy as opposed to openness in opposite sex families with adolescents (aged 10-14 years) conceived through DI.[181] One third of families had disclosed their child's donor conception whereas two thirds had not.[182] In terms of parent-child interaction, there were lower levels of conflict between mothers and sons than between mother and daughters, but also lower levels of warmth with their fathers overall, found in families that had disclosed.[183] Taken together with the finding in phase 1 of this study, the authors proposed that the absence of a genetic relatedness between fathers and children in DI families may become important as children grow older, especially where there has been disclosure.[184] It should also be noted that children in this phase were going through their adolescence, a time which has been set to include parental difficulties and tensions that are transient in nature[185] and that increased distance in parent-child forms part of a healthy transition towards adulthood.[186] This study is clear however, in stating that the identification of difference is not synonymous with the identification of dysfunction.[187]

The most recent study, which is the seventh phase in the longitudinal study established by Golombok, sought to establish the psychological well-being in children, now aged 20 and emerging into adulthood.[188] Of the 65 sets of parents, 37 disclosed to their child before the age of 7, 11 disclosed after 7, and 17 had not yet disclosed (26%), 15 of whom were DI parents.[189] All of the surrogacy parents had disclosed before 7 years of age, as did 8 of the ED and DI families. This study found that mothers who had disclosed by age 7 showed significantly higher levels of wellbeing compared to those who had not disclosed by age 7, including reduced anxiety and depression, lower levels of negative parents but no difference in couple relationship quality.[190] It concluded that the young adults who were told after age 7 indicated more negative outcomes for parental acceptance and were found to be more likely to have a developmental disorder. This study, therefore, re-enforces the earlier studies that not only is disclosure before the age of 7 preferable for the child themselves but also for the familial unit.

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[181] T. Freeman & S. Golombok, "Donor Insemination: A Follow- Up Study of Disclosure Decisions, Family Relationships and Child Adjustment at Adolescence" (2012) 25 *Reproduction Biomedicine Online* 193.
[182] *Ibid* at 197.
[183] *Ibid* at 198; 200. In terms of psychological adjustment, only two children were identified as having a definite or marked disorder, both of whom had not been disclosed to. However, no significant difference was found regarding the psychological welling of children based on disclosure status, and families in this group were generally functioning well, regardless of disclosure.
[184] *Ibid* at 201.
[185] *Ibid* at 201.
[186] *Ibid* at 202.
[187] *Ibid* at 201.
[188] S. Golombok, C. Jones, P. Hall, S. Foley, S. Imrie & V. Jadva, "A Longitudinal Study of Families Formed Through Third-Party Assisted Reproduction: Mother–Child Relationships and Child Adjustment From Infancy to Adulthood" (2023) 59(6) *Developmental Psychology* 1059. Adult children who not disclosed to were not included.
[189] *Ibid,* at page 1066.
[190] *Ibid,* at page 1067.

The Child's Perspective

The child's perspective is dependent on their parents being open in their disclosure and so unfortunately, the number of children eligible to be questioned about their thoughts and feelings regarding their conception is generally quite limited.

Effect of Disclosure on Identity

Attachment theory dictates that early relationships with parents underpin the development of internalised mental representations and thereby influence a child's personality development, perceptions and trajectory.[191] Children with secure attachment styles conceptualise their parents as a secure base and this internal working model protects children as they negotiate developmental challenges.[192] While considering that disclosure and searching for one's donor could be perceived as a threat to both children and their parents, a study published in 2016 hypothesised that children with more secure attachment styles would feel more comfortable with integrating their donor conception into their identity.[193] 19 adolescents, ranging from 12-19 years of age were interviewed with 63% born to single mothers and 37% born to lesbian couples.[194] The authors of this study designed the Donor Conception Identity Questionnaire in order to make their assessments.[195] All children had been disclosed to before the age of seven, none were in contact with their donor, yet each had located at least one donor-sibling. These children were found to have higher levels of curiosity about, and acceptance of their donor conception and were rated as being higher on the secure-autonomous scale.[196] Curiosity was considered to be an important trait for adolescents who were investigating which aspects of self would be integrated into a subjective sense of identity.[197] Intra-family communication was also said to be critical as it has been found to facilitate the process of building a coherent sense of

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[191] J. Bowlby, *Attachment* Vol.1 (1969/1982) (New York, Basic Books); M. Main, N. Kaplan, J Cassidy, "Security in Infancy, Childhood and Adulthood: a Move to the Level of Representation. Growing Points of Attachment Theory and Research" (1985) 50 *Society for Research in Child Development* 167, as cited in J. Slutsky, V. Jadva, T. Freeman, S. Persaud, M. Steele, H. Steele, W. Kramer & S. Golombok, "Integrating Donor Conception into identity Development: Adolescents in Fatherless Families" (2016) 106(1) *Mental Health, Sexuality and Ethics* 202 at 203.

[192] M. S. DeWolff & M. H. van Ijzendoorn, "Sensitivity and Attachment: a Meta-Analysis on Parental Antecedents of Infant Attachment" (1997) 68 *Child Development* 571. A secure attachment style is also associated with high, coherence, high adaptive coping, the capacity for needing others and exploring important relationships, flexibility to change views on others and events, an ease with imperfections of self and others and an acceptance of the failings of parents and family members, J. Slutsky, V. Jadva, T. Freeman, S. Persaud, M. Steele, H. Steele, W. Kramer & S. Golombok, "Integrating Donor Conception into identity Development: Adolescents in Fatherless Families" (2016) 106(1) *Mental Health, Sexuality and Ethics* 202 at 204.

[193] J. Slutsky, V. Jadva, T. Freeman, S. Persaud, M. Steele, H. Steele, W. Kramer & S. Golombok, "Integrating Donor Conception into identity Development: Adolescents in Fatherless Families" (2016) 106(1) *Mental Health, Sexuality and Ethics* 202 at 203.

[194] *Ibid* at 204.

[195] The adolescents were asked to rate their feelings about being donor conceived, their willingness to discuss donor conception with others, the frequency and quality of their thoughts about the donor and donor conception, the level of importance they ascribed to being donor conceived and the extent to which they had considered their donor and the extent to which they had considered their donor and donor conception in the context of "who they are", *ibid* at 204.

[196] *Ibid* at 205.

[197] *Ibid* at 206.

identity, albeit in an adoption setting.[198] A higher level of avoidance of, and negative feelings about donor conception among adolescents was found in those children with an insecure-disorganised attachment pattern.[199] Overall, this study found that, from an attachment perspective, the optimal emotional context arises from openness that is experienced in a balanced, supportive and coherent manner.[200]

Feeling upon Disclosure

While some studies provide some particularly negative insights for children told later in life, more recent studies evidence more positive outcomes for children who were informed at an early age. One study reported that the most common reaction upon disclosure was curiosity (72%); however the reactions of individuals were found to be associated with age of disclosure.[201] Those told in adulthood were more likely to be upset, angry, confused, shocked, relieved, and numb than those told in childhood.[202] There was a small minority of respondents who wished they had not found out (3.5%), and those who stated that they were indifferent.[203] In response to how they felt at the time of the study, curiosity remained the primary feeling (69%), with this being most prevalent in those in adulthood (75%). There was no significant difference between children (46%) and adults (44%) in terms of acceptance.[204] However, adults remained more likely to feel upset, isolated, and angry than children.[205] In terms of their parents, 40% of offspring said they felt no differently towards their mother and 30% even said they appreciated her honesty. Those told during childhood were less likely to report feeling angry about being lied to or feeling a sense of betrayal.[206]

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[198] L. VonKorff & H. D. Grotevant. "Contact in Adoption and Adoptive Identity Formation: the Mediating Role of Family Conversation (2011) 25 *Journal of Family Psychology* 393., cited *ibid* at 206.
[199] This pattern is categorised by low narrative coherence, high derogation of self, contradictory strategies, dissociated states of mind and references to frightening experiences than remain unresolved, *ibid* at 204. This was similarly found in a study that followed, S. Zadeh, C. M. Jones, T. Basi & S. Golombok, "Children's Thoughts and Feelings about their Donor and Security of Attachment to their Solo Mothers in Middle Childhood" (2017) 32(4) *Human Reproduction* 868 at 873.
[200] *Ibid* at 207.
[201] V. Jadva, T. Freeman, W. Kramer & S. Golombok, "The Experiences of Adolescents and Adults Conceived by Sperm Donation: Comparisons by Age of Disclosure and Family Type" (2009) 24(8) *Human Reproduction* 1909 at 1913. These participants were recruited from the Donor Sibling Registry which encourages contact and thus may not be representative of all donor-conceived offspring and may oversubscribe to a contact-positive outlook. Of the 165 donor offspring participants, 30% had found out about their conception before the age of three and 19% had found out after the age of 18, with one finding out at the age of 50. Of the children who had been informed of their conception, 4% were informed by someone who was not their parents; one of whom had overheard her parents conversation, and another discovered the truth in her genetics class at school. This relatively low number is interesting given that fear of disclosure by others was reported as a consistent reason in favour of disclosure.
[202] Breakdown: upset (38%), angry (44%) confused (69%), shocked (75%), relieved (38%) and numb (38%).
[203] Breakdown: wished they had not found out (4/114) and those who were indifferent (13/114).
[204] V. Jadva, T. Freeman, W. Kramer & S. Golombok, "The Experiences of Adolescents and Adults Conceived by Sperm Donation: Comparisons by Age of Disclosure and Family Type" (2009) 24(8) *Human Reproduction* 1909 at 1914.
[205] Breakdown: upset (22%), isolated (16%) and angry (28%).
[206] *Ibid* at 1915.

However, those told in adulthood were more likely to feel sympathetic towards their mother. This was echoed by children born to opposite sex couples who most commonly felt sympathetic towards their father, with 21% saying that disclosure made them love their parents more, compared to the 15% born to mothers only. While 34% felt angry at being lied to by their mother, only one person felt this towards their father. Following on from the earlier reasons not to disclose as a protection of the father and his infertility, a repeated aspect of disclosure in this study was that it occurred for many upon parental separation or the death of the father.[207] While mothers in these studies often provide protectionist arguments, it appears that this is tied to the trust or a debt they feel towards their partner, that extinguishes upon separation or death. However, unfortunately, there was no results reported of how the children felt specifically in these situations where either, the disclosure grew from the abandonment of loyalty or where the child had no opportunity to then question their father.

There also appeared to be a slight divergence in terminology for the donor, with those from opposite sex couples (14%) more likely to call him "father", "donor father, or "biological father" than those in lesbian couple families (0%). The two most common labels attributed were either "donor" or nothing.[208] Very few called their donor "dad".[209] Single mother families were assessed in a further study, where children, aged 4-9, were told that the researchers were conducting a study of family life, their social experiences, and their feelings about growing up without a father.[210] No reference was made by the researchers to the child's donor conception. When asked about their familial make-up, only 4% of children mentioned their donor and 2% mentioned their donor siblings.[211] The children were then asked if, and how, they would like to change their family structure and only one child said they wanted their donor to be involved in his family life.[212]

Another study, published in 2014, examined the perspectives of children whose parents had disclosed that they had been born using sperm donation and egg donation.[213] In terms of how they felt about their conception, ten responded either positively or neutral and four had more mixed or negative feelings.[214] These responses ranged from one child saying that they had cooler things on their mind to one feeling a bit strange. One ED child stated that they were just happy they had

[207] *Ibid* at 1915-1916.
[208] V. Jadva, T. Freeman, W. Kramer & S. Golombok, "The Experiences of Adolescents and Adults Conceived by Sperm Donation: Comparisons by Age of Disclosure and Family Type" (2009) 24(8) *Human Reproduction* 1909 at 1915.
[209] Two born to opposite sex couples; one born to a single mother family, and one born to a lesbian couple family. Although it should be noted that the offspring themselves were not asked what terminology they used and such terminology did not dictate the nature of the relationship sought with the donor, *ibid* at 1917.
[210] S. Zadeh, T. Freeman & S. Golombok, "What Does Donor Mean to a Four-Year-Old?: Initial Insights into Young Children's Perspectives in Solo Mother Families" (2017) 31 *Children and Society* 194.
[211] *Ibid* at 196.
[212] *Ibid* at 197.
[213] L. Blake, P. Casey, V. Jadva & S. Golombok, "I was Quite Amazed: Donor Conception and Parent-Child Relationships from the Child's Perspective" (2014) 28 *Children and Society* 425.
[214] Breakdown: positively neutral (4 DI; 6 ED) and mixed or negative feelings (1 DI; 3 ED)

their mum and dad. When asked how they felt when they were first informed about their conception, the children were most likely to have felt shocked or amazed, neutral, or had mixed feelings.[215] With regard to how they felt about their donor, children reported feeling either grateful, or neutral.[216] Most expressed an interest in meeting their donor,[217] with five children describing the donor as being kind, nice or generous.[218] However, the majority of children stated that they had not spoken to other people about the nature of their conception; only four had discussed with others.[219] For those who had not, they said they were too busy or that they did not want anyone to know. However, on the other side of the scale, one child said that they showed off their conception to others at school, showing the spectrum of reactions that can arise based on the personality of the individual child.

A subsequent study published in 2017 interviewed 19 children aged 7-13, from single mother families who had all been informed about their donor conception.[220] The children had either been informed before the age of three (85%), four (5%), eight (5%) or twelve (5%).[221] Most (74%) were conceived using an anonymous donor. The most common reactions were curiosity (15%), positivity (11%) or neutrality (11%). No children reported feeling negatively, although one child said that they felt "different". More than half of the children (52%) said that they did not think about the donor with a majority (84%) offering either a positive or neutral description of the donor, whereby they felt either positively or neutrally about him (90%).[222] Among these descriptions were a kind, caring, nice, loving person who one nine year old girl described as having helped her to be alive. However, there were a few minority negative descriptions, and feelings about the donor. One eight year old girl described her donor as a weird man, while a 12 year old girl described him as probably not trustworthy.[223]

More recently, a group of 44 adolescent children, born to opposite sex couples, were interviewed about their disclosure experience in a study published in 2018.[224] The vast majority of the children felt indifferent about their conception (73%) with the others feeling either positive (16%) or ambivalent (11%).[225] Most of those who felt positively described the process as cool, special, or lucky. Those who felt indifferent

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[215] *Ibid* at 433. Breakdown: shocked or amazed (1 DI; 3 E), neutral (1 DI; 2 ED), mixed feelings (2 DI; 1 ED).
[216] Breakdown: grateful (2 DI; 2 ED), or neutral (2 DI).
[217] *Ibid* at 435
[218] *Ibid* at 433. Breakdown: 1 DI; 4 ED.
[219] *Ibid* at 433.
[220] S. Zadeh, C. M. Jones, T. Basi & S. Golombok, "Children's Thoughts and Feelings about their Donor and Security of Attachment to their Solo Mothers in Middle Childhood" (2017) 32(4) *Human Reproduction* 868.
[221] *Ibid* at 870. Most children could remember being told (63%) or reported that they had always known (16%) about their donor conception.
[222] *Ibid* at 871.
[223] Neither of these participants had met their donor and so these views were purely based on the nature of their involvement in their conception.
[224] A. Zadeh, E. C. Ilioi, V. Jadva & S. Golombok, "The Perspectives of Adolescents Conceived Using Surrogacy, Egg or Sperm Donation" (2018) 33(6) *Human Reproduction* 1099.
[225] *Ibid* at 1101.

reported that they did not mind or care as it did not affect their daily life and did not change their relationship with either parent. However, some children born through surrogacy did note that it was particularly difficult to explain to peers, with one participant recalling being called "adopted" or "fostered" as a child.[226] While most adolescents had no contact with their surrogate or donor, most children were interested in them as people (57%). While some spoke of wishing to assess any commonalities, others spoke of wanting to know their "*real parent*".[227] In addition, many children also wanted to know what their biological parent's experience and feelings were about their engagement, such as "*how did it feel*" and "*are you happy you did it*?".[228] In terms of how they viewed their surrogate/donor, many described them as a family friend, aunt or godparent but they did not view the relationship as one between mother and child.[229] Only one child (who had a genetic link with the surrogate) reported a negative feeling about the surrogate.[230] Overall however, none of the adolescents in this study were distressed about the nature of their conception and most had been informed of their conception before the age of seven.

Understanding of Disclosure

Understanding disclosure has been explored in terms of age as well as gauging individual assessments of the extent and nature of the disclosure by the parents. A study published in 2010 interviewed children at the age of seven to explore their level of understanding.[231] Of the six DI children who were interviewed, only two demonstrated that they had some understanding of their donor conception or were able to repeat parts of the story that their parents had told them.[232] Two children spoke about "seeds" and showed a rudimentary understanding of having a genetic link: "*we think that we are allergic to nuts because a man was allergic to nuts*".[233] One child spoke about her mother buying her from another woman and described the big needle that contained her: "*they got a big needle and put it in. And that was me! I was in the needle! I've been in a needle*". As before, three DI children and one ED child described the donor as being a nice or kind man/woman.[234]

These children were subsequently interviewed at the age of ten.[235] When asked about how they were conceived, the children mentioned scientific terms such as eggs, sperm and particles or story-like terms such as the seed, special man and being

[226] *Ibid* at 1101.
[227] *Ibid* at 1102.
[228] *Ibid* at 1103.
[229] *Ibid* at 1103.
[230] *Ibid* at 1102.
[231] L. Blake, P. Casey, J. Readings, V. Jadva & S. Golombok, "Daddy Ran Out of Tadpoles: How Parents Tell Their Children that they are Donor Conceived, and What their 7 Year-Olds Understand" (2010) 25(10) *Human Reproduction* 2527.
[232] *Ibid* at 2531.
[233] *Ibid* at 2532.
[234] *Ibid* at 2532.
[235] L. Blake, P. Casey, V. Jadva & S. Golombok, "I was Quite Amazed: Donor Conception and Parent-Child Relationships from the Child's Perspective" (2014) 28 *Children and Society* 425.

put into a freezer.[236] The study reported that two thirds of DI children and 60% of ED children demonstrated an understanding of their conception. The authors of this study reflected that children at the age of ten were able to provide the most coherent responses about their conception and were able to provide longer and more detailed responses than when they were seven.[237] It was also noted that this later development in understanding could be attributed to the knowledge of reproduction and biological inheritance that is required, as separate from sexual intercourse.[238] However, when a study was conducted on ten year old children who were born through surrogacy only, the majority showed at least some knowledge of the nature of their conception, yet only 9% showed a clear understanding.[239] One spoke of their mother's womb being "*a bit broken*". In another study, which looked at children's understanding of surrogacy, where the children were 3-9 years old and were born to two gay fathers,[240] 50% of fathers perceived their children to have some understanding and 20% to have understood everything. However, this was significantly related to the child's age.[241] The older the child was, the more layers of their disclosure story were revealed.[242] In a further study of children aged 7 - 13, 74% of children demonstrated an understanding of at least one aspect of the conception process.[243] While it appears that children are able to reiterate the information provided to them in disclosure at a young age, this does not necessarily reflect an understanding of the impact the disclosure had on them.

Experiences of Adult Donor Offspring

The studies discussed above focused primarily on children who had been disclosed early in life and demonstrate a clear link between early disclosure and more positive outcomes. Children seem more likely to respond with curiosity or indifference. In acknowledging that those children were relatively young when reporting their experiences and may not yet feel the full weight of the information, a study published in 2000 asked adult donor conceived children about their experiences.[244] However, a significant limitation on this study is that participants were recruited from donor conception support networks only and all participants resided in a

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[236] *Ibid* at 432. This reiterates earlier findings from studies such as S. Zadeh, C. M. Jones, T. Basi & S. Golombok, "Children's Thoughts and Feelings about their Donor and Security of Attachment to their Solo Mothers in Middle Childhood" (2017) 32(4) *Human Reproduction* 868 at 871.
[237] *Ibid* at 434.
[238] *Ibid* at 435.
[239] V. Jadva, L. Blake, P. Casey & S. Golombok, "Surrogacy Families 10 Years On: Relationship With the Surrogate, Decisions over Disclosure and Children's Understanding of their Surrogacy Origins" (2012) 27(10) *Human Reproduction* 3008 at 3012.
[240] L. Blake, N. Carone, J. Slutsky & E. Raffanello, "Gay Father Surrogacy Families: Relationships with Surrogates and Egg Donors and Parental Disclosure of Children's Origins" (2016) 106(6) *Fertility and Sterility* 1503.
[241] *Ibid* at 1508.
[242] *Ibid* at 1508.
[243] S. Zadeh, C. M. Jones, T. Basi & S. Golombok, "Children's Thoughts and Feelings about their Donor and Security of Attachment to their Solo Mothers in Middle Childhood" (2017) 32(4) *Human Reproduction* 868 at 871.
[244] A.J. Turner & A. Coyle, "What Does it Mean to be a Donor Offspring? The identity Experiences of Adults Conceived by Donor Insemination and the Implications for Counselling and Therapy" (2000) 15(9) *Human Reproduction* 2041.

country where they had no legal right to identify their donor. 16 participants took part who were, on average, 44.6 years of age. A myriad of views arose in this study. These ranged from being shocked at the news to feeling a sense of calm, due to the liberation felt from finding out the truth. One woman described feeling like a trap door had opened under her feet and how she had to reappraise her entire identity.[245] Another spoke about how she felt that her "*identity was threatened to the very core of her understanding*".[246] One women spoke of her anger, stating that her entire life was based on a lie, and her fury at her mother for dying with the secret. Along with anger came mistrust for some participants, due to the withholding of information and the severity of the secrecy, not only in their mothers, but also in others generally.

However, some did experience positive reactions, but these only appeared to arise from feeling relief that their social father was not related to them. This was particularly true for one woman who deemed her father "*a creep*" and a "*terrible man*" was not related to her.[247] This was also true for a man whose social father disinherited him, upon disclosure.[248] He described himself as a "*walking symbol of his [father's] infertility*" and a "*battle ground for my parents' conflicts*". One man spoke of the "*senseless*" nature of the secrecy, stating that his parents feared his rejection when in fact, he felt rejected by his social father, "*as if there was something wrong with me*", which affected his sense of security within the family. One woman spoke of sensing the secrecy and thinking that it was impossible for her self-esteem not to have been damaged as a result. This feeling that "*something was not right*" was common among participants, with one woman feeling pity for her social father and his inability to act naturally around her at times. In this way, disclosure allowed her to view that difficult relationship in a new way, seeing her father as a victim "*also*".[249] Another woman spoke of how her father's infertility caused her mother to abrogate authority to him in order to re-establish his control and in doing so, "*profoundly influenced the balance of power in the family*".[250]

The right to know their genetic origins was a common theme among all but one participant. One woman described her need to know who she was and how she came to be as a "*primal and unrelenting force*" which was inescapable and undeniable. For others, it was also about medical information, personality traits, and life events, with a desire to find commonality and a closeness. The study also noted that the resorting to fantasy was a recurring theme among participants. For example, one man believed his donor to be Alan Turing, a mathematician responsible for decrypting German codes in World War II. This echoed earlier studies where the same level of fantasy was prevalent; one child had told her school that her father was seven foot tall, another said her father was dead and one child

[245] *Ibid* at 2044.
[246] *Ibid* at 2045.
[247] *Ibid* at 2045.
[248] *Ibid* at 2046.
[249] *Ibid* at 2046.
[250] *Ibid* at 2046.

created a pretend family with a dad, sister, brother, cat, and dog.[251] It was suggested that such fantasy is used as a coping strategy for blocking the threat to their identity by providing a form of temporary escape through wishful thinking or speculation.[252]

Given that the participants had no statutory mechanism to access information about their donor, many spoke about feelings of loss, sadness, being unwanted and incomplete or merely part of an unemotional medical procedure.[253] This was amplified by one participant who managed to contact her donor who refused contact with her. One man spoke of the devolution of authority by the government to the medical profession in releasing donors from their responsibility in relation to their children. Another spoke about the lack of support she received from those around her who perceived her search for her donor as an invasion of privacy or unnecessary, as her father was the man who raised her.[254] This was echoed by another participant who stated that his experience was that people felt uncomfortable speaking about infertility and donor insemination and had no idea about the psychosocial ramifications of these complex issues. However, other donor conceived children reported receiving significant support from others, which gave one woman the confidence and validation to continue her search. While no one person offers a viewpoint applicable to all others, this study provides an explicit demonstration of the harmful and extreme impact of late disclosure on a person's life. It was evident that the negativity experienced by the participants related significantly more to the secrecy and the unexplained manifestations of discomfort in social fathers, than the nature of their conception itself. Those participants who experienced crises of identity did so at an age when their identity was fully formed, rather than at an age when their conception could be interwoven into their identity. Taken together, the studies reviewed provide a clear pathway for disclosure that favours early intervention, honestly at all times and continuous discussion.

Child Participation in the O'Connell Study

As aforementioned, regrettably, this research study only benefitted from participation from one child. The interview with Claire (7 years old, donor conceived) focused mostly on what she knew of her donor. The responses focused mostly on his being a donor and his nationality and could be best be described as indifferent. When asked what she knows about him, and whether she would like to know his name, she said, "*well, I don't really mind. Like if I did, I wouldn't really care. But if I didn't, I don't care either*". Upon being asked how she would describe her family she said, *"I don't have a dad, but I do have a mom, I have a thing called a donor"*. She

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[251] S. Zadeh, T. Freeman & S. Golombok, "What Does Donor Mean to a Four-Year-Old?: Initial Insights into Young Children's Perspectives in Solo Mother Families" (2017) 31 *Children and Society* 194 at 198; 200.

[252] G.M. Breakwell, *Coping with Threatened Identities*, (1986, London)

[253] A.J. Turner & A. Coyle, "What Does it Mean to be a Donor Offspring? The identity Experiences of Adults Conceived by Donor Insemination and the Implications for Counselling and Therapy" (2000) 15(9) *Human Reproduction* 2041 at 20146-2047.

[254] This woman stated: "*I got the impression that 'society' did not feel I have a right to anything more than a medical history. People do not acknowledge a need/right to know traits, history, or even realise that their sense of identity might be tied up with their family history, or family stories, or remembrances about a person*", at 2047.

described a donor as "*somebody who donates cells to a woman to make a baby*". She noted that she had seen a photo of her donor when he was young, but she had forgotten what he looked like. When asked if she would like to find out more about her donor she said, "*I'm not sure because that's when I'm older, I'll decide when I'm older".* When asked how she feels about having a donor, she said *"like, I like not having a dad".* Claire was born to a mother who expressed considered security in her own need to engage with AHR and had described Claire as having always known that she was donor-conceived. Therefore, while only one participant, the views of Claire nonetheless echo the studies referenced above in the fact that she was disclosed to early, which is common for children of single mothers, she refers to her donor as a donor and uses more scientific language in line with the terminology used by her mother and she expresses ambiguity about him. She reports no negative feelings, and it is evidently just one aspect of her personal story.

Identifying Donor Siblings

Many countries place a maximum number on the amount of families that can receive a donation from each donor[255] and many countries provide for a register in order to identify donor siblings.[256] A study published in 2009 sought to examine the experiences of parents locating and meeting donors and donor siblings based on members of the US Donor Sibling Registry (DSR).[257] 791 parents took part in the study, 98% of which were female. Most parents (87%) were seeking their child's donor siblings and only 47% of those were trying to trace their child's donor.[258] In terms of reasons given by parents for seeking out donor siblings, curiosity was the most frequent "main" reason followed by the importance of the child's self-identity. 11% also wanted their child to have a sibling. Lesser chosen reasons were medical reasons (4%), my child asked me to (4%) and wanting their child to know that they had tried (4%). Only 33% of parents searching for their child's donor siblings had told their child that they were doing so, with the significant reason for this being the avoidance of disappointment should they be unsuccessful.

Parents frequently described meeting the donor siblings and their families as exceeding expectations and used phrases like "*special bond", "enriching", "wonderful"* and *"fun"*.[259] 73% of parents were in fact successful in finding donor siblings with 34.45% of children in contact with them and 27% meeting them. Parents framed the relationship between their children and their donor siblings in terms of "*family", "extended family*" and "*friendship*". The majority of parents in contact with donor siblings were in contact frequently (33%). Parents themselves felt very close to the donor siblings, stating that they felt "maternal" about these children who were a part of them, despite the lack of genetic connection. Parents commented that they loved the siblings as if they were their own and saw their child

[255] In the UK, there is a limit of ten families; in the Netherlands, the limit is 25 offspring per donor of a population of 800,000; in America, the limit is 25 live births per population of 850,000.
[256] Such as the Donor-Sibling Registry (DSR) in America and Donorlink in the UK.
[257] T. Freeman, V. Jadva, W. Kramer & S. Golombok, "Gamete Donation: Parents' Experiences of Searching for their Child's Donor Siblings and Donor" (2009) 24(3) *Human Reproduction* 505.
[258] *Ibid* at 507.
[259] *Ibid* at 511.

form closer bonds with their donor siblings than they had with any of their friends. However, some children met with their donor siblings without knowing their genetic significance but were told instead that they were "*friends*".[260] Only one parent described their experience with the donor siblings as negative. Where lesser positive experiences were reported, this was due to differences of opinion between the families in terms of disclosure, parents' sexualities, and the large distances between them.[261] What was evident from the study was that relationships between children and their donor siblings were considered safer, less complex, and perhaps less of a threat to the parents given that they did not offer a competing parental role in the same way as the donors could.

While this study engaged parents, a more recent study, published in 2017, queried the motivation and experiences of 23 adolescents who had contacted and met donor siblings through the DSR.[262] 14 of the participants were from single mother families and nine were from same sex families.[263] All but two participants reported that their parents had integrated their donor conception into their lives in such a way as to allow it to become part of their identity.[264] This led them to understand the nature of the relationship and caused either excitement or neutrality at the prospect of meeting.[265] Most noted feeling neutral but stated that it was when their differences from others were accentuated that they felt the discrepancy. That being said, most felt comfortable telling others (83%); however, only 22% would refer to their donor sibling as a brother or sister.[266]

In terms of motivation to contact donor siblings, curiosity was the most significant theme (83%). Most contacted their donor siblings in order to learn more about their donor (43%) and some described the experience as transformative (26%). Most described meeting their donor sibling as important because it gave them insight into themselves (26%) or provided them with a more nuanced sense of identity (56%),[267] echoing previous studies.[268] For some, this feeling did not require a meeting but

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[260] *Ibid* at 513.

[261] *Ibid* at 512.

[262] S. Persaud, T. Freeman, V. Jadva, J. Slutsky, W. Kramer, M. Steele, H. Steele & S. Golombok, "Adolescents Conceived through Donor Insemination in Mother-Headed Families: A Qualitative Study of Motivations and Experiences of Contacting and Meeting Same-Donor Offspring" (2017) 31 *Children and Society* 13.

[263] All but one child could either not recall being disclosed to, reported having always known, or was told before the age of seven. All but two participants reported that their parents had integrated their donor conception into their lives in such a way as to allow it to become part of their identity.

[264] *Ibid* at 18.

[265] *Ibid* at 18.

[266] *Ibid* at 19.

[267] *Ibid* at 17.

[268] V. Jadva, T. Freeman, W. Kramer & S. Golombok, "Experiences of Offspring Searching for and Contacting Their Donor Siblings and Donor" (2010) 20 *Reproductive Biomedicine Online* 523. This study investigated the experiences of 165 offspring, aged 13-61. Out of this sample, 78% of offspring were searching for their donor siblings whereas 8% were not searching for either donor siblings or their donor. The most common reason for this was that they did not feel the need to, with some stating that they did not have enough information to search. In terms of when the participants were searching for their donor siblings, most said curiosity, to have a better understanding of themselves (64%), to know and understand a missing part of themselves (52%), their desire for a secure sense of

rather, the knowledge was sufficient (17%). Those adolescents who did not already have a sibling were more likely to feel like their donor sibling fulfilled a missing role in their family (13%) and most sought a relationship with their donor-sibling (65%).[269] There was a variance however, even among donor siblings, where 22% found that they developed a close relationship with some but felt relatively distant with others.[270] Others found it difficult to connect with their donor-siblings, with many requiring "*special trips*" to meet them. Overall, this study questions policies where identifying information is only available at the age of 18 given the positive engagement and the repeated finding that such interactions assist adolescents in developing their identity and personality.[271] It did note however, that this growth and need to meet genetically linked siblings is a reaction to a social influence and that an acknowledgement of donor conception origins from an early age appears to be an important factor in normalising the experience.[272]

Donor and Surrogate Siblings within the O'Connell Study

Within the O'Connell Study, there was naturally a considerable difference in knowledge and contact with donor and surrogate siblings where the donor or surrogate was known to the parents prior to their AHR journey:

> *"They're definitely much closer, even though they live really far apart. But there's definitely kind of an extra, you know, connection out there that [the surrogate's] kids are way more fascinated with her, than the local ones because she was born there….they all know that [the surrogate] carried her but that she is our baby, they knew that they were getting a cousin, not a sibling."*
>
> - Anna (Surrogacy)

Anna also described how part of the counselling she and her husband received detailed how they would talk to the surrogate's children so that they knew they were getting a cousin, as opposed to a sibling. However, for Christine and Paul who engaged with a previously unknown surrogate, there was a perception that the surrogate would be the focus of future contact, but that the surrogate siblings would be secondary. Paul described how, in advance of the birth, the surrogate's children knew that their child was not their brother or sister, but more of a "belly buddy" who is going to Ireland when he's born but who they will get to meet. They

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identity (40%), medical reasons (40%) and their desire to form a relationship (43%). More offspring from single mother families sought to find a new family member and older offspring were more likely to want medical information and an understanding of themselves. Of those searching, 33% had found their donor siblings, 95% of these had been in contact with them and 50% of these were in contact at least once a month. In terms of experience, 60% reported meeting their donor siblings as a very positive experience.

[269] S. Persaud, T. Freeman, V. Jadva, J. Slutsky, W. Kramer, M. Steele, H. Steele & S. Golombok, "Adolescents Conceived through Donor Insemination in Mother-Headed Families: A Qualitative Study of Motivations and Experiences of Contacting and Meeting Same-Donor Offspring" (2017) 31 *Children and Society* 13 at 17.

[270] *Ibid* at 18.

[271] *Ibid* at 20.

[272] *Ibid* at 20.

described how the siblings held the baby and have many photos with him but that as time goes by, they believed it would be more of a "distant friendship" than siblings.

> *"But he will know them as her kids."*
>
> - *Christine and Paul (Surrogacy and Egg Donation)*

Two participants who had both availed of US donations described their access to their child's donor siblings. For Aoife, she said there was no formulated mechanism to safeguard against an excessive amount of donor siblings arising in Ireland. She described a system in which the sperm bank itself, rang around the Irish clinics to determine whether her donor had donated to their clinics, on a considerably informal basis of self-regulation. The bank then sent a card of congratulations on the child's birth, and on her first birthday, with an offer for her to join the sibling registry:

> *"I'd always kind of thought, I'll leave that to [my child], it would be her own decision. But then it was just a bit of a whim. So I didn't really think it through that much. But I thought no, leaving it until 18 makes a bigger deal out of it. If she grows up knowing about these siblings, maybe it's better. So I did on a whim said yeah, sure. I'll be on it."*
>
> - Aoife (DAHR)

On foot of this, Aoife was provided with the identifying details of four donor siblings, all resident in America. There was a varying level of contact, mostly on social media, although not consistent or substantive. Another participant who had originally chosen an anonymous donor, was contacted and informed that the donor was subsequently open for contact. Through their egg donor, they were provided with identifying information in respect of three "doublings" based in France. Sean explained that they have not had any telephone contact but have exchanged emails and photographs with the family, and that neither family had made any decisions in relation to future communication, stating: "*we're just maintaining a kind of, "getting to know you" scenario."*

Conclusion

This Chapter sought to identify any key themes that have arisen from the research studies undertaken, and indeed, in the O'Connell study which has specific regard to Irish parents. The research studies showed variations among the age of the children involved, the family formation, the cultural background, and the dynamics of the individual families. However, a key consistent theme was the beneficial impact to both children and the family more broadly of open dialogue from an early age, both as to their use of AHR procedures, the nature of the child's conception and donor or surrogate information. The studies demonstrated that children should be disclosed to by the age of seven in order to encapsulate the disclosure in their identity, self-development, and narrative, albeit not necessarily their full understanding. Children who were disclosed to by this age, generally expressed ambivalence, or curiosity about their donor/surrogate, and had healthier relationships with, and a secure attachment to, their parents. Higher rates of disclosure were also commonly found

among surrogacy families, lesbian mothers, and single women, with DI opposite sex parents found to have the lowest disclosure rates comparatively. This would seemingly and naturally follow on from discussions in Part 1 whereby heteronormative systems of parentage and birth registration facilitate that continued concealment above and beyond other family formations. Therefore, such families constitute a particular target for instilling the benefits of disclosure. More broadly, it was evident that the terminology used by the parent will often filter down to the child and so early informational sessions and supports are undoubtedly useful in framing these conversations. However, that being said, no issue was raised in terms of the child's narrative, either from a scientific perspective or the more "kind man/woman" descriptions. Within the O'Connell study, it was evident that Irish parents in this more modern era, where policy and legislative discussions on identity are taking place in the public domain, are willing and eager to vindicate their child's right to identity through openness and disclosure. They appear to instinctively know that these aspects of the child's identity should be woven in from an early age. The reasons not to disclose set out in the earlier studies were not borne out in the O'Connell Study. However, notably, the O'Connell Study did not involve any opposite sex couples with donor conceived children outside of surrogacy; therefore, this remains an area requiring further exploration, in the Irish context.

Chapter 5: The Child's Right to Identity: A Historical, International and Irish Perspective

Introduction

The term "identity" derives from the Latin term "*identitas*" which is defined as "*the state of having unique identifying characteristics held by no other person or thing*".[1] It has been argued that identity is made up of two distinct parts: the dynamic and the static. Dynamic refers to characteristics that are in constant flux such as intellectual, moral, cultural, religious, political, and professional. Static refers to those attributes that are immutable and perpetual, that make one visible to the outside world, such as image, physical features, name, birth information, sex, parenthood, genetic heritage and nationality.[2] It would be easily forgivable for issue to be taken with framing a child's identity as purely a genetic or epigenetic component of their personhood, as this thesis does, when there is an endless list of aspects of life that contribute to a person in terms of how they view themselves, conduct themselves and engage in relationships with others.

The purpose of this chapter is not to take a reductionist or biologically determinist approach to identity but rather, to explore how domestic legislation, international conventions, and the judiciary have explored this concept. Given that judges are generally not responsible for answering existentialist questions that are influenced by psychology, sociology and philosophy, this examination focuses on the legal parameters of identity in terms of rights-based thinking. In this regard, it is noted that the right to identity is also intertwined with ancillary rights such as the right to privacy, health, bodily integrity, and principles such as dignity and the free development of one's personality.[3] However, as will be evidenced below, the right to identity has been refocused as a right to identify others of special importance in order to identify oneself.

The following Chapter will therefore explore the right to identity under the Convention on the Rights of the Child (CRC), the European Convention on Human Rights (ECHR) and the Irish Constitution. It shall then examine the legislative framework set out in the 2015 Act and the proposals contained within the 2022 Bill against any requirements or parameters set down by the CRC, ECHR, and the Constitution. Finally, this Chapter shall consider the constitutionality of an automatic disclosure mechanism without the explicit authority of the parents, or indeed, against their wishes.

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[1] M Giroux & M DeLorenzi, "Putting the Child First: A Necessary Step in the Recognition of the Right to Identity" (2011) 27 *Canadian Journal of Family Law* 53 at 59.
[2] *Ibid* at 60.
[3] *Ibid* at 84.

The Convention on the Rights of the Child

While other international conventions protect the right to identity to varying degrees,[4] the CRC was the first Convention that focused primarily on providing protection to children, in respect of their civil, political, social, economic, and cultural rights and recognised them as rights holders as opposed to objects of welfare. Ireland signed the CRC on the 30th of September 1990 and ratified it 28th of September 1992; however, due to Ireland's dualist legal system under Article 29.6 of the Constitution, individuals are unable to utilise the CRC before the Irish courts. The CRC, while not directly enforceable in Ireland, does, however, have a significant influence in terms of the perception of compliance within the international community.[5] Specific to identity, the CRC explicitly provides protection of the child's identity in both Article 7[6] and 8,[7] as well as a number of relevant ancillary rights.[8] Both of these Articles were broadly accepted by the States Parties at the point of

[4] The most specific Convention in the context of AHR, the Convention on Human Rights and Biomedicine provides in Article 1 that parties to the Convention shall protect the "dignity and identity of all human beings…with regard to the application of biology and medicine"; however, this convention has been neither signed nor ratified by Ireland and thus, has not been incorporated into, or been held to be enforceable in, Irish law. Article 15 of the Universal Declaration of Human Rights narrowly recognises identity through a right to a nationality which protects against arbitrary deprivation. Similarly, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights do not contain an explicit right to identity; however, Articles 24(2) and (3) of the ICCPR provide for the right to a name and nationality. Article 17 of the ICCPR is similar in substance to Article 8 of the ECHR in its protection of private and family life and expands to include protection against unlawful attacks on an individual's honour and reputation. These international conventions, in their general nature, only protect an individual's identity insofar as it relates to the conferring of a feature of identification and sense of belonging on that person in terms of their nationality.

[5] The National Policy Framework which sets out the Government's agenda and priorities in relation to children and young people until 2020 is "rooted in the State's commitments under the United Nations Convention on the Rights of the Child, Department of Children and Youth Affairs, *Better Outcomes, Brighter Futures: National Policy Framework for Children and Young People* 2014-2020 at 12.

[6] Article 7(1) of the CRC states that a child shall be registered immediately after birth and shall have the right to a name, nationality, and the right to know and be cared for by his or her parents "*as far as possible*". Article 7(2) provides that States Parties shall ensure the implementation of this right especially where the child would otherwise be stateless. Article 7 therefore, encompasses the more practical measures that can be undertaken in realising factual and descriptive identifiers of a person.

[7] Article 8(1) provides that States Parties must undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognised by law without unlawful interference. (2) Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection with a view to speedily re-establishing his or her identity. As Stewart notes, "*it is important to know whose law is intended. If national law is meant, then Article 8 does nothing more than obligate a state to respect its own applicable laws*", diminishing the right significantly. G. A. Stewart, "Interpreting the Child's Right to Identity in the UN Convention on the Rights of the Child" (1992) 26(3) FLQ 221. At 224.

[8] These rights are the right to have their best interests be a primary consideration in all actions concerning them (Article 3), the right to development (Article 6), and the right to be heard (Article 12).

inception;[9] however, the scope of these Articles as they apply in the AHR context are not immediately evident from the wording alone. For example, Article 7 refers to the child's right to know their "parents" whereas, Article 8 refers explicitly to identity, with reference to the child's "family relations". Furthermore, early drafting of Articles 7 and 8 demonstrates a reluctance to explicitly refer to biological connection.[10] Therefore it could be argued that the intention behind the application of these Articles to donors and surrogates, who do not otherwise provide a parenting or familial role, was limited. Gaining insight into the functioning of these rights can be difficult in the absence of a designated court that hears cases taken by individuals claiming violations of such rights. As Besson has noted, neither Article 7 nor 8 provides any criteria as to how to balance the child's interests with those of others in case of a conflict.[11] However, the General Comments issued,[12] and the compliance assessments conducted by the Committee on the Rights of the Child (the

[9] When Ireland signed and ratified the CRC, it made no reservations at all in respect of the entire CRC. Interestingly, Luxembourg, in its reservations, noted that it believed that nothing in Article 7 prevented their legal process of anonymous births "*which [are] deemed to be in the interest of the child, as provided by Article 3 of the Convention*". Czechoslovakia also made a declaration in 1991, stating that in cases of irrevocable adoptions and artificial fertilisation, their practice of donor anonymity does not contravene Article 7. Poland originally stipulated in its reservation that the right of an adopted child to know their natural parents may be limited to enable the adoptive parents to keep the child's country of origin a secret. However, this reservation was withdrawn in March 2013. There were no reservations or declarations made in respect of Article 8. United Nations Treaty Collection, Status of Treaties: 11. Convention on the Rights of the Child, New York, 20 November 1989.

[10] The absence of explicit reference to biological links in Article 8 appears to be a choice of the Working Group, whose initial wording in 1985 referred to the restoring of a child's "blood relations". The delegations from the Netherlands, Australia, and Finland during the drafting of the Article observed that the concept of family identity was not known in every State and therefore, wished to include wording such as "as recognised by law" in order to customise its application. The Mexican delegation argued that the biological elements of the identity should be included but this was not accepted and throughout the written record, there was no separation in terms of biological and non-biological parents. The same broad, or at least undefined, scope appears to apply to the right to know and the right to be cared by a person's parents in Article 7. Office of the United Nations High Commissioner for Human Rights, Legislative History of the Convention on the Rights of Child Volume 1, New York, and Geneva 2007, at 384-385 and Report of the Working Group on a Draft Convention on the Rights of the Child, U.N. Doc. E/CN.4/1986 at 72.

[11] S. Besson, "Enforcing the Child's Right to Know her Origins: Contrasting Approaches Under the Convention on the Rights of the Child and the Child and the European Convention on Human Rights" (2007) 21(2) *International Journal of Law, Policy, and the Family* 137 at 149. However, she considers this silence to be capable of positive interpretation when considered against the CRC's aim and general ideology.

[12] Specifically, Committee on the Rights of the Child, "General Comment No. 14 (2013) on the Right of the Child to have his or her Best Interests taken as a Primary Consideration" CRC/C/GC/14 (May 2013), Committee on the Right of the Child, "General Comment No. 7 (2005) on Implementing Child Rights in Early Childhood" CRC/C/GC/7.Rev.1 (September 2006) and Committee on the Rights of the Child, "General Comment No. 20 (2016) on the Implementation of the Rights of the Child during Adolescence" CRC/C/GC/20 (December 2016).

Committee) under the reporting process[13] can provide a better understanding of these rights.

General Comments

In its General Comment on implementing child rights in early childhood, the Committee noted that "*young children should be recognised as active members of families, communities and societies, with their own concerns, interests and points of view. For the exercise of their rights, young children have particular requirements for physical nurturance, emotional care, and sensitive guidance*".[14] Furthermore, "*young children's earliest years are the foundation for their physical and mental health, emotional security, cultural and personal identity, and developing competencies*".[15] The Committee also noted that the growing body of theory and research confirms that "*young children are acutely sensitive to their surroundings and very rapidly acquire understanding of the people, places and routines in their lives, along with awareness of their unique identity*".[16] Furthermore, the General Comment stated that relationships with parents and other primary caregivers allow children to "*construct a personal identity and acquire culturally valued skills, knowledge and behaviours*".[17] The relevance of these points arises most prominently within considerations of when and how a child should have their conception status disclosed to them. Finally, the Committee argues that the "*more a child knows and understands, the more his or her parents will have to transform direction and guidance into reminders and gradually to an exchange on an equal footing*".[18] These passages clearly indicate that a child, even from a young age, is to be considered an active participant in their own life and formulation of their identity. Parents and other adults should be vehicles for this progression, not gatekeepers.

The Complaint Procedure under the CRC: A Potential for Increased Enforcement?

Since 2014, the Committee have introduced a complaints system which may provide valuable practical exploration of these rights.[19] This mechanism provides for complaints to be made to the Committee on the Rights of the Child through three

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[13] Under Article 44 of the CRC, Ireland is obliged to submit reports of its progress in implementing the rights under the CRC to the Committee on the Rights of the Child every five years.[13] Despite there being no enforcement mechanism implicit in the Committee's responses to these reports, they do provide a roadmap for future reforms and can also be a source of international embarrassment if certain standards are not met.

[14] Committee on the Right of the Child, "General Comment No. 7 (2005) on implementing child rights in early childhood" CRC/C/GC/7.Rev.1 (September 2006) at 3.

[15] *Ibid.*

[16] *Ibid* at 7.

[17] *Ibid.*

[18] *Ibid.*

[19] Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, (Resolution A/RES/66/138) Adopted 19 December 2011, Entered into force 14 April 2014. Ratified by Ireland on the 24th of September 2014.

different avenues: the individual communication procedure,[20] the inter-state communications procedure and the inquiry procedure.[21] To date, there have been a number of complaints in relation to Article 7 and Article 8 of the CRC. However, none have been made against Ireland and in fact, no complaints have been made against Ireland.[22] Only one complaint relates to the right to identity in the context of AHR. This involved the refusal of the Costa Rican Civil Registry to register the name of the egg donor on the birth certificate of twin boys, who had been born to a surrogate in California.[23] In California, the genetic father was declared to be the sole legal parent and he was granted exclusive parental authority with the surrogate's consent. The donor's forename was left blank on the Californian birth certificate, but her surname was registered as the mother's surname. The donor sought to remain anonymous until the twins were 18 but agreed to disclose her identity at that time if they so wished. When the twins' father sought to register the twins' birth in Costa Rica, the twins were assigned their father's two surnames and the registrar refused to register the donor's surname, despite the father's requests, as it was asserted that the maternal parentage was indeterminate. The Constitutional Chamber of the Supreme Court of Costa Rica held that the laws of the United States were not binding on Costa Rica and that there had been no infringement of fundamental rights given that the father was not denied the right to register his children as Costa Ricans. The twins' father claimed that there had been a violation of his sons' right to preserve their identity under Article 8 of the CRC.

This complaint is the first of its kind whereby the genetic parent actively sought the realisation of the child's right to identity through the registration of the donor's identity, as opposed to her exclusion. However, it should be noted that in this case, there was no second parent competing for such registration. In determining the admissibility of the complaint, the Committee noted that Article 7 only requires that States Parties ensure the implementation of the right to a name in accordance with their national law. It did not reference Article 8. It also noted that the "*interpretation or application of national legislation is primarily the function of the national authorities unless such interpretation or application is clearly arbitrary or constitutes a denial of justice".*[24] In addition, the Committee, in finding that the complaint was

[20] The individual communication can be made by the individual or, by another who can justify acting on the individual's behalf without their consent, proposing that a violation has been perpetrated by the State. These communications, made under Article 5 of the OP3CRC, may be based on suspected violations of the CRC or either of the two other optional protocols: the Optional Protocol to the Convention on the sale of children, child prostitution and child pornography and the Optional Protocol to the Convention on the involvement of children in armed conflict. The Committee has the power to deem a complaint inadmissible if the complaint is anonymous, not in writing, constitutes an abuse of, or is incompatible with, the complaints system, has already been examined or if all domestic remedies have not been exhausted. The complaint must be brought within one year of the exhaustion of domestic remedies. It will also be deemed inadmissible if the communication is manifestly ill-founded or insufficiently substantiated or if the facts that gave rise to the complaint arose before OP3CRC came into effect (Article 7).

[21] The inquiry procedure allows for a Committee investigation upon receipt of reliable information indicating grave or systematic violations by a State party.

[22] See: https://www.ohchr.org/Documents/HRBodies/CRC/TablePendingCases.pdf

[23] J.A.B.S., CRC/C/74/D/5/2016.

[24] *Ibid* at paragraph 4.3.

manifestly ill-founded and inadmissible, remarked that the author had not demonstrated that the nature of the registration constituted a barrier to the twins' ability to have full knowledge of their genetic origins. This shows the relevance of the proactive stance of the father in exercising his sons' identity. Even in the absence of such registration, he himself could act as a source of information and the donor had agreed to have her identity disclosed once the twins reached majority.

Reporting to the Committee on the Rights of the Child – Ireland's Compliance with the CRC

In terms of the reporting process, regrettably, the issue of identity as it relates to AHR has not featured prominently in either the early Committee or Irish reports.[25] However, in its third and fourth Irish reports, the Committee noted that there had been "*insufficient attention to the rights and interests of children born as a result of assisted reproduction technologies, in particular with the involvement of surrogate mothers*".[26] The Committee recommended that children born through AHR technologies should have their best interests held as a primary consideration and should have access to information about their origins; and in doing so, the State should consider providing adequate counselling and support to surrogates and prospective parents. Among the 155 requests[27] in the Committee's List of Issues to Ireland, published in November 2020, was that Ireland describe the measures undertaken by the State to ensure that children born through AHR, in particular surrogacy and DAHR, have their best interests taken as a primary consideration and have access to information about their origins.[28] The State Report referred to the mechanisms within the 2015 Act and the 2022 Bill for access to identifying information and moreover, stated that "*consideration of the welfare and best interests of children born as a result of AHR is the key principle underpinning all legislative measures in this area*."[29] The Ombudsman for Children's Office has published their own report for the Committee in August 2022. It is most notable that it recommends that applications for identifying and non-identifying information on origins should be able to be made by a child "*without limitations as to the child's age*".[30] The Children's Rights Alliance, who also reported to the Committee, made no

[25] There was no mention of AHR at all in either the first or second report, albeit the second report did refer to identity in the context of adoption.
[26] Committee on the Rights of the Child, "Concluding Observations on the Combined Third and Fourth Periodic Reports of Ireland" CRC/C/IRL/CO/3-4 (March 2016) at 7.
[27] To be responded to in a maximum of 21,200 words.
[28] Committee on the Rights of the Child, List of issues prior to submission of the combined fifth and sixth reports of Ireland, CRC/C/IRL/QPR/5-6 at page 4.
[29] Committee on the Rights of the Child "Combined fifth and sixth periodic reports submitted by Ireland under article 44 of the Convention, due in 2021" (5 September 2022) at page 18.
[30] Ombudsman for Children's Office, "Report of the Ombudsman for Children's Office to the UN Committee on the Rights of the Child pursuant to the combined fifth and sixth reports submitted by Ireland under the simplified reporting procedure" (August 2022) at page 23.

recommendation as to the age of access to such information,[31] nor did the Irish Human Rights and Equality Commission.[32]

The Committee issued its concluding observations in February 2023.[33] It reiterated its recommendation that Ireland ensure that the best interests of the child principle is applied consistently in all programmes and legislative, administrative, and judicial proceedings involving children.[34] In relation to identity specifically, it recommended that Ireland should ensure that "all children", including those born through AHR, have access to information about their origins, including by "revising" the 2015 Act and the 2022 Bill.[35] This recommendation would appear somewhat scant in terms of prescription;[36] however, the call for a revision would appear to suggest that the age limits imposed, that of 18 years of age in the 2015 Act and the proposal of 16 years of age in the 2022 Bill are in need of revision so that "all children" can access information about their origins. However, it then goes on to state that in line with the 2022 Bill, the *Gender Recognition Act 2015* should be amended to allow children aged 16 and 17 years of age to achieve legal recognition of their gender identity.[37] This would, somewhat confusingly, indicate an endorsement of the age of 16 and 17 as the age within which a child should be able to access information about their origins and this shall be discussed in considerably more detail below.

The CRC and the Committee do not perhaps, offer much prescription in terms of the mechanism within which a child born through AHR should have their identity vindicated. It is hoped that the introduction of the complaints system will generate more practical examples to illuminate the area, that the Committee will make more prescriptive recommendations in future reports to Ireland and that a standalone General Comment on identity will be published. However, it is evident that the Committee has confirmed that children born through AHR are covered by the CRC, that they have a right to identify both their donor and surrogate and that a rights based approach is one that views children as independent rights holders where

[31] Children's Rights Alliance, "Civil Society Alternative Report in response to the Fifth and Sixth Combined Report of Ireland under the UN Convention on the Rights of the Child" (15 August 2022).
[32] Irish Human Rights and Equality Commission, "Submission to the UN Committee on the Rights of the Child on the List of Issues Prior to Reporting for the fourth periodic examination of Ireland" (1 July 2020).
[33] Committee on the Rights of the Child, "Concluding observations on the combined fifth and sixth periodic reports of Ireland" CRC/C/IRL/CO/5-6 (28 February 2023).
[34] *Ibid,* at page 4, point 16(a).
[35] *Ibid*, at page 5, point 20(a).
[36] It should be noted that amongst the reports in respect of other countries, the Committee has rarely strayed much beyond recommending that the child's should have access to their origins, without much additional detail. The most detailed recommendation was made in respect of Switzerland in 2015 where the Committee recommended that the State Party "intensify its efforts to ensure, *as far as possible,* respect for" the right of a child born through AHR to know its origin, and that the State Party should "consider" the removal of the requirement that the child have a legitimate interest in the origin information before it is released. Committee on the Rights of the Child, "Concluding observations on the combined second to fourth periodic reports of Switzerland", CRC/C/CHE/CO/2-4 (26 February 2015) at page 7, points 32-33.
[37] Committee on the Rights of the Child, "Concluding observations on the combined fifth and sixth periodic reports of Ireland" CRC/C/IRL/CO/5-6 (28 February 2023), at page 5, point 20(b).

parental investment in their early development contributes to both their evolving capacity and identity.

Article 8 of the European Convention on Human Rights

Unlike the CRC, the European Convention on Human Rights (ECHR) contains a body of case law on the right to identity, which sees the balancing of rights borne out. Such case law is justiciable before the Irish courts on foot of the *European Convention on Human Rights Act 2003.*[38] However, it should be noted that the right to identity is not explicitly provided for in the ECHR, nor is it a standalone right, like Articles 7 and 8 of the CRC. It is encompassed in the right to respect for private and family life under Article 8 which contains an inherent balancing of rights and a proportionality test that must be satisfied before a violation can be found.[39] The following European Court of Human Rights (ECtHR) cases explore the right to identity as it is dissected into its various formations and notably relates only to applicants who became capable of arguing for themselves in adulthood, or adults acting on behalf of children, in seeking information regarding their genetic parents or

[38] This Act provides that the Irish courts must, when engaging in an exercise of statutory interpretation must, insofar as possible, do so in a manner compatible with the State's obligations under the Convention provisions (section 2(1) of the 2003 Act). Irish judges must stay abreast of the ECtHR's decisions, declarations, and any advisory opinions under Protocol No. 16 (section 4(a) of the 2003 Act). Furthermore, the Irish courts have the power to make a declaration of incompatibility in respect of a statutory provision or rule of law where there is no other legal remedy that is adequate or available (section 5(1) of the 2003 Act). However, such a declaration does not affect the validity, continuing operation, or enforcement of the provision (section 5(2)(a) of the 2003 Act). Therefore the Irish courts have an obligation to adhere to the principles as set out in the cases before the ECtHR which have on numerous occasions dealt with the issue of international surrogacy agreements and corresponding parentage.

[39] These cases involve actions against the State, as opposed to another person such as the child's intending parent, donor, or surrogate. Therefore, the determinations of the Court are not made through a balancing of the rights of two parties, but rather, it is a multi-step test as to whether a violation of one party's right has taken place as a result of State interference. As part of this test however, the vindication of another abstract party's rights can be submitted by the State as the reasoning or "legitimate aim" behind the interference. In determining whether there has been a violation, the Court's first question is whether the right asserted is applicable to the facts of the case and has been subsequently interfered with, whether a legitimate aim exists, whether the level of interference was proportional to the aim. In order for the interference to be proportional, it would have to be minimally invasive, necessary in a democratic society and constitute a pressing social need. However, a disproportionate interference can still be saved from a violation through a wide margin of appreciation. See: Registry of the European Convention on Human Rights, "Guide on Article 8 of the European Convention on Human Rights" (Updated 31 August 2021) and S. Kingston & L. Thornton, "A Report on the Application of the European Convention on Human Rights Act 2003 and the European Charter of Fundamental Rights: Evaluation and Review" (July 2015). Such an approach is evident in the Canadian case of *R v Chaulk* [1990] 3 SCR 1303 as approved by Costello J. in *Heaney v Ireland* [1994] IR 593 at paras. 32-34 as follows: "The means chosen must pass a proportionality test. They must: (a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations; (b) impair the right as little as possible, and (c) be such that their effects on rights are proportional to the objective".

caregivers. It is noteworthy that there has yet to be a case involving a child seeking information on, or contact with, his or her surrogate or donor.[40]

The right to identity has been identified in three different ways, all being found to exist within the auspices of the right to respect for private life: the right to information regarding the individual's upbringing and care,[41] the right to know one's ascendants[42] and the right to identify one's parents.[43] While the right to information regarding the individual's upbringing and care has thus far been confined solely to information, the right to know one's ascendants is synonymous with the right to a process that will grant certainty in relation to the paternity of an identified individual, both living and deceased. The right to identify one's parents, on the other hand, is the right to be provided with identifying information regarding one's unidentified birth parents. This right, like its predecessors, is not absolute and the court's consideration of it has reflected the need for inherent procedural safeguards in the process in order to balance the rights and interests of those involved. Within these contexts, the right to respect for private life has been preferred to the right to bodily integrity (asserted by those refusing to submit to DNA testing), the ongoing operation of the child care system (through the protection of social worker's reports) and the right to rest in peace (through the facilitation of exhuming a body for DNA testing), and these shall be discussed in turn.

The Right to Know One's Ascendents

While a number of paternity cases have been considered under Article 8,[44] such cases focused on the applications of genetic fathers seeking to have their legal fatherhood recognised. The following cases however arise from children seeking to have paternity determined against the wishes of the putative father. In this regard, the right to know one's ascendants was identified in the cases of *Mikulic v Croatia*,[45] *Jaggi v Switzerland*,[46] and *Roman v Finland*,[47] in which each applicant was seeking to

[40] There are however two pending cases in relation to the use of anonymized gametes: *Gauvin-Fournis v France* (Application No. 21424/16) and *Silliau v France* (Application No. 45728/17).
[41] *Gaskin v The United Kingdom (*Application No. 10454/83, 7 July 1989).
[42] *Jaggi v Switzerland* (Application No. 58757/00, 13 July 2006), *Mikulic v Croatia* (Application no. 53176/99, 4 September 2002).
[43] *Godelli v Italy (*Application no, 33783/09, 18 March 2013); *Odievre v France (*Application no. 42326/98, 13 February 2003).
[44] See: *Rasmussen v Denmark* (Application No. 8777/79, 28 November 1984); *Ahrens v Germany* (Application no. 45071/09, 22 March 2012); *Chavdarov v Bulgaria* (Application No. 3465/03, 21 December 2010); *Ostace v Romania* (Application No. 12547/06, 25 February 2014); *Kroon v The Netherlands* (Application No. 18535/91, 27 October 1994); *Anayo v Germany*, (Application No. 45071/09, 21 December 2010); *Schneider v Germany* (Application No. 17080/07, 15 September 2011); *Kautzor v Germany* (Application No. 23338/09, 22 March 2012); *Doktorov v Bulgaria* (Application No. 15074/08, 5 April 2018).
[45] Application No. 53176/99, 4 September 2002. Mikulic was a child born to an unmarried mother who filed a civil suit against the putative father to establish paternity and to claim maintenance. He denied paternity and refused to present for court mandated DNA testing more than six times over a period of five years. However, the Convention was only applicable for just a little over four years. The Government asserted that it was the responsibility of HP to present for such testing and stated that even the applicant did not raise the request for DNA testing until ten months into the proceedings.
[46] Application No. 58757/00, 13 July 2006.
[47] Application No. 13072/05.

obtain a DNA sample to prove the paternity of individuals who had sexual relations with their respective mothers yet who denied paternity. In each case, the domestic frameworks denied the applicants access to an adjudication process to definitively determine who their genetic father was. Mikulic, the only child applicant, argued that she had been kept in a state of prolonged uncertainty as to her personal identity and had the Court decided her case, her family relationship with her father might have been established earlier.[48] The Court found that private life "*includes a person's physical and psychological integrity and can sometimes embrace aspects of an individual's physical and social identity*" and must, to a certain degree, comprise of the right to establish relationships with other human beings.[49] It held that the reason that individuals should be entitled to such information and "*details of their identity as individual human beings*" is because of its formative implications for their personality.[50] The Court held that an individual has a vital interest "*in receiving the information necessary to uncover the truth about an important aspect of their personal identity*".[51] The Court concluded that the absence of an independent authority which may determine a paternity claim speedily or the absence of any procedural measure to compel the alleged father to comply with the Court order constitutes a disproportionate interference with the applicant's right to respect for private life and thus, there had been a violation of Article 8. However, it is noted that the Court left the merits of the actual decision as to paternity to the member state themselves and stated only that an independent adjudication is warranted to protect the rights and interests involved.

These sentiments were reiterated in the case of *Jaggi*,[52] where the Court once again held that the right to an identity, which includes the right to know one's ascendants, is an integral part of the notion of private life and requires "*particularly rigorous scrutiny*" when weighing up the competing interests.[53] It reiterated the vital interest

[48] Application No. 53176/99, 4 September 2002. at paragraph 44. The Court, in framing the delay as a violation of Article 6, held that the competent national authorities were required to act with particular diligence in ensuring the progress of the proceedings, given that the applicant's "right to have her paternity established or refuted and thus to have her uncertainty as to the identity of her natural father eliminated" was at stake. It also held that such a right falls within private, as opposed to family life, as the applicant differs from those in *Rasmussen v Denmark,* Application no. 8777/79 and *Keegan v Ireland* Application no. 16969/90 as she had never established family ties with HP.

[49] Application no. 53176/99, 4 September 2002. at paragraph 53.

[50] *Ibid* at paragraph 54.

[51] *Ibid* at paragraph 64.

[52] Application No. 58757/00, 13 July 2006. The applicant in this case, having been placed in foster care and having met his mother only upon reaching the age of majority, was informed that AH was his father. Jaggi's putative father refused to partake in paternity tests and denied paternity until he died, and Jaggi sought his exhumation. The Court had to consider additional competing interests such as the human dignity of the deceased and inviolability of his corpse. The Government had not submitted any philosophical grounds for opposing the taking of the DNA sample which the Court considered to be a relatively unintrusive measure. However, one aspect of this case which may set it apart from creating the perception of an absolute right to a DNA sample from a deceased individual, is that in Switzerland, the corpses are buried on a leased basis of approximately 20 years in duration and therefore, the deceased was due to be exhumed regardless of the outcome of the case when the current lease expired. Therefore, the Court noted that the right to rest in peace only enjoyed temporary protection and this was considered a mitigating factor in the interference with the rights of the deceased.

[53] Application No. 58757/00, 13 July 2006 at paragraph 37.

at stake and the balancing of competing interests that must take place. The Court, in finding a violation of Article 8, held that the preservation of legal certainty[54] is not sufficient to deprive the applicant of the right to ascertain his parentage. Similar to Jaggi, in the case of *Roman v Finland*,[55] the Court acknowledged that the competing interests were the child's right to uncover the truth about an important aspect of their personal identity and the corresponding elimination of uncertainty, and the putative father's interest in being protected from claims concerning facts that go back many years.[56] The "*yardstick*" against which these factors are measured is whether a legal presumption has been allowed to prevail over biological and social reality.[57] In following this test, and despite the social reality of *Roman* being that her genetic father was deceased, the Court found a violation of Article 8 given the absence of any relief mechanism.

Given that maintenance was provisionally agreed to by the Croatian court of first instance in *Mikulic,* and *Jaggi* was not seeking any legal entitlements from his putative father, the ECtHR did not mention the extent to which the right to private life imposed legal responsibilities on the proven paternal figure. However, in *Haas v The Netherlands*,[58] the Court held that an applicant cannot derive a right to be recognised as the heir of a deceased person for inheritance purposes, from Article 8 of the ECHR, as such would be stretching the notion of family life too far. Nonetheless, these cases, while arising in relation to known putative fathers, elucidate a strong focus on the child's right to their identity in the context of the knowledge of their genetic father, and a mandate on the State to create a mechanism through which this can be achieved.

However, a number of points should be noted. The first is that the applicants had not been proactively disclosed to and an adult gatekeeper to some degree had impacted their access to the decisions. In *Mikulic,* her mother as her next friend instituted proceedings to have the father identified in order to obtain

[54] The Government argued that contesting a judicial decision of the domestic courts from 56 years previously would interfere with the principle of legal certainty and public confidence in the courts system.

[55] Application No. 13072/05. Roman was born before the entry into force of the Paternity Act 1976. This Act provided that such children had to bring paternity proceedings within five years of its commencement. Her surname was that of her mother's husband, but her biological father was discharging his child maintenance obligations in respect of her. The applicant began wondering about her biological parentage and in 2001, 20 years after the expiration of the stature of limitations, she found a record in the church registry listing her legal father as her stepfather as well as the maintenance agreement. Two years later, she began paternity proceedings against her biological father, but these were dismissed on the basis that her claim was time-barred. In 2007, DNA tests confirmed the identity of her biological father however he passed away a year later.

[56] *Ibid* at paragraph 51.

[57] *Ibid* at paragraph 53.

[58] Application no. 36983/97. In this case, the applicant sought to be recognised as the deceased's (P's) son for the purposes of inheriting his estate. P had never legally recognised the applicant but had made regular payments towards the applicant's care and upbringing, given him birthday presents, visited him, went on day trips with him and his mother and the applicant called him "Daddy". P died without leaving a will and his nephew was identified as the sole heir.

maintenance.[59] *Jaggi* had grown up in foster care and only discovered the identity of his putative father when he met his birth mother later in life. *Roman* found out through church records. However, once discovered, it became the putative fathers themselves who became the obstacle in their continuous refusal to subject themselves to DNA testing. These applicants had been failed repeatedly by their adults in their life and by the absence of any proactive mechanism in early life to avail of and understand their genetic family relations. Therefore, the vindication of this right is clearly dependent on proactive disclosure of the details of their conception to them. Ultimately however, in the exploration of the balance struck between identity and legal certainty, it is argued that identity wins out when the child's rights are brought to the fore of the proceedings.

The Right to Information Regarding One's Upbringing and Care

The right to information regarding one's upbringing and care was identified by the Court in *Gaskin v The United Kingdom.*[60] In this case, the applicant was a man whose mother had died when he was less than one year old and who had spent his life either in care or with various different foster families until the age of 18. He subsequently sought access to the file kept by the local authority in respect of his upbringing and time in care.[61] The Court held that the applicant's file undoubtedly contained information of deep personal interest concerning his childhood, development and history and thus, "*could constitute his principal source of information about his past and formative years*".[62] The Court found that "*persons in the situation of the applicant have a vital interest, protected by the Convention, in receiving the information necessary to know and to understand their childhood and early development*".[63] It concluded, in finding a violation of Article 8, that "*the interests of the individuals seeking access to records relating to his private and family life must be secured [under a system] when a contributor to the records either is not available or improperly refuses consent*".[64] The Court concluded that the positive obligations of Article 8 require that an independent authority be empowered to

[59] This had been ordered by the domestic courts and is why it did not form part of the ECtHR proceedings.
[60] Application No. 10454/83, 7 July 1989.
[61] This began by means of an application for discovery of documents of the local authority, against which he intended to bring a case for negligence. The local authority argued that the professionals who entered information into the records would be reluctant to be frank in their reports if they knew they would be made available to the children themselves, at paragraph 15. It argued that it was in the interest of effective care that the information provided should be as detailed as possible. In opposition, the applicant argued that it was in the public interest that the standard of care by a local authority to a child in care could be reviewed. Following reforms in the law, it was possible to disclose the documents where the author of said documents consented to such a release. Out of 352 contributions by 46 persons, the applicant received 65 documents supplied by 19 people. Those contributors who refused to provide their consent did not have to give reasons but stated that third party interests may be harmed as a result of the release, that the contribution would be of no value if it was taken out of context, that it was not the normal practice to disclose such information, that professional confidence was involved and even, that it would be detrimental to the applicant's interests, at paragraphs 26 and 27. His medical condition is noted in paragraph 45.
[62] At paragraph 36. The Commission previously held that "the file provided a substitute record for the memories and experience of the parents of the child who is not in care".
[63] At paragraph 49.
[64] *Ibid*.

make the final determination as to whether such information should be released to the applicant. It should not be solely the decision of the birth parent, or state authority, as to whether such information is withheld.

There are several important aspects of this case that could be considered noteworthy. The first is that the Court did not make a determination of substance on whether the applicant should be granted access to the information. It focused on the procedural aspects of the system as opposed to the merits of any decision. It maintained that the decision for such should be maintained by an independent authority. Should such an authority determine that there are sufficient reasons to deny the applicant the information, there is nothing in this judgment that would suggest the Court would find a violation of Article 8. Whether the authority's reasons for denying such access should be scrutinised in terms of reasonability and proportionality was not elaborated on; the authority merely has to exist. Secondly, the information sought in this case was not related to any genetic or gestational parent but rather, to caregivers and information relating to the nature of the applicant's upbringing, including his early caregivers. Therefore, the competing interests were not those of individuals who the information related to, but rather, persons who, while having an interest in keeping certain facts confidential, especially if they were to be subjected to negligence claims, were not going to be contacted and no relationship was being sought with any of them. This is arguably not the case in the majority of cases involving adoptions or AHR. Finally, the applicant in this case was granted a remedy that had retrospective effect, despite there being no expectation of prospective release at the time the information was obtained. Therefore, it is noteworthy that these standards arise where there was an expectation of secrecy, as opposed to privacy, and the procedural requirements were imposed regardless.

The Right to Know One's Parents

The right to know one's parents arises amongst the competing rights of two individuals, where at least one has no knowledge of the identity of the other. To date, it has only arisen in cases involving adoption and where there is no possibility of imposing legal obligations on the birth parent given the ages of the applicants and the extinguishment of all legal rights of the biological parents by virtue of the adoption process itself. Therefore, the motivations behind these cases truly focus on answering the applicants' lifelong question of where they came from.

Odievre v France[65] and *Godelli v Italy*[66] involved two women who were both "legally abandoned" at birth, in circumstances in which each mother had requested that

[65] Application No. 42326/98, 13 February 2003.

[66] Application No. 33783/09, 18 March 2013. Adopted children in Italy could receive access to information about their origins and the identity of their birth parents upon reaching the age of twenty-five; however, access to such information was refused where the birth mother had not recognised the child at birth.

their identity remain secret.[67] *Odievre* had since learned that her mother had given birth to three sons and wished to gather information on her siblings; whereas *Godelli* suspected that a girl in her village who was born on the same date as her was her twin. *Godelli's* adoptive parents refused any contact between them. While *Odievre's* birth mother had affirmed her wish not to have any contact with her daughter, *Godelli* did not have the option to request such information and the wishes of her birth mother were never ascertained following her birth. Therefore, *Godelli* argued that the conflict affected two adults endowed with their own free will.[68] While *Odievre* was provided with non-identifying information, *Godelli* was provided with nothing. Italian legislation accepted the mother's decision as a blanket ban on any request for information made by the applicant, regardless of the reason for, or the legitimacy of, that decision.[69] Godelli also argued that the mother could "*paralyse the rights of third parties*" particularly those of the biological father or siblings who could also be deprived of their rights under Article 8 through their ignorance or inability to know her.[70]

In *Odievre,* the applicant referred to *Gaskin,*[71] stating that there was no independent system that was responsible for making the final decision regarding access to the records in the event of a birth mother failing to answer or withholding consent.[72] The French Government in *Odievre* argued that the applicant's mother had expressly manifested an intention to abandon the applicant and had agreed to her adoption by

[67] Under French law, at the time of the birth, if a mother decided to abandon her child legally, she could receive free medical care during the month preceding and following the birth. If the child's mother or father was registered on the birth certificate, there would be no legal entitlement to have the costs of accommodation and confinement paid for.

[68] In pointing to Article 7 of the Convention on the Rights of the Child, the applicant submitted that a child from birth had "as far as possible, the right to know his or her parents". She also pointed to The Hague Convention which provided that the competent authorities of a Contracting State must ensure that information held by it concerning a child's origins, in particular information concerning the identity of his or her parents and medical history, should be preserved, insofar as it was permitted by law. She argued that Italy had exceeded the limits of its margin of appreciation because the child's interests were not taken into account and also because, in contrast to *Gaskin,* the system did not provide for access to the information, even where the mother agreed, *ibid* at paragraph 39.

[69] *Ibid*

[70] *Ibid*.

[71] *Gaskin v The United Kingdom* Application No. 10454/83, 7 July 1989.

[72] *Ibid,* at paragraph 33.

others.[73] In its determination, the Court reiterated, once again, that individuals have a vital interest, protected by the Convention, in receiving the information necessary to know and to understand their childhood and early development.[74] It held that Article 8 protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world. It held that *"[b]irth, and in particular the circumstances in which a child is born, forms part of a child's, and subsequently the adult's, private life guaranteed by Article 8 of the Convention".*[75] In noting that there must be a considered balancing of the competing rights, the Court held that "*the expression 'everyone' in Article 8 of the Convention applies to both the child and the mother*".[76] The Court distinguished *Odievre* from *Gaskin* and *Mikulic*, stating that the "*issue of access to information about one's origins and the identity of one's natural parents is not of the same nature as that of access to a case record concerning a child in care or to evidence of alleged paternity*".[77] It stated that this case involves a birth mother who had expressly requested that information about the birth remain confidential and made repeated reference to her indifference; indicating strongly that the birth mother's intention was an important factor in the Court's determination.[78] It could be deduced therefore, that the birth mother's intention to sever legal ties was afforded stronger weight by the Court than her child's intention to create legal ties, or at least identification ties. Whether this is in favour of the birth mother's autonomy or a best interests approach in terms of the kind of reception an adopted child may

[73] The Government argued that the right of the birth mother to request confidentiality pursued a legitimate aim, "*namely alleviating the distress of mothers who did not have the means of bringing up their children. By affording them the option of confidentiality, the French state sought to encourage women in that position to give birth in favourable conditions, rather than alone with the attendant risk that they may not tend to the child's needs*", at paragraph 36. With regard to the proportionality of the interference, the Government argued that providing such information to the child could come into conflict with the freedom which all women enjoy, which is to decline their role as mother or to assume responsibility for the child. It submitted that there were alternative systems in place that offered psychological and social supports to encourage mothers to keep their children. Social services were also under a duty to inform mothers of the time-limits and conditions that had to be complied with if they wished to take their children back, at paragraph 38. It finally argued that the right to obtain non-identifying information with a view of enabling children to reconstruct their personal histories had been made generally available since 1978. In their totality, it argued that such actions were a genuine attempt to strike a balance between the competing interests involved.

[74] *Godelli v Italy,* Application no, 33783/09, 18 March 2013, at paragraph 42.

[75] Application No. 42326/98, 13 February 2003 at paragraph 30.

[76] *Ibid,* it continued, "On the one hand, people have a right to know their origins, that right being derived from a wide interpretation of the scope of the notion of private life…On the other hand, a woman's interest in remaining anonymous in order to protect her health by giving birth in appropriate medical conditions cannot be denied" at paragraph 44.

[77] *Ibid* at paragraph 43.

[78] It commented that the applicant's mother never went to see the baby at the clinic, nor had she ever expressed a desire to meet her. According to the applicant's mother, the father stated that he did not wish to be a father to the applicant. It was noted that the applicant's mother was amenable to the father's wishes and met the separation with the child with indifference, at paragraph 12.

experience upon reunion is unclear; but given the narrative of the Court's judgment, it is submitted that the former is the more likely.

The Court in *Odievre* noted that the legitimacy of the aim was to be found in the policy pursued by the French Government to avoid abortions and in particular, illegal abortions, and that the right to respect for life is a higher-ranking value guaranteed by the Convention.[79] Notably these concerns would not be as likely to arise in the purposeful context of AHR. In finding that the French legislation sought to strike a balance and ensure sufficient proportionality between the competing interests, and, having regard to the margin of appreciation, the Court held that there had been no violation of Article 8. Most interestingly, the Court made its first diversion from the preceding case law in relation to identity. A mitigating factor considered by the Court was the legislative efforts of France in furthering the right to identity through the establishment of an independent tracing body. This body was not required to adjudicate when one party unreasonably withheld their consent, as would appear to be a base level requirement set down by *Gaskin* but was nonetheless accepted by the Court as a sufficient demonstration of balancing competing interests. In this regard, Mulligan has described *Odievre* as an outlier case amongst the issue of identity.[80] She notes that the analysis of the margin of appreciation was "dubious", that the Court failed to acknowledge that France was in the minority in its provision for anonymous birth, and that it did not consider the nature of the right being infringed, an aspect which is highly pertinent to the breadth of the margin afforded.[81]

In terms of third parties, the Court found that the issue extends beyond the applicant and her mother and "*cannot be dealt with in isolation from the issue of the protection of third parties, and in particular, the adoptive parents, the father and the other members of the natural family*".[82] While this may appear like a promising stance in favour of disclosure, this was not the case. The Court proceeded, in an extremely paternalistic manner, to state that "*non-consensual disclosure could entail substantial risks, not only for the mother herself, but also for the adoptive family which brought up the applicant, and her natural father and siblings, each of whom also has a right to respect for his or her private and family life*".[83] The Court in *Odievre,* seems to insinuate that the other parties, such as half-siblings, would generally be in a worse situation in the event that they are granted access to each other, despite the absence of any empirical research to support such a finding. Arguably, such key stakeholders should at least be provided with the option to engage with each other, rather than the enforcement of a blanket ban on such contact, as they had never made the choice to enforce such privacy and may not even be aware that they have such siblings. Thus, there is also a lack of respect for

[79] *Ibid* at paragraph 45.
[80] A. Mulligan, "Anonymous Gamete Donation and Article 8 of the European Convention on Human Rights: The Case for Incompatibility" (2022) *Medical Law International* 1 at 9.
[81] *Ibid* at 16.
[82] Application No. 42326/98, 13 February 2003 at paragraph 52.
[83] *Ibid.*

the self-determination of the individual.[84] Margaria has noted that the majority opinion insinuates that the adoptee's right to know does not go beyond his or her maternal origins and that the "*positive dimension of the birth father's and siblings' right to respect for private and family life – which, in such circumstances, would resonate with a right to know about one's progeny and, more generally, one' birth family – is totally disregarded*".[85] She argues that the father and sibling's rights flow from the rights of the mother, given that if she chooses to keep her delivery secret and fails to engage in registration mechanisms, the realisation of their rights may be irreparably unfulfilled. Therefore, "*it would be illogical to raise concerns over access restrictions for the parental records, unless mother-related obstacles are first removed*".[86]

In *Godelli,* the Court diverted from the judgment in *Odievre* slightly, finding that particularly rigorous scrutiny is called for when weighing up the competing interests.[87] In finding a violation of Article 8, the Court held that Italy had not struck a balance between the competing interests, but rather "*blind preference*" was inevitably given to the birth mother. The Court in *Godelli* did not provide for an absolute right to identifying information from a child's birth parents but rather, it rejected the blanket ban. It considered the health and safety concerns of both the mother and the child that could arise upon the withdrawal of the expectation of privacy that arose from the legal abandonment. However, the absence of an independent body to conduct searches, or ascertain the birth mother's contact preferences led the Court to find that the Italian system had disproportionately interfered with the applicant's right to private life. There does not appear to be any discernible material distinction of impact between the two legal systems, aside from the absence of an Italian tracing service. It would appear from a comparison of the two cases that once a tracing service locates the birth mother and queries whether she would consent to the release of her information, Article 8 has been complied with, even where it is a blanket refusal with no independent adjudication on the individual circumstances.

Assessing Ireland's Compliance with the ECHR

The cases above relate to adoption where the birth mothers had an expectation of privacy. While it is evident that identity is considered a vital element to an individual's personal development and self-realisation, the ECtHR has not gone so far as to say that the child born through adoption has an absolute entitlement to the identifying information of their genetic or gestational parent. Nonetheless, a number

[84] Pretty v United Kingdom, (*Application No. 2346/02,* 29 April 2002).
[85] A Margaria, "Anonymous Birth: Expanding the Terms of Debate" (2014) 22 *International Journal of Children's Rights* 552 at 571.
[86] *Ibid.*
[87] Ibid at paragraph 52.

of procedural safeguards are required by Article 8.[88] Ultimately however, the splitting of motherhood has not arisen within the case law of the ECtHR,[89] and therefore, the varying levels of importance placed on those aspects in terms of the child's identity have not yet been assessed by the Court. Furthermore, no case relating to historical surrogacy agreements or donation has been decided by the ECtHR. Therefore, in short, strictly, Ireland has no obligations to comply with when it comes to the right to know one's surrogate and/or donor. However, commentators suggest, and such is accepted here, that the anonymisation of donation and surrogacy comes within the ambit of Article 8.[90]

In terms of the case law set out above, it is evident that there are numerous variables that distinguish the context of AHR from adoption. Such variables include the pre-conception nature of the AHR context wherein all parties can determine their roles without otherwise being obliged to do so. Within this context exists an easy extinguishment of any expectation of privacy or the need for policies to offset abandonment or abortion. Mulligan has argued that one possible "legitimate aim" in maintaining anonymity would be that such serves the public interest by promoting donation.[91] However, such an argument would be moot in Ireland where anonymous donation has already been prohibited and this shall be explored below.[92] Furthermore, when the same issue was raised by the Commission on Assisted

[88] While not the focus of this thesis, it is noted that the *Birth (Information and Tracing) Act 2022* is intended to provide open disclosure of an adopted person's birth parents and early life information, (sections 6-8). This information will be provided to applicants regardless of their birth parents objections and so there is no adjudicative process to determine the merits or balance the competing interests and circumstances of the parties. However, there is a requirement for persons whose birth parents do not wish to have contact to attend an "information session" on the importance of privacy which was submitted as being necessary to offset concerns of constitutional challenge - Joint Committee on Children, Equality, Disability, Integration and Youth, "General Scheme of the Birth Information and Tracing Bill 2021: Discussion (Resumed)" (28 September 2021).

[89] For an exploration of the right to identity in surrogacy see: A. Mulligan, "Protecting Identity in Collaborative Assisted Reproduction: The right to Know One's Gestational Surrogate" (2020) 34 *International Journal of Law, Policy and The Family* 20 and E. O'Callaghan, "Surrogate born Children's Access to Information About Their Origins" (2021) *International Journal of Law, Policy, and The Family* 1.

[90] A. Mulligan, "Anonymous Gamete Donation and Article 8 of the European Convention on Human Rights: The Case for Incompatibility" (2022) *Medical Law International* 1.

[91] *Ibid* at 23.

[92] Furthermore, a 2016 Study on motivations of egg donors following the introduction of payments of £750 demonstrated that there had been an increase of 23% following the introduction of the payments in tandem with increased marketing and public awareness. However, all women stated that they were motivated to help other women have their own child, thinking about how much pain and sadness childlessness would cause, yet only four of the donors already had children. Eight donors were motivated from knowing someone who had been affected by infertility. Of those that did not have children, six women did not want children themselves and wanted to give another woman the chance. Donating eggs was also viewed as mutually beneficial as it would cause the donors to feel good about themselves. None of the donors mentioned payment as a motivating factor and ten donors said that they would still have donated even if they did not receive any payment. In fact, ten were unaware that they would receive payment. Identifying information was not a feature of the donor's answers albeit, there was no "control" group of women who had sought not to donate so these outcomes could be considered quite limited. S. Graham, V. Jadva, T. Freeman, K. Ahuja & S. Golombok, "Being an identity-Release Donor: A Qualitative Study Exploring the Motivations, Experiences and Future Expectations of Current UK Egg Donors" (2016) 19(4) *Human Fertility* 230.

Human Reproduction, the Commission noted that countries where anonymous donation is prohibited only experience a decrease in donations for a relatively brief period.[93]

The Irish Judiciary and the Unenumerated Right to Identity under Article 40.3

The case law in Ireland in respect of the child's right to identity has been sparse, focused on adoption, and has had to operate in a legislative vacuum in relation to the scientific development of the splitting of motherhood. Interestingly, there has been a correlation between some of the ECtHR determinations and the findings of the Irish courts. For example, the case of *CR v An Bord Uchtála*[94] involved a similar scenario to *Godelli*, whereby a blanket ban, with no independent adjudication mechanism, on CR obtaining information about his birth mother was deemed to be an invalid determination and was quashed by the High Court.[95] The Court held that it was necessary "*to screen any applicant and indeed the parent he is attempting to trace"*.[96] This judgment goes further than *Odievre* in simply requiring that a tracing service exist and follows the judgments of *Gaskin* and *Godelli* in requiring that there be an independent assessment of the merits of the application. The Court held that An Bord Uchtála (the Board) was the appropriate adjudicator and could determine the issue with expedition and without undue expense, unlike a court application.[97] While this judgment perhaps raises issues of *nemo iudex in causa sua* (no man should be a judge in his own cause) given that the birth certificate was sought from the Board's records, it nonetheless provides a base requirement of "identity" law in Ireland, that any blanket refusals will not be permitted. It was not until five years

[93] Commission on Assisted Human Reproduction, "Report of the Commission on Assisted Human Reproduction" (2005) at page 45.

[94] [1993] 3 IR 535. This case concerned the Adopted Children Register which was connected to the register of births by way of an index in order to create the possibility for tracing. Information from this index was only accessible by way of court order, or an order from an Bord Uchtála. Furthermore, a person could only obtain an order for discovery or inspection of records of the Board, or be provided with information from the Board, if it was considered to be in the child's best interests to do so. CR was 50 years old when he consulted solicitors in relation to this information. He had a difficult upbringing, living in poverty with a psychiatric illness, which he believed was exasperated by his unfulfilled wish to know his origins. He sought his birth certificate in anticipation of him getting married, at which point he discovered that he had been adopted. He was refused access to his birth certificate on the basis that there was no statutory right to such information.

[95] Section 8 of the *Adoption Act 1976.* Interestingly, this section was not in the original Bill as drafted but was a government amendment proposed at Committee State of the Dáil Debates. There was no discussion about it beyond a brief explanation by Mr Patrick Mark Cooney, then Minister for Justice, which slightly varied from the wording itself. He stated firstly that its purpose was in case of a situation "which, as far as is known, has never arisen" when a person applies to the Court for information allowing them to trace the connection between the ACR and the register of births. He further stated that the purpose was to ensure that it "is only where the interests of the child concerned *require* it that such an order may be made" [emphasis added]. Vol. 291 No. 14, Dáil Éireann Debate, *Adoption Bill 1976: Committee Stage,* 30 June 1976. The minimal discussion about this section could be explained by the urgency required in passing the Bill, which was in response to *M v An Bord Uchtála and the Attorney General* [1977] IR 287, a case that found an adoption order invalid because the birth mother was not informed that she could revoke her consent. The 1976 Act was repealed by the 2010 Act, but section 8 was almost identical to section 88 of the 2010 Act.

[96] [1993] 3 IR 535 at 541.

[97] *Ibid* at 542.

later, in 1998, that the Supreme Court found that an unenumerated right to identity existed under Article 40.3 of the Constitution in *I O'T v B.*[98] This case involved two women who sought out the identity of their birth mothers having been "de-facto" adopted.[99] They also sought, akin to *Gaskin,* information about the nature of their adoption placement. Before the Supreme Court, the applicants argued that there was a constitutional right to identity and argued that denying the applicants their right to identity would violate their right to bodily integrity.[100] While no argument was made in relation to the absence of a medical history in this regard, the right to bodily integrity was considered in the context of psychological health due to the emotional consequences of such a denial.[101]

The Court, in a 4-1 majority, held that an unenumerated right to identity existed and arose pursuant to Article 40.3.1 of the Constitution.[102] Kenny J in particular noted that individuals should have the opportunity "*of realising his or her full personality and dignity as a human being*".[103] Such a finding is arguably more in keeping with such information being seminal to an individual's self-development, akin to the judgments of the ECtHR. However, the Court, in having established the existence of the right to identity, went on to clarify that the right was not absolute and was restricted where there had been a lawful adoption, relying on the right to privacy as espoused in *Kennedy v Ireland.*[104] The Court held that any restriction based on the constitutional right to privacy and confidentiality must be based on the circumstances of the case and the wish of the natural mothers to exercise such a

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[98] [1998] 2 IR 321.

[99] Their adopting parents had been named on their birth certificate, yet the local priest had contact details for one birth mother and personally knew the other. The first birth mother ignored the priests letters and the second told him that she would be unable to cope if he contacted her again.

[100] They also argued that their property rights and right to be held equal before the law could only be vindicated by the identification of their birth mothers.

[101] [1998] 2 IR 321 at 368. There was also an argument in defence of their physical health which they argued related to the risk of marriage to a close relation in the absence of such information. With regard to the arguments on bodily integrity, Keane J held that if the risk of marrying those who are closely related by blood were so extreme as to necessitate the court's finding of the right to identity, "it would render the introduction of a system of legal adoption impossible" at 376.

[102] The Court relied on *G v An Bord Uchtala* [1980] IR 32 in finding that this right arose from the infant's "*total dependency and helplessness and from the mother's natural determination to protect and sustain her child*", and "*is a basic right flowing from the natural and special relationship which exists between a mother and her child*". It could be argued that these elements: dependency, helplessness, determination, protection, and sustenance are not specific to an individual person but rather, is indicative of the vulnerable nature of a young child and the support required from a dedicated caregiver. These concepts are inconsistent with a grown adult seeking information regarding the identity of their birth mother, from whom they no longer require assistance in relation to their survival.

[103] *Ibid.*

[104] [1987] IR 587, "*the right to privacy is one of the fundamental personal rights of the citizen which flows from the Christian and democratic nature of the State. It is not an unqualified right. Its exercise may be restricted by the constitutional rights of others, by the requirements of the common god and is subject to the requirement of public order and morality*" at 592. The right to privacy of the natural mother was lauded heavily in the dissent of Keane J, to the extent that it was found that even the "*despatch by the Court of social workers, counsellors and other professionals to interview private citizens who have no wish to be involved in such processes must, of its nature, constitute an intrusion on the privacy of the natural mother*", *Ibid* at 374.

right.[105] In his dissent, Keane J, having found that the right to identity was not simply about knowledge and recognition, but rather would have corresponding legal entitlements such as a right of succession to their mother's property, found that such could not prevail over the right to privacy.[106] However, Barron J placed greater weight on the "*undertaking as to secrecy*" given to the natural mother rather that the property rights vested in the child, again presuming that such would arise.[107] However, ultimately, in its final determination, the Court set out a number of criteria to which the Court is to have regard to, in determining the merits of an application.[108] Such criteria, which were based in the intentions and circumstances of the parties, were prescribed in a legislative vacuum.[109] Therefore, it is argued that at a minimum, the judiciary has clearly recognised that a constitutional right to identity exists as a personal right, that this necessitates an individualised assessment of the two key competing rights, that of identity and privacy, and it is within the

[105] [1998] 2 IR 321 at 349.

[106] *Ibid* at 375-376. Opponents of the somewhat reductionist genetic determinism nature of the legal exploration of identity will enjoy one key passage of this dissent, namely: "*to say that a person in the position of the applicants who has been denied that information, and as a consequence the opportunity of getting to know his or her natural parents has in some sense failed to realise 'his or her full personality and dignity as a human being' could be regarded as a grave overstatement…To say of such people that they have failed in any sense to realise their full personality and dignity as human beings is, it could be argued, to deny the unique value which should be attributed to every human being, irrespective of his or her parentage or ancestry, a value which is surely at the heart of the legal philosophy which underlies the Constitution*" ibid, at 370-371. This passage is of course, in the minority of the Court's judgment and so is not binding on any future decisions. However, it is a nuanced approach to the right to identity which could, it is argued, frame the discussion on identity in a different manner so as to not focus on any perceived deficits in an individual's personality but rather, provide for information or contact as a reflection of the interest or curiosity of the individual.

[107] *Ibid* at 381.

[108] These criteria were: the circumstances giving rise to the natural mother relinquishing custody of her child; the present circumstances of the natural mother and the effect thereon (if any) of the disclosure of her identity to her child; the attitude of the natural mother to the disclosure of her identity to her natural child, and the reasons therefor; the respective ages of the natural mother and her child; the reasons for the natural child's wish to know the identity of her natural mother and to meet her; the present circumstances of the natural child; and the views of the foster parents, if alive, *ibid* at 355. In diverting slightly from the finding of the majority, Barron J held that is it the emotional effect of the order made by the Court that should be considered by the Circuit Court Judge, at 182. He also held that the "*court should approach the matter in two stages. At the first stage the Court should decide whether or not to involve the mother. It should do so only if the evidence of emotional hurt to the daughter as balanced against emotional hurt to the mother is, applying the indicated criteria, so compelling that in the absence of any other evidence it would grant the relief sought. In this event, I would agree with the manner in which it is proposed that the mother should be involved. At the final stage, the Court should apply the same test as at the first stage having regard to the totality of the evidence and either grant or refuse relief accordingly*".

[109] The *Birth Information and Tracing Act 2022* (the 2022 Act) now fills such a vacuum, albeit in the context of adoption.

legislative freedom of the Oireachtas to determine how to balance the competing interests involved.[110]

Further to *IOT,* the judiciary have made a number of cursory remarks in relation to the genetic link:

> *"This* [genetic] *bond is greatly valued by parent and children alike, and by natural siblings in respect of their shared parentage. It is illustrated by the frequently found phenomenon of the mature adult who, separated at birth or in infancy from his or her parents and siblings, feels a strong desire to locate them many years later."*[111]

This passage emanates from a consideration of birth parents in adoption. However, In *McD*, the couple purposefully chose a known donor in order to vindicate the child's right to know their genetic father. The Supreme Court held that -

> *"It is well known, however, from adoption situations in particular, that a child not brought up by and out of contact with one or more of his or her natural parents will frequently have a real interest at some stage in making contact. Considering the child's best interest therefore, the blood link is always a factor to be taken into account but any conclusions that are drawn, having taken it into account, may vary enormously depending on the circumstances".*[112]

In addition, Fennelly J noted that the psychiatrists involved were in agreement that a child should normally have knowledge, as part of the formation of his or her identity, of both parents in the absence of compelling reasons to the contrary:

> "*There is natural human curiosity about parentage. Scientific advances have made us aware that our unique genetic make-up derives from two independent but equally unique sources of genetic material. This is the aspect of the welfare of the child which arises".*[113]

In each of these cases however, it should be noted that there had not yet been any severance of the genetic relations legal status as parents, unlike in the context of an

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[110] The Court held that the nature of personal rights and the common good are ever developing concepts, and that personal rights can be regulated by the Oireachtas where the common good requires such an intervention. It held that the actions of the Oireachtas to balance certain rights and interests must prevail, "*unless it was oppressive to all or some of the citizens or unless there is reasonable proportion between the benefit which the legislation will confer on the citizens or a substantial body of them and the interference with the personal rights of the citizen*", quoted in *I O'T v B* [1998] 2 IR 321 at 341. It could be argued that such a passage refers more to a test of proportionality, whereby the interference is serving the legitimate aim of maintaining the birth mother's privacy and confidence in the system of legal abandonment, instead of a balancing of the rights exercise.

[111] *N v HSE* [2006] IR 374 at page 502.

[112] *J McD v PL & BM* [2008] 1 IR 417, Geoghegan J.

[113] *Ibid,* at paragraph 81, Fennelly J.

adoption order, DAHR declaration of parentage or parental order.[114] Therefore, these passages could be said to relate only to circumstances where such a person has a legal relationship with their child. However, this is easily disputed given the seeming progression from where the Court refers to "*strong desires to locate*" and a "*real interest in making contact*" in relation to birth parents, to the perspective change to "*human curiosity*" when referring to a sperm donor. It is argued that the latter is demonstrative of identity in line with the ECtHR cases' "*vital interest*" and what Mulligan refers to as, "*the Applicant's fundamental interest in self-knowledge for the purposes of self-development as an end in itself*".[115] However, as aforementioned, identity in the context of AHR has not been the subject of much debate in the Irish courts. *McD* was already known to the child and the surrogate in *MR*, was the child's aunt. Therefore, a consideration of the child's knowledge of either was not required in either case. However, it should be noted that when *McD* was remitted to the High Court, it was determined that the female couple would reveal to the child that McD was his biological father at their discretion and when they consider it to be age appropriate; it was not McD's information to share.[116] Having said that, the discretion lay within the question of how to tell, not whether to tell.

More recently, a more tangential consideration of the right to identity was considered by the Supreme Court in *Adoption Authority of Ireland v C & D.*[117] Hogan J dealt with the issue of identity within the realm of Irish public policy. The Court, in this case, was being called upon to consider whether any issues of public policy would require the non-recognition of a foreign adoption order that followed a surrogacy arrangement in the US. Similar to *McD,* the surrogacy agreement rendered all contact between the known surrogate and known egg donor, and the child, at the discretion of the intending parents. The intending parents agreed to send photos and updates but there was no independent mechanism for disclosure; only tracing through the *Birth (Information and Tracing) Act 2022* (the 2022 Act).[118] Hogan J held that any objection based on public policy grounds falls away because if the US adoption order was recognised by the Court, the child would have access to the provisions of the 2022 Act, noting however, that the 2022 Act cannot be enforced abroad. The tenor of the judgment therefore was that an unenforceable and voluntary tracing mechanism, as opposed to proactive disclosure, could not be said to:

> *"constrain the right of the children to obtain information regarding their [sic] genetic mother such that these clauses must be deemed on*

[114] In *G,* the issue before the Court revolved around the dispensing of her consent to the adoption order further to her placing the child for adoption; the adoption order had yet to be made. In *N v HSE,* the same issue applied where the adopting parents sought to dispense with the birth parents consent to the adoption order. In *JMcD*, he was a genetic father for the purposes of Irish law, and this was not severed by virtue of the unenforceable donor agreement made between the parties.
[115] A. Mulligan, "Anonymous Gamete Donation and Article 8 of the European Convention on Human Rights: The Case for Incompatibility" (2022) *Medical Law International* 1 at 10.
[116] *JMcD v PL & BM* [2010] IEHC 120.
[117] [2023] IESC 6 (Judgment of Hogan J, to which to the Chief Justice, O'Donnell CJ concurred).
[118] Section 2(1)(c) of the 2022 Act expands the scope of the 2022 Act to adoptions in a place outside the State, where the particulars of the adoption are entered in the register of intercountry adoptions.

> *their face to be at odds with the substance of the constitutional right identified in IOT and as the source of that right has been supplemented or varied by this judgment".*[119]

The "supplementation" or "variation" referred to by Hogan J is his finding that the unenumerated right to know and identify one's birth mother, in light of the Court's decision in *Friends of the Environment v Government of Ireland,*[120] is to be considered a derived right. A derived right was held, within that judgment, by Clarke CJ to be a concept of increased grounding and substance than those previously stated to be "unenumerated", as it "*conveys that there must be some root or title or structure of the Constitution from which the right in question can be derived*". In this manner, Hogan J was simply ensuring that there was no doubt that the right to identity was not derived "*simply from judges looking into their hearts and identifying rights which they think should be in the Constitution*",[121] but rather, from a combination of "*rights, values and structure*" of the Constitution".[122] He held that:

> *"To my mind there is no need at all in this context to have regard to some generalised unenumerated right to know one's identity. The right to know one's genetic identity is clearly an aspect of personhood: indeed, it might be said that there are few things more critical to the protection of that right than knowledge of one's genetic identity. Quite apart from the deep longing of most people to learn about their identity, knowledge of this genetic identity is obviously an important feature of modern medicine. To that extent knowledge of genetic identity is simply part of the bundle of rights associated with the protection of the person expressly enumerated in Article 40.3.2".*[123]

This may have appeared to bolster the rich foundations of the right to identity in terms of its source, yet regrettably, the substantive finding in relation to the facts of this particular case demonstrate a regressive *Odievre*-like stance taken by the learned judge. The acceptance of an unenforceable tracing service as consistent with the newly characterised derived right allows for a complete bypassing of any proactive element of disclosure or gateway to personal access to the information, without any reliance on others. However, it should be noted that the identity aspect of this case was quite minimal in comparison to considerations of commerciality and not dealt with in the judgment of the Chief Justice at all. The provisions on identity only arose within the surrogacy agreement and not the adoption order which was the subject of the application for recognition and the focus of the judgment. Therefore, the extent to which this aspect of the judgment is particularly binding or instructive is unclear.

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[119] *Ibid* at paragraph 86 (Hogan J).
[120] [2021] 3 IR 1.
[121] *Ibid* at paragraph 8.6 (Clarke CJ).
[122] *Ibid.*
[123] [2023] IESC 6 at paragraph 85 (Hogan J).

The Importance of Genetic "Truth" in the Irish Courts

It is noteworthy that the child's right to know the biological truth of their conception has long been established in Irish law, albeit in the realm of paternity cases.[124] In cases arising under section 35 of the 1987 Act, the primary motivator of the Court is to offer the child their genetic truth, even at the expense of the legal recognition of their social reality. The initial hints of such an approach arose from the dissenting UK judgment by Lord Summer in a case which considered the principle that married parents should not be able to give evidence as to the child's paternity.[125] Lord Summer opined that such a law would undoubtedly result in a child considering "*how scrupulously the law has safeguarded his status of legitimacy…it is best that truth should out, and that truth should prevail*".[126] Echoes of this judgment can be seen in the Irish approach to the displacement of a social father's legal parentage in favour of the genetic father.[127] In the consultative case of *D v D,*[128] the Court surmised that "[*t]he Court should be concerned in ensuring that truth shall prevail. If the husband is not the father of his wife's child, that is a truth which should be established*".[129] This remains the case even where the true paternity would result in the child having no legal father, such as in the case *G v G*.[130] The Court relied on *S v S*,[131] in which O Hanlon J stressed that rule of evidence must yield to "*the paramount policy of ascertaining truth and doing justice*" and that this was rendered all the more cogent and binding by the constitutional guarantees of access to justice and entitlement to fair procedures. The Court also referenced and endorsed a number of UK judgments culminating in the judgment of Balcombe J in *Re F (a minor).*[132] This judgment set out that in many cases, the best interests of the child are best served if the truth is ascertained. It found that the Court does not have to be satisfied that the

[124] As well as UK Law which has been largely influential in the earlier cases cited here. Brown and Wade have commented that when "judicial language refers to 'truth' or 'identity', both concepts appear to involve the privileging of genetic paternity, A. Brown & K. Wade "The Incoherent Role of the Child's Identity in the Construction and Allocation of Legal Parenthood" (2022) *Legal Studies* 1, at 12.

[125] *Russell v Russell* [1924] AU 697.

[126] *Ibid* at page 745 – 747. The dissenting judgment of Lord Summer in the Russell case argued that public policy "*tells us nothing"* as it is an "*evolving, not to say an unstable thing" which differs from century to century. Similarly, he argued that the word "morality tells us nothing, for what moralists condemn, the law ignores*", at page 743. In considering the child. Finally, he drew attention to the absurdity of the principle when viewed in light of the introduction of divorce in 1857, wherein the sanctity of the married life cannot escape violation. He concluded that, "*in the administration of justice nothing is of higher importance than that all relevant evidence should be admissible and should be heard by the tribunal that is charged with deciding according to the truth*".

[127] For example, *S v S* [1984] ILRM 66*, D v G* [1990] 4 JIC 0501*, Z v Y* [2008] IEHC 472.

[128] [1992] 7 JIC 3002.

[129] *Ibid* at paragraph 50.

[130] [1994] 11 JIC 3001.

[131] [1984] ILRM 66.

[132] *Re F (A Minor) (Blood Tests: Parental Rights)* [1993] FAM 314

outcome of the tests will be for the benefit of the child, in order to find that the direction of blood tests would be. Balcombe J held that:

> *"it is not really protecting the child to ban a blood test on some vague and shadowy conjecture that it may turn out to be to its disadvantage. It may equally turn out to be for its advantage or at least to do no harm".*[133]

While it is acknowledged that section 35 is not a mechanism through which genetic recognition can be distinguished from legal parentage,[134] these passages further demonstrate a historical level of support from the judiciary in relation to the child's interest in knowing their genetic origins. Furthermore, it is important for present considerations that section 35 has always provided for a legislative mandate for judicial intervention in a family's decision[135] not to disclose the genetic link between a child and a putative genetic parent, and such a section has never been challenged on its constitutionality.

The Irish Legislative Framework of Identity

While Part 1 focused on assessing and expanding the pathways to intending parentage, the natural corollary of this is to provide a mechanism to vindicate the child's right to identity. There are arguably six possible mechanisms within which to manage the child's right to identity. The first is total anonymity which would reflect a complete deference to the right to privacy of the donor and surrogate, and the parental autonomy of the intending parents. The second option would involve the provision of non-identifying information only. The third option would be the provision of identifying information which is restricted in some way i.e., through age, or an information session on the right to privacy. The fourth option is a hybrid of options two and three. The fifth option is complete transparency and openness, which would involve the complete right to access the identifying information at any time, with no restriction on an individual's right to contact their donor or surrogate. The sixth could be categorised as a standalone provision, or act in concert with the latter three options, and is a duty to disclose the nature of the child's conception to them, either enforceable against the parents or a pro-active measure of the State. The path chosen will undoubtedly depend on a number of factors, such as the expectation of privacy of the biological parent, the parental autonomy of the intending parents and the expected outcomes of such disclosure on the child.

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[133] *Ibid* at page 599, It should be noted however that in this case, the blood tests were not directed upon the application of a third party where the child was being brought by as a member of the family with their mother and her husband. In this case, despite the principles as set out, the Court found that the welfare of the child depended more on her relationship in the family unit and a blood test would only disturb this stability.

[134] See *CR v An Bord Uchtála* [1993] 3 IR 535 and *I O'T v B* [1998] 2 IR 321.

[135] In circumstances where such family status continues until the court's declaration.

The End to Donor Anonymity under the 2015 Act and 2022 Bill.

The National Donor Conceived Person's Register and the National Surrogacy Register

The *Children and Family Relationships Act 2015* (the 2015 Act) put an end to the practice of anonymous donation[136] and the *Health (Assisted Human Reproduction) Bill 2022* (the 2022 Bill) will continue this policy.[137] In addition, the Irish legislature has chosen a process of registration of both identifying information and non-identifying information relating to the surrogate and the donor in its attempts to vindicate the child's right to identity.[138] A parent can obtain non-identifying information at any time and a child can seek out non-identifying information[139] or identifying information in relation to the child's donor or surrogate through an application to the National Donor Conceived Person's register[140] (NCDPR) and/or the National Surrogacy Register[141] (NSR). While a DAHR donor is registered in the NDCPR, a surrogacy donor is registered in the NSR. The child will be alerted to these registers through their parent's disclosing to them that such access is possible, or alternatively, through a process of State disclosure. Within this process, the child's

[136] There is one exception to the donor anonymity contained with the 2015 Act whereby an anonymous gamete acquired by the facility beforehand could be used in AHR treatment if the donor consents to its use and the intending parent already had a child using this gamete (section 26(5)). Therefore, donor anonymity was protected for in excess of 8 years following the enactment of the 2015 Act. However, there is no tracing mechanism for any donors prior to the 2015 Act to even determine whether they would be open to contact. Therefore, instead of allowing a child born before the commencement of the 2015 Act, the opportunity to access information about their donor through their younger sibling, the 2015 Act seeks to withhold the information from both children, in favour of the donor's privacy. Similarly, there is an exception that applies to embryos formed before the date of commencement, as long as they were acquired before that date and the donor(s), has consented to its use in a DAHR procedure, or further DAHR procedure (section 26(6)). This provision is not dependent on pre-existing siblings arising from the use of gametes to form the embryo. It also has no time limit in likely, yet confusing, deference to the protection of the embryo and unwillingness to destroy it, given that embryos were deemed not to constitute life and being worthy of "respect" only, as found in *Roche v Roche* [2009] 2 IR 321 as opposed to the constitutional protection of the right to identity identified in *I O'T v B* [1995] 2 IR 321.

[137] Section 59(2)(a) of the 2022 Bill. There is considerable overlap in terms of gamete donation in the 2015 Act carrying over to the 2022 Bill. DAHR procedure and further DAHR procedure are both given the same definitions in both. Section 7(5) of the 2022 Bill provides that the provisions of the 2015 Act relating to the use of gametes in AHR treatment shall apply *in addition* to the provisions in the 2022 Bill, and where there is a conflict, the irreconciliation will be decided in favour of the 2015 Act. There are explicit exceptions to the application of the 2015 Act in this regard and these arise in section 18(1)(b), (c) (requires the consent of the use of the gamete under section 6 of the 2015 Act/consent to the use of an embryo under section 14 or 16 of the 2015 Act), 26(3) (allows the use of any gametes or embryos provided under the 2015 Act prior to the commencement of section 26(3), seemingly regardless of the upper age limitation set by that section) and 29(2) of the 2022 Bill (as per section 26(3), except in the context of embryos).

[138] For further exploration of the 2015 Act's identity provisions, please see: D. Lyons, "Reliance Upon Public International Law Treaties for the Justification of Domestic Legislative Developments: Exploring Parts 2 and 3 of the Children and Family Relationships Act as a Case Study" (2020) 26(1) MLJI 17.

[139] Section 34(1) of the 2015 Act. Section 67(1) of the 2022 Bill provides that a child who has attained 16 years of age, or the parent or a guardian of a child who has not attained the age of 16, may request information in the NSR in respect of a relevant donor other than their name, date of birth and contact details and information on the sex, year of birth, and number, of persons who have been born as a result of gametes donated by the same donor, from the AHRRA.

[140] Section 33(1) of the 2015 Act.

[141] Section 24(2)(d), (3)(b), 69(1), (2) of the 2022 Bill.

birth certificate is annotated to reflect that further information is available about them in the NSR or NDCPR.[142] Such annotations, and access to the registers, is only available to the child when they turn 18. However, the 2022 Bill proposes to reduce this to 16 years of age.[143] In addition, each party to a surrogacy agreement will receive an AHR information document which is intended to provide a level of guidance. Within this document, both the donor[144] and the surrogate[145] will be informed that it is desirable that they keep their NSR information updated. This is then reiterated by the AHR treatment provider who confirms to each that they may be contacted once the child reaches 18/16.[146] The intending parents will also be informed that it is desirable for them to inform the child, at an appropriate age, that they were born from AHR treatment.[147] Notably, the system operates entirely prospectively, and every party is aware of their rights and obligations prior to the conception of the child. Therefore, any person who did not want their identity released to the child could simply opt not to donate or act as a surrogate.

Accessing Information from the Registers

At present, the relevant information can be sought from the Minister who must comply with this request,[148] although it is proposed under the 2022 Bill that this function shall transfer to the Assisted Human Reproduction Regulatory Authority (the AHHRA).[149] In its current form, the 2015 Act involves an element of consultation with the donor before the information will be released.[150] The Minister notifies the donor of the request and unless the Minister receives a response within 12 weeks, the information is released. Donors can make submissions, arguing that their safety or the safety of the child requires that the information be withheld from the child, and this is considered by the Minister having regard to the child's right to identity.[151] This independent adjudication arises despite the pre-conception determination of the donor to engage in the process, knowing that their anonymity has a time limit. If the Minister refuses to release the information to the child, the child may appeal within 21 days of the notification of refusal.[152] No such appeal lies in respect of a

[142] Section 66(2) – (4) of the 2022 Bill.
[143] Section 159 of the 2022 Bill.
[144] Section 14(3)(e) of the 2022 Bill.
[145] Section 14(2)(i) of the 2022 Bill.
[146] Section 7 of the 2015 Act. Section 24(2)(e), (3)(c) of the 2022 Bill.
[147] Section 14(2)(ii) of the 2022 Bill. Notably, there was no such information provided to the intended parents under the 2015 Act however, it is set out in the 2022 Bill that every person engaging in any AHR treatment shall receive this document and therefore, going forward, if enacted, such information will be provided to all intending parents.
[148] Section 34(3) of the 2015 Act.
[149] Section 160 of the 2022 Bill proposes to insert section 41A into the 2015 Act which allows for a general delegation of his functions under Parts 2 and 3 of the 2015 Act to the AHRRA.
[150] Section 35(2) of the 2015 Act.
[151] Section 35(3) of the 2015 Act. Professor O'Mahony has argued that "[i]t is questionable whether the provisions allowing for identifying information to be withheld are necessary, especially since other protections exist in the criminal law that would protect the safety of a donor in the highly unlikely event that this was placed at risk", Professor Conor O'Mahony, Special Rapporteur on Child Protection, "A Review of Children's Rights and Best Interests in the Context of Donor-Assisted Human Reproduction and Surrogacy in Irish Law" (2020) at page 27.
[152] Section 35(5) of the 2015 Act.

donor where their information is released to the child against the donor's wishes. These provisions have been criticised by both former Special Rapporteurs for Child Protection, with Professor O'Mahony arguing that they have the potential to place a disproportionate restriction on the right to identity, especially as criminal law protects the safety of a donor in the event of any risk.[153] The 2022 Bill therefore proposes to remove the 12 week objection period for the donor and simply release the information upon request.[154] It proposes that the AHHRA must now release the relevant information save for a couple of powers to request further information and for the application to be in the prescribed form etc.[155] There is also a mechanism for the donor to obtain information about the number of persons born using their gamete, and the sex and year of birth of each,[156] together with provision for a prospective contact preference register of sorts within the NDCPR. Where a donor seeks this information from the Minister, the Minister shall notify the child and release the information if they do not receive any representations from the child within 12 weeks.[157] Interestingly, should the child wish to withhold the information from the donor, they simply have to express their objection.[158]

Prospective Tracing and Access by Donor Conceived Children

The child may decide that they wish, upon reaching the age of 18, to record their identifying information and contact details in the NCDPR and consent to its release to the donor.[159] The child may also, at the age of 18, request the number, sex, and year of birth of each of their donor siblings,[160] and request that the Minister record their details and consent to their release to their donor sibling. If the donor sibling objects to its release, that is sufficient.[161] Similar to the 2015 Act, the 2022 Bill proposes a contact preference register for donor siblings; however, it also appears to disclose a child's conception status to them without prior warning. A child born through AHR may apply to the AHRRA for identifying information of any person of any age,[162] who shares a common donor,[163] and the AHRRA shall trace the donor sibling's information in the NSR and the NDCPR.[164] The 2022 Bill requires that the

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[153] Professor Conor O'Mahony, Special Rapporteur on Child Protection, "A Review of Children's Rights and Best Interests in the Context of Donor-Assisted Human Reproduction and Surrogacy in Irish Law" (2020) at page 27, also citing G Shannon, *Tenth Report of the Special Rapporteur on Child Protection* (2016) at p158.

[154] Section 159(c) of the 2022 Bill seeks to remove this requirement. The 2022 Bill does however lower the threshold for release through its elimination of the 12 week objection period for the donor and surrogate's identifying information and a consideration of any objections by the Minister that is contained within the 2015 Act and previously, in the 2017 Scheme - Head 54(2)(b), (3) of the *General Scheme of the Assisted Human Reproduction Bill 2017*.

[155] Section 72, 73 of the 2022 Bill.

[156] Section 34(2) of the 2015 Act. A donor may request the Minister to provide him or her with information from the Register on the number of persons who have been born as a result of the use in a DAHR procedure of a gamete donated by the donor, and the sex and year of birth of each of them.

[157] Section 36(3)(b) of the 2015 Act.

[158] Section 36(4) of the 2015 Act.

[159] Section 36(1) of the 2015 Act.

[160] Section 34(1)(b) of the 2015 Act.

[161] Section 37(4) of the 2015 Act.

[162] Section 70(3)(a) specifically refers to the contact details of any child (AHR) or adult (AHR).

[163] Section 70(3)(a) of the 2022 Bill.

[164] Section 70(3)(c) of the 2022 Bill.

person requesting the information be at least 16 years of age but this does not apply to the person receiving the information.[165] The AHRRA shall then send that donor sibling a notice informing them that the applying donor sibling is seeking to contact them and that, unless they respond and object within 12 weeks, their contact information will be disclosed to the applying donor sibling.[166] This would therefore appear to enable the AHRRA to proactively notify a child under 16 years of age that their donor sibling is seeking them out and in turn, that they are donor conceived, or indeed, conceived through surrogacy.

While this is extremely welcome in terms of the child's right to identity being truly recognised as the right of the child, as opposed to the parent, there are a number of issues. The first is that it seems to be a mistaken provision that otherwise undermines the legislation's intention of retaining the parental autonomy and or donor's privacy until at least 16 years of age. Alternatively it could be demonstrating that donor privacy is actually the preferred underlying policy for the identity provisions, despite the pre-conception framework. Under the 2022 Bill, the child cannot apply for identifying information in relation to their surrogate, or their donor, or obtain their annotated birth certificate until 16 years of age, but they can contact another child who has no idea that they are AHR conceived. The 2015 Act, in contrast, and if amended, makes it a requirement that the donor conceived child who is contacted is 16 years of age.[167] The explanatory memorandum demonstrates no intention for this to be amended by the 2022 Bill and is not otherwise reflective of the actual purpose of the section.[168] Secondly, sending such information in such a manner to a child of any age could easily result in its interception by the donor sibling's parents at a time where the child may not be able to read let alone decipher the intricacies of AHR. While this thesis strongly argues in favour of a child's right to identifying information and knowledge of their conception at any age, this requires a corresponding age appropriate, and support led, mechanism that goes beyond a letter from the AHHRA to a child who could be in their infancy. In this regard, it is noteworthy that the requirement for counselling supports for the child arises only at the point of application for information from the NDCPR,[169] as opposed to the point at which a child is informed by way of communication from a civil registrar, or in the case of a donor sibling - the NSR, that they are born through DAHR and/or surrogacy. While again, this is a circumstance that can arise in a non-AHR setting where counselling is not state mandated, such disclosure or realisation is not state regulated, and it is argued there is a higher obligation on the State to offset harms

[165] Section 70(1) of the 2022 Bill.
[166] Section 70(4) of the 2022 Bill.
[167] Section 36(2) of the 2015 Act.
[168] *Explanatory Memorandum of the Health (Assisted Human Reproduction) Bill 2022,* at page 11, provides that section 70: "*This section outlines, in respect of instances where a person who acted as a donor in the context of a surrogacy agreement may also have separately acted as a donor in the context of a DAHR procedure under the CFR Act 2015, the information which can be provided from, or recorded on, the National Surrogacy Register and the National Donor Conceived Person Register*".
[169] Counselling is currently mandatory before the release of any information under section 38(2) of the 2015 Act. However, it is acknowledged that section 159(f) of the 2022 Bill seeks to remove this requirement.

where possible, when it is controlling or facilitating the circumstances in which disclosure occurs.

"The Chain of Custody"

A consideration of the "chain of custody" seeks to track the collection of the donor/and or surrogate's information to the point of release. This is to determine how connected the framework is, in terms of the only proactive state release of information (the annotated birth certificates). In all AHR treatments, which currently can only take place in a AHR facility, it is the obligation on the treatment provider to collect the information.[170] Under the 2015 Act, this information is then given to the Minister and where known, whether the DAHR procedure resulted in a pregnancy, or indeed, a birth.[171] The latter information is dependent on the intending parents reverting to the clinic with the information.[172] The Minister shall then make an entry in the NDCPR in respect of every child **born** in the State.[173] This would appear to exclude children who subsequently are born outside of the country or are, to the knowledge of the Minister, not born. This is relevant where the Minister has a particularly limited authority to make enquiries beyond asking the DAHR facility for this information.[174] The primary obligation to disclose the fact of pregnancy and birth is on the intending parents.[175] However, the only offences arising under the 2015 Act relate to persons who obstruct or interfere with a garda investigation, or fail or refuse to comply with a request or requirement of an authorised officer, in relation to a DAHR facility;[176] these do not extend to intending parents who do not disclose relevant information. Furthermore, the Minister notifies an tArd Chlaraitheoir that they have made such a record in the NDCPR.[177] Only at that point, does an tArd Chlaraitheoir annotate the child's birth certificate to denote that the child is donor-conceived.[178] This annotation is then made available to the child upon their request for their birth certificate at any point over the age of 18.[179]

Under the 2022 Bill, the information is provided to the AHRRA by the AHR treatment provider within six months of the embryo transfer,[180] however, unlike DAHR under

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[170] Section 24 of the 2015 Act. The operator of a DAHR facility must not acquire a donor's gamete, where that gamete will be used in the formation of an embryo subsequently used in a DAHR procedure, unless, at the time of the acquisition, such an operator acquires the donor's name, date and place of birth, nationality, the date of donation and their contact details. This rule also applies to embryos acquired. Under section 59(2) of the 2022 Bill, this includes the name, date of birth, nationality, and contact details of the surrogate, intending parents and any donor, which intending parent(s) provided the gamete and the date on which the donor made his donation, or the embryo transfer was undertaken.

[171] Section 28(4) of the 2015 Act.

[172] Section 27(3) provides that where the intending parents do not provide this information, the DAHR operator shall contact the intending parent concerned in order to obtain the information relating to the pregnancy and birth.

[173] Section 33(2) of the 2015 Act.

[174] Section 29 of the 2015 Act.

[175] Section 27 of the 2015 Act.

[176] Section 31(5) – (7) of the 2015 Act.

[177] Section 39(1) of the 2015 Act.

[178] Section 39(2) of the 2015 Act.

[179] Section 39(3), (4) of the 2015 Act.

[180] Section 59(4), (5)(a) of the 2022 Bill.

the 2015 Act, it is the responsibility of the surrogate to provide the provider with the pregnancy and birth confirmation.[181] Like the 2015 Act, there is no obligation on the surrogate to provide this information and her failure to do so, will result in a request that she provide this information, and an encouragement that she provide this information.[182] This failure however, will be communicated to the AHRRA, unlike the 2015 process.[183] The AHHRA shall make an entry in the National Surrogacy Register but only where the child has been born in the State and where it receives the information noted above from the provider, as well as a notification that the parental order application has been made and determined.[184] Only where a parental order application has been determined, will the interaction with an tArd Chlaraitheoir take place.[185] Therefore the annotation of the child's birth certificate relating to the NSR shall only take place where the intending parents make a parental order application. It should also be noted that while an tArd Chlaraitheoir has general powers of enquiry,[186] there is no explicit power for an tArd Chlaraitheoir to access the pre-birth information held by the Minister in order to compare the information to that contained within the birth register. Therefore, the workability of the State's method of disclosure flows from, and is dependent on, the intending parents or surrogate who are not necessarily statute bound to provide it, in the absence of any corresponding penalties.

Abnormalities, Exclusions, and Inequalities

There are a number of concerning features within both identity frameworks beyond those explored above. For example, identifying information cannot be sought by a parent under the 2015 Act and Lyons has described this as an anomaly, given that such access would vindicate the child's right to identity where the parent wishes to do so at an earlier age.[187] The preference therefore is arguably focused towards the donor's privacy, as opposed to parental autonomy, even though that expectation is legislatively malleable given the pre-conception framework of AHR. Furthermore, while the intending parents must also register their information, such as name, date of birth, address, and contact details,[188] and these must be retained by the operator of the DAHR facility[189] and recorded in the NDCPR,[190] there is no provision for the child to access this information should the intending parent shirk their responsibilities. There is however provision for identifying intending parents under the 2022 Bill.[191] This inclusion, in conjunction with the fact that the 2022 Bill

[181] Section 59(3) of the 2022 Bill.
[182] Section 59(7) of the 2022 Bill.
[183] Section 59(6)(b) of the 2022 Bill.
[184] Section 65(2), (3) of the 2022 Bill.
[185] Section 66(1) of the 2022 Bill.
[186] Section 64 of the 2004 Act, these extend only to ensuring that the particulars in the register of birth is accurate, not for example, the corresponding proposed NDCPR, NSR or RPOS.
[187] D. Lyons, "The Constitutionality of Extending the Right to Identity Provisions in the Children and Family Relationship Act 2015 to Donor-Conceived Children" (2017) 16(1) *Hibernian Law Journal* 63 at 70.
[188] Section 25(3)(a) of the 2015 Act.
[189] Section 28(3)(b) of the 2015 Act.
[190] Section 33(3)(c) of the 2015 Act.
[191] Section 68(1) of the 2022 Bill.

facilitates a guardian, as well as a parent to make the request on the child's behalf,[192] could be seen as remedying a gap in the 2015 Act. However, in the absence of a corresponding amendment to the 2015 Act to apply such a provision uniformly to both contexts, it is argued that it is an indication of the legislature's acknowledgment that not every parental order will be made and perhaps to a considerably higher degree than declarations under the 2015 Act, given that an intending parent's only redress really will be to obtain guardianship under section 6C of the 1964 Act.

In addition, the frameworks as enacted and as proposed create fundamental disconnects between legal recognition and identity. This arises in a number of ways. The first is that there are parents who will be clearly excluded from the 2015 Act for reasons beyond their control, or through reproductive personal choice. There is no incentive for such couples to use a known donor and there is no mechanism to voluntarily register the donor's information in the NDCPR.[193] In this regard, the opportunity to use a balanced and aptly safeguarded pathway to parentage as a mechanism to vindicate the child's identity more broadly is not utilised. The second is that, while female couples who avail of DAHR will be unable to obtain their declaration of parentage without registration in the NDCPR, or register the birth without their certificate of compliance,[194] opposite sex couples[195] and single women will be able to avail of the presumptions of parenthood,[196] and the absence of mandatory registration of unmarried fathers respectively. This arises even where they do initially comply with the conception requirements under the 2015 Act given the absence of broader powers for both the Minister and an tArd Chlaraitheoir, in light of the chain of custody discussed above. Finally, there is a correlation between the restrictive frameworks in Part 1 and the cavitied frameworks in Part 2. The age of majority is the time at which guardianship and the corresponding decision-making authority of the parents ends.[197] Therefore, if donors retain the rights and duties of parentage due to a court refusal to grant a declaration of parentage, these

[192] Section 34(1) of the 2015 Act, compared to section 67(1) of the 2022 Bill.

[193] It could be argued however, that any person who voluntarily registers such information would not require it, as they would appear to be willing to disclose such information to the child and can do so privately without a state register. However, for those that need perhaps a more incentivising basis, a more inclusionary approach to legal recognition of DAHR parentage not only results in intending parentage being recognised on a wider scope, but also, an incentive to comply with provisions relating to the child's right to identity.

[194] Section 27(2), (4) of the 2015 Act allows the issuing of a certificate for the civil register under section 27(5) where the child has already been born and the couple have provided the DAHR operator the name of the child, the date and place of birth, sex and address of the child.

[195] Excluding couples requiring egg donations as such couples would naturally require the assistance of a DAHR facility. However, this could be obtained abroad.

[196] While it is acknowledged presumption of maternity for the gestational mother in section 46(1) of the 1987 Act, it is accepted that, in the absence of DNA tests, the birth mother will naturally be assumed to have both genetic and epigenetic relationships with the child and will be registered on the birth certificates without question.

[197] There are certain instances, such as medical treatment where a 16-17 year old is considered to be able to proffer their own consent, however this is considered to be a defence for medical professionals as opposed to an empowering provision for children, section 23 of the *Non-Fatal Offences Against the Person Act 1997.*

provisions cut a child off from their legal father in Irish law until the age of 18 years of age. At such point, the child will only have a minimal residual claim to maintenance, if any,[198] and the estate of the donor, if deceased, may have already been disposed of, with no guarantee of any provision akin to section 117 of the Succession Act 1965 existing in another jurisdiction.[199] The child will also have potentially missed out on 18 years' worth of citizenship entitlement depending on the citizenship of their donor. Furthermore, the 2022 Bill also provides that a parental order will name who is not a parent, as well as who is the parent. Therefore, the 2022 Bill envisions that the donor will be named on the parental order.[200] As a result, it is presumed that the donor will be known, rendering the provisions on non-identifying information for parents unnecessary which, in and of itself, is not an issue. It is not problematic for the legislature to demonstrate a comprehensive coverage of the more remote circumstances. However, it is argued that the combination of these provisions demonstrate a lack of joined up thinking.

Furthermore, it is noteworthy that in the space of just five years, (since the publication of the 2017 scheme to the 2022 Bill) the impetus has moved towards earlier and easier access wherein the proposals remove the right of the donors to object and reduce their expectation of privacy by two years. While this is a positive, yet not optimal, development for the children involved, it becomes problematic when the 2022 Bill provides for transitional provisions.[201] Such provisions dictate that the reduction in the age limit, the removal of the donor's right of objection and the Minister's adjudication on the competing interests of the donor and the child, shall not apply to donors who are registered in the NDCPR prior to the commencement of the amending provision in the 2022 Bill, in deference to the donor's rights as opposed to the child's.[202] Therefore, there will be a cohort of children who have to wait two years longer for identifying information, and endure an adjudication on their identity rights, as a result of being born in the period

[198] Maintenance under the 1976 Act continues until the child is no longer dependent. Dependency as a default lasts until the age of 18 years of age but can continue until the earlier of the following: the child reaching 23 years of age or the child concluding their third level education. A child may also remain dependent by virtue of their disability.

[199] Section 117(1) provides that where, on application by or on behalf of a child of a testator, the court is of opinion that the testator has failed in his moral duty to make proper provision for the child in accordance with his means, whether by his will or otherwise, the court may order that such provision shall be made for the child out of the estate as the court thinks just.

[200] Section 64(1) of the 2022 Bill.

[201] Section 161 of the 2022 Bill.

[202] In this regard, . K. Hammarberg, L. Johnson, K. Bourne, J. Fisher & M. Kirkman, "Proposed Legislative Change Mandating Retrospective Release of Identifying Information: Consultation with Donors and Government Response" (2014) 29(2) *Human Reproduction* 286 reports consultations with 42 donors in the State of Victoria in respect of proposals to retrospectively de-anonymise donor information. Just under half supported the move and focused on the need for donor-conceived children to know and understand their genetic heritage. However, the other half rejected the recommendation, stating that it would violate the terms of their understanding and undermine trust in guarantees of privacy and confidentiality, harming them and their families. Some donors who rejected the proposal also rejected counselling and support services as inadequate compensation for the compulsory release of their information, with some seeing it as patronising. Inevitably, the government did not proceed with its proposal and released information on donations before the introduction of identity release, with their consent only.

between the commencement of the 2015 Act (4 May 2020) and the commencement of the 2022 Bill's amendments. While there are differing standards for children born before and after the 2015 Act, it is entirely unsatisfactory that differing standards should be imposed depending on amendments proposed within two years of its commencement.[203] This underlines the importance of getting a framework right from the start and not *post facto* diminishing the rights and expectations of those involved.

Finally, the 2015 Act and the 2022 Bill, as proposed, currently exclude the recognition of donors or surrogates prior to the commencement of the legislation. There are perhaps a number of reasons for this, when considered in conjunction with adoption tracing legislation.[204] In considering birth registration as the primary source of information, it should be noted that, in DAHR, any woman who birthed the child would have naturally been registered on the original birth certificate and there was, and remains, no corresponding requirement to register the unmarried genetic father, or the "sperm donor", even if known. She also could have availed of the presumptions of paternity to register her male partner at the time, whereas female partners simply could not have been registered at all. Secondly, in the event of surrogacy to date a child's birth certificate was never hidden behind a "surrogacy certificate" in the same way as the adoption certificates that were issued and used in favour of original birth certificates. Therefore, a child born through surrogacy, whose surrogate was registered as their birth mother, already has access to that information. Thirdly there would be no AHR equivalent of adoption societies, other than perhaps private fertility clinics that were not subject to state regulation and are not subject to judicial review. Therefore, such clinics were never held to any standard on maintaining records in relation to the donations with a future release mechanism. In many instances, they were also not privy to the identity of the donor themselves given the prevalence of anonymous donation until relatively recently.

It must be further borne in mind that where a donor or surrogate was involved by way of an international component, which is incredibly likely, a tracing service operating in Ireland would have to have foreign jurisdiction in order to have any chance at enforcing any further right to identity of the child, as opposed to simply carrying out an "ask and hope for the best" policy. Furthermore, with such easy access to websites where such donations could be readily sent by post internationally, there was no way for the State to track these donations. Therefore, it is argued that any retrospective recognition of the child's identity in relation to their donor or surrogate would undoubtedly either run into such challenges or not expand much further beyond the current regulations on data protection and freedom of information. That is not to say that a tracing service should be a futile endeavour. Ultimately, it is argued that the proposed established AHRRA could include a tracing function or at the very least, a contact preference register. This could at least offer a

[203] Freeman argues that the child's interests should not be subservient to the donor's, as to do so would be just another example of silencing a child's voice. Freeman, "The New Birth Right? Identity and the Child of the Reproduction Revolution" (1996) 4 *International Journal of Children's Rights* 273 at 288.

[204] See: the *Birth Information and Tracing Act 2022*.

mechanism for domestic situations, and a voluntary means of information exchange for donors and surrogates with an international element or who could otherwise be shielded by a private fertility clinic perhaps relying on patient confidentiality as a blanket policy.

The Release of Medical Information

As mentioned above, Hogan J has recently espoused the importance of genetic identity, as a feature of modern medicine.[205] This follows the judgment of *I O'T,* wherein Barron J, in demonstrating cognisance of the emerging technology, held that the need to keep the possibility of identity open is based on genetics; and noted that help from a "*member of a cognate family might be essential in certain diseases*".[206] Furthermore, in *N v K,*[207] the High Court found that the child *"has a vital interest in ascertaining his paternity particularly in this era of increased knowledge of genetic and hereditary conditions".*[208] While the 2022 Bill makes provision for such release in limited circumstances, the 2015 Act is surprisingly silent on this aspect. The list of information obtained from a donor, or available to the child or intending parents, does not extend to medical information and there is no reference to genetic screening within the 2015 Act.

Nevertheless, fertility clinics in Ireland are legally required to perform certain screening and testing under Schedule 3 of the *European Communities (Quality and Safety of Human Tissues and Cells) Regulations 2006.* Such regulations are referred to throughout the 2022 Bill and will explicitly apply to the 2015 Act, if enacted. Donors who are not partners of the recipient of the donation are treated differently than "partner donors"[209] and stricter criteria apply.[210] These regulations require strict testing for certain medical conditions, the taking of a full medical history and,

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[205] *Adoption Authority of Ireland v C & D* [2023] IESC 6 at paragraph 85.
[206] [1998] 2 IR 321 at page 381.
[207] [1988] IEHC 15.
[208] *Ibid* at paragraph 31.
[209] As an aside, one difficulty in the AHR context is that it is unclear whether partner donation would apply where both intending parents provided their gamete but yet the embryo is transferred into a surrogate who is a partner to neither of the intending parents. Whether such an intending parent constitutes a donor or not will have implications for the level of testing and exploration carried out.
[210] Such regulations distinguish between partner donation for direct and indirect use, and donations for those that are not partners. Direct donation does not require screening for donor selection criteria or lab testing. Direct donation is categorised by donations that do not need to be stored or cryopreserved. In the case of sperm processed for intrauterine insemination, where the sperm is not to be stored, the biological testing may not be required if the tissue establishment can demonstrate that the risk of cross contamination and staff exposure has been addressed through the use of validated processes. European Communities (Quality and Safety of Human Tissues and Cells) Regulations 2006, section 11, schedule 3, point 1. Indirect donation requires the clinician determining the justification for the donation and its safety for the recipient and any children born, through a review of the donor's medical history and therapeutic indications, as well as certain tests (at point 2). These required tests are HIV 1 and 2, Anti-HIV-1,2, Hepatitis B, HBsAg, Anti-HBc, Hepatitis C, and Anti-HCV-Ab. HTLV-I antibody testing must also be performed for donors living in, or originating from, high-prevalence areas or with sexual partners originating from those areas, or where the donor's parents originate from those areas. In certain circumstances, additional testing may be required depending on the donor's travel and exposure history and the characteristics of the tissue or cells donated (e.g., RhD, malaria, CMV, T cruzi). Where these certain tests are positive, that does not necessarily exclude such donors in partner donation.

dependent on the information provided, a more targeted genetic testing process for the donor. If a donor tests positive for certain medical conditions, they are excluded from donating.[211] Therefore, on its face, it would seem like the 2006 Regulations provide many safeguards for a child born from such a donation. However, such mandatory testing focuses primarily on sexually transmitted diseases and the genetic screening is more of an optional tool. The key issue arising is that there is no evident enforcement mechanism that would require full and open disclosure by a donor in relation to their genetic history above and beyond those tests that are routinely screened for. Genetic screening takes places based on the family history presented by the donor and only with the donor's consent. [212] While it is acknowledged that it is highly unlikely that most donors would purposefully conceal relevant medical or genetic information, there have been reports of incredibly concerning concealments,[213] and many donors may not be aware of their genetic make-up. An unknown medical history or absence of full genetic screening is not uncommon among children not born through AHR; however, it is argued again that when the State interferes with general reproductive freedoms, it should do its utmost to strengthen protections that actually impact on individual children. Therefore, it is argued that there should be criminal sanction for donors who knowingly, purposefully, or even perhaps, recklessly, conceal pertinent medical information (such as a health affecting, life limiting or fatal condition) when donating, in addition to the open disclosure of medical information at the point of donor selection.

Under the 2022 Bill, an AHR treatment provider may disclose non-identifying medical information about a donor, or a person born through the use of donated gametes or embryos in an AHR treatment procedure. The information may be provided to a requesting registered medical practitioner (RMP) in only two circumstances. The first is that that the disclosure is necessary to avoid an imminent and serious risk to the health of the person. The second is to enable the RMP to provide medical advice to a person regarding the existence of a genetic or hereditary condition that might be harmful to that person or to his or her children, including any future children he or she might have.[214] This information will be disclosed without the consent of the person to whom the information relates. The absence of open sharing of non-identifying medical information is arguably a counter-intuitive choice in circumstances where AHR frameworks are modelled on individuals opting in voluntarily prior to conception. If they did not wish to have their medical information released, they could simply choose not to donate. Furthermore, having this information will in all likelihood not identify the donor in any way unless it

[211] The donors must be negative for HIV 1 and 2, HCV, HBV and syphilis and sperm donors must additionally be negative for Chlamydia.

[212] Genetic screening for autosomal recessive genes known to be prevalent, according to international scientific evidence, in the donor's ethnic background and an assessment of the risk of transmission of inherited conditions known to be present in the family must be carried out, after consent is obtained. Complete information must be provided, in accordance with the requirements in these Regulations. Complete information on the associated risk and on the measures undertaken for its mitigation must be communicated and clearly explained to the recipient. Blood samples at the time of testing is also required from non-partner donors.

[213] E. Chudy, "Sperm Donor with Incurable Genetic Condition Fathered 15 Children to Lesbian Mothers" *Pink News* (31 May 2022).

[214] Section 37 of the 2022 Bill.

relates to a considerably rare genetic condition and such connection between it and the donor has been publicised. Therefore, the risk to privacy runs on a scale of minimal to non-existent. It could perhaps be suggested that knowledge of a particular genetic condition could identify a donor known to the child, albeit not as their donor. For example, if a child shared a rare genetic condition with their "favourite uncle", this could then lead to their questioning whether they share a genetic connection with this person.

Finally, it is argued that the lack of automatic and comprehensive disclosure of the donor's medical and genetic information constitutes an interference with the rights of the parents, or rather the guardians of the child, as well as the child themselves. In the case of *K v The Information Commissioner,*[215] a father who shared guardianship with his deceased wife's sister-in-law, was denied access to his child's medical records following her hospital admission. The Supreme Court held that -

> *"As a matter of Constitutional and family law a parent has rights and duties. In general, a parent would expect to be given and would be given medical information about his or her child. It would only be in exceptional circumstances that medical information about a child would not be given to a parent/guardian."*[216]

It held that a parent's rights and duties include caring for their child who may require medical treatment. It found there is a presumption in favour of releasing the child's medical information to the child's guardian so that they can make appropriate decisions for the child, and serve their best interests.[217] In this regard, it is accepted that a clinic cannot give what it does not have; however, it is submitted that it is open to the legislature to provide automatic disclosure of any medical history to the child, or the child's parents prior to conception so that they can make an informed choice as to the use of such donation, as well as all relevant medical decisions in respect of the child after they are born.

Registration of Parentage: the Difference of Treatment in Children born through DAHR and Surrogacy

The introduction of secondary registers in the 2015 Act and 2022 Bill correlate to a broadening of the default registration mechanism for intending parents: the birth certificate. When a child is born through DAHR under the 2015 Act, it is primarily the duty of the parents to register the birth of the child and they shall provide a section 27(5) certificate[218] demonstrating compliance with the requirements of the 2015 Act and a statutory declaration stating that they consented under Part 2 of the 2015 Act

[215] [2006] 1 IR 260.
[216] *Ibid* at pages 267 – 268.
[217] *Ibid*.
[218] Section 27(5) of the 2015 Act provides that this certificate shall state that compliant with the 2015 Act. Therefore it shall confirm the location of the procedure, the date it was performed, the intending parent with the genetic link, whether a donor/donated embryo was used, the adherence to the consent and registration requirements and compliance in respect of any donation obtained from another county. This certificate shall confirm that the intending parent is the parent of the child.

to be the parents of the child to the exclusion of all others.[219] Therefore, from the birth of the child, the intending parents and not the donor, can be registered on the birth certificate. There are no specialised DAHR birth certificates, albeit it is not possible to register two mothers, only one mother/parent and a second parent. Where the second intending parent is a man, he can be assigned the title "father". It should be noted however that this is a closely related issue to that which is currently under consideration by the ECtHR.[220]

The difficulty with such registration in this manner, as opposed to a secondary register, is not its break with tradition,[221] as arguably that is the sole purpose and entitlement of the legislature in introducing the 2015 Act. The primary issue is that there is an inconsistency within the two AHR frameworks which affects the child's right to identity. DAHR parents can be registered on the child's original birth certificate without the issuing of any secondary certificates being issued, such as gender or adoption certificates.[222] However, in the 2022 Bill, it is the surrogate who is registered on the child's birth certificate, not the intending parents. Once a parental order is granted, the intending parents obtain a certified copy of an entry in the Register of Parental Orders for Surrogacy ("a parental order certificate"),[223]

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[219] Section 19A(8) of the 2004 Act.

[220] *SW v Austria,* Application No. 1928/19, lodged on 3 January 2019. The applicants are a same sex couple with a daughter who was gestated by one of the mothers and adopted by the other. The couple sought a birth certificate indicating that both were the child's mothers. The birth certificate listed both mothers but categorised the adoptive mother as "father/parent" which the applicants argue make it clear as to who is biologically related to the child. Their requests were refused by the registrar's office and dismissed by the domestic courts. Before the ECtHR, they have argued that the layout of the birth certificate and the resulting revelation constituted a violation of the family's strictly personal sphere and infringed their right to informational self-determination. Finally, they submitted that it was discriminatory as the birth certificates of children born to different sex parents did not reveal if the parents were biological or adoptive parents. Among the questions posed to the parties is whether there is a right under Article 8 to issue a birth certificate that includes a child's adoptive parent's data. While this case revolves around adoption, it is submitted that the judgment will have important connotations for the law on birth certificates generally and more specifically, in the revelation of non-biological ties on the birth certificate.

[221] In *Foy v an tArd Chláraitheoir* [2002 IEHC 116, McKechnie J held that the birth certificate was not "*seen as a document capable of recording later events in one's existence….irrespective of its importance. It is not an identity document. It is confined to the recording of particulars specified in and mandated by statute*", at paragraph 101. He held that the birth certificate was a "snapshot" of matters on a particular day, the Count found that "*it is not a continuum record of one's travel through life or even of the most important and significant events of that journey*", at paragraph 170. However, subsequently, O'Donnell J in *MR & DR v An tArd Chlaraitheoir* [2014] IESC 60 held that "*while I agree that the register (and certificate) is a document of historical value and documenting a historical fact, I would respectfully doubt that it can be said to be no more than that. It clearly had considerable significance for the plaintiff in that case and the applicants in this*", at paragraph 11..

[222] While gender recognition certificates can be issued pursuant to the *Gender Recognition Act 2015* which recognise an individual's true gender, they do not amend the birth certificate. This was confirmed to this author by the Office of the General Registrar by email on 27 October 2020. A certified copy of an entry in the Register of Gender Recognition may be issued and used as a birth certificate and this will reflect the chosen gender and any change of name under section 3A of the 2004 Act. Similarly, a child who has been adopted receives an "adoption certificate" under the Adoption Act 2010, but their original birth certificate remains unaltered, section 89(1) of the 2010 Act.

[223] Section 35D of the 2004 Act, as proposed by section 157(d) of the 2022 Bill.

which for all intents and purposes is to satisfy any request for a birth certificate.[224] This separate register is to be established in spite of the fact that a parental order can be applied for 28 days after the child's birth and the intending parents have three months to register the child's birth.[225] Therefore, despite the surrogate being registered in the NSR, the intending parents cannot obtain such an entry unless the surrogate is already registered on the child's birth certificate,[226] even if in law, the surrogate is no longer the legally recognised mother of the child within the permissible registration period.

The difficulty arises because a child, under the 2022 proposals, can only apply for a copy of the parental order certificate when they reach the age of 16.[227] By comparison, an entry in the Adopted Children Register (ACR) is available to the child at any point;[228] however, the adoption certificate cannot disclose to the recipient that the certificate relates to an adopted person.[229] The parental order certificate has no such concealing provision and so, comparatively, it should declare in some fashion that it is a parental order certificate and should not appear as if it is an original birth certificate.[230] Furthermore, Tobin correctly asserts that there is no age limitation on a child requesting their birth certificate,[231] and no limitation is contained with the 2022 Bill. Therefore, the provisions read as if the child will have a certificate, either the original birth certificate that includes the name of their surrogate (rendering the "annotation process" completely moot), or a secondary certificate that makes it plan on its face that it is a parental order certificate.

In the first instance, a framework which provides ready access to the child's surrogate's details, but not the donor's, creates a hierarchy of biological connection

[224] Section 35F of the 2004 Act, as proposed by section 157(d) of the 2022 Bill.
[225] Section 62(4) of the 2022 Bill, section 19(1), 19A(1) of the 2004 Act.
[226] The proposed section 35B(2) of the 2004 Act, as inserted by section 157(d) of the 2022 Bill, provides that "*this part [which applies to parental order and the register of parental orders for surrogacy] shall not apply where the birth of a child named in a parental order has not already been registered in the register of births"*.
[227] Section 35D(1) of the 2004 Act, as proposed by section 157(d) of the 2022 Bill.
[228] Section 85(3) of the 2010 Act. Interestingly, the Adoption Amendment Act 2017 amended section 85(4) to ensure that any entry provided to any person shall omit any reference or particulars of any previous adoptions which may have taken place (this is confirmed by the explanatory memorandum on the *Adoption Information and Tracing Bill 2016*, section 35).
[229] Section 89(2) of the 2010 Act. Given that such would be self-evident to a person who requested a search of the ACR, as opposed to the register of births, this provision suggests that where an adopted person requests their birth certificate, they shall be provided with an adoption certificate that looks like a birth certificate, with no corresponding disclosure.
[230] It was previous argued before the Joint Oireachtas Committee on International Surrogacy that there are implications here for the child's privacy however, such concerns are not accepted here. Joint Committee on International Surrogacy, "Analysis of the Issues Paper" (12 May 2022) and Joint Committee on International Surrogacy, "Preventing the Sale, Exploitation and Trafficking of Children: Discussion" (19 May 2022). It is argued that the right to privacy does not arise in such a context any more than it would apply to a child having to present an entry from the foreign births registrar or a birth certificate with no father named, or two mother's named; anything other than the "default" heteronormative understanding of reproduction. It is contended that such a presumption stigmatises the nature of surrogacy in forming a family and further perpetuates the secrecy that has shrouded birth practices that go beyond the "norm".
[231] B. Tobin, "An Appraisal of Ireland's Current Legislative Proposals for Regulating Domestic Surrogacy Arrangements" (2019) 41(2) *Journal of Social Welfare and Family Law* 205 at 211.

based on epigenetics instead of inheritable characteristics. Secondly, in DAHR, the default parentage, or re-registration of intending parents on the birth certificate does not cause any issue with regard to female couples as there is a natural disclosure there is at least one "missing" genetic link. However, in circumstances where the intending parents are an opposite sex couple, there is no indicator that there is a genetic link missing and absolutely no pathway or trigger for the child's access to identifying information of their donor unless they happen to apply for their birth certificate after the age of 18(/16) or their parents disclose the nature of their conception to them. While it is acknowledged that the presumptions of paternity already facilitate such concealment, this new framework of registration constitutes the first state mandated recognition of non-genetic parents being registered on the birth certificate. The registrar can claim ignorance in the absence of any proactive requirement for DNA tests; however, they cannot do so when they are presented with a DAHR couple. As Besson's asserts, the State is the main duty-bearer of the child's right to know her origins.[232]

It is also noteworthy that the parental rights of the DAHR intending parents are already enjoyed by virtue of a section 21, 22 or 35 declaration and so this registration arguably favours parental recognition over the easy facilitation of the child's identity. Ultimately, the position within this thesis is that there should be open disclosure of a child's DAHR or surrogacy journey, and therefore the access of a child to their birth certificate naming their surrogate appears very positive. It is again, however, diminished by what is argued to be a clearly unintentional and ill-considered drafting error. There is however a number of amendments to the process that would arguably balance the rights of those involved. The first is that the birth certificate should reflect the intending parents on foot of a pre-birth parental order application, which is an approach that has previously found favour with Tobin.[233] The second is that the surrogate and donor remain registered on the NSR and the NDCPR only. Finally, there should be no age restriction on the child's access to identifying information in the secondary registers. It is submitted that such a framework would recognise each party's contribution as well as the child's social and legal reality. However, while the third point is arguably possible as long as donors are notified of same prior to conception, thereby quashing any expectation of privacy, the availability of such access is entirely dependent on the child's knowledge to look for

[232] S. Besson, "Enforcing the Child's Right to Know her Origins: Contrasting Approaches Under the Convention on the Rights of the Child and the Child and the European Convention on Human Rights" (2007) 21(2) *International Journal of Law, Policy and the Family* 137 at 144. She notes that it is the state which has the means and hence the duty to arrange for registration at birth and for the collection and disclosure of all relevant data pertaining to a person's identity.

[233] Tobin has stated that "*the effective enjoyment of a child's right to birth registration requires that the law recognise and reflect the actual nature of a child's family environment and include information about the identity of those persons who have accepted parental responsibility for the child*", J. Tobin, "The Convention on the Rights of the Child: The Rights and Best Interests of Children Conceived Through Assisted Reproduction" (2004) LSRP No. 541 at 30. He continues, "*it is consistent with the rights of children under International law to demand that the registration of their birth represents a true indication of their familial relations and not simply an outdated desire to confirm to a heterosexual couple concept of parentage*", at 32.

such information. Therefore, the constitutionality and the practicality of a duty on either the parent or the State to disclose must be considered.

The Constitutionality of Automatic Disclosure

It is argued that a duty to disclose on either the State or the intending parents must arise firstly, by virtue of such disclosure acting as a gateway to the realisation and vindication of the child's right to identity and secondly, to offset the State's interference by severing the ties between the child and their biological progenitors. In this regard, Freeman has argued that the right to identity is a "*right not to be deceived about one's true origins*",[234] and Vonk argues that the duty is on the child's parents as part of their "*procreational responsibility before conception*".[235] Bracken has further argued that the maintenance of a register, such as the NDCPR or the NSR, without a corresponding duty to disclose, would be a "*futile exercise*".[236] The right to be informed about the nature of one's conception appears fundamental and is considered step one of a two-step process in realising the right to identity. Without the initial disclosure, the right to identity cannot be exercised. Blauwhoff argues that:

> *"it must be conceded, that notions of '(progressive) autonomy' and 'informational self-determination' may become empty constitutional shells as long as the concerned individual remains ignorant of the underlying disparity, this prompts the question of enforceability as to who should be held accountable for 'telling'".*[237]

To date, there has only been minimal exploration of a duty to disclose, and such consideration is subject to a familiar limitation, that of being considered in the context of adoption. In *I O'T v B,*[238] Keane J, in his dissent, pointed to the relationship between the concept of rights on one hand and freedoms and powers on the other. He held that the concept of rights:

> "*necessarily involves the existence of a co-relative 'duty' on another person or body…Thus, in the present case, the 'right' [to identity] would be a meaningless concept, unless there existed a corresponding duty on the part of either the notice parties or the natural mothers themselves or both of them to give the applicants that information*".[239]

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[234] M. Freeman, "The New Birth Right? Identity and the Child of the Reproduction Revolution" (1996) 4 *International Journal of Children's Rights* 273 at page 291.

[235] L. Bracken, "In the Best Interests of the Child? The Regulation of DAHR in Ireland" (2016) 23 *European Journal of Health Law* 391 quoting M Vonk, "Children and their parents: A Comparative Study of the legal position of children with regard to their intentional and biological parents in English and Dutch Law" (Intersentia, 2007) at 252-253.

[236] L. Bracken, "In the Best Interests of the Child? The Regulation of DAHR in Ireland" (2016) 23 *European Journal of Health Law* 391 at 400.

[237] R J Blauwhoff, "Tracing Down the Historical Development of the Legal Concept of the Right to Know One's Origins; Has 'to know or not to know' ever been the legal question?" (2008) 4(2) *Utrecht Law Review* 99 at 103.

[238] [1998] 2 IR 321.

[239] *Ibid* at 368. However, notably, this insightful passage arose from the only judge within the case not to find that a child had an unenumerated right to know the identity of their natural parent.

It could be argued that there are an array of quasi-disclosure legislative mechanisms already available. The State has created its own disclosure mechanism through the annotated birth certificates,[240] children born through surrogacy seem to have unfettered access to their birth certificates which name the surrogate, and children must be joined as parties to parental order and declaration of parentage proceedings.[241] There are also a number of provisions that indirectly result in a child having knowledge of their surrogate or donor. The first of these is that surrogates and donors cannot be paid, the second is that agencies who match intending parents and surrogates are prohibited and the third is that publicising a notice for a surrogate is a criminal offence. Each of these provisions indicate that intending parents will have little choice but to ask friends and family known to them, and inevitably their child, to act as a surrogate.[242] However, what is considerably lacking, is a reliable State automatic disclosure mechanism operative from the child's birth, or a proactive duty to disclose on the parents. Therefore, the natural question arises as to who should be responsible for carrying out this disclosure, as distinct from who should mandate and enforce this disclosure, and what reasons, if any, justify opposing a duty to disclose.

Interfering with Parental Autonomy

A duty to disclose on parents raises numerous issues of both legality and practicality. The primary legal issue is the justification of state interference in the autonomy and decision-making of the child's parents and the marital family. Such interference could arise if, for example, the State required the parents to disclose and if a penalty was imposed on those who refused. There are two cases wherein the Supreme Court delve into this issue in detail, namely, *North Western Health Board v HW and CW,*[243]

[240] Section 39(4) of the 2015 Act; Section 66(4) of the 2022 Bill.

[241] Section 21(3), 22 of the 2015 Act; section 35(1B) of the 1987 Act. This was not previously a requirement of the 1987 process, albeit it was within the Court's discretion to serve notice or join any person as a party to the proceedings under section 35(7) of the 1987 Act. There is, however, no requirement within the 1987 Act for the voice of the child to be heard, unlike the 2015 process (section 21(8)).

[242] If not known, it is envisioned that she will at least be identifiable given that a written agreement between the parties must be created in the absence of any technical or professional service, section 51(2) of the 2022 Bill.

[243] *North Western Health Board v CW & HW* [2001] IR 622. The respondents in this case were Jehovah's witnesses and parents to the child in question, Paul. They did not believe in harming others and drawing blood from their child. Notably however, the issue was not defended on religious grounds, but on the power of the autonomy of the marital family alone. The parents did not argue that the child's and their interests aligned but rather more pointedly, that the right of the family must take precedence over the rights of the child, under Article 42.5 of the Constitution, unless there has been an exceptional failure of the parental duty, for either physical or moral reasons.

commonly referred to as the "PKU test" or "heel-prick test" case, and *Re JJ.*[244] The Constitutional article from which the parental authority emanates was Article 42.5,[245] which was replaced in 2015 with Article 42A.2.1,[246] as part of a standalone article devoted to the rights of children. The PKU case took place prior to the insertion of Article 42A, and the JJ case took place after. Therefore, it will be necessary to assess any impact of this new standalone article on the vindication of a child's rights against the parent's wishes.

The PKU Test Case

The Supreme Court in the PKU case, which dealt with whether a young child should receive the "heel prick test",[247] was divided between the majority made up of Denham J (as she then was), with Murphy, Murray and Hardiman JJ concurring and a strong dissent from Keane CJ. There was a number of findings made by the Court which arguably muddied any prospect of a distinct or prescribed hierarchy of rights. The Court held that "*the fact that the family is the fundamental unit group of society is a constitutional principle*", that the child was a member of that family, and was the responsibility of the parents.[248] However, it also held that the rights of the parents are not absolute and that children are rightsholders by virtue of both the benefit of their family, and as an individual. The Court further noted that the courts will protect the constitutional rights of the child, whether legislation exists or not. In the absence of legislation, the Court must be guided by a direct analysis of the constitutional provisions, specifically Article 41, the language of which is "*clear and strong*" and which "*places the family at the centre of the child's life*".[249] Denham J held that it was

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[244] *Re JJ* [2021] IEHC 655, [2021] IESC 1, [2021] IESC 11. The child in this case who is referred to as "John" throughout had suffered catastrophic injuries in an accident such as brain injuries, fracture of his left clavicle, multiple rib fractures, fractured right humeral shaft, pulmonary contusions and pulmonary haemorrhage, a grade 1 splenic laceration, fractured public rami, maxillary fractures, and a left greater wing of his sphenoid fracture. After a few efforts, he was successfully extubated but remains fed by a nasogastric tube, has a long-term catheter to facilitate the delivery of medications and his lungs need intermittent suctioning to remove secretions. He also had a urinary catheter and is doubly incontinent. The evidence given by the medical team was that it is not expected for John to walk, talk, develop any meaningful awareness of his surroundings, be able to communicate or process information, nor will he ever be capable of performing any voluntary movements.

[245] This Article provides that in exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.

[246] This Article provides that in exceptional cases, where the parents, regardless of their marital status, fail in their duty towards their children to such extent that the safety or welfare of any of their children is likely to be prejudicially affected, the State as guardian of the common good shall, by proportionate means as provided by law, endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.

[247] This test is routinely carried out on new-born babies, and involves piercing the child's skin with a lancet, in order to test for five main conditions. These conditions range in their impact on the child's life, varying from intellectual disabilities resulting in life-long reliance on others for their care, to life threatening illnesses. The statistical likelihood of the child having one of the illnesses ranged from 1 in 3,500 (Hypothyroidism) to 1 in 49,000 (Homocystinuria).

[248] *North Western Health Board v CW & HW* [2001] IR 622 at 718.

[249] *Ibid* at 719.

not necessary for her to determine the extent of the absolute nature of the State's duty to vindicate the rights of the child.[250] However, ultimately, she held that the:

> *"family is the decision maker for family matters – both for the unit and for individuals in the family. Responsibility rests fundamentally with the family. The people have chosen to live in a society where parents make decisions concerning the welfare of the children and the State intervenes only in exceptional circumstances. In assessing whether State intervention is necessary the fundamental principle is that the welfare of the child is paramount. However, part of the analysis of the welfare of the child is the wider picture of the place of the child in the family; his or her right to be part of that unit".*[251]

In developing the point on exceptional circumstances, the Court found that intervention may be warranted if the child's life is in immediate danger, or where there is a real or significant chance of having the disease for which he was being screened. Murray J held that:

> *"It would be impossible and undesirable to seek to define in one neat rule or formula all the circumstances in which the State might intervene in the interests of the child against the express wishes of the parent. It seems however, to me, that there must be some immediate and fundamental threat to the capacity of the child to continue to function as a human person, physically, morally, or socially, deriving from an exceptional dereliction of duty on the part of the parent to justify such an intervention"*[252]

Therefore, it was the imminence or the significance of the risk and the position within the marital family that was relevant, as opposed to the support of the expert medical community, and the proportionality of the decision when considering the objectively minimal interference with the parent's autonomy versus the potential depth of the impact on the child.[253] It could also be said that this passage would not protect a child from an interference at a young age that may not be realised until they are more developed. However, the application of such a suggestion does not marry well with the fundamental bases for the State's child care system, arguably the most considerable framework of parental interference, which is based in large

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[250] She also found that any comment as to what the finding of the Court would be, had a statutory obligation existed on the parents to present their child for the PKU test, or as to whether such an obligation should be put in place, would only be speculative and inappropriate. In this manner, the Court was reluctant to effectively impose a compulsory test, without having the benefit of analysis and preliminary work which would normally precede legislation.

[251] *Ibid* at 722.

[252] *Ibid* at 740.

[253] In the PKU test case, the child had no identifiable medical conditions; the case was about offsetting the risk of five medical conditions, which, if left untreated, would have had considerable impacts on the child's quality of life. Therefore, there was no immediate concern, but the depth of the impact was significant. It was also the case that the heel prick test was minimally invasive and posed little to no risk to the child.

part on early life risk, and the implications of same in later life.[254] The Court, in citing *Re JH*,[255] concluded that the constitutional presumption that the welfare of the child is found within the family prevails, unless there are compelling reasons why that cannot be achieved, or where there are exceptional circumstances where the parents fail in their duty.[256] It held that "*any intervention by the courts in the delicate filigree of relationships between the family has profound effects*".[257] Furthermore, the Court made it explicitly clear that the principle behind excluding State interference in parental decision-making is a constitutional principle emanating from Article 42.5 of the Constitution.

Arthur has argued that the PKU case "*errs too far in the direction of protection and is, on the whole, unreceptive to the claims of children*".[258] This was most clear in the Court's acceptance that had the child been a ward of court, the Court would have easily ordered the test to be carried out based on the medical evidence alone.[259] The PKU test case was therefore undoubtedly reflective of a judicial approach that viewed the child's general interests as arising primarily from their parents making decisions for them, as opposed to an objective standard as to what a reasonable person would consider in the child's best interests as an independent rights holder. O'Mahony and Kilkelly have argued that "*the fact that [the rights of the child] are not expressly recognised in the Constitution meant that there was no duty on the Court to weigh the child's rights in the balance. For this reason, this case exemplifies the consequence of the lack of express protection for children's rights in the Constitution".*[260] However, as mentioned above, this case relates to a previous

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[254] It should be noted that O'Mahony has argued that the reference to "health, development or welfare" brought about by Article 42A "*seemed to do little other than harmonise the language in the Child Care Act and in the constitutional provision that authorises that Act*", C. O'Mahony, "The Same, but Different? Article 42A and the Threshold for State Intervention in Family Life: *In Re JJ*" (2022) *Irish Supreme Court Review.*

[255] [1985] IR 375.

[256] [2001] IR 622 at 724.

[257] *Ibid.*

[258] R. Arthur, "North Western Health Board v. H.W. and C.W.—Reformulating Irish Family Law" (2002) 20(20) ILT 39.

[259] "*The test to be applied is not the simple medical test. Medical opinion before the Court was unanimous as to the appropriateness of the PKU screening test. However, the test for the Court is not the simple test as to whether the benefit of the PKU test outweighs the medical risk. If that were the test, in my view, the decision would be clear and in favour of ordering the PKU test. However that is not the test to be applied to the case. Nor is the test to be applied that of seeking out what would be the decision of responsible parents. The child is not an orphan or a ward of court. Thus the test is not that which would be applied if the child was a ward of court. The entire circumstances relating to the child have to be taken into consideration. They include the parental decisions*", *ibid.* See also Murray J at page 734-735.

[260] U. Kilkelly and C. O'Mahony, "The Proposed Children's Rights Amendment: Running to Stand Still?" (2007) 10(2) IJFL 19. However, it should also be noted that in critiquing the proposed wording for the now Article 42A, they argued that *"[f]undamentally, the proposed Art.42A does not increase the express level of protection for children's rights in the Constitution, and it does not re-calibrate the historic imbalance between the constitutional rights of children and those of parents and the family. The difficulties which led to the many calls for constitutional change are not, apart from one minor exception, addressed by the amendment as currently worded. Rather than strengthen the constitutional recognition and protection of the rights of children, the proposed provision appears to*

constitutional threshold which has since been reimagined to an extent under Article 42A.

Judicial Consideration of Parental Autonomy in the Context of Genetic Identity

Before delving into the *JJ* case, and its impact on the constitutional tension between the child's rights and parental autonomy in the wake of Article 42A, it is important to note the High Court judgment of *Z v Y.*[261] This case specifically considered the implication of disclosure of a child's genetic lineage on parental autonomy. The Court (Laffoy J) considered whether it was necessary for a child (Jane), who was almost 16 years of age, to be put on notice of the proceedings which related to the establishment of her genetic parentage, and potentially joined as a party. The Court also considered whether it should have jurisdiction to direct someone other than her parents to disclose to the child that the proceedings were in being, and if so, what were the criteria in determining to make such a direction. The proceedings arose by virtue of the legal parents seeking a declaration restraining the registrar from conducting its inquiry into the accuracy of Jane's birth details, as registered. Therefore, such a direction would naturally have the implication of bypassing her legal parents authority and telling her that the applicant was potentially her genetic father.

The Court had appointed a psychologist whose professional opinion was that the child should be told about the proceedings, that the child's welfare would be served by disclosure and the Court agreed.[262] It therefore adjourned the matter on a number of occasions in order to facilitate this; however, the legal parents refused to do so, citing Article 42.5 of the Constitution. All parties agreed that the child had a constitutional right under Article 40.3 to be informed of the existence of the proceedings given that they involved decisions of "*fundamental importance*" to her. This was suggested by both parties to relate to her guarantee of basic fair procedures, emanating further from the child's right to be heard in proceedings relating to their welfare.[263] However, while counsel for the putative father argued that the child had a constitutional right to the care and company of both of her biological parents and co-relatively to know the identity of her "true" parents, the Court deemed it unnecessary and inappropriate to express any view on that.[264] Regardless, this point is moot given that the provisions of the 2015 Act and 2022 Bill

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entrench in the Constitution the position that children enjoy inferior constitutional protection as compared with adults".

[261] [2008] IEHC 472. In this case, a putative genetic father was asserting that he had a right to be registered on the birth certificate even where the mother's spouse was already registered. He had engaged in a paternity test but not a declaration of parentage under section 35 of the 1987 Act.

[262] *Z v Y* [2008] IEHC 472 at 16.

[263] The Court relied on the judgment of Finlay Geoghegan J in *FN v CO*[2004] 4 IR 431 in support of this point. However, this broad concept of "proceedings relating to the child's welfare" was arguably narrowed by Article 42A.4.

[264] *Z v Y* [2008] IEHC 472 at 7.

provide a statutory right to such information, albeit the use of "true" is questionable in the context of AHR.[265]

In considering the impact of Article 42.5, the Court noted that Article 40.3 was also engaged where a separate duty arose on the State to protect the constitutional rights of children.[266] Both articles require the State to have due regard for the natural and imprescriptible rights of the child. The Court held that it had jurisdiction to intervene to protect the child's constitutional rights, regardless of the absence of legislation.[267] Furthermore, it reiterated that taken together, Articles 40, 41 and 42 require that state interference arise only in exceptional circumstances, where there has been a failure on the part of the parents in their duty towards their children. The particular question for the Court was whether there is a parental right to control the communication of information to a child about legal proceedings concerning the paternity of the child. In answering this question, the Court accepted in principle the submission from counsel that there is a parental right to decide what to tell a child at the different stages of their development about their paternity, and that there is a right to control both the content and timing of what the child is told.[268] The Court held that the parents do have the primary right and duty to ensure that steps are taken to enable the child's constitutional right to information relating to the proceedings. However, it also held that the State could step in if the parents have failed in that duty.[269] Therefore, the Court held that the failure of the parents to tell the child about the proceedings constituted a failure for the purposes of Article 42.5 and was exceptional in nature. The Court held that it could not determine whether the failure was for physical or moral reasons, or whether there was blameworthiness, given that the parents had not given evidence on the reasons why

[265] Furthermore, in relation to the right to the care and company of both a child's biological parents, this is clearly not a right that can be enforced against a parent, and it has been previously held by Parke J in the case of *G v An Bord Uchtala* [1980] IR 32 at paragraph 904 that "[t]he child, of course, has personal rights, which are recognised by Article 40 of the Constitution to life, to be fed, to be protected, reared and educated in a proper way, but in my view a child has no constitutional right to have these obligations discharged by his or her natural parent, and that if there are other persons able and willing to satisfy such requirements, then a child's constitutional rights are sufficiently defended and vindicated".

[266] The Court cited In *Re Article 26 and the Adoption (No. 2) Bill 1987* [1989 IR 656 in support of this point.

[267] In support of this point the Court referenced to Hardiman J's statement that the decisions of the parents "should not be overridden by the State or in particular by the courts in the absence of a jurisdiction conferred by statute", *North Western Health Board v CW & HW* [2001] IR 622, at 755, yet preferred Denham J's finding that it is settled law that courts have a constitutional jurisdiction to intervene to protect the constitutional rights of a child whether legislation exists or not, at page 718.

[268] *Z v Y* [2008] IEHC 472 at 14.

[269] *Ibid* at 15.

they did not wish to tell the child.[270] Therefore, the Court ordered that the child should be told, and that someone other than the parents should tell her.[271]

As mentioned previously, a child now must be joined as a party in applications relating to the declaration of their parentage,[272] and so this case is, to a point, moot. However, it is reflective of the judicial consideration of the interference with parental autonomy when the genetic truth is at stake. It is significant for the Court to have found that the failure of a parent to tell a child about proceedings in which their genetic parentage arises, constitutes a failure for the purposes of Article 42.5. While it can easily be said that this failure emanates from the child's procedural rights, it is submitted that it is not a considerable departure from this judgment to invoke the child's constitutionally recognised derived right to identity as a basis for imposing a duty to disclose, even in the absence of such proceedings. Where there are no proceedings, and no independent court to oversee its implementation and make a finding, the level of enforcement is severely diminished. That being said, it would be difficult to provide any rational basis for a policy that respects the rights of those children whose identity becomes the subject of court proceedings while leaving every other child in ignorance, particularly in circumstances where the State has knowledge of such ancestry and facilitates its collection, maintenance, and dissemination. Finally, it is suggested that while this case did not deal with the constitutionality of joining a child as the party to such proceedings, or indeed a state mandated process of automatic disclosure, the finding in this case is arguably quite non-fact specific. It could not be easily suggested that this judgment arises from a particular set of facts, not likely to be repeated. There were very little, if any, unique circumstances which arose which would prevent a deduction that this judgment is of general application. The legal parents did not give reasons for their failure to disclose the material information and there was also no immediate or fundamental threat to the child, seemingly creating a divergent approach from the Court in the PKU test case.

The Impact of Article 42A

A review of the cases referring to Article 42A conducted by the author in respect of every published case from 2015 – 2022 shows that there have only been a handful

[270] However, it ultimately resiled itself to finding that it was a moral failure by the parents, in the absence of any evidence of any physical factors which it described as a psychiatric or psychological disability, *ibid,* at 17.

[271] While the manner in which the child should be told, and when she should be told, was subject to further evidence from the Court appointed assessor, the outcome of this has not been published. However, the Court did preliminarily suggest the following criteria: a) her general level of intelligence, personality and understanding, b) her current living conditions and the state of the relationships in her life, c) the impact of being told by a third party as distinct from her parents, d) the relative suitability of different people who could tell her about the proceedings, e) the impact of being told at this particular time in her life and f) the impact of not being told at all and finding out later, and g) the relative risks of damage in all these eventualities, as compared with each other, *ibid* at 18.

[272] Section 21(3) of the 2015 Act, Section 35(7) of the 1987 Act.

of cases that refer to Article 42A in any substantive terms,[273] and less, that directly deal with the standard of state intervention in parental decision-making,[274] with only one case reported in the media.[275] The most substantive consideration of the implication of Article 42A on state interference with parental decision-making is *Re JJ.*[276] In this case, the parents were separated but their views were aligned in that the father supported the ardent wishes of the child's mother. The child involved had a very poor quality of life and the point of contention was that, in the event of a dystonic episode,[277] that was so severe as to require invasive ICU measures, the medical team did not wish to persist in their interventions in respect of any resulting medical issues brought on by the required pain relief. The family wanted the medical team to administer the pain relief as well as the subsequent interventions to keep

[273] It should be noted that the broader consideration of Article 42A and the best interests principle is considered by the Court in, *PH v Child and Family Agency* [2016] IEHC 106, *Mc G & C v The Child and Family Agency* [2017] IESC 9, *Bedford Borough Council v M, A & Child and Family Agency* [2017] IEHC 583, *CB and PB v Údarás Uchtála na hÉireann* [2018] IESC 30, *Child and Family Agency v Adoption Authority of Ireland* [2018] IEHC 515*, SOTA v Child and Family Agency* [2018] IEHC 714, *Child and Family Agency v ML* [2019] IECA 109, *DK v PIK* [2022] IECA 54.

[274] For example, the Court in *the Child and Family Agency v AM* [2016] IEHC 749 made only passing reference to Article 42A yet ultimately decided against both the parents and the child's wishes to remove the child to the UK for behavioural treatment that was not otherwise available in Ireland. The Court, notwithstanding the introduction of Article 42A, referred to the PKU case, and noted that State intervention in extreme situations was justified only where there was an immediate and fundamental threat to the life of the child. With little other analysis of the constitutional provisions, the Court ultimately made its determination based on the compelling medical evidence but endorsed the views of Lord Donaldson, in considering the balancing of parental and child rights, who held that: "*the Court needs to be mindful that the views of any parents may, very understandable, be coloured by their own emotion or sentiment…Their own wishes however understandable in human terms, are wholly irrelevant to consideration of the objective best interests of the child save to the extent in any given case that may illuminate the quality and value to the child of the child/parent relationship". Re J. (A Minor) (wardship: medical treatment)* [1991] Fam 33. This passage could perhaps be argued as being out of step with the general tenor of the judicial commentary on state intervention.

[275] M. Carolan, "Court Gives Go-Ahead for Kidney Procedure on Child Despite Parents' Objections" *Irish Times* (10 July 2019). which somewhat follows the consideration of the Court in AM. This matter was before the President of the High Court, Kelly J (as he then was), and involved a child who had suffered irreversible kidney damage and would suffer further unless he received a surgery to which his parents objected. The objections of the parents were noted by the Court not to relate to any religious or philosophical ground but rather, their disbelief as to the severity of their child's medical needs. The parents in this case were said not to have accepted his diagnosis. It held that the parents deep seated but irrational belief constituted a failure where their child's best interests were concerned. Unfortunately, there was no further reporting in relation to any orders as to surgical intervention..

[276] It also considered the law on euthanasia, the obligations on medical professionals to act in emergency situations and the jurisdiction of the Court in wardship. Such considerations are beyond the scope of this thesis.

[277] Dystonia is a hyperkinetic movement disorder which causes abnormal electrical signals to be sent to the muscles which can trigger painful, prolonged, and involuntary contractions of muscles. John's dystonia affected all four limbs, and a paediatric intensivist gave evidence to the Court that in her 9 years of working with approximately 1,000 different patients with the disease, the severity of John's suffering was unparalleled save one patient. His symptoms are brought on by anything which causes him discomfort, including noise and the delivery of medication. At the time of the application, John was having between 2-7 episodes per day and was considered to be resistant to medication targeted to relieve his episodes. John was unable to communicate his pain due to his injuries.

their child alive, even though he was expected to continue to have excruciating dystonic episodes until interventions were withheld.

From the outset, the Attorney General made submissions to the effect that Article 42A could be seen as a "*constitutional recalibration to provide for a more child-orientated approach to matters of constitutional interpretation*".[278] He submitted that aside from Article 42A.2.1, the personal rights of the child under Article 42A.1 could provide a separate constitutional basis for intervention. Therefore, the Court was asked to determine whether a failure had to be established and if so, whether the threshold had changed in light of Article 42.2.1, or whether the child's own natural and imprescriptible rights under Article 42A.1 warranted intervention. One aspect of the case that has been confirmed on a number of occasions[279] since the insertion of Article 42A, albeit not in such clear terms, was that the marital status of the parents had no bearing on the outcome of the case because Article 42A expressly applies to children, regardless of the marital status of their parents.[280]

In discussing the changes brought about by Article 42A, there are, it is submitted, a number of positions taken by the Court that appear to favour both sides of the pre- and post-Article 42A eras. For example, it held that where there is a perceived clash between the rights and interests of the family members, namely the parents and the child, these cannot be addressed by reference to the collective rights of the family unit under Article 41.[281] This would appear to move away from viewing the child as a member within a rights based familial unit. However, it then noted that Article 42A was introduced in the absence of any amendment of Articles 41 and 42.1. Therefore, it reasoned that the strong position of the family is maintained and Article 42A must be interpreted in such a context.[282] The Court considered the nature of amendments to the Constitution which, on one hand it suggested could be deemed a societal endorsement of a change believed to be required, in response to decided cases or the Constitution itself. In this regard, Brady has stated, *"[w]hatever Article 42A.1 might mean, it must mean something. The electorate cannot be presumed to have voted in favour of a provision that needlessly repeats the rest of the article*".[283] However, the Court continued that Article 42A was not "*a single clear-cut reversal of the direction of the law […] but rather a more wide-ranging, though subtle, change to the posture of the Constitution in relation to child and family matters*".[284] Somewhat more definitively, it found that the case law created under Article 42.5 could not be directly applied to the position under Article 42A, and to do so, would ignore the fact

[278] *Re JJ* [2021] IESC 1, at paragraph 58.
[279] *PH v the Child and Family Agency* [2016] IEHC 106, at paragraph 44-46 and *M v Minister for Justice and Equality* [2018] IESC 14 at paragraphs 217-218
[280] *Re JJ* [2021] IESC 1 at paragraph 100. The Court held that "the test to be applied to the parental decision does not, in any way, depend upon the marital status of the parents".
[281] *Ibid* at paragraph 102.
[282] *Ibid* at paragraph 129.
[283] A. D. P. Brady, "Children's Constitutional Rights: Past, Present and Yet to Come", *Catherine McGuiness Fellowship Seminar* (6 December 2018), at para 32.
[284] *Re JJ* [2021] IESC 1 at paragraph 130.

of the amendment.[285] This point alone creates somewhat of a blank slate to any consideration of the constitutional position arising from a conflict between the rights of the family and the rights of the child. The extent of this, however, must still be explored.

Article 42.1 – The Child as an Independent Rights Holder

In terms of Article 42A.1,[286] it is evident from the Court's judgment that this is seen mostly as a restatement of pre-existing rights; in particular, the reference to the "*natural and imprescriptible*" rights of the child was already contained within the since removed Article 42.5, as well as previous case law.[287] In this regard, the Court held that this "*text crystallises and endorses a developing trend in the case law*",[288] and cited Denham J in the PKU test case where she held that "*initially cases were more protective of parental authority and the family in all but very exceptional cases. However, in recent time the child's right have been acknowledged more fully*".[289] The Court continued that it could be said that the "*change was one of* emphasis *rather than* substance*, or making explicit what was implicit, but does not mean that the change was without significance or importance for constitutional interpretation*".[290] The Court held that one of the objectives of Article 42A.1 and the express statement of rights was to ensure that cases where the parent must substitute their consent for that of the child, in which the "*rights of the child come to the forefront*", were not approached "*by reference to the objective of maintaining the authority of the family, but rather through the lens of the rights of the child*".[291] The Court described the amendment as "*subtle*" yet "*its direction is clearly discernible*".[292]

The amendment was held as seeking to maintain a balance and, in some cases, a necessary tension, between the familial autonomy and the rights of the child.[293] The Court held that:

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[285] The Court noted that "*the conclusion that Article 42.5 defined the circumstances under which the State could and should intervene in a family to protect the interests of the child was part of the background against which that provision was itself removed from the Constitution, and a new separate Article, Article 42A, introduced*", at paragraph 107.

[286] This Article provides that the State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights.

[287] In *Nicolaou v An Bord Uchtala* [1966] IR 567, the Supreme Court held that "*Th[e] "natural and imprescriptible rights*" [spoken of in Article 42.5] cannot be said to be acknowledged by the Constitution as residing only in legitimate children any more than it can be said that the guarantee in section 4 of the Article as to the provision of free primary education excludes illegitimate children. While it is not necessary to explore the full extent of "*the natural and imprescriptible rights of the child*" they include the right to 'religious and moral, intellectual, physical and social education.' An illegitimate child has the same natural rights as a legitimate child though not necessarily the same legal rights", at 642. In *N v HSE* [2006] IR 374, Hardiman J held that *"It would be quite untrue to say that the Constitution puts the rights of parents first and quite untrue to say that the Constitution puts the rights of parents first and those of children second. It full acknowledges the 'natural and imprescriptible rights' and human dignity, of children, but equally recognises the inescapable fact that a young child cannot exercise his or her own rights."*

[288] *Re JJ* [2021] IESC 1 at paragraph 126.

[289] *North Western Health Board v CW & HW* [2001] IR 622, at 718.

[290] *Re JJ* [2021] IESC 1 at paragraph 131.

[291] *Ibid* at paragraph 132.

[292] *Ibid* at paragraph 133.

[293] *Ibid*.

> "*a situation where parents make decisions in relation to a child, not because they concern the child's rights but the child cannot make them for him or herself, but rather where the decision is one always for the parent to make in what they consider the interests of the child, such as educational and other choices prima facie within the authority of the Family. The parents are not therefore substituting themselves for the child – they are the primary decision-makers, and the Constitutional test for State override is applicable*".[294]

This passage would appear to create two categories of children's rights. The first category is that of "parental authority" rights that naturally fall to a parent throughout the lifetime of their child's childhood and do not arise in adulthood. The second category is where the right is a child's right, but the child cannot make a decision for themselves, perhaps by reason of a deficit in the child's social or legal capacity to fully realise and exercise the right by themselves. The latter category could be considered "rights in waiting". The Court considered the issue of medical treatment and described the situation in which a child cannot lawfully provide such consent, and

> "*a substitute consent is necessary. In such circumstances, the rights of the child come to the forefront. One of the objectives of Article 42A.1, and the express statement of the rights of the child, is, perhaps, to ensure that such cases* ***were not approached by reference to the objective of maintaining the authority of the family,*** *but rather through the lens of the rights of the child*" (emphasis added).[295]

The Court described parental decision-making in relation to children as a "*complex issue and cannot be reduced to a 'one size fits all formula*'".[296] It further considered the example of a child who is the beneficiary of compensation arising from a civil liability claim. The child's own right to this property is the "*sole consideration, and the duty of parents is only to* ***secure those rights***".[297] The Court further expanded in holding that -

> *"some decisions made within the Family are decisions by parents in relation to their children, and where it is possible that the parental decision,* ***or the absence of a parental decision*** *can be said to be damaging to the interests of the child. Article 42A.1 is an emphatic statement of the rights of the child, and that there is, therefore, a corresponding duty on parents to uphold and vindicate those rights"* (emphasis added).[298]

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[294] *Ibid* at paragraph 145. The Court also held that *"[t]he Constitution has, since 1937, affirmed the central importance of the Family. The Family is, however, a collective body made up of individuals who themselves have rights. One aspect of the constitutional position of the Family is the right of a family collectively to make decisions, for example, in relation to lifestyle or life choices, sometimes as a result of religious or ethical beliefs, and the State must respect those choices within certain constitutional limits*", at paragraph 131.
[295] *Ibid* at paragraph 132.
[296] *Ibid* at paragraph 145.
[297] *Ibid* at paragraph 145.
[298] *Ibid* at paragraph 131.

Therefore, there are rights of the child that parents are duty bound to secure, safeguard, and vindicate. These appears to constitute an evolution of the following finding of Hardiman J in *N v HSE:*[299]

> "*a right conferred on or deemed to inhere in a very young child will in practice fall to be exercised by another on his or her behalf. In practice therefore, though such a right may be ascribed to the child, it will actually empower whoever is in a position to assert it, and not the child himself or herself*".[300]

The distinction drawn by the Court appears to be that a "parental authority" right can be interfered with under the Article 42A.2.1 test, whereas the child's right under Article 42A.1 is independent of the authority of the family and is only safeguarded by the parent. The underlying premise is that a lower threshold is imposed to justify a state action to vindicate a right that is the child's, as opposed to the parent's agency to manage their family affairs. In this regard, the Court held that "*[i]t would be quite wrong to force all these different decisions into a single decision-making pattern of parental primacy qualified only by a high threshold of parental failure."*[301] It is argued therefore that it is the categorisation of the right into one of these two classifications that determine which test must be imposed; however, there is some doubt as to what such a test under Article 42A.1 would look like. In the High Court, Irvine P rejected the proposition that the State could *only* intervene to vindicate the child's constitutional rights where the parents had failed in their duty, finding that this submission was based neither by case law nor the Constitution.[302] The State could intervene where the parents had failed *or* where there were compelling reasons to do so.[303] Where such compelling reasons existed, she then held that the appropriate course was to focus on the evidence in determining what the best interests of the child were. The Supreme Court, however, did not deem it necessary to engage in a determination of whether the "compelling reasons" test survived Article 42A, or a substantive consideration of any detailed test for assessing whether a child's personal right had been unjustifiably interfered with under Article 42A.1, given that

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[299] [2006] IR 374 (the Baby Ann case)
[300] *Ibid* at page 503.
[301] *Re JJ* [2021] IESC 1 at paragraph 146.
[302] *Re JJ* [2021] IEHC 655, at paragraph 117. She held that *"[t]he Constitution makes clear that the State must be in a position to step in, even in the absence of any failure on the part of the parents. The constitutional rights of the child, although presumed to be vindicated by any decision made by their parents concerning their care, are not held in abeyance. The State cannot put on blinkers and only look at whether there has been a failure on the part of one person to determine whether the rights of another person deserve protection. Where it can be shown that the rights of the child are in serious jeopardy, it is no longer safe for the Court or the State to rely upon the presumption that the child's imprescriptible rights will be vindicated by their parents. Where there are compelling reasons to believe that the child's imprescriptible rights will not be protected or vindicated by their parents, the State must intervene to fulfil its obligations towards the child. Were that not the case, the rights of the child could be set at nought. Further, it is important to stress that before a court may intervene to protect and vindicate the rights of the child it is not appropriate for it to find that the course of action taken by the parents is not in the child's best interests. What is required is that it be established that the rights of the child are so clearly and materially in jeopardy that the Court must make sure that, whatever decision is made, it is the one that vindicates the child's constitutional rights*".
[303] *Re JJ* [2021] IESC 1 at paragraph 41.

it was satisfied that the parents had failed in their duty to their child under Article 42A.2.1.[304] However, it should be noted that the Supreme Court held that a child has rights under the Constitution both individually as a person, and collectively as a member of a family.[305]

Article 42A.2.1 – State Interference with Parental Autonomy

Should the arguments in the previous section be doubted, it is important to consider whether the original test for parental interference has been altered by the introduction of Article 42A.2.1. The most relevant textual amendment for the purposes of this discussion is that the reference to failure due to "*physical and moral reasons*" in Article 42.5 has been removed and replaced with a failure "*to such an extent that the safety or welfare of any of the children is likely to be prejudicially affected*". This, the Court (in JJ) found, constituted a "*significant change of focus from the* cause *of parental failure to its* effect*",*[306] and emphasised the "*significance of any such failure in its impact upon the child, rather than the motivation or reasoning of the parents*".[307] The Court held that such phrasing is better understood as describing the type of failure which would always have triggered State involvement. This had the effect of removing the blameworthiness from the test applied by the Courts.[308] However, while the parent's inadequacy or culpability appears to have lost its weight in the view of the Court, the Court must "*give full value and effect to the genuine, heartfelt and honest response of the family, even if it runs counter to the entirety of the medical consensus*".[309] Ultimately, while there

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[304] *Ibid* at paragraph 98, the Court prefaced its judgment by stating that "*[w]hile Irvine P. addressed other possible bases for the court's decision, such as the State's obligation to vindicate the rights of the child, and the question of compelling reasons to consider that the presumption that the best interests of the child was achieved within the family had been discharged, it will be convenient to consider first whether the express provisions of Article 42A permit the Court to grant the relief sought,* ***since a positive conclusion on that issue might dispose of the case****, and a negative conclusion would be a relevant factor in considering any other basis for the orders sought*". At paragraph 107, it further noted that in *Re JH, "*Finlay C.J. made reference to State intervention where there were "other compelling reasons" and that it has been submitted that there is a general jurisdiction to intervene to vindicate the rights of children. As discussed above, it may be necessary to consider the nature and extent of any such jurisdiction in due course. However, in the first place, it is necessary to decide whether the circumstances of this case are sufficient to justify State intervention under Article 42A." Finally, in its conclusion at paragraph 176, the Court held that "*[b]ecause we have considered that that test has been satisfied in this case, we have not found it necessary to consider whether any different standard is required by reference to any test of compelling reasons or of vindicating the rights of the child and, if so, whether such a test can now be derived from the Constitution as it now stands*".

[305] *Ibid,* at paragraph 177.

[306] *Ibid* at paragraph 134.

[307] *Ibid.*

[308] It held that "*it should be made clear that there can now be no question of any moral failing or culpability in reaching such a conclusion [of the failure]. Instead, the question is to be judged solely by the consequences of any decision for the safety or, as here, the welfare, of the child", ibid* at paragraph 153.

[309] *Ibid* at paragraph 150. Furthermore, in the area of a "value judgment" of expertise the Court considered that parents who follow a minority, yet respectable, medical opinion are unlikely to have constituted a failure. Even where there is unanimity of medical opinion, "*it is important to probe that opinion for its depth and conviction*", given that "*real expertise does not pretend to omniscience*".

remains a high hurdle for state intervention, the Court held that "*the question [of parental failure] is to be judged solely by the* consequences *of any decision for the safety or, as here, the welfare, of the child*".[310]

The next consideration is once a failure has been established, how is the Court to determine what decision should be made in its stead. While Irvine P made it clear that the best interests test is triggered by the parent's failure, the Supreme Court's judgment is arguably not as clear. It held that in disputes where there is an alleged failure of parental duties, then the best interests of the child must be of paramount consideration and due regard must be had to Article 42A.4.[311] However, it is argued that there is perhaps something artificial in the manner in which the Court has written its judgments in relation to the tension between the rights of parents and children. It is often the case that the best interests principle is the paramount consideration in the Court's determination. However, that principle presumes that the child's best interests are maintained within the familial unit and a natural corollary of this is that the parent's know best in where the child's interests lie. Therefore, the waters can become easily muddied when the child's rights or interests are not seen as independent from the family, and are not based solely on facts and expertise, where a technical area of practice is the core issue in the case. In this regard, the Court in JJ held that -

> *"Since the introduction of Article 42A…the threshold [at which] State intervention is met – is somewhat clearer…while the Constitution maintains a preference for parental views over those of third parties such as doctors and social workers, and for the family over the State, the fact is that the rights of the child* ***are separate and individual*** *and that the best interests of a child are* ***capable of independent determination****. At some point, therefore, the Constitution contemplates, and indeed requires, that the views of third parties be, in turn, preferred to parents."*[312]

However, the Court also reiterated the position that the "*best interests of the child normally comprehends being part of a family with everything that that entails*".[313] And, in its next breath, the Court seems to impose a proviso to such a statement, saying that "*however*", any dispute as to the impact of a decision or conduct on health or welfare "*must be approached through the lens of the interests of the child*". This is a historically frustrating position which suggests that the focus is the child, as an independent rights holder, separate to the interests of the family, when this cannot be the case where the Court explicitly endorses the continuation of the

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Where some experts may come to the conclusion of ceasing interventions more quickly than family members, that also would not necessarily amount to any failure on the part of the parents, at paragraph 147. It also, should not just be treated as just a medical issue, the Court must attempt to "maintain space for the possibility that the difference between the parents and the medical team may be related to unspoken and perhaps unarticulated differences of approach as to the benefit and burden of the continuation of the life in question", at paragraph 148. Therefore, under this reasoning, JJ may have had another outcome had he not been in such pain.

[310] *Ibid* at paragraph 153.

[311] *Ibid* at paragraph 135.

[312] *Ibid* at paragraph 136.

[313] *Ibid* at paragraph 135.

presumption that the child's best interests is found within the family. A judgment, such as *JJ,* which proceeds to endorse both approaches is arguably confusing matters all the more in withholding clear guidance on the hierarchy of rights. Thankfully however, it should be noted that the Supreme Court recently summarised the position of the Court in *Re JJ* as being that "*Article 42A effected an incremental change and subtly re-calibrated the respective rights of the children and parents gently in favour of the former"*,[314] which perhaps offers a clearer conclusion than the *JJ* case itself.

The Court in *JJ* in ultimately making its decision, referred to the best interest principle,[315] and focused on John's avoidable pain and suffering and held that "*it is obviously the duty of parents to seek to ward off such avoidable suffering for their children*".[316] The wording here of "*avoidable suffering*", while applying in the immediate case to severe physical pain, would appear relevant to the context of disclosure in circumstances where the time at which disclosure is made can either cause or extinguish the potential for harm, as is evident from the studies detailed in Chapter 4. Where a child is told earlier, they are arguably more likely to internalise the information into their identity in the manner they so choose, as part of their continuing development and understanding. Where disclosure occurs later in life or by way of a third party, this has the higher potential to incur more negative consequences and additional burdens of potential betrayal and concealment. While it could be argued that "John's" suffering is the more tangible, and universally and objectively understood, it is argued that there should not be a hierarchy created between physical and emotional suffering in a rights based framework.

In this regard, and reverting back to the case law of the ECtHR, it is noted that the Government in *Jaggi* argued that the applicant's identity had not been interfered with as he had been able to develop his personality even in the absence of certainty as to the identity of his biological father, at the age of 67. The Court did not detail, nor had the Government submitted, how the absence of a developed personality would manifest itself. However, it did state that being denied biological certainty had "*formative implications*" for one's personality and that an interest in such certainty does not disappear with age, "*quite the reverse*". It held that the ongoing search for conclusive information throughout one's life implies mental and psychological suffering, even if it has not been medically attested to.[317] This sentiment was repeated in *Odievre*[318] and *Godelli,*[319] with the Court in *Odievre* finding that creating relationships with others encapsulates the preservation of mental stability which is indispensable to effective enjoyment of the right to respect for private life.[320] This is in line with Eekelaar's assertion that "*it would be a grievous mistake to see the [CRC] as applying to childhood alone. Childhood is not an end in itself, but part of the*

[314] *Child And Family Agency & B v The Adoption Authority Of Ireland & C & Z* [2023] IESC 12 at paragraph 33.
[315] *Ibid* at paragraph 152.
[316] *Ibid* at paragraph 153.
[317] *Jaggi v Switzerland,* Application No. 58757/00, 13 July 2006, at paragraph 40.
[318] *Odievre v France,* Application No. 42326/98, 13 February 2003.
[319] *Godelli v Italy* Application No. 33783/09, 18 March 2013 at paragraph 56.
[320] Ibid at paragraph 29.

process of forming the adults of the next generation. The [CRC] is for all people. It could influence their entire lives".[321] By virtue of the ECtHR having seemingly acknowledged this, it would appear that any legislation that prescribed a proactive mechanism for disclosing the child's biological background to them, could certainly be said to have a legitimate aim, that of preventing the type of mental and psychological suffering, and "*avoidable suffering*", as described by the courts.

One further consideration within "*parental failure*" cases is the familial dynamics and these are an area which are more readily interfered with through disclosure, albeit it is argued such interference is more prevalent amidst *late* disclosure. Such impact could be an emotional distance between the child, and a breaking down of the familial relationships in a manner reminiscent of Denham J's consideration of the intervention in PKU. She held that "*in such a [familial] unit the dynamics of relationships are sensitive and important*" and "*the delicate filigree of relationships within the family*" should form part of the analysis on the welfare of the child. Such views were held by the Court in *JJ* to *"remain apposite*",[322] who held that "*it is important to consider the wider context, such as whether parental co-operation would be necessary and the likely impact on the functioning and operation of the family in the future*".[323] This may arise for example, where one parent wishes to disclose and the other parent does not because they, for example, lack a genetic link to the child, unlike the disclosing parent. Where one parent discloses, this could impact on parental co-operation; however it is not within the gift of the State to prevent this, given that simply telling a child without any third party intervention or assistance is all that is required. There is nothing preventing a parent from disclosing the information to the child in the absence of agreement, and at most, both parents may subject themselves to court proceedings under section 11 of the 1964 Act where they would be proactively asking for a third party to intervene and make the decision on their behalf. It is only where both parents do not wish to disclose, or where the only parent does not wish to disclose, that the issue of parental failure arises. It is the unity of both parents that triggers the constitutional defence.[324] While forced disclosure could impact on how a child views a non-genetic parent, again, it is argued that this arises only where the child has already constructed a

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[321] J Eekelaar, "The Importance of Thinking that Children have Rights" in P Alston, S Parker & J Seymour, *Children, Rights and the Law* (Oxford: Oxford University Press, 1992) at 234.

[322] *Re JJ* [2021] IESC 1 at paragraph 143.

[323] *Ibid*.

[324] This is particularly evident from the case of *AC (A Minor) & A Ward of Court* [2019] IEHC 691, in which a child had a very high risk neuroblastoma and the parents disagreed on the treatment required. The evidence was that curative intent treatment was likely to extend survival time and was recommended by the treating consultant, but the parents could not agree. The Court referred to Article 42A insofar as it related to the State's recognition and affirmation of the natural and imprescriptible rights of all children and is required as far as practicable, by its laws to protect and vindicate those rights. Having considered all of the evidence and submissions, the Court concluded that it was in the best interests of the child that curative intent treatment should be proceeded with on the basis of the strong legal presumption in favour of taking all steps to preserve life and the unanimous view of all relevant medical experts. In addition, it was mainstream treatment and not experimental and there was a realistic possibility of a cure, the mother took a balanced and rational approach and that the father was rather more affected by emotion and sentiment that reason. Article 42.5, 42A.2.1 or the PKU test case did not form part of the reasoning of the decision.

narrative around their identity that is challenged through disclosure. This is entirely avoidable.

Finally, one further relevant consideration in the context of disclosure and a further hurdle in automatic disclosure surviving a test of constitutionality, was the immediacy and fundamentality of the risk at stake, that was so prevalent in the judgment of the PKU test case.[325] Such a finding was absent from the judgment in JJ. While this may have been considered so obvious within the facts of the case as not to warrant its inclusion in the larger analysis, its absence is notable amidst the focus on the effect of the failure on the child. In the context of disclosure, it could not be said that it is emergent given the considerable years of development of a child; however, the Court in *JJ* did not distinguish between an effect that was immediate and one which would arise in the future.[326] Again, it is argued that a framework that focuses on the effect on the child necessitates early intervention to offset "*avoidable suffering"*.

Where Does the Right to Identity Fall?

Applying the above considerations to the context of identity rights; it is argued that it cannot be said that such rights arise within the authority of the family only. The right of an individual to their identity, as held to exist in *I O'T* is a right that garners constitutional protection and arguably, goes to the heart of self-knowledge and self-development; it cannot be said to fall subject to the preferences of others, it is inherent. Ronen has argued that the child's right to identity is "*derivative of their human dignity*" and should "*protect the development of an authentic self-actualizing individual*" who maintains ties of interdependence to significant others.[327] Lyons has described early access to identifying information as the State "*recognising the autonomy of children to act in accordance with their own welfare*", as opposed to state intervention in parental authority.[328] Similarly, Wade has sought to reconceptualise disclosure as a mechanism to self-realisation; arguing that it is about

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[325] In the PKU test case, the child may have suffered considerably from the diseases, yet they were distant prospects that would develop only over time; there was no level of emergency to the screening tool. The impact would have been deeply felt by the child but the risk itself was relatively low.

[326] The ultimate judgment of the Court was contingent on an event and the ultimate decision of the Court may never arise given the response of John to the medication in the time between the High Court application and Supreme Court judgment. In fact, the Court noted that the most difficult issue in the case was whether to make any determination at all, yet it did note that the change in circumstances may be divisive in another case which does not have the history of John's case. It held however that John's responsiveness to the medication did not remove the necessity for a court hearing; it merely postponed it. It also considered that where an application was brought in emergent circumstances, it would not allow the Court sufficient time to consider the issues in detail and provide an appropriate merits based decision, *ibid* at paragraphs 166, 168 and 169.

[327] Y. Ronen, "Redefining the Child's Identity" (2004) 18(2) *International Journal of Law, Policy, and the Family* 147 at 148. Ronen characterises a children's rights regime as one that ideally is responsive to the complementing need "to be" and the need "to become". It is argued here that a slight reconstruction of this ideal would be the need "to be" and the option "to potentially become".

[328] D. Lyons, "The Constitutionality of Extending the Right to Identity Provisions in the Children and Family Relationship Act 2015 to Donor-Conceived Children" (2017) 16(1) *Hibernian Law Journal* 63 at 78.

the autonomy to self-determine the weight and importance that a person attaches to that biological aspect of their individuality:[329]

> *"While the concept of identity is important in the conceptualisation of the interest in knowing one's origins, this concept is reflective of how some people* relate *to such information. Autonomy more accurately captures the nature of the interest one has in being told that there is information about one's genetic or gestational origins available. The reason for this is that while some individuals may see information about origins as central to their identity, others may not, depending on their own values and views."*[330]

She argues that an individual has a life-long interest in exercising autonomous action regarding information about their origins, "*because it has the potential to be important to them*".[331] In this regard, disclosure is a first step to realising this potential importance within the right to identity. It also cures two potential harms, the first being the absence of knowledge about one's conception method or, the identity of the person who contributed to their immutable characteristics or who provided for their safe delivery into the world. The second is the potential for betrayal and the loss of a presumed or untruthfully assigned biological link to a parent. The extent to which the disclosure process impacts on the familial unit is also a relevant factor, as early disclosure allows for the child to form their own self-narrative. This is preferrable to having a seminal piece of information withheld by those who are entrusted with safeguarding and protecting the child's right, while the child builds their capacity, and legal entitlement to access the information.

With regard to Article 42A, Brady has argued that it "*arises in the context of children already enjoying most of the constitutional rights of adults, and therefore, must be rights relating to children and childhood"*.[332] Furthermore, in terms of rights being "secured", within the context of identity, an absence of automatic disclosure can result in the parent determining not only to hold these rights in trust until the child is 18, at which time the child can take over, but also to deprive the child of their biological truth into adulthood and potentially, for their lifetime. Therefore, it is argued that the right to identity is a personal right of the child which falls within Article 42A.1, is worthy of further consideration by the courts in due course and escapes the high threshold test of failure arising from Article 42A.2.1. Furthermore, it is argued that this position is accepted to some extent in the 2015 Act and the 2022 Bill wherein a child can applying for identifying information, but their parent cannot.

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[329] K. Wade, "Reconceptualising the Interest in Knowing One's Origins: A Case for Mandatory Disclosure" (2020) 28(4) *Medical Law Review* 731. Within this article, Wade argues for mandatory disclosure, but the mechanism through which this can be achieved was regrettably outside of the scope of the article. See also: A. Brown & K. Wade "The Incoherent Role of the Child's Identity in the Construction and Allocation of Legal Parenthood" (2022) *Legal Studies* 1-18 wherein Brown and Wade focus on Eekelaar's categories of identity: the individual identity, the communal identity, and the narrative identity, where in they add their own, the genetic identity.

[330] *Ibid* at 736.

[331] *Ibid* at 737.

[332] A. D. P. Brady, "Children's Constitutional Rights: Past, Present and Yet to Come", *Catherine McGuiness Fellowship Seminar* (6 December 2018), at paragraph 34.

The Form of the Direct Disclosure to the Child

Having argued that the right to identity is the right of the child, held in trust by the parent, as opposed to a right entirely within the sphere of parental authority, and that the vindication of such a right requires a corresponding disclosure, it is important to assess what mechanisms could be utilised to achieve this insight for the child. The two keys "disclosers" in this regard are the parents and the State.

The Parents as the Disclosers; the State as the enforcers

One potential option would be to provide in statute that parents must disclose the nature of their child's conception to their children upon a certain age or, an age within their discretion, with a prescribed upper threshold. Within this option, there would be an enforcement structure of a penalty for the offence of failure or refusal to carry out this disclosure by a certain time. This would arguably be permissible according to Besson, who argues that Article 8(2) of the CRC suggests that the law should penalise those who breach the child's right to preserve her identity.[333] However, there are a number of issues with this proposal. The first is that there is a difference between disclosing to a child when they are very young and do not perhaps have the capacity to retain or understand the information and making it part of their continuing self-narrative and development from birth, wherein the information is absorbed and processed in line with their capacity at any one time. Disclosure is a continuing action that cannot constitute a once off tick the box exercise and therefore, it is argued that the offence would need to cover a continued failure to disclose into a child's later years.

Furthermore, a second issue of enforceability arises. This proposal would firstly require registration of all children born through AHR to enable the relevant state oversight body, tasked with enforcing such a provision, to know which children would require such disclosure. Due to the presumptions of parenthood, the lack of DNA testing and the easily concealed nature of at home conception through self-insemination etc, there is simply no way to ensure all children are captured for the purposes of registration. The third is that the parents and their lack of disclosure to the child would have to proactively come to the attention of the state oversight body. This would inevitably require disclosure to become a process encapsulated by another element of state provision. The fourth difficulty is that even if the family came to the attention of the state, it would require state agents to interview a child in an age appropriate manner in order to reliably confirm that disclosure had been made. Apart from being reminiscent of a police state taking children into separate rooms in order to trust their parent's word, such is likely to unnerve the child and make them feel othered. The entire process would be unduly invasive, and it is simply unprecedented that the State would resource a state authority to intervene in such situations. It would also have the very unwelcome outcome of perhaps imposing the opportunity to report one's parents to a state authority at the child's

[333] S. Besson, "Enforcing the Child's Right to Know her Origins: Contrasting Approaches Under the Convention on the Rights of the Child and the Child and the European Convention on Human Rights" (2007) 21(2) *International Journal of Law, Policy and the Family* 137 at 145.

discretion if disclosure occurred later in life in a particular difficult family dynamic for one reason or another.

Therefore, what is proposed here, is that the obligation to directly disclose to the child should be placed primarily on the State, as opposed to the parents. However, as noted from *Re JJ* above, the constitutional obligation on the State when involving itself in such decisions requires a level of resourced support for the parents. Disclosure is an ongoing process and requires a certain level of "buy-in" from parents. To favour the child's right to obtain the information is not to disregard the parent's role in its entirety; the parent should be incorporated into the disclosure process in a holistic manner. In this regard, the Court held that the space and protection for family autonomy must apply to all families, "*regardless of resources, access to expertise or wider capacity to process complex information and persuasively articulate their position*".[334] The obligation this places on the State is to "*attempt*" to be mindful of "*the unspoken and perhaps unarticulated differences of approach*" between the parents and the third party experts.[335] In addition, it held that if parents feel their deeply held experiences and views have been overridden by impenetrable technical language and procedures, then that would "*fall short of what the Constitution promises to families facing critical decisions*".[336] Such passages appear to give rise to a corollary duty on the State to inform parents in appropriate language, having regard to their capacity, of the reasons justifying the state intervention. Therefore, it is argued that the State should also be mandated to provide information sessions to parents on the reasoning for such disclosure, and the method within which it can take place, on an ongoing basis.[337] Additionally, there is also perhaps a suggestion in the reference to resources that where a parent cannot afford themselves to obtain such expertise, it should be facilitated by the State.

The State as the Disclosers

Having regard to the number of mechanisms as to how the State has already dipped its toe in automatic disclosure,[338] it is proposed here that the most appropriate mechanism of automatic disclosure is through state registration of the child's conception method on the original birth certificate which is available to the child at

[334] *Ibid* at paragraph 148.
[335] *Ibid.*
[336] *Ibid* at paragraph 150. The Court noted that John's family have had to deal with the bewildering medical procedures and specialisations which they had never encountered before and attempt to digest and comprehend sometimes complex medical terms and advice.
[337] In this regard, it is noted that there is one supportive provision, whereby the AHR information document received at the start of the treatment process will read that it is desirable that the intending parents inform the child of their conception, at an appropriate age -section 14(2)(ii) of the 2022 Bill.
[338] The State already acts as a discloser under the 2015 Act and the 2022 Bill through its registration of identifying information, its annotation of birth certificates and its release of the information, albeit currently from the age of 18 and only where the child seeks out their birth certificate. As noted above, it is proposed that this information will be released at the age of 16, during childhood, regardless of the parental views. The 2015 Act and the 1987 Act (but not the 2022 Bill) also joins the child as a party to any declaration of parentage proceedings. The 2022 Bill allows surrogacy born children to view their birth certificate naming their surrogate.

all times.[339] This could be considered perhaps a more passive disclosure process; however it neutralises the role of the State, from a party who is actively concealing information it collates and registers, to a party who is recording relevant information relating to the child. It also releases the State from all obligations to hide an individual's genetic truth through a misshapen and misguided identity framework filled with opportunities for differences in treatment based on AHR method and the existence of court proceedings, which is rife for challenge. In terms of the constitutionality of such a proposal, the case of *Habte v Minister for Justice and Equality,*[340] is of considerable assistance. Within this case, the Court of Appeal upheld the decision of the trial judge who held that the right to have one's identity correctly recognised by the State is "*so fundamental that it must be recognised as an unenumerated constitutional right*", and that such a right implies a:

> *"constitutional onus on the State, arising from the inherent dignity of the individual referred to in the Preamble and the personal rights of the citizen in Article 40.3 of the Constitution, to accurately record and* ***represent central aspects of personal identity****"* (emphasis added).*[341]*

The trial judge had held that such a right is closely related to the enjoyment of several socio-economic and other rights.[342] Such rights were considered by the Court to be "*necessary to ensure the dignity and freedom of the individual and they inhere in the individual personality which constitutes a vital human component of the social, political and moral order posited by the Constitution*".[343] While the central aspects of personal identity discussed in this case referred to age,[344] ethnicity,[345] gender,[346] and name,[347] it also referred to *MR*[348] and to the judgment of McKechnie J wherein he found that DNA material, "*which carries into the inheritable characteristics upon which our individual sense of self and identity is based*", was "*so integral that it must command constitutional protection*".[349] Therefore, it is argued here that the registration of a person's conception method, when they were born as a result of AHR and where corresponding information is available in secondary registers, is an integral aspect of an individual's personal identity. This argument is supported all the more when such accurate registration acts as a gateway to the true realisation of the

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[339] Bracken has noted that this has previously been considered by the UK Government prior to the institution of the 2008 Act. While this proposal was ultimately rejected, the government did pledge to keep the matter under review. L. Bracken, "In the Best Interests of the Child? The Regulation of DAHR in Ireland" (2016) 23 *European Journal of Health Law* 391 at 400.

[340] [2020] IECA 22, as per Power J.

[341] *Ibid* at paragraph 31.

[342] *Ibid* at paragraph 3.

[343] *Ibid* at paragraph 9.

[344] *Habte* itself dealt with the issue of the accurate registration of a person's date of birth.

[345] *Ciubotaru v Moldova* (Application No. 271138/04, 27 April 2010).

[346] *Goodwin v United Kingdom* (Application No. 28957/95, 11 July 2022).

[347] *Caldaras v An tArd Chláraitheoir* [2013] 3 IR 311.

[348] *MR and DR v an tArd Chlaraitheoir* [2014] IESC 60.

[349] Referred to by Power J in *Habte v Minister for Justice and Equality* [2020] IECA 22, at paragraph 18. The original judgment of McKechnie J can be found at *MR and DR v an tArd Chlaraitheoir* [2014] IESC 60, at paragraph 393: "*That [genetic] contribution is singular in its significance: it is what gives rise to our very being: it is the basis of who we are: it directs our individual uniqueness and is indestructibly engrained in our characteristics and those which we pass on to our offspring, by procreation.*"

individual's right to identity through the knowledge of their conception method, and the details of their donor and/or surrogate.

However, it could be argued that this constitutional onus on the State is already being fulfilled, in that, this information is being accurately registered;[350] it is just not being made available to the relevant person who has the most to gain from such access due to a choice to place parental authority at the top of the hierarchy. In addition to the arguments made above in favour of the right to identity being the child's right, it is argued that it is a natural corollary of the right to have one's identity accurately registered that this integral and personal aspect of "*individual uniqueness*" be available to the person to whom it relates. In this regard, the Court in *Habte* referred to the ECtHR case of *Cemalettin Canli v Turkey,*[351] wherein the ECtHR confirmed that Article 8 and the right to respect for private life is applicable to personal data, in the public domain, where it is systematically collected and stored in files held by the authorities.[352] It is beyond question that the right to respect for private life extends to children under the ECHR, and specifically in the realm of identity[353] and AHR.[354]

More practically, a child is undoubtedly going to require and look at their birth certificate at an early stage, given its administrative uses for educational purposes, passports etc. Even where parents might seek to conceal the birth certificate, it is argued that the risk of inadvertent disclosure is considerable and therefore, such parents would most usefully take a proactive approach in the disclosure. Such registration also signals an openness, and a State endorsement of the factual nature of the child's conception being a facet to which should be open to the public. It is considered that such an approach would also have a cultural and societal impact around disclosure. The primary difficulty with the current framework, is that, until 18, the child's birth certificate has no such annotation, and it is very possible for that birth certificate to be maintained and used without any need for any additional copies to be obtained. The current process allows for an increased ability to conceal fundamental and integral information about an individual. It is proposed here that the secondary registers would continue to operate in conjunction with the annotated birth certificate from birth, and it would be readily understood that donor conceived children or surrogacy born children who have their conception method registered on their birth certificates have a corresponding entry in the NDCPR or NSR, and such information should be capable of access at any time. This mechanism would negate the need for the Register of Parental Orders in Surrogacy to act as a secondary "parental register".

There could perhaps be said to be two considerable issues with such a framework. The first is parental autonomy which has been discussed in considerable detail in the preceding section. Even if it was determined that such a provision constituted an interference with parental autonomy, is it submitted that further to the judicial

[350] Section 66(2) – (4) of the 2022 Bill, section 39 of the 2015 Act.
[351] (Application No. 22427/04, 18 November 2008).
[352] Referred to by Power J in *Habte v Minister for Justice and Equality* [2020] IECA 22, at paragraph 21.
[353] *Mikulic v Croatia* (Application No. 53176/99, 4 September 2002).
[354] *Mennesson v France* (Application No. 65192/11, 26 September 2014).

commentary of Article 42A under *Re JJ*, the right to identity is the right of the child, not the right of the familial unit. Annotating a child's birth certificate, which is a document of fact surrounding the child's birth, is arguably the manner in which best demonstrates that it is the child's fact and the child's identity, and that there is no obligation on a State to effectively lie to a child and prescribe otherwise. Even if that is not the case, it is argued that, pursuant to the case of *Y v Z*, non-disclosure does constitute a failure of the parents and the State should have a legal basis to intervene. The second issue is that such a proposal does not escape the difficulty of capturing all eligible children. It is argued that the identity mechanisms flow directly from the regulation of AHR treatment and assignment of parentage. Therefore the AHR frameworks detailed in Chapters 2 and 3 must become more inclusive if for no other reason than to broaden the application and scope of corresponding identity frameworks.

One further point, which was previously argued before the Joint Oireachtas Committee on International Surrogacy, was that there are implications here for the child's privacy where their birth certificate (or other certificate used for such a purpose) reflects that a child is donor conceived, or that they were born through surrogacy.[355] However, such concerns are not accepted here. It is argued that the right to privacy does not arise in such a context any more than it would apply to a child having to present an entry from the foreign births registrar or a birth certificate with no father named, or two mother's named; anything other than the "default" heteronormative understanding of reproduction. It is contended that such a presumption stigmatises the nature of surrogacy and donor conception in forming a family and further perpetuates the secrecy that has shrouded birth practices that go beyond the "norm". However, for any persons who do not wish to disclose that aspect about themselves to third parties, it would be an administrative fix of providing for a short form birth certificate without such an annotation.

Finally, it is acknowledged that an issue arises in the international context where a child is registered in the register of births in another jurisdiction, in respect of which, Irish law cannot impose such an annotation.[356] One potential solution to such an obstacle could be that there is a mandatory requirement for each child born through DAHR or surrogacy abroad to be registered in the Foreign Births Register,[357] an entry from which could contain such an annotation. Alternatively, a register for international AHR births could be created and maintained by the AHHRA, in place of the current proposals for a register of parental orders for surrogacy in the 2022 Bill.

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[355] Joint Committee on International Surrogacy, "Analysis of the Issues Paper" (12 May 2022) and Joint Committee on International Surrogacy, "Preventing the Sale, Exploitation and Trafficking of Children: Discussion" (19 May 2022).

[356] A foreign birth can only be registered in the Irish register of births where the country of origin did not have a system of registration of births, or it is not possible to obtain copies of or extracts from civil records of the births, section 26 of the 2004 Act.

[357] A foreign births entry book is kept in Irish diplomatic missions and consular offices and is also kept in the Department of Foreign Affairs in Dublin (section 27 of the 1956 Act). Such books may have entries of foreign births relating to children deriving citizenship through their Irish born mother or father. Such particulars will then be transmitted to the Department of Foreign Affairs in the foreign births register.

Conclusion

This thesis sought to explore the workability of a legislative framework that provided both legal recognition for intending parents and their children and a vindication of the child's right to identity through identifying their surrogate and/or donor. It has concluded that this framework has to view these two aspects of AHR as interwoven with each other; neither can exist in a silo. However, this thesis has demonstrated that there are a number of issues with the framework as currently proposed, such that this harmonisation and integration is subject to consistent barriers, mostly as a result of seemingly lack of forethought and an absence of a consistent underlying policy basis for legislative choices.

Chapter 1 detailed how the 2015 Act and the 2022 Bill have sought to expand parentage and guardianship beyond the gestational and genetic link. One key conclusion within this Chapter is that perpetuating the historical ideals of parentage is to treat same sex couples and their children unequally, having regard to the gendered and heteronormative presumptions of paternity and legislative workarounds. It is not enough that all persons availing of AHR are treated the same; they must be treated in a manner that allows all persons and their children to access the same level of legal recognition. In this regard, the sexuality of the intending parents must be an active consideration among policymakers and the legislature.

A second conclusion arising from Chapter 1 is that the female genetic link has been treated inconsistently within the DAHR framework and the surrogacy proposals. In DAHR, an egg donor must agree that she is not the parent; in surrogacy the intending genetic mother seemingly cannot access parentage. Chapter 1 detailed the public perception that there remains no pathway to parentage by virtue of this female genetic link alone, in stark contrast to that of the genetic father. However, as noted in Chapter 1, this perception is challenged within this thesis having regard to the treatment of the 1987 Act in *MR.* Regardless, no proactive or explicit recognition of the female link has been proposed by the government in the 2022 Bill. As set out in Chapter 3, this is of considerable concern given the mandate laid out for government by the Supreme Court in *MR* to legislate for the legal value of both the gestational and genetic link.

A further conclusion arises in respect of the unmarried genetic father, his independent access to guardianship and custody under the 1964 Act and the pathway for his partner to these same legal statuses as an extension. Chapter 1 concluded that due to a drafting error that has arisen since 1987, such a person does not, despite the reality of court life going on as normal, have access to court awarded guardianship and custody, nor does their partner by extension, even where they have spent the requisite time caring for the child day to day. Taking these conclusions together, there can be no doubt that children born through AHR are being placed in a particularly precarious position having regard to the treatment of both the female and male genetic link in Irish law.

Finally, Chapter 1 detailed the further difficulties that the law on statutory interpretation imposes on the AHR context. It posited that the legislature in imposing definitions akin to "parents of donor conceived children" in choice pieces of legislation narrowed the application of the Irish statute book to such parents as a

whole. Regretfully this concern was realised in the recent Supreme Court judgment of *A, B & C* which arguably leaves an onerous and uncertain obligation on the legislature in determining how to accurately indicate that various pieces of legislation encapsulate AHR parents.

Chapter 2 explored the DAHR framework within the 2015 Act specifically and found there to be a number of key exclusions. These related to children born or conceived outside of Ireland (prospectively), children conceived using a known donor (retrospectively), non-clinical conception, and the use of gametes from international cryobanks. Furthermore, it was argued that the "known donor" exclusion was based on a mistaken interpretation of the *McD* case by the Department of Health. This Chapter was also critical of the absence of the paramountcy principle within the legislation, as well as demonstrating the disproportionate impact of these exclusions on same sex female couples when compared to single mothers or opposite sex couples. This Chapter acknowledged that the 2015 Act had a number of policy objectives, namely safeguarding the health of those involved through screening and the use of treatment facilities, vindicating the child's right to identity through the creation of national registers and ensuring the informed consent of those involved. It concluded that those same policy objectives can be achieved by broadening the scope of the 2015 Act in the manner suggested by the author in the private members *Children and Family Relationships Amendment Bill 2023,* which was introduced into the Dáil on the 27th of June 2023.

The resulting low level of application of the 2015 Act to DAHR families was evident in the O'Connell study, whereby none of the participants gained parentage by virtue of introduction of the 2015 Act. Finally, it was evident that while participants experienced a low level of practical implication as a result of this absence of parentage, it was evident that it was only through chance and good faith interactions with professionals or administrators that this continued. None of the participants had experienced the medical emergencies or relationship breakdown that would have rendered this absence of parental recognition disastrous and placed the child in real precarity. However, it was evident that DAHR parents are choosing not to challenge the boundaries and are, to a degree, restricting the normal freedom of family life in the absence of more comprehensive legal recognition. Therefore, the ultimate conclusion of this chapter was that the current framework is focused on health regulation, as opposed to equality within familial regulation, treating each family as susceptible to uniform application. Furthermore, it concluded that the 2015 Act's exclusionary nature coupled with the absence of judicial discretion is not child centred insofar as the Court is unable to make the decision it deems ultimately to be in the best interests of the child, even where the substantive policy objectives have been met and the corresponding safeguards have been engaged.

Chapter 3 focused on the surrogacy framework proposed under the 2022 Bill and the international and retrospective proposals arising from the Inter-Departmental Group's policy paper in December 2022, against the case law of the ECtHR, the ECJ and the Irish courts. It concluded that the single greatest flaw in the legislative proposals is the absence of the paramountcy principle which would both respect the best practice framework set out in the 2022 Bill, while also placing the child at the centre of any determinations of parentage. Such would constitute a worthy

approach in light of the complex nature of AHR across jurisdictions, the difficulties in imposing blanket and uniform rules on all families and the post-facto imposition of a prescribed framework of legal recognition on intending parents and children already born, who had no framework to comply with, or best practice to follow. It concluded that a number of key academics, and governmental and legislative bodies, had misinterpreted the findings of the seminal case of *MR and DR*, and that such an interpretation has perhaps influenced the cumbersome and excessively paternalistic proposals which unduly bestow the status of legal mother on the surrogate and provide her with an absolute veto in respect of the parental order. While it was accepted that it was open to the government and the legislature to name the surrogate as the legal mother at birth, it was also entirely meritorious, relying on precedent within adoption law to allow for a transfer of this parentage where the best interests of the child required this to be done. This chapter also considered the requirement to have a genetic link within the intending parental unit and concluded that the rationale proposed for this requirement, that of offsetting the risk of child trafficking, was not borne out, having regard to the entirety of the proposed framework. With regard to the specific criteria, it concluded that while the formulation of a best practice model is preferrable, no one requirement should impede the making of a parental order if the Court deems that the best interests of the child otherwise require the making of the order.

Chapter 4 detailed the research studies that had previously been carried out in disclosure practices amongst intending parents who had gone through AHR, against the findings of the O'Connell Study. It concluded that such a study, conducted over the last couple of years and in the Irish context, demonstrated that Irish parents show considerably more openness than previous studies, primarily based in the UK, the US, Finland, or Sweden. All participants have chosen to disclose their child's conception status to them, as well as the details of their surrogate and donor. However, one couple were intending on keeping the identity of the egg donor secret based on her wishes. While none of the reasons within previous studies for not disclosing were borne out by the O'Connell study, there was a reiteration perhaps in the variation of importance imposed on the surrogate and the egg donor, with the latter being considered less involved in the child's conception and overall life story. The participants focused on disclosure being the right of the child and how age appropriate disclosure on a continuum was the best practice, in line with the findings borne out in previous studies. Studies relating to later disclosure detailed stronger feelings of betrayal but also relief for children who did not enjoy a close relationship with their social father. However, ultimately, the studies considered indicated clear benefits for both the child, parents, and the familial unit arising from disclosure by the age of seven. At this age, it was found that the child may not necessarily understand all of the details but will be able to interweave the disclosure into their own personal story and narrative.

Finally, Chapter 5 scrutinised the right to identity as it has been considered by the Committee on the Rights of the Child, the ECtHR, and the Irish courts and subsequently, the legislative frameworks under the 2015 Act and 2022 Bill. It concluded that neither framework provided for any retroactive recognition of identity within either framework but proposed a myriad of reasons for this. It found

that there were a number of inconsistencies within both frameworks that treated children differently based on the method of their conception, with regard to their birth certificates. It criticised the transitional provisions proposed by the 2022 Bill which would treat children differently based on whether they were born post 2015 Act or 2022 Bill. Ultimately however, the primary concern within these two frameworks was the absence of any automatic disclosure mechanism for the child within childhood, considered against the benefits of early disclosure established in Chapter 4. While the State has, whether indirectly or unintentionally, allowed for mechanisms of disclosure, the primary method involves a child applying for their birth certificate after the age of 18 and being informed that further information about them is available in the NSR or NDCPR. What this Chapter proposed, and argued was constitutionally permissible, was the annotation of a child's birth certificate from the point of birth to demonstrate the method of conception. This, it was argued, vindicated the child's right to identity, through a matter-of-fact demonstration of the child's information.

However, this discussion demonstrated the clear tension that exists within identity and legal recognition frameworks: that the frameworks of identity are often dependent upon inclusive and accessible frameworks for parentage. For example, the presumptions of paternity provide opposite sex couples with no reason to register the nature of their child's conception and the lack of DNA testing upon birth registration facilitates such concealment. Those whose exclusion from the 2015 framework, or 2022 proposals is blatantly obvious have no corresponding incentive to register the requisite information, to avail of known donors or maintain contact with the surrogate. In this manner, vindication of the child's identity has been used as an incentive for intending parents to be legally recognised. However, as has been borne out by the O'Connell Study, notwithstanding a lack of legal recognition, Irish parents are choosing, opting, and preferring to vindicate their child's identity.

The core recommendations of this thesis, therefore, is that legislative amendments are introduced to the 2022 Bill to remedy the definition of "parent" within the 1964 Act, to clarify the legal recognition attached to the female genetic link and to establish a clear basis on which AHR parents can be assured that they are encapsulated by particular pieces of legislation. It is vital that the frameworks for both DAHR and surrogacy become more inclusive and in this regard, the paramountcy principle should be incorporated into both the 2015 Act and the 2022 Bill. The Children and Family Relationships Amendment Bill 2023 should be enacted or alternatively, its provisions should be inserted into the 2022 Bill prior to its enactment. This would remedy the core exclusions of the 2015 Act, as set out in Chapter 2, as well as introduce a presumption of maternity for same sex female couples, among other provisions. Arising from Chapter 3, it is recommended that the Adoption Authority of Ireland begin publishing statistics relating to adoptions founded on surrogacy agreements in order to assess whether Ireland is currently in compliance with its Article 8 obligations under the ECHR. Furthermore, the 2022 Bill should be amended to allow for pre-birth parental orders, the possibility of the dispensing of the surrogate's consent in such an application and appropriate interaction with key pieces of legislation, such as the 1964 Act. Chapter 4 provides the underlying basis for the recommendations arising from Chapter 5, namely that

children should have open access to the circumstances of their conception from birth through an annotated birth certificate, together with identifying information in respect of their donor and/or surrogate through access to the NDCPR and NSR. Furthermore, it is recommended that the transitional provisions are removed from the 2022 Bill's proposals as they are a degradation of the right of the child in favour of a steadfast loyalty to the donor's expectation of privacy to 18, as opposed to 16, years of age.

Ultimately, this thesis concludes that beyond all else, the Department of Health and Inter-Departmental Group, who are spearheading the legal reforms in this context need to embrace a rights based approach that is not based in protectionism or paternalism, but rather, in autonomy, equality and a human rights based approach. They need to treat each child as an individual rights holder and not a subject of its policies, and each family as the *"natural primary and fundamental unit group of Society*" and not simply collateral damage of health regulation.

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- United Nations Treaty Collection, Status of Treaties: 11. Convention on the Rights of the Child, New York, (20 November 1989).

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- Lydia Bracken, "Opening Statement to Special Oireachtas Committee on International Surrogacy on International Surrogacy and the Particular Issues Faced by Same Sex Couples, Both Male and Female, Entering International Surrogacy Arrangements and Achieving Parental Recognition" (28 April 2022)
- Professor Conor O'Mahony, Special Rapporteur on Child Protection, "Opening Statement to the Joint Oireachtas Committee on Surrogacy" (7 April 2022).
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Websites

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Appendix: Social Research Ethics Committee Application

UCC University College Cork, Ireland Coláiste na hOllscoile Corcaigh	**Social Research Ethics Committee (SREC)** **ETHICS APPROVAL FORM** ✉ srec@ucc.ie https://www.ucc.ie/en/research/about/ethics/

Introduction

UCC academic staff and postgraduate research students who are seeking ethical approval should complete this approval form. Ethical review by the Social Research Ethics Committee (SREC) is required where the methodology is not clinical or therapeutic in nature and proposes to involve:

- direct interaction with human participants for the purpose of data collection using research methods such as questionnaires, interviews, observations, focus groups etc.;
- indirect observation with human participants for example using observation, web surveys etc.;
- access to, or utilisation of, anonymised datasets;
- access to, or utilisation of, data or case files/records concerning identifiable individuals;
- conducting Internet Research or research online.

SREC @ UCC considers itself an enabling committee, promoting strong research ethics amongst UCC's community of staff and student researchers. We are open to all types of research in the social research domain and if your research approach does not readily fit into this research form, do not be discouraged. Please add additional relevant notes to convey what you think is pertinent about the ethical aspects of your study.

Application Checklist

This checklist includes all of the items that are required for an application to be deemed complete. In the event that any of these are not present, the application will be returned to the applicant ***without*** having been sent for review. Please complete the checklist underneath and ensure that your application includes all of these prior to submission. Thank you and best of luck with your research. If you require additional guidance, click here.

	Delete as applicable
All relevant files are combined into one PDF file (SREC application form, consent/assent forms, information sheets, data collection instruments, permission letters, etc.)	Yes

Completed SREC Application Form	Yes
Information Sheet(s) / Information Statement (i.e. at the beginning of an electronic survey) included	Yes
Consent Sheet(s) / Consent Statement (i.e. at the beginning of an electronic survey) included	Yes
Data Collection Instrument: Psychometric Instruments / Interview Guide / Focus Group Schedule / Survey Questionnaire / etc. included	Yes
Copy of permission letters to undertake research from relevant agencies/services included (if available)	NA
If you are under academic supervision, your supervisor(s) have approved the wording of and co-signed this application prior to submission	Yes
If this is a resubmission, all the revised and new text is highlighted in yellow	NA
Have you applied for ethical approval for this project from another UCC ethics committee?	No

APPLICANT(S) DETAILS

Name of UCC applicant(s)	Claire O'Connell	**Date**	18/11/19
Name of Department / School / Research Institute / Centre / Unit / College	School of Law	**Contact No.**	
Correspondence Address		**Email Address**	
Name and year of course (students only)	PhD (Law) – Year 4 (Part-Time)	**Name of supervisor(s)** (students only)	Dr Conor O'Mahony
Is this a resubmission?	Yes	SREC Log No. (if a resubmission): 2019-211	

Obtaining ethical approval from SREC does not free you from securing permissions and approvals from other institutional decision-makers and agency ethical review bodies. These bodies may accept the SREC approval, but researchers are responsible for ensuring they are compliant in advance of collecting data.

Project working title	The views of parents and children born through assisted human reproduction (AHR) on the disclosure of their conception and the effect of the lack of legislation on AHR on the creation of legal ties between parent and child.

If this is a collaborative project / community-based participatory research project / *joint* application with another agency, please complete this additional section:

Names of research partners / civil society organisations collaborating on this project (this section must be completed for participatory / community-based participatory research studies)	
Agency contact person and position	
Agency address	
Details of the partnership (Please identify clearly the roles and responsibilities held by each party in the partnership in relation to the different aspects of the research).	

ETHICAL APPROVAL SELF-EVALUATION

If your answer falls into any of the shaded boxes below, please address each point later on in the application form

		YES	NO
1	Do you consider that this project has significant ethical implications?	X	
2	Will you describe the main research procedures to participants in advance, so that they are informed about what to expect?	X	
3	Will participation be voluntary?	X	
4	Will you obtain informed consent in writing from participants?	X	
5	Will you tell participants that they may withdraw from the research at any time and for any reason, and (where relevant) omit questionnaire items / questions to which they do not wish to respond?	X	

6a	Will data be treated with full confidentiality / anonymity (as appropriate)?	X	
6b	Does your project require you to carry out a Data Protection Impact Assessment (DPIA) in compliance with UCC Data Protection Policy?	X	
7	Will data be securely held for a minimum period of ten years after the completion of a research project, in line with the University's *Code of Research Conduct* (2016)?	X	
8	If results are published, will anonymity be maintained, and participants not identified? (see Q. 30 below regarding open data considerations, if relevant)	X	
9	Will you debrief participants at the end of their participation (i.e. give them a brief explanation of the study)?	X	
10	Will your project involve deliberately misleading participants in any way?		X
11	Will your participants include children / young persons (under 18 years of age)?	X	
12	If yes to question 11, is your research in compliance with the UCC *Child Safeguarding Statement* which sets out the legal requirements under the Children First Act 2015?	X	
13	Will your project require you to carry out "relevant work" as defined in the National Vetting Bureau (Children and Vulnerable Persons) Acts 2012 to 2016?	X	
14	Do you require official Garda Vetting through UCC before collecting data from children or vulnerable adults? (Please note that having a Garda Vetting through another body is not sufficient; a separate UCC Garda Vetting is always required.)	X	
15	Will your participants include people with learning or communication difficulties?		X
16	Will your participants include patients / service users / clients?		X
17	Will your participants include people in custody?		X
18	Will your participants include people engaged in illegal activities (e.g. drug taking, illegal Internet behaviour, crime, etc.)?		X
19a	Is there a realistic risk of participants experiencing either physical or psychological distress?	X	
19b	Is there a realistic risk of the researcher experiencing either physical or psychological distress?		X
20	If yes to question 19a, has a proposed procedure for linking the participants to an appropriate support, including the name of a contact person, been given? (see Q. 33)	X	
21	If yes to question 19b, has a proposed procedure/support structure been identified?		X
22	Are your research participants students with whom you have some current/previous connection (module coordinator, research supervisor, professional tutor, etc.)?		X
23	Will your study participants receive payment / gifts / voucher / etc. for participating in this study?		X
24	If your research is conducted on the internet, does it involve human participants? (e.g. through web surveys, social media, accessing or utilising data (information) generated by or about the participant/s; or involve observing human participants in their online interactions/behaviour). If yes, please review and utilise the UCC policy for conducting Internet Research.		X

DESCRIPTION OF THE PROJECT

*Ethical review requires that you **reflect** and seek to **anticipate** ethical issues that may arise, rather than reproduce copious text from existing research proposals into these boxes. Entries should be **concise** and relevant to the point / question.*

25. Very brief description of your study (15-25 words max.)
[e.g. This is a qualitative study of primary school teachers' attitudes towards religious teaching using focus groups to collect original data]

This is a qualitative study of the attitudes of parents who have engaged with AHR techniques on disclosure to their child and the views of children who have been informed of their AHR conception, and on the legal difficulties in establishing their parentage.

26. What is your study about? (100-200 words max.)

My doctorate asks whether the laws proposed on AHR are in the best interests of children through the legal inclusion of social parents and exclusion of reproductive contributors such as sperm/egg/mitochondrial donors and surrogates. A significant element of this PhD is the child's right to identity and the need for legal certainty in respect of a child's caregivers. This particular aspect of my doctorate seeks to explore the decision making of adults who have engaged in AHR and who have decided either to tell or not to tell their children about their conception. This is connected to the fact that there are minimal mechanisms, currently and proposed, through which a child may independently find out about the nature of their conception and thus, their right to identify information regarding their biological background is at risk. Where parents have disclosed the child's conception to them, this study would then involve interviewing those children. I would also ask parents about the process of establishing their legal parentage in the absence of AHR legislation as this relates to the legal certainty attained by children born through AHR. This study is not psychological in nature, but rather, it will simply display the views of those whose lives will be affected by the legislative proposals.

27. What are your research questions?

1. What is the reasoning for Irish parent's disclosure status?
2. For children who have had their conception status disclosed to them, how do they view their parents and their donor/surrogate?
3. For children who have had their conception status disclosed to them, do they wish to meet their donor/surrogate or know more about them?
4. How have Irish parents who engaged in AHR procedures established legal parentage?
5. Have Irish parents who engaged in AHR procedures established any difficulties in decision making or applications due to the lack of legislation governing parentage in AHR?

28. Who are the participants in your study? (recruitment methods, number, age, gender, exclusion/inclusion criteria, detail permissions to be sought / secured already, and how will you recruit participants?)

The inclusion criteria for this study is:

1. individuals and their parents (if they so choose to participate, and if any) who have conceived a child through assisted human reproduction techniques such as surrogacy, egg donation or sperm donation.
2. The children of these parents who have reached the age of five and who have had their conception status disclosed to them by their parents.

The participants would come from a variation of family formation: single parents, same sex couples and opposite sex couples as the variation in family formation relates closely to disclosure. For example, heterosexual couples could "hide" the details of conception by donor relatively easily whereas in single parent or same sex families, there is a reproductive contributor "missing" and this requires an explanation. There would be no preference in terms of gender although it is a relevant consideration to the research questions in this study. For example, male same sex couples currently do not have any legal mechanism to become joint parents of a child through surrogacy. On the other hand, female same sex couples, who are more likely to engage in donor assisted human reproduction, now have a legal basis for parentage as of May 2020. Also, while disclosure is more common in surrogacy, as opposed to donor assisted human reproduction, the National Donor Conceived Person's Register has come into effect, recording donor information in May 2020 whereas, the National Surrogacy Register is still only a proposal under the General Scheme of the Assisted Human Reproduction Bill. In addition, historically, the fact of birthing the child has made it easier to gain legal rights as the gestational mother has been found to be the person who may register as the child's mother. This affects same sex female couples and single mothers who use sperm donors. Unmarried fathers are treated very differently in law than a gestational mother and enjoy a lower level of legal protection. This affects same sex male couples and single fathers.

While I am conscious that I may receive a low level of participant response given the relatively small numbers of families in Ireland who have engaged in AHR using a third party, I will ideally have 30 participants in total. I hope that 5 - 10 children will take part, and that the remaining participants divide along the lines of surrogacy users and donation recipients, with the latter group being in the majority. If I receive more interest than expected, then I will balance the amount of time I have to conduct the interviews with the impact it may have on participants to be removed from consideration, given the sensitive nature of the topic involved. If I was under significant time pressures, preference would go to those that, as a group, provide the most well rounded picture of the various family formations. I would also like to have a mix of single parents, same sex couples (both male and female) and heterosexual couples as well as having a mix of donor conceptions and surrogacy conceptions families. This is because in the research I have conducted so far I have been able to draw certain conclusions about certain genders, family formations and sexual orientations following certain patterns in terms of disclosure and because the Irish legal position favours certain genders/sexual orientations and family formations in terms of legal certainty and I would like to explore this.

In order to recruit participants, I will create a notice that would outline the criteria, the nature of the study and my contact information to discuss participation with any willing parties (See Appendix 1). I will contact fertility clinics within Ireland, infertility support groups (such as NISIG) and advocacy groups (such as Equality for Children, LGBT Ireland and Treoir) directly, asking to pass on the call for participants for my study in the event that such contact was covered by the data processing agreement that they have with their clients (see Appendix 2) or that same can be displayed in their newsletters, if applicable. I will also use social media. This will include Twitter and Facebook and I will engage with interested persons and social groups relevant to the study. These will be identified through general searches relating to supporting families in infertility, donor conception and surrogacy (for example, there is a Facebook group called "Surrogacy Ireland: Parents and Surrogates" which has 216 members). Once these groups are identified, I

will contact the moderator or head of the group so as to not post the call for participants inappropriately in a safe space discussion focused on members' experiences.

29. Concise statement of *anticipated* ethical issues raised by your project. How do you intend to deal with them? Please address *all* items where your answers fell into a shaded box in the self-evaluation above. (350 words max.)

This study seeks to allow parents who have engaged in AHR procedures, using a third party, to share their experiences in the Irish context. I also want to provide for a child-centred and inclusive approach to my research, where children have the opportunity to share their views in a process that impacts on them. However, I will not do this where the children are not aware of their conception status and I will require the consent of both the parent(s) and the assent of the child before any interviews take place. To interview children who are unaware of their disclosure status would be to interfere with the natural cohesion of their family by having a stranger expose children to an extremely personal insight into their lives and this could potentially cause them significant emotional distress. Thus, no children will be interviewed without their parent's consent as well as the parent's consultation as to how the questions ought to be asked. While I have laid out the questions I intend to ask the child [Appendix 4], the terminology will be altered depending on discussions I have with the parents. I will seek to follow the phrasing and terminology that they used during disclosure and each question will be signed off by the parent(s) of the child in advance of me meeting the child to minimise the risk of any distress or any unnecessary adherence to societal norms.

I will also inform all participants that no identifiable information about them will be used however, their sexual orientation, AHR techniques, genetic information, civil status and gender will be identified in the final dissertation. I will be stating in the information sheets, and in person, that if they feel this information might be sufficient for others to identify them, and if they wish to remain anonymous, that they consider this and weigh up the risk with any benefit they see as potentially arising from participation. They will be allowed to choose their own pseudonym and will be able to review the final chapter in order to alert me to any inaccuracies or details that they would consider identifiable. Any inaccuracies or identifiable aspects of the research will then be removed upon request. Each participant will, however, be informed through the information sheets that I will not be sharing their pseudonym with anyone else but if they were to do so, their anonymity could not be guaranteed. I will also impress upon them on the information sheets and again in person that no gratuitous information will be included that would risk identification. Each child will also be given the option of providing their feedback in a medium that best suits them. This may be the interview, a drawing, poetry etc.

It is not anticipated that this study will cause undue psychological distress however, distress is a possibility given the sensitive nature of the subject matter. In order to avoid any foreseeable distress and effectively respond to any unforeseeable distress, all possible provisions have been taken to ensure minimal distress. Potential participants will be informed clearly (in writing) what the study involves in the Information sheet, ensuring that they are prepared for the nature of the questions being asked and they can choose not to participate if they wish. Participants will be allowed time to ask questions to the researcher prior to providing consent or assent so that they are properly informed. Participants will be given ample time to decide whether or not they wish to participate. Participants will be repeatedly told in written form, that they may withdraw from the interview at any time, without prejudice. I will signpost supports on the information sheets

which will be provided and considered well in advance of meeting the participant. I will consult with the parents in advance in relation to suitable terminology in respect of the questions I ask the child and ask if there are any particular triggers that I should refrain from mentioning. I will also check in with each participant after the interview to assess their wellbeing and if they are distressed by the interview, and if so, I will immediately end the interview and signpost appropriate supports. If through the course of the research the child appears to be negatively affected by the research, I will inform the child's parent or guardian.

In terms of child protection, I have completed Garda vetting by UCC and I am already aware of my role as a mandated person. I will make each parent and child aware of the fact that while their views in relation to this study will be kept anonymous, if the child makes a declaration or informs me that they have been harmed or are at a risk of being harmed, that I will be informing my designated liaison person (DLP) and will either directly, or through my DLP, notify Tusla through a mandated report. The interviews will take place at whichever location is most comfortable and suitable for the participants. I do not wish to confine the study to Dublin, where I am currently living, and so I will be making myself available to travel to the homes and or local public places of each participant. For those who do live in Dublin and are comfortable with me interviewing their child, I have arranged to conduct interviews in the child-friendly surroundings of the Ombudsman for Children's Office (OCO). More specifically, there are multiple rooms in the OCO that have large glass windows that make the entirety of the room visible to the external area which has a waiting area for the parents. I will not conduct any interviews with children where their parent(s) are not fully able to view us at all times. Where such a location cannot be found, I will ensure that a second researcher is present in the room, who has been vetted and is aware of their child protection responsibilities and I will amend the information and consent forms to reflect this. I will also, in light of the Covid-19 pandemic, be making the option of a video call available to each parent and each child. This would eradicate the need for a second researcher and would allow for close monitoring by the parent.

Throughout the study, I will be guided by useful publications such the Department of Children and Youth Affairs Guidance for Developing Ethical Research Projects involving Children and the Ombudsman for Children's Good Practice Guidance in Children's Participation in Decision-Making.

30. Data.
(a) How will you collect your data? Brief description and justification of methods and data collection measures to be used.
(b) If you are creating audio/video recordings, who will perform the transcription? (If transcription is being outsourced the transcription service used needs to be trustworthy, reliable and confidential and ensure that data transfer is done securely).
(c) What type of data will you be storing?
(d) How and where will you store your data? (provide details for both physical *and* electronic documents . See page 7, Electronic Data Storage for guidance around data storage).
(e) For how long will you store the data? (A minimum storage period of 10 years is required)
(f) Who will you share the data with? (*Sample* prompts: If you plan to make your raw research dataset available publicly as part of the open data movement, or if you are required to do so as part of funding/journal requirements, please address your protocol here (make explicit links to Q.

32 below and show that you have addressed this in your consent form and information sheet). For collaborative/community-based participatory research, please address issues such as shared ownership of data, publication of findings, etc. If your funder contractually requires you to give them access to the 'raw' dataset, examine relevant implications, including appropriate anonymisation, protocols for secure access to the dataset, etc.).

(g) If you are planning to analyse an existing dataset, please outline how the original consent process allows for your data analysis.

(h) If you are planning to request access to health/case files/personal records that were not created for research purposes, please address Data Protection considerations, provide a strong rationale and comprehensively address associated ethical issues.

(i) If you ticked yes to Q.6 above, have you submitted your DPIA?

(a) I will be using an initial call for participants notice to which I will ask people to email me if they wish to know more. At this point I will send them out a document and a participant information form in order to gauge the demographic data. The nature of this study is that I expect a rather small sample size and therefore the choice of participants will depend on the numbers of people interested in participating. Therefore, I will have to gather and retain this demographic data. I will then, after a prescribed period of time, end the call for participants and on the basis of those interested, will create a hard copy list of eligible participants. I will then delete the data of those, if any, that I have deemed are in excess of a number which I can accommodate in the study and confirm such deletion to them through their preferred method of contact. At this point I will contact the chosen participants by their preferred communication method to arrange either the interview, or a preliminary meeting/phone call/video call. I will collect paper based consent/assent forms for each participant and will scan these so as to have an electronic copy. The interview itself will be collected through audio on two devices, my iPhone and my iPad. I have chosen two methods of recording as a safety mechanism to ensure that at least one device records the interview. Once the interview is completed, the recording will immediately be transferred to a secure server and deleted from the original device. I will then transcribe these interviews on my encrypted laptop in word documents. The transcripts will not contain any identifying information, only the pseudonym. In the event of a video call, I will not be recording the visual aspect but rather, only the audio. I will do this using the video calling system's own software or again, my iPhone or iPad. The video calling software, Microsoft Teams also allows for automatic upload directly to the UCC OneDrive.

(b) I will be the only person in possession of the audio files and will transcribe the audio files myself.

(c) I will be storing a spreadsheet of contact information and demographic data such as name, age, location, sexual orientation, AHR technique, family formation, gender, number of children and the corresponding pseudonym. I will be storing an audio file of each interview and a transcribed word document for each interview.

(d) I will store the electronic copies of the consent forms, audio files, transcripts and any preparation materials on my UCC OneDrive account. Each file will be either password protected or encrypted with 7zip encryption software. The hard copies of the consent forms will be scanned into an electronic copy and the originals will be shredded. I will store the hard copy spreadsheet in a locked filing cabinet in my home.

(e) I will inform participants that I must store this data for ten years after the completion of the research project, as is required by UCC's code of research conduct.

(f) I will only make the transcripts available to my PhD supervisor if requested, but the extracts that I use in my doctoral thesis will be available to anyone, upon request. Of course, at this stage, the extracts will be pseudonymised. I will own the data, as outlined in Annex C of UCCs IP policy and as confirmed by the Technology Transfer Unit. This is based on the fact that UCC is not paying me any stipend on this PhD or to undertake the research work, UCC is not providing any substantial equipment or resources to me that are not generally available to all students, the research is not being undertaken as part of a larger research programme within the School of Law and no external funding agencies are supporting this work in any way.

(g) N/A

(h) N/A

(i) Yes [See: Appendix 7]

31. Arrangements for informing participants about the nature of the study (e.g. information sheets, letters of invitation, social media information, participant recruitment, focus group welcome/schedule, withdrawal, etc.)

I have attached the call for participants [Appendix 1], the parent information sheet [Appendix 3] and the child's information sheet [Appendix 6]. The call for participants will be sent to fertility clinics and also advocacy and support groups such as Treoir, Equality for Children, LGBT Ireland and NISIG. I will also post it on Twitter, targeting interested persons, and Facebook groups. Many of the relevant Facebook groups are secret and require me to request to join the group. As I do not wish to invade these private spaces with an unsolicited notice, I will instead contact the moderator of each group privately to request if such publication would be appropriate. If any individuals contact me in response to the call for participants, they will receive the participant information sheet, and this will include a form that would require them to fill out demographic data in order to allow me to assess their eligibility to take part in the study. I would then email each willing participant to ask if they wish to conduct a preliminary meeting with me. I feel this will be particularly important with regard to them feeling comfortable enough for me to interview their child. Once participants confirm their decision to take part, I will send them the information sheets, consent forms, assent forms and data protection notices and I will contact them with a schedule of days that I am available in which to conduct an initial discussion with them and/or their children of the timeline involved, consent forms, data protection notices and if applicable, the interview questions of their children. I will also advise them at this stage that the children can participate in any other way they do choose, through a story, poetry or drawing a picture. Within a proceeding period of at least two weeks, I will answer any follow up questions and ask participants to either scan and email me their consent forms or send them to me by post, in the event of a video call interview or, I will collect them in hardcopy when I conduct the interview, if they're done in person. I will ask at each stage if they have any questions they wish to ask me about the process. At all points of contact, I will make them aware of their freedom to withdraw from the study at any time up until 7 days after the interview. I will also give them a full debriefing about the study following the interview.

32. How you will ensure that participants provide informed consent? (cf. Question 4 - attach relevant form(s); address special considerations in terms of children / young people / vulnerable persons / adults who have difficulty in making decisions unaided)

Each participant will be explained to in full detail as to what the study entails. For children, I will create an accessible explanation, using Plain English and clear terminology (See Appendix 6), and ask them at regular intervals if they understand the information and if they have any questions. Child participants will also be allowed time to ask questions to the researcher prior to providing assent so that they are properly informed. Parents will be informed that nothing their children say may be told to them after the interviews, in advance of their consenting to the study, unless it falls under the Children First guidelines. I will similarly make children aware of this and point out to children that their parent's may be able to identify them based on their choice of language and feelings that they have already disclosed to their parents. Children will also have to give their own assent to ensure that they aren't feeling coerced to engage in the study. While children are going to be offered the opportunity to provide their own pseudonym, I will make it clear to them that if this is relayed to their parents, it would cause the child's views to be identifiable to their parents. Parents will also have the option to engage in an interview by themselves or with their partner. See consent forms – Appendices 5 and 6.

33. Outline of debriefing process at the end of the data collection process (cf. Question 9)**. If you answered Yes to Questions 19a or 19b, give details here. State what you will advise participants to do if they should experience problems (e.g. who to contact for help).**

At the end of every interview, I will explain the full nature of my PhD and ask if they have any questions about any aspect of my PhD or the study. I will also ask every participant if they feel like they are in need of any supports in relation to what they have told me. For any participant is in need of further support I will direct them to:

1. ISPCC Child and Family Supports, Childline or Teenline.
2. Their local Jigsaw centre
3. Barnardos
4. The National Infertility Support and Information Group
5. LGBT Ireland
6. The National Infertility Support and Information Group
7. BelongTo One to One Support Service

I have taken a day course from Jigsaw on Understanding Youth Mental Health in preparation for this study.

34. Estimated start date and duration of project

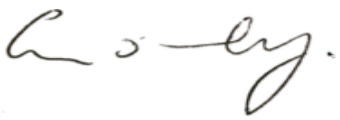
January 2021: The call for participants will be sent out. This call will remain open for 1 month. As potential participants express interest, I will be sending out the preliminary forms and obtaining demographic data.

February 2021: This will be the deadline for the return of the demographic data. If they have not done so by that point. I will send one reminder email which will state that if they do not reply I will take it as understood that they no longer wish to participate in the study.

February -April 2021 on an ongoing basis: I will begin the logistical aspect of the study in terms of dates upon which applicants are available to meet and set locations for the interviews, with the goal of holding the interviews in April – August 2021. April – August 2021: I will then be transcribing the interviews on an ongoing basis. September - December 2021: I will draft the chapter for my doctorate. Total duration of study: 12 months.

35. Additional information of relevance to your application
N/A

36. Declarations	Delete as applicable
I/we agree that should there be unexpected ethical issues arising during the course of this study, that I/we will utilise my/our professional/disciplinary code of ethics, and/or notify UCC SREC, where appropriate.	Yes
I/we have consulted the UCC *Code of Research Conduct* (2016) and believe my/our proposal is in line with its requirements.	Yes
I/we have consulted the UCC *Child Protection Policy* and believe my/our proposal is in line with its requirements.	Yes
I/we have consulted the UCC GDPR guidelines and declare that our project is GDPR compliant. Where required under the UCC GDPR Guidelines, I have submitted a DPIA.	Yes Yes
I/we have consulted the UCC Garda Vetting Guidelines, and where appropriate, researchers on this project have valid Garda vetting through UCC (having a valid Garda Vetting through another body is insufficient).	Yes

37. Signatures	
UCC Applicant(s)	Academic Supervisor / Tutor / Principal Investigator (where applicable)
	
Date: 07.07.20	Date: 07.07.20

1. Please submit a *signed* copy of this form and all relevant attachments **as one PDF file** to srec@ucc.ie. A picture of signatures pasted into section 37 is acceptable. No hard copies of this application are required.
2. SREC is not primarily concerned with methodological issues, but we may comment on such issues in so far as they have ethical implications.

Appendix 1: Call for Participants

This Research Study has been granted ethical approval by the Social and Research Ethics Committee of UCC

Appendix 2: Information For Fertility Clinics and Advocacy Groups

Dear *Fertility Clinic Staff/Advocacy Group (delete as appropriate)*

I am a PhD student in University College Cork, and I am starting a research study on children's rights in assisted human reproduction. I was hoping you might be able to help me by displaying my call for participants. I notice your webpage has a *newsletter/news section/space* for recent notices and I would be very grateful if you could upload the attached. This study is attempting to find out the views of parents about their decision whether to disclose the nature of their child's conception to them and also any legal issues that have arisen in their or their partner's, if any, attempts to gain legal parentage or guardianship of the child. The inclusion criteria for the study is simply that you are an individual or couple who have engaged in either surrogacy or donor conception which has resulted in the birth of a child. While the law is currently in somewhat of a fluctuating state, this research is intended to ensure that any decision makers hear the experiences of the people involved.

If you, or any of your clients, have any questions at all, please feel free to contact me on oconnellc@umail.ucc.ie.

Kindest Regards,

Claire O'Connell

Appendix 3: Parent Information Booklet

Firstly, thank you so much for your interest in this study and for considering participating. This study will inform my PhD's larger question which is: *Are the Irish laws and legislative proposals on assisted human reproduction in the best interests of the child*? I come at this question from a children's rights approach and therefore, a large factor in the discussion is the child's right to identify information about their biological parent as well as their legal certainty of parentage to their day to day caregivers. In this study, "biological parent" will refer to surrogates, egg donors and sperm donors. This study does not engage with such reproductive contributors, but rather, this research is about you, the parents, and your children.

The aspect of my PhD that this study will focus on is two-fold. The first is disclosure: telling your child about how they were conceived and about their biological origins. What the proposed legislation says is that the decision to tell a child about the nature of their conception will lie with the parents, or, with the county registrar's office when the child turns 18 and requests their birth certificate. With this in mind, this study will ask you questions about whether you wish to disclose, or have disclosed, your child's conception status to them and if so/not, for what reasons? I will also be asking about the ways in which you and your partner (if any), established your legal parentage and any difficulties you've experienced as a result of the lack of AHR legislation. Any views on this topic are welcome and there are no right or wrong answers. The most important thing is that this study provides a platform for those whose lives are affected by AHR legislation, or lack thereof, to make their views known. Any views provided to me will remain anonymous and you will get the chance to review any passages I use in my final dissertation, under your pseudonym of choice.

While there is no requirement on participants to engage their children in this study, I am asking all participants who have disclosed their child's conception status to them and made them aware of their donor/surrogate conception, if they would be comfortable with me talking to their child about their experience of disclosure and how they feel about their biological parent. This is completely at the discretion of you, the parent. It should be noted however, that any views that I receive from any children will not be relayed to the parents. This is to ensure that the child feels comfortable speaking freely. If you feel comfortable with me interviewing your child, please be certain that any such interview will comply with the Child Protection Policy of UCC and that I have been fully Garda vetted. As part of that compliance, I must report any allegations, suspicions or disclosures of child abuse or neglect, should they arise in the course of me conducting this research study. Any interviews will also take place in a location and time that are convenient for you.

If this sounds like something you might be interested in and you would like to discuss it a bit further, please feel free to send me any questions you might have. If you are comfortable with moving forward, I would be very grateful if you could fill out the following form. The information received from this form will be saved in password-protected files on a secure server and will be used for the purpose of determining which individuals might best meet the inclusion criteria for the study. There is also the possibility that while you may meet the inclusion criteria, you may exceed the pre-requisite number of participants required for this

study. You shall be informed of the outcome in any event. If you do not meet the inclusion criteria or exceed the pre-requisite number, your participation information form and all accompanying personal data will be deleted, and I will send you confirmation of this.

Participation Information Form

Name(s):
Preferred contact information and details: _____ Phone call ☐ Video call (Microsoft Teams) ☐ Email ☐ Text message ☐
Preferred contact for forms: Post ☐ Email ☐
County of residence:
Number of Children:
Please tell me a little bit about the make-up of your family (for example, single parent family, opposite or same sex parenting):
Which assisted human reproduction technique did you avail of? Surrogacy ☐ Egg Donation ☐ Sperm Donation ☐
If you have a partner, would they like to participate in the study? (if so, please provide their contact information if they would like me to contact them directly): Yes ☐ No ☐ N/A ☐ Contact Information:_____
Would you be open to discussing your child's participation in the study? Yes ☐ No ☐
Would you like to arrange a preliminary meeting to discuss the study? Yes ☐ No ☐
Would you prefer to conduct the interview: At your home ☐ In a public place ☐ Video call (Microsoft Teams) ☐ (In the event of interviews with any children) In the Ombudsman for Children's Office ☐
Do you have any concerns about participating that I could address?
I consent to the processing of this demographic data for the purposes of assessing my inclusion in this research study Yes ☐ No ☐

Next Steps

This study will take place in four stages. The first is that you return the participant information forms and once the deadline for submission has passed, I will select a number of participants to take part. I am hoping to interview everyone who applies but unfortunately, this may not be possible depending on the numbers of interested parties. My research has different impacts on families based on their sexual orientation, gender and family formation and so I am hoping to interview families who have availed of surrogacy and donor assisted human reproduction, who are opposite sex couples, same sex couples, single parents, two-parent families, male, female and non-binary. The second stage is that, having selected the participants, I will send out the adult and child information sheets, consent forms, data protection notices and if applicable, a list of questions I would ask your child in their interview. I can send these by post or by email. The third step is to have a preliminary meeting/phone call/video call so that I can go through the various forms with you and I can answer any questions you may have. If after this, you were comfortable with me speaking to your child, we would organise a similar meeting/phone call/video call for me to explain the child friendly forms to them (in your presence) and explain a little bit about how it will work and answer any questions they have. Following a period of approximately two weeks in which you can have a further think about whether you wish you or your child to participate, and have had time to return the signed forms to me, the fourth step is for me to schedule and conduct the interview itself in the event that you are happy to proceed.

The interviews can take place by video call using Microsoft Teams, in a public area or in your home, wherever you feel most comfortable. In light of UCC Child Safeguarding Statement and in line with the Department of Children and Youth Affair's *Guidance for developing ethical research projects involving children,* it is best practice not to interview a child alone unless they are in full view of their parents. In this regard, we have a few options. If you give your consent to allow me to speak with your child, and if you live within a close distance of Dublin, I have organised a meeting space in the Ombudsman for Children's Office, where there is a very child friendly atmosphere (it's very colourful with lots of bean-bags). The Ombudsman for Children's Office has a glass "cosy-corner" which is fully visible to anyone on the other side. Equally if you wished to go to a public place i.e. a park or have the interview in your home, we would remain in your eye line at all times. The space should be wherever you and your child feel most comfortable and I will do anything I can to facilitate that. In the event of a video call with your child, this would alleviate many child protection concerns as I would not be physically present with the child and again, the child would be in your eye line the whole time but ideally, out of ear shot so the child feels most comfortable in answering my questions. If we are unable to find somewhere suitable, then I will ensure that there will be a second researcher with me, during any interview with your child. It would be important in that instance for you consent to their having access to your child's data and their presence in the room.

As mentioned above, no participant's answers or views will be made known to any other participant regardless of any reference to you personally. This is to ensure the free expression of each participant's views. However, it's very important to me that parents will

see the questions that I plan to ask their child in advance. This is particularly important as I wish to ensure that I use the same terminology used by the child's parents so as to not confuse or distress the child in any way. We can discuss any reservations you might have in relation to any of these questions and the best method to make the child feel most comfortable. Each participant would have to sign a consent form and this would request your consent to participate in the interview, to record the audio of the interview and to retain your personal data for ten years after the completion of the research project. Your data will only be used for my own personal academic purposes. This would include its inclusion in subsequent research studies, articles, journals, books, as well as for use at conferences or as part of a submission to a policy/governmental committee/working group (but always on a non-identifying basis). I would similarly ask any children who wish to participate to sign a similar assent form.

The interview with each adult participant should take no longer than 30 - 45 minutes. However, if any participant wishes to exceed this timeframe and has more views that they would like to make known, we will continue until the participant feels ready to conclude the interview. The child's interview will in all likelihood be much shorter however, the interview will be child-led, and we will conclude the interview whenever they feel most comfortable. Any and all consent can be revoked up to 7 days after the interview has taken place. If during this time, a participant feels like they do not wish for me to use this information or relay these views under a pseudonym in my doctorate thesis, they can simply contact me and all data relating to that participant will be erased. I will also confirm with the participant that all such data has been erased.

As part of the interview process, you will also be able to choose your own pseudonym which will be used to mask your identity in the final thesis. While no identifying information will be used, I will be including your family formation, sexual orientation and the assisted human reproduction technique used, as these are relevant factors to the research questions. If you are concerned about your anonymity and think that these pieces of information taken together could lead someone to identity you, please consider participation carefully. No gratuitous information that could lead to your identification will be used in my final thesis and as soon as I have completed the chapter on the research study, I will provide it to each participant so that they can question any query they might have or let me know if they feel a detail is identifying. Also, if any participant feels I have misrepresented their views, they can inform me and if such views have been misrepresented I will remove or amend them accordingly. If, at any point, a participant wishes to be sent a copy of their own recording, they can send me a request and I will ensure to respond with any recordings I hold of them within 7 days using the HEANet Filesender service to ensure the security of their data.

Finally, while these interviews are mostly just supposed to be more of a chat, and all of the questions asked to your child will only be asked with your permission, every study that involves a potentially sensitive topic requires me to provide you with certain information. I will be checking in with each participant throughout the interview to make sure they wish to continue, and they may withdraw from the interview at any time. If at any point in the interview, any participant wishes to stop the interview, we will immediately do so. If any

participants appear distressed or upset, we can take a break and I will be happy to signpost certain organisations that might be able to assist in any distress you might feel. For your own information, these include organisations such as: the National Infertility Support and Information Group, LGBT Ireland, ISPCC Child and Family Supports, Childline or Teenline, your local Jigsaw centre, Barnardos, BelongTo One to One Support Service. I will also ensure to inform any parents if their child feels any distress throughout the interview during a post-interview de-brief.

Appendix 4: Interview Layout and Structure

Adult Interview Structure

Pre-Interview

1. Introduction – who I am, what my study is about
2. Discuss information sheets, consent forms, data protection notices for adults and children
3. Ask is there is anything they would like me to know/questions before the interview
4. If they have indicated that they wish for their child to take part then briefly explain to them about the child-centred approach of my PhD and the importance of participation.
5. Go through the questions for the children and discuss terminology
6. Schedule interview for 2 weeks ahead and advise of return of forms

Interview

1. Ask if there have been any changes since we last spoke/any outstanding questions.
2. Confirm that they have read, understood, signed and returned each form to me.
3. Advise that they can stop the interview any time and that they don't have to answer any questions they don't want to.
4. Ask the following questions and intermittently ask them if they feel comfortable continuing or if they would like a break:
    a. What was your reason for engaging in AHR?
    b. Have you disclosed the nature of the child's conception to the child?
    c. If so, what were your reasons?
    d. If so, how did you do it?
        i. How did you describe the role of the donor/surrogate?
        ii. Did you use a supportive tool?
        iii. Who told the child?
    e. If not, what were your reasons?
    f. If not, do you plan on telling the child in the future?
    g. Have you informed others about the nature of the conception?
    h. Did you use a known or unknown donor/surrogate?
    i. Would the end to donor anonymity affect your decision to engage in AHR in the manner that you did?
    j. Did the AHR facility you used, if any, provide any counselling or views on disclosure?
    k. Do you have up to date identifying information about the donor/surrogate?
    l. How would you feel if the child wished to meet their donor/surrogate?
    m. How do you feel overall about your AHR experience?
    n. Did you engage in the AHR procedure internationally?
    o. How did you seek to establish legal parentage?
    p. Have you encountered any difficulties in acting as a parent to your child in terms of decision making or applications?

Post-Interview

1. Ask if they have any questions or anything else they would like to tell me
2. Ask them how they are and for any feedback they wish to provide
3. Provide information on supports if necessary
4. Ask them if they have any questions about my PhD as a whole

5. Tell them again what I'm going to do with the information and remind them that they have 7 days to tell me that they want to withdraw from the study

Child Interview Structure

Pre-Interview

1. Introduction – who I am and ice breakers
2. What my study is about – provide child information sheets, assent forms, data notices
3. Advise that they can stop the interview any time and don't have to answer any questions they don't want to
4. Ask how they would like to engage in the study – would they prefer drawing or writing?
5. Ask is there is anything they would like me to know/questions before the interview
6. Confirm they want to do the interview and ask them when they would like to do it
7. *Interview*
8. Ask if there have been any changes since we last spoke/any outstanding questions.
9. Confirm that they have read, understood, signed and returned each form to their parent/me
10. Advise that they can stop the interview any time and don't have to answer any questions they don't want to.
11. Ask the following questions[1] and intermittently ask them if they feel comfortable continuing or if they would like a break:
    a. Do you know how you were created?
    b. How do you feel about that?
    c. How did you feel when you were told?
    d. How do you feel now?
    e. How old were you when you were told?
    f. How were you told?
    g. Do you, or would you like to, know anything about you donor/surrogate?
    h. Have you met or contacted your donor/surrogate?
    i. Would you like to know more about, or contact, your donor/surrogate?
    j. What would you tell your donor/surrogate if you had the chance?
    k. How do you feel about your parents?
    l. Have you talked to anyone else about how you were created?

Post-Interview

1. Ask if they have any questions or anything else they would like to tell me
2. Ask them how they are and for any feedback they wish to provide
3. Provide information on supports if necessary
4. Ask them if they have any questions about my PhD as a whole
5. Tell them again what I'm going to do with the information and remind them that they have 7 days to tell me that they want to withdraw from the study

[1] It should be noted that these questions provide the framework for the questions being posed to the child. The exact terminology and phrasing will be dictated by conversations with the parents and a continuation of their chosen terminology. The questions will also be adapted based on the age, understanding and maturity of the child.

Appendix 5: Adult Information Sheet, Consent Forms and Data Protection Notice

Adult Participant Information Sheet

Thank you for considering participating in this research project. The purpose of this document is to explain to you what the work is about and what your participation would involve, so as to enable you to make an informed choice.

The purpose of this study is to ascertain your views on disclosure of your child's conception status where they were born through assisted human reproduction. It also involves questions about how you were able to create legal ties to your child in the absence of legislation on assisted human reproduction, and any obstacles you faced. Should you choose to participate, you will be asked to take part in a one-to-one interview with researcher, Claire O'Connell. This interview will also be audio-recorded.

Participation in this study is completely voluntary. There is no obligation to participate, and should you choose to do so you can refuse to answer specific questions or decide to withdraw from the interview. Once the interview has been concluded, you can choose to withdraw from participation at any time in the subsequent 7 days.

All of the information you provide will be kept confidential and anonymous and will be available only to me (the researcher) and my PhD supervisor. The only exception is where information is disclosed which indicates that there is a risk of harm to you or to others. Once the interview is completed, the recording will immediately be transferred to a secure server and deleted from the original device. The interview will then be transcribed by me, the researcher on my encrypted laptop. Both the audio file and the transcribed document will be retained. This data will be stored for ten years after the completion of the research project, as is required by UCC's code of research conduct, and to allow the data to be used in subsequent research studies, articles, books or other submissions. The information you provide may contribute to research publications and/or conference presentations and the final doctoral thesis. All identifying information will be removed from any excerpts used in the final dissertation, however, your gender, sexual orientation, family formation and AHR technique will be used as these are considered to be relevant variables to the findings.

I do not anticipate any negative outcomes from participating in this study and I certainly do not intend to cause any distress to participants. Some of the topics broached in the interview, however, are of a sensitive and personal nature. At the end of the interview, I will discuss with you how you found the experience and how you are feeling. Should you experience distress arising from the interview, I will ensure to provide you with the contact details for support services which may be of assistance.

This study has obtained ethical approval from the UCC Social Research Ethics Committee.

If you have any queries about this research, you can contact me at oconnellc@umail.ucc.ie.

If you agree to take part in this study, please sign the consent form overleaf.

Adult Participant Consent Form

I……agree to participate in Claire O'Connell's research study.

The purpose and nature of the study has been explained to me in writing and any questions I have, have been satisfactorily answered by Claire.

I am participating voluntarily.

I give permission for my interview with Claire to be audio-recorded.

I understand that I can withdraw from the study, without repercussions, at any time, whether before it starts or while I am participating.

I understand that I can withdraw permission to use the data within 7 days of the interview, in which case all of my personal data will be deleted.

I understand that anonymity will be ensured in the write-up by disguising my identity with a pseudonym.

I understand that disguised extracts from my interview may be quoted in the thesis and any subsequent publications or submissions if I give permission below:

I agree to participate in this study in the manner noted above and to the quotation and publication of extracts from my interview. (Please tick the following box) ☐

Signed: …… Date: ……..

PRINT NAME: ……

Parent's Consent Form

I……agree to allow my child…….to participate in Claire O'Connell's research study.

The purpose and nature of the study has been explained to me and my child in writing and any questions I have, have been satisfactorily answered by Claire.

I am giving this consent voluntarily.

I give permission for my child's interview with Claire to be audio-recorded.

I understand that my child can withdraw from the study, without repercussions, at any time, whether before it starts or while my child is participating.

I understand that I can withdraw permission to use my child's data within 7 days of the interview, in which case their personal data will be deleted.

I understand that anonymity will be ensured in the write-up by disguising my child's identity.

I understand that disguised extracts from my child's interview may be quoted in the thesis and any subsequent publications or submissions if I give permission below:

I agree to my child participating in this study in the manner noted above and for the quotation and publication of extracts from my child's interview. ☐

AND

I consent to another researcher to be present during the interview and I consent to their being privy to the demographical information about me and my child. ☐

OR

I confirm that the following suitable location has been arranged where I will have full view of my child at all times …… ☐

Signed: …… Date: ……..

PRINT NAME: ……

Data Protection Notice

The retention of all data provided by you is done so on the basis of your consent. You should also be aware that this study in seeking to retain special categories of your personal data i.e. data concerning your medical treatments, genetic data and your sexual orientation. Such data is specifically relevant to the study. This is because, for example, single or same sex mothers and fathers may be more inclined to disclose the nature of their child's conception given the absence of a third party that is biologically required in conception.

The data obtained in the course of this study may also be used in subsequent studies and may be published and disseminated in other articles and presentations. However, at all times, a pseudonym will be used in such a way so as to make you unidentifiable. You can at all times choose your own pseudonym so that your data is easily identifiable to you. Your data will be retained for a period of ten years after the completion of the research project, as this is required by University College Cork.

In terms of data minimisation, the content of your answers is relevant to the research questions in the study. It is also important that it is retained in the event of a disagreement as to what was said and so the final thesis can reflect your views accurately. The demographic data is used to narrow the inclusion criteria of participants and also as a means for communication with participants.

The data provided can always be updated by participants and I will ensure that it is accurate, based on the information relayed to me by participants. While this may be more easily ensured by multiple researchers peer reviewing the research, I would prefer to limit the exposure of identifiable data to me alone. Every audio file and word document transcript will be password protected and kept on a secure server. Only the spreadsheet will contain identifiable information along with the assigned pseudonym and it will be kept in a locked filing cabinet in my home. This pseudonym will then be use on every other file, instead of your name or other identifiable information.

If, at any point, you have any issue with the manner in which your data is being retained as part of this study, please do contact me and I will do my best to resolve the issue. However, you also retain the right to lodge a complaint with the Data Protection Commission.

I consent to my data being processed in the manner described ☐

Signed: …… Date: ……..

PRINT NAME: ……

Appendix 6: Child Information Sheet, Assent Forms and Data Protection Notice (Age 11-18)

Hi! Thanks so much for considering talking to me about a little bit of your life. This sheet is just to explain how it would all work and why I'm doing it.

The reason I'm doing these interviews is because I'm doing a course in college about loads of different types of families and how they came to be. I'm really interested in the laws to do with families and especially making sure that your parents have all the legal rights they need to make decisions about you and that you have all the legal rights you should have too.

My course is all about children's rights, and what's really important in all the things I've learned is that, as the child, you should be the main focus of any decision about you. And I thought the best way for me to know what that is, is to ask you and to see if you want to tell me how you feel about it.

There are lots of different ways families can be made. Some can be made with your parents, and some can be made with a little help from other people. I'd like to talk to you because your family was made with a little help from other people and I would like to know what you think about them, if anything at all.

So, having said all that, I would really like to chat with you for about 30 minutes (or whatever time you'd prefer) and then I'd like to read back on everything you said to see if I could use it to make sense of what is best for children who have families similar to yours! This is because the law will be changing a little in the next few years and I want to make sure that when the law-makers are deciding how it should work, that they know what you said about it.

If it's okay with you, I would like to record the conversation (mostly because I am not that fast at writing and I want to make sure I remember everything you said and don't mess any of it up).

It is totally up to you if you want to do this and even if we start the conversation and you want to stop, that's no problem! Even after we finish, you can have a think over the next week to make sure you really want me to use what you told me. If you decide you want to stop being in my research, just let me know within the week and I'll delete everything (and send you a copy of the recording if you like).

Otherwise, we can have a sit down and a chat about your family. We can meet in your home or in somewhere you like to go to (as long as your parents say it's okay) or we can go to this place called the Ombudsman for Children's Office (which has beanbags). Or we can talk on a video call, whatever you would prefer! I will then type it all up and if you want, you can create a name for yourself, like a code name, that I'll use instead of yours, so only you (and anyone else you want to tell) will know what you said. This can include your parents because I want you to feel free to say anything you want, without anyone else knowing. There is only one exception to this and that would be if you told me that you were in danger or if something had happened that hurt you. I would have to tell someone that. On the other hand, if you want your parents in the room that's no problem and we can all have a chat together.

If you have any questions about the study, just let me know and I'll try and answer as best I can.

If this is all okay by you, just sign the assent form and we'll get started!

Child's Assent Form (Age 11-18)

I……agree to take part in in Claire O'Connell's research study.

Claire has told me the reasons for this study and what it's about has been explained to me verbally by Claire and also in writing.

I am giving this consent because I want to. No one has made me give this consent and I want to talk to Claire. I also give permission for everything I say (and my voice) to be recorded.

I know that I can change my mind, and that this won't cause any problems for Claire or anyone else. I know that I can change my mind before the interview, during the interview, or at any time up to a week after the interview. I know that I can ask Claire to delete everything relating to me during this time.

I know that anything I say will be kept secret and Claire will not tell anyone what I said. I know that Claire will be using some, or maybe all, of what I say in her thesis but that my name will not be put next to the things I've said. I know that I can choose my own name so that I know it's me she's talking about. I know that Claire will send me a copy of the thesis chapter with what I've said included in it and that she will fix any mistakes if I ask her.

I agree to talk to Claire and for her to use what I say in her thesis ☐

Signed: …… Date: ……..

PRINT NAME: ……

What I'm going to do with your information

For me to do this research, I need to be able to know some things, like your name and your age, but I can only keep the information you give me if it's okay with you.

When we do the interview, either you or I will pick a code name for you. This code name can be whatever you want it to be (within reason, fancy people are going to be reading this, so you know, keep it clean). From the interview, I'm going to be typing out some of the things you've said but I'm going to use the code name, not your actual name. I'm going to put these quotes into this big long book that I have to write so that I can give it to the university at the end of my course. Sometimes I go to events and I speak about my research, or I write articles so other people can see what I am working on, and I might use them there too but always using the codename!

There are lots of rules for doing a study like this and one of those is that my university says that I have to keep all of your information for ten years after the study finishes. This is a good thing because if you look at what I wrote (which I can send you when it's all finished) and you see something and think I've made a mistake, then I can check your information and change it to what it actually is.

So how am I going to store all this information? Well there's going to be one piece of paper that has your name and age on it and your code name so I can keep track of everyone. This piece of paper is going to be kept in a locked box. When I type out our conversation (again, with codenames only) I'm going to put it on my laptop and everything I type up is going to have a password on it that only I will know. Everything is then kept on my university's server online so if I lost my laptop or it got stolen or anything like that, all of your information is still secret.

If this is all okay with you, please tick this box and sign below ☐

Signed: …… Date: ……..

PRINT NAME: ……

Appendix 7: Child Information Sheet, Assent Forms and Data Protection Notice (Age 5-10)

Hello! My name is Claire and I'm doing a study. My study is about families like yours and if it is okay with you I would like to ask you some questions about it

I think what you have to say is really important. And I want to tell other people what you think when they are deciding things about families like yours. It will take 30 minutes or longer if you'd like! I have a bad memory so if it is okay with you, I'm going to record us talking on my phone.

If you don't want to, don't worry, that's fine! Even if, when we start talking you think you would like to stop, that's fine too. And whatever you tell me, I won't tell anyone that you said it. Unless it's something that made you sad or hurt, then I will have to, just to make sure you're okay. If this sounds like something you want to do, just sign the form on the next page!

This is Bobby by the way
(he loves being coloured in)

Child's Assent Form (Age 5-10)

I……..agree to take part in Claire's study.

She has told me what it is about, and I would like to talk to her.

I know that I can stop it at any time.

I do not mind if she records my voice.

I know that I can ask Claire to delete everything about me.

I know that Claire will not tell anyone what I say, unless it is something that is bad for me and then she has to tell someone.

I know I can pick my code name for what Claire writes.

I know that Claire will fix any mistakes if I ask her to.

I agree to talk to Claire and for her to put what I tell her into her study.

If you agree with all of these sentences, tick this box ☐

My Name: ……. Date: ……..

My name in capital letters: …….

What is Data?

Data is the things that you tell me about yourself.

It could be your name or your age.

There are rules that say I have to ask you if it is okay for me to write these things down and keep them, so that I can do the study.

I can only use what you allow me to use.

But if you allow me to use it, I have to keep it for ten years after my study is over.

When you tell me things, I might use them in a big book I am writing.

I might also use them if I am talking about my study at an event or if I want to write in a magazine about the study.

But if I do, I will not use your name.

I'm going to use a code name that you get to choose (if you want to!).

Only you will know your code name so only you will know which bit of the book is talking about you.

If you tell your parents your code name, then they will know which bit is about you too.

I'm going to keep your data on a piece of paper in a locked box and I'm going to keep all of your code name data on my computer and online.

This should be really safe and only I will be able to see all of your data.

Is this okay? If it is, just tick this box ☐

My Name: ……. Date: ……..

My name in capital letters: …….

Appendix 8: Data Protection Impact Assessment

Step 1a: DPIA Screening Checklist		
Does your project involve:	**Yes**	**No**
Evaluation or scoring of personal data (including profiling and predicting)	X	
Automated decision-making with legal or similar significant effects		X
Systematic monitoring including through a publicly accessible place on a large scale		X
Sensitive data or data of a highly personal nature (including special categories of data and criminal data)	X	
Data processed on a large scale		X
Matching or combining data sets		X
Data concerning vulnerable people (including children)	X	
Innovative use or applying technological or organisational solutions		X
Processing preventing data subjects from exercising a right or using a service or contract		X
If you have answered yes to any of the above questions, you must carry out a DPIA. Please see the DPIA Procedure for further information.		

Step 1b: Identify the Need for a DPIA
Explain broadly what the project aims to achieve and what type of processing of personal data it involves. You may find it helpful to refer or link to other documents, such as a project proposal. Summarise why you identified the need for a DPIA (this can draw on your answers to step 1/ the screening questions).
This project aims to interview parents and their children in relation to the parent's use of an assisted human reproduction techniques and the disclosure of their use of these techniques to their children. This will involve a preliminary collection and screening of participant's special categories of personal data such as the nature of their medical procedures, their genetic data and sexual orientation. The interviews will then ask parents their reasons for their disclosure status and ask children how they feel having been disclosed to. It will also involve questions to parents regarding the difficulty in creating legal ties with their children. The collection, screening, use and retention of personal and sensitive data and the interviewing of children requires a DPIA.

Step 2: Describe the Processing
Describe the nature of the processing: how will you collect, use, store and delete data? What is the source of the data? Will you be sharing data with anyone? You might find it useful to refer to a flow diagram or another way of describing data flows. What types of processing identified as likely high risk are involved?

Collection:
I will put out the call for participants through social media, targeted groups and fertility clinics. The latter two calls will be done through email and I'll record every contact on a hard copy spreadsheet. Any responses or expressions of interests will be similarly recorded on the spreadsheet. I will then send out an information sheet which will request data which is of a special category of personal data which will be entered into the spreadsheet upon receipt of the answers. Once the participants are chosen, I will then arrange pre-interview information sessions and subsequent interview dates. In advance of every interview, I will provide participants with a data protection notice and the consent form. I will then record the interviews on two devices, an iphone and an iPad. I will then transcribe the interviews. The transcripts shall be pseudonymised.

Use:
No one else, apart from my PhD supervisor upon request, will have access to this data. I will create a pseudonymised system whereby the hard copy spreadsheet will contain the only identifying information in terms of names and contact methods and the corresponding pseudonym. The transcripts and the resulting text in my dissertation will contain the pseudonym, sexual orientation, genetic data, AHR technique and family formation of each participant.

Storage:
The data will be stored as emails, audio files, pdf consent forms, word document transcripts and resulting text for the dissertation. Each file will be password protected. Each file will be stored in one folder which will be stored on my UCC OneDrive Account apart from the spreadsheet that ties the identifying information to the pseudonyms. This will be a hard copy and will be kept in a locked cabinet in my home.

Deletion:
All files saved onto the UCC OneDrive Account will be subsequently deleted from the original device such as email account, iPhone and iPad. The consent forms will be signed in person, I will scan them into a pdf file and shred the original document.

Describe the scope of the processing: what is the nature of the data, and does it include special category or criminal offence data? How much data will you be collecting and using? How often? How long will you keep it? How many individuals are affected? What geographical area does it cover?

The data is both personal data and special categories of personal data in that it will include data such as names, ages, personal accounts of their experience with the legal system of assisted human reproduction as well as genetic data, data concerning health and personal data concerning an individual's sex life or sexual orientation. I will be recording and transcribing the interviews which will be recorded under a pseudonym. The exact amount of data used is currently unclear as it will depend on the answers given and the number of participants. Aspects of the data such as the participant's chosen AHR technique, sexual orientation and family formation will be used for each participant in my final thesis as well as any information that is relevant to answer my research questions. The data will be collected over approximately 6-9 months depending on the level of engagement and availability of participants. I will retain the data for ten years after the completion of the

research project and each participant will have to consent to this in advance of the interview. If any person seeks to withdraw from the study up to 7 days following the interview, they can do so, and all of their data will be deleted. The number of individuals affected will depend on the level of interest in the study. This study will cover the Republic of Ireland given that it is related to a specific lack of legislation in assisted human reproduction in this jurisdiction.
Describe the context of the processing: what is the nature of your relationship with the individuals? How much control will they have? Would they expect you to use their data in this way? Do they include children or other vulnerable groups? Are there prior concerns over this type of processing or security flaws? Is it novel in any way? What is the current state of technology in this area? Are there any current issues of public concern that you should factor in? Are you signed up to any approved code of conduct or certification scheme (once any have been approved)?
Any participants will be unknown to me before they express interest in the study. They will be parents and children who have engaged in assisted human reproduction. The parents may or may not have disclosed the nature of their children's conception however, only children who have been disclosed to will be interviewed. The participants will be in total control over the extent of their inclusion in the study up until 7 days following the interview. At any time up until this point, they can withdraw from the study. After this, they would still be able to view every reiteration of their input in my final thesis and may also point out any inconsistency or mistakes. Such inconsistencies or mistakes will be rectified upon request if proven to be so, based on the original recordings. Each participant will be aware in advance of the interview of the nature of the interview, the questions being asked to their children, how I will be storing their data and for how long. They may also choose their own pseudonym. The children will be able to choose the communication method. For example, if they do not wish to answer the questions, they can draw, write a poem or use another medium to express themselves. The use of participatory studies is not novel, and I do not have any concerns over this type of processing or security. Each parent and child will be providing informed consent based on information provided in an accessible way before ever taking place in the study. In terms of technology, I will be using a secure server and password protecting each file. I believe this is sufficient to maintain the security of the data. I will be Garda Vetted in advance of the interviews and have already been provided with Children First Training.
Describe the purposes of the processing: what do you want to achieve? What is the intended effect on individuals? What are the benefits of the processing for you, and more broadly?
With this study, I want to provide answers to my research questions. I want to get an overview of the personal experiences of parents who have engaged in assisted human reproduction in the Irish context and their response to disclosure and legal certainty. I want to provide an evidence based approach of the practical realities that are faced by individuals in response to legislative proposals made in a participation vacuum. In terms of the participants, I want them to feel empowered to share their views, to feel like they are important stakeholders in this discussion and that by providing me with their insights, that it will be used in a thesis that fundamentally seeks to promote a child-centred system in assisted human reproduction legislation. I want this study to be an outlet for their otherwise unheard views.

Step 3: Assessment of Necessity and Proportionality of Processing
Describe compliance and proportionality measures, in particular: what is your lawful basis for processing? Does the processing actually achieve your purpose? Is there another way to achieve the same outcome? How will you prevent function creep? How will you ensure data quality and data minimisation? What information will you give individuals? How will you help to support their rights? What measures do you take to ensure processors comply? How do you safeguard any international transfers? Prior consultation?
The lawful basis for processing this data will be the informed, free and explicit consent of each participant. The request for consent shall be expressed in clear and plain language. The processing does achieve my purpose in that the personal accounts of individuals will inform my overall thesis and my specific research questions. I have identified two significant areas of discussion in my thesis and only these are being focused on in the study. In order to ensure data quality and data minimisation, I have pre-prepared the interview questions and, while there will inevitably be slight divergence as they will be semi-structured interviews, these questions will form the structure and I will endeavour to ensure such is maintained throughout the interviews. I will not be asking any questions unrelated to my research questions. I will be providing individuals with an information sheet in advancing of obtaining their participant information and providing them with time to ask any questions before consenting/assenting. Following on from that, I will conduct pre-interview information sessions with parents so as to answer any questions in advance of the interview. I will also be asking them at the end of the interview if they need any supports and have any questions about my PhD and the nature of the research. I will support their right to be heard through their involvement in the study. I will support their rights in terms of data protection through the methods outlined in this impact assessment. In this study, I am both the data controller and the data processor and so I do not have to rely on others to ensure the data protection of my participant's data. There will not be any international transfers. In terms of consultation, this is answered in Step 4.

Step 4: Consult with Stakeholders
Consider how to consult with relevant stakeholders: describe when and how you will seek individuals' views – or justify why it's not appropriate to do so. Who else do you need to involve within your organisation? Do you need to ask your processors to assist? Do you plan to consult information security experts, or any other experts?
In advance of my social research ethics proposal, I consulted with my PhD supervisor and the participation unit of the Ombudsman for Children's Office in order to be aware of modern methodologies of engaging with children and best practice approaches. In addition, I will throughout the interviews, carry out brief exit feedback interviews with each participant to ensure that I am aware of general comfort levels, any emotional difficulties faced and any changes that could be made as I move forward. I do not believe that I need to consult further with specialised information security experts as the most important aspects of this study in terms of data will be advanced notice, informed consent and secure data retention servers.