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Assisted Human Reproduction Coalition Briefing Paper

Briefing paper from the Assisted Human
Reproduction Coalition
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Executive summary

This briefing paper, prepared by the Assisted Human Reproduction (AHR) Coalition, aims to inform policy makers, politicians, human rights, children's rights and LGBT organisations, the media, women's groups, support groups, relevant organisations and the general public about the different types of AHR methods available, the scenarios in which those procedures might be used and the legal situations of those involved in using each type of procedure.

The AHR Coalition represents seven member organisations, LGBT Ireland, Equality for Children, the National Infertility Support and Information Group (NISIG), Rainbow Family Equality Network (RFEN), Irish Families through Surrogacy, Independent Living Movement Ireland (ILMI) and Irish Gay Dads. There are five main types of AHR procedures currently available, Intracervical Insemination (ICI), Intrauterine Insemination (IUI), In Vitro Fertilisation (IVF), Reciprocal IVF and Surrogacy. AHR procedures are used by single people, male-female couples, LGBT+ couples and other persons / couples who may have a fertility, disability or health issue that prevents them from successfully or safely conceiving or carrying a child to birth.

Currently, IUI, IVF and Reciprocal IVF are procedures that are available to people in fertility clinics in Ireland and internationally. Surrogacy is not yet legislated in Ireland. ICI is a non-clinical procedure that can be administered without the need of a clinic. There is no legislation covering ICI.

The introduction in 2015 of the Children and Family Relationships Act (CFRA) and its commencement in May 2020 paved the way for some children born through AHR procedures to establish legal parent-child relationships with their intended parents. Since May 2020, children born using IUI, IVF or Reciprocal IVF who are born in Ireland and conceived in an Irish fertility clinic can be recognised as the legal child of their intended parents. This recognition happens through the registration of the child's birth with both parents listed on the birth certificate. The birth of the child and any relevant donor information is placed on the National Donor-Conceived Person Register.

However, children born through ICI and surrogacy continue to be unable to establish a legal parent child relationship with their intended parents in Ireland leaving vulnerable children and their parents in precarious legal situations when it comes to citizenship provisions, access and custody, childcare, healthcare, social welfare and succession / inheritance. Equally, children born internationally or conceived through international clinics remain unable to establish legal relationships with their parents. Annex 1 outlines the various AHR procedures and situations, where they might be used, and the legal situations the children and parent(s) find themselves in.

Children who do not fall under the remit of the CFRA remain governed under previous legislation in Ireland which was not designed at a time when AHR procedures were available.

This legislation is inadequate as it only allows for legal paternity of a child to be established through DNA testing or marriage to the legal 'mother', thus not accounting for children conceived using donor sperm, and only allows for legal maternity to be established through birth, thus only allowing for the person who gives birth to the child to be recognised as the legal mother of the child. In some cases, this creates situations where people cannot legally have children. For example, a single woman who cannot safely conceive or carry a child, could only potentially avail of surrogacy but could not legally ever become a recognised parent of a child born through surrogacy. This legislation is completely inadequate when set against the realities of how families are formed today using AHR procedures. Amendments to the CFRA 2015 and publication of an inclusive AHR Bill are needed to rectify this situation.

1. Introduction

This briefing paper from the Assisted Human Reproduction (AHR) Coalition sets out the different assisted human reproduction methods used by single people, male-female couples, LGBT+ couples and any other person / couple who may have a fertility, disability or health issue that prevents them from successfully or safely conceiving or carrying a child to birth. The purpose of this document is to demystify AHR procedures, outline when and why a person / couple might avail each of the AHR procedures and the legal implications for the parent(s) and child.

The information presented here is informed by the experiences and expertise of those involved in the AHR Coalition. This includes charity and not-for-profit organisations, parents, medical and legal experts. Annex 1 outlines a legislation gap matrix summarising the types of procedures used for AHR and where the gaps exist. This is a live document and any updates, clarifications or corrections deemed required will be included in later versions.

1.1 Assisted Human Reproduction Coalition

The Assisted Human Reproduction (AHR) Coalition was formed in 2020 is made up of not-for-profit organisations and groups whose members are affected by the lack of legislation around AHR in Ireland. The driving principle behind the work of the AHR Coalition is to ensure that equality is secured, and the human rights of children conceived using AHR, their intended parents and families, are protected and advanced in laws or policies, while also protecting the rights and best interests of women who act as or have acted as surrogates.

The primary objective of the AHR Coalition is to inform the development of laws or policies pertaining to Assisted Human Reproduction (AHR) from the perspective of the best interests and welfare of the children conceived through AHR, and the human rights and equality of their intended parents and families.

The AHR Coalition is currently made up of LGBT Ireland, the National Infertility Support and Information Group (NISIG), Equality for Children, Rainbow Family Equality Network (RFEN), Irish Families through Surrogacy, Independent Living Movement Ireland (ILMI) and Irish Gay Dads.

- LGBT Ireland is a national charity and was established in 2010 as a national support service for Lesbian, Gay, Bisexual and Transgender people and their families and friends. LGBT Ireland works with the government on a variety of issues affecting LGBT+ people.

- The National Infertility Support and Information Group (NISIG) has been established for 25 years and provides emotional and information support to all those both exploring and undergoing fertility treatment including those on the donor conception and surrogacy journey.
- Equality for Children was established in 2019 as a campaign for equality for children of LGBT+ families. EFC is a not-for-profit organisation that is entirely volunteer-led. EFC works with the government to influence positive inclusive change to the rights of children born to LGBT+ parents while also raising societal awareness of the issue.
- Rainbow Family Equality Network (RFEN) was established in 2020 and works to bring together representative organisations in LGBTQI community to both disseminate relevant information and take feedback on AHR.
- Irish Families through Surrogacy – was established in 2021. Supports intended parents through the legal process involved in gaining parental rights of children born through surrogacy. IFTS provides support to all intended parents who are considering pursuing surrogacy domestically and internationally through advice, guidance, and practical tips from other intended parents.
- Independent Living Movement Ireland (ILMI) is led by disabled people and promotes a rights-based social model of disability, challenging the unacceptable charity / medical model of disability. ILMI is working towards the removal of societal barriers that prevent equal participation of disabled people, challenging the denials of people’s rights and the promotion of the philosophy of independent living.
- Irish Gay Dads provides an online space of friendly support and information for dads and and dads-to-be who are members of the LGBTQ+ community, and who live in Ireland or are Irish living abroad. Irish Gay Dads advocates for changes in the law to advance the rights of children and families of gay dads.

2. Key Terms

This section explains some key terms that are frequently used when discussing Assisted Human Reproduction.

Cis woman / man:

A cisgender person is one whose gender identity matches their sex assigned at birth. For example, someone who identifies as a woman and was identified as female at birth is a cisgender woman. A cisgender man is one who identifies as male and was identified as male at birth.

Transgender man / woman:

Transgender people have a gender identity or gender expression that differs from the sex that they were assigned at birth. Trans women are people who identify as female but were identified as male at birth. Trans men are people who identify as male but who were identified as female at birth. Many trans men have the capability of using their own eggs and / or uterus to have children. A trans person may also be gay or straight, so depending on their sexual identity there may be differing options open to them when it comes to starting a family.

Male-female couples:

In this document, the term male-female couples is used in reference to couples where one person in the couple has male reproductive organs and the other has female reproductive organs. The couple may or may not identify as male and female and may or may not identify as heterosexual.

Female / Woman / Person with a Uterus:

There are many people who have the capability of using their own eggs and uterus to conceive and bear biological children. These include cis women, non binary people and trans men. Reference to a 'female' person in this document is all encompassing and is intended to include cis, non binary and trans people. Reference to female / woman in this document also refers to anyone who has eggs and a uterus- though they may not identify as female.

Male / Man:

There are many people who have the capability to produce sperm to create biological children. These include cis men, non binary people and trans women. Reference to a 'male' person in this document is all encompassing and is intended to include cis, non binary and trans people. Reference to male / man in

this document also refers to anyone with male reproductive organs who can produce sperm - though they may not identify as male.

Anonymous donor:

An anonymous donor is a person who donates sperm or eggs through a sperm bank or a fertility clinic. They do not consent to any identifying information being given to prospective parents or any children conceived as a result of their sperm / egg donation.

Non-anonymous / traceable donor:

A non-anonymous or traceable donor is a person who donates sperm or eggs through a sperm bank or fertility clinic. No identifying information will be given to prospective parents. When working with an Irish fertility clinic, they consent to their information being stored on a database and made available to children conceived as a result of their donation once they reach the age of 18.

Known donor:

A donor is referred to as a known donor if they are known to the person / couple they are donating to for conception purposes. They may be a friend, a relative or an acquaintance or the known donor may be introduced by the clinic the Intended Parent(s) choose to work with. Unlike anonymous and non-anonymous / traceable donor arrangements, this person isn't found through an agency / sperm bank or fertility clinic. When using AHR, sometimes one of the intended parents is the 'known donor'. For example, in the case of a male-female couple using IUI or IVF with their own sperm and egg, the male is considered a **partner known donor**. When using AHR with a known donor that is not an intended parent, the donor is considered a **non-partner known donor**.

Surrogate: A person who acts as a surrogate is a woman who agrees to carry and bear a child for another person, or couple, the intended the parents. The intended parents become the child's parent(s) after birth. A surrogate is sometimes referred to as the 'surrogate mother' or 'gestational carrier'. We use the term surrogate in this document to encompass these terms.

Intended parent(s): The term intended parent(s), refers to the person / people (who may be male(s) and / or female(s) who may or may not be married, who initiate and fund the Assisted Human Reproduction process and are intending be the parents of a child being born through AHR. Intended Parents typically initiate the process because they are single, because of a fertility or health issue that prevent them from

otherwise conceiving or carrying a child to term or because they are a same sex couple. One or both of the intended parents may be the biological parents of the child(ren) born through AHR.

Guardianship: As detailed in the table below, guardianship is very different from parentage especially as most parents are automatically recognised as guardians but not all guardians are parents. Most significantly however, guardianship ceases when the child turns 18 whereas as parentage is recognised indefinitely. This can have considerable impact on issues such as inheritance. The following table sets out the main differences between Parentage and Guardianship:

Parentage	Guardianship
Parental rights are automatically granted.	Guardianship rights must be applied for through the district court system.
Parental rights are granted immediately on the birth of a child allowing the parent to participate in all key decisions regarding their child's welfare.	At the earliest, in the case of LGBT+ couples or intended mothers that went through surrogacy, Guardianship rights can be applied for once the child reaches the age of 2.
Right to make all major decisions in relation to the child's upbringing for example, which school / crèche the child will attend, the religion they will participate in, and so on.	Right to make all major decisions in relation to the child's upbringing for example, school, religion, and so on.
Duty to maintain the child until no longer dependent.	Duty to maintain the child until no longer dependent (such as, when the child turns 18).
Entitled to full inheritance rights as child and natural parent.	No automatic inheritance rights for the child of a guardian, although provision can be made for the child through the guardian's will.
Group A inheritance thresholds ¹	Inheritance treated as third party inheritance (Group C thresholds ¹)
Child automatically has legal relationships with relatives of their parents for example, aunts, uncles, cousins.	Child is not considered to be legally related to their guardian's relatives.
Child entitled to tax reliefs on inheritance from relatives	Inheritance treated as third party inheritance.
Child is entitled to claim citizenship from their parent as per the rules of the country involved.	Child cannot claim citizenship through guardianship.

¹ Inheritance tax thresholds are divided in three groups: Group A parent to child; Group B where the beneficiary is a brother or sister, nephew or niece of a lineal ancestor; Group C includes all other cases.

More details about inheritance tax:

https://www.citizensinformation.ie/en/money_and_tax/tax/capital_taxes/capital_acquisitions_tax.html

1. Assisted Human Reproduction Procedures Explained

1.1 Intracervical Insemination (ICI)

3.1.1 What is it

Intracervical Insemination (ICI) or, as it is more commonly known, at-home insemination, is a type of artificial insemination that involves inserting donor sperm into the cervix of a female / woman around the time of ovulation.

3.1.2 Where can this procedure be performed

This procedure does not require medical support / intervention, that is, medical training, a medical licence or medical equipment and can be performed anywhere by anyone using a plastic syringe typically purchased “over the counter” without a medical prescription.

3.1.3 The legal position of children born using this procedure

Children born through ICI in Ireland can **only** have a legal parent-child relationship with intended parents who is deemed their biological mother². In this case, the person deemed the biological mother is the person whose egg was fertilised and who carried the child in their uterus and gave birth to the child. This is because the legislation enabling a legal parent-child relationship to be established between both the intended parents and a child born through AHR (CFRA, 2015) does not have a pathway for a relationship to be established if the child is conceived outside of an Irish fertility clinic.

Under the CFRA, the child’s other intended parent can apply to the courts to be the legal guardian of the child only once the child turns two and only if the registered biological mother³ provides permission.

This is the only current option available to children born through ICI⁴. The child’s non-biological intended parent (even if married to the registered biological mother) is otherwise deemed a legal stranger to the child⁵.

² The sperm donor in the case of ICI, can also establish a legal parent-child relationship with the child in the same way any man can establish a parent-child relationship with a child in Ireland. If not married to the person deemed the biological mother of the child, they have no automatic rights to or legal relationship with the child. They can, with their own and with the biological mother’s consent, be listed as ‘father’ on the child’s birth certificate. If they do not obtain consent, they can establish the right through DNA evidence and a court process. They can also apply for guardianship, access, custody of joint custody in respect of the child.

³ In Ireland, the person who is registered as the child’s biological mother is the person who gives birth to the child. They may or may not be a biological parent and may or may not identify as a mother or female.

⁴ Adoption may become available to families in these situations once the Adoption Amendment Act, 2017 becomes operationalised by the Adoption Authority. As of March, 2021, it is not available.

⁵ In the case of male-female couples where the male partner is married to the biological mother, the male partner can avail of the presumption of paternity and be named as the father of the child on the birth certificate regardless of whether he is the biological father or not.

3.1.4 Why ICI

Single females, male-female couples where the male partner has a fertility issue or a disability, or female same sex couples might choose this type of AHR for any one or combination of the following reasons:

- 1) the person who will be providing the egg and carrying the child does not have any known fertility problems and so do not necessarily require the services of a fertility clinic
- 2) they may not have the funds required to pay for IUI or IVF through fertility clinics in Ireland.
- 3) they may wish to choose a known donor (such as, someone they know might agree to donate their sperm) rather than a donor from the small number of European sperm banks that Irish clinics use. While Irish fertility clinics can in theory accommodate 'non-partner known donor IUI and IVF' by getting the appropriate licence from the Health Products Regulatory Authority (HPRA), in practice it is not commonly available in Irish fertility clinics.
- 4) The process is typically faster than working through an alternative process involving the services of a fertility clinic.

3.2 Intrauterine Insemination (IUI)

3.2.1 What is it

Intrauterine Insemination (IUI) is a method of conception where sperm is injected directly into the uterus of a woman around the time of ovulation.

3.2.2 Where can this procedure be performed

This procedure requires medical training and medical equipment in order to be safely administered. Fertility clinics typically offer IUI services.

3.2.3 The legal position of children born using this procedure

The legislation enabling a legal parent-child relationship to be established between intended parents and a child born through AHR (CFRA, 2015) has a pathway for a legal parent child relationship to be established for a child conceived through IUI if the following conditions are met⁶:

- 1) The sperm used is either a partner known donor, non-partner known donor, or a traceable donor.
- 2) Conception occurs in a fertility clinic in the Republic of Ireland.
- 3) The child is born in the Republic of Ireland.

Children born through IUI that meet the above conditions can therefore have a legal parent-child relationship with both their intended parents recognised upon the birth of the child. This is established through the registration of the birth of the child with the Civil Registration Service. The child's birth certificate lists their intended parents as their parents and the legal parent-child relationship is established and recognised through this registration.

If a non-partner known donor or a traceable donor was used, this information is registered on the National Donor-Conceived Person Register. When a donor conceived child turns eighteen, they can get information on their donor from the National Donor-Conceived Person Register.

If a child is conceived using IUI but does not meet all of the above conditions, for example, the child is born outside of the Republic of Ireland, the only option available is guardianship⁷. Under the CFRA, the

⁶ Note: Retrospective provisions under the CFRA enabled children conceived through IUI, IVF and Reciprocal IVF before May 4th 2020 to establish a legal parent-child relationship with their intended parents if the following conditions were met:

- The child was conceived in an Irish fertility or international clinic through either intrauterine insemination (IUI), in vitro fertilisation (IVF) or reciprocal IVF.
- The child is conceived using either an anonymous or traceable sperm donor.
- The child was born in Ireland.

⁷ Adoption may become available to families in these situations once the Adoption Amendment Act, 2017 becomes operationalised by the Adoption Authority. As of March, 2021, it is not available.

child's non-biological parent can apply to be the legal guardian of the child once the child turns two and with the permission of the biological parent. The child's non-biological parent (even if married to the biological parent) is otherwise deemed a legal stranger to the child⁸.

3.2.4 Why IUI

Male-female couples might choose this type of AHR because they have a fertility, disability or health issue that is preventing them from successfully conceiving a child without intervention.

Single females and female same sex couples might choose this type of AHR if they have no known fertility or health issues but want to conceive a child using a traceable or non-partner known donor.

⁸ In the case of male-female couples where the male partner is married to the biological mother, the male partner can avail of the presumption of paternity and be named as the father of the child on the birth certificate regardless of whether he is the biological father or not.

3.3 In Vitro Fertilisation (IVF)

3.3.1 What is it

In Vitro Fertilisation (literally meaning fertilization in glass) is a method of conception where eggs are retrieved and then fertilised with sperm outside of the body.

Embryos are created and then either placed back into the womb through a fresh embryo transfer or frozen for use at a later date.

3.3.2 Where can this procedure be performed

This procedure requires medical training, a medical licence and medical equipment in order to be safely administered. Fertility clinics typically offer IVF services.

3.3.3 The legal position of children born using this procedure

The legislation enabling a legal parent-child relationship to be established between intended parents and children born through AHR (CFRA, 2015) has a pathway for a relationship to be established if the child is conceived through IVF if the following conditions are met⁹:

- 1) The sperm used is either a partner known donor, non-partner known donor, or a traceable donor.
- 2) The egg used is from the intended biological parent and person who will birth the child.
- 3) Conception occurs in a fertility clinic in the Republic of Ireland.
- 4) The child is born in the Republic of Ireland.

Children born through IVF that meet the above conditions can therefore have a legal parent-child relationship with both their intended parents recognised upon the birth of the child. This is established through the registration of the birth of the child with the Civil Registration Service. The child's birth certificate lists their intended parents as their parents and the legal parent-child relationship is established and recognised through this registration.

If a non-partner known donor or a traceable donor was used, this information is registered on the National Donor-Conceived Person Register. When a donor conceived child turns eighteen, they can get information on their donor from the National Donor-Conceived Person Register.

⁹ Note: Retrospective provisions under the CFRA enabled children conceived through IUI, IVF and Reciprocal IVF before May 4th 2020 to establish a legal parent-child relationship with their intended parents if the following conditions were met:

- The child was conceived in an Irish fertility or international clinic through either intrauterine insemination (IUI), in vitro fertilisation (IVF) or reciprocal IVF.
- The child is conceived using either an anonymous or traceable sperm donor.
- The child was born in Ireland.

If a child is conceived using IVF but does not meet all of the above conditions, for example, the child is conceived in a clinic outside of the Republic of Ireland, the only option available is guardianship¹⁰. Under the CFRA, the child's non-biological parent can apply to be the legal guardian of the child once the child turns two and with the permission of the biological parent. The child's non-biological parent (even if married to the biological parent) is otherwise deemed a legal stranger to the child¹¹.

3.3.4 Why IVF

Single females, male-female couples and female same sex couples might choose this type of AHR because they have a fertility, disability or health issue that is preventing them from otherwise successfully conceiving a child.

¹⁰ Adoption may become available to families in these situations once the Adoption Amendment Act, 2017 becomes operationalised by the Adoption Authority. As of March, 2021, it is not available.

¹¹ In the case of male-female couples where the male partner is married to the biological mother, the male partner can avail of the presumption of paternity and be named as the father of the child on the birth certificate regardless of whether he is the biological father or not.

3.4 Reciprocal In Vitro Fertilisation

Reciprocal IVF is a method of IVF which involves both partners in an LGBT+ / same sex relationship. One partner's eggs are used along with donor sperm to create embryos. Resulting embryos are then placed back into the other partner's womb.

3.4.1 Where can this procedure be performed

This procedure requires medical training, a medical licence and medical equipment in order to be safely administered. Fertility clinics often offer Reciprocal IVF services.

3.4.2 The legal position of children born using this procedure

The legislation enabling a legal parent-child relationship to be established between intended parents and children born through AHR (CFRA, 2015) has a pathway for a relationship to be established if the child is conceived through Reciprocal IVF if the following conditions are met¹²:

- 1) The sperm used is either a non-partner known donor, or a traceable donor.
- 2) The egg used is from one of the intended parents and the child is carried by the other intended parent.
- 3) Conception occurs in a fertility clinic in the Republic of Ireland.
- 4) The child is born in the Republic of Ireland.

Children born through Reciprocal IVF that meet the above conditions can therefore have a legal parent-child relationship with both their intended parents recognised upon the birth of the child. This is established through the registration of the birth of the child with the Civil Registration Service. The child's birth certificate lists their intended parents as their parents and the legal parent-child relationship is established and recognised through this registration.

If a non-partner known donor or a traceable donor was used, this information is registered on the National Donor-Conceived Person Register. When a donor conceived child turns eighteen, they can get information on their donor from the National Donor-Conceived Person Register.

¹² Note: Retrospective provisions under the CFRA enabled children conceived through IUI, IVF and Reciprocal IVF before May 4th 2020 to establish a legal parent-child relationship with their intended parents if the following conditions were met:

- The child was conceived in an Irish fertility or international clinic through either intrauterine insemination (IUI), in vitro fertilisation (IVF) or reciprocal IVF.
- The child is conceived using either an anonymous or traceable sperm donor.
- The child was born in Ireland.

If a child is conceived using Reciprocal IVF but does not meet all of the above conditions, for example, an anonymous sperm donor is used, the only option available is guardianship¹³. Under the CFRA, the child's non-biological parent can apply to be the legal guardian of the child once the child turns two and with the permission of the biological parent. The child's non-biological parent (even if married to the biological parent) is otherwise deemed a legal stranger to the child.

3.4.3 Why Reciprocal IVF

Female same sex couples / LGBTQ+ couples might choose this type of AHR because of fertility, disability or health issues or because they both want to be involved in the physical process of conceiving the child.

¹³ Adoption may become available to families in these situations once the Adoption Amendment Act, 2017 becomes operationalised by the Adoption Authority. As of March, 2021, it is not available.

3.5 Surrogacy

Surrogacy is an arrangement whereby a surrogate (a woman) agrees to carry and bear a child for another person, or couple, who will become the child's parent(s) after birth. Surrogacy may be either traditional or gestational, these are differentiated by the genetic origin of the egg used in the process.

Gestational Surrogacy - In gestational surrogacy, the egg used to create the embryo is from an egg donor or an egg from one of the intended parents. As a result, a baby born through gestational surrogacy will have no genetic link to the surrogate.

Traditional Surrogacy - A traditional surrogacy is one where the surrogate's egg is fertilised *in vivo* by an intended father's or a donor's sperm. Insemination of the surrogate can occur naturally, through ICI, IUI or IVF. The resulting child is genetically related to the surrogate.

In both gestational surrogacy and traditional surrogacy, the sperm used can be that of one of the intended parents (who would be the biological father of the child) or donor sperm.

3.5.1 Where can this procedure be performed

Gestational surrogacy can only be performed through IVF and therefore requires; medical training, a medical licence and medical equipment in order to be safely administered. Fertility clinics that offer IVF services typically offer surrogacy if it is regulated in their jurisdiction. This is not the case in Ireland, therefore, anyone wishing to engage in gestational surrogacy must use the services of an overseas fertility clinic.

Traditional surrogacy can be achieved through natural conception, ICI, IUI or IVF.

3.5.2 Where do Irish people avail of surrogacy

In Ireland surrogacy is neither prohibited or allowed. Intended parents can enter surrogacy agreements with their surrogate to clarify misunderstandings and avoid disagreements. Any formal or informal agreement does not change the reality of the Irish law that recognises the surrogate as the legal mother. Irish people avail of surrogacy internationally, typically in countries where the legal framework for surrogacy is clear and fully regulated, for example, Canada, USA, Ukraine.

Depending on the country the process might involve: an agency that coordinates the complex process, and finds a suitable surrogate; solicitors to draft surrogacy agreements and offer legal advice to the surrogate; and a fertility clinic that handles the IVF procedure. Some countries allow for compensated surrogacy, where the surrogate is paid for their role in the process, for example, Ukraine, while others allow altruistic surrogacy only, where only reasonable expenses can be paid to the surrogate (cost of the medical tests, scans, relocation if needed, clothes, or loss of income). Some countries, for example, Ukraine, Canada, provide a birth certificate with the intended parents' names listed on it as parents,

regardless of whether they are biologically linked to the child or not. However, for all couples availing of international surrogacy, in Ireland only one parent, the biological father (proven after DNA evidence), can be recognised as a parent¹⁴.

3.5.3 The legal position of people involved

The legal status and rights of all involved in surrogacy are governed by legislation dealing with non-surrogate births and children. Put very simply, this means that Irish law doesn't distinguish between a baby born through surrogacy and a baby born through conventional means.

As a result, in Ireland, the surrogate (regardless of whether they have a biological link to the child) is considered to be the legal mother¹⁵ of the child and the child's guardian. The surrogate's husband (regardless of whether they have a biological link to the child) is presumed to be the father, but this presumption is rebuttable by DNA evidence.

Legal maternity is significant as it impacts on issues such as: birth registration, citizenship provisions, childcare and / or educational provisions, healthcare, social welfare and succession / inheritance.

In Ireland paternity can be established through DNA evidence. However, maternity can only be established through birth. This means, that Irish parents who avail of domestic or international surrogacy can only establish a legal parent-child relationship between the biological father and the child, i.e. one of the intended parents has to be male and their sperm has to be used to conceive the child. This also means that the child born as a result of surrogacy can only get their Irish citizenship rights through their biological father. This effectively excludes all single females, all same-sex female couples, male-female couples where the male is not an Irish citizen, male-female couples where the male has fertility issues and male same-sex male couples where both have fertility issues from accessing surrogacy.

While it is recommended that all parties to a surrogacy arrangement make an agreement covering all aspects of their surrogacy journey (including up to and beyond the birth of any child), such agreements cannot be enforced under Irish law.

¹⁴ In the case of a male-female couple where both are Irish citizens, they are, for all intents and purposes, regarded as the legal parents of the child if they are both listed as parents on the child's birth certificate and the child can avail of Irish citizenship. However, this presumption of maternity and paternity does not extend to single people, same-sex male or female couples or to couples where one or both parents is not an Irish citizen when availing of international surrogacy. In all of these cases, a biological link from the child to an intended parent who is an Irish citizen is required in order to access Irish citizenship.

¹⁵ In Ireland, the person who is registered as the child's biological mother is the person who gives birth to the child. They may or may not be a biological parent and may or may not identify as a mother or female.

3.5.3.1 What happens now when a child is born through surrogacy

After birth a legal process will start to recognise the intended father as the legal father through DNA evidence. If the child is born in a country that recognises citizenship on birth they will receive a passport and can travel back to Ireland. If not they will need to receive an emergency travel document, based on the intended father's DNA evidence and their right to Irish citizenship based on succession. This can lead to children being 'stateless', that is, without any citizenship entitlements, for a period.

Upon the child's entry into Ireland, the intended parents are obliged to contact the HSE within 48 hours to declare that they have brought the child into the jurisdiction and begin the process for the biological father to establish sole custody and guardianship of the child.

While the legal process takes place the intended father might need to seek permission from the surrogate to apply for different services like passports.

Children born to Irish parents through surrogacy are typically conceived and born internationally and are not registered on the National Donor-Conceived Person Register.

3.5.3.1 The legal position of the surrogate

Under Irish law, the person who gives birth to a child, in this case the surrogate, is registered as the legal mother of the child, regardless of whether there is a biological connection between the surrogate and the child. The surrogate's husband / partner is automatically recognized as the father. If the child is born in a country where the intended parents can be listed as the parents on the birth certificate, for example, Ukraine, USA, Canada, the surrogate is not considered the legal mother in that jurisdiction. In most countries this happens through a pre-birth or post-birth administrative or court process or in some countries automatically based on a surrogacy agreement-type contract.

3.5.3.2 The legal position of the intended male parent(s) / father(s)

3.5.3.2.1 The legal position of the biological father

In a surrogacy arrangement, the legal position of the biological father of the child is not guaranteed. The only person with guaranteed parental rights is the surrogate, regardless of whether the surrogate is biologically linked to the child or not.

If the surrogate consents, the biological father will be allowed to do the following on the birth of the child:

- Be named as father on the child's birth certificate.

- Apply for joint guardianship (with the surrogate) of the child¹⁶
- Apply for a declaration of parentage, guardianship, custody and an order dispensing with the necessity for the consent of the surrogate regarding passports.

If the surrogate does not consent, the biological father has no automatic parental rights that he can rely upon. As a result, he will need to:

- seek a court order in order to have his name added to the birth cert.
- Make a separate court order in order to be allowed joint guardianship* of the child.
- Apply for custody of the child.

The courts, when making a decision on whether to grant or refuse an application made to it by the biological father, will typically base their decision on what is, in the court's opinion, in the best interests of the child. Therefore, there is no guarantee that any application brought before the court by the biological father will be successful.

3.5.3.2.2 The legal position of the non-biological father as second parent

The non-biological father in a male same sex couple can only seek to be appointed guardian of a child after two years if he has shared parental responsibility for the day-to-day care of the child with the biological father during that two year period. This has no impact on the surrogate's status as the child's legal mother and guardian.

The application by the non-biological father must be notified to all legal parents and / or guardians of the child, although the decision will not affect that legal parents or guardian's existing rights in relation to the child. In deciding whether or not to allow the guardianship application, the court will consider the degree to which any other guardians are involved in the child's upbringing and any views of the child or children involved. If guardianship is granted, the new guardian's rights will be set out in the court's order and may not be as extensive as the rights of the other guardians.

3.5.3.2.3 The legal position of the non-biological father (single parent or in an opposite sex couple)

In this case surrogacy is not an option for the father or the couple since under Irish law they won't be recognised as a father.

¹⁶ Notes regarding joint guardianship: Being named on a child's birth certificate does not give the biological father (assuming he is not married to the legal mother) any guardianship rights in respect of a child, hence the need to make a joint guardianship application.

The statutory declaration that allows for a joint guardianship must be signed in the presence of a; Notary Public, Peace Commissioner, Commissioner for the Oaths or registrar of a civil registrations service authorised to take and receive statutory declarations.

Fathers who have been appointed joint guardians by a court or by statutory declaration can be removed from their position if the court is satisfied it is in the child's best interest. The only way a mother can give up her guardianship rights in Ireland, is if the child is placed for adoption.

3.5.3.3 The legal position of the intended mother

In Irish law a mother cannot be defined by DNA proof, so there is no distinction made if the intended mother is the biological mother or not, that is, a donor egg was used.

The child's intended mother, whether the biological mother or not, has only one option, guardianship¹⁷.

The intended mother can apply to be the legal guardian of the child once the child turns two and with the permission of either the surrogate or the biological father or both.

3.5.4 Why surrogacy

For cis single males or gay cis male couples, surrogacy is the only option available to them if they want to have biological children.

For single females, or male-female couples where there are fertility, disability or health issues that prevent them from successfully or safely conceiving and carrying a child to birth, surrogacy is the only option available if they want to have biological children. Same-sex female couples may also use surrogacy if they have fertility, disability or health issues that prevent them both from successfully or safely conceiving and carrying a child to birth.

¹⁷ Adoption may become available to families in these situations once the Adoption Amendment Act, 2017 becomes operationalised by the Adoption Authority. As of March, 2021, it is not available.

2. Current relevant legislation

Up until May 2020, male-female couples who underwent donor assisted fertility treatment were treated in the same way as naturally occurring conceptions. As long as the female in the relationship was carrying the pregnancy, it would not be differentiated to a naturally occurring conception. This presumption of maternity and paternity¹⁸ presented a straightforward pathway for many male-female couples to establish legal parent-child relationships with their children regardless of whether neither, one or both were biological parents to the child born through AHR. This presumption of paternity does not extend to same-sex couples who had no legal pathway to have both intended parents establish a legal parent-child relationships with their children born through AHR, nor did it extend to children born to male-female couples through surrogacy if they are not both named on the child's birth certificate.

4.1 Children and Family Relationships Act (CFRA) 2015

The Children and Family Relationships Act 2015 (CFRA)¹⁹ commenced on 4 May 2020. This act is a welcome first step towards providing legislation to recognise the relationships between children born through assisted human production and their Intended Parents. It created a framework and legal pathways for the recognition of the legal parent-child relationship between children and their intended parents if the all of following criteria are met:

- The child is conceived in an Irish fertility clinic through either intrauterine insemination (IUI), intro-vitro fertilisation (IVF) or reciprocal IVF.
- The child is conceived using either a traceable or known sperm donor.
- The child is born in Ireland.

Children who are born in Ireland through AHR who meet these criteria can have a legal parent-child relationship recognised upon the registration of their birth.

The CFRA also provided for retrospective recognition for children conceived born before 4 May 2020 through a parental order process if they met the following criteria:

- The child was conceived in an Irish fertility or international clinic through either intrauterine insemination (IUI), intro-vitro fertilisation (IVF) or reciprocal IVF.
- The child is conceived using either an anonymous or traceable sperm donor.
- The child was born in Ireland.

¹⁸ https://www.citizensinformation.ie/en/birth_family_relationships/separation_and_divorce/presumption_of_paternity.html

¹⁹ <http://www.irishstatutebook.ie/eli/2015/act/9/enacted/en/html>

4.2 Adoption Amendment Act, 2017

The Adoption Amendment Act, 2017²⁰, provides a legal pathway for a child to establish a legal child-parent relationship with their non-biological parent through a step-parent adoption process. The non-biological (second) parent can 'adopt' the child with the biological parent's consent through this process.

Adoption is a complex, lengthy and invasive process that involves²¹:

1. An application made by the couple including relevant consent by the parent who is registered on the child's birth certificate.
2. An assessment of suitability through a number of interviews and home visits by a Tusla social worker. This involves examination of financial, mental and physical well-being.
3. The report from the Tusla social worker is reviewed by the local adoption committee and a recommendation is made.
4. The Adoption Authority of Ireland considers the recommendations and decides whether to grant a declaration of eligibility and suitability. If a declaration is granted, it is for a period of two years.
5. An Adoption Order is granted within the two years.
6. The child's parents go before the Board of the Adoption Authority of Ireland.
7. An Adoption certificate is issued.

The Adoption Authority, has not yet processed any adoption applications which relate to Assisted Human Reproduction citing the absence of AHR legislation. The AHR Coalition notes that there is also a lack of clarity around how step-parent adoption would work in the case of children born to intended parents through AHR. For example, what would happen in the case where a step-parent is not successful in attaining a declaration of eligibility and suitability?

²⁰ <http://www.irishstatutebook.ie/eli/2017/act/19/enacted/en/html>

²¹ https://www.citizensinformation.ie/en/birth_family_relationships/adoption_and_fostering/adopting_a_child.html

Annex 1. Current legislation gap matrix

Procedure / Clinic setting	First Intended Parent	Second Intended Parent	Gestational carrier	Egg	Sperm	Child's parent 1 at birth	Child's parent 2 at birth	First Intended Parent legal status	Second Intended Parent legal status
ICI	Female	Male	First Intended Parent	Parent	Parent	First Intended Parent	Second Intended Parent	Parent	Parent
ICI	Female	Male	First Intended Parent	Parent	Donor	First Intended Parent	Second Intended Parent	Parent	Parent
ICI	Female	Female	First Intended Parent	Parent	Donor	First Intended Parent	Legal stranger	Parent	Legal stranger
ICI	Female	N/A	First Intended Parent	Parent	Donor	First Intended Parent	N/A	Parent	N/A
IUI/IVF*	Female	Male	First Intended Parent	Parent	Parent	First Intended Parent	Second Intended Parent	Parent	Parent
IUI/IVF*	Female	Male	First Intended Parent	Parent	Donor	First Intended Parent	Second Intended Parent	Parent	Parent
IVF*	Female	Male	First Intended Parent	Donor	Parent	First Intended Parent	Second Intended Parent	Parent	Parent

Procedure / Clinic setting	First Intended Parent	Second Intended Parent	Gestational carrier	Egg	Sperm	Child's parent 1 at birth	Child's parent 2 at birth	First Intended Parent legal status	Second Intended Parent legal status
IVF*	Female	Male	First Intended Parent	Donor	Donor	First Intended Parent	Second Intended Parent	Parent	Parent
IUI/IVF*	Female	Female	First Intended Parent	First Intended Parent	Donor	First Intended Parent	Second Intended Parent	Parent	Parent
IUI/IVF*	Female	Female	First Intended Parent	Second Intended Parent	Donor	First Intended Parent	Second Intended Parent	Parent	Parent
IVF*	Female	Female	First Intended Parent	Donor	Donor	First Intended Parent	Second Intended Parent	Parent	Parent
IUI/IVF*	Female	N/A	First Intended Parent	Parent	Donor	First Intended Parent	N/A	Parent	N/A
IVF*	Female	N/A	First Intended Parent	Donor	Donor	First Intended Parent	N/A	Parent	N/A
Surrogacy	Male	Male	Surrogate	Donor	First Intended Parent	Surrogate	Surrogate's husband (if one)	Parent after court order only	Legal stranger
Surrogacy	Male	Male	Surrogate	Donor	Second Intended Parent	Surrogate	Surrogate's husband (if one)	Legal stranger	Parent after court order only

Procedure / Clinic setting	First Intended Parent	Second Intended Parent	Gestational carrier	Egg	Sperm	Child's parent 1 at birth	Child's parent 2 at birth	First Intended Parent legal status	Second Intended Parent legal status
Surrogacy	Male	Male	Surrogate	Donor	Donor	Surrogate	Surrogate's husband (if one)	Legal stranger	Legal stranger
Surrogacy	Male	Female	Surrogate	Parent	Parent	Surrogate	Surrogate's husband (if one)	Parent after court order	Legal stranger
Surrogacy	Male	Female	Surrogate	Parent	Donor	Surrogate	Surrogate's husband (if one)	Legal stranger	Legal stranger
Surrogacy	Male	Female	Surrogate	Donor	Parent	Surrogate	Surrogate's husband (if one)	Parent after court order	Legal stranger
Surrogacy	Male	N/A	Surrogate	Donor	Parent	Surrogate	Surrogate's husband (if one)	Parent after court order	N/A
Surrogacy	Male	N/A	Surrogate	Donor	Donor	Surrogate	Surrogate's husband (if one)	Legal stranger	N/A
Surrogacy	Female	Female	Surrogate	Parent	Donor	Surrogate	Surrogate's husband (if one)	Legal stranger	Legal stranger
Surrogacy	Female	Female	Surrogate	Donor	Donor	Surrogate	Surrogate's husband (if one)	Legal stranger	Legal stranger
Surrogacy	Female	N/A	Surrogate	Parent	Donor	Surrogate	Surrogate's husband (if one)	Legal stranger	N/A
Surrogacy	Female	N/A	Surrogate	Donor	Donor	Surrogate	Surrogate's husband (if one)	Legal stranger	N/A

*Note only if these procedures are carried out in accordance with the CFRA 2015, i.e. the sperm used is either a partner known donor, non-partner known donor, or a traceable donor, conception occurs in a fertility clinic in the Republic of Ireland and the child is born in the Republic of Ireland.