Surrogacy, parentage, and citizenship: Ireland in the wider world
No.3 of 2013

Editorial

Surrogacy is currently unregulated in Ireland, but has been the focus of case law, and of substantial media attention. Amongst the issues raised are questions around legal parentage, given the possibility of a distinction between genetic and gestational parenthood. As a consequence there is the potential for uncertainty about citizenship for children born through international surrogacy agreements. These uncertainties may have serious implications for the rights and protection of children.

There is debate on whether prohibition or regulation is the best approach to resolving these issues, and on what forms of regulation (if any) might be applied. Legislation on the issue has been signalled by the Minister for Justice and Equality. Following the amendment to Article 42 of the constitution, the ‘best interests’ of the child will be paramount in framing any legislation.

This Spotlight outlines current law and policy in Ireland and reviews the comparative situation relating to surrogacy regulation.

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Summary

Surrogacy is an arrangement whereby a woman agrees to give birth to a baby for someone else. It is currently unregulated in Ireland, but this does not mean that surrogacy does not take place. As in other countries where surrogacy is prohibited or unregulated, "the judiciary is increasingly confronted with the consequences of such prohibitions and/or legal vacuums."¹

A key issue falling to courts to decide relates to legal parentage. A child born as a result of a surrogacy arrangement can potentially have a relationship with any of five individuals: the surrogate mother; the commissioning mother; the commissioning father; an egg donor or a sperm donor. This can increase to six if the surrogate mother’s husband is included. As parentage is the basis on which many rights and protections for children are based, uncertainties around legal parentage may have serious consequences for children.²

Ireland is broadly within the European mainstream in assuming that the birth mother (and if married, her husband) are legally the parents. As elsewhere, there are procedures whereby the husband may rebut this assumption, and whereby fatherhood may be provable by reference to DNA. Motherhood, however, has been treated as relating to gestation and thereby ‘certain’. However, a recent High Court decision (which may yet be appealed) held that the genetic mother rather than the birth mother was entitled to be registered on the birth certificate.

The Minister for Justice and Equality has stated that he intends to publish the heads of a Family Relationships and Children Bill in 2013, which among other matters, will deal with parentage issues arising from surrogacy.³ An important background is the amendment to Article 42 of the Constitution, making the ‘best interests’ of the child paramount.

It is not clear that domestic legislation can resolve parentage issues arising from international surrogacy. Conflicts between countries as to where legal parentage lies can equate to uncertain citizenship and to the consequent threat of statelessness for children. There have been calls for multilateral action on surrogacy to address these and other issues around surrogacy.

Introduction and definition

This Spotlight reviews current law and policy relating to surrogacy in Ireland, placing this in the context of the comparative situation.

Surrogacy is a complicated phenomenon and there are a number of different forms of surrogacy. This section introduces and defines the key terms used in this Spotlight.

Definitions⁴

Surrogacy is an arrangement whereby a woman agrees to give birth to a baby for someone else. It is common to differentiate between a traditional surrogacy arrangement and a gestational surrogacy arrangement. In a traditional surrogacy arrangement, the surrogate mother uses her own eggs and she is

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² HCCH (2012): see fn.4 for full reference.
³ HCCH (2012): see fn.4 for full reference.
therefore genetically related to the child she carries. In a **gestational surrogacy** arrangement, the mother does not use her own eggs, and she is therefore not genetically related to the child. In the latter case, various combinations of donated eggs and/or sperm may be involved via In Vitro Fertilisation (IVF).

It is also common to differentiate between altruistic and commercial surrogacy. In **altruistic surrogacy**, the surrogate does not receive remuneration, beyond (in some circumstances) ‘reasonable’ compensation for expenses associated with the pregnancy. In **commercial surrogacy**, however, the surrogate is paid a fee.

The couple or individual who requests that a surrogate carry a child on their behalf may be termed the intending parent/s or the **commissioning parent/s**. The latter is the term used in this *Spotlight*. In all forms of surrogacy, a **surrogacy agreement/arrangement** between the commissioning parent or parents and the surrogate mother may be involved. This may involve issues beyond consent to hand over the child at birth, such as financial or health matters.

Surrogacy often involves individuals who are living in more than one state. The **receiving state** is the state in which the commissioning parents are resident, and to which they intend to return. The state in which the surrogate lives and gives birth is the **state of the child’s birth**.

### Ethical debates and debates

Ethical debates around surrogacy are very wide-ranging and many lie outside of the scope of this *Spotlight*. Some of the most commonly raised general concerns are briefly touched on here, before more specific issues related to parentage and citizenship are addressed. Whether these concerns are best addressed through regulation or through prohibition is a matter of debate, and is considered further in the conclusion to this *Spotlight*. As outlined below, there is substantial variation cross-nationally in which approach states have adopted.

### General concerns

This section looks at three broad sets of concerns around: commodification; exploitation; and child protection.

#### Commodification

Commercial surrogacy in particular has attracted a range of criticisms, such as that placing a monetary value on women’s reproductive capacity implicitly undermines the inherent value of women and children. The Iona Institute has argued that one of the chief reasons why states have prohibited surrogacy is that it commodifies the human body:

> ‘With surrogacy, the child becomes the mere object of a legal transaction, while the surrogate mother is used, effectively, as an incubator. Such commodification in itself violates the dignity of both the surrogate mother and child.’

On the other hand, the Commission on Assisted Human Reproduction (CAHR) outlines the argument that surrogacy is: ‘indistinguishable from other practices whereby the human body may be seen as being utilised for profit, such as professional athletics and modelling.’

#### Exploitation

In particular, many organisations and bodies have expressed concerns about the potential exploitation of surrogate

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5 CAHR (2005) op.cit. p. 50.
mothers, particularly those from poorer countries.8

“Some have likened the travel to less economically developed countries to engage surrogates to a form of ‘outsourcing’ of pregnancy.”9

Although the focus has been on the potential for exploitation in commercial surrogacy, concerns have also been expressed with regard to altruistic surrogacy, including the potential for moral coercion of surrogate mothers.10 Commissioning parents, who may have exhausted all other routes to parenthood, are also at risk of exploitation. Issues here include misinformation, poor regulation of surrogacy, and difficulties in establishing legal parentage (discussed further below).

Child protection concerns

Surrogacy also raises clear child protection issues, including the right to protection from child abuse and trafficking, the right to have his or her best interests regarded as a primary consideration in all actions concerning him or her, to know their identity, and to have parents and a state.11

For further information, a useful summary of arguments for and against surrogacy is provided in the Report of the Commission on Assisted Human Reproduction (2005) (pp. 48-49) at this link: http://www.dohc.ie/publications/cahr.html

Parentage and guardianship

Legal parentage has been described as ‘...arguably, the gateway for children through which many legal rights and obligations flow’.12 However, parentage is increasingly complex, comprising genetic, gestational and social elements.13 A child born as a result of a surrogacy agreement can potentially have up to five people in some form of parentage relationship: the commissioning parent or parents, the genetic parent or parents (egg and/or sperm donor), and the surrogate mother. This rises to six if, the surrogate mother’s husband is included.14

The potential for competing claims to parentage can lead to problems which may fall to courts to resolve. Reasons why a surrogacy arrangement breakdown may include:

- the surrogate mother chooses to keep the child;15
- the commissioning parents decide they no longer want the child, perhaps because they separate during pregnancy, or because the child is born with a disability;16
- the surrogate mother is requested to have an abortion by the commissioning parents following a disability being detected during pregnancy;17

International surrogacy

The growth of international surrogacy agreements raise specific issues around parentage, and linked with this, citizenship. A central problem with the growth in international surrogacy is that states differ considerably in how and if they regulate surrogacy, and

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9 HCCH, 2012, p. 7, Fn. 27
10 Iona Institute (2012) op.cit.
11 HCCH (2012) op.cit., p. 4
12 HCCH (2012) op.cit., p. 20.
14 Iona Institute (2012).
15 See the English case CW v NT and another [2011] EWHC 33, as cited in Hutchinson (2012) op.cit. where following an informal surrogacy arrangement the surrogate mother opted to keep the child, leading to court proceedings.
16 See HCCH (2012) p. 4 Fn.7 for an examples of where this has occurred.
17 “Surrogate mother: A new wrinkle in the abortion debate” CNNWire, 5 March 2013.
consequently how they assign parentage and citizenship to children born from international surrogacy agreement (discussed further below). Figure 1 (below) illustrates an example of these kinds of problems.

**Figure 1: examples of problems with international surrogacy**

Commissioning parents from State A enter into a commercial surrogacy arrangement with a married woman in State B, which permits surrogacy.

The child is born in State B and is recognised there (via varying legal procedures) as the legal child of the commissioning parents. The child consequently has no entitlement to citizenship in State B.

The commissioning parents apply for a passport to allow them to travel home with their child. State A rejects application as the law recognises the surrogate mother and her husband as the parents, not the commissioning parents.

Child is stateless and with uncertain parentage. If some arrangement is made to allow the child to enter State A, the commissioning parents may still have problems being recognised as legal parents or guardians of the child, depending on the circumstances.

Source: adapted by Oireachtas Library & Research from examples provided in HCCH (2011)

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**Surrogacy in Ireland: current law**

There is currently no statutory framework in place in Ireland either to prohibit or regulate surrogacy. The Commission on Assisted Human Reproduction (CAHR) recommended in 2005 that surrogacy be regulated, and more specifically, that the child born through surrogacy should be presumed to be that of the commissioning couple, but their recommendations have not been implemented.\(^{18}\) Although there has been no definitive statement on the legality or otherwise of surrogacy agreements per se by the Irish judiciary, a number of cases have come before the High Court involving many ancillary issues that can arise as a result of such arrangements.

Domestic surrogacy arrangements may give rise to issues including parentage and guardianship.\(^{19}\) These issues may also arise in international surrogacy arrangements, along with citizenship and travel document issues.

In response to these issues, guidelines were published by the Minister for Justice, Equality and Defense in February 2012 to advise couples on citizenship, guardianship, parentage and travel document issues in relation to children born as a result of surrogacy arrangements entered into outside the State.\(^{20}\)

**Irish law on the presumption of and rebuttal of parentage**

Until the recent court decision in *M.R. & Anor v An tÁrd Chláraitheoir & Ors*\(^{21}\) (discussed further below) Irish law seemed relatively straightforward on the issue of parentage. The principle of

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\(^{19}\) Once the child is born in Ireland to an Irish parent, the child will be entitled to Irish citizenship.

\(^{20}\) Available at: [http://www.justice.ie/en/JELR/Pages/PR120000035](http://www.justice.ie/en/JELR/Pages/PR120000035)

\(^{21}\) [2013] IEHC 91 (5th March, 2013 Abbott J.)
mother is always certain\textsuperscript{22} was accepted almost without question. Irish law presumes that in the case of a married couple, the husband is the father of any child born to the couple during the marriage. The man will be regarded as the child’s father unless/until the contrary is proved. The presumption does not apply in the case of unmarried couples unless the man’s name appears on the child’s birth certificate. If both parties agree, the man’s name can be entered on the child’s birth certificate without any great difficulty. Where the parties dispute the matter, the court may order that a paternity test is carried out to ascertain the man’s status. It is also possible to make an application to the Circuit Court to have a person declared to be a parent.

In deciding who is the legal parent in the event of surrogacy, the general rules governing parentage in Ireland would apply. The position was outlined in January 2012 in the following terms by Tánaiste and Minister for Foreign Affairs and Trade, Mr Eamonn Gilmore:

\textit{In considering these questions it is important to be aware that the fact that a genetic relationship exists between a commissioning adult and the child does not mean that he or she is automatically the legal parent of the child under Irish law. Under Irish law the woman who gives birth to the child – the surrogate mother – is the legal mother of the child, even if the ovum from which the child was produced was provided by one of the commissioning adults, or by a donor.}\textsuperscript{23}

However, this position was altered by the decision of the High Court in \textit{M.R.} (which may yet be appealed to the Supreme Court).\textsuperscript{24}

\textbf{Parentage and surrogacy: the case of \textit{M.R.}}

In the case of \textit{M.R.}, a married couple entered into an agreement whereby the wife’s sister would carry and give birth to the couple’s child. Twins were born and their registration details cited the genetic father and the birth mother as the parents. An application to the office of the Chief Registrar to correct the record to record the genetic mother as the legal parent was refused because there was no statutory basis upon which this could be done. The couple then sought various Declarations from the High Court to the effect that both genetic parents were the legal parents and that this should be reflected on the birth certificates.

The central issue for the Court was which of the two women ought legally to be deemed to be the mother. The Court heard arguments that the matter was governed by the principle that ‘the mother is always certain’ but ruled that no statutory provision underpinned this. The judge acknowledged that in the days before IVF, it could be said with certainty that a woman was (or was not) the mother of a given child. Advances in science have superseded this to the extent that the principle was no longer applicable and the Court held that in this case the genetic mother was entitled to be registered on the birth certificates.

Unless/until the Supreme Court overturns this decision the current legal position in Ireland is that the presumption of parenthood for the birth mother is now a ‘rebuttable presumption’, as it has been for some time for fathers.

\textbf{Citizenship, travel documents and surrogacy}

Where a child is born outside the State by way of an international surrogacy arrangement, issues may arise as to whether the child is an Irish citizen and consequently whether an Irish travel document may be issued to the child. In determining these issues, Irish law must be applied. To be entitled to Irish
citizenship, the child must be born to an Irish parent. Previously, this meant that either the genetic father or surrogate mother must be an Irish citizen. However, in light of the decision in M.R, the position may be altered such that the child may be entitled to Irish citizenship where the genetic mother is an Irish citizen.

To be eligible for a passport, it must be established that the child is an Irish citizen. In general, only a parent or guardian may apply for a passport on behalf of the child and subject to limited exceptions, all guardians of the child must consent to the issuing of a passport.26

The High Court has recently ruled that a child born in India as a result of a surrogacy agreement between an Irish citizen and an anonymous egg donor was entitled to Irish citizenship and to an Irish passport.27 The Court reached its decision by reference to the ‘best interests’ principle and on the basis of the factual matrix of the case, which in summary was as follows. An Irish citizen and his partner entered into an agreement with a woman in India. The agreement was that the woman would be implanted with an embryo created by the man’s sperm and the egg of an anonymous donor. The commissioning couple were named on the birth certificate, issued in India. The surrogate mother had consented to any orders made by the Court. The reasons given for the decision were that:

- A DNA test had established that the man was the biological father;28
- The child had been habitually resident with and cared for by, the commissioning couple;
- The surrogate mother was not likely to seek any involvement in the child’s life;
- It was in the child’s best interests to have an Irish passport issued to her;
- Given the child’s age, it was inappropriate for the Court to seek her views on the issues.

Issues for the future

The Minister for Justice and Equality has indicated that he is preparing a Family Relationships and Children Bill, which will, among other matters, deal with parentage issues arising from surrogacy. He has indicated that in preparing proposals for legislation he is reviewing legislation worldwide which addresses the issues of parentage, assisted human reproduction and surrogacy and also considering the recommendations contained in the Report of the Commission on Assisted Human Reproduction. Additionally, following the Children’s Rights Referendum and the amendment to Article 42, it is worth noting the requirement that in all proceedings involving children the

25 Under Irish law, if the surrogate mother is married, then her husband is presumed to be the father of the child. This presumption may be rebutted by applying for a declaration of parentage under the Children Act 1987. Evidence of paternity will be required, generally by way of reliable DNA evidence. Court proceedings issued should be served on the surrogate mother and her husband. If the surrogate mother is not married, paternity may be recognised by the Irish authorities on receipt of reliable DNA evidence. Even where a declaration of parentage is granted, however, as the genetic father is not married to the surrogate mother, he is not automatically a guardian of the child and must apply for a guardianship order. Any court proceedings issued must be served on the surrogate mother.26 Or their consent must have been dispensed with by an Irish court.
28 DNA testing showed that the probability that the man was the child’s father was 99.999%
29 For example: matters pertaining to child safety and welfare as well as any proceedings involving adoption, guardianship, access or custody.
courts must regard the ‘best interests’ of the child as being the ‘paramount consideration’.

Comparative perspectives

The complex issues for states arising from a growth in international surrogacy arrangements have led to a number of comparative studies of surrogacy in recent years. International surrogacy agreements are a form of private international law, and the issue has been examined in some detail by the Secretariat (the ‘Permanent Bureau’) of the Hague Conference on Private International Law (HCCH). The HCCH has produced two preliminary reports on the issues arising from international surrogacy arrangements, with a Final Report due in 2014. Unless otherwise stated, these two Reports provide the basis for this section. The issue has also been examined in a number of research Reports prepared for the European Parliament’s Committee on Legal Affairs.

Worldwide: a diversity of regimes

The HCCH outlined the a diversity of surrogacy regimes (as of 2012) and this section is based on their account. On the one hand, surrogacy is explicitly prohibited in some countries, and surrogacy arrangements may attract criminal sanctions. Clearly, surrogacy arrangements in these countries are not enforceable.

In other countries surrogacy is not regulated – Ireland is currently an example – and again, surrogacy arrangements are not enforceable.

Countries where surrogacy is regulated fall into two broad types: those which permit and regulate certain forms of surrogacy, generally altruistic forms. These surrogacy arrangements are not enforceable, and in some of these countries, commercial surrogacy may be expressly prohibited.

Finally, there are a number of countries which have permissive approaches to surrogacy, including to commercial surrogacy. These latter countries are frequently the focus of international surrogacy agreements, discussed in more detail below.

Table 1 (over) summarises the diversity of surrogacy regimes, using the HCCH typology. Country examples are indicative, in that full details of each country’s regime is not provided.

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30 The HCCH describes itself as an intergovernmental organisation which works for the progressive unification of the rules of private international law. Further information is available here: http://www.hcch.net/index_en.php?act=text.display &tid=4

31 HCCH (2011 and 2012) op. cit., - see footnote 3 above for full reference.


33 HCCH (2012) notes that responses to surrogacy are in a state of flux. A questionnaire to Members has been circulated which should return an up to date picture, but the results of this will not be available until April 2014 (L&RS communication with HCCH secretariat).

Impact on regulatory structures

These different forms of regime lead to substantial variation across a number of dimensions, not all examined here. These include the rules governing legal parentage and citizenship, and whether surrogacy agreements are legally enforceable. Where surrogacy is regulated, regulations may encompass:

- the eligibility of commissioning parents and/or surrogates;
- the kind of surrogacy arrangement which is permissible;
- the regulation of intermediaries.

Establishing legal parentage

The rules governing legal parentage vary depending on regime type. Broadly, where surrogacy is prohibited or unregulated general rules around parentage apply, and generally the birth mother (and her husband if married) is deemed to be the parent. This may be contestable in the courts. This is the most common approach in the EU27. 37

In some countries, adoption may be a route for a commissioning mother to acquire legal parentage (e.g. Germany, Switzerland). 38

Transferring parentage: pre-birth and post-birth procedures

In countries which provide for the transfer of parentage, procedures vary, broadly between countries which have prospective (pre-birth) procedures and those with post-birth procedures. The consent of the gestational mother is generally required, but surrogacy agreements may be enforceable in some places (e.g. California).

Table 2 summarises arrangements in three countries which have regulations to

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35 These might include a medical reason for the need for surrogacy, marital status, sexual orientation, age.
36 For example, in some countries a genetic link between one of the commissioning parents may be required, or only traditional surrogacy may be allowed.
38 This may depend on whether an illegal surrogacy arrangement was entered into.
transfer parentage: the UK, Greece and Australia (Queensland).

Cross border surrogacy agreements: resolving issues

Many issues have arisen world-wide where children have found themselves caught between conflicting legal regimes, unable to access parentage or citizenship. Approaches have varied. As one commentary notes:

“For the moment … none of the existing international instruments contains specific provisions designed to regulate it. In such circumstances each of the jurisdictions confronted by the international surrogacy applied a specific approach though all invoked their international private laws.”

Some states have partial remedies for the problems which arise, often based on perceptions of what is in the child’s best interests, which are given precedence over the state’s disapproval of surrogacy.

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**Table 2: regulating parentage in UK, Greece and Australia**

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<thead>
<tr>
<th>UK</th>
<th>Greece</th>
<th>Australia (Queensland)</th>
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<tbody>
<tr>
<td>The surrogate mother is the legal parent, but the <strong>Human Fertilisation and Embryology Act 1990</strong> provided for the making of Parental Orders (POs) for the transfer of parentage.</td>
<td>Altruistic surrogacy permitted since 2002. Under the Greek Civil Code, a ‘pre-birth’ court order may be granted, resulting in the commissioning parents being regarded as legal parents from birth. This is reflected in the birth certificate.</td>
<td>The surrogate mother is presumed to be the mother, and her partner (if any) is presumed to be the father, or in certain circumstances, the female partner is presumed to be the parent of the child.</td>
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<tr>
<td>Applicants had to be married, over 18, domiciled in the UK, and at least one applicant had to be a genetic parent. The <strong>Human Fertilisation and Embryology Act 2008</strong> extended the right to legal parentage to those in a same-sex relationship or those in an unmarried heterosexual relationship. Single, or non-related (to child) commissioning parents must adopt to achieve legal parenthood.</td>
<td>The court must satisfy itself that there is a written SA, no financial benefits, and medical reasons for the surrogacy. Both parties must be permanent residents of Greece.</td>
<td>Parentage order may be made by the courts after birth, who must be satisfied that a range of conditions have been met e.g. SA made before conception, all parties received independent legal advice and counselling, the surrogate mother be over 25, medical or social need for surrogacy, and other conditions.</td>
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Hatzis (2010) op.cit.


Ibid.


Why do you need to transfer the parentage of the child?

agreements. These might, for example, involve recognising foreign birth certificates simply to establish legal paternity, or providing emergency documents to permit a child to enter a state. In Australia, for example, one commentary notes that:

'The anomalous situation has developed that Australian courts effectively uphold the results of agreements which are prohibited by state and territory legislation and are required to do so for the sake of the best interests of the child.}

Other states have no remedies. The outcome is an inconsistent ad hoc approach across states.

Policy perspectives

This conclusion looks at a number of different policy options:

- continuing the current (unregulated) policy on surrogacy;
- shifting towards a more prohibitionist policy stance;
- introducing some form of regulation.

On the latter point, some specific issues around regulating parentage are discussed.

Continuing current policy: remaining unregulated

Ireland currently has no statutory framework in place which regulates surrogacy, and one option is simply to remain unregulated. As outlined above, countries vary substantially in their regulatory approaches to surrogacy, broadly along a continuum from prohibition through to permissiveness. Ireland is therefore not alone in not regulating (see Table 1, p.9). However, it is worth noting that surrogacy may contravene other general laws in these countries e.g. relating to child trafficking.

However, it can be argued that a lack of regulation has not dissuaded people from surrogacy, as Irish case law testifies. As noted above, the Commission on Assisted Human Reproduction (CAHR) recommended in 2005 that surrogacy be regulated. Responding to the M.R case, the National Infertility Support and Information Group have also said that they hope that progress on regulating surrogacy will be made.

In April 2013, Geoffrey Shannon (the Special Rapporteur on Child Protection) argued that given the vulnerability of children born as a result of a surrogacy arrangement in terms of their status with the State, some clarity was required. He stated that surrogacy should either be provided for in law, or

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51 Approaches differ between civil law jurisdictions and those countries where the common law system operates. Most of the continental European states have civil law legal systems. Broadly speaking, they are based on various elements of Roman law and their defining characteristic is that they are codified. Common law systems are to be found in countries which were/are British colonies. The common law is also sometimes referred to as 'judge-made law' although this is no longer an accurate description.
53 HCCH (2012) note that a number of States which currently have no regulation are considering some form of regulation.
54 Ibid. pp. 10-11.
55 http://www.ionainstitute.ie/index.php?id=2817
made illegal, and that it was a matter for the Oireachtas and not the courts. 56

As noted above, legislation in relation to parentage and surrogacy is envisioned by the Minister for Justice and Equality, although the content of this is not yet unknown.

Prohibiting surrogacy

In terms of a shift in policy stance, some critics of surrogacy advocate for a move to outright prohibition. Arguments for prohibition are based around the ethical concerns with surrogacy outlined above (p.3-5).

The Iona Institute, for example, argue that the problems with surrogacy are such that it should not be permitted, in the interests of both women and children. They have suggested that while the status of children already born should be regularised, thereafter the practice should be prohibited. 57

On the other hand, from a comparative perspective, it has been argued that commissioning parents often use surrogacy services abroad because they are prohibited or restricted at home. 58 This has been termed ‘regime shopping’. 59 Thus prohibitive approaches can potentially lead to on going problems with international surrogacy arrangements (see below for discussion).

It is also possible to combine regulation and prohibition for different forms of surrogacy: hence the CAHR (2005) recommended regulating altruistic surrogacy, but prohibiting commercial surrogacy.

56 “Ireland “should not turn a blind eye to surrogacy”; Child protection expert says State must decide to clear legal minefield or impose an outright ban”. Sunday Independent, 7 April 2013.
59 Keyes (2012) op.cit.

Criminal sanctions

Regardless of whether surrogacy is regulated, unregulated or prohibited, criminal sanctions for specific circumstances could be introduced:

- A general prohibition on surrogacy could potentially encompass criminal sanctions for participating in a surrogacy arrangement, either domestic or international.
- Regulating domestic surrogacy can also co-exist with criminalising overseas commercial surrogacy arrangements, as is the case in a number of Australian states (NSW, Act, Queensland).
- Whether regulated or unregulated, ‘DIY’ or informal surrogacy arrangements are not unknown, and can lead to a range of problems, including very serious child protection issues. 60

Issues in regulating parentage

This section reviews three sets of issues specifically related to regulating parentage in the event of surrogacy:

- genetics or intent;
- the best interests of the child;
- and the potential for multilateral actions.

The full range of regulatory issues around surrogacy are not discussed here. These include such issues as regulating who can potentially act as surrogate, what forms of surrogacy arrangement might be allowable, whether there should be a regulatory authority and what form it might take, whether intermediaries should be regulated and how, and other such issues. 61

60 See for example the Huddleston case in Pennsylvania (Huddleston v infertility Centre of America Inc, 700 A.2d 453 (Pa.Super. Ct. 1997)) where an infant who was transferred to the care of the commissioning father after birth died six weeks later due to physical abuse.
61 A very full review of regulatory options internationally is available in HCCH (2012) op.cit.
**Genetics or intent?**

As noted above, the recent court decision in *M.R. & Anor v An tÁrd Chláraitheoir & Ors* held that the genetic mother was entitled to be entered on the birth certificate.

In relation to this, a number of sources have pointed to a general trend across countries for the principle of intent (rather than genetics) to be the determinant of parentage. The CAHR (2005), for example, recommended that the child born through surrogacy should be presumed to be that of the commissioning couple, in effect prioritising intent over genetics. However, the Commission also recommended that the child born through surrogacy should be entitled to access the identity of the surrogate mother, and where relevant, the genetic parents.

In terms of potential processes for regulating parentage, there is substantial variation amongst countries which allow for the transfer of parentage, such as:

- whether this is done via pre-birth or post-birth orders;
- whether gestational or traditional surrogacy is involved;
- whether there is a requirement for a genetic link with at least one parent.

The Iona Institute has argued that splitting the role of mother and/or father between different individuals violates the child’s right to know their origin and identity, as well as potentially giving rise to litigation.

**Best interests of the child**

The newly inserted Article 42A enshrines into the Constitution the requirement that in all proceedings involving children, that courts are to regard the ‘best interests’ of the child as being the ‘paramount’ consideration.

This necessity to place the best interest of the child to the fore is shared with other countries. For example, the HCCH summarised a number of cases in different countries where partial or ad hoc solutions were arrived at to enable a child born from an international surrogacy arrangement to return “home”. They remark that the solutions have often been explicitly based upon recognition that the pre-eminent consideration must be the best interests of the child. They suggest that such decisions may represent the beginnings of a trend in some States to focus on the status of the child and to disassociate this from the illegal nature of the contract under internal law. However, the Iona Institute implicitly argue against such an approach, in the interests of discouraging international surrogacy:

‘Refusal to transcribe the filiation of children obtained through international surrogacy in the civil registry is one of the most effective ways of dissuading intending parents from resorting to a surrogate mother abroad.’

As noted above, however, they suggested regularising the position of existing children.

What precisely constitutes the ‘best interests’ of the child is clearly open to substantial debate.

**Multilateral action**

There are possibilities for individual states to take action on the issues arising from cross border surrogacy arrangements. For example, responding

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63 The term ‘presumed’ was used to allow for the possibility that their presumption be rebutted. CAHR (2005), p.53. There was not consensus among the Commission on recommendations relating to surrogacy.  
64 For example: matters pertaining to child safety and welfare as well as any proceedings involving adoption, guardianship, access or custody.  
to difficulties which have arisen in India due to commissioning couples having problems when they seek to take children ‘home’, a bill to regulate surrogacy (the Assisted Reproductive Technology (ART) Regulation Bill 2010) was drafted.

This contains provisions which require non-Indian residents to have documentation which proves that their country of origin permits surrogacy, and that the child born through surrogacy in India will be permitted entry into their country of origin.67

However, it has been argued that more formal multilateral actions may be necessary or desirable.68 In particular, a key role has been posited for action in the sphere of private international law.

The Hague Convention on Intercountry Adoption69 has been suggested as a model, but this does not present a straightforward template, since adoption ‘raises different demographic, political and social concerns compared to surrogacy’.70

The HCCH have suggested potential content for private international law measures specifically relating to surrogacy, and this is the subject of ongoing work by the organization.71 However, they note that multilateral action might be neither desirable nor feasible. Certainly, finding common cause between prohibitive and permissive regimes may be extremely difficult.72

Action at the EU level has also been advanced, and the European Parliament’s Committee on Legal Affairs has commissioned research on surrogacy to consider ‘…the wider role of any potential EU legal response to surrogacy beyond the management of consequential disputes’.73

One of the aims of the research is to provide an analysis of the potential remit of the EU in this area and what role any EU legal measures and uniform rules should play.

This report (A comparative study on the regime of surrogacy in EU Member States) is due imminently.

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67 The legislation currently remains in draft form but in March 2013 the current Indian government stated that they would be bringing a Bill to regulate surrogacy: ‘Govt proposes to Bring Bill to regulate surrogacy: Azad’ The Hindu, March 19th 2013.
68 HCCH, 2012 (p.27).
71 HCCH (2012) op.cit. See also Hutchinson (2012) op.cit.
73 Brunet (2012) op.cit. p. 4.