Surrogacy and Consent under Irish Law: A Problematic Copy and Paste from the UK

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Abstract

In July 2024 Ireland enacted detailed legislation regulating both domestic and international surrogacy arrangements, in the form of the Health (Assisted Human Reproduction) Act 2024. This article will discuss the model for regulating domestic surrogacy in Part 7 of the 2024 Act and critique the court's inability to dispense with the surrogate's consent to a post-birth parental order except in the most unusual circumstances. The consent provisions in Part 7 of the 2024 Act are very similar to those in the UK's Human Fertilisation and Embryology Act 2008. The article demonstrates how the 2024 Act accords a gestational surrogate remarkable weight in determining a genetically unrelated child's legal parentage, and how this may be detrimental to intended parents and their surrogate-born children. Further, the approach in the 2024 Act may conflict with the provisions on children's rights, and familial rights, and the state's concomitant obligations in relation to same, in the Constitution of Ireland, and international surrogacy-related best practice in the Verona Principles. The article concludes by suggesting amendments to the 2024 Act to better balance the rights of all parties to a domestic surrogacy.

Keywords: surrogacy; consent; parentage; parental order; best practice; Verona Principles; Constitution of Ireland; law reform.

[A] INTRODUCTION

Following a process that commenced back in 2000, Ireland recently enacted detailed legislation regulating both domestic and international surrogacy, in the form of the Health (Assisted Human Reproduction) Act 2024 (the 2024 Act).[1] This article argues that the "hybrid" model for regulating domestic surrogacy arrangements in Part 7 of the 2024 Act appears to be based on Irish policy-makers' misunderstanding of the ramifications of a decade-old Supreme Court judgment concerning

[1] However, the provisions of the 2024 Act have not yet been commenced.

surrogacy arrangements and the principle of *mater semper certa est*. In particular, the article critiques the court's inability to dispense with the need for the surrogate's consent to a post-birth parental order except in the most unusual circumstances. The consent provisions in Part 7 of the 2024 Act are remarkably similar to those in the Human Fertilisation and Embryology Act 2008 (HFEA 2008) of the United Kingdom (UK). Despite only regulating gestational surrogacy arrangements, where the surrogate will have no genetic connection to the child she gives birth to, the provisions of Part 7 of the 2024 Act accord her remarkable weight in determining a genetically unrelated child's legal parentage. The upshot is that, in practice, this model of surrogacy regulation will in some cases operate to the detriment of intended parents and their surrogate-born children, and aspects of it are arguably contrary to the provisions concerning children's rights, and familial rights, and the state's concomitant obligations in relation to same under the Constitution of Ireland.

[B] A SURROGACY FRAMEWORK FOR IRELAND: IT'S BEEN A LONG ROAD …

In Ireland, the comprehensive statutory regulation of surrogacy arrangements has taken almost a quarter of a century to come to fruition, from the establishment of the Commission on Assisted Human Reproduction (CAHR) in early 2000 to the enactment in mid-2024 of the 2024 Act. In 2000, CAHR was established by the then Minister for Health and Children, Micheál Martin, to examine how assisted human reproduction, including surrogacy, might be regulated. The regulation of non-commercial surrogacy arrangements, where a surrogate would only receive reimbursement for expenses "directly related" to participation as a surrogate, was recommended by CAHR in its report in 2005 (CAHR 2005: 54).

However, the political will to act on the CAHR report only surfaced almost a decade later, when proposals to regulate donor conception procedures plus domestic non-commercial surrogacy *and* "pre-commencement" international surrogacy arrangements were included in the initial General Scheme of the Children and Family Relationships Bill 2014 (Tobin 2023: 87).

Ireland's premier surrogacy proposals were met with heavy criticism (Madden 2014; Tobin 2014) and by the time a revised version of the General Scheme was published later that year, in September 2014, the provisions

on surrogacy had been deleted in their entirety.[2] The surrogacy proposals were removed because the Oireachtas[3] did not to want to pre-empt the pending Supreme Court decision in the non-commercial, intrafamilial "surrogacy case" of *MR & Another v An tArd-Chláraitheoir* (2014).

As this author has stressed elsewhere (Tobin 2017: 142), it is ironic that the Oireachtas showed such deference to the Supreme Court's pending decision in *MR & Another v An tArd-Chláraitheoir* (2014) because, in its decision, released in November 2014, the Supreme Court *largely* deferred to the Oireachtas as regards the appropriate regulation of surrogacy and invited it to take "urgent action" on this matter. Subsequently, in February 2015, the then Fine Gael/Labour coalition Government approved the drafting by the Department of Health of the General Scheme of a Bill on Assisted Human Reproduction, with surrogacy one of the many complex areas to be included in this Scheme.

The General Scheme of the Assisted Human Reproduction Bill 2017 (the 2017 General Scheme) was approved by the subsequent Fine Gael/Fianna Fáil minority Government in October 2017, and, despite languishing in development hell for almost five years, it was finally succeeded in March 2022 by the Health (Assisted Human Reproduction) Bill 2022, which was then enacted in July 2024 as the Health (Assisted Human Reproduction) Act 2024. The 2024 Act will regulate many matters pertaining to assisted human reproduction, such as gamete and embryo donation and embryo and stem cell research, and will lead to the establishment of a regulatory body known as the Assisted Human Reproduction Regulatory Authority (AHRRA). Parts 7 and 8 of the 2024 Act regulate prospective, non-commercial domestic and international surrogacy arrangements, respectively, with Part 12 regulating past domestic and international surrogacy arrangements. This article focuses on the regulation of prospective domestic surrogacy arrangements in Part 7.

[2] Indeed, when signed into law by the President of Ireland on 6 April 2015, Parts 2 and 3 of the Children and Family Relationships Act 2015 regulated, *inter alia*, legal parentage in cases of clinical donor-assisted human reproduction (DAHR) *other than surrogacy*. Parts 2 and 3 of the 2015 Act were commenced on 4 May 2020.

[3] Oireachtas is the word for Parliament in the Irish language.

[C] IRELAND'S "HYBRID MODEL" FOR REGULATING DOMESTIC SURROGACY ARRANGEMENTS

Part 7 of the 2024 Act establishes a "hybrid model" for the regulation of prospective, non-commercial, gestational surrogacy agreements *in Ireland*. The regulatory model contains elements of both the "pre-conception state approval" and "post-birth parental order" models.[4] The AHRRA must, among its many functions, approve a surrogacy agreement prior to any treatment going ahead, and there are numerous "pre-surrogacy" safeguards in Part 7 that the parties must comply with in order to have their agreement approved by this state body. These include, *inter alia*, all of the parties receiving independent legal advice, AHR counselling and satisfying the AHRRA that they do not present a potential risk of significant harm or neglect to any child, whether such child is born as a result of the surrogacy or otherwise. This pre-surrogacy regulatory oversight is similar to that which exists in other jurisdictions, such as Greece, South Africa, Israel, New Zealand, and the Australian states of Victoria and Western Australia, which require "pre-authorisation" of a surrogacy agreement, either by a court or a state regulatory body. However, the AHRRA's "pre-authorisation" of the surrogacy agreement between the intended parents and the surrogate will be limited to the approval of treatment, because Part 7 of the 2024 Act does not sanction any "pre-conception State approval" of the child's legal parentage. Instead, the gestational surrogate will be the legal mother and guardian[5] of the child at birth and the intended parents must go through a "post-birth Parental Order" process in court to establish their legal parentage. Hence, Part 7 represents something of a "hybrid" model for regulating domestic surrogacy agreements, with both pre-conception and post-birth legal processes for all of the parties to adhere to.

[D] VERONA PRINCIPLES: ALTERNATIVE OPTIONS REFLECTING INTERNATIONAL BEST PRACTICE

The Verona Principles, a set of non-binding international principles which, in the words of the United Nations (UN) Committee on the Rights of the Child, are designed to contribute "to developing normative guidance for

4 For a discussion of these models, see generally Tobin (2017).

5 In Irish law, guardianship is the equivalent of the concepts of parental responsibility or parental authority.

the protection of the rights of children born through surrogacy" and "may serve as an important tool that will help identify appropriate legislative responses to the new challenge related to the protection of children's rights in the context of surrogacy" (Verona Principles: Statement of Support by UN Committee on the Rights of the Child) were published by the International Social Service (ISS) in 2021. The Principles contemplate two approaches to legal parentage at birth in a surrogacy context. The Irish approach is *largely* in sync with the first approach (Verona Principles 10.4), which provides that, where the surrogate mother is a legal parent at birth and wishes to relinquish and/or transfer legal parentage and parental responsibility, an expeditious post-birth legal mechanism should facilitate her in doing so. Indeed, the Principles acknowledge that "in the vast majority of States, a surrogate mother has legal parentage at birth" (Verona Principles 10.2).

However, an alternative approach to legal parentage was available to Irish policy-makers, for the Principles also envisage that for domestic, non-commercial surrogacies, "States may provide intending parents with exclusive legal parentage and parental responsibility by operation of law at birth" provided the surrogate has the right to confirm or revoke her consent to their exclusive legal parentage post-birth (Verona Principles 10.6). Thus, it would appear that the enactment of legislation in Ireland permitting the "pre-conception" authorization of domestic surrogacy arrangements *and* legal parentage by the AHRRA, coupled with a process that easily facilitates the surrogate's post-birth right to object to (or confirm) the earlier determination of parentage, would have been in compliance with international best practice in a surrogacy context, as contemplated by the Verona Principles.

Nonetheless, Irish policy-makers adopted the former approach when drafting the legislation because of their interpretation of a now decade-old decision of the Supreme Court of Ireland.

[E] *MR & ANOTHER v AN TARD-CHLÁRAITHEOIR*: A CONFUSING OR CONVENIENT PRONOUNCEMENT ON *MATER SEMPER CERTA EST*?

In the "surrogacy case" of *MR & Another v An tArd-Chláraitheoir* (2014), the Supreme Court established that it is for the Oireachtas to determine motherhood in surrogacy arrangements. The case involved an amicable, altruistic surrogacy arrangement between family members.

The gestational surrogate gave birth to twins on behalf of her sister and her sister's husband, the intended *and* genetic parents of the children. However, in line with existing legislation, the registrar of births would only allow the birth mother and the genetic father to be recorded as the parents on the twins' birth certificates. The genetic parents applied to the Registrar General to have the twins' birth certificates amended to reflect the genetic reality of their familial situation, but were denied this on the understanding that *mater semper certa est* (mother is always certain) required the birth mother to be registered on the birth certificates. The genetic parents then applied to the High Court on behalf of the twins for a declaration that the genetic mother was the legal mother pursuant to section 35 of the Status of Children Act 1987, which allows a person to apply to the court for a declaration that the person named in the application is their mother or father. In the High Court, on the basis of the evidence before him, Abbott J granted a declaration that the genetic mother was the legal mother of the twins and was therefore entitled to be recorded as such on their birth certificates (*MR & Another v An tArd-Chláraitheoir* 2013). However, the state appealed this finding to the Supreme Court, which reversed the High Court decision and quashed the declaration that the twins' genetic mother was entitled to be registered as their "mother" on their birth certificates.

The case has been interpreted by the Department of Health, the state body responsible for drafting the 2024 Act, as requiring the surrogate to be recognized as the legal mother of a surrogate-born child at the time of that child's birth. Indeed, when the predecessor to the 2024 Act, the 2017 General Scheme, was being drafted, the Department's officials were adamant that:

> 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.[6]

However, this appears to be a misreading by the Department of the judgment in the *MR* case. *The Supreme Court did not find that the birth mother must always be the legal mother at birth in the context of a surrogacy arrangement.* Denham CJ actually found that the principle of *mater semper certa est*, "mother is always certain", is not part of the common law of Ireland:

> It appears to me that in fact the maxim *mater semper certa est* was not part of the common law of Ireland. It was a statement which

[6] Email from Paul Ivory, Bioethics Unit, Department of Health, to Dr Brian Tobin (16 November 2016).

> recognised the medical and scientific fact that a birth mother was the mother of the child. The common law of Ireland has not addressed the issue of motherhood in a surrogacy situation (2014: paragraph 88).

More significantly, Denham CJ held that the legal definition of "mother" in the context of a surrogacy was actually a matter for the Oireachtas to determine via appropriate legislation:

> Such lacuna should be addressed in legislation and not by this Court … [u]nder the current legislative framework it is not possible to address issues arising on surrogacy, including the issue of who is the mother for the purpose of registration of the birth. *The issues raised in this case are important, complex and social, which are matters of public policy for the Oireachtas* (2014: paragraphs 116-118, emphasis added).

On this analysis, it would appear that it was entirely open to the Department of Health to draft legislation allowing for pre-conception approval of parentage in surrogacy situations, which would have allowed an intended mother to be recognized as a legal mother at birth, and which, as discussed, would have been fully in compliance with the Verona Principles. Given this, and the robust pre-surrogacy safeguards for all parties that are contained in the Irish legislation, as well as the fact that only non-commercial, gestational surrogacy is being regulated, it seems bizarre that intended parents, at least one of whom must have a genetic link to the surrogate-born child, are unable to avail of "pre-conception State approval" of their legal parentage under the provisions of the 2024 Act.

Although the Department of Health's basis for adopting an approach where the surrogate will be the legal mother at birth in both the 2017 General Scheme and the 2024 Act *possibly* emanated from the Supreme Court's 2014 decision in *MR & Another v An tArd-Chláraitheoir*, it is plausible that the case has been conveniently (and incorrectly) interpreted by the Department to pursue a rather restrictive approach to legislating for surrogacy arrangements. This is because the Supreme Court's decision in the *MR* case was only released in November 2014, yet an approach to legal parentage based on *mater semper certa est* had already been adopted by Part 3 of the General Scheme of the Children and Family Relationships Bill 2014, which contained Ireland's premier surrogacy proposals and was published in January 2014. Indeed, in the Notes accompanying Part 3 of that draft legislation it is stated that "the policy intention is that in a surrogacy case, the birth mother will be recorded as the child's mother". While Part 3 made provision for a post-birth parental order process, the Notes made it clear that "the consent of any surrogate is essential and

she will be the legal mother of the child if she does not consent"—all of this despite the fact that only the regulation of gestational surrogacy was being proposed under Part 3. In addition, the court's ability to dispense with the surrogate's consent was highly restricted to situations where she is "deceased or cannot be traced". While the 2014 General Scheme was drafted by the Department of Justice and not the Department of Health, the same restrictive approach to the practice of surrogacy is taken by both of these state departments in the pieces of legislation drafted by them, and it is difficult to see how the *MR* case had any real bearing on the strict policy positions taken.[7]

Indeed, in January 2018, when Department of Health officials were invited to the Houses of the Oireachtas to address the members of the Oireachtas Joint Committee on Health about the provisions in the 2017 General Scheme, they remained wedded to the principle of *mater semper certa est*, with the Department's Geraldine Luddy emphasizing to the Committee that:

> In this country, the birth mother is the mother. That is not changed in surrogacy cases in the scheme. The surrogate must transfer her right. If she does not do so, she remains the mother.[8]

The Department of Health's Dr Tony Holohan also reinforced this stance when questioned:

> The scheme clearly provides that at the point of birth, the Latin principle is *mater semper certa est*, or motherhood is always certain. The birth mother is the mother until such time as she goes through or consents to the parental order process through the courts.[9]

The Department of Health's reasons for opting for a post-birth determination of legal parentage for intended parents in a surrogacy context appear to be misguided and were possibly based on an entrenched moral viewpoint tied to traditional notions of motherhood.[10] Alternatively, the Department may simply have adopted the *mater semper certa est* principle for deciding motherhood at birth in a surrogacy context

[7] Indeed, commenting on the policy rationale to exclude traditional surrogacy from the 2014 General Scheme in the accompanying "Notes", Madden (2014: 54) states that: "This language displays a negative bias against surrogacy which is neither appropriate nor justified." Traditional surrogacy was similarly excluded from the 2017 General Scheme and the 2022 Bill, and it is not regulated under the 2024 Act.

[8] Committee Debates, Joint Committee on Health, 17 January 2018.

[9] Ibid.

[10] Indeed, wherever the gestational surrogate is referred to in the Health (Assisted Human Reproduction) Bill 2022 and, ultimately, the 2024 Act, she is referred to as a "surrogate mother". In the 2014 General Scheme, and also in the 2017 General Scheme, she was instead referred to as a "surrogate".

because it is a common way of establishing legal motherhood across the world (Iliadou 2024: 477), albeit not one required by the Irish Supreme Court in a surrogacy situation. In any event, Part 7 of the 2024 Act and, consequently, this somewhat prohibitive model of domestic surrogacy regulation, was enacted in July 2024 and now forms part of Irish law.

[F] THE SURROGATE'S CONSENT TO A POST-BIRTH PARENTAL ORDER

The requirement in Part 7 of the Act that, at birth, the surrogate will be the child's legal mother, is not unusual—it is replicated in, *inter alia*, the UK, New Zealand, Portugal and the Australian states of Victoria and Western Australia. However, despite the rather selfless, admirable role she undertakes, a gestational surrogate has no genetic connection to the child, and designating her the child's legal parent at birth does not accord with the evidence pertaining to a surrogate's intentions when entering into a surrogacy arrangement (Law Commission & Scottish Law Commission 2019: 182). Nonetheless, akin to the legislation in the UK,[11] Part 7 provides that the intended parents must go through a judicial "post-birth Parental Order" process to establish legal parentage. The intended parents will have to apply to the court for a parental order transferring legal parentage from the surrogate to them a minimum of 28 days after the birth of the child, with the surrogate consenting to the order.[12]

Mirroring the UK legislation, Part 7 affords remarkable post-birth leeway to the surrogate, which arguably makes more sense in the UK context where traditional surrogacy is permitted and the surrogate can be genetically related to the child, but makes little sense in an Irish context where only gestational surrogacy is regulated. Significantly, Part 7 of the 2024 Act mirrors the current UK law surrounding the surrogate's consent to a parental order, such that this can only be dispensed with by the court where she is either deceased, cannot be located after reasonable efforts have been made to find her, or lacks decision-making capacity.[13] This is a significant retrograde step when compared to the draft legislation from which the 2024 Act emanated, the 2017 General Scheme, because at least there was a provision in that draft legislation which provided

[11] See section 54 of the HFEA 2008.

[12] See sections 65(5) and 66(1)(a)(iii) of the 2024 Act.

[13] See section 66(2)(b) of the 2024 Act. The equivalent provision in the UK is section 54(7) of the Human Fertilisation and Embryology Act 2008, which provides that the surrogate's consent to a parental order is not required *only* when she cannot be found or is incapable of giving agreement. There is no opportunity for the court to otherwise dispense with the surrogate's consent, as observed by Theis J in *Re AB (Surrogacy: Consent)* (2016).

some potential relief for intended parents should the surrogate arbitrarily refuse to consent to the making of a parental order. Head 48 of the General Scheme enabled the court to waive the requirement for the surrogate's consent in a wider variety of circumstances, including where she is deceased; lacks the capacity to provide consent; cannot be located after reasonable efforts have been made to find her; or, importantly, "for any other reason the court considers to be relevant".[14]

This would have offered a potential remedy to intended parents in this particular predicament and might, in practice, prevent the kind of outcome that occurred in the case of *Re AB (Surrogacy: Consent)* (2016)[15] in the UK. Indeed, in 2018, during oral evidence sessions at Westminster to consider reform of the law on surrogacy in the UK, the All-Party Parliamentary Group on Surrogacy was impressed that, in Ireland, the General Scheme was "responding to some of the thorny issues that have arisen in the English courts, by planning to remove the aspect of the law that means the surrogate's consent could not be dispensed with if unreasonably withheld" (2021: 13).

Indeed, one wonders whether this provision was intentionally removed from the 2024 Act to make domestic surrogacy as perilous an undertaking as possible for Irish intended parents because, rather than adopt Head 48 of the General Scheme, Part 7 has reverted to a restrictive provision identical to that contained in Ireland's premier legislative proposals on surrogacy, which were scrapped back in 2014. As demonstrated, Part 3 of the General Scheme of the Children and Family Relationships Bill 2014 only allowed for the surrogate's consent to a parental order to be waived by the court if she was either deceased or untraceable.

Further, in the UK, the Law Commissions recommended in their report, *Building Families through Surrogacy: A New Law* (2023: volume 1, 47-48, *Core Report*) that, as regards the existing criteria for making parental orders under the law in that jurisdiction, a court should have the power to dispense with the requirement that the surrogate must consent to a parental order being made in circumstances where the welfare of the child requires it. This recommended approach to the surrogate's consent is very much in sync with the Verona Principles, which envisage that, where

[14] See Head 48 of the 2017 General Scheme. However, the ability of the court to dispense with consent "for any other reason [it] considers to be relevant" might have allowed for too much judicial discretion in these situations, if enacted.

[15] In this case the surrogate and her husband refused to consent to a parental order in favour of the intended parents, and there was no possibility for the court to waive their consent. See also Douglas (2017). See also *H v United Kingdom* (2022) where the same-sex intended parents did not even apply for a parental order once the surrogate and her husband refused to provide their consent to it.

states choose to make the surrogate the legal mother at birth, then, if she chooses to retain legal parentage, a court or "other competent authority" should expeditiously conduct a best interests of the child determination. On the contrary, the Irish approach to the surrogate's consent will not allow for this—once the surrogate refuses to consent, an application for a parental order simply cannot proceed, and a court has no authority to consider the best interests of the child.

The Oireachtas must amend the current legislative model for regulating domestic surrogacy as regards the surrogate's consent; it should reconsider its approach in light of the recommendation from the Law Commissions regarding very similar legal provisions in the UK, as well as international best practice for surrogacy, as contemplated by the Verona Principles.

[G] THE CONSEQUENCES OF THE SURROGATE'S BLANKET ABILITY TO REFUSE CONSENT

It should be strongly emphasized that surrogates rarely refuse to consent to a parental order. However, the surrogate's blanket ability to refuse consent has had real-world consequences in a number of significant cases in less than a decade. In *Re AB (Surrogacy: Consent)* (2016), relations between the gestational surrogate and the intended parents broke down during the pregnancy. Following the birth of twins, A and B, the gestational surrogate and her husband refused to consent to the making of a parental order in favour of the genetic intended parents. This refusal was despite the fact that A and B had no contact with the surrogate and her husband, who had also made it clear that they wished to play no active role in the children's lives. Theis J noted that the respondents' rationale for refusing their consent to a parental order was "due to their own feelings of injustice, rather than what is in the children's best interests" (paragraph 8). Nonetheless, Theis J held that the consent of the surrogate and her husband was essential to the making of the order:

> Without the respondents' consent the application for a parental order comes to a juddering halt, to the very great distress of the applicants. The result is that these children are left in a legal limbo, where, contrary to what was agreed by the parties at the time of the arrangement, the respondents will remain their legal parents even though they are not biologically related to them and they expressly wish to play no part in the children's lives (paragraph 9).

Given the "very unusual" circumstances of the case, Theis J adjourned the application for a parental order and expressed the hope that the surrogate would in the future be able to "see the situation from the viewpoint of the young children" (paragraph 32).

Re AB represents judicial confirmation that an application for a parental order has no possibility of success under the current law in the UK where the surrogate refuses consent, and it demonstrates the notable imbalance between the surrogate's position and that of the intended parents, and the child, under the legislation. Indeed, it appears to have dissuaded intended parents from even applying for a parental order in situations where the surrogate has made it clear that she will not consent to one. In 2022, the case of *H v United Kingdom* was decided by the European Court of Human Rights (ECtHR).[16] Similar to *Re AB*, the case involved a domestic, gestational surrogacy arrangement in the UK, but this time one between a male same-sex couple and the surrogate and her husband. Similar to *Re AB*, relations between the parties broke down before the child's birth and, following the birth, the surrogate and her husband refused to consent to a parental order being made in favour of the intended parents. However, unlike the couple in *Re AB*, here the intended parents did not even apply for a parental order and, consequently, the surrogate and her husband remain the legal parents.[17]

Recently, *Re C (Surrogacy: Consent)* (2023) even established that a parental order can be overturned where the surrogate's consent to same was "neither free nor unconditional". Further, Jackson LJ held that section 54(6) of the HFEA 2008, which deals with the surrogate's consent, cannot be read in such a way as to confer on the court the power to dispense with the surrogate's consent and that "the right of a surrogate not to provide consent is a pillar of the legislation" (ibid paragraph 61). Given the striking similarity between section 54(6) of the HFEA 2008 and its Irish equivalent, section 66 of the 2024 Act, the decisions in *Re AB* and *Re C* are likely to be of highly persuasive value when cases surrounding

[16] The applicants were challenging the compatibility of UK birth registration laws with the child's right to respect for private life under Article 8 of the European Convention on Human Rights (ECHR) because such laws require the surrogate's husband to be registered as the surrogate-born child's "father" on their birth certificate, rather than the child's genetic intended father. The ECtHR found that this was within the UK's wide margin of appreciation in the context of assisted human reproduction, and the impugned laws had not resulted in the child being "wholly deprived of a legal relationship" with her intended parents, with whom the child was residing, and both of whom had been awarded parental responsibility together with the surrogate and her husband. The ECtHR declared the case inadmissible as being manifestly ill-founded under Article 35 of the ECHR. For a detailed analysis of this case, see Tobin (2023: 176-183).

[17] Tobin (ibid) argues that this "is completely understandable in light of the recent decision in *Re AB (Surrogacy: Consent)*".

the surrogate's consent to a parental order eventually come before the Irish courts, and knowledge of the outcomes in these UK cases may deter Irish intended parents who find themselves in conflict with the surrogate from even applying for a parental order.

[H] CONSTITUTIONALLY INFIRM?

In Ireland, the overly restrictive approach to the surrogate's consent to a parental order in the 2024 Act is arguably constitutionally infirm. In 2014, in *MR v An tArd-Chláraitheoir*, the Supreme Court did not give the Oireachtas free reign in relation to the regulation of surrogacy. In his judgment, Clarke J referred to "constitutionally permissible" legislation and cautioned that "[w]ithin constitutional bounds it is *largely* a question of policy for the Oireachtas to determine the precise parameters of [surrogacy] regulation" (paragraph 8.7, emphasis added). Clarke J made it quite clear that any future legislation concerning surrogacy would be "of doubtful constitutional validity" if it precluded surrogate-born children from becoming part of a *constitutional family* (ibid paragraph 9.6). The only "family" recognized by the Constitution of Ireland is the married family in Article 41, and a recent attempt by referendum to expand this constitutional definition of "the family" beyond married (opposite-sex and same-sex) families was rejected.[18] Indeed, in Article 41.3.1, "the State pledges itself to guard with special care the institution of marriage, on which the family is founded, and to protect it against attack".

As demonstrated, section 66 of the 2024 Act allows a gestational surrogate to arbitrarily withhold her consent to a parental order being made in favour of intended parents, and this of course includes married intended parents (whether they are opposite-sex or same-sex).[19] As there is no possibility for the court to carry out a best interests of the child assessment and possibly dispense with the surrogate's consent where it is withheld to the detriment of married intended parents, this provision could very well be struck down as unconstitutional if challenged in court by married intended parents. It could be deemed by the judiciary to constitute a disproportionate "attack" on the constitutionally revered (and, according to the most recent referendum result, socially preferred)

[18] In March 2024, a constitutional referendum to extend the constitutional definition of "The Family" in Article 41 beyond marriage to also include "other durable relationships" was rejected by 67.69% of the Irish electorate.

[19] The institution of marriage was extended to same-sex couples following a successful constitutional referendum in 2015 that led to the insertion of Article 41.4, which provides: "marriage may be contracted in accordance with law by two persons without distinction as to their sex". Married couples are constitutionally protected family units under Article 41 of the Constitution of Ireland.

marital family unit, as it prevents surrogate-born children from becoming part of a constitutional family where they would be legally recognized as the children of their married parents.

In addition, the "natural and imprescriptible" rights of all children are expressly protected in Article 42A of the Constitution of Ireland.[20] Doyle and Feldman observe that Article 42A, known as the "Children's Amendment" and only inserted in 2015 following a referendum, places the constitutional rights of the child "front and centre" (Doyle & Feldman 2013: 130).

Shannon suggests that a child may enjoy a "natural constitutional right to family life pursuant to Article 42A.1" (Shannon 2010: 36). Thus, a child born via a gestational surrogacy might very well enjoy a constitutional right to family life with its intended parents, the very persons who are responsible for its birth by initiating the surrogacy arrangement in the first place. Therefore, by arbitrarily refusing to consent to the making of a parental order, a gestational surrogate could be denying the child its constitutional rights in relation to its intended parents. In these circumstances, a genetic intended father of the child would still be able to acquire parentage and guardianship of the child through the courts, but there would be no possibility for the intended mother or, in a same-sex relationship, the intended co-father, to acquire parentage, and under Irish law such persons would only be eligible to apply for guardianship of the child where they have shared with the parent responsibility for the child's day-to-day care for a period of more than two years.[21] Therefore, the legal consequences of a surrogate's refusal to consent to a parental order could indeed be quite significant for the child—this could materially affect its enjoyment of any right it might have to family life with its intended mother or intended co-father, particularly during the child's early years of life.

[I] DISPENSING WITH CONSENT IN THE CONTEXTS OF ADOPTION AND SURROGACY

I have suggested elsewhere that a child-centred reason for waiving the need for the surrogate's consent should have been included in the 2024 Act, and this could have taken the form of a provision equivalent to that

[20] Article 42A.1 of the Constitution of Ireland 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."

[21] See section 6C of the Guardianship of Infants Act 1964, as inserted by section 49 of the Children and Family Relationships Act 2015.

contained in Irish adoption legislation (Tobin 2023: 96). In the context of an adoption, section 31 of the Adoption Act 2010, as amended, allows the High Court of Ireland to dispense with the need for the natural mother's consent where she fails, neglects or refuses to give her consent to the making of an adoption order.[22] However, before doing so the court must have regard to "the rights, whether under the Constitution or otherwise, of the persons concerned" (including the natural and imprescriptible rights of the child in Article 42A) and, in resolving the matter, the best interests of the child shall be the paramount consideration for the court. O'Mahony (2021: 24) also favours this child-centred approach to consent in surrogacy, and, in the UK, the Law Commissions' *Building Families through Surrogacy* (2023: 47) suggested approach to reforming the law there as regards dispensing with the surrogate's consent to a parental order is based on the provisions of adoption law.[23]

However, an examination of Irish case law concerning the *exercise* of the court's power to dispense with the need for the birth mother's consent to an adoption order is of little value because the circumstances leading to her refusal to consent are usually remarkably different. In an adoption context, birth mothers often refuse to consent to the final adoption order being made because they claim they did not give a full, free and informed consent to placing the child for adoption in the first place, and they seek to have the child returned to them from the prospective adoptive parents, who in turn seek a section 31 order from the High Court dispensing with the need for the birth mother's consent to the making of the adoption order. It is these difficult situations that most of the reported Irish case law is concerned with.[24]

In surrogacy, although surrogates consent to participating in the surrogacy arrangement in the first place, they sometimes later arbitrarily refuse to consent to the parental order because their relationship with the intended parents broke down during the pregnancy and, feeling

[22] Shannon notes that Ireland's initial adoption legislation, the Adoption Act 1952, did not allow for the possibility of a court dispensing with the need for the birth mother's consent—if she did not sign the consent form for the legal adoption of the child, the adoption could not go ahead: see Shannon (2020: 588). This is an interesting parallel with the consent requirements in Ireland's premier surrogacy provisions contained in the 2024 Act. The Adoption Act 1974 first gave the prospective adoptive parents the right to apply to the High Court to dispense with the need for the birth mother's consent to the adoption.

[23] Indeed, the Law Commissions note that their suggested test, that the court should be able to dispense with the surrogate's consent to a parental order where the welfare of the child requires it, "is the same as the one that applies to adoption" and was supported *by the majority* of consultees (Law Commission & Scottish Law Commission 2023: 47-48).

[24] See, *inter alia*, *EF & FF v An Bord Uchtála* (1996); *Northern Area Health Board v An Bord Uchtála* (2002); *G v An Bord Uchtála* (1980).

aggrieved, they wish to exercise their right of veto that allows them to wholly frustrate the intended parents from securing legal parentage.[25] Unlike the birth mother in an adoption context, the surrogate rarely wants to regain custody of the surrogate-born child.[26] Nonetheless, where she refuses to consent to a parental order, the issue for the intended parents is the same as that for prospective adopters where a birth mother refuses her consent—they need a legal option available to them to have her consent dispensed with by a court. However, unlike prospective adopters, the 2024 Act grants intended parents no such option. This is not to say that the surrogate's consent *should* be dispensed with by a court, for cases might arise where she is refusing it due to child protection concerns or other valid reasons. However, where she refuses to consent, the court should at least be empowered to engage in a best interests of the child determination in deciding whether or not to make the order. By not allowing for such a process where consent is refused, the 2024 Act is not in compliance with international surrogacy-related best practice, law reform suggestions from a jurisdiction with identical laws on surrogacy and consent, or the consent provisions of Irish adoption law. If legislation can allow a genetic mother's consent to an adoption order to be dispensed with, where justified, it should similarly allow for the possibility of a gestational surrogate's consent to be dispensed with by a court where this is deemed to be in the best interests of the child.

[J] THE BEST INTERESTS PRINCIPLE: A TRANSPARENT JUSTIFICATION FOR THE EXERCISE OF THE COURTS' POWER

If the 2024 Act was amended to provide the courts with the power to dispense with the need for the surrogate's consent to a parental order, in addition to a consideration of the constitutional rights of the parties concerned, as is the case under Irish adoption law, the guiding principle for the court in deciding the matter should be the "best interests" principle.[27]

[25] See *Re AB (Surrogacy: Consent)* (2016); *H v United Kingdom* (2022).

[26] Although *Re C* (2023) involved a parental order being set aside because the surrogate had not given a "free nor unconditional" consent, and the traditional surrogate, who had used her own egg in the arrangement, wanted contact with the child. However, this case is similar to many others involving consent issues surrounding parental orders in that, about halfway through the pregnancy, the relationship between the surrogate and intended parents had deteriorated.

[27] Legislation provides that, in the contexts of adoption, guardianship, custody and access, the best interests of the child "shall" be the paramount consideration for the court, and stipulates that the court "shall" decide the child's "best interests" by reference to a statutory checklist: see, respectively, section 19 of the Adoption Act 2010, as inserted by section 9 of the Adoption (Amendment) Act 2017, and section 3 of the Guardianship of Infants Act 1964, as inserted by section 45 of the Children and Family Relationships Act 2015.

Section 66 of the 2024 Act already provides the courts with a "best interests" checklist to assist them in deciding parental order applications in circumstances where the surrogate *consents*, so this same checklist could be extended to require the court to consider the same factors in its "best interests" assessment in those rare situations where the surrogate refuses to consent.

A statutory requirement for the courts to adhere to this "best interests" checklist in these situations would ensure that any decision of the court to dispense with the need for the surrogate's consent to a parental order is decided by reference to clear, child-centric factors.

This would ensure transparency in surrogacy-related judicial decision-making and, equally, serve as a child-centric justification for the exercise of judicial discretion in these cases.[28]

[K] CONCLUSION

Part 7 of the 2024 Act introduces a restrictive model of domestic surrogacy regulation into Irish law, particularly surrounding the requirement for the surrogate's consent to a parental order. The inability of a court to engage in a best interests of the child determination when faced with a non-consenting surrogate and have open to it the possibility of dispensing with the need for her consent to a parental order is not in compliance with international best practice as envisaged under the Verona Principles. Further, this restrictive statutory approach to the surrogate's consent is constitutionally suspect when the rights of the married family unit and children's rights in Articles 41 and 42A, respectively, and the state's constitutional obligations to protect such rights, are considered. As enacted, Part 7 will undoubtedly generate disputes surrounding the surrogate's consent, but UK case law concerning very similar provisions on consent in this context may have a chilling effect on many such disputes being litigated. Legislation which places the gestational surrogate in such an arbitrarily strong legal position is not in the best interests of the surrogate-born child, or its intended parents. In light of law reform recommendations from the UK concerning similar legislative provisions, and international surrogacy-related best practice as contemplated by the

[28] The factors the court "shall have regard to" under section 66 of the 2024 Act in determining the best interests of a child in respect of whom a parental order application has been made are:(a) the child's age and maturity; (b) the physical, psychological and emotional needs of the child; (c) the likely effect of the granting of the parental order on the child; (d) the child's social, intellectual and educational needs; (e) the child's upbringing and care; (f) the child's relationship with his or her intending parents (or, in the case of a single intending parent, that intending parent); and (g) any other particular circumstances pertaining to the child.

Verona Principles, as well as the approach to dispensing with a birth mother's consent under Irish adoption legislation, the Oireachtas should amend Part 7 of the 2024 Act to ensure that it is more family and child-centred and to avoid the possibility of certain of its provisions being declared unconstitutional.

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