

## **CITIZENSHIP, PARENTAGE, GUARDIANSHIP AND TRAVEL DOCUMENT ISSUES IN RELATION TO CHILDREN BORN AS A RESULT OF SURROGACY ARRANGEMENTS ENTERED INTO OUTSIDE THE STATE**

This document is intended to provide guidance as to the principles that will be applied by the Irish authorities when considering

- (i) whether a child is an Irish citizen, and
- (ii) who the child's legal parents and guardians are,

for the purposes of dealing with applications for travel documents on behalf of children born outside the State as a result of surrogacy arrangements.

This document is not intended to give rise to any expectations or to replace legal advice, and anyone who is thinking about becoming involved in a surrogacy arrangement should seek expert legal advice.

In this document, expressions such as "surrogate mother" or "commissioning adults" have been used for the sake of clarity and simplicity, but this does not mean that the Irish authorities consider that these expressions have any legal standing. In this document "travel documents" refers to passports, including emergency passports, and Emergency Travel Certificates.

The guidance provided in this document applies where the commissioning adults intend to bring the child to live with them in the State. If the commissioning adults intend to bring the child to live outside the State, Irish law concerning the establishment of parentage and parental responsibility may not apply, and therefore this guidance may not apply. In such circumstances, commissioning adults should seek legal advice in their country of habitual residence.

In all their actions, the Irish authorities are bound by applicable Irish law and must act in accordance with the legal rights of everybody involved, with the rights of the child being a paramount consideration.

The Irish authorities will take a child-centred approach to decision making in this area and will be guided in particular by the principle that the best interests and welfare of children can most effectively be secured when they are in the care of a guardian who has legal authority to take decisions, including medical decisions, on their behalf.

### **Section 1 - Status of a child born of a surrogacy arrangement**

In determining whether a child born outside the State is an Irish citizen, it is necessary first of all to establish whether the child was born to an Irish parent.

Furthermore, in general, only a **parent** or **guardian** may apply for a travel document on behalf of an Irish citizen child.

Thus the questions of:

- who are the legal parents of the child, and
- who are the legal guardians of the child

must be examined in order to determine whether a child born outside the State is an Irish citizen, and whether consequently an Irish travel document may be issued to the child.

In considering these issues, the Irish authorities are required to apply Irish law. It should be noted that foreign birth certificates or court orders are not necessarily binding in Irish law or upon Irish authorities,

#### *The child's genetic relationships*

A child born as a result of a surrogacy arrangement may have a genetic relationship with any of the following:

- the surrogate mother, the commissioning mother, or an egg donor
- the commissioning father or a sperm donor

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.

#### *The legal mother of the child*

Under Irish law the woman who gives birth to the child - in this case, 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.

Under the Guardianship of Infants Act 1964, the mother of a child born outside marriage is the child's **sole guardian**. Under Irish law, family relationships and the rights and responsibilities that flow from them cannot be subjected to the ordinary law of contract and cannot, in particular, be transferred to another person, bought, or sold. This means that, under Irish law, the surrogate mother and the child will have a life-long legal relationship with one another.

#### *The legal father of the child*

To identify the legal father of the child, the surrogate mother's marital status must first be determined.

- If the surrogate mother is married

If the surrogate mother is married, then under section 46 of the Status of Children Act 1987, the surrogate mother's husband is presumed by law to be the father of the child, unless the contrary is proved on the balance of probabilities.

The husband will also, along with the surrogate mother, be the joint guardian of the child.

If the commissioning father is the genetic father of the child, it is possible to overcome the presumption of paternity in favour of the surrogate mother's husband, so as to allow the commissioning father to be recognised as the legal parent of the child. A guardianship order may also be sought by the commissioning father.

Under domestic Irish law, this requires an application for a declaration of parentage to be made to the Circuit Court under Part VI of the Status of Children Act 1987. The Attorney General must be put on notice of any such application if it is to be binding upon State authorities. Application should also be made by the commissioning father for a guardianship order.

The commissioning father will need to provide evidence of paternity in support of this application. As a rule, the Irish authorities will require DNA evidence from a reliable source (see Section 4, below) to support a claim by a commissioning parent that he is a father of a child. Steps will have to be taken to serve any court proceedings issued on the surrogate mother and on her husband. Legal advice should be sought concerning any such court proceedings.

- If the surrogate mother is not married

If the surrogate mother is not married, and the commissioning father is the genetic father of the child, then the Irish authorities may recognise his paternity of the child on receipt of reliable DNA evidence (see Section 4, below).

It is important to note that, because the commissioning father is not married to the surrogate mother, he is not automatically a guardian of the child under Irish law, even if he has been granted a declaration of parentage. Under Irish law the commissioning father can obtain a guardianship order if he is the genetic father of the child. Steps will have to be taken to serve any court proceedings issued on the surrogate mother.

Legal advice should be sought about the appropriate mechanism for arranging for the commissioning father to be made a guardian of the child.

## **Section 2 - Citizenship and passports**

The child's entitlement to Irish citizenship, and thus an Irish passport, will be determined by reference to, respectively, the **Irish Nationality and Citizenship Act 1956** as amended, and the **Passports Act 2008**.

Before a passport can be issued to a child born outside the State, as described above, it is necessary to establish that:

- 1 the child was born to an **Irish parent** and is therefore an Irish citizen; this means that either the genetic father or the surrogate mother of the child must be an Irish citizen, and
- 2 subject to specific, limited exceptions set out in the Passports Act 2008, all **guardians** of the child consent to the issuing of a passport to the child, or that their consent has been dispensed with by an Irish court.

Generally speaking, only a **parent or guardian** of a child may apply for a passport on his or her behalf.

The Irish authorities can give no guarantees, before the birth of any particular child, that a child will be automatically regarded as an Irish citizen, that the commissioning adults will be regarded as parents or guardians of that child and therefore that a passport or other travel document can be provided for that child.

**In the best interests of the child and as a matter of best practice, a passport will be issued only where guardianship has been established but the Irish authorities may issue an Emergency Travel Certificate (see Section 3, below) to enable the child to enter the State.**

## **Section 3 - Emergency Travel Certificates**

An application for an Emergency Travel Certificate ("ETC") must be considered on its own merits; however as a general rule the Irish authorities must be satisfied:

- 1 that the child is or may be an Irish citizen, and
- 2 that the application for the ETC is being made by a parent or guardian of the child, and
- 3 that—
  - (i) the consent of all of the child's guardians to the issuing of an ETC has been obtained, or
  - (ii) such consents have been dispensed with by an Irish court, or
  - (iii) there are exceptional circumstances involving an immediate and serious risk of harm to the child's life, health or safety requiring the child to undertake travel for which a travel document is required and that for the

purpose of securing the welfare of the child a travel document should be issued to the child,

and

4 that the issuing of an ETC is in the best interests of the child

The Irish authorities do not, in general, regard it as being in the best interests of children that they would arrive into the State with adults to whom they have no legally recognised relationship and who have no legal authority to make decisions, including medical decisions, on their behalf. The Irish authorities will therefore, in the best interests of children, seek the following undertakings from commissioning adults before an ETC is issued:

- The commissioning adults will be required to provide a written undertaking that they will notify their local health centre of the child's presence within two working days of their arrival in the State.
- The genetic father will be required to provide an undertaking that he will apply to the Court for a declaration of parentage and a guardianship order in relation to the child, for the purposes of ensuring that his legal relationship with the child is established and he is in a position to make decisions, including medical decisions, on behalf of the child. The genetic father's undertaking must specify that he will commence the required court proceedings (applications) within 10 working days of the arrival of the child into the State unless there are exceptional circumstances, and in any case within 20 working days.

The Passport Service will inform the immigration authorities and the Health Service Executive (HSE) of all ETCs that have been issued, and of the undertakings that have been given.

It should be noted that, under Part IVB of the Child Care Act 1991, as inserted by section 16 of the Children Act 2001, it is an offence for a person who is not a parent, guardian, cohabitee of a parent or guardian or a relative of the child, to undertake the full time care of a child for more than 14 days unless the provisions of Part IVB of the Act of 1991 are complied with.

#### **Section 4 - Practical requirements for applications for travel documents**

- An application for a travel document must be made on a child's behalf by a child's **legal parent or guardian**. Where the surrogate mother is married, in the absence of a declaration of paternity in favour of the genetic/commissioning father, the application must therefore be made by the mother of the child (the surrogate mother) and the consent of the surrogate mother's husband is required unless she is divorced or widowed. Where the surrogate mother is unmarried no such consent issue arises.

- Where for the purpose of a passport application a commissioning father seeks to establish that he is the genetic father of the child, DNA evidence from a satisfactory source (see below) must be furnished to support his claim.
- Equally, in the case of an application for an ETC, DNA evidence from a satisfactory source (see below) demonstrating that the commissioning father is the genetic father of the child will be required to support a claim that a child "may be" an Irish citizen.
- Where it is proposed to seek DNA reports in the country of birth, the report must be sought from a laboratory independent from any provider of surrogacy services. Commissioning adults should consult the Irish Passport Service in advance concerning the laboratory which is to be used.
- DNA samples should be taken by a suitably qualified independent third party (e.g. doctor, nurse or medical scientist); the person taking the samples must satisfy himself/herself as to the identity of the persons from whom samples are being taken; the samples must be placed in secure containers by the person taking the samples; and the samples must be transmitted by the person taking the samples direct to the testing laboratory and not given to the person being sampled.
- An affidavit must be provided by the person taking the sample(s) stating his/her profession; explaining how he/she satisfied himself/herself as to the identity of the persons giving the samples; confirming that he/she placed the samples in secure containers; and confirming that he/she transmitted each sample direct to the testing laboratory and that he/she did not give it to the persons being sampled, describing by what method the sample was forwarded to the laboratory.
- The Irish authorities will not accept DNA results derived from home testing kits.
- An affidavit by the surrogate mother should be provided stating her marital status and where she is divorced or widowed, supporting documentation should be included.
- Subject to limited exceptions set out in the Passports Act, the consent of the child's **legal guardians** (including the surrogate mother) to the issue of a travel document must either be obtained, or dispensed with by an Order from an Irish Court, before the application for the travel document is submitted. Where the surrogate mother is married, the consent of her husband to the issue of a travel document will therefore generally need to be obtained unless she is divorced or widowed.
- Where the surrogate mother is not a fluent English or Irish speaker, it will be necessary for her to sign **both** the application form **and** a certified translation, *or* provide an affidavit in her own language stating that she consents to an Irish travel document for the child being issued to the commissioning father.

- Affidavits by the surrogate mother must be made after the birth of the child, at the same time as, or shortly before, the application is being made.
- A certified English or Irish translation of the affidavit must be provided.
- If the surrogate mother is illiterate, a lawyer must read the terms of the application form or the affidavit to her in a language which she understands and the lawyer must then make an affidavit confirming that this has been done. That affidavit should then be supplied with the application.
- The consent of the surrogate mother must be full, free and informed.
- Where an application is made to an Irish court for the consent of the birth mother to the issue of a travel document in respect of the child to be dispensed with, it may be advisable to ask the court to dispense with such consent(s) for all future travel documents up until the child is 18 years of age. Otherwise, it may be necessary to make a number of such applications until the child reaches adulthood.

### **Seek legal and medical advice before proceeding**

It is important that anybody considering becoming involved in an international surrogacy arrangement should seek expert legal advice from a lawyer qualified in Ireland. This advice should be provided independently of any clinics or intermediaries involved in the surrogacy arrangement.

Further legal advice should be sought well in advance of travel, so that the commissioning adults' legal advisers can ensure that any necessary Court applications are prepared in advance, to enable applications to be dealt with expeditiously.

It is the responsibility of commissioning adults to ensure that the arrangements that they make are compatible with Irish law and that any child born as a result of a surrogacy arrangement is able to enter and reside in the State, if that is what is intended.

Please note that the process of establishing:

- 1 whether a commissioning adult is a legal parent of the child,
- 2 whether the child is an Irish citizen, and
- 3 whether the consent of the child's guardians has been obtained or dispensed with

may take some time and involve one or more applications to an Irish court.

Commissioning adults should be aware that delays in receiving standard infant screening may cause delay in the detection of serious conditions, the presence of which could have significant and irreversible health repercussions. It is strongly recommended that medical advice on these matters is sought in advance of travel.

Please also note that the costs associated with the processes described in this document are the responsibility of the commissioning adults.

If commissioning adults intend to apply for a travel document for a child, they should plan for the possibility of the child having to remain in the country of birth until such time as the requirements for issuing a travel document for the child have been met. Specifically, they should make sure that appropriate care, accommodation, medical attention and medical insurance can be provided for the child and anybody caring for the child within the country of birth until it has been established whether a travel document can be issued.

The Irish authorities will endeavour to deal with all queries as promptly and efficiently as possible. The Irish authorities are required to act in compliance with Irish law and will not facilitate the unlawful movement of children across national boundaries.