"From Goldilocks to the Seven Dwarfs - the Children and Family Relationships Act, 2015: A Guide to 21st Century Family Law"

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Introduction

We should probably resist the urge to assess the likely difficulties which may emerge in a family law regime based on fairy stories but perhaps some of them can give us a sense of societal/cultural expectations and in some instances, perhaps, they give an amber light. Generally speaking, subject to the diverse culinary skills which may arise, nuclear families, Goldilocks would suggest are good. They eat healthy stuff like porridge and go on family forest hikes before breakfast. Broader more wide ranging family units especially involving unrelated third parties would appear to be bad news if Cinderella, Hansel and Gretel and Snow White are to be given any credence. However, there are always exceptions - a small girl can do nicely and flourish being cared for by seven unrelated men on the evidence of Snow White's experience with the seven dwarfs! So much for the guidance of fairy stories!

An overview of Irish family law from, let's say mid-way through the 20th century shows that some but no fundamental progress had been made. Pre- Tilson Infants (1951)[1] we had a patriarchal system favouring the vesting of legal control of families in the father. This was the start of change. There can be no doubt that there have been many developments since, but these changes were still based upon the primary and legally preferred social grouping being the family based on heterosexual marriage.

The emergence of the Guardianship of Infants Act, 1964 brought with it automatic guardianship rights for married couples but refrained from affording such rights to unmarried fathers by excluding unmarried fathers from the definition of father in s. 2 of the Act. The introduction of the Status of Children Act, 1987 made certain changes to the Guardianship of Infants Act, 1964

[1] Tilson (Infants), Re (No. 3) [1951] 1 IR 1. The Supreme Court had to determine the validity of a pre-nuptual agreement between a husband and wife which sought to regulate the religious upbringing of any children of the marriage. The case concerned the marriage of a Roman Catholic woman to a Protestant man. The parties had signed an agreement which acknowledged that any children of the marriage would be raised in the Roman Catholic faith. The Supreme Court upheld the agreement and held that the children should be returned to the mother to be educated by her in accordance with the Roman Catholic faith, as per the terms of the agreement.

including the insertion of s.6A of the 1964 Act by s.12 of the Status of Children Act, 1987 in that it provided unmarried natural fathers the right to being an application for joint guardianship.[2] It was not long before the operation of the section was tested by a father who was not married to the mother of his child.

In *K v W*[3], an unmarried father of a child placed for adoption against his will sought to challenge the adoption process. The adoption process at the time, stipulated that the consent of the guardian(s) of the child were required before an adoption order could be made. However, as an unmarried father Mr. K did not have automatic guardianship rights or custody vis-á-vis the child and was not in a position to contest the adoption. Mr. K issued proceedings in the Circuit Court under s. 6A(1) of the 1964Act seeking to be appointed guardian of the child. In the Circuit Court and in the High Court on appeal, Mr. K was awarded guardianship and additionally custody of the child however, Barron J. stated a case to the Supreme Court where it was held that s.6A of the 1964 Act gives the natural father the right to apply for guardianship but does not give him the right to be appointed guardian. The Court was clear to point out that the position of an unmarried natural father is not akin to the legal position of the father married to the mother of his child.[4] Post- Keegan, the enactment of the Children Act 1997 enabled an unmarried father to be appointed guardian of a child with the mother's consent by way of statutory declaration.[5] In *GT v. KAO*[6], the father's mere right to apply for guardianship was questioned. McKechnie J identified a need for greater societal recognition of the role of the unmarried father, who in that case, "from the moment of birth, nurtures, protects and safeguards his child; sometimes to a standard which all too frequently married fathers fail to live up to".[7]

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[2] Section 6A of the Guardianship of Infants Act, 1964 as inserted by s.12 of the Status of Children Act, 1987 provides that:

(1) Where the father and mother of a child have not married each other and have not made a declaration under section 2(4), or where the father was a guardian of the child by virtue of a declaration under section 2(4) but was removed from office under section 8(4), the court may, on application of the father, by order, appoint the father to be a guardian of the child.

[3] [1990] 2 IR 437

[4] [1990] 2 IR 437 at 447.

[5] Section 2(4) of the Guardianship of Infants Act, 1964 as inserted by s.4 of the Children Act, 1997.

[6] [2007] IESC 55

[7] [2007] IESC 55 at para. 50.

More recently, the position of the natural unmarried father was considered in terms of rights of custody in *McB v LE*[8]. MacMenamin J recognised a "clear conceptual distinction" between the concepts of custody and access in respect of the Hague Convention. In addition, the Court found that a so called *de facto* relationship was one which was not cognisable in Irish law.

It is clear that there is significant uncertainty and ambiguity in relation to guardianship, custody and access in respect of non-marital families where no such similarities appear for marital families. The growth of non- traditional and alternative familial structures has left the legislature with no option but to legislate for the vastly different familial landscape which exists in 2015 as distinct from the traditional family model in the 1960's. The Children and Family Relationships Act, 2015 provides a much more comprehensive review of family law in Ireland. The new Act moves completely away from any particular family model and in particular from the heterosexual, nuclear and marriage – based family providing for a very broad range of family structures. In truth, the Children and Family Relationships Act, 2015 finalises the progression of Irish family law from Goldilocks to the Seven Dwarfs.

The Children and Family Relationship Act, 2015 – Part IV

Given the sheer number of sections in this Act, which total no fewer than one hundred and eighty sections, it would be impossible to analysis each section. This article will focus primarily on Part IV of the Act which deals with the amendments made to the Guardianship of Infants Act, 1964.

A. Automatic Guardianship

The Guardianship of Infants Act, 1964 (hereinafter referred to as "the 1964 Act") provides for automatic guardianship for mothers and their husbands. The 2015 Act amends the definition of father under s.2 of the 1964 Act by inserting two further circumstances where a person can be deemed to be the father of a child.[9] The insertion of s. 2(4A) to the 1964 Act extends the

[8] *In the matter of the Child Abduction and Enforcement of Custody Orders Act 1991 and in the matter of the Hague Convention on the Civil Aspects of International Child Abduction 1980 and in the matter of Council regulation No 2201/2003 EC and in the matter of JSMcB, EMcB and JCMcB (children); JMcB, Applicant v. LE, Respondent* [2010] 4 IR 433

[9]Section 43 of the2015 Act amends Section 2 of the Guardianship of Infants Act, 1964 provides the definition of a father as "includes a male adopter under an adoption order, but subject to section 11(4) , does not include the father of a child who has not married that child's mother unless either-

(a) an order under section 6A (inserted by the Act of 1987) is in force in respect of that child,

definition of 'father' to include circumstances where the father and mother are not married to one another but have been cohabiting together for no less than 12 consecutive months, which must include three consecutive months after the birth of the child. While this in itself does not give unmarried father the same automatic rights as natural mothers, it do go a long way to improve the current situation unmarried fathers often find themselves in. In addition, s.6D allows for fathers who have obtained equivalent guardianship rights in another State to have those rights and responsibilities recognised in this jurisdiction by way of guardianship.

Section 43 of the 2015 Act provides for the amendment of s.2 of the 1964 Act to include a definition of 'parent' as being redefined to mean not only a father or mother of a child but also to include the parent or parents of donor- conceived children. S.47 of the 2015 Act amends s.6 of the 1964 Act to allow for civil partners or cohabiting couples who have jointly adopted a child to be guardians of said child jointly. This is a welcome move which closes the lacuna in the law which has been evident since the enactment of the Civil Partnership and Certain Rights of Cohabitants Act, 2010. It follows that where a child is adopted jointly, upon the death of a civil partner or cohabitant, the surviving partner or cohabitant shall be guardian of the child either solely or jointly with any guardian appointed by the deceased or by the Court. The replacement of s.6A of the 1964 Act by s.48 of the 2015 Act will allow the Court to make an order appointing a non guardian, who is a parent, as guardian of a child. This means that where a same sex couple are parents of a child, both can have guardianship of the child if they meet the criteria set down in the Act.

The Act goes further by inserting s.6B to s.6E into the 1964 Act. S.6B deals with the rights of parents who have used assisted human reproduction as a means to procreate. S.6B(1) states that a man who is the parent of a child as defined by s.5(1)(b) of the 2015 Act[10] and is married to the birth mother is an automatic guardian of that child. Where s.6B(1) does not apply, the Act

(b) the circumstances set out in subsection (3) of this section apply,
(c) the circumstances set out in subsection (4) of this section apply,
(d) the circumstances set out in subsection (4A) of this section apply, or
(e) the father is a guardian of the child by virtue of section 6D.

[10] Section 5(1) of the 2015 Act states that "The parents of a donor-conceived child who is born as a result of a DAHR procedure to which *subsection (8)* applies are- (a) the mother and, (b) the husband, civil partner or cohabitant, as the case may be, of the mother.

creates circumstances where a parent of the child together with the birth mother shall be guardian. These include:

a) where the person has entered into a civil partnership with the mother;
b) where the person has cohabited with the mother for a minimum period of twelve months including three months after the birth of the child;
c) where the person and the mother of the child concerned are declared parents under section 5;
d) where the person and the mother of the child agree to the appointment of the person as guardian of the child;
e) where the person and the mother of the child are not cohabitants but have entered into arrangements regarding custody and access to the child and
f) have made a statutory declaration to that effect in a form prescribed by the Minister.

It is quite clear that the 2015 Act significantly expands on the number of situations where automatic guardianship can be granted.

B. Non Parental Guardianship

S.6C of the 1964 Act as inserted by the new Act goes further in giving the court jurisdiction to appoint guardians where the Applicant is not a parent. Persons may be deemed eligible by the court if they are over the age of 18 and on the date of the application, he or she, is married to or in a civil partnership with or has cohabited with a parent of the child and has shared parental responsibility for the child's day to day care for a period of 2 or more years.

Alternatively, a person who, on the date of the application has provided for the child's day to day care for a continuous period of more than 12 months and the child has no parent or guardian who is willing or able to exercise the rights and responsibilities of a guardian, can apply for guardianship. In such an instance, the Child and Family Agency (hereinafter the 'CFA') must be put on notice of the application[11] and the court must have regard to the views of the CFA in deciding whether or not to accede to such an application. While initially the provisions contained in s.6C may seem quite broad, a court cannot make an order under this section without the

[11] Section 6C(4) of the 1964 Act as inserted by section 49 of the Children and Family Relationships Act, 2015.

consent of each guardian of the child, the applicant concerned and must give due regard to the views of the CFA in relation to the application. However, the court can dispense with the consent of a guardian to the making of an order, if it is satisfied that the consent of the guardian is being unreasonably withheld and it is in the best interests of the child in making the order. The court must also be cognisant of the number of guardians which the child already has and the degree in which they may be involved in the child's upbringing before appointing a further person as guardian. It should be noted that where a guardian is appointed under the jurisdiction of s.6C and both parents are alive, the person appointed will only enjoy the rights and responsibilities of a guardian if the Court expressly orders same and to the extent specified in the Order.[12] If the court decides to exercise its jurisdiction as per s.6C(9),the court must have regard to the relationship between the child and the person seeking to be appointed and the best interests of the child in the making of such an Order.

It is accepted that guardianship has been recognised by the judiciary as a very significant responsibility for a parent but up until now there has been no statutory definition of what the term guardianship entails. Section 6C (11) outlines for the first time the rights and responsibilities encompassed by conferring guardianship on a person. These include the responsibility to:

(a) make decisions on the child's place of residence;
(b) make decisions regarding the child's religious, spiritual, cultural and linguistic upbringing;
(c) decide with whom the child should live;
(d) consent to medical, dental and other health related treatment for the child, in respect of which the guardians consent is required;
(e) consent to the issuing of a passport together with other further
(f) place the child for adoption and consent to said adoption.

In appointing a non-parent guardian of a child, the court will decide which if any of the above responsibilities will apply to the guardian so appointed.

[12] Section 6C(9) of the 1964 Act as inserted by section 49 of the Children and Family Relationships Act, 2015

C. Qualifying Guardians

The concept of a qualifying guardian is introduced by section 43 of the new Act[13].A qualifying guardian is a person who is guardian of a child being the parent of the child and has custody of the said child. In addition, a person who is not the child's parent but has custody of said child to the exclusion of any living parent may also be a qualifying guardian. Such persons will have the ability to appoint other persons to temporarily act as guardians in the event of illness or incapacity.

D. Third Parties and their Entitlements

The new Act gives some third parties certain rights in respect of the children in their care. Persons who are not biologically related to children can make applications for guardianship in circumstances where the following criteria are met:

i) A person is in a relationship with a parent of a child such a step mothers/fathers, cohabitants and civil partners for more than 3 years who have shared parental responsibility for that child for 2 or more of those years;

ii) Persons who are providing day to day care for a period of more than 12 months continuously where the child has no parent or guardian willing to step up.

Both circumstances, radically increase the number of persons who may apply to the Court for guardianship of a child in circumstances where they are caring for said child. For example, a foster carer who has been given temporary care of a child because his/her parents or guardians are unwilling or unable to care for the child adequately, can make an application to be appointed guardian of said child where the child has been in his/her care for a year. It is clear that the inclusion of such entitlements for third parties will go a long way to alleviate the stress of having to come to court or seek the consent of the parents/guardians when decisions in respect of the child need to be made.

[13] Section 43 of the Children and Family Relationships Act, 2015 inserts the definition of a 'qualifying guardian' into section 2 of the Guardianship of Infants Act, 1964.

In addition, the expansion of guardianship rights to step –parents and cohabitees where they have been acting effectively in *loco parentis* for a period of two years will apply to a large variety of familial structures across the country.

Custody and Access Provisions

At the moment, s.11 of the 1964 Act provides for a mechanism whereby mothers and fathers can apply for access to their children. The Act dictates that the reference to father and mother in s.11(2) of the 1964 Act be replaced by parents. While the new provision will allow for parents to apply for access and custody to their children, parents are not required to be guardians before making an application for access.[14] However, each parent and guardian must be put on notice of each application.

The current provisions contained in s.11A of the 1964 Act allowing for a relative to apply for access to a child are significantly amended by the 2015 Act. A relative is described as being the child's grandparent, brother, sister, uncle or aunt.[15] Section 11E provides that an application can be made by a relative of the child or by a person with whom the child resides where the person is or was married to or is a civil partner or has been cohabiting with the parent of the child and has for two or more years shared parental responsibility for the child's day to day care. In addition, a person who has provided day to day care for the child in question for a continuous period of twelve months where the child has no parent or guardian who is willing or able to exercise their guardianship rights, can apply for an access or custody order from the court. This provision removes the necessity for such persons to bring a leave application to the court before making an application.[16] However, before it can make such an order, the court must have regard to all the circumstances outlined which include:

- the connection the person has with the child;
- the risk of disruption to the child's life, if any;

[14] Section 11(4) of the Guardianship of Infants Act, 1964 as amended by section 53 of the Children and Family Relationships Act, 2015

[15] Section 43 of the Children and Family Relationships Act, 2015 amends section 2 of the Guardianship of Infants Act, 1964 to include the definition of a relative as being the "child's grandparent, brother, sister uncle or aunt".

[16] Section 11 B of the Guardianship of Infants Act, 1964 states that " a person may not make an application under subsection (1) unless the person has first applied for and been granted by the court leave to make the application."

- the wishes of the child's guardian;
- the views of the child and
- whether it is necessary to facilitate access of the person in question to the child.[17]

Further, the court will not make an order under this section, without the consent of each guardian unless the court dispenses with the consent of the guardian if it is satisfied that the making of such an order is in the best interests of the child.

In respect of applications for custody for relatives and other individuals, the same requirements apply as with access.[18] Section 11E (5) allows the court to grant joint custody to a person who applies along with the child's parent and in such circumstances where the parties cannot agree, the court shall specify where the child should live and specify the contact arrangements which are to take place between the child and the person with whom he/she does not normally reside. Section 58 of the Act gives an additional power to the court in relation to applications under the Act. The court may make orders and/or conditions to protect the best interests of the child and impose conditions where the holding of a passport is concerned. In addition, the court can adjourn the proceedings of its own motion for a section 20 report at any time, if it considers there to be care or supervision issues.

Enforcement Orders

A parent or guardian who has an order for custody and/or access will now have recourse to a wide variety of remedies in order to enforce an access or custody order.[19] Any such application must be brought on notice to each parent and guardian. However, the court can only make an enforcement order where it is satisfied that:

- access and/or custody was unreasonably withheld;
- it is in the best interests of the child in question to make such an order;

[17] The considerations which the court must give are outlined in section 11B (3) of the Guardianship of Infants Act, 1964 which is not affected by the Act.
[18] Section 11E of the Guardianship of Infants Act, 1964 as inserted by section 57 of the Children and Family Relationships Act, 2015.
[19] Section 18A of the Guardianship of Infants Act, 1964 (as inserted by section 60 of the Children and Family Relationships Act, 2015)

- it is appropriate in all the circumstances to make an order.[20]

The new remedies available to a party applying for an enforcement order are provided for in section 18A(4) of the 1964 Act (as amended) and include the following:

- the court can give the applying party additional access in lieu of access which was withheld, if there has been adverse effects on the Applicant's relationship with the child in question;
- the court can order that the Respondent reimburse the Applicant for any necessary expenses actually incurred in attempting to exercise his/her right under the order for custody and/or access;
- In addition, the court can order that either party or both to do one of the following in order to ensure future compliance with the order namely, attend a parenting programme, family counselling and/or mediation.

The introduction of the above sanctions available to the court may go some way to alleviate the problem of individuals acting in defiance of court orders believing the court will not incarcerate them from doing so. The penalty for additional expenses incurred by the applying party might serve as an added deterrent as more often than not parties are persuaded to act in accordance with court orders to prevent monetary sanctions.

Despite the insertion of the aforementioned enforcement mechanisms, the court cannot make an enforcement order for additional access in lieu of any withheld access unless:

a) the child has had an opportunity to give his/her views to the Court;
b) the court has taken views, if any, of the child into account in making the order.[21]

If the court is of the opinion that the denial of access was reasonable in the particular circumstances, it may refuse to make an enforcement order or make such an enforcement order as it considers appropriate. The above enforcement provisions are available without prejudice to

[20] Section 18A(3) of the Guardianship of Infants Act, 1964 as inserted by section 60 of the Children and Family Relationships Act, 2015.
[21] As per Section 18A(5) of the Guardianship of Infants Act, 1964 as inserted by section 60 of the Children and Family Relationships Act, 2015

the law as to contempt of court.[22] The court also has the power to vary or terminate an enforcement order under section 18C of the 1964 Act.

Strangely, the Act introduces a new regime for persons who seek access/custody and fail to exercise their right to same. Section 18D of the 1964 Act gives a parent/guardian the right to apply to the court for an order requiring the other/parent or guardian to reimburse any necessary expenses actually incurred as a result of the other parent/guardian failing to exercise their right to custody/access where a court order was sought to that effect. The aforementioned expenses include travel expenses, lost remuneration and any other expenses that the court may allow.

Compensatory Access

Recently, the Court of Appeal in *MM v. GM*[23] dealt with the issue of compensatory overnight access in recognition of access lost as a result of one parties' refusal to allow overnight access. The matter came before the Court of Appeal by way of appeal of an Order of White J to suspend overnight access for a period of months due to a fractious and war like relationship between the parties and further Ordered that no applications were to be made in respect of the case before the case came back before him on the adjourned date. The husband GM, appealed the making of the Order to the Court of Appeal. Kelly J found that the trial judge acted fully within his jurisdiction under the Guardianship of Infants Act, 1964 to suspend overnight access for a period of time having heard oral evidence from Professor Sheehan and on the basis of the Affidavit evidence before him. However, Kelly J found that:

> Without in any way trespassing upon the jurisdiction of the trial judge when the matter comes before him next month it would seem appropriate that consideration be given to the question of more generous overnight access being granted with GM than was originally contemplated so as to compensate the children for the loss of appropriate access that they have suffered to date. [24]

[22] Section 18A(6) of the Guardianship of Infants Act, 1964 as inserted by section 60 of the Children and Family Relationships Act, 2015
[23] *MM v. GM* [2015] unreported decision (Court of Appeal), 23rd February, 2015
[24] *Ibid* at para. 40.

The ability of the family law courts to enforce access/custody Orders can at times be ineffective. Presently, the Court can make compensatory access orders or transfer custody to the other party if the court believes that in doing so it is acting in the best interests of the child as per s.3 of the 1964 Act, where a party has willfully withheld access for no valid reason. The above case provides an illustration as to the circumstances when a court might think it appropriate to do so.

Best Interests of the Child

An overriding concept of the new Act is the best interests of the child. S.63 of the Act introduces Part V to the 1964 Act which deals with the best interests of the child. The section specifies that where a court is making a determination under the new Act, the court shall have regard to all the factors or circumstances which are relevant to the child and the family before making a decision.

The aforementioned factors include:

a) the benefit to the child of having a meaningful relationship with his/her parents, relatives and other persons;
b) the views of the child;
c) the physical, psychological and emotional needs of the child and the effect a change in circumstances will have on that child;
d) the child's social needs;
e) the child's age and special characteristics;
f) any harm which the child has suffered or at risk of suffering;
g) the willingness and ability of each child's parents to facilitate a relationship with others;
h) the capacity of each person to care for the child.

Under Part V of the 1964 Act (as inserted), if there is domestic violence within the home, the court must give special consideration to same.[25] Family violence includes behavior of the parent or guardian including attempts to cause physical harm to the child. Where the safety of the child and other members of the family are in question, the court must look at the likely impact of same

[25] Section 31(3) of the Guardianship of Infants Act, 1964 as inserted by section 63 of the Children and Family Relationships Act, 2015.

on the child. The conduct of parents may be considered in the limited context of where it is relevant to the child's welfare and best interests.

So what does this mean? The best interests test means that any court in determining any issues in respect of the child must consider the effect any decision will have on the child having regard to the various criteria above. The effects of the test on the courts time and the courts infrastructure will not be known until such time as the section is commenced. However, I think that it is safe to say that the court will have to give serious consideration to the welfare and wellbeing of any child in accordance with the above criteria, before the court can make a decision. The test states that the Court shall have regard to *all of the factors or circumstances* which are relevant to the child concerned and his/her family. The recognition of the possible effect of domestic violence on a child's wellbeing and the impact of any such violence on the child goes someway to appreciate the possible impact domestic violence can have on children. It remains to be seen whether the courts will strictly apply the best interests test or whether it will act as more of a guideline when decisions are being made.

The decision of the Supreme Court to uphold the result of the Children's Referendum as valid will no doubt also have an impact on how Judges deal with the views of children in future applications. Article 42A.4.1 will state as follows:

> Provision shall be made by law that in the resolution of all proceedings -
> i brought by the State, as guardian of the common good, for the purpose of preventing the safety and welfare of any child from being prejudicially affected, or
> ii concerning the adoption, guardianship or custody of, or access to, any child,
> the best interests of the child shall be the paramount consideration.

For the first time, the rights of children will be recognised as being the most important. The enactment of the 2015 Act will strengthen the position of children in the courts system whereby the judiciary will be bound to ensure that the welfare of children is the most important consideration ahead of any rights of the child's parents or indeed of any person asserting a right to have access, custody or guardianship.

Section 47 Report

The existing provisions in the Family Law Act, 1995 and the Family Law (Divorce) Act, 1996 pertaining to section 47 reports are not amended or repealed. The Act does however enact a section dealing more extensively with section 47 reports. S.32(6) states that a court shall facilitate free expression by a child and ensure that the views of the child are not as a result of undue influence exerted upon the child and may make an order under section 32 which deals with the appointment of an expert to assist in the expression of the child's wishes.

Section 32 of the 1964 Act (as inserted by s.63 of the 2015 Act) allows the court to order an expert report where the welfare of the child is at issue, either by its own motion or by request of either party. In deciding whether to make such an order, the court must have regard to:

- the age and maturity of the child;
- the nature of the issues in dispute;
- any previous report pertaining to the welfare of the child in question;
- best interests of the child;
- if the making of an order will assist expression of the child's views;
- the views of the expert in the report.[26]

In a change to the current provisions relating to a section 47 report, the Minister may specify the minimum qualifications for experts and the fees and allowable expenses which may be charged by said expert. In addition, the court can determine who bears the cost of the report and what fees are allowable for same. Any report obtained should be made available to the parties concerned and to the child, if the child is not a party to the proceedings, but if the child is to receive a copy of the report the court should have regard to the provisions in section 32(5) of the 1964 Act.[27]

[26] Section 32(3) of the 1964 Act as inserted by section 63 of the Children and Family Relationships Act, 2015

[27] Section 32(5) of the 1964 Act as inserted by section 63 of the Children and Family Relationships Act, 2015 states that:

"In determining whether a report obtained under subsection (1)(a) should be furnished to the child to whom it relates, the court shall have regard to the following:

(a) the age and maturity of the child and the capacity of the child to understand the report;
(b) the impact on the child of reading the report and the effect it may have on his or her relationship with his or her parents or guardians;
(c) the best interests of the child;
(d) whether the best interests of the child would be better served by the furnishing of the report to the parent, guardian, next friend of the child or an expert appointed under subsection (1)(b), rather than to the child himself or herself.

Maintenance

The new Act brings changes in respect of maintenance for cohabitees. S. 73 of the new Acts inserts s.5B into the Family Law (Maintenance of Spouses and Children) Act, 1976 which addresses maintenance for children of cohabitants. In circumstances, where a cohabitant is not the parent of the dependent child but is appointed guardian under s.6C of the Guardianship of Infants Act (as amended), the other cohabitant may make an application to the court for maintenance in respect of that dependent child. The court must have regard to all the circumstances before making a determination as to the amount of any payment. In addition, the jurisdiction of the District Court to award maintenance for dependent children, now includes a provision to order a lump sum to the maximum value of €15,000 in line with the monetary jurisdiction of the District Court in general civil actions.

While the 2015 Act provides many changes to existing family law legislation, it also introduces some new concepts.

A. Definition of Guardianship

The Children and Family Relationships Act, 2015 creates some new novel ideas. For the first time, the rights and responsibilities attaching to guardianship have been placed on a statutory footing. The insertion of s.6C of the Guardianship of Infants Act, 1964 sets out such rights and responsibilities at s.6C(11) as being:

(a) to decide on the child's place of residence;
(b) to make decisions regarding the child's religious, spiritual, cultural and linguistic upbringing;
(c) to decide with whom the child is to live;
(d) to consent to medical, dental and other health related treatment for the child, in respect of which a guardian's consent is required;
(e) under an enactment specified in subsection (12);
(f) To place the child for adoption, and consent to the adoption of the child, under the Adoption Act 2010.

This provides a clear road map for what is entailed in an order for guardianship.

B. Temporary Guardianship

The Act goes a step further and provides for parents to appoint temporary guardianship to a nominated person in certain circumstances. This is a new concept whereby a qualifying guardian may nominate a person to be a temporary guardian in the event that the qualifying guardian becomes incapable through serious illness or injury of exercising his/her rights and responsibilities of guardianship.[28] The nomination must be in writing and specify such limitations, if any, as the qualified guardian wishes to impose as per s.6E(2) of the 1964 Act(as amended).

There is a proviso that where a qualifying guardian or a nominated person is of the opinion that the other is incapable through serious illness or injury of exercising the rights and responsibilities of guardianship, either may apply to the court for an order under this section.[29] Such an application must be on notice to each guardian, nominated person, any parent who is not the child's guardian and the Child and Family Agency. This will allow either a qualified guardian or a temporary guardian to make an application to court to remove the other from acting as a guardian. It is important to note that s.6E(6) states that the court may make an order appointing a nominated person as a temporary guardian of a child only where it is satisfied that:

a) the qualified guardian is incapable as a result of serious illness or injury of exercising the rights and responsibilities of guardianship;
b) the nominated person is a fit and proper person;
c) it is in the best interests of the child.

The court in making any such order may impose limitations or conditions for periodic review by the court as it sees necessary and in the best interests of the child.[30]

B1. The Power of Parents to Appoint Testamentary Guardians

[28] Section 6E of the Guardianship of Infants Act, 1964 as amended by section 49 of the Children and Family Relationships Act, 2015.
[29] *Ibid* at section 6E(3) of the 1964 Act.
[30] Section 6E(12) of the Guardianship of Infants Act, 1964 as inserted by section 49 of the Children and Family Relationships Act, 2015

Section 50 of the 2015 Act provides for the powers of parents to appoint testamentary guardians. Upon the death of a guardian, the surviving guardian (if any) will be the guardian of the child either solely or jointly with a person appointed testamentary guardian by the deceased or by guardian(s) appointed by the court.

A testamentary guardian may be appointed by deed or will by a guardian who is a parent of the child or not a parent but has custody of the child to the exclusion of any living parent.[31] If the aforementioned guardian dies, the testamentary guardian will act jointly with any surviving guardian of the child so long as the surviving guardian remains alive. It is possible for the surviving guardian to object to the testamentary guardian acting jointly with the surviving guardian or for the testamentary guardian to consider the surviving guardian is unfit to have custody of the child and in such instances either party can apply to the court for an order under this section.[32]

If either party seeks an order from the court in the above situation, the court may make an order that either:

a) the appointment of the testamentary guardian is revoked and the surviving guardian shall remain the guardian of the child; or
b) the testamentary guardian must act jointly with the surviving guardian; or
c) the testamentary guardian shall act as guardian of the child to the exclusion of the surviving guardian to the extent in which the court deems proper.

The aforementioned provisions give great scope for the courts to deal with any disputes in relation to testamentary guardianship.

C. Donor Assisted Human Reproduction

The new Act deals extensively with the introduction of Donor Assisted Human Reproduction (hereinafter referred to as "DAHR") and the regulation of same. Part 2 of the 2015 Act deals

[31] Section 7 (3) of the Guardianship of Infants Act, 1964 as amended by section 49 of the Children and Family Relationships Act, 2015
[32] Section 7 (4) of the Guardianship of Infants Act, 1964 as amended by section 49 of the Children and Family Relationships Act, 2015

with the regulation of DAHR and stipulates that DAHR is a procedure performed within the State with the objective of implantation of an embryo in the womb of a woman where:

- one of the gametes is from a donor;
- each gamete is from a donor;
- the embryo was provided by a donor.[33]

A donor conceived child is defined as a child born within the State after the commencement of the section, as a result of DAHR or a child to whom a person has been declared to be his/her parent under ss. 21 or 22.[34]

Section 5 of the Act states that the parents of a child conceived via DAHR are the mother of the child and her husband, civil partner or cohabitant as the case may be. Section 5(2) specifically notes that the donor of an embryo or a gamete used in DAHR is not the parent of any resulting child and as a consequence of same has no such parental rights or responsibilities. The mother of a child born as a result of a DAHR procedure will be the birth mother and not the woman who provided the genetic material. This provision provides clarity for couples seeking the services of a surrogate who are willing and able to provide their own genetic material, like the couple in the case of *MR v. an tArd Chlaritheoir* [35].

In that case, a married couple who were unable to bear their own children due to the wife's gestational issues sought the help of the woman's sister who agreed to become a surrogate. The genetic material of the intended parents was artificially inseminated into the surrogate, who became pregnant with twins. Upon the birth of the twins, the couple were immediately given the twins by the surrogate, who saw herself as no more than a surrogate and genetically, the children's aunt. The only matter at issue before the High Court was the refusal of An tArd Chlaraitheoir to recognise the genetic mother as the legal mother of the children. In High Court, the State argued that the birth mother was the legal mother and that the maxim *mater simper certa est* applied. The Applicants argued that maternal certainty was no longer available given

[33] Section 4 of the Children and Family Relationships Act, 2015
[34] *ibid*
[35] [2013] IEHC 91

the development of IVF. Abbott J in the High Court found in favour of the Applicant and declared the genetic mother to be the legal mother.

The case was appealed to the Supreme Court by the State. The Supreme Court upheld the appeal and found that the law remained unchanged to the extent that the gestational mother was indeed the legal mother until the legislature determined otherwise. Perhaps the most damning of the judgments given by the Supreme Court was that of Mr. Justice Hardiman where he stated that there was a "serious disconnect between what developments in science and medicine render possible on one hand and the state of law on the other".[36] The legislature has now enacted the 2015 Act which deals with the issue of IVF and parentage arising from same. The parents of a child born via DAHR are the birth mother and her partner, if relevant. It is just a pity that the issue of surrogacy has yet to be addressed by the legislature in any meaningful manner.

One of the significant changes made by the 2015 Act is the prohibition of the use of anonymous egg and sperm donation. The Act deals extensively with consent to the use of donor sperm or eggs. In general, as per s.6 of the Act, a person consents where he/she has reached the age of 18 years, has received the information as detailed by s .7 of the Act and makes a declaration before any donation is made which is in writing, signed, dated and is witnessed. In addition, any donor must consent to his/her information being held and state that they are aware they are not the parent of any resulting child. Further, he/she must consent to the recording of their personal details on a Register of Information and understands that a child born as a result of DAHR may seek to contact the donor.

Section 7 of the Act sets out the information which must be provided to the donor before he/she provides any samples, these include:

- the donor is not the parent of any resulting child;
- the donor consents to their information being held;
- the donor understands that a child may seek to contact him/her
- it is desirable that the donor keeps his/her information updated on the Register;
- there is a right to revoke consent under section 8 of the Act.

[36] Judgment 7th of November, 2014, pp. 2-3

However, the ban on anonymous donations provides serious issues for IVF clinics who are currently operating on the basis of being unregulated and thus using sperm and eggs from anonymous donors. It seems it was the existence of such clinics and the operations of same which led the legislature to provide for instances where the Act will act retrospectively for children born as a result of DAHR before the commencement of the s.20 of the Act. The Act makes provision for parents to seek declarations of parentage in respect of children born within the State and children born as a result of DAHR before s.20 comes into effect, where said DAHR procedure was performed either within the State or outside the State where it was legal in the State in which the procedure was performed. There is a caveat that the person(s) applying for a declaration pursuant to this section must have been the intended parent of the child at the time of the procedure.[37]In addition, the donor must have been anonymous and not the intending parent of the child.[38]

Children born prior to s.20

Parents can seek said declarations of parentage in the District Court or Circuit Court. In relation to the District Court, the mother and an intending parent can apply jointly to the court for a declaration of parentage. Where the child in question has reached the age of 18, he/she must be put on notice of the application and joined as a party to the proceedings. The application is brought by Notice of Motion and Grounding Affidavit with the affidavit stating that:

1. the child falls within the scope of section 20;
2. the Applicant was at the time referred to in section 20(1)(c) an intended parent and;
3. he/she consents to the declaration being made.[39]

The court may direct that the papers are sent to the Attorney General and in deciding upon making the declaration, the court shall give the child an opportunity to make his/her views known to the court and have regard to said views with respect to the child's age and understanding.

[37] Section 20(1)(c) of the Children and Family Relationships Act, 2015
[38] Section 20(1)(d) of the Children and Family Relationships Act, 2015
[39] As specified in section 21(4) of the Children and Family Relationships Act, 2015

An application can be made to the Circuit Court for a declaration as to parentage by, the child, mother of the child or the relevant person. Given that said application is not a joint application between the mother and the other intended parent, evidence is required that section 20 applies to the child in question and that the relevant person was the intended parent to said child.[40] It is for the applicant to prove on the balance of probabilities that the relevant person is the intended parent as per section 20(6) of the Act. However, the court will not make a declaration where it is satisfied that to do so would not be in the best interests of the child where he/she has not attained the age of 18 or where the making of such a declaration would be contrary to the interests of justice. The effect of such a declaration will be that the relevant person is deemed a parent under s.5 and that the donor of the genetic material is not the parent of the child and therefore has no parental rights or responsibilities.[41] Also, the declaration may have an effect on the succession rights of all parties concerned in bringing such an application.

The Regulation of IVF Clinics

Part 3 of the Act deals with the regulation of DAHR clinics which to date remain unregulated. Any such clinic must now seek certain information from donors including their name, date of birth, nationality, contact details and the date of donation before the genetic material of said donor can be used.[42] In addition, the person carrying out such a procedure must be a registered medical practitioner or a registered nurse. Similarly, the intending parents must provide their name, date of birth, address and contact details together with their consent and the express consent of their partner, if applicable.[43]

The use of anonymous donors is no longer permitted in Ireland.[44] The Act makes it an offence for a clinic to allow IVF treatment using genetic material of anonymous donors going forward. Failure to comply with said provisions could result in criminal sanctions being imposed by the

[40] See section 21(4) of the Children and Family Relationships Act, 2015
[41] See section 23 of the Children and Family Relationships Act, 2015
[42] As per section 24(3) of the Children and Family Relationships Act, 2015.
[43] Section 25(3) of the Children and Family Relationships Act, 2015
[44] Section 26(1) of the Act states that "The operator of a DAHR facility shall not use or permit to be used in a DAHR procedure a gamete provided by a donor unless- (a) the gamete has been acquired in accordance with *section 24(1)*, and the donor of that gamete- (i) has consented under *section 6* to the use of the gamete in a DAHR procedure, or (ii) where the gamete is acquired from outside the State, has consented to the use of the gamete in a DAHR procedure, where that consent is substantially the same as that provided for in *section 6*."

court. Section 31 of the Act outlines a sanction of a fine or a maximum of 12 months imprisonment upon summary conviction and on indictment, a maximum fine of €70,000 or a maximum of two years imprisonment or both. Given the possible criminal sanctions for those clinics allowing the continuing use of anonymous genetic material, the Minister for Justice has indicated that Parts 2 and 3 of the Act will not be commenced for a period of one year in order to given the IVF clinics an opportunity to make changes to their existing businesses so to comply with the new Act.

The National Donor-Conceived Person Register

Section 33 of the Act provides for the Minister for Health to establish and maintain a register to the known as the National Donor-Conceived Person Register (hereinafter referred to as 'the Register'). It will hold details of each child born as a result of DAHR. Each entry will contain the name, date of birth, address of the child, the details of the clinic, the parent's information and the donor's information. S.34 makes provision for a child over the age of 18 or for the parent of a child under the age of 18 to request information from said Register. Section 32(1) states that information other than the relevant donor's name, date of birth and contact details may be sought from the information recorded on the Register including the number of children born as a result of the genetic material donated by the donor with particular details pertaining to the child's sex and year of birth. The donor is also entitled to request such information if he so chooses.

If a child seeks the release of the aforementioned information from the Register under section 35(1) of the Act, the Minister shall notify the donor if a request is received from the child and release the information sought 12 weeks later to the child unless the donor sets out why the safety and well being of the donor/child or both requires the information not to be released. A person can appeal to the Circuit Court, if the release of said information is refused. An appeal must be entered within 21 days of the notification of the decision. Any such appeal will be heard *in –camera* and be made on notice to the Minister.

The Minister for Health will inform An tArd Chlaratheoir that there is information held on the National Register for each child born as a result of donor material. This will mean that where a child requests a copy of his/her birth certificate, he/she must be told that there is further information held about them, if the child is over the age of 18.

The use of a National Register may give rise to increased reproductive tourism where couples do not want to take the risk that the donor of the genetic material used to conceive their child may come out of the woodwork in years to come. Some may travel to other jurisdictions where the use of anonymous donations is available in order to avoid the possibility of an unwanted addition to their family in years to come.

Conclusion

In general, the Act makes sweeping reforms to guardianship, adoption and assisted human reproduction. In relation to guardianship, the reforms represent welcome changes to an area of law which has long since provided protection for families of the Goldilocks variety with no recognition for families akin to those who grow up in family arrangements like Snow White. The extension of guardianship to relatives and non relatives of a child represents a recognition of the care given to children by non genetic parents and persons acting in *loco parentis*. In addition, the enforcement provisions provide the courts with additional necessary tools to ensure individuals are not maliciously withholding access from the other parent and to impose sanctions on those not complying with court orders. The regulation of IVF clinics and procedures is a welcome development but the introduction of a National Register may result in possibly driving more couples abroad than at present to places where the donors remain anonymous. The recent passing of the Referendum to allow for same sex marriage clearly demonstrates that Ireland truly is ready to embrace the idea of the modern family, at last.