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# Relate

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The journal of developments in social services, policy and legislation in Ireland

## Children and Family Relationships Act 2015

The Children and Family Relationships Act 2015 has been passed. It is expected that its provisions on adoption, guardianship and custody will come into effect in the near future. Its provisions in relation to assisted human reproduction will not come into effect for at least a year. The General Scheme of the Bill was described in the October 2014 issue of *Relate*. The Act differs from that General Scheme in a number of respects. The Act is long and complex. Here we outline its main aspects.

### Adoption

At present, a married couple may jointly adopt a child. Single people may also adopt but two single people may not jointly adopt. The Act provides that civil partners and cohabiting couples may jointly adopt a child. This is expected to come into effect in the near future.

No one has a right to adopt. The primary consideration in adoption is always the best interests of the child. In practice, there are very few adoptions in Ireland at present. There were 49 adoption orders made in 2012. In 2013, there were 116 adoption orders of which 86 were adoptions by a birth parent and their spouse. There were 83 adoption orders granted in the period January 2014–September 2014.

### Guardianship, custody and access

The General Scheme of the Bill proposed to repeal the Guardianship of Infants Act 1964, re-enact some of its provisions and replace others. The Act does not repeal the 1964 Act but does make a number of changes to it.

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The Act requires the child's best interests to be the paramount consideration in any decisions on guardianship, custody and access. In all cases the views of the child must be taken into account if the child is in a position to express views.

The Act gives additional powers to the courts in any applications under it. The court may impose such conditions as it considers necessary in the best interests of the child. For example, it may impose conditions on the holding of the child's passport – who may hold it and where it may be held.

### ***Application to become a guardian***

The Act provides that a step-parent, a civil partner or a person who has cohabited with a parent for not less than three years may apply to the court to become a guardian where they have co-parented the child for more than two years.

A person who has provided for the child's day-to-day care for a continuous period of more than a year may apply for guardianship if the child has no parent or guardian who is willing or able to exercise the rights and responsibilities of guardianship. So, for example, a grandparent or a foster parent could apply.

If the court appoints a guardian to a child where one or both parents are alive, the guardian will not generally have the right to make certain major decisions about the child unless that right is expressly granted by the court. The main decisions involved are:

- Where the child should live and with whom
- Decisions about the child's religious, spiritual, cultural and linguistic upbringing
- Consents to medical, dental and other health-related treatment for the child
- Placing the child for adoption or consenting to the child's adoption

### ***Temporary guardians***

The Act allows for the appointment of a temporary guardian if the parent is suffering from a serious illness or injury which prevents them from exercising guardianship responsibilities in respect of the child.

### ***Unmarried fathers and guardianship***

The Act provides that an unmarried father will automatically be a guardian if he has lived with the child's mother for 12 months, including at least three months with the mother and child following the child's birth. The period of cohabitation can take place at any time before the child turns 18 years old.

Previously unmarried fathers did not automatically acquire guardianship rights. There were two mechanisms available to them to do so and these will continue to exist:

- The father and mother may each sign a statutory declaration to the effect that he is the father; having the father's name on the birth certificate is not, in itself, enough to give him guardianship rights; the statutory declaration must also be made and signed
- An application may be made to the court for guardianship

Under the Act, a new arrangement will be put in place whereby unmarried parents may sign the statutory declaration when registering or re-registering the child's birth. (A birth may be re-registered if the parents were not married to each other, did not record the father's details at the time of registration and now want to record those details. It may also be registered if the parents marry each other after the child's birth has been re-registered.)

At the point of registration of the child's birth, the unmarried parents will be told that the inclusion of the father's name on the birth certificate does not in itself confer guardianship. The couple will be given a copy of the statutory declaration. It will be possible for them to sign the declaration in the presence of a registrar, at no charge, either at that time or within a fortnight. They may also make this declaration at a later time.

Registrars will have the authority to witness statutory declarations for guardianship.

Before signing the statutory declaration, parents were required to have made arrangements in relation to custody of, and access to, the child. This requirement is being removed. The Department of Justice and Equality intends to review the operation of these arrangements within two years.

It is intended to establish a voluntary depository into which parents can put copies of their statutory declarations. Ultimately, a central register may be established.

At present, when registering a birth, it is not compulsory to register the name of the father if the parents are not married to each other. The Civil Registration (Amendment) Act 2014 provides that it will be compulsory to register the father's name except where there are compelling reasons not to do so (see *Relate*, February 2015). This is not yet in effect.

### ***Custody***

The Act provides that a parent's spouse or civil partner, or a parent's cohabitant of not less than three years' duration, can apply for custody where they shared parenting of the child for two years.

A person can apply for custody if they have parented the child for a year and if there is no parent or guardian willing or able to exercise the powers and responsibilities of guardianship.

## Access

The two-stage procedure for relatives such as grandparents to get a court order for access is being reduced to one stage.

## Enforcement

The Act provides for enforcement orders in cases where orders for custody or access have been made and such custody or access has been unreasonably denied by another parent or guardian.

Enforcement orders may impose various requirements, for example, they may require that:

- The parent who has been refused access or custody may get longer periods of such access or custody
- The parent be reimbursed for any expenses incurred in trying to enforce their rights
- One or both parents engage in mediation or counselling

## Deciding the best interests of the child

The Act sets out the factors which the courts must consider when deciding on the best interests of a child. It provides that the court must have regard to all of the factors or circumstances that it regards as relevant to the child concerned and their family.

These factors and circumstances include:

- The benefit to the child of having a meaningful relationship with each parent and with the other relatives and people who are involved in the child's upbringing and, except where such contact is not in the child's best interests, of having sufficient contact with them to maintain such relationships
- The views of the child concerned if they can be established
- The physical, psychological and emotional needs of the child concerned, taking into consideration the child's age and stage of development and the likely effect on them of any change of circumstances
- The history of the child's upbringing and care, including the nature of the relationship between the child and each of the parents and other relevant people and the desirability of preserving and strengthening such relationships
- The child's religious, spiritual, cultural and linguistic upbringing and needs
- The child's social, intellectual and educational upbringing and needs

- The child's age and any special characteristics
- Any harm which the child has suffered or is at risk of suffering, including harm as a result of household violence, and the protection of the child's safety and psychological well-being
- Where applicable, proposals made for the child's custody, care, development and upbringing and for access to and contact with the child, having regard to the desirability of the parents or guardians of the child agreeing to such proposals and co-operating with each other in relation to them
- The willingness and ability of each of the child's parents to facilitate and encourage a close and continuing relationship between the child and the other parent, and to maintain and foster relationships between the child and their relatives
- The capacity of each person in respect of whom an application is made to care for and meet the needs of the child; to communicate and co-operate on issues relating to the child; and to exercise the relevant powers, responsibilities and entitlements to which the application relates

## Getting the view of the child

The court is required to facilitate the free expression of the child's views and to ensure that those views are not expressed as a result of undue influence.

In any proceedings relating to the guardianship, custody or upbringing of, or access to, a child, the court may order an expert report on any question affecting the welfare of the child and/or appoint an expert to find out and convey the child's views.

## Maintenance

The Act provides that the court may make maintenance orders requiring the cohabiting partner of a child's parent to make payments towards the maintenance of the child. A maintenance order may be made against a cohabitant who is not the parent of the child in question but has been appointed a guardian.

## Succession

Children have no automatic right to inherit from their parents under a will but they may apply to court if they consider that proper provision has not been made for them. The court may order that some provision be made for a child or children from the estate of the deceased. Such an order cannot reduce the entitlement of a spouse to a legal right share or the share on intestacy but it can reduce the entitlement of a civil partner. This will continue to be the case except in those cases where the surviving civil partner is the parent of the child. (This may

arise when the assisted human reproduction rules come into effect – see below.)

## Presumption of paternity

The presumption that a woman's husband is the father of the child will no longer apply if the child is born more than 10 months after they separated.

## Assisted human reproduction

The Act deals with assisted human reproduction but not with surrogacy. Legislation on surrogacy is being drafted by the Department of Health and it is expected that it will be published later this year.

The provisions in relation to donor-assisted human reproduction will not be commenced for at least a year after the Act was passed – so not before April 2016. This is to protect couples who are currently undergoing fertility procedures. The Minister for Health will have responsibility for commencing these provisions and preparing the necessary regulations.

### *Parentage in cases of donor-assisted human reproduction*

This Act does not change the basic rule that the birth mother is the legal mother of the child. This was reaffirmed by the Supreme Court in *M.R. and D.R. & others -v- An t-Ard-Chlaraitheoir & others*.

[courts.ie/Judgments.nsf/597645521f07ac9a80256ef30048ca52/E238E39A6E756AB480257D890054DCB6?opendocument](http://courts.ie/Judgments.nsf/597645521f07ac9a80256ef30048ca52/E238E39A6E756AB480257D890054DCB6?opendocument)

In this case, the Supreme Court ruled that the birth mother is the legal mother of the child. This is the rule in all cases including where the child is a donor-conceived child and the birth mother has no biological connection to the child.

The Act provides for determining the status of the intending second parent of a donor-conceived child.

At present, there is a legal presumption that the mother's husband is the father of a donor-conceived child even if the husband has no biological connection to the child. This presumption can be rebutted. The Act aims to provide for civil partners and cohabitants to be a legal parent of the child. This person is known as the "intending parent".

The parents of a donor-conceived child will be the birth mother and her husband, civil partner or cohabitant (intending parent) provided the mother and the intending parent have given the necessary consents in advance. Otherwise the mother alone is the parent of the child.

A donor is not a parent and has no parental rights or responsibilities in respect of the child.

When the legislation is in effect, the intending parent will be regarded as a legal parent if the following conditions are met:

- The donor-assisted human reproduction took place in a clinical setting.
- The birth mother and the intending second parent consented in advance to being the parents of any child born through donor-assisted human reproduction, and
- The donor also consented in advance of the procedure to not being a legal parent of the child and to a number of other conditions

### *Retrospective recognition of parentage*

The Act allows for retrospective recognition of the parentage of certain donor-conceived children. Where a child was born in Ireland as a result of donor-assisted human reproduction treatment carried out before the Act comes into effect either in Ireland or in a country where the procedure is regulated, an application may be made to the courts for a declaration of parentage. There are a number of conditions to be met including that the intending parent was the intending parent at the time of conception and that nobody other than the mother and the intending parent is recorded as a parent on the birth register.

The mother and the intending parent may jointly apply to the District Court for a declaration that the intending parent is the parent of the child. The child will be joined as a party to the proceedings – that means that the child may be separately represented. The child's views will be taken into account if they are in a position to express views. In certain circumstances, the Attorney General may also be involved in the proceedings. A declaration may be granted if the court is satisfied that the conditions are met and, if the child is aged under 18, such a decision is in the best interests of the child.

The mother, the intending parent or the child may apply to the Circuit Court to have the intending parent declared a parent. Again, the child will be joined in the proceedings and their views will be heard if appropriate. The Circuit Court may refuse a declaration where it is satisfied that to do so would not be in the best interests of the child (where the child is aged under 18) or it would be contrary to the interests of justice.

Such a declaration means that the intending parent has the rights and responsibilities of a parent from the date of the declaration. The donor is not a parent and has no parental rights or duties in respect of the child.

If such a declaration is granted, the child's birth may be re-registered.

## **Donors**

A donor must be at least 18 years old. They must:

- Have been informed about the legal consequences of donating and of the rights of any child born as a result of the donation
- Give consent in writing before the donation is made
- Sign a declaration that they understand the process and understand that they will not be a parent to any child born as a result
- Consent to information about them being provided for the purposes of the register (see below)
- Declare that they understand that the child may access the information on the register and try to contact them

A donor's consent may be restricted to the use of a donation by a specific parent or parents. A donor may withdraw consent but that does not change the situation which applies if the donation has already been used.

Donors may be paid reasonable expenses. The consent of a donor will not be regarded as valid if financial compensation other than reasonable expenses is given. Reasonable expenses mean the donor's travel costs, medical expenses and any legal or counselling costs.

Donors must provide their name, date and place of birth, nationality, the date and place where the donation occurred and contact details. In effect, anonymous donations will no longer be possible.

## **Parents' consent**

The intending mother must be at least 21 years old. She must consent to the information being provided on the register and to the husband, civil partner or cohabitant being the other parent.

The intending parent must also be 21 years old and give the required consents.

## **Facility providing the procedure**

The Act sets out the detailed rules under which donations may be made.

The facility providing the assisted human reproduction procedure must collect information about the donor, the mother and any intending parent. This includes information such as names, dates of birth, addresses and contact details. It must also arrange for the required information to be provided to the parents and the donor and must ensure that the appropriate consents are provided. The facility must retain detailed information on the parents, donors and consents.

All involved must understand that this information will be provided to the National Donor-Conceived Person Register. They must also understand that the child may access the information from the age of 18 and may try to contact the donor. The Minister for Health has various powers to ensure that facilities are in compliance with the legislation.

## **National Donor-Conceived Person Register**

The Minister for Health will establish and maintain the National Donor-Conceived Person Register. This register will contain information about the child, the parent (s), the donor and the facility where the procedure took place. The child, the parents and the donor have different rights of access to the information on the register. In all cases, the Minister must be satisfied that the child or the donor has received counselling on the implications of providing or seeking the information.

## **Child or parent access**

A child who is aged 18 or over, or the parent of a child who is aged under 18, may ask for the following information from the register:

- Information about the donor that has been recorded, other than their name, date of birth and contact details
- The number of children who have been born as a result of the donor's donation and the sex and year of birth of each child.

The Minister must provide this information.

A donor-conceived child who is aged 18 or over may ask for the name, date of birth and contact details of the donor.

The Minister must then tell the donor of the request and that the information will be provided after 12 weeks unless the donor makes representations to the Minister setting out why the safety of the donor or the donor-conceived child, or both, requires that the information not be released.

If such representations are made, the Minister may withhold the information from the child or release the information. A donor-conceived child may appeal the withholding of the information to the Circuit Court. There is no provision for an appeal by a donor against a decision to release the information.

## **Donor access**

A donor may ask for information about the number of children born as a result of their donation and the sex and year of birth of each child.

The Minister must provide this information.

A donor has no absolute right to access information about a child. However, a donor-conceived child who is aged 18 or over may ask the Minister to put information about themselves on the register. If the donor then asks for that information, it will be provided unless the child objects. Similar arrangements apply if a donor-conceived child wants information about another donor-conceived child who is the biological child of the same donor.

## Social Welfare (Miscellaneous Provisions) Act 2015

The Social Welfare (Miscellaneous Provisions) Act 2015 provides for a number of social welfare changes. The following are the main changes.

### Back to Work Family Dividend

The Act provides for the Back to Work Family Dividend (BTWFD) which was announced in the Budget. It means that the Increase for a Qualified Child (IQC) which is payable with social welfare weekly payments may be retained by certain people if they take up employment or self-employment. The current level of the IQC is €29.80 a week for each child.

It is payable to people with children who have been long-term unemployed or receiving the One-Parent Family Payment (OFP) and who return to work. They must sign off all social welfare payments except Family Income Support (FIS), Domiciliary Care Allowance and Child Benefit. They are paid the equivalent of any Increases for Qualified Children that were being paid on their jobseeker or OFP (up to a maximum of four children) for the first year in employment. Half that amount will be paid weekly for the second year.

It can also be paid to a person who was getting an Increase for a Qualified Adult with their payment if their qualified adult finds work provided the main claimant meets all the conditions set out above.

The maximum weekly payment is €119.20 in the first year and €59.60 in the second year. It is tax free. If they qualify for the dividend they may also qualify for FIS and the amount is not taken into account in the means test for FIS. Self-employed people do not qualify for FIS.

Applications have been accepted for the scheme since 5 January 2015. Payments are expected to start in May 2015 but they will be made to eligible applicants from the date of the claim. The scheme is available to people who meet the conditions on or after 5 January 2015 and before 1 April 2018. In practice, anyone who qualifies should have used their entitlement by 1 April 2020.

The Act provides that the BTWFD scheme will cease from 1 April 2021. (In legislation, this is sometimes known as a "sunset clause".)

The existing scheme of continued payments for qualified children is abolished by the Act.

### Lone parents

The arrangements which will apply to lone parents from 2 July 2015 were outlined in detail in the February 2015 issue of *Relate*. From 2 July 2015, they may qualify for the OFP only if their youngest child is under the age of seven. There were already two exceptions to this rule:

- If the Domiciliary Care Allowance (DCA) is being paid in respect of a child, then the age limit is 16. This means they can qualify for OFP until that child reaches the age of 16. DCA ceases to be payable at age 16.
- If they have been recently bereaved, the OFP is payable for two years from the death of their spouse, civil partner or cohabitant or until the youngest child reaches 18.

This Act provides for one further change. Lone parents who are also eligible for a half-rate Carer's Allowance will be able to qualify for the OFP until the youngest child is aged 16. It is expected that this will benefit about 1,800 lone parents. This includes 800 lone parents who were due to lose their entitlement in July 2015; others who had already lost entitlement to the OFP and some recipients of Carer's Allowance who will qualify for the OFP for the first time when their youngest child is aged seven or older.

### Jobseeker's Allowance transitional arrangement (JST)

The Act also provides for an extension of the JST arrangements (these are described in the February 2015 issue of *Relate*). At present, JST is available to lone parents who have been in receipt of the OFP within the last three years and where their youngest child is aged between seven and 13 years. The Act provides that JST will be available to all lone parents where the youngest child is aged between seven and 13 years, whether or not that person has been receiving the OFP.

## Medical assessors

The Act includes provisions which aim to clarify the role of the medical assessor in the social welfare decision-making process. Effectively, this provides a legislative basis for the existing practices of the Department of Social Protection.

In general, decisions about social welfare, including whether or not you are entitled to a payment and how much the payment should be, are made by deciding officers of the Department of Social Protection. Medical assessors may be involved in advising about illness, disability and carers' payments. They may carry out medical assessments, desk reviews and desk assessments of medical evidence and reports provided by applicants. Any such assessment is considered by the deciding officer but the medical assessor does not make the decision.

The Act provides that eligibility for Carer's Benefit, Carer's Allowance and Respite Care Grant is decided by a deciding officer on the basis of all of the information available. This information includes all of the relevant medical evidence that has been submitted by the claimant in support of the claim. It may also include any opinion provided by a medical assessor of the Department.

## Garda Siochana Ombudsman Commission

The Garda Siochana Ombudsman Commission (GSOC) was established in 2007 under the Garda Siochana Act 2005. The Garda Siochana (Amendment) Act 2015 came into effect on 27 April 2015 and provides for some changes to the remit of GSOC.

The main functions of GSOC are:

- To deal with complaints from the public concerning the conduct of Gardai
- To report the results of its investigations to the Garda Commissioner and, if appropriate, to the Director of Public Prosecutions
- To conduct other investigations of matters concerning the conduct of Gardai
- To examine practices, policies and procedures of the Gardai

You may complain to GSOC about any conduct of a Garda which is alleged to be misbehaviour. Misbehaviour is conduct which constitutes an offence or a breach of discipline. Breach of discipline includes courtesy, neglect of duty, falsehood or prevarication, abuse of authority, corrupt or improper practice, misuse of money or property in the custody of the Gardai,

being drunk or affected by drugs and discreditable conduct. You may complain if you are directly affected by the conduct or if you witnessed it. Someone else may complain on your behalf if you agree to that or if you are unable to agree to it because of your age, or because of a physical or mental condition. At present, you must make the complaint within six months of the conduct giving rise to the complaint but GSOC may extend this time limit if there are good reasons.

The Garda Commissioner is obliged to refer to GSOC any matter that appears to indicate that the conduct of a Garda may have resulted in the death of, or serious harm to, a person.

GSOC may itself instigate an investigation if it appears that a Garda may have committed an offence or behaved in a manner that would justify disciplinary proceedings or the Minister for Justice and Equality may refer such a situation to GSOC.

Some complaints may be resolved informally. If the complaint is not suitable for informal resolution or the informal process fails, GSOC may either:

- Refer the complaint to the Garda Commissioner for investigation,
- Conduct an investigation itself or
- Direct an officer of GSOC to investigate the complaint

If the complaint relates to the death of, or serious harm to, a person as a result of Garda operations or while in Garda custody or care, GSOC must immediately direct a designated officer to examine the complaint and make a recommendation about how it should be investigated. Complaints which have been investigated by one method may subsequently be investigated by another.

GSOC officers have similar, but not as extensive, powers to investigate as Gardai have.

### Changes made in 2015 Act

The Garda Siochana (Amendment) Act 2015 amends the Garda Siochana Act 2005. The main changes are:

**Investigative powers:** The 2015 Act also amends the Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993 and the Criminal Justice (Surveillance) Act 2009 to allow GSOC to exercise certain additional police powers. This means that GSOC investigating officers will have similar powers to Gardai in relation to:

- Intercepting communications for the purposes of a criminal investigation
- Carrying out surveillance in connection with a criminal investigation into an arrestable offence

The Citizens Information Board provides independent information, advice and advocacy on public and social services through citizensinformation.ie, the Citizens Information Phone Service and the network of Citizens Information Services. It is responsible for the Money Advice and Budgeting Service and provides advocacy services for people with disabilities.

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**Time limits:** The general time limit for making a complaint to GSOC is extended from six months to a year. GSOC has the power to extend the time limit further if it considers that there are good reasons to do so.

**Referral to GSOC:** The Act provides that the Minister for Justice and Equality may refer a matter to GSOC for investigation even if the identity of the Garda involved is not known at the time of the investigation or where the investigation may also involve a person who is not a Garda.

**Garda Commissioner:** The Act brings the Garda Commissioner within the scope of GSOC investigations. It also provides that there is a statutory duty on the Garda Commissioner to ensure that information is provided to GSOC for the purposes of an investigation as soon as practicable.

**Own initiative:** GSOC may carry out an examination, on its own initiative, of practices, policies or procedures of An Garda Siochana for the purpose of preventing or reducing complaints. At present, it can do this only when asked by the Minister. Website: [gardaombudsman.ie](http://gardaombudsman.ie)

## Other developments in relation to policing

### Policing Authority

The Department of Justice and Equality has published the General Scheme of the Garda Siochana (Amendment) Bill to provide for the establishment of a new Policing Authority.

### Independent review mechanism

The Department of Justice and Equality has established a panel of lawyers to examine approximately 300 complaints alleging Garda misconduct or problems with investigating misconduct. Website: [justice.ie](http://justice.ie)

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