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Relate

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Family law update

There have been a number of legislative developments affecting families and relationships in recent years. This issue of *Relate* explains the recent changes to legislation on divorce and judicial separation in Ireland arising from the Family Law Act 2019. Parents now have access to a wider range of statutory leave and benefits at different stages of a child's life. *Relate* describes the newest type of statutory leave, parent's leave, available to new parents and how it differs from other types of leave. Finally, *Relate* describes the Children and Family Relationships Act 2015 in relation to donor-assisted human reproduction and how it intends to give greater certainty to parents, donors and donor-conceived children about their rights and responsibilities. These provisions are expected to commence in May 2020.

Divorce and judicial separation

In 1995, a referendum was passed in Ireland which removed the prohibition on divorce in Ireland, permitting an Irish court to grant a divorce when certain conditions are met. These conditions included:

- The spouses have lived apart for at least four years out of the previous five years before divorce proceedings can begin.
- There is no reasonable prospect of reconciliation between the spouses.
- Proper provision has been (or will be) made for the spouses, the children of either or both spouses, and any other person stated by law.

Legislation in the form of the Family Law (Divorce) Act 1996 was then passed to provide for the minimum four-year period of living apart and the other arrangements for divorce. It was not possible to change this minimum four-year period without a referendum.

In addition, the Irish Constitution prohibited people whose divorce was not recognised in the State from remarrying in Ireland during the lifetime of the divorced spouse. However, this had little impact as the Oireachtas could already make laws on this subject, and had passed legislation saying that remarrying in Ireland after an unrecognised foreign divorce was illegal.

A referendum on the regulation of divorce was held on 24 May 2019. A single proposal was put forward to make two changes:

- To remove the reference in the Constitution to a minimum period of living apart and grant power to the Oireachtas to specify the length of any minimum period of living apart
- To remove the constitutional prohibition on remarrying in Ireland where there was an unrecognised foreign divorce

Voters had to choose whether to accept both changes or none. The proposal passed by 82.1% to 17.9%.

Family Law Act 2019

Changes to the Family Law (Divorce) Act 1996

The Family Law Act 2019 implements the result of the 2019 referendum. It amends the Family Law (Divorce) Act 1996 and provides that spouses must now live apart for two years out of the previous three years before bringing divorce proceedings. The periods of living apart necessary for a divorce and for a dissolution of a civil partnership are now the same.

The 2019 Act also puts the meaning of 'living apart' (as applied by the courts) into legislation for the first time. It is now clarified that spouses can be living apart even when they still live in the same property. For this to be the case, they must cease being in an 'intimate and committed' relationship. However, a relationship does not cease to be 'intimate and committed' just because it ceases to be sexual in nature.

This change particularly facilitates spouses whose financial circumstances make it difficult or impossible for one spouse to move out of the family home, after a relationship breakdown.

These changes came into effect on 1 December 2019.

Changes to the Judicial Separation and Family Law Reform Act 1989

The 2019 Act makes similar changes to the Judicial Separation and Family Law Reform Act 1989 in relation to judicial separation. One of the conditions for a judicial separation was that the couple had to have been living apart for at least three years (where one spouse did not give their consent to the judicial separation). This period has been reduced to one year whether or not both parties agree to the decree being granted.

The definition of 'living apart' to be used in divorce proceedings will also now apply to judicial separations.

These changes came into effect on 1 December 2019.

Civil partnerships and qualified cohabitants

The Family Law Act 2019 definition of 'living apart' is also applied to dissolving a civil partnership or deciding whether a person is a qualified cohabitant. However, no changes have been made to the necessary period of living apart for people seeking the dissolution of a civil partnership, and it remains two years out of the previous three years.

Provision to allow for the continued recognition of UK divorces if there is a no-deal Brexit

Currently, divorces, judicial separations and marriage annulments granted in all parts of the UK (England, Scotland, Wales, Northern Ireland and Gibraltar) are recognised in Ireland by virtue of an EU regulation (Regulation 2201/2003).

There is a risk that UK divorces would no longer be recognised in Ireland without new legislation if there is a no-deal exit.

Therefore, as a precautionary measure, the Family Law Act 2019 also provides for existing UK divorces, legal separations and marriage annulments to continue to be recognised if there is a no-deal Brexit. In addition, the Act allows for the recognition of new divorces, judicial separations and annulments after a no-deal Brexit. However, these will not be recognised if neither spouse was living in the UK when the divorce (or judicial separation or annulment) proceedings were started. In addition, they will not be recognised if the underlying order conflicts with a prior order made in Ireland or another recognised country.

The commencement of this legislation will only be necessary if the UK exits the EU without a withdrawal agreement.

New statutory leave available to parents

Maternity and adoptive leave have been a long-established entitlement for new parents. Paternity leave and Paternity Benefit were introduced in 2016. Parental leave was first introduced in 1998 and was extended to 22 weeks from September 2019. Parental leave is unpaid.

The Parent's Leave and Benefit Act 2019 introduced a new type of leave, parent's leave, in November 2019. Parent's leave allows both parents to take two weeks' leave from employment in the child's first year. The Act also amends the Social Welfare Consolidation Act 2005 so that people taking parent's leave may also be entitled to Parent's Benefit if they have made sufficient PRSI contributions.

This table summarises the current differences between parent's leave, parental leave and paternity leave.

Type of leave	Who gets it?	How long is it for?	Is it paid?
Parent's leave	Parents of children under 1 year (or in the first year of adoption)	2 weeks	Yes. Parent's Benefit is paid for 2 weeks if sufficient PRSI contributions have been made.
Parental leave	Both parents and guardians of children up to the age of 12 years	22 weeks	No. It is unpaid.
Paternity leave	New parents of children under 6 months (but not the mother of the child)	2 weeks	Yes. Paternity Benefit is paid for 2 weeks if sufficient PRSI contributions have been made.

Parent's leave

Parent's leave aims to let working parents spend more time with their baby or adopted child during the first year.

It is intended that each working parent will be entitled to two weeks' parent's leave for a child born, or adopted, on or after 1 November 2019. It may be increased in the future (up to a maximum of nine weeks).

Parent's Benefit is available to both employees and self-employed people who take parent's leave and who have enough social insurance (PRSI) contributions. Parent's Benefit is explained in more detail later.

To get parent's leave, the child must be born, or adopted, on or after 1 November 2019. You must also meet certain conditions. You must:

- Be a 'relevant parent' (see 'Who can take parent's leave?')
- Take the leave within one year of the birth of the child or, in the case of adoption, within one year from the date the child is placed with you (the placement date)
- Give at least six weeks' notice to your employer

The legislation only provides for the minimum entitlement to parent's leave. Your contract of employment may give you more rights.

Who can take parent's leave?

Relevant parents can take parent's leave for eligible children. A 'relevant parent' is one of the following:

- A parent of the child
- A partner (spouse, civil partner or cohabitant) of the parent of the child
- A parent of a donor-conceived child, as provided for under Section 5 of the Children and Family Relationships Act 2015 (this is not expected to come into effect until May 2020 at the earliest)
- The adopting parent of the child, where there is only one adopting parent
- The partner of the adopting parent of the child (if the parents have not adopted jointly)
- Where a child is jointly adopted: each member of a married couple of the same sex, or a couple that are civil partners of each other, or a cohabiting couple of the same sex

How can parent's leave be taken?

You can take this leave as:

- One continuous period of two weeks' leave or
- Separate periods of at least one week

Parent's leave cannot be transferred between parents, except in certain circumstances (such as the death of one of the parents). If you have, or adopt, two or more children at the same time (such as twins), you are still only entitled to a maximum of two weeks' leave.

You must give notice to your employer before you can take parent's leave. You must:

- Give your notice in writing
- Tell your employer at least six weeks before the leave is due to start
- Include the start date, the way the leave will be taken and how long it will last

Can an employer refuse or postpone parent's leave?

Your employer can only refuse parent's leave if you are not entitled to it. However, your employer can postpone your parent's leave for up to 12 weeks for any of the following reasons:

- Seasonal variations in the volume of work
- No replacement to carry out your work
- The nature of your duties
- The number of other employees who are also taking parent's leave
- Any other relevant matters

An employer must consult with the employee before potentially postponing the parent's leave. If the employer decides to postpone the leave, they must give written notice to the employee at least four weeks before the parent's leave is intended to begin. The notice must set out a summary of the reasons for postponing the parent's leave. Parent's leave cannot be postponed more than once, in respect of the same child.

Parent's leave and adoption

If you are applying for parent's leave for an adopted child, you may need a certificate of placement for the child. If the adoption is an intercountry adoption and took place outside the State, you may need a written declaration of eligibility and suitability, and confirmation of the day of placement (or expected date of placement).

Other rules for parent's leave

You are treated as being in employment while you are on parent's leave.

- Annual leave – you continue to build up annual leave while you are on parent's leave.
- Public holidays – you are entitled to any public holidays that occur during your parent's leave.
- PRSI contributions – you can get credited PRSI contributions while you are on parent's leave.

You cannot be penalised (or threatened with penalisation) by your employer for taking, or proposing to take, parent's leave. Disputes about parent's leave can be referred by the employee or the employer to the Workplace Relations Commission within six months of the dispute or complaint occurring. The time limit may be extended for up to a further six months, but only if there is a reasonable cause which prevented the complaint from being brought within the normal time limit.

Parent's Benefit

Parent's Benefit is paid by the Department of Employment Affairs and Social Protection (DEASP) to employees and self-employed parents while they are on parent's leave from work.

Parent's Benefit is only payable if you have enough PRSI contributions. Therefore, it is possible to qualify for parent's leave and not qualify for Parent's Benefit (if you do not meet the PRSI contribution conditions).

Each parent is entitled to receive Parent's Benefit. Like parent's leave, you can take two consecutive weeks or two separate weeks of leave, and it is only paid once for multiple births and adoptions. For example, if you have twins or adopt two children at the same time, you get only one payment.

If you decide not to take parent's leave you are not entitled to get Parent's Benefit.

How to apply for Parent's Benefit

If you are an employee, you must notify your employer that you intend to take parent's leave (with your intended dates) at least six weeks before your leave will start. You should apply to the DEASP for Parent's Benefit at least four weeks before the date you start your parent's leave.

If you are self-employed, you should apply to the DEASP for Parent's Benefit at least six weeks before you intend to take parent's leave. You need your child's PPS number to apply for Parent's Benefit.

PRSI contributions for Parent's Benefit

PRSI contribution conditions for Parent's Benefit are similar to the conditions for Maternity Benefit, Adoptive Benefit and Paternity Benefit. You must have a minimum number of weeks' paid PRSI contributions within a relevant period.

Your PRSI contributions can be from both employment and self-employment. The PRSI classes that count for Parent's Benefit are A, B, C, D, E, H and S (self-employed).

You automatically get credited contributions or credits when you are getting Parent's Benefit.

If you are already getting a social welfare payment

Half-rate Parent's Benefit may be payable if you are getting any one of the following payments:

- One-Parent Family Payment
- Widow's, Widower's and Surviving Civil Partner's (Contributory) Pension
- Widow's, Widower's and Surviving Civil Partner's (Non-Contributory) Pension
- Death Benefit by way of Widow's/Widower's/Surviving Civil Partner's or Dependent Parent's Pension (under the Occupational Injuries Scheme)

If you are providing full-time care to another person, you may qualify for half-rate Carer's Allowance with your Parent's Benefit.

Necessary declarations and disqualifications

If you are employed, you must declare that your parent's leave dates have been approved by your employer when you apply for Parent's Benefit. The DEASP may contact your employer asking them to confirm the dates.

If you are self-employed, you self-certify your leave and declare that you will not engage in any work during your parent's leave.

If you engage in any work when you are receiving Parent's Benefit, whether you are employed or self-employed, you may lose your entitlement to the benefit.

If you are an EU citizen, you will not receive (that is, you will be disqualified from receiving) Parent's Benefit for any period of Parent's Benefit that you spend outside the EU. If you are a non-EU citizen, you will be disqualified from receiving Parent's Benefit for any period of the Parent's Benefit that you spend outside the Republic of Ireland.

Rates of Parent's Benefit

The standard weekly rate of Parent's Benefit is currently €245. However, you may get a higher rate in certain circumstances. Parent's Benefit is subject to income tax. However, USC and PRSI are not payable on Parent's Benefit.

If you have other dependants, your Parent's Benefit rate is compared to the rate of Illness Benefit that you would get if you were off work through illness. You will receive the higher of the two rates.

Although Illness Benefit has a lower personal rate than Parent's Benefit (€203 is the maximum), it includes extra payments for your dependants. For this reason, you may get a rate of Parent's Benefit above €245, depending on the circumstances of your partner, and how many children you have. Parent's Benefit is usually paid directly into your bank (into a current or deposit account, not a mortgage account).

However, if your employer pays you in full while you are on parent's leave, they may require Parent's Benefit to be paid directly into their bank account. You should check your contract of employment to see what applies to you.

Hospitalisation of an eligible child

If your child is in hospital, you can postpone your parent's leave and/or Parent's Benefit or the portion of it that remains. However, you must start your parent's leave and/or Parent's Benefit within seven days of your child's discharge from hospital.

Death of a child

If your child dies within the first year of birth or adoption, you are still entitled to take your parent's leave and receive Parent's Benefit.

Parental leave

Parental leave entitles parents to take unpaid leave from work to spend time looking after their children. A parent, an adoptive parent, or a person acting *in loco parentis* (that is, acting as a parent to the child) can take parental leave.

The Parental Leave (Amendment) Act 2019 extends the amount of parental leave available to parents and raises the qualifying age limit of children from 8 years to 12 years. Since 1 September 2019, you can take 22 weeks of parental leave for each eligible child. From 1 September 2020, you will be able to take 26 weeks of parental leave. Your entitlement to parental leave ends on your child's 12th birthday. Before 1 September 2019, parental leave was 18 weeks for each eligible child and it had to be taken before a child's 8th birthday.

The 2019 Act also increases the age at which the parents of an adopted child can avail of parental leave, where the child is adopted close to the cut-off age. Where the child is adopted between the ages of 10 and 12, the adopting parents now have two years from the date of adoption to use their parental leave. Previously, the maximum two-year extension only applied where the child was adopted between the ages of 6 and 8 years.

The Act also sets out how parents who had already used up their parental leave entitlement can now avail of the additional weeks.

Donor-assisted human reproduction

The Children and Family Relationships Act 2015 contains wide-ranging reforms to areas such as adoption, custody and guardianship. It is also the first Irish legislation to deal with the issue of donor-assisted human reproduction (that is, where the sperm or the egg of a person outside the relationship, or a donated embryo, is used to bring about a pregnancy).

The provisions for donor-assisted human reproduction in the Children and Family Relationships Act 2015 will come into effect on 4 May 2020. A number of supplementary regulations have also been recently passed which specify the various forms, declarations and certificates which will be required.

Initially, the Children and Family Relationships Act 2015 was also intended to deal with surrogacy arrangements. However, it was ultimately decided to deal with these issues in a separate piece of legislation.

That legislation, the Assisted Human Reproduction Bill, has still not passed and there is no timeline currently for its enactment. As a result, the explanations below apply only to couples where a female partner is to be the birth mother - heterosexual and lesbian couples.

Donor-assisted human reproduction procedures

Under the Children and Family Relationships Act 2015, a donor-assisted reproduction procedure occurs where an intending mother is implanted with:

- A male sperm from a donor
- A female egg from a donor
- A male sperm and a female egg from a donor
- An embryo provided by a donor

For the procedure to be recognised, it must be carried out in a Donor-Assisted Human Reproductive (DAHR) facility within Ireland.

Parentage in cases of donor-assisted human reproduction

The parents of a donor-conceived child will be the birth mother and her partner (spouse, civil partner or cohabitant) who is the intending parent – provided the mother, any other intending parent and the donor have given the necessary consents in advance. They will have all parental rights and responsibilities in relation to the child.

If the necessary consents have not been given, the mother alone will be the parent of the child and she will have all parental rights and responsibilities in relation to the child.

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

Retrospective recognition of parentage

The 2015 Act allows for the retrospective recognition of the parentage of certain donor-conceived children. Where a child was born in Ireland as a result of a donor-assisted human reproduction procedure that was carried out before the Act comes into effect in May 2020, an application may be made to the courts for a declaration of parentage. This applies whether the treatment was carried out in Ireland or in another country where the procedure is regulated.

There are a number of conditions to be met. This includes 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 – which means that the child may be represented separately. 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.

In cases where there is no joint application, the mother, the intending parent or the child may apply individually 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.

A declaration will be granted if the court is satisfied that the conditions are met and, if the child is under 18, that this decision is in the best interests of the child. The declaration means that the intending parent has the rights and responsibilities of a parent from the date of the declaration.

The Circuit Court may refuse a declaration where it is satisfied that to grant it is not in the best interests of the child (who is under 18) or where it would be contrary to the interests of justice.

Donors

Donors cannot be anonymous. They must provide their name, date and place of birth, nationality, the date and place where the donation occurred and contact details.

The donor of an egg or sperm must be at least 18 years old.

Where an embryo is donated, both the provider of the sperm and the egg must consent to the embryo being used. However, neither provider needs to be the intending parent of the child.

All donors 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 a witnessed consent in writing before making the donation
- 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 their personal information being provided for the purposes of the register
- 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 mother or parents.

A donor may withdraw consent but that does not change the situation which applies if the donation has already been used.

Provisions applicable to all donors

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 means the donor's travel costs, medical expenses and any legal or counselling costs.

If a donor requests it, they must be provided with information on:

- How many children have been conceived as a result of their donation
- The sex and year of birth of each child

Access to identifying information in relation to donor-conceived children is covered below.

The specific declarations which must be signed by a donor are set out in S.I. No. 544/2019.

The intending parents

The intending mother must be at least 21 years old before the procedure is performed and must sign a witnessed declaration that she:

- Has been informed of the legal consequences of the procedure
- Consents to certain information being provided on the register
- Understands that the child may access the information on the register and try to contact the donor
- Understands that the donor will not be the parent or have any rights or responsibilities in relation to the child
- If there is to be another parent, she consents to her spouse, civil partner or cohabitant being the other parent

If there is a second intending parent, they must:

- Be the spouse, civil partner or cohabitant of the intending mother
- Be 21 years old before the procedure is performed
- Make a similar witnessed declaration as the intending mother

Consent of the intending mother or any intended parents can be withdrawn but only before the procedure has been performed.

The specific declarations which must be signed by intending parents are set out in S.I. No. 545/2019.

The intending parents must inform the facility providing the procedure whether the procedure has led to a pregnancy and, if so, of the expected date of birth. When the pregnancy ends, the intending parents must inform the facility of the outcome of the pregnancy. If a child is born, they must inform the facility of the name, date and place of birth, sex and address of the child.

DAHR facilities

The Children and Family Relationships Act 2015 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.

Everyone involved must understand that this information will be provided to the National Donor-Conceived Person Register (see below). 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 parents, 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

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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, is entitled to the following information from the register:

- Information about the donor that has been recorded (excluding 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. These representations would set out why the safety of the donor or the donor-conceived child, or both, requires that the information is not released.

If the donor makes representations, the Minister can decide to withhold the information from the child or release it. A donor-conceived child may appeal the Minister's decision to withhold the information to the Circuit Court. A donor cannot appeal the Minister's decision to release the information.

The donor-conceived child must receive counselling in relation to the decision to seek the information, before the Minister can release the information.

Donor access to information about their donor-conceived children

A donor has no absolute right to access personal or identifying 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.

In this case, both the donor and the donor-conceived child must receive counselling in relation to their respective decisions.

Access to information by a donor-conceived child in relation to other donor-conceived children resulting from the donation

Similar arrangements to the previous section apply if a donor-conceived child aged 18 or over wants information about another donor-conceived child who is the biological child of the same donor. In that case, both of the donor-conceived children must receive counselling in relation to their respective decisions.

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