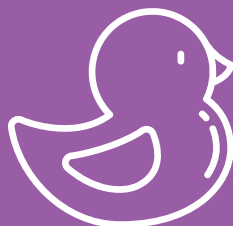
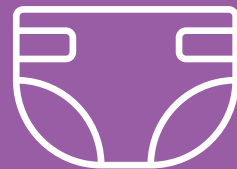
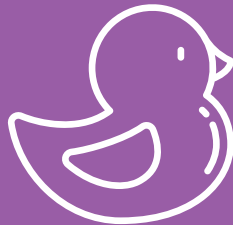
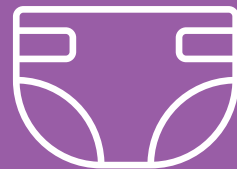


# Surrogacy:

## A Route To Parenthood In Ireland

2nd Edition 2019



**Dear Readers,**

We take great pleasure in welcoming you to the Poe Kiely Hogan Lanigan Surrogacy: A Route to Parenthood in Ireland, 2nd Edition.

As part of our commitment to providing you with the most up to date advice and guidance, we have created this 2nd edition e-book. This is the most comprehensive surrogacy guide available, including information about the current legal process, proposed legislation and developments in Ireland, Canada and the Ukraine.



**Signed:**



**Martin O'Carroll**



**Annette Hickey**



**Geraldine Fahy**

# Contents



<b>Introduction</b>	04
<b>Traditional and Gestational Surrogacy</b>	07
<b>Domestic Surrogacy</b>	09
<b>International Surrogacy</b>	11
<b>Irish Court Process</b>	17
<b>General Scheme of Assisted Human Reproduction Bill 2017</b>	19
<b>Frequently Asked Questions</b>	22
<b>Summary</b>	24

# Chapter 1

# Introduction





There comes a stage in most couples lives when they have a strong desire to have a child and start a family. For many different reasons, however, the route to parenthood isn't always straight-forward and can be full of ups and downs.

Experiencing infertility can be extremely distressing and emotionally trying. Infertility can be a complex matter and there are a great many factors which may prevent a couple from having their own child

Fortunately, in a progressive society, such as Ireland, people are now much more open and honest about their struggles to have a child and are likely to seek out help and advice from their doctor rather than suffering in silence for too long.

The growing demand for infertility services has meant reproductive medical science has advanced tremendously in recent years. Assisted Human Reproduction (AHR) is a major industry, with many single people, same-sex couples and hetero-sexual couples in Ireland electing to go down this route in the hopes of having a child of their own.

Surrogacy is one option couples may choose to explore in their desire to become parents. Simply speaking, surrogacy is when a woman (the surrogate) carries a child for a woman or couple unable to conceive and/or carry a child. There is currently no legislation in Ireland that deals with the legal issues arising from surrogacy. A huge move towards the

development of legislation occurred when the Government published the General Scheme of the Assisted Human Reproduction Bill in October 2017. The General Scheme proposes to regulate gestational surrogacy in Ireland where the surrogacy meets with the criteria set out in the Bill.

### Note:

- » Irish Law; The mother is the woman who gives birth. A mother cannot be defined by DNA evidence, regardless of whether or not her own egg was used.
- » The Father is defined by DNA evidence.
- » The male who provides the genetic material is the father.
- » Surrogacy is not an option in circumstances where the father cannot provide a gamete.

As well as the legal implications associated with surrogacy in Ireland, there are also emotional, social and economic issues to consider if a person decides to embark upon surrogacy as a means to having a family.

This guide has been commissioned by Poe Kiely Hogan Lanigan Solicitors to shine a light on surrogacy in Ireland and the key factors for couples to consider if they decide to take this route to parenthood. The practice of domestic and international surrogacy will be discussed in detail, and alternatives to surrogacy will also be looked at. Throughout this guide, the various legal implications will be discussed in a way which is straightforward to understand. Our purpose is to better inform and prepare readers for any decision they make towards parenthood in Ireland.



## Chapter 2

# Traditional and Gestational Surrogacy





## Traditional Surrogacy

Traditional surrogacy is where a woman (the surrogate) carries a child conceived using her own egg and sperm from the intended father. This is done using Intrauterine Insemination (IUI), which involves placing sperm inside the surrogate's uterus to facilitate fertilization.

Traditional surrogacy is not advised, largely to the fact that the surrogate is biologically related to the child they intend to handover to the intended parents (the people who will care for and raise the child).

## Gestational Surrogacy

Gestational surrogacy is when the surrogate carries a child conceived using the egg of the intended mother or egg donor and sperm from the intended father. This type of surrogacy requires medical intervention as this is the only way the intended mother's egg can be transferred into the surrogate's body. The procedure is a delicate one and will require In Vitro Fertilisation (IVF).

### Traditional

Surrogate's egg used with intended father's sperm or donor sperm

Artificial Insemination (AI) is used

Surrogate genetically related to child

Surrogate is child's legal parent at birth

### Gestational

Intended mother's own eggs or donor eggs used with intended father's sperm or donor sperm.

In Vitro Fertilisation (IVF) is used

Surrogate not genetically related to child

Surrogate is child's legal parent at birth (in Ireland)

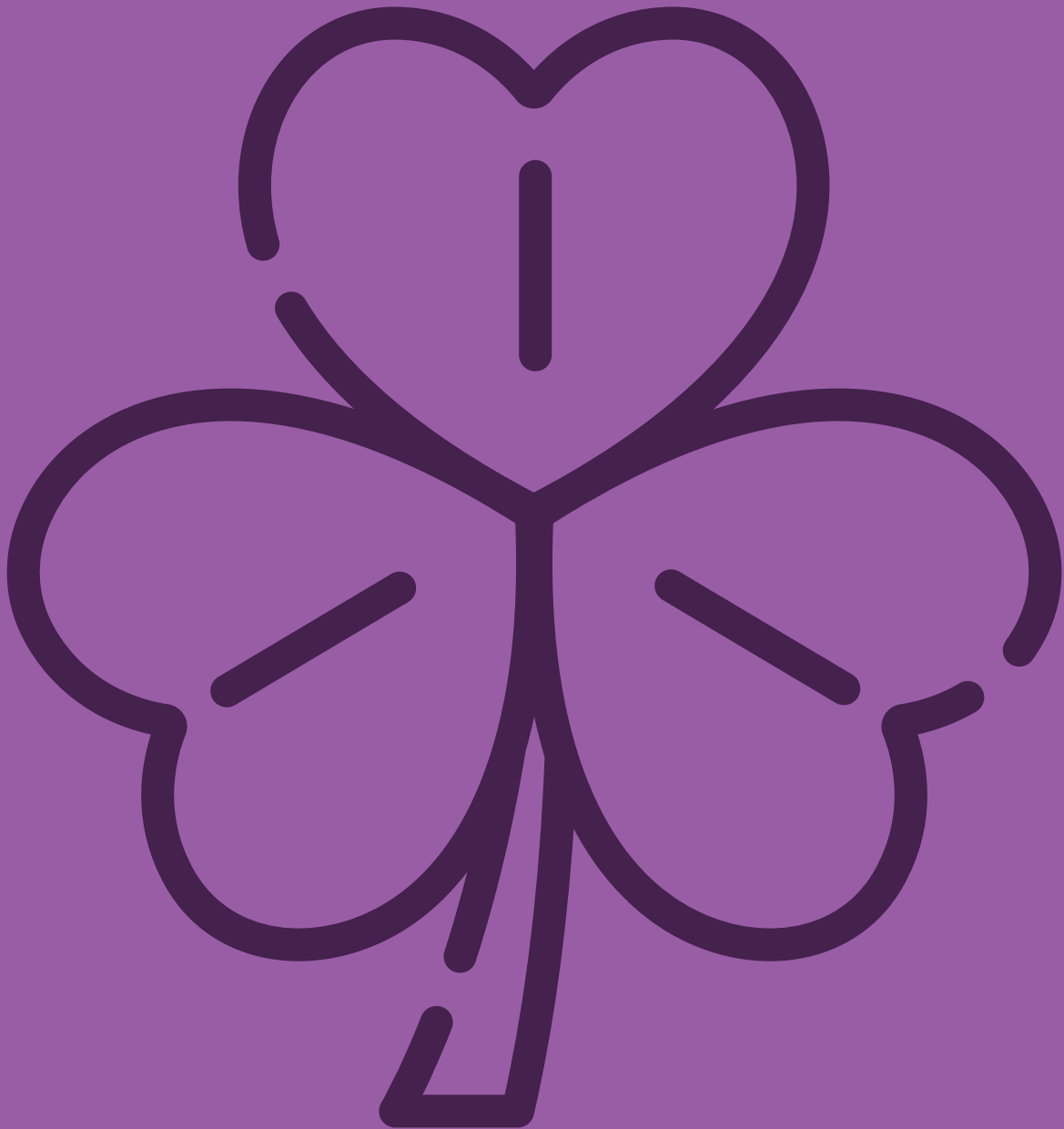




## Chapter 3



# Domestic Surrogacy



In Ireland, surrogacy is neither legally prohibited nor permitted and effectively sits in a bit of a legal 'grey-area'.

Surrogacy arrangements in Ireland tend to be done altruistically by a surrogate who knows the infertile couple and wishes to give them the gift of parenthood. Compensation in the way of medical and travel expenses may be covered by the intended parents by way of an informal agreement with the surrogate.

Surrogacy Agreements are not enforceable in Ireland. We recommend that all parties seek legal advice before entering into a memo of common understanding and intention regarding their Surrogacy Agreement. This memo will list their common agreement and understanding about their surrogacy arrangement.

The risk of entering into an informal surrogacy agreement is that complex issues arise around parentage and guardianship of the child. In Irish law the surrogate is still considered the legal mother of the child and is therefore the child's legal guardian because she has given birth to the child. The intended mother/second parent cannot establish a legal relationship with the child until she has shared the day to day care of the child with the father for a period of two years. The legal father (whose parentage is established by DNA evidence) can apply to the Irish Court with the child for a declaration of parentage, guardianship and sole custody of the child. When he is appointed guardian then he can then make all decisions regarding the child's welfare including educational, medical and all matters relating to the child's physical and psychological wellbeing.

If the surrogate mother is married her husband is presumed by law to be the father of the child, unless the contrary is proven through DNA evidence. If she is not married, she is the sole guardian.



## Chapter 3

# International Surrogacy



Over the years a number of Irish couples have chosen to go overseas to seek a surrogate in a country where surrogacy is legal.

As with domestic surrogacy in Ireland, there is no legislation in Ireland that deals with the issues arising from international surrogacy for Irish residents.

Irish couples have travelled to countries such as Canada, USA and Ukraine where surrogacy is legal and (for some) a lucrative practice. There are commercial surrogacy clinics abroad which facilitate surrogacy arrangements between intended parents and surrogates. Prices can range from €30-150K depending on the country, the clinic and the treatment required.

As well as arranged surrogacy costs through a clinic, there are other outgoings and commitments to consider, such as travel expenses, medical costs, insurance, legal fees and accommodation.

Aside from considering the costs, intended parents also need to be aware that issues of citizenship and guardianship will arise for a child born via a surrogate in another country. In Ireland, the woman who gives birth to the child is recognised as the legal mother. When it comes to heterosexual couples and same-sex male couples, guardianship will be based on DNA evidence from the father. As the law in Ireland is at the moment, a single woman or same sex female couple cannot seek parentage or guardianship.

### **Note:**

1. Whilst the surrogacy agreement may be enforceable in the country of birth, it is not enforceable in Ireland.
2. The legal definition of the mother in the country of birth may refer to the Irish intended parent who may be listed as such on the birth cert. In Ireland the mother is defined as the woman who gave birth to the child, i.e. the surrogate mother.
3. Irrespective of where your child is born (be it Ukraine where emergency travel documents are required before you can leave the country and an undertaking is given to proceed with the legal process in Ireland on your return or in Canada, where there is no necessity for emergency travel documentation in order to leave the country) the legal process in Ireland is still necessary.

There are some countries where surrogacy is illegal, and others where it is legal but with some restrictions. For example, altruistic surrogacy is legal in some countries but commercial surrogacy is not. There are also countries, like Ireland, where surrogacy is not prohibited but not regulated either. It is also the case where some countries allow surrogacy but only for opposite sex married couples and not same sex couples. Even in countries where surrogacy is legalised, laws can vary from place to place. This is why it is so important for couples to do their own research and understand what the different laws are and if they would be willing to go to another country to find a surrogate.

Whilst the complex legal issues involved with international surrogacy can be difficult to understand, successful strategies have been developed to enable couples to become parents. The right strategy may differ from case to case, and the involvement of experienced Irish Solicitors is essential in choosing and implementing the best route to take.

Clearly, the international laws regarding surrogacy are varied and complicated. If a couple wishes to take this route they should make sure that they completely understand the surrogacy laws in that country and how they can protect their interests as intended parents. It is crucial they seek qualified legal advice both in that Country and in Ireland in advance, to ensure that they know exactly where they stand and what they may come up against.

## **Surrogacy Clinics - What To Consider**

Time spent looking into different surrogacy clinics/agencies will be time well spent. It would be advisable to look into their costs, their practices and success rates.

As previously mentioned, international surrogacy is not a cheap option, with costs varying from €30-150K. Whilst it may be tempting to be dictated by price, couples will want to choose a reputable clinic, where surrogates have been screened with care and consideration. Medical screening of the surrogate should always take place, and psychological assessments may also be offered by the surrogacy clinic and may give couples added peace of mind.



## Putting Safeguards In Place

It is clear there are lots to consider before, during and after the surrogacy process. Entering into a surrogacy agreement should not be done lightly, and will involve a lot of serious thought. There are social, emotional, financial and legal factors to consider and possibly overcome.

Some of the factors to consider before deciding to embark on a surrogacy arrangement are:

- » Surrogacy is a legally complex matter and it would be advisable to seek the advice and counsel of a qualified Solicitor before entering into such an arrangement. The legal implications will take time and patience to go through and there will also be legal fees involved.
- » Take time to select the right surrogacy clinic/agency; properly research them, their practices and their success rates. Find out how they screen and look after their surrogates and what the costs of their service are.
- » Be upfront with close friends and family as they could prove a valuable support system.

## Questions To Ask A Surrogacy Clinic

**How long has the clinic been in operation?**

**Do you medically screen surrogates?**

**Do you offer psychological assessments for surrogates?**

**What is the fee payment structure?**

**How are surrogacy expenses handled?**

**To what extent is contact encouraged between the surrogate and the intended parents?**



## Surrogacy in the Ukraine

Commercial surrogacy has been legal since 2000 but only for married heterosexual couples with medical evidence/reports which confirm a medical issue which a pregnancy is not advised. If you are pursuing surrogacy in the Ukraine, the first step should be to seek legal advice from an experienced solicitor.

Under Ukrainian law, the baby is considered to be the child of the Irish parent(s) from the moment of conception and their names appear on the birth certificate. The surrogate has no parental right to the baby. The clinic's legal advisor will draft the surrogacy agreement and provide the legal documentation required in the Ukraine. It is very important that you research the clinic and get all of the information about the clinic to allow you make a fully informed decision before starting your surrogacy journey.

After the baby is born, DNA evidence will establish the paternity of the Irish father. As the baby's father is an Irish citizen, he can apply to the Irish consulate in the Ukraine for an emergency travel certificate which allows the baby travel to Ireland with his/her father. Your legal advisor in the Ukraine will assist you with the application for the emergency travel certificate.

The Irish consulate requires the father to provide an undertaking to notify the local health centre of the child's presence within 2 working days of arrival in Ireland and to commence the Court application within 10 working days of arrival of the child, if there are exceptional circumstances within 20 working days. The list of documentation required by the Irish Consulate is available on our website.

Ukrainian legislation on surrogacy is likely to evolve over the coming years. We continue to monitor the legal position on surrogacy developments and will provide updates.





## Surrogacy in Canada

Surrogacy in Canada is a legal and highly successful option for those needing assistance in growing their family. Federal law only permits altruistic surrogacy. Commercial surrogacy is prohibited, thus surrogate mothers can only receive compensation for reasonable expenses incurred as a result of the pregnancy. At the time of writing this ebook, there are discussions taking place in Canada regarding what constitutes reasonable expenses and whether or not commercial surrogacy should be legalized. We will monitor the progress of the legislation and update our website and social media with any developments.

If you are pursuing surrogacy in Canada, the first step should be to seek professional legal advice. The laws regarding surrogacy may vary from province to province, for example, in Alberta a Court Order is required to have both intended parents named on the birth cert, whereas in Ontario and British Columbia, the intended parents' names automatically go on the birth certs without the necessity of a Court Order.

Health systems also vary between provinces. The surrogate mother's expenses may be covered in some states but the baby is not a Canadian resident so therefore is not entitled to free healthcare.

Your legal advisor in Canada will also advise you and guide you when choosing an agency/clinic and the process involved.

Surrogacy in Canada is open to heterosexual and same sex couples alike.

The baby is immediately entitled to a Canadian passport and therefore there is no requirement for emergency travel documents and no undertaking is given to commence Court proceedings on your return to Ireland. This does not mean there is no necessity for Court Orders. Under Irish law, the mother is the woman who gives birth, and therefore the surrogate is seen as the child's sole legal guardian in the state. The father requires a declaration of parentage in order to be appointed a guardian of the child. Therefore, it is vital that the Court process commences as soon as possible on your return to Ireland to ensure your child has a legal guardian in the state and to ensure the protection of the state for him/her.

## Chapter 5

# Irish Court Process



The Irish father applies to the Irish Court to regularize his legal relationship of parentage, guardianship and custody of the child.

It is a requirement that the Office of the Attorney General be joined to the proceedings as a notice party. The Chief State Solicitor's Office are put on notice of the application and they provide a list of proofs which need to be met with before final orders are granted by the Court. A list of these proofs (as at today's date) can be found on our website.

Orders sought from the Court are as follows;

1. Declaration of Parentage
2. Declaration of Guardianship
3. Declaration of Custody
4. Dispensing with the necessity for the consent of the surrogate regarding passports.

These Court applications can be made in either the Circuit Court or the High Court.

When you meet with your legal advisors in Ireland they will discuss in detail with you;

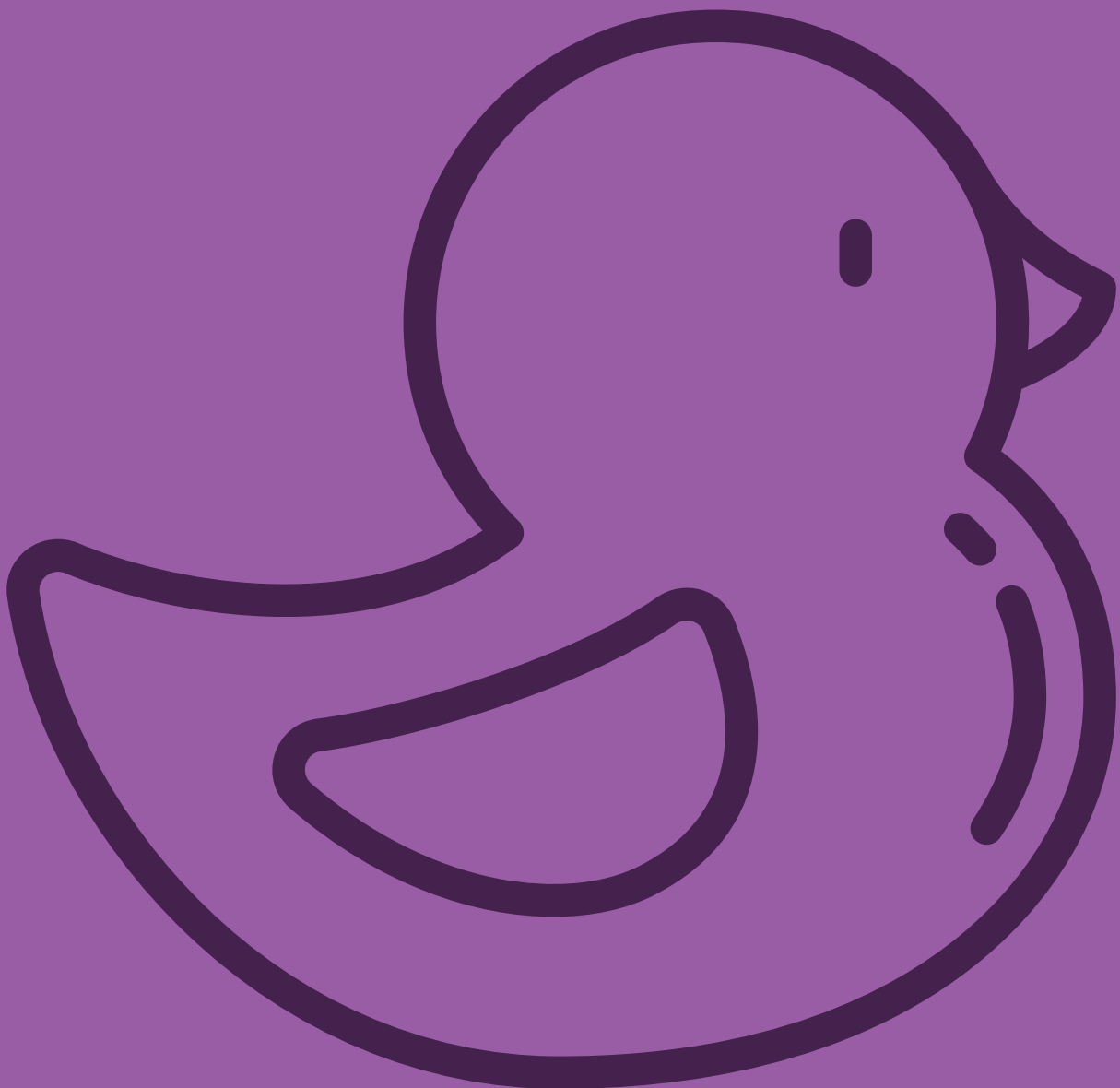
1. The stages involved in the Court process.
2. The documents required to commence and proceed with your application.
3. The timeframe involved from once you return home to Ireland until final orders are granted.
4. The requirements of the Court.
5. The requirements of the Chief State Solicitors Office.



Chapter 6



# General Scheme of Assisted Human Reproduction Bill 2017



For the first time in Ireland's history the General Scheme of Assisted Human Reproduction Bill 2017 presented a legal framework for domestic gestational surrogacy.

The bill proposes to make altruistic surrogacy in Ireland legal and prohibit commercial surrogacy. Whilst not yet law in Ireland, it sets out rules and regulations that perspective intended parents should follow in order for a surrogacy agreement to be formally accepted.

The Bill outlines specific guidelines for intended parents to follow in terms of the surrogate they choose, the reasonable expenses they should provide to the surrogate, legal advice they must seek and the requirements for a Parental Order.

The key considerations of the Bill include:

### **1. The Surrogate**

The surrogate must be habitually resident in Ireland, have previously given birth to a child and be aged 25 and 47 years of age. Prior to the application for authorisation from the Regulatory Authority the surrogate must have been assessed and approved as suitable to act as a surrogate by a doctor and counsellor.

### **2. The Intended Parents**

There can be one or two intended parents who must be habitually resident in Ireland, aged between 21 and 47 years of age, who are either unable to gestate a pregnancy, unable to conceive a child for medical reasons, likely to have her health significantly affected by a pregnancy/ giving birth, unlikely to survive a pregnancy/birth.

### **3. Reasonable Expenses**

Commercial surrogacy agreements are prohibited in Ireland, however, there will be an obligation under a surrogacy agreement to pay or reimburse the surrogate's reasonable expenses. These 'reasonable expenses' will be enforceable when the agreement is made prior to the transfer of the embryo to the surrogate and will include costs associated with the pregnancy or birth such as:

- » Pre-natal or post-natal medical expenses
- » Travel costs
- » Accommodation costs

- » Reimbursing the surrogate for loss of earnings as a result of unpaid leave for up to two months during which the birth happened and any other period during the pregnancy when the surrogate was unable to work on medical grounds relating to the pregnancy or birth.
- » Counselling expenses
- » Expenses associated with receiving independent legal advice in relation to the Surrogacy Agreement and in relation to the Parental Order.

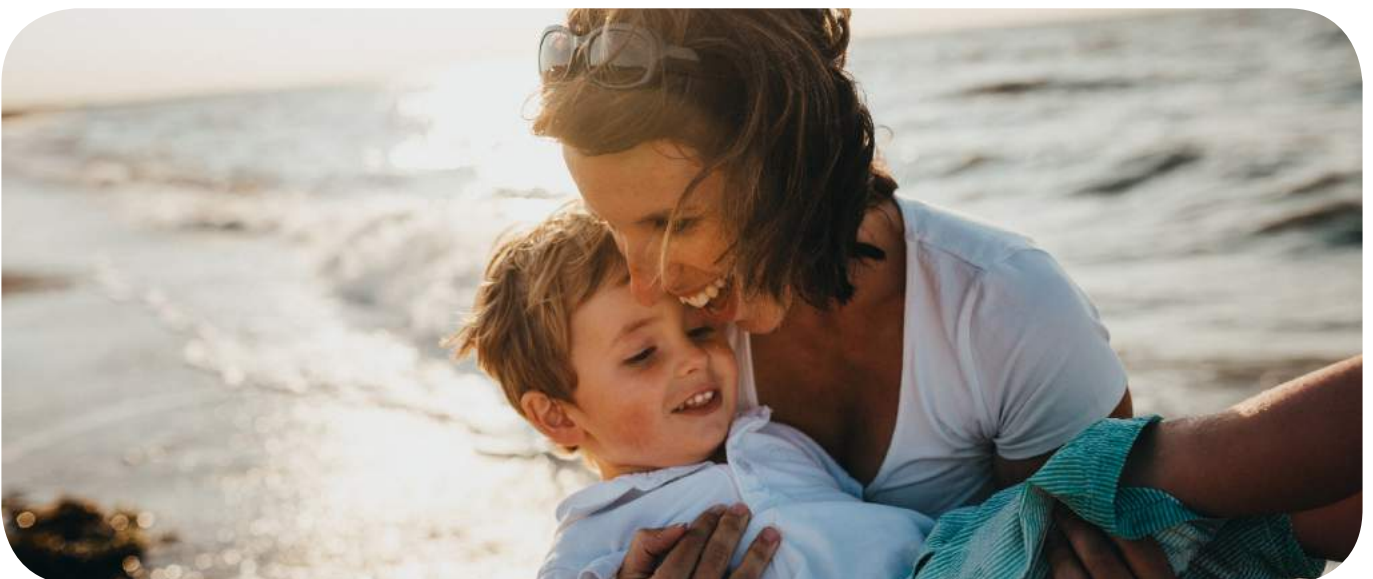
#### **4. Independent Legal Advice and Counselling**

The surrogate and each intended parent shall receive counselling and independent legal advice at each stage of the surrogacy agreement, being before the agreement is signed, after the birth of the child and at the time of the application for a Parental Order.

#### **5. Parental Order**

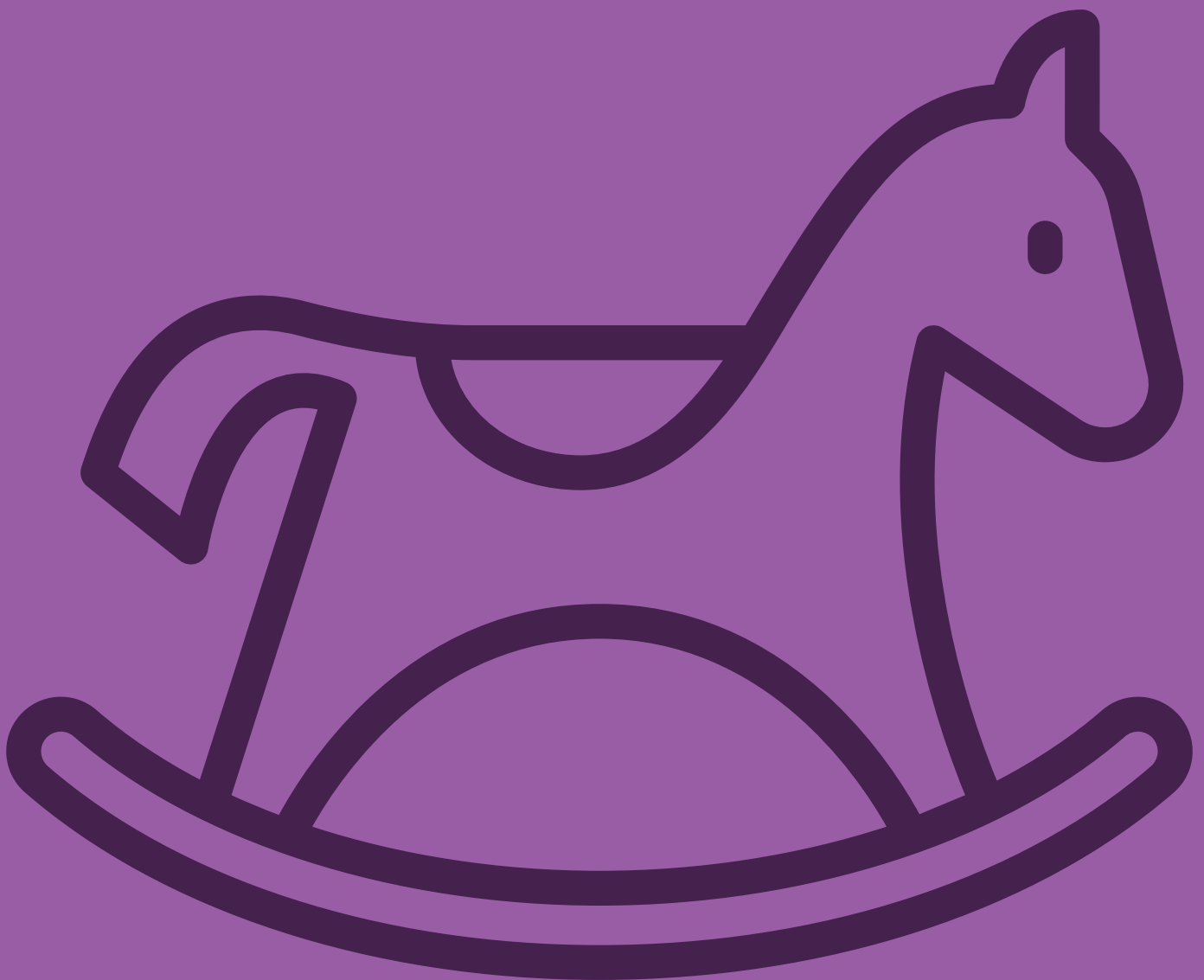
An application can be made to the Court for a Parental Order no earlier than 6 weeks and no later than 6 months after the birth of the child. At the time of the application to the Court the home of the child must be with the intended parents. The application must be accompanied by evidence that the intended father provided a gamete used for the child's conception and the surrogate's egg was not involved. The Court will require the surrogate (and her husband if she is married) to consent to the granting of the Parental Order unless the surrogate is deceased, hasn't the capacity to consent, cannot be located or any other reason the Court considers relevant. The Court will grant a Parental Order once it is satisfied the child will become the child of the intended parents.

It is also worth noting that the surrogate will remain the legal mother of any child she gives birth to under a surrogacy agreement until the Parental Order is granted.



# Chapter 7

# FAQs





We have prepared a list of questions we have been asked, arising out of our first edition e-book;

**1. Is my partner entitled to Maternity Benefit?**

No. The “mother” is defined in Irish law as the woman who gives birth and she has statutory entitlement to maternity leave and maternity benefit.

**2. When can my partner apply for Guardianship and what is the process involved?**

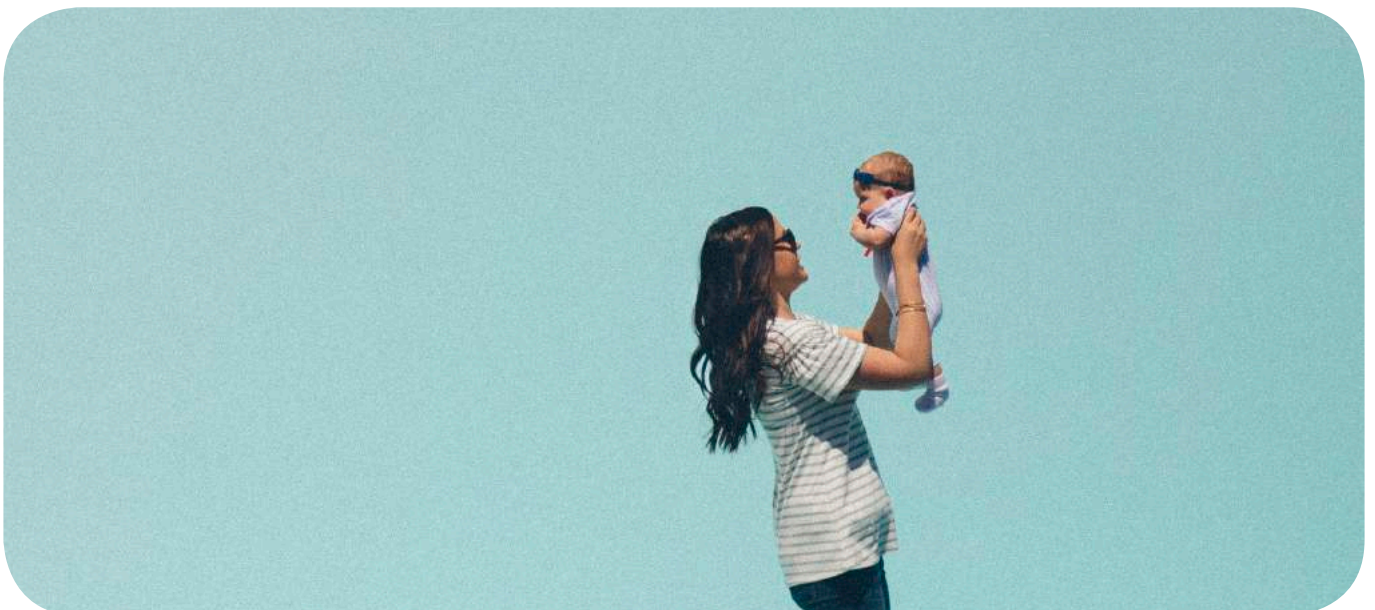
Once they are married to, in a civil partnership with or have cohabited for three years with, the first parent and have shared parental responsibility and day to day care of the child for two years, the second parent, under changes in the Children and Families Relationship Act 2015 and the Children and Families Relationship Amendment Act can apply for guardianship and/or adoption.

**3. When can I apply for the baby’s Passport and can my partner apply for a Passport for the baby once guardianship is granted to her/him?**

After the Court grants the orders listed in the chapter “Court Process” the guardian, once he is an Irish citizen, can apply to the passport for a passport for the child.

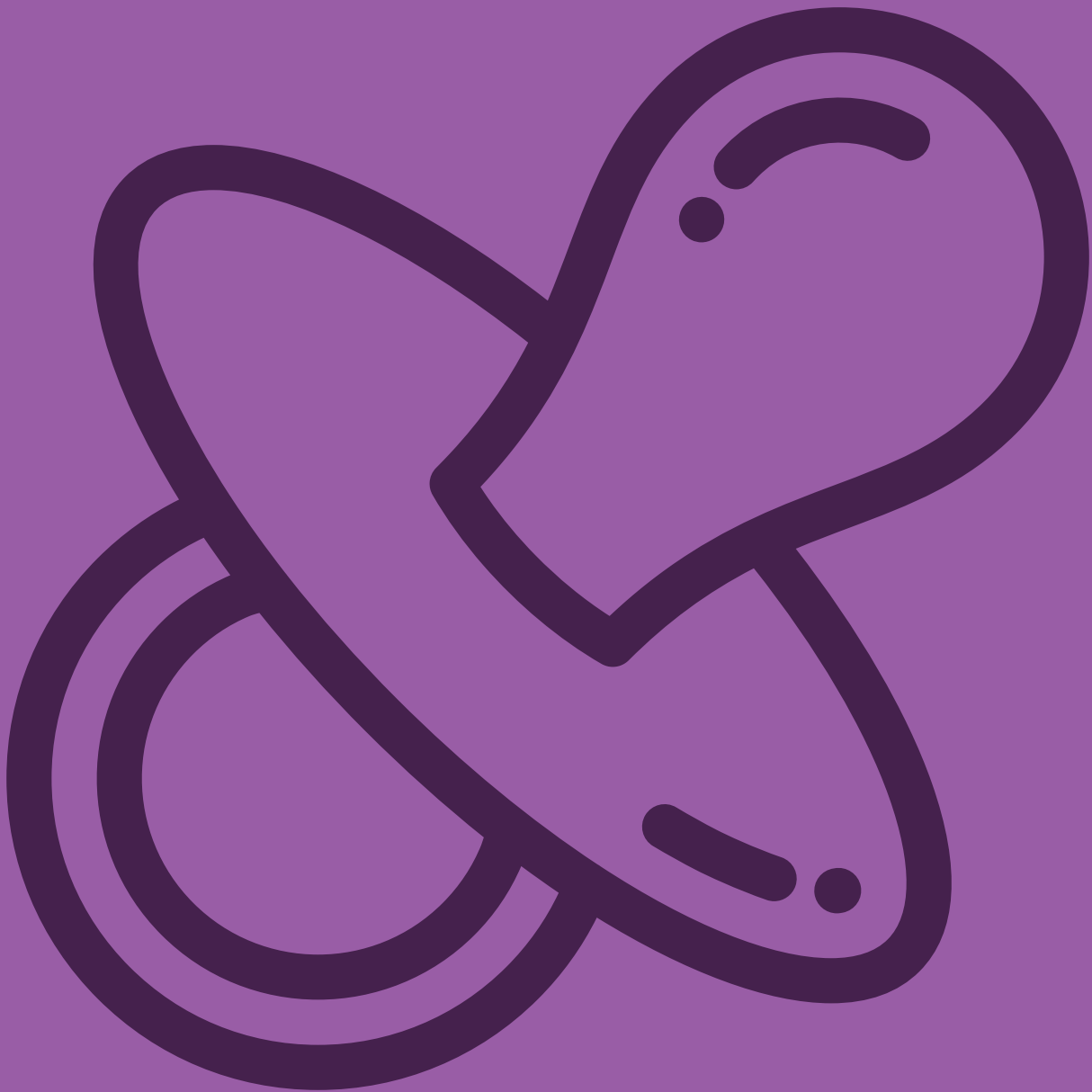
**4. How do we get a PPSN for our baby?**

The parent/guardian of the child must attend at their local PPS number allocation centre to obtain the child’s PPSN.



# Chapter 8

# Summary





Surrogacy in Ireland is legally complex and one which will require input from a qualified experienced solicitor.

Given the complexity of the procedure involved, it is crucial that you seek legal advice prior to embarking on your surrogacy journey.

Here at Poe Kiely Hogan Lanigan, our experienced surrogacy/fertility law team has brought couples through their entire international surrogacy process. We understand how emotional and stressful the surrogacy journey can be for couples. We know how important this is to you and we have the experience and expertise to help.

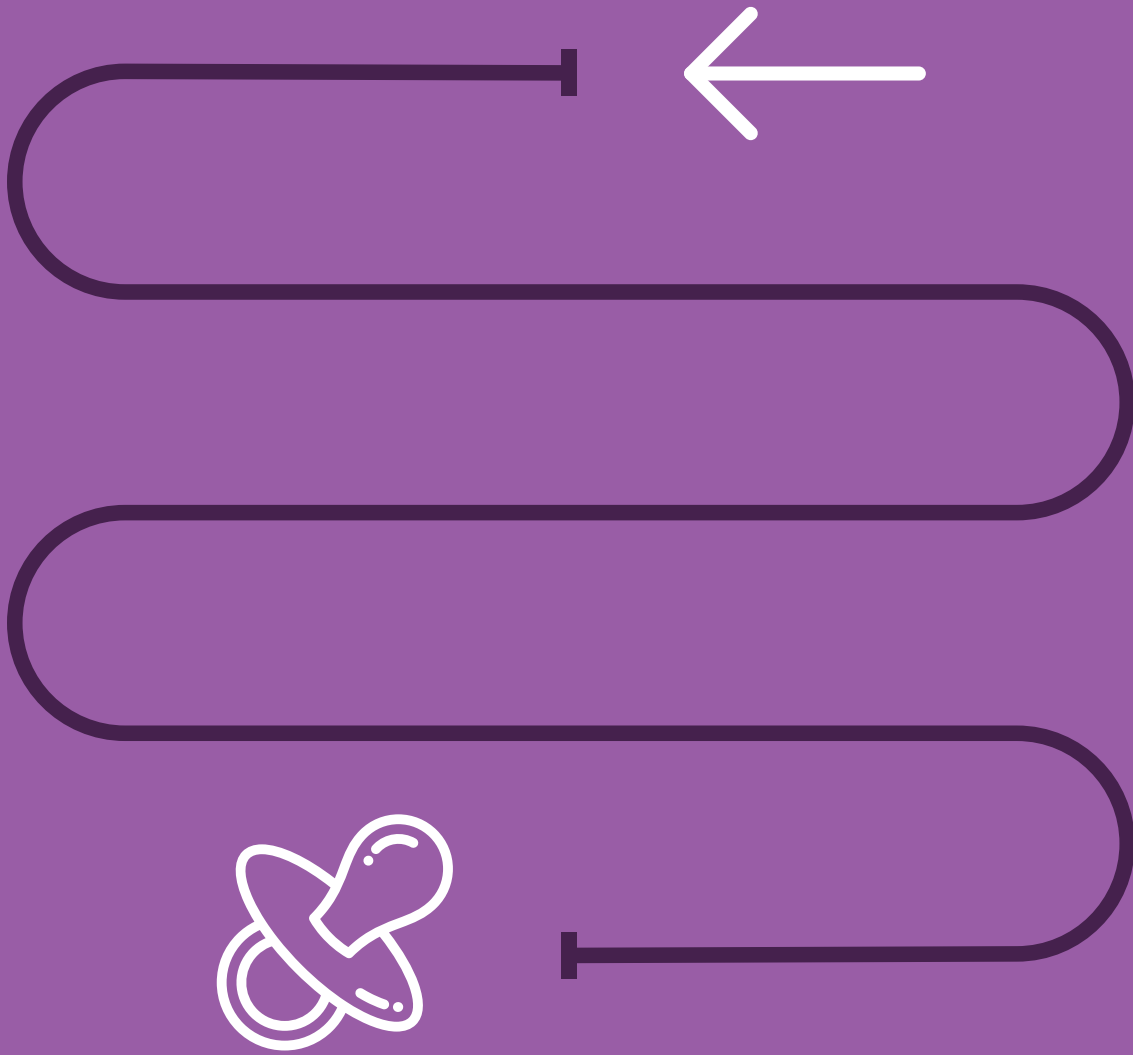
We hope this guide has proven useful and informative. To discuss any of the legal issues highlighted in this guide, please [click here](#) to arrange an appointment with us.

## Contact Us Today, We're Here To Help!

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