THE REGULATION OF DAHR IN THE CHILDREN AND FAMILY RELATIONSHIPS ACT 2015: DONOR INFORMATION AND PARENTAGE

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Introduction

The Children and Family Relationships Act 2015[1] places donor-assisted human reproduction (DAHR) on statutory footing in Ireland for the first time. Part 2 and Part 3 of the 2015 Act will in future regulate parentage in cases involving DAHR, though as of 23 December 2015, both parts have yet to be commenced.[2] The decisions taken in creating Parts 2 and 3 have been viewed as progressive and much needed step to achieve legal certainty in this area of family law.[3] Previously, it was left to the discretion of the courts to decide individual cases concerning DAHR. For example, the case of *Roche v Roche and Others*,[4] in which the plaintiff sought custody of three frozen embryos which had been produced using her ex-husband's sperm,[5] gave rise to a lengthy debate in the Supreme Court encompassing issues including status of the pre-implanted embryo under the Irish Constitution which, it may be argued, would be more appropriately determined by the legislature. The 2015 Act is therefore to be welcomed for addressing the position of the donor in relation to parentage in DAHR situations and the amount of information a child born as a result of DAHR is entitled to receive. This article will analyse how the 2015 Act has endeavoured to deal with the ethical questions surrounding these two issues.

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[1] Children and Family Relationships Act 2015 [hereinafter the 2015 Act].

[2] For updates on the status of the Act, see the Irish Statute Book, Children and Family Relationships Act 2015 <http://www.irishstatutebook.ie/eli/isbc/2015_9.html> (visited 1 March 2016).

[3] Ursula Kilkelly, Children's Rights and Marriage Equality <http://humanrights.ie/constitution-of-ireland/childrens-rights-and-marriage-equality/> (visited 10 January 2016).

[4] [2009] IESC 82; [2010] 2 ILRM 411.

[5] [2010] 2 ILRM 411.

I. Regulation of Information Available to Donor Conceived Persons

Section 33 of the 2015 Act introduces a National Donor Conceived Person Register, a new system of information retrieval for both the child produced by a donor gamete and also for the donor themselves. When the National Donor Conceived Register now comes into effect, both the child and the donor will have access to their respective identifying information and contact details. The child will also be given access to information about their possible half-siblings. The changes in relation to half-sibling information has been cited as a positive and forward-thinking decision, given Ireland's relatively small population and the unlimited number of donations that can be made, which could give rise to the possibility of involuntary incest.[6] However, the decision to remove the donor's right to anonymity, favouring the child's right to know their biological identity is far more contentious.

As of yet, no homogeneous policy is apparent across EU member states on the issue of donor anonymity. Countries including France, Denmark and Spain only allow anonymous donations, whereas Sweden, Norway, the Netherlands and Switzerland solely permit people who are willing to have their identity known to donate.[7] On this point, Andrew Bainham has observed that, while UK legislation removes donor anonymity, nowhere is it specified that a child has a right to be told that they were conceived through donor assisted human reproduction.[8] This situation is replicated in the 2015 Act. It may therefore be argued that despite how important or unimportant anonymity is deemed to be, it remains irrelevant if the child is never made aware of their factual genetic make-up. However, this also represents a particularly bleak outlook on parents' potential willingness to allow their child to access vital information such as donor medical history, caused by personal fears that the knowledge of a donor may affect their parent-child relationship. It appears from the provisions of the 2015 Act that the Oireachtas has decided to trust that parents engaging in DAHR will act in the best interests of their child. In a similar vein, the UK government has stated "that it is preferable that parents are educated about

[6] Kilkelly, note 3.
[7] Tony O'Connor and David Walsh "Donors, Privacy in Assisted Human Reproduction" (2011) 17(1) *MLJI* 19.
[8] Andrew Bainham, "Arguments about Parentage" (2008) 67(2) *CLJ* 322, at 328.

the benefits of telling children that they were donor-conceived rather than forcing the issue through the annotation of birth certificates."[9] While legally enforcing DAHR indication on birth certs may single out DAHR children in a social context, and may thus put them at risk of discrimination on this basis in future, DAHR indication would also avoid the possibility that parents may try to hide their children's genetic roots, thereby depriving them of the benefit of knowing about hereditary genetic disorders or medical conditions. Nonetheless, the policy behind the approach of the British government, which encourages an open dialogue between parents and their children, is undoubtedly well intentioned in promoting familial relationships based on transparency, trust and honesty, and giving weight to the personal autonomy of parents in deciding when to disclose information about their child's genetic heritage.

One benefit of allowing children to know the identity of and contact information of their donor is that it may alter the donor's motivation for donating genetic material. The concept of donating sperm or embryos might take on a greater sense responsibility for donors if it becomes probable that they may be contacted by a child who is their biological relative at some point in the future. One study has claimed almost 70% of DAHR children contact donors by the age of 18.[10] On the other hand, concerns have been raised that prohibiting anonymous donations would result in a dramatic drop in available gametes, and would ultimately be counterproductive in allowing infertile couples to conceive.[11] It has also been argued that large amounts of information could still be provided while simultaneously protecting donor anonymity. Simply omitting the donors contact details and name would maintain donor anonymity while retaining the benefits of a national-donor conceived register in terms of access to genetic and medical information.[12] However this would not address the argument that the right to contact biological parents is an intrinsic aspect of the right to personal autonomy.[13] In the case of *McD v L*,[14] the Supreme Court recognised that children have a natural human curiosity about parentage.[15] Likewise, the ECtHR have affirmed "the importance to children of accessing information

[9] *Ibid.*, at 336.
[10] Susan Golombok "Psychological adjustment in adolescents conceived by assisted reproduction techniques: a systematic review" (2014) 21 (1) *Human Reproduction Update* 84.
[11] Kilkelly, note 3.
[12] Kilkelly, note 3.
[13] Bainham, note 8, at 347.
[14] [2009] IESC 81.
[15] [2009] IESC 81, at [78].

about their identity."[16] In the UK the case of *R v Secretary of State for Health, ex parte Quintavalle (on behalf of Pro-Life Alliance)*[17] saw the House of Lords hold that in order to respect private and family life every person needs to be able to establish their identity, including their biological origins.

II. Parentage in DAHR situations

The 2015 Act introduces a policy of intention when determining the parentage of DAHR child, thus affirming that the gamete donor of a DAHR child has no role or responsibilities as a legal parent to the child. The idea that legal parentage can be achieved by those who can afford DAHR reflects a more modern outlook on family life. While the rights of the child are advocated over the rights of the donor in relation to anonymity, here the law favours the interests of intending parents, with the desire of the intending parents to conceive children being given precedence over a child's possible desire to be kept in the care of their biological parents.[18] Tom Ellis argues that "separating a person from his parents must only happen as a last resort, and separation before birth is thoroughly unjustifiable...It is not the place of the government or the place of legislation to declare that gamete donors are not parents. Parenthood is a fact of biology."[19] This view rejects the argument that parentage can also be established through the actual performance and fulfilment of the role of a parent. It supports the argument of "parenting by being" rather than "parenting by doing".[20] English law has willingly adopted the idea that parentage is established through biological truth. In *Re G (Children)*[21], the House of Lords was required to consider the definition of a parent. Baroness Hale of Richmond notably established three key aspects of parentage, namely the genetic, gestational and, social and psychological, two out of three of these principles relating to biology.

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[16] Brian Tobin, "The revised general scheme of the Children and Family Relationship Bill 2014: cognisant of the donor-conceived child's constitutional rights?" (2014) 52(2) *IJ (ns)* 153 at 159.
[17] [2003] 2 WLR 692.
[18] Ray Kinsella, *Family Relationships Bill puts desires of adults above the rights of children*, <http://www.independent.ie/opinion/comment/family-relationships-bill-puts-desires-of-adults-above-the-rights-of-children-31078668.html> (visited 10 January 1 2016).
[19] *Joint Committee on the Human Tissue and Embryos (Draft) Bill 2007, Volume II: Evidence* , HL Paper 169-II, HC Paper 630-II, Ev 16, at [2] and [24].
[20] Bainham, note 8, at 323.
[21] [2006] UKHL 43; [2006] 1 WLR 2305.

Additionally in the case of *Re H and A (Paternity: Blood Test)*[22] the Court of Appeal decided that paternity was to be established through science, as it is generally in the best interests of the child to be raised by biological parents. However, if this principle was to be applied to the hypothetical scenario of a child who had an abusive genetic father but a caring step-father, it is hardly sufficient to conclude to decide that the best interests of the child lie with his scientific parent. While perhaps a simplistic argument, there is a strong case to be made that love and affection are more important than mere biological reassurance.

It may be difficult to conceive of the fact that a child could potentially have three parents. However there seems to be no significant reason why sharing parentage between three people could not be in the child's best interest. For example, it was held in by the Superior Court of Pennsylvania in *Jacob v Schultz-Jacob*[23] that for the purpose of support a child may have three legal parents.[24]

This was not the approach adopted by the Oireachtas in the 2015 Act, but the provisions of s. 35 of the 2015 Act allowing information in respect of relevant donor to be provided to the donor-conceived child does in some ways reflect an acceptance of this idea. While legally only two parents exist, the provision of the National-Donor Conceived Person register leaves the option of obtaining a third parental link open to the child by allowing the child access to the name and contact details of the donor. The 2015 Act thus leaves the decision to obtain a third parental link to the discretion of the child, rather than the donor, parents or the legislator. This in itself could be seen as a positive step, showing the commitment of the Oireachtas in putting the needs of the child at the forefront of the Act. Rather than creating a generalised rule for every DAHR situation, there is room in the legislation for both personal autonomy and the best interests of the child to be given equal weight.

Finally, it is interesting to note that while it has been argued that the provisions of the Children and Family Relationships Act 2015 were largely influenced by the debate surrounding the same-sex marriage referendum in 2015, the 2015 Act establishes a "*mater semper*" principle.[25] This means that the woman who gives birth to the child is the legal mother, implying firstly, there must be at least one female parent, and secondly, that surrogacy is excluded from the scope of the Act entirely, though it was initially

[22] [2002] EWCA Civ 383.
[23] (2007) 923 A 2d 473.
[24] Bainham, note 8, at 345.
[25] Kilkelly, note 3.

proposed that surrogacy should be regulated by the 2015 Act. Thus, surrogacy remains an area which has yet to be legislated for in Ireland.[26] Nonetheless, it is difficult to understand why the *mater semper* principle has been adopted in the 2015 Act, given that in the case of *MR v An t-Ard Chláraitheoir*,[27] McKechnie J explicitly doubted whether the maxim ever formed part of Irish law.[28] The case also confirmed that surrogacy contracts cannot be enforced through the Irish Courts, again highlighting a real need for legislation in this area.

Conclusion

The decision of the Oireachtas to legislate for DAHR was timely intervention to provide much needed regulation in this area of family law. It is difficult to foresee how effective the decision will be to remove both donor and child anonymity, given the individualistic nature of the desires and wishes of both parties. Yet it is commendable that the child is at least given the option to make this decision for themselves. The way in which the autonomy of the child has been respected is also to be viewed positively. While the legislation may not be perfect, it has arguably fulfilled its aim of being "a child-centred Act which addresses the rights of children to legal security, to the care of their parents and important adults in their lives, and to equality before the law."[29] The 2015 Act is therefore to be welcomed as a progressive step towards greater legal recognition of the diverse family situations that have become part of Irish life.[30]

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[26] Tobin, note 16, at 153.
[27] [2014] 11 JIC 0701.
[28] [2014] 11 JIC 0701 at [142].
[29] Address by Frances Fitzgerald, Minister for Justice and Equality at the Adoption Authority Seminar on the Children and Family Relationships Act 2015 <http://www.justice.ie/en/JELR/Pages/SP15000109> *(*visited 5 March 2016).
[30] Meg MacMahon, "All Changed, Changed Utterly: The Marriage Equality Referendum and Children and Family Relationships Act" (2015) 18(4) *IJFL* 95.