

## KEY POINTS

### What is the issue?

There remains confusion in the UK surrounding parentage rights following surrogacy.

### What does it mean for me?

Although reform is on the horizon, current legislation demands careful navigation by parents intending to enter into domestic or international surrogacy arrangements.

### What can I take away?

A concise summary of the current law and upcoming reforms.



# Legal conceptions

SARAH WILLIAMS DISCUSSES RECENT REFORMS TO THE LEGISLATION SURROUNDING SURROGACY IN THE UK

## CURRENT LEGISLATIVE FRAMEWORK

It has long been acknowledged that the existing surrogacy legislation in the UK is so outdated that it is not fit for purpose. Increasingly, judges have been obliged to rely upon judicial ingenuity and stretch interpretations of extant legislation to breaking point in order to safeguard the welfare of the surrogate-born child.

Although extensive reform is on the horizon, until such reform is enacted, the current legislation demands careful navigation by parents intending to enter into domestic or international surrogacy arrangements.

The primary legislative foundation, in the form of the *Surrogacy Arrangements Act 1985* (the Act), remains 'good' law despite being totally out of step with modern advances in artificial reproductive medicine and shifting cultural and societal attitudes.

The Act resulted in commercial arrangements being strictly banned and only altruistic surrogacy arrangements permitted.<sup>1</sup> Parental orders, whereby

the rights of the surrogate (and her legal partner) are extinguished while full parental rights are conferred on the intended parents, were introduced in 1990.

In 2008, there was widespread legislative reform in the form of the *Human Fertilisation and Embryology Act 2008* (the HFE Act). This modernising legislation set out the eligibility criteria for parental orders and extended these to same-sex couples, those who were married or in a civil partnership and, in 2013, to all couples in 'an enduring relationship'.<sup>2</sup> From January 2019,<sup>3</sup> following a declaration of incompatibility with human rights legislation, single individuals have also been eligible to apply for a parental order.

## WHO IS THE LEGAL MOTHER?

The HFE Act reaffirmed the principle that, as the surrogate gives birth to the child, she will be deemed to be the legal mother unless and until the intended parent/s obtain a parental order. If



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the surrogate mother is unmarried, an intended father can be placed upon the child's birth certificate following the birth.

#### WHO IS THE LEGAL FATHER?

Although a biological father can rely upon the common-law presumption of legitimacy to recognise his parentage, the HFE Act provides for scenarios whereby legal parenthood is otherwise vested in the non-biological father or second parent. If the surrogate is married, her husband will be deemed the legal parent.

#### THE CRITERIA FOR OBTAINING A PARENTAL ORDER

The criteria are strictly defined as follows:<sup>4</sup>

- At least one applicant must have a genetic link to the child.
- The applicant/s must apply for a parental order within six months of the child's birth.
- At the time of the application, the child must be living with the intended parent/s.
- At least one applicant must be domiciled in the UK, the Channel Islands or the Isle of Man.
- The intended parent/s must be over 18.
- The surrogate (and any other legal father or second legal parent) must consent to the making of the parental order.
- Valid consent cannot be obtained until six weeks after the birth.

The incorporation of s.1 of the *Adoption and Children Act 2002* into the surrogacy arena resulted in the courts being obliged to consider, in addition to the above, the life-long welfare of the child when determining any parental order application.<sup>5</sup>

The parental order is seen, in comparison to the UK's European neighbours, as a gold standard in the recognition of parentage for the intended parent/s. In one application, legal parentage is conferred on them, while the rights of the surrogate are extinguished. In France, for example, it is not unusual for the non-biological intended parent to be obliged to settle for the lengthy and complex path of adopting their surrogate-born child.

However, gold standard or not, the threshold to meet the criteria is high and impractical. For example, if neither of the intended parents have parental responsibility for the child pending the granting of the parental order (e.g., if the surrogate is married) then, even though the child is living with the intended parents, they are dependent upon the consent of the surrogate and her legal partner for matters such as consent to medical procedures and taking the child out of the jurisdiction.

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## The immediate post-birth assignment of parentage will bring much needed clarity and legal certainty'

#### FORTHCOMING WHOLESALE REFORM AND THE ASSIGNMENT OF PARENTAGE

In 2018, as part of the 13th Programme of Law Reform, the Law Commission of England and Wales confirmed that surrogacy legislation would be subject to a comprehensive three-year review. In a pivotal political shift, the government supported surrogacy as a means of family creation for the first time.

Dr Marilyn Crawshaw, Chair of the Project Group on Assisted Reproduction, summarised the compelling reasons when she stated:<sup>6</sup> *'Surrogacy law reform is needed to put the human rights and needs of surrogate-born people first and foremost – ensuring access to genetic and gestational heritage information; understanding that all involved in their conception and birth carry lifelong responsibilities; ensuring international standards outlawing child selling are met; preventing statelessness; and improving regulation.'*

At the conclusion of the three-year review, the government consultation paper, *Building Families through Surrogacy: A new law*, set out the following key proposals:

- the implementation of a pre-conception assessment of the welfare of the child so that there is no requirement to undertake this post-birth;
- the introduction of a pre-conception surrogacy arrangement;
- the introduction of specific regulation for surrogacy arrangements (in particular, matching and facilitation services) and specific safeguards, such as counselling and independent legal advice for both the surrogate and the intended parent/s;
- maintaining the requirement for there to be a genetic link between the child and one or both of the intended parent/s, save where the intended parent/s are medically infertile;
- permitting certain payments to the surrogate (loss of welfare entitlement, gifts, costs associated with a surrogate pregnancy, compensation for pain and inconvenience, loss of earnings, etc.)

but notably maintaining a ban on commercial payments;

- creating a new surrogacy pathway to parenthood in domestic arrangements that will permit the intended parent/s to be deemed the legal parent/s of the child from the moment of birth;
- the creation of a register to allow those born by surrogacy to access information about their origins (to include any sperm or egg donors); and
- allowing, on a country-by-country basis, international surrogacy arrangements to be legally recognised here, along with the introduction of unified guidance on nationality and immigration issues in order to assist intended parent/s and their surrogate-born child to return to the UK.

A draft Bill setting out the above is expected later in 2022.

#### CONCLUSION

Although, overall, the legal reforms are welcomed impatiently, from other quarters there is a sense of frustration that an opportunity to permit domestic commercial surrogacy arrangements is being missed. There is a significant dearth of domestic surrogates, which results in very long waiting lists, and the domestic commercialisation of surrogacy arrangements may have boosted the number of willing surrogates.

However, the immediate post-birth assignment of parentage will bring much needed clarity and legal certainty to the current grey area pending the obtaining of a parental order.

This also means that intended parents seeking comfort from a commercial surrogacy arrangement will still be obliged to look overseas, with all the expense and logistical issues that entails. They will also be tracked on the antiquated pathway to parenthood that we have currently.

#LEGISLATION #MATRIMONIAL  
#MODERN FAMILIES #UK

1 s.2(1) of the *Surrogacy Arrangements Act 1985* provides that no person shall, on a commercial basis, do any of the following:

- (a) initiate any negotiations with a view to the making of a surrogacy arrangement;
- (b) take part in any negotiations with a view to the making of a surrogacy arrangement;
- (c) offer or agree to negotiate with a view to the making of a surrogacy arrangement;
- (d) compile any information with a view to its use in making, or negotiating the making, of a surrogacy arrangement; and
- (e) knowingly cause another to do any of those acts on a commercial basis.

2 *Marriage (Same Sex Couples) Act 2013* 3 Declaration of incompatibility in *Re Z (A child) (No 2)* [2016] EWHC 1191 (Fam); *Human Fertilisation and Embryology Act 2008 (Remedial Order 2018)* 4 s.54, HFEA 2008 and HFEA 2008 (Remedial Order 2018) 5 s.1, *Adoption and Children Act 2002* 6 Scottish Law Commission, Discussion Paper No 167, *Building Families through Surrogacy: A new law*, joint consultation paper (6 June 2019)