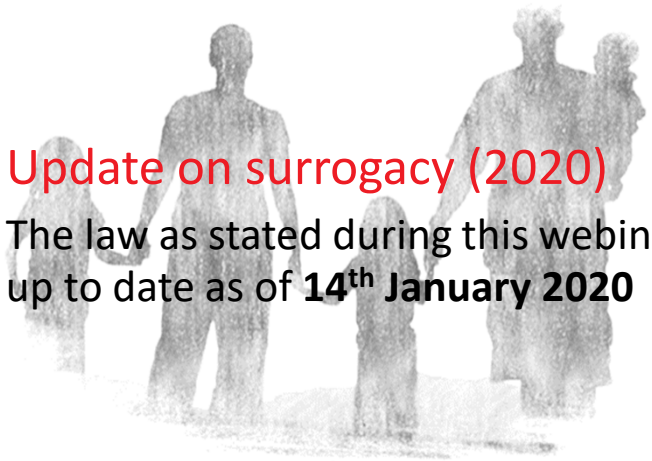
LexisNexis®

Update on surrogacy (2020)

28th January 2020

Before viewing this webinar, please visit www.lexiswebinars.co.uk/test-your-system to ensure that your network and PC are configured correctly.
Tip: Press F11 on your keyboard to enlarge the webinar player.



Update on surrogacy (2020)

The law as stated during this webinar is up to date as of **14th January 2020**

LexisNexis® Confidential

LexisNexis

Introduction

LexisNexis® Confidential

LexisNexis

Colin Rogerson

Partner

Dawson Cornwell

LexisNexis® Confidential

LexisNexis

UK legal issues with Surrogacy

What legal issues arise?

Surrogacy spans several legal disciplines

- Criminal/Regulatory law
- Family law
- Nationality / Immigration law
- Private client and estate planning

Surrogacy Arrangements Act 1985

Background

- The UK Government established the Warnock Committee in 1982 to consider the implications of medical advances in human embryology and the emergence of IVF in the late 1970s. In 1984, the Committee's report made a raft of recommendations in respect of human embryology and fertility treatments, but also made recommendations in respect of surrogacy.
- The Warnock Report recommended a prohibitive approach towards surrogacy by any legislation.
- In 1985 the "Baby Cotton" case hit the UK tabloids. Kim Cotton was a UK surrogate who had been paid £6,500 to carry a surrogate child for a foreign couple through a USA based commercial surrogacy agency. She also received payments for selling her story to the tabloids. Public outcry at the time and concern of "baby selling" resulted in the UK Government swiftly enacting the Surrogacy Arrangements Act 1985.
- The 1985 Act had the effect of:
  - rendering any surrogacy agreement unenforceable by or against any party as a matter of law (section 1A);
  - Criminalising third party brokers of surrogacy arrangements on a commercial basis;
  - Restricting the ability of surrogates to advertise their services or for people to advertise for a surrogate

Surrogacy Arrangements Act 1985 – Third party brokers

- Section 2:

1. No person shall on a commercial basis do any of the following acts in the United Kingdom, that is –

   (a) Initiate any negotiations with a view to making of a surrogacy arrangement,

   (aa) Take part in any negotiations with a view to making of a surrogacy arrangement,

   (b) Offer or agree to negotiate the making of a surrogacy arrangement, or

   (c) Compile any information with a view to its making, or negotiating the making of, surrogacy arrangements

   and no person shall in the United Kingdom knowingly cause another to do any of those acts on a commercial basis.

- It is not, however, an offence for intended parents or surrogates to do such an act as specified in section 2(1). The offence only applies to third parties.

Surrogacy Arrangements Act 1985 continued

JP v LP & Ors [2014] EWHC 595 (Fam), Eleanor King J:

- 41. Outside the regulated clinics advice is hard to find; there are few firms of solicitors specialising or even passingly knowledgeable in the field, perhaps in part because the prohibition contained in **s2**, **Surrogacy Arrangements Act 1985** prohibiting the negotiating of surrogacy agreements on a commercial basis means that firms are not providing a 'surrogacy service'. Surrogacy is however becoming increasingly common and the number of applications for parental orders around the country is increasing rapidly, particularly since the amendments to the HFEA 2008 now quite properly allow same sex and single women to apply for parental orders.
- 42. In CP's case not only did the first firm of solicitors draft an illegal surrogacy agreement, but once Children Act proceedings commenced no one knew, (or checked up on), the time limits relating to parental orders.
- 43. The application for and granting of parental orders whist not "routine" is no longer the exclusive province of lawyers specialising in reproduction and human embryology law. An understanding of and ability to make a proper application complying with the provisions of the HFEA 2008 should be as much a part of the skills set of a competent general family practitioner as is a step parent adoption.

Surrogacy in the UK

- The 1985 Act remains in force despite a significant shift in society's views towards what constitutes a family;
- Surrogacy operates in the UK on an altruistic basis without third party agencies operating on a commercial basis.
- There are three surrogacy organisations in the UK who operate on a not for profit basis:
  - Surrogacy UK;
  - COTS; and
  - Brilliant Beginnings
- Informal and independent matching groups are available through social media sites such as Facebook.

International Surrogacy

- There are disparate approaches towards surrogacy around the world, which can be broadly categorised into four categories:
- **The Prohibitive Approach**
  - Surrogacy is prohibited by law and often criminalised eg France, Germany
- **The Tolerant Approach**
  - Surrogacy is tolerated in certain circumstances, for example non commercial surrogacy eg UK, Australia (some states) and Canada
- **The Free Market Approach**
  - Surrogacy is unregulated and not prohibited, examples include California and other US states
- **The Regulatory Apporach**
  - Surrogacy is heavily regulated eg South Africa, Israel
- Intended parents from jurisdictions with less favourable laws in relation to surrogacy engage in "fertility tourism" to enter into surrogacy arrangements overseas.

Legal issues with international surrogacy

- The Parentage / Surrogacy Project at the Hague Conference on Private International Law is considering the feasibility of an international convention on surrogacy.
- There are currently no international laws or conventions which recognise parentage on an international level. In the context of international surrogacy, this gives rise to the risk of children being born either stateless or where their state of habitual residence does not recognise them as the legal children of their intended parents.
- Brussells II bis and the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children both explicitly exclude the establishment of a parent-child relationship.
- Children born through overseas surrogacy are often born in jurisdictions where the intended parents are recognised as the legal parents of the child at birth, or at the very least prior to the registration of birth. The foreign birth certificate may not reflect the legal parentage in the jurisdiction of residence.

Family law implications in respect of surrogacy

Who are the parents

- The common law presumptions of parentage do not apply where a child is conceived as a result of artificial insemination.
- The provisions of the Human Fertilisation and Embryology Act 2008 operate to determine the legal parentage of children **conceived** after 6 April 2009.

HFEA 2008 s.33 Meaning of "mother"

(1) The woman who is carrying or who has carried the child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman, is to be treated as the mother of the child.

(2) Subsection (1) does not apply to any child to the extent that the child is treated by virtue of adoption as not being the woman's child.

(3) Subjection (1) applies whether the woman was in the United Kingdom or elsewhere at the time of the placing in her of the embryo or the sperm and eggs

Family law implications in respect of surrogacy – Meaning of "mother"

- Thus the woman who carries the child through pregnancy will be recognised as the child's legal mother regardless of where in the world the child was born and regardless of whether or not there is any genetic link between the mother and the child.
- As a result of HFEA 2008 s.33 an **egg donor** will have no legal relationship or any rights in respect of the child.
- A **surrogate** (whether traditional or gestational) will be recognised as the child's legal mother
- **Second legal parent?**
  - If the surrogate married (or a in a civil partnership) with a man, her husband/CP is presumed to be the legal father unless it can be shown that he did not consent to the pregnancy (section 35).
  - If the surrogate is married (or in a civil partnership) with a woman, her wife/CP is presumed to be the legal parent unless it can be shown that she did not consent to the pregnancy (section 42).
  - If the surrogate is unmarried and not in a civil partnership, the HFEA does not attribute a second legal parent and the biological father is likely to be a legal parent because in this case the common law rules about parentage would apply.

Parental Orders

- In **Re C (A Minor) (Surrogacy: Wardship) [1985]** FLR 846 was the reported judgment in the Baby Cotton case. It established that where a child has been born through surrogacy, and the mother does not want the child, and the commissioning parents are able to offer a suitable home, the court is likely to allow them to care for the child.
- However the operation of the law to attribute legal parentage to the surrogate would mean that children would not have a formal legal relationship with their de facto parents unless an adoption order was made.
- The Parental Order was initially introduced in the Human Fertilisation and Embryology Act 1990 and was available to married (heterosexual) applicants.
- In 2008, the HFEA 2008 expanded the pool of applicants to unmarried couples (including same-sex couples) and to same-sex couples in a civil partnership.
- In 2019, following the making of a declaration of incompatibility made by Sir James Munby P in **Re Z (A Child) (No 2) [2016]** 2 FLR 327, single applicants contributing their own genetic material were permitted to make applications for parental orders.

Parental Orders: the criteria – Section 54 and Section 54A HFEA 2008

Criteria:

- Child must have been born as a result of a surrogacy arrangement;
- Child must have a direct genetic link to at least one of the applicants (or to the applicant in the case of a single application made under section 54A).
- In the case of a joint application under section 54, the applicants must be married, in a civil partnership or in an enduring family relationship and not within prohibited degrees of separation.
- The application must be made within six months of birth (case law does not necessarily reflect this);
- The applicant(s) must be over the age of 18 at the time of the order being made;
- The child's home must be with the applicant(s) at the time of making the application and the time of the making of the order;
- At least one of the applicants must be domiciled in the United Kingdom, Channel Islands or Isle of Man at the time of making the application and the making of the order;
- The surrogate and any other parent who is not one of the applicants (ie her spouse or civil partner) must give their full consent to the making of a parental order. In the case of a surrogate, consent cannot be valid until the child is at least six weeks old.
- There are very limited exceptions to the requirement of consent (where the surrogate cannot be found or where she is incapable of giving her consent);
- The court is satisfied that no payments other than for reasonable expenses have been made by the applicants for or in consideration of the making of arrangements, the order, or the handing over of the child unless authorised by the Court.

Parental Orders – best interests

- The Human Fertilisation and Embryology (Parental Orders) Regulations 2010 incorporate the welfare checklist as contained in section 1 of the Adoption and Children Act 2002 into parental order applications.
- Consequently, the **lifelong** best interests of the child are the court's paramount consideration when considering these applications.

Parental Orders – Key issues

Time Limit

- Section 54(3) provides that: *except in a case falling within subsection (11), the applicants **must** apply for the order during the period of 6 months beginning with the day on which the child is born.*
- It will be noted that there is little room for ambiguity in the interpretation of this statute. Indeed in **JP v LP & Ors [2014] EWHC 595 (Fam),** Eleanor King J stated that an application could not be made outside the time frame.
- However, in **Re X (A Child) (Surrogacy**: **Time Limit) [2014]** EWHC 3135 (Fam), Sir James Munby P permitted an application to be made out of time. After being referred to the Hansard debates preceding both the enactments of the 1990 and 2008 Acts, it was clear that the time limit inserted into the respective Bills had never been debated. He concluded that it could not have been Parliament's intention to deny the child of their legal relationship with their parents because an application was made out of time.
- Since **Re X**, the courts have allowed numerous "out of time applications."

Parental Orders - payments

- Most international surrogacy arrangements are "commercial" arrangements and involve payments made that exceed expenses reasonably incurred.
- Such arrangements must be authorised by the courts before a Parental Order can be made.
- In practice, these sums must be identified and evidenced to the Court, but the Court is likely to authorise such payments.

In **Re X**, the President endorsed the tests identified previously by Hedley and Theis JJ, namely:

1) Whether a sum is disproportionate to "reasonable expenses". Is the sum too high or too low that there may be concerns about exploitation or undue pressure that it may overbear her free will?
2) It is contrary to public policy to sanction excessive payments that effectively amount to buying children from overseas.
3) However, the 2010 Regulations import the lifelong best interests test as the paramount consideration. As a consequence, it is difficult to imagine circumstances where the welfare of a child would not be gravely compromised by a refusal to make the order.
4) Have the applicants acted in "good faith" and "without moral taint?" and has there been any attempt to defraud the authorities

Parental Orders - consent

- Consent of the respondents is vital.
- In **Re AB (Surrogacy – Consent) [2016] EWHC 2643 (Fam)** there had been a breakdown in the relationship between the intended parents and the surrogate and her husband. The surrogate did not wish to parent the children and did not challenge the placement of the children with the intended parents. She accepted that a parental order would be in the best interests of the children but would not consent to the making of an order. Theis J was unable to make a parental order in those circumstances.
- Where a respondent cannot be located, case law indicates that extensive searches must be undertaken before the court will dispense with the need to obtain her consent. See for example the decision of Baker J in **Re D and L (Surrogacy) [2012] EWHC 2631 (Fam)**

Parental Orders - jurisdiction

- At least one of the applicants must be domiciled in the UK, Channel Islands or Isle of Man.
- They need not necessarily be habitually resident in the UK, but the Court must be satisfied of the issue of domicile. Applicants without a clear domicile must provide evidence to support their asserted domicile. Oral evidence may be required.

Barry O'Leary
Partner
Wesley Gryk

Nationality & Immigration Law

Parents in British nationality law

Who are the child's parents in British nationality law following an international surrogacy arrangement?

- The child's mother is the woman who gives birth to the child - the surrogate mother
- The child's father depends on the marital status of the surrogate mother.
  - If she has a husband, the father is her husband
  - If there is no husband, the father is the 'natural father' (the biological father)
- (Sections 50 (9) and (9A) of the British Nationality Act 1981 and the British Nationality (Proof of Paternity) Regulations 2006 as amended in 2015.)

British citizenship “by descent” or “otherwise than by descent”

- Every British citizen is either British “by descent” or “otherwise than by descent”.

- **What is the difference?**
- The type of citizenship does not affect any rights or duties that go with British citizenship, *apart from the ability to automatically transmit citizenship to children born abroad.*
  - British citizens “otherwise than by descent” - automatic transmission of citizenship to children born abroad.
  - British citizens “by descent” – no automatic transmission of citizenship to children born abroad.

- **Who falls into which category?**
- As a general principle, British citizens are British “otherwise than by descent” if they are British by birth, adoption, registration or naturalisation in the United Kingdom.
- People who are British citizens by virtue of being born to a British parent outside the UK are British citizens “by descent”.

Scenarios with a British Citizen Commissioning Parent

Scenario 1 -- Unmarried surrogate mother and biological British Citizen father who is British otherwise than by descent

- The child in this scenario is a British Citizen on birth and should apply for a British passport.

Scenario 2 - married surrogate mother and biological British Citizen father who is British otherwise than by descent

- The fact that the surrogate mother is married blocks the transmission of British Citizenship from the biological father to the child.
- As the child is not born British, a solution needs to be found in British nationality or immigration law. The possible options are :
  - Wait for a Parental Order to be issued
  - Visa outside the rules
  - Registration as a British citizen under Section 3(1) of the British Nationality Act 1981.

Scenarios with a British Citizen Commissioning Parent (continued)

Scenario 3 - relying on British Citizenship otherwise than by descent of commissioning mother or non-biological father

- The options are similar to scenario 2 but:
  - Wait for a Parental Order to be issued –but is a parental order available?
  - Visa outside the rules - but is a parental order available?
  - Registration as a British citizen – but will the Home office require a post-birth order from the foreign jurisdiction?

Scenario 4 - relying on a commissioning parent who is British by descent.

- Wait for a Parental Order to be issued – the same as above
- Visa outside the rules –the same as above but is there an application within the rules?
- Registration as a British citizen – there will be another hoop to jump through.

Non-British parents

The considerations are different for non-British parents.

- Parents with indefinite leave to remain
- EEA national parents
- Parents with limited leave

When can the child travel to the UK?

Non-visa v visa nationals

The world is split into countries whose citizens are in British immigration law 'visa nationals' or 'non-visa nationals.'

- Visa nationals must have a visa if coming to the UK even if only coming for a visit. If they try to come to the UK without a visa, they will not be allowed on the plane (because the airline may be fined if they were to let them travel).
- 'Non-visa nationals' can come to the UK **for a visit** without obtaining a visa.

The USA example

US citizen are non visa nationals.

- Are children born in the USA following a surrogacy arrangement US citizens?
- Will they be able to obtain a US passport?
- Can they travel to the UK on that US passport?

The Ukraine example

How long will the child be in Ukraine?

Will there be changes in this area?

R (ota K, a child by her litigation friend) v SSHD

- In the case of **R (ota K, a child by her litigation friend) v SSHD [2018] EWHC 1834 (Admin),** the High Court declared that section 50 (9A) of the British Nationality Act 1981 was incompatible with human rights as it discriminates unlawfully against children whose mothers are married to a man other than the child's father when the child is born.
- The Secretary of State for the Home Department initially appealed that decision but has now decided to withdraw.
- What changes will be made?

The Law Commission

Upcoming Family webinars

- Update on surrogacy (2020) – 28th January 2020
- Domestic abuse update (2020) – 18th February 2020
- Parental responsibility and the deprivation of liberty (2020) – 17th March 2020
- (LIVE) Update on public children (2020) – 14th April 2020

LexisNexis® Confidential

LexisNexis

Thank you and reminders

- This webinar is designed to help solicitors meet requirements A2 (Maintain competence and legal knowledge) and A4 (Draw on detailed knowledge/understanding) of the SRA's Statement of solicitor competence. You may also use the quiz, which can be accessed via the "Take a quiz" link on the webinar details page, to reinforce your understanding of the webinar content. You should answer 7 out of 10 questions correctly and will have two attempts at the quiz.
- Please submit feedback via the survey screen.
- This webinar will be archived immediately, and will be available to view on-demand for 24 months.
- A transcript of the webinar can be made available on request within 48 hours.
- You can use the training and evaluation record form which is included in the supporting materials for this webinar to log this training activity and how it relates to the continuing competences that the SRA requires from all solicitors.

If you have any queries, please contact us:

webinars@lexisnexis.co.uk

+44 (0) 330 161 2401

@LexisUKWebinars

lexisnexis-webinars

LexisNexis® Confidential

LexisNexis

Thank you for attending.

We hope you've enjoyed this session.

Bespoke in-house training solutions

- Tailored for your business
- Extensive portfolio of expert presenters
- All areas of legal practice covered
- Location of your choice

Find out more - http://www.lexiswebinars.co.uk/in-house-training

LexisNexis