

The surrogacy journey

Fiona Lyon discusses the legal & practical steps for modern families in surrogacy arrangements

IN BRIEF

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Surrogacy arrangements date back to biblical times but gained real potential after 1978 when the first baby was conceived via IVF. This innovation pioneered further medical advances in the field of childbirth. In 1982, the first baby was born via egg donation and the first gestational surrogacy was achieved in 1985, with no genetic link between birth mother and baby. However, surrogacy gained bad press early on following the controversial surrogacy case of 'Baby M' in the US in the mid-1980s. This was a case where the surrogate had a biological link to the baby and refused to relinquish her parenthood following the birth. A two-year custody battle ensued with the intended parents being granted custody and the surrogate having visitation rights. This is, fortunately, a rare occurrence.

The growth of surrogacy arrangements has increased dramatically over recent years, with the oldest recorded surrogate being aged 61 who gave birth to her own grandchild. Surrogacy arrangements have gained further prominence with stars such as Elton John, Robbie Williams, Sarah Jessica Parker and Kim Kardashian extending their family in this way. There are many reasons why people turn to surrogacy, which include failed IVF procedures, recurring miscarriages, pregnancy health risks, premature menopause or internal abnormalities. These types of arrangements are also very popular in the LGBTQ+ community as they allow a genetic link to be created to a child where otherwise it might not have been possible.

This article will explore the legal and practical steps that must be taken by couples embarking on a surrogacy journey.

Terminology

- ▶ **Intended parents ('IPs' or 'IP')**—the parent(s)-to-be, where one or both are biologically linked to the baby.
- ▶ **Surrogate**—preferred name of the individual carrying the baby (not mother or parent).

- ▶ **Gestational/Host surrogacy**—the surrogate has no biological link to the baby and the embryo is created using the IPs' gametes or with assistance from a donor.
- ▶ **Straight surrogacy**—the surrogate will use her own egg and the IP's sperm or donor sperm.
- ▶ **Commercial surrogacy**—where the surrogate is permitted to be paid compensation to carry a child in addition to expenses. This is legal in the US and a few other countries but not in England.
- ▶ **SPAR surrogacy**—Special Program of Assisted Reproduction (SPAR) allows an HIV positive man to become a biological father to a child without transmitting the disease.
- ▶ **Surrogacy agreement**—document signed by the parties involved to record their intentions and commitment to the process.
- ▶ **Parental orders**—a court order that transfers legal parenthood from the surrogate (and potentially her husband/civil partner) to the IP(s).

Pathway to surrogacy

Surrogacy in England is legal, but the surrogacy agreements themselves are not legally binding or enforceable. Under the Surrogacy Act 1985, it is a criminal offence to advertise for a surrogate, negotiate a commercial arrangement with a surrogate or facilitate surrogacy for someone else. It is also a criminal offence for a surrogate to advertise surrogacy services. In order to minimise risk, it is recommended to proceed via an experienced surrogacy organisation and to enter into a surrogacy agreement. The three largest surrogacy organisations are: Surrogacy UK, Brilliant Beginnings or COTS. These organisations help the IP(s) to find a surrogate and conduct background and medical checks to ensure the right candidates are found and matched. It is important for the IP(s) to develop a relationship of trust with the surrogate and to get to know each other properly before any surrogacy agreement is reached.

Surrogacy agreements are likely to include:

- ▶ **Conception arrangements**—how the embryo is to be created and inseminated. If the parties require IVF treatment, further decisions will need to be made



such as choice of clinic and how many embryos should be transferred at a time.

- ▶ **Pregnancy arrangements**—including medical decision-making (if something goes wrong), healthcare (what medications and vitamins should be used), who will attend appointments and how much information the IP(s) will be given during this waiting period.
- ▶ **Birth arrangements**—outlining the type of birth, medications and who will be present.
- ▶ **Post-birth arrangements**—how the baby will leave hospital. It is important to agree discharge arrangements with healthcare staff so the IP(s) are recognised.
- ▶ **Expenses**—it is good practice for the surrogate to provide an estimate of reasonable costs up front and for it to be recorded in the agreement. The surrogate is also permitted to be reimbursed for:

- i) loss of earnings;
 - ii) her partner/spouse's loss of earnings (if applicable);
 - iii) treatment costs, such as IVF;
 - iv) additional childcare to cover appointments;
 - v) travel costs;
 - vi) additional food and supplements;
 - vii) additional therapies that assist the pregnancy; and
 - viii) modest recovery break with her family.
- These payments will be scrutinised by the Family Court when it comes to making the parental order and the surrogate must keep a record.

- ▶ **Wills**—most IPs will be recommended to make a will to ensure guardianship is considered in the event of death of one or more of the IPs. The IP(s) will want to nominate carers to ensure the surrogate and the child are protected.



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Criteria

The parties must ensure they can meet the requirements of a parental order before embarking on the surrogacy journey to prevent complications at the other end. The criteria to apply is as follows:

- ▶ HFEA, s 54 (A)(1)—the child must be carried by a surrogate and be genetically linked to at least one of the applicants.
- ▶ HFEA, s 54(2)—the IP(s) must be married/in a civil partnership or are in an enduring family relationship.
- ▶ HFEA, s 54(3)—the IP(s) must apply within six months of the birth.
- ▶ HFEA, s 54(4)—the child's home must be with one of the IP(s) at the time of the application and at least one of the IPs domiciled in the UK.
- ▶ HFEA, s 54(5)—the IP(s) must be over 18 when the Order is made.
- ▶ HFEA, s 54(6)—the surrogate and their partner/spouse must give consent unconditionally to a parental order being made.
- ▶ HFEA, s 54(7)—the surrogate cannot give consent before six weeks from the birth has passed (this will be done on forms C52 and A101A in practice).
- ▶ HFEA, s 54(8)—the court must be satisfied that the expenses paid and incurred by the surrogate must be reasonable and not commercial.

Parental orders

Once the criteria are fulfilled the court will look at whether the making of the order is in the child's best interests. Many IP(s) conduct the parental application themselves but some choose to be represented as it involves court hearings. The process of applying for a parental order usually takes six to twelve months and the steps are as follows:

- ▶ The IP(s) must register the birth by sending Form C51 and the birth certificate to the local Family Court and the court fee

of £215. It is not necessary to wait the six weeks for the surrogate to consent.

- ▶ NB: Due to delays with registering births during the pandemic, the courts have confirmed parental order applications can be made without birth certificates so long as they are filed before the making of the parental order.
- ▶ Once the court application is made, CAFCASS (Children and Family Court Advisory and Support Service) will appoint a social worker within two to five days of receipt to act as the 'parental order reporter'.
- ▶ The CAFCASS officer will represent the child's interests and make independent inquiries with the parents to decide if the order should be granted. They will also ensure that the surrogate consents.
- ▶ CAFCASS will then produce a parental order report. It will take around eight to twelve weeks to get to this stage.
- ▶ There are usually two hearings, a directions hearing and a final hearing. The parents are asked to produce a statement setting out why they meet the parental order criteria after the directions hearing. However, the hearings can be combined in straightforward cases if directions can be dealt with in writing. Alternatively, there can be more than one directions hearing if there are complexities to the case.
- ▶ If the case is straightforward, it can be approved by a magistrate. More high-profile matters are heard in the High Court and involve cases that do not meet the criteria or have an international element.
- ▶ Once the order is made it is sent to the General Register Office (GRO) so that they can enter the new details on the Parental Order Register. The process is the same wherever the child was born but the GRO will write to the local

Register Office and ask them to log that this birth is 'Re-registered by the Registrar General'.

- ▶ The GRO will then write to the IP(s) to inform them that they can apply for a new birth certificate.

The law of surrogacy is under review by the Law Commission and in 2019 a consultation paper was published. The report contained many recommendations which included that court proceedings should be abolished for domestic surrogacy arrangements. However, international cases will still need to be approved by the High Court to guard against the risk of human trafficking. The Commission is expected to produce a final report with its recommendations for reform of the law, and a draft Bill, in early 2022.

Caselaw update

Re X (Parental Order: Death of Intended Parent Prior to Birth) [2020] EWFC 39

Facts:

- ▶ M and F enter into a straight surrogacy arrangement after years of struggling to conceive.
- ▶ Parties set out that they intend to apply for a parental order and this is set out in the surrogacy agreement.
- ▶ F dies of heart failure five months into the pregnancy.
- ▶ M makes an application for a parental order on behalf of herself and F, despite being unable to meet the enduring relationship criteria.
- ▶ M's representatives asked for the legislation to be 'read down' to comply with X's human rights as the legislation had not contemplated an IP dying.

Held:

- ▶ Child X's Art 8 and Art 14 rights were engaged and it was her right to be recognised as the child of F.
- ▶ Child X's birth certificate cited the surrogate's husband, who she has no relationship to.
- ▶ Had the parent survived, the criteria for a parental order would have been met.
- ▶ The joint applicant rule was discriminatory on the grounds of relationship status, without justification.
- ▶ The legislation was read down to enable the requirements of s 54 to be met where the child's parent dies after conception but before birth.

Re: A [2020] EWHC 1426 (Fam)

This case cited *Re: X* in the judgment.

Facts:

- ▶ February 2017: child A born from a surrogacy arrangement.

- ▶ M and F were both biologically linked to the child.
- ▶ M and F separated during the surrogate's pregnancy with A.
- ▶ M applied for A to be a ward of court after the birth.
- ▶ F confirmed he no longer wanted to be involved in the proceedings.
- ▶ July 2017: M made an application as a single mother for a parental order, which did not meet the enduring relationship criteria.
- ▶ The court stayed the application with liberty to apply for the stay to be lifted.
- ▶ 3 January 2019: The Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018 introduced s 54A into the Human Fertilisation and Embryology Act 2008 to allow single parents to apply for parental orders.
- ▶ The stay was lifted.
- ▶ F changed his mind and decided he wanted contact with A and to be a parent.
- ▶ 16 December 2019: M and F make a joint application over two years after birth.

Issues for the court:

- ▶ Joint Application was out of time.
- ▶ The legislation prescribes that the IPs should be in an 'enduring relationship' and they were not together.
- ▶ The legislation provides that the child's home should be with the applicants and they did not live together.
- ▶ Child A was only having indirect contact with F (with the intention this would progress to direct and staying contact).
- ▶ The court was required to 'read down' three provisions of s 54 of HFEA 2008 and consider Parliament's intentions.

Held:

- ▶ The lateness of the application did not bar the court from making an order.
- ▶ The court was satisfied that the parties were in an enduring family

COVID-19 & international surrogacy

- ▶ Popular destinations for international surrogacy arrangements are the US, Canada, Georgia and the Ukraine. Babies born in the US and Canada are classed as citizens and are entitled to a passport, which normally come through in a couple of weeks. In the Ukraine it can take up to 16 weeks and it is therefore important for the IP(s) to do their research. If no local passport is available, then it may be necessary to apply for a British passport to get the child home. The IP(s) are recognised as the legal parents of the child in these countries and will be named on the birth certificate. The surrogate in the Ukraine has no status as a parent to a child born by surrogacy, even if they are genetically linked. However, this will not be sufficient to establish parenthood once the family returns to the UK and a parental order is still required. This is very different to England where parental responsibility is automatically conferred on the birth mother.
- ▶ COVID-19 has presented some unique and challenging problems to international surrogacy arrangements. The travel ban has put some IP(s) and their surrogates in legal limbo with some countries closing their borders. In some cases, it has not been possible for the IP(s) to travel to attend the birth and collect their babies. It was reported in *The Guardian* that a US surrogate had no choice but to care for the child she had birthed when the parents were unable to collect their baby from China. The surrogate was not related to the child but agreed to look after him until the parents could enter the US following the travel ban on Chinese nationals in January 2020.
- ▶ In the Ukraine, there have been reports of 35 newborns born to surrogacy being looked after in a hotel room by a rota of nannies. There have been reports of the IP(s) being turned away at the US border as they are only allowed to enter post-birth. The emotional risks presented by the surrogate bonding with the baby have led to surrogacy case workers looking after the babies themselves. Even when the IP(s) can enter the country, the nationwide closure of the passport office will cause issues in obtaining the required documentation for the baby to leave. The financial and emotional cost for the IP(s) is devastating while they also miss out on precious bonding time. The stakes are increased with many babies also being uninsured for treatment should they catch COVID-19. The average cost of a US surrogacy is between £150,000 to £250,000, which for some who have been caught has doubled.

relationship due to their commitment and dedication to A.

- ▶ Child A's Art 8 and Art 14 rights were engaged and the court was bound to consider the effect on the reality of the child's life.
- ▶ This concept of home was to be given a 'wide and purposive interpretation' and the fact that A had a home with both IPs was sufficient.
- ▶ The court focussed on the IPs agreement in respect of the future care arrangements for A, which were progressing towards staying contact.

The parental order was made as it was held to be 'overwhelmingly in the welfare best interests of A', which was referred to

as the 'ultimate test' in whether to make the order. The court was careful to reflect Parliament's intentions: 'If a parental order is not made, the child is likely to be denied the social and emotional benefits of recognition of this relationship with his parents and would not have the legal reality that matches his day to day reality.'

Comment

These two cases highlight how the courts are willing to look at the spirit of the legislation rather than the technical letter of the law to protect children's rights and prevent injustice to a child born to a modern family. **NLU**

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