

UNCLASSIFIED



CAFCASS GUIDANCE FOR PARENTAL ORDERS

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Approved by:		Version no:	0.2
Next review date:	May 2011	Ref:	
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INTRODUCTION

Recent legislative changes have from 6th April 2010 extended the categories of couples who may apply for a Parental Order, to acquire the status of 'legal parent' following a surrogacy arrangement. These changes were made by the Human Fertilisation and Embryology Act 2008¹ ("the 2008 Act") and the Human Fertilisation and Embryology (Parental Orders) Regulations 2010 ("The 2010 Regulations")². The 2010 Regulations apply selected provisions of the Adoption and Children Act 2002, and modifies them to cater for Parental Orders rather than Adoptions, notably the welfare checklist and the legal effect of the Parental Order. New rules of court also set out procedural requirements for applications for Parental Orders.³ In summary:

- To acquire the status of legal parents the commissioning couple must apply for a Parental Order⁴.
- Applications for Parental Orders must start in the Family Proceedings Courts.
- The Court will appoint a Cafcass officer to act as Parental Order Reporter. ("POR")
- The 2008 Act permits civil partners and couples in an enduring family relationship to apply for Parental Orders, in addition to married couples as originally specified in the 1990 Act.
- Parental Order applications are no longer specified proceedings so the child is not automatically a party. One of the PORs duties is to advise whether the child should be joined as a party, this will usually only occur in complex cases which are transferred to the High Court.

BACKGROUND

Surrogacy provides an opportunity for a couple to have a child that is genetically related to either one or both of them, where this would otherwise not be possible. Arranging for a surrogate to carry a child involves complex and sensitive issues about who holds parental responsibility of any child born as a result.

In the UK, in cases of assisted conception whether or not this involves medical treatment, the woman who carried and gave birth to the child is the child's legal mother.⁵ The 2008 Act also specifies that, if the surrogate is married or in a civil partnership, her partner will be the father (or second parent) of the child; the

¹ [Human Fertilisation and Embryology Act 2008](#)

² Human Fertilisation and Embryology (Parental Orders) Regulations 2010 – (http://www.opsi.gov.uk/si/si2010/draft/ukdsi_9780111491355_en_1)

³ The Family Proceedings Courts (Children Act 1989)(Amendment)(No 2) Rules 2010 ("The FPC Rules") and for the higher courts the [Family Proceedings \(Amendment\)\(No 2\) Rules 2010](#). ("The Higher Court Rules")

⁴ The Family Proceedings Courts (Children Act 1989) (Amendment) Rules 2010 insert new rules 21A and 21J into the Family Proceedings Courts (Children Act 1989) Rules 1991. [haven't managed to check this yet]

⁵ [Section 33, Human Fertilisation and Embryology Act 2008](#)

exception to this is if it can be shown that the partner did not consent to the treatment.

If the surrogate is not married or in a civil partnership, there are three potential issues to be aware of:

- The surrogate may have completed a parenthood or fatherhood agreement⁶ with her partner before having treatment, in which case the partner will then be the father / second parent of the child;
- The applicant parent man may have registered as the child's father.⁷ This will be because his sperm was used in the treatment; or
- The child will have no second parent.

The Court Rules specify who will be the parties to the case.⁸ The applicants are the commissioning couple and the respondents will be the surrogate and her partner (subject to the criteria outlined above), or any other person with parental responsibility for the child at the date of the application.

Transitional arrangements:

- **Section 54 (11) cases where the child is older than six months.**⁹ Section 54 (11) of the 2008 Act provides for same sex and unmarried couples who were not able to apply for Parental Orders under the 1990 Act. If they fulfil the criteria for application, they may apply for Parental Orders within the first six months of the provisions of the 2008 Act and the regulations coming into force on 6th April 2010.
- **Regulations.** The regulations came into force on 6th April 2010. Parental Order cases where the application was made under the 1990 Act will continue to be dealt with under the 1990 Act.
- **Court rules.** From the 6 April the date the Court Rules came into force all Parental Order cases will be dealt with under the new rules set out by the Family Proceedings Courts (Children Act 1989) Amendment Rules 2010.¹⁰

THE ROLE OF THE PARENTAL ORDER REPORTER

The commissioning couple are required to complete an application for a Parental Order (form C51). A copy of the child's birth certificate will be attached to the form, alongside a copy of the commissioning couple's marriage or civil partnership certificate (where applicable).

⁶ The Human Fertilisation and Embryology Act 2008, s44 and 37 respectively.

⁷ Register of live births – held by the General Register Office

⁸ Rule 21G of the FPC Rules and rule 4A.7. of the Higher Court Rules

⁹ [Section 54 \(11\) of the Human Fertilisation and Embryology Act 2008](#)

¹⁰ [Family Proceedings Courts \(Children Act 1989\) Amendment Rules 2010](#)

Once the court receives the completed application, a request will be made to Cafcass for the nomination of an Family Court Adviser to act in the role of a POR .

Duties of the Parental Order Reporter:

- Identify what information needs to be available for the court to make a decision about the application;
- Ensure that all criteria for making a Parental Order are met.
- Undertake Cafcass initial safeguarding checks (following the same approach which is undertaken in private law work to first hearing cases) to establish if there is any information concerning risk of harm.
- Applying the adapted 2002 welfare checklist, establish if there is any reason why the Court should not make a Parental Order
- Demonstrate the child's best interests both in what needs to happen now and what needs to be happening to work towards future needs, such as issues addressing the child's sense of identity and belonging; and

THE ROLE OF PARENTAL ORDER REPORTER

When undertaking the assessment as to whether an order is in the child's best interests for the immediate and longer term future the POR will need to consider each of the application criteria¹¹ to make sure it is fulfilled by the commissioning couple.

In every case at least one of the applicants is a genetic parent to the child. There is a presumption that a Parental Order will be granted unless the criteria for granting an order are not met or there are safeguarding or significant welfare concerns.

The guidance set out below gives details each of the criteria to assist the POR in making his/her assessment.

1. The welfare of the child, the paramountcy principle, and the Welfare Checklist.

The welfare of the child is the Court's paramount consideration in Parental Order applications. The Parental Order Welfare Checklist requires the court to consider:¹²

- The child's ascertainable wishes and feelings regarding the decision, with regard to the child's age and level of understanding;
- The particular needs of the child;
- The likely effect on the child (throughout life) of having ceased to be a member of the original family and having become the subject of a Parental Order;

¹¹ set out in section 54 of the 2008 Act

¹² [Welfare Checklist, Section 1, Adoption and Children Act 2002](#) as applied by the 2010 Regulations.

- The child's age, sex, background, and any other characteristics of the child which the Court considers relevant;
- Any harm (within the meaning of the Children Act 1989) which the child has suffered or is at risk of suffering; and
- The relationship which the child has with relatives, and with any other person in relation to whom the Court considers the relationship to be relevant.

2. The child has been carried by a surrogate, as a result of her having assisted reproduction treatment and the sperm or the egg of at least one of the applicants were used to bring about the creation of the embryo.

Where treatment was carried out at a HFEA licensed clinic¹³, the commissioning couple should provide a written statement from the fertility clinic where they were treated giving evidence of the treatment received.

Where possible, information about the treatment should be acquired from both the commissioning couple and the surrogate, this could be in the form of a letter from a HFEA licensed clinic. If this is not possible or the information is insufficient the POR can contact the clinic directly, who may be able to disclose information about the treatment under section 33A(2)(q) of the 1990 Act. The clinic is required, before offering treatment, to 'consider the welfare of the child that may be born as a result of treatment'¹⁴ and this, coupled with any further investigation undertaken by the clinic, will be recorded in the records of the surrogate. These records will also include details of the applicant parents or surrogates counselling before their treatment.

However, not all cases will involve treatment at a HFEA licensed centre. If the couple did not receive treatment at a licensed fertility clinic, or if treatment was in a private clinic overseas the POR should make enquiries into the circumstances of the child's conception and birth. These circumstances should be recorded in the report. Where there is uncertainty about implications of surrogacy which has occurred overseas advice should be sought from Cafcass Legal.

3. The commissioning couple must be married, civil partners, or in an enduring family relationship.

Where the commissioning couple are married or in a civil partnership, they have to provide a certificate with the Parental Order (C51) application form.

If the couple are living as partners in an enduring family relationship during the course of the assessment the POR needs to be satisfied that this is the case, and

¹³ www.hfea.gov.uk provides a search-engine of licensed clinics.

¹⁴ The 1990 Act s 13(5)

<http://www.hfea.gov.uk/5473.html?fldSearchFor=welfare%20of%20the%20child>

that the couple are not within prohibited degrees of relationship with each other.¹⁵ For example, this could be achieved by seeing original birth certificates of family members.

4. The Parental Order application must be made within 6 months of the child being born

The POR will be able to determine this using the child's birth certificate that is submitted with the C51 form. The consent of the surrogate to the making of the Parental Order is ineffective if it is given less than six weeks after the child was born.

5. The child's home should be with the commissioning couple, who must be domiciled in the UK, Channel Islands, or the Isle of Man.

The subject child must be living with the commissioning couple when the application for the Parental Order is made; the POR can establish this by visiting the commissioning couple at their home.¹⁶ During this period, the surrogate (and partner) will have parental responsibility for the child; the child is not being privately fostered and cannot be removed from this care without the consent of the applicants or authorisation from the Courts.¹⁷

6. The commissioning couple must both be aged 18 or over when the order is made.

The date of birth of both parties will be provided on the application form. Where there is doubt, the birth certificates should be made available by the commissioning couple.

7. The surrogate (and partner) must freely and unconditionally consent to the making of the Parental Order

A completed and signed A101A form is a record of the surrogate's consent to the Order, and should be witnessed by a Cafcass reporter (this may be the Parental Order Reporter). However, the use of this form is not mandatory, and it is also accepted for the surrogate to consent to the making of the Order in person, in court.

If the POR is not satisfied that the surrogate (and her partner where applicable) have a full understanding of the consequences of giving their consent to a

¹⁵ Two persons are defined as being within prohibited degrees of relationship if one is the other's parent, grandparent, sister, brother, aunt or uncle; this also includes relationships of half blood or, in the case of an adopted person, where those relationships would exist with their adoptive, former adoptive, or birth parents. It does not include any other adoptive relationships. [Section 58\(2\) Human Fertilisation and Embryology Act 2008](#).

¹⁶ Applicants for Parental Orders should be advised to seek their own legal advice as to whether or not they are domiciled / habitually resident in the UK.

¹⁷ Paragraph 12 of Schedule 4 to the Regulations (privately fostered children: exemptions), ACA 2002 s.36 as applied by the Parental Order Regulations

Parental Order or if consent is refused then the case should be referred back to court and the POR should clarify this with the commissioning couple. If the grounds are related to incapacity, it is likely that the Court will require a detailed medical report from an appropriate source. Any costs for such a medical report fall to the commissioning couple, and the advice of the Court should be sought before making such arrangements.

8. The Court must be satisfied that no money or other benefit, other than reasonable expenses, has been received by the surrogate.

The surrogate can only receive 'reasonable expenses' from the commissioning couple, and both the Court and the POR must be satisfied with this. The Parental Order Reporter should discuss the expenses that have been paid with both the commissioning couple and the surrogate.

Whether expenses are deemed reasonable will depend on the circumstances of the case, and any concerns regarding expenses that may not have been reasonably incurred should be set out in the report to the Court.¹⁸

Disclosure of information

The information that can be disclosed by the courts is specified in rule 21(jk) of the Court Rules. A person who is the subject of a Parental Order, and at least 18 years of age, may apply to the Court to receive copies of:

- The application for the Parental Order (but not any attached documents);
- The Parental Order and any other orders relating to the proceedings;
- Any transcript of the Court's decisions; and
- The report made to the Court by the Parental Order reporter.

Appeals

The Parental Order regulations apply the appeals provisions in the Children Act 1989 to Parental Orders. Therefore, the appeals process in Parental Order cases reflects the appeals process for adoption cases.

Links

Human Fertilisation and Embryology Act 2008

http://www.opsi.gov.uk/acts/acts2008/ukpga_20080022_en_1

Human Fertilisation and Embryology (Parental Orders) Regulations 2010

http://www.opsi.gov.uk/si/si2010/uksi_20100985_en_1

¹⁸ Re X and Y (Foreign Surrogacy) [2008] EWHC 3030, a decision of Hedley J. The judge asked himself whether the sum paid was disproportionate, whether the commissioning couple acted in good faith and whether there was an attempt to defraud the authorities.

Human Fertilisation and Embryology Act 1990

http://www.opsi.gov.uk/acts/acts1990/Ukpga_19900037_en_1

Adoption and Children Act 2002

http://www.opsi.gov.uk/acts/acts2002/ukpga_20020038_en_1

Family Proceedings Courts (Children Act 1989) Amendment Rules 2010

http://www.opsi.gov.uk/si/si2010/uksi_20100787_en_1

Family Proceedings (Amendment) (No 2) Rules 2010