

Cafcass' response to the Law Commission consultation on surrogacy reform

Cafcass (the Children and Family Court Advisory and Support Service) is a non-departmental public body sponsored by the Ministry of Justice. Cafcass represents children in family court cases in England. We make sure that their wishes and feelings are heard and that decisions are made in their best interests. We are independent of the courts, children's services, education and health authorities.

We have a unique experience within surrogacy cases as the only social work organisation whose practitioners are appointed by the court as 'parental order reporters' (POR) when intended parents apply for a parental order. The POR represents the interests of the child rather than those of the adults and advises the court of what is in the child's best interests. They do this through an assessment process involving the child, intended parent(s), and surrogate, by meeting the parents with their child to observe their interaction, as well as ensuring that the surrogate continues to consent freely and unconditionally.

This assessment process is generally "light touch" with a focus on parents understanding the importance of the child learning about their origins and identity, and how to do this in a child-focused way as well as the effect on the child throughout their life of the making of the parental order.

While we agree with the proposed new pathway to parenthood in principle we are seeking further assurances about the process for the pre-conception safeguarding assessment and suggest a requirement for this to be carried out by a qualified social worker. If the intended parent(s) and surrogate are appropriately advised and supported pre-conception, and appropriate safeguarding checks are undertaken, we feel the new pathway could be in the best interests of the child and take the place of the current post-birth welfare assessment carried out by the POR, in applicable cases.

Other key points in our response to the Law Commission consultation include:

- We support the parental order process remaining for surrogacy arrangements that do not make use of, or fall outside of, the proposed new pathway to parenthood.
- We support there being a duty to keep a record of surrogacy arrangements under the new pathway, as this is part of the child's life story.
- We have some concern about the period in which the surrogate can object to the agreement. The proposed timeframe is not in line with current legislation, which states that the surrogate's consent is only valid when it is given at least six weeks after the child's birth. If the Law Commission determines post-birth consent to be a requirement, it should be a meaningful process and allow for any complications that may arise during or post birth that may affect the surrogate's capacity to consent freely and unconditionally. We have some concern about the default position being that the surrogate consents rather than making a positive statement of consent
- We agree that the surrogate's spouse or civil partner should not continue to be the child's legal parent, or a respondent to any court application.
- We agree that it is in the child's best interests for the adult(s) they live with to have parental responsibility from birth, to enable them to make decisions for the child.
- We agree that regulated surrogacy organisations should be non-profit making and that it would help if organisations could promote the pathway as an alternative to independent arrangements as long as this remained within the non-profit restrictions.
- We support the abolition of the six-month time limit for making a parental order application. While it is in the child's best interests for applications to be made as soon

as possible, the law shouldn't discourage or prohibit parents from seeking a parental order outside of a set timeframe.

- We have concerns that removing the need for a genetic connection between the parent(s) and the child is a fundamental shift and could have consequences for the child in terms of their identity. We are seeking further information on the circumstances the Law Commission anticipates the 'medical necessity' exception will apply, and whether there are any potential unintended consequences.
- It is not in the child's best interests for surrogacy to be undertaken for financial gain but compensatory payments should be permitted. We support some scrutiny around payments to surrogates, and clarity and transparency as to what can be expected, to safeguard the adults involved.

Legislative reform is needed but the focus of this must be on the best interests of the child, rather than any adults involved, though we recognise there is often a clear intersection between both. The proposals feel adult-focused, in that the pathway is designed to make the process easier for parents and surrogates, rather than starting from a view of what would best meet the child's welfare needs. The welfare of the child is paramount in current legislation and this must continue.

Finally, the proposed introduction of a new pathway provides an opportunity to consider how best to engage parents and potential surrogates with appropriate advice and support before conception. It also provides an opportunity to consider how best to promote awareness of legislation for those arranging surrogacy overseas or domestic arrangements without agency involvement. This would help to mitigate the risk of children whose birth may not be accurately registered or who may not be informed of their origins as they grow up. Relevant organisations and professionals need to work together to ensure the pathway is presented to intended parents and surrogates as a beneficial process that can provide security and support during the pregnancy and once the child is born.

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