

Surrogacy Handbook: Guidance for Parental Order Reporters

1.0 Introduction

1.1 This guidance sets out key background information to support Cafcass officers acting as Parental Order Reporters in parental order proceedings. This includes:

- The legislative framework and process for surrogacy in the UK
- The Parental Order Reporter role and duties

2.0 Definitions

2.1 **Surrogacy** – as defined in the Surrogacy Arrangements Act 1985:¹ ‘surrogate’ means a woman who carries a child in pursuance of an arrangement—

(a) made before she began to carry the child, and

(b) made with a view to any child carried in pursuance of it being handed over to, and parental responsibility being met (so far as practicable) by, another person or other persons.

2.2 **Parental Orders** – as defined in the Human Fertilisation and Embryology (HFE) Act 2008:² the court may make an order providing for a child to be treated in law as the child of the applicant/s provided that certain conditions are satisfied.

2.3 **Parental Order Reporter (POR)** – is the Cafcass officer appointed to advise the court in Parental Orders.

3.0 Legislation

3.1 In summary:³

- the intended parent/s must apply for, and be granted, a Parental Order to acquire the status of legal parents;
- the court must appoint a Cafcass officer to act as Parental Order Reporter.

4.0 Background

4.1 Surrogacy provides an opportunity for a couple or single applicant to have a child that is genetically related to either one or both of them where this would otherwise not be possible.

4.2 There are two types of surrogacy:

- **‘traditional’ or ‘genetic’ surrogacy** where the intended father’s sperm and the surrogate’s eggs are used; and

¹ [The Surrogacy Arrangements Act 1985](#)

² [Section 33, Human Fertilisation and Embryology Act 2008](#)

³ [Family Proceedings \(Amendment\)\(No 2\) Rules 2010](#)

- **‘host’ or ‘gestational’ surrogacy** where the surrogate’s eggs are not used. This includes variations such as: the intended mother’s egg being fertilised by the intended father’s sperm and carried by the surrogate; the intended mother’s egg being fertilised by a donor’s sperm and carried by the surrogate; or a donor’s egg being fertilised by the intended father’s sperm and carried by the surrogate.
- 4.3 Surrogacy can be arranged through established clinics or through informal means. In the UK, only ‘reasonable expenses’ should be paid in these arrangements. In overseas arrangements, commercial surrogacy may be lawful in that country; see 6(g) and 6(h) for more specific information on how these issues are addressed within the application of the HFE Act criteria.
- 4.4 Under UK law, the woman who carries and gives birth to a child is the child’s legal mother at birth and will have Parental Responsibility (PR) for the child. This therefore also applies to surrogates.⁴
- 4.5 If a child is born through surrogacy arrangements overseas and is brought into the UK by parents who are domiciled here, we apply our own rules to parenthood, regardless of the international arrangements in the country of birth
- 4.6 In most cases, there are three potential PR issues to be aware of:
- If the surrogate is married or in a civil partnership, the surrogate’s husband, wife or civil partner will be the legal parent or second parent of the child, and will hold PR for the child.
 - If the surrogate is unmarried and does not have a civil partner, a male intended parent may, as the biological father, have registered the birth together with the surrogate as the child’s father and therefore have PR for the child.⁵
 - The child may have no second legal parent.
- Please note that the concept of legal parenthood is different to that of PR. If in doubt about anything, please seek advice from Cafcass Legal (0777 647 0065)***
- 4.7 A Parental Order application is the legal part of the surrogacy process which enables the intended parent(s) to become the child’s legal parent after the child is born. If granted, the Parental Order transfers legal parenthood from the surrogate (and her partner, if applicable) to the intended parent/s.
- 4.8 Under current legislation, the applicant/s can be a married couple, civil partners, a couple in an enduring family relationship or a single applicant.⁶

⁴ [Section 33, Human Fertilisation and Embryology Act 2008](#)

⁵ Register of live births – held by the General Register Office

⁶ On 4 January 2019 the Human Fertilisation and Embryology Act 2008 was amended to allow for single applicants to apply for a parental order.

- 4.9 The applicant/s must 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 intended parents' marriage or civil partnership certificate where applicable.
- 4.10 Once the court receives the completed application form, a request will be made to Cafcass for the nomination of a Family Court Adviser to act in the role of a POR.
- 4.11 The Family Procedure Rules specify who will be the parties to the case. The applicant/s are the intended parent/s and the respondent(s) will be: the surrogate; her husband or civil partner if she has one; and any other person with PR for the child at the date of the application. Depending on the complexity of the case, the POR may need to consider whether the child should be joined as a party.

5.0 Duties of the Parental Order Reporter

- 5.1 The duties of the POR include those listed in Practice Direction 16A of the Family Procedure Rules 2010 (10.1),⁷ and the relevant HFE regulations which require the POR to refer to the Welfare Checklist in the Adoption and Children Act 2000 with modifications for Parental Order applications.⁸
- 5.2 It is the responsibility of the POR to provide a report to the court which:
- assesses whether the criteria in s54 of the HFE Act 2008 are met (see section 6);
 - takes into account the welfare checklist (see section 7) and any other relevant matters.
- 5.3 The POR must make such investigations as are necessary to carry out the POR's duties and must, in particular:
- (a) contact or seek to interview such persons as the POR thinks appropriate or as the court directs; and
- (b) obtain such professional assistance as is available which the POR thinks appropriate or which the court directs be obtained (it would be unusual for professional assistance to be necessary, but it may arise in international cases where expert advice is required about the law in a foreign jurisdiction).
- 5.4 The POR should make a professional judgement as to the need to undertake safeguarding checks with the police and local authorities. This may be considered necessary as Cafcass is the only professional agency involved in Parental Order applications, but this reason should be recorded. The consent of the parties is required to undertake such checks.
- 5.5 The POR may wish to advise the intended parents on the importance of children born through surrogacy being informed of their origins. We believe that this can help children

⁷ [Family Procedure Rules, Practice Direction 16A \(10.1\)](#)

⁸ [Parental Orders \(HFE\) Regulations 2010](#)

grow up secure in their identity and relationship with their intended parents. The [Cafcass factsheet 'After the Surrogacy Process'](#), which includes information about speaking to children about their origins, may be helpful. Access to information about both the surrogate and donor,⁹ if applicable, could be important to the child. However, practitioners should recognise that informing children of their origins is a choice for parents to make.

6.0 Application criteria (s54 and s 54A of the Human Fertilisation and Embryology Act 2008)

6.1 The criteria for making a parental order, together with considerations for the POR, are set out below.

- a) S54A is included in the act which says that one applicant can apply for a parental order. The criteria for the making of a parental order in section 54 will apply in the same way to a sole applicant.
- b) **The child is carried by a surrogate who is not the wife of the applicant/s after the placing in her of an embryo or sperm and eggs or artificial insemination.**
 - If a Human Fertilisation and Embryology Authority (HFEA) licensed clinic was used, the POR should seek information about the arrangement from the applicants or if necessary directly from the clinic.
 - If alternative arrangements were used (overseas clinics or no medical intervention) the POR should make enquiries into the circumstances of the child's conception.
- c) The applicant or one of the applicants must be biologically related to the child, whether the applicant/s is male or female.
 - The POR should ask parties for an account of the circumstances of the child/ren's conception (including the identity of the sperm donor) and should consider whether a DNA test is necessary – for example, if the account given, or the parties themselves, raise any doubt about the child/ren's paternity.
- d) **The applicant/s can be a single applicant, husband and wife, civil partners or two people in an enduring family relationship. Note, that this is the wording of the new legislation and for reasons unknown to Cafcass, same sex married couples are not covered under this section, although they would be able to apply as a two people in an enduring family relationship.**
- e) **The application must be made within six months of the child's birth.**

⁹ UK Donor Link (www.ukdonorlink.org.uk) is the UK's voluntary information exchange and contact register for those directly affected by donor conception prior to August 1991; the HFEA holds a statutory register of information for those concerned from 1st August 1991. Access to information for individuals conceived through donor material is a right in the UK from the age of 18. However, where a child has been born through treatment overseas, there may be very little information available about the donor and the individual may have no legal rights to this information.

- This criterion was the subject of a decision in the High Court, *Re X*,¹⁰ where the court approved the making of a Parental Order despite the application having been made after the six month period had elapsed. There may therefore be cases where this criterion may not apply but would not be fatal to the application; see the [legal alert on Re X](#) and in such circumstances seek advice from Cafcass Legal.
- Section 54A(11) states the 2019 amendment for single applicant is retrospective stating that in relation to a child born before the section came into force, that the child can be made the subject of an application provided the application is made within six months of the remedial order coming into force.

f) The child's home is with the applicant/s and they are domiciled in the UK.

- Domicile relates to where the applicant/s have their permanent home, to which they always have the intention of returning when they are absent. The issue of domicile can be complex and does not necessarily require the applicant/s to be living in this jurisdiction; seek advice from Cafcass Legal if the domicile is not clear.

g) The applicant/s must be over 18 years of age.

h) The surrogate and her partner/husband must freely, and with full understanding of what is involved, consent unconditionally to the order.

- The surrogate's consent is only valid when it is given at least six weeks *after* the birth of the child.
- For cases where the surrogate resides in England, the POR should consider whether they need to meet the surrogate themselves or whether they can ask a Cafcass colleague in a local office to assist. The relevant FCA should record the surrogate's consent by witnessing the surrogate sign the [A101A form](#). The surrogate may want to attend court.
- If the surrogate lives in Wales, consent can be witnessed by a Family Court Adviser or, if Cafcass Cymru agree, an officer of Cafcass Cymru.
- For cases where the surrogate resides outside England and Wales, but within the UK, the POR cannot witness consent. Consent should be witnessed in the following ways:
 - In Scotland, by a Justice of the Peace or Sherriff
 - In Northern Ireland, by a Justice of the Peace
- For cases outside the UK, the POR cannot obtain the surrogate's consent in person and the applicant/s will have to provide evidence of consent to the order witnessed by anyone authorised by law in that country to administer oaths for judicial or legal purposes, a British Consular official or

¹⁰ [Re X \(A Child\) \(Surrogacy: Time limit\) \[2014\] EWHC 3135 \(Fam\)](#)

notary public. Please note that cases involving a surrogate overseas will be heard in the High Court.

- Consent from the surrogate's partner/husband is not required if they did not consent to the treatment or cannot be found.
 - The Parental Order can only be made by consent and if there are issues around consent, please seek legal advice from Cafcass Legal (0777 647 0065). These proceedings may become child arrangements disputes. In all cases, the welfare of the child will be the paramount consideration.
- i) **The court must be satisfied that no money or other benefit (other than for expenses reasonably incurred) has been given or received by either of the applicant/s in consideration of the making of the order, the handing over of the child, the obtaining of consent and the making of arrangements in advance of the application.**
- The POR should be provided with details of all monies paid to the surrogate and any agency involved in the arrangements.
 - Payments made that are not reasonable expenses can be retrospectively authorised by the court under s54(8) and each case will be considered individually. Payments made to international agencies are likely to be approved, as well as other payments such as introduction fees and payments to egg donors, provided they are not unlawful in the country where they were made.

If in doubt about any of the above please contact Cafcass Legal and/or present your concerns to the court.

7.0 The welfare of the child, the paramountcy principle, and the welfare checklist

7.1 The welfare of the child throughout their life is the court's paramount consideration in Parental Order applications. The applicable welfare checklist from the Adoption and Children Act 2002 needs to be considered.¹¹

8.0 The disclosure of the Parental Order report

8.1 Under the Family Procedure Rules, the report of the POR is confidential and cannot be shared with the parties unless a direction is made by the court for the report to be disclosed.

8.2 If the court makes an order for the report to be filed *and served* by a particular date, this deals with the requirement that the court gives permission. This may be requested by the parties at the initial directions hearing.

¹¹ [Welfare Checklist, Section 1, Adoption and Children Act 2002](#). (HFE(PO) Regs 2010)

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