

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 1985¹: ‘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 2008²: the court may make an order providing for a child to be treated in law as the child of the applicants 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 summary³:

- the intended parents 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 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:

¹ [The Surrogacy Arrangements Act 1985](#)

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

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

- **‘traditional’ or ‘genetic’ surrogacy** where the intended father’s sperm and the surrogate’s eggs are used; and
 - **‘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 or civil partner will be the legal father 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 parents to become the child’s legal parents after the child is born. If granted, the Parental Order transfers legal parenthood from the surrogate (and her partner, if applicable) to the intended parents.
- 4.8 Under current legislation, the applicants must be a husband and wife, civil partners, or a couple in an enduring family relationship.⁶

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

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

⁶ This HFE Act criterion has been subject to a High Court judgment in *Re Z (A Child) (No 2)* [2016] EWHC 1191 (Fam). This declared that the requirement was incompatible with Article 8 when taken with Article 14 of the

- 4.9 The applicants 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 applicants are the intended parents 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 2000.⁸
- 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

European Convention on Human Rights, discriminating against a single person's right to private and family life. This criterion is therefore likely to change.

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

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

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 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 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) **The child is carried by a surrogate who is not the wife of the applicant 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.

b) **At least one or both of the applicants are genetically related to the child.**

- The POR should consider whether a DNA test is necessary.

c) **The applicants must be husband and wife, civil partners or two people in an enduring family relationship.¹⁰**

- This criterion has been subject to a High Court judgment in *Re Z (A Child) (No 2)* [2016] EWHC 1191 (Fam). This declared that the requirement was incompatible with the European Convention on Human Rights, discriminating against a single person's right to private and family life. This criterion is therefore likely to change.

d) **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.

¹⁰ *Re Z (A Child) (No 2)* [2016] EWHC 1191 (Fam).

- This criterion was the subject of a decision in the High Court, *Re X*,¹¹ 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.
- e) **The child’s home is with the applicants and one or both of them are domiciled in the UK.**
- Domicile relates to where the applicants 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 applicants to be living in this jurisdiction; seek advice from Cafcass Legal if the domicile is not clear.
- f) **Both applicants must be over 18 years of age.**
- g) **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 domestic cases, the POR should consider whether they need to meet the surrogate. The POR can record the surrogate’s consent by witnessing the surrogate sign the [A101A form](#). The surrogate may want to attend court.
 - For international cases, the POR cannot obtain the surrogate’s consent in person if she is outside of the UK and the applicants will have to provide evidence of consent to the order. 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.
- h) **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 applicants 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.

¹¹ [Re X \(A Child\) \(Surrogacy: Time limit\) \[2014\] EWHC 3135 \(Fam\)](#)

- 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 paramouncy 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.¹²

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.

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¹² [Welfare Checklist, Section 1, Adoption and Children Act 2002](#). (HFE(PO) Regs 2010)