

Law Commission consultation on the law governing surrogacy – Cafcass response

Cafcass (the Children and Family Court Advisory and Support Service) is a non-departmental public body within the Ministry of Justice. The role of Cafcass within the family court is to: safeguard and promote the welfare of children; provide advice to the court; make provision for children to be represented; and provide information and support to children and their families.

Cafcass has unique experience within surrogacy cases, as the only social work organisation whose practitioners are appointed by the court as 'Parental Order Reporters' (POR) in cases where intended parents apply to the court for a parental order. The role of the POR is to represent the interests of the child, rather than those of the adult parties, and advise the court of what is in the child's best interests. The POR will investigate the circumstances of the case, before making a recommendation to the court about whether a parental order should be made. The POR will advise the court whether the criteria for making a parental order as set out in section 54 of the HFEA are met and will apply the welfare checklist from the Adoption and Children Act 2002. Cafcass has recently run a zero-cost campaign aimed at professionals and support services who will be in contact with intended parents within the first six months, to improve awareness of both the importance of parental orders and the court process. Cafcass has also contributed to the cross-government working group relating to surrogacy.

As an organisation with considerable expertise in this area, we welcome the opportunity to contribute to any consultation on proposed law reform. Our remit is to act in the best interests of the child in family proceedings. We believe that the focus of any legislative reform must similarly be on the best interests of the child, rather than the intended parents, but accept that there will often be a clear intersection between both.

1. Which of the Law Commission's project suggestions do you wish to comment on?

Surrogacy.

2. Can you give an example of how the issue highlighted causes problems in practice?

The legislation on legal parenthood is inconsistent, outdated and open to different interpretations.

- Firstly, the law on who can be registered on the initial birth certificate is open to different interpretations. The law states that the surrogate will be named as the legal mother, and if the surrogate is married her husband will be the legal father. Where the surrogate is unmarried, the intended father who has a genetic link may want to be listed on the birth certificate, but this is not set out clearly in the law. This has led to inconsistent practice. In some instances the genetic father is listed on the birth certificate, but the General Registry Office has advised that this is not preferred practice.
- Secondly, problems in practice are caused by a lack of awareness of some intended parents about the need for a parental order. This is particularly common in

international cases where legal parentage has been confirmed in the country where the child was born. It has also been seen in domestic cases where one of the intended parents (the genetic father) has been named on the birth certificate, and therefore believes they already are the legal parent; however, in these cases without a parental order the surrogate's husband may be the legal parent rather than the genetic father, the surrogate will remain a legal parent, and the other intended parent will not be a legal parent.

- Thirdly, some intended parents choose not to apply for a parental order, despite awareness of the requirements, as they feel that they should not have to go through an intrusive court process or believe it is unnecessary given genetic connections between the child and parent.
- Fourthly, some criteria for making a parental order under section 54 of the HFEA are inconsistent between the statute and case law. The case law has eroded some of the criteria for making an application, such as allowing an extension to the time limit in exceptional circumstances, and the more frequent use of the court's authorisation of payments to the surrogate in excess of reasonable expenses (see examples set in in section 3). This inconsistency can cause confusion for intended parents thinking about whether or not they meet the criteria (and therefore whether to apply for a parental order), as well as conflicts for professionals advising or reporting on them.

These issues are believed to have led to families with children born through surrogacy not obtaining parental orders. Without a parental order, legal parenthood has not been transferred from the surrogate (and her partner) to the intended parents, which makes parents and children legally vulnerable. Obtaining a parental order is vital as the current law stands to ensure that the child is living with parents who have status as legal parents. This legal relationship provides security for the child as he or she grows up, enabling parents to make decisions about their education and health care, as well as providing security if the parents separate or if one of them dies. This problem was described by Mrs Justice Theis at a Surrogacy Symposium in 2015 as "a ticking legal time bomb" for those families without secure legal parenthood.

International surrogacy issues, including immigration and delays in bringing children into the country from abroad, can also cause problems for the child. The child may: be 'stateless', if the foreign jurisdiction has extinguished the surrogate's parental rights but the UK recognises the surrogate as the legal parent; be 'parentless', if the parents are unable to remain with the child in the country of birth, but cannot obtain clearance to bring the child into the UK; and arrive in the UK after the six month time limit.

There have been examples of international surrogacy in which there has been difficulty in obtaining valid consent to the transfer of legal parentage, where the surrogate is illiterate or does not speak the same language as the intended parents. There have also been cases in which concern has been expressed about possible exploitation of the surrogate, particularly in Thailand and India. Lack of transparency around the surrogate's consent could indicate risk in other areas, as questions should be raised about intentions for the child if the intended

parents are willing to ignore or participate in exploitation. There is a potential risk of child trafficking being presented as surrogacy, although this is addressed through professional social work involvement (the parental order process).

Lastly, there are currently no upper restrictions within the Surrogacy Arrangements Act 1985 on the age of intended parents entering into surrogacy arrangements, or the number of children they arrange to have through surrogacy arrangements at one time. There may be long term issues relating to the welfare of the child/ren when they are born. The 1985 legislation has been in place for some time and further regulation of the arrangements for surrogacy may be required to address developments in science and society.

3. What priority should we give to this issue compared with the other issues we have identified, and any other law reform proposals you have made?

Reform of surrogacy legislation should be prioritised due to the lack of clarity in the current legislation and inconsistency between the statute and case law. Cafcass shares information and advice as part of its role within parental order proceedings; as a statutory agency we point out the statute, but also need to set out what case law shows about its application in practice. The inconsistency between the two can be difficult to set out in advice to members of the public.

Rather than the statute being subject to incremental changes as a result of case law refining its application, it would be better for the law to be refined and clarified, to examine each criteria to determine if it is necessary, and to ensure that applicants are not drawn into complex legal proceedings they are not prepared for.

There have been significant development in the social acceptability of surrogacy as a way to form a family and concurrent increases in the number of surrogacy arrangements in the UK since the main legislation was enacted in 1985 (recent statistics can be seen in section 8). Reform should be prioritised to bring the legislation up to date.

4. Please tell us about any court/tribunal cases, legislation or journal articles that relate to the problem we have identified.

Regarding lack of awareness of the need for a parental order and the six month time limit:

- *Re X (A Child) (Surrogacy: Time Limit) [2014] EWHC 3135 (Fam)*
This established in case law that the statutory six month time limit for parental order applications should not prevent applications outside of this period, on a case by case basis. In this case, the intended parents were unaware of the need for a parental order until a private law residence application following a separation. The judge viewed the parental order as preferable to an adoption order as the optimum legal and psychological solution for the child whose genetic father was one of the intended parents.
- *Re A (A Boy) and B (A Girl) [2015] EWHC 911 (Fam)*

This case involved two children, aged 5 and 8, who were subject to parental order applications. The intended parents had been transparent about the children's origins with authorities throughout the children's lives, but had been unaware of the need to apply for parental orders. Although the application was made outside of the six month time limit, the case applied the decision of *Re X* and judged that there had been no abuse of the public policy behind the time limit.

Regarding 'reasonable expenses':

- *Re S (parental order) [2009] EWHC 2977 Jud*
This case set out matters of public policy behind the criteria, which included: preventing the circumvention of childcare laws in the UK; preventing involvement in payments which amount to effectively buying children overseas, which has been ruled out in this country; and ensuring that sums of money, which may appear modest, would not be of such a substance that they overbear the will of a surrogate.
- *Re L (a minor) [2010] EWHC 3146 (Fam)*
This case followed the implementation of the HFEA Regulations in 2010 which made the child's welfare the paramount consideration. The judge noted that, where the welfare considerations were otherwise met, only the clearest case of the abuse of public policy would prevent a parental order being made based on excessive payments. He noted that the court should nevertheless continue to scrutinise applications in order to police the public policy matters identified in *Re S*.

Regarding the need for the application to be made by two people:

- *Re Z (A Child) (No 2) [2016] EWHC 1191 (Fam)*
This case involved a surrogacy where the biological father was a single individual, and had not, therefore, been granted a parental order. The President of the Family Division made a declaration that the requirements of the HFEA were incompatible with Article 8 when taken with Article 14 of the European Convention on Human Rights, discriminating against a single person's right to private and family life.

Regarding international arrangements – delay in returning to the UK:

- *Re Z (Foreign Surrogacy: Allocation of Work) (Guidance on Parental Order Reports) [2015] EWFC 90*
This case involved twins born through gestational surrogacy in India, whose genetic father was the intended parent. Difficulties with bringing the children home to the UK were encountered with the Foreign and Commonwealth Office, HM Passport Office and the British High Commission in Delhi, and resulted in the children being effectively stranded in India for over a year, some of that time in the absence of either intended parent. Without a parental order, the children did not have British nationality and could not enter the country.

Regarding international arrangements – the consent of the surrogate (however it is worth noting that India's ban on surrogate services for foreign couples will mean that this is no longer an issue in the UK):

- *Re AB v CD (Surrogacy – Time Limit and Consent) [2015] EWFC 12*

This case involved children born through surrogacy in India and the judge highlighted the need to ensure clear lines of communication with the surrogate to ensure valid consent. Documents had been provided to show the surrogate's consent to placing the children with the intended parents: these were written in English and 'signed' using a thumbprint. There was no evidence that the information had been translated and read in the surrogate's language or that the surrogate understood the contents before placing her thumb print.

Regarding cases where the intended surrogacy arrangements have gone wrong and resulted in subsequent child arrangements disputes:

- *Re Z (surrogacy agreements) (Child arrangement orders) [2016] EWFC 34 (Fam)*

This case does not involve surrogacy legislation, but shows the complexities of the issues at play in some cases. The surrogate, who had no genetic link to the baby, did not consent to handing the child to the intended parents. She was a vulnerable young woman with learning difficulties who lacked understanding of the arrangement she entered into and was of limited financial means. The judge found that the intended parents, who had very different social, economic and educational backgrounds, acted in a potentially exploitative way. She also made observations about the unregulated market in surrogacy in the UK which had led to the situation, including introductions between parties over Facebook; no screening of either side; and payments made at the 'going rate'.

Regarding cases involving concurrent surrogacy arrangements:

- *Re A, B and C (UK surrogacy expenses) [2016] EWFC 33*

In this case the intended parents entered into concurrent surrogacy arrangements with three different surrogates, and subsequently had three children born within six months of each other. Welfare concerns were raised given the demanding care needs of three young children, although the parents were found to have anticipated the challenges and responded appropriately. The judge also questioned whether, by entering into so many arrangements at once, the intended parents had taken appropriate, child-centred decisions about building their family.

5. Can you give us information about how the issue is approached in other legal systems?

There are very different approaches within different jurisdictions, even within Europe: some have banned surrogacy entirely (France, Germany); some have lawful commercial surrogacy arrangements (Georgia); some give the surrogate no rights or remove these by consent. Many international surrogacies are arranged in countries with lawful and regulated commercial surrogacy, such as America and Canada. Commercial surrogacy may also arise in countries where there are no laws prohibiting it.

If a child is born through surrogacy arrangements 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 those countries.

6. Within the United Kingdom, does the problem occur in any or all of England, Wales, Scotland or Northern Ireland?

All.

7. What do you think needs to be done to solve the problem?

The consultation background sets out some specific issues which may need to be reviewed, including:

- legal parenthood of the surrogate (and her partner) at birth, and post-birth parental orders via courts;
- the conditions for making a parental order;
- surrogacy and the single parent; and
- regulation of surrogacy and the application of the welfare principle.

We have responded to these points, and also noted other specific aspects of the surrogacy law which we suggest require amending.

Legal parenthood arrangements and post-birth parental orders

We believe that the current legislation on legal parenthood and post-birth parental orders should remain. The parental order process takes place after birth and involves qualified social work assessments in order to provide a valuable safeguard for the best interests of the child, as well as protection against potential exploitation of the surrogate or intended parents.

We feel that it is important that the parental order process, with its necessary court assessments, is completed after the child is born. This allows a child-led decision and full welfare analysis involving the child. In our experience the vast majority of surrogacy cases are entirely straightforward and it is rare that a parental order would not be considered to be in the best interests of the child.

Nonetheless, the post-birth parental order process allows our highly skilled social workers to meet with the intended parents and to see them with their child, as well as ensure that the surrogate continues to consent 'freely and unconditionally' after the birth has taken place. While in the majority of cases this is a given, there are rare cases which can be more complicated and do require serious consideration about the best interests of the child. Such cases often involve unregulated and more informal surrogacy arrangements, where the surrogate or intended parents may not have had comprehensive information or advice before embarking on the surrogacy process. We often work with cases that have an international element, where there is increased potential for exploitation of all involved – child, surrogate and intended parents. We believe that the current post-birth process and role of the Parental Order Reporter act as a valuable safeguard against this.

The problems with the current legal parenthood arrangements which we have identified in section 2 relate to a lack of awareness of current legislation and a lack of clarity on who can

be registered on the birth certificate. The law should be clarified to enable consistent birth certificate registration, and easier understanding of the process involved in obtaining a parental order. More should be done to promote awareness of the legislation and the fact that a parental order is the most appropriate legal arrangement for children born through surrogacy.

The conditions for making a parental order

We disagree that the HFEA criteria are too restrictive; the spirit of the majority of the criteria is appropriate, although we believe that the following current criteria for making a parental order should be reviewed.

- *Applications from two people ('surrogacy and the single parent')*
The recent High Court judgement about single parents applying for parental orders shows that there is scope for this aspect of the current legislation to be reformed. We believe that single individuals should be able to make a parental order application. The welfare of the child should be the paramount consideration and does not prevent single individuals from parenting.

- *Time limit for application within six months*
The spirit of the time limit reflects the best interests of the child, which is that legal arrangements should be secured promptly. However, we believe that the strict time limit of six months could be modified. Our experience shows that those outside of the current timeframe are heard, where the parents were unaware of the requirement or unable to apply within the time limit due to lengthy international arrangements.

The discrepancy between the legislation and case law should be clarified so that intended parents are not put off making a parental order application after six months. Parental orders are the most appropriate form of legal parenthood for those involved in surrogacy arrangements, as set out in Re X above; while these should be completed promptly, they should not be prevented by an arbitrary time limit. The legislation could be amended to state that intended parents must apply within six months unless there are exceptional reasons why they could not do so, which will be taken into account by the court.

- *Only 'reasonable expenses' to be paid to the surrogate*
Our experience in parental order cases show that the rules around reasonable expenses paid to surrogates are unclear and that expenses outside of the criteria are frequently retrospectively authorised by the court. These can often be based on the normal commercial amounts paid in international surrogacy arrangements. While expenses should not prevent a parental order from being made when this is in the best interests of the child who has already been born, we believe that payments should remain limited to reasonable expenses. The legislation should not permit commercial surrogacy and should clarify the rules around reasonable expenses.

Regulation of surrogacy arrangements and the application of the welfare principle

The focus of the legislation should remain on the child's best interests, as well as avoiding the potential for exploitation of surrogates and intended parents. The welfare principle is rightly paramount; the status of the HFEA criteria should be addressed, as the welfare principle has meant that some criteria for making a parental order, such as the time limit and reasonable expenses, have been overridden, but others have not, such as domicile requirements.

We do not believe that pre-birth contracts should be enforceable, or that pre-birth regulation is required. However, comprehensive information or advice should be made available, so that the surrogate and intended parents all fully understand what they are entering into and what needs to happen after surrogacy to transfer parenthood. This is provided by support organisations but it should also be set out on relevant government websites. As set out above, the current post-birth parental order process ensures that there is a professional safeguard in place for protecting the child's best interests, ensures the consent of the surrogate is considered by the court, and enables the child and parents to have secure legal positions.

We do not believe that surrogacy should become commercialised in the UK. The current provisions allow for reasonable expenses to be paid, but beyond this could have a later-life impact on the child's wellbeing. There is currently a lack of research on the lifelong impact of commercial surrogacy on children's wellbeing, and until this has been subject to robust longitudinal analysis, it should be avoided. Commercial surrogacy also introduces a risk of businesses buying and selling children. An increase in access to people choosing to act as surrogates in the UK could be encouraged instead by a clear message from government that 'normalises' surrogacy and confirms that it is an acceptable means of forming a family.

Other specific aspects of surrogacy law:

- *Separation of surrogacy law from the HFEA and promotion of the surrogacy-specific legislation*

We believe that the surrogacy section should be separated out from the HFEA legislation, in recognition of its different status and required considerations. Following its review, it should also be publicised. The need for parental orders, particularly in international cases, should be more widely known within public sector services involved at various points (e.g. health, birth registration, immigration) as well as made clear for interested individuals and organisations.

- *Further regulation within the Surrogacy Arrangements Act 1985*

Consideration should be given to whether upper age limits for intended parents should be included and whether more than one arrangement can be entered into at the same time. This further regulation may not be appropriate within the parental order legislation, as at that stage the child/ren are already born. Amendment to the Surrogacy Arrangements Act could set out restrictions at an earlier stage, establishing what terms would be an unlawful surrogacy arrangement which would then deter people from entering into arrangements that may risk the welfare of the intended child/ren.

- *International issues*

Different regulations internationally can lead to problems for the child (set out in section 4). There should be clearer processes for returning children born through surrogacy to the UK, including better awareness of the need to apply to the UK courts for a parental order to secure the nationality and legal status of the child with their parents. This does not require a change in legislation, but does require better information provision for intended parents going and returning from abroad.

8. What is the scale of the problem?

While surrogacy remains a relatively uncommon route to parenthood, the number of surrogacy cases with which Cafcass is involved is increasing. These cases are a minimum measure of the numbers of surrogacy arrangements, only including those which involved applications to the court for a parental order in England. These have increased annually, rising particularly quickly within the last three years from 202 in 2013-14, to 241 in 2013-14, and to 295 in 2015-16.

However, we believe that there are a number of children who have not been made subject of parental orders, who are therefore in an insecure legal position in their families. The scale of this problem is unknown.

9. What would be the benefits of reform? In particular, can you identify any:

- Economic benefits (costs of the problem that would be saved by reform); or**
- Other benefits, such as societal or environmental benefits?**

The societal benefits of a more streamlined and accessible parental order process would include more children born through surrogacy living in legally secure positions. Improved consistency and understanding of the legislation would likely speed up and simplify the process for individuals and professionals involved. It could also lead to increased court applications, although the societal benefits would outweigh the economic costs.

10. If this area of the law is reformed, can you identify what the costs of reform might be?

See section 9.

11. Does the problem affect certain groups in society, or particular areas of the country, more than others? If so, what are those groups or areas?

Intended parents tend to be more common among heterosexual couples experiencing fertility problems and same-sex male couples. Our experience also suggests that surrogacy in the UK is largely undertaken by couples who are financially secure.

12. In your view, why is the Law Commission the appropriate body to undertake this work, as opposed to, for example, a Government department, Parliamentary committee, or a non-Governmental organisation?

The Law Commission is best placed to effect a change to the statute itself for those areas which require amendment or clarification. Government policy could support changes by confirming that surrogacy is a legitimate route to parenthood and raising awareness of this, together with the updated legislation.

13. Have you been in touch with any part of the Government (either central or local) about this problem? What did they say?

Cafcass has contributed to the cross-government working group on surrogacy, led by the Department of Health. Cafcass' input to date has largely been around a campaign led by the organisation to promote the importance of intended parents making a Parental Order application. The group is developing a further work programme.

14. Is any other organisation such as the Government or non-Governmental group currently considering this problem? Have they considered it recently? If so, please give us the details of their investigation of this issue, and why you think the Law Commission should also look into the problem.

See sections 12 and 13.