

## **Surrogacy law reform: Parliamentary briefing paper 2020**

**Brilliant Beginnings (leading non-profit UK surrogacy agency)**

**NGA Law (specialist surrogacy law firm)**

### **What is surrogacy?**

Surrogacy is where a woman carries and gives birth to a child for someone else. The intended parents may be a different-sex couple who cannot carry a pregnancy (often following cancer, repeated miscarriages, unexplained infertility or the mother having been born without a womb), a same-sex couple or a single parent. Historically surrogacy involved the artificial insemination of a woman with the intended father's sperm (called traditional surrogacy). Modern surrogacy now often involves embryos created in a fertility clinic with the intended parents' eggs and sperm (or with donated eggs) which are transferred to a surrogate who carries a child not biologically hers (called gestational or host surrogacy).

### **How many UK children are conceived through surrogacy?**

There are no official statistics (except the parental order register, which does not give a total picture) although we estimate there are currently 500+ children per year born through surrogacy to UK parents, up from around 50 per year before 2008. The rise is mainly due to the availability of international surrogacy, with UK parents conceiving through surrogacy in the USA, the Ukraine, Georgia, Canada and other jurisdictions (India was previously a popular destination, but closed to foreign couples in November 2015). Social media is also facilitating increasing numbers of informal UK surrogacies.

### **Do surrogates often change their minds?**

This is a common misconception. Surrogates are typically mothers who have found pregnancy easy and want to help someone else to have a family, and they commit to carrying a baby for the intended parents which they do not see as their own. Over the past 30 years, there have been only a handful of UK cases involving surrogates seeking to keep the baby, compared with several thousand successful UK arrangements. Surrogates are very clear they are not the child's mother.

### **Are payments for surrogacy in the UK illegal?**

UK law does not make it illegal to pay a surrogate more than her expenses, although the Family Court must retrospectively authorise any payments of more than 'reasonable expenses' after the birth. UK surrogates are typically paid £12,000 to £20,000; although couched in the language of 'expenses' a broad approach is taken and this often involves an element of compensation for inconvenience. Parents going overseas pay compensation to surrogates, with US surrogates typically compensated \$30,000 to \$50,000 plus expenses. There have now been hundreds of cases in which compensation has been authorised, and none where authorisation has been refused. The myth that UK law does not allow surrogate compensation is a fiction.

## **Current law and practice**

**The Surrogacy Arrangements Act 1985** – makes UK surrogacy agreements unenforceable, prohibits third parties arranging surrogacy for profit in the UK, prevents lawyers from drafting surrogacy agreements, and prohibits advertising. The Act was a reaction to media coverage of the 'baby Cotton' case in 1985 and its policy was to discourage surrogacy. In fact informal UK surrogacy has proliferated, with UK surrogacy services principally provided by Facebook groups, unregulated Internet sites and support organisations run by volunteers. There are two non-profit surrogacy organisations in the UK (COTS and Surrogacy UK) and one non-profit UK surrogacy agency running a fully-managed professional service

(Brilliant Beginnings), although all have currently closed their books to new intended parents due to a shortage of UK surrogates.

**The Human Fertilisation and Embryology Act 1990 (updated in 2008)** – makes the woman who gives birth (the surrogate) and her spouse (the surrogate's spouse) the legal parents of a child, excluding the status of intended parents. If the baby is born in the UK, the surrogate and her spouse are registered on the birth certificate. The intended parents can apply for a parental order after their child is born to make them the legal parents if they meet all the criteria (see Annex) and the birth certificate is then re-issued in their names. The process takes 6-9 months. The mechanism was tacked on as a last-minute amendment when surrogacy was rare and there was virtually no Parliamentary debate on the detail.

The Law Commission is currently reviewing these issues and published some provisional proposals for law reform in June 2019. Their final report is anticipated in 2022.

## Current issues and problems

**UK surrogacy options** – There is a significant shortage of UK surrogates. In addition to the surrogacy organisations, the other options for UK surrogacy are currently to find a friend or family member or an 'independent' surrogate via an online group (often on Facebook). Although disputed surrogacy cases remain rare, the numbers of such cases is increasing and the informality of UK surrogacy fertilises avoidable problems where important issues (such as views on termination, and expectations about the relationship) have not been properly thought through at the outset. The murkiness of the rules around payments also leads to anxiety, confusion and dishonesty.

**International surrogacy** - Many parents prefer to go abroad, and research we have conducted in conjunction with Cambridge University has shown that the main drivers are a) accessibility to surrogates within a clear professional service and b) greater legal certainty. Virtually all international surrogacy arrangements involve openly compensated surrogacy facilitated by professional agencies. Some international experience is safe, legal and ethical, but practice varies and there are wider concerns about exploitation and safety, particularly in less economically developed countries.

**Parentage** – The intended parents (who care for the child from birth) are not recognised as legal parents; instead the surrogate and her spouse are. In international cases, this means that children are often born stateless and parentless. This places significant pressure on the Home Office/ Passport Office, with complex immigration applications (it takes at least 4-5 months to bring a newborn child home from some countries).

**Parental orders** - The parental order process for reassigning parentage after the birth is problematic, with restrictive and outdated criteria (see Annex) assessed after the event. The law cannot comfortably deal with the modern realities of diverse surrogacy experience, and as a result the courts have stretched the rules to make orders crucial to safeguard children's welfare. This has led to a watering down of the criteria, making the current law outdated and artificial. However, there are limits to how far the courts can evolve the law and some children (particularly those born to single parents) have been left without resolved parentage. Judges of the High Court Family Division have repeatedly and consistently expressed concern about UK surrogacy law, including:

In *Re Z (No. 2) (2016)* the President of the High Court Family Division made a formal declaration of incompatibility under the Human Rights Act that the law discriminated against children born to single parents. The court was unable to make a parental order in favour of a single father who had a son through US surrogacy, leaving the child a ward of court and leaving the US gestational surrogate with sole parental responsibility. This resulted in an amendment to the law in 2019 allowing single parents to apply.

Mr Justice Hedley in *Re X and Y* (2008) (the first case to authorise payments to resolve issues for twins born 'stateless and parentless') said "*What the court is being required to do is to balance two competing and potentially irreconcilably conflicting concepts*". He urged the "*wisdom*" of a Parliamentary review.

The President of the Family Division in *Re X* (2014) (the case which said that parents could apply late even though the law says they 'must' apply within six months) said: "*Can Parliament really have intended an application made just one day late to be barred forever?... It is the very antithesis of sensible; it is almost nonsensical.*"

Ms Justice Russell in *Re Z* (2016) (a disputed 'Facebook' UK surrogacy case) - *There is no screening of either surrogate or commissioning parents and no support available other than support from others involved with the [Facebook] forum... This unregulated form of surrogacy means that there are on the one side vulnerable surrogates, and on the other commissioning parents who are legally unprotected from unpredictable outcomes.*"

## Is there a better way?

We need workable law which accepts that surrogacy is here to stay, manages its realities to protect children, and appropriately supports diverse modern families in line with the wider law on assisted reproduction and non-traditional families. We are therefore calling for:

- **Parentage from birth** – Children should have secure status with their parents immediately from birth. The Law Commission has recommended a new 'pathway' for parenthood which enables some intended parents to be recorded on the birth certificate without a court order if sensible steps have been followed pre-conception (including counselling, legal advice and a written agreement) but subject to the surrogate having an absolute right to change her mind. Although a good step in the right direction, we do not think the recommendations go far enough in providing legal certainty or providing for surrogacy arrangements which fall outside the pathway (including international surrogacies). We think that the surrogate should not have a veto and that where a court order on parentage is needed the court should be able to make an order pre-birth rather than after birth.
- **Written agreements for UK surrogacy** – Parents and surrogates entering into surrogacy arrangements in the UK should be encouraged to put in place written agreements before conception. The purpose of recognised written agreements is not to control surrogates (who retain bodily autonomy) but to establish intention, give clarity and create a mechanism for validating parentage. Parents and surrogates can be required, through this process, to consider key issues including how to manage the child's long term welfare needs.
- **Transparency about surrogate compensation** – Compensation for surrogates in the UK and overseas is a reality and the court now authorises payments exceeding expenses in many parental order applications, as confirmed by the Law Commission. We think that the law cannot effectively restrict payments in a private arrangement and that surrogates and parents should have choice and freedom to manage their financial arrangements transparently, to avoid dishonesty, anxiety, confusion.
- **International surrogacy** – Although some overseas surrogacy is well-managed, difficulties include children born stateless, unresolved parentage, and concerns about the ethics of surrogacy in poor and unregulated destinations. Creating a better structure for UK surrogacy will make UK surrogacy more accessible and so reduce this problem, but the law must also safeguard the welfare of children born overseas.

- **UK surrogacy services** – Professional and experienced support for those going into UK surrogacy arrangements should be encouraged. The law should therefore be amended to:
  - Enable (although not require) parents and surrogates negotiating a surrogacy agreement to access professional support, including counselling and legal advice; and
  - Abolish the outdated and unenforced advertising restrictions.
- **Children’s long term welfare interests** – Surrogates and parents should be encouraged to promote openness with the child and to maintain an ongoing connection. Public records should be expanded to keep better information for children born through surrogacy, including in international surrogacy cases. This will bring the law on surrogacy into line with the law on gamete donation.

### Summary

UK and international surrogacy is here to stay, and the current law is outdated and failing parents, surrogates and children. Well-managed surrogacy is a positive form of family-building, which we should grasp and encourage within a responsible, ethical legal framework which puts children first.



NGA Law is a specialist fertility law firm, which has represented parents in more than 1,200 surrogacy cases, including 16 landmark reported cases (including the very first international surrogacy, and the recent case in which the President of the Family Division made a declaration of incompatibility under the Human Rights Act). The firm has also been involved in policymaking on surrogacy for many years, working with the Department of Health, Human Fertilisation and Embryology Authority and various charities, and being instrumental in winning previous legal changes.

Brilliant Beginnings is a leading non-profit UK surrogacy agency (one of only three surrogacy organisations in the UK) which works with UK parents and surrogates, supporting ethical UK and international surrogacy arrangements, and campaigns to raise awareness and encourage positive change. Brilliant Beginnings is the only UK surrogacy agency which supports international as well as UK surrogacy arrangements.

### Annex – Criteria for a parental order

The court may make a parental order providing for a child to be treated in law as the child of a couple or single person over 18 if:

- The child is carried by someone else following artificial insemination or embryo transfer and at least one of the applicants is the biological parent.
- The application is made within six months of the birth (although case law has modified this).
- The child’s home is with the applicant/s and one or both of the applicants is domiciled in a part of the UK, Channel Islands or Isle of Man (although case law has modified this).
- The surrogate (and her spouse) unconditionally consent to the order freely and with full understanding, not before the child is six weeks old (unless the surrogate cannot be found or is incapable of giving agreement).
- The court is either satisfied that no more than reasonable expenses has been paid, or agrees to authorise the payments retrospectively (although case law has established that payments will always be authorised if the order is in the child’s best interests).

Further reading:

<https://www.ngalaw.co.uk/blog/2019/10/06/our-views-on-the-law-commission-surrogacy-reform-proposals>

<https://www.brilliantbeginnings.co.uk/blog/reforming-surrogacy-laws-conference-london-6-june-2019>

<https://www.change.org/p/uk-government-it-s-time-to-review-uk-surrogacy-law>