





SURROGACY

The new pathway and proposals for reform

A short talk by Martin Kingerley QC
36 Family



INTRODUCTION

What is surrogacy?

The current statutory regime

The need for reform

The Law Commission Report

What is surrogacy?

A definition

Types of surrogacy arrangement

Gestational surrogacy (aka host or full surrogacy)

Traditional surrogacy (aka straight/partial surrogacy)

What is surrogacy?

A definition:

Surrogacy Arrangements Act 1985

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.*

What is surrogacy?

The parties to a surrogacy arrangement

The intended/commissioning parents

The surrogate

The surrogate's partner.

What is surrogacy?

Altruistic surrogacy – a definition:

‘A surrogacy arrangement in which neither the surrogate nor any surrogacy agency involved make and profit’

Commercial surrogacy - a definition:

‘A surrogacy arrangement in which the surrogate and any agency involved charge the intended parents a fee which includes an element of profit’

Surrogacy – the current statutory regime

The Surrogacy Arrangements Act 1985

Key aspects:

Definitions of the parties to a surrogacy arrangement

Prohibitions on commercial arrangements

Surrogacy – the current statutory regime

Prohibition on negotiating surrogacy arrangements on a commercial basis
(s2 SAA 1985)

What is prohibited?

- (i) Initiating or taking part in negotiations with a view to the making of a surrogacy arrangement;
- (ii) Offering to agree to negotiate the making of a surrogacy arrangement;
or
- (iii) Compiling any information with a view to its use in making or negotiating the making of surrogacy arrangements.

Surrogacy – the current statutory regime

Who is prohibited?

Anyone and everyone!

Sanction?

It is a criminal offence to do so.

Surrogacy – the current statutory regime

The Human Fertilisation and Embryology Act 2008
(HFEA)

S54 (1) – the applicants

S54 (2)-(8) – conditions

Surrogacy – the current statutory regime

'a parental order presents the optimum legal and psychological solution for X and is preferable to an adoption order because it confirms the important legal, practical and psychological reality of X's identity'

The consequences of not making an order in this case are as follows:

- (i) there is no legal relationship between the child and his biological father who is also the commissioning father;*
- (ii) the child is denied the social and emotional benefits of recognition of that relationship;*
- (iii) the child may be financially disadvantaged if he is not recognised legally as the child of his father (in terms of inheritance);*
- (iv) the child does not have a legal reality which matches the day-to-day reality..'*

Re X (A Child) (Surrogacy: Time limit)

[2014] EWHC 3135 (Fam) ,Per Munby P

Surrogacy – the current statutory regime

s.54 (1)

On an application made by two people (“the applicants”), the court may make an order providing for a child to be treated in law as the child of the applicants if—

(a) the child has been carried by a woman who is not one of the applicants, as a result of the placing in her of an embryo or sperm and eggs or her artificial insemination,

(b) the gametes of at least one of the applicants were used to bring about the creation of the embryo, and

(c) the conditions in subsection (2) to (8) are satisfied.

Surrogacy – the current statutory regime

s.54 (2) The applicants must be –

(a) husband and wife,

(b) civil partners of each other, or

(c) two persons who are living as partners in an enduring family relationship and are not within prohibited degrees of relationship in relation to each other.

Surrogacy – the current statutory regime

s.54 (3) – ‘..The applicants must apply for the order during the period of 6 months beginning with the day on which the child is born’

s.54 (4) – ‘At the time of the application and the making of the order-

(a) The child’s home must be with the applicants, and

(b) either or both of the applicants must be domiciled in the United Kingdom or in the Channel Islands or the Isle of Man

Surrogacy – the current statutory regime

s.54 (5) At the time of the making of the order both the applicants must have attained the age of 18.

Surrogacy – the current statutory regime

s.54 (6) The court must be satisfied that both –

- (a) The woman who carried the child, and*
- (b) any other person who is a parent of the child but is not one of the applicants (including any man who is a father by virtue of section 35 or 36 or any woman who is a parent by virtue of s42 or 43,*
have freely, and with full understanding of what is involved, agreed unconditionally to the making of the order

Surrogacy – the current statutory regime

s.54 (7)

Subsection (6) does not require the agreement of a person who cannot be found or is incapable of giving agreement; and the agreement of the woman who carried the child is ineffective for the purpose of that subsection if given by her less than six weeks after the child's birth.

Surrogacy – the current statutory regime

s.54 (8) – The court must be satisfied that no money or other benefit (other than expenses reasonably incurred) has been given or received by either of the applicants for or in consideration of –

- (a) The making of the order,*
 - (b) Any agreement required by subsection (6)*
 - (c) The handing over of the child to the applicants, or*
 - (d) The making of arrangements with a view to the making of the order,*
- Unless authorised by the court.*

The need for reform

The transformative effect of Parental Orders and the acquisition of legal parentage

Uncertainty, lack of clarity: consent and joint intention

The status of payments

Difficulties arising from international surrogacy arrangements

The Law Commission Report

Consultation paper

Suggested reforms

Draft Bill in due course based in final recommendations

Reform – The new pathway

The new pathway –

‘Would enable the intended parents to become the parents of the surrogate-born child at birth, subject to the surrogate deciding to exercise her right to object during a defined period of time following the birth’

‘There would be no need for the intended parents to apply for a parental order’

Reform – The new pathway

The new pathway – Eligibility Criteria

Health Screening

Legal advice,

Implications counselling,

background checks; and

home visits.

Requirement for surrogate to have previously given birth

Reform – The new pathway

Regulation of licensed fertility clinics and surrogacy organisations

The role of licensed fertility clinics and surrogacy organisations

Reform – the new pathway

Commercial surrogacy not permitted

Professionals permitted to charge for services in respect of surrogacy arrangements

Advertising formally permitted

Reform – The new pathway

Welfare assessments within the new pathway

Not an assessment of *'fitness to parent'*

Reform – The new pathway

Cases falling outside the new pathway

Non-compliance with eligibility criteria

The objections of the surrogate

Continued use of the current statutory regime

Reform – The new pathway/s.54?

Suggested amendments to the current statutory regime

A dual track approach

Habitual Residence and Domicile

Dispensing with consent

Payments

Reform – The new pathway/s54?

Habitual Residence and Domicile

The complexities of domicile

Domicile (continued)

Basic Principles – Re Z and B v C (Domicile) [2012] 2 FLR 797

- (i) A person is, in general, domiciled in the country in which he is considered by English law to have his permanent home. A person may sometimes be domiciled in a country although he does not have his permanent home in it.*
- (ii) No person can be without a domicile;*
- (iii) No person can at the same time for the same purpose have more than one domicile;*
- (iv) An existing domicile is presumed to continue until it is proved that a new domicile has been acquired;*
- (v) Every person receives at birth a domicile of origin;*

- (vi) Every independent person can acquire a domicile of choice by the combination of residence and an intention of permanent or indefinite residence, but not otherwise;*
- (vii) Any circumstance that is evidence of a person's residence, or of his intention to reside permanently or indefinitely in a country, must be considered in determining whether he has acquired a domicile of choice;*
- (viii) In determining whether a person intends to reside permanently or indefinitely, the court may have regard to the motive for which residence was taken up, the fact that residence was not freely chosen, and the fact that residence was precarious;*
- (ix) A person abandons a domicile of choice in a country by ceasing to reside there and by ceasing to intend to reside there permanently, or indefinitely, and not otherwise;*
- (x) When a domicile of choice is abandoned, a new domicile of choice may be acquired, but, if it is not acquired, the domicile of origin revives.*

Domicile and Habitual Residence

The argument for an habitual residence test

Widely used within other aspects of family law

Compatible with European principles and jurisprudence

Less complex for parents residing but not born in the UK

Dispensing with consent

The current law – consent is not required only where the surrogate or other parent cannot be found or is incapable of giving agreement

Recommendation – *‘the court should have the power to dispense with consent where the child is living with the intended parents (and the surrogate consents to this), or following a determination by the court that the child’s primary residence should be with the intended parents’*

▶ Dispensing with consent

Refusing to consent

Concerns as to dispensing with the surrogate's consent

Overcoming arguments in respect of the genetic link

The current situation:

Analysis of payments made – What is permitted?

Retrospective authorisation – *Re X and Y (Parental Order: Retrospective Authorisation of Payments)* [2011] 1 EWHC 3147.

Acting ‘in good faith and without moral taint’ *Re L (Commercial Surrogacy)* [2010] EWHC 3146
(*Fam*)

Retrospective authorisation will continue to be permitted

Alternative approaches

Identification of categories of payment – the problem of inclusion

Costs actually incurred, essential costs and additional costs

Lost earnings, Compensation and gifts

A fixed fee?

Concluding remarks

International Surrogacy arrangements

Improving the hospital process

The possible reduction in the availability of surrogacy arrangements



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