Surrogacy: A Guide to the Current Law (Part 2) - Issues Arising

In the second of two articles providing an introduction to surrogacy law, Bianca Jackson, a pupil barrister at Coram Chambers, considers the main issues arising from the current legislation.

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Introduction

As evident from the first article in this series, surrogacy law in the United Kingdom is predominantly governed by the Surrogacy Arrangements Act 1985 ("SAA 1985"), together with the Human Fertilisation and Embryology Act 1990 ("HFEA 1990"), the Human Fertilisation and Embryology Act 2008 ("HFEA 2008"), the Human Fertilisation and Embryology (Parental Orders) Regulations 2010 ("HFER 2010"), and Part 13 of the Family Procedure Rules 2010 ("FPR 2010"). But rather than providing a comprehensive approach to surrogacy arrangements, the law is confusing, complex, and poorly adapted to meet the needs of modern families. This has resulted in a number of contentious issues, particularly in relation to enforcing surrogacy arrangements and acquiring a parental order. Whilst the first article examined the key statutes and regulations, providing a brief introduction to surrogacy law in the UK, this article highlights some of the most common problems and gaps in the current legislation.

Commercial Surrogacy Arrangements

By far the most litigious aspect of surrogacy law is the prohibition of commercial surrogacy arrangements pursuant to s.2(1) of the SAA 1985. The provision has not deterred commissioning couples and surrogate
mothers from entering into commercial agreements, especially since it is significantly easier to locate a surrogate mother in regions where payment is authorised. As such, the court has been compelled to balance Parliamentary intention (as encapsulated in the statute) against the welfare of the child.

The issues:

- Although the commissioning parents and/or the surrogate mother are not guilty of an offence if payment is made [SAA 1985, s.2(2)], the court will not grant a parental order unless it is satisfied that the surrogacy arrangement was altruistic [HFEA 2008, s.54(8)].
- This stipulation applies even if the surrogacy arrangement took place in a country or state where commercial surrogacy is legal [HFEA 2008, 54(10)].
- Unable to meet the criteria of s.54(8), some commissioning parents choose to raise their child in the UK without a parental order and legal parenthood, leaving the child vulnerable.
- However, commissioning parents can still apply for a parental order even if the surrogacy arrangement was commercial. Section 54(8) of the HFEA contains the proviso that the court has the discretion to authorise payments retroactively.
- The court has been willing to do so where it is in the best interests of the child, especially since the child's welfare became the "paramount consideration" of the court [HFER 2010, Schedule 1, Section 1 (consideration applying to the exercise of powers), (i)], so long as the payments are not so disproportionate to expenses reasonably incurred to be an affront to public policy and the commissioning parents acted in good faith.
- The judiciary has made it very clear in the case law that this is not an automatic dispensation; judges will consider each case on the facts and balance the welfare of the child against the public policy embargo on commercial surrogacy.
- However, in all of the reported cases concerning s.54(8) of the HFEA, the court has retroactively approved payments beyond reasonable expenses, regardless of whether the child's welfare has been the "first consideration" or the "paramount consideration". This includes payments to both surrogate mothers and third party brokers.
- The highest payment (so far) to a surrogate mother retroactively approved by the UK court is $56,750 (American dollars), plus expenses, in J v G [2013] EWHC 1432 (Fam).

Key cases:

- Re X & Y (Foreign Surrogacy) [2008] EWHC 3030 (Fam)
- Re S (Parental Order) [2009] EWHC 2977 (Fam)
Cross-border Surrogacy Arrangements

The growth in surrogacy generally has been concomitant with an increase in international surrogacy, or "reproductive tourism". The General Register Office of England and Wales notes that in approximately 26% of the 939 parental orders made between January and October of 2011 (i.e. 133 births) the births took place overseas, contrasting with 13% in 2010, 4% in 2009, 2% in 2008 and 0% in 1995, the first year of registration. This increasing globalisation of surrogacy has resulted in a myriad of domestic problems, whether a child is brought into the UK or taken abroad.

1. Bringing Children into the United Kingdom:
   The issues:

   - Regardless of whether the surrogacy arrangement took place in the United Kingdom or elsewhere, the definitions of parenthood under the HFEA 2008 apply [see in particular s.33(3) and s.35(2)].
   - Thus, even if the surrogate mother's country of residence recognises the commissioning parents as the "mother" and "father" or "second parent" of the child on the child's birth certificate and extinguishes the rights of the surrogate mother (as do many places, including South Africa, the Ukraine, and some of the American states), these arrangements will not be recognised under British law.
   - This lack of recognition of foreign surrogacy laws can raise difficulties when the commissioning parents attempt to return to the UK with the child, which they must do in order to apply for a parental order [HFEA 2008, s.54(4)].
   - Most countries predicate a child's nationality on at least one of his/her parents having that nationality. If the country where the surrogacy arrangement took place recognises the commissioning...
parents as the legal parents, it will not bestow the surrogate parents' nationality on the child.

- Simultaneously, if the UK does not identify the commissioning parents as the legal parents, the child cannot obtain British citizenship and, by extension, entry clearance into the United Kingdom.
- Unless granted special leave to enter by the Home Secretary, a child could therefore be left "stateless" and a "legal orphan", to cite Hedley J in Re X & Y (Foreign Surrogacy)[2008] EWHC 3030 (Fam) [9], even if that child is the biological offspring of one or both of the commissioning parents.

**Key cases:**

- *Re X & Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam)

2. Taking Children Out of the United Kingdom

**The issues:**

- Whilst it is far less prevalent, foreign commissioning parents occasionally enlist British surrogates to carry a child for them, particularly when their home country has a more restrictive approach to surrogacy than the United Kingdom.
- This is not proscribed under any of the legislative instruments that govern surrogacy.
- However, the HFEA 2008 stipulates that at the time that the commissioning parents apply for a parental order – and when that order is made – they must be domiciled in the UK [s.54(4)(b)].
- There is no judicial discretion to dispense with this provision.
- The courts have managed to circumvent this issue on a case-by-case basis, for example, by recognising British domicile retroactively or by utilising s.84 of the Adoption and Children 2002 to grant parental responsibility to the commissioning parents.
- However, the judiciary have been critical of foreign commissioning parents taking advantage of the UK’s relatively permissive surrogacy laws and have indicated that doing so may result in a costs order.

**Key cases:**

- *Re G (Surrogacy: Foreign Domicile)* [2007] EWHC 2814 (Fam)
- *Z and another v C and another* [2011] EWHC 3181 (Fam)

**Consent**
The written consent of the surrogate mother and her husband or partner (if any) is the linchpin of a parental order, particularly since surrogacy arrangements are unenforceable (see the next section). This stipulation acts as a protective measure, ensuring that the legal parents are not extinguishing their parental status under duress or without sufficient understanding of the surrogacy arrangement. However, the specific requirements under UK law of when and how consent must be given have caused difficulties for commissioning parents. These can broadly be divided into two categories:

1. Locating The Legal Parents

   **The issues:**
   
   - In order to realise a parental order, both the surrogate mother and father or second parent (if any) must give free, informed, and unconditional consent to the making of the order [HFEA 2008, s.54(6)].
   - Consent must be given within six months of the child's birth [HFEA 2008, s.54(3)].
   - However, the surrogate mother is not considered capable of giving consent for the first six weeks after the child is born [HFEA 2008, s.54(7)].
   - This can be problematic if the surrogate mother and/or her husband or second parent cannot be located after that time period, especially in the case of international surrogacy arrangements.
   - As the child's welfare is the "paramount consideration" of the court, judges have been willing to dispense with consent if it is in the best interests of the child to make a parental order so long as all reasonable steps have been taken to locate the surrogate mother (or her husband or second parent) and have failed.
   - Note that if any of the legal parents cannot be located, a detailed statement of facts setting out the history and the efforts made to acquire agreement must be filed with the court [Family Procedure Rules 2010 Rule 13.10(2)(b)].

   **Key cases:**
   
   - *Re G (Surrogacy: Foreign Domicile)* [2007] EWHC 2814 (Fam)

2. Consent to the Parental Order (Correct Forms)

   **The issues:**
   
   - In addition to providing consent during a certain time period, the surrogate mother and her husband or second parent (if any) must also give consent in the correct format.
• If the agreement is executed in the United Kingdom, Form A101A must be used [Family Procedure Rules 2010, Practice Direction 5A, 3.1, Table 2].

• Conversely, where consent is given outside of the UK, rule 13.11(4) of Part 13 of the Family Procedure Rules 2010 applies, namely that any form of agreement must be witnessed by a person who is authorised to administer an oath in that country, a British Consular Officer, a notary public, or an officer holding a commission in any of the regular armed forced of the Crown.

• Consent procedures in the country where the surrogacy arrangement took place can differ from those in the UK, causing difficulty for commissioning parents when they apply for a parental order.

• The court has been willing to construe consent where the incorrect procedure has been followed so long as the consent document fulfils the procedural requirements of Rule 13 of the Family Proceedings Rules 2010.

**Key case:**

*Re C (A Child)* [2013] EWHC 2413 (Fam).

**Enforceability**

Related to the question of consent is enforceability. Until the consent of the surrogate mother and her husband or partner (if any) is enshrined in a parental order, the surrogacy agreement is an informal arrangement. Although there have only been two reported cases of surrogacy arrangements breaking down in the UK, one of the driving reasons for commissioning parents seeking surrogates abroad is the guarantee of clear and contractual rights.

**The issues:**

• The HFEA 1990 inserted s.1A into the SAA 1985, making all surrogacy arrangements unenforceable, whether altruistic or commercial in nature.

• As such, there is no binding obligation on any of the parties to the surrogacy agreement.

• Of particular concern is that the commissioning parents have no legal recourse for ordering the transfer of the child if the surrogate mother changes her mind, even where the child is biologically their own since the woman who carries a child is the prima facie legal mother of that child (HFEA 2008, s.33) – this is an irrebuttable presumption.

• The current unenforceability of the surrogacy arrangement means that the surrogate mother (and her husband or partner) has the
first and primary claim to the child and can change her mind up until the parental order is granted.

**Key cases:**

- **CW v NT and another** [2011] EWHC 33
- **Re N (A Child)** (under sub nom P (A Child)) [2007] EWCA Civ 1053 (this case is the exception to the rule).

**Single Commissioning Parents**

According to the 2011 General Lifestyle Survey Overview from the Office for National Statistics, the number of single parents has tripled over the past forty years. In 1971, a lone parent headed just eight per cent of households, whereas by 2011 that figure reached 22 per cent. Whilst some single-parent households are the result of circumstance, others embody a conscious choice of a parent to raise a child on his or her own. But although single parents are permitted to adopt children or, in the case of single women, undergo IVF, their options with regards to surrogacy are limited by the HFEA 2008.

**The issues:**

- In the various statutory instruments regulating surrogacy in English law, there is no direct prohibition preventing single individuals from commissioning a child through a surrogacy arrangement, regardless of that individual's gender, age, or sexual orientation.
- However, to acquire a parental order, the law stipulates that commissioning parents must be either married, in a civil partnership, or two persons living as partners in an enduring family relationship who are not related to one another [HFEA 2008, s.54(2)].
- Single commissioning parents cannot obtain legal parenthood under s.54 for a child born as a result of a surrogacy arrangement, even if the child was engendered using their genetic material.
- The consequences of s.54 of the HFEA 2008 for single parents differ slightly dependent on the gender of the commissioning parent and the relationship status of the surrogate mother.
- Where the surrogate mother is married or in a civil partnership, section 35 or section 42 of the HFEA 2008 apply: her husband or partner will be the de facto father or second parent of the child if he or she consented to the surrogacy treatment.
- If the surrogate mother is not married or in a civil partnership, a single commissioning father can be treated as the legal father of the child under s.36 of the HFEA 2008 provided that the agreed fatherhood conditions apply, namely that the surrogate mother and the commissioning father give their written consent [HFEA, s.37].
Likewise, the commissioning mother can be treated as the second parent under s.43 of the HFEA 2008 if the surrogate mother and the commissioning mother give their written consent [HFEA 2008, s.44].

Yet, a commissioning single woman will never be regarded as the legal mother of the child since, as mentioned earlier, the legal mother in the United Kingdom is always the woman who carries the child [HFEA, s.33].

An amendment to the HFEA 2008 extending s.54 to single commissioning parents was debated in 2008, but it was ultimately rejected as the government felt that surrogacy was such a significant enterprise that only couples should undertake it.

**Key cases:**

- There has been no recorded case law on single parents attempting to acquire a parental order under s.54 of the HFEA.
- However, the court has given some indication of the approach that it might take in A and A v P, P and B [2011] EWHC 1738 (Fam), in which the court awarded a parental order to a commissioning mother and her deceased husband.

**Conclusion**

The present legislation governing surrogacy in the United Kingdom has engendered various issues for surrogate mothers, commissioning parents, and the resultant children, as well as third party brokers. The court has tackled these problems with a number of creative solutions in order to safeguard the welfare of the child. However, the difficulties remain. Almost thirty years since the introduction of the Surrogacy Arrangements Act 1985, it is time to ask what the function of surrogacy law in the United Kingdom is and what it should be. Should it be a preventative instrument to discourage certain people from engaging in surrogacy arrangements? A normative instrument, trying to shape families in the way certain segments of society would like them to be, rather than the way they actually are? Or should the law function as a regulatory instrument, protecting the interests of all of the parties involved? Until Parliament revisits surrogacy law, it remains out of step with the reality of reproductive practices in twenty-first century.
