

When does the surrogacy relationship end?

DOROTHEA GARTLAND, BARRISTER, 4PB, 20/11/2019

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Reports recently that pop star Robbie Williams and his wife Ayda Field are planning to go to Hawaii with their family and surrogate who carried their one-year old daughter might have some scratching their heads about just how this complex surrogate relationship works – especially when many may assume this contact comes to an end once the baby is born.

In the case of Robbie and Ayda, they have said they're treating the holiday as a joint celebration – for their daughter's birthday, but also as an opportunity to show their appreciation to their surrogate, who they have a close relationship with. But when does the surrogate relationship end? And are there any legal issues to be aware of if maintaining a close relationship with your surrogate?

Surrogacy has always complex – both legally and practically, but with more and more couples considering and taking up this route to create their family both in the UK and abroad, the Law Commission states the number of children born this way could be 10 times higher than it was a decade ago. More issues are coming to the fore and legislators are doing their best to keep up with this and the adapting shape of modern families.

In the UK, the Law Commission recently finished asking for responses to the government's provisional recommendations which suggest significant changes to the current laws for surrogacy in England and Wales, which many argue are behind the times and in need of an overhaul. For example, the government has proposed the intended parents should be recognised as the legal parents of their child from birth – provided there is a written agreement.

This is a significant improvement on the current laws, which mean the surrogate is classed as the legal parent once the child is born and it can take between six and 12 months to transfer legal parenthood to the intended parents. This leaves families in a state of limbo and can create real problems if the child was born abroad, for example.

In England and Wales, you currently need to apply for a parental order to become the legal parent within six months of the birth and this can be done as a couple or individually but only if you're biologically related to the child. If neither are related to the child, the only way to become legal parents is through adoption.

Conversely, US legislation can be much more friendly to the surrogacy process, although the laws do vary depending on state. California, for example, makes it possible for all intended parents to establish their legal parentage prior to the birth.

This clarity around the surrogacy process and parentage once the baby is born can naturally make everyone involved feel a bit more relaxed. Although it is rare for a surrogate to try and keep the baby once born, it is not unheard of and again, although judges in the UK have in the past often favoured the parents rather than the surrogate when it comes to custody disputes, it is clearly still a cloud of stress which hangs above the procedure for parents and for surrogates.

As part of the surrogacy consultation there is a proposal to introduce specific regulation for surrogacy arrangements and safeguards for parents and surrogates. This is very important as the recent radio documentary series made by Dustin Lance Black 'Surrogacy: A Family Frontier' has made clear (this is a fascinating series and is still available on BBC Sounds).



The clarity of arrangements in California may mean it is more usual to see parents like Robbie Williams and Ayda Field keeping in touch with their surrogate after the baby is born.

Many are hopeful that the current consultation into surrogacy laws in England and Wales will result in real change and a legal system which reflects our modern society in the same way that the law in England and Wales has adapted and been updated to recognise other different family structures.

Surrogacy reforms – Domicile of the surrogate child and advertising surrogacy

DOROTHEA GARTLAND, BARRISTER, 4 PAPER BUILDINGS, 26/03/2020

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Recent adverts on social media urging women to become surrogate mothers have once again stirred the hornet's nest of what is permitted under current surrogacy laws.

In [my previous piece on surrogacy](#), I addressed one of the Law Commission's recommendations in its consultation paper last year on possible law reform, that the intended parents should be recognised as the legal parents of their child from birth, but how far must these reforms go in order to create a clear and fair legislative structure ensuring the safety of surrogates and intended parents alike?

The Law Commission [published its joint consultation paper](#) last June setting out provisional proposals for, and questions about, the reform of the law of surrogacy. Under the current law, the advertising of surrogacy arrangements - with certain limited exception of non-profit organisations - is prohibited. For example, posting on a Facebook group to look for someone to be a surrogate puts parties at risk of committing a criminal offence.

One of the biggest problems with prohibiting advertising is that it is frequently breached on social media such as on Facebook or Twitter. It is an interesting comparison point that advertising for egg and sperm donors is not prohibited and this point was made to the Law Commission by COTS Surrogacy UK during the consultation.

The Law Commission has provisionally proposed to remove the prohibitions on surrogacy advertising. Their proposal would be that anything that can be done lawfully with respect to surrogacy arrangements can be advertised.

The consultation paper makes the point that if domestic surrogacy is to be made more attractive, as opposed to international surrogacy, then there must be a means to communicate that message and provide information to those interested. The Law Commission has acknowledged that removing the ban would mean parties continue to contact each other on the internet but they say it is clear to them "that such contact will continue even if the ban remains in place".

Another area of the law the Law Commission has looked at is domicile. Currently sections 54(4) (b) and 54A(3)(b) of the Human Fertilisation and Embryology Act 2008 requires at least one of the applicants for a parental order to have domicile in this jurisdiction at the time of the application and at the making of the order. This can be either domicile of choice or domicile of origin. The importance of domicile in the UK has been emphasised by the courts a number of times however the Law Commission has noted that many cases show the factual complexity involved in the determination of domicile. It can be difficult for some intended parents, who have immigrated to this jurisdiction.

The Law Commission has recommended that some connection to this jurisdiction is necessary, but that the factual determination of habitual residence is an alternative and better option to domicile. Habitual residence is already used in UK family law and is also the test applied by the EU and in international legislation, such as Brussels IIa Regulation and the 1996 Hague Convention. It is therefore a familiar concept within international law.

The Law Commission's provisional recommendation in its June 2019 consultation document is that habitual residence is introduced as an alternative to domicile for both the new and old pathways in surrogacy. The document goes on to state that on consideration of the issue, it does not think that the Court's jurisdiction to make a parental order following surrogacy should be linked to the domicile / habitual residence of the child (see Chapter 12 of the consultation document).

With the completion of the consultation into surrogacy laws in October 2019, it is now up to the Law Commission to turn its findings into draft legislation to put to the Government, which is expected in 2021. This is certainly a positive for surrogates and hopeful parents seeking surrogates, albeit law reform is still some way off.