Is it time for 'compensated' surrogacy arrangements?

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Family analysis: Do we need new regulation to deal with national and international surrogacy? Hassan Khan, barrister at 4 Paper Buildings and Anne-Marie Hutchinson OBE, partner at Dawson Cornwell, consider the current challenges surrounding children born through surrogacy and the potential of an international convention that would set minimum standards and prevent stateless children.

What are the potential legal issues surrounding children born though surrogacy if their parents fail to seek a parental order?

The main issue is that the provisions of the Human Fertilisation and Embryology Act 2008 (HFEA 2008) are clear. The surrogate mother is always the legal mother of the child, and if married, her husband is the legal father, irrespective of whether one or both of the commissioning parents are biologically linked to the child and/or that there are orders in place in another country giving them full legal rights in respect of the child. This may have important consequences if the surrogate seeks to challenge the custody of the child, or if there is a dispute between the commissioning parents.

The safest way to remedy this situation and to regularise the legal relationship between the commissioning parents and the child is to apply for a parental order pursuant to HFEA 2008, s 54 from the English court, which extinguishes the rights of the surrogate and her husband and divests them in the commissioning couple. It is often said to be akin to a fast-track adoption and specifically designed for children born through surrogacy, whether in this country or abroad.

Without a parental order, in some cases, the child can end up stateless and parentless and there may be adverse consequences on separation or death of one of the couple and consequent inheritance issues. This was recently emphasised by Theis J in a lecture given to the International Academy of Matrimonial Lawyers (IAML) on 18 May 2015.

Why are so many parents failing to register?

The biggest problem is awareness. In our experience commissioning couples do not seek legal advice in this country before embarking on an arrangement abroad. They sometimes believe, and are occasionally misinformed, as to their rights according to English law. For example, if they have already obtained an order in say the United States giving them rights, they wonder why they need anything else.

We also think that the financial and emotional burden of undertaking these arrangements takes its toll. International surrogacy arrangements are expensive and by the time the couple and child arrive back in the UK they may have few resources available to engage lawyers to seek orders.

In India, it can be emotionally tough, since the Indian Government has put in place stringent conditions in respect of visas, which has resulted in many of our clients being separated from their children for significant periods of time.

If the six-month time limit to register has passed, what options do parents have?

In *Re X (A child) (Surrogacy: Time Limit)* [2014] EWHC 3135 (Fam), [2014] All ER (D) 48 (Oct), the President of the Family Division, Sir James Munby, ruled that the six-month time limit is not a bar to the grant of a parental order. Of course this will depend on the circumstances of each individual case and the aim should be to apply within the time limit.

PSL practical point: *See also News Analysis: Stretching the parental order criteria to make do with outdated laws*.

Have there been any significant cases recently on this subject?

Re B and C (Surrogacy: Adoption) [2015] EWFC 17, [2015] All ER (D) 95 (April) is a recent case which involved a mother bearing a child for her own son using a donor egg and her son's sperm. This meant that the father and child had the same parents and were therefore siblings. Since the father, as a single man, was unable to apply for a parental order the court made an adoption order instead, pursuant to the Adoption and Children Act 2002.

PSL practical point: *See also News Analysis: Courts left to pick up the pieces in surrogacy cases for further analysis of the decision in Re B and C.*

Do we need new powers to deal with national and international surrogacy?

On a national level, the law would have to recognise commercial arrangements for surrogacy in order to avoid the numerous legal pitfalls. The existing law in the Surrogacy Arrangements Act 1985 remains largely unchanged since its 'knee-jerk' introduction in the 1980s in response to the first surrogate child to be born in the UK in 1985.

The law currently prevents third parties, on a commercial basis, to negotiate or broker surrogacy arrangements. This often prevents the commissioning parents and surrogates from obtaining professional advice before they enter into such arrangements. Allowing third parties to undertake these activities would likely lead to fewer difficulties arising later in the process.

On an international level, the Hague Conference is exploring the suitability of an international convention that would set minimum standards and perhaps ensure that children are not left without parents or stateless. It remains in its early stages and has a long way to go, since it will require consensus by its members on a variety of ethically and legally complex questions.

What are the lessons for lawyers to ensure best-practice in this area?

Lawyers should avoid involving themselves in negotiating surrogacy arrangements on a commercial basis as this is a criminal offence, as set out in the Surrogacy Arrangements Act 1985. It is important to alert clients to this at the outset of any consultation to avoid any unrealistic expectations.

We also need to be aware of the laws in other countries relating to surrogacy so that we are able to advise clients as to their compatibility with English law. If, for example, the legal parentage is established in the jurisdiction where the surrogate lives by way of adoption, there is the potential for the commissioning parents to inadvertently commit a criminal offence.

How might this area of work develop in the future?

Since 2010 the law opened up to allow same-sex couples to apply for parental orders and gay couples comprise a large proportion of the couples we advise. We also advise heterosexual couples who have struggled conceiving for years.

We predict that Parliament or the courts may be forced to allow single people to apply for parental orders in the same way that they are able to apply for adoption orders. We see no real reason why this should be otherwise and think it discriminates against single people wishing to start a family.

We hope there will be an acceptance by Parliament that it is much better to have a regulated system of commercial surrogacy in this country rather than couples venturing abroad and getting themselves into legal difficulties.

The issue of commercial arrangements is difficult with arguments on both sides. What is clear is such arrangements are being made and are coming before the court. The term 'commercial' carries with it many adverse connotations. As was noted at the IAML Symposium in May 2015, the preferable term for such arrangements should perhaps be 'compensated' surrogacy rather than 'commercial'. This would allow arrangements which are open, transparent and non-exploitative to be recognised and endorsed.

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Interviewed by Evelyn Reid.

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