

Dec 22, 2020 10:55am

Surrogacy during a global pandemic



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Dec 22, 2020 4 min read



The Covid-19 pandemic brought with it disruption to all walks of life. This has certainly been the case in respect of international surrogacy arrangements where surrogates, intended parents and the children born to such arrangements, have found themselves in a state of limbo, often in different jurisdictions for unknown periods of time.

It is not the first time in recent years where a significant global event has caused disruption in the world of

international surrogacy. When an earthquake hit Nepal in 2015, a regular destination for international surrogacy arrangements at the time, it caused a considerable amount of disruption to all those involved.

Throughout 2020, there have been numerous examples of intended parents facing difficulty getting to the destination where the surrogate is located. In circumstances where the intended parents find themselves able to travel to the country where the surrogate is located, they have been faced with difficulty being able to get back to this jurisdiction in a timely fashion, incurring additional and unexpected costs.

There are also practical difficulties with restrictions in hospitals, where, for example, it may have been planned for the intended parents to be present at birth but this being no longer possible because of social distancing rules. The wider implications for such families can be significant, with the status of the children born in some cases taking longer to regularise with the intended parent(s).

In this jurisdiction, Lady Hale described the law in relation to surrogacy as being “*fragmented and in some ways obscure*” (*Whittington Hospital NHS Trust v XX* [2020] UKSC 14). The “fragmented” and “obscure” nature of surrogacy means that it is difficult to identify the number of children born via surrogacy each year in this jurisdiction. Equally, it is difficult to ascertain the number of children born via surrogacy in another jurisdiction to intended parents who return to live in this jurisdiction with their child, particularly where, despite the “ticking legal timebomb”^[1] it creates, there is no obligation for intended parents to regularise their legal relationship with the child.

The most recent statistics published by the Ministry of Justice in June 2020 showed that in 2012, 184 parental orders were made in England and Wales, compared to 440 in 2019. ^[2] These statistics show a steady rate of increase and a willingness for courts to make those orders where the criteria are met.

Notwithstanding the statutory provisions that permit altruistic surrogacy in the UK, there is often a perception amongst intended parents that undertaking surrogacy in the UK might be “risky” because of the way in which the law operates, means that the surrogate (and her husband if married) is always regarded as the legal parent unless and until a parental order (the bespoke order required in surrogacy cases) is made, creating a sense of legal uncertainty. In reality, disputes are rare, however it is compounded with the view that many intended parents feel there is a lack of certainty that they will be matched with a surrogate.^[3] Intended parents therefore often go abroad to countries where they consider that there is greater certainty around their status as parents to a child and quicker matching arrangements.

The Law Commission for England and Wales have attempted to address the issue by making proposals to modernise legal framework for surrogacy in this jurisdiction. One of the key proposals is that legal parenthood should be ascribed to intended parents at birth providing certain criteria are met.^[4] This is broadly reflective of a 2018 study by the *SurrogacyUK Working Group on Surrogacy Law Reform* that recommended that intended parents should be recognised as parents at birth.^[5]

It remains unclear what the Law Commission’s final recommendations will be in respect of law reform, but it seems likely that there will be some changes made to the current legal framework to provide greater legal certainty to surrogates, intended parents and most importantly, the children born to such arrangements.

Andrew has recently written ‘*A Practical Guide to the Law in Relation to Surrogacy*’ –

<https://www.amazon.co.uk/Practical-Guide-Law-Relation-Surrogacy/dp/1912687496/>

References

[1] <https://www.theguardian.com/lifeandstyle/2015/may/18/unregistered-surrogate-born-children-creating-legal-timebomb-judge-warns>

[2] Ministry of Justice, *Family Court Statistics Quarterly: January –March 2020 (Table 4)* available at <https://www.gov.uk/government/statistics/family-court-statistics-quarterly-january-to-march-2020>

[3] N. Gamble & H. Prosser ‘Modern surrogacy practice and the need for reform’ (2016) 4 *Journal of medical law and ethics* Vol 4

[4] <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2019/06/Surrogacy-consultation-paper.pdf>

[5] <file:///Z:/Surrogacy-in-the-UK-2nd-Report-20181230.pdf>