

COVID-19 Pandemic Highlights Need For Surrogacy Law Reform

19/03/2021 by Andrew Powell is a barrister at 4 Paper Buildings



The global impact of the COVID-19 pandemic has been devastating to many aspects of our everyday lives. This has particularly been the case for people embarking on parenthood via surrogacy.

In cases where intended parent(s) had plans for international surrogacy arrangements, travel restrictions, and in some cases, borders being closed, has caused unimaginable and unforeseeable difficulties.

However, the pandemic has brought into sharp relief the existing laws in this country in relation to surrogacy and the need for reform.

The former President of the Supreme Court, 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 country. This is particularly the case where, despite the “[ticking legal timebomb](#)” it creates, there is no obligation for intended parents to regularise their legal relationship with the child.

A parental order is the bespoke order that affords intended parents with legal recognition as parents. It is similar to an adoption order in that it extinguishes the surrogate’s legal relationship with the child (and that of her husband if married) but it is an order that is intended to *reflect* a legal relationship that was always intended whereas adoption orders extinguishes legal relationships and *replaces* it with new ones. 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. These statistics show a steady rate of increase and a willingness for courts to make those orders where the criteria are met.

Intended parents often cite the lack of availability of surrogates in this country as a reason why they travel abroad for surrogacy arrangements as well as the lack of legal certainty of who will be a parent at birth. However there have been a number of domestic cases where intended parents and surrogates

have met strangers informally using websites and social media forums such as Facebook. Such arrangements can be fraught with difficulties, where there is often a profound lack of understanding of the legal implications to such arrangements. Where disputes arise, protracted legal proceedings can ensue to determine with whom a child should live. Whilst these cases are rare, they bring with them additional financial and emotional costs for individuals who are often already fragile. Sadly, it can sometimes end up being a false economy when shortcuts have been taken.

There is however some hope, in terms of legal reform in this country which would hopefully eradicate the need for such underground arrangements. The Law Commission for England and Wales has 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.

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.

For intended parents thinking about surrogacy, the first question they must ask themselves more generally is in what country they wish to undertake a [surrogacy arrangement](#). Whatever country that is decided (be it here or abroad), the key point is that intended parents must take responsibility for undertaking their own due diligence. This is particularly the case when the arrangement takes place in another country, where surrogacy isn't common. Even in this country where informal arrangements are made, if intended parents are expected to have limited contact with a surrogate, it should raise a number of questions to intended parents (e.g., is the surrogate fully aware what she is agreeing to take part in?)

If given proper thought and consideration before starting a [surrogacy journey](#), it is likely to minimise matters becoming difficult further down the line. If in doubt, appropriate legal advice should always be sought.

Andrew Powell is a barrister at 4 Paper Buildings and has recently written [A Practical Guide to the Law in Relation to Surrogacy](#)