

CHANGES AFOOT? AN OUTLINE OF THE LAW COMMISSION'S PROPOSALS FOR THE REFORM OF SURROGACY LAW

Victoria Flowers, Barrister, Harcourt Chambers. Joint author of 'Surrogacy: Law, Practice and Procedure in England and Wales' (Family Law)

Abstract:

An outline of the proposed changes to surrogacy law arising from the Law Commission's much anticipated report and Draft Bill published in March 2023, including consideration of the recommendations regarding financial arrangements and the question of the surrogate's consent.

Introduction

Surrogacy arrangements raise complicated and sometimes controversial legal issues. Currently, when a child is born through surrogacy, their legal parent(s) will be the surrogate and, if there is one, her spouse or civil partner. Sometimes there can also be a second legal parent who is an intended parent, but often intended parent(s) are not the child's legal parent(s) at birth. If certain conditions are satisfied, a parental order can be obtained from the courts which transfers legal parenthood of that child away from the surrogate and any other legal parent in favour of the intended parent(s). That requires a legal process which can take a long time, leaving a measure of uncertainty for all concerned, not least the child, in the meantime.

The importance of parental orders resolving legal parenthood cannot be underestimated. Parental orders have been described as going 'to the most fundamental aspects of status and, transcending even status, to the very identity of the child as a human being: who he is and who his parents are. It is central to his being, whether as an individual or as a member of his family.' (*Re X (A Child) (Surrogacy: Time Limit)* [2015] 1 FLR 349 at [54]).

The current law concerning parental orders is found in sections 54 and 54A of the Human Fertilisation and Embryology Act 2008 (depending on whether the application is made by one or two applicants). Those sections permit the court to make parental orders if various conditions are satisfied, but certain of those conditions have triggered wide-ranging academic and legal debate.

In March 2023, the Law Commission of England and Wales published a joint report with the Scottish Law Commission setting out recommendations and a Draft Bill that they describe as a 'robust new system to govern surrogacy, which will work better for children, surrogates and intended parents'.

This article outlines some of the key proposed changes, with a focus on the law of England and Wales.

What are the proposed frameworks?

Rather than there only being one way of obtaining a parental order, which is simply unavailable if the conditions are not all satisfied, the Law Commission recommends two different options to resolve legal parenthood of children born through surrogacy.

A new pathway is proposed which would enable the intended parent(s) to be the child's legal parents at birth and to be immediately named as the parents on the birth certificate. This is described as an administrative process with no need for court

proceedings. The new pathway is intended to front-load robust screening and safeguarding so that, if the requirements are met, the child has the benefit of security and certainty about their parentage from birth.

Court intervention by applications for parental orders (with amended requirements) would, however, also continue to be an option for those who choose not to, or cannot, meet the conditions of the new pathway.

What are the similarities of the two frameworks: the new pathway and applications for parental orders?

There are various eligibility requirements that would apply equally to both the new pathway and parental orders.

The surrogate must be over 21. There is currently no requirement as to the surrogate's age. The Law Commission specifically considered whether to recommend a statutory maximum age for surrogates, but declined to do so. Similarly, requirements of previously having given birth, or a maximum limit on the number of surrogate pregnancies that a surrogate may undertake, were scrutinised but rejected.

The intended parent(s) must be over 18 (which repeats the current legislation). Again, the Law Commission considered whether to recommend a maximum age for intended parents, but declined to do so.

The current relationship status requirements of the applicants (if there are two) will remain the same for both regimes: they must be husband and wife, civil partners, or two persons living as partners in an enduring family relationship and not within the prohibited degrees of relationship.

There must be a genetic link with at least one of the intended parents (as per the current framework), save in the limited circumstances set out below where the court would have the power to make a parental order in favour of one intended parent without a genetic link. The Law Commission considered whether to permit 'double donation'. This had been provisionally proposed in its Consultation Paper in cases of medical necessity in the context of domestic arrangements. The full report recommended no change to the current position, but did suggest the UK Government may wish to consider whether a policy permitting double donation could be introduced.

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