

The Minefield of Surrogacy Law

Natalie has kindly agreed to write an article in each edition of our magazine



UK fertility law was first drafted in the late 1980s when donor conception was seen as a far more significant issue than surrogacy. As a result, the law provides that it is the carrying mother who is the legal mother of a child. Where a married woman conceives artificially with sperm from someone other than her husband, the law also provides that her husband is the legal father.

These rules are great if you are conceiving with donor eggs or donor sperm, but they produce exactly the wrong outcome in surrogacy situations. If you conceive with a surrogate who is married, the surrogate mother and her husband are the legal parents at birth, and neither of you – the intended parents – has any recognition as a legal parent, even if the child is biologically yours.

Recognising that the parenthood rules would cause difficulty for parents conceiving through surrogacy, a system was put in place as part of the 1990 Act whereby intended parents could apply post-birth for a 'parental order' to reassign legal parenthood to them. The parental order system has disappointingly not been reformed by the HFE Bill currently going through Parliament (except to allow applications from unmarried same sex couples as well as married couples).

To get a parental order and become the parents of a child born through surrogacy, you have to meet all of the following criteria:

- at least one of the intended parents must be domiciled in the UK;
- the intended parents must be over 18 and married to each other;
- the surrogate mother (and her husband) must consent;
- the child must be living with the intended parents;
- the application must be made within six months of the birth, and
- nothing more than 'reasonable expenses' must have been paid to the surrogate.

The current system is without doubt problematic.

Firstly, all the power lies with the surrogate mother and her husband. If either changes their mind and does not consent, the court has no power to grant a parental order to the intended parents. Though most surrogacy arrangements do not go wrong, if the worst happens, this means that the courts have very limited powers to assist, even if the welfare of your child demands it.

Secondly, it typically takes several months to obtain a parental order and in the meantime you are left in a kind of legal limbo with no parental status. In practice, this causes all sorts of difficulties over care of children in hospital and consent for baby immunisations.

The other enormous problem on the horizon, which the courts in the UK have not yet had to grapple with substantially, is international surrogacy. Many foreign jurisdictions have a more permissive approach to surrogacy than the UK and, with the internet and cheap travel making international fertility treatment shopping possible, patients are increasingly considering going abroad for treatment.

This is where the legal issues get really complex. If you are domiciled in the UK, British fertility law makes it clear that the rules apply to you regardless of where in the world you conceive. That means that you could end up in a very difficult legal situation where no one is regarded as the legal parents of your child at birth, and getting clearance to bring your child into the UK becomes very difficult. If you have agreed to pay your foreign surrogate a commercial sum (bearing in mind that this may be commonplace in that country and entirely acceptable there), that could preclude you from getting assistance from the British courts.

Flipping the coin, it is just as complicated for foreign couples conceiving through surrogacy in the UK. A test case last year demonstrated just how complicated the law is where a parental order is not available (it took nine months of expensive litigation, at enormous cost, for the court to find a legal way of allowing the intended parents to take their child home to Turkey, notwithstanding everyone's agreement). The court warned that the state would not bear the cost of any future cases, which is likely to make surrogacy a very expensive exercise for any other foreign couples following in this couple's footsteps.

The courts have said repeatedly that anyone considering entering into a surrogacy arrangement should take legal advice before proceeding, and that means they are unlikely to be sympathetic where foreseeable legal problems arise. Working in the field and having seen how badly things can go wrong for quite bizarre reasons which might be completely unanticipated, it's a recommendation I would endorse. Surrogacy law is a minefield, and one which needs to be navigated with enormous care.