

Made in the U.S.A.—Representing U.K. Parents Conceiving Through Surrogacy and ART in the United States

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I. Introduction

The demand for Assisted Reproductive Technology (ART) has grown as infertility has become a growing problem and more women are attempting reproduction at older ages. Knowing how to deal with international clients is a hot topic for ART lawyers in the United States.¹ The goal of this article is to give American lawyers an understanding of ART law in the United Kingdom (U.K.) and to serve as a practical guide for U.S. attorneys advising U.K. ART clients.

II. Understanding Why U.K. Parents Come to the United States

The first thing for U.S. attorneys to understand is why U.K. parents are coming to the United States to have babies through ART. The U.K. is, after all, not a bad place to conceive through fertility treatment. There is close regulation of safety and standards by the Human Fertilisation and Embryology Authority (the HFEA),² a liberal legislative regime (including full parental recognition for same-sex parents) and a very long pedi-

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1. In October 2011, I was invited to speak at the ABA Family Law Section's Fall Meeting with other ART attorneys from across the globe at a session entitled "Going Home with Baby—How to Advise International Clients in ART Cases." I represented the parents in international surrogacy cases *Re X and Y (Foreign Surragacy)*, [2008] 3030 EWHC (Fam) (Eng.); *Re L (A Minor)* [2010] 3146 EWHC (Fam); *Re IJ* 921 EWAC (Fam). [2011]. This article builds on that seminar.

2. The Human Fertilisation and Embryology Authority came into existence in 1991 as a quasi-autonomous nongovernmental organisation to license and monitor all U.K. fertility clinics and research involving human embryos.

gree in cutting-edge clinical in vitro fertilization (IVF) practice. The first IVF baby in the world was conceived and born in the United Kingdom in 1978.³

There are, however, some significant practical obstacles for intended parents building families in the United Kingdom, particularly those conceiving through surrogacy and donation. Only organisations licensed by the HFEA (which in practice means fertility clinics) are permitted to “procure” gametes for donation in the United Kingdom,⁴ and parents who need donated eggs (and to a lesser extent sperm) often face long waiting lists. The causes of the donor shortage in the United Kingdom are controversial, but probably include the HFEA restrictions on how much clinics can pay donors (no more than \$1,200 per cycle for egg donors)⁵ and the fact that donors must, by law, agree to being identifiable to the child at age eighteen.⁶

Surrogacy is even more difficult in practice in the United Kingdom. It has never been illegal, but reactionary legislation introduced in 1985,⁷ following a media storm over a surrogacy case,⁸ aimed to stop surrogacy from developing into a commercial industry in the United Kingdom. This legislation still remains effective and provides that, while individuals are free to enter into surrogacy arrangements with each other, matching for surrogacy cannot be carried out professionally in the United Kingdom. It is an offence for third parties to broker surrogacy arrangements on a commercial basis. In practice, this bars fertility clinics as well as private agencies from recruiting surrogates for intended parents. Advertising for a surrogate by intended parents (or anyone else) is also against the law. Finding a surrogate in the United Kingdom therefore takes some ingenuity. Parents typically look among friends and relatives or through one of the United Kingdom’s informal surrogacy social groups, with varying success and very little certainty or control.

Another challenge for parents is the perceived precariousness of surrogacy in the United Kingdom. Any U.K. surrogacy arrangement is explicitly “unenforceable” under U.K. law⁹ and intended parents therefore rely on their surrogate to hand over the baby and give up her parental rights by

3. Louise Joy Brown was born on 25 July 1978 in Oldham, Greater Manchester, U.K., following IVF treatment pioneered by Patrick Steptoe and Robert Edwards (who was awarded the Nobel Prize in 2010) in the U.K.

4. Human Fertilisation & Embryology Act, 1990, c. 37 § 4(1A) (as amended) (U.K.).

5. Human Fertilisation & Embryology Authority, www.hfea.gov.uk/6700.html (U.K.).

6. Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations 2004/1511(U.K.).

7. Surrogacy Arrangements Act 1985 c. 49 (U.K.).

8. *Re C (A Minor) (Ward: Surrogacy)*, Family Division, 14 Jan. 1985 (U.K.).

9. Surrogacy Arrangements Act 1985, § 1A (U.K.).

consent postbirth. In fact, the risk of the surrogate changing her mind is probably smaller in practice than many parents realize. There have only been two reported United Kingdom cases of custody disputes following surrogacy,¹⁰ compared with over 900 recorded successful surrogacy cases.¹¹ The perception, however, that United Kingdom surrogacy arrangements are risky is strong and an important incentive for those looking abroad.

Despite these challenges, many parents do successfully conceive through surrogacy and/or egg donation in the United Kingdom. However, the journey is not an easy one. In contrast, more permissive U.S. states offer professional matching with readily available egg donors and surrogates, choice and control, minimal waiting times, and the certainty of an enforceable arrangement recognised by the law. This background is important to a U.S. attorney, because what the U.K. clients value is not access to something they cannot legally do at home, but rather speedy, professional, and “looked after” services.

III. How U.K. Law Determines Parentage

Parentage for children conceived through ART is determined, not by case law, intention, or contract in the United Kingdom, but by statute. The Human Fertilisation and Embryology Act 1990 (which came into force on 1 August 1991) sets clear rules on parentage for all children conceived through artificial insemination or IVF. These were updated by the Human Fertilisation and Embryology Act 2008 (which now applies in respect of children conceived through ART after 6 April 2009), the main change being to give same-sex parents the same legal status as heterosexual parents through ART.

A. U.K. Parents Conceiving with Donated Eggs

Under the Human Fertilisation and Embryology Act, “[T]he woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman, is to be treated as the mother of the child.”¹² The rule explicitly applies “whether the woman was in the United Kingdom or elsewhere at the time of the placing in her of the embryo or the sperm and eggs.”¹³

A British woman who conceives with donated eggs will therefore be

10. *Re N (A Child)*, Re Court of Appeal (Civil Division), 25 July 2007 and *Re TT (Surrogacy)* Family Division District Registry (Birmingham), 21 January 2011(U.K.).

11. A total of 914 parental orders had been granted in the U.K. by October 2011, according to the General Register Office.

12. Human Fertilisation & Embryology Act 2008, c. 22 § 33(1) (U.K.).

13. *Id.* at § 33(3).

treated as the legal mother (and the donor will not) for U.K. purposes, simply by virtue of her giving birth. Nothing else is required to establish her parentage, or to exclude the parentage of the donor. Although additional legal steps may be required in the relevant U.S. state to arbitrate between competing presumptions of maternity (by way of a contract and/or pre- or post-birth court order), for the purposes of U.K. law, the birth mother's parentage is unassailable, wherever in the world she conceives.

B. U.K. Parents Conceiving with Donated Sperm

For couples conceiving with donated sperm, parentage under U.K. law depends on the parents' marital status.

1. WHERE THE INTENDED PARENTS ARE MARRIED

If the intended parents are married, both will automatically be treated as the legal parents of any child conceived with donated sperm, provided the conception is by artificial insemination or IVF and not by sexual intercourse (and there is no need for a doctor to be involved to confirm this). Section 35(1) of the Human Fertilisation and Embryology Act 2008 provides:

If—(a) at the time of the placing in her of the embryo or of the sperm and eggs or of her artificial insemination, W was a party to a marriage, and (b) the creation of the embryo carried by her was not brought about with the sperm of the other party to the marriage, then . . . the other party to the marriage is to be treated as the father of the child unless it is shown that he did not consent to the placing in her of the embryo or the sperm and eggs or to her artificial insemination (as the case may be).

Again, the law explicitly applies whether the wife “was in the United Kingdom or elsewhere”¹⁴ at the time of conception, and so covers British couples conceiving in the United States.

2. WHERE THE INTENDED PARENTS ARE IN A CIVIL PARTNERSHIP

Civil partnership is, broadly, U.K. same-sex marriage.¹⁵ Lesbian couples will be treated as being civil partners if they have either registered as civil partners in the United Kingdom, or have a registered same-sex partnership elsewhere in the world. The non-U.K. registered partnership is automatically recognised as a civil partnership in the United Kingdom (including, for example, a U.S. state or Canadian same-sex marriage, a French Paques and most other forms of registered same-sex marriage or union across the world).

The law on parentage was updated by the Human Fertilisation and Embryology Act 2008 and the changes came into force (nonretrospec-

14. *Id.* at § 35(2).

15. *See* Civil Partnership Act 2004 (U.K.).

tively) in respect of children conceived on or after 6 April 2009. The 2008 Act extends the wording of the 1990 Act for married couples and makes a lesbian civil partner the “other parent”¹⁶ of an artificially conceived child. This enables both partners to be recorded on the United Kingdom birth certificate. The wording is virtually identical to the provision giving fatherhood to husbands in sperm donation cases. As with husbands, the rules expressly apply no matter where in the world conception takes place, unless it is shown that the birth mother’s civil partner did not consent.

3. WHERE THE INTENDED PARENTS ARE NOT MARRIED/CIVIL PARTNERS

Things get more complicated if the couple is not married or in a civil partnership. If the couple conceives in the United Kingdom at a clinic licensed by the Human Fertilisation and Embryology Authority, U.K. law allows both partners to elect (by signing certain HFEA forms before conception) that the nonbiological parent is the other legal parent.¹⁷ However, if the couple conceives outside the U.K. licensing system, they cannot both be treated as legal parents from birth for the purposes of U.K. law. This is irrespective of any contracts signed in the United States to give the non-biological parent parentage. This may in practice be a significant disadvantage of having sperm donation treatment in the United States for an unmarried British couple, depriving the nonbiological father or nonbirth mother from being a legal parent from the birth.

C. Do We Need a Donor Agreement?

Since in the United Kingdom it is legislation which determines parentage and provides a standard mechanism for release of information to the child, in most cases there is no need for a written contract (at least for U.K. law purposes—it may still be important to put one in place to tie up the legal issues in the relevant U.S. state).

Where donor agreements are helpful under U.K. law is in known sperm donation cases where the sperm donor plans to have some degree of involvement in the child’s upbringing (typically as a male role model or co-parent to a lesbian or solo mother family). In these cases, having a donor agreement in place is important for two reasons: First, it will be of evidential value if a dispute does arise while the child is under eighteen. In which case the family courts have very flexible powers to determine rights of contact for the donor and anything relevant can be taken into account, including a written agreement between the parties. Second, it helps the parties to set things up with clarity and transparency which, in

16. Human Fertilisation & Embryology Act 2008, § 42 (U.K.).

17. *Id.* at §§ 36–37, 43–44.

my experience, can be enormously valuable in preventing disputes from arising. In cross-border cases, it is important for attorneys in all the relevant jurisdictions to have an input.

IV. Surrogacy for British Parents

The U.K. legal landscape for British parents going abroad for surrogacy has changed significantly over the past few years. Although the change has gone in a largely progressive direction for parents, it is important to realise that the shift represents more a forced acceptance of the modern global realities of fertility treatment than a positive embracing of commercial surrogacy in principle, and international surrogacy remains sensitive and controversial in the United Kingdom. As things stand:

- It is not against the law for British couples to go abroad and engage commercial agencies to help them broker a surrogacy arrangement, even though they could not do this in the United Kingdom, where such agencies are banned.
- Where parents do go abroad, U.K. courts will endorse what they have done retrospectively if this is in the best interests of the child. A number of key High Court cases since 2008 have set the principles for how this works in practice.
- Historically, many U.K. parents conceiving through surrogacy in the United States may have gone “under the radar” and ignored the U.K. legal issues apparently without consequence. However, this is becoming increasingly risky (as well as unnecessary now that there is a tested legal solution) as awareness of surrogacy is growing among U.K. border officials and social workers.

A. Who Are the Parents?

The U.K.’s statutory laws on parentage apply to all children conceived through artificial insemination or IVF, whether the context is donation (which is what the rules were designed for) or surrogacy. Parentage determined by statute gives welcome certainty in many donation cases, but its inflexibility produces difficult outcomes in surrogacy cases. As explained above, U.K. legislation provides that the woman who gives birth “and no other” is the legal mother.¹⁸ In surrogacy cases, this makes the legal mother, always and irrefutably, the surrogate mother.

The position of the intended father (or the biological father in gay dad cases) depends on the surrogate’s marital status:

- If the surrogate is married, the surrogate’s husband “and no other

18. *Id.* at § 33(1).

man” is the legal father.¹⁹ The position cannot be challenged or rebutted with evidence of the intended father’s paternity, because the rules are designed to override biology in donation cases—effectively the intended father is treated as a sperm donor. A similar rule applies if the surrogate is in a same-sex registered partnership (which includes any foreign marriage or registered partnership which would, in the United Kingdom, be recognised as a civil partnership).²⁰ In these cases, it is the surrogate’s lesbian partner who is the child’s other parent under U.K. law, and again the biological father is treated as a sperm donor.

- If the surrogate is unmarried, then the biological father will be treated by U.K. law as the legal father from birth. This can be helpful in terms of transmitting British nationality to the child, although the father will still not have full parental status once he gets back to the United Kingdom, since unmarried fathers have limited status under U.K. law.

B. United Kingdom Rejects U.S. Legal Position on Parentage

Attorneys in the United States often ask why U.K. law so stubbornly applies its own rules on parentage and refuses to recognise a properly issued U.S. birth certificate or court order awarding parentage to the intended parents, particularly where there has been due and thorough legal process. The technical reason for this is that U.K. law on parentage is worded to apply extraterritorially (saying that it applies no matter where in the world conception takes place). The U.S. position on parentage will be recognised in the United States, but for any U.K. legal purposes, the United Kingdom is entitled to apply its own rules. It is often articulated that there should be no distinction for British parents conceiving in the United Kingdom and British parents conceiving abroad. A more sophisticated answer, however, is bedded in policy and the fact that the U.K. courts have consistently sought to guard two principles which have been at the heart of U.K. surrogacy law since its inception:

1. that a surrogacy agreement should never be enforced against an unwilling birth mother (There is a requirement under U.K. law that parentage can only be transferred if the surrogate fully and freely consents following a six-week postbirth cooling off period.), and
2. that any element of payment or reward to the surrogate mother needs to be very closely overseen—U.K. policy seeks to discourage commercial surrogacy arrangements wherever possible and, where they do happen, to ensure that they are not exploitative.

19. *Id.* at §§ 35, 38.

20. *Id.* at §§ 42, 45.

Foreign court orders (however legitimately obtained) will therefore not be automatically recognised in the United Kingdom because there is no assurance that these principles have been complied with.

The nonrecognition of U.S. law on parentage is now established law in the United Kingdom, affirmed repeatedly by the High Court in various published, and many more unpublished, judgments. In the case of *Re S* (2009), for example, a British couple conceived twins through a surrogacy arrangement in California and returned to the United Kingdom with a California prebirth order confirming their parentage.²¹ They gave evidence to the High Court that others had “been to California and had children by the same arrangements without any difficulty.” The judge responded saying:

What I think was meant by this is that they have chosen not to seek the approval of the English courts for the purposes of regularising that arrangement. That may have very serious long term implications because, of course, without a parenting order the surrogate remains the lawful parent. If the surrogate were married then of course the lawful father would be the surrogate’s husband and serious problems may arise in due course if no steps are taken to put these matters right.²²

For British parents, the lack of recognition of the U.S. position is therefore far from a mere technicality. It is a fundamental question of parentage, which determines the child’s British nationality, status, and identity, and whether the parents have any right to care for their child in the United Kingdom once they return home.

Without a U.K. court order to confirm parentage, the risks in practice are:

- The surrogate mother remains the legal mother under U.K. law. She will have a residual status which could be problematic long into the future. For example there may need to be key decisions made about the child’s care, or there may be legal proceedings concerning the child.
- One or both of the intended parents will have no status as a parent in the United Kingdom, and both will lack decision-making authority. This prejudices the child’s identity and rights of inheritance and nationality, as well as meaning that the parents are not legally or financially responsible and do not have the authority to make decisions about their child’s care. The rules are complicated, but in some circumstances, social services are obliged to become involved and the parents commit a criminal offence if they do not either apply for parentage or notify social services and allow them to oversee their care.

21. *Re S* (Parental Order) [2009] EWHC (Fam) 2977, 1 FLR 1156 (U.K.).

22. *Id.*

C. The Solution: A Parental Order

There is a specific U.K. court application designed to remedy the awkward application of the parentage rules for children conceived through surrogacy, and the process takes place postbirth. “Parental orders” were specifically created for surrogacy situations, as a more streamlined alternative to adoption for parents who had conceived through surrogacy.

Like an adoption order, a parental order reassigns parentage fully and permanently. But unlike an adoption order, the scope of assessment is more limited. The other significant difference is that a parental order triggers the re-issue of the child’s birth certificate and effectively re-writes parentage from birth, something which is not dissimilar to the pre- and post-birth parentage proceedings for surrogacy in many U.S. states. Parental orders have been available as a surrogacy solution since 1994, but are currently provided for by section 54 of the Human Fertilisation and Embryology Act 2008.²³

1. WHAT IS THE COURT ASSESSING?

To obtain a parental order, the intended parents must meet all of the following criteria, and the court must also be satisfied that making the order is in the child’s best interests (which is not usually difficult to establish):

- The child must have been conceived through ART and carried by a woman who is not one of the intended parents (i.e., the context is surrogacy);²⁴
- At least one of the intended parents must be the child’s biological parent;²⁵
- The intended parents must be married, same-sex civil partners or living together as partners in an enduring family relationship (single parents are excluded). Heterosexual couples who are granted a parental order are ultimately named on the U.K. birth certificate as “mother” and “father.” Gay couples are named as “parent” and “parent;”²⁶
- The application must be made within six months after the birth (with no discretion to extend the deadline);²⁷
- The child must be in the care of the intended parents at the time of the

23. Section 30 of the Human Fertilisation & Embryology Act 1990 was in force from 1 November 1994 until 5 April 2010, when section 54 of the Human Fertilisation & Embryology Act 2008, which superseded it, came into force. The 2008 Act is virtually identical to the prior law, except that it allows unmarried and same-sex couples to apply for a parental order, as well as heterosexual married couples (U.K.).

24. Human Fertilisation & Embryology Act 2008, c. 22 § 54(1)(a) (U.K.).

25. *Id.* at § 54(1)(b).

26. *Id.* at § 54(2).

27. *Id.* at § 54(3).

application and the making of the order;²⁸

- At least one of the intended parents must be domiciled in the United Kingdom (and note that domicile is not equivalent to residence or nationality, so any parents with non-U.K. roots or connections will need careful advice);²⁹
- The surrogate mother (and her husband/partner) must consent fully and freely, and not less than six weeks after the birth. In practice, the surrogate's consent needs to be verified by the court, and the surrogate will need to be involved to some extent in the U.K. court process;³⁰ and
- Either the court must be satisfied that the surrogate has received no payments or benefits other than for her expenses reasonably incurred, or alternatively the court must agree to authorise the payments.³¹

2. THE STICKY ISSUE OF PAYMENTS FOR SURROGACY

The policy behind the requirement that the court must be satisfied that no more than reasonable expenses has been paid was designed to restrict the practice of surrogacy to altruistic arrangements. However, the court was explicitly given a get-out clause, so that it could make an exception to this rule at its discretion (the logic presumably being that the court should not be absolutely prevented from making an order it considered to be in the best interests of a child). There is no guidance in the legislation as to the circumstances in which this discretionary power should be exercised, and this is something which has developed through case law in the U.K. High Court.

“Reasonable expenses” is in practice quite tightly defined by the High Court and includes only identifiable out-of-pocket expenses, not pregnancy compensation or inconvenience payments. It is a common misconception among U.S. surrogacy attorneys (and some less experienced U.K. practitioners) that U.S. surrogacy contracts for U.K. clients should be worded in a particular way or limited to a particular figure to stick within what the U.K. court will consider as being reasonable expenses. Unless the arrangement is genuinely an uncompensated surrogacy, this is, in fact, irrelevant. The matter at issue before the court will, in fact, be whether to authorise the payment, something which requires quite different considerations.

In deciding this issue (whatever the figure involved), the court will consider very carefully both the detail of the particular case and the wider policy issues, and detailed legal argument will be needed. Ultimately, until

28. *Id.* at § 54(4)(a).

29. *Id.* at § 54(4)(b).

30. *Id.* at § 54 (6), (7).

31. *Id.* at § 54(8).

Parliament changes the law, the U.K. court has to justify in each and every case why it is making an exception to wider U.K. policy against commercial surrogacy. This is why, currently, all parental order applications involving foreign commercial surrogacy arrangements are heard in the U.K. High Court (contrasting sharply with most domestic surrogacy applications, which are typically heard very informally and with minimal cost before lay magistrates in the most junior family courts).

The very first case to authorise a payment to a foreign surrogate mother, which we handled, was the case of *Re X and Y* (2008).³² It involved a British married couple who conceived twins through a surrogacy arrangement in the Ukraine, paying a married surrogate mother €27,000 (\$35,000), only a small part of which represented her expenses. The court for the first time agreed to exercise its discretionary power to “authorise” an openly commercial payment because without a parental order, the twin children would remain stateless and parentless as a result of the mismatch between U.K. and Ukrainian law on parentage. The court said that it was prepared to make the order because the sum paid was not wholly disproportionate to U.K. policy, the parents had acted in good faith, the surrogate had not been exploited, and the parents had not attempted to defraud the authorities.³³

There have followed several subsequent published cases, all involving foreign commercial surrogacy arrangements and all successfully granted in favour of the parents (as well as an increasing number of other cases granted without having been published). The case of *Re S* (2009)³⁴ further set out the principles the court should consider in such cases, including that the parents must not be circumventing child protection laws in the United Kingdom, that the arrangement must not represent baby buying, and that payments must be shown not to have “overborne the will” of the surrogate.

A watershed was marked in the case of *Re L* (2010),³⁵ which again we handled and which involved an Illinois surrogacy arrangement. The court held that the welfare of the child should always be the court’s “paramount consideration.”³⁶ A parental order should therefore only be refused in a

32. *Re X and Y* (Children) (Parental Order: Foreign Surrogacy) [2008] EWHC (Fam) 3030 (U.K.).

33. *Id.* J. Hedley cautioned against relying on a standard guideline figure of £10,000 as reasonable because the costs must be realistic in each case.

34. *Re S* (Parental Order) [2009] EWHC (Fam) 2977 (U.K.).

35. *Re L* (A Child) (Parental Order: Foreign Surrogacy) [2010] EWHC (Fam) 3146 (U.K.).

36. *Id.* In addition, the 2010 Regulations (the Human Fertilisation & Embryology (Parental Orders) (Consequential, Transitional and Saving Provisions) Regulations 2010, SI 2010/985 import § 1 of the Adoption and Children Act 2002 into § 54, which makes the welfare of the child the paramount, not just the first, consideration.

commercial surrogacy context if the case was “one of the clearest abuse of public policy.” This case significantly raised the bar for refusing a parental order on public policy grounds, and has marked perhaps the most significant step yet towards general acceptance of commercial surrogacy in the United Kingdom. It has also substantially eased the process and cost of obtaining a parental order in the High Court for most standard U.S. surrogacy cases.

Nonetheless, the U.K. court continues to treat each international parental order application seriously, and the issue of commercial surrogacy remains sensitive. The judgment in the *Re L* case, for example, was considered a controversial and landmark ruling. The front page headline of one of the United Kingdom’s main national newspapers read “Childless couples win the right to pay surrogate mothers.”³⁷

D. Where Are We Now?

The legal process after surrogacy in the United Kingdom is increasingly manageable, but it is not a rubber stamping exercise, and every application is very carefully scrutinised. Applications involving U.S. surrogacy arrangements are typically much easier in practice to litigate than those from other surrogacy destinations, as the court shows less concern about disparity in standards of living and potential exploitation, there is less difficulty over translation and language barriers (in particular, in relation to evidence of the surrogate’s consent), and the court is reassured by the established legal processes and the involvement of an attorney from the outset (which is rarely seen in, for example, Indian and Ukrainian arrangements).

E. Immigration and Nationality: Getting Home

The first question asked by many U.K. intended parents is what else they need to do to bring their baby home as quickly as possible after the birth. While parental orders offer a complete legal solution (including British nationality), they can take up to a year to obtain, and are therefore not an effective tool in practice for getting home quickly.

It is important for U.K. clients to obtain a British passport or alternative authorisation for their child to enter the United Kingdom before they travel, and U.S. attorneys should be wary of being over-confident with U.K. clients, based on past experience, about the ease of travelling on a U.S. passport alone. Where the surrogate is unmarried, the child will often be entitled to a British passport from birth, and this is the quickest and easiest route home. Alternatively, an application can be made for an entry

37. Childless Couples Win the Right to Pay Surrogate Mothers, www.telegraph.co.uk/health/children_shealth/8190131/Childless-couples-win-the-right-to-pay-surrogate-mothers.html (U.K.).

clearance visa, also now a tried-and-tested route, although it does take a little longer. We find in practice that the United States is a preferable destination to other global surrogacy destinations for U.K. clients, with the immigration processes dealt with more quickly and efficiently.

F. Checklist for U.S. Attorneys Setting Up Surrogacy Arrangements for British Clients

1. Make it clear that clients need to consider the legal issues in both the United Kingdom and the United States. There is increasing awareness in the United Kingdom that parents need to grapple with both, and the most client-focused U.S. attorneys work in tandem with U.K. lawyers from the outset.
2. It is helpful (though not imperative) if the British parents are matched with an unmarried surrogate, because the immigration issues will be quicker and easier to resolve.
3. The U.K. court will want to know that the surrogate has had as much support and independent advice as possible, both before entering the arrangement and during the process. Do what you can to ensure that the surrogate entered into the arrangement on a free and informed basis, has a positive relationship with the intended parents, has not been subjected to undue risks and has been supported throughout. Make the surrogate aware that she will need to give consent more than six weeks after the birth as part of the U.K. court process.
4. The court will need to “authorise” any payments to the surrogate of more than her actual expenses. The actual figure is not usually material (nor is the wording in the contract), but the court will need detailed information about exactly how much has been paid, as well as information setting the payment in context.
5. Be alert to potential problem scenarios where your clients may fall outside the scope of U.K. parental orders and immigration solutions, including single parents and those conceiving with donated eggs and sperm.

V. Conclusion

Assisted reproduction, especially surrogacy, involves difficult and sensitive issues in all cases because three or maybe four adults are involved throughout the process of conception, pregnancy and birth. The issues become more complex when the surrogacy involves international participants. The law needs to balance and protect the respective interests of all the participants, and most importantly, the resulting child, from exploitation. Lawyers involved in these complex arrangements need to be prepared to address legal issues in both the United Kingdom and the United States.

