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This article was first published on Lexis®PSL Family on 9 October 2014. Click for a free trial of [Lexis®PSL](#).

Stretching the parental order criteria to make do with outdated laws

09/10/2014

Family analysis: Natalie Gamble, owner of Natalie Gamble Associates a UK firm specialising in fertility and parenting law, considers the court's decision in *Re X (A Child)* and says the case illustrates the urgent need for reform of UK surrogacy laws.

Original news

Re X (A Child) (Surrogacy: Time limit) [2014] EWHC 3135 (Fam), [2014] All ER (D) 48 (Oct)

Following an application by the applicants, surrogate parents of the child, X, for a parental order, made outside of the time limit, the Family Division held that the Human Fertilisation and Embryology Act 2008, s 54(3), did not have the effect of preventing the court from making an order merely because the application had been made after the expiration of the six-month time period.

What issues did this case raise?

The case concerned the parentage of a child born through surrogacy in India, and specifically the restrictive criteria which apply to parental orders (the mechanism for extinguishing the motherhood of a surrogate and transferring parenthood to the intended parents in surrogacy cases). In this case, the parents had not applied for a parental order within the strict six-month deadline (the law says the applicants 'must' apply within six months of the birth), and only became aware they were not the legal parents of their child after they separated and became embroiled in court proceedings. The President of the Family Division, Sir James Munby P had to decide whether the court had jurisdiction to make a parental order out of time. He decided that it did, and made a parental order in favour of the parents so that they became the legal parents of the child they had cared for since birth, and the parenthood of the Indian surrogate and her husband was extinguished.

To what extent is the judgment helpful in clarifying the law in this area?

The judgment is absolutely the right decision in terms of justice and child welfare--how could it be in a child's best interests for the legal parents to remain the Indian surrogate and her husband, who have no biological connection and never cared for the child or had any intention to do so? The outcome was entirely the right one. However, it is a muddying rather than clarifying decision, since one of the mandatory criteria for a parental order has effectively been ignored. Since the President was clear that each case must be considered individually on the facts and he is not making a general rule, it is not clear how far the ruling may extend to other applications made late, or whether it may open the door to other mandatory legislative criteria (both in this area of law and elsewhere) being varied or ignored.

Are there still any grey areas or unresolved issues lawyers will need to watch out for?

We do not yet know how willing the court will now be to routinely hear parental order applications after the deadline, so lawyers should be cautious about advising other parents who need a parental order that they do not need to apply in time.

What are the implications for lawyers? What will they need to be mindful of when advising in this area?

The law on international surrogacy seems to get ever more complex, with a run of published judgments stretching the criteria for a parental order, and difficulties arising over conflicts of law with the law in the country where the child is born, immigration issues and inter-country adoption. Lawyers should be cautious about advising on surrogacy law without a thorough knowledge of all the case law as well as the legislation.

Are there any trends emerging in the law in this area?

UK law on surrogacy is very clearly in dire need of a review. As the President highlighted in this case, there was almost no Parliamentary debate on the rules which were tacked on to the Human Fertilisation and Embryology Bill in 1990 when surrogacy was in its infancy. The whole system of reassigning parentage after the event (and asking the court to assess various restrictive criteria in hindsight) is flawed, and now that UK and international surrogacy is so commonplace (with reportedly 1,000 babies born through surrogacy in India alone per year to UK parents), the problems with the law are being thrown into sharp relief. This is only the latest judgment (albeit perhaps the most surprising yet) in a run of High Court judgments where the court has stretched outdated rules in order to protect children. What we really need is a Parliamentary review. When we get as far as the court saying that Parliament didn't really mean 'must' when it said 'must', it is surely time for the rules to be reassessed.

Interviewed by Duncan Wood.

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