

Why are surrogate children being left legally parentless?



This quarter's article follows on from my piece about surrogacy reform last quarter, and is about a case recently heard in the High Court.

The case involved two children, age 8 and 5, who had been born through surrogacy arrangements in California in 2006 and 2009, using the British father's sperm

and eggs from a donor. Pre-birth US court orders made the British parents the legal parents in California, and they were recorded as the parents on the US birth certificates. However, UK law treated the surrogate and her husband as the legal parents and this made the British parents legal strangers to their own children. It was not until 2012 that the parents discovered they were not in fact legal parents. They had no legal rights to make parenting decisions in the UK, the children were not British, and the children had no right to inherit from them or to financial protection if they separated. The children's British passports had been wrongly issued, and could not be renewed.

Having missed the opportunity to apply for a parental order (which 'must' be applied for within six months of birth), the parents initially applied to adopt the children. However, following another case which allowed a late application, the parents instead asked the court for parental orders. Both parents gave compelling evidence about what parental orders would mean to them and their children. The children knew they had been conceived with the help of an egg donor and surrogate but the parents felt strongly that adding an adoption 'sub clause' to their story was inappropriate and would undermine the children's strong sense of identity as the children of their family.

The judge, Ms Justice Russell, agreed and said that it would be '*manifestly unjust*' for the six month deadline to be given greater weight than the welfare of the children. The children deserved birth certificates rather than adoption certificates, and to have their real identity (from birth) properly recognised. Other children born through IVF and donor conception were given birth certificates reflecting their parentage and surrogate children deserved the

same. Adoption, in contrast, was a square peg for a round hole.

The decision is important practically, because it effectively removes the six month deadline for applying for a parental order after surrogacy – late applications are now permitted in all but exceptional circumstances. Even more important, though, are Ms Justice Russell's wider comments about the rights of surrogate-born children, making it clear that they should be recognised as the natural children of reproduction. She said:

'The applicants were their planned and intended parents from before conception and since the day on which they were born. To make adoption orders would effectively deny adequate recognition of the applicants' and children's identity and their right to family life, particularly their established identity, their biological and social ties. There is no doubt in this case that as far as these children are concerned their identity has already been formed as the biological children of their father and the commissioning of their conception and birth involving their mother.'

The decision means that the parents have finally received British birth certificates for their children confirming the parentage which has, in every real sense, existed since their children's conception. It is undoubtedly a happy outcome for all involved.

But there are wider questions. The judgment is a just and sensible one from a court which sees the realities of surrogacy every day. But the fact remains that UK law left these much-loved children legally parentless for the first 8 and 5 years of their lives. As Ms Justice Russell observed, California has '*considerable experience and a sound regulatory framework in surrogacy*' which is '*regretfully not available in the UK*'. Cases like this vividly show why, like in California, UK law needs to resolve parenthood in undisputed surrogacy cases before a child is born, rather than after. If, as Ms Justice Russell says, children born through surrogacy have a basic human right to be recognised as the natural children of the parents who conceive them, then surely that right exists from birth too? It seems wrong for children to be left legally parentless for any period of time, whether a few months or 8 years, and with so many UK parents driven overseas to access professional surrogacy services not available in the UK, how many other UK children are living in the same legal black hole, and what might happen to them if things are not resolved before real problems arise? ■

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