

Is it finally time for surrogacy reform in the UK?



Surrogacy has hit the headlines over the past few weeks, with lessons to be learned.

In May, High Court judge Ms Justice Russell ruled that a UK gay couple should have main care of their 15 month old baby daughter after a 'surrogacy dispute' with the baby's mother. The decision followed a battle over what had been agreed, and a history of the mother breaching court orders and conducting a homophobic smear campaign against the father and his partner. The judge's decision focused on what was in the child's best interests, and she ruled that the fathers were better able to meet the child's needs.

The decision was, at one level, not any kind of legal precedent, but just another dispute between parents in the family court. But it highlights the dangers of informal family-building arrangements for intended parents in the UK. The judge said that such cases were on the increase because of the 'lack of a properly supported and regulated framework' for surrogacy.

This week Mrs Justice Theis, another High Court judge addressing a conference in London, talked about the 'ticking timebomb' of children born through surrogacy overseas. It is estimated that 1,000 to 2,000 children are born to UK parents through surrogacy each year, with 95% born outside the UK. However, each year the court only makes around 200 parental orders (which secure legal parentage in the UK). That means that the majority of UK parents through surrogacy are living under the radar, caring for children who are not in fact legally theirs. As the judge said, this could have all kinds of legal implications for the child if the parents separate, die or even in respect of simple things like making medical decisions and renewing the child's passport, issues we are now starting to see play out in practice. The judge told the conference 'we need legislative reform to provide a legally supported framework.'

The overall message is clear: UK surrogacy law is in a mess, and reform is needed. On the one hand in the UK surrogates are scarce, agreements are not recognised or legally binding, and surrogacy is essentially an informal adventure for all involved. This is the legacy of 30 year old laws which bar agencies and advertising, and make

agreements unenforceable and illegal for lawyers to draft. While thankfully disputes like the one reported last week are rare, there is no structure for recognising surrogacy in the UK which might help prevent them. Neither are genuine surrogates properly supported if they decide to help someone else have a family.

On the other hand, the lack of options in the UK is driving parents overseas to countries like the USA, India and the Ukraine. In those countries, surrogates are more readily accessible and parents have the security of a professionally-managed process. However, even if you ignore the ethical issues around surrogacy in third world destinations, international surrogacy creates considerable legal problems. Children are frequently born stateless and parentless because laws don't match up, stuck in an overseas country until the UK authorities exercise a discretion to allow them to come home. Even then the parents who brought them into the world are not recognised as their legal parents in the UK (even if they have a US court order confirming their parentage) unless they apply to the family court for a parental order.

UK law is failing surrogate children, both those born in the UK and those born overseas. What we need is a proper structure in the UK to recognise and support ethical surrogacy. We want to see a process for parents and surrogates at the outset, to ensure that everyone goes into an arrangement fully informed and consenting. There should then be a structured process for establishing parentage, so the right people can be named on the birth certificate from the outset. This is how surrogacy is managed in other jurisdictions (such as many US states), and it protects everyone involved. Well-managed surrogacy is the very best of human collaboration, and we should be doing everything we can to support it.

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