



EXPERT: Natakie Gamble

# IS SURROGACY LAW REFORM FINALLY ON THE HORIZON?

UK law is brilliantly supportive of modern family-building, with one big exception: surrogacy. UK surrogacy law is firmly stuck in the 1980s and long overdue for reform. The good news is that it seems that a review might finally be on the cards. The Law Commission, which is responsible for reviewing outdated UK laws, has been asked by the government to consider taking on surrogacy law as a project. If they agree, it will mean a proper review of the current law.

That is good news for children and families. Currently, the UK does not recognise surrogacy agreements (which are, by law, 'unenforceable'). Instead, UK law treats the surrogate and her husband as the legal parents, irrespective of who the biological parents are and what everyone intends. Intended parent couples can apply to the family court after their child is born for a court order which transfers parenthood to them. Although this resolves the legal issues (both for them and the surrogate), it is a sticking plaster rather than a solution.

The process takes far too long, and the criteria are restrictive and outdated.

Then there are the criminal restrictions. Contrary to popular myth, it is not illegal for a UK surrogate to be paid more than expenses (the court has to consider what was paid, but can and does authorise compensation). What is illegal in the UK is for parents and surrogates to advertise to find each other, and for anyone other than non-profit organisations to provide a matching service. When the law was written in the 1980s, policymakers worried that surrogacy was fraught with risk, particularly of surrogates changing their minds, and exploitation if money was involved. The law therefore tried to discourage surrogacy, by making it legally risky, and making it as hard as possible for surrogates and parents to find each other.

But it didn't work. Instead of withering away, surrogacy has blossomed in the informal spaces the law left and it has spilled out online and overseas. Happily

30 years' experience has also proved that it is almost unheard of for a surrogate to have a change of heart - women can and do make a commitment to carry someone else's child, and surrogacy is, in the overwhelming majority of cases, a positive experience for all involved, creating a foundation in which children are thriving.

However, the legal framework has made UK surrogacy arrangements frayed with risk and vulnerability, and left people to muddle through without any legal process until after the child is born. Not enough UK surrogates come forward, which is unsurprising given that the law does not protect them or honour the amazing commitment they are making. The UK's three non-profit surrogacy agencies (Brilliant Beginnings, COTS and Surrogacy UK) have all had to close their doors due to the shortage of UK surrogates. Meanwhile 'independent' surrogacy matches via online forums and Facebook groups (without any formal screening or preparation process) are increasingly common.

Given the UK context, it is not surprising that many UK parents are choosing to go overseas to access legally recognised surrogacy, in places like the USA, the Ukraine, Georgia and until recently India. The attraction is the professional services offered which make it easy to find a surrogate, and the reassurance of a legally recognised agreement. Experience across the globe varies, with ethical managed surrogacy in places like the US expensive, and concerns about the quality of service and the treatment of surrogates in poorer countries. It seems we have exported, rather than resolved, the concern about exploitation.

International surrogacy is also creating serious legal problems for children. Even if the intended parents are recorded on the birth certificate in the country where their child is born, UK law does not recognise them as the legal parents. Many children are born stateless and parentless and most face a long wait to be brought home to the UK, usually 4-5 months and sometimes much more. UK intended parents need to apply to the family court to become the legal parents in the UK, but many do not, leaving children vulnerable long term.

The family court has been picking up the pieces, creatively adapting the law to protect children. For example, the courts

formal declaration that UK surrogacy law was breaching the human rights of single parents and their children (because a British single father of a boy born through surrogacy in the US could not apply to become the parent of his own biological child under UK law). Only 20 declarations of incompatibility have ever been made by the UK court, and 19 of them resulted in a change to the law, which shows their significance.

In response to the court ruling, the government told Parliament that it has asked the Law Commission to consider including surrogacy law in its next programme. We are yet to see if they will agree, and even if they do the road ahead is a long one, but that is no bad thing. We need the law to protect children better and to deal with the full diversity of modern surrogacy, but there are real policy concerns and we also need to do all we can to ensure that well-managed responsible surrogacy (in which all parties are informed and equal, and no one taken advantage of) is encouraged, and we minimise the risk of exploitation and disputes.

If they take on the project, we don't yet know what the Law Commission might recommend, but as a team which has been involved in more than 700 surrogacy arrangements across the full spectrum of UK and international surrogacy, we know what works. We are calling for:

- Written surrogacy agreements made before conception so that key issues are considered and settled upfront. Surrogates should not be contractually compelled to do anything against their wishes (and should have absolute control over their own bodies) but what is agreed and intended should be recorded clearly at the start.
- Parental orders should be made during the pregnancy where everyone consents, recognising the agreement so that the intended parents become the child's legal parents immediately on birth. The criteria for parental orders should ensure the law is workable for all the children actually being born through modern surrogacy, whether in agency, family or independent surrogacy arrangements in the UK or overseas, and no matter whether their parents are single or couples.
- Disputes between parents and surrogates are incredibly rare, but where they happen the family court should decide (as it does now) what is in the child's best interests.
- Surrogate compensation should be managed in a more honest and transparent way. Concerns about surrogates (and intended parents) being taken advantage of are better handled by ensuring everyone is well informed about what they are getting into, and there is clarity and honesty.
- As with children born through egg and sperm donation, clear information should be kept long term for children born through surrogacy which they can access in later life if they wish.

Natalie Gamble Associates and Brilliant Beginnings has launched an online petition with this call to action. There was an overwhelming and immediate response, with more than a thousand people signing the petition in just three days, and heartbreaking comments showing the hard choices being made and the difficulties experienced, not only by parents and surrogates, but their whole families.

If you are affected by these issues or empathise with those who are, please help our campaign by signing our petition [change.org/p/uk-government-it-s-time-to-review-uk-surrogacy-law](https://change.org/p/uk-government-it-s-time-to-review-uk-surrogacy-law), by following us on social media (@BrillBeginnings @NGambleAssoc) and by writing to your MP.

now routinely authorise compensation payments (with significant compensation in almost all international surrogacy cases and a going rate of £12,000 to £15,000 for UK surrogates) in order to award parentage. The belief that compensated surrogacy is not permitted in the UK is a fiction. The court has also stretched other requirements, making orders where surrogates cannot be found to give consent, or where applications are made long after the six month deadline. In case after case, High Court judges have warned of the problems the law is creating, and emphasised children's basic right to an identity as the legal child of their parents.

With so many damning court judgments stretching back to 2007, it is remarkable that the law has not already been reviewed. In 2015, Jessica Lee MP tabled a Parliamentary debate in which she described UK surrogacy law as 'outdated and illogical'. At the time, the Minister for Health said the government had no plans to change the law, but the debate put the issue on the map and since then the campaign for reform has subsequently gathered pace, with all three UK surrogacy organisations calling publicly for parentage to be resolved pre birth, and Baroness Warnock (the architect of the UK's fertility laws) apologising for having 'got surrogacy wrong' all those years ago.

However, the turning point came in May this year, when the President of the High Court Family Division made a rare

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