

The Surrogacy Arrangements Act 1985

To what extent does the current law on surrogacy infringe on parental rights?

Current law

The woman who gives birth is always treated as the mother in UK and has the right to keep the child, even if they're not genetically related.

A parental order is applied for through the family courts and it transfers parenthood from the surrogate to the intended parents with the surrogates

consent. Until parental orders are granted, which is not done until six weeks after the birth, the parents are not permitted to make any medical decisions.

Due to the law in the UK restricting commercial surrogacy, parents may turn to international surrogacy agreements, which leads to the exploitation of international surrogates as they are often being paid as low as 1/10th of the price than those in the UK.

Another way the law infringes on parental rights it that there are no laws in place to provide guidance when the child is refused by intended parents.

Reform

One way the law has been reformed is by the introduction of legislation which has enabled a single person to apply for a parental order if they are an intended parent in respect of a surrogacy arrangement.

In the 13th programme of the Law Reform, the Law Commission have identified possible issues surrounding the law on surrogacy, these include, how the law is regulated, the exploitation of surrogates and parental orders.

Changes to the Human Fertilisation and Embryology Act 2008 allows for the surrogate and intended parents to grant legal parenthood to the IP immediately at birth. Therefore, narrowing the gap of 12 months which is what the IP's would normally have to wait before they are the legal parents.

In conclusion, our research found that the surrogacy rules that were first introduced 30 years ago are not fit for purpose. Due to the growing concerns the government have agreed to fund independent bodies and attempt to make sure that the UK has laws which work for the modern world.

All information cited in our report
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Surrogacy is the act of a woman bearing a child for another person/couple who are unable to carry a child themselves¹. Sometimes this can be the only way for people to have a child genetically and therefore is commonly used. This process is governed by The Surrogacy Arrangements Act 1985² and some provisions of the Human Fertilisation and Embryology Act 1990-2008³. This is an area of law which has provoked controversy and is in need of being critically examined. The Law Commission have identified possible issues surrounding the law on surrogacy, these include, how the law is regulated, the exploitation of surrogates and parental orders⁴. Until parental orders are granted, which is not done until six weeks after the birth of the child, the parents are not permitted to make any medical decisions about their child. The Law Commission have looked into these areas in the Law Commissions 13th programme of law reform⁵. As a group, we have researched into these areas but also expanded our research to see what happens if the surrogate mother or parents die, if the surrogate mother changes her mind and wants to keep the child and if the parents refuse the child/abortion rights.

The woman who gives birth is always treated as the mother in UK law and has the right to keep the child, even if they're not genetically related⁶. An example being in the case of *AB v CD*⁷, the surrogate mother and her husband remained the legal parents to the child despite the baby living with the biological mother and her new husband. This was because the biological parents didn't know they had to apply for a parental order before they divorced. This therefore infringes on their rights as parents because despite being the biological and intended parents, agreed by both them and the surrogate, legally they are not due to a misunderstanding. The court was frustrated that it was prevented from making parental orders which explicitly recognised the biological parents as the legal parents⁸. Surrogacy contracts are not enforceable in the UK⁹ so if the surrogate changes her mind before a parental order has been signed, she is the legal parent. A parental order is applied for through the family courts and it transfers

¹ Law Commission, *Making Surrogacy Laws that work for the parents, the surrogate and, most importantly, the child* (Law Commission consultation paper to be published in 2019)

² The Surrogacy Arrangements Act 1985

³ The Human and Fertilisation Act 1990-2008

⁴ Law Commission, *Surrogacy laws set for reform as Law Commissions get Government backing* (4th May 2018) <<https://www.lawcom.gov.uk/surrogacy-laws-set-for-reform-as-law-commissions-get-government-backing/>> accessed 09/11/2018

⁵ Law Commission, *Making surrogacy laws that work for the parents, the surrogate and, most importantly, the child*, available at <<https://www.lawcom.gov.uk/project/surrogacy/>> accessed 09/11/2018

⁶ Home Office, 'Surrogacy: legal rights of parents and surrogates' <<https://www.gov.uk/legal-rights-when-using-surrogates-and-donors>> accessed 09/11/2018

⁷ [2018] 4 WLUK 178

⁸ *Ibid* [Summary]

parenthood from the surrogate to the intended parents with the surrogates consent¹⁰. In the case of C, D v E, F, A, B¹¹ the surrogate changed her mind and did not want to hand over consent to the intended parents. Without the respondent's consent the application for a parental order comes to a juddering halt. The result is that these children are left in a state of legal uncertainty, where, contrary to what was agreed by the parties at the time of the arrangement, the respondents will remain their legal parents even though they are not biologically related to them and they expressly wish to play no part in the children's lives¹². The Law Commission has recently announced that surrogacy may be included in their next programme of law reform and have invited responses as to whether this should be an area that is included¹³. The intended parents are a couple who can not have children so turn to surrogacy as a way to start a family. At least one of the intended parent's in the couple must be a genetic parent to the child¹⁴. The Government has introduced legislation to change the law, so that a single person will also be able to apply for a parental order to transfer legal parenthood to them if they are an IP in respect of a surrogacy arrangement¹⁵. Once the child is born and a parental order has been granted, the intended parents are now the legal parents of the child and have the right to parental leave. In 2014 the government passed legislation to give IPs in a surrogacy arrangement the right to adoption leave and pay¹⁶. After the child is born, it is up to the legal parents, whether this be the intended parents or the surrogate, to tell the child about the surrogacy. The most recent change to the law was brought in by changes to the Human Fertilisation and Embryology Act 2008 on October 1st, 2013. This change allows for the surrogate and intended parents to grant legal parenthood to either of the intended parents immediately at birth. This is made possible through completion of various parental order forms, however, this has to be before the surrogate undergoes the fertility treatment. This gap between birth and Parental Order is normally a gap of up to twelve months, this latest change has narrowed this, but, has not replaced Parental Orders. This is because it cannot grant legal parenthood to the intended parents or terminate the surrogate's legal parenthood¹⁷.

¹⁰ Health Ethics, Population Health, Global & Public Health, cost centre 10800, 'The Surrogacy Pathway: Surrogacy and the legal process for intended parents and surrogates in England and Wales' (2018), 19

¹¹ [2016] EWHC 2643 (Fam)

¹² Ibid [paragraph 9]

¹³ Ibid [paragraph 12]

¹⁴ Health Ethics, Population Health, Global & Public Health, cost centre 10800, 'The Surrogacy Pathway: Surrogacy and the legal process for intended parents and surrogates in England and Wales' (2018), 5

¹⁵ Ibid [page 5]

¹⁶ Ibid [page 22]

¹⁷ Robin Charrot, 'What do you need to know about surrogacy?' (2014) 1 P.C.B. 2014 39-43

Another issue regarding the law on surrogacy is the exploitation of surrogates. In the UK, commercial surrogacy has been made illegal under the Surrogacy Arrangements Act 1985, which states that surrogacy may only be carried out “informally, unregulated, and without any support from a third party”¹⁸. This area of law is also dealt with by some provisions of the Human Fertilisation and Embryology Act 2008. The law states that surrogacy arrangements must be negotiated solely by the surrogate and commissioning parents¹⁹. Due to the law in the UK restricting commercial surrogacy, parents may turn to international surrogacy agreements²⁰. This can then lead to the exploitation of the international and often poorer surrogates. As low as 1/10th of the price that intended parents would have been willing to pay in their originating country is paid to international surrogates²¹. For example, research has shown that around 1000 babies are born in India to UK parents per year²². This means the underprivileged women are risking their health – and lives possibly – through exploitation²³. One way in which surrogate mothers in the UK are protected is that they have the freedom to change their mind about giving the child to the intended parents, because they are the legal parent until they have signed to hand over parental orders²⁴. However, it may be argued that this is exploiting the intended parents as they are the biological parents but aren’t legally allowed custody of the baby if the surrogate just changes her mind. Another way in which the intended parents may be exploited is if the surrogate fakes the pregnancy. A British woman ‘Louise Pollard’ was charged with fraud after being paid thousands of pounds to go through the surrogacy process for different couples and then claiming she had miscarriages. Again, this shows that the law surrounding surrogacy needs to be regulated and be clear for all parties involved to avoid exploitations like this²⁵.

One of the more controversial issues that is raised in regards to surrogacy infringement is the possibility of the parents refusing the child or requesting an abortion of the embryo/foetus. In

¹⁸ Surrogacy Arrangements Act 1985

¹⁹ Ruth Cabeza *et al*, *Surrogacy: Law, Practice and Policy in England and Wales: Chapter 9 The Case for Surrogacy Law Reform Does UK surrogacy law protect surrogates, intended parents and/or children born through surrogacy?* (Family Law 2018)

²⁰ Ruth Cabeza *et al*, *Surrogacy: Law, Practice and Policy in England and Wales: Chapter 7 International Surrogacy and British Nationality and Immigration Law* (Family Law 2018)

²¹ Mrinal Vijay, ‘Commercial surrogacy arrangements: the unresolved dilemmas’ (2014) 3(1) 173 UCL Journal of Law and Jurisprudence

²² Stephen Wilkinson, ‘Exploitation in International Paid Surrogacy Arrangements’ (2016) 33(2) Journal of Applied Philosophy <<https://onlinelibrary.wiley.com/doi/pdf/10.1111/japp.12138>> accessed 29th October 2018

²³ Mrinal Vijay, ‘Commercial surrogacy arrangements: the unresolved dilemmas’ (2014) 3(1) 173 UCL Journal of Law and Jurisprudence

²⁴ Home Office, ‘Rights for surrogate mothers’ <<https://www.gov.uk/rights-for-surrogate-mothers>> accessed 26th October 2018

²⁵ BBC News ‘Fake surrogate mother Louise Pollard jailed’ (June 2014)

most cases this is mainly due to the conception of more than one child or more than what the intended parents desired. The problem therefore is who is responsible for the child as lawfully the surrogate is the mother, however, she may not be biologically related to the child in any way. Prior to the child/children being born an agreement will have been made between the parents and surrogate. Although, in the UK it is not permissible to devise a legally binding surrogacy contract between the two parties involved. Therefore, if the intended parents then refuse the child the surrogate is left the legal mother of a child which she did not intend to be her own nor intent to have to care of. In 2014, a British surrogate was left with a child after it was refused by the intended parents due to the child having a medical condition. Baby Amy was born with Congenital Myotonic Dystrophy which caused breathing difficulties and lack of head control and facial expression. The parents refused to accept Amy yet took home her healthy twin brother a month later. The surrogate is now caring for the child with her partner alongside her other children. Due to the law, the surrogate is the lawful mother of the child so therefore had no option but to care for the child that was not biologically related to her²⁶. Furthermore, there is also the possibility that the intended parents may seek an abortion of the surrogate child before it is born. This could be due to the several different reasons such as medical conditions or refusal due to the financial aspect of caring for the child. The most thought provoking factor of this scenario is whether the autonomy of the mother's body is more significant and therefore it is up to the surrogate to decide whether to terminate the pregnancy, or, if it should be up to the intended parents as the baby is biologically theirs. There is the argument that if the child is disabled, the surrogate can most likely just walk away whereas the intended parents have to care for the child not only physically but socially as the weight of caring for a disabled child can often cause large strain on the parents who care for the surrogate child²⁷. This therefore infringes on parental rights as there are no laws in place to provide guidance when the child is refused by the intended parents.

Another way in which the law on surrogacy infringes on parental rights is if a situation arises whereby the surrogate changes her mind and wants to keep the child. Without a parental order the surrogate is entitled to change her mind and keep the baby at any time. In one case, a surrogate mother changed her mind about handing over the baby to a gay couple but the Court

²⁶ Inderdeep Bains, 'I don't want a dribbling cabbage for a daughter': What mother told her surrogate before rejecting disabled baby girl' (August 26) 2014 <<https://www.dailymail.co.uk/news/article-2734374/Surrogate-mother-twins-gave-birth-disabled-girl-told-woman-intended-child-didnt-want-dribbling-cabbage.html>> accessed 09/11/2018

²⁷ Emily Contreras, 'Surrogacy and Abortion: Whose body, whose baby?' (6 December 2017) <<http://www.publicseminar.org/2017/12/surrogacy-and-abortion/>> accessed 09/11/2018

of Appeal granted the gay couple custody of the baby. Even though the surrogate had the right to change her mind, it was held that this did not mean that the surrogate should keep the child²⁸. This shows the surrogate's rights had been infringed and that the law surrounding surrogacy needs to be clarified. The Human Fertilisation and Embryology Act 1990²⁹ was amended in 2008 which now allows surrogate mothers to keep the child if they wish to do so before the parental order is signed.

Surrogacy is one of the oldest solutions to infertility and in the UK surrogacy laws were written in the 1980's. People who want to become mothers today recognise that the law is out of date and needs to be changed due to its impracticalities.³⁰ In the UK altruistic surrogacy is legal whereas commercial surrogacy is not compared to overseas such as India. Before the change in 2013, the intended parents are transferred their rights under a court process which takes up to a year after the birth. This shown to be problematic and outdated criteria has been reformed. The current law also restricts payments to surrogates to 'reasonable expenses' but in reality, authorise compensation³¹ Furthermore, the law does not show to support a surrogate's commitment to carry a child for someone else. Many organisations have had to close their doors to new intended parents due to the shortage of UK surrogates. In 2005, a surrogate in the UK died shortly after giving birth. Natasha Caltabiano, was 29 and already a mother of two, suffered a ruptured aorta and died from a heart attack. The healthy baby was handed to the parents after the surrogate's death. Critics argue that the 'surrogate has risked her life to gift a couple with a child'. Perhaps if there was a fixed law or a contract to ensure that all parties are cared for in the surrogacy process, these issues would not arise.³² Furthermore, Sarah Jones has been a surrogate for four years. Sarah from Epworth has been back by MP's Brigg and Goole Andrew Percy have said that the current laws that have been set up since the 1980's are 'outdated and inadequate'.³³

²⁸ Olivia Rudgard 'Surrogate mother who changed her mind must hand baby to gay couple, court rules' Telegraph (November 2017)

²⁹ The Human and Fertilisation Act 1990-2008

³⁰ Michael Rose, 'Surrogate mother calls for 'old-fashioned' laws on births to be changed' The Guardian (18th January 2018) <<https://www.theguardian.com/lifeandstyle/2018/jan/18/surrogate-mother-calls-for-old-fashioned-laws-on-births-to-be-changed>> accessed 12 November 2018

³¹ NGA Law, 'How UK surrogacy law needs to change' (2014) <<https://www.nataliegambleassociates.co.uk/knowledge-centre/how-uk-surrogacy-law-needs-to-change>> accessed 12 November

³² Andrew Norfolk 'Surrogate baby battle' The Times (5 February 2005) <<https://www.thetimes.co.uk/article/surrogate-baby-battle-xzdcbcxp3ph>> accessed 12 November 2018

³³ BBC News, 'Surrogate mother and MP: UK surrogacy law 'outdated and inadequate'' (17 January 2018) <<https://www.bbc.co.uk/news/uk-england-humber-42721906>> accessed 12 November 2018

Surrogacy arrangements are continuing to be a popular choice for couples who are unable to start a family on their own. In consequence, the current law is being stretched to a breaking point. High Court judges have described the law as 'irreconcilably conflicting' and 'the very antithesis of sensible' and, in case after case, have called for 'better regulation' of surrogacy in the UK³⁴.

In conclusion, in this research report the aim was to determine if the current law on surrogacy infringes on parental rights. In consequence, it has shown in numerous ways how it does but also how it does not. Thus being, that if the intended parent no longer wants their baby the surrogate has no choice but to be the legal mother. Despite this, ways in which statutes have attempted to solve these issues are also identified, an example being the changes to the Human Fertilisation and Embryology Act 2008 on October 1st, 2013, allowing for the surrogate and intended parents to grant legal parenthood to either of the intended parents immediately at birth. Nevertheless, there are still inconsistencies and more work and reform is certainly needed to ensure that everyone's rights involved in the surrogacy process are protected. From our findings in the report, the surrogacy rules that were first introduced 30 years ago are not fit for purpose and surrogacy is becoming more common. Due to the growing concerns the government have agreed to fund independent bodies and attempt to make sure that the UK has laws which work for the modern world.

³⁴ Brilliant Beginnings, 'UK surrogacy law reform' (2019)
<<https://www.brilliantbeginnings.co.uk/campaigning/simplify-surrogacy-law>> accessed 12 November 2018