



FAMILY LAW

Children

Surrogacy

Surrogacy arrangements have significant legal implications. Read on to find out more information about this complex area of law, and the recent changes brought about by the provisions of the Human Fertilisation and Embryology Act 2008 (“HFEA 2008”).



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Legal Parenthood

The legal definitions of parenthood in circumstances where a child is born by assisted reproduction is complex. The mother of a child is the one who carries a child following assisted reproduction. She may lose the status of “mother” only through adoption or the making of a Parental Order. The “other parent” will depend on the circumstances at the time of the child’s birth. Further details can be provided.

Surrogacy

The Surrogacy Arrangements Act 1985 prohibits the entering into or negotiating of a surrogacy arrangement on a commercial basis. It also states that surrogacy agreements entered into in this country are unenforceable.

The Human Fertilisation and Embryology Act 1990 (“**HFEA 1990**”) introduced the concept of a “Parental Order”. A Parental Order is the legal mechanism for transferring the status of a parent from the surrogate to the commissioning parents. The HFEA 1990 only provided for cases in which the commissioning couple were married. Under the HFEA 2008, the category of people who can apply for a Parental Order has been extended. Civil partners and two persons living as partners in an enduring family relationship, as well as married couples, can apply for Parental Orders.

Parental Orders

The Court may make a Parental Order if the conditions set out in section 54 of the HFEA 2008 are complied with. The conditions include (but are not limited to):

- (i) The application must be made more than six weeks and less than six months after the birth;
- (ii) At least one of the applicants must be genetically related to the child;
- (iii) Either or both of the applicants must be domiciled in the UK;

- (iv) The Court must be satisfied that the surrogate mother has freely, and with full understanding of what is involved, agreed unconditionally to the making of the Parental Order;
- (v) No payments have been made to the surrogate mother, other than reasonable expenses.

All of the requirements identified under section 54 HFEA 2008 will have to be satisfied. In some cases, where a Court is unable to make a Parental Order, it may make an Adoption Order in relation to a surrogate child who is born in England. Another possibility, if the Court is satisfied of the arrangements for the child, could be for the Court to make a Residence Order.

Foreign Surrogacy Arrangements

There have been numerous cases which highlight the difficulties of dealing with the laws of two jurisdictions which may not be compatible. There are many jurisdictions in which a surrogacy arrangement is enforceable domestically, unlike in the UK. There are also jurisdictions where surrogacy agreements are illegal. There are very complex rules about bringing a surrogate child into this jurisdiction. The child will not automatically be a British citizen and immigration advice should therefore be sought at the outset. It is very important to consider the immigration position in advance; expert immigration advice can be provided by Kingsley Napley’s immigration department which has extensive experience in this area.

In this complicated and fast changing area of family law, expert advice should be sought at the very outset. Miranda Baker, a partner in our family department, is a recognised expert in surrogacy law. For further information, please contact:

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