Children of our time

Natalie Gamble outlines the history of surrogacy law in the UK and considers whether a review is needed

'If the surrogate is married, the legal parents at birth are the surrogate mother and her husband. Neither commissioning parent has any legal relationship with the child, even if both are the biological parents.'

The idea of a woman carrying a child for someone else and then handing it over at birth is controversial. During the past 25 years the law has had to grapple with difficult questions in relation to surrogacy, including who the parents of the child should be, what rights the surrogate mother should have and, more widely, how vulnerable women should be protected from the risk of commercial exploitation.

The Human Fertilisation and Embryology Bill (HFEB) 2008 marks the first major overhaul of fertility law in 18 years, but it has not substantially reviewed how the law treats surrogacy. With such sensitive issues at stake and with surrogacy becoming increasingly common at home and abroad, this seems a missed opportunity.

Origins of the current law

The law governing surrogacy in the UK has its roots in the findings of the Warnock Committee, which reported to Parliament in 1984, and in *Re C (A minor)* [1985], the baby Cotton case that hit the headlines in January 1985. This involved surrogate mother Kim Cotton, who was paid £6,500 to carry a child. After intervention by the local authority, the commissioning parents were ultimately granted wardship by the court, but the 'baby-for-cash deal' attracted enormous publicity and provoked great controversy.

The Surrogacy Arrangements Act (SAA) 1985 followed, and remains the chief regulatory law governing surrogacy in the UK. The SAA 1985 makes it an offence to negotiate a surrogacy arrangement on a commercial basis or to advertise that you are seeking a surrogate, willing to act as a surrogate or willing to negotiate or facilitate a surrogacy arrangement (s2-3). Section 1A (inserted in 1990) also makes surrogacy arrangements unenforceable.

The effect is not that surrogacy, or even payments of the surrogate's expenses, are illegal in the UK (as they are in various other European countries) but rather that surrogacy is kept informal. If parents wish to conceive through surrogacy, they must find a surrogate mother privately without advertising and without the assistance of a commercial broker and, if something goes wrong, the law will not step in to enforce the arrangement.

Parenthood in surrogacy cases

The Human Fertilisation and Embryology Act (HFEA) 1990 followed five years later and dealt with the difficult issue of parenthood for children conceived through assisted reproduction.

Section 27 HFEA 1990 provides that:

> The woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman, is to be treated as the mother of the child.

Section 27 gives important protection to women conceiving with donated eggs by associating legal motherhood with gestation and not biology. In surrogacy situations, however, the effect is usually the opposite of the parties' intentions: s27 confers legal motherhood solely on the surrogate mother and extinguishes any claim of the commissioning mother, even when she is the child's biological parent.

Fatherhood in surrogacy situations is just as complex. Practitioners without specialist knowledge of this area would be forgiven for assuming that the father in a surrogacy situation is treated just

like any other unmarried natural father: registered on the birth certificate where the mother agrees, or otherwise able to acquire parental responsibility by court application (if necessary rebutting the common law presumption that the mother's husband is the legal father). The law is not, however, that simple.

Section 28 HFEA 1990 provides:

> (1) This section applies in the case of a child who is being or has been carried by a woman as the result of the placing in her of an embryo or of sperm and eggs or her artificial insemination.
>
> (2) If:
>
> (a) at the time of the placing in her of the embryo or the sperm and eggs or of her insemination the woman was party to a marriage, and
>
> (b) the creation of the embryo carried by her was not brought about with the sperm of the other party to the marriage,
>
> then... the other party to the marriage shall be treated as the father of the child unless it is shown that he did not consent...

Section 28 HFEA 1990 was designed to protect fathers in donor insemination cases. Covering situations in which a child is conceived artificially, it confers fatherhood on a husband who is not the biological father, and it goes further than the common law presumption, since it cannot be rebutted with DNA evidence.

The effect, in most surrogacy situations, is that the surrogate's husband is the legal father of the child, and not the commissioning biological father. Given that the surrogate's husband has no biological connection with the child, nor any intention to act as a parent, this outcome often seems illogical, and certainly so to those involved.

Since s28 HFEA 1990 only applies when the surrogate has a husband, the effect, for commissioning parents, is that a great deal depends on the marital status of the surrogate mother they choose:

- If the surrogate is married, the legal parents at birth are the surrogate mother and her husband. Neither commissioning parent has any legal relationship with the child, even if both are the biological parents.
- If the surrogate is unmarried, the legal parents at birth are the surrogate mother and the commissioning biological father. The commissioning father will have parental responsibility if registered on the birth certificate and can then in turn confer parental responsibility on his wife (the commissioning mother) by agreement.

Re G and Re N demonstrate that the black and white wording of the surrogacy legislation is not always practical, and it has consequently been left to the court to find complex and creative alternative solutions.

The law in practice

With the exception of the court's power to authorise payments in excess of reasonable expenses, the conditions of s30 HFEA 1990 (see box on p13) are all absolute and the court has no general dispensing power enabling it to grant a parental order if the conditions are not all satisfied. In practice, this lack of flexibility has caused difficulty when the welfare of a child has demanded action but a parental order could not be granted.

In *Re N (A child)* [2007] the court found that a surrogate mother had deceived the commissioning parents into enabling her to conceive a child she never had any intention of handing over. The parliamentary response to such situations (reiterated during the debate on the HFEB 2008) has always been that a child should never be taken away from a birth mother against her will. However, in *Re N* the commissioning father applied for court intervention (using the wider family law rather than seeking a parental order, given the surrogate's lack of consent and the expiry of the six-month deadline) and the Court of Appeal, emphasising the deception by the surrogate mother and the welfare of the child, awarded care of the child to the commissioning parents. This result was particularly surprising given that the surrogate was married, and so her husband ought to have been treated as the legal father. It demonstrates the willingness of the courts to take a more pragmatic approach to the complexity of real-life surrogacy situations.

Re C (A minor)
[1985] FLR 846
Re G (Surrogacy: Foreign domicile)
[2007] EWHC 2814 (Fam)
Re N (A child)
[2007] EWCA Civ 1053

In *Re G (Surrogacy: Foreign domicile)* [2007] there was no dispute among any of the parties that the child should be cared for by the commissioning parents. The problem here was entirely a legal one: the commissioning parents were both Turkish and so unable to satisfy the domicile requirement in s30(3) HFEA 1990. The commissioning parents' application for a parental order therefore had to be rejected, leaving the court with the difficult task of finding an alternative solution. After nine months of expensive litigation, which required a full local authority assessment of the commissioning parents and expert evidence from Turkey, the court granted an order under s84 of the Adoption and Children Act 2002 allowing the commissioning parents to take the child to Turkey for adoption.

These cases demonstrate that the black and white wording of the surrogacy legislation is not always practical, and it has consequently been left to the court to find complex and creative alternative solutions.

Even when all goes well and the conditions of s30 can be satisfied, the existing system of law is not entirely

satisfactory, since it leaves both the intended parents and the surrogate parent/s in legal limbo for months after the birth until a parental order is granted. In practice, there is legal uncertainty for both sides during this period. There are also very real practical difficulties, including the fact that the parents who have care of the child do not have parental responsibility and so cannot consent to baby immunisations and other medical treatments.

The HFEB 2008

It is perhaps surprising that the HFEB 2008 has not substantially reviewed surrogacy law, and particularly the application of parenthood rules designed for donor conception. Clause 54 of the HFEB 2008 extends the categories of applicants entitled to apply for a parental order to include unmarried and same-sex couples, as well as married couples. Clause 59 also clarifies the SAA 1985 to ensure that not-for-profit surrogacy organisations such as COTS and Surrogacy UK (which have in practice operated for years without prosecution) operate legally. However, in all other respects the existing law is retained.

Is the current law still fit for purpose?

One issue apparently overlooked by Parliament when considering the HFEB 2008 is the worrying potential minefield of international conflicts of law in relation to surrogacy. Fertility treatment is increasingly operating in an international marketplace, with recent surveys indicating that up to a quarter of assisted reproduction births in the UK are now the product of treatment abroad. Surrogacy is treated very differently around the world, with certain jurisdictions (including India, Ukraine and some US states) allowing commercial and enforceable surrogacy, and others (including Turkey and various European countries) banning surrogacy altogether. These variations encourage couples desperate for a child to cross borders and this is already causing difficult legal conflicts, as *Re G* demonstrates. The parliamentary debate on the HFEB 2008 also highlighted potential legal difficulties for British intended parents conceiving with foreign married surrogates, whereby a conflict of law could result in a biological child of British parents being born legally parentless and stateless in a foreign country.

Meanwhile, in the UK, surrogacy is increasingly regarded as an acceptable part of fertility treatment, and increasing numbers of licensed clinics are offering treatment to couples who present with surrogate mothers. As IVF becomes a more routine medical treatment, it has also become much more commonplace for surrogate mothers to carry an embryo created by the commissioning parents and to have no biological relationship with the child, which may bring the structure of the existing parenthood rules into even greater question.

As we have seen, the current rules on parenthood were not designed for surrogacy and they apply awkwardly. Section 30 HFEA 1990 is not a satisfactory solution since, in conflict with the accepted wider principles of family law, its inflexibility restricts the ability of the court to act in the best interests of the child. When HFEA 1990 was passed, the difficulties it posed for surrogacy were deemed acceptable because donor conception was considered much more significant, surrogacy was still immensely rare, and it was felt that s30 provided sufficient remedy for any injustice that did occur. Now that surrogacy is no longer the exotic rarity it once was, a more bespoke solution is needed that affords surrogacy the recognition it deserves.

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Surrogacy law has always needed to preserve a delicate balance: upholding the public policy of preventing commercialised reproduction while also enabling parents conceiving through surrogacy to achieve legal security in circumstances deemed acceptable. But we have come a long way from baby Cotton and are living in a much-changed world that will bring difficult new challenges. If surrogacy law is to cope with the next 25 years, these issues need to be addressed more bravely. ■

Applying for a parental order

Section 30 HFEA 1990 creates a mechanism (a kind of fast-track adoption process) for sorting out difficulties: extinguishing the surrogate's responsibilities and reassigning parenthood fully to both commissioning parents. Section 30 provides that the court can grant a parental order if:

- the child was carried by a surrogate mother and is the biological child of at least one of the commissioning parents;
- the application is made within six months of the birth;
- the commissioning parents are over 18, married to each other, and at least one of them is domiciled in the UK;
- the child is living with the commissioning parents at the time of the application;
- both the surrogate mother and her husband (provided they can be found and are capable of giving consent) fully and freely consent to the order being granted, the surrogate mother not before six weeks; and
- the surrogate mother has not been paid more than reasonable expenses, unless authorised by the court.