

In Practice

International surrogacy law conference in Las Vegas, October 2011

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In a world where global information is now no further away than anyone's fingertips, increasing numbers of infertile and same sex prospective parents are crossing borders to conceive with foreign donors and surrogate mothers. International assisted reproductive technology (ART) has produced a string of difficult cases in recent years concerning, in particular, the family and immigration status of children born through cross border surrogacy arrangements.

In France, for example, the Mennesson family lost a high profile battle to recognise their children, born through surrogacy in the US, as French. Twins born through a surrogacy arrangement in the Ukraine to British parents in 2008 were rendered stateless and parentless until High Court intervention remedied their status. In Italy, anti surrogacy laws have enabled the inheritance rights and family identity of a child Princess born through international surrogacy to be contested in a bitter family dispute. As a result of cases like these, surrogacy is now firmly on the international law agenda, and the Hague Conference on Private International Law has announced that it is considering a new convention to regulate it.

This was the context for the American Bar Association's ART Law Committee global conference in Las Vegas in October 2011. In a heavyweight gathering, the world's leading surrogacy law experts were invited to share knowledge and to consider developments in international policymaking on surrogacy.

The British perspective

Speaking as part of an international panel, I reported positive news from the UK, that namely the English family courts have been evolving a body of case law over the last few years allowing foreign surrogacy arrangements to be ratified. British parents can, even if only retrospectively, now acquire legal parenthood and British nationality for a child born through surrogacy abroad.

Parental orders were first created as the bespoke UK legal remedy for surrogate-made families by the Human Fertilisation and Embryology Act 1990. They were deliberately designed as an alternative to adoption, recognising that the biological parents of a child born through surrogacy would not (as a result of ART laws designed for donation) be the legal parents of their child but that it would be inappropriate for them to undergo the full rigours of an adoption process. The Human Fertilisation and Embryology Act 1990 allowed a more streamlined transfer of parenthood. It enabled a child's birth certificate to be reissued (via a parental order) if the family court was satisfied that the parents had complied with various criteria. Most importantly, one or both of the parents had to be the child's biological parent, the surrogate mother had to consent freely to the handover and the arrangement had to be altruistic rather than commercial.

Since the implementation of this law in 1994, things have moved on significantly. The parental order solution is now being applied in practice to international surrogacy cases, even where the parents have entered into commercially arranged surrogacy. In addition, procedures for navigating nationality and immigration are increasingly well trodden, minimising the problems parents are experiencing getting home.

This has been a fast developing area of law. In 2008, my specialist team and I represented the British commissioning parents in *Re X and Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam), [2009] 1 FLR 733 the first case heard by the English High Court which ratified a foreign (in this case Ukrainian) commercial surrogacy arrangement. There was no dispute between the parties but the British parents were not treated as the legal parents under

English law. This was because UK law protects the woman who gives birth and her husband, in effect presuming them to be the recipients of donated eggs or sperm where a child is conceived artificially and is not biologically theirs. Since Ukrainian law (which is permissive on surrogacy) treated the British intended parents as the parents and not the surrogate or her husband, each system of national law effectively abdicated parenthood for its own citizens. The effect was that the children were denied parents in both jurisdictions and were consequently neither British nor Ukrainian citizens.

A parental order from the UK court was the obvious solution for the British family but it could only be made if the court was prepared to 'authorise' the payment of more than reasonable expenses to the surrogate mother (in that case a figure of around €27,000 which was being used as a down payment on a home). Payments for surrogacy were lawful in the Ukraine where the arrangement was made but against public policy in the UK, where no more than 'reasonable expenses' is expected to be paid. Whether the English court would be prepared to ratify an openly commercial surrogacy arrangement was, at the time, un-chartered territory and the decision was not an easy one for the court. As Mr Justice Hedley said 'I find this process of authorisation most uncomfortable. What the court is required to do is to balance two competing and potentially irreconcilably conflicting concepts'.

In other national courts where the child's welfare and wider public policy have been similarly in conflict (including France), children have been denied rights and status because it was deemed more important to uphold wider policy. It is a credit to our child-focused family court system that in the UK the child's welfare has been prioritised, enabling the protection of all children of British parents, no matter how or where they are born.

In the story of evolving UK law on international surrogacy, there then followed Parliamentary consideration of the Human Fertilisation and Embryology Act 2008. This not only re-established the existing legal framework for parental orders in the UK but expanded its scope (to cover same-sex and unmarried couples). Changes were also introduced through the associated Human

Fertilisation and Embryology (Parental Orders) Regulations 2010, which came into force on 6 April 2010 alongside s 54 of the new Human Fertilisation and Embryology Act 2008. These made the child's welfare, not just the court's 'first' consideration, but its 'paramount' consideration, an implicit Parliamentary endorsement of the court's decision in *Re X and Y* to prioritise the children's welfare over public policy. Changes were also made to the nationality rules (I am happy to say following recommendations I was asked to give to the government at the time) allowing children to become British automatically on the grant of a parental order – previously, British nationality could only be acquired through a separate application to the Home Office.

Government policy, endorsed by Parliament, therefore went some way towards accepting international surrogacy arrangements. This evolution of policy was taken up by the High Court in the first case to be heard under the new legislation, *Re L (A Minor)* [2010] EWHC 3146 (Fam), [2011] 1 FLR 1423. The case involved a surrogacy arrangement entered into between British commissioning parents and a married surrogate mother in Illinois, USA and again, my team and I represented the parents. Mr Justice Hedley's judgment noted the development of Parliamentary policy and determined that, although careful scrutiny would continue, 'it will only be in the clearest case of the abuse of public policy that the court will be able to withhold an order if otherwise welfare considerations support its making'.

Re L and the Human Fertilisation and Embryology Act 2008 therefore now set the marker for where UK law on commercial surrogacy stands: although the UK does not yet allow commercial surrogacy at home, it is prepared to endorse arrangements which take place within other policy frameworks abroad, provided that the court is satisfied that the surrogate mother consents, has not been exploited, and the arrangement is not one involving a circumvention of child protection laws by wholly unsuitable parents.

Ultimately, what this means is that the UK has conceded to the realities of globalised reproduction and made protecting all children conceived by British parents its priority. What was clear from

In Practice

the other presentations at the ABA conference was that other countries are taking a less enlightened approach. I was fortunate to sit as part of a panel alongside leading specialist lawyers from Germany, Italy and Australia, who talked eloquently about the problems faced by their own compatriots. In Germany and Italy surrogacy is prohibited altogether, and in Australia, while laws vary from state to state, it can be an offence for parents to engage in a commercial surrogacy arrangement both at home and overseas. The trend of legislation in these countries has been to try to make things more, rather than less, difficult for parents conceiving through international surrogacy arrangements. However, even in these countries, creative legal advisors like those at the Las Vegas conference are finding ways of using the law to protect the families they are advising. Legal solutions are often available provided that parents plan appropriately in advance.

Working towards a global solution

There was much discussion at the conference about the Hague Conference's announcement that it is considering an international convention to regulate cross-border surrogacy and the experts at the conference discussed how a workable solution might be shaped at an international level.

The basic problem is that, on a global scale, there is enormous disagreement about some pretty fundamental questions: at what stage a woman should be allowed to surrender her rights to a child she gives birth to, whether it is acceptable for surrogates to be compensated and indeed whether surrogacy should be allowed at all. The international conflicts of law we are seeing in practice are arising, not just because mismatched laws have evolved separately and need to be jigsawed together, but because fundamentally different policy frameworks on surrogacy which are deeply and passionately opposed. Creating any international consensus will undoubtedly be a challenge, even though the potential benefits of some kind of international solution is needed.

There was also much concern expressed at the conference about the rights of parents to procreate. There has been some

suggestion in the Hague's early discussions that they may adapt the existing Hague Convention on Intercountry Adoption and in particular that prospective parents may be required to be pre-approved by authorities at home (to the same standard as for adoption) before they can engage in an international surrogacy arrangement.

However, surrogacy arrangements involve the conception of a parent's own child and this is a process very different from adoptive situations where an existing child is placed in a home they do not otherwise belong to. Parents choose surrogacy because they cannot conceive by more conventional means; they are no more likely to pose a risk to children than any other prospective parents conceiving their own children. It would be unthinkable in most liberal societies for individuals to need a licence from the state to reproduce – parents are instead subject, quite rightly, to robust systems of child protection which remove children if they are neglected or abused. Quite apart from the practical difficulties of adding to the load of an already overburdened social services, we need to understand that what makes surrogacy unique and different from both adoption and 'normal' conception is the involvement of a third party in the creation of the life of a child. The key objective should be, not vetting the suitability and motivation of prospective parents, but ensuring that the third party relationship is managed ethically and successfully for the protection of all involved (including the child). In order to create an effective international convention regulating surrogacy arrangements, it is clear that we cannot simply emulate previously trodden paths. We will need a blank sheet of paper and a fresh new approach.

Conclusions

I came away from the ABA conference struck by a number of things:

- How personal and passionate ART lawyers are – many, it seems, have been through the process of fertility treatment themselves, and all care very deeply about helping others to build families responsibly and safely.
- How different this area of law is from other areas of family law practice, and how important it is to have a specialist

understanding of not only the complex legal provisions but also the medical and social practices which underpin them.

- How divergent views are around the world about assisted reproduction, about surrogacy, and particularly about compensation for donors and surrogates.

It does not surprise me that parents are crossing borders to access the reproductive treatments they need. Having worked with prospective parents for many years, I cannot overstate just how strong the drive to have children is, and how determined parents are to do whatever is necessary to build a family, even where they face significant practical obstacles or criminal sanctions. In a globalised post information revolution world, we need to recognise this reality and ensure that protecting the

welfare of children is prioritised over increasingly futile social policy objectives.

In response to the growing challenge of tackling these issues at an international level, and in response to the Hague Conference's attention, the American Bar Association's (now international) ART Law committee represents a leading community of specialist lawyers, not just from across the US but from all over the world. I was privileged to be a foundational part of the group in Las Vegas and look forward to the work we will do together.

Any readers with an interest in this area of law or a wish to become involved are welcome to join us, and should contact the author in the UK (www.nataliegambleassociates.com) or Stephen H Snyder, Chair of the ABA ART committee, for further information.

In Practice