

grant of a parental order and that is that it would not be in the best interests of the child to do so.

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It's time to review UK surrogacy law

A review of UK surrogacy law is, it seems, finally on the way. Responding to the ruling in *Re Z (No 2)* (above) the government told Parliament on 7 June 2016 that it has asked the Law Commission to consider including surrogacy in its 13th programme. Natalie Gamble Associates (which specialises in surrogacy cases) and non-profit surrogacy agency 'Brilliant Beginnings' have in response launched an online petition setting out the problems with the current law. There was an overwhelming and immediate response, with more than a thousand people signing the petition in just 3 days. The online comments show the hard choices being made in the absence of proper law, and the difficulties experienced, not only by parents and surrogates, but their whole families. Several heartbreaking comments have been left by 'nannies in waiting'.

Change is very long overdue. Against a backdrop of law which makes surrogacy agreements unenforceable and does not recognise the intended parents as the child's legal parents, not enough UK surrogates come forward and the UK's three non-profit surrogacy agencies (which provide essential support in the absence of clear law) have all recently had to close their doors. Instead, increasing numbers of UK parents are making surrogacy arrangements informally online, or going overseas to countries which offer legally recognised surrogacy. Informal UK arrangements are frayed with risk and vulnerability, and people are left to muddle through without any legal process until after the child is born. Internationally, countries where ethical and legal surrogacy is available are expensive, while more affordable options are risky with dangers

that poor surrogates are being exploited. Children born through international surrogacy are not protected, with the law leaving many new-borns stranded overseas 'stateless and parentless' for months after they are born, and some left with permanently unresolved legal parentage.

In managing the ever-growing numbers, the current law is being stretched to breaking point. The President's recent declaration of incompatibility under the Human Rights Act follows many other cases where High Court judges have highlighted problems with the law, including describing it as 'irreconcilably conflicting' and 'the very antithesis of sensible'. We need a proper legal framework for surrogacy in the UK which works in a global context and puts children's welfare first. It should include:

- Written surrogacy agreements in the UK so that key issues are considered and settled upfront.
- Parental orders made during the pregnancy to make the intended parents the child's legal parents at birth, with a review of the outdated criteria to ensure that the law is workable and that all children have their parentage recognised.
- The family court continuing to decide what is in the child's best interests if there is a dispute (although such cases are very rare).
- Clarity that UK law permits surrogates to be compensated, reflecting reality and allowing this to be dealt with more honestly and transparently.
- Prompt recognition of the status of children born through surrogacy overseas, ending the long wait to come home.
- Within the existing non-profit model of UK surrogacy arrangement services, more workable rules and an abolition of the restrictions on advertising, so that more people can access well-managed UK surrogacy.
- Better information kept long term for children born through surrogacy in the UK and overseas.

If you agree, please sign the petition: www.change.org/p/uk-government-it-s-time-to-review-uk-surrogacy-law

Natalie Gamble
Partner, Natalie Gamble Associates

Mental capacity and deprivation of liberty

In July 2015 the Law Commission (LC) opened a consultation on the law of mental capacity and deprivation of liberty. The consultation is now closed. The LC published an interim statement on 25 May 2016 and expect to publish a final report with its recommendations and a draft Bill in December 2016. The Deprivation of Liberty Safeguards (DoLS) aim to protect people who lack mental capacity but who need to be deprived of liberty so they can be given care and treatment in a hospital or care home. If a person's right to liberty needs to be infringed in other settings, an authorisation must be obtained from the Court of Protection.

The DoLS have been criticised since they were introduced for being overly complex and excessively bureaucratic. In March 2014, a House of Lords Select Committee published a detailed report concluding that the DoLS were 'not fit for purpose' and recommended that they be replaced. At the same time, a case in the United Kingdom Supreme Court held that far greater numbers of people fell to be dealt with under the DoLS system than had previously been thought. This has placed increasing burdens on local authorities and health and social care practitioners administering the DoLS.

The LC consultation paper concluded that the DoLS are 'deeply flawed'. The LC provisionally proposed that they be replaced with a new system to be called 'Protective Care'. Broadly speaking, protective care had three aspects: the supportive care scheme, the restrictive care and treatment scheme,

and the hospitals and palliative care scheme. The LC's May 2016 interim statement summarises the key messages from consultation and sets out some initial conclusions. The LC is working on its final report and recommendations with a draft Bill expected in December 2016. All the documents can be viewed on the free Family Law website: www.familylaw.co.uk.

CoP: pilot Practice Direction

The final version of the pilot Practice Direction was published on 16 June 2016 in advance of a case management pilot commencing in the Court of Protection (CoP). The pilot will commence on 1 September 2016, although the pilot Practice Direction was initially published in draft in March to allow practitioners to prepare for a significant change in case management practice. The pilot scheme sets out three case management pathways for CoP proceedings:

- (1) a property and affairs pathway;
- (2) a health and welfare pathway; and
- (3) a hybrid pathway for cases that have elements of both property and health.

The pilot Practice Direction will place an obligation on applicants to provide improved analysis of the issues at the start of a case, allowing for more robust case management decisions to be taken at the outset and all issues to be identified at the earliest opportunity in proceedings. It will also seek to encourage early resolution of cases, to reduce the number and length of hearings required in contested cases and to promote judicial continuity. The pilot is expected to run for up to 12 months. A separate pilot Practice Direction dealing with reports commissioned under s 49 of the Mental Capacity Act 2005 was also published now for information only. Both can be viewed on the freely available website: www.familylaw.co.uk.