

to obtain a parental order which secures their legal status.

In confidence that the change will go through, there is nothing to stop single parents proceeding with storing eggs, sperm or embryos now, or even to go ahead with surrogacy if they are able to find a surrogate in the UK. Provided they have a biological connection and meet the other requirements they will be able to apply to become the legal parent of their child once the law changes.

#### **The Law Commission review**

At the same time as announcing the remedial order for single parents, the government announced that it had invited the Law Commission to conduct a more widespread review of U.K. surrogacy law.

The Law Commission commenced their three year project in spring 2018, at the end of which they will produce recommendations and a draft Bill to steer the government as to how the law should be reformed. It will take some time – after the report is published the government will need to decide whether and when to implement any recommended changes – but we are hopeful that it will result in law which, for the first time, recognises and supports surrogacy properly.

In the meantime, it is important that the Law Commission hears from all those who have a professional or personal interest in surrogacy law reform. We understand there will be a public consultation later in the project so do get involved to share your experience.

#### **New Department of Health guidance**

Knowing that this would all take some time, the Department of Health put together some best practice guidance for surrogacy which was published in February 2018 (<https://www.gov.uk/government/publications/having-a-child-through-surrogacy>). Working with the three key surrogacy organisations (and other experienced surrogacy professionals) the guidance is a good reflection of current U.K. surrogacy practice. It recommends that arrangements are set up with care, the help of an organisation and agency and that those involved access counselling and legal advice. It includes guidance on the medical and legal process, and the emotional issues, and encourages families to consider the child's long term welfare in decisions about how information is shared over time. It is well worth a read if you work with parents or surrogates going through the surrogacy process.

#### **Counselling intended parents and surrogates**

Surrogacy involves an important emotional dynamic between surrogates and the parents they are helping. Counselling is vital to help everyone involved consider the emotional implications of the journey they are embarking on, and to communicate clearly with each other, both at the outset and throughout the journey. When it works well, surrogacy can be among the most heartwarming of all forms of assisted reproduction, but even if outright disputes are rare there is often a risk of disappointment, frustration and miscommunication. The current law does not help, and its uncertainties feed confusion, anxiety and worry for everyone. With clearer law which gives more certainty, counsellors will have an easier job to support surrogacy well.

*Natalie Gamble is known internationally as the UK's leading fertility lawyer and founded NGA Law*

## Surrogacy law - where are we with law reform?

### by Natalie Gamble

Surrogacy is an increasingly common way of building a family for U.K. parents. Modern families are more diverse than ever and this means that intended parents planning to conceive through surrogacy now include not just different-sex couples with fertility or medical difficulties, but also male same-sex couples, single parents and transgender parents who need the help of another woman to carry their child. There is also more variety in the types of surrogacy arrangements being embarked upon by UK parents, with as many now going overseas for surrogacy (to destinations like the US, Canada and the Ukraine) as conceiving with surrogates in the UK.

But UK law has not caught up, and has not been reviewed substantially since it was written in the 1980s. There is growing acceptance that the law needs to change, and in the last year we have seen the first tentative steps towards positive reform.

#### **What are the problems with the current law?**

U.K. law treats the woman who gives birth as the legal mother and, if she is married, treats her consenting spouse as the father/other parent. This is law written for donor conception, which protects the legal status of parents through egg or sperm donation. But in surrogacy cases it makes the wrong people the legal parents, assigning parenthood to the surrogate and her spouse without taking account of biology, intention or what everyone involved has agreed. The law puts the child into a position of legal limbo: in the care of the parents who conceived him or her, but still legally the child of the surrogate and her spouse.

There is a mechanism for resolving this - the parents can apply to the UK family court for a parental order after their child is born and this leads to the re-issue of the birth certificate in the right names. The problem is that parental orders are a sticking plaster for a small number of UK surrogacy cases, rather than a proper legal structure for supporting hundreds of surrogacy cases per year. The legal process for transferring parenthood is lengthy (taking 6 months or more) and, while some applications are straightforward, the requirements are restrictive and outdated and leave some families excluded. Some of the criteria have been stretched by the courts – for example it is now possible to apply

for a parental order late even though the law says the application 'must' be made within 6 months of the birth, and the court routinely authorises payments of more than expenses to surrogates. However, other criteria have proved unmovable – the court cannot ignore the requirement that the intended parents must be a couple and nor can it make an order if the surrogate does not consent, even if the order is clearly in the child's best interests.

There is also the problem of how surrogacy is regulated in the U.K. Restrictions on agency services mean that U.K. surrogacy happens via non-profit organisations and Facebook groups, with no legal requirement for suitability screening, counselling, legal advice or any other professional support. The UK's three non-profit surrogacy organisations - COTS, Surrogacy U.K. and Brilliant Beginnings – all offer different levels of screening and support and do an admirable job of supporting U.K. surrogacy but are hampered by the shortage of surrogates who come forward and the prohibition on advertising. Increasing numbers of intended parents are instead going overseas for surrogacy, and this has created new legal difficulties. There is almost always a mismatch between the country of birth and the UK over the issue of who the legal parents are, leaving children born stateless and parentless.

There is growing acceptance that the law, once designed to tolerate but discourage surrogacy, needs to be brought up to date to accept and support it. We need law which encourages everyone to set things up responsibly and in turn recognises the arrangement made between a surrogate and her intended parents so the right people are recognised as legal parents from birth. Parents through surrogacy deserve the same legal protection and security as parents through egg and sperm donation. Although we aren't quite there yet we may finally be moving in the right direction, with various positive steps toward reform.

#### **The inclusion of single parents**

In 2016 our team successfully represented a single father with a son born through surrogacy in the US, who challenged the law. The High Court made a ruling that UK law (which did not allow him to apply for a parental order as a single parent) breached his human rights. Human rights rulings like this are rare and significant, and in response the government announced that it would change the law to allow single parents to apply for parental orders. Although it has taken some time to put that promise into effect, a remedial order is now finishing its passage through Parliament and should change the law from early 2019. This will enable single biological mothers and fathers who have children through surrogacy