Reform needed?

Louisa Ghevaert outlines the findings and recommendations contained in a report on UK surrogacy, including survey results

The report of the Surrogacy UK Working Group on surrogacy law reform, *Surrogacy in the UK: Myth busting and reform* (the report) (November 2015), examined the current practice of surrogacy in the UK. In addition to myself, the Surrogacy UK Working Group comprises Dr Kirsty Horsey, senior lecturer at Kent Law School, University of Kent; Natalie Smith, trustee of Surrogacy UK; Sarah Norcross, director of the Progress Educational Trust; and Sarah Jones, a trustee of Surrogacy UK. The report analyses data, dispels myths that have shaped debate, and concludes that surrogacy law in the UK is out of date. The report also sets out recommendations for law reform, and best practice to safeguard the interests of surrogate-born children and improve surrogacy in the UK for intended parents and surrogates.

**Surrogacy law in context**

Surrogacy law in the UK was put into place over 30 years ago in the form of the Surrogacy Arrangements Act 1985, followed by the Human Fertilisation and Embryology Act 1990. This put in place public policy restrictions against commercial surrogacy in the UK, and a ban on legally enforceable surrogacy contracts, enabling surrogacy to operate only on an informal altruistic basis. While surrogacy law was reviewed and updated by the Human Fertilisation and Embryology Act 2008 (HFEA 2008), this did not amount to a root-and-branch overhaul. Instead, the structure of surrogacy law in the UK has remained largely the same, although access to the parental order regime was broadened beyond married heterosexual couples to enable unmarried and same-sex couples to apply, to bring it in line with other equality legislation.

Surrogacy law in the UK therefore extends into its fourth decade. The informality of surrogacy arrangements in the UK create legal uncertainty and the law is cumbersome. It does not recognise intended parents as the legal parents of their surrogate-born child at birth and leaves surrogates and their spouses legally and financially responsible for the surrogate-born child until a parental order is granted by the court in England and Wales some months after the birth. The informality of surrogacy in the UK can make intended parents anxious that their surrogate may have a change of heart and decide to keep their child. Single intended parents, and those requiring double donation (conception with donor eggs and donor sperm) in conjunction with surrogacy, remain ineligible for a parental order. This creates frustration, a palpable sense of unfairness and difficulties in practice.

**Busting the myths**

Surrogacy is an evolving area, both in the UK and from an international perspective. The internet provides accessible information about surrogacy and this, together with celebrity endorsement and organised commercial surrogacy opportunities overseas, means that approaches to family building and surrogacy are changing. There is increased interest and demand for surrogacy and this increasingly challenges surrogacy law in the UK.

However, it is notoriously difficult to obtain accurate data about surrogacy arrangements entered into by intended parents from the UK. Different government agencies and organisations record different aspects of the process. There is neither a centralised system
The numbers of surrogate children born annually to UK-based intended parents are modest, and the majority of these surrogacy arrangements are domestic and altruistic in nature.

...
The report also highlights that s54, HFEA 2008 (which governs parental order applications) is increasingly being purposively read down by the judiciary to give effect to the welfare of the surrogate-born child. This follows the president of the Family Division, Sir James Munby, describing the six-month statutory deadline for applying for a parental order as ‘nonsensical’ in X (A Child) (Surrogacy: Time Limit) [2014]. It also reflects the growing number of cases where expenses in excess of reasonable pregnancy-related expenses are retrospectively authorised by the High Court, citing the paramount welfare of the child following Re L (a minor) [2010].

Recommendations for reform

The report finds that surrogacy is not ‘already commercial’ in the UK and that calls for surrogacy to be commercialised in the UK should be viewed with caution given the misinformation and lack of accurate data about how surrogacy works in practice in the UK. It seeks to guard the principle of altruistic surrogacy in the UK, in line with its survey findings, viewing it as a ‘relationship and not a transaction’. This is aligned with public policy regulating other areas of assisted reproduction in the UK, including gamete donation (where payments to egg and sperm donors are capped to cover expenses and do not represent commercial compensation).

The report finds that three-quarters of respondents to the survey want reform of surrogacy law in the UK so that intended parents are recognised as the legal parents of their surrogate-born child at birth (p21). Around 69% of surrogates who responded to the report also believed they should not have the right to change their mind about handing the child over to the intended parents, with a further 3.6% saying the surrogate should only be able to change her mind ‘until birth’ (p21).

The report does not seek radical reform of surrogacy law in the UK, instead stating that current surrogacy law provides a workable basis from which improvements can be made.

Recommendations for reform include:

- parental orders should be available in ‘double donation’ cases to enable intended parents to conceive a child with both donor eggs and donor sperm;
- single intended parents should be eligible to apply for a parental order to remove discrimination;
- so legal parenthood is conferred on intended parents at birth;
- the six-month statutory time limit for applying for a parental order should be removed;
- parental order/surrogacy birth data should be centrally collected and published annually to ensure more rigorous ownership and control of surrogacy data in the UK; and
- legal restrictions on surrogacy-related advertising and the criminalisation of this should be reviewed in the context of not-for-profit organisations.

The report makes additional recommendations aimed at improving public and professional awareness and understanding about surrogacy in the UK, including that:

- the Department of Health should publish guidance on surrogacy for professionals including midwives, hospitals, Cafcass and fertility clinics;
- the Department of Health should publish a ‘legal pathway’ document for intended parents and surrogates; and
- surrogacy should feature in schools’ sex and relationships education alongside education on in(fertility), assisted conception and modern family building options.

Conclusion

The report concludes that the majority of surrogacy arrangements undertaken by intended parents from the UK are domestic and take place on an altruistic basis. It recommends the reform of surrogacy law to improve and simplify the domestic surrogacy experience and make surrogacy in the UK a more attractive option. In doing so, it is hoped that this will reduce the numbers of intended parents entering into overseas commercial surrogacy arrangements, which are not aligned with UK public policy, and which carry with them very real inherent legal and practical risks.

That said, the report does not recommend a ban on travelling internationally to access surrogacy, concluding that it would be difficult to enforce this. It further acknowledges that it would be impossible to effectively regulate overseas surrogacy arrangements given the scale, lack of international consensus, and rapidly evolving landscape.

One in six couples in the UK struggle with infertility and increasing numbers of single people want to achieve their dream of a family. Assisted conception and surrogacy create real children and families for those needing help with their family building. UK law should be reformed to remove uncertainty over legal parenthood, and meet the best interests of surrogate-born children and the needs and wishes of people undertaking surrogacy in the UK.

Re L (a minor) [2010] EWHC 3146 (Fam)
X (A Child) (Surrogacy: Time Limit) [2014] EWHC 3135 (Fam)