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Review Article

Surrogacy in Modern Obstetrics in the UK: Review of the Parental Order (HFEA 1990) over the past three Decades

Burrell Celia*

Department of Obstetrics and Gynaecology. Barking, Havering and Redbridge University Hospital NHS Trust, UK

***Corresponding author**
Burrell Celia. Department of Obstetrics and Gynaecology. Barking, Havering and Redbridge University Hospital NHS Trust. UK. Tel: +447815969670

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Abstract

The first surrogacy case in the UK occurred in 1985. During that time when surrogacy was in its infancy, it was under the umbrella of the Human Fertilization and Embryology Authority (HFEA) (1990) legislation. The HFEA (1990) introduced the parental order (child arrangement order) that facilitates the transfer of parenthood from the surrogate to the intended parent. This article reviews changes in surrogacy and the parental order in the UK over the past three decades. Over this period, there have been minimal advancement in the legislation surrounding surrogacy to protect the intended parents, surrogates and safeguard children especially for overseas surrogates and children who are born overseas which remains vulnerable. In spite of the lack of advancement, surrogacy remains successful as it has actively evolved to fit into a unique niche. Currently, surrogacy not only help intended parents – (single parent/same sex couples/different sex couples and unmarried couples) to achieve their aspiration of their first baby; but surrogacy has evolved to help existing parents to have more children and produce extended and blended families.

INTRODUCTION

Over the past three decades, surrogacy has extended to beyond just helping sub-fertile couples to achieve their aspiration of having genetically related child (children). The perfect nuclear family has been complemented and sometimes replaced by several unusual combinations of dynamic family structures. Grandmothers have acted as surrogate to give birth to their grandchildren. Many celebrities in the USA have had various surrogacy arrangements to facilitate the birth of children to extend existing families, thus opening the debate for surrogacy as being popular and accepted method to create new families and extend existing families [1]. Celebrities have publically utilized surrogacy arrangements to welcome children in blended families where the couple already have children that were conceived naturally.

When the Human Fertilization and Embryology Authority (HFEA) was introduced in 1990 in the UK, it was the first statutory body of its kind in the world to oversee the licensing, monitoring, inspection and provision of medical and legislative information for fertility clinics including fertility treatment, egg, sperm and embryo utilization, storage and ethical disposal. In the UK, the HFEA provides protective legislation for IVF treatment and surrogacy pregnancy within a fertility clinic. This has not changed, as currently surrogacy still falls under the umbrella of the HFEA legislation. Over three decades ago, the HFEA (1990) introduced the parental order to facilitate transition of parenthood from the surrogate to the intended parent(s) [2]. Under UK legislation, the surrogate remains the legal parent of any child conceived as a result of surrogacy; irrespective of wherever in the world that the child was born. The intended parent(s) (irrespective of being a single parent, same sex couple, or different sex couple) must apply for a parental order (child arrangement order) to become the legal parent. The parental order transfers parenthood with all parental rights and full responsibilities permanently to the intended parents. The HFEA (1990) Guidance had minor amendments and was updated (HFEA 2018), [3] but the legislation surrounding surrogacy in general and parental order specifically remains relatively inflexible. USA and Canada have supportive legal surrogacy framework which acknowledges and accepts the intended parent(s) as the legal parent from birth. This means that the intended parent name(s) will be written on the child's/children's birth certificate(s) at birth. However, as stated above, this needs to be followed up with UK legislation, with the application for a parental order to transfer parenthood to the intended parents, and to secure a UK birth certificate and UK passport. The UK legislation surrounding surrogacy trumps overseas surrogacy legislation, independent of whose names are on the child's birth certificate. The Children and Families Act (2015) makes minimal contribution to the advancement of surrogacy legislation, however it aims to safeguard the best

interest of the child; ensuring that this is not contradicted or circumvented with the parental order [4]. Thus the parental order will not be used/misused to approve parenthood to an unfit mother/parent(s)– include unfit intended parent(s) or unfit surrogate.

CRITERIA FOR PARENTAL ORDER

The intended parents must satisfy the UK Family Court Section 54 (couples) and Section 54A (single parent) of the HFEA (2008) [3]. For surrogacy cases concerning children born in the UK, the parental order application would be managed by the local Family Court; while for international surrogacy cases with babies born overseas, these parental order applications would be made to the Central Family Court in London.

Currently under the HFEA Act 2008 section 54, the criteria for granting a parental order are listed below [3].

(1) The conception must be from placing an embryo, sperm or egg into the surrogate mother or by donor insemination. The intended parent (single mother) or if a couple – at least one party must be the biological/genetic parent of the child.

(2) The intended parent(s) must be married, in a civil partnership or cohabitees in a family relationship, and both are > 18yrs old.

(3) The surrogate (and the legal father if not the commissioning/intended father) must give consent to hand over the baby within 6 weeks after delivery.

(4) It is recommended that the parental order application must be made within 6 months after delivery.

(5) The child/children must be living with the intended parent(s), one or both of whom must be domiciled in the UK, Channel Island or Isle of Man.

(6) No payment should be made to the surrogate (other than reasonable expenses). Expenses are decided by the court.

Under UK legislation, the surrogate has a unique legal privilege of motherhood immediately at birth, irrespective of the circumstances or outcome of the pregnancy. Thus the surrogate has prima facia legal responsibility for a child that she never wanted, and leave the intended parent with no legal responsibility for this child whose creation they actively seek [5]. In order to facilitate a smooth transition of parenthood from the surrogate to the intended parent via parental order, the surrogate must give full, free and unconditional consent (free of coercion) > 6 weeks after delivery unless the surrogate cannot be found or is incapable of giving consent. The surrogate must give her consent for transfer of parenthood from 6 weeks after delivery. If the surrogate refuses to consent to giving up the baby or actively challenge the decision and request to keep the baby, then the parental order route is not a viable option for parenthood to the intended parents, even if they have a genetic link to the baby. The case of D and L (Surrogacy) set a precedent as it was the first UK case whereby the judges awarded parenthood to the intended parents without the consent of the surrogate mother [6]. There was extensive effort to find the unmarried surrogate from India to obtain consent but this was unsuccessful. In the case of Re TT (Surrogacy), the surrogate changed her mind and was allowed to keep the baby [7]. Currently, there is a grey area with no guidance concerning when the baby should initially be handed over to the intended parent(s) to be looked after. In the case of Carole Horlock, an incredible and extraordinary altruistic surrogate in the UK, [8] stated that she handed over all thirteen surrogate babies that she delivered without even cuddling them; because she was not emotionally attached to the babies as she viewed them as not being hers to keep in the first place. There are no national guidelines [9]. The intended parent(s) and the surrogate are left to work out details about the timing of handing over the baby, breastfeeding/donated breast milk, timing of vaccination and any medical management that is needed.

More recent legislation have seen parents who are going through a divorce having had a child through surrogacy, who have applied to the courts seeking to revoke the original parental order, and requesting a new parental order to obtain custody of the child. Parents who are separated or divorced after obtaining a parental order are seen by the courts in child custody cases to be in the same position independent of a surrogacy background. In the case of G v G (2011), the father sought consent from the courts to have the parental order overturned [10]. However the court rejected the application stating that the original parental order was final and permanent.

The parental order application should be done between 6 weeks to 6 months after birth, independent of whether the child was born in the UK or overseas. However in the case of Re X (A Child) (Surrogacy: Time Limit), the High Court set a precedent and concluded that the strict six months limit could be extended in some instances [11]. The case involved a surrogate from India and UK intended parents who encountered significant delays in taking the baby back to the UK. This was due to the disjointed, non harmonious and frankly conflicting surrogacy legislations in both countries that posed profound challenges and outright barriers affecting the smooth transition of parenthood. The intended parents were awarded a parental order over six months after the delivery of the baby. This was done in the best interest of the child. The court argued that to reject granting a parental order in this case would be absolute 'nonsense.' Many international surrogate cases face significant delays when trying to take the baby back to the UK and it may be impossible to meet the six months deadline.

UK legislation dictates that at the time of the parental order application, the child must be living with the intended parent(s), one or both of whom must be domiciled in the UK, Channel Island or Isle of Man. The court interprets domicile in a broad sense, to facilitate the best interest of the child. Therefore domicile goes beyond where the intended parent(s) currently live(s) or their citizenship status; but also incorporates their permanent home. Therefore parents living overseas with significant roots in the UK may still be eligible to apply for a parental order. This broad

interpretation of domicile was seen in the case of CC v DD (2014) which involved a couple who were living in France. The intended parents were successful in being granted a parental order as the British mother proved to the court that she had retained domicile within the UK [12]. Similarly intended parents who were born overseas, must prove to the courts that they have permanently settled in the UK, rather than just living in the UK. This was seen in the case of AB v SA (2012), whereby the court was satisfied and granted a parental order for the American-Polish same sex couple who had permanently settled in the UK [13].

The court will only approve a parental order if the intended parent satisfied the court that reasonable expenses were paid to the surrogate. However the court has not been explicit in giving a definition for 'reasonable expenses' that is allowed to be paid to the surrogate. A successful surrogacy relies on a delicate balance between reasonable compensation for the surrogate but falls short of inducement to gestate and exploit surrogates [14]. The court will authorize reasonable payment retrospectively on application of a parental order. The court aims to safeguard children, to prevent exploitation, or any attempt to circumvent child protection laws. In the case of *Re* X and Y (Foreign Surrogacy*)* which involved a surrogate from Ukraine and UK intended parent [15]. Twins were conceived using donor eggs fertilized and the intended father's sperm. Under Ukrainian laws, the intended parents were the legal parents from conception, therefore the names of the intended parents were written on the children's birth certificate. The judge approved a parental order based on the best interest of the children. Review of UK surrogate cases showed that the courts have a low threshold to approve reasonable payments. In fact the courts have never refused to make a parental order with the sole reason for refusal being too much money was paid to the surrogate.

Irrespective of the perilous route to obtaining the much priced parental order, the majority of intended parent(s) who apply to the court has/have been successful. The parental order is needed for consent of children's medical care including vaccination which may be optional, but vaccination for travel is highly recommended especially for children born overseas. The parental order is crucial in obtaining a UK birth certificate and British passport. The UK birth certificate in turn is essential for all legal documents including inheritance and pension. Parental orders are needed in cases of Social Services involvement with the family, legal complications of separation or divorce of the parents, or when one parent wishes to move overseas. In case of any future involvement with the surrogate in key decisions for example, if a genetic sibling needs medical treatment/transplant the parental order will be needed.

Significant Changes in Surrogacy in the UK over the Past Three Decades

During the 21st century, IVF assisted technology have advanced exponentially including completing research and the successful delivery of three parents babies as a result of mitochondrial replacement therapy [16,17]. Progress and advancement in surrogacy legislation have not kept pace with changes in medicine. The advancement in surrogacy legislation in the UK came about indirectly as a result of advancement in the HFEA legislation; on many occasions the legislative changes occurred on a case by case basis. Over the past three decades, there has been very little advancement that directly benefits and supports surrogates and intended parents. Two significant progress in surrogacy legislation occurred just over a decade ago HFEA 2008 part 3 (effective 2010) and almost half a decade ago (HFEA 2019) resulted in a major changes to the outdated original criteria for the application of a parental order [3,18]. The HFEA (2010) amendment incorporated and embraced same sex couples and unmarried couples to be eligible to apply for parental orders [19]. The HFEA (2019) amendment removed the restriction and thus allowed single parent to be eligible to apply for a parental order. However to be eligible, the intended parent must be the child's biological parent. For intended parents who are not the genetic parent for example a single mom who used egg donor to conceive, then they need to apply for an adoption order. These changes to widen the eligibility for parental order have occurred in a slow step like manner.

Under the Children and Families Act (2015), the intended parent(s) has/have been granted special form of adoption leave and pay (maternity and paternity leave rights) since April 2015. For international surrogates whereby the child was born outside the UK, neither intended parent would be granted parental responsibility at birth; so they would not be entitled to maternity leave or payment. However if the child was born in the UK, only the intended parent registered on the UK birth certificate would have parental responsibility. The maternity and paternity leave rights apply to all intended parents (same sex parents, different sex parents and single parent). If the intended parent is a couple, then they must decide who would apply for the main adoption leave – (maternity leave and pay), and the other partner would be entitled to paternal leave and pay. The adoption leave and pay entitlement starts from the date of birth of the child, independent of whether the child was born in the UK or overseas.

The HFEA Code of Practice (2013) allows the intended mother's and the surrogate's names to be written on the birth certificate, once both had signed the HFEA Parental Electron Forms before conception [20]. The case of R and Another v An tArd Charaitheoir and Ors set a precedent in the UK, as the Irish High Court allowed the intended mother/genetic mother to be the legal mother [21]. This allowed the intended parent to have full responsibility (not the surrogate) at birth by signing the birth certificate. This case allowed a more flexible and modern approach to the interpretation of parenthood. The HFEA (2008) approved for non-profit making surrogacy agencies to be legalized thus facilitating more transparency and communication especially for overseas surrogates. The introduction of the HFEA LC Form (2013) allowed the surrogate's spouse/partner (if married) to sign this form if he/she does not consent to the surrogate's treatment and this can be used to establish lack of parenthood [20]. Prior to the introduction of the LC Form, the surrogate's spouse/partner (long term civil partnership) or

husband (if married) would be considered to be the legal father of the child/children at birth; even if the surrogate and her husband/partner had separated, his name would be placed on the child's/children's birth certificate.

Dichotomy in Surrogacy

The first successful IVF assisted pregnancy in the world occurred in the UK (1978) [22]. The first known surrogacy assisted pregnancy in the UK (1985) occurred almost a decade later [23]. Since there was more research into IVF for longer when surrogacy was still in its infancy; one may argue that IVF would have resulted in more advancement compared with surrogacy. The first two IVF assisted babies born in the UK have since conceived naturally and had both successful pregnancies. Bristol Museum Archives was granted permission to display the journey of world's first IVF pregnancy at the National Science Museum, London [23].

Almost two decades ago (since April 2005), advancement in the HFEA legislation resulted in changes in donor anonymity. Therefore HFEA clinics in the UK can release information about the donor under certain circumstances. Under UK legislation, for IVF assisted conception since April 2006 until present, egg and sperm donors are no longer anonymous. However there is an exception to this rule, therefore for families who already had a child conceived with an anonymous donor (pre 2005), the donor would remain anonymous and the couple could be treated again with this anonymous donor to conceive a genetic sibling. Donor conceived individuals from the age of 18 years old who would like to be put in contact with another donor conceived sibling can join the HFEA Donor Sibling Register [24]. On request, the HFEA can put donor conceived siblings in touch with each other. Currently egg, sperm and embryo donors can apply to the HFEA or the Fertility clinic to get limited information about the outcome of their donation, and about whether the donation resulted in the birth of a baby, the sex of the baby and the year of birth. The donor does not have a right to request the identity of the children or their parents.

There is no similar counterpart in Surrogacy. There are no official HFEA Surrogacy Register. For surrogacy assisted pregnancy, there is no national guideline on the eligibility or standard for screening for potential surrogates, and no standard counselling for the surrogate and/or the intended parent. There is no formal national data collection, no follow up on the incidence and outcome of surrogacy assisted pregnancy. Equally, there is no mandated counselling for the children who on becoming an adult (>18 years old), can gain access to their birth certificate. Unlike fostering and adoption services, in the case of surrogacy a full disclosure and barring service chick is not routinely done [14,25].

CONCLUSION

Over the past three decades, surrogacy resulting in IVF treatment in a fertility clinic remains under the HFEA legislation in the UK. Since the HFEA (1990) which introduced the parental order, there had been tiny steps and minor amendments to the HFEA (2008). This resulted in changes to enable single parent, same sex couples and unmarried couples to be eligible to apply for parental order. Intended parents are now eligible to apply for adoption/maternity leave and pay under certain circumstances if the baby was born with in the UK. During 2013, special forms were introduced to facilitate more a flexible and modern interpretation of parenthood. However there have been no significant changes in the Children and Families Act (2015) to promote the advancement of Surrogacy legislation. The Law Commission Report on the Review of UK Surrogacy Laws (2016) generated many debates but there have not been any meaningful changes as yet.

This is not surprising because over a quarter of a century ago the Brazier Report (1997) was commissioned when surrogacy was in its infancy [26]**.** None of the recommendations have ever been instituted. This did not result in surrogacy withering on the vine and dying. In fact the opposite occurred. It is difficult (practically impossible) to obtain accurate data about all surrogacy cases (within the UK and overseas) – the incidence, and pregnancy outcome. As stated above there is no national surrogacy registry. However surrogacy has evolved from helping sub-fertile couples to fit into a unique niche. Surrogacy is increasing helping intended parents not just to create new families but to extend existing families; and to facilitate blended families where the couple already have children that were conceived naturally or via IVF. Another three decades in the future, one may argue that surrogacy continues to bring out the best in people; as there are no greater aspiration and achievement in life than giving the ultimate gift of life – a precious baby. This is priceless and cannot be contained by restrictions and barriers and lagging legislations.

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