In the first of two articles providing an introduction to surrogacy law, Bianca Jackson, a pupil barrister at Coram Chambers, considers the key statutes and regulations underpinning this growing area of family law practice.

Introduction

As any legal practitioner who has waded into the muddy waters of surrogacy knows, surrogacy law in the United Kingdom has developed in a haphazard fashion. Although a number of governmental committees have considered the law over the past thirty years, it has hardly changed since the last-minute introduction of the Surrogacy Arrangements Act 1985 ("SAA 1985"), and those few amendments that have been made have been devised largely in reaction to antecedent litigation. As a result, surrogacy law is piecemeal, out-dated, and full of contradictions: for example, commercial surrogacy is prohibited, but the courts can authorize payments to the surrogate mother; third party non-profit surrogacy organizations can receive remuneration for some services, but not for others. There is no comprehensive legal approach to surrogacy or even consensus about what such an approach would look like. As such, surrogacy law remains a source of confusion to both practitioners and those who engage in surrogacy practices.

This is the first of two articles. In an effort to clarify the existing law for practitioners and laymen alike, it examines the key statutes and regulations, providing a brief introduction to surrogacy law in the UK. The second article will explore some of the issues and complications that arise in the practice of surrogacy law, including matters relating to international surrogacy arrangements, single parents and alternative families.
Surrogacy Arrangements Act 1985

The Surrogacy Arrangements Act 1985 is the main statutory instrument governing surrogacy in the United Kingdom. It defines the key terms, including "surrogate mother" [s.1(2)] and "surrogacy arrangements" [s.1(3)], and lays down the following key principles, which can be roughly divided into those pertaining to "commissioning" (also known as "intended") parents and those pertaining to professional bodies:

1. The law as it pertains to commissioning parents:

   - Surrogacy arrangements are not illegal if they are altruistic (i.e. the surrogate mother does not receive payment for carrying the commissioned child).
   - Commercial arrangements for surrogacy are prohibited [s.2(1)]. However, the commissioning parents and/or the surrogate mother are not guilty of an offence if payment beyond reasonable expenses is made [s.2(2)]- though if payment is made, this may have ramifications for the outcome of the application for a parental order. See s.54(8), HFEA 2008, in the next section.
   - Regardless of whether payment is made to the surrogate mother or not, all surrogacy arrangements are unenforceable [s.1A - inserted by Human Fertilisation and Embryology Act 1990].
   - It is a criminal offence for a person to advertise that they are looking for a surrogate mother or are willing to act as a surrogate mother [s.3(1)(a)] and the penalty for doing so is a fine and/or up to three months imprisonment [s.4(1)].

2. The law as it pertains to professional bodies:

   - It is a criminal offence for any third party (whether an individual or a professional body) to broker surrogacy agreements between a surrogate mother and commissioning parents for commercial purposes, i.e. for payment [s.2].
   - It is also a criminal offence for third parties to advertise their willingness to broker a surrogacy arrangement [s.3(1)(a)], as well as for newspapers or periodicals to carry said advertisements [s.3(2)].
   - The penalty for any of the above offences is a fine and/or up to three months imprisonment [s.4(1)].

Human Fertilisation and Embryology Act 1990 and Human Fertilisation and Embryology Act 2008

While the SAA 1985 defines the terms of and regulates surrogacy arrangements, the Human Fertilisation and Embryology Act 1990 ("HFEA 1990") and its amending legislation, the Human
Fertilisation and Embryology Act 2008 ("HFEA 2008"), address a number of different aspects of reproductive law, from regulating what can and cannot be done with gametes to the functions of the Human Fertilisation and Embryology Authority. For the purposes of surrogacy arrangements, the two acts provide guidance on the legal definitions of parentage post-birth and how parental responsibility is transferred from legal parents to the commissioning parents. An understanding of the prima facie relationship at birth of the child to all parties involved and how those relationships may be altered is integral to managing a surrogacy arrangement, whether pre- or post-birth.

It is also important to note that the HFEA 2008 extends the right to apply for parental orders – set out in HFEA 1990 – to same-sex and unmarried couples [s.54], and stipulates that that non-profit making surrogacy agencies can charge for some of their services [s.59]. The main principles encapsulated in the two acts are as follows:

1. **Legal definitions of parentage**

   - The legal mother of a surrogate child is the woman who carries the child, regardless of whether she is genetically related to that child [HFEA 2008, s.33]. This is an irrebuttable presumption.
   - If the surrogate mother is married at the time of her treatment (i.e. the placing in her of the embryo or the sperm and eggs, or her artificial insemination), the legal father of the surrogate child is the person married to the legal mother at the time of treatment, unless he did not consent to the treatment [HFEA 2008, s.35].
   - Likewise, if the surrogate mother is in a civil partnership at the time of her treatment, her civil partner will be the legal second parent of the child, unless she did not consent to the treatment [HFEA 2008, s.42].
   - Where the surrogate mother is unmarried and not in a civil partnership, the legal father/second parent can be designated in two ways:
     - If no one chooses otherwise, the commissioning father will be regarded as the legal father of the child so long as he is also the biological father.
     - If treatment takes place at a licensed fertility clinic, the surrogate mother can appoint the commissioning mother [HFEA 2008, s.43] or a non-biological father as the second parent [HFEA 2008, s.36].
   - Sperm donors are not regarded as legal fathers [HFEA 2008, s.41].
It is important to note that all of the aforementioned definitions apply whether the treatment and surrogacy arrangement took place in the United Kingdom or elsewhere.

2. The transfer of parental responsibility and legal parenthood

In order to obtain parental responsibility and legal parenthood for the child born out of a surrogacy arrangement and extinguish the status of the surrogate mother, the commissioning parents must apply for a parental order [HFEA 2008, s.54(1)]. The commissioning parents must be over the age of eighteen and either married, in a civil partnership, or two persons living as partners in an enduring family relationship who are not related to one another [HFEA 2008, 54(2)]. In other words, single individuals cannot apply for a parental order.

Moreover, at least one of the commissioning parents must have provided genetic material for the child in order for the couple to obtain parental responsibility and legal parentage [HFEA 2008, 54(1)(b)].

The application for a parental order must be made during the six month period after the child's birth [HFEA 2008, s.54(3)]. However, it cannot be made in the six weeks following the child's birth as the agreement of the legal mother is viewed as ineffective in those six weeks [HFEA 2008, s.54(7)].

When the commissioning parents make the application for parental responsibility, the child must be living with them and either one or both of the commissioning parents must be domiciled in the United Kingdom [HFEA 2008, s.54(4)].

As intimated earlier, when granting an application for a parental order, the court must be satisfied that no money or benefits were exchanged between any of the parties, i.e. that the surrogacy arrangement was not a commercial arrangement. However (and somewhat paradoxically), the court has the discretion to authorize payments and benefits between the parties [HFEA 2008, s.54(8)].

**Human Fertilisation and Embryology (Parental Orders) Regulations 2010**

The Human Fertilisation and Embryology (Parental Orders) Regulations 2010 ("HFER 2010") inserted s.1 of the Adoption and Children Act 2002 ("ACA 2002") into s.54 of the HFEA 2008. As such, the welfare of the child is now the paramount consideration of the court when considering an application for a parental order, as opposed to the "first consideration", as the previous regulations dictated [Schedule 1, Section 1 (consideration applying to the exercise of powers), (i)].

The HFER 2010 also stipulate that the checklist of matters which the court
must take into account when determining an application for adoption applies also when deciding parental orders. Those considerations are as follows:

- The child's wishes and feelings, considered in light of his/her age and understanding – though this is not relevant with regards to surrogacy where the parental order must be applied for within six months of the child's birth [ACA 2002, 1(4)(a)];
- The child's particular needs [ACA 2002, 1(4)(b)];
- The effect on the child throughout his life of ceasing to be a member of his/her original family and being made the subject of a parental order [ACA 2002, 1(4)(c)];
- The child's age, sex, background, and any of the child's characteristics that the court considers relevant, [ACA 2002, 1(4)(d)];
- Any harm that the child is at risk of suffering if a parental order is made [ACA 2002, 1(4)(e)]; and
- The relationship that the child has with relatives or any other person that the court feels is relevant [ACA 2002, 1(4)(f); Note that the HFER 2010 omits subsections i-iii of 1(4)(f)].

Family Procedure Rules 2010

Part 13 of the Family Procedure Rules 2010 ("FPR 2010") provides integral guidance on s.54 of the HFEA 2008. Though it is crucial that any commissioning parents or legal practitioners applying for a parental order have a grasp of all of the procedural rules, some of the most salient ones are outlined below.

1. Applying for a Parental Order

- As detailed in s.54 of the HFEA 2008, an application for a parental order may be made only by a married couple, a couple in a civil partnership, or two persons living in an enduring family relationship who are not related [13.3(1)]. The respondents to the application are the surrogate mother, any second parent, anyone with whom there is a provision for contact, and/or any other person or body with parental responsibility at the time of the application [13.3(2)].
- For the purpose of international surrogacy arrangements, notice of proceedings must also be given to any person with parental responsibility for the child who lives outside of the United Kingdom [13.4].
- When an application has been made, the court will set a date for hearing the application and appoint a parental order reporter [13.5]. The parental order reporter investigates the matters set out in s.54 and advises the court on whether there is any reason why an application should be refused [16.35].
Before the first hearing, the applicants must serve the respondents with the application, a form for acknowledgement, and a notice of proceedings [13.6(1)(a-c)]. All of the respondents must subsequently file an acknowledgement of service and serve it on the other parties within seven days [13.7].

Where the surrogate mother cannot be found or is incapable of agreement, the applicants must state in the application that agreement is not required and provide a statement of facts setting out why [13.10(1-2)].

At the final hearing, the applicants must provide the court with a full certified copy of an entry in the registers of live-births [13.15(2)(a)].

A parental order takes effect from the day it is made [13.20(1)].

Conclusion

Despite the patchwork of data that exists on surrogacy arrangements in the United Kingdom, it is clear that surrogacy is on the rise. The annual rate of parental orders that were granted to commissioning parents more than doubled between 2007 and 2011*. Yet engendering a surrogacy arrangement remains a complex process, not least because surrogacy law in the United Kingdom is complex and antiquated. There has been a rallying cry amongst legal practitioners and academics to bring surrogacy law into the 21st century, but thus far, this has not materialized. Until a comprehensive approach to surrogacy law is created, it is critical for lawyers, as well as all parties involved in the surrogacy process, to understand the law as it currently exists. This article has hopefully provided a clear, albeit rudimentary, explanation of the fundamentals of surrogacy law in the United Kingdom. The next article will examine some of the difficulties that arise out of the current provisions and the court's management of these issues in practice.

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