Sarah Williams, Legal Director and Head of Surrogacy, Fertility, Adoption & Modern Family at **Payne Hicks Beach**, is a contributing author of the recently published International Comparative Legal Guide - Family Law 2021, first published in ICLG - Family Law 2021 on 28 August 2020 and reproduced with kind permission.

Surrogacy: Where Are We Now?

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Historical Context of Surrogacy in the UK

Surrogacy occupies a rather unsatisfactory grey area in English law. With the primary legislative foundations laid 35 years ago in the Surrogacy Arrangements Act 1985, surrogacy falls between being neither wholly encouraged nor strictly prohibited. As the former President of the Family Division, Sir James Munby, noted, "the approach in the Surrogacy Arrangements Act was – is – that surrogacy is, at best, to be tolerated, so neither encouraged nor in large part even regulated".[1] Thus, in practice, although altruistic and compensatory surrogacy arrangements are now permitted, commercial surrogacy remains strictly banned and somewhat controversial.

The initial political foray into surrogacy began in earnest in 1982, with the creation of the Warnock Committee, headed by Baroness Warnock, the esteemed philosopher and ethicist. The Committee operated within strict terms of reference: "to consider recent and potential developments in medicine and science related to human fertilisation and embryology, to consider what policies and safeguards should be applied, including consideration of the social, ethical and legal implications of these developments and to make recommendations."[2] When the Committee reported in July 1984, it steadfastly opposed the commercialisation of surrogacy in any form, including measures to enforce criminal sanctions against any agencies involved in facilitating surrogacy arrangements. The Committee even went so far as to recommend that any professionals who knowingly assisted in the facilitation of a surrogacy arrangement should be made criminally liable.[3] While the committee refrained from recommending that the intended parents be liable to criminal prosecution, being concerned that children should not be "born to mothers subject to the taint of criminality",[4] they did, however, recommend that all surrogacy contracts be deemed illegal and thus unenforceable in the courts.

In the same year, when Kim Cotton (a married mother of two) agreed to enter into a commercial surrogacy arrangement for an infertile couple in the US, she could not have imagined the intense public scrutiny and hostility that would ensue.[5] This arrangement, for which she was to be paid £6,500 for carrying the child, caused widespread moral and political outrage, leading to the child being made the subject of wardship proceedings to determine where the child, "baby Cotton", should live.

The Surrogacy Arrangements Act 1985 (the SAA) was thus rushed through Parliament as a direct knee-jerk response to the "baby Cotton" scandal and relied heavily upon the recommendations of the Warnock Committee. While the terminology of the SAA ensured that surrogacy agreements would be unenforceable, it refrained from criminalising either the surrogate or the commissioning parents by actually entering into such an agreement. However, those who entered into surrogacy arrangements for financial gain would be liable to criminal prosecution.[6]

The prohibitions against the commercialisation of surrogacy are set out in s 2(1) of the SAA 1985 and provide that no person shall, on a commercial basis, do any of the following:[7]

(a) initiate any negotiations with a view to the making of a surrogacy arrangement;
(b) take part in any negotiations with a view to the making of a surrogacy arrangement;
(c) offer or agree to negotiate the making of a surrogacy arrangement;
(d) compile any information with a view to its use in making, or negotiating, the making of surrogacy arrangements; and
(e) knowingly cause another to do any of those acts on a commercial basis.

Any individual doubting the force of such provisions would be wise to acquaint themselves with the case of *JP v LP* [2014] EWCH 595 (Fam), [2015] 1 ALL ER 26, when Eleanor King J noted that the solicitors, in drawing up a surrogacy agreement, "were in fact committing a criminal offence as, whilst such agreements can be lawfully drawn up free of charge, the solicitors in preparing and charging for the preparation of the agreement were negotiating surrogacy arrangements on a commercial basis in contravention of section 2 of the Surrogacy Arrangements Act 1985…".

There is no doubt that the advances in medical reproductive technologies at this time were making waves and provoking controversy, particularly from religious groups. The following year, in 1986, the infamous US scandal of Baby M hit the worldwide media when surrogate mother, Mary Beth Whitehead, answered a newspaper advert from Mr William Stern and his wife, Elizabeth to have a child in return for $10,000.[8] Significantly, Mary-Beth agreed to use her own eggs and be inseminated with the sperm from Mr Stern, resulting in both the surrogate and the father being biological parents of the child. Following the birth of the child, Ms Whitehead refused payment and refused to hand over baby M to the Sterns. This resulted in a global media frenzy as the dispute entered hitherto uncharted US legal territory. Both parties became locked in a dispute over who was the rightful parent of the child. Ultimately, the Courts awarded custody to the Sterns and visitation rights to Ms Whitehead, but this case opened up the debate around the ethical dilemmas presented by surrogacy arrangements in the context of the brave new world of IVF, and left an enduring legal legacy in the state of New Jersey.

Back in the UK, the recommendations of the Warnock Committee report still resonated and formed the basis of the updating legislation, in the form of the Human Fertilisation

and Embryology Act 1990 (HFEA 1990).[9] This Act created the Human Fertilisation and Embryology Authority, the world's first independent regulator of fertility clinics and treatment and research of human embryos in the UK.[10]

Whilst HFEA 1990 permitted surrogacy on an altruistic or compensatory basis, in a continuing effort to set down a marker against commercial surrogacy, the compensation had to be strictly reasonable and open to retrospective scrutiny and authorisation from the court.

HFEA 1990 also saw the introduction of the novel legal instrument, the parental order. Bespoke to surrogacy, this has been aptly described by Theis J as a wholly transformative order (equivalent to an adoption order), whereby the legal parenthood of the surrogate is extinguished as full lifelong parental rights are conferred upon the commissioning parents.

The incorporation of the Human Rights Act in 1998 into English law obliged the courts to consider, for the first time, the right to family life. Along with the advances in reproductive technologies, this allowed couples to believe their right to have a family, even if they were unable to conceive themselves. As stated by Russell J in *A & B (Children) (Surrogacy: Parental Orders: time limits)* [2015] EWHC 9ll Fam [39] to [41]:[11]

> "By virtue of the Human Rights Act 1998 the court has a duty to read and give effect to the law, as far as possible, in a way which is compatible with the children's and the Applicants' right to respect for family life under Article 8 of the European Convention on Human Rights (ECHR). The European Court of Human Rights has ruled in a number of cases going back many years from *Marckx v Belgium* (1979-80) 3 EHRR 230, *Johnston v Ireland* (1986) 9 EHRR 203 and *Kroon v Netherlands* (1995) 19 EHRR 263, that the right to respect for family life under Article 8 ECHR includes the right to adequate legal recognition of biological and social family ties."

Wholesale reform of the HFEA 1990 legislation came in the form of the Human Fertilisation and Embryology Act 2008 (HFEA 2008). HFEA 2008 constituted a major overhaul and update of the preceding 1990 HFEA legislation, which was increasingly outdated and unfit for purpose. One of the most significant legislative updates extended the availability of parental orders to same-sex couples in a civil partnership, or married (following the Marriage (Same Sex Couples) Act 2013), or those in an enduring relationship.

Notably, the overriding objective of this legislation was to protect the legal rights of the surrogate by re-affirming the long-established English legal principle that the woman who gives birth to the child is unequivocally the legal mother of the child at birth, even if she was a gestational surrogate and thus had no genetic affiliation to the child. Controversially, it is the surrogate mother who is afforded the strongest protection: s.33 (1) HFEA 2008 defines the legal mother of the child as the "woman who is carrying the child or has carried the child as a result of the placing in her of an embryo or of sperm and eggs". Indeed, if ever there was a doubt, the section continues that "she, and no other woman" is to be treated as the legal mother of the child. The biological mother, on the other hand, is regarded as being a legal stranger to the child until the granting of a parental order.

Identifying the legal father in a surrogacy arrangement is, under this Act, a more intricate task. Whilst at common law, the biological father can rely upon the common law presumption of legitimacy, the Act provides for a number of circumstances in which legal parenthood will be instead vested in the non-biological father or second parent. Where the surrogate is married, the presumption of legitimacy takes precedence: the legal father will be the surrogate's husband and will, accordingly, be afforded parental responsibility for the child. However, this presumption is rebuttable upon the surrogate proving, on the balance of probabilities, that the child is not a legitimate child of the marriage and that there is no genetic link between the child and the father.

The dramatic transformation in the British socio-political and cultural landscape has meant attitudes to surrogacy have shifted profoundly since 1985. This was evidenced in 2018, in the Government's Department of Health and Social Care guidance, "*Having a child through Surrogacy*", when the Government openly endorsed surrogacy for the first time: "Surrogacy is increasingly becoming an option for starting a family for people who are unable to conceive a child themselves … the government supports surrogacy as part of the range of assisted conception options."[12]

Surrogacy is increasingly seen as a socially and legally acceptable option for all, especially since January 2019, when single individuals also became eligible to apply for a parental order (the HFEA 2008 (Remedial Order) 2018).[13] Here the government was obliged to respond to the declaration of incompatibility with Human Rights Legislation, in *Re Z (A child) (No 2)* [2016] EWHC 1191 (Fam), by introducing remedial legislation to address the issue of single applicants wishing to obtain parental orders.[14]

Now, when the court is tasked with considering the making of a parental order, if the court is satisfied that each of the requirements of s.54(1)-(8) HFEA 2008 are met, it must also have regard to the lifelong welfare needs of the child under s 1 Adoption and Children Act 2002.[15]

Further reform is within striking distance. In 2018, the Law Commission confirmed that the existing legislation would be subject to a comprehensive three-year review. The consultation paper, published on 6 June 2019, suggested a new pathway to legal parenthood for commissioning parents.[16] The new pathway would replace the current system where the intended parents must make an application for a parental order only after the child has been born and do not become legal parents until the parental order is obtained, which can be many months later. This is designed to prevent the unsatisfactory scenario where the judges are presented with a *fait accompli*. This new pathway would be heavily regulated and allow intended parents to become the legal parents at birth. Crucial protections for the surrogate would remain, in the form of a period of grace, during which she could object to the commissioning parents becoming the child's legal parents.

On this point, Munby J has made his views clear: "The question has been raised whether the application for a parental order could be issued in anticipation and before the child is born. The idea has its attractions and is probably worth exploring. For my part, however, I would be adamant that we must retain the rule in section 54(7) that the surrogate mother cannot give effective consent less than 6 weeks after the child's birth. As in adoption, it is an essential safeguard. So, although it may be appropriate to contemplate an application being made before birth, I would oppose any suggestion that a parental order could be made before birth."[17] However, Munby J acknowledges that the consensus is increasingly in favour of a pre-birth process rather than a post-birth process:

> "Now that, it might be thought, is probably right for two quite distinct reasons. One is you can only have, I suspect, real protections if there is an effective process of regulation pre-conception. And the reason for that, as we have discovered in this country ... is that if you have a post-birth process and the judge is presented, if it is a judicial process, ex post facto with a live child who is living with X and Y, if you do not make the order, the consequences in a jurisdiction like ours is that the child remains parentless and maybe stateless in a complete limbo. Therefore, whatever

attention you pay to welfare, however carefully the welfare reports are put together, however much you try and focus on this best interests of the child, I suspect … that the best protection for the best interests of the child is by pre-conception rather than a post-birth process."[18]

However, until the Law Commission's recommendations are formally adopted, the judges remain constrained by the existing outdated legislation. Such constraints have required the judges to be increasingly creative in their interpretation of the existing laws. As Munby J observes: "Our legislation in this country is elderly by any standards. It only works because of the judicial ingenuity which goes into making rules which are not fit for purpose actually work."[19]

A striking example of such "judicial ingenuity" was demonstrated in the case of *X, Re* [2020] EWFC 39, before Theis J.

X, Re [2020] EWFC 39

This case concerned a child (X) born via surrogacy in distressing and unusual circumstances. The child was conceived after an emotional journey for the intended parents (Mr and Mrs Y) via IVF. An embryo was created using Mr Y's sperm and an egg donor, and carried by a married surrogate (Mrs Z) in a domestic surrogacy arrangement. Tragically, and without warning, the intended father died four months before the child was born.

As a single applicant with no genetic affiliation to the child, Mrs Y was not eligible to bring an application for a parental order, under section 54 Human Fertilisation and Embryology Act 2008 (HFEA).

Mrs Y had no option but to take the unprecedented step of applying for a parental order jointly with her deceased husband, so that they could both acquire legal parenthood for the child and, therefore, both be included on the child's birth certificate. This application, brought within the requisite six-month limit, had the full support of the surrogate and her husband, Mrs and Mr Z.

Mrs Justice Theis acknowledged that whilst all the welfare instincts of the court pointed towards a parental order being made, as a matter of judicial procedure, she had to consider if the requirements of s.54 HFEA 2008 had been fulfilled, as the circumstances of this case (where the application is made by one intended parent, but on behalf of one surviving and one deceased intended parent) had never before been contemplated by the court.

The intended mother wrote in her statement that: "It is incredibly important to me to apply for a parental order. It is not just for myself or for the respondents (who have never intended to be her legal parents), but because I want her to have the surname (Y) and to have her father recognised. It will break my heart for her, and him, if it is not possible for (Mr Y) to be put on her birth certificate. We have been through so much for so many years; … and the egg donor and the respondents (the surrogate and her husband), all gave so much to make this possible … She (X) deserves to have a parental order which recognises him as her father, and I hope that the court will find a way to make this possible."

The submissions to the court focused on inviting the court to "read down" s.54 HFEA via the lens of s. 3 of the Human Rights Act 1998 ("So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."), namely:

(i) the requirements for two applicants (s.54(1));
(ii) the status of the applicants' relationship (s 54 (2)(a));
(iii) the requirement for the child to have her home with the applicants at the time of the application and the making of the order (s 54 (4)(a)); and
(iv) the applicants to be over the age of 18 years at the time of the making of the order (s 54 (5)).

The parties proposed the following additional provisions (underlined) to the s 54 (1), (2), (4) (a) and (5) as follows:

"S 54 (1) On an application made by two applications (*or on an application brought on behalf of two applicants who, but for the fact that one of the applicants has died after the conditions in s 54(1)(a) were met, would have met the requirements of s54(1)(b) and s54(2)*), ("the applicants"), the court may make an order providing for a child to be treated in law as the child of the applicants if

(a) The child has been carried by a woman who is not one of the applicants, as a result of the placing in her of an embryo or sperm and eggs or her artificial insemination,
(b) The gametes of at least one of the applicants were used to bring about the creation of the embryo, and
(c) The conditions in subsections (2) to (8) are satisfied.

Section 54 (2) The applicants must be (*or in the case of an application where an applicant has died were immediately prior to the applicant's death*).

(a) Husband and wife,
(b) Civil partners of each other; or
(c) Two persons who are living as partners in an enduring family relationship and are not within prohibited degrees of relationship in relation to each other

Section 54 (3) – No amendment required

Section 54 (4) At the time of the application and the making of the order

(a) The child's home must be with the applicant's (or in the case of an application where an applicant has died and the application is brought on his or his behalf by the surviving applicant, the child's home must be with the surviving applicant), and
(b) Either of both of the applicants must be domiciled in the United Kingdom or in the Channel Islands of the Isle of Man

Section 54(5) At the time of the making of the order both the applicants must have attained the age of 18 (or in the case where an applicant has died, the deceased applicant must have attained the age of 18 before his or her death)

Section 54 (6), (7) and (8) – no amendment required."

Theis J observed that her judicial hands were tied: an application for a parental order is not discretionary, it is either granted or dismissed: there are no such range of orders which the court may identify as what is "fair and reasonable in all the circumstances of the case".[20] There was no alternative legislative scheme whereby Parliament addressed the legal relationship of a child with his or her intended parents in circumstances where the intended parent, who has the biological relationship with the child, dies after the embryo transfer to the surrogate, in accordance with s 54, but prior to the making of a parental order. Furthermore, the person most affected by this particular legal lacuna was the child, X, itself.

Theis J found that both Articles 8 (right to respect for private and family life) and 14 (protection against discrimination) were engaged, despite the child being unable to establish a family life with her biological father due to his untimely death.

Theis J then dismissed the applicability of an adoption order, citing Munby J in *Re X*:[21] "adoption is not an attractive solution given the commissioning father's existing biological relationship with X. As X's guardian puts it, a parental order presents the optimum legal and psychological solution for X and is preferable to an adoption order because it confirms the important legal, practical and psychological reality of X's identity." Adoption would also have created something of a "legal fiction", as s.67 of

the Adoption and Children Act 2002[22] states that the effect of an adoption order is such that the adopted person is to be treated in law as if born as a child of the adopter, which would not properly reflect the reality of the surrogacy arrangement in this case.

Furthermore, a child arrangements order or a special guardianship order in favour of the intended mother would result in her only securing parental responsibility limited to X's minority, would not extinguish the child's relationship with the surrogate and her husband and would leave X's biological father remaining a legal stranger to the child.

Theis J concluded that in this instance, the reading down of the HFEA legislation would indeed provide the most appropriate order for a child born as a result of this type of arrangement, as this provision was specifically created for a child born as a result of a surrogacy arrangement such as in this case. There was no alternative order available to the court that could properly and accurately reflect X's identity, including her relationship with her father.

Furthermore, Theis J observed that, given the child's connection with her biological father would have been safeguarded in any other birth circumstances (either naturally or by way of assisted conception), it would be discriminatory for the circumstances of her birth to prevent this. A failure of the law to recognise the child's connection with her biological father as a result of her birth through a surrogacy arrangement would amount to a breach of Article 14: the right to enjoy her Article 8 rights without discrimination on the grounds of birth.

To put it bluntly, the consequences of not making a parental order in this case would have meant: there would be no legal relationship between the child and her biological father; the child would be denied the social and emotional benefits of recognition from that relationship; the child might be financially disadvantaged; and the child would not have the legal reality to match the day-to-day reality.

Accordingly, Theis J found the only order that would confer joint and equal parenthood on the intended mother and the intended deceased father was a parental order.

Theis J's creative judicial interpretation in reading down the provisions in s. 54 (1), (2)(a), (4)(a) and (5) HFEA 2008 meant that the making of a parental order in these circumstances was construed as not incompatible with the "underlying thrust of the legislation being construed" and as implied would "go with the grain of the legislation". Consideration of X's welfare, as set out in ACA 2002, also required the court to grant a parental order, as only that order would recognise X's reality in a transformative way as the legal child of her parents, Mr and Mrs Y.

However, not all surrogacy arrangements can be brought into the fold of s.54, resulting in much judicial exasperation. In *AB v CD (Surrogacy)* [2018] EWHC 1590, the biological parents of twins born via surrogacy separated and divorced before they applied for a parental order. Keehan J declared that he was "extremely frustrated, as no doubt are the [commissioning parents], that I am prevented, without any obvious good, legal or policy reasons from making orders which explicitly recognise them as the legal mother and the legal father of these children". Keehan ultimately relied upon the court's inherent jurisdiction to place the children legally with their mother, but it was clear this was a most unsatisfactory legal conclusion and one which fell "far short of the transformative effect of a parental order".

This decision sits in stark contrast to the recent case of *Re: A (Surrogacy s. 54 Criteria)* [2020] EWHC 1426 (Fam), again before Keehan J. Here, a parental order was made despite the commissioning parents being separated at the time of applying for a parental order (this was even more remarkable given the commissioning father had minimal indirect contact with the child, and the application was out of time). This was at odds with s.54 (2)(c) HFEA 2008, which provides: "On an application made by two people ("the applicants"), the court may make an order providing for a child to be treated in law as the child of the applicants if [they are]…(c) two persons who are living as partners in an enduring family relationship …" Furthermore, s.54 (4)(a) provides that the child's home at the time of the application and upon the making of any parental order must be with the applicants, which was also not the case here. Keehan J was directed in submissions to the decision of the *ECtHR in Kroon v The Netherlands* (1994) 19 EHRR 263, [1995] 2 FCR 28 where the court observed:

> "Where the existence of a 'family tie' with a child has been established, the State must act in manner calculated to enable that tie to be developed and legal safeguards must be established that render possible as from the moment of birth or as soon as practicable thereafter the child's integration in his family."

and that:

> "In the court's opinion, "respect" for "family life" requires that biological and social reality prevail over legal presumption."

This led to Keehan J ruling that: "In light of their agreement and commitment to A, I am also satisfied that the parents are in an enduring family relationship." Furthermore, he went on: "The term 'home' must be given a wide and purposive interpretation. The authorities make clear that the term is not and should not be restricted to cases where the applicants live together under the same roof … I am satisfied that A has a 'home' with the mother and the father." A parental order was duly made.

Final Observations

It is widely acknowledged that the current surrogacy laws are no longer fit for purpose.[23] Whilst judicial ingenuity and creativity are increasingly relied upon to ensure the outdated legislation does not prevent the welfare of the child being placed at the centre of any surrogacy arrangement, there is an increasing impatience to reset the current legislative landscape to accommodate the demands of the modern world and enshrine the anticipated proposals of the Law Commission with the compatible legal pathways to parenthood.

Endnotes

1. Keynote Presentation by Sir James Munby. Annual Conference of the Progress Educational Trust, 5 December 2018.
2. https://www.bmj.com/content/bmj/289/6439/238.full.pdf.
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4. DHSS (1984), para 8.19.
5. https://www.independent.co.uk/life-style/health-and-families/uk-first-surrogate-mother-kim-cotton-carry-someone-else-baby-law-change-a7645831.html.
6. s.2(2) SAA 1985.
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8. https://www.nytimes.com/1987/01/05/nyregion/surrogate-mother-battle-goes-to-trial.html and https://en.wikipedia.org/wiki/Baby_M.
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13. https://www.legislation.gov.uk/ukdsi/2018/9780111171660/contents.

14. The House of Commons Briefing Paper, April 2019: http://researchbriefings.files.parliament.uk/documents/CBP-8076/CBP-8076.pdf.
15. S.1 Adoption and Children Act 2002.
16. https://www.lawcom.gov.uk/surrogacy-reforms-to-improve-the-law-for-all/.
17. Keynote Presentation by Sir James Munby. Annual Conference of the Progress Educational Trust, 5 December 2018.
18. The Way Forward – General Discussion, by Sir James Munby. International Surrogacy Forum 2019.
19. *Ibid.*
20. As in S. 25 Matrimonial Causes Act 1973.
21. *Re X (A Child) (Surrogacy: Time Limit)* [2014] EWHC 3135 (Fam).
22. https://www.legislation.gov.uk/ukpga/2002/38/contents.
23. Sir Nicholas Green, Chair of the Law Commission: https://www.lawcom.gov.uk/surrogacy-reforms-to-improve-the-law-for-all/.

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Prior to joining Payne Hicks Beach, Sarah was in-house counsel for a US firm where she worked extensively on an ultra-high-net-worth Californian divorce and contested children proceedings. Thereafter she joined a specialist family law firm where she developed her expertise in complex international surrogacy, fertility and modern family law, representing internationally famous clients from the fields of sports and media.

"Possessed of that winning combination of intelligence, capacity for hard work and charm," Sarah is adept at handling her cases with the utmost discretion and sensitivity. She is "a true fighter in pursuit of her clients' interests" and determined to get the very best outcome for them. She is often called to comment on the latest legal developments by the national press and makes regular contributions to specialist family law journals.

Sarah is a member of the Family Law Bar Association, Association of Lawyers for Children and both the Adoption Committee and the Assisted Reproduction Technology Committee of the American Bar Association. She also sits on the Bar Liaison Committee and is an active member of the Mentoring Scheme for pupil barristers at Inner Temple.

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