

Single Parents and Surrogacy

Introduction

“Thirty years on from the UK’s first surrogate case, the law as to surrogacy arrangements remains largely the same”.¹ Meanwhile, there have been significant developments in both reproductive science and technology, and in the globalization and commodification of reproductive services. It is now much easier for prospective parents to organize a surrogate pregnancy online and arrange cheap, convenient international travel.² The accepted definition of what constitutes a family has also changed dramatically over the past three decades.

The traditional concept of a ‘family’ suggests a family unit comprising a heterosexual married couple with children who are their biological offspring. This description does not always fit the family in question, if the family has utilised IVF or surrogacy to have children, includes adoptive or otherwise non-biological children, same-sex parents, or single parents. The increasing range of medical options open to hopeful parents, including IVF and surrogacy, means that it is now more likely that only one parent will be biologically related to their child. Where relationships break down, this can cause uncertainty as to parental responsibility, contact and residence. Furthermore, individuals may use surrogacy services to have a child with the intention of being a single parent; there are no legal bars to individuals accessing surrogacy.³ Due to scientific developments and the broader social acceptance of non-traditional families,

¹ Slabas, N., ‘Surrogacy: what’s next for the UK?’ <<http://blogs.lexisnexis.co.uk/family/surrogacy-whats-next-for-the-uk/>>, 23 March 2016, accessed 3 September 2016.

² Horsey, K., ‘Surrogacy in the UK: Myth busting and reform’ Report of the Surrogacy UK Working Group on Surrogacy Law Reform (Surrogacy UK, November 2015), 5.

³ Scott, N., ‘Is surrogacy possible for single people?’ <<http://www.porterdodson.co.uk/is-surrogacy-possible-for-single-people/>>, 10 June 2016, accessed 2nd September 2016.

people are more empowered and have greater choice about how and when they have children. Problems arise for single commissioning parents once the surrogate child has been born.

In the UK, the woman who gives birth is legally the mother of the child and has the right to keep the child, even if not genetically related.⁴ Commissioning parents, whether a couple or an individual, do not acquire legal parental responsibility through surrogacy. Parental responsibility can only be transferred to the commissioning parents by means of a successful application for either an adoption order in accordance with section 46 of the Adoption and Children Act 2002, or a parental order under section 54 of the Human Fertilisation and Embryology Act 2008 ('the 2008 Act') in respect of the child. As the law stands, single parents have fewer avenues to acquire parentage than couples because it is not open to individuals to apply for a parental order under section 54 of the 2008 Act. This essay will make a case for the reform of the law relating to the acquisition of parental responsibility by individuals who become parents through surrogacy.

A brief legislative history

There is significant disparity between the legislation relating to adoptive parents and to commissioning parents in surrogacy cases. Since the introduction of adoption in the UK, legislation has always provided for adoption orders to be made in favour of either one person or a couple (for example, s.1(3) of the Adoption Act 1926, ss.14-15 of the Adoption Act 1976 and s.51 of the Adoption and Children Act 2002).⁵

⁴ 'Surrogacy: legal rights of parents and surrogates', <<https://www.gov.uk/legal-rights-when-using-surrogates-and-donors/overview>>, 4 April 2016, accessed 3 September 2016.

⁵ *Z (A Child) (Surrogate Father: Parental Order)*, Re [2015] EWFC 73; [2015] (Fam Ct) at [8].

Legislation relating to surrogacy and the acquisition of parental responsibility by commissioning parents was introduced much more recently than that pertaining to adoption, but can be traced back to the Human Fertilisation and Embryology Act 1990 ('the 1990 Act'). Section 30 of the 1990 Act contained no provision for a parental order to be made in favour of one person, and furthermore stipulated that the applicants must be parties to a marriage.

The 1990 Act was reviewed between 2004 and 2007 to ensure that it would remain "effective and fit for purpose in the early 21st Century".⁶ This recognised the developments in science, technology and societal opinion since the law was initially passed.⁷

The equivalent section of the 2008 Act is section 54, which holds that:

"(1) 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 –

- (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.

(2) The applicants must be—

- (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."

Other requirements include that the application must be made within six months of the birth of the child (s.54(3)), the child's home must be with the applicants and at

⁶ *Review of the Human Fertilisation and Embryology Act: Proposals for revised legislation (including establishment of the Regulatory Authority for Tissue and Embryos)*, Department of Health, December 2006, 1.

⁷ Horsey, 8.

least one of the applicants must be domiciled in the UK (s.54(4)), both the applicants must be aged 18 or over (s.54(5)), and the surrogate mother must consent to the order (s.54(6)).

The 2008 Act demonstrates how the law has progressed since 1990 in line with the increasing societal acceptance of non-traditional family structures. It has met the stated aim of the review in that it better recognises “the wider range of people who seek and receive assisted reproduction treatment in the early 21st Century”, but it has not gone far enough.⁸ Section 54 allows for applications to be made by married couples, civil partners, or cohabiting partners in an enduring family relationship, but does not extend to providing for single parents to apply for parental orders even though the review recognised that it had “for many years been possible for a single person to adopt a child”.⁹

The need for reform

This essay submits that reforming section 54 of the 2008 Act to allow single parents to apply for parental orders in surrogacy cases would serve to:

1. Protect the Convention rights of the parent and the child;
2. Update the law; and
3. Promote the welfare of the child.

Convention rights

Despite developments in many other aspects of family law which now provide for alternative family structures, section 54 remains in place, unfairly and illogically

⁸ *Review of the HFEA*, 20.

⁹ *Ibid.*

restricting the rights of single parents in surrogacy matters. Adoption is the only means for a single parent to be legally recognised as their child's parent. This is in direct contrast to couples, who can apply for a parental order using section 54. The recent cases of *Re Z (a child)* [2015] EWFC 73, and *Re Z (a child) (No 2)* [2016] EWHC 1191 (Fam), have questioned this remarkable anomaly and have paved the way for further consideration and reform of section 54.

The child Z is the biological child of the applicant father and a third party egg, delivered by a surrogate mother in Illinois. By means of a declaratory judgment under US law, the surrogate mother was relieved of any legal rights and responsibilities for Z and the father became the sole legal parent. However, under English law the surrogate mother remained Z's sole legal parent. In *Re Z*, the father's application for a parental order was dismissed on the basis that such an order is not available to a single parent.¹⁰

In the subsequent hearing of *Re Z (No 2)*, the Secretary of State for Health conceded that the current provisions of section 54 were incompatible with the father's Convention rights, specifically article 8 taken in conjunction with article 14. The father's argument was that, as the application for a parental order can be made only by two people, that is "a discriminatory interference with a single person's rights to private and family life, which is therefore inconsistent with articles 8 and 14 of the Convention".¹¹ Initial arguments that the father's independent article 8 and 12 rights were impinged were dropped, and Munby P. made a declaration that section 54(1)

¹⁰ *Re Z* at [39].

¹¹ *Re Z* at [18].

and (2) of the 2008 Act are incompatible with article 14 taken in conjunction with article 8, this being the scope of the concession.

The Secretary of State for Health recognised that “the difference in treatment, namely the inability to obtain a parental order, is on the sole ground of the status of the commissioning parent as a single person versus the same person were he part of a couple”.¹² Being single, as opposed to being part of a couple, is a ‘status’ within the meaning of article 14, and the effect of section 54 is to discriminate against single parents in breach of article 14. Put simply, excluding the recognised exceptions, our domestic law should not be incompatible with our Convention rights. Where it is, as in the case of section 54, it must be reformed.

Bringing the law up to date

The relevant legislation has been updated only once in nearly three decades, and has not fully appreciated the extent to which the scope of the definition of a family has changed since 1990.

Single parent families have existed for as long as reproduction has existed, with varying degrees of stigma or acceptance depending on the contemporary societal norms. A ‘non-traditional’ or ‘alternative’ family structure may comprise a single parent and a child, and this is more likely to be the case in 2016 than in the 1990s: the number of single parents with dependent children increased by nearly 400,000 between 1996 and 2015.¹³ The nearly two million single parents represent 25% of

¹² *Re Z* (No.2) at [12], quoting para. 3 of the Secretary of State for Health’s statement of reasons.

¹³ Office for National Statistics, <<http://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/families/bulletins/familiesandhouseholds/2015-11-05#lone-parents>> accessed 2 September 2016.

households with dependent children.¹⁴ There are only limited statistics available relating to the number of surrogate births in the UK.¹⁵ This is because some commissioning parents travel overseas to use commercial surrogacy services rather than pursuing surrogacy in the UK, and because not all commissioning parents apply for a parental order. However, the number of surrogate births is reported as increasing in recent years,¹⁶ and it should not come as a surprise that some children in single parent families may have been delivered by a surrogate mother. The law should provide for this scenario.

The omission of single parents in section 54 is anomalous when legislation has been adapted to provide for other forms of alternative family structures such as cohabiting couples, civil partnerships, same-sex couples and adoptive families. As the 21st Century progresses, it is unacceptable that this category of parent is precluded from attaining legal recognition as the parent of their child in surrogacy arrangements. By remaining silent on the right of single parents to apply for a parental order, the law in this area risks stagnating. Reform is urgently needed to bring the rights of single commissioning parents into line with the rights of couples in surrogacy arrangements.

Welfare of the child

¹⁴ Ibid.

¹⁵ Horsey, 10.

¹⁶ Salmon, L., 'Dispelling some of the myths about surrogate births', <<http://www.irishnews.com/lifestyle/2016/01/19/news/dispelling-some-of-the-myths-about-surrogate-births-386871/>>, 19 January 2016, accessed 4th September 2016.

As with all cases where decisions are made determining any question with respect to the child's upbringing, the welfare of the child must be the paramount consideration.¹⁷

Single parents and their surrogate children are in an incredibly vulnerable position because individuals are unable to apply for a parental order to extinguish the surrogate mother's parentage and have parental responsibility transferred to them. Given that surrogacy arrangements are not legally binding in this country, the surrogate mother could theoretically seek to reclaim their child from the commissioning parent if no parental order has been obtained. This uncertainty and vulnerability undermines both the child's security and their relationship with their parent. Furthermore, "protracted litigation over children is profoundly harmful to everyone concerned",¹⁸ and will very rarely be in the best interests of the child in line with the welfare principle. Where possible, prolonged acrimonious and emotionally charged court proceedings, either involving a commissioning parent seeking a parental order or between a surrogate and a commissioning parent, should be avoided.

The only way for single commissioning parents to secure their parentage is to adopt their offspring. The Secretary of State for Health argued in *Re Z (No.2)* that adoption is "the most common method for providing legal recognition of the parent-child relationship in surrogacy cases across Europe".¹⁹ It was also argued that the provision of adoption in surrogacy cases instead of some other form of recognition

¹⁷ Children Act 1989, s.1(1).

¹⁸ *Re J and K (Children: Private Law)* [2014] EWHC 330 (Fam), Pauffley J at [1].

¹⁹ *Re Z (No.2)* at [13], quoting para. 3 of a letter from the Government Legal Department dated 11th May 2016.

has not been suggested by Strasbourg to be a breach of Convention rights.²⁰ However, adoption is not necessarily the most appropriate method of conferring legal parentage in surrogacy cases.

Adoption is intended for situations where the child is already in existence and the parent or parents are unable to keep them. This does not always translate effectively in surrogacy cases where the birth of the child has been commissioned, and the child brought into the world for the express purpose of being handed over to the commissioning parents. This can be seen very clearly in the case of *B v C* (Surrogacy - Adoption) [2015] EWFC 17, where the applicant father B sought an adoption order for his biological child. B had entered into a surrogacy arrangement with his mother C and her husband, D, resulting in the birth of the child. C and D were the legal parents of the child, who was deemed to be B's brother despite the fact a donor egg had been used.

There are two major issues with adoption in surrogacy cases:

- (1) discrimination against single parents by preventing them applying for parental orders and compelling them to adopt their biological child, and
- (2) the difficulties of making adoption fit a surrogacy case, which does not “provide the optimum legal and psychological solution for, and thus does not promote the best interests of, a child born of a surrogacy arrangement”.²¹

²⁰ *Ibid.*

²¹ *Re Z* at [21].

Reforming section 54 to allow single parents to apply for parental orders would promote security in the relationships between single commissioning parents and their children by allowing the relationship to be legally formalised, affording them a greater degree of permanence. It would remove the need for parents to go through the adoption process and the difficulties associated with adoption in surrogacy cases by providing a bespoke legal solution, which will promote the welfare of the child.

Effecting a reform

The courts have felt themselves unable to read down section 54, in accordance with section 3(1) of the Human Rights Act 1998, to include individuals.²² In light of the declaration of incompatibility resulting from *Re Z (No.2)*, parliament will reconsider section 54. However, this does not guarantee that there will be legislative reform in this area as there are significant policy considerations to overcome. These considerations were debated in the 1990s and in 2008, and are summarised in comments made by the Minister of State for Public Health, Dawn Primarolo, in the House of Commons when clause 54 of the Bill was debated in 2008:

“adoption involves a child who already exists and whose parents are not able to keep the child, for whom new parents are sought. That is different, which is why there is no parallel [...] Surrogacy, however, involves agreeing to hand over a child even before conception. The Government are still of the view that the magnitude of that means that it is best dealt with by a couple. That is why we have made the arrangements that we have”.²³

This essay submits that section 54 should be amended so that it does not exclude single parents from applying for parental orders in respect of surrogacy. This would

²² *Re Z* at [35] – [36].

²³ See Dawn Primarolo in Hansard (HC Debates) 12th June 2008, cols 248-249.

be a relatively simple reform to effect, and would have the potential to have a positive impact on a statistically significant tranche of aspiring parents.

The simplest way of effecting the suggested reform would be to amend the wording of section 54 to allow for individuals as well as couples, as follows:

“(1) On an application made by *one or two people* (“the applicants”) [...]

(2) The applicants must be—

(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, or

(d) *an individual.*”

Conclusion

This area of fertility law is ripe for legislative reform. The current system of compelling single commissioning parents to adopt their child on the basis of the relative complexity or sensitivity of surrogacy is “artificial, disproportionate and discriminatory”.²⁴ The declaration of non-compatibility made by Munby P. in *Re Z* (No.2) is the essential catalyst for reform of section 54, because it raises a fundamental question of equality which must be addressed as a matter of human rights. The need to update the law, and bring it into line with our social and cultural norms, contextualises the argument for reform. The welfare principle, which underpins children law, would be better satisfied and the best interests of the child protected and promoted by providing an appropriate, bespoke method for single commissioning parents to cement their legal status as parents.

²⁴ *Re Z* at [20].

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