PUMP COURT
CHAMBERS

Modern Parenting in the 21st Century: An Overview of Surrogacy

Jennifer Lee, Pump Court Chambers

6 October 2021

What is surrogacy?

Surrogacy is defined in the report of the Committee of Enquiry into Human Fertilisation and Embryology 1984 (the Warnock report) at paragraph 8.1 as:

> "***the practice whereby one woman carries a child for another with the intention that the child should be handed over at birth"***.

- Case of "baby Cotton" led to the Warnock report (above) and the Surrogacy Arrangements Act 1985.

- Under the 1985 Act, commercial surrogacy is illegal in the UK – criminal offence to advertise either for a surrogate, or to be a surrogate. Surrogacy contracts drawn up in advance of a pregnancy of birth are not enforceable.

- Warnock report paved the way for the Human Fertilisation and Embryology Act 1990 (HFEA 1990) – permitted surrogacy in the UK on an altruistic basis, and for reasonable expenses to be paid to surrogate.

PUMP COURT
CHAMBERS

What is surrogacy?

- Only married heterosexual couples could apply for parental orders then.
- **Reform: Human Fertilisation and Embryology Act 2008 (HFEA 2008) which came into force in April 2010.**
- Made parental orders available to same sex couples in a civil partnership or marriage (following the Marriage (Same Sex Couples) Act 2013), or partners whether same sex or heterosexual who are in an enduring family relationship.
- Further reform in 2019, opening door for single applicants to apply for parental orders (following **Re Z (A Child) (No 2) [2016] 2 FLR 327**).

PUMP COURT
CHAMBERS

Surrogacy - terminology

- **Partial surrogacy (traditional surrogacy) –** where the surrogate mother (the mother who gives birth to the child) is the genetic mother. Her egg or ovum is fertilised by the semen, usually of the commissioning father.

- **Total surrogacy (gestational surrogacy) -** where the surrogate mother receives an egg into her womb, which is either already fertilised (donation of embryo), that egg coming from another woman and fertilised before being transferred, or she receives an unfertilised egg into her womb, which is then fertilised usually with the semen of the commissioning father.

The rise in surrogacy

PUMP COURT
CHAMBERS

The rise in surrogacy

- 'Celebrity' surrogacy stories often make headline news raising greater awareness of this area. There have been scandals too, e.g. the case of "Baby Gammy" in 2015.

- Since the push for greater transparency in the Family Courts, more cases on surrogacy (or the issues arising therefrom) have also been reported, thus raising greater awareness.

- For many individuals who experience difficulty having children (e.g. infertility, same sex couples), surrogacy increasingly seen as a viable option, often seen as an 'easier' route to parenthood (see **XX v Whittington Hospital NHS Trust [2017] EWHC 2318 (QB)**).

PUMP COURT
CHAMBERS

The rise in surrogacy

- Figures released by CAFCASS has shown a steady increase in the number of parental order applications.
- 2008 – just 67 applications, only one was an international surrogacy arrangement.
- 2018 – over 280 applications, highest proportion of those involving surrogacy in England.
- Figures have continued to rise despite the pandemic, appears that over 300 applications for parental orders have been made in the past year.

PUMP COURT
CHAMBERS

The rise in surrogacy

- There are still unknown numbers of children being brought into the country whose parents never apply to regularise their status. Per Theis J, these children are sitting on a "ticking time bomb".

- The law does not recognise surrogacy as a binding agreement. When commissioning parents fail to apply for parental orders, they are leaving themselves and their child in a very precarious legal position.

- The only legal parents, with rights and responsibilities, are the gestational/birth parents (i.e. the surrogate and, if she is married/in a civil partnership, her husband/partner unless it can be shown that the husband/partner did not consent to the placing in the surrogate of the embryo or the sperm and eggs, or to her artificial insemination).

PUMP COURT
CHAMBERS

Parental orders – the legal framework

- Under English law the birth mother is always regarded as the child's mother until altered by an order of the Court. The surrogate cannot simply "surrender" her PR or legal parenthood (s33(1), HFEA 2008).

- If the surrogate is married, the spouse/ partner of the surrogate will be the other legal parent (unless the court is satisfied that the spouse/partner did not consent to the arrangement) (s35 (1), HFEA 2008).

- If the surrogate is unmarried (or her partner does not consent), a male commissioning parent who is genetically related will be treated as the other legal parent (does not, of itself, confer parental responsibility).

- Alternatively, if the surrogate is unmarried (or her partner does not consent) if conceiving at a licensed fertility clinic in the UK, someone else, usually the intended mother/ the non-biological father, can be nominated as the other parent.

PUMP COURT
CHAMBERS

Parental orders – the legal framework

- The HFEA introduced the parental order – this is the means by which the legal status of the birth parents is extinguished, and the commissioning parent(s) become the legal parents of the child and acquire PR.

- The effect of the order is that, in law, the child is for all purposes treated as their child and not the child of any other person.

- A parental order (like an adoption order) is "transformative". Importantly, where regulatory orders fall away as the child reaches adulthood, the parental orders is lifelong.

Parental orders – the legal framework

Per the former President, Munby J, in **Re X (A Child) (Surrogacy: Time Limit) [2014] EWHC 3135 (Fam)** (para 54):

> *"Section 54 goes to the most fundamental aspects of status and, transcending even status, to the very identity of the child as a human being: who he is and who his parents are... A parental order has, to adopt Theis J's powerful expression, a transformative effect, not just in its effect on the child's legal relationships with the surrogate and commissioning parents but also, to adopt the guardian's words in the present case, in relation to the practical and psychological realities of X's identity. A parental order, like an adoption order, has an effect extending far beyond the merely legal. It has the most profound personal, emotional, psychological, social and, it may be in some cases, cultural and religious, consequences."*

PUMP COURT
CHAMBERS

Parental orders – the legal framework

The criteria for making a parental order is set out in s54 and s54A of the HFEA 2008.

- The application can be made by one or two people who must be aged at least 18.

- Used to be that there must be two applicants – but the law was changed on 3 January 2019 to allow single applicants (via the introduction of a new s.54A).

- The applicant, or one of the applicants where there are two people, must have provided the gametes (genetic material) used to create the embryo. An arrangement involving both donor sperm and eggs would not be permitted within the legislation.

PUMP COURT
CHAMBERS

Parental orders – the legal framework

- The child has been carried by a woman who is not the applicant or one of the applicants, as the result of the placing in her of an embryo or sperm and eggs, or her artificial insemination.

- Where two people apply for a parental order, the applicants must be husband and wife; civil partners of each other; or two persons who are living as partners in an enduring family relationship and are not within prohibited degrees of relationship (s.54(2)).

- At the time of the application and the making of the order, the child must be living with the commissioning parent/parents.

- At the time of the application and the making of the order, at least one of the commissioning parents must be domiciled in the UK, in the Channel Islands or the Isle of Man.

PUMP COURT
CHAMBERS

Parental orders – the legal framework

- The application must be made during the period of six months beginning with the day the child was born (s.54 (3) and s.54A (11)).

- No money or other benefit must have been given or received, other than for reasonable expenses, unless the court authorises such payment (retrospectively, if appropriate).

- Surrogate (and husband/ civil partner of the surrogate if applicable) must have freely and with full understanding, agreed unconditionally to the order being made. The agreement of the surrogate is not effective if given by her less than six weeks after the child's birth.

- The court may dispense with such agreement in circumstances where the surrogate (or husband/CP) cannot be found or are incapable of giving agreement.

PUMP COURT
CHAMBERS

Cases of interest

Re X (A Child) (Surrogacy: Time Limit) [2014] EWHC 3135 (Fam)

- It was a fundamental assumption that the court had no power to extend the six month time limit.

- The application in Re X was made over 2 years after the child's birth. Commissioning parents had been unaware of the statutory requirements until they separated and applied for a residence order.

- The court noted the omission to apply for a parental order, and that the commissioning parents were not the legal parents and did not have PR.

- If parental order not available, in the absence of an application for an adoption order, the only options were residence, special guardianship or Wardship.

PUMP COURT
CHAMBERS

Cases of interest

Re X (A Child) (Surrogacy: Time Limit) [2014] EWHC 3135 (Fam)

- Munby P granted the parental order, although it was made 26 months after X was born, on these grounds:
  - Parliament could not have intended an absolute bar on the grant of parental orders outside the six month time limit. Parliament intended a "sensible" result.
  - Applying the principles first espoused in *Howard v Bodington (1877) 2 PD 203*, where a statutory procedural requirement is breached, the court should consider the underlying purpose of the requirement to determine how the breach should be treated. In the case of a parental order, the court must consider the impact on the applicant of breaching the time limit, and the impact on the child whose welfare is the court's paramount concern.

Cases of interest

Re X (A Child) (Surrogacy: Time Limit) [2014] EWHC 3135 (Fam)

- Section 54 of the HFEA 2008 goes to the status and very identity of a child; who he is and who his parents are. A parental order has a transformative effect and the consequences of a parental order stretch decades into the future.

- Having regard to the ECHR, a statute must be "read down" in such a way as to ensure that the essence of a protected right is not impaired.

  "…I assume that Parliament intended a sensible result. Given the subject matter, given the consequences for the commissioning parents, never mind those for the child, to construe section 54(3) as barring forever an application made just one day late is not, in my judgment, sensible. It is the very antithesis of sensible; it is almost nonsensical." (para. 55)

PUMP COURT
CHAMBERS

Cases of interest

Re X (A Child) (Surrogacy: Time Limit) [2014] EWHC 3135 (Fam)

Sir James Munby proceeded to state (para. 66):

> *"I intend to lay down no principle beyond that which appears from the authorities. Every case will, to a greater or lesser degree, be fact specific. In the circumstances of this case the application should be allowed to proceed. No one – not the surrogate parents, not the commissioning parents, not the child – will suffer any prejudice if the application is allowed to proceed.*
>
> *On the other hand, the commissioning parents and the child stand to suffer immense and irremediable prejudice if the application is halted in its tracks."*

PUMP COURT
CHAMBERS

Cases of interest

Re X (A Child) (Surrogacy: Time Limit) [2014] EWHC 3135 (Fam)

- Since *Re X*, there have been other cases where the six month limit has been extended. Examples:

- **AB v CD (Surrogacy: time limit and consent) [2015] EWFC 12**, where the time limit was extended by 3 years

- **A & B (Children) (Surrogacy: Parental orders: time limits) [2015] EWHC 911 (Fam***)*, where the time limit was extended by over 7 years.

PUMP COURT
CHAMBERS

Cases of interest

X (A Child: foreign surrogacy) [2018] EWFC 15

- The applicants were husband and wife, one of whom was gay. They lived in separate homes and their child's time was split between them. They described their relationship as "platonic and not romantic"

- Under the HFEA 2008, applicants for a parental order must be ''husband and wife'', and at the time of the application and order, the child's home must be ''with'' the applicants.

- Were the applicants married? Was the child's home "with the applicants"? The Court determined in favour of the applicants on both issues.

PUMP COURT
CHAMBERS

Cases of interest

X (A Child: foreign surrogacy) [2018] EWFC 15

The former President observed (paras. 7 and 8):

> *"The marriage, which took place in this country, complied with all the requirements of the Marriage Act 1949. There is, as Ms Fottrell has demonstrated, no ground upon which the marriage could be declared voidable, let alone void. There can be no question of the marriage being a sham. In short, the marriage is a marriage. The fact that it is platonic, and without a sexual component, is, as a matter of long-established law, neither here nor there and in truth no concern of the judges or of the State…. A sexual relationship is not necessary for there to be a valid marriage."*

Cases of interest

X & Y (Foreign Surrogacy) [2008] EWHC 3030 (Fam)

- If payments for more than reasonable expenses have been made to the surrogate, the Court will need to authorise those payments retrospectively before making a parental order.

- In X & Y, the English commissioning parents and the Ukrainian surrogate and husband had agreed monthly payments of €235 pm during the pregnancy, plus a lump sum of €25,000 on the live birth.

- "Reasonable expenses" is not defined in the statute, which offers no guidance.

Cases of interest

X & Y (Foreign Surrogacy) [2008] EWHC 3030 (Fam)

- Hedley J held that the Court should ask itself three questions (para. 22):

  (i) whether sums paid disproportionate to reasonable expenses?
  (ii) whether the applicants had acted in good faith and without 'moral taint' in their dealings with the surrogate mother?
  (iii) whether the applicants were party to any attempt to defraud the authorities?

- Fact specific as to what amounted to "expenses reasonably incurred".

- The Court was satisfied that the applicants had acted in good faith, had not taken advantage of the surrogate mother, and there had never been any attempt to defraud the authorities. The commissioning parents had sought at all times to comply with English and Ukrainian law.

PUMP COURT
CHAMBERS

Cases of interest

X & Y (Foreign Surrogacy) [2008] EWHC 3030 (Fam)

- Hedley J satisfied that payments were not so disproportionate to reasonable expenses that the granting of a parental order would be an affront to public policy.

- Revisited in a number of further authorities. **Re A, B and C (UK surrogacy expenses) [2016] EWFC 33**.

- 3 applications for parental orders in respect of 3 children following surrogacy arrangements entered into in this jurisdiction. The key issue was whether or not the expenses paid to the surrogates entered had been reasonably incurred.

PUMP COURT
CHAMBERS

Re A, B and C (UK surrogacy expenses) [2016] EWFC 33.

- Russell J in grappling with that issue observed:

  "The law provides for no such tariff for expenses for UK surrogacy, or indeed any definition in respect of "expenses reasonably incurred".
  There is no universally acceptable figure to pay for surrogacy expenses in the UK irrespective of the circumstances in law, whether it is £15,000 or more or less." (emphasis added).

- Courts should only refuse to make a parental order where there has been the clearest abuse of public policy (para. 29):

  "The need for the court to consider issues of public policy extends to welfare and to ensure that commercial surrogacy agreements are not used to circumvent childcare laws in this country, resulting in the approval of arrangements in favour of people who would not have been approved as parents on welfare grounds under any set of existing law such as adoption…the court must be careful not to be involved in anything that looks like a payment for buying".

PUMP COURT
CHAMBERS

Cases of interest

Re X (A Child)(Parental Order: Surrogacy Arrangement)[2020] EWFC 39

- Commissioning/ intended parents entered into surrogacy agreement in the UK with another couple. Conceived in May 2018 at a licensed fertility clinic using commissioning father's sperm and surrogate's eggs.

- Tragically and unexpectedly, five months into the pregnancy, the intended father died. The surrogate gave birth in early 2019 and the child (X) has been in the care of the intended mother since then.

- Legal position: Surrogate was X's legal mother at birth. Her husband was legal father. The intention was that the intended parents would apply for parental order following X's birth.

PUMP COURT
CHAMBERS

Cases of interest

Re X (A Child)(Parental Order: Surrogacy Arrangement)[2020] EWFC 39

- Difficulty was that the intended father had unexpectedly died and the intended mother (his wife) was not able to apply as a single applicant.

- Whilst the law was changed on 3 January 2019 to allow single parents to apply (via the new s.54A HFEA), she was not eligible as she did not have a biological connection with X, which is a requirement (the eggs were the surrogate's).

- Adoption order not ideal. Although surrogate's and her husband's legal status would be extinguished and intended mother would be legal parent, it would not have placed any recognition on commissioning father – the intended and biological father.

PUMP COURT
CHAMBERS

Cases of interest

Re X (A Child)(Parental Order: Surrogacy Arrangement)[2020] EWFC 39

- Could the Court "read down" the requirements so that they were compatible with the ECHR and s.3 HRA, in the same way the former President had "read down" the statute in Re X (Surrogacy: Time Limit) 2014?

- Theis J concluded that Art. 8 was engaged. The State has a responsibility to ensure that X's right to a private life was respected, which extended to ensuring that she was provided with recognition of her identity as the child of her (deceased) father.

- Article 14 was also engaged because without a parental order, X was not able to have a birth certificate which reflected the relationship and connection she had with her parents, solely by virtue of her birth through surrogacy.

PUMP COURT
CHAMBERS

Cases of interest

Re X (A Child)(Parental Order: Surrogacy Arrangement)[2020] EWFC 39

- Had X been born naturally to the intended parents, she would have had a legal connection with her father, as ss. 39-40 of the HFEA 2008 provides for fathers being recorded on birth certificates where the embryo transfer/ artificial insemination takes place posthumously.

- The Court concluded that Parliament could not have intended X to be excluded from such recognition, and that this scenario had not been considered by Parliament when the statute was drafted.

- The proposed "reading down" was in the spirit of, or would "go with the grain" of the legislation, with Parliament having indicated that it seeks to ensure that the law does not discriminate against different categories of applicants on the grounds of relationship status.

PUMP COURT
CHAMBERS

Reform

- Law Commission is undertaking a review of the law on surrogacy.

- Proposal includes a new pathway for surrogacy in the UK through which intended parents become the legal parents at the point of birth, provided certain requirements are met, e.g. medical and criminal records checks, independent legal advice, counseling, entering into a written surrogacy agreement, undergoing a pre-conception assessment of the child's welfare.

- Proposal also includes international surrogacy arrangements being automatically recognised here, on a country-by-country basis

- Commission expects to produce its final report and a draft Bill in Autumn 2022.

PUMP COURT
CHAMBERS

Useful Resources

- Law Commission Review on Surrogacy: www.lawcom.gov.uk/project/surrogacy/
- CAFCASS: www.cafcass.gov.uk/grown-ups/parents-and-carers/surrogacy/
- Donor Conception Network (charity offering information, support and community to donor conception families and prospective families): www.dcnetwork.org/who-are-we
- Stonewall: www.stonewall.org.uk/help-advice/parenting-rights/surrogacy-1
- Surrogacy UK (group of active surrogates and intended parents): www.surrogacyuk.org/home
- COTS: www.surrogacy.org.uk/
- Brilliant Beginnings: www.brilliantbeginnings.co.uk/

PUMP COURT
CHAMBERS

PUMP COURT
CHAMBERS

Jennifer Lee
Barrister (Call: 2007)

T: 020 7353 0711
E:
j.lee@pumpcourtchambers.com
Twitter: @JLeeBarrister
www.pumpcourtchambers.com

The LEGAL 500 UNITED KINGDOM LEADING JUNIOR 2022

RANKED IN Chambers UK Bar 2021 Jennifer Lee

"Her attention to detail is second to none. In a particularly complex case, she was able to grasp both the key details and the minutiae with ease and her intricate knowledge of the matter really impressed the client."
-Chambers & Partners 2020

- Jennifer is a specialist family law practitioner. with a thriving practice in family finance. She has successfully represented HNW clients in cases involving family businesses, inherited wealth, substantial pensions, nuptial agreements, and trusts. Many of her cases involve foreign assets and cross-jurisdictional issues, such as the validity of an overseas marriage/ divorce, and competing claims in multiple jurisdictions (including Asia and Africa).

- Over the years, Jennifer has developed an interest in the Court of Protection, particularly where there are parallel divorce/ financial remedy proceedings. She leads the Court of Protection Team with Leslie Samuels QC. She also has experience in the area of surrogacy and modern families, having acted for commissioning parents in HFEA cases for some years.

- Jennifer has appeared in a number of high-profile reported cases, most notably in *Veluppillai v Veluppillai & Ors* [2015] EWHC 3095 (Fam) (High Court), *LFL v LSL (McKenzie Friends & Breach of Court Orders)* [2017] EWFC B62, and *N v N (Afghanistan: Validity of an Overseas Marriage)* [2020] EWFC B55.

- Jennifer continues to be ranked as a "Leading Junior (Tier 1) - Family and Children Law" in The Legal 500, and as a specialist in "family/matrimonial law" in Chambers & Partners (UK Bar). She regularly appears in arbitrations and private FDRs. She also sits as a private FDR "Judge". She has been highly commended for her attention to detail and her robust approach, both in negotiations and during hearings.

Jennifer is a member of Resolution, the Chartered Institute of Arbitrators (ACIArb), and the FLBA. She serves on Resolution's ED&I Committee, and regularly contributes to seminars and articles on family law and COP, including for ThoughtLeaders4 and Westlaw.

PUMP COURT
CHAMBERS

Modern Parenting in the 21st Century: An Overview of Surrogacy

Jennifer Lee, Pump Court Chambers

6 October 2021