



July 2023

Briefing for UN Rapporteur: Reem Alsalem

Co-founded by Lexi Ellingsworth and Liz Purslow, we are a grassroots campaign which formed in response to the 2019 public consultation by the England and Wales, and Scottish Law Commission, on law reform on the 1985 Surrogacy Arrangements Act. As a single issue campaign we work with other established groups such as Nordic Model Now and Object Now, as well as emerging organisations such as Surrogacy Concern on the issue of surrogacy. We are self-funded, we receive no external funding and function with a small group of volunteers who support with research and campaign actions in their spare time.

Brief history of UK law

Following the Warnock report in 1984 the Surrogacy arrangements Act 1985 was brought into law as a result of the actions of Mrs Kim Cotton. Mrs Cotton, a British national, engaged in a commercial surrogacy agreement with a US agency and a pregnancy for strangers overseas, using her own egg. She gave birth to a genetic daughter and has expressed regret at not knowing her name. Later, she had two twin sons for friends (using implanted embryos) and established Childlessness Overcome Through Surrogacy (COTS), the oldest surrogacy agency in the UK.

The Act bans commercial surrogacy and it is upon this basis that surrogacy in the UK is limited to 'altruistic surrogacy', with the provision of 'out of pocket expenses' only and it is promoted on the principle of 'friendship first'. In reality this often runs to £1000+ a month and strangers meet online or through an agency to arrange transactional pregnancies.

In 1997 the Brazier report concluded that tighter regulations on payment should be made and that established agencies should regulate surrogacy arrangements. None of the recommendations were enacted. Lobbying from pro-surrogacy parties saw surrogacy added to the 13th programme of reform to be explored by the Law Commission, as agreed by the Department of Health and Social Care; this was launched in 2017. The recommendations include a [draft Bill](#) and were published in March of this year.

UK law

Under the current law, parental rights of the surrogate mother (and her partner if she has one) are transferred to the commissioning parents when a judge approves a parental order. The application for such an order must be made within 6 months of the birth but parental orders falling outside of this period have been agreed in the best interest of the child.

Examples of 'expenses' have included costs unrelating to pregnancy such as mobile phone bills, rent and having a private gardener and school fees. Gifts and holidays are also permitted. There are no enforceable contracts but Memoranda of Understanding are drawn up if an agency is involved. 'Independent journeys' outside of surrogacy agencies are fraught with even greater risk, as they largely operate outside the legal framework understood by experienced agency coordinators.

UK proposals

Reform proposals contain what has been labelled by the Law Commission as a 'key ask' and it is one that pro-surrogacy lobbyist and agencies have consistently pushed for - *it is that parental rights for the commissioning parent/s begin at birth*. The surrogate mother can withdraw her consent up to and including birth but after this point she must apply for parental rights herself within 6 weeks of the birth. If she withdraws her consent it is recommended that the decision over legal parentage would move to the Courts where it is decided who the legal parents are and what is in the best interests of the child. As the new proposals allow for a woman to use her own egg, this could mean a woman giving up her own genetic child, possibly her first child, with no right to future custody or access.

Independent journeys will still be permitted on the proposed new 'pathway', as advocated for by the Law Commission, as long as they meet certain criteria; however it is not necessary to engage with an agency for the duration of the agreement.

Surrogacy gone wrong

Here is a small sample of recent cases where an 'altruistic' surrogacy agreement has been contested in the UK courts.

1. CONSENT - does not meet requirement of 'free and unconditional'

A landmark case as this ruling from January 'set aside' a parental order in an unprecedented high court case. The child is genetically related to the mother and remains in the custody of the commissioning parents despite their legal rights being 'overturned'. Legal action is ongoing and we continue to assist the surrogate mother.

[C, Re \(Surrogacy: Consent\) \(Rev1\) \[2023\] EWCA Civ 16 \(16 January 2023\) \(bailii.org\)](#)

2. CONSENT WITHDRAWN - Judge rejects appeal and issues a contact order

A couple commission a woman to have a gestational surrogate pregnancy for them, she is implanted with an egg-donor embryo in Cyprus. She is an experienced surrogate mother with two prior surrogacy pregnancies but in this pregnancy she has health problems. The relationship between her, her husband and the commissioning couple deteriorates and they are informed by lawyer a day before the birth that the woman and her husband want to keep

the child. As the surrogate mother already has a large family and she has no genetic connection to the child the Judge decides that the commissioning couple should retain custody and the surrogate mother is allowed to visit the child 6 times a year. Significantly the court notes state that a parental order “tells one nothing about what the best welfare arrangements for the child will be after birth.”

[H \(A Child : Surrogacy Breakdown\) \[2017\] EWCA Civ 1798 \(17 November 2017\) \(bailii.org\)](#)

3. BEST INTERESTS OF THE CHILD - Judge grants parental order

In this case the judge ordered the one year old child who was still co-sleeping and breastfeeding with her mother to be removed and sent to the father(s). The judge appears to have a lack of understanding of the relationship of the toddler to her mother. In our view if the mother consented to a surrogacy arrangement prior to conceiving, she should be able to withdraw her consent during the pregnancy and after the birth, and the best interests of the child should be prioritised in family court.

[Gay couple win UK surrogacy battle over baby girl | Reuters](#)

4. AGE OF SURROGATE MOTHER - consent for parental order withheld

The surrogate mother was 51 at the time of implantation and twins were born prematurely. Health concerns were raised at the 12 week scan but as these concerns were apparently not taken seriously by the commissioning couple, the relationship broke down and remained problematic after the birth. The surrogate mother withheld her consent to the parental order it seems upon this basis as she and her husband have no wish to be involved in the children’s lives, as is reported in court notes.

[AB \(Surrogacy: Consent\), Re \[2016\] EWHC 2643 \(Fam\) \(25 October 2016\) \(bailii.org\)](#)

5. CONVICTIONS FOR PAEDOPHILIA - Judge approves parental order

A couple commissioned twins from a woman in Colombia. The twins are born prematurely and tragically one twin dies. Both men live in Thailand but the parental order was applied for in the UK by the genetic father. It becomes known that the commissioning father has 8 convictions for paedophilia. As he is present alone and his partner is in Thailand the baby is made a ward of court. The case concludes with the judge agreeing that the convicted paedophile father loves and cares for the child and the convictions were a long time ago, so parental rights are granted.

[Z \(Care Proceedings: Surrogacy\) \[2021\] EWHC 589 \(Fam\) \(12 January 2021\) \(bailii.org\)](#)

6. DECEPTION BY COMMISSIONING PARENTS - unsuitable care of newborn

A couple commission twins but one parent has a brain injury and both parents do not reveal the extent of his condition until after the birth. The pregnancy is heterotopic pregnancy and the woman has one twin and a fallopian tube removed. The remaining baby is removed 3 minutes after birth and the

surrogate mother is discharged. What follows appears to be a catalogue of errors in the care of the newborn resulting in a brain haemorrhage. The surrogate mother wishes to withdraw her consent as they are unsuitable parents but the child is placed in foster care. The British Surrogacy Centre is registered in California.

[S \(A Child\) \(Care Proceedings; Surrogacy\) \[2015\] EWFC 99 \(08 December 2015\) \(bailii.org\)](#)

7. EXPLOITATION OF VULNERABLE WOMAN - rare case as mother retains custody

In a significant case where a surrogate mother does retain custody of her child as the online arrangement was considered exploitative. This woman met the commissioning couple through an independent broker who had worked with the men before. A contract that was printed off from the internet was signed by the woman at a service station in the UK despite the surrogate mother having learning difficulties. She was flown to Cyprus for the IVF procedure where two embryos - each one fertilised with each of the men's sperm - to conceive twins. One twin died but a baby boy survived and the judge considered the medical condition of the child and thought that he would benefit by remaining with his mother.

[Z \(surrogacy agreements : Child arrangement orders\) \[2016\] EWFC 34 \(30 June 2016\) \(bailii.org\)](#)

8. SIMULTANEOUS SURROGACY - Judge approves parental order despite concerns

Three babies being born within the space of six months to three different surrogate mothers. Although the judge notes the dishonesty involved as connections were made online and brokered through a third party, the parental orders for all three children are approved.

[Judge Condemns 'Dishonesty' Of Same-Sex Couple In Surrogacy Case | HuffPost UK News \(huffingtonpost.co.uk\)](#)

Conclusion

We have multiple concerns for the proposals which seek to liberalise surrogacy; from allowing invested parties to regulate the process and expenses, to advertising related services, as well as moving the point at which the commissioning parents gain legal parentage. The law has already forgotten that women are human and children are not blank canvases to be traded and fails to recognise that surrogacy in the UK is already transactional, albeit operating under the guise of altruism and friendship.

In the new proposals it is recommended that for access to the surrogacy pathway, the surrogate mother must be a minimum age of 21, with an age of just 18 for the commissioning parents. We believe both ages are far too young. Women aged 21 are unlikely to have experienced pregnancy, and therefore unable to know what giving up a baby would entail. Surrogacy agencies already no longer require a

woman to have completed her family before engaging in surrogacy. There are no upper age limits despite increased obstetric health risks for older mothers. There are no upper age limits for commissioning parents, nor are there recommendations for the number of pregnancies a woman can undertake or how many women at a time commissioning parents can impregnate.

We remain concerned about what constitutes 'reasonable expenses' as we do not believe these proposals will bring this in line with actual pregnancy costs. We also have concerns about current UK Surrogacy Agencies becoming Regulated Surrogacy Organisations (RSOs) under the proposals. Many signpost or advise commissioning parents on undertaking commercial surrogacy arrangements abroad, including in countries such as Mexico, Canada and Ukraine.

As demonstrated in the examples given, surrogate mothers rarely receive parental rights even when their consent is withdrawn, under the current laws. Transferring parental rights at birth means that women with regret will have even less of a legal footing to make a claim to the child they have given birth to.

Please refer to our case study on surrogacy regret for insight as to how women are devastated by known but rarely documented experience.