Approach with caution

Karen Holden discusses issues that may arise in international surrogacy and how preparation is key when advising on such arrangements

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While international surrogacy engages complicated issues of family and immigration law, and every journey is different, this article will discuss some key legal issues and common pitfalls that should be considered when engaging in an overseas surrogacy arrangement. In particular, it takes a comparative look at some jurisdictions that are currently popular for international surrogacy, ie Canada, the US and the Ukraine.

While family lawyers in this jurisdiction will usually handle only the UK aspects of the arrangement, they will work closely with lawyers in the overseas jurisdictions to ensure a smooth journey. There is no universal law or harmonious process for international surrogacy, and it is therefore imperative to stay abreast of the other jurisdiction's rules, to create as smooth a journey as possible, once the intended parents return to the UK with their child.

Parental orders

Regardless of where the birth takes place, if the intended parents wish to live with their child in the UK, a parental order is required to ensure that they become the legal parents. It does not matter whether the intended parents will be considered the legal parents in the jurisdiction where the birth occurred, as once back in this jurisdiction the laws of England and Wales will prevail. Thus, a parental order will be needed whether engaging in domestic or international surrogacy arrangements. A parental order will assign full parental and legal rights to the two or single intended parent(s).

The requirements for a parental order where there are two applicants are contained in s54, Human Fertilisation and Embryology Act 2008 (HFEA 2008), and include:

- the child must have been born through a surrogate as a result of the placing in her of an embryo or sperm and eggs or her artificial insemination (s54(1)(a), HFEA 2008);
- at least one of the intended parents must have a biological connection to the child (s54(1)(b), HFEA 2008);
- 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 to each other (s54(2), HFEA 2008).
- the application must be made within six months of the child's birth (s54(3), HFEA 2008);
- the child must live with the intended parents (both at the time of the application and the making of the order) (s54(4)(a), HFEA 2008);
- at least one of the intended parents must be domiciled in the UK (s54(4)(b), HFEA 2008);
- the intended parents must be over the age of 18 (s54(5), HFEA 2008);
- the intended parents must have the surrogate's (and her spouse's) consent, given not less than six weeks after birth (s54(6) and (7), HFEA 2008); and

- only reasonable expenses have been paid to the surrogate, unless authorised by the court (s54(8), HFEA 2008).

Since 3 January 2019, s54A, HFEA 2008 (as inserted by the Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018, SI 2018/1413, following the decision in *Re Z (A Child) (No 2)* [2016]) makes it possible for a single person to apply for a parental order, but the above criteria still apply. Also, following the decision in *K v L* [2019] (in which my firm represented the first respondent, who was the non-biological intended parent), if the intended parents separate during the application process, meaning that the child is not physically living in the same house as both applicants at the time of the order, a parental order can still be achieved in certain circumstances.

If the intended parents do not make an application for a parental order, this can cause a myriad of issues for the child that could follow them throughout their lives, for example inheritance issues. If the intended parents should separate, without having obtained a parental order, then the non-biologically connected parent will have limited legal rights. In international surrogacy, where it may not be easy or even possible to contact the surrogate at a later date, the need to secure the parental rights of the intended parents at an early stage is even greater. The courts have been clear that without a parental order, the legal relationship between the intended parents and the child is not secure. In order to avoid things going awry, it is best to understand the pitfalls and seek to mitigate these issues early on.

On an application for a parental order, the court must be satisfied that only 'reasonable expenses' were paid to the surrogate (ss54(8), 54A(7), HFEA 2008). It is open to the court to retrospectively approve payments and, as there is no legal definition of reasonable expenses, a common-sense approach should generally be taken. Anything directly pregnancy related, for example compensation for time off work, travel, medical bills, pregnancy clothes etc, will usually be considered reasonable. Anything that is considered a transactional fee will need to be retrospectively approved by the court.

In international arrangements, especially in jurisdictions that permit commercial surrogacy, expenses may be incurred that would be considered to be outside the remit of reasonable expenses in this jurisdiction. In that scenario, the intended parents should expect the court to scrutinise expenses more closely when deciding whether or not to retrospectively approve the payments made, to ensure that doing so would not result in a commercial arrangement and therefore be an abuse of public policy. This can create a more burdensome and costly process, so it is imperative that the intended parents understand what the courts here would consider to be reasonable expenses. Intended parents engaging in international surrogacy should always keep records and receipts of expenses, so that they can support their position when returning to the UK. There is always a risk that the court could deny a parental order where expenses in excess of those that would be considered reasonable have been paid and which the court decides it cannot retrospectively approve. However, to date, the courts' approach in international surrogacy cases has been to approve these expenses to enable the parental order to be made, in order to protect the best interests of the child. To do otherwise would risk leaving the baby in a different country to that of their legal parents, who do not wish to bring them up, and living with parents who have no legal status.

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Common surrogacy jurisdictions

There are many reasons why intended parents may look to other jurisdictions for a surrogacy arrangement, for example to increase their chances of finding a surrogate, to have their names on the birth certificate to ensure that they are considered the legal parents from birth and also cost considerations. There may also be a concern that without a legally binding contract and formal arrangement in place, the surrogate could change her mind, which

is a known concern for surrogacy in this jurisdiction. Some more commonly encountered overseas jurisdictions for surrogacy arrangements are discussed below, although it should be noted that much may depend on the nationality and immigration status of the intended parents from a UK perspective, regardless of the requirements of the country where the surrogacy takes place, and specialist immigration advice should be obtained.

US

One of the most well-known and utilised destinations for international surrogacy is the US. Surrogacy is legal in many states in the US – it is governed at a state level and varies across the country. Where surrogacy is permitted and governed by the state law, it usually falls into two distinct categories:

- **Pre-birth surrogacy:** which means that on birth the intended parents immediately become the legal parents of the baby in the US, they appear on the birth certificate and, for insurance and immigration purposes, they are the legal parents under US law. While this is often seen as desirable, it comes with its own considerations, such as the child potentially not being covered by the birth mother's medical insurance. This may sound negligible, but if the child needs two or more months in hospital and several operations this could mean thousands of pounds as well as the intended parents being required to stay in the US for medical decisions. On a return to the UK, an application for a parental order will still be required.

- **Post-birth surrogacy:** which means that on birth the surrogate mother remains the legal mother until such time as the intended parents apply for a court order as the child leaves the hospital. This means the child remains the surrogate's dependent, so may potentially be covered by her medical insurance.

In contrast to the UK, all medical care is funded privately in the US. Any medical costs incurred by the surrogate, as well as the child, could become the responsibility of the intended parents. So, intended parents need to consider whether the surrogate has insurance for herself that covers surrogacy (as many will not), then insurance for the baby, and when this applies.

Canada

We can compare the position in the US to that in Canada, which, in simplistic terms, provides free healthcare to its population. A child born in Canada is entitled to a Canadian passport, however the position as to healthcare is ambiguous and the surrogate mother may be entitled to free healthcare, but not the child. Specialist insurance may be needed to cover the child at birth and it is recommended that such a policy is obtained to insure against any risk of a prolonged hospital stay after birth if there are complications. As such, similar to the position in the US, insurance for the child, post birth, is highly recommended.

Canadian law permits surrogacy but only on a purely altruistic basis (save in Quebec, where surrogacy agreements, even those that are altruistic, are not recognised) and only reasonable, surrogacy-related expenses can be paid to the surrogate. As such, it has synergy with UK law, making harmonisation of the arrangements easier. A child born in either the US or Canada will automatically be entitled to a US or Canadian passport which allows the child to leave and return to those countries, but what about entry into the UK? Some intended parents take the risk and travel using either a US or Canadian passport and hope that the border officials allow them through on the basis that they intend to apply for a parental order. This can work but the intended parents risk being turned away at the border. It remains imperative, therefore, that consideration is given to how the child can enter the UK and become a British citizen.

Ukraine

The Ukraine is another country which is popular for surrogacy arrangements, due to lower costs and the availability of surrogates. The Ukraine is only open to heterosexual, married couples who cannot conceive for medical reasons, but the legal framework presents particular issues for UK intended parents which should be carefully considered before engaging in a surrogacy arrangement. In the Ukraine, intended parents are legally considered the parents of the child from conception, with the surrogate having no parental rights or responsibilities. This in turn means that the child, under Ukrainian law, has no Ukrainian nationality and cannot obtain a Ukrainian passport. Intended parents must obtain a UK passport for their child while still in the Ukraine in order to enter the UK, which can be a burdensome process.

The future of surrogacy

The surrogacy community awaits the outcome of the consultation by the Law Commission and the Scottish Law Commission and hopefully thereafter for Parliament to pass the laws needed to protect both surrogates and intended parents, but more importantly the children born through these arrangements.

The Law Commission proposals include a new pathway to parenthood which would recognise the intended parents as the legal parents from birth in domestic surrogacy arrangements. With the new pathway, the 'work' would be done pre-conception, including finding the surrogate, medical checks, enhanced criminal records checks, independent legal advice and counselling for all parties, then a written surrogacy agreement and an assessment of the welfare of the child. Once the child is born, the intended parents will be the legal parents without the need to make a court application, subject to there being no objection by the surrogate within a defined period. If the surrogate does object, then the intended parents would need to make an application for a parental order in the usual way and the consultation is also considering giving the courts the power to dispense with the surrogate's consent in certain circumstances, something which is simply not possible now. However, this new pathway would not be applicable to international surrogacy arrangements. The proposal instead is that recognition would be on a 'country by country' basis and that there should be a streamlining and shortening of the process to obtain a passport or a visa for the child born overseas so that the process begins before birth. ■

K v L & anor
[2019] EWFC 21
Re Z (A Child) (No 2)
[2016] EWHC 1191 (Fam)