DEKA CHAMBERS

BRIEFING
July 2024

FAMILY LAW

Welcome to the latest edition of the Briefing from the Family Team at Deka Chambers with articles by Francesca Kolar and Al Hogarth.

At the end of a month of Pride celebrations across the country, in this edition of the Briefing we look at some issues of particular interest to the LGBTQ+ community.

Francesca Kolar provides an overview of the legal framework for surrogacy in this jurisdiction and makes the case for a wholesale review.

Al Hogarth considers 2 first instances cases in relation to treatment for teenagers who wish to transition, where the child consents but a parent opposes such treatment.

Deka Chambers is one of the largest common law sets in the country. We have a strong and experienced team of barristers who provide advocacy and advice in all areas of family law.

In the Family Team at Deka Chambers we have a number of barristers who have specific experience of the legal complexities that arise in relation to assisted reproduction, child arrangements, legal parenthood, marriage and family finance concerning LGBTQ+ parents and partners.

We are also very pleased to announce that Nerys Wyn Rees will be joining the Family Team at Deka Chambers from August 2024.

Oliver Millington
Head of the Family Law Team

Surrogacy

Many reading this article will be familiar with what surrogacy is and the different types of surrogacies. But by way of introduction, surrogacy is the practice of a woman (the 'surrogate') becoming pregnant with a child that may, or may not, be genetically related to her, carrying the child and giving birth to the child for another family (the 'intended parents').

There are different forms of surrogacy, including 'Traditional surrogacy' also referred to as 'straight' or 'partial' surrogacy, an arrangement whereby the surrogate is genetically related to the child born of the surrogacy arrangement because her own egg is used. In this situation artificial insemination is used to conceive the child.

Or there is 'Gestational surrogacy', which is also referred to as 'host' or 'full' surrogacy, where the surrogate is not genetically related to the child born of the surrogacy arrangement because her eggs have not been used. Here, IVF will be used to conceive the child.

Legal Framework

In *Whittington Hospital NHS Trust v XX* [2020] UKSC 14, a novel clinical negligence case where the claimant was claiming special damages for the costs of commercial surrogacy abroad, due to being unable to bear children due to the negligence of failing to diagnose cervical cancer following misreported smear tests, Lady Hale giving the lead judgment stated that *"the UK law on surrogacy is fragmented and in some ways obscure".*

The starting point is that the 'surrogate' is the child's legal mother when the child is born, as per s.27 and s.33 of the Human Fertilisation and Embryology Act 1990 ("HFEA"). The surrogate therefore having parental responsibility for the child may not surrender or transfer any part of that responsibility to another, as per s.2(9) of the Children Act 1989. Section 1A of the Surrogacy Arrangements Act 1985 expressly provides that *"no surrogacy arrangement is enforceable by or against any of the persons making it".* Therefore, if the surrogate mother refused to surrender the child, then the intended/commissioning parent will have to go to Court to seek an order that the child is to live with them. The surrogacy arrangement is not necessarily determinative of that issue, it is only a relevant factor to take into consideration.

Another complication is that if the surrogate mother is married or in a civil partnership, then her husband, wife, or civil partner will automatically be the child's other legal parent, unless it is shown that they did not consent to the placing of the sperm/eggs, embryo, or the artificial insemination which resulted in the pregnancy. If the surrogate mother is not married, it is possible for the intended father to be treated as the legal father if he is the genetic father, or if he is nominated as the other legal parent when the child is born. But any decision about where the child should live is a complex one, should the child live with the surrogate/gestational mother, who may also be genetically related to the child and her partner or the intended parents, one of whom may also have a genetic relationship with the child but not a gestational one?

In order for the intended parents to be recognised as the child's legal parents they will need to apply to the Court for a Parental Order, pursuant to s.54 and 54A HFEA 2008. Applications can be made jointly by a married

couple, civil partners, or two people living as partners in an enduring family relationship, or more recently applications can be made by a single person. Notably, Mr Justice Keehan, in *Re: A (Surrogacy: s.54 Criteria)* [2020] EWHC 1426 (Fam) made a Parental Order where the intended parents were no longer in a relationship but were still in an 'enduring family relationship' in respect of their ongoing commitment to the child.

To satisfy the criteria for a Parental Order, the gametes of *at least one* of the applicants must have been used to create the embryo, thus intended parents can still apply for a Parental Order if they have provided both a donor egg and sperm. There is also no limit on jurisdiction in terms of where in the world the embryo is created.

Even after an international surrogacy, for example in the United States, where in many states the intended parents can apply for a pre-birth order confirming their legal status, thereby being recognised as the legal parents at birth, unless the intended parents apply for a Parental Order they would not be recognised as the child's legal parents in England & Wales.

Applications cannot be made until after the child is born and must be made within a period of 6 months, beginning with the day on which the child was born. However, the Courts do now frequently make Parental Orders in respect of children who are much older and following *Re X (A Child) (Parental Order: Time Limit)* [2014] EWHC 3135 (Fam) the 6-month deadline can be relaxed.

At the time of making the application, and at the time of making the order, the child must have his home with the applicant(s) and at least one of the applicants must be domiciled in the UK, Channel Islands or Isle of Man, note that is not a condition of residence. The issue of domicile is highly fact dependent, but the domicile requirement must be satisfied, irrespective of how powerful the welfare considerations may be, an issue determined in the recent case of *X & Anor v Z & Ors* [2023] EWFC 41.

The court must also be satisfied that the woman who carried the child and anyone else who is a legal parent (not being an applicant) has freely and with full understanding of what is involved agreed unconditionally to the making of the order, as per s.54(6) HFEA 2008. The woman's agreement is ineffective if given less than six weeks after the child's birth. This becomes complicated in a situation where the surrogate may surrender the child, but then refuse her consent to the Parental Order, or when the surrogate has agreed but the other legal parent has not.

No money or other benefit, other than for expenses reasonably incurred, can be given or received by the applicant(s) for making the surrogacy arrangement, handing over the child, or giving agreement to the application unless authorised by the Court. The clear focus in domestic law is to prevent the commercialisation of surrogacy. S.2 of the Surrogacy Act 1985 bans third parties from negotiating a surrogacy arrangement, though different rules apply to non-profit making bodies. Furthermore, advertisements indicating that anyone may be willing to enter or negotiate a surrogacy agreement, or that anyone is looking for a surrogate mother, are also banned. The obvious difficulty with the latter is that trying to pursue or explore surrogacy options in the UK is very limited and international surrogacy is accessible only to those who can afford the cost and expenses of it.

Reform of the System

The Law Commission of England & Wales published in March 2023 its joint report with the Scottish Law Commission, outlining recommendations for a robust new system to govern surrogacy, titled 'Building Families Through Surrogacy: A New Law'. The report recommends a comprehensive range of reforms to enable surrogacy to work better for children, surrogates and intended parents.

The following key reforms are recommended *[emphasis added]:*

- The creation of a new pathway to legal parenthood for domestic surrogacy arrangements, which *will allow intended parents to be legal parents from birth;*
- Requirements and safeguards for the new pathway to ensure that surrogacy is the right decision for the surrogate and intended parents, and that the welfare of the child born is protected;
- Reforms to the law governing the payments that intended parents can make to the surrogate, to provide clarity, transparency and an effective means of enforcing limitations, and to guard against the risks of exploitation;
- The creation of regulated bodies, called Regulated Surrogacy Organisations, who will be non-profit-making bodies regulated by the Human Fertilisation and Embryology Authority (HFEA) and will oversee agreements under the new pathway, providing important support to the surrogate and the intended parents;
- Reforms to the parental order process, that will continue to be used for some surrogacy agreements, including *provision for the court to make a parental order without the consent of the surrogate, provided the welfare of the child requires that an order be made;*
- The creation of a new Surrogacy Register to allow those born of surrogacy agreements to access information about their origins;
- Improved employment rights for intended parents. Our recommendations will ensure a surrogate is treated in the same way as any woman who is pregnant and the intended parents are treated in the same way as any other person with a new child;
- Some limited reforms and the *provision of comprehensive guidance on nationality and immigration issues, to avoid unnecessary delay for those who have had a child through surrogacy overseas bringing the child to the UK.*

Of the key proposals, many would welcome that the new pathway to parenthood would enable the intended parents in a domestic setting to be recognised as the child's legal parents from birth and to be named on the first birth certificate. This would dispel much of the uncertainty of pursuing surrogacy in the UK and would create a 'pre-birth' system rather than ratifying surrogacy after the child is born. The Court also having the power to dispense with the surrogate's consent, where the welfare of the child requires it, would potentially make the Parental Order application process more efficient.

However, the Law Commission's final proposals do not seek to fully remove the Parental Order application process, and so intended parents who conceive via surrogacy abroad will still have to apply for a Parental Order on their return to the UK. This still leaves a legal limbo where intended parents are recognised as the legal parents in the country in which the child was born, but not in the country where the child will live, or is a national/citizen of.

The Government was due to respond in full to the Law Commission's report by March 2024, but this has not happened, likely due to it being an Election year. The Government's interim response in November 2023 was unfortunately lacking. Whilst they recognised the importance of the work undertaken by the Law Commission, their response was that *"parliamentary time does not allow for these changes to be taken forward at the moment".*

In the interim, there are improvements that could be made to the system without legislative change. A recent case of *AY and another v ZX* [2023] EWFC 39 highlights that allocation of surrogacy cases should be to a District or Circuit Judge, due to legal complexity. In *AY* magistrates at first instance declined to make a Parental Order because the artificial insemination of the surrogate had taken place at home pursuant to private arrangement, outside of a licensed fertility clinic. Mr Justice Macdonald, at appeal, determined that s.54 HFEA 2008 does not explicitly require artificial insemination to take place in a licensed clinic,

although this is desirable, for a parental order to be made and that the legal requirements of s.54 were satisfied in that case.

For intended parents pursuing surrogacy abroad, there are also significant complexities in respect of the child's nationality and applying for a UK passport without a Parental Order. This could be simplified, with a streamlined procedure/ policy for intended parents from the Home Office and/or Passport Office. Many will know that such a streamlined procedure is possible as emergency passports were issued swiftly in the midst of the covid-19 pandemic.

Conclusion

It is clear that UK surrogacy laws and the system as a whole is in much need of reform. It is hoped that progress will be made in the new Parliament. However, in order to create an inclusive, accessible and transparent system of surrogacy in the UK, it is fundamental that the rights of intended parents change, to keep up with the much more rapidly shifting societal norms of modern families.

HABITUAL RESIDENCE AND JURISDICTION IN CARE PROCEEDINGS

Alastair Hogarth

Re A & Ors (Care Proceedings: 1996 Hague Convention: Habitual Residence) [2024] EWFC 110. Judgment in care proceedings concerning 4 children subject to an undetermined asylum application, considering the issue of jurisdiction.

Knowles J considered the question of habitual residence and jurisdiction in a complex case involving children initially from Syria granted asylum in Austria. The children became known to child welfare services in Austria, before arriving in the UK across the channel in a small boat with the father. The mother obtained orders in Austria withdrawing custody from the father and assigning it to her. The father was imprisoned in the UK for the manner in which the children were brought to the UK and the local authority issued an application for care orders in respect of the children.

The court had to initially determine the question of habitual residence and provided a thorough statement of the law following the recent decision in *London Borough of Hackney v P & Ors (Jurisdiction: 1996 Hague Child Protection Convention)* [2023] EWCA Civ 1213 in which Deka Chambers' own Ed Lamb KC appeared. In *Hackney* Moylan LJ concluded that in respect of the relevant date for the purposes of Article 5 concerning jurisdiction:

i) The 1996 Convention applies to proceedings for an order under Part IV of the CA '89;
ii) The court must determine the issue of jurisdiction at the outset of the proceedings by reference to the date on which the proceedings were commenced;
iii) Jurisdiction under the 1996 Convention can be lost during the course of proceedings, if it was based on habitual residence and the child has ceased to be habitually resident in England and Wales. Accordingly, the court must be satisfied that it retains jurisdiction at the final hearing;
iv) Jurisdiction is acquired under Article 5 from the date on which a child becomes habitually resident in England and Wales; the effect of this on existing proceedings will depend on the circumstances of the case;
v) The court in England and Wales will likely have jurisdiction to make interim orders under Part IV under Article 11 when the child is habitually resident in a Contracting State;
vi) The court in England and Wales will likely have jurisdiction to make interim orders under Part IV under Article 11 and will also have substantive jurisdiction based on a child's presence here when the child is habitually resident in a non-contracting state.

Knowles J referred specifically to the dicta in *Hackney* where the court deprecated delay in decision-making in international cases engaging the 1996 Convention since this was always contrary to the best interests of children, but acknowledged that a child's habitual residence may change in the course of proceedings as a consequence of the very delay in determining where a child is habitually resident. Knowles J then set out a comprehensive review of the 5 Supreme Court decisions in respect of definition of habitual residence.

In all the circumstances of the case the court determined that the children *had* become habitually resident in this jurisdiction, rejecting the submissions of the local authority and guardian that they had not. For cases in which the question of jurisdiction arises, *Re A & Ors* provides a comprehensive

review of the current state of the law.

Abduction application in home court

Smolik, Elena (A child) (Re Senior Courts Act 1981) [2024] EWHC 920. Application by a mother for return of her child from Slovakia – return ordered.

Francis J gave judgment in an abduction case in relation to a 5-year old girl whose mother was a Tunisian national living in the UK and whose father was a Slovakian with British citizenship. The court noted that such cases are almost always private, but that occasionally in abduction cases publicity orders are made because it may assist in the recovery of the child concerned. In the present case the father took the child to Slovakia with the mother's agreement and then did not return.

Notably the court considered the Court of Appeal decision in *Re S (Abduction: Hague Convention or BIIa)* [2018] EWCA Civ 1226 where Moylan LJ said, albeit *obiter*, that absent good reason within Brussels II cases the application should be made to the court where the child had been taken rather than the home court. The court raised why the application had not been made through the Central Authority in Slovakia, which she would have been entitled to do. The mother had obtained legal aid to bring her application and had received legal advice that she would not get any free legal assistance in Slovakia, rendering an application in Slovakia prohibitive.

Francis J accepted that if free legal assistance was not available in the foreign court, it was perfectly proper that the mother made the application in this jurisdiction for the child's return. In his judgment, the judgement of Moylan LJ in *Re S* did not set down a blanket ban on Hague applications being made in the home country, albeit that may be the proper course in most cases.

Transgender treatment

O v P & Anor [2024] EWHC 1077 (Fam). Proceedings between parents concerning a 16 year-old's treatment for gender dysphoria, including M's application for a prohibited steps order.

Judd J considered a case where a mother applied for a prohibited steps order and for the court to make a best interests declaration under the Inherent Jurisdiction in respect of the child Q, 16. Q had informed his parents in 2020 that he was transgender which his father had accepted but his mother had not. In 2022 the mother applied for a PSO preventing the father from arranging for Q to access private treatment for gender dysphoria.

Following the publication of the Cass review, the mother invited the court to make a declaration that any proposed prescribing of puberty blockers or gender affirming hormones to a person under 18 should be subject to the oversight of the court and that the decision in *Bell v Tavistock and Portman NHS Foundation Trust & Ors* [2021] EWCA Civ 1363 and of Lieven J in *AB v CD* [2021] EWHC 741 (determining that parents were able to give consent to administering of puberty blockers on behalf of their children without the need of an application to court) could not survive the findings.

The court held that pursuant to s.8 Family Law reform Act '69 Q was entitled to consent to his own treatment whether or not his parents agreed. The inherent jurisdiction may be invoked on occasion to override decisions of competent minors but those cases almost always arise in the context of young people refusing life-saving medical treatment. There could be a situation where a child is extremely vulnerable or where the proposed medical providers are not regulated where a court could be persuaded it was appropriate to intervene.

The controversy over treatment of young people for gender-related distress is a matter of public interest but something which should

fall to be considered by medical or associated professions, or government. The court therefore in the circumstances that there was no realistic basis on which to override Q's consent to treatment, discharged the interim orders and brought the proceedings to an end.

EF v LM and J [2024] EWHC 922 (Fam). Judgment considering whether 16-year-old has capacity to consent to receiving hormone treatment and whether the court should prevent further treatment.

Following Judd J sending her judgment to the parties in *O v P* (above), the President of the Family Division handed down judgment in a strikingly similar case. The court considered the child, J,'s capacity to consent to receiving hormone treatment and whether the court should in any event exercise its powers under the inherent jurisdiction and/or the Children Act '89 to prevent further hormone treatment.

It was acknowledged that the court's approach to the determination of issues relating to gender dysphoria in children and young people under 18 was and is still developing and the court was asked to provide guidance in light of lessons learned in the case.

In the circumstances of a measure of agreement between the parties, the court took the approach that given that the law in respect of issues in cases of gender dysphoria is still very much in development the court should be careful to move forward on a case-by-case basis so that the approach under common law is developed incrementally rather than by judicial diktat.

Nevertheless, the President urged any other court faced with a case involving the private clinic Gender GP to proceed with extreme caution before exercising any power to approve or endorse treatment that that clinic might prescribe. Were the option of J resorting to Gender GP for a further prescription to be raised, there *would* be a need to consider very carefully (a) his capacity to consent to that particular option and (b) whether the circumstances were such that the court *should* exercise the inherent jurisdiction to prevent him from doing so.

Suspension of PR for convicted paedophiles

On 10th May the government tabled an amendment to the Criminal Justice Bill which will mean that when child rapists are sentenced their ability to make decisions about their own children's lives will be automatically suspended. The change builds on Jade's Law, introduced through the Victims and Prisoners Bill, currently progressing through the Lords, which applies an automatic suspension of parental responsibility in cases where a perpetrator has killed a partner or ex-partner with whom they share children.

The change will apply in cases where the perpetrator attacks any child. Following suspension, the cases would then be referred to family courts where it will be for the perpetrator to prove to a judge that it is in the child's interests for their parental responsibility to be reinstated. Under this approach local authorities will be responsible for making the application to the family courts.

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