

## Guidance for Parental Order Reporters

### Introduction

- 1.1 This guidance sets out the key background information to support Cafcass officers acting as Parental Order Reporters in cases where applications for Parental Orders have been made.
- 1.2 This includes:
- The legislative framework and process for surrogacy in the UK
  - The Parental Order Reporter roles and responsibilities
  - The disclosure of information to anyone born through surrogacy arrangements
  - The appeals process in parental order cases.
- 1.3 You may also wish to read the Cafcass Guidance on Donor Assisted Conception, which sets out the legislative framework for medical treatments in the UK, birth registration and the issues that may be encountered in Cafcass cases relating to donor assisted conception.

### Legislation

- 2.1 Surrogacy is not illegal in the UK but it is restricted by the Surrogacy Arrangements Act (1985), which makes any commercial payments for surrogacy arrangements illegal. It is illegal to offer or advertise that one is looking for a surrogate, or is willing to act as a surrogate; it is also an offence to commercially broker a surrogacy arrangement.
- 2.2 The Human Fertilisation and Embryology Act 1990 introduced the parenthood rules and the system of parental orders which still govern the status of those involved in surrogacy arrangements. Legislative changes from 6<sup>th</sup> April 2010 extended the categories of couples who may apply for a Parental Order in order to acquire the status of 'legal parent' following a surrogacy arrangement. These changes were made by the Human Fertilisation and Embryology Act 2008<sup>1</sup> ("the 2008 Act") and the Human Fertilisation and Embryology (Parental Orders) Regulations 2010 ("The 2010 Regulations").<sup>2</sup> The 2010 Regulations apply selected provisions of the Adoption and

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<sup>1</sup> [Human Fertilisation and Embryology Act 2008](#)

<sup>2</sup> Human Fertilisation and Embryology (Parental Orders) Regulations 2010 – ([http://www.opsi.gov.uk/si/si2010/draft/ukdsi\\_9780111491355\\_en\\_1](http://www.opsi.gov.uk/si/si2010/draft/ukdsi_9780111491355_en_1))

Children Act 2002, and modify them to cater for Parental Orders rather than Adoption Orders, notably the welfare checklist and the legal effect of the Parental Order.

### 2.3 New rules of court also set out procedural requirements for applications for Parental Orders.<sup>3</sup>

In summary:

- To acquire the status of legal parents the commissioning couple must apply for a Parental Order.<sup>4</sup>
- Applications for Parental Orders must start in the Family Proceedings Courts.
- The Court will appoint a Cafcass officer to act as Parental Order Reporter (“POR”).
- The 2008 Act permits civil partners and couples in an enduring family relationship to apply for Parental Orders, in addition to married couples as originally specified in the 1990 Act.
- Parental Order applications are no longer specified proceedings so the child is not automatically a party. One of the POR’s duties is to advise whether the child should be joined as a party, this will usually only occur in complex cases which are transferred to the High Court.

## Background

3.1 Surrogacy provides an opportunity for a couple to have a child that is genetically related to either one or both of them where this would otherwise not be possible. Arranging for a surrogate to carry a child involves complex and sensitive issues, including about who holds legal parenthood and/or parental responsibility of any child born as a result. Contracts drawn up in advance are not enforceable.

3.2 There are two types of surrogacy:

- i. In the first type – known as ‘traditional’ or ‘genetic’ surrogacy - the sperm of the intended father is used to fertilise the egg of the surrogate. This can be performed in a fertility centre, but more often the insemination happens without medical involvement.
- ii. In the second type - known as ‘host’ or ‘gestational’ surrogacy, either:
  - the sperm of the commissioning father is used to fertilise the egg of the intended mother in a laboratory and the resulting embryo is transferred to the surrogate mother’s womb.

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<sup>3</sup>The Family Proceedings Courts (Children Act 1989)(Amendment)(No 2) Rules 2010 (“The FPC Rules”) and for the higher courts the [Family Proceedings \(Amendment\)\(No 2\) Rules 2010](#). (“The Higher Court Rules”)

<sup>4</sup> The Family Proceedings Courts (Children Act 1989) (Amendment) Rules 2010 insert new rules 21A and 21J into the Family Proceedings Courts (Children Act 1989) Rules 1991

- the sperm of the commissioning father is used to fertilise the egg of a donor in a laboratory and the resulting embryo is transferred to the surrogate mother's womb.
- the sperm of the donor is used to fertilise the egg of the intended mother and the resulting embryo is transferred to the surrogate mother's womb.

Medical intervention is always required in 'host' or 'gestational' surrogacy.

3.3 In the UK, the woman who carries and gives birth to a child is the child's legal mother, regardless of whether conception involved medical treatment and regardless of whether she is the biological mother.<sup>5</sup> The 2008 Act also specifies that, if the surrogate is married or in a civil partnership, her partner will be the father or second parent of the child; the exception to this is if it can be shown that the partner did not consent to the medical treatment, or support the surrogate during pregnancy.

3.4 In most cases, there are three potential Parental Responsibility (PR) issues to be aware of:

- A male commissioning parent may, as the biological father, have registered the birth together with the surrogate as the child's father and therefore have PR for the child;<sup>6</sup>
- The surrogate's husband or civil partner will be the father/ second parent of the child and hold PR for the child.
- The child may have no second parent.

*Please note that the concept of legal parenthood is different to that of PR. Service users with any concerns should be advised to seek legal advice.*

3.5 The Court Rules specify who will be the parties to the case.<sup>7</sup> The applicants are the commissioning couple and the respondents will be the surrogate and her partner (subject to the criteria outlined above), or any other person with parental responsibility for the child at the date of the application.

3.6 Unless the surrogacy arrangements are carried out in a fertility centre licensed by the Human Fertilisation and Embryology Authority (HFEA), there are no UK legal requirements or guidance regarding assessment and preparation of any parties involved. Arrangements involving overseas fertility treatments will be subject to any requirements of such jurisdictions.

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<sup>5</sup> [Section 33, Human Fertilisation and Embryology Act 2008](#)

<sup>6</sup> Register of live births – held by the General Register Office

<sup>7</sup> Rule 21G of the Family Proceeding Court Rules 2010 <http://www.legislation.gov.uk/uk/si/2010/1065/made>

## **The role of the parental order reporter**

- 4.1 The commissioning couple are required to complete an application for a Parental Order (form C51). A copy of the child's birth certificate will be attached to the form, alongside a copy of the commissioning couple's marriage or civil partnership certificate (where applicable).
- 4.2 Once the court receives the completed application, a request will be made to Cafcass for the nomination of a Family Court Adviser to act in the role of a POR.

## **Duties of the Parental Order Reporter:**

- 5.1 The duties of the Parental Order Reporter are as follows:
  - Identify what information needs to be available for the court to make a decision about the application;
  - Ensure that all criteria for making a Parental Order are met (see below).
  - Undertake Cafcass initial safeguarding checks on the commissioning couple, (following the same approach which is undertaken in private law work to first hearing cases) to establish if there is any information concerning risk of harm.
  - Applying the adapted 2002 Welfare Checklist, establish if there is any reason why the Court should not make a Parental Order
  - Demonstrate the child's best interests both in what needs to happen now and what needs to be happening to work towards future needs, such as issues addressing the child's sense of identity and belonging (including where there is genetic or ethnic difference) and any contact arrangements with the surrogate (and her partner and children if applicable).

## **Assessment Criteria**

- 6.1 When undertaking the assessment as to whether an order is in the child's best interests for the immediate and longer term future the POR will need to consider each of the application criteria<sup>8</sup> to make sure it is fulfilled by the commissioning couple.
- 6.2 In every case at least one of the applicants is a genetic parent to the child. If all parties agree a Parental Order will be granted unless the criteria for granting an order are not met.
- 6.3 If the POR identifies safeguarding or significant welfare concerns s/he should make a referral to social services, as safeguarding concerns would not necessarily prevent the court from making a Parental Order.

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<sup>8</sup> set out in section 54 of the 2008 Act

- 6.4 The guidance set out below gives details of each of the criteria to assist the POR in making his/her assessment:

### **The welfare of the child, the paramouncy principle, and the Welfare Checklist**

The welfare of the child is the Court's paramount consideration in Parental Order applications. The applicable welfare checklist from the Adoption and Children Act 2002 requires the court to consider:<sup>9</sup>

- The child's ascertainable wishes and feelings regarding the decision, with regard to the child's age and level of understanding;
- The particular needs of the child;
- The likely effect on the child (throughout life) of having ceased to be a member of the original family and having become the subject of a Parental Order;
- The child's age, sex, background, and any other characteristics of the child which the Court considers relevant;
- Any harm (within the meaning of the Children Act 1989) which the child has suffered or is at risk of suffering; and
- The relationship which the child has with relatives, and with any other person in relation to whom the Court considers the relationship to be relevant.

### **The child has been carried by a surrogate and the sperm or the egg of at least one of the applicants were used to bring about the creation of the embryo**

Where treatment was carried out at a HFEA licensed clinic information about the treatment should be acquired from both the commissioning couple and the surrogate, where possible: this could be in the form of a letter from a HFEA licensed clinic. If this is not possible or the information is insufficient the POR can contact the clinic directly, who may be able to disclose information about the treatment. The clinic is required, before offering treatment, to 'consider the welfare of the child that may be born as a result of treatment'<sup>10</sup> and this, coupled with any further investigation undertaken by the clinic, will be recorded in the records of the surrogate. These records will also include details of any counselling provided by the clinic to the applicant parents or surrogate (and partner).

However, not all cases will involve treatment at a HFEA licensed centre. If the arrangements were carried out without medical intervention or if treatment was in a clinic overseas, the POR should make enquiries into the circumstances of the child's conception and birth. These circumstances should be recorded in the report. Where there is uncertainty about the implications of surrogacy arrangements made overseas advice should be sought from Cafcass Legal.

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<sup>9</sup> [Welfare Checklist, Section 1, Adoption and Children Act 2002](#) as applied by the 2010 Regulations.

<sup>10</sup> Refer to Section 13 (5) of the Human Fertilisation and Embryology Act 1990 (as amended by the 2008 act) which relates to welfare of the child <http://www.hfea.gov.uk/5473.html>

**The commissioning couple must be married, civil partners, or in an enduring family relationship**

Where the commissioning couple are married or in a civil partnership, they have to provide a certificate with the Parental Order (C51) application form.

If the couple are living as partners in an enduring family relationship the POR needs to be satisfied during the course of the assessment that this is the case, and that the couple are not within prohibited degrees of relationship with each other.<sup>11</sup> For example, the latter could be achieved by seeing original birth certificates of family members.

**The Parental Order application must be made within 6 months of the child being born**

The POR will be able to determine this using the child's birth certificate that is submitted with the C51 form.

**The child's home should be with the commissioning couple, one or both of whom must be domiciled in the UK, Channel Islands, or the Isle of Man.**

The subject child must be living with the commissioning couple when the application for the Parental Order is made; the POR can establish this by visiting the commissioning couple at their home.<sup>12</sup> Domiciled in the UK means where a person has their sole and permanent home and to which, when they are absent, they always have the intention of returning. If the domicile criteria are not met then the court has to be informed. However, given that the law on who can be domiciled is complex, if you are unsure as to whether the criteria are met you should seek advice from Cafcass Legal.

**The commissioning couple must both be aged 18 or over when the order is made.**

The date of birth of both parties will be provided on the application form. Where there is doubt, the birth certificates should be made available by the commissioning couple.

**The surrogate (and partner) must freely and unconditionally consent to the making of the Parental Order**

A completed and signed A101A form is a record of the surrogate's consent and that of the child's legal father where this is not the commissioning father to the Order and

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<sup>11</sup> Two persons are defined as being within prohibited degrees of relationship if one is the other's parent, grandparent, sister, brother, aunt or uncle; this also includes relationships of half blood or, in the case of an adopted person, where those relationships would exist with their adoptive, former adoptive, or birth parents. It does not include any other adoptive relationships. [Section 58\(2\) Human Fertilisation and Embryology Act 2008](#).

<sup>12</sup> Applicants for Parental Orders should be advised to seek their own legal advice as to whether or not they are domiciled / habitually resident in the UK.

can be witnessed by a Cafcass reporter (this may be the Parental Order Reporter). However, the use of this form is not mandatory, and it is also acceptable for the surrogate to consent to the making of the Order in person, in court. The consent of the surrogate to the making of the Parental Order is ineffective if it is given less than six weeks after the child was born.

If the POR is not satisfied that the surrogate (and her partner where applicable) have a full understanding of the consequences of giving their consent to a Parental Order, or if consent is refused, then the case should be referred back to court. If the grounds for concern are related to incapacity, it is likely that the Court will require a detailed medical report from an appropriate source. Any costs for such a medical report fall to the commissioning couple and the advice of the Court should be sought before making such arrangements.

**The Court must be satisfied that no money or other benefit, other than reasonable expenses, has been received by the surrogate.**

The surrogate can only receive 'reasonable expenses' from the commissioning couple, and both the Court and the POR must be satisfied with this. The Parental Order Reporter should discuss the expenses that have been paid with both the commissioning couple and the surrogate.

Whether expenses are deemed reasonable will depend on the circumstances of the case, and any concerns regarding expenses that may not have been reasonably incurred should be set out in the report to the Court.<sup>13</sup> If there is doubt as to what constitutes a reasonable expense, this needs to be addressed to the court.

## **Disclosure of information to anyone born through surrogacy arrangements**

7.1 The information that can be disclosed by the courts is specified in rule 13.16 of the Family Procedure Rules 2010.<sup>14</sup> A person, who is the subject of a Parental Order, and at least 18 years of age, may apply to the Court to receive copies of:

- The application for the Parental Order (but not any attached documents);
- The Parental Order and any other orders relating to the proceedings;
- Any transcript of the Court's decisions; and
- The report made to the Court by the Parental Order reporter.

7.2 Where the child is born as the result of a donor egg or sperm in the surrogacy arrangements, the resulting child has the right to apply for identifying information

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<sup>13</sup> Re X and Y (Foreign Surrogacy) [2008] EWHC 3030, a decision of Hedley J. The judge asked himself whether the sum paid was disproportionate, whether the commissioning couple acted in good faith and whether there was an attempt to defraud the authorities.

<sup>14</sup> <http://www.legislation.gov.uk/uk/si/2010/2955/article/13.16/made>

about their donor(s) once they reach the age of 18.<sup>15</sup> New rules regarding access to information were introduced as part of the HFE Act 2008, which came into force in October 2009. For further information refer to Cafcass guidance for donor assisted conception.

## The disclosure of the Parental Order Report

- 8.1 The report of the Parental Order Reporter is confidential and cannot be shared with the parties unless a direction is sought from the court for the report to be disclosed.

## Appeals

- 9.1 The Parental Order regulations apply the appeals provisions in the Children Act 1989 to Parental Orders. Therefore, the appeals process in Parental Order cases reflects the appeals process for adoption cases.

## Links

Practitioners may find it useful to refer to the '[key messages from research](#)' document, which includes research specific to surrogacy. If you are a self employed contractor, please ask your contract manager for a copy.

The Surrogacy Arrangements Act 1985  
<http://www.legislation.gov.uk/ukpga/1985/49>

Human Fertilisation and Embryology Act 2008  
<http://www.legislation.gov.uk/ukpga/2008/22/contents>

Human Fertilisation and Embryology (Parental Orders) Regulations 2010  
<http://www.legislation.gov.uk/uksi/2010/985/contents/made>

Human Fertilisation and Embryology Act 1990  
<http://www.legislation.gov.uk/ukpga/1990/37/contents>

Adoption and Children Act 2002  
<http://www.legislation.gov.uk/ukpga/2002/38/contents>

Family Proceedings Courts (Children Act 1989) Amendment Rules 2010  
<http://www.legislation.gov.uk/uksi/2010/787/contents/made>

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<sup>15</sup> A small number of donor conceived people were affected adversely by transition arrangements. All donors recruited for the first time after 1.4.05 were required to be identifiable but a small number of treatments were approved using past donations, for example to complete a family using the same donor.