Surrogacy and Employment Law: When it’s not your pregnancy is it your leave of absence?

The UK position

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Introduction

The UK is one of the more surrogacy-friendly jurisdictions within the European Union. Several EU jurisdictions (notably France, Germany and Switzerland) criminalise surrogacy. The very clear policy behind the legislation concerning surrogacy and ART is to discourage commercial surrogacy arrangements. *The Surrogacy Arrangements Act 1985* was enacted in reaction to the public outcry following the first commercial surrogacy case in England (*Re C (A Minor) (Ward: Surrogacy)* 1985 1 FLR 846).

*The Surrogacy Arrangements Act 1985* creates a criminal offence for a person, on a commercial basis, to initiate or take part in any negotiations with a view to the making of a surrogacy arrangement, offer or agree to negotiate the making of a surrogacy arrangement, or compile any information with a view to its use in making, or negotiating the making of surrogacy arrangements (section 2(1)). The effect being that only Intending Parents or the Surrogate Mother herself are permitted to negotiate the terms of a commercial surrogacy agreement. The terms of any surrogacy contract are unenforceable (*The Surrogacy Arrangements Act 1985 s.1*). *The Surrogacy Arrangements Act 1985* also prohibits the advertising of a willingness to become a surrogate, or to advertise for a surrogate (section 3).

The UK’s policy on commercial surrogacy and its restrictive laws has led to many British Intending Parents seeking to enter into surrogacy arrangements in jurisdictions with more liberal fertility laws. UK law does, however, have a comparatively advanced and liberal legislative framework for the acquisition of parental rights for Intending Parents of children born through surrogacy arrangements in the form of a “parental order” (which has been
available to same-sex couples since 6 April 2010)(Human Fertilisation & Embryology Act 2008 s.54).

In all other areas of law, British Intending Parents have the safety net of a legal framework to enable them to enjoy the same legal rights and recognition as parents. The Parental Order process cannot commence until the child is at least six weeks old. Applications for parental orders involving overseas surrogacy arrangements are all currently heard in the Family Division of the High Court in London (following the decision of Mr Justice Hedley in X v Y (Foreign Surrogacy) [2009] 1 FLR 733). It is not uncommon for the parental order process to take anywhere from 6 to 12 months before a parental order is made. Thus there will be a significant period of time in the child’s life where the parents caring for the child are not recognised by UK law as being the child’s legal parents.

How does this lapse of time affect the leave of absence that would otherwise be available by virtue of statute following the birth of the child? It is a question that is rarely considered by British Intending Parents who are often faced with more pressing and overwhelming issues such as immigration, citizenship and parenthood.

**Who is a parent?**

Before looking at more detail at the types of leave of absence available to Intending Parents, it is necessary to identify who the legal parents of the child are.

The “legal parents” of a child conceived through artificial insemination or IVF are identified by the provisions of the Human Fertilisation & Embryology Act 1990 and the 2008 Act of the
same name. The 1990 Act came into force on 1 August 1991 and applies to children conceived before 6 April 2009. The parenthood provisions of the 2008 apply to children conceived on or after 6 April 2009 through artificial insemination or IVF.

UK law operates on a “two-parent model” and a child cannot have more than two legal parents.

**Mother**
A child’s “mother” is defined as “the woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman, is to be treated as the mother of the child.” (Human Fertilisation and Embryology Act 2008 s.33(1). Thus the surrogate will always be treated as the child’s mother, even if she is a gestational surrogate and there is no genetic link between the surrogate and the child.

**Where the “mother” is married**
If the surrogate is married, her husband will be treated as the second parent of the child (Human Fertilisation and Embryology Act 2008 s.35(1)) unless it can be shown that he did not consent to the pregnancy.

**Where the mother is in a civil partnership**
Civil partnerships are legally recognised unions between same-sex partners and broadly afford the parties to the civil partnership the same legal rights as a married couple (see the Civil Partnership Act 2004). “Overseas relationships” itemized in Schedule 20 of the Civil Partnership Act 2004 are recognised in the United Kingdom as a civil partnership under Civil Partnership Act 2004 s.213. They include marriages formed in jurisdictions where same-sex
marriage is permitted as well as civil unions or domestic partnerships in the States of California, Connecticut, Maine, Massachusetts, New Jersey and Vermont.

If the surrogate is in a civil partnership or in an “overseas relationship” the same-sex civil partner or spouse will be recognised as the other by virtue of *Human Fertilisation and Embryology Act 2008 s.42* where the child was conceived on or after 6 April 2009 unless it can be shown that she did not consent to the surrogacy arrangement.

**Where the surrogate is unmarried**

In situations where the surrogate is unmarried the Intending Parent will be recognised as a legal parent without Parental Responsibility. Parental Responsibility is defined as “all the rights, duties, powers, responsibilities and authority which by law a parent of a child in relation to the child and his property.” The genetic father of a child born to an unmarried surrogate would be treated as a matter of English law in the same way as it would treat an unmarried father.

**An overview of statutory leaves of absence available to Intending Parents**

Intending Parents (either same-sex or heterosexual) are entitled not to statutory maternity leave and pay as a matter of English law because of how English law identifies the legal parents of a child under the *Human Fertilisation and Embryology Act 2008*. 
Employed female employees are entitled to take a total of 56 weeks statutory maternity leave, including an entitlement to Statutory Maternity Pay for 39 weeks.\(^1\) Employees also have the right to benefit from all of her normal terms and conditions of employment, except for remuneration and at the end of maternity leave, she has the right to return to her original job.

Parents of adopted children are entitled to Adoption Leave. Under the *Paternity and Adoption Leave Regulations 2000* an employee is entitled to adoption leave in respect of a child if he:

a) is the child’s adopter (ie matched with the child for adoption by a UK adoption agency);

b) has notified the agency that he has agreed that the child should be placed with him and agreed the date of placement;

c) been in continuous employment with the same employer for at least 26 weeks;

d) complied with notice requirements to his employer.

Parents entitled to adoption leave enjoy the same rights and benefits to mothers who are entitled to maternity leave and pay. Where adopters are a couple, one of the two parents will be entitled to the adoption leave.

Both maternity and adoption leave rights are enshrined in domestic legislation and European Union legislation. No such protection is in place for Intending Parents applying for a Parental Order. The disparity between parents of children born through surrogacy

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\(^1\) The first 6 weeks Statutory Maternity Pay “SMP” is paid at 90% of the average weekly earning, the following 33 weeks being paid at 90% of the average weekly earning or the SMP rate – currently £135.45 per week (whichever is the lower).
arrangements and adoptive parents or parents of children conceived traditionally is largely believed to have been an oversight of the legislatures during the drafting of the *Human Fertilisation and Embryology Acts*. The “discrimination”, particularly for commissioning mothers, has received coverage in the national press (The Telegraph, 18 April 2012 “Mother who had babies through surrogate appeals for right to maternity pay). 

**C-D v S-T (2011) ET/2505033/11**

This was a case in which the Newcastle-upon-Tyne Employment Tribunal decided to refer questions to the European Court of Justice (“ECJ”) about whether EU maternity and discrimination law protects a woman who becomes a mother through surrogacy should be entitled to paid maternity leave to bond with her baby, establish breastfeeding and maintain and develop her family life. The tribunal did not finalise the terms of the reference to the ECJ, since it was left to counsel to formulate the terms of the reference.

In the case, the Employment Tribunal accepted that there were no EU directives or jurisprudence, or any domestic UK legislation in its present form that makes specific reference to surrogacy but acknowledged that pregnancy and maternity are protected as fundamental rights by EU law.

*C-D v S-T* is an interesting case because the Applicant mother relied upon the *Pregnant Workers Directive* 92/85/EEC which provides that the Direction “may not have the effect of reducing the level of protection afforded to … workers who have recently given birth or who are breastfeeding...” At paragraph 43 of the judgment, the Employment Tribunal noted the difference as being that “special protection is specifically attached to breastfeeding.” The
immediate result could well be an exception for heterosexual Intending Parents to be eligible for a paid leave of absence. Clearly same-sex couples cannot breastfeed, although it is highly unlikely that such an artificial and discriminatory distinction would last and, at the very least, the case of *C-D v S-T*, depending on the outcome of the ECJ, could be a stepping stone towards achieving equality.

A decision from the ECJ is awaited.

**So what leaves of absence are available to intending parents in the UK?**

There are various types of leave of absence which Intending Parents may potentially, depending on the circumstances, be eligible for:

**Paternity Leave**

In a surrogacy arrangement, the parent who donates the sperm may be entitled to paternity leave. The Intending Parent must be a legal parent within the meaning of the *Human Fertilisation and Embryology Act 2008* (see – above – NB in a surrogacy arrangement this will only occur if the surrogate is unmarried; if the surrogate is married her spouse will be considered the legal parent).

Assuming the Intending Parent is a legal parent, they will be entitled to paternity leave if:

a) they are an employee (as opposed to an independent contractor); and

b) have worked continuously for their employer for 26 weeks ending with the 15th week before the baby is due or the end.
Those who are eligible can choose to take either one week or two consecutive weeks’ paid paternity leave. They cannot take odd days. Employees will be entitled to Statutory Paternity Pay (currently £135.45 per week) or 90% of their average weekly earning, if that is less. Paternity leave must be taken within 56 days of the actual birth of the child.

**Parental Leave**

Intending Parents are potentially entitled to “parental leave.” Parental leave is provided for in the *Maternity and Parental Leave etc Regulations 1999* and are available to any parents of a child under 5 years of age.

The criteria are:

a) they must be employees;

b) they must have at least one-year’s continuous service with their current employer;

c) they must have, or expect to have, responsibility for a child.

Regulation 2 provides that a person has “responsibility for a child” if “he has parental responsibility for a child.”

“Parental Responsibility” is defined in *The Children Act 1989* section 3 as “all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property.” Parental Responsibility (“PR”) effectively means parental rights.
In a surrogacy situation it is probable that neither Intending Parent will have PR for their surrogate child immediately after the child is born, especially where the child’s birth is not registered in the United Kingdom.

When the Parental Order has been made both Intending Parents will undoubtedly have “responsibility” for the child and therefore be entitled to take parental leave. The regulation, however, entitles people “who expect” to have responsibility for a child. Thus intending parents caring for their surrogate child will be entitled to take parental leave before the parental order is made, provided they will issue an application for a parental order.

Parental leave itself is simply an entitlement to be absent from work and it is therefore an entitlement to an unpaid leave of absence. Both parents may take up to 13 weeks (either consecutive or un-consecutive) until the child is 5 years of age.

**Conclusions**

The law relating to leaves of absence for Intending Parents in the United Kingdom urgently needs to be reformed. It should be noted that following media coverage of the issue in national press in April 2012, John Healey MP introduced a Private Member’s Bill into the House of Commons to address the discrimination faced by Intending Parents. The Surrogate Parents (Leave, Pay and Allowance Arrangements) Bill was given an unopposed first reading in Parliament, but was always unlikely to become law. The Bill’s first reading took place on 17 April 2012 but failed to complete its passage through Parliament before the end of the Parliamentary session. This means that the Bill will make no further progress.
Until such time as this area of law has been reformed, British Intending Parents would be well advised to research whether their employer has a policy for surrogacy and, if not, have discussions with their employer so that they can plan ahead.

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