

PARLIAMENTARY DEBATES

HOUSE OF COMMONS
OFFICIAL REPORT

Second Delegated Legislation Committee

DRAFT HUMAN FERTILISATION AND
EMRYOLOGY ACT 2008 (REMEDIAL) ORDER 2018

DRAFT HUMAN FERTILISATION AND
EMRYOLOGY (PARENTAL ORDERS)
REGULATIONS 2018

Tuesday 18 December 2018

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The Committee consisted of the following Members:

Chair: MR NIGEL EVANS

† Chalk, Alex (*Cheltenham*) (Con)
 † Day, Martyn (*Linlithgow and East Falkirk*) (SNP)
 Doughty, Stephen (*Cardiff South and Penarth*) (Lab/
 Co-op)
 † Doyle-Price, Jackie (*Parliamentary Under-Secretary
 of State for Health and Social Care*)
 † Graham, Richard (*Gloucester*) (Con)
 † Hall, Luke (*Thornbury and Yate*) (Con)
 † Hodgson, Mrs Sharon (*Washington and Sunderland
 West*) (Lab)
 † Keegan, Gillian (*Chichester*) (Con)
 † Kyle, Peter (*Hove*) (Lab)

Mahmood, Shabana (*Birmingham, Ladywood*) (Lab)
 † Masterton, Paul (*East Renfrewshire*) (Con)
 † Morton, Wendy (*Aldridge-Brownhills*) (Con)
 † Norris, Alex (*Nottingham North*) (Lab/Co-op)
 † Percy, Andrew (*Brigg and Goole*) (Con)
 Sheerman, Mr Barry (*Huddersfield*) (Lab/Co-op)
 † Smith, Jeff (*Manchester, Withington*) (Lab)
 † Throup, Maggie (*Erewash*) (Con)

Hannah Bryce, Yohanna Sallberg, *Committee Clerks*

† **attended the Committee**

Second Delegated Legislation Committee

Tuesday 18 December 2018

[MR NIGEL EVANS *in the Chair*]

Draft Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018

8.55 am

The Parliamentary Under-Secretary of State for Health and Social Care (Jackie Doyle-Price): I beg to move,

That the Committee has considered the draft Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018.

The Chair: With this it will be convenient to consider the draft Human Fertilisation and Embryology (Parental Orders) Regulations 2018.

Jackie Doyle-Price: It is a pleasure to serve under your chairmanship, Mr Evans, and to move the motion. Parental orders are an important mechanism that transfer the legal parenthood of a child born through a surrogacy arrangement from the surrogate and her partner, if she has one, to the intended parents. The effect of a parental order is that the child born to the surrogate is treated in law as the child of the applicants for the parental order and that any parental rights of the surrogate and her partner are extinguished. That confers legal certainty of parenthood, parental responsibility and decision making on behalf of the child to the intended parents. It is clearly a key legal underpinning of the new arrangements for surrogacy.

When the Human Fertilisation and Embryology Act 1990 laid down the legal foundations, parental orders were introduced for married heterosexual couples only. In the Human Fertilisation and Embryology Act 2008, that was extended to same-sex couples, civil partners and couples in long-term relationships where the relevant criteria were satisfied.

In 2015, there was a legal challenge by a father who had a child through a surrogacy arrangement in the USA. He could not apply for a parental order because he was single. The High Court found that the 2008 Act was in breach of article 14 of the European convention on human rights, combined with article 8. In May 2016, the Court made a declaration of incompatibility. The declaration related to the lack of any provision enabling a person in the position of the applicant—someone not in a long-term relationship—to apply for a parental order. The order addresses that case by removing any discrimination against single people being able to exercise their rights under the 2008 Act.

The Government made a commitment to rectify the incompatibility as soon as possible. That is why we are here today. I have been determined to see this through and get the law changed. I pay tribute to my hon. Friends the Members for East Renfrewshire and for Brigg and Goole, who have been my conscience in ensuring that we bring the arrangements to the House as soon as possible.

I think all members of the Committee would recognise that since surrogacy was first introduced back in the 1980s, it has become increasingly common as a method for childless couples and individuals to address their wish to have a family. As such arrangements become more commonplace, it is important that we in Parliament ensure that the legal provisions underpinning them are safe for the child and for everyone whose rights need to be respected. The proposals have been considered by the Joint Committee on Human Rights. After its extensive and rigorous scrutiny, we have amended the order to get it into the shape that it is in now.

The regulations replace the Human Fertilisation and Embryology (Parental Orders) Regulations 2010 as a consequence of the changes made by the order that we are considering. The regulations will set the legal framework for parental orders by making provision for matters such as the legal status of a person who is the subject of a parental order, how the register functions and the factors that a court must take into account when considering an application for a parental order. It is worth emphasising that the issuing of a parental order still very much relies on the decision of the courts.

The regulations operate by applying, with modifications, adoption legislation to parental orders. For example, the regulations contain the requirement for the relevant Registrar General to hold and maintain a parental order register. When the child is born, the surrogate and her partner, if she has one, will record the child's birth on the live birth register. Once the parental order has been granted, the court will send a copy of the order to the Registrar General and a new birth certificate will be issued. That is important when we satisfy ourselves about the legal rights and status of the parental order and how that will affect the child. This will be a certified copy of the entry in the parental order register.

Following the JCHR's clear recommendations about the remedial order, we do not strictly need to debate the order, but the Government took the view that a joint debate with the parental order regulations would be more appropriate, and I am glad that this Committee has done so too. I hope that this debate has helped to illustrate the reason behind the regulations and explained the policy behind them, and I hope that we have been suitably transparent on an issue that many hon. Members will have very clear views about. I commend both statutory instruments to the Committee.

9.1 am

Mrs Sharon Hodgson (Washington and Sunderland West) (Lab): It is indeed a pleasure to serve under your chairmanship, Mr Evans. The Minister and I shared a phone conversation about this issue earlier this year; I believe it was sometime in the summer. I told her then that I would support the Government in this change and I remain committed to that today. I know that the Government have been keen to get this right. It is a shame that it has taken so long for the measure to be brought forward. Sadly, Brexit seems to get in the way of everything at the moment.

In May 2016, as we have heard, the High Court ruled that the inability of a single person to obtain a parental order was incompatible with the European convention on human rights. The Government rightly confirmed in December 2016 that they would lay a remedial order

before Parliament, but with the referendum and then a general election and Brexit business in-between, we are now only just getting to debate the revised draft of the remedial order.

I understand that a draft remedial order was tabled in November 2017, but that the Joint Committee on Human Rights said that a blanket ban on a person

“who is in a couple getting a single parental order is clumsy and inflexible, as well as discriminatory”,

and, in relation to the requirement for a single person still married or in a civil partnership to prove that a separation from a partner was permanent, that that would be

“difficult or impossible to prove to the Courts”.

The Government’s revised remedial order has addressed the JCHR’s concerns, and it has advised that there are now no reasons why this order should not be agreed by both Houses of Parliament. However, I would like to place a couple of questions on the record, which I hope the Minister will be able to address when she concludes the debate.

First, when will single people be able to apply for a parental order? As the Minister will be aware, many people have already been waiting years for the legislation to come forward and so will be very eager to start a family of their own. Can she provide an update on what this will mean for surrogacy and adoption legislation? I know that the Law Commission is looking into the matter as part of a three-year review, but I am sure that if the Minister could please update us on it as soon as possible, that would be helpful to families and campaigners.

Has the Department made any assessment of unintended consequences to the way parental orders operate as a result of these measures? Applications for parental orders can be made six weeks after the birth of a child and are made to the Children and Family Court Advisory and Support Service—CAFCASS—for a court fee of £215. Has the Government made any recent assessment of the cost of the court fee and any accessibility issues that it may cause?

The Minister recently said:

“The order will allow a six-month period where an existing sole applicant can retrospectively apply for a parental order for a child born through surrogacy.”—[*Official Report*, 19 July 2018; Vol. 645, c. 38WS.]

Currently, applications can be made six weeks after birth. Why has a six-month period been chosen for retrospective applications, and has any assessment been made of the impact that that could have on the surrogate mother, parents and child?

As I have said, I support the Government in making these changes, so I am happy to end my remarks there.

9.4 am

Andrew Percy (Brigg and Goole) (Con): It is a pleasure to serve under your chairmanship, Mr Evans. On behalf of the all-party parliamentary group on surrogacy, I thank the Minister for the positive way in which she has engaged both with us as a group and with the surrogacy community. I also thank her for the positive language that she has used about surrogacy on numerous occasions, which is new from a Government Minister. Going back decades now, I think there has always been something of a nervousness in Government about the language used around surrogacy, but the Minister has been absolutely

clear that surrogacy is a positive way of creating families, often for less conventional relationships. We thank her for that.

We also thank the Minister specifically for the NHS guidance that she issued through the Department, which several surrogates have already made use of. Imagine being a surrogate who is excited about a new birth but is forced by the hospital to hand over the child in a hospital car park or, worse still, is unable to see their own child after the birth. There is clearly still more work to do in this department, but this is clearly a positive step forward, and the surrogacy community welcomes it.

Similarly, I thank the Minister for the Government funding of the Law Commission review, which the APPG is very engaged in. We have taken evidence over the last few weeks from lawyers, intended parents, surrogates and others. This afternoon we will take evidence from Tom Daley, who went overseas with his partner because of the problems in the UK with obtaining a parental order. There is a lot more to be done on parental orders, particularly on the time it takes to get one in the UK. We look forward to those issues being addressed as part of the Law Commission review.

The APPG and the surrogacy community are happy that the draft order has at last been laid. It comes out of the September 2015 case of *Re Z*, in which the court was unfortunately unable to grant a single male applicant a parental order. There have been delays, some of which came about as a result of potential unintended discrimination that could have come out of the original wording. However, it was absolutely clear when the Minister laid the draft order before Parliament on 19 July this year that her language was very positive. That is to be welcomed.

As I said, laying the order has taken a long time, which has resulted in some people who would by now have become parents being unable to do so, while others have been forced overseas. It has also put the courts in a difficult position in several cases.

Peter Kyle (Hove) (Lab): Does the fact that people have to travel abroad not indicate that this option is available to only those with resources and money? Vast swaths of the population who do not have the resources to travel abroad do not actually have access to surrogacy.

Andrew Percy: That is true in part. There is no doubt that, if people want to go to a model place for surrogacy such as California, it is a very expensive option, although the actual costs paid to the surrogate are generally the same as those in the UK; it is the medical costs and all the rest of it that pushes costs up. People are forced to go, if not to the United States, then to regimes in the world where the systems and protections for the surrogate, let alone the intended families, may not be of a standard that we would be comfortable with. That is why it is vital that we change the law in this country, so that surrogacy can become so much easier for those denied it at present.

Several other cases have come before the courts in which applications for parental orders have unfortunately had to be stayed, or other powers, such as wardship, have had to be used. Although we welcome the draft order, there are still some issues for single people moving forward, which I hope the Minister will confirm will be

[Andrew Percy]

addressed as part of the Law Commission review. For example, under the remedial order, some single people will still be excluded from being parents, while a parent who is not genetically linked to the child will be unable to be granted a parental order. Similar issues could arise if an intended parent dies during the course of a surrogate pregnancy.

There are also sad cases of, for example, women who have received cancer treatment, leaving them unable to use their own uterus or eggs. If they are single and use egg donation, they will not be able to receive a parental order. More work needs to be done to address some of those challenges, and I hope that will be undertaken as part of the Law Commission review.

I thank the Minister again for the incredibly positive way she has engaged. The draft order will enable more people to form families—it will enable more individuals to become part of the surrogacy family, to register with organisations such as Surrogacy UK and to get on with building their families.

9.10 am

Jackie Doyle-Price: I thank hon. Members for their contributions. I particularly thank the hon. Member for Washington and Sunderland West for the constructive way in which she has approached this issue. We want to ensure that the law is fit for purpose in the 21st century, when surrogacy is becoming more common, and I look forward to having further conversations with her as the Law Commission continues its work. It is clear that the use of surrogacy arrangements has grown massively since the original legal framework was drawn up, and we really need to satisfy ourselves that the law is fit for purpose.

The hon. Lady asked when the measure will kick in. It will kick in 14 days after I sign off these statutory instruments following the approval of the House, so we can take action straightaway. Clearly, however, a lot of people have been waiting a considerable time for the change, so it will be possible to make retrospective applications going back six months. We kept that the same as in the previous legislation, but clearly the courts will be able to consider whether the change of law applies to a case and make judgments on that basis.

The hon. Lady also mentioned court fees. Those are of course primarily a Ministry of Justice issue. We are happy to follow up with the MOJ, but I am fairly

confident that the fees will not be excessively burdensome, bearing in mind that parents have to go through the legal process of seeking a parental order as it is.

My hon. Friend the Member for Brigg and Goole showed his great passion for and interest in this subject. He is absolutely right that there are still issues with surrogacy law. It was without hesitation that I approved the grant to the Law Commission to have a good look at this whole area. He specifically mentioned parents with no genetic link to the child and the legal issues that follow from that. It is only when we think about these issues in the round that we realise just how vulnerable both parents and children are when the law is less than satisfactory. I can say to him categorically that the Law Commission absolutely is picking up the genetic link issues in its review, and I am sure it would welcome representations. I was interested to hear about his continuing work on this subject.

The Government recognise that there is a small but important number of individuals who have been waiting patiently for the law to be changed. No matter how small their number, it is essential that we in Parliament ensure that those people's rights are protected and guaranteed, particularly given that we found such an obvious lacuna in our law. Those are people who are not currently recognised legally as the parent of their child, which is not good for the child, either. There are also people waiting to undertake a surrogacy arrangement with the support of a national surrogacy organisation who want the certainty of being able to apply for legal recognition of parenthood before embarking on their journey. That illustrates that people want the responsibility of exercising parenthood, and we absolutely must ensure that the legal framework enables them to make that choice and do it correctly.

Once again, I thank everyone for the spirit in which they approached these measures. We have corrected an injustice here, if I may say so, Mr Evans. I thank everyone for their contributions.

Question put and agreed to.

DRAFT HUMAN FERTILISATION AND EMBRYOLOGY (PARENTAL ORDERS) REGULATIONS 2018

Resolved,

That the Committee has considered the draft Human Fertilisation and Embryology (Parental Orders) Regulations 2018.—(*Jackie Doyle-Price.*)

9.15 am

Committee rose.