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Jackson, Bianca, Horsey, Kirsty and Spearman, Andrew (2021) *Surrogate decision making in crisis*. Journal of Medical Ethics, 48 . pp. 297-298. ISSN 0306-6800.

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Surrogate decision-making in crisis.

Commentary

The case states that a male same-sex couple (the intended fathers) entered into a surrogacy arrangement with an unrelated surrogate (M) using donor sperm and the surrogate's eggs. M is the legal mother pursuant to s33 of the Human Fertilisation and Embryology Act (HFEA) 2008. Though the facts tell us that there was no legally binding arrangement, this is in fact the position of the law: under s1A Surrogacy Arrangements Act, no surrogacy arrangements can ever be binding on the parties.

Issue 1: Whose Sperm?

It is not clear whether the donor sperm is from one of the same-sex couple or not. If it was donor sperm and not from either intended father, this is not an arrangement that would be recognised in law, as one of the men must be genetically related to the child in order for them to obtain legal parenthood via a parental order, under s54 HFEA 2008. They could apply to adopt the child, although they may fall foul of adoption legislation¹ if any money has moved between them and M and they fall within an exemption.² In any event, an adoption cannot be achieved in time for them to obtain legal parenthood in a crisis situation.

In the absence of a biological connection and the resulting legal parenthood (discussed below), in order to obtain parental *responsibility* for the child to allow them to make decisions about Baby T's care, the men would need to apply for leave to apply for a child arrangements order pursuant to s10 Children Act 1989. However, in the circumstances (where the only legal parent that we are aware of is unconscious), an application under the inherent jurisdiction of the court for wardship might be more appropriate.

Issue 2: Is the Surrogate Married/Civilly Partnered?

Even if the donor sperm belonged to one of the intended fathers, it is not clear whether M was married or civilly partnered at the time that treatment was given to conceive the child.³ If she was, her husband/wife/civil partner would be regarded as the legal father/second parent of the child pursuant to either ss35 or 42 HFEA 2008 unless it can be shown they did not consent to the treatment at the time (particularly, although not exclusively, having completed the HFEA's LC Form), and responsible for making decisions about the child's medical care by virtue of holding parental responsibility.

As noted above, in the absence of legal parenthood for either intended father in this situation, in order to obtain parental *responsibility* for the child, the men would either need the husband/wife/civil partner's consent to the intended fathers having parental responsibility and/or a child arrangements order ("lives with", which would bestow parental responsibility) being made in their favour, or to apply for leave to apply for a child arrangements order.

¹ Ss.92(1) & 95 Adoption and Children Act 2002 ("ACA 2002")

² Ibid, ss.92(3) & 96(1)

³ Assuming the pregnancy was achieved via treatment at a licenced centre – if it was not then the legislation does not determine legal parenthood and common law presumptions apply.

If the husband/wife/civil partner refused to be involved or the intended parents differed from that parent in what they thought should happen to Baby T, it is probable that an application under the inherent jurisdiction of the court for wardship would be the most appropriate intervention to ensure no important decisions are made in respect of Baby T without the court.

Issue 3: If One Intended Parent is the Legal Father

If M was neither married nor civilly partnered at the time of Baby T's birth, the genetic intended father of the child would be the legal father unless the non-genetic intended father was designated the legal father under s36 HFEA 2008.⁴ Legal parenthood confers parental responsibility on whichever man is to be regarded as the legal father, which would give him the right to make decisions about Baby T's medical care once the child's birth had been registered.⁵ As M is not able to register the birth, another informant could be engaged but it is likely that in this critical situation birth registration will not yet have occurred.

The legal father could make an urgent application for a child arrangements order that the child "lives with" both intended parents, thereby giving both men parental responsibility. Pursuant to s7 Children Act 1989, where more than one person has parental responsibility for a child, each of them may act alone and without the other (or others) in meeting that responsibility. As such, the legal father of the child can exercise that responsibility even if M is unconscious.

If the clinicians and the legal parent agreed on the treatment, then there would technically be no need for court oversight. However, given the serious nature of the withdrawal of treatment, M's unconsciousness, and the tangled question of parenthood, it would seem appropriate for the court to operate under its inherent jurisdiction. If the legal parent and the clinicians did not agree, the clinicians would need to make an application under the court's inherent jurisdiction in any event.

Issue 4: Parental Order

In theory, the intended fathers could apply for a parental order on an urgent basis, with a view to M's consent being dispensed with under s54(7) HFEA 2008, though it is unclear from the case study whether they meet the remaining criteria. One of the main difficulties with this route is that it necessitates a parental order report, which will take at least eight weeks, and the situation appears critical. It is likely the court would be slow to transfer legal parenthood when the issue can be addressed in the interim by either a child arrangements order or making the child a ward of court.

Issue 5: Legal Reform

Though the clinicians must act according to the law as it is *now*, it is worth noting that the Law Commission of England and Wales, alongside the Scottish Law Commission, is currently reviewing the law on surrogacy.⁶ It will make recommendations to government in 2022. In their

⁴ And subject to the insemination or IVF having taken place in the course of licenced treatment.

⁵ Ss.2(2) & 4(1), Children Act 1989

⁶ <https://www.lawcom.gov.uk/surrogacy/> accessed 17 March 2021

public consultation document, published June 2019, the Law Commissions proposed a new 'pathway to parenthood' that would enable intended parents (provided certain steps are followed) to become legal parents *from birth*, without the need for a parental order.⁷ As long as one of the men in this hypothetical case was the genetic father, they would be able to become legal parents this way. Thus, in the future, it may be that clinical considerations in difficult cases of this nature could be made somewhat easier.

However, this proposal is made subject to the surrogate's 'right to object'. If she exercised that right or, crucially, lacked the capacity to do so, it is proposed that this would revert the arrangement to the parental order route.⁸ It is already the case that, in parental order applications, the court has the ability to make an order without the surrogate's consent, if she lacks the capacity to provide it. It is proposed that this would continue.⁹ In a situation such as we are faced with here, therefore, the Law Commissions' current proposals would unfortunately make no difference, as the same difficulties with the time it takes to obtain a parental order would arise.

⁷ Law Commission of England and Wales and Scottish Law Commission, *Building Families through Surrogacy: A New Law – A Joint Consultation Paper* (6 June 2019), 8.2

⁸ *ibid* 8.29

⁹ *ibid* 8.34