

Looking at the options

Eve Piffaretti and Alison Craggs set out the ways in which an LGBT+ person may become a parent, and the legal obstacles they may face in doing so



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'The proportion of children being adopted by same-sex couples in England is at its highest level, with one in every eight adoptions being by same-sex couples.'

An LGBT+ person wanting to become a parent may decide to foster or adopt a child, or have fertility treatment if they want to have a child that is genetically linked to them. In this article we explore the legal status of LGBT+ parenting where a single person or couple raise one or more children as parents. Figures from the Office of National Statistics (ONS Families and Households 2017) show that there are 34,000 same-sex married couples in the UK, and of them 6,000 have dependent children; that there are 55,000 civil partnership couples, 8,000 of which have dependent children; and that there are 101,000 same-sex cohabiting couples, 4,000 of which have dependent children.

Fostering and adoption

LGBT+ people are able to foster and adopt a child either as an individual or as a couple. The Adoption and Children Act 2002 (ACA 2002) reformed adoption law to provide for adoption orders to be made in favour of single people, married couples and unmarried couples. Section 144(4), ACA 2002 defines a couple as a married couple, civil partners or two people (whether of different sexes or the same sex) living as partners in an enduring family relationship. ACA 2002 enabled same-sex couples to apply to adopt a child for the first time, and since then the number of same-sex couples seeking to adopt has risen steadily.

Potential LGBT+ adopters are protected from discrimination under the Equality Act 2010. Adoption agencies must assess all applications fairly, using the same criteria

whatever the potential adopter's sexual orientation.

Statistics relating to the Family Court for the period July to September 2018 (see: www.legalease.co.uk/family-court-jul-2018) noted the continuing downward trend in the number of adoption applications and orders. This fall has been blamed on the length and complexity of the legal adoption process, improved success rates for fertility treatments such as IVF and couples choosing surrogacy instead. However, the proportion of children being adopted by same-sex couples in England is at its highest level, with one in every eight adoptions being by same-sex couples (see: www.legalease.co.uk/children-looked-after). LGBT+ people can bring fantastic parenting skills to their adopted children. We're thrilled to see agencies consistently recognising that LGBT+ people play a key role in helping transform the lives of our most vulnerable children.

Surrogacy

Surrogacy, when a woman bears a child on behalf of someone else or a couple who are unable to conceive or carry a child themselves and who then intend to become the child's parents, is increasingly becoming an option for single-sex and trans couples wanting to have a child. Full surrogacy occurs where the eggs of the intended mother or a donor are used and there is therefore no genetic connection between the child and the surrogate (also known as host or gestational surrogacy), whereas partial surrogacy involves the surrogate's egg being fertilised with the sperm of the intended father (also known as straight or traditional surrogacy).

Surrogacy is legal in the UK, but surrogacy agreements or arrangements are not legally binding or enforceable. However, such a written and signed agreement or arrangement will stand as a statement of intention about how the surrogacy arrangement will work and each party's commitment to the other prior to the commencement of the surrogacy.

The Surrogacy Arrangements Act 1985 makes it a criminal offence for people to negotiate or arrange a surrogacy arrangement on a commercial basis. There are a number of non-profit, altruistic, organisations that are exempt and who can, therefore, lawfully assist potential surrogates and intended parents to navigate their surrogacy. It is also an offence for anyone to advertise that a woman is willing to enter into or to facilitate the making of a surrogacy arrangement, or that any person is looking for a woman to become a surrogate mother (subject to exemptions for the not-for-profit organisations). There is also an offence to negotiate the terms of a surrogacy agreement for any payment, except for reasonable expenses. Consequently, the intended parents need to understand the risks involved in surrogacy and consider what support they can access to mitigate these prior to the birth. For example, the risk that a surrogate may change her mind about agreeing that the intended parent(s) should become legal parents of a child born through surrogacy via a parental order.

The Human Fertilisation and Embryology Authority (HFEA) is the UK's independent regulator of fertility treatment and research using human embryos and was established by the Human Fertilisation and Embryology Act 1990 (HFEA 1990), as amended. The HFEA's statutory functions are set out at s8, HFEA 1990, and include the licensing and regulation of clinics that offer assisted fertility treatment including the assisted conception necessary for a surrogacy arrangement. Some licensed clinics require that the intended parent(s) have taken legal advice in advance of treatment to ensure there is understanding about the parental order application and the clinic may ask for a letter to confirm that this advice has been sought. Other licensed clinics may want to see the surrogacy agreement to ensure the

main decisions have been discussed and agreed.

Part 2, Human Fertilisation and Embryology Act 2008 (HFEA 2008) deals with the parentage of children conceived by means of assisted reproduction. By virtue of ss54 and 55, HFEA 2008 and Reg 2 and Sch 1,

If at the time of the placement of the embryo or gametes or artificial insemination, the woman is a party to a civil partnership or a same-sex marriage, her civil partner or spouse is to be treated as a parent of the child, unless it was shown that she did not consent to the mother's treatment.

Human Fertilisation and Embryology (Parental Orders) Regulations 2010, SI 2010/985, read with s46, ACA 2002, where a child is born through a surrogacy arrangement using the gametes of at least one intended parent, the intended parents may, if the woman carrying the child consents, apply for a parental order under which the intended parents become parents of the child and the parental responsibility of other individuals is extinguished.

A parental order can, therefore, only be made with the surrogate's consent and transfers legal parenthood from the surrogate (and her spouse or civil partner, if she has one) to the intended parent(s). The order process takes place after the child's birth, with an application to the family court to be made within six months of the birth. Such a parental order will extinguish the status of the surrogate mother and grant full parental status to the applicants. A parental order reporter is appointed by the court to make enquiries and file a report, to provide a safeguard as to the best interests of the child. A sealed copy of the parental order will be sent by a court officer to the Registrar General, and every parental order includes a direction for the Registrar General to make an entry in the parental order register to reflect the order.

Parental order applications are typically heard by lay justices, where the child's place of birth was England and Wales and all parties agree to the making of the order, but may be

heard by a High Court judge where there are questions over whether the parental order criteria are met or if the child is born overseas. The way in which parental orders are granted has been criticised due to the potential difficulties for new intended parents in the intervening period, such as the

ability to make medical treatment decisions about the child. Prior to the parental order being made, the surrogate mother continues to be legally and financially responsible for the child.

Legal parenthood

Section 33(1), HFEA 2008 provides that:

... 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.

Sections 35 and 36, HFEA 2008 set out the situations in which a man may be the father of a child born by assisted reproduction. If at the time of placement or insemination the mother was married, her husband is deemed to be the father for all purposes, even if the sperm was donated by a third-party donor (unless it is shown that he did not consent to the placement or insemination (s35, HFEA 2008)). Otherwise, under s36, HFEA 2008, if the embryo or gametes were placed in the mother in the course of treatment services, the s37, HFEA 2008 'agreed fatherhood conditions' apply, ie where the man remained alive at the relevant time, and the creation of the mother's embryo was not brought about with the man's sperm, that man is to be treated as the father of the child unless one of the exceptions applies.

Section 38, HFEA 2008 confirms that where a person is to be treated as the

father of the children by virtue of ss35 or 36, HFEA 2008, no other person is to be treated as the father of the child.

Section 42, HFEA 2008 extended legal parentage by enabling the civil partner of a woman who was in a civil

2008 operate in an analogous manner to ss36 and 37, HFEA 2008. By virtue of s45(1), HFEA 2008, where a woman is treated under ss42 or 43 as being the parent of a child no man is to be treated as the father of the child.

day of their lives and surrogacy can be the only option for some who want a genetic link to the baby. But the issues are difficult and there is no quick fix.

A second female parent will be treated in a similar way to a father: she will have parental responsibility automatically if she is a party to a civil partnership or a marriage with the mother at the time of the fertility treatment and she consented to that treatment.

partnership at the time of treatment (now extended to a woman in a same-sex marriage by virtue of the Marriage (Same Sex Couples) Act 2013), to become the second legal parent of the child. If at the time of the placement of the embryo or gametes or artificial insemination, the woman is a party to a civil partnership or a same-sex marriage, her civil partner or spouse is to be treated as a parent of the child, unless it was shown that she did not consent to the mother's treatment. The effect is to put civil partners and same-sex spouses on the same footing as opposite-sex married couples under s35, HFEA 2008.

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The parties must be married or in a civil partnership at the relevant time and not judicially separated or subject to a separation order, but the provisions do extend to the parties to a void marriage if either or both of them reasonably believed at that time that the marriage or civil partnership was valid (ss49-50, HFEA 2008).

The case for change

Surrogacy laws are currently under review by both the Law Commission of England and Wales and the Scottish Law Commission, and it is anticipated that a joint consultation paper will be issued during 2019. The Law Commissioner for England and Wales, Professor Nick Hopkins, has stated that:

Our society has moved on from when surrogacy laws were first introduced 30 years ago and, now, they are not fit for purpose. For many, having a child is the best

The Law Commissions have already identified three potential areas of concern as follows (see: www.legalease.co.uk/surrogacy-reform):

- **difficulties with parental orders:** a parental order transfers parentage from the surrogate mother to the intended parents, but that process can only happen after the baby is born and is subject to conditions which may require reform;
- **international surrogacy:** the uncertainty in the current law may encourage use of international arrangements, where there are concerns about the exploitation of surrogates; and
- **how surrogacy is regulated:** the rules governing how surrogacy is undertaken should be brought up to date and further improved.

The results of a survey, *Surrogacy in the UK* (see: www.legalease.co.uk/surrogacy-in-the-uk), were released in December 2018, having been conducted by Kent Law School, on behalf of Surrogacy UK's working group on surrogacy law reform. The survey found that 69% of surrogates believed that the law should be changed so that legal parenthood automatically rests with intended parents at the point of birth, whether genetically related to the child or not. 14% said

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that parenthood should rest with the intended parents from birth where both are genetically related to the child, with others opting for combinations of the surrogate and the intended parent(s) depending on genetic links to the child. The Surrogacy UK review is also considering commercial surrogacy, but the recent survey shows that the majority of surrogates back the status quo, with 71% of those surveyed strongly agreeing or agreeing that they should only be allowed to claim reasonable and verifiable expenses.

Trans people

The Government Equalities Office estimates the size of the trans population in the UK to be in the region of 200,000 to 500,000. Trans people are people whose gender identity is the opposite of the gender assigned to them at birth (for example, a transgender man is someone who has transitioned from female to male). It also includes people who are non-binary and therefore regard themselves as neither a man nor a woman. Gender identity is different to sexual orientation. A transgender person could be heterosexual, lesbian, gay or bisexual.

The Gender Recognition Act 2004 (GRA 2004) does not require a trans person to have undergone any hormone treatment or surgery to be granted a gender recognition certificate (GRC). Those who do undergo hormone treatment or surgery, especially if of child-bearing age, are advised before doing so to consider gamete storage (the storage of eggs or sperm) for future use, either with a partner or using a surrogate.

A trans person may transition by making social changes (for example, changing how they dress and their gender on documents such as their passport, driving licence etc), by medical changes (for example, taking hormones or undergoing surgery) and/or by legal changes (by making an application under the GRA 2004 for a GRC).

Consequences of obtaining a GRC

Section 9(1), GRA 2004 provides that where a GRC is issued to a person, that person's gender becomes for all purposes the acquired gender

(so that, if the acquired gender is the male gender, the person's sex becomes that of a man and, if it is the female gender, the person's sex becomes that of a woman).

However, s12, GRA 2004, which covers parenthood, goes on to state that:

Surrogacy laws are currently under review by both the Law Commission of England and Wales and the Scottish Law Commission, and it is anticipated that a joint consultation paper will be issued during 2019.

The fact that a person's gender has become the acquired gender under [GRA 2004] does not affect the status of the person as the father or mother of a child.

Therefore a trans person's legal status as the father or mother of their child does not change after a GRC has been issued, and neither will their rights and responsibilities for the child. While the trans person's birth certificate will change once they have the GRC, their child's will not. Therefore, a trans man with a GRC would have the legal gender of a man, but still be recorded as the mother of an existing child.

Section 12, GRA 2004 does not mention how the status of the mother or father would be recorded in relation to any child born to him/her after a GRC has been issued. The GRA 2004 does not address non-binary trans parents and therefore it is unclear how their gender would be recorded.

At a preliminary High Court hearing on 7 June 2018, a trans man who had transitioned before giving birth to a child asked the court to allow him to be named as the child's 'father' or 'parent' on the birth certificate, instead of 'mother'. The registrar recording the birth told him that the law required the person who gave birth to the child to be registered as the mother. The applicant is arguing that requiring him to register as the child's 'mother' is contrary to ss9(1) and 12, GRA 2004, and breaches his human rights as to a respect for privacy and family life and non-discrimination

within the meaning of Arts 8 and 14 of the Human Rights Act 1998. While other trans men have given birth, they have, to date, been registered on the child's birth certificate as the child's 'mother'. The president of the Family Division, Sir Andrew McFarlane, heard the application in February 2019,

and while his judgment is awaited, the president said 'I am inviting the government to consider whether the operation of [HFEA 2008] needs to be looked at' (see: www.legalease.co.uk/fertility-law-transgender).

Guardianship

The appointment of a guardian by will, or otherwise, will be a further consideration, but is outside the scope of this article and merits separate consideration.

Conclusion

LGBT+ people are increasingly becoming parents either as individuals or as couples, but the law has struggled to keep pace with the creation of families in varied and non-traditional ways. In February 2019, surgeons from Imperial College London and Oxford University received ethical approval from the NHS to perform 15 womb transplants on infertile women. It is reported that the team is also considering trialling the procedure on those who were born male, after they were approached by a number of trans women. Although it is likely to be several years before such a procedure for trans women can happen, this latest development demonstrates how advances in medical treatments move at a pace. As Professor Nick Hopkins, Law Commissioner for England and Wales, stated in relation to the proposed surrogacy consultation, 'Now we want all those with an interest to get involved and help us make the law fit for the modern world'. ■