



Department
of Health &
Social Care

Human Fertilisation and Embryology (Parental Order) Regulations 2018

A consultation on revised regulations to reflect changes to the Human Fertilisation and Embryology Act 2008 that enable a single person to apply for a parental order

DH ID box
Title: Human Fertilisation and Embryology (Parental Order) Regulations 2018: A consultation on revised regulations to reflect changes to the Human Fertilisation and Embryology Act 2008 that enable a single person to apply for a parental order
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Document Purpose: Consultation
Publication date: March 2018
Target audience: Surrogacy organisations. Law firms dealing with surrogacy arrangements. The judiciary. Anyone interested in entering a surrogacy arrangement.
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Human Fertilisation and Embryology (Parental Order) Regulations 2018

A consultation on revised regulations to reflect changes to the Human Fertilisation and Embryology Act 2008 that enable a single person to apply for a parental order

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Executive summary

The Department of Health laid a remedial order in Parliament for scrutiny on 29 November 2017. The order addresses an incompatibility in Section 54 of *The Human Fertilisation & Embryology Act 2008*, which is concerned with applications for parental orders, which transfers legal parenthood after a surrogacy arrangement.

The High Court made a declaration in May 2016 that the provision in the Human Fertilisation & Embryology Act 2008 which enables couples, but not a single person, to obtain a parental order following surrogacy is incompatible with Article 14, taken in conjunction with Article 8, of the European Convention on Human Rights. *The Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018* amends the primary legislation to enable a single person to apply for a parental order, subject to certain conditions. The Order also includes consequential amendments that are needed to related primary legislation.

The Human Fertilisation and Embryology (Parental Orders) Regulations 2010 modify existing legislation (primary and secondary) to apply selected provisions in respect of adoption to children who are the subject of parental orders. This existing legislation is not directly affected by the remedial order but re-made regulations are necessary in order to be read with the changes made to parental orders made by the remedial order.

The Department has proposed re-making the regulations rather than amending them. This is because they are complicated, consisting of modifications to legislation, and it is clearer to re-make them, as well as ensuring that all the appropriate modifications are captured and that the legislation will work as intended.

1. Overview

Introduction

- 1.1. Surrogacy is when a woman carries a baby for someone who is unable to conceive or carry a child themselves. When a child is born under a surrogacy arrangement, the intended parents of the child may apply to a court for a parental order, which, if granted, would transfer the legal parenthood of the child 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. The order operates like a speeded up form of adoption and must be applied for through the family court in England and Wales, through the Court of Session or Sheriff Court in Scotland and through the Courts & Tribunals Service in Northern Ireland.
- 1.2. Surrogacy has an important role to play in our society, helping to create much-wanted families where that might otherwise not be possible. It enables relatives and friends to provide an altruistic gift to people who aren't able to have a child themselves, and can help people to have their own genetically-related children. The UK Government recognises the value of this in the 21st century where family structures, attitudes and life-styles are much more diverse.

Background - surrogacy arrangements

- 1.3. The Surrogacy Arrangements Act 1985 ("the 1985 Act") regulates certain activities in connection with arrangements that relate to agreements for a woman to carry a child as a surrogate mother. The 1985 Act provides that it is lawful to enter into a surrogacy arrangement in the UK, but it is not enforceable in law. Further, the 1985 Act prohibits the negotiation (and other related activities) of surrogacy arrangements on a commercial basis, although permits non-profit making bodies to assist in making surrogacy arrangements and recovering certain reasonable costs for doing so. The 1985 Act also governs advertisements for surrogacy and provides that it is a criminal offence under the 1985 Act to advertise that you are willing to act as a surrogate, are looking for a surrogate, or are a third party willing to negotiate a surrogacy arrangement (although there are some exceptions for not for profit organisations).

Background – transfer of legal parenthood

- 1.4. Provisions in the Human Fertilisation and Embryology Act 1990 ("the 1990 Act") allowed, where a child was born under a surrogacy arrangement, for the transfer of legal parenthood from the birth mother to the intended parents by means of a parental order. Under the 1990 Act, the court only had the power to grant parental orders to married heterosexual couples.
- 1.5. The Human Fertilisation and Embryology Act 2008 ("the 2008 Act") introduced new provisions to extend eligibility for parental orders following a surrogacy arrangement to reflect broader changes in social policy. Under that Act, a court was given the extended power to grant a parental order to civil partners and couples in long-term relationships where the relevant criteria were satisfied. The Marriage (Same Sex Couples) Act 2013 and the Marriage and Civil Partnership (Scotland) Act 2014 and Civil Partnership Act

2004 (Consequential Provisions and Modifications) Order 2014 (SI 2014/3229) later amended the 2008 Act to include same sex married couples.

- 1.6. The changes in law in relation to surrogacy arrangements have all been focussed on couples and under the current law, a court cannot grant a parental order to a single applicant. The intention was that an individual seeking to acquire legal parenthood of a child born under a surrogacy arrangement would have to adopt the child. The rationale at that time was that the fuller assessment carried out in adoption proceedings was more likely to ensure that a person on their own was able to cope with the demands of bringing up a child.

The legal challenge

- 1.7. In 2015, a UK resident single father, who had a child through a surrogacy arrangement in the USA, applied for a parental order for 'Child Z' through the Family Court. In September 2015, the Court rejected the application as it did not meet the requirements of the 2008 Act, because the father was not applying as part of a couple, and the Court did not consider it possible to "read down" the provisions of the 2008 Act to enable this outcome.
- 1.8. The applicant then brought a challenge under the Human Rights Act, alleging that the provisions of the 2008 Act were in breach of Articles 8 and 14 of the European Convention on Human Rights ("ECHR") in not allowing parental orders for a single person. The Secretary of State for Health was a party to the challenge and conceded that there was a breach of Article 14 (but not Article 8). This recognises the evolving domestic and European Court of Human Rights case law in this area.
- 1.9. On 20 May 2016, the Family Court made a declaration (*Neutral Citation Number: [2016] EWHC 1191 (Fam)*) that the provision in the Human Fertilisation & Embryology Act 2008 which enable couples, but not a single person, to obtain a parental order following surrogacy is incompatible with Article 14 of the European Convention on Human Rights. Article 14 prohibits discrimination in the enjoyment of Convention Rights (in this case, the right to respect for private and family life in Article 8) on the grounds of a person's status, and it was accepted that this could include a single person in this context.

The remedy

- 1.10. *The Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018* was laid in parliament on 29 November 2017 for scrutiny and it is intended that this become law in 2018, subject to Parliament's views.
- 1.11. Provisions for the application and award of parental orders, to transfer legal parenthood following surrogacy, are to be found in Section 54 of the Human Fertilisation & Embryology Act 2008. The draft remedial order replicates the functions of Section 54, which covers an application made by two people, with a new Section 54A for 'one applicant'.
- 1.12. The provisions of the Human Fertilisation & Embryology Act 2008 are supported by *The Human Fertilisation & Embryology (Parental Orders) Regulations 2010*. The regulations provide for specified adoption legislation to be applied, with modifications, to parental orders.

2. A Summary of the Human Fertilisation and Embryology (Parental Orders) Regulations 2018

2.1 The Regulations have been re-made but largely reflect the same position as the original 2010 Regulations. The re-made 2018 regulations tidy up the presentation and numbering of the clauses and remove a small number of out of date references. The Regulations also revoke the 2010 regulations.

Context

2.2 The Human Fertilisation and Embryology Act 1990 included a regulation making power that provided for specified adoption legislation to be applied, with modifications, to parental orders. This also provided for references in any enactment to adoption, an adopted child or an adoptive relationship to be read as including a reference to a parental order.

2.3 The amended Human Fertilisation and Embryology Act 2008 included new provisions for legal parenthood and the award of parental orders in Section 54 and retained the regulation-making power in Section 55. The original 2010 Parental Order regulations brought together powers and modifications from earlier sets of regulations.

Scope

2.4 The legislation that the parental order regulations modify and apply is set out in schedules, which cover respectively:

- The Adoption & Children Act 2002 – which sets out the adoption legislation that is applied and modified to enable parental orders to be made in England & Wales.
- The Adoption & Children (Scotland) Act 2007 - which sets out the adoption legislation that is applied and modified to enable parental orders to be made in Scotland.
- The Adoption (Northern Ireland) Order 1987 - which sets out the adoption legislation that is applied and modified to enable parental orders to be made in Northern Ireland.
- Various necessary modifications to other related legislation, which enable the parental order process work effectively.

What the Regulations do

England & Wales

2.5 Schedule 1 of the regulations makes provision in relation to parental orders granted in England and Wales. Schedule 1 of the draft re-made regulations will apply and modify provisions of the Adoption & Children Act 2002 to parental orders granted in England and Wales. The key provisions are as follows:

The welfare of the child

2.6 The Children Act 1989 makes a child's welfare the paramount consideration of the court when it makes decisions about a child's upbringing and sets out a welfare checklist. The 2002 Adoption Act reflected these principles, making the welfare of the child the paramount consideration of the court in deciding whether to grant an adoption order. The draft regulations therefore enact this provision in relation to parental orders, in line with broader Government policy on child welfare.

2.7 The adoption legislation also sets out a welfare checklist that reflects the provisions in the Children Act 1989. This checklist has been applied and modified in the draft regulations in relation to the granting of parental orders.

Parental Orders

2.8 The draft regulations set out what form a parental order must take and what it means to be the subject of a parental order. The draft regulations achieve this by applying and modifying the definition of an adoption order from the 2002 Act.

2.9 A parental order granted under the amended 2008 Act provides for a child to be treated in law as the child of the intended parent or parents. Once an adoption order has been granted under the 2002 Act, the adopted child is deemed to be the legitimate child of the adopting parents. The draft regulations make equivalent provision for a child subject to a parental order to ensure they will also be deemed to be the legitimate child of the intending parent or parents, and to provide that no-one else will have parental responsibility for that child.

2.10 The draft regulations reflect the changes to the 2008 HFE Act made through the remedial order a single person, subject to restrictions set out in Section 54A can now apply for a parental order.

Court Powers

2.11 The draft regulations apply and modify sections of the adoption legislation, which provide the court with the relevant powers if a child is removed from the intending parents, while the parental order application is pending. The draft regulations enact sections of the adoption legislation that give the court powers where a child is removed from the care of the intending parents once a parental order has been applied for.

Northern Ireland

2.12 Schedule 2 of the regulations makes provision in relation to parental order granted in Northern Ireland. Schedule 2 of the draft regulations will apply and modify provisions of the Adoption (Northern Ireland) Order 1987. The 1987 Order makes similar provisions as the 2002 Act does to England and Wales and the 2007 Act does in Scotland. This means that that the provisions applied and modified for parental orders are also similar and cover the same issues as set out above for the 2002 Act (at paras 2.5- 2.11).

2.13 The draft regulations reflect the changes to the 2008 HFE Act made through the remedial order a single person, subject to restrictions set out in Section 54A can now apply for a parental order.

Scotland

2.14 Schedule 3 of the regulations makes provision in relation to parental orders granted in Scotland. Schedule 3 of the draft regulations will apply and modify provisions of the Adoption & Children (Scotland) Act 2007 to parental orders granted in Scotland. The 2002 Act and the 2007 Act are broadly similar, which means that that the provisions applied and modified for parental orders are also similar and cover the same issues as set out above for the 2002 Act (at paras 2.5- 2.11).

2.15 In Scotland:

- the relevant legislation does not contain a welfare checklist
- the status of illegitimacy has been abolished with the exception of provisions relating to any title, coat of arms, honour or dignity.

The UK as a whole

Parental Order Register

2.16 The 2010 Regulations reflected 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. This will be a certified copy of the entry in the 'Parental Order Register'. The Registrar General will mark the entry in the live birth register as 'Re-registered' (in Scotland the birth entry is marked "Parental Order"). The draft regulations provide for this system of registration to be maintained.

2.17 The relevant Registrar General must make traceable the connection between any entry in the register of births which has been marked "Re-registered" or "Parental Order" and any corresponding entry in the Parental Order Register. Information kept by the relevant Registrar General for this purpose is not open to public inspection or search, and this principle is maintained in the re-made regulations.

Inheritance and succession

2.18 It is also necessary to set out in legislation the inheritance rights of a person who is the subject of a parental order. For example, an adopted child cannot inherit a peerage or title of honour, or any property that is connected to the peerage or title, from one the adopted parents, unless it has been expressly provided for. This applies to a child subject to a parental order

What will implementation cost

2.18 The impact assessment for the proposed policy changes enacted by the remedial order and regulations together is at Annex C. These give a broad outline of the potential costs to business organisations of the proposed changes.

3: Responding to the consultation

Have your say

While the policy change enacted by the remedial order has been set by the Court, your views are invited on the draft regulations that support the implementation of the order, on the Impact Assessment and on any relevant issues that you feel the consultation document has not covered.

We look forward to receiving your views.

Consultation questions related to the draft regulations

Question 1: Do you think the draft regulations are correct and accurate?

Yes/No

Add any additional comments here:

Question 2: Do you think that there any consequential modifications that are missing from the draft regulations?

Yes/No

Add any additional comments here:

Question 3: Are there any impacts on business that you think have not been covered in the accompanying impact assessment documentation?

Yes/No

Add any additional comments here:

The consultation process

This document seeks views on the draft regulations to support the introduction of a remedial order to allow a single person to apply for a parental order to transfer legal parenthood after a surrogacy arrangement.

The consultation is being run in accordance with the Cabinet Office guidance on consultations, which is available at:

<https://www.gov.uk/government/publications/consultation-principles-guidance>

The closing date for the consultation is **Friday 20 April 2018**.

Responses may be submitted via web form at Citizen space, on this link:

<https://consultations.dh.gov.uk/human-tissue/hfe-parental-order-regulations-consultation>

When returning the response form, please state whether you are responding as an individual or representing the views of an organisation. If you are responding on behalf of an organisation, please make it clear who the organisation represents.

If you have any queries related to this consultation, you can email:

poregsconsultation@dh.gsi.gov.uk

or write to:

Parental Order Regulations Consultation
Department of Health & Social Care
Sixth Floor North
39 Victoria Street
London SW1H 0EU

Comments on the consultation process itself

If you have concerns or comments which you would like to make relating specifically to the consultation process itself please contact:

Consultations Coordinator
Department of Health & Social Care
Sixth Floor North
39 Victoria Street
London SW1H 0EU

E-mail: consultations.co-ordinator@dh.gsi.gov.uk

Please do not send consultation responses to this address.

Confidentiality of information

We manage the information you provide in response to this consultation in accordance with the Department of Health Personal Information Charter, which can be found at:

<https://www.gov.uk/government/organisations/department-of-health/about/personal-information-charter>

Information we receive, including personal information, may be published or disclosed in accordance with the access to information regimes, primarily the Freedom of Information Act 2000, the Freedom of Information (Scotland) Act 2002, the Data Protection Act 1998 and the Environmental Information Regulations 2004.

If you want the information that you provide to be treated as confidential, please be aware that, under the Freedom of Information Act, there is a statutory Code of Practice with which public authorities must comply and which deals, among other things, with obligations of confidence. In view of this, it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department of Health.

The Department of Health will process your personal data in accordance with the Data Protection Act and, in most circumstances, this will mean that your personal data will not be disclosed to third parties.

Summary of the consultation

A summary of the responses to this consultation will be made available before or alongside any further action, such as laying legislation before Parliament, and will be placed on the Consultations website.

Annexes

This consultation document has the following annexes, which are published separately:

- Annex A: The Human Fertilisation and Embryology Act 2008 (remedial) Order 2018
- Annex B: The Human Fertilisation and Embryology (Parental Orders) Regulations 2018
- Annex C: Impact Assessment
- Annex D: Equality Impact Assessment