

## **A BRIEF GUIDE TO WHO IS A PARENT AND PARENTAL ORDERS UNDER THE HUMAN FERTILISATION AND EMBRYOLOGY ACT 2008**

### **1. Who is a parent?**

The parts of the 2008 Act defining who is a parent came into force on 6 April 2009 (Human Fertilisation and Embryology Act 2008 (Commencement No 1 and Transitional Provisions) Order 2009, SI 2009/479, amended by SI 2009/2232). The position is as follows:

Unless a parental order or adoption order is made, the woman who carries a child is treated as the child's mother, regardless of the genetic material involved in the conception (s 33). In a case where a child is born as a result of the placing in a woman of an embryo, or of sperm and eggs, or her artificial insemination, the term 'father' or 'parent' may have a special meaning. The rules for determining who, if anyone, is the child's father or parent are complex.

- (1) The usual rebuttable presumption found in section 5 of the Law Reform (Parent and Child) (Scotland) Act 1986 that the mother's husband is the child's father applies. The rules set out at heads (2) and (3) below only apply if that presumption is rebutted (ss 38(3) and 45(3)).
- (2) Where the woman was married at the time of the procedure resulting in conception, but the embryo was created using sperm from someone other than her husband, the husband is treated as the father, unless it can be shown that he did not consent to the procedure. Similarly if the woman was a party to a civil partnership, then the other party to the civil partnership is to be treated as a parent of the child, unless it can be shown that she did not consent to the procedure (ss 35 and 42).
- (3) If there is no one who could be treated as father or parent by virtue of head (2), and the embryo or sperm and eggs were placed in a woman ("W") or she was artificially inseminated in the course of licenced treatment services provided in the United Kingdom then the father ("M") or other parent ("P") may be identified by satisfaction of certain conditions. These are that M or P has given notice consenting to being treated as father or parent, W has given notice consenting to the person being so treated, and neither has given notice withdrawing consent, nor has W given notice that she consents to someone else being treated as father or parent. Notices must usually be in writing. W cannot be within the permitted degrees of relationship with M or P (see s 58(2)). M or P must be alive at the time of the treatment. In the case of M the creation of the embryo cannot have been brought about using his sperm (ss 36, 37, 43 and 44).
- (4) Where a person falls to be treated as a father or parent under head (2) or (3), no one else can be treated as father (ss 38(1) and 45(1)).
- (5) A sperm donor who gave consent to the use of his sperm within the regulatory framework of the Human Fertilisation and Embryology Act 1990 is not a father (s 41(1)).

- (6) A person whose sperm is used after his death should not be treated as a father, save that he may in certain limited circumstances be entered as father on a child's birth certificate. There is a similar provision for entry of a deceased husband or civil partner's name on the birth certificate where donated sperm have been used to create an embryo. There are also provisions for entry on the birth certificate of the name of a deceased person where there has been transfer of an embryo in the course of licenced treatment services and conditions similar to those mentioned in (3) above apply (ss 40 and 46).
- (7) A sperm donor who gives sperm outwith the regulatory framework of the 2008 Act is the father, unless the woman is married and her husband consented to the procedure resulting in her carrying the child, in which case head (2) applies.
- (8) A woman who has donated her eggs does not thereby fall to be treated as the parent of a child carried by another woman (s 47).

The provisions above may result in the child having only one parent, namely the woman who is treated as the mother. A father or second female parent who is identified under these rules set out in the Human Fertilisation and Embryology Act 2008 will not have parental responsibilities and parental rights, unless he or she has entitlement by operation of law, or by agreement, or if an order is made under the Children (Scotland) Act 1995. Regardless of whether or not he or she has responsibilities and rights, his or her agreement to a parental order is required. The provisions of the Human Fertilisation and Embryology Act 2008 as to who is a parent are superseded in the event that an adoption order is granted. The child's parents will then be the adopters (ss 33(2), 38(4) and 45(4)).

## **2. Parental Orders**

A surrogacy arrangement is an arrangement where one woman agrees to carry a child for another. Such a child would usually be regarded as the child of the mother who carried him or her. The Human Fertilisation and Embryology Act 2008 permits the court, in certain limited circumstances, to make a parental order which results in the child being treated as the child of another woman and her husband, her civil partner, or a person with whom she is living in an enduring family relationship. Parental orders are in many respects similar to adoption orders.

The provisions of the Act in relation to parental orders came into force on 6 April 2010 (Human Fertilisation and Embryology Act 2008 (Commencement No 3) Order 2010, SI 2010/987), replacing orders under s 30 of the Human Fertilisation and Embryology Act 1990.

A parental order under section 54 of the Human Fertilisation and Embryology Act 2008 may be made where:

- (1) an application is made by a married couple, civil partners of each other, or two persons who are living as partners in an enduring family relationship and are not within prohibited degrees of relationship in relation to each other (see s 58(2));
- (2) the child has been carried by a woman other than one of the applicants as a result of the placing in her of an embryo or sperm and eggs or her artificial insemination;
- (3) the gametes of at least one of the applicants were used to bring about the creation of the embryo;
- (4) an application is made within six months of the birth of the child;
- (5) the child's home is with the applicants at the time of the application and at the time the order is made;
- (6) either or both of the applicants is domiciled in the United Kingdom or the Channel Islands or the Isle of Man at the time of the application and at the time the order is made;
- (7) both the applicants have attained the age of 18 by the time the order is made;
- (8) the woman who carried the child and any other person who is a parent (including a person treated as the father or parent by virtue of the relevant legislation) have freely, and with full understanding of what is involved, agreed unconditionally to the making of the order.

If any of these conditions is not satisfied, a parental order cannot be granted. That does not, however, prevent an application being made for an adoption order.

While the court has no power to dispense with the agreement to a parental order of a parent, agreement is not required from a person who cannot be found, or is incapable of giving agreement. A mother cannot give agreement to a parental order less than six weeks after the birth of the child.

A parental order cannot be made where money, or other benefit, has been given or received by either of the applicants for or in consideration of the making of the order, agreement to the order, the handing over of the child to the applicants, or the making of any arrangements with a view to the order. Commercial surrogacy arrangements cannot usually lead to a parental order. Payments may be made in respect of expenses reasonably incurred, without this affecting an application for a parental order. If a payment other than for expenses has been made, this may be authorised by the court which determines the application for a parental order. The application may then proceed (see *C v S* 1996 SLT 1387).

### **3. Application of Adoption and Children (Scotland) Act 2007**

The Human Fertilisation and Embryology Act 2008 provides for regulations applying the statutory provisions about adoption to parental orders (s 55). The Human Fertilisation and Embryology (Parental Orders) Regulations 2010, SI 2010/985 apply, subject to appropriate modifications, many of the features of adoption to parental orders (see reg 4 and Sch 3). These include restrictions on removal of the child while an application is pending, conditions

for making orders, effects of an order and provisions relating to registration in the Parental Order Register.

The sections of the 2007 Act that apply (subject to appropriate modifications are:

14(1) to (4) and (8)

22, 24, 27(1)

33(1) and (2), 35, 40(1) to (3), (5), (6) and (10)

41, 42, 43(1) to (3)

53, 54, 55(1) to (5), 56, 57

58(1), (2), (6) and (10)

77(1), 108(1) and (2), 109(1), 111, 113

114(1) to (4), 117, 118, 119(1)

Sch 1 paras 1, 2, 4, 5, 7, 8

#### **4. Court rules**

A new chapter of Court of Session rules has been added for parental orders under the 2008 Act, chapter 97.

In the sheriff court the rules are found in a new Part VI of the Child Care and Maintenance Rules 1997.

The rules are similar to those which apply in adoption in a number of respects, including the possibility of securing a serial number to protect the petitioners' identity and provision for a reporting officer and curator *ad litem*.

*Janys M Scott QC*

4 June 2010