



# Association of **Lawyers for Children**

Promoting justice for children and young people

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The Association of Lawyers for Children (hereafter “ALC”) is a national association of lawyers working in the field of children law. It has close to 1,000 members, mainly solicitors and family law barristers who represent children, parents and other adult parties, or local authorities. Other legal practitioners and academics are also members. Its Executive Committee members are drawn from a wide range of experienced practitioners from both sides of the legal profession practising in different areas of the country. Several leading members are specialists with over 20 years’ experience in children law, including local government legal services. Many have written books and articles and lectured about aspects of children law and hold judicial office. The ALC exists to promote access to and equality of justice for children and young people within the legal system in England and Wales in the following ways:

- i. lobbying in favour of establishing properly funded legal mechanisms to enable all children and young people to have access to justice;
- ii. lobbying against the diminution of such mechanisms;
- iii. campaigning and advocating on against any form of discrimination which may affect children within the family justice system
- iv. providing high quality legal training, focusing on the needs of lawyers and non-lawyers concerned with cases relating to the rights, welfare, health and development of children;
- v. providing a forum for the exchange of information and views on the development of the law in relation to children and young people;
- vi. being a reference point for members of the profession, governmental organisations and pressure groups interested in children law and practice; and
- vii. funding or co-funding research where we perceive gaps in knowledge or evidence relating to changes in policy and practice in children proceedings.

The ALC is a stakeholder in respect of all government consultations pertaining to law and practice in the field of children law and welcomes this opportunity to provide its views in respect of this consultation.

## **Introduction**

1. The ALC confines itself in this response document to addressing those areas of the Commission's proposals that are within its areas of expertise with a particular focus on the rights of children and the importance of ensuring that children's interests are properly and fully represented at all parts of the pre-proceedings stage and within proceedings when a court is considering the acquisition of legal parentage in any context including surrogacy.
2. It is the ALC view that the role of the parental order reporter provides vital protection of the rights and interests of the individual child within the court process. They are independent of any party and they provide the Court with important information as to whether the making of the order serves the welfare best interests of the subject child. It is the ALC view that a parental order should only be made if the child's welfare supports the making of that order. This is consistent with the making of any order which assigns legal parenthood and indeed parental rights under English Law.
3. The ALC reminds the Commission of the domestic and international legal obligations which require the state to safeguard and promote the rights of children within their family and their right to identity. Any legal process which seeks to establish or indeed to terminate a legal relationship between children and their genetic parents must be compliant with the fair trial obligations of Article 6 and the right to respect for family and private life under Article 8 of the European Convention on Human Rights. As such it is imperative that any legal process which is proposed is thorough, transparent and fully cognisant of the rights of the child. Moreover Article 7 of the UNCRC requires that the state protect the child's right to identity. The ALC takes the view that the parental order reporter plays an important function by investigating the child's circumstances and advising the Court as to whether a parental order serves the child's welfare best interests.
4. The ALC would have grave concerns about the removal of the role of the parental order reporter from the parental order process. The ALC considers it to be vital to the welfare of children that this provision is retained in any scheme for the making of parental orders which might emerge in the future legislation. While it recognises that intended parents have found the process to be cumbersome that in itself cannot

justify removing the independent investigative role of the parental order reporter. This is particularly important in international surrogacy cases. The ALC considers that great caution is required when downgrading the importance of an independent investigation of a child's circumstances. The effect of a parental order is lifelong. It transfers legal parenthood. There is a wider public interest in ensuring that the child's circumstances are fully and independently investigated. It also has to be balanced against the potential status benefits that the child might lose, if the surrogate is not the legal mother of the child from birth, for example immigration status. Currently a child will benefit from the immigration status of his legal parents and his intended parents as the making of a parental order does not remove this status from a child. This is a real benefit to a child that will be lost if the surrogate is never a legal parent of the child.

**Removal of Post-Birth Welfare Assessment [Paras 7.70 – 7.77; 8.38 – 8.51; 8.104 – 8.106]**

5. The Law Commission proposes that, within the “new pathway”, all vestiges of a post-birth welfare assessment would be removed. Instead, *‘account should be taken of the welfare of any child that may be born as a result of the surrogacy arrangement at the pre-conception stage’*. In making this recommendation, the Law Commission draws parallels with: (a) children conceived by way of fertility treatment at a UK Clinic; and, (b) children conceived naturally.
6. There are a number of potential difficulties with this approach:
  - a. A pre-birth welfare assessment of any sort is inevitably undertaken in a vacuum and at a level of generality, without reference to the individual child conceived. Any such assessment is likely to be less rigorous and offer a lesser form of protection for the child. It also cannot take into consideration any other relevant factors post birth which have an impact on the child throughout his life.
  - b. This is particularly the case given that, on the whole, a pre-birth welfare assessment of the form contemplated is predominantly based on self-reporting by the parents (albeit that there is guidance in the Code of Practice and the Law Commission propose criminal record checks). The individuals at the clinics who

would be ensuring that such forms are completed are not child welfare professionals, and the level of scrutiny applied to forms completed by intended parents at UK clinics has been shown to be limited (See the line of cases from *Re HFEA 2008 (A and other) (legal parenthood :written consent)* [2015] 1WLR 1325.

- c. The parallel with children conceived by way of fertility treatment is not necessarily an accurate one. In terms of the need for a sufficiently rigorous welfare assessment, there is a fundamental difference between fertility treatment assisting in the conception of a child who will be carried by the intended mother, and the conception of life to be carried by a person intending to relinquish care upon birth. However small, the risk of exploitation or welfare concerns arising is greater in the latter than the former. The ALC notes that where there is a risk of exploitation impacting on the welfare of the child particularly where the child may be genetically related to the gestational mother who acts as surrogate, there is a strong imperative that there is an independent holistic welfare analysis post birth such as is currently carried out by the parental order reporter.
- d. The ALC considers that the parallel with natural conception is also an inaccurate one. Inevitably, however a child is conceived, there is always the possibility for previously unknown welfare concerns to arise post-birth. However, the difference from the child's perspective is the greater potential in a surrogacy arrangement for complex adult dynamics to give rise to such concerns.
- e. The Law Commission also proceeds on the basis that *'the way that the law currently works means that the court's discretion about whether to make a parental order – once it has the ability to do so – is, in practice, very much circumscribed'* (para 7.73), and that *'we note that surrogate-born babies currently live with their intended parents whilst awaiting the making of a parental order. A number of months may pass from the birth of the child to the child's welfare being considered...'* (para 7.71). However:
  - i. This wrongly implies that, to date, the exercise of the court's discretion has been little more than a “rubber stamp”.

- ii. The rigour of a welfare assessment isn't necessarily dependent on its proximity to the birth, but on the ability of a suitably qualified professional meeting with both parents with the child in their home.
7. The Law Commission's proposal to remove a post-birth welfare assessment is based, in part, on the perceived benefit that this brings to the intended parents in avoiding the need for any post-birth court process. However, this overstates the manner in which the balance is currently struck. A large number of individuals seek a parental order without legal advice, and in such circumstances the parental order reporter collates the relevant material for the court. Although rigorous, the welfare assessment is a comparatively non-invasive process, involving a single home visit by the CAFCASS officer. The ALC does not support the proposal and considers that it does not provide sufficient safeguards for the rights and interests of the subject children.
8. The Law Commission argues that *'we provisionally consider that the child's welfare is better protected by the screening and procedural requirements being imposed prior to conception...and by enabling the intended parents to be legal parents from the birth of the child'*. However, while certainty as to legal parenthood at the time of birth, with the consequential stability that it brings, is not to be discounted, this has to be balanced against the need for there to be a proper welfare assessment tailored to the individual child in the circumstances in which they will be living, as opposed to prior to their conception. The ALC considers that the current scheme whereby the welfare assessment falls first to the parental order reporter and then to the Court should be retained.

**Invitation to Consider Whether There Should be Any Amendment to the Welfare checklists [Paras 8.107 – 8.121]**

9. The Law Commission invites consultees to give a view as to whether there should be amendments to either of the following:

- a. The welfare checklist in the Children Act 1989, so as to provide additional factors to take into account when determining the arrangements for children born by way of a surrogacy arrangement;
  - b. The welfare checklist in the Adoption and Children Act 2002, so as to provide additional factors to take into account when deciding whether to make a parental order.
10. The Law Commission at paragraph 8.116 provides a list of possible additions.
11. The ALC considers that there does not seem to be any need to amend either checklist. The courts have already had to determine a number of issues in both contexts, in which the welfare checklists as expressed have proved sufficient to guide the court's decision-making. There is a real risk that including additional factors over-complicates any welfare determination, or prejudices one factor above others. The ALC considers that the welfare checklist which is consistent with other legislation should be retained in its current form.
12. The court, and in particular the Court of Appeal, have emphasised how the current and well-tested approach to welfare is sufficient to enable the court to consider the individual circumstances of each case and attach appropriate weight to various factors, depending on the circumstances (e.g. *Re H (Surrogacy Breakdown)* [2017] EWCA CIV 1798; *Re M (A Child)* [2017] WCA Civ 228).

### **Automatic Parental Responsibility [Paras 8.131 – 8.132]**

13. The Law Commission proposes that, in relation to children born outside the “new pathway”, the intended parents should acquire parental responsibility automatically where: (a) the child is living with them or being cared for by them; and, (b) they intend to apply for a parental order.
14. On one view, there is a benefit to the child from this reform as it ensures that, at the earliest opportunity, his carer's have parental responsibility for him and so are able to

make urgent or important decisions if necessary. However, the ALC notes that there are some issues with this proposal:

- a. It is unclear how such PR would be conferred. If it is intended to be automatically, the criteria proposed are arguably too vague and could lead to uncertainty.
- b. For example, it is unclear whether this would confer PR on intended parents who are engaged in a welfare dispute as to the arrangements for a child with the surrogate, and who care for the child in a shared care arrangement pending a welfare determination by the court. (Arguably, there is a benefit to it applying in such circumstances, as it levels the playing field to some extent pending the court's determination and reduces the risk of unilateral action by one set of parents).

#### **Enabling the Court to Dispense with the Surrogate's Consent [Paras 11.50 – 11.58]**

15. The Law Commission proposes that the criteria for a parental order be amended, such that the consent of the surrogate is not an absolute requirement. It proposes that the court have the power to dispense with the surrogate's consent if the child's welfare requires it, in a manner akin to adoption.
16. The proposal is that the court should have the power to dispense with the surrogate's consent, and that of any other legal parent, where: (a) the child is living with the intended parents with the surrogate or any other legal parent's consent; or, (b) following a determination by the court that the child should live with (or have his "primary residence" with) the intended parents. This power would be subject to the same welfare principle as within the Adoption and Children Act 2002.
17. While the aim of this proposal is laudable, avoiding a situation such as that in *Re AB (Surrogacy: Consent)* [2017] 2 FLR 217, there are a number of difficulties with it:
  - a. This power would usually only fall to be exercised where there is, or has been, a dispute between the surrogate and the intended parents. The

proposal wrongly proceeds on the basis that the outcome of that dispute would be binary – the child lives with one set of parents or the other. That ignores the possibility (likelihood?) that the court may order some form of shared care arrangement.

- b. This proposal risks encouraging unnecessary litigation as to the arrangements for the child, as a “win” in the form of a “live with” order would make the difference between a parental order being available or not.
- c. The ALC is concerned is that any legal framework which might dispense with the consent of the surrogate adopt the approach set out in the Adoption and Children 2002 at s.52, which provides that the consent of the birth parent may not be dispensed save in limited welfare driven circumstances. As such the ALC proposes that the consent of the surrogate should only be dispensed with if;
  - i. The surrogate and her husband cannot be found
  - ii. The child’s welfare requires a parental order to be made.
- d. The ALC considers that there is some benefit to the interest of children generally but within the context of removing and attributing legal parenthood that there is consistency of approaches between different legislative frameworks. Moreover it is the view of the ALC that in circumstances where the Court is invited to dispense with the consent of the surrogate because the child’s welfare requires it, a parental order reporter should be mandated by legislation to provide a report to the Court as to whether that is the case. The ALC considers that to be necessary to consistently safeguard and promote the interests of children.

**Association of Lawyers for Children**

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