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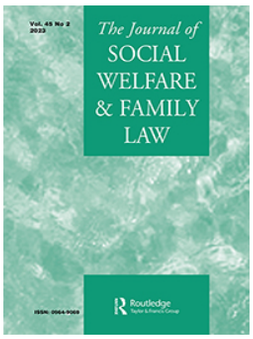
DOI:
10.1080/09649069.2023.2243153

Document Version
Publisher's PDF, also known as Version of record

Citation for published version (Harvard):
Mahmoud, Z 2023, 'Mother today, stranger tomorrow?', *Journal of Social Welfare and Family Law*.
https://doi.org/10.1080/09649069.2023.2243153



Routledge
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Journal of Social Welfare and Family Law

ISSN: (Print) (Online) Journal homepage: https://www.tandfonline.com/loi/rjsf20

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To cite this article: Zaina Mahmoud (14 Aug 2023): Mother today, stranger tomorrow?, Journal of Social Welfare and Family Law, DOI: 10.1080/09649069.2023.2243153

To link to this article: https://doi.org/10.1080/09649069.2023.2243153

JOURNAL OF SOCIAL WELFARE AND FAMILY LAW
https://doi.org/10.1080/09649069.2023.2243153

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KEYWORDS Surrogacy; parental order; legal motherhood; consent

In the United Kingdom, legal motherhood is allocated on the basis of gestation alone (Births and Deaths Registration Act 1953, s 2; Human Fertilisation and Embryology Act 2008 ('HFEA'), s 33(1)). This results in an undesirable situation in surrogacy arrangements, with the surrogate automatically recognised as the child's legal mother at birth. A Parental Order (PO) is a legal mechanism recognising 'legal parentage around an already concluded lineage connection' (*AB v CT (Parental Order: Consent of Surrogate Mother)* [2015] EWFC 12), extinguishing the surrogate's legal motherhood and recognising the intended parents (IPs) as the child's legal parents. Sections 54, 54A of the HFEA 2008 outline the criteria necessary for a PO to be granted, though recent case law reveals how almost all these requirements have lost their legal weight. In *Re C (Surrogacy: Consent*) [2023] EWCA Civ 16, the Court of Appeal underlined the importance of the surrogate's consent to the PO, which must be freely obtained, with full understanding of what is involved, and unconditional, no earlier than six weeks post-birth (HFEA 2008, ss 54(6)-(7)).

Where a surrogate refuses to consent because she wishes to raise the child herself, the courts decide with whom the child shall live by applying the welfare checklist set out in s 1 of the Children Act 1989 (*Re Z* (*Surrogacy Agreements: Child Arrangement Orders)* [2016] EWFC 34). In other cases, where a surrogate has refused to consent to a PO, without any intention of playing a part in the child's life, the courts made it clear that adoption orders are inappropriate mechanisms to vest the IPs with legal parenthood. Instead, a child arrangements order under section 8 of the Children Act 1989 can be made in favour of the IPs, while their PO application continues to be stayed (*Re AB (Surrogacy: Consent)* [2016] EWHC 2643 (Fam)).

However, in *Re C*, it was not that the surrogate (A) outright refused to consent: A agreed that the IPs would raise the child (C) as the legal parents, but her consent was conditional on her being a significant person to C, albeit not as a mother [**10**]. After A's sister introduced her to the IPs, A offered to act as a traditional surrogate for them. Following artificial insemination of A's egg with one of the IP's sperm, A became pregnant with C. As the pregnancy progressed, the relationship between A and the IPs deteriorated rapidly. Though A had always anticipated she would consent, after C's birth she opposed their PO application [**10**]. In evidence, A stated that she 'couldn't lie and say

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that [she gives] consent unconditionally' [**35**], and agreed to the PO on two conditions: a child arrangements order providing for monthly contact and a prohibited steps order preventing the IPs from moving without her written agreement [**10**]. Her 'unconditional' consent was due to her not seeing any other way to move forward without it [**38**].

The Court of Appeal asked three questions: (1) whether A provided free and unconditional consent to the PO, (2) whether the ECHR allows for the court to dispense with A's consent, and (3) what order could be made, if the answer to (1) and (2) was 'no' [**53**]. Jackson LJ noted that since A's consent was provided on the promise of a child arrangements order, it was 'not merely reluctant but neither free nor unconditional' and remitted the PO application [**60, 65**]; A's right to refuse consent to the PO was 'a pillar of the legislation' [**61**]. Any judicial overreach would 'go against the grain' of the legislation. Jackson LJ concluded that the PO should be remitted, and though C remains with the IPs, 'the appropriate legal mechanism for that, and the question of contact with [A] are matters that are beyond the scope of this appeal' [**63**].

In 2019, the Law Commission of England and Wales and the Scottish Law Commission (the Law Commissions) undertook a joint project reviewing the legal framework, recognising that the current law was not in the best interests of surrogates, IPs, and children born through surrogacy. Law Commissions (2023) propose a regulated surrogacy scheme referred to as the 'new pathway' (*para 1.10*). The facts of *Re C* allow for a discussion of how the Law Commissions' proposals could impact surrogacy decisions.

Under the 'new pathway', recognition of the IPs' legal parenthood shifts from a judicial process after the birth (through the PO) to an administrative one, enabling them to become the child's legal parents at birth provided that aligns with the surrogate's intention (*para 2.12*). The new pathway introduces various pre-conception screening and safeguarding checks, and – importantly—requires oversight from a Regulated Surrogacy Organisation (RSO). However, the surrogacy in *Re C* was independently arranged, that is, without involvement of any surrogacy organisation, as is the case for most domestic traditional surrogacy arrangements (Law Commission 2019). As the new pathway requires RSO oversight, their arrangement would not have followed the new pathway.

Under the proposed reforms, the IPs would have automatic parental responsibility as C was living with them and they would have had to apply for a PO (*para 5.44, 5.84(3)*). Additionally, they would fall within section 10 of the Children Act 1989, such that they would be eligible to apply for a child arrangements order without leave of the court – pending the determination of their PO application (*para 5.99*). If their PO application was granted, then A could seek leave of the court to apply for a section 8 order; if the IPs' PO application was unsuccessful, then they could seek leave to apply for a section 8 order (*para 5.107*).

Unlike the current framework, under the proposed reforms, the court would be able to dispense with A's consent to the PO, if doing so would be in C's best interests: C is living with the IPs and the only remaining link with A is her legal parental status (*paras 5.110, 10.134, 10.138, 10.142*). As A is genetically related to C and there has been increased awareness of children's right to know their genetic origins, it is likely that the IP's successful PO application – extinguishing A's legal parenthood – would have been accompanied by a child arrangements order, if A were to apply for this order. In this way, an answer is provided to Jackson LJ's question of what appropriate legal mechanism would allow for C to remain with the IPs, while still having contact with A.

Alternatively, assuming that A and the IPs had engaged in surrogacy on the new pathway, with RSO oversight, A would have the right to withdraw consent, but there would be different consequences depending on when this right was exercised: if done pre-birth, a PO is required for the IPs to gain legal parenthood, but if done post-birth, A would have to apply for a PO in her favour, as the IPs would automatically be recognised as the legal parents from birth (*Chapter 4*, 2023).

As the relationship deteriorated during the pregnancy, it is possible that A would have withdrawn her consent during the pregnancy, resulting in her recognition as the legal mother. The IPs would be eligible to apply for a child arrangements order under section 8 of the Children Act 1989 without leave of the court – pending their PO application. As discussed above, the court would be able to dispense with A's consent to the PO, and the IPs' PO application would be successful.

Alternatively, as A stated that she had always anticipated she would have consented to the PO, it is possible that she would have withdrawn her consent post-birth within the proposed six week period in the new pathway. A would not be C's legal mother (*para 10.90*), and the IPs would remain the legal parents provided C is living with them. A's parental responsibility would continue until her PO application is granted or refused. Certain criteria must be satisfied for her successful PO application: giving notice of her decision 'that she wants to be treated in law as the parent of the child' to the IPs and the RSO, and her being domiciled or habitually resident in the UK (*Draft Surrogacy Bill s 21(5), (8)*). More importantly, the success of the PO application hinges on whether it would be in C's best interests, which, as explained above, would be satisfied. A is domiciled in the UK and the facts of *Re C* reveal her opposition to the PO application was accompanied by a letter to them explaining her position [**6**]. As such, these criteria are met, and the RSO would be required to provide 'social, emotional and financial support to the surrogate' (*para 4.127*, 2023).

The law does not account for the possibility of legal recognition of someone in A's circumstances without it being as a legal parent – more specifically, a mother – which is clearly inappropriate. The reforms proposed in the Law Commission's Final Report are a step towards a more nuanced approach to parenthood and caring responsibilities, but arguably don't go far enough in recognising the potential multiplicity of relationships emerging from surrogacy. A did not want to be C's mother, but wanted to be a significant person to him and have contact with him.

Disclosure statement

No potential conflict of interest was reported by the author.

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