

## Chapter 7: Parenthood and Parental Responsibility

### Question One

Felicity and Gabriel have lived together for ten years. Five years ago they decided to start a family and although Felicity became pregnant without difficulty, she suffered several miscarriages. Felicity discovered that she has a medical condition that prevents her from carrying a baby to full term. Felicity's cousin, Hayley, who is not married or in a relationship, agreed to have a baby for them and was implanted with an embryo created using Gabriel's sperm and Felicity's egg. The treatment took place at a licensed clinic. Last week Hayley gave birth to a baby girl, Ida. She has decided that she does not want to give the baby to Felicity and Gabriel. Felicity says that she has to give the baby to them, as she and George are Ida's real parents.

- a) Advise Felicity and Gabriel.
- b) What would the position be if Hayley attempted to hand the baby over but Felicity and Gabriel didn't want her?

### Answer Guidance

This problem question focuses on legal parenthood and surrogacy, both of which should be defined and explained. Students should be aware that surrogacy agreements are not legally binding under s.1(A) of the Surrogacy Arrangements Act 1985 and should therefore consider who is the legal mother and father of Ida under the common law and the Human Fertilisation and Embryology Act 2008. Particular reference should be made to the *Amphill Peerage Case* [1977] AC 547 and s.33(1) of the HFEA 2008. Students should also point out that Gabriel is not considered a sperm donor for the purpose of s.41(1) HFEA 2008. The answer should then explain why a parental order, which can be used to transfer parenthood and parental responsibility to the commissioning couple in a surrogacy situation under s.54 HFEA 2008, would not be granted by the courts. Alternatives to a parental order e.g. child arrangements orders, should be mentioned. Cases such as *Re P (Surrogacy: Residence)* [2008] Fam Law 18 and *CW v NT* and another [2011] EWHC 33 should be included in the answer. The second part of the question requires candidates to explain the legal position if Felicity and Gabriel change their mind. Candidates should point out that the commissioning couple cannot be forced to go through with the agreement or to have any contact with the child, however, Gabriel would be liable to pay child support. If Hayley does not want to raise the child, local authority intervention would be required and adoption should be considered.

## Question Two

With reference to the Common Law and Statute explain how the law determines the legal parents of a child and outline the consequences of legal parenthood.

## Answer Guidance

This essay question invites students to discuss legal parenthood, which should be distinguished from genetic parentage, social parenting and parental responsibility. The answer should begin with an explanation of the Common Law rules, which were developed before artificial methods of conception became possible. The Banbury Peerage Case (1811) and the Amphyll Peerage Case [1977] AC 547 on paternity and maternity respectively, should be included in the answer. Students can also discuss how genetic paternity can be established with reference to the s.20(1) of the Family Law Reform Act 1969. The answer should then consider how the provisions of the Human Fertilisation and Embryology Act 2008 (previously 1990) displace the Common Law rules. Particular reference should be made to s.33(1) of the HFEA 2008 regarding maternity and sections 41(1) and 35-37 HFEA 2008 on paternity. The position in relation to same sex couples should also be considered (s.42-44 HFEA 2008). The consequences of legal parenthood must then be discussed e.g. liability for child support, inheritance, the right to apply for an order under s.8 of the Children Act 1989 without leave, nationality and adoption. Students should point out that a legal parent will only have the right to make decisions regarding the child's upbringing if he also has parental responsibility.

### Question Three

Explain the meaning of parental responsibility and consider whether the law relating to parental responsibility discriminates against fathers. Do you think that the law should be changed ?

### Answer Guidance

Parental responsibility (PR) is defined in s.3(1) of the Children Act 1989 as 'all rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property'. This question requires candidates to explore the meaning of parental responsibility with reference to case law and statute and to explain who has parental responsibility for a child. S.2(1) of the Children Act 1989 provides that the mother and father have PR if they were married when the child was born. If they were not married, the mother has automatic PR but the father only has PR if he has acquired it (s.2(2)). The means of acquiring parental responsibility contained in s.4 i.e. joint registration of the birth, parental responsibility agreement and parental responsibility order must be explained and evaluated. The approach taken by the court in relation to PR orders must be considered (*Re M (Contact: Parental Responsibility)* [2001] 2 FLR 342) and the termination of acquired parental responsibility should also be discussed. Students should then assess whether the different treatment of fathers and mothers is justified and whether the law should be changed. Reference can be made to article 8 of the European Convention on Human Rights and to *Smallwood v UK* (1999) 27 EHRR 155.

#### **Question Four**

Evaluate the differences between automatic and acquired parental responsibility.

#### **Answer Guidance**

This essay question requires students to evaluate the differences between automatic and acquired parental responsibility. First, it is necessary to define parental responsibility (s.3(1) of the Children Act 1989) and to explain when it can be exercised. The answer should then identify who has automatic parental responsibility for a child i.e. the mother of the child and the father of the child if he was married to the mother when the child was born (s.2(1) and 2(2) Children Act 1989). If the father was not married to the mother at the time of the birth he can acquire parental responsibility under s.4 of the Act. The means of acquiring parental responsibility i.e. joint registration of the birth, parental responsibility agreement and parental responsibility order should be explained and evaluated. A key point to mention is that automatic parental responsibility can only be terminated if an adoption or parental order is made whereas acquired parental responsibility can also be terminated under s.4(2) of the Children Act 1989 (see *Re D (A Child)* [2014] EWCA Civ 315). Students should also point out that non-parents can acquire parental responsibility for a child e.g. step parents (s.4A(1)) and the local authority if a care order is made (s.33).