

The Chosen Middle Ground: England, Surrogacy Law and the International Arena

Natalie Gamble and Louisa Ghevaert, *Partners, Gamble and Ghevaert LLP*

Surrogacy (whereby a woman carries a child for someone else with the intention of handing the child over at birth) is a controversial subject which raises emotive social, ethical and legal issues. The UK Government did not substantially review the law governing surrogacy as part of its overhaul of assisted reproduction law in the Human Fertilisation and Embryology Act 2008 and this was a missed opportunity to introduce some much needed reform, particularly in the light of the growing phenomenon of international surrogacy. This is not the first time that government has shied away from addressing surrogacy law proactively. It has consistently taken a laissez-faire approach, allowing the law in England and Wales to become ever more problematic in a fast moving global arena. As other countries become more permissive in their approach to surrogacy, and fertility treatment and fertility tourism continue to grow in popularity, the middle ground approach of English law is facing difficult new challenges. The law is no longer keeping pace, and British fertility patients seeking to satisfy deep seated desires to start a family are increasingly falling into major difficulties as a result of complexities in surrogacy law and limited public information. This raises the question: what can or should be done about surrogacy law in England and Wales, as international surrogacy arrangements increasingly reach a critical mass?

The Warnock Report

To understand the inherently complex nature of the problem requires an understanding of the historical context. The Committee of Inquiry into Human Fertilisation and Embryology, chaired by Baroness Warnock, was established in 1982 and reported in 1984 ('the Warnock Report'). Its purpose was to consider the ethical implications of assisted reproduction, including surrogacy, following the birth of the first test tube baby in 1978 and in the knowledge that fertility treatment was here to stay. Its findings set the tone and basis of surrogacy legislation that continues today.

The committee was unable to reach agreement about surrogacy which they said 'presented us with some of the most difficult problems we encountered'. The committee placed great weight on the moral and social objections to surrogacy, agreeing unanimously that surrogacy solely for convenience was 'totally ethically unacceptable'. Although the committee recognised some potential benefits, including the generosity of the surrogate mother's act and the happiness of the commissioning parents, it commented that:

'even in compelling medical circumstances the danger of exploitation of one human being by another appears to the majority of us far to outweigh the potential benefits, in almost every case. That people should treat others as a means to their own ends, however desirable the consequences, must always be liable to moral objection. Such treatment of one person by another becomes positively exploitative when financial interests are involved.'

The Warnock Report therefore recommended that legislation be enacted to criminalise any third party involvement in surrogacy, with offences catching introductory organisations and fertility doctors who treated surrogate mothers. Regulation of surrogacy was opposed on the basis that this might in fact encourage its development.

While the Warnock Report therefore stopped short of recommending the criminalisation of the surrogate mother and commissioning parents, its recommendations would (had they been implemented) have prohibited all surrogacy arrangements in the UK other than those made privately without the involvement of any medical services. Surrogacy was regarded on the whole as distasteful, and conservative morality prescribed that it was in society's best interests to legislate to discourage it on public policy grounds. However, the committee was not in agreement and a dissenting opinion was also attached as an appendix to the Warnock Report. This minority view, which took a more liberal approach, argued that public opinion on surrogacy was not yet full formed and that, with demand likely to continue, the door should be left ajar. The minority too strongly opposed commercial surrogacy, and recommended that, if surrogacy was allowed, it should operate only on a non-commercial basis and that it should be closely regulated.

Post Warnock

The subsequent legislation regulating surrogacy practice in England and Wales was, however, haphazard and did not reflect a concerted policy approach taking up either of the alternative Warnock recommendations: surrogacy was neither fully outlawed nor regulated. The Surrogacy Arrangements Act 1985 ('the 1985 Act') and provisions in the Human Fertilisation and Embryology Act 1990 ('the 1990 Act') arguably represented instead a knee-jerk reaction to surrounding events with little in the way of joined up thinking even at this early stage.

To set this in context, the 1985 Act was enacted swiftly following the highly publicised 'Baby Cotton'

Features

case (*Re C (A Minor) (Wardship: Surrogacy)* [1985] FLR 846, [1985] Fam Law 191), a year after the Warnock Report. The case involved a child born in the UK following a surrogacy arrangement between the commissioning parents and surrogate mother Kim Cotton, who was paid £6,500. Although all involved consented to the handover of the child, the local authority intervened and made the child a ward of court. Mr Justice Latey eventually ruled that the care of the child should be given to the commissioning parents on welfare grounds, noting that the question of payments did not fall to be considered in the case before him since there was no application for adoption. He did, however, comment that this aspect of the case raised 'difficult and delicate problems of ethics, morality and social desirability' which were under 'active consideration elsewhere'.

The 1985 Act subsequently addressed this legal 'gap', attempting to stem concerns about the potential exploitation of surrogate mothers by prohibiting commercially arranged surrogacy. It became a criminal offence to advertise for a surrogate mother, to advertise one's services as a surrogate mother, and to facilitate a surrogacy arrangement on a commercial basis. The focus of the 1985 Act was to ban commercial surrogacy in principle and to try to limit surrogacy in its practical application. However, it omitted to deal in any detail with altruistic surrogacy arrangements, and nor did it expressly deal with the thorny issue of payments by setting parameters for acceptable levels of payment to surrogate mothers.

Notwithstanding this backdrop, the demand for surrogacy continued (as predicted by the dissenting view of the Warnock Committee) and in 1987, the court was again forced to deal with a surrogacy arrangement in the case of *Re Adoption Application (Payment for Adoption)* [1987] 2 FLR 291. In this case, Mr Justice Latey was faced with an application for adoption by commissioning parents who had paid £5,000 to their surrogate mother. Mr Justice Latey ruled that the payments were compensation rather than payments but that, even if they were payments, he had the power to authorise them retrospectively and would do so in order to grant the adoption order. The child involved was by this time 2 years old and happily settled with the commissioning parents and Mr Justice Latey acknowledged that it would have been very difficult for him to have refused the adoption order, notwithstanding the payments to the surrogate mother.

Three years later, there followed the Parliamentary debates on the groundbreaking Human Fertilisation and Embryology Act 1990 ('the 1990 Act'), the first piece of legislation in the world to create a comprehensive system of regulation for fertility treatment. But when the 1990 Act was introduced to Parliament, there was very little mention of surrogacy beyond making absolutely clear, through the insertion of a new s 1A into the 1985 Act, that surrogacy arrangements were unenforceable. Surrogacy was not seen as a priority; rather as a restricted practice which would only occur in a handful of cases.

What was to become s 30 of the 1990 Act, enacting for the first time a process whereby commissioning parents could apply for a parental order to reassign legal parenthood (as opposed to relying on adoption law), was only inserted at the Report Stage of the Bill as a last minute amendment. It was precipitated by the case of a couple who conceived twins following a surrogacy arrangement and complained to their MP in reaction to involvement by their local authority that they must apply to adopt their children. As the genetic parents they objected, and their dispute with their local authority subsequently led to wardship proceedings (*Re W (Minors) (Surrogacy)* [1991] 1 FLR 385). The couple's MP proposed an amendment to the Bill, which would allow married couples to obtain parental rights for their child without relying on adoption law. The government supported the amendment which became s 30 of the 1990 Act, although it did not come into force until 1994 and most of the detail was left to be worked out in subsequent regulations.

The Brazier Report

By the mid 1990s it was becoming increasingly apparent that attitudes to surrogacy were shifting. This was reflected in the British Medical Association's publication in 1996 of 'Changing Conceptions of Motherhood', a paper which reviewed surrogacy practice in Britain and endorsed surrogacy as an acceptable last resort fertility treatment. There was also growing evidence that fertility clinics licensed by the Human Fertilisation and Embryology Authority were, with the HFEA's authorisation, offering IVF and other treatment services to surrogate mothers, adding respectability to the practice of surrogacy.

Against this perceptible shift in opinion, the new Labour government commissioned the Brazier Report in June 1997. The committee, chaired by Professor Margaret Brazier, was instructed to examine surrogacy law and practice 'to ensure that the law continued to meet public concerns', although the issue of whether commercial payments or enforceable arrangements should be permitted was specifically excluded from the remit of inquiry. The Brazier Report observed that surrogacy law had evolved on the periphery of English fertility law to date, stating: 'We find that the incomplete implementation of the recommendations of either the majority or the minority of the Warnock Committee created a policy vacuum within which surrogacy has developed in a haphazard fashion.' The Report went on to echo the minority Warnock Committee view, recommending the regulation of surrogacy by the Department of Health, a centralised Code of Practice, new legislation to set out more clearly the categories of expenses allowed and a requirement for all parental order applications to be heard in the High Court. However, like the Warnock Report, the recommendations of the Brazier Report on surrogacy were never implemented.

The Latest Round of Legislation

The government's review of fertility law through the Human Fertilisation and Embryology Act 2008 ('the 2008 Act') last year once again failed to review the issue of surrogacy thoroughly. Some minor changes have been made by the legislation – for example extending entitlement to apply for a parental order to unmarried and same sex couples (although not single men and women) and clarifying that non-profit making surrogacy agencies can charge for some of their services – but the basic structure of the law remains unaltered.

So Where Does the Law Stand Now?

Surrogacy arrangements in the UK are lawful, although it is an offence for third parties to broker arrangements on a commercial basis, and it is an offence to advertise in connection with making a surrogacy arrangement. In practice, several non-profit making agencies have grown up in the UK which assist contacts to be made between surrogates and commissioning parents. These agencies (as a result of their non-commercial nature) have never been prosecuted under the 1985 Act and have now been formally legalised through the 2008 Act. However, the reality is that, for patients not lucky enough to have a friend or relative to volunteer, the process of finding a suitable UK surrogate mother is often long and uncertain.

Surrogacy arrangements in the UK are subject to complex rules on legal parenthood and commissioning parents will not automatically be treated as the legal parents of the child, even if the child is theirs biologically. The legal mother at birth will always be the surrogate mother under English law. Who is the legal father depends on the marital status of the surrogate mother: if she is married or in a civil partnership at conception, her husband/partner will be the irrefutable second legal parent; if she is single, the commissioning father can claim fatherhood if he is the biological father.

In either case, the commissioning parents may apply to the court within 6 months of the birth for a parental order (currently under s 30 of the 1990 Act, although this will be replaced by s 54 of the 2008 Act as from 6 April 2010). A parental order reassigns parenthood to both commissioning parents and extinguishes the status of the surrogate mother (and her husband/partner). Various conditions must be met for the order to be granted including, most crucially in the international context, that at least one of the commissioning parents must be domiciled in a part of the UK, and that no more than reasonable expenses has been paid to the surrogate mother, unless the payment is authorised by the court.

The grant of a parental order also relies on the consent of the surrogate mother; parenthood will only be transferred to the commissioning parents if the surrogate mother (and her husband) agree, and if the child is in the care of the commissioning parents at both the time of the application and the time of the

order. An arrangement which is reneged on cannot be enforced through the courts contractually (although in practice the family courts may be willing to intercede, as in *Re N (A Child)* [2008] 1 FLR 198). In other words, English law allows and supports surrogacy if it fits the model deemed acceptable: altruistic, non-commercial, consenting and privately arranged.

English Law in its International Context

This middle ground approach – allowing surrogacy but seeking to control the form it takes – is tricky, and in practice it has had the effect internationally over the past few years of making the UK both an importer and exporter of surrogacy. Various European countries (including France, Italy, Turkey and Germany) take a more restrictive approach than the UK. Fertility patients living in such countries are attracted to the UK as a surrogacy haven within Europe. At the same time, the delay and uncertainty experienced by British couples looking for a surrogate mother in the UK drives them abroad to more liberal jurisdictions where commercial surrogacy is permitted, arrangements are legally enforceable and surrogates are freely available. India, certain US states and Eastern Europe are increasingly renowned as surrogacy 'hotspots' internationally and there is anecdotal evidence that the numbers of British patients travelling abroad for surrogacy is increasing rapidly (see the London Evening Standard 'Surrogate baby delivered in India every 48 hours', 20 May 2009).

One should not underestimate the impact of globalisation and the information revolution on the phenomenon of cross-border surrogacy. With foreign fertility clinics in places like India and the USA now actively promoting their services to the British market, and with global information at everyone's fingertips, fertility tourism is not a phenomenon which is likely to go away. So what are the implications under English law for those who cross borders for surrogacy?

Foreign Couples Coming to the UK for Surrogacy

English law is drafted specifically to deter the use of the UK for forum shopping on surrogacy. In addition to wider rules of jurisdiction, s 30(3) of the 1990 Act provides that one of the conditions for obtaining a parental order is that at least one of the commissioning parents is domiciled in a part of the UK, Channel Islands or Isle of Man. The court has no power to waive this requirement, which means that if a commissioning couple does not satisfy the domicile requirement, a parental order will simply not be available.

This is exactly what happened in the case of *Re G (Surrogacy: Foreign Domicile)* [2008] 1 FLR 1047. The case involved a Turkish couple who travelled to the UK and conceived with a British surrogate mother. When the couple applied for a parental order

Features

(having been assured by the surrogacy agency which facilitated the arrangement that other foreign couples had successfully obtained such an order in the past), concerns over domicile resulted in the case being transferred to the High Court where Mr Justice McFarlane held that a parental order could not be given. There followed 9 months of litigation which ultimately resulted in the grant of an order under s 84 of the Adoption and Children Act 2002, granting parental responsibility to the commissioning parents and authorising the child to be taken out of the UK to be adopted in Turkey.

Although the position was ultimately successfully resolved in favour of the commissioning parents, Mr Justice McFarlane warned that English law should not be used by foreign couples seeking to evade more restrictive home legislation and that, to compensate the public purse, any similar future cases could expect costs orders to be made accordingly. Mr Justice McFarlane also expressed his concerns about the lack of regulation of surrogacy in the UK (again echoing the Warnock minority view and the Brazier Report) and sent a copy of his judgment to the government to urge reform.

British Couples Going Abroad for Surrogacy

Even more worrying difficulties arise for British couples who go abroad for surrogacy. It is easy to understand the draw of foreign surrogacy for British fertility patients. In contrast to the informality, uncertainty and delay of a potential UK surrogacy arrangement, countries which permit surrogacy without such restrictions offer immediate treatment with a surrogate mother sourced by the foreign clinic (or an associated agency), underpinned by an enforceable agreement which in many cases allows the commissioning parents to be named on a foreign birth certificate. But there is a legal minefield waiting to catch such prospective patients, something vividly demonstrated by the case of *Re X and Y (Foreign Surrogacy)* [2009] 1 FLR 733. In this case, heard in the High Court last year, a British couple conceived twins with a Ukrainian surrogate mother through a commercial surrogacy arrangement. Although the commissioning parents were treated as the legal parents in the Ukraine and named on the Ukrainian birth certificate, English surrogacy law did not recognise their parental status and so did not allow them to confer British citizenship status on the children.

The crux of the legal problem in *Re X and Y* centred around the application of the 1990 Act parenthood provisions. Section 27 of the 1990 Act (now s 33 of the 2008 Act) states that the woman who carries a child is its legal mother. Section 28 of the 1990 Act (now s 35 of the 2008 Act, with an equivalent s 42 applying to civil partners as from 6 April 2009) provides that the carrying mother's husband is the legal father of a child unless it is shown he did not consent to the conception. Although these provisions benefit patients conceiving with donor eggs or sperm, in surrogacy cases they

have the effect that, if the surrogate mother is married at conception, the surrogate mother and her husband will be the legal parents at birth and English law will treat neither commissioning parent as a legal parent.

One of the chief difficulties with English law as it affects international surrogacy arrangements is that the parenthood provisions in the 1990 Act are stated to apply 'whether the woman was in the United Kingdom or elsewhere' at the time of conception, and so are explicitly of extra-territorial effect. In *Re X and Y*, the outcome was that neither the British commissioning parents (in the UK) nor the Ukrainian surrogate parents (in the Ukraine) had legal responsibility for the children at birth and as a result, the twins were born stateless and with no entitlement to enter the UK. Had the Home Office not been persuaded to grant temporary clearance on a discretionary basis, the children could have been abandoned to state care in the Ukraine when the British parents' tourist visas expired, and the British parents may then have been unable to obtain a parental order both with regard to jurisdiction and on the basis that the children's home was not with them at the time of the order.

The Issue of Payments

Of course, the big problem with resolving the legal difficulties in such cases is payments. Since the thing which drove the parents abroad is almost inevitably a desire to access a more liberal surrogacy framework, the likelihood of commercial payments having been made to the surrogate mother is high. The court has the power to authorise a payment in excess of payments under s 30(7) of the 1990 Act, but given the policy background set out above, such decisions are not made lightly. *Re X and Y* represents only the second reported case to authorise a payment in excess of expenses under s 30(7), and the amount of £23,000 authorised in the case represents a near doubling of the previous highest amount authorised of £12,000.

The chief difficulty for the court, of course, is that by the time it is asked to authorise the payments, the child in question has been born and its welfare weighs heavily against the public policy imperative of prohibiting commercial payments. As Mr Justice Hedley noted in *Re X and Y*, welfare and public policy are 'two competing and potentially irreconcilable concepts' and:

'it is almost impossible to imagine a set of circumstances in which by the time the case comes to court, the welfare of any child (particularly a foreign child) would not be gravely compromised (at the very least) by a refusal to make an order'.

Having said this, achieving a parental order in a commercial surrogacy situation is not a straightforward exercise and, following *Re X and Y*, it is now clear that any application for a parental

order involving a question over payments will be heard in the High Court and the circumstances considered very carefully.

The Problem with the Current Law

Both these recent cross-border cases demonstrate the creativity of the courts in finding alternative solutions where a surrogacy arrangement does not fit the traditionally acceptable model, and demonstrate that in practice the courts will go to great lengths to protect the welfare of the child. But the cases are difficult and complex, and carry a heavy cost for those involved. What we now have is therefore the worst of all worlds. The law neither effectively restricts commercial or cross-border surrogacy, nor adequately protects children born as a result. Our restrictions which seek to control commercial surrogacy have been shown to be ineffective in practice, with the courts acknowledging that welfare is always likely to be given priority. At the same time, children born through such arrangements face legal complexities which leave them vulnerable in the absence of expensive and complex litigation.

It is also concerning that the legal expense and complication involved in resolving the issues, and the illusion of parental authority which comes from a foreign birth certificate, may encourage commissioning parents who do manage to secure entry into the UK to omit (knowingly or innocently) to apply for a parental order on their return home. Since s 30(2) of the 1990 Act imposes a non-extendable time limit of 6 months from the birth for the commissioning parents to apply for a parental order, those who fail to do so may well be left caring for a child illegally and without parental responsibility, and without an easy remedy if the problems are revealed at a later stage.

What is the Solution?

The first solution has to be better information: with no one responsible for regulating surrogacy in the UK and foreign clinics offering seemingly attractive packages, it is all too easy for prospective parents to create a surrogate pregnancy without being aware of the potential legal complications. Better public information about the path ahead will enable people to make more informed choices. But this alone is not enough. We need a review of our legislation, and the creation of law which for the first time acknowledges the reality of surrogacy and adopts active measures to balance and protect the interests of the

commissioning parents, the surrogate parents and child appropriately, in both domestic and international cases.

One possible solution for the UK might be to consider regulation involving a pre-birth legal process so that commissioning parents could seek to resolve the legal issues in advance of the birth (perhaps without entirely extinguishing the surrogate mother's status at this stage if this were felt inappropriate). This is something adopted by various states in the USA, where those involved in surrogacy arrangements apply to court or complete paperwork at a much earlier stage to enable the commissioning parents to be treated as the legal parents from birth. This can enable appropriate counselling and support to be provided to all those involved at an early stage, thereby protecting against exploitation, and incentives could be offered to commissioning parents to make use of the process by way of offering entitlements to maternity leave and the prospect of being named on the birth certificate. Regulatory involvement at an earlier stage would also provide the opportunity for preventative intervention into the issue of payments, albeit that there needs to be a realistic acceptance that in foreign arrangements more liberal attitudes to payment are likely to be the norm. Although the detail of such a scheme would clearly need careful thought, tackling the issues at an earlier stage is surely a better approach than leaving breaches of the law to be discovered only after a child is born, by which time welfare considerations are bound to preside and the court will, although possibly at great expense and complexity, be compelled to find some solution.

Any new legislation also needs to be realistic and pragmatic and to understand the realities of our modern globalised world. The desire to procreate is one of the most fundamental human imperatives, and while differing regulatory approaches to surrogacy persist around the world, people will cross borders irrespective of the legal complexities. There may be very good justification for adopting a moral high ground, but any attempt by the law to mould surrogacy to the way we would like it to be in an ideal world has to be tempered by the realisation that there is a limit to what domestic legislation can achieve. And what makes this such a difficult issue is that we cannot simply leave those who defy the law to suffer the consequences, since that means abandoning vulnerable new born children to an uncertain future. In an increasingly globalised world, we need to review surrogacy law properly for the first time and we need to do so with a pragmatic international perspective.