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Are contracts and pre-birth orders the way forward for UK surrogacy?

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International surrogacy is becoming an increasingly common way of building a family for UK parents. In October 2014, Jessica Lee MP spoke to the UK Parliament of the estimated 1,000 to 2,000 children born per year through surrogacy to UK parents (with up to 95% now born overseas). She described the current law as outdated and ill-equipped, particularly where international surrogacy arrangements are concerned. On the campaign trail in April 2015, Nick Clegg told Pink News that 'we should be learning from the experience of couples who have used surrogacy, and looking at how full legalisation has worked in places like California'. Despite legal changes in the UK which have been generally supportive of alternative families and surrogacy (including same-sex marriage, and maternity leave rights for parents through surrogacy) there has not been a full review of UK surrogacy since the 1980s, and the law needs to catch up with reality. This article considers in more detail Ms Lee's proposals for a system of surrogacy contracts and pre-birth orders, and considers whether a properly structured surrogacy system in the UK might better safeguard parents, surrogates and most importantly children.

The current law, its origins and problems

UK surrogacy law can be split into two distinct areas: legal parentage and the rules relating to surrogacy services in the UK.

Legal parentage after surrogacy

UK law dictates that, regardless of where a child is born, the surrogate is the child's legal mother (s 33 of the Human Fertilisation and Embryology Act 2008 ('HFEA 2008')). If the surrogate is married or in a civil partnership, her husband, wife or civil partner is the child's other legal parent (ss 35 and 42 HFEA 2008). If the surrogate is unmarried, the intended father (or one of the intended fathers if a gay couple) is the legal father. The mechanism designed to transfer legal parentage to the intended parents is a parental order, which is a UK court process that takes place post-birth (s 54 HFEA 2008).

This leaves the child in a kind of 'legal limbo' in the period between birth and the granting of a parental order, which can take many months. In international cases, there is typically a mismatch between the law on parentage in the country where the child is born and the law in the UK, so that children are born with no legal parents anywhere in the world, often 'marooned stateless and parentless' (*Re X and Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam), [2009] 1 FLR 733, para [10]). This causes immediate practical difficulties around parental responsibility and immigration (with children waiting many months for documentation permitting entry to the UK) but it also fundamentally fails to recognise the child's identity, and biological and social ties, as protected by Art 8 of the European Convention on Human Rights ('ECHR') and Art 8 of the United Nations Convention on the Rights of the Child ('UNCRC') (*Marckx v Belgium* (Application No 6833/74) (1979–80) 2 EHRR 330, ECHR, *Kroon v Netherlands* (1995) 19 EHRR 263, *A and Another v P and Others* [2011] EWHC 1738 (Fam), [2012] 2 FLR 145, paras [24]–[25]). As Munby P stated in *Re X (A Child) (Surrogacy: Time Limit)* [2014] EWHC 3135 (Fam), [2015] 1 FLR 349 '[s]ection 54 goes to the most fundamental aspects of status and, transcending even status, to the very identity of the child as a human being: who he is and who his

parents are. It is central to his being, whether as an individual or as a member of his family' (para [54]). UK law's failure to recognise the child as a member of the right legal family from birth is inconsistent with the protection given to other children born through assisted reproduction, particularly those born as a result of egg and sperm donation where the intended parents are legal parents from conception.

While parental orders provide a remedy, it is a remedy too late and fraught with problems. This is perhaps not surprising given that parental orders were never a properly considered legal framework, but an afterthought added to the Human Fertilisation and Embryology Bill in 1990 just 5 weeks before the Bill's final reading and with very little parliamentary discussion. At the time, the focus of the law was on IVF and egg donation (hence the rule that the woman who gives birth is the legal mother); surrogacy was in its infancy and international surrogacy completely unheard of. Parental orders were perhaps an adequate remedy for a handful of UK surrogacy cases, but they were never a proper structure for managing surrogacy in the thousands.

The basic problem is that UK law requires the family courts to vet surrogacy arrangements which have already taken place. It creates a set of criteria which (in hindsight) each individual surrogacy arrangement must meet to be acceptable. Since by the time the case comes to court, a child's welfare is at stake, the court is always under considerable pressure to find a way of making a parental order even if the criteria are not comfortably fulfilled. In practice, the court has employed considerable flexibility and common sense in meeting this challenge, to the benefit of children, but this in turn has created law which is complex and confusing.

The most obvious example is the rules intended to restrict payments. One of the criteria of s 54 is that the surrogate mother (and surrogacy agency) should not receive any payments in excess of reasonable expenses, although, if this does occur, the court is able to retrospectively authorise such payments. However, as Hedley J stated in *Re X and Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam), [2009] 1 FLR 733 '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' (para [24]). As such, the UK court has never refused to authorise commercial payments, even though some cases have involved very large sums of money (for example, $56,750 in *J v G (Parental Orders)* [2013] EWHC 1432 (Fam), [2014] 1 FLR 297). Although this trend is positive in its protection of children's rights and welfare, it makes the alleged UK policy of permitting only 'altruistic' surrogacy an illusion rather than a reality. When one adds the fact that surrogates in the UK have been routinely paid £15,000 or more for many years (without much reference to what the true expenses are, and without any apparent difficulties arising in subsequent parental order applications heard by magistrates) it is clear that UK law does in fact already permit payments of more than expenses for surrogacy, even if it pretends not to do so.

There are many other problems with the parental order system. The apparently mandatory 6-month deadline for making a parental order application was recently described by Munby P as 'nonsensical' (para [55]) and, effectively, ignored (again, with commendable flexibility in terms of child welfare, but serving to further confuse the boundaries of the law).

Notwithstanding the court's flexibility, some children born through surrogacy remain disenfranchised from any legal protection. Single parents who have children through surrogacy are unable to apply for parental orders (notwithstanding that the policy against single parents is inconsistent with the law on adoption and donor insemination). Parents with a long-term but not permanent home in the UK cannot meet the requirement that one or both 'must' be domiciled in the UK (also inconsistent with adoption law, which looks to whether the parents are domiciled or habitually resident in the UK).

Overall, UK law on legal parentage following surrogacy is no longer fit for purpose and we need to start with a clean sheet of paper.

Surrogacy services

Surrogacy services in the UK are restricted by the Surrogacy Arrangements Act 1985, which was rushed through Parliament in response to a media scandal. Its aim was to stop the development of surrogacy as a practice by making it a risky business, and by limiting the means by which parents and surrogates could make contact with each other. As well as making agreements between surrogates and commissioning parents unenforceable (s 1A), the Act makes it a criminal offence for any third party to broker a surrogacy arrangement for payment (ss 2 and 4). There are also extensive anti-advertising provisions, making it a criminal offence to publish or distribute via any medium an advertisement 'that any person is or may be willing to enter into a surrogacy arrangement or to negotiate or facilitate the making of a surrogacy arrangement' or 'that any person is looking for a woman willing to become a surrogate mother or for persons wanting a woman to carry a child as a surrogate mother' (s 3). Although the HFEA 2008 introduced some exceptions in relation to not-for-profit organisations, allowing them to charge a reasonable fee to recoup some of their costs (ss 2(2A)–(2C), (5A), (8A)–(8B)) and to advertise under certain circumstances (s 3(1A)), the prohibition on commercial agencies still significantly limits the availability of experienced third party intermediaries and appropriate support services for surrogacy in the UK. It does not, of course, restrict the availability of such surrogacy services internationally; nor does or could UK law prevent parents from accessing those services.

The 1985 Act intended to stop the development of surrogacy in the UK, and its focus was therefore restrictive rather than regulatory. In fact, what it achieved was the growth of an informal and unregulated UK surrogacy industry, a wild west which co-exists somewhat bizarrely with the highly regulated UK fertility sector. UK surrogacy matches are now commonly made on Facebook groups and unregulated websites with no screening, advice or professional support, UK lawyers are barred from drafting agreements (even as non-binding statements of intention), and parents and surrogates are expected to enter into surrogacy arrangements with no legal structure or certainty. Without the intervention of well-informed professionals, such as those trained in child welfare, law and healthcare, and the provision of appropriate, high-quality support services, such as counselling and legal advice, parties risk receiving inadequate support and information during and after the surrogacy process.

An example of the damaging impact of informal agreements is *Re TT (Surrogacy)* [2011] EWHC 33, [2011] 2 FLR 392. This case concerned an informal surrogacy agreement made via the internet, which led to acrimony between the parties and a bitter dispute in the courts as to the terms of the agreement and the child's place of residence. As Baker J noted, those entering into these kinds of internet-facilitated agreements 'do not have the advantage of the advice, counselling and support that the established agencies provide' (para [2]). A more recent example is *JP v LP and Others (Surrogacy Arrangement: Wardship)* [2014] EWHC 595 (Fam), [2015] 1 FLR 307, again involving a private surrogacy arrangement, in which King J emphasised the 'real dangers which can arise . . . where assistance is not sought at a regulated fertility clinic ... At a licensed clinic, consideration will be given to the welfare of a child born as a result of the surrogacy arrangement and counselling services will be provided to the parties which will include the provision of information about the likely repercussions of a surrogacy arrangement and the importance of obtaining a parental order' (para [39]).

Given this context in the UK, it is not surprising that so many parents are instead

now choosing to go overseas to countries where they can engage professional agencies and enter into binding surrogacy contracts, even if there are significant challenges. In addition to the difficulties around parentage and immigration described above, the lack of regulation and appropriate international minimum standards create other significant issues, such as the potential exploitation of both intended parents and surrogate mothers, unreliable legal frameworks and varying standards in healthcare and fertility treatment. Internationally, there are considerable differences in how surrogacy is managed. In the USA, surrogates are typically well-educated and enter into arrangements with the benefit of legal advice having undergone extensive medical and psychological screening. In India, there is little direct relationship between the parties which means that considerable trust is placed on the agencies involved to ensure that surrogates are properly informed and supported, with the risks of exploitation considerably higher given the levels of poverty.

Although the Hague Conference has been looking into the possibility of an international instrument to regulate surrogacy, which it is hoped will introduce minimum protections, it is still at a very early stage and as such it is highly unlikely that any meaningful international regulation will be forthcoming in the near future.

Policy and ethics

UK policy on surrogacy comes historically from the *Warnock Report*, and the reaction to the case of Baby Cotton in the mid-1980s. The Warnock Committee asserted that surrogacy presented a 'danger of exploitation of one human being by another' especially 'when financial interests are involved' (paras 8.17–8.18). However, in reality, the issues around payment and exploitation are much more complex. It could be argued that underpayment of surrogates carries just as much risk of exploitation as the offer of excessive payment, especially given the risks associated with pregnancy and childbirth. There is also the risk for intended parents to be financially exploited by surrogates, rather than the other way around. In a recent UK case a 'fake surrogate' was jailed for fraud after pretending to be pregnant to several desperate couples simultaneously and extorting tens of thousands of pounds from them (*Fake Surrogate Mother Louise Pollard Jailed*, BBC, 16 June 2014).

In various US states which permit commercial surrogacy, concerns about potential exploitation are tackled by ensuring that all those entering into a surrogacy agreement have counselling, legal advice and medical and psychological screening to ensure that they are fully informed about all the risks and implications before they go ahead. Payments for inconvenience (which can be distinguished from payment for the purchase of children) are permitted without restriction, but must be agreed transparently in advance in a clear written contract. Ironically, the typical compensatory payment for US surrogates is $25,000 to $35,000, which is not disproportionate to the £15,000 plus expenses often paid to UK surrogates. The Californian approach seems a much more sophisticated approach to preventing exploitation than that of UK law, where the restrictions on contracts and the involvement of third parties in fact prevent effective support at the outset of an arrangement. As we have seen, UK law in driving parents overseas is also exporting rather than resolving the risk of exploitation.

The Warnock Committee also asserted that a surrogacy arrangement could be degrading to the child, as he/she would feel abandoned and that he/she had been bought and sold (para 8.11). This is a concern which has largely been disproved with experience, alongside a wider growth in social tolerance to alternative families. This is supported by Golombok et al's findings that outcomes for surrogate children were just as good as, if not better than, those of traditionally-conceived children ('Children born through reproductive donation: A longitudinal study of child adjustment' (2013) 54 *Journal of Child Psychology and Psychiatry* 653).

There is also a policy concern which still persists that many surrogacy arrangements are likely to end in dispute with surrogates changing their minds, and that the practice should therefore be discouraged. In fact experience has shown that this rarely happens, and that women who choose to become surrogates have a clear commitment to carrying someone else's child, and find the experience a positive one. Surrogates are equally concerned by the lack of structure and certainty the law currently provides.

Proposed reform

We need to reform UK law to better manage surrogacy arrangements, to ensure that parents, surrogates and children are adequately protected, and to reduce the need for parents to enter into international surrogacy arrangements if they do not wish to.

Jessica Lee MP has proposed a system of contracts and pre-birth orders modelled on that of US states such as California, Texas, Utah, Virginia and Florida. This would enable surrogates and intended parents to enter into a surrogacy agreement at the outset to agree key issues (perhaps following counselling and medical/psychological clearance), and provide a system where a pre-birth order would be made by the family court to ratify that agreement before the child was born. Where there is no dispute (as in the overwhelming majority of cases), this would create a mechanism by which the intended parents would be recognised as the legal parents immediately upon their child's birth and named as such as on the birth certificate. It would bring the legal process forward and have the advantage of certainty in that the child would not be left in 'legal limbo' for many months between their birth and the granting of a parental order. It would also be more reflective of reality in that the intended parents will assume care of the child at birth, and the surrogate and her spouse will not have continuing obligations.

The new pre-birth order system should be open to both individuals and couples, and to those who are habitually resident in the UK as well as those domiciled here. In addition, a form of pre-birth orders should be available to parents who have entered into international surrogacy arrangements, enabling them to bring their children home promptly.

In our experience, disputes between surrogates and intended parents happen very rarely, but the Family Court should not lose its welfare jurisdiction in respect of disputes which do occur (this meaning, of course, that surrogacy contracts are only 'binding' where everyone remains in agreement). Disputes should continue to be resolved, as in all other UK children proceedings, on the basis of the court's assessment of the welfare of the child.

It should be admitted and made clear that payments to surrogates for their inconvenience are permitted, and those going into a surrogacy arrangement should agree them upfront and in writing. While it may be tempting to set a limit, it is better to take the approach adopted in California and allow flexibility provided there is complete transparency in the contract. Not only is this a healthier approach in practice, but it goes no further than the reality already being permitted on the ground. Concerns about exploitation should be addressed through proper support and clarity at the outset.

Lastly, the current restrictions on surrogacy agencies, particularly profit-making surrogacy agencies, in respect of advertising and services offered should be abolished. Instead, we should ensure that there is wider access to high quality support services, to ensure the safety of all those involved in surrogacy arrangements.

Surrogacy is often unfairly branded as an ethically fraught and controversial practice. In fact, well-managed surrogacy is typically a positive experience for everyone involved, and we need only look to the US for a proven system of how to manage it properly. Jessica Lee MP and Nick Clegg are absolutely right, the need for Parliament to look at surrogacy afresh is long overdue.