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# Reforming the law regulating surrogacy: extending the family

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## Abstract

*This paper considers the current law relating to surrogacy and re-emphasises the need for urgent reform. It starts by reflecting on how we got where we are and notes that the legal framing of surrogacy debates has forced us into the legislative and regulatory position we are now in. We argue that a review of the law regulating surrogacy should be comprehensive and we look at a potential model of regulation in the future. We suggest surrogacy regulation should be inspired by a fiduciary model recognising relationships between families, extended families and surrogates. The model we suggest is one of mutual fiduciary obligations owed by intended parents to surrogates and vice versa, supported by pre-conception agreements reflecting such mutual duties while recognising the overriding concern for the welfare of a child born as a result of a surrogacy arrangement. We lack space in this paper to argue for the law to give full status to legally enforceable fiduciary obligations in surrogacy. We simply contend that the concept offers a helpful model in thinking about the future for regulating surrogacy.*

## Introduction

This paper was first delivered by Margaret Brazier as the keynote address at the seminar which forms the basis of this special issue. As Kirsty Horsey notes in her Introduction,[1] one of the objectives of the seminar was to press for reform of the law regulating surrogacy. Much has changed since that sunny day in May. The Law Commission's consultation on its Thirteenth Programme for law reform asks whether the Law Commission should include in

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1 K. Horsey, this issue, at pp. 153-154.

that programme a review of the law relating to surrogacy.[2] The answer in our view is 'yes' and the review must be comprehensive. After decades of inaction,[3] despite calls for law reform,[4] it seems that the chaotic state of UK law relating to surrogacy may at last be addressed. Thus the original title of this paper 'Jam Tomorrow Will Not Do'[5] is (we hope) no longer apt. 'Jam', that is to say proposals for reform with a reasonable chance of success, may be on its way.

Other papers in this collection address many aspects of surrogacy and set out the authors' proposals for law reform. In our paper, we first re-iterate why comprehensive reform of the law relating to surrogacy is so urgently needed to protect the well-being of children born as a result of surrogacy arrangements, and reflect about how and why we reached this current impasse on surrogacy. We then note how the legal framing of surrogacy debates has created problems of its own and suggest ways of thinking about surrogacy inspired by a fiduciary model representing a relationship between families, new ways of creating and recognising extended families, rather than a commercial model of babies for sale grown in carriers who happen to be women. Intended parents, couples and individuals seek surrogacy arrangements because they passionately wish to found a family. Most women who choose to become surrogates do so because they have a strong desire to help others found their own family.[6]

## The need for reform now[7]

One objection to embarking on what will be a complex and costly review of surrogacy laws might be that even at the most expansive estimate of the number of surrogacy arrangements, that number, and thus the number of children born of surrogacy, is relatively small.[8] The bald number of children at risk should not matter when the potential consequences for children (and

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2 Law Commission, 13th Programme of Law Reform, July 2016.

3 In the wake of evidence of changing attitudes to surrogacy and a highly publicised case where an arrangement broke down in a blaze of media publicity, the government commissioned a review of payments and regulation of surrogacy arrangements. The review team reported in 1998 but none of the recommendations for reform were implemented: see *Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation* Cm 4068 (1998) hereafter '*Surrogacy Review*'.

4 See M. Freeman 'Does Surrogacy Have a Future after Brazier?', *Medical Law Review* 7 (1999), 7, 20.

5 See Lewis Carroll, *Alice in Wonderland*. The White Queen declared 'The rule is, jam tomorrow and jam yesterday - but never jam today'.

6 See the paper by N. Smith, this issue, especially at pp. 247-250.

7 See A. Alghrani/D. Griffiths/M. Brazier, 'Surrogacy Law: From Piecemeal Tweaks to Sustained Review and Reform', in A. Diduck/N. Peleg/H. Reece (eds.), *Law in Society: Reflections on Children, Family, Culture and Philosophy - Essays in Honour of Michael Freeman* (2015), 425.

8 *Ibid*. Another factor to consider is the cost in terms of legal fees and court time of the sheer number of cases now heard in the Family Division.

their parents, genetic, gestational, social or psychological)[9] may be dire. A response to calls for law reform that simply asserted that only a few children faced risk of harm would be swiftly attacked.

Imagine this scenario:

Twins are born in the UK to an unmarried couple, Ana and Ben. Ana is from the Ukraine and a student in the UK. Ben is a refugee from Somalia. Ana dies in a road accident on the way home from hospital. Ben is unable to cope with grief and two new born babies. The infants look dirty and malnourished. Neighbours become concerned. Social services tell them they should contact the Ukrainian and Somalian embassies. 'Foreign babies' are not their concern. The Ukrainian embassy replies that unmarried women do not transmit Ukrainian nationality to their children. The Somalian embassy says that Ben has forfeited his citizenship and bars Ben's sister from coming over to the UK to help Ben care for the twins. Ana's brother is also refused a visa to come to help.

The twins' fate is raised in Parliament. Ministers express regret, pointing out this is an unusual case involving only two babies. The case will be carefully examined in due time.

Of course no local authority social services department would simply leave two infants physically in their jurisdiction to starve to death. Something will be done about the immediate risks to the babies whatever their nationality. The media would have a field day if a Minister responded 'only two babies' were abandoned by the state – the fact that it was only two babies at risk would cut little ice.

The risks to children arising from the inadequacy of UK law in relation to surrogacy arrangements are not as stark as the risks to our hypothetical twins. There are nonetheless significant risks to the well-being of children when surrogacy arrangements go awry, often but not always arrangements with a foreign aspect. The complex and inadequate state of the law (or a toxic mix of UK and foreign laws) may mean that a baby (or babies) risks to quote Hedley J, being 'marooned stateless and parentless'[10] and, were the letter of the law to be applied, babies could not be united with the parent or parents who sought their birth. In rare cases wholly unsuitable arrangements create chaos on breakdown and may involve outright fraud.[11]

In relation to overseas surrogacy arrangements, judges are regularly asked to approve a parental order in cases involving the exchange of sums of money which are hard to see as even generous expenses. While UK law makes it a condition of the grant of a parental order that only reasonable expenses may be

9 Lady Hale in *Re G (children)* [2006] UKHL 629 [32-37].

10 *In re X and Y (Children) (Parental Order: Foreign Surrogacy)* [2008] EWHC 3030 (Fam) [10].

11 *R v. Pollard*, Bristol Crown Court (June 2014); See also *Re A v. X* [2016] EWFC 34 for an illustration of the problems encountered with Facebook and social-media.

paid to the surrogate,[12] many foreign jurisdictions allow surrogates to be paid for their services and to make a profit on the arrangement. Time and again judges are asked to approve payments already made to the foreign surrogate of the equivalent of £15,000 and more. The payment may well be in addition to a payment to a foreign agency and the agreement to make the payment may be framed in such a way that if interpreted literally, it cannot be seen as other than straight deal to pay the surrogate for handing over the child.[13] If the letter of UK law were followed, the intended parents would be denied a parental order and might be unable to acquire the status of the child's legal parents.[14]

Different laws governing legal parenthood at birth often mean that while UK law regards the birth mother and her husband as the legal parents at birth whose consent is needed for the parental order, the foreign law confers parental status on the intended parents. When the child is born abroad to a Ukrainian mother and her husband, that child will not have UK nationality nor any right to enter this sceptre'd isle.[15] With some help from the Borders Agency judges find ways of settling the infant with the parents who sought his existence. In many of these cases, absent judicial creativity, children might languish in orphanages overseas. It is unsurprising that the judges have for many years called for Parliament to intervene. Nearly a decade ago in *In re X and Y (Children) (Parental Order: Surrogacy)*,[16] a married couple domiciled in England entered into a surrogacy arrangement with a married Ukrainian woman. She had been implanted with embryos derived from donor eggs fertilised by the husband's sperm and gave birth to twins. Under Ukrainian law once the twins had been handed over to the intended parents, the woman had no parental rights or duties to the children and the children had no right to Ukrainian nationality or rights of residence in Ukraine. As far as Ukrainian law was concerned the intended parents were for all purposes the legal parents of the twins. Under UK law, the surrogate and her husband were the legal parents and the twins had no claim to British nationality. The children were at the time of the application for a parental order 'effectively legal orphans' and stateless.[17] As was to happen many times in later cases, Hedley J exercised judicial ingenuity to enable him to secure the welfare of the children in granting a parental order to the British couple. He commented fairly mildly that the government had 'indicated that it was minded to review the law and regulation of surrogacy. It is no part of the court's

12 See s. 54 Human Fertilisation and Embryology Act 2008 (formerly s. 30 Human Fertilisation and Embryology Act).
13 See *In re X and Y* (n 10, at [16]).
14 Note that the payment may also in theory preclude the couple from adopting the child; see s. 95 Adoption Act 2002; see *C v. S* 1996 SLT 1387.
15 See *Re K (Minors)* [2010] EWHC 1180 Fam.
16 [2008] EWHC 3030 Fam.
17 *Ibid.* [9].

function to express views on that save perhaps to observe that some of the issues thrown up in this case may highlight the wisdom of holding such a review'.[18] Moylan J was more forthright in 2014:

There is in my view a compelling need for a uniform system of regulation to be created by an international instrument in order to make available an appropriate structure in respect of what can only be described as the surrogacy market.[19]

Problems with surrogacy posing risks to the well-being of the child are not limited to overseas surrogacy arrangements. Consider *Re N (a Child)*.[20] P agreed to carry a child for a married couple, SJ and TR. She underwent artificial insemination with the husband's sperm. She became pregnant but later told the couple untruthfully that she had miscarried. She gave birth to and kept the child, N. The couple later discovered the fraud and when N was eighteen months old the Court of Appeal upheld the decision by Coleridge J that N's biological father, SJ should be granted a residence order. It further emerged that some years earlier P had practiced a similar deceit on another couple. It was agreed that the child C, now nearly six, should remain with P and her husband but at some later time should be told about her genetic paternity. To put it at its lowest, C experienced the loss of her sibling and at some stage must come to terms with her mother's extraordinary behaviour.

Data on surrogacy is thin.[21] A number of arrangements take place 'beneath the radar' - with no formal legal process at all. The dangers of such informality are illustrated by *JP v. LP and others*.[22] A married couple agreed with a friend that she would act as a surrogate. She became pregnant after self-insemination with the husband's sperm. No attempt was made by the couple to apply for a parental order and some months after the birth the marriage broke down and the wife JP left the couple's home. JP absent a parental order had no claim to legal parenthood although she was the child's primary carer. The surrogate was the legal mother and the husband the legal father. After years of legal wrangling Eleanor King J made the child a ward of court and granted the former couple a joint residence order. This order gave JP parental responsibility. The surrogate remained the legal mother also enjoying parental responsibility though forbidden

18 *Ibid*. [29].
19 *Re D (a child)* [2014] EWHC 2121 Fam [1].
20 [2007] EWCA Civ 1053.
21 See M. Crawshaw/E. Blyth/O. Akker, 'The changing profile of surrogacy in the UK – Implications for national and international policy and practice', *Journal of Social Welfare and Family Law* 34 (2012), 265; and K. Horsey, 'Surrogacy in the UK: Myth busting and reform' Report of the Surrogacy UK Working Group on Surrogacy Law Reform (Surrogacy UK, November 2015).
22 [2014] EWHC 595 (Fam); *Re A v. X* [2016] EWFC 34.

by court order from any attempt to exercise parental responsibility without the leave of the court. Eleanor King J warned of:

> [T]he real dangers that can arise as a consequence of private 'partial' surrogacy arrangements where assistance is not sought at a licensed fertility clinic (or indeed of full surrogacy arrangements where the child is born abroad). At a licensed clinic consideration will be given to the welfare of a child born as a result of a 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.[23]

Agreeing 'something must be done' is easy. Determining what can and should be done is harder and the difficulty of formulating sensible proposals for law reform helps explain why successive governments have turned a deaf ear to judicial and other calls for reform of the law[24] and left the mess for judges to sort out case by case.

The challenge for those working to change the law is to create a framework that will incentivise better practice and reduce the hard cases which now beset the courts ensuring the best possible outcome for the children of surrogacy and their families. No framework will be perfect. Even if within the UK we create a system of regulation that makes home-grown surrogacy the most attractive option to most intended parents potential surrogates, some will still resort to access abroad or informal 'under the radar' arrangements. Regulation may be off-putting to some people seeking surrogacy and an incentive to avoid domestic regulation. That is why ideally a solution to the problems of surrogacy law should be international.[25]

## Back to basics

We need to start by going back to the beginning. In 1984, the Warnock Committee noted that surrogacy presented them with 'some of the most difficult questions we encountered'.[26] Public opinion was sharply divided on many of the other issues addressed by the Committee. In relation to surrogacy the Committee found that that there were 'strongly held objections to the concept of surrogacy, and it seems from the weight of evidence submitted to us that

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23 *JP v. LP and Others (surrogacy arrangements: wardship)* [2014] EWHC 595 [39].

24 See *Surrogacy Review*.

25 See Jackson, this issue, at p. 197, and Rogerson, this issue, at p. 275.

26 *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (1984) (Cmnd 9314) (hereafter '*Warnock*') at 8.17.

public opinion is against the practice.'[27] The Committee proposed measures designed to discourage surrogacy. At the time the Chair of the Committee, then Dame Mary Warnock, joined the majority of the Committee in rejecting the minority view that surrogacy should be regulated by an official agency which would oversee and approve surrogacy arrangements and facilitate the handover of the child. Baroness Warnock later changed her mind.[28] In 1984, however, when the Warnock Committee published its Report, opposition to laws facilitating surrogacy was, as the Committee found, fairly widespread. In 1978 in *A v. C*, the first surrogacy case to come before a British court, the Lord Justices of Appeal declared surrogacy arrangements to be 'irresponsible, bizarre and unnatural'.[29]

After *Warnock* and before the Human Fertilisation and Embryology Act 1990 became law, Kim Cotton gave birth to a child for an overseas couple receiving a payment of £6500 with a further £6500 paid to the agency that arranged the surrogacy. Mrs Cotton was content to hand over the child as agreed.[30] Social services intervened and Latey J was entrusted with the task of determining if the couple could take custody of the baby. In a highly pragmatic judgment which was to set the precedent for later judicial interventions focusing on the welfare of the child, Latey J granted custody to the intended parents.[31] The Kim Cotton case however highlighted the role of agencies and dubious practices in the USA. A picture emerged in the media of surrogacy as a crude commercial transaction. Women were seen as being lured into selling their babies. The women themselves might be vulnerable and ripe for exploitation. At the end of the process they might be forced to hand over the child against their will. Stories of variable authenticity circulated about women who were able to carry a child choosing to opt for surrogacy to avoid ruining their figures or damaging their careers. The emergence of aggressive US surrogacy agents (salesmen) reenforced a dystopian vision of a commercial baby market. The Warnock Committee suggested that it would be degrading for a child to be 'bought for money'.[32]

In this climate, the Surrogacy Arrangements Act 1985 was rushed though Parliament. Payments to any third party for arranging surrogacy were banned and 'contracts' for surrogacy made unenforceable. More general disapproval of the practice also led the Committee to rule out any non- profit making state service. Fear of a child being born 'tainted with criminality' meant that while

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27 *Ibid*. para 8.10.

28 Mary Warnock, *Making Babies: Is there a right to have Children?* (OUP, 2002), 87-93; also see Mary Warnock's Foreword to this issue, at p. 155.

29 *A v. C* [1985] FLR 445 (decided in 1978 but not reported until 1985).

30 See Kim Cotton's own account, in this issue, especially at p. 230.

31 *Re C (A Minor) (Wardship: Surrogacy)* [1985] FLR 846.

32 *Warnock*, at para 8.11.

much of the Surrogacy Arrangements Act was re-enforced by criminal sanctions, if an 'illegal' payment was made directly from the couple to the surrogate no crime was committed but the original provision in section 30 of the 1990 Act relating to parental orders set the condition that no order should be granted if the surrogate received more than reasonable expenses. Surrogacy in the UK became a kind of 'hold your nose' practice – not to be encouraged, but not to be banned, as it was in France.

Surrogacy has not 'withered on the vine'.[33] Some of the dystopian visions of the Warnock Committee and Parliament during the passage of the 1985 Act have proved groundless. There is no evidence that wealthy career women contract out pregnancy to advance their careers or that the rich and beautiful do so to save their figures. In the UK, in successful arrangements with no overseas element, the crude commercial model of surrogacy has not materialised. In many (but by no means all) cases, surrogacy is a relationship between families or enduring friends.[34] It is this model of relationship which we argue should drive reforms of the law.

There are those who would have no objection to a regulated surrogacy (baby) market, based on a controlled commercial model. For those uncomfortable with such a market the irony is that the dystopian vision of a surrogacy market has come to be largely as a result of attempts to ban it. Payments are made that look excessive, children risk being 'marooned stateless and parentless'. Poor and powerless women may well be being exploited, but not British women. A largely unregulated international market has sprung up.[35] The objectification of surrogates defined primarily as outsourcing a womb to rent has developed in the USA. The term 'surrogate mother' often gives way to the notion of a 'gestational carrier'.[36] In this model, couples (especially but not solely gay couples) will seek woman A as an egg donor chosen for her genetic strengths of intelligence and beauty and a gestational carrier woman B is chosen perhaps for her childbearing hips and successful record in prior pregnancies. Enforceable contracts grant a high level of control to the couple or individual commissioning the pregnancy. As commercial surrogacy was practised until recently in India and Thailand, egg donor and gestational carrier were similarly separate roles. The carrier was subject to intensively monitored terms of service. Measures to minimise the chance of bonding between the surrogate and the child are put in place. In terms that we cannot better, Julie Wallbank warned intended parents 'to be

33 *Surrogacy Review*, para. 3.44.

34 See the papers by N. Smith, this issue, at p. 237, and N. Gamble & H. Prosser, this issue, at p. 257.

35 See E. Jackson, this issue, at p. 197.

36 D. Morgan, 'A Surrogacy Issue: who is the other mother?', *International Journal of Law and the Family* 8 (1994), 386-412.

aware that they are collaborating with a woman not a womb'.[37] Those who engage and those who manage gestational carriers on a commercial basis are, we suggest, wanting to contract with a womb rather than engage with a woman.

A dilemma emerges. Banning payments, outlawing contracts and trying to keep the lid on home grown surrogacy has given rise to the very evils we sought to rule out. Is there a way out? Should we join Lady Warnock in seeking to rethink our understanding of surrogacy and acknowledge that intended parents resorting to surrogacy in the 'Dark Ages' of the 1980's got a raw deal? In those early years, the focus of debate on the emerging reproductive technologies was more one of beneficence to those unable by virtue of medical misfortune to have children rather than on autonomy or the expansion of assisted conception to those seeking alternative family structures.[38] Moreover, the focus was principally on infertile women. IVF helped those who like Lesley Brown had blocked tubes, gamete donation helped couples where the man lacked viable sperm, and women who did not ovulate. Surrogacy was the only source of help for women unfortunate to have been born without a womb or lost that womb to disease, women who did not wish or were not able to adopt. In such cases the infertility was absolute; there was no chance of the woman being able to carry a child. The plight of the wombless did not render them less worthy of help especially as clinically the process of DI and partial surrogacy was so simple that medical help was not strictly necessary (with respect to the Court of Appeal in *A v. C*, partial surrogacy is less 'unnatural' than most forms of assisted conception). Even full surrogacy requiring IVF is on the lower level of complexity in the spectrum of fertility treatments. Did the very fact that surrogacy is not an exclusively medicalised procedure contribute to its controversy? Having a child via partial surrogacy was something willing parties could achieve for themselves, unsanctified by the cloak of medical 'permission'.[39] In 2016, as a result of developments on the internet, 'Do-It-Yourself' private surrogacy arrangements allow intended parents and surrogates to avoid the regulatory regime that arises when treatment is received at a licensed centre. While there may appear to be benefits to strictly private arrangements, such are equally met with risks given the lack of clinical control for simply testing sperm to ascertain it

37 J. Wallbank, 'Too many mothers? Surrogacy, kinship and the welfare of the child', *Medical Law Review* 10 (2002), 271, 294.

38 See E. Jackson *Regulating Reproduction: Law, Technology and Autonomy* (Hart Publishing, 2001).

39 '"Do it yourself" surrogate pregnancy ends in legal chaos with three-year-old boy effectively having two-mothers', *Mail Online* (5 March 2014) www.dailymail.co.uk/news/article-2574143/Do-surrogate-pregnancy-ends-legal-chaos-three-year-old-boy-effectively-having-two-mothers.html (last accessed 3 November 2016); 'DIY surrogate pregnancy ends in court battle', *The Telegraph* (6 March 2014) www.telegraph.co.uk/news/uknews/law-and-order/10679695/DIY-surrogate-pregnancy-deal-ends-in-court-battle.html (last accessed 3 November 2016).

is suitable for treatment[40] or conducting a pre-conception assessment of prospective child welfare.

Fears of adverse consequences arising from facilitating surrogacy led the UK to ban payments and make contracts unenforceable. At this point the first named author must make a humble confession. In agreeing with the ban on payments in 1984 when Warnock reported and in 1998 when she chaired the Surrogacy Review, she was wrong and Michael Freeman was right.[41] She has not changed her mind about the dangers of the commodification of children or in some cases women who agree to act as surrogates. 'Commercial' surrogacy, where acquiring a child is legally and socially conceptualised as akin to buying a high performance sports car, is not a model that fits with the value society ought to accord to children.

## The welfare of the child

Judges struggling to avoid adverse consequences to children arising from apparent breaches of the law on expenses,[42] or incompatible laws on parenthood at birth,[43] or failures to take formal measures to grant parental status to one or both of the intended parents,[44] emphasise that the court's highest priority is the 'welfare of the child'.[45] The Human Fertilisation and Embryology (Parental Orders) Regulations 2010[46] now mandate that the welfare of the child is the 'paramount consideration', introducing a welfare checklist which a court must take into account on every application for a parental order. As Hedley J stated in *Re X and Y*:

> [I]t is almost impossible to imagine a set of circumstances in which by the time the case comes to court, the welfare of the child...would not be gravely compromised at the very least by a refusal to make a [parental] order.[47]

In the context of many other Assisted Reproductive Technologies (ARTs), section 13(5) of the Human Fertilisation and Embryology Act 1990, which required that before any licensed treatment can begin, the clinics must take ac-

40 See E. Jackson, 'The law and DIY assisted conception', in K. Horsey (ed.), *Revisiting the Regulation of Human Fertilisation and Embryology* (Routledge: London, 2015), 31-49.
41 See Freeman, 'Does Surrogacy Have a Future' 1997 (n. 4).
42 *Re S (Parental Order)* [2010] EWHC 2977 Fam.
43 *In re X and Y* (n. 16).
44 *JP v. LP* (n. 23).
45 *Re L (a Minor)* [2010] EWHC 4756 Fam.
46 SI 2010/985; and see the Human Fertilisation and Embryology (Consequential, Transitional and Savings Provisions) Order 2010, SI 2010/196.
47 [2008] EWHC 3030 Fam [24].

count of the welfare of 'any child who may be born as a result of the treatment' has been roundly condemned.[48] The modest amendment of the section in the 2008 Act that replaced the requirement to consider 'the need for a father' with the need of that child for 'supportive parenting' did little more than dilute criticisms that the provision is discriminatory. So is it right that in the context of surrogacy arrangements, the child's welfare should be centre stage?

Section 13(5) has been attacked on several grounds. First, a principal philosophical criticism is that in most of the decisions about whether or not to offer ARTs to the patient, if treatment is refused because of the perceived risk to the welfare of an as yet hypothetical child, the choice is whether that child be born or never exist.[49] For non-existence to be worse than existing, the potential harm to the child to be would need to be 'serious' while presenting a 'significant risk'.[50] Secondly, it entrusts decision about potential welfare to clinicians who lack the expertise, training and facilities to make such welfare judgments. Thirdly, clinics asked to address complex medical and moral considerations about a theoretical child's welfare may well fall into dangerous realms of clinical speculation and intuitive appeal.[51] For example, if prospective parents seek pre-implantation genetic diagnosis and tissue typing to bring about the birth of a 'saviour sibling', and if the treatment is refused the saviour baby will never be born. Clinicians are asked to judge not just the medical prospects of treatment, but also to speculate whether the parents will be able to love and care for the saviour child rather than seeing her as just the means to an end. What will the effect be on the saviour child maybe ten or more years on if the donation of cord blood or bone marrow later fails and the elder sibling dies? Such child welfare considerations are evidently complex and fraught with ethical wrestling.

Surrogacy is different. The question is not shall this child be born or would he be better never to be born, but how can the law ensure that the child (any child) once born is cared for in the most favourable environment to allow him to flourish, that he is not a 'legal orphan', a bargaining factor between warring 'parents', at risk of being separated from the social mother he has bonded with. The questions about welfare are practical; surrogacy unlike other ARTs raises few significant *medical* questions, or fundamental moral questions about the

48 See E. Jackson 'Conception and the Irrelevance of the Welfare Principle', *Modern Law Review 65* (2002), 176; House of Commons Science and Technology Committee *Human Reproductive Technologies and the Law*, para 101.

49 For a summary of these arguments see C. Gavaghan, 'Regulating after Parfit: Welfare Identity and the UK Embryology Law', in Goodwin/Koops/Leenes (eds.), *Dimensions of Technology Regulation* (Wolf Legal Publishers, 2012).

50 Human Fertilisation and Embryology Authority (2009) Code of Practice (8th edition, London: HFEA) Welfare of the Child 8.0.

51 S. Elliston, 'The welfare of the child principle and the use of PGD: selecting for disability', in S. McClean/S. Elliston (eds.), *Regulating Pre-Implantation Genetic Diagnosis: A Comparative and Theoretical Analysis* (Routledge, 2013).

nature of the embryo. Decisions about the implications and implementation of arrangements in the light of child welfare considerations will be made not by clinicians but by experienced judges, or in a reformed legal framework perhaps by a dedicated surrogacy approvals authority. In either case the decision makers will have access to skilled advisors. Placing the welfare of the child at the heart of laws relating to surrogacy does not ask that we decide should this child be born at all but rather how can the law make arrangements more likely to work, how risks of break down can be reduced?[52] What steps can the law legitimately take to maximise the aggregate lifetime welfare of the child born into a surrogacy arrangement? How can a new family be founded that reconciles the needs and wishes of the adult parties and the best chances to promote the well-being of the child?

UK law is muddled and contradictory. The 2010 Regulations governing parental orders require that the interests of the child must take priority in regulating surrogacy. The broader legal framework governing surrogacy fails to support the good intentions of the 2010 Regulations. The difficulty in the law as it stands – the 1985 Act outlawing contracts, the conditions for the grant of a parental order banning payments and the rules defining parental status at birth – make it near to impossible for judges hearing applications for parental orders to prioritise welfare without flagrantly flouting other provisions of the law. Judicial creativity has so far found a way to avoid disastrous outcomes for children at the cost of making the law look like an ass, and because any scrutiny of the arrangement is *ex post facto*, sometimes preventing any substantial evaluation of the initial agreements. The historical aversion to encouraging surrogacy means that regulation to attempt to facilitate good practice in surrogacy remains absent.

## Rethinking regulation

We now make tentative suggestions for a conceptual framework within which reform of the law might be located if surrogacy is recognised as a legitimate means of founding families, but a model of a surrogacy market based on consumer law is rejected. Such a framework would (as argued above) place the welfare of the child at the centre of the law and also protect and honour the interests of other parties to the arrangement. We argue that the law should be based on a fiduciary model, seeking to endorse and protect relationships of trust between the adult parties and enforcing an obligation of trust in relation to the child. Surrogacy would become part and parcel of modern family law.

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52 We are unaware of the data on this aspect but we do note that although the risk of breakdown is small the costs of breakdown are inevitably traumatic.

Such a model would permit (though not mandate) a moderate payment to the surrogate, encourage clear agreements between the adult parties, allow accredited agencies to facilitate surrogacy,[53] and make the transfer of legal parental status much simpler.[54] The law should seek to make surrogacy work based on the models of good practice garnered from evidence of successful surrogacy practice in the UK today. [55]

We first look at how the especially thorny problems illustrated in those cases where the judges have had to stretch the letter of the law near to breaking point might be addressed within a framework based on such a fiduciary model. Then we explore a little further the broader implications of such a fiduciary model.

## 'Contracts', agreements and payments

Contracts and payments have been perhaps the most divisive questions besetting debates on surrogacy and hindering consensus on law reform. At first glance endorsing either seems to steer surrogacy firmly into the commercial arena. This does not need to be the case. Legal language and classifications have not helped. The word 'contract' invokes a picture of the market, of sale of goods and buying and selling babies with attendant legal rules about 'satisfactory quality' and 'fitness for purpose'. In the international commercial surrogacy market operating in some parts of the world this situation exists. Contracts control the surrogates' behaviour, for example, specifying that in certain circumstances should ante-natal tests show the fetus suffers from some form of disability the pregnancy should be terminated. The vendor must hand over the 'goods' if the terms of the contract are met. The buyers may reject faulty goods.[56]

Are contracts and a trust based model of surrogacy prioritising the welfare of the child thus incompatible?[57] Not necessarily if we reflect on the language and meaning of contract in everyday language. In common law, agreement alone does not create a legal contract. Both parties must provide consideration, something of value in return for the promise of the other party. Legal contracts at common law are *bargains* so at first glance the language of contract seems

53 This would include consideration of the appropriate extent to which agencies could advertise surrogacy services.

54 Discussed further A. Alghrani/D. Griffiths/M. Brazier, 'From Piecemeal Tweaks to Sustained Review and Reform', in A. Diduck/N. Peleg/H. Reece (eds.), *Law and Society: Reflections on Children, Family, Culture and Philosophy - Essays in Honour of Michael Freeman* (2014, Brill) 425-453.

55 See e.g. Jadva, this issue, at p. 215; Smith, this issue, at p. 197, and Gamble and Prosser, this issue, at p. 257.

56 See S. Callaghan/A. Newson, 'Surrogacy, motherhood and Baby Gammy', *Bionews* 766 (2014).

57 See Jackson, *Regulating Reproduction* 2001 (n. 38), 308-315.

to envisage surrogacy as bargaining for a baby. Strip away the bargain element and focus on popular understanding of contracts as agreements (as is the case in most civil law jurisdictions) and there will be few people who would not agree that the surrogate and the intended parents should negotiate a clear agreement setting out mutually agreed expectations, what the Surrogacy Review termed a Memorandum of Understanding.[58] The Surrogacy Review however recommended that a surrogacy agreement should not permit any payment over and above reasonable expenses. Does paying the surrogate tip the agreement over the threshold of an agreed relationship based on trust and into the jaws of the market?

Opponents of paying surrogates will say, call the contract what you will, if a surrogate is paid a greater sum than the expenses she has incurred, the intended parents are buying a baby. As Michael Freeman[59] and many others have argued, the payment can rightly rather to be regarded as payment for the surrogate's services, akin to paying the doctors at a fertility clinic in the private sector for their services.[60] The payment is not for the sale of goods (babies) but for reproductive labour. The surrogate woman is paid for her services as the fertility doctor is paid for hers.[61] A lawyer would not draft a contract without expecting an appropriate fee. The professional status of the service provider only alters the essential nature of the assistance rendered, if we regard labour done by the hands and brain of the doctor as different from the work done by the surrogate in permitting the use of her body. Perhaps the question provokes uncomfortable feelings about the intimate use of women's bodies? Most women who struggle to feed their baby would have few qualms about the baby being fed by bottle or tube from a breast milk bank. Having another woman breast feed your child may feel uncomfortable albeit the same end is attained. [62]

One immediate difference between the surrogate who allows her body to be used to gestate the baby and professionals who use brain and hands to create the embryo is obvious. The private patient must pay the clinic whether or not a take home baby is safely delivered. If we conceptualise the surrogate as a 'human clinic', payment would be due independently of the transfer of the infant, just as fees must be paid to the clinic for fertility treatment even if treatment was unsuccessful. Intended parents are unlikely to agree to pay the surrogate's fees if she is free to change her mind and keep the child. Framing the agreement

58 *Surrogacy Review*, paras. 8.12-14.

59 See Freeman, 'Does Surrogacy Have a Future' 1999 (n. 4).

60 See Jackson, *Regulating Reproduction* 2001 (n. 38).

61 Liezl Van Zyl/R. Walker, 'Surrogacy, Compensation, and Legal Parentage: Against the Adoption Model', *Journal of Bioethical Enquiry* 12(3) (2015), 383-387.

62 S. Wood, 'Breastfeeding Controversy: Milk Sharing: Would you nurse another mom's baby? Read this before you make up your mind' (www.parenting.com/article/breastfeeding-controversy-milk-sharing) (last accessed 8 July 2016); V. Thorley, 'Mother's experiences of sharing Breastfeeding or Breastmilk, Part 2: the 21st century', *Nursing Reports* 12(1) (2012), 4-11.

as for services not sale will not remove the reality that what intended parents seek is 'their' child. So do we return to the scenario of a dystopian market and a woman having the child she has carried torn from her arms, even when she may have grounds to be concerned about the welfare of the child if she relinquishes her as agreed?

We should note that even traditional contract rules would not necessarily result in the surrogate being obliged to comply with a contract of sale. Contracts for personal services are not subject to specific performance.[63] If you engage a nanny and your views on child care prove irreconcilable, or he just does not like you, you cannot get an order that he continues to work for you. There may be liability in damages for breach of contract, so on traditional contract rules the surrogate who refuses to surrender the child might be liable for the cost to the couple of a further surrogacy arrangement. Nor is the analogy with the nanny a complete fit. The nanny walking out causes domestic disruption but does not deprive parents of 'their' child.

## Parental status and a fiduciary model

And therein lies the thorny question, whose child is the baby? Current UK law is clear on maternity; at birth the child is the child of the surrogate.[64] At least in relation to gestational surrogacy arguments are advanced that the intended parents should be the legal parents of 'their' baby from birth.

Practical considerations offer some support for such a change. English law provides for a no more than two-parent model, and the surrogate mother is the legal mother.[65] In the most common case where the surrogate is part of a married heterosexual relationship her husband is the legal father. Complex provisions govern legal fatherhood in other cases but it remains the case that no provision is provided in law for anything other than two legal parents.[66] Intended parents can acquire parental responsibility only via a parental order, which cannot be applied for until the child is at least six weeks old, or via adoption. In the interim, decisions about for example necessary medical treatment in theory remain with the surrogate even if she has handed over the child. The child and all possible 'parents' exist in a legal limbo that does not square with the paramountcy of the welfare of the child in surrogacy arrangements.

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63 *De Francescov Barnum* (1890) 45 Ch D 430; and see Jackson, *Regulating Reproduction* 2001, (n. 38), 312.

64 HFEA 2008 Part 2 section 33 (1).

65 *Ibid*., Part 2 section 35 (1).

66 See M. Brazier/E. Cave, *Medicine, Patients & the Law* (Manchester University Press, 6th edition, 2016), 387-398.

We acknowledge that there are sound arguments to consider changing the law on parental status at birth in surrogacy arrangements but not on the basis of whom the child 'belongs' to. She 'belongs' to no-one in the sense we usually use that word. In another sense she 'belongs' to us all as do all children whose welfare in a modern state is not solely the business of parents even when there is no dispute about who those parents are.

How might a fiduciary model of surrogacy approach parental status and parental rights? Parental rights derive from parental responsibility, a responsibility usually but not always derived from biological parenthood. Where parents are dead or incapacitated, guardians act for a child and care for the child in her minority. Guardians undoubtedly owe fiduciary duties to the child. Guardianship offers another way to think about the triangular relationship between the surrogate, the child and intended parents. During her pregnancy the surrogate is de facto the ante-natal guardian of the child she carries, regardless of whose gametes created the child. She is a trustee for the welfare of the child. It will be envisaged by all parties that at birth she will surrender both the child and its guardianship and formal parental responsibility will be conferred on the intended parents. The relationship between surrogate and child cannot be extinguished at the cutting of the umbilical cord. A guardian who had grounds for serious concern about the welfare of the child she carried would have a moral obligation to take some action. A couple who regarded the surrogate as a partner in their reproductive enterprise would take care to ensure her welfare as well as the child's, and vice versa. Each adult party is a 'trustee' for the well-being of the others. We envisage surrogacy as a 'marriage' with sometimes three or more people in it. Such a relationship will be complex at times. Different people will want different things from the relationship as do partners in a marriage. Agreement on what this relationship should entail, clarity and trust are essential.

Concepts of guardianship and trusteeship open the door to consideration of pre-conception agreements which, based on sound advice,[67] would address the welfare of the child, the agreed expectations of the adult parties and provide that the intended parents be presumed to obtain parental responsibility at birth. Pre-conception agreements might be likened to the pre-nuptial contracts in *Radmacher (formerly Granatino) v. Granatino*.[68] The analogy is less than perfect and we use it simply to show that agreements can carry weight while allowing for concerns about any suggestion of coercion or limited understanding on the part of any of parties or those affected by the 'contract' being given full scrutiny.

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67 See Alghrani/Griffiths/Brazier, 'From Piecemeal Tweaks' 2014 (n. 54).
68 [2010] UKSC 42.

Given societal interests in child welfare, to take legal effect the agreement would require prospective scrutiny by a court or a regulatory authority.[69] The parties to the agreement would need to demonstrate that they have addressed the matters of concern to each of them, including the relationship between the surrogate and the child and her family after birth, payments and expenses, health care provision and what might ensue in certain contingencies, for example if intended parents separate or one partner dies. The agreement must be one entered into wholly voluntarily, fully informed, with all parties having had time to reflect. The approving authority must be satisfied that the agreement meets the needs of the child.

Such an agreement would be scrutinised before conception and the intended parents granted a provisional parental order with the caveat that the surrogate has a set time, normally expiring before the birth, to register an objection relating to changed circumstances and/or risks to the child triggering a full re-hearing. In the absence of objection from the surrogate or other concerns being expressed about the welfare of the child once born, the provisional order could be simply confirmed, rather as a decree nisi becomes a decree absolute.

## Fiduciary obligations

Once the reproductive enterprise is embarked on and pregnancy established, the relationship between surrogate and intended parents should continue to be based on a fiduciary model, one grounded in trust and utmost good faith. English courts have been reluctant to expand the legal categories of fiduciary relationships, notably in refusing to extend fiduciary relationships to the doctor/patient relationship.[70] We lack space here to argue for the law to give full status to legally enforceable fiduciary obligations in surrogacy. We simply contend that the concept offers a helpful model in thinking about surrogacy.[71]

Classical fiduciary relationships such as trustee and beneficiary, solicitor and client, parent and child, or husband and wife require that the fiduciary acts to promote the interests of the vulnerable party in the relationship, the beneficiary, client, or child, usually in relation to the management of the latter's property. He enjoys a position of trust and must act in utmost good faith.

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69 See K. Horsey/K. Neofytou, 'The fertility treatment time forgot: what should be done about surrogacy in the UK?', in K. Horsey (ed.). *Revisiting the Regulation of Human Fertilisation and Embryology* (Routledge: London, 2015), 117-135.

70 *Sidaway v. Governors of the Bethlem Royal Hospital and the Maudsley Hospital* [1984] 1 All ER 1018 at 1029 (per Dunn LJ) (CA); and [1985] 1 All ER 643 at 651 (per Lord Scarman) (HL).

71 For a similar argument in relation to doctor/patient relationships in screening for HIV see M. Brazier/M. Lobjoit, 'Fiduciary Relationship: An Ethical Approach and a Legal Concept', in R. Bennett/C. A. Erin, *HIV and AIDS: testing, screening and confidentiality* (OUP, 2001) 179.

MacLachlin J, supporting the extension of fiduciary relationships to doctors and patients in the Canadian Supreme Court, made it clear that it is not enough to abide by the letter of the law: in making decisions about the welfare of the other party the fiduciary must act 'to the highest standard of dealing with their patients which the trust accorded to them requires'.[72]

The reluctance of English judges to extend the categories of fiduciary relationships to doctors arose in part from what was perceived as dissimilarity between classical fiduciary relationships and doctor/patient relationships. Fears were also expressed that imposing a fiduciary character on doctor/patient relationships would 'entrench the power balance' between doctors and patients.[73] A model of fiduciary relationships in surrogacy arrangements is less of a departure from the established notions of fiduciary duties than their extension to doctors. Parents already owe fiduciary duties to their minor children, guardians to their wards and spouses to each other. Within surrogacy, we might argue that all candidates for legal parenthood and/or guardianship owe such a duty to the child. That duty requires that they prioritise the interests of the child in hard cases above their own interests.

From such a duty it follows that unless there are overriding concerns about the welfare of the child coming to light after an approved pre-conception agreement, the surrogate will as soon as possible hand over the child and relinquish any claim to retain 'custody' of the child, allowing the child to settle with and bond with the intended parents as quickly as possible. Equally, however, should information come to light casting doubt on the capacity of the intended parents to care for the child, the fiduciary duty to the child requires that the surrogate (as guardian of the child) ensures those concerns are addressed. On their part intended parents have an obligation of utmost good faith that, for example, requires them to disclose any information relevant to the welfare of the child. For example if a provisional parental order is made in favour of A and B, and later A becomes aware that B's violent temper and impatience create a risk to the child, A has a duty to disclose that information. If when the child is born, he is born with significant disabilities the intended parents nonetheless have a duty to honour the arrangement and undertake parental responsibility for him. They cannot simply walk away.

It might further be argued that a fiduciary model that imposes a duty to the child on all the adult parties means that in the above example of the birth of a disabled child, the surrogate too retains an obligation to the child that becomes highly relevant if the intended parents renege on their agreement. Such an obligation does not compel her to raise the child herself but does require that

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72 *Norberg v. Wynrib* (1992) 92 DLR 449, 486-7.

73 I. Kennedy, 'The Fiduciary Relationship and Its Application to Doctors', in P. Birks (ed.), *Wrongs and Remedies in the Twenty First Century* (Clarendon Press, 1986).

she ensure that the child is cared for. The intended parents again cannot be compelled to accept the child but their fiduciary duty demands that they provide financial support for the child should the surrogate decide that she will raise it.

Our concept of a fiduciary model for surrogacy extends beyond the extension of the established fiduciary category of parent and child to both the surrogate and the intended parents to suggesting a model of mutual fiduciary obligations owed by intended parents to surrogates and vice versa. Pre-conception agreements should reflect such mutual duties of care ensuring for example that the surrogate will be provided with all she needs for a healthy, happy pregnancy, that the parties agree on such matters as post-birth contact, and that all agree on the nature of the intended parents' involvement in the pregnancy. Should the agreement not cover points of later dispute the mutual notion of fiduciary obligation can fill the gaps. So, for example, assume A and B enter into an arrangement with C who at the time of the arrangement plans to emigrate with her husband, and so no provision is made for contact. C's husband dies suddenly and she and her children remain in the UK. C now wishes to retain some connection to the child and the parents. Both her welfare and that of the child should be considered, not simply the terms of the agreement.

Extending a fiduciary model to the adult parties can be supported on at least two grounds. First, as with any child, the welfare of a child born as a result of a surrogacy arrangement can in practice never be wholly divorced from the welfare of the adults on whom she is dependent. The health and well-being of the surrogate during pregnancy and the parents who will care for her after birth affect the child.[74] A constructive relationship between all the adults benefits the child. Secondly, fiduciary relationships seek to protect a vulnerable party in a relationship from misuse of power by the fiduciary. In surrogacy arrangements, *both* parties are vulnerable to misuse of power by the other. The risks of exploitation of surrogates are well rehearsed. Surrogates too have power to 'exploit' intended parents demanding more money or deceiving the intended parents about the outcome of a pregnancy.[75]

## No easy task

Reforming UK law on surrogacy will not be easy. It may be tempting to seek a 'quick fix' to obvious problems. The challenge is to create a framework of laws and regulations that protects the extended family that surrogacy creates and reduces the risks of breakdown and legal wrangling. UK law

74 See Jadva, this issue, at p. 215.
75 *R v. Pollard* (n. 11); *Re N (A Child)* [2007] EWCA Civ 1053.

should offer incentives to opt into domestic regulation and reduce the numbers who seek surrogates overseas. A fiduciary model emphasising the centrality of trust may help inform lawmakers. One question, however, we have not even asked. Is surrogacy now regarded as a responsible and legitimate way to found a family? Has evidence of how surrogacy can work dispelled the deep suspicions of the Warnock Committee? Our answer is 'yes', but unless there is first a clear articulation that surrogacy is acceptable, half-hearted measures may again result in hazy laws.[76]

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