JOURNAL OF MEDICAL LAW AND ETHICS; VOL. 4, NR. 3, 197-214, PARIS LEGAL PUBLISHERS © 2016

UK Law and International Commercial Surrogacy: 'the very antithesis of sensible'

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Abstract

This article evaluates possible responses to the increased frequency with which UK couples and individuals travel overseas in order to access commercial surrogacy arrangements. It concludes that the ban on commercial involvement in surrogacy arrangements within the UK, and the criteria that must be satisfied before legal parentage can be transferred to the intended parents, do not promote the best interests of children, surrogates and intended parents. By facilitating some oversight of surrogacy before the child is conceived, pre-birth approval for parental orders coupled with greater professional involvement in surrogacy, would not only better meet the needs of all parties, but would represent a more sensible, efficient and effective way to regulate surrogacy.

Introduction

Since the first international surrogacy case reached the High Court in 2008,[1] there has been a steady stream of cases in which UK intended parents (IPs) have sought to formalise their legal relationships with children born as a result of international commercial surrogacy arrangements. A Cafcass[2] study calculated that, of the 189 parental order applications that year, approximately 40% had involved international surrogacy.[3] While this gives an indication of how many UK citizens travel overseas each year for the purposes of surrogacy, because not all IPs apply for parental orders, exact numbers are unknowable.

If it is becoming more common for UK citizens to travel in order to access commercial surrogacy in other countries, how should UK law respond? Since third party involvement in commercial surrogacy is a criminal offence in the UK, should mechanisms be put in place to deter UK citizens from using commercial surrogacy agencies overseas? Alternatively, should the status quo be

* DOI 10.7590/221354016X14803383336806

1 *Re X & Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam).

2 Children and Family Court Advisory and Support Service.

3 According to the Cafcass study, there was a total 189 parental order applications in 2013-14; Cafcass then analysed in detail a random sample of 79 of these, of which 32 had involved international surrogacy. Cafcass, *Cafcass Study of Parental Order Applications made in 2013/14* (Cafcass, 2015). However, it is likely that these numbers underrepresent the true numbers of people travelling for surrogacy: see N. Gamble/H. Prosser, this issue, at p. 257.

regarded more positively, as a 'safety valve' which enables the UK to prevent the development of a surrogacy industry, while allowing those citizens who want to engage in commercial surrogacy to do so relatively easily? If people travel because they are unable to find a surrogate in the UK, should attempts be made to make surrogacy in the UK easier or more attractive? Should efforts instead be directed to some sort of cross-national regulation in order to protect the interests of surrogates, egg donors, children and intended parents?[4] Might it be more realistic simply to provide information to people considering travelling overseas, so that they at least are able to understand the risks and to make informed choices?

As I shall explain below, there are multiple reasons why the extra-territorial criminalisation of commercial surrogacy would be ineffective and counterproductive. An increase in the number of women volunteering to become surrogate mothers in the UK might help to reduce the excess demand for surrogacy, but it is unlikely to eliminate it. International regulation would have clear benefits, but it might be difficult to achieve and could also push the international market in surrogacy underground. Good information is clearly necessary in order that IPs understand the legal and medical risks involved in international surrogacy, but in practice, many people self-refer to overseas clinics and agencies, whose staff cannot be expected to have a thorough understanding of British law on citizenship and parentage.

Perhaps the most straightforward way to ensure that people contemplating travelling overseas for surrogacy are first provided with accurate information would be to give them an incentive to make contact with local healthcare providers before they travel. At a minimum, this could involve 'shared care', so that IPs first receive preliminary investigations and advice at a local regulated fertility clinic. This could help to ensure that people know what treatments are appropriate for them before they travel. It could also provide an opportunity to inform them about the legal pitfalls of international surrogacy, and the medical risks to surrogates from, for example, multiple embryo transfer. A more powerful incentive to go through an official information-giving and screening process at home before people travel abroad for surrogacy might involve pre-conception authorisation for a parental order, so that the IPs could be recognised as the child's legal parents from birth. In what follows, I evaluate possible responses to the growth in international commercial surrogacy, before concluding that the case for reform of the law relating to surrogacy in the UK is now overwhelming.

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4 See Rogerson, this issue, at p. 275.

Prohibition

Many countries prohibit, or try to discourage commercial surrogacy. Most draconian, perhaps, is the extra-territorial criminalisation of involvement in commercial surrogacy. Residents of New South Wales in Australia, for example, commit a criminal offence if they travel anywhere in the world for commercial surrogacy. In practice, however, no one has been convicted of this offence, which is, in any event, easy to avoid simply by acquiring a postal address in neighbouring Victoria, from where it is not an offence to travel for commercial surrogacy.

Because commercial surrogacy generally results in the birth of a child whom the surrogate does not want to keep, the need to protect the welfare of the child will often mean that legal systems which ostensibly ban commercial surrogacy have no option other than to facilitate the child's return 'home' with her parents. In Canada, for example, commercial surrogacy is a criminal offence, punishable by up to ten years in prison, but at the same time, there are clear guidelines to facilitate the acquisition of Canadian citizenship by children born as a result of overseas commercial surrogacy arrangements.[5] Citizenship will be granted provided that the IPs can provide evidence of a genetic link with the child, the child's birth certificate, proof of payment of hospital bills and a copy of the contractual agreements with the clinic and the surrogate mother.[6]

A different but undoubtedly also draconian response to international surrogacy is to fail to have any mechanism through which the IPs can become the child's legal parents. This used to be the case in France, until, in 2011,France's failure to recognise two children's relationships with their intended fathers, to whom they were biological related, was held by the Grand Chamber of the European Court of Human Rights (ECtHR), to interfere with the children's Article 8 rights.[7] Then in 2015, the French Cour de Cassation decided two cases involving French men who had entered into surrogacy arrangements in Russia.[8] The Court held that 'Surrogate motherhood alone cannot justify the refusal to transcribe into French birth registers the foreign birth certificate of a child who has one French parent', thus allowing the names of the intended father and the surrogate to appear on the French birth register. It is not possible for the

5 K. Lozanski, 'Transnational surrogacy: Canada's contradictions', *Social Science & Medicine* 124 (2015), 383-390.

6 *Ibid*.

7 *Mennesson v. France (*Application no. 65192/11) and *Labassee v. France* (Application no. 65941/11), 26 June 2014.

8 Cour de Cassation, Rulings on the transcription into French birth registers of children born abroad of a surrogate mother, 3 July 2015.

name of the child's intended mother or, in the case of gay male couples, the intended second father to appear on the register, and surrogacy continues to be illegal in France, punishable, in theory at least, by up to six months in prison.

In the UK, it is an offence for anyone other than the surrogate and the IPs to facilitate or negotiate a surrogacy arrangement 'on a commercial basis'. In practice, this means that reputable organisations like COTS, Surrogacy UK and Brilliant Beginnings, which help to put IPs and surrogate mothers in touch with each other, must do so on a 'not for profit' basis.[9] It is also an offence to advertise a willingness to participate in or facilitate surrogacy arrangements, or to publish such advertisements. In practice, however, there has never been a prosecution and, as Natalie Gamble has explained: 'Just a few clicks on Google will uncover UK prospective parents and surrogates connecting with each other on busy online surrogacy forums and social networking pages'.[10]

Surrogates and IPs who enter into commercial arrangements with each other do not commit an offence, but one of the conditions that must be satisfied before a parental order can be granted is that: 'The court must be satisfied that no money or other benefit (other than for expenses reasonably incurred) has been given or received ... unless authorised by the court'.[11] In practice, however, court authorisation of payments significantly greater than 'expenses reasonably incurred' has become routine. Because the child's welfare throughout her life is the court's paramount consideration when deciding whether to make a parental order, the courts are usually presented with a *fait accompli*. If the child's settled home is with her IPs, a parental order will be in her best interests, and payments in excess of expenses will be authorised.

In most cases, the court will simply set out the payments made in excess of expenses, before asking a series of questions about them, described by Theis J. in *Re P-M* as a 'well-trodden path': [12]

i. Was the sum paid disproportionate to reasonable expenses?
ii. Were the applicants acting in good faith and without moral taint in their dealings with the surrogate mother?
iii. Were the applicants party to any attempt to defraud the authorities?

Having invariably answered 'no' to all of these questions, the court then turns to the paramountcy of the child's welfare throughout her life, and, as

9 For more detail on the operation of these surrogacy organisations, see K. Cotton; N. Smith; N. Gamble/H. Prosser, this issue, at pp. 229, 237 and 257, respectively.
10 N. Gamble, 'A better framework for United Kingdom surrogacy', in S. Golombok et al. (eds.), *Regulating Reproductive Donation* (Cambridge UP, 2016), 140-162, 141.
11 Human Fertilisation and Embryology Act 2008, s. 54.
12 [2013] EWHC 2328 (Fam) at para. [20].

Theis J. put it in *Re P-M*, 'where the welfare considerations demand that an order should be made, the court will only in the clearest case of abuse of public policy consider not making an order'.[13]

Although the courts have left open the possibility of refusing to grant an order where there has been 'a clear abuse of public policy', this has never happened in practice. We therefore do not know when, if ever, an abuse of public policy might be so clear or grave that it would take priority over child welfare considerations. We do, however, know that making unwitting misrepresentations to a court and making an unlawful payment to a surrogate mother is insufficient. In *Re W*,[14] a British couple had entered into a surrogacy arrangement with a commercial surrogacy agency in California. They were matched with a surrogate in Nevada, to whom they had paid $38,500, in addition to her expenses, as well as giving her gifts valued at $2,093 (they had also paid $22,000 to the surrogacy agency). The payment to the surrogate was not only significant, it was also unlawful in Nevada, and documents filed in a Nevada court had wrongly stated that no compensation had been paid.

Against this, Theis J. held that the IPs had acted in good faith; there was no 'moral taint' in the dealings between them and the surrogate;[15] and the payments did not represent 'an inducement to enter into this arrangement in a way that her will may have been overborne'.[16] It was also 'not outside the amounts that have been paid in other similar cases involving US surrogacy arrangements'.[17] Theis J. therefore found that the payments were not an abuse of public policy; she duly authorised them, and a parental order was made.

In addition to facilitating legal parenthood through the making of parental orders, the Foreign and Commonwealth Office (FCO) has issued detailed guidance on how to apply for British citizenship for children born overseas as a result of international commercial surrogacy arrangements.[18] The rules are complicated, and the processes differ according to whether the surrogate is married, and whether the genetic father is a British citizen otherwise than by descent.[19] When launching their latest guidance, the FCO's Children's Policy

13 At para. [19].
14 [2013] EWHC 3570 (Fam).
15 At para. [26].
16 At para. [27].
17 At para. [27].
18 Foreign and Commonwealth Office, *Surrogacy Overseas* (FCO, 2014).
19 That is, he is a British citizen by virtue of birth, adoption, registration or naturalisation in the United Kingdom. British citizens by descent, that is people who were born overseas to a British parent, do not automatically transfer their British citizenship to their children born overseas.

Adviser said that it was important to warn parents that 'the legal processes around international surrogacy are complicated and the procedure for getting passports and confirming nationality for the child can be complex and take a long time'.[20] The purpose of the FCO guidance was to 'inform prospective parents about what to expect right from the outset – so that they are prepared, get the right advice and they don't run into unexpected difficulties'.[21]

Throughout the world, therefore, it is common for domestic prohibitions of commercial surrogacy to be easily avoided by travelling overseas, and for courts and immigration services to have no option but to facilitate the acquisition of parenthood and citizenship. There are commentators who object to this de facto tolerance of international commercial surrogacy. Kristin Lozanski, for example, maintains that it is 'grossly inconsistent' to prohibit commercial surrogacy within Canada, while positively enabling it outside of Canada's borders.[22] If, as Lozanski argues, the reasons for prohibiting commercial surrogacy are concerns about the 'commodification of bodies' and 'gender inequality', it would be peculiar if these concerns stopped at the Canadian border. As a result, she claims that 'Health Canada would thus be more accurate in stating that "the commercial trade and abuse of the reproductive capabilities of [Canadian] children, [Canadian] women, and [Canadian] men is, for health and ethical reasons, a crime [in Canada, though not elsewhere]"'.[23]

In practice, however, is hard to see how the law could do anything other than tolerate the bypassing of domestic prohibitions of commercial surrogacy. It would be impossible to stop people travelling,[24] and once a child is born, the principal concern for any court must be to protect her best interests, which will invariably not be served by punishing her parents by criminalising them, or preventing them from acquiring legal parenthood. Indeed, this was the view of the Warnock Inquiry in 1984. Despite the Committee's view that there should be legislation to criminalise the operation of surrogacy agencies, its report was clear that 'We do not envisage that this legislation would render private persons entering into surrogacy arrangements liable to criminal prosecution, as we are

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20 FCO Press Release, 'Before considering surrogacy overseas do your research, advises FCO', www.gov.uk/government/news/before-considering-surrogacy-overseas-do-your-research-advises-fco (accessed 28 June 2016).

21 *Ibid*.

22 K. Lozanski, 'Transnational surrogacy: Canada's contradictions', *Social Science & Medicine* 124 (2015), 383-390. See also I Glenn Cohen, *Patients with Passports: Medical Tourism, Law and Ethics* (Oxford UP, 2014).

23 Lozanski, *ibid*., 383-390.

24 L. Culley et al., '"What are you going to do, confiscate their passports?" Professional perspectives on cross-border reproductive travel', *Journal of Reproductive and Infant Psychology* 31 (2013), 46-57.

anxious to avoid children being born to mothers subject to the taint of criminality'.[25]

Although commercial surrogacy is, in theory, prohibited in the UK, in practice, UK citizens can engage in commercial surrogacy abroad or at home without facing any sanction at all. The prohibition on commercial surrogacy is therefore almost completely ineffective, biting only on the operation of for-profit surrogacy agencies. In practice, then, the ban on commercial surrogacy may simply place obstacles in the way of surrogate mothers and IPs obtaining professional support and advice.

The status quo as a 'safety valve'

Although some might argue that it is incoherent to prohibit commercial surrogacy while facilitating the acquisition of legal parenthood for IPs whose children were conceived through international commercial surrogacy arrangements, others have suggested that this could be regarded more positively, as a 'safety valve'. Guido Pennings, for example, has argued that the tolerance of citizens avoiding restrictive laws by travelling overseas 'shows a healthy degree of relativism'.[26] Blocking the treatment of minority groups would, according to Pennings, be 'dangerous, as it could increase feelings of frustration, suppression and indignation'. Instead, reproductive travel is a 'safety valve that avoids moral conflict, and as such, contributes to a peaceful coexistence of different ethical and religious views in Europe'.[27]

Pennings et al. have suggested that if it becomes common for people to travel in order to avoid legal restrictions, it could amount to a 'form of civil disobedience' which exerts pressure on their home government to change the law.[28] Pressure on the 'safety valve' function of international commercial surrogacy might also come from the surrogates' home countries. Within the past few years, more and more low and middle income countries have closed their doors to international surrogacy arrangements. It is no longer possible for foreigners to enter into surrogacy arrangements in Thailand, Nepal and India. Mexico briefly appeared to be an attractive alternative destination, but in 2016,

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25 *Report of the Committee of Enquiry into Human Fertilisation and Embryology* (HMSO: London, 1984), para. 8.19.

26 G. Pennings, 'Legal harmonization and reproductive tourism in Europe', *Human Reproduction* 19 (2004), 2689-2694.

27 *Ibid.*

28 G. Pennings et al., 'ESHRE Task Force on Ethics and Law 15: Cross-border reproductive care', *Human Reproduction* 23 (2008), 2182-2184.

Mexico too changed its laws and IPs must now be Mexican citizens. As a result, Mexican clinics have entered into arrangements with US surrogacy agencies so that the IVF procedure takes place more cheaply in Mexico, before the US surrogate returns to the US for the remainder of her pregnancy.

For the time being, foreigners are still able to engage in surrogacy arrangements in a number of countries, including Canada, the Ukraine, Russia, Georgia, Cambodia and Greece. And international commercial surrogacy will undoubtedly continue to be available, at a high price, in the US. But given rapidly changing laws, international commercial surrogacy's capacity to act as a 'safety valve' is undoubtedly unstable, and if the US becomes the only possible destination, it will be prohibitively expensive for all but the wealthiest IPs.

Self-sufficiency

A different response to international commercial surrogacy might be for individual nation states to strive to become self-sufficient in surrogacy services.[29] If people could more easily access surrogacy arrangements locally, demand for international commercial arrangements might be likely to dwindle.[30] This could also benefit those who cannot afford to travel, and might also reduce the risk of exploitation of foreign surrogates.

It is, however, unclear whether there are, in fact, enough women in the UK who would be willing to act as surrogates for all of the IPs who currently travel overseas for surrogacy. Certainly, the evidence from the UK organisations that match IPs and surrogates is that there are more would-be IPs than there are would-be surrogates. At the time of writing, Surrogacy UK's website explains that it is not taking on any new IPs, because of a shortage of available surrogates:

'We are currently not taking IP applications. As an organisation we like to maintain a surrogate to intended parent ratio of 1:3 and at present it stands at 1:5. We are continually reviewing the ratios.'[31]

Of course, it is possible that the availability of surrogates in the UK might increase if commercial surrogacy were allowed, although this is not the view

29 G.K.D. Crozier and D. Martin, 'How to address the ethics of reproductive travel to developing countries: A comparison of national self-sufficiency and regulated market approaches', *Developing World Bioethics* 12 (2012), 45-54.

30 K. Horsey and S. Sheldon, 'Still Hazy After All These Years: The Law Regulating Surrogacy', *Medical Law Review* 20 (2012), 67-89.

31 www.surrogacyuk.org/intended_parents/joining-surrogacy-uk (accessed 21 October 2016).

of the Surrogacy UK Working Group on Surrogacy Law Reform, whose report suggests that commercial surrogacy is 'largely unsupported among those who have experienced surrogacy first hand'.[32]

It is also possible that changes to the law to enable the IPs to be recognised as the child's legal parents from birth might encourage more women to consider surrogacy. There is some evidence that British surrogates resent the requirement that their name should appear on the child's birth certificate.[33] Decriminalising advertising might help to raise awareness of surrogacy and 'normalising' it by publicising accounts of surrogacy arrangements that have worked well might also help. Inevitably, there tends to be considerable media interest in the small minority of arrangements that goes wrong. For example, a distressing recent case,[34] involving a surrogate with learning difficulties, gave rise to some predictably grim headlines, like this from the *Mail on Sunday*: 'Surrogate mother who agreed to give birth to a baby for a gay couple she met in Burger King wins custody of the boy after judge finds she was "manipulated and exploited"'.[35] Of course, it could be argued that this case, where the parties found each other on a Facebook forum, offers powerful support for the regulation of surrogacy and for routine professional involvement in surrogacy arrangements. Ironically, then, the UK's ban on commercial involvement in surrogacy does not stop payments, but it does make this sort of ill-advised Facebook arrangement more, rather than less likely.

Although it might be assumed that commercial surrogacy would involve much greater payments to surrogates than are already permitted as 'expenses', this is not necessarily the case. In their recent study, the Surrogacy UK Working Group found that more than two-thirds (68.2%) of UK-based surrogates were paid between £10,000-15,000 in expenses, with 27.1% receiving less than £10,000 and 4.7% receiving £15,000-£20,000.[36] Their survey also included 16 IPs who had had children through surrogacy overseas, in which the mean sum paid to the surrogate was £17,375. This is not dramatically different from the 'going rate' for expenses in the UK. Of course, this average includes IPs who had entered into surrogacy arrangements in India, where surrogates receive significantly less than in the US. Nevertheless, in two of the most recent High

32 Surrogacy UK Working Group on Surrogacy Law Reform, *Surrogacy in the UK: Myth busting and Reform* (Surrogacy UK, 2015), para. 5.2.

33 See, for example, V. Jadva, 'Surrogacy: issues, concerns and complexities', in Susan Golombok et al. (eds.), *Regulating Reproductive Donation* (Cambridge UP, 2016), 126-139; and K. Horsey, *Surrogacy in the UK: Myth busting and Reform* (Surrogacy UK Working Group on Surrogacy Law Reform, 2015).

34 *A & B v. X & Z (A Child by his guardian)* [2016] EWFC 34.

35 Jo MacFarlane/Polly Dunbar, *Mail on Sunday* (3 July 2016).

36 Surrogacy UK Working Group on Surrogacy Law Reform, *Surrogacy in the UK: Myth busting and Reform* (Surrogacy UK, 2015), para. 3.1.

Court cases involving US surrogate mothers, the amounts paid varied from £12,850 and £14,375[37] to $33,737.10.[38]

In Surrogacy UK's survey, the main expense for IPs who had entered into surrogacy arrangements overseas were the additional costs of medical fees (on average, £26,281.25), travel and accommodation (£8,781.25), and legal and other fees (£14,000). These fees are not, in fact, much more than cost of the bespoke 'matching service' offered on a not-for-profit basis in the UK by Brilliant Beginnings. For UK surrogacy, an initial options review meeting with Brilliant Beginnings costs £500 plus VAT, with the full service costing £12,000 plus VAT.[39] Surrogacy UK's and COTS' fees are lower. Nevertheless, it is clear that a non-commercial surrogacy arrangement in the UK can cost as much as £35,000. If substantial sums of money are able to change hands in non-commercial surrogacy, the ban on commercial surrogacy looks rather weak and ineffective.

International Regulation

All international surrogacy involves at least one overseas patient: the surrogate and, in arrangements made by gay and single men, or where the female intended parent cannot use her own eggs, they will also involve the treatment of an egg donor. These women are assuming the risks, discomforts and inconveniences of fertility treatment and/or pregnancy for the benefit of others. As patients, their care should be the first concern of the medical professionals involved in their care, and their rights as patients should be protected and respected by those who commission their services. One of the most troubling features of international surrogacy is the concern that this has not always been the case.

Evidence from India suggests that, in some surrogacy cases, there has been a complete absence of informed consent. Rudrappa and Collins interviewed 70 Indian surrogates in Bangalore, and found that none of them had been told what kinds of medical interventions they would undergo; they had not received any information about the risks of ovarian stimulation; most of them were not told that they would deliver through caesarean section at weeks 36-38 and none had received any postnatal care from the agencies that hired them.[40]

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37 *A, B v. C, D* [2016] EWFC 42.
38 *Re Z (A Child)* [2015] EWFC 73.
39 www.brilliantbeginnings.co.uk/intended-parents/brilliant-beginnings-fees (accessed 21 October 2016).
40 S. Rudrappa/C. Collins, 'Altruistic Agencies and Compassionate Consumers: Moral Framing of Transnational Surrogacy', *Gender and Society* 29 (2015), 937-959.

Regardless of nationality, egg donors and surrogates have the same rights as any other patients to make decisions about their medical care. Contractual terms that purport to take away those rights – perhaps by specifying that an abortion will take place if a fetal abnormality is detected – are oppressive and should be automatically struck out of contracts, in the same way as unfair contract terms are deleted from other contracts. While contractual terms which specify that termination will take place in certain circumstances are unenforceable and oppressive, it is nevertheless sensible for surrogates and intended parents to discuss their attitudes towards, for example, termination and delivery method, as well as post-birth contact, before entering into an agreement with each other. Of course, a surrogate who initially believes that she would be happy to deliver by caesarean section must retain the right to change her mind, but agreements are more likely to go smoothly when parties' expectations are discussed openly before they make a decision to proceed. In countries where it is not routine for intended parents and surrogates to meet before conception, and where there are language barriers even if they do meet, it will be harder for the parties to a surrogacy agreement to make sure that they have a shared understanding of how they are going to navigate their relationship, both during the pregnancy and after the child is born.

As a result of concerns that the rights and interests of surrogates are not always properly safeguarded in commercial surrogacy arrangements in low and middle income countries, it has been suggested that some form of cross-border regulation should be attempted.[41] In practice, international regulation might most plausibly be effected by an international instrument akin to the Hague Conventions on inter-country adoption and child abduction. To this end, the Hague Conference on Private International Law has recently taken up the issue of international surrogacy arrangements.[42] While it identified 'the need to eliminate "limping" legal parentage and statelessness' as the most immediately pressing issue, other important issues were:

'the need to ensure surrogate mothers' free and informed consent to ISAs [international surrogacy arrangements]; the need to ensure appropriate standards of medical care for surrogate mothers and children, including ensuring the surrogate mother's ability to retain decision-making over her own body; the need for some minimum checks concerning the intending parents' suitability

41 See also Rogerson, this issue, at p. 275.

42 Hague Conference on Private International Law *Council on General Affairs and Policy of the Conference: Conclusions and Recommendations* (HCCH, 2015).

to enter into the arrangement, and the need to establish standards concerning the child's right to know his/her genetic and birth origins.'[43]

Minimum standards for surrogacy might include a requirement that the contract must be in a language that the surrogate can understand, and that it must not include oppressive terms which seek to take away the pregnant woman's right to make decisions about her medical care. Of course, global minimum standards would be difficult to enforce, but a Hague Convention on International Surrogacy would send a clear signal about acceptable and unacceptable features of international commercial surrogacy.[44]

Education

Adopting a 'harm reduction' approach, similar to that invoked in relation to drug use and prostitution in the light of the AIDS pandemic, if people are going to travel overseas in order to access surrogacy arrangements, regardless of what the law says or does, the emphasis should instead be upon trying to make this as safe as possible. In relation to cross-border reproductive care more generally, the counsellors and patient support group representatives interviewed by Culley et al. thought the only feasible response to reproductive travel is to educate people, and ensure that 'they go into it with their eyes open and fully aware of the implications'.

If all IPs attended licensed clinics in the UK before making their surrogacy arrangements overseas, it would be possible for them to be well informed about the questions they need to ask, the safety risks to the surrogate and egg donor, and the implications of UK citizenship and parentage laws. In practice, however, it is the internet, rather than domestic healthcare professionals, to which people turn when seeking out information about international commercial surrogacy.[45]

Clinics' and agencies' websites now specifically target foreigners by offering Skype consultations and help with travel and accommodation, but equally im-

43 Hague Conference on Private International Law *The Desirability and Feasibility of Further Work on the Parentage/Surrogacy Project* (HCCH, 2014).

44 See also C. Humbyrd, 'Fair trade international surrogacy', *Developing World Bioethics* 9 (2009), 111-18.

45 E. Blyth, 'Fertility patients' experiences of cross-border reproductive care', *Fertility and Sterility* 94 (2010), e1, e121; W. Van Hoof/G. Pennings/P. De Sutter, 'Cross-border reproductive care for law evasion: should physicians be allowed to help infertility patients evade the law of their own country?', *European Journal of Obstetrics & Gynecology and Reproductive Biology* 202 (2016), 101-105; Jackson et al., 'Learning from Cross-Border Reproduction', *Medical Law Review* (2017), (in press).

portant are online communities and Facebook groups.[46] Unwanted childlessness can be a lonely experience, especially when most of one's friends appear to be able to conceive effortlessly; for some patients, virtual online communities can be an invaluable source of friendship and advice. It is increasingly common for members of these forums and groups to request information about other people's experiences at specific overseas clinics, which other members will answer. Fertility Friends, for example, currently has separate discussion threads devoted to surrogacy in India, Georgia, Ukraine, Russia and Greece.

It would be impossible to force people to visit a licensed clinic in the UK, or their GP, before seeking treatment abroad, but it might be possible to encourage collaboration between home and domestic providers. If IPs knew that it was possible to receive parts of the treatment – scans and drugs prior to egg retrieval, for example – before travelling overseas, there might be an incentive for them to make contact with healthcare professionals at home. This would then provide an opportunity for them to receive high-quality and accurate information about international surrogacy's risks and downsides before they make their arrangements with an overseas agency or clinic. If we cannot stop people engaging in international commercial surrogacy arrangements, we should at least make sure that they understand its pitfalls for them and their children, as well as for surrogates and egg donors.

Healthcare professionals within the UK are not universally well trained in the implications of surrogacy arrangements. Indeed there is some evidence that surrogates and IPs within the UK have encountered attitudes from clinicians and other healthcare staff that are at best unhelpful, and in some cases, actually hostile.[47] In their survey of UK fertility clinic staff, for example, Norton et al. found that 70% believed that surrogacy cases take up 'excessive amounts of staff time', with some staff commenting that the parties to surrogacy arrangements could be 'very demanding and high maintenance'.[48] More training in surrogacy, and its legal and other implications might enable healthcare professionals to offer better advice to couples contemplating surrogacy overseas.

It would be possible to provide a more powerful incentive for pre-travel engagement with an official body, such as the courts or Cafcass, if IPs could be

46 Jeremy Snyder et al., 'The "patient's physician one-step removed": the evolving roles of medical tourism facilitators', *Journal of Medical Ethics* 37 (2011), 530-4.

47 See e.g. N. Smith, this issue, at p. 237. Also see *The Independent* 'NHS hospitals forcing surrogate families to hand over newborn babies in car parks due to 'dire and outdated' laws', 29 October 2016.

48 Wendy Norton et al., 'A survey of UK fertility clinics' approach to surrogacy arrangements', *Reproductive biomedicine online* 31 (2015), 327-338.

pre-approved for a parental order before they travel.[49] A fast-track mechanism for the attribution of parenthood from birth would also enable surrogacy arrangements to be scrutinised before a child is conceived, rather than, as happens at present, scrutiny taking place only after the child has been living with the IPs for several months.[50]

In practice, pre-conception approval might work in the same way as pre-birth orders do in the US and Greece, where the arrangement is ratified in advance by a court,[51] and, unless circumstances have changed, perhaps because the agreement no longer represents the parties' wishes, the IPs can then be registered on the child's original birth certificate, and be recognised as her legal parents from birth. For IPs entering into international surrogacy arrangements, a pre-birth order, ratified by a UK court, might enable their child to be recognised as a British citizen from birth, thus speeding up and simplifying the processes of obtaining a passport for her and returning to the UK.

Of course, if pre-approval for a parental order was dependent upon proof of the surrogate's free and informed consent, it might, in practice, be difficult or even impossible for UK-based IPs to acquire this information before they travel overseas.[52] If, instead, pre-approval for a parental order simply involved approval of the IPs as suitable prospective parents for a child born to a foreign surrogate, on the basis of a report from a Cafcass Parental Order Reporter, this might be more straightforward. Following pre-approval, once the child has been born, and proof of the surrogate's free and informed agreement to relinquish the child has been registered with the court, a parental order could be issued automatically, without the need for a hearing. In the event that proof of the surrogate's agreement was not produced immediately after the child's birth, the pre-approval would lapse and the IPs would be free to pursue the option of a post-birth parental order, or another mechanism for the transfer of parental responsibility.

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49 E. Jackson, 'The law and DIY Assisted Conception', in Kirsty Horsey (ed.), *Regulating Assisted Conception* (Routledge, 2015), 31-49.

50 M. Crawshaw/S. Purewal/O. van den Akker, 'Working at the margins: the views and experiences of court social workers on parental orders work in surrogacy arrangements', *British Journal of Social Work* (2012), 1-19.

51 See, for example, K. Horsey/K. Neofytou, 'The fertility treatment time forgot: What should be done about surrogacy in the UK', in K. Horsey (ed.), *Revisting the Regulation of Human Fertilisation and Embryology* (Routledge, 2015), 117-35 and N. Gamble, 'A better framework for United Kingdom surrogacy', in S. Golombok et al. (eds.), *Regulating Reproductive Donation* (Cambridge UP, 2016) 140-162, 157.

52 Although it is worth noting that this information has not always been easy to find after birth, if the surrogate mother has lost touch with the agency. See, for example, *Re D (Minors) (Surrogacy)* [2012] EWHC 2631 (Fam) and *R v. T* [2015] EWFC 22.

Conclusion

The case for reforming the law on surrogacy in the UK has been a strong one for decades. Unlike other types of assisted conception, surrogacy has, since 1985, been regulated by a largely ineffective ban on commercial surrogacy, which in practice just prevents surrogacy agencies from making a profit from carrying out certain acts in relation to surrogacy, and by criteria for parental orders which can be avoided, most straightforwardly by not applying for a parental order at all.

All parental orders need court approval, and parental orders in cases involving international surrogacy need the approval of a High Court judge. As a result, surrogacy arrangements make profligate use of scarce judicial resources. Rather than only reaching the court when there is a dispute, or where something has gone wrong, surrogacy arrangements which have gone smoothly nevertheless take up a considerable amount of court time, even when, in practice, the court is effectively rubber-stamping an arrangement that has already been made.

In short, there are two closely related reasons to believe that the case for reform of surrogacy law is now overwhelming.

First, the courts consider surrogacy arrangements after the child has been born, when their paramount consideration must be the child's welfare throughout her life. It is therefore impossible for the courts to do anything other than make whatever order will best protect the child's interests. In international surrogacy arrangements, judges can and do repeatedly warn of the dangers of entering into these agreements without legal advice, but these warnings come too late, after the child is here. If the IPs are eligible for a parental order, and this would be in the child's best interests, a parental order will be granted automatically, on the basis of what is almost a template judgment. To say that this is an inefficient use of the resources of the Family Division of the High Court would be an understatement.

It could therefore be argued that courts consider individual surrogacy arrangements, if they consider them at all, at the wrong time, after the child is born and living with her 'parents', by which time, the court will usually have no choice but to make a parental order. It would be possible to institute a vetting process with teeth so that IPs could be pre-approved for parental orders, before the child is conceived. This could simply be done by Cafcass, or, if necessary, their recommendation could receive fast-track confirmation from a judge. And, of course, if there were grounds for concern, a pre-birth parental order could be refused.

Of course, in reality, people who were turned down at that point, or who did not apply for pre-approval could still travel overseas and engage in commercial surrogacy arrangements. They might then return home with a child whose legal position will require resolution in the courts. Pre-conception approval for parental orders will not make the problem of people bypassing the law disappear. What it would do, however, is change the default position.

In the vast majority of straightforward surrogacy cases, pre-approval for a parental order, which then crystallises at birth, could mean that the IPs were recognised as the child's legal parents from birth. This would make it easier for them to obtain a passport for their new baby and return to the UK. It would be more efficient, as well as more appropriate, if the law's default position was better aligned with the reality that the vast majority of surrogacy arrangements go smoothly and that a parental order will almost always be in the child's best interests.

Of course, there will be exceptions to the norm, and there will be surrogacy cases in which the courts will have to step in, after the event, in order to protect the child's best interests.[53] Pre-approval for a parental order could be revoked, if there were grounds to believe that it was no longer in the child's best interests, or if the surrogate had withdrawn her consent. But it is surely sensible for court time to be devoted to cases in which there is a real issue to be decided, or a dispute to be settled, rather than wasting judicial time by forcing High Court judges to tick a series of boxes – Was the sum paid disproportionate to reasonable expenses? Were the applicants acting in good faith and without moral taint in their dealings with the surrogate mother? Were the applicants' party to any attempt to defraud the authorities?[54] – before making an order that no one could ever seriously have doubted would be made.

Secondly, the criteria for parental orders themselves would appear to be in disarray. At least in the case of payments, the UK statute specifically allows for judicial discretion in order to accommodate the interests of children born as a result of commercial surrogacy. More striking is the President of the Family Division's recent interpretation of another necessary condition for the making of a parental order, namely that the application must be made within six months

53 This might be demonstrated by Cafcass's finding that, in 154 of 156 cases, the outcome was the making of a Parental Order; of the remaining two cases, one application was withdrawn, and in the other case a Care and Protection Order was made. See further Cafcass, *Cafcass Study of Parental Order Applications made in 2013/14* (Cafcass, 2015).

54 See, for example, Theis J. in *CH, NM v. SM, MM, X (By His Children's Guardian)* [2016] EWHC 1068 (Fam).

of the child's birth.[55] There is no similar 'unless authorised by the courts' clause in this provision, and until the case of *Re X (A Child) (Surrogacy: Time limit)*,[56] the courts had assumed that, regardless of whether a parental order might be in the child's best interests, the statutory words were clear and unambiguous, so that no order could be made after the child was six months old.[57] Then, in *Re X*, Sir James Munby P decided that this cannot have been parliament's intention. Parliament, he reasoned, 'must have intended a sensible result', and 'slavishly' sticking to a six-month time limit would not be sensible:

'Given the subject matter, given the consequences for the commissioning parents, never mind those for the child, to construe section 54(3) as barring forever an application made just one day late is not, in my judgment, sensible. It is the very antithesis of sensible; it is almost nonsensical.'

Unsurprisingly, *Re X* has been followed by several cases that would have otherwise been out of time. Although Sir James Munby P used the example of an application made a day late in order to illustrate his claim that this could not be what parliament had intended, parental orders have now been granted several years later. In *Re A (A Child)*,[58] for example, relying upon the judgment in *Re X*, Russell J made parental orders in respect of two children, aged eight and five years old.

The unravelling of section 54 continued in May 2016, in *Re Z (A Child) (No 2)*,[59] a case brought by a single man who was the biological father of a child born to a surrogate in the US. Three days before the hearing, the Secretary of State for Health conceded that the prohibition on single people's access to parental orders was incompatible with Article 14 of the European Convention on Human Rights:

'The Secretary of State accepts that the facts fall within the ambit of Article 8 and that Article 14 is engaged. It is accepted that there is a difference in treatment between a single person entering into a lawful surrogacy arrangement and a couple entering the same arrangement. This difference in treatment, namely the inability to obtain a parental order, is on the sole ground of the status of the commissioning parent as a single person versus the same person

55 Human Fertilisation and Embryology Act 2008, s. 54(3).
56 [2014] EWHC 3135 (Fam).
57 For example, in *J v. G (Parental Orders)* [2014] 1 FLR 297 Theis J. said: 'It should be remembered parental order applications must be made within six months of the child's birth, there is no power vested in the court to extend that period' [2014] 1 FLR 297.
58 [2015] EWHC 91 (Fam).
59 [2016] EWHC 1191 (Fam).

were he part of a couple. The Secretary of State accepts that, in light of the evidence filed and the jurisprudential developments both domestic and in Strasbourg ... this difference in treatment on the sole ground of the status of the commissioning parent as a single person versus being part of a couple, can no longer be justified within the meaning of Article 14.'

If an eligibility criterion based upon a person's marital status is discriminatory, could it also be argued that the requirement that at least one of the IPs must be the child's genetic parent discriminates unfairly against doubly infertile couples, whose infertility may be the result of a disability, which, like marital status, is a protected characteristic for the purposes of the Human Rights Act 1998? If the trumping criterion for the making of a parental order is the child's best interests throughout her lifetime, it would surely be sensible for it to be admitted that this, coupled with the surrogate mother's agreement to the making of the order, is the only criterion for eligibility for a parental order, and that the other restrictions either have been, or are waiting to be rewritten or ignored in order to protect the child's wellbeing.

In the past, it was plausible to argue that it would be inefficient to set up a cumbersome bespoke framework for the regulation of surrogacy, when the numbers of births each year are so low. While the numbers are increasing, surrogacy is unlikely ever to become a common way to start a family. Nevertheless, the efficiency argument could now be turned on its head. With cuts to the court service's budget, and plans to move towards online courts for simple contractual disputes, it seems extraordinary that international commercial surrogacy continues to require a full court hearing before a judge in the Family Division of the High Court in order to tick a handful of boxes, that are invariably ticked because the child's best interests trump other considerations. Given that pre-approval of parental orders might also be in the best interests of IPs and children, by ensuring that neither is left in a legal limbo during the child's first months (or now years) of life, there would seem to be no good reason for a government looking for further efficiency savings in the Ministry of Justice not to seize the 'low hanging fruit' of our expensive, inefficient and ineffective law on surrogacy.