

Mapping out a future for the UK's law on surrogacy

Natalie Smith*

Trustee, Surrogacy UK

Abstract

Surrogacy UK (SUK) is a not for profit organisation that has been helping to create families through surrogacy for over fourteen years. This article highlights some of the practical issues 'on the ground' that intended parents (IPs) and surrogates face and argues that there needs to be urgent reform of UK surrogacy law. We make a case for why the altruistic nature of surrogacy should be protected and we lay out our recommendations for reform, which include: parental orders (POs) should be pre-authorized so that legal parenthood is conferred on IPs at birth; POs should be available to single people who use surrogacy and IPs where neither partner has used their own gametes ('double donation'); and the rules on surrogacy-related advertising and the criminalisation of this should be reviewed in the context of non-profit organisations. We also ask the Government, in consultation with the surrogacy community, to produce better guidance for the public and professionals in the field.

We argue that a set of principles should be used to assess any recommendations for reform. Reform must not decrease access to surrogacy; should reflect lived experiences of surrogacy; should centre on the welfare of children; and should promote surrogacy as a relationship and not a transaction. Finally, we give an update on our reform campaign.

I. Introduction

Surrogacy UK (SUK) is a not for profit organisation that has been helping to create families through surrogacy for over fourteen years. Our philosophy is based upon a firm belief that the best surrogacy outcomes result from investing time in developing trust and mutual respect between surrogates and intended parents (IPs). Our values centre on community, integrity, trust, honesty and teamwork. This article highlights some of the practical issues 'on the ground' that IPs and surrogates face and argues that urgent reform of UK surrogacy law is necessary. We make a case for protecting the altruistic nature of surrogacy and we lay out our recommendations for reform.

We argue that a set of principles should be used to assess any recommendations for reform. Reform must not decrease access to surrogacy; should reflect lived experiences of surrogacy; should centre on the welfare of children; and should promote surrogacy as a relationship and not a transaction. Finally, we

* DOI 10.7590/221354016X14803383336644

give an update on our reform campaign and what has been accomplished in the year since we published our report in November 2015.¹

2. Problems arising from the current law

In 2015 the SUK working group on surrogacy law reform conducted a survey of IPs, surrogates and professionals in the field (the largest of its kind ever in the UK) and the subsequent report concluded that UK surrogacy law is outdated and in dire need of reform.² The report highlights that the law does not align with the best interests of surrogate born children or with the reality of surrogacy as it is experienced by surrogates and IPs in the UK. It also draws attention to increasing judicial dissatisfaction with the provisions of surrogacy law, especially in relation to POs. Judges are increasingly prepared to purposively read down the provisions of s. 54 Human Fertilisation and Embryology (HFE) Act 2008 in order to give effect to the welfare of the child. The report argues that the current law is premised on a series of myths, fears and misunderstandings that are at odds with the real practice of surrogacy in the UK.

The issues with the current law are well documented in our 2015 report and reflect the kind of issues that we come across every day in supporting our members through their surrogacy journey. In the past month, for example, we have recently helped our members deal with the following problems, all of which are typical for people going through surrogacy. One surrogate was distressed when her IPs were locked out of the delivery room whilst she (in the midst of labour) was asked to produce legal paperwork detailing their surrogacy arrangement before they could be let in. This caused her considerable distress as not only were the IPs her birth partners, but her main motivation to be a surrogate was to see her IPs become parents and meet their baby. Similarly, another set of IPs was told by a midwife that they would not be able to be in the room when their baby was delivered and that they could not hold their baby whilst they were in the hospital. Another set of IPs was ignored completely by a midwife during an appointment after being told they were not the legal parents and therefore she could not communicate with them. Sadly, many of our surrogates are made to hand babies to the IPs in the hospital car park.³ We have also recently supported the surrogate and parents of twins born prematurely.

¹ 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).

² *Ibid.*, p. 6.

³ A fairly widespread issue, also reported in the national press recently, see 'NHS hospitals forcing surrogate families to hand over newborn babies in car parks due to 'dire and outdated' laws', *The Independent* (29 October 2016).

Needing considerable medical care, the surrogate has been required to give her consent for life saving emergency operations, visits by family and numerous other decisions that should be with the parents who are caring for the children on a daily basis. There have also been several heart wrenching conversations about what would happen if one of the babies died – would the parents be able to organise the funeral? Would the child ever be recognised as belonging to their family? The situation has caused considerable distress for everyone involved, not least the surrogate who desperately wants to see the parents treated as parents. One couple recently told us how they had re-mortgaged their house and borrowed money from parents in order to travel to the US for surrogacy because they thought the risk of someone potentially keeping their baby – built as it is into the existing law – was too great. Such stories indicate to us that there are deep-set flaws within the existing law, as none of these circumstances are ideal for anyone concerned, least of all the children.

3. Recommendations for reform

Our 2015 report concludes that the detailed recommendations for reform should be consolidated in a new Surrogacy Act. It says, ‘we envisage that this Act would continue to reflect the altruistic, compensatory model of surrogacy in the UK, while removing unnecessary barriers standing in the way of those seeking to use surrogacy or become surrogates and better representing how domestic surrogacy arrangements actually work in practice’.⁴

The detailed set of recommendations can be found in the report, however they can be summarised as follows: POs should be pre-authorised so that legal parenthood is conferred on IPs at birth; POs should be available to single people who use surrogacy and IPs where neither partner has used their own gametes (‘double donation’); and the rules on surrogacy-related advertising and the criminalisation of this should be reviewed in the context of non-profit organisations. We also ask the Government, in consultation with the surrogacy community, to produce better guidance for the public and professionals in the field. Finally the report argues that the principle of altruistic surrogacy should be guarded – surrogacy as a relationship and not a transaction.

Removing discrimination (against single people and people who are doubly infertile) and recognising the true identity of surrogate born children – as belonging to the family of the IPs – from birth, would go a long way to solving many of the issues that arise for surrogates and IPs, and crucially would serve

⁴ Horsey, ‘Surrogacy in the UK’ 2015 (n. 1).

to better meet the welfare needs of children born through surrogacy.⁵ As one of our surrogates recently said:

‘surrogates go into surrogacy knowing that it is our duty to sign parental rights over to the true parents, but why this cannot be done and sorted long before it actually is is ridiculous. The law needs to be changed for all future families made through surrogacy’.⁶

Another surrogate commented:

‘it was so special to see my friends meet their son for the first time, it was wonderful to give him back to his adoring parents. I just wish the law recognised them as legal parents from birth – he was never mine to keep.’⁷

An interview, conducted with surrogates from SUK in May 2016,⁸ provides further insight into the motivations of surrogates and their views on legal parenthood. Lianna, a surrogate, commented:

‘it was horrible for his mum, not to be able to go on the birth certificate straight away. She’s his mother in every shape, way and form. Just because she didn’t carry him doesn’t make her any less of a mother’.

At the May 2016 conference on Surrogacy Law Reform, hosted by Kent Law School, there was widespread consensus on the need to recognise parents from birth and to remove discrimination from surrogacy legislation. Whether surrogates should be paid (over and above the reimbursement of reasonable expenses) was a topic that raised more lively discussion. The rest of this article sets out why SUK believes that any law reform should guard the altruistic, non-compensatory, nature of UK surrogacy. We return to the reasons that provoked us to set up a working group to tackle this issue and draw out the principles that we believe any recommendations for reform should be assessed against.

⁵ See the comments about ‘identity’ made by Theis J., in the recent case *CD v. EF and AB* [2016] EWHC 2643.

⁶ Surrogacy UK Facebook Page (accessed 30 October 2016).

⁷ Surrogacy UK Facebook Page (accessed 22 October 2016).

⁸ www.surrogacyuk.org/reform-interviews-surrogates.html.

4. Looking backwards to move forwards – extracting principles for legal reform

SUK became active in the campaign for legal reform in 2014 after a Westminster Hall parliamentary debate led by Jessica Lee MP, then Conservative Member for Erewash. SUK related to the ‘legal and political minefield’ that she described and supported her call for Parliament to ‘face up to such problems and try to find a solution’.⁹ We wholeheartedly agreed with her call for new surrogacy legislation, encompassing pre-birth orders, and the ending of the six-month deadline for applying for a PO. The call for a code of practice for surrogates and IPs also sounded an interesting idea though was lacking in detail. However, the remainder of her recommendations – enforceable written agreements and ‘inconvenience payments’ – left us with a profound feeling of unease and fuelled our decision to enter the debate.

Why do these concepts trouble us so much? In the rhetoric of sweeping ‘common sense’ statements lay the devil of detail that could fundamentally alter the nature of UK surrogacy. The proposed solution centred on a step towards US-style commercial surrogacy, with legitimised ‘inconvenience payments’ and relationships regulated through contractual obligations (the analogy made by Jessica Lee was to buying a house or leasing a car).¹⁰ Taken together this would be a drastic move away from the altruistic principle of UK surrogacy (only ‘reasonable expenses’ can be paid to surrogates)¹¹ and the deeply personal and relationship-based ties that characterise the majority of UK surrogacy arrangements. It seemed that, despite a certain neatness to the way its logic addressed the dearth of clarity under UK surrogacy law, little consideration had been given to the impact of such suggestions on real children, IPs, surrogates and families and on the lived reality of those undertaking surrogacy.

Problems also arise with the terminology. The term dismisses the reciprocal nature of surrogacy – the surrogate is realising her own aspirations of helping to create a family, something that is hugely motivational in and of itself. There are, of course, huge sacrifices made by surrogates in the making of families through surrogacy. However, it is not as simple as an inconvenience passively submitted to by one party for the convenience of another, which can be compensated through a fixed or other payment. In fact, research shows that money is not a main motivator for UK or US-based surrogates, even where payment is common practice, e.g. in America.¹² The concept of an ‘inconvenience pay-

⁹ www.publications.parliament.uk/pa/cm201415/cmhansrd/cm141014/halltext/141014h0001.htm.

¹⁰ *Ibid.*

¹¹ Human Fertilisation and Embryology (HFE) Act 2008, s. 54.

¹² For example, see V. Jadvā, this issue, at p. 215.

ment' is based on a misunderstanding of the dynamics of, and motivations for, surrogacy in the UK.

5. Why does this matter?

Why would this matter if legal reform accomplished the much needed clarity that both Jessica Lee and we wanted and fixed the flawed mechanics of an outdated law? We identify four main reasons. First, it would reduce access to surrogacy as a form of modern family building by increasing associated costs. Secondly, it would favour short-term transactional relationships over long-term trust-based ones. Thirdly, it would have a negative impact on societal views of surrogacy, surrogate born children and surrogacy. Lastly, such reform would not have a clear positive impact on the welfare of surrogate-born children. We argue that any recommendations for reform must not decrease access to surrogacy; should reflect lived experiences; should centre on the welfare of children; and should promote surrogacy as a relationship and not a transaction.

5.1 Reducing access to surrogacy by increasing costs

The exact cost of surrogacy in the UK and overseas is unclear, but we do have some data that we can work from. A survey conducted for our November 2015 report gained responses from 111 women who had been surrogates in the UK. One hundred and four of these women (95.4%) received compensation for this: twenty-nine received less than £10,000; seventy-three received £10,000-£15,000 and five received £15,000-£20,000.¹³ In the same survey, 177 IPs who used a UK-based surrogate reported a mean expenses cost of £10,859.¹⁴ Payments to surrogates in the US, by contrast, appear to be higher,¹⁵ as we know the total overall cost to be.¹⁶ Anecdotal evidence from an international Facebook chat group suggests that payments to US surrogates (not including agency, medical or insurance costs) are \$30,000-\$50,000 (approx. £23,000 - £38,000), with additional expenses also paid for, e.g. childcare and travel, as well as a monthly allowance of around £150. A quick Google search shows fees paid to surrogates (not including agency, medical or insurance costs) of around \$45,000

¹³ Horsey, 'Surrogacy in the UK' 2015 (n. 1), 20.

¹⁴ *Ibid.*, 23.

¹⁵ Our survey had responses from 14 IPs who went to the US for surrogacy (out of 19 who went overseas in total). The mean sum that went to the surrogate for all overseas surrogacy was £17,375 (*ibid.*, 24), though this included the (lesser) sums paid to surrogates in some other destinations.

¹⁶ See N. Gamble and H. Prosser, this issue, at pp. 262, 265.

– \$60,000 (or approx. £36,000 – £49,000) in California.¹⁷ This is significantly more than the average reimbursed expenses to UK surrogates that our survey responses indicate. Whilst we recognise that UK surrogacy is not cheap – due to expenses and medical costs – it is untenable that legal reform should further *increase* costs, thus reducing access to this form of family building, and potentially driving some people towards totally unregulated Facebook and other groups on social media, or to low cost overseas destinations, where risks are higher.¹⁸

It is interesting that there appears to be little appetite from the surrogacy community itself for a movement towards payments and contracts.¹⁹ This is supported by the 2015 survey and feedback from our own members. An internal poll of twenty SUK surrogates in 2016 showed that 90% agreed that they should not be paid to be a surrogate. In an interview with surrogates,²⁰ Sarah (a four times surrogate) concludes by saying: '[i]f they saw that [the moment a couple becomes parents] they would have no question of why a surrogate would do it. They would understand why you do it and why you can't get paid to do it'.

5.2 Favours short-term transactional relationships over long-term trust-based ones

There is no doubt that those undertaking US-style commercial surrogacy can and do build strong and enduring relationships with their surrogate.²¹ However, there is huge concern within sections of the surrogacy community in the UK about a movement away from the principle of altruism and mutual decision making which is enshrined in UK law, and which, to date, has resulted in openness and pride in relation to surrogacy, and enduring relationships between surrogates, IPs and children born through surrogacy.²²

There should be no short cuts to the necessity of IPs and prospective surrogates investing time in getting to know each other and in building a habit of collaboration around all aspects of surrogacy. It is vital to have a written record of the intentions of those involved (that is based on a full, preferably mediated, discussion) around all aspects of a surrogacy relationship – from contact, to

¹⁷ For example, see West Coast Surrogacy (www.westcoastsurrogacy.com/surrogate-program-for-intended-parents/surrogate-mother-cost (accessed 14 October 2016)); Fertility SOURCE Companies (www.fertilitysourcecompanies.com/surrogacy/looking-for-surrogate-costs-and-financing/ (accessed 14 October 2016)).

¹⁸ As shown in a recent case: *Z (surrogacy agreements: Child arrangement orders)* [2016] EWFC 34. Also see E. Jackson, this issue, at p. 197.

¹⁹ See, for example, the recorded responses in Horsey, 'Surrogacy in the UK' 2015 (n. 1), Appendix 3, pp. 53-54.

²⁰ Available at www.surrogacyuk.org/reform-interviews-surrogates.html.

²¹ See Gamble and Prosser, this issue, at p. 257.

²² Horsey, 'Surrogacy in the UK' 2015 (n. 1), section 3.

expenses, to medical decisions, to birth plans – however, this should be a statement of intent and not a contract that can be enforced by a court of law. Any calls for reform should centre on the welfare of children, which is best met by encouraging deep, open, mutualistic and ongoing relationships between surrogates and IPs.

5.3 Negative impact on societal views of surrogacy and surrogate born children

Surrogates and IPs face a daily battle to educate friends, family, work and acquaintances on surrogacy and the values that underpin the majority of relationships. That battle is particularly difficult for surrogates who face frequent questions of ‘so, how much did you get paid?’

The majority of UK surrogacy relationships are based on trust, respect, empathy and friendship. Our members have a huge amount of pride in surrogacy that enables them to be open, confident and patient when it comes to talking about their journey with family, friends and strangers. This puts them in a fabulous position to talk to their children about surrogacy. The values that equip them to have those conversations are, for many people, rooted in the reciprocal and non-commercial nature of surrogacy. Many of our members have expressed concern that money (a fee to the surrogate) would taint the experience for them.²³

Again, that is not to say that those who engage in commercial surrogacy cannot reflect on positive values of their surrogacy arrangement. The comments of Jessica Lee, in likening surrogacy to purchasing a house or leasing a car, show a concerning lack of understanding of what is actually involved. A better analogy would be to a marriage. A marriage with a prenuptial agreement can, of course, work and be very happy, but it would be wrong to make this a cornerstone of the law and hold it up as the norm. Surrogacy is about making families, not money. Any legal reform should reflect this.

5.4 No clear positive impact on the welfare of surrogate-born children

Many of the voices on surrogacy in the 1980s expressed concern over the negative effect on children's well-being if they come to know they have been ‘paid for’. The Warnock Report²⁴ indicated that it ‘might be psychologically damaging to the child, or degrading to the child, when it was treated

²³ For example as expressed by IPs and surrogates on TV in *Sunday Morning Live* (24 July 2016) and the *Victoria Derbyshire Show* (4 March 2016).

²⁴ *Committee of Inquiry into Human Fertilisation and Embryology, Report Cmnd 9314* (London: HMSO, 1984) (‘the Warnock Report’).

as a commodity in a financial transaction'.²⁵ Whilst many of the concerns over surrogacy expressed in the Brazier and Warnock reports have not come to pass, there seems to be no argument that payments to surrogates by IPs would have a positive impact on the welfare of surrogate born children. SUK believes that the central tenet of any legal reform should be to maximise their welfare.

6. The Surrogacy UK Working Group on Legal Reform

The unease that accompanied our interpretation of the 2014 recommendations founded the principles on which SUK set up a cross-organisational working group to look at the question of legal reform in early 2015. The working group consists of Natalie Smith, a trustee of SUK and mum to twin girls born through surrogacy, Sarah Jones, Chair of SUK and a three-time surrogate (at the time of writing Sarah was pregnant with her fourth surrogate pregnancy), Sarah Norcross, Director of Progress Educational Trust, a charity that aims to advance public understanding of science, law and ethics in the fields of human genetics, assisted reproduction, embryology and stem-cell research, Dr Kirsty Horsey, from Kent Law School, University of Kent, and Louisa Ghevaert, an expert in surrogacy, fertility and parenting law at Michelmores LLP.

One of our first endeavours was to undertake research on surrogacy in order to enable a fact-based set of recommendations for reform that were based on the lived experiences of those undertaking surrogacy. Some of the results of that research are discussed above, and further detail is contained elsewhere in this issue.²⁶ Essentially, our research called into question previous claims that as many as 1,000 to 2,000 children are born via surrogacy each year to UK parents, up from 50-100 in 2008. It called for child-centred reform that acknowledged the importance of identity, inheritance and early decision making, and laid out a set of recommendations for reform, as outlined above.

6.1 Our campaign so far

When we launched our reform campaign there was little appetite in Government for reform of UK surrogacy law. SUK's working group coordinated a letter writing campaign to MPs, encouraging surrogates and IPs to inject their voice directly into the debate. At the same time, we rallied MPs, led by Andrew Percy, Conservative member for Brigg and Goole, to take our

²⁵ *Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation, Report of the Review Team* Cm 4068 (London: HMSO, 1998) ('the Brazier Report'), para. 4.3.

²⁶ Horsey, this issue, at p. 181.

message – that UK surrogacy law was outdated and reform was urgently needed – directly to Jane Ellison MP, then Parliamentary Under Secretary for the Department of Health (DH).

As well as hearing the voices of the surrogacy community it was important to continue listening to those of the academic and legal professions, and the working group encouraged a wide group of stakeholders to continue to sound the call for reform. Influential amongst these are the voices of the original architects of the UK's surrogacy law, Baroness Mary Warnock and Professor Margaret Brazier, who signed the Preface to our report.²⁷ Further, each admitting that in their own way they 'had got surrogacy wrong', both now support reform and spoke at the conference upon which this issue is based to detail their thoughts and recommendations.²⁸

Alongside this, the working group continued to promote our campaign, by speaking at conferences and writing about it. We also secured national media and legal coverage of the issue, including in the *Guardian*, *The Times* and *Family Law*.²⁹ We consulted with CAFCASS about its PO awareness campaign,³⁰ and the terminology used in its information sheets for both prospective parents and for PO reporters. We also collated letters of support for our recommendations from key organisations, including other reputable surrogacy organisations (COTS and Brilliant Beginnings) as well as wider-ranging organisations including Stonewall, the British Fertility Society and the Donor Conception Network. At the same time, other campaigners were also advocating reform. One of the most significant events taking place was a human rights challenge over the law's exclusion of a single man from being able to apply for a PO. In May 2016, the decision of the President of the Family Division of the High Court was that this did infringe the petitioner's human rights, and a declaration of incompatibility was made.³¹ This has been a key milestone on the road to reform.

SUK brought a panel of surrogates and IPs to the conference on law reform upon which this issue is based. Our aim was to talk about both the experience of surrogacy in the UK and about views and hopes for reform. The following sets out the stories of those members in their own words to give further insight into the lived reality of surrogacy.

²⁷ Alongside Professor Susan Golombok, who has done fantastic work on a longitudinal study of families created by surrogacy.

²⁸ See Warnock, at p. 155; Brazier and Waxman, at p. 159, this issue.

²⁹ 'The kindness of strangers: should surrogates get paid?', *The Guardian* (21 November 2015); 'Surrogacy in the UK: time for legal reform?', *Times Law* (26 November 2015); 'Landmark report shines light on the practice of surrogacy in the UK and calls for legal reform', *Family Law* (20 November 2015).

³⁰ See www.cafcass.gov.uk/grown-ups/surrogacy/become-the-legal-parent-of-a-child-born-through-surrogacy.aspx, accessed 14 October 2016.

³¹ *In the matter of Z (a child)* (No. 2) (2016) EWHC 1191 (Fam).

6.1.1 Michelle Green, surrogate

'I first stumbled upon surrogacy at seventeen years of age, after watching a documentary on a lady who had been a surrogate for friends of hers. Right then I thought "wow what an amazing thing to do for someone, maybe I could do that"? At such a young age though and not even thinking of having a family of my own just yet, the thought was pushed to the back of my mind.

In 2013, a friend of mine donated her eggs and shared on Facebook of her delight that she had managed to help a couple become a family. The post she shared touched me and fired my own desire to perhaps also help create the family I loved so dearly and couldn't imagine being without for a couple who was less fortunate than myself.

After searching the internet for egg donation I stumbled across surrogacy, then Surrogacy UK. Excited by the thought that I could do just that little bit more, I had completed my family, had no use for my eggs or womb anymore why not share it?

I joined Surrogacy UK in October 2013, and started to get to know a couple in March 2014. This period was filled with fun and laughter but also talking through the seriousness of the journey we were embarking on, we talked through every eventuality and completed an agreement in early June 2014. After this point we threw ourselves into the crazy process of trying to get pregnant via host surrogacy. In early August, I found out I was pregnant with my couple's precious cargo and then later that month that I was very luckily carrying twins.

Twin girls were born in March 2015 making me a very proud surrogate. I am continuing my journey in surrogacy to now trying to help another couple become a family, this time as a traditional surrogate. At the time of writing we have been unsuccessful after ten attempts and are just about to start the IVF process where I'll undergo a full IVF cycle. Egg donating then also carrying.

I feel surrogacy law reform is very important. It needs to remove the uncertainty of parenthood for surrogate born children. As a married surrogate, my husband and I became legal parents of the twins, until they were four months old, something that I think should be handed to the parents at the birth of the child. The parents should register the birth and be on the birth certificate.

We need to make surrogacy widely available to as many people as possible, that means keeping surrogacy altruistic, my journey was about friendship, not a business transaction. Currently surrogacy is unavailable to single people, or those that haven't got use of their own gametes, this should be lifted to make surrogacy more accessible to these people.

There does also need to be guidance across all aspects of healthcare for the parents and the surrogates in order not to feel isolated while going through the journey, I was lucky and was fully supported, however others are not so lucky, with car park handovers and being unable to leave the hospital leaving the child

in the care of his/her parents through fear of being accused of child abandonment.’

6.1.2 Caroline Evans, surrogate

‘I wanted to be a surrogate for as long as I can remember, as it truly breaks my heart that there are people out there that may never experience the joy and love of being a parent. I also wanted to experience being pregnant again and again, but have no desire for any more children of my own. I believe that whilst I am healthy/fertile, why not use my body to help other people have the precious gift of a child?’

To be honest, when I first started looking seriously at being a surrogate, a lasting friendship with a couple wasn’t my first priority. But after joining Surrogacy UK, the organisation I have been with for nearly four years now, I realised how wonderful it is to create good and honest friendships – surrogacy doesn’t have to be a taboo subject, or something to be frowned upon – done in the right way, it can be a magical and remarkable process that creates lasting happiness and memories for all involved.

I delivered a baby girl in September 2014 for the first couple I chose to help, we have a life-long connection, and I enjoy getting regular updates and photographs, and visiting them a few times a year. The couple I am currently fourteen weeks pregnant for I have known since joining SUK – they have been through a lot of heartache (before coming to surrogacy and also with their surrogacy journey so far) so knowing them so well, it was an easy choice to help them next. They were already close friends of mine. [Update – at the time of writing Caroline is now 20 weeks pregnant with her IPs’ son.]

The current law is in desperate need of change – both parents should be recognised as legal parents from birth (on birth certificate) and the surrogate should not be responsible for the child whatsoever. The way things stand at the moment, it is unfair on all parties and not a pleasant experience for the parents to have to wait (sometimes up to a year) to be legally recognised as the parents.

Also, as with adoption and fostering, and indeed people who choose to have children naturally on their own, surrogacy should be made open to single people. Also, IVF using donor sperm and donor eggs implanted into a woman is allowed during personal treatment couples go through – this should be extended to surrogacy too (at the moment at least one parent has to be genetically related to the child). In the near future I really hope to see the law catch up with the times and mirror the needs of the growing surrogacy community in the UK.’

6.1.3 Sarah Jones, surrogate

I am a four times surrogate, whose surrogate children range in age from twelve to nearly born (at the time of writing, I am 36 weeks pregnant).

As a 23 year old, I had one daughter with no intention at that time of having any more children, yet I was young, healthy and as far as I was concerned had so much fertility to share. My daughter was my entire world and having her changed my perspective on what is important in life, and thinking there were people out there who suffered from infertility really hit a chord with me.

I initially looked into egg donation, went to the clinic and signed up yet didn't feel comfortable not knowing what happened with my eggs, or any offspring that came about. Known egg donation was something that didn't happen at the time, and the thought of being anonymous didn't feel right. I didn't want to be completely in the family's life but I would have liked some choice who received my eggs.

At that time, I felt it wasn't for me, but revisited it a few years later. A Google search for egg donation brought up surrogacy and for the first time it clicked what I wanted to do. It was easy for me to be pregnant and I could really give the gift of a child to someone who I would have met.

Surrogacy UK completely fit the ethos I felt was the right way to do surrogacy – by making friendships and having mutual respect for each other. I joined the organisation and within a year I met my first IPs. On meeting my IM, I genuinely felt I had met a sister – we bonded immediately and decided to become a team. A few months later we become pregnant and I gave birth in June 2004 to their daughter. I had never felt such pride before and such a sense of achievement – I had done this. I had made a mother and a father, grandparents, aunts, uncles all by doing something I found easy.

I couldn't stop there, so the next year I gave birth to another little girl for another couple. Her parents were a couple whose journey I had followed for two years and I wanted nothing more than to help them succeed in being a family.

I then took a break to marry my husband and have two more children of my own, but when we had completed our family we came back to surrogacy. As a family we chose a wonderful couple to help, who instantly became our family. Elliot was born in 2013, and I'm now pregnant with his little sister. Surrogacy had enriched my life in so many ways, it has brought me more family, friends and a group of like-minded women who I am proud to call my surro-sisters.

The current law is outdated and isn't beneficial to any party, the parents, the surrogate but more importantly the child born through surrogacy. The fact that the genetics parents aren't recognised from birth is harmful to the child and the parents and leaves the surrogate and her husband in a vulnerable position. It is confusing for medical staff whilst the surrogate is pregnant, and is potentially life threatening especially if the child is born prematurely. For the

genetic parents to get the permission of the surrogate before operations can take place belittles their role as parent, and leaves them feeling helpless.

For this reason I would like to see the parents recognised from birth. The surrogate and her husband do not want parental rights so I'm unsure who this law is currently designed to protect. We need to look at surrogacy as a whole and what laws can be changed that will benefit and protect the child born.'

6.1.4 Natalie Smith, mum to twins born through surrogacy

'I was fifteen years old when I discovered that I would never be able to carry a child. After my periods didn't start, routine tests revealed that I had a congenital condition called MRKH, which meant that my womb had not formed properly. The diagnosis was devastating and fragmented my whole sense of self, ripping apart the carefree and happy life that I had been living. Friendships and relationships fell apart as deeply held assumptions about my identity and my future dissolved. I spent over fifteen years dealing with the grief of the diagnosis. When surrogacy was mentioned to me at the age of fifteen, it was an embryonic concept – not really well practised or understood in society – but I instantly knew that this was the option for me. I had a visceral need to have my own biological children and to nurture a baby from birth – something that only grew stronger when I met my husband. I wanted with every part of me to create life from a bit of myself and a bit of him and to raise a family together. After we got married we researched surrogacy on the internet and came across a few surrogacy organisations. The horror of going through all this with the possibility that someone could keep our child at the end was something that played constantly in my mind. We had fleetingly looking into surrogacy in India but the unfamiliarity of the country or culture meant that I could not navigate the complex process and be sure that no one had been exploited or coerced into helping me. America, with its excessive costs was also not an option. It seemed absurd to start something as solid as a family by taking on such financial risk.

Surrogacy UK got back to us and told us about a conference that was happening the following weekend. It was my birthday weekend and we cancelled all plans in order to go. I'll never forget the fear and the anxiety of entering into this unknown world. SUK welcomed us. Meeting people going through the same process was priceless. The emphasis on building a relationship was perfect for us and spoke to the values that we wanted to build our family on.

We were lucky that we met Jenny, a mum to three boys and a child minder, after just a few months at a social in Cadbury's world. We instantly clicked and spoke nonstop for around ten hours. It felt like meeting Jon in that she was "the one" and I knew that this was something special. Thankfully we received the call the next day saying that Jenny would like to get to know us and started on our mandatory SUK three month getting to know you period. In practice, due to the quarantine of our embryos, it was nine months before we started

trying to get pregnant, by which time we had spent countless hours talking, meeting face-to-face and getting to know each other's families. I can honestly say that I am privileged to have Jenny in my life, not only because of what she has done for us but because she is a remarkable person who inspires me to be a better person. I can think of no one I respect more. For Jenny her motivation is simple, she feels that everyone has the right to become a parent and she feels that if she can help then she must. She herself experienced five years of infertility in-between her first and second child and this caused her to develop an iron resolution to help others suffering from infertility.

We were lucky that we got pregnant the first time and at six weeks, whilst a nurse fiddled with an ultrasound and we chatted away as a team, we were overcome with emotion to hear the heartbeats of our children fill the room. Our twin girls were born in January 2011.

I strongly feel that our surrogacy journey could have been better if we had been acknowledged as the parents from birth. Unfortunately, administrative errors meant that our parental order was not granted until the twins were 15 months old. Quite frankly, that is a disgrace and disrespectful to my children who have never had any other sense of identity outside of our family. That the law did not acknowledge that is unfair. It is a fragile time for anyone when you become parents for the first time and to be told that you are less of a parent is not helpful to anyone – it breeds insecurity that is not helpful in building confidence to talk to children about their origins or in maintaining long-term relationships with your surrogate. Equally, Jenny did not want the responsibility for our children. She was not handing her baby to us, but giving us back our child after nine months of babysitting. UK law needs to be changed urgently to recognise IPs at birth. I am proud to be campaigning for the changes that SUK has recommended.'

6.1.5 Kate Dobb, mother to twins born through surrogacy

'In 1987, when I was just ten years old, my world fell apart when I was diagnosed with stage 4 Rhabdomyosarcoma, a rare and aggressive cancer. The treatment was intensive and lasted two years. Although it was successful, I was left with many long-term side effects and at the age of thirteen I found out I was infertile. I was heartbroken. Not only had the treatment caused ovarian failure but my uterus was so damaged by the high dose radiotherapy I would be unlikely to carry a pregnancy to term.

Over the years my infertility affected me enormously. It was a big secret I carried around by myself. When I did broach the subject with doctors I wasn't presented with any options, most commonly I was told "But you're alive" and then the subject was swiftly changed. Coping with infertility has been far harder than coping with a cancer diagnosis.

I was lucky enough to meet a really supportive partner. I was honest with him about my situation from the start. He said we'd find a way to have a family together.

At a late effects clinic for young cancer survivors I met the fertility doctor who changed my life forever, Professor Ledger. He suggested surrogacy.

My lovely younger sister offered to donate eggs so we started to investigate host surrogacy and came across Surrogacy UK. We were attracted by its "friendship first" ethos and became full members in January 2013.

We were fortunate to meet our surrogate, Mikki, just a few months later. She lives in Shropshire where I grew up and we clicked immediately. We had a three month period of "getting to know" each other and grew really close before embarking on treatment. We discussed everything about the journey ahead such as how many embryos to transfer and what her expenses were. Luckily Mikki fell pregnant after the first embryo transfer – with twins! We were there every step of the way during the pregnancy – every scan, consultant and midwife appointment. We were overwhelmed that someone was willing to go through all this for us. We were both present for the birth – I cut my son's cord and my partner cut my daughter's cord and then we had skin to skin with our babies. Mikki was so proud to have helped us achieve our dream of having a family.

We were fortunate that the hospital was supportive after the birth. But it was always a worry for us that the doctors might have needed Mikki's permission for medical consent even though we were their parents.

The laws surrounding surrogacy need to be updated to ensure it is seen as an acceptable and accessible route to parenthood. In hindsight I am dismayed by the lack of knowledge of surrogacy amongst the healthcare professionals who treated me for the late effects of cancer. Many seemed to have a fear of surrogacy as a way of family building. In fact, it should have been presented as an option for family building right from the start. I think this is largely due to ignorance and a genuine fear that the surrogate might "keep the baby" because under the current law the parents are not granted legal parenthood until several months after the birth.

I would like to see legal parenthood to be assigned to the IPs at birth. I also strongly oppose any move to a commercial model of surrogacy. All the surrogates I have met been motivated by a desire to help people. A move towards commercialisation will mean many people will be unable to achieve their dream of parenthood for financial reasons, it also may mean women would be encouraged to enter into surrogacy arrangements for the wrong reasons.'

6.1.6 Alan Watt, looking to become a parent via surrogacy

'Very early in our relationship we discussed our desire to be parents but as a same sex couple our journey to parenthood was never going to be straightforward. We spent a long time discussing the type of parents we wanted to be and the options available to us before ultimately deciding that our

first choice was altruistic surrogacy. This was never a decision that we took lightly but our experience at Surrogacy UK convinced us that it was an option we wanted to pursue.

After an extended “getting to know” period with a wonderful surrogate and her partner we have had two unsuccessful IVF attempts and we are currently trying to get pregnant. This experience has been one of extreme highs and lows but our desire to be parents has never waned. We have developed a close and strong relationship with our surrogate and her partner who have provided us with an enormous amount of support and encouragement. [Update – Alan and his partner are now expecting their first child. Their surrogate is 10 weeks pregnant at the time of writing.]

Why is reform needed? Surrogacy comes with a lot of stigma and misconceptions for both surrogates and IPs and there is a real need to demystify some of these stereotypes and to create a more transparent environment. We know surrogacy is happening in the UK but the law has not kept up with the actual practice and rather than fight it, the law should play a more active role in protecting people – surrogates, IPs and most importantly children born via surrogacy.

Experiences of surrogacy are complex and there are multiple variations but one key factor that needs urgent attention is pre-birth parental orders that protect everyone involved and put the child first. The birth of a child is always a highly emotional and at times stressful experience so if part of the administration could be simplified and clarified then everyone will benefit.’

7. Conclusions: Where are we now?

Since the conference on 6 May 2016 there have been huge steps forwards in regard to reform of surrogacy law. Later the same month the Government indicated that it had asked the Law Commission to consider including a project on surrogacy in its thirteenth programme of law reform, and also confirmed that it is looking to ‘update the legislation on parental orders’ in relation to the exclusion of single people from being able to apply for a parental order.³² The letters written to Jane Ellison seemed to have a positive impact, with the language of her responses slowly evolving to indicate an openness to change³³ and a willingness to meet with the SUK working group. We also secured, via Andrew Percy MP, an adjournment debate on surrogacy in Parliament. Unfortunately, however, the EU Referendum then took place, and in the subsequent reshuffle, Jane Ellison moved to the Treasury and Andrew Percy was

³² Parliamentary Question and Answer 39065, 7 June 2016.

³³ See Parliamentary Question and Answer 38078, 23 May 2016.

promoted to Parliamentary Under-Secretary (Department for Communities and Local Government) shortly before the debate, meaning that it was unable to take place. However, the working group continues to pursue its campaign and are working with other MPs and peers in order to secure a new debate.

In July 2016 the Law Commission began its formal consultation on whether it should look at surrogacy law.³⁴ Members of the working group met with the new Minister responsible for surrogacy at the DH, Nicola Blackwood MP. We were reassured of the gravity with which the Government is taking this subject, and of the outgoing call from Jane Ellison to prioritise a meeting with SUK. Ms Blackwood confirmed that it is no longer a question of 'if' reform should happen, but 'how'.

In the meeting, Ms Blackwood set out a three-pronged approach on reform of surrogacy legislation: the Department of Health is supporting a proposed Law Commission project, which would review all aspects of UK surrogacy legislation; an interim update to existing legislation to enable single parents to apply for a parental order; and a collaborative project – working with UK surrogacy organisations – to produce guidance on surrogacy for professionals, surrogates and IPs in order to improve experiences under the current system. This project has already begun.

Since the conference there has been a case in the High Courts³⁵ where a surrogate has refused to consent to the making of parental orders after the relationship with the IPs broke down after the surrogate did not feel she was shown enough consideration when there were concerns raised for her health at the twelve week scan. Somewhat unusually, the surrogate and her partner 'wish to play no part in the children's lives' and 'their rationale for refusing their consent is due to their own feelings of injustice, rather than what is in the children's best interests'.³⁶ There is no dispute that the welfare of the children requires parental orders to be made. Theis J. comments 'from the perspective of these children's lifelong emotional and psychological welfare parental orders are the only orders that accurately and properly reflect the children's identity as surrogate born children'. As a result of this case, SUK is now also campaigning for an amendment to the HFE Act in order to enable the judge to dispense with the surrogate's consent where it is unreasonably withheld and where the welfare of the child demands it, so that the legal status of the AB twins can be resolved and judges may make child centred decisions in the rare cases where surrogacy relationships break down.

Inevitably, both SUK and the working group are thrilled with the progress made and acknowledge the multi-faceted nature of the campaign for reform

³⁴ See www.lawcom.gov.uk/surrogacy/. The consultation closed on 31 October 2016 and we await a decision from the Law Commission as to whether it will take this project forward.

³⁵ www.baillii.org/ew/cases/EWHC/Fam/2016/2643.html.

³⁶ Theis J., in *CD v EF and AB* [2016] EWHC 2643.

and the many voices that have contributed, not least the letters written by many surrogates and IPs. We hope the Law Commission will take on the reform project and reflect the conclusions of our 2015 report in its recommendations. SUK conducted a letter writing campaign to encourage surrogates and IPs to write to the Law Commission and share their views on reform and the importance of this project. We hope that their voices will be at the heart of its recommendations and that its proposals will consider the (short and long term) impact on the lived experience of surrogacy, and the welfare of surrogate born children.

However, there is no certainty that reform will happen, or that, if it does, its shape will match our recommendations, or that the timeframe for reform will be acceptable. The proof of the pudding is in the eating, as they say. SUK and its working group will therefore continue the work to promote the recommendations of our 2015 report and to drive positive and ethical reform for UK surrogacy.