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# **The Regulation of Surrogacy in the United Kingdom: The Case for Reform**

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Keywords: Surrogacy; Assisted Reproduction; Parental Orders; Human Fertilisation and Embryology.

## **Abstract:**

This article considers the legal regulation of surrogacy in the United Kingdom and examines legislative changes and case law that have emerged over the past three decades. We illustrate how the legal requirements to obtain parental orders (which give parenthood to the intended parents after the birth and extinguish the parental status of the surrogate) are overly restrictive and anachronistic. The legal requirements needed to obtain such orders have resulted in clear anomalies and left children in a state of legal-limbo. In practice some of the legal requirements are often bypassed and this alone is a compelling argument for legal reform. Other requirements, such as parental orders only being available to couples, are discriminatory and violate the individual's right to respect for their private and family life. The regulation of surrogacy is also incoherent and inconsistent when compared with other aspects of 'becoming' a parent via other assisted reproductive technologies. This paper argues that the anomalies that judicial decisions have generated in this domain have intensified the case for reform. We argue that the time is opportune for a new statute governing this contentious area and make the following three proposals for reform: (i) a pre-conception regulatory framework (ii) permitting moderate payment (iii) widening access to parenthood and moving away from the two-parent model.

## **INTRODUCTION**

Founding a family is regarded as a fundamental aspect of individual and social life. Perhaps because of this, the right to marry and found a family is a universal right protected in both the Universal Declaration of Human Rights<sup>1</sup> and the European Convention of Human Rights.<sup>2</sup> It

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\* School of Law, University of Liverpool; School of Law, University of Sussex The article is based on a presentation the authors gave at the "Surrogacy Law Reform Conference: Surrogacy in the 21st Century: Rethinking Assumptions, Reforming law" held on the 6th May 2016, London. The authors thank Dr Kirsty Horsey for the invitation to participate at the conference and the audience for constructive feedback received.

is not an unqualified right and does not entitle one to positive assistance in founding a family.<sup>3</sup> But it does mean that certain impediments to founding a family are illegitimate. While procreation through sexual intercourse is the traditional method of founding a family, some individuals may have to rely upon assisted reproduction methods or surrogacy (the process whereby a woman gestates a child for another person/couple) in order to found a family. Regulating assisted reproduction is no easy feat and regulation of surrogacy is no exception. The UK was one of the first countries in the world to offer a comprehensive regulatory framework to govern assisted reproductive technologies (ARTs) after a lengthy process<sup>4</sup>. This can be contrasted with the ad hoc knee jerk reaction to regulate surrogacy, which culminated in the Surrogacy Arrangements Act 1985 which Freeman noted was “an ill-considered and largely irrelevant panic measure, which in essence criminalised commercial surrogacy”.<sup>5</sup> Whilst the UK may have initially led the way in the regulation of other assisted reproductive technologies, since 1985, the law governing surrogacy has developed in a haphazard fashion and piecemeal changes made over the years have resulted in a regulatory framework that is contradictory and confusing for all involved. As increasing numbers resort to founding a family through surrogacy<sup>6</sup>, the law has struggled to adapt to changes in social attitudes and the increasing demand. There is a real concern that the law is failing either to adequately respect the private and family lives of those who wish to procreate

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<sup>1</sup> Article 16 (1) of the United Nations Universal Declaration of Human Rights 1948 (the UN Declaration) provides that 'Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family'.

<sup>2</sup> The European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (the European Convention) declares in Article 12 that 'Men and women of marriageable age have the right to marry and to found a family'. Article 8 provides everyone has a right to private and family life.

<sup>3</sup> In *Evans v Amicus Healthcare Ltd; Hadley v Midland Fertility Services Ltd* [2003] EWHC 2161 (Fam), [2004] 1 FLR 67, at para [264], Wall LJ described any right to found a family in the following terms: 'The right to found a family though IVF can only, put at its highest, amount to the right to have access to IVF treatment. Self-evidently, it cannot be a right to be treated successfully. Furthermore, it is a right which is qualified by availability, suitability for treatment and cost.' See also *Briody v St Helen's and Knowsley Area Health Authority* (2001) EWCA Civ 1010, [2001] 2 FLR 1094, per Hale LJ at para [26]: 'While everyone has the right to try to have their own children by natural means, no one has the right to be provided with a child'; and the earlier decision of *R v Secretary of State for the Home Department ex parte Mellor* (2001) EWCA Civ 472, [2001] 2 FLR 1158.

<sup>4</sup> Legislation to regulate assisted human reproduction arose only after lengthy consideration of the issues by the *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (Cmnd 9314) (HMSO, London 1984) – Hereafter The Warnock Committee. There was also a protracted process of public consultation through the Green and White Papers: *The Legislation of Human Infertility Services and Embryo Research* (1986) (Cm 46) and the White Paper *Human Fertilisation and Embryology: A Framework for Legislation* (1987) (Cm 259) respectively..

<sup>5</sup> M Freeman, “Is Surrogacy Exploitive?” in S McLean (eds) *Legal Issues in Human Reproduction* (Aldershot: Dartmouth 1989) at p 165.

<sup>6</sup> M Crawshaw, E Blyth and O Akker, “The changing profile of surrogacy in the UK –Implications for national and international policy and practice” (2012) 34 (3) *Journal of Social Welfare and Family Law* 265-275.

in this manner, or to protect the welfare of children born via such arrangements. The latest spur to improve regulation in this area is the recent High Court declaration that the legislative provision which bars a parental order being granted to a single person (as opposed to a couple) is incompatible with the Human Rights Act 1998.<sup>7</sup> Following this declaration and the recent recognition of surrogacy as an area in need of law reform in the Law Commission's 13<sup>th</sup> Programme consultation<sup>8</sup>, it is anticipated that reform in this area may be imminent.

In seeking to contribute to the debate on what shape reform may take, this paper is split into two parts. In the first part, we discuss the prevalence and incidence of surrogacy, briefly setting out the present regulatory framework and inadequacies in the legislation governing surrogacy; namely the Surrogacy Arrangements Act 1985 and (in respect of the making of parental orders) the Human Fertilisation and Embryology Acts 1990 and 2008. As optimism surrounding future reform grows, we suggest that one area of law in particular need of reform is that pertaining to parental orders, which prescribe the conditions for granting legal parenthood to those who wish to parent children born via a surrogate. We set out the importance of a parental order both for the child and the parents, before illustrating the effects of the current restrictive conditions for the making of such an order, which have left some children living in the UK without any identified legal parent. We argue that the anomalies judicial decisions have generated intensify the case for reform.

In Part II of the paper, having identified gaps and inconsistencies in the present regulatory framework, we discuss how the law in the UK can be reformed so that it is "fit for purpose in the 21st Century".<sup>9</sup> We argue that the time is opportune for a new statute governing this contentious area and make the following three proposals for reform: (a) a pre-conception regulatory framework (b) permitting moderate payment (c) widening access to parenthood and moving away from the two-parent model.

In making proposals for reform, we acknowledge that on a global level, suggestions for international reform have been made.<sup>10</sup> Whilst we agree that an international

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<sup>7</sup> *Re Z (A Child) (No 2)* [2016] EWHC 1191 (Fam).

<sup>8</sup> <http://www.lawcom.gov.uk/13th-programme-of-law-reform-consultation/>

<sup>9</sup> One of the stated aims when revising the legislation. Department of Health, *Review of the Human Fertilisation and Embryology Act: Proposals for revised legislation (including establishment of the Regulatory Authority for Tissue and Embryos)*, Cm 6989 (DoH, London, 14 December 2006).

<sup>10</sup> See *Permanent Bureau of The Hague Conference, Private International Law Issues Surrounding The Status of Children, Including Issues Arising From International Surrogacy Agreements Report* (2011) <http://www.hcch.net/upload/wop/genaff2011pd11e.pdf> ; A-M Hutchinson, "The Hague Convention on Surrogacy: Should we agree to disagree?" ABC Section of Family Law' 2012 Fall CLE Conference, Philadelphia; J McCandless, L Brunet and K Davaki, *A Comparative Study on the Regime of Surrogacy in EU*

convention/framework is needed, in this paper we focus on regulation in the domestic context for two reasons: firstly, a better domestic regulatory framework may reduce the number of individuals /couples from this jurisdiction entering into international surrogacy arrangements. Secondly, given the fact the UK regulatory system of assisted reproduction is one that has been emulated worldwide, it is important that the UK improves the present legal framework so that it is fit for purpose and provides certainty and clarity for all those involved. Whilst acknowledging arguments that contend regulation has no place in the founding of families,<sup>11</sup> in the context of surrogacy, it has been plausibly argued that regulation is required to ‘ensure the best protection of the various vulnerable parties’.<sup>12</sup> Legislation is the best mechanism for reform as it maintains the UK government’s current stance that assisted reproduction warrants specialist regulation and brings this area it into line with the regulation of other areas of assisted reproduction.<sup>13</sup> **PART I- MIND THE GAPS!**

### **The Regulatory Framework**

It was amidst much controversy that the principal statute regulating surrogacy in the UK, the Surrogacy Arrangements Act 1985 (SAA) was born. In January 1985, there was a public outcry when married mother of two, Kim Cotton, received £6500 for acting as a surrogate,<sup>14</sup> in what was condemned as a ‘baby-for-cash-deal’.<sup>15</sup> After local authority intervention the commissioning parents were ultimately granted wardship by the courts. In the judgment, Latey J referred to the “*difficult and delicate problems of ethics, morality and social desirability raised by surrogacy.*”<sup>16</sup> This was actually the second case of surrogacy to come before the British courts; the first having occurred some nine years earlier, in 1976<sup>17</sup> in the

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*Member States* (May 2013, published by the European Parliament); K Trimmings and P Beaumont (eds) *International Surrogacy Arrangements: Legal Regulation at the International Level* (Hart Publishing, 2013) – for a Book Review see E. Walmsley and A. Alghrani “Book Review: K. Trimmings and P. Beaumont, *International Surrogacy Arrangements: Legal Regulation at the International Level*” (2015) *Child and Family Law Quarterly* (2015) 467.

<sup>11</sup> A. Alghrani and J. Harris, “Should the Foundation of Families Be Regulated?” (2006) 18(2) *Child and Family Law Quarterly* 191.

<sup>12</sup> The Surrogacy Review, para 6.5, p 49.

<sup>13</sup> The United Kingdom is not alone in imposing specialist regulation of this area, Robert Lee and Derek Morgan noted: “Most states have on examination, concluded that some form of regulatory control (usually through specially framed and implemented legislation) is preferable to no regulation, although the nature of that regulation and review differs markedly” in R Lee, and D Morgan, *Human Fertilisation and Embryology: Regulating the Reproductive Revolution* (Blackstone Press: London, 2001) p 12.

<sup>14</sup> *Re C (A Minor) (Wardship: Surrogacy)* [1985] FLR 846.

<sup>15</sup> BBC, 1985 “1985: Inquiry over ‘baby-for-cash’ deal” [online] available at [http://news.bbc.co.uk/onthisday/hi/dates/stories/january/4/newsid\\_2495000/2495857.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/january/4/newsid_2495000/2495857.stm). Accessed 16 March 2017.

<sup>16</sup> *Op cit* n 10, p 846.

<sup>17</sup> Only reported in 1985.

case of *A v C*.<sup>18</sup> The commissioning parents, Mr A and Mrs B (a divorcee with whom he lived and who was unable to bear children), offered a prostitute £3500, virtually their life savings, to have Mr A's child. She refused but for £500 located a 19-year-old woman, Miss C, 'who was on the fringe of that world' and who agreed to bear Mr A's child for £3000 and at birth to hand over the child to the couple. Miss C was artificially inseminated with Mr A's sperm at a clinic and in due course gave birth to a son. However Miss C changed her mind and refused to surrender the child. Mr A was initially granted access to the child but this was withdrawn on appeal. The arrangement was described by Ormrod LJ as, a 'totally inhuman proceeding'<sup>19</sup> and a 'sordid commercial bargain'.<sup>20</sup>

It was against this backdrop that the Surrogacy Arrangements Act 1985<sup>21</sup> was enacted. Its provisions were based upon the recommendations of the Committee of Inquiry into Human Fertilisation and Embryology in 1984.<sup>22</sup> The Warnock Committee were concerned with the "risk of commercial exploitation of surrogacy"<sup>23</sup> and had recommended that "...legislation be introduced to render criminal the creation or the operation in the UK of agencies whose purposes include the recruitment of women for surrogate pregnancy or making arrangements for individuals or couples who wish to utilise the services of a carrying mother".<sup>24</sup> The Warnock Committee's hostility towards commercial surrogacy as a method of founding a family was clear and they were unanimous that surrogacy for convenience alone was ethically unacceptable. The majority went further and held that even in compelling medical circumstances, "the danger of exploitation of one human being by another appears to the majority of us far to outweigh the potential benefits, in almost every case."<sup>25</sup> The Report clearly influenced the restrictive stance taken in the SAA 1985 which thirty-two years later remains the primary legislation governing surrogacy in the UK.

The SAA 1985 makes it a criminal offence to be commercially involved in the initiation and negotiation of surrogacy arrangements, or to be involved in publicising or advertising

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<sup>18</sup> [1985] FLR 445.

<sup>19</sup> *Ibid*, p 454.

<sup>20</sup> *Ibid*, p 457.

<sup>21</sup> Hereafter The SAA 1985.

<sup>22</sup> M. Warnock, *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (Cmnd 9314) (HMSO, London 1984). The committee was set up in 1982 to "examine the social, legal and ethical implications of recent and potential developments in the field". Hereafter referred to as 'The Warnock Committee'.

<sup>23</sup> *Ibid*, para 8.18.

<sup>24</sup> *Ibid*.

<sup>25</sup> *Ibid.*, para 8.17.

surrogacy arrangements.<sup>26</sup> Notwithstanding the fact that the primary purpose of the practice is to bring about the creation of a child, both the 1985 Act and the Warnock Report were notably silent as to the welfare of the child (it was only mentioned once, in passing, in the Report). Five years after the enactment of the SAA 1985, the Human Fertilisation and Embryology Act 1990<sup>27</sup> addressed the issue of parenthood for children conceived by assisted reproduction methods. This statute introduced parental orders that would enable the transfer of legal parenthood from the surrogate (and her husband if she had one) to the commissioning parents. The following criteria had to be satisfied before one would be eligible to apply for a parental order: the applicants had to be married; aged over 18; domiciled in the UK, Channel Islands or Isle of Man; at least one of them had to have a genetic link to the child; the application must have been made within six months of the child's birth; the existing legal parents must have consented to the parental order; the child's home must be with the commissioning parents; and lastly only reasonable expenses must have been paid to the surrogate. The 1990 Act also inserted a new section into the Surrogacy Arrangements Act 1985 that no surrogacy arrangement is enforceable by or against any of the parties making it.<sup>28</sup>

Appearing to “accept the need for reform”,<sup>29</sup> partially in response to a US surrogacy agency seeking to operate in the UK<sup>30</sup>, the government in 1998 commissioned the Surrogacy Review.<sup>31</sup> None of its recommendations were ever implemented. The report proposed a new Surrogacy Act, backed by a Code of Practice which would set out a model of good practice for couples and surrogates, including discouragement of multiple surrogacy and a frank exchange of information to all involved. Underpinning the recommendations was the central proposal that the prohibition of any payment to surrogate mothers, other than compensation for specific expenses actually incurred as a result of the pregnancy, should be retained. Freeman criticised the Surrogacy Review for focusing on payments to surrogates rather than child welfare<sup>32</sup> and argued against the prohibition on payment stating “...the [Surrogacy Review] fails to appreciate that withdrawing remuneration from surrogates will only drive

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<sup>26</sup> Section 2.

<sup>27</sup> Hereafter ‘the 1990 Act’.

<sup>28</sup> Section 1A of the Surrogacy Act 1985 inserted by s 36 HFE Act 1990.

<sup>29</sup> E Jackson, *Medical Law Text, Cases and Materials* (Oxford: OUP, 2013) p 846.

<sup>30</sup> M Brazier and E Cave, *Medicine, Patients and the Law* (London: Penguin Books, 2011).

<sup>31</sup> Brazier Report, *Surrogacy: Review for Health Ministers of Current Arrangements For Payments and Regulation* (Cm 4068) (Department of Health, 1998) – Hereafter ‘The Surrogacy Review’.

<sup>32</sup> M Freeman, ‘Does Surrogacy Have a Future After Brazier?’ (1999) 7 *Medical Law Review* 1, p 8.

potential surrogates away from regulated surrogacy into an invisible and socially uncontrolled world where the regulators will be more like pimps than adoption agencies”.<sup>33</sup>

The Human Fertilisation and Embryology Act 2008 made changes to the 1990 Act<sup>34</sup> that extended the provisions on legal parenthood for those who found a family through assisted conception. Eligibility to apply for parental orders was broadened to encompass those in a same sex relationship or ‘two persons living as partners in an enduring family relationship and not within the prohibited degrees of relationship to each other.’<sup>35</sup>

Finally, the Human Fertilisation and Embryology (Parental Orders) Regulations 2010<sup>36</sup> which accompany the 2008 Act, belatedly applied section 1 of the Children and Adoption Act (ACA) 2002 to Parental Order applications so that the child's welfare must now be the court's “paramount consideration... throughout his lifetime”. As the welfare of the child has to be considered from a lifelong perspective, rather than just through childhood, and the court must have regard to the welfare checklist as set out in s 1 of the ACA (ACA) 2002, the welfare of the child is no longer simply one consideration among many, but rather the consideration which should override all others.

These later piecemeal changes have attracted criticism that they have made the substantive provisions of the SAA 1985 unworkable.<sup>37</sup> Courts are in effect being forced to grant parental orders in order to comply with the welfare of the child provision, as per the 2010 Regulations, notwithstanding the fact that some of the provisions of section 54 of the Human Fertilisation and Embryology Act 2008 have not been complied with, for instance where expenses which exceeded ‘reasonable expenses’ have been paid to the surrogate. The law has become increasingly out-dated and detached from the reality of the practice. The difficult realities emerging out of such out-dated law are revealed in stories of surrogates handing over

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<sup>33</sup> *Ibid*, p 10.

<sup>34</sup> Hereafter the 2008 Act. On the 2008 statute see M Fox, ‘The Human Fertilisation and Embryology Act 2008: Tinkering at the margins’ (2009) 17 *Feminist Legal Studies* 333; J McCandless and S Sheldon, ‘The Human Fertilisation and Embryology Act (2008) and the tenacity of the sexual family form’ (2010) 73 *Modern Law Review* 175.

<sup>35</sup> Section 54 of the 2008 Act.

<sup>36</sup> Hereafter, ‘the 2010 Regulations’.

<sup>37</sup> K Horsey and S Sheldon ‘Still hazy after all these years: The law regulating surrogacy’ (2012) 20 *Medical Law Review* 67.



newborn babies in hospital car parks and surrogates having to sign consent forms for medical treatment for a child that they do not consider theirs.<sup>38</sup>

In contrast to the hostility surrounding surrogacy when the SAA 1985 was enacted, societal and judicial attitudes towards the practice have since become more accepting. In *Re T*,<sup>39</sup> Baker J noted how “the practice of surrogacy – whereby a woman gives birth to a child for others- has been accepted as a method of enabling childless couples to experience the joy and fulfilment of parenthood’.<sup>40</sup> The media, which once publicly condemned Kim Cotton for surrogacy, now covers stories of Elton John,<sup>41</sup> Sarah Jessica Parker<sup>42</sup> and Nicole Kidman,<sup>43</sup> who have all used surrogacy as a means of founding a family, in more neutral terms. Related to the acceptance of the practice, with low cost flights abroad and easy access to the Internet, increasing numbers are evading the restrictive regulation of surrogacy in the UK, and resorting to informal or overseas commercial surrogacy arrangements.<sup>44</sup> We now turn to how prevalent the practice is in the UK, noting that there is no systematic data collection on surrogacy and it remains ‘under researched both nationally and internationally.’<sup>45</sup>

### **Prevalence and incidence of surrogacy**

Reliable data on surrogacy in the UK is largely absent. The General Registry Office (GRO) is the government agency responsible for the registration of births in England and Wales. Valuable research undertaken by Crawshaw *et al* into GRO data, reported that parental orders quadrupled in the period 1995-2013.<sup>46</sup> Official sources show that in 2014, 272 parental orders were granted; 39% of those were for children born via overseas surrogates. This represents a sharp increase from 2008 when only 2% of the children were born via overseas surrogates.<sup>47</sup> Thus from what little official data on surrogacy exists, it is known that surrogacy is generally on the increase, yet the lack of more meaningful information creates real cause for concern. In November 2015, the Surrogacy UK Working Group on Surrogacy

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<sup>38</sup> NHS Trusts often make parties leave their premises to handover the child as they do not want to be liable if a dispute occurs and it is within the hospital grounds. See <http://www.independent.co.uk/news/uk/home-news/nhs-surrogate-births-rules-laws-parents-babies-handed-over-car-parks-a7381646.html>

<sup>39</sup> *Re T (a child) (surrogacy: residence order)* [2011] EWHC 33 (Fam).

<sup>40</sup> *Ibid.* at 33.

<sup>41</sup> H Pidd “You can tell everybody, this is our son: Elton John becomes a father at 63” *The Guardian* 28 December 2010.

<sup>42</sup> V Groskop “What is the truth behind Sarah Jessica Parker's use of a surrogate? *The Guardian* 30 April 2009.

<sup>43</sup> “Nicole Kidman announces birth of daughter born through surrogate” *The Guardian* 17 January 2011.

<sup>44</sup> M Crawshaw, E Blyth and O Akker, “The changing profile of surrogacy in the UK –Implications for national and international policy and practice” (2012) 34 (3) *Journal of Social Welfare and Family Law* 265.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*

<sup>47</sup> Figures given by Crawshaw et al, above n 44, from General Registry Office data.

Law Reform<sup>48</sup> in a Report titled *Surrogacy in the UK: Myth Busting and Reform*,<sup>49</sup> sought “to highlight the reality of the practice of surrogacy in the UK in 2015, while recognising the problems that international surrogacy arrangements may bring”.<sup>50</sup> They reported that “as there is no requirement to apply for a PO, and because there are limits on who may do so, parental order records themselves are not a true indicator of how many surrogacy arrangements are entered into, or where they take place.”<sup>51</sup>

Whilst rates of domestic and foreign surrogacy arrangements are believed to have risen significantly in recent years, the extent of the increase and the nature of the arrangements remain largely unknown. This is a concern, as we will show in the next section how foreign surrogacy jeopardises the welfare of the child in that obtaining a parental order becomes more difficult. In one case, the effect of the law “was that the children were marooned stateless and parentless”.<sup>52</sup> Yet due to lack of data we do not know the full extent of the problem.

Details of the characteristics of surrogates and commissioning parents (sexual orientation, relationship status, ethnicity, social class, whether donor gametes have been used) are available from some sources (eg parental order files) but have not been collated and analysed. There is also a lack of analysis into the motivations and experiences of using a surrogate or acting as a surrogate. Whilst there have been empirical studies undertaken with children born through surrogacy, surrogates and commissioning parents these are developmental psychology studies.<sup>53</sup> There has, to date, been no sociological empirical research which seeks to explore the current profile of domestic surrogacy, how people are negotiating it and the impact of current regulation of surrogacy on all interested parties. This lack of monitoring contrasts sharply with the rigorous nature in which data on other methods of assisted reproduction, notably IVF, are collated and analysed. Such information is important in order to glean important facts about family creation in the UK for example, who is driving demand

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<sup>48</sup> Surrogacy UK, one of the not for profit surrogacy agencies in the UK, set up the Working Group on Surrogacy Law Reform to highlight the need for urgent reform of surrogacy law in the UK. It is composed of representatives of Surrogacy UK, a lawyer, academic and the Director of the Progress Educational Trust.

<sup>49</sup> The Report was based on the findings of an online survey from June-August 2015, asking respondents questions about their experiences of surrogacy. There were 434 responses overall, including from 111 surrogates and 206 commissioning parents. The report is available at: <https://www.kent.ac.uk/law/research/projects/current/surrogacy/Surrogacy%20in%20the%20UK%20Report%20FINAL.pdf> (last accessed 02/03/17).

<sup>50</sup> *Ibid*, p 5.

<sup>51</sup> *Ibid*, p 13.

<sup>52</sup> *Re X and Y (Foreign Surrogacy)* [2009] 1 FLR 733.

<sup>53</sup> See S Imrie, V Jadvá and S Golombok, ‘Surrogate mothers 10 years on: A longitudinal study of psychological wellbeing and relationships with the parents and child’ 2015 *Human Reproduction*, 30(2) 373. These studies show that children born through surrogacy and surrogates themselves are within ‘normal’ levels of psychological adjustment.

for surrogacy, who is excluded from accessing it and what forms of families are being created. This lack of data is also at odds with special significance that law and society have always attached to a person's status<sup>54</sup>; in particular legal parenthood, which has important and far ranging implications on both the adult and the child. In *Re E and F (Assisted Reproduction: Parent)*<sup>55</sup>, Cobb J highlights this importance:

The legal status of 'parent' carries with it implications for: i) the law relating to contact & residence (section 10(4)(a) Children Act 1989); ii) child maintenance (schedule 1, para.4 and 10 Children Act 1989 as amended by schedule 6 HFEA 2008); iii) inheritance (section 48(5) HFEA 2008); iv) "bring(ing) and defend(ing) proceedings about the child" (Baroness Hale in *Re G* [2006] UKHL 43 [2006] 2 FLR 629 at §32); and importantly: v) "mak(ing) the child a member of that person's family" (*Re G* *ibid.*)<sup>56</sup>

Despite this lack of information and the importance attached to accurately identifying who is a parent, it is evident that the law and regulation is not responding to the needs of some of those who are using and being born through surrogacy arrangements.

### **Parental Orders - Attaining parenthood through surrogacy**

In order to obtain a parental order, commissioning parents must comply with all the provisions of section 54 of the HFEA 2008 and follow the procedure as set out in Part 13 of the Family Procedure Rules 2010 (FPR 2010). The legal position is clear. Unless a parental order is made, the legal mother of any child born following a surrogacy arrangement entered into here or abroad is the surrogate mother who gives birth to the child; she will also have parental responsibility.<sup>57</sup> If the surrogate mother is married, her husband is the legal father of the child, even though he may have no biological relationship with the child.<sup>58</sup> If the surrogate mother has a civil partner, that partner will be the child's legal parent.<sup>59</sup> If the surrogate mother is unmarried, does not have a civil partner, and the commissioning father has a biological connection with the child he is the legal father, but he may not have parental

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<sup>54</sup> *Re E and F (Assisted Reproduction: Parent)* [2013] EWHC 1418 (Fam), at [1] and Lord Wilberforce's speech in *The Amphill Peerage* [1977] AC 547, at 568G—H.

<sup>55</sup> [2013] EWHC 1418 (Fam).

<sup>56</sup> *Ibid*, para 2.

<sup>57</sup> HFE Act 2008 s 33.

<sup>58</sup> HFE Act 2008, s 35.

<sup>59</sup> HFE Act 2008 s 42 and s 44.

responsibility.<sup>60</sup> That usually depends on whether his name is on the birth certificate or he and the child's mother have made an agreement for him to have parental responsibility for the child.<sup>61</sup>

A parental order, if made, results in the commissioning parents becoming the child's legal parents and extinguishes the surrogate mother's status as the child's legal mother, together with that of her husband or any other legal parent. Importantly, such an order gives the commissioning parents parental responsibility.<sup>62</sup> Without a parental order, the commissioning parents will not be the legal parents of the child. They may not have parental responsibility and whilst this in itself may not affect their ability to provide day-to-day care for the child, it may have long-term consequences (for example affecting inheritance rights) and could affect their ability to take certain steps on behalf of the child (for example, apply for a passport). There is a great concern about the number of children being raised by commissioning parents who do not have parental orders, as voiced by Theis J in *Re A and B (No 2 Parental Order)*:

I am not concerned about the children who are the subject of parental order applications, but am more concerned about those who are not. There is a real risk that those who care for children born as a result of these arrangements may be inadvertently sleepwalking into an uncertain legal future for their much wanted child. That uncertainty is very likely to be detrimental to that child's long-term welfare. I sincerely hope publication of this judgment will assist people who may be in that situation.<sup>63</sup>

Parental orders which transfer parentage from the surrogate to the intended parents goes to the most fundamental aspects of status and to the very identity of the child, who s/he is and who his/her parents are. It is central to a child's being, whether as an individual or as a member of his family. These matters are fundamental to both the commissioning parents and the child. A parental order has, to adopt Theis J's powerful expression, 'a transformative effect', not just in its effect on the child's legal relationships with the surrogate and commissioning parents but also in relation to the practical and psychological realities of the

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<sup>60</sup> If the commissioning father's sperm is used he will automatically be the legal parent if no one else has been nominated as a legal parent and will acquire parental responsibility when registered on the birth certificate. See HFE Act 2008 ss 36-38.

<sup>61</sup> For acquisition of parental responsibility see Children Act 1989 s 4.

<sup>62</sup> Parental responsibility is defined in s 3 of the Children Act 1989 as "all the rights, duties, powers, responsibilities and authority which by law a parent has in relation to the child and administration of his/her property".

<sup>63</sup> [2015] EWHC 2080 (Fam) [13].

child's identity; it creates what Thorpe LJ in *Re J (Adoption: Non-Patrial)*<sup>64</sup> referred to as 'the psychological relationship of parent and child with all its far-reaching manifestations and consequences.'<sup>65</sup> These judicial pronouncements support our view that legal parenthood is of the utmost importance for both the adult and child. This is not to negate other parental relationships that are not based on established legal links, such as social and psychological parenthood.<sup>66</sup> However to deprive individuals who choose to found a family via surrogacy of parental status, simply because they have used this method is discriminatory and fails to acknowledge the societal and legal developments in respect of alternative and diverse family structures, from which the regulation of surrogacy is now out of sync.

Having discussed the importance of conferring parental status upon those who acquire parenthood through surrogacy, we now outline the legal requirements needed to obtain a parental order and how each requirement has proved problematic in practice. *Surrogacy and the single parent*

Despite the fact that single parents can and do conceive children through surrogacy (as through adoption and other forms of assisted reproduction) the law excludes them from applying for a parental order. Whilst the 2008 Act amended section 30 of the 1990 Act, to allow couples in a civil partnership, married or in an enduring family relationship to apply for parental orders, single people are still excluded from applying. Section 54(2) of the 2008 Act requires that the applicants are husband and wife, or same-sex civil partners or two people who are living as partners in an enduring family relationship.<sup>67</sup> Legislation did not totally fail to take into account the fact that s 54 still excluded single people. Dawn Primarolo, the Minister of State at the Department of Health in 2008, in the Parliamentary debate on the 2008 Act made the case for the government, in response to the point that if single people are able to adopt and to receive IVF, why can they not get a parental order in surrogacy cases? She stated that:

...surrogacy, however, involves agreeing to hand over a child even before conception. The Government are still of the view that the magnitude of that

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<sup>64</sup> [1998] NILR 424.

<sup>65</sup> *Ibid*, p 429.

<sup>66</sup> See Baroness Hale's description of this important category of 'parent' in *Re G (Children)* [2006] UKHL 43 at p 35.

<sup>67</sup> Section 54(2).

means that it is best dealt with by a couple. That is why we have made the arrangements that we have.<sup>68</sup>

This was detailed in *Re Z*, where the judge, drawing on this argument, stated “although the concept of who are a couple for this purpose has changed down the years, s 54 of the 2008 Act is clear that one person cannot apply... we know from what the Minister of State said in 2008 that this was seen as a necessary distinction based on what were thought to be important points of principle.”<sup>69</sup>

The irony with this revision is that a key legislative change in the 2008 Act was to revise the controversial s 13(5) which mandated prospective parents be screened prior to being offered treatment and in particular to stipulate that ‘*a woman shall not be provided with treatment services unless account has been taken of the welfare of the child who may be born as a result of the treatment (including the need of that child for a father), and of any other child who may be affected by the birth.*’ This was accompanied by guidance, which contained a list of factors that clinics were required to consider in performing the welfare of the child assessment.<sup>70</sup> The provision sparked much criticism, not only because it clearly discriminated against single and lesbian women,<sup>71</sup> but also because clinicians used this guidance to interpret the welfare provision in varied ways, which not surprisingly often resulted in very different decisions being made from one clinic to the next.<sup>72</sup> Such discrimination was unjustified, given that the assumption that good parenting requires two parents of either sex is flawed in the light of social and psychological research.<sup>73</sup> The welfare of the child provision was amended by the 2008 Act, which replaced the word ‘father’ with ‘supportive parenting’ thereby widening access for single and lesbian women who wish to found a family using fertility treatment. Ironically the very legislation which revised the offending s 13(5), failed to acknowledge and revise the stipulation in s 54, which, notwithstanding its extension to those

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<sup>68</sup> See <http://thejusticegap.com/2015/10/some-single-parents-cant-get-a-parental-order-even-for-their-own-child/>.

<sup>69</sup> [2016] EWHC 1191 (Fam).

<sup>70</sup> This was the then HFEA, Code of Practice, Sixth Edition, section 3.12.

<sup>71</sup> See D Savas and S Treece, 'Fertility Clinics: One Code of Practice?' (1998) 3 *Medical Law International* 243.

<sup>72</sup> See *Tomorrow's Children: Report of the policy review of welfare of the child assessments in licensed assisted conception clinics* (HFEA, 2005), at p 7.

<sup>73</sup> H Reece, 'Subverting the Stigmatisation Argument' (1996) 23 *J Law & Soc* 484; S Golombok and F Tasker, 'Do Parents Influence the Sexual Orientation of Their Children? Findings from a Longitudinal Study of Lesbian Families' (1996) 32 *Development Psychology* 3; F Tasker and S Golombok, 'Adults Raised as Children in Lesbian Families' (1995) 65(2) *Amer J Orthopsychiat* 203; S Golombok, F Tasker and C Murray, 'Children Raised in Fatherless Families from Infancy: Family Relationships and the Socio-emotional Development of Children of Lesbian and Single Heterosexual Mothers' (1997) 38(7) *Child Psychology* 783.

in an ‘enduring family relationship’, still meant single people could not apply for a parental order and thus attain legal parenthood for a child created via surrogacy.

The criticisms levied against the former s 13(5) which precluded single women from accessing IVF,<sup>74</sup> continues to apply to the restriction barring single individuals from attaining legal parenthood in relation to a child created via surrogacy. Restricting eligibility for a parental order to couples discriminates against single parent households and disregards the fact that the social climate in which the HFE Act now operates, has altered greatly from when the legislation was passed. Alternate family structures are now more commonplace and acceptable. Increasing numbers of children are raised in single parent households; single parent families currently comprise 16.2% of all families in the UK.<sup>75</sup>

This legal provision which precludes a single parent from obtaining a parental order, was recently successfully challenged in the case of *Re Z (A Child) (No 2)*.<sup>76</sup> The applicant was the British biological father of a 21-month-old boy known as ‘Z’, who was born through a surrogacy arrangement in the United States and lived with his single father in the UK. Following Z’s birth, the commissioning father obtained a declaratory judgment in Minnesota, relieving the surrogate of any legal rights or responsibilities for Z and establishing the father’s sole parentage of Z. As the father was not able to apply for a parental order, for the purposes of English law, the surrogate mother remained Z’s mother and had sole decision-making rights. This resulted in the unusual position that no one in the UK had parental responsibility for the child. Consequently the child was made a ward of court during the proceedings. The applicant successfully argued that s 54 constituted a discriminatory interference with a single person’s rights to private and family life, and was thus inconsistent with Articles 8 and 14 of the European Convention of Human Rights. The father’s case was supported by CAFCASS. The President of the Family Division made a declaration of incompatibility.<sup>77</sup> It has been

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<sup>74</sup> E Jackson, “Conception and the Irrelevance of the Welfare Principle” (2002) 65 *Modern Law Review* 176; G Pennings, “The Welfare of the Child” (1999) 14 *Human Reproduction* 1146; S. Millns, “Making ‘Social Judgements that Go Beyond the Purely Medical’: The Reproductive Revolution and Access to Fertility Treatment Services” in J Bridgeman and S Millns (Ed) *Law and Body Politics: Regulating the Female Body* (Aldershot: Dartmouth, 1995) 79; E Sutherland, “Man Not Included – Single Women, Female Couples and Procreative Freedom In The UK” (2003) 15(2) *Child and Family Law Quarterly* 155.

<sup>75</sup> The Labour Force Survey, Office for National Statistics, *Lone Parent Families in the UK by Country, 1996 to 2015* (2016) revealed there were 3,022,000 ‘Lone Parent Families’ out of 18,712,000 in the UK in 2015. <<https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/families/adhocs/006183lonparentfamiliesintheukbycountry1996to2015>> accessed 6 March 2017.

<sup>76</sup> [2016] EWHC 1191 (Fam).

<sup>77</sup> The Human Rights Act 1998 provides that the human rights contained in the European Convention on Human Rights (ECHR) form part of UK law. All UK law must be interpreted, so far as it is possible to do so, in a way that is compatible with ECHR rights. Section 4 provides that if the court is satisfied an Act of Parliament “is

demonstrated that the legislative requirements that stipulate only couples can attain a parental order discriminate against the fundamental human rights of single individuals, thus supporting the case for legislative reform.

Our argument that the law on parental orders is discriminatory is supported by how it is out of sync with both adoption law and assisted conception law, which both allow for single parents to found a family through adoption<sup>78</sup>/ IVF<sup>79</sup>. The only avenue to attaining legal parental status for single parents who found a family through surrogacy is to obtain an adoption order. This occurred in *AB v CD*<sup>80</sup> when B, a single man in his mid-twenties, entered into a surrogacy arrangement, leading to the birth of A, with his mother C (who had acted as the surrogate) and her husband D. Theis J granted B's application and made an adoption order. Theis J set out the differences between adoption and parental as follows:

.... Both orders are transformative, but a parental order proceeds on the assumption one of the applicants is the biological parent. That is one of the key criteria in s 54 HFEA. It doesn't change the child's lineage as an adoption order does; a parental order creates a legal parentage and removes the legal parentage of the birth family under the provisions of the HFEA 2008. Unlike adoption there is already a biological link with the applicants before the parental order application is made. Its purpose is to create legal parentage around an already concluded lineage connection.

From the point of view of the child the orders are different. An adopted child is seen to have had a family created for it, whereas in a surrogacy arrangement the child's conception and birth has been commissioned by the parents, the child has a biological connection and the same identity as one of the parents. The latter arrangement is more congruent with a parental order than an adoption order.

These differences are important welfare considerations from the child's perspective. These are the reality of the identity issues children will need to resolve. In surrogacy situations the court by making a parental order settles the

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incompatible with a Convention right, it may make a declaration of that incompatibility". This does not affect the validity of the law; it remains up to Parliament to decide whether or not to amend the law.

<sup>78</sup> Section 51 of the Adoption and Children Act 2002 provides that 'an application may be made by one person who has attained the age of 21 years and is not married'..

<sup>79</sup> The Human Fertilisation and Embryology Act 2008.

<sup>80</sup> [2015] EWFC 17.



identity issue and does not leave other fictions to be resolved, which could be the case if an adoption order was made in these situations.<sup>81</sup>

As is clear from this passage, adoption orders in these cases are inappropriate as they are putting such individuals in the nonsensical situation that they are seeking to adopt their own children. Given that we do allow single individuals to found a family via adoption or fertility treatment and in light of the fact that there are no data, scientific or social, to support the thesis that single people should not have the right to reproduce and to bring up children, this requirement that only couples can apply for a parental order should be removed. In Part II of the paper, the reforms we propose liberalise surrogacy in widening the ambit of those who may attain legal parenthood and found a family through surrogacy. We suggest a move away from the notion that parenthood can only be established via two individuals. Widening eligibility as to who may apply for a parental order will result in more parents taking advantage of legal avenues to formalise the surrogacy arrangement and ascertain legal parenthood, which we know is important for both the child and parent.

### *The Genetic Link*

Section 54(1) requires that one of the applicants must be genetically related to the child in order to apply for a parental order. This requirement is again out of sync with other assisted reproduction methods – for instance a woman can be the parent of a child created via IVF with donor gametes for which she and her partner share no genetic link.<sup>82</sup> This provision serves to exclude all those who have used a surrogate and donor gametes and precludes them from ever being able to apply for a parental order. The Surrogacy Law Reform Project state that ‘the rationale for this requirement in relation to surrogacy is to “legitimise” the relationship and in some way to prevent and protect women and their husbands/partners being pressured into (or deliberately and criminally embarking on) conceiving babies purely with the aim of giving them away (harking back to previous links made between surrogacy and “baby selling”).’<sup>83</sup> They note how in South Africa a corresponding provision was ruled unconstitutional in *AB and Another v Minister of Social Development*.<sup>84</sup> As the Amicus Curiae, the Centre for Child Law contended, such a requirement ‘violates ... rights to

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<sup>81</sup> *Ibid*, p 70.

<sup>82</sup> HFE Act 2008 s 33 – the mother that gestates the child is the legal mother once she has given birth, alongside her partner/spouse.

<sup>83</sup> *Op cit*, n 44 at p 33.

<sup>84</sup> (40658/13) [2015] ZAGPPHC 580 (12 August 2015).

equality, dignity, reproductive health care, autonomy and privacy'.<sup>85</sup> On the argument that the welfare of the child was best served by maintaining a requirement for one of the commissioning parents to be genetically related, the judge in that case said: 'this constitutes an insult to all those families that do not have a parent-child genetic link'.<sup>86</sup>

Whilst we advocate correct legal parental status as being in both the interests of the child and adult, one can be a parent without being genetically related to the child. Thus the prerequisite of a genetic link to one of the applicants should not be a requirement to attaining that special status. Given that we (rightly), do not minimise the role played by social parents when they have founded a family via adoption because there is no genetic link, nor the role those who have reproduced using donor gametes, it is only fair and consistent that this requirement be removed in the surrogacy context. Founding families is not a matter of genetics, but of love and commitment.<sup>87</sup> Removing this requirement will allow the law to be more consistent with other areas of law and do more to protect the welfare of children in ensuring the individuals acting as parents are able to apply for the corresponding legal parental status.

### *Time Limits*

Another pre-requisite to a parental order being granted is that 'the application is made within 6 months of the birth of the child'.<sup>88</sup> The underlying policy behind the provision, identified by Eleanor King J in *JP v LP and others*,<sup>89</sup> was to provide for the speedy consensual regularisation of the legal parental status of a child's carers following a birth resulting from a surrogacy arrangement. This rule was relaxed by the High Court in *Re X (Surrogacy: Time limits)*<sup>90</sup> when an application for a parental order was made two years and two months after the child was born. The commissioning parents, who had the child with the aid of an Indian surrogate and Indian IVF clinic, stated that the reason for the delay was because they were unaware of the need to apply for a parental order. Trimmings comments that the judgment

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<sup>85</sup> *Ibid* at 84.

<sup>86</sup> *Ibid*.

<sup>87</sup> See JL Hill, 'What Does it Mean to be a "Parent"? The Claims of Biology as the Basis for Parental Rights' (1991) 66 *NYU L Rev* 353; A Bainham, "Parentage, Parenthood and Parental Responsibility: Subtle, Elusive Yet Important Distinctions" in A Bainham, S Day Sclater and M. Richards (eds), *What is a Parent? A Socio-legal Analysis* (Hart, 1999). See also arguments regarding the intention to parent in G Douglas "The Intention to be a Parent and the Making of Mothers" (1994) *Modern Law Review* 634.

<sup>88</sup> HFE Act 2008 s 54(3).

<sup>89</sup> [2014] EWHC 595 (Fam).

<sup>90</sup> [2014] EWHC 3135 (Fam).

demonstrates ‘the willingness of the court to continue stretching the statutory requirements of section 54 and thus reaffirms the trend towards a more and more lenient approach to parental order applications’.<sup>91</sup> However, she notes that whilst it is plausible that the court ‘sought to ease the plight of the commissioning parents in the present case by relaxing the apparently absolute nature of the six-month time limit. On the other hand, however, it has to be asked how far statutory rules should be bent by the Court in order to achieve justice in individual cases.’<sup>92</sup> We argue that the fact the judiciary are being placed in this position clearly highlights the case for legislative reform. Statutory rules should not have to be ‘bent’ by the courts.

Again, in *Re A and B (No 2 Parental Order)*<sup>93</sup> a parental order application was granted despite being made 17 months after expiration of the time limit. Granting the application, Theis J stated that it was in the children's lifelong welfare interests for a parental order to be made, that a purposive construction could be given to the time requirement in s 54(3) and that, in any event, it was possible to 'read down' the provision to give effect to the Human Rights engaged, in particular Article 8 of the European Convention of Human Rights. She spoke of “the transcendental importance of a parental order, with its consequences stretching many, many decades into the future” and how, “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.”<sup>94</sup> This decision again strengthens our argument that this provision should be repealed; parents are sometimes not aware they have to apply for a parental order, adherence to such a provision is not always in the child’s best interests and lastly the judiciary should not have to bend the law in order to achieve justice in individual cases.

### *Domicile*

There is no requirement under s 54 that either the applicant or the child should be present in the UK. The court's jurisdiction to make a parental order rests solely on the requirement in s 54(4)(b) that at least one of the applicants has a domicile in a part of the United Kingdom, Channel Islands or the Isle of Man. The key principles for domicile were set out in *C and C v*

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<sup>91</sup> K Trimmings, ‘Six-month deadline for applications for parental orders relaxed by the High Court’ (2015) 37(2) *Journal of Social Welfare and Family Law* 241 at 243.

<sup>92</sup> *Ibid.*

<sup>93</sup> [2015] EWHC 2080 (Fam).

<sup>94</sup> *Ibid.*, at [55].

*D and D*<sup>95</sup> and in *AB (Surrogacy: Domicile.)*<sup>96</sup> the court emphasised that a finding of domicile of choice must be determined by reference to the individual facts of each case. In this application for parental orders, the applicants, AB and CD, had entered into a surrogacy arrangement with the respondent gestational surrogate, GH, through a commercial surrogacy agency in Illinois, USA. As all the other requirements of s 54 had been met, the court had to determine whether at least one of the applicants were ‘domiciled’ in the jurisdiction at the time of the application and at the time of making the order. The applicants' domicile of origin was Germany, although one of the applicants - CD - asserted that she had acquired a domicile of choice in the jurisdiction of England and Wales which she retained even though, the applicants had not lived in England for any length of time since 2013, due to force of circumstances, including a necessary sale of the family home in England. Moreover the applicants had not been able to take the children out of the jurisdiction of Germany as a result of the children's legal status (both held only American passports). The application was granted.

Whilst s 54 (4)(a) of the 2008 Act requires the child's home to be with the applicants at the time of the application and the making of the order, it does not specify that the child's or the applicants' home must be in the UK. In two cases regarding applications for parental orders the judges have expressed concern regarding their jurisdiction to grant such applications when the children were not in the UK.<sup>97</sup> Despite the welfare of the child throughout his/her lifetime being the paramount concern, the 2008 Act differs from adoption law and practice as neither the statute nor the regulations require that the children who are the subject of the parental order are seen by the parental order reporter in their home. The legislation appears to provide the court with the discretion to direct or judge the scope and arrangements for the welfare oversight needed in any particular case. Parental Orders can and have been made without the child of the surrogacy arrangement ever being seen. Yet again this illustrates how the provisions under s 54 do little to safeguard children born via surrogacy and are by-passed in practice.

### *Surrogate Consent*

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<sup>95</sup> [2014] EWHC 1307.

<sup>96</sup> [2016] EWFC 63.

<sup>97</sup> Hedley J in *K (Minors) (Foreign Surrogacy)* [2010] EWHC 1180 (Fam) and Russell J in *Re Z (Foreign Surrogacy: Allocation of Work: Guidance on Parental Order Reports)* [2015] EWFC 90.

Section 54 also stipulates that an application can only be made if the surrogate ‘freely, and with full understanding of what is involved, agreed unconditionally to the making of the order’<sup>98</sup>, unless the surrogate cannot be found or is incapable of giving consent.<sup>99</sup> This consent is only valid six weeks after the child's birth. The difficulties of this requirement are evident in the case of *Re AB (Surrogacy: Consent)*<sup>100</sup> in which an application for parental orders was adjourned due to the surrogate’s refusal to consent to the order being made, when the relationship between herself and the commissioning parents broke down. The applicants, C and D, were the biological parents of twins A and B. The respondents were E, the twins' surrogate mother and F, her partner. All the criteria for making a parental order in s 54 of the 2008 Act were met, bar the one criterion in s 54(6) that the respondent and her partner consented to the making of the order. Whilst they had handed over the twins to the commissioning parents and had no wish to be involved in the children's lives, they refused their consent to the parental orders ‘due to their own feelings of injustice, rather than what is in the children's best interests’.<sup>101</sup> As Theis J noted:

Without the respondent’s consent the application for a parental order comes to a juddering halt, to the very great distress of the applicants. The result is that these children are left in a legal limbo, where, contrary to what was agreed by the parties at the time of the arrangement, the respondents will remain their legal parents even though they are not biologically related to them and they expressly wish to play no part in the children's lives.<sup>102</sup>

This refusal resulted in the two following consequences:

‘(1) They remain living with the applicants, who are their biological and psychological parents, but not their legal parents. The child arrangements order, which gives the applicants parental responsibility, lasts until they are 18 years old. (2) The respondents, who wish to play no part in the children's lives, remain the children's legal parents throughout their lives by virtue of ss 33 and 35 HFEA.’<sup>103</sup>

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<sup>98</sup> Section 54(6).

<sup>99</sup> Section 54(7).

<sup>100</sup> [2016] EWHC 2643 (Fam).

<sup>101</sup> *Ibid*, [8].

<sup>102</sup> *Ibid*, [9].

<sup>103</sup> *Ibid*, [10].

The court therefore granted the application made by all parties to adjourn the matter generally, acknowledging that whilst it is generally preferable to bring proceedings to an end, these were quite exceptional circumstances. Clearly, this is a wholly unsatisfactory situation, with the law not reflecting the reality of the situation.

Whilst surrogates do sometimes refuse to consent to parental orders for quite different reasons to the above case, for instance where the surrogate wishes to raise the child herself,<sup>104</sup> we argue in Part II of the paper that such situations could be avoided by a better pre-conception regulatory framework which contains adequate safeguards and ensures all parties are appropriately informed as what the process involves.

### *The unenforceable Ban on Payment*

The last pre-requisite for a parental order to which we now turn, is the provision in s 54(8) of the 2008 Act that the court be satisfied that no money or other benefit (other than for expenses reasonably incurred) has been paid to the surrogate.<sup>105</sup> This is in line with the SAA 1985, which made it a criminal offence for anyone to play a part in a commercial surrogacy arrangement. There is no definition of what constitutes ‘reasonable expenses’ and it is left up to the individuals involved in a surrogacy arrangement to come to an agreement regarding these expenses. A number of non-profit agencies such as Surrogacy UK<sup>106</sup>, Childlessness Overcome Through Surrogacy (COTS)<sup>107</sup> and Brilliant Beginnings<sup>108</sup> have been set up to facilitate altruistic surrogacy arrangements by making appropriate introductions. Brilliant Beginnings have stated that at present ‘reasonable’ expenses can range from £12,000 – £15,000.<sup>109</sup> The recommendation by the Brazier Report that expenses should be statutorily defined by a new Surrogacy Act<sup>110</sup> was not acted upon, although it is debatable how much certainty this would provide. In practice, expenses do often exceed what is ‘reasonable’. The

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<sup>104</sup> *Re Z (surrogacy agreements) (Child arrangement orders)* [2016] EWFC 34.

<sup>105</sup> SAA 1985, s 3.

<sup>106</sup> <http://www.surrogacyuk.org/>

<sup>107</sup>; [http://www.surrogacy.org.uk/About\\_COTS.htm](http://www.surrogacy.org.uk/About_COTS.htm)

<sup>108</sup> <http://www.brilliantbeginnings.co.uk/> See also A Alghrani and D Griffiths, ‘Surrogacy: What is so “brilliant” about “Brilliant Beginnings”?’ *Bionews*, September 2013.

<sup>109</sup> <http://www.brilliantbeginnings.co.uk/blog/how-much-can-uk-surrogates-get-paid>. Accessed 11 April 2017.

<sup>110</sup> M Brazier, A Campbell, and S Golombok, *Surrogacy: Review for health ministers of current arrangements for payments and regulation - Report of the review team* 1998, Cm 4068, 1-99 at p 59.

Surrogacy UK Working Group survey found that while overall the average compensation paid was £10,859, 41% of the respondents to their survey had paid more than £15,000.<sup>111</sup>

Notwithstanding this prohibition, payments made, which have clearly exceeded ‘reasonable expenses’ have been retrospectively authorised by the courts, in at least five cases in the last decade.<sup>112</sup> The reason for this gap between theory and practice is that courts have been placed in an impossible position by the stipulation in the 2010 Regulations that the child’s welfare throughout the child’s life is the paramount consideration. Their impact was highlighted by Hedley J in *Re L (a minor)* when he stated ‘ .... It must follow that it will only be in the clearest case of the abuse of public policy that the court will be able to withhold an order if otherwise welfare considerations support its making.’<sup>113</sup> The 2010 Regulations thus make it unlikely courts will ever refuse retrospectively to authorize payment and grant a parental order, when the child/children are resident with the commissioning parents, especially where the surrogate mother resides outside the jurisdiction. Were a court to declare expenses to be grossly disproportionate, this would bar a parental order being granted, which could leave a child parentless and in some cases stateless. This would not be in a child’s best interests, especially when there are two perfectly capable parents who have already expended so much financially and emotionally to create the child. It is clear that the current legal ban on payment is not working and that this gap between theory and practice, is exacerbated by the increasing ease by which commissioning parents can travel to countries where commercial surrogacy is permissible.

In concluding Part I, we have endeavoured to illustrate that despite the fundamental importance and significance of a parental order, for both a child and the commissioning parents, the overly restrictive and anachronistic legal requirements needed to obtain one have resulted in anomalies, inconsistencies and are generally bypassed in practice. We now suggest reforms to regulation to ameliorate the situation.

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<sup>111</sup> <https://www.kent.ac.uk/law/research/projects/current/surrogacy/Surrogacy%20in%20the%20UK%20Report%20FINAL.pdf> (last accessed 02/03/17.)

<sup>112</sup> *Re X and Y (Foreign Surrogacy)* [2008] EWCH 3030 (Fam); *Re S (Parental Order)* [2009] EWHC 2977 (Fam); *Re L (Commercial Surrogacy)* [2010] EWHC 3146 (Fam); *Re IJ (Foreign Surrogacy Agreement Parental Order)* [2011] EWHC 921 (Fam); *A v another v and others* [2011] EWHC 1738 (Fam); *J v G* [2013] EWHC 1432 (Fam).

<sup>113</sup> *Re L (Commercial Surrogacy)* [2010] EWHC 3146 (Fam), [9] and [10].

## PART II – REFORM<sup>114</sup>

### A Pre-Conception Regulatory Framework

Having outlined how reform in this area is long overdue, we argue that endeavours should be made towards “prospective, facilitative, enabling and liberal regulation”.<sup>115</sup> This should take the form of a new pre-conception regulatory framework that has child welfare at its centre, as opposed to the post hoc, in theory restrictive, but in practice ineffective, framework we currently have. Studies show that children born through surrogacy show no detrimental psychological effects<sup>116</sup>, however as shown in Part 1, current law surrounding surrogacy is harming children. A pre-conception regulatory framework should be designed with the welfare of any child/children created with the aid of a surrogate as the paramount concern. A system regulated by a board or authority could be put in place, just as it is for those seeking the use of assisted conception services such as IVF. Parties could be correctly informed and given appropriate counselling before participating. A better regulatory regime in the UK will hopefully mean fewer people resorting to international surrogacy and the problems it creates – such as conflict of laws, which have left children stateless and parentless. This would bring this method of family formation in line with other statutes governing children.<sup>117</sup> Section 1(2) of the Adoption and Children Act 2002 makes the welfare of the child throughout his life the paramount consideration of both the court and the adoption agency in adoption proceedings. The Human Fertilisation and Embryology Authority is responsible for licensing and monitoring fertility clinics, which are mandated by law to consider the welfare of a child prior to offering treatment.<sup>118</sup> Similarly the Human Tissue Authority as set up by the Human Tissue Act 2004 has specific panels to ensure directed living donations have been free from duress or undue influence and that no unlawful payments have been made. Whilst the lengthy bureaucracy, duplication and delay in the adoption process has been criticised, it does offer a thorough vetting process of prospective parents. Unlike the current prohibition on private commercial surrogacy arrangements, which is difficult to enforce, the availability of

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<sup>114</sup> In this section we develop proposals first made with Professor Brazier in A Alghrani, D Griffiths and M Brazier “Surrogacy Law: From Piecemeal Tweaks to Sustained Review and Reform” in A Diduck, N Peleg and H Reece, (eds) *Law In Society: Reflections on Children, Family, Culture and Philosophy- Essays in Honour of Michael Freeman Law* (2014, Brill Publishers) 425.

<sup>115</sup> E Jackson, *op cit n* (2013). **AUTHORS TO PROVIDE FOOTNOTE NUMBER.**

<sup>116</sup> See n 47.

<sup>117</sup> Section 1 Children Act 1989 has been considered but has been omitted from mention here since it is not relevant at the point of family formation, as all the other provisions listed are; it exists for different circumstances and in that sense serves a different purpose.

<sup>118</sup> HFE Act 1990 s 13(5).



officially regulated surrogacy arrangements would hopefully eliminate most of the motivation for private/overseas agreements that have later left children in legal limbo.

### *The Position of the Surrogate*

At present the regulation of surrogacy comes in after the birth of the child. Parental orders were designed to clarify who the legal parents were after a child had been handed over and to ensure the surrogate had voluntarily consented. Our regulatory scheme would allow for the immediate transfer of legal parentage at birth. This would offer greater certainty to all parties.<sup>119</sup> We suggest that the present requirements for a parental order that mandate the surrogate consents to any parental order be removed from the legislation. This would resolve the inherent uncertainty that permeates the current law, which stems from the fact that surrogacy arrangements are not legally enforceable<sup>120</sup> and it is the woman who gives birth to the baby who is regarded as the legal “mother”.<sup>121</sup> It also avoids the present situation whereby surrogates, who have handed over the child to the commissioning parent/s immediately after the birth, are still the legal parents for at least six weeks and possibly longer, until a parental order is made which relinquishes them from the responsibility. This delay leads to some of the problems outlined earlier, for instance where the baby was handed over to the commissioning parents in a car park due to hospitals’ fears that a dispute might arise.<sup>122</sup> Immediate transfer of parentage ensures such issues do not arise.

A change in the regulation of surrogacy to make surrogacy contracts enforceable would offer more security to commissioning couples and might incentivise individuals to find surrogates located within the UK. Whilst some may recoil at the idea that surrogates may be forced to surrender the child against their will, we argue that this is a distortion of what the notion of enforceability means. Pre-conception agreements, entered into following sound information and guidance before conception happens, could avoid many of the current problems when surrogates do not consent to a transfer of parentage. Usually agreements break down because they have been entered into without proper understanding. Research shows that commissioning parents increasingly get information from sources that are not robust, such as

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<sup>119</sup> It is extremely rare for a surrogate to change her mind. Yet there is still great fear of either party reneging on agreements. See K Horsey, ‘Fraying at the edges – UK surrogacy law’ (2015) 24 (4) *Medical Law Review* 608.

<sup>120</sup> SAA 1985 s1B.

<sup>121</sup> HFE Act 2008 s 33.

<sup>122</sup> See n 34.

Google, Facebook or Internet chat rooms.<sup>123</sup> Pre-conception agreements would help avoid that. As part of these agreements there would have to be robust information, guidance and consent procedures. In *Re G MacFarlane J* condemned the absence of ‘any statutory or regulatory umbrella’ that leaves the role of facilitating surrogacy arrangements to ‘groups of well-meaning amateurs’.<sup>124</sup> *MacFarlane J* recognised the ban on commercialisation meant that these agencies are operating in a very restrictive environment. With proper accreditation, agencies could help reduce some of the disputes that do arise, as they would be better resourced and regulated. Disputes that do arise between surrogate and commissioning parents after the birth could be litigated and the court can assess which party can best meet the best interests of the child, as is the situation at present when a dispute occurs and a Child Arrangements Order is sought.<sup>125</sup>

### *Permitting Moderate Payment*

A pre-conception regulatory framework could allow for agreed moderate payments and thus we turn to our next suggestion for reform – removing the ban on payment. Here we depart from the recommendations for reform from both The Surrogacy Review<sup>126</sup> and The Surrogacy UK Working Group on Surrogacy Law Reform.<sup>127</sup> The current prohibition on commercial surrogacy may deter women from acting as surrogates in the UK. Without reliable data on surrogacy, we are left to speculate as to whether individuals are now resorting to overseas arrangements simply because there is not the supply to meet the demand for this service in the UK. Despite well-rehearsed arguments that the ban was implemented so as not to exploit women,<sup>128</sup> this has not stopped the practice but rather has compounded it, as the lack of UK surrogates may drive people abroad to more exploitative situations which causes problems surrounding parental status. Thus allowing payment of surrogates in the UK, potentially reduces such problems. Again more research is needed on this, not just with current surrogates but other women who might consider acting as a surrogate if payment were an option. In addition, recent research has shown that some see compensated surrogacy

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<sup>123</sup> See n 129.

<sup>124</sup> *Re G (Surrogacy: Foreign Domicile)* [2007] EWHC 2814 (Fam).

<sup>125</sup> Children Act 1989 s 8.

<sup>126</sup> The Surrogacy Review, *op cit* 29.

<sup>127</sup> See Surrogacy UK Working Group on Surrogacy Law Reform Report para 5.2.

<sup>128</sup> For more on exploitation see A Wertheimer, ‘Exploitation and Commercial Surrogacy’, (1996-1997) 74 *Denv. U. L. Rev.* 1215; A Wertheimer, *Exploitation* (Princeton, NJ, Princeton University Press, 1999); E Anderson, ‘Is Women’s Labour a Commodity?’ (1990) 19 (1) *Philosophy & Public Affairs* 71; S Roach Anleu, ‘For Love but Not for Money?’ (1992) 6 (1) *Gender and Society* 30.

as actually being more ethical than altruistic surrogacy.<sup>129</sup> Findings from an Australian empirical project on cross-border reproduction showed that many commissioning parents were frustrated that they could not properly compensate the surrogate and felt this added to the inequity of the situation.<sup>130</sup> Finally, as identified in Part One, we know that in several cases judges have authorised payments that have exceeded reasonable expenses, so in practice the current law on altruistic surrogacy is not working in any case.

Whilst some surrogates fear that payment may change the special relationship between surrogate and the commissioning parents<sup>131</sup> more research is needed on this. Those who oppose payment note how allowing payment may put surrogacy out of sync with other forms of assisted reproduction in the UK, which currently operate on an altruistic model (gamete donation in particular).<sup>132</sup> Commercial surrogacy is not supported in the Report of the Surrogacy UK Working Group on Surrogacy Law Reform<sup>133</sup>, who, in suggesting reform, stated that ‘we must guard the principle of altruistic surrogacy in the UK – surrogacy as a relationship not a transaction’<sup>134</sup>. Instead it argued that reasonable costs should be revisited and increased slightly.

As Jackson *et al* have shown payment and altruism do not have to be mutually exclusive.<sup>135</sup> They can be mutually intertwined and if payment is permitted, it need not be compulsory, those who wish to act as a surrogate solely as an act of altruism could still do so.<sup>136</sup> We believe there is a strong case to be made that surrogates should be paid not just expenses, but for their actual labour. We further contend that surrogacy can be distinguished from other ARTs, as the labour involved is much more intensive than donating an egg or sperm.<sup>137</sup> This

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<sup>129</sup> E Jackson, J Millbank, I Karpin and A Stuhmcke, ‘Learning from Cross-Border Reproduction’ (2017) 25 (1) *Medical Law Review* 23.

<sup>130</sup> *Ibid.*

<sup>131</sup> *Ibid.*

<sup>132</sup> See Surrogacy UK Working Group on Surrogacy Law Reform Report para 5.2 which stated “we do not support a move to commercial surrogacy as we see this as out of kilter with the policy behind altruistic gamete donation (which is in line with EU Tissue Directive). See also G Bahadur “Altruism in assisted reproductive technologies” (2001) 2(3) *Reprod Biomed Online* 155.

<sup>133</sup> *Ibid.*

<sup>134</sup> *Ibid.*, p 6.

<sup>135</sup> See n 128.

<sup>136</sup> Although in making this line of argument, we acknowledge that there is a question – often raised in the context of blood donation – that if some are paid it will inevitably alter the experience of those prepared to do it for free. See A Fernandez Montoya “Altruism and payment in blood donation” (1997) 18 (3) *Transfusion Science* 379; RM Titmuss, *The Gift Relationship*, (London: Allen and Unwin, 1971).

<sup>137</sup> For feminist arguments on embodied labour see R Fletcher, M Fox and J McCandless “Legal Embodiment: Analysing the Body of Healthcare Law” (2008) 16 (3) *Medical Law Review* 321.

apparent aversion to using gestational labour for profit needs to be revised. As Freeman contends:

‘...The money is paid to the surrogate not to compensate her for giving up the child, nor to ‘buy’ the child. The money is payment for her services, it is compensation for the burden of pregnancy. The child may have a right not to be sold, but that is a distortion of what is happening, even in cases of commercial surrogacy.’<sup>138</sup>

Similarly Erin and Harris argued:

‘It is never made clear why, for example, the use of a uterus for profit is undignified whereas the use of a brain for profit, or a hand for profit, is not. It is difficult to escape the ungenerous thought that the Warnock Committee were rather preoccupied with the analogies between surrogacy and prostitution and felt that use of the reproductive organs of the body for profit is of the essence of prostitution.’<sup>139</sup>

In noting how allowing payment and altruism are not mutually exclusive they further note:

Surrogacy, to be sure, is a very personal service; but it is one which is designed and intended to do what is almost universally considered to be not only a good in itself but part of the very meaning and purpose of life: namely to bring into existence children who are wanted, who will be loved and who have every prospect of being cared for, protected and successfully reared to adulthood. In all societies this costs money or money's worth. In all societies many people are involved in bringing this about, and many of them are paid for their services, from doctors and nurses to teachers and child-minders. Surrogacy, it seems to us, is just one further dimension of this range of services.<sup>140</sup>

We argue one way forward would be to allow advertising, so as to help those who wish to enter into such arrangements, permitting payment to agencies to cover their fees, and allowing a ‘moderate fee’ to be paid to surrogate mothers in addition to ‘reasonable

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<sup>138</sup> M Freeman, *op cit*, n 4, p 178.

<sup>139</sup> J Harris and CA Erin, “An Ethically Defensible Market in Organs” (2002) 325 *British Medical Journal* 114.

<sup>140</sup> *Ibid.*

expenses'. The surrogate would be recompensed for her labour and not simply the financial costs of pregnancy. The reader may ask what exactly do we mean by a 'moderate fee'? One option might be to treat surrogacy as akin to a full time job and pay up to a maximum of the minimum wage of £7.50 for 37.5 hours over the 40 weeks of pregnancy adding up to a fee of £11,250.

Alternatively one could allow the market to set the fee. We suggest restricting payment to a 'moderate sum' in part, to avoid pricing many commissioning couples out of the market, so that only those of considerable means would have this method of founding a family open to them. If the UK fee is set too high, couples will still resort to other jurisdictions where a surrogate's services can be obtained for less. If it is set too low, the change in the law may not produce more willing surrogates and thus commissioning individuals/couples will still look abroad.<sup>141</sup>

In considering permitting payment, we have acknowledged what this may mean for the surrogate and how may it alter her role once her services are rendered. Baroness Hale stated:

'the fact that in English law the woman who bears the child is legally the child's mother recognises a deeper truth: that the process of carrying a child and giving him (which may well be followed by breastfeeding for some months) brings with it, in the vast majority of cases, a very special relationship between mother and child, a relationship which is different from any other.'<sup>142</sup>

Research demonstrates that surrogates do not see themselves as parents, but sustained ties between them and the families they have helped illustrate that for some, there may be a special relationship created through the gestational link in the way that Baroness Hale outlines.<sup>143</sup> Amrita Pande's ethnography with Indian surrogates highlighted how the surrogate mothers fostered kinship ties through shared bodily substances (blood and breast milk) and the labour of gestation and birth.<sup>144</sup> The women were seeking acknowledgement of their role:

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<sup>141</sup> For more on this point see Donna Dickenson work where she explores the two contrasting concepts of exploitation and choice in D Dickenson "Exploitation and Choice in the Global Egg Trade" in M Goodwin (eds) *The Global Body Market: Altruism's Limits* (Cambridge University Press: Cambridge, 2013).

<sup>142</sup> *Re G (Surrogacy: Foreign Domicile)* [2007] EWHC 2814 (Fam), [34].

<sup>143</sup> The Surrogacy UK Working Group on Surrogacy Law Reform survey found overwhelmingly that surrogates do not see themselves as mothers. See also S Imrie and V. Jadva, 'The long-term experiences of surrogates: relationships and contact with surrogacy families in genetic and gestational surrogacy arrangements' (2014) *Reprod Biomed Online* 424.

<sup>144</sup> A Pande, "'It may be her eggs but it's my blood": Surrogates and everyday forms of kinship in India" (2009) 32 *Qualitative Sociology* 379.

that they went beyond merely providing a service or womb for nine months. In many cases this does not happen, and for many who commission foreign surrogates, that may be deliberately so there is little contact after the child is born. Transnational surrogacy thrived in India in part because it relied on the fact that surrogate mothers and intended parents rarely, if ever, met face-to-face.<sup>145</sup> Despite the concern this could happen in the UK, under a pre-conception regulatory framework with the surrogate becoming more like a gestational carrier with little contact with the commissioning parents or child, this is perhaps too simplistic a view and fails to recognise that contracts, payment and enforceability can co-exist with recognising the ‘very special relationship between (gestational) mother and child’.

### **Widening access to parenthood and moving away from the two-parent model**

In addition to widening eligibility for legal parenthood to encompass parents who are not genetically related, or are single, we argue that parental orders should be extended to more than two people.<sup>146</sup> If a child’s welfare is to be at the centre of any law reform, it should be acknowledged that surrogacy potentially involves more than two people with a claim to parenthood. Potentially, more than two individuals have been involved in the creation of the child. If all parties (commissioning parents and surrogate) wish to play an active, close and fulfilling role in the child’s life, arguably the law should acknowledge this. The current focus on a ‘couple’ as being the only legitimate framework from which parenthood can be constructed, as evidenced in s 54 of the 2008 Act, is out dated and simply fails to acknowledge the many diverse family forms that exist.<sup>147</sup> Canada offers an alternative example of a legal framework, which recognises more than two parents.<sup>148</sup> The British Columbia (BC) Family Law Act (2011) has made it possible for a child to have more than two parents where ART is used to conceive the child. In the context of surrogacy and donor

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<sup>145</sup> M Deckha, “Situating Canada’s Commercial Surrogacy Ban in a Transnational Context: A Postcolonial Feminist Call for Legalization and Public Funding” (2016) 61 (1) *McGill Law Journal* 31.

<sup>146</sup> A substantial body of literature has emerged on how assisted reproduction has fragmented parenthood and exploration of the idea of recognising multiple parents through law. See L Smith “Tangling the web of legal parenthood: legal responses to the use of known donors in lesbian parenting arrangements” (2013) 33 *Legal Studies* 355; R Leckey, “Two Mothers in Law and Fact” (2013) 21 *Feminist Legal Studies* 1; R. Leckey “Law Reform, Lesbian Parenting, and the Reflective Claim” (2011) 20 *Social & Legal Studies* 331; N Bala, “The evolving Canadian definition of the family: Towards a pluralistic and functional approach” (1994) 8 *International Journal of Law, Policy, and the Family* 293; J Bridgeman, H. Keating and C Lind (eds), *Responsibility, Law and the Family* (Aldershot: Ashgate, 2008). R Collier and S Sheldon, *Fragmenting Fatherhood: A Socio-Legal Study* (Oxford: Hart, 2008); A Diduck, ‘If only we can find the appropriate terms to use the issue will be solved’: Law, identity and parenthood” (2007) 19 *Child and Family Law Quarterly* 458.

<sup>147</sup> See G Douglas “Parenthood: Commitment, Status and Rights” in J Eekelaar, (ed.) *Family Law in Britain and America in the New Century*. (Brill Nijhoff, 2016) 91.

<sup>148</sup> See <http://www.cbc.ca/news/canada/british-columbia/della-wolf-is-b-c-s-1st-child-with-3-parents-on-birth-certificate-1.2526584>

conception, s 30(1) stipulates that the birth mother and donor(s) can be named as a parent alongside the intended parent or parents.<sup>149</sup> Importantly, a condition to there being more than two legal parents is a pre-conception agreement among all of the prospective parents, something we will discuss next. Whilst many surrogates do not see themselves as parents, if there was formal or legal recognition and such ‘alternative’ families could be negotiated from the outset, it would be interesting to see how many would appear. Legal recognition gives legitimacy to ties and can create them.<sup>150</sup>

Surrogates wanting legal parenthood may be the extreme. Another approach, which would put surrogacy on par with other ARTs, is to recognise gestational links as we do genetic links. There has been a recent move to widen access to information about one’s genetic origins.<sup>151</sup> Underlying and accompanying this is the discourse of genetic relatedness, which asserts that knowledge of genetic origins is fundamental to donor-conceived children.<sup>152</sup> Yet gestational links are not given such significance. With advances in our knowledge about epigenetics maybe this is wrong and gestation is possibly not as distinct from genetics as we once thought. A recent Irish case<sup>153</sup> raised the question of what role gestation should take when ascribing motherhood. An expert in that case outlined the role of epigenetics and the capacity of the gestational environment to influence a child’s genetic make- up. If donor-conceived children have a ‘right to know’ about their donors then perhaps surrogate children have a ‘right to know’ about their surrogate. While in practice many children born through a surrogate are told and contact is often maintained<sup>154</sup> perhaps there should be a ‘Register of Information’ as is held by the Human Fertilisation and Embryology Authority for donor conceived children. This would recognise and acknowledge the surrogate’s reproductive links. We thus argue that eligibility for legal parenthood should be widened in recognition of the diversity of family forms.

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<sup>149</sup> British Columbia Family Law Act [SBC 2011].

<sup>150</sup> See J McCandless, and S Sheldon, ‘Genetically Challenged: The Determination of Legal Parenthood in Assisted Reproduction’ in T Freeman, S Graham, F Ebtehaj, & M Richards (Eds.), *Relatedness in Assisted Reproduction: Families, Orgins and Identities* 61 (Cambridge: Cambridge University Press, 2014); H Ragone “Surrogate Motherhood” in C Brettell and C Sargent (eds) *Gender in Cross-Cultural Perspective* Third Edition, (Upper Saddle River New Jersey: Prentice Hall, 2001).

<sup>151</sup> Donor anonymity was removed for gamete donors in April 2005 following the HFEA (Disclosure of Donor Information) Regulations 2004. Later encompassed within amended disclosure provisions in section 24 of The Human Fertilisation and Embryology Act 2008. On donor anonymity see S Golombok, “Anonymity - or not - in the donation of gametes and embryos” in S Day Sclater, F Ebtehaj, E Jackson and M Richards (eds), *Regulating Autonomy: Sex, Reproduction and Family* (Oxford: Hart, 2009) 223.

<sup>152</sup> C Smart, ‘Family Secrets: Law ad Understandings of Openness in Everyday Relationships’ (2009) 38 *Journal of Social Policy* 551.

<sup>153</sup> *M.R & Anor -v- An tArd Chlaraitheoir & Ors* [2013] IEHC 91.

<sup>154</sup> V Jadvá, C Murray, E Lycett, et al, *op cit*, n 47.

## CONCLUSION

“The time is opportune for a new Surrogacy Act”.<sup>155</sup>

This sentence is truer now than when Freeman first made the statement in 1999. Whilst surrogacy may nowadays be more visible due to its use by celebrities and the fact it has become a more socially acceptable means of achieving parenthood, the limitations of the legal position with regard to surrogacy are clear. The legislation put in place over thirty-two years ago, with its focus on banning commercialisation, is now out-dated and no longer reflects the realities of practice. Surrogacy has not ‘withered on the vine’<sup>156</sup> as the Surrogacy Review hoped for in 1984 when the Warnock Committee reported, and instead it has become an ‘acceptable alternative’<sup>157</sup> to other methods of alleviating infertility. The climate in which such legislation is operating has altered dramatically since its enactment. We live in an age of the Internet, whereby the use of the World Wide Web to facilitate private arrangements or international surrogacy is fingertips away. Ad-hoc piecemeal amendments made in 1990, 2008, and 2010 have served to saddle the law with confusion and incoherence. We have argued that the anomalies generated by judicial decisions have intensified the case for reform.

It is important for all that legal parenthood is correctly attributed and that the current restrictions on who is eligible for a parental order are removed, thus allowing single individuals or indeed more than two to apply for parental status. We illustrated how the requirement that an application is made within six months is arbitrary, with judges having to bend this requirement so as to achieve justice in individual cases. The mandate that one of the applicants be genetically linked to the child is out of sync with other areas of law and should be removed.

In the absence of workable regulation people will continue to resort to do-it-yourself surrogacy arrangements<sup>158</sup>; they will continue to evade the payment ban in the UK and enter into international surrogacy arrangements in countries which have well established commercial surrogacy agencies, before later attempting to returning to the UK with the child,

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<sup>155</sup> M. Freeman, (1999) *op cit* n 30, at p 20.

<sup>156</sup> The Surrogacy Review, *op cit* 29, para 3.44.

<sup>157</sup> *Ibid*, para 4.7.

<sup>158</sup> A Alghrani “Commentary; “Surrogacy: ‘A Cautionary Tale’ *Re T (a child) (surrogacy: residence order)* [2011] EWCH 33 (Fam) (2012) 20 (4) *Medical Law Review* 631-641.



who may be marooned “stateless and parentless”.<sup>159</sup> Until such time, Theis J argued: “There’s a ticking legal time bomb that might arise later on through [the parents’] deaths, testamentary [inheritance] issues and through parents splitting up – or even simply if passports need to be renewed.”<sup>160</sup> If the State is to protect the child’s long-term welfare needs, there has to be “legislative reform to provide a legally supported framework”.<sup>161</sup>

We propose sensitive and sensible reform could be achieved by a pre-conception framework and more controversially, have argued that moderate payment should be allowed. As Warnock, Brazier and Golombok recently stated “The UK has regulated surrogacy arrangements for thirty years and many other countries have, in that time, modelled similar laws on ours.”<sup>162</sup> If the UK is to continue to lead the world with its regulation of these alternate ways of founding a family such as surrogacy, it needs to be in line with modern social realities and reform is now long overdue.

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<sup>159</sup> *Re X and Y (Foreign Surrogacy)* [2009] 1 FLR 733.

<sup>160</sup> Dame Lucy Theis in the context of those who have founded a family via surrogacy but have not applied for a parental order – ‘Unregistered surrogate-born children creating ‘legal time-bomb’, judge warns 18 May 2015, *The Guardian*, <https://www.theguardian.com/lifeandstyle/2015/may/18/unregistered-surrogate-born-children-creating-legal-timebomb-judge-warns> (last accessed 16 March 2017).

<sup>161</sup> *Ibid.*

<sup>162</sup> M Warnock, M Brazier and S Golombok in the foreword to *Surrogacy in the UK: Myth Busting and Reform*, *op cit*, n 64 at p 5.