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Not withered on the vine: The need for surrogacy law reform

1. Introduction

Surrogacy is an arrangement in which, by mutual consent prior to conception, one woman (the surrogate), becomes pregnant, carries and gives birth to a child or children on behalf of others who intend to be the parent(s) ('the intended parent(s)' (IPs)). Though the terminology used to describe the participants varies, and can be contentious, essentially all surrogacy arrangements fall into one of two types. 'Full', 'host', 'carrier', 'gestational' or 'IVF' surrogacy occurs where the surrogate is genetically unrelated to the child she carries (i.e. she is implanted with an embryo created by mixing others' egg and sperm, often but not always those of the IPs). Clearly, such arrangements require clinical involvement. 'Partial' or 'traditional' surrogacy occurs where the surrogate's own egg is used (so she is also genetically related to any resulting child(ren)). Somewhat confusingly this form of surrogacy has also been called 'genetic', 'complete', 'straight' or 'genetic-gestational' surrogacy. While this may involve clinical expertise, it doesn't have to: pregnancy can be established via self-insemination.

In the last decade or so, surrogacy has re-emerged as 'controversial', largely as a result of the rise of international (or 'cross-border') surrogacy arrangements, most of which are commercial in nature. This has driven television and news media, the family courts, and wider legal questions,¹ as well as piquing academic – and potentially regulatory – interest.² The internet-fuelled modern phenomenon of international surrogacy has heightened and renewed interest in how surrogacy is and should be regulated in both the UK and elsewhere.³ In the UK, a flurry of cases over the last 8-10 years has resulted predominantly from

¹ Including human rights issues, see e.g. *Mennesson v. France* (ECHR June 2014).

² The Law Commission has recently closed its consultation on its thirteenth programme of law reform (31 October 2016), in which it asked whether it should consider surrogacy (www.lawcom.gov.uk/surrogacy/ accessed 1 November 2016).

³ K. Horsey/S. Sheldon, 'Still Hazy After All These Years: The Law Regulating Surrogacy', *Medical Law Review* 20 (2012), 67; also E. Jackson, this volume at XX. Some commentators suggest international regulation – see C. Rogerson, this volume at XX. See also the work of the Permanent Bureau of The Hague Convention on Private International Law (HCCH) Parentage and Surrogacy Project - www.hcch.net/en/projects/legislative-projects/parentage-surrogacy. However, universal agreement is unlikely to be easily achieved – see e.g. A. Blackburn-Starza, 'Council of Europe rejects surrogacy guidelines' *BioNews* 873 (17 October 2016).

internationalised or cross-border surrogacy arrangements. A number of these have challenged the sanctity or legitimacy of the existing rules surrounding the transfer of legal parenthood and/or the prohibition on (commercial) payments.

‘Domestic’ cases also show how even those entering non-international arrangements suffer, because surrogacy law remains ‘hazy’.⁴ This statement is supported by a report published in November 2015, which included the results of a survey to which 111 surrogates and 206 IPs responded.⁵ Taken together, the case law and survey responses illustrate that surrogacy law in the UK is no longer fit for purpose. This article contends that, having been crafted in 1985 under different prevailing conditions and being based on assumptions that are no longer tenable, it is time to repeal the Surrogacy Arrangements Act (as well as the related provisions in the Human Fertilisation and Embryology Act 2008) and start again with surrogacy. Demand for surrogacy clearly did not ‘wither on the vine’ as the majority of the Warnock Committee hoped.⁶ There is now a pressing need for new legislation that is able to cope with the demands of 21st century surrogacy, which must be empirically grounded, facilitative and able to sensibly and sensitively encompass the increased use of international arrangements.

2. Surrogacy’s history: a social and legal overview

The first surrogacy cases in the UK emerged in the late 1970s and early 1980s, before any statutory guidance existed. Judicial disapproval of the practice was evident from the language used in judgments to describe surrogacy arrangements, which were seen as ‘immoral’, ‘bizarre and unnatural’, ‘sordid commercial bargains’, agreements to ‘sell a child’ and ‘a kind of baby-farming operation of a wholly distasteful and lamentable kind’.⁷ Even where no dispute arose between the parties, the state expressed concern for child welfare (*Re C (a*

⁴ Horsey/Sheldon, ‘Still Hazy After All These Years’ 2012 (n. 3), also see most recently *A B and C (UK surrogacy expenses)* [2016] EWFC 33; *Z (surrogacy agreements: Child arrangement orders)* [2016] EWFC 34; *CD v. EF and AB* (2016) EWHC 2643.

⁵ K. Horsey, ‘Surrogacy in the UK: Myth busting and reform’, Report of the Surrogacy UK Working Group on Surrogacy Law Reform (Surrogacy UK, November 2015).

⁶ *Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation, Report of the Review Team Cm 4068* (1998) (London: HMSO) (‘the Brazier Report’), para. 2.23, and M. Brazier, ‘Regulating the Reproduction Business?’, *Medical Law Review* 166 (1999), 180.

⁷ See especially the judgment of Ormrod LJ in *A v. C* [1985] FLR 445.

minor) [1985]).⁸ The notorious American *Baby M* case led to further concerns about surrogacy's potential for exploitation of women.⁹ In that case a young single woman entered a surrogacy contract with a wealthy couple. Later, following disagreements, she went 'on the run' with the baby, only to later have the surrogacy contract enforced against her in a blaze of publicity.

A case like *Baby M* could only fuel the fire that was already growing in the anti-surrogacy community, particularly among many radical feminists who saw surrogacy as a patriarchal attempt to gain control over women's reproductive processes, exploitative of women and commodifying women, children and/or reproduction. Some likened surrogacy to prostitution,¹⁰ or even slavery,¹¹ and it is probably no coincidence that Margaret Atwood's futuristic dystopia *The Handmaid's Tale* was first published in 1985.

In 1982 the British government commissioned a Committee of Inquiry, chaired by Mary Warnock, a respected moral philosopher, to consider the implications of (then still new) IVF technology and related aspects of fertility treatment (including the use of gamete donors and surrogacy) and the emerging science of embryology.¹² The Warnock Committee concluded that relationships between mother and child become distorted when a woman becomes

⁸ [1985] FLR 846 and see K. Cotton, this volume, at XX.

⁹ *Baby M, In the matter of* (1988) 537 A 2d 1227.

¹⁰ For example, G. Corea, 'The Reproductive Brothel', in G. Corea (ed.), *Man Made Women: How New Reproductive Technologies Affect Women* (Bloomington and Indianapolis: Indiana University Press, 1987), 38 (the term 'reproductive brothel' originated with Andrea Dworkin in her book, *Right Wing Women* (London: Women's Press, 1983)); K. Pollit, *Reasonable Creatures: Essays on Women and Feminism* (New York: Vintage Books, 1995), 69; T. Shannon, *Surrogate Motherhood: The Ethics of Using Human Beings* (New York: Crossroad Publishing, 1988), 152.

¹¹ Mary Lyndon Shanley compares surrogacy to 'contracts for consensual slavery' in "'Surrogate Mothering" and Women's Freedom: A Critique of Contracts for Human Reproduction', in P. Boling (ed.), *Expecting Trouble: Surrogacy, Fetal Abuse and New Reproductive Technologies* (Oxford: Westview Press, 1995), 165.

¹² *Committee of Inquiry into Human Fertilisation and Embryology, Report Cmnd 9314* (1984) (London: HMSO) ('the Warnock Report'). See Mary Warnock's Foreword to this volume for reflections on the findings of this Inquiry in relation to surrogacy.

pregnant in order to carry a child she will give away and recommended that both commercial and non-profit agencies be prohibited, and that all participants in surrogacy arrangements should be criminalised, other than the surrogate and the IPs (in order for the child to avoid the ‘taint of criminality’).¹³ It also said that all surrogacy arrangements should be void and unenforceable.¹⁴ A dissenting minority distanced themselves from the main recommendations on surrogacy, saying instead that the practice – which could greatly benefit some infertile couples, and on the basis that demand for it would not go away – should be regulated and provided by licensed surrogacy agencies: ‘the door should be left ajar’.¹⁵

Some of Warnock's recommendations on surrogacy were acted on almost immediately. The Surrogacy Arrangements Act (SAA) 1985 followed soon after the report and – over 30 years later – is still in force. Agencies or brokers operating on a commercial basis have been banned in the UK since the SAA which, based on the Warnock Committee's recommendations, also made it illegal to advertise for or as a surrogate. No criminal offence is imposed on the actual participants, reflecting the Committee's view that this would be better for the children born from surrogacy arrangements. Thus, the SAA neither prohibits nor facilitates surrogacy; however the legal vulnerability perpetuated by the Act can be seen as intending to discourage surrogacy arrangements.

The Human Fertilisation and Embryology (HFE) Act 1990 inserted a provision into the SAA rendering all aspects of surrogacy arrangements unenforceable. No one is granted legal rights by a surrogacy agreement. IPs cannot therefore sue for performance or damages if the surrogate changes her mind, and nor can she have any remedy against them if they renege. On top of the SAA's criminal provisions, the HFE Act defined who the legal mother and father of children born following assisted conception procedures. In most cases, as explored below, legal parenthood becomes automatically vested in those who will raise the child, whether or not there is a genetic connection, though this is not the case for surrogacy. The Act established a process under which legal parenthood could be transferred to IPs from the surrogate (and her spouse/partner, if there is one), providing they meet certain criteria, via a parental order (PO).¹⁶ This stemmed from a late amendment to the Bill, added by an MP who

¹³ Warnock Report, para. 8.18.

¹⁴ *Ibid.*, para. 8.19.

¹⁵ Warnock Report, Expression of Dissent A: Surrogacy.

¹⁶ These provisions are now contained in the HFE Act 2008, s. 54.

was approached by constituents objecting to having to adopt their own genetic baby. More recently, these ‘status provisions’ – including the PO mechanism – were updated by the HFE Act 2008 following minimal public consultation. Though this means that the correct people can eventually be legally recognised as the parents, the very existence of such an order has the effect of reinforcing underlying presumptions that the surrogate *should* be the legal mother of the child and therefore that surrogacy arrangements are about taking babies away from mothers, rather than women helping others become parents.¹⁷ This means that surrogacy is treated in law largely as a version of adoption, rather than a form of assisted conception. Interestingly, however, in the 2015 survey referred to above, only four of the surrogate respondents said that the law is correct in identifying them as the legal mother at birth.¹⁸

The government last concerned itself with surrogacy in the context of payments. In 1997 Professor Margaret Brazier chaired a further inquiry into surrogacy.¹⁹ There appeared to be no question of the correctness of banning commercial agencies and preventing advertising. The then new Labour government worried about seemingly ever-increasing payments being made to surrogates which, despite limitations on commercialism, were becoming increasingly high.²⁰ However, despite that Committee’s recommendations, particularly in relation to the expenses that might legitimately be paid to surrogates, no further legislative change occurred.

¹⁷ K. Horsey, ‘Challenging presumptions: legal parenthood and surrogacy arrangements’, *Child and Family Law Quarterly* 4 (2010), 449. See also N. Gamble/H. Prosser, this volume, at XX.

¹⁸ A further 76 ‘said a clear “no” to a question asking whether the surrogate should have the right to change her mind about giving the baby to the IPs’: Horsey, ‘Surrogacy in the UK’ 2015 (n. 5), 21.

¹⁹ Note 6, above.

²⁰ Expenses payments in this country are still not exorbitant. The 2015 survey responses showed that the majority of surrogates in the UK (68.2%) reported receiving between £10,000 and £15,000, with none receiving more than £20,000. The IPs in the survey reported paying £0 to £25,000 to the surrogates they used with the average payment being £10,859 (Horsey, ‘Surrogacy in the UK’ 2015 (n. 5), 20, 23).

The Brazier Report confirmed that Warnock's recommendations were based on the assumption, held by the majority of the Committee, that surrogacy was exploitative:²¹

'the clear objective of those [Warnock's] proposals was to implement a legislative framework which strongly discouraged surrogacy arrangements, made transparent society's disapproval of surrogacy as a practice, and limited resort to surrogacy arrangements to, at most, a handful of instances where a relative or close friend would agree to act as a surrogate on an altruistic basis'.²²

In other words, the Warnock majority, taking a 'moralistic, paternalistic' stance,²³ hoped that strict regulation, particularly of the commercial aspects of surrogacy, would cause the practice of surrogacy to 'wither on the vine'.

Brazier recommended that only limited payments to surrogates – in the form of 'justifiable expenses' – should be allowed.²⁴ Justifiable expenses included such things as maternity clothing, healthy food, travel expenses, counselling, insurances, medical tests and procedures – and should be evidenced by receipts or other documentation. The Brazier Report ultimately also recommended that surrogacy should continue to be discouraged but recognised that 'surrogacy should remain an option of last resort available only to couples where the intending mother's condition renders pregnancy impossible or highly dangerous to her'.²⁵ To facilitate this, the report recommended repeal of the SAA and surrogacy-related provisions of the 1990 HFE Act, followed by the creation of a new Surrogacy Act. However, despite the so-called pressing need to reconsider surrogacy, nothing was done following the Report: none of its recommendations were acted upon. And, even when the opportunity arose to fully re-examine the law relating to surrogacy in the context of a wider review of the 1990 Act in

²¹ Brazier Report, para. 2.4-2.6. The Warnock Report had certainly had little positive to say about surrogacy, stating that if 'a woman deliberately allows herself to become pregnant with the intention of giving up the child to which she will give birth ... is the wrong way to approach pregnancy' (para. 8.11). This is also admitted by Mary Warnock in her Foreword to this volume, at XX.

²² Brazier Report, para. 2.11

²³ Michael Freeman, 'Is Surrogacy Exploitative?', in Sheila McLean (ed.), *Legal Issues in Human Reproduction* (Aldershot: Dartmouth, 1989), 166.

²⁴ *Ibid* paras. 5.24–5.25.

²⁵ *Ibid* para. 8.9.

2005-2007, little happened. By this time, as has been argued elsewhere, surrogacy had been ‘swept under the carpet’.²⁶

In 2005 the House of Commons Science and Technology Committee recommended that the Government should include within its review of the 1990 Act an assessment of surrogacy arrangements, taking the Brazier Report as a starting point and considering all developments since 1998. It further recommended that consideration should be given to introducing separate legislation covering surrogacy. One would have hoped that, in order to achieve this, detailed attention would be paid to all aspects of surrogacy and its regulation.²⁷

Though the Department of Health subsequently undertook a supposedly comprehensive review of the law on assisted reproduction and embryology to make it ‘fit for purpose’ in the 21st century,²⁸ on surrogacy, its consultation document asked merely ‘what, if any, changes are needed to the law and regulation as it relates to surrogacy’. It asked whether, if changes were deemed necessary, these should follow Brazier’s recommendations and/or be dealt with in separate legislation outside the review. Again apparently there was no doubt that the approach taken against commercialism, agencies or advertising was correct: no specific questions were asked about the basic regulation of surrogacy – or the moral or other justifications for it. A further question related to legal parenthood but was limited in scope and seemingly included only because it couldn’t be omitted in the context of the other changes that would have to be made to parent ‘status provisions’ in a post-civil partnership era. No consideration was given at all to the then emerging international surrogacy marketplace, or the issues that this might generate.

2.1 Changing Attitudes

Since the 1980s, social, media, judicial and medical representations of surrogacy changed, largely positively. The language used by judges became less disapproving. The British

²⁶ K. Horsey, ‘Swept Under the Carpet: Why Surrogacy Law Needs Urgent Review’, in N. Priaux/A. Wrigley (eds.), *Ethics, Law and Society*, vol. 5 (Ashgate, 2013).

²⁷ In the same year, the Irish Commission on Assisted Human Reproduction (CAHR) had recommended – in the context of a wholesale absence of regulation of ART in Ireland – that surrogacy should be allowed, but regulated in order to protect participants, and that parenthood following surrogacy should be based on intention, as it would also be for parents using donated gametes or embryos (CAHR 2005, 52-53).

²⁸ Department of Health, *Review of the Human Fertilisation and Embryology Act: A Public Consultation* (DoH, London 2005).

Medical Association changed its stance on surrogacy (in 1996 it officially recognised surrogacy as ‘an acceptable option of last resort’) as did the Human Fertilisation and Embryology Authority, as evidenced by successive Codes of Practice. More fertility clinics became willing to facilitate surrogacy arrangements. Cases seem largely to have raised questions about retrospective authorisations of expenses, and increasingly to be about navigating the hazy technicalities of legal parenthood. Surrogates were presented mostly as women doing ‘a good thing’ by mainstream media, even where they received money for doing so. Since the early 1990s all major British soap operas have featured at least one surrogacy storyline, as did *Friends*, a high-profile and very popular comedy series from the US. Surrogacy also gained its own ‘celebrity status’, being used by Sir Elton John and his partner David Furnish, as well as Nicole Kidman, Robert de Niro, Sarah Jessica Parker, Cristiano Ronaldo, Neil Patrick Harris, Tyra Banks and Lucy Liu, among others. One blog commentator – herself a surrogate – describes how the celebrity ‘trend’ for surrogacy has helped to normalise it and how modern reporting is ‘often sympathetic and altruistic, rather than purely sensationalistic, and so public opinion follows’.²⁹

Nowadays, some fairly large-scale non-commercial agencies exist and, as they offer services on a not-for-profit basis, are able to facilitate arrangements between commissioning parents and surrogates, as well as provide a source of support for all those involved.³⁰ Given the nature of the relationship between surrogates, potential parents and agencies in the UK, it is unsurprising that studies have shown that it is altruism that motivates the majority of surrogates.³¹ Very few disputes – that is, where a surrogate changed her mind and decided to keep the baby she carried – have ever been documented.³² The oldest surrogacy agency operating in the UK, COTS, estimates that less than 5% of arrangements break down (and not all of these will be after pregnancy is established). In fact, evidence shows that the majority of surrogates in the UK (94.3%) stay in touch with the families they helped create, and that there is a high level of openness between IPs and their children about the method of their

²⁹ ‘Jo’, ‘Surrogacy “trend” for celebrities’, UK Surrogacy Support (19 March 2012),

<http://uksurrogacysupport.com/surrogacy-trend-celebrities/> (accessed 25 October 2016).

³⁰ See Cotton, this volume, at XX; Smith, this volume, at XX; Gamble/Prosser, this volume, at XX.

³¹ V. Jadvá, this volume, also see Horsey, note 13 above.

³² N. Gamble/H. Prosser, this volume, identify only five reported dispute cases (at XX), and these are not all cases where the surrogate changed her mind.

conception.³³ Very rarely does a worrying case emerge, for example concerning the surrogate's bodily autonomy or the behaviour of either party.³⁴ When one does, often it appears that better regulation and/or support and guidance for the participants might have prevented the situation. Even so, we should not overreact to the hard cases. It is important to bear in mind that despite the attention it receives, surrogacy is not common – COTS celebrated its one thousandth baby earlier this year.³⁵ According to Cafcass figures, until a few years ago there was an average of about 50 POs being issued annually and, though this has risen in more recent years, the numbers are still in the low hundreds.³⁶

3. The need for legal reform

Having outlined how surrogacy has been treated since its emergence into our legal consciousness over three decades ago, as well as a growing acceptance of surrogacy, the remainder of this article seeks to illustrate that although surrogacy has been largely forgotten by regulators, it has certainly not 'withered on the vine'. As discussed above, the availability and ease of obtaining international surrogates has made surrogacy more visible. If anything, the use of surrogacy may be on the rise, as illustrated not only by annual increases in the number of POs being issued but also the increased number and variety of cases reaching the courts. With the UK now recognising same sex marriage, the resulting implicit legitimisation of gay families may lead increasing numbers of gay male couples to investigate surrogacy. For all these reasons, it becomes even more imperative that the law regulating surrogacy is revisited, to address the inadequacies we can already identify. As the Minister responsible for driving the 2008 Act through parliament stated:

³³ Horsey, 'Surrogacy in the UK' 2015 (n. 5), 20, 22. Also see V. Jadvá, this volume.

³⁴ See, e.g. note 12 above. Also, the Thai surrogacy case of 'Baby Gammy' discussed in A. Newson/S. Callaghan, 'Surrogacy, motherhood and Baby Gammy', *BioNews* 766 (11 August 2014).

³⁵ See K. Cotton, this volume at XX.

³⁶ M. Crawshaw/E. Blyth/O. van den Akker, 'The changing profile of surrogacy in the UK - Implications for policy and practice', *Journal of Social Welfare and Family Law* 34(3) (2012), 265; Horsey, note 13, above.

Evidently, however, there are people who do not apply for POs so these numbers do not reflect the true incidence of surrogacy being undertaken.

‘discussions about surrogacy should be dealt with elsewhere and not by amending the Bill, because the issues involved are complex and the debate has not been properly considered due to its late emergence as an issue in the Bill’.³⁷

It must be time, now, for those discussions to begin. Here, I want to focus on one of the major problems (which is interlinked and overlaps with other issues, including cross-border/international arrangements): legal parenthood and parental orders.

3.1 Legal Parenthood and Parental Orders

Section 33(1) of the 2008 HFE Act is clear and unequivocal about motherhood.³⁸ The mother of any child born following any procedure is the woman who gives birth ‘and no other woman’.³⁹ The position regarding legal fatherhood is treated somewhat differently. In many cases, the legal recognition of the mother also determines fatherhood. Under ss. 35-37 of the 2008 Act, if the woman who gives birth is married (to a man) when either an embryo (created without the husband’s sperm) or mixed gametes are placed in her, or when she undergoes insemination – her husband becomes the legal father. This therefore covers not only ‘straightforward’ IVF but also IUI with/and the use of donated sperm. The situation is the same even where treatment takes place in another country. The exception to this rule exists only if the woman’s husband did not consent to her being so treated (which inevitably draws its own questions about the patriarchal nature of the provisions). If she is not married, but a man undergoes ‘treatment together’ with her in licensed premises, he becomes the legal father. A gap exists with regard to more ‘informal’ insemination procedures, that is, do-it-yourself inseminations which may occur outside a clinical setting.⁴⁰ For a married couple, legal fatherhood in such situations is governed by the common law presumption of paternity (unless disproved) while unmarried fathers can become legal fathers only if they jointly register the birth with the mother. The 2008 Act mirrored the fatherhood provisions for female same sex civilly partnered couples having children using (clinical) donor

³⁷ Dawn Primarolo, Minister of State, Department of Health, Hansard, 12 June 2008, cols. 248-249.

³⁸ As was its predecessor 27(1) of the 1990 HFE Act.

³⁹ This also explains the amendments made to the 2008 legislation (see s. 42) after the Marriage (Same Sex Couples) Act 2013 which allow a woman’s female spouse to become a ‘second parent’ but not another ‘mother’, despite the parties’ intentions and even if the ‘second parent’s’ egg was used to establish the pregnancy.

⁴⁰ See E. Jackson, ‘The Law and DIY Assisted Conception’, in K. Horsey, (ed.), *Revisiting the Regulation of Human Fertilisation and Embryology* (2015, Routledge), 31-50.

insemination, by creating the status of ‘second parent’ for female partners of women undergoing licensed treatment and giving birth as a result (ss. 42-44): civil partnerships (and now marriage) between women are thus treated (bizarrely) the same, but differently from ‘traditional’ marriage, which can create a ‘father’.

The legislative formula assigning legal parenthood following assisted reproduction works well for straightforward IVF and also for procedures using egg or embryo donation, as these techniques are used to allow a woman otherwise unable to conceive naturally (whether because she or her partner and infertile, or even if she is single) the ability to give birth to a child she intends to raise. However, when her problem is an inability to carry a child, the legislative position fails to recognise the social and familial reality she intends when using a surrogate.⁴¹ As can be seen from both the original 1990 legislation and its 2008 amendments, the parenthood provisions in respect of *most* forms of treatment correctly assign legal parenthood to those who intended to become parents via treatment. Therefore, we can say that legal parenthood, for the most part, reflects the intended social reality of the families created and, by doing so, the best interests of the children concerned.⁴² However, this is *not* the case in two situations. First, the formula works only for heterosexual couples: two women having a child together may both wish to be ‘mother’, while two men (or a single man)⁴³ may prefer no-one to be so named. In non-heteronormative relationships the law then fails to reflect reality (and this is further compounded in relationships where the donor – or surrogate – is intended by the parties to be involved in some way, perhaps as a third co-parent). Secondly – and of greater concern here – in a surrogacy arrangement intention to become a parent *only* translates automatically into legal parenthood in the situation where an unmarried surrogate receives licensed ‘treatment together’ with the intended father. So, although he becomes correctly recognised as the legal father, if he has a partner, female or male, who also intended to be the parent, only *half* of them can have their intention legally recognised. This

⁴¹ See K. Horsey, ‘Unconsidered Inconsistencies: Parenthood and Assisted Conception’, in K. Horsey/H. Biggs, (eds.), *Human Fertilisation and Embryology: Reproducing Regulation* (Routledge-Cavendish, 2007).

⁴² Since the Human Fertilisation and Embryology (Deceased Fathers) Act 2003 this has even been the case where sperm is used posthumously with the deceased father having given prior written consent.

⁴³ ‘Singleness’ and ART is not only difficult for anyone attempting it, but also is biologically and legally more difficult for men. See *B v. C (Surrogacy: Adoption)* [2015] EWFC 17 and *In the matter of Z (a child)* (No. 2) (2016) EWHC 1191 (Fam).

suggests either that surrogacy is viewed as ‘other’ – and therefore potentially more dangerous – than other ARTs, or that the intention *does* translate to parenthood following ‘normal’ IVF or donor conception is serendipitous rather than deliberate.

Presumably, the intention behind attaching babies to the women who carried them, whether or not there is a genetic connection, was to ensure ‘certainty’ for surrogate-born children, as well as certainty that the surrogate may always change her mind. However, it might also be thought a deliberate attempt to delegitimise surrogacy and discourage people from entering surrogacy arrangements, particularly in the light of Warnock’s concerns. If one of the legislative goals was to offer protection to the perceived vulnerable parties (principally believed to be the surrogate mother and the child) then it is certainly questionable whether this is achieved. While the surrogate is ‘protected’ in the sense that certainty is maintained and, should she want to, she knows that she could keep the child, making this an absolute is at odds with what will usually be in the best interest of the child.⁴⁴ If another goal was to discourage surrogacy then it is perhaps the case that some might be deterred by the provisions – but anecdotally at least it would appear more to be the case that ways would be sought around the law and this may in fact be a reason that has driven some IPs to seek surrogacy in other countries.⁴⁵

Given an overall view of surrogacy and why people do it, is the way legal parenthood is currently attributed the best way, or would other starting points be more appropriate? Two other possibilities emerge: parenthood follows the genetic link or follows the parties’ intentions. Both are considered here to see whether preference for that method should be brought into new legislation. However, doing justice to participants in surrogacy arrangements means that part of the consideration must be how assigning parenthood by either of these methods would impact across *all* ARTs.

Basing legal parenthood following ART and surrogacy on the genetic link seems at first attractive – perhaps because of our innate attraction to biology and the ‘natural’. Quickly, however, it loses its appeal. Only one form of surrogacy (gestational) would be viable – yet not always possible, and never so in the case of gay male IPs. Further, prioritising genetic connections simply does not work if we are to allow gamete and embryo donation. Society has already decided that donors should *not* be legal parents – presumably given the responsibility that this carries, combined with the nature of and motivation for donation in the

⁴⁴ See related comments of Theis J in *CD v. EF and AB* [2016] EWHC 2643.

⁴⁵ N. Gamble/H. Prosser, this volume, at XX; E. Jackson, this volume, at XX.

first place. While we recognise that biological connections have *importance*, in that, for example, we allow those conceived using donor sperm to find out the identity of the donor upon reaching adulthood,⁴⁶ we have not and could not merge genetics and legal parenthood unless we were prepared to remove conception using donors as an option for infertile people. On the other hand, intention has a distinct possibility as a tool for – at least presumptively – determining legal parenthood following both ARTs and surrogacy. It is not unprecedented: since the early 1990s a number of US states either by case law or legislation have recognised intentional parenthood, as does New Zealand, some Australian states and some popular overseas surrogacy destinations including the Ukraine and India and, via a pre-birth order, Greece. In 2005 Ireland’s CAHR recommended that parenthood following ART should be presumptively based on intention, as had the New Zealand Law Commission in 2004. As already discussed, *most* of the provisions in the HFE Act already recognise the parties’ intentions, though not explicitly. Those situations where intention to become a parent is not so recognised – that is, for all surrogacy (for heterosexual or gay couples, or single people) – could clearly be addressed by doing so. This would be fairer, in the sense of not discriminating against those with a particular type of infertility or with a particular relationship or need.

The 2008 changes were clearly intended to represent fairer treatment of gay and unmarried couples across the spectrum of assisted reproduction. However, the legislation continues to treat those using surrogacy differently, while no justification for this has been provided since Warnock. Unless there is proper justification – which may have been the case if surrogacy was prone to dispute, or exploitation was rife, or there was evidence that children were in some way disadvantaged by being born through surrogacy – surrogacy should be treated no differently from other forms of ART in respect of legal parenthood, meaning parenthood should automatically vest in those who intended it. Elsewhere in the law there are mirroring provisions. Payments, for example, are not allowed other than for reasonable expenses incurred for either surrogates or gamete/embryo donors. Though payments are generally higher in surrogacy, this is a reflection of the associated costs and length of carrying a pregnancy to term. Further, we allow egg-sharing to take place in licensed settings – sharing eggs in return for reduction in IVF costs (which may amount to a benefit of hundreds if not

⁴⁶ See E. Blyth/L. Frith, ‘Access to genetic and biographical history in donor conception: An analysis of recent trends and future possibilities’, in K. Horsey, *Revisiting the Regulation of Human Fertilisation and Embryology* (Routledge, 2015), 136.

thousands of pounds) does not impact on the recognition of parenthood, which still follows intent. Failing this, intent could be partially recognised by the operation of a pre-birth process which comes into effect at birth to immediately transfer legal parenthood to the IPs. Not only would this mean that the correct people were recognised, it would reflect the views and feelings held by the majority of surrogates and IPs, and potentially avoid other problems like non-recognition or poor treatment of IPs by hospital staff or, for example, issues regarding consent to treatment of a new-born infant.⁴⁷

3.1.1 Parental Orders

There are many problems with the PO process. First, it is not compulsory to apply for an order, and a number of IPs do not or choose not to apply.⁴⁸ In 2016, Cafcass ran a campaign to raise awareness of the need to apply for a PO, having identified this as a problem. Further, some people cannot apply for an order as they are ineligible. This does not prevent them using surrogacy, only from being legally recognised as the parents of their children (who often may be genetically related) without adopting. At the very least, this different treatment of different groups of people is a reason that the system should be questioned. Some further reasons are considered here.

Upon the granting of an order, legal parenthood is transferred to the IPs, should they be lucky enough to fit within the tight parameters required by the legislation. In the 2008 Act, the qualifying criteria were extended to include unmarried couples in undefined ‘enduring family relationships’ and same sex partnerships either civilly partnered or in such an enduring relationship. As under the 1990 Act, at least one party must be genetically related to the child and the child must reside with the couple, either or both of whom must be domiciled in the UK. Unconditional agreement from the surrogate *and any other parent* must be received, but this can only be given after six weeks but before six months following the birth of the child (giving a wholly unnecessary grace period given the surrogate’s ultimate right of veto in any case).⁴⁹ In granting an order, a ‘court must be satisfied that no money or other benefit (other

⁴⁷ See ‘NHS hospitals forcing surrogate families to hand over newborn babies in car parks due to ‘dire and outdated’ laws’, *The Independent* (29 October 2016).

⁴⁸ Horsey, ‘Surrogacy in the UK’ 2015 (n. 5). See also Jackson et al., note 40 above.

⁴⁹ It is now arguable whether the six-month time limit exists at all, given judicial extensions of the timeframe undertaken in the best interests of the children (see e.g. *Re X (a child) (surrogacy: time limit)* [2014] EWHC

than for expenses reasonably incurred) has been given or received'. In practice, the process of gaining a PO can take many months, leading to a real-world concern. If the child resides with the IPs then unless and until an order is made the people caring for the child are not legally responsible and have no decision-making authority, while the surrogate (and potentially her partner) remains both financially and legally responsible.

Extending the categories of people who may apply for POs looks progressive on the face of it. Section 54 is an improvement on the 1990 Act, which specified that POs were available only to married couples – the extension to civil partners and those in 'enduring family relationships' is welcome, but did not go far enough in terms of providing equal legislative treatment. Section 54 begins 'On an application made by two people...' This exclusion of single applicants has recently been subject to a human rights challenge, resulting in a declaration of incompatibility, which the government must now address.⁵⁰ This would provide the perfect opportunity or springboard from which to review the rest of the law. In any case, the provision does not *prevent* single people entering surrogacy arrangements (if this was the intention), it just prevents children from having their (single) parent properly recognised, which surely cannot be in their best interests. It also entirely fails to take into account what might happen if a couple either separates or one partner dies during the course of the surrogacy or parenthood transfer process.⁵¹ How is this in a child's best interest?

The fact that one of the couple *must* be genetically related to be able to qualify for PO seems also to place an unnecessary barrier in the path of a minority of people seeking parenthood via surrogacy. While not usually being a problem, given who uses surrogacy and why, what about couples who require a donated embryo? Or if both partners in a same sex relationship were infertile (or even if they *agreed* that neither of them would be a genetic parent)? Given that other aspects of the parenthood provisions in the Act *deprioritise* the genetic link (such as in relation to donors), how is this tenable?

As already mentioned, despite s. 54 deeming a parental order impossible if payments beyond 'reasonable expenses' are made, the courts have a fairly long history of retrospectively authorising payments that could be viewed as breaking this provision, where it would be in

3135 (Fam); *Re A and B* [2015] EWHC 911 and *AB v. CD* [2016] EWFC 42). The veto right is discussed in *CD v. EF and AB* [2016] EWHC 2643.

⁵⁰ *In the matter of Z (a child) (No. 2)* (2016) EWHC 1191 (Fam).

⁵¹ However, see *A & Anor v. P & Ors* [2011].

the best interest of the child to grant an order. This is largely to do with recognising the status quo and avoiding disruption in a child's settled life with the commissioning parents. What is the alternative? It would seem axiomatic that the refusal to grant an order on this basis would merely place the child into further uncertainty about their home life and the legal status of those bringing them up. Enforced return to the surrogate is not an option, leaving only the possibility of adoption or care. Retrospective authorisation of larger sums of money changing hands seems to be a continuing trend.⁵² As some judges have identified – in the best interests of the children concerned, what else could they do?⁵³

Unlike adoption orders, POs cannot be given without the consent of the surrogate (within the timeframe outlined above) *even if unreasonably withheld*.⁵⁴ If a court finds, despite a withdrawal of consent, that it would be in the child's best interests to be with the commissioning parents, it is possible that an order might still be made.⁵⁵ This raises some problems that could be avoided with parenthood presumptively following intent. For example, in *Re D and L* [2012], a parental order was authorised despite not being able to get the surrogate's consent (she couldn't be found).⁵⁶ While this case also serves to illustrate the jeopardy that may be faced by some commissioning parents, it also highlights the surrogate's clear intention *not* to be involved with the child.

Conclusion

Surrogacy in the UK is imperfectly restricted rather than being properly and safely regulated. What law there is was designed in the 1980s to discourage surrogacy and was founded on the twin assumptions that agreements would go wrong, and that the surrogacy involves exploitation and taking babies from their mothers. Since then, the law has been modified without much thought. Given the power of the internet and the ever-growing, ever-changing international surrogacy industry, that objective is now completely obsolete. People who want a child through surrogacy – especially but not limited to those who can afford it – will have

⁵² See e.g. *X and Y (Children), Re* [2011], *Re D and L (Surrogacy)* [2012] EWHC 2631 (Fam); *Re W* [2013] EWHC 3570 (Fam) as just some of the many examples.

⁵³ See e.g. Hedley J in *X and Y* [2008] at para. [24]; Theis J in *Re P-M* [2013] EWHC 2328 (Fam) at para. [19].

⁵⁴ Not being able to override this has led to a situation whereby a court was *unable* to prioritise children's best interests – see *CD v. EF and AB* [2016] EWHC 2643.

⁵⁵ See *Re N* [2007] *Public policy* [deception] but also compare *CW v. NT* [2011] – full refs needed.

⁵⁶ *Re D (Minors) (Surrogacy)* [2012] EWHC 2631 (Fam) and *R v. T* [2015] EWFC 22.

one.⁵⁷ Medical tourism is on the rise more generally and ART, including surrogacy, is not excluded. People have many reasons for entering this type of arrangement including easier and faster access to treatment, which is often facilitated by the ability to pay, coupled with the ease of finding a surrogate and the certainty that the agreement will result in a baby.⁵⁸ However, cross-border surrogacy brings its own problems. It would be preferable to have a more facilitative domestic legal regime that recognises surrogacy for what it is: women helping others to create their families. Perhaps, then, fewer parents would need to travel abroad to countries where medical procedures may be less safe, the laws relating to birth registration and citizenship may conflict with ours, leaving children and parents legally vulnerable and surrogates may not be adequately protected from exploitation.

The biggest part of the reform needed is in relation to legal parenthood following surrogacy. This needs thorough review, including reconsideration of both the process and the criteria upon which parenthood is awarded. Overall, the problems raised by POs and in particular the increasing levels of judicial dissatisfaction with the application of the criteria for awarding them, suggest that a post-birth order is not necessarily the best way to determine parenthood following surrogacy. It should be the IPs who register the birth of their child(ren) and have legal responsibility and obligations to them from the moment of birth. The voices of surrogates and IPs should be heard on this: surrogates do not view themselves as mothers, while IPs generally invest in parenthood as much as, if not more than, other parents. Psychologically, they are parents from the moment of conception. Consideration should therefore be given to reversing the presumption that the surrogate is the mother or, if this is deemed untenable, to establishing a pre-birth process which leads to the recognition of the IPs as legal parents at birth where everyone continues to agree.

The existing law on payments is confused and ineffective: there is no clarity about what 'reasonable expenses' means. High Court judges are prepared to circumvent the rules even when they view expenses paid as being beyond reasonable. Questions about payments come too late in any case: after the child is born, and usually by the time it is being cared for by those who made the payments, with responsibility abdicated (though not legally) by those who received them - child welfare must (and does) take priority. Thus, as well as changing the way legal parenthood is recognised following surrogacy, it is time to review what expenses may be considered 'reasonable'.

⁵⁷ See E. Jackson, et al, 'Learning from Cross-Border Reproduction', *Medical Law Review* (2017), (in press).

⁵⁸ Horsey, 'Surrogacy in the UK' 2015 (n. 5).