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**FRAYING AT THE EDGES – UK SURROGACY LAW IN 2015**

*H v S (Surrogacy Agreement)* [2015] EWFC 36; *Re B v C (Surrogacy: Adoption)* [2015] EWFC 17; *Re Z (A Child: Human Fertilisation and Embryology Act: parental order)* [2015] EWFC 73; *A & B (Children) (Surrogacy: Parental orders: time limits)* [2015] EWHC 911 (Fam).

**Summary**

This commentary examines a series of high profile surrogacy cases decided in 2015. Taken singly or together, these cases serve to illustrate how the UK's law on surrogacy – in particular its provisions regarding eligibility for parental orders – are not only out of date, but also becoming nonsensical. These problems culminate in an evident inability of the law to protect the best interests of children born through surrogacy, and indicate strongly a need for reform.

**Keywords**

Cross-border surrogacy; intended parent; international surrogacy; parental order; payment; surrogacy arrangement.

**INTRODUCTION**

2015 saw a raft of cases about surrogacy arrangements that prove – if we didn't already know – that the law regulating surrogacy in the UK is increasingly out of date and failing to adequately protect the best interests of children and families. In part, this is because the law's provisions have the unintended (and unconsidered) effect of driving some prospective parents into overseas arrangements, lured by supposed certainty of outcome and often potentially by what they believe to be more favourable legal parenthood provisions (for example having both intended parents (IPs) named on the birth certificate). Overseas surrogacy arrangements are almost all commercial, often brokered by profit-making agencies or organisations. Costs vary by destination but, for example, it is common for the total costs of surrogacy undertaken in the US to be upwards of £100,000.<sup>1</sup> Other destinations are cheaper, which might explain their sudden booms, yet they raise further and different ethical questions, particularly regarding the potential exploitation of women.<sup>2</sup> Many countries (such as India, Thailand, Nepal and Mexico) have, since their surrogacy market burgeoned, closed down or are in the process of closing their doors to foreigners in the wake of ethical and/or practical problems. That said, while one door closes another tends to open, so ethical issues merely shift geographically.

The bulk of the UK's surrogacy law stems from the Surrogacy Arrangements Act 1985 (now over three decades old – science and society have seen great change in that time) and the Human Fertilisation and Embryology (HFE) Act 1990 (as amended in 2008). The law prohibits commercial

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<sup>1</sup> Costs include travel, accommodation, broker/agent fees, clinical costs (for IVF), the surrogate's fee, health/life insurance for the surrogate and for the baby/ies once born, etc. See *e.g.* 'Childless UK couples forced abroad to find surrogates' *The Observer* (21 February 2016), which states '[i]t costs around \$130,000 (about £91,000) plus insurance to secure the services of a surrogate in the US'.

<sup>2</sup> The alternative argument – certainly advanced by some journalistic articles and television documentaries on surrogacy in *e.g.* India – is that surrogacy is not exploitation but in fact a life-changing moment for many (poor) women – the one-off payment enabling them to buy a house for their family, or send their children to a good school, for example (see *e.g.* 'House of Surrogates' (BBC4, October 2013)).

arrangement of surrogacy, renders surrogacy arrangements unenforceable by/against either party, determines legal parenthood following a successful arrangement and introduces 'parental order' (PO) provisions, under which eligible IPs may apply to have legal parenthood transferred to them after having a child via surrogacy. Recent judgments indicate increasing judicial dissatisfaction with some provisions of the law, especially in relation to the criteria under which PO applications may be granted and how these match the realities of modern day surrogacy. Judges seem increasingly prepared to purposively interpret or 'read down' the provisions of S54 HFE Act 2008 to give better effect to the welfare of the child, as they rightly should. Notwithstanding this judicial flexibility, it appears possible that at least one of the PO eligibility requirements under S54 might in fact violate IPs' or children's human rights.<sup>3</sup>

This paper examines a number of 2015 surrogacy cases which indicate separately and together a pressing need for reform of surrogacy laws in the UK. First, in *H v S (Surrogacy Agreement)*,<sup>4</sup> the care of a 15-month old girl was awarded to a male same-sex couple, against the legal mother's wishes. She had deceived the father(s) about the extent to which she wished to be involved in the girl's life – that is, whether she was acting as a surrogate or not. Second, two cases involving single men's use of surrogacy also highlighted the law's inadequacies – the first was *Re B v C (Surrogacy: Adoption)*,<sup>5</sup> where a man had no choice but to adopt his own biological child, who was also his legal brother. Later, in *Re Z (A Child: Human Fertilisation and Embryology Act: parental order)*<sup>6</sup> the President of the Family Division found that a single father was unable to apply for a PO merely by virtue of his single status. This raised human rights questions that were incapable of resolution at the time, but the case is continuing on a human rights basis with a decision expected later in 2016. This is particularly interesting because if the rights-based argument succeeds, the law will presumably require amending to make it rights compatible. In *A & B (Children) (Surrogacy: Parental orders: time limits)*,<sup>7</sup> the provision requiring a PO application to be made within six months of the child's birth was circumvented in order to allow an order to be granted in respect of children aged five and eight years old. It appears from this decision – and similar others – that, in reality, where it is in the child(ren)'s best interests, there is now no real time limit in the law within which a PO application must be made, making somewhat a mockery of the provision.

### PROBLEMS WITH THE EXISTING PARENTAL ORDER ELIGIBILITY CRITERIA ALREADY EXISTED

A PO is a court order, granted under the provisions of S54 HFE Act 2008, which transfers legal parenthood from the surrogate (and often her spouse or partner) to the IPs.<sup>8</sup> Without a PO the IPs

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<sup>3</sup> It was argued in *Re Z (A Child: Human Fertilisation and Embryology Act: parental order)* [2015] EWFC 73 that the court should not fail to accurately recognise parenthood in situations in which people (in this case a single man) used surrogacy to conceive biological children on their own and that the court should take responsibility for evolving the law using its powers under the Human Rights Act 1998. See further discussion of this case, below.

<sup>4</sup> [2015] EWFC 36.

<sup>5</sup> [2015] EWFC 17.

<sup>6</sup> [2015] EWFC 73.

<sup>7</sup> [2015] EWHC 911 (Fam).

<sup>8</sup> The plural is used here as *Re Z* tells us that the letter of the law here is (currently) clear – only *couples* may apply for a PO as S54 HFE Act 2008 explicitly makes reference to applications being made by 'two people' (at [5]).

do not become the legal parents of the child(ren) and the surrogate remains the legal mother. This obviously has consequences, including the possibility that the people raising the child(ren) do not gain the legal authority to make certain decisions about their life, education or medical care (although they can gain parental responsibility), and the surrogate (and perhaps her partner/spouse) has to be located to give authority in such matters. There may be longer-term consequences too, for example regarding inheritance and succession rights. Though the cases mentioned above clearly illustrate that the PO requirements need reconsideration, they were not the first to demonstrate problems with the existing criteria; *prior* to 2015 cracks were already showing in the ‘eligibility requirements’ required under S54. Largely, this was due to retrospective authorisations by the court of payments made to surrogates that would otherwise seem to contravene the provisions. The Surrogacy Arrangements Act 1985 makes clear that no surrogacy arrangement can be enforced by or against any of the parties who made the agreement.<sup>9</sup> The Act also criminalises the initiation and negotiation of surrogacy arrangements (by third parties) on a commercial basis, as well as the compiling of information for use in such. However, it is not an offence for money to change hands between a surrogate and IPs.<sup>10</sup> The ‘sanction’ for anyone doing so – that is, paying or being paid for a surrogacy arrangement – is supposedly contained in S54, in that the payer may render themselves ineligible for a PO. There is a risk that any payment (or other benefit) considered to be more than (undefined) ‘expenses reasonably incurred’ by the surrogate could lead to the court’s refusal to grant an order (subject to the other criteria being met).<sup>11</sup>

As part of IPs’ eligibility for a PO, S54(8) demands that the court is:

...satisfied that no money or other benefit (other than for expenses reasonably incurred) has been given or received by either of the applicants for or in consideration of—

- (a) the making of the order,
  - (b) any agreement required by subsection (6),<sup>12</sup>
  - (c) the handing over of the child to the applicants, or
  - (d) the making of arrangements with a view to the making of the order,
- unless authorised by the court.

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<sup>9</sup> S1(A), as inserted by S36 HFE Act 1990.

<sup>10</sup> This stems from a recommendation of the Warnock Committee, which wished children to be free from the perceived ‘taint of criminality’ (at para. 8.19).

<sup>11</sup> The closest thing we have to a definition of ‘reasonable expenses’ is found in the 1998 Brazier Report, which had identified some surrogates receiving payment ‘in excess of any reasonable level of actual expenses incurred’ (‘Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation, Report of the Review Team’ Cm 4068 (London: HMSO, 1998), para. 3.20). The Report recommended that surrogates should only be able to receive compensation for ‘genuine and verifiable’ expenses (para 5.25) associated with the pregnancy (and gave a list of examples of the kinds of thing this might include) but none of the Report’s recommendations ever became law.

<sup>12</sup> S54(6) requires full and unconditional consent to the making of the order by the surrogate (the legal mother of the child(ren) by virtue of S33 HFE Act 2008) and her spouse or partner (who may be the legal father or second parent subject to the provisions in the HFE Act in ss35-36 and ss42-43, respectively).

The irony is that when an arrangement runs smoothly (as the vast majority do) and the handing of the child to the IPs by the surrogate is not disputed (as it rarely is), the provision suggests that a court *should* consider refusing a PO, even though the child by this time is well and truly in the care of the IPs and may have been for some months. The surrogate doesn't want the child back, the IPs intend to continue raising the child, yet the law says that legal parenthood might not be able to rest with them, because of a payment. This lack of certainty must surely be part of what drives some IPs to seek out overseas surrogates. The alternative path for IPs in such a situation would be to apply to adopt – further disrupting the family.<sup>13</sup> How could such a situation possibly be in the best interests of a child?

The final words of S54(8) allow a court to authorise any payments made to surrogates.<sup>14</sup> This is not as uncommon as might be expected, given the tone of the law: payments have been retrospectively authorised in cases going back decades.<sup>15</sup> Commenting on this, the Brazier Report said the committee was 'not aware of any case in which an application has been refused on the grounds that an unacceptably large sum of money has been paid to the surrogate mother by the commissioning couple'.<sup>16</sup>

The increase in cross-border commercial surrogacy arrangements in more recent years led to a series of new 'payment' cases being brought before the courts. It became relatively common to see the court retrospectively authorising such payments, in the best interests of the children concerned. In *Re X & Y (Foreign Surrogacy)*,<sup>17</sup> Hedley J authorised payments of 235 Euros per month paid by a British couple to a Ukrainian surrogate, as well as a 25,000 Euro lump sum when the children (twins) were born. These payments evidently exceeded the surrogate's 'expenses' (in fact, the lump sum was to enable her to place a deposit on a flat). Granting the order, Hedley J commented:

it is almost impossible to imagine a set of circumstances in which by the time the case comes to court, the welfare of the child (particularly a foreign child) would not be gravely compromised (at the very least) by a refusal to make an order.<sup>18</sup>

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<sup>13</sup> That said, adoption is incredibly complex as a solution for international surrogacy due to the restrictions on bringing a child into the UK for the purposes of adoption, and the criminalisation of payments. As Russell J acknowledged in *A & B (Children) (Surrogacy: Parental orders: time limits)* [2015], adoption in such circumstances would be 'a square peg for a round hole', adding that the 'very existence of parental orders is a testament to the decision of Parliament that adoption orders do not benefit children born through surrogacy' ([67]-[68]).

<sup>14</sup> And in fact to agencies, brokers etc. Though it does not specifically say so, presumably the intention behind the law was only to allow retrospective authorisations – as prospective authorisations would indicate a more progressive approach to surrogacy than is reflected in the law more generally and suggest that the encumbrance of the post-birth parental order process is largely unnecessary.

<sup>15</sup> See, for early examples *Re an Adoption Application (Surrogacy)* [1987] 2 All ER 826; *Re MW (Adoption: Surrogacy)* [1995] 2 FLR 759; *Re Q (A Minor) (Parental Order)* [1996] 1 FLR 369; *Re C* [2002] EWHC 157 (Fam); [2002] 1 FLR 909. A different question is whether pre-birth authorisation of any money to change hands, for expenses or otherwise (what is an 'expense'? Is time? Is discomfort?) might serve the interests of the child better, rather than post-birth assessments being made adding to the instability and precariousness of the child's legal situation.

<sup>16</sup> At para 5.3.

<sup>17</sup> [2008] EWHC 3030.

<sup>18</sup> At [24].

In *Re L (a minor)*,<sup>19</sup> Hedley J authorised payments made to a surrogate from Illinois, US, citing the Human Fertilisation and Embryology (Parental Orders) Regulations 2010 which had shortly before made the child's welfare the court's 'paramount' rather than just its 'first' consideration. The approach was followed in *X and Y (Children)*,<sup>20</sup> regarding payments made by a couple to two different Indian surrogates. In that case, the then President of the Family Division, Sir Nicholas Wall, found that that whilst the payments did not comply with S54 HFEA 2008, they were not disproportionate and the couple had acted in good faith: POs were granted.

Thus, it already appears that what might be considered payments beyond 'reasonable expenses' or compensation (as certainly happens in most overseas arrangements) will generally always be authorised by a court unless *another* reason exists for the court to refuse to grant an order. If this wasn't enough on its own to call into question the adequacy of the current law, 2015 gave us further instances that show exactly how frayed at the seams it has become, and illustrate the problems caused by the failure to adequately review the law and the assumptions upon which it rests when the opportunity arose prior to the HFE Act 2008. For ease, the cases selected can be summarised into categories: disputes about intention, applications by single applicants and extensions of the statutory time limit.

#### *A. Disputes about Intention – H v S (Surrogacy Agreement)*

In *H v S (Surrogacy Arrangement)*,<sup>21</sup> a case that was media-hyped, including front-page coverage in a national newspaper, the IPs were awarded the care of a 15-month old despite the wishes of the legal mother. The case revolved around a disputed arrangement – not about whether a surrogate would give up the child or not, or about payment of expenses or otherwise, but about *whether or not a surrogacy arrangement had even been entered into*. The parties were a male same-sex couple (H and B, H being the biological father of the child) and the legal mother (S) in relation to the child, M. H and B contended that they had entered into an agreement with S that she would carry a child for them as a surrogate, that H and B would be the child's co-parents, but that S would 'continue to play a role in the child's life'.<sup>22</sup> S claimed that the agreement was that she would be the child's main parent and carer, that 'H would be, in effect, a sperm donor' and that she and H would be 'like two heterosexual parents that have a child and are separated'.<sup>23</sup> Any role that B might play in M's life was 'vociferously rejected' by S.

The case did not arise from a PO application but dealt with applications made by H and B for parental responsibility and a child arrangements order providing that the child would live with them under the Children Act 1989/Children and Families Act 2014 and a counter-application by S for a child arrangements order providing that the child would live with her. At the time of the hearing, the child lived with S, who had obstructed H and B having regular contact with her and breached interim court orders. M's guardian told the court that S's negative opinions of H and B would cause the child emotional harm and confusion about her identity. She recommended that M reside with H and B and that contact with S be reduced to once a month. Ms Justice Russell DBE found that 'the

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<sup>19</sup> [2010] EWHC 3146 (Fam).

<sup>20</sup> [2011] EWHC 3147 (Fam).

<sup>21</sup> [2015] EWFC 36.

<sup>22</sup> At [1].

<sup>23</sup> *Ibid.*

legislation that governs altruistic surrogacy had no part in the decisions as S does not consent to a parental order or to having acted as a gestational surrogate'.<sup>24</sup> The legal issue was therefore essentially about the child's living arrangements; ultimately a child welfare decision. Despite finding that this was not a surrogacy case,<sup>25</sup> Russell J observed that *Re N (A Child)*<sup>26</sup> (a disputed surrogacy case which was resolved with the child being allowed to stay with the IPs, as a matter of best interests) had similar facts. There, the Court of Appeal endorsed an approach that centred on the child's welfare, asking '...Put very simply, in which home is he most likely to mature into a happy and balanced adult and to achieve his fullest potential as a human?'<sup>27</sup>

Concluding her decision in *H v S*, Russell J said the court's function was not 'to decide on the nature of the agreement between H, B and S and then either enforce it or put it in place' but to 'decide what best serves the interests and welfare of this child throughout her childhood'.<sup>28</sup> It was clear to the court that S could not prioritise the child's needs above her own and would be unable to meet M's emotional needs 'now and in the long term'.<sup>29</sup> Conceding that moving a young child from the person she viewed as her mother was a difficult decision likely to cause distress, Russell J found H would best be able to meet the child's immediate and future needs. He had shown the ability to allow her to grow into a happy, balanced and healthy adult and he could help her to reach her greatest potential.<sup>30</sup> Arguably, however, the best decision in welfare terms would have been the greater legal and practical stability that would be provided for S by a PO, rather than mere determination of residence and parental responsibility, thus a finding that this – despite or because of the deception – was a surrogacy arrangement could ultimately have benefited S. Ironically, in almost the next sentences of her judgment, Russell J implicitly concedes the arrangement was in fact surrogacy:

The pregnancy was contrived with the aim of a same-sex couple having a child to form a family assisted by a friend, this was ostensibly acquiesced to by all parties at the time the agreement was entered into and conception took place. Therefore M living with H and B and spending time with S from time to time fortunately coincides *with the reality of her conception and accords with M's identity and place within her family*.<sup>31</sup>

Therefore, despite the attention this case received, it merely highlights that all decisions in surrogacy or supposedly 'not-surrogacy' arrangements must ultimately be based on the child's best

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<sup>24</sup> At [3]. Note a potential terminological problem arises as usually the phrase 'gestational surrogate' (also 'host surrogate') is used to refer to a woman who has the embryo or gametes of the intended parents (and/or donors) transferred into her for gestation. A woman who uses her own egg in a surrogacy arrangement is commonly referred to as a 'straight' or 'traditional' surrogate.

<sup>25</sup> Though, confusingly, one of the findings of the court was that the mother had '...deliberately misled the Applicants in order to conceive a child for herself rather than changing her mind at a later date' ([55]), suggesting that if the court was so minded it *could* have chosen to treat this as a surrogacy arrangement. Had this been the case, the issue remaining would be S's (lack of) consent to a parental order. The mere fact that she did not consent to a parental order, as it was put, does not of itself make this not a surrogacy arrangement.

<sup>26</sup> [2007] EWCA Civ 1053.

<sup>27</sup> At [12]-[13].

<sup>28</sup> At [125].

<sup>29</sup> At [120].

<sup>30</sup> At [122].

<sup>31</sup> At [125] (emphasis added).

interests. An interesting comment at the beginning of the judgment indicates the court's view on agreements reached 'privately' between potential parents:

The lack of a properly supported and regulated framework for arrangements of this kind has, inevitably, lead to an increase in these cases before the Family Court.<sup>32</sup>

This is true in relation to all forms of assisted reproduction – private and especially do-it-yourself arrangements can be dangerous for everyone concerned, and are less likely to best promote the welfare of the children born through them.<sup>33</sup> With surrogacy, properly regulated and legislatively-supported agencies and advisers, coupled with a legal framework that does not perpetuate the myth that something is fundamentally 'wrong' about surrogacy by resting on the assumption that surrogacy involves babies being taken away from their mothers, would better serve the interests of children, by coinciding with the *reality of their conception* and understandings of their *identity and place within their family*. This would also better support and facilitate expectations of both surrogates and IPs, as information gleaned for a recent survey on the practice of surrogacy in the UK shows.<sup>34</sup> Given that we know the long term psychological and social health of families created via surrogacy is good,<sup>35</sup> and that surrogates and *their own* families fare well after well-conducted arrangements,<sup>36</sup> it is time that the policy underpinning the entirety of the law on surrogacy – especially that related to parenthood – is properly reviewed.

### *B. Single Applicants - Re B v C (Surrogacy: Adoption) and Re Z (A Child: Human Fertilisation and Embryology Act: Parental Order)*

Two 2015 cases illustrate the problems that single people who use surrogacy encounter when seeking to become legal parents. Early in the year more media hype was dedicated to an arrangement entered by a single man whose own mother was the surrogate (using a donated egg).<sup>37</sup> The crux of the case – the first reported relating to a single person seeking parenthood via surrogacy – was the application by the intended father, Mr Casson, to *adopt* his own child (he was ineligible, as a single person, for a PO). Adoption was the only option for him to become the legal father of a child who was biologically his, and which but for him would not have come into existence. This too was difficult, due to the fact that the arrangement had been made before the child was in existence, as

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<sup>32</sup> At [2].

<sup>33</sup> In relation to donor conception and the legal and other risks of 'DIY' arrangements, see E Jackson, 'The Law and DIY Assisted Conception' in K Horsey (ed) *Revisiting the Regulation of Human Fertilisation and Embryology* (Routledge, Abingdon, 2015) 31. See also *Re N (A Child)* [2007] EWCA Civ 1053.

<sup>34</sup> 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), section 3.1 and also graphs in Appendix 2 at pp 45-48.

<sup>35</sup> S Golombok, L Blake, P Casey, G Roman and V Jadva, (2013) 'Children born through reproductive donation: A longitudinal study of child adjustment' 54 *Journal of Child Psychology and Psychiatry* 653.

<sup>36</sup> V Jadva, S Imrie and S Golombok, (2015) 'Surrogate mothers 10 years on: A longitudinal study of psychological wellbeing and relationships with the parents and child' 30(2) *Human Reproduction* 373-379.

<sup>37</sup> *B v C (Surrogacy: Adoption)* [2015] EWFC 17. See e.g. 'I don't care what people think. My baby's loved, I'm happy and nothing else matters: Single gay man and his mum who gave birth to his surrogate son insist they've done nothing wrong' Daily Mail (15 March 2015).

well as the fact that Mr Casson was legally the child's brother,<sup>38</sup> but the adoption order was eventually granted. The facts combined (supposedly) made it imperative for the court to look intricately at the arrangement and at the relevant (adoption) law, in order to determine – perversely – that Mr Casson had not committed a *criminal* offence. Had this been able to proceed like every other surrogacy arrangement, the stress and disruption to the child and the family could have been minimised.<sup>39</sup>

*Re Z*, decided in September 2015, raises further issues regarding single applicants.<sup>40</sup> Here, a PO application was made by a single man (again the biological father). Sir James Munby, President of the Family Division, found himself unable to grant the order, despite clear and unequivocal consent from the American surrogate and support from the Cafcass Parental Order Reporter. The decision turned on the literal wording of S54(4) HFE Act 2008. As Munby P described it,

But for one matter this application would be unproblematic. The problem is that the application is made by a single parent, whereas section 54 seemingly requires an application to be made by “two people”.<sup>41</sup>

Z asked the court to interpret the law flexibly, as if it said 'one or' two applicants. His lawyers contended that modern international surrogacy makes single fathers conceiving biological children on their own a reality.<sup>42</sup> They argued that the law should not deny such children legal recognition, and that the discrimination against single parents makes no sense (and may be contrary to the right to private and family life under the Human Rights Act 1998) given the fact that single men and women in the UK may become legal parents through adoption, IVF or donor conception.<sup>43</sup> However,

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<sup>38</sup> S33(1) HFE Act 2008 renders the woman who gives birth, ‘and no other woman’ the legal mother. As this was his own mother, the child becomes, in law, his brother.

<sup>39</sup> The arrangement only became treated – in law – as a ‘not-surrogacy’ arrangement once the inadequacy of the parental order provisions under S54 HFE Act 2008 was shown. Though this would also have happened if his mother had not been the surrogate, the adoption process would have been somewhat easier as the child would not have been his ‘brother’. The case therefore also illustrates a further problem (not as uncommon where mothers or sisters act as surrogates for a female relative) with regarding the surrogate as the legal mother of the child at birth, a presumption upon which the whole law rests but which has never been questioned. Crucially, *surrogates* do not view themselves as the mother of the children they carry, as evidenced in the recent survey referred to in note 34, above, and believe that the law is wrong to recognise them as such.

<sup>40</sup> [2015] EWFC 73.

<sup>41</sup> At [5].

<sup>42</sup> In fact, though such a situation is more likely to be experienced by a single man, it is not impossible that a woman could be a single applicant. In terms of law reform, presumably this would cause concern that allowing such a thing might encourage ‘vanity’ or ‘convenience’ surrogacy. However, there are situations where surrogacy for a single woman might have medical reasons – for example a young woman undergoing treatment for cancer and who stores her eggs or ovarian tissue to retain the chance of having her own children at a later date. Relatedly to the treatment or otherwise, she later needs a hysterectomy (perhaps even after having a first child – IVF and related procedures do not exclude single women, though the clinic would be obliged to consider the welfare of the potential future child. In practice, being single is no real barrier to IVF or other clinical fertility treatment (see *e.g.* E Lee, J Macvarish and S Sheldon ‘Assessing Child Welfare under the Human Fertilisation and Embryology Act 2008: A Case Study in Medicalization?’ (2014) 36 *Sociology of Health & Illness* 500), so it is difficult to see why the same woman – particularly one in that situation – should not be able to achieve motherhood via surrogacy).

<sup>43</sup> See Natalie Gamble Associates, ‘High Court rules it cannot grant birth certificates to single dads through surrogacy’ at <http://www.nataliegambleassociates.co.uk/blog/2015/09/07/high-court-rules-it-cannot-grant-birth-certificates-to-single-dads-through-surrogacy/>.

on this occasion Munby P considered the court unable to 'read down' the law, and found that the Human Rights Act could not be used to amend the law without Parliament's involvement. Crucially, the potential to allow single people to apply for POs had been considered and rejected in debates leading to the 2008 Act.<sup>44</sup> A sensible amendment to S54 had been suggested, partly as a response to the introduction of the 'supportive parenting' concept in the 2008 Act, though also with a view to making the law on surrogacy consistent with adoption. In dismissing the amendment, Dawn Primarolo MP (as she was then), said:

...surrogacy is such a sensitive issue, fraught with potential complications such as the surrogate mother being entitled to change her mind and decide to keep her baby, that the 1990 Act quite specifically limits parental orders to married couples where the gametes of at least one of them are used. That recognises the magnitude of a situation in which a person becomes pregnant with the express intention of handing the child over to someone else, and the responsibility that that places on the people who will receive the child. There is an argument, which the Government have acknowledged in the Bill, that such a responsibility is likely to be better handled by a couple than a single man or woman.<sup>45</sup>

Though it is possible to see how Munby J felt his hands were tied, the sheer lack of interrogation that these comments have been subjected to is incredible. It is surely a magnitudinous decision when people who are *not* the parents of a child to decide to adopt. Yet the government apparently trusts single people in this situation, but not following surrogacy. In any event, these statements rest on presumptions of magnitude that the surrogacy community itself is saying is unfounded, and draws on the 'potential complications' of the surrogate changing her mind that are in fact exceedingly rare occurrences (notwithstanding the deception cases discussed above).

The putative father in *Z* has latterly sought a declaration that the legislation (specifically S54(4)) is incompatible with human rights laws. A decision is awaited later this year. If *Z* succeeds in his claim it would seem that at least part of S54 will have to be rewritten. This (alongside the other flaws in the legislation shown by other cases considered here) would grant the perfect opportunity to review the law as a whole, perhaps with a view to the creation of an entirely new, comprehensive piece of surrogacy legislation – freshly and properly considered and based on modern understandings of family and empirical data – that is fitting for and reflective of modern day surrogacy.

### *C. Extensions to the Six-month Statutory Time Limit - A & B (Children) (Surrogacy: Parental Orders: Time Limits)*

S54(3) HFE Act 2008 states that for a PO to be granted, the relevant application must be made within six months after the birth of the child to which the application pertains.<sup>46</sup> Despite this, in *X (A Child) (Surrogacy: Time Limit)*,<sup>47</sup> Munby P had granted an order *after* the six-month deadline had passed, finding a purposive interpretation of S54(3) acceptable. He referred to the time limit as 'almost

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<sup>44</sup> See paras [15]-[17] and [36].

<sup>45</sup> Public Bill Committee debate, Hansard, cols 248-9 (House of Commons, 12 June 2008).

<sup>46</sup> Though if made within the first six weeks, S54(7) renders ineffective any consent given by the surrogate to the making of the order.

<sup>47</sup> [2014] EWHC 3135 (Fam).

nonsensical' and asked: 'Can Parliament really have intended that the gate should be barred forever if the application for a parental order is lodged even one day late? I cannot think so'.<sup>48</sup> He added:

Given the subject matter, given the consequences for the commissioning parents, never mind those for the child, to construe section 54(3) as barring forever an application made just one day late is not, in my judgment, sensible.<sup>49</sup>

Munby's decision in *X* was later followed and endorsed in *A & B (Children) (Surrogacy: Parental orders: time limits)*,<sup>50</sup> where the High Court granted POs for children aged 8 and 5, who until that point had in fact been legally parentless. After their births via a Californian surrogate, pre-birth US court orders had enabled the British parents to have birth certificates issued in their names, but under UK law, without a PO, the couple were legally strangers to their own children. They did not discover this fact until 2012.<sup>51</sup> Granting the orders despite the significantly longer time beyond six months than in *X*, Russell J said it would be 'manifestly unjust to give a delay that was innocently wrought, even a very long one such as this, greater weight than the welfare of these children'.<sup>52</sup> She placed great emphasis, rightly, on the children's knowledge of the means of their conception and birth, as part of their identity, and the inappropriateness of adoption orders for parents who had children through surrogacy.<sup>53</sup> Further, she was guided by the principle that the welfare principle must outweigh any public policy concerns,<sup>54</sup> other than in the clearest cases of abuse of public policy, which this was not.<sup>55</sup>

Later in 2015 saw *A & B (No 2 - Parental Order)*,<sup>56</sup> a complicated case in which a couple applied for a PO for twins born to a surrogate in India in December 2011.<sup>57</sup> Their application was late because they had been unaware that an order was required, and why.<sup>58</sup> Their names were on the Indian birth certificates. When they first became aware of the necessity (or desirability) of a PO, they were advised that they were ineligible. As with the previous case, the decision in *X* had alerted them to the possibility of obtaining the orders. All of their actions had been in good faith. Mrs Justice Theis DBE was invited to consider whether the order could be granted despite the application being made out of time, alongside the issue of the children's home being with both of the applicants, who had by that time separated,<sup>59</sup> and more well-rehearsed domicile,<sup>60</sup> consent<sup>61</sup> and payment issues.<sup>62</sup> She

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<sup>48</sup> At [55].

<sup>49</sup> *Ibid.*

<sup>50</sup> [2015] EWHC 911 (Fam).

<sup>51</sup> This meant *inter alia* that the parents had no legal rights to make decisions on behalf of the children, the children were not British, and had no inheritance rights or rights to financial protection if the couple separated.

<sup>52</sup> At [71].

<sup>53</sup> At [61]-[67] and [71].

<sup>54</sup> See *Re L* [2010] EWHC 3030 (Fam), at [10], per Hedley J.

<sup>55</sup> At [46]-[47].

<sup>56</sup> [2015] EWHC 2080 (Fam). See also *AB v CD (Surrogacy - Time Limit and Consent)* [2015] EWFC 12 (Fam) and *A and B (Children: Surrogacy: Parental Orders: Time limit)* [2015] EWHC 911 (Fam).

<sup>57</sup> At the time of the hearing, the children were three years old.

<sup>58</sup> See para [65].

<sup>59</sup> S54(4)(a) requires that at the time of the making of the application 'the child's home must be with the applicants'.

<sup>60</sup> S54(4)(b) requires that at the time of the making of the application 'either or both of the applicants must be domiciled in the United Kingdom or in the Channel Islands or the Isle of Man'. Both parties had been born abroad but asserted that they were domiciled in the UK.

began her judgment by stating that the case raised 'important issues as to the extent the court is able to purposively interpret or 'read down' the criteria' in S54 HFE Act 2008, following the decision in *X*.<sup>63</sup> She went on to explain some of the problems that lack of a PO can cause:

Without a parental order the commissioning parents will not be the legal parents of the child they have probably cared for since birth, and whom the child regards as their de facto parents. 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...<sup>64</sup>

After careful analysis, Theis J felt able to purposively interpret S54(3), and 'read it down' so as to give effect to the children's long-term welfare interests (and all parties' human rights, in particular those stemming from Article 8 of the European Convention on Human Rights). In her opinion, 'to not construe it in such a way could have detrimental long term consequences for the children and the applicants, which is precisely what the section sets out to prevent'.<sup>65</sup>

## CONCLUSION

If questions remain about the inadequacies of our laws, another 2015 case, decided towards the very end of the year, illustrates the problems clearly. In *Re Z (Foreign surrogacy: allocation of work)* [2015],<sup>66</sup> Russell J gave guidance for the handling of international surrogacy cases, after twins born to a surrogate were unable to leave India for over a year. The IPs had already had one child by surrogacy in India. The return of the twins was delayed by the British Passport Office's refusal to accept as authentic documents the parents provided confirming the identity of the surrogate and the fact she was widowed (so there was no second legal parent). There was also a problem in the UK courts, in that the case was wrongly allocated to a local rather than a High Court judge, causing further delay. As Russell J put it:

The situation for them and for the commissioning parents was increasing parlous as time passed placing a significant and increasing financial and emotional burden on the family as well as denying the children the opportunity to develop the important initial bond that babies need.<sup>67</sup>

Clearly to be in such a situation – looked after by nannies in poor accommodation – would not be in the children's best interests – considering the disruption this would have caused, the insecurity about their future and the lack of quality time that the children were able to spend with their IPs

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<sup>61</sup> S54(6) requires that the court is satisfied that the surrogate (and her spouse or partner, if they are also the legal parent) has 'freely, and with full understanding of what is involved, agreed unconditionally to the making of the order'.

<sup>62</sup> See section above – it appears that payment alone, commercial or otherwise, will not be enough to negate an application for a parental order where to grant one would otherwise be in the best interests of the child(ren) concerned.

<sup>63</sup> At [4].

<sup>64</sup> At [12].

<sup>65</sup> At [72]. It is hard to see how this statement would not also be potentially very helpful to the claims made by single man claim in *Re Z*.

<sup>66</sup> [2015] EWFC 90.

<sup>67</sup> At [6].

(and their sister) for the entirety of the first year of their lives. The situation may have long-term effects on the entire family, not least the children.

Again, the failure of our surrogacy laws to recognise the IPs as the real parents of these children (and in this particular case, the rights this would have given in terms of nationality) is highlighted. Russell J has now issued guidance meaning that in future, all surrogacy cases where the birth takes place outside of England or Wales will be handled by a High Court judge with experience in international surrogacy cases (or in conjunction with one who has).<sup>68</sup> She also criticised the role the Passport Office played in the delays in this case. However, though there were additional administrative failures which increased the hardship faced by this family, it remains a clear illustration of how our laws need to be updated and reformed in the best interests of children.

Each decision discussed above highlights just how inadequate UK surrogacy law has become in relation to the realities of 21<sup>st</sup> century surrogacy. We cannot escape the fact that the internet and other developments have changed the landscape of surrogacy – not just in ease of accessing information but also in the many different sources of information, of differing standards and created for different purposes, including ‘packages’ offered to surrogacy destinations where the process and legalities, such as who will be named on the birth certificate, are made to appear easier (and therefore more tempting to potential parents). Accurate information about surrogacy does exist, but people searching would need to know where to look in order to find it.

Coupled with technological developments and an increased marketisation of surrogacy overseas are societal changes that have led to increased acceptance of different family forms and different ways of going about forming families. Surrogacy does not have the same ‘yuk factor’ it once may have had and, in fact, can be seen as one of the ultimate acts of kindness, even where the surrogate is compensated for her out of pocket expenses. Commercial practices – as the majority of internet-sourced arrangements and overseas arrangements are – complicate this understanding. This is particularly true because our law is predicated on the assumption that surrogacy ought to be purely altruistic in nature. The entire tenor of the law and its focus on non-commercialisation, alongside the parenthood provisions following surrogacy that rest on long-held but unchallenged presumptions models surrogacy not as a form of assisted reproduction, but a form of adoption. This (re)emphasises the wrongly-held assumption that surrogacy means mothers giving up their babies, leading inevitably to concerns about vulnerable women and potential exploitation.

What the law singularly fails to reflect is lived experience: the view of surrogates that they are *not* mothers, the fact that IPs (who may have already expended a great deal of time, energy and money on unsuccessful IVF treatments and/or suffered from repeated miscarriages) are vulnerable too, frightened about the ‘risk’ – foregrounded by the law – that the surrogate will change her mind. They are also worried about achieving legal parenthood. It is no wonder that some turn to overseas surrogacy, particularly when marketed as the ‘safer’ more certain option. Our legal provisions and an accessible overseas surrogacy marketplace, lead to a lack of understanding of the legal intricacies involved in surrogacy among many prospective parents, which unfortunately drives some abroad.<sup>69</sup> Those who come to surrogacy via failed attempts at IVF or other treatments *may* have the benefit of

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<sup>68</sup> Para [73].

<sup>69</sup> See feature article cited in n1, above. See also *Re Z (Foreign surrogacy: allocation of work)* (2015), a case starkly illustrating some of the unexpected pitfalls of overseas surrogacy arrangements.

advice from clinics or support agencies that is able to counter this problem – letting them know that it is possible to do surrogacy, and do it well, in the UK – and outlining the legalities involved in overseas arrangements. However, one risk is that they have by this time exhausted themselves financially, try to go it alone and therefore do not receive the best advice, leaving them potentially vulnerable to fraudsters and more heartbreak. Furthermore, there is an increasing market for surrogacy among the gay community and specialist marketeers already in place with pathways to ‘good’ surrogacy outcomes for this (commercial) expanding client base.

Arguably, the framework of the existing law creates and perpetuates a particular understanding of surrogacy and drives the continuing (external) market for it. It is common knowledge among those involved with surrogacy on both a professional and volunteer basis that prospective parents have often misunderstood what they ‘get’ from overseas arrangements, in terms of legal rights and parenthood. Overseas birth certificates naming both IPs as co-parents of the child(ren) born via surrogacy have no effect at home, due to S33(1) HFE Act – a parental order is still required, and there may still be immigration issues.

Overall, many of the problems being highlighted in recent surrogacy cases could be avoided if there was sensible law reform. If IPs were recognised as legal parents of children born to a surrogate from the outset, fewer people would travel overseas for surrogacy. Parenthood is what these people desperately desire. For those who did travel, for whatever reason (perhaps cultural connections), immigration problems would be more easily resolved. POs would be rendered unnecessary (this would also better align surrogacy with other assisted reproductive practices and disassociate it from adoption) or, if retained, could be made to become effective at birth, as happens in some other jurisdictions. If this were to be the case, removing the requirements of coupledness and genetic linkage would make surrogacy consistent with other assisted reproductive practices (and with adoption).<sup>70</sup>

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<sup>70</sup> Unconsidered in this note is a further provision of S54 which requires at least one of the applying couple to have a genetic link to the child(ren) in order to become eligible for a parental order. The rationale for this requirement is presumably to ‘legitimise’ the relationship and in some way to prevent and protect women and their spouses/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 of surrogacy to so-called ‘baby-selling’). It is hard to imagine that without evidence of such pressure being exerted or of the inability to stem such criminal behaviour, this requirement remains justified, particularly in a circumstance where an infertile couple is unfortunate enough to require ‘double donation’. In South Africa, a corresponding provision was recently ruled unconstitutional on the grounds that it ‘violates ... rights to equality, dignity, reproductive health care, autonomy and privacy’ (*AB and Another v Minister of Social Development As Amicus Curiae: Centre for Child Law* (40658/13) [2015] ZAGPPHC 580 (12 August 2015) (at [76])). On the argument that the child’s welfare was best served by maintaining the genetic link requirement, the judge in that case said this was ‘an insult to all those families that do not have a parent-child genetic link’ (at [84])). Removing this requirement in the UK would better mirror other forms of assisted reproduction, such as IVF donated egg and sperm – where this is not required in law. In IVF, genetically related or not, the woman giving birth would become the legal mother. It is conceivable therefore that this might one day result in a discrimination claim on the difference of treatment of same-sex female couples from same-sex male couples (who could only achieve parenthood via surrogacy) in law.