Surrogacy: creating a sensible national and international legal framework

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International surrogacy has become a global phenomenon. Children are increasingly being born through cross border surrogacy arrangements in which intended parents conceive with the help of a surrogate mother based in a different jurisdiction. The USA, Eastern Europe and India are all major surrogacy 'destinations', attracting intended parents from a wide range of countries.

There is currently no international regulation of surrogacy, and there have been a number of high profile international cases in which children born through surrogacy have been denied citizenship or parentage in the country of their parents. As a result, surrogacy has been put on the agenda of the Hague Conference on Private International Law, which is set to review whether and how an international treaty structure could be put in place. In April 2011 the Council on General Affairs and Policy requested that the Permanent Bureau intensify work 'with emphasis on the broad range of issues arising from international surrogacy arrangements'. The Permanent Bureau drew up a preliminary report in March 2012 and expects to produce a final report with recommendations by April 2013. The concerns being discussed are wide-ranging, and include:

- the vulnerability of surrogate children born without adequate legal identity and nationality;
- the potential exploitation of third world surrogate mothers;
- the lack of regulation of surrogacy providers, with no minimum standards or protection for intended parents; and
- the risks of allowing unsuitable parents to conceive through surrogacy without any advance vetting process.

These issues are significant, and the fast growth of the unregulated global surrogacy industry over a relatively short period clearly necessitates some kind of international legal response. However, it is also important to deal with surrogacy in a considered manner, which recognises its uniqueness and the benefits as well as the problems it brings.

The positive side of international surrogacy

Surrogacy is not just a source of problems, but of enormous happiness for the families it creates. It offers often the last or only hope of a biological family for parents who have defeated cancer, suffered stillbirths or repeated miscarriages, or been through years of gruelling unsuccessful fertility treatment. It is a family building option for gay couples who want to become biological parents with parental autonomy, which avoids the dangers of disputes within long term co-parenting arrangements.

Families created through surrogacy are, virtually by definition, much-wanted, and this creates a recipe for loved children born into families which will cherish and nurture them. Research shows that outcomes for children born through surrogacy and donation, and in alternative family structures, are very good, particularly where there is openness and honesty about the child's origins.

Surrogacy also benefits surrogate mothers and their families. I have known many surrogate mothers over the years, and am always struck by the self-worth they derive from having helped transform a childless couple into a family. This is not limited to surrogate mothers in the UK. Of course, in many foreign destinations there is the added dimension of payments made for the carrying of a surrogate pregnancy, but it is too simplistic to think that foreign surrogates are not altruistically or emotionally motivated as well as being drive by financial incentives. I have known a US surrogate mother who, having been paid a 'carrier fee' for her discomfort and inconvenience first time around (as is conventional practice in the state where she lives), went on to carry a second pregnancy for the same intended parents for no payment at all. I have known an Indian surrogate mother who used the payment she received from a surrogacy to re-start a family business which had been destroyed by flooding, and heard her account of how much pride she took in re-establishing her family's financial independence, while also helping someone else's family as well. The two families were glad to help each other, and have stayed in touch. What this shows is that surrogacy can be a win-win collaborative human enterprise, which creates lifelong relationships which are enriching for all, including the resulting child.

The problems of international surrogacy

Life is, of course, not always rosy. Collaborative reproduction is by nature complicated, and as with any complicated human endeavour there is a risk of difficulties and disputes. There is also the very real risk of exploitation by third parties involved in the facilitation of surrogacy, particularly in unregulated contexts and countries where there is significant poverty. Very serious and significant difficulties undoubtedly do commonly arise in connection with international surrogacy arrangements, but often as the product, not of the surrogacy itself per se, but of the complexity and mismatch of national laws.

Laws on surrogacy vary enormously across jurisdictions. In India, there is no regulation and this

has enabled a permissive and lucrative commercial surrogacy industry to flourish; in certain US states surrogacy is explicitly enforceable through a clear legal framework (either through statute or case-law); in many European countries surrogacy is illegal. This difference in legal approaches arises, not just by historical accident, but as a result of fundamentally opposed policy approaches. National policies on surrogacy disagree over such basic questions as who the parents are, whether agreements can be enforceable, or paid, or indeed whether surrogacy should be allowed at all.

What is important to realise is that these differences are not only causing legal complications where surrogacy happens to occur across borders (for example in inter-family surrogacy cases); they are driving the demand for cross-border arrangements. In the age of the internet, parents who cannot access surrogacy services at home (because surrogacy is illegal or heavily restricted) can simply tap into more liberal frameworks elsewhere. Parents who have no connection with the USA or India are choosing to conceive their children through surrogacy there, simply because it is the only practical route for them. If the Hague Conference is to look at regulating surrogacy at an international level, it needs to understand these realities.

The UK's policy approach to surrogacy and assisted reproduction

UK law has, since the inception of IVF, always recognised that assisted reproduction (including surrogacy) requires its own rules, separate from wider children and adoption law and with quite different underpinning principles. The Human Fertilisation and Embryology Act 1990 (now updated by the Human Fertilisation and Embryology Act 2008) was the first piece of legislation in the world to introduce a comprehensive regulatory structure for fertility treatment and embryo research. Its main focus was to regulate the third parties involved in assisted reproduction (via the Human Fertilisation and Embryology Authority (HFEA)) in order to ensure safety and agreed ethical and policy principles. The system works well. By way of example, the current HFEA public consultation on the ethics of creating embryos with DNA from three people in order to treat mitochondrial disease shows how our careful regulatory framework has enabled the UK to stay right at the cutting edge of worldwide scientific advancement while maintaining safety and public confidence.

The HFEA 1990/HFEA 2008 have also sought to balance carefully the rights of the individuals involved in collaborative reproduction processes, and to create clarity and certainty on questions of parentage. The relative rights of donors, parents, surrogates and yet-to-be conceived children are balanced very carefully, following lengthy public debate in Parliament, and with the ability to evolve as social attitudes have shifted (with, for example, egg and sperm donors becoming identifiable as from 1 April 2005).

Parentage following surrogacy – quite rightly – sits within this special legal framework in the UK. The rules on parenthood ensure that the surrogate's status is protected (the policy being that a woman who gives birth should be free to decide whether she wishes to surrender her parentage), but creates a unique legal remedy for parents through surrogacy which also recognises their biological connection – that of a parental order under s 54 of the HFEA 2008.

At an unsophisticated level, a parental order looks like an adoption order – it permanently extinguishes the parenthood of the birth parents and reassigns this to the intended parents. The Human Fertilisation and Embryology (Parental Orders) Regulations 2010 even borrow the wording of the Adoption and Children Act 2002 to create the mechanism for this transfer of parenthood. However, parental orders are very different from adoption, and deliberately so. They were created by the HFEA 1990 as a self-conscious and bespoke alternative to adoption in surrogacy cases. Unlike adoption, a parental order can only be applied for within 6 months of a child's birth and it triggers the re-registration of the child's birth certificate. Although parenthood is technically transferred when a parental order is made (which happens some time after birth), the short window of opportunity to apply, the re-issue of the birth certificate and the requirement that the child is already in the care of the intended parents, acknowledges that the effect of a parental order is to clarify and affirm parenthood (where everyone agrees) rather than in any real sense to transfer it from one family to another.

The process is also deliberately designed to be more contained than an adoption application, and there is no requirement for prior vetting of prospective parents (instead there is a welfare assessment carried out as part of the post birth court application). UK law has long recognised that it would be inappropriate for parents of their own genetic child to undergo the full rigours of an adoption application, and that surrogacy requires a very different approach.

The appropriateness of vetting prospective parents in advance (in respect of their ability to parent a child not yet conceived) is an issue for all assisted reproduction, and not just surrogacy. Any assessment is an interference with parents' right to procreate and their right to a private and family life, so needs to be justified. What level of vetting is justified is a sensitive question, and the lines of comparison are complex. Why should parents suffering infertility be made to jump through hoops when fertile parents do not? The state does not licence parents to reproduce (instead, child protection kicks in where a child is abused or neglected), and there is no obvious reason why there is more risk that those with fertility issues are more unsuitable prospective parents than their fertile counterparts). If the involvement of a third party is what makes the difference, why should those

conceiving with the aid of surrogate (where both parents are often the biological parents) be treated differently than parents conceiving with egg and sperm donors?

These questions have been carefully and thoughtfully addressed by the UK legal approach to assisted reproduction and have evolved over time in response to social changes. The HFEA 1990 introduced a requirement for fertility clinics to consider, before agreeing to treat any woman, 'the welfare of the child, including the need of that child for a father' (a wording which was updated by the HFEA 2008 to refer instead to 'supportive parenting' to make it clear that alternative family forms were now accepted). There are also requirements for counselling and provision of information. How these duties have been applied in practice has been regulated by the HFEA, and over time successive versions of the Code of Practice have liberalised the application of the welfare of the child assessment. The welfare of the child assessment is now a light risk-based approach with a presumption in favour of treatment unless there are very serious concerns. It has been increasingly recognised that, in balancing the rights of the prospective child against the rights of parents to procreate, the rights of the parents must be given greater weight.

Once a child has been born through surrogacy and a court application is made, focus then shifts to the child's welfare which, by virtue of the 2010 regulations, becomes the court's 'paramount consideration'. This is entirely appropriate given that the child is no longer hypothetical, and another commendable aspect of the UK's approach which has in practice enabled the law to adapt to the modern realities of global surrogacy practice.

The flexibility of the law and its ability to promote the child's welfare was shown clearly in the case of *Re L (Commercial Surrogacy)* [2010] EWHC 3146 (Fam), [2011] 1 FLR 1423, which involved a surrogacy arrangement entered into between British commissioning parents and a married surrogate mother in Illinois, USA. Mr Justice Hedley's judgment noted the development of Parliamentary policy and determined that, although careful scrutiny would continue in cases where payments of more than expenses were made which breached the UK policy framework for surrogacy, 'it will only be in the clearest case of the abuse of public policy that the court will be able to withhold an order if otherwise welfare considerations support its making'. The child's welfare was paramount.

The problems UK law creates internationally

UK law does not, however, have all the answers. There is very little effective law in the UK regulating the provision of surrogacy services. Surrogacy does not fall within the regulatory oversight of the Human Fertilisation and Embryology Authority (in the way, for example, that the management of donation services does). Regulation is dealt with by separate law in the Surrogacy Arrangements Act 1985 which imposes restrictions designed to prevent surrogacy being arranged professionally.

When these laws were introduced in 1985, the hope was that they would halt the development of surrogacy on a widespread basis. However, this has not happened and, in practice, the legal restrictions today simply restrict the provision of surrogacy services in the UK to unregulated volunteer organisations with no state oversight of the quality of services. At the same time, the restrictions in the Surrogacy Arrangements Act 1985 put these providers at a competitive disadvantage from professional surrogacy providers abroad. UK law could significantly address the flow of intended parents to less regulated jurisdictions by providing a more effective safe regulated framework at home.

The other major problem with UK law (which mirror difficulties experienced elsewhere internationally) is that the law does not recognise the intended parents as the legal parents of a child born through surrogacy from an early enough stage. Typically in cross-border arrangements, conflicts of law arise on the question of parentage, with the intended parents treated as the legal parents in the destination country, but not in the UK. Because our court process for securing parentage takes place post birth and is lengthy, this leaves children initially born in a legal vacuum and can create severe immigration difficulties. The case of *Re X and Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam), [2009] 1 FLR 733 is perhaps the most stark case in point. The first case to explore these issues, it involved British parents who had conceived with a married Ukrainian surrogate. Although the intended parents were named on the Ukrainian birth certificate, UK law treated the Ukrainian surrogate and her husband as the children's legal parents, and the result was that the children were born 'marooned stateless and parentless'.

There is an increasingly powerful case for bringing forward our surrogacy court process so that UK parents can be recognised as the legal parents earlier. On 17 April 2012 in Parliament, John Healey MP (the former shadow Secretary of State for Health) said: 'There are probably around 100 babies born through surrogacy each year, but the number is growing as society is changing and science is advancing. Surely there must be a good case for Britain, like some States in the US, to have a system of pre birth orders.'

Such a move would, as far as the UK is concerned, make a very significant difference in overcoming the conflict of law difficulties and immigration problems experienced by parents conceiving children through surrogacy abroad. Enabling parents to be legally recognised from an earlier stage may also facilitate the resolution of other problems, including the current lack of maternity leave rights for mothers through surrogacy (an issue currently being considered in Parliament).

What this means for the Hague Conference

However, resolving things from a UK perspective would of course not be a complete international solution. As the Permanent Bureau has said: 'The number of international surrogacy arrangements appears to be growing at a rapid pace and while some States are attempting to resolve the problems arising as a result, this global phenomenon may ultimately demand a global solution.' The Hague Conference's approach is still at an early stage of discussion, with various possible approaches being considered to achieve the primary goal of protecting the identity rights of children born through surrogacy arrangements. Any solution is likely to be long in the making.

The Permanent Bureau is already very clearly aware of the potential challenges involved in reaching any international consensus, given the disparity between national approaches. Those countries which are fundamentally opposed to surrogacy as a concept may not be persuaded to accept parentage through surrogacy in another jurisdiction. Conversely, the key permissive jurisdictions like the USA and India (where surrogacy is an established and lucrative industry) may not be incentivised to engage with the international framework.

There are some difficult waters ahead to navigate, and the Hague Conference needs to be very clear about exactly what the problems are it needs to address, and to work hard at building consensus where possible. It is important to recognise that the main problems being experienced are to do with law and policy. The focus should be on the providers of surrogacy services, and should promote arrangements which support the collaborative process and protect the individuals involved from exploitation. Careful thought also needs to be given to the extent of any prior vetting of parents, recognising that surrogacy belongs to the world of reproduction rather than adoption and that parents conceiving through surrogacy are no more likely to be unsuitable than fertile parents.

These issues and sensitivities have long been grappled with by the UK Parliament, which has stayed at the forefront of regulating assisted reproduction treatment globally. There may be helpful lessons to learn from this experience. In the meantime the UK would do well to tidy up its own house with better national surrogacy laws, which will in the short term at least benefit UK families.