Modern surrogacy needs a modern law: How should we regulate surrogacy in the 21st century?

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At the Royal Society of Edinburgh, on 27 September 2018, the Progress Educational Trust (PET) held its public event 'Modern Surrogacy Needs a Modern Law: How Should We Regulate Surrogacy in the 21st Century?'. The event was supported by the Scottish Government, and was chaired by PET's director Sarah Norcross.

In the past decade, it is estimated that the number of children born through surrogacy has increased tenfold, paralleling societal and legal recognition of more diverse family forms. The Law Commissions of Scotland and of England and Wales, both of which were represented at the event (which boasted a law commissioner for surrogacy on its speaker panel as well as the chairs of both organisations in the audience), are working jointly to review surrogacy law and to make recommendations for reform.

Professor Nick Hopkins, who is leading the review of surrogacy law for the Law Commission of England and Wales, explained that the 1985 Surrogacy Arrangements Act, was designed to remove financial motivations for surrogacy in the wake of the 'Baby Cotton' case. Acknowledging that the law is now out-of-step with societal attitudes, he pointed to the Department of Health and Social Care guidance published in early 2018 as the first time the government has recognised surrogacy as a legitimate form of family building.

The second speaker, Claire Kelly, had acted as a surrogate for two families (giving birth to three boys for them) as well as donating her eggs to a third family (resulting in the birth of twin boys) and being mother to her own two sons – in one way or another, she had contributed to bringing seven boys into the world. She spoke about her experiences, the enduring bonds she had developed with all the families she had helped, and her experiences with hospitals and bureaucracy.

Dr Kirsty Horsey from the University of Kent – lead author of the report 'Surrogacy in the UK: Mythbusting and Reform', and a contributing editor at BioNews – told the audience about her findings from surveys of surrogates, intended parents and other interested parties which she and her colleagues conducted in 2015 and 2018.

Robert Gilmour, co-director of SKO Family Law, explained that lawyers really only get involved with surrogacy after the baby is born, when a parental order is needed to transfer legal parentage from the surrogate to the intended parents. Surrogacy agreements have no legal weight in the UK, where it is an offence for a lawyer to even offer to draft one.

Gilmour told the audience his experience of surrogacy had been overwhelmingly positive – in contrast to much family law work, which deals with family breakdown, surrogacy cases tend to be harmonious and joyful. When legal difficulties arises with surrogacy in the UK it is more often related to immigration than family law, in cases where intended parents have sought surrogacy abroad.

The final speaker was Dr Agomoni Ganguli Mitra, co-director of the University of Edinburgh's Mason Institute. She brought an ethical dimension to the discussion, saying that although the interests of the child (the most vulnerable party) should be paramount, it is important that all parties be considered and that all potential interests, benefits and harms be examined.

Several recurring themes emerged throughout the presentations, and during subsequent discussion involving the audience.

Altruism, commerce and reasonable expenses

The current law states that a surrogate may only be paid 'reasonable expenses'. The vagueness of that phrase, said Professor Hopkins, has led to uncertainty among intended parents and surrogates as to what is allowed.

Dr Horsey agreed that this is confusing, adding that the terms 'commercial' and 'altruistic' – often proposed as the only two models of surrogacy, are used by different people to mean different things. For example, is surrogacy commercial if the surrogate profits, or only if third parties (such as agencies) are taking a commission? Parties need to know how much recompense they are allowed to give and receive.

Dr Ganguli Mitra thought that to equate 'altruistic' with 'good' and 'commercial' with 'bad' was simplistic. While most people are concerned that surrogacy may be exploitative, she encouraged the audience to ask themselves what this really means. Does an arrangement become exploitative when it gives rise to profit, when it seems unfair, or when there is a lack of respect for the surrogate? Similarly, she explored concerns about commodification – is the problem paying someone too little, too much, or not at all?

Timing of parental orders

Current law provides that a parental order must be applied for within a window of six weeks to six months after a surrogate giving birth to a child, although recent case law has seen this extended.

Professor Hopkins acknowledged in his presentation that these time limits can cause problems – the fact that legal parenthood cannot be transferred from the surrogate to the intended parents for at least six weeks after the birth often fails to meet the expectations of either party. Kelly confirmed that this was her view: 'I feel like it should be from birth. I don't want to have legal responsibility for someone else's child – I've got my own family.'

This mismatch of expectations can be amplified if the newborn requires medical treatment. If the surrogate is still the legal parent then she will be required to sign medical forms and consents, even as the intended parents are at their child's bedside. In the worst case scenario,

should the child not survive, there may never have been a legal link between the intended parents and their child.

Conversely, if the surrogate should die before the parental order is completed while the child survives, then a particular feature of Scots law means that the child could have a claim to the surrogate's estate (even if the surrogate had a will in place).

Need for a genetic link to the child

At present, a parental order can only be issued if at least one of the intended parents' gametes were used to conceive the child. Professor Hopkins acknowledged that this is an area the Law Commission is reviewing, not least in light of the Remedial Order which will – if passed – allow single people as well as couples to apply for parental orders.

Because women are more likely to need to use donor gametes than men, it could be argued that this requirement is discriminatory, because it would disadvantage single women. Dr Horsey pointed out that a woman can undergo IVF treatment using both donor eggs and donor sperm, and so long as she carries the resulting pregnancy, herself, she – and her spouse or civil partner, if she has one – will be the legal parent(s) of the resulting child.

The question that the Law Commission must grapple with is this: if the requirement for a genetic link is removed, how can the legal recognition and regulation of surrogacy be clearly distinguished from the legal recognition and regulation of adoption? Is there a way to make legally tractable the fact that the parent(s) specifically undertook to bring a particular baby into the world?

Dr Ganguli Mitra questioned what the requirement for a genetic link says about our attitude to families created through adoption.

Devolution

Although surrogacy legislation is the same across the UK, it is administered through the different court systems of Scotland and of England and Wales. Kelly, who has acted as a surrogate for one family in England and one in Scotland, said that her experience obtaining parental orders was more difficult and more expensive under the Scottish system.

An audience member suggested that because adoption and family law are under the control of the Scottish Parliament, surrogacy should be devolved as well. Gilmour replied that because so few cases come before the Scottish courts (13 parental orders were granted by Scottish courts in 2017), it would become more difficult for his profession to advise clients, because of a lack of Scotland-specific case law. Decisions of English and Welsh courts are not binding upon Scottish judges, but they are seen as persuasive.

Another audience member advocated for a global solution, and an international agreement on surrogacy, which the panel agreed would be good in principle but virtually impossible to achieve.

Conclusion

Surrogacy is here to stay. How the UK develops a law that recognises and balances the interests of all parties involved, while keeping the welfare of children born through surrogacy paramount, will be a significant challenge for the Law Commissions.

If there was a single theme that ran through most of the contributions to this discussion – including contributions from a surrogate, intended parents, parents who had decided to adopt, and fertility practitioners and lawyers – it was a desire for greater certainty. At the same time, however, there was no unanimous view of how exactly the law should be reformed to bring about such certainty.

Still, the fact that PET was able to hold such a thoroughgoing and well-attended public discussion of the matter – and the fact that the Law Commissions will be consulting further on it – is to be warmly welcomed.