Law reform essay competition 2025: highly commended – Jack Clayton

Regulating International Surrogacy: An Internal Approach

Introduction:

Since the Surrogacy Arrangements Act was introduced in 1985, society and its understanding of family formation have changed drastically. Surrogacy is no longer regarded as an exceptional method of family formation, but a realistic option for many families who would not otherwise be able to conceive children. Legislation has since improved with the Human Fertilisation and Embryology Act 2008 to regulate domestic surrogacy agreements; however, the legislation has failed to address the risks and issues that surrogates, prospective parents, and their children face when entering international surrogacy agreements.

Reform of international surrogacy law is necessary to manage the standards of international surrogacy agencies, to limit the potential for financial exploitation of surrogates, and to better record the consent of international surrogates. In particular, there should be increased regulation of international surrogacy agencies, statutory guidance as to expenses paid to surrogates, and changes as to the content of the A101A consent form.

Background/Existing Law:

Both domestic and international surrogacy orders in England and Wales are made by parental order under sections 54 and 54A of the Human Fertilisation and Embryology Act 2008. A parental order, under S. 54 and S.54A, extinguishes the legal parenthood of the surrogate parent and registers the intended parent as the legal

parent. Several conditions apply: one intended parent must be genetically linked to the child; the application must be made between 6 weeks and 6 months of the child's birth; the child's home must be with the applicant; the applicant must be domiciled in the United Kingdom, Channel Islands, or Isle of Man; the surrogate mother must have freely, fully, and unconditionally agreed to the order; and the court must be satisfied that the surrogate or agency has received only reasonable expenses.

The decision to grant a parental order is guided by the paramountcy principle. The child's best interests must be the paramount consideration. In practice, parental orders are almost never refused. This includes when the child's genetic link was to the applicant's deceased husband,[1] when expenses exceeded reasonable levels,[2] or when the order was granted 24 years after the child's birth.[3]
Domestic surrogacy is further regulated by the Surrogacy Arrangements Act 1985, which makes surrogacy arrangements unenforceable;[4] it is a criminal offence to negotiate a surrogacy arrangement on a commercial basis,[5] and to advertise surrogacy.[6]

Jurisdictionally, these regulations do not apply to international surrogacy agreements. Meaning that prospective parents can enter into binding surrogacy agreements and easily find and pay for surrogates. International surrogacy is further attractive due to binding surrogacy arrangements and the availability of surrogates. A study by Shenfield et al investigated the general reasons for intended parents travelling abroad for surrogacy services. 34% of the interviewees from the United Kingdom said difficulties accessing surrogacy were a reason to seek international surrogacy, and 28.3% said the better quality of international surrogacy was a factor in seeking international surrogacy.[7]

The current legislation has caused a flight towards international surrogacy; the law commission went as far as to refer to the current law "encouraging parents to use international surrogacy".[8]

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[1] A v P [2011] EWHC 1738 (Fam)
[2] AB v CD (Surrogacy: Time Limit and Consent) [2015] EWFC 12
[3] X v Y (Parental Order Adult) [2022] EWFC 26
[4] S. 1A Surrogacy Arrangements Act 1985
[5] S. 2 Surrogacy Arrangements Act 1985
[6] S. 3 Surrogacy Arrangements Act 1985
[7] F Shenfield, 'Cross border reproductive care in six European countries' [2010] 25(6) Human Reproduction 1361-1368
[8] The Law Commission of England and Wales, 'Building families through surrogacy: a new law' [2023] Law Commission No. 411, 17

Risks Posed by Existing Surrogacy Law:

Exploitation

Arguably, the greatest issue with the current law lies in exploitative practices in international surrogacy agencies. Within the past years, there has been an increase in the reporting of the unethical practices of international surrogacy agencies.

In Re Z,[9] Mrs Justice Theis highlighted a surrogacy agency, called SurrogateBaby, which created a surrogacy arrangement between a same sex couple and the surrogate in a jurisdiction they knew did not permit same sex surrogacy, and actively encouraged the intended parents to lie about the nature of their relationship to the surrogate and governmental bodies. Despite exposing the intended parents, the surrogate, and unborn child to serious risk if their true relationship was revealed, a parental order was made, as refusal would have adversely affected the child's lifelong welfare. No sanctions were placed upon the surrogacy agency, who still practice surrogacy at the time of writing.

Outside of the courtroom, the Observer found that another international surrogacy agency, New Life Global, was engaging in practices that were dangerous to surrogates and ethically immoral.[10] In particular, the Observer found that New Life was offering multi-embryo transfers, a practice that involves planting several embryos into a surrogate to increase the chance of twins or triplets being born. Double embryo transfer is not widely available in the United Kingdom, given the heightened risks of maternal mortality; triple embryo transfer is only allowed in exceptional circumstances. Furthermore, New Life offers gender selection services, wherein a client may choose the gender of their child to "balance the gender in the family", to prevent genetic disorders, and to meet "cultural and social norms".[11] Such practice is banned in the UK under Section 1ZB Schedule 2 of the HFEA 1990. Despite the media attention, New Life Global still offers surrogacy services, including both multi-embryo transfers and gender selection.

It is submitted that the current laws on international surrogacy do not go far enough to prevent dangerous practices by international surrogacy agencies, as in

[9] Re Z [2024] EWFC 304

[10] Shanti Das, 'Global surrogacy agency accused of putting women at risk with 'unethical' medical procedures' (*The Guardian*, 18 December 2022) <https://www.theguardian.com/society/2022/dec/18/global-surrogacy-agency-accused-of-putting-women-at-risk-with-unethical-medical-procedures> accessed 11 October 2025

[11] ID at 10

almost all but the 'clearest case' of public policy,[12] a parental order will be made. The bad practices of international surrogacy agencies will remain unless influenced by external regulation.

Expenses

Despite s54(8) HFEA 2008 outlining that the only "expenses reasonably incurred" may be accepted for providing surrogacy services, there have been a plethora of cases with allowed payment to both surrogates and international surrogacy agencies. Allowing expenses beyond those which are reasonably incurred in international surrogacy arrangements risks exploitation through the power imbalance between the intended parents and the surrogate.

For example, an intended parent from England has substantial purchasing power when compared to surrogates from a poorer country; intended parents from the United Kingdom have an average GDP per person of £56,660, whereas popular surrogacy locations of Ukraine and India have an average GDP per person of £6,380 and £2,820, respectively. The average domestic surrogacy arrangement costs between £20,000 and £80,000+, whereas international surrogacy arrangements can be significantly higher, with surrogacy arrangements in the United States of America costing upwards of £250,000.[13] Even considering the lesser of these totals, there becomes a real risk that an individual from England and Wales would be able to pay a comparatively substantial sum of money, which may, in effect, void the consent of the prospective surrogate.

The court has attempted to mitigate this risk by enacting the 'moral taint' test, wherein an individual may have their expenses sanctioned so long as there was no bad faith in the payment. However, this test does not go far enough. Under D'Alton-Harrison's analysis of 31 reported judgments relating to commercial payments, she found that in a staggering 20 judgments both compensation for the surrogate and commercial profit expenses were permitted.[14] In one of those judgments, AB v CD, no investigation was given as to the proportion of the "reasonable expense" that was received by the surrogate; rather, a lump sum was approved which was paid directly to the surrogacy agency.[15] It should be noted that what is a reasonable expense is a matter of judicial discretion, rather than something that requires expert analysis.

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[12] Re L (A Minor) [2010] EWHC 3146

[13] International monetary fund, 'World Economic Outlook Dataset' (*GDP per capita, current prices*, 2025) <https://www.imf.org/external/datamapper/NGDPDPC@WEO/GBR/UK R/IND> accessed 22 October 2025

[14] R D'Alton-Harrison, 'Regulating international surrogacy, 'the elephant in the room': some reflections on reform from a UK study' [2019] CFLQ 47

[15] ID at 3

Allowing more than reasonable expense risks the effect of nullifying the consent of surrogates by making their surrogacy a financially necessary rather than a genuine altruistic choice.

Conceptualising consent

A further issue is informed consent. Even under perfect conditions, the courts struggle to identify whether true and unaltered consent has been given.

Under the Family Procedure Rules PD5A, the consent of an international surrogate to a parental order is recorded on Form A101A; however, the content of this form lacks the detail required to truly conceptualise consent. On form A101A, the surrogate signs that "understands that [they] will no longer legally be treated as the parents and that [their] child will become part of the applicants' family" and must tick a box asking whether the surrogates "have taken legal advice" or "have not taken legal advice, but [they] have been advised to do so".

Merely asking a surrogate whether they understand that they will "no longer legally be treated as the parent" is not a useful question to ask; most parents in the United Kingdom do not know what it means to be legally a parent. It is nonsensical to ask a surrogate from another country, who may or may not have taken legal advice, whether they understand one of the most complicated areas of domestic law in the England and Wales. Without reform, there remains a real risk that surrogates are signing parental orders to which they do consent.

Reasons for Reform:

The law concerning international surrogacy should be reformed to provide a comprehensive and safe mechanism of family formation; it should directly address the risks that are posed by unscrupulous surrogacy agencies, as well as mitigate the exploitation of surrogates, and be formulated in a way that is clear and understandable for the lay individual to understand.

The reform that could be made would be to directly outlaw any form of international surrogacy. This would be in line with several countries across the globe, including France, Germany, and Italy, which ban both commercial and altruistic arrangements. However, such a proposal does not match the attitude of the country, with the UK government actively supporting surrogacy "as part of the

range of assisted conception options".[16] An outright ban fails to address the risks of stateless children and the significant harm that would follow.

The alternative might be that of no further restriction, merely accept that risks occur, but rely upon the concept that prospective parents would seek out reliable surrogacy agencies to organise their surrogacy. However, from the fact that SurrogacyBaby Agency and New Life Global are still functioning, this will not work. A balance must be found between an outright ban on international surrogacy and ignorance of the risk of international surrogacy.

Reforms:

I propose a tripartite reform on the law of international surrogacy. Namely, the creation of a 'restricted list' and 'approved list' of surrogacy agencies, the creation of a statutory definition of a reasonable expense, and the reformulation of the A101A form.

The government of the United Kingdom should create a two-tier list of international surrogacy agencies: the 'restricted list' and the 'approved list'. The 'restricted list' of international surrogacy agencies would mirror the provisions in the Children and Adoption Act 2006, insofar as it would suspend parental orders made by children born of arrangements from suspended agencies. The 'approved list' identifies international surrogacy agencies with robust and ethical practices of which the government approves.

Under the Children and Adoption Act 2006, the Secretary of State created a 'restricted list' which mandates that adoptions from certain countries are suspended by reason that it would be against public policy to further bring children from the home country to the United Kingdom.[17] For example, Cambodia is on the restricted list by virtue that there is evidence of insufficient safeguards in the Cambodian adoption system to prevent children being adopted without parental consent.

Under the 'restricted list' of international surrogacy agencies, an agency like New Life Global can be added to create a presumption that no parental orders are to be made because of their continued practices of gender selection and multi-embryo transfers.

[16] ID at 8, 23

[17] Department for Education, 'List of countries where special restriction are in place under the children and Adoption Act 2006' (Adoptions: Restricted List, April 2023)

Moreover, the government could create an 'approved list' of international surrogacy agencies that meet additional requirements that they believe are beneficial for a functioning and proper surrogacy agreement. These may be requirements for counselling, independent legal advice, and limits on payments. The conditions on which an international surrogacy agency would receive accreditation could mirror the regulations as imposed by the HFEA and could be easily adapted to apply in international circumstances. If an 'approved list' were created, international surrogacy agencies around the world would be incentivised to engage in approved practices in order to gain accreditation by the government of the United Kingdom. As a trusted and reliable country of human rights, prospective parents from across the world would seek out accredited surrogacy agencies, which would lead to increased publicity and potentially sales. The government could use the silent hand of economics to improve the standards of surrogacy agencies.

Not only would the 'restricted list' effectively ban some of the bad practices of international surrogacy agencies, and the 'approved list' have a positive effect on the standards of international surrogacy agencies, but it would also have an educational effect on prospective parents. A prospective parent can learn why certain international surrogacy agencies have entered into the 'restricted list' and can understand what standards an international surrogacy agency must offer to be on the 'approved list'

My second reform is a two-fold approach to reform: to provide a statutory definition of "reasonable expenses" and a particularised method of registering reasonable expenses. "Reasonable expense" should be defined in a way that initially outlines what expenses could be deemed reasonable, e.g., medical expenses, legal expenses, and living costs, and then the court can examine how reasonable they are in light of the country of origin. To achieve this definition of "reasonable expenses", I proposed that reasonable expenses must be particularised insofar as they directly state the recipient, the purpose, and the amount they are to be paid. This avoids the risk that the court faced in AB v CD would approve all the expenses regardless of where the expense originated.[18]

The final reform would concern the content of the A101A form to ensure true and unfettered consent is obtained from the surrogate. Form A101A should change the tick box of "I understand that I will no longer legally be treated as the parent and that my child will become a part of the applicants' family" to an open text box in which the surrogate must, in their own words, explain their understanding of what it means to consent to a parental order. This would make it clearer to the court that the surrogate understands and can articulate the effects of their actions, and the impact consenting

[18] ID at 2

to the order will have on their relationship to their child, thereby removing some of the risk that the surrogate does not truly consent to the making of the Parental Order.

Conclusion:

Given the risk posed by international surrogacy arrangement there is a need for legislative intervention as to protect children, surrogates, and intended parents. I have proposed a three-part approach that utilises internal legislation to manage the standards of international surrogacy agencies, to limit the potential for financial exploitation of surrogates, and to better record the consent of internation surrogates. It is achieved through a 'restricted list' and an 'approved list' of international surrogacy agencies, a statutory definition of reasonable expenses, and a reformatting of the A101A form.