The Law of Surrogacy: 'a ticking legal time-bomb'

'*We do not envisage that this legislation would render private persons entering into surrogacy arrangements liable to criminal prosecution, as we are anxious to avoid children being born to mothers subject to the taint of criminality.*'[1]
– The Warner Report, by the Committee of Inquiry into Human Fertilisation and Embryology, 1984

Introduction

The Warner Report, published in the context of a media outcry caused by the cases of Baby Cotton in the UK and Baby M in the USA, was the first official attempt to grapple with the law surrounding surrogacy[2]. The Report represents the birth of an ambivalent attitude to surrogacy that continues to define the law in this area. Whilst never criminalised, in the eyes of the law surrogacy remains a somewhat illegitimate method of starting a family.

The legal framework that has developed from the Warner Report is in desperate need of reform. The restrictive approach intends to discourage people in certain situations from using a surrogacy arrangement. However, surrogacy is becoming more common, with official figures showing a dramatic rise since the turn of the Century[3]. This is causing unwelcome trends - informal surrogacy arrangements, the growth of unregulated international surrogacy and legal uncertainties that will affect the welfare of children born through surrogacy.

Last year, Dame Lucy Theis, a Judge in the Family Division, described the situation as a 'ticking legal time-bomb'. She warned that a model that discourages formal

[1] Page 47, Report of the Committee of Inquiry into Human Fertilisation and Embryology, 1984 ('The Warner Report').
[2] Cotton was paid £6,500 to be a surrogate for a foreign couple, through an American commercial agency. See *Re C (A Minor) (Wardship: Surrogacy) [1985] 2 FLR 846;* a potential surrogate in America was reported to have fled with a child she had agreed to give to a wealthy couple: see *In the Matter of Baby M (1988) 537 A 2D 1227*
[3] Data is scarce on surrogacy because so many arrangements are informal. Jessica Lee MP estimates there are 'between 1,000 and 2,000 a year' with 'up to 95% coming from abroad'. The number of official Parental Orders went up from 50 to 149 between 2007-2011, see Blyth, E., Cranshaw, M, and Fronek,P., (2015) 'Reform of UK Surrogacy Laws: the need for evidence', BioNews 813

avenues for surrogacy arrangements will lead to thousands of children finding themselves in a legal vacuum – parentless and stateless[4].

Proposed Reform

This essay will argue for reforms to Parental Orders[5] - the mechanism by which parents using a surrogate gain legal parentage – both in their substance and the timing of the application.

Firstly, the group of potential applicants for Parental Orders should be widened. Whilst the current provisions are discriminatory, inconsistent with social attitudes and the law in other areas of fertility, the changes will also encourage intended parents to take advantage of the legal avenues to surrogacy arrangements. This will help stem the increased flow of intended parents looking to surrogates abroad and help ensure the child has clarity and certainty in later life.

Secondly, this essay will argue for legislation to acknowledge and encourage pre-birth arrangements. This would validate surrogacy arrangements before a child is born – offering certainty for the child, ensuring all parties consent and the welfare of the child is prioritised. A pre-emptive process would also allow more effective policing of the surrogacy process, reassuring those who are wary of the commercialisation of the practice.

Background

The recommendations in the Warner Report were enacted in the Surrogacy Arrangements Act 1985[6]. The provisions were wholly restrictive, introducing a criminal offence to have an operation that recruits or advertises for women to act as surrogates and to provide by statute that all surrogacy agreements are illegal

[4] See comments reported https://www.theguardian.com/lifeandstyle/2015/may/18/unregistered-surrogate-born-children-creating-legal-timebomb-judge-warns
[5] Set out in S54, Human Fertilisation and Embryology Act 2008
[6] The Surrogacy Arrangements Act 1985

contracts[7]. Potential benefits or provisions to formalise surrogacy arrangements that were already occurring were apparently not considered.

The law has not, in any meaningful way, developed since these provisions were enacted more than 30 years ago. There have been some incremental permissive steps to align surrogacy law with other legislation, such as providing for civil partnerships and maternity leave for mothers of surrogate children. In 2008, new provisions for the transfer of legal parentage to the intended parent were enacted, but these, this essay will argue, only further the restrictive attitude seen in the Surrogacy Arrangements Act by barring certain groups of potential parents from securing legal status[8]. The law's approach started from a position of deep scepticism and remains highly restrictive.

At the intersection of ethics, science and policy, lawmakers have been incredibly wary of the potential moral hazards of surrogacy. There is an immediate fear of surrogates having a change of heart. Others have bemoaned the potential of a commercialisation of surrogacy, which has been allowed to flourish in India[9]. More broadly, there has been an anxiety as to the sanctity of childbirth and ensuring the 'magnitude' of giving birth is recognised[10].

Yet, there are new challengers for the law and surrogacy in the 21st Century. Intended parents can now browse the Internet to find a potential surrogate from across the world. International surrogacy comes with its own ethical and legal issues – for example, the potential for exploitation of women from poorer countries and complications regarding immigration rules. Furthermore, our moral and social outlook towards 'family' has changed with the introduction of civil partnership and, more recently, same-sex marriage.

[7] Page 47, The Warnock Report
[8] see the Human Fertilisation and Embryology Act 2008
[9] http://www.telegraph.co.uk/news/2016/08/25/india-unveils-plan-to-ban-commercial-surrogacy/
[10] See Minister of Health, Dawn Primarolo, Column 248, Hansard, 12th June 2008 - PBC Deb 12 June 2008 (am) cc247–248

Surrogacy is becoming more popular, attitudes are changing, and the availability of international surrogacy means, even if we wanted to, we can no longer stand still.

Widening Applicants for Parental Orders

The Law

Currently, the law states that a woman who carries the child as a result of the placing in her of an embryo, or of sperm and eggs, is the mother of that child[11]. If the surrogate is married, or has a civil partner, her legal partner is the child's other legal parent[12]. Therefore, at birth, any surrogacy arrangement is not represented in law. Regardless of the genetic make-up of the new-born, or any prior agreement, in law the surrogate and any husband or civil partner are the parents.

The law allows for the formal transfer of legal parentage through Parental Orders[13]. The provision allows two people to apply to the court for an order for the transfer of legal parentage from the surrogate, who carried the child. Importantly, the child must be genetically linked to at least one of the applicants. Alongside expected criteria (such as the applicants being over the age of 18), the applicants must be husband and wife (or in a civil partnership or 'enduring relationship'), and make the application within 6 months of the child's birth. The child must be residing with the applicants and the court must be satisfied the surrogate freely and with full understanding consents to the order.

These provisions mean many people can't gain legal parentage when using a surrogate. The intention is to protect the sanctity of certain traditional aspects of childbirth and motherhood. However, the current provisions are discriminatory and unhelpful to ensuring the child's welfare.

Single Parents

[11] S.33, Human Fertilisation and Embryology Act 2008
[12] S.35, Human Fertilisation and Embryology Act 2008
[13] S.54, Human Fertilisation and Embryology Act 2008

The law explicitly bars single applicants to legal parentage. In the matter of *Z (A Child: Human Fertilisation and Embryology Act: Parental Order) [2015]*, a single man was refused a Parental Order despite being the biological father, receiving the unequivocal consent of the surrogate and support for the order from the CAFCASS Legal Officer. Sir James Munby, President of the Family Division, on giving judgement, stated that 'the principle that only two people – a couple – can apply for a parental order has been a clear and prominent feature of the legislation throughout' and the provision 'could not be clearer'[14].

In this situation, the law all but ignores the welfare of the child. The father has been adjudged by the appropriate body to become the legal parent and has received the complete consent of the surrogate. Even so, a single person is not seen to befit the legal parentage in the eyes of the law. It is worth considering whether such views on the ability and legitimacy of a single parent having a child in other areas of policy and law would be deemed to be fair.

The argument made by the Minister when considering these provisions in Parliament was that 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 place on the people who will receive the child…is likely to be better handled by a couple than a single man or woman'[15]. Yet, the situation is very different when considering the legal status of Parental Orders for intended parents choosing to adopt. Since the origins of legal adoption, legislation has always provided for adoption orders to be made in favour of either one person or a couple[16]. In adoption law, unlike surrogacy law, the child's welfare is paramount. If a single parent can provide for the child, their relationship status should be unimportant.

The law, in its current form, is perverse but also discriminatory, encroaching on the rights of adults to undertake the very natural decision to start a family. In Israel, for

[14] Para 36. In the matter of Z (A Child: Human Fertilisation and Embryology Act: Parental Order) [2015]
[15] See Minister of Health, Dawn Primarolo, Column 248, Hansard, 12th June 2008 - PBC Deb 12 June 2008 (am) cc247–248
[16] Section 1(3), Adoption Act 1926

example, the Attorney-General has recently declared Israeli surrogacy law to be discriminatory because it only provides for couples to use the arrangement[17]. Despite Sir Munby's refusal to 'read down' a different interpretation, and allow a single parent to use a surrogate, the father in *Z (A Child)* is now seeking a declaration of incompatibility of the current provisions with Articles 8, 12 and 14 of the Convention.

The requirement of a couple for legal parentage in surrogacy cases is perhaps the clearest example of out-dated notions of family and motherhood being prioritised over the practicalities of modern fertility behaviour.

Genetic-link

Another requirement of applying for a Parental Order requires that one or both of the intended parents must have a genetic link to the child ('the gametes of at least one of the applicants were used to bring about the creation of the embryo')[18]. The intention of the policy is to discourage surrogacy arrangements where the intended parents have no genetic link. Regardless of the surrogate's consent, and the welfare of the child, the law shows a reverence to a traditional concept of family that is inconsistent with other fertility options. For example, the law deems a female recipient of IVF (with a donated egg), as being legitimate. In this scenario, the carrier, despite no genetic link, is deemed to be the mother of the child in the eyes of the law[19].

This policy shows a stubborn reverence to the notion of a mother having to carry the child herself. If using a surrogate, a person is not acting illegally, but neither, it would seem, are they acting legitimately. For intended parents embarking on this process, the law is confusing, burdensome and offensive.

[17] See reports here http://www.haaretz.com/israel-news/.premium-1.729199
[18] S.54, Human Fertilisation and Embryology Act 2008
[19] This is because S33 Human Fertilisation and Embryology Act states that the carrier of a child is deemed the mother in law.

In South Africa, a similar policy has been ruled unconstitutional. In *AB and Another v Minister of Social Development (4-658/13) [2015]*, it was said that
'the genetic link requirement (in the context of surrogate-gestation) clearly constitutes discrimination...[and] encroaches upon their human dignity not only in that it prohibits a member of the sub-class from exercising his or her right to autonomy but also in light of the fact that the exclusion reinforces the profound negative psychological effects that infertility often has on a person'[20].

By widening the group of potential applicants for Parental Orders to include single persons and those with no genetic link to the child in cases of surrogacy, the law would become more consistent, fairer and prioritise the child's welfare.

System of Surrogacy

The problems with a 'post-birth' system

The law of surrogacy comes into effect after the birth of the child. Although pre-birth agreements will inevitably be taken into account by the courts, they are non-binding and not provided for in law. Parental Orders and the entire legal framework is based on clarifying and ratifying surrogacy after-the-event.

This causes huge problems. Firstly, the child is born in a state of legal limbo, with the surrogate continuing to be the legal parent until a parental order is successfully applied for (if at all). Secondly, by ignoring the inevitability of surrogacy agreements occurring pre-birth, provisions that attempt to ensure the process of surrogacy is fair are often redundant. For example, on an application for a Parental Order, the court must be assured that the surrogate arrangement was not undertaken for commercial reasons[21]. Yet, in *Re X and Y (Foreign Surrogacy) [2009] 1 FLR 733* Hadley J stated, 'it is almost impossible to imagine a set of circumstances in which by the time the case comes to court, the welfare of any child would not be gravely

[20] Para 76, AB and Another v Minister of Social Development (4-658/13) [2015]
[21] S.54, Human Fertilisation and Embryology Act 2008

compromised by a refusal to make an order'[22]. The surrogate in this case had been paid a sum for a deposit for a new flat. This payment would surely not be covered as a reasonable expense. Yet, the courts are forced to turn a blind eye to the commercialisation of surrogacy because they only have a say after the event.

Thirdly, accepting pre-birth arrangements would dramatically cut the chances of confusion, manipulation or exploitation. The unregulated nature of surrogacy means all pre-birth arrangements operate with complete informality that can lead to complexities. In the matter of *A & B and X [2016] EWFC 34*, the surrogate had originally consented to the surrogacy after meeting the intended parents for less than two hours at a fast food restaurant and signing a document that mimicked a commercial surrogacy arrangement from America that had been found online. The potential surrogate had learning difficulties and was not accompanied by an appropriate advising adult. She later changed her mind and sought to keep her child. It is unfathomable that a court would have allowed such an agreement to take place if the intended parents had sought a parental order pre-birth.

Proposed regime

The law should encourage parties to a surrogacy to agree all relevant issues and ensure the welfare of the child before birth. A new provision should explicitly allow intended parents to seek Parental Orders before the child is born, instead of the current provisions that only allow an application in a period after birth. Alongside the already necessary safeguards – such as appropriate age and free and full consent from the surrogate – the court should then pre-emptively ensure that the intended parents are capable of meeting the child's needs, using the relevant criteria as set out in S1 of the Children's Act 1989. In particular, sub-section (3) (f) - how capable each of the parents, or any other person in relation to whom the court considers the question to be relevant, is to meeting the child's needs.

[22] Para 24, Re X and Y (Foreign Surrogacy) [2009] 1 FLR 733

The court, in granting the parental order, will have to be assured the surrogacy arrangement has not been made for commercial gain. Parliament has made it clear there is no desire to follow the American and Indian models of allowing surrogacy for profit. Ensuring parental orders occur before birth will give the courts more foresight and muscle in policing surrogacy arrangements.

Further, by placing the emphasis on pre-birth arrangements, the law would encourage the non-profit bodies and people supporting intended parents through surrogacy to ensure the arrangement was right for all parties. If a Parental Order was to be applied for before the event, all parties are more likely to undertake due process – which, for example, may include sufficient counselling to reassure the court regarding the presence of consent. Currently, those working in surrogacy can help bring about the arrangement without worrying too much about the critical pre-birth process as the courts only become relevant after the event.

Overall, the need for applications for Parental Orders to occur pre-birth, essentially approving a surrogacy arrangement before a child is born, will prevent confusion, ensure the process is formal and allow the courts to prioritise the child's welfare before all else.

Conclusion

The reforms this essay advocate liberalise surrogacy – allowing more intended parents who fulfil the necessary criteria to become parents through legal avenues. But, by bringing forward Parental Order applications to before the child is born, they also act to ensure the process is legitimate, thorough and safe.

For too long, surrogacy has been operating in the shadows of the law – a practice neither fully accepted nor barred. This ambivalence is out-dated and self-defeating. For adults who dream of becoming parents, surrogacy should remain a realistic and reasonable avenue to explore. For the unborn child through surrogacy, the law

should seek to ensure their welfare is paramount and future more steady and certain.