

# Modern surrogacy practice and the need for reform

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## Introduction

As the owners of specialist law firm Natalie Gamble Associates and non-profit surrogacy agency Brilliant Beginnings, we have been immersed in surrogacy practice (and the realities of how the law plays out on the ground) for many years. On the legal side, our team represented the first parents to get a parental order following international surrogacy in 2008,<sup>1</sup> and since then we have been involved in 14 further reported surrogacy cases (each making new law) and hundreds of unreported cases. Between 2009 when Natalie Gamble Associates opened and October 2016, we gave legal advice on 672 surrogacy cases, 211 involving surrogacy in the UK and 461 involving overseas surrogacy. As campaigners, we have helped win changes to UK surrogacy legislation, including recognition of same-sex parents on birth certificates in 2008,<sup>2</sup> abolition of restrictions on the storage of embryos for surrogacy for longer than five years in 2009,<sup>3</sup> surrogate children becoming British on the grant of a parental order in 2010,<sup>4</sup> advice to the HFEA on its new Code of Practice guidance on surrogacy in 2013, and the introduction of adoption leave and pay (equivalent to full maternity leave and pay) for intended parents in 2015.<sup>5</sup> We also recently represented the single father in *Re Z*, securing a court declaration of incompatibility with the European Convention on Human Rights.<sup>6</sup>

We launched Brilliant Beginnings in 2013 as a non-profit sister organisation to our law firm, because there was a need for our knowledge and we felt compelled to support families in a wider way. Through Brilliant Beginnings our team counsels parents impartially on all their surrogacy options to help them make informed decisions about which path to choose, and we help facilitate

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<sup>1</sup> *Re X and Y* (2008) EWHC 3030 (Fam).

<sup>2</sup> Human Fertilisation and Embryology Act 2008 s. 33-55.

<sup>3</sup> Human Fertilisation and Embryology (Statutory Storage Periods for Embryos) Regulations 2009.

<sup>4</sup> Human Fertilisation and Embryology (Parental Orders) Regulations 2010.

<sup>5</sup> Part of the Children and Families Act 2014.

<sup>6</sup> *In the matter of Z (a child)* (No. 2) (2016) EWHC 1191 (Fam).

responsible surrogacy in the UK and the US, as well as campaigning for domestic legal reform and to raise awareness.

Both legal and practical, our experience gives us a broad perspective on how surrogacy (and the law regulating surrogacy in the UK) really works in practice, both in relation to surrogacy arrangements conducted in the UK and those entered into overseas. We see the full range of different surrogacy experiences and the full length of the surrogacy process, working with parents and surrogates making decisions at the outset, and helping them manage what happens all the way through conception until after a child has been born and the legalities resolved. We see the positive surrogacy stories and the cases where disputes, problems or ethical concerns have arisen. We see how well-meaning policy objectives have produced unanticipated (and often counter-productive) outcomes.

## The current landscape for surrogacy in the UK

UK surrogacy arrangements take place in one of three ways:

- Between existing friends or family members;
- Following an online connection made between strangers via one of the many thriving Facebook groups and websites (including *surrogatefinder.com*) where ‘independent’ surrogates and intended parents meet informally. Connections are made directly between intended parents and prospective surrogates with no formal preparation or screening, and support and knowledge is then shared informally between members of the groups. Although we have seen positive surrogacy arrangements made in this way, we have also been involved in and seen some true horror stories including a couple who were defrauded by a woman who pretended to be pregnant for them in order to extort their life savings;<sup>7</sup> a couple who defrauded the court about the amounts paid to their three simultaneous surrogates;<sup>8</sup> and a disputed ‘Facebook’ surrogacy case in which an arrangement rushed into resulted in a dispute and the gestational surrogate retaining care of the child.<sup>9</sup>
- With the support of one of the three lawful non-profit surrogacy agencies in the UK: COTS, Surrogacy UK and Brilliant Beginnings. As at October

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<sup>7</sup> ‘Fake surrogate mother Louise Pollard jailed’, *BBC News* (16 June 2014), [www.bbc.co.uk/news/uk-england-devon-27868511](http://www.bbc.co.uk/news/uk-england-devon-27868511) (accessed 10 October 2016).

<sup>8</sup> *Re A, B and C (UK surrogacy expenses)* (2016) EWFC 33.

<sup>9</sup> *Re Z (surrogacy agreements) (child arrangements orders)* (2016) EWFC 34.

2016, all three agencies have closed their books to new intended parents in the face of growing demand from intended parents and a shortage of UK surrogates.

### **The UK's non-profit surrogacy agencies**

COTS is the oldest UK agency; it was established in the late 1980s and has recently celebrated its 1,000<sup>th</sup> birth.<sup>10</sup> It is run by volunteers and matches intended parents with traditional and gestational surrogates. Following preliminary checks, surrogates are given intended parent profiles to choose from, and they decide who they want to match with. A volunteer support worker is assigned to help put a written agreement in place and to provide support if problems arise.

Surrogacy UK was established in the 1990s with a philosophy of 'surrogacy through friendship'.<sup>11</sup> Again, it is run by volunteers, but has a different model for matching. Intended parent and surrogate members join online boards and attend social events where everyone mixes. Surrogates make an offer to proceed with an intended parent couple, and when a 'team' forms there is an obligatory three month 'getting to know you' period before they can proceed with attempting to conceive, either using traditional or gestational surrogacy. Informal support is given by the community, and via an allocated volunteer support worker who is a parent through surrogacy or is/has been a surrogate.

We set up Brilliant Beginnings in 2013 in order to provide a third alternative, aiming to offer a more structured process for surrogacy in the UK for those who wished to access it and were largely otherwise going overseas.<sup>12</sup> Brilliant Beginnings has paid staff whose full-time job is to support parents and surrogates, and we work closely with other appropriate professionals including counsellors and lawyers. We manage the surrogacy process closely, supporting our surrogates and intended parents through each step of the journey.

We have a rigorous application process for surrogates which, as well as ensuring a surrogate's suitability, aims to support her and help her ensure that she is fully prepared, informed and ready. When a prospective UK surrogate contacts us, we first screen for basic criteria (which include health, personal and financial stability, age, and that she has already had a child who is living

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<sup>10</sup> [www.surrogacy.org.uk/](http://www.surrogacy.org.uk/). See also K. Cotton, this issue, at p. 229.

<sup>11</sup> [www.surrogacyuk.org/](http://www.surrogacyuk.org/). See also N. Smith, this issue, at p. 237.

<sup>12</sup> [www.brilliantbeginnings.co.uk](http://www.brilliantbeginnings.co.uk).

with her). We have a nurse as part of our team who carries out a medical screening, and contacts the surrogate's GP to ensure she is healthy and will be medically safe. We carry out a criminal records check and we take up three personal references (speaking to the referees by telephone to gauge personality from a different perspective). We arrange a specialist preparation counselling session with a BICA-accredited counsellor to give the opportunity to discuss the emotional issues and validate that the potential surrogate is ready and fully informed.<sup>13</sup> We also arrange confidential legal advice with an independent solicitor separate from our team.

Throughout this process, which usually takes around 3-4 months, our team has an ongoing personal dialogue with the surrogate and her partner (or whoever is supporting her) which includes a home visit in person. We get to know our surrogates very well at a personal level, and we provide detailed information about all aspects of the surrogacy process before a surrogate is matched. We talk at length about her expectations and wishes, and the kind of relationship she would like with her intended parents. We talk about the often tricky issues of expenses and views around termination. We talk about how to talk to the surrogate's own children, and how to manage things with wider family and employers. We want to enable clear informed decisions to ensure that the surrogate's personal and professional life is set up for the surrogacy. Only 5% of the surrogates who first contact us get through to the end of our screening, and that is something we feel very comfortable with.

We go through a similar process with the intended parents we work with, getting to know them, carrying out criminal records checks, taking up references, providing legal advice, and talking to them in depth about the process and their expectations.

Only after this groundwork is done do we propose a match, and we do it on a personal one-to-one basis. To match, we first exclude any mismatch of expectations in terms of critical issues like views on termination and other individual key deal-breakers, and we dovetail the anticipated expenses of the surrogate with the budget of intended parents. From there, we decide who we think would be the best personality match, taking great care over how we do this and drawing on the significant time we have spent with both sides. Our aim is to put people together who would get on well regardless of the surrogacy. We want to facilitate lasting relationships which will enable the experience to be easy and natural for the adults, but most importantly create a positive foundation for the child long term. We then facilitate an introduction during which we air critical issues

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<sup>13</sup> BICA is the British Infertility Counsellors Association.

and, if everyone agrees to proceed after the initial match meeting, we then encourage them to take time to get to know each other and to form a really strong relationship of trust and collaboration which will ideally last, not only through the pregnancy, but far beyond.

We then help with all the logistics of arranging treatment at a UK licensed clinic, ensuring everyone has the information and support they need, and helping them to think about issues such as the long term implications for the child if they are conceiving with an egg donor, and to access appropriate professional support. Unlike the other UK agencies, we only work with gestational surrogates and we only facilitate treatment for UK surrogates at UK clinics, which means that everyone conceives through an HFEA licensed clinic (and if using an egg donor therefore conceives with an identifiable donor), and we work closely with clinicians and counsellors. Once the surrogate is pregnant, we support everyone with practicalities and emotional issues (including making arrangements for the birth, dealing with GPs etc.). Where complications arise (which sadly is always a risk with any pregnancy) we take enormous care to support everyone.

We do not advocate that our way is the only right way to do surrogacy in the UK. It will not suit everyone and our support, even though provided on a non-profit basis, costs considerably more than the volunteer agencies because of the enormous amount of time involved and the professional counselling and legal advice provided by third parties (which we pay for) included in our fees. But it is designed to set things up at the outset so as to minimise miscommunication and any ensuing complication, and to offer more structure in the UK for parents who would otherwise be likely to go overseas.

Like COTS and Surrogacy UK, our biggest challenge is finding enough surrogates for the intended parents who want our help. None of the UK's surrogacy agencies are currently taking on more intended parents but, even before that was the case, the numbers of UK agency surrogacies were relatively small. Brilliant Beginnings currently has 10 matched surrogates (at different stages) and is screening more. COTS and Surrogacy UK see a few dozen surrogacy births per year at most. At the same time, demand is growing rapidly with increasing numbers of same-sex couples (and single parents) looking to start a family, and more awareness of surrogacy as a fertility option for women with medical or fertility issues. Surrogacy is now firmly on the map as an accepted family-building option and increasingly seen as the next step where other options are unsuccessful or unavailable. Changing social attitudes to same-sex marriage and different kinds of family creation are also encouraging adults who in previous times might not have pursued their wish to become parents to do so. All the UK agencies work very hard to raise awareness, but there are too few UK surrogates. It is illegal for agencies to advertise that they are looking for surro-

gates, and in practice this puts the agencies at a disadvantage against independent surrogacy forums, where intended parents and surrogates advertise freely as individuals (which breaches the law, albeit that the law is never enforced).

### Why parents go overseas for surrogacy

It is not surprising that many UK intended parents are choosing to go overseas. We work with intended parents making these choices every day, and they do not do so lightly, or in ignorance of their options in the UK.

Although disputes with surrogates in the UK are rare in practice, many intended parents say they are deterred by the lack of legal security in the UK (most do understand that the risk of the surrogate changing her mind is tiny, but feel they cannot accept there being any risk). Many also feel there is no certainty they will find a surrogate in the UK or that the potential timescale for doing so is too long. Others reject the informal matching methods in the UK as something they do not feel comfortable with, preferring the involvement of a professional service-provider who can guide them through every stage. With the UK's agencies unable to take on new intended parents, the wish for structure and support is likely to be an escalating motivation driving parents abroad since the only UK options currently available are the entirely informal ones.

Going overseas for surrogacy is, however, not an easy option. Apart from the obvious challenges of managing a surrogacy process across borders (including logistical, language and cultural barriers), the ethical issues concern many parents. This is a big driver for parents choosing the US as a destination for those who can afford it, given that US surrogacy is a balanced and legally recognised arrangement between fully informed consenting adults. However, US surrogacy is beyond the financial reach of many parents, costing an average of £130,000 (explained further below). Many parents who cannot afford this option but are concerned about managing surrogacy responsibly take considerable care to ensure they work with reputable agencies and clinics in less economically developed destinations.

In practical terms, those going overseas often face a very long wait to bring a new-born child home, an average of 4-5 months (other than from the US and Canada) and in some cases much longer.<sup>14</sup> The legal process for obtaining a

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<sup>14</sup> See, for example, *Re L and M* (2015) EWFC 90 in which the parents had waited more than a year for a British passport for their children in India, and 'British baby passport row', *The Telegraph* (15 July 2014), [www.telegraph.co.uk/women/womens-politics/10966392/British-baby-passport-row-I-feel-helpless-says-father.html](http://www.telegraph.co.uk/women/womens-politics/10966392/British-baby-passport-row-I-feel-helpless-says-father.html) (accessed 25 October 2016).

parental order once back in the UK is also significantly more complicated than in UK surrogacy cases, with all international surrogacy parental order applications heard by High Court judges with extensive documentation and evidence required.

The most recent Cafcass parental order statistics show 107 international surrogacy applications logged for January to August 2015, 40% more than the 76 UK surrogacy cases recorded for the same eight month period.<sup>15</sup> It is therefore beyond doubt that international surrogacy is now outstripping UK surrogacy, with more parents going overseas than staying in the UK.

However, the true numbers may be much bigger than the parental order statistics reveal, because not everyone who goes overseas for surrogacy applies for a parental order. In 2015, Mrs Justice Theis (one of the High Court judges who hears international surrogacy cases) said during a conference keynote speech that her ‘concern is about the people who are not making applications’ which she described as a ‘ticking legal time bomb’.<sup>16</sup> Figures from the UK Passport Office do not give a reliable guide to the true numbers, since the immigration routes home to the UK are complex (some parents apply for a British passport overseas, some apply in the UK, some travel home on a US or Canadian passport, some travel using an alternative EU passport, and some secure entry clearance documentation rather than a passport). There is ultimately no single official UK process which everyone who goes through international surrogacy must follow, and this means that the true number of children being born via surrogacy abroad is unknown. Certainly our experience is that there has been exceptionally rapid growth in international surrogacy since 2008, rising from a small handful of cases to very significant numbers today.

The court struggles to understand why parents would not apply for a parental order when the court has never refused to make one. There is a mixed explanation for this. Even now, we are still seeing parents who are unaware of the need to apply for a parental order in the UK (often comforted by a foreign birth certificate naming them as the parents, and not enlightened by surrogacy providers in the destination country). This is hopefully a reducing problem, and Cafcass has recently launched a PR campaign to encourage parents to apply.<sup>17</sup> The lifting

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<sup>15</sup> Cafcass, reply dated 7 October 2015 to a Freedom of Information Act request made by Brilliant Beginnings.

<sup>16</sup> ‘Unregistered surrogate-born children creating “legal timebomb”, judge warns’, *The Guardian* (18 May 2015), [www.theguardian.com/lifeandstyle/2015/may/18/unregistered-surrogate-born-children-creating-legal-timebomb-judge-warns](http://www.theguardian.com/lifeandstyle/2015/may/18/unregistered-surrogate-born-children-creating-legal-timebomb-judge-warns) (accessed 10 October 2016).

<sup>17</sup> Cafcass, ‘Five reasons to apply for a parental order’, [www.cafcass.gov.uk/news/2016/september/five-reasons-you-should-apply-for-a-parental-order.aspx](http://www.cafcass.gov.uk/news/2016/september/five-reasons-you-should-apply-for-a-parental-order.aspx) (accessed 25 October 2016).

of the six-month deadline by judicial discretion<sup>18</sup> (explained further below) has now created the opportunity for people to apply late if they were unaware of the need to apply previously, and we are seeing a growing trend of cases where parents are applying for parental orders long after the event.<sup>19</sup> It is clearly good for children's welfare that the opportunity to apply is now not barred forever if the deadline is missed.

The bigger problem is the parents who *choose* not to apply. Many perceive the UK's legal process to be inappropriate and resent having to justify themselves as parents of a child they already consider theirs. Although parental orders were expressly designed to be a more appropriate alternative to adoption, they still do not fully recognise that these are the parents' natural children and are born with that identity. The process of applying for a parental order is also often perceived as being complex, lengthy and expensive, and without a tangible practical benefit. We are commonly asked by parents whether any issues could really arise in practice if they do not apply, and who will ever question their child's foreign birth certificate. Quite apart from the legal difficulties being created for children left in permanent limbo, this gives rise to concerns about whether such parents are indirectly being encouraged to be secretive about the fact their children have been born through surrogacy, which may create significant issues for their children long term.

### How surrogacy works in the various overseas destinations

In many US states, surrogacy is available to heterosexual couples, same-sex couples and single parents through a well-established structured process, with a reliable time-frame and process for matching. Gestational surrogates are screened and prepared by professional agencies (which includes psychological screening and legal advice) and, once matched, parents and surrogates enter into a written agreement, which is backed up by a robust legal process which recognises the intended parents as the child's legal parents at birth (the detail of the legal mechanism behind this varies from state to state, as to whether it recognises parenthood status from before conception or assigns parenthood from birth).

In our experience of hundreds of US surrogacy arrangements, we see that US surrogates and UK parents typically form close and enduring relationships,

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<sup>18</sup> *Re X (a child) (surrogacy: time limit)* (2014) EWHC 3135 (Fam).

<sup>19</sup> See, for example, *Re A and B* (2015) EWHC 911 in which the children were aged 8 and 5; and *AB v. CD* (2016) EWFC 42 in which the children were age 12 and 13.

in a very similar way to participants in UK surrogacy arrangements, and we are interested to see that US surrogates are very similarly motivated to UK surrogates (typically wanting primarily to help someone else to have a family). There is a clear gap in research on this issue, but our extensive experience is that the legal structure around the arrangement supports rather than detracts from the close personal relationship which is formed. For example, we see many cases in which a US surrogate carries a sibling pregnancy for the same intended parents. In one of our cases a US surrogate sent us a surprise note to her intended parents to pass to the judge for the final parental order hearing which read:

‘I struggle to put into words what this experience has meant to me. It’s a chapter in my life that makes me proud to have shared with my children and with anyone who listened to me share my story. I thank you for entrusting the life of your unborn son to me, it was one I did not take lightly. Congratulations on this memorable day! He is here, he is healthy, he is happy and he is YOURS! I feel like in a way, we have expanded our family by three. We love you all and wish we could be there today to hug you and throw a party!’<sup>20</sup>

While compensation is paid openly in US surrogacy arrangements, the issue feels uncomplicated and simply a customary part of the process, and the figures are not enormous: US surrogates typically receive \$25,000 to \$40,000 plus some out of pocket expenses.

However, as we have noted above, US surrogacy is expensive overall, costing an average of £130,000. This is a result of the range of professional services involved, for which the costs in the US are high across the board, including fertility treatment, surrogacy agency services, US legal services and most significantly health insurance (for both the surrogate and the newborn) which often constitutes a substantial portion of the budget. Although safe, legal and ethical (in the sense of being a balanced arrangement entered into by fully informed consenting adults, in which neither side is taken advantage of and everyone is carefully supported), this puts US surrogacy out of the financial reach of most UK parents.

India was previously the other major surrogacy destination for UK parents (although it was only available to heterosexual married couples after 2013). Media reports in 2012 said that up to 1,000 children were being born to UK parents through surrogacy in India each year.<sup>21</sup> However, from November 2015,

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<sup>20</sup> See [www.brilliantbeginnings.co.uk/blog/the-wonderful-relationships-of-surrogacy-and-how-uk-law-should-support-them-better](http://www.brilliantbeginnings.co.uk/blog/the-wonderful-relationships-of-surrogacy-and-how-uk-law-should-support-them-better).

<sup>21</sup> ‘Revealed: how more and more Britons are paying Indian women to become surrogate mothers’, *Daily Telegraph* (26 May 2012), [www.telegraph.co.uk/news/health/news/9292343/Revealed-how-more-and-more-Britons-are-paying-Indian-women-to-become-surrogate-mothers.html](http://www.telegraph.co.uk/news/health/news/9292343/Revealed-how-more-and-more-Britons-are-paying-Indian-women-to-become-surrogate-mothers.html) (accessed 10 October 2016). This was unofficially said by UK officials working in connection

India barred surrogacy treatment for foreigners, effectively closing this as an option for UK parents. Although the change in policy was initially enforced through administrative procedures, a formal move to amend the law in India was made in August 2016 when the Indian government announced that it was introducing the Surrogacy (Regulation) Bill 2016 to Parliament, apparently motivated by negative media coverage of unethical surrogacy practice in India.<sup>22</sup> At the time of writing this legislation has not yet been passed, but surrogacy practice has already come to a stop in India for foreign couples. Before this happened, Indian surrogacy was much less costly for UK intended parents, costing around £30,000 overall paid direct to the clinic which facilitated the whole arrangement, the Indian surrogate then typically receiving £2,000 to £4,000 from the clinic (often a life-changing sum in the Indian context). Although we have seen some positive Indian experience, we have also seen some ethically concerning cases involving poor and illiterate surrogates. Particular concerns arise where the arrangement is managed by the clinic at arm's length so that there is little or no direct relationship between the parents and the surrogate.

Surrogacy is and remains available in the Ukraine and Georgia (although only to heterosexual married couples) and costs £30,000 to £50,000 overall. Legislation in the Ukraine/Georgia recognises the intended parents as the legal parents, although there is no other legal regulation of surrogacy services or formal process for parents or surrogates to go through. Although there are longstanding service providers, experience is variable and concerns include the risks of proceeding with surrogacy in a country experiencing political instability, and the long waiting times to apply for a British passport.<sup>23</sup>

Another newer destination more parents are looking to is Canada, where surrogacy is available to heterosexual, same-sex and single parents, and in various provinces the court can make an order on parenthood (based on a pre-conception written agreement) immediately after birth. The wait to match with a surrogate is relatively shorter than even in the US but, since both non-profit and for-profit professional agencies/third parties are prohibited from providing matching services, surrogates are generally unscreened and less prepared and so relationships can be fragile. The overall costs are less than in the US (around £70,000 on average, since Canada has public healthcare, agencies cannot charge a fee for all their services and surrogate payments are restricted).<sup>24</sup> However

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with the issue of British passports in India at the time to be realistic, although the Passport Office has subsequently declined to confirm this.

<sup>22</sup> See <http://pib.nic.in/newsite/pmreleases.aspx> (accessed 25 October 2016).

<sup>23</sup> See, for example, *Re X and Y* (2008) EWHC 3030 (Fam) and *Re IJ* (2011) EWHC 921 (Fam).

<sup>24</sup> Assisted Human Reproduction Act (S.C. 2004).

the lines are blurred and surrogacy is evolving. Canada has previously focused on helping Canadian parents and the influx of international parents means there is still some unravelling to do.

There are then the moving destinations, by which we mean unregulated destinations which pop up and quickly disappear, examples including Thailand, Nepal and Mexico. We are seeing Cambodia, Laos and Vietnam now evolving, and the existing history suggests that other destinations will keep emerging as destinations close, in response to demand. These are perhaps the most risky international surrogacy arrangements of all because they operate entirely in an absence of law and regulation. The pattern is that surrogacy blossoms among inexperienced providers, before being shut down virtually overnight, leaving parents and surrogates mid-process in a difficult and uncertain position. Overall, international surrogacy is a very varied, fast-changing landscape and the choices are not easy to navigate or assess. It makes the case for law reform enabling responsible surrogacy in the UK increasingly compelling.

### How UK law works in practice

When the Surrogacy Arrangements Act was passed in 1985, it was hoped that its restrictions would make surrogacy 'wither on the vine'.<sup>25</sup> Instead, surrogacy has grown within the informal and unregulated spaces the law left, and it has spilled out overseas.

It is on the question of legal parenthood where we have seen the biggest problems. UK surrogacy law treats the surrogate (and if she is married her spouse) as the child's legal parents.<sup>26</sup> The intended parents can then apply, if they are eligible, for a parental order to make them the legal parents after the event. Various conditions must be met, including that only expenses have been paid (or the court agrees to authorise any payments), that the surrogate and her husband consent, and that the intended parents are a couple, at least one of whom is a biological parent.<sup>27</sup>

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<sup>25</sup> *Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation - Report of the Review Team* (1997), the 'Brazier Report', summarising the Warnock Committee's conclusions, paragraph 2.23. See also M. Brazier and S. Waxman, this issue, at p. 159, and K. Horsey, this issue, at p. 181.

<sup>26</sup> S. 33 and 35/42 Human Fertilisation and Embryology Act 2008, previously s. 27-29 Human Fertilisation and Embryology Act 1990.

<sup>27</sup> S. 54 Human Fertilisation and Embryology Act 2008, previously s. 30 Human Fertilisation and Embryology Act 1990.

It is worth noting that this legal framework was never a carefully considered policy framework. Parental orders did not even appear in the original 1990 Bill, and were tacked on to the legislation as a last-minute amendment just five weeks before the law was passed. There was virtually no parliamentary debate on what the conditions for parental orders should be, and the law remained unchanged (other than to permit applications from same-sex and unmarried couples) when the Human Fertilisation and Embryology Act was reviewed in 2008.

### What about the surrogate changing her mind?

One of the most fundamental policy concerns underpinning UK law on surrogacy was that a surrogate might – and should be allowed to – change her mind. A parental order can therefore only be applied for after the child has already been handed over, and the surrogate and her husband have an absolute veto, and can only give consent after the child is six weeks old.<sup>28</sup> Changes of heart were a perhaps understandable concern when surrogacy was in its infancy, but one which has been proved wrong by experience. Such situations are so rare in practice as to be almost unheard of. Indeed, having dealt with nearly 700 surrogacy cases in our legal team, we have only ever seen one dispute of this kind (and it involved a surrogate who had misled the intended parents, rather than experienced a change of heart).

Even in those very rare cases where things have gone horribly wrong, UK law has not simply upheld the surrogate's right to keep the baby: the Family Court has decided what is best for the child, as it does in every other kind of dispute involving children. There are only five reported cases of surrogacy disputes in the UK, and in three of them care was awarded to the intended parents.<sup>29</sup> The reality is that the Family Court has a broad discretion to decide what happens if surrogacy goes wrong. That is of course appropriate, since human situations are complex and the child's welfare must be considered, rather than an arbitrary rule of law applied without any consideration of the particular circumstances.

However, the Family Court can only determine care arrangements and has no power to make a parental order without consent even if doing so is manifestly in the child's best interests. In the most recent disputed UK surrogacy case

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<sup>28</sup> S. 54(4)(a) and s. 54(6)/(7) HFE Act 2008.

<sup>29</sup> *In the Matter of N* (2007) EWCA Civ 1053; *Re TT* (2011) EWHC 33 Fam; *H v. S* (2015) EWFC 36; *In the Matter of Z* (2016) EWFC 34; *CD v. EF and AB* (2016) EWHC 2643.

(which followed a UK agency surrogacy arrangement) the relationship between the intended parents and the gestational surrogate broke down during the pregnancy because the surrogate did not feel she had been given enough recognition and support by the intended parents, and the surrogate and her husband then vetoed the parental order out of spite, rather than because they had any wish to be involved in the children's lives. Mrs Justice Theis said:

'Without the respondents' consent the application for a parental order comes to a juddering halt, to the very great distress of the applicants. The result is that these children are left in a legal limbo, where, contrary to what was agreed by the parties at the time of the arrangement, the respondents will remain their legal parents even though they are not biologically related to them and they expressly wish to play no part in the children's lives... Even though the children's lifelong welfare needs require a parental order to be made, if the respondents' consent is not forthcoming the court cannot make a parental order.'<sup>30</sup>

The law's approach now simply feels out of step with reality. It wrongly presumes that the tiny minority of cases where things go wrong are the norm, and in so doing fails to cater appropriately for the overwhelming majority of cases where everyone honours what was intended at the start. Ultimately, the law fails to reflect what surrogacy fundamentally is: a commitment by a woman to carry someone else's child for them, and not a post-birth decision to give up or 'hand over' her child. At the same time, the law is failing children by restricting the court's ability to make an order on parentage which is in the child's best interests where disputes do – rarely – occur.

### Payments for surrogacy

The law is also out of step with reality in respect of the issue of payments. Despite widespread misreporting, it is not 'illegal' for a surrogate in the UK to be paid more than her expenses: neither the surrogate nor the parents commit any offence no matter what they pay. Parliament made a clear decision in 1985 not to criminalise parents and surrogates in respect of arrangements made to conceive a child – this is set out explicitly in the legislation.<sup>31</sup> The rules on 'expenses' only appear within the requirements for a parental order. What the law actually says is that, when considering a parental order application,

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<sup>30</sup> *CD v. EF and AB* (2016) EWHC 2643 (Fam).

<sup>31</sup> S. 2(2) Surrogacy Arrangements Act 1985.

the family court must be satisfied that no more than expenses reasonably incurred have been paid, or must authorise the payments retrospectively.<sup>32</sup>

In UK surrogacy arrangements, a custom has developed whereby a lump sum for 'expenses' is agreed at the start. It is sensible to settle expectations upfront, but our experience is that the figure is commonly set with limited reference to the surrogate's personal out of pocket expenses (or is very generously accounted). There is, on the ground, a 'going rate' for UK surrogacy of £12,000 to £17,000, as noted by Ms Justice Russell in two recent cases.<sup>33</sup> The myth that it is acceptable in law to pay a figure of this amount regardless of the circumstances is entrenched and widely reported in the media. It is even apparently accepted in the magistrates' court, where, in our experience, lump sums for 'expenses' are routinely accepted at face value and without any itemisation being required.

The reality is therefore that most UK surrogates are compensated, not with a life-changing amount but with something for their inconvenience. We see no evidence that the payment of some reasonable compensation detracts from their altruism, taints their relationship with their intended parents, or creates a risk of exploitation. The problem is the lack of transparency. The current law encourages dishonesty, the making (and demanding) of undeclared gifts and payments, and it creates confusion, anxiety and scope for either side to renege on what was agreed. Honest parents go through the whole surrogacy process anxious about whether their payments will be accepted at the end. Less honest parents do not tell the truth – we are frequently asked by clients what sum the court would 'like to hear'. Recently this issue was highlighted in *Re A, B and C* (2016) in which the parental order reporter uncovered that the parents had only disclosed to the court around half the amounts they had actually paid (although the court went on to make parental orders, as these were in the children's best interests). The way payments are dealt with in UK surrogacy feels confused, murky and unhealthy.

The dynamic of international surrogacy has stretched things still further. International surrogacy cases are heard in the High Court, and almost all involve openly paid compensation and fees paid to profit-making overseas agencies. High Court judges conduct a detailed forensic examination of everything that is paid, down to the last penny. The court is absolutely clear that anything paid to the surrogate and the agency which is not an identified out of pocket expense requires the court's express authorisation. However, the compensation element

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<sup>32</sup> S. 54(8) Human Fertilisation and Embryology Act 2008.

<sup>33</sup> *Re A, B and C* (2016) EWFC 33 and *In the Matter of Z* (2016) EWFC 34.

is always authorised because the child's welfare is paramount. In the very first international surrogacy case, twins born to UK parents were marooned 'stateless and parentless' in the Ukraine following a surrogacy arrangement in which the surrogate had been paid €27,000. The court rightly said that public policy against payments and the welfare of the children were 'irreconcilably conflicting concepts' and authorised the payments made in retrospect.<sup>34</sup> Since then, case after case has emphasised children's rights and the court now authorises considerable sums absolutely routinely, including significant and life-changing sums. For example, in a recently published case, Mrs Justice Theis described the authorisation of a compensation payment of \$52,523 to a surrogate (of which only \$9,500 was expenses) as a 'non-controversial matter'.<sup>35</sup>

Having been involved in hundreds of surrogacy cases, we can honestly say that it no longer matters how much a surrogate is paid. The purported restriction on payments has simply been proved unenforceable in practice, and the UK's alleged bar on compensated surrogacy is more fiction than reality. In addition, while there may be genuine concerns about managing surrogacy in a way which avoids either side being taken advantage of or entering into an arrangement unwisely or without full information, such policy concerns are not managed by the current law.

### Other problematic conditions

The law has also presented difficulties in other areas where parental orders have sought to enforce policy ideals which may conflict with children's welfare.

Despite the requirement that an application 'must' be made within six months of the birth, in 2014 the President of the Family Division permitted an application to be made two years after a child's birth, saying that the hard deadline was 'nonsensical' when weighed against the child's welfare.<sup>36</sup> We have subsequently been involved a case in which parental orders were made for an 8 and a 5 year old, and more recently parental orders were made for 12 and 13 year olds.<sup>37</sup> Despite what the law says, there is no longer really any deadline. Again, this makes the law confused and not what it seems.

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<sup>34</sup> *Re X and Y* (2008), *ibid*.

<sup>35</sup> *ABCD v. GH* (2016) EWHC 2063.

<sup>36</sup> *Re X (a child) (surrogacy: time limit)* [2014] EWHC 3135 (Fam).

<sup>37</sup> *Re A and B* [2015] EWHC 911 and *AB v CD* [2016] EWFC 42.

The restriction of parental orders to couples and biological parents has been more problematic. Such parents can and do conceive children through surrogacy, but are currently excluded from being able to apply for a parental order. This is a false enforcement of policy, since the effect of the law is not to stop parents conceiving through surrogacy, but rather to deny their children the right to have their legal parentage properly resolved. The law is also completely out of step with policy in other areas, for example in permitting single parents to adopt children and to conceive through assisted reproduction, and permitting gamete donation in which a child is conceived with both donated eggs and sperm.

In the case of *Re Z (a child)*<sup>38</sup> we represented a single father who had a child through surrogacy in the US and sought a parental order, inviting the court to read the law flexibly using the provisions of the Human Rights Act 1998, as had been done in relation to the six month deadline. The President of the Family Division ruled that the court could not stretch the wording of section 54 this far. However, in his subsequent decision reported as *Re Z (a child) (No. 2)*<sup>39</sup> the President went on to make a declaration of incompatibility under the Human Rights Act 1998, declaring the current law's exclusion of single applicants to be a breach of the European Convention on Human Rights for single parents and their children.

Declarations of incompatibility are rare and significant; only 20 have ever been made by the court across all areas of law, and 19 of these resulted in changes to the law to remedy the breach. At the time of writing, the government has told Parliament that it has accepted the judgment in *Re Z* and is considering how the breach may be remedied. Reform is almost certainly inevitable, given that the Secretary of State for Health conceded in the case that the law was discriminatory and consented to the court making the declaration of incompatibility. Whatever happens in respect of wider reform, it is hoped that a swift amendment of the current law will follow to enable this father (and the more than 40 other single parents we have advised) to secure their legal parentage.

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<sup>38</sup> [2015] EWFC 73.

<sup>39</sup> [2016] EWHC 1191.

## The case for legal reform

UK surrogacy law currently represents a glaring anomaly in UK family and fertility law, entirely at odds with the legal principles of upholding child welfare and taking a progressive and non-discriminatory approach to assisted reproduction and non-traditional families.

Urgent reform is needed to the law on parenthood. Where everyone agrees, legal parenthood should be resolved (on the basis of a pre-conception written agreement, or a lawful surrogacy arrangement entered into overseas, and everyone's consent) via a parental order made before a child is born, recognising intention and ensuring the child has a secure legal identity from birth. This recognises the reality of what a surrogacy arrangement is, and it is appropriate for the overwhelming majority of surrogacy cases where there is no dispute. It would also be entirely consistent with UK law on egg and sperm donation, where legal parentage is clearly resolved at the outset.

Allowing parental orders to be made, by consent, pre-birth does not mean that UK surrogacy agreements will be contractually enforceable against a surrogate if there is a dispute. Neither will it mean that a surrogate could be contractually compelled to forgo autonomy over her own body. It would simply mean that there is a clear mechanism for regulating parenthood, from birth, where everyone agrees. In the very rare cases where there is a disagreement, the Family Court should continue to decide what is best for the child, although with powers to determine parentage as well as care arrangements to prevent a surrogate unreasonably exercising a veto in a way which is contrary to the welfare needs of the child.

The criteria for the making of a parental order should ensure the child's welfare is paramount. That means separating policy from parentage, removing the unenforceable restrictions on payments and the exclusion of single and non-biological parents so that all children born through surrogacy (both in the UK and overseas) can have their parentage recognised. We also need better information rights for children. To bring the law in line with that for gamete donation, the existing register of information should be expanded to record meaningful information for the child to access in later life whether they are born in the UK or overseas.

None of this is difficult, but it will require a reorientation of our policy thinking. For many years UK public policy has been to discourage surrogacy, but this has proved ineffective and even counter-productive. In the same time-frame, social and political understandings of what a family is or can be have undeniably changed. In surrogacy, concerns about exploitation have been exported rather than resolved, and considerable risk is being created by the lack

of transparency, and the unintended encouragement of informal surrogacy arrangements in the UK. UK policy should now focus on supporting ethical surrogacy practice as far as possible, by which we mean surrogacy arrangements in which all parties are fully informed and well-supported, and there is both a strong relationship and a commitment to what is best for the child throughout their life. That is done by helping people to deal with the issues upfront, and to have a clear and transparent legal process. Experience shows that most surrogacy arrangements are positive experiences for all involved, and that much-wanted children born through surrogacy are thriving.<sup>40</sup>

In considering the options for reform, we should resist the temptation to distil the debate to a choice between 'altruistic' or 'commercial' surrogacy. These are unhelpful and unclear concepts, and can mask solutions for managing the genuine policy concerns which exist. We should focus on how we can facilitate parents and surrogates engaging in surrogacy on a fully informed and equal basis, without either side taking advantage of the other. But we also need to be realistic about the full range of surrogacy options through which children are being conceived, and ensure the law is workable in practice. Surrogacy (both in the UK and internationally) is here to stay in many different forms, and we need to manage the consequences of that for families and children. Above all else, it is the duty of the law to ensure that the welfare of children is protected.

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<sup>40</sup> Longitudinal studies also appear to bear this out – see e.g. the work summarised by V. Jadva, this issue, at p. 215.