Womb for Improvement
Enforcing Qualifying Surrogacy Agreements in England and Wales

This essay will examine the current status of surrogacy arrangements in England and Wales and explore the legal problems faced by the growing number of couples turning to surrogacy in order to have children. It will suggest that the current legal position, in which surrogacy arrangements are unenforceable, is no longer tenable and will propose the introduction of qualifying surrogacy agreements as the best means of both protecting the welfare of the child and safeguarding the rights and autonomy of the adults involved.

A growing trend
Recent statistics reveal that the number of children registered after being born to a surrogate has risen by 255% in the past seven years: in 2007 only 47 parental orders were filed over children born via surrogacy, rising to 167 in 2013 and a staggering 24 in January 2014 alone.¹ This astronomical boom should come as no surprise given the shift in family dynamics over recent years. In 2012, there were 7,037 same-sex couples registered in civil partnerships² and this year, 1,409 couples married in the first three months following the legalisation of same-sex marriage.³ Indeed, it is not only same-sex couples enlisting surrogates: the cost and complications of procedures such as IVF are well-documented and an increasing number of heterosexual couples are turning to ‘traditional’⁴ surrogacy in order to create a family.

¹ Emily Dugan, ‘Revealed: Surrogate births hit record high as couples flock abroad’, The Independent, 2nd March 2014
² ONS, Civil Partnerships in the UK 2012, 8th October 2013
³ ONS, How many marriages of same sex couples have been formed in England and Wales so far?, 21st August 2014
⁴ ‘Traditional’ surrogacy refers to the process whereby a surrogate is artificially inseminated with the commissioning father’s sperm, creating a child that is the genetic product of the surrogate mother.
The current legal situation

Unfortunately, couples contemplating surrogacy risk becoming embroiled in a legal minefield. A surrogacy arrangement is defined by s 1(3) Surrogacy Arrangements Act 1985 as follows: ‘an arrangement is a surrogacy arrangement if, were a women to whom the arrangement relates carry a child in pursuance of it, she would be a surrogate mother’. By virtue of section 1A SAA 1985 (inserted by s 36(1) Human Fertilisation and Embryology Act 1990), surrogacy arrangements are not enforceable in England and Wales. Furthermore, s 2 SAA 1985 renders making and negotiating a surrogacy arrangement on a commercial basis an offence.

The designations of legal parenthood contained with HFEA 2008 causes further problems for couples considering surrogacy. Under s 33 of the 2008 Act, s 33 the surrogate mother ‘and no other woman’ is the legal mother of any child she carries, regardless of genetic link. If the surrogate mother is unmarried and not in a civil partnership then, as long as the treatment takes place at a licensed facility, either:

- the commissioning biological father is to be treated as the legal father (s 36); or
- the commissioning mother or non-biological commissioning father is to be treated as the second parent (s 43).

Obtaining parental responsibility is complex for commissioning parents: pursuant to s 54(1) HFEA 2008, the commissioning parents must obtain a parental order from the court which will only be granted in prescribed circumstances. Parents can only obtain such an order if one of them is biologically related to the child (s 54(1)(b)) and the child lives with them (s 54(4)(a)). Furthermore, s 54(2) only allows parental orders to be
granted to couples who are married, in a civil partnership or an ‘enduring family relationship’. Single parents, therefore, are not eligible.

An application for a parental order must be made no less than six weeks and no more than six months after the child is born (s 54(3) and 54(7) respectively). Furthermore, the court must be satisfied that the surrogacy arrangement is not commercial in nature, although it may authorise payments between the parties as it considers appropriate (s 54(8)). As in all children proceedings: the child’s welfare is the court’s paramount consideration when deciding whether or not to grant a parental order.

Cautionary Tales

In *JP v LP, SP and CP*, King J warned:

> The facts of this case stand as a valuable cautionary tale of the serious legal and practical difficulties which can arise where men or women, desperate for a child of their own, enter into informal surrogacy arrangements, often in the absence of any counselling or any specialist legal advice.5

Indeed, the phrase ‘cautionary tale’ has become all too familiar in judgements grappling with the fall-out from surrogacy arrangements. In *JP v LP, SP and CP*, the commissioning parents’ relationship broke down months after the surrogate child was born. The commissioning mother made her application for a parental order out of time and so the only option available to the court was to grant the mother parental responsibility via shared residence under s 8 Children Act 1989. As recognised by King J:

> This remains, on any view, an unsatisfactory solution and understandably leaves the mother feeling vulnerable; a residence order does not confer legal

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5 *JP v LP, SP and CP* [2014] EWHC 595, para 2
motherhood upon her and, in the unlikely event that she ceased to have a residence order, she would lose her parental responsibility.6

Both Re D and L (Children) (Surrogacy Parental Order)7 and Re WT8 considered the requirement for the surrogate mothers ‘consent’ to relinquish parental responsibility where the surrogates, both nationals of India, were unknown to the commissioning parents. In Re D and L, Baker J made a parental order in favour of the applicants after finding that all reasonable steps had been taken to find the surrogate mother to no avail and in that context it was in the best interests of the children to dispense with the need for valid consent.9 In Re WT, Theis J only accepted the written consent of the surrogate mother after receiving a sworn affidavit from an Indian lawyer confirming he had met with the mother and her consent had been given ‘freely and with full understanding of what is involved.’10 Had the parties had more freedom in coming to a private agreement about the appropriate designations of parenthood upon the birth of their child rather than being subject to the onerous requirements of HFEA 2008, then I submit these cases would never have needed to come before the court.

In CW v NT and Another,11 the surrogate mother refused to surrender the child and so the court were forced to make a decision regarding residence according to the test outlined by in Re P (Surrogacy: Residence), that is deciding: ‘in which home is [the child] most likely to mature into a happy and balanced adult and achieve his fullest potential as a human.’12 Baker J made a residence order in favour of the surrogate

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6 Ibid., para 34
7 Re D and L (Children) (Surrogacy Parental Order) [2012] EWHC 2631 (Fam)
8 Re WT [2014] EWHC 1303 (Fam)
9 Re D and L paras 38-40
10 Re WT para 30
11 CW v NT and Another [2011] EWHC 33
12 Re P (Surrogacy: Residence) [2007] 1 FLR 198, para 12
mother and a contact order in favour of Mr W. Mrs W, the non-biological commissioning mother, was left with no parental rights or responsibilities in relation to the child. In his judgment, Baker J acknowledged: ‘the risks of entering a surrogacy agreement are very real.’

A further problem which plagues surrogacy arrangements is the s 2 SAA 1985 restriction on negotiating surrogacy arrangements on a commercial basis. King J described the effect of this provision in *JP v LP, SP and CP*:

Outside the regulated clinics advice is hard to find; there are few firms of solicitors specialising, or even passingly knowledgeable, in the field, perhaps in part because the prohibition contained in s 2, *Surrogacy Arrangements Act 1985* prohibiting the negotiating of surrogacy agreements on a commercial basis means that firms are not providing a 'surrogacy service'. Surrogacy is however becoming increasingly common and the number of applications for parental orders around the country is increasing rapidly.

**The need for reform**

These cautionary tales unequivocally demonstrate the need for reform. I submit enforceable surrogacy agreements are a desirable, practical and useful solution and will serve to:

i. protect and promote the welfare of the child;

ii. respect the reproductive rights and autonomy of the individuals involved;

and

iii. reduce the risk of exploitation.

**Prioritising the best interests of the child**

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13 *CW v NT and Another*, para 1.
14 *JP v LP, SP and CP* [2014] EWHC 595, para 41
The welfare principle is uncontroversial: s 1 Children Act 1989 requires that the child’s welfare be the court’s paramount consideration when determining any question with respect to the child’s upbringing. It is similarly uncontroversial that being subjected to protracted litigation is far from an auspicious start for any child and is rarely (if ever) considered to be in their best interests.

Allowing for surrogacy arrangements to be enforced and carefully negotiated in advance of any pregnancy will undoubtedly ensure that the adults involved fully understand and accept the consequences of the agreed terms. It will allow for the commissioning parents and the surrogate to make key decisions about the role they will each play in the child’s life and the level of contact (if any) to be enjoyed between the child and surrogate mother. Not only will increased certainty and clarity greatly reduce the likelihood of litigation, but more importantly, these decisions go to the heart of any child’s identity and sense of belonging. Knowing why they were brought in the world, by whom and what role all of the adults involved played in their life is vitally important in order for them to ‘mature into a happy and balanced adult and achieve [their] fullest potential as a human.’

Furthermore, in those (hopefully few) instances in which litigation is commenced and the terms of a qualifying surrogacy arrangements challenged, the court will have a starting point as to what the intentions of the adults were when they decided to bring this child into the world. This will be exceedingly helpful in terms of deciding what is best for that child in the future.

15 Re P (Surrogacy: Residence) [2007] 1 FLR 198, para 12
Respecting autonomy

Greece is the only country in the European Union to have developed comprehensive legislation in relation to surrogacy; rendering it permissible when medically necessary.\(^\text{16}\) Although I do not propose to replicate Greece’s model, not least because it prohibits surrogacy as a social ‘choice’, the rationale behind their legislation is illuminating. The purpose of permitting surrogacy in Greece is two-fold: first and foremost to protect the interests of the child and second, to ensure: ‘the respect for the individual’s personal freedom and personal development, and for the individuals right to procreate.’\(^\text{17}\) This is an important principle and one that we should seek to encourage and enshrine in the legislation of England and Wales as consistent with Article 8 of the European Convention on Human Rights.

Fighting exploitation

Requiring parties to freely consent to an agreement in order for it to be enforceable is the best weapon against exploitation. Such consent is far more powerful at the outset rather than after the child has been born at which point emotions will surely be running high. Empowering surrogates by offering them independent legal advice and encouraging them to actively participate in the negotiation of these agreements is the most effective way of ensuring valid consent.


\(^{17}\) Ibid., pp. 277-8
The reform

I. Introducing qualifying surrogacy agreements

I propose that s 1A SAA 1985 is repealed and replaced with a short bill setting out the conditions to be met for a surrogacy arrangement to be enforceable. Arrangements which achieve this status will be termed ‘qualifying surrogacy agreements’.

Adopting the Law Commission’s recommendations

In February 2014, the Law Commission published its findings concerning financial division upon divorce. The report recommended the introduction of qualifying nuptial agreements on the basis of three main arguments:

1. Autonomy: allowing for qualifying pre-nuptial agreements enables couples ‘choose the financial consequences of the ending of their relationship, rather than having those consequences imposed upon them.’

2. Certainty: ‘the most important point of a pre-nuptial agreement is to provide both parties with a high degree of certainty as to the outcome in the event of a breakdown in their forthcoming marriage.’

3. Adopting a precedent set internationally: allowing couples who have married in another jurisdiction where pre-nuptial agreements are binding, to move to England and Wales safe in the knowledge that their agreement can still be enforced.

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18 The Law Commission, Matrimonial Property, Needs and Agreements, No. 343, 26th February 2014, p. 79
19 Ibid., p. 81
20 Ibid., p. 82
The difference between the division of assets and the upbringing of a child is an obvious one, and although the subject-matter is different, the ethos and purpose behind such ante-agreements is very similar as outlined above. As such, I propose to adapt the model designed by the Law Commission as the basis for the setting out the criteria for qualifying surrogacy agreements.

**Procedural safeguards**

In order for a surrogacy agreement to be deemed qualifying it must meet the following procedural requirements:

A. **Contractual validity**

Basic contractual requirements must exist: agreement, consideration and an intention to create legal relations. In this instance, successful impregnation of the surrogate by the commissioning father will constitute consideration. Furthermore, an agreement will be deemed unenforceable and rendered void if there is evidence of mistake, duress or undue influence.

B. **Execution**

Any agreement must be recorded in signed writing and contain statements to the effect that all parties, the surrogate and the commissioning parents, understand the terms of the agreement, have taken appropriate independent legal advice (see below for the detailed conditions) and recognise that in executing this agreement,

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21 Ibid., p. 104
22 Ibid., p. 105
23 Ibid., p. 109
they will be subject to all of its terms. This will include an additional statement from the surrogate mother agreeing to relinquish all parental rights and responsibilities over the child upon birth.

C. Timing

As acknowledged by the Law Commission, ‘the most obvious purpose of a timing requirement is to relieve the pressure, or the feeling of compulsion, to sign an agreement because of the impending wedding.’ 24 The Law Commission recommended that in order to be valid, a pre-nuptial agreement must be signed at least 28 days before the marriage ceremony.25 There is no similar ‘D-Day’ for surrogacy – artificial insemination, especially when performed outside a clinic, can be done whenever and wherever the parties choose. However, there is still merit in enforcing timing requirement as it allows for a ‘cooling-off’ period before attempts at artificial insemination begin.

D. Independent legal advice

Proper, thorough and appropriate independent legal advice is essential for all parties entering such agreements. For qualifying pre-nuptial agreements, the Law Commission recommended that legal advice should include advice on the effect of the agreement as a whole as well as in relation to the rights of the party being advised.26 I suggest the same advice is appropriate for surrogacy agreements. The parties must understand exactly what role they are to play in the child’s life and that this agreement is binding, enforceable and unlikely to be varied later down the

24 Ibid., p. 111
25 Ibid., p. 116
26 Ibid., p. 131
line. Of paramount importance is the surrogate’s understanding that upon birth, she will relinquish all rights and responsibilities over the child she has carried. Receiving this advice at the outset, from an independent legal professional, will hopefully ensure that situations like those in CW v NT and Another, will be avoided.

Independent advice and the process of negotiating a detailed agreement will encourage parties to think realistically about the family unit they intend to construct for their child. Perhaps most importantly, to what extent will the surrogate remain involved in the child’s life? Agreeing this in advance with the assistance of trained professionals will ensure that any agreement executed is as comprehensive and thorough as possible and has contemplated and accounted for a range of different outcomes.

II. Opting out of HFEA 2008

Autonomy over the designation of legal parenthood

A short provision should be inserted in HFEA 2008 allowing for parties who have entered a qualifying surrogacy agreement to assign legal parenthood within that agreement. For surrogacy agreements which do not qualify or are silent on the matter, the 2008 Act will still apply. This will remedy the problems faced in Re D and L, Re WT by allowing parties to agree these designations privately. It will also ensure that commissioning, non-biological mothers like Mrs W and JP in CW v NT and Another and JP v LP, SP and CP respectively are afforded equal rights and responsibilities over the child.
III. Amend s 2 SAA 1985

Legal professionals should be allowed to assist in advising, drafting and executing qualifying surrogacy agreements to ensure the agreements comprehensively cover all of the relevant issues as outlined above.

IV. Enforcing international agreements

Agreements involving non-British nationals and executed outside the jurisdiction shall still be deemed enforceable so long as they adhere to the criteria above.

Conclusion

In an ever evolving society it is important that the law keeps pace with those whom it seeks to govern and regulate. The statistics paint a clear picture: surrogacy is and will continue to boom. Indeed, this is a logical and unsurprising development given the consistent development in family dynamics apparent since the mid-twentieth century. Common sense dictates that properly considering all eventualities and planning ahead as far as possible is not only eminently sensible, but more importantly, the best way of protecting and promoting the welfare of any children. Regulated and enforceable surrogacy agreements are an inevitability, introducing them sooner rather than later will ensure that fewer children and families suffer as the result of a system which currently breeds chaos and confusion.

3000 words exactly, including footnotes

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