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Reform of UK surrogacy laws: the need for evidence

Eric Blyth, Marilyn Crawshaw and Patricia Fronek

Surrogacy, whether altruistic or commercial, has become the focus of much public and academic commentary. Given the complexity of surrogacy practice, we have become concerned that many 'reform' arguments are based on alleged matters of fact: a dangerous state of affairs.

For example, an unsubstantiated claim made in a debate in Westminster Hall in 2014 that the number of children born through surrogacy each year had risen from 50-100 in 2008 to between 1000 and 2000 (1) has continued to be uncritically cited (2). This is despite our own research clearly demonstrating the lack of robust data about the number of surrogacy arrangements made by UK couples either in the UK itself or overseas (3) and similar findings discussed at a roundtable on international surrogacy reported previously in *BioNews* (4).

In a similar vein, unsubstantiated assumptions have been made about difficulties arising for surrogates and commissioning parents during pregnancy, such as a surrogate changing her mind, or where parental rights are threatened due to the absence of enforceable written agreements within current laws (2). According to this logic, arguments are sometimes taken one step further, where the absence of enforceable agreements is claimed to be the cause of surrogates and commissioning parents avoiding formal agreements altogether (2).

While such *opinions* may well exist, no evidence exists that they are commonplace among commissioning parents or surrogates, nor indeed the cause of parties avoiding contractual arrangements.

Sometimes it is argued that fewer problems with surrogacy occur in the US than in the UK because of enforceable contracts. However, again, we are aware of no evidence that this is the case nor that such contracts can adequately safeguard the interests of commissioning parents, as indicated in a court ruling in Indiana (5). If the use of enforceable pre-birth contracts was so obviously and simply the correct way forward, one might have anticipated its adoption by far more than the very few jurisdictions that have done so (6, 7).

On the contrary, surrogacy contract enforceability could simply legitimise the commercialisation of child procurement and trafficking that restrictions on payment were

designed to prevent - and contribute to the potential exploitation of children, surrogates and commissioning parents. The exploitation of surrogates has been of particular concern in countries where contracts favour business interests as well as where significant economic disparities between surrogates and commissioning parents exist (3, 4).

Concerns have been raised about the lack of informed consent in these circumstances (8). Further, such a proposal ignores the implications of removing the basic human right of pregnant women to make autonomous decisions while their pregnancy is ongoing and to have a legal relationship to the child at birth.

Existing evidence of surrogacy practice in the UK does not to date show that the unenforceability of surrogacy contracts constitutes a major or even a significant problem. Indeed in the case of *H v S (Surrogacy Agreement)* (9) and in all other cases of surrogacy that have been heard in UK courts, the court's disposition rested entirely on the paramountcy of the child's welfare. The judge's ruling in the case of *H v S* was eminently sensible; it was actually the private nature of the surrogacy arrangement rather than the absence of an enforceable contract that adversely affected its outcome.

Considered through the lens of the children born through surrogacy, a contrary argument – and one that we believe to be both pragmatically and ethically superior - is that the child's best interests should comprise the *sole* basis on which a surrogacy case (whether contested or consensual) should be determined. In practice, this is of course what UK courts are doing, regardless of current legal restrictions on payments made by commissioning parents to domestic or overseas surrogates (10). It may even be argued that – despite the *messiness* of the specific cases courts may be asked to resolve – the UK system 'gets there in the end'.

We nevertheless agree that UK surrogacy legislation, which has remained substantively unchanged for around a quarter of a century, needs to be revised to better reflect the changed context of surrogacy arrangements, and in particular the development of arrangements that transcend international borders (3, 4).

We propose that, included in such changes, the role of child welfare agencies should be enhanced with their involvement starting *prior* to any arrangements going ahead rather than at the end of the process. There is need for improved levels of assessment, information and preparation of commissioning parents and surrogates and improved support for all parties

prior to and during the pregnancy, and afterwards (11, 12). The apparent discrepancy between the number of Parental Order applications made to UK courts (3) and the much higher numbers of international surrogacy cases reported by the media (13) needs to be investigated, first to ascertain whether such differences exist in fact and, if this is demonstrated, to identify measures to provide greater incentives for commissioning parents to apply for Parental Orders. Finally there is need for surrogate offspring to have access to identifying and biographical information about their legal parents at birth *and* their genetic parents as well as those who raise them.

It is important that commentary and legislative reforms be informed by accurate information, good data collection and research, which are patently in short supply.

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