

Should English Law regarding Surrogacy be Reformed in Order to Legalise Commercial Surrogacy?

Introduction

- ❖ Surrogacy refers to an arrangement made between a woman and intended parents (IPs), whereby the woman becomes pregnant and gives birth to a child which is handed over to the IPs for them to raise¹
- ❖ As surrogacy law has remained unchanged since 1985, it is time the legislation was updated and reformed
- ❖ This piece will clarify the current legislation around surrogacy, and determine where it originates from
- ❖ It will consider previous reviews looking to reform surrogacy law and evaluate why they have not resulted in any change to the legislation
- ❖ Reasons why many are opposed to the payment of surrogates will be discussed, and these reasons will be shown to be unnecessary when considering paid surrogacy in the UK
- ❖ The positive impacts legalising commercial surrogacy could have will be explained
- ❖ Suggestions for law reform will be made

Key Terms

- Commercial Surrogacy (CS)**- the surrogate and any agency involved in the arrangement will charge a fee for their 'services', resulting in a profit²
- Altruistic Surrogacy**- agreements where neither the surrogate nor any surrogacy agency involved with the agreement make a profit²
- Gestational (or full) Surrogacy**- an agreement where the surrogate is not genetically linked to the baby she is carrying²
- Traditional (or partial) Surrogacy**- an agreement where the surrogate is genetically related to the baby, as her egg is used²
- Domestic Surrogacy Agreement**- the surrogate and IPs are based in their home country, and all the elements of the surrogacy procedure occur there²
- Transnational Surrogacy Agreement**- at least some part of the process happens in an alternative country to that in which the IPs reside, because the surrogate is based there¹

Commercial Surrogacy Under English Law

- The Surrogacy Arrangements Act (SAA) was set in motion in 1985. It dictates that altruistic surrogacy is legal in the UK, but CS is illegal
- The SAA was amended in 1990 following the introduction of the Human Fertilisation and Embryology Act 1990 (HFE Act), in which surrogacy contracts were made unenforceable
- A White Paper and the Brazier Report both looked at reviewing the law surrounding surrogacy, but neither resulted in any change to the law. This was likely due to the strong views of the public on surrogacy at the time
- The SAA was produced following the Warnock Report, published in 1984.³ The Warnock Report was produced by a committee largely opposed to the legalisation of surrogacy
- The HFE Act dictates that a surrogate may only be paid 'reasonable expenses', and that should they receive more, there is the risk that the IPs will not be granted a parental order⁴
- The results of the Law Commissions' public consultation are yet to be published, but could result in some changes to a very outdated law

The Case for Commercial Surrogacy

- Surrogacy is a Form of Reproductive Labour**
- Surrogacy is not only a form of reproductive labour, but a form of work. Therefore surrogates deserve to be compensated for this.
- Enabling payment would not make the process of surrogacy less altruistic. Despite monetary compensation, the surrogate is still majorly disadvantaged in comparison to the benefit gained by the IPs. This is due to the large toll pregnancy takes on the body.
- Promotion of Reproductive Autonomy**
- Legalising CS would maximise procreative autonomy for both surrogates and IPs, since it would enable surrogates to use their body as they want to, and IPs the chance to have a child.
- If surrogates are able to fulfil their procreative autonomy, there will be an increased supply of surrogates. Hence, there are more opportunities for IPs to find a match enabling them to fulfil their wish of having a child.
- This increased supply, may depend on whether the law surrounding the attribution of parenthood is changed alongside the law on commercialising surrogacy.
- Reduction of Reproductive Tourism**
- If CS were legalised and the law changed to ensure that IPs were recognised as legal parents of the surrogate-born child from birth, the supply of domestic surrogates would increase. The greater legal certainty this invokes would reduce the occurrence of transnational surrogacy arrangements.
- This would reduce the number of women exploited in other countries where there is little regulation of the surrogacy process.
- Increasing domestic surrogacy arrangements is better for both the IPs and the surrogates, since the IPs get to experience the pregnancy and there is no concern about the paperwork required to bring a child back to the UK.

Conclusion

- ❖ New legislation must be published to represent current societal views on surrogacy.
- ❖ The government should legalise commercial surrogacy by allowing payments to surrogates beyond mere expenses.
- ❖ Commercial surrogacy in the UK can be ethically defended since the main concerns held by some, including the fear of exploitation of women and commodification of both women and children, can be overcome with the use of proper regulation.
- ❖ Legalising commercial surrogacy would enhance the options available to infertile couples by promoting their reproductive autonomy, as well as maximising surrogates' autonomy to the greatest extent.
- ❖ Legalising commercial surrogacy in the UK would dissuade intended parents from travelling abroad to establish surrogacy arrangements with more vulnerable women who are at greater risk of exploitation
- ❖ Payments to surrogates need to be enabled within the law and should be agreed pre-conception as part of a contract, and should be paid on a pro-rata basis
- ❖ The new pathway proposed by the Law Commission in their recent review should be implemented and arrangements under this pathway (or the old pathway) should be assisted by a not-for-profit surrogacy agency, regulated by the HFEA
- ❖ The legal ban on advertising should be lifted

Commercial Surrogacy in the UK is Ethically Defensible

- Payments can lead to Exploitation**
- When payments are too high, poor women feel compelled to become surrogates and therefore their consent to the process becomes involuntary
- Payments which are too low do not compensate surrogates adequately for the risks associated with pregnancy, or reflect the benefit gained by the IPs
- IPs may be financially exploited by surrogates since they are desperate for a child and only the surrogate can provide them with one
- Introducing a minimum and maximum fee level, alongside mandatory screening and counselling for surrogates, could prevent all of these problems
- Surrogacy Commodifies Women and Children**
- CS turns women into an object and a childbearing factory; they become 'a means to an end'⁵
- Since a surrogate makes her own decision about partaking in the process, she is never a mere means to an end. Surrogates see themselves as performing a service for others
- All workers are in some way being used as a 'means to an end', yet are legal. There is no reason why commercial surrogacy should be seen any differently
- Surrogacy Amounts to Baby-Selling**
- CS commodifies children, making them into objects which can be bought and sold. This can leave them scarred⁶
- Commodities by definition are objects which are owned and to be used as the owner sees fit. Children are not owned by their parents and are not instruments to fulfil their wishes, therefore are not commodities
- There is little evidence to suggest that there is negative impacts on children born through surrogacy. They have been found to develop just as well psychologically and cognitively as other children their age
- Children may actually be positively psychologically impacted since they know that they were planned and wanted, unlike some naturally conceived children
- Commercialising Surrogacy will increase the number of Arrangements**
- Commercialising surrogacy would increase the number of arrangements, since more women will be willing to undertake surrogacy if they are to be paid
- Whilst they may to some extent increase, most surrogates do not partake in surrogacy for the financial gain, instead for the great impact it has on the IPs
- Any increase would be more likely to result from other changes which would coincide with allowing payments to surrogates, such as changes in the attribution of legal parenthood and the legalisation of advertising

How the Law Should Be Reformed

- Surrogacy Agencies should be regulated by the HFEA, and should remain 'not-for-profit'.
- Implement payment thresholds and payment plans, to enable surrogates to be paid beyond mere expenses.
- Legalise advertising, to maximise surrogate autonomy, and reduce the number of Transnational Surrogacy Agreements.
- Implement the Law Commissions' proposed new pathway, to enable a contract to be drawn up between a surrogate and the IPs.

References

1. Law Commission, *Building families through surrogacy: a new law* (Law Com No. 244, 2019) pg xiii.
2. Margaret Brazier, Alastair Campbell and Susan Golombok, *Review for Health Ministers of Current Arrangements for Payments and Regulations* ('The Brazier Report') (Cm 4068, 1998) para 8.9.
3. Department of Health and Social Security, *Report of the Committee of Inquiry into Human Fertilisation and Embryology* ('The Warnock Report') (Cmnd 9314, The Stationery Office, 1984).
4. Human Fertilisation and Embryology Act 2008 (HFE Act 2008) s54(8).
5. John Tobin, 'To prohibit or permit: What is the (Human) Rights response to the practice of International Commercial Surrogacy?' (2014) 297.
6. Alan Wertheimer, 'Exploitation and Commercial Surrogacy' (1997) 74.

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