

Do the Current UK Laws Governing Surrogacy and Gamete Donation Adequately Protect the Parents and Children, or is Reform Required to Achieve This?

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Abstract

The UK laws that cover technologically assisted reproduction are from a time in which these techniques were viewed as taboo and the science behind them was new and under-studied. This article will analyse the advantages and disadvantages of the UK's surrogacy and gamete donation laws. It explores the extent to which they are lacking and, drawing on laws in other jurisdictions to decide what, if any, reforms are needed to ensure that parents and children that are traversing the UK's system are treated fairly and with respect.

The article argues that the reform of laws governing gamete donation were adequate, taking into consideration the changes of the public's perception of this and the science that makes it possible. However, there are still areas of gamete donation such as the practice of posthumous gamete donation that necessitate reform. Furthermore, this study argues that the law governing surrogacy is in desperate need for reform. The current system can be seen to encourage a system that can leave women in economically disadvantaged countries at risk of exploitation as well as putting the prospective parents in a legally uncertain situations that the judiciary are forced to address.

Keywords: Family Law; Surrogacy; Gamete Donation; Reform

1. Introduction

Over the last thirty years, the fertility sector has seen rapid growth, development and innovation. As assisted reproductive technology has evolved and has become more effective, it has become more widely accepted and used. This article will focus on two forms of assisted reproduction, surrogacy and gamete donation. In surrogacy arrangements, a woman carries and gives birth to a baby for another person or

couple.¹ Gamete donation is using eggs and/or sperm from someone else in order to help intended parents have a child.² It is estimated that, in 2020, over 500 children were born through surrogacy to UK parents. This would mean a 10-fold increase compared to 15 years ago.³ The BBC reports that “parental orders, which transfer legal parentage from the surrogate, rose from 117 in 2011 to 413 in 2020.”⁴ A similar upward trend has been seen in the donation and use of donated eggs and sperm. According to the Human Fertilisation and Embryology Authority, in the past 20 years, the use of donor eggs with donor sperm has increased 50-fold but is still less common than the use of donor eggs with partner sperm increased 22-fold.⁵

In the UK, surrogacy and gamete donation are regulated by the Surrogacy Arrangements Act 1985 and the Human Fertilisation and Embryology Act 2008. This article critically analyses the current law and make recommendations for reform based on a comparison to the laws in other countries such as Ukraine.

The article argues that surrogacy law is in dire need of reform to reflect the advancement in technology and change in public opinion. Reforming surrogacy law could allow commercial surrogacy and/or facilitate international surrogacy and obtaining parental orders. If achieved, this has great potential to protect the rights of intended parents and surrogates. One option would be to ban surrogacy altogether to allow for more time to research the practice and raise awareness. However, it would also be likely to drive surrogacy underground, increasing the risk of exploitation of surrogates, especially in international surrogacy arrangements. Additionally, it might lead to unacceptable situations where children are left legally parentless. To prevent this, it is not only domestic law that needs reform. The article also recommends the

¹ Brilliant Beginnings, 'What is Surrogacy' <<https://brilliantbeginnings.co.uk/what-is-surrogacy/>> accessed 1 April 2022.

² American Society of Reproductive Medicine, 'Gamete (Eggs And Sperm) And Embryo Donation' <<https://www.reproductivefacts.org/news-and-publications/patient-fact-sheets-and-booklets/documents/fact-sheets-and-info-booklets/gamete-eggs-and-sperm-and-embryo-donation/>> accessed 1 April 2022.

³ Brilliant Beginnings, 'Surrogacy Law Reform: Parliamentary Briefing Paper 2020' <<https://brilliantbeginnings.co.uk/wp-content/uploads/2020/06/Parliamentary-briefing-paper-2020.pdf>> accessed 1 April 2022.

⁴ Jo Deahl, 'Surrogacy is Absolutely What I Want To Do' *BBC* (22 September 2021) <<https://www.bbc.co.uk/news/uk-58639955>> accessed 1 April 2022.

⁵ Human Fertilisation and Embryology Authority, 'UK statistics for IVF and DI treatment, storage, and donation' (May 2021) <<https://www.hfea.gov.uk/about-us/publications/research-and-data/fertility-treatment-2019-trends-and-figures>> last accessed 1 April 2022.

creation of an international surrogacy treaty to provide a universal system for countries to follow.

The next part of the article outlines and critically analyses the current law on surrogacy and gamete donation as well as relevant academic commentary before it moves on to discuss possibilities of reform, first of surrogacy law, then of the law governing gamete donation.

2. The Current Law Covering Surrogacy and Gamete Donation

This section critically analysis the law that governs surrogacy and gamete donation.

2.1 Surrogacy

The UK defines a surrogacy arrangement as ‘an arrangement made before the woman began to carry the child with a view to any child carried in pursuance of it being handed over to, and parental responsibilities being met by, another person or persons’.⁶ The common method is defined as artificial insemination of a woman leading to the woman carrying a baby that is genetically related to the mother who agrees to give the baby up upon birth.⁷ The less common but growing trend of gestational surrogacy consists of an egg fertilised by a sperm, both from the intended parents.⁸ If the arrangement is a success and goes forward as planned, the gestational mother hands over the baby and the commissioning couple is then able to apply to the courts for a parental order that would mean, subject to meeting legal prescribed criteria, they become the legal parents.⁹ Surrogacy is fast becoming a widely accepted and genuine method of ending the agony of childlessness. However, the legislative framework is difficult to navigate and can produce results that are baffling to the lay person and can be seen to be catastrophic to the persons at the centre of the decision.¹⁰

⁶ Surrogacy Arrangements Act 1985 S1(2).

⁷ Usha Regachary Smerdon, ‘Crossing Bodies, Crossing Borders: International Surrogacy Between the United States and India’ (2008) 39(1) Cumberland Law Review 15, 17.

⁸ Ibid.

⁹ Human Fertilisation and Embryology Act 2008 S54.

¹⁰ *Re P (Surrogacy: Residence)* [2008] 1 FLR 177 per Coleridge J.

Even though surrogacy is legal in the UK, extremely tight restrictions on what can and cannot be done exist. The laws governing surrogacy were passed in 1985¹¹ and 1990¹² and have hardly been updated. The fact that the drafting was based heavily upon recommendations made by the Warnock committee (convened in 1982) and the 1984 Report of the Committee of Inquiry into Human Fertilisation and Embryology, which used what is now extremely outdated science meaning that the foundations of the legislation are in fact, even more out-dated than first thought. These laws list the process that prospective parents must follow, as well as the actions that are prohibited. Some of the most important parts of these pieces of legislation are: surrogacy agreements are not enforceable,¹³ surrogacy is not to be carried out on a commercial basis,¹⁴ surrogacy is not to be advertised within the UK neither is stating that a person is willing to or seeking to take part in surrogacy,¹⁵ the mother of the child is the woman who carries the baby to birth (even if there is no genetic relation),¹⁶ and, if the woman was impregnated artificially then '*pater est*' is presumed and the man that she is married to is the father (there is almost always no genetic relationship).¹⁷ The strict nature of these laws creates a pseudo-ban on surrogacy. This has created a situation where many prospective UK parents go overseas to jurisdictions with less restrictive surrogacy laws.¹⁸

The issue of UK residents bringing home children from international surrogate mothers, due to the strict and unworkable regulations within the UK, is one that creates many legal issues. The most common one being that prospective parents require a parental order but fail to meet one of the criteria set out in S54 of the Human Fertilisation and Embryology Act 2008. It is usually that money has been paid to the surrogate mother. Nevertheless, the courts are frequently forced to issue a parental order as the child would be without legal parents if they did not, contravening the child's

¹¹ Surrogacy Arrangements Act (n6).

¹² Human Fertilisation and Embryology Act 1990.

¹³ Surrogacy Arrangements Act (n6) S1(a).

¹⁴ Ibid S2(1).

¹⁵ Ibid S3(5).

¹⁶ Human Fertilisation and Embryology Act (n12) S27.

¹⁷ Ibid S28.

¹⁸ Kirsty Horsey, 'Fraying at the Edges: UK Surrogacy Law in 2015: H v S (Surrogacy Agreement) [2015] EWFC 36, Re B v C (Surrogacy: Adoption) [2015] EWFC 17, Re Z (A Child: Human Fertilisation and Embryology Act: Parental Order) [2015] EWFC 73, A & B (Children) (Surrogacy: Parental Orders: Time Limits) [2015] EWHC 911 (Fam)' (2016) 24(4) Medical Law Review 608.

human rights.¹⁹ Judges regularly work around the various shortcomings of S54, deeming that the child's best interest as the most important consideration when issuing parental orders.²⁰ So far, there has only been one case that has demanded all S54 requirements to be met, in that case a single man was the person seeking the parental order and the court determined that the requirement of two applicants was a 'fundamental feature'.²¹ This was subsequently overturned and the Government conceded that this requirement contravened the father's rights under Article 14 and 8 of the European Convention of Human Rights (ECHR).²² This case shows just how outdated the laws that govern surrogacy are. The fact that they no longer comply with arguably the most important piece of European legislation (incorporated into UK law through the Human Rights Act 1998) should have been the indicator that reform was needed.

In addition to the need to purposively interpreting S54 of the Human Fertilisation and Embryology Act to safeguard the child's best interest,²³ the UK's surrogacy laws need reform to make them less restrictive. Eekelaar believes that just because a couple is, for some reason, unable to have what is regarded as a natural pregnancy, they should not be excluded from being able to have a child. Current legislation does not do this expressly, but its effects are verging upon a ban.²⁴ Jonathan Herring, one of the most well-respected family law commentators, stated that: 'other than making it outright illegal, the current legal framework governing surrogacy could not make it any harder to legally navigate'.²⁵ Emily Jackson argues that the ability to procreate, even via modern scientific methods, is essential to a person's wellbeing.²⁶ Taking this idea and applying it to how restrictive surrogacy legislation is in the UK, Eekelaar poses the following question: if it is a widely accepted fact that forced sterilisation, such as that carried out by the Nazi's, are abhorrent then is refusing to let a couple have a child via a surrogate any better?²⁷

¹⁹ Jonathan Herring, *Family Law* (9th edn, Pearson 2019) 374

²⁰ Re A and B (children) (surrogacy: parental orders: time limits) [2015] EWFC 911 (Fam)

²¹ Re Z (a child: HFEA: Parental Order) [2015] EWFC 73

²² Human Rights Act 1998

²³ Horsey (n18).

²⁴ John Eekelaar, *Family Law and Personal Life* (2nd edn, Oxford University Press 2017) 90

²⁵ Jonathan Herring, 'Whose Baby Is It Anyway? Surrogacy Dilemmas' (2011) 161(7452) *New Law Journal* 195

²⁶ Ibid.

²⁷ Ibid.

While some legal commentators support the idea of parenting, emphasising social parenthood over biological ties,²⁸ others agree with 'parenting by being' and believe that biology should be the determining factor and the fact that a certain person gave birth to the child.²⁹ This is supported by the UK's current restrictive surrogacy legislation.

2.2 Gamete donation

Gamete donation is the act of supplying a sperm or an egg to create an embryo outside of the womb.³⁰ A gamete is defined as any human sperm or egg or germ that is alive and in any stage of maturity.³¹ The laws governing gamete donation are the same pieces of legislation that govern surrogacy, that is the Human Fertilisation and Embryology Act 1990 and 2008. This legislation lists the rights of the person that has donated the gamete and the rights of the child born using the gamete. Gamete donation laws have seen much more reform than that of surrogacy, mainly due to it being much more common. Around 13,500 children are born via gamete donation each year.³² Currently, in the UK, children that are born via the donation of gametes after the date of 1/4/2005 are able to find out the following about the donor at the age of sixteen: physical description, year and country of birth, ethnicity, any children at time of donation and their gender, marital status, medical history, any additional info listed by donor.³³ At the age of 18, a person conceived via gamete donation may discover: the donor's full name currently and at birth, date and town of birth, and most recent listed address. If the person donated the gamete before 1/4/2005, the information that is released to the child cannot reveal the donor's identity. In that case, generic features such as physical description, year and country of birth and ethnicity are all that is discoverable. There is the option of removing donor anonymity completely and signing

²⁸ Ibid.

²⁹ Andrew Bainham, 'Arguments About Parentage' (2008) 67 (2) The Cambridge Law Journal 322.

³⁰ Human Fertilisation and Embryology Act (n9) S1.

³¹ Ibid.

³² Coparentscouk, 'How Many Babies Are Born Using a Sperm Donor?' <<https://www.coparents.co.uk/blog/how-many-babies-are-born-using-a-sperm-donor/#:~:text=In%20the%20US%2C%20it%20is,30%2C000%20babies%20across%2070%20countries.>> accessed 18 October 2020.

³³ Human Fertilisation and Embryology Act (n12) S31ZA.

onto the voluntary contact register. With this the parent and child conceived via the donated gamete can contact the donor.³⁴

Gamete donation is a widely debated topic. The main area of contention focuses on the rights that donors should have alongside the rights of the people who were conceived using those gametes. There are those who believe, very strongly, that the possibility of contact between a child and their biological parents is essential for several different reasons, ranging from medical to societal. They make comment on the unique situation the child finds themselves in. They are part of a familial 'triad', that is themselves, their social parents and their genetic parents.³⁵ Current UK legislation allows contact to be initiated, although no party is legally required to establish or maintain a connection. The change from complete anonymity to this method is a reflection on how socio-science has evolved. There is now an understanding of how important a socio-biological connection is. The change of approach by the UK is predicted to create a cultural change within society. A 2002 study had found that 5% of families had disclosed to their child about egg donation and 8.6% with sperm donation.³⁶ 'Triad' children often complain of discontinued identities and a feeling of not truly belonging. There have even been calls for this group to be given specific legal protection from harms such as identity disturbance and other psychiatric illnesses that are now known to impact them disproportionately.³⁷

However, this level of transparency also faces criticism. Some argue that allowing a person to locate their genetic parents after a childhood of a "mum and dad" would only cause confusion to their identity.³⁸ They back this up with studies that show that relationships of a child conceived using gamete donation and their social parent is just as strong as the relationship between parents and child conceived using in vitro fertilisation (IVF).³⁹ Conservative sections of society also believe that revealing very personal parts of a family is completely a matter of personal and family choice rather

³⁴ Human Fertilisation and Embryology Act (n12) S31ZF(1).

³⁵ Alice Diver, *A Law of Blood-ties - The 'Right' to Access Genetic Ancestry* (Springer 2014) 3.

³⁶ Susan Golombok et al, 'Families Created by Gamete Donation: Follow-up at Age 2' (2005) 20(1) Human Reproduction 286.

³⁷ Diver (n32) 7.

³⁸ Robert Snowden and Geoffrey Duncan Mitchell, *The Artificial Family: Consideration of Artificial Insemination by Donor* (George Allen and Unwin 1981).

³⁹ Golombok (n36).

than a decision to be made by the state.⁴⁰ Up until the change in 2005, reports into this area of science had recommended that gamete donation be done anonymously, as this would prevent intrusion from the third party into the family and the removal of anonymity would discourage men from considering donating.⁴¹ Those that support donor anonymity also point out that much of the harm caused by the lack of information about a person's genetic parents admittedly comes from studies with adopted children and question the accuracy of the comparison.⁴²

After outlining the current law and debates around surrogacy and gamete donation, the next parts of the article will focus on law reform.

3. Surrogacy law reform

When the law regulating surrogacy was passed it was done so in an era that looked upon 'non-natural' methods of conceiving with great scepticism. This is juxtaposed to society now where it is viewed as a genuine and legitimate path to parenthood.⁴³ Despite calls for reform,⁴⁴ this view has failed to be translated into legislation by various governments and, as outlined above, the law is still restrictive. In this section comparative insights from other jurisdictions are used to recommend potential reforms of the relevant legislation. Two proposed approaches for UK legal reform in this area are: to allow commercial surrogacy the other is to continue to legislate with updated laws that reflect the views of the 21st century. In either case, reforms are highly criticised, with few advocates demanding surrogacy to be banned altogether.

3.1 Legalising Commercial Surrogacy

The first route to be examined is the permission of commercial surrogacy. As was mentioned in the previous section, it is common for UK citizens seeking a surrogate to

⁴⁰ Ian Walker and Pia Broderick, 'The Psychology of Assisted Reproduction - Or Psychology Assisting its Reproduction?' (1999) 34(1) *Australian Psychologist* 38.

⁴¹ Department of Health and Social Security, *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (Cmnd. 9314, 1984) 15.

⁴² F Shenfield, 'Filiation in Assisted Reproduction: Potential Conflicts and Legal Implications'(1994) 9(7) *Human Reproduction* 1348.

⁴³ *CW v NT and Another* [2011] EWHC 33 (Fam). [1] (Baker J).

⁴⁴ Law Commission, 'Building Families Through Surrogacy: A New Law A Joint Consultation Paper' (Law Com No. 224, 2019) para 9.4.

travel abroad, with a particularly common destination being the Ukraine, seen by some as 'dangerous' and 'murky'.⁴⁵ In contrast to the UK, Ukrainian law allows women to receive more than just a reimbursement of their costs for the act of being a surrogate, bringing about a system that views surrogacy as a transaction, allowing for a more legally certain 'contractual' outlook.⁴⁶

However, jurisdictions that allow commercial surrogacy, such as Ukraine, are not without their own issues. Commercial viability rarely results in good ethics. The Ukraine has seen a slow but steady shift towards tighter regulation of international surrogacy as more and more cases are brought to the courts in a reaction to people exploiting Ukrainian surrogates and take advantage of the lack of their parental rights over the child they give birth to.⁴⁷ This was initially seen as a good measure that ensures that the surrogacy agreement is adhered to and a situation does not occur where the birth mother decides she wants to keep the baby and the prospective parents are powerless to do anything, even if the baby is biologically theirs.⁴⁸ However, while Ukrainian law limits the rights of surrogates, it does not prescribe checks on the intended parents, leaving the birth mother powerless to stop the child falling into ill-intentioned hands. An investigation by the Assisted Reproductive Technology Support Centre found that this is an alarmingly common occurrence. They list seven mothers that have attempted to cancel handing over of their children due to fraud, blackmail, or ill intention.⁴⁹ It can be argued that a more contractual outlook on surrogacy that adequately protects surrogates and intended parents is the optimal route as this produces an opportunity for the parties to challenge outcomes of disputes over the child. It would allow trained professionals to decide "in which home the child most likely to mature into a happy and balanced adult and to achieve his fullest potential as a human", avoiding cases where neither party has any say in the outcome.⁵⁰

⁴⁵ *CW v NT and Another* (n43).

⁴⁶ Anastasia Herman, 'Surrogacy Law Changes What To Expect' (2 April 2019) <[⁴⁷ Family Code \(Ukraine\), Article 123.](https://www.anastasiaherman.com/news/2019/4/2/surrogacy-law-changes-what-to-expect#:~:text=On%202018%20several%20surrogacy%20law,has%20its'%20pros%20and%20contras.&text=Cu rrent%20legislation%2C%20namely%20article%20123,parental%20rights%20over%20the%20child.> accessed 8 December 2020.</p></div><div data-bbox=)

⁴⁸ *CW v NT* (n46).

⁴⁹ Assisted Reproductive Technology Participants Centre, 'Surrogate Motherhood: Fraud, Blackmail and Unfair Customers' (19 June 2018) <<https://artpsc.org/en/2018/06/19/>> accessed 11 December 2020.

⁵⁰ *Re P* (n5).

As indicated above, an argument against allowing commercial surrogacy is that it allows exploitation. There is a risk that, as has happened with prostitution, women will be trafficked into countries that allow commercial surrogacy and sold as surrogates.⁵¹ If the UK were to legalise commercial surrogacy, it would be essential that that risk is addressed carefully.

A more contractual approach to surrogacy has also been criticised, with some even calling the conceived children, cattle and merchandise, the mothers reproductive prostitutes and the prospective fathers cuckholds, the surrogate's husbands pimps and the whole system labelled as trafficking.⁵² The Warnock report has addressed this issue and made it very clear that when finances are involved, what can be a very human gesture turns into one party using the other for their own intended purposes.⁵³

However, some disagree with the argument that commercial surrogacy creates a risk of exploitation, arguing that it is mutually beneficial for the parties. Some purport that those at risk of being exploited can be easily identified and as such, support can be offered to them.⁵⁴ So, if a person is economically disadvantaged, the agreement between the surrogate and the prospective parents would need to be examined to make sure that the surrogate is not being forced to accept the prospective parents' demands. This can be achieved by ensuring that the surrogate mother either receives a set payment for the services or that the surrogate mother receives a percentage of the average salary in the country she resides in (in effect a minimum wage), made easy by the contractual nature that commercial surrogacy could have.⁵⁵

The above discussion indicates that there are clear disadvantages and advantages to allowing surrogacy to be practiced commercially. Having said that, carefully managed commercial surrogacy, overseen by the State or state-backed agencies, may offer the most secure and safe environment for all involved in the surrogacy process, both the prospective parents and the surrogate mother.

⁵¹ Sheila Jeffreys, 'Reject Commercial Surrogacy as Another Form of Human Trafficking' *The Conversation* (11 August 2014) <<https://theconversation.com/reject-commercial-surrogacy-as-another-form-of-human-trafficking-30314>> last accessed 1 April 2022.

⁵² Lori B Andrews, 'Surrogate Motherhood: The Challenge for Feminists' (1988) 16 (1-2) *Law Medicine and Health Care* 72, 74.

⁵³ Mary Warnock, *A Question of Life: The Warnock Report on Human Fertilisation and Embryology* (Blackwell 1985) para. 8.17.

⁵⁴ Stephen Wilkinson, 'The Exploitation Argument Commercial Surrogacy' (2003) 14(2) *Bioethics* 169

⁵⁵ *Ibid.*

The England and Wales Law Commission have recently embarked upon a three-year project, analysing the current state of the law that governs surrogacy. The important aspect of this report is that it is going to examine the rights of all the parties that are involved in the surrogacy process, including any risk of exploitation. One of the promising signs from the early stages of this report is the acknowledgement that the legislature in England and Wales have been slow in their response to any societal changes. Acknowledging this will allow them to tackle this issue and surrogacy can be an example to other areas that quick changes to the law that reflect societal views is extremely beneficial to all.⁵⁶ The Law Commission has three specific areas that they aim to make recommendations on. Reflecting the issues raised above, these three areas are parental orders, exploitation of women in international surrogacy arrangements, and what can be done to promote or facilitate domestic surrogacy arrangements. If the report makes real substantive recommendations, it could create positive change in surrogacy processes in the UK. The more pressing question in the current Covid-19 world in which we live is whether the government will have enough appetite and time to implement the changes.

3.2 Updating the Law

While the Law Commission explores ways to promote or facilitate domestic surrogacy arrangements, it is still worth considering how international surrogacy can be facilitated. Therefore, this section will focus on the point in the surrogacy process where parents attempt to bring home foreign-born surrogate children.

The case that illustrates problems that may arise at this point is *Paradiso*, an Italian based case that shows the difficulty of dealing with surrogacy with no international standards.⁵⁷ In this case, an elderly couple in Italy were unable to conceive, a company took them to a Moscow based clinic that offered what was legal in Russia but illegal in Italy, a paid surrogate birthing the child. It was planned that the egg would be from the intended mother. However, it transpired that the child's genetic link to the mother was not proven. As such, the Italian authorities declared the child abandoned, removed it

⁵⁶ Sarah Williams and Emma Williams, 'Surrogacy: It's Time for the Law to Catch Up' [2019] *International Family Law Journal* 121.

⁵⁷ *Paradiso and Campanelli v Italy* (European Court of Human Rights, Grand Chamber, Application No 25358/12, 24 January 2017).

from the intended parents and put it up for adoption. As surrogacy is illegal in Italy, the ECHR ruled that the authorities taking the child was not an Article 8 violation. This decision was extremely troublesome for persons wanting to have children via surrogacy as it removes reliance on Article 8 as a remedy to any issues.⁵⁸ This judgement effectively removes the idea of a *de facto* family by failing to recognise one, when a claim has these three criteria; absence of biological ties, short duration of cohabitation and legal uncertainty created by the applicants themselves.⁵⁹ These criteria will be difficult to meet as surrogacy arrangements, by their very nature, involve situations where intended parents have spent very little time with the child and often surrogacy is necessary due to the intended parents being genetically unable to have children.

Any discussion of modernising UK law to facilitate international surrogacy must be considered in the context of Brexit. Even though Brussels⁶⁰ is included in the collateral damage of Brexit, it continues to be a very useful regulation that remedies any conflict between family law in the EU. It is especially useful in dealing with child abduction and child custody, something that is especially pertinent in case regularly seen when surrogacy agreements break down. Many warned of the dangers of repealing Brussels II, a step that results in a 'domestication without full reciprocity' system.⁶¹ In other words, a decision that is made either in the UK or in the EU is not enforceable in the other jurisdiction. One of the specific issues that the repealing of Brussels II brings about is the reliance that UK lawyers will have on their foreign counterparts when dealing with cross-jurisdictional cases, the type that international surrogacy manifests.⁶² The 1989 case of *Davy-Chiesman* ruled that a solicitor cannot rely solely on counsel.⁶³ This will either result in surrogacy cases requiring specialist solicitors that have a knowledge of the jurisdiction in question or two lawyers being instructed, one in each country. This type of specialised knowledge, or the requirement for dual instruction, will result in the cost of such a case being extremely high, something that

⁵⁸ Marianna Iliadou, 'Surrogacy and the ECtHR: Reflection on Paradiso and Campanelli v Italy' (2018) 27(1) Medical Law Review 144.

⁵⁹ Ibid.

⁶⁰ Council Regulation (EC) No 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility [2003] OJ L 338/1

⁶¹ David Burrows, 'Brexit and Family Law' [2019] 7828(Feb) New Law Journal 7 <<https://www.newlawjournal.co.uk/content/brexit-family-law>> accessed 12 May 2022.

⁶² Ibid.

⁶³ *Davy-Chiesman v Davy-Chiesman* [1984] Fam 48, [1984] 1 WLR 291.

would be devastating to those of a lower economic background. The other result would mean that persons are left with no representation in legal proceedings, something that would create a system that regularly produces results that are not beneficial to the child and would leave prospective parents with nowhere to turn. Thus, it is essential that any form of reform addresses these issues.

The Davy-Chiesman highlights great uncertainty when planning an international surrogacy, with the UK's current stance meaning a conflict of laws arises, creating wholly unforeseen circumstances.⁶⁴ A possible solution would be to move from the birth test⁶⁵ to the intent test. This aims to determine what the intent was when the surrogacy was agreed. This approach was used in California, where the court had to decide who the legal parents were as the intended parents had separated before birth.⁶⁶ This method would remove the risk of a child being left legally parentless and offers protection to intended parents who use donor eggs and sperm.⁶⁷

Applying an intent rather than the birth test would undoubtedly offer a great level of certainty to couples wishing to return to the UK with a child born abroad via a surrogate. However, the need for, and lack of, an international standard remains an issue. This is highlighted by *X and Y*⁶⁸ where the difference in laws created the limping parentage that the UN had warned about.⁶⁹ In this case, an English couple agreed a surrogacy arrangement with a Ukrainian couple. As part of the agreement, the surrogate mother would be implanted with embryos conceived with donor eggs and fertilised by the intended father's sperm, in exchange for payments. When the intended parents wanted to bring their newborn twins home, it became very clear that English and Ukrainian laws clashed, leaving the surrogate and intended parents as well as the children in limbo. Under Ukrainian law, the twins were not the children of the surrogate parents, whereas under English law, they were. The presiding judge, Hedley J, summarised their situation perfectly: 'marooned, stateless and parentless, whilst the

⁶⁴ *X & Y (Foreign Surrogacy)* [2008] EWHC 3030 Hedley J at 8.

⁶⁵ Human Fertilisation and Embryology Act (n9) S33(1).

⁶⁶ *Re Marriage of Buzzanca*, 61 Cal App 4th 1410 (1998).

⁶⁷ Katrina Trimmings and Paul Beaumont, 'International Surrogacy Arrange International Surrogacy Arrangements: An Urgent Need for Legal Regulation at the International Level' (2015) 7(3) *Journal of Private International Law* 627.

⁶⁸ *X & Y* (n64).

⁶⁹ UN General Assembly 'Report of the Special Rapporteur on the Sale and Sexual Exploitation of Children, Including Child Prostitution, Child Pornography and Other Child Sexual Abuse Material' (15 January 2018) 37th Session, UN Doc A/HRC/37/60.

couple could neither remain in the Ukraine nor bring the children to the UK'.⁷⁰ Eventually, after considerable difficulty, the intended parents were granted a parental order and became the children's legal parents. The case clearly highlights the need for uniform international standards for surrogacy arrangements to avoid uncertainty for all parties.

3.3 *Banning Surrogacy*

While some argue and advocate for less restrictive surrogacy laws that facilitate international surrogacy, other support the idea that surrogacy should be made illegal. This is the case in France⁷¹ and Germany⁷² who have outlawed any type of surrogacy, be it altruistic or commercial. This could be a sensible, short term way of monitoring something that the State feels they do not understand fully, allowing for debate and research before appropriate laws are passed.⁷³ However, one of the most persuasive reasons to ban surrogacy relate to potential exploitation and ethical factors already mentioned above. Activist groups argue that just because something exists, it should not be regulated. They say that practices such as slavery and prostitution exist but claim that there are no calls for these to be regulated.⁷⁴

When a country bans surrogacy, the issue is that the citizens within that state can still travel abroad and find a surrogate elsewhere, and this is when the above-mentioned limping parentage dilemma appears. This highlights that, to truly tackle and regulate surrogacy effectively, a global approach with a wide-reaching set of international standards is essential. An international treaty akin to the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption is necessary. This would require the signatories to agree to the creation of a central authority that liaises with foreign counterparts, protect any vulnerable surrogates, and create a system that results in the smooth and safe return of foreign-born children.⁷⁵

⁷⁰ X & Y (n64).

⁷¹ Code Civil (France), Article 16-7.

⁷² Act 74/90 (Germany).

⁷³ Trimmings and Beaumont (n67).

⁷⁴ Marie-Josèphe Devillers, 'Abolishing Surrogacy Would Take Real Political Courage' (7 October 2020) <<https://nordicmodelnow.org/2020/10/07/abolishing-surrogacy-would-take-real-political-courage/>> accessed 6 December 2020.

⁷⁵ Trimmings and Peaumont (n67).

So far, the article demonstrated that the UK's legislation fails to govern surrogacy adequately. The system adopted by the Ukraine was explored as an example of a country that allows commercial surrogacy. However, the Ukraine's commercial approach to surrogacy can be seen to have been unsuccessful as it leaves surrogates powerless if they find out that the intended parents were not fit to be parents and prevent them from taking custody of the child. It was also demonstrated that commercial surrogacy can cause exploitation of vulnerable parties, in this instance the surrogates. The article then explored the potential, and arguably the optimal, resolution to this: State or State backed agency intervention that adequately regulates things such as payments to surrogates and the process of passing custody of the child from surrogate to intended parents in a way that protects both parties. This addresses the two areas of reform currently explored by the Law Commission: parental orders and the prevention of exploitation of women in international surrogacy arrangements. The article also discussed international surrogacy and highlighted challenges created by Brexit and the resulting unenforceability of foreign decisions and the need for dual instruction. It has been suggested that the resulting uncertainty could be lessened by moving from the birth test to the intent test to establish parenthood. However, even then there is a need for the creation of uniform international standards.

While there is a push for law reform to bring surrogacy law in line with developing social attitudes that see surrogacy in a positive light, the article also noted calls to ban the practice. While this might allow for more time to research and raise awareness about surrogacy, it might increase the demand for potentially exploitative or uncertain international surrogacy arrangement in the meantime.

4. Reforming Gamete Donation

Contrary to the UK's conservative view on surrogacy, it is one of the more forward-thinking countries that has followed societal and scientific changes when it comes to gamete donation. Having said that, the law still requires reforms. For example, one of the most criticised areas of the HFEA 2008 is its failure to offer the same level of support to the donors and donor recipients as it does to donor-conceived people. The 2009 HFEA 2008 working group stated donor-conceived children were given more support due to the lack of control that the donor-conceived people had in any part of

the process, making them susceptible to distress when information about donors becomes available to them at the ages of 16 and 18.⁷⁶ This is clearly a very good reason to offer services to this group, but not for the complete lack of any statutory duty to offer any level of service to those also in the 'triad'. It is detrimental to the donor and the donation recipient, but it may also prove detrimental to the donor-conceived as the other two people in the triangle may be unable to offer the level of support required to create a meaningful relationship.⁷⁷ The idea of competing "rights" in this highly emotional scenario needs to be extinguished. All the parties have needs and expectations that need to be managed carefully and in a way that encourages openness, allowing the donor and the donor-conceived to create a fulfilling relationship.⁷⁸ This idea is supported by the medical profession. They understand that a young adult contacting a donor, who may have no legal children of their own, can be extremely daunting. The donor-conceived person will likely be seeking information that they may not have or may ask questions that donors do not know how to answer. Offering them a controlled and safe environment, akin to a contact centre, would be beneficial to both parties as they venture into their new relationship.⁷⁹

Another area, that is becoming more prominent as technology advances and one that the UK may soon be forced to act upon is posthumous gamete donation. The UK currently has a sperm shortage and compensates for this by importing sperm from other countries, namely 4000 from the USA and 3000 from Denmark.⁸⁰ The idea of posthumous donation was first reported in 1980, using either electrostimulation or surgery, both raising ethical issues.⁸¹ Few believe that taking a heart from a willing person after their death to save the life of another allows a person's reproductive cells to be harvested to allow others to have children. Clearly a larger debate is required before this practice is either allowed or banned. In absence of clarity, many Western

⁷⁶Rosetta Wotton, 'Opening the Register Policy: A Principled Approach' (2009) <http://hfeaarchive.uksouth.cloudapp.azure.com/www.hfea.gov.uk/docs/AM_Item_9_Jan09.pdf> accessed 26 December 2020.

⁷⁷ Leah Gilman and Petra Nordqvist, 'Organizing Openness: How UK Policy Defines the Significance of Information and Information Sharing about Gamete Donation' (2018) 32(3) *International Journal of Law, Policy and the Family* 316.

⁷⁸ Andrea Braverman and William Schlaff, 'Recommendations for Gamete and Embryo Donation: A Committee Opinion' (2013) 99(1) *Fertility and Sterility* 47.

⁷⁹ Ibid.

⁸⁰ Nathan Hodson and Joshua Parker, 'The Ethical Case for Non-directed Postmortem Sperm Donation' (2020) 46(7) *Journal of Medical Ethics* 489.

⁸¹ Cappy Rothman, 'A Method for Obtaining Viable Sperm in the Post-mortem State' (1980) 34(5) *Fertility and Sterility* 512.

countries such as France, Germany, Sweden, and Norway, have decided to ban posthumous donation, with only Hungary leading the way and expressly allowing it.⁸² Allowing posthumous gamete donation would, theoretically, rectify the drop in numbers of sperm donors that has occurred since the removal of anonymity. A good comparison to make with gamete donation is living and posthumous kidney donation. Many would like to donate but feel that the possible effects of doing so whilst alive is not worth the risk to their life, and the idea of doing so after their death is much more appealing.⁸³

The fact that posthumous gamete donation is currently outlawed in many States indicates that there are potential negative effects that must first be analysed before the UK can make a final decision. The most important consideration is the effect on the donor-conceived person. As was discussed above, it is now widely accepted that access to a person's ancestry is essential to a sense of identity and a person's mental health. This will obviously be unavailable if the person that donated their gametes is deceased. Some argue that a child who would otherwise not have been able to be conceived is in a better position than not being alive.⁸⁴ Evidence also suggests that a child's desire is not to strike a child-parent relationship with their genetic parent, but is instead to inquire about their genetic origins.⁸⁵ However, some believe that if there is a substantial risk of the child being negatively impacted due to the donor being deceased, the process should not be allowed, as it is imperative that a child would be able to live a worthwhile life.⁸⁶ It is also important that, since the donor is dead, the death is not due to a genetic disease that could be passed onto the donor-conceived, this issue is easily solved by using the current process that living donors have to follow. If a person wishes to be on a posthumous donor register, they should first be made to clear a health screening.⁸⁷

Furthermore, it is important to address how deceased donor's family may react and what legal relationship they would have with any offspring. As is the case with tissue donation, knowing that the deceased "lives on" can bring great comfort to a family, but

⁸² Law No. 154/1997, Health Care Law (1997) (Hungary).

⁸³ Hodson (n80).

⁸⁴ Derek Parfit, *Reasons and Persons* (Oxford University Press 1984).

⁸⁵ Hodson (n80).

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

knowing that the deceased lives on through a child may lead to spouses or parents wanting access. This can be viewed as an unwanted intrusion into the new donor family's life, or as a way in which the donor-conceived may be able to access their heritage. Any decision that is made by the Government must carefully consider the ramifications of both policies. If posthumous gamete donation is to be successful for all parties, the needs and expectations of all must be carefully managed. The fact that wider society looks favourably upon posthumous gamete donation is a sign that there is a willingness for policy to be discussed. It is especially favourable when being used in a specific case to produce a single child with a person the deceased was in an existing relationship with, a situation that might also ease the issue of how to treat the deceased's family in relation to the donor-conceived.⁸⁸

In summary, the laws that govern gamete donation are much more fitting to the thoughts of the public. They allow for a certain and safe process and have a system that this article believes any surrogacy reforms should follow, one of state governance and rules that dictate what happens in the most sensitive parts of the process. However, as was stated above, that does not mean that there are not areas that could be improved upon. There is a clear need to improve the level of support that is offered to the parties involved in the process of birth via gamete donation. It can be a confusing and possibly emotionally and mentally damaging time for both the child conceived and the parents for several reasons and proper support would ensure that all involved are given the best chance of fully benefitting from this marvel of science.

The less pressing area of address is ensuring that the laws keep pace with the ever-evolving science. This was highlighted using the area of posthumous gamete donation, an act that prior to the law being drafted was not viable, and now is. The law cannot be allowed to stagnate as has happened historically. The legislature must ensure that the level of reform that is required for surrogacy is never reached. Allowing this to happen would inevitably mean that there are persons that are being treated unjustly and that there are likely people either missing the opportunity to conceive the way that they want, or they are having to go elsewhere to achieve this.

⁸⁸ Ibid.

5. Conclusion

The article has demonstrated that, where UK legislation has been recently updated, as with the gamete donation laws, it has been done well. It has considered advances in science and the changes in societal thinking. However, where the law has been left for decades, as it has with the law on surrogacy, it is severely lacking. The current legislation creates a very difficult system for citizens that are attempting to benefit from a normal, alternative, method of having a child.

The recommendations that were explored in both sections examined ways in which the laws could be improved. These ranged from creating new pieces of legislation, desperately needed to avoid the limping parentage issue that plights surrogacy, to minor tweaks that could improve the recently updated gamete donation laws. Changes to surrogacy laws may leave the UK in a position that sees criminal gangs able to exploit the system and changes to gamete donation law may see unrealistic expectations from deceased donors.

To conclude, surrogacy laws require immediate reform. The longer it is left in its current state the more damage it will do. The upcoming draft Bill is going to be crucial moment for reform. It is extremely likely that legislators will recommend wide reaching reform. It is vital that the Government, even in the Covid-19 world, pass this Bill into law and create a safe and legally certain environment for all parties involved in surrogacy. In addition, the international community also needs to act, with a treaty being the optimal outcome. There is a danger of increased uncertainty as the Brussels II regulation is repealed. There needs to be a solution that creates certainty between the European's and UK's jurisdictions to avoid recurrence of the issues that have already been explored in this article.

Compared to surrogacy, the law governing gamete donation reflects scientific progress and greater social acceptance of egg and sperm donation. While it needs less fundamental reform, it could still be improved by offering a similar level of support for donor-conceived people as to donors and donor-recipients. Additionally, to make the law more future-prove, legislators could begin to address the possibilities for posthumous gamete donation and how it could be done in an ethical way. The legislation that governs gamete donation is in a much better state with only minor changes required to improve it. The changes discussed are ethically sensitive, so

great care and extensive debate is necessary before any decision is made. However, allowing posthumous donations to an existing partner would create a sensible and safe way of trialling the technology.

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