

Governance of the Legal and Domiciled Parent:  
International Surrogacy, Border Controls and  
the 'Disconnected' Family.

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## **Abstract**

Rita D'Alton-Harrison - Governance of the Legal and Domiciled Parent: International Surrogacy, Border Controls and the 'Disconnected' Family.

The thesis is grounded in empirical research using mixed methodology to examine the way in which commissioning couples report their experiences of international surrogacy to the courts. International surrogacy is the process by which couples travel abroad to enter in to an arrangement for another woman to carry and/or conceive a child for them with the expectation that the child will be handed over to the commissioning couple following the birth. The original contribution made by this thesis is that it seeks, by re-examining witness statements, reports and court judgments to argue that reported experiences of international surrogacy can have an effect within the judicial system through a knowledge exchange that is capable of providing an equilibrium within the family unit through judicial policy. The dichotomy of the private and public sphere of sexual relationships assumes a new and unintended political osmosis that moves the discourse away from exploitation to one of mutual dependency, welfare and family formation. Commissioning couples become autodidactic during their risk aversion choices but their self-acquired knowledge has benefits in promoting social change and calls for action leading to an oriented judicial attack on the statutory provisions assigning legal parentage status through parental orders.

## **List of Abbreviations**

ABA – American Bar Association

ART – Assisted Reproductive Technologies

ASRM – American Society for Reproductive Medicine

BASW – British Association of Social Workers

BMA – British Medical Association

Cafcass – Child and Family Court Advisory and Support Service

DAP – Data Access Panel

ESHRE – European Society of Human Reproduction and Embryology

GRO – General Register Office

HFEA – Human Fertilisation and Embryology Authority

HMCTS – Her Majesty's Courts and Tribunals Service

NHS – National Health Service.

NICE – National Institute for Health and Care Excellence

PAA – Privileged Access Agreement

POR – Parental Order Reporter

RCOG - Royal College of Obstetrics and Gynaecology

UKVI – UK Visa and Immigration

UNCRC – United Nations Convention on the Rights of the Child 1989

UNESCO – United Nation's Educational Scientific and Cultural Organisation

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## Introduction

Mr Justice Hedley observed in the case of *X and Y (Foreign Surrogacy)*<sup>1</sup> in 2008 that the commissioning couple's experience of international surrogacy had been categorised by stress, delay and expense and that 'the path to parenthood has been less a journey along a primrose path, more a trek through a thorn forest'.<sup>2</sup> These comments were made shortly before the Human Fertilisation and Embryology Act 2008<sup>3</sup> ('2008 Act') came in to effect on 6<sup>th</sup> April 2009.<sup>4</sup> This legislation included provisions on parentage and the process for obtaining legal recognition of parentage following a surrogacy arrangement. Yet even after the implementation of these new statutory provisions Mr Justice Hedley noted once again in the case of *Re L*<sup>5</sup> that the problematic nature of international surrogacy and the commissioning couple's entitlement to parentage remained, as couples were still receiving incorrect information about the international surrogacy process including the immigration process for re-entering the UK with the child after conclusion of the surrogacy arrangement.<sup>6</sup>

International surrogacy therefore formed the main areas for examination in this thesis and in particular the parentage process. Whilst family theorists such as Val Gillies<sup>7</sup> have argued for retaining and centring family as an important and enduring sociological framework for examination, equally parentage and claims to parentage are also an important part of that framework. International surrogacy, the process of travelling to another country to find a woman to carry and/or conceive a child for another or others is lawful in the UK but is only partially regulated. The 2008 Act and its 1990 predecessor regulate fertility treatments in UK licensed clinics but the law does not specifically extend to overseas clinics or self-insemination by the parties.

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<sup>1</sup> [2008] EWHC 3030 (fam).

<sup>2</sup> *ibid* [2].

<sup>3</sup> Human Fertilisation and Embryology Act 2008 (HFEA 2008).

<sup>4</sup> This legislation amended parts of the HFEA 1990.

<sup>5</sup> *Re L (a minor)* [2010] EWHC 3146.

<sup>6</sup> *ibid* [8].

<sup>7</sup> V Gillies, 'From Function to Competence: Engaging with the New Politics of Family' (2011) 16 (4) Sociological Research Online 11.

Legal parentage involves a complex interaction between family law, immigration law and the differing laws across borders that can potentially cause confusion for commissioning couples embarking on an international surrogacy journey. Legal parentage rather than social parentage drives the formalisation and legitimisation of the surrogacy process.

The aim of this thesis was therefore to examine the processes and legal structures in place to transfer legal parentage to commissioning couples completing international surrogacy arrangements with a particular focus on the law in England and Wales. The motivations and experiences of couples completing an international surrogacy arrangement but who did not go on to apply for a parental order are outside the scope of this thesis. Using a central research question that inquired in to the extent that the legal definition of parentage might inform the legal experiences of commissioning couples, the goal of the research was to examine the interplay between the UK laws on parentage within international surrogacy and the reported accounts of the commissioning couples subject to those laws. Sub-research questions were also used to examine wider issues of rights and discrimination pre and post the grant of a parental order.

The empirical research focused on the written and spoken word from which to derive meaning. It examined what Sandra Hale and John Gibbons<sup>8</sup> describe as 'secondary realities'. These are defined as the events that are subject to the litigation and form part of the courtroom process. Secondary realities have value to the extent that the retelling of stories can tell us something about individual lived experiences in retrospection.

The first stage of the document research (involving 32 parental order case files) was approached by examining the accounts of commissioning couples as re-told by them through their witness statements as well as the accounts re-told to

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<sup>8</sup> See S Hale and J Gibbons, 'Varying Realities Patterned Changes in the Interpreter's Representation of Courtroom and External Realities' (1999) 20 (2) *Applied Linguistics* 203.

Parental Order Reporters (“PORs”) who then reproduced those accounts in their reports. PORs are court probation officers responsible for assessing the welfare of the child for the court. Once a parental order application is made PORs interview commissioning couples in order to make recommendations to the court as to what order would be in the child’s best interests based on a welfare checklist.

To some extent the witness statements of the couples contained reflexivity in construction. Reflexivity in this sense is used to describe the knowledge construction of the events by commissioning couples through self-reference, which in turn reveals a level of consciousness through the re-telling process. Sharing with others what has been learnt is an important part of the process of making sense of the world as individually perceived.

It was possible to analyse the accounts to see how international surrogacy is framed at a micro-level<sup>9</sup> (at an individual level) through interactions between the commissioning couple, the surrogate and clinic staff. Narrative Research and Thematic Analysis were used as the methodological vehicles to analyse the data in this first stage of the research.

The second stage of the document research involved analysis of 31 reported judgments using Forensic Linguistics as a methodological tool to analyse the legal language used by experts to frame international surrogacy. This also provided an opportunity to examine how experts with reporting functions such as lawyers and PORs used language when drafting witness statements and reports. The reporting of commissioning couples’ ‘secondary realities’ could also be examined at a meso-level,<sup>10</sup> used in this sense to denote the examination at a larger scale by considering possible effects on a legal

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<sup>9</sup> A sociological term used to denote analysis of small-scale interactions between individuals. See its main proponent George Herbert Mead from the Chicago School of Sociology linked to ‘symbolic interactionism theory’ in works such as George H Mead, *Mind, Self and Society: From the Standpoint of a Social Behaviourist* (First published 1934, University of Chicago Press 1967).

<sup>10</sup> A sociological term used to denote for example a small population size such as a community or organisation.

community and its legal structures and the wider reproduction community through messages issued by the judiciary. It is at the meso-level that policy begins to take shape. This in turn has affected judicial policy by moving it to one that is 'orient – focused'<sup>11</sup> to family unification. The concept map of the findings from this thesis can be found at Appendix 3.

Thought processes and legal processes become entwined in the design, structures and methodology of this thesis which has language and law as the core of analysis. The thesis argues that commissioning couples have taken an autodidactic (self-taught) approach to surrogacy and this type of self-education or attainment of knowledge is without regulatory guidance. This autodidactic approach has fuelled risk-aversion practices by couples but has also led to successful outcomes.

### **Terminology**

As the primary focus of the thesis is on the legal structures surrounding an application for a parental order, in order to acknowledge the role that contracts play in the process the thesis uses the term 'commissioning couple', 'commissioning mother' and 'commissioning father' to reflect the contractual and payment stages. However, the term 'surrogate' is used as opposed to 'surrogate mother' to denote that the focus of the research is on ultimate rather than originating parentage.

'Biology' is used to denote physiology and the functions of bodily parts and is used in particular when referring to the process of reproduction and the gestational aspects. This is distinguished from 'genetics,' which is used to refer to inherited characteristics.

As the main methodological approach is Narrative Research the term 'stories'<sup>12</sup> is used alongside 'narratives' and 'accounts' to refer to the commissioning

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<sup>11</sup> A term used to denote a willingness to tailor or adapt existing law to specified circumstances.

<sup>12</sup> Eg Jerome Bruner, *Making Stories* (Harvard University Press 2003).

couples' witness statements and the spoken accounts given to the POR although it is accepted that these stories are just partial stories.

The legislative provisions relating to surrogacy are found in a number of different Acts of Parliament and each have differing territorial extents with some reserved matters for jurisdictions such as Scotland and Northern Ireland. As such the empirical research only focuses on the law in England and Wales. However, the main legislative provisions on parentage and parental orders cover England, Wales, Scotland and Northern Ireland and as such reference is made to UK surrogacy legislation in this thesis.

### Thesis Structure

The findings are discussed across three separate chapters in order to isolate for the reader the particular findings attributable to the use of each of the three methodologies adopted. Whilst some findings addressed the research questions additional findings were also identified during the data analysis.

Chapter one sets out the background surrounding the move towards the regulation of international surrogacy and examines some of the weaknesses in the present law, which have been termed 'disconnects'. Disconnects is used in the sense of reflecting a break in the connection between regulation of domestic surrogacy in licensed clinics and the lack of regulation of international surrogacy in overseas licensed clinics but also serves as a useful verb to describe the lack of connection between immigration law and family law in this field and the arguments advanced to uncouple surrogacy laws from adoption laws.

Chapter two examines the conceptual and evidence-based nature of surrogacy in order to highlight some of the academic debates surrounding international surrogacy that might provide a reference point for the future design of regulation. Whilst the written voices in this thesis mirrored some of the conceptualised voices of academics in the discourse surrounding international surrogacy there were also stark differences in the reframing of the practice. This chapter also provides a literature review.

Chapter three explains the mixed methodology and methods approach to the data collection and analysis. In particular it attempts to provide justification for the mixed approach, chosen in order to generate findings from multi-layered and multi-dimensional text. This chapter also explains the correlation between Narrative Research, Forensic Linguistics and Thematic Analysis.

Chapter four provides an overview of the findings from the Narrative Research analysis drawing on Bruner's<sup>13</sup> 'life-meshing' approach to narratives (discussed in chapter 3). Meaning is derived from words and sentences using semantics to signify key phrases, signs and words or other signifiers within the sentence structure such as punctuation. Metaphors were also examined because of their ability to hide as well as reveal meaning. Another method of language used by the actors in this study was the language of re-formation in the sense of using memory to creatively reconstruct the narrative through reported speech. This was evident in all witness statements and parental order reports.

Chapter five continues the analysis of language by employing a different methodological vehicle, one that examines the construction of legal language, namely Forensic Linguistics. The language used by the lawyers and PORs in the drafting of witness statements and reports was analysed using a traditional narrative research tool of William Labov and Joshua Waletzky's<sup>14</sup> six stages of story-telling but applying it to legal language (discussed in chapter 4 and 5). Semantics was again employed to decipher meanings in the framing of international surrogacy by PORs and the judiciary. Again metaphors were examined but paying particular attention to judicial metaphors by drawing on the work of George Lakoff and Mark Johnson.<sup>15</sup> The analysis attempts to understand how the use of 'voices' to frame the practice of international surrogacy might have wider implications. In particular the use of a new kind of

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<sup>13</sup> J Bruner, 'Life as Narrative' (1987) 54 (1) *Social Research* 1 and reprinted in (2004) 71 (3) *Social Research* 691.

<sup>14</sup> W Labov and J Waletzky, 'Narrative Analysis' in J Helm (ed) *Essays on the Verbal and Visual Arts* (University of Washington Press 1967) 12.

<sup>15</sup> George Lakoff and Mark Johnson, *Metaphors We Live By* (First published 1980, The University of Chicago Press 2003) 236.

metaphor is identified, 'sensory metaphors' intended to touch, change and affect behaviour.

Chapter six describes the Thematic Analysis findings, which essentially draws on the language analysed in the Narrative and Forensic Linguistics part of the research (chapters four and five) and thus provides the 'big picture' of the research. Three key themes of Networks and Relationships, the 'Autodidactic Consumer' and the Re-Imagining of International Surrogacy were identified together with associated sub-themes and connected streams.

Finally chapter seven reflects upon some of the issues arising from the findings in chapters four, five and six to consider how these findings might assist the future design of regulation governing international surrogacy to improve the experiences of couples undertaking the international surrogacy journey. In the conclusion to chapter seven there is a call for a new consolidating Surrogacy Act that distinguishes between home and international surrogacy practices with a particular emphasis on cross border cooperation and regulation of clinics.

It is important to be mindful of the criticisms of the interpretive approach adopted in this research and the difficulties involved in treating information from narratives as a form of data that can be analysed scientifically in order to give an authentic insight into people's experiences<sup>16</sup>. However, it is arguable that the role of the researcher is to reveal a story or to shine a light on one aspect of the social world whether this is at a local or national level. Accounts from narratives can be useful in providing collective stories about international surrogacy to help form a reality, however limited, as well as helping to highlight contradictions in alternative accounts of international surrogacy such as those of politicians, the media or the medical profession. Therefore whilst it is accepted that the findings from the data analysis of the narratives in this thesis cannot be representative of the experiences of all couples involved in international surrogacy and that the accounts are partial accounts, it does provide a lens through which to begin to examine some of the issues facing a

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<sup>16</sup> David Silverman, *Interpreting Qualitative Data: Methods for Analysing Talk, Text and Interaction* (Sage Publications 2001) 109.

small group of couples who embarked on a surrogacy journey across a period of almost five years from April 2009 – January 2014 and the reaction of the legal experts to such cases.



## CHAPTER ONE

### Surrogacy – A Case for Coherent Regulation

#### 1.1 Introduction

The acceptance of surrogacy can be traced back to the sixteenth century,<sup>17</sup> with references also found in the bible,<sup>18</sup> but this has not made it universally acceptable as can be seen by the polarised academic discourse surrounding the subject<sup>19</sup> and research suggesting that members of the public view surrogacy as problematic.<sup>20</sup> Surrogacy still remains a contentious and closed issue in society.<sup>21</sup> It exposes the parties involved to certain risks as well as making them susceptible to exploitation and harm and this extends also to the resultant child. As such, the *parens patriae*<sup>22</sup> of the judiciary becomes important in ensuring that the rights of the child are protected. These include the rights of the child to form a relationship with its intended parents.

The word surrogacy derives from the latin *surrogatus* meaning 'substituted'. The surrogate may use her own eggs in the fertilisation process in which case she will be genetically related to the child (this practice is known as, 'genetic', 'traditional' or 'partial' or 'straight' surrogacy and will hereinafter be referred to

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<sup>17</sup> Eg fourteenth century Lipit – Ishtar Code of Mesopotamia and the 1772 Babylonian Code of Hammurabi instruments, which regulated the practice of surrogacy.

<sup>18</sup> Book of Genesis 16.1 – 16.16, which refers to the maid of Abraham and Sarai acting as a surrogate for them in the birth of their son Ishmael.

<sup>19</sup> See discussion in chapter 2.

<sup>20</sup> Eg AE Poote and O Van Den Akker, 'British Women's Attitudes to Surrogacy (2009) 24 (1) Human Reproduction 139 and C Petitfals, MT Munoz Sastre, P Clay Sorum, E Mullet, 'Mapping People's Views Regarding the Acceptability of Surrogate Motherhood' (2017) 35 (1) Journal of Reproductive and Infant Psychology 65 relating to the views of the French individuals and JE Chliaoutakis, S Koukouli and M Papadakaki, 'Using Attitudinal Indicators to Explain the Public's Intention to have Recourse to Gamete Donation and Surrogacy' (2002) 17 (11) Human Reproduction 2995 in relation to the views of Greek individuals.

<sup>21</sup> See some of its published detractors as discussed in chapter 2.

<sup>22</sup> Loosely translated as 'Parent of the Nation' and used to denote the court's role as protector of children.

as “genetic surrogacy”). Alternatively the surrogate may have an embryo implanted in her womb using donated eggs either from the commissioning mother or a separate egg donor (this practice is known as ‘gestational’ or ‘host’ or ‘full’ surrogacy and will hereinafter be referred to as “gestational surrogacy”).<sup>23</sup> The surrogate may choose to provide her services altruistically or to charge a fee but in England and Wales ‘money or other benefits’ must be authorised by the court.<sup>24</sup> It is left to the courts to decide what amounts will be authorised in the best interests of the child.<sup>25</sup>

The current laws on surrogacy can be found in separate pieces of legislation namely the Surrogacy Arrangements Act 1985 (“the 1985 Act”) that applies only to England and Wales, the Human Fertilisation and Embryology Act 1990 (‘the 1990 Act’) that applies only to England and Wales (except those parts amended by Part 1 of the 2008 Act which apply to England and Wales, Scotland and Northern Ireland).<sup>26</sup> Newer legislation such as the 2008 Act have attempted a more consistent unification of the law across the UK and apply to England and Wales, Scotland and Northern Ireland<sup>27</sup> and the Human Fertilisation and Embryology (Parental Orders) Regulations 2010 (which applies the Adoption and Children Act 2002 to surrogacy) also applies to England and Wales, Scotland and Northern Ireland.<sup>28</sup> The most recent amending legislation to the surrogacy laws remains the 2010 regulations.<sup>29</sup>

The law in England and Wales partially regulates surrogacy under the Human Fertilisation and Embryology Acts 1990<sup>30</sup> and 2008.<sup>31</sup> The Human Fertilisation

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<sup>23</sup> These terms are taken from the British Medical Association’s publication *Changing Conceptions of Motherhood* (BMA publications 1996) and remain valid to date.

<sup>24</sup> See HFEA 2008, s 54 (8).

<sup>25</sup> See the use of judicial discretion in the cases of *Re C* (Application by Mr. and Mrs. X under s.30 of the Human Fertilisation and Embryology Act 1990) [2002] 1 FLR 909 and *X and Y* (n 1), [19].

<sup>26</sup> See the explanatory notes to HFEA 2008, para 19.

<sup>27</sup> HFEA 2008, para 18.

<sup>28</sup> See the HFEPOR 2010, s 1 (3).

<sup>29</sup> HFEPOR 2010.

<sup>30</sup> Note that Part 2 of the 1990 Act relating to parenthood extends only to England and Wales and are reserved matters for Scotland and Northern Ireland.

and Embryology Authority (“the HFEA”) a body originally set up under the Human Fertilisation and Embryology Act 1990, regulates surrogacy performed in a licensed clinic in England and Wales.<sup>32</sup> However, private arrangements are not regulated, save that all commissioning parents who want to be legally recognised as the parents must apply for a parental order at which point they must meet ten criteria<sup>33</sup> which include the application being made within six-months of the child’s birth,<sup>34</sup> domicile in the UK by one of the applicants<sup>35</sup> who must be at least 18,<sup>36</sup> a genetic connection to the child by at least one of the applicants<sup>37</sup> and the requirement that the applicants are a couple.<sup>38</sup>

Single people (whilst being able to access surrogacy) cannot yet apply for a parental order. The child must also be living with the couple at the time of the application<sup>39</sup> and the surrogate must have consented to this.<sup>40</sup> The surrogate’s consent must have been given no earlier than six weeks after the birth of the child<sup>41</sup> and the surrogate must be a person other than the applicants<sup>42</sup> and the surrogate may only be paid ‘reasonable expenses.’<sup>43</sup> The question of what amounts to reasonable expenses is not defined in the legislation but is intended to refer to expenses related to the pregnancy and birth rather than monetary compensation for the provision of a child.

It is also illegal for third parties to negotiate, facilitate or arrange a surrogacy.<sup>44</sup>

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<sup>31</sup> Note that the sections of Part 1 of the 2008 Act that amend the 1990 Act and Parts 2 and 3 of the 2008 Act extend to England and Wales, Scotland and Northern Ireland, see the explanatory notes to HFEA 2008, para.18.

<sup>32</sup> Yet the HFEA did not provide detailed advice on surrogacy in its Code of Practice until 8<sup>th</sup> October 2013. See Guidance Note version 3.0>  
<http://www.hfea.gov.uk/501.html>>accessed on 8 December 2013.

<sup>33</sup> HFEA 2008, s 54.

<sup>34</sup> HFEA 2008, s 54 (3).

<sup>35</sup> HFEA 2008, s 54 (4) (b).

<sup>36</sup> HFEA 2008, s 54 (5).

<sup>37</sup> HFEA 2008, s 54 (1) (b).

<sup>38</sup> HFEA 2008, s 54 (2).

<sup>39</sup> HFEA 2008, s 54 (4) (a).

<sup>40</sup> HFEA 2008, s 54 (6).

<sup>41</sup> HFEA 2008, s 54 (7).

<sup>42</sup> HFEA 2008, s 54 (1) (a).

<sup>43</sup> HFEA 2008, s 54 (8).

<sup>44</sup> See Surrogacy Arrangements Act 1985 (SAA 1985), s 2 & s 2A.

Regulation does not apply to surrogacy that is performed non-surgically (without the assistance of a licensed clinic), namely through artificial or natural insemination of the sperm of the donor commissioning father and the surrogate's eggs. Similarly if a commissioning couple choose to use a clinic outside the UK in what is known as inter-country or international surrogacy (hereinafter called "international surrogacy"), then the surrogacy arrangement is not regulated. However, the courts and immigration authorities will become involved in the process once the commissioning couple return to the UK. This is because the commissioning couple must seek entry clearance for the child<sup>45</sup> and may apply to the courts for a parental order<sup>46</sup> to become recognised as the legal parents.

Academics have argued that the legislation on surrogacy, as it applies to England and Wales and parts of the UK, remains complex, incoherent and conflicting in places. In particular, the misshapen mix of rules and discretion in the 2008 Act has previously been identified as problematic by Kirsty Horsey and Sally Sheldon in their 2012 summation of the law<sup>47</sup> as well as others.<sup>48</sup> Since then a number of key judicial decisions has seen the emergence of case-based reform<sup>49</sup> discussed further in chapter one. Judges have also authorised the publication of private surrogacy judgments to act as a cautionary message to couples seeking to become parents through international surrogacy arrangements whilst at the same time using statutory interpretation to sanction the practice. The areas that continue to generate the most litigation are the

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<sup>45</sup> Immigration Rules 1994 as amended in December 2013.

<sup>46</sup> HFEA 2008, s 54.

<sup>47</sup> K Horsey and S Sheldon, 'Still Hazy After all These Years: The Law Regulating Surrogacy' (2012) 20 (1) Medical Law Review 67.

<sup>48</sup> Eg M Fox, 'The Human Fertilisation and Embryology Act 2008: Tinkering at the Margins' (2009) 17 (3) Feminist Legal Studies 333, C Fenton-Glynn, 'The Regulation and Recognition of Surrogacy under English Law: an Overview of the Case Law' (2015) 27 (1) Child and Family Law Quarterly 83 and K Horsey, 'Fraying at the Edges: UK Surrogacy Law in 2015' (2016) 24 (4) Medical Law Review 608.

<sup>49</sup> Eg A, A v P, P, B [2011] EWHC 1738, Re P-M (Parental Order: Payments to Surrogacy Agency) [2013] EWHC 2328 (fam), Re X (a Child) (Surrogacy: Time Limit [2014] EWHC 3135) and Re Z (A Child) (No.2) [2016] EWHC 1191 (fam).

enforceability of surrogacy contracts<sup>50</sup> and the authorisation of payments to a surrogate where such payments amount to more than reasonable expenses and therefore have to be retrospectively authorised by the courts to avoid the resulting child being homeless and/or stateless.<sup>51</sup> Aspects of section 54 on time limits, domicile and the 'home' of the child have also required judicial intervention as will be discussed later in this chapter. Yet there are dangers that inconsistencies will arise in allowing regulation to develop through case law rather than legislation.<sup>52</sup> Natalie Gamble<sup>53</sup> argues that the UK system of partial regulation that allows yet restricts surrogacy has created a ticking time bomb. There have been calls for a unified Surrogacy Act as far back as 1998<sup>54</sup> but so far the government has resisted<sup>55</sup> although the Law Commission are currently considering surrogacy as a possible project for inclusion in its 13<sup>th</sup> programme of law reform.<sup>56</sup>

Incorporating changes to the surrogacy laws within the 2008 Act that was largely related to embryo research, meant that important changes to the surrogacy laws were not fully debated and this included the question of whether surrogacy should be fully regulated particularly in light of the growth of

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<sup>50</sup> See cases such as *Re C (a minor) Ward Surrogacy* [1985] Fam. Law 191 (the baby cotton case), *Re P (minors) (wardship: surrogacy)* 1987 2 FLR 421 and *W v H (Child Abduction: Surrogacy) (No.1)* [2002] 1 F.L.R. 1008.

<sup>51</sup> See cases such as *In the Matter of C (A Child)* [2002] EWHC 157, FLR 1156, *X and Y (n 1)*, *Re S (Parental Order)* [2009] EWHC 2977, *Re L (n 5)*, *In the Matter of X and Y (Children)* [2011] EWHC 314, *A v P (n 49)*, *J v G* [2013] EWHC 1432 (fam) and *Re P-M (n 49)*, *Re C* [2013] EWHC 2408, *Re W* [2013] EWHC 3570 (fam), *Re WT (Surrogacy)* [2014] EWHC 1303 (fam), *Re G and M* [2014] EWHC 1561, *CC v DD* [2014] 1307 (fam), *Re X (a child) (Surrogacy: Time Limit)* [2014] EWHC 3135, *AB v CD (Surrogacy Time Limit and Consent)* [2015] EWFC 12, *R and S v T* [2015] EWFC 12, *D & G v ED & DD and A & B* [2015] EWHC 911, *Re X (Foreign Surrogacy)* [2016] EWHC 270 (fam) and *KB and RJ v RT* [2016] EWHC 760.

<sup>52</sup> See the case of *X and Y (n 1)*.

<sup>53</sup> N. Gamble, 'Crossing the Line: the Legal and Ethical Problems of Foreign Surrogacy' (2009) 19 (2) *Reproductive Biomedicine Online* 151.

<sup>54</sup> Department of Health, *Review for Health Ministers of Current Arrangements for Payments and Regulation* (White Paper Cm 4068, 1998) ("the Brazier Report").

<sup>55</sup> The House of Commons Science and Technology Committee, *Human Reproductive Technologies and the Law (fifth report)* (HC 2004-05, 7-1) Recommendation 79,18 were not implemented.

<sup>56</sup> Law Commission < <http://www.lawcom.gov.uk/surrogacy/> > accessed 10 April 2017. A final decision is expected in Autumn 2017.

international surrogacy. Indeed by the time that Dawn Primarolo (the then Minister of State for Health) came to debate what was then clause 54 of the Bill in the Public Bill Committee stage in 2007 she noted ‘surrogacy has rarely featured in the scrutiny and the debates that have taken place on the review of the 1990 Act and the Bill.’<sup>57</sup>

Whilst both the 1990 and 2008 Act dealt extensively with assisted reproduction technologies, surrogacy was given less prominence in both Acts requiring further detail to be provided by adapting adoption legislation.<sup>58</sup> The 2008 Act was an amending Act yet seemingly deficient leading to judges such as Mr Justice Hedley calling for a detailed review of the law on surrogacy suggesting that any review of the present law should take into account ‘nationality, control of the commercial element, the rules of consent and the question of legal parentage.’<sup>59</sup> All these issues remained problematic despite the passing of the 2008 Act.

One could argue that this piecemeal approach is reflective of societal attitudes towards surrogacy. For example, at the time of the 1984 Warnock review,<sup>60</sup> which looked into the ethical implications of the field of human fertilisation, surrogacy was not an accepted method of treatment for fertility and therefore its practice was not widespread and was limited to private surrogacy outside a licensed clinic. However, by 1996 its practice became acceptable, for example, the British Medical Association (“BMA”) withdrew any objections to medical practitioners offering surrogacy as a form of fertility treatment.<sup>61</sup> At the time of the parliamentary debates of the 1990 Bill the then Minister for Health Virginia Bottomley in the House of Commons debate stated that ‘the House will be

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<sup>57</sup> Human Fertilisation and Embryology Bill Deb 12 June 2008, cols 3 – 296, 248 <<https://www.publications.parliament.uk/pa/cm200708/cmpublic/human/080612/pm/80612s01.htm>> accessed 23 June 2017.

<sup>58</sup> The Adoption and Children Act 2002 (ACA 2002) was applied to surrogacy by the HFEPOR 2010.

<sup>59</sup> X and Y ((n 1), [29] heard on 9 December 2008.

<sup>60</sup> Department of Health and Social Security, *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (Cmnd 9314, 1984) (“the Warnock Committee”).

<sup>61</sup> BMA (n 23).

aware that the Government's policy is that legislation should not encourage surrogacy arranged privately or on a non-commercial basis.<sup>62</sup>

The view of the Government in 1990 was aligned to the views expressed in the Warnock report<sup>63</sup> that surrogacy should be tolerated but not encouraged. The government however, continued to take a cautious approach to the extension of rights in this controversial area of medical advancement and the Department of Health commissioned a report for Ministers, which became known as the 'Brazier Report'.<sup>64</sup> Although this report came some 14 years after the Warnock report<sup>65</sup> attitudes to surrogacy remained much the same. The Brazier committee did not agree with the Warnock committee that surrogacy was exploitative per se but felt it became potentially exploitative when there was a lack of payment for the voluntary services provided by the surrogate.<sup>66</sup> In addition they accepted that payments were in themselves problematic as they might induce women to become surrogates without fully appreciating the risks.<sup>67</sup>

The Brazier committee's primary reason for restricting the practice of surrogacy was the potential harm to the welfare of the child<sup>68</sup> and vulnerable adults<sup>69</sup> as opposed to Warnock's view that it was harmful to society as a whole and should be discouraged.<sup>70</sup> The Brazier committee felt that the focus of the restrictions on surrogacy should be on commercial surrogacy and they defined commercial surrogacy as 1) payments for the child<sup>71</sup> 2) payments being made to the surrogate which are more than reasonable expenses<sup>72</sup> and 3) profit-making by surrogacy agencies.<sup>73</sup> The committee recommended a broad definition of reasonable expenses as well as a code of practice binding surrogacy

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<sup>62</sup> HC Deb 2 April 1990 vol 170, col 984.

<sup>63</sup> Warnock Report (n 60).

<sup>64</sup> Brazier Report (n 54).

<sup>65</sup> Warnock Report (n 60) 135.

<sup>66</sup> Brazier Report (n 54) [4.23].

<sup>67</sup> Brazier Report (n 54) [4.25].

<sup>68</sup> Brazier Report (n 54) [4.27 – 4.30].

<sup>69</sup> Brazier Report (n 54) [4.21].

<sup>70</sup> Warnock Report (n 60) Forward para. 5, 2.

<sup>71</sup> Brazier Report (n 54) [4.39 – 4.47].

<sup>72</sup> Brazier Report (n 54) [5.24 – 5.27].

<sup>73</sup> Brazier Report (n 54) [4.44].

arrangements and a memorandum of understanding to be drawn up by the parties.<sup>74</sup> None of the Brazier recommendations were implemented by the government in 1998 or subsequently in the 2008 Act.<sup>75</sup> This remains unexplained and has been criticised by the House of Commons Science and Technology Committee in their 2005 report.<sup>76</sup> The failure to implement the Brazier recommendations was arguably compounded by an attempt to amalgamate surrogacy legislation in to existing legislation, which avoided the need for a fresh debate, or new consolidating legislation. It is argued that this had the effect of creating disjointed legislation that produced a number of disconnects and ultimately resulted in court led corrective adjustments that have impacted on the law relating to parental orders.

## **1.2 The Disconnected Law – Family Law Provisions**

The surrogate family is viewed largely through the lens of parentage and domicile and this is reflected in the drafting of the current laws. However, whilst the common law has evolved to take a concessionary stance on the issue of domicile (as discussed at 1.2.2), the originating right to biological maternal parentage remains.<sup>77</sup> The definition of parentage is less fluid in surrogacy than the definition that has evolved in the case of sperm donation involving lesbian recipients where the non-recipient is automatically regarded as the second parent.<sup>78</sup>

A married surrogate will be regarded in law as the legal parent<sup>79</sup> and her husband as the other legal parent,<sup>80</sup> this is regardless of whether the sperm is provided by the commissioning father or commissioning mother. However, if the surrogate is unmarried and the sperm of the commissioning father is used in the surrogacy process then the commissioning father will be regarded as the legal

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<sup>74</sup> Brazier Report (n 54), chapter 9.

<sup>75</sup> HC Science and Technology Committee (n 55) recommendation 79.

<sup>76</sup> *ibid* 185.

<sup>77</sup> See HFEA 2008, s 33 where the legal mother remains the birth mother at the birth of the child.

<sup>78</sup> HFEA 2008, ss 42 and 43.

<sup>79</sup> HFEA 2008, s 33.

<sup>80</sup> HFEA 2008, s 35 (1) (b).



father.<sup>81</sup> The commissioning mother has no legal motherhood status (even if her eggs are used in the surrogacy process) until such time as the UK courts grant a parental order.<sup>82</sup> For the purposes of surrogacy the term parent is therefore restricted to a biological mother. A commissioning father's entitlement is only based on biology, if there is not a prior entitlement of another through marriage.<sup>83</sup>

The 2008 Act focuses on who will be regarded as the 'legal parent' rather than examining what makes a person a parent. This contrasts with more recent legislation such as section 11 (3) of the Children and Families Act 2014<sup>84</sup> where for the purposes of child arrangement, special guardianship or child protection orders<sup>85</sup> a parent is defined as a person 'involved in the child's life in such a way that does not put the child at risk of suffering harm'. Whilst the provision is not meant to be of general application it is interesting that in an attempt to define parent no reference is made to a biological connection and carer becomes entwined with the legal assignation of the title of parent.

Half of the case files in this research (50%, N=16) involved surrogates who were married and therefore the commissioning fathers involved in these surrogacy arrangements would not have an automatic parental entitlement until such time as a parental order was granted by the court despite the fact that they provided their sperm and therefore had a genetic connection to the child. In contrast the percentage of gestational surrogates who by definition had no genetic connection to the child was very high at 97% (N=31) yet in law these surrogates were automatically regarded as the legal mother.

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<sup>81</sup> HFEA 2008, s 36.

<sup>82</sup> HFEA 2008, s 54.

<sup>83</sup> HFEA 2008, s 35 (1) (b) and s 36.

<sup>84</sup> Children and Families Act 2014 (CFA 2014), s 11 (3) that inserts a new s 1 (6) in to the Children Act 1989 (CA 1989).

<sup>85</sup> CA 1989, s 1 (4) and s 2A as amended by the CFA 2014.

### 1.2.1 Parentage and Process

When the 2008 Act was introduced in the House of Lords on 8<sup>th</sup> November 2007<sup>86</sup> the provisions on the extension of embryo research together with a tabled amendment to the abortion laws, were so contentious that they took up much of the debate time in Parliament.<sup>87</sup> The only element of the changes to the surrogacy laws that took up similar lengths of debating time to embryo research were the proposals to amend s.13 (5) of the previous 1990 Act on the question of a child's need for a father and also the new legal parentage provisions in Part 2 of the Act.<sup>88</sup>

The new legal parentage provisions contained in Part 2 gave same sex couples and unmarried heterosexual couples receiving fertility treatment the same legal parentage rights as married heterosexual couples.<sup>89</sup> These provisions were important in recognising the parental rights of same-sex couples as well as extending the categories of those who could apply for a parental order. However, the provisions did not extend to single people leaving adoption as the only route open to those wanting children through surrogacy but who are not in a relationship.

Dawn Primarolo (the then Minister of State for Health) debating clause 54 of the Bill in the Public Bill Committee said the government had acknowledged in 'that such a responsibility is likely to be better handled by a couple than a single man or woman.'<sup>90</sup>

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<sup>86</sup> HL Deb 8 November 2007 Vol 696, col 139.

<sup>87</sup> Eg HL Deb 3 December 2007 vol 696, col 1495-1563, HL Deb 4 December 2007 vol 696, col 1610-1623, HL Deb 10 December vol 697, col 11-75 and HL Deb 12 December vol 697, col. 318-247.

<sup>88</sup> HL Deb 3 December 2007 vol 696, col 1495-1563, HL Deb 4 December 2007 vol 696, col 1610-1623, HL Deb 10 December vol 697, col 11-75 and HL Deb 12 December vol 697, col. 318-247.

<sup>89</sup> This part of the Act did not come in to force until 6<sup>th</sup> April 2010. See the Human Fertilisation and Embryology Act 2008 (Commencement No.3) Order 2010.

<sup>90</sup> Human Fertilisation and Embryology Bill Deb 12 June 2008, cols 3 – 296, 248. This amendment was tabled by Dr. John Pugh on behalf of Dr. Evan Harris.

Statistics from the Office of National Statistics<sup>91</sup> show that traditional one couple households with up to two dependent children remain the norm and that two parent married couples with dependent children comprise 63% of the statistics in 2016 as compared to 22% for lone parents. However, multi-family households of more than two children became the fastest growing family unit in 2016 comprising 323,000 households.<sup>92</sup> Couples therefore remain both the statistical and legal notion of family parenting (although Parliament will be amending the law to include single parents within the surrogacy legislation).

Whilst the courts have been inflexible about varying the statutory meaning of parent for the purposes of determining automatic rights to the child prior to court intervention, they have been willing to be flexible to a degree on the question of transfer of parentage. Transfer of parentage relies on the concept of consent, which is set out in schedule 3 of the 2008 Act<sup>93</sup> and relates to the use of gametes. The consent must be in writing and signed by the person giving consent who will be the surrogate for the purposes of international surrogacy.

Consent is also a mechanism for ensuring the surrogate's will has not been overcome. However, in *D and L (surrogacy)*<sup>94</sup> the courts were willing to grant a parental order even though no legitimate written consent was produced that could be said to satisfy the requirements of schedule 3. Whilst a written consent was provided by the clinic in this case, it was accepted by the court (and by the parties) that the surrogate had not signed the document. A parental order was made despite the fact that the 2008 Act provides that the court must be satisfied that the surrogate gave her consent 'freely, and with full understanding of what is involved' and that she also 'agreed unconditionally to the making of the

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<sup>91</sup>Office for National Statistics, 'Labour Force Survey: Families and Households 2016' at <<https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/families/bulletins/familiesandhouseholds/2016>> accessed on 19 December 2016. The outputs for the 2017 research had not been completed in full by the submission date of this thesis.

<sup>92</sup> A 66% rise from 2006.

<sup>93</sup> HFEA 2008, sch 3 para 3.

<sup>94</sup> [2012] EWHC 2631 (fam).

order.<sup>95</sup> Critics of surrogacy might well conclude from this case that statutory provisions that are intended to protect a surrogate's right to claims of parentage can be too easily overridden by the courts.

In order to acquire legal parentage commissioning couples must make an application for a parental order and meet the criteria set out in section 54 of the 2008 Act.<sup>96</sup> The procedure for parental order applications is prescribed by the Family Procedure Rules Part 13.<sup>97</sup> The length of the process can vary according to how complex the issues are. Commissioning couples make an application by completing form C51 in which they are named as the applicants and the surrogate and her husband (if she is married) are named as the respondents. Full details of the child are given on the form together with details of any related children. Confirmation of the surrogate's agreement to the parental order application is also required. A copy of the form together with notice of proceedings issued by the court is then served on the respondents (surrogate and her husband) who must return an acknowledgement of service (form C52) within seven days.<sup>98</sup> The rules also provide for service on any local authority or voluntary organisation that has accommodated the child.

The first hearing usually takes place within four weeks of the application.<sup>99</sup> This is a directions hearing at which time the court can determine issues such as the correct venue for the hearing to take place, whether the parties should file written witness statements and whether a POR should be appointed. The court can also consider whether the child should be separately represented by a Children's Solicitor (a court appointed law firm who will represent the interests of the child by acting as a Guardian).

Only 9% (N=3) of the case files involved a child who was separately represented. In the first file the surrogate withheld her consent and made demands to see the child and to be paid more money and the Children's

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<sup>95</sup> HFEA 2008, s 54 (6).

<sup>96</sup> HFEA 2008, s 54.

<sup>97</sup> Family Procedure Rules 2010 (FPR 2010) (as amended).

<sup>98</sup> See FPR 2010, Part 13 rule 6.

<sup>99</sup> FPR 2010, Part 13 rule 9.

Solicitor was appointed to represent the child's interests.<sup>100</sup> In relation to the second file the child was born with a medical condition for which she required on-going treatment.<sup>101</sup> In relation to the third file the couple had been unable to secure a visa for the child and the child remained outside the UK during the period of the parental order application.<sup>102</sup>

The final hearing normally takes place once an assessment of the commissioning couple has taken place by the POR, although it is not an obligatory requirement that a POR is appointed.<sup>103</sup> If the application is not contested it can proceed on the basis of the written evidence of the parties. Although the parties attend the final hearing they are not usually required to give evidence.

As such, the courts in their policing role do not enquire in to the treatment of the surrogate beyond the question of payments<sup>104</sup> and the issue of the surrogate's consent to the handover of the child.<sup>105</sup> One might argue based on consideration of the reported cases that the main consideration for the courts has become whether the lifelong needs of the child would be met by retrospectively authorising unlawful payments<sup>106</sup> rather than whether the surrogate has encountered any exploitation during the surrogacy arrangement. Section 54 of the 2008 Act does not require the court to specifically check on the surrogate's wellbeing during the surrogacy process.

The other complication is that parental order applications must be made within six months. This requirement has been extended in case law so that it has

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<sup>100</sup> File 4.

<sup>101</sup> File 1.

<sup>102</sup> File 15.

<sup>103</sup> FPR 2010, Part 13 r 12.

<sup>104</sup> HFEA 2008, s 54 (8).

<sup>105</sup> HFEA 2008, s 54 (6).

<sup>106</sup> *Eg C (A Child)* (n 51), *FLR 1156*, *X and Y* (n 1), *Re S* (n 51), *Re L* (n 5), *X and Y (Children)* (n 51), *A v P* (n 49), *J v G* (n 51) and *Re P-M* (n 49).

become a matter of years rather than months.<sup>107</sup> This means that the courts are presiding over a process to decide parentage when in truth the commissioning couple have already been raising the child and acting as parents long before the involvement of the court. If the child were at risk within the six-month time frame for making an order, then it is arguable that the courts' role as protector of the child comes far too late.

### **1.2.2 Domicile**

The domicile provisions of the 2008 Act requires that at least one of the applicants must treat as their home, or have a substantial connection to, the UK, Channel Islands or the Isle of Man. Cases suggest that these provisions have also been flexibly interpreted by the courts.

A move was made to streamline Section 54 (b) of the 2008 Act with the British Nationality Act 1981 following an amendment proposed by Mark Simmonds in the Public Bill Committee debates of the 2008 Act.<sup>108</sup> He raised the concern that there was a potential conflict between clause 54 of the 2008 Act<sup>109</sup> and the 1981 Act<sup>110</sup> and he proposed an amendment.<sup>111</sup> The effect of this amendment meant that the previous requirement for both applicants to be domiciled in the UK, Channel Islands or Isle of Man was removed and instead only one of the applicants would need to comply with the domicile requirement. This was considered a necessary adjustment because the 1981 Act only requires domicile by one parent for a child to be able to claim nationality. Domicile and rights to nationality were therefore closely aligned. Yet domicile is interpreted in a much more flexible manner with less stringent requirements for evidence than would be required from the immigration authorities.

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<sup>107</sup> See *Re X (A Child)* (n 49), *AB v CD* (n 51), *D & G v ED & DD* (n 51), *Re A and B (No.2 Parental Order)* [2015] EWHC 2080, *A and B v C and D* [2016] EWFC 42 and *KB and RJ v RT* (n 51).

<sup>108</sup> Human Fertilisation and Embryology Bill HC Deb 12 June 2008, cols 3-296, 249.

<sup>109</sup> HFEA 2008, s 54 (4) (b).

<sup>110</sup> British Nationality Act 1981 (BNA 1981).

<sup>111</sup> Human Fertilisation and Embryology Bill HC Deb 12 June 2008, cols 3-296, 249. See amendment No. 176 clause 54 page 46, line 16.

Domicile can be by origin or choice. A domicile of choice only requires a genuine intention to reside permanently in the UK<sup>112</sup> or for an unlimited time.<sup>113</sup> However an intention to return to a domicile of origin that is based on contingency, which is foreseeable and anticipated, will mean a domicile of choice cannot be relied upon.<sup>114</sup> Only 6% (N=2) of the case files involved applications where domicile had to be determined as part of the parental order application. However, reported judgments reveal higher numbers of cases where domicile has been in issue during a parental order application.

Guidelines on domicile in parental order cases were laid down by Mrs Justice Theis in *Z, B v C, Cafcass Legal as Advocates to the Court*,<sup>115</sup> a case involving a homosexual couple of Israeli origin. Whilst it was clear that both had been habitually resident in the UK since 2008, the court had to determine whether they were domiciled in the UK for the purposes of section 54 (4) (b) of the 2008 Act.<sup>116</sup> The court in this case cited Dicey<sup>117</sup> and *Barlow Clowes International Ltd (In Liquidation) & Others v Henwood*<sup>118</sup> and held that domicile could relate to where an applicant had their permanent home and that crucially 'an existing domicile is presumed to continue until it can be proved that a new domicile has been acquired'.<sup>119</sup> Following these authorities, the court were satisfied on a balance of probabilities by the applicant's evidence In the case of *Z, B v C*<sup>120</sup> that they intended to make the UK their domicile of choice.

However, the evidence was arguably less convincing in later cases that applied the guidelines from *Z, B v C*.<sup>121</sup> For example, in *CC v DD*,<sup>122</sup> which was also

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<sup>112</sup> See *Mark v Mark* [2005] UKHL 42, [47] (Baroness Hale).

<sup>113</sup> Dicey, Morris and Collins, *On the Conflict of Laws* (14<sup>th</sup> edn, Sweet and Maxwell 2006) [6-039].

<sup>114</sup> Dicey (n 115) [6-040].

<sup>115</sup> [2011] EWHC 3181.

<sup>116</sup> HFEA 2008, s 54 (4) (b).

<sup>117</sup> Dicey (n 113).

<sup>118</sup> [2008] EWCA Civ 577.

<sup>119</sup> *Barlow Clowes International Ltd (In Liquidation) & Others v Henwood* [2008] EWCA Civ 577 [8] (Arden LJ).

<sup>120</sup> *Z, B v C* (n 115).

<sup>121</sup> *Z, B v C* (n 115).

<sup>122</sup> *CC v DD* (n 51).

heard by Mrs Justice Theis, both applicants were living in France at the time of the application. Whilst the applicant-commissioning mother was born in Britain she had not lived in the UK since 2006 but the court held this remained her domicile of origin. The court was influenced by the fact that the commissioning mother had two properties in the UK and returned to the UK frequently. However, no arguments were heard by the court as to whether having investment properties in one country was sufficient to establish a continuation of the home domicile especially when the current domicile of choice (France) had not been given up and it was not possible according to the authorities cited in *Z, B v C*<sup>123</sup> for an applicant to have two domiciles. The court decided that the commissioning mother had never given up her domicile of origin, namely the UK, because she had not taken steps to acquire French nationality and intended to return either when her relationship ended or on the death of her partner. However, acquiring a new nationality is not necessary for a domicile of choice. Whether the end of a relationship can be said to meet Dicey's 'foreseeable and anticipated' contingency requirement<sup>124</sup> is also debatable although return on the death of a partner might be thought to be sufficiently foreseeable.

One can compare the decision in *CC v DD*<sup>125</sup> with the prior decision of *Re G (Surrogacy: Foreign Domicile)*<sup>126</sup> which predated the 2008 Act and where a parental order was refused on the basis that both applicants were living in Turkey at the time of the application. On the logic of the decision in *CC v DD*<sup>127</sup> if the commissioning couple had been fortunate to have investment properties in the UK and an intention to return to the UK (perhaps to establish relations with the surrogate) they might well have been able to argue a domicile of choice. This would mean that domicile could be easily established in order to obtain a parental order in Britain to circumvent unfavourable surrogacy laws in the applicant's domicile of choice.

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<sup>123</sup> *Z, B v C* (n 115).

<sup>124</sup> Dicey (n 113).

<sup>125</sup> *CC v DD* (n 51).

<sup>126</sup> [2007] EWHC 2814.

<sup>127</sup> *CC v DD* (n 51).



This problem can be further illustrated In the case of *Re A*<sup>128</sup> where the commissioning father left the UK in 2007 and lived in Switzerland followed by France and then South Africa. He gave written evidence of an intention to return to the UK on his retirement. The court held that a domicile of choice was not established and the UK remained the domicile of origin even though at the time of the proceedings he was applying for a residency permit to live and work in Dubai and continued to have homes in France and South Africa but no property in the UK. Neither France nor Dubai would have a mechanism by which the applicants could be recognised as the legal parents within those jurisdictions.

### 1.2.3 Assessing Parentage

Section 13 (5) of the 1990 Act as amended by section 14 (2)(b) of the 2008 Act requires clinics to assess before commencing fertility treatment whether the resulting child will have ‘supportive parents’. Section 13 (5) only applies to treatment in a licensed clinic and so no assessment of ‘supportive parents’ would be undertaken in the case of private surrogacy arrangements.

Emily Jackson<sup>129</sup> argues that section 13 (5) requires clinicians to make an evaluation of a patients’ future parenting abilities and that this is ‘incoherent, disingenuous and illegitimate’<sup>130</sup> and amounts to an abuse of state powers and an interference in privacy, autonomy and procreative decision making rights as well as identity. Parenting is thus pre-assessed where the status is acquired through assisted reproduction but not when it is acquired through natural conception, yet one might argue that the welfare of the child can be at risk from any parent regardless of how they acquire their status.

Ellie Lee et al<sup>131</sup> found in their 2015 research that the replacement of the word ‘father’ with supportive parent had the desired effect of preventing clinics

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<sup>128</sup> [2015] EWHC 1756 (fam).

<sup>129</sup> E Jackson, ‘Conception and the Irrelevance of the Welfare Principle’ (2002) 65 (2) Modern Law Review 176.

<sup>130</sup> *ibid* 177.

<sup>131</sup> EJ Lee, S Sheldon and J Macvarish, ‘After the ‘Need for...a Father’: ‘the Welfare of the Child’ and ‘Supportive Parenting’ in Assisted Conception Clinics in the UK’ (2015) 6 (1) Families and Relationships and Societies 71.

discriminating against same sex couples but did not provide sufficient clarity of what 'supportive parenting' means. As such clinicians entered in to conversations with prospective parents about their future parenting plans and discussions were child-centred and evidence focused in the sense that clinicians looked for signs of commitment and an understanding of the needs and welfare of the child. Surrogacy is included within section 13 (5) but private or overseas arrangements will not be caught by section 13 (5).

Before the court grants a parental order the court will usually ask for a POR assessment undertaken by a Children and Family Court Advisory and Support Services ("Cafcass") officer. However this assessment is not based on 'supportive parents' but on the interests of the child welfare checklist. It was not a mandatory requirement that the POR's assessment involve the child until 2015.<sup>132</sup> This meant that prior to 2015 cases may exist where the commissioning couple were not seen with the child for the purpose of compiling the parental order reports and as such paradoxically being awarded the status of parent did not include direct evidence of interactions with the child.

Section 54 of the 2008 Act also requires that the child must have their home with the commissioning couple before a parental order application can be made the Cafcass officer's involvement occurs after the child has been placed with the commissioning couple and the focus is thus on the suitability of the home for the child rather than the suitability of the commissioning couple to act as parents and to meet the child's welfare needs. Even if the commissioning couple were to fail the child welfare assessment, in many cases it would not be possible to return the child to the birth mother.

Surrogacy and other forms of artificial reproduction therefore require an assessment of parental or care suitability to be made by others. The necessity of prior assessment of a person's ability to parent is a view held by Hugh LaFollette<sup>133</sup> who argues that as society regulates certain harmful activities

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<sup>132</sup> See *Re Z (Foreign Surrogacy) (Allocation of Work: Guidance on Parental Orders)* [2015] EWFC 90, [77] (Mrs Justice Russell).

<sup>133</sup> H LaFollette, 'Licensing Parents' (1980) 9 (2) *Philosophy and Public Affairs* 182.

such as driving a car, which could cause death or injury, similarly the state should license parents, he would however extend this to all parents rather than only those seeking treatment for infertility. In LaFollette's view individuals only had a right to parent if they could meet certain minimum standards. However, he conceded that licencing could not be based on notions of a 'good parent' as this would be hard to define but should be based on notions of a 'bad parent' and bad parents should not be licensed. Legislation has arguably attempted to define a 'good parent'.<sup>134</sup> Janet Malik<sup>135</sup> argues that the concept of the 'good parent' should be the ability to shape a child's characteristics so they have the necessary personality and resilience to flourish in their future lives. Good parenting is not in her view based on biology. If parenting abilities are to be assessed then some consensus is needed as to the scale of measurement.

### **1.3 The Disconnected Law – Immigration Provisions**

Whilst the domicile provisions of the 2008 Act and the 1981 Act were streamlined, the proof of parentage was not and thus an opportunity was missed to streamline the family and immigration rules for international surrogacy. This 'disconnect' between the UK family laws on parentage and executive decisions on border controls means that judges and immigration officials can sometimes find the law hard to interpret. A temporary visa is issued for the child on the basis the commissioning couple will go on to apply for a parental order.

At present there is no guarantee that a child conceived using a surrogate in another country would be able to gain entry into the UK. The UK Visa and Immigration's ("UKVI") guidelines 'Inter-Country Surrogacy and the Immigration Rules'<sup>136</sup> makes it clear that this will only occur where the commissioning father can be regarded as the legal father (i.e. where he provides the sperm and the surrogate is unmarried). In all other cases entry clearance will be required and

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<sup>134</sup> See the CFA 2014, s 11 (3).

<sup>135</sup> J Malek, 'Use or Refuse Reproductive Genetic Technologies: Which Would a 'Good Parent' Do? (2013) 27 (2) Bioethics 59.

<sup>136</sup> UK Visa and Immigration, 'Inter-Country Surrogacy and Immigration Rules' <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/261435/Intercountry-surrogacy-leaflet.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/261435/Intercountry-surrogacy-leaflet.pdf)> accessed 19 December 2016.

where surrogacy is not through a UK licensed clinic or involves only the commissioning mother donating her eggs then entry is by discretion.

In order to apply for a parental order, the commissioning couple will return to the UK jurisdiction with the child (who will not at this point be regarded as a UK citizen). As identified by Linda Bosniak,<sup>137</sup> citizenship is a form of legal status. This is particularly true in relation to surrogacy. As far as surrogacy migration is concerned, many of the countries that attract UK citizens across its borders adopt a *jus sanguinis* approach (the grant of citizenship to the child is dependent on the citizenship of one of the parent) as opposed to a *jus solis* approach where citizenship is granted to the child if born within the country's borders.

Dual citizenship is not an option that is immediately available to a surrogate child. A commissioning father who has a genetic link to the child (and where the surrogate is unmarried) may apply for a British passport for the child.<sup>138</sup> However, whilst this regularises the child's legal immigration status through the father, the father must still apply for a parental order in the family courts if he wishes to parent with the commissioning mother rather than the surrogate. The father also has to prove parentage through a DNA test to satisfy immigration authorities but there is no requirement to do this in the family courts.

Where the commissioning father is not recognised as the legal father for immigration purposes, the child cannot automatically acquire British citizenship and instead an application has to be made for entry clearance.<sup>139</sup> A commissioning mother who provides her eggs will never be regarded as the legal mother and will have to apply for entry clearance for the child outside the

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<sup>137</sup> Linda Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership* (Princeton University Press 2008).

<sup>138</sup> See the BNA1981, s 3 and the Nationality, Immigration and Asylum Act 2002, s 9. The commissioning father in these circumstances may also register the child's birth at the Foreign and Commonwealth Office who will issue a consular birth certificate but the surrogate will be registered as the mother.

<sup>139</sup> See Immigration (Leave to Enter and Remain) Order 2000, Article 3 and Immigration Rules, Part 8, para 297.

immigration rules and entry is then by discretion.<sup>140</sup> An application for entry clearance will usually be made at the British Consulate of the host country where the surrogacy arrangements has taken place but applications can take several weeks or months to process.<sup>141</sup> In the case of *Re Z (Foreign Surrogacy)* Ms Justice Russell remarked that immigration delays were ‘emotionally and psychologically damaging’ to the children.<sup>142</sup> If a commissioning couple decide to simply arrive at border controls with the child then entry will be by discretion and not guaranteed.<sup>143</sup> Once entry clearance has been obtained it is still necessary to register the child as a British Citizen. This can be done at the discretion of the Home Secretary<sup>144</sup> or automatically on the grant of a parental order.<sup>145</sup>

There is not a linked service between the border agency and the UK family courts in terms of checking that a commissioning couple have applied for a parental order. However in order to obtain a British passport for the child a parental order will usually have to be produced as part of the documentary evidence. The lack of communication between the two legal structures means that some cases can fall through the net as can be seen in the case of *D & G v ED & DD and A & B*<sup>146</sup> where the commissioning couple managed to obtain a British passport for the child without a parental order due to an administrative error on the part of the UKVI. In the case of *Re JJ (A Child)*<sup>147</sup> the court did

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<sup>140</sup> See the case of *Re K (Minors: Foreign Surrogacy)* [2010] EWHC 1180 regarding some of the difficulties encountered when the question of whether a parental order is likely to be granted if the commissioning couple were temporarily allowed in to the country using discretion.

<sup>141</sup> See in particular *The Times* (UK), Rosemary Bennett, ‘British Newborns Fined as Illegal Immigrants in India’ 10 June 2014. Available at: <http://www.thetimes.co.uk/tto/news/uk/article4113724.ece> accessed on 1 March 2015. This article reported that there is a chaotic system of issuing UK passports in India leading to babies being classified as “illegal immigrants.”

<sup>142</sup> (n 132), [51].

<sup>143</sup> See Immigration Rules, Part 1, para 23A.

<sup>144</sup> BNA 1981, s 3(1).

<sup>145</sup> HFEPOR 2010, Schedule 4 which amended s 1 (5) (a) and s 5A of the BNA 1981.

<sup>146</sup> *D & G* (n 51).

<sup>147</sup> [2011] EWHC 921 (fam), [2011] 2 FLR 646.

consider whether family courts should give the border agency formal notice of a parental order but Mr Justice Hedley concluded that this was not necessary.<sup>148</sup> However, the case of *D & G v ED & DD and A & B*<sup>149</sup> demonstrates that a much closer working relationship is needed between the family courts and the UKVI in the case of international surrogacy.

#### **1.4 The Disconnected Analogy – Adoption and Surrogacy**

The surrogacy legislation relies upon the Adoption and Children Act 2002 (“the 2002 Act”) in relation to the standard for child protection.<sup>150</sup> Surrogacy legislation is aligned to adoption legislation under the premise that surrogacy is the same as or similar to adoption. There are of course fundamental differences. Surrogacy involves a genetic link between one of the commissioning parents and the child whilst adoption does not. A surrogacy arrangement arises from an agreement between the parties before conception takes place whilst adoption does not. The surrogate child will be handed over immediately following birth whilst this does not usually occur in an adoption situation. In the case *CC v DD*<sup>151</sup> Mrs Justice Theis noted:

In terms of identity only parental orders will fully recognise the children’s identity as the applicant’s natural children, rather than giving them the wholly artificial and, in their case, inappropriate status of adopted children.<sup>152</sup>

Similarly Mrs Justice Russell noted in the case of *D & G v ED & DD and A & B*<sup>153</sup> that adoption ‘wrongly suggest that the children have had a disrupted rather than continuously secure identity within their family.’<sup>154</sup>

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<sup>148</sup> *ibid.*

<sup>149</sup> *D & G* (n 51).

<sup>150</sup> ACA 2002, s 1.

<sup>151</sup> *CC v DD* (n 51).

<sup>152</sup> *ibid* [61].

<sup>153</sup> *D & G* (n 51).

<sup>154</sup> *ibid* [64].

Some members of the judiciary therefore view surrogacy as distinct from adoption. The findings of the empirical research in this thesis also confirms that many of the commissioning couples rejected adoption as an alternative solution to their fertility needs because a genetic connection was more important to them. Adoption was considered or partially pursued in only 28% (N=9) of the case files. Many couples viewed the solution to their childlessness as a medical one requiring medical treatment and therefore excluded adoption on that basis. In addition some couples expressed a wish to avoid the perceived stigma associated with adoption and this is discussed further at 4.2.

The surrogacy legislative framework has however placed strong reliance on the ability of the 2002 Act to bridge any legislative gaps in the surrogacy legislation. In doing so it arguably fails to draw sufficient distinction between the 'disrupted' and 'secure'<sup>155</sup> status differences between surrogacy and adoption noted by Mrs Justice Russell.

Not all of the adoption provisions govern surrogacy. Schedule 1 of the Human Fertilisation and Embryology (Parental Orders) Regulations 2010 sets out those provisions of the 2002 Act that will apply to parental orders in surrogacy cases. Parental orders are governed by section 1 of the Adoption and Children Act 2002.<sup>156</sup> The section 1 (4) checklist of the 2002 Act also applies to surrogacy<sup>157</sup> and requires the court to take into consideration the relationship the child has with relatives<sup>158</sup> and any expressed wishes and feelings of those relatives relating to the child.<sup>159</sup> The value and likely continuation of the child's relationship with their relatives is given due regard as is the ability of such relatives to meet the child's needs and 'to provide the child with a secure environment in which the child can develop.'<sup>160</sup> The child's relationship with relatives has been interpreted to include the commissioning couple.<sup>161</sup>

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<sup>155</sup> D & G (n 51).

<sup>156</sup> See HFEPOR 2010, s 2.

<sup>157</sup> See HFEPOR 2010, Schedule 1.

<sup>158</sup> ACA 2002, s 1 (4) (f).

<sup>159</sup> ACA 2002, s 1 (4) (f) (iii).

<sup>160</sup> ACA 2002, s 1 (4) (f) (ii).

<sup>161</sup> ACA 2002, s 1 (8) (b).

Whilst the alignment of the surrogacy and adoption law adopts a child-centred approach based on the child's welfare there are arguably weaknesses in the alignment, which are two-fold. The first is in relation to its failure to align the adoption provisions on reasonable payments with surrogacy payments and the second is in relation to the 'welfare of the child' test as the paramount consideration in surrogacy cases.

#### **1.4.1 Reasonable Payments**

Section 54 (8)<sup>162</sup> is the section that arguably demonstrates the disconnect between two important statutory provisions, the UK's prohibition on commercial surrogacy through section 54 (8) and the requirement that the courts make the welfare of the child paramount under section 1 (2) of the 2002 Act.<sup>163</sup> Section 54 (8) does not define what is meant by 'expenses reasonably incurred'<sup>164</sup> and this has created difficulties in the interpretation of this section. The section focuses on money or other benefit that has been made by the commissioning couple (the applicants) in consideration for certain promises. What money or benefit might be regarded as capable of retrospective authorisation has been left to the courts to decide.

The lack of a broad definition of reasonably incurred expenses in statute would perhaps have been acceptable if the courts had been able to develop a broad definition through case law. However, this has not happened, instead the courts have developed a test for retrospectively authorising payments. One might argue that this is contrary to Parliament's stated mischief of the surrogacy legislation, that of preventing commercial surrogacy. The fact that the government considered it necessary to control commercial surrogacy can be seen in the comments of the then Secretary of State for Health the Right Honourable Kenneth Clarke who, when commenting on the passage of the 1990 Act through the House of Commons, stated that the Surrogacy

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<sup>162</sup> HFEA 2008, s 54 (8).

<sup>163</sup> ACA 2002.

<sup>164</sup> HFEA 2008, s 54 (8).



Arrangement Act 1985 'quickly and effectively quelled the prospect of the development of commercial surrogacy agencies in this country.'<sup>165</sup>

Parliament intended by enacting section 2 of the 1985 Act that third parties such as surrogacy agencies should not profit from surrogacy arrangements.

However, a number of cases reveal that the courts have sanctioned commercial payments to surrogacy agencies abroad.<sup>166</sup> Once the court is satisfied that the public policy considerations have been met they then decide to measure the question of payments based on the standards applicable in the treatment country rather than by UK standards. This was established in cases such as *Re L*,<sup>167</sup> *In the Matter of X and Y (Children)*<sup>168</sup> and *Re P-M*.<sup>169</sup>

Certainly case law development from 1998 to 2005 should have highlighted to Parliament by the time of the drafting of the 2008 Act that the courts had been placed in a position of retrospectively authorising payments.<sup>170</sup> Indeed even in 1998 the Brazier Report commented that the review team had been unable to find a single case where a parental order had been refused on the grounds of an unacceptably large payment.<sup>171</sup> Whilst section 59 of the 2008 Act<sup>172</sup> now permits surrogacy agencies to receive reasonable payment for permissible services this does not extend to payments that include an element of profit. Whilst section 2 does not apply to surrogacy agencies abroad, one might argue that UK commissioning couples should still be expected to act within the 'spirit' of section 2 if parental orders are to be granted in order not to contravene the UK prohibition on commercial surrogacy.

Before deciding whether to retrospectively authorise payments the courts have developed a common law test based on 'moral taint'<sup>173</sup> and 'affront to public

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<sup>165</sup> HC Deb 2 April 1990 vol 170, col 915.

<sup>166</sup> Eg *Re P-M* (n 49) and *Re W* (n 51).

<sup>167</sup> *Re L* (n 5).

<sup>168</sup> *X and Y (Children)* (n 51).

<sup>169</sup> *Re P-M* (n 49).

<sup>170</sup> See cases such as *Re C* (Application by Mr. and Mrs. X) (n 51).

<sup>171</sup> Brazier Report (n 54), [5.3].

<sup>172</sup> HFEA 2008, s 59 which inserted a new s 2A in to the SAA 1985.

<sup>173</sup> See *Re S* (n 51), [7] and *X and Y* (n 1), [21ii].

policy'.<sup>174</sup> The issue of exploitation is assessed by a consideration of whether the will of the surrogate has been overcome by the payments and therefore whether there is true consent. Excessive payments can be said to offend public policy. The question of whether any commercial payments would be an affront to public policy was first considered by Mr Justice Hedley in *X and Y (Foreign Surrogacy)*<sup>175</sup> and is to be decided on a case by case basis. The public policy in question was further explained in the case of *Re S*<sup>176</sup> as requiring the court to ensure that UK childcare laws are not circumvented, that children are not commoditised by the commercial arrangement and that excessive sums were not being paid to overcome the will of the surrogate.<sup>177</sup> The courts are therefore careful to establish whether the commissioning couple have acted in 'good faith' and without 'moral taint'<sup>178</sup> and with no attempt made to 'defraud the authorities.'<sup>179</sup> Mr Justice Hedley notes in *Re S* that the present law might 'encourage the less scrupulous to take advantage of the more vulnerable.'<sup>180</sup>

Mr Justice Hedley was referring to the Human Fertilisation Act of 1990, which has now been amended by the 2008 Act but the amendments have not made any changes to the common law test in *X and Y*<sup>181</sup> and *Re S*<sup>182</sup> or included any further clauses relating to potential exploitation of the surrogate. Instead the categories of payments fulfilling the 'authorisation' test has grown and this started with the decision in *Re P-M (Parental Order: Payments to Surrogacy Agency)*.<sup>183</sup> This case heralded a much more relaxed attitude to the retrospective authorisation of payments by the courts. Previously approved payments to third parties had consisted only of compensation payments or medical expenses only.<sup>184</sup> *Re P-M*<sup>185</sup> clarified that the wording of section 54 (8)

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<sup>174</sup> *X and Y* (n 1), [20].

<sup>175</sup> *X and Y* (n 1).

<sup>176</sup> *Re S* (n 51).

<sup>177</sup> See *Re S* (n 53), [7] and *X and Y* (n 1), [21].

<sup>178</sup> Both terms used in the test in *X and Y* (n 1), [21ii].

<sup>179</sup> See the last part of the test in *X and Y* (n 1), [21iii].

<sup>180</sup> *Re S* (n 51) [7].

<sup>181</sup> *X and Y* (n 1).

<sup>182</sup> *Re S* (n 51).

<sup>183</sup> *Re P-M* (n 49).

<sup>184</sup> *Eg Re L* (n 5) and *X and Y (Children)* (n 51) and *J v G* (n 51).

<sup>185</sup> *Re P-M* (n 49).

was such that it was wide enough to include not just payments to the surrogate but also to third parties, this was uncontroversial. The case went further by accepting that payments to a surrogacy agency that contain an element of profit, whilst unlawful in the UK,<sup>186</sup> could be retrospectively authorised by the courts.

This was then extended in the case of *Re W*<sup>187</sup> to include 'gift payments' to surrogates that circumvented the law in the treatment country and were not therefore in compliance with the relevant legal framework.<sup>188</sup> In this case the surrogate was based in Nevada and the law at the time stated 'it is unlawful to pay or offer to pay money or anything of value to the surrogate except for the medical and necessary living expenses'.<sup>189</sup> Whilst the court accepted that the 'gift payments' would contravene this provision, they also accepted on the basis of expert advice that as there were no penalties or sanctions linked to the provision it was not criminal. However, the expert did consider that the commissioning couple might have been involved in a fraud on the Nevada court by not declaring such payments at the time a pre-birth order was granted. Despite this evidence, the court did not consider that the commissioning couple had acted with a 'moral taint' as per the public policy test in *X and Y*<sup>190</sup> and instead held they had acted in good faith by relying on lawyers and the surrogacy agency.

The court also circumvented the question of 'moral taint' by stating that as the surrogacy agency were based in California, Californian law and not the law in Nevada would apply to the question of payments.<sup>191</sup> This allowed retrospective authorisation of the payments, which would not have been possible if the law in Nevada had had been taken as the applicable legal framework. This jurisdictional shift thus allowed the courts to avoid an outcome that would have

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<sup>186</sup> Profit payments to surrogacy agencies conflict with SAA 1985, s 2 ( c ).

<sup>187</sup> *Re W* (n 51).

<sup>188</sup> *ibid.*

<sup>189</sup> Nevada Revised Statute Chapter 126 clause 045. This section has since been repealed.

<sup>190</sup> *X and Y* (n 1).

<sup>191</sup> *Re W* (n 51), [23].

led to the refusal of a parental order and continued uncertainty for the child. The courts have also stated in the case of *Re A*<sup>192</sup> that payments to egg donors are not caught by the provisions of section 54 (8).

There has not been a reported case where the court has refused a parental order based on exploitation of the surrogate through commercial payments and this has been confirmed publicly in 2015 by Mrs Justice Theis the lead family judge in surrogacy cases<sup>193</sup> and no reported cases have emerged during the period of this thesis. Even where the courts have criticised excessive payments and wilful deceit on the part of the commissioning couple over the sums paid to the surrogate, as in the case of *A and B v X and Z*,<sup>194</sup> a parental order has still been granted.

#### **1.4.2 The Paramountcy Test**

The alignment of the surrogacy and adoption legislation also introduced a paradox within section 54 (8) of the 2008 Act in relation to the court's role of policing commercial payments. Under the 2010 Regulations<sup>195</sup> the courts must now consider the welfare needs of the child as the paramount consideration when making a parental order. This prevents the interests of the other parties to the surrogacy arrangement being considered. Putting the interests or welfare of the child as the first consideration rather than the paramount consideration might arguably have left the courts with more flexibility to interpret section 54 (8) than at present.<sup>196</sup> The retrospective alignment of section 54 to the adoption provisions has arguably caused the current problems with retrospective authorisation of payments as the courts are presented with a fait accompli at the time a parental order application is made because they are asked to consider payments retrospectively. However, when the welfare of the child is

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<sup>192</sup> *Re A* (n 128), [18].

<sup>193</sup> International Association of Matrimonial Lawyers Surrogacy Symposium held on 18<sup>th</sup> May 2015 at Charles Russell Speechlys and attended by the author.

<sup>194</sup> [2016] EWFC 34.

<sup>195</sup> HFEPOR 2010, s 2.

<sup>196</sup> The Parental Orders (Human Fertilisation and Embryology) Regulations 1994 which had previously required the court to apply s.6 of the Adoption Act 1976 and consider the best interests of the child as the first consideration.

the paramount test it is difficult for the courts to refuse parental orders based on unreasonable payments even though the legislation provides them with discretion to do so.

### **1.5 Disconnected Statistics on International Surrogacy**

There is not yet a requirement for the number of international surrogacy arrangements to be officially recorded by UK authorities or overseas clinics. The Ministry of Justice does not separately record and distinguish international surrogacy cases from domestic surrogacy cases but has provided estimated figures of the number of parental order cases in response to Freedom of Information (“FOI”) requests from researchers and these relate to the number of parental order applications heard by the courts. The General Register Office (“GRO”) records parental orders lodged with them together with a request for a change to the names of the parents on the child’s birth certificate. Cafcass record the number of parental order applications in which they have been asked to prepare reports for the courts.

The most recently reported statistics from these three bodies can be found in the journal article of Crawshaw et al<sup>197</sup> in 2003 and the report of Horsey<sup>198</sup> in 2015. Research from Crawshaw et al<sup>199</sup> draws on statistics from the GRO and these show that in 2009 there were approximately 5 (4%) applications that related to international surrogacy and approximately 16 applications (13%) in 2010. By 2011 there were 17 cases (26% of the total applications). No figures were included post 2011.

In contrast Horsey’s 2015 report<sup>200</sup> used statistics from the Ministry of Justice,<sup>201</sup> Parental Order Register<sup>202</sup> and Cafcass.<sup>203</sup> There are no Ministry of

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<sup>197</sup> M Crawshaw, E Blyth and O Van Den Akker, ‘The Changing Profile of Surrogacy in the UK: Implications for National and International Policy and Practice’ (2012) 43 (3) *Journal of Social Welfare and Family Law* 271.

<sup>198</sup> Kirsty Horsey, *Surrogacy in the UK: Myth Busting and Reform, Report of the Surrogacy UK Working Group on Surrogacy Law Reform* (Surrogacy UK 2015).

<sup>199</sup> Crawshaw et al (n 204).

<sup>200</sup> *ibid.*

<sup>201</sup> Horsey (n 198) 14, Table 2.1.1.

Justice figures given for 2009 or 2010. However, the figures given for 2011 are much lower than Crawshaw's reported figure of 17. Horsey reports having obtained statistics of 6 cases relating to international surrogacy in 2011 and 8 in 2012 rising sharply to 31 in 2013.<sup>204</sup> When these statistics are considered in the context of this study they reveal the unreliability of the official recorded figures. For example the Ministry of Justice records show that only 6 files are recorded as international surrogacy files for the year 2011. However, in 9 files were accessed by the researcher and these were provided by HCMTS for the year 2011. In addition 11 case files were collected for 2012, this again contrasts with the Ministry of Justice statistics that record a figure of 8. For the five-year period covering the case files used in this research the Ministry of Justice, the Parental Order Register and Cafcass also recorded differing annual figures for international surrogacy of 77, 250 and 164 respectively.<sup>205</sup>

The reliability of the Ministry of Justice and General Register Office figures are further complicated by the fact that the Ministry of Justice and Cafcass records also show additional figures for unrecorded and unknown addresses where it is not possible to ascertain whether the cases are domestic or international cases.<sup>206</sup> There is of course a possibility (although unlikely) that a significant number of cases exist where no parental order report was requested from Cafcass and so the figures for international surrogacy parental order applications could be higher. In addition it is possible for parental orders to be granted even where couples have not used a clinic since section 54 of the 2008 Act does not specifically restrict applications to children born with the assistance of a clinic. In those circumstances the figures where the surrogate is unidentified or cannot be traced may include self-insemination cases (both domestic and overseas) where clinics were not used.

Only one case file in this study involved a surrogate who could not be traced and therefore where there might have been an unrecorded or unknown

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<sup>202</sup> Horsey (n 198) 16, Table 2.1.2 and Table 2.1.2.

<sup>203</sup> Horsey (n 198) 16, Table 2.1.2 and Table 2.2.1.

<sup>204</sup> Horsey (n 198) 16, Table 2.1.1.

<sup>205</sup> Horsey (n 198) 16, Table 2.1.1, 2.1.2 and 2.2.1.

<sup>206</sup> Horsey (n 198) 16, Table 2.1.1 and 2.2.1.

address. In all other cases the clinics kept a record of the surrogates. In the remainder of the files the PORs or lawyers were able with the assistance of the commissioning couple to trace the surrogate who then provided written consent in accordance with section 54 (6) of the 2008 Act.<sup>207</sup>

Whilst the true number of international surrogacy case files for April 2009 – January 2014 cannot be determined, all the published figures show that the number of domestic surrogacy cases is significantly higher than the number of cases relating to international surrogacy.<sup>208</sup> What is certain is that international surrogacy accounts for significantly less of the total parental order applications heard by the UK courts.

It is possible to see that international surrogacy is increasing as a practice. It is unknown why these sharp rises occurred. The Human Fertilisation and Embryology (Parental Orders) Regulations 2010 may have had some impact as it came in to force on 6<sup>th</sup> April 2010 and enabled the creation of a Parental Order Register as well as permitting changes to be made to the birth certificates of children born through surrogacy after the grant of a parental order. It also enabled same sex couples to apply for a parental order.

## **1.6 The Challenges of Trans-Global Regulation**

The UK is one of many countries in Europe that permits surrogacy<sup>209</sup> but there are also countries within Europe where surrogacy is banned or restricted such as France, Germany and Italy.<sup>210</sup> In some jurisdictions an absence of a policy framework prohibiting commercial surrogacy allows it to flourish particularly with

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<sup>207</sup> HFEA 2008, s 54 (6).

<sup>208</sup> The Freedom of Information Response dated 9 June 2015 to the author shows that for the five year period 2009 – 2013 there were 266 UK cases as opposed to a total of 236 from the combined statistics from the Ministry of Justice and General Register Office statistics as reported by Horsey and Crawshaw.

<sup>209</sup> Other countries include Belgium, Denmark, Greece, Latvia and Netherlands. See European Parliament Directorate-General for Internal Policies: Policy Department, Citizens Rights and Constitutional Affairs, *A Comparative Study on the Regime of Surrogacy in EU Member States* [European Parliament Manuscript 2013] Table 2 page 15.

<sup>210</sup> *ibid.*

the rise of surrogacy agencies and fertility clinics. Examples include Pennsylvania, Ukraine and countries on the African continent such as Uganda. Surrogacy is not accepted as a legitimate method of family formation in all jurisdictions across the world and criminal sanctions can be applied where surrogacy is performed<sup>211</sup> or where payment takes place for the arrangement.<sup>212</sup> The differing international regulatory frameworks make the task of an international surrogacy convention a difficult one. The different approaches to regulation around the world also underline the difficulties in finding a regulatory solution to international surrogacy within the UK.

Yet there is not a general consensus internationally as to how surrogacy should be regulated. In the majority of states around the world<sup>213</sup> the legal principle or maxim of ‘mater semper certa est’ means that the surrogate is recognised as the legal mother in law and legal proceedings must take place to either transfer parentage or confer some other legal status on the commissioning mother and her partner such as adoption or guardianship. Regulation of surrogacy arrangements across the world either focuses on the pre-birth arrangements’ such as the legality and enforceability of the arrangements and the criteria that must be met before the birth takes place.<sup>214</sup> Alternatively the focus is on the ‘post-birth’ arrangements and focuses on the legitimisation of the parental status of the commissioning parents.<sup>215</sup> Legislation also makes a distinction between genetic surrogacy and gestational surrogacy.<sup>216</sup> Some jurisdictions permit gestational surrogacy<sup>217</sup> but ban genetic surrogacy<sup>218</sup> and others permit

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<sup>211</sup> For example, Serbia, Spain, Slovakia and Switzerland. See The Hague Conference on Private International Law, ‘A Study of Legal Parentage and the Issues Arising from International Surrogacy Arrangements’ preliminary document no.3 C March 2014 p. 16<<http://www.hcch.net>> accessed 6 January 2017.

<sup>212</sup> For example, Iceland, Philippines and Portugal, see *ibid*.

<sup>213</sup> For example, UK, Australia, Canada, Turkey, Thailand, Sweden, Denmark, Germany, Japan, Israel. For a further list of states see The Hague Conference (n 218) 9.

<sup>214</sup> Eg California under its Uniform Parentage Act 2013 (UPA 2013), §7962.

<sup>215</sup> Eg the UK under its HFEA 2008, s 54.

<sup>216</sup> Eg UPA 2013 (California) and Israel under the Agreements for the Carriage of Fetuses (Approval of Agreement and Status of the Newborn) Law 5756 – 1996.

<sup>217</sup> Eg Uniform Parentage Act 2013 (California).

<sup>218</sup> Eg Israel (n 223).



both.<sup>219</sup> In addition some jurisdictions make a distinction between the legality of altruistic surrogacy usually involving a family member or friend acting as a surrogate but for no payment,<sup>220</sup> and commercial surrogacy involving payment to the surrogate.<sup>221</sup> Other jurisdictions provide for the psychological assessment of the parties before a surrogacy arrangement is entered in to.<sup>222</sup> Some jurisdictions impose an age requirement of the surrogate<sup>223</sup> and/or requirements that she must have her own children.<sup>224</sup> Conditions may also be imposed on the commissioning parents. For example in the UK only couples may apply for a parental order to be recognised as parents following a surrogacy arrangement.<sup>225</sup> Other states ban same-sex couples accessing surrogacy.<sup>226</sup>

Changes to national laws alone are not sufficient given that the practice of surrogacy crosses borders this means extraterritorial legislation or conventions are also necessary. However it is argued that any new legal framework should be one that takes in to account experiential and reflective knowledge of the participants. There are issues that differentiate international surrogacy from domestic surrogacy, which would require careful drafting of any regulation and these matters are discussed further in chapter seven.

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<sup>219</sup> Eg the UK under the HFEA 2008.

<sup>220</sup> Eg Australia, Hong Kong China and New Zealand.

<sup>221</sup> Eg Illinois, California and Israel where commercial surrogacy is permitted.

<sup>222</sup> Eg South Australia under its legislation the Family Relationships Act 1975 and the Assisted Reproductive Treatment Act 1988 and Israel under the Agreements for the Carriage of Fetuses (Approval of Agreement and Status of the Newborn) Law 5756 – 1996, Greece under Article 1458 of the Greek Civil Code and Article 8 of Law 3089/2002 (“Enforcement of Medically Assisted Reproduction”) and Illinois, US under the Gestational Surrogacy Act 2005.

<sup>223</sup> Eg South Africa, which imposes a minimum age of 21 and a maximum age of 34 for a genetic surrogacy arrangement and a minimum age of 21 and a maximum age of 50 for gestational surrogacy. Israel imposes a minimum age of 22 and a maximum age of 38.

<sup>224</sup> Eg New Zealand where the requirement is that the surrogate has completed her family and South Africa where the requirement is that the surrogate has living children of her own.

<sup>225</sup> HFEA 2008 s 54 (2).

<sup>226</sup> Eg Western Australia under the Surrogacy Act 2008 and the Human Assisted Reproductive Technology Act 1991 and Southern Australia under the Family Relationships Act 1975 and the Assisted Reproductive Treatment Act 1988, Hong Kong under the Human Reproductive Ordinance Cap 561.

## **1.7 Conclusion**

The morality and exploitation discourse of international surrogacy presents a complex set of legal challenges in terms of achieving a measured paternalistic response to the dichotomy of regulation and privacy. Whilst harm to individuals may be obvious in the context of a case to be decided, morality and ethics however can be harder to ascertain as it requires a societal barometer to detect changes in opinion and circumstances.

Partial regulation has been the government's response to this sphere of private family life, yet international surrogacy regulation remains complex and particular questions arise as to whether the regulation should remain an 'end point control' operating at the point of an application made by commissioning couples for a parental order or become a 'start point control' operating at the point that the couples enter in to contractual surrogacy relations. The present law has according to its critics created an un-workable set of rules that in turn risks marginalising sections of society.

The UK already partially legislates the surrogate family but a disconnect exists in relation to a number of areas of the current regulation including between private surrogacy arrangements in the UK and international surrogacy arrangements. Any design of future regulation arguably needs to take in to account the competing interests implicit in child protection and adult protection. It is argued that the starting point should be to understand who the stakeholders are and how they are likely to be affected by changes to surrogacy laws. Whilst it is true that regulation should focus on the collective public good, to understand how that collective good should be framed it is also necessary to consider what is happening at an individual level and whether any lessons can be drawn and harnessed in particular from the knowledge appropriation of the actors within the surrogacy social space in order to help distinguish between

‘post-truth’<sup>227</sup> claims about surrogacy, conceptualisation of surrogacy and the reality of the actors’ experiences.

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<sup>227</sup> Defined in the Oxford Dictionary as ‘relating or denoting circumstances in which objective facts are less influential in shaping public opinion than appeals to emotion and belief’. See Oxford Dictionary (online) < <https://en.oxforddictionaries.com/word-of-the-year/word-of-the-year-2016> > accessed 4 July 2017.

## CHAPTER TWO

### Surrogacy – A Conceptual and Evidence-Based Analysis

#### 2.1 Introduction

To best understand how any new policy might affect the cultural significance and acceptance of surrogacy it is useful to examine how surrogacy is conceptualised in order to measure this against the reality of the recounted experiences of some of the applicants involved in this study. In a legal world where experiences are constantly constructed and deconstructed for the courtroom, voices and the messages they bring can sometimes be forgotten and conceptualisation can often obscure the practicalities and realities of life.

#### 2.2 Surrogacy Conceptualised as Harm

A consequentialist harm - based argument is that surrogacy will destroy the conventional family model that is one based on heterosexuality and marriage or co-residence and where both parents ideally have a genetic connection to the child. Some family theorists argue that the breakdown of traditional families will lead to social disorder.<sup>228</sup> Whilst the 2008 Act extended surrogacy to same sex couples the traditional two – parent family model remains as single people are excluded from applying for a parental order and must instead apply to adopt the child. The concern to maintain the conventional family even in a supposedly unconventional method of conception is seen by the fact that the grant of legal parentage is only available to couples and where at least one of them has a genetic connection to the child.<sup>229</sup>

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<sup>228</sup> Eg Patricia M Morgan, *Farewell to the Family: Public Policy and Family Breakdown in Britain and the USA* (2<sup>nd</sup> edn, Institute of Economic Affairs Health and Welfare Unit 1995) and J Davies (ed), *The Family is it Just Another Lifestyle Choice?* (Choice in Welfare No.5, Institute of Economic Affairs Health and Welfare Unit 1993).

<sup>229</sup> HFEA 2008 s 54 (1)(b).

Another consequentialist argument is one based on the harm caused to women in general by the practice of surrogacy. Radical feminists such as Andrea Dworkin<sup>230</sup> argue that advances in reproduction technologies have been to the disadvantage of women as such advances enable men to control women's bodies and reduce them to no more than a 'Mother Machine'<sup>231</sup> as articulated in her 1983 book in a chapter titled 'The Coming Genocide.'<sup>232</sup> She argued that traditionally women's role had been consigned to two models: the farming model of reproduction and motherhood and a brothel model, which was non-reproductive in nature<sup>233</sup> and served only a sexual function. These two models, whilst previously operating separately, had in her view merged with the advent of new reproductive technologies.

Similarly Renate Duelli Klein<sup>234</sup> warned of a future where women would give up their autonomy to 'technodocs,' male reproductive experts who would exploit women's bodies for profit.<sup>235</sup> The emergence of this theory of patriarchal medicine can be traced back to Barbara Ehrenreich and Deidre English's 1978 research<sup>236</sup> into how the role of women in healthcare as 'healers' was reduced over a period of 150 years and that the development of the male doctor's practice was predicated on the basis that a 'woman's normal state was to be sick'.<sup>237</sup>

India is one example of how the medicalisation of parenthood has resulted in a booming industry. India saw an increase in commercial surrogacy following the

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<sup>230</sup> Andrea Dworkin, *Right Wing Women: The Politics of the Domesticated Females* (The Womens Press 1983).

<sup>231</sup> See Gena Corea, *The Mother Machine: Reproductive Technologies from Artificial Insemination to Artificial Wombs* (Harper Collins 1985) and Corea (n 240).

<sup>232</sup> Dworkin (n 230) 147.

<sup>233</sup> Dworkin (n 230) 174.

<sup>234</sup> R Duelli Klein, 'What's 'New' About the 'New' Reproductive Technologies?' in G Corea, R Duelli Klein, J Hanmer, HB Holmes, B Hoskins, M Kishwar, J Raymond, R Rowland and R Steinbacher (eds) *Man Made Women: How Reproductive Technologies Affect Women* (Hutchinson and Co (Publishers) Ltd 1985).

<sup>235</sup> Duelli Klein (n 234).

<sup>236</sup> Barbara Ehrenreich and Deidre English, *For Her Own Good: 150 Years of the Experts' Advice to Women* (Bantam Doubleday Dell Publishing Group 1998).

<sup>237</sup> *ibid* 110.

Supreme Court decision in Baby Manji<sup>238</sup> that recognised commercial surrogacy. However, the rapid growth of commercial surrogacy in India has led to the Indian government re-assessing the position with the introduction of the Surrogacy Regulation Bill<sup>239</sup> which will, when enacted, restrict surrogacy to altruistic surrogacy for heterosexual married couples who are Indian citizens and where the surrogate is a close relative of the intending couple.<sup>240</sup> The Bill also makes it a criminal offence to exploit the surrogate or to abandon, exploit or disown a surrogate child.<sup>241</sup>

Amrita Pande notes the commercialisation of parenthood and identified the Indian State of Gujarat as one of the most popular places for reproductive tourism in India.<sup>242</sup> She conducted a qualitative study of Indian surrogates at a clinic in Anand Gujarat. Pande argues that commercial surrogacy is a form of labour because the surrogate provides a service in order to produce an outcome for which she is financially rewarded and like other forms of labour it is open to exploitation.<sup>243</sup> However, she suggests that surrogates far from being victims are 'critical agents' in the process and capable of making decisions that affect them. Pande analyses such labour in the context of a recreated factory setting in the form of surrogacy hostels controlled by fertility clinics, not dissimilar to Dworkin's original vision. Pande distinguishes the exploitation argument noting that clinics seek to produce a perfect surrogate by disciplining

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<sup>238</sup> Baby Manji Yamada v Union of India (2008) 13 SCC 158.

<sup>239</sup> Surrogacy (Regulation) Bill 2016 introduced in Parliament in November 2016. The Bill extends to the whole of India except the State of Jammu and Kashmir, see clause 1 (2) chapter 1.

<sup>240</sup> *ibid* clause 4 chapter III.

<sup>241</sup> Surrogacy (Regulation) Bill 2016, clause 35 chapter VII.

<sup>242</sup> A Pande, 'Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker' (2010) 35 (4) *Signs* 969.

<sup>243</sup> See A Pande, 'Commercial Surrogate Mothering in India: Nine Months of Labor?' in (eds) K Kosaka and M Ogino (eds), *A Quest for Alternative Sociology* (Trans Pacific 2008), A Pande, 'Not an 'Angel', Not a 'Whore': Surrogates as 'Dirty' Workers in India' (2009) 16 (2) *Indian Journal of Gender Studies* 141 and Pande (n 252). This view is also supported by academics such as Winddance Twine, see *Outsourcing the Womb: Race, Class and Gestational Surrogacy in a Global Market* (Routledge - Cavendish 2011).

and training the surrogates but that the hostels actually emerge as a space for resistance rather than servitude.<sup>244</sup>

The potential exploitation that radical feminists warn of is greatest in international surrogacy particularly where emerging countries such as India are chosen as a destination for reproductive tourism. This is best demonstrated in a BBC documentary aired in October 2013.<sup>245</sup> The documentary film - makers secured exclusive access to the Akanksha Clinic in the town of Anand in Gujarat in India. Over 100 surrogates were accommodated in one house sharing 10 to a room. They were employed to carry babies for western couples using mainly gestational surrogacy where the eggs would be provided by the commissioning mother or a separate egg donor (so that there would be no difficulties about the child's ultimate skin colour). The surrogates were paid \$8,000 (equivalent to almost £5,000) for carrying one embryo and \$10,000 for carrying twins. In the event that the surrogate miscarried she would be paid only \$600.

One might argue in these circumstances that Dworkin's vision of a 'reproductive brothel' had materialised. However, in terms of the brothel being the creation of male doctors and scientists it was in fact the creation of a female fertility specialist Dr Nayna Patel<sup>246</sup> and her husband. Equally one could debate whether Dr Nayna Patel was merely part of a male dominated culture within reproductive medicine.

Arguments based on the patriarchy of reproductive medicine usually fail to take into account the increasing numbers of female professionals who are involved in the evolution of the new reproductive technologies<sup>247</sup> and particularly female

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<sup>244</sup> Pande (n 242).

<sup>245</sup> Special Editions Films, House of Surrogates, commissioned by BBC 4 and aired on 1 October 2013 at 9.00pm.

<sup>246</sup> Dr. Patel is a qualified Gynaecologist and medical director of the Akanksha Clinic with specialism in *in vitro* fertilisation.

<sup>247</sup> See Royal College of Obstetricians and Gynaecology, *The Future Workforce in Obstetrics and Gynaecology: England and Wales Full Report* (RCOG Press 2009) 7 at ><https://www.rcog.org.uk/en/guidelines-research-services/guidelines/the-future-workforce-in-obstetrics-and-gynaecology/>>accessed 19 December 2016.

gynaecologists<sup>248</sup> and those specialising in reproductive technologies.<sup>249</sup>

Although the data on reproductive medicine may be unreliable given that there might be other consultant based clinical activities related to reproductive medicine in hospitals, which were unaccounted for due to poor and unreliable referral data.<sup>250</sup>

Men, medical or non-medical, are not necessarily driving the demand for surrogacy and without the demand there is not a profitable market. In a study conducted by the London Family and Child Psychology Research Centre<sup>251</sup> in 2003, one of the issues researchers examined was who initiated the suggestion of surrogacy amongst the commissioning couple. From the 42 couples that took part 43% of commissioning mothers perceived the decision to choose surrogacy as their own as against 48% who said it had been a joint decision, only a small majority perceived it as the commissioning father's decision.<sup>252</sup> These findings support similar findings found in Blyth's 1995 study.<sup>253</sup> It is important to take in to account the fact that when made by a same sex female couple the demand for motherhood does not involve male pressure being exerted.

Fatherhood is a desire imposed by society as much as motherhood (this can be seen in the case of same sex male couples seeking the services of a surrogate). Men also now have a greater role in child rearing as a result of family friendly policies.<sup>254</sup> Under the Employment Relations Act 1999 the government introduced entitlement to 13 weeks unpaid parental leave for

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<sup>248</sup> Royal College of Obstetrics and Gynaecology, Medical Workforce in Obstetrics and Gynaecology: 20<sup>th</sup> RCOG Report' (RCOG Press 2011) 11.

<sup>249</sup> Royal College (n 248) 28.

<sup>250</sup> See similar comments made by Royal College (n 248 ) 29.

<sup>251</sup> F MacCullum, E Lycett, C Murray, V Jadv and S Golombok, 'Surrogacy: The Experience of Commissioning Couples (2003) Human Reproduction 18 (6), 1334.

<sup>252</sup> *ibid* 1337.

<sup>253</sup> E Blyth, 'Not a Primrose Path': Commissioning parents' experience of Surrogacy Arrangements in Britain' (1995) Journal of Reproductive Infant Psychology 13, 188.

<sup>254</sup> Eg the Shared Parental Leave Regulations 2014 SI 2014/3050.



employees to care for children<sup>255</sup> and the Employment Act 2002 introduced up to two weeks paid paternity leave for working fathers.<sup>256</sup>

Surrogacy along with other fertility treatments such as in vitro fertilisation (IVF) is also seen as reversing and harming advances made in the women's movement because reproductive technologies, like the porn industry would use women's bodies to oppress women. The risks would lie in the economic exploitation of women as breeders. Jan Hanmer<sup>257</sup> argues that advances in science such as the Pill and research by William Masters and Virginia Johnson<sup>258</sup> on sexual behaviour helped to raise women's consciousness and to separate sexuality from reproduction and childrearing.<sup>259</sup> This in turn led to motherhood being viewed as oppressive. However, in Hanmer's view, whilst the sexual revolution led to women turning advances in medical science to their advantage, this would not necessarily be the case with the new reproductive technologies. Hanmer cautions that raising consciousness alone will not be enough to prevent the exploitation of women as some women will also be disadvantaged by factors such as age, race, country of origin, disability and religion.<sup>260</sup>

Other radical feminists ventured more liberal views suggesting that the social stigmatisation of mothers as victims was unhelpful and that reproductive technologies could actually empower women by giving them the chance to decide whether or not to become mothers and control the biological processes

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<sup>255</sup> See Employment Relations Act 1999 Part 1 schedule 4.

<sup>256</sup> See Employment Act 2002 Part 1 chapter 1.

<sup>257</sup> J Hanmer, 'Transforming Consciousness: Women and the New Reproductive Technologies' in G Corea, R Duelli Klein, J Hanmer, HB Holmes, B Hoskins, M Kishwar, J Raymond, R Rowland and R Steinbacher (eds) *Man Made Women: How Reproductive Technologies Affect Women* (Hutchinson and Co (Publishers) Ltd 1985).

<sup>258</sup> William H Masters and Virginia E Johnson, *The Human Sexual Response* (Lippincott Williams and Wilkins 1966).

<sup>259</sup> Hanmer (n 257) 90.

<sup>260</sup> Hanmer (n 257) 97.

of their own bodies.<sup>261</sup> They championed surrogacy as pro-autonomy and this is discussed further in 2.4.

Even pioneers of reproductive medicine have added their voices to the fear of the emergence of 'designer babies' commissioned by wealthy western women. Lord Winston<sup>262</sup> one of the UK's pioneers of pre-implantation diagnosis<sup>263</sup> has warned that the advancement of the new reproductive technologies will see a divide in society with the rich being able to pay for 'designer babies' that are scientifically engineered in a method similar to eugenics.<sup>264</sup>

The conceptualisation of surrogacy as a practice that is exploitative, harmful and leads to commodification is a complex one but not without foundation and has proved to be true in a number of stories highlighted in the media. For example, the media reports surrounding the 'Baby Gammy'<sup>265</sup> story where an Australian couple used a Thai surrogate who bore twins was met with a tightening of controls on the practice of surrogacy in some countries such as India and Cambodia. Following intense media attention the story also led to the Thai authorities announcing in August 2014 that it would be introducing new laws amending the Thai Civil and Commercial code to ban commercial surrogacy.<sup>266</sup> The new Act only permit altruistic gestational surrogacy<sup>267</sup> between family members where the surrogate has a blood tie and the

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<sup>261</sup> Eg Shulamith Firestone, *The Dialectic of Sex: The Case for Feminist Revolution* (Farrar Strauss Giroux 1970) and C Shalev, *Birth Power: The case for Surrogacy* (Yale University Press 1989).

<sup>262</sup> Lord Winston is emeritus professor of fertility studies at Imperial College London.

<sup>263</sup> Lord Winston was part of a team at Hammersmith Hospital London whose research led to the first baby born through Pre-implantation Genetic Diagnosis (PGD), which involves the genetic profiling of embryos prior to implantation.

<sup>264</sup> See Lord Winston's speech given to the Pre-implantation Genetic Diagnosis International Society's annual meeting at the University of Kent on 29<sup>th</sup> April 2014 as reported in Bionews 753 12 May 2014 <[http://www.bionews.org.uk/page\\_418155.asp](http://www.bionews.org.uk/page_418155.asp)> accessed on 13 May 2014.

<sup>265</sup> Eg News.com, 'Australian Couple Claim they are not the Parents of Baby Gammy – Born to a Thai Surrogate' AP and Network Writers, News Corp Australia<<http://www.news.com.au/lifestyle/parenting/australian-couple-claim-they-are-not-the-parents-of-baby-gammy-born-to-a-thai-surrogate/story-fnet085v-1227012256324>>accessed on 3 August 2014.

<sup>266</sup> Protection of Children Born from Assisted Reproductive Technologies Act 2015.

<sup>267</sup> *ibid* § 22 (2).

commissioning couple are a heterosexual couple.<sup>268</sup> Media reports later revealed that the commissioning father in the Baby Gammy case had convictions for sex offences involving minors.<sup>269</sup> The courts also doubted the veracity of the surrogate's evidence particularly as she had received payment from the media.<sup>270</sup>

Another example of the media framing the victimhood status of a surrogate can be seen in the widely reported Texas case of Esthela Clark<sup>271</sup> who pleaded guilty to smuggling a Mexican woman in to the US and holding her captive whilst trying to impregnate her with her boyfriend's sperm using various methods of non-clinical artificial insemination. Clark was found guilty under Florida's human trafficking legislation.<sup>272</sup> Whilst gestational surrogacy is legal in Florida<sup>273</sup> Clark's actions were considered criminal in nature. These and other media reports seemingly support the academic discourse relating to the potential for harm and exploitation.

### **2.2.1 Harm to the Surrogate**

The protection of women and indeed children becomes a strong focus in the arguments against the practice of surrogacy. The surrogate is singled out in much of the academic debate as the party most likely to be harmed by the practice of surrogacy and surrogates are often given victimhood status.<sup>274</sup>

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<sup>268</sup> Protection of Children Born from Assisted Reproductive Technologies Act 2015, § 21.

<sup>269</sup> Eg B Lagan, 'Surrogacy Row Father is a Sex Offender', The Times (UK) 6 August 2014.

<sup>270</sup> Farnell and Another and Chanbua [2016] FCWA 17. [56].

<sup>271</sup> Eg J Smith, 'Surrogate Slave: Florida Woman, 47, Paid for Young Woman to be Smuggled in from Mexico and Held her Captive for Two Years While she Tried to Impregnate her with Boyfriend's Sperm and Fed her on Beans', Daily Mail Online (UK) 27 March 2017 <<http://wfla.com/2017/03/28/florida-woman-pleads-guilty-to-smuggling-woman-and-using-her-as-sex-surrogate/>> accessed 27 March 2017 and D Riley, 'Surrogacy in the Market of Desire', Bioethics Online (Blog) 4 February 2017 <<http://www.bioethics.net/2017/04/surrogacy-in-the-market-of-desire/>> accessed 10 April 2017.

<sup>272</sup> The 2016 Florida Statutes, Chapter 787.

<sup>273</sup> The 2012 Florida Statutes, Chapter, § 742 742.14 – 742.17.

<sup>274</sup> Eg arguments about risks and harm to a surrogate advanced by academics such as S Dodds and K Jones, 'Surrogacy and Autonomy' (1989) 3(1) Bioethics 1.

One of the areas of concern is the potential vulnerability of the surrogate to psychological risks. This is because, it is argued, the surrogate may not appreciate the emotional attachment that will develop between her and the foetus during pregnancy and the long-term psychological effects that will ensue as a result of giving up the child. According to Susan Dodds and Karen Jones<sup>275</sup> a surrogate who has not given birth before would not have the necessary autonomy because she would not be aware of the risks and outcomes of the pregnancy.

Elly Teman<sup>276</sup> argues that many psychological studies of surrogates have been framed around the false premise that all mothers experience attachment and bonding to a baby carried in their womb therefore any women who do not experience what is regarded as normal maternal feelings are categorised as abnormal. She cites Parker's<sup>277</sup> 1983 research which concludes that surrogates were often motivated by unresolved feelings and argues that his statistical data does not support this, yet his research has been relied on by others in an attempt to find a psychological link. Teman argues that the 'bonding theory' favoured by psychologists is flawed because it is 'culturally constructed'.<sup>278</sup> Teman also suggests that researchers should listen to the surrogate experience rather than try to impose forced concepts and categories in their research and in doing so may discover a paradigm that is not based on socially constructed notions of motherhood or the family.

As well as psychological harm to the surrogate there are also physical risks that pose harm to the surrogate such as the complications that can occur during childbirth or the risk of sexually transmitted diseases in private surrogacy arrangements that use unscreened sperm for artificial or natural insemination.

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<sup>275</sup> Dodds and Jones (n 274).

<sup>276</sup> E Teman, 'The Social Construction of Surrogacy Research: An Anthropological Critique of the Psychosocial Scholarship on Surrogate Motherhood' (2008) 67 (7) *Social Science & Medicine* 1104.

<sup>277</sup> PJ Parker, 'Motivation of Surrogate Mothers – Initial Findings' (1983) 114 (1) *American Journal of Psychiatry* 117.

<sup>278</sup> Teman (n 276) 1107.

There is also a risk of multiple pregnancies in surrogacy through IVF and this can bring additional health risks to the surrogate. However, Teman<sup>279</sup> argues that conceptual notions of what might be normal behaviour or expectations surrounding reproduction can distort the other realities of the practice of surrogacy.

### **2.2.2 Harm to the Commissioning Couple**

Harm can arguably occur through a failure to recognise or accept the identity of another. One potential area of harm is where lack of recognition leads to harm to identity especially on the question of legal parentage and this is most evident in relation to motherhood. Section 33 of the 2008 Act<sup>280</sup> does not make any allowance for the fact that the commissioning mother may use her own ovum in a gestational surrogacy arrangement and therefore be genetically related to the child. Thus the motherhood status of the commissioning mother is not automatically recognised in law.

On the question of motherhood Sara Ruddick<sup>281</sup> argues that motherhood consists of two distinct labours, giving birth and raising the child and that these labours should be separated and equally validated. In addition Ruddick argues that the same woman need not necessarily perform these labours. Emily Jackson<sup>282</sup> and Julie Wallwork<sup>283</sup> argue that society and the law should recognise dual motherhood, namely the claims of two mothers over one child. Jackson observes that 'the law has been stymied by the principal of parental exclusivity'<sup>284</sup> and that the intention to become a parent should be the deciding factor rather than biology. Jackson however recognises that there will always be a need to nominate the 'Principal Parent' when assessing issues of care and

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<sup>279</sup> Teman (n 276), 1108

<sup>280</sup> HFEA 2008, s 33.

<sup>281</sup> Sara Ruddick, *Maternal Thinking: Towards a Politics of Peace* (The Women's Press Ltd 1990).

<sup>282</sup> E Jackson, 'What Is a Parent' in A Diduck and K O'Donovan (eds) *Feminist Perspectives on Family Law* (Routledge - Cavendish 2006).

<sup>283</sup> J Wallbank, 'Too Many Mothers? Surrogacy, Kinship and the Welfare of the Child' (2002) 10 *Medical Law Review* 271.

<sup>284</sup> Jackson (282), 60.

support for the child and that in the case of a surrogacy arrangement this should always be the commissioning mother.

Katherine O'Donovan and Jill Marshall<sup>285</sup> argue that the failure to distinguish between the childbirth role (maternity) and the child-rearing role (motherhood) is made not only by feminists but also by health practitioners who refer to a pregnant woman as the mother throughout her pregnancy. Such distinctions are particularly important in surrogacy where maternity may belong to one woman and motherhood to another. Eugenia Caracciola di Torella<sup>286</sup> further argues that the continuation of the distinction between the social and legal meaning of maternity in EU Directives leads to unfairness. In addition a woman's care giving role in determining the right to legal parentage can further be sub-divided into the 'bio-natural' mother (a commissioning mother who has a biological connection to the child) and the 'socio-natural mother' (a commissioning mother who does not have a biological connection to the child).<sup>287</sup>

Twenty-first century feminists such as Alison Diduck and O'Donovan<sup>288</sup> argue that the feminist narrative on identity has changed from one based on male domination and the invisibility of women to a celebration of gender differences and an acceptance of the importance of a woman's place within the family, what Diduck and O'Donovan term 'pro-familialism'.<sup>289</sup> Whilst the feminism discussion continues to be centred on economic and political power of women it has moved towards an examination of how women construct and give meaning to their lives. This in turn has led to a shift in the discourse surrounding the legal

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<sup>285</sup> K O'Donovan and J Marshall, 'After Birth: Decisions about Becoming a Mother' in A Diduck and K O'Donovan (eds), *Feminist Perspectives on Family Law* (Routledge - Cavendish 2006) 101.

<sup>286</sup> E Caracciola di Torella and P Foubert, 'Surrogacy, Pregnancy and Maternity Rights: a Missed Opportunity for a More Coherent Regime of Parental Rights in the EU' University of Leicester School of Law Research Paper no. 15 – 20.

<sup>287</sup> For further discussion see R D'Alton-Harrison, 'Mater Semper Incertus Est: Who's Your Mummy?' (2014) 22 (3) *Medical Law Review* 357.

<sup>288</sup> A Diduck and K O'Donovan, 'Feminism and Families: Plus Ça Change? In A Diduck and K O'Donovan (eds), *Feminist Perspectives on Family Law* (Routledge-Cavendish 2006).

<sup>289</sup> *ibid*, 2.

obligations of the state and the individual.<sup>290</sup> The importance of motherhood has also been emphasised by financial rewards and employment protection<sup>291</sup> and this arguably elevates rather than diminishes the status of motherhood. However, one might argue that this elevated status of motherhood is threatened by the sub-division of legal and social parentage based on biology. Thus vulnerability for the commissioning couple can be linked to a lack of recognition of status.

Social identity theorists argue that status recognition is also important to the individual<sup>292</sup> and that individuals face a struggle for recognition on becoming aware of their mutual dependency and that awareness of the self can only be achieved on entering into a relationship of recognition with another. For example, Axel Honneth<sup>293</sup> argues that:

‘Stances of love, legal respect and esteem thus accentuate and display various aspects of the basic attitude we understand generally as recognition.’<sup>294</sup>

There exists to some extent an inter-play between identity and autonomy and social recognition and autonomy. The reliance on others to validate an individual’s worth however is arguably yet another example of the non-autonomous state of motherhood even for the commissioning mother. The other difficulty is that motherhood itself might be regarded as a social construct dependent on images in the media, narratives in film and literature as well as legal and philosophical views of motherhood. Identity is also transformative as argued by Morwenna Griffiths<sup>295</sup> and therefore future identities can be affected by past identities. Many of the commissioning mothers in this thesis study

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<sup>290</sup> *ibid* 4.

<sup>291</sup> Eg CFA 2014, s 122 that introduced an entitlement to maternity leave for the first time for a commissioning mother in a surrogacy arrangement.

<sup>292</sup> Eg H Tajfel and JC Turner, ‘The Social Identity Theory of Inter-Group Behaviour’ in S Worchel & WG Austin (eds) *Psychology of Intergroup Relations* (2<sup>nd</sup> edn, Nelson-Hall 1986).

<sup>293</sup> Axel Honneth, *The I in We: Studies in the Theory of Recognition* (Polity Press 2012).

<sup>294</sup> *ibid* 80.

<sup>295</sup> Morwenna Griffiths, *Feminism and the Self: The Web of Identity* (Routledge 1995).

spoke of how the status of motherhood would give them purpose in life and a future identity.

### 2.2.3 Harm to the Child

Arguments that the practice of surrogacy harms the child are expressed mainly through issues of identity (discussed below), vulnerability (discussed at 2.3) and commodification (discussed at 2.5). Identity can be regarded as the consciousness or self-awareness, which is derived from membership of a particular social group. Most of the academic discourse surrounding surrogacy has focused on identity issues of the surrogate child rather than the parents.

Child psychologists have long recognised the importance of maternal behaviour to a child's development and in consequence identity. For a child their identity is formed not just by their biology but also by their social environment. Joseph Goldstein et al<sup>296</sup> recognise that a child's psychological development and subsequent attachment to a parent is not based on biology alone. This is echoed by Harry Brighthouse and Adam Swift<sup>297</sup> who place the child rearing role of a parent into four distinct roles of intimacy, dependability, freedom to remain or exit and responsibility for the child's wellbeing. Brighthouse and Swift argue that this is what makes a parent unique rather than biology. Thus a child is still able to identify with non-biological parents because they are integral to the child's psychological development (see discussion in chapter 6 at 6.2.4).

The issue of identity of the child is particularly important when only one of the commissioning couple has a genetic link to the child. However, suggestions that a non-genetic parent is likely to have difficulties bonding with the child have been repeatedly dismissed in psychological studies.<sup>298</sup> Such studies have found

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<sup>296</sup> The 'psychological parent' theory in Joseph Goldstein, Albert J Solnit, Sonja Goldstein and Anna Freud, *The Best Interests of the Child* (The Free Press 1996).

<sup>297</sup> H Brighthouse and A Swift, 'Parents' Rights and the Value of Family' (2006) 117 Ethics 80.

<sup>298</sup> Eg H Bos and F Van Balen, 'Children of the New Reproductive Technologies: Social and Genetic Parenthood' (2010) 81 (3) Patient Education and Counseling 429 and O Van Den Akker, 'The Importance of a Genetic Link in Mothers Commissioning a Surrogate Baby in the UK (2000) 15 (8) Human Reproduction 1849.



that there is no difference between the child-parent relationship involving natural and artificial conception.

Some academics argue that a child's right to know their origins is a fundamental human right.<sup>299</sup> Some argue<sup>300</sup> that the interests of the child are not protected when the child is removed from their birth mother as this leads to an identity crisis for the child. Even after the grant of a parental order, the question may arise as to whether the child should keep in contact with their birth mother and whether the welfare of the child should include a right to know and have contact with its birth mother. In the UK the anonymity of donors was abolished in 2005 and this therefore applies to egg donors. The HFEA keeps a register of information on donors, which can be accessed by donor - conceived children when they reach 18.<sup>301</sup>

The Nuffield Council on Bioethics recommended in their 2013 report<sup>302</sup> that the decision as to whether to tell donor – conceived children of their origins should be a matter left to the parents. However, the Hague Conference on Private International Law is currently looking at the issue of an international Convention on surrogacy and have indicated that any future Convention should include the child's right to know their origins.<sup>303</sup> Disclosure of the child's origins was a conversation that was recorded in the majority of the parental order reports. Most of the commissioning couples spoke of an intention to reveal the child's origins through story telling and photographs and for those who did not, this issue was broached by the POR and its importance emphasised.

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<sup>299</sup> Eg K Wade, 'The Regulation of Surrogacy: a Children's Rights Perspective' (2017) *Child and Family Law Quarterly* 113.

<sup>300</sup> Eg Iona Institute's paper 'The Ethical Case Against Surrogate Motherhood' in response to Ireland's proposals to enact legislation on surrogacy <<http://www.ionainstitute.ie/assets/files/Surrogacy%20final%20PDF.pdf>> accessed on 29<sup>th</sup> December 2013. The Iona Institute promotes marriage and religion in society.

<sup>301</sup> HFEA 2008, s 24.

<sup>302</sup> Nuffield Council on Bioethics, *Donor Conception: Ethical Aspects of Information Sharing* (Nuffield Council on Bioethics 2013).

<sup>303</sup> Hague Conference on Private International Law, *Preliminary Report on the Issues Arising from International Surrogacy Arrangements* (Permanent Bureau 2012).

## 2.3 Surrogacy Conceptualised as Vulnerability

One argument advanced against the practice of surrogacy is the risk that it will make certain sections of society vulnerable in that reproductive technologies will become available only to those able to meet its high cost. This in turn would lead to couples from low socio-economic backgrounds being priced out of the market. The data in this study confirms that those from high-income professional backgrounds indeed primarily undertake international surrogacy arrangements.

However, it should be noted that whilst the majority of surrogacy arrangements in this study took place in countries with a lower standard of living and where the women were drawn from poor socio-economic backgrounds, a significant number of the surrogacy arrangements took place in western jurisdictions such as the US where the women were from higher socio-economic backgrounds.

The most popular destination chosen by the commissioning couples was India a jurisdiction chosen by 50% (N =16) of the couples followed by the US chosen by 41% (N =13). Ukraine was chosen by 6% (N= 2)) with only one file involving a surrogacy arrangement in Canada (3%). The official statistics reported by Horsey et al<sup>304</sup> shows that the most popular destination for UK commissioning couples was India but closely followed by the US.<sup>305</sup>

This pattern of the choice of host countries is repeated in the 31 reported international surrogacy judgments analysed for this thesis<sup>306</sup> and perhaps challenges some of the cultural expectations of the socio-economic indicators of surrogacy. It is unsurprising that India was the most popular choice within the

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<sup>304</sup> Horsey (n 198) 14, Table 2.1.2 and 16, Table 2.2.1.

<sup>305</sup> Horsey (n 198) 14, Table 2.1.2.

<sup>306</sup> For cases involving India see Re K (140), X and Y (Children) (n 51), A v P (n 49), Z, B v C (n 115), D and L (n 94), A & B v SA [2013] EWHC 426 (fam), Re WT (n 51), Re X (A Child) (n 49), Re A and B (no.2) (n 107), Re Z (Foreign Surrogacy) (n 132), Re A and B (No.2) (n 107), Re X (Foreign Surrogacy) (n 51) KB and RJ (n 51). For the US see Re S (n 51), Re L (n 5), J v G (n 51), Re P-M (n 49), Re W (n 51), Re C (n 51), Re G and M (n 51), CC v DD (n 51), D & G (n 51), Re Z (A Child) (n 49), Z (A Child) (No.2) (n 51), A and B v C and D (n 107).

sample given the low cost of living which in turn allows the clinics to charge more competitive prices for their services and the services of the surrogate. However, what is surprising is that cost does not always dictate the treatment choices made by the commissioning couples given the high number of commissioning couples who were attracted to the US as a destination for surrogacy. India has reversed its policy on commercial surrogacy following the passing of the Surrogacy (Regulation) Bill 2016 which will see surrogacy restricted to altruistic surrogacy available to Indian nationals and those of Indian descent.<sup>307</sup>

It is not just the surrogate who is potentially vulnerable but also the child who must be protected by the state and thus state intervention that seeks to limit surrogacy, one could argue, is justified. Martha Fineman's body of work on vulnerability and dependency<sup>308</sup> all contain the same theme, namely that law and policy should take account of the concepts of vulnerability and resilience. Children are considered to be the 'paradigmatic vulnerable subject'<sup>309</sup> in Fineman's view and exemplify how vulnerability can materialise through a dependency on others. Fineman concludes that by being attentive to the 'vulnerable subject'<sup>310</sup> the true meaning of equality will be achieved, one that focuses by 'exploring the nature of the human part, rather than the rights part, of the human rights trope'.<sup>311</sup> The state therefore has a role to play.

John Stuart Mill<sup>312</sup> argued that the state should always intervene on behalf of children because of their vulnerability and that where a parent was not able to provide food, shelter or education for a child that should be the role of the state.<sup>313</sup> There is no doubt that the welfare of the child is considered central to

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<sup>307</sup> The Surrogacy (Regulation) Bill 2016 clause 60 (11) (a).

<sup>308</sup> See Martha Albertson Fineman, *The Autonomy Myth: A Theory of Dependency*, (First published 2004, The New Press 2005), MA Fineman, 'The Vulnerable Subject and the Responsive State' (2010) 60 Emory Law Journal 251 < <http://web.gs.emory.edu/vulnerability/>> accessed on 15 June 2016.

<sup>309</sup> Fineman (n 308).

<sup>310</sup> Fineman (n 308b), 267.

<sup>311</sup> Fineman (n 308b), 255.

<sup>312</sup> John Stuart Mill, *On Liberty* (First published 1859, Cosimo Inc 2005).

<sup>313</sup> *ibid* 128.

the practice of surrogacy. Before medical practitioners can treat prospective parents in a surrogacy arrangement they must consider the need of the child for 'supportive parents.'<sup>314</sup> The consideration of the child's welfare thus takes place even before the child is born. In addition after the birth of the child, the court must once again give paramount consideration to the welfare of the child but this time when considering whether to grant a parental order in favour of the commissioning couple.<sup>315</sup>

## **2.4 Surrogacy Conceptualised as Autonomy**

Autonomy can be defined as the will of the individual to self-rule and self-mastery. Radical feminists<sup>316</sup> argue that women involved in the practice of surrogacy, particularly the surrogate, are not autonomous because they do not act with either informed or voluntary consent and that autonomy must be looked at in relation to social relationships and not merely the self. As far as voluntary consent is concerned it is argued that a surrogate is not acting voluntarily because she does so out of economic necessity.

Feminist opponents of surrogacy also argue that the practice of surrogacy removes the surrogate's autonomy over her body and also her reproductive choice and that particularly with the growing practice of international surrogacy women in emerging economies are at risk of being exploited for commercial gain.<sup>317</sup> This is particularly so where surrogacy brokers are permitted to charge a fee for arranging surrogacy contracts.<sup>318</sup> The tyranny of patriarchy, radical feminists such as Dworkin argue, erodes any possibility of autonomy on the part of women who take part in the new reproductive technologies. Therefore paternalism (by a male medical profession) was seen as a barrier to true autonomy. Yet academics disagree on the interpretation of autonomy and the different forms that it can take.

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<sup>314</sup> HFEA 2008, s 14 (2) (b) amends HFEA 1990 (HFEA 1990), s 13 (5).

<sup>315</sup> See HFEPOR 2010, schedule 2, which adopts the wording of s.1 (2) of the ACA 2002 on the lifelong welfare of the child being paramount.

<sup>316</sup> Eg R Duelli Klein (n 234) and Hanmer (n 257).

<sup>317</sup> Eg Dworkin (n 230), and Dodds and Jones (n 274).

<sup>318</sup> Eg S O'Brien, 'Commercial Conception: A Breeding Ground for Surrogacy', (1986) 65 North Carolina Law Review 127, 144.

Immanuel Kant<sup>319</sup> argues that autonomy depends on rationality because in order to be autonomous individuals must have the intellectual capacity to reason and believe which in turn governs the decisions made by them. This is in contrast to David Hume<sup>320</sup> who argues that whilst reasoning is important it is not the sole component of autonomy, as it also requires desires and preferences to inform the decisions that individuals make. Mill takes this further suggesting that autonomy can only be acquired by individuals who have a desire for the truth.<sup>321</sup> Hume's interpretation of autonomy is criticised by Richard Lindley as too simplistic in that it fails to take account of the conflict that can exist between desires.<sup>322</sup> However, this view of moral autonomy differs greatly from what Gerald Dworkin<sup>323</sup> has termed personal autonomy, which is not constrained by moral obligations, and which individuals can apply to any aspect of their own lives. Personal autonomy is based on an individual's independent desire and they have the power to accept or reject those desires. Personal autonomy compliments theories on moral responsibility but is not values driven.

However, for those who would take a metaphysical approach to autonomy and argue that one can never be truly autonomous because humans are shaped by their environment and biology and that therefore their values and beliefs and ability to make decisions are never truly their own, personal autonomy becomes a problematic concept. It raises the question of whether it is possible to argue that a person governs their own self if the self is in turn governed by external factors. Susan Woolf<sup>324</sup> argues that a 'RealSelf View' of autonomy that ascribes freedoms to individuals to govern their own will based on their own system of values ignores the conundrum of where the real self originates from and how it came to dictate the behaviour on which the values are based.

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<sup>319</sup> Immanuel Kant, *The Critique of Practical Reason* (Rev Ed edn, Penguin Classics 2007).

<sup>320</sup> D Hume, 'Essays and Treatises on Several Subjects' (online repository) <<http://www.davidhume.org/texts/etss.html>> accessed 23 June 2017.

<sup>321</sup> Stuart Mill (n 312), *On Liberty*.

<sup>322</sup> Richard Lindley, *Autonomy: Issues in Political Theory* (Prometheus books 1986).

<sup>323</sup> Gerald Dworkin, *The Theory and Practice of Autonomy* (Cambridge University Press 1988).

<sup>324</sup> Susan Woolf, *Freedom Within Reason* (Oxford University Press 1990).

Instead Woolf offers a theory of 'ReasonView' autonomy<sup>325</sup> that recognises that the self and the self's value systems have been externally influenced but recognises that an individual can put their own mark or influence on the adoption of such values through reasoning or the appreciation of reasoning or the lack thereof. Woolf includes imagination, perception and logical thought within her definition of reason. An individual's ability to reason ultimately determines whether or not we hold those individuals responsible for their actions. A responsible agent in Woolf's view is one who is free to form, govern and change their values and thus the freedom necessary for responsibility to arise is 'a freedom within reason'.<sup>326</sup> This moves the discussion to a normative rather than a metaphysical ground. Writers such as Carol Gilligan,<sup>327</sup> and Anthony Giddens<sup>328</sup> take self-autonomy further by suggesting that it is also embedded in mutuality and a concern for the needs of others.

Susan Dodds and Karen Jones<sup>329</sup> take the autonomy argument further in surrogacy by dividing autonomy into two related factions, 'occurrent autonomy' and 'dispositional autonomy'. They argue both are absent in the case of surrogates. Occurrent autonomy is the ability to make decisions based on rationality much in the way Kant<sup>330</sup> described. The rationality is based on the individual's knowledge of their life map. Dispositional autonomy however, is 'a unified, self-directed life-plan'.<sup>331</sup> They argue in the case of surrogacy a surrogate has neither occurrent nor dispositional autonomy and therefore the surrogate is non-autonomous.

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<sup>325</sup> See S Woolf, 'Freedom Within Reason' in J Stacey Taylor (ed) *Personal Autonomy: New Essays on Personal Autonomy and its Role in Contemporary Moral Philosophy* (Cambridge University Press 2005).

<sup>326</sup> Woolf (n 325) 271.

<sup>327</sup> Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Harvard University Press 1982).

<sup>328</sup> Anthony Giddens, *The Transformation of Intimacy: Sexuality, Love and Eroticism in Modern Societies* (first published 1992, Polity Press 2008).

<sup>329</sup> Dodds and Jones (n 274).

<sup>330</sup> Kant (n 319).

<sup>331</sup> Dodds and Jones (n 274) 2.

Occurrent autonomy, Dodds and Jones argue cannot exist because the surrogate does not make an informed decision because an informed decision requires knowledge of the risks and outcomes which a surrogate cannot have because every pregnancy is different and carries different risks and outcomes. With regard to dispositional autonomy a surrogate does not self-direct her own life map because she gives up a child and cannot possibly know what will happen to that child and in addition the surrogate's psychological health is affected. In entering a surrogacy contract the surrogate is often directed by others with agreements relating to non-smoking during the pregnancy, the method of labour, decisions as to abortions and so on.

Dodd and Jones' claims that a surrogate lacks autonomy is challenged by Justin Oakley<sup>332</sup> who claims that as far as occurrent autonomy is concerned it is nonsensical to claim that it depends on knowledge of the outcome of decisions as if this were the case than contracts such as marriages would not be entered into autonomously as it would be impossible to predict the outcome. Whilst he accepts some knowledge of the risks is needed he argues this is a question of degree depending on the importance of the decision being made.

Fineman questions whether individuals can truly be autonomous when autonomy relies on individuals being able to partake in the advantages and disadvantages society offers yet in order to do so they would need to have the resources that would allow them to act within society's expectations in terms of activities and tasks.<sup>333</sup> Fineman notes that whilst the everyday activities of family life are considered to be private the reality is that the formation and ending of families is heavily regulated by the state.<sup>334</sup> Fineman singles out policies on the family as being examples of the usurpation of social and collective responsibility in favour of a fallacy of autonomy that she labels the 'autonomy myth'. For Fineman, policies promoting marriage are problematic when what society should really value is the care-giving role.

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<sup>332</sup> J Oakley, 'Altruistic Surrogacy and Informed Consent (1992) 6 (4) Bioethics 269.

<sup>333</sup> Fineman (308a) 29.

<sup>334</sup> Ibid 59.

One of the conditions for autonomy is freedom, which has also been expressed as liberty. John Stuart Mill<sup>335</sup> defined human liberty as amounting to an understanding by an individual of the proportion of their life and conduct that should belong to them and involving a consciousness in demanding the right to control those areas of their life. This necessarily involved freedoms of thought, feeling, opinion and sentiment.<sup>336</sup>

Mill recognised that there was a conflict between liberty and authority and that in certain situations moral authority would require the suppression of liberty. For example, he did not perceive as a violation of liberty the laws that at the time prevented marriage where the parties could not show that they had the means to support a family.<sup>337</sup> Mill therefore accepted that there were certain situations in which the state should intervene in private life regardless of liberty.

Elizabeth Wicks<sup>338</sup> argues that whilst State intervention is important in some parts of an individual's life that might ordinarily be regarded as 'private' there should be a clear line drawn around a private space where the state has no right of interference and this line should be drawn around what she terms 'bodily autonomy' as against individual autonomy which Wicks accepts should be used to protect an individual's rights and freedoms. Bodily autonomy is thus defined by Wicks as 'the embodied self that is capable of making truly autonomous decisions rather than a disembodied mind.'<sup>339</sup> However, Wicks accepts that surrogacy should be an exception and warrants some limited regulation because of the competing interests of multiple parties.

Thomas May<sup>340</sup> argues that in bioethics autonomy must be based on the political framework that governs decision-making in bioethics and that in the

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<sup>335</sup> Stuart Mill (n 312).

<sup>336</sup> *ibid* 16.

<sup>337</sup> Stuart Mill (n 326), 132.

<sup>338</sup> E Wicks, *The State and the Body: Legal Regulation of Bodily Autonomy* (Hart Publishing 2016).

<sup>339</sup> *Ibid* 15.

<sup>340</sup> T May, 'The Concept of Autonomy in Bioethics' in JS Taylor (ed) *Personal Autonomy: New Essays on Personal Autonomy and its Role in Contemporary Moral Philosophy* (Cambridge University Press 2005) 299.



USA in particular this political framework he identifies as liberalism. This in turn governs our social relations to the extent that the issue of morality within bioethics is limited by the political rights of the individual. The liberal approach rather than relying on social bonds, involves deciding who should have the ultimate authority to identify the values upon which the decision-making is based where the rights of the individuals are in conflict. However, recognition of a person's autonomy, according to May, has to be a starting point in order to regulate behaviour under a liberal political framework.

Using May's political model of liberalism decision-making in bioethics taken together with a personal autonomy outlook as espoused by Woolf and others<sup>341</sup> it is possible to see how state regulation might still provide protection for some elements of individual freedom and privacy within surrogacy within the parameters of intervention based on Mill's harm principle<sup>342</sup> and Fineman's 'vulnerable subject'<sup>343</sup> and this is discussed further in chapter seven.

There is no doubt that arguments of exploitation and harm as against arguments of empowerment can be applied equally to surrogacy depending on who is controlling the process. The accounts of the commissioning couples suggested that they felt most empowered when making the decision to choose a surrogate but most vulnerable at the various contractual and legal stages in the surrogacy arrangement when decisions were made by others.

## **2.5 Surrogacy Conceptualised as Commodification**

Another part of the harm discourse is whether surrogacy leads to commodification of children and the womb. This is a symbolic argument on the basis that surrogacy promotes the practice of baby selling and that this in turn demeans society and the role of reproduction in society. A contrary view is espoused by, Margaret Brazier who observes that the law in the UK already

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<sup>341</sup> See James Stacey Taylor (ed) *Personal Autonomy: New Essays on Personal Autonomy and its Role in Contemporary Moral Philosophy* (Cambridge University Press 2005).

<sup>342</sup> Stuart Mill (n 312).

<sup>343</sup> Fineman (n 308b) 267.

puts a price on body parts and the loss of a child through the compensation scheme in personal injury and other torts.<sup>344</sup> In addition a price is placed on the use of donor sperm and eggs in reproductive medicine.<sup>345</sup> Therefore, Brazier argues, putting a price on receiving a child through surrogacy should not be abhorrent. Instead, Brazier notes that society shies away from making surrogacy contracts enforceable with the child as the consideration and instead advocates a system whereby the surrogate is remunerated for her pregnancy services rather than for the final product, namely the child. However, fears that reproductive technologies will lead to baby machines and baby selling have not waned in over three decades.<sup>346</sup>

Elizabeth Anderson<sup>347</sup> argues that commercial surrogacy should be made illegal and that treating women's labour as a type of commodity using a man's sperm as the raw material degrades surrogates. She further argues that commercial surrogacy turns parental rights in to property rights and replaces some of the parental rights with market norms because the surrogate deliberately conceives a child with the intention of relinquishing her parental rights and handing over the child for payment. Anderson argues her point from the perspective that commercial surrogacy involves the sale of children.

Jason Hanna<sup>348</sup> however, argues that such arguments wrongly bring 'market norms'<sup>349</sup> in to the relationship between a parent and a child. He argues that at the point of contract the surrogate does not have parental rights to sell because no child is in existence at that stage and that parental rights arise after birth and are held by those intending to raise the child.

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<sup>344</sup> M Brazier, 'Can We Buy Children?' (1999) 11 (3) *Child and Family Law Quarterly* 345.

<sup>345</sup> *ibid* 351

<sup>346</sup> Eg Dworkin (n 239), Brazier Report (n 56), and C Overall, 'Reproductive 'Surrogacy' and Parental Licensing' (2015) 29 (5) *Bioethics* 353.

<sup>347</sup> ES Anderson, 'Is Women's Labour a Commodity?' (1990) 19 *Philosophy and Public Affairs* 7.

<sup>348</sup> JKM Hanna, 'Revisiting Child-Based Objections to Commercial Surrogacy' 24 (7) *Bioethics* 341.

<sup>349</sup> *ibid* 342.

Even altruistic surrogacy, Anderson argues, degrades the surrogate because of the requirement that she detach all emotional bonds to the child. This argument is supported by Anton Van Niekirk and Liezl Van Zyl<sup>350</sup> who both argue that it is the requirement that the surrogate detaches emotionally from the child (her 'pregnancy perspective') and sever all future emotional bonds with the child that can make both commercial and altruistic surrogacy dehumanising.

Shalev argues that part of the emancipation of women would be to put 'an economic price on reproductive activity.'<sup>351</sup> Yet under section 54 (8) of the 2008 Act<sup>352</sup> if a price is put on 'reproductive activity' there is a risk that an application for a parental order will not succeed. However, retrospective authorisation of otherwise unlawful payments continues through case law as discussed in chapter one.

## **2.6 Surrogacy Conceptualised as a Rights Based Argument**

Arguably what has enabled surrogacy to be treated in a utilitarian progressive way in those jurisdictions that permit the practice has been adherence to human rights as a result of legal challenges. One can draw on examples found across the world of legal challenges calling for recognition of fertility rights<sup>353</sup> and the rights of the family.<sup>354</sup>

In the UK the European Convention on Human Rights<sup>355</sup> has been incorporated into national legislation through the Human Rights Act 1998<sup>356</sup>. This ensures an observance of rights such as the right to found a family<sup>357</sup> and the right to

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<sup>350</sup> A Van Niekirk and L Van Zyl, 'The Ethics of Surrogacy: Women's Reproductive Labour' (1995) 21 (6) *Journal of Medical Ethics* 345.

<sup>351</sup> Shalev (n 261) 166.

<sup>352</sup> HFEA 2008, s 54 (8).

<sup>353</sup> *Eg Evans v United Kingdom* (2006) EHRR 21 and *SH and Others v Austria* (2011) ECtHR (application no. 57813/00).

<sup>354</sup> *Eg Mennesson v France* (2014) EHRR 65192/11 and *Labassee v France* (2014) EHRR 65941/11 and *Paradiso and Campanelli* (2017) EHRR 25358/12.

<sup>355</sup> European Convention on Human Rights 1950 (ECHR 1950).

<sup>356</sup> This came into effect in October 2000.

<sup>357</sup> ECHR1950, Art 12.

respect for family life.<sup>358</sup> In addition, like India, the UK is a signatory to the UN Convention on the Rights of the Child (“UNCRC”),<sup>359</sup> which provides that it is the right of the child from birth to know and be cared for by its parents.<sup>360</sup> The preamble to the UNCRC recognises that a loving and happy family environment is important to a child’s development.<sup>361</sup>

Similarly the family is given a recognised and protected status within Article 8 of the European Convention on Human rights which recognises the right to respect for family and private life and Article 16 (3) of the UN Universal Declaration of Human Rights<sup>362</sup> and provides that ‘the family is the natural and fundamental group unit of society and is entitled to protection by society and the state.’

Article 3 of the UNCRC<sup>363</sup> also recognises that the rights of the child should prevail in all actions relating to children and this is intended to include not only parents but also policy and law - makers. This Convention has been ratified by the UK on 16<sup>th</sup> December 1991 but has not been incorporated in to domestic legislation in the same way as the European Convention on Human Rights (“ECHR”). The case of *HS (Algeria) v Secretary of State for the Home Department*<sup>364</sup> confirmed that this Convention applies in the UK particularly on immigration matters. This is of particular importance to an international surrogacy situation where the commissioning couple must first apply for entry clearance for the child before they have been legally recognised as the child’s parent.

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<sup>358</sup> ECHR 1950, Art 8

<sup>359</sup> United Nations Convention on the Rights of the Child 1990 (UNCRC 1990) which was adopted on 20<sup>th</sup> November 1989 and came in to force on 2<sup>nd</sup> September 1990.

<sup>360</sup> UNCRC 1990, Art 7.

<sup>361</sup> See the UNCRC 1990. The same statement can also be found in the preamble to the Hague Convention on Protection of Children and Co-operation in Respect of Inter-Country Adoption 1993.

<sup>362</sup> UN Universal Declaration of Human Rights 1948 adopted by the General Assembly of which the United Kingdom was a member.

<sup>363</sup> UNCRC 1990 Art 3.

<sup>364</sup> [2009] CSOH 124 and [2010] CSIH 97.

John Tobin<sup>365</sup> argues that where a child has been conceived as a result of an unlawful practice within a prohibitionist state, the practice should not be given legitimacy by Article 3 other than as a necessary interim measure to secure the child's best interests. However, the UK is not a prohibitionist state and what little exists of the recorded data<sup>366</sup> shows that international surrogacy has been on the rise steadily since 2008. Published case law as discussed in chapter one also suggests that the courts are routinely using section 54 (8) to retrospectively authorise what might otherwise be regarded as commercial surrogacy because more than reasonable expenses have been paid.

Tobin<sup>367</sup> argues that morality should be the guiding principle and the current international law framework would suggest that surrogacy as a practice amounts to the sale of a child under Article 35 of the Convention on the Rights of the Child 1989<sup>368</sup> and the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography 2000.<sup>369</sup> Any international treaty, Tobin argues would be doomed to failure because states that prohibit surrogacy would be unlikely to enter such a Treaty and therefore regulation could not take place effectively at an international level. Instead, a prohibitionist Treaty would find more favour and be more consistent with international law. Tobin proposes a 'substantive rights based approach'<sup>370</sup> that both conceptualises the issues of commercial surrogacy within international human rights as well as resolving competing rights.

However, Tobin's approach of making morality the central focus of the discourse belies the fact that morality is a social construct as well as a legal one that can be deconstructed and reconstructed. Whilst it is true that legislation can provide a moral framework, morality can change overtime depending on

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<sup>365</sup> J Tobin, 'To Prohibit or Permit: What is the (Human) Rights Response to the Practice of International Commercial Surrogacy?' (2014) 63 *International and Comparative Law Quarterly* 317.

<sup>366</sup> See Horsey (n 198), 14, Tables 2.1.1, 2.1.2 and 2.2.1 and Crawshaw et al (n 204).

<sup>367</sup> Tobin (n 365).

<sup>368</sup> UNCRC 1990.

<sup>369</sup> Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography 2000 (in force 18 January 2002).

<sup>370</sup> Tobin (n 365) 322.

society's views. An example is the fact that homosexuality was considered morally wrong until its legalisation in 1967<sup>371</sup> also in the UK marriage was previously considered to be a union between husband and wife but has now been redefined to include same sex unions.<sup>372</sup>

Tobin does however accept that the strongest rights-based argument is that of the right to found a family and that a surrogacy arrangement might come within this or alternatively within Article 17 of the International Covenant on Civil and Political Rights<sup>373</sup> as confirmed within the decision of the European Court of Human Rights in *SH and Others v Austria*.<sup>374</sup>

The 'margin of appreciation' that enables states some national say in human rights issues to the exclusion of the European Court of Human Rights is something that has been accepted within the European Convention on Human Rights<sup>375</sup> and in a number of key decisions of the European Court on Human Rights.<sup>376</sup> Whilst the 'margin of appreciation' might allow prohibitionist States to deny the right to reproductive health<sup>377</sup> it can also be conveniently side-stepped to encourage a more libertarian approach to the practice of surrogacy as can be seen in the French case of *Mennesson v France*<sup>378</sup> where the European Court of Human Rights held that where issues of an individual's identity or their very existence is at stake, then the margin of appreciation will be restricted.

## **2.7 An Evidence-Based Approach to Surrogacy**

Whilst conceptualising some of the perceived risks of international surrogacy is a necessary starting point, it is argued that only evidence-based research that

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<sup>371</sup> See the Sexual Offences Act 1967.

<sup>372</sup> See Marriage (Same Sex Couples) Act 2013, s 1.

<sup>373</sup> International Covenant on Civil and Political Rights 1966 (which came in to force in 1976).

<sup>374</sup> *Mennesson* (n 354).

<sup>375</sup> ECHR 1950.

<sup>376</sup> For a discussion of margin of appreciation see *Z v Finland* (1998) 25 EHRR 371 and see its application in *SH and Others* (n 353), *A, B, C v Ireland* (2010) ECtHR (application no. 25579/05) and *Evans* (n 353).

<sup>377</sup> Eg *SH and Others* (n 353).

<sup>378</sup> *Mennesson* (n 354) (2014) citing *SH and Others* (n 353), [94].

looks at the experiences of the stakeholders (surrogates and commissioning couples) can really settle the question as to which risks should be regulated, which are minimal and which can be removed through education. Empirical work in this area of law should it is argued continue to be of particular interest to legislators.

### **2.7.1 Prior Studies**

There have been prior studies conducted in to surrogacy involving UK commissioning couples. The first category relates to parental order applications but these have been conducted largely to establish the number of parental order applications made in the UK courts<sup>379</sup> or to consider the work of PORs.<sup>380</sup> These have not used the statements from the case files themselves. For example, data obtained by the British Medical Association (“BMA”) in 1995<sup>381</sup> showed that fewer than 50 parental order applications were made in 1995 following the implementation of section 30 of the 1990 Act.<sup>382</sup> This study took place shortly after the coming into force of the Human Fertilisation Act 1990 and its new provisions on parental orders.<sup>383</sup>

The research of Marilyn Crawshaw et al<sup>384</sup> was statistical in nature and also related to the number of parental order applications applied for in the UK between 2008 and 2011.<sup>385</sup> Their research did however distinguish between UK and international surrogacy births and therefore was an important starting point for this research in examining the rising popularity in the use of international surrogacy by UK commissioning couples. The BMA and Crawshaw studies differ from the study in this thesis because applications for a parental order

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<sup>379</sup> Eg BMA (n 25) and Crawshaw et al (n 197).

<sup>380</sup> S Purewal, M Crawshaw and O Van Den Akker, ‘Completing the Surrogate Motherhood Process: Parental Order Reporters’ Attitudes Towards Surrogacy Arrangements, Role Ambiguity and Role Conflict’ (2012) 15 (2) Human Fertility 94. and M Crawshaw, S Purewal and O Van Den Akker, ‘Working at the Margins: The Views and Experiences of Court Social Workers on Parental Orders Work in Surrogacy Arrangements’ (2013) 43 (6) British Journal of Social Work 1225.

<sup>381</sup> BMA (n 23) 8.

<sup>382</sup> HFEA 1990, s 30 introduced parental orders for the first time.

<sup>383</sup> *ibid.*

<sup>384</sup> Crawshaw et al (n 197).

<sup>385</sup> Purewal et al (n 380) and Crawshaw (n 197).

were not used as a statistical marker but instead were used as a snapshot of the experience of the surrogacy legal process by examining the parental order case files.

The statistics obtained by Crawshaw and her team were updated by a later report of Horsey et al.<sup>386</sup> Horsey's research<sup>387</sup> focuses on both surrogates and commissioning couples but mainly on their attitudes to surrogacy. Preliminary findings from an online survey administered in June to August 2015 revealed that the majority view was that the current surrogacy laws should be reformed (75.2%).<sup>388</sup> A lower number were however in favour of a public consultation before a change in the law. The written responses suggested a distrust of the public to understand the real issues surrounding surrogacy and that unless those actually involved in surrogacy were consulted the public consultation could be hampered by ignorance or prejudice. From the 434 responses only two responses were received from couples that had used an overseas surrogate. The study was therefore of limited value in terms of offering an insight in to the experiences of couples using international surrogacy given the sample size.

Further studies looked at parental orders from the perspective of the work of PORs.<sup>389</sup> The study by Purewal et al<sup>390</sup> examined the attitudes of PORs towards surrogacy arrangements and the legal process. The study comprised 33 PORs (46% of all the PORs employed by Cafcass), 31 of the 33 participants felt that surrogacy agencies should be regulated<sup>391</sup> and 20 of the 33 participants felt that the UK government should do more to prevent international surrogacy.<sup>392</sup> Only 9 out of the 33 participants suggested the need for a clearer and tighter legal framework and practice guidelines<sup>393</sup> but 24 out of the 33

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<sup>386</sup> Horsey (n 198).

<sup>387</sup> *ibid.*

<sup>388</sup> Horsey (n 198) 26.

<sup>389</sup> Purewal et al (n 380) and Crawshaw et al (n 380).

<sup>390</sup> See Purewal et al (n 380).

<sup>391</sup> *ibid* 96.

<sup>392</sup> Purewal et al (n 380).

<sup>393</sup> *ibid* 96.



participants felt that commissioning parents should receive psychosocial assessment before entering into a surrogacy arrangement<sup>394</sup>.

The second study POR was conducted by Marilyn Crawshaw et al.<sup>395</sup> Sixteen PORs took part in telephone interviews. The findings were that PORs felt that their work was constrained due to becoming involved at the late stages of the surrogacy process as well as the lack of formal guidelines and case law available. The response rate to the telephone interviews was low at 46% (N = 16) and only one POR had experience of international surrogacy arrangements.

Crawshaw et al noted that because PORs were less frequently involved in surrogacy work they relied very much on their own intuition and initiative. This meant that their approaches to collecting evidence differed but all were bound to consider the welfare of the surrogate child under the checklist of s.1 (4) of the 2002 Act.<sup>396</sup> The PORs perceived the most difficult aspect of their work to be in determining whether more than reasonable expenses had been paid by the commissioning couple.<sup>397</sup> This was partly because of poor record keeping by the commissioning couples or because the PORs felt it was the court's role rather than their own to determine such issues.<sup>398</sup> Some PORs expressed their private views that payments increased the risk of the adults being exploited.<sup>399</sup>

It was possible to draw on some of the attitudes of the PORs in the empirical research for this thesis because access to the court files also included parental order reports. These were analysed using forensic linguistics as a methodology as a way to find additional meaning given to the written word. Whilst there were limitations in this approach to that of a straight forward interview, it did throw some light on how the words used in the reports can influence court decisions particularly as heavy reliance is placed on parental order reports as part of the

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<sup>394</sup> Purewal et al (n 380).

<sup>395</sup> Crawshaw et al (n 380).

<sup>396</sup> ACA 2002, s 1 (4).

<sup>397</sup> The courts could potentially deny the commissioning couple a parental order under the HFEA 2008, s 54 (8).

<sup>398</sup> Crawshaw et al (n 395) 1232.

<sup>399</sup> *ibid* 1233.

legal process. It also adds to the existing body of research looking at how professionals are left to use their own discretion and judgment to interpret key parts of the 2008 Act.<sup>400</sup>

The findings in this thesis are consistent with the findings in the study that PORs have a mixed approach to determining the question of reasonable payments under section 54 (8) of the 2008 Act<sup>401</sup> with some relying on case law or relying on their own assessment or assessment of third parties whilst others expressed a reluctance to reach a view believing it to be the a matter for the court to determine. This is discussed further in chapter five. As well as the recommendations made by Crawshaw et al<sup>402</sup> further recommendations have been made in this thesis regarding training for PORs and this is discussed in chapter seven.

The second category of research involving UK commissioning couples considered the reported experiences of commissioning couples through interviews<sup>403</sup> reported findings of harmonious relationship with the surrogate,<sup>404</sup> limited openness about their surrogacy<sup>405</sup> and a willingness to disclose to the child their true origins.<sup>406</sup> Similar findings are to be drawn from the case files analysed for this research. However, the studies mentioned focused on the experiences of the surrogacy process itself such as motivations for entering into the surrogacy arrangement and the experience of the surrogacy process during pregnancy and after birth.

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<sup>400</sup> Eg S Sheldon, E Lee and J Macvarish, 'Supportive Parenting', Responsibility and Regulation: The Welfare Assessment under the Reformed Human Fertilisation and Embryology Act (1990)' 78 (3) Modern Law Review 461 and E Lee et al (n 133).

<sup>401</sup> HFEA 2008, s 54 (8).

<sup>402</sup> Crawshaw et al (n 380) 1241.

<sup>403</sup> Eg Blyth (n 253), MacCullum et al (n 253) and V Jadv, L Blake, P Casey and S Golombok, 'Surrogacy Families 10 Years on: Relationship with the Surrogate, Decisions over Disclosure and Children's Understanding of their Surrogacy Origins' 27 (10) Human Reproduction 3008.

<sup>404</sup> *ibid.*

<sup>405</sup> See Blyth (n 253) 191, Jadv et al (n 403) 3011 and MacCullum et al (n 253) 1336.

<sup>406</sup> See Blyth (n 253) 189 and Jadv et al (n 403) 3011.

Another relevant study is that relating to the question of a genetic link and this was conducted by Olga Van Den Akker in 2000.<sup>407</sup> In this UK study 29 commissioning mothers took part ranging in age from 29 to 47 years. They were at different stages of the surrogacy process, 16 women who had a genetic link to the child and they all responded to the questionnaire by stating that a genetic link was important. This response might be as expected given their ability to use their own genes. However, of the 13 women who did not have a genetic link to the child 31% felt a genetic link was important.<sup>408</sup>

Van Den Akker reported that overall a genetically related child was desirable for most couples and that women showed “an unequivocal desire to have a family”<sup>409</sup> and would accept the best form of creating a family that was available to them. The study does throw some light on the issue of how women might feel when their partner has a genetic link but they do not.

In the Van Den Akker study the participants were surveyed at different stages of the surrogacy process, 35% were in the early stages of the arrangement or had completed the arrangement successfully.<sup>410</sup> Whilst 45% had the baby living with them<sup>411</sup> it is not clear from the statistics provided whether all stages of the legal process had been completed, for example, whether an application had been made for a parental order. Also it is unclear what proportion of the 45% were women with only a partial link to the child.

More recently Lucy Blake et al<sup>412</sup> have explored the motivations of UK homosexual commissioning couples for starting a family through surrogacy. Their findings suggest that most homosexual couples view adoption as a less desirable option because they have less control over the parentage process. The couples also favoured gestational surrogacy as they did not want the

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<sup>407</sup> Van Den Akker (n 298).

<sup>408</sup> *ibid* 1852.

<sup>409</sup> Van Den Akker (n 298), 1853.

<sup>410</sup> Van Den Akker (n 298), 1852.

<sup>411</sup> *ibid*.

<sup>412</sup> L Blake, N Carone, E Raffanello, J Slutsky, AA Ehrhardt and S Golombok, ‘Gay Father’ Motivations for and Feelings about Surrogacy as a Path to Parenthood’ (2017) 32 (4) Human Reproduction 860.

surrogate to have both a genetic as well as a gestational connection to the child.

Much has also been written about the psychological development of children born as a result of a surrogacy arrangement,<sup>413</sup> and from the perspective of the surrogate's experiences<sup>414</sup> as well as studies conducted using surrogates and commissioning couples outside the UK which reported similar findings to the UK research.<sup>415</sup> Judgments have previously been analysed applying forensic linguistics as a methodological tool<sup>416</sup> as adopted in this thesis.

In terms of comparable research using assisted reproduction court judgments, Linda Maule and Karen Schmid<sup>417</sup> examined Californian appeal cases between 1960 and 2000 involving children born through assisted reproduction ("ART"). However, these case reports did not focus solely on international surrogacy. The authors argue that assisted reproduction has moved parenthood from the private to the public sphere, which presents a challenge to the traditional 'laissez-faire' attitude of the US courts.<sup>418</sup> The body of cases emerging between 1960 and 2000 was said to demonstrate that the courts had moved closer to determining social policy around ART. Maule and Schmid argue that this should be the role of the legislature and not the courts because the legislature consists

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<sup>413</sup> Eg S Golombok, C Murray, V Jadva, F MacCullum and E Lycett 'Families Created Through Surrogacy Arrangement: Parent-child Relationships in the 1st Year of Life' (2004) 40 (3) *Developmental Psychology* 400. The research team also reported on children at ages 2, 3, 7 and 10 in other publications.

<sup>414</sup> Eg E Blyth, 'I wanted to be interesting. I wanted to be able to say 'I've done something interesting in my life': Interviews with Surrogate Mothers in Britain' (1994) 12 (3) *Journal of Reproductive and Infant Psychology* 189, V Jadva, C Murray, E Lycett, F MacCallum and S Golombok, 'Surrogacy: the Experiences of Surrogate Mothers' (2003) 18 (10) *Human Reproduction* 2196.

<sup>415</sup> Eg Pande (n 242) and, H Ragoné, *Surrogate Motherhood: Conception in the Heart* (Westview Press 1994).

<sup>416</sup> Eg LM Solan, *The Language of Judges* (University of Chicago Press 1993) and Y Maley, 'Judicial Discourse: The Case of the Legal Judgment' in JE Clark (ed) *The Cultivated Australian: Festschrift in Honour of Arthur Delbridge* (Helmut Buske Verlag 1985), D Mazzi, "This Argument Fails For Two Reasons": A Linguistic Analysis of Judicial Evaluation Strategies in US Supreme Court Judgements' (2010) 23 (4) *Journal for the Semiotics of Law* 373.

<sup>417</sup> LS Maule and K Schmid, 'Assisted Reproduction and the Courts: The Case of California' (2006) 27 (4) *Journal of Family Issues* 464.

<sup>418</sup> *ibid* 465.

of elected officials. They also argue that it is much easier for the legislature to expose the courts to social disapproval by leaving them to tackle the controversial issues such as surrogacy.

Using human and family ecology theory they describe the legal system as an 'ecosystem' and its interaction with 'macro-systems' such as societal and cultural beliefs as influencing the family 'microsystem'.<sup>419</sup> The family's interaction with health practitioners is described as the 'microsystem' and the authors argue that families, whilst semi-closed, often open on a selective basis to interact with other systems around them but at the same time attempt to maintain boundaries. However, it is ultimately the courts that determine the true boundaries by deciding on the legal membership of a family. This has included determining 'personhood'<sup>420</sup> and the concept of the 'intended parents' formed out of contract.<sup>421</sup> The courts have used conceptual tools such as the best interests of the child and intention to form a family as the basis for deciding social policy around ART.

Maule and Schmid argue that there is a need for family practitioners to collect and analyse court decisions relating to child and family policies to help bridge the ecosystem and the microsystem. It was possible to build on some of the work of Maule and Schmid but in a UK context and by examining court judgments in international surrogacy cases over a seven-year period.

## **2.8 Conclusion**

The potential for exploitation and harm is the central argument that is conceptualised to advance moral justifications for the restriction and containment of the practice of surrogacy particularly in relation to the lack of 'true' autonomy by the surrogate and the potential for race exploitation by western women of their poor socio-economic contractual partners. However, autonomy is also advanced as an equally persuasive conceptualised argument for the practice of surrogacy together with right based arguments relating to the

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<sup>419</sup> Maule and Schmid (n 417) 468.

<sup>420</sup> *Re Baby M* (1988), 537 A.2d 1227, 109 N.J.

<sup>421</sup> *Johnson v Calvert* (1993) 5 Cal.4<sup>th</sup> 84, 851 P.2d 776.

alternative nature and fluidity of the family form and the protection of the legal parent and child's identity and right to private life.

The conceptualisation of surrogacy is often at odds with the evidence-based research, which suggests that the parties rarely perceive themselves as exploited or at risk and understand the contractual nature of the agreement. An intentionalist approach to the practice is taken by the parties in that the ultimate aim of the contractual relationship is that the child should belong to the commissioning couple. The evidence also suggests that friendships can be formed between the surrogate and the commissioning couple and that whilst commerciality underlies the relationship there is a mutual benefit that provides a stark reminder of the role of each party. This is not to say that exploitation or harm does not sometimes occur as can be seen by reports in the media but these would appear to be isolated reports but do highlight some of the risks that regulation would need to address.

There is not conclusive evidence that surrogacy is a method of fertility imposed on commissioning mothers by their male counterparts or a male dominated profession and in fact the medical profession in the UK have taken a cautious approach to the practice. As will be seen in the later chapters of this thesis, the evidence suggests that at least for heterosexual couples surrogacy remains a treatment of last resort. The next chapter focuses on the rationale and design of the empirical research and the approach taken to the data analysis.

## CHAPTER THREE

### The Empirical Research – Methodology and Methods

#### 3.1 Aim and Purpose

As previously stated in the introduction to this thesis, the primary aim in the design of the study was to reveal how commissioning couples story their experiences of international surrogacy for the courtroom and how this is understood by the courts and what affect, if any, this might have on the implementation and interpretation of the law.

The purpose of the research was to examine the connection (if any) between those stories to compare and contrast with the UK political agenda on widening the meaning of ‘family’ with reference to the surrogacy process. By examining these two main areas it was possible to identify possible areas for reform as discussed in chapter seven.

The data set comprised legal documents and these have their own interpretive world given that the documents can be drafted to contain technical language (term of art) decipherable only to a particular professional group, or consist of the reporting of a state of affairs or include story-telling in the form of narratives contained in, for example, witness statements. Taking account of the different documentary genres the documents were therefore grouped in to what Peter Tiersma<sup>422</sup> describes as ‘Operative Documents’<sup>423</sup> those that set out the legal framework and regulate legal relations (e.g. court judgments) and ‘Persuasive Documents’,<sup>424</sup> those created to convince a court (e.g. witness statements and parental order reports).

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<sup>422</sup> Peter M Tiersma, *Legal Language* (The University of Chicago Press 1999).

<sup>423</sup> *ibid* 139.

<sup>424</sup> Tiersma (n 422) 139.

### **3.1.2 Originality**

This research bridges the gap in the available empirical studies by using qualitative data to look at the legal process rather than the medical and psychological processes surrounding surrogacy. Like some of the studies mentioned in chapter two, the research focuses on UK commissioning couples. However, unlike all the prior studies identified in chapter two, it focuses on the legal process for parental orders and the mechanism for conveying accounts of experiences to the court. This study is therefore the first of its kind in relation to this type of research in the UK.

The research, unlike previous research, also examines international surrogacy court judgments in England and Wales and 31 international surrogacy judgments between 2009 and 2016 were chosen. Again, using forensic linguistics as a methodology it was possible to analyse the changing attitudes of the judiciary in England and Wales to international surrogacy and the extent of their case based reform of the law.

The empirical research will thus add to the existing body of knowledge and research in the field of international surrogacy by providing examples and information on the way commissioning couples frame their experiences for the courts as well as supplementing the existing research on the use of language in the court process.

## **3.2 Research Questions**

Research questions were used to provide a focus for the literature review and data collection. Given the examination of the parental order process the issue of legal parentage was considered central to the examination of the topic. The central research question adopted for the purpose of the study was therefore:

To what extent (if at all) does the legal definition of parent in the immigration and family law processes of international surrogacy inform the legal experiences of commissioning couples?



The assumption that parentage forms part of the legal experience was made because parentage is central to both the immigration and family legal process. In order to obtain entry clearance to bring the child back into the UK one of the commissioning couple must meet the criteria for parentage under the British Nationality Act 1981 and the British Nationality (Proof of Paternity) Regulations 2006.<sup>425</sup> In order to apply for a Parental Order in the family court all parties with parental responsibility for the child must be joined to the proceedings.<sup>426</sup> In addition at least one of the applicants must have a genetic connection to the child.<sup>427</sup> Therefore parentage is so entwined with the legal process in surrogacy that it is more than a mere preconception that it will form part of the legal experience. However, what was not already pre-determined was the extent (if at all) that parentage affects commissioning couples' retelling of their experiences.

When addressing the central research question of whether the legal definition of parent informs the experiences of commissioning couples it was important to consider the differences in the legal status of each member of that couple. The gender and method of gamete donation has an impact on the legal classification of parent and therefore whether there is a need to apply for a parental order. The court case files revealed commissioning couples who fell in to one of specific parentage groups which are represented by a table in Appendix 2.

There were no surrogacy arrangements involving lesbians in the case file as surrogacy tends to be less popular choice for this group perhaps because of the low statistical likelihood of a union of two women with fertility issues or the availability of IVF as a more suitable alternative treatment. Sperm donation is often the preferred route for lesbian couples. In addition sections 42 and 43 of

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<sup>425</sup> BNA 1981, s 2 and s 50 (9) read in conjunction with paragraphs 2 & 3 of the British Nationality (Proof of Paternity) Regulations 2006.

<sup>426</sup> FPR 2010, Part 13 rule 3(3).

<sup>427</sup> HFEA 2008, s 54 (1) (b).

the 2008 Act<sup>428</sup> confer automatic parenthood status on lesbian couples using sperm donation in a licensed clinic in the UK and is therefore a less complex route to parenthood.

In the case of six of the files it was not possible to clearly ascertain the marital status of the surrogate. This was due to the fact that some of the files had incomplete information at the time of access but also because in the case of at least one of the files<sup>429</sup> very little was known about the surrogate and the clinic were unable to provide clear records of the surrogate's personal details. Another case file<sup>430</sup> dealt solely with the issue of domicile and therefore no information was to be found about the surrogate's marital status.

It was anticipated that court documents including witness statements would refer to the process of dealing with the immigration authorities to satisfy the family courts that the requirements of section 54<sup>431</sup> have been complied with. UK Visas and Immigration ("UKVI") do not keep separate records that are identifiable as relating specifically to applications for an entry visa involving surrogacy and so it was not possible to obtain additional data from the UKVI.<sup>432</sup>

Following further reading and after consideration of the literature, three sub-research questions were identified as having a connection with the existing theory and research in this area of law.

#### *Sub-research Questions:*

1. Does the legal definition of parent in anyway affect the commissioning couple's pre-hearing experiences?

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<sup>428</sup> HFEA 2008, s 42 and s 43.

<sup>429</sup> File 3.

<sup>430</sup> File 31.

<sup>431</sup> HFEA 2008, s 54.

<sup>432</sup> Email from UK Border Agency to author (31 July 2012 and 28 August 2012) and email UK Visas and Immigration department to author (18 March 2014).

2. Do the commissioning couples' accounts suggest that they feel unfairly or unjustly treated in terms of their status prior to obtaining a parental order?
3. Based on the recounted experiences of commissioning couples, is the legal process an adequate and effective way to confer parenthood status on the commissioning couple?

Sub-questions one and two were answered with reference to the data analysis (see chapter four) and sub-question three was considered as part of the doctrinal element of the thesis (see chapter seven).

### **3.3 Methodology**

The empirical approach involved the collection of qualitative data using a mixed methodology approach namely, Narrative Research, Forensic Linguistics and Thematic Analysis. A social constructivist approach was favoured. This involved essentially undertaking an interpretive study using a constructivist paradigm in order to capture and understand the 'constructions' that the story-tellers hold, that is, the way people create meaning of the world and the artificial constructs they put in place to do this. The data was examined for metaphors in order to make sense of meanings through artificial constructs.

The Narrative Research analysis and findings are discussed at chapter four. Forensic Linguistics was used to continue the analysis of the narratives but this time focusing on legal language and the analysis and findings are discussed at chapter five. Finally Thematic Analysis was used to group the meanings in to themes to examine wider issues common to the couples. This is a method of data analysis that identifies patterns within the data set and identifies them through themes or stories. Virginia Braun and Victoria Clarke<sup>433</sup> argue that themes are the foundation of all qualitative methods and therefore argue for Thematic Analysis to be considered as a standalone methodology in its own

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<sup>433</sup> V Braun and V Clarke, 'Using Thematic Analysis in Psychology' (2006) 3 (2) *Qualitative Research in Psychology* 77, 78.

right. However, using Thematic Analysis as the only methodology would have risked the possibility of losing meanings from the multi-layered data.

All three methodological approaches employ one central tool of analysis, namely language. The 'tenor'<sup>434</sup> of the data, the way in which language marks the formality of the legal proceedings, moved between interpersonal, conceptual, regulatory and a simple account. The context or 'register',<sup>435</sup> the adaptation of the formality of the language depending on the listener, was also of importance. Therefore the 'actor' and the 'voice' were categorised particularly in the context of the witness statements and the parental order reports. The subsequent voices can only be viewed as one part of the story of the 'lived experience' of the commissioning couples as told in retrospection. Each of the three methodologies is explained further below.

### **3.3.1 Narrative Research**

This is a methodology employing qualitative methods that uses narratives from sources such as interviews, letters, diaries and so on, to understand how people create meaning in their lives. To this extent it complements the constructivist approach and similarly the data analysis method is interpretive. The research involves analysis of text used to tell a 'story' based on a series of events. It is therefore the analysis of story telling.

The narrative captures a past experience and may be real or fictional. Use of narrative research in this sense is then derived from the stories of commissioning couples as retold through court documents and this is used as a tool for sharing and transferring knowledge around international surrogacy. There are a number of different approaches to analysing text in narrative research but the one closely aligned to forensic linguistics was chosen, namely Bruner's 'life-meshing'<sup>436</sup> approach was used. Bruner describes storytelling as

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<sup>434</sup> What John Gibbons describes as language that marks formality and social relationships. See John Gibbons, *Forensic Linguistics: an Introduction to Language in the Justice System* (Blackwell Publishing Ltd 2003) 10.

<sup>435</sup> *ibid* 10.

<sup>436</sup> Bruner (n 13).

forming three parts; the fabula (the subject matter or plight of the story), the sjuzet (the use of both plot and language) and the genre (the type or kind of story). He relies on Kenneth Burke's<sup>437</sup> theory that narratives are parts of the many changes of human life and intention. For example, Burke identifies the crucial stages that narratives go through as Agent, Action, Goal, Setting, Instrument and Trouble.<sup>438</sup>

According to Bruner, through the process of reconstruction of narratives individuals can themselves become the narratives through what Bruner identifies as 'life-meshing',<sup>439</sup> where individual narratives are meshed in to a community of narratives that share some philosophy on the nature of life. He uses the narratives of a family of two adults and two adult children and describes how their lives are revealed through their choice of words. From the narratives Bruner unpicks how individual stories mesh together as a result of shared experiences born out of a family setting. He identifies in particular how the home and the outside world ("the real world") are contrasted using spatial metaphors.

The stories of the commissioning couples revealed a 'life-meshing' of individual narratives around a shared experience born out of to a risk-aversion choice (both on the part of the commissioning couple and the surrogates) that was born out of a philosophy of hope and this is discussed further in chapter four.

Using narratives in research is not new but critics such as Wittgenstein<sup>440</sup> question the value of such narratives in giving meaning and descriptions that have any longevity. Wittgenstein argues that given the games that people play with language there can be issues with the trustworthiness of such stories. However, given that the narratives were taken largely from court documents where parties are bound by oaths and affirmations to tell the truth it was felt that such narratives would have greater value. It is accepted that despite the formal

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<sup>437</sup> Kenneth Burke, *A Grammar of Motives* (University of California Press 1992).

<sup>438</sup> Bruner (n 12).

<sup>439</sup> Bruner (n 13).

<sup>440</sup> Ludwig JJ Wittgenstein, *Philosophical Investigations* (GEM Anscombe, PMS Hacker and J Schulte tr, 4<sup>th</sup> edn, Wiley-Blackwell 2009) 115.

nature of court proceedings the parties might still have incentives to construct narratives in a particular way that advances their case and presents them in a good light. However it was possible to also draw on the Cafcass reports (compiled following independent investigations) to balance the narratives provided by the parties themselves.

Jerome Bruner<sup>441</sup> defends narratives as units of analysis despite criticisms that such narratives can never reflect the reality of life as lived but merely serve to show such lives were constructed after reflection and interpretation by the 'actors'. Bruner argues that an examination of how those narratives are constructed is a worthy analysis because it shows through the reflexivity how individuals might have acted and so adds "to the ancient homily that the only life worth living is the well examined one."<sup>442</sup> Whilst such narratives involve memory recall it is in itself interpretive and any omissions can also be important in telling the researcher about the interpretation. In Bruner's view 'a life led is inseparable from a life as told'.<sup>443</sup> The use of language and the portrayal of culture and conventions are also telling and form rich data for analysis. This is supported by Richard Winter<sup>444</sup> who writes: 'We do not "store" experience as data, like a computer: we "story" it'.<sup>445</sup>

### **3.3.2 Forensic Linguistics**

This method involves the application of linguistics to the language of the law. Winter argues<sup>446</sup> that a researcher cannot truly reflect on the interpretation and reinterpretation of data in order to give meaning unless the researcher engages in the complexity of how explanatory concepts are structured. Thus it takes narrative research deeper through an exploration of the construction of language. Whilst narrative research aims to interpret the storyteller's own conceptualisation of their social schema forensic linguistics also captures the

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<sup>441</sup> Bruner (n 13).

<sup>442</sup> *ibid* 709.

<sup>443</sup> Bruner (n 13) 708.

<sup>444</sup> Richard Winter, *Learning from Experience* (Routledge 1989).

<sup>445</sup> *ibid* 235.

<sup>446</sup> Winter (n 444).

implicit analysis of the interpretation. Winter refers to this as 'Dialectics',<sup>447</sup> the process of identifying one thing within its relationship context rather than in isolation. This arguably avoids the risk of the researcher developing what might be thought of as vocabulary silos by not considering how language interrelates as well as how it is constructed. To understand how actors give meaning to their actions and behaviours a social constructionist researcher also needs to understand how actors may structure and conceptualise their language and this may include the use of metaphors.

George Lakoff and Mark Johnson<sup>448</sup> argue that 'human thought processes are largely metaphorical'<sup>449</sup> and that as a result the 'human conceptual system is metaphorically structured and defined'.<sup>450</sup> Rather than metaphors being confined to literary expression, Lakoff and Johnson argue that it is a common form of language used to express and understand thoughts and actions. They argue concepts can be communicated using 'structural metaphors'<sup>451</sup> where one concept/description is structured in terms of another such as 'understanding is seeing',<sup>452</sup> or 'orientational metaphors'<sup>453</sup> that give a concept/description a spatial orientation such as 'I am feeling down today'<sup>454</sup> as well as the use of non-metaphorical language such as 'time is money.' However the concepts themselves can be metaphorically expressed. An example of metaphorically expressed concept can be found in legal judgments when 'analogous reasoning' is employed. This is where the inference that certain things are similar to each other in certain respects leads to the drawing of inferences that they are also similar in other respects. Stephen Winter<sup>455</sup> argues that whilst it is important in understanding the imaginary mind, analogous reasoning can be dangerous because of the use of constant comparisons in

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<sup>447</sup> Winter (n 444) 46.

<sup>448</sup> Lakoff and Johnson (n 15).

<sup>449</sup> *ibid* 6.

<sup>450</sup> Lakoff and Johnson (n 15) 6.

<sup>451</sup> *ibid* 14.

<sup>452</sup> G Lakoff and M Johnson, 'The Metaphorical Structure of the Human Conception System' 4 *Cognitive Science* 195.

<sup>453</sup> Lakoff and Johnson (n 15) 14.

<sup>454</sup> *ibid*.

<sup>455</sup> Steven L Winter, *A Clearing in the Forest: Law, Life and Mind* (University of Chicago Press 2003).

law. The use of analogous reasoning was explored when examining the 31 court judgments and this is discussed in chapter five. Forensic linguistics is therefore a vehicle used to interpret what is unsaid as much as what is said by the legal professionals.

Whilst a body of research<sup>456</sup> exists surrounding courtroom testimony and how these can lead to an alternative reality, there has been little research on how PORs may influence the written evidence of the applicants that the court eventually hears. Thus 'reported speech'<sup>457</sup> can have stylistically different ways of conveying the stories of others and in organising the speaker's responses. In addition as PORs usually interview couples together they will be able to direct who speaks first and when.

### 3.3.3 Using Thematic Analysis

The Literature Review and pilot interview (see Appendix 1) were a useful starting point to anticipate some of the themes that might eventually be identified in the research and to help to design the data collection sheet to look for evidence of those themes. These themes however were not the drivers for the research and did not dictate the themes that were eventually identified. Thematic analysis was used alongside the other methodological approaches to find patterns within the data. This approach in some respects is similar to the grounded theory approach of coding. Johnny Saldaña<sup>458</sup> notes:

A code in qualitative inquiry is most often a word or short phrase that symbolically assigns a summative, salient, essence-capturing, and/or evocative attribute for a portion of language-based or visual data.

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<sup>456</sup> Eg B Danet, KB Hoffman, NC Kermish, HJ Rafn, HJ and DG Stayman, 'An Ethnography of Questioning in the Courtroom' in RW Shuy (ed) *Language Use and the Uses of Language* (Georgetown University Press 1980) 222, J Luchjenbroers ' 'In Your Own Words..': Questions and Answers in a Supreme Court Trial' (1997) 27 *Journal of Pragmatics* 477 and D Eades, 'I Don't Think its an Answer to the Question: Silencing Aboriginal Witnesses in Court' (2000) 26 *Language in Society* 161.

<sup>457</sup> See Deborah Tannen, *Talking Voices: Repetition, Dialogue, and Imagery in Conversational Discourse* (First published 1989, Cambridge University Press 2007).

<sup>458</sup> Johnny Saldaña, *The Coding Manual for Qualitative Researchers* (Second edition, Sage Publications 2013) 3.



It is in essence a way to give meaning to chunks of text which are then scrutinised further until interpretation leads either to the detection of patterns, categories or ideas. Thematic analysis is described by Braun and Clarke<sup>459</sup> as 'a specific approach in its own right'.<sup>460</sup> They disagree with Richard Boyatzis<sup>461</sup> that it is simply a foundational tool used across many different types of qualitative research and argue that many other methodologies such as Grounded Theory claim to be following a theoretical approach when in fact the conclusion of the research presents themes rather than theory. Braun and Clarke<sup>462</sup> term this 'grounded theory lite' in that not all aspects of grounded theory are employed during the research

Like coding, Braun and Clarke also view Thematic Analysis as a way of identifying and analysing patterns or commonly recurring themes and then selecting which ones to report on as part of the research. However, unlike grounded theory coding, thematic analysis does not require the patterns or themes to be bound to a theory. One of the difficulties of grounded theory is that grounded theory scholars do not have an agreed approach as to how to derive theory from coding. Glaser<sup>463</sup> identified eighteen 'coding families' from which theory could be built. However, this has been criticised as forcing a framework on to the research.<sup>464</sup> This has led other grounded theory scholars to develop

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<sup>459</sup> Braun and Clarke (n 433).

<sup>460</sup> *ibid.*

<sup>461</sup> Richard E Boyatzis, *Transforming Qualitative Information: Thematic Analysis and Code Development* (Sage Publications 1988).

<sup>462</sup> Braun and Clarke (n 433) 81.

<sup>463</sup> Barney G Glaser, *Theoretical Sensitivity: Advances in the Methodology of Grounded Theory* (Sociology Press 1978) 164. The 18 'coding families' were then enlarged upon in by Glaser in Barney G Glaser *Doing Grounded Theory* (Sociology Press 1998) and the category of 'social worlds and social arenas' has been further enlarged by Adele Clarke in AE Clarke *Disciplining Reproduction: Modernity, American Life Sciences and the Problems of Sex* (University of California Press 1998).

<sup>464</sup> See Kathy Charmaz, *Constructing Grounded Theory: A Practical Guide Through Qualitative Analysis* (Sage Publications 2006) 66.

their own coding families<sup>465</sup> and others to criticise grounded theory methodology as producing low-level theories.<sup>466</sup>

Grounded Theory scholars also claim that theory 'emerges' from the data.<sup>467</sup> Braun and Clarke<sup>468</sup> are critical of any suggestion that theory merely 'emerges' or the suggestion that such themes exist in the data waiting to be discovered. Taylor and Ussher<sup>469</sup> also caution against the use of the term 'emerging' because:

[It] is a passive account of the process of analysis, and it denies the active role the researcher always plays in identifying patterns/themes, selecting which are of interest, and reporting them to the readers.<sup>470</sup>

Thematic Analysis was therefore chosen as a method of analysis that was more likely to avoid the imposition of a forced theoretical framework whilst capturing important evidence or ideas from the data that could more readily answer the research questions. Thematic Analysis thus provided more flexibility in terms of a deductive approach to the data where research questions were used representing the researcher's interest in particular areas of the field under study. This contrasts to a traditional grounded theory approach which would favour an inductive method of collecting the data without the collection or analysis being driven by the researcher's own theoretical interests and the theory is truly grounded in the data and is therefore an unimpeded discovery.

As the nature of the data varied from case file to case file it was important to ensure a cross checking of themes arising from those files containing both

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<sup>465</sup> AE Clarke, *Situational Analysis: Grounded Theory after the Postmodern Turn* (Sage Publications 2005) and Johnny Saldaña, *The Coding Manual for Qualitative Researchers* (Second edition, Sage Publications 2013).

<sup>466</sup> See Derek Layder, *Sociological Practice: Linking Theory and Research* (Sage Publications 1998).

<sup>467</sup> Eg Anselm Strauss and Juliet Corbin *Basics of Qualitative Research: Grounded Theory Procedures and Techniques* (2<sup>nd</sup> ed, Sage Publications 1998).

<sup>468</sup> Braun and Clarke (n 433).

<sup>469</sup> GW Taylor and JM Ussher, 'Making Sense of S & M: a Discourse Analytic Account' (2001) 4 *Sexualities* 293.

<sup>470</sup> *ibid.*

witness statements and POR reports<sup>471</sup> and those files containing only one of these types of documents. A check was therefore made to ensure that the themes discussed could be found in files containing 'complete' data from the document research.

### **3.4 Method**

The chosen method was document research using court case files and judgments. Some background statistical data was collected but the analysis largely consisted of narratives from the witness statements and reports of Cafcass that formed the data corpus. However, only 53% (N = 17) of the files contained both witness statements and POR reports. 22% (N = 7) contained only witness statements and 19% (N = 6) contained only Parental Order Reports. There were 2 files that contained a POR report with another document containing narratives such as an email or a letter from the commissioning couple.

Even with the limitations of the narratives produced for the court they still have research validity in terms of how the stories have been constructed for the courtroom and this offers an opportunity for further analysis. For example, is the focus of the narratives directed at showing compliance with section 54 (8) of the 2008 Act<sup>472</sup> (payments amounting to reasonable expenses) or are they largely directed at proving entitlement to legal parentage? There is the added advantage that commissioning couples have already told their stories to an extent in court documents and the numbers will be higher than a researcher could hope to find in terms of participants for interviews during the limited research period of a PhD given that surrogacy still has some social stigma connected to it.

#### **3.4.1 Accessing the data**

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<sup>471</sup> Files 1, 2, 4, 6, 7, 10, 11, 13, 16, 19, 21, 23, 24, 25, 28, 29 and 30.

<sup>472</sup> HFEA 2008, s 54 (8).

To obtain access to the court files it was necessary to apply for a Privileged Access Agreement (“PAA”) from the Ministry of Justice. The process of accessing the data is described in Appendix 1.

#### **3.4.2 Triangulation of the Data**

Consideration was given as to whether transcripts of oral testimony from the same couples might lead to greater triangulation of the data to ascertain whether the narratives differed in language, scope, detail and complexity when given verbally in a courtroom setting. The attempts to achieve further triangulation are discussed at Appendix 1 including methods employed to recruit participants. Triangulation was eventually partially achieved by using the reported judgments in conjunction with the case files.

### **3.5 The Sample**

Purposive sampling was adopted to the extent that HMCTS were asked to select files that met particular criteria of interest and importance to the research, namely files in the High Court or Principal Registry that related to applications for a parental order made after 6<sup>th</sup> April 2009. HMCTS records showed that 22 international cases were heard in the High Court from 2008 – 2013 in addition to the 10 reported cases identified by the researcher. The PAA was therefore granted based on a sample of 32 case files selected from the HCMTS case management database known as ‘FamilyMan’. A categorisation of the data grouping has been included in Appendix 2 together with a copy of the data collection sheet.

Due to purposive sampling it was not possible to achieve diversity in terms of social economic or geographical patterns but the aim was to find a representative sample of couples applying for and obtaining a parental order as opposed to a sample representing wider society. The inclusion criteria were already dictated to some extent by section 54 (2) of the 2008 Act therefore the sample consisted only of couples and only the parental order process. There was however an equal division between sexual orientation.

### 3.6 Review of the Literature

In gathering materials for the literature review, the topic of surrogacy was divided into three main areas of 1) surrogacy 2) parentage and 3) immigration. These were then further sub-divided to obtain search terms, used to conduct a key word search of databases such as Westlaw,<sup>473</sup> Lawtel,<sup>474</sup> HeinOnline,<sup>475</sup> Pubmed,<sup>476</sup> the Social Sciences Citation Index (SSCI)<sup>477</sup> and Scopus.<sup>478</sup> The sub-categories identified were 1) surrogacy 2) international surrogacy 3) legal aspects of surrogacy 4) surrogacy and immigration 5) surrogacy and adoption '6) legal parentage 7) the sociology of the family 8) immigration involving children and 9) stateless children. These key words were chosen because they closely matched the central research question. Google Scholar was also used to search for books and journal references. Examining the titles and abstracts first helped to sort journals in to relevance. An examination also took place of the bibliographies of all studies and journal articles (including leading medical law and family law journals) produced through the electronic database search in order to broaden the research trail. A list was compiled of the journals that regularly featured surrogacy articles such as Bioethics and the Medical Law Review and regular monthly searches of these particular journals took place as well.

With regard to the sub research questions, feminist literature was explored as well as literature surrounding discrimination. Additional search terms such as 1) discrimination in family law 2) surrogacy and discrimination 3) surrogacy and equality and 4) feminism and surrogacy were used. This helped to throw up relevant empirical studies, journal articles and cases.

An electronic search using Amazon and Google helped to find books relating to surrogacy as well as books relating to the sociology of the family. Relevant

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<sup>473</sup> <[www.westlaw.co.uk](http://www.westlaw.co.uk)> accessed via [www.le.ac.uk/library](http://www.le.ac.uk/library) various dates.

<sup>474</sup> <[www.lawtel.com](http://www.lawtel.com)> accessed via [www.le.ac.uk/library](http://www.le.ac.uk/library) various dates.

<sup>475</sup> <[www.HeinOnline.org](http://www.HeinOnline.org)> accessed via [www.le.ac.uk/library](http://www.le.ac.uk/library) various dates.

<sup>476</sup> <[www.ncbi.nlm.nih.gov/pubmed](http://www.ncbi.nlm.nih.gov/pubmed)> accessed via [www.le.ac.uk/library](http://www.le.ac.uk/library) various dates.

<sup>477</sup> <<http://wok.mimas.ac.uk>> accessed via [www.le.ac.uk/library](http://www.le.ac.uk/library) various dates.

<sup>478</sup> <[www.scopus.com](http://www.scopus.com)> accessed via [www.le.ac.uk/library](http://www.le.ac.uk/library) various dates.

cases were found using the search term 'surrogacy' in legal databases such as Westlaw UK, Lawtel, Lexis Nexis and Family Law Week Online. Finally a manual search for methodology books was conducted at university libraries as well as medical law textbooks. The bibliographies of those books found online were also examined to find further articles on methodology in either hard copy or electronic format. Google Alerts was used as a way to keep the researcher updated with media coverage of surrogacy and the search term 'surrogacy' was used for the alert and this also led to identifying new material published on the Internet including newspaper articles, blogs and forums. Regular checks were made throughout the PhD registration period for new publications through email alerts and various online databases and academic profiles on institutional websites. Attending conferences also helped to identify relevant literature.

### **3.7 Ethics**

Ethics approval for this research was granted by the University of Leicester's Ethics Committee on 18<sup>th</sup> February 2013 (application reference number rdah1-33d7) to use human participants (the pilot interview – see Appendix 1). In terms of the document research, the PAA granted by the Ministry of Justice contains clear requirements for the anonymisation of data for Data Protection purposes (see Appendix 1) and these requirements were complied together with the University's Research Ethics Code of Practice. Storage and use of data was also in accordance with the Data Protection Act 1998. Measures were put in place such as ensuring that the party's name or address were not collected or recorded during access and that the data collection sheets (prior to anonymisation) were only stored on hard drives or USBs protected by encryption software such as PGP. Ethics guidelines in the British Sociological Association's Statement of Ethical Practice<sup>479</sup> were followed when conducting the pilot interview.

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<sup>479</sup> British Sociological Association, *Statement of Ethical Practice for the British Sociological Association* (British Sociological Association 2002) statement 28 <[www.britisoc.co.uk/about/equality/statement-of-ethical-practice.aspx](http://www.britisoc.co.uk/about/equality/statement-of-ethical-practice.aspx)> accessed 2 February 2013

Case files were numbered randomly and all identifying information was removed from the narratives before reproducing them in this thesis. As the author was the sole transcriber in relation to the case files, identifying data was removed at the point of collection and the transcripts were then re-read following data collection to remove any further identifying information that may have survived the initial anonymisation process. All segments of narratives were checked carefully to ensure no identifying information remained before entering data in to NVIVO and checked again against any NVIVO generated documents.

### **3.8 Data Analysis**

The narratives were cross-referenced to develop a coding system involving short phrases or sentences that represented a relevant idea or theme. The cross - referencing of codes was achieved by using NVIVO. The codes selected included any 'in vivo codes' that pointed to the informant's meanings of their own views and actions. The second sub-research question: 'do the commissioning couple's narratives suggest that they feel unfairly or unjustly treated in terms of their status prior to obtaining a parental order?' also required an axial coding approach<sup>480</sup> of linking the subcategories of 'rights' to the larger categories that emerged.

In addition to using a computer program for coding a paper system of typed memos and tables were used to conceptualise the categories of data in narrative form. Adele Clarke<sup>481</sup> advocates the importance of using maps and memos to situate the discourse emerging from the narrative data as they also help to highlight multiple perspectives and conflicts in the social world in which the research is situated. This process proceeded the coding to enable familiarisation with the data to identify what Clarke describes as the 'meso-level actors'<sup>482</sup> within the area that is being observed. Clark argues that 'situational

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<sup>480</sup> Strauss and Corbin's type of coding that relates categories to sub-categories see Anselm L Strauss and Juliet M Corbin, *Basics of Qualitative Research: Grounded Theory Procedures and Techniques* (Sage Publications 1990) 109.

<sup>481</sup> Clarke (n 465).

<sup>482</sup> *ibid* 192.

analysis provides big picture maps that enable the researcher to “see” better where they may – and may not – want to go.’<sup>483</sup> Whilst a coding manual was not kept graphs, charts, tables and pictorial maps were used to illustrate patterns and relationships identified in the data as well as to describe the methods used for data analysis.

The narratives from the data sheet were then transposed on to 32 separate tables each divided in to 1) line by line narratives 2) meanings and 3) identified themes. The full text for each file was divided in to segments by sentence or paragraphs and inserted in to the narrative section of the table. This became the ‘data set’ that was then subjected to analysis using word documents. This helped to conceptualise the categories of text in narrative form and enabled an early analysis of the data visually before moving on to inputting the data into NVIVO.

This initial paper approach was favoured rather than simply typing all the narrative interpretation straight in to NVIVO because it allowed time and space for reflection of the assigned meanings and themes and space for immersion through repeated reading. For example, some meaning and themes were further refined or changed at the point of inputting the data in to NVIVO such as the merging of the separate themes of ‘desire for change’ became ‘hope’ and ‘trust’ and ‘agency’ developed as ‘autodidactism’ in order to capture the different ways in which these themes were expressed.

The use of NVIVO allowed all the material to be viewed and analysed in one place and to make cross-references between narratives. ‘Nodes’ were created to collect references to particular themes emerging from the narratives and sub-nodes were used to represent a variation on the emerging theme. For example, the theme of ‘care giving’ was identified as a central theme (node) in phase one of the data analysis but not all files described the theme in the same way and different expressions of the same theme included for example, ‘parent as

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<sup>483</sup> Clarke (n 465), 203.



educator', 'bonding and attachment', 'wellbeing' and so on. Using sub-nodes allowed for deeper analysis of the nodes themselves.

Each segment of text was cross-referenced to text from different files to develop themes and the themes were then examined in the context of existing literature on surrogacy. Initially eleven themes were identified with over 100 sub-themes in the first stage of analysis, this was reduced over time to three central themes with four sub-themes and connected streams and these are discussed in chapter six.

Due to the multi-layered nature of the court narratives they were further analysed by actor (applicants) and voice (applicants, PORs and applicant's lawyers) and by gender (applicant commissioning mothers and applicant commissioning fathers). As the 32 case files contained an equal number of heterosexual and homosexual<sup>484</sup> couples the narratives were compared as far as possible between these two groupings to identify any patterns in terms of similarities or differences in expression of experiences as well as the use of language. An interpretive approach was then taken to each group of themes and sub-themes to identify overarching themes and these were then recorded as the identified themes.

As Braun and Clarke<sup>485</sup> argue, decisions as to the proportion of data sets giving rise to evidence of a theme is a matter for a researcher's judgment and may be based on the research questions explored by the researcher as opposed to the frequency in which the themes arise during data analysis.<sup>486</sup> The research questions were used to guide and inform the interrogation of the data as well as establishing whether any of the themes within the literature review were actually replicated in the data. However, as the researcher should also keep an open mind in order to be able to see what the data is revealing, patterns and frequency of themes were also considered and recorded.

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<sup>484</sup> This term is used rather than same sex couples to denote the fact that there was not any lesbian couples within the sample.

<sup>485</sup> Braun and V Clarke (n 433) 77.

<sup>486</sup> *ibid* 82.

### 3.9 Background Information on Data

Four of the case files were related to each other and involved applications made by commissioning couples for a second surrogate child. They were treated as separate files for the purposes of recording the background statistics (unless otherwise indicated). In 34% (N=11) of the case files the commissioning couples were legally represented but in 66% (N =21) of the files they acted as litigants in person. It was therefore possible to divide the data between narratives produced by lawyers in the form of witness statements for the applicants and witness statements prepared by the applicants as laypersons. Comparisons were then drawn when considering use of language and this formed part of the forensic linguistics analysis in chapter five.

There were 16 homosexual couples and 16 heterosexual couples within the data set. It was possible to draw comparisons between the experiences reported by the heterosexual couples and the experiences reported by the homosexual couples. The two main differences were in relation to attitudes towards post-birth contact with the surrogate (discussed at 4.10) and adoption (discussed at 4.2) and to a lesser extent descriptions of parentage (discussed at 6.2.4.3).

There was only one file where the applicants would not have been eligible to make an application for a parental order at the time of starting the surrogacy process and this related to a homosexual couple. This is because the Human Fertilisation and Embryology Act 2008 (Commencement No.3) Order 2010, which extended the definition of couples to same sex couples, had not come in to effect.<sup>487</sup> This perhaps suggests that for this particular couple becoming parents was more important than the issue of obtaining legal parentage status in the UK courts.

There were therefore 48 men in the study and 16 women. The mean age of the men in the study was 43 as compared to 44 for the 16 women in the study. Whilst the youngest female applicant was 38 and the oldest applicant was 54,

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<sup>487</sup> HFEA 2008 (Commencement No.3) Order 2010 came in to force in April 2010.

overall the women's mean age meant that statistically they were within an age group that precluded their entitlement to access surrogacy treatment in the UK under the National Health Service ("NHS"). The National Institute for Health and Care Excellence ("NICE") guidelines excludes surrogacy from its list of NHS funded treatment.<sup>488</sup> However, women under 40 who have not conceived after two years of regular intercourse are eligible for three full cycles of IVF according to the NICE guidelines.<sup>489</sup> This entitlement is reduced to one full cycle for women between 40-42 years of age.<sup>490</sup>

Women over 43 years of age are not entitled to IVF treatment.<sup>491</sup> However many Clinical Commissioning Groups ("CCGs")<sup>492</sup> operate their own local policies and some will consider funding surrogacy in exceptional circumstances<sup>493</sup> and others will only consider funding fertility for women up to the age of 35 regardless of the NICE guidelines on the upper ages for IVF referral.<sup>494</sup> However, others refuse to fund any treatment involving surrogacy.<sup>495</sup>

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<sup>488</sup> See National Institute of Care and Excellence Guidelines (CG156), *Fertility Problems: assessment and treatment* (Nice 2013) <<https://www.nice.org.uk/guidance/published?type=cg>> accessed on 1 June 2016.

<sup>489</sup> *ibid* 31.

<sup>490</sup> Nice (n 487) 31.

<sup>491</sup> *ibid* 31.

<sup>492</sup> Known as Primary Care Trusts until 1<sup>st</sup> April 2013 following the coming in to force of the Health and Social Care Act 2012.

<sup>493</sup> Eg Guidelines of Gloucestershire Clinical Commissioning Group (NHS Gloucestershire 2015) <<http://www.gloucestershireccg.nhs.uk/wp-content/uploads/2015/08/Surrogacy.pdf>> accessed on 6 June 2016.

<sup>494</sup> Eg Guidelines of Oxfordshire Clinical Commissioning Group Body's Paper 'Assisted Reproduction Services for Infertile Couples – policy recommendation' (NHS Oxfordshire 2013) <<http://www.oxfordshireccg.nhs.uk/wp-content/uploads/2013/07/2013-07-25-Paper-25-ARS-policy-proposal-July-2013-FINAL.pdf>> accessed on 1 June 2016

<sup>495</sup> Eg Cheshire and Merseyside Clinical Commissioning Group Guidelines (NHS Cheshire and Merseyside) <<http://www.liverpoolccg.nhs.uk/media/1025/final-infertility-policy-26022015-1.pdf>> accessed on 1 June 2016.

The majority of the individuals who were in couples came from the occupational ranking of professionals<sup>496</sup> whilst a quarter came from a much higher income occupational group relating to senior managers.<sup>497</sup> Whilst a small number of applicants fell in to the lower occupational groups of Technicians,<sup>498</sup> Service and Sales Workers,<sup>499</sup> Craft and Related Trades<sup>500</sup> and Plant and Machine Operators,<sup>501</sup> overall the commissioning couples came from a high socio-economic background. There were eight individuals declaring themselves as 'homemakers' or 'carers' within the new family unit whilst one file did not include any information on occupation.<sup>502</sup>

Further analysis of the heterosexual couples data revealed that 31% (n =5) of couples actually travelled abroad for donor egg IVF. Their reproductive choices were based on choosing clinics with an international reputation and good success rates. Surrogacy was not their goal-orientated preference at the time of travelling abroad they were persuaded by the clinics to chose surrogacy after donor egg IVF failed. Three of the commissioning mothers from these five couples were over the IVF treatment age according to the NICE guidelines.<sup>503</sup>

The most popular destination chosen by the commissioning couples was India. This was a jurisdiction chosen by 50% (N =16) of the couples followed by the US chosen by 41% (N =13). Ukraine was chosen by 6% (N= 2)) with only one file involving a surrogacy arrangement in Canada (3%). The reasons given for choosing international surrogacy related to ease of access to treatment in the host country and to this extent matched the findings of Francoise Shenfield et

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<sup>496</sup> See UN International Labour Organisation's International Standard Classification of Occupations ISCO-08 2008, group 2

<<http://www.ilo.org/public/english/bureau/stat/isco/isco08/>> accessed 5 January 2016.

47% of individuals came from this grouping

<sup>497</sup> ISCO (n 519), group 1 - 24% of individuals were from this higher occupational ranking.

<sup>498</sup> ISCO (n 496) group 3. 6% of individuals were in this grouping.

<sup>499</sup> ISCO (n 496) group 5. 2% of individuals fell in to this grouping.

<sup>500</sup> ISCO (n 496) group 7. 2% of individuals fell in to this grouping.

<sup>501</sup> ISCO (n 496) group 8. 2% of individuals fell in to this grouping.

<sup>502</sup> Files 8 and 32 involved the same couple as did files 29 and 30 and so for the purposes of calculating the percentages falling in to specific occupational groups only one of the files in each pairing was included.

<sup>503</sup> Nice (n 487).

al.<sup>504</sup> The specific 'access' reasons were reported as the ease of enforceability of surrogacy contracts abroad as compared to the UK, speed in finding a suitable surrogate abroad and more choice for an ethnic match with an overseas surrogate or egg donor. Other reasons given included the ethics, reputation and costs of clinics as well as higher age allowance for treating couples. Treatment in the UK was seen as less desirable as a result and the selection process and relationship with overseas clinics is discussed further at 4.4 – 4.6.

Various payments were made under the contract. Payments to Indian surrogates ranged from approximately £2,000 to £7,000 with a mean of £4,413.95. This compared to the US where the payments to surrogates ranged from approximately £9,600 to £36,000 with a mean of £22,297.61. The payments to surrogates in the Ukraine was given in one file as £7,000 whilst in the second file the surrogate and clinic costs were given as a total figure of £21,836 and it was not possible to distinguish which proportion represented costs to the surrogate. In the case of the file relating to a surrogacy arrangement in Canada the sum expressed was approximately £9,366 for the surrogate's expenses, which included loss of expenses. The sum appears to be low compared to payments to surrogates in the US but it is important to note that this was the commissioning couple's second surrogacy arrangement with the same surrogate and so the parties may have negotiated a smaller fee.

There is a significant difference between the reported amounts paid to Indian surrogates in this study as opposed to US surrogates but this could be reflected by the difference in the cost of living. Also in the US case files surrogates tended to be drawn from higher socio- economic groups whereas in India the surrogates were usually drawn from lower socio- economic groups.<sup>505</sup>

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<sup>504</sup> F Shenfield, J de Mouzon, G Pennings, AP Ferraretti, A Nyboe, G de Wert and V Goossens, 'Cross Border Reproductive Care in Six European Countries: the ESHRE Taskforce on Cross Border Reproductive Care' (2010) *Human Reproduction* 25 (6) 1361.

<sup>505</sup> This information is taken from the case files that contained details of either the surrogate's occupation or the husband's occupation or family income.

France Winddance Twine's<sup>506</sup> research into payments made to surrogates in the US compares the wages of gestational surrogates (between \$20,000 - \$25,000 excluding after birth cash payments and disbursements) with that of women working in the service and care industries. She found that they compared favourably with women working in retail, clerical, hairdressing and nursing homes. There was the added advantage that the women could be 'stay-at-home workers' which enabled them to continue caring for children of their own whilst contributing to the family income. Pande's research of Indian surrogates<sup>507</sup> found that the sums received by them equated to five years of total family income using a median family income of \$60 per month. Like Winddance Twine, Pande considers such work to be equivalent to the care industry but stigmatised because it is of a sexual nature.

Whilst the US had the highest mean surrogate and clinic costs it was still regarded as a popular choice for many couples in the sample. This may be due to the fact that in some US states such as California the law is more favourable towards commissioning couples, including same sex couples. Once couples have entered in to a notarised assisted reproduction agreement with the surrogate they are entitled to obtain a pre-birth judgment that recognises their status as the legal parents under the California Family Code.<sup>508</sup> This is effectively a pre-conception order. From the 41% (N=13) case files involving jurisdictions in the US, 6 related to surrogacy arrangements in California of which 5 involved homosexual commissioning couples.

The parentage laws in California continue to evolve<sup>509</sup> with further changes made since many of the couples in this study commenced their surrogacy journey. For example, there is an automatic entitlement to a birth certificate in which they can be expressed as the 'mother', 'father' or 'parent' (regardless of

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<sup>506</sup> Winddance Twine (n 243)).

<sup>507</sup> Pande (n 242).

<sup>508</sup> See California Family Code 2013 (as amended) § 7960.

<sup>509</sup> The Uniform Parentage Act 1973 (as amended) was extended in 1988 to cover legal parentage for children conceived through artificial reproduction and again in 2002 to recognise the commissioning mother as the legal mother.

gender) without the need to mention the surrogate.<sup>510</sup> Also some counties in California do not require a formal hearing before a pre-birth order is granted and the application can be paper based.<sup>511</sup> The California Family Code 2013 also gave the court powers to recognise that a child has more than two parents if this is necessary to prevent a child being separated from his or her parents.<sup>512</sup>

The remaining US states chosen by the commissioning couples did not have surrogacy laws automatically advantageous to the commissioning couple. This meant that those commissioning couples had to take further legal steps in the treatment country to apply for either the equivalent of a parental responsibility agreement,<sup>513</sup> post birth adoption<sup>514</sup> or a discretionary declaration of legal parentage.<sup>515</sup> This suggests that either the commissioning couples did not carry out any or sufficient legal research about the laws in those countries before travelling or that there were other factors in their choice of jurisdiction that outweighed any perceived disadvantages of the legal system in the host country.

The most popular method of surrogacy was gestational, 97% (N =31) of couples used this method of conception as opposed to just 3% (N =1) who used the genetic method. Some jurisdictions only permit gestational and not genetic practices of surrogacy and it was not always possible to ascertain from the narratives whether the use of the gestational method was always a choice or a requirement of law within the chosen jurisdiction. This preference for gestational surrogacy meant separately negotiating with both a surrogate and an egg donor

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<sup>510</sup> Assembly Bill 1951 Chapter 334 amending the Health and Safety Code § 102425 to § 102425.1 which came in to effect on 1st January 2016.

<sup>511</sup> There is no requirement under the California Code 2013 (as amended) § 7960 (e) and (f) and § 7960 (2) for there to be a formal hearing unless specifically requested by a party.

<sup>512</sup> Senate Bill 274, Family Law: parentage: child custody and support 2013. This Bill made changes to the California Family Code of 2012 in 2013 and those changes came in to effect on 1 January 2014.

<sup>513</sup> Similar to orders made in the UK under the CA 1989.

<sup>514</sup> This is the position in US states such as Pennsylvania, Alaska and Florida.

<sup>515</sup> This is the position in US states such as Maryland, Massachusetts and Connecticut and in jurisdictions such as Canada.

(except in the case of the 5 heterosexual couples who were able to use the commissioning mother's eggs).

It is however important to note that the jurisdictions chosen by the majority of the commissioning couples (India) at the relevant time permitted both forms of surrogacy (genetic and gestational) but the couples in question still chose a gestational method. Although legislation in some US states such as California only confers a right to a pre-birth order in the case of a gestational surrogacy arrangement there is no legislation<sup>516</sup> that specifically prohibits genetic surrogacy and therefore genetic surrogacy is still practised and couples can apply for an adoption order to regulate parentage.

This preference for gestational surrogacy may suggest a wish to eliminate the ethnicity of the surrogate from the fertilisation process. This is particularly relevant when one considers that 50% (N =16) of the case files involved an Indian surrogate but with evidence in 19% (n =3)) of the files that the commissioning couple were within a group that might be termed as 'white'.<sup>517</sup> However, it is notable that in 41% (n=13) of the Indian case files the commissioning couple chose the jurisdiction specifically for an ethnic match either with a surrogate or an egg donor. In relation to those 41% of couples, 54% (n =7) were in a mixed ethnicity relationship and 46% (n =6) had the same ethnicity as their partner and the surrogate or egg donor.

In respect of the couples who chose gestational surrogacy, 84% (n=27) used eggs donated by a stranger and 16% (n =5)) used eggs donated by the commissioning mother. Whilst findings by Van Den Akker<sup>518</sup> suggest that commissioning mothers would like a genetic connection to the child this was

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<sup>516</sup> California Family Code 2013 (as amended) for example does not specifically prohibit the practice of genetic surrogacy.

<sup>517</sup> The term white is used in preference to the word Caucasian which has fallen out of favour as it geographically denotes people originating from the Caucasus, see eg R Bhopal and L Donaldson, 'White, European, Western, Caucasian, or what? Inappropriate Labeling in Research on Race, Ethnicity and Health' (1998) 88 (9) American Journal of Public Health, 1303. The term 'white' was also used in many of the parental order reports.

<sup>518</sup> Van Den Akker (n 298).



rarely achieved in practice as evidenced by the case files. Some couples chose simultaneous surrogacy arrangements and 6% (N = 2) of the files<sup>519</sup> involved a double surrogacy where more than one surrogate contracted with the same commissioning couple to achieve a double pregnancy. Other notable statistics were that 41% (N = 13) of the files involved a twin birth as opposed to 59% (N = 19) of the files that involved the birth of a single child.

In 72% (N = 23) of the case files the application for a parental order was concluded within six months, 22% (N = 7) of the files took between seven to eleven months to conclude and 6% of files (N = 2) took over 12 months to conclude. Therefore in the majority of cases parental order applications were dealt with in a reasonable period of time but in a small number of cases delays occurred and these were due to the fact that the court did not have all the information necessary to confirm that all aspects of the section 54 criteria of the 2008 Act had been met, for example, consent of the surrogate, or payment of reasonable expenses and this necessitated further investigation and the collection of further evidence. The surrogate was not legally represented in any of the case files and surrogates did not file witness statements for any of the applications.

Additionally 9% (N = 3) of the files<sup>520</sup> involved cases in which a solicitor was appointed by the court to represent the surrogate child but their role involved making enquiries as to the whereabouts of the surrogate and ensuring the surrogate's consent had been voluntarily given rather than considering any wider issues relating to the child's welfare and well-being which was largely dealt with by the POR.

Three themes were eventually identified in the course of the data analysis and are discussed in chapter six and a concept map can be found at Appendix 3. The themes were: 1) Relationships and Networks 2) The Autodidactic Consumer and 3) Re-imagining International Surrogacy. These themes represented the life meshing of the stories that could be clearly heard through

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<sup>519</sup> Files 18 and 29.

<sup>520</sup> Files 1, 4 and 15.

the text and formed a community of experiences common to the commissioning couples as discussed in chapter four as well as messages both hidden and explicit from the judiciary and other legal experts as discussed in chapter five. The theme of Relationships and Networks also had associated sub-themes of power and vulnerability, trust, spatial connectedness and identity, which in turn had their own connected streams. Thus the findings are discussed across three chapters starting with chapter four.

## CHAPTER FOUR

### Findings – Narrative Research

#### 4.1 Introduction

The stories, as Bruner calls them, were naturally grouped around particular aspects of what Bruner<sup>521</sup> calls the ‘fabula’<sup>522</sup> namely the subject matter or plight of the story that gives rise to themes, in this case the surrogacy arrangement. The stories began with the use of language or ‘sjuzet’ (plot)<sup>523</sup> to explain the reasons behind the couples’ decision to start the surrogacy journey and moved on to describe the preparations for the journey both physically and emotionally. Many of the stories described the nature and the degree of the relationships built with the surrogate and the clinics. Essential to the story were the steps taken to prepare for parenthood and this involved some discussion of the legal and administrative processes in both the host treatment country and the country of domicile. Finally the stories moved towards a conclusion that reflected upon the couples future hopes and aspirations for the child. The stories were not grouped around the section 54 criteria as might be expected but focused largely on motivations, preparations, the contractual arrangement and emotions.

The stories also varied depending on the speaker. Many of the witness statements were joint witness statements but some files contained statements from both of the potential parents. As expected, the commissioning couples in their reporting of events tended to use less formal language than the legal experts (lawyers, judges and PORs). However, some of the witness statements alternated between formality and informality, expression of emotion and emotionless responses. The commissioning couples also drafted their statements using the active voice where they put themselves at the centre of the action. This contrasted with the reports of, for example, the PORs, which

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<sup>521</sup> Bruner (n 13).

<sup>522</sup> *ibid* 699.

<sup>523</sup> The plot as told through the use of language.

were written in a passive voice where the subjects (commissioning couple or surrogate) are described as being acted upon rather than doing the action.

#### **4.1.1 The Voice of the Commissioning Mother**

Many of the commissioning mothers' witness statements, although not joint statements, were careful to include their partner's emotions as combined with their own, for example, 'we were unable to birth our own child'<sup>524</sup> or 'word (sic) could not describe how happy we were'<sup>525</sup> or 'we decided to proceed with surrogacy.'<sup>526</sup> This twinning aspect of the witness statements was also present in the sole statements of the commissioning fathers and signified an intention to take a united approach in the proceedings.

Some of the commissioning mothers' witness statements contained their own emotive responses such as:

*In the days to come I refused to see anyone and was sinking into depression. Then one day I logged onto the internet and joined a website call (sic) '(name of website)' I read many stories on their (sic) and I began to cry. For the first time I was grateful I was able to feel morning sickness, see the ultrasound pictures of my daughter and feel her kick.*  
(File 20, statement of commissioning mother).

This commissioning mother writes in the first person to emphasise the impact her miscarriage had on her. However, for some commissioning mothers, even emotional moments were treated with formality and simple reporting:

*We have been attempting to procreate over this period of time in the natural process; but all our attempt failed. After this, we tried various Assisted Reproductive Technology procedures for six times, attempting to procreate. I also suffered miscarriage during 2002 year. I could not produce eggs thereafter. All medical procedures for fertility following this*

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<sup>524</sup> File 24.

<sup>525</sup> File 20.

<sup>526</sup> File 4A and 4B.

*was (sic) carried out by using donor eggs which were genetically unrelated.*

(File 15, statement of applicant mother).

Even allowing for the fact that English may not have been the first language for this commissioning mother the reporting style is very matter of fact. This may signal that some applicants acting as litigants in person adopted formalised language to fit the formality of the legal proceedings.

Whilst formality of language was seen by some of the couples as a necessary part of preparing a witness statement, most of the couples' witness statements did not follow the section 54 criteria of the 2008 Act. This led to court directions for further witness statements to be filed so that evidence supporting all of the section 54 criteria could be obtained from the commissioning couples and this inevitably increased the length of proceedings. The formal language adopted sometimes served to mask the full emotional impact of the surrogacy process and therefore was a missed opportunity to impress upon the court (in their own words) the full effect and nature of their journey. This tendency to replace self-revealing language with the language of formality could be problematic in cases where oral evidence is not given.

#### **4.1.2 The Voice of the Commissioning Father**

Like the commissioning mothers' statements these varied in terms of formality and emotiveness. Commissioning fathers were also capable of expressing emotions that shifted from the formulaic nature of simple reporting.

In relation to the 16 heterosexual couples only 13% (n = 2) of the case files included separate witness statements prepared by both applicants and in the 16 homosexual case files only 19% (n = 3) included separate witness statements from both applicants. In the majority of the cases the courts therefore either received joint accounts or accounts from only one of the applicants. The dominate witness statement for homosexual couples tended to come from the applicant with a genetic connection to the child but this often meant that the

voice of the second commissioning father who was to have equal parentage status either went unheard or was not given the same status. However, this was balanced by the fact that the POR interviewed both prospective fathers, although as indicated in chapter 5.2 it was not always clear whose voice was being recorded in the reports and the voice of the non-genetic parent is equally important.

#### **4.1.3 The Joint Voice of the Commissioning Couple**

Eight of the case files included joint witness statements<sup>527</sup> as compared to fifteen case files<sup>528</sup> that contained witness statements from just one applicant. There was use of the first person 'we' throughout the joint statements and very rarely would the narrative split to recall an individual rather than a shared experience. The use of 'we' was used to express joint emotion, for example, 'we considered this quite unreasonable'<sup>529</sup> or to apportion joint blame, for example, 'we acknowledge this sum exceeds expenses reasonably incurred by the surrogate over the course of her pregnancy.'<sup>530</sup> This meant the court (and indeed the author) was not able to distinguish between any differing experiences of the applicants that might have existed

The style and tenor of the narratives would change when applicants filed multiple statements. For example, both files 19 and 16 included joint statements for the applicants that used language in the third person in one statement (to address themselves as 'applicants' or more formally by their surnames) but also included joint statements written in the first person using 'we'. It was as if the commissioning couples were uncertain as to the level of formality to use for the court. These witness statements were prepared by the applicants rather than lawyers, which would explain the change in style and format.

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<sup>527</sup> Files 6, 8, 11, 16, 21, 24, 25 and 32.

<sup>528</sup> Files 1, 2, 4, 7, 10, 13, 15, 19, 20, 22, 23, 26, 28, 29 and 30.

<sup>529</sup> File 8.

<sup>530</sup> File 25.

#### 4.1.4 The Lawyers' 'Voice'

Nine<sup>531</sup> of the witness statements were prepared by lawyers and followed the procedural formalities for the drafting of these documents.<sup>532</sup> This differed from the 15 statements<sup>533</sup> prepared by the applicants that did not follow the procedural requirements, for example, many of them contained un-numbered paragraphs and did not end with a statement of truth.<sup>534</sup>

The cost of legal representation in the UK can often be a prohibitive additional expense when couples have already spent significant sums of money for the surrogacy process and in some cases additional sums of money to instruct international lawyers. In the case of KB and RJ v RT<sup>535</sup> Mrs Justice Pauffley began the judgment with a dedication to the QC and solicitors who had 'been prepared to act without recompense in these proceedings.'<sup>536</sup> Only one of the couples in the study might have met the legal aid means criteria but legal aid is not as a general rule available for surrogacy cases.<sup>537</sup>

The lawyers witness statements followed a clear pattern of story-telling similar to Labov and Waletzky's<sup>538</sup> six stages of story-telling namely 'abstract' (the beginning of the story), 'orientation' (the actors or events involved), 'complicating action' (what happened), 'evaluation' (the relevance of what happened), 'resolution' (how matters were dealt with), and 'coda' (what it all means in the context of the reporting). The story is therefore told by the lawyers in a sequential way and through a cognitive process has been pre-constructed.

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<sup>531</sup> Files 2, 4, 6, 7, 13, 21, 22, 23 and 26.

<sup>532</sup> FPR 2010, Part 17 and Part 22.

<sup>533</sup> Files 1, 8, 10, 11, 15, 16, 19, 20, 24, 25, 28, 29, 30, 31 and 32.

<sup>534</sup> FPR 2010, Part 22.

<sup>535</sup> KB and RJ (n 51).

<sup>536</sup> *ibid* [1].

<sup>537</sup> Legal Aid Agency guidelines <<https://www.gov.uk/guidance/apply-for-legal-aid#categories-of-law>> accessed 5 August 2016.

<sup>538</sup> Labov and Waletzky (n 14) 12.

This contrasted with the PORs' reports that focused more on the orientation to tell the court about the circumstances of the commissioning couple (for example, their domicile, their ability to provide a home for the child) and the complicating action, namely the circumstances surrounding the surrogacy arrangements. It also contrasted with the statements prepared by the couples acting as litigants in person. The disjointed way in which litigants in person retell their stories means that for clarity purposes the court may have to rely heavily on the parental order reports which themselves may carry their own hidden meanings and biases or unchecked conclusions as discussed in 5.2. Witness statements drafted by lawyers can help to address this imbalance but the involvement of lawyers for international surrogacy cases is usually limited due to cost.

#### **4.1.5 Descriptions of Parentage**

Most of the commissioning couples referred to the surrogate by either name or as 'surrogate' or both<sup>539</sup> thus avoiding specific reference to any parentage status by the use of the term 'surrogate mother.' However, some freely used the term 'surrogate mother' or used 'surrogate' and surrogate mother' interchangeably.<sup>540</sup> It was not possible to glean from the narratives whether the choice of terms had been influenced by issues of identity surrounding parentage or by the designation of 'mother' to the surrogate under UK law.

The fact that the PORs also varied in their use of terminology did not suggest that the parental order process itself required the use of 'surrogate mother' as a term. The parental order reports varied between the use of the term 'surrogate'<sup>541</sup> in combination with the surrogate's name and the use of the term 'surrogate mother',<sup>542</sup> others used the term interchangeably.<sup>543</sup> Some of the PORs referred to the commissioning couple as 'the intended parents'.<sup>544</sup> The legal process only requires parties to be identified as 'applicants'

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<sup>539</sup> Eg files 2, 7, 8, 10, 11, 16, 21, 26, 28, 29, 30 and 32.

<sup>540</sup> Eg 15, 19, 20, 22 and 24.

<sup>541</sup> Eg files 2, 5, 10, 11, 12, 16, 21, 23, 28 and 29.

<sup>542</sup> Eg 3, 18 and 25.

<sup>543</sup> Eg files 4, 6, 9, 17 and 27.

<sup>544</sup> Eg files 11, 12 and 25.



(commissioning couple) or 'respondents' (surrogate and her husband). The application form for a parental order (form C51) does however request information on the 'birth mother' the 'birth father' and 'birth parent'.

Whilst the majority of commissioning couples and PORs preferred the use of the term 'surrogate', the choice of the terminology 'surrogate' did not show a pattern that varied based on the country of origin of the surrogate that might signal an attitudinal pattern in the written assignation of parentage. The term was used by commissioning couples who had completed surrogacy arrangements in India, the US and Canada. Similarly the term 'surrogate mother' was used to refer to surrogates based in both India and the US.

Metaphors were also found in the commissioning couples' witness statements to express feelings of happiness and enthrallment with the birth of the child as well as their new status as parents. Metaphors referring to the child as a 'gift' were used (discussed further at 4.9) as well as non-metaphorical concepts that Lakoff and Johnson define as 'spatial orientations'<sup>545</sup> and are important because they emerge directly from experience. The files included spatial orientations such as:

*Time seemed to stand still at that moment and we were completely oblivious to our surroundings.*

(File 2, second applicant).

This was a way for couples to express how at the point of the birth of the child their emotions, thoughts, actions and focus were completely taken over by the event. It is also used to express how poignant the moment was for many of the couples.

Parentage as a concept was metaphorically expressed. Witness statements suggested use of metaphors around parent as educator in that commissioning couples saw their parental role as imparting knowledge:

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<sup>545</sup> Lakoff and Johnson (n 15) 14.

*I have a lot of love to give, and have travelled and want to teach them that there is a big world out there.*

(File 1, first applicant)

Or parent as therapist with the caregiver role infused with powers to bestow happiness:

*We love him with all our hearts and will do everything in our power to raise him to be happy and complete.*

(File 5, joint applicants)

The descriptions of parentage suggested couples viewed parentage as a verb rather than a noun – emphasis was placed on actions rather than bio-identity and couples described how they would be parents rather than how they would meet the legal definition. The emphasis was not on the biological structure of parentage but the social process of parentage and this is discussed further in chapter six.

## **4.2 Motivations**

Couples spoke about how parentage was their ‘goal’ or ‘purpose’ but only once they were in a committed relationship. Parentage was therefore viewed as a developmental or transitional part of a union. Couples also considered how a child born through surrogacy might be viewed and received by their friends, families and neighbours and most concluded that the changing societal attitudes meant that the children would be generally accepted. This societal acceptance was also viewed as developmental, however, whilst the heterosexual couples focused on how the child would be accepted, homosexual couples focused on how their new family unit would be accepted.

Some commissioning couples weighed up the outcomes of alternative courses of action such as adoption.<sup>546</sup> These alternatives were rejected as too problematic. Surrogacy was viewed as a means to give these couples the best possible outcome and this was measured in terms of the greatest satisfaction in becoming a genetic parent. Those who reported considering it as an option in particular perceived adoption as more problematic than surrogacy. For example:

*Having lived in (name of country) and witnessed the plight of orphaned children, we were keen to adopt from (name of country). But after several interviews and going on the required adoption courses, we found the process lengthy and without guarantee of success.*

(File 10, second applicant).

One couple perceived problems associated with adoption as an added burden given that the task of parenting as a same sex couple would bring its own societal pressures:

*Our next discussion was about how we should have children. Of course adoption would be the most sensible, least selfish option. But I have grown up with two adopted cousins and saw the difficulties for both the children and the adoptive parents. It was going to be complicated enough for us without the added pressure of the adoption process.*

(File 29, second applicant).

For many couples the solution to childlessness was a medical one (surrogacy) rather than a social one (adoption). However, there were differences to be found amongst the reports of the heterosexual and homosexual couples relating to their choice to become parents through surrogacy. Heterosexual couples favoured medical interventions such as IVF and egg donation before finally settling on surrogacy as a last resort. Although adoption was considered in 28%

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<sup>546</sup> Nine files discussed adoption as an alternative form of becoming parents. See files 6, 9, 10, 16, 18, 22, 23, 24 and 29.

(N = 9) of the case files a greater proportion of heterosexual couples (78%, n = 7) reported considering adoption as an alternative method of forming a family with one couple having already previously completed a successful adoption. This compared to only 22% (n = 2) homosexual couples that reported considering adoption as an alternative.

Whilst the two homosexual couples mentioned above reported considering adoption 44% (n = 4) of the heterosexual couples actually took steps to start the adoption process. The two homosexual couples that considered adoption reported rejecting it in favour of a preference for a genetic connection to the child and saw it is a less complicated route for their childlessness. The four heterosexual couples were prepared to proceed with adoption but all abandoned the process after it became too lengthy or was viewed by them as too complicated or their application was rejected.

The rejection of adoption in favour of surrogacy, like the research conducted by Helená Ragoné<sup>547</sup> was an attitudinal pattern found in the witness statements. As stated there was only one couple in this study that had already chosen adoption as a route and successfully adopted a child before choosing surrogacy as a way to grow their family further. In her written statement the commissioning mother describes how she had conceived naturally but developed hyperthyroidism during the pregnancy. This required her to take medication that in turn caused infertility. This couple wanted to extend their family and therefore settled on adoption as a means to do so. When deciding to extend their family further, they decided that achieving a genetic connection was important to them and underwent numerous cycles of IVF, which resulted in three pregnancies followed by miscarriages. It was as a result of failed IVF treatments abroad that this couple finally considered surrogacy after receiving medical advice.

Thus having successfully adopted, this couple came to the realisation when trying for another child that a genetic connection was important to them this

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<sup>547</sup> Ragoné (n 415). The statistics are not broken down by sexual orientation of the couples.

time round. Couples who dismissed adoption viewed a genetic connection as necessary for intimacy in the child-parent relationship even if this intimacy was through a genetic connection by proxy in the case of the non-genetic parent. One non-genetic parent remarked: 'I adore (name of surrogate child) and fully accept him as our son'.<sup>548</sup>

Another couple spoke of how they had made a decision early in their marriage to have two children genetically related to them and one through adoption. However, after failed IVF attempts adoption seemed the only option to produce their first child. However they soon discovered that this was problematic after being advised by UK adoption agencies that their chances of adopting were limited because they were a couple in a mixed ethnicity relationship. This couple were also unable to achieve their desire for an ethnic match through the international adoption process.

Most couples had reasons for rejecting domestic surrogacy in the UK and these varied from higher clinic costs, or a perception that commissioning couples had a weaker legal status or rights in the UK, or that the commissioning couples' age excluded them from fertility treatment or that it would be harder to find a surrogate of the same ethnicity as either themselves or their partner in Britain. One couple explained their rejection of domestic surrogacy to the POR and it was reported in the following terms:

*Ms (name of second applicant) and Mr (name of first applicant) tell me that they initially explored a clinic called (name of fertility clinic) but were 'turned off' from this for a number of reasons. Chief amongst these were that they had no say in the health lifestyle of the prospective mother and felt this could compromise the health of their child should the mother smoke or drink. Secondly British law meant that in the event the surrogate could decide to keep the child and they would then be subject to possible maintenance. Thirdly the laws had changed in the United Kingdom, in respect of disclosure so that a child of a surrogate*

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<sup>548</sup> File 7, second applicant.

*arrangement could now seek their biological parent. Mr (name of first applicant) felt that these options made using a UK surrogate service 'fraught with danger'; and that as parents they could be placed in a difficult situation.*

(File 9, POR).

What is interesting about this report and why it has been reproduced in length is that these voiced reasons display a lack of knowledge by the commissioning couple that an international surrogacy arrangement would still mean that they would be subjected to UK law on their return. This lack of knowledge of UK law and procedure has been highlighted in case law.<sup>549</sup> This can be seen particularly in respect of those cases where applications for a parental order were made out of time<sup>550</sup> with the longest delay involving children aged 14 and 12.<sup>551</sup> Some couples made choices based on their own beliefs or poorly researched or misunderstood information.

#### **4.3 Preparations**

All the commissioning couples in this study had embarked on a degree of research prior to travelling to their chosen treatment country. However the degree and quality of the research varied from simple Internet research in to the medical implications of surrogacy and the price differences between the different surrogacy agencies and clinics to more in depth research in to the laws in different countries as compared to the law in England and Wales. Couples also reported participating in pre-surrogacy assessments involving psychological assessments and counselling before making a final decision to proceed with surrogacy. In many of the files the PORs confirmed the careful preparations that took place prior to couples making the final decision to pursue surrogacy, for example:

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<sup>549</sup> Eg See A and B v SA [2013] EWHC 426 (fam) and Re W (n 53).

<sup>550</sup> See Re X (A Child) (n 51), AB v CD (n 51), D & G v ED & DD and A & B (n 109), Re A and B (No.2) (n 107), KB and RJ v RT (n 51) and A and B v C and D (n 109).

<sup>551</sup> A and B C and D (n 107).

*It was evident from speaking to them that a great deal of thought, consideration and research was undertaken by them before they made the decision to apply to the (name of clinic) in (area).*

(File 3, POR).

One couple, for example, noted that the whole process from initial thought to action and conclusion was a lengthy one signalling that decisions were not taken lightly or rushed:

*Our journey to start a family has taken almost 5 years from initial discussions to finally sharing the joy of (name of surrogate child)'s birth.*

(File 31, joint applicants).

Couples spoke of the organisation of flights and visits to the surrogate to ensure that they were present at the surrogate's pre-natal appointments or other medical appointments.

Some files revealed a detailed level of research that included not just medical but also legal research:

*We made our own research prior to entering in to the surrogacy arrangement and understood that any babies conceived would be stateless initially and that we would need to stay in (name of jurisdiction) for a minimum of three months and care for them whilst we applied for British citizenship, then a British passport in (name of jurisdiction) followed by applying for an exit visa from the (national) authorities and finally applying for the parental order.*

(File 4, second applicant).

However, in many of the files there was very little evidence of research in to the laws governing surrogacy in the UK or evidence that clinics had dealt with UK lawyers previously and understood the procedural requirements under the 2008

Act<sup>552</sup> and the Family Procedure Rules.<sup>553</sup> The lack of knowledge of the laws on surrogacy in the UK is not just restricted to commissioning couples, there is evidence in reported court judgments of lack of knowledge by UK lawyers,<sup>554</sup> overseas lawyers,<sup>555</sup> overseas clinics,<sup>556</sup> and UK judges.<sup>557</sup> Thus the knowledge deficit also resides in the so-called 'expert systems'<sup>558</sup> that one would expect to support the autonomous patient in navigating through risks.

#### 4.4 Selection of Clinics and Surrogates

Couples spoke of seeking advice from friends who had completed their own surrogacy arrangements. There was also evidence that commissioning couples selected clinics in India and the Ukraine not just on costs but based on the clinic's treatment of the surrogate and the provisions made for the surrogate's wellbeing:

*They also welcomed the fact that this clinic appeared to treat surrogates with respect, and that the surrogate's own family would have a far better quality of life following the financial payments she would receive.*

(File 1, POR).

None of the couples reported to the court that the surrogate had not been well treated or that clinics had reneged on earlier promises and contractual arrangements to make provisions for the surrogate's welfare and wellbeing during the pregnancy. Although the surrogate is made a respondent to a parental order application and can file a witness statement, for those respondents whose first language is not English this would require some assistance from experts. It would also be difficult for the court to make any assessment as to the accuracy of reports of the surrogate's welfare and

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<sup>552</sup> HFEA 2008.

<sup>553</sup> FPR 2010.

<sup>554</sup> Re G and M (n 51).

<sup>555</sup> CC v DD (n 51).

<sup>556</sup> See Re IJ (n 147), Re WT (n 51) and Re D (A Child) [2014] EWHC 2121.

<sup>557</sup> See Mr G and Mrs G [2012] EWHC 1979 and JP v LP, SP and CP [2014] EWHC 595 (Fam).

<sup>558</sup> Anthony Giddens, *The Consequences of Modernity* (Polity Press 1991).



wellbeing based only on the commissioning couples' witness statements or enquiries of the clinics.

A recent study by Norwegian anthropologist Kristin Engh Førde,<sup>559</sup> as reported in the Bioedge newsletter,<sup>560</sup> suggests that clinics may exaggerate their concerns for the surrogate in order to satisfy enquiries made by commissioning couples about the clinic's ethical business model. Engh Førde interviewed 32 commissioning couples and 27 surrogates involved in a surrogacy arrangement in India. Whilst it was noted that commissioning couples chose clinics due to their advertised ethical approach to surrogates, Engh Førde argues that this was more a marketing tool used by clinics rather than a genuine concern for the wellbeing of the surrogates. However, the witness statements from the case files suggested that many of the commissioning couples were able to observe for themselves and report back to the court the provisions that were made for the surrogates such as housing, prescriptions, housekeeper services and specially prepared food.

Commissioning couples choosing surrogacy arrangements in western countries were also concerned with the wellbeing of the surrogate but the concern was voiced as one that related to the business ethics and reputation of the clinics and the practice of surrogacy as a whole rather than a concern solely for the treatment of the surrogate, for example:

*We decided to use an American-based surrogacy agency because we were familiar with, and have respect for, the medical and legal processes in the USA. Further we wanted to ensure that any agency we used had a strong and established reputation for ethics and compliance.*

(File 25, Joint applicants).

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<sup>559</sup> K Engh Førde, PhD extract in *Reproductive Technology and Surrogacy: A Global Perspective*, H Åsgeirsson and S Nordal (eds) (Norden, Nordic Council of Ministers 2015).

<sup>560</sup> M Cook, 'Remarkable Insights in Norwegian Study of India's Surrogate Mothers Bioedge' <<https://www.bioedge.org/bioethics/remarkable-insights-in-norwegian-study-of-indias-surrogate-mothers/12342>> accessed 10 June 2017.

These couples displayed a more ethical business orientated preference than a well-being orientated preference.

Whilst the selection of clinics was ethics focused the selection of surrogates focused on the individual and their personality and motivations. In terms of the choice of surrogate in the US and Canada this was based on mixed reasons which included the personality and maturity of the surrogate, for example:

*It struck us that despite her youth, (name of surrogate 1) showed thoughtfulness and maturity; she seemed to fully understand what she was signing up for.*

(File 32, joint applicants)

An important factor in the selection of surrogates was whether there was an instant liking or respect felt by the commissioning couple at the time of meeting the surrogate, signalling an emotion-orientated preference to choice:

*When they met with the respondent surrogate mother (name of surrogate), they sensed she was genuine, warm and well intentioned. She was unmarried and had three successful births. They “hit it off with her” to such an extent that she was a witness at their civil ceremony.*

(File 11, POR).

This ‘gut feeling’ approach taken by commissioning couples to the selection of surrogates has been noted in previous research by Blyth.<sup>561</sup> Blyth’s research also notes that the meeting with the surrogate is categorised by trust.<sup>562</sup> Similarly in this study there was evidence of relationships built on trust and this is discussed further at 6.2.5.

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<sup>561</sup> Blyth (n 253).

<sup>562</sup> Blyth (n 253) 188.

The choice of surrogate was also based on a need to be satisfied that the surrogate's motivation was the correct one demonstrating that value-orientated preferences were also influencing the choices made:

*It was of paramount importance to me that we found a surrogate who was doing this because she believes in surrogacy and helping people make a family.*

(File 26, first applicant).

Some couples treated the selection process as a formal interview:

*After reviewing the potential candidates in conjunction with (name of second applicant) and speaking at great length, I was most drawn to the First Respondent, (name of surrogate). I had spoken with her family as well and exchanged a lot of emails to ensure she was the right kind of person to help (name of second applicant) and I have a family.*

(File 26, first applicant).

Surrogates were therefore selected through a combination of factors ranging from their personality, motives and responses to questions posed by the commissioning couple. However, it was clear that surrogates also considered themselves to be selecting the right commissioning couple to establish relationships, as there were reports of commissioning couples being rejected on the basis of their sexual orientation or surrogates pulling out shortly after meeting the commissioning couple without offering an explanation. The selection process was therefore often two-way with multiple suitability criteria employed.

The commissioning couple viewed the relationship between themselves and the surrogate as one of a partnership in which there was mutual benefit to both. For example,

*They described working in partnership with the respondent before, through and after the pregnancy. This allowed them to feel closer to the process and (name of Child)'s development.*

(File 11, POR).

*The selection process was a two-way matter and it was made clear that the surrogate had to be happy with both (name of second applicant) and I as we were with her.*

(File 2, first applicant).

This mutualism (co-existing in a relationship from which each benefits from the others activity) enabled the development of trust which was itself linked to the fact that in the majority of cases the surrogate had been chosen by the commissioning couple prior to the parties entering the contract and that she was considered as the person most likely to provide a good level of service resulting in a live birth with minimum complications. The mutualism was thus embedded in the selection process, the contract process and the commissioning couples' perception of the power balance within their relationship with the surrogate.

The commissioning couple viewed their contribution as helping the surrogate to improve her own life in some way either materialistically or emotionally:

*Mrs (name of surrogate) wanted to become a surrogate to earn money and have time to raise her daughter as she was a single parent.*

(File 7, first applicant).

*One of her children is said to have a disability. She undertook the surrogacy arrangement with the support of her family as a means of providing financial stability for her own children.*

(File 9, POR).

*The money that she received from being a surrogate would make life a little comfortable for a while.*

(File 2, first applicant).

All the commissioning couples understood that a happy surrogate meant a healthy pregnancy and that a good relationship was key to a successful outcome in terms of the birth of the child. In return the surrogate's contribution was reported as a healthy pregnancy, the delivery of a live baby and good relations with the commissioning couple that might continue post birth.

#### **4.5 Forming the Contractual and Social Structure**

Whilst the majority of applicants had access and contact with the surrogate, in a few cases the clinic controlled and limited the amount of contact. For example,

*There is little information known about the surrogate mother and the applicants confirm that at no stage did they have direct contact with her.*

(File 3, POR).

The absence of contact between the commissioning couple and the surrogate, although rare, has also been noted in reported cases. For example in *Re WT (Surrogacy)*<sup>563</sup> the lack of contact caused considerable delays to the parental order application as the court had to be satisfied the surrogate had consented and been paid the amounts indicated in the surrogacy agreement. The court noted that 'the clinic in this case has not always been helpful in the way it has responded to reasonable requests on behalf of the applicant.'<sup>564</sup> Similarly in *R and S v T (Surrogacy: Service, Consent and Payments)*<sup>565</sup> the court was unable to establish that the surrogate's consent had been given freely and therefore dispensed with service of the proceedings on the surrogate. In the case of *In the Matter of Re D (A Child)*<sup>566</sup> the inability to trace the surrogate meant that the court could not obtain direct evidence as to her marital status which had legal implications for the question of parentage for the commissioning father.<sup>567</sup>

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<sup>563</sup> *Re WT* (n 51).

<sup>564</sup> *ibid* [43].

<sup>565</sup> [2015] EWFC 22.

<sup>566</sup> *Re D* (n 556).

<sup>567</sup> See HFEA 2008, s 35.

However, the majority of the commissioning couples in this study met and formed varying degrees of relations with the surrogates, but where relations were not established through regular contact then problems did occur and this is discussed further at 4.10.

Standard surrogacy contracts were used in all the court case files sampled. These included clauses that were financially disadvantageous to the surrogate for example the reduction of payments on the happening of certain contingencies such as miscarriage or forced abortion and those that were financially disadvantageous to the commissioning couple such as payments made regardless of failed embryo transfers and increased success fees on the birth of twins.

Whilst the contracts included clauses that were disadvantageous to the parties, there were also advantageous clauses. For example, advantageous clauses included those stipulating that the surrogate would be paid as soon as she began the service and throughout the various stages of her service. In return the commissioning couple would be entitled to the handover of the child soon after birth. The clauses were therefore reciprocal in nature. The commissioning couple also agreed through the contract to accept a legal obligation for the resulting child and go through all necessary legal processes to regularise citizenship and parentage of the child. Thus there was an undertaking to assume parental rights in the future rather than a direct transfer of parental rights. Some contracts stipulated that the commissioning couple would be entitled to register the birth of the child.

Although the clinics were in different jurisdictions the surrogacy contracts contained some common clauses such as the surrogate voluntarily consenting to undergo all necessary medical procedures to give birth to the child. The surrogates confirmed by signing the contracts that they were fully aware of the medical tests and procedures involved and that they did not have any pre-existing gynaecological problems and had undergone tests for sexually transmitted infections such as HIV and infections such as Hepatitis B & C. In terms of the pregnancy the surrogate was also required to confirm that she

would cooperate and not do anything to harm the health of the unborn child, engage in sexual intercourse during the pregnancy or terminate the pregnancy unless medically advised to do so.

The clinics in turn sought acknowledgement from the parties through the contract that they understood that there was no guarantee that the embryo transfer would work and a pregnancy result and that if advised by the clinic, they would agree to embryo reduction. Whilst UK law does not recognise the binding nature of surrogacy contracts, the contracts do carry evidential weight in that the court will give effect to the 'intention' of the parties.

#### **4.6 Payments and the Commercial Relationship**

In terms of payments the contracts included clauses that the commissioning couple would bear, pay and reimburse all costs and expenses that the surrogate might incur in performing her obligations under the agreement. All the case files contained narratives to suggest that the commissioning couple did not have any control over the fixed payments to the surrogate and were not responsible for making any payments directly to the surrogate.

This was evidenced in the witness statements:

*We were informed about fees at an early stage and understood that the clinic were in charge of paying the surrogate at fixed rates that they had set.*

*(File 7, first applicant).*

*I did not pay any money directly to the First and Second Respondents. I understand the clinic forwarded money due to them at appropriate interval. I understand that money was paid upon completion of the first trimester of pregnancy and at the eighth month of pregnancy.*

*(File 13, second applicant).*

Thus commissioning couples reported they were not in control of payments and as such were not in a position to assess what might be regarded as reasonable expenses.

Whilst the commissioning couple were paying for the surrogate's services they did not view this in terms of financial power or the ability to apply pressure on the surrogate. The reports of the surrogate's motivations (as told by the commissioning couples) seemed to suggest that the surrogate was 'homo oeconomicus'<sup>568</sup> in the sense that her reproductive action was taken after balancing cost against benefit and choosing an outcome that was self-motivated and would bring her the rewards that she sought. The commissioning couple did not perceive their financial power as power that they held over the surrogate, precisely because they did not directly control the payments.

The majority of the applicants were drawn from either the senior manager occupational grouping under the International Labour Organisation's classification ISCO-08<sup>569</sup> (group one) or from the professional occupational grouping (group two), signalling that financial power enabled most of the commissioning couples to make goal directed choices that might not be as easily available to members of the general population from lower socio-economic backgrounds. This could arguably cause a shift in the power relationship between the commissioning couple and the surrogate particularly where the commissioning couple are able to purchase extra benefits and comforts for the surrogate. This was clear in a few of the cases, for example one couple recounted paying for a traditional birthing ritual so that the surrogate would feel valued in her gestational role rather than be perceived simply as a carrier.

Couples also spoke of providing extra comforts such as international call cards for the surrogate so they could keep in touch with the commissioning couple,

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<sup>568</sup> Terminology associated with economic theory that humans are rational actors capable of making rational decisions to pursue only work that is necessary to their pursuit of wealth.

<sup>569</sup> ISCO (n 496).



money for organic food or money for alternative therapies. The accounts mentioned the provision of non-contractual comforts and products for the surrogate as part of a gesture of trust and goodwill to underline the importance of the surrogate's role in protecting the health and wellbeing of the unborn child. There was nothing in the narratives to suggest that the non-contractual payments were made as a way to control the surrogate. However, given the nature of the narratives, one could argue that they are written to present the commissioning couple in a good light to the court and so any thoughts of control or influence would not be admitted. However, the accounts confirm that the non-contractual payments were still negotiated by the clinics and the payments were paid through the clinics and so there would have been little opportunity for the commissioning couples to directly exert control over the surrogate.

There was no evidence that the commissioning couples resented or were dissatisfied with the amounts of money earmarked for the surrogate either under the terms of the contract or outside the contract. Indeed couples talked about wanting the surrogate to be properly compensated and where possible for the payments to have life changing consequences for the surrogate. Where it was perceived that the surrogate was financially independent, couples still expressed a concern that the surrogate and her family should not be out of pocket in terms of expenses incurred, for example:

*We also agreed to pay for necessary living expenses and for all (name of surrogate)'s unforeseen losses costs and expenses in so kindly undertaking the surrogacy.*

(File 26, first applicant).

Commissioning couples did show an awareness of the potential for exploitation of the surrogate but perceived this in terms of low payments or failure by the clinics to take care of the surrogate during the pregnancy stage rather than through the wider discourse of commodification of the surrogate's body or an affront to her dignity or robbing the surrogate of true autonomy. Thus exploitation was seen in terms of the payments to the surrogates failing to

reflect the true cost or risks of the service provided rather than in terms of the morality of the practice of surrogacy itself.

In contrast, the commissioning couples attitude towards clinic expenses was different. Couples linked their acceptance of costs to a need to achieve their ultimate goal of parentage. Tensions were noted in the commissioning couples' description of the role of the clinic measured in terms of value for money. The perception of most of the commissioning couples was that the clinics held all the financial power. For example, one POR noted:

*The clinic asked for additional money at every opportunity through the process but once involved, the applicants felt bound to agree to the demands of the clinic.*

(File 1, POR).

The relationship between the clinics and the commissioning couple was often tenuous and categorised by a forced trust. Putnam distinguishes between 'thick trust'<sup>570</sup> in relationships that are strong and frequent, from 'thin trust'<sup>571</sup> where individuals choose to believe a new acquaintance or 'anonymous other'<sup>572</sup> and to take their word in the hope there will be benefits for them over time. It is the social trust in its thin form that appears to have sustained many of the surrogacy arrangements.

Like the reported cases, the case files showed that there was a trend towards retrospectively authorising commercial payments made in international surrogacy cases. Many couples appeared to appreciate this legal requirement but few had an understanding of what 'reasonable expenses' entailed. Some kept detailed records, other relied on the clinics to justify each and every amount to the courts once the commissioning couple returned to the UK and

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<sup>570</sup> Putnam ascribes this term to RS Burt and M Knez, 'Trust and Third Party Gossip' in RM Kramer and TR Tyler (eds) *Trust in Organisations* (Thousand Oak Publications 1996) 68.

<sup>571</sup> Robert D Putnam, *Bowling Alone: The Collapse and Revival of American Community* (Simon and Schuster 2000) 136.

<sup>572</sup> Putnam refers to this as 'the anonymous other,' see *ibid* 137.

made an application for a parental order. Others made their own evaluation that the expenses must be reasonable as they were contained in the contract:

*No extra payments have been made to the surrogates outside the arrangements with the clinic, and we feel that in so far as the clinic has established a reputation of guarding the best interests and welfare of the surrogates, the terms of their payments meet the subjective criteria of the right level of expenses paid to them.*

((File 29, first applicant).

*Whilst this is a commercial arrangement lawful in India, the magnitude of these payments is intended to also conform to British considerations for the welfare of the surrogates.*

(File 29, first applicant).

This 'subjective criteria' of clinic assessment, was often the benchmark with which couples measured the reasonableness of the payments made to the surrogate believing that industry standards for surrogacy in the treatment country would be the same measure of reasonable expenses employed by the UK courts under section 54 (8), thus couples relied on the clinics understanding.

#### **4.7 Understanding the Legal Process**

Understanding the nature and significance of the surrogacy contracts is an important aspect of the knowledge acquisition for commissioning couples, particularly in terms of the level of payments made to the surrogate and how this might be perceived. Yet few sought legal advice before signing such contracts perhaps because the contracts were presented as standard contracts and in many cases the clinics advertised their standard fees on their websites. However, this did not stop the clinics imposing additional costs at various stages of the process.

This lack of legal research by commissioning couples was also confirmed in the reported judgments. For example in *A and B and C and D*<sup>573</sup> it is reported that the applicants applied for a parental order for children who were then aged 13 and 12 respectively. The commissioning couple stated in their witness statement: 'we thought that we were the parents for legal and all purposes in the USA and in the UK and no one in the USA or the UK had ever suggested otherwise to us.'<sup>574</sup>

For those who did seek legal advice there were no criticisms contained in the witness statements of that advice, although the courts themselves have been willing to criticise the actions and advice of legal representatives.<sup>575</sup> Blyth<sup>576</sup> also found in his study of commissioning couples that during interviews some couples criticised legal representatives for lack of knowledge and experience of the legal implications of surrogacy arrangements. However, Blyth's study was conducted in 1995 and the law has evolved since then with more reported cases of surrogacy and more legal professionals acquiring experience.

As the case files contained the names and addresses of legal representatives acting for some of the commissioning couples, it was possible to note that lawyers representing the commissioning couples were drawn from a very small circle of firms and barristers chambers with specialist experience. Whilst lawyers were employed to protect the commissioning couples' interests, none of the surrogates in the case files were legally represented. Instead the court acted as a kind of protector of the rights and interests of the surrogate.

Many couples talked of taking steps to satisfy themselves that the surrogate had consented to the arrangements and had her family's support. Interpreters were used where the surrogate did not speak English and some of the commissioning couples were present at the time the surrogate signed the consent form releasing any claim to the child. They reported being satisfied that

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<sup>573</sup> *A and B* (n 107).

<sup>574</sup> *ibid* [9].

<sup>575</sup> *Eg Re G and M* (n 51).

<sup>576</sup> Blyth (n 253).

no pressure was placed on the surrogate and that she understood and consented throughout.

However, in the few case files where the commissioning couple did not meet the surrogate there was no formalised mechanism for the commissioning couple to satisfy themselves that the surrogate's consent had been given freely and that she understood the legal implications of the consent and (where necessary) an interpreter had been used to explain the meaning and legal implications of the documentation that she was signing. Cases such as *Re WT (Surrogacy)*<sup>577</sup> remind commissioning couples of the necessity to satisfy the UK court that the surrogate's consent has been given freely and in order to do so they must 'establish clear lines of communication with the surrogate mother.'<sup>578</sup> This did not always occur.

In one of the case files<sup>579</sup> the commissioning couple obtained the surrogate's consent before the six-week cooling off period prescribed by section 54 (7) and were then unable to correct this error by obtaining her consent at a later date as the clinic was unable to trace the surrogate. As the procedure then became complex the commissioning couple instructed lawyers to act for them. However, the lawyers came 'off the record' before the final hearing signalling either that the commissioning couple were unable to continue to meet the lawyers' fees or that there had been some disagreement about the conduct of the case. The applicants proceeded as litigants in person and a parental order was eventually granted. This demonstrates how an understanding of UK legal procedure is necessary for commissioning couples and overseas clinics but also how UK judges need to familiarise themselves with surrogacy laws in other jurisdictions.

#### **4.8 Knowledge Acquisition**

Whilst many couples relied on the surrogacy agencies and clinics to help them to become familiar with the administrative and legal formalities of the host country, some couples were left to seek and acquire this knowledge for

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<sup>577</sup> *Re WT* (n 51).

<sup>578</sup> *ibid* [42].

<sup>579</sup> File 3.

themselves. This sometimes involved dealing with international lawyers, embassies and egg donation clinics, for example:

*I found out from the embassy that I needed a consent form from the surrogate for the MN01 UK citizenship application form.*

(File 1, first applicant).

This couple were not told that the procedure for obtaining an exit visa for the child to leave the country would involve satisfying the British High Commission that the surrogate's consent to relinquishing parentage had been freely given.

In one case the commissioning couple found out that the process was much more complicated than the clinics had explained and involved being subject to assessment by international social workers:

*The authorities completed their own investigation and CRB and police checks before issuing the babies with the exit visa. The authorities then sent a field government worker to visit us at our apartment to interview us with the babies. The same government worker interviewed both surrogates and (name of first surrogate's), ensuring that they had received payments as indicated in the agreements and that they were happy with the arrangements.*

(File 4, second applicant).

In another case<sup>580</sup> the commissioning couple were met with delays in their application for a visa for a child. Whilst the application had been approved they had not received a British passport for the child and seemed unaware that they could still travel and enter the country conditional on an application being made for a parental order and a subsequent application for a British passport. In one particular case<sup>581</sup> the parental order contained the wrong date of birth of the child and this led to delays in obtaining a British Passport for the child.

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<sup>580</sup> File 10.

<sup>581</sup> File 12.

Whilst there was a knowledge deficit in some areas of the surrogacy process there was also evidence that as a response to perceived risks the commissioning couple acted to fortify themselves against those risks by acquiring the necessary knowledge in the absence of official advice or support. This included speaking to friends who had undergone their own surrogacy journey or speaking to commissioning couples that had used the same overseas clinic.

There were also accounts that signalled that couples had been through a steep learning curve in terms of learning through experiences of the wider world even before embarking on the surrogacy journey. Narratives from three of the case files described how death or illness gave them a longing to create life. In the case of same sex couples some spoke of how their parent's gradual acceptance of their sexual orientation led to a later gradual acceptance of the surrogate child. This pre-process knowledge of the uncertainties and complexities of relationships also fortified these couples against the stresses encountered once the process began.

By and large the narratives did not dwell on negative experiences but talked candidly about how adversity had been overcome thus the 'complication' aspects of the narrative dealing with unforeseen events and circumstances were briefly re-told whilst the 'resolution' part of the narrative or 'events' aspects of the narrative received more attention

#### **4.9 Post – Birth – Moving on to Parentage**

The post-birth stage was categorised by a period of stability for the commissioning parents and it was also a space to enable them to turn their minds to their care giving role. Couples spoke of taking parenting and first aid classes, making child-friendly adjustments to their home and involving family and friends in their new family unit as well as compiling photographic and documentary evidence of the child's origins to help the child to develop a positive identity later on in life.

The stories contained expressions of joy at receiving the 'gift' of a child and gratitude towards the surrogate once the child was born. Marcel Mauss<sup>582</sup> in his theory of gifts argues that gifting is reciprocal as it sets up a cycle of exchanges that do not stop at the receipt of the gift and in this way acknowledges that there is no such thing as a free gift. The 'gift narrative' of the commissioning couples does not necessarily belie the nature of the commercial agreement that had taken place because gifting also requires some form of reciprocity and this may be financial. The mutualism was not altruism but was an acknowledgement that a valuable gift exchange had taken place, a child to the commissioning couple and financial benefits to the surrogate.

The discourse post-birth moved from one of commerciality to a narrative of recognition of the surrogate's selfless sacrifice for the commissioning couples' benefit:

*Dropping (name of surrogate) off at the airport for her trip to (name of city and State), (name of first applicant) hugged her and we tearfully told her that we would always be grateful for everything she had done for us.*  
(File 8, joint applicants).

There was a clear shift in the fabula<sup>583</sup> part of the story-telling back to the past as the commissioning couple reflected back on their journey in order to make sense of their future and complete the transition from non-parent to parent.

*The emotional, financial and legal challenges we faced during this time immediately disappeared when we first met (name of surrogate child). She is a constant source of wonder, laughter and amazement.*  
(File 31, joint applicants).

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<sup>582</sup> Marcel Mauss, *The Gift: The Form and Reason for Exchange in Archaic Societies* (First published 1950, Routledge 2002) 10.

<sup>583</sup> This is a term employed in narrative research to describe the chronological order of events in story telling.



Emily Teman<sup>584</sup> argues that the expectations of reciprocity between the surrogate and the commissioning couple can change once the child is born. Expectations of reciprocity, Teman argues, can lead to tensions and misunderstandings between the surrogate and the commissioning couple based on the extent of expectations as to gratitude and the importance of the surrogate's role as 'giver'.<sup>585</sup>

Gratitude was described by Teman through the process of 'momentous acknowledgement'<sup>586</sup> when the commissioning mother acknowledges the value of the surrogate's gift and this cements their relationship. This is contrasted with the 'denial of the gift'<sup>587</sup> when the commissioning mother fails to acknowledge the value of the gift bestowed on her and in this way reciprocity does not occur. However, the couples' accounts for this thesis suggested reciprocity was also measured by additional non-contractual payments to secure the surrogate's welfare and comfort.

The majority of the commissioning couples in this study expressed gratitude on the receipt of the 'gift' of the child and this was through their own witness statements or to the POR. Gratitude was expressed in terms of the value of the gift to them using terms such as 'precious' 'lucky' and 'truly blessed'<sup>588</sup> and describing their feelings in terms of joy and happiness and delight<sup>589</sup> whilst others spoke in terms of wonderment or amazement or being thrilled.<sup>590</sup> The word 'gratitude' was also used to express their acknowledgement of the surrogate's act. Couples therefore linked the word gratitude<sup>591</sup> with their feelings about the value of the gift as well as the giver of the gift.

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<sup>584</sup> Elly Teman, *Birthing a Mother: The Surrogate Body and the Pregnant Self* (University of California Press 2010) 212.

<sup>585</sup> *ibid* 212.

<sup>586</sup> Teman (n 584) 215.

<sup>587</sup> Teman (n 584) 225.

<sup>588</sup> Files 10, 20

<sup>589</sup> Files 2, 5, 8, 11, 13, 14 and 25.

<sup>590</sup> Files 6 and 29.

<sup>591</sup> Files 8, 5 and 32

This post momentous acknowledgment came through strongly in those statements written by the commissioning couples whereas the files that contained only narratives from the parental order reports tended to report on matters in line with the section 1 (4) checklist of the 2002<sup>592</sup> Act as well as matters from assessment scales such as the Parenting Daily Hassles Scale<sup>593</sup> and therefore focused more on the couples' care and future plans for the child as opposed to recounting feelings as retold from the point of moving from non-parent to parents.

The use of post acknowledgement momentous statements by the commissioning couples could arguably be viewed as self-serving in that the couples may have appreciated the significance of acknowledging the surrogate's role to officials determining the issue of parentage. As noted previously, none of the files contained any direct criticisms of the surrogates. However, this is not to say that the gratitude and acknowledgement of the surrogates' role was not genuine.

In the case of one couple the birth of the child was viewed as a true gift as no money was attached:

*We agree that we have not paid any kind of money towards the birth of (name of child) to the surrogate mother (name of surrogate). Infact (sic), she didn't want atall (sic). This was REAL help from a sister indeed who already completed her family before becoming a surrogate mother for us. (File 24, joint applicants).*

The applicants reported to the POR that they offered the surrogate money to cover lost wages but she refused, 'she would not accept any payment, saying it was a "gift" for them'.<sup>594</sup>

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<sup>592</sup> ACA 2002, s 1 (4).

<sup>593</sup> Department of Health's Parenting Daily Hassles Scale measures the impact of 20 daily pressures on a carer which is designed to test an individual's experience of being a parent and is used by Cafcass.

<sup>594</sup> File 24, parental order report.

There was only one case in which relations with the surrogate had soured after she demanded more money post-birth in order to sign the necessary consent forms for the UK courts but the statements did not directly criticise the surrogate. The surrogate made demands to see the baby in this case. After a number of communications with the international lawyer assisting the court and after further repeated demands for money the surrogate finally agreed to sign the consent forms. In this particular case the commissioning couple selected two surrogates and on the advice of the clinic did not establish any contact.

The lack of an established relationship between the commissioning couple and the surrogates in this particular case may have lead to feelings of rejection by the surrogate that were exacerbated by the clinics role as a go-between. This might explain the later demands for money. Teman<sup>595</sup> observed in her study that surrogates often viewed the commissioning mother's act of distancing herself from the surrogate as 'insulting'.<sup>596</sup> It maybe that in this particular file the loss of an opportunity to form relations of some kind with the commissioning couple led to difficulties especially as the surrogate who demanded more money had been hospitalised with diarrhoea and vomiting during the pregnancy and there may have been a sense of loss of worth arising from the distancing of relations. It might also be a sign that this surrogate was regretting giving up the child however her demands for money convinced the legal professionals involved that this was not the case.

#### **4.10 Post – Birth - Establishing Kinships and Connectedness**

In respect of the heterosexual couples in this study only a small number stayed in contact with the surrogate and this was mainly on an indirect basis. Although two files revealed a much closer connection and increased level of contact:

*We have a very close relationship with our surrogate (name of surrogate) and her husband (name of surrogate's husband). We will forever be*

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<sup>595</sup> Teman (n 584).

<sup>596</sup> Teman (n 584), 205.

*grateful to them for helping us to start the family that we have so desperately longed to have.*

(File 6, joint applicants).

In the main most of the heterosexual couples reported being actively discouraged by the clinics from keeping in touch with the surrogate, but some did make enquiries about the surrogate's future progress, for example:

*Mr (name of first applicant) and Ms (name of second applicant) understand from the clinic that Mrs (name of surrogate) has gone on to become a counsellor and supporter of other women undertaking surrogacy.*

(File 9, POR).

Others considered that contact with the surrogate at the handover stage following birth was a natural cut-off point during which their gratitude could be expressed and they could move on with their lives:

*We were delighted to see her during the DNA testing of the babies at the clinic and thank her in person for the priceless gift that she gave us both. (Name of surrogate) was also delighted to see the healthy babies and wish us and the babies a good life and future.*

(File 2, first applicant).

In the case of the homosexual couples however, a significant proportion stayed in contact with the surrogate with two couples forming a more lasting bond with regular visits. These couples do not appear to have been dissuaded by the clinics to form connections with the surrogate and this may be because there was not a competing mother in the equation. Levels of intimacy included for example, naming the surrogate child after the surrogate's own children or the commissioning couple inviting the surrogate and her family to their wedding ceremony post-birth of the child.

The relationships continued across geographical space and across time but the spatial nature of this post-birth connectedness varied with descriptions ranging from 'friendships' to 'family member.' If kinship is measured on intimacy then many of the homosexual couples engaging in spatial connectedness can be said to have reached this level of kinship. The relationships were not based purely on a genetic tie to the child.

However, not all the homosexual couples were as positive about continued contact. Some of the narratives explored the fact that the relationship with the surrogate might not survive after the birth of the child:

*They do not anticipate remaining in contact with the surrogates but I understand that the Indian grandmother maintains some links.*

(File 29, POR).

Nevertheless, the vast majority of homosexual couples spoke of friendships or closeness with the surrogate that would continue in either direct or indirect form. A genetic tie between the surrogate and child was absent in all but one of the cases involving homosexual couples in the study as they had all chosen gestational surrogacy using an egg donor. The decision to continue a relationship across seas therefore went beyond the question of sharing a genetic link to the child and was based on shared experiences. The contact was maintained indirectly through emails, telephone and/or Skype conversations but in at least one of the files the contact was more direct with the surrogate and her family attending the commissioning couple's subsequent marriage ceremony.

It is notable that for the surrogates drawn from lower socio-economic backgrounds in India and the Ukraine there was less of a tendency for the commissioning couple to stay in contact with the surrogates. In respect of the 16 case files relating to surrogacy arrangements in India only one file reports that the commissioning couple kept in touch with the surrogate, but this couple had a pre-existing familial connection to the surrogate. In relation to the 2 case files where the surrogacy arrangement took place in the Ukraine, one of the

commissioning couples kept in touch with the surrogate but this was for the purpose of using the surrogate again for a second surrogacy pregnancy. Only one file out of the total 32 files revealed a continuing connection between a commissioning couple and an egg donor.

Teman<sup>597</sup> notes in her study that 'over time, just as myths often do, the women romanticize the story of their bond to the point that they exclude mention of tensions, injections, disappointments and the monetary exchange between them'.<sup>598</sup> It is possible therefore that many of the reports of the friendships formed between the surrogate and the commissioning couple may indeed have been romanticised for the court. However, existing research<sup>599</sup> suggests that the relationship that develops between the surrogate and the commissioning couple during the surrogate's pregnancy can be a strong one.

The strongest link after birth is found to exist between the commissioning mother and the surrogate rather than between the surrogate and the commissioning father or child.<sup>600</sup> Vasanti Jadva et al<sup>601</sup> in their study of commissioning couples found that the frequency of contact with the surrogate remained constant over time between the child's ages of one and three.<sup>602</sup> However, by the age of 7 there was a sharp decline in frequency of contact<sup>603</sup> even making allowances and adjustments<sup>604</sup> for the fact that the original sample of 42 couples had reduced over this time period. The final conclusion was that overall by the time the child reached 10 there was less frequent contact between the commissioning couple and the surrogate.

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<sup>597</sup> Teman (n 584).

<sup>598</sup> Teman (n 584) 223.

<sup>599</sup> O Van Den Akker, 'Psychological Trait and State Characteristics, Social Support and Attitudes to the Surrogate Pregnancy and Baby' (2007) 22 Human Reproduction 2287.

<sup>600</sup> See Ragoné (n 415), MacCullum et al (n 251), Teman (n 584) and Jadva et al (n 416).

<sup>601</sup> Jadva et al (n 403).

<sup>602</sup> Jadva et al (n 403), 3010.

<sup>603</sup> Jadva et al (n 403).

<sup>604</sup> The Non-Parametric Friedman Tests for repeated data was used.

Research has also suggested that parents go on to tell donor conceived children about how they were conceived.<sup>605</sup> Most found that disclosure usually took place before the children reached the ages of 4 or 5 and that the commissioning mother usually took on the role of disclosure.<sup>606</sup> Early disclosure was reported as being more beneficial for the child in later life.<sup>607</sup> Most couples in this study appreciated the importance of disclosure, for example:

*We both firmly agreed that we do not want to surprise the twins with an explanation of their background at a much later stage in their lives and our views on this are supported by the research we have undertaken. In talking to the children, we will be very keen to emphasise the positives i.e. how much we wanted them, how very happy we are that we took the decision to have children and that they have been positively supported by (name of surrogate) and her family and by many other close family members and friends.*

*(File 22, first applicant)*

Research in to how commissioning couples tell the surrogate child about fertility issues have reported the use of metaphors such as ‘broken tummy’<sup>608</sup> and ‘bad belly’<sup>609</sup> and daddy ran out of tadpoles’<sup>610</sup> or using narratives referring to ‘spare parts.’<sup>611</sup> Similarly, the commissioning couples in this study used metaphors such as ‘incubator’ and terms such as ‘Tummy Mummy’ to describe

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<sup>605</sup> K MacDougall, G Becker, JE Scheib, RD Nachtigall, ‘Strategies for Disclosure: How Parents Approach Telling their Children that they were Conceived with Donor Gametes’ (2007) 87 (3) Fertility Sterility 524 and L Blake, P Casey, J Readings, V Jadvá and S Golombok, ‘Daddy Ran Out of Tadpoles’: How Parents Tell Their Conceived Children that they are Donor Conceived, and what their 7-year-olds Understand’ (2010) 25 (10) Human Reproduction 2527.

<sup>606</sup> Blake et al (n 623), 2532 that cites a number of studies.

<sup>607</sup> Eg V Jadvá, T Freeman, W Kramer and S Golombok, ‘The Experiences of Adolescents and Adults Conceived by Sperm Donation: Comparisons by Age of Disclosure and Family Type’ (2009) 24 (8) Human Reproduction 1909.

<sup>608</sup> Jadvá et al (n 403), 3013.

<sup>609</sup> *ibid.*

<sup>610</sup> Blake et al (n 623) 2530.

<sup>611</sup> K MacDougall, G Becker, JE Scheib, R Nachtigall, ‘Strategies for Disclosure: How Parents Approach Telling their Children that they were Conceived with Donor Gametes’ (2007) 87 Fertility Sterility 524.

the role of the surrogate. All couples indicated an intention to tell the child about their origins at an early stage although some couples had yet to give thought as to how this would be done but were assisted by discussing various methods with the POR.

#### **4.11 Addressing the Research Questions**

The central research question, ‘to what extent (if any) does the legal definition of parent in the immigration and family law processes of international surrogacy inform the legal experiences of commissioning couples?’ was therefore best answered by consideration of the motivations for couples embarking on their surrogacy journey and the nature of the preparations undertaken. The legal definition of parent only informed the commissioning couples experiences indirectly as most were focused on the social definition of parent which in turn focused on verb parentage – how and not who.<sup>612</sup> Whilst some couples obtained legal advice about the UK law on parentage many couples entered surrogacy arrangements without first considering the process they would need to undergo in order to secure legal parentage on their return to the UK. Their focus was on becoming a parent as they defined it (the care of a child genetically related to one of them) but not necessarily a parent within the legal definition. For those couples their legal experiences were informed by a definition one might regard as a ‘waiting parent.’<sup>613</sup> The commissioning couples eagerly awaited the arrival of the child and put in place preparations to receive the child. During the waiting stage social connections were made with the surrogate and the clinics, both groups were viewed as collaborators in the parentage process.

Parenthood was viewed as a natural developmental progression to full commitment in a stable relationship. Couples chose surrogacy either, (in the case of heterosexual couples), as a last resort following failed infertility treatment or as a preferred option to social infertility/involuntary childlessness in

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<sup>612</sup> David Morgan has previously called for the family to be regarded as an adjective rather than a noun in the formation of family policies. See DHJ Morgan, ‘Risk and Family Practices: Accounting for Change and Fluidity in Family Life’ in EB Silva and C Smart (eds) *The New Family?* (Sage Publications 1999).

<sup>613</sup> For a further discussion of social parentage see R D’Alton-Harrison (n 287).



the case of homosexual couples. It is unlikely that prior knowledge of the legal parentage process would have dissuaded these couples given the expressed motivations for surrogacy was to create a family and the social rather than legal meaning of family was the enduring image held by the couples.

Once the choice had been made to pursue international surrogacy, the resulting immigration requirements on parentage had a significant impact although the family law requirements were less impactful. Couples often had to navigate their own way through the administrative processes involved in obtaining exit and entry visas for the child. The impact of the immigration requirements can be seen in those stories where the couples were separated from their partners and/or the child whilst paperwork to admit the child in to the country could be completed. This process required further co-operation from the surrogate post-birth as the British Embassy sometimes conducted interviews with the surrogate and required evidence of the surrogate's marital status. Complications could occur where the clinic and the surrogate had not prepared for this continuing involvement. In some jurisdictions such as India, the delay in obtaining an exit visa for the child could run into months, which meant additional expense for couples in prolonging their stay in the treatment country.

The family law requirements had less of an impact in the sense that many of the commissioning couples viewed themselves as the parents once the child was born. The surrogacy contracts legitimised that status, in the view of the couples, particularly as hospitals also followed protocols and treated them as the parents following birth. A parental order was viewed as a formality rather than a necessity, unlike the immigration requirements for the child. Problems did however occur in the family process in relation to the administrative requirements of a parental order, namely the completion of the consent form by the surrogate or receipt of a breakdown of expenses paid from the clinics. When these administrative requirements were not met or were delayed this caused complications for the commissioning couples in terms of slowing the parentage process, increasing costs and resulting in stress and anxiety.

The family law impact such as it existed was therefore to be found primarily in the administrative aspect of the legal process where clinics and commissioning couples were unprepared for the resultant bureaucratic requirements. Couples had the additional administrative burden of making an application for a parental order on their return to the UK and this was often without legal representation. The impact was therefore felt the most where couples did not have official or expert support in dealing with the administrative requirements.

There was a knowledge deficit as far as the UK legal processes were concerned that was in stark contrast to the extensive research couples had undertaken in order to find suitable surrogacy agencies and clinics and to research costs as well as the legal position in the host country. There was evidence to suggest that some couples held a belief that the legal position on parentage in the host country would be the same or similar to that in the UK. For those couples, although the legal definition of parent did inform their legal experiences,' it was the wrong definition, one associated with the host country rather than the UK. Therefore some couples took additional legal steps to secure legal parentage in the host country such as adoption orders, declarations of paternity, declarations of parentage and legal custody orders but these were steps that would not be recognised on the couples return to the UK.

For those jurisdictions that recognised the commissioning couple as the legal parents and permitted registration of the birth of the child and entitlement to a formal birth certificate, this only served to give some couples a false sense of security about parentage. It was left to the immigration authorities to explain that a parental order would be needed before a British passport could replace any temporary entry visas for the child.

Whilst some couples recounted dismissing adoption in favour of surrogacy, couples were often unaware that an adoption order might still be necessary for jurisdictions where laws did not explicitly provide for surrogacy. Adoption was dismissed by some couples because of the fears of lengthy delays, their potential vulnerability as prospective parents due to age or their desire for a genetic connection to the child. Adoption orders through surrogacy

circumvented these difficulties within some jurisdictions but also meant couples were at risk of breaching the UK provisions on international adoption that prevented children being brought in to the country without oversight of the process by UK adoption agencies, social workers and the court.<sup>614</sup>

The accounts suggested that this knowledge deficit also extended to the clinics, many were unaware of the possibility of continued involvement after the handover of the child but before the grant of a parental order. This included providing records to the UK courts to confirm payment details or the surrogate's personal details. Some of the case files included correspondence between lawyers or commissioning couples in which clinics were asked for their continued involvement and cooperation once a parental order application was made. The co-operation was not made part of the contractual agreement entered in to by the parties.

However, after the surrogacy arrangement, as one would expect, the legal definition of parent directly informed the legal experience of the couples in the sense that all the couples applied for and were granted a parental order. This was not therefore part of the research question for this reason. However, the second sub-research question relating to the extent to which couples felt unfairly or unjustly treated due to their non-parentage status did warrant examination. The detraditionalisation of reproduction was not without its difficulties, there was evidence to suggest that some couples felt unfairly or unjustly treated in terms of their status as non-parents prior to the grant of a parental order and this was seen very much in terms of their relationship with the clinics on the question of costs and cooperation with the parental order process post-handover of the child. This was where feelings of vulnerability were most felt, particularly as most couples sought an intimate child-parent relationship through a genetic connection and surrogacy was their only solution to childlessness.

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<sup>614</sup> ACA 2002, s 83.

This unfair or unjust treatment pre-birth of the child derived from the couples' childlessness status rather than legal recognition of parentage. The clinics however, often saw their involvement as ending at the point of the birth of the child. There was therefore a lack of understanding as to roles and responsibilities in the legal process of the clinics as against their reproductive role.

It is also worth noting that whilst not directly expressed as unfairness or unjust treatment the applications for a parental order were not always without complications. For example requirements relating to domicile, consent of the surrogate and reasonable expenses under section 54 parentage provisions meant that this either slowed down the process for some of the commissioning couples or meant they incurred additional expenses and/or time in producing evidence to meet the requirements.

In terms of the sub-research question, 'does the legal definition of parent in anyway affect the couple's pre-hearing experiences?' it was clear from the stories that many of the perceived difficulties surrounding the legal definition of parent were around the right of the commissioning couple to take the child out of the country without official approval. Therefore the sub-research question was also answered in that evidence pointed to the legal definition of parent affecting the commissioning couple's pre-hearing experiences, as it often required them to deal with conflicting definitions of legal parent in different jurisdictions or to take part in processes across two jurisdictions in order to regularise their status as parents. Again the immigration process was where the legal definition of parent had the most effect on the couples' pre-hearing experiences. 50% (N =16) of the files in this study involved a married surrogate which meant that the immigration process was not straight forward for these couples as the child had to be registered as a British citizen before the child could leave the treatment country.

The commissioning couple were aware that the surrogate held the reproductive power through her status and this meant that the commissioning couple were careful in their dealings with the surrogate and took steps to ensure that the

surrogate's welfare and wellbeing was respected throughout the process. Where they did not have direct contact with the surrogate couples would still make the necessary enquiries of the clinic as to the surrogate's health and wellbeing. Although it was not always the UK or host country's legal definition of parent that led to this behaviour or indeed the assignation of the title of 'parent' to the surrogate in the commissioning couple's mind, it was a recognition of the surrogate's role in the birth of the child and her status as protector of the foetus from harm that accorded her a semi-parent role if not a full one.

#### **4.12 Conclusion**

The narratives meshed together to form a philosophical outlook on the nature of life and life giving. This philosophy was one where the status of parenthood was considered its own reward worthy enough to endure stresses and exposure to risks. Those risk-aversion choices were made in the belief that the arrangement had mutual benefits for both parties. The accounts also meshed together to form a philosophical view towards international surrogacy in the sense of recounting disappointments, difficulties or stresses in a sanguine way. Whilst the journey itself was reported as less than calm the reporting of events adopted a serene reflexivity that suggested survival born out of resilience. Risks were taken, stresses were overcome and the reports focused on happy final outcomes in the form of the surrogate child. In this way commissioning couples might be viewed as agents working to circumvent prohibition and navigate change by responding to a free market in reproduction. Their selection of clinics was ethics, values and wellbeing focused in order to ensure that the surrogacy arrangements were within what they considered to be ethical and non-exploitative parameters, but also categorised by a non-traditional business approach to reproduction.

The relationship between the surrogate and the commissioning couple was largely reported to the courts as positive through which negative images of surrogacy were sometimes contrasted when payments were discussed. The written reports merged in to written voices that had the ability to influence the judicial outlook and approach to international surrogacy and this is discussed

further in chapter 5. The negative images of possible exploitation were countered by enquiries made by the commissioning couples to the clinics about their ethics and wellbeing policy. Many of the commissioning couples based their choice of clinic on what they regarded to be a caring approach by the clinics towards the surrogates especially in relation to the surrogacy arrangements taking place in jurisdictions such as India and the Ukraine. The potential for exploitation was seen largely in terms of failure to sufficiently reward the surrogate financially. Third parties who were removed from the actual surrogacy arrangement, such as PORs and the courts, also addressed the question of exploitation through the lens of payments and this is discussed further in chapter five.

The final sub-research question, 'is the legal process an adequate and effective way to confer legal parenthood status on the commissioning couple?' is dealt with in chapter seven through an analysis of the effectiveness of the current law and some reflections on reform.

## CHAPTER FIVE

### Findings – Forensic Linguistics

#### 5.1 Introduction

Like Narrative Research, Forensic Linguistics has language as its units of analysis but this time the focus is on legal language and its use in legal proceedings. Forensic linguistics can be used to unmask some of the hidden knowledge and comprehension of the speaker through speech or written words, as such this chapter is divided by the voices of specific groups of actors in order to identify ascribed meanings. Gunther Kress<sup>615</sup> argues that there is an 'interconnectedness of linguistic and social matters'<sup>616</sup> in that individuals can be social agents for change through their use of language.

#### 5.2 The Voice of the POR

The PORs are an important second voice of the commissioning couple in the courtroom this is because the parental order reports carry significant weight and influence with the courts and the recommendations of a POR are rarely if ever disregarded by the court. Reports present an opportunity to use written words to convey interpersonal meaning, signals and opinions of the POR to the court.

The reports were written against a prescribed welfare checklist<sup>617</sup> and the reports included sub-paragraphs relating to such matters as the background to the parental order application (the surrogacy arrangement), the nature of investigations undertaken and enquiries made by the POR. Any observations relating to the children who were the subject of the parental order application were also noted. Family composition and support networks were also of interest to the PORs. The reports ended with recommendations to the court about the

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<sup>615</sup> Gunther Kress, *Linguistic Processes in Sociocultural Practice* (Second edition, Oxford University Press 1989).

<sup>616</sup> *ibid* 2.

<sup>617</sup> ACA 2002, s 1 (4).

grant of a parental order. Most reports contained numbered paragraphs and some included exhibits such as the surrogacy contract.

The PORs adopted a style of reporting that was both biographical in nature concentrating on the 'orientation' (the actors or events) as well as recasting their own identity on to the story through their reaction and choice of words. Deborah Tannen argues that "reported speech" is not reported at all but is creatively constructed by a current speaker in a current situation'.<sup>618</sup> This, Tannen argues, is because taking information in one situation and then reproducing that information in a different situation involves a fundamental shift in the nature of the communication and yet the actual truth of the reporting is often not challenged. Dialogue which recounts action or drama can be especially problematic she argues.

All the parental order reports were silent as to the order in which the 'speakers' (the commissioning couple) were invited to report their experiences and in some circumstances the speakers were given a 'joint voice' similar to some of the witness statements and as such this presented their experiences as shared although in reality the experiences may have been felt at different levels. The reports were used to construct the applicant's 'voice'.<sup>619</sup> However, they often did so in a way that represented a simple reporting of the state of affairs that would be expected from the report of a court-appointed official or expert who has to remain impartial and so did not always capture the emotions or passion within the voices that they were reporting.

The formality of reporting in the POR reports contrasted with the emotive statements found in the commissioning couples' witness statements. For example, one can compare the difference in emotional content found in file 23 between the commissioning mother's account and the POR's account of how a decision was reached to use surrogacy as a form of fertility treatment:

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<sup>618</sup> Deborah Tannen, *Talking Voices: Repetition, Dialogue, and Imagery in Conversational Discourse* (First published 1989, Cambridge University Press 2007) 107.

<sup>619</sup> See MM Bakhtin, *Dialogic Imagination: Four Essays by MM Bakhtin* (University of Texas Press 1982).



*(Name of applicant father) and I have always very much wanted to expand our family and over the course of 8 years from the age of 33 we attempted IVF treatment in the hope that I would become pregnant. I have had approximately 18 cycles of IVF over the course of 8 years. I became pregnant on 3 separate occasions and all 3 times had miscarriages. The physical and emotional strain of this became more and more difficult to bear. The constant expectation and disappointment with the highs and lows of the entire IVF process caused unbearable strain and stress for me and for us.*

*(File 23, Commissioning mother's statement).*

When reported by the parental order this becomes:

*They wanted to have another child and again tried the IVF route and when their last attempt, at a fertility clinic in (name of country), failed it was suggested to them that they try to have a child through surrogacy and they were recommended to a clinic in the (name of jurisdiction).*

*(File 23, POR).*

The retelling of events fails to report the emotional impact that the failed fertility treatment had on the commissioning mother. This formality of reporting was also found in some of the commissioning couples' accounts as discussed in chapter four.

Some reports did contain language that signified the POR's own sympathy and affiliation with the commissioning couples' circumstances and this tended to be when describing their parenting role:

*(Name of the twins) have all the love, care and attention, baby clothes, equipment, toys etc. that they could need in a comfortable and well equipped home. The clothes (sic) are an obvious delight to their parents.*

*(File 3, POR).*

There was a different focus placed by PORs and commissioning couples on what they considered to be important to relay to the courts. If for example one considers file 6, the POR reports her own reaction to the commissioning couple's acceptance of the advice given about disclosure during the interview using the word 'impressed.'

*I have discussed this question with the applicants and was impressed by how much thought and preparation they had already done with (surrogate mother) on these issues and intend to do with the twins. The issue they found difficult was how to explain the egg donation. We discussed this and I advised them that there were books for children that can be accessed on the internet that deal effectively with the issue in age appropriate ways. It can be dealt with in the same way as surrogacy. Mrs (surrogate mother's surname) has talked to them about the issue saying that it took "three of us to produce the twins."*

(File 6, POR).

This can be compared to the joint statement of the commissioning couple where they do not mention their intention to disclose origins to the child in their witness statement but instead use language to emphasise and enforce their legal claim to the child:

*(Surrogate mother) and (surrogate mother's husband) do not have any legal rights over either (surrogate child 1) or (surrogate child 2) in (name of jurisdiction). We refer to the pre-birth order made on (date)...by virtue of which they have no legal rights or obligations under (name of jurisdiction) law in respect of the children. (Name of surrogate mother) and (name of surrogate mother's husband) consented with full knowledge and understanding of the legal implications of the pre-birth order being made in (name of jurisdiction). Indeed the court will note from the children's birth certificate at pages 5 to 6 of the exhibit that we are each named as the children's mother and father respectively.*

(File 6, joint statement of applicants).

Therefore the issue of disclosure is not prioritised in the couple's own reporting back to the court. The emphasis placed by commissioning couples on entitlement suggested that disclosure of origins to the child was not part of their story for the court and was given less prominence in the retelling of past and future events. Instead the question of disclosure was addressed by the PORs.

The difference in approaches may be explained by the commissioning couples understanding of the role and purpose of the legal proceedings (being a process to settle the issue of legal parentage) as opposed to the parental reporter's understanding of their role (to ensure the welfare of the child is met). In addition some of the witness statements were written before receipt of the parental order reports and therefore there was not always an opportunity to respond to the issue of disclosure as raised by the POR. None of the commissioning couples appear to have taken issue with the question of disclosure when raised by the POR during interview. However, there was a difference to be found between those couples who had already given the matter some thought and responded enthusiastically to the suggestion (71%, n = 15) and those who said that they would give the matter serious thought (29%, n = 6).<sup>620</sup> For example, in one file the POR writes:

*Their (sic) intended parents recognise that the knowledge of the children should be a developing process rather than being told the information in a prepared session.*

(File 29, POR)

Yet in this same file one of the commissioning couple seems ambiguous about future intentions to disclose and writes:

*How will I tell them I wonder? Tell them what? They will one day know that they were lucky enough to have two Daddies, they'll also know pretty much what its like to have a Mummy. We'll tell them about the wonderful people who have helped look after them; grannies and*

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<sup>620</sup> There were 4 out of the 25 files containing POR reports where no indication was given about disclosure.

*granddads and uncles and aunts and great uncles and aunts and even a very enthusiastic great granddad.*

(File 29, first applicant).

There appears to be an almost defiant position adopted that the children will find female role models within the immediate and extended family and there was not therefore a need for the child to know the surrogate. This file related to a surrogacy arrangement in a non-western country.

Whilst the PORs often gave their final view on the question of legal parentage, there were some matters that the PORs were careful to leave to the courts but were able to signal their own feelings of concern through signposting. For example, in file 29, the POR was clearly concerned that there was missing documentation relating to the nature and terms of the surrogacy arrangement. Instead of directly stating this they couched their concerns in careful terms to the judge as if imparting a non-verbal marker:

*The applicants were able to arrange British passports for all three children and the family returned to their home in England on (date). For some reason the (sic) there is no reference to baby (name of surrogate child 2) on the copies of the flight documentation. I was recently advised that this was because she was in the care of her (nationality) grandmother.*

The use of the words 'for some reason' suggests a declared confusion on the part of the POR as to why there is no documentary explanation given for the missing documents. The use of the words 'I was recently advised' as opposed to for example, 'I have been able to establish' also signals that the confirmation received is not conclusive.

The PORs followed a pattern of using quotation marks when assigning speech to the commissioning couple or using written markers such as 'I have been

told/informed'<sup>621</sup> or 'the applicants were very clear'<sup>622</sup> or 'the applicants describe/spoke of.'<sup>623</sup> However, sometimes this would also be more vaguely expressed as 'I understand.'<sup>624</sup> At other times it would be unclear whether the adjectives chosen belonged to the POR or the commissioning couple. For example, in file 28 the POR clearly ascribes words to the commissioning couple:

*The applicants had a room at the hospital next door to (name of surrogate) who they described as a "brilliant surrogate".*

(File 28, POR).

But when describing the same couple's experience of researching surrogacy agencies the POR writes:

*The applicants also looked into (name of surrogacy agency)'s (sic) in the UK but they heard a couple of bad stories about this agency.*

(File 28, POR).

The adjective 'bad' is not ascribed to the commissioning couple through the use of quotation marks but is reported back as part of their account but could in fact be the PORs own choice of words. This is an example of reported speech that could perhaps reflect the listener's interpretation rather than the actual words spoken by the storyteller. Similarly in another file<sup>625</sup> the POR refers to the commissioning couple's double surrogacy as a 'calculated move' and uses quotation marks but again it is unclear whether these are meant to reflect the commissioning couple's reported description of their actions or the POR's own value judgment.

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<sup>621</sup> Eg files 10, 16, 17 and 29.

<sup>622</sup> Eg file 19.

<sup>623</sup> Eg files 1, 11, 13, 23 and 25.

<sup>624</sup> Eg files 9 and 19.

<sup>625</sup> File 29.

### 5.2.1 The PORs Non-Expert Role

The reports often strayed beyond the parental order's expertise in terms of advising the courts on the question of the reasonableness of payments made under the terms of the surrogacy contracts. PORs essentially have the status of court appointed experts in family proceedings. As such one would expect their evidence to be subject to the requirements of expertise,<sup>626</sup> yet they are not classed as experts in family proceedings.<sup>627</sup> An expert's evidence will usually be given in writing, rather than orally, unless directed by the court.<sup>628</sup> All evidence received in legal proceedings must satisfy the normal evidential principles of admissibility and reliability yet some of the assessment of reasonable payments that the PORs made could not be said to be reliable.

It was unclear the extent of the research carried out by the POR or the tests employed to establish the question of 'reasonableness'. For example:

*The amount of £9,366 seems to have been reasonably and properly made to me.*

(File 21, POR).

In this account the POR does not explain on what basis they believe that the payments have been 'reasonably and properly made'.

Some parental orders shied away from making determinations about the reasonableness of the payments, for example:

*All monies appear to be accounted for. I am not in a position to assess whether or not the amount was reasonable, as that would depend on the circumstances in India, although it appears to be in line with an established arrangement with clinics in India.*

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<sup>626</sup> FPR 2010, Part 25 rule 3.

<sup>627</sup> CFA 2014, s 13 (8) (c).

<sup>628</sup> FPR 2010, Part 25 rule 9.

(File 19, POR).

Others appeared to base their determination of ‘reasonableness’ on case law or the tests originated in *X and Y*<sup>629</sup> and *Re S*<sup>630</sup> and subsequently applied in other cases:

*Although the payment may have amounted to some monies over and above her actual expenses, this figure still falls below the amounts which have been approved as ‘reasonable expenses’ in reported international surrogacy cases such as Re X and Y (2011)*

(File 2, POR).

Some of the PORs made it clear that the views expressed on the question of reasonableness were their own personal opinion even though there appeared to be little evidence to arrive at an assessment of reasonableness:

*I have not yet had sight of receipts confirming these payments, but Mr (Applicant 1) and Mr (Applicant 2) are in the process of identifying the relevant bank statements and I expect these to be available shortly. In my opinion, this is a reasonable amount to be paid given the international circumstances and Mr (Applicant 1) and Mr (Applicant 2) acted in good faith in making these statements.*

(File 27, POR).

‘In my opinion’ signals an attempt to give expert advice on this issue as if knowing and being confident that the court would rely on this advice. Even when the POR states in the same file that payments accorded with acceptable standards in the treatment country, they fail to make clear the evidential basis for the claim other than:

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<sup>629</sup> *X and Y* (n 1).

<sup>630</sup> *Re S* (n 51).

*This is considered an acceptable amount under (name of jurisdiction) law, covering loss of earnings, all pregnancy expenses and an amount to cover the inconvenience and 'pain and suffering' involved.*  
(File 27, POR).

This inconsistency of approach to the question of what amounts to 'reasonableness' of payments and therefore whether it can be said that the surrogate's will has or has not been overcome is a troubling one and has been noted in previous research.<sup>631</sup> It is even more problematic if one notes from chapter four that the commissioning couples did not control payments and so could not measure the issue of reasonableness either.

### **5.3 The Voices of the Judiciary**

In the case of court judgments, forensic linguistics is also a useful tool in looking not just at the judiciary's own thought processes but also how the judiciary assesses and evaluates the meanings given to international surrogacy through the use of metaphors as well as meanings given to disputed sections of statutes through the process of statutory interpretation and analogous reasoning.

Unlike some European countries with Roman law systems such as Germany, English court judgments do not start with the decision but instead recite the facts of the case and the reasoning before the final decision. In addition, unlike German judgments, judges use informal language and judgments are written in the first person. Whilst judgments are intertextual in the sense that the courts will refer to other judgments, English judgments rarely refer to academic writers or judgments in other jurisdictions. Unlike France, which relies heavily on statute to support its decisions, English courts rely on statute together with a system of precedent by considering judgments made in earlier cases through a hierarchical court structure. In situations where a case is heard by more than one judge, then the judgments record the judgments of each judge (including the majority decision as well as any dissenting judgments). This so-called 'judge made law' aspect of the common law adds to the system of authorities upon

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<sup>631</sup> Purewal et al (n 380) and Crawshaw et al (n 197).



which the English law is based and developed. The lack of formality of English judgments means that judges will often build their own style of language in to the written judgments.

From the analysis of the 31 reported judgments between 2009 and 2016 a pattern emerged of the court using linguistics as a device to challenge and rewrite key provisions of section 54 of the 2008 Act. In addition the use of judicial metaphors also gave a clear indication of the judiciary's views on the practice of surrogacy. In particular a pattern emerged of the courts redeveloping important aspects of section 54 of the 2008 Act in order to further a policy of family unity.<sup>632</sup>

All the judgments were High Court judgments since no international surrogacy cases have been reported as having reached appeal level.<sup>633</sup> Each case brought a new set of issues for determination. Many cases<sup>634</sup> quoted Mr Justice Hedley's decisions in *X and Y (Foreign Surrogacy)*<sup>635</sup> and *Re S*<sup>636</sup> as a basis for deciding how to exercise discretionary powers and measure the reasonableness of payments and some cases included metaphors as a means to frame international surrogacy.

### **5.3.1 Caution Expressed in Judicial Metaphors**

Metaphors were used in the witness statements and court judgments to both illuminate and to hide meaning. The judiciary often employed metaphors such as the 'policing' metaphor used to signify the gatekeeper role of the court in terms of preventing commercial surrogacy agreements by scrutinising payments. For example, in the case of *In the Matter of X and Y (Children)*<sup>637</sup> the

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<sup>632</sup> HFEA, s 54.

<sup>633</sup> Although one reported domestic surrogacy case has reached the Court of Appeal. See *Re M (a child)* [2017] EWCA Civ 228.

<sup>634</sup> Eg *Re K* (n 140), *Re L* (n 5), *X and Y (Children)* (n 51), *Re IJ* (n 147), *A v P* (n 49).

<sup>635</sup> *X and Y* (n 1).

<sup>636</sup> *Re S* (n 51).

<sup>637</sup> *X and Y (Children)* (n 51).

court's role is described using the policing metaphor. Sir Nicholas Wall refers to the speech by Mr Justice Hedley in *Re L*.<sup>638</sup>

[T]he court should continue carefully to scrutinise applications for authorisation under Section 54 (8) with a view to policing the public policy matters identified in *Re S* (Parental Order [2009] EWHC 2977 (fam)).<sup>639</sup>

The secrecy and stigma surrounding international surrogacy has also been subject to a metaphor by Mr Justice Baker which also conveyed his sympathy for the surrogate:

A surrogate mother is not merely a cipher. She plays the most important role in bringing the child into the world. She is a "natural parent" of the child.<sup>640</sup>

'Cipher' is used to denote the secrecy surrounding surrogacy arrangements and in particular to signal the need to discuss or recognise the surrogate's role.

The metaphor of surrogacy as a free market or trade dictated by supply and demand has been echoed in judgments.<sup>641</sup> For example in *Re P-M*<sup>642</sup> Mrs Justice Theis stated 'the reality is there is a legal commercial framework, which is driven by supply and demand.'<sup>643</sup> This amounts to analogous reasoning by the court using payments and commerciality to denote similarity with trade. The courts also used analogous reasoning by drawing comparisons and similarities between identity and family in a number of cases<sup>644</sup> in order to reach the conclusion that the child's welfare is met through family identity. For example, in

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<sup>638</sup> *Re L* (n 5).

<sup>639</sup> *X and Y (Children)* (n 51), [36].

<sup>640</sup> *D and L* (n 94), [25].

<sup>641</sup> *Eg JP v LP* (n 557).

<sup>642</sup> *Re P-M* (n 49).

<sup>643</sup> *Re P-M* (n 49) [19].

<sup>644</sup> *Eg A v P* (n 51), [28], *J v G* (n 53), [27], *AB and DE* [2013] EWHC 2413, (fam), [34], *D & G* (n 51), [61], *Re A and B (No.2)* (n 107), [76], *AB v CD* (n 51), [71] and *Re X (A Child)* (n 51), [54 - 61].

Re X (A Child)<sup>645</sup> Sir James Munby argues that a parental order is the ‘optimum legal and psychological solution’<sup>646</sup> for the child rather than adoption because only this will secure the child’s identity within the family unit.

Non-metaphors were also used to convey messages, for example, spatial orientations such as:

The message needs to go out loud and clear to encourage parental order applications to be made in respect of children born as a result of international surrogacy, and for them to be made promptly.<sup>647</sup>

‘Loud’ and ‘clear’ are also used to send out a warning and to underline the need for the message to be heard. These metaphors and non-metaphors also served another purpose and became what can be described as a kind of sensory metaphor to affect others and to emphasise and highlight the message that follows it. Sensory metaphors were used to warn commissioning couples of the dangers and complexities of international surrogacy. These were messages to avoid a practice, which could be harmful, and where physical sensations were invoked by analogy.

Another example of a sensory metaphor can be seen in one of the most quoted passages of an international surrogacy judgment taken from the case of *X and Y*,<sup>648</sup> which in turn is taken from the work of Blyth.<sup>649</sup> In this case Mr Justice Hedley described parenthood in these terms: ‘the path to parenthood has been less a journey along a primrose path, more a trek through a thorn forest.’<sup>650</sup> The choice of the analogy between a ‘primrose path’ which is itself an idiom used to convey a pleasurable and easy life, with a ‘thorn forest’ serves to underline how harmful and opaque international surrogacy can be. Other sensory metaphors

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<sup>645</sup> Re X (A Child) (n 51).

<sup>646</sup> *ibid* [54].

<sup>647</sup> Per Mrs Justice Theis in *J v G* (n 51), [30].

<sup>648</sup> *X and Y* (n 1).

<sup>649</sup> Blyth (n 253) 189.

<sup>650</sup> *X and Y* (n 1), [2].

have included 'legal minefield'<sup>651</sup> and 'pitfalls'<sup>652</sup> and have been used by the judiciary to describe the legal implications of international surrogacy arrangements that go wrong.

Similarly Mrs Justice Theis expressed her sympathy for the commissioning couples in *Re G and M*<sup>653</sup> by stating that 'the applicants were clearly caught between a rock and a hard place.'<sup>654</sup> This adage is used to denote being in a difficult situation or making a choice between two difficult situations and again uses sensory images. Thus the metaphors serve to highlight the intractability of international surrogacy as well as to illuminate judicial sympathies to those wishing to become parents using this difficult route.

As well as using metaphors to emphasise the legal complexities of international surrogacy, the judiciary also used words such as 'once again' at the beginning of the reported judgments<sup>655</sup> to signal their exasperation that cases continued to come before them with the messages that they had dispatched seemingly unheeded. Reported judgments continued nevertheless to be dispatched to provide yet another 'example'<sup>656</sup> or 'cautionary tale'<sup>657</sup> with the court noting in the case of *CC v DD*<sup>658</sup> that the child would 'if nothing else leave his mark long term in the legal textbooks that consider this area of law.'<sup>659</sup>

### 5.3.2 Judicial Use of Conjunctions and Verbs

There has been a notable move by members of the judiciary to challenge the current wording of section 54 of the 2008 Act. In order to do so the courts first had to dismantle the conjunction 'if' used in section 54 (1) of the Act.<sup>660</sup> This

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<sup>651</sup> *Re G and M* (n 51), [1].

<sup>652</sup> *Re S* (n 51), [27].

<sup>653</sup> *Re G and M* (n 51).

<sup>654</sup> *Re G and M* (n 51), [21].

<sup>655</sup> *Eg Z, B v C* (n 117), [1], *AB v CD* (n 51), [1], *Re A and B (No.2)* (n 107), [1] and *Re X (Foreign Surrogacy – Child's Name)* (n 318), [5].

<sup>656</sup> *Eg Re D* (n 556), [1], *Re G and M* (n 51), [1] and *R and S v T* (n 51), [2],

<sup>657</sup> *Eg Re WT* (n 51).

<sup>658</sup> *CC v DD* (n 51).

<sup>659</sup> *ibid*, [1].

<sup>660</sup> HFEA, s 54 (1).

section provides that a parental order may be made 'if' certain conditions are met. The conditions in section 54 (1) – (8) as discussed in chapter one, together with the sub-sections comprise ten main conditions.

Sir James Munby pre-empted any criticism of a failure to use a purely linguistic approach to the wording of section 54 (1) by stating that 'slavish submission to such a narrow and pedantic reading would simply not give effect to any result that Parliament can sensibly be taken to have intended.'<sup>661</sup> The court therefore wanted to achieve its desired result without the limitations of the language of the statute.

As currently drafted section 54 makes all the ten conditions obligatory save two. Only the conditions relating to the consent of the surrogate<sup>662</sup> and payment of money or other benefits,<sup>663</sup> gives the court a discretion if, the condition is not complied with. The discretion in section 54 (8) has previously been discussed. In relation to the surrogate's consent, the court can set aside the requirement for consent where the surrogate cannot be found or is incapable of giving agreement and this is provided for in the Family Procedure Rules.<sup>664</sup>

Although judicial discretion has not been written in to the remaining eight conditions, so far the court has dismantled the obligatory nature of at least four<sup>665</sup> of the remaining eight conditions by allowing applications to proceed and succeed despite non-compliance. This circumvention of the provisions of section 54 has been achieved through the use of a combination of human rights considerations, artful statutory interpretation and logical and lexical semantics.<sup>666</sup> The conditions relating to the definition of 'applicants' in section

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<sup>661</sup> Re X (A Child) (n 51), [56].

<sup>662</sup> HFEA 2008, s 54 (6).

<sup>663</sup> HFEA 2008, s 54 (8).

<sup>664</sup> FPR 2010, Part 13 rule 10 and HFEA 2008, s 54 (7).

<sup>665</sup> These relate to HFEA 2008, s 54 (2), s 54 (2) (c), s 54 (3) and s 54 (a).

<sup>666</sup> Logical semantics is the study of linguistics in the context of the logical and sensible assumptions about meaning whilst lexical semantics is the analysis of the meaning of language using its relationship to other words.

54 (1),<sup>667</sup> the enduring nature of a relationship in section 54 (2) (c),<sup>668</sup> the meaning of ‘home’ for the purposes of deciding whether or not the child is living with the applicant under section 54 (4) (a)<sup>669</sup> and the time limit for making an application under section 54 (6)<sup>670</sup> have all been challenged.

### 5.3.3 Statutory Interpretation and Linguistics

Statutory interpretation often involves linguistic elements to assist the court in either adhering to or departing from the original language of statute. However, the method can be used to justify a given outcome as can be seen by comparing the different decisions reached in the cases of *Re X (A Child) (Surrogacy: Time Limit)*<sup>671</sup> and *Re Z (A Child: Human Fertilisation and Embryology Act: Parental Order)*,<sup>672</sup> both decisions of Sir James Munby the President of the Family Division of the High Court.

In the case of *Re X (A Child) (Surrogacy: Time Limit)*<sup>673</sup> the court had to decide the meaning of the verb ‘must’ in section 54 (3) of the 2008 Act.<sup>674</sup> This section requires a parental order application to be made no later than six months after the birth of the child. The court used statutory interpretation to extend the time limit for making an application from six months to approximately seventeen months. The child in this case was born on 15<sup>th</sup> December 2011 but an application for a parental order was not made until 6<sup>th</sup> July 2013. This extension was achieved by reading down the ordinary meaning of the word ‘must.’

However, Sir James Munby’s consideration of linguistics was restricted purely to the construction of section 54 as a whole rather than the very precise meaning of ‘must.’ The conjunction ‘if’ in section 54 (1) would linguistically be constructed as involving a condition to be met before further action could be

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<sup>667</sup> See *A v P* (n 51).

<sup>668</sup> See *DM and LK* [2016] EWHC 270 (fam).

<sup>669</sup> See *Re Z (Foreign Surrogacy)* (n 132).

<sup>670</sup> See *Re X (A Child)* (n 51).

<sup>671</sup> *Re X* (n 51).

<sup>672</sup> *Re Z (Foreign Surrogacy)* (n 132).

<sup>673</sup> *Re X* (n 51).

<sup>674</sup> HFEA 2008, s 54 (3).

taken and therefore would have to be read together with section 54 (3), which is itself constructed as imposing a condition and therefore 'if' had to be downgraded in relevance. Drawing on the case of *Howard v Boddington* (1877),<sup>675</sup> Sir James Munby decided the word 'if' was of a directory nature rather than a mandatory nature,<sup>676</sup> as distinguished<sup>677</sup> and clarified<sup>678</sup> in other cases. The court therefore adopted a practice of 'reading out' which involves omitting words from statute.

The court was unable to find any parliamentary debates on the rationale behind section 54 (3). Considerations were focused on the child's identity being dependent upon the legal relationship with its parents. Referring to the 'lifelong' requirement to treat the welfare of the child as paramount the court argued that it must have been Parliament's intention for the courts to look to the future when deciding on matters affecting the child.<sup>679</sup> Thus family identity as a concept was capable of deposing key words in written law.

Whilst Sir James Munby stated: 'I intend to lay down no principle beyond that which appears from the authorities. Every case will, to a greater or lesser degree, be fact specific,'<sup>680</sup> his approach was followed in the later case of *AB v CD (Surrogacy-Time Limit and Consent)*,<sup>681</sup> *D & G v ED & DD and A & B*,<sup>682</sup> *Re A and B (No.2 Parental Order)*,<sup>683</sup> *A and B v C and D*<sup>684</sup> and *KB and RJ v RT*.<sup>685</sup>

Sir James Munby's decision was also used to justify reading down a different statutory provision namely section 54 (4) (a) relating to meaning of 'home' in the

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<sup>675</sup> *Howard v Boddington* (1877) 2 PD 203.

<sup>676</sup> *ibid*

<sup>677</sup> *Eg London & Clydeside Estates Ltd v Aberdeen District Council* [1980] 1 WLR 182, *Wang v Commissioner of Inland Revenue* [1994] 1 WLR 1286 and *R v Soneji and Another* [2005] UKHL 49

<sup>678</sup> *ibid* [189] (Lord Hailsham).

<sup>679</sup> *Re X (A Child)* (n 51), [55].

<sup>680</sup> *Re X* (n 51), [65].

<sup>681</sup> *AB v CD* (n 51).

<sup>682</sup> *D and G* (n 109).

<sup>683</sup> EWHC 2080 (fam).

<sup>684</sup> *A and B* (n 109).

<sup>685</sup> *KB and RJ* (51).

cases of *Re Z (Foreign Surrogacy: Allocation of Work: Guidance on Parental Order Reports)*<sup>686</sup> and *Re A and B (No.2 Parental Order)*<sup>687</sup> where the applicants were found to have their 'home' with the child even though they were not living with the child at the time of the application. Reading down (rather than reading out) involves choosing a particular meaning for words in the statute to ensure compliance. However, this had the effect of giving 'home' a vague meaning and it was interpreted as being a condition to be applied at the time of the making of the parental order rather than at the time of the making of the application<sup>688</sup> and that the making of a parental order activated the right to family life aspect of Article 8.<sup>689</sup>

In *DM and LK*<sup>690</sup> the practice of reading down was used to interpret 'enduring relationship' in section 54 (2) (c) as one including a relationship where the parties only lived together part-time. This was achieved by reading down the provisions and taking in to account Article 8.<sup>691</sup> The practice of reading down statutory provisions has arguably been used as a vehicle in international surrogacy cases to avoid the ordinary language of the statute to signal to the government that the time for law reform is long overdue as well as to ensure that an already formed family can be recognised in law and labelled as such.

For example, in the case of *A v P*<sup>692</sup> a case that was also cited in *Re X (A Child) (Surrogacy: Time Limit)*,<sup>693</sup> the meaning of 'applicant' in section 54 (1)<sup>694</sup> was redefined. The applicant-commissioning father in this case died of liver cancer after an application for a parental order was made but before the final decision of the court. No definition of 'applicant' could be found in the 2008 Act yet section 54 (1) provided that 'on an application made by two people ("the applicants")', the court may make an order for the child to be treated in law as

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<sup>686</sup> *Re Z (Foreign Surrogacy)* (n 132).

<sup>687</sup> [2015] EWHC 2080 (fam).

<sup>688</sup> See *Re Z (Foreign Surrogacy)* (n 132), [94].

<sup>689</sup> ECHR1950, Article 8.

<sup>690</sup> *DM and LK* (n 668).

<sup>691</sup> ECHR 1950, Article 8.

<sup>692</sup> *A v P* (n 51).

<sup>693</sup> *Re X (A Child)* (n 51).

<sup>694</sup> HFEA 2008, s 54 (1).



the child of the applicants' if certain conditions in section 54 as a whole were met. The court had to determine whether the cause of action could survive the applicant commissioning father's death. The court decided that whilst in matrimonial cases a claim might be extinguished by death, a parental order was of a declaratory nature and concerned a child who could also be considered to be an applicant. This is a surprising conclusion given the language structure of the section. It presumes that the people making the application are doing so for the child and the use of the words 'as the child of the applicants' suggests the child and the applicants cannot be one and the same person.

This decision was made despite the fact that section 54 (1) (which refers to 'applicants') should be read in conjunction with section 53 (3) which requires that certain conditions be met both at the time the application is made and at the time the order is made.<sup>695</sup> The commissioning father could not be said to have satisfied those conditions given that his death occurred before an order had been made. The court, took in to account the 'transformative' nature of section 54 of the 2008 Act and found that 'the effect of not making an order will be an interference with that family life in that the factual relationship will not be recognised by law.'<sup>696</sup>

The court therefore imposed a rights based argument again based on family identity to justify moving away from the ordinary language of the statute. In particular the court was concerned that the child should have the 'social and emotional benefits of recognition' of a legal relationship with the commissioning couple, which was important to the child's identity and would serve to protect that identity in accordance with the UNCRC1989.<sup>697</sup> Therefore the rights based argument was also infused with arguments relating to certainty around the identity and wellbeing of the child.

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<sup>695</sup> See similar comments made by Sir James Munby in the case of *Re X (A Child)* (n 51), [60].

<sup>696</sup> *Re X (A Child)* (n 51), [24].

<sup>697</sup> *A v P* (n 51), [26 – 27].

The lack of application of linguistics to statutory interpretation in the case of *Re X (A Child) (Surrogacy: Time Limit)*<sup>698</sup> and *A v P*<sup>699</sup> can be contrasted with the case of *Re Z (A Child: Human Fertilisation and Embryology Act: Parental Order)*.<sup>700</sup> This was an application for a parental order by a single father who would not be eligible to apply under section 54 of the 2008 Act because section 54 (2) only includes couples. This case was also heard by Sir James Munby.

Whilst Sir James Munby could have taken the same approach that he had taken in *Re X (A Child) (Surrogacy: Time Limit)*<sup>701</sup> and read down the provisions of section 54 (2) as 'directory' and therefore not capable of causing the whole proceedings to fail if there was non-compliance with the condition of couple-hood, he was precluded from doing so because this time Parliament's intention was clearly recorded.<sup>702</sup>

Whilst the court accepted that section 3 of the Human Rights Act 1998<sup>703</sup> gave the court a right to consider whether the language of a statute was inconsistent with the European Convention on Human Rights 1950, section 3 was itself limited in use because of the use of the word 'possible.' Section 3 reads: 'So far as it is possible to do so, primary legislation must be read and given effect in a way which is compatible with Convention rights.'<sup>704</sup> Sir James Munby, quoting authorities such as *Ghaidan v Godin-Mendoza*,<sup>705</sup> held that section 3 could not be used to interpret the language of the 2008 Act so as to adopt a meaning that was inconsistent with 'a "fundamental feature." a "cardinal" or "essential" principle of the legislation.'<sup>706</sup> However, he was careful to preserve and justify the opposite approach to reading down cases taken in *Re X (A Child)*

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<sup>698</sup> *Re X (a child)* (n 51).

<sup>699</sup> *A v P* (n 51).

<sup>700</sup> *Z (a child)* (n 318).

<sup>701</sup> *Re X (A Child)* (n 51).

<sup>702</sup> Human Fertilisation and Embryology Bill HC Deb 12 June 2008, col 248. This amendment was tabled by Dr. John Pugh on behalf of Dr. Evan Harris.

<sup>703</sup> Human Rights Act 1998, s 3.

<sup>704</sup> *ibid.*

<sup>705</sup> [2004] UKHL 30.

<sup>706</sup> *Re Z (A Child)* (n 134), [37].

(Surrogacy: Time Limit)<sup>707</sup> and *A v P*<sup>708</sup> by specifically stating at paragraph 40 of the judgment that it was still permissible to read down sections 54 (3)<sup>709</sup> and section 54 (4).<sup>710</sup> Those sections were not therefore considered ‘essential’ or ‘fundamental’ to the legislation on surrogacy.

Despite succumbing to the rigidity of the language of section 54, it is clear that Sir James Munby in *Re Z*<sup>711</sup> felt uncomfortable interpreting the law in a purely lexical semantic way for this case by considering the meaning of section 54 (3) and its relationship to the meaning of language used in the parliamentary debates. This is shown by the final paragraph of the judgment, which is essentially a call for the applicant’s lawyers to make a further application before him purely on the question of the incompatibility of section 54 with Articles 8, 12 and 14 of the European Convention on Human Rights.<sup>712</sup> The matter thus came before Sir James Munby once again as *Re Z (A Child) (No.2)*<sup>713</sup> at which time the court was prepared to make a declaration that section 54 (2) was incompatible with the European Convention on Human Rights.<sup>714</sup> It is worth noting however, that the Secretary of State who intervened in this case viewed discrimination as the central issue.

Adopting a rights based approach has moved the courts one step further towards dismantling section 54 of the 2008 Act<sup>715</sup> altogether. The key cases of *Re X (A Child) (Surrogacy: Time Limit)*,<sup>716</sup> *A v P*,<sup>717</sup> *Re Z (A Child: Human Fertilisation and Embryology Act: Parental Order)* and *Re Z (A Child) (No.2)*<sup>718</sup>

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<sup>707</sup> *Re X* (n 51).

<sup>708</sup> *A v P* (n 51).

<sup>709</sup> HFEA 2008, s 54 (3). This section relates to the six-month time limit to apply for a parental order.

<sup>710</sup> HFEA 2008, s 54 (4). This is the requirement that the child’s home must be with the applicants.

<sup>711</sup> *Z (a child)* (n 318).

<sup>712</sup> ECHR 1950, Articles 8, 12 and 14.

<sup>713</sup> *Re Z* (no.2) (n 49).

<sup>714</sup> ECHR 1950. The court held that there was incompatibility with Article 14 when taken in conjunction with Article 8.

<sup>715</sup> HFEA 2008, s 54.

<sup>716</sup> *Re X* (n 51).

<sup>717</sup> *A v P* (n 51).

<sup>718</sup> *DM and LK* (n 668).

*and DM and LK*<sup>719</sup> demonstrate a normative approach to statutory interpretation that is perhaps affected by the sympathies of key members of the judiciary towards international surrogacy despite the recognised risks that it exposes the parties to. Such cases also highlight how the reported experiences of commissioning couples caused a shift in messaging from warnings about international surrogacy to an acceptance of the importance of connecting an already finished family to ensure identity for the child.

#### **5.4 Judicial Sympathy Expressed through Metaphors**

The use of sensory metaphors that urged caution in earlier cases (as discussed in 5.3.1) gave way to a much more resigned acceptance of international surrogacy as a practice suggesting that the reported experiences of couples was affecting the judicial approach to the practice. For example, in *J v G*<sup>720</sup> the concern expressed in earlier cases about couples entering international surrogacy arrangements (a pre-action warning) shifted to a concern that couples should be encouraged to apply for a parental order after completing an international surrogacy arrangement (a post-action warning). Mrs Justice Theis message was as follows:

I would like to add a few general observations. Those who embark on this type of surrogacy arrangement are to be encouraged to apply for parental orders. There has been a noticeable increase in such applications being made, which is to be welcomed.

Later judgments<sup>721</sup> tended to end more with a focus on the need for an order for the child's life-long welfare needs and to keep the new family unit together rather than to publicly chastise those couples who chose international surrogacy as a route or merely to point out the hazards of international

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<sup>719</sup> *Re Z and Re Z (no.2)* (n 49).

<sup>720</sup> *J v G* (n 51), [30].

<sup>721</sup> *Eg AB and DE* [2013] EWHC 2413, *Re P-M* (n 49), *Re X (A Child)* (n 49), *Re Z (Foreign Surrogacy)* (n 142), *AB v CD* (n 51), *Re A and B (No.2)* (n 107), *KB and RJ* (n 51), *DM and LK* (n 668).

surrogacy. Later cases<sup>722</sup> were also careful to distinguish surrogacy from adoption with adoption orders referred to in *D & G* and *ED* and *DD* and *A & B*<sup>723</sup> as ‘a square peg for a round hole.’<sup>724</sup>

## 5.5 The Intertextual Nature of Judicial Language

Many of the judgments were intertextual in nature in the sense that the rationale for the decision often lay in understanding the rationale and decision in another case. The most quoted cases were *X and Y*,<sup>725</sup> *Re S*<sup>726</sup> and *Re L (a minor)*<sup>727</sup> and these dealt with the public policy test in relation to whether payments could be considered reasonable.

Like some of the narratives of the PORs, the reported judgments showed a tendency by the judiciary to use previous cases as a measure for deciding the question of the reasonableness of payments. Judges rely on previous reported cases that match the same jurisdiction under consideration. Whilst previous cases were often cited there was a tendency to ‘speed cite’ so that a previous High Court case was cited as authority even though the facts were different and might normally be distinguished on appeal. For example, in the case of *Re Z (Foreign Surrogacy)*<sup>728</sup> the court decided that it could interpret section 54 (4) (a) of the 2008 Act<sup>729</sup> flexibly by holding that the child’s home was with the applicants even though the child was residing in India, initially cared for by nannies and later by the applicant father. This case was then cited in the later case of *KB and RJ v RT*<sup>730</sup> but here the facts were that none of the applicants lived in the home. The child was cared for by a grandmother, the applicant’s only means of communication with the child was by Skype from the UK for a total of two hours per day.

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<sup>722</sup> *Eg CC v DD* (n 124), *AB v CD* (n 51), *D & G* (n 147).

<sup>723</sup> *D & G* (n 109).

<sup>724</sup> *ibid*, [67].

<sup>725</sup> *X and Y* (n 1).

<sup>726</sup> *Re S* (n 51).

<sup>727</sup> *Re L* (n 5).

<sup>728</sup> *Re Z (Foreign Surrogacy)* (n 132).

<sup>729</sup> HFEA 2008, s 54 (4) (a).

<sup>730</sup> *KB and RJ* (n 51).

Yet this difference was not dealt with in the judgment and the Judge did not explain why the principle in *Re Z (Foreign Surrogacy)*<sup>731</sup> should apply. Also, whilst in *Re Z (Foreign Surrogacy)*<sup>732</sup> the court stated that as an alternative it could rely on reading down the statutory provisions of section 54 (4) (a) of the 2008 Act or interpreting it in line with Article 8, this was not discussed as a possible alternative in the case of *KB and RJ v RT*.<sup>733</sup>

The court did go further in *Re A and B (No.2 Parental Order)*<sup>734</sup> and read down the provisions of section 54 (4) (a) so that it applied when neither parent was living with the child. A purposive approach was taken to statutory interpretation and it was argued that Parliament could not have intended that legal parenthood should be denied simply because this home condition had not been met. Notably, there was no attempt by the court to refer to the parliamentary debates as to whether section 54 (4) (a) had been discussed at all. The court was concerned the child should not be left in a 'legal vacuum.'<sup>735</sup> A certainty approach was again employed to circumvent the ordinary language of the statute so as to construe 'home' in a flexible way.

The practice of speed citing in judgments on international surrogacy meant that parts of the ratio decidendi (the reason for the decision) often went unexplained as judgments were often rushed out to send cautionary warnings to the public.

## 5.6 Conclusion

It was possible to address the central research question to a limited extent by examining whether the legal definition of parent as conveyed in messages from legal experts affected the commissioning couple's pre-hearing experiences and this could be answered in the negative. The written judgments were used to send messages to commissioning couples by the use of sensory metaphors that were intended to touch, affect and change behaviour. However, the reports

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<sup>731</sup> *Re Z (Foreign Surrogacy)* (n 132).

<sup>732</sup> *ibid.*

<sup>733</sup> *KB and RJ* (n 51).

<sup>734</sup> *Re A and B (No.2)* (n 107).

<sup>735</sup> *Re A and B (No.2)* (n 107), [44].

given by the commissioning couples (as discussed in chapter four) suggest that many couples were unaware of these messages. Few of the commissioning couples reported being aware of any international surrogacy judgments and so cautionary messages and warnings issued by the judiciary did not inform the experiences as reported by the couples.

For those who used lawyers or experts prior to embarking on a surrogacy journey, the data suggested that they were more prepared for the post-birth legal process that would follow and what they would need to show in terms of the payments that were made as part of the surrogacy arrangement. Lawyers were therefore capable of conveying the need for caution, suggesting that judicial messages reached lawyers but not the couples themselves. Only a small proportion of couples in this thesis had the assistance of lawyers.

The findings from the forensic linguistics analysis also went beyond the research questions. The analysis revealed that the pre-hearing experiences of the commissioning couples were capable of affecting the judiciary rather than vice versa and so the impact was reversed. Commissioning couples acted as a conduit to affect the actual parental order process by presenting the judiciary with new issues arising from new jurisdictions. Thus through experiential osmosis the parentage process was affected. The judiciary responded with an orient-focused approach to the 2008 Act and key parts of section 54 were re-interpreted in a responsive approach to decision-making by the courts. This in turn was driven not just by the welfare of the child but also by a genuine concern for family formation and family unification to achieve identity for the child.

The witness statements of commissioning couples played an important role as a window through which the judiciary could view the reality of the practice of international surrogacy, through their stories new issues arrived for resolution and a family-focused approach enabled the courts to justify by-passing some of the perceived harshness of section 54 with its notional boundaries to the acquisition of parenthood. This was achieved through the use of statutory interpretation applying both linguistic and non-linguistic approaches as befitted

the outcome the courts wanted to achieve. Therefore as well as being a means to legal parenthood, parental order applications also became a means to impart new information about non-traditional parentage processes, legal identities and kinships to the judiciary. This knowledge was then reformulated by the judiciary in to a risk versus rights discourse intended to be disseminated to lay participants and experts alike. The micro-level experiences of the commissioning couples (as discussed in chapter four) and the meso-level effect of those experiences on the expert system and legal structures (discussed in this chapter) formed some important central themes that are discussed in the next chapter.



## **CHAPTER SIX**

### **Findings – Thematic Analysis**

#### **6.1 Introduction**

The findings in chapters four and five were used to identify broad themes that revealed something about the social and legal processes within international surrogacy and how these processes were reported by the commissioning couple and the expert system. The three central themes are discussed below (6.2, 6.3 and 6.4). There were also sub-themes of power and vulnerability, trust, spatial connectedness and identity which in turn had a number of streams connected to them and were themselves connected to the wider thesis topic of parentage and process. These also captured the way in which international surrogacy was subsequently reframed by commissioning couples and the expert system. A concept map of the thematic analysis can be found at Appendix 3.

#### **6.2 Networks and Relationships**

The commissioning couples' court accounts focused largely on the exchanges taking place within the network formed between the commissioning couple, the surrogate and the clinic but it was also possible to get a limited sense of the quality of the relationships that developed. Networks and relationships operated closely as a single theme however, sociologists have distinguished the two. For example networks tend to focus on the exchanges that take place rather than the actors themselves whereas relationships would focus on both the actors and their exchanges.

Karen Cook and Richard Emmerson's theory of 'exchange networks'<sup>736</sup> examines how a single network is formed and categorised by the commitment

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<sup>736</sup> KS Cook and RM Emmerson, 'Power, Equity and Commitment in Exchange Networks' (1978) 43 *American Sociological Review* 721.

of the actors. Each actor has the opportunity to exchange relations in the sense of giving and receiving benefits and where resources are redistributed within the network. Reciprocity, trust and power are key features of the network. The network therefore operates as both a form of economic activity and as a norm.

The connections that take place in order to form surrogacy networks were categorised by a collaboration in which the parties form interpersonal relationships in order to birth a child. This collaborative reproduction also requires empathy, trust, honesty, understanding and reciprocity all values that are also features of the social structure for social capital<sup>737</sup> (discussed at 6.2.2) and is necessary for the creation of the temporary kinship community. It was possible to identify regular exchanges taking place in relation to discussions around birthing arrangements and cost.

There is a symbiotic relationship that exists between the members of the network and the expert's structure (predominately the surrogacy agencies, clinics and lawyers) that has economic advantages in the same way that economic advantages exist in the relationship between buyer, supplier and manufacturer. However the clinics as an expert system are also part of the network and are able to enter the space to form temporary relationships with the surrogate and commissioning couple. Within the networks relationships of varying degrees were established and displays of power took place.

### **6.2.1 Sub-Theme of Power and Vulnerability**

Cook et al<sup>738</sup> describe the tensions that exist within networks in terms of a power-dependency relationship in which power can be either one directional or two directional. 'Positive' connections occur where the relations are reciprocal and where the exchange moving in one direction is dependent on the exchange moving in a different direction. 'Negative' connections however occur where the

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<sup>737</sup> JS Coleman, 'Social Capital in the Creation of Human Capital' (1988) S95 American Journal of Sociology 94.

<sup>738</sup> KS Cook, RM Emerson, MR Gilmore and T Yamagishi, 'The Distribution of Power in Exchange Networks: Theory and Experimental Results' (1983) 89 American Journal of Sociology 275

exchange is only moving in one direction. These connections are more likely to foster dependency and hence a power-dependency pattern.<sup>739</sup>

The stories suggested that the clinics power over the commissioning couple was one directional whilst the clinics power over the surrogate was two directional as there was a co-dependency in operation. This co-dependency two directional flow of power was also true in relation to the surrogate's power over the commissioning couple.

The accounts of the commissioning couples suggested that this mix of positive and negative attributes of the network also acted to create tensions. This was because the power did not always reside with the same individuals.. Jane Ellen Harrison<sup>740</sup> argues that it is 'collectivity' and 'emotional tension'<sup>741</sup> that turns simple encounters in to a ritualistic process or rite. The 'tribe'<sup>742</sup> Harrison argues, must have a collective emotional tension. In the case of surrogacy it is the child that provided that emotional tension and in that emotional tension the power lay. It is in the act of waiting for the birth of the child that much of the social interaction and ritualistic episodes take place.

All the power was ultimately derived from who controlled the means to the child. The child was a persuasive force in the assignation of parentage and the power therefore resided with whoever had the child or the ability to create the child. This power lay with the clinics at pre-contract and pre-conception stage, with the surrogate at the pre-birth stage and with the commissioning couple at post-birth stage. Whilst there was the potential for the power to be abused because of dependency on the child and all that the child symbolised, the abuse was contained through trust and reciprocity the combination of which produced a mutualistic approach to the surrogacy arrangement where the parties recognised that each would receive benefits from the exchange taking place within the network.

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<sup>739</sup> Cook et al (n 738) 278.

<sup>740</sup> Jane E Harrison, *Ancient Art and Ritual* (Williams and Norgate 1913)  
< <https://archive.org/details/ancientartritual00harruoft> > accessed 25 June 2016.

<sup>741</sup> Harrison (n 740) 36.

<sup>742</sup> Ibid 38.

The surrogate and the clinics were only the temporary custodians of the power as the power followed the child after birth. This post-birth power held the means to social change. As the commissioning couple moved out of the network at the post-birth stages they became more powerful through the power held by proxy as custodians of the child. This was reflected in the final outcome of the legal process because regardless of deficiencies or non-compliance with the statutory requirements, the commissioning couples' physical possession of the child presented the courts with a *fait accompli*. This meant that parental orders could be granted even where the commissioning couple had paid more than reasonable expenses or time limits had elapsed or consent of the surrogate had not been obtained or they did not meet either the relationship status or domicile status necessary for the grant of a parental order. Once the child was in the possession of the applicants, procedural bars to legal parentage could be overcome.

The relationships themselves were established primarily as a commercial relationship with the child at the centre but all parties appreciated the sensitivity of feelings and emotions around the child. In order to forge relationships the commissioning couple also drew on networks pre relationship formation (e.g. surrogacy agencies, lawyers) and post relationship formation (e.g. egg donors, lawyers, hospitals, clinics).

There is an understanding that develops between all the actors in the network (the commissioning couple, the surrogate and the clinic) that their actions will lead to future reciprocal actions. The child engendered a shared sense of commitment and reciprocity that allowed relationships to form. The usage of the 'gift' analogy to refer to the child was present in the narratives yet this did not belie the nature of the commercial arrangement. The birthing process generated levels of trust between the immediate parties and the clinics although this trust took time to nurture (as discussed in 6.2.2).

The networks were capable of continuing after the surrogacy arrangements ended through continued contact with the surrogates and new networks also

emerged and could be seen in the form of extended family and friends and schools that helped to support the new family unit. The shift in the power advantage the surrogate has over the commissioning couple takes place after the birth of the child when the commissioning couple move on in their new family unit. The surrogate is dependent thereafter on the commissioning couple facilitating some form of contact between the surrogate and the child.

#### **6.2.1.2 Vulnerability as Dependency**

Martha Fineman<sup>743</sup> defines vulnerability as a human quality that in its most tangible and visible form manifests as 'harm, injury and misfortune,'<sup>744</sup> it is thus regarded as 'biological and constant'<sup>745</sup> in nature. It is constant in the sense that it is only ameliorated rather than eliminated, as all individuals are vulnerable and/or dependent at various stages in their lives. Vulnerability differs from exploitation that involves a party benefiting unfairly from another's labour or resources. However, vulnerability can also be viewed as the state of being exposed to exploitation or harm with or without an understanding of being in that state and this is the definition given to vulnerability within this thesis.

The vulnerabilities evident from the stories arose from the commissioning couples' childlessness status, reliance on third parties (the surrogate and the clinic) and exposure to increasing costs. Some of these increased costs arose as a result of the legal assignation of parentage to the surrogate, in some cases this resulted in court proceedings to attain parentage before the child could return to the UK.

Commissioning couples are often portrayed as akin to Bauman's<sup>746</sup> conceptualisation of social class hierarchy, namely 'contemporary global elites' who can travel with 'extraterritorial capital.' The financial power of the 'contemporary global elites' or reproductive consumers means that in the social hierarchy there are likely to be those who are left vulnerable particularly in

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<sup>743</sup> Fineman (n 308b) 251.

<sup>744</sup> Fineman (n 308b) 267.

<sup>745</sup> Fineman (n 308b) 268.

<sup>746</sup> Zygmunt Bauman, *Liquid Modernity* (Polity Press 2000).

relation to commercial surrogacy. However, the narratives suggested a degree of vulnerability experienced by commissioning couples also dependent upon power brokers, namely the clinics, and this led to feelings of vulnerability.

Not all the commissioning couples reported feelings of vulnerability. Some witness statements and parental order reports specifically mentioned vulnerability whilst others did not. The lack of acknowledgment by the commissioning couple of the potential for exploitation does not mean that vulnerability was not operating within the network. One might argue that where contracts are in place and where parties enter in to contracts freely and voluntarily and (in the case of commercial surrogacy) payment is made for the services provided the likelihood of vulnerability through exploitation is low. However, this is not necessarily so. It is precisely because there is a contractual situation covering the provision of a service for monetary payment that the vulnerability arises and this would be the same with any consumer-supplier relationship. For example, the service may not be provided to the level agreed or at all, payment may be more than agreed, the contract may fail to provide for the involvement of parties in formalities that exist post completion of the contract.

In terms of the commissioning couples' own perception of vulnerability this varied. Whilst most of the applicants felt a lack of control and voiced feelings of helplessness around for example, decisions relating to costs or geographical separation from the surrogate or their partners, not all applicants perceived themselves as vulnerable throughout the whole process. Vulnerability depended very much on the experiences of the applicants, a type of 'experiential vulnerability.'

Some of the vulnerability was expressed in terms of an infertile state either biologically or socially. Even before forming surrogacy relationships with the clinic and the surrogate, some commissioning couples talked about levels of stress related to infertility and undergoing infertility treatment. For example:

*The constant expectation and disappointment with the highs and lows of the entire IVF process caused unbearable strain and stress for me and for us.*

(File 23, first applicant)

There already exists a body of research confirming the existence of psychological stresses involved in multiple and prolonged fertility treatment<sup>747</sup> and how travelling abroad for fertility treatment can then exacerbate those stresses.<sup>748</sup>

The parental order reports in some of the case files expressed concern about the commissioning couples' exposure to stresses and the commissioning couple's reported levels of suffering were referred to as 'vulnerability,' for example, when considering the issue of geographical separation by the couple during the surrogacy process:

*The separation of the adults caused them great emotional distress and (second applicant) was of course not with the twins throughout almost all that time, not able to get to know them, to form attachments. In describing experiences in (name of area), when I first met the applicants, they described feelings of vulnerability in great detail.*

(File 1, POR).

Further examples of vulnerability were reported in the couples' dealings with the clinics. For example, in one case the commissioning couples reported how the clinic failed to put in place proper procedures and keep accurate records to

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<sup>747</sup> Eg BJ Berg and JF Wilson, 'Psychological Functioning across Stages of Treatment of Infertility' (1991), 14 (1) Journal of Behavioral Medicine 11 and JC Daniluk, 'Reconstructing Their Lives: a Longitudinal, Qualitative Analysis of the Transition to Biological Childlessness for Infertile Couples' (2001) 79 Journal of Counselling and Development 439.

<sup>748</sup> Eg E Blyth, 'Fertility Patients' Experiences of Cross-Border Reproductive Care' (2010), 94 (1) Fertility and Sterility e11 and L Culley, N Hudson, E Blyth, W Norton, A Pacey and F Rapport, ' "What Are You Going to do, Confiscate Their Passports?": Professional Perspectives on Cross-Border Reproductive Travel' (2013) 31 (1) Journal of Reproductive and Infant Psychology 46.

enable the surrogate to be traced. This potentially risked the successful outcome of the commissioning couples' application for a parental order, as they were unable to show that the surrogate had consented to the handing over of the child as required by Part 13 of the Family Procedure Rules.<sup>749</sup>

The clinics poor response to the need to provide information for the UK courts was also a source of both dependency and vulnerability on the part of this commissioning couple:

*Shortly before the birth of our sons it became clear, through a sequence of emails that the clinic had a complete disregard for UK laws.*

(File 3, Joint applicant's letter to the court).

The clinic failed to assist the commissioning couple or the UK court in tracing the surrogate post-birth and this meant that the commissioning couple were dependent on the court to set aside the procedural requirement for the surrogate's consent using its discretionary powers under the Family Procedure Rules.<sup>750</sup>

Another couple reported that the surrogate reneged on the agreement to sign the consent form and requesting further sums of money outside the agreed payments in the contract. There were reports of surrogates refusing to carry a child or clinics refusing to help them when learning of the commissioning couple's sexual orientation. This in turn cost them time and money in the process:

*The applicants were paired with a woman who had been through the process before. She 'pulled out' when she found out that they were a gay couple.*

(File 12, POR).

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<sup>749</sup> FPR 2010, Part 13 and Practice Direction 5A. Form 101A to be completed by the surrogate mother.

<sup>750</sup> FPR 2010, Part 13 rule 10.



As well as reports of difficulties with egg donors:

*They relayed the stress of initial complications with two potential egg donors, one who forgot to take relevant medication and another who had an infection.*

(File 11, POR).

Others reported stress relating to the pregnancy itself with counselling seen as the solution to resolve feelings of anxiety:

*Mr and Mrs (name of applicants) underwent counselling regarding what would happen if the unborn child was found to have any abnormalities.*

(File 6, POR).

Some applicants felt in control of the process from start to finish but these were mostly those who had carried out both medical and legal research prior to entering the surrogacy arrangement. Some commissioning couples were also able to draw on the knowledge of friends who had gone through the surrogacy process before them.

There was also evidence in the files of collective vulnerability in that the surrogate and the commissioning couple were also subject to the contractual obligations imposed by the clinics and surrogacy agencies and therefore subject to levels of dependency for example, in terms of the number of embryo transfers and the failure of such transfers. However, it was not possible to examine the surrogates' accounts of their relationship with the clinic.

It was not possible to explore in more depth the effect or impact of the declared or perceived vulnerability of the commissioning couple from their written narratives alone. It was clear however, that although the commissioning couples were British subjects, responsibility for their vulnerable state was not ameliorated by their national identities or their visitor status in the host treatment jurisdiction.

### 6.2.2 Sub-Theme of Trust

James Coleman<sup>751</sup> recognises the value of human relationships within social networks and advances a theory of social capital. Social capital becomes the connections between individuals and is seen as a resource that exists in the dynamics of human relationships and compliments human capital.<sup>752</sup> At the same time it can be distinguished from human capital which involves skills and knowledge whereas social capital is based on obligations, trust and community, all of which Coleman argues are essential for the development of interpersonal relationships both inside and outside the family

There was evidence of varying levels of trust between the actors (surrogate and commissioning couple) within the network that might point to the existence of the resource of social capital. Trust in this sense is defined as a confidence or belief that is free from any suspicion or doubt. The trust was infused with hope and mutualism and this sustained the levels of trust during the existence of the network. However, the accounts of the commissioning couples rarely pointed to a complete lack of suspicion or doubt and so the faith in the relationships rarely reached complete levels of trust. Instead the trust was a tenuous one built on fragile and shaky foundations and was dependent on reciprocity within the relationships.

The close connection between trust and reciprocity can be seen in actions taken to honour a contractual relationship that might not be enforceable in certain countries, the provision of a service (the surrogate agrees to give birth and the commissioning couple agree to raise the resultant child) and rewards (the surrogate is paid either a fee or reasonable expenses and the commissioning couple are given a solution to their fertility needs). The benefit of

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<sup>751</sup> Coleman (n 737)

<sup>752</sup> The skills and knowledge of a worker that contributes to their productivity. Eg Adam Smith, *An Enquiry into the Nature and Causes of the Wealth of Nations* (ed) L Dickey (first published 1773 and 1776, Hackett Publishing co 1993) and Max Webber, *The Protestant Ethic and the Spirit of Capitalism* (eds) T Parsons and A Giddens (first published 1930, Routledge 2001) and Gary S Becker, *Human Capital: A Theoretical and Empirical Analysis, with Special Reference to Education* (first published 1963, University of Chicago Press 1993).

the trust and reciprocity was also captured by the clinics in terms of fees charged to help the parties achieve their ultimate goal.

Putnam's<sup>753</sup> description of 'thin trust' as one that exists between strangers who have become recently acquainted<sup>754</sup> was evident between the commissioning couples and the surrogates in much the same way that it existed between the commissioning couple and the clinics. The fact that the trust is in its thin form and relies on an expert system circling the network leads only to a semi-closed structure in the case of surrogacy. This suggests that the stranger status of the surrogate requires time and fewer intrusions from the clinics to be upgraded to the status of friendships with the commissioning couple. It may at the point of completion of the surrogacy arrangement be regarded as a truly closed structure for those couples going on to form friendships with the surrogate where regular contact is maintained.

A surrogacy network that has a community orientated approach where commissioning couples and surrogates are mindful of each others wellbeing is more likely to be able to capitalise on its social capital and avoid what Putnam terms 'social decapitalisation',<sup>755</sup> a move towards individualism rather than community. This might occur when levels of trust decline and the actors switch to protecting their own interests. Community relations are dependent on the trustworthiness of all members of the community. Thus where clinics failed to adhere to their part of the bargain in terms of honouring the trust that had been established this led to a deterioration in relations.

The move towards the stability of the birth stage also acts to reinvigorate and re-energise the network as the trust between the surrogate and the commissioning couple is rewarded and feelings of gratitude towards the surrogate are expressed. Tenuous or thin trust allowed the relationships to continue in some circumstances despite feelings of vulnerability. The trust

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<sup>753</sup> Putnam (n 591).

<sup>754</sup> Ibid 136.

<sup>755</sup> Putnam (n 591) 276.

meant that some of the actors had differing levels of power bestowed upon them at different stages of the surrogacy process. The community or the connections formed within the network were important to its continuation.

### **6.2.3 Sub-Theme of Spatial Connectedness**

The small-scale networks exist with varying levels of trust and happiness and connectedness as couples navigate a new space where status is to be negotiated overseas and across time. Whilst the birthing process itself ordinarily involves levels of intimacy, the relationships were not characterised by intimacy in the same way but rather were an acknowledgment of a mutual vulnerability that comes from need which in turn led to levels of trust based on the reciprocal nature of the agreement.

The clinics and the surrogate would receive money for their financial help and the commissioning couple would receive a child or children. Not all the temporary relationships survived after the birthing process but for those that did the immediate parties were rewarded with a form of connectedness that was able to survive a lack of geographical proximity, for example:

*It is anticipated that the surrogate mother, her partner and her children will have an active and beneficial role in (name of child)'s life of which time will be arranged for them to spend time with each other as well as continuing participation contact via Skype.*

(File 5, parental order reporter).

Connectedness, the state of being joined or linked, was characteristic of the nature of the relationships that formed within the network. It was capable of surviving geographical separation post-birth of the child as well as being capable of longevity. Building connections across time and space was one of the positive elements of the relationships formed by the immediate parties (the surrogate and the commissioning couples).

Elisabeth Beck-Gernsheim<sup>756</sup> argues that post-industrialisation family has moved from a community held together by obligations to a more individualised form where relatedness remains but obligations have decreased. This new form of family, Beck-Gernsheim argues, allows for elective relationships. The spatial connectedness within international surrogacy arrangements provided an example of one way through which elective relatedness was expressed in the extension to the traditional family. There was evidence that intended kinships could arise from the connectedness notwithstanding its transitory nature. Lasting ties based on both experiential and biological or genetic ties feed the connection and this tie although affected by geography, is no less meaningful to the couples.

The majority of the homosexual commissioning couples reported continuing kinships with the surrogate as compared to only a few heterosexual couples. The connectedness was given the status of 'friendships,' 'relationships,' 'bonds' and 'family unit' in the descriptions given to the PORs. The contact was largely indirect through the use of the Internet, emails and letters but some couples reported continuing direct contact with visits.

The connectedness within the network was transitory in nature in the sense that it usually ended when the child was born and handed over to the commissioning couple. However, this was not the case for all couples. Should the parties agree to remain in contact through the exchange of letters/emails and photographs then it is possible for the network to remain but in a reshaped form. However, if the connectedness were purely forced or reluctant friendships then the networks would not survive across time and space for any significant period of time. If it did not end at the point that the contract was completed and the child handed over to the commissioning couple, then it might end soon afterwards once the child began to mature. Any connectedness between the surrogate and the child could also potentially change as the child develops and seeks to form new connections in the wider world. This transition arguably

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<sup>756</sup> E Beck-Gernsheim, 'On the Way to a Post-Familial Family: From a Community Need to Elective Affinities' (1998) 15 (3-4) *Theory, Culture and Society* 53.

mirrors the loosening of bonds in the traditional family but is at an accelerated rate.

#### **6.2.4 Sub Theme of Identity**

Identity was a sub-theme also linked to the other two main themes of the autodidactic consumer and the re-imagining of international surrogacy. It thus pervaded as a theme in the stories and many of the aspects of academic discourse on identity as discussed in chapter two were present. All identities were ultimately linked to the child either through a desire to become a recognised parent to the child, a desire to have a genetic link to the child or a desire to give the child a strong identity of their own. For the expert system, particularly the judiciary, the child's identity was linked to their family identity and giving effect to that identity was considered the best way to ensure the child's welfare and needs were met. For example, Sir James Munby In Re X (A Child) (Surrogacy: Time Limit)<sup>757</sup> stated that 'section 54 goes to the most fundamental aspects of status and, transcending even status, to the very identity of the child as a human being.'<sup>758</sup>

Identity came through strongly as a theme in the court judgments as much as the witness statements and parental order reports. This was in relation to both the child's future identity and that of the commissioning parents who were faced with establishing a new role as a parent and unravelling what this would mean in terms of changes to the commissioning couple's lives. In the case of homosexual couples, discussions took place as to how terminology could be used to differentiate their dual status as fathers. For couples seeking a positive ethnic match identity was expressed in terms of physical sameness and the majority of the commissioning couples problematized how they would explain the surrogacy arrangement to the child when discussing their origins. The problematizing of recognition and identity for commissioning couples can therefore be broadly discussed in terms of identity through genetics, identity through ethnicity, identity as parents and finally the future identity of the child.

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<sup>757</sup> Re X (A Child) (n 51).

<sup>758</sup> *ibid* [54].

#### 6.2.4.1 Identity Through Genetics

All but one of the case files involved gestational surrogacy where the surrogate acted as a host body for the embryo rather than using her own gametes to aid conception, which would then have given her a partial genetic link to the child. For those commissioning couples able to use their gametes gestational surrogacy and identity were inextricably linked. For example:

*(Name of first applicant) said that as it was her egg and her husbands (sic) sperm that created their son she felt this made it easier for the surrogate as it was like incubation rather than giving to a child that was the surrogates (sic) own genetic material. She also thought this would be important for (name of surrogate child) to know who were her genetic parents.*

(File 13, POR).

One commissioning mother was able to breast feed the child with the assistance of hormone tablets and massage to induce milk and she reported that this gave her an even greater bond with the child in addition to the genetic connection. A genetic connection became a way to express a desire to achieve intimacy with the child.

However, only a small proportion of commissioning mothers were able to use their eggs. For the majority this meant that only one part of the couple had a genetic connection. This was also the case for many of the homosexual couples although they had a choice to designate one parent as the genetic parent and to switch this genetic profile for a second child. As such, in the case of the non-genetic parents, intimacy through a genetic connection was often achieved by proxy.

Whilst egg donors were used for many of the births couples did not usually consider the egg donor for the purposes of the discussion of the child's origins and identity. In many of the cases the egg donor remained anonymous sometimes through legal requirements and sometimes through choice of the

egg donor. As the name of egg donors does not appear on birth certificates this meant that for many of the children it would not be possible to establish their heritage or meet their biological mother. Clinics did however provide medical histories of egg donors and in some cases a description of the egg donor's physical appearance or a photograph of the egg donor. However, some clinics did not provide any details as a matter of course. The PORs rarely discussed the issue of tracing the egg donor in the future, instead the focus was on tracing the surrogate although in most of the case files the child had no genetic link to the surrogate.

#### **6.2.4.2 Identity Through Ethnicity**

There were issues of identity for some of the commissioning couples in terms of racial matching and matching of physical features as well as religious alignment with the surrogate. Ragoné<sup>759</sup> argues that gestational surrogacy has allowed attitudes to race, ethnicity and gender to be transfigured so that differences are set aside or deemphasized between surrogates and commissioning couples. In Ragoné's research surrogates viewed race in a way that was positive to their feelings of acting as a gestational carrier rather than as a mother to the child. Carrying a child that was not of the same ethnicity as the surrogate meant, in the surrogate's view that they were less likely to think of the child as their own. Race therefore allowed the surrogate to distance herself from the child. This was also beneficial to the commissioning couple as the surrogate was less likely to become attached to the child or view the child as her own. This, Ragoné argues, has added another tier to relatedness in addition to relatedness issues that occur when a commissioning mother does not have a genetic link to the child.

Commissioning couples also viewed race positively when they were able to find surrogates or egg donors with the same, or sufficiently close, ethnic match to their own as it reinforced the genetic connection that the commissioning mother could also share by proxy. Race was not an issue in the choice of surrogate. In the case of one case file where the commissioning couple were described by

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<sup>759</sup> Ragoné (n 567).



the POR as 'white,' the couple chose both an Indian surrogate and an Indian egg donor. Their decision was explained as follows:

*Information given to me by Mr (name of first applicant) and Ms (name of second applicant) told me that they used eggs from an Indian donor. Due to Ms (name of second applicant)'s background they believed the match would be better for them and was a less expensive option than trying to acquire an egg from a European donor.*

(File 9, POR).

The physical appearance of the mother in terms of her skin colouring (which was described as 'European') was regarded as sufficiently close enough in colouring to an Indian surrogate allowing concern for physical sameness to be replaced by a concern to minimise cost in this particular case.

In the same file the issue of ethnicity was later raised as an identity issue in the parental order report:

*As stated earlier in this report both children are of Anglo-Indian heritage. Due to the cultural and ethnic origin of their parents these children will be brought up in a white British household. Mr (name of first applicant) and Ms (name of second applicant) have stated that they will in time and when the children are able to understand; inform them of their ethnic origin. Until then they are confident that their family, local community and the children's school are culturally diverse enough to be able to provide support for (names of surrogate children).*

(File 9, POR).

The children's cultural identity was an issue raised by the POR in this case as one that required careful handling by the commissioning couple. It is interesting that race that could be regarded as unimportant for donor selection was later highlighted as a possible issue of identity for the child in the future. The case also raises interesting issues about the use of the term 'white' that disguises other racial identities that a person may possess that belies their colouring.

In another case file the commissioning couple used two surrogates to achieve a double pregnancy. The POR referred to this as a 'calculated move' to pre-empt a proposed change in the law in the jurisdiction to prevent same-sex couples accessing surrogacy. The POR was particularly concerned by the fact that the commissioning couple who were of different ethnicity and had each chosen to father a child with a different surrogate. This produced one child related to one father and twins related to the other father. This in turn meant that whilst there were benefits in acquiring an instant family of five, the children had different ethnic appearance. Therefore an attempt by this family to produce genetic sameness in terms of relatedness to one father led to genetic and racial differences within the same family unit.

Religious affiliation with the surrogate was also an important component of identity for one couple in the sample:

*We are also of Hindu religion and wanted someone practising the same religion so that the care for the baby in the uterus was the same spiritually as though I was carrying the baby.*

(File 7, first applicant).

Hudson and Culley<sup>760</sup> argue that it is precisely because of historical conflicts between different religious communities such as the Hindu or Muslim communities that would lead commissioning couples of Indian descent to actively seek out a surrogate with the same religious affiliation. Thus like a genetic connection, race and religion also became a way to express intimacy in the child-parent relationship.

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<sup>760</sup> C Hudson and L Culley, 'Infertility, Gamete Donation and Relatedness in British South Asian Communities' in T Freeman, S Graham, F Ebtehaj and M Richards (eds) *Relatedness in Assisted Reproduction: Families Origins and Identities* (Cambridge University Press 2014).

#### 6.2.4.3 Identity - Laying Claim to Parentage

None of the five women who were able to use their own gametes (and therefore had a biological link to the child) could legally be regarded as the mother at birth under UK law.<sup>761</sup> However, the narratives suggested mothers still described themselves as parents and mothers at the time of birth and before a parental order had been granted:

*On a personal note, being a mum is THE best feeling in the world, and I am absolutely loving my new role. (Name of child) is the most precious thing in the world and both (name of husband) and I feel very lucky and truly blessed.*

(File 10, statement of second applicant).

*Holding my own babies was an incredible moment that I still cherish!*

(File 2, first applicant).

Signe Howell<sup>762</sup> argues that a forgotten aspect of kinship is the navigation of new relationships with the newborn child where the kinship is not dependent on biology, a common feature of adoption. As such the mother and child must forge a new identity for themselves and this becomes part of the parent-child identity. Similarly in surrogacy cases a commissioning mother without a biological or genetic link to the child must undergo a new process of aligning her own identity with that of the child – what Howell terms ‘Kinning’<sup>763</sup>.

In the case of most couples, there was a unilateral ownership of the legal status of parenthood after the birth and before the grant of a parental order. The ownership was unilateral in the sense that the couples did not depend on a

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<sup>761</sup> See HFEA 2008, s 33.

<sup>762</sup> S Howell, ‘Kinning: the Creation of Life Trajectories in Transnational Adoptive Families’ (2003), 9 (3) *Journal of the Royal Anthropological Institute* 465.

<sup>763</sup> *ibid.*

formal ascribing of parenthood but felt able to claim parentage for themselves based on the outcome of the surrogacy arrangement, namely a live birth. This became a way to self-label themselves as parents.

There were differences to be found between the heterosexual couples' construct of parentage as against the homosexual couples. Whilst all focused on how they could make life better for the child or children, like the research by Abbie Goldberg et al<sup>764</sup> there was evidence that homosexual couples placed greater emphasis on values when discussing how they would parent. Social parentage became the longed for status. Relatedness was often by proxy through the genetic parent for the non-genetic parent but the concept of parentage had no biological constraints.

Couples went through a post-birth stage of parenthood adjustment when they adjusted to new labels for themselves (self-labelling) and new labels imposed by society that one might term 'societal-labelling.' In relation to self-labelling, discussions took place between the POR and many of the homosexual couples as to how they would differentiate their individual fatherhood status through the use of terminology. Labels were used to distinguish birth mother and eventual mother and to distinguish between fathers in a same sex union. Couples selected their own parental labels in order to insert a difference in to the sameness of the father terminology and this included adopting labels such as 'Daddy' for one father and 'Dada' for the other or 'Popa' and 'Papa.' These were labels that commissioning couples chose for themselves based on their own understanding of identities and order of importance in the care-role.

The societal labelling process required the couples' own identity as parents to be confirmed by third parties, namely the POR and the court. The PORs interviewed commissioning couples with the children to observe their parenting

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<sup>764</sup> AE Goldberg, JB Downing and AM Moyer, 'Why Parenthood and Why Now?: Gay Men's Motivations for Pursuing Parenthood' (2012) 61 (1) Families, Relationships and Societies 157.

qualities and used measures such as the 'Parenting Daily Hassles Scales'<sup>765</sup> to record levels of stress exhibited by the commissioning couple to daily parenting tasks. When examining whether the child's needs were being met the PORs focused on 'loving and nurturing' environments, 'alert and responsive' and 'happy and healthy' children and the development of emotional bonds with descriptions of the parenting role of the commissioning couple such as:

*They both play an active role in ensuring (name of child) has all the love, stability and support to flourish through to adulthood.*

(File 1, POR).

Addressing the role of the commissioning couple as well as their parental abilities:

*...they have the "aptitude, patience, time and resources" to also be "great" parents to second child.*

(File 14, POR).

The POR also reported on the couples care-giving role by describing aspects of family life relating to provisions made for the child in terms of clothing, toys and baby equipment and commenting on how well equipped the house was for caring for children. The grant of a parental order became no more than a formality and a legal necessity for these couples. The conferment of legal parenthood was understood by most commissioning parents to take place at the handover of the child and again upon assessment of their parenting skills by the POR.

#### **6.2.4.4 Identity Through Origins**

Within the study most of the commissioning couples spoke to the POR of an intention to reveal the child's origins through story-telling and photographs

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<sup>765</sup> These are Department of Health questionnaire designed to measure the extent of coping strategies for stresses of daily parental tasks. This questionnaire is adapted from KA Crnic and CL Booth, 'Mothers' and Fathers' Perceptions of Daily Hassles of Parenting Across Early Childhood', 53 Journal of Marriage and the Family 1043.

Disclosure of the child's origins was a conversation that was recorded in the majority of the parental order reports. In terms of story-telling most of the couples reported that they would tell the child about their origins at an early age using a mixture of stories and photographs:

*Mr (name) and Mrs (name) have many photographs of (name of child) virtually from her conception and throughout the surrogate's pregnancy with her. They intend to make a book for (name of child) to look at which explains the process and allows her to view her life from the outset. They are also aware of literature that will help her to understand this and plan to read this with her from an early age so it becomes a part of her life as she grows up.*

(File 27, POR).

All couples indicated an intention to tell the child about their origins at an early stage although some couples had yet to give thought as to how this would be done but were assisted by discussing various methods with the POR.

### **6.3 The Autodidactic Consumer**

Michel Foucault<sup>766</sup> argues that power is enabled through knowledge. One can see this operating in two ways within the data set, knowledge acquired by the commissioning couple gives them power to navigate and negotiate the expert system but equally knowledge of the science of reproductive medicine and its choices also means subjugation by commissioning couples both financially and in terms of the provision of their own gametes to the clinics who in turn control the outcome together with the surrogate. Knowledge acquisition therefore can have both positive and negative effects.

Commissioning couples were viewed as autodidactic in the sense that they became self-taught about some aspects of the social, administrative and legal processes involved in international surrogacy. There was therefore a self-

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<sup>766</sup> Michel Foucault, *Discipline and Punish: the birth of a prison* (Penguin 1991) and Michel Foucault, *The History of Sexuality: The Will to Knowledge* (First published 1998, Penguin 2008).

acquisition of knowledge. Commissioning couples were also capable of meeting the definition of consumer within section 2 (3) of the Consumer Rights Act 2015:<sup>767</sup> ‘an individual acting for purposes that are wholly outside the individual’s trade, business, craft, or profession’<sup>768</sup> and where they enter into a contract for good or services provided by a trader.<sup>769</sup>

As consumers, they often had limited knowledge to enter in to contracts with clinics. Paradoxically whilst they might satisfy the legal definition of consumer, their rights are not recognised primarily because such contracts are not enforceable in the UK. As consumers commissioning couples are denied protections such as the right to a price reduction<sup>770</sup> or restricting the trader to a reasonable price when the contract fails to include a fixed price for part of the service.<sup>771</sup> As surrogacy contracts involve parties from different countries then international contract law would normally apply unless the parties agree to be bound by UK law. Yet international contracts would not be recognised in the UK for surrogacy purposes.

Whilst choosing their subject (the country where the surrogacy would take place) commissioning couples then had to familiarise themselves with processes and procedures relating to that chosen subject. Some couples already had a formal education in their chosen subject, particularly if they had been through a surrogacy arrangement before or had acquired knowledge from others who had been through the process. However many were novices. There was access to ‘teachers’ (surrogacy agencies, clinics and lawyers) for some aspects of the process, other aspects required study time on their part to research information that others were unable to provide or where they were unable to afford the cost of additional teachers to fill the knowledge deficit. Such couples were self-taught consumers accessing a service abroad. All the couples were able to pass on their experiences to the court through their

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<sup>767</sup> Consumer Rights Act 2015 (CRA 2015). This Act came in to effect on 1<sup>st</sup> October 2015.

<sup>768</sup> *ibid* s 2 (3).

<sup>769</sup> CRA 2015, s 2 (2).

<sup>770</sup> *Ibid* s 56.

<sup>771</sup> CRA 2015, s 51.

stories. This is particularly evidenced in the knowledge that the commissioning couples pass on to the courts unfamiliar with a new and emerging practice of international surrogacy, especially in relation to the surrogacy laws in different jurisdictions.<sup>772</sup>

The autodidactism was also categorised by a purpose driven search for knowledge of how to pass on to a future status (parenthood) and to explain that process to others knowing that this might sometimes be met with disapproval, as well as seeking knowledge of how to explain to the child their identity and origins when the commissioning couples were themselves acquiring new identities. The accounts in the witness statements and parental order reports suggested that in terms of their knowledge search the commissioning couples preferences or goals were more utilitarian directed to one of fulfilling happiness associated with becoming parents and care givers.

#### **6.3.1 Autodidactism and Risk Aversion Choices**

Lorraine Culley et al<sup>773</sup> note from their study of clinicians and counsellors and other support workers involved in fertility treatment that whilst patient-choice is respected there is an acknowledgement that the patient autonomy operates within a range of risks and that the state does not offer sufficient protection from ‘the risk-laden abroad.’<sup>774</sup>

For the couples the state of childlessness meant that they assumed risks in travelling abroad to unfamiliar legal and administrative systems, paid sums of monies that often increased beyond their original expectations, formed relationships with strangers, entered in to non-UK contracts arranged by brokers and endured geographical separation from family and friends. Some couples entered surrogacy contracts within jurisdictions that did not formally recognise surrogacy and relied on third parties to assist them in obtaining some

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<sup>772</sup> Eg Re S (n 53) which migrated knowledge of the laws in California, Re W (n 53) which migrated knowledge on the surrogacy laws in Nevada USA and A & B v SA (n 569) which migrated knowledge about surrogacy laws in Russia.

<sup>773</sup> Culley et al (n 748).

<sup>774</sup> *ibid* (n 813), 53.



form of legal recognition of their parental responsibility for the child. Choices were made to expose themselves to levels of risk, but risk in this sense meant uncertain outcomes.

When exposed to uncertainty couples then tried to reduce that uncertainty through their own efforts either by negotiation (with the clinic or surrogate) or engaging with the legal structures that they encountered abroad. The time and effort in taking purposive action meant that commissioning couples were not merely actors who were enslaved products of their own environment but individuals making choices even if those choices might be externally affected by the social facts<sup>775</sup> in their world schemas. This choice was a risk-aversion choice - a decision to gamble on a given outcome aware of risks that might lead to known or unknown outcomes but deciding to take the perceived lesser risk of surrogacy as against the perceived greater risk of childlessness.

#### **6.4 The Re-Imagining Theme**

The final theme identified was Re-imagining – this theme encompassed the way that commissioning couples reframed their experiences in the court narratives in to largely positive experiences and how the judiciary reframed cautionary messages about international surrogacy in to a positive narrative about family identity and reframed the law in order to achieve this. Whilst the expert system has the power through coercion to alter the parties ‘social facts’ in the way that they view, feel, think or act within the network this was less affective in relation to judicial messages but more affective in relation to advice from clinics and international lawyers.

The detraditionalisation of reproduction paradoxically did not mean the detraditionalisation of the family this was because the two-parent model remained the norm. Parentage was seen as developmental to a relationship yet

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<sup>775</sup> See Emile Durkheim’s definition of social facts as being a way of acting, values or norms, which are external to the individual but which can operate through constraint to control the individual. They can include institutions and group membership. See Emile Durkheim, *The Rules of Sociological Method: and selected texts on sociological methods* (First published 1895, Free Press 2014).

at the same time it was not necessary that the child should be a product of that relationship. Instead couples focused on how to become parents through their own actions rather than through their sexual union. They identified parentage as an action rather than a biologically ascribed title. This verb parenting was one that focused on doing rather than being and was achievable with or without a genetic connection and so was a role that could be shared by both partners regardless of biology. This demedicalisation of parentage by removing the importance of biology or genetics from parenting also served to democratise it and couples felt comfortable enough to adopt self-labelling to give themselves new titles that meant something to them and captured their understanding of parenthood.

Whilst a genetic connection was not necessary for the assignation of parentage it was considered to be a factor that might ensure deeper levels of intimacy in the child-parent relationship through identity but this intimacy was also capable of being achieved by the non-genetic parent in the knowledge that the child was genetically connected to their partner. Some couples also associated intimacy with race and religious affiliation.

For the commissioning couples success was reframed as taking opportunities (medical treatment) in the face of adversity (childlessness) to achieve a desired outcome (parenthood). Couples either focused on the wellbeing of the surrogate or on the clinics ethical business practices. Any vulnerability felt by commissioning couples within the network was ameliorated by the positive feelings towards the child and their new parenting role after exiting the network. Acquiring knowledge also helped the commissioning couples to re-imagine issues of vulnerability as one where they were in control of the process and able to acquire resilience.

The re-telling of their story also acted as a reflective tool for commissioning couples to consider how they might contribute to changes to an understanding of international surrogacy. The narratives re-imagined surrogacy not as exploitative or harmful but as a space where parties could meet for mutual benefit and where temporary relationships could be formed with the chance for

longstanding friendships to emerge. It also enabled commissioning couples to re-imagine their own roles within society as parents and caregivers who had chosen a route that was not widely understood or accepted. By re-telling their stories couples were able to give expression to their journey and consider how the same stories would be re-told in the future to the child. Story telling thus acted as a reflective tool for future dissemination of the process that the couples had completed and the origins of the child.

## **6.5 Conclusion**

Temporary social displacement caused by the decision to seek medical solutions for childlessness abroad lead to the displaced actors within networks becoming self-knowledgised and passing this post experiential reflexive knowledge on to the judiciary through story-telling and the reframing of international surrogacy. The judiciary in turn assimilated, reformulated and passed on the knowledge through a new form of judicial mood music, one in which identity was at the core of the decision-making and moralising took a back seat as an intentionalist approach was taken to the meaning of family. The judicial mood was pro-family formation to the extent that the judiciary were prepared to make a concerted attack on the criteria in section 54 of the 2008 Act to remove boundaries to the acquisition of parenthood.

The narratives also provide a new understanding of the social capital harnessed in surrogacy networks and the experiential knowledge that passes by osmosis in to the social consciousness and this in turn provides an opportunity for social movement through calls for action. The reflexivity nature of the commissioning couples accounts held value for the judiciary in re-assessing international surrogacy.

All the commissioning couples relied to some extent on the actions of others (mainly medical and legal professionals) to bring about a stable social order in the surrogacy process through the handover of the child to the commissioning couple. However there was also an enforced dependency on their own resilience and knowledge acquisition to ensure the parentage process did not risk derailing their plans for creating a new family unit. There was however also

a knowledge deficit about the legal process that meant couples often had to carry out additional research on their own and take additional steps to obtain legal parentage status.

The formation of networks and relationships enabled a collaborative approach to international surrogacy that navigated any potential for shame and guilt related to moral or ethical issues surrounding the practice. However, the collaboration was not without its difficulties as a power-dependency operated in the background that created exposure to vulnerability.

Nevertheless connections formed within the collaborative exchange networks were capable of continuing post-birth. The post-birth connectedness between the surrogate, the commissioning couple and the child arguably has the ability to put the child in a new family setting outside the immediate nuclear family that has spatial dimensions. It becomes a new distant influence for regulation to address.

## CHAPTER SEVEN

### International Surrogacy - Some Reflections on Reform

#### 7.1 Introduction

Anthony Giddens<sup>776</sup> argues that democracy within the public sphere is an essential condition for the democratising of personal relationships including those between parent and child.<sup>777</sup> Legal structures are also important in the democratisation process and as can be seen from chapter five the legal structures have already begun the move towards the recognition of the democratisation of reproduction through surrogacy. Rather than debating whether surrogacy should exist as a practice, the courts have focused on how an already completed process can be given societal recognition for the benefit of the child's future identity and wellbeing.

Part of the continuing legal discourse remains how exploitation and harm can be minimised and how private family relationships and kinships can be protected across borders. This would involve a recognition that family structures, as Beck<sup>778</sup> argues, are 'crumbling social structures'<sup>779</sup> which are reforming as a result of modernisation in to the social process of 'individualization'<sup>780</sup> whereby individuals take charge of their life-plan or 'biographies' which are themselves fluid and can be produced and reproduced through self-reflexivity. Restricting surrogacy would, it is argued, have the effect of restricting the richness and flexibility of new forms of biographical parentage, family and kinship. International surrogacy brings new forms of connectedness for family lawyers to grapple with. David Morgan<sup>781</sup> argues that the focus of family policy should be on the practices that individuals acquire as a result of

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<sup>776</sup> Giddens (n 328).

<sup>777</sup> *ibid* 195.

<sup>778</sup> Ulrich Beck, *Risk Society: Towards a New Modernity* (First published 1992, Sage Publications 2009).

<sup>779</sup> *ibid* 104.

<sup>780</sup> Beck (n 778) 135.

<sup>781</sup> DHJ Morgan, 'Risk and Family Practices: Accounting for Change and Fluidity in Family Life' in EB Silva and C Smart (eds) *The New Family?* (Sage Publications 1999).

having significant ties to others and this should be the basis of investigation and policy-making.

The political aspects of liberalism<sup>782</sup> that exists in the UK legal structures also means that international surrogacy is likely to continue to be recognised within the UK. The mutualism and risk discourse of the courtroom suggests that more, not less regulation is needed. It is argued that regulation rather than soft law is the best way to address issues of potential vulnerability of the parties, risks of exploitation and any reduction in a woman's dignity. Any risks of child trafficking through surrogacy can be addressed through the UK's existing criminal legislation.<sup>783</sup> Equally, democratising the reproduction market may also address power-dependency relationships by ensuring that there is judicial oversight to provide 'balancing operations.'<sup>784</sup> The United Nation's Educational Scientific and Cultural Organisation (UNESCO) has also issued guidance to states on the ethical considerations in relation to bioethics in the field of medicine, life sciences and assisted technologies in Article 3 (2)<sup>785</sup> that could form part of any future regulation.

The official statistics discussed in chapter one suggest that the number of international surrogacy arrangements is growing year on year as such there is a risk that a black market will emerge if international surrogacy is banned. In the absence of regulation the risk of exploitation and harm is also likely to increase. This can be seen by the fact that jurisdictions such as Thailand, Cambodia and India have during the period of this research banned international surrogacy, yet reports suggest that surrogates are simply travelling to neighbouring jurisdictions where the practice is still permitted or left unregulated and that a

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<sup>782</sup> Used in this sense to mean a philosophical attitude in favour of liberty and equality.

<sup>783</sup> Eg the Modern Slavery Act 2015, s 2.

<sup>784</sup> A term used by Richard Emmerson to denote the balancing of power through the ability of weaker members of a network to form coalitions or for resources to be redistributed within the network to protect weaker members. See RM Emmerson, 'Power-Dependence Relations' (1962) 27 (1) American Sociological Review 31, 34.

<sup>785</sup> UNESCO, 'Universal Declaration on Bioethics and Human Rights' (2005) 57 (186) International Social Science Journal 745.

trade in exported gametes has emerged particularly in jurisdictions such as Laos.<sup>786</sup>

Surrogacy involves children who are not in a position to assert any rights pre-contract and for this reason it is important that the court retains its *parens patriae* position and a degree of legal paternalism remains vital in this area of law. Whilst there is no doubt that regulation will encroach on aspects of family and private life, it is important to remember that such rights are not absolute rights and some interference in those rights can and should be justified as long as safeguards are in place to ensure that state interference is minimal. Brazier<sup>787</sup> observes that surrogacy is by far the most dangerous of the different forms of assisted regulation but is the least regulated

Autonomy within the boundaries of legal paternalism should therefore be the aim of future regulation. Whilst some degree of familial privacy is disturbed, personal autonomy can remain within the hands of commissioning couples through free choice to choose surrogacy as a method to start a family, a degree of choice of jurisdictions and clinics abroad and choice as to how to raise and care for the child. Personal autonomy would exist because commissioning couples can continue to make the choice to use international surrogacy regardless of any moral disapproval and autonomy would extend to privacy of parenthood and child-rearing post-birth.

## **7.2 Revisiting Agenda Setting and Implementation**

What is needed is a return to the agenda setting stage<sup>788</sup> to redesign the UK policy on surrogacy but with attention paid to the particular features of

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<sup>786</sup> Eg the recent media coverage of the transportation of vials of semen in to Laos, BBC News Online, 'Thai Police Arrest Man Smuggling Semen in to Laos' <<http://www.bbc.co.uk/news/world-asia-39663671>> accessed 21 April 2017.

<sup>787</sup> M Brazier, 'Regulating the Reproduction Business?' (1999) 7 (2) Medical Law Review 166, 183.

<sup>788</sup> See the policy cycle originally developed by Harold D Laswell, *The Decision Process* (Maryland, University of Maryland Press 1956) setting out the various stages of policy design as agenda setting, policy formation, decision making, implementation and evaluation.

international surrogacy. Kirsty Horsey and Surrogacy UK<sup>789</sup> advocate a change in the surrogacy laws that promotes altruistic domestic surrogacy as the first choice for UK commissioning couples with IVF surrogacy made available through the NHS in accordance with the NICE guidelines. On the question of international surrogacy the report states:

While we do not believe that travelling internationally to access surrogacy should be prohibited (nor do we think this could be properly enforced), we would like to see the numbers of people who do so decrease.<sup>790</sup>

However, the empirical research from this thesis suggests that the reasons commissioning couples choose international surrogacy is partly because of the long waiting lists of UK surrogacy agencies, better success rates of overseas clinics and greater opportunities for ethnic matching with egg donors. These deficiencies in the home surrogacy market cannot be cured overnight and international surrogacy will continue to flourish and so an opportunity should not be missed to introduce regulation that specifically addresses the growing demand.

One couple in their report to the court described the UK surrogacy market as 'fraught with danger'<sup>791</sup> because they held the perception that the courts favoured the surrogate in terms of parentage rights. They were also concerned that there was a lack of anonymity of donors in the UK and felt that they would have less say in determining whether or not the surrogate adopted a healthy lifestyle during the pregnancy. For such couples a prohibition on international surrogacy would not be a deterrent to prevent them from travelling overseas to access the practice neither would it lead to a reduction in the practice. If the only sanction is a non-entitlement to a parental order then couples are likely to by-pass the legal system altogether. This would mean that the court would not

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<sup>789</sup> Horsey (n 198).

<sup>790</sup> *ibid* 38.

<sup>791</sup> Section 4.2 of thesis - File 9.



have an opportunity to assess the child's wellbeing and the couples' future intentions.

### **7.2.1 Interim Measures**

The stories described in chapter four and the emerging case law suggests there is an urgent need for International surrogacy for UK couples to be addressed now within the statutory framework to ensure the parties are protected and to assist them in navigating risks. An international Convention on international surrogacy could take many years to come to fruition. Whilst the outcome of the Hague Conference on Private International Law's deliberations on an international Surrogacy Convention are awaited there would be nothing preventing the UK government working closely with those host countries that currently receive UK commissioning couples. This can be achieved by reaching bilateral agreements with jurisdictions that have a proven track record of regulation, compliance and accreditation of the surrogacy industry.

The US and India were the most popular destinations for UK commissioning couples in the case files. Whilst India has now restricted its surrogacy market the UK could still develop bilateral agreements with states in the US. The US is a popular destination for UK couples, 40% (N = 12) of the reported judgments in the data set involved surrogacy arrangements in the US and 41% (N = 13) of the case files. An international code of practice adopted by all overseas clinics from such jurisdictions with an awareness of the legal requirements for formalising parentage in the UK is also needed and this is discussed at 7.8.

The Foreign and Commonwealth Office could also provide couples with information about jurisdictions where surrogacy is available to UK couples and where there are safeguards in place through regulation. This could be achieved by this department adding to their current 2014 guide on surrogacy.<sup>792</sup> The provision of this service would be similar to the general information made

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<sup>792</sup> Foreign and Commonwealth Office (FCO), Surrogacy Overseas (Foreign and Commonwealth Office 2014) at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/477720/new\\_1.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/477720/new_1.pdf) accessed 16 June 2017.

available through the Foreign and Commonwealth Office website about specific jurisdictions where international adoption is permitted.<sup>793</sup>

This would still leave the question of the different surrogacy orders made across jurisdictions and even within the US itself. Some agreement would be needed on the recognition of differing parentage orders across jurisdictions. The American Bar Association (“ABA”) have previously called for any final draft Convention from the Hague Conference on Public International Law to allow for cross-border recognition of parentage judgments.<sup>794</sup> The Hague Conference have indeed convened an expert panel to consider parentage in surrogacy across jurisdictions.<sup>795</sup>

The ABA also state in the same document that individual member countries should be allowed to continue to regulate surrogacy within their own borders as they see fit which would mean that overseas parentage judgments could continue to be ignored. As US states have differing parentage judgments in relation to surrogacy this could prove problematic. If for example, UK commissioning couples received an adoption order from a US state that does not have any specific laws governing surrogacy then this could cause conflict in view of the provisions of section 83 of the Adoption and Children Act 2002<sup>796</sup> as previously discussed in chapter one. This would mean that surrogacy would need to become an exception to the provisions of the 2002 Act or that the UK should move towards recognising pre-conception orders before the surrogacy process begins that would then trump any subsequent parentage orders in the host jurisdiction.

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<sup>793</sup> See FCO <<https://www.gov.uk/search?q=adoption>> accessed 16 June 2017.

<sup>794</sup> See American Bar Association Report to the House of Delegates February 2016 at <<http://apps.americanbar.org/dch/committee.cfm?com=FL142000>> accessed 20 May 2017.

<sup>795</sup> Hague Conference on Private International Law Parentage/Surrogacy Project <<https://assets.hcch.net/docs/ed997a8d-bdcdb-48eb-9672-6d0535249d0e.pdf>> accessed 4 September 2017.

<sup>796</sup> ACA 2002, s 83. See the discussion of the risk of breaching this provision in cases such as *Re G and M* (n 318) and *CC v DD* (n 124).

The surrogate is trading reproduction as a service and the commissioning couple are obtaining the services of the womb (and sometimes the gametes from a third party). It is purely a contractual venture and the accounts in chapter four suggest that the parties themselves viewed the arrangements as contractual, regardless of its non-contractual status in UK law. Like services that are offered at no cost, the surrogate may choose not to charge for her services (altruistic trade) or she may choose to make a charge (commercial trade). However, the risks must not be underestimated and to this end a state sponsored national education programme on international surrogacy would be beneficial and this is discussed below.

### **7.3 A National Education Programme**

The autodidactic consumer that is a feature of this research, whilst commendable as determined actors, should not be permitted to travel the road of international surrogacy alone. In order to minimise risks, stresses and anxieties a national education programme about international surrogacy should be a key feature of the government's commitment to recognising this method of family formation. The accounts suggest that the commissioning couple's knowledge deficit far exceeded the knowledge acquisition and this is a cause for concern. However, it is not just commissioning couples who would benefit from an education programme, lawyers, PORs and members of the judiciary have all at various times and in various ways shown an ignorance of the nuances and complexities of this area of the law particularly in relation to understanding the laws that operate within another jurisdiction.

The HFEA and for the Department of Health could be the main organisations responsible for publishing guidance for commissioning couples and medical professionals in the field whereas the Judicial College<sup>797</sup> should be responsible for ensuring that Judges are properly trained across all levels of the family courts and are equipped to deal with international surrogacy cases, including familiarity with parentage laws and orders in other jurisdictions. Similarly

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<sup>797</sup> This is the organisation responsible for training judges in all courts and tribunals in the UK and was established to discharge the Lord Chief Justice's statutory obligation to provide judicial training under the Constitutional Reform Act 2005.

Cafcass should ensure that all its PORs are equipped to deal with international surrogacy cases and in particular to prepare reports about complex areas of law in other jurisdictions. It is recommended that PORs avoid making any assessment in their reports on the question of reasonable expenses and this should remain within the realm of the judiciary who are better able to assess past cases.

Horsey and Surrogacy UK would go further with proposals for an education programme and extend this to include schools and have called for surrogacy to be taught as part of sex education within the curriculum.<sup>798</sup> However, it is prospective parents rather than children who need to be educated about the process although there is merit in educating children about the different forms a family can take including donor-conceived children and this is something that already happens within most schools.

Part of the education of participants and experts should include a recognition that surrogacy should no longer be thought of as simply a treatment of last resort. The 10<sup>th</sup> Statement of European Society of Human Reproduction and Embryology (“ESHRE”)<sup>799</sup> considered the ethical issues of surrogacy and concluded (like the BMA in 1996) that surrogacy was a morally acceptable method of assisted reproduction but only as a last resort.<sup>800</sup> The Task Force of the ESHRE also stated that medical practitioners were not morally or legally obliged to become involved in surrogacy as a form of treatment.<sup>801</sup> Designating surrogacy as a treatment of last resort ignores the fact that for same sex couples that are childless, it is often a treatment of first choice. Adoption in contrast was reported as a difficult and complex alternative to surrogacy by both heterosexual and homosexual couples.

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<sup>798</sup> Horsey (n 204) 7.

<sup>799</sup> European Society of Human Reproduction and Embryology Task Force, ‘ESHRE Task Force on Ethics and Law 10: Surrogacy’ (2005) *Human Reproduction* 20 (10), 2705.

<sup>800</sup> *ibid* 2707.

<sup>801</sup> ESHRE (n 798), 2707.

The position of the BMA and ESHRE differs from that adopted by the Ethics Committee of the American Society for Reproductive Medicine (“ASRM”)<sup>802</sup> who consider that surrogacy has become a common practice that need not be exploitative if certain safeguards are put in place to protect the parties:

If the gestational carrier is adequately protected and compensated, gives fully informed consent, and receives health care and psychological and emotional support, it is reasonable to conclude that gestational surrogacy arrangements are ethically justifiable and that intended parents should become the legal parents of the child.<sup>803</sup>

This is a marked shift from their 1990 recommendations<sup>804</sup> in which they recommended clinics should pursue surrogacy arrangements as a “clinical experiment”<sup>805</sup> to enable observations of the psychological effects of the procedure on the parties, the possibility of bonding of the surrogate with the child and procedural issues such as screening and whether the parties should meet during the process. Thus some parts of the medical profession appear willing to accept that surrogacy might have earned a place as a routine fertility treatment subject to certain safeguards.

A national education programme should also address the fact that a social parent is just as important as a legal parent. Much of the academic debate about the surrogate’s legal entitlement to be recorded as the legal mother of the child fails to recognise the genetic or biological contribution of the egg donor. Where the surrogate acts only as a gestational carrier and the egg donor has requested anonymity (or anonymity is imposed by law), ascribing legal rights of the surrogate over the rights of the egg donor or the donor commissioning mother on a purely biological would appear less defensible. There is of course

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<sup>802</sup> See Ethics Committee of the American Society for Reproductive Medicine, ‘Consideration of the Gestational Carrier: a Committee Opinion’ (2013) 99 (7) *Fertility and Sterility* 1838.

<sup>803</sup> *Ibid* 1841.

<sup>804</sup> See American Society for Reproductive Medicine (ASRM), ‘Surrogate Gestational Mothers: Women who gestate a Genetically Unrelated Embryo’ (1990) 53 *Fertility and Sterility* 64S.

<sup>805</sup> *ibid*, 67S.

the biological argument of ‘pregnancy bonding’ with the child that the surrogate has and the epigenetic<sup>806</sup> effects passed to the child in the womb. However, if one also considers that bonding can occur immediately after birth (especially where the commissioning mother is encouraged to breast feed) and that epigenetics can occur as a result of environmental factors<sup>807</sup> as much as biological factors then the biological basis of ascribing female parentage again appears out dated.

### **7.3.1 Education Through Counselling**

Other professionals can also play an important role in the education of the risks associated with international surrogacy and this is through the compulsory counselling and assessment of the parties. The lack of compulsory counselling for parties involved in surrogacy coupled with the lack of assessment of the commissioning couple before the child is handed over to them, are arguably examples of where full regulation could remove some of the concerns and risks associated with surrogacy without completely eroding autonomy.

One might argue that compulsory counselling would be an intrusive measure for couples who have a full or partial genetic connection to the child especially as parents using ‘natural’ methods of conception would not be required to go through the same process. However, surrogacy is not the same as unassisted reproductive methods particularly because it involves a third party in the reproductive process. It involves new relationships that may bring new tensions. Surrogacy raises some complex issues about social interactions between the surrogate and the commissioning couple and the child that would not exist in a traditional pregnancy situation and this is where the counselling needs to be focused.

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<sup>806</sup> A process affecting foetal development through gene activity.

<sup>807</sup> See DF Bjorklund, ‘Mother Knows Best: Epigenetic Inheritance, Maternal Effects and the Evolution of Human Intelligence’ (2006) 26 *Developmental Review* 213 who argues that non-genetic maternal effects post-birth can also have an effect on a child’s genes.

It is important that overseas surrogates in particular receive counselling so that they are aware of risks associated with pregnancy and are aware of potential emotions that may arise at the handover stage of the child. Commissioning couples should be counselled in relation to their childlessness status and the possible emotions associated with handing over reproduction to another party and in the case of the non-genetic parent counselling should address how they will adjust to parenting a child who has a genetic connection to their partner but not to them.

It is also important that commissioning couples explore the idea of future kinships particularly as the case files suggest a preference to use married surrogates who have families of their own. This means that the surrogate child will have half-siblings that they may want to trace at a later date if contact is severed. It is not suggested that commissioning couples should receive counselling on how to parent. However, it would be disingenuous to suggest that surrogacy arrangements are just like having a child through natural childbirth simply because there is a genetic connection with one of the children.

The BMA accepted the views of psychologists such as Stratton<sup>808</sup> that the psychological effects of surrogacy were not any greater than those involved in conventional reproduction or other forms of reproductive technologies. They were however concerned about the lack of psychological support available to parties involved in a surrogacy arrangement.<sup>809</sup> They recommended that health professionals should actively encourage parties to a surrogacy arrangement to seek counselling.<sup>810</sup> The BMA also recognised that there could be potential psychological risks to the surrogate due to her attachment to the baby and psychosocial factors relating to post-natal depression.<sup>811</sup>

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<sup>808</sup> P Stratton, 'Does Surrogacy Raise Major Psychological Problems?' (1990) *Bulletin of the Society for Reproductive and Infant Psychology* 11 as referred to in BMA (n 25) 43.

<sup>809</sup> BMA (n 25) 3.

<sup>810</sup> *ibid* 60, recommendation 8.

<sup>811</sup> BMA (n 25) chapter 5.

Counselling is a requirement when surrogacy takes place in a UK licensed clinic.<sup>812</sup> Whilst both the 1990 and 2008 Act require licensed clinics to provide a 'suitable opportunity to receive proper counselling'<sup>813</sup> this is not the same as making counselling services mandatory. In addition the provision does not apply to private surrogacy arrangements. This means a surrogate in a private arrangement may not appreciate the full extent of her actions. With private surrogacy (unlike surrogacy treatment in a licensed clinic) there is no requirement that the surrogate must have given birth herself before agreeing to become a surrogate. The British Fertility Society's recommendation that the law should be amended to include counselling for all surrogacy arrangements was not taken forward.<sup>814</sup>

Many overseas clinics already offer counselling and assessment for international surrogacy either on a voluntary basis or as part of a requirement under their national laws. It would not be burdensome to require proof of attendance by commissioning couples in counselling and assessment schemes as part of an application for a parental order.

Counselling and assessment of the commissioning couple and surrogate should be a requirement in the same way that assessment is required under the Hague Convention on Inter-country Adoption.<sup>815</sup> Robert J Edelman<sup>816</sup> advocates compulsory counselling for parties involved in a surrogacy arrangement arguing that 'counselling can help to ease specific anxieties, facilitate decision making and ensure that issues are resolved at an early stage before difficulties have a chance to arise.'<sup>817</sup> He argues that whilst some research<sup>818</sup> suggests that surrogates have a negative experience the majority of available research suggests that surrogates adjusted well to being separated from the child.

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<sup>812</sup> See HFEA 1990, s 13 (6) as amended by the HFEA 2008, s 14 (3).

<sup>813</sup> See HFEA 1990, s 13 (6) as amended by the HFEA 2008, s 14 (6A).

<sup>814</sup> Brazier Report (n 54), [6.10].

<sup>815</sup> Hague Convention on the Protection of Children and Co-operation in Respect of Inter Country Adoption 1993.

<sup>816</sup> RJ Edelman, 'Surrogacy: the Psychological Issues' 22 (2) *Journal of Reproductive and Infant Psychology* 123.

<sup>817</sup> *ibid*, 132.

<sup>818</sup> For example, Blyth (n 253 and 414).



Jennifer Damelio and Kelly Sorenson<sup>819</sup> argue (when discussing surrogacy in the US) that rather than banning commercial surrogacy, states should offer a system whereby surrogates attend ‘contract pregnancy’ classes to be educated about the risks involved so that they are not exploited by third party brokers, lawyers or indeed the commissioning party.

It would be difficult for UK courts to enforce compulsory counselling or order that surrogates attend such classes. However, if counselling were made part of the parental order application process in the same way that mediation has now become a part of the divorce process, this would enable further time for reflection by the parties given the risks and complexities involved. The judiciary could make recommendations as part of a pre-parental order direction that some provision is made by the clinics for the parties to attend such classes or to make similar provisions.

Counselling provision need not be restricted to clinics. The British Infertility Counselling Association (“BICA”) has an accredited scheme under which infertility counsellors are qualified counsellors or psychotherapists and are required to adhere to the Human Fertilisation and Embryology Authority’s Code of Practice for the qualification of clinic counsellors.<sup>820</sup> Overseas clinics should demonstrate that their counsellors meet similar accreditation requirements.

In terms of assessment of the suitability of women to act as a surrogate, this would need to be left to the laws in each country, as views would differ. This is illustrated by the differing views of organisations and groups such as the BMA, the European Society of Human Reproduction and Embryology (“ESHRE”) and the American Society for Reproductive Medicine (“ASRM”). For example, the ESHRE Task Force recommended that surrogates should be 35 or under for genetic surrogacy) and 45 or under for gestational surrogacy and that she have

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<sup>819</sup> J Damelio and K Sorenson, ‘Enhancing Autonomy in Paid Surrogacy’ (2008) 22 (5) *Bioethics* 269.

<sup>820</sup> See Human Fertilisation and Embryology Authority’s Code of Practice, (8<sup>th</sup> edn, HFEA 2012) (as amended).

at least one child of her own in order to ensure autonomy in relation to decision making and consent.<sup>821</sup> ASRM took the view that surrogates should be at least 21 as this was the age of majority in the United States and that the surrogate should have experienced at least one pregnancy of her own resulting in a live birth. There is not currently an upper age limit for a surrogate in the UK and the BMA has not issued any guidelines in respect of this<sup>822</sup> largely because UK clinics are not involved in finding or selecting surrogates.

#### **7.4 Judicial or Legal Oversight of Surrogacy Contracts**

The surrogacy contracts in the case files focused on the provision of the services of reproduction by the surrogate. Within the contracts each surrogate confirmed that she recognised that any parental rights arising from the birth of the child belonged to the commissioning mother. The contracts were not worded in terms to suggest that the surrogate was transferring parental rights, as those rights do not arise until after the child is born. If for example, the surrogate were to miscarry, no parental rights would arise and therefore it is arguably premature to suggest that those rights are in existence at the time of the contract. Similarly if the surrogate were to choose to abort the child it would not be possible for the surrogate to make this decision if the contract had the effect of transferring parental rights to the commissioning couple. Even in jurisdictions that recognise the commissioning couple as the parents pre-birth, parental rights are not actually transferred until after the child is born and this occurs through a court order that recognises the earlier contractual relations.

The wording of such contracts, together with the need to ensure voluntary consent and understanding of all parties, means that lawyers or other legal professionals should be involved in the process. This can be achieved by either only making the contracts enforceable after judicial scrutiny or by providing that such contracts should be notarised to ensure that the legal professional is able to certify that the contracts have been correctly formed and signed. The

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<sup>821</sup>ESHRE (n 798), 2707.

<sup>822</sup> Neither the British Medical Association's handbook of Ethics and Law, *Medical Ethics Today* (BMA publications 2017) or BMA (n 25) contain any guidelines on upper age limits for surrogates.

advantage of making the contracts enforceable is that Parliament can stipulate which clauses the contracts should contain in order to meet judicial approval. The disadvantage is that such contracts may be less desirable under international law as overseas clinics tend to use their own lawyers to draft such contracts and negotiating English law and jurisdiction for enforceability may be more problematic. However, the contracts in the case files tended to use similar clauses even though the contracts were across different jurisdictions. English law also tends to be the adopted law in international contracts and as such standardised clauses could work if careful research is undertaken about the common clauses used in surrogacy arrangements across jurisdictions and those clauses are included.

It is not suggested that the scrutiny of the contract should be used as an opportunity by the court to rewrite standard surrogacy contracts that have universally acceptable clauses but instead should be used by the judiciary to ensure that provision has been made for the surrogate's welfare and wellbeing given the court's current policing role. In addition it is an opportunity to ensure that only reasonable expenses have been negotiated and that the parties understand the need to keep receipts and other evidence during the process and that failure to adhere to court directions can lead to refusal of a final parental order post-birth.

Some jurisdictions such as California, South Africa and Greece already provide for scrutiny of surrogacy contracts. For example, the California Family Code<sup>823</sup> provides that assisted reproduction agreements for 'gestational carriers' shall only be signed when independent and licensed lawyers represent the parties. South Africa's Children Act 2005<sup>824</sup> provides that surrogate motherhood agreements must first be approved by the High Court. In the case of Greece the commissioning mother has to file an application to the Multi-Member First Instance Courts for permission to proceed with a surrogacy arrangement and this first requires the commissioning mother to submit the written agreement to

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<sup>823</sup> California Family Code 2014, Part 7, § 7962.

<sup>824</sup> Children's Act 38 of 2005, Chapter 19, s 292.

the court for scrutiny before a final decision is granted.<sup>825</sup> This also provides the opportunity for surrogacy trust funds to be established to control payments.

A similar system could apply in the UK with either lawyers or the courts overseeing surrogacy contracts. If lawyers were consulted for notarisation it would be a more effective form of scrutiny if they were UK lawyers with knowledge of international surrogacy laws so that UK law can be explained to the commissioning couple together with the law in the host country. This would inevitably increase costs and as legal aid is not currently available for parental orders this requirement could be costly and act as a disincentive to couples. This would mean the intended protection becomes less effective due to cost. If however, the courts had oversight through the payment of a court application fee that was in line with present application fee costs in family cases then this might be more affordable and likely to lead to compliance particularly if it were linked to any later applications for a parental order.

It could be argued that there is a disadvantage to commissioning couples in that this suggested reform will add another layer to the existing process. However, it is likely that it will reduce the amount of time a court takes to make final parental orders as the court will already have determined issues such as domicile, consent of the surrogate and reasonable expenses at the contract scrutiny stage. It should also be possible for commissioning couples to register themselves as the parents of the child on the birth certificate when the child is born and for overseas birth certificates to be accepted as proof of parentage. If the surrogate then successfully challenges a parental order, changes can be made to the UK birth certificate to record the surrogate as the legal mother post the parental order determination in the same way that parental orders are sent to the GRO in order to amend birth certificates so as to name the commissioning couple as the legal parents.

The contract scrutiny process could take effect through amendments to the existing Family Procedure Rules. However this should also be supplemented by

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<sup>825</sup> See the Greek Civil Code law 4272/2014 and the Greek Code of Civil Procedure (Law 4335/2015).

legislation that reverses the *mater semper certa est* presumption that the biological mother is the mother of the child. The British Columbia model provides a perfect example of how this can be achieved. Their Family Law Act 2013<sup>826</sup> provides that in a surrogacy arrangement that meets certain contractual criteria the intended parents will automatically be the child's legal parents at birth.<sup>827</sup>

Another model is that of the District of Columbia, US that takes a collaborative approach to surrogacy<sup>828</sup> and also reverses the *mater semper certa est* presumption<sup>829</sup> and pre-birth petitions of parentage can be made based on intentions set out in surrogacy contracts and termed 'collaborative reproduction.'<sup>830</sup> The District of Columbia model is an interesting one because it signalled the reversal of a 25-year ban of surrogacy in the State and a move to embrace diverse families and family forms at once rather than introduce piecemeal legislation or take a soft law approach. Final parentage orders are then made post-birth to allow for legal challenges by the surrogate.

Pre-conception contract scrutiny would also enable the courts to consider the question of payments to determine whether reasonable expenses have been paid or are to be paid (although it will be argued in 7.5 that restricting payments to reasonable expenses in the case of international surrogacy is unrealistic). Such declarations need not necessarily go as far as making surrogacy arrangements enforceable as the courts would reserve the right to re-open the contract if at the final parental order stage the parties had not complied with court orders or if the surrogate changed her mind and wanted to challenge the grant of a parental order. It would however be an important procedural step to the recognition of intention pre-birth and before an application could be made for a final parental order.

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<sup>826</sup> Family Law Act 2013 (as amended), Chapter 25.

<sup>827</sup> *ibid* chapter 25 s 29 (3).

<sup>828</sup> See the Collaborative Reproduction Amendment Act 2015 (CRA 2015) that came in to effect on 7th April 2017.

<sup>829</sup> *ibid* s 16-407 (a).

<sup>830</sup> CFA 2015, 16-401 definitions.

## 7.5 Payments under International Surrogacy Contracts

There are no agreed international standards for payments to surrogates and no agreed interpretation of the meaning of reasonable expenses although the work of the European Parliament<sup>831</sup> and the Hague Convention on Private International Law<sup>832</sup> continues. It might therefore be argued that by constructing its own commercial surrogacy policy the UK government risked the policy operating in a vacuum without extraterritorial legislation.

The diversity of attitudes to surrogacy by various states as highlighted in the work of the Permanent Bureau of the 'on Private International law'<sup>833</sup> shows that surrogacy is permitted in some countries, banned in others and remains unregulated in others with no view expressed by the state as to its legality or otherwise.<sup>834</sup> The report also identifies states with a permissive approach to commercial surrogacy.<sup>835</sup>

It is argued that it is necessary to provide broad guidelines on the meaning of reasonable expense for the purposes of a declaration of compliance under section 54 (8) of the HFEA 2008. In 1998 the Brazier committee<sup>836</sup> terms of reference included considering whether payments should continue to be made to surrogates. They recommended allowable expenses. These were to include amongst other things accommodation, medical expenses, legal fees, and reimbursement of the surrogate's loss of earnings.<sup>837</sup> The committee did not consider that payments to surrogacy agencies should come within the definition of genuine expenses. The committee also felt that any additional payments

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<sup>831</sup> See European Parliament Directorate-General for Internal Policies: Policy Department, Citizens Rights and Constitutional Affairs, *A Comparative Study on the Regime of Surrogacy in EU Member States* (European Parliament Manuscript 2013) and A Rigon and C Chateau, 'Regulating International Surrogacy Arrangements – State of Play' Policy Department C: Citizens Rights and Constitutional Affairs, European Parliament Legal Affairs Briefing Note August 2016.

<sup>832</sup> Hague Conference Preliminary Report (n 312).

<sup>833</sup> *ibid*.

<sup>834</sup> Eg US States such as Massachusetts, Oregon and Tennessee.

<sup>835</sup> The states mentioned are Georgia, India, Russia, Thailand, Uganda, Ukraine and some states in the US. See Hague Conference Preliminary Report (n 312) 16.

<sup>836</sup> Brazier Report (n 54).

<sup>837</sup> *ibid* [5.25].

should be prohibited to prevent the commodification of children and avoid such payments acting as an allurements to entering into such arrangements.<sup>838</sup> They did not envisage judges retrospectively approving payments and felt judges should not authorise impermissible payments (but this is precisely what is currently happening).

The ESHRE Task Force recommendations<sup>839</sup> accepts that payments for surrogacy services should be permitted, they recommended that these should be restricted to reasonable expenses and relate to the surrogate's pregnancy related expenses as well as loss of actual (rather than potential) income and pregnancy related expenses not covered by private insurance or the national health system.<sup>840</sup> There is therefore some broad consensus to be found on those types of payments that might be considered reasonable without stipulating precise amounts.

A broad definition of reasonable expenses would at least provide parties to a surrogacy arrangement with a yardstick with which to measure compliance. Lessons can perhaps be taken from countries such as South Africa where a partial definition of reasonable expenses is written in to statute and is defined as including expenses that are directly related to the surrogate's artificial insemination, her medical care, clothing, insurance and loss of earnings and legal costs.<sup>841</sup>

Even in the UK adoption legislation there is a model on which to base a definition as section 96 of the Adoption and Children Act 2002<sup>842</sup> permits certain 'excepted payments' to be made to a registered adoption society in respect of expenses reasonably incurred by the society in connection with the adoption or proposed adoption and this has been discussed in chapter one. The issue of 'reasonable expenses' needs to be addressed by broadly defining the term and providing clear guidance on the difference between compensatory payments

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<sup>838</sup> Brazier Report (n 54), [5.11].

<sup>839</sup> ESHRE (n 798)

<sup>840</sup> ESHRE (n 798) 2706.

<sup>841</sup> Children's Act 2005.

<sup>842</sup> ACA 2002, s 96.

(which should be permissible) and profit payments (which should arguably be unlawful whilst commercial surrogacy remains unlawful in the UK).

A consensus on what broadly amounts to reasonable payments could be achieved through bi-lateral agreements given that each jurisdiction has different living costs. If one definition were used it would have to remain broad in nature to take in to account different economic conditions in different jurisdictions and enable the courts to determine matters on a case-by-case basis with proof of expenditure by the commissioning couples. UK courts could then draw on the legislation or judicial guidelines of host countries on reasonable expenses rather than relying on unsupported evidence from PORs or previous UK judgments as the analysis in chapter six suggests is currently happening.

If a two-stage approach were taken to the parental order process then commercial surrogacy could be considered at an early stage when the contract is scrutinised before the birth of the child, the interests of the child need not be the paramount consideration because at this stage the child would not have been born. Instead the court can apply Mr Justice Hedley's public interest test. Amending the checklist under section 1 (4) of the 2002 Act<sup>843</sup> to include the level of payments and integrating the three-stage approach of Mr Justice Hedley in *X and Y*<sup>844</sup> would also ensure that payments become a realistic consideration at the first stage when the contract is scrutinised.

By altering the present welfare test for payments to one where the child's welfare is regarded as the first or primary consideration rather than the paramount consideration (at least in the interim parental order stage), it is argued that this would enable a real rather than an artificial consideration of the policy against commercial payments. At the second stage after the birth when parentage is formally transferred then the interest of the child can once again return to being the paramount consideration.

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<sup>843</sup> ACA 2002, s 1 (4).

<sup>844</sup> *X and Y* (n 1), [21].



The issue of payments should be separated from an application for a parental order under section 54 of the 2008 Act to avoid the non-congruent mix of the beneficial policy of parentage (aimed at the commissioning couple and the child) and the punitive policy of commercial surrogacy (aimed at the commissioning couple and third parties).

When analysing the 31 court judgments it was noted that in those cases relating to commercial payments<sup>845</sup> the courts found it difficult to separate expenses from compensation and profit and often had to retrospectively authorise total sums rather than a portion of the total sum, an example is to be found in the case of *AB v CD*.<sup>846</sup> The accounts in chapter four also suggest that commissioning couples could not make their own assessment of what amounted to reasonable expenses.

Putting in place legislation or procedural rules that require an expenses form to be completed in much the same way as the form E<sup>847</sup> financial statement in matrimonial proceedings would ensure greater transparency. This does involve a further legal form for applicants to complete but will at least direct the minds of commissioning couples and surrogacy agencies to the importance of providing this information. This is to ensure that all parties understand the level at which payments might be considered unlawful and avoid arbitrary guidelines being set by surrogacy agencies. This would address the concerns raised by Mrs Justice Theis in the case of *Re WT (Surrogacy)*<sup>848</sup> that commissioning couples were not keeping accurate documentary accounts of the various stages involved in the surrogacy process and payments. The expenses disclosure form could be lodged after the contract scrutiny stage but before the final parental order stage.

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<sup>845</sup> See n 51.

<sup>846</sup> *AB v CD* (n 51).

<sup>847</sup> A court application form intended for parties to a divorce claim to give full and frank disclosure of their income when applying for financial relief under the Matrimonial Causes Act 1973 and the Civil Partnership Act 2004.

<sup>848</sup> *Re WT* (n 51), [42 c].

## 7.6 Policing Commercial Surrogacy

This metaphor of surrogacy as a free market or trade dictated by supply and demand has been echoed in judgments.<sup>849</sup> The courts have signalled a willingness to accept the commercial reality of international surrogacy whilst at the same time denouncing its existence. The couples in this study did not consider commercialism and ethics to be mutually exclusive. Yet, for many, commercialism equates to exploitation. Certainly commercialism brings with it opportunities for exploitation but it also brings benefits and financial rewards. Exploitation can be addressed through regulation and so should not be a bar in itself to recognising commercial surrogacy. The retrospective authorisation of commercial payments merely serves to undermine a policy against commercial surrogacy.

It is argued that in view of the judicial approach to payments within international surrogacy cases there is a case for rethinking the UK's ban on commercial surrogacy. Recent research by Jackson et al<sup>850</sup> in to the views of Australian couples accessing cross border reproduction found that couples considered altruistic surrogacy to be as morally problematic if not more than commercial surrogacy. Taking something for nothing appeared to these couples to be more exploitative.

Katarina Trimmings and Paul Beaumont argue that a surrogate should be compensated but that compensation should be based on a recognised formula such as a multiple of the minimum salary in the surrogate's home country.<sup>851</sup> The ASRM support commercial surrogacy arguing that payment to surrogates is consistent with payments to participants in medical research and that as long as payments are not made to unduly influence or exploit a

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<sup>849</sup> Eg JP v LP (n 557).

<sup>850</sup> E Jackson, J Millibank, I Karpin and A Stuhmcke, 'Learning from Cross-Border Reproduction' (2017) 25 (1) Medical Law Review 23.

<sup>851</sup> <sup>851</sup> K Trimmings and P Beaumont, 'International Surrogacy Arrangements: An Urgent Need for Legal Regulation at the International Level' (2011) 7 (3) Journal of Private International Law 627, 644.

surrogate then a surrogate should be rewarded for the risks involved in pregnancy. This is a shift from their 1990 position when they recommended that where possible surrogacy should be altruistic. Whilst they accepted at the time that payments might be a necessity for surrogacy to take place they were divided on whether payments of any kind should be permitted.<sup>852</sup>

Amel Alghrani and Danielle Griffiths<sup>853</sup> argue that as surrogacy is a personal service, then advertising and surrogacy agencies fees should be permitted together with a 'moderate fee' to the surrogate in addition to reasonable expenses. However, this risks enriching the brokers at the expense of the surrogate's services. The accounts of the commissioning couples suggested that there was a unified concern for the surrogate to be properly compensated and it is recommended that any payment to surrogates should reflect the true worth of their service.

Regulation should have as its core aim a desire to ensure that surrogates are properly rewarded for the services that they provide and if indeed surrogacy is a form of labour as argued by Pande<sup>854</sup> and Winddance Twine<sup>855</sup> then a fair and equal wage should be attached. This could be achieved by jurisdictions setting a minimum fee that reflects a realistic market price for services provided. Further research is however needed in to how such fees can be fixed and protected before the ban on commercial surrogacy is removed altogether.

## **7.7 Changes to the Parental Order Process**

The arguments for dividing the parental order process in to a two- stage process have already been discussed in 7.5. The benefit is the ability to separate the court's policing role (in the case of commercial surrogacy) from its protector role (in the case of the welfare of the child).

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<sup>852</sup> ASRM (n 802), 67S.

<sup>853</sup> A Alghrani and D Griffiths, 'The Regulation of Surrogacy in the United Kingdom: the Case for Reform' [2017] Child and Family Law Quarterly 165, 178.

<sup>854</sup> Pande (n 242).

<sup>855</sup> Winddance Twine (n 243)).

It is argued that it is intention plus genetic connection that justifies early recognition of the commissioning couple's parentage status pre-birth. Parental orders are seen as a necessary step in securing the wellbeing of the child and their lifelong needs. In addition such orders recognise the rights of the applicants to family life under Article 8 of the European Convention on Human Rights. Parental orders also enable the courts to make an enquiry in to the practice adopted in each surrogacy arrangement in order to ensure that no party has been unduly prejudiced or harmed.

The British Association of Social Workers ("BASW") Position Statement on surrogacy<sup>856</sup> argues that although surrogacy leads to conflicting rights and interests the rights of the child should remain paramount and that the UN Convention on the Rights of the Child was written before the popularity of reproductive technologies. The BASW argue that as there may be more than one set of potential parents in a reproductive technology situation it would not be possible to balance all the competing rights and therefore the rights of the child should be made paramount. Whilst this is a logical argument it ignores the fact that the paramountcy test has become so intertwined with commercial surrogacy (that does require the court to take into consideration the interests of others such as the surrogate as well as public interests) that it has become unworkable.

The meso-level effect of the commissioning couples' stories suggests that the courts have moved towards an approach that centres family identity within the child welfare debate. This would provide strong arguments for judicial determination informed by a family-centred rather than a purely child-centred approach to surrogacy particularly as the child is not in being at the crucial point that contractual relations are formed. Even the Netherlands Government

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<sup>856</sup> British Association of Social Workers, BASW Position Statement – Surrogacy, (BASW 2017) at <[http://cdn.basw.co.uk/upload/basw\\_70338-8.pdf](http://cdn.basw.co.uk/upload/basw_70338-8.pdf)>accessed 20 May 2017.

Committee<sup>857</sup> who adopted a child-centred approach in their report in to proposed changes to the parentage laws on Norway accepted that the best interests of the child could often be used as a convenient ‘magic formula’ to resolve conflicts without determining what interests and rights of the child were actually being protected.<sup>858</sup> If family identity is to become the focus of the court’s protector role then logically the family should be centred in the design of surrogacy legislation.

The present criteria for applying for a parental order also seems unnecessarily weighted in favour of couples. In South Africa, unlike the UK, there are no restrictions on a person’s marital or relationship status.<sup>859</sup> Single parents are a common feature of UK society yet single parents are not recognised as legal parents when starting a family using reproductive technologies. Previous research has shown the reproductive experiences of single men and women to be largely positive.<sup>860</sup> The declaration of incompatibility in the case of *Re Z (no.2)*<sup>861</sup> in which the Secretary of State intervened and accepted the human rights breach, suggests that this disconnect in the present law has been accepted and will be remedied in the future. The data did not include any accounts from single people because of the parameters of the inclusion criteria for the research. However, reported judgments would suggest that there are strong rights-based arguments for section 54 (2) of the 2008 Act to be reviewed to include single people.

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<sup>857</sup> See Netherlands Government Committee on the Reassessment of Parenthood, *Child and Parents in the 21<sup>st</sup> Century: Report of the Government Committee on the Reassessment of Parenthood* (Government Committee on the Reassessment of Parenthood 2016).

<sup>858</sup> Ibid [11.1].

<sup>859</sup> Children’s Act no 38 of 2005.

<sup>860</sup> See N Carone, R Baiocco and V Lingiardi, ‘Single Fathers by Choice Using Surrogacy: Why Men Decide to Have a Child as a Single Parent’ (2017) *Human Reproduction* 1 and S Golombok, S Zadeh, S Imrie, V Smith and T Freeman, ‘Single Mothers by Choice: Mother-Child Relationships and Children’s Psychological Development’ (2016) 30 (4) *Journal of Family Psychology* 409.

<sup>861</sup> *Re Z (no.2)* (n 49).

In their 2015 report *Horsey and Surrogacy UK*<sup>862</sup> recommends that parental order applications should be extended to commissioning couples where neither have a genetic link to the child (known as “double donation”). Whilst it is accepted that parental orders should be extended to single couples given that the law is already moving in that direction,<sup>863</sup> the question of including ‘double donations’ is more complex.

There are valid reasons to continue with the genetic connection requirement, as it is the genetic connection to at least one of the potential parents that also justifies a reversal of the *mater semper certa est* principle, which would be harder to justify in a double donation situation. Whilst it is true that the South African High Court were prepared to rule in *AB v Surrogacy Advisory Group and Minister of Social Development As Amicus Curiae: Centre for Child Law*<sup>864</sup> that the requirement for a genetic link in their surrogacy laws was unconstitutional, they were also quite careful to distinguish the UK position on the basis that unlike South Africa the UK does not have a written constitution.<sup>865</sup>

It is recommended that the current requirement for a genetic connection from at least one of the commissioning couple should remain; this is in order to keep surrogacy distinct from adoption. As Mrs Justice Theis noted in *AB v CD (Surrogacy – Time Limit and Consent)*<sup>866</sup> the purpose of a parental order is ‘to create legal parentage around an already concluded lineage connection.’<sup>867</sup> If a genetic connection does not exist and a surrogacy arrangement has taken place then a parental order should not be the correct route because parental orders were established in law for a particular purpose.

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<sup>862</sup> *Horsey* (n 198) 33.

<sup>863</sup> See *Z (a Child) (No.2)* (n 51). See also the more recent case of *M v F & SM* (Human Fertilisation and Embryology Act 2008) [2017] EWHC 2176 (fam) in which the applicant was a single mother. The court made the child a ward of court until such time as there is a change in the law to permit parental order applications by single people.

<sup>864</sup> [2015] (40658/13) ZAGPPHC 580.

<sup>865</sup> *AB v Surrogacy Advisory Group and Minister of Social Development As Amicus Curiae: Centre for Child Law* (40658/13) [2015] ZAGPPHC 580, [49].

<sup>866</sup> *AB v CD* (n 51).

<sup>867</sup> *ibid* [69 (3)].

However, social parentage acquired through double donation should be legally recognised, as it is a legitimate form of social parentage in much the same way that a non-genetic parent with a partner with a genetic parentage claim has a social parentage claim through parental orders. To exclude couples from obtaining a formal court order to recognise their status might arguably be discriminatory in the same way exclusion of single parents was found to be discriminatory. The question is whether parental orders are the correct route. There is a distinction to be found and that is that the connection is not biological or by proxy with double donation as neither parent has a genetic claim to a child and so could not satisfy section 54 (1) (b) of the 2008 Act.

One way to recognise double donations and to distinguish this method of parenthood from parental orders and adoption is to develop a new route through 'kinship orders'. This would create three routes to legal parentage either through a parental order, a kinship order or an adoption order. Double donation through surrogacy remains distinct from adoption, as Kenneth McK Norrie<sup>868</sup> observes, adoption proceedings are intended to give the state an interest and role that is performed through the local authority whereas surrogacy applications are a private law process.

Randy Frances Kandel<sup>869</sup> argues that the 'sexual family' that relies on the two-parent model is an out-dated one and that kinship models should be developed that recognise both the commissioning mother and the surrogate as the legal mother. The kinship order is therefore a new process that could be applied not just to double-donations but also to situations where the commissioning couple and the surrogate are in agreement that the surrogate should continue to play a role in the child's life and where all the parties welcome a formalised process to bring this in to effect.

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<sup>868</sup> K Mck. Norrie, 'English and Scottish Adoption Orders and British Parental Orders after Surrogacy: Welfare, Competence and Judicial Legislation' (2017) CFLQ 93. The author does however go on to conclude that for the Scottish system at least the legal process itself is capable of being used as a single process for both adoption and surrogacy.

<sup>869</sup> RF Kandel, 'Which Came First: the Mother or the Egg? A Kinship Solution to Gestational Surrogacy' (1994) 47 Rutgers Law Review 165.

The time limit of six months under section 54 (3) of the 2008 Act<sup>870</sup> should be replaced with a requirement to make an application within ‘a reasonable period of time’. This then gives the courts a wide discretion to consider applications outside of the current six month period to avoid the judicial semantics that has been employed to achieve the same results in case law through statutory interpretation as seen in chapter six. The home provisions of section 54 (4) (a)<sup>871</sup> should remain in place as it is important to establish that the child has indeed been handed over to the commissioning couple and that they have the care of the child but the legislation may benefit from some definition of ‘home’ in view of the judicial attempts to stretch the usual meaning.

The present six-week “cooling-off” period<sup>872</sup> should remain to allow the surrogate to change her mind even if there is a move towards pre-conception and pre-birth recognition of the commissioning couple’s parentage. This is because rather like financial agreements in divorce proceedings, in matters involving children there can never be a ‘clean-break’. The court retains the power to reconsider the agreement. Thus even with a two-stage parental order application, if the surrogate changed her mind during the cooling-off period she could still apply to challenge the parental order before it became final. However, there may be an argument to make be a distinction between challenges under a genetic surrogacy arrangement where the surrogate has a genetic connection to the child and challenges made to a gestational surrogacy arrangement where the surrogate has no genetic connection to the child because of the question of the child’s future identity. Only in exceptional circumstances (for example, evidence of the unsuitability of the commissioning couple to parent) might a parental order be refused in a gestational surrogacy arrangement that has had judicial oversight at the beginning of the process (subject to the best interests of the child). This further supports the need to distinguish ‘double donation’ in the parentage process.

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<sup>870</sup> HFEA 2008, s 54 (3).

<sup>871</sup> HFEA 2008, s 54 (4) (a).

<sup>872</sup> See HFEA 2008, s 54 (7).



ESHRE also recommend a 'cooling-off period' in their recommendations but it is not clear whether this is meant to refer to the pre or post conception stage.<sup>873</sup> They also agree that the focus should be on the intention of the parties and state that the commissioning parents:

[S]hould be informed that they are the parents of any born child. For the best interest of the future child, their moral responsibility is engaged from the start of the project.<sup>874</sup>

ASRM do not consider the issue of a 'cooling-off period' but favour counselling for all parties and the drawing up of legal agreements. They argue the intention of the parties should prevail and intentionality determines parenthood.

Another significant change that should be made to the parental order process is the wording of the parental order itself. Language has been at the core of this research especially the use of language by the commissioning couple to convey emotions and expectations and to interpret their new role, as parents. The focus on language should be continued through the careful use of the language in court orders assigning the long sought after status of legal parent. Currently the wording simply states that a parental order is granted to the applicants. However, this does not recognise the difficult journey that the commissioning couple have had to make in order to acquire that status. It is suggested that a wording that reflects what legal parentage means as opposed to any interim status that the commissioning couple have so far held, would emphasise the importance and nature of parental orders. A wording is suggested below as one that incorporates the verb meaning of parent by bringing together some aspects of the definition that commissioning couples used to self-label themselves as parents:

The court formally recognises that (name of applicants) have demonstrated a genetic connection to (name of the child) and an intention and commitment to raise (name of child) and undertake the

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<sup>873</sup>ESHRE (n 798) 2707.

<sup>874</sup>ibid 2706.

duties and obligations associated with parenthood including providing (name of the child) with guidance, protection, care and a safe environment and acting in (name of child)'s best interests and ensuring their well-being. In recognition of which (name of applicants) are to be treated in law as the legal parents of (name of child).

In the case of 'kinship orders,' couples could undertake to provide the child with 'good parenting' within similar pedagogical definitions produced by the Netherlands Government Committee.<sup>875</sup> These comprise seven core elements, which includes commitment, continuity and identity.<sup>876</sup>

The author visited a number of courts and anecdotal evidence from family court managers suggests that an unofficial but frequent part of the parental order process is for pictures to be taken of the child with the presiding Judge. Couples request this in order to document the experience of becoming parents and provide a reference for the children later in life. This suggests that commissioning couples welcome the ceremonial nature of bestowing legal parental status and this should be capitalised by the courts perhaps with parental orders and kinship orders formally signed by the presiding judge. This might have the additional benefit of encouraging those who have not previously applied for a parental order to do so by moving to a humanised way to bestow societal-labelling of parenthood. A recent precedent can be found for humanising court orders involving children in the case of *Re A (Letter to a Young Person)*<sup>877</sup> where a court order took the form of a letter to a child.

The willingness of couples to document the parental order process for the child also suggests that couples may be willing to explain their surrogacy journey to their children later in life. The majority of case files indicated that couples were prepared to consider disclosure. Whilst disclosure of a child's origins was not

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<sup>875</sup> Netherlands Government Committee (n 856) 11.1.

<sup>876</sup> *ibid.*

<sup>877</sup> [2017] EWFC 48.

the focus of this research, existing research,<sup>878</sup> although criticised,<sup>879</sup> suggests that there is an acceptance by most couples of the child's right to know. However, there are limitations to the psychological research and more information is needed as to the impact of disclosure on adult children who become aware of their origins after infancy.

Nevertheless, the question arises as to whether a right to disclosure should be formalised through a court order. In *Farnell and Another and Chanbua*,<sup>880</sup> as part of a supervision order of the parents, the judge made a formal order that a words and pictures storybook should be kept for the child Pipah. This was to be put together by the commissioning couple with the help of psychologists and social workers. It is intended that the storybook be read to the child by a member of the Australian Department for Child Protection and Family Support every three months from the age of two. Thus disclosure was made a requirement of the parentage order. The Netherlands Government Committee go further in their recommendations on the disclosure of origins and suggest that an 'Origin Story Register'<sup>881</sup> should be established that could be accessed by the child at any age.

The case files contained statements to the effect that whilst commissioning couples had not dismissed the possibility of disclosure they wanted time to find the right way to do this and the right time and age for the child. As discussed in chapter five, disclosure of origins did not form part of the commissioning couples' story telling to the court but was prompted by questioning from the

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<sup>878</sup> Eg L Blake, V Jadv and S Golombok, 'Parent Psychological Adjustment, Donor Conception and Disclosure: a follow-up over 10 years' (2014) *Human Reproduction* 29 (11), 2487, S Golombok, 'Parenting in New Family Forms' (2017) *Current Opinion in Psychology* 15, 76, E Blyth, M Crawshaw, L Frith and C Jones, 'Donor-Conceived People's Views and Experiences of Their Genetic Origins: A Critical Analysis of the Research Evidence' (2012) *Journal of Law and Medicine* 9 (4), 769.

<sup>879</sup> G Pennings, 'Donor Children Do Not Benefit From Being Told About Their Conception' (2017) *Bionews Online Newsletter* 15 May 2017 at <[http://www.bionews.org.uk/page.asp?obj\\_id=842013&PPID=841585&sid=68](http://www.bionews.org.uk/page.asp?obj_id=842013&PPID=841585&sid=68)> accessed on 15th May 2017 and G Pennings, 'Disclosure of Donor Conception, Age of Disclosure and the Well-Being of Donor Offspring' (2017) 35 (2) *Human Reproduction* 969.

<sup>880</sup> *Farnell* (n 281), [270].

<sup>881</sup> Netherlands Government Committee (n 856) 11.1.5.

PORs. In addition, as discussed in chapter four some couples did not have contact with the surrogate or the surrogate remained anonymous and thus the information they could pass on to the child was often limited. There was also less after birth contact between commissioning couples and surrogates in non-western jurisdictions. It is argued for these reasons that a parental order would not be a suitable mechanism to deal with disclosure and disclosure should remain an option (to be encouraged) rather than a condition (to be imposed). PORs should continue to discuss the question of disclosure with commissioning couples and provide information and support on how best disclosure could be dealt with using some of the research that is already known about a child's ability to process this information from a young age.

Finally, consideration should be given to providing a template witness statement for commissioning couples that includes each of the criteria in section 54 of the 2008 Act.<sup>882</sup> This would encourage commissioning couples acting as litigants in person to provide evidence for each criteria to avoid the need for the court to order that further written evidence is filed at a later date. It is hoped that this will reduce some of the delays. The section 54 criteria can also be split across the two-stage parental order process so that there is time for couples to collect further evidence if needed. For example, stage one could deal with the commissioning couple's status, including a pre-conception POR assessment based on 'supportive parenting' that applies an interest of the child test that is not paramount and so takes a family-centred approach.

Couples could also be encouraged to undergo fertility and relationship counselling to prepare them for the formation of new relationships with the surrogate. Stage one would also include the pre-contract scrutiny, domicile and reasonable payments. Stage two could deal with evidence of the surrogate's consent and the POR post-birth child welfare assessment, the focus here could be on the child's welfare as paramount which would be necessary in any challenge on the question of ultimate parentage if the surrogate were to contest the proceedings.

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<sup>882</sup> HFEA 2008, s 54.

## 7.8 Training and Accreditation

As discussed in chapter five, whilst PORs are not experts they often attempted to give expert evidence that was then subsequently relied upon by the courts, particularly on the question of reasonable payments. Clear guidelines contained within the Family Procedure Rules on the purpose, nature and content of POR reports would provide transparency and offer guidance in much the same way that Practice Direction 25B<sup>883</sup> provides guidance for experts on the nature and content of their reports. In particular the reports should highlight whose voice is being recorded by the POR. This might lead to care in the retelling of the commissioning couples' accounts in POR official reports as well as ensuring the court is aware of the voices of both applicants particularly where only one applicant has filed a witness statement.

Regulation should also include steps to ensure that third party brokers and lawyers are accredited before they can become involved in the surrogacy industry. Accreditation should include adhering to a Code of Conduct, ensuring access to counselling for all the parties as well as properly managed surrogacy trust funds. To restrict surrogacy merely to UK licensed clinics ignores the fact that many couples cannot afford the monetary cost involved in IVF surrogacy in the UK and that surrogacy is not routinely available as part of free healthcare.

If overseas clinics were required to sign up to a Code of Conduct before appearing on an approved list of clinics (which could perhaps be accessed through the UK regulator the HFEA) then this might be a possible way to ensure compliance by organisations that the government does not have the power to regulate. Any reported breaches of the Code would lead to clinics being removed from the HFEA list. This would mean commissioning couples have one access point for finding overseas clinics rather than carrying out random research across the Internet. The HFEA's responsibilities would not involve full regulation simply advertising clinics that have signed up to an approved UK Code of Conduct for overseas clinics involved in surrogacy practices.

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<sup>883</sup> FPR 2010, Part 25, Practice Direction 25B.

The Brazier report recommended that the government seek to impose a Code of Practice on surrogacy agencies to provide a certain level of information, advice and support to parties involved in a surrogacy arrangement<sup>884</sup> and this would have addressed the issue of education about some of these risks if the Brazier recommendations had been implemented. However, it is suggested that these recommendations do not go far enough and what is needed is a Code of Conduct that includes not just surrogacy agencies but also overseas clinics.

The Code of Conduct should include an agreement by clinics to keep a record of the personal details of the surrogate, a record of the medical treatment received by the surrogate and commissioning couple, a schedule of payments and what they relate to as well as an undertaking by clinics that they will cooperate with any enquiries made by UK courts, lawyers and PORs as part of the parental order process. The case files and reported judgments suggest that clinics did not always keep proper records and were therefore not always able to provide full and detailed information to the courts, or legal professionals. Signing up to a Code of Conduct would also act as an indirect education programme for overseas clinics of the requirements of section 54.

A template for a Code of Conduct already exists within the accreditation framework for UK clinics as administered by the HFEA under the Human Fertilisation and Embryology Act 1990<sup>885</sup> and the Human Fertilisation and Embryology Authority's Code of Practice.<sup>886</sup> An adapted version could be used for the basis of a Code of Conduct for overseas clinics. The important requirement would be for the 'person responsible' within the clinic to be named and that person should be familiar with the UK legal requirements.

## **7.9 Conclusion**

Language was used in a number of ways in this study and varied according to the different actors using language for different purposes. The language came together as a collection of 'voices' to provide a 'social voice' commenting on the

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<sup>884</sup> Brazier Report (n 54), 7.21 and chapter 8.

<sup>885</sup> HFEA 1990.

<sup>886</sup> Human Fertilisation and Embryology Authority Code of Practice (n 845).

practice of surrogacy and to provide a 'conceptualised voice' that reshaped experiences in the retelling of stories. Language used in a subjective way based on micro-level experiences at an individual level also had meso-level effects at organisational level in terms of the legal structures and institutions problematizing international surrogacy by moving the discourse towards pro-family solutions. The tangential effect of the migration of knowledge and issues by the commissioning couple as autodidactic consumers also led to a subtle shift of policy from a child-centred one to one focused on protecting the family unit by using the future identity of the child as a mechanism to do so.

The findings in chapters four, five and six provide some insight in to issues facing commissioning couples and the courts and other legal professionals and provides some valuable information upon which to draw on in the design of future regulation. Many issues have been highlighted and these include the need for an education programme for parties addressing the legal issues arising within international surrogacy such as immigration and parentage requirements, some judicial or legal oversight of contracts, a definition of reasonable expenses in terms of the payments made under an international surrogacy agreement or alternatively a statutory acceptance of commercial surrogacy. Specialist training for PORs would also assist the work of the court as would accreditation of overseas clinics and a more formalised court process that requires evidential proof of domicile and payments in the same way that evidence of the surrogate's consent has been formalised through form 101A. It is argued that a normative framework that considers the experiences of stakeholders such as surrogates and commissioning couples can lead to effective legislative design.

This research contributes to research on international surrogacy through the legal lens of the commissioning couples and will be of interest to policy-makers, academics, lawyers and other legal personnel. However, more research about international surrogacy and its effect on UK commissioning couples is needed. A follow-up study using interviewing methods that focuses specifically on how commissioning couples view the parental order process itself would also add to the literature in this field together with quantitative research relating to the

similarity of surrogacy contract clauses across jurisdictions to help inform any pre-contract judicial scrutiny process.

Whilst initial findings would suggest that vulnerability was most evident when it came to payments and cooperation in the subsequent legal process, further research is needed that focuses specifically on this area, perhaps adopting a method using semi-structured interviews which would provide a more focused assessment of the relationship between UK commissioning couples and overseas clinics. To further understand whether clinic payments can be said to amount to be reasonable, this area of law would also benefit from a quantitative approach that examines clinic fees and expenses across some of the popular destinations for UK commissioning couples including the US. Whilst this thesis argues for commercial surrogacy to be considered as a viable option, it is accepted that more research is needed in to how this might be achieved in practice and in a way that protects the surrogate and commissioning couple and does not suggest the purchase of children.

The relationship between the commissioning couples, surrogate and clinics in this research was recounted as one that existed based on forms of trust and mutualism and research focusing on what these concepts mean to commissioning couples and how they differ (if at all) between altruistic and commercial arrangements would also add to the scholarship in this area.

The medical world and the academic and legal community are divided as to how far the practice of surrogacy should be encouraged but in the UK it is protected as part of an individual's basic right to access fertility treatment. The surrogacy discourse can often produce animus towards the practice but the role of the court is to afford all its citizens protections and rights recognised by the state. If one considers how difficult the imposition of a human rights framework must have seemed to countries post the second world war, complexity was not a barrier to achieving this goal as the sharing of a common rationality of peace made this possible. The sharing of a common rationality of protection of the family unit, should it is argued, similarly make cross border co-operation on surrogacy regulation possible.



There are few critics that would deny the importance of family to human relationships and if family and child protection can be the common rationality which brings countries together to regulate international surrogacy then the difficult task may yet be achievable. The legalisation of same sex marriages in jurisdictions such as the England and Wales<sup>887</sup> and the US<sup>888</sup> has also arguably reaffirmed and sanctioned the diverse forms the family unit can take particularly as adoption or surrogacy are favoured methods of producing families for those in male same sex unions. This means the time is now right for a fresh look at the current legislation on surrogacy.

The UK already partially legislates the surrogate family but a disconnect exists between domestic surrogacy arrangements in the UK and international surrogacy arrangements by UK couples abroad that must be addressed. It is arguable that the time has now come to return to the agenda - setting table in order to provide clear statutory guidelines for implementation of a policy on international surrogacy and consideration given to the enactment of a new consolidating Surrogacy Act.

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<sup>887</sup> See the Marriage (Same Sex Couples) Act 2013.

<sup>888</sup> See *Obergefell v Hodges et al* (2015) 576 US, a US Supreme Court decision heard in 2015 that guaranteed the fundamental right to marry to all same sex couples in all states of the US.

## **APPENDIX 1**

## **Accessing the Data**

This involved first seeking business sponsorship from the relevant section of Her Majesty's Court Service ("HMCTS") which was in this case the section dealing with family cases. This necessitated the completion of a Data Access Panel Application ("DAP"). This was then forwarded to the DAP Secretariat with a copy of a draft of the methodology chapter of the thesis. The DAP Secretariat then forwarded the form on to the correct HMCTS business area to request their support. Approval then had to be sought from the President of the Family Division, which caused further delays. The original application was made on 26<sup>th</sup> June 2013 and the PAA was granted on 2<sup>nd</sup> January 2014 and expired on 31<sup>st</sup> July 2014. One extension of time was sought as access required visits to courts in England and Wales and involved travelling to five courts between April and July 2014.

Files and file numbers could not be released directly to the author for the research and this meant that the author made personal visits to each court. Three of the courts required a one-day visit whilst the remaining courts required multiple visits of between 2 and 7 days.

The author was not permitted to remove, copy or photograph files and therefore the files had to be transcribed on site. The author had to provide an estimate of the length of time necessary for access at each site and this had to be stipulated before the grant of the PAA. It was therefore necessary to make a decision as to how much data to transcribe on each visit given the restrictions in time. A data collection sheet was used with various headings to aid collection. In terms of the narratives a decision was taken to merely summarise any background information and to only transcribe word for word those narratives that dealt with the surrogacy process and the legal process (immigration and family). A list was made of all other documents included in the file such as court orders, marriage certificates and surrogacy contracts with a brief summary of their contents. The surrogacy contracts were compared to ascertain similar clauses for reporting purposes.

A data collection sheet was designed and used to collect general background information such as the ages and occupations of the applicants, the country where the surrogacy arrangement took place, any difficulties encountered during the parental order application and whether a final parental order was made together with details of the terms of the order. In a separate section of the data collection sheet space was provided to record verbatim the narratives from the witness statements and POR's report. Only narratives relating to the following areas were collected:

- (a) Narratives relating to the surrogacy process (this included reasons for embarking on the surrogacy journey and choice of surrogate and reactions of family members and friends).
- (b) Narratives relating to the immigration process to bring the child back in to the UK.
- (c) Narratives relating to the legal process to obtain parenthood in both the UK and the country where the surrogacy arrangement took place (if applicable).
- (d) Any other narratives relating to parenthood.
- (e) Narratives relating to the surrogate child (excluding identifying information).

Any additional information was merely summarised and recorded as background information. The data collection sheets (32 in total) therefore represented the full data collected from each file.

### **Attempts at Triangulation of the Data**

A further application was therefore made to DAP on 13<sup>th</sup> April 2015 to consider the oral evidence from an initial sample of five files. This was to allow a decision to be made as to whether this source of data would prove useful to the

research. The sample was also limited to five because at that stage the potential costs of obtaining the transcripts was unknown given that cost would depend on the length of the recorded evidence. Also it was unclear what, if any, oral evidence might exist within each case file. A PAA for oral testimony was granted on 28<sup>th</sup> August 2015, subject to obtaining the trial judge's consent to the transcription of oral evidence from each case file.

One of the trial judges involved in the five cases had since retired and as such all applications were referred to the lead family court judge Mrs Justice Theis in November 2015. After consideration of the five files the court noted in private correspondence to the author that there was insufficient oral testimony contained in the files. There were only two of the five case files in question that contained oral evidence and this had been limited to the issue to be addressed on the day, namely domicile. The court indicated that generally in many parental order cases it would be unusual for oral testimony to be given. In view of this indication a decision was made not to proceed with further applications as the court attached significant weight to the narratives in the form of witness statements and parental order reports. It was felt that the data set was as reliable as could be expected in the circumstances. It was not possible to embark on a fishing exercise by obtaining a PAA for the sole purpose of a trial judge or court staff examining each case file to ascertain whether oral testimony was given and whether a recording of the evidence given at the hearing existed. Therefore this type of triangulation was not possible.

Attempts were made to obtain triangulation through interviews with participants. From commencement of the PhD in September 2012 the author explored a number of ways to recruit participants, many of these methods proved unsuccessful. One couple was successfully recruited through a personal contact of the author on 25<sup>th</sup> May 2013 and this was treated as a pilot interview to test the interview questions and interview style and to obtain background themes for further exploration. The narratives from the interview were coded using Thematic Analysis techniques and the findings were used as part of the

‘theoretical sampling’<sup>889</sup> to help inform the data analysis of the pre-trial court narratives. No further interviews were conducted because of poor recruitment of participants, however, the themes of knowledge acquisition, risk taking, identity, care giving, biological ownership and commercial ownership were identified from the transcript of the interview.

### **Steps Taken to Recruit Participants**

- Registration on two online surrogacy chat-rooms, namely [www.fertilethoughts.com](http://www.fertilethoughts.com) and [www.allaboutsurgacy.com](http://www.allaboutsurgacy.com) on 4<sup>th</sup> June 2012. However both websites are heavily moderated and registration was not approved when the author revealed that she was a researcher.
- Posting a copy of the Information for Participants factsheet on the legal information website [www.compactlaw.co.uk](http://www.compactlaw.co.uk). Details of the research was given together with contact details to enable interested couples to contact the author through the website. A link to this information was also posted on the author’s LinkedIn profile. No participants were recruited through these websites.
- A Twitter account was set up to recruit participants by posting stories and links to surrogacy information. The account was registered as @Ritadah1 on 19<sup>th</sup> November 2014 with a call for participants. The Twitter page was kept regularly updated with tweets about surrogacy but unfortunately no contact was made with participants using this method.
- Writing letters to known professionals and journalists was another method employed in order to enlist help. Letters were written to surrogacy agencies (6<sup>th</sup> July 2013) MPs (27<sup>th</sup> October 2014), Journalists (19<sup>th</sup> November 2014) and lawyers (27<sup>th</sup> October 2014 and 2<sup>nd</sup> June 2014). One lawyer (the lawyer for the couple who took part in the pilot interview) indicated a willingness to be interviewed anonymously about

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<sup>889</sup> This is where the analysis of the data directs more sampling/collection of data and is a method that derives from Grounded Theory methodology.

her experiences of acting in surrogacy cases generally but was unwilling to pass on details to her other clients on the basis that as high-ranking professionals they would find such an approach obtrusive. No replies were received from any of the other professionals to letters sent despite chasing each individual by telephone. It was felt that a sole interview from one lawyer would not add anything to the analysis of the court narratives given that data collection had already taken place by this stage.

- A successful registration was completed with the website [www.gaysurrogacy.co.uk](http://www.gaysurrogacy.co.uk) on 27<sup>th</sup> March 2015 and a researcher profile page was created but again this did not elicit any responses.
- The author attended the Alternative Parenting Show at the Connaught Rooms in London on Saturday 19<sup>th</sup> September 2015 but most of the attendees were at the early stages of their surrogacy journey and were seeking information about surrogacy generally including international surrogacy but had not completed the surrogacy process. Those that had were either stallholders with affiliations to surrogacy agencies in the UK or consulting firms looking to advise on international surrogacy. Approaches were made to those who identified themselves as having completed the surrogacy process and written information about the study was handed out to a few interested parties but none subsequently came forward with a willingness to participate in the study.

## **APPENDIX 2**



## **Table of Claim to Parentage**

<b>Surrogate's Marital Position</b>	<b>Commissioning Couples' Status</b>	<b>Type of Gamete Donation</b>	<b>Legal Parentage before Parental Order</b>	<b>Number of Cases in Sample</b>
Unmarried	Heterosexual	<i>Genetic</i> (surrogate's eggs, commissioning father's sperm)	Surrogate and commissioning father	<b>0</b>
Unmarried	Heterosexual	<i>Gestational</i> (commissioning mother's eggs, commissioning father's sperm)	Surrogate and commissioning father	<b>2</b> (Files 7 and 16)
Unmarried	Heterosexual	<i>Gestational</i> (egg donor and commissioning father's sperm)	Surrogate and commissioning father	<b>3</b> (Files 2, 9 and 10)
Unmarried	Heterosexual	<i>Gestational</i> (egg donor and sperm donor)	Surrogate only	<b>0</b>
Married (husband consents to surrogacy)	Heterosexual	<i>Genetic</i> (surrogate's eggs, commissioning father's sperm)	Surrogate and her husband (rebuttable presumption)	<b>0</b>
Married (husband consents to surrogacy)	Heterosexual	<i>Gestational</i> (commissioning mother's eggs, commissioning father's sperm)	Surrogate and her husband (rebuttable presumption)	<b>1</b> (File 13)
Married (husband consents to surrogacy)	Heterosexual	<i>Gestational</i> (egg donor and commissioning father's sperm)	Surrogate and her husband (rebuttable presumption)	<b>8</b> (Files 4, 6, 15, 17, 19, 22, 23, 24)
Married (husband consents to surrogacy)	Heterosexual	<i>Gestational</i> (egg donor and sperm donor)	Surrogate only	<b>0</b>
Unmarried	Homosexual	<i>Genetic</i> (surrogate's eggs, commissioning father's sperm)	Surrogate and donor commissioning father	<b>0</b>
Unmarried	Homosexual	<i>Gestational</i> (egg donor	Surrogate and donor	<b>4</b> (Files 11,

		and commissioning father's sperm)	commissioning father	12, 21, 25)
Married	Homosexual	<i>Genetic</i> (surrogate's eggs, commissioning father's sperm)	Surrogate and her husband (rebuttable presumption)	<b>1</b> (File 1)
Married	Homosexual	<i>Gestational</i> (egg donor and commissioning father's sperm)	Surrogate and her husband (rebuttable presumption)	<b>6</b> (Files 18, 26, 27, 28, 29, 30)
Married	Homosexual	<i>Gestational</i> (egg donor and sperm donor)	Surrogate only	<b>0</b>

#### **NB**

1. There were no files in which the surrogate's husband did not consent to the surrogacy arrangement.
2. In the group of homosexual couples who used the gestational method with an egg donor, 5 files did not contain information as to the marital status of the surrogate.
3. In the group of heterosexual couples who used the gestational method using the commissioning mother's own eggs, 2 files did not contain information as to the marital status of the surrogate.

## DATA COLLECTION SHEET

Legal Experiences of UK Commissioning Couples involved in International Surrogacy

1.

CASE NUMBER (as given for anonymity purposes)

2.

DATE APPLICATION MADE (insert details)

3.

COUNTRY WHERE SURROGACY TOOK PLACE (insert details)

AGE OF COUPLES (insert details)

- a)
- b)

4.

GENDER OF COUPLES (insert details)

- a)
- b)

5.

RELATIONSHIP STATUS (select one)

- a) Marriage
- b) Civil Partnership
- c) Enduring Family Relationship (term taken from s.54 Human Fertilisation and Embryology Act 2008)

6.

PARENTAL OCCUPATION STATUS (**select from attached list if information given**)

- a) Group 1
- b) Group 2
- c) Group 3
- d) Group 4
- e) Other

7.

TYPE OF SURROGACY (**select one**)

- a) Traditional (surrogate mother and commissioning father have genetic link to the child)
- b) Gestational (commissioning mother and commissioning father have a genetic link to the child)
- c) Gestational – Egg Donor (Egg Donor and commissioning father have a genetic link to the child)

8.

PRIOR LEGAL RESEARCH CONDUCTED BY COUPLE? (**select one of information given**)

- a) Yes (give details)
- b) No

9.

IMMIGRATION ENTRY CLEARANCE FOR CHILD OBTAINED PRIOR TO COURT ACTION? (**select one if information given**)

- a) Yes
- b) No

10.

PARENTAL ORDER OBTAINED? (**select one**)

- a) Yes
- b) No

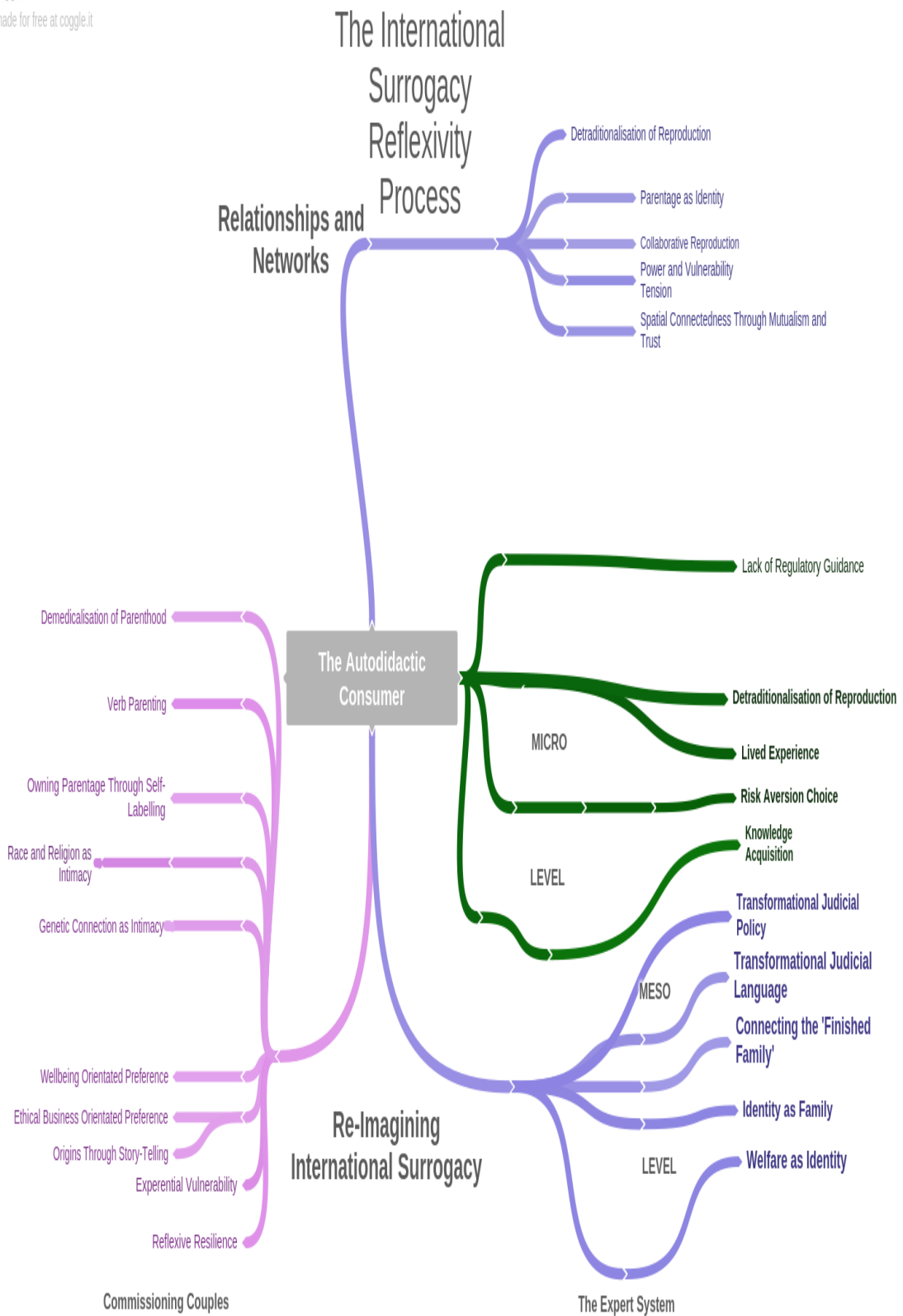
11.

LIST FILE DOCUMENTS NOT USED IN NARRATIVE RESEARCH

12.

NARRATIVES OF COUPLE'S LEGAL EXPERIENCE TAKEN FROM  
WITNESS STATEMENTS AND CAFCASS REPORTS (**please include  
relevant passages by way of quotations with page numbers**)

## **APPENDIX 3**



## Table of Authorities

### Table of UK Cases

- A, A v P, P, B [2011] EWHC 1738.
- A and B v C and D [2016] EWFC 42
- A and B (No.2 Parental Order) [2015] EWHC 2080 (fam).
- AB v CD (Surrogacy – Time Limit and Consent) [2015] EWFC 12.
- A and B and CX and D [2016] EWFC 42.
- AB v DE [2013] EWHC 2413 (fam).
- A & B v SA [2013] EWHC 426 (fam).
- A and B v X and Z (A Child by his guardian) [2016] EWFC 34.
- Barlow Clowes International Ltd (In Liquidation) & Others v Henwood. [2008] EWCA Civ 577.
- CC v DD [2014] EWHC 1307.
- D & G v ED & DD and A & B [2015] EWHC 911 (fam).
- D and L (Surrogacy) [2012] EWHC 2631 (fam).
- Howard v Boddington (1877) 2 PD 203.
- Ghaidan v Godin-Mendoza [2004] UKHL 30.
- HS (Algeria) v Secretary of State for the Home Department (2009). CSOH 124 and [2010] CSIH 97.
- In the Matter of C (A Child) [2002] EWHC 157.
- In the Matter of Re D (A Child) [2014] EWHC 2121.
- In the Matter of X and Y (Children) [2011] EWHC 314.
- J v G [2013] EWHC 1432 (fam).
- JP, v LP, SP and CP [2014] EWHC 595 (fam).
- KB and RJ v RT [2016] EWHC 760 (fam).
- London & Clydeside Estates Ltd v Aberdeen District Council [1980] 1 WLR 182.
- M v F & SM (Human Fertilisation and Embryology Act 2008) [2017] EWHC 2176 (fam).
- Mark v Mark [2005] UKHL 42.
- Mr G and Mrs G [2012] EWHC 1979 and JP v LP, SP and CP [2014] EWHC 595 (Fam).
- R and S v T (Surrogacy: Service, Consent and Payments) [2015] EWFC 22.
- R v Soneji and Another [2005] UKHL 49.
- Re A [2015] EWHC 1756 (fam).
- Re A and B (No.2 Parental Order) [2015] EWHC 2080.
- Re A (Letter to a Young Person) [2017] EWFC 48.
- Re C [2013] EWHC 2408 (fam).
- Re C (Application by Mr. and Mrs. X under s.30 of the Human Fertilisation and Embryology Act 1990) [2002] 1 FLR 909.



- Re C (a minor) Ward Surrogacy [1985] Fam. Law 191 (the baby cotton case).
- Re D (A Child) [2014] EWHC 2121 (fam).
- Re DM and LK [2016] EWHC 270 (fam)
- Re G and M [2014] EWHC 1561.
- Re G (Surrogacy: Foreign Domicile) [2007] EWHC 2814.
- Re: IJ (A Child) [2011] EWHC 921 (fam), [2011] 2 FLR 646.
- Re K (Minors: Foreign Surrogacy) [2010] EWHC 1180 (fam).
- Re L (a minor) [2010] EWHC 3146.
- Re M (a child) [2017] EWCA Civ 228
- Re P (minors) (wardship: surrogacy) [1987] 2 FLR 421.
- Re P-M (Parental Order: Payments to Surrogacy Agency) [2013] EWHC 2328.
- Re S (Parental Order [2009] EWHC 2977 (fam), [2010] 1 FLR 1156.
- Re W [2013] EWHC 3570 (fam).
- Re WT (Surrogacy) [2014] EWHC 1303 (fam).
- Re WY (Surrogacy) [2014] EWHC 1303.
- Re X (A Child) (Surrogacy: Time Limit) [2014] EWHC 3135 (fam).
- Re X (Foreign Surrogacy – Child's Name [2016] EWHC 1068 (fam).
- Re Z (A Child: Human Fertilisation and Embryology Act: Parental Order) [2015] EWFC 73.
- Re Z (A Child) (No.2) [2016] EWHC 1191 (fam).
- Re Z (Foreign Surrogacy) (Allocation of Work: Guidance on Parental Orders) [2015] EWFC 90.
- W v H (Child Abduction: Surrogacy) (No.1) [2002] 1 F.L.R. 1008.
- Wang v Commissioner of Inland Revenue [1994] 1 WLR 1286.
- X and Y (Foreign Surrogacy) [2008] EWHC 3030 (fam).
- Z, B v C, Cafcass Legal as Advocates to the Court [2011] EWHC 3181.

#### Table of European Cases

- A, B, C v Ireland (2010) EctHR (application no. 25579/05).
- Evans v United Kingdom (2006) EHRR 21.
- Labassee v France (2014) EHRR 65941/11.
- Mennesson v France [2014] EHRR 65192/11.
- MR and DR (suing by their father and next friend OR) and others v An t-Ard Chlaraitheoir and others [2014] IESC 60 (Ireland).
- Paradiso and Campanelli (2017) EHRR 25358/12.
- SH and Others v Austria (2011) EctHR (application no. 57813/00).
- Z v Finland (1998) 25 EHRR 371.

#### Table of Cases – Other Jurisdictions

- AB v Surrogacy Advisory Group and Minister of Social Development As Amicus Curiae: Centre for Child Law (40658/13) [2015] ZAGPPHC 580 (South Africa).
- Anna J v Mark C (1991) 286 Cal. Rptr 369 (Ct. App. 1991) (US).
- Baby Manji Yamada v Union of India (2008) 13 SCC 158 (India).

- Farnell and Another and Chanbua [2016] FCWA 17 (Australia).
- Johnson v Calvert (1993) 5 Cal.4<sup>th</sup> 84, 851 P.2d 776 (US).
- Obergefell v Hodges et al (2015) 576 (US).
- Re Baby M (1988), 537 A.2d 1227, 109 N.J. (US).

#### Table of UK Statutes

- Adoption and Children Act 2002, s 1, s 1 (2), s 1 (4), s 1 (4) (f), s 1 (4) (f) ii), s 1 (4) (f) (iii), s 1 (8) (b), s 83, s 95, s 96, s 96 (3), s 96 (4).
- Borders, Citizenship and Immigration Act 2009, s 55.
- British Nationality Act 1981, s 1 (5) (a), s 2, s 3, s 3 (1), s 5A, s 50 (9), s 50 (9A).
- British Nationality (Proof of Paternity) Regulations 2006 paragraphs 2 and 3.
- Children Act 1989, s 8.
- Children and Families Act 2014, s 11 (2), s 11 (3).
- Consumer Rights Act 2015, s 2 (3), s 51, s 56.
- Constitutional Reform Act 2005.
- Employment Act 2002, Part 1 Chapter 1.
- Employment Relations Act 1999, Part 1 Schedule 4.
- Family Procedure Rules 2013 (as amended), Practice Direction 5A, Part 13, Part 13 r 6, Part 13 r 9, Part 13 r 10, Part 13 r 12, Part 22, Part 25 r 9.
- Human Fertilisation and Embryology Act 1990, s 13 (5), s 13 (6), s 30.
- Human Fertilisation and Embryology Act 2008, s 14 (2) (b), s 14 (6A), s 24, s 33, s 35 (1), s 35 (1) (b), s 36, s 42, s 43, s 45 (3), s 47, s 54, s 54 (1), s 54 (1) (b), s 54 (2), s 54 (3), s 54 (4), (4) (a), s 54 (4) (b), s 54 (5), s 54 (6), s 54 (7), s 54 (8).
- Human Fertilisation and Embryology Bill HL Bill 2007-08, 70.
- Human Fertilisation and Embryology Act 2008 (Commencement No.3) Order 2010.
- Human Fertilisation and Embryology (Parental Orders) Regulations 2010, s 1 (3), s 2, sch 1, sch 2, sch 4.
- Human Rights Act 1998, s 3, s 4 (1).
- Immigration (Leave to Enter and Remain) Order 2000, Art. 3.
- Immigration Rules 2016 (as amended), part 1 para 23A, part 8 para 297.
- Marriage (Same Sex Couples) Act 2013, s 1.
- Minors Contract Act 1987.
- Modern Slavery Act 2015, s 2.
- Nationality, Immigration and Asylum Act 2002, s 9.
- Parental Orders (Human Fertilisation and Embryology) Regulations 1994.
- Sexual Offences Act 1967.
- Surrogacy Arrangements Act 1985, s 2, s 2A, s 2 (2) (a), s 2 (2) (b), s 2 (c), s 2 (3).
- Shared Parental Leave Regulations 2014 SI 2014/3050

## Table of Statutes – Other Jurisdictions

- Agreements for the Carriage of Fetuses (Approval of Agreement and Status of the Newborn) Law, 5756 1996 (Israel).
- Assembly Bill 1951 Chapter 334 (US, California).
- California Family Code 2013 (as amended), § 7960 (e) and (f) and §7960 (2) (US, California).
- Collaborative Reproduction Amendment Act 2015 (US, District of Columbia).
- Children's Act 38 of 2005, Chapter 19, s 292 (South Africa).
- Family Law Act 2013 (as amended), Chapter 25, Chapter 25, s 16-401, Chapter 25, s 16-407 (a), Chapter 25 s 29 (3) (Canada, British Columbia).
- Health and Safety Code §102425 (US, California).
- European Convention on Human Rights 1950, Art. 8, Art.12, Art. 14 (Europe).
- Family Relationships Act 1975 (Southern Australia).
- Gestational Surrogacy Act 2005 (US, Illinois).
- Greek Civil Code, Art. 1458 (Greece).
- Greek Code of Civil Procedure (Law 4335/2015) (Greece).
- Greek Civil Code law 4272/2014 (Greece).
- Hague Convention on Protection of Children and Co-operation in Respect of Inter Country Adoption 1993 (Hague).
- International Covenant on Civil and Political Rights 1966 (UN).
- Law 3089/2002 ("Enforcement of Medically Assisted Reproduction") (Greece).
- Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography 2000 (UN).
- Protection of Children Born from Assisted Reproductive Technologies Act 2015, § 21 and 22 (2) (Thailand).
- Senate Bill 274, Family Law: parentage: child custody and support 2013 (US, California).
- Surrogacy (Regulation) Bill 2016, clause 1 (2) Chapter 1, clause 4 Chapter III, clause 35 Chapter VII, clause 60 (11) (a) (India).
- Nevada Revised Statutes, Chapter 126 clause 045 (US, Nevada).
- The 2016 Florida Statutes, Chapter 742, Chapter 742.14, Chapter 742.17, Chapter 787 (US, Florida).
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