**Written Article**

***This is the final manuscript for an article that has been accepted for publication in Child and Family Quarterly in Issue 1, Vol 31, 2019. The final published version of this article can be found at*** <http://www.familylaw.co.uk/news_and_comment/regulating-international-surrogacy-the-elephant-in-the-room-some-reflections-on-reform-from-a-uk-study> ***and will be made publicly available 24 months after its publication date.***

**Journal: Child and Family Law Quarterly**

Submission Date:

Paper Title: Regulating International Surrogacy, ‘The Elephant in the Room’: Some Reflections on reform from a UK Study

Author: Anonymised

Key Words: International Surrogacy, Commercial Surrogacy, Parental Orders, Reasonable Expenses, Intended parents, Regulation

## Abstract

The UK legislative framework within which surrogacy is situated is a post-event framework where the legal structures act to regulate the family after the child has been born. Yet, even pre-event frameworks have been criticised with the UN Rapporteur denouncing international surrogacy involving commercial payments within pre-birth agreements as child trafficking. Arguments that international surrogacy arrangements (ISAs) are more complex to regulate than domestic surrogacy arrangements are given credence by the fact that there are competing legal structures to navigate in the form of differing national laws on family and immigration matters. Yet without regulation, it is arguable that the practice may become subject to the black market where the risks of exploitation and harm increase. This article will consider the findings from empirical research analysing a sample of ISA parental order case files involving UK couples, to consider what lessons can be drawn from these couples’ experiences as the Law Commissions[[1]](#footnote-1) begin their work to consider the efficacy of the UK’s present laws on surrogacy as part of the 13th programme of reform.

1. **Introduction**

Surrogacy is a form of assisted conception and can be defined as an arrangement between the intended parents and another woman (the surrogate) who agrees to carry and/or conceive a child for them with the express agreement that the resulting child will be handed over to the intended parents on birth. Part of the continuing legal discourse on international surrogacy is how exploitation and harm can be minimised and how private family relationships and kinships can be protected across borders. However, opposition to international surrogacy remains,[[2]](#footnote-2) and the UN Rapporteur in her January 2018 report[[3]](#footnote-3) suggested that ISAs can, in certain circumstances, constitute the sale of children and are therefore incompatible with human rights particularly where commercial payments are made pre-birth of the child.[[4]](#footnote-4)

In this article I will argue that due to the potentially commercial aspects of international surrogacy, particular attention should be paid to the contractual aspects of ISAs when devising a new national statutory framework. This article therefore focuses on the contractual aspects of ISAs rather than on wider issues such as reform to legal parentage or whether commercial surrogacy should be permitted in the UK, topics which are beyond the scope of this article and have been discussed elsewhere.[[5]](#footnote-5)

Using some of the findings from empirical research conducted over a five-year period (2012-2017), I will consider whether and how international surrogacy contracts could be regulated. In Part I of this article I consider the background to the current problematic legal structures. In Part 2 I present some of the findings from the empirical research. In Part 3 I reflect on how the recounted experiences of those couples might inform future reforms and provide a statutory framework for a consolidated Surrogacy Act that includes specific provisions on international surrogacy.

**Part 1 - Background to the Problematic Legal Structures**

Although non-commercial surrogacy has been lawful in the UK since the Surrogacy Arrangements Act 1985,[[6]](#footnote-6) the legislators did not have international surrogacy in mind as a practice that would emerge and require legislative attention. The Human Fertilisation and Embryology Acts of 1990 and 2008 Act have since sought to keep pace with the evolving nature of reproductive technology.The most recent amending legislation to the surrogacy laws remains the 2010 regulations[[7]](#footnote-7), which aligns surrogacy to some aspects of adoption law in the UK such as the welfare test and the disclosure of information to a child who has reached adult age.[[8]](#footnote-8)

The Human Fertilisation 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.[[9]](#footnote-9) Private and overseas arrangements are not regulated by the HFEA. The 2008 Act regulates both domestic and international surrogacy through parentage. The surrogate mother is recognised as the legal mother.[[10]](#footnote-10) Intended parents who want to be legally recognised as the parents must apply for a parental order. They must satisfy ten criteria,[[11]](#footnote-11) which include making the application within six months of the child’s birth;[[12]](#footnote-12) at least one of the applicants being domiciled in the UK,[[13]](#footnote-13) at least 18 years of age,[[14]](#footnote-14) having a genetic connection to the child;[[15]](#footnote-15) and the applicants being a couple who are either married, in a civil partnership or in an ‘enduring relationship’.[[16]](#footnote-16) Single people (whilst being able to access surrogacy) cannot yet apply for a parental order.[[17]](#footnote-17) The child must also be living with the couple at the time of the application,[[18]](#footnote-18) and the surrogate must have consented to a parental order application being made.[[19]](#footnote-19) The surrogate’s consent must have been given no earlier than six weeks after the birth of the child.[[20]](#footnote-20) The surrogate must be a person other than the applicants[[21]](#footnote-21) and the surrogate may only be paid ‘reasonable expenses’ unless authorised by the courts.[[22]](#footnote-22) 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.[[23]](#footnote-23) It is also illegal for third parties to negotiate, facilitate or arrange a surrogacy.[[24]](#footnote-24)

In the case of ISAs, the UK courts and immigration authorities are only involved in the process once the intended parents return to the UK. The intended parents must first seek entry clearance for the child,[[25]](#footnote-25) which is conditional upon them also applying to the courts for a parental order[[26]](#footnote-26) to become recognised as the legal parents. An intended father who has a genetic link to the child (and where the surrogate is unmarried) may apply for a British passport for the child.[[27]](#footnote-27) 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 intended mother rather than the surrogate. The father also has to prove parentage through a DNA test to satisfy immigration authorities.[[28]](#footnote-28)

Where the intended 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.[[29]](#footnote-29) An intended mother who provides her eggs will not be regarded as the legal birth mother and will have to apply for entry clearance for the child outside the immigration rules. Entry is then by discretion.[[30]](#footnote-30) 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. If the intended parents decide to simply arrive at border controls with the child, then entry will be by discretion and not guaranteed.[[31]](#footnote-31) 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[[32]](#footnote-32) or automatically on the grant of a parental order.[[33]](#footnote-33) Thus, the immigration process is a complex one. In the case of *Re Z (Foreign Surrogacy)* Russell J remarked that immigration delays were ‘emotionally and psychologically damaging’ to the children.[[34]](#footnote-34)

There is not a linked service between the border agency and the family courts in the UK in terms of checking that the intended parents have applied for a parental order. The lack of communication between the two legal structures means that some cases can fall through the net as can be seen in *D & G v ED & DD and A & B*[[35]](#footnote-35) where the intended parents managed to obtain a British passport for the child without a parental order due to an administrative error on the part of the UK Visa and Immigration (UKVI). In the case of Re *IJ (A Child)*[[36]](#footnote-36) the court considered whether the family courts should give the border agency formal notice of a parental order but Hedley J concluded that this was not necessary.[[37]](#footnote-37) However, it is argued that a much closer working relationship is needed between the family courts and the UKVI in the case of international surrogacy.

Academics have argued that the legislation on surrogacy remains complex, incoherent and conflicting in places.[[38]](#footnote-38) In particular, the misshapen mix of rules and discretion in the 2008 Act has been identified as problematic by Kirsty Horsey and Sally Sheldon.[[39]](#footnote-39) Since then a number of key judicial decisions have led to reform.[[40]](#footnote-40) Judges have also authorised the publication of private surrogacy judgments to act as a cautionary message to couples seeking to become parents through ISAs, whilst at the same time using statutory interpretation to sanction the practice.[[41]](#footnote-41) The areas that continue to generate the most litigation are the enforceability of surrogacy contracts[[42]](#footnote-42) 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.

Aspects of section 54 on time limits,[[43]](#footnote-43) domicile,[[44]](#footnote-44) and the ‘home’[[45]](#footnote-45) of the child have also required judicial intervention. Yet there are dangers that inconsistencies will arise in allowing regulation to develop through case law rather than legislation.[[46]](#footnote-46) There have been calls for a unified Surrogacy Act as far back as 1998[[47]](#footnote-47) but so far the government has resisted[[48]](#footnote-48) although the Law Commission now have the remit to consider surrogacy as part of their 13th programme of law reform.

Whilst case-based reform is not ideal, it has played an important role in the ‘democratisation’[[49]](#footnote-49) of surrogacy and family formation. However, the challenge to legislative design is to ensure surrogacy remains in line with international law and principles and that surrogacy does not simply become a practice that diminishes a ‘woman’s dignity’.[[50]](#footnote-50) While the risks of child trafficking through surrogacy can be addressed through the UK’s existing criminal legislation,[[51]](#footnote-51) and the sale of children prevented through treaties,[[52]](#footnote-52) there is more that needs to be done within the national family law structures to ensure child protection. To put in place a new domestic surrogacy framework without addressing international surrogacy is to ignore the elephant in the room.

**Part 2 - Experiencing International Surrogacy**

The empirical research on which this article is based analysed how UK intended parents frame their experiences of international surrogacy for the court process. The sample consisted of 32 court case files, which were selected from the date when the Human Fertilisation and Embryology Act 2008 came in to force (6 April 2009) to the date that I was granted a privileged access agreement by the Ministry of Justice (January 2014).[[53]](#footnote-53) These files included documents such as witness statements and parental order reports. By way of triangulation I also analysed 31 international court judgments. These were all the known international surrogacy judgments reported between 6 April 2009 and December 2016, this being the date when the data analysis was completed. These 31 judgments were not chosen to match the case files[[54]](#footnote-54) but were simply an additional source of data to show what might be happening to other couples whose stories were not captured in the case files and also to highlight any patterns in terms of the judicial response to international surrogacy.

The reasons the couples gave for choosing international surrogacy broadly related to ease of access to treatment in the host country, and to this extent matched the findings of Francoise Shenfield et al.[[55]](#footnote-55) 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 also included the ethics, reputation and costs of overseas clinics, as well as higher age limits for treating couples. Conversely, treatment in the UK was seen as less desirable. The explanations for this included the perceived long waiting lists of UK surrogacy agencies, lower success rates of UK clinics, and fewer opportunities for ethnic matching with egg donors abroad.

The most popular destination chosen by the intended parents in the sample was India.[[56]](#footnote-56) This was a jurisdiction chosen by 16 (50%) of the couples. This was closely followed by the USA, which was chosen by 13 (41%). Ukraine was chosen by only two (6%) with only one file involving a surrogacy arrangement in Canada (3%). This reflects the official statistics reported by Kirsty Horsey[[57]](#footnote-57) which also show India and the USA to be the most popular destinations. Many of these jurisdictions permit commercial surrogacy although the UK does not.

Payments to Indian surrogates ranged from approximately £2,000 to £7,000 with a mean of £4,413.95. This compared to the USA where the payments to surrogates ranged from approximately £9,600 to £36,000 with a mean of £22,297.61. One Ukrainian surrogate was paid £7,000, whilst in the second case the surrogate and clinic costs were given as a total figure of £21,836 and it was not possible to distinguish what proportion represented costs to the surrogate. In the case of the surrogacy arrangement in Canada the sum was approximately £9,366 for the surrogate’s expenses, which included loss of income. While the significant difference between the reported amounts paid to Indian as opposed to USA surrogates might support accusations of potential exploitation, it could also reflect differences in the cost of living in these jurisdictions. In addition, the case files relating to USA surrogates tended to be drawn from higher socio- economic groups whereas in India the surrogates were usually drawn from lower socio- economic groups.[[58]](#footnote-58)

France Winddance Twine’s[[59]](#footnote-59) research into payments made to surrogates in the USA compared the wages of gestational surrogates (between $20,000 and $25,000 excluding after birth cash payments and disbursements) with that of women working in the service and care industries. She found that the figures 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’, enabling them to continue caring for their own children whilst contributing to the family income. In contrast Amrita Pande’s research of Indian surrogates[[60]](#footnote-60) 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 Widdance Twine, Pande also considers such work to be equivalent to the care industry but stigmatised because it is of a sexual nature. Helena Ragone has also observed in her ethnographic study that surrogates view surrogacy as a part-time job.[[61]](#footnote-61)

Whilst the USA had the highest mean surrogate and clinic costs it was still a popular choice for many couples in the sample. This may be due to the fact that in some USA states, such as California, the law is considered more favourable towards intended parents. Notarised contracts are enforceable and pre-birth judgments are made in favour of the intended parents under the California Family Code.[[62]](#footnote-62) Of the 13 case files involving the USA, six related to surrogacy arrangements in California, of which five involved same-sex intended parents.

The majority (31) of the case files involved gestational surrogacy where the surrogate carries the child but does not provide her eggs, as opposed to just one ISA involving the genetic method where the surrogate provides her eggs and is genetically related to the child. Intended parents also chose married surrogates in 16 of the case files.

The majority of the applicants in the case files were drawn from either the senior manager occupational grouping under the International Labour Organisation’s classification ISCO-08[[63]](#footnote-63) (group one) or from the professional occupational grouping (group two), signalling that financial power enabled most of them to make goal-directed choices that might not be as easily available to those from lower socio-economic backgrounds. This could arguably cause a shift in the power relationship between the intended parents and the surrogate particularly where the intended parents 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. Others paid for additional comforts such as housekeeper, organic food and international telephone cards.

In many of the files the Parental Order Reporters (PORs) confirmed the careful preparations that took place prior to couples making the final decision to pursue surrogacy. 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 also reported participating in pre-surrogacy assessments involving psychological assessments and counselling before making a final decision to proceed with surrogacy.

ISAs were therefore protracted and complex and were not chosen without a consideration of other methods first. All the opposite-sex couples in the sample tried other fertility treatments before pursuing surrogacy after those treatments failed. In the case of same-sex couples, surrogacy was sometimes, but not always, considered in conjunction with adoption. Adoption was either considered or partially pursued in only nine of the case files, and of this number only two related to same-sex couples. Most couples viewed the solution to their childlessness as requiring medical treatment and therefore excluded consideration of adoption on that basis. Instead, they were prepared to enter into contracts regardless of the question of their enforceability.

 In addition, some couples expressed a wish to avoid the perceived stigma associated with adoption. For example, one couple explained their adoption experience as follows:

*We began researching adoption in (year). In (year) we applied to our local authority who advised that we would have very little chance of adopting in the UK, given that we were a mixed race couple. So we turned our focus to international adoption and researched the various countries where we may have better success. India was an easy choice, given (name of second applicant)’s heritage and the fact that she has family and friends in (name of area) so we would have local support… to date we have yet to receive a single match.* (File 19, first applicant).

Many of the intended parents reported rejecting adoption because a genetic connection was more important to them.

The reported judgments also suggest that the judiciary view adoption as inappropriate where a genetic connection exists between the intended parents and the child. For example, in *CC v DD*[[64]](#footnote-64)Theis J 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.[[65]](#footnote-65)

Similarly Russell J noted in *D & G v ED & DD and A & B[[66]](#footnote-66)* that adoption ‘wrongly suggest that the children have had a disrupted rather than continuously secure identity within their family.’[[67]](#footnote-67)

Helena Ragoné[[68]](#footnote-68) found that US intended parents also viewed adoption as problematic. The length of waiting times and the disqualification of couples due to age were the common reasons cited for rejecting adoption in favour of surrogacy. Approximately 35% of the sample in Ragoné’s study had either considered or chosen adoption before finally deciding on surrogacy.[[69]](#footnote-69)

B. Prior Legal Research

The lack of legal research by intended parents, before embarking on ISAs, is confirmed in many of the reported judgments. For example, in *A and B and C and D*[[70]](#footnote-70) it is reported that the applicants applied for a parental order for children who were then aged 13 and 12 respectively. The intended parents 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.’[[71]](#footnote-71) The Department of Health and Social Care’s (DHSC) newly issued guidelines on surrogacy[[72]](#footnote-72) may go some way to educating couples about the practical considerations and legal requirements for surrogacy, although the guidance does not specifically address international surrogacy.[[73]](#footnote-73)

Within the case files nine couples sought legal advice. There were no criticisms of that advice in the witness statements, although the courts themselves have been willing to criticise the actions and advice of legal representatives.[[74]](#footnote-74)As the case files contained the names and addresses of legal representatives acting for some of the intended parents, it was possible to note that lawyers representing intended parents were drawn from a very small circle of firms and barristers chambers with specialist experience. Whilst lawyers were employed to protect the intended parents’ 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, focusing on the issue of the surrogate’s consent.

Many couples talked of taking steps to satisfy themselves that the surrogate had consented to the arrangements before entering into the contract and had her family’s support. Interpreters were used where the surrogate did not speak English and some of the intended parents were present at the time the surrogate signed the consent form releasing any claim to the child. Couples reported being satisfied that no pressure was placed on the surrogate and that she understood and consented throughout. For example:

*Mrs (name of surrogate) attended with her husband, she signed the No Objection Certificate dated (date) appended to this statement as Exhibit (initials and number). I was in the office, (name of third party) was interpreting, (name of surrogate’s husband) had some English. A second lady who worked in the clinic was also there*. (File 1, first applicant))

However, in the few case files where the intended parents did not meet the surrogate there was not a formalised mechanism for the intended parents 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)*[[75]](#footnote-75) remind intended parents 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.’[[76]](#footnote-76) Most of the case files revealed an established relationship with the surrogate. However, in five cases the contact was indirect through letters, emails and Skype calls rather than face-to-face meetings. In four of the files the extent of the communication between the surrogate and the intended parents was unclear and the clinics appear to have acted as intermediaries.

In one file[[77]](#footnote-77) the intended parents 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 her. As the procedure then became complex the intended parents instructed lawyers to act for them. However, the lawyers came ‘off the record’ before the final hearing signalling either that the intended parents 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.

1. Forming Contractual Relations

Understanding the nature and significance of a surrogacy contract is an important aspect of knowledge acquisition for intended parents, 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. This might perhaps be because the contracts were presented as standard and non-negotiable, and in many cases the clinics advertised their standard fees on their websites. Nonetheless, this did not stop the clinics imposing additional costs at various stages of the process. For example, in one file it was 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).

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. They also included clauses that were financially disadvantageous to the intended parents, such as payments being required regardless of failed embryo transfers and increased success fees on the birth of twins.

There were, however, also advantageous clauses, such as clauses stipulating that the surrogate would be paid as soon as she began the service and continued throughout the various stages. In return the intended parents would be entitled to the handover of the child soon after birth. The clauses were therefore reciprocal in nature. The intended parents 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, although the UN Rapporteur argues that such clauses still contain an implicit agreement to transfer a child.[[78]](#footnote-78) Some contracts also stipulated that the intended parents would be entitled to register the birth of the child.

All the case files contained narratives suggesting that the intended parents did not have any control over the fixed payments to the surrogate and were not responsible for making any payments directly to the surrogate. For example:

*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 intended parents reported they were not in control of payments. This is particularly important given that couples must satisfy the court that they have not paid more than reasonable expenses.[[79]](#footnote-79) As costs and expenses had been predetermined by the clinic none of the couples can be said to truly be in a position to assess what might be regarded as reasonable expenses. This is discussed later in this section.

B. Exploitation and Harm

The couples in this study did not consider commercialism and ethics to be mutually exclusive. Nonetheless, the UN Rapporteur has concluded that commercialism equates to exploitation.[[80]](#footnote-80) However, whilst the intended parents 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 intended parents) seemed to suggest that the surrogate was ‘homo oeconomicus’[[81]](#footnote-81) 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:

*They also welcomed the fact that this clinic appeared to treat surrogates with respect, and that the surrogate’s own family would have a better quality of life following the financial payments she would receive.* (File 1, POR)

The intended parents did not perceive their financial power as power that they held over the surrogate, precisely because they did not directly control the payments.

There was nothing in the accounts to suggest that the voluntary non-contractual payments for extra comforts such as international calls and organic food were made as a way to control the surrogate. Given the nature of the accounts, one could argue that they are written to present the intended parents in a good light to the court and so any thoughts of control or influence would not be admitted. However, as the non-contractual payments were paid through the clinics, it is arguable there would have been little opportunity for the intended parents to exert control over the surrogate directly, as the clinics acted as brokers and intermediaries in the relationship.

Nor did the accounts suggest that the intended parents resented or were dissatisfied with the amounts of money earmarked for the surrogate 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:

*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).

Intended parents 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, dignity, autonomy or the sale of children. 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. For example:

*Further, for (name of second applicant) and I, an amount that was low would seem like exploitation and we wanted to avoid this.* (File 7, first applicant).

In contrast, the intended parents’ attitude towards clinic expenses was different. Couples linked the control of payments by clinics to their ability to control the success of the ISA. Couples accepted clinic costs because of a need to achieve their ultimate goal of parentage. Tensions were noted in the intended parents’ description of the role of the clinic measured in terms of value for money. The perception of most of the intended parents was that the clinics held the power in the relationship because of their control of the payments.

The relationship between the clinics and the intended parents was often tenuous and categorised by a forced trust. Putnam distinguishes between ‘thick trust’[[82]](#footnote-82) in relationships that are strong and frequent and ‘thin trust’[[83]](#footnote-83) where individuals choose to believe a new acquaintance or ‘anonymous other’[[84]](#footnote-84) 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 relationships between the intended parents and the clinic.

1. Reasonable Expenses

Section 54(8) of the 2008 Act does not define what is meant by ‘expenses reasonably incurred’[[85]](#footnote-85) and this has created difficulties in interpretation. This section focuses on money or other benefits provided by the intended parents 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. Parliament intended by enacting section 2 of the 1985 Act that third parties such as surrogacy agencies should not profit from surrogacy arrangements.[[86]](#footnote-86) However, a number of cases reveal that the courts have sanctioned commercial payments to surrogacy agencies abroad.[[87]](#footnote-87) Before deciding whether to retrospectively authorise payments the courts have developed a common law test based on ‘moral taint’[[88]](#footnote-88) and ‘affront to public policy.’[[89]](#footnote-89)

When analysing the 31 court judgments it was noted that in those cases relating to commercial payments[[90]](#footnote-90) the courts found it difficult to separate expenses from compensation and profit and often (in 20 of the reported judgments) had to retrospectively authorise total sums rather than a portion of the total sum, as in *AB v CD.*[[91]](#footnote-91) This is particularly important in view of the UN Rapporteur’s condemnation of remuneration and payments being sanctioned by states,[[92]](#footnote-92) although she is careful to distinguish payments made for expenses from this condemnation.[[93]](#footnote-93)

Like the reported cases, the case files show that there was a trend towards retrospectively authorising commercial payments made in international surrogacy cases (eight files). 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 intended parents returned to the UK and 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).

This ‘subjective criteria’ of clinic assessment was often the benchmark by 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). Couples thus relied on the clinics understanding of reasonable expenses.

The difficulties in interpreting the reasonable expenses requirement of section 54 can also be seen in the narratives of the PORs. 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,[[94]](#footnote-94) yet they are not classed as experts in family proceedings.[[95]](#footnote-95) An expert’s evidence will usually be given in writing, rather than orally, unless directed by the court.[[96]](#footnote-96) 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. Analysis of the POR reports suggested limited or lack of research into how expenses could be categorised as reasonable. 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.* (File 19, POR).

Others appeared to base their determination of ‘reasonableness’ on case law or the tests established in *X and Y*[[97]](#footnote-97) and *Re S*[[98]](#footnote-98) and subsequently applied in other cases. 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’ arguably 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:

*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.[[99]](#footnote-99) Marilyn Crawshaw and others noted in their study of parental orders[[100]](#footnote-100) that PORs often felt called upon to make assessments beyond their professional expertise leading to them to take positions that were not morally evaluated or theoretically sound.[[101]](#footnote-101)

##

## Part II - Revisiting Agenda Setting and Implementation

Regulation should draw on evidence-based research in designing measures to protect the various parties to surrogacy agreements. In my view, what is needed is a return to the agenda-setting stage[[102]](#footnote-102) to redesign UK policy on surrogacy but with attention paid to the particular features of international surrogacy. Since the deficiencies in the home surrogacy market cannot be cured overnight, 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’[[103]](#footnote-103) 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. If the only sanction is 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 have an opportunity to assess the child’s wellbeing and the couples’ future intentions.

### Domestic Measures to regulate ISAs Through A Consolidated Surrogacy Act

The stories described in the court case files and the emerging case law suggests that there is an urgent need to devise a statutory framework specifically for international surrogacy to ensure that the parties are protected and to also assist them in navigating risks. An international Convention on international surrogacy could take many years to come to fruition if at all. The Hague Conference on Private International Law have broadened their remit to one of legal parentage rather than simply looking at international surrogacy and publicly admit that an agreement on international surrogacy remains unlikely given the divergent views of it member States.[[104]](#footnote-104) Nonetheless the HCCH Experts’ Group met in September 2018 to discuss the feasibility of an instrument to provide for the recognition of parentage judgments between states and will meet again in February 2019 to specifically discuss ISAs.[[105]](#footnote-105) Amendments to national law would not impede this process as the HCCH experts favoured recognition of legal parentage made abroad by operation of law in the home state.

There is a clear attitudinal distinction between adoption and surrogacy that has been highlighted by both couples in and the judiciary in this research (as discussed in Part I) and so a new Surrogacy Act that simply draws upon adoption law, rather than distinguishing it from surrogacy law, is unlikely to be well received. The surrogacy legislation relies upon the Adoption and Children Act 2002 (“the 2002 Act”) in relation to the standard for protection of the child’s welfare.[[106]](#footnote-106) There are of course fundamental differences between these two types of family formation. Surrogacy generally involves a genetic link between one of the intended 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.

B Interim Measures – Building a Bridge Between Differing Jurisdictions.

Whilst 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 intended parents and have acceptable child protection measures in place. The data discussed in Part I suggests that the US and India are popular venues although the Indian market has since become restrictive.[[107]](#footnote-107) A consolidated approach to regulation could be achieved by reaching bilateral agreements with jurisdictions that have a proven track record of regulation, compliance and accreditation of the surrogacy industry. The Law Commission is only tasked with dealing with national legislation and so will be limited in how far they can change the international surrogacy landscape. However, there are no reasons why changes to national legislation cannot include a recognition that international surrogacy exists and provisions to protect parties undertaking ISAs. Even the UN Rapporteur concedes in her report[[108]](#footnote-108) that the international community should work together to protect the rights of children by developing agreed standards and principles through further research and discussion.

This would still leave the question of the different surrogacy orders made across jurisdictions and whether contracts formed outside the UK should be recognised, particularly where commercial payments have been made. At the very least, some agreement is 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 Private International Law to allow for cross-border recognition of parentage judgments.[[109]](#footnote-109) However, it also states that individual member countries should be allowed to continue to regulate surrogacy as they see fit within their own borders,[[110]](#footnote-110) which would mean that overseas parentage judgments could continue to be ignored. As USA states have differing parentage judgments in relation to surrogacy this could prove problematic. If, for example, UK intended parents received an adoption order from a USA 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.[[111]](#footnote-111) This would mean either that surrogacy would need to become an exception to the provisions of the 2002 Act or that the UK would have to move towards recognising pre-conception orders before the surrogacy process begins that would then trump any subsequent parentage orders in the host jurisdiction. Pre-conception orders would also be a way to distinguish contracts that include commercial payments from those that permit only payment of expenses.

B. Enforceability of Contracts

All of the couples in the case files entered into written ISA contracts. The wording of ISA contracts, together with the need to ensure voluntary consent and understanding of all parties, is a reason for lawyers or other legal professionals to be involved in the process. This can be achieved by either making the contracts enforceable (but only after judicial scrutiny) or by providing that such contracts should be notarised by lawyers to ensure that a legal professional is able to certify that the contracts have been correctly formed and signed.

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 (or indeed statutory imposed) clauses. Instead, it 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 relation to commercial surrogacy. In addition, it is an opportunity to ensure that only reasonable expenses have been negotiated, 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.

The advantage of making such contracts enforceable is that Parliament can broadly stipulate which type of clauses the contracts should contain in order to meet judicial approval. The disadvantage is that such legislative intervention 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 given recognition. This could also be made a provision of any bi-lateral agreement.

The UK already has post-birth mechanisms for determining commercial surrogacy that includes some scrutiny in terms of the payments made, but it is argued that these are not robust enough and nothing in the UN Rapporteur’s comments would prevent a post-birth review that is also supplemented by a pre-birth review of contracts in the case of non-commercial arrangements.[[112]](#footnote-112).

Some jurisdictions such as California, South Africa and Greece already provide for pre-birth scrutiny of ISAs. For example, the California Family Code[[113]](#footnote-113) 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[[114]](#footnote-114) provides that surrogate motherhood agreements must first be approved by the High Court. In the case of Greece, the intended 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 intended mother to submit the written agreement to the court for scrutiny before a final decision is granted.[[115]](#footnote-115) 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 surrogacy laws in other jurisdictions so that UK law can be explained to the intended parents 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 arguably act as a disincentive to couples using ISAs. Critics might posit that this would mean the intended protection becomes less effective due to cost. An alternative scheme could be that the courts are given oversight through the payment of a court application fee that is in line with present application fees for family cases. This might then be a more affordable alternative and likely to lead to compliance particularly if it were linked to any later applications for a final parental order.

B. Defining Reasonable Expenses

The witness statements and POR reports discussed in Part 2 suggest that there remains some confusion as to the legal meaning of reasonable expenses with couples and PORs ascribing their own interpretations. If the aim of any new legislation on surrogacy is to prevent commercial surrogacy rather than cross-border surrogacy, then clearer guidelines are required as to the meaning of ‘reasonable expenses’ and the difference between permitted compensation and impermissible profit payments. In 1998 the terms of reference of the Brazier committee[[116]](#footnote-116) 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.[[117]](#footnote-117) 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 should be prohibited to prevent the commodification of children and avoid such payments acting as an allurement to entering into such arrangements,[[118]](#footnote-118) and that judges should not authorise impermissible payments.

The DHSC guidelines do contain examples of the types of reasonable expenses that have been approved in case law[[119]](#footnote-119) but these are guidance only and clarity should be brought to bear through legislation. Amel Alghrani and Danielle Griffiths[[120]](#footnote-120) argue that as surrogacy is a personal service, then advertising and surrogacy agencies fees should also be permitted together with a ‘moderate fee’ to the surrogate in addition to reasonable expenses.

The list of permissible expenses does not have to be an exhaustive list, but 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 into the statute: it includes expenses that are directly related to the surrogate’s artificial insemination, her medical care, clothing, insurance, and loss of earnings and legal costs.[[121]](#footnote-121) Even in the UK adoption legislation there is a definition of expenses to be found in section 96 of the Adoption and Children Act 2002,[[122]](#footnote-122) which 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.

A consensus on what amounts to reasonable payments for ISAs could also be achieved through bi-lateral agreements given that each jurisdiction has different living costs. If one definition were used it would arguably need to remain broad in nature to take into 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 intended parents. 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 data suggests might be happening currently.

In addition, putting in place legislation or procedural rules that require an expenses form to be completed in much the same way as the form E[[123]](#footnote-123) financial statement in matrimonial proceedings would also ensure greater transparency around payments. This would address the concerns raised by Theis J in the case of *Re WT (Surrogacy)*[[124]](#footnote-124) that intended parents 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.

B. Addressing Exploitation and Commercialisation Through a Welfare Test

As discussed in Part 2, the accounts did not suggest that couples viewed their ISAs as exploitative or harmful. Nonetheless, they were aware of the potential for exploitation and harm to the surrogate from payments that did not reflect the true value of the service.

If a two-stage approach were taken to the parental order process, then this does at least provide an opportunity for commercial surrogacy to be policed at an early stage when the contract is scrutinised before the birth of the child. This also provides an opportunity to reassess whether the current paramountcy welfare test is appropriate. The interests of the child need not be the paramount consideration at the contract scrutiny stage because at this stage the child would not have been born. Instead the court can apply Hedley J’s public interest test.[[125]](#footnote-125) Integrating the three-stage approach of Hedley J in *X and Y*[[126]](#footnote-126) as a welfare considerationwould 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[[127]](#footnote-127) to one where the child’s welfare is regarded as the first or primary consideration rather than the paramount consideration (at least at the contract scrutiny stage), it is argued that this would enable a real rather an artificial consideration of the policy against commercial payments. At the second stage, after the birth when parentage is formally transferred, the interest of the child can once again return to being the paramount consideration.

B. Education and Counselling

In Part 2 some evidence was advanced to suggest that whilst couples undertake careful research about the medical process and costs, their research into the legal requirements of the host and home countries is patchy at best and absent at worst.

The Foreign and Commonwealth Office (FCO) could extend its current remit to provide couples with information about jurisdictions where surrogacy is available to UK couples and where there are safeguards in place through regulation to prevent exploitation through commercial payments. This could be achieved through additions to their current 2014 guide on surrogacy,[[128]](#footnote-128) and would be similar to the general information made available through the Department of Education website about specific jurisdictions where international adoption is permitted.[[129]](#footnote-129) It could also include information about lawyers in other jurisdictions who are accredited or licensed to advise in this area of law.

The HFEA and the DHSC could be the main organisations responsible for publishing additional guidance for intended parents and medical professionals in the field of both domestic and international surrogacy. The Judicial College should continue to 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, ensuring their familiarity with parentage laws and orders in other jurisdictions. Similarly, the Children and Family Court Advisory and Support Service (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. Instead, this should remain the role of the judiciary, who are better able to assess past cases and hear from experts from the jurisdiction in question.

Other professionals can also play an important role in providing education as to the risks associated with international surrogacy through the compulsory counselling and assessment of the parties. Compulsory counselling for parties involved in surrogacy, coupled with the assessment of the intended parents before the child is handed over to them, are arguably examples of where changes through regulation could remove some of the concerns and risks associated with surrogacy without completely eroding autonomy.

It might be argued 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 precisely 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 intended parents and the child that would not exist in a traditional pregnancy situation and this is where any counselling needs to be focused.

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. Jennifer Damelio and Kelly Sorenson[[130]](#footnote-130) argue (when discussing surrogacy in the USA) 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 intended parents.

It is also important that intended parents explore the idea of future kinships, particularly as the case files suggest a preference for using married surrogates who have families of their own. This means that the surrogate child will have half-siblings whom they may want to trace at a later date if contact is severed. It is not suggested that intended parents 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 intended parents.

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 intended parents in counselling and assessment schemes as part of an application for a parental order.

It might be argued that it would be difficult for UK courts to enforce compulsory counselling abroad 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. Pre-birth orders would enable judges to direct the parties to attend counselling as a prerequisite for an order to be made.

B. Accreditation of Clinics, Surrogacy Agencies and Lawyers

Finally, regulation should also include steps to ensure that third party brokers and lawyers are accredited before they can become involved in the surrogacy industry. The data in Part 2 suggests the potential for tensions in the relationship between the intended parents and the clinics. Accreditation may go some way to addressing this. Accreditation of overseas clinics could be through the voluntary adoption of a Code of Conduct, ensuring access to counselling for all the parties, and 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 HFEA) then this might be a possible way to ensure compliance by organisations that the government does not have the power to regulate through UK law. Any reported breaches of the Code would lead to clinics being removed from the HFEA list. This would mean intended parents would 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 of overseas clinics but simply advertising to the public those overseas clinics that have signed up to an approved UK Code of Conduct.

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 intended parents, a schedule of payments and what they relate to, and 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 some clinics did not 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 1990 Act[[131]](#footnote-131) and its Code of Practice.[[132]](#footnote-132) 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.

The 1985 Act already deals with the regulation of UK surrogacy agencies[[133]](#footnote-133) but should be updated to reflect the growing practice of agencies operating

through social media such as Facebook.[[134]](#footnote-134) 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[[135]](#footnote-135) 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 both overseas surrogacy agencies and overseas clinics.

## A. Conclusion

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 access to fertility treatment within the 1990 and 2008 legislation. The surrogacy discourse can often produce animus towards the practice of international surrogacy but the role of the court is to afford all its citizens protections and rights recognised by the state.

There are few 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 England and Wales[[136]](#footnote-136) and the US[[137]](#footnote-137) has also arguably reaffirmed and sanctioned the diverse forms the family unit can take, which is particularly important given that surrogacy is a favoured method 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 for the surrogate family but a disconnect exists between domestic surrogacy arrangements in the UK and the use of ISAs by UK couples that must be addressed. Returning to the agenda-setting table would provide an opportunity to formulate a clear integrated statutory framework for surrogacy that recognises international surrogacy as a legitimate method of family formation and supports the practice through full regulation.

1. The Law Commissions of England and Wales and of Scotland are working together on proposals for law reform. [↑](#footnote-ref-1)
2. See for example, ES Anderson, ‘Is Women’s Labor a Commodity?’ (1990) 19(1) *Philosophy and Public Affairs* 71; C Overall, ‘Reproductive ‘Surrogacy’ and Parental Licensing’ (2015) 29(5) *Bioethics* 353. [↑](#footnote-ref-2)
3. United Nations General Assembly Human Rights Council*, Report of the Special Rapporteur on the Sale and Sexual Exploitation of Children, Including Child Prostitution, Child Pornography and Other Child Sexual Material* (United Nations, January 2018). [↑](#footnote-ref-3)
4. Ibid, [33] and [54]-[57]. [↑](#footnote-ref-4)
5. See for example R D’Alton-Harrison, ‘Mater Semper Incertus Est: Who’s Your Mummy? (2014) 22 (3) *Medical Law Review*, 357 and S Wilkinson, ‘Exploitation in International Paid Surrogacy Arrangements’ (2016) 33(2) *Journal of Applied Philosophy* 33(2) *Bioethics* 125. [↑](#footnote-ref-5)
6. Surrogacy Arrangements Act (SAA) 1985. [↑](#footnote-ref-6)
7. Human Fertilisation and Embryology (Parental Orders) Regulations (HFEAPOR) 2010. [↑](#footnote-ref-7)
8. Ibid, Sch 1. [↑](#footnote-ref-8)
9. Yet the HFEA did not provide detailed advice on surrogacy in its Code of Practice until 8 October 2013. See Guidance Note version 3.0. [↑](#footnote-ref-9)
10. Human Fertilisation and Embryology Act (HFEA) 2008, s 33. [↑](#footnote-ref-10)
11. HFEA 2008, s 54. [↑](#footnote-ref-11)
12. HFEA 2008, s 54(3). [↑](#footnote-ref-12)
13. HFEA 2008, s 54(4)(b). [↑](#footnote-ref-13)
14. HFEA 2008, s 54(5). [↑](#footnote-ref-14)
15. HFEA 2008, s 54 (1)(b). [↑](#footnote-ref-15)
16. HFEA 2008, s 54(2). ‘Enduring relationship’ is not defined in the Act. [↑](#footnote-ref-16)
17. This will change when the Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018 comes into force. [↑](#footnote-ref-17)
18. HFEA 2008, s 54(4)(a). [↑](#footnote-ref-18)
19. HFEA 2008, s 54(6). [↑](#footnote-ref-19)
20. HFEA 2008, s 54(7). [↑](#footnote-ref-20)
21. HFEA 2008, s 54(1)(a). [↑](#footnote-ref-21)
22. HFEA 2008, s 54(8). [↑](#footnote-ref-22)
23. Department of Health and Social Care (DHSC), *The Surrogacy Pathway: Surrogacy and the Legal Process for Intended Parents and Surrogates in England and Wales* (DHSC), 2018), 10. [↑](#footnote-ref-23)
24. See SAA 1985, ss 2 and 2A. [↑](#footnote-ref-24)
25. Immigration Rules 1994, as amended in December 2013. [↑](#footnote-ref-25)
26. HFEA 2008, s 54. [↑](#footnote-ref-26)
27. See the British Nationality Act (BNA) 1981, s 3 and the Nationality, Immigration and Asylum Act 2002, s 9. [↑](#footnote-ref-27)
28. See British Nationality (Proof of Paternity) Regulations 2006, s 50(9). [↑](#footnote-ref-28)
29. See Immigration (Leave to Enter and Remain) Order 2000, Art 3 and Immigration Rules, Part 8, para 297. [↑](#footnote-ref-29)
30. See *Re K (Minors: Foreign Surrogacy)* [2010] EWHC 1180 regarding some of the difficulties encountered in deciding parental order applications when decisions as to entry into the country are still pending. [↑](#footnote-ref-30)
31. See Immigration Rules, Part 1, [23A]. [↑](#footnote-ref-31)
32. BNA 1981, s 3(1). [↑](#footnote-ref-32)
33. HFEPOR 2010, Sch 4, amending BNA 1981, ss 1(5)(a) and 5A. [↑](#footnote-ref-33)
34. [2015] EWFC 90, [51]. [↑](#footnote-ref-34)
35. [2015] EWHC 911. [↑](#footnote-ref-35)
36. [2011] EWHC 921 (Fam), [2011] 2 FLR 646. [↑](#footnote-ref-36)
37. Ibid. [↑](#footnote-ref-37)
38. See 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] CFLQ 83 and K Horsey, ‘Fraying at the Edges: UK Surrogacy Law in 2015’ (2016) 24(4) *Medical Law Review* 608. [↑](#footnote-ref-38)
39. K Horsey and S Sheldon, ‘Still Hazy After all These Years: The Law Regulating Surrogacy’ [2012] 20(1) *Medical Law Review* 67. [↑](#footnote-ref-39)
40. See eg, *A, A v P, P, B* [2011] EWHC 1738 (Fam), *Re P-M (Parental Order: Payments to Surrogacy Agency)* [2013] EWHC 2328 (Fam), *Re X (a Child) (Surrogacy: Time Limit)* [2014] EWHC 3135 (Fam) and *Re Z (A Child) (No 2)* [2016] EWHC 1191 (Fam). [↑](#footnote-ref-40)
41. See Author, 2018. [↑](#footnote-ref-41)
42. See eg, *Re C (a minor) (Wardship: 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 FLR 1008. [↑](#footnote-ref-42)
43. See for example, *Re X (A Child) (Surrogacy: Time Limit)* [2014] EWHC 3135; *AB v CD (Surrogacy-Time Limit and Consent)* [2015] EWFC 12; *D & G v ED & DD and A & B* [2015] EWHC 911; *Re A and B (No 2 Parental Order)* [2015] EWHC 2080 (Fam); *A and B v C and D* [2015] EWFC 12; *KB and RJ v RT* [2016] EWHC 760 (Fam). [↑](#footnote-ref-43)
44. See eg, *CC v DD* [2014] 1307 (Fam); *Re G (Surrogacy: Foreign Domicile)* [2007] EWHC 2814 (Fam). [↑](#footnote-ref-44)
45. See eg, *Re Z (Foreign Surrogacy: Allocation of Work: Guidance on Parental Order Reports* [2015] EWFC 90; *Re A and B (No 2 Parental Order)* [2015] EWHC 2080 (Fam). [↑](#footnote-ref-45)
46. See eg, *X and Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam), [24] [↑](#footnote-ref-46)
47. Department of Health, *Review for Health Ministers of Current Arrangements for Payments and Regulation* (White Paper Cm 4068, 1998) (“the Brazier Report”). [↑](#footnote-ref-47)
48. 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. [↑](#footnote-ref-48)
49. A term used by Anthony Giddens to refer to the state’s ability through the exercise of democracy in the public sphere to influence relationships in the private sphere. See Anthony Giddens, *The Transformation of Intimacy: Sexuality, Love and Eroticism in Modern Societies* (first published 1992, Polity Press 2008). [↑](#footnote-ref-49)
50. A condemnation made by the European Parliament in their resolution of 17 December 2015 in their Annual Report on Human Rights and Democracy in the World 2014. [↑](#footnote-ref-50)
51. Eg the Modern Slavery Act 2015, s 2. [↑](#footnote-ref-51)
52. See for example, Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (2000) of which the UK is a signatory. [↑](#footnote-ref-52)
53. For discussion of methodology and further discussion of the data see R D’Alton-Harrison, ‘The Language of Collaborative Reproduction: Written ‘Voices’ Reframing International Surrogacy’ (2018) 14 *Journal of Contemporary Legal Issues,* 277. [↑](#footnote-ref-53)
54. This would not have been possible as the judgments are reported with the parties’ names anonymised. After data analysis took place, only one file was found to be linked to a reported judgment. [↑](#footnote-ref-54)
55. 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] 25(6) *Human Reproduction* 1361. [↑](#footnote-ref-55)
56. India has now taken steps to ban commercial surrogacy under the Surrogacy (Regulation) Bill 2016. [↑](#footnote-ref-56)
57. K Horsey, *Surrogacy in the UK: Myth Busting and Reform, Report of the Surrogacy UK Working Group on Surrogacy Law Reform* (Surrogacy UK, 2015). [↑](#footnote-ref-57)
58. 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. [↑](#footnote-ref-58)
59. F Winddance Twine *Outsourcing the Womb: Race, Class and Gestational Surrogacy in a Global Market* (Routledge-Cavendish, 2011), 19. [↑](#footnote-ref-59)
60. A Pande, ‘Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker’ (2010) 35(4) *Signs* 969. [↑](#footnote-ref-60)
61. H Ragone, ‘Chasing the Blood Tie: Surrogate Mothers, Adoptive Mothers and Fathers’ (1996) 23(2) *American Ethnologist* 352, 355. [↑](#footnote-ref-61)
62. See California Family Code 2013 (as amended) §7960. See criticisms of the Californian model at note 4, [54]-[57] and [77(e)]. [↑](#footnote-ref-62)
63. See UN International Labour Organisation’s International Standard Classification of Occupations ISCO-08 2008, <<http://www.ilo.org/public/english/bureau/stat/isco/isco08/>> accessed 29 June 2018. 24% of individuals were from group 1 and 47% from group 2. [↑](#footnote-ref-63)
64. [2014] 1307 (Fam). [↑](#footnote-ref-64)
65. Ibid [61]. [↑](#footnote-ref-65)
66. [2015] EWHC 911. [↑](#footnote-ref-66)
67. Ibid [64]. [↑](#footnote-ref-67)
68. H Ragoné, ‘Of Likeness and Difference: How Race is Being Transfigured by Gestational Surrogacy’ in H Ragoné and F Winddance Twine (eds), *Racial Ideologies and Racial Realities* (Routledge 2000), I (2). [↑](#footnote-ref-68)
69. Ibid. [↑](#footnote-ref-69)
70. [2016] EWFC 42. [↑](#footnote-ref-70)
71. Ibid, [9]. [↑](#footnote-ref-71)
72. DHSC, n 23. [↑](#footnote-ref-72)
73. This is however addressed in the publication by the Foreign and Commonwealth Office, *Surrogacy Overseas* (Assets Publishing Service 2013) last updated 26 June 2014. [↑](#footnote-ref-73)
74. See eg *Re G and M* [2014] EWHC 1561 (Fam). [↑](#footnote-ref-74)
75. EWHC 1303 (Fam). [↑](#footnote-ref-75)
76. Ibid [42]. [↑](#footnote-ref-76)
77. File 3. [↑](#footnote-ref-77)
78. Note 4, [51]. [↑](#footnote-ref-78)
79. See HFEA, s 54(8). [↑](#footnote-ref-79)
80. Note 4, [29-33]. [↑](#footnote-ref-80)
81. 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. [↑](#footnote-ref-81)
82. 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. [↑](#footnote-ref-82)
83. RD Putnam, *Bowling Alone: The Collapse and Revival of American Community* (Simon and Schuster, 2000), 136. [↑](#footnote-ref-83)
84. Putnam refers to this as ‘the anonymous other’: ibid, 137. [↑](#footnote-ref-84)
85. HFEA 2008, s 54(8). [↑](#footnote-ref-85)
86. See speech of the Rt. Hon. Kenneth Clarke, *Hansard*, HC Deb, 2 April 1990, vol 170, col 915. [↑](#footnote-ref-86)
87. See eg *Re P-M* [2013] EWHC 2328 (Fam); *Re W* [2013] EWHC 3570 (Fam). [↑](#footnote-ref-87)
88. See *Re S* [2009] EWHC 2977, [7]; *X and Y*, above n 1, [21ii]. [↑](#footnote-ref-88)
89. [2008] EWHC 3030 (Fam), [20]. [↑](#footnote-ref-89)
90. See eg *In the Matter of C (A Child)* [2002] EWHC 157 (Fam); *X and Y* [2008] EWHC 3030 (Fam); *Re S (Parental Order)* [2009] EWHC 2977; *Re L* [2010] EWHC 3146 (Fam); *In the Matter of X and Y (Children)* [2011] EWHC 314 (Fam); *A v P*, above n 49, *J v G* [2013] EWHC 1432 (Fam); *Re P-M*, above n 49; *Re C* [2013] EWHC 2408 (Fam); *Re W* [2013] EWHC 3570 (Fam); *Re WT (Surrogacy)* [2014] EWHC 1303 (Fam); *Re G and M* [2014] EWHC 1561 (Fam); *CC v DD* [2014] 1307 (Fam), *Re X (A child) (Surrogacy: Time Limit)* [2014] EWHC 3135 (Fam); *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 (Fam); *Re X (Foreign Surrogacy)* [2016] EWHC 270 (Fam); *KB and RJ v RT* [2016] EWHC 760 (Fam). [↑](#footnote-ref-90)
91. *AB v CD* [2015] EWFC 12*.* [↑](#footnote-ref-91)
92. Note 4, [38]-[41]. [↑](#footnote-ref-92)
93. Note 4, [76]. [↑](#footnote-ref-93)
94. FPR 2010, Part 25, r 3. [↑](#footnote-ref-94)
95. Children and Families Act 2014, s 13(8)(c). [↑](#footnote-ref-95)
96. FPR 2010, Part 25 r 9. [↑](#footnote-ref-96)
97. [2008] EWHC 3030 (Fam). [↑](#footnote-ref-97)
98. [2009] EWHC 2977. [↑](#footnote-ref-98)
99. 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; 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. [↑](#footnote-ref-99)
100. Crawshaw et al, n 99. [↑](#footnote-ref-100)
101. Ibid, 1241. [↑](#footnote-ref-101)
102. See the policy cycle originally developed by HD Laswell, *The Decision Process: Seven Categories of Functional Analysis* (University of Maryland Press, 1956) setting out the various stages of policy design as agenda setting, policy formation, decision making, implementation and evaluation. [↑](#footnote-ref-102)
103. File 9. [↑](#footnote-ref-103)
104. Comments made by Laura Martinez-Mora, Principal Legal Officer at the Permanent Bureau of the Hague Conference (HCCH) at the Academy of European Law conference on Law and Practice on Surrogacy, Cambridge University 26 June 2018. [↑](#footnote-ref-104)
105. HCCH, Report of the Experts’ Group on the Parentage/Surrogacy Project (Meeting of 25-28 September 2018), (HCCH 2018). [↑](#footnote-ref-105)
106. Adoption and Children Act 2002, s 1. [↑](#footnote-ref-106)
107. See above n 7. However s 377 of the Indian Constitution that made homosexuality a criminal offence was decriminalised by the Supreme Court on 6 September 2018 and this may lead to a future revision of India’s ban on same-sex couples accessing surrogacy. [↑](#footnote-ref-107)
108. United Nations General Assembly Human Rights Council, Report of the Special Rapporteur on the Sale and Sexual Exploitation of Children, Including Child Prostitution, Child Pornography and Other Child Sexual Material (United Nations January 2018). [↑](#footnote-ref-108)
109. See ABA Report to the House of Delegates Resolution 112B February 2016. . [↑](#footnote-ref-109)
110. Ibid, 1 and [10] [↑](#footnote-ref-110)
111. ACA 2002, s 83. See the discussion of the risk of breaching this provision in cases such as *Re G and M* [2014] EWHC 1561 and *CC v DD* [2014] 1307 (Fam). [↑](#footnote-ref-111)
112. Note 4, [41] & [76]. [↑](#footnote-ref-112)
113. California Family Code 2014, Part 7, §7962. [↑](#footnote-ref-113)
114. Children’s Act 38 of 2005, ch 19, s 292. [↑](#footnote-ref-114)
115. See the Greek Civil Code law 4272/2014 and the Greek Code of Civil Procedure (Law 4335/2015). [↑](#footnote-ref-115)
116. Brazier Report, above n 60. [↑](#footnote-ref-116)
117. Ibid, [5.25]. [↑](#footnote-ref-117)
118. Ibid, [5.11]. [↑](#footnote-ref-118)
119. Note 34, 10. [↑](#footnote-ref-119)
120. A Alghrani and D Griffiths, ‘The Regulation of Surrogacy in the United Kingdom: the Case for Reform’ [2017] CFLQ 165, 178. [↑](#footnote-ref-120)
121. Children’s Act 2005. [↑](#footnote-ref-121)
122. ACA 2002, s 96. [↑](#footnote-ref-122)
123. 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. [↑](#footnote-ref-123)
124. [2014] EWHC 1303 (Fam), [42 c]. [↑](#footnote-ref-124)
125. *X and Y* [2008] EWHC 3030 (Fam), [21]. [↑](#footnote-ref-125)
126. Ibid. [↑](#footnote-ref-126)
127. See ACA 2002, s 1(4). [↑](#footnote-ref-127)
128. 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>> accessed 10 November 2018. [↑](#footnote-ref-128)
129. See Department of Education <https://www.gov.uk/child-adoption/adopting-a-child-from-overseas>accessed 10 November 2018. [↑](#footnote-ref-129)
130. J Damelio and K Sorenson, ‘Enhancing Autonomy in Paid Surrogacy’ [2008] 22(5) *Bioethics* 269. [↑](#footnote-ref-130)
131. HFEA 1990. [↑](#footnote-ref-131)
132. HFEA Code of Practice (8th edn, HFEA 2012) (as amended). [↑](#footnote-ref-132)
133. See eg SAA 1985, ss 1 and 2. [↑](#footnote-ref-133)
134. See eg, *A & B and X and Z (A Child by his guardian)* [2016] EWFC 34 where the court ordered that the child should remain with the surrogate after the intended parents commissioned the surrogacy arrangement through a Facebook page and where there was an alleged degree of respect and care for the surrogate. [↑](#footnote-ref-134)
135. Brazier Report, above n 60, [7.21] and ch 8. [↑](#footnote-ref-135)
136. See the Marriage (Same Sex Couples) Act 2013. [↑](#footnote-ref-136)
137. See *Obergefell v Hodges et al* 576 US (2015) . [↑](#footnote-ref-137)