Commentary

Crossing the line: the legal and ethical problems of foreign surrogacy

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Abstract

UK law has for many years taken a careful approach to surrogacy, neither banning it nor allowing it to develop unrestrictedly. This careful middle approach seeks to balance permitting what may be a last hope for infertile couples against a wider public policy that bars commercialized reproduction: surrogacy is allowed in the UK, provided it is consensual and involves the payment of no more than reasonable expenses. But in an increasingly globalized world, patients are crossing borders for treatment, often to places where such restrictions on the commerciality or enforceability of surrogacy arrangements do not apply. The resulting conflicts of law can be a minefield, and this makes the maintenance of the UK's careful legal balance increasingly untenable.

UK law has for many years taken a careful approach to surrogacy, neither banning it nor allowing it to develop unrestricted. While the law acknowledges that surrogacy is an acceptable form of fertility treatment and often a last hope for infertile couples, it balances this against a wider public policy against commercialized reproduction. This public policy is one that is seen throughout fertility law – for example, restricting the payments that can be made to donors, and leading to the careful regulation of egg sharing schemes. Public policy upholds the principle that such intimate arrangements should be gifts, and that reproduction should not be bought and sold.

UK surrogacy law is therefore focused on avoiding commercialization. The commercial brokering of surrogacy arrangements is criminalized, as is advertising for or by surrogates. Surrogacy arrangements that do not breach these rules (typically privately made arrangements between friends or relatives) will be endorsed by the family courts if no more than reasonable expenses have been paid to the surrogate mother. Surrogacy arrangements are also, by law, unenforceable, so it is a prerequisite that the birth mother agrees to the child being handed over.

This legal approach puts the UK on a middle path internationally between, on the one hand, countries like Italy and Germany where surrogacy is banned completely, and, on the other, countries like USA (Snyder and Byrn, 2005), India (Malhotra and Malhotra, 2009) and Ukraine where there are few restrictions and fully enforceable commercial arrangements are allowed.

But the trouble with treading a middle path is what do you do when someone strays off-track? In an increasingly globalized world, this is the problem UK surrogacy law now faces. International differences of law are encouraging increasingly knowledgeable fertility patients to shop around the world for treatment. British parents struggling to find an altruistic surrogate mother in the UK (not least because of the legal restrictions here) are attracted abroad to countries where there is ready availability of willing host surrogate mothers, many of them offering their services on a commercial basis. Eastern Europe, the USA and India are all popular destinations.

But the pitfalls are extreme, and British couples who go abroad for surrogacy (and clinicians who advise them) need to be aware of the difficulties. The problems were demonstrated vividly last year in the first High Court case to explore the legal problems of foreign surrogacy (Re X and Y (Foreign Surrogacy) Family Division 9 December 2008, reported [2009] 2 W.L.R. 1274). The case (Theis *et al*., 2009) involved a British commissioning couple who conceived twins with the help of a married Ukrainian host surrogate. Although the British parents had been reassured that under Ukrainian law they would be treated as the legal parents and named on the birth certificate, under English law the parents of the twins were the host surrogate and her husband. The conflict between English and Ukrainian law had the effect of abdicating parental status for both couples, and this left the children without legal parents and without rights to either British or Ukrainian citizenship. The children were, in the words of High Court judge Mr Justice Hedley, 'marooned stateless and parentless'.

In order to grant an order awarding parenthood to the British parents, the High Court had to sanction a commercial payment made to the surrogate mother. The court had the impossible task of balancing 'two competing and potentially irreconcilable concepts' in having to weigh up public policy against the best interests of two very vulnerable children. Ultimately, the welfare of the children was given priority, but the court considered the position very carefully and stressed that every case would be looked at on its own facts.

Above all else, the landmark decision (the first UK ratification of a commercial surrogacy arrangement) demonstrates that, in a global world, the UK's moderate approach to surrogacy is

becoming untenable. In the short term, it is crucial that fertility patients are made aware of the potential legal pitfalls of looking abroad for surrogacy treatment. Foreign clinics are aggressively marketing their services internationally, and there needs to be much better public information to help patients understand the full picture.

There are doubtless many patients who are already caught in the legal minefield – perhaps unknowingly – and will face an uncertain future. Some may be anticipating the birth unaware of the immigration and legal matters (not to mention expense) they will face when their much-wanted child arrives. Others may have already slipped through the immigration net (although it is unknown for how long this will continue), unaware that they are caring for a child with whom they have no legal relationship.

In the longer term, the solution must be a reform of the law. In the UK, the Human Fertilisation and Embryology Act 2008 did not consider surrogacy in detail and this was a missed opportunity. Here, the rise of cross-border infertility treatment/assisted reproduction technology has created a ticking time-bomb for the delicate legal balance which has held sway for the past 20 years. It is a time for a fresh approach.

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