

International Surrogacy Workshop

Minutes by Ryan Dowding

9:55 – Start

James Netto – Solicitor Advocate: specializes in abduction, surrogacy and adoption (all involving international elements):

- 1-2000 surrogacies a year: booming in the United Kingdom (that is a “conservative estimate”).
- About 10% of the above are in receipt of a parental order: so 10% don’t have any legal relationship with birth parents.
- India has a huge market for surrogacy.
- Described it as “very much nascent” because this issue is still relatively new and most of the issues are still very much in their infancy.
- *Re Z* (2016) EWHC 1191: important judgement. Declaration of incompatibility with ECHR on the provision requiring a ‘couple’ to have a child via surrogacy.
- Application within 6 months of birth – flexible criteria: again, Munby has been behind creating this flexibility.
- “Domiciled” – a term requiring roots in a particular country. From the perspective of practice, James notes that this is a real pain for applicants.
- Flexible “commerciality test”.
- India and America are big destinations. Cambodia, Nepal, Laos are becoming more prominent. Huge issues are created because of how distinct these various jurisdictions are.
- Council Regulation (EC) No 2201/2003: excludes specifically the parent-child relationship from its scope because of differences in jurisdictions.
- Malta only legalized divorce properly in 2011.
- Some States, like the Netherlands, are very willing, in a conflict of laws case, to apply the law of another country, whereas the UK will not.
- \$2.1-billion market – allegedly – for international surrogacy in India.
- Work of the Permanent Bureau of the Hague Conference in Private International Law: panel of experts on surrogacy (est. March 2011).
- Big and high profile cases in the ECtHR.

- Hague Convention: Feb this year they held a four-day conference. Most States do not have specific private international law rules and mostly apply their general ones.
- American Bar Association: US State Department have come out against a convention regulating international surrogacy because it's big business. ABA provided an expert report: talks about focusing on conflict of laws; there should not be, they say, a best interests doctrine; no obligation of a genetic link which is required under English law.
- American Academy of Assisted Reproductive Technology Attorneys: talk about a 7 step plan. Pre-pregnancy counselling; child's parentage would be determined by administrative (judicial?) central authority; donation; ART procedures commence; intended parents travel freely to surrogate's country; child born; final parentage determined by Central Authority.
- Is this really about surrogacy? He doesn't think so. Instead, he thinks it is about conflict of laws: a symptom of a broad problem.

Kirsty Horsey

- 30-year-old law on surrogacy which Horsey describes as a "knee-jerk reaction" to social circumstances appertaining at the time. The report which led to the reform of the law was fairly anti-surrogacy.
- Thinks that a lot of people who are not applying for parental orders are probably failing to do so simply because they don't know that they have to.
- What binds it all together is the paramountcy principles, so in some ways none of the other rules matter.
- As part of their report they set up an online survey. Got far more responses than anticipated. Recommendations made:
 - Reform is a must.
 - Must centre on welfare of child/family.
 - Compensation/reimbursement should still be allowed (not profit).
 - Should consider ways of recognizing IPs as legal parents.
 - Single people/double donation [no genetic link] couples should be entitled to surrogacy.
 - State agents involved (MoJ, Cafcass etc...) should produce better, clearer and joined-up guidance.
- Reform required now: need better data collection and better information out there. Advertising of services (not necessarily for profit) should be allowed. People often don't know where to look. Want to minimize overseas being the first choice.
- Survey: 434 responses; 111 surrogates; 206 intended parents (65 IP respondents were gay males; 19 overseas); 112 'others' (9 clinicians; 9 lawyers; 6 social workers; 15

academics/researchers; rest = others including e.g., family members, prospective parents etc...)

- Majority of surrogates and IPs maintained an ongoing relationship.
- High degree of openness with the child.
- Very few surrogates thought that they should have been the legal mother from birth (most thought the IPs should be).
- Average amount a surrogate received: £10-15,000.
- Highest total reimbursement for UK-based surrogate: £60,000; sums ranged from £0-25,000 and the mean was £10,589.
- 300 of the people in the survey said, unequivocally, 'yes' to the need for law reform.
- Amongst surrogates, the notion that the contract should be enforceable the resounding answer was yes, "except where the best interests of the child are not met".
- Baroness Deech: "[t]he Government has no current plans to review the legislation relating to surrogacy but is keeping this issue under consideration."
- However, Law Commission have been asked to put it on their 13th work programme this summer.

Questions

- Regarding double donation, what is the difference, then, when compared to adoption? Secondly, in relation to India, despite not allowing 'foreigners' to go to India to have surrogacy:
 - James: anyone with "even a slither of Indian" is able in practice to go to India. Many of the women are extremely vulnerable i.e., chemotherapy and other things which have caused their infertility: then you have to add the surrogacy process, the legalities of it and finally you need to apply for adoption. Says he represented a party in a case where a Facebook page for international surrogacy was involved and it was like a "boot sale".
 - Kirsty: with a system of international surrogacy but with restrictions on certain number of people etc... you are opening yourself up to deception ("desperation is a big driver" – particularly when coupled with the certainty of coming home with a child). Lack of information.
- Marilyn Crashaw: 39% of orders made = the child was born abroad.
 - James: figures are effectively a guess.
- Question about why a parental order was not made in the case involving the abusive parents with criminal convictions. Separate issue.

- James: anecdotal case. Long time back. Head of Cafcass talked about that particular case.
- Note on the figures of international surrogacy:
 - Says she is doing empirical research and has more figures than the MoJ does. There are a large proportion of unreported or unknown addresses of the surrogate mothers.
 - James: notes that having a missing address is a frequent problem in Asian countries particularly.

Panel 2

Marilyn Crawshaw

- Chair of PROGAR: Project Group on Assisted Reproduction: regularly consulted on various issues of policy and practice and works alongside a large variety of organisations such as the British Infertility Counselling Association; Children’s Society etc...
- Woeful lack of joined up thinking across government departments and agencies in relation to data collection. Described as a “travesty” the sheer lack of knowledge we have about how many surrogacy conceived children are entering or residing in this country.
- Human rights:
 - CRC specifically: 5 key areas that we should be looking at before doing anything else about developments around surrogacy arrangements.
 - It affords the BI of the child “primary” consideration in all situations. Crawshaw and her organisation’s view = that it should be the paramount consideration.
 - Article 2: right of children to be free from discrimination.
 - What do we mean by ‘parent’? We should be thinking about this re: those who have a “linear genetic relationship” with the parents; those who carry the child OR those who raise the child – all forms of parents (similar approach to that taken in *Re G*). All should be treated with dignity and respect.
 - Few jurisdictions have registries or databases which contain information about donors, surrogates etc... Child and IPs should be able to find this information.
 - Offspring are dependent on parents telling them that they have a human right to exercise.
 - It is important (cites Implementation Handbook) that a child knows their background and identity or has the means to find it.
- Exploitation of all parties must be challenged:

- Usually, surrogacy might be subjected to scrutiny, but IPs are not so much. Yet, these are the people we hope to be checked out (NOTE: the case James mentioned – unreported, involving abusive IPs).
- What is the boundary between commercialism and not-for-profit? Need more analysis.
- Severe lack of regulation.
- Boundaries between surrogacy and child selling are porous. The potential for child sharing being wrapped up as ‘surrogacy’ is there, but human rights agencies fail, often, to see it.
- Right to a nationality: sometimes adults’ desire to have children creates problems in relation to this. One partner rushes home. Both have a lack of information. No follow up from the government e.g., ‘why are you not applying for a parental order’.
- Jurisdictions should recognize all cross-border surrogacy arrangements.
- We should not be sanctioning illegal activities.
- Final point, need for informed consent from the surrogate.
- Final slide provides a list of her organisation’s proposals.

Olga van den Akker

- Unfamiliarity in third party assisted conception cases have led to: (1) individual psychosocial issues; (2) social issues [...]; (3) global issues.
- The issues begin: right at the test-tube.
- Surrogacy is non-traditional. In vivo differences: a surrogate mother with her own constitution. Her constitution, her habits etc... are likely entirely different. All of this has an effect on the unborn child. Overwhelming evidence, in fact, that this will affect the health and wellbeing of the foetus, infant, child, adult etc...
- Research on parent-child relationships and the child’s psychosocial development is inconclusive. However, overprotectiveness, less parenting self efficacy etc... are unreported. Anxiety in intended mothers can be explained by the fact that there is a lot of pressure, uncertainty and investment involved in surrogacy.
- Cognitive dissonance:
 - What happens where a surrogate thinks a genetic link is important but they subsequently relinquish the baby? Further studies needed.
 - Vice versa: i.e., where they think it is unimportant, but commission a baby. How did these affect them?
- Prenatal attachment – conflicted:

- Usually encouraged. Opposite is true with surrogate mothers (SM). Surrogate agencies will encourage them not to think of it as their child. In most cases they are very successful.
- However, he does a SM reconcile her attachment with the obligation to relinquish the child?
- Prenatal attachment – intended mother:
 - Absolutely no research on how an IM might develop attachment with the SMs child. No genetic link.
- There is nothing traditional whatsoever about this families, she explains. In some countries, like India/Vietnam, culture binds people to the belief that the mother is the real mother of the child (Hibino, 2015). These links, Olga says, are very important considerations for theorists and those considering surrogacy.
- There is a stark disparity between figures from the GRO and surrogacy agency figures regarding how many children are born from surrogacy arrangements and are now in the UK. Many different explanations.
- SMs are significantly younger, often single, have never been pregnant before (often): often, she says, social support is crucial in these situations because they will, for the above reasons, be vulnerable individuals. 18% of genetic and 20% of gestational surrogates had experienced PND in a previous pregnancy. Almost no research into this occurring in other countries. Bolsters her point regarding the necessity of social support.
- Socio-economic inequalities are massive. Doesn't matter whose research you pick up, same sort of figures.
 - IPs usually professional/upper/middle class individuals – SMs usually lower class/less educated – this is just in the UK. Disparities worse elsewhere.
 - There is a power difference, not just an economic one (or perhaps the two are intrinsically linked).
- Summary:
 - Adverse psychological effects;
 - Research into consequences of kinship and identity is only barely scratching the surface;
 - We need to accept all of these issues as serious ones and get ahead of the game.

Julia Feast

- Rights of a child.
- Makes no bones about the fact that she believes every child has a right to know who they are and where they come from.

- Children can grow up and form very loving relationships with adoptive parents.
- Parents should not be fearful that being truthful with their child about their origins will damage their relationship.
- A member of the birth registration campaign group: a coalition of organisations and individuals dedicated to child and family welfare.
- Promote and advocate for full and accurate information about genetic parentage.
- The existing system of birth registration = “incapable” of coping with scientific, technological and social changes in relation to child conception and birth.
- The current system could also be said to be discriminatory in relation to people born from adoption and those born through surrogacy. Adopted people will be issued with a certificate that looks the same as a birth certificate, but has the words ‘adoption certificate’ written on it. People will know how they have been born but “why should their privacy be compromised”?
- Risk of (however remote) incest without knowledge of origins.
- HFEA 2008 led to certain changes allowing for 2 fathers, 2 mothers etc... to become parents. In 2013 the BRCGroup put forward a proposal to the Law Commission asking for registration to be reformed so as to reflect 21st-century family forms. However, this proposal did not go through: couldn’t find somebody in the Government to assist (a requirement).
- What are they proposing?
 - A national instrument placing all people on an equal footing: no need for two certificates (long one and short one).
 - All people should have certificate for legal parentage and another document showing genetic parentage. On the second document it would show individuals where to go to seek information about heritage i.e., if you are adopted go to A, if surrogate-born go to B.
 - Matter of urgency to remove discrimination in access to information about “who they are and where they come from”.
 - While we wait, thousands of children are being and will continue to be denied information about who they are and where they are from.

Arianne Shahvisi

- Feminist philosophy and bio-ethics background. Not something she has worked on extensively, but just thoughts on transnational gestational surrogacy.
- Starting point: it is “morally troubling”.
- “Surrogacy is imbedded in a nexus of really problematic norms”.

- Assumption: there is no positive right to be a parent or reproduce. There is perhaps a negative right, but nobody is obliged to ensure that you can reproduce.
- Focuses on the idea of the “genetic imperative” and why it is so important for so many people to produce their own child.
- On closet analysis we find, she argues, that there aren’t really any compelling positive reasons for having your own child. The desire to beget your own child is probably irrational: “which is fine, if people are willing to be irrational”.
- Any specification of the genetic material of that child before is probably irrational unless we attempt to specify, not that it should be like us necessarily, but that it should have positive features e.g., “good at running”.
- Rationalities are undervalued today, whereas genetics are often overvalued.
- For the most part transnational gestational surrogacy facilitates the transfer of white bodies across borders which is all facilitated. “It is a great irony that is Indian women had the same freedom of movement of the children they gestate, they would likely not be gestating those children.”
- The big question for Arianne: “Whose genes? Whose bodies?”
 - What race? What gender? What labour are they usually involved in? Nationality is usually key.
 - Limited freedom of movement, she notes. These women cannot “come after you”.
- Why India? The rationale: India formally/informally permits commercial surrogacy. Possibility of services for very little money. Little risk. “All of these comes back to a capitalist economic model.” A large amount of women who will not usually drink, smoke etc... you can guarantee that your surrogate mother will be “well behaved”.
- India is a nation full of medical professionals: colonial residue. English language fluency.
- Can consent be given from a position of poverty?
 - It is lucrative. Pays large amounts of money for things which are otherwise beyond the reach of many women.
 - Comparison with sweat-shop labour: similarities in that the agency of the individual is thrown into doubt under the weight of her poverty.
- Relationship with feminism:
 - Feminists: some are for, some against. Some see it themselves as in solidarity with the SM.
 - Conservatives for surrogacy: preserves the traditional family.
- Extends woman’s relegation to the reproductive sphere and is wholly compatible with other forms of traditional, stay at home, feminized labour.

- A woman should be the surrogate, even though the woman cannot or should not. Often, the poor women become the functional women. Can't call something a feminist act if it delegates the task to 'the' women.

Alan [...]

- Member of a volunteer-led organisation in the UK which facilitates opportunities to meet surrogates. You apply to become a member (as a couple). Somebody from Surrogacy UK then explains the process and you attend social events – which are coupled with an online message board – where you meet prospective parents/surrogates.
- A surrogate will express interest. Compulsory 3-month 'getting-to-know' period.
- The agreement period, including a very complex form which goes through various things to do with your friendship with the surrogate, medical issues etc...
- Has had personal experience. Met a surrogate carrying a baby with another couple at their very first event.
- She had a 6-month period post-having a baby (compulsory). Then had an elongated period where they have had some failed IVF attempts. Through that time they have developed a great friendships with the surrogate and are ready to have a child.
- Surrogate mother called auntie Annie by the children.
- "The support of our surrogate ... our surrogate was the one really saying 'no, no; don't give up'".
- The surrogate is not using her own eggs, in Alan's case. The children in the other families were both from heterosexual couples who had their own embryos.
- Would 100% be "up for more counselling".
- Sometimes Annie will say "it's your baby, you decide" and we will say "it's your body, you decide".

[Sandra Bateman]

- When couples say they met through Surrogacy UK it is relieving.
- From the clinic's perspective, all they do is advise.
- She thinks that we need to focus on the child. She has had various stories where it has run smoothly. However, in other cases they cut off their connection with the surrogate as soon as the child is born.
- COTTS is another organisation which she finds it relieving to be involved with. Usually, the surrogates have been heavily vetted and frequently she finds that the surrogates will choose the parents, not the other way around.
- Look at the legal aspects and refer them to agencies etc... BUT they can't see that. All they can see "at that time is ... they want a baby." It's "all they're wanting".

- Once they have had their second scan they won't come back. They just go through maternity and are discharged from the hospital.
- There is no 'must' hanging over counselling. Absolutely up to the clinic.
- If they have come from Surrogacy UK they get pre-reports from the organisation and they know they the individuals will have been pretty well vetted, so it's fairly relaxed.
- However, they will recommend three months of counselling. This is relatively unusual however.
- Noted again (though indirectly) the incest point: where people don't know who the donor is there is always a problem.

[Deborah Sloan]

- What she found when trying to get information was that it was very difficult.
- Has lots of experience doing counselling for donor gametes.
- With surrogacy, you have to bring up some very difficult issues: pose lots of "what if" questions which can feel like you're "killing somebody's dreams".
- What is unique from a counselling perspective is that you are talking about a child which has been "created before it's conceived". Feels like it's present in the room. Asks her clients to imagine not only the baby, but also to engage with the human being as they will be in the future: "can you imagine the 12-year-old"; "can-you-imagine the 20-year-old" etc...
- Intrigued by "what do the IPs need and what does the surrogate need". Who is the client: is it the intended child, the IP or the surrogate.
- People frequently come in with the loaded question in their head of "is this normal".
- Comment on Arianne: one of the things that comes into the counselling room: not so much the big philosophical questions about genetics, but about desire: what are peoples' desires for their future child and for themselves.
- The clinic can state that they will not treat you unless you have had counselling. They have the legal right to withhold their services.
- Recommends having a minimum number of sessions.
- Sometimes it takes a facilitated conversation to uncover the differences which might come up later down the line, which in turn facilitates an understanding of what is truly involved.

General Points from the discussion

- Facebook pages and other social media: how to regulate it better because frequently people will strike up worrying deals online, but the sites themselves refuse to self-regulate.
- Law Commission should look at the whole thing, not just surrogacy.

- Philip asked a question on co-parenting of a child. Noted in the U.S. where distant relationships and not friendships are involved. What does Alan think? He feels very positively about his relationship with Alan. Having co-parenting relationship could be disastrous if they decided to e.g, move away.
- In practice e.g., when it goes to court it is never from a reputable agency.
- Documentation: while the document is not legally binding it means that they have thought about the issues involved, discussed them, negotiated and they now have a document which shows intent and is, perhaps, morally binding.
- Craig notes that there are some things that law simply cannot (or at least struggles) to control. Julia Feast was displeased: “that’s why we are here”, she argues that we are here to discuss reforms and attempt to do something about these issues [specifically in the context of not knowing who donors are because of a poor registration system].
- James talks about the fact that the problem of not knowing a father is sometimes not a legal point, it is a social-work point. He cites a case he is involved in where he is representing a woman who was horrifically domestically abused by a man convicted of murder. They have gone for full revocation of PR. The child has effectively lost his origins story/identity and the mother doesn’t know what to tell him.
- Both counsellors talk to their clients about social perceptions and the difference [Deborah] between “genetics and belonging”.
- Costs: Alan says that with adoption, the State is much more keen to have a much more detailed/invasive look into somebody’s life, whereas in surrogacy we don’t at all (effectively, one counselling session will do). What do the counsellors think? **Alan: “equally so, when a heterosexual couple has a child, nobody ever questions them”.**
- People are naïve when they go abroad [Sandra].
- Alan did consider international surrogacy, but was uncomfortable about it. Cultural differences were an issue. So was the fear of exploitation. Also liked the social aspect of Surrogacy UK’s approach.
- Alternative Parenting Show: sponsored by James. Kirsty and Sandra = unhappy with it. Like a market.
- Bilateral agreements might be the way to go because it’s slower, but something needs to be done.

Claire Fenton-Glynn

- How do we deal with surrogacy arrangements which are legal in the country of birth, but contrary to the law of our country?
- Assessed through the lens of the jurisprudence of the ECtHR.

- *Re X and Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam): British couple travelled to Ukraine. Entered arrangement with married surrogate. Everything fine until went to get a passport for the mother. Went to Ukrainian authorities, however, their law was that the commissioning parents were the parents, whereas in the UK it was the birth parents. Eventually resolved outside of the immigration laws.
- *D v Belgium* (App No. 29176/13): Belgian couple travelled to Ukraine to undertake surrogacy. Child refused travel authorization to return to Belgium due to lack of evidence provided concerning the genetic relationship. Manifestly unfounded: no obligation on a country to allow entry to a child born outside of proper legal processes. Rationales? Judgement, they said, to facilitate compliance with the law of both countries.
- *Mennesson and Labassee v France* (App No. 65941/11): two French couples to USA to enter surrogacy arrangements as per laws in those jurisdictions. Came back to France and tried to register the children. Refused: would give rise to a surrogacy arrangement (1) null and void under French law; (2) which the legislature had expressly forbidden. Court took “incredibly unsympathetic view” of the claim of the parents. Difficulties encountered in producing a foreign birth certificate not insurmountable. Court reiterated that in striking a fair balance between interests of the State and the child the rights of the latter must prevail.
- *Foulon et Bouvet v France* (July 2016): similar factual situation to the above. Reaffirmed the above judgement.
- Describes *Mennesson and Labassee* as “not a watershed moment”. Is a reiteration of domestic law.
- *Paradiso and Campanelli v Italy* (App No. 25358/12): Italian husband and wife travelled to Russia for surrogacy arrangement. When born, registered with commissioning parents listed on the birth certificate. On return to Italy, they sought to have birth certificate registered. Charged with misrepresentation of legal status because under Italian law the birth mother is the mother. Charged with a violation of adoption legislation. At the same time, the public prosecutor removed the child from the family and opened grounds for adoption. Child had simply been abandoned under Italian law. Art 8 case. Complained about removal of child and refusal to recognize parental status. DID violate Article 8. *De facto* family life between parents and child, despite lack of genetic link. Child 6-months old before removal. Two dissenting judges heavily criticised the the judgement and said that Article 8 should not be interpreted as protecting a family life between people with whom the child has no genetic link and where the facts suggest that the child was brought in and parented despite it being a criminal offence. The decision of the majority, the dissenters said, denies the right of the national authorities the freedom to apply their own laws. ECtHR found that reference to public order cannot given domestic authorities *carte blanche* to take any action whatever.
- Results: “represent a backdoor legislation of international surrogacy”. Have seen the effects of these cases across Europe. Germany cited *Mennesson and Labassee*. Spanish authorities

have been directed that as a result of ECtHR decision they can no longer rely on the public policy provision (similar to Italy's).

- Ultimate effect: gradual abandonment of policies which disallow international surrogacy.

Christina Weis

- Ethnographic accounts of surrogacy relationships in St Petersburg, Russia.
- Talked mainly to surrogacy workers. Clients were hard to find (only talked to a few). Talked to agency staff.
- Dominant narrative: "labour of love".
- Other accounts: gift of a child; chance to be a mother; putting your own life in danger to give a child to another.
- "In Russia, the framing is very commercial – very economic".
- Commercial, gestational surrogacy is legal (since 1995).
- Representative of an agency: "70% of our clients don't communicate with the surrogate mother – why should they? If they had liked to take care of that, then they would have found themselves a surrogate and taken care of it in the first place. We have curators who take care of the surrogate mothers, they can call them and ask how they feel, how things are going, their attitude, health and so on (...)"
- Showed a screenshot from a website where, every couple of minutes, individuals will upload their details and their offers for surrogacy. No statistics so no idea how many surrogacy relationships arise.
- A couple more slides which detail a number of experiences from surrogate workers who express a desire to meet the prospective parents; to see their faces and know who it is that they are giving their child to.
- One said "maybe the client parents just wanted to forget how their child was born" – another individual explaining how she feels about staying in contact with a IP. Another mentioned that after having the child she didn't want to talk about babies after giving birth. Just wanted to move on.
- Anyuta, first time SM: "if the bio-mama wants to watch over my pregnancy at every step and turn, I consider that he right won't oppose her." Notion of commerciality.
- Another noted that she was trying to avoid emotional labour i.e., extra effort which fell outside of the contract between the SM and the IP.
- One of the women began by envying the other women who were in contact with the IPs, but changed her mind later on and grew to like the fact that nobody was watching over her.
- The vast majority of women regarded it "as a sort of business arrangement". Very few were in contact. Mostly it was birthday cards and the occasional phone call.

- Questions the term “altruistic surrogacy” and the notion that there is an “expectation” of a relationship with the SM.

Alan Brown

- “Two means two, but must does not mean must”. Recent decisions on the conditions for parental orders.
- Focus on two cases in particular:
 - *Re Z (Surrogate Father: Parental Order)* [2015] 1 WLR 4993.
 - *Re X (Parental Order: Time Limit)* [2015] 1 FLR 349.
- Says that in the last few years there has been judicial law reform. With the Law Commission, we have proper, detailed and coherent reform. Whereas, if we have piecemeal law reform that can be problematic.
- Section 54(3): 6-month time limit from the moment the child is born. Word must is used.
- Various cases have described it as mandatory, non-extendable, that there is no power vested in the court to extend that period.
- *Re X*: couple had not applied for a PO until when the child was 2-years (or so) old. They simply did not realize. The President granted it regardless.
- On the basis that there was a lack of parliamentary language discussing the provision, the President held that he could reasonably interpret it the way he did. He also emphasized the notion of the child’s identity. This was, Alan argues, the core reasoning.
- *Re A (A Child)* [2015] Fam Law 1052: now there is effectively not time limit. It has been “judicially interpreted out of existence”.
- S.54(1) not allowed to single applicants.
- *Re Z (Surrogate Father: Parental Order)* [2015] 1 WLR 4993: was not persuaded that he could depart from the statutory language.
- Dawn Primarolo, an MP in Parliament, made clear that the Gov felt that the decision to hand over a child before the child was even born was of such a magnitude that it was better dealt with by a couple. However, *Re Z (No. 2)*: saw a declaration of incompatibility being made.
- There is a disparity, he argues, between Munby’s latching of his judgement onto the child’s “very identity” in *Re X* and the fact that he doesn’t use that to trump other arguments in *Re Z*.
- Simplest explanation = difference in parliamentary language. Not willing to usurp it in the latter case where it was so much clearer.
- Tentatively suggests that this distinction is perhaps influenced by the traditional, two-parent family being granted significance in the legislative regime, which is reflected in the

Parliamentary language and in both judgements. This is what he said potentially precluded the judiciary from taking action in *Re Z (No. 1)*.

Overall Responses

Debra Wilson

- New Zealand is a bi-cultural society and she is very conscious of the fact that any law that gets passed in NZ must respect the culture of the indigenous people.
- The introduction includes “where is my river, where is my home”.
- Only after describing the home and the country does genetics become important. That is very important in NZ. Your cultural background is far more important than your individual person.
- In NZ it is very common that a child will be raised by other, extended family members. It isn't that the parents didn't want the child, “it's just what culture does”.
- Culture is more important than what an individual might want. So, just because an individual might want to take advantage of surrogacy, that doesn't mean it furthers the culture.
- Major case in NZ: man of Mauri(?) descent. Didn't consider himself as such and wanted to be buried with his wife, children etc... He was buried there by the Mauri(?) tribe took his body away and buried it with his umbilical cord. Two-years of court decisions which eventually found that he had to be buried with his umbilical cord.
- Regulate surrogacy very differently.
 - Vet everyone who wants to go through surrogacy domestically.
 - Commercial surrogacy not allowed in any shape or form.
 - Very short legislation BUT it creates two bodies: (1) modeled on HFEA and creates guidelines on use of artificial technologies; (2) regulatory body: regulates clinics who are forced to go through a formal process. Fertility clinic will divert cases on to the ethics committee who make sure they hear the voices of everyone possible: SM, IP, person representing the child etc... Surrogate must have individual counselling; IPs must as well; existing children must etc... Various tribal groups will write reports, if the individuals are tribally affiliated.
 - Fertility clinics cannot act without ethical approval.
 - Everything considered case by case.
- International regime effective non-existent, like the UK. Not good. Needs reform.
- Couple of cases in last few months.
- (1) Gay couple who went overseas at the time that a *de facto* gay couple could not go through the process. Have to adopt to get parental order, but adoption legislation at that time wouldn't facilitate gay couple. They went to Mexico. Were deceived by surrogate couple.

Three children born. One had major health problems. All premature. They decided to address lack of money with crowdfunding. Got a lot of money to assist. It turned out that they had attempted to defraud the system.

- (2) Surrogacy from Thailand. Went there in 2012. Little boy born and brought home and the IPs went through parental process: i.e., adoption. Asked if genetically related. They said “of course”, but it came back negative. They could not grant an adoption order in that case. It had to be dealt with in the inter-country adoption system. Had to go back to Thailand and go through the regime. After a couple of years they were able to adopt him. However, things took a difficult turn: did he potentially have a genetic child out there by virtue of a mistake with the hospital. They refused any kind of information and were threatened. Implication was that this was not a mix up.
- NZ have decided in response to those cases that they need to reform their laws.
- They don't want to change the altruistic only approach. No need. Judges are very creative. Judge described it as a “paid surrogacy” not a “commercial surrogacy”. The former are fine and the latter is a criminal offence. The border is porous.
- Fixed the issue of *de facto* homosexuals not being able to adopt. Genetic link is the current focus in NZ. Does it matter is the question.

Observations

Craig Lind

- Pragmatist: have to do something. Need to attempt to regulate things. Seems to him that if our rules are effective at preventing them from doing what they want to do, they will find a way to do it anyway.
- Always a power dimension. There is no way to have a surrogacy arrangement without it.
- Best interests of the child = very important; but it may be overwhelmed by other policy considerations: the sale of children; exploitation issues etc... which are so bad that we don't think that surrogacy is an appropriate price to pay.
- Last overarching observation: we have to try to organize information in some way because we don't seem to know what is going on.
- Whenever we talk about the regulation of an international practice there is the need for an international agency: a mediator of the practice.
- Something about agencies which require attention. But this brings up discussions about how or whether they are commercialized.
- We do have international regulatory regimes and ways of regulating conflict of laws. However, they seem to have failed us.
- Overarching principles that determine when and whether we can engage in international surrogacy.

- We were a discouraging state because that was how our legislation was designed.
- There are good reasons why our system is failing.
- Overarching principles which matter:
 - Structures power: within the context of children, there are power structures in operation, particularly in relation to women and children. We are concerned about these. Can these be dealt with domestically, differently from at the international level. Maybe we have to think about a dual system of regulation: domestic and international.
 - Different agreements potentially necessary: with California (or the US generally) we may wish to have bilateral frameworks which deal differently with different systems.
 - Same *vis-à-vis* distinct cultural systems.
 - Tracing our origins becomes very different to manage across borders. Another concern.
 - The effectiveness of law. If we have a regulatory regime which fails to be effective at regulation.