

TITLE

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When your mother's not your mother: the problems of normalising surrogacy

For most couples the desire to have children is deeply imbedded in their relationship. After all, human beings are made for love and children are a real expression of love. So, when couples discover that they cannot have children this can be devastating. On the other hand, some couples, notably same sex couples, enter their union knowing from the outset that having their own children together is impossible, yet they still yearn to be parents, as do some single people who are not in any relationship. 'Welcoming' a child via a surrogate mother seems to provide the answer. Influential celebrities who use surrogate mothers have become role models for surrogacy and hold out this as an option for all. However, the desire to be a mother or father does not justify any right to have a child. Children have the right to be born in their own real families with their own mother and father.

Without any real discussion of the serious ethical issues involved in surrogacy, and despite significant concerns over surrogacy arrangements, new proposals have been put forward by the Law Commission of England and Wales and Scottish Law Commission that will not only facilitate and enable surrogacy but will also turn surrogacy and parenthood into merely an administrative process. Under these proposals parenthood becomes a matter of a paper agreement between the parties: the intended parents and surrogate mother who make up the 'surrogacy team', under the oversight of an organisation that ensures the team are aware of the implications of their agreement. The proposals appear in the Law Commissions joint report *Building families through surrogacy: a new law*. While the aim of the report is to clarify the law, in effect the proposals provide a 'new pathway' to having children. Significantly, these proposals move from tolerance of a practice to full support of surrogacy as a means of having a family. Surrogacy becomes simply 'part of the range of assisted conception options', and parenthood is reduced to admin. Not only has surrogacy been normalised by these proposals, these proposals deprive the mother of her status as a mother from the very beginning of the pregnancy and if she wants her own child she has to reclaim her child within six weeks of the birth.

Surrogacy is often presented as an altruistic act of helping a couple fulfil their dreams of having a family. However, surrogacy is always an injustice. Surrogacy raises serious questions not least that human beings cannot be the objects of a transaction between others. There is a real concern of the exploitation of women. Instead of being a gift for the parents, the child becomes an object of a commissioning agreement between the surrogate and 'intended parents'. By its very nature, surrogacy intentionally deprives the child of the mother who gave bodily care from the very beginning of the child's life and so surrogacy fragments parenthood. However, the new proposals bypass these serious issues. Instead, the proposals simply consider the practicalities of surrogacy and once what can be done is given a legal framework without discussing what should be done, the process of normalising an otherwise unjust action has begun. With its proposed 'new pathway' *Building families* treats the surrogate as temporary rented accommodation. The occupant, the child, remains vulnerable to the intentions and desires of the surrogacy team of the intended parents and the surrogate mother.

Under current legislation, which is by no means perfect, the surrogate mother is the legal parent of a child born through surrogacy. To have a legally recognised relationship to the child the intended parents must obtain a parental order through the courts. This means that

when courts decide on a parental order application they give paramount consideration to the welfare of the child. Under the proposed new pathway the necessity of a court application for a parental order is removed. Instead, the intended parents and the surrogate agree before the child's conception that the intended parents will become the child's legal parents at birth. There need not be a medical reason for taking the route of surrogacy. Surrogate mothers need not have given birth before, as such a requirement would not respect the autonomy of women who want to be surrogates, and there is no upper age limit or limit to the number of surrogate pregnancies she may undertake. This pathway agreement will be overseen by new Regulated Surrogacy Organisations (RSOs), supervised by the Human Fertilisation and Embryology Authority. As the UK's regulator of fertility treatment and research using embryos, the HFEA already has a long reach and its remit will be further expanded to encompass surrogacy arrangements. The task of RSOs is to ensure that the surrogacy team are aware of the implications of surrogacy and its emotional and practical consequences. This pre-conception assessment of the understanding of the surrogacy team includes an assessment of whether a future child would be at risk of significant harm or neglect. However, it is a weak and ineffective replacement for a court decision on the best interests of an existing child. Rather than the focus being on the welfare of the child, under the proposed legislation what is now of paramount importance are the intentions of the 'surrogacy team.'

The proposed new pathway that presents surrogacy as yet another reproductive choice means that the welfare of the child, already precarious under previous legislation and under existing reproductive technologies, now loses any real significance. The aim of the Law Commissions may have been to reform the law, but this was not in response to addressing the serious ethical issues related to surrogacy or to remedy injustice or to protect women and children who are at risk of exploitation or objectivization. The underlying aim for the reform seems to be to reinforce the pre-conception intentions of the surrogacy team. In part this is due to the practical concern that intended parents worry the surrogate may change her mind, the surrogate worries that the intended parents will change theirs, a concern that is inevitable given the very nature of surrogacy. However, contract and the instrumentalization of motherhood seem to have triumphed over the natural mother and child bond. We have normalised mothers not being mothers.