

In the case of *B v C (Surrogacy Adoption)* [2015] EWFC 17 Mrs Justice Theis made the following statement:

“It is... imperative that... parents contemplating parenthood through surrogacy obtain comprehensive legal advice as to how to proceed... They need to ensure that all the appropriate steps are undertaken to secure lifelong legal security regarding their status with the child.” (para 33)

Critically analyse this statement in the light of the law and the results of your survey.

Opinions on surrogacy vary dramatically. Whilst the law is clear on who are or are not the legal parents of a child born through surrogacy, the public seems much more divided and unsure. Theis J’s statements are supported by the results of an internally conducted survey, regarding the issue of parental responsibility and legal parenthood following surrogacy arrangements. An overwhelming majority believed that those who would raise the child, whether biologically related to the child or not, should be described as the parents. However, the law disagrees and affirms that the woman who carries the baby is its mother, and her partner – if he or she agrees to the surrogacy arrangement – is the other legal parent.¹ Therefore, Theis J’s belief that “parents contemplating parenthood through surrogacy [must] obtain comprehensive legal advice as to how to proceed” is fully justified, particularly since the social definition of parenthood and the legal definition are contrasting. It is through a comparison of the survey results and the legal principles governed by the Human Fertilisation and Embryology Act 1990 and 2008 (HFEA 1990 and 2008)² and the Adoption and Children Act 2002 (ACA 2002) that this essay will attest to Theis J’s remarks by showing the reality that our social perceptions of parenthood need to be aligned with the legal position.

Survey methodology

In order to gain a sense of the public’s perspective on parenthood with regards to surrogacy, it was imperative to ask for people’s opinions as to who they would consider the parents of a child in certain situations. Ten questionnaires in total were completed. The surveys themselves comprised of four slightly different scenarios, each time asking to whom the respondent would assign the title of mother and father, and whether the surrogate should be involved in important decisions regarding the child. As the sample size is very small, it is necessary to note that it is in no way representative of the public as a whole.

¹ Sections 33 and 42 of the HFEA 2008.

² The 2008 Act amended the 1990 Act but both remain good law.

Survey results

The majority of the respondents answered all scenarios very similarly³ with the exception of one who for ease shall now be referred to as person X.⁴ Scenario one, whereby the child was biologically related to both commissioning parents, had 90% of the respondents in agreement, deciding that the commissioning parents were the legal mother and father and that the surrogate should not have a say in important decisions affecting the child. X believed that the surrogate and the surrogate's husband would fill this role, as the law dictates, explaining that "without any court orders, they are the only people with parental responsibility unless [the commissioning parents] have applied for it". Scenario two caused more disagreement. In this case, it was the surrogate's egg rather than the commissioning mother's and therefore the child was biologically related to the surrogate. 70% of respondents still believed the commissioning mother to be the legal mother, and it was unanimously expected that the biological father should be considered the legal father. However, the discrepancy between the opinions regarding the surrogate's involvement in important decisions resulted in no overwhelming agreement, with only 40% of those asked still saying that she should not.

Interestingly, both scenarios three and four had everyone in agreement once more with the exception of X. In scenario three, regarding a single mother using a surrogate to carry her egg fused with an anonymous sperm, 80% believed that the surrogate was the legal mother, 100% maintained that the surrogate's husband should not be considered the legal father and 90% felt that the surrogate should not have a say in important decisions for the child. X believed that the surrogate was in fact the legal mother and that she should possibly have a say as her name will be on the birth certificate and will automatically have parental responsibility. Scenario four followed a single man whose child is the result of his sperm and an anonymously donated egg. Again, 90% of respondents believed that the surrogate was not the child's parent and that the commissioning father was, again with the conviction that the surrogate had no right to involvement in important decisions. X believed that the surrogate was the mother, that David was the father and that the surrogate possibly has a say "if she is the only person with parental responsibility".

Legal definition of parenthood

Under section 33(1) of the HFEA 2008, it is made clear that the woman who has carried the child, "and no other woman", is considered the legal mother of the child. This mother is known as the

³ See Fig 1, Fig 2 and Fig 3 for visual representation of results.

⁴ Participant Identification Number 4.

gestational mother and the procedure by which the child is born is known as gestational surrogacy.⁵ Section 35(1) explains that her husband is the legal father – so long as he consents to the surrogacy arrangement – and section 42 explains that, if the surrogate is married to or in a civil partnership with a woman at the time of treatment, then the other woman shall be listed as the other legal parent. If she is a single woman, then it is the biological father who will be listed as the legal father.⁶ These provisions will remain legally enforceable until a court order is made to alter the legal parenthood. This can be done through a Parental Order⁷. Although an Adoption Order⁸ will only grant adoptive parenthood rather than legal parenthood, it has been recognised that the effect of the two orders is largely the same.

Theis J's judgement in *B v C*

*B v C (Surrogacy: Adoption)*⁹ saw a single homosexual man successfully apply for an Adoption Order for his biological son under section 92(4)(a) of the ACA 2002, whose gestational mother was also the applicant's mother. This was a rather unique set of circumstances and the court determined that, in allowing the child to stay with his biological (but not legal) father, no crime had been committed because section 92(4)(a) contains an exception allowing a relative of the child to adopt him or her. Were they not treated as legal relatives, this procedure would have been against the law as private adoption arrangements are illegal. As the applicant's mother was the gestational mother of the child, the law perceived the applicant and the baby as brothers. Consequently he was able to adopt. This case captures entirely the discrepancy one can find between social expectations of parenthood and the legal reality. The sampled public described the social father as a father in scenario four; it is perplexing that the law does not recognise his fatherhood. Theis J's statements in this regard ring true; if one wishes to be regarded as a legal parent he needs to know the intricacies of the law.

It is abundantly clear then that Theis J's convictions that commissioning parents "need to ensure that all the appropriate steps are undertaken to secure lifelong legal security regarding their status with the child" are correct as there appears to be a serious lack of awareness in this field of the law. The survey results, though limited, confirm that very few people have the same perception of parenthood as the law dictates. It is absolutely essential that commissioning parents fully understand how to obtain parenthood of the child to avoid identity issues and potential legal complications with the surrogate. Surrogacy arrangements are not enforceable and it would be

⁵ P. Brinsden, 'Gestational Surrogacy' (2003) 9 Hum Reprod. 483, 484.

⁶ HFEA 1990 s.28(3).

⁷ In accordance with the requirements found under s.54 of the HFEA 2008.

⁸ Applied for under section 92(4)(a) ACA of the 2002.

⁹ *B v C (Surrogacy: Adoption)* [2015] EWFC 17, [2015] 1 FLR 1392.

emotionally devastating if a commissioning family were unable to become parents to the child because they did not check whether they would fall within the s.54 of the HFEA 2008 requirements. Fenton-Glynn writes that it is the concept of the child's best interests which has "dictated... the jurisprudence of the court on s.54" hence the thorough procedure. In each survey scenario, at least 90% of the respondents answered in a manner that was incompatible with the current legislation and this shows that it is paramount that the laws surrounding legal parenthood are more widely known as it would be inconceivable, and potentially very damaging, to align the law with the social perceptions.¹⁰ Although *B v C* was quite an exceptional scenario, Theis J's statements are no less valid.

Parental Orders and Adoption Orders

A Parental Order can be granted by the court which would bestow legal parenthood for the commissioning parents under section 67 of the ACA 2002 if the prerequisites are met under section 54 of the HFEA 2008. These requirements can be either practical or biological, for example section 54(1) provides that the gestational mother must not be the same as the commissioning mother and that the "gametes of at least one of the applicants were used to bring about the creation of the embryo". An alternative to a Parental Order is an Adoption Order under section 46 of the ACA 2002, though – as previously mentioned – this does not bestow legal parenthood on the commissioning parents.

An Adoption Order once more confers parental status onto individuals, and in surrogacy arrangements would be the course of action for a single person. Whilst single people are able to obtain Adoption Orders, this is not true of Parental Orders. This is governed by section 54 of the HFEA 2008 which lists the conditions the applicant needs to fulfil. In situations where single people wish to have children which are biologically related to them, surrogacy followed by adoption is often their only option. Remarkably, in *A v P*¹¹ Theis J observed that "the effect of a Parental Order is the same as an Adoption Order" thus favouring the law as it stood, but four years later, in *AB v CT (Parental Order: Consent of Surrogate Mother)*¹² she abandoned that opinion and explained that "an Adoption Order... leaves open the risk of a fiction regarding identity that may need to be resolved by the child later in life" and could consequently be unsuitable in surrogacy arrangements. Furthermore, Munby J in *Re X (A Child) (Parental Order: Time Limit)*¹³ acknowledged that given the biological relationship between the parent and child, an Adoption Order would be less desirable

¹⁰ C Fenton-Glynn, 'The difficulty of enforcing surrogacy regulations' (2015) 74 CLJ. 34.

¹¹ *A v P* [2011] EWHC 1738 (Fam), [2012] 3 WLR 369 [30].

¹² *AB v CT (Parental Order: Consent of Surrogate Mother)* [2015] EWFC 12 (Fam), [2016] 1 FLR 41 [71].

¹³ *Re X (A Child) (Parental Order: Time Limit)* [2014] EWHC 3135 (Fam), [2015] 2 WLR 745 [7].

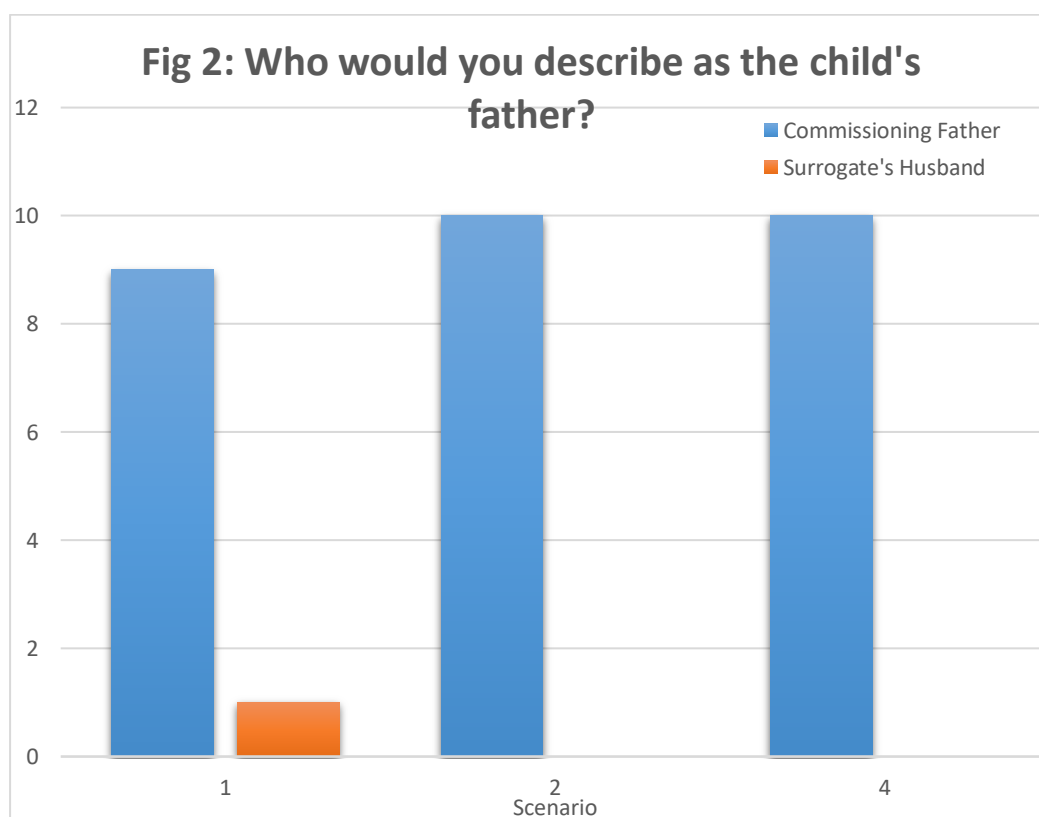
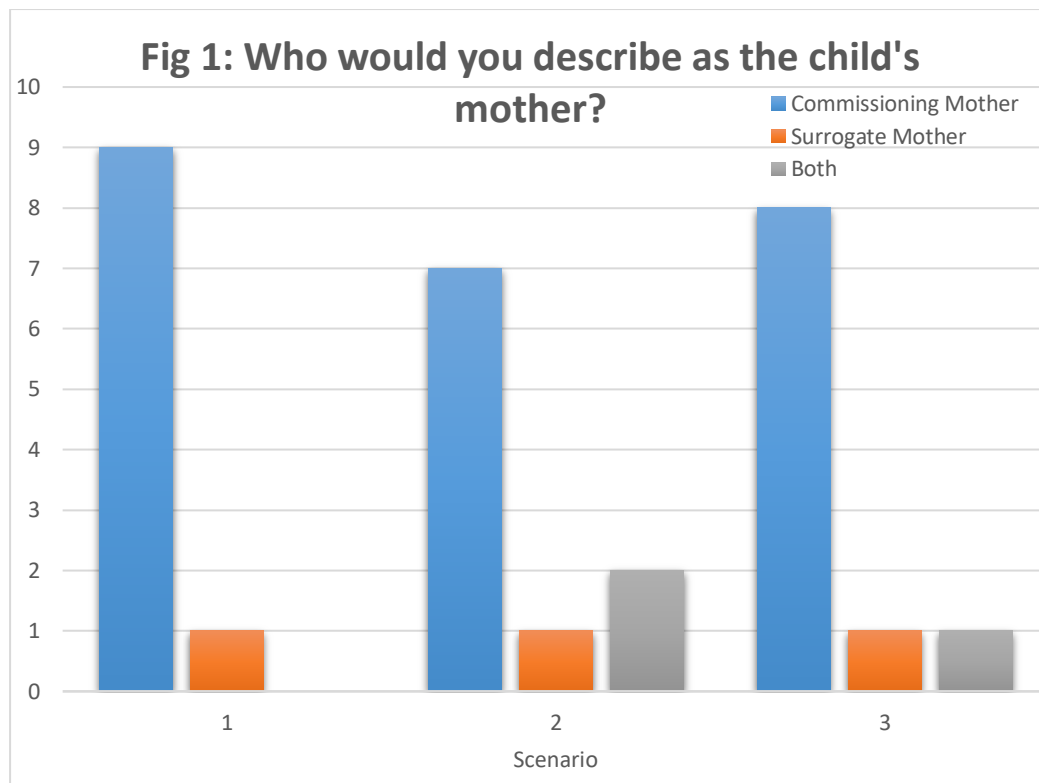
than a Parental Order in the case of a surrogate arrangement. This explicitly illustrates a Parental Order as the preferential method of ensuring parenthood. Hence, Theis J's belief that commissioning parents need to "obtain comprehensive legal advice as to how to proceed" is sincere and that a Parental Order is the most appropriate. As the experiences of commissioning couples can already be incredibly difficult¹⁴, avoiding legal difficulties would be a strong priority for anybody wishing to obtain the legal parenthood of their biological child born through surrogacy. Similarly, in order to safeguard against the "legal minefield" often associated with the destruction and creation of legal parental titles, it is crucial that they ensure that they have fulfilled the requirements for a Parental Order found under section 54 of the HFEA 2008.

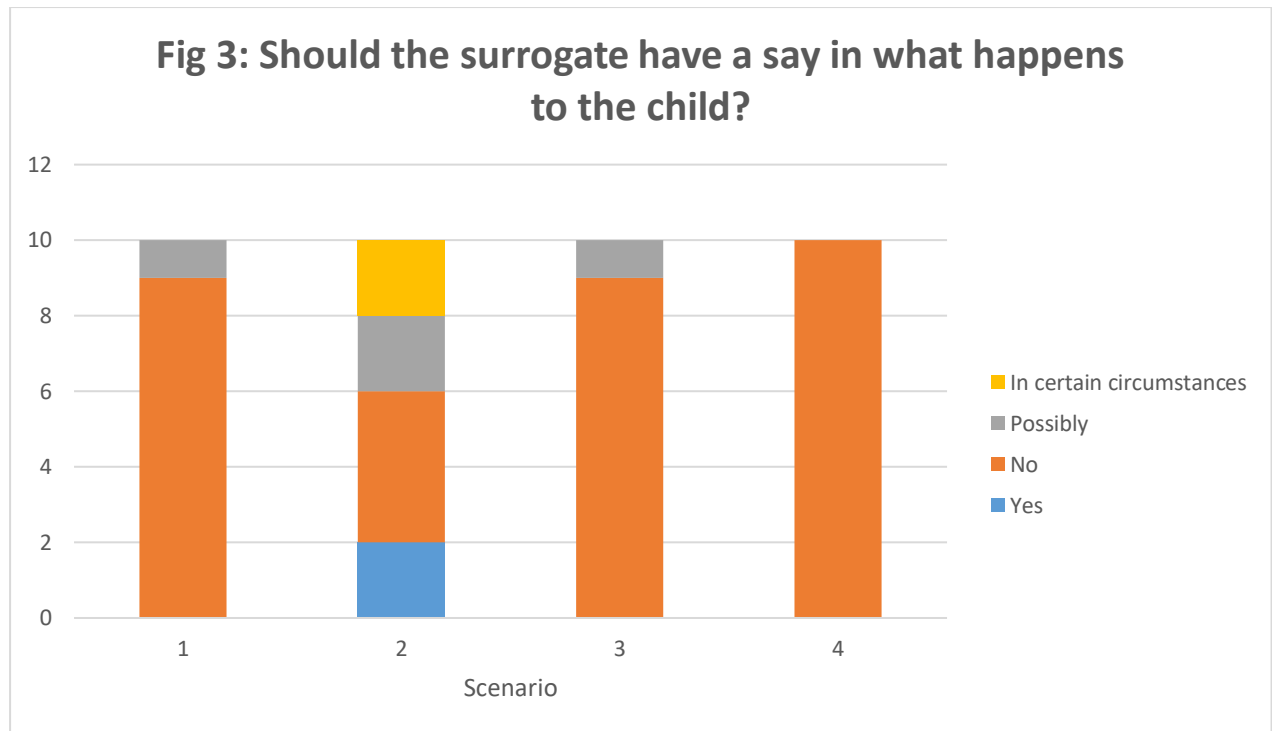
Conclusion

To conclude, the difference between the social expectations of parenthood and the legal definitions exposed, through use of the conducted survey, illustrates that more needs to be done to ensure that commissioning parents are fully aware of the procedures they may face. It is particularly noticeable that the overwhelming majority expressed an opinion in each scenario which did not match up with the law and this enforces the idea that the social perceptions need to be aligned with the legal reality. It would be unconscionable to change the current legislation as it could potentially cause far more damage than good and, regardless, it should be the responsibility of the commissioning parents to ensure that they understand what needs to be done rather than have it over simplified and to disrupt the status quo. It is in this regard that Theis J's judgement is entirely accurate and, with the welfare and security of a child at stake, her contention that commissioning parents need to seek out competent legal advice is of paramount importance. Application for Parental Orders and Adoption Orders are not to be taken lightly and, particularly in the case of Parental Orders, it is imperative that you ensure that you fulfil all of the requirements.

WORD COUNT: 1996

¹⁴ F MacCallum, 'Surrogacy: The Experience Of Commissioning Couples' (2003) 18 Hum Reprod. 1334.





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