INTRODUCTION

“1.Now Sarai Abram's wife bare him no children: and she had an handmaid, an Egyptian, whose name was Hagar.  2. And Sarai said unto Abram, Behold now, the LORD hath restrained me from bearing: I pray thee, go in unto my maid; it may be that I may obtain children by her. And Abram hearkened to the voice of Sarai.  3. And Sarai Abram's wife took Hagar her maid the Egyptian, after Abram had dwelt ten years in the land of Canaan, and gave her to her husband Abram to be his wife.  4. And he went in unto Hagar, and she conceived: and when she saw that she had conceived, her mistress was despised in her eyes.” (Genesis 16: 1-4)

It could never be suggested that surrogacy is a new problem. Informal surrogacy arrangements, whether altruistic or otherwise, have occurred and, indeed, the frequency of them is impossible to guesstimate. Clearly developments in the field of assisted human reproduction have altered the circumstances in which surrogacy can arise such that there can be complete anonymity between the providers of the genetic material and the intended parents, an identity distinction between the genetic mother (or now, potentially, mothers) and the surrogate and increased ease of foreign travel can put physical distance between the gestational mother and the intended parents. Thus, the particular animosity which presented between Hagar and Sarah can be avoided but perhaps the manner of Ishmael’s conception and birth and the problems which ensued are still relevant today in that they demonstrate that surrogacy never had an easy path. This paper will consider the evolution of surrogacy law in Ireland and the failure of the legislature to implement a regulatory framework for couples who wish to avail of surrogacy as an alternative to traditional methods of reproduction. The possible options for regularising the position, based on current legal remedies will be addressed together with the implications for foreign commercial surrogacy arrangements in the event that the promised legislation follows the route previously contemplated in the General Scheme of a Children and Family Relationships Bill, 2014, otherwise known as ‘the disappearing legislation’.
IRELAND

Surrogacy remains unregulated in Ireland. However, altruistic and commercial surrogacy arrangements are regularly being embarked upon by Irish persons who wish to be parents and for whom other options are not available. Curtailments and negative publicity pertaining to foreign adoptions has undoubtedly increased the number of intending parents who turn to surrogacy as an option for family foundation but, in addition, the fact that, in the case of infertility, surrogacy offers the option of a genetic link to the fertile party or indeed to both parties in the case of gestational inabilities, makes surrogacy attractive. The countries in which commercial surrogacy is available (certain States in the US together with most usually India, the Ukraine and, to a lesser degree, Thailand) are now regularly being resorted to by Irish couples who wish to embark upon this route and the agencies offering surrogacy arrangements in these foreign locations are often most organised. In general, birth certificates which are made available in these birth countries indicate that the intended (or commissioning) parents are the registered parents of the child but, of course, such birth certificates do not determine parentage according to Irish law. However, it is useful to reflect upon the conflict of laws issues that can arise in these circumstances. By way of example, in Ukraine, all surrogacy is legal. However, there are restrictive measures in place namely that the intended parents must be married. In addition, it is the intended parent’s names that are placed on the birth certificate of the child as they are the persons entitled to the child from the time of conception. This can create serious issues of statelessness which was discussed by Hedley J, in the English case of *Re X and Y (Foreign Surrogacy)*. In that case, twins born as a result of a surrogacy arrangement in the Ukraine were rendered stateless when the commissioning parents were refused admission back into the UK with the twins due to a serious conflict in the surrogacy laws of the UK and those of the Ukraine. In

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1 [2008] EWHC 3030
the Ukraine, once the surrogate gives birth to the child and delivers the child to the commissioning parents, she and her husband are relieved of all obligations towards said child. Effectively, the resulting child has no rights or legal status in the Ukraine and there is no obligation owed to them by the Ukraine authorities. Under English law, the children in this case, had no legal parents as the Ukrainian surrogate under English law was the legal mother of the children with the father being the surrogate’s husband. This left the commissioning couple in a very difficult situation. They could not remain in the Ukraine with the children as they were on a temporary visa but had difficulty returning to the UK with the children. Eventually, the children were permitted to enter the UK with the applicants having satisfied the immigration authorities that the commissioning father was the genetic father of the twins by presenting DNA results to that effect. The couple were granted entry with the children in order to apply to regularise their status as parents of the children.

THE CURRENT IRISH LEGAL POSITION

“When it is considered that an illegitimate child may be begotten by an act of rape, by a callous seduction or by an act of casual commerce by a man with a woman, as well as by the association of a man with a woman in making a common home without marriage in circumstances approximating to those of married life, and that, except in the latter instance, it is rare for a natural father to take any interest in his offspring, it is not difficult to appreciate the difference in moral capacity and social function between the natural father and the several persons described in the sub-sections in question.” (The State (Nicolaou) v. An Bord Uchtala\(^2\) (Walsh J.)

Undoubtedly the ‘casual commerce’ to which Walsh J. was referring was not a surrogacy arrangement. However, the dictum does demonstrate the historic backdrop to the legal position of non-marital fathers in Ireland. The legal position of the birth father has since improved (and will further improve if the current Children and Family Relationships Bill becomes law) but remains (and will remain) one of inequality when compared with the position of the birth mother or the married father, these latter two having automatic

\(^2\) [1966] IR 567
parental entitlements of a very enduring nature while the former remains in the ‘right to apply’ category (and, even under the new legislative regime, the natural father will only have automatic guardianship rights if there are other conditions concerning the nature of his relationship with the mother satisfied also). It is thus incongruous that it is from this ‘second class citizen’ position that the legal rights of the birth father are pivotal to achieving any de facto legal recognition in Ireland for families derived from surrogacy arrangements. The current legal position is that complex surrogacy arrangements which can push scientific developments in the case of assisted human reproduction to the limit have to be shoehorned into existing legal perimeters. This is often an unhappy fit. Essentially, in order to gain legal recognition, there must be a parental link between the person and the child which fits into the current definition of ‘father’ or ‘mother’ under Irish law. The former is most straightforward. The commissioning father frequently provides the genetic material used in the surrogacy process and in consequence his is the legal father under Irish law. Through this legal link, he can

• Seek and obtain a declaration of parentage under the Status of Children Act, 1987;
• Seek to be appointed a guardian of the child under the Guardianship of Infants Act, 1964 (as amended)
• Seek custody of the child under the Guardianship of Infants Act, 1964;
• Seek a dispensing with consent of the other parent to the issuing of a passport for the child (also under the Guardianship of Infants Act, 1964);
• Obtain Irish citizenship for his child and, in consequence, an entitlement to an Irish passport.

If the sperm used in the surrogacy process is not that of the intended father, no legal fatherhood arises and the applications listed above cannot be sought. In the case of the intended or commissioning mother, the egg used in the process may or may not be her egg. If it is not, there is no genetic link with the child concerned. However,
since the legal definition of ‘mother’ in Irish law is the gestational mother and the commissioning mother in a surrogacy arrangement will never be such, legal remedies cannot be sought through the commissioning or intended mother of the child. This was clarified by the Supreme Court in MR and DR v An tArd Chlaraitheoir and Others\(^3\).

Thus, the current situation allows for a solution of sorts to be achieved in terms of getting the child into the country and ‘bedded down’ in its intended family but does not address the fundamental issue of regularising the legal status of the child concerned within the family in which it is intended that child will grow up. Most importantly, the woman who will nurture and care for the child will have no legal relationship with it. Obviously, very significant problems arise if there is no genetic link with the commissioning father (whether there is such with the commissioning mother or not).

**PRACTICALITIES**

When foreign commercial surrogacy arrangements started to appear in the Irish legal landscape, perhaps six or seven years ago, there tended to be little advance legal planning. The first involvement of lawyers was often after the child was born and instructions were received in a state of complete panic. Often, the commissioning mother was in India or Ukraine with the child, living in very unsatisfactory conditions and trying to care for a newborn baby (without experience or family support). Finances were usually a significant issue also as most couples in this situation will have already expended considerable sums on infertility and other medical treatments as well as on the surrogacy arrangement itself. The instruction was always very clear – please get my family home as quickly as possible. This required an application to the Circuit Court (or the High Court) seeking the reliefs in favour of the father set out above but where a declaration of parentage is being sought, requiring scientific proof that the man concerned is the father of the child, and the reliefs involved a

\(^3\) 7\(^{th}\) November 2014
very considerable inroad upon the rights of the legal mother (the surrogate) obviously her consent also had to be demonstrated. There was also the involvement of the State. In my experience, judicial and State authorities were sympathetic, co-operative and facilitating. Once the Orders were obtained, passport application then had to be made. This has been eased through the Emergency Travel Certificate process details for such application being available from the Department of Justice and Equality– ref.


It is important to note that this ETC addresses some of the urgency of the situation but does not obviate the need for a court application. The timeframes for the commencement of legal proceedings remain short and particularly so when it is considered that Affidavits will have to be obtained in respect of DNA evidence and also from the surrogate who will most desirably have received independent legal advice and will also have to have sworn any Affidavits she provides in a language which she understands, requiring legal translation of the drafts prepared.

REFORM

In relation to surrogacy, the Report of the Commission on Human Reproduction was published in April 2005 and it recommended that regulation would be introduced in relation

4 Department of Justice and Law Reform document http://www.justice.ie/en/JELR/Pages/Surrogacy

“The Irish authorities will therefore, in the best interests of children, seek the following undertakings from commissioning adults before an ETC is issued:

• The commissioning adults will be required to provide a written undertaking that they will notify their local health centre of the child’s presence within two working days of their arrival in the State.
• The genetic father will be required to provide an undertaking that he will apply to the Court for a declaration of parentage and a guardianship order in relation to the child, for the purposes of ensuring that his legal relationship with the child is established and he is in a position to make decisions, including medical decisions, on behalf of the child. The genetic father’s undertaking must specify that he will commence the required court proceedings (applications) within 10 working days of the arrival of the child into the State unless there are exceptional circumstances, and in any case within 20 working days.” (underlining added)
to surrogacy\textsuperscript{5} and, some ten years later these are still awaited.\textsuperscript{6} Indeed, the progress of matters at this point would make the plot of a good novel with chapters entitled – “The Case of the Disappearing Legislation” and “Whose Job is it anyway?”

The flurry of legal activity in Ireland in the surrogacy arena began with excitement arising from a brave and forward thinking High Court decision in \textit{MR and DR v An tArd Chlaraitheoir and Others}\textsuperscript{7} - an oasis in a desert of Irish law on human reproduction. The facts of the case were very straightforward – a married woman with gestational incapacity and her husband are facilitated in having a family by the voluntary agreement of the woman’s sister to act as the gestational mother. The genetic material is entirely that of the married couple. There was no dispute between the applicants and the surrogate, the legal dispute involved having the female applicant registered as mother of the ensuing children. Who is the legal mother? The State argued \textit{mater simper certa est}. The Applicants argued that maternal certainty was no longer so certain in the post-IVF era. The High Court found in favour of the Applicants and declared the genetic, intended mother to be the legal mother. The legal reasoning was that the maxim aforementioned was a rebuttable presumption which, on the facts of the case, was rebutted. Abbott J. stated:\textsuperscript{8}

\begin{quote}
“The maxim \textit{mater simper certa est} is part of a series of maxims relating to maternity and paternity arising from the ancient Roman law. It can be said that the maxim achieved such prominence, acceptance and fixity by reason of the fact that before IVF the mother of the baby was determined at parturition or birth and the maxim (being an incontrovertible truth) expressed the facts of the situation. In the parlance
\end{quote}

\textsuperscript{5} The Commission (p 54) opined that the regulations should ‘protect the various interests of all parties to the surrogacy arrangement, with particular reference to the interests of any resulting children.’ The attitude to surrogacy for profit was unfavourable – “The Commission was concerned with the possibility of commercial interests being involved in reproduction and, in keeping with its view on payments in donor programmes, felt that participants in surrogacy should not profit from such an arrangement. The prohibition on commercialisation reflects a concern that by placing a monetary value on a woman’s reproductive acapacity, the inherent value of women and children is implicitly undermined. Surrogate mothers should not suffer financial loss, but there should be no element of profit involved in the arrangement.’

\textsuperscript{6} The most recent indications of the intended legislative framework from the Minister for Health indicate that commercial surrogacy will be banned with only altruistic surrogacy permitted.


\textsuperscript{7} [2013] IEHC 91

\textsuperscript{8} At Para. 100
of the common law the maxim became a presumption at law and in fact. Because it was based on incontrovertible facts, it became an irrebuttable presumption in any court proceedings. That meant that motherhood would be presumed in respect of a baby as between a woman and that baby once parturition of that baby was proven in relation to the woman. No other evidence or argument was required. The matter was self evident. No evidence could be adduced to controvert this presumption. If perchance evidence could be permitted by the law to be introduced to controvert this conclusion, then the presumption would change from being irrebuttable to rebuttable. The presumption could be rebutted by whatever evidence was appropriate. Prior to surrogacy arrangements, this possibility of the rebuttal of mater semper certa est did not arise. The fundamental issue in this case is whether, in the circumstances of this case of surrogacy, such a possibility arises within the current legal and constitutional framework of this jurisdiction.

Obviously, in the surrogacy context, the case had limitations in its usefulness as a precedent due to the particular facts. It clearly did not advance the legal position of the intended mother in the case involving the use of donor eggs or the eggs of the surrogate or, indeed, the legal position of the intended parents in a surrogacy arrangement involving entirely donated gametes. However, it did advance the emergence of a constitutional family in the context of surrogacy arrangements with all of the tenacious rights that that entails. In addition, the determinations in the decision did not expressly distinguish between commercial and altruistic surrogacy arrangements. The decision was appealed by the State to the Supreme Court.

The Supreme Court by a substantial majority gave judgement on the 7th November 2014 and determined that this was a matter for the legislature and that the law remained that the gestational mother was the legal mother until the legislature determined otherwise. The Chief Justice opined that the maxim relied upon by the State had never formed part of the common law, that there was a lacuna in the law which the legislature, not the courts, must address.

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9 A family derived from marriage with special protection under Article 41 of the Bunreacht na hEireann.
“Any law on surrogacy affects the status and rights of persons, especially those of
the children; it creates complex relationships, and has a deep social content. It is,
thus, quintessentially a matter for the Oireachtas.”10

The majority favoured the interpretation of ‘mother’ for the purposes of birth registration as
meaning the birth mother and alteration of this to deal with surrogacy cases was a matter
for law making. Murray J. stated:11

“..., any law governing the myriad of circumstances which can arise where births
occur through surrogacy must, as is internationally recognised, address fundamental
issues of a social, ethical and moral nature. This necessarily involves the making of
value judgements and the formulation of best policy as to the status and rights of
genetic mothers, birth mothers, as well as the welfare and dignity of the children
involved.
How these complex issues concerning such rights, status and welfare can be
addressed, taking account of competing, or even conflicting, values, is
quintessentially a matter for a legislature. The courts do not, in my view, have at
their disposal objective criteria to lay down some golden rule of series or principles
which would govern such matters.”

Hardiman J., in a judgment which is short and to the point, perhaps send the strongest
political message. Referring to the English legislation of 1990 and the decision on this point
in Re W (Minors)(Surrogacy)12, he stated:

“No parallel resolution is possible in this jurisdiction because, almost a quarter
century after the English Act, the legislature has yet to address the matter. It
intends to do so as a matter of urgency; there has been a Report which clarifies
many issues; there has been a Bill relevant sections of which have not, however,
been proceeded with. I wish to join with my colleagues in pointing out the urgency
of the need for legislation on this topic. There is, at present, a serious disconnect
between what developments in science and medicine have rendered possible on the
one hand, and the state of the law on the other. It is as if Road Traffic law had
failed to reflect the advent of the motor car. The failure to adapt the law in relation
to developments in Embryology of course affects far fewer people, but it affects
them in a peculiar and intimate fashion which makes statutory law reform in this
area more than urgent.”13

The lone voice in dissent14 was that of Clarke J. who held that both the genetic and the

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10 Judgement delivered 7th November 2014, p. 31
11 Judgement delivered 7th November 2014 p. 24
12 [1991] 1 FLR 385
13 Judgement 7th November 2014, pp. 2 - 3
14 This is a matter of some debate in the context of the judgement of McMenamin J.
“... I am, ..., satisfied that both the genetic mother and the birth mother have some of the characteristics of “mothers” as that term is currently used in our law. The term “mother”, historically, referred to both because both were, as a matter of then scientific fact, necessarily the same person. They are no longer now, however, necessarily the same person. But neither has, in my view, by reason of that scientific advancement, necessarily lost their status.”

He continued on to postulate a ‘least worst’ solution –

“... there may well be cases where the merits would overwhelmingly favour declaring either a birth mother or a genetic mother as being properly regarded as the mother to the exclusion of the other. But there is just no legal framework in which such a decision can properly be taken which differentiates between one case and another. In the absence of legislation the law must be the same in all cases. In those circumstances a law which does not exclude either has the potential to do less harm than a law which necessarily completely excludes one.”

The legislature’s position remains unclear. In the days immediately preceding the commencement of the Supreme Court hearing, the Government published a General Scheme of a Children and Family Relationships Bill, 2014 which included provisions relating to parentage in cases of assisted human reproduction. The provisions of the Scheme recognised altruistic surrogacy using arrangements not dissimilar to those operating in the UK but with some notable differences particularly in the context of permissible payments to the surrogate. The intended parents could be declared to be the parents of the child and the gestational mother not to be such parent provided:

1. Human reproductive material had been provided by either the intended mother or the intended father or both of them and human reproductive material must not have been provided by the surrogate;

2. The intended parents are spouses, civil partners or in a committed relationship;

3. All parties consent or consent is waived as provided for in the legislation. The veto of the surrogate is replicated, waivers relating to where the surrogate has died or

15 Judgement 7th November 2014, p. 49
16 Judgement 7th November 2014, p. 50
17 The Scheme was published on the 30th January 2014
18 Part 3
The surrogate must consent post-birth and any surrogacy agreement will not suffice as evidence of such consent;

4. The declaratory application is made after the birth of the child being not less than 30 days and not more than 6 months after the birth date;\(^\text{20}\)

5. There was no reference to the welfare of the child being an overriding consideration in the declaratory application but the court is mandated to make the declaration of parentage in favour of the commissioning parents in the context of surrogacy only if, inter alia, it is in the best interests of the child to do so;\(^\text{21}\)

6. A declaration will not be made in the case of a commercial surrogacy arrangement.\(^\text{22}\)

In the context of the UK model providing for retrospective authorisation of payments,

\(^{19}\) In this regard, the judgement of Baker J. in *In the matter of D & L (Minors)(Surrogacy)* [2012] EWHC 2631 (Fam) is instructive.

\(^{20}\) The Irish proposals did not provide for an extension of these timelimits and therefore the situation which arose in *In re X (A Child)(Surrogacy)* [2014] EWHC 3135 and the very interesting judgement of Sir James Munby therein are worthy of consideration.

\(^{21}\) The application of best interest principles in the UK has, it is submitted, led to what might be considered a liberal approach to parental order applications in this context in the UK.

\(^{22}\) The proposals very clearly set out the permissible costs and expenses which had to be reasonable and would be so only if actually incurred and vouched. There is nothing envisaged equivalent to the authorisation of the court of payments to the surrogate such as is found in section 54(8) of the Human Fertilisation and Embryology Act, 2008 in the UK. It is this provision which has enabled commercial inter-country surrogacy arrangements to result in parental orders in the UK, such court authorisation being substantially based upon child welfare principles. Guidelines to be adopted in such authorisations are set out in the judgment of Baker J. in *In the matter of D & L (Minors)(Surrogacy)* [2012] EWHC 2631:

1. The question whether a payment exceeds the level of 'reasonable expenses' is a matter of fact in each case. There is no conventionally-recognised quantum of expenses or capital sum: *Re L*, supra.

2. The principles underpinning section 54 (8), which must be respected by the court, is that it is contrary to public policy to sanction excessive payments that effectively amount to buying children from overseas: *Re S*, supra.

3. On the other hand, as a result of the changes brought about by the 2010 Regulations, the decision whether to authorise payments retrospectively is a decision relating to a parental order and in making that decision, the court must regard the children’s welfare as the paramount consideration: *Re L*, supra, and *Re X and Y* (2011), supra, per the President.

4. It is almost impossible to imagine a set of circumstances in which, by the time an application for a parental order comes to court, the welfare of any child, particularly a foreign child, would not be gravely compromised by a refusal to make the order: per Hedley J in *Re X and Y* (2008), approved by the President in *Re X and Y* (2011) at paragraph 40. It follows that: ‘it will only be in the clearest case of the abuse of public policy that the court will be able to withhold an order if otherwise welfare considerations support its making’, per Hedley J in *Re L* at paragraph 10.
it is difficult not to sympathise with the position as set out by Hedley J. in Re X & Y (Foreign Surrogacy) 23:

"I feel bound to observe that I find this process of authorisation most uncomfortable. What the court is required to do is to balance two competing and potentially irreconcilably conflicting concepts. Parliament is clearly entitled to legislate against commercial surrogacy and is clearly entitled to expect that the courts should implement that policy consideration in its decisions. Yet it is also recognised that as the full rigour of that policy consideration will bear on one wholly unequipped to comprehend it let alone deal with its consequences (ie the child concerned) that rigour must be mitigated by an application of a consideration of that child's welfare. That approach is both humane and intellectually coherent. The difficulty is that it is almost impossible to imagine a set of circumstances in which by the time the case comes to court, the welfare of any child (particularly a foreign child) would not be gravely compromised (at the very least) by a refusal to make an order. Bracewell J's decision in Re AW (Adoption Application) [1993] 1 FLR 909 is but a vivid illustration of the problem. If public policy is truly to be upheld, it would need to be enforced at a much earlier stage than the final hearing of a section 30 application. In relation to adoption this has been substantially addressed by rules surrounding the bringing of the child into this country and by the provision of the Adoption with a Foreign Element Regulations 2005. The point of admission to this country is in some ways the final opportunity in reality to prevent the effective implementation of a commercial surrogacy agreement. It is, of course, not for the court to suggest how (or even whether) action should be taken. I merely feel constrained to point out the problem."

While the proposed legislation did little to advance the legal status of families previously created in the context of commercial surrogacy (it is difficult to see how the payments made to surrogates in such cases would comply with the permissible payments envisaged in the legislative scheme proposed) who would remain in a position of legal uncertainty, at least the future status of such arrangements was clarified together with the requirements for

(5) Where the Applicants for a parental order are acting in good faith, with no attempt to defraud the authorities, and the payments are not so disproportionate that the granting of parental orders would be an affront to public policy, it will ordinarily be appropriate to give retrospective authorisation, having regard to the paramountcy of the children's welfare.

The judgement of the President Sir Nicholas Wall in Re X and Y (Parental Order: Retrospective Authorisation of Payments) [2011] EWHC 3147 (Fam) is also instructive in this regard. 23 [2008] EWHC 3030 at para. 24.
recognition of surrogacy arrangements into the future. But legislative reluctance remains. A revised Scheme of a Children and Family Relationships Bill, 2014 was published in September 2014 with the provisions relating to surrogacy entirely excised therefrom, the now Minister for Justice citing the pending Supreme Court decision (it came in November) and a need for further policy and consultation work as the reasons for the removal of the surrogacy provisions. It has been indicated that legislative proposals in this regard are imminent with the mantle for same apparently having moved to the Minister for Health but, as yet, proposals are awaited.

SO WHAT ARE THE POSSIBLE SOLUTIONS?

1. Section 8/11 of the Guardianship of Infants Act, 1964;
2. Access *in loco parentis*?
3. Wardship?
4. Adoption?
5. The new legislation? Section 5 of the proposed legislation. Guardianship under section 45 of the proposed legislation? Custody under section 53 of the proposed legislation?

THE FUTURE

Pandora’s box? The genie’s lamp? Scientific advances in the area of human reproduction have undoubtedly challenged the law and ethics. However, it is somewhat like reflecting on the reduction in loss of life if we did not have cars and airplanes – undoubtedly true but will this stop any of us driving or flying? Many people, fortunately, never need to think of alternative forms of reproduction but for those who do, if altruistic surrogacy is not an option, they will consider commercial surrogacy and have resort to countries which permit this. Failure to recognise this fact and in consequence penalising the resulting children by a
failure to give legal recognition to their de facto parentage and family groupings amounts to 
avoidant law-making at best and a powder keg at worst. As Madden has opined:

“If the intended parents transgress the payment provisions ..., they may face 
criminal prosecution and a declaration of parentage will not be granted. This is in 
effect punishing the child for the sins of its parents and is not in the child’s best 
interests.
How would a court reconcile these provisions with the requirements to decide the 
parentage and custody of a child on the basis of its best interests in a situation 
where its genetic parents, in whose care and custody the child has been since birth, 
have been refused a declaration of parentage and imprisoned for giving the 
surrogate a payment which falls outside the rigours of the legislation?”