

1 Building Irish families through surrogacy: medical and judicial issues for the
2 advanced reproductive technologies

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17 **Abstract**

18 Surrogacy involves one woman (surrogate mother) carrying a child for another
19 person/s (commissioning person/couple), based on a mutual agreement requiring the
20 child to be handed over to the commissioning person/couple following birth. Reasons
21 for seeking surrogacy include situations where a woman has non-functional or absent
22 reproductive organs, or as a remedy for recurrent pregnancy loss. Additionally,
23 surrogacy may find application in any medical context where pregnancy is
24 contraindicated, or where a couple consisting of two males seek to become parents
25 through oocyte donation. Gestational surrogacy is one of the main issues at the
26 forefront of bioethics and the advanced reproductive technologies, representing an
27 important challenge to medical law. This analysis reviews the history of surrogacy
28 and clinical and legal issues pertaining to this branch of reproductive medicine.
29 Interestingly, the Medical Council of Ireland does not acknowledge surrogacy in its
30 current practice guidelines, nor is there specific legislation addressing surrogacy in
31 Ireland at present. We therefore have developed a contract-based model for surrogacy
32 in which, courts in Ireland may consider when confronted with a surrogacy dispute,
33 and formulated a system to resolve any potential dispute arising from a surrogacy
34 arrangement. While the 2005 report by the Commission on Assisted Human
35 Reproduction (CAHR) is an expert opinion guiding the Oireachtas' development of
36 specific legislation governing assisted human reproduction and surrogacy, our report
37 represents independent scholarship on the contractual elements of surrogacy with
38 particular focus on how Irish courts might decide on surrogacy matters in a modern
39 day Ireland. This joint medico-legal collaborative also reviews the contract for
40 services arrangement between the commissioning person/s and the surrogate, and the
41 extent to which the contract may be enforced.

42

42 **Introduction**

43 Surrogacy describes an alternate means of conception for individuals who are unable
44 to conceive a child naturally. In surrogacy, one woman (surrogate mother) carries a
45 child for another person/s (commissioning person/couple), based on an agreement
46 before conception requiring the child to be handed over to the commissioning
47 person/couple following birth.

48

49 The basic idea of surrogacy is an understandably private matter. Yet there is nothing
50 new in the concept of surrogacy, which probably began with civilisation itself. While
51 Biblical references include Sarah (Genesis 16:4) and Rachel (Genesis 30:3), perhaps
52 less well-known allusions to surrogacy date from 1500 B.C. and are found among the
53 artefacts of the Hurrians of Mesopotamia [1]. Certainly surrogacy was practiced in
54 classic Greek society as early as the 4th century B.C.[2], and in medieval Tuscany, one
55 mother's daily correspondence preserved from around the year A.D.1500 provides
56 another perspective of surrogacy [3]. The longest intact personal inscription that
57 survives from ancient Rome (known as *Laudatio Turiae*—a late 1st century B.C.
58 epitaph) includes a tender reference to surrogacy as antiquity's common-sense remedy
59 to childlessness [4].

60

61 Contemporary advances in medical science have taken the application of surrogacy to
62 a new level of sophistication, and over the past two decades surrogacy has attracted
63 legislative attention worldwide. In clinical practice, surrogacy includes arrangements
64 whereby a woman agrees to become pregnant (either by artificial insemination or via
65 embryo transfer), and carry a child to term with the intent to relinquish custody of that
66 child upon its birth to the couple with whom she has made the agreement [5]. This

67 agreement has the practical effect of causing a purposeful conception followed by
68 voluntary surrender of the offspring by the birth mother, or shortly after birth [6].

69

70 A surrogate may have a purely altruistic reason for agreeing to carry a child for
71 someone else, but generally this is done in exchange for compensation to the
72 surrogate mother. Recent research has challenged the cultural assumption that
73 "normal" women do not voluntarily become pregnant with the premeditated intent to
74 surrender the child for money [7]. General public acceptance of this is increasing but
75 remains somewhat limited [8]. Regarding the level of support for surrogacy,
76 considerable variation exists across population sub-groups with some of this
77 perception appearing to be influenced by prevailing media portrayals of surrogacy [9].

78

79 While generally favourable legislation relating to IVF had appeared in several
80 jurisdictions by the end of the 1980's, this level of acceptance did not initially extend
81 to surrogacy. For example, South Africa, England and Australia had produced
82 essentially negative legislation on surrogacy by 1990 [10]. Even though the United
83 Kingdom's *Surrogacy Arrangements Act 1985* (SAA 1985) [11] prohibits payments
84 for surrogacy arrangements, financial compensation and reimbursement of reasonable
85 expenses to the surrogate are considered lawful. This contrasts with the United States
86 model where (depending on the State) a surrogate may be paid for the service of
87 carrying the child to term. The main concern with the SAA is that, even where a
88 surrogate has agreed to carry to term a child which comprises of the gametes of the
89 commissioning couple, under the latter Act, the surrogate will be regarded as the legal
90 parent of the offspring, even though she holds no genetic tie with the child.

91

92 Although distinct types of surrogacy exist and the definitions of each have
93 occasionally resulted in confusion, the status of the surrogate herself (the woman
94 carrying the child) determines the type of surrogacy. Does the surrogate have a direct
95 genetic link to the child? How this question is answered establishes the classification
96 of each surrogacy arrangement:

97

98 1. *Partial Surrogacy (traditional surrogacy)*: This is currently the most common
99 form of surrogacy arrangement, where the carrying female is fertilised with
100 the commissioning male's sperm (either by sexual intercourse or assisted
101 insemination). Because this type of surrogacy does not rely on the advanced
102 reproductive technologies, partial surrogacy may be undertaken privately
103 without the aid of a medical practitioner.

104

105 2. *Full Surrogacy (gestational surrogacy)*: This relies on in vitro fertilisation
106 (IVF) and therefore involves minor surgery and the expertise of highly trained
107 medical staff. The commissioning couple may provide both sperm and ovum,
108 while the surrogate provides the uterus where the resulting embryo created by
109 IVF is transferred.

110

111 In the latter arrangement, the resulting child shares the same genetic composition as
112 the commissioning couple, providing that both the sperm and ovum of the couple
113 were used, whereas in the former arrangement, the child is genetically related to both
114 the commissioning father and the surrogate mother (as the oocyte source). When a
115 dispute arises, the genetic makeup of the child usually carries judicial weight in
116 deciding where a child is more suitably placed. A typical surrogacy contract would

117 stipulate the objective of the contract including the intention of the commissioning
118 person(s) to be the legal parents of the child. The surrogate would merely be
119 providing a service which is necessary in order for the contract to be carried out. Strict
120 application of the principles of contract law would conclude that a child born through
121 gestational surrogacy, thereby exclusively comprising the genetic makeup of the
122 commissioning couple (or partly, where the sperm or ovum of one of the parties was
123 donated), should never be legally classified as offspring of the surrogate (as appears to
124 be the case in some countries) simply because the surrogate delivered the infant.

125

126 Similarly, with partial surrogacy the courts typically interfere only when confronted
127 with a custody dispute and in particular, when required to determine the best interests
128 of the child. It may be claimed that both the commissioning couple and the surrogate
129 mother would have an equal legal right to claim custody of the child in this context.
130 However, as noted above with full/gestational surrogacy, the surrogate has no genetic
131 connection to the offspring and therefore the commissioning person(s) should have a
132 stronger claim to be awarded custody. Thus, depending on the particulars of the
133 agreement between the parties, the courts, as will be seen throughout this paper,
134 should reserve judgement until all the facts are delicately assessed with reference to
135 the following; the intention of the parties, the genetic parent/s of the child and most
136 importantly, the best interests of the child.

137

138

138 **Current Legal Position in Ireland**

139 At present, Ireland has no legislation governing surrogacy arrangements or any forms
140 of assisted reproductive medicine. The *Commission on Assisted Human Reproduction*
141 (CAHR), chaired by Dr. Deirdre Madden of University College Cork, concluded in
142 2005 as the government's first attempt to address the need for statutory regulation in
143 the area of assisted human reproduction [12]. Overall the CAHR report was widely
144 accepted as being a positive step parallel to other EU jurisdictions. The portion of the
145 Commission's report specifically dealing with surrogacy may be seen as a reflection
146 of current society's social, moral, and ethical milieu. The report recommended that
147 there should be "*no prohibitions regarding marital status, gender or sexual*
148 *orientation of the commissioning person(s)*", and as such, is generally viewed as
149 taking a progressive step towards a socially diverse Ireland.

150

151 Although the Oireachtas Health Committee (OHC) has assessed the findings of the
152 CAHR report, thus far, no Parliamentary action has resulted from the work of the
153 OHC. Until the Oireachtas passes a law specifically addressing surrogacy, Ireland will
154 remain a blank slate leaving it to the judiciary to determine what rights either party in
155 a surrogacy arrangement may have. In the absence of relevant legislation here, women
156 in Ireland have very limited access to surrogacy and only recently have pregnancies
157 from surrogacy here been described [13]. Estimates of the number of Irish couples
158 participating in surrogacy arrangements outside of Ireland are difficult to calculate,
159 however a voluntary organisation based in the United Kingdom, Childlessness
160 Overcome Through Surrogacy (COTS), has records of its agency assisting 10 Irish
161 couples to become parents to 15 children over the years with no disputes arising from
162 such arrangements (*personal communication*).

163 In an Irish context, if a surrogacy arrangement were to require adjudication now, it is
164 likely that judges would look to the Medical Council of Ireland (IMC) as the statutory
165 body empowered to regulate the practice of medicine at a national level. One of the
166 functions of the IMC is to provide guidance on professional ethics to physicians, and
167 the Council publishes its “Guide to Ethical Conduct & Behaviour” every five years
168 for this purpose. However, the IMC has not been progressive about regulating the
169 advanced reproductive technologies. For example, a provision restricting IVF only to
170 married couples was retained until 1994, and the most recent edition of the IMC
171 ethical “Guide” (2004) did not even mention surrogacy [14].

172

173 The Irish judiciary also could turn to precepts of common law supplemented by the
174 1937 Irish Constitution [15]. The closest statute that might reasonably be applied in
175 this setting would approximate the same set of facts pertaining to the adoption of a
176 child by the commissioning couple, and would therefore be conditional upon the
177 surrogate mother relinquishing custody after approval by the Adoption Board, under
178 the *Adoption Acts 1952-1998* [16]. This hypothesis leads to the issue of whether the
179 *Adoption Acts 1952-1998* in their present state, would fit properly as part of a solution
180 to disputed surrogacy arrangements. At least two factors must be addressed for this
181 analysis.

182

183 First, the Adoption Acts stipulate that a mother cannot lawfully relinquish her parental
184 rights by offering a child for adoption *before* its birth, even if she wishes to do so. The
185 CAHR’s dissenting opinion position paper on surrogacy focused strongly on this key
186 distinction, and speculated that this aspect of the Adoption Acts was specifically
187 crafted with a view to keep mothers from recklessly waiving a constitutional right,

188 until it was absolutely clear that they had a full understanding of what they were, in
189 fact, giving up [17]. An effort to resolve a surrogacy dispute by applying the *Adoption*
190 *Acts 1952-1998* is therefore problematic, because all surrogacy contracts depend on
191 the parties' mutual agreement well in advance of conception.

192

193 The second issue deals with the Adoption Acts' treatment of payment to the birth
194 parents. In surrogacy arrangements, some form of monetary compensation would
195 almost invariably pass from the commissioning person/s to the surrogate (birth
196 mother). This may be so even in the context of a genuinely altruistic arrangement,
197 where the commissioning person/s offset the costs of the delivery procedure, and
198 perhaps clinic expenses associated with prenatal care. Although such expenses may
199 only cover the above procedures, this trace level of economic involvement may be
200 regarded as a contravention of the Adoption Acts.

201

202 When this matter was investigated in 2007, the Irish Adoption Board indicated that it
203 receives at least two applications per year from commissioning couples seeking to
204 adopt a child born through surrogacy. The Board has permitted the commissioning
205 person/s to cover the general expenses of the surrogate so long as this arrangement is
206 not coercive or driven by profit. This is so, even though Section 42 of the Principal
207 Act clearly states that any payment or other reward will be in direct contravention of
208 the Act. However, one must bare in mind that the principal Act was penned in 1952
209 and did not foresee the practical realities and difficulties in conceiving – nor did it
210 foresee the plethora of contemporary advances in medical science.

211

212 The practical effect of this (permitting the adoption by the Board), in an Irish context,
213 means that similar payments (provided they are reasonable) flowing from the
214 commissioning person/s to the surrogate are very unlikely to be viewed as a
215 contravention of the Adoption Act. However, when evaluating surrogacy disputes, the
216 courts need to contemplate a number of key factors including the biological (genetic)
217 status of the child, the contractual intention of the parties, and most importantly, the
218 best interests of the child. The matter of '*reasonable expenses*' should also be
219 assessed to the extent that this is a necessary element of the surrogacy arrangement,
220 yet assuming the above factors were properly considered, the issue of expenses would
221 not hinder the true essence of the contract and would become only of secondary
222 importance.

223

224 **Surrogacy Models in Foreign Jurisdictions**

225 Given the absence of relevant Irish legislation and case law specific to surrogacy, it is
226 useful to explore jurisdictional strategies adopted by persuasive authorities elsewhere.
227 Although there are several countries that have, in either a legislative or judicial
228 capacity, established legal precedent on issues pertaining to surrogacy, two (*i.e.*,
229 United Kingdom and California) are studied here with a view to compare and contrast
230 these approaches.

231

232 *United Kingdom*

233 In the United Kingdom, the legislation pertaining to surrogacy is the SAA 1985 [11].
234 This legislation came in response to a highly publicised surrogacy case known as
235 '*Baby Cotton*' [18]. This case arose prior to the introduction of the SAA and involved
236 a partial surrogacy arrangement that had been set up through a commercial agency in

237 the United States. The surrogate agreed to be inseminated with the commissioning
238 fathers' sperm and, upon the birth of the child resulting from this procedure, was
239 content to relinquish custody. When a custody dispute arose, the local court
240 intervened and Baby Cotton was temporarily made a ward of court. Mr. Justice Latey
241 found the commissioning couple to be suitable parents and ultimately ruled that the
242 sole care and custody of the child should be awarded to them, and that they were
243 therefore permitted to take the child out of the United Kingdom.

244

245 The first case addressing a disputed surrogacy arrangement in the United Kingdom
246 was actually decided in 1978, although it was not reported until 1985 [19] when the
247 controversial *Baby Cotton* case came before the courts. In that first judicial
248 exploration of contested parentage arising from surrogacy, the court held that “the
249 agreement was void on the grounds of public policy”, but subsequently gave the
250 child's biological father visitation rights.

251

252 The Baby Cotton story attracted considerable media attention and was subsequently
253 drawn into Parliamentary debates, which began to question the *a priori* moral
254 acceptability of surrogacy itself. Against this background, the SSA 1985 was passed
255 which prohibited the commercialisation of surrogacy by third-parties or agencies, but
256 did not prevent the act of surrogacy itself. Since its enactment, the Act has received
257 criticism on the basis that it was enacted due to “moral panic” [20] and was described
258 as a “stopgap measure driving surrogacy underground” [21].

259

260 While the Act was created with the laudable goal of combating the commercialisation
261 of surrogacy in the United Kingdom, it was unclear how the exchange of money

262 would be “less commercial” if given directly to the surrogate mother by the
263 commissioning couple, instead of by an agency (ostensibly acting on behalf of the
264 commissioning person/s). The SAA 1985 therefore aimed to discourage surrogacy
265 arrangements by prohibiting intermediaries, but in practical terms it had the effect of
266 proliferating amateur surrogacy agreements by outlawing professional, experienced
267 help. It may be argued that legal advice and formal counselling for the surrogate
268 mother has value, as it would reduce the risk of separation issues that may be
269 encountered when she delivers the child, compared to the circumstance where the
270 surrogate mother would not have access to such resources. The involvement of a
271 regulated agency providing this professional service (for a fee defrayed by the
272 commissioning person/s), may thus be seen as contributing a highly technical yet
273 beneficial service to inform all parties as they contemplate entering a surrogacy
274 arrangement.

275

276 Under English law, the woman who physically gives birth to the child is currently
277 classified as the legal mother irrespective of whether she is the genetic mother of the
278 child. This means that in the United Kingdom the commissioning mother, who may in
279 fact be the genetic mother of the child, will never automatically acquire legal parental
280 responsibility for a child born through a surrogacy arrangement [22]. It should be
281 noted that the SSA 1985 prohibits any agency to facilitate commercial surrogacy
282 arrangements and prohibits advertisements for surrogates or to recruit a surrogate in
283 the United Kingdom. In contrast, the *Human Fertilisation and Embryology Act 1990*
284 (HFEA 1990) [23] confirms the common law position that such contracts are
285 unenforceable in the United Kingdom. HFEA 1990 does not specifically address

286 surrogacy arrangements, but S.30 does provide measures the commissioning couple
287 may take in applying for adoption or guardianship rights.

288

289 From this analysis, it may be concluded that English law does not presently prohibit
290 surrogacy arrangements but does criminalise them if such agreements include a
291 commercial element. Any contracts made of a commercial nature, beyond what may
292 be deemed as covering reasonable expenses will be declared void in accordance with
293 English law [24]. The legal approach to surrogacy in the United Kingdom has also
294 been criticised because it regards as irrelevant the intention of the parties involved.
295 This is perhaps best illustrated in sec. 27 of HFEA 1990 which states that a surrogate
296 is defined as the legal mother of the child born, even though she may be genetically
297 unrelated to the child and have no wish to be held as its legal mother.

298

299 *State of California (USA)*

300 In the 1993 case *Johnson v. Calvert* [25], the California Supreme Court extended
301 existing California Family Law statutes to protect all parties in surrogacy
302 arrangements and in oocyte donation pregnancies. *Johnson v. Calvert* presented a
303 straightforward example of a dispute arising from a gestational surrogacy agreement.
304 The commissioning woman, Crispina Calvert, had undergone a hysterectomy and was
305 therefore unable to carry a child but still had ovaries and was therefore able to
306 produce her own eggs. She and her husband entered into an agreement with a
307 surrogate, Anna Johnson, to be paid a fixed fee in return for the bringing to term the
308 commissioning couple's child created from their gametes. When the relationship
309 between the parties deteriorated, both parties applied to the court for an order of
310 parentage. The surrogate (carrier), Ms. Johnson, claimed that she was being exploited

311 due to the fact that she was a woman of lower economic status. The court disagreed
312 and stated that considering the contract there was no coercion or duress involved, and
313 that “there had been no proof that surrogacy contracts exploit poor women...”. The
314 California State Supreme Court affirmed the lower Court ruling that a gestational
315 surrogacy contract was legal and binding.

316

317 The California Court further reasoned that there were two distinct ways to prove
318 maternity using an existing statute (*i.e.*, California Family Law Code). The first
319 method was by proof of giving physical birth to the child, and the second method was
320 by proof of genetic consanguinity (blood tests). But since *Johnson v. Calvert* involved
321 two different women who could each fulfil different parts of the statutory
322 requirements, the Court held that the woman who intended to “bring about the birth of
323 a child that she intended to raise as her own -- is the natural mother under California
324 law.”

325

326 An earlier analysis of this case [26] concluded that the California Court appreciated
327 the complexities of IVF and the level of planning and coordination needed to achieve
328 a pregnancy, and regarded the *intellectual conception* of the child as being the
329 fundamental cause of the child’s creation, “But for the commissioning parents setting
330 out to find a surrogate to carry their embryo, this child would have never come into
331 existence.” In other words, if the commissioning couple takes the necessary logistical
332 steps to identify and engage a surrogate mother with the intention of the surrogate
333 carrying to term a child that is genetically related to one (or both) of the parties, and
334 the surrogate voluntarily agrees to such terms, then that contract should in all

335 instances be given validity in favour of the commissioning couple based on that
336 intent.

337

338 This important California decision is in contrast to some other jurisdictions in the
339 Unites States where absolute prohibition on surrogacy has been effected by
340 completely banning the practice. The New Jersey Supreme Court decided a well-
341 known American surrogacy case, *In the Matter of Baby M* [27], holding that the
342 agreement itself was void but nevertheless awarded custody to the commissioning
343 couple. California law has paved the way for prospective parents, surrogates, and egg
344 donors to be reasonably certain that their *intentions*, as expressed by their formal
345 surrogacy agreement, will be respected. California courts have consistently upheld the
346 intended parents' rights and obligations of parenthood when they use a surrogate or
347 egg donor to help create a family. This result will generally hold true regardless of
348 whether the parents use their own genetic material, donated eggs, or artificially
349 inseminate a surrogate.

350

351 The California approach is acknowledged as completely opposite to that operating in
352 the United Kingdom. In California, a contractual model is viewed as giving rise to the
353 rights and obligations of the joint intention of the parties to the contract. Under a
354 contract for services, consideration is given by way of placing an embryo or
355 commissioning person's sperm into the surrogate. Prior to making such an agreement,
356 both parties are fully aware of the basic terms of the contract; specifically, that the
357 surrogate will carry the child to term with the intention that she will, upon its birth,
358 give that child over to the commissioning couple.

359

359 **Surrogacy Contracts**

360 A surrogacy contract is a contract no different to any other contract as it essentially
361 relates to the agreement or promise made by both parties: contract law is primarily
362 concerned with agreements that involve one party, or each party, giving an
363 undertaking or promise to the other party [28]. The rights and duties of the surrogate
364 stem from two basic promises that she makes to the commissioning couple. First, she
365 promises to be treated with the commissioning couple's genetic material (partial/full
366 surrogacy) and carry the child to term. The surrogate will also give an assurance that
367 she will attend regular prenatal appointments so as to ensure the health and safety of
368 the foetus.

369

370 Secondly, the surrogate will promise to surrender all rights in the child to the
371 commissioning couple. This latter promise may become complicated if the surrogate
372 is married, as the law presumes that a child born to a married woman is the child of
373 the woman and her husband. However, this presumption is rebuttable and thus, the
374 commissioning couple should from the outset, make it a term of the contract that the
375 surrogate and her husband explicitly agree to make no claim to the resulting child;
376 without this statement, the intention of the parties may be undercut. Such a provision
377 would help reduce emotional strain and the probability of litigation, and would avoid
378 harming the child by involving it in custody proceedings [29].

379

380 A surrogacy arrangement based on contractual intention should not be designed to
381 commodify offspring. Surrogacy arrangements do not deal with fungibles and must
382 not encourage a system where children are treated as goods that may be contracted in
383 and out of. While the notion of surrogacy could understandably figure centrally in the

384 arena of Irish family law, when examining the matrix of relationships embraced by
385 surrogacy, one may see that surrogacy also has a basis in contract law. As with all
386 contracts, they are designed to protect the interests of both parties as well as to bring
387 to fruition, the express and implied terms of the contract. This perspective derives
388 from the basic agreement made between the surrogate and the commissioning couple;
389 the surrogate agrees to carry the foetus to term, for the benefit of the commissioning
390 person/s and, the latter agree to re-compensate the surrogate for her time and expense
391 in carrying out said procedure, of which, would not be possible without her
392 agreement.

393

394 A proposed contractual model for surrogacy in Ireland could effectively be based on
395 the common law principles of freedom to contract, as enunciated in *Johnson v.*
396 *Calvert* [25]. From a contract law standpoint, Irish courts could assess several factors
397 for consideration when adjudicating a surrogacy dispute. Assuming all elements of a
398 valid contract exist, *offer and acceptance* of carrying out the surrogacy arrangement
399 and thereby electively agreeing to all terms of the contract, *consideration* would be
400 regarded as given by consenting to have the embryo/sperm transferred to the
401 surrogate's uterus, and finally, the contract would on the birth and relinquishing of the
402 child, be classified as having satisfied the *intention* of the parties concerned and
403 thereby completed. It should be noted that whether the particular terms of the contract
404 are "reasonable" is not technically at issue. Indeed a surrogacy contract could consist
405 of any number of terms/clauses, yet it may be assumed that all such terms are
406 reasonable because they were freely acceded to by all parties involved [30].

407

408

408 **Intent of the parties**

409 “*Intention*” in a surrogacy agreement connotes the same meaning as in other legal
410 contracts. Courts look to what the parties intended by examining the contract in a
411 prima facie fashion. The contract itself should detail the provision of a service to and
412 on behalf of the commissioning couple (the intended parents), and the contract
413 language would stipulate that the fundamental purpose of the agreement is to provide
414 the intended parents with a child which is genetically theirs. In consideration for the
415 contractual promise, the surrogate (or host) would be recompensed for her expenses
416 incurred during pregnancy. Whether or not this compensation might conflict with
417 Ireland’s Adoption Act, as presently configured, cannot be known with certainty.
418 However, as mentioned above, provided such payments are viewed by the Board as
419 “reasonable” between the parties, the courts may infer that they do not contravene the
420 Acts.

421

422 Recognising the aforementioned distinctions in other legal systems, it can be noted
423 that courts in the United Kingdom have ruled that the best possible approach in
424 relation to the issue of fees was to ‘disregard the morality or immorality of the
425 arrangement itself...’ and to decide on the best interests of the child [18,31].
426 Furthermore, California case law has further shown that courts will award legal
427 parentage to the intended parents of the child irrespective of the gestational
428 arrangements.

429

430 This was precisely demonstrated in *Re Marriage of Buzzanca* [32], where the court
431 considered a more complicated IVF case involving an egg donor, extending the
432 opinions from *Johnson v. Calvert*. In this conflict regarding donor oocytes and

433 gestational surrogacy, the Court held that where a child is born as a result of a
434 surrogacy arrangement to a couple who are not the biological (genetic) parents, the
435 intention of that couple to become parents would still be sufficient to render them the
436 legal parents of the child. The Court reasoned in *Buzzanca* that the intended mother to
437 a surrogacy contract using a donated egg could prove she was the mother under
438 existing *California Family Code Section 7610* by virtue of her consent to undergo
439 "...a medical procedure which results in a pregnancy and eventual birth of a child"
440 [32].

441

442 When given an opportunity to decide on such complex cases involving surrogacy
443 disputes, Irish courts in assessing legal parentage and the best interests of the child,
444 might seek some guidance from the legislative and judicial model currently used in
445 the United Kingdom. However, as mentioned at the introductory stage, the SAA in
446 the United Kingdom will only provide assistance to the commissioning couple where
447 the surrogate willingly relinquishes the baby and permits the adoption. Thus, the
448 California model would offer wider protection to the true and intended parents of the
449 infant, taking into account the best interests of the infant at all times. Alternatively,
450 the Irish judicial system could assess the contractual intentions of all parties
451 concerned, or as the court opined in the *Calvert* decision, the '*intellectual conception*'
452 of the child and the '*but for*' test adopted by other jurisdictions. These considerations
453 should facilitate the Irish courts' interpretation of the terms of the agreement, the
454 status of parentage in light of advances in modern medicine, and most importantly,
455 the best interests of the child.

456

457

457 **The Constitution and contract law in Ireland: Conflicting philosophies?**

458 Moral philosophers have often debated the topic of obligation in relation to keeping
459 one's promise. It is believed that where one simply agrees to keep a particular
460 promise, they should be held up to that promise as moral obligations are created by an
461 individual saying so. Accordingly, legal philosophers are often influenced by moral
462 philosophical theories about 'promising' when exploring contract-based agreements.
463 This formulation may become somewhat complicated when viewed in the framework
464 of the Irish Constitution, however.

465

466 Can it be said that the contract model combined with the Irish Constitution advances a
467 couple's basic right to procreate and establish a family? The 1937 Constitution of the
468 Republic of Ireland [15] explicitly acknowledges the special status of the family as
469 *'the natural primary and fundamental unit group in society'*, and as such recognises
470 the natural rights of its members. However, the well-intentioned protections afforded
471 to the Irish family by the Constitution may be variously interpreted as either
472 supporting or proscribing the practice of surrogacy. For example, it may be argued
473 that the commissioning couple is pursuing a family and the only way this goal can
474 possibly be achieved is through surrogacy. The couple might further contend that if
475 surrogacy contracts were deemed invalid, unconstitutional, and/or unenforceable, the
476 lack of a legally meaningful surrogacy mechanism in Ireland would effectively
477 deprive them of the opportunity to have a family—a family which in turn, is
478 ostensibly protected by the Constitution itself.

479

480 When deciding a case involving full (gestational) surrogacy, an Irish court would hear
481 compelling arguments in favour of the commissioning person/s since in this setting

482 the child would share the same genetic composition as the commissioning couple, and
483 have nothing in common genetically with the surrogate. Other jurisdictions have
484 acknowledged that in disputed gestational surrogacy arrangements, both women
485 involved could be considered the child's natural mothers. However, when intention
486 and genetics informed their deliberations, the California Court regarded the legal
487 mother as the genetic mother, and as such, custody was awarded accordingly.
488 Considering the family rights guaranteed within the Irish Constitution, it could be
489 argued that this gives more emphasis on the commissioning couple as opposed to the
490 surrogate (birth mother). Therefore, in order to safeguard that familial relationship,
491 the Irish courts could recognise a contract-based model in the absence of specific
492 surrogacy legislation.

493

494 **Public policy developments**

495 In response to the widespread availability of the advanced reproductive technologies,
496 many jurisdictions have developed regulations and/or legislation designed to
497 anticipate problems or disputes arising from this technology.

498

499 *Ireland*

500 The majority of the CAHR were of the opinion that surrogacy should be regulated by
501 a separate licensing body specifically for surrogacy, and also recommended the remit
502 of the Adoption Board be extended to include surrogacy [12]. In assessing the
503 contractual issues in a surrogacy arrangement, the Commission stated that due to the
504 various forms of surrogacy arrangements available including contractual, commercial,
505 altruistic, anonymous and intra-familial and genetic surrogacy, "the rules that may be
506 envisaged for one type may not necessarily fit the others" [12].

507 The Commission recommended that for traditional (partial) surrogacy, Irish courts
508 would classify the surrogate as the legal mother due to genetic and gestational
509 reasons. The Commission did consider the legal position in gestational (full)
510 surrogacy, where the surrogate carries an embryo that is not genetically her own, and
511 stated, “both genetics and gestation play a necessary and equally important role in
512 bringing the child into existence”. Furthermore, the Commission discussed legal
513 parentage in surrogacy arrangements as follows: “the rights based on the ‘intent of
514 reproduction’, in other words what all parties intended from the outset of the
515 arrangement, should form the basis of recommendations on legal parentage in cases of
516 surrogacy.” [12]

517

518 After considering several options related to the legal parentage of a child born through
519 surrogacy, the majority of the panel recommended that the child born through
520 surrogacy should be ‘*presumed*’ to be that of the commissioning couple [12]. This
521 position by the CAHR can direct the Oireachtas in developing legislation to grant
522 parental and legal status in gestational surrogacy arrangements. Thus far, the
523 Government has not commented on the Commission’s recommendations.

524

525 *United Kingdom*

526 It has been more than 20 years since the government of the United Kingdom produced
527 a formal enquiry into *Human Fertilisation and Embryology*, the resulting document
528 known as the Warnock Report [33]. This was followed by a related regulatory effort,
529 the Brazier Report [34]. At the time of its publishing, the Warnock Report assented to
530 most forms of reproductive technology such as IVF, artificial insemination and egg
531 donation. Curiously, the majority voice in the Warnock Report took a rather negative

532 view of surrogacy and predicted that it would “disappear” or “wither on the vine.”
533 Moreover, the Warnock Report considered surrogacy to be “inconsistent with human
534 dignity that a woman should use her uterus for financial profit and treat it as an
535 incubator for someone else’s child.” But neither the SAA 1985 nor HFEA 1990 fully
536 embodied the recommendations of the Warnock Report.

537

538 The Brazier Report [34] reviewed surrogacy arrangements to ensure that “the law
539 continued to meet public concerns.” Brazier recognised that since the time of the SAA
540 1985 and the findings of the Warnock report, public opinion had changed on
541 surrogacy, and indeed that surrogacy had become an “acceptable alternative” to other
542 forms of reproductive treatments. Brazier recommended that in order to consolidate
543 and reform the law, a new Surrogacy Act was needed [35]. The Brazier report
544 contended that “legal considerations” of surrogacy led to the conclusion that “any
545 financial arrangements” beyond reasonable expenses “has to be regarded as a form of
546 child purchase” and thus, Brazier recommended that surrogacy contracts containing
547 such provisions continue to be unenforceable. However, the Brazier Report advocated
548 allowing surrogacy to continue albeit in a regulated fashion, and with the ban on
549 commercialisation to remain in place [34].

550

551 The Brazier Report concluded that compensation between consensual adults for the
552 service of bringing to term the commissioning person/s child, should not be regarded
553 as an act of purchasing children but rather payment for services rendered. In most
554 surrogacy relationships, at least one or both commissioning persons are in fact
555 genetically related to the child born from the surrogacy arrangement. Wilson has said
556 that where one or both parents seek to adopt a child born through surrogacy, the

557 *Adoption Act 1952* may permit this because the arrangement is considered a form of
558 ‘step-family adoption’ (where either one or both persons are biologically related to the
559 child). According to this view, the surrogate mother effectively is seen as
560 ‘surrendering or abandoning’ her right to custody of the child. Thus, payment of
561 reasonable expenses is considered reimbursement to the surrogate for loss of earnings
562 and any medical procedures carried out as a result of her services [16].

563

564 **Surrogacy contracts and Irish public policy**

565 All contracts contain similar elements; whether the document concerns completing
566 renovations to one’s business or home, or agreeing to carry a child to term for
567 someone else. All contracts should include the structure necessary to deem it valid:
568 offer, acceptance, and consideration. Even when a contract has these required
569 components, issues of moral consideration may complicate the question of whether
570 courts would hold surrogacy contracts valid [36]. This is because all legal systems
571 reserve the right to declare a contract void if it is legally or morally offensive,
572 contrary to public policy, or if it involves the commission of an unlawful act [28].

573

574 *Grounds for invalidation*

575 A surrogacy contract may be rendered invalid when its terms describing
576 compensation for “expenses” are critically viewed as exploitative, thus creating an
577 impression of commercialisation. Expenses have come to include monetary payment
578 to the surrogate for her medical treatment, her loss of earnings associated with
579 pregnancy and other general expenses (*i.e.*, maternity clothes and travel) calculated at
580 a standard consistent with current market trends. In Ireland, this exchange of expense
581 payments from the commissioning person/s to the surrogate could be contentious

582 because the *Adoption Act 1952* specifically prohibits a birth parent from receiving or
583 agreeing to receive ‘any payment or other reward in consideration of the adoption of
584 the child’. It therefore forbids any person from giving or agreeing to give any such
585 payment or reward. Courts in Ireland could take the view, irrespective of whatever
586 label is put on the agreement, that “the reality of the contract is that it is an agreement
587 to pay a fee in connection with an adoption”, and therefore illegal [37].

588

589 English judges have tended to permit expense payments to the surrogate, provided
590 they are reasonable, regarding such compensation as somewhat incidental to the
591 agreement itself. This evokes a troublesome question: If a surrogacy case were to
592 come before Irish courts today in the absence of surrogacy legislation, would the
593 adoption of one’s own genetic child be in contravention to the *Adoption Act 1952*?
594 Upon a strict reading of the Section 42, the answer would be yes. However, as noted
595 above, the Adoption Board will not classify reasonable expenses (medical or other) as
596 contravening the Acts. One reason this agency has facilitated such adoptions is
597 because one or both of the parents seeking the adoption is legally and genetically the
598 parent/s of the child they seek to adopt (*personal communication*).

599

600 *Basis of illegality*

601 The prevailing historical view was that any act of surrogacy diminished women and
602 was degrading to all females. One of the central challenges confronting surrogacy is
603 whether it is morally or ethically just, and whether in view of such concerns, the
604 courts must assess the enforceability of surrogacy contracts. As such, the courts when
605 looking at matters of public policy take account of the ‘common good’ and the
606 changing perceptions of society as the validity of such contracts is evaluated.

607 Judges have never enforced contracts which, in the interests of morality and the
608 common good, are regarded as contrary to public policy. In a French surrogacy case
609 brought before the *Cour de Cassation*, the court held that surrogate motherhood must
610 be regarded as lawful and “not contrary to public policy” and the “adoption is in
611 accordance with the interests of the child” [38]. Although courts are quick to strike
612 down illegal or morally offensive contracts, what may once have been regarded as
613 morally doubtful may over time become socially and ethically acceptable. Modern
614 reproductive technology has given many individuals an opportunity to create a family
615 through various medical and surgical procedures. In light of these developments, it is
616 unlikely that surrogacy would be viewed as objectionable or morally offensive by
617 Irish courts. Indeed, it could be a delicate matter for a court to disparage and
618 invalidate a surrogacy contract without to some degree also entangling the offspring
619 who would be at the very centre of the dispute. By doing so, the resulting child would
620 almost certainly be tainted with judicial disgust, an outcome antagonistic to “the best
621 interests of the child” doctrine.

622

623 Although the courts of each jurisdiction seek to promote and protect the best interests
624 of the child, this outcome is not always evident. An example of this may be found in
625 the first surrogacy dispute litigated in Australia, *Re Evelyn* [39]. The outcome of this
626 1998 decision resulted in a highly disruptive environment for all parties concerned.
627 While at the time, Australia had a complete prohibition on surrogacy, the court did not
628 take this into account but decided instead to regard with more gravity the maturity of
629 the parties in what was described as an altruistic, well-intentioned arrangement.
630 However, the judge here decided that even though Evelyn had spent two years with
631 her intended family, she should be returned to her birth mother (surrogate) to be

632 raised. The intended parents were given shared long-term responsibility. It is
633 anticipated that a ruling of this type would have limited influence on future Irish
634 jurisprudence, as courts in Ireland tend to rely heavily on forensic or scientific
635 literature which is in near universal agreement that the effect of such “parent
636 switching” entails substantial psychological trauma to the child if bonds of attachment
637 are formed and broken with the adoptive/intended parents [40,41].

638

639 **Breach of Contract & The Role of the Judiciary**

640 Where a custody dispute arises between the surrogate and the commissioning
641 person/s, what approach should the Irish courts take in resolving the dispute? It is our
642 opinion that any future surrogacy dispute in Ireland ideally should be adjudicated on
643 the basis of a *Three Point Test* to measure the critical aspects of the arrangement: 1)
644 *the genetic make-up of the child*, 2) *the contractual intentions stipulated by the parties*
645 *to the agreement*, and most importantly, 3) *the best interests of the child*.

646

647 A genotypic approach would be fully consistent with the proposals of the CAHR
648 report [12], which would validate that the gametes of one or both of the
649 commissioning person/s were in fact used to bring about the creation of that child.
650 Additionally, it would be important for Irish courts to consider the *intention of the*
651 *parties* at the time of the agreement. Any decision may be supplemented by looking to
652 the ‘intellectual conception’ of the child and the ‘but for’ test (*i.e.*, ‘but for’ the
653 intention of the intended parents, the child would have never existed).

654

655 Finally, we believe that the best interests of the child should outrank the former
656 criteria in assessing legal parentage/custody in all cases. This last element of the

657 equation, admittedly subjective, gives appropriate deference to the bench in
658 quantifying the deciding factor in the outcome of the case. If, based on all available
659 evidence, an Irish court determined that the birth mother (surrogate) rather than the
660 commissioning couple best served the needs and interests of the child, then the
661 previous two elements above would fail on such findings. However, if the court were
662 satisfied that in a traditional surrogacy arrangement, both the birth mother and
663 commissioning couple equally were eligible for custody, then the courts decision
664 should rest on the first two factors in the *Test*.

665

666 *Remedies*

667 There are a number of ways both parties might breach a surrogacy contract. For
668 example, the commissioning couple could decide not to pay for the medical expenses
669 of the surrogate. Or, the surrogate might in some way intentionally harm the foetus by
670 smoking or drinking during pregnancy. While these issues do not easily fall within the
671 scope of our analysis, the commissioning couple (in the first scenario) may be held to
672 be in breach of the terms of the contract and thus, compelled to uphold (specific
673 performance) the terms of the contract. Similarly, in the second scenario the surrogate
674 would be in breach of the express terms of the contract since it would be imperative
675 for the commissioning couple to choose a healthy host to carry their child to full term.
676 Accordingly, the surrogate may be liable to damages for emotional distress caused to
677 the intended parents. Regarding situations where the surrogate refuses to relinquish
678 custody of the child, what relief is available to the commissioning person/s? Are
679 contractual remedies suitable in the context of surrogacy arrangements and how may
680 such remedies be quantified?

681

682 *Damages*

683 Would an award of damages be an acceptable remedy in a surrogacy dispute? If so,
684 how would the courts calculate this bearing in mind they would be assessing such
685 damages in relation to (or, in exchange for) the loss of one's child? If legal parental
686 custody of a child were to be granted to the birth mother (surrogate), would it be
687 morally just to order restitution to the commissioning couple for the financial loss
688 they had incurred, by directing reimbursement to them for '*expenses*' and medical
689 treatments that they had paid to the surrogate (or her caregivers) during the gestational
690 period? If the court simply reimbursed the commissioning couple for expenses, would
691 this be a favourable remedy? A specific set of facts could lead an Irish court to decide
692 that due to the child being partly that of the surrogate (genetically), that the
693 commissioning person/s be required to pay for whatever expenses and costs
694 associated with the child's upbringing, but with parental custody being assigned to the
695 surrogate.

696

697 This scenario strongly favours the surrogate, and the commissioning person/s would
698 find themselves in a situation with considerably less than they started with, as they
699 would be forced to pay for offspring that they intended for themselves but would be
700 legally denied full access to. This remedy appears unbalanced in that the surrogate
701 would ultimately receive two benefits compared to none for the commissioning
702 person/s, since the birth mother (surrogate) would enjoy the child as well as some
703 form of guaranteed payment for its support. It is our belief that the Irish courts should
704 decide the issue of damages in light of the party of whom it awards custody to:

705

706 • If the commissioning couple breach the terms of the contract then the
707 surrogate should only be awarded compensation as per the terms of the
708 contract, i.e., to put her in the position she would have been in had the contract
709 been carried out fully. This would be in line with the recommendations of the
710 CAHR report and the Adoption Acts 1952-1998.

711

712 • If the Surrogate breaches the contract (by refusing to relinquish custody), the
713 courts should award the commissioning couple joint custody and a refund of
714 all expenses that were incurred (medical and other).

715

716 *Specific Performance*

717 The application of specific performance would generally block the previous outcome
718 by simply enforcing the agreement in place between the signatories to the agreement.
719 The surrogate would, by court order, be forced to comply with the full intentions and
720 objectives of the contract as stipulated therein, and therefore be obligated to give the
721 child over to the commissioning parents. This judicial requirement of removing a
722 baby from the bosom of its birth mother may first appear somewhat callous and
723 indelicate, since the intrusion of legal manoeuvres near a moment traditionally given
724 great family, social, and spiritual significance is unsettling. But the background and
725 circumstances of such a birth would be quite different here. Indeed, the highly
726 specialised context of the surrogacy arrangement is itself unnatural, and the ultimate
727 conclusion of the contract would have specifically called for the bonds of motherhood
728 to be reassigned to the commissioning person/s as *the* essential condition of fulfilling
729 the agreement. Proper and total execution of the agreement occurs only when the

730 surrogate specifically performs the tasks required of her, namely, by providing the
731 commissioning person/s with the child that they themselves had conceptualised.

732

733 It must be admitted that for any future case in Ireland involving this emotional alloy
734 of contract, family, and constitutional law, absolutes are difficult when determining
735 the sensitive matter of parentage and child custody. Yet by utilising the *Three Point*
736 *Test* as presented previously, Irish courts could (in the absence of legislation) render a
737 just and equitable decision based on sound legal principles.

738

739 **Conclusion**

740 Given the many advances in modern fertility therapies and the wide availability of
741 these treatments, the notion of surrogacy finds itself on many social, family, religious
742 and political agendas. Recognition of surrogacy and its important role in modern
743 society is welcome, and today it no longer carries the stigma of an earlier time.
744 Surrogacy is now optimistically viewed as being an acceptable method of procreation
745 “in circumstances where it would otherwise not be possible”. Irish courts dealing with
746 a future issue where the surrogate fails to relinquish custody could apply the *Three*
747 *Point Test* to consider genetic data and the intention of the parties at the time of
748 making the contract. Account must also be taken of the best interests of the child, as
749 determined by experienced judges.

750

751 For judicial matters, we favour the *Three Point Test* over existing expert committee
752 opinions because there are important inconsistencies between documents Irish Courts
753 might consider, including the CAHR Report [12] and the Brazier Report [34]. The
754 CAHR Report found ‘*presumed*’ intention to be critical in assigning legal parent
755 status to the commissioning person/s, whereas the Brazier Report recommended the

756 surrogate mother be recognised as the legal mother of the child irrespective of genetic
757 relatedness or original parental intention.

758

759 On legislative matters, we agree with the CAHR Report's recommendation that the
760 Oireachtas, in developing legislation on surrogacy, should consider the consensual
761 nature of surrogacy arrangements, and, as such, the '*presumed intention*' of
762 parenthood should be sufficient to grant the commissioning person/s legal parentage
763 and custody of the child. The Oireachtas will also need to consider the unfavourable
764 treatment of the commissioning person/s in the United Kingdom, where surrogacy
765 contracts have been deemed unenforceable and would raise questions here about
766 one's Constitutionally-protected right to procreate. This concern may be assuaged by
767 application of the *Three Point Test* (or some similar methodology) as outlined here.
768 For Ireland, this contract-based approach combined with a respect for Constitutional
769 family rights may be regarded as a successful contribution to surrogacy arrangements
770 here.

771

772 **Competing interests**

773 None declared.

774 **Authors' contributions**

775 ESS and CMH contributed equally to this manuscript.

776

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