

Surrogacy for same-sex couples – Who is the legal parents of a surrogate child?

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Abstract:

At the end of the 20th century, discrimination against same-sex couples has still become alive around the world, but nowadays, particular states and territories removed gradually discrimination against same-sex couples. They have the right to be treated equally. Whereby, same-sex couples rights are human rights. Besides, these couples have civil rights which are different recognized in different countries and territories based on their legal systems. With the desire to be parents of same-sex couples, in reality, many same-sex couples have found methods to have children such as adoption and surrogacy and some countries have referred to this issue in their laws. Same-sex partners have been enjoyed the right of marriage or recognized the civil relationship, enabling them to have limited legal rights, such as succession and adoption. However, in the legislative and judicial practice, recognizing surrogacy for same-sex couples is controversial because of the difference and conflict in provisions on their rights in different countries caused by various points of view. Surrogacy refers to a contract in which a woman carries a pregnancy “for” another couple. Although this surrogacy arrangement appears to be beneficial for all parties concerned, certain delicate issues need to be addressed through carefully framed laws to protect the rights of the surrogate mother and the intended parents. In this case, what challenges which same-sex couples have to face when they wish to have biological children, i.e., a child made from genetic material derived from at least one of the individuals, by entering into surrogacy agreements? Assuming same-sex couples can overcome social prejudices, including their ability to raise children because of their sex, what obstacles do they face in being declared legal parents? What might be the surrogate's legal rights, if any? The legal issues about the characteristics, the consequences of surrogacy, and the relationship between children born by surrogacy and same-sex parents will be clarified in detail in this article.

Keywords: *same-sex couples, surrogacy, legal parents, UK, Vietnam*

1. Introduction

The global campaign to secure protections for people of the LGBT³ community has made significant progress in recent decades. However, due to the misconception that homosexuality is a mental illness with psychological distortions, this community still suffer from discriminatory activities such as ridicule and violence.

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³ LGBT is an initialism for lesbian, gay, bisexual and transgender.

The 21st century has recorded an increase in the number of cases related to violence and discrimination because of individuals' sexual orientation. Since 2003, the United Nations General Assembly has repeatedly called attention to the killings of persons because of their sexual orientation through its resolutions on the extrajudicial, summary, or arbitrary execution.⁴ For instance, according to a Resolution adopted by the General Assembly (A/RES/57/214) on February 25th, 2003, the General Assembly called upon Governments concerned to investigate promptly and thoroughly all cases of killings committed for any discriminatory reason, including sexual orientation; or in Resolution on December 18th 2014, the General Assembly urged States to conduct prompt, exhaustive and impartial investigations into all killings, including those because of their sexual orientation⁵. On Human Rights Day 2010, the Secretary-General expressed his concern about this issue in a speech, stating that “we reject discrimination in general, and in particular discrimination based on sexual orientation... Together, we seek the repeal of laws that criminalize homosexuality”⁶. What stands out from these reminds and callings are that our society still lacks recognition of the diversity of sexual orientation as well as respect for legitimate rights and benefits of the LGBT community, including fundamental civil and social rights, similar to those of heterosexual persons. All members of our society who are aware of and uphold human rights have been continuously fighting for this recognition and respect.

Regarding the civil and social rights of individuals of the LGBT community, two basic rights are brought up for discussion in the cohabitation relationship of same-sex couples, namely the right to property during this period and the right to have children. Compared to heterosexual couples when they think about having children, some traditional methods could be used, meanwhile, same-sex couples may choose from various routes to parenthood such as co-parenting, adoption or fostering, donor insemination and surrogacy.

Surrogacy is not a new term as well as an ideal choice reserved for same-sex couples. However, it is one of several options that these couples prefer taking when they want to enjoy their parental rights, especially the right to raise and take care of their biological children. Based on the comparison, analysis, and commentary on the legal provisions on surrogacy of the United Kingdom, this paper will clarify some legal issues related to surrogacy that same-sex couples will face when choosing this method. Furthermore, this article also refers to the case of Vietnam which are still not recognized same-sex relationships, thus suppose some suggestions to ensure the enjoyment of fundamental rights including the reproductive rights of these couples.

2. Overview of parenthood desire and surrogacy of Same-Sex couples

2.1. Parenthood desire

Parenthood desire is a legitimate demand of same-sex couples. It is the result of previous basic needs such as the need to live together and get married. Having a family life with full members

⁴ United Nations Human Rights Office of the High Commissioner, ‘United Nations Resolutions on sexual orientation, gender identity and sex characteristics’ (OHCHR) <<https://www.ohchr.org/EN/Issues/LGBTI/Pages/UNResolutions.aspx>> accessed 12 November 2021

⁵ UNGA Res 69/182 (30 January 2015) UN Doc A/RES/69/182.

⁶ UNHCR ‘Annual Report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General’ (17 November 2011) UN Doc A/HRC/19/41.

including parents and children is a simple dream of same-sex couples in the LGBT community. In 2015, a study on child custody of homosexual, bisexual and transgender people had been conducted. The results of this study show that 87.7% of the asked through the online questionnaire said they have an intention or plan to have children⁷ and 86% of the interviewees stated, “in the past, present or future, having children is a necessary need”.⁸ The upward trend in parenthood desire of same-sex couples under the above survey was quite compatible with the ones carried out in some other countries. For instance, in the United States of America, a 2013 Pew Research Center’s survey⁹ found that 51% of LGBT adults of any age have children or would like to have children in the future; and the 2014-2016 American Community Survey revealed that same-sex couples are seven times more likely than different-sex couples to be raising an adopted or foster child and married same-sex couples show higher rates of childrearing.¹⁰ In the United Kingdom, with the total number of adoptions in England falling 3,340, 570 cases were to same-sex couples that means 1 in 6 adoptions in 2020 were to same-sex couples¹¹. Eight years ago, the figure for this was 160 adoptions, representing 1 in 22 adoptions that year.¹² All able examples have partly shown an uprising increase in the need to become parents and enjoy the rights to care for and raise children of same-sex couples.

Having a child is a great wish of same-sex couples and this aspiration is often hindered by difficulties in the process of having and raising children, stemming from the attitudes of the surrounding community and current legal provisions which are restricting these couples from parenthood. In terms of legal barriers, all the pathways to parenthood have varying degrees of legal obstacles associated with same-sex couples and laws regarding parenting and relationship recognition differ dramatically by country and state. Regarding social barriers, despite the increase in gay and lesbian couples having children, sexual minorities still face numerous social barriers to becoming parents.¹³ Same-sex couples confront a social landscape in which heterosexuality is privileged and the understanding of family entails a heterosexually married couple.¹⁴ In addition, the family’s disapproval and the discouraging or unsupportive behaviours from the authorities are also among the factors causing obstacles. Taking care of and raising a child requires huge support from the State and society, through taking action against violations of the rights and interests of relevant subjects, especially same-sex couples on the basis of non-discrimination based on sexual orientation when raising children.

⁷ USAID and UNDP, *The right to adoption of lesbian, gay, bisexual and transgender people in Vietnam: Reality and Recommendation* (UNDP 2015) 23.

⁸ Ibid

⁹ ‘A Survey of LGBT Americans’ (Pew Research Center) <<https://www.pewresearch.org/social-trends/2013/06/13/a-survey-of-lgbt-americans/>> accessed 13 November 2021.

¹⁰ ‘How many Same-sex couples in the US are Raising Children’ (UCLA School of Law Williams Institute) <<https://williamsinstitute.law.ucla.edu/publications/same-sex-parents-us/>> accessed 13 November 2021.

¹¹ ‘1 in 6 adoptions in England in 2020 to same-sex couples [10 December. 2020]’ (New Family Social) <<https://www.newfamilysocial.org.uk/General-News/9419046>> accessed 15 November 2021.

¹² Ibid

¹³ Nicholas K.Park and Emily Kazyak and Kathleen Slauson-Blevins, ‘How Law Shapes Experiences of Parenthood for Same-sex Couples’ (2016) 12 *Journal of GLBT Family Studies* 115

¹⁴ Ibid

2.2. *Surrogacy*

Surrogacy is a method of assisted reproduction where same-sex couples work with a gestational surrogate who will care and care for their baby until birth. These couples use surrogacy to start or grow their families when they cannot do so on their own because they cannot procreate through sexual intercourse. Though childbirth once resulted exclusively from heterosexual intercourse, modern technology facilitates reproduction notwithstanding functional and structural infertility.¹⁵ Functional infertility occurs when an individual can not reproduce with her or his partner for medical reasons, such as unviable ova or sperm, whereas structural infertility applies to the situation of individuals who are single or those who have a partner of the same-sex, and therefore require another party's biological assistance to reproduce. Consequently, same-sex couples who are structurally infertile can utilize various assisted reproductive techniques to procreate, including surrogacy.

Unlike adoption, surrogacy is a method for same-sex couples to have their biological children. For instance, for gay couples, only one of the men can fertilize an egg to be used in surrogacy, likewise for lesbian couples, they have to accept that their partner is not the child's biological parent. Due to the complexity of the relationship between the parties involved in surrogacy, this will be started under an agreement called the "surrogacy agreement". A surrogacy agreement stipulates the rights and obligations of relevant parties, including the surrogate mother and intended parents. Typically, a surrogacy agreement will include parental rights, custody of the child at birth, location of delivery, future contact between the parties, health insurance, other insurance obligations, medical decisions during pregnancy (right to make medical decisions), payment of medical bills, financial considerations, such as the gestational surrogate's compensation and expense. The surrogacy agreement will be considered as a road map of the process so the more carefully it is drafted, the more successfully same-sex couples actualize their parenthood desire.

3. **Regulations in the United Kingdom on surrogacy for same-sex couples**

3.1. *The background*

Establishing a family is considered a fundamental aspect of personal and social life. Perhaps because of this, the right to marry and found a family is a universal right protected in both the 1948 Universal Declaration of Human Rights (the 1948 UDHR) and the European Convention of Human Rights. Accordingly, Article 16.1 of the 1948 UDHR states that "*men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family*". This right was subsequently reaffirmed in the 1950 European Convention on Human Rights, namely in Article 12 that "*men and women of marriageable age have the right to marry and to found a family*". What stands out from the two above articles is the subject of marriage is men and women. This is not to imply that this relationship is established only between a man and a woman. However, due to many reasons especially social conceptions, the meaning of these provisions has been construed as marriage can only be based on the relationship of two individuals who are heterosexuality.

¹⁵ Michael S DePrince, 'Same-Sex Marriage and Disestablishing Parentage: Reconceptualizing Legal Parenthood through Surrogacy' (2015) 100 Minn L Rev 797

Although sexual reproduction is the traditional method of starting a family, some individuals may have to rely on assisted reproductive methods or surrogacy (the process by which a woman carries a surrogate for another person/couple) to start a family. This reason comes from functional and structural infertility which is mentioned in Part 2.2. The United Kingdom (the UK) was considered one of the first countries in the world to offer a comprehensive regulatory framework to govern assisted reproductive technologies (ARTs), including surrogacy, after a lengthy process. Furthermore, the UK also recognized the marriage of same-sex couples since 2013¹⁶. As result, the regulations on surrogacy for heterosexual couples will be applied to same-sex couples, similar to other regulations related to fundamental human rights, to ensure legitimate rights and benefits of these couples against discrimination based on sexual orientation.

For same-sex couples who are unable to conceive a child themselves, surrogacy in the UK is becoming an increasingly popular option when they want to become parents. According to new data obtained by Brilliant Beginnings from the Child and Family Court Advisory and Support Service, parental order applications from couples in same-sex relationships reached 350 in 2018, more than five times the figure made in 2014, when just 69 were recorded.¹⁷ Surrogacy in the UK is governed by the 1985 Surrogacy Arrangements Act (the SAA 1985)¹⁸ and some related provisions of the 1990 Human Fertilisation and Embryology Act (amended and supplemented in 2008 – HFEA 2008). Due to the provoked controversy and the need of being critically examined, some possible issues surrounding the law on surrogacy were identified by the Law Commission¹⁹, which is how the law is regulated and parental order. From this fact, in Part 3 of this paper, some legal issues on surrogacy under the UK law will be shown, namely (i) definition of relevant terms, (ii) the legitimacy of the surrogacy agreement and (iii) rights of surrogate mother and parental order (for the transfer of parental rights).

3.2. Definitions of relevant terms

Under the SSA 1985, the “surrogacy agreement”²⁰ and the name of a party to the surrogacy agreement – “surrogate mother”²¹ was defined. Accordingly, “surrogate mother” means a woman who carries a child in pursuance of an agreement made before she began to carry the child and an agreement is a “surrogacy agreement” if the child is born as a result of a negotiation agreement made by the surrogate mother. In this case, the SSA 1985 provides an overview of two relevant terms related to pregnancy consent but omits the definition of the other party to the surrogacy agreement, especially the surrogacy agreement for same-sex couples. This other party is called “intended parents”. They are couples or individuals who cannot have a child themselves and who

¹⁶ Marriage Act 2013, s 1(1).

¹⁷ ‘New data from English family court shows 350% growth in UK and international surrogacy over the last 12 years’ (Brilliantbeginnings) <<https://brilliantbeginnings.co.uk/new-data-family-court-350-percent-growth-surrogacy/>> accessed 12 November 2021.

¹⁸ The Surrogacy Arrangements Act 1985 was enacted in the backdrop that there was a public outcry for surrogacy agreements made in 1976 and 1985. Its provisions were based upon the recommendations of the Committee of Inquiry into Human Fertilisation and Embryology in 1984.

¹⁹ The Law Commission is the statutory independent body created by the Law Commissions Act 1965 to keep the law of England and Wales under review and to recommend reform where it is needed.

²⁰ The Surrogacy Arrangements Act 1985, s 1(3).

²¹ The Surrogacy Arrangements Act 1985, s 1(2).

are considering surrogacy as a way to help them to realize their parenthood desire. They may be heterosexual or same-sex couples in a marriage, civil partnership or living together/co-habiting, or individuals regardless of their relationship status.²² Therefore, a surrogacy agreement is an agreement between intended parents and a surrogate mother relating to carrying a child in pursuance, made by a surrogate mother and at least one of the intended parents in the couple must be a genetic parent to the child.²³ This agreement basically is not a legally binding document but rather a statement of intention about how the agreement will work and the commitment that each party is making to the other in advance of the surrogacy commencing. This is why some main surrogacy organizations agree that it is fundamentally important to have a written agreement which is a basis for the effective communication and mutual understanding between intended parents and surrogate mother.

3.3. The legitimacy of the surrogacy agreement

The legitimacy of the surrogacy agreement depends on the reason for this agreement. Under UK law, a surrogacy agreement based on a commercial basis is illegal. This means, no person shall on a commercial basis do any of the following acts in the UK, including the offer or agree to negotiate the making of a surrogacy arrangement or take part in any negotiations with a view to making a surrogacy arrangement.²⁴ A surrogacy agreement based on a commercial basis will be related to any payment in respect of making, or negotiating or facilitating the making of, any surrogacy arrangement, received by one party to the surrogacy agreement²⁵. In this case, “payment” does not include payment to or for the benefit of a surrogate mother or prospective surrogate mother. Therefore, in order not to violate the agreement on surrogacy for commercial purposes²⁶, the parties to the agreement must prove that they didn’t do the act with a view to any payment being received in respect of it. Although this issue was not regulated in the SSA 1985, the HFEA 2008 clarified “payment” to avoid the misuse of it for commercial purposes. In particular, Section 54(8) of the HFEA 2008 requires the court to consider the legality of this ‘payment’. Herein, this ‘payment’ not including expenses reasonably incurred for the benefit of a surrogate mother or prospective surrogate mother, has been given or received by either of the applicants for or in consideration of the making of the order, the handing over of the child to the applicants,... unless authorised by the court. However, there is a risk that anything considered to be ‘payment’ for surrogacy could result in the refusal of the court to grant a parental order. It has been a relatively common occurrence in recent years for payments to surrogates that might be thought to be over and above what can be called ‘reasonable expenses’ to be retrospectively authorised by a court when considering whether or not a parental order can be granted. For example, in *Re X & Y (Foreign Surrogacy)* [2008]²⁷, a British couple paid 235 Euros per month to their Ukrainian

²² ‘Guidance The Surrogacy pathway: surrogacy and the legal process for intended parents and surrogates in England and Wales’ (Department of Health & Social Care) <<https://www.gov.uk/government/publications/having-a-child-through-surrogacy/the-surrogacy-pathway-surrogacy-and-the-legal-process-for-intended-parents-and-surrogates-in-england-and-wales>> accessed 15 November 2021.

²³ Ibid

²⁴ The Surrogacy Arrangements Act 1985, s 2(1).

²⁵ The Surrogacy Arrangements Act 1985, s 2(3).

²⁶ The Surrogacy Arrangements Act 1985, s 2(4).

²⁷ [2008] EWHC 3030

surrogate, as well as 25,000 Euros when the children (twins) were born. Though these payments evidently exceeded the surrogate's 'expenses' (in fact, the lump sum was to enable her to place a deposit on a flat), the payments were later authorised so that a parental order could be made. As a result, these payments will generally always be authorised by a court unless there is another reason for the court to consider that the granting of a parental order to the intended parents would not be in the best interests of the child.

3.4. *Rights of surrogate mother and parental order*

Regarding the rights of surrogate mothers, under UK law, in a surrogacy agreement, the woman who gives birth is always treated as the mother and has the right to keep the child, even if they're not genetically related²⁸. As a result, the legal parents of the child after birth in the surrogacy agreement is the surrogate mother, the intended parent(s) is not the legal parents even though they have the same biological. As a result, the legal parents of the child after birth in the surrogacy agreement is the surrogate mother, the intended parent(s) is not the legal parents even though they have the same biological. For instance, in the case of *AB v CD*, the surrogate mother and her husband remained the legal parents to the child despite the baby living with the intended parent(s).²⁹ The reason for this matter is the intended parent(s) didn't know they had to apply for a parental order. Therefore, this infringes on their rights as parents because though surrogacy agreement has been agreed to by the parties (in this case, between intended parent(s) and surrogate mother) but legally, the recognition of intended parent(s) as the legal parent of the child is not recognized. This was because Section 36 of the HFEA 1990 introduced section 1A into the 1985 Act to provide that 'no surrogacy arrangement is enforceable by or against any of the persons making it' i.e. surrogacy contracts are unenforceable in the courts³⁰. This means that the surrogate mother cannot be required by the intended parent(s) under any contractual provision to hand over her child, nor can the intended parent(s) be required to hand over any money or recover any money paid to the surrogate mother under the terms of such a contract.

On the other hand, if the surrogate changes her mind and wants to keep the child, according to the provisions of surrogacy law, she still has legal rights over the child in this surrogacy agreement. Without a parental order, the surrogate is entitled to change her mind and keep the baby at any time. Another way in which the law on surrogacy infringes on parental rights of the intended parent(s) in this case. There was an actual case recorded when a surrogate mother changed her mind about handing over the baby to a gay couple but the Court of Appeal granted the gay couple custody of the baby. Even though the surrogate had the right to change her mind under the HFEA 2008, it was held that this did not mean that the surrogate should keep the child³¹. The right to be a legal parent of the surrogate mother has demonstrated the concern of legislators about the rights of the surrogate child, especially in case the intended parents give up their intention to be a parent

²⁸ The Human Fertilisation and Embryology Act 1990, s 27.

²⁹ Annabelle Poole and Hannah Pearman and Ellie Pook and Gledisa Qokthi and Jasmine Rushworth, 'The Surrogacy Arrangements Act 1985 To what extent does the current law on surrogacy infringe on parental rights?' (2019) 1(1) Student Journal of Professional Practice and Academic Research 58.

³⁰ Margaret Brazier, Susan Golombok and Alastair Campbell, 'Surrogacy: review for the UK Health Ministers of current arrangements for payments and regulation' (1997) 3(6) Human Reproduction Update 623.

³¹ Olivia Rudgard, 'Surrogate mother who changed her mind must hand baby to gay couple, court rules' (Telegraph, 17 November 2017) <<https://www.telegraph.co.uk/news/2017/11/17/surrogate-mother-changed-mind-giving-baby-must-hand-child-gay/>> accessed 17 November 2021.

of the surrogate child at any stage. In any circumstances, the surrogate will still enjoy their basic rights.

In terms of a parental order, this step plays an important role in the surrogacy agreement, transferring parental rights from the surrogate mother to the intended parents. Without a parental order, the commissioning parents will not be the legal parents of the child. They may not have parental responsibility and whilst this in itself may not affect their ability to provide day-to-day care for the child, it may have long-term consequences (for example affecting inheritance rights) and could affect their ability to take certain steps on behalf of the child (for example, apply for a passport).³² Consequently, in this case, both the intended parent(s) and the child in a surrogacy arrangement face potential risks of legal parental rights and a recognition of the fragility of their relationship.

To extinguish the surrogate's parental status, the intended parent(s) have to seek a parental order under Section 54 of The HFEA 2008 and follow the procedure as set out in Part 13 of the Family Procedure Rules 2010 (FPR 2010). A parental order which transferred parentage from the surrogate to the intended parents goes to the most fundamental aspects of status and to the very identity of the child (who s/he is and who his/her parents are), and it is applied for through the family courts³³. A parental order, if made, results in the legal consequence that the intended parent will become the legal parent with full rights concerning the child in the surrogacy agreement. At the same time, extinguishes the surrogate mother's status as the child's legal mother, together with that of her husband or any other legal parent. Importantly, such an order gives the commissioning parents parental responsibility.³⁴ It is central to a child's being, whether as an individual or as a member of his family. These matters are fundamental to both the intended parent(s) and the child.

Another problem intended parents have to face that is a surrogacy agreement can only be made with the surrogate's consent. It means, if the surrogate changes her mind before a parental order has been signed, she is the legal parent. In the case of *C, D v E, F, A, B*³⁵ the surrogate changed her mind and did not want to hand over consent to the intended parent(s). Without the respondent's consent, the application for a parental order comes to a juddering halt. The result is that these children are left in a state of legal uncertainty, where, contrary to what was agreed by the parties at the time of the arrangement, the respondents will remain their legal parents even though they are not biologically related to them and they expressly wish to play no part in the children's lives³⁶. Once the child is born and a parental order has been granted, the intended parents are now the legal parents of the child and have the right to parental leave. The most recent change to the law was brought in by changes to the HFEA 2008 on October 1st, 2013. This change allows for the surrogate and intended parents to grant legal parenthood to either of the intended parents immediately at birth. This is made possible through the completion of various parental order forms, however, this has to be before the surrogate undergoes the fertility treatment. This gap between

³² Alghrani, Amel and Griffiths, Danielle 'The Regulation of Surrogacy in the United Kingdom: The Case for Reform' (2017) 29(2) Child and Family Law Quarterly 165.

³³ Ibid (n 20)

³⁴ Parental responsibility is defined in section 3 of the Children Act 1989 as "all the rights, duties, powers, responsibilities and authority which by law a parent has in relation to the child and administration of his/her property".

³⁵ [2016] EWHC 2643.

³⁶ Ibid [9].

birth and parental order is normally a gap of up to twelve months, this latest change has narrowed this, but, has not replaced parental orders. This is because it cannot grant legal parenthood to the intended parents or terminate the surrogate's legal parenthood³⁷.

About the granted time of a parental order, Section 54(3) HEFA 2008 states that for a parental order to be granted, the application must be made between six weeks and six months after the birth of the child concerned. Despite this, in *X (A Child) (Surrogacy: Time Limit)* [2014]³⁸, the High Court granted a parental order after the six-month deadline for making them had passed. This decision was later followed in *A & B (No 2 - Parental Order)* [2015]³⁹. In this case, a couple applied for a parental order concerning twins born to a surrogate in India in December 2011 (thus, at the time of the hearing the children were three years old). From the above two cases, to protect the interests of the parties in the surrogacy relationship, especially the interests of the child, HFEA should give the Court the right to consider the reasonableness of the time limit for ordering the parents. Herein, the six-month time limit is described as 'almost nonsensical' and the question posed here is "Can Parliament have intended that the gate should be barred forever if the application for a parental order is lodged even one day late?"⁴⁰. Besides, 'without a parental order, the commissioning parents will not be the legal parents of the child they have probably cared for since birth, and whom the child regards as their de facto parents. Whilst this in itself may not affect their ability to provide day to daycare for the child, it may have long term consequences, for example affecting inheritance rights...'⁴¹.

4. Surrogacy for same-sex couples from the perspective of Vietnamese law

4.1. Regulations of Vietnamese law

Viet Nam is a country that has not yet recognized same-sex marriage. Therefore, in the near future, if Viet Nam acknowledges this issue, the provisions of Vietnamese law relating to surrogacy for heterosexual couples will simultaneously regulate surrogacy for same-sex couples. Surrogacy following Vietnamese law is recorded mainly in the Law on Marriage and Family 2014 and the Decree No.10/2015/ND-CP on Giving birth in vitro fertilization and conditions for altruistic gestational surrogacy (Decree No. 10/2015/ND-CP). In addition, some other relevant texts include the Circular No.57/2015/TT-BYT on detailing a number of articles of Decree No. 10/2015/ND-CP dated January 28, 2015, by the Government on in vitro fertilization and conditions for surrogacy for humanitarian reasons (Circular No.57/2015/TT-BYT), the Decree No.98/2016/ND-CP on amending a number of articles of the Decree No. 10/2015/ND-CP dated January 28, 2015, by the Government providing for childbirth by in vitro fertilization and conditions for surrogacy for humanitarian purposes (Decree No.98/2016/ND-CP), the Decision No. 7358/QD-BYT on the publication of administrative procedure is provided in Decree No.98/2016/ND-CP dated 07/01/2016 amending and supplementing some articles of Decree No.10/2015/ND-CP dated 28/01/2015 regulations on having a baby by IVF technical and conditions for a sustainable party

³⁷ Robin Charrot, 'What do you need to know about surrogacy?' (2014) 1 P.C.B. 39.

³⁸ [2014] EWHC 3135.

³⁹ [2015] EWHC 2080.

⁴⁰ Ibid n 36 [55].

⁴¹ Ibid n 37 [12].

for humanities (Decision No. 7358/QD-BYT). These documents will stipulate some main issues about surrogacy including (i) the definition of relevant terms, (ii) the legitimacy of the surrogacy agreement and (iii) the parental rights of the intended parents involved in this surrogacy agreement.

(i) Definition of relevant terms

Under Law on Marriage and Family 2014, regarding surrogacy, the definition of altruistic gestational surrogacy is provided. Accordingly, altruistic gestational surrogacy means a pregnancy carried voluntarily for non-commercial purposes by a woman for a couple of whom the wife is unable to carry a pregnancy and give birth even if assisted reproductive technology is applied. The voluntary gestational carrier is impregnated and gives birth through the transfer into her uterus of an embryo created by in vitro fertilization from the ovule of the wife and sperm of the husband.⁴² Furthermore, Decree No.10/2015/ND-CP stipulates the definition of the surrogate mother (single woman)⁴³ and intended parents (next of kin of the same line of a spouse who asks for gestational surrogacy)⁴⁴.

(ii) The legitimacy of the surrogacy agreement

According to Article 5.2. (g) of the Law on Marriage and Family 2014, surrogacy for commercial purposes is a prohibited practice. Commercial gestational surrogacy means a pregnancy carried by a woman for another person through assisted reproductive technology for enjoying economic or other benefits.⁴⁵ Vietnamese law only allows surrogacy for humanitarian purposes and requires some accompanying conditions. In this case, Article 95 of the Law on Marriage and Family 2014 supply many conditions for surrogacy agreement such as surrogacy agreement shall be based on the voluntariness of involved parties and established in writing; the intended parents' conditions⁴⁶; the surrogate mother conditions⁴⁷; this surrogacy must not contravene the law on giving birth with assisted reproductive technology; and the Government shall detail this Article. Moreover, in a surrogacy agreement, besides the relevant conditions in Article 95 mentioned above, there should be other conditions such as⁴⁸ commitment to fulfil of parties the rights and obligations prescribed in Articles 97 and 98 of the Law on Marriage and Family 2014; civil liabilities in case one or both

⁴² Law on Marriage and Family 2014, Art 3(22).

⁴³ Decree No.10/2015/ND-CP, Art 2(6)

⁴⁴ Decree No.10/2015/ND-CP, Art 2(7)

⁴⁵ Law on Marriage and Family 2014, Art 3(23).

⁴⁶ a/ The wife is certified by a competent health organization as unable to carry a pregnancy and give birth even with assisted reproductive technology;

b/ The couple has no common child;

c/ The couple has received health, legal and psychological counseling.

⁴⁷ a/ She is a next of kin of the same line of the wife or husband who asks for gestational surrogacy;

b/ She has given birth and is permitted for gestational surrogacy only once;

c/ She is at a suitable age and is certified by a competent health organization as eligible for gestational surrogacy;

d/ In case she is married, she obtains her husband's written consent;

dd/ She has received health, legal and psychological counseling.

⁴⁸ Law on Marriage and Family 2014, Art 96.

parties breach commitments under the agreement; a surrogacy agreement shall be made in writing and notarized.

(iii) The parental rights of the intended parents involved in this surrogacy agreement

Under Vietnamese law, rights and obligations of the intended parents toward their child shall arise from the time the child is born⁴⁹. It means a child born in case of the surrogacy agreement is the common child of the husband and wife who asks for such surrogacy agreement from the time this child is born. Besides, the intended parent may not refuse to receive their child. An intended parent that delays receipt of his/her child or breaches the child nursing and caring obligations shall support this child following the Law on Marriage and Family 2014 and be handled under relevant laws. If causing damage to the gestational carrier party, he/she shall pay damages. In case the gestational surrogacy requesting party dies, the child is entitled to the inheritance of the former's estate in accordance with the law. When the surrogate mother refuses to deliver the child, the intended parents have the right to request a court to oblige the former to deliver the child. Thus, the parental rights of the intended parents were established since the child is born even though the birth mother is not the child's biological mother.

4.2. Some comments

Based on regulations on surrogacy under Vietnamese and UK laws, what stands out from these regulations is both legal systems have regulated some basic issues on surrogacy, including the definition of relevant terms, the legitimacy of surrogacy agreement and rights of relevant parties. However, there are some outstanding differences between them as below.

To begin with the definition of surrogacy, surrogacy under Vietnamese law is more specific than that of UK law. However, this definition will not cover the case of same-sex couples due to the lack of recognition of Vietnam on same-sex marriage. Accordingly, Vietnamese law allows surrogacy when the wife is unable to carry a pregnancy and give birth even if assisted reproductive technology is applied. Meanwhile, the inability of same-sex couples to have their biological children because of structural infertility.

In terms of the legitimacy of the surrogacy agreement, both Vietnamese and UK laws affirm that only surrogacy is allowed for non-commercial purposes. However, Vietnamese law has not yet clearly defined the expression of commercial purposes while UK law has done this.

Regarding the parental rights of the intended parents involved in this surrogacy agreement, Vietnam's regulations clearly define the legal parental rights to the child in the surrogacy agreement, different from UK law, specifically about the time of determining the parental rights. Accordingly, under Vietnamese law, the legal parental rights of the intended parents are determined from the time the child is born, whereas, under UK law, this legal parental right is only transferred to the intended parent when the 'parental order' procedure is granted. In the author's opinion, the provisions under UK law have flexibility in deciding the legal parent of the child. In other words, even if an agreement has been established, the surrogate mother and her husband (or partner, if any) can be a legal parents of the surrogate child, instead of the intended parent. In case intended parents intend to change their minds, the reluctance to take surrogate children will affect the psychology of raising children, thereby affecting children's rights and interests. For example,

⁴⁹ Law on Marriage and Family 2014, Art 98.

these children may be discarded as soon as they are received. Thus, the UK's regulations on parental orders will create opportunities for parties to think carefully before making decisions.

5. Conclusion

The right to marriage and family is a universally fundamental human right, including for same-sex couples. To ensure the efficiency of enjoying this right, some recommendations have been proposed as follows:

- (i) Recognize the relationship between same-sex couples, towards same-sex marriage, so that these couples will have a basis to enjoy their related rights such as the right to marriage and family.
- (ii) Modify the definition of surrogacy of Law on Marriage and Family 2014 towards a general approach similar to UK law. After the modification, legal provisions on surrogacy under Vietnamese law could be applied for same-sex couples.
- (iii) Adding manifestations of commercial purposes in surrogacy, thereby there is a basis to thoroughly limit acts of taking advantage of surrogacy for illegal reasons.
- (iv) Adding the "parental order" step in the process of surrogacy to ensure the best rights and interests of surrogate children.

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