The "Credulous or the Naïve"?
The Irish Department of Health's Response to Commercial Surrogacy

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Abstract

This article explores the prohibition of commercial surrogacy as currently contained within the Health (Assisted Human Reproduction) Act 2024. The 2024 Act regulates surrogacy for the first time in Irish law and creates a framework for the recognition of intending parentage arising from surrogacy agreements. This article explores the safeguards for surrogates contained within the 2024 Act against the arguments generally cited by the Department of Health against commercial surrogacy—that of commodifying children and exploitation of women. It considers Irish case law on commercial surrogacy and that of the European Court of Human Rights. It also includes passages from the O'Connell Study which was conducted within the author's PhD thesis. The article concludes that the refusal to recognize the legal parent–child relationship based on the commercial nature of the surrogacy agreement is a violation of the child's right to respect for private life under Article 8 of the European Convention on Human Rights (the ECHR). It also finds that the Irish Courts have found no public policy reason strong enough to justify the refusal to recognize a foreign adoption order which followed a commercial surrogacy agreement. Primarily it argues that a commercial surrogacy agreement can be ethical; but requires sufficient safeguards for those parties involved.

Keywords: surrogacy, commercial surrogacy, assisted human reproduction, donor conception, intending parentage

I. Introduction

In a 2023 Supreme Court judgment, Mr Justice Hogan held that:

> "*it must be recognised that if international surrogacy is to be facilitated or accommodated at all…then some element of commerciality is almost unavoidable, indeed inherent, in such arrangements"*[1] and that "*it seems clear that in practice a fee of some kind is generally paid to the gestational mother. This, after all, is the way in which international commercial surrogacy actually works and only the credulous or the naïve would suggest otherwise*".[2]

The Health (Assisted Human Reproduction) Act 2024 (the 2024 Act)[3] contains the first framework for the recognition of intending parentage through surrogacy in Irish law. It also prohibits commercial surrogacy both internationally and domestically. Engaging in

[1] [2023] IESC 6, at paragraph 93.
[2] *Ibid* at paragraph 60 (Hogan J).
[3] This legislation passed through the Irish legislature, the Oireachtas on the 26th of June 2024; however, its provisions have yet to be commenced.

commercial surrogacy is just one of the many justifications for a refusal of a parental order[4] and is also a criminal offence under the 2024 Act.[5] However, such prohibition and criminal sanction does not extend to reasonable expenses related to gamete donation which are defined as a person's travel expenses, medical expenses, counselling expenses and legal expenses.[6] Certain reimbursements are also permissible where such expenses are associated with becoming or trying to become pregnant, the pregnancy or birth,[7] or the entering into and giving effect to a surrogacy agreement.[8] This approach shall be analysed in this article, having regard to the views of the Special Rapporteur on the sale and sexual exploitation of children and the case law of both Ireland and the European Court of Human Rights. Included in this article shall also be the views of the participants in the "O'Connell Study", a study carried out within this author's thesis which explored the numerous difficulties experienced by Irish parents in availing of the recognition of the legal parent child relationship in surrogacy.

1. Legitimate Aim No. 1: Preventing Exploitation and Coercion

The Irish Inter-Departmental Group[9] has stated that the prohibition of commercial surrogacy has two stated aims.[10] The first is to offset the "concerns relating to the welfare and commodification of the children involved" and the second is to offset "the potential risks of coercion and exploitation of vulnerable women to act as surrogate

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[4] The 2024 Act proposes that the surrogate shall be the legal mother upon the birth of the child and the intending parents must apply for an order (parental order) from the Court only after 28 days after the birth of the child. Once the intending parents prove their compliance with the legislation, the Court will grant the parental order, transferring parentage from the surrogate to the intending parents.

[5] Section 35(1), 57 and 93 of the 2024 Act. It is prohibited under the 2024 Act for a person to receive or agree to receive a payment or offer, make or give or agree to offer a payment for a donation, or to facilitate the making of the donation. Surrogacy agreements where the surrogate is given a payment are prohibited both domestically and internationally.

[6] Section 35(3) of the 2024 Act. Previously, under Head 41 of the 2017 General Scheme, the surrogate's husband also benefitted from expenses relating to independent legal advice, and reasonable travel and accommodation. Interestingly, this provision was removed at the same juncture at which such men were precluded from the presumption of paternity in surrogacy agreements.

[7] The "reasonable expenses" associated with the pregnancy or birth include any pre-natal or post-natal medical expenses associated with the pregnancy or birth, any travel or accommodation expenses associated with the pregnancy or birth, the expense of reimbursing the surrogate for a loss of earnings for 6 months during which the birth of the child took place, or any other period during the pregnancy or thereafter (max. 12 months) where she was unable to work due to medical grounds related to the pregnancy or birth.

[8] Sections 58(2) and 94 of the 2024 Act. The "reasonable expenses" associated with entering into and giving effect to a surrogacy agreement include the expenses associated with the surrogate receiving counselling in relation to the surrogacy agreement (whether before or after entry into the agreement), the expenses associated with the surrogate receiving independent legal advice in relation to the surrogacy agreement or a parentage order related to the surrogacy agreement, the expenses, including the reasonable travel and accommodation expenses, associated with the surrogate being a party to proceedings in relation to making a parentage order as a consequence of the surrogacy agreement.

[9] The Inter-Departmental Group (IDG) has representation from the Department of Health, the Department of Justice and the Department of Children, Equality, Disability, Integration and Youth, and was formed to determine how best to implement the recommendations of the Joint Oireachtas Committee on International Surrogacy published in July 2022.

[10] [10] Inter-Departmental Group, "*Policy Paper – International Surrogacy and Recognition of Past Surrogacy Arrangements*" (December 2022) at page 11, point 2.7.

mothers".[11] However, it is notable in this regard, that the 2024 Act chooses to prohibit commercialisation, instead of criminalising exploitation. Payments are not, for example, seen by those in the Department of Health as compensating women for elements of the gestational process, such as the risk involved,[12] or providing the means for the surrogate to provide for her own family while she is carrying the child for another. As Ordinaire has suggested, such payments to the surrogate are also likely to enable her to take better care of herself, thus ensuring the health and well-being of the child.[13] Rather, the Department of Health have established a hard line view against commercial surrogacy simpliciter, either choosing not to assess whether, or having already determined that, the same legitimate aims could be realised through the extensive safeguards contained within the 2024 Act aimed at securing the surrogate's welfare.

The surrogate, who is described as "surrogate mother" throughout the 2024 Act, despite research demonstrating that surrogates were resistant to the term,[14] must be habitually resident in Ireland,[15] have previously given birth to a child[16] and be aged over 25.[17] She must engage in pre-requisite counselling,[18] a physiological assessment by a registered medical practitioner,[19] mandatory legal advice,[20] information regarding risks,[21] and follow the prescribed consent procedures.[22] She shall, before giving consent for the surrogacy agreement, be informed that she will be the legal mother of any child born as a result of the surrogacy agreement, confirm that she has received the legal advice, AHR counselling, the AHR information document[23] and record her information in the National Surrogacy Register (NSR).[24] The surrogate's consent is

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[11] *Ibid*.

[12] As the Scottish Law Commission and the Law Commission of England and Wales have noted, pregnancy represents a significant life decision that may have serious and potentially damaging consequences for a surrogate's health. Such health problems and risk are noted as including "*cramps, feeling faint, pelvic pain, incontinence, constipation, morning sickness (hyperemesis gravidarum) and tiredness. Then there is the birth itself: women experience pain during childbirth and shortly after, particularly, for example if they have vaginal tearing, an episiotomy, or a caesarean section. Women may also suffer post-traumatic stress disorder ("PTSD") in pregnancy and after birth*." Law Commission, Thirteenth Programme of Law Reform (Law Com No 377) at paragraph 2.37.

[13] L. Ordinaire, "Which of You is My Mother – Birth Registration Issues in Ireland and the Need for Well Designed Surrogacy Regulation" (2016) 19(1) IJFL 7 at page 11.

[14] Surrogacy UK Working Group on Surrogacy Law Reform "Surrogacy in the UK: Myth Busting and Reform" (November 2015) and Surrogacy UK Working Group on Surrogacy Law Reform, "Further Evidence for Reform" (December 2018) at 9.

[15] Sections 51(a)(i), 79(1)(a)(i), 202(a)(i) and 214(a)(i) of the 2024 Act.

[16] Sections 55(1)(a) and 91(1) of the 2024 Act.

[17] Sections 55(1)(b) and 91(1)(b) of the 2024 Act.

[18] Sections 18, 55(1)(c) and 86 of the 2024 Act.

[19] Section 55(1)(d) of the 2024 Act.

[20] Sections 61 and 98 of the 2024 Act.

[21] Section 12 of the 2024 Act.

[22] Sections 19-25 of the 2024 Act.

[23] Section 13 of the 2024 Act provides for an AHR information document which is published by the regulatory authority in respect of each type of AHR treatment and sets out the basic information that it is satisfied that a person seeking, or potentially seeking, such type of AHR treatment ought to know about such treatment.

[24] Section 19 and 25 of the 2024 Act.

required both to the parental order[25] and to the child living with the intending parents following the child's birth,[26] and she will be registered as the child's mother on the birth certificate.[27] The surrogacy agreement must be pre-approved by the Assisted Human Reproduction Regulatory Authority (AHRRA) [28] and it is a criminal offence to engage in a surrogacy agreement that has not been approved by the AHRRA.[29] It is also an offence to knowingly participate, or induce, or attempt to induce, another to participate, in a non-permitted surrogacy agreement, either as a surrogate or intending parent.[30]

Bracken has pointed out that the 25 years age limit does not apply to intending parents who only have to be 21 years of age, or to donors who only have to be 18 years of age under the 2015 Act.[31] She suggests that this requirement, coupled with the explanatory note, indicates that "*drafters of the Bill regard the people who act as surrogates as insufficiently mature to exercise their reproductive autonomy*".[32] She argues that this is paternalistic and undermines the capacity of young people who can otherwise legally enter into virtually any other agreement once they are over the age of majority.[33] She recommends instead that such age limits are left to the judgment of the treating clinician based on their medical circumstances. However, this perhaps suggests that fertility specialists should have a role in assessing a capacity to parent, based seemingly on the maturity of the individual, without any specific expertise to do so.

Furthermore, the requirement that a surrogate must have had a child before in order to provide valid consent under the 2024 Act is another deeply paternalistic and protectionist provision. This, it is argued, is not because the Department of Health would be incorrect to assume that every women cannot inherently know what it is to birth a child and have that child raised by others; but rather, the issue is that it presumes that women cannot consider this risk and make a determination, nonetheless. It has not been considered for example, that many women who have chosen not to have a child, may perhaps be particularly suited to act as surrogates where they have expressed no wish to be parents. The UK Law Commissions recently considered this requirement as part of its reform project[34] and ultimately determined that it should not be required under UK law. Concerns had been raised within their consultation period in relation to the surrogate's lack of awareness of the implications of pregnancy on her mentally, psychologically, and physically. Indeed in this regard, the

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[25] Sections 66(1)(iii), 103(1)(iii), 205(1)(c) and 217(1)(c) of the 2024 Act.
[26] Sections 64 and 101 of the 2024 Act.
[27] Section 230 of the 2024 Act inserts section 30N(2) of the 2004 Act. This provision does not facilitate the registration of the intending parents in the register of parental orders for surrogacy if the child's birth is not already registered.
[28] Sections 52(1) and 90(1) of the 2024 Act.
[29] Section 53(1), 90(1) and 193(1) of the 2024 Act.
[30] Section 193(3) of the 2024 Act.
[31] L. Bracken, "The Position of the surrogate in the Health (Assisted Human Reproduction) Bill 2022" (2022) 25(3) IJFL 45 at page 46.
[32] *Ibid*.
[33] *Ibid*.
[34] Law Commission & Scottish Law Commission, *Building Families Through Surrogacy: a New Law, Volume II: Full Report,* (LC Report No. 411) (SLC Report No. 262) 28 March 2023, at pages 143-145.

Irish government's Inter-Departmental Group[35] working on the issue of surrogacy in the Irish context suggested that this requirement is a "*critical aspect of informed consent*" and saw no compelling argument for excluding the requirement from the framework.[36] The UK Commissions found it compelling that such a requirement would constitute a paternalistic interference with a woman's bodily autonomy, inaccurately suggest that past pregnancies are a reliable predictor of future pregnancies and impose external values that a family is incomplete without children.[37] It determined that the concerns raised could be better met through individualised medical checks, screening, and implications counselling,[38] all of which is otherwise contained in the 2024 Act.

The primary difficulty with the 2024 Act in this regard, is that its stated aim is to safeguard surrogates against exploitation but through its considerable efforts to impose, an "only practice", as opposed to a "best practice", framework, it has shackled every women whose version of autonomy and bodily integrity does not match that of the Department of Health. It has determined what is best for the woman who wishes to act as a surrogate, instead of facilitating an individual or personal approach. While some women may expect their reproductive choices to be respected nonetheless, the paramountcy principle[39] is notably absent from the 2024 Act and so there will be no judicial discretion to grant parental orders using this reasoning. While certain jurisdictions, such as the UK, also operates a "reasonable expenses" model, the UK courts habitually permit payments above and beyond this threshold and grants the parental order, as it is deemed to be in the best interests of the child to do so.[40] This will not be possible in Ireland.

Specifically, with regard to the prohibition of payments above and beyond reasonable expenses, the 2024 Act fails to recognise that women can accept payments for acting as a surrogate as a recognition of her part in the expansion of a family, and not have

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[35] The Policy Paper of the Inter-Departmental Group (IGD) describes as follows "*An Inter-Departmental Group – with representation from the Department of Health, the Department of Justice and the Department of Children, Equality, Disability, Integration and Youth – was formed following the publication of the Final Report of the Oireachtas Joint Committee on International Surrogacy (JCIS) in July 2022. The purpose of the this group was to develop a Policy Paper on a recommended approach to establishing a system to allow the possibility of formal recognition by the State of surrogacy arrangements undertaken in other jurisdictions by Irish citizens or lawful residents and access to a legal route to parentage and guardianship under Irish law, which would seek, in so far as appropriate and possible, to implement the recommendations of the JCIS, Inter-Departmental Group",* "*Policy Paper – International Surrogacy and Recognition of Past Surrogacy Arrangements*" (December 2022).

[36] *Ibid* at page 17, Section 4.1.

[37] Law Commission & Scottish Law Commission, *Building Families Through Surrogacy: a New Law, Volume II: Full Report,* (LC Report No. 411) (SLC Report No. 262) 28 March 2023, at pages 144-145.

[38] *Ibid* at page 145.

[39] The paramountcy principle prescribes that where, in any proceedings, the court, in determining whether to make an order, shall regard the best interests of the child as the paramount consideration.

[40] There are no reported cases wherein the Court has refused a parental order based on excessive payment, Law Commission & Scottish Law Commission, *Building Families Through Surrogacy: a New Law, Volume II: Full Report,* (LC Report No. 411) (SLC Report No. 262) 28 March 2023 at 311, point 12.41(2). In *Re L (A Minor) (Commercial Surrogacy)* [2010] EWHC 3146 (Fam), Hedley J stated that "*it will only be in the clearest case of abuse of public policy that the Court will be able to withhold an order if otherwise welfare considerations support its making*". The court in this case authorised $27,000. In *X and Y (Children)* [2008] EWHC 3030 (Fam), a similar approach was taken and £27,405.22 was authorised by the court. In *J v G (Parental Orders)* [2013] EWHC 1432 (Fam), the surrogate was paid $53,000. In *Re C (Parental Order)* [2023] EWCA Civ 16*,* the surrogate was paid £8,812 and in *Re X and Y (Foreign Surrogacy)* [2008] EWHC 3030, the surrogate was paid $25,000.

such constitute exploitation or coercion. It is further submitted that healthcare is universally commercial.[41] Specifically, within the AHR context in Ireland, couples and individuals are paying thousands of euros, in order to carry out IVF treatments often without any financial assistance from the State aside from tax credits.[42] Therefore, it has already been widely accepted that the conception of a child necessarily involves payments rendering it difficult to understand where altruism must begin and end in a surrogacy agreement. Proponents of the prohibition of such payments must accept that the clinics, the donors, the intermediaries, [43] the airlines, the counsellors, the legal representatives, and the judges are all paid, yet the surrogate is not.[44] It has also been suggested that altruistic surrogacy should not be considered synonymous with ethical surrogacy as there is also the potential for emotional exploitation which can occur between close acquaintances or family members who may act as surrogates.[45]

In the international context, members of the Irish legislature who have been vocal about their disagreement with the practice of surrogacy generally, have referred to the increased risk of exploitation of "poor women" internationally .[46] The question which arises is whether consent should be invalidated by virtue of payment simpliciter or presumed to be invalidated by virtue of socio-economic status or geographical location.[47] It is argued that the latter is a harmful assumption which negates the

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[41] This point was well articulated by the submissions of Senator Mary Seery Kearney throughout the hearings by the Joint Committee on International Surrogacy.

[42] While some public funding is now available, it is extremely restrictive and does not extend to any assisted human reproduction where there is a donor or surrogacy element. This is despite the Children and Family Relationships Act 2015 regulating donor conception since 2020 and requiring same sex female couples to attend a fertility clinic even where there is no clinical requirement for them to do so. C. Finn, "Donnelly promises free IVF will be expanded to include donor materials as scheme opens today" *The Journal* (25 September 2023), C. Egan, State-funded fertility treatment should not discriminate against queer couples" *Irish Examiner* (16 August 2023), C. Egan, "'Why are we an afterthought?' — LGBT+ couples left out of State-funded fertility treatment online" *Irish Examiner* (27 September 2023).

[43] Section 97(b) of the 2024 deems payments to international intermediaries to be permissible.

[44] Bracken would appear to be in agreement with this point and suggests that arguably the risk of exploitation is greatest where the surrogate is not paid but everyone else is. L. Bracken, "The Position of the surrogate in the Health (Assisted Human Reproduction) Bill 2022" (2022) 25(3) IJFL 45 at page 50.

[45] J. Y. Lee, "Surrogacy: Beyond the Commercial/Altruistic Distinction" (2023) *Journal of Medical Ethics* 196-199. Bracken also suggests that where payments to surrogates are tightly controlled, this can cause a shortage of surrogates, which can place pressure on woman to act for family members or within friendship circles. L. Bracken, "The Position of the surrogate in the Health (Assisted Human Reproduction) Bill 2022" (2022) 25(3) IJFL 45 at page 50.

[46] Senator Ronan Mullen, who also stated his beliefs that children should be raised by a man and a woman, and that transgender persons and single men should not have access to surrogacy, stated: *"[by] the way, if all of this is so good, why is it not possible just to get this done in Ireland using Irish citizens or to get it done in the EU using EU citizens? Why is it that you have to enable international surrogacy? The reason is that there are not enough poor people to exploit in Ireland and the EU…It is not rich women who carry babies for poorer women but rather poorer women in their economic disadvantage who grasp at this opportunity to make money from financially advantaged people. It is shameful we smile on this by regulating it."* Vol. 301, No. 8, Seanad Éireann Debate, "Health (Assisted Human Reproduction) Bill 2022: Committee Stage" (20 June 2024).

[47] This point was particularly well made throughout the hearings of the Joint Committee on International Surrogacy and set out in its final report: Joint Committee on International Surrogacy "Final Report of the Joint Committee on International Surrogacy" (July 2022) at page 31. This point was also made 8 years previously by Madden, D. Madden, "An Analysis of Legislative Proposals for Parentage in Assisted Reproduction and Surrogacy" (2014) 17(2) IJFL 52 at 54.

autonomy and agency of women in determining what they wish to do with their bodies and the commentary behind such a position is often concerningly pious and lacking legal credibility.[48] Such an approach does not see women as individuals within their own set of circumstances. For example, Gamble has referred to one of her cases where, a surrogate, who "*had a business that she ran with her husband, but it had been destroyed by flooding. The surrogacy enabled the family to restart that business and get back on their feet. That woman was incredibly proud that she could do that to help her family*".[49] This one story demonstrates a case study of one woman who with one act helped her own family considerably and created another, However, in Ireland, she would be subject to criminal prosecution and the indefinite imposition of legal parenthood in respect of the child. Furthermore, while it is difficult to extrapolate a common experience from one study, it is noteworthy that a 2014 UK study reported surrogates main motivation as "*wanting to help a childless couple*" (59%), with 9% wishing to help a relative and 6% wishing to help a friend.[50] 3% of surrogates cited payment as a motivator in subsequent surrogacy agreements but not in the initial agreement. To prohibit payments in the absence of context as to who the intending parents are, who the surrogate is and what is the nature of the payment, is imposing a blanket wide regulation that presumes exploitative practices. It is not submitted here that all payments should be permissible in all situations, but rather, an individual assessment should take place before a child is left without a parental order, and surrogates and intending parents are prosecuted and potentially imprisoned or severely fined for breaching this prohibition.

2. Legitimate Aim No. 2: Preventing the Sale of Children

It is acknowledged that the concern regarding payments is not based on the exploitation and coercion of the surrogate alone, but on the perception that such payments constitute the sale of children. In this regard, the Special Rapporteur on the Sale and Sexual Exploitation of Children (SRSSEC) prepared a report on this issue to the Human Rights Council in 2018,[51] and a periodical report specifically for Ireland in

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[48] For example, G. Lilenthal, N. Ahmad & Z. A. B. Ayub, "*Policy Considerations for the Legality of Surrogacy" (2015) 21(2) Medico-Legal Journal of Ireland 88 describes how its critique will avoid the "administrative constrictions of stare decisis and black letter law, and instead examine the situation in its naked realities*". Such realities appear from the author's perspective to include that surrogacy is slavery, "*consent is the defence of choice for the coercer*" and describes how the "*female body was often seen as highly exploitable, while the male body was viewed as the magnificent prototype*". They posit that surrogates only engage in emotional and ideological views of their work to counter the effect of their "*dirty work*".

[49] Joint Committee on International Surrogacy, "Surrogacy in Ireland and in Irish and International Law: Discussion (Resumed)" (20 April 2022).

[50] S. Imrie & V. Jadva, "The Long-Term Experiences of Surrogates: Relationships and Contact with Surrogacy Families in Genetic and Gestational Surrogacy Arrangements" (2014) 29(4) *Reproductive BioMedicine Online* 424 at 431.

[51] Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material, "Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development" A/HRC/37/60 (January 2018).

2019.[52] The 2019 Report recommended that the Irish state enact legislation that would regulate surrogacy arrangements to ensure that the best interests of the child are protected,[53] and the 2018 Report suggests how to achieve this. It is submitted that this report is somewhat contradictory in nature; it argues that a child should not be discriminated against by virtue of the circumstances of their birth,[54] yet prescribes strict criteria that must be adhered to, in order to prevent what it considers to be the sale of children. The SRSSEC does not suggest what should happen in the event that the framework she proposes is not complied with; however it is evident that outside of the following suggested framework, commercial surrogacy[55] must be prohibited.

She argues that commercial surrogacy constitutes the sale of children unless the "surrogate mother" is afforded the status of mother at birth and is under no obligation to transfer legal parentage of the child. All payments must be made to the surrogate prior to any transfer of parentage or physical custody of the child and must be non-reimbursable. Any transfer of parentage must be a gratuitous act, based on the surrogate's post-birth intentions, rather than on any legal or contractual obligation.[56] The framework must provide for a pre-birth suitability assessment of the intending parents, a post-birth assessment of the child's best interests, and the protection of the child's origins. The surrogate must also maintain her rights of informed consent in regard to health care decisions and freedom of movement and travel.[57]

There is no issue in terms of the best interests assessment, the bodily autonomy of the surrogate and the protection of the child's origins; however, it is submitted that it is the SRSSEC's approach to the parties involved that garners concern. While it must be accepted that the subject matter of her position naturally lends itself to quite a protectionist and severe viewpoint, she nonetheless, it is argued, proposes a framework that does not respect the intent, consent, and autonomy of the parties, and offers quite a reductionist view of the surrogate. As Tobin has noted, the purposes for which a child is "sold" in the Optional Protocol[58] "*clearly contemplates the exploitation and degradation of the child. In contrast the intended purpose of commercial surrogacy is non-exploitative and indeed it is anticipated that the intending parents will provide*

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[52] Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material, "Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development" A/HRC/40/51/Add.2 (November 2019).

[53] *Ibid,* at page 17, Part IV, B, para. 77(c).

[54] Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material, "Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development" A/HRC/37/60 (January 2018) at paragraph 70.

[55] Commercial surrogacy is defined as payments that go beyond reasonable and itemised expenses incurred as a direct result of the surrogacy arrangement, *ibid,* at paragraph 39.

[56] *Ibid,* at paragraph 72.

[57] *Ibid*, at paragraph 73.

[58] Optional Protocol to the Convention on the Rights of the Child on the Sale Of Children, Child Prostitution and Child Pornography, A/RES/54/263, 25 May 2000. Article 3 provides that criminal law within the states parties should account for the offering, delivering or accepting by whatever means a child for the purpose of a) sexual exploitation of the child, b) transfer of the organs of the child for profit and c) engagement of the child in forced labour.

appropriate care and support for the child".[59] The 2018 Report states that any pre-conception or pre-birth agreement that includes provision as to the transfer of parentage for the child, as well as a payment to the surrogate beyond reasonable expenses constitutes the sale of children.[60] She responds to arguments that intending parents are not "*buying*" their own children by stating that such intending parents are "*at a minimum paying for exclusivity*".[61] She suggests that *"[t]he legal fiction of the "never-a-mother" gestational carrier is a legal concept which is used to justify denial of the surrogate mother's rights*".[62] It is submitted that this type of thinking is paternalistic and anachronistic in viewing every surrogate as a mother who is losing her child, instead of a woman who is choosing to make other families lives better, while also notably being welcomed into families and remaining in contact subsequent to the birth.[63]

The report does not discuss the nature of informed consent, or the benefits of each person's role being clearly defined before the child is even conceived. In fact, this clarity and determination between the parties is severely criticised throughout. Any reference to the consent of the surrogate is that which arises post-birth. However, it is argued that the surrogacy agreement offers an opportunity for a written understanding between all parties prior to conception and facilitates the surrogate's wishes as much as the parents. The report seems to require the surrogate's intention to transfer parentage only at a particular point, after the birth of the child. Bracken has noted that "*it seems tenuous to argue that the surrogate's post-birth consent is legitimate but her pre-conception consent amounts to a transaction*".[64] There is seemingly no permissible

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[59] J. Tobin, "To Prohibit or to Permit: What is the Human Rights Response to the Practice of International Surrogacy" (2014) 63(2) *The International and Comparative Law Quarterly* 317 at page 336.

[60] Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material, "Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development" A/HRC/37/60 (January 2018). "This report considers that the surrogate mother is being paid for the services of gestating the pregnancy and the transfer of the child…In commercial surrogacy arrangements, the promised and actual transfer of the child is usually of the essence of the arrangement and accompanying agreements and contracts, without which payments would be neither made nor promised", *ibid* at paragraph 51. "In general, the provisions relating to the transfer of the child are of the essence of the agreement, without which the intending parents would neither enter into the agreement nor pay the surrogate mother", *ibid,* at paragraph 60.

[61] *Ibid*, at paragraph 58.

[62] *Ibid*, at paragraph 57.

[63] See: L. Blake, N. Carone, J. Slutsky & E. Raffanello, "Gay Father Surrogacy Families: Relationships with Surrogates and Egg Donors and Parental Disclosure of Children's Origins" (2016) 106(6) *Fertility and Sterility* 1503. Surrogates were found to be more likely to have met the father's extended family (68%) and had attended family weddings (15%) or baby showers (19%). V. Jadva, L. Blake, P. Casey & S. Golombok, "Surrogacy Families 10 Years On: Relationship With the Surrogate, Decisions over Disclosure and Children's Understanding of their Surrogacy Origins" (2012) 27(10) *Human Reproduction* 3008 where most of the children (20/33) were in contact with their surrogate, with 25% of their mothers reporting that they would like their child to have more contact and the remainder seeing it as "just right". S. Imrie & V. Jadva, "The Long-Term Experiences of Surrogates: Relationships and Contact with Surrogacy Families in Genetic and Gestational Surrogacy Arrangements" (2014) 29 *Reproductive BioMedicine Online* 424 where 77% of surrogates remained in contact with the children. Where there was no contact between the surrogate and the child, over half still received photos of, and updates on, the child.

[64] L. Bracken, *Same-Sex Parenting and the Best Interests Principle* (Cambridge: Cambridge University Press, 2020), p 231, as cited by L. Bracken, "The Position of the surrogate in the Health (Assisted Human Reproduction) Bill 2022" (2022) 25(3) IJFL 45 at page 50.

provision for dispensing with a surrogate's unreasonably withheld consent within the SRSSEC's model and there are evidently no number of safeguards or ethical requirements that could allow a surrogate to resist the legal status of "mother".

The 2024 Act is currently compliant with the 2018 Report in most respects; most substantially, no surrogacy agreement is enforceable,[65] the surrogate's consent to the parental order is a necessity (other than where she lacks capacity, is deceased or cannot be found) and there is a complete prohibition on commercial surrogacy. In addition, the definition of "surrogacy" under the 2024 Act means:

> "an agreement between a woman and the intending parents…under which the woman agrees to attempt to become pregnant, by the use of an egg other than her own, and, *if successful, to transfer the parentage of any child born as a result of the pregnancy to the intending parents…"*(emphasis added),[66]

This would suggest a pre-conception intention to transfer parentage based on a successful procedure as being inherent in the surrogacy process.[67] However, as this is not connected to commercial payments, the sale of children does not arise under the SRSSEC's model. There is however one key issue of inconsistency between them. The report recommends that any criminal sanction should focus on for-profit intermediaries, whereas the 2024 Act instead criminalises the intending parents, the surrogate,[68] and the donor.[69]

The former Special Rapporteur on Child Protection for Ireland has also raised an issue of inconsistency in relation to the Special Rapporteur's treatment of altruistic and commercial surrogacy, wherein she requires post-birth transfers of parentage for both.[70] It should be noted however that the Special Rapporteur for Child Protection ultimately recommended that only altruistic surrogacy should be permitted in the domestic framework of surrogacy, as this would "*achieve a higher level of compliance with children's rights standards*".[71] However, unlike the SRSSEC, he believes that such altruism, coupled with sufficient safeguards should allow the intending parent's parentage to arise from birth.[72] He also accepts that criminalising parents for

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[65] Section 59(1) of the 2024 Act.
[66] Section 2(1) of the 2024 Act.
[67] This is also noted by Bracken in L. Bracken, "The Position of the surrogate in the Health (Assisted Human Reproduction) Bill 2022" (2022) 25(3) IJFL 45 at page 50.
[68] Bracken has suggested that it is difficult to comprehend how imprisoning or fining a surrogate due to her reproductive choices safeguards her rights. L. Bracken, "The Position of the surrogate in the Health (Assisted Human Reproduction) Bill 2022" (2022) 25(3) IJFL 45 at page 46.
[69] Sections 52(3), 53(1), 89(3) and 90(1) of the 2024 Act prohibits any person from participating in a surrogacy agreement that has not been approved by the AHHRA, or from knowingly participating in a non-permitted surrogacy, either domestically or internationally.
[70] Professor Conor O'Mahony, Special Rapporteur on Child Protection, "A Review of Children's Rights and Best Interests in the Context of Donor-Assisted Human Reproduction and Surrogacy in Irish Law" (December 2020) at page 21, "*the report recommended virtually the same safeguards for both altruistic and commercial surrogacy, notwithstanding the fact that the Rapporteur's concerns regarding sale of children were primarily directed towards commercial surrogacy*".
[71] *Ibid*.
[72] *Ibid* at page 23.

commercial payments or leaving the child in "legal limbo" or in the child care system is not in the child's best interests.[73] It is argued here that any requirement for a court application, such as the post-birth court application model of the 2024 Act, naturally requires that both the surrogate and the intending parent be entitled to make submissions as to any unforeseen intervening events that impact on the resulting parentage of the child. The existence of such a process, therefore, is arguably a safeguard against pre-determined transfer of parentage, otherwise than in the best interests of the child. It could not therefore be said that any payment prior to the Court application constitutes the sale of children as no transfer of custody and parentage is guaranteed for such a payment.

II. Domestic and International Obligations in Relation to Commercial Surrogacy

While one could argue that the legislature is imbued with wide legislative discretion, it is useful to consider whether the prohibition on commercial surrogacy is a policy choice, or a legal necessity based on precedent. In this regard, the Supreme Court, in one of its very few judgments on surrogacy, considered in *Adoption Authority of Ireland v C & D,*[74] whether a foreign adoption order made subsequent to a commercial surrogacy agreement should be recognised in Ireland. In this case, the egg donor was paid $7,500 and the surrogate was paid in and around $50,000. While the US legal representatives attested to how these payments were compensation for time, medical and psychological risk, pain, suffering and inconvenience, the Court clearly did not accept that these were not "commercial payments".[75] However the Court found that these payments were "standard" and "unexceptional" in the context of the USA, where the surrogacy arrangement took place, and indeed, Mr Justice Hogan's quote in this regard can be found at the open of this article.[76]

Notably, no issue was taken by the Court, or no suggestion was made, that the surrogate's consent was in any way sullied by the payment of money. Nonetheless, the Court held that commercial payments, such as those at play in the agreements with both the surrogate and egg donor, were in conflict with Irish public policy.[77]

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[73] *Ibid*.

[74] [2023] IESC 6. This case involved a same sex male couple who engaged in a Californian gestational surrogacy agreement with an egg donor. The parties obtained a UK parental order in 2019 yet did not have joint parental recognition in Ireland. The non-genetic father of the children was born in Northern Ireland and the genetic father was born in the UK. They were married in the US. It should be noted that the High Court (Barrett J) held that public policy has a "limited function and is confined to egregious cases", [2021] IEHC 785 at paragraph 44. Barrett J concluded that there was nothing "immoral or mercenary at play" in the proceedings before him, "*no prostitution, no trafficking, no child abuse issues presenting" – All that presents is the wholesome love of two men for each other and for their children. On the Family List one so often encounters unhappiness that it is, frankly, wonderful to be asked to adjudicate in a case where such an abundance of love and joy presents*", at paragraph 48.

[75] [2023] IESC 6, at paragraphs 61-62 (Hogan J).

[76] *Ibid* at paragraph 93 (Hogan J).

[77] *Ibid* at paragraph 64 (O'Donnell CJ). In reaching this conclusion, O'Donnell CJ relied on the prohibition against payments in adoption under domestic and international law, the recommended prohibition on payment for donors and surrogates from the 2005 Report of the Commission of the Assisted Human Reproduction, the prohibition on payments above reasonable expenses for donations provided for in section 19 of the 2015 Act, and the proposals in the then 2022 Bill which prohibited commercial surrogacy, *ibid* at paragraphs 65 – 79.

However, the Court made it clear that it was not endorsing this policy[78] and that determining public policy should not be an "*expression of opinion as to what public policy ought to be, rather than what it is*".[79] The Chief Justice, O'Donnell CJ, further held that the Court's statement as to what it deemed the current policy did not mean that Irish public policy is incapable of change by the Oireachtas or otherwise. [80] Ultimately, while it held that the public policy on commercial payments rendered the surrogacy agreement itself unenforceable,[81] the Chief Justice nevertheless determined that the foreign adoption order was deserving of legal recognition in Ireland.[82] This judgment would appear at the very least to instil a level of confidence in the policy makers that if payments were made in a context wherein all necessary safeguards had been imposed, then such payments would be judicially permissible in determining to make the parental order, particularly in the international surrogacy context. This judgment offers a clear preference towards the legal recognition and regularisation of the social reality of the child with their intending parents over endorsing the purported concerns associated with commercial surrogacy. Regrettably, despite this, the Department of Health has continued its prohibition on commercial surrogacy. This judgment arose subsequent to the publishing of the Health (Assisted Human Reproduction) Bill 2022 but prior to the publication of the proposals on international surrogacy, which would have offered ample opportunity for further amendment.

Beyond domestic precedent, the European Court of Human Rights (ECtHR) imposes obligations on States Parties, including Ireland, in adhering to their international human rights commitments. Specifically, the *European Convention of Human Rights Act 2003* provides that the Irish courts must, when engaging in an exercise of statutory interpretation must do so, insofar as possible, in a manner compatible with the State's obligations under the Convention provisions.[83] Irish judges must stay abreast of the ECtHR's decisions, declarations, and any advisory opinions under Protocol No. 16.[84] Furthermore, the Irish courts

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[78] *"A court is not expressing any view as to the merits, wisdom, or desirability of this policy. It is quite possible to doubt the logic of seeking to draw a bright line between commercial and non-commercial surrogacies, for example. It is also apparent that public policy in this regard is not static, and a significant development in thinking can be detected. However, legislation can best be drafted and at a broader level, policy informed, if there Is a clear understanding of what the law currently provided, and how public policy, which will determine the recognition of foreign surrogacies, and adoptions, now stand", ibid* at paragraph 87 (O'Donnell CJ).

[79] *Ibid* at paragraph 59 (O'Donnell CJ) Hogan J also held that that the "*contours of that public policy are themselves elusive and appear to be possibly changing"* at paragraph 2 (Hogan J).

[80] *Ibid* at paragraphs 68, 82, 94 and 108 (O'Donnell CJ). Furthermore, it also did not mean that the surrogacy agreement was incapable of having legal effects and consequences; that a person could not legally enter into such agreements; and the subsequent step parent adoption order should not be recognised by the Irish courts.

[81] *Adoption Authority v C & D & Ors* [2023] IESC 6 at paragraph 64. This position could best be described as obiter comments as the Court had not been called upon to answer any questions as to enforceability of the agreement. "This Court is not being asked to enforce the contract which has, as it happens, long since been performed", at paragraph 69 (Hogan J).

[82] As mentioned above, the justification for this related to the child's best interests, the importance of domicile in the determination of applicable civil status, the precedent set down by the ECtHR and the support of the Attorney General for its recognition, *ibid* at paragraphs 87 - 91. There was no suggestion therefore from the State's legal officer that the fact that the surrogacy was commercial in nature and preceded the step-parent adoption delegitimised the process.

[83] Section 2(1) of the 2003 Act.

[84] Section 4(a) of the 2003 Act.

have the power to make a declaration of incompatibility in respect of a statutory provision or rule of law where there is no other legal remedy that is adequate or available.[85] Moreover, as a State Party, Ireland can itself be brought before the ECtHR for a complaint alleging a violation in respect of the applicant's rights under the ECHR.[86] Therefore the Irish courts have an obligation to adhere to the principles as set out in the cases before the ECtHR, and one would hope that the various state Departments would be advised by the Attorney General's office as to potential challenges to the legislative proposals based on the ECtHR.

The ECtHR case of *KK v Denmark,*[87] specifically deals with the issue of the recognition of a foreign adoption order subsequent to a commercial surrogacy agreement. The ECtHR held that States Parties are afforded a wide margin of appreciation in matters which raise "*delicate moral and ethical questions*", and that "*the quality of the parliamentary and judicial review of the necessity of a general measure…is of particular importance, including to the operation of the relevant margin of appreciation*".[88] However where the best interests of the child are in issue, this margin is narrowed.[89] The Danish court's best interests assessment determined that the child's interest was best placed in not being treated as a commodity, and refused to recognise the legal parent-child relationship between the child and their intending mother in Danish law.[90] Such a lack of recognition was held by the ECtHR to have a negative impact on the child's right to respect for private life, in particular because it "*placed them in a position of legal uncertainty regarding their identity within society*".[91] Therefore, it was in the children's best interests to obtain the same legal relationship with their intending mother as they had with their father.[92] It found having regard to the paramountcy principle and the consequently reduced margin of appreciation of the State,[93] the two factors which carried particular weight, that Denmark had not:

> *"struck a fair balance between, on the one hand, the **specific** children's interest in obtaining a legal parent-child relationship with the intended mother, and, on the other, the rights of others, namely those who, **in general***

[85] Section 5(1) of the 2003 Act. However, such a declaration does not affect the validity, continuing operation, or enforcement of the provision, see section 5(2)(a) of the 2003 Act.
[86] Article 34 of the European Convention on Human Right. It should be noted that other States Parties can also refer an alleged breach by Ireland to the ECtHR.
[87] Application No. 25212/21, (6 December 2022). In this case, the twins, born to a Ukrainian surrogate, obtained Danish nationality by virtue of their father's genetic link. The intending mother was also granted joint custody together with the intending father. The domestic Supreme Court had held that the Advisory Opinion applied to surrogacy where remuneration was paid and that the best interests of the children should always be taken into account. However, the applicant was seeking the recognition of a step parent adoption subsequent to a surrogacy agreement and there was an absolute prohibition on payments in adoption. Therefore, the Supreme Court held that a change in the law was required for them to recognise the intending mother as the legal parent in Danish law. At the time of the judgment, the law (section 15 of the *Adoption Act 1997*) was no longer applied in containing an absolute ban on stepchild adoption with regard to children born though a commercial surrogacy agreement.
[88] *Ibid* at paragraph 45-46.
[89] *Ibid* at paragraph 76.
[90] *Ibid* at paragraph 57.
[91] *Ibid* at paragraph 72. It held that while the intending mother could make a will to cure the inheritance issues, the children would not be heirs unlike other Danish children who have a legal parent-child relationship.
[92] *Ibid* at paragraph 74.
[93] *Ibid* at paragraph 75.

***and the abstract**, risked negatively affected by commercial surrogacy arrangement".*[94] (emphasis added)

It followed that there had therefore been a violation of the children's right to respect for private life under Article 8 of the ECHR;[95] marking a considerable departure for the ECtHR from earlier cases.[96] Therefore, it is argued that the prohibition on commercial surrogacy simpliciter in the 2024 Act, with no assessment as to whether such payments specifically and negatively impacted on the child, is at risk of an immediate challenge of its compatibility with Article 8 of the ECHR in the Irish courts. Despite this however, the Department of Health have been adamant in its continued prohibition.[97]

III. The O'Connell Study on Legal Recognition and Disclosure in Assisted Human Reproduction.

As part of this author's thesis, a qualitative study was conducted made up of semi-structured interviews. The desired participant was an individual or couple who had engaged in AHR treatment and had a child born to them, and children who had the nature of their AHR conception disclosed to them. This study had 11 adult participants and one child participant. The adult participants were: a single mother through donor assisted human reproduction (DAHR), a married female couple who engaged in DAHR, a married woman who had engaged in DAHR, a male couple who engaged in surrogacy and egg donation, a married man who had engaged in surrogacy and egg donation, an opposite sex couple who engaged in surrogacy with egg donation and two married women who had engaged in surrogacy with their husbands. There was therefore a total of eight interviews with the adult participants, as every married couple, where both wished to participate, engaged through a joint interview. The mothers in the surrogacy families had required surrogacy by virtue of either cancer or a genetic condition. Every surrogacy journey took place internationally and no surrogate lived in the same jurisdiction as the child. One mother asked her sister to act as a surrogate and another father asked a friend. There were four previously unknown surrogates, two from the

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[94] *Ibid* at paragraph 76.

[95] The Court did not however, provide much of an exploration on this point. The Court deemed the domestic court to concentrate on the children's lives and "taken it for granted" that the intending mother's private life "*being her right to personal development through her relationship with the children, and her interest in continuing that relationship with them"* was outweighed by public interests, at paragraph 55. Nonetheless, it saw no reason to hold otherwise.

[96] It was relatively not that long ago when the concurring judgment in *Paradiso & Campanelli* Application No. 25358/12, (27 January 2015), made extreme statements on surrogacy itself and the child who it considered "*a victim of human trafficking*" who was "*commissioned and purchased by the applicants"*. It also stated that: "*Both the child and the surrogate mother are treated not as ends in themselves, but as means to satisfy the desires of other persons. Such a practice is not compatible with the values underlying the Convention…Not everyone is capable of using their intellect, as this requires considerable intellectual efforts and life-long learning, which is a very difficult task. It is much easier to earn money using the body, especially if one takes into account that strong demand exists for bodies for the purpose of surrogacy, and this demand has been quite stable for centuries…Those who prefer to use their brains will continue to develop new technologies and science. In the situation of a radically increasing global population, it could be considered reasonable from an economic perspective, to exploit the body*".

[97] Recently, the Minister of Health in Committee Stage of the 2022 Bill [now the 2024 Act] that "*We have a pretty binary view on [commercial surrogacy]. Commercial surrogacy will not be allowed, regardless of the merits of sharing inherited wealth or whatever. If it is done in respect of the surrogacy, the courts will not grant the parental order",* at Select Committee on Health, *Health (Assisted Human Reproduction) Bill 2022: Committee Stage (Resumed)* (9 March 2024).

Ukraine, one from the UK and one from the US. Every surrogacy journey was gestational surrogacy only; no surrogate was genetically related to the child.

None of the mothers who had gone through surrogacy were the legal mothers or guardians of their children at the time of interview. One of these mothers had a child already through "natural conception" and therefore, she was the legal mother of one child but not the other. None of these mothers had guardianship of their surrogacy born children at the time of the interview. Every surrogate was the legal mother in Irish law. One genetic father was the legal father of his children born through surrogacy, whereas his husband was not. Another participant was the genetic father to only one of his children; therefore, he was the legal father of that child, a guardian to another child and had no legal relationship with his youngest child.

This study underwent a considerable ethics review by the UCC Social Ethics and Research Committee who approved data protection notices, interview questions, consent forms and information documents provided to participants. The study included both adult and child friendly versions of each document. Each participant engaged with the study through either a video call or, for one participant, a phone call. The data was manually coded using thematic analysis. Every participant has been given a pseudonym where this has been requested, or where no preference as to their being identified was stated.

1. Financial Cost within the O'Connell Study

The issue of cost was a considerable theme amongst participants in the O'Connell Study, as it was within the Bracken study.[98] While it is argued that a general public narrative can revolve around the financial exploitation of women, it was evident that the costs involved were either prohibitive or a severe burden on the parents. The cost involved in AHR journeys arise from the medical treatment itself (including unnecessary medicalisation for socially infertile individuals/couples), the counselling, the legal advice, the travelling, the accommodation, the international transport of gametes and/or embryos, the payments to the surrogate and to the donors and the Court applications. Many of these expenses can arise across multiple jurisdictions, and many participants who experienced loss engaged in these processes and these expenses multiple times. This also includes participants who took time off work, did not apply for, or were not allocated, parental leave or benefits. While public IVF funding was provided for as of September 2023; at present and to date, the cost of surrogacy journeys must be met on an entirely private basis with only tax relief on the medical treatment as mitigation. It was clear that the lack of legal framework in Ireland caused higher costs and resulted in prohibitively expensive processes. As this study examined only parents who already had children through AHR, there is no way of knowing how many individuals have not become parents as a result of the costs involved.

2. Cost of The Surrogacy Journey

For most participants, AHR was the only option for them to broaden their families and it came at huge financial sacrifice, often at the expense of other family needs. One couple advised that they could only afford their surrogacy journey because their own

[98] L. Bracken, *LGBTI+ Parent Families in Ireland: Legal Recognition of Parent-Child Relationships* (University of Limerick, 2021) at page 31.

parent had sold their family home. Another couple put a considerable amount of their wedding savings into their surrogacy journey while another delayed the building of their family home:

> "*Finances are the only thing stopping us from ever doing it in the future. We would do it in a heartbeat.*"
>
> - Christine (Surrogacy and Egg Donation)

> *"It's a huge emotional and financial burden, like the whole thing. It's like, it's wild. But I think when you have infertility, or a fertility issue, you do anything, I see that watching other people as well, like, you really would do anything."*
>
> - Anna (Surrogacy)

3. Payments to the Surrogate

Four participants described the actual payment process involving three surrogates. One couple paid their surrogate €16,000 in Ukraine, with a monthly allowance paid through the clinic. Mary viewed this payment as money to improve her quality of life throughout her pregnancy but also as allowing the surrogate to do more things with her family. The lump sum payment in Ukraine is generally made upon receipt of the birth certificate but as Mary and her husband's child was born at the beginning of the war, they had to leave without any birth certificate and Mary did not wish for their surrogate to have to wait to receive the payment *"we didn't want her to wait for her money and we trusted her"*. Another couple in the UK paid their surrogate €14,000 as a lump sum on the day of the birth, as well as her expenses, including travel, loss of earnings and a periodic sum each month for her to purchase maternity wear, vitamins etc. A further couple's surrogate was a friend and so she did not want any payment, but she was compensated for reasonable expenses. Such expenses included compensation for her loss of earnings in her last few months of her "*draining*" pregnancy.

When asked how they viewed payments to surrogates above and beyond reasonable expenses, participants who provided a lump sum payment spoke of the opportunities they were able to offer the surrogate and the evident altruism of the surrogates:

> *"I think people are foolish if they think that people just do it for money. Like...anyone who's ever been pregnant or gone through anything to do with childbirth or anything, would realise that no woman is going to just do that for money, it's too big of a thing...because it's your body...I think that even if it is commercial, there is still always an altruistic aspect to it. I don't think that they have to be completely mutually exclusive."*
>
> - Christine (Surrogacy and Egg Donation)

> "*We paid a lot extra. For two reasons. one, we think the surrogate is better catered for in the States. And two, because you have an awful lot more structure and support and everything is linear. We knew exactly what was going to happen. And that took an awful lot of stress away from us."*
>
> - Paul (Surrogacy and Egg Donation)

"I just kind of looked at it like that was a life changing sum of money for her and just something that she would not have been able to achieve because of the economy and different things in the Ukraine…And then I suppose I think…that if I was a mum and money was tight, if I could do this for somebody else to be able to afford maybe a house for my family. I absolutely think that it's something that I would do as well so I always, you know, put myself in her situation."

- Mary (Surrogacy)

"I think they should allow compensation, because okay, it's not a business, but they are doing a huge thing for us…Without us being completely overcharged, because we have to pay the clinic, we have to pay for the appointments, we have to pay for the transport, even food, on the days that she's missing work and she's not being paid, we have to pay her for her loss of earnings."

"And I'm fine with all that, I think it's fair."

- James and Alex (Surrogacy and Egg Donation)

A prominent theme in the study was financial struggle, demonstrating clearly that intending parents engage in commercial systems out of necessity as opposed to any willingness to sink themselves into financial precarity.

4. Payments to the Egg Donor

Between the two same sex male couples, one paid a registration fee to an agency of approximately €450.00; however, they paid €12,000 for 12 eggs and the other couple paid a set fee to the clinic for all expenses which one participant estimated included payment of approximately €5,000 - €10,000 for the egg donations. Paul and Christine who spent approximately €200,000 on their surrogacy journey in the US spoke about their level of discomfort around the different pricing structures for egg donors. They stated that that was the only part that felt like a financial transaction; the payment to the surrogate was not seen through the same lens. A higher fee was paid for egg donors who had proven success and Paul described that despite his discomfort, he did opt for a more expensive donation because of the donor's "*proven track record*", having been trying for 4-5 years. Under the 2024 Act, none of these participants would be entitled to use these embryos for any future surrogacy journeys, and varying price structures for egg donors would also not be permissible for any reasons other than variations in expenses incurred by the donors.

5. Social Welfare Benefits

The 2024 Act makes no allowances for social protection benefits or parental leave. This left many parents in a financially precarious position following the birth of their child with one non-genetic father having to pretend that he was unwell in order to be given a doctor's certificate excusing him from work, having been refused paternity leave by his employer:

"I was 'sick' for almost a month…And I had to lie to [my employer]. And because they wouldn't accept it, I had to make myself very depressed and [pretend I had]

mental health issues. And they were kind of insisting on medication…I felt very bad lying, of course, but it was the only way that I could have some time out."

- Alex (Surrogacy and egg donation)

Alex and his husband James decided that there was no way James could travel alone to bring their child home. James considered leaving his job but that would place them in further financial precarity. Two genetic mothers in surrogacy did not receive any maternity benefits but one mother was granted three months maternity leave, at the discretion of her employer. However, it was also a theme that many participants did not even apply for social welfare benefits. Anna and her husband, who had not yet obtained a declaration of parentage, and whose daughter had a foreign birth certificate in the name of the surrogate and her husband, did not apply for social welfare benefits, beyond child benefit. Similarly, Mary and her husband who did not have a birth certificate for their child, did not avail of either leave or benefits.

"Well, I didn't get any maternity leave. I work in the private sector too. So I don't get any money. I suppose, from a financial aspect, you know, it's a big loss to me, because I mean, I don't have an income, you know, when I suppose my husband, then he's kind of supporting the kids in the meantime. Parental leave, my husband didn't even look about parental leave, to be honest."

- Mary (Surrogacy)

"That's definitely something that needs to change. Because some companies like bigger companies, like the Googles, the whatever, you know, Facebook's and stuff, have surrogacy leave policies. Like there's nothing obligatory in law anywhere. And like that, that's not really right. Because you're becoming a parent, like?"

- Christine (Surrogacy and Egg Donation)

"It's incredibly hard to explain the amount of stress that infertility/cancer diagnosis/a surrogacy journey creates, and how much it impacts your day to day, that it has to be so complicated…I just find it baffling that we've all missed out on the state benefits. And if this does get sorted out, that we won't get backdated for it…like at the end of the day, we all have scraped together to do this…we've all missed out on this because we've been discriminated against for not giving birth ourselves. And it's so unfair that because the Court system is complicated and slow and all the rest, we're missing out on all of those leaves, like the amount of money that you have to earn to be able to spend it. I know it's not a huge amount, like the maternity benefit is quite low but still it's great, and it's supposed to be a time that you have that other income to support your family unit…There is so much admin to it, and you're like, you know what, I'm just busy being a mum…it really takes away from the time you have with your child".

- Anna (Surrogacy)

Anna also described how they waited for the passport for 6 weeks in the jurisdiction where her daughter was born and as a result her and her husband missed 6 weeks of work. While it is anticipated that complimentary legislation providing for social welfare benefits and parental leave will be introduced now that

the 2024 Act is enacted, it is clear that the financial burden suffered by intending parents is considerable, and financial planning is not only required for medical, legal, counselling and ancillary costs but also for the more hidden costs of returning home and being reliant on annual leave or unpaid leave, and savings, to care for their child.

6. Cost in Obtaining Legal Recognition

It may perhaps be considered natural to presume that the strict adherence to legal frameworks and regulated processes, as expensive as it may be, is worth it in order to gain legal parentage of your child. However, it became very clear from this study that engaging in the process in order to avail of surrogacy is one thing, while being able to pay the legal fees in order to gain the parentage is another. While some participants spent all of their savings on the AHR journey itself, one couple in particular described how they then could not pay the legal costs involved in recognising their parentage:

> *"That whole legal side of it, we kind of put on the long finger....we just don't have that type of cash laying around after everything we've gone through. And it would take like a little bit of time to save up to do that. And just on the list of priorities with that type of finances, it's just not, like we have 100 things we'd rather do with the house."*
>
> - Paul (Surrogacy and Egg Donation)

> *"And I think that's kind of one of the main reasons that I feel like it having to get sorted out with this [AHR] Bill is because like, it's expensive for me to become [my child's] guardian. And it's going to be expensive for my husband as well to become her father."*
>
> - *Anna (Surrogacy)*

> *"My surrogate got €16,000 and the solicitor and the barrister took €16,000 for my husband's paperwork. And I just feel that they're talking about...surrogates being exploited, but I mean, we're being exploited in Ireland, because we'll pay €16,000 for fees, and I would have paid my surrogate €32,000 not a problem. Like I'd rather give her €32,000 because she deserves every single penny....this lady carries the most precious thing in my life and changed my life forever for what she got off me, €16,000, and then the solicitor gets the same kind of money. You know, it just makes me cross."*
>
> - Mary (Surrogacy)

Furthermore, an approach has been taken by some legal representatives to take cases in the High Court unnecessarily when less expensive applications to the District, or Circuit Court, could be made. This is to the extent whereby there is a standalone "surrogacy list" of case in the High Court, once a month, at present under Judge Jordan.[99] However, the common applications sought are a declaration of parentage for the genetic father (Circuit Court) and dispensing with a surrogate's consent for a passport to be issued and guardianship (District Court). Both of these courts provide mechanisms for serving a person outside of the jurisdiction and applications for

[99] See: http://legaldiary.courts.ie/high-court List: Family Law, Sub-title: Surrogacy.

substituted service. While there is currently no legal framework for parental orders in surrogacy in Ireland while the commencement of the 2024 Act is pending, none of the ”workaround applications” require the High Court’s jurisdiction, save for where an adoption order is being made without the consent of a parent or guardian or where there is an application for recognition of a foreign adoption. No such adoption orders were made in respect of the participants in this study.

IV. Conclusion

This article sought to analyse the prohibition of commercial surrogacy in both the domestic and international setting, as proposed by the 2024 Act. It found that the concerns that are commonly lauded presumes that commercial surrogacy exists in a vacuum without the context of a highly regulated framework with extensive safeguards to ensure the prevention of any exploitative practices. The question is not necessarily whether commercial payments should be made but whether, in circumstances where it is legal in another country to avail of commercial surrogacy and where every effort has been taken to ensure an ethical surrogacy journey, an Irish intending parent should face up to two years in prison and a fine of up to €50,000. It is also whether such practices necessitate the refusal of a parental order where there is no evidence of exploitation or interference with the autonomy and informed consent of the surrogate. This article argues that the answer to both must be in the negative. Commercial surrogacy is the reality in the international context and its prohibition will prevent many loving intending parents from furthering their families. Only the credulous or naïve would believe otherwise.