

STANDING COMMITTEE ON LAW AND JUSTICE

Inquiry into legislation on altruistic surrogacy in NSW

ANSWERS TO QUESTIONS ON NOTICE (Remaining from the questions sent pre-hearing)

by
FamilyVoice Australia

14 April 2009

Criteria to meet before entering into an altruistic surrogacy arrangement

1. In your submission (p 7) you argue that single parents and same-sex couples should not be given access to surrogacy arrangements.

- *Can you elaborate on your reasons for taking this view?*

Allowing surrogacy for single persons and for same-sex couples **necessarily** means denying the child who is the object of the surrogacy arrangement the right to be raised and cared for by either a father or a mother. This is inherently unjust. It is contrary to millennia of experience on the raising of children, to commonsense and to a large body of social science research.

- *Can you direct the Committee to any studies that address this issue?*

In addition to the studies referenced in the submission the following additional information may assist the Committee.

Children's well-being is adversely affected by being deprived of either a mother or a father. Fathers and mothers make different contributions to a child's upbringing. Neither can adequately substitute for the other.¹

Depriving children of a mother

Allowing male same-sex couples or single men to acquire a child by surrogacy would deprive a child of the care and love of a mother.

"Mothers have a distinctive ability to understand infants and children. Mothers also excel in interpreting their children's physical and linguistic cues. Mothers are more responsive to the distinctive cries of infants. They are better able than fathers, for instance, to distinguish between a cry of hunger and a cry of pain from their baby, and better than fathers at detecting the emotions of their children by looking at their faces, postures, and gestures ... adolescents report that their mothers know them better than their fathers do.

"In sum, mothers are better able than fathers to read their children's words, deeds, and appearance to determine their emotional and physical state. This maternal sensitivity to children helps explain why mothers are superior when it comes to nurturing the young, especially infants and toddlers. Because they excel in reading their children, they are better able to provide their children with what they need—from a snack to a hug—when they are in some type of distress."²

“The critical contributions of mothers to the healthy development of children have been long recognized. No reputable psychological theory or empirical study that denies the critical importance of mothers in the normal development of children could be found.”³

Depriving children of a father

Allowing female same-sex couples or single women to acquire a child by surrogacy would deprive a child of the care and love of a mother.

“Fathers excel when it comes to discipline, play, and challenging their children to embrace life’s challenges... Typically, fathers engender more fear than mothers in their children because their comparatively greater physical strength and size, along with the pitch and inflection of their voice, telegraph toughness to their children... Engaging in rough physical play with dad teaches children how to deal with aggressive impulses and physical contact without losing control of their emotions...”

“Compared to mothers, fathers are more likely to encourage their children to take up difficult tasks, to seek out novel experiences, and to endure pain and hardship without yielding. Fathers are more likely than mothers to encourage toddlers to engage in novel activities, to interact with strangers, and to be independent; and as children enter adolescence, fathers are more likely to introduce children to the worlds of work, sport, and civil society.”⁴

Same-sex couples as parents?

In addition to depriving a child of either a father or a mother there is other evidence that allowing same-sex couples to acquire a child through surrogacy would not be in the best interests of the child.

A key Australian study has shown significant detrimental outcomes from homosexual parenting. Dr Sotirios Sarantakos, Associate Professor of Sociology at Charles Sturt University, Wagga Wagga, NSW, has done a number of studies on heterosexual and homosexual couples. In 1996 he published a paper, *Children in three contexts*, where he explored the relationship between family environment and behaviour of primary school children living in three family contexts - married heterosexual couples, cohabiting heterosexual couples and homosexual partners.⁵

The major finding of the study was that family type did make a significant difference to the children’s school achievements. Children in families where their biological parents were married to each other scored best of the three groups in language ability (7.7), mathematics (7.9) and sport (8.9). Children of cohabiting heterosexual couple families generally did next best in these areas (6.8, 7.0 and 8.3), while children of homosexual partners scored lowest (5.5, 5.5, 5.9). In class behaviour more children of homosexual partners were reported to be timid and reserved, unwilling to work in a team or talk about family life and holidays. In general they felt “uncomfortable when having to work with students of a sex different from the parent they lived with”. Sex identity was reported by teachers to be a problem area for some children of homosexual families. Sarantakos cautiously concludes that “married couples seem to offer the best environment for a child’s social and educational development”.

Advocates of parenting by homosexual partners frequently claim that about 50 studies have been done “proving” no difference in outcome between children raised by married couples or by homosexual partners. Any social science study depends for its validity on following rigorous statistical and research procedures. Dr Robert Lerner and Dr Althea Nagai, experts in quantitative analysis, after dissecting each of 49 of such studies found at least one fatal research flaw in each study.⁶ These studies are therefore no basis for good science or good public policy.

In her book *Children as Trophies?*⁷ British sociologist Patricia Morgan reviews 144 published studies on same-sex parenting and concludes that it fosters homosexual behaviour, confused gender roles, and increased likelihood of serious psychological problems later in life.

Professor Lynn D Wardle shows even from those studies which conclude in favour of homosexual parenting that there is data showing that homosexual parenting may be harmful.⁸ There is a greater incidence of homosexual orientation in the children raised by homosexual partners with resulting problems including suicidal behaviour, promiscuity, etc. There is also a greater incidence of anxiety, sadness, hostility, defensiveness and inhibitions (some of these especially among boys of lesbian mothers).

A recent meta-analysis by two gay activists failed to support the "just like other children" myth. In 2001, Judith Stacey and Timothy J Biblarz, both supporters of gay parenting, published a study entitled, "(How) Does the Sexual Orientation of Parents Matter?" In it they re-examined twenty studies of same-sex parenting that had supposedly shown no difference, and charged their authors with ignoring the differences they had indeed found. There were differences: children raised by parents with SSA showed empathy for "social diversity", were less confined by gender stereotypes, more likely to have confusion about gender identity, more likely to engage in sexual experimentation and promiscuity, and more likely to explore homosexual behaviour.⁹

Professor George Rekers' evidence as an expert witness has been instrumental in the success of several US court actions defending State laws excluding homosexual adoption or fostering as having a "rational basis". Rekers is Professor of Neuropsychiatry & Behavioral Science at the University of South Carolina School of Medicine. Professor Rekers states that "in a household with a homosexually-behaving adult, the foster child would be exposed to additional stress with the impact of the significantly higher rates of psychological disorder (particularly affective disorders such as depression), suicidal ideation, suicide attempt, suicide completion, conduct disorder, and substance abuse in homosexually-behaving adult."¹⁰

"Homosexual partner relationships are significantly and substantially less stable and more short-lived on the average compared to a marriage of a man and a woman, thereby inevitably contributing to a substantially higher rate of household transitions in foster homes with a homosexually-behaving adult."¹¹

"Homosexual foster-parent households lack a daily resident model of either a mother or a father, lack the unique contributions of either a mother or a father to childrearing, and lack a model of a husband/wife relationship which is significantly healthier, substantially more stable socially and psychologically, and is more widely approved compared to homosexual lifestyles. The best child adjustment results from living with a married man and woman compared to other family structures. It is clearly in the best interests of foster children to be placed with exclusively heterosexual married-couple foster families because this natural family structure inherently provides unique needed benefits and produces better child adjustment than is generally the case in households with a homosexually-behaving adult."¹²

Dale O'Leary in his book *One Man, One Woman* discusses "science, myths and same-sex parenting" He concludes: "As more persons with SSA [same-sex attraction] acquire children, society will increasingly be pressured to ignore the problems caused by same-sex parenting - just as it ignores the problems caused by divorce - and join in the pretence that that having two mommies is just the same as having a mommy and a daddy. But no matter how many people praise "family diversity," children being raised by parents with SSA will always know that it's not

the same, and someday they will resent how their needs have been sacrificed for the sake of a social experiment. In a sad irony, the more that cultural elites insist that there is nothing wrong with their situation, the more these children will feel guilty about resenting it, and this guilt will lead them to conclude that there must be something wrong with them.”¹³

A 30 member multi-party commission of the French National Assembly on the Family and the Rights of Children commented in its 2006 report on “research on children raised by same-sex couples” which concluded that there was an “absence of any ill effects on the children”. The commission stated that the “scientific nature and the representation of the samples of the populations studied were broadly criticized and contested during the hearings... The lack of objectivity in this area was flagrant.” The commission endorsed the statement of an expert witness on adoption: “inasmuch as there is absolutely no reason to doubt the educative and emotional qualities of homosexual parents, we do not yet know all the effects on the construction of the adopted child's psychological identity. As long as there is uncertainty, however small, is it not in the best interest of the child to apply the precautionary principle, as is done in other domains?”¹⁴

2. What other criteria do you think should be met before entering into a surrogacy arrangement?

We do not support giving any legitimacy to surrogacy arrangements of any kind.

Legal rights and responsibilities

3. Your submission (p 2) notes a situation where both surrogate and intending parents rejected the surrogate child (reported in The Australian, 21/1/83, ‘Spurned baby sparks action on surrogate births’). Could you tell the Committee a little more about that case and how it was resolved?

“Mrs Judy Stiver, a Michigan housewife, agreed to bear a child for Alexander Malahoff and his wife for a fee of \$10,000. All went well until the child was born, when it was discovered that he suffered from microcephaly - a condition whereby the child has an abnormally small head and often turns out to be mentally retarded. Mr Malahoff no longer wanted the child, and told the hospital to withhold treatment - Mrs Stiver also rejected the child, saying that there had been no maternal bonding. The hospital went to court and won permission to care for the child and the Michigan Department of Social Services fostered the child out.

“This was not the end of the matter, as Malahoff asserted that he could not be the father. Mr Malahoff and Mr Stiver then underwent blood tests to establish paternity before appearing on the Phil Donahue television talk show to discuss the situation - where it was dramatically revealed that Mr Stiver was in fact the father. It emerged that while Mrs Stiver was contractually obliged to abstain from intercourse for some time after insemination, she had not received any instruction about intercourse prior to insemination.

“The Stivers accepted that the child was their own. Mr Malahoff reacted by suing Stiver for not producing the child he contracted for and the Stivers countered by suing their doctor, lawyer and psychiatrist for not advising them properly about marital sex. They also sued Malahoff for invading their privacy by making the matter public and alleged that the child's illness was caused by a virus transmitted in Malahoff's sperm.”¹⁵

Parental status

4. Some submissions to this inquiry have suggested that the presumption of parentage, which currently resides with the birth parents, should be transferred to the intending parents in a surrogacy arrangement. What is your view on this issue?

If surrogacy is allowed then the birth mother (and birth father – that is the husband of the birth mother) should retain the same rights in relation to relinquishing a child as those who relinquish a child for adoption. As stated in Section 7.1 of the submission:

Taken together Section 60 and 73 (2) of the Adoption Act 2000 operate to ensure that no adoption order is finalised less than 60 days after the birth of the child. Any surrogacy legislation should mirror these provisions so that consent to a parenting order in favour of the commissioning parents may not be sought from the birth mother and birth father until 30 days after the birth of the child. There should be no legal presumption that the best interests of the child would indicate a parenting order in favour of the commissioning parents. The birth mother and father should have a further 30 day revocation period after consent is initially given.

5. In your submission (p 5) you note that the process for surrogate parents to become adoptive parents under the Adoption of Children Act 1965 (NSW) is an ‘uncertain’ one. Could you elaborate on what you mean by this?

Prior to the passage of the Assisted Reproductive Technology Act 2007 there was no law directly governing surrogacy arrangements in New South Wales. Parties to a surrogacy arrangement could seek an order for adoption. However, there was no guarantee that such an order would be made. The decision would be made on the basis of the best interest of the child with no presumption in favour of the commissioning parents. The consent of the birth mother would be required.

Section 45 of the Assisted Reproductive Technology Act 2007 reinforced this approach by providing that surrogacy arrangements were unenforceable. In other words, if a birth mother decided to keep a child then the commissioning parents cannot invoke the surrogacy arrangement in any attempt to seek a parenting order or an adoption order.

Wellbeing of surrogate children

6. In your submission (p 2) you raise concerns about potential harm to surrogate children, including ‘identity bewilderment’ and issues of ‘belonging and wantedness.’

- *Can you elaborate on your concerns in this area?*
- *Can you direct the Committee to any studies that address whether or not being born through a surrogate arrangement harms children?*

There is very little data yet on the experience of children born as a result of surrogacy. In our submission the experiences of children of donor insemination is a useful pointer to the likely issues to be faced by children born as a result of a surrogacy arrangement. These children are now telling their stories as adults. The book “Who Am I?” is a very useful collection of stories with a good analysis of the issues.

The submission to this inquiry by Tangled Webs should be given great weight. It is the nearest thing to hearing the voices and interests of the future children who may be the victims of legislation facilitating surrogacy arrangements.

Ethics

7. Some submissions to this inquiry have suggested that surrogacy arrangements put the rights of the adults involved above the rights of the child, by satisfying the intending parents desire to have a child.

- *Can you comment on this view?*
- *In your view, how do surrogate and traditional births differ in terms of the rights of adults and children?*

We agree with this view. Surrogacy treats the child as a ‘commodity’ that is ordered or commissioned by the commissioning parents to fulfil their felt need to have a child. It differs from adoption which is a response to the need of a child whose birth parents have decided that they are not able or willing to raise the child.

Other

8. Your submission notes (pp 3-4) the potential for harm to the birth mother who gives up her newborn to the intending parents.

- *Are you aware of any studies that address harm to the birth mother in surrogacy arrangements?*
- *Do you think pre- and post-natal counselling can adequately address the potential for harm to the birth mother?*

At 3.2 in the submission a report on harms to the birth mother is noted As follows:

In January 1987 the New York Times reported on some of the problems emerging in relation to surrogacy.¹⁶

“A new study on 30 women who had babies as surrogates, for example, found that three of the women were so distraught after giving up the babies that they needed therapeutic counselling.

“Such psychological counselling is now the exception rather than the rule, a situation some researchers criticize. But interviews with the three women before and during the pregnancy produced no obvious indications that difficulties lay ahead.

“‘We cannot predict with any certainty how a surrogate mother will do psychologically, or whether she will decide to keep the child,’ said Philip Parker, the Detroit psychiatrist who has interviewed almost 500 women who sought to become surrogate mothers.”

The failure of interviews before and during the pregnancy to identify any indications of distress occurring after the birth strongly suggests that counselling is not adequate to address the harms to the birth mother. These harms are inherent in the unnatural proposal of surrogacy which attempts to reduce the rich interpersonal experience of gestational motherhood to mere

mechanical incubation. While women remain something more than machines it will not prove possible to remove the harms of the depersonalisation involved in surrogacy by mere talk.

References

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2. *Ibid.*
3. Byrd, A.D., "Gender Complementarity and Child-rearing: Where Tradition and Science Agree"; <http://www.narth.com/docs/GenderComplementarityByrd.pdf>
4. W. Bradford Wilcox, "Reconcilable Differences: What Social Sciences Show About the Complementarity of the Sexes & Parenting"; <http://www.familymen.com/The%20necessity%20of%20both%20sexes%20in%20parenting.htm>
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12. *Ibid*.
13. O'Leary, D., *One Man, One Woman*, Sophia Institute Press, 2007, extract available at: http://www.mercatornet.com/articles/view/science_myths_and_same_sex_parenting/
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