

INQUIRY INTO LEGISLATION ON ALTRUISTIC SURROGACY IN NSW

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INVESTIGATION INTO ALTRUISTIC SURROGACY COMMITTEE SUBMISSION

Introduction and background

This submission covers some issues relating to gay men seeking to become parents through surrogacy, although it has relevance to surrogacy arrangements in general. The submission is informed by the existing literature as well as a current PhD research project on gay men from Australia and the United States. This qualitative study investigates these men's decisions about having children, and their understandings of parenting and family and their negotiation of the legal and bio-medical aspects of reproductive technologies. At the time of writing the project includes data from 30 men. In all but one case these were *commercial* surrogacy arrangements, as opposed to *altruistic* surrogacy.

Current situation

An increasing number of gay men and lesbians in New South Wales are pursuing parenthood. However, as a result of laws and policies restricting access to adoption and assisted reproductive technologies, gay individuals or couples are often forced interstate or overseas to pursue parenting. Most of the men interviewed as part of this research project did not consider surrogacy as their preferred way of becoming parents. Many regarded surrogacy as the most straightforward option in the sense that many alternatives (such as adoption, fostering, co-parenting) were not easily available. However, somewhat paradoxically, surrogacy was considered as a more secure option in terms of being able to have full legal custody of the children which wasn't the case with co-parenting. (For the men in the study, the emergence of new technologies has created possibilities that hadn't previously existed, and for the Australian men in particular, the emergence of global markets has created the conditions that have made new ways of achieving parenthood possible.)

Transfer of legal parentage

Recent changes in NSW allow for the non-birth mother in a lesbian relationship to be listed as a parent on a birth certificate issued in this state. However for a male couple pursuing parenthood there is still a lack of clarity about the parental status non-biological parent without seeking parenting orders from the Family Court of Australia.

In the US state of California it is recognised that assisted reproductive technologies have created new possibilities for parenthood and therefore also additional claimants to legal parentage. It is possible in that state to seek a pre-birth judgment by a Superior Court naming the intended parent(s) in a surrogacy agreement as the legal parent(s) of the child, and this would then be reflected in the birth certificate issued by the Californian Office of Vital Records. In this case, the birth mother would never appear on the birth certificate. (In the absence of such a judgment the surrogate's name must go on the birth certificate.) In addition the state of California provides for two parents of either sex to be listed on the birth certificate by having boxes for 'Parent 1 / Mother' and 'Parent 2 / Father'.

The current situation in New South Wales means that most gay men pursuing parenthood through surrogacy must travel overseas to have children. This raises the issue of the recognition of birth certificates issued in other jurisdictions. Section 11 of the STATUS OF CHILDREN ACT 1996 states that:

11 Presumptions of parentage arising from registration of birth

A person is presumed to be a child's parent if the person's name is entered as the child's parent in the Births, Deaths and Marriages Register or a register of births or parentage information kept under a law of the Commonwealth, another State or a Territory or a prescribed overseas jurisdiction.

A "prescribed overseas jurisdiction" is described as "any country, or part of a country, outside Australia that is prescribed by the regulations for the purposes of the provision in which the expression is used." It is unclear what this means in terms of children born

overseas through surrogacy arrangements. It implies for example that if a birth certificate is issued in another jurisdiction that provides for two parents of the same sex to be listed as parents (as in the example cited above) then both these people would be automatically recognised in New South Wales as the legal parents.

However, in the case of many gay couples with children born through surrogacy, only one parent, the biological father, will appear on the birth certificate—either on its own, or in addition to the name of the surrogate. This creates significant difficulties and distress for these families as the non-biological parent is not recognised as a legal parent.

Current laws and practices governing birth certificates in Australia privilege *birth circumstances* over: 1) genetic relationship; or 2) intention to parent. This emphasis is outlined in Section 14 of the STATUS OF CHILDREN ACT 1996:

14 Presumptions of parentage arising out of use of fertilisation procedures

(1) When a married woman has undergone a fertilisation procedure as a result of which she becomes pregnant:

(a) her husband is presumed to be the father of any child born as a result of the pregnancy even if he did not provide any or all of the sperm used in the procedure, but only if he consented to the procedure, and

(b) the woman is presumed to be the mother of any child born as a result of the pregnancy even if she did not provide the ovum used in the procedure.

(2) If a woman (whether married or unmarried) becomes pregnant by means of a fertilisation procedure using any sperm obtained from a man who is not her husband, that man is presumed not to be the father of any child born as a result of the pregnancy.

(3) If a woman (whether married or unmarried) becomes pregnant by means of a fertilisation procedure using an ovum obtained from another woman, that other woman is presumed not to be the mother of any child born as a result of the pregnancy.

This assumption of parentage does not require a legal pre- or post-birth adoption process.

Also, as assisted reproductive technologies have now enabled the separation of the

genetic mother and the birth (or gestating) mother, laws have continued to reflect birth circumstances rather than genetic relationship. However in most cases, legal parentage still reflects the *intentions* of all the parties involved. In contrast, with regards to surrogacy, there is a conflict between the intentions of those involved and the circumstances which grant legal recognition of parentage. In all Australian jurisdictions the woman who gives birth to a child is the legal mother whether she is genetically related to the child or not, and whether she intends to act as parent to the child or not.

The role of a genetic relationship

Despite an often-held assumption that people who have become parents through surrogacy are highly invested in genetic connectedness this does not seem to be born out in my own research. Gay couples often go to great lengths not to reveal the identity of the biological father (to others, to the children, or sometimes even to themselves). Also, gay couples who have had children through surrogacy are generally open about the circumstances of their children's' birth, and often encourage open discussion with their children as well as ongoing contact with the surrogate and/or egg donor (if known).

One issue often raised (see for example the recent Queensland investigation into altruistic surrogacy) is whether the surrogate should be able to use her own gametes or whether she should have no genetic relationship to the child. It is often perceived that the latter will reduce the risk of non-relinquishment of the child to the intended parent/s after birth. However there are a number of policies and procedures that could be put in place—even if surrogacy contracts are to remain unenforceable—to reduce the risk of non-relinquishment (and to protect the surrogate's health, privacy and financial position) without enforcing unnecessary, complex and expensive clinical procedures on the egg donor and surrogate when the surrogate and the intended parent(s) are willing to pursue a

traditional surrogacy arrangement. This could include: informed and genuine consent; psychological screening and/or or counselling of the surrogate; and peer support.

Regulation of surrogacy arrangements (esp. compensation)

A surrogate should not be expected to incur costs associated with carrying a child for another individual or couple in addition to her time and labour. All reasonable medical costs and other out-of-pocket expenses should be able to be covered by the intended parent(s) if that is the agreement of the parties involved. Significant concerns exist about encroaching commercialisation if any compensation is provided, however, these concerns are not supported by the research that shows even in jurisdictions where commercial surrogacy is legal, financial compensation is not the primary motivation for surrogates. Nevertheless, given the concerns expressed by many about commercialism some system should be established for overseeing the fair and just compensation of surrogates for medical costs and other out-of-pocket expenses such as travel costs and lost earnings.

National consistency

All forms of surrogacy are currently illegal in Queensland. In other states, surrogacy contracts are not enforceable and commercial surrogacy is not legal. Further, some Australian states require commissioning/intending parents and the surrogate to reside in that state. Gay men wanting to become parents are therefore often forced to pursue the difficult and expensive option of commercial surrogacy, usually in the United States.

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