

INQUIRY INTO LEGISLATION ON ALTRUISTIC SURROGACY IN NSW

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Submission

on

Legislation on Altruistic Surrogacy in NSW

to the

Standing Committee on Law and Justice

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1. Introduction

On 4 August 2008 the NSW Attorney General, the Hon John Hatzistergos MLC, asked the Standing Committee on Law and Justice to conduct an inquiry into whether NSW legislation requires amendment to better deal with altruistic surrogacy. The committee has called for public submissions which are due by 26 September 2008. The committee is due to report by 31 March 2009.

2. A law on surrogacy

Surrogacy contracts, including non-commercial contracts, are explicitly void under Section 45 of the *Assisted Reproductive Technology Act 2007* which provides that:

45 Surrogacy agreements void

A surrogacy agreement is void whether made before, on or after the commencement of this section.

This approach rejects the notion that the law should give any recognition whatsoever to any surrogacy arrangements. There are sound reasons for this approach.

Surrogacy involves an arrangement made, before the conception of a child, in which a woman who intends to carry a child during pregnancy agrees that she will hand over the child after his or her birth to be raised by the person or persons who commission her to carry the child.

Surrogacy is to be clearly distinguished from adoption. Adoption is an arrangement made after the birth (or at least after the conception) of a child - in the best interests of the child. The process of adoption allows birth parents (particularly the mother), who feel unable to support or rear the child, to decide freely to give up their position as the legal parents of a child and allow other persons to become the legal parents of the child.

Adoption primarily serves the needs of an existing child for parents who can raise him or her. Adoption may also serve the needs of relinquishing parents who freely decide that they are not able to raise a child, and the needs of well balanced, healthy and committed childless couples who wish to raise a child. However the needs of the relinquishing parents and adopting parents are secondary. The primary concern in adoption is the best interests of an existing child.

Surrogacy reverses these concerns. Surrogacy primarily serves the wishes of the commissioning parents (or parent) to procure a child by any means. In surrogacy, the child who does not yet exist becomes a commodity - the object of a legal contract. Surrogacy undermines the natural right of birth parents - especially the woman who carries a child, but also her husband - to be the legal parents of any child born to them unless they freely decide to relinquish the child. It subordinates, to the interests of the commissioning couple, the best interest of the child by ignoring the natural bonding of a child to the birth mother during pregnancy and potentially, his or her sense of identity, family and belonging.

A law permitting surrogacy does this by giving validity to a contract made before the conception of a child to put into effect a plan that intentionally fractures the child's life by separating the gestational mothering of the child from its subsequent upbringing.

The current law in New South Wales, which voids surrogacy contracts, including non-commercial contracts, provides a strong disincentive for entering into any surrogacy arrangement. It is good law and should be retained.

3. Complexities of surrogacy

3.1 Harms to the child

Surrogacy may result in harm to the child whom the surrogate mother relinquishes, breaching a natural bond and potentially leading to identity problems in the child.

Children born as a result of a surrogacy contract are likely to share the “identity bewilderment” experienced by children born as a result of donor insemination. Recent accounts written by adults who were conceived as a result of donor insemination describe the profound problems of identity and belonging they experienced both as children and as adults.¹ Some of these problems were related to secrecy - not being told the truth about their origins but intuiting that they were different. However, problems also persisted after the truth was revealed or discovered, including a longing to know the absent genetic parent.

Issues of identity, belonging and wantedness are likely to be important for children conceived as a result of a surrogacy contract. They may yearn to know, “Who am I? How could my mother give me away?”

It must be kept in mind that these issues are imposed on the child as a result of an intentional plan formed before the conception of the child, not unavoidably encountered through the exigencies of dealing, after the fact, with a crisis pregnancy.

Other harms to the child include the possible risk of rejection by one or both parties due to disability or other unwanted characteristics. The very fact of “commissioning” a child tends to reduce the child to an object rather than a person in his or her own right. Surrogacy contracts may include a commitment by the gestational mother to abort the pregnancy in the event of a prenatal diagnosis of disability or imperfection or the non-preferred sex. A child born with a disability may be rejected by both the commissioning parents and by the birth mother, with no-one willing to take parental responsibility for the child.²

Harm may arise if more than one baby is conceived when only one baby was desired. In 2001 a UK surrogate mother carrying twins sued a Californian couple who disavowed the contract when she refused to abort one of her unborn babies.³ Then again, the surrogate mother might take action to end the life of her unborn baby against the wishes of the commissioning parents.

The child may become the object of a legal dispute over custody. Notwithstanding a surrogacy contract a birth parent, especially the mother, may find she has bonded with the child and wishes to assert a legal claim to parenthood. In *Re Evelyn*⁴ the experience of the birth mother, Mrs S is reported as follows:

“It emerges from the material of Mrs S that she was struggling with the task of coming to grips with her decision to hand the child to the Qs. She attended grief counselling and had contact with a Relinquishing Mothers' Group. She says she came to the realisation that she could no longer abide by the arrangements. She says she was suffering emotionally as a result of the separation from her daughter and that, after much agonising, she concluded that it was better for herself, the child Evelyn and for her other children for Evelyn to be returned to her.”

Decisions may be made by courts at various level of the judicial hierarchy which result in the child being alternately placed in the custody of each of the contending parties, seriously disrupting the normal processes of bonding and attachment with the likely consequences of ongoing psychological harm to the child.

A persuasive case against permitting surrogacy was recently published⁵ in the progressive French journal *Liberation* by Myriam Szejer, a child psychiatrist and Jean-Pierre Winter, a psychoanalyst.

Szejer and Winter write that “For the defenders of surrogacy, parental love will prevent the child from suffering from the after-effects of this mode of conception. It is forgotten that the prescription of in-vitro fertilisation (IVF) necessary for surrogacy is the equivalent of ‘an order to abandon one’s child’.

“The importance of epigenetics on the physical and psychological development of the fetus is known, as well as the emotional bond between the pregnant woman and the child she is carrying and the deleterious effects of the separation mother and baby at birth. In order not to cut this link, doctors place the newborn on the mother’s womb after delivery, so as to restore its antenatal benchmarks which are stored and recorded for him as identity. They invented kangaroo care, the “skin to skin” contact of mother and baby while in hospital, because it is in the early postpartum period that the foundations of self-image are built. Pediatricians and midwives have seen how these practices improved the prognosis of survival, length of hospitalization, and the success of breastfeeding. How could doctors now prescribe abandonment of the newborn child? It is not gametes that the newborn recognizes as mother, but the woman who bore him. We know that the wounds of abandonment function as a bilateral amputation of Self. The most successful adoptions fail to erase the traces conscious and unconscious of this abandonment, both for the psyche of the child and for the mother who give up part of herself.

“In the case of surrogacy this separation is legally programmed and not the result of a tragedy of life, as in adoption.

“We should oppose a practice of which the child is the victim and which opposes the interest of the mother against that of the child, and even of other players. We need to be concerned about the future of all the players in surrogacy: the mother, the baby, but also the husband of the surrogate mother or her own children. The whole family is affected by this act, as would society be as a result of the transformation of the laws on filiation that would derive from it. When it ratifies this theory that separates mind from body, the social structure is responsible for doing so.”

3.2 Harms to birth parents

A surrogacy contract reduces a woman’s experience of gestational motherhood to a contractual service. This depersonalizing of the natural human experience of pregnancy may prove harmful to the birth mother, her family (including her husband and her children) and to the child she is carrying.

In January 1987 the New York Times reported on some of the problems emerging in relation to surrogacy.⁶

“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 formation of a profound bond between mother and child is a natural process that is stimulated by the hormone oxytocin associated with birth and breast feeding.⁷ Surrogacy involves making a decision when the woman is not subject to such influences – before the conception of the child – and then being required by the legal contract to carry out this decision when she is subject to these natural emotions.

It is unjust to women to seek to bind them in advance to a decision which may cause them unforeseen but profound distress when it is time to act on it. This concern applies equally to altruistic and commercial surrogacy.

In the case of altruistic surrogacy the problem may be exacerbated if the birth mother is going to continue to have any close contact with the child. This is likely to increase the bond for both mother and child.

3.3 Harms to other children

Surrogacy could also cause harm to other children of the birth mother. Existing children of the woman acting as a surrogate mother may well form a relationship with the new child in the surrogate mother's womb. These children may then suffer grief on learning that the unborn baby is to be given away and may fear that they also may be given away.

Surrogacy undermines the status of children in general by allowing the very existence and life of the child to be the object of a contract between parties. The notion that a child's parentage can be determined by a contract rather than by birth, or an adoption procedure in which the best interests of the child are paramount, is subversive of the child's right to identity and security.

Principle 6 of the *Declaration on the Rights of the Child*⁸ states that:

"The child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and under the responsibility of his parents, and, in any case, in an atmosphere of affection and of moral and material security; a child of tender years shall not, save in exceptional circumstances, be separated from his mother."

A surrogacy contract is an agreement made before the conception of a child that he or she will be "separated from his mother" at or soon after birth. Such contracts are a serious violation of the natural rights of the child.

4. Surrogacy legislation in other jurisdictions

Surrogacy contracts, including non-commercial contracts, are explicitly void under statute law in Tasmania (*Surrogacy Contracts Act 1993*); South Australia (*Family Relationships Act 1975*); Victoria (*Infertility Treatment Act 1995*) and Queensland (*Surrogate Parenthood Act 1988*).

In the Australian Capital Territory the Parentage Act 2004, Division 2.5 provides for non-commercial "substitute parentage agreements" to be given effect by the Supreme Court making a parenting order in favour of the "substitute parents".

The Northern Territory and Western Australia don't currently have any laws dealing directly with surrogacy. However, before the Western Australian Parliament was prorogued for the 6 September 2008 State election the *Surrogacy Bill 2007* which would legalise non-commercial surrogacy had passed both houses and amendments made to the bill by the Legislative Council were being considered by the Legislative Assembly.

The *Assisted Reproductive Treatment Bill 2008* was introduced into the Victorian Legislative Assembly on 9 September 2008. It would legalise surrogacy, allowing single people as well as lesbian and male homosexual couples to arrange to acquire a child through a surrogacy arrangement.

On 28 March 2008 the Standing Committee of Attorneys-General (SCAG)⁹ “agreed to develop a unified framework for the legal recognition of parentage achieved by surrogacy arrangements, based on the following principles:

- The rationale for the legislation is to ensure the best interests of the child are the paramount consideration in recognising surrogacy arrangements
- The model regime should aim to minimise scope for dispute between the surrogate mother and the intended parents.
- The model should aim for minimal intervention in people’s lives.”

They also “agreed in principle that a unified framework should contain the following key features:

- commercial surrogacy will remain illegal
- non-commercial surrogacy arrangements will be lawful but agreements will be unenforceable
- informed consent of all parties is essential
- mandatory specialist counseling
- court orders will be available recognising the intended parents as the legal parents where the surrogacy arrangement meets legal requirements and is in the best interests of the child.”

At the SCAG meeting in July 2008¹⁰ “ministers:

- noted that the Australian Health Ministers’ Conference and the Community and Disability Services Ministers’ Conference have not yet approved release of the surrogacy consultation paper;
- request SCAG officers to arrange for coordinated release of the paper out of session, once that approval has been obtained, and
- noted that, in line with other jurisdictions, NSW has referred this issue to its Legislative Council Standing Committee on Law and Justice.”

5. Judicial decisions re surrogacy in NSW

In New South Wales, prior to the enactment of the *Assisted Reproductive Technology Act 2007*, some parties to a surrogacy agreement have succeeded in obtaining an order from the Supreme Court under the *Adoption of Children Act 1965* making them the adoptive parents of the child. However, this procedure is uncertain as Bryson J observed:¹¹

“I repeat the statement of Windeyer J in *W: Re Adoption* (NSWSC 6 July 1998) ‘It is important to state that in coming to this decision, the Court is not determining whether surrogate births are or are not to be encouraged.’ It would be incorrect to interpret this decision as expressing approval or endorsement of surrogate parenthood, or as expressing general readiness to ratify surrogacy arrangements with adoption orders. I share the disquiet which has been expressed elsewhere, including by the Law Reform Commission,¹² about surrogate parenthood, and I share the Commission’s disapproval of commercial arrangements and their view that surrogacy should not be encouraged and that it is appropriate for the legislature to consider regulating it. These general

considerations cannot control my task of adjudication on the facts of the instant case and in conformity with the legal rules found in the Adoption of Children Act 1965, including the paramountcy rule. I do not regard surrogate parenthood as an ideal arrangement, but the circumstances of the present case appear to me to be as favourable as are ever likely to be encountered.

"This decision if rightly understood should not give encouragement to make arrangements for surrogate parenthood or to seek adoption orders. Any other adoption application must be considered according to law, in which the welfare and interests of the child are paramount; welfare and interests of children cannot be generalised, and must be addressed in detail on the facts of each case, and the outcome of earlier cases will provide little guidance."

6. The Family Law Act 1975

Section 65C of the Family Law Act 1975 provides that either or both of the child's parents, the child, him or herself, a grandparent of a child, or any other person concerned with the care, welfare and development of the child may apply for a parenting order.

Several cases heard by the Family Court of Australia have considered what effect, if any, the impact of surrogacy contracts should have on the outcome applications for parenting orders.

In *Re Mark*,¹³ Brown J considered the relevance of a surrogacy contract entered into under the law of California but observed (at 94) "It is the Family Law Act which governs this case, not the provisions of the surrogate agreement." In this case the Court did make parenting orders in favour of the commissioning parents who were two male homosexuals.

In *Re Evelyn*,¹⁴ the Full Court upheld a decision by Jordan J making a parenting order in favour of a birth mother and her husband despite the existence of a surrogacy arrangement. The Full Court adopted the view that the existence or otherwise of the surrogacy arrangement had no effect on the outcome of the case.

"Before his Honour, an argument was mounted on behalf of the Ss that the various State and Commonwealth provisions relating to surrogacy led to the inevitable conclusion that for various reasons, the law required a decision in favour of the Ss. His Honour, correctly in our view, rejected this proposition as artificial and based his decision squarely upon the principle that 'the paramount consideration remains the best interests of the child'.

"This argument was not pursued on appeal, although Ms Powell drew our attention to that part of his Honour's reasons for judgment where his Honour expressed himself as being comforted in his decision by the law's public policy of discouraging surrogacy.

"However she pointed out that this did not form part of his decision and we agree with this view. If it had been otherwise, we would have had considerable reservations about it, because we cannot see that such an approach would have been consistent with the Court's obligation to regard the best interests of the child as the paramount consideration."

It appears then, that unless Section 65C of the Family Law Act 1975 is amended by the Commonwealth Parliament in such a way as to deprive the Family Court of Australia of its power to make parenting orders upon the principle that the paramount consideration is the best interests of the child, no state surrogacy legislation could effectively provide for secure parenting orders in favour of the commissioning parent or parents.

Given this limitation on State legislative powers it seems imprudent to proceed with legislation which could mislead prospective participants in a surrogacy contract into believing the State law could deliver finality on parenting arrangement.

7. Particular matters

There are particular matters raised by any law permitting surrogacy. Some of the difficulties that arise from these matters are considered below and suggestions made for minimising these difficulties. None of this discussion should be taken as support for any law permitting surrogacy.

7.1 Consent and revocation

Current adoption law acknowledges the significance of the natural bond between the birth parents and their child by ensuring sufficient time for relinquishing parents to make a free decision about consenting to adoption. 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 father if she has a husband) 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.

Birth parents who are parties to a surrogacy contract should have no less right in relation to the relinquishing of a child than birth parents who are considering adoption.

7.2 Genetic testing of a child's parentage

Before any parenting order relating to a child who is the subject of a surrogacy arrangement genetic testing to confirm the child's biological parentage should be compulsory.

A surrogate mother impregnated by IVF or AI may in fact have actually become pregnant to her husband by natural intercourse. Any such child should not be treated as the subject of a surrogacy arrangement.

7.3 Single and same-sex parents

No surrogacy legislation should permit single women or men, two persons in a same sex relationship or two persons in a de facto relationship to be the "arranged parent" or "arranged parents" in a surrogacy arrangement or to have a parenting order made in their favour.

This would be contrary to the best interests of the child.

A large body of social science research confirms the near universal belief, across times and cultures, that marriage is the best environment for raising children. Children flourish best on a range of indicators (including educational outcomes, school misbehaviour, smoking, illegal drugs, and alcohol consumption, sexual activity and teen pregnancy, illegal activities and psychological outcomes) when they are raised by a mother and a father in a publicly committed, lifelong relationship.¹⁵

A few examples of particular research findings illustrate this general conclusion.

Three- and four-year-old children with two biological parents are three times less likely than those in any other type of family to have emotional or behavioural problems such as attention deficit disorder or autism.¹⁶

Girls whose fathers left the family early (before age 5) were five times more likely in the US and three times more likely in New Zealand to become pregnant as a teenager compared to girls from traditional families.¹⁷

Male adolescents in all types of families without a biological father (mother only, mother and stepfather, and other) were more likely to be incarcerated than teens from two-parent homes, even when demographic information was taken into consideration in analyses. Youths who had never lived with their father had the highest odds of being arrested.¹⁸

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.¹⁹

In the light of this evidence it would be unconscionable to legislate to validate arrangements made before the conception of a child that may result in that child being the subject of a parenting order in favour of anyone other than a man and woman married to one another.

7.4 Reasonable expenses

Laws permitting non-commercial surrogacy may provide for the payment of "reasonable expenses associated with the pregnancy or the birth" to the birth mother by the arranged parent or arranged parents. If there is no definition or guidance as to what might count as a "reasonable expense associated with the pregnancy or birth" it may become permissible to pay for wages foregone as a result of the pregnancy. If so, it is possible that some women may be attracted to surrogacy as an alternative means of earning income to working. "Reasonable expenses" must be rigorously limited to actual out-of-pocket expenses relating to the pregnancy.

8. Conclusion

The distress of married couples unable to successfully conceive and bear a child is deserving of sympathy but cannot justify the abandonment of a law which serves to protect the best interest of children and to uphold the natural dignity of motherhood.

Nevertheless the grief experienced by childless couples is a real and growing problem as the incidence of infertility in Western nations increases. More needs to be done to promote greater public awareness of factors which have been identified as leading to an increase in infertility over recent decades such as delayed child bearing, abortion (especially multiple abortions), and promiscuity and associated sexually transmitted infections, especially chlamydia.

The promotion of adoption as a life-preserving alternative to abortion which would enable many more infertile couples to raise a family should also be encouraged.

9. Endnotes

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