The South Australian Council on Reproductive Technology
Annual John Kerin Symposium

Surrogacy – the emerging issues

"Weaving the legal maze of surrogacy in South Australia today"

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The nature of family and our society has been changing radically over the past two decades. The increasing availability of assisted reproductive technologies is contributing in only a very small way to the increase in diversities in families. A far greater impact is the changing nature of family with the breakdown of the nuclear family as a result of marriage or relationship; break down leading to new often blended families

The increase in same sex couples now having children and the increase in single mothers with children are all impacting on what we consider a family unit today..

The 2006 amendments to the *Family Law Act* ensure another major change in the nature of family with the expectation that children will continue to be co-parented by both parents irrespective of whether or not they are still together. Unless the presumption of shared parental responsibility is rebutted by incidents of family violence the Courts now expect children to be spending substantial time, if not equal time, with both parents.

In this context the debate in relation to assisted reproductive technology and its impact on the family unit is a relatively small issue.

Studies and most recently the Victorian Law Reform Commission occasional paper *Outcomes for Children born of ART in a Diverse Range of Families*[1] have highlighted the positive differences that have been found in the quality of parenting within ART families when compared with natural conception families.

However they found the stigmatisation of such families is still a major problem in our society where a child born as a result of ART can have a sense that they are different or abnormal. The Reform Commission argues that we need to embrace families that include child / parent relationships that are not purely biological and *only then can we claim to be a socially progressive and tolerant society*[2] (page 4, Victorian Law Reform Commission Occasional Paper).

There are about 5,000 children born in Australia each year who have been conceived using ART techniques. This represents only 1.7% of all live births. Surrogacy remains a highly controversial area of assisted reproductive technology. From the limited studies available commissioning parents show they engage in little conflict with the surrogate mother. The majority of parents plan for ongoing contact between the child and the surrogate mother.

[1] Dr. Ruth McNair ,Victorian Law Reform Commission 2004

These parents are universally open with the children regarding the use of surrogacy in their conception. Yet the moral arguments and moral permissibility debate continues, in this area to a far greater extent than in any other area of the 'nature of family' debate.

Surrogacy, *where a woman agrees to carry and bear a child for another woman (or couple) and relinquishes the child at (or shortly after birth)* has been with us for centuries and is an event that is acceptable and practised in many cultures.

However the legal, ethical and social challenges that have now been debated for over 20 years in Australia has left a maze of confusing, ambiguous and conflicting surrogacy laws and regulations across Australia. It is time we agreed on a unified approach to surrogacy legislation nationally.

The Standing Committee of Attorney's General (SCAG) placed a uniform approach to surrogacy laws across Australia on their agenda in 2007. This was adjourned awaiting the Victorian Law Reform Commission final report of 2007. We have now heard that SCAG will look at a unified approach 2008.

Until this anticipated uniform approach each State must still determine their own laws as family relationships (other than marriage) registrations of births

[2] Pg.4 Mc Nair report.

and adoptions remain within the State jurisdiction. A national uniform approach would require States to either handover certain powers to the Commonwealth or more likely pass uniform laws across Australia in each State.

The Australian Capital Territory *Artificial Conception Amendment Act 2000* enacted for the first time legislation to allow substitute parents to apply to the Supreme Court for a parentage Order about the child. The paramount consideration remains the requirement that the making of the Order is in the best interests of the child and that both birth parents freely and with full understanding agreed to the making of the Order. However birth certificates can be changed without any formal adoption process.

The Victorian Law Reform Commission released its final report in June 2007 with 130 recommendations, 32 of which related to surrogacy. I will spend some time in detailing these recommendations because they are likely to be highly significant in the National approach to surrogacy.

The Commission supports the regulation of surrogacy arguing that *"it can play an important role in minimising the potential for disputes and in protecting all parties including the child from possible harm"*.[3] The Commission recommends defining eligibility for surrogacy.

This includes a doctor being satisfied that if a couple wish to commission a woman to carry a child they must be:-

[3] The Victorian Law Reform Commission. Assisted Reproductive Technology and Adoption ;Final Report ,2007

- unlikely to be able to become pregnant, to carry a pregnancy or give birth;
- or a natural birth is likely to place the commissioning woman's life or health or that of the baby at risk.

The commissioning couple will be required to:-

- have counselling;
- will not be eligible if they have charges proven against them for a sexual offence;
- been convicted of a violent offence;
- had a child protection Order made against them.

However the Commission recognised that a couple should be able to commission a surrogacy arrangement regardless of relationship or marital status or sexual orientation.

A Clinical Ethics Committee at the licensed clinic must decide whether treatment can proceed.

Partial surrogacy, where the surrogate mother's egg would be used in the conception of the child should also be permitted.

Couples should not be excluded from commissioning a surrogacy arrangement if they are unable to contribute their own gametes.

Surrogacy agreements or commercial arrangements should continue to be void.

However the reimbursement of prescribed payments should be enforceable.

They recommend that parentage orders in favour of a couple who have commissioned a surrogacy arrangement should be made if the Court is satisfied the Order would be in the best interests of the child.

The Application must be made no earlier than twenty eight (28) days and no later than six (6) months after the birth of the child.

A substitute parentage order should have the same status and effect as an Adoption Order.

Once a substitute parentage Order has been made the birth register should be amended to record the commissioning parent as the parents of the child and a new birth certificate should be issued.

A central register should be expanded to allow identifying information about a surrogate mother and commissioning parents to be registered and released to the child in the same way as information about donors is registered and released.

In South Australia the issue of surrogacy has been keenly focused with the introduction of the Statutes Amendment (Surrogacy) Bill 2006 by the Honourable John Dawkins MLC. This Bill was withdrawn and referred to the Social Development Committee for its consideration as part of a formal enquiry.

I commend to you the 26th Report of the Social Development Committee enquiry into Gestational Surrogacy laid on the table of the Legislative Council on 13 November 2007.

The Government has an obligation to respond to this Report within six (6) months of its release and we should therefore hear by mid May 2008 of the Government's response.

I would hope therefore that in twelve months time the law surrounding surrogacy in South Australia and in the whole of Australia will look somewhat different than it does now.

In South Australia the *Family Relationships Act 1975* is the relevant legislation that deals with surrogacy. Section 10F of the Act defines three key terms:-

Procuration contract means a contract under which-

(a) a person agrees to negotiate, arrange, or obtain the benefit of, a surrogacy contract on behalf of another, or

(b) a person agrees to introduce prospective parties to a surrogacy contract;

Surrogacy contract means a contract under which:-

(a) a person agrees:-

(i) to become pregnant or to seek to become pregnant; and

(ii) to surrender custody of, or rights in relation to, a child born as a result of the pregnancy; or

(b) a personal who is already pregnant agrees to surrender custody of, or rights in relation to, a child born as a result of the pregnancy;

Valuable consideration, in relation to a contract, means consideration consisting of money or any other kind of property that has a monetary value.

Under Section 10G of the Act

(1) A surrogacy contract is illegal and void.

(2) A procuration contract is illegal and void.

It is possible to argue that an altruistic surrogacy arrangement does not constitute a contract but an understanding between two persons which is not enforceable at law. A success of any arrangement entered into then relies on the continuing goodwill of both parties involved. There is no legal avenue for enforcing the agreement between the parties should any of the parties have a change of heart in relation to the agreement.

In the event of a dispute between the parties the determination of where the child will reside or live will ultimately need to be made by the Family Court of Australia or the Federal Magistrates Court whose overriding consideration will be what is in the child's best interests.

Under Section 10C of the *Family Relationships Act* the surrogate mother who gives birth to the child is for the purposes of the Law of South Australia the mother of the child notwithstanding that the child was conceived by fertilisation of an ovum taken from another woman and from donor sperm that was not her husband or partners.

Under Section10D of the *Family Relationships Act* the surrogate mother's husband or partner is deemed to be the father of the child.

Under Section 10E of the *Family Relationships Act* where a woman becomes pregnant in consequence of a fertilisation procedure and a man donated sperm then for the purposes of the law of the State the man referred to shall be conclusively presumed not to have caused the pregnancy and is not the father of the child.

Commissioning parents under a gestational surrogacy arrangement where both parents have donated their own biological material, cannot be currently recognised under the law of South Australia as parents of their own child. The surrogate mother and her husband or partner are deemed to be the parents of the child.

This legislation was enacted to legitimise the birth of children conceived by donor insemination and to protect the donor to ensure that he was not legally regarded as the father of the child requiring payment of maintenance and allowing potential inheritance claims against his Estate. Until recently his identity would also remain protected.

If a biological father was to sign the birth certificate as if he was the father of the child when the surrogate mother had a husband or a partner the biological father would be committing an offence under the *Births Deaths & Marriages Registration Act 1996*.

The only way either biological parent can have their details included on the birth certificate of the child is through subsequent adoption of the child on Application to change the details of the birth certificate.

Since I have been advising "would be" commissioning parents on a regular basis we have successfully (by consent) obtained parenting orders in relation to the child pursuant to the *Family Law Act*. The Orders do not sever the legal relationship of the surrogate mother with the child but provide for the commissioning parents to have Orders that the child lives with them and that they have the sole parental responsibility for that child.

This Application can be made to the Federal Magistrates Court with the surrogate parents receiving independent legal advice and supporting an

Application for these Orders to be made. These Court Orders do not constitute adoption of the child and therefore the birth certificate cannot be changed. Residual rights remain for the child to potentially claim against the surrogate mother for maintenance and inheritance.

At the present time in South Australia the only way to sever all legal relationships with the surrogate parents is to obtain an Adoption Order. It is worth exploring with the Adoptions Branch of Families SA whether parties will be eligible for adoption with the assistance of the Department. Leave must first be granted under Section 60G of the *Family Law Act* for an adoption to proceed. In 2006 I successfully applied on behalf of commissioning parents in the Youth Court for an adoption to proceed. Their child was born in Victoria and the father was permitted to be named on the birth certificate as the known donor.

The child in that case was born as a result of an altruistic surrogacy arrangement. The biological make up of the child was that of the applicant father, the commissioning father, as sperm donor and the commissioning mother as egg donor. The Youth Court ordered that the Adoption and Family Information Service become a party to the proceedings. The Court ordered that a Report as to the suitability of the prospective adoptive parents and their capacity to care adequately for the child be prepared. The Department argued that they had no real evidence of paternity as there was no paternity

test having being undertaken. The child was however conceived at the Sydney IVF clinic using the sperm of the father. It was thus reasonably assumed that the biological father was also the commissioning parent. Judge Moss indicated that he would grant the adoption but that in future applications should be made via the Adoption Branch to ensure the necessary reports could be prepared. The surrogate mother and her children were all interviewed by a psychologist to determine their consent to relinquish and to ensure they had an opportunity to withdraw their consent even when the child had been in the care of the commissioning parents for over twelve months.

It remains the case however that the Adoption Act is not the appropriate legislation to establish parentage for commissioning parents in a surrogacy arrangement.

If the increasing number of enquires that I have for legal advice surrounding the status of the law in relation to surrogacy is any indication there is a great deal more interest and use of gestational surrogacy in Australia over the past five years.

During the 1990's when I was sitting on the Council of Reproductive Technology the issue of surrogacy often arose but the numerous enquires that were being undertaken at the time examining the issue of surrogacy and reproductive technology generally opposed surrogacy or at the very least reflected ambivalence towards the practice. It is only in the last five years or so that it appears community support for non commercial altruistic surrogacy has increased.

This seems to be largely due to the willingness of New South Wales and the ACT reproductive technology clinics being prepared to provide support services for invitro fertilisation for surrogate mothers.

The Enquiry into Gestational Surrogacy in South Australia by the Social Development Committee of State Parliament recommends a Bill to amend the *Family Relationships Act 1975* to among other things ensure a process is developed to allow the legal transfer of parentage to occur without the need for commissioning parents to adopt their own genetic child.

Once the transfer of parentage has occurred birth certificates should be amended to appropriately reflect this transfer. The Australian Capital Territories *Births Deaths & Marriages Registration Act* serves as a suitable example of this process. It is recommended that the legislation be retrospective to apply to children already born through surrogacy arrangements.

I would urge the State Government to make the recommended amendments to the *Family Relationships Act 1975*. Not only will these amendments ensure that children already born as a result of a surrogacy arrangement in South Australia (and there are now at least a dozen of them) can have their genetic make up appropriately recognised but it will provide certainty for the legal status of these children who are already being stigmatized due to ongoing prejudicial societal attitudes.

There are many balancing acts in considering the paramount interests of children born as a result of surrogacy arrangements. I would suggest that the paramount consideration is that children are able to have a meaningful and loving relationship with the parents whose home they not only are lovingly raised in but whose genetic material has provided for their birth.

Appropriate recognition of the surrogate parents is obviously required and it has been recommended by the Social Development Committee that this be recorded on the child's amended detailed birth certificate. Research shows however that parents in these arrangements genuinely have an open and communicative relationship.

It has been one of the joys of my legal practice to share in the difficult journey with commissioning parents from the heartache of years of ART to a happy family unit on the birth of a much loved child.