A THESIS PRESENTED

IN PARTIAL FULFILLMENT OF THE REQUIREMENTS OF

THE DEGREE OF MASTER OF LEGAL STUDIES AT THE

UNIVERSITY OF TASMANIA

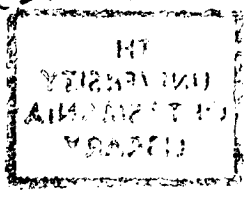
SEPTEMBER 1987

RESEARCH THESIS

"Surrogate motherhood - an acceptable solution for infertile couples?"

VERONIKA MADDOCK

Real name Maria-Veronika Maddock



ACKNOWLEDGEMENTS

I am indebted to the Committee to Investigate Artificial Conception and Related Matters (Tasmania) for its assistance in giving me access to research papers, articles, and reports.

My appreciation and thanks go also to Annette Alexander for transforming my near illegible manuscript into its typewritten form.

CONTENTS

CHAPTER 1

INTRODUCTION

It has been variously estimated that one out of six couples[1] or 15-20 percent of couples[2], are infertile. The changes in social attitudes and social welfare policies towards single mothers together with the increased use of contraception and abortion mean that the demand for adoptable babies now surpasses the supply. Those infertile couples who are frustrated by the long adoption procedures and are unable to be helped through the Artificial Insemination by Donor (AID) or In Vitro Fertilization (IVF) programmes are turning in increasing numbers[3] to a practice with a long history which has only recently gained world-wide attention - the practice of surrogate motherhood.

The practice of surrogacy dates back at least to Biblical times. One of the first recorded instances is found in the Old Testament. Almost 4 000 years ago Sarah, the wife of Abraham, could not conceive and sent her husband to her Egyptian maid Hagar saying "It may be that I may obtain children by her".[4] Hagar thus bore Ismael. Another example is that of Rachel, wife of Jacob, who required Billa to "bear upon my knees that I may also have a child by her".[5] Jacob's other wife, Leah, had the same arrangement with her slave-girl Zilpah.[6]

Today, surrogate motherhood has provoked considerable debate on the moral, ethical, legal, and social consequences, issues to which existing legislation has failed adequately to address itself. In a jurisdiction where no specific legislation on surrogacy exists, the application of existing laws produce distorted results which are beyond the probable legislative intent. Where specific legislation prohibits the practice of surrogacy, it has failed to recognize long term implications of such prohibition.

Most of the known cases of surrogacy arrangements involve the insemination of the surrogate with the sperm of the husband of the infertile couple. The insemination of the surrogate with the sperm of a person other than the husband of the infertile couple is, of course, a possibility, but would probably be a method resorted to only where both the wife and husband are infertile. In this case, the resultant child has no genetic link with his intended parents. The expression infertile couple in this paper is used to denote a couple where the wife is incapable of bearing, or carrying to term, a child.

Discussion in this paper is limited to infertile couples who participate in surrogacy arrangements by the most common means of the artificial insemination of the surrogate by the sperm of the husband. It is by the use of such a practice that the major ethical and legal issues arise.

Recent developments in the field of In Vitro Fertilization now enable an embryo to be implanted in a woman who is not the genetic mother of the embryo. In the case of a surrogacy arrangement, the surrogate becomes the gestational or 'host' mother and where the couple have both contributed the genetic material, they are the genetic parents. Three other possibilities become available with the use of the technique of embryo transfer. The first is where an embryo consisting of the wife's ovum fertilized by donor sperm is implanted in the surrogate. In this case, only the wife has a genetic link to the resultant child. The second is where an embryo consisting entirely of donated genetic material is implanted in the surrogate. In this case, neither the couple nor the surrogate have genetic links with the resultant child. It is difficult to envisage the circumstances in which such an arrangement would be resorted to. The third possibility is where an embryo consisting of the ovum of a donor fertilized by the sperm of the husband is implanted in the surrogate. In such a case, the child has a genetic link to the husband. In all cases involving embryo transfer, the surrogate would be the gestational mother, and most of the legal and ethical issues relevant in the case where the surrogate herself has contributed genetic material to the child may not be as relevant.

Although it is possible to understand the desire of a single man, or a single woman, or a homesexual couple to use

the services of a surrogate mother, the issues raised in such an arrangement involve different considerations from those inherent in arrangements made by infertile couples.

The participation in a surrogacy arrangement by a single person means intentionally depriving a child of a second parent.[7] Certainly society can do little to prevent a woman from becoming pregnant, whether she is single or married. However, by the rules of nature and the conditions imposed by most communities, a single man has much more difficulty in deliberately creating a child with the intention of being its sole parent. The basic reason for allowing a couple to use artificial reproductive techniques is to enable the couple to fulfil their love through procreation.[8] This argument can be extended to surrogacy which may be viewed as a form of artificial reproduction.

Through the use of simple artificial insemination procedures not involving medical intervention,[9] a homosexual couple may become 'parents' of a child born to a surrogate. However the use of a surrogacy arrangement in these circumstances raises serious social implications for the child and for the accepted elements of what constitutes the basic unit of society - the family.

The purpose of this paper is to discuss the major problems inhibiting the use of surrogacy, including existing legislation, concerns of public policy and judicial

decisions and comments.

In the findings of the committees formed in various jurisdictions to look into the issue of surrogacy arrangements, it is noted that the majority of the reports favour prohibition of the practice of surrogacy and two of the jurisdictions have enacted legislation accordingly.

In Canada, the province of Ontario favours the use of surrogacy through legislative control, as do some of the States in the United States. These reports and relevant legislation are evaluated with a view to comparing the attitudes in different jurisdictions.

The effectiveness of private contract in surrogacy arrangements as practised in the United States is examined and compared with the use of legislation to control such arrangements. The arguments for and against the prohibition of surrogacy are presented, with the conclusion that legislation allowing and regulating the practice of surrogacy is to be preferred in order to protect the welfare of all the parties, especially that of the child.

CHAPTER 2

MOTIVATION TO PARTICIPATE IN SURROGACY ARRANGEMENTS

Definition of Surrogacy

The term surrogate motherhood or surrogacy is most commonly used to denote the procedure by which a woman produces a child by becoming impregnated with the sperm of the husband of an infertile wife or, in rare occasions where the husband is also sterile, by the sperm of another man,[10] and surrenders all parental rights over the resultant child to the husband and his wife. The couple (intended parents) then take steps formally to adopt the child. The child may, in some cases, be handed over to the couple and registration details may be falsified to hide the true parentage.

In the most common case, the term "surrogate mother", which strictly interpreted means substitute mother, is a misnomer. The woman who is impregnated in fact contributes the egg and uterus and is not therefore a substitute mother but is the genetic mother. The wife who rears any child born thereafter becomes the social mother or substitute mother as she parents a child borne by another woman.

Motivation of Infertile Couple

What motivates an infertile couple to seek an arrangement with a surrogate - an arrangement which is widely disapproved of, has no protection in law, and in some

instances may be prohibited by the law? In a poll conducted by a research organization in 1982 in Australia and Great Britain,[11] it was found that in Australia, 32 percent of those people questioned thought the practice of surrogacy should be permitted while 44 percent were against the practice and 24 percent had no opinion. In Britain, only 25 percent were in favour of the practice while 55 percent were against it. The data did not reveal the reason why opinion was against the practice of surrogacy, but writers Singer and Wells[12] consider that such an opinion may have sprung from a distaste of the idea of a woman giving up to another a baby to whom she has given birth.

The main reasons for seeking a surrogacy arrangement are the inability of the wife to either conceive a child or carry a child to term and the desire of the couple to found a family. These reasons are similar to the reasons why couples seek In Vitro Fertilization procedures. A surrogacy arrangement is the only chance to have a child who has a genetic relationship to at least one of the couple. Where adoption is not available, it is the only chance for an infertile couple to have any sort of a child.

According to Keane and Breo,[13] the husband of an infertile woman, in keeping with the feelings of most other men, experiences a strong need to have a child who is biologically his own. In seeking a surrogate, the couple are acknowledging this need.

The use of surrogacy as a matter of convenience because, for example, the wife does not wish to interrupt her career, is a far more controversial matter. It is easy to criticize a woman who uses the services of a surrogate for reasons other than medical necessity, yet the long established practice of mothers leaving their children in the care of nannies, nurses, wet nurses, baby sitters and day care centres is widely accepted. However, given society's reluctance to accept surrogacy in cases of necessity, it is unlikely that surrogacy for reasons of convenience would be readily accepted.

Right to Found a Family

The basic unit of society is the family and most couples feel the need to create a family unit. Couples seeking to participate in surrogacy arrangements may be supported in their desires by the fact that various international agreements provide for the right to found a family.

The International Covenant on Civil and Political Rights[14] states that the family is the natural and fundamental group unit of society.[15] However, it also gives special mention of the right of every child to such protection on the part of his family, society, and the State as is required by his status as a minor.[16]

The right to found a family is further restricted by the provisions of the Declaration of the Rights of the Child[17] to which Australia is a signatory. The Declaration provides that a child shall, wherever possible, grow up in the care of his parents and shall not "save in exceptional circumstances be separated from his mother".[18] The Declaration also sees the need for the child to be protected against all forms of exploitation and not be subject to trafficking in any form.[19]

The relevance of the Declaration to the practice of surrogacy lies in the fact that, on the face of it, surrogacy contravenes the sentiments of the Declaration. In the usual surrogacy arrangements, the child is separated from his mother, the surrogate is paid a fee, and the child is relinquished to another set of 'parents'. This may be viewed as a form of trafficking, depending on the attitude taken towards the fact of payment made to surrogates.[20] Any legislation relating to surrogacy needs to take into account these special provisions protecting the interests of every child. However, as the Declaration is of moral force only, a failure to comply with these provisions would not affect the validity of such legislation.

In the United States, the right of choice in matters of abortion and procreation and the right to beget and bear children are well established.[21] The right to enter into a surrogacy arrangement may be inferred from the right not to procreate through contraception and abortion and from

the right to privacy which was recognized by the Supreme Court in Griswold v Connecticut.[22] However, such fundamental rights may be justifiably regulated where compelling State interest so dictates, but only to the extent that is necessary to protect the conflict of interest between the freedom of the individual in organizing his or her private life and the interest of the State in its role as *parens patriae*. In the case of Roe v Wade,[23] the Supreme Court held that after the first trimester of pregnancy, the State may regulate abortion in any way which is reasonably necessary to preserve the life or health of the pregnant woman.

The Supreme Court's view that the "outer limits of .... privacy have not been marked by the court"[24] may support the suggestion that in the United States a right to practice surrogacy arises from the right to privacy. However, the commercial aspect of surrogacy may be a sufficient compelling State interest to justify the regulation of surrogacy.

Motivation of Surrogates

A woman may seek to be a surrogate for a variety of reasons. An initial study of 125 women applying to provide surrogate mothering services[25] found various emotional reasons for the willingness of a woman to bear a child for another. This ranged from the enjoyment of being pregnant, the need to assuage guilt feelings of a previous abortion or adoption, the desire to help others, to the desire for financial gain.

From his study, Parker[26] concluded that participation as a surrogate mother gave a woman who had lost her child through abortion or adoption a chance to redeem herself and to assuage her feelings of guilt. However, Sappideen[27] questions whether participating as a surrogate mother will have a redemptive effect, given that such participation is not generally an acceptable activity by society.

If the surrogate sees the arrangement as a means of earning money, there is the possibility that she may not be altogether frank about her medical history and be less than careful about her health during pregnancy. It has been found that blood donors who are paid for their blood deliberately conceal any personal information which may debar them from donating their blood.[28] It appears that a person who sells his blood because of a need to earn money is less likely to reveal any medical problems he may have.

In the case of a surrogacy arrangement, adequate medical and psychological screening before being accepted as a surrogate would help in discovering any potential difficulties in this area. A materialistic view to a surrogacy agreement may add stress to the surrogate, who is already in what may be regarded as a stressful situation. A surrogate who is motivated by purely financial considerations may not feel very committed to the wellbeing of the unborn child. She may also experience conflicting emotions between her nurturing role and her financial motives. Stress may have an adverse effect on the unborn child and may give rise to an increase in perinatal death, congenital abnormalities, accidental injuries during pregnancy or a difficult labour.[29] However, it is not clear how far studies on the adverse effect stress has on a pregnant woman can be related to the position of a surrogate.

In his study, Parker found that 89% of the women surveyed, required a fee for their services.[30] If payment to the surrogate covers more than the reasonable costs incurred in connection with the pregnancy and childbirth, it may appear to be payment in exchange for the child. Such payment may be viewed as an offence against those provisions of the various adoption legislations which prohibit payment made in consideration of the adoption of a child, and the transfer of the possession of the child or the making of

arrangements, with a view to the adoption of a child.[31] Any payment made to reimburse for actual expenditure may be outside the ambit of those provisions.

Although at first glance an altruistic motive may be seen in a laudatory light, there are problems which are similar to those encountered in the area of organ donation. Altruism may be regarded as a gift relationship between the parties which imposes an obligation to receive and to repay in equivalent value.[32]

In the field of organ donation, it has been suggested[33] that a family might bring subtle pressure to bear on one of its members to donate an organ such as a kidney. In such a case, the recipient of such a donation may feel unable to refuse the gift and continue to feel obligated towards the donor. The donor, on his part, may consider the recipient as an extension of himself and may exhibit proprietary interest in the conduct of the recipient.

Where there is no personal relationship involved in the donation of an organ, this sense of obligation to give, to accept, and to repay would more likely be absent. Where a donation is given without payment, such as the case of an unpaid blood donor, it can be said to be an act of altruism - an act for the benefit of society without reimbursement.[34]

Where relatives are involved in a surrogate motherhood arrangement, the mixing of kinship is confusing and not in the best interest of the child or the natural mother. The surrogate, as a member of the family, remains in contact with the child, often in the role of a more distant relative, such as an aunt. The situation is analogous to grandparent adoptions where the natural mother is known as the sister. The surrogate may be reluctant to relinquish all control over the child and be unable to accept the secondary role.

Confidentiality in Surrogacy Arrangements

The reason for anonymity in organ donation cases is to minimize the sense of obligation and identification.[35] Whether the identity of the surrogate mother should be confidential is analogous to adoption and artificial insemination by donor situations. While the sperm donor in an artificial insemination procedure is assured of confidentiality, the surrogate, who in the majority of cases is also the ovum donor, is generally known by the infertile couple. Even if the surrogate is not personally known, the details of her medical history, education, background, and physical features would be made known to the couple before the surrogacy arrangement proceeded.[36]

Considering the length of time and effort involved in producing a child, the possibility of a woman acting as a surrogate mother more than once is very remote. Therefore the likelihood of an incestuous marriage, the main consideration for revealing identity, is also very remote. However, as is often the situation in adoption cases, a child may have a strong psychological desire to know its biological parent as well as a need to know the medical background of its biological family. On the other hand, if the experience in the area of kidney donation can be applied to surrogacy, the identities of the parties should not be revealed.

Conclusion

Ideally, financial gain should not be the primary factor which encourages a natural parent to relinquish parental rights. This results in decisions being made which may not be in the best interests of the natural parent or child. The motives of a surrogate may affect her attitude towards the unborn child which may result in a standard of care below that which is necessary for the well being of the child.

It may be argued that the transfer of custody of a child is not in the best interests of a child if financial gain is the factor which motivates a woman to enter into a surrogacy agreement. However, at the time the agreement is

made, it is not the welfare of the child which is the focal point but the hopes of the infertile couple and the financial needs of the surrogate. The fact of a profit motive may well justify regulation of surrogacy agreements but is not an argument for prohibiting them. The surrogate is not paid only for her consent to the adoption but more for her personal services in conceiving, bearing, and delivering the child for the infertile couple and is compensation for the loss of income, pain and suffering.

The motivation of a surrogate in participating in a surrogacy arrangement may well have an effect on the well-being of the unborn child. However, apart from the very few cases of family surrogacy arrangements, it is unlikely that a woman will undergo the arduous and potentially hazardous experience of pregnancy and childbirth without being adequately compensated for all the factors involved. This is not to say that the profit motive overrides any other reasons the surrogate may have. As Kim Cotton expressed the matter, "It wasn't a case of having a baby for money, it was more a case of wanting a way to bring in some money that would make me feel worthwhile".[37]

CHAPTER 3

REPORTS AND LEGISLATION IN AUSTRALIAN AND OVERSEAS JURISDICTIONS

Since 1982, governments throughout Australia have become increasingly concerned about the issues raised by the development in reproductive techniques, especially as it affects the status of the children born as a result of scientific breakthroughs to alleviate infertility. A brief look at the reports of the various committees set in this country, and in United Kingdom, Canada, and United States with special regard to the practice of surrogacy reveals a generally consistent approach in principle against the practice.[38]

Commonwealth

The Commonwealth did not set up a government committee, but the Family Law Council did establish the Asche Committee.[39]

The Asche Committee specifically agreed with the Warnock Committee[40] that the State should not permit any surrogacy agreements on the ground that .... "as a matter of public policy, surrogacy arrangements are seen to be contrary to the welfare and interests of the child".[41] Such agreements should be null, void, and unenforseable, with criminal sanctions against the exchange of money or the use of advertisements.[42] However, a woman and a couple entering a surrogacy agreement for altruistic reasons should

not be subject to any criminal penalty. The Asche Committee believed that legislation prohibiting the practice of surrogacy would prevent surrogacy agreements. The argument that a woman should be free to use her body as she wished was rejected by the Asche Committee as it failed to take account of the welfare of the child and left the woman at risk of exploitation.

A national uniform approach to the issues arising out the practice of surrogacy was advocated by the Asche Committee to deal with the social, moral, legal and ethical questions.[43]

Victoria

In Victoria, the Waller Committee issued its final Report in August 1984.[44]

In this report, the Waller Committee opposed the practice of surrogacy, whether by natural or by artificial insemination, or by E.T. The Committee condemned the buying and selling of a baby which it saw as being the core of surrogacy agreements.[45] The Committee recommended that commercial surrogacy arrangements should not be part of an IVF programme.[46]

The Waller Committee also addressed the issue of voluntary surrogacy without any element of commerce but had grave doubts that such an arrangement would be in the best

interest of the child, given the problems raised by the surrogate's refusal to relinquish the child.[47]

As a result of the recommendations of the Waller Committee, the State of Victoria enacted legislation aimed at surrogacy agreements. At the date of writing, it is the only State in Australia to do so.

Section 30(2) of the Infertility (Medical Procedures) Act 1984[48] makes it an offence to publish a statement, advertisement, or notice inducing a person to act as a surrogate or stating a woman is willing to act as one, and to receive payment or reward for consideration for the making of a surrogacy agreement or for acting as a surrogate. This differs from similar legislation in the United Kingdom as this provision bans payment between the surrogate and the couple. The penalty imposed for contravention is 50 units ($5,000) or imprisonment for 2 years. Section 30(3) provides that a surrogacy contract or agreement is void.[49] The use of the word "void" in this context may merely mean unenforceable and not that the contract or agreement is illegal.

Subsection (1) of section 30 provides, by way of reference, a definition of a surrogate mother.

This definition appears to be limited to those women who are resident in Victoria and therefore advertisements or notices published in Victoria which are prohibited under

subsection (2) if addressed to potential surrogates resident in Victoria, may be valid if aimed at securing the services of a surrogate resident outside Victoria. The prohibition will not hinder those determined to seek a surrogate.

Queensland

In Queensland, the Demack Committee released its Report in March 1984.[50]

The Demack Committee reached the same conclusion as the Asche Committee and the Waller Committee in that it recommended that it should be made illegal to advertise for surrogates[51] but did not consider it desirable at present to make surrogacy arrangements criminal offences.[52] The Demack Committee also recommended that a surrogacy agreement be null, void, and unenforceable on the ground of public policy.[53]

On the matter of the use of donor gametes, the Committee considered that the public welfare did not require legislative banning of the use of donor sperm but it was not unanimous on the question of banning donor ova. The Committee agreed that donor sperm should only be used if medical reasons dictate their use. As for donor ovum, any embryo transfer should only be made to the infertile wife of the couple.[54]

The Demack Committee examined the issues involved in surrogacy in the light of ethical considerations in protecting the basic moral values of the community. It considered the rights and protection of the child as provided for in the Human Rights Commission Act 1981 of the Commonwealth and the United Nations Declaration of the Rights of the Child, 1959.

The Committee did not claim it was expressing the mind of the community, or even the majority of the community. Indeed, it is clear from the submissions made to the Committee that there is no consensus in the community regarding fundamental ethical issues involved in modern reproductive techniques and procedures. This made the task of promulgating ethical guidelines even more difficult. The Committee endeavoured to enunciate certain principles to underline the many issues involved.

Tasmania

The Chalmers Committee issued its Final Report in June 1985.[55]

The Chalmers Committee was of the opinion that the practice of surrogacy in general and commercial surrogacy agreements in particular are unacceptable to the Tasmanian community at the present time and recommends that the practice of surrogacy should not be recognized as an acceptable procedure for the alleviation of infertility in

Tasmania. Yet the Committee fell short of prohibiting such procedures, believing that there is a possibility of permitting surrogate procedures in certain cases in the future. The Committee did not believe that criminal penalties were an appropriate means of controlling the practice of surrogacy but considered regulation by specific legislation to be in the best interest of the child. Such regulation would ensure that surrogacy agreements are controlled by the existing State agencies and would prohibit any private surrogacy agreement. Any financial recompense should be limited to the reasonable expenses incidental to the pregnancy and birth.

Amendments to the Status of Children Act 1974 (Tas.) have already been discussed.[56] The position in Tasmania is that, although like its Victorian counterpart the legislation establishes maternity in cases of donor ovum, unlike South Australia, Victoria, and New South Wales, it does not recognize de facto relationships and therefore children born in such circumstances fall outside the ambit of the legislation. This anomaly may cause hardship to those de facto couples who, having undergone the relevant fertilization procedures in those States, settle in Tasmania and find that the law here does not recognize the legal status of any children born as a result of those procedures.

New South Wales

The New South Wales Law Reform Commission is to conduct a full review of the issues involved in the practice of surrogacy but has yet to proceed with this project but has published a report on human artificial insemination.[57]

In the meantime, the Artificial Conception Act 1984[58] was enacted to provide for the paternity and legal status of a child born as a result of the use of donated sperm. It encompasses de facto couples, unlike the Tasmanian legislation, but does not provide for the maternity of a child in the case of a donated ovum. Recent amendments made by the Children (Equality of Status) Amendment Act 1984[59] provide in section 18A(2)(d) that the presumption which exists by virtue of section 11(1) of the Children (Equality of Status) Act 1976[60] prevails over the conflicting irrebuttable presumption under section 6 of the Artificial Conception Act 1984[61] which presumes the semen donor not to be the father. It appears that the amendments may provide a means for recognizing biological paternity in surrogacy cases.[62] Under section 11(1), a man may execute a paternity acknowledgment that he is the father of an ex-nuptial child and if it is countersigned by the mother or recorded in the appropriate register, that man is presumed, for all purposes, to be the father of the child. In this way, biological paternity, although initially precluded, may be re-instated and a rebuttable presumption is deemed to prevail over an irrebuttable presumption.

South Australia

In South Australia the Working Party on In Vitro Fertilization and Artificial Insemination by Donor[63] recommended that no change be made to the law to permit the practice of surrogacy. It did so on the grounds of the social complications which may arise from surrogacy agreements such as the surrogate's refusal to hand over the child, the illegality of payment being made in relation to the adoption of the child and concern of public policy. It would appear therefore, that the Working Party viewed surrogacy in the context of existing legislation and concluded that the existing law already prohibited the practice of surrogacy.

The Family Relationships Amendment Act 1984,[64] as is the case with the Victorian Act, provides for establishing paternity and maternity where donor gametes are used. The Working Party considered that the legislation provides a satisfactory basis on which a child may be legally recognized as the child of the marriage or the de facto relationship.

Unlike the position as evident from the New South Wales legislation, it did not like the use of the term "artificial conception" as it considered that it is the procedure used to fertilize the gametes which is artificial and not the conception.

Western Australia

The Meadows Committee was established with its term of reference confined to IVF. An Interim Report was released in August 1984[65] in which the Meadows Committee recommended that an evaluation of IVF in Western Australia to provide information as to the results and effects of IVF in order to further assist it in its work especially relating to de facto couples.

The Artificial Conception Act 1985,[66] as with the Victorian, South Australian, and Tasmanian legislation, establishes both paternity and maternity, including where donor gametes are used. Section 6(1) of that Act provides that the husband is the father of a child born as a result of a fertilization procedure undertaken by his wife with his consent. Where donated ovum is used in such a procedure, with the consent of the husband, section 5(1) provides that the wife is the mother of the child. Section 7 denies parentage to the donor of any ovum, or the donor of any sperm (who is not the wife's husband) used in the fertilization procedure. The Act, unlike its Tasmanian counterpart, applies to "de facto" and "legal" spouses. The provisions establishing paternity and maternity (sections 5 and 6) apply only to these spouses. Section 7, however, precludes parentage of the donors of genetic material, whether or not the woman who becomes pregnant has a "legal" or "de facto" spouse. The Act is silent as to the paternity

(and maternity) of a child born to such a woman. Similarly, where the woman is married, and her husband does not consent to the procedure, the Act is inapplicable. It is unfortunate that the Act perpetuates the legal fiction approach to paternity by using terminology which presumes that the husband has caused the pregnancy (subsection (1)(a) of section 6). As was pointed out in the Interim Report of the Asche Committee,[67] the role of the law is discredited when actual fact is misrepresented by law. A better approach is that used in the United States and also in the Tasmanian legislation[68] whereby the husband is treated in law as if he were the father.

United Kingdom

In the United Kingdom, the Warnock Committee made certain recommendations relating to the practice of surrogacy in its report presented in June 1984.[69] The Warnock Committee unanimously agreed that surrogacy merely for the convenience of the wife, is "totally ethically unacceptable".[70]

To the majority, the danger of exploitation outweighed the potential benefits to such an extent that they were unable to even approve of non-profit making surrogacy services. The Warnock Committee therefore proposed to render criminal the operation of both profit and non-profit making surrogacy organizations.[71] Also liable to

prosecution should be the actions of any person who knowingly assists in the establishment of a surrogate pregnancy.[72] This latter recommendation was intended to cover any form of advertisement in relation to a proposed surrogacy and even women who become surrogates and may even cover the infertile couple as well. Finally, the Warnock Committee recommended that all surrogacy agreements be illegal contracts and therefore unenforceable in the courts.[73] It would appear that no prosecution is envisaged against the infertile couple, although the agreement is rendered illegal.

It has been suggested[74] that a criminal sanction is unlikely to be effective since parties to a surrogacy arrangement need merely to assert that normal sexual intercourse occurred between the surrogate and the genetic father of the child who subsequently agreed to bring up the child. It is not unusual for a putative father to take such actions or even to pay substantial compensation or alimony to the mother of his illegitimate child.

Following the public outcry which followed the Baby Cotton Case in January 1985,[75] which involved a child born to an English woman for an American couple as result of a surrogacy arrangement made through an American agency, the Government rushed through Parliament the Surrogate Arrangements Act 1985 (U.K.). Although the Earl of Caithness (acting on behalf of the Government in the House

of Lords) denied that this was the reason behind the Act,[76] the Secretary of State for Social Services (Mr. Norman Fowler) stated that this was in fact the situation during the Second Reading in the House of Commons.[77] The Act falls short of implementing all of the recommendations of the Warnock Committee in that it is only directed at commercial agencies and does not deal with any altruistic, charitable or family arrangements.

Section 1 contains an extensive definition of a surrogate mother as a woman who carries a child in pursuance of an arrangement made before she began to carry the child with a view to the child being handed over to another person. Regard is to be had to all the circumstances, including the payment of money or money's worth, in deciding if the arrangement was made with such a view. However, the payment of money by the infertile couple to or for the benefit of the surrogate is not illegal under section 2(2) and (3). It is therefore inaccurate to state that the Act prohibits commercial surrogacy. By allowing the payment to the surrogate without any safeguards, the Act fails to protect either party from exploitation.

Section 2(1) prohibits certain activities if done on a commercial base, including taking part in any negotiations for a surrogacy arrangement. A person does an act on a commercial basis if he does it with a view to payment being received by himself or another. A solicitor may commit an

offence if his act could be construed as taking part in the negotiations or offering to negotiate or even compiling any information with a view to its use in the negotiation. However, the surrogate herself is exempted from the provisions of section 2(1) and so is a person who commissions a surrogate to carry a foetus for him - Section 2(2)(b). Presumably the use of the male pronoun indicates that it refers to the husband of the infertile couple.

Section 2(5) and (7) also prohibit commercial activities of a body of persons. Whereas an individual is guilty of an offence if he does an act on a commercial basis and payment is received or contemplated in respect of that act, a body of persons is guilty of an offence if negotiating the making of surrogacy arrangements is one of its activities and payment is made to it, whether or not the payment is connected to that activity. This may be important in the case of a charitable body which receives a donation after assisting the parties.

Section 2(4), (6), and (9) provide defences and a person may have a defence if it can be established that the payment was not made in respect of the surrogacy arrangement.

Section 3(1) makes it an offence to publish or distribute any advertisement offering to act as a surrogate or searching for a surrogate. The prohibition is exhaustive and covers all forms of advertising. A distinction is made

between those who publish - section 3(2) and (4), and those who distribute a prohibited advertisement - section 3(3) and (5). A person who publishes a prohibited advertisement is guilty irrespective of his state of knowledge, whereas a person who distributes a prohibited advertisement is guilty only if he knew the advertisement contained any indication relating to surrogacy.

Penalties for contraventions against the Act are a fine not exceeding $2,000 with the additional sentence of up to 3 months' imprisonment for an offence against section 2.

The major weaknesses of the Act are that it allows surrogacy but does not provide any framework for its regulation and that it ignores the issues of the status of the child and parenthood. To point to other legislation which deals with these issues in other contexts, is to ignore the problems that arise by applying legislation aimed at a particular set of circumstances to circumstances of a different nature. At present, a child born as a result of a surrogacy agreement is not deemed by law to be the child of the intended parents, the infertile couple. The child may be well looked after by his intended parents, but no legal status is attached to the relationship and the child remains a ward of the court. The presumptions of parenthood under the existing legislation work to the detriment of the intended parents and the child.

The majority of the Warnock Committee recommended that all surrogacy arrangements be made illegal and unenforceable - yet section 1(9) of the Act states that the Act applies to surrogacy arrangements whether or not they are lawful or unforceable. Thus, the legislation does not address itself to the legality or otherwise of surrogacy arrangements. This may be interpreted as inferring that some surrogacy arrangements may be enforceable. Matters relating to the custody and upbringing of a child is governed by section 1 of the Guardianship of Minors Act 1973 (U.K.) and, therefore, the terms of a surrogacy agreement would not prevail over the child's best interests. A term requiring the surrogate to hand over the child would not therefore be enforceable. The Minister for Health, Mr. Kenneth Clarke, resisted attempts to amend section 1(9) as, in his opinion, a surrogate should be permitted to rely on the agreement in some instances.[78] One such case would be that a surrogate who stopped work in reliance on a promise to reimburse her for loss of earnings should be able to recover for that loss. The problem with this approach, as one writer has suggested,[79] is to decide which terms are valid and on what basis should they be so decided.

By limiting the Act to commercial agencies only, the Act leaves the door open for non-profit organizations to make surrogacy arrangements without attracting criminal liabilities, provided the use of any kind of advertisement,

prohibited under section 3, is not resorted to. By prohibiting the use of any kind of advertising, it would be very difficult for a couple to seek an unknown person as a surrogate and for a woman unknown to the couple to offer her willingness to act as a surrogate. Only by word of mouth, or through family or friends is the possibility left open for some arrangements to be made. In such circumstances, family arrangements may well be the only way for infertile couples to achieve their desire to have a child who is biologically connected to one of them.

In order to rectify some of the ambiguities of the Act, the Surrogacy Arrangements (Amendment) Act 1986 (U.K.) removes the immunity from prosecution of the surrogate and any person commissioning her. It also extends the Act to cover non-commercial surrogacy agencies. Finally, it makes it an offence to assist or take part in the establishment of a pregnancy knowing that it is in pursuance of a surrogacy agreement.

Ontario, Canada

In contrast to the Warnock and Waller Reports, the Report of the Ontario Law Reform Commission[80] concluded that modern law must reflect the benefits of the new technologies and the hopes of infertile men and women while guarding against those excesses seen as harmful to society in general. The Commission based its recommendations on the premise of what is in the best interest of the resultant child.

The Commission recognized that the ethical, social, moral and legal issues of the problem had to be faced. Instead of adopting one overall approach to artificial reproduction in general, the Commission proposed a functional and pragmatic approach formulating particular responses to particular problems.

In regard to surrogacy, the Commission was of the view that as a matter of public policy, surrogacy should be permitted. It also recognized the fact that if prohibited, surrogacy would not disappear, but would continue unregulated. The Commission recommended that surrogacy agreements be enforceable provided they are supervised, and approved by the courts. The suitability of participants and the terms of the agreement would be subject to the scrutiny of a judge. The agreement would provide for certain eventualities such as abortion and death of an intended parent. The resultant child would be the legal child of the

infertile couple who contracted with the surrogate.

The dissenting member of the Commission, Vice-Chairman Allan Leal, based his criticism against surrogacy on the grounds that the procreation and rearing of children should be within the marital union and that surrogacy was an exploitative arrangement. It cannot be said today that the long-life partnership of marriage is the prevailing standard pattern. From a point of view of sexual roles in society, marriage is often seen as the relationship in which a woman is exploited by her husband and society's male-dominated views of her place in the marriage. Although the possibility of exploitation of women in surrogacy arrangement does exist, under a system of regulation and supervision, that possibility is greatly reduced. The opinion has been expressed more than once that the outcry of moral indignation against surrogacy would not be heard if men were the ones bearing a child - the freedom men have to control their sexual lives should extend to women, especially in decisions affecting their sexual roles.[81]

If the proposals put forward by the Ontario Law Reform Commission were to be accepted in all jurisdictions the cause of equality would be enhanced. Women should be free to make their own decisions in the areas of procreation, and defining their sexual roles and responsibilities. The traditional views of motherhood are those formulated by men and perpetuated in law by judges nearly all of whom are

male. Support of surrogacy should be based on equality.[82]

The importance of the Report lies in its thoughtful approach and analysis of all the issues involved in human artificial reproduction, including the practice of surrogacy. The Commission realised that the moral, social and psychological issues had to be faced. In the view of the Commission, the best interests of the child formed the basis of its recommendations. It therefore advocated a system which permitted private agreements but which protected the interests of all parties by subjecting the agreements to the scrutiny and supervision of the court. By recognizing that there exists a genuine demand for artificial means of alleviating the childlessness of infertile couples, the Commission accepted the fact that new technologies and procedures were available and should be used to the benefit of these infertile couples. This attitude is in stark contrast to views stated in other Reports.

United States

In the United States, no formal reports of any Committees have been issued but a few States have proceeded to draft legislation in the area of surrogacy, but with varying results.

In Michigan, a Bill was introduced to regulate the practice of surrogacy which includes criteria for suitability of infertile couples and terms of the contract.[83] The biological father and his wife are deemed

to be the legal parents of the resultant child provided the wife acknowledged that her husband was the biological father. Presumably, the situation where a donor is used for insemination of surrogate is not contemplated by the Bill. It only alleviates the position of a fertile husband who has an infertile wife and not the infertile husband.

The Kansas legislation[84] validates a surrogacy agreement if written consents of all parties (including the husband of the surrogate) were obtained and certain requirements as to the terms of the contract were met.

The resultant child is presumed to be the child of the infertile couple, thus making adoption unnecessary. Where the surrogate refuses to hand over the child, the child is deemed to be the child of the surrogate and the husband of the infertile couple (again presuming that he has donated the semen). The Bill does not adequately define the status and responsibilities of each party if any breach of the term of the contract were to occur. This is unsatisfactory as far as the child is concerned.

The South Carolina Bill[85] relies on the adoption procedure to establish parenthood. At birth the child is presumed to be the child of the surrogate and her husband, until an adoption order under the Bill is made in favour of the infertile couple. This overcomes the problem prescribed by the adoption statute forbidding payment. This approach

ensures that the child has a legal status at all times and parental responsibilities are always in one parental couple or other. Unlike the case in Kansas, the supervision of the court goes beyond the formation of the contract by continuing through the pregnancy until the adoption procedure is finished.

The most recent Californian Bill[86] is a bold attempt to end the confusion surrounding surrogacy agreements and deals with many situations overlooked by earlier legislation. Where the surrogate has donated the ovum and is the genetic mother, the procedure for adoption is incorporated into the Bill and is one of the prescribed terms of the surrogacy agreement. The surrogate is required to relinquish all parental rights to and the custody of the child, and the intended parents are obliged to take custody of and parental responsibility for the child, immediately after the birth, regardless of whether the child suffers from any physical or mental disease.

The Kansas, Michigan, South Carolina, and California Bills all specifically permit the payment of a fee and from differing viewpoints. As the child is deemed to be the legitimate of the infertile couple, the payment of a fee in Kansas is not viewed as payment for the purchase of a child. Such payment may be decided by the terms of the agreement. The South Carolina Bill permits payment as compensation for the loss of income, the additional duties involved in

childbearing and the restrictions on normal activities during pregnancy. However the amount of such compensation is to be strictly controlled by the court. The California Bill also allows payment to the surrogate as compensation for her services. In Michigan, payments may be made in respect of reasonable medical, legal, and living expenses, and for loss of work time. However, no discounting is allowed for stillbirth or a defective child.

Most of the Bills contemplate the use of the services of a surrogate by single individuals. The Kansas Bill implies that the procedure is only available to married heterosexual couples, and that the surrogate mother herself be married by the use of the terms sperm donor and his wife and surrogate mother and her husband. The Californian Bill enables couples, whether married or not, and single persons of either sex, to enter into a surrogacy agreement.

The South Carolina Bill limits it to married couples by reference to the natural father and his wife.

Conclusion

Most of the Reports of the Committees recommended that surrogacy agreements should be null, void, illegal and unenforceable.[87] Only the Chalmers Committee in Tasmania in its Report[88] advocated that surrogacy arrangements should not be prohibited on the ground that in some instances such arrangements should be permitted. The Demack

Committee in its Report[89] agreed with the Report of the Chalmers Committee[90] that no criminal liability should be attached to participating in surrogacy arrangements. However, the Reports of the Waller Committee[91] and the Report of the Warnock Committee[92] recommended criminal sanctions regarding advertising and payments made in respect of surrogacy arrangements. These recommendations have now been incorporated into legislation in Victoria[93] and the United Kingdom.[94]

The desirability of legislation which prohibits and criminalizes the practice of surrogacy is to be doubted, given an infertile couple's obvious desperate need to have a child biologically related to at least one of them. So long as infertile couples are unable to obtain a child by other means, the law will continue to be broken. When law is contravened, the legal status of the children born as a result of surrogacy arrangements will be in limbo or it will be decided under existing law which is not designed to cater for such situations. This will result in many difficult cases being decided under entirely inappropriate rules.

To suggest, as the Asche Committee did in its Report,[95] that legislation which prohibits the practice of surrogacy would prevent the practice from occurring is to ignore past experience in the area of abortion. When abortion was made a criminal offence, it continued to flourish as it met a desperate need. It continued, unabated

and unregulated, often performed by non-medically trained persons, causing ill-health, and in some cases, death of women.

It is premature to criminalize surrogacy which, if adequately regulated, may provide a successful means of alleviating infertility. The problems associated with the refusal of a surrogate to hand over the child or the refusal of an infertile couple to accept a deformed baby are capable of being solved.

A preferable approach is to permit surrogacy in certain well-defined circumstances subject to regulation and the control of the courts or an appropriate government body. The enlightened approach of the Ontario Law Reform Commission and some States in the United States has much to recommend it. In the States of Alaska and Rhode Island legislation has been enacted specifying that surrogacy contracts are legal and enforceable.[96] The Californian Bill provides for the judicial enforcement of surrogacy contracts which the Bill declares "are not per se against sound public and social policy".[97]

CHAPTER 4

SURROGACY ARRANGEMENTS

Public Policy

The term public policy is difficult to define but it can be said that conduct against public policy is conduct that is "injurious to and against the public good".[98]

As the Demack Report pointed out,[99] there is disagreement in society on what might be regarded as the most basic issues of public concern. Certainly, there is little consensus on the matter when applied in the area of reproductive procedures. On the one hand, there is the opinion that the expectation of human happiness justifies the application of any new reproductive technology or procedure, and on the other, is the opinion that to allow any technical or third party intrusion into the marital relationship was to violate the traditional notions of the sanctity of marriage. The separation of procreation from the marital relationship is seen by many as a dehumanizing factor which threatens the existence of the marriage and the family while also weakening the biological links in the family. However, the purpose of reproductive techniques and procedures is not to replace normal procreation methods but to enable a couple to have a child which otherwise they would be unable to have.

The notion that an agreement by a parent to transfer parental rights and liabilities in respect of a child is unenforceable as being against public policy appears to be based on the maxim *ex turpi causa non oritur actio* - an action does not arise from an illegal cause. It is clear from Godblot v Fittock[100] that the maxim is only one element of the wider concept of public policy. In the law of contract, the maxim signifies that a contract which is entered into for an illegal purpose will not be enforced by the courts.[101]

Before a court acts on this principle, due consideration ought to be given to the extent to which public harm may occur and the nature of the moral quality of the conduct in the light of community standards. As times change, public policy relevant to a particular issue also changes. As it is a very elastic notion, public policy will also depend on the particular judge's view of whether a particular agreement conflicts with the concept of public morality or decency. The consequences at law of entering into a contract apparently against public policy should vary in severity according to the degree of impropriety on the part of the parties.[102] A contract which is prejudicial to the status of marriage is commonly referred to as void. A surrogacy contract, seen in this context, may be viewed as void so far as it offends against public policy.

Terms of Surrogacy Agreements

In arriving at a conclusion whether a surrogacy agreement is unenforceable as against public policy, it is useful to examine the type of provisions normally found in such agreements as formulated in the United States. It is there that the practice of regulating surrogacy arrangements within the framework of contract principles began. Noel Keane, a lawyer in the State of Michigan, arranges contracts between infertile couples and surrogates.

A typical contract would provide for the husband of an infertile woman to agree to the following:-[103]

1 - to have his sperm used for the artificial insemination of the intended surrogate.

2 - to accept the fact that he is the natural father of any child or children born from such insemination and take custody of such a child or such children.

3 - to pay for all medical expenses for the period from insemination till 6 weeks after the birth of the child, relating to the pregnancy, childbirth, paternity testing, travel expenses, life insurance. A deposit is paid by the natural father and the full amount is paid over to the surrogate mother after his paternity has been proven.

4 - to accept all the children born in a multiple birth.

5 - to assume legal responsibility of an abnormal child.

The intended surrogate for her part agrees to the following:-

1 - to be artificially inseminated with the sperm of the husband of the infertile couple.

2 - to abstain from sexual intercourse 2 weeks before being artificially inseminated.

3 - to carry a child resulting from such insemination to term.

4 - to undergo such medical testings and examinations as may be necessary for her health or for the health of the child.

5 - to waiver rights to abort the child except on medical grounds.

6 - to abstain from drinking alcohol, taking unprescribed drugs and smoking.

7 - to surrender all parental rights over the child.

8 - to deliver the child into the custody of the infertile couple after birth.

9 - to return any money already paid if paternity tests show the sperm donor is not the father of the child.

The husband is required to give his consent to the artificial insemination of his wife to rebut the presumption that the child is a child of their marriage, and promises to make no claim to the child. The wife of the sperm donor on her part agrees to adopt the child.

One of the main reasons that a surrogacy agreement is regarded as being unenforceable is the principle that the rights and duties of a parent are not property rights and therefore cannot be assigned to others.[104] This approach overlooks the fact that the rights and duties of one parent - the surrogate - are transferred to the other parent - the natural father and not to a stranger. Under AID legislation, a husband who consents to the artificial insemination of his wife is deemed to be the father of the resultant child.[105] Therefore, in a surrogacy arrangement, a child who is born as a result of artificial insemination and with consent of the husband of the surrogate mother is the legal child of her husband. There arises a complex situation unintended by the legislation whereby the natural mother and legal father of a child wish to transfer parental rights and obligations to the natural father of the child who it has always been intended should be the father in fact and who will raise the child. Such intentions are not

detrimental to the welfare of the child and therefore should not fall within the ambit of the principle of the inalienability of parental rights and duties. Where the wife has contributed the ovum and is the genetic mother, the agreement may be seen as payment for the use of a womb rather than payment to buy a child.

In the State of Kentucky, the Attorney-General issued an opinion[106] that surrogacy agreements are illegal and unenforceable as they amounted to baby selling, and contravened State Statutes which allowed applications to terminate parental rights only if they were made 5 days or later after the birth of the child. However, an agreement which provides for the parental rights to be terminated at the earliest legal opportunity would not breach such statutes. The Attorney-General of the State of Oklahoma also expressed an opinion[107] that surrogacy agreements are unenforceable on the ground that they violated Statutes which prohibited trafficking in children.

Breaches of Surrogacy Agreements

Even if it is accepted that a surrogacy agreement is enforceable on the ground that such an agreement would not offend against the principle of public policy, a plethora of legal and ethical problems arise where a breach of any of the provisions in the agreement occurs.

Although surrogacy agreements may be carefully drawn up to prevent the participants from changing their minds and to anticipate the many complex situations which may arise, it may not be possible to establish the means by which any breaches of the terms of the agreement may be settled by the court. Any term of the agreement which the court finds to be contrary to public policy may be struck down.

An examination of the breaches which may occur and the remedies available will demonstrate the difficulties the parties to surrogate motherhood arrangements will have to face.

1. Abortion - Where the surrogate wishes to abort the foetus, it is unclear if she can be legally prevented from so doing by the genetic father of the foetus.

In the United States, abortion raises the issue of a constitutional right to privacy which has usually been considered in te rms of a State's right to regulate. The U.S. Supreme Court in Carey v Population Services International[108] in overturning a state statute prohibiting the distribution of contraceptions to minors analyzed the right to privacy as being one aspect of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment.[109] The Court recognized that, while the outer limits of the right of privacy had not been marked by the Court, the right of an individual to make certain important

personal decisions without unjustified government interference was clear. The decision whether or not to beget or bear a child is one of the protected choices.

In Roe v Wade,[110] the U.S. Supreme Court rejected the argument of a woman's absolute right to terminate her pregnancy at any time. However, the Court held that a woman had the right, in consultation with her physician, to terminate her pregnancy in the first trimester, based on the fundamental right to privacy. The U.S. Supreme Court has also held that this right to abortion is a right which does not depend on the consent of her husband.[111] In the United Kingdom, a husband's consent to his wife's abortion is similarly not required.[112]

In Australia, in the case of the Attorney-General of Queensland (Ex. rel. Kerr) and another v T,[113] the Supreme Court of Queensland rejected a natural father's application for an injunction to prevent the unmarried mother of his child from aborting the child, even though such an abortion might be a breach of the criminal law. The court held that it would not be a proper exercise of discretion to grant the injunction on the assumption that the woman proposed to commit a crime as the determination of that issue is for the jury. To act on such an assumption would be to overstep the limits to which the law should intrude upon personal liberty and privacy in the pursuit of moral and religious aims.

If a woman's husband cannot veto his wife's decision to abort, it is unclear whether in a surrogacy agreement the infertile couple, who only have a contractual relationship with the surrogate, have a right to stop such an abortion, even where the agreement specifically prohibits such an action on the part of the surrogate. Certainly, if the surrogate does abort, she is in breach of a term which is the very essence of the agreement. The usual remedy available in contract is an action for damages and in a surrogacy agreement the infertile couple may recover any expenses already paid. While these damages for monetary harm may compensate for any financial loss, they do not take into account any emotional harm suffered by the infertile couple in losing the child.

2. Proper self care - Where the surrogate is in breach of any term of the agreement which prohibits smoking, drinking, and taking medication without medical consent, and that breach results in a miscarriage or a defective child, many emotional issues are raised. The expectations of the infertile couple of having a child, or having a healthy child, have been impaired. The couple may have an action for damages for breach of terms of the contract or sue in tort in negligence.

In an action for negligence, the infertile couple must prove that the surrogate owed them a duty to maintain an adequate level of care during her pregnancy. If the

surrogacy agreement contains explicit provisions regarding this level of care, the extent of her duty is clear. If the agreement does not specify the level of care, the standard of care must be the same that a reasonable pregnant woman in the circumstances would undertake. The law regards the concept of reasonableness as flexible to be applied according to the circumstances in each case.

The liability of duty of care is not merely a duty not to act carelessly, but is "a legal duty not to be careless .....".[114] Not every bit of carelessness is actionable. "There has to be a breach of a duty which the law recognizes .....".[115] Since the "categories of negligence are never closed",[116] it is always open for Parliament or the courts to expand the existing areas of liability by creating new situations of duty of care. Although a surrogate, in maintaining proper self care, protects the welfare of the unborn child, the duty of care may be owed to the infertile couple as the intended parents of the child who may suffer nervous shock. The test of liability for shock "is foreseeability of injury by shock".[117] If the infertile couple establish that a duty of care is owed them by the surrogate and that a breach of this duty has occurred, they must then prove that the breach caused damage in order to succeed. "Causation must, primarily, be a question of fact .....".[118] The courts appear to isolate those factors but for which the damage would not have been

sustained from what appears to be the most responsible cause. In the case of a defective child, it may be difficult to trace the origin or cause of some congenital defects. Although it is generally accepted that alcohol consumption may cause birth defects, it may not be possible to prove that a specific birth defect is the result from such consumption.

A surrogacy agreement may contain a provision for specified damages in the event of a breach. Where such a specified sum is a genuine pre-estimate of the loss that will be suffered because of the breach, the infertile couple would be entitled to recover their liquidated damages where a breach occurs without having to prove any actual damage. Liquidated damages have been defined as "... the sum which the parties have by the contract assessed as the damages to be paid, whatever may be the actual damage.".[119]

However, if the specified sum does not bear a reasonable relationship to the expected damages the court will interpret the provision as a penalty provision and will not enforce it. "The destination between penalties and liquidated damages depends on the intention of the parties to be gathered from the whole of the contract.".[120]

Where payment of money damages will be inadequate, either because the harm is not clearly quantifiable or because money cannot adequately compensate for the damage suffered, equitable relief may be available.

The grant of a mandatory injunction is issued at the discretion of the court. The court will only grant an injunction where the plaintiff shows a very strong probability that grave damage will accrue to him if the injunction is refused or that damages, if rewarded, would not be a sufficient remedy.[121]

If a surrogate fails to obtain an appropriate level of medical attention, the infertile couple should have little difficulty in showing that damages would be inadequate in such circumstances. For the infertile couple to be entitled to an injunction, it is not necessary to prove that the damage caused is substantial.[122] However, a mandatory injunction, compelling the surrogate to undertake certain activities in order to maintain proper self care may not be granted if it demands close personal supervision by the court. Equitable relief by way of specific performance will not be available if there is an adequate remedy in law,[123] or where damages does not afford adequate relief. The principle "has always been that equity will only grant specific performance if, under all the circumstances, it is just and equitable so to do."[124] The subject matter of a surrogacy agreement is certainly unique and it is doubtful that damages are either adequate or appropriate in the circumstances. However, a contract for personal services is not specifically enforceable,[125] and the surrogacy arrangement may be viewed as an agreement for personal services. This is important if the infertile couple were to seek relief by way of a mandatory injunction as the courts have refused the issue of an injunction

if it, in effect results in the specific enforcement of a contract which is not otherwise specifically enforceable.[126]

It appears, therefore, that although the equitable relief of mandatory injunction or specific performance is more desirable from the infertile couple's point of view, the courts may be reluctant to grant such relief. On the other hand, the remedy of damages may be inadequate and in any case difficult to quantify. It is likely therefore that the term of a surrogacy agreement to obtain adequate medical care and attain a proper level of self care may be unenforceable.

3. Handicapped child - Where an infertile couple refuses to accept a handicapped child born as a result of a surrogacy agreement, it may be difficult to determine an appropriate remedy. Specific performance is unlikely since a court would not force the couple to take custody of an unwanted child as this would not be in the interests of the child.

The husband should not be able to deny responsibility for the child as not only is he the genetic father of the child but has also contracted to accept the child. The surrogate may be able to claim damages from the infertile couple to cover the cost of rearing the child she had not expected to keep.

However, the surrogate is debarred from claiming damages for the breach if she fails to take all reasonable

steps to mitigate the loss caused by the breach. However, the only way the surrogate may mitigate against loss she would suffer in incurring the expenses of bringing up the child would be to put the child up for adoption. Where the surrogate does not wish to do so, it is unlikely that a court would force adoption as that may be contrary to the welfare of the child.

In Australia, the court may also make maintenance orders against the father of the child under the various maintainance acts.[127]

Where none of the parties to the agreement is willing to accept the child, the surrogate should be able to offer the child for adoption.

Genetic, physical, and psychological screening of all parties to a proposed surrogacy agreement should help to minimize the possibility of an infertile couple who are unwilling to accept a defective child entering into such an agreement. A genetic evaluation of the proposed surrogate would help to prevent the possibility of the birth of a child with a genetic deficiency. Prenatal testing may also discover abnormalities in the foetus. However, the question then arises whether the infertile couple may then require an abortion to be performed.

The Surrogate Parenting Associates[128] defined certain factors which were to be taken into account by that organization in the screening of potential surrogate mothers.[129] She had to be a married woman of good health with no transmutable genetic disorder who had already given birth to at least one healthy child.

Any physician who assists in a surrogacy agreement by carrying out the screening procedures should also provide counselling to all the parties. If a physician fails to properly carry out screening procedures as a result of which a handicapped child is born, it is questionable whether any of the parties may sue the physician for negligence or malpractice. It may be difficult to prove that a particular action or lack of action on the part of the physician caused the handicap. If this causal connection is established, the physician may be liable in negligence as he owes a professional duty of care to the infertile couple and the surrogate to detect possible genetic defects. The failure to do so prior to insemination will result in the birth of a child who may inherit the genetic abnormality. The failure to do so during early pregnancy may debar the parties from the option of an abortion.

However, the measure of damages in such a case would be almost impossible to quantify. The court cannot be expected to calculate a sum of money when faced with the task of comparing the value of life to the value of never

having been born or having been born handicapped.

It should be remembered that the seemingly callous approach of the infertile couple in refusing to accept a handicapped child is not unique to situations involving surrogacy agreements. The same reactions occur where a handicapped child is born to a fertile couple. A surrogacy agreement should not be viewed as undesirable solely on the ground that in some cases a handicapped child may be rejected by his intended parents. This argument in some respects resembles the issues involved in comparing the benefit of not being born at all with the value of a life, albeit an impaired life.

As is the case in ordinary family situations, the handicapped child may be cared for by foster parents, in an institution or perhaps even put up for adoption. The welfare of the child concerned will dictate his future.

4. Disputed paternity - Another situation in which an infertile couple may reject a child apparently born as a result of a surrogacy agreement is where the child is not the genetic child of the intended father. A provision for compulsory blood tests and other paternity tests after birth of the child should be part of the agreement to establish the child is in fact the child of the intended father. Proof that a child is not the biological child of the intended father is usually the result of the surrogate

mother breaching a term of the contract to abstain from sexual intercourse with any man within a specified period prior and after insemination with the intended father's sperm. There has been one case of disputed paternity in the U.S.A. on this issue.[130] M, the intended father, refused to accept a child born to S with whom he had contracted to provide a child and who had been artifically inseminated with his sperm. The child was born with a disorder which showed mental retardation. Blood and genetic tests confirmed that M was not the father of the child, but that the child was the child of S and her husband. M sued S for not producing the child he had contracted for, S sued the physician, lawyer, and psychiatrist involved in the surrogate motherhood programme for not advising her about the timing of sexual intercourse with her husband. The surrogacy agreement included a provision that S abstain from sexual intercourse until pregnant as a result of being inseminated with the sperm of M. S also sued M for violating her privacy by making the matter public (the results of the paternity tests, which showed that M was not the father of the child, were announced on a well-known television programme). S also claimed that the child's illness had not been passed on by his genetic parents but by a virus transmitted by the sperm of M.

The end result was that S and her husband accepted the child into their family but the case serves as an example of

what can go amiss when the terms of a contract and their implications are not fully understood by the parties.

Another dispute of paternity was raised in a recent case when a surrogate refused to hand over her child to an infertile couple, Mr. & Mrs. S., after agreeing to a surrogacy arrangement.[131] The surrogate, Mrs. W. claimed that she had sexual intercourse with her husband around the same time that she was artificially inseminated with the sperm of Mr. S. and alleged that her husband might be the child's father, despite having had a vasectomy. Superior Court Judge Harvey Sorkow (New Jersey) ruled that temporary custody of the child be given to Mr. & Mrs. S. until the validity of the surrogacy agreement is decided.

5. Failure to pay agreed sum - The surrogate should be able to recover expenses and costs agreed to if they are delineated in the agreement, and if they are not, they may be ascertained by assessing the actual expenses and costs incurred.

If the surrogate is a single woman, it is possible that she may claim maintenance for herself and her child.[132]

If she is married, it is doubtful that she can make any financial claim in respect of the child against the sperm donor as natural father as under artificial insemination legislation[133] it is her husband who is treated in law as the father of the child. If the agreement stipulates a sum of

money which is in excess of a reasonable amount for actual expenses, it may be viewed by the court as payment with a view to the adoption of the child. As will be discussed later,[134] such a payment is prohibited under the various adoption laws.

6. Divorce or death of infertile couple - The effect of this doctrine of frustration is to "bring the contract to an end forthwith, without more and automatically".[135] If the intended parents were both to die before the birth of the child, their promise to accept and adopt the child cannot be fulfilled. The contract is void for impossibility of performance. This doctrine of frustration is one which is merely used as a possible defence to an action for breach of contract due to non-performance of part or all of a contract. In a surrogacy situation, it may provide a defence to the estate of the couple against a claim by the surrogate for the specified sum. The general rule that a party to a contract is strictly liable to perform a promise[136] was mitigated by the case of Taylor v Caldwell[137] which held that where the fulfilment of a contract is frustrated by extraneous factors for which neither party is responsible, the liabilities of the parties are discharged. What will or will not amount to frustration depends on the facts of each case. The courts will determine the case on the basis of what is fair and just.[138]

In a contract for personal services, the courts generally assume that the parties intended that the contract will not be binding on either if performance is prevented or made impossible by the death of either party.[139] On this basis, it is most likely that a claim by the surrogate for unpaid money due will fail against the defence of the doctrine of frustration in the event of the death of the couple. If only one of the couple were to die, this defence would be weakened by the fact that the surviving partner may be well capable of accepting the child.

If the impossibility or frustration of the contract is self-induced by one party, as in a divorce, that party cannot rely on the doctrine of frustration to discharge him from his obligation.[140] In a situation where the intended parents are divorced before the birth of the child, it may be argued that there is no longer a couple to whom the child is to be handed over. The surrogate may be excused from handing over the child and may be entitled to claim costs already incurred but not yet paid. However, neither party is entitled to recover any money already paid.[141]

7. Relinquishment of Child - If the surrogate refuses to hand over the child and the infertile couple suffer distress, monetary damages are inadequate to compensate for the loss of a child and are not usually recoverable in contract actions. In the United States, the accepted view is that the law does not impose a general duty of care to

avoid causing mental distress.[142] However, an action for breach of contract on the basis of intention to inflict mental or emotional distress may be available.[143] However, such an action is not a viable proposition, as the surrogate is not likely to have sufficient funds to meet any damages awarded. An action for specific performance is an alternative remedy. However, in such a case, the court must determine whether removal of the child from the surrogate will be in the best interests of the child. It is clear from A v C[144] that these matters are decided with reference to the welfare of the child. The court is unlikely to be biased in favour of the natural father by virtue only of a provision in the contract.

From the surrogate's point of view, if she refuses to hand over the child as agreed, she may well succeed in action for child support against the natural father where the court decides she has a right to keep the child. However, it has been argued that it is best for all concerned to have the child in a stable financial environment with its natural father and his wife rather than in an impoverished environment with only one parent to raise it.[145]

The effect of relinquishing a child on a surrogate mother may be only partly compared to the effects of relinquishing a child for adoption. Research in the latter area has found the effects to be a long lasting sense of loss.[146] However, relinquishing a child into the care of an infertile couple

according to a pre-arranged agreement does not inherently contain the same emotional elements as adoption following an unwanted or unplanned pregnancy. In a study carried out by Parker[147] of women applying to act as surrogates, most of the women denied the importance of their biological contribution to the child. They minimized the anticipated feelings of loss and sadness by emphasizing the experiential contribution to the development of the child.

Adoption laws and Financial Aspect of Surrogacy Arrangements

In order for a surrogacy agreement to be illegal, it must violate conduct prohibited by law. In the absence of specific legislation on the issue, the courts have turned to the concept of public policy and existing law to resolve some of these concerns - in particular the laws prohibiting the sale and purchase of a child and the relinquishment of parental rights other than by adoption.[148]

Under the various adoption laws, it is a criminal offence to make a payment or be involved with any arrangements to make payment with a view to adopt a child without the approval of the court of the Director of Welfare.[149] The purpose of such a provision is to prevent black market trafficking in babies.

It has been argued that a provision prohibiting payment in connection with adoption, does not apply to a situation where one party to the arrangement is the natural father of the child.[150] Such a parent cannot be said to be purchasing

his own child and the procedure resembles custody rather than adoption.[151] Where adoption of the child is not contemplated by the parties, any payment made to the surrogate could not be viewed as payment in connection with an adoption and therefore is not illegal. Where payment is not made to the surrogate, the issue of illegality does not arise and therefore adoption may proceed. It has also been argued[152] that statutes forbidding payment in connection with adoption do not apply to surrogacy arrangements as they were not drafted to meet such situations but were designed to prohibit blackmarket baby selling. Furthermore, it has been argued[153] that even if a surrogacy arrangement requires the adoption of the child and falls within the ambit of a prohibition on the payment of a fee in connection with that adoption, the arrangement does not violate the prohibition as the payment is not for a child, but for the services offered by the surrogate such as pregnancy and childbirth. The fact that these statutes do not purport to make it a crime to pay someone for becoming pregnant or having a baby confirms that surrogacy was never the target of the statutes.[154]

The prohibition on the payment or reward for or in consideration of an adoption, consent, and transfer of a child[155] appears to be strengthened by the provision enabling a court to refuse to make an adoption order in reliance on a consent obtained by "fraud, duress or other improper

means".[156] The financial gain offered by the infertile couple may be viewed as coercion or an improper means of obtaining consent to the adoption of the child. However, the offer of payment to do an arduous task is not in itself coercive. The surrogate is aware of what is involved in pregnancy and childbirth and makes an informed choice to participate. The payment is in consideration of the risks she undertakes. It is normal practice for a person to expect remuneration for services voluntarily rendered. Without payment, a person is unlikely to carry out such a serious undertaking.

The aspect of commercialism leads to the notion that the child is treated as a consumer product. As Keane points out,[157] it is difficult to understand why the commercial aspect of surrogacy is viewed as being inconsistent with public policy. A person usually satisfies his needs in a commercial way. A profit motive in a surrogacy arrangement should not mean that such an arrangement should be prohibited. It is more an argument for regulation.

The question of whether the infertile couple are buying a child or the surrogate's personal services may not be the only question at issue. An additional question may be whether the couple are "buying" the right to rear a child by paying the mother to beget and bear one.

As well as the argument that surrogacy may involve exploitation of a surrogate, the necessity or desirability of payment of a fee may preclude the less well-off infertile couple from participating in such an agreement. This could be viewed as a means test on parental suitability. Only those couples who can afford to pay the fee for the services of a surrogate (in the vicinity of US $10,000) are able even to contemplate surrogacy as a way of alleviating their childlessness. Unless they are successful in the long adoption queues, they are destined to have their desire to be parents thwarted.

Surrogacy may be likened to early adoption in that the surrogate has consented to relinquish her child to an infertile couple after its birth. The difference is that in a surrogacy agreement the surrogate makes this decision before becoming pregnant. This fact poses problems for the infertile couple if they wish to apply for adoption. Section 26 of the Adoption of Children Act 1968 (Tas.)[158] provides that a court will not rely on any consent given before the birth of a child, or within 7 days after the birth, unless the woman is medically fit. In addition, consent once given, may be revoked any time before 30 days after the consent was given or before the day an adoption order is made, whichever comes first (section 23).

Even if a surrogacy agreement were to provide for consent to adoption to be given in accordance with these provisions, the infertile couple run the risk of the surrogate changing her mind. Once consent has been revoked, the only recourse the infertile couple may have is to persuade the court to dispense with her consent under section 27(1)(e) on the basis that special circumstances exist and, under section 11, that the adoption is in the best interests of the child.

Cases

There has been conflicting authority on the issue of payment in surrogacy agreements. In the opinion of Keane,[159] several decisions in the United States suggest that public policy objections may not necessarily be relevant in cases of payment made for adoptions where the adoptions are made in a family context.

In re Estate of Shirk[160] a mother agreed to the adoption of her child by the child's grandmother in exchange for the grandmother's promise to bequeath her estate to the mother and child. The executor of the will claimed that the agreement was void as against public policy as it constituted the barter of a child.

The Kansas Supreme Court was of the opinion that a "contract of a parent by which he bargains away for his pecuniary gain the custody of the child to a stranger and

attempts to relieve himself from all parental obligations, placing the burden on another who assumes it, without natural affection or moral obligation, but only because of the bargain, is void as against public policy".[161]

The court distinguished the case from the usual public policy considerations because it involved a family compact and was not without natural affection or moral obligation.

In a surrogacy situation, the agreement may be seen as a family compact since it involves the biological father and biological mother both of whom have parental obligations towards the child.

Although a pecuniary motive may be important to the surrogate mother in entering the contract, the fact of pecuniary gain to the mother in Shirk's Case[162] did not deter the court from approving the agreement. The case, according to Keane,[163] demonstrates that it is going too far to lay down a general rule that payment for consideration for adoption should always be adverse to the child's interest. In surrogacy arrangements, the rule should not apply where there is natural affection and moral obligation on the part of the adopting parent towards the child. Surrogacy agreements are agreements between parents, and objections to such agreements on the ground of "baby-buying" lose much of their argument in surrogacy situations.

The State of Michigan Court of Appeal in Doe v Kelley[164] held that the adoption laws, although not directly prohibiting surrogacy agreements, did preclude any payment in connection with the use of adoption procedures to alter the legal status of a child born as a result of such an agreement. In that case, a couple, who wished to pay an intended surrogate a $5,000 fee, sought a declatory judgment that Michigan Statutes, prohibiting payment in connection with adoption of a child or release of parental rights, were unconstitutional. The court rejected the claim that the Statutes violated the childless couple's right to privacy, as there existed compelling State interest in forbidding any financial arrangements involved in the creation of family relationships. Any change in policy would, in the opinion of the court, have to come from the legislature. The case was affirmed by the Michigan Court of Appeals[165] which upheld the view that although the Statute did not prohibit surrogacy arrangements, they did preclude payment in conjunction with adoption. Both the Supreme Courts of the State of Michigan and the United States have refused to hear the case on appeal.[166] The logic of the case appears to be that surrogacy for a fee is a case of baby selling. As all baby selling is (should be) illegal, surrogacy for a fee is (should be) illegal.

However, the Statute involved did not address itself to a surrogacy situation but was aimed at preventing involuntary relinquishment of the natural mother's child because of financial duress. A surrogate voluntarily relinquishes her child and the agreement is entered into before the pregnancy thus negating any financial pressure brought about by the birth.

In a case which involved an agreement similar to the one in Shirk's Case,[167] a federal court held that it was not against public policy to enforce an agreement to permit the adoption of an illegitimate child by its father where the adoption was in the best interests of the child and pecuniary gain was not the motivating factor on the part of the mother.[168]

Another attempt to validate surrogate arrangements was made in Michigan in the case of Syrkowski v Appleyard[169] by way of custody proceedings. The court rejected the attempt on the ground that the State's paternity Act provided for support of only those children who were born out of wedlock. The Attorney-General of the State of Michigan argued that as the child was a child of the surrogate and her husband by virtue of the artificial insemination laws, her husband was obliged to provide that support. Once again, the court did not rule on the validity of surrogacy agreements, stating that it was a matter of policy for the State legislature to determine.

In Kentucky v Bersheer[170] the court held that a surrogacy agreement did not fall within the prohibition on the sale of babies as the natural father cannot be characterized as either adopting or buying his own baby.

The use of this approach allows custody to be given to the biological father or allows the couple to adopt the child. In Tasmania, an adoption order may be made in favour of a husband and wife jointly where one of them is the natural parent of the child.[171]

In the United Kingdom, there seems little likelihood of surrogacy agreements being upheld by the courts on the basis of a right to privacy in procreation, since there is not a written Constitution. The earliest case considered by English courts illustrates the attitude of the court towards an arrangement which on the face of it appears unsavoury. In the case of A v C[172] a couple sought the custody of the husband's child, born by artificial insemination to a girl as a result of an agreement which involved the payment to the girl of £500. Judge Comyns refused to enforce the agreement on the ground that it was a contract for the sale and purchase of a child and branded such a contract as "pernicious". The case does not resolve the question of the legality or validity of surrogacy agreements but clearly shows that the English courts will not grant specific performance in a case which involves such an agreement. The fact that the mother of the child was a prostitute, and that

the father was not married to his wife at the time the agreement was made, may go some way to explain the judge's distaste of the case. However, it may be that at that time, the idea of surrogacy was so novel that no 'respectable' woman would have risked her reputation to enter into a surrogacy agreement.

Despite the fact that the Surrogacy Arrangements Act 1985 (U.K.) prohibited commercial surrogacy, a surrogacy agency was not prosecuted in relation to payments which were made to the surrogate on the ground of insufficient evidence that any law was broken.[173] The surrogacy agency claimed that the surrogate was not paid for carrying a child but for keeping a diary of her pregnancy and taking part in a film on the subject. Therefore such a payment did not contravene subsections (5) and (6) of that Act which made it an offence for a body of persons to receive payment for negotiating or facilitating the making of arrangements. Any money received by the agency appeared to be made in connection with matters other than the negotiation of a surrogacy arrangement.

The case which was the driving force behind the rapid introduction of the Surrogacy Arrangements Act 1985 (U.K.) was the case of Re A Baby.[174] The mother of the baby was paid to be artificially inseminated by the sperm of the husband of an infertile wife. The husband and his wife paid the London agency of an American surrogate motherhood organisation the equivalent of A$19,600.[175] The mother of

the baby left the baby in hospital and returned home less than 24 hours after giving birth. The local government council for the borough where the baby was born sought a court order to prevent the mother from handing over the baby for eight days and was granted a "place of safety" order preventing the child's removal from the hospital. The order meant that the natural father could only have his child if he applied to the court for her to be made a ward of the court in the hope he would be granted custody. In the High Court, Latey J. declared that care and control of the child be given to the father and his wife, an American professional couple. The child was thus able to be taken to live with the couple in America. The judge was of the opinion that the moral and ethical issues arising from the circumstances of the child's birth were not for the court to rule on.

Application of Existing Statutes to Surrogacy

Surrogacy is different from the black market adoptions envisaged by existing legislation. In a typical "baby buying" situation, an unmarried woman becomes pregnant accidentally and an intermediary arranges for the child to be adopted by a couple whose fitness as parents have not been professionally ascertained.

In contrast, the surrogate voluntarily becomes pregnant and bears a child by pre-arrangement for a couple, one of whom is biologically related to the child. The decision to

give the child up for adoption is not the result of an unplanned pregnancy but is an informed and deliberate choice.

If a surrogate voluntarily relinquishes custody of her child to the biological father of the child, there appears to be little justification to prohibit her from receiving payment. The payment is an arrangement between the parents of the child, and not as between one parent and a stranger to the child. It is not unknown for a man to pay maintenance to a woman to whom he feels some moral obligation to maintain, even in the absence of a legal marriage between the man and the woman. In the United States, this form of maintenance, commonly known as "palimony" is often a matter of litigation on the part of the woman. In a surrogacy arrangement, the father of the child has arranged with a woman to provide him with a child. In consideration for her services, the surrogate is paid a fee. This is hardly the situation envisaged by the legislatures at the time when the existing legislation prohibiting black market adoptions were enacted.

Existing legislation does not contemplate the relinquishment of custody of a child other than a legally recognized form of adoption. Without such an adoption, the child remains the legal child of the woman who gave birth to it - the surrogate.

The short and long term effects of the payment of a fee on the infertile couple and the child need to be studied to determine the long-term or short-term result on the psychology of the parties. Regarding the surrogate's position, it is possible to argue that financial gain may have an undue influence on a woman to become a surrogate. It may be quite pertinent to question how much money it would take to change a woman's voluntary decision to become a surrogate into an involuntary one.

Most of the surrogates surveyed by Parker[176] required the payment of a fee which covered more than the expenses incurred. However, this profit motive was always accompanied by at least two other major factors which contributed to their decision. One was the satisfaction gained by the enjoyment of the pregnancy itself and the gift of a child, while the other was a personal desire to experience again the loss of a previous child through adoption or abortion. The surrogates surveyed did not regard the payment of a fee paid after the delivery of the baby as payment in exchange of parental rights and responsibilities, but viewed it as payment for their services. Parker suggests that preliminary data does not reveal any significant difference in the short term psychological results between surrogates who received a fee after the delivery compared with surrogates who did not receive any fees at all.[177] Parker goes on to suggest that

the study of the effects on the parties of payment of a fee should differentiate between four major types of payments.[178] First, the payment of out of pocket expenses; second, a fee for the services of insemination, pregnancy, labour, and delivery; third, the payment equivalent to the value of opportunities foregone because of the pregnancy; fourth, a fee for the transfer of parental rights. The payment of any combination of these four payments may have a different effect on each of the parties involved. The effect on a child of the knowledge that payment was made to create and obtain him may be lessened or heightened depending on which type of payment was made and the attitude of the parties towards that payment. The effect on the infertile couple may include feelings of guilt. Parker concludes that in order to make rational, legal, moral, and policy judgments about the desirability or otherwise of permitting surrogacy arrangements, the question of the effects of such payments need to be studied.[179]

The statutes, when applied to surrogacy agreements, rather than preventing commercialization of adoption, prevent the promotion and creation of a family. The concentration on the commercial aspect of surrogacy agreements misses the main issue as to whether such agreements should be permitted. If they are to be permitted, there is no reason why a fee should not be paid to compensate for the costs and expenses involved in

participating in such a potentially painful and hazardous experience.

If existing legislation is used in relation to new situations, reasonable construction must be given to give effect to the purpose of the statute to avoid unjust application of the law and absurd consequences. This is especially so where Statutes provide criminal sanctions. Any ambiguity regarding the intended scope of such statutes should arguably be resolved on the side of leniency. With respect to the prohibition on payment in connection with an adoption, the court ought to consider the intent of the prohibition. It is unlikely that these Statutes intended to cover surrogacy arrangements as these arrangements have only come to public attention in recent years - quite some time after the Statutes were enacted. Another point to consider is that any payment made in a surrogacy arrangement can be identified as payment for the surrogate's services and not for the ultimate adoption and therefore falls outside the ambit of the prohibition.

Conclusion

It is no easy matter to balance the arguments for and against the question of whether a surrogacy agreement is legal or even valid. The principle of freedom of contact together with the interests of the infertile couple in establishing a family are factors to be considered. On the other hand, the child's welfare is of paramount importance.

The main objection to surrogacy arrangements appears to be the commercial aspect whereby a child is perceived to be bought and sold in a "baby-selling" transaction and the potential exploitive nature of the arrangement. The term "baby-selling" is misused in the context of surrogacy. The child is not "sold" as an object or a slave; rather the surrogate is compensated for her services and the relinquishment of her parental rights and responsibilities. The agreement that a child is handed over only to a couple who is willing to buy the privilege, is based on the idea that only the wealthy could afford to, and only the needy would need to, enter into surrogacy arrangements. This problem does exist, but is easily overcome if all surrogacy arrangements are regulated, and subject to strict conditions, including that of a payment of reasonable fees and expenses to compensate for the services of the surrogate. In the United States, where blood is "donated" for money, the sale of blood is regarded as a service to the community. It is not such a wide gap then to regard the "sale" of genetic material as a service. It can hardly be argued that the amount offered to a surrogate is an offer too good to refuse, considering the risks, effort, and time involved in a pregnancy. "For nine month's work, 24 hours a day, it comes out as £1 an hour".[180] In the United States, a sperm "donor" is paid for "time spent" - usually for half an hour's "work".

A man may sell his sperm to help the wife of an infertile husband to have a child by the means of artificial insemination (AID) and be well regarded by the community for his services. Yet, it is generally considered to be against public policy, and specifically a crime in United Kingdom and the State of Victoria, for a woman to sell her services to help the infertile wife of a husband to have a baby by the means of a surrogacy arrangement.

Surrogacy is a natural complement to AID and can be viewed as a superior form of adoption, similar to step-parent adoption where one of the parents is the biological parent.

Although significant technical differences occur between the practice of AID and the practice of surrogacy, the donor of a female gamete should not be regarded in such a different light as the donor of the male gamete.

Women should have a right to use their bodies as they wish - if the law gives them this right regarding abortion, which is seen by many as the extinguishment of life, why should the law not allow them the right to use their body to create a life, albeit for another couple. Seen in this light, it is an act of generosity, and is a step not taken lightly. With proper screening procedures, unsuitable women would not be permitted to enter into a surrogacy arrangement. The danger of the wealthy couple exploiting a

poor surrogate is further diminished if the fees for the services of the surrogate are strictly regulated and tailor made to fit the particular circumstances of each case. Where the intended father is the biological father of the resultant child, the argument of buying his child does not stand up.

From the viewpoint of the child, the principle that the welfare of the child is of paramount consideration is often stated. The payment to the surrogate for her services is equated with treating the child as a commodity, to be bought and sold. However, the biological father of the child, who helped to create the child is compensating a woman for her part in nurturing and bearing the child in place of his wife who is unable to perform this activity. He is caring for the child he has created - a far different situation from that envisaged by those who enacted legislation banning payment in connection with the adoption of a baby.

Another major objection arises from the religious concept of marriage as the basis for procreation and parenthood. The practice of surrogacy brings a third person into the marital relationship and clearly separates procreation from sexual intercourse, and procreation from rearing a child. This intrusion is seen to be worse than that of a semen donor in AID cases as the contribution of the surrogate is more intimate and personal. However, if procreation and parenthood are seen to be the reasons for

marriage, the failure to achieve these results may seriously undermine the marital relationship. If a woman cannot have children, she and her husband should have the right to fulfil their desire for parenthood with whatever reasonable means are available. Surrogacy in most of these cases is the only serious option, given the scarcity of babies available for adoption. Those couples who feel strongly against the use of surrogacy need not seek out such arrangements, but access in general should not be denied merely on these grounds.

The problem of the effect on the surrogate of relinquishing her child is of some concern and there can be found some analogy in adoption procedures. However, in surrogacy, the mother makes the decision to bear a child for another in advance of pregnancy and relinquishment is seen by her as the final stage of that decision. She is not forced into it by the circumstances surrounding the cause of pregnancy. It is to be recognized that relinquishing her child will in some cases cause the surrogate some stress, but that, of itself, should not be a reason for outright prohibition on the practice of surrogacy.

In a jurisdiction which regulates and carefully controls surrogacy arrangements, provision should be made to allow a surrogate to keep her child.

The problem of a defective child rejected by the surrogate and the infertile couple is another sensitive issue that needs careful handling. It is not an uncommon situation in the community at large, where the reaction of the parents is often total rejection, sometimes to the point of refusing permission to carry out life-saving operations. However, the incidence of abnormality at birth is not so high as to make it an expected occurrence and therefore a ground to prohibit surrogacy.

One point that appears to be missed when stating an objection to the deliberate creation of a child for the benefit of others, is that millions of unplanned babies are born to unwilling parents. The fate of these babies is far more precarious than the fate of a child who has been planned in advance and eagerly awaited to be reared by loving people willing to assume parental obligations.

These grounds, taken individually or together, are not of themselves sufficient to place an outright ban on the practice of surrogacy and to impose penal sanctions.

Surrogacy offers too much of a viable alternative to disappear simply because it is banned. Criminalizing it will only cause it to flourish illegally where exploitation poses a real threat to all the parties involved.

It may be considered by some that because the problems associated with the practice of surrogacy may have emotional effects on children born as a result of such a practice, surrogacy should not be permitted. However, similar effects on adopted children and children born as a result of AID procedures have not been used as an argument militating against adoption or AID. The community does not view such procedures as outrageous or criminal, yet they present similar problems regarding the identity crisis of a child and the need for it to know its heredity. Adoption laws in Australia are being amended to reflect this need. There is no reason why laws on surrogacy could not do the same.

The question is whether the decision to participate in a surrogacy arrangement should be a private matter for the parties to resolve and agree upon or whether there is sufficient State interest justified by the dictates of public policy to justify regulation.

Society in general does not need protection from the use of surrogacy as a means of alleviating infertility. The individuals who do need protection are the infertile couple, the surrogate, and most importantly, the child. This can only be achieved if surrogacy is recognized and regulated. Regulation by way of legislation should define the rights and duties of the parties, and specify the requirements necessary to ensure the health and welfare of all parties.

CHAPTER 5

STATUS OF THE CHILD UNDER CURRENT LEGISLATION

A major concern is the determination of the parentage of a child born as a result of a surrogacy agreement as significant consequences flow from such determination. The legal status of the child affects, among other things, its rights of inheritance, maintenance, and custody.

Paternity

The term father is defined in the Oxford English Dictionary as a person who has begotten a child. At common law, the father of a child is the man whose sperm fertilizes the egg. The tests are quite clearly genetic. However this position may be altered by the application of statutory presumptions. Presumptions in law operate to promote the interests of the family and protect the child from the stigma of illegitimacy.

The Status of Children Act 1974 (Tas.)[181] abolished the common rule that no legal relationship exists between an illegitimate child and its natural father, and placed such a child in the same position as a legitimate child in respect of maintenance and intestacy.

Section 5 of the Status of Children Act 1974 (Tas.) provides that a child born to a married woman during her marriage is presumed, in the absence of evidence to the contrary, to be a child of that marriage. This presumption presents a problem in a surrogacy agreement where the surrogate is married, as her husband, and not the biological father, is presumed to be the father of the child.

Of course, contrary evidence can be produced by several means by establishing that sexual intercourse occurred between the surrogate and the husband of the infertile couple (which is unlikely where artificial insemination is used), by proof of non-access between the surrogate mother and her husband, by evidence of her husband's sterility, or by biological paternity tests carried out on the child and all parties. Blood tests cannot prove that a certain man is the father of a certain child but with a 93% accuracy, can exclude a man as father of the child. New developments in DNA fingerprints can now provide positive proof of paternity in 99% of the cases.[182]

However, such testing requires the co-operation of the surrogate's husband. Where a dispute about custody of a child arises in a surrogacy arrangement, and evidence was given that the surrogate's husband could not be the father of the child, the court may determine that the child is not the child of the marriage. However, establishing that fact

may not help the parties in deciding custody. The court is unlikely, under current practice, to accept the surrogacy arrangement as a means by which such a dispute is to be settled. The court is unlikely to force an unwilling natural father to take custody of his child where the surrogate is demanding that he do so. This may well be contrary to the welfare of the child. The court may need to consider the question of damages payable to the surrogate, but such an order is based on the acceptance of the surrogacy arrangement as an enforceable contract. The court is similarly unlikely to force a reluctant surrogate to relinquish her child to the natural father. The same problems arise. Until legislation specifically dealing with the issues involved in surrogacy is enacted, these problems have little chance of being solved.

The position regarding children born as a result of artificial insemination by donor (AID) procedures has been clarified with the result that parenthood of such children are determined in a manner which is appropriate to the intention of the parties to such procedures.

Section 10C of the Status of Children Act 1974 (Tas.)[183] determines the parenthood of a child born as a result of AID or IVF procedures. With respect to paternity, the husband who has consented to his wife undergoing either of those procedures is treated in law as the father of any child born as a result of such procedures and the donor of the sperm used in the procedure is treated in law as if he

were not the father of such a child.

The purpose of ensuring the husband's consent is to free him from the obligation of supporting a child where his wife seeks AID and he does not want to have a child. It also serves to free the donor of the sperm from any obligation to support a child he did not himself want.

However, it is difficult to see why such a consent is vital to determining the paternity of a child. Certainly, the presumption of the husband's consent is rebuttable - section 10(5) - but, if it is rebutted, section 5 of the Act may be relevant in presuming the child to be a child of the marriage anyway. There is no indication as to which section is paramount. But, if evidence to the contrary is established, a child, whether in a surrogacy situation or not, may end up with no legal father.

Where a surrogate is married and whether AID or natural procedures are used, either the surrogate's husband is treated as the father of the resultant child and the sperm donor is not (section 10C) or the child is a child of their marriage (section 5). Either result has the effect of undermining the purpose of the surrogacy agreement and the biological and intended father is required to rebut the presumptions in both section 5 and section 10C in order to establish his paternity. He then faces the problem presented in section 10C(2) which states that he, as donor

of the semen used in AID or IVF procedures shall not be treated in law as the father of a child born as a result of such a procedure.

The biological father may find section 8 useful. Section 8(1) provides that the entry of the name of a person named as the father of a child in the Register of Births is prima facie evidence that the person so named is the father of the child. Section 8(2) provides that an instrument by a person acknowledging paternity of a child is prima facie evidence that the person named as the father is the father of the child. However, the relationship between section 8(1) and (2) and section 10C(2) is unclear. There appears to be areas of conflict in applying the provisions which cater for children born as a result of AID or IVF procedures to children born as a result of surrogacy agreements where the surrogate is married.

The position would be far less complicated where the surrogate is unmarried. The biological and intended social father is regarded in law as the natural father of the child provided he has acknowledged paternity. However, a problem arises if for some reason the natural father refuses to acknowledge paternity and refuses to accept the child. Section 10C(2) rules out the sperm donor as the father and thus the child is left with no legal father.

Maternity

Where in a surrogacy agreement, the surrogate receives an embryo transfer (ET) the question of maternity also raises complex issues. Using the procedure of ET, the surrogate carries an embryo in her uterus which has been formed by the fertilization of the infertile couple's own gametes, or by the wife's ova and donor sperm or by donor ova and donor sperm. The technique of ET may be used where the wife can produce healthy ova but is unable for medical reasons to carry a child in her uterus.

With the changes in procreation techniques now available, motherhood is a changing concept of increasingly uncertain ambit.

Traditionally, the concept of motherhood involves procreation and gestation as one inseparable notion. The law regards the woman who gives birth to a child as the mother of the child. Section 5 of the Status of Children Act 1974 (Tas.)[184] presumes a child born to a woman during her marriage as a child of the marriage. This appears to contemplate that the woman giving birth is the child's legal mother. However, that section relates more to the status of the child as a child of the marriage than as to who is the child's mother.

Section 10C(3) and (4) of the Status of Children Act 1974 (Tas.)[185] provides that a woman who bears a child as a result of AID or IVF using donated ovum is treated in law as the mother of the child and the ovum donor is not the mother. The technique of ET introduces an extra dimension as the embryo is a genetic stranger to the surrogate who actually carries and eventually gives birth. Before the advent of such a technique, the legal position of mother and child arose from physical and biological certainty. The maxim of mater semper certa est may need to be re-examined in the light of these new techniques and especially in the area of surrogacy.

The difficulty is in deciding whether the donation of genetic material gives right to a claim of motherhood or whether the gestational contribution and eventual delivery justifies such a claim. A confusing picture emerges where the law itself cannot make up its mind. In the case of Corbett v Corbett,[186] there was judicial acceptance of the significance of genetic determination in deciding the sex of a person. This may influence courts to find that genetic rather than gestational contribution should also be a deciding factor in deciding maternity. On the other hand, the Status of Children Act 1974 (Tas.) has negated the significance of genetic contribution in determining the maternity (and for the most part, paternity) of a child born as a result of those procedures. The legislation was

enacted to accord to such a child the status that was intended by the use of those procedures. The donors of any genetic material used were never intended to be the parents of the child. The analogy with a surrogate agreement is quite clear. The intended parents in a surrogacy arrangement are determined by the terms of the surrogacy agreement.

It is submitted that a court faced with a surrogacy case would be more likely to hold that the surrogate giving birth was the natural mother. This view would more readily conform with the general concept of motherhood which recognizes the birth-giving woman as the mother. Certainly the birth-giving woman is easily identified. Problems involving proof of genetic parentage are avoided.

The Status of Children Act 1974 (Tas.), section 10E[187] gives effect to this view by stating that the woman who gives birth to a child from a donated ovum is the mother of that child and the rights and obligations of the genetic parents are extinguished. However, these provisions were designed specifically to cover AID and In Vitro Fertilization (IVF) procedures, and therefore define parenthood in terms which satisfy the needs and meet the intentions of the parties involved in such procedures. To apply these provisions to surrogacy arrangements is to apply the needs and criteria of a completely different set of circumstances which involve intentions opposite to those involved in surrogacy arrangements.

Bonding

The bonding of the child to the birth-giving mother is said to have important effects on the child. Not enough is known of the extent to which bonding occurs in the uterus. Bonding after birth has a strong effect on the relationship between the baby and its mother. But if the baby's mother is deemed to be the infertile woman who takes custody of the baby as soon after birth as is possible, the bonding then occurs between the baby and the intended mother. The issue of bonding is also present in adoption, yet it has not been mentioned as a reason against adoption.

Conclusion

It is becoming increasingly evident that the notion of motherhood has to meet the changes that are occurring in reproductive techniques. The time has come when it may be necessary to divide the notion of motherhood between the genetic mother and the gestational mother. Both may establish evidence of motherhood and neither can negate the motherhood of the other.

Legislation relating to AID and IVF was not intended to cover surrogacy agreements. The courts are unlikely to extend the scope of such legislation in order to include circumstances that were not contemplated. As the Court of Appeal held in Syrkowski v Appleyard,[188] legal recognition

is of legislative concern and not for judicial pre-emption. If surrogacy is to be a recognized procedure to alleviate infertility, specific legislation is required to protect the rights of all those involved.

Alternatives need to be found to the present presumptions of maternity and paternity. The determining factor should be based on what is in the best interests of the child. The child's welfare would best be served by deciding that its mother and father are the persons who intend to assume parental responsibility of the child, whether or not either has contributed any genetic material. The biological connection should not of itself be the determining factor, neither should the gestational contribution. This is not to deny the importance of either contribution. Indeed, the effect of the uterine environment and the host woman's activities on the development of the foetus cannot be ignored.

One factor which needs to be taken into account in determining what is in the best interests of a child, is the intention of the parties involved in the arrangement. Where clearly only one party to the arrangement is willing to take custody of the child, be it the surrogate or the infertile couple, the welfare of the child would seem to indicate that it would face a better future with the party that is, in the words of the Demack Report "committed to [the] nurture, education and support".[189] This approach, of

course, does not overcome the problem of the conflict that arises where both parties wish to take custody of the child, as is the case where the surrogate refuses to relinquish the child. It is unlikely, in the absence of specific legislation, that the courts would force a mother who is otherwise fit to be a mother, to give up her child. Where the child is not genetically hers, the courts may well have to re-examine the issues and for this reason, legislation should decide the matter.

It is inappropriate to apply existing legislation aimed at defining parentage in AID and IVF procedures to surrogacy arrangements. A donor who is not legally recognized as a child's father, risks losing the child who is genetically his own, despite acknowledging his intention to be the father by the terms of the surrogate agreement. These provisions are based on defining parentage, especially paternity, on the assumption that the woman is married and emphasize the importance of the consent of the woman's husband to the AID or IVF procedures. In a surrogacy arrangement, if the surrogate is married, it is usual to obtain her husband's consent but not in order that he may be recognized legally as the father. On the contrary, he consents to the terms of the agreement whereby the sperm donor is recognized to be the father. The only way to ensure that the surrogate's husband is not treated in law as the father of the child, is for him to refuse the procedure of AID being carried out on his wife. However, this does not mean that the sperm donor is the father. He is specifically excluded.

To settle the separate issues of maternity and paternity in surrogacy arrangements, legislation is required.

CHAPTER 6

RECOMMENDATIONS

Alternative Approaches to Surrogacy

In order to meet the challenges which the practice of surrogacy faces, three possible approaches may be taken. The first approach is to legislate prohibiting the practice of surrogacy and providing penal sanctions against its use. This approach raises more problems than the ones it intends to remedy.

The provision of penal sanctions is not the most effective or appropriate way to overcome the problems of surrogacy. Although the effect of such sanctions would be to prevent commercial exploitation by profit making agencies, it does mean that surrogacy arrangements would continue by private arrangements without the benefit of professional skills in screening and counselling and without safeguards to protect the interests of all the parties involved. The prohibition on the practice of surrogacy will not deter infertile couples desperate to have a child from entering such private agreements. A criminal sanction is difficult to enforce if the parties collude to prevent detection that a surrogacy arrangement was in fact entered into and carried out. This is not to argue that crimes which are difficult to detect should not be crimes. Breaches of laws prohibiting homosexual acts between consenting adults are difficult to detect. The practice of surrogacy can be viewed as a means of achieving parenthood, which in itself is not a crime.

Prohibiting surrogacy will mean that the status of a child born in contravention of such legislation is at best unsettled, while the fate of its creators is at worst imprisonment. Neither of these two results do anything to promote the advancement and stability of the family.

The second approach is to allow the practice of surrogacy to develop through private contract and by judicial determination according to each individual case. This approach is based on the premise that specific legislation permitting surrogacy cannot foresee all possible new developments and problems in this area. However legislation in other areas can be and is regularly updated whenever the need arises. There is nothing intrinsically different in the area of surrogacy from other legislative areas dealing in family matters. This approach would probably result in a patchy and difficult to follow case law. Private contract without regulation at its inception is not the best system in which the interests of the child, who is not a party to the contract, can be fully protected. It can lead to exploitation of the weaker party, the surrogate, who may be unable to bargain equally if her financial status was a critical factor. This approach also fails to provide, as a matter of course, the initial screening and counselling procedures which are important to ensure that the arrangement is one which all parties ought to enter into.

The third and recommended approach is to legislate in favour of the practice of surrogacy. This approach will enable infertile couples to fulfil their desires for a child of their own, will shield the surrogate from the risks of exploitation, and above all, will protect the welfare of the child - who will inevitably be born in spite of any legislation outlawing his creation.

It is recommended that surrogacy agencies be established within appropriate government departments. Such agencies would take full responsibilities for the screening and counselling of prospective parents and surrogates in relation to their genetic, physical and psychological fitness to participate. The criteria for final selection should be clearly stated in the legislation.

As with adoption provisions, surrogacy should, at this stage, be made available only to heterosexual couples, whether legally married or not. To allow a single person to use the services of a surrogate is to intentionally deprive the resultant child of a second parent. Although this often happens in the case of divorce or the death of one parent, it has not been the intention of the parents that any children they have may be brought up in a one-parent family. The basic reason for allowing a couple to have a child by artificial procedures is to give them an opportunity of establishing their family and to ensure that the child is born into a normal traditional family relationship.[190]

However, to restrict the procedure to couples may be discrimination.

To allow the use of such procedures by lesbian couples or homosexual couples does create further problems to the child. The child would be brought up, not in a family which is recognized by the community as a "normal" family, but in a family which is not recognized by the community and may suffer as a consequence. Both these issues must be decided in the best interests of the child.

The use of a surrogate as a matter of convenience for the wife should not be permitted. Surrogacy should be viewed as an arrangement made for the purpose of enabling childless couples who are unable to bear a child to have a child where all other avenues are unavailable. It has been argued that to allow the practice of surrogacy in cases for convenience of the wife who does not wish to be involved in a pregnancy is to manipulate human life at personal whim.[191] Legislation is much more likely to be acceptable to the community if necessity is made the only rationale for permitting surrogacy to those who will benefit from its practice. If community standards in the future are able to accept the notion of surrogacy for convenience, legislation could be enacted to cover that situation.

Parties should be permitted to enter into surrogacy agreements which are supervised by the appropriate government agency. Legislation should provide that certain terms are to be mandatory in all such agreements. One such term would specify the level of medical and self care the surrogate is expected to take, including the circumstances in which she may have the foetus aborted. An abortion should only be carried out if the continuation of the pregnancy would present a real danger to the life or health of the surrogate, or where pre-natal tests show a defective foetus and all the parties consent to the abortion. If one party withholds consent, then the pregnancy should continue and that person is to be responsible for the child.

Another mandatory provision would cover what expenses and fees are payable. It is suggested that any payment should be made to the agency and should be for medical expenses up to six weeks after the birth, compensation if the surrogate miscarries, living expenses, payment of premiums or a life insurance, and a certain sum for services. The consent of all parties, including the spouse of a surrogate, should be required to the transfer of parental rights after paternity has been proved.

Legislation should also provide for the status of the child by clearly defining who the legal mother and legal father of the child is. In a surrogacy situation, it is the couple who the surrogacy agreement contemplated as parents,

regardless of their individual or combined donation of genetic material. At birth, the child is provisionally deemed to be the child of his intended parents. Tests to prove, where appropriate, the paternity of the husband, are to be carried out within seven days of the birth. If the tests prove positive, and the child is handed over, the court issues an order which enables the intended parents to register the child as their legal child. In this way, formal adoption under the Adoption of Children Act 1968 (Tas.) is bypassed and therefore the problems associated with the payment of fees in connection with an adoption are avoided.

If the surrogate refuses to hand over the child, she should not be compelled to relinquish her child if she is the biological mother. However, with careful screening before participation in a surrogacy agreement, this problem would seldom arise. However, any payments made should be reimbursed.

Provision should also be made as to what is to happen in the event of a multiple birth, a defective child, the death of either one or both of the intended parents, or their divorce. These matters may be left to be decided by the parties, subject to the overall control of the appropriate government department.

The anonymity of the surrogate should be assured with the proviso that her medical background be available for any future use. However, with the recent trend of releasing parental information to adult adoptees at their request, this aspect may also need to be considered.

It has been the usual practice where children have been born as a result of AID procedures to hide this fact and register the child as the child of the intended parents. In Victoria, unlike other States, it is no longer an offence for the intended parents, instead of the biological parents, to register as parents in the Register of Births. The Adoption Act 1984 (Vic.)[192] makes provision for this and also enables adopted persons to seek and gain access to identifying information regarding their family origins.[193] That Act also gives reciprocal rights to natural parents,[194] natural relatives,[195] and adoptive parents[196] to seek certain information about the adopted person.

Children born as a result of reproductive techniques should not be treated differently from other children so that the records of their origins are hidden and inaccessible. The elimination of secrecy and distortion of information relating to family relationships, medical backgrounds, and family origins is vital to the healthy social and psychological development of children in their families.[197] It is also important for society in general to ensure that birth records accurately reflect actual parentage.

However, the surrogate needs to be protected, if she so wishes, from being identified as the biological mother. Birth registers should be maintained by the appropriate government agency to keep accurate record of both biological parents and new family relationships that are created outside the biological links. Access to such information should be made available to persons who are seeking their genealogical connections.

By placing the practice of surrogacy under the control and guidance of the State, the community may be assured that the most vulnerable of its members are protected from the dangers inherent in clandestine or uncontrolled arrangements. Potential financial exploitation of the surrogate can be avoided by ensuring that surrogacy arrangements meet certain requirements. Screening and counselling of all parties ensure that the participants are made fully aware of the issues involved and that most potential problems are avoided. Strict guidelines will go a long way towards securing the best interests of the child born as a result of a surrogacy arrangement if those guidelines are set with the child's welfare in mind.

Conclusion

The gift of life is precious. To create a longed-for child for a couple unable to conceive and bear a child within their marriage or relationship is surely a noble need. The fact that recompense may be made to the woman who offers to carry the foetus to term within her body does not derogate from the miracle of the birth of a baby. What is against public policy and against the welfare of a child, is that the child born as a result of a surrogacy arrangement will, unless he receives protection from the State, be born in "no-man's land" - a land where no man is his legal father or his legal father is a man who has no genetic or intended link with him.

The State has a major responsibility to protect the welfare and interests of all children. The prohibition and criminalization of the practice of surrogacy is against the welfare and interest of the child born as a result of a prohibited surrogacy arrangement. The legal status of such a child would have to be determined under legislation which is not designed to cover such situations with the most likely result that he would not be deemed to be the child of his intended parents. If adoption procedures are unavailable to the infertile couple, the child would live with them in a legal limbo, legally belonging to someone else. Prohibiting the practice ignores the plight of the child if a dispute were to arise as to his custody and

therefore fails to protect his interests. The advantages of legislation which clearly defines parenthood and provides for custody and adoption would bring certainty into an area which is confused at present and is in danger of becoming increasingly complex. There is no doubt that surrogacy will continue despite any legal sanctions.

The issues central to the debate on whether or not surrogacy should be permitted are how society views the concept of motherhood and how society should react to reproductive technology and the changes it has brought to the accepted standards of procreation.

Only by permitting the practice of surrogacy and legislating for its control and regulation can the interests of the child and also of the other parties be fully protected. Even if only one child were to be born into this "no-man's" land, the State has a duty towards that child, not to penalize his creators, but to safeguard his status in society.

As long as the family remains the basic unit of society, infertile couples will seek to find a means of alleviating their plight of childlessness. The practice of surrogacy offers such couples a realistic and viable solution.

APPENDIX

RELATIONSHIPS IN SURROGACY ARRANGEMENTS

H = infertile husband
W = infertile wife
SM = surrogate mother

D = donor
S = sperm
O = ovum

		genetic link of child to H & W
SH + OSM	H is biological father W is intended mother SM is biological mother	1 genetic link
SH + OW	H + W are biological parents SM is gestational mother	2 genetic links
SH + OD	H is biological father W is intended mother SM is gestational mother	1 genetic link
SD + OW	H is intended father W is biological mother SM is gestational mother	1 genetic link
SD + OSM	H + W are intended parents SM is biological mother	no genetic links
SD + OD	H + W are intended parents SM is gestational mother	no genetic links

POSTSCRIPT

Since completing the thesis, 2 developments in the area of surrogacy indicate a change in judicial thinking on some important issues.

The issue of commercialism involved in the adoption of a child born as a result of a surrogacy agreement was discussed in a recent case in the United Kingdom.[198] A married couple applied to the court for an adoption order in their favour in respect of the natural child of the husband born by natural conception, as a result of a surrogacy arrangement with another woman. Latey J held that the surrogacy arrangement did not contravene section 50(1) of the Adoption Act 1958 which prohibits any payment or reward made in connection with the adoption of a child. He concluded that as the amount of £5000 paid to the surrogate did not cover her loss of earnings and expenses, there was no element of profit or reward in the arrangement. Even if the payment were to be characterized as a payment or reward within section 50(1), Latey J was of the view that the court, when considering the welfare of the child, has discretion to authorize any payment or reward which has been, or may be, paid in such cases.

---

198. Reported as Re an Adoption Application: Surrogacy, Family Division, March 11, 1987 in (1987) New Law Jnl., 267.

In the United States, the case of "Baby M"[199], Judge Harvey Sorkow (New Jersey) made legal history in April 1987 by ruling that the surrogacy contract made between Mr. and Mrs. Stern and a surrogate Mrs. Whitehead was binding and awarded custody of the child born as a result of that contract to the Sterns. The case has provoked much criticism both before and after the ruling, some of it because of the surrogate's behaviour and some because of the judge's comments on her character. It would seem that the judge was of the view that it was in the best interests of the child to remain with the Sterns. There is no doubt that all parties have gone through agonizing times clearly, the present law of contract is inadequate to solve custody disputes in surrogacy cases.

As a final point, it is interesting to note that a national survey conducted by the New South Wales Law Reform Commission, believed to be the first opinion survey in the world on surrogacy, found that 51% of the 2500 people polled were in favour of surrogacy, 33% disapproved, while 13% expressed no opinion.[200] The majority were in favour of paying the surrogate a fee plus expenses. However, on the question of custody of the child, about a third thought the married couple should have custody while 26% thought the surrogate should and 25% believed a court should decide.

---

199. See page 58 and note 131 *ante*.
200. Reported in The Mercury, 20 May 1987.

FOOTNOTES

1. According to Goldfarb, C., in "Two Mothers, One Baby, No Law," (1983) 11 Human Rights 27-29, 54.

2. Packard, The People Shapers (1st ed.) Boston: Little Brown, 1977.

3. According to N.P. Keane, in "Legal Problems of Surrogate Motherhood", (1980) S. Illinois Uni. L.J., 147.

4. Genesis. 16:1-16.

5. Genesis. 30:3-16.

6. Genesis. 46:18-26.

7. H.T. Krimmel, "The Case Against Surrogate Parentry", (1983) 13 Hastings Centre Report, 35.

8. I. Davies, "Close Encounters in a Test Tube," (1983) 133 New Law Journal 107.

9. For example, by the use of a straw.

10. See Appendix for the various ways in which surrogacy may be effected through donated genetic material.

11. Morgan Gallup Poll cited in Singer, P. & Wells, D., The Reproductive Revolution. Melbourne, Oxford University Press, 1984, p.115.

12. *Ibid.*, p. 115.

13. See Keane, N.P., and Breo, D.L., The Surrogate Mother. N.Y., Everest House, 1981.

14. Adopted by the General Assembly of the United States in 1966 and entered into force on 23rd March 1976.

15. *Ibid.*, Article 23.

16. *Ibid.*, Article 24.

17. United Nations Declaration of the Rights of the Child, 1959.

18. *Ibid.*, Principle 6.

19. *Ibid.*, Principle 9.

20. See Chapter 4, p.62 *et. seq.*

21. According to Parker, D.C., "Surrogate Mothering: An Overview", (1984) Family Law, 140.

22. 381 U.S. 429.

23. 410 U.S. 113.

24. Carey v Population Services International 431 U.S. 678, p.685.

25. Parker, P.J., "Motivation of Surrogate Mothers: Initial Findings" (1983) 140 Am J. Psychiatry 117.

26. *Ibid.*, p.118.

27. Sappideen, C., "The Surrogate Mother - A Growing Problem" (1983) 6 U.N.S.W. Law Journal, 79.

28. Titmus, R.M., The Gift Relationship - from Human Blood to Social Policy. (1971) 76-77, 151.

29. Laukaran H & Van den Berg B.J., "The Relationship of Maternal Attitude to Pregnancy Outcomes and Obstetric Complications" (1980) 136 Am. J. Obstet. Gynaecology 374.

30. Parker, P.J., "Motivation of Surrogate Mothers: Initial Findings" (1983) 140 Am. J. Psychiatry 117.

31. Adoption of Children Act 1964 (N.S.W.) s.47, Adoption of Children Act 1964 (Qld.) s.43, Adoption of Children Act 1966 (S.A.) s.44, Adoption of Children Act 1896 (W.A.) s.18, Adoption of Children Act 1968 (Tas.) s.43, Adoption of Children Ordinance 1965 (A.C.T.) s.47, Adoption of Children Act (N.T.) s.44, Adoption Act 1984 (Vic.) s.119.

32. Sappideen, C., "The Surrogate Mother - A Growing Problem", (1983) 6 U.N.S.W. Law Journal, 79.

33. Fox, R.C., and Swazey, J.P., The Courage to Fail: A Social View of Organ Transplants and Dialysis. (1974).

34. Titmus, R.M., The Gift Relationship - from Human Blood to Social Policy. (1971) 76-77, 151.

35. Sappideen, C., "The Surrogate Mother - A Growing Problem" (1983) 6 U.N.S.W. Law Journal, 79.

36. Smith, G.P., "The Perils and Perigrinations of Surrogate Mothers", (1982) Medicine and Law 325.

37. Cotton K. and Winn D., Baby Cotton: For Love and Money, London, (1985), p.37.

38. The one exception being the Canadian Law Reform Commission report - see p.33 *et. seq.*

39. Final Report of the Asche Committee on Reproductive Technology to Family Law Council - May 1985 (Chairman: The Hon. Mr. Justice Asche).

40. Report of the Committee of Inquiry into Human Fertilization and Embryology, Department of Health and Social Security, HMSO, Cmnd. 9314, issued on 27 July 1984 (Chairperson: Dame Mary Warnock).

41. Final Report of the Asche Committee, *op. cit.*, Recommendation 16.

42. Final Report of the Asche Committee, *op. cit.*, Recommendation 17 - "That there be a prohibition on the exchange of money or benefits for surrogate motherhood services, for arranging surrogacy services and for advertising surrogacy services; that the legislation provide that surrogacy contracts or agreements are null and void because they are contrary to public policy and are therefore unenforceable;".

43. Final Report of the Asche Committee, *op. cit.*, Recommendation 17 - "That there be a prohibition on the exchange of money or benefits for surrogate motherhood services, for arranging surrogacy services and for advertising surrogacy services; that the legislation provide that surrogacy contracts or agreements are null and void because they are contrary to public policy and are therefore unenforceable;".

44. Interim Report, Committee to Consider the Social, Ethical and Legal Issues arising from In Vitro Fertilization, September 1982 (Chairman: Mr. L. Waller); Report on Donor Gametes in IVF, Committee to Consider the Social, Ethical and Legal Issues arising from In Vitro Fertilization, August 1983 (Chairman: Mr. L. Waller); Report on the Disposition of Embryos produced by In Vitro Fertilization Committee to consider the Social, Ethical and Legal Issues arising from In Vitro Fertilization, August 1984 (Chairman: Mr. L. Waller).

45. *Ibid.*, paragraph 4.6.

46. *Ibid.*, paragraph 4.17.

47. *Ibid.*, paragraph 4.16.

48. Act No. 10163, (Victoria).

49. It can be argued on the maxim "expressio unius exclusion alterius" that whereas subsection (2) of section 30 provides for a penalty and subsection (3) does not, a surrogacy contract or agreement is not tainted with illegality. (See under Current Topics "Legislation in regard to surrogate motherhood" (1985) 59 Aust. Law Jnl, 306.

50. Report of the Special Committee appointed by the Queensland Government to Enquire into the laws relating to Artificial Insemination, In Vitro Fertilization and other related matters. March 1984 (Chairman: The Hon. Mr. Justice Demack).

51. *Ibid.*, p.118.

52. *Ibid.*, p.117.

53. *Ibid.*, p.118.

54. *Ibid.*, pp. 77-78.

55. Final Report, Committee to Investigate Artificial Conception and Related Matters, June 1985 (Chairman: Mr. Don Chalmers).

56. See chapter 4, *ante*.

57. "Human Artificial Insemination", New South Wales Law Reform Commission Report No. 48, 1986.

58. Act No. 3 (N.S.W.).

59. Act No. 6 (N.S.W.).

60. Act No. 97 (N.S.W.).

61. Act No. 3 (N.S.W.).

62. Atherton, R., in "Artificially Conceived Children and Inheritance in New South Wales", (1986) 60 Aust. Law Jnl., 374, p.376.

63. Report of the Working Party on In Vitro Fertilization and Artificial Insemination by Donor, South Australia, January 1984 (Aileen Connon and Phillipa Kelly).

64. Act No. 102 (S.A.).

65. Interim Report of the In Vitro Fertilization Ethics Committee of Western Australia, August 1984 (Chairman: Mr. Robert Meadows).

66. Act No. 57 (W.A.).

67. Interim Report of Asche Committee on Reproductive Technology to Family Law Council, July 1984 (Chairman: The Hon. Mr. Justice Asche).

68. Status of Children Act 1974, s.10C.

69. Report of the Committee of Inquiry into Human Fertilization and Embryology, Department of Health and Social Security, HMSO, Cmnd. 9314, issued on 27 July 1984 (Chairperson: Dame Mary Warnock).

70. *Ibid.*, paragraph 8.17.

71. *Ibid.*, Recommendation 56.

72. *Ibid.*, Recommendation 57.

73. *Ibid.*, Recommendation 58.

74. Priest, J.A., "The Report of the Warnock Committee as Human Fertilisation and Embryology", (1985) 48 Modern Law Review, No. 1, 73.

75. Re a Baby (1985) NLJ Reports February, 106.

76. See 1293 HC Deb. 1535 (June 14, 1985); 1295 H.L. Comm. of the Whole House 925 (June 28, 1985).

77. See 1344 HC Deb. 23 (April 15, 1985).

78. 1348 HC Deb. 131.

79. Sloman, S., "Surrogacy Arrangements Act 1985", (1985), 4 Oct., New Law Journal, 978.

80. Report of the Ontario Law Reform Commission on Artificial Reproduction and Related Matters, Ministry of the Attorney-General, Toronto, July 1985.

81. Allan C. Hutchinson, "OLRC Report on Artificial Reproduction and Related Matters" (1985), 30 August, New Law Journal 875, p.876.

82. *Ibid.*, p.876.

83. Michigan House Bill 5184 - October 1981.

84. Kansas Senate Bill No. 485 (1984).

85. South Carolina House Bill No. 3491 (1982).

86. Bill on Alternative Reproduction to amend the Californian Civil Code, introduced in June 1985.

87. Demack Committee, see note 142, *ante;* Asche Committee, see note 131, *ante;* Waller Committee, see note 136, *ante;* Warnock Committee, see note 161, *ante.*

88. See note 55, *ante.*

89. See note 50, *ante.*

90. See note 55, *ante.*

91. See note 44, *ante.*

92. See note 69, *ante.*

93. Infertility (Medical Procedures) Act (No. 10163) 1984 (Vic.).

94. Surrogacy Arrangements Act 1985 (U.K.); Surrogacy Arrangements Amendment Act 1986 (U.K.).

95. See note 39, *ante.*

96. Alaska HR 498, 12th Leg. 1st Sess. (1981); Rhode Island, R1 Assembly 83-H 6132, Jan. Sess. (1983).

97. *Op. cit.*, note 86, Clause 7501.

98. Collins v Blantern, (1767) 2 Wils. 341; 95 E.R., 851.

99. Report of the Special Committee appointed by the Queensland Government to Enquire into the laws relating to Artificial Insemination, In Vitro Fertilization and other related matters. March 1984 (Chairman: The Hon. Mr. Justice Demack).

100. [1964] N.S.W.R. 22, 25-26, 32.

101. Smith v Jenkins (1970), 119 C.L.R. 397 pp.411-412.

102. According to Cheshire G.C., and F.foot, C.H.S., Law of Contract, (3rd Australian edition by Starke, J.L., and Higgins, P.F.P.), Butterworths, 1974.

103. Martin, D.K., "Surrogate Motherhood: Contractual Issues and Remedies under Legislative Proposal", (1984) Washburn Law Journal, Vol. 23, 601; Holten, E.L. Van, "Surrogate Motherhood in California, Legislative Proposals". (1981) 18 San Diego Law Review 341.

104. Brooks v Blount [1923] IKB 257, Doe v Kelley (1981) 106 Mich. App. 169.

105. Artificial Conception Act 1984 (N.S.W.) s.5, Children (Equality of Status) Amendment Act 1984 (N.S.W.) s.18A, Status of Children Act 1974 (Vic.) s.10D, Family Relationships Act 1975 (S.A.) s.10d, Status of Children Act (N.T.) s.5D, Status of Children Act 1974 (Tas.) s.10C, Artificial Conception Act 1985 (W.A.) s.6, Artificial Conception Ordinance 1985 (A.C.T.) s.5.

106. Kentucky Attorney-General Opinion 81-18 published in 1981.

107. Oklahoma Attorney-General Opinion No. 83-162 (1983) 9 F.R. 2761.

108. 431 U.S. 678, (1977).

109. *Ibid.*, 684-86.

110. 410 U.S. 113, 163-164 (1973).

111. Planned Parenthood of Missouri v Danforth 428 U.S. 52, 69 (1976).

112. Paton v British Pregnancy Advisory Board [1979] Q.B. 276.

113. (1983) 57 A.L.J.R. 285.

114. Moorgate Mercantile Co. Ltd. v Twitchings [1977] A.C. 890, p.919, per Edmund-Davies, L.J.

115. Deyong v Shenburn [1946] K.B. 227, p.233, per Parcq, L.J.

116. Donoghue v Stevenson [1932] A.C. 562, p.619, per Macmillan, L.J.

117. King v Phillips [1983] 1 Q.B. 429, p.441, per Denning, L.J.

118. Imperial Chemical Industries Ltd. v Shatwell [1965] A.C. 656, p.690, per Donovan, L.J.

119. Wallis v Smith (1882), 21 Ch.D. 243, p.267, per Cotton, L.J.

120. Law v Redditch Local Board, [1892], 1 Q.B. 127, p.132; [1891-4] All E.R. Rep. 891, p.294, per Lopers, J.

121. Morris v Redlands Bricks Ltd. [1970] A.C. 652, p.665, per Upjohn, L.J.

122. McCombe v Read [1955] 2 Q.B. 429.

123. Cudd v Rutler, (1720), 1 P.Wms. 570; 24 E.R. 521.

124. Stickney v Keeble, [1915], A.C. 386, p.419 per Parker, L.J.

125. Rigby v Connol (1880), 14 Ch.D. 482; J.C. Williamson Ltd. v Lukey (1931), 45 C.L.R. 282.

126. Whitwood Chemical Co. v Hardman, [1891] 2 Ch.416.

127. Maintenance Act 1967 (Tas.) ss.26, 27, Maintenance Act 1965 (Vic.) ss.7, 10, 12, Maintenance Act 1964 (N.S.W.) ss.12, 13, 17, Maintenance Act 1965 (Qld.) ss.8, 11, 16, Maintenance Ordinance 1968 (A.C.T.) ss.14, 16.

128. Founded by Dr. Richard Levin in Louisville, Kentucky in 1980.

129. Smith, G.P., "The Perils and Peregrinations of Surrogate Mothers", (1982) Medicine and Law, 325, p.330.

130. Malahoff v Stiver No. 83-4734 Michigan, reported in New York Times, January 28, 1983, p.18.

131. Reported in the Mercury 12 September 1986 and The Age 10 December 1986.

132. Smith, G.P., "The Perils and Peregrinations of Surrogate Mothers", (1982) Medicine and Law, p.327.

133. Status of Children Act 1974 (Tas.). See also note 45, *ante* for other jurisdictions.

134. See Chapter 3, p.38 *et. seq.*

135. Hirji Mulji v Cheong Yue S.S. Co. Ltd., [1926] A.C. 497 per Sumner L.J., p.505.

136. Paradine v Jane (1647) Aleyn 26; 82 E.R. 897.

137. (1863) 3 B. & S. 826; 122 E.R. 309.

138. Scanlon's New Neon Ltd. v Tooheys Ltd. (1943) 67 C.L.R. 169, per Latham C.J.; p.187.

139. Morgan v Manser [1948] 1 K.B. 184; [1947] 2 All E.R. 666.

140. Bank Line Ltd. v Arthur Capel & Co. Ltd. [1919] A.C. 435.

141. Krell v Henry [1903] 2 K.B. 740; [1900-3] All E.R. Rep. 20.

142. Clark v Associated Retail Credit Men, 105 F. 2d 62, 66 (D.C. Cir. 1939).

143. Samms v Eccles, 11 Utah 2d. 289, 293, 358 P. 2d 344, 347 (1961).

144. (1978) 8 Family Law 170.

145. Smith, G.P., "The Perils & Perigrinations of Surrogate Mothers", (1982) Medicine and Law 325, 327.

146. Winkler, R., & Van Keppell, M. Relinquishing Mothers in adoption and their long term adjustment, Institute of Family Studies, Melbourne, 1984.

147. Parker, P.J., "Motivation of Surrogate Mothers: Initial Findings", (1983) 140 Am. J. Psychiatry 117.

148. The United Nations Declaration of the Rights of the Child, 1959, Principle 9, provides that the child "shall not be the subject of traffic in any form".

149. Adoption of Children Act 1968 (Tas.), s.43.

150. Mady, T.M., "Surrogate Mothers: The Legal Issues", (1981), 7 Am. Jnl. Law and Medicine, 323.

151. *Ibid.*, p.329.

152. *Ibid.*, p.330.

153. *Ibid.*, p.331.

154. Keane, N.P., "Legal Problems of Surrogate Motherhood", (1980) S. Illinois Uni. L.J., 147.

155. Adoption of Children Act 1968 (Tas.), s.43. See also note 31 *supra* for other jurisdictions.

156. *Ibid.*, s.26.

157. Keane, N.P., "Legal Problems of Surrogate Motherhood", (1980) S. Illinois Uni. L.J., 147.

158. See note 31 for other jurisdictions.

159. Keane, N.P., "Legal Problems of Surrogate Motherhoods", (1980) S. Illinois Uni. L.J., 147, p.159.

160. 186 Kan. 311, 317, 350 P. (2d) 1 (1960).

161. *Ibid.*, p.324.

162. *Ibid.*

163. Keane, N.P., "Legal Problems of Surrogate Motherhood", (1980) S. Illinois Uni. L.J., p. 160.

164. 6 F.L.R. 3011 (1980).

165. 106 Mich. App. 169 (1981).

166. Appeal denied 414 Mich. 875 (1982); *cert* denied _____ US _____. S. Ct. 834 (1983).

167. 186 Kan. 311, 317, 350 P. (2d) 1 (1960).

168. Reimche v First National Bank, 512 F. 2d 187, 189 (9th Cir. 1975).

169. 122 Mich. App. 506, 33 N.W. 2d 90 (1983).

170. No. 81 - Cl - 0121 - Franklin Circuit Court.

171. Adoption of Children Act 1968, s.13(4).

172. (1978) 8 Family Law 1970.

173. Reported in The Mercury 21 November 1985.

174. (1985) New Law Journal Law Reports, Feb 1, 106.

175. Reported in The Age 16 November 1985.

176. Parker, P.J., "Surrogate Motherhood, Psychiatric Screening and Informed Consent, Baby Selling and Public Policy" (1984) 12:1 Bull Amacad Psychiatric Law, 2.

177. *Ibid.*, p.34.

178. *Ibid.*, p.33.

179. *Ibid.*, p.34.

180. Cotton K. and Winn D., Baby Cotton: For Love and Money, London, (1985), P. 37.

181. For other jurisdictions, see note 105 *ante*.

182. This technique was developed by Dr. A. Jeffreys at the University of Leicester, Stanmore, Middlesex. Genetic material (DNA) is extracted from blood or other tissue and reacted with a probe to produce a pattern of bands which is specific to one individual. Half the bands are inherited from the mother,and half from the father. Few bands are shared by unrelated people and each offspring inherits a different random selection of bands from each parent.

183. For other jurisdictions, see note 105 *ante*.

184. For other jurisdictions, see note 105 *ante*.

185. For other jurisdictions, see note 105 *ante*.

186. (1970) 2 All E.R. 33.

187. For other jurisdictions (except N.S.W. which does not cover procedures involving donated ova), see note 105 *ante*.

188. (1981) 8 F.L.R. 2139; (1983) 9 F.L.R. 2260.

189. Report of the Special Committee appointed by the Queensland Government to Enquire into the laws relating to Artificial Insemination, In Vitro Fertilization and other related matters. March 1984 (Chairman: The Hon. Mr. Justice Demack), at p.55.

190. Davies, I., "Close Encounters in a Test Tube" (1983) 133 New Law Journal 107.

191. Mady, T.M., "Surrogate Mothers: The Legal Issues" (1981) 7 Am. Jnl. Law and Medicine, 323.

192. Act No. 10150.

193. *Ibid.*, ss.93 and 94.

194. *Ibid.*, ss.95 and 96.

195. *Ibid.*, s.97.

196. *Ibid.*, s.98.

197. Interim Report of the Asche Committee on Reproductive Technology to Family Law Council - July 1984 (Chairman: The Hon. Mr. Justice Asche), p.10.

BIBLIOGRAPHY

ARTICLES

Andrews, L.B., "The Stork Market. The law of the New Reproduction Technologies". (1984) 70 A.B.A. Jnl 50.

Asche, A. Hon J., "Legal Problems arising from AID, IVF and Related Procedures", Proceedings of the Conference: Ethical Implications in the use of Donor Sperm, Eggs and Embryos in the Treatment of Human Infertility. F. Di Giantamasso (ed), Monash University Centre for Human Bioethics. Melbourne, May 1983.

Atherton, R.F., "Artificially Conceived Children and Inheritance in New South Wales" (1986) 60 A.L.J., 374.

Baxter, E., "Surrogate Mothers - The Legal Issues". The Parliament of the Commonwealth of Australia Current Issues Brief No. 43984, Dept. of the Parliamentary Library.

Black, R.C., "Legal Problems of Surrogate Motherhood", (1981) 16 New Eng. L.R. 373.

Brahams, D., "The legal and social problems of In Vitro Fertilization; Why Parliament must legislate" - I (1983) 133 New Law Journal, 859.

Brahams, D., "The legal and social problems of In Vitro Fertilization; Why Parliament must legislate" - II (1983) 133 New Law Journal, 881.

Chalmers, D.C., "Legal Aspects of Artificial Conception (Artificial Insemination and In Vitro Fertilization) in Australia. In Proceedings of the 6th World Congress on Medical Law. Ghent. Belgium World Association for Medical Law. August 1982.

Cuisine, D.J., "Some Legal Implications of Embryo Transfer", (1979) 129 New L.J. 627.

(Current Topics) "Legislation in regard to surrogate motherhood" (1985) 59 A.L.J., 306.

(Current Topics) "Surrogate motherhood - the Warnock and Waller Reports" (1984) 58 A.L.J., 683.

Davies, I., "Close Encounters in a Test Tube" (1983) 133 New Law Journal 107.

Goldfarb, C., "Two Mothers, One Baby, No Law", (1983) 11 Human Rights 27-29, 54.

Holten, E.L. Van., "Surrogate Motherhood in California, Legislative Proposals". (1981) 18 San Diego Law Review 341.

Hutchinson, A.C., "OLRC Report on Artificial Reproduction and Related Matters", (1985) 30 Aus. New Law Journal, 858.

Keane, N.P., "Legal Problems of Surrogate Motherhood", (1980) S. Illinois Uni. L.J., 147.

Kennan, J., "Science and the Law - Lessons from the Experience of Legislating for the New Reproductive Technology" (1985) 59 A.L.J. 488.

Krimmel, H.T., "The Case Against Surrogate Parenting", (1983) 13 Hastings Center Report, 35.

Mady, T.M., "Surrogate Mothers: The Legal Issues", (1981) 7 Am. Jnl Law and Medicine, 323.

Martin, D.K., "Surrogate Motherhood: Contractual Issues and Remedies under Legislative Proposal", (1984) Washburn Law Journal, Vol. 23, 601.

Mason, S., "Abnormal Conception" (1982) 56 A.L.J. 347.

Mayo, M., "The Legal Status of the AID child in Australia", (1976) 50 A.L.J., 562.

Morgan, D., "Who to Be or Not to Be: The Surrogacy Story". (1986) 49 Modern Law Review, No. 3, 358.

(Noted) "Surrogacy and the Law" (1985) New Law Jnl., 121.

(Noted) "Surrogate motherhood - the Warnock and Waller Reports" (1984) 58 A.L.J., 683.

Parker, D.C., "Surrogate Mothering: An Overview", (1984) Family Law, 140.

Parker, P.J., "Motivation of Surrogate Mothers: Initial Findings", (1983) 140 Am J. Psychiatry 117.

Parker, P.J., "Surrogate Motherhood, Psychiatric Screening and Informed Consent, Baby Selling and Public Policy" (1984) 12:1 Bull Amacad Psychiatric Law, 21.

Parker, P.J., "Surrogate Motherhood: The Interaction of Litigation, Legislation and Psychiatry", (1982) International Journal of Psychiatry Vol. 5, 341.

Priest, J.A., "The Report of the Warnock Committee on Human Fertilisation and Embryology", (1985) 48 Modern Law Review, No. 1, 73.

Robertson, J.A., "Surrogate Mothers: Not so novel after all", (1983) 13 Hastings Center Report 28.

Sappideen, C., "The Surrogate Mother - A Growing Problem", (1983) 6 U.N.S.W. Law Journal, 79.

Skene, L., "Moral and Legal Issues in the New Biotechnology" (1985) 59 A.L.J. 379.

Sloman, S., "Surrogacy Arrangements Act 1985", (1985) 4 Oct, New Law Journal, 978.

Smith, G.P., "The Perils and Perigrinations of Surrogate Mothers", (1982) Medicine and Law 325.

Tager, L., "Surrogate Motherhood, Legal Dilemma", (1986) 103 South African Law Journal, 381.

NEWSPAPERS

Andrews, L., "A world of brave new babies faces problems", The Australian, 4 April 1985.

Cook, S., "Law must tread carefully as it follows the scientists", The Australian, 23 July 1984.

Cook, S., "Surrogacy deals 'unenforceable'", The Australian, 2 August 1984.

"Court intervenes in surrogate birth", The Mercury, 7 January 1985.

Davis, I., "Surrogate motherhood boom in America pregnant with legal peril", The Australian, 21 January 1985.

"Donor embryos - 2 pregnant", The Herald, 22 July 1983.

"Floodgates open on surrogate motherhood", The Mercury, 21 November 1985.

"Grey area of surrogate mother and child", The Guardian Weekly, 13 January 1985, Vol. 132, No. 2.

Lockwood, K., "In vitro issues catch the law unawares", The Australian, 5 May 1983.

Lyons, J., "Surrogate births 'legal' in all States but Victoria", The Australian, 16 January 1985.

"MPs angry in wake of surrogate birth", The Mercury, 8 January 1985.

"Natural father wins custody of daughter", The Mercury, 12 August 1986.

Quinn, L., "Ethical dilemmas of surrogacy", The Australian, 21 March 1985.

"Research into womb flushing fails to get support of national bodies", The Mercury, 22 February 1985.

Rowland, R., "Why curb the business of test-tube pregnancy?", The Age, 6 March 1985.

"Status of IVF 'egg' needs clarification", The Mercury, 25 July 1984.

Stevens, J., "Baby Cotton goes home but controversy lingers", The Age, 16 January 1985.

"Surrogate mother's baby in custody", The Australian, 7 January 1985.

"Surrogate mothers defended", The Mercury, 26 September 1984.

"Surrogate mothers may not be paid", The Australian, 16 January 1985.

"Surrogate parents may be common", The Mercury, 5 January 1984.

"The legal tangle behind surrogacy", The Australian, 12 August 1986.

Timmins, N., "Why a woman will give life to her sister's baby", The Australian, 11 December 1984.

Tonti-Filippini, N., "IVF programme threatens the new Generation", The Australian, 15 December 1983.

Tonti-Filippini, N., "Ownership of an embryo would be ownership of a human being", The Age, 10 May 1983.

"UK Govt. to outlaw paid surrogacy", The Australian, 8 January 1985.

"UK High Court gives 'baby Cotton' to her father, wife", The Mercury, 16 January 1985.

"When having a baby is a nine-month contract - for $10,205", The Australian, 4 July 1984.

BOOKS

Keane, N.P., & Breo, D.L. The Surrogate Mother. N.Y., Everest House, 1981.

Rassaby, A.A., Surrogate Motherhood: The position and problem of substitutes in W.A.W. Walters and P. Singer (eds.). Test Tube Babies. Oxford Uni. Press, 1982, pp. 97-109.

Scott, R., The Body as Property. London, Allen Lane, 1981.

Singer, P. & Wells, D., The Reproductive Revolution. Melbourne, Oxford University Press, 1984.

REPORTS

AUSTRALIA

Commonwealth of Australia
Interim Report of Asche Committee on Reproductive Technology to Family Law Council - July 1984 (Chairman: The Hon. Mr Justice Asche).

Final Report of the Asche Committee on Reproductive Technology to Family Law Council - May 1985 (Chairman: The Hon. Mr. Justice Asche).

New South Wales
Human Artificial Insemination: Artificial Conception Discussion Paper 1, New South Wales Law Reform Commission, November 1984 (Chairman: Mr Russell Scott).

Human Artificial Insemination by Donor: Some Australian perspectives (New South Wales 1983-4), Dr. Graeme Rawson, July 1984.

Queensland
Interim Report of the Special Committee appointed by the Queensland Government to Enquire into the Laws relating to Artificial Insemination, In Vitro Fertilization and other related matters, May 1983 (Chairman: The Hon. Mr Justice Demack).

Report of the Special Committee appointed by the Queensland Government to Enquire into the Laws relating to Artificial Insemination, In Vitro Fertilization and other related matters, March 1984 (Chairman: The Hon. Mr Justice Demack).

South Australia
Report of the Working Party on In Vitro Fertilization and Artificial Insemination by Donor, South Australia, January 1984 (Aileen Connon and Philippa Kelly).

Tasmania
Interim Report, Committee to Investigate Artificial Conception and Related Matters, State of Tasmania, December 1984 (Chairman: Mr Don Chalmers).

Final Report, Committee to Investigate Artificial Conception and Related Matters, June 1985 (Chairman: Mr Don Chalmers).

Victoria
Interim Report, Committee to Consider the Social, Ethical and Legal Issues arising from In Vitro Fertilization, September 1982 (Chairman: Mr Louis Waller).

Report on Donor Gametes in IVF, August 1983, Committee to Consider the Social, Ethical and Legal Issues arising from In Vitro Fertilization, September 1982 (Chairman: Mr Louis Waller).

Report on the Disposition of Embryos produced by In Vitro Fertilization, August 1984, Committee to Consider the Social, Ethical and Legal Issues arising from In Vitro Fertilization, September 1982 (Chairman: Mr Louis Waller).

Western Australia
Interim Report of the In Vitro Fertilization Ethics Committee of Western Australia, August 1984 (Chairman: Mr Robert Meadows).

UNITED KINGDOM
Report of the Committee of Inquiry into Human Fertilization and Embryology, Department of Health and Social Security, HMSO, Cmnd. No. 9314, July 1984 (Chairperson: Dame Mary Warnock).

CANADA
Report of the Ontario Law Reform Commission on Artificial Reproduction and Related Matters, Ministry of the Attorney-General, Toronto, July 1985.

LEGISLATION

AUSTRALIA

Commonwealth of Australia
- Family Law Act 1975 (No. 53)
- Family Law Amendment Act 1983 No. 72)
- Marriage Act 1961 (No. 12)
- Marriage Amendment Act 1985 (No. 7)

New South Wales
- Artificial Conception Act 1984 (No. 3)
- Children (Equality of Status) Act 1976 (No. 97)
- Children (Equality of Status) Amendment Act 1984 (No. 6)

Queensland
- Status of Children Act 1978 (No. 30)

South Australia
- Family Relationships Act 1975 (No. 115)
- Family Relationships Act Amendment Act 1984 (No. 102)

Tasmania
- Adoption of Children Act 1968 (No. 33)
- Status of Children Act 1974 (No. 36)
- Status of Children Amendment Act 1985 (No. 122)

Victoria
- Adoption Act 1984 (No. 10150)
- Infertility (Medical Procedures) Act 1984 (No. 10163)
- Status of Children Act 1974 (No. 8602)
- Status of Children (Amendment) Act 1984 (No. 10069)

Western Australia
- Artificial Conception Act 1985 (No. 14)

Australian Capital Territory
- Artificial Conception Ordinance 1985 (No. 57)

Northern Territory
- Status of Children Act 1979 (No. 16)

UNITED KINGDOM

Adoption Act 1975
Children Act 1976
Surrogacy Arrangements Act 1985

UNITED STATES

California Assembly Bill No. 3771 (1982)
Kansas Senate Bill No. 485 (1984)
Michigan House Bill 5184 - October 1981
South Carolina House Bill No. 3491 (1982)
Uniform Parenting Act 1973

TABLE OF CASES

Morgan v Manser [1948] 1 K.B. 184; [1947] 2 All E.R. 666.

Morris v Redlands Bricks Ltd. [1970] A.C. 652.

Paradine v Jane (1647) leyn 26; 82 E.R. 897.

Paton v British Pregnancy and Advisory Service [1979] Q.B. 276.

Planned Parenthood of Missouri v Danforth 428 U.S. 52, 69 (1976).

Re a Baby (1985) New Law Journal Law Reports Feb 1, 106.

Reincke v First National Bank, 512 F. 2d 187, 189 (9th Cir. 1975).

Rigby v Connol (1880), 14 Ch.D. 482.

Roe v Wade 410 U.S. 113, 163-164 (1973).

Samms v Eccles, 11 Utah 2d. 289, 293, 358 P. 2d 344, 347 (1961).

Scanlon's New Neon Ltd. v Tooheys Ltd. (1943) 67 C.L.R. 169.

Smith v Jenkins (1970), 119 C.L.R. 397.

Stickney v Keeble [1915] A.C. 386.

Syrkowski v Appleyard (1981) 8 F.L.R. 2139; (1983) 9 F.L.R. 2260.

Taylor v Caldwell (1863) 3 B. & S. 286; 122 E.R. 309.

Wallis v Smith (1882), 21 Ch.D. 243.

Whitwood Chemical Co. v Hardman [1891] 2 Ch. 416.

J.C. Williamson Ltd. v Lukey (1931), 45 C.L.R. 282.