Biology, Genetics and Intent

Who are the legal parents of children born of surrogacy arrangements?

- *The biological parents, the woman who gives birth to the child and her husband, or*

- *The genetic parents, the man and woman who supply the gametes, or*

- *The commissioning parents, the man and woman who intended to bring about the birth and raise the child?*

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Introduction

Infertile Australians are engaging in "reproductive tourism" to access surrogacy arrangements[1] in the hope of realising their dreams of having children. "Reproductive tourism" is movement from one legal forum to another to seek assisted reproduction services that are not available at home.[2]

There is an increasing acceptance of surrogacy arrangements in certain jurisdictions in Australia and around the world. The growth of infertility in modern society and the declining numbers of children available for adoption has increased the need for further assisted reproductive technology options to be made available.[3]

The evolution of IVF technology has resulted in greater acceptance of the concept, as now the surrogate need not be genetically related to the child. It has meant that the biological, genetic and child rearing roles of parenthood can potentially be separated.

Traditionally the law recognises the birth mother and her husband as the legal parents. A child a married woman gives birth to is presumed to be a child of her marriage. However, due to advances in assisted reproductive technology an automatic presumption in favour of the birth parents is no longer appropriate. It can be shown that "intent to parent" is the emerging legal trend for determining parentage of surrogate children.

Case law and legislative developments indicate that an IVF surrogacy arrangement either where the commissioning parents are the genetic parents or where one or both gametes[4] come from donors can be legally secure.[5] A traditional surrogacy agreement where the surrogate is the genetic mother holds great legal and emotional risks.[6]

Both the Australian Capital Territory,[7] and some states in the United States[8] can now be described as providing a favourable legal forum for IVF surrogacy.[9]

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[1] A surrogacy arrangement is where a woman ("the surrogate") agrees to conceive and give birth to a child on behalf of others ("the commissioning parents") who intend to raise the child. Based on the definition by P W Janu, 'Surrogacy Arrangements in Australia: Analysis of the Legal Framework in Australia' (1995) 9 AJFL 200.

[2] Term derived from *Health Canada: Reproductive and Genetic Technologies Overview Paper (1999)* <http://www.hc-sc.gc.ca/englis/rgt/overview.ht>13.

[3] Western Australia, *Parliamentary Debates*, Legislative Assembly, 22 April 1999, 7604 (Megan Anwyl, Government Member of Legislative Assembly).

[4] Gametes refers to ovum and sperm.

[5] *Johnson v. Calvert*, 851 P2d 776 (Cal 1993).

[6] In the cases of *Re Baby M*, 537 A.2d 1277(N.J.1988) and *Re Evelyn*(1998) FLC 92 807 the surrogate in traditional surrogacy arrangements suffered extreme grief when she relinquished her child and then reneged on the surrogacy arrangement.

[7] *Artificial Conception Amendment Act 2000* (ACT*)* gazetted on 28 September 2000.

[8] *Uniform Parentage Act (2000)*. The provision regarding IVF surrogacy is an optional part of the amendments. States can elect whether to adopt this part of the legislation. Texas has adopted the legislation and it has been introduced in Maryland, Minnesota and West Virginia.

[9] This involves an embryo created through IVF technology either using gametes from both commissioning parents or one commissioning parent and a donor being implanted into the surrogate.

In Australia, the Australian Capital Territory has the most liberal surrogacy laws.[10] Evidence has been given that a fertility clinic in Canberra treats cases of IVF surrogacy from all over Australia.[11] Recent amendments to legislation, enable resident commissioning parents to become the child's legal parents.[12] At least one commissioning parent must be the child's genetic parent.[13]

In some states in the United States the legal climate invites reproductive tourism to flourish. Both traditional and IVF surrogacy arrangements can be accessed through commercial agencies.[14]

Legislation recently drafted in the United States can provide commissioning parents to an IVF agreement with parental status prior to the child's birth. The commissioning parents or the surrogate need only have resided in the relevant state for ninety days prior to the making of the application.[15]

Prospective parents are accessing these jurisdictions as the legal position in the remainder of Australia is restrictive. Queensland holds the most extreme position where all types of surrogacy arrangements, both commercial and altruistic, are illegal.[16]

To accommodate advances in assisted reproductive technology the law must be prepared to evolve with science and look at "intent to parent" to determine legal parentage rather than who gave birth to or is genetically related to the child.

Uniform legislation should be enacted in Australia providing strict regulation for IVF surrogacy arrangements and allowing commissioning parents to make a court application for a parentage order so that the child's birth certificate can be amended accordingly. Otherwise Australians will continue to access favourable jurisdictions to gain access to more progressive laws.

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[10] *Substitute Parent Agreements Act 1994* (ACT) s 5, forbids only commercial surrogacy arrangements.

[11] The Canberra Fertility Clinic cited in Western Australia, Senate Select Committee Report, *Report of Select Committee on the Human Reproductive Technology Act 1991* (1999) 250, 251.

[12] *Artificial Conception Amendment Act 2000* (ACT) above n 7.

[13] Definition "substitute parent agreement", *Artificial Conception Act 1985 (ACT)* s 2(2).

[14] Eg, California has no legislation however case law has created a favourable surrogacy climate. States such as Florida, Nevada, New Hampshire and Virginia have legislation that allows and enforces surrogacy contracts. For a comprehensive review of the legal position in the USA see American Surrogacy Center, Inc, TASC Legal Overview and Resources at<http://www.surrogacy.com/legals/states.html>.

[15] *Uniform Parentage Act 2000*, s 803.

[16] Surrogate Parenthood Act 1988 (Qld) s 2(2).
The offence is entering into where the offence is entering into a "prescribed contract" either to bear a child to be reared by others or to agree to hand over to others a child that has already been conceived.

Traditional Surrogacy

The Case Law in Australia and the United States

The first assisted reproductive technology to become available was artificial insemination by husband (AIH) or by donor (AID).[17] The procedure "AIH" has been used to facilitate "traditional surrogacy" arrangements where the surrogate is the genetic and birth mother and the commissioning father the genetic father.

In both the United States and Australia the position in relation to traditional surrogacy arrangements is clear. Apart from in a handful of states in the United States that strictly regulate them by statute,[18] traditional surrogacy agreements are not legally secure.

Courts in both countries have acknowledged a strong emotional link between a surrogate who is the genetic and birth mother and her child. The landmark decision in the United States was the *Baby M*[19] case decided by the New Jersey Supreme Court in 1988. Almost ten years later the Brisbane Family Court handed down Australia's first and to date, only decision involving a dispute over residence of a surrogate child, *Re Evelyn*.[20]

The landmark decision in each country resulted from a situation where the surrogate mother suffered intense grief after relinquishing her baby and reneged on the surrogacy agreement. In both, the surrogacy agreement was declared void and it was held that the genetic parents, being the surrogate mother and the commissioning father, were the legal parents of the child. Both courts then looked at which parent it was in the best interests of the child to reside with.

In *Baby M* the surrogate mother unfortunately was not in an equal position with the commissioning parents to provide a stable home for the child. The Supreme Court of New Jersey granted the commissioning father and his wife custody, and the surrogate visitation rights. However, the Court voided the purported termination in the surrogacy contract of the surrogate's parental rights. It also set aside the commissioning mother's adoption of the child granted by the trial court.[21]

In contrast, in the Australian case, *Re Evelyn*, the trial judge made it clear that both sets of parents could equally provide a satisfactory environment for the child. He then proceeded to make a decision in favour of the surrogate mother on the basis of her special relationship with the child as her genetic and birth mother.[22]

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[17] Ami S Jaeger, 'Monograph, *Assisted Reproductive Technologies Model Act*, Assisted Reproduction and Genetic Technologies Committee, Family Law Section, American Bar Association (December 1999) 2.
[18] For example states such as Florida, Nevada, New Hampshire and Virginia have legislation that allows and enforces surrogacy contracts.
[19] Above n 6.
[20] (Unreported, Family Court of Australia at Brisbane, Jordan J, 19 December 1997) 61-65.
[21] Above n 6, 1131.
[22] Above n 20.

This decision was made despite the fact the child had been residing with the commissioning parents for most of her life and they therefore had the "status quo" as is significant in Australian family law.[23] It was also made despite the judge's acceptance of expert testimony that the child's primary attachment at that time was to the commissioning mother and that in children under three it is ordinarily in the best interests of the child to support this attachment.[24]

The trial judge decided that the long-term implications were more important than the short-term distress to the child caused by separation from her primary caregiver. His Honour stated:

I also accept that an order placing Evelyn in the residence of her biological mother provides her with the optimum situation in which to work through issues relating to her surrogacy.[25]

On appeal the Full Court said:

Notwithstanding that the present case concerns a surrogacy situation, it remains clear, as a matter of principle, that there is no presumption in favour of the biological parent nor any presumption in favour of the biological mother where the child is female.[26]

Despite this statement it seems clear that the trial judge gave preference to Evelyn's biological and surrogate mother. He held that if the child was not returned it was likely that she would experience a sense of rejection by her biological mother. He also took into account that this may result in the mother suffering from extreme grief that could lead to major depression. Further, he felt that the biological mother could best answer questions about her origins as she approached adolescence.[27]

Case law in the United States contrasting the court's attitudes to IVF surrogacy with traditional surrogacy

In 1993 IVF surrogacy arrangements adopted a stronger legal position than traditional surrogacy when the Supreme Court of California held in *Johnson v. Calvert*[28] that in a situation where both commissioning parents were the genetic parents, the surrogate had no parental rights to the child. This landmark case shifted Californian law regarding surrogacy to look at "intent to parent" when determining parentage.

[23] Cowling v Cowling (1998) FLC 92 801.
[24] Above n 22, 62.
[25] Ibid.
[26] Above n 6, 85 106.
[27] Above n20.
[28] Above, n 5.

In this case the surrogate was the gestator of an embryo conceived using gametes from both commissioning parents. After the birth she reneged on the surrogacy agreement. Both she and the commissioning parents sought to be declared the legal parents of the child. Under the relevant legislation in California, maternity could be proved both by being the genetic mother and by having given birth to the child.[29] As both the surrogate and genetic mother could provide proof of maternity the court had to decide who was in fact the legal mother.

It concluded that the genetic and birth mother were "tied" under the relevant legislation and then broke the tie by looking at the intent of the surrogacy contract. The Court looked at which mother had intended to bring about the birth and raise the child as her own. It held that this was the commissioning mother.

In contrast in 1994 the Californian Supreme Court considered a "traditional" commercial surrogacy agreement evidenced by a contract *In the Marriage of Moschetta.*[30] In this case it was argued that there was a tie between the surrogate and commissioning mothers, however this argument was rejected as the commissioning mother was not the genetic mother. The court held that the surrogate who was the genetic mother was the legal mother.[31]

Poignantly the Court stated:

While we affirm the judgement so far as it vests parental rights in the surrogate mother, we are not unmindful of the practical effect of our decision in light of Johnson v. Calvert. Infertile couples who can afford the high-tech solution of in vitro fertilisation and embyro implantation in another woman's womb can be reasonably assured of being judged the legal parents of the child, even if the surrogate reneges on her agreement. Couples who cannot afford in vitro fertilization and embryo implantation, or who resort to traditional surrogacy because the female does not have the eggs suitable for in vitro fertilisation, have no assurance their intentions will be honoured in a court of law. For them and the child, biology is destiny.[32]

The court called again as it had in *Johnson v. Calvert*[33] for legislative guidance as it pointed out, that the *Uniform Parentage Act 1973* at that time was not enacted with surrogacy in mind.[34]

[29] Civil Code 7003, 3-5.
[30] 25 Cal.App. 4th1218 (1993).
[31] Ibid 1221.
[32] Ibid 1223.
[33] Above n 5, 783.
[34] Above n 31,1224.

Statutory Position of Surrogacy in Australia

The ACT is the only State or Territory in Australia that can be described as providing a favourable legal forum for surrogacy.

In Queensland it is not legally possible to enter into any type of surrogacy arrangement. If you enter into an altruistic arrangement or a commercial contract you can be charged with a criminal offence.[35] There has been a case where the surrogate and commissioning mother were charged but the presiding Magistrate discharged both women without recording a conviction.[36]

This issue was dealt with in the *Report of the Taskforce on Women and the Criminal Code*.[37] The recommendations of this report simply restate what has been the position in most of Australia for a decade:

> *That the Surrogate Parenthood Act 1988 (Qld) be amended so that only commercial surrogacy is prohibited*.[38]

The Report also suggests that only IVF surrogacy be permitted where the surrogate is not the genetic mother.[39]

In South Australia[40] arranging a surrogacy service is prohibited and in Tasmania[41] the provision of technical and professional services is illegal.

In Victoria, the *Infertility (Medical Procedures) Act 1995* (Vic)[42] provides that a woman cannot undergo an IVF procedure unless she has been diagnosed as infertile or is likely to pass on a genetic abnormality or disease. This means that a potential surrogate cannot legally access IVF treatment. It is interesting to note that the much publicised IVF surrogacy of Linda Kirkman in the late 1980s occurred prior to this section coming into operation.

In New South Wales and the Northern Territory there is no legislation dealing with surrogacy leaving a question as to the legality of such arrangements.

Western Australia is currently in the policy development[43] stage of surrogacy legislation being drafted as a result of the recommendations of the *Report of Select Committee on the Human Reproductive Technology Act 1991*.[44]

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[35] Above n 16.
[36] Case on file Women's Legal Service quoted in the *Report of the Taskforce on Women and the Criminal Code* (March 2000) 374.
[37] Ibid.
[38] Ibid 386.
[39] Ibid 384.
[40] Section 5, *Surrogacy Contracts Act 1993* (SA).
[41] *Surrogacy Contracts Act 1993* (Tas).
[42] s13(3)(d)(I).
[43] Western Australia, Statement, Legislative Assembly, 24 November 1999, 3695/2 (Mr Day, Minister for Health).

This report, tabled in Parliament on 14 May 2000, is the most favourable to date regarding surrogacy arrangements in Australia. The recommendations are evidence of the extent to which the climate towards surrogacy has changed in Australia over recent years. The Select Committee recommended that legislation be introduced to make legal a variety of different surrogacy arrangements.

Refreshingly the Select Committee took a realistic approach acknowledging that West Australians had access to surrogacy arrangements in the ACT and in the United States. It also acknowledged that surrogacy arrangements may be entered into over the internet. It stated:

> *Against this background the Select Committee has considered the question of surrogacy based upon humanitarian grounds and acknowledged the availability of new technology.*[45]

It was also acknowledged that it would be better to have legislation in place so that arrangements could be regulated and controlled.

In support of the Select Committee's recommendations member, Megan Anwyl, said in a report to the Legislative Assembly:

Infertility is rising in the community and adoption is virtually non-existent in Western Australian Society.[46]

She cited that only 15 intrastate and less than 30 overseas adoptions had occurred in 1998. She stated that a concern was that all Australians have equal access to fertility treatment regardless of their financial circumstances or where they live in Australia.[47]

However, the Select Committee did not reach a firm conclusion on the types of surrogacy arrangements that should be permitted, although all members disagreed with an arrangement where the surrogate is inseminated with donor sperm. All but one member agreed with the option of IVF surrogacy where one or both commissioning parents are the genetic parents. Members opinions were mixed on the traditional arrangement where the surrogate is inseminated with the commissioning father's sperm and in IVF surrogacy where a donor embryo is used. A majority agreed with donor IVF if one parent was the genetic parent. The final recommendations appear to ask for legislation to sanction all but the option of the surrogate being inseminated with donor sperm.[48]

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[44] Above n 11.
[45] Ibid, 243
[46] Above n 3.
[47] Ibid.
[48] Above n 11, 269-271.

The Select Committee did not consider the decision in *Re Evelyn*[49] when recommending that traditional surrogacy arrangements where the commissioning father has provided the sperm and the surrogate is the genetic mother, should be permitted.

This report has now been given almost the full support of the Government. The government was supportive of the recommendation to draft legislation on surrogacy however decided that further "policy development" was required to develop the appropriate legislation.

The recommendations of the Select Committee included: [50]

- That the best interests of the child be paramount in any surrogacy legislation
- Counselling be mandatory for all parties
- That the Reproductive Technology Council consider any applications for surrogacy on a case-by-case basis
- That all reasonable expenses be paid for by the commissioning couple
- That if surrogacy is formalised the Western Australian Minister for Health approach the Federal Government with a view to allowing in vitro fertilisation (IVF) surrogacy treatments to be considered by Medicare as any other IVF treatment.
- That legislation be drafted to provide for surrogacy arrangements as outlined and to clarify the legal status of surrogate children and their commissioning parents as a matter of urgency
- That the *Adoption Act 1994*(WA) be amended to enable adoptions to proceed where surrogate births have occurred in Western Australia pending the introduction of surrogacy legislation

It will be interesting to see which path the government chooses in relation to the types of surrogacy arrangements it provides for.

[49] Above n 6.
[50] Above n 11, 272-274.

The Worldwide Evolution of IVF Surrogacy

The introduction of IVF technology has dramatically affected the acceptance of surrogacy arrangements. The first such birth using IVF, was that of Louise Brown in Britain in 1978.[51]

An IVF surrogate may be likened to a human incubator. She is carrying an embryo genetically unrelated to her and will have no biological or blood link with the child she delivers. This procedure has opened the door for commissioning parents to have a child that is biologically related to one or both of them.

The first reported IVF surrogate birth in Australia occurred in Victoria, that of Alice Kirkman in 1988. This arrangement was a "sister surrogacy" using IVF treatment at the Epsworth Hospital.[52]

Subsequently in 1993 the Kennett government looked at amending the *Infertility (Medical Procedures) Act 1984* (Vic) to allow fertile women to participate in the IVF program as part of "voluntary" surrogacy arrangements. However this proposal did not proceed as it was thought at the time that the government was "taking an enormous risk for little electoral gain.[53]

In 1990 the United Kingdom provided legal status to a child the subject of a traditional or IVF surrogacy arrangement. The *Human Fertilisation and Embryology Act 1990*[54] provided this legal status if he or she was genetically related to one of the commissioning parents.

In 1996 Israel passed laws allowing IVF surrogacy only.[55] In this country only the commissioning father must be genetically related to the child. The genetic mother can be the commissioning mother or a donor. This law made Israel the third jurisdiction after the American states of New Hampshire and Virginia to positively sanction and heavily regulate surrogacy.

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[51] Ami S Jaeger, 'Monograph' above n 17, 3. This contains an explanation of additional technologies that have developed since IVF, namely GIFT and ZIFT. These technologies are simply all referred to in this article simplistically as "IVF".

[52] Standing Review and Advisory Committee on Infertility, Annual Report (1996) at <http://hna.ffh.vic.gov.au/phb/hce/infert/lookback.htm>

[53] "Surrogacy and the Law", *Herald Sun*, 8 October 1993, 14 quoted in Select Committee Report above n 11, 254.

[54] The United Kingdom has had surrogacy legislation since 1985 when the *Surrogacy Arrangements Act* was quickly passed due to media and community interest following the Baby Cotton case. This involved Kim Cotton a British woman acting as surrogate for a couple residing in the United States.

[55] *Surrogate Motherhood Agreements (Approval of Agreement and Status of Newborn) Law.*

In June 2000 the Legislative Council of Hong Kong enacted the *Human Reproductive Technology Ordinance*. This legislation is modeled on the United Kingdom statute and regulates surrogacy arrangements, making it unlawful to negotiate commercial arrangements and establishing a Council on Human Reproductive Technology. Surrogacy arrangements have been limited to where both commissioning parents are the biological parents.[56]

In the year 2000 the Australian Capital Territory largely copied the United Kingdom legislation with one significant departure, only IVF surrogacy is covered. One of the commissioning parents must be genetically related to the child. The child's other genetic parent can be the other commissioning parent or a third party donor.[57]

At the same time in the United States the National Conference of Commissioners on Uniform State Laws that makes public policy recommendations for lawmakers in the states voted unanimously to amend their *Uniform Parentage Act 1973.* The *Uniform Parentage Act 2000*[58] now includes provisions for surrogacy, however they only apply to IVF surrogacy. Article 8 deals with IVF agreements. It provides that commissioning parents can obtain parentage orders prior to the birth in an IVF surrogacy agreement.

In New Zealand the *Assisted Human Reproduction and Human Assisted Reproductive Technology Bills* are currently before a Senate Select Committee due to report on 31 May 2002.[59] In 1997 the National Ethics Committee on Assisted Human Reproduction (NECAHR) granted ethical approval for IVF non-commercial surrogacy. In 1998 NECAHR allowed a fertility clinic to go ahead with a non-commercial IVF surrogacy.[60]

Favourable Surrogacy Jurisdictions

Legislative trends to allow the commissioning parents to be the legal parents

The ACT

The changing needs of people in this electorate resulted eventually, after much opposition, in amendments to legislation that allow the commissioning parents in an IVF surrogacy arrangement to become the legal parents of their child.

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[56] Dr Thomas Chan<pmo@hwb.gnc.gov.hk>' Surrogacy' Health and Welfare Bureau, Hong Kong (26 October 2000).
[57] Above n 13.
[58] This Act amended the *Uniform Parentage Act 1973.*
[59] Bills before Select Committees at <http://www.gp.co.nz/wooc/npaper/select-committee-bills.html >.
[60] AnneElse,"HightimetoProtectOurFuture"(January1999)<at http://geocities.com/nzwomen/AnneElse/19990128reproduction.html>1.

Former Chief Minister, Kate Carnell had been trying to change the law since the birth of Australia's first legal surrogate baby, Jessica Haynes born of an IVF surrogacy arrangement in 1996. Soon after the birth the Chief Minister presented the *Artificial Conception (Amendment) Bill 1996*, a private Members Bill, to the Legislative Assembly. The Bill dealt with giving surrogate children legal status within their commissioning family.

Prior to the introduction of the Bill a combination of the *Artificial Conception Act 1985*(ACT) and the *Substitute Parent Agreements Act 1994*(ACT) had provided the ACT with the most liberal surrogacy laws in Australia. Non-commercial arrangements were permitted and were termed "substitute parent agreements" rather than surrogacy arrangements.[61]

This relaxed climate enabled the Canberra Fertility Clinic to be established to assist people with surrogacy arrangements. The *Substitute Parent Agreements Act* provides that if the arrangement is non-commercial :

- A party to the agreement can arrange the surrogacy service[62],
- The parties can enter into a surrogacy contract[63] and
- Technical and professional services can be provided.[64]

It has been said that Dr Martyn Stafford-Bell, the Director of the Clinic had interpreted the legislation to mean that, "We're the only state where the law says go for it".[65] On 7 August 1996 he assisted in the IVF surrogacy arrangement of Jessica Haynes being Australia's first legal surrogate child. He has given evidence that in 1997 the Centre treated 14 IVF surrogacy cases from all over Australia.[66]

The Clinic only undertakes IVF surrogacy arrangements in cases where both gametes come from the commissioning parents. The clinic does not arrange the surrogate, it only assists parties who have already found each other. There are strict criteria for participating parties, comprehensive medical and legal information is provided and there is a requirement for mandatory counselling.[67]

In March 1997 the ACT Community Law Reform Committee released an Issues Paper[68] regarding the Bill. Kate Carnell pleaded at the time:

…do not let some children end up in a situation where they are simply in a legal void, living with their genetic parents who are not actually their legal parents, potentially forever. [69]

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[61] Above n 13.
[62] *Substitute Parent Agreements Act* 1994 (ACT) s4.
[63] Ibid s5.
[64] Ibid s8
[65] Anna Krohn, *Bioethics Research Notes* (1996) 8 (4) <http://bioethics.com/research/research/op0804.html> 2.
[66] Evidence given before Select Committee in the Report of Select Committee above n 11, 250.
[67] *Report of Taskforce on Women and the Criminal Code* above n 38, 374.
[68]Community Law Reform Committee (ACT), Issues Paper on the *Artificial Conception (Amendment) Bill* 1996 (March 1997).
< http://www.dpa.act.gov.au/ag/Reports/CLRC/ac.html>.

However members of the Legislative Assembly did just that, the Bill was opposed and then lay dormant for several years.

In 1998 Hamish Ryan was born, also as a result of an IVF surrogacy arrangement. Hamish is the biological child of his commissioning parents as a result of an IVF surrogacy arrangement. Hamish is the product of an egg from his mother fertilised by his father and implanted into the womb of his aunt. Earlier this year Hamish's biological parents applied to the ACT Supreme Court[70] for a declaration that they were Hamish's parents and for an order[71] that the Registrar of Births, Deaths and Marriages amend his birth certificate accordingly.

Justice Crispin held that it would be in Hamish's best interests to grant the declaration and orders sought, however, conclusions arising from *Artificial Conception Act 1985* (ACT) prevented him from doing so.

The relevant sections[72] drew the conclusions that where a married woman undergoes a fertility procedure her husband is presumed to be the father of the resulting child. It also provided that where a man other than her husband provided sperm for the procedure that that man is presumed not to be the father. Similarly the birth mother is presumed to be the mother and the woman who provided the ovum is conclusively presumed not to be the mother.

His Honour concluded,

Whilst I am conscious of the need to ensure due recognition of the parenthood of couples raising a child born to them as a result of reproductive technology procedures, it does appear that the present form of legislation may require further consideration.[73]

The birth of the Hamish Ryan and the resulting problems that both sets of parents had provided further impetus for Kate Carnell to again present this amending legislation to the Legislative Assembly. Early in 2000 Jessica's Hayne's mother was organising to enrol her daughter in pre-school and found that she could not sign the necessary forms as she was not Jessica's legal mother. Neither sets of parents could give medical permissions.[74] It seems that these logistical problems that significantly impacted upon the day to day lives of the children and their families pushed these amendments through.

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[69] Australian Capital Territory, *Parliamentary Debates*, House of Representatives, 11 May 2000) 1 (Kate Carnell, Chief Minister).
[70] *Re an Application pursuant to the Births Deaths and Marriages Registration Act* [2000] ACTSC 39.
[71] Pursuant to s16(3) of the *Births Deaths and Marriages Act 1997* (ACT).
[72] ss 5, 6.
[73] *Re an Application pursuant to the Births Deaths and Marriages Registration Act* [2000] ACTSC 39.
[74] Above n 71.

On 31 August the *Artificial Conception (Amendment) Bill 2000* was passed in the Legislative Assembly. The amendments meant that the commissioning parents of a child as a result of IVF surrogacy can apply to the Supreme Court for a parentage order and that the child's birth certificate can then be amended. [75] This circumvents the need to apply for adoption orders or for orders from the Family Court for residence. One of the commissioning parents must be the child's genetic parent.[76] The laws are to apply to a child conceived in the ACT prior to July 2002 as a result of a procedure carried out within this Territory. The ACT Law Reform Commission then has to report back before July 2002 and the laws will then be reviewed.[77]

It is significant that the amendments do not cover a traditional surrogacy arrangement. The Women's Legal Centre in ACT had made a submission that the law should not give greater security to IVF arrangements in preference to the safer and less invasive procedure of artificial insemination by donor. The Centre also pointed out that both procedures are authorised by the *Substitute Parents Agreements Act 1994* and the *Artificial Conception Act 1985*.[78] This submission did not gain support.

Adoption was not considered an appropriate option as under the *Adoption Act 1993*(ACT*)* the surrogate and genetic parents have no control over how or with whom the child is placed after relinquishing control to the Director of Family Services.[79]

To obtain an order six conditions have to be met:

- The application must be made at least six weeks and no more than six months since the birth
- The child's home must be with both commissioning parents
- Both birth parents must be in agreement freely and have full understanding of exactly what is involved
- Both commissioning parents must live in the ACT
- The genetic and birth couple must generally have assessment and counselling.
- The order is in the best interests of the child.[80]

The application can only be made by a heterosexual couple as it is provided that the agreement must be for a man and a woman to indicate their intention to become the parents of the child.[81] However, they may either be married or in a de facto relationship.[82]

The amendments do not change the fact that, in the ACT, although surrogacy or "substitute parent agreements" can be entered into in non-commercial circumstances, they are not enforceable.

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[75] *Artificial Conception Act 1985* (ACT), s10.
[76] Above n 13.
[77] *Ibid* , s9(1).
[78] Community Law Reform Committee (ACT), Issues Paper Above n 70,11
[79] Chief Minister, Australian Capital Territory, Kate Carnell, *Genetic Parents now able to be legal parents – surrogacy laws passed*, Press Release, (31 August 2000)1.
[80] *Artificial Conception Amendment Bill 2000*, ss10, 11.
[81] Paragraph (b) in the definition of "substitute parent agreement, above n 13.
[82] *Artificial Conception (Amendment) Bill 1996* Report 17, Community Law Reform Committee (October 1997) 15.

The practical effect of the Order is that the Registrar would enter the details of a parentage order in the parentage register and then re-register the birth of the child. It also gives the child the same rights of property and inheritance as if adopted. The child can have access to a copy of the entry in the Register of Births, but any identifying information requires the permission of both the commissioning parents and birth parents.[83]

[83] *Artificial Conception Act 1985* (ACT), s 21(2).

The United States

Uniform Parentage Act 2000

In the near future many states in the United States will have specific legislation that resolve these issues of lawful parentage but only in an IVF or what is termed in the United States, a "gestational" surrogacy arrangement.

In August 2000 the National Conference of Commissioners on Uniform State Laws that makes public policy recommendations for lawmakers in the states voted unanimously to amend the *Uniform Parentage Act 1973*.

The *Uniform Parentage Act 2000*[84] now includes provisions for surrogacy, however they only apply to IVF surrogacy. Article 8 deals with gestational (IVF) agreements. It overcomes the questions raised in *Johnson v. Calvert*[85] by providing legal parentage to the commissioning parents.

The Drafting Committee wrote:

...childless couples may choose modern science over traditional adoption in the hopes of having a child of their own genetic making. Voiding or criminalising gestational agreements will force individuals to find friendly legal forums for the process…One thing is clear; a child born under these circumstances is surely entitled to have its status clarified.[86]

The key provisions are that:

- The commissioning parents must be married
- The agreement can cover an arrangement where the commissioning parents are the genetic parents or where one or both gametes come from donors
- The commissioning parents and prospective surrogate and her husband (if she is married) must apply to the court for approval of their agreement
- The agreement can provide for payment of consideration.
- The agreement may not limit the right of the surrogate to make decisions to safeguard her health or that of the embryo or fetus.

[84] National Conference of Commissioners on Uniform State Laws,Drafts of Uniform and Model Acts<http://www.law.upenn.edu/bll/ulc/upa/final00.htm>.
[85] Above n 5.
[86] OPTS,inc < http://www.opts.com/nccusl.html>.

Section 803 provides the court may order prior to the child's birth that the commissioning parents will be the parents of the child born pursuant to the surrogacy agreement if it is satisfied that:

- Either the surrogate or the commissioning parents have been residents of California for at least 90 days
- Medical evidence shows that the commissioning mother is unable to bear a child or is unable to do so without unreasonable risk to her physical or mental health or to the unborn child
- Unless waived by the court, the relevant child-welfare agency has made a home study of the commissioning parents and the commissioning parents meet the standards of fitness applicable to adoptive parents
- All parties have voluntarily entered into the agreement and understand its terms
- The prospective surrogate has had at least one pregnancy and delivery and her bearing another child will not pose an unreasonable health risk to the unborn child or to the physical or mental health of the prospective surrogate
- Adequate provision has been made for all reasonable health-care expenses associated with the agreement until the birth of the child, including responsibility for those expenses if the agreement is terminated
- The consideration to be paid to the surrogate is reasonable

Section 807 provides that after the child is born the commissioning parents must file a notice with the court of the birth and the court can then make an order confirming that they are the parents of the child and directing a birth certificate to issue naming them as parents. If there is a dispute about the child, the court can order genetic testing to determine parentage.

The provisions are also very clear about the status of donors. Section 702 provides that a donor is not a parent of a child conceived by means of assisted reproduction.

It is interesting to note that these amendments allow overseas couples to access IVF surrogacy in California. Only the surrogate need be a resident for more than ninety days and the court can waive the requirement of a home visit to the commissioning parents.

The American Bar Association also has a Committee[87] working on draft legislation, the *Model Assisted Reproductive Technologies Act*. This draft legislation contains similar provisions in relation to what they term "gestational agreements".[88]

[87] Committee on the Laws of Assisted Reproductive Technologies Act.
[88] Section 1.06B.

Australian common law position on obtaining parentage of surrogate child

Until legislation such as that now available in the ACT is enacted around Australia commissioning parents must apply to the Supreme Court for an adoption order.

Difficulties arise in state legislation that has not been drafted with surrogacy arrangements in mind but seems to accommodate artificial insemination or IVF treatment. This legislation can be found throughout Australia and the United States.

For example, sections 14 and 15 of the *Status of Children Act 1996* (NSW) provides an irrebuttable presumption that the surrogate and her husband are the parents of the child. It states that if a woman becomes pregnant by means of a fertilisation procedure using sperm obtained from a man other than her husband, or an ovum obtained from another woman, that other man or woman is presumed not to be the parent of any child born as a result of the pregnancy.

Section 60H of the *Family Law Act 1975* (Cth) provides that when a child is born to a woman as a result of an artificial conception procedure while she is married to a man, provided she had his consent or he is on the birth certificate, the child is their child at law whether or not biologically related to them.

There have been a number of New South Wales Supreme Court decisions dealing with applications for adoption arising from surrogacy arrangements, two being traditional arrangements where the surrogate was the biological mother and one being an IVF arrangement.[89] The cases show a growing acceptance by our Courts that surrogacy arrangements are taking place and that these children need certainty regarding their legal status in the family.

In the matters of *W: Re Adoption* [90]in 1998 and the *Application of A and B*[91] and the *Application of D and E*[92] this year Justices Windeyer and Bryson respectively granted adoption orders in favour of the commissioning parents in traditional surrogacy arrangements.

Significantly in *W: Re Adoption* [93] the child had been born in California to a surrogate mother artificially inseminated with the husband's sperm. The surrogacy arrangement was commercial and had been entered into through the Centre for Surrogate Planning in California. A Superior Court in California had granted the husband a paternity and custody order and an order that he have sole financial responsibility for the child.

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[89] *W: Re Adoption* BC9803062 Supreme Court of NSW- Adoption Division, Windeyer J (22 June 1998), *Re Application of A and B* BC200003799, Supreme Court of NSW, Equity Division, Adoptions, Bryson J, (7 July 2000) and *Re Application of D and E* BC200003802 Supreme Court of NSW Equity Division Bryson J (7 July 2000).
[90] Above n 89.
[91] *Ibid*.
[92] *Ibid*.
[93] *Ibid.*

The parties already had another son born pursuant to a surrogacy arrangement. They had adopted this child through orders made by the National Court of Justice of Papua New Guinea.

Windeyer J held that the parties had complied with the requirements of the *Adoption of Children Act 1965* (NSW). In coming to a decision, His Honour examined recommendations made by the New South Wales Law Reform Commission. The Department of Community Services opposed the adoption order. However, His Honour decided that the welfare and interests of the child would be promoted by making the adoption order. Windeyer J took into account that the older son had been adopted and that this order would give both children equal status and inheritance rights in the family.

Of significance is that the judge did not concern himself with the surrogacy arrangement that he stated was entered into in accordance with the laws of California where the commissioning parents were residing at the time.[94]

Donor Issues

To prevent reproductive tourism Australia needs to enact uniform legislation and modelled on the *Uniform Parentage Act 2000*. This would mean that we would condone IVF surrogacy in circumstances where either the genetic parents gametes are used or one or both gametes come from donors. This would enable commissioning parents who are suffering from types of fertility that prevent them being able to contribute their gametes access to surrogacy.

It should be pointed out that Alice Kirkman, Australia's first IVF surrogate baby was born of an arrangement where her aunt was implanted with an embryo formed from her mother's egg and donor sperm. This was because her commissioning father was suffering from a medical condition that prevented him from contributing viable sperm.[95]

The other argument is favour of the use of donor material is that Australians already have access to it in the form of artificial insemination and IVF treatment. Further, advances in medical science now mean that many serious diseases have been found to have a genetic link and access to medical information about donors could be crucial to a child's future health.

Article 7 of the *Convention on the Rights of the Child*[96] provides that children should have the right to know and be cared for by both parents. Article 8 also entitles a child to preserve his or her identity.

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[94] *Ibid* 5.

[95] Maggie Kirkman, IV99 Speaker Bios <http://www.plps.com/speakers/ivfsp-bios.html>.

[96] *United Nations*, Treaty Series, Vol 1577, 3 (entered into force 2 September 1990). There are 140 signatories. Australia's ratification was accepted on 17 December 1990.

It can be argued that in an IVF surrogacy arrangement the "parents" are the commissioning parents, not the biological parents. It has been said, "a donor whose consent to donation has been properly obtained is not regarded in law as a parent of the child."[97]

Evidence was given before the West Australian Select Committee on the *Human Reproductive Technology Act 1991* by children born from arrangements using donor insemination. This evidence indicates the need of children to have access to information about their biological origins. One submission stated, "I am deeply concerned about the denial of information that I feel is essential to my sense of identity and my health."[98]

The recommendations of the Select Committee were that:

- Children born as a result of surrogacy arrangements may elect to have access to identifying information about their surrogate mother and biological parentage, if donor material was used to conceive them, upon attaining the age of 16 years.

- All birth records include the donor information.

- A register of children born from surrogacy arrangements be kept in a central location.

In order to give the children born of surrogacy arrangements knowledge of their origins these recommendations should form part of any uniform surrogacy legislation.

Conclusion

Clearly in the last decade there has been a shift from traditional to IVF surrogacy arrangements. The case law in Australia and the United States shows, that where the surrogate decides to retain the child after the birth, judges will be extremely reluctant to separate a surrogate child from his or her genetic and birth mother.

An IVF arrangement can be secure. The child is either the biological child of the commissioning parents or conceived through the full or partial use of donor gametes. Legislation can provide that donors have no parental role. As the surrogate is not biologically related to the child there is no need to go down the road of adoption. The commissioning parents should be able to have their names placed directly on the birth certificate, which should also acknowledge the surrogate as the gestating mother.

Uniform legislation should be adopted throughout Australia modeled on that of the *Uniform Parentage Act 2000*. This legislation would allow infertile couples to enter into IVF surrogacy arrangements knowing that the intent of their written arrangement will prevail. There is no need for Australia to follow the commercial path of the United States.

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[97] Blyth E. 1998; 237-253 quoted in Report of Select Committee on the *Human Reproductive Technology Act* 1991 (1999) 193.

[98] Submission 59 at Report of Select Committee above n 11.

We have shown with the establishment of the Canberra Fertility Clinic that a discreet service can be accessed. There is no need to allow the creation of commercial agencies and the resulting risk of exploitation of the parties.

The *Uniform Parentage Act 2000* provides for a written agreement to evidence the surrogacy arrangement. It also provides that it "may provide payment for consideration." This does not mean that Australia needs to adopt a commercial approach. Parties can find each other and the surrogate should be paid adequate compensation for her role. Extensive medical expenses are involved in IVF treatment and the medical and hospital expenses need to be accounted for in addition to compensation to the surrogate for her time and possible loss of earnings.

The time has come for Australia to embrace these types of surrogacy arrangements. Legitimising them allow the arrangements to be properly regulated and to ensure that the best interests of the child prevail.

Uniform state and territory legislation should be enacted throughout Australia to legalise IVF surrogacy arrangements across the nation. Cultural practices, such as those of Torres Strait Islanders need to be acknowledged so that they don't conflict with the law. However, because of the genetic link between the birth mother and child, traditional surrogacy arrangements should ultimately be governed by common law. The Family Court "best interests of the child" approach[99] is the appropriate forum to determine these types of disputes.

At present Australians either living in the ACT or with the requisite financial resources to travel to the ACT or the United States can gain access to surrogacy arrangements. They can also source information and make contact over the Internet with a variety of support groups in Australia and overseas and with commercial agencies in the United States. Access to this valuable assisted reproduction option should not just be available to those with substantial financial means or living in the ACT. There should be equal opportunity for people to access this technology irrespective of their income or place of residence

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[99] *Family Law Act 1975* (Cth) s 65E.