



## Chapter 19

# Parentage and Surrogacy

### CONTENTS

184 CURRENT LAW

185 PROBLEMS WITH THE LAW

# 19

## Chapter 19

# Parentage and Surrogacy

Under a surrogacy arrangement, the intention is that the person or couple who commission the arrangement, not the surrogate, will care for and be the parent(s) of the child, regardless of whether they are genetically related to the child. The commission's terms of reference ask us to consider clarification of the legal status of any child born as the result of a surrogacy arrangement.

In this chapter we explain the current law that determines the parentage of children born of surrogacy arrangements. We examine alternative ways that parenting status could be clarified to protect the interests of all parties—particularly the child. We then recommend a mechanism to transfer legal parentage from the surrogate to the commissioning parent(s).

### CURRENT LAW

In Victoria, the participants in a surrogacy arrangement cannot decide between themselves who will be regarded as the legal parents of any child born. The *Infertility Treatment Act 1995* makes all surrogacy agreements void.<sup>1</sup> This means that agreements will have no legal effect and cannot be enforced in a court, including agreements:

- for the child to be the child of the commissioning parent(s) (whether by adoption, agreement or otherwise) and not the child of the surrogate mother
- to transfer guardianship of the child to the commissioning parent(s)
- to surrender permanently the right to care for the child to the commissioning parent(s).<sup>2</sup>

Instead, legal parentage will be determined according to the *Status of Children Act 1974*.<sup>3</sup>

The parental status of each of the parties involved will differ according to whether the surrogate has a male partner and whether donated sperm or eggs (either from the commissioning parent(s) or from third parties) have been used to conceive the child.

If the child is conceived through sexual intercourse between the surrogate and a commissioning man, the surrogate is legally regarded as the mother of the child and the man is legally regarded as the child's father.<sup>4</sup>

If the child is conceived from a treatment procedure using donated gametes, the surrogate is married or in a de facto heterosexual relationship and her partner has consented to the conception procedure:

- the surrogate is regarded as the mother of the child and her partner as the father<sup>5</sup>
- the commissioning couple are not regarded as the parents of the child even if they have provided their own sperm and/or eggs<sup>6</sup>
- if a third party has donated the sperm and/or eggs used to conceive the child, that person is presumed not to be a parent of the child.<sup>7</sup>

If the surrogate is single, in a same-sex relationship, or does not have the consent of her male partner to the treatment procedure, the man who donated the sperm used to conceive the child has no rights and incurs no liabilities for the child.<sup>8</sup> This provision would apply to a commissioning father who provided his sperm for the purpose of conception.

The Status of Children Act does not say that a sperm donor to a woman in this situation is not the father of the child. In Chapter 13 we recommend that the donor should be presumed not to be a parent of the child in these circumstances, in the same way as he is not considered a parent of a child born to a married woman.

However, as discussed in Chapter 11, a person may apply for parenting orders at the Family Court under provisions of the *Family Law Act 1975* (Cth). It is possible that a donor may be regarded as a parent of the child for the purposes of the Family Law Act.<sup>9</sup> In *Re Mark*, Justice Brown of the Family Court considered whether a man who commissioned a surrogacy arrangement in the United States, using his sperm, was the legal parent of the child born of that arrangement.<sup>10</sup> She said:

*Having regard to the provisions of the Family Law Act and authorities cited, it may well be that Mr X is Mark's parent for the purposes of the Family Law Act.<sup>11</sup>*

However, as there was no contradictor or respondent in this case to make opposing arguments, Justice Brown refrained from making a positive finding that the man was a legal parent of the child.<sup>12</sup> She did make orders recognising the man's (and his partner's) parental responsibility for the child.

The surrogate is considered the mother if her own egg is used to conceive the child. However, the Status of Children Act is silent about whether the surrogate is regarded as the mother of a child conceived with donated eggs if she does not have a male partner.<sup>13</sup>

In most situations, the commissioning parent(s) who provided the gametes used to create a child have no legal relationship with the child and the surrogate and her partner (if any) are legally regarded as the child's parents. If the commissioning person or couple wish to be recognised as the legal parent(s) of the child they have two options.

The first option is to apply for a parenting order from the Family Court. However, as discussed in Chapter 11, the effect of parenting orders is limited because they do not confer full parental status on a person but rather a range of powers and responsibilities in relation to the child.

The second option is to adopt the child. However, privately arranged adoptions are not permitted in Victoria, except where one of the adopting parents is a relative of the child.<sup>14</sup> Adoption is only possible where the surrogate is a relative of one of the commissioning parents, as in the Kirkman case where the surrogate was the sister of the commissioning mother and therefore the aunt of the child.<sup>15</sup>

No matter who is recognised as the legal parent(s), it is important to understand that the Family Court retains the power to make parenting orders in favour of any person concerned with the care, welfare and development of a child if the court considers it to be in his or her best interests.<sup>16</sup> This means that even if the commissioning couple were recognised as the legal parents of the child under state law, the surrogate may still apply for parenting orders in the Family Court. Alternatively, if the surrogate and her partner (if she has one) are recognised as the legal parents of the child (as is currently the case under the Status of Children Act), the commissioning couple may apply for parenting orders.

## PROBLEMS WITH THE LAW

The current law does not recognise the intentions of commissioning parents and surrogates in relation to parentage of a child born of a surrogacy arrangement. In Chapter 11 we explained why legal parentage is important. Inability to be recognised as a parent means that the people who care for the child do not have legal responsibility and lack many of the powers necessary to make decisions for the benefit of the child. If the commissioning couple separate, the person who no longer has the day-to-day care of the child will not be liable to pay child support, and if one parent dies without naming the child in his or her will, the child will have no automatic right to a share of the estate.

During our consultations we heard from people who had commissioned surrogacy arrangements and were caring for the child but who were not legally recognised as the child's parents. One commissioning couple who made a submission argued 'the law needs amendment to recognise the people who intend to bring up the child' and said that 'the commissioning couple should be identified at law as the parents of a child born from a surrogacy'.<sup>17</sup>

The commission received a submission describing the predicament of one family created through surrogacy.<sup>18</sup> The commissioning woman was physically unable to carry a pregnancy to term, so she and her husband arranged a surrogacy. The surrogate gave birth to twins using sperm and eggs provided by the commissioning couple.<sup>19</sup> The surrogate and her husband appear as the mother and father of the twins on their birth certificates. As a consequence, each time parental permission is required for school or medical purposes, the commissioning parents have to approach the surrogate and her husband to provide their permission to the relevant agency. The commissioning couple find this both inconvenient and belittling.

Other difficulties which can arise because the surrogate and her partner are the legal parents of a child include that:

- a passport cannot be obtained without the consent of the surrogate
- various organisations, such as scouts, require the consent of the legal parents for a child to be enrolled
- the surrogate and her partner, but not the commissioning parents, can claim social security and taxation allowances.<sup>20</sup>

- 1 *Infertility Treatment Act 1995* s 61.
- 2 *Infertility Treatment Act 1995* s 3 (definition of 'surrogacy agreement').
- 3 These provisions are discussed more fully in Chapter 11.
- 4 Generally, if a woman who is married or in a de facto relationship with a man gives birth to a child, her partner is presumed to be the father of the child: *Status of Children Act 1974* s 5; *Family Law Act 1975* (Cth) ss 69P, 69Q. The presumption can be rebutted by evidence that a man other than the woman's partner is the father of the child: see H. A. Finlay et al, *Family Law in Australia* (1997) para 7.7; *Family Law Act 1975* (Cth) s 69U.
- 5 *Status of Children Act 1974* ss 10C, 10D, 10E.
- 6 *Status of Children Act 1974* ss 10D, 10E.
- 7 *Status of Children Act 1974* ss 10C, 10D, 10E.
- 8 *Status of Children Act 1974* s 10F.
- 9 There are conflicting decisions on this point in *Re Patrick* (2002) 28 Fam LR 579 and *Re Mark* (2003) 31 Fam LR 162: see discussion page 123.
- 10 *Re Mark* (2003) 31 Fam LR 162.
- 11 *Re Mark* (2003) 31 Fam LR 162, 174.
- 12 *Re Mark* (2003) 31 Fam LR 162, 174.
- 13 See Chapter 13 for further discussion of parental status where a donated egg has been used by a woman without a male partner.
- 14 *Adoption Act 1984* s 122. 'Relative' is defined in s 4. It is also possible that the Secretary or principal officer of an approved agency could approve the commissioning parents as 'fit and proper persons' to adopt the child, if they had complied with all other adoption regulations (s 13). The commissioning parents would then have to be approved by the court. In NSW, where the same restriction applies, there have been reported cases in which the court has made an adoption order in favour of the commissioning couple where the surrogate was the sister of the commissioning mother: *Re A and B* (2000) 26 Fam LR 317; *Re D and E* (2000) 26 Fam LR 310. In each case, the court was satisfied that an adoption order would be in the best interests of the child. See also *W: Re Adoption* (1998) 23 Fam LR 538.
- 15 Relative adoptions are permitted only where 'exceptional circumstances exist which warrant the making of an adoption order': *Adoption Act 1984* s 12(b).
- 16 *Family Law Act 1975* (Cth) ss 64B, 65C, 60CA.
- 17 Submission PP3 31 (Robert Rushford).
- 18 Submission CP 195 (Tammy Lobato MP, Member for Gembrook).
- 19 The surrogate was implanted with the commissioning couple's embryos at a clinic in Canberra: Julie Tullberg, 'Parents, but it's not legal' *Lilydale & Yarra Valley Leader* (Melbourne), 15 January 2007, 1.
- 20 Submission PP3 12 (Berry and Associates Family Lawyers).

# 19

## Chapter 19

# Parentage and Surrogacy



***Why should our daughter's birth certificate state [that the surrogate is her parent]? She is our family and will inherit from our estate, she is not my sister's child and is not entitled to their family's assets, so her birth certificate should state that we are her legal parents.***

It is possible for the commissioning parent(s) to obtain parenting orders from the Family Court which will provide them with the necessary parental powers and responsibility to care for the child. However, parenting orders are not equivalent to full legal parental status and only last until the child reaches the age of 18. They do not extinguish the parental status of the surrogate and her partner (if any). This means that the surrogate and her partner may be technically liable to pay child support and if one of them dies without making a will, the child will be entitled to a share of their estate, along with the surrogate's own children.

Other commissioning parent(s) made submissions about the difficulties they experience as a result of not being recognised as legal parents. In one instance, after nine years of unsuccessful IVF treatment, the commissioning mother's sister offered to act as a surrogate. The sister carried an embryo created by the commissioning couple and gave birth to a child:

*Our daughter is now five years old and we continue to love her dearly. She has a very special relationship with her aunty, uncle and two cousins and fully understands that she was grown in her auntie's tummy but she is her mummy and daddy's special darling daughter ...*

*Why should our daughter's birth certificate state [that the surrogate is her parent]? She is our family and will inherit from our estate, she is not my sister's child and is not entitled to their family's assets, so her birth certificate should state that we are her legal parents.<sup>21</sup>*

The commission has also been informed that some people who enter into surrogacy arrangements have agreements drawn up by lawyers prior to conception to clarify each party's intentions about the arrangement. Even though such an agreement will not determine who are the legal parents of the child, and cannot be enforced, it can provide a framework which assists the parties to clarify their intentions and may help to reduce disputes about surrogacy arrangements.<sup>22</sup>

## DETERMINING LEGAL PARENTAGE

The commission has identified three broad options for determining the legal parentage of children born of surrogacy: determining parentage after the birth of a child, court orders prior to the birth of a child, or an automatic deeming provision to establish parentage. The commission has considered the following policy questions in deciding which model is the most appropriate:

- Should the commissioning person or couple be recognised as the legal parents of the child? If so, should this occur at conception or only after the child is born?
- What should happen if the surrogate wants the child to live with her rather than with the commissioning parents?
- Should the commissioning person or couple be required to undergo any form of assessment of their fitness to parent?
- Should it be necessary to obtain a court order for the transfer of legal parentage?

In most jurisdictions in Australia the law about parentage in surrogacy arrangements is similar to that in Victoria, that is, the surrogate mother and her partner are regarded as the legal parents of the child.

The ACT is a notable exception because it provides a mechanism for the transfer of legal parentage from the surrogate to the commissioning couple after the birth of the child. The *Parentage Act 2004* (ACT) does not directly regulate who is eligible to enter into a surrogacy arrangement or what conditions should be met before such an arrangement may proceed. Eligibility for treatment is covered in guidelines issued by clinics offering surrogacy. Instead, legal intervention occurs after the birth of the child, when the court is empowered to transfer the legal parentage of the child from the surrogate and her partner to the commissioning couple, provided a number of conditions have been met.

The ACT Supreme Court may make a parentage order in favour of the commissioning couple (called the 'substitute parents') if the child was conceived as a result of a procedure carried out in the ACT and the following conditions are met:

- neither the surrogate nor her partner is a genetic parent of the child
- there are two substitute parents, at least one of whom is a genetic parent of the child
- the court is satisfied that the making of the order is in the best interests of the child
- both the surrogate and her partner (if any) freely, and with a full understanding of what is involved, agree to the making of the order.<sup>23</sup>

The court is to take a number of matters into consideration, including:

- whether the child's home is with both substitute parents
- whether both substitute parents are aged at least 18
- whether payment or reward (other than for expenses reasonably incurred) has been given or received for, or in consideration of, any aspect of the surrogacy arrangement
- whether the surrogate and her partner (if any) and substitute parents have received appropriate counselling and assessment from an independent counselling service
- anything else the court considers relevant.<sup>24</sup>

A parentage order is given substantially the same legal effect as an adoption order.<sup>25</sup> The provisions of the *Adoption Act 1993* (ACT) which enable adopted people to obtain information identifying their birth parents apply to children for whom parentage orders have been made. This means that children born through recognised surrogacy arrangements in the ACT have the right to obtain identifying information about their surrogate mothers once they turn 18, or earlier if they have the consent of the surrogate and their parents.<sup>26</sup>

As noted in Chapter 10, adoptive parents are recognised as legal parents for the purposes of the Family Law Act and the *Child Support (Assessment) Act 1989*. Whether a parenting order made in the ACT will be given the same status as an adoption order under federal law has not yet been tested in the courts.

A similar process to that operating in the ACT applies in the United Kingdom (UK).<sup>27</sup> In the absence of any order to the contrary, the surrogate and her partner are treated as the legal

parents of the child.<sup>28</sup> The commissioning couple may apply to the court for a parental order in their favour provided the following conditions are met:

- the commissioning couple are married and aged at least 18
- the gametes of the husband or the wife, or both, were used to create the embryo
- the application to the court is made within six months of the birth of the child
- at the time of the application the child's home is with the commissioning parents
- no money or other benefit (other than for expenses reasonably incurred) has been given or received in respect of the surrogacy agreement.

A different approach to determining the parentage of children born of surrogacy is followed in some United States (US) jurisdictions. In some states, a court can determine parentage before the child is born.<sup>29</sup> To obtain a pre-birth order the commissioning parents and surrogate must apply to the court before the birth of the child for an order approving the arrangement and declaring the commissioning parents to be the legal parents. In some jurisdictions, additional criteria apply, such as the existence of a genetic relationship between at least one commissioning parent and the child to be born, in addition to the requirement that the commissioning parents be married. Once an order is made, the commissioning parents automatically become the child's legal parents at the moment the child is born. Other US jurisdictions allow court approval of surrogacy arrangements, but the transfer of parentage does not occur until after birth.<sup>30</sup>

In a recent report, the New Zealand Law Commission has recommended a similar process for determining parentage to that available in these US states. It recommends a pre-birth interim order that would become final 21 days after birth, provided certain matters have been proved and no aspect of the agreement is in dispute.<sup>31</sup> The New Zealand government has expressed support for the transfer of parentage in surrogacy arrangements, but has not decided on the mechanism for doing so.<sup>32</sup> At the time of writing, no steps have been taken to implement these recommendations.<sup>33</sup>

- 21 Submission PP3 33 (Fiona Rushford).
- 22 Surrogacy roundtable, 20 October 2004.
- 23 *Parentage Act 2004* (ACT) ss 24, 26(1). The commissioning parents must also reside in the ACT: s 24(e).
- 24 *Parentage Act 2004* (ACT) s 26(3).
- 25 *Parentage Act 2004* (ACT) s 29.
- 26 *Adoption Act 1993* (ACT) ss 66, 68.
- 27 *Human Fertilisation and Embryology Act 1990* (UK) s 30. Where the conditions are not met (for example, the commissioning couple is not married) they cannot obtain a parenting order. They may apply to adopt under the *Adoption and Children Act 2002* (UK): *Human Fertilisation and Embryology Authority, Code of Practice* (6th ed, 2003).
- 28 *Human Fertilisation and Embryology Act 1990* (UK) ss 27, 28.
- 29 States that do not have legislation dealing with surrogacy, and appear to permit pre-birth orders include: California, Alaska, Colorado, Connecticut, Kansas, Maine, Maryland, Mississippi, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Dakota: see John Seymour and Sonia Magri, *A.R.T., Surrogacy and Legal Parentage: A Comparative Legislative Review* (2004); Steven Snyder and Mary Byrn, 'The Use of Prebirth Parentage Orders in Surrogacy Proceedings' (2005) 30 *Family Law Quarterly* 633, 643.
- 30 New Hampshire, Virginia, Texas, Utah, Illinois and Florida: Snyder and Byrn (2005), above n 29, 651 5.
- 31 New Zealand Law Commission, *New Issues in Legal Parenthood*, Report 88 (2005) 93–7.
- 32 New Zealand Government, *Government Response to Law Commission Report on New Issues in Legal Parenthood* (March 2006).
- 33 The New Zealand Law Commission reports that 'fuller policy work is being considered towards implementing the recommendations relating to the presumption of paternity, DNA parentage testing and surrogacy arrangements': *New Zealand Law Commission Annual Report (2005-06)* (2006).

# 19

## Chapter 19

# Parentage and Surrogacy



### RECOMMENDATIONS

123. The *Status of Children Act 1974* should be amended to empower the County Court to make substitute parentage orders in favour of a person or couple who have commissioned a surrogacy arrangement (the applicant(s)), subject to the conditions that:
- the court is satisfied that the order would be in the best interests of the child
  - the application was made no earlier than 28 days and no later than six months after the birth of the child
  - at the time of the application, the child's home is with the applicant(s)
  - the applicants have met the eligibility criteria for entering into a surrogacy arrangement
  - the surrogate mother and/or her partner (if she has one) has not received any material advantage from the arrangement save for reimbursement of expenses permitted by the legislation
  - the surrogate mother freely consents to the making of the order.
124. In deciding whether to make a substitute parentage order, the court should also take into consideration whether the surrogate's partner (if she has one) consents to the making of the order.
125. If the application is made by a person whose partner consented to the arrangement before the child was conceived but has not consented to the application for a substitute parentage order, there should be a presumption that that person will also become a legal parent of the child.

An alternative option we considered was to deem the commissioning couple to be the parents of the child. The *Status of Children Act* could be amended to provide that the people who commission a surrogacy arrangement are deemed to be the child's legal parents from birth, and that the surrogate be presumed not to be a parent of the child. Such a presumption would recognise the intention of the parties before the birth of the child. It would have automatic effect and would not require the commissioning couple to take any steps or undergo any process to be recognised as the child's parents.

To implement a deeming provision it would be necessary to clarify that the existing presumptions in the *Status of Children Act* which apply to donors (that is, that donors are not the parents of a child, or have no rights and incur no responsibilities for a child born using their gametes) do not apply to commissioning parents who donate gametes as part of a surrogacy arrangement.

Under this model, the commissioning parent(s) would be recorded as the parents on the child's birth certificate. If the surrogate decided not to relinquish the child after birth, the matter would need to be resolved by the Family Court. If the court found that it was in the best interests of the child to remain with the surrogate, it could make a parenting order in her favour but she would not be recognised as a legal parent of the child.

### RECOMMENDATIONS

As long as surrogacy is legally permitted in Victoria, the law that deals with parental relationships arising from such arrangements should be clarified. Failure to recognise the parental role of the people who make the decision to have a child, who are caring for the child and who are regarded in every other sense as the parents of the child cannot be in the child's best interests. Surrogacy arrangements are based on the premise that the surrogate and her partner (if any) do not intend to become parents. The law's failure to recognise the parental relationship between the commissioning parent(s) and the child has serious consequences for children.

However, the commission believes that there are sufficient complexities in surrogacy arrangements to justify a cautious approach when dealing with legal parentage. The welfare of the child must be the paramount consideration and the interests of both the commissioning parents and the surrogate must be protected. For this reason, the commission has concluded that the transfer of legal parentage from the surrogate to the commissioning couple should not be automatic. Instead, it should involve a process which treats the surrogate as the parent of the child and requires all parties to meet certain specified criteria before legal parentage can be transferred.

### PROTECTING SURROGATE MOTHERS

The commission received mixed responses in submissions on how to balance the competing need to protect the surrogate from being forced to relinquish the child if she changes her mind, against the commissioning parent(s)' desire for certainty that the child will be relinquished to them.

At one roundtable discussion on surrogacy convened by the commission, some people were of the view that the parties' intentions regarding parentage should be enforceable. Participants said that certainty of parentage would assist the surrogate to cope with the pregnancy and relinquish the child.<sup>34</sup>

The commission also heard from people who believe the surrogate should be protected against pressure to hand over the child to the commissioning parents.<sup>35</sup> Arguments made in support of protecting the surrogate's decision not to relinquish the child included:

- the genetic connection of the commissioning parents (if it exists) should not necessarily displace the connection that the surrogate has as a result of gestating the child
- the intention and/or capacity of a person to parent a child can change over time. Intentions should not be viewed as fixed determinants of what is in the best interests of the child
- in contested situations, determinations of parentage should be made according to the best interests of the child.

The commission believes that it is not possible to devise legislation that will guarantee certainty of parentage in a surrogacy arrangement. Although people may enter into an agreement with strong intentions and expectations, these sentiments can change during the pregnancy or at the birth of the child. There is always the risk that a surrogate will decide she wants to keep the child, even if the commissioning parent(s) have been recognised as the child's legal parent(s). It is not possible to legislate to eliminate this risk.

State law cannot exclude the federal jurisdiction of the Family Court. If a dispute arises about where or with whom the child should live, the Family Court has the power to hear and determine the dispute, regardless of the legal parental status of the surrogate and/or the commissioning parent(s) under state law. The dispute would be determined in accordance with section 60CA of the Family Law Act, which requires the court to regard the best interests of the child as the paramount consideration when deciding whether to make a particular parenting order for a child.

However, legal rules and processes can create a framework for surrogacy arrangements that support the parties. The commission has recommended that parties to a surrogacy arrangement receive counselling and obtain independent legal advice (see Chapter 17).

This will not necessarily guarantee certainty in outcome, but it will assist in making the parties aware of the range of possible outcomes and able to appreciate the risks involved. Surrogacy arrangements in Australia are currently characterised by a high level of trust between the commissioning parent(s) and the surrogate.<sup>36</sup> Fostering trust between the parties is an important factor in minimising potential conflicts.

The commission has concluded that the law should not compel the surrogate to hand over the baby to the commissioning couple if she decides that she cannot bring herself to do so. As discussed in Chapter 17, the lessons learnt from the experience of relinquishing mothers in adoption cannot be ignored.<sup>37</sup> The surrogate mother should be recognised as the parent of the child unless she consents to the making of a court order transferring parentage to the commissioning parent(s) after the child is born. Before an order can be made, the child must have lived with the commissioning parents for a specified period. This principle should apply whether or not the surrogate is genetically related to the child.

### LEGAL PROCESS

In *Position Paper Three: Surrogacy*, the commission recommended that adoption be the mechanism to transfer parentage in surrogacy arrangements because it is an established and recognised regime and has as its guiding principle the paramountcy of the welfare and interests of the child. Several submissions objected to the use of adoption as a mechanism because of the negative connotations associated with it, and because adoption is a mechanism for a different purpose to surrogacy.<sup>38</sup> One submission from a commissioning parent said the process of adoption would be 'onerous and humiliating'.<sup>39</sup>

Other submissions said that because in many surrogacy cases the commissioning parents are the genetic parents of the child, it is artificial to require them to adopt their child.<sup>40</sup> Concern was also expressed about the delay between birth and the transfer of parentage, and permitting the surrogate to withhold her consent once the child is born.<sup>41</sup> A delay in transferring parentage could also have implications for decisions about postnatal care.<sup>42</sup>

34 Surrogacy roundtable, 21 February 2006.

35 Surrogacy roundtables, 20 October 2004 and 21 February 2006.

36 Surrogacy roundtable, 21 February 2006.

37 See page 173.

38 Submission PP3 54 (AIS Forum).

39 Submission PP3 2 (Anonymous).

40 Submissions PP3 2 (Anonymous), PP3 12 (Berry and Associates Family Lawyers), PP3 24 (Katrina Harrison), PP3 27 (Katherine Harding).

41 Submissions PP3 45 (Anonymous), PP3 55 (Fertility Access Rights).

42 Submission PP3 27 (Katherine Harding).

# 19

## Chapter 19

# Parentage and Surrogacy

### RECOMMENDATIONS

126. A substitute parentage order should have the same status and effect as an adoption order made under the *Adoption Act 1984*.
127. The court should have discretion to make substitute parentage orders in favour of people who have already had children through surrogacy. In exercising its discretion, the court should be satisfied that:
  - the order would be in the best interests of the child
  - the child's home is with the applicants
  - the applicants have to the extent possible met the eligibility criteria for entering into a surrogacy arrangement
  - the surrogate mother and/or her partner (if she has one) has not received any material advantage from the arrangement, save for reimbursement of expenses permitted by the legislation
  - the surrogate mother freely consents to the making of the order.
128. Once a substitute parentage order has been made, the birth register should be amended to record the commissioning parent(s) as the parents of the child and a new birth certificate should be issued.
129. The central register maintained under the *Infertility Treatment Act 1995* should be expanded to allow identifying information about a surrogate mother and commissioning parent(s) to be registered and released to the child in the same way as information about donors is

The commission has concluded that the terminology and operation of a substitute parentage order, as provided for in the ACT Parentage Act, would address some of the concerns raised about using adoption as the mechanism to transfer parentage from the surrogate to the commissioning parent(s). The commission believes that the use of substitute parentage orders to recognise parentage would be preferable to adoption. We agree that adoption can have connotations of abandonment for the child, which should not be imported into the surrogacy context.

The commission recommends that an application for a substitute parentage order should be made by the commissioning parent(s) (the applicants) to the County Court no earlier than 28 days and no later than six months after the birth of the child. The order should be declared to have the same status as an adoption order.

The commission recommends that before the court is able to make the substitute parentage order it would need to be satisfied that:

- the order is in the best interests of the child
- at the time of the application the child's home is with the applicant(s)
- the applicant(s) have met the eligibility criteria for entering into a surrogacy arrangement
- the surrogate and/or her partner (if she has one) has not received any material advantage from the arrangement save for reimbursement of expenses permitted by the legislation
- the surrogate freely consents to the making of the order.

There may be circumstances in which the surrogate mother is unable to give her consent to the making of the order, for example if she has died during childbirth. In such cases the provisions for dispensing with consent in adoption should be applied.<sup>43</sup> The consent of the surrogate's partner (if any) should be a relevant, but not decisive factor in the court's decision.

It is possible that at the time the application for a substitute parentage order is made, the commissioning parents may no longer be in a relationship, even if they were together for the pre-treatment processes and at the time the pregnancy was achieved. The law concerning parentage in surrogacy arrangements needs to be able to deal with this situation.

If the application is made by a person who had a partner who consented to the arrangement at the outset but has not consented to the application for a substitute parentage order, there should be a presumption that the former partner will become a legal parent of the child as well. This is by virtue of his or her participation in the consent, counselling and information provision processes at the outset of the arrangement. It is also consistent with the law that applies to parents of children conceived through the use of donated gametes, where consent to treatment is the key factor in transferring parentage to a non-biological parent.

The commission believes that a substitute parentage order should only be available to people who have undertaken surrogacy arrangements with the assistance of a clinic, and have met all of the counselling, consent and information requirements of the legislation. The court should not have to make independent enquiries about these requirements: the clinic should certify that the applicants have met all of the relevant criteria.

People who undertake private surrogacy arrangements would need to pursue options, where available, under the *Adoption Act* and the *Family Law Act* to formalise their arrangements.

### COMPLETED SURROGACY ARRANGEMENTS

The court should have discretion to make substitute parentage orders in favour of people who have already had children through surrogacy. In exercising its discretion, the court should be satisfied that:

- the order would be in the best interests of the child
- the child's home is with the applicant(s)
- the applicant(s) have, to the extent possible, met the eligibility criteria for entering into a surrogacy arrangement
- the surrogate mother and/or her partner (if she has one) has not received any material advantage from the arrangement, save for reimbursement of expenses permitted by the legislation
- the surrogate mother freely consents to the making of the order.

## PROVIDING INFORMATION

The commission received submissions from families who have or are intending to commission surrogacy agreements about the information that appears on their child's birth certificate. One woman considering commissioning a surrogacy arrangement wrote:

*As [the law] stands our surrogate and her husband will have to register the birth. They will be registered as the mother and father and their children will be listed as siblings even though biologically they are not.*<sup>44</sup>

Some submissions described the practical difficulties that arise because the commissioning parents are not listed on the birth certificate. Other submissions placed symbolic value on birth certificates:

*She was and is my precious daughter and my sister made a wonderful gesture for us to bring her into the world. I believe very strongly that her birth certificate should reflect this information.*<sup>45</sup>

The commission has decided that once a substitute parentage order has been made, the surrogate's name should not appear on the child's birth certificate. This is consistent with the commission's recommendations about birth certificates of children born through donor treatment procedures generally, where only a child's legal parents are listed on the birth certificate.<sup>46</sup> Similarly, if a substitute order is not made for any reason, and the surrogate and her partner remain the legal parents of the child, the names of the commissioning parent(s) should not appear on the child's birth certificate, even if they are the child's genetic parents.

Parents are required to complete a birth registration statement within 60 days of a child's birth.<sup>47</sup> The statement allows the Registry of Births, Deaths and Marriages to issue a birth certificate for the child. It is likely that in most cases, the child's birth would be registered prior to the granting of a substitute parentage order, and the birth certificate would list the surrogate and her partner (if she has one) as the parents. In such cases, the birth register and certificate should be amended to record the commissioning parent(s) as the parents of the child. This is the practice in the ACT, where the birth may be re-registered only after the court makes an order under the *Parentage Act 2004* (ACT).<sup>48</sup>

In Chapter 15 we discussed the importance of children being informed of their genetic origins and having the option to discover the identity of the person who donated the gametes used in their conception. It is equally important for children born through surrogacy arrangements to be told about their birth and to be able to identify the woman who acted as the surrogate mother.

At a roundtable on surrogacy, some participants said that disclosure of information about conception was more likely in surrogacy arrangements than for other forms of ART. It has been reported that in cases of donor conception, approximately only one third of donor-conceived children are told about their conception.<sup>49</sup> However, in one UK study of surrogacy outcomes, 77% of surrogates felt that the child should be told about his or her origins and no surrogates said the child should not be told.<sup>50</sup> In another research project examining outcomes for children conceived using ART, 44% of commissioning parents in surrogacy arrangements had begun to tell their three year old children about their method of conception, whereas only 5% of donor insemination parents had done so.<sup>51</sup> Fifty-three percent of the surrogacy parents planned to tell their children about their origins (three per cent were undecided).<sup>52</sup>

In surrogacy arrangements, the parties' social networks are often aware of the surrogacy and it is difficult to hide this information from children. Submissions to the commission reflected this, with one surrogate writing:

*We have never kept any information surrounding the birth of P from our two children and have always explained the circumstances surrounding her arrival. They fully understand that she grew up in her mummy's tummy, but that she is R and F's baby.*<sup>53</sup>

The commissioning parents wrote:

*Our daughter is now five years of age. She knows that she has a special aunty and she is extremely close to her cousins. She has been told that she came from 'L's tummy' and that message is repeated regularly. Her cousins (now aged 7 and 9) know the special role L had in the birth of our daughter and this message is also repeated regularly.*<sup>54</sup>

43 *Adoption Act 1984* s 43.

44 Submission PP3 24 (Katrina Harrison).

45 Submission PP3 33 (Fiona Rushford).

46 See Chapter 14.

47 *Births, Deaths and Marriages Registration Act 1996* s 18.

48 *Births, Deaths and Marriages Registration Act 1997* (ACT) ss16A and 16B.

49 See Chapter 15, page 150.

50 Vasanti Jadva et al, 'Surrogacy: The Experiences of Surrogate Mothers' (2003) 18(10) *Human Reproduction* 2196, 2202.

51 Susan Golombok et al, 'Non-Genetic and Non-Gestational Parenthood: Consequences for Parent-Child Relationships and the Psychological Well-Being of Mothers, Fathers and Children at Age 3' (2006) 21(7) *Human Reproduction* 1918, 1922.

52 *Ibid.*

53 Submission PP3 51 (Laura Clark and Dominic Dillon).

54 Submission PP3 31 (Robert Rushford).

# 19

## Chapter 19

# Parentage and Surrogacy



registered and released.

### RECOMMENDATIONS

130. The commissioning parent(s) and the surrogate mother should be counselled about the importance of informing children of their genetic origins and the circumstances of their birth. They should be provided with ongoing counselling and support to enable them to inform children about their origins.

The commission acknowledges that these examples only indicate that disclosure in surrogacy arrangements is more likely to occur; they do not remove the need to stress that disclosure is important. If altruistic surrogacy is facilitated in Victoria, the commission recommends that identifying information about the surrogate be registered and released to the child in the same way as information about donors is recorded and released.

Research suggests that it is common for the parties to a surrogacy arrangement to maintain contact after the birth of the child.<sup>55</sup> However, ongoing contact is made more difficult when people travel outside Victoria to access surrogacy. One man, who with his partner commissioned a surrogacy arrangement in the US said:

*While we enjoy a very close relationship with our surrogate and envisage this continuing long into the future the sheer distance between us makes keeping in touch difficult. We hope that our surrogate will remain a part of our children's lives, amongst other things, so that they can feel a sense of connection with where they came from in an open and transparent manner.<sup>56</sup>*

The counselling provided before the surrogacy will clearly play an important role in assisting parents to appreciate the importance of informing children of their origins. However, we also believe that commissioning parent(s) should be provided with ongoing counselling and support after the birth of their children to equip them to inform the children about their origins.

55 Fiona MacCallum et al, 'Surrogacy: The Experience of Commissioning Couples' (2003) 18(6) *Human Reproduction* 1334: 64% of the commissioning mothers interviewed had regular contact with the surrogate after the birth of the child.

56 Submission PP3 45 (Anonymous).