

INVESTIGATION INTO ALTRUISTIC SURROGACY COMMITTEE

SUBMISSION

Introduction

This submission covers some issues that relate to the experience of gay men seeking to become parents through surrogacy, although it has relevance to surrogacy arrangements in general. The submission is based on some of the existing literature on surrogacy, gay and lesbian parenting, as well as a current PhD research project on gay men from Australia and the United States who have become parents through surrogacy.

An increasing number of gay and lesbian Queenslanders, like other Australians, are seeking to become parents. For example, out of a total of 231 online advertisements in 2007 seeking donors, co-parents or surrogates on a popular Australian gay and lesbian website, 37 (16%) were from Queenslanders. However, as a result of laws and policies restricting access to adoption and assisted reproductive technologies, gay individuals or couples are often forced interstate or overseas to pursue parenting. In the case of a gay male couple seeking to have children for example, they would need to find a woman (or women) willing to co-parent with them. If this is not possible, or if they are seeking to have children on their own, surrogacy is one of the few options available to them.

However all forms of surrogacy are currently illegal in Queensland. In other states, surrogacy contracts are not enforceable and commercial surrogacy is not legal. Further, some Australian states require commissioning/intending parents and the surrogate to reside in that state. Gay men wanting to become parents are therefore often forced to pursue the difficult and expensive option of commercial surrogacy, usually in the United States.

Consideration for transfer of legal parentage

Birth certificates

In some US states, notably California, it is recognised that assisted reproductive technologies have created new possibilities for parenthood and therefore also additional claimants to legal parentage. For this reason it is possible in that state to seek a pre-birth judgment by a Superior Court naming the intended parent(s) in a surrogacy agreement as the legal parent(s) of the child, and this would then be reflected in the birth certificate issued by the Californian Office of Vital Records. In this case, the birth mother would never appear on the birth certificate. (In the absence of such a judgment the surrogate's name must go on the birth certificate.)

In addition the state of California provides for two parents of either sex to be listed on the birth certificate by having boxes for 'Parent 1 / Mother' and 'Parent 2 / Father'.

As mentioned above, the current situation in Queensland means that all people pursuing parenting through surrogacy must travel outside that state (and often overseas) to have children. This raises the issue of the recognition of birth certificates issued in other jurisdictions. Section 18B(1) of the Status of Children Act Status of Children Act 1978 Queensland (Reprinted as in force on 1 February 2004) states that:

If, under a law of the Commonwealth, a State or a prescribed overseas jurisdiction, a person is named as a child's parent in a register of births or parentage information, the person is presumed to be the child's parent.

It is unclear what this means in terms of children born overseas through surrogacy arrangements. It implies for example that if a birth certificate is issued in another jurisdiction that provides for two parents of the same sex to be listed as parents (as in the example cited above) then both these people would be recognised in Queensland as the legal parents.

However, in the case of many gay couples with children born through surrogacy, only one parent, the biological father, will appear on the birth certificate—either on its own, or in addition to the name of the surrogate. This creates significant difficulties and distress for these families as the non-biological parent is not recognised as a legal parent.

Current laws and practices governing birth certificates in Australia privilege birth circumstances over genetic connectedness or intended parenthood. This emphasis on circumstances has always existed in designating paternity i.e. the husband of the mother is the putative father even if he is not the biological father. To use the example of a child born as the result of donor insemination, the husband (i.e. the social father) and not the donor (i.e. genetic father) appears on the birth certificate. This assumption of parentage does not require a legal pre- or post-birth adoption process. Also, as assisted reproductive technologies have now enabled the separation of the genetic mother and the birth (or gestating) mother, laws have continued to reflect birth circumstances rather than genetic connectedness. For example a child born as the result of egg donation and IVF will not have the genetic mother on the birth certificate. In both these examples, legal parentage still reflects the intentions of all the parties involved. However in relation to surrogacy there is a conflict between the intentions of those involved and the circumstances which grant legal recognition of parentage. In all Australian jurisdictions the woman who gives birth to a child is the legal mother whether she is genetically related to the child or not, and whether she intends to act as parent to the child or not.

The role of a genetic relationship between the child and the commissioning parent/s and/or surrogate

One of the questions posed for this inquiry was whether the surrogate should be able to use her gametes or whether she should have no genetic relationship to the child. This suggestion is in keeping with trends in the commercial surrogacy field in the United States where most surrogacy arrangements are now gestational rather than traditional. This trend seems to reflect the desire to separate genetic motherhood from gestational motherhood. It is perceived that this will in turn reduce the risk of non-relinquishment of the child after birth. However there are a number of policies and procedures that could be put in place—even if surrogacy contracts are to remain unenforceable—to reduce the risk of non-relinquishment (and to protect the surrogate's health, privacy and financial position) without enforcing unnecessary, complex and expensive clinical procedures on the egg donor and surrogate when the surrogate and the intended parent(s) are willing to pursue a traditional surrogacy arrangement. This could include: informed and genuine consent; psychological screening and/or or counseling of the surrogate; peer support; the requirement that she has completed her family.

Despite an often-held assumption that people who have become parents through surrogacy are highly invested in genetic connectedness this does not seem to be born out in my own research. Gay couples often go to great lengths not to reveal the identity of the biological father (to others, to the children, or sometimes even to themselves). Also, gay couples who have had children through surrogacy are generally open about the circumstances of their children's' birth, and often encourage open discussion with their children as well as ongoing contact with the surrogate and/or egg donor.

Legal rights and responsibilities

Advertising

If commercial surrogacy is to remain illegal there should be reconsideration of the right to advertise and broker surrogacy agreements. In the absence of financial incentives there should be no undue fear of coercion by intended parents. Interestingly, some jurisdictions such as Israel (where commercial surrogacy is legal) prevent surrogacy within families because of the risk of coercion.

Compensation

A surrogate should not be expected to incur costs associated with carrying a child for another individual or couple in addition to her time and labour. All reasonable medical costs and other out-of-pocket expenses should be able to be covered by

the intended parent(s) if that is the agreement of the parties involved. Significant concerns exist about surrogacy becoming a commercial arrangement if any compensation is provided. However, these concerns, apart from reinforcing a gendered view that all women's reproductive labour should be given freely, are not supported by the research that shows even in jurisdictions where commercial surrogacy is legal, financial compensation is not the primary motivation for surrogates. However, given the concerns expressed by many about commercialism some system should be established for overseeing the fair and just compensation of surrogates for medical costs and other out-of-pocket expenses such as travel costs and lost earnings.

Conclusion

Given the parameters of this inquiry are limited to altruistic surrogacy only, the minimum requirement should be for gay men, lesbians and heterosexual de facto couples not to be excluded from accessing this option.

A handwritten signature in black ink, appearing to read 'Dean Murphy', with a stylized, flowing script.

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