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SUBMISSION #
112

Ms. Julie Conway
The Research Director
Investigation into Altruistic Surrogacy Committee
Parliament House, George Street
Brisbane QLD 4000

RECEIVED
26 JUN 2008

Dear Ms Conway

RE: INVESTIGATION INTO ALTRUISTIC SURROGACY

Thank you for the opportunity to comment on this important issue. The Queensland Law Society supports adoption of a uniform approach to surrogacy across Australia. We appreciate that this is a developing area of law and social policy, but it is the view of the Society that there must be procedures in place to permit individuals to legally enter into surrogacy agreements and transfer parentage of a child to the intended parents.

The details of such procedures are of particular interest to the Society as there are significant advice implications for legal services providers.

Decriminalizing Surrogacy Arrangements

The Queensland Law Society believes that the legal restrictions and criminal penalties against altruistic surrogacy should be removed from the *Surrogate Parenthood Act 1988 (QLD)*.

Role of the Government

The government should play a role in regulating altruistic surrogacy arrangements. The legislative framework should include the mechanisms for entering into binding surrogacy agreements with recourse to the Supreme Court or a statutory body where issues surrounding the agreement's interpretation, variation or enforcement are required. The government should also ensure that the current laws relating to the issue of birth certificates is amended to enable the child's birth to be registered with the intended parents noted as the child's parents.

It may be that there should be a register of all surrogacy agreements entered into, possibly maintained by the Department of Communities in a manner similar to the Adoption Register.

Alternatively it might be that all agreements are required to be approved by the Supreme Court or statutory body. I will discuss this aspect of altruistic surrogacy later.

It is our view that providing a legal framework for the creation of a surrogacy agreement would help minimize conflict between the surrogate and intended parents. Judicial oversight can also help to ensure that the best interests of the child are protected.

Commissioning Parents Criteria

Any legislation should use terminology of "suitability" not "eligibility" which implies some sort of application process and approval in order to enter into such an arrangement. It is our view that several factors are relevant to *suitability* not *eligibility*. Fertility, for example, is relevant to *suitability* not *eligibility*. It is extremely difficult for

couples to demonstrate infertility to the degree necessary to allow them to become eligible to adopt children. This impediment should not be extended to surrogacy agreements. We do not dispute that the intended parent's ability to conceive a child is relevant; it should not be an issue of eligibility, but of suitability for such an agreement. Similarly, the age of the intended parent, family size, relationship duration and stability are all relevant to suitability, but not eligibility.

Common criteria for commissioning parents and surrogates include:

- demonstration of informed consent through specialist counseling and independent legal advice;
- agreement on arrangements prior to conception;
- parties must be resident in jurisdiction;
- exclusion of parties convicted of sexual or violent offences or subject to a child protection order without specific assessment and approval.

In the United States and United Kingdom surrogacy arrangements require that the commissioning parents be married and at least one of the intended parents be a genetic parent to the child. Whilst legally requiring an intended parent to be a genetic parent is a framework which at least ensures some connection between one of the intended parents and a child, it leaves couples, be they same sex or heterosexual, in the position where, if neither of them can contribute to the parentage of the intended child, then their only recourse to having a child, is adoption.

If the surrogate is a genetic parent, there must be an adequate way to transfer legal parentage to the intended parents. This is discussed later in this letter.

It is our view that the definition of altruistic surrogacy should only include pre-conception agreements in Queensland. Other arrangements to transfer custody of a child from his or her birth parent would appear to fall within the framework of legal adoption.

The Society has long advocated for reform to the existing Adoption law. The best interest of children should be the paramount consideration in the delivery of adoption services and decision making. It would be a mistake to model the surrogacy provisions on the draconian provisions enshrined in the adoption legislation. Significant amendments are necessary to allow for the transfer of legal parentage from the birth parent to the intended parents where the agreement is not entered into until the pregnancy has occurred.

The United Kingdom *Adoption and Children Act 2002* (UK) offers a model for adoption arrangements. The statute provides that natural parents can consent to adoption and it extends the definition of 'couple' to include two persons living as partners in an enduring family relationship. Any person over the age of 21 may adopt and the child must live with the intended parent 10 weeks prior to an adoption order.

The Surrogacy Agreement - Legal Rights and Responsibilities

The Supreme Court or some other statutory body should have jurisdiction to deal with applications where the agreement's interpretation, variation or enforcement prior to the birth of the child, is required.

The Society believes it would be appropriate for the Supreme Court to have authority to make orders about the surrogacy agreement, on the basis of what is in the best interest of the child. If the Court is to be required to approve surrogacy agreements then it should have regard to the best interests of the child and list criteria to be considered including:

- A home study of the intended parents and the surrogate;
- The intended parents, the surrogate and her husband, if she is married, meet standards of fitness for the placement of a child – factors for consideration could include age, family size, infertility and duration and stability of relationships;
- The agreement contains adequate provisions to guarantee the payment of reasonable medical and ancillary costs;
- All parties have received counseling concerning the effects of surrogacy; and
- The agreement would not be substantially detrimental to the interests of any of the affected persons.

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The Court would then have the authority to order the issuing of a new birth certificate naming the intended parents as the parents after the birth of the child.

Whilst the Supreme Court currently has jurisdiction in relation to adoption proceedings and issues relating to the issue of birth certificates it must be remembered that once the child is born Federal Courts have jurisdiction pursuant to the Family Law Act to parenting arrangements for the child and adoption. If proceedings were to be instituted by any of the parties to the surrogacy agreement, in the Family Court then Federal Law would take precedence over State laws. The States should approach the Federal Government with a view to amending the Family Law Act to ensure that in deciding parenting arrangements for a child it takes into account any surrogacy agreement entered into under a law of the States or Territories.

In those circumstances any State legislation should include provisions authorizing and requiring State based government departments to co-operate in the Federal Family Law Proceedings in a similar way to matters which involve special medical procedures for children, particularly if a regime is adopted whereby the State based Department is required to prepare a report into the factors set out above.

Non Court Approved Surrogacy Agreements

Ideally, there should also be a mechanism for non court-approved enforceable contracts provided the contract is in writing and signed by all parties (the intended parents, the surrogate and her husband if she is married). I note however the difficulty there may be in providing for an enforceable agreement with the current Federal/State system of laws in Australia.

The State of Virginia, U.S.A., provides that if there is not a court-approved surrogacy agreement, the gestational mother is the child's mother unless the intended mother is a genetic parent, in which case the intended mother is the mother. This arrangement makes sense legally and socially. Virginia treats surrogacy arrangements much like adoptions, the intended parents may enter into a surrogacy contract with a woman and her husband, if she is married, in which the woman agrees to relinquish her rights and duties as parent of a child conceived through assisted conception.

If a Court is called on to determine whether the surrogacy agreement is enforceable after the birth of the child, then the legislation (and maybe the Family Law Act, as well) should provide factors which the Court must look at in determining what is in the best interests of the child born to the surrogate mother, such as:

1. Whether a contractual agreement was entered into by parties over the age of 18;
2. whether the parties received counseling concerning the effects of surrogacy;
3. age, family size, duration and stability of relationships;
4. similar provision to Section 60CC of the Family Law Act
5. The intent of the parties;
6. The genetic relatedness of the parties to the child;

There has been a general trend toward court's honoring the intent of the parties when they have entered into an assisted reproduction agreement.

Surrogacy Agreements Entered Into Outside of Jurisdiction

It is foreseeable that situations will arise where surrogacy agreements are entered into in other states or countries. For example, a unique situation arose when a homosexual couple from the United States contracted with a Russian mother to serve as a surrogate and then moved to Australia. Similarly, intended parents who are residents of Queensland may enter an agreement with a surrogate mother from a different state or country. The legislation would need to anticipate such scenarios and create a way to recognize the legal parentage of the child.



Rights of Surrogate Mother

It is also important that the surrogate mother be the sole source of consent with respect to clinical intervention and management of the pregnancy. She should be required to agree to consent to reasonable medical instructions about her prenatal health, but the intended parents should not have authority over the surrogate mother's medical decisions.

If the intended parents are not genetically related to the child, in some places the surrogate mother is required to assume legal rights and responsibilities for the child. This type of provision would require an amendment to Queensland Adoption Law to allow for the surrogate mother to relinquish custody of the child to the intended parents. It is our view that it is not in the best interests of new born infants to be kept in the hospital while legal arrangements are being finalized. Especially in circumstances where all parties have agreed to the transfer of custody.

The United Kingdom legislation provides a model for establishing and enforcing surrogacy agreements.

It is our view that the surrogate mother should be reimbursed for reasonable medical expenses and compensated for other financial loss related to the pregnancy. The amount of compensation could be dictated by legislation if needed.

Child's Rights to Access Information

The United Nations Convention on the Rights of the Child recognizes and enshrines every child's right to familial relationships. Children born out of surrogacy arrangements should possess the same rights:

Article 7

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible, the right to know and be cared for by his or her parents.

Article 8

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

If a Register of Surrogacy Agreements is legislated, this will need careful management in terms of access to the register by children born of a surrogacy arrangement and indeed by the surrogate mother. There may be situations where a child needs medical information about potential genetic diseases and should in very limited circumstances be able to access records to find out this information. It may also be that the Surrogacy and Adoption Registers should have similar requirements in relation to access by the parties to the agreement and the children born of a surrogate arrangement. These criteria should be looked and reviewed should the government decide on the creation of a surrogacy register.

Conclusion

Due to the nature of evolving scientific technology there will always be exceptions and changes to the surrogacy processes, in our view, however, it is imperative to create a legal framework to permit and facilitate surrogacy arrangements and to allow for the transfer of legal parentage to the intended parties.

Yours faithfully



Megan Mahon
President