

SURROGACY: ART'S FORGOTTEN CHILD

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I BACKGROUND

For decades, various kinds of assisted reproductive technology ('ART') have been used to facilitate pregnancy for infertile couples. Techniques used include artificial insemination, in vitro fertilisation, gamete intra-fallopian transfer and zygote intra-fallopian transfer. Depending on the technique used and the circumstances of the couple, the parents may or may not be genetically related to their offspring. ART of the kind mentioned is now regarded as standard, mainstream medical intervention. While such treatment is now regarded by most as ethically and morally uncontroversial, our society is confronted with many ethical and moral dilemmas as a result of ART and the advances in scientific knowledge associated with reproductive techniques. Who should be entitled to access ART? Should prospective parents be able to select the sex or indeed any other physical characteristics of their child? Should pre-implantation genetic manipulation be permitted if this could have positive medical outcomes for an existing child of the parents? Should the offspring be entitled to information about their genetic origin? As scientific advances make more options available, these, and other, challenging issues will need to be addressed and resolved by our community and lawmakers.

The fact that ART and rapid advances in scientific knowledge give rise to difficult ethical and moral dilemmas has not meant that we, as a community, have sought to deny infertile couples access to ART. Even the most conservative commentators of social reform are unlikely to advocate denying access to ART for infertile couples because of the complex issues that have arisen, and undoubtedly will continue to arise, in this vexed area.

And yet, as a community, we seem to take a different approach in relation to surrogacy arrangements. There is a considerable amount of academic literature that counsels against regulating or facilitating surrogacy arrangements, even ones

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that are not commercially driven.¹ Concerns focus on the potential for exploitation of the surrogate; the devaluing of the mothering role (such arrangements being detrimental to the notions of traditional families); that surrogacy could be used in inappropriate circumstances; and the potential (or actual) harm to a child born as a result of the arrangement. The debate about surrogacy is interesting in that feminist views are split: many are concerned about the potential for exploitation of less powerful women who are more likely to offer their services as surrogates, either for financial reasons or as a means of enhancing their own self-esteem; while others see any prohibition as paternalistic and an invasion of a woman's right to self-determination or autonomy.

It is submitted that the discomfort that many in the community feel about surrogacy is reflected in the approach taken and the language used by the Victorian Law Reform Commission ('VLRC') in its current review on assisted reproductive technology and adoption. The VLRC was asked 'to enquire into and report on the desirability and feasibility of changes to the *Infertility Treatment Act 1995* (VIC) and the *Adoption Act 1984* (VIC) to expand eligibility criteria in respect of all or any forms of assisted reproduction and adoption'.² As part of its comprehensive review, the VLRC published a Consultation Paper titled *Assisted Reproduction & Adoption: Should the Current Eligibility Criteria in Victoria be Changed?*³ Despite the terms of reference being confined to eligibility criteria for surrogacy (as a form of ART) and clarification of other aspects of the existing legislation relating to 'payment or reward' in relation to a surrogacy arrangement, the VLRC expressly sought comment from the public about whether the law should continue to permit altruistic surrogacy.⁴ It is not apparent why such comment was sought in light of the narrow terms of reference which limited the review to eligibility criteria in the surrogacy context, rather than an enquiry into the appropriateness of surrogacy itself. In a subsequent position paper on surrogacy,⁵ the VLRC resiled from pursuing this line of enquiry and review, expressly acknowledging that this threshold issue of whether altruistic surrogacy should be permitted was indeed outside its terms of reference. Nevertheless, there seems to be an undercurrent throughout the *Position Paper* which suggests that altruistic surrogacy is a matter worthy of reconsideration by the government, or one currently under review by the government.⁶

1 See, eg, Penne Watson Janu, 'The Case for Discouragement of Surrogacy Arrangements' (1996) 4 *Journal of Law and Medicine* 72. Cf Imogen Gold, 'Surrogacy: Is There a Case for Legal Prohibition?' (2004) 12 *Journal of Law and Medicine* 205 and Lindy Willmott, 'Surrogacy: Ill-conceived Rights' (2002) 10 *Journal of Law and Medicine* 198.

2 See, eg, Victorian Law Reform Commission, *Assisted Reproductive Technology & Adoption: Should the Current Eligibility Criteria in Victoria be Changed?*, Consultation Paper (2003) [1].

3 Ibid.

4 Ibid [1]–[4].

5 Victorian Law Reform Commission, *Assisted Reproductive Technology & Adoption – Position Paper Three: Surrogacy* (2005) ('*Position Paper*').

6 Although this was not expressly stated, the VLRC's *Position Paper* contemplates that the law may be changed to prohibit altruistic surrogacies: see, eg, ibid [1.3], [1.4]. It is also interesting to observe that many recommendations and statements in the *Position Paper* are couched in language that they will only apply 'if altruistic surrogacy continues to be permitted in Victoria': see, eg [5.18].

II FRAGMENTED LEGISLATIVE RESPONSE

As a result of governments failing to adequately consider how surrogacy, as one form of ART, should be regulated, Australia has a fragmented, illogical and dysfunctional legal regime. Legislation dealing with surrogacy exists in Victoria, South Australia, Queensland, Tasmania and the Australian Capital Territory,⁷ but all jurisdictions deal with the subject matter in different ways. The other jurisdictions (New South Wales, Western Australia and the Northern Territory) have not enacted legislation so the enforceability of surrogacy arrangements is likely to be decided by reference to common law principles.

As a result of this piecemeal legislative response to regulating surrogacy arrangements, the following inconsistencies exist between the Australian jurisdictions:

- In some, but not all, jurisdictions, it is a criminal offence for a person to facilitate a surrogacy arrangement;
- In some, but not all, jurisdictions, couples entering commercial surrogacies may be liable to criminal prosecution;
- In some, but not all, jurisdictions, health professionals assisting with a surrogacy may be liable to criminal prosecution;
- In one jurisdiction (Queensland), individuals involved in an altruistic surrogacy may be liable to criminal prosecution;
- In some, but not all, jurisdictions, it is possible for commissioning parents (at least in some circumstances) to be regarded as the legal parents of the child.⁸

In addition, in most jurisdictions there are legislative barriers that frustrate effect being given to the intention of the parties to a surrogacy arrangement. The position in Victoria is illustrative (although these obstacles exist in most jurisdictions). Under the *Infertility Treatment Act 1995* (Vic) ('ITA'), commercial but not altruistic surrogacies are prohibited. Altruistic surrogacies, therefore, may lawfully be carried out. However, as identified by the VLRC in its review, the ITA makes it virtually impossible for an infertile commissioning couple to have a surrogate mother artificially impregnated with their (or anyone else's) gametes. To be eligible for insemination, the surrogate would need to satisfy the infertility criterion. As the surrogacy arrangement would be occurring because of fertility difficulties of the commissioning woman, rather than the surrogate, it is unlikely that this criterion could be satisfied. Secondly, even if a child were born and given to the commissioning parents, there are legal obstacles that prevent them from being registered as the legal parents.⁹ This creates problems for the commissioning parents, as they do not have the legal power that is needed in a

7 *Infertility Treatment Act 1995* (Vic); *Family Relationships Act 1975* (SA); *Surrogate Parenthood Act 1988* (Qld); *Surrogacy Contracts Act 1993* (Tas); *Parentage Act 2004* (ACT) respectively.

8 See n 10 below.

9 In most Australian jurisdictions, status of children legislation deems the birth (surrogate) mother to be the legal mother, and the commissioning parents have no parenting rights. This is the case even if gametes of the commissioning parents are implanted into the surrogate.

variety of contexts, particularly the authority to make decisions about issues such as medical treatment.¹⁰

III WHAT IS THE HARM?

In a liberal democracy, governments should not prohibit private activity unless that activity does harm to others. For many couples, surrogacy provides the only pathway to parenthood. This may be for a range of reasons, but most commonly because the woman has a medical condition that either prevents her or makes it dangerous for her to carry the child to term.¹¹ Because surrogacy will bring benefit to at least this group of individuals, the practice should not be prohibited unless there is evidence that it is a harmful one.

Despite speculation that surrogacy arrangements exploit the surrogate mother and are potentially harmful to the child, the available empirical research does not support this position. Indeed, the relatively limited amount of research that has been conducted suggests that surrogacy arrangements are, on the whole, successful.

In its *Position Paper* on surrogacy, the VLRC referred to research in the United Kingdom that explored the experience of 42 commissioning couples and 34 surrogates. The researchers reported their findings in three articles, each article focusing on different aspects of the study:

- Their conclusion in relation to the experience of the commissioning parents was that '[c]ommissioning couples generally perceived the surrogacy arrangement as a positive experience'.¹² The researchers observed that the relationships between the couple and the surrogate were generally good, regardless of whether they knew the surrogate before the arrangement. Positive relationships continued after the birth of the child, and many couples maintained contact with the surrogate.
- Their conclusion in relation to the experience of the surrogates was that '[s]urrogate mothers do not appear to experience psychological problems as a result of the surrogacy arrangement'.¹³ The interviews conducted with 34 women suggested that they did not generally experience major problems in their relationship with the commissioning couple in handing over the baby,

10 Depending on the particular jurisdiction, however, there may be some options available to commissioning parents. Firstly, it is open to commissioning parents (in all jurisdictions) to apply to the Family Court for a parenting order which, if granted, would give the parents the legal power to make decisions on behalf of the child. However, such an order does not deprive the surrogate of the status of legal parent and there would, therefore, continue to be succession implications arising from the parental status that may not have been intended by the parties. In New South Wales and, more recently, South Australia, commissioning parents have been allowed to adopt the child. In the Australian Capital Territory, commissioning parents can apply to the Supreme Court for a parentage order which, if granted, puts the parents in the same legal position as adoptive parents.

11 Victorian Law Reform Commission, above n 5, [2.5].

12 Fiona MacCallum et al, 'Surrogacy: The Experience of Commissioning Couples' (2003) 18(6) *Human Reproduction* 1334, 1334.

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

or from the reactions of those around them. Further, the emotional problems that were experienced by some of the women interviewed after birth decreased over time.

- Their conclusion in relation to an assessment of the parent-child relationship in the first year of the child's life was that surrogate families indicated greater psychological well-being and adaptation to parenthood than natural-conception families; parents showed greater warmth and attachment-related behaviour toward their infants, and greater enjoyment of parenthood, than did natural-conception parents.¹⁴

Empirical research into the lives of over 80 surrogate mothers and prospective parents has also been conducted in the United States. The researcher expected to find evidence of exploitation among surrogate mothers, but concluded that 'many of the concerns raised about surrogate motherhood are rashly speculative and bear no relation to the arrangements as they currently exist'.¹⁵

In the United Kingdom, altruistic surrogacy is not prohibited. In 1999, an English IVF clinic reviewed its IVF surrogacy practice over the previous nine years. Under the internal processes of the clinic, all such cases are considered by an independent ethics committee to ensure that the circumstances are appropriate for an IVF surrogacy and that all aspects of the arrangements had been fully and appropriately considered. While acknowledging the difficult issues that arise in the clinical setting, the clinic concluded that 'our experience over the past nine years shows that an altruistic system can work and work well'.¹⁶

IV CONCLUSION

Surrogacy is a practice that has been with us for centuries, and one that is acceptable and practised within many cultures. It is also a practice that has been regulated in the United Kingdom and many jurisdictions in the United States. In a liberal democracy, behaviour should be permitted unless there is evidence that such behaviour causes harm to others. The fact that only one Australian jurisdiction (Queensland) attaches sanctions to individuals entering into altruistic surrogacy arrangements suggests that governments (generally) are not satisfied that harm is caused as a result of such arrangements. And yet, governments have not ensured that an appropriate legislative and regulatory framework exists to support altruistic surrogacies. If altruistic surrogacy is a practice that is to be permitted, then governments have a responsibility to regulate it to achieve optimal outcomes for all involved.

There is no doubt that there is potential for harm for those involved in surrogacy arrangements: there have been documented cases in Australia where a

14 Susan Golombok et al, 'Families Created Through Surrogacy Arrangements: Parent-Child Relationships in the 1st Year of Life' (2004) 40(3) *Developmental Psychology* 400, 408.

15 Lori Andrews, 'Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood' (1995) 8 *Virginia Law Review* 2343, 2350.

16 Peter Brinsden et al, 'Treatment by In Vitro Fertilisation With Surrogacy: Experience of One British Centre' (2000) 320 *British Medical Journal* 924, 926.

surrogate mother and her family experienced enormous psychological distress as a result of relinquishing their biological child to infertile family members,¹⁷ and where conflict arose between a surrogate and commissioning parents about residence of the child (who was biologically related to both the surrogate and the commissioning father) which had to be resolved by the Family Court.¹⁸ However, in the absence of research that suggests adverse outcomes for the child, failure to support this form of assisted reproduction by putting in place an appropriate legislative and regulatory framework to the same extent as exists for other forms of ART cannot be justified.

The potential for harm could be minimised by appropriate regulation, both through legislation and accreditation. Legislation should be enacted to facilitate altruistic surrogacies; establish appropriate criteria for the commissioning parents; ensure adequate counselling is received by all parties; establish a process that would, in an appropriate case, facilitate the commissioning parents becoming the legal parents of the child; and to ensure that the child has access to information regarding his or her genetic origins. Legislation should also establish safeguards through accreditation processes under which clinics would be required to comply with an established code of practice. If governments undertook the necessary research and consultation to ensure appropriate legislation and accreditation were in place, the potential for adverse outcomes would be reduced.

State and Territory governments should act co-operatively to enact consistent legislation. Several undesirable consequences flow from not taking such action. Firstly, infertile couples in some jurisdictions will be denied treatment that is available to couples in other jurisdictions. Currently, a couple living in the ACT is able to enter a surrogacy arrangement and the commissioning parents can apply to the Supreme Court for a parentage declaration. In stark contrast, criminal sanctions attach to a Queensland couple who enter into an altruistic surrogacy arrangement, and further, that couple is prohibited from travelling elsewhere in Australia to do so. Secondly, the failure to recognise surrogacy as a form of ART disadvantages couples with a particular reason for infertility. Unless this differential treatment can be justified on some principled basis, the law is rightly brought into disrepute as treating one section of the community differently from another. Thirdly, aspects of the law in many jurisdictions are simply irrational in the surrogacy context. It is unacceptable for such a situation to continue.

The social landscape has shifted considerably since many of the surrogacy statutes were enacted. It is time for all governments to confront and resolve the difficult and complex issues that arise from surrogacy, a largely forgotten and insufficiently regulated form of ART.

17 ABC, 'Story of Sydney', *Australian Story*, 8 February 2001.

18 *Re Evelyn* (1998) 23 Fam LR 53.