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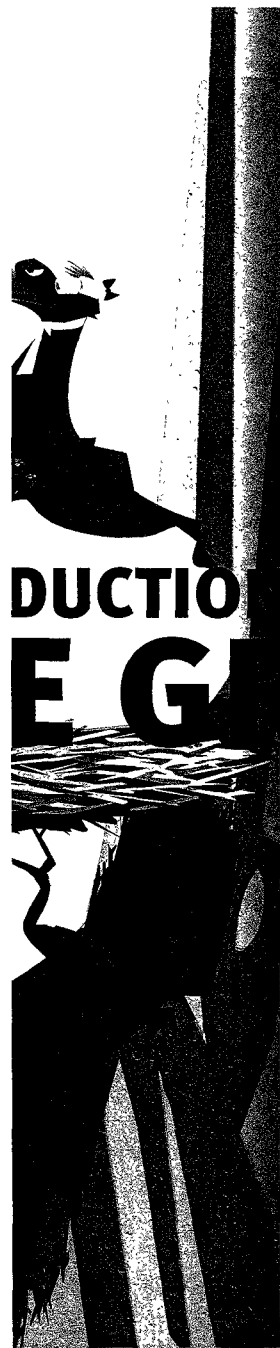
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Surrogacy has arguably been the most controversial mode of assisted reproduction. However, there has been a gradual judicial and legislative trend towards acceptance of it as a legitimate means of family formation.

BY VICTORIA LAMBROPOULOS

REPRODUCTION RIGHTS – THE GROWING SUR

Surrogacy has perhaps provoked more public debate and inquiry than other modes of alternative or assisted reproduction. One reason for this is that surrogacy offends deeply held views in our society regarding family and the origins of family.

The predominant public opinion has always been strongly against surrogacy and it has often produced extreme emotional responses.¹ This has influenced policy and law making in this area. The common ethical and moral objections are that surrogacy arrangements will lead to trading in babies and women being susceptible to being used as mere incubators. The initial legislative response was to discourage if not ban surrogacy altogether.

Since the 1980s, however, much has changed in our society and views on surrogacy have shifted. It has been suggested that there is a judicial and legislative trend in both

the UK and Australia towards allowing altruistic surrogacy.¹ Access to surrogacy through the IVF program has recently been the subject of review by the Victorian Law Reform Commission (VLRC).²

WHAT IS SURROGACY?

Surrogacy involves an agreement made with a woman who is or who is to become pregnant (the surrogate mother). She is the one who gestates the child. In accordance with the agreement, which can be for altruistic or commercial purposes, the woman will surrender the child born from that pregnancy permanently to another person or people who wish to become the child's parents. This couple (in most instances a couple is involved) is called the commissioning couple.³ The commissioning couple is in a care-giving role with the child after its birth. They are also often called the social parents.⁴

This is the generally accepted definition of surrogacy in most jurisdictions. "Full surrogacy is where the child has no genetic connection with the gestating or surrogate mother; this is achieved through IVF procedures. Traditional or partial surrogacy is where the child is the genetic child of the surrogate."⁵ This can occur naturally, either through sexual

Victoria was the first state to introduce legislation in this area by way of the *Infertility (Medical Procedures) Act 1984* which came into force in 1986. The provisions in this Act were later duplicated in the current Act, the *Infertility Treatment Act 1995*.⁶ Unlike the UK, Victoria did not choose to introduce a specific piece of legislation that deals exclusively with surrogacy. This is perhaps a downfall of the current regime in Victoria. The provisions in the *Infertility Treatment Act* are unnecessarily complex and make it very difficult for infertile couples to have a child through IVF surrogacy.

Under s59 of the *Infertility Treatment Act*, "[a] person must not make, give or receive or agree to make, give or receive a payment or reward in relation to or under a surrogacy agreement or the arrangement of a surrogacy agreement or an arrangement to act as a surrogate mother". Not only are payments for reward prohibited, but any payment by way of reimbursement to the surrogate mother for her general expenses, such as hospital and medical expenses, are also prohibited.⁷ The maximum penalty for breaching this provision is \$24,000 or two years imprisonment.

Any advertising associated with surrogacy services is also banned under s60 of the *Infertility Treatment Act* and carries with it the same penalty as s59. This means that surrogate brokers cannot advertise in Victoria. However, this does not

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intercourse or self-insemination.⁸ Surrogacy can take up to 10 forms.⁹ It is the only form of assisted reproduction that can occur naturally and is also often the only way a couple can have a child which is genetically their own.

SURROGACY AND THE LAW IN VICTORIA

There have been no significant studies done on the incidence of surrogacy in Australia. "We can only guess as to how long surrogacy has been practised in Australia, although the New South Wales Law Reform Commission learned of one family in which children had been born by use of a surrogate in 1870 and in 1900."¹⁰ It is suggested that most surrogacy arrangements have been kept quiet and performed underground

prevent couples from finding surrogates overseas as they can simply search the Internet and find a plethora of brokers in other countries such as the US. A recent example of this was Mr and Mrs Banfield who found a surrogate in the US who had twins for them. They then brought the children to Australia and have been rearing them as their own.¹¹ This situation occurs despite the difficulties for commissioning parents in obtaining parental status at law in Australia.

Under s61 of the *Infertility Treatment Act* surrogacy agreements are void. Therefore, any agreement entered into will not be enforced by a court. Altruistic surrogacy – that is, surrogacy without any reward or payment being exchanged of any kind – is legal in Victoria. This is the accepted interpretation of the provisions. While initially the legislation intended to ban surrogacy altogether, this did not occur.¹²

Instead, the *Infertility Treatment Act* only regulates IVF surrogacy. This means that altruistic surrogacy which occurs without the assistance of an IVF clinic is not regulated specifically by the *Infertility Treatment Act*; however, it is permitted.

WHO CAN ACCESS IVF ASSISTED SURROGACY?

It is very difficult for couples seeking access to IVF assisted surrogacy to comply with the eligibility provisions under s8 of the *Infertility Treatment Act*. The provisions were designed to apply to infertile women who can carry or gestate their child to term. Before a woman can access IVF treatment she must be considered to be infertile in accordance with s8. Therefore, as the surrogate mother will undergo the infertility treatment, she and not the commissioning mother must comply with the infertility requirement. The infertile couple who desires a child must not only find a surrogate mother, but an infertile surrogate mother. The proposed surrogate must also have the consent of her partner prior to undergoing IVF treatment: s8(2). Further, s20 of the *Infertility Treatment Act* provides that before a woman can undergo a treatment procedure using a donor sperm and a donor egg, she must be unlikely to become pregnant with sperm from her own husband or partner.⁴⁴ This is another significant hurdle for a commissioning couple. A single woman can access IVF treatment under the provisions if she is clinically infertile in accordance with s8 of the *Infertility Treatment Act*.⁴⁵

As stated in the VLRC consultation paper, the eligibility requirements are intended to apply to people who want to have children for themselves.⁴⁶ They were not drafted to apply to surrogacy and in fact create a significant barrier. Although the *Infertility Treatment Act* does not specifically ban altruistic surrogacy, effectively this is what it achieves.

THE LAW IN OTHER AUSTRALIAN STATES

Victoria, Tasmania, South Australia, the ACT and Queensland are the only states that have enacted legislation in this area. All of these states except Queensland allow altruistic surrogacy. Queensland bans surrogacy altogether. All of these states except South Australia strictly ban the payment of any fee or reward to a surrogate. South Australia allows some valuable consideration/costs to be recovered as a debt.⁴⁷ All states ban the advertising and arranging of surrogacy services. "The remainder of the states are regulated by ethical guidelines and the general law. At the time of writing the *Assisted Reproductive Technology Bill 2003* (NSW) was before the New South Wales Parliament. Part 4 of that Bill deals with surrogacy."⁴⁸

JUDICIAL TREATMENT OF SURROGACY

Surrogacy has come before the courts in the context of applications or disputes over the placement of the child born from a surrogacy arrangement. These cases show there is little certainty at law for potential parents with respect to their

parental rights. In the most recent surrogacy case in Australia, *Re Mark: an application relating to parental responsibilities*,⁴⁹ Justice Brown gave a gay couple the prime responsibility for the care and welfare of a child born out of a commercial surrogacy arrangement in the US on the basis that it was in the paramount interests of the child. In making the decision, her Honour noted that despite Mr X (who was one of the commissioning parents) being the genetic father and being named on the birth certificate in the US as the father, no specific presumption of parentage arose in his favour under the *Family Law Act 1975* (Cth). Interestingly, Justice Brown stated that the fact the child was born pursuant to a commercial surrogacy agreement was an irrelevant consideration in assessing whether the commissioning couple should be given the prime responsibility for the care of the child. [94]

However, the decision may not have been made in the commissioning couple's favour if the surrogate mother contested the application as happened in the case of *Re Evelyn (No 3)*.⁵⁰ This case was the first and so far the only surrogacy case in Australia to go to the High Court. It was a bitter dispute between the surrogate parents and the commissioning parents over the placement of a child. The High Court granted custody to the surrogate mother on the principle that it was in the paramount interests of the child under s65E of the *Family Law Act*. This was despite the fact that baby Evelyn had been living with the commissioning parents and not the surrogate mother up until the High Court's decision was made.

It appears the only clear way commissioning parents can become legal parents is through adoption proceedings. In *Re Mark*, Justice Brown refrained from making an order that Mr X, who was the genetic father, was also the child's father for the purposes of the *Family Law Act*. However, her Honour did remark that Mr X may well be the child's father for the purposes of the Act. [83] The legal presumptions of parentage in the *Status of Children Act 1974* (Vic) provide little assistance. The Act presumes the birth mother who is the surrogate is the child's legal mother and her partner is the father. It has been said that the legal presumptions "reinforce the traditional family unit by deeming any child born within a marriage to be a child of the woman and her husband".⁵¹ This does not fit the complexities of surrogacy

ETHICS AND THE FUTURE

Surrogacy provokes extreme responses because of the difficult ethical issues which it ignites. The initial fear in the 1980s was that surrogacy was viewed as the "buying and selling of babies". Even altruistic surrogacy received strong condemnation.⁵² Surrogacy arrangements can lead to the commodification of the formation of family in society, being the birth of a child into a family unit. It is no surprise that our law bans the payment of any reward in a surrogacy arrangement.

However, since the 1980s there have been advances in IVF which have meant that the genetic and gestational aspects of the birth process can be separated. Further, infertility rates have risen in our society and the number of

children available for adoption has declined. This has gradually changed the public's opinion on legitimate family formation. The initial condemnation against surrogacy so loudly voiced in the 1980s seems to have turned into a lull of gradual acceptance. Couples like the Banfields simply access surrogacy brokers overseas via the Internet. Arguably this means the Victorian bans are ineffective. It is probable that surrogacy will become more attractive as infertility rates rise and many couples will turn to this if it is the only way that they can medically start a family. ●

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1. G Douglas, *Law, Fertility and Reproduction*, 1991, Sweet & Maxwell, London, pp141-4, cited in A Stuhmcke, "Looking backwards, looking forwards: judicial legislative trends in the regulation of surrogate motherhood in the UK and Australia (2004) 18 *Australian Journal of Family Law* 1 at p2 at note 16.
2. See the article by A Stuhmcke, note 1 above.
3. VLRC, *Assisted Reproduction and Adoption: Should the current eligibility criteria in Victoria be changed?*, consultation paper, 20 January 2004.
4. The definition is taken from the VLRC consultation paper, note 3 above, at p107. Also note the definition of surrogacy agreement in s3 of the *Infertility Treatment Act 1995* (Vic).
5. New Zealand Law Commission, *New Issues in Legal Parenthood*, preliminary paper 54, March 2004, p36.
6. Note 5 above, at p36.
7. A procedure by which semen is inserted by a woman into her vagina without medical assistance (typically by using a needleless syringe).
8. A Stuhmcke, "Surrogate motherhood: the legal position in Australia" (1994) 2 *Journal of Law and Medicine* 116-124 at p117.
9. Keith Mason QC, "Surrogacy: setting the Australian scene", paper in M Meggitt (ed), *Surrogacy: in whose interest? Proceedings of the National Conference on Surrogacy*, Melbourne, February 1991, p7.
10. See A Stuhmcke, note 1 above, at p12.
11. The UK under the *Surrogacy Arrangements Act 1985* allows the surrogate mother to be paid reasonable expenses.
12. Miranda Wood, "Twins give new meaning to 'Made in Australia'", *The Age*, 2 May 2004.
13. See A Stuhmcke, note 1 above, at p12 and VLRC consultation paper, note 3 above.
14. Opinion by Gavan Griffith QC cited in VLRC consultation paper, note 3 above, p109.
15. *McBain v Victoria* (2000) 99 FCR 116 invalidated the provisions in the *Infertility Treatment Act* which required that a woman be married or in a de facto relationship before being able to undergo treatment on the basis it was inconsistent with s22 of the *Sex Discrimination Act 1984* (Cth).
16. VLRC consultation paper, note 3 above, at p109.
17. See A Stuhmcke, note 1 above, at p14.
18. John Seymour and Sonia Magri, *ART Surrogacy and Legal Parenthood: A comparative legislative review*, VLRC occasional paper, August 2004, p46.
19. [2003] 31 Fam LR 162. The numbers in square brackets in this article refer to the paragraph numbers in the judgment.
20. [1998] 23 Fam LR 667.
21. Penelope Beem, "Where does a man stand on issues of assisted reproduction, surrogacy, artificial insemination within lesbian relationships and posthumous conception?" (2004) 18 *Australian Journal of Family Law* 13-15; see in particular p14 for quotation.
22. Waller Committee, *Report on the Disposition of Embryos Produced by IVF*, August 1984, quoted in A Stuhmcke, note 1 above, p12.