

The future of surrogacy in New Zealand – Beyond the adoption model

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Surrogacy in New Zealand is treated as a form of adoption. ACART (2014) proposes that the Health Minister consider compensating women who act as surrogate mothers. We think this is a step in the right direction, but until the adoption model is abandoned surrogacy will not be a safe practice for New Zealanders. ACART's consultation document does not address the issue of legal parenthood, but it is one that is intimately linked to the issue of compensation to surrogates because the Adoption Act (Section 25) prohibits payments in consideration of adoption. If, as we will argue below, surrogates deserve to be compensated for their labour, it is imperative that we acknowledge that the adoption framework is inappropriate in surrogacy.

The HART Act (Section 14.1) states that '[a] surrogacy arrangement is not itself illegal, but is not enforceable by or against any person'. Although people are free to enter surrogacy arrangements, any previous agreement regarding legal parenthood will not be enforced. Instead, legal parenthood is determined in accordance with the Status of Children Act 1969 (as amended in 1987 and 2004). Section 17 states that if a woman conceives with donor gametes, she is for all purposes the mother of the child, and Section 18 states that if a woman's partner consents to the ART procedure, he will be the parent of the resultant child. The implication for surrogacy arrangements is that the surrogate and her partner will be the legal parents at birth. She can then decide whether to give the child up for adoption by the intended parents. Effectively, surrogacy in New Zealand operates as a form of adoption, despite the fact that it has two rather distinct features: the surrogate becomes pregnant with the intention of relinquishing the child; and one or both of the adoptive parents is also the biological parent of the child. According to the Adoption Act 1955 the birth mother is not legally able to give consent until at least 10 days after the birth of the child (Section 7). Like any other person who wishes to adopt a child, the intended parents will have to be vetted by Child, Youth and Family (CYF), and an adoption order will only be approved if the court is satisfied that the adoptive parents are fit and proper persons to raise the child (Section 11).

Prior to the 1987 Amendment parenthood in New Zealand was grounded in genetic connection. In law, a gamete donor was a legal parent, despite the fact that he or she did not want the rights, duties and liabilities of parenthood. The 1987 Amendment was motivated by the belief that parentage 'should be decided on a social rather than a biological basis' (Henaghan & Atkin, 2013, p. 270). The Amendment achieved the desired result for couples who use donor gametes to overcome infertility, but in our view it achieved the opposite in the case of surrogacy, where the surrogate and her partner are recognised as the legal parents, while the intended parents, who are also the genetic parents, are treated as gamete donors. That appears to have been the intended result. The 1987 Amendment was promoted, at least in part, to prevent a Baby M case in New Zealand.² Opponents of surrogacy used this case to support their view that a woman cannot possibly decide ahead of time whether she would be capable of relinquishing her baby at birth. The introduction of the 1987 Amendment was aimed at protecting women by recognising the birth mother as the legal mother, regardless of whether she entered a surrogacy arrangement, and regardless of whether the child was genetically related to her.

The old adage 'hard cases make bad law' applies to surrogacy legislation both here and abroad. There is now sufficient evidence that the vast majority of surrogacy arrangements run smoothly. Women who become surrogates do decide in advance to give the baby to the intended parents and do relinquish the baby. That is the only reason they became pregnant. We believe that the law should change, and that intended parents should be recognised as the legal parents at birth. This would serve the interests of all parties to the agreement.

The HART Act aims to protect surrogates but actually makes them vulnerable, because the intended parents can also change their minds about adopting the child, or the Family Court may not grant an adoption order in their favour. Indeed, ACART (2013, p. 2) accepts this as a major risk factor for the surrogate. We believe it is an unacceptable risk to bear. In particular, if the child is born with an abnormality the surrogate may find herself responsible for a child that she cannot raise without significant hardship to herself and her family. Putting that child up for adoption by strangers is her only other option.

The intended parents are especially vulnerable given that ACART requires that at least one of them is the genetic parent of the intended baby. This genetic status is never again formally acknowledged. Should the surrogate change her mind about relinquishing the child or the

Family Court not grant an adoption order in their favour they face the loss of their genetic child. We do not want to suggest that the child is their property because it is their biological issue, but wish to highlight the horror for them of having a child to whom they are closely related raised by non-relatives who may not even maintain contact. New Zealand makes strenuous efforts to find family members to foster children who are taken from their biological parents, but in surrogacy this principle seems to have no force.

Even where the adoption process ends up running smoothly, the knowledge that either party can change their mind introduces a huge amount of fear and uncertainty into the relationship. Much of the uncertainty, as well as the fear and mistrust this can engender, will be eliminated by making surrogacy agreements legally binding. In addition to the benefits that certainty about legal parenthood would have for both the intended parents and the surrogate, it also serves the interests of the resulting child, for it will eliminate the risk that the child will 'become the subject of a dispute if the relationship between the surrogate and the intending parent(s) breaks down' (ACART, 2013, p. 2). The interests of the child are not being taken seriously in a system that maintains the fiction that the birth mother is the mother and the intended parents merely another couple applying for adoption under the 1955 Adoption Act. Adoption is a service that aims to find permanent legal parents for a child whose parents, family or whanau are unable to care for the child. As noted by Henderson (2013, p. 43), this does not encompass the motivations behind surrogacy arrangements.

A further undesirable consequence of retaining the adoption framework for surrogacy is a lack of procreative privacy for the intended parents. They are forced into the most public way of becoming parents: permitted by the state to adopt a child following suitability tests that assume the child is not theirs. They must participate in the fiction that the baby is not their child, even if they are its genetic parents, unless the state says it is. The state can only grant them parental status if the surrogate relinquishes a baby that is not hers. We do not object to suitability tests in themselves and support some screening of intended parents as well as surrogates, but it should be done before any surrogacy arrangement is validated. Once the agreement is confirmed the state should not play a role in the fate of the child. The intended parents should be the legal parents from birth and the surrogate should not be able to renege on the agreement at that point.

Section 14(3) of the HART Act prohibits commercial surrogacy, holding that it will be an offence to give or receive valuable consideration in exchange for participation in a surrogacy arrangement. Commercial surrogacy is widely condemned on the grounds that payment commodifies babies and exploits women. However, we argue that what makes commercial surrogacy morally wrong (when it is wrong) are practices such as:

- A failure to obtain free and informed consent before entering the arrangement;
- Restriction of the surrogate's freedom during pregnancy;
- Violation or restriction of her right to make decisions that may affect her health, including whether to terminate the pregnancy, have selective termination or even have a natural or caesarean delivery;
- Providing inadequate health care, which can lead to high rates of late miscarriage or perinatal death and premature birth;
- Transferring more than two embryos, which results in a high incidence of multiple pregnancies.³

New Zealanders should be strongly discouraged from seeking out commercial surrogacy services overseas, but this should be accompanied by an attempt to make domestic surrogacy more attractive to both infertile couples and potential surrogates. The prohibition of commercial

surrogacy is based on the mistaken assumption that payment of surrogates amounts to embracing a crude business or contractual model, which typically has the following features:

- The aim is to make a profit, and both parties are motivated by self-interest;
- A competitive market is encouraged: providers compete with each other to offer clients the most attractive deal;
- It is based on the principle ‘Let the buyer beware’;
- Clients ‘get what they pay for’.

The contractual model inevitably leads to the unsafe practices listed above. Fortunately it is not the only model for paid surrogacy. We argue that not paying surrogates is unfair and a form of exploitation in itself. Instead, we have developed a professional model in which surrogates are motivated by a desire to do something worthwhile but are nevertheless compensated for their labour (see Van Zyl & Walker, 2013; Walker & Van Zyl, 2015). It is widely accepted that the work done by members of other caring professions – such as taking care of the sick and vulnerable – is in some sense priceless, but people still expect to be compensated for their labour. To guard against exploitation of surrogates and other harmful and unethical practices we favour the creation of a professional body, which will have the task of screening and registering surrogates, regulating fees, and licensing and monitoring clinics that offer surrogacy services. Licensed clinics will be required to use registered surrogates and provide all support services that the parties may need at any time during the arrangement (including post-natally).

Commercial surrogacy is often opposed on the grounds that the child is treated as a commodity: the surrogate is paid to hand over her child to the commissioning parents. What is less often noticed is that altruistic or unpaid surrogacy also commodifies the child – this time as a gift.

Instead of viewing surrogacy as a form of adoption, we favour viewing it as a way of overcoming infertility: the surrogate makes it possible for an infertile couple to have their own child. The intended parents are not buying a child, nor are they receiving it as a gift. Instead, a woman who is able to is providing the gestation of their own child. This requires a fundamental shift in the legal approach to surrogacy in New Zealand, but would align regulation more closely with the way in which participants usually view it. It is quite common for a surrogate not to think of the developing foetus as her own. Intended parents, in turn, rightfully think of the baby as theirs from the outset, which makes it particularly reprehensible that the surrogate has the freedom to change her mind. The intended mother is in the same position as the genetic father in more traditional arrangements: someone else is pregnant with, and gives birth to, her child.