Surrogacy and the law: three perspectives

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Abstract

In this article we argue that, from the perspective of the surrogacy triad, the legal process in New Zealand does not work well. We conducted semi-structured interviews with surrogates and intended parents about their experience of the New Zealand system and found several common themes, which we report here. Most legal professionals lack experience with surrogacy adoptions and do not always provide accurate advice, which leads to additional cost and stress for the intended parents in particular. A large part of the problem is that the legislation itself is not fit for purpose and forces the triad into a Family Court procedure that is antithetical to the intentions of all members. ECART plays a valuable role in facilitating domestic surrogacies and we argue for it to be expanded to include all traditional surrogacies and to be the only port of call for the triad to establish the intended parents as the legal parents of the baby from birth.

Introduction

One of the distinguishing features of surrogacy arrangements, compared to other forms of assisted reproduction, is the extent to which the legal profession is involved in the practice. Fertility clinics provide medical advice and counselling for clients using established procedures such as in vitro fertilization (IVF). If donated eggs or sperm are used they will need approval from the Ethics Committee for Assisted Reproductive Technology (ECART) and legal advice to appoint testamentary guardians prior to treatment. But the involvement of the legal profession ends there. At the end of succesful treatment the birth of their baby is simply registered like any unassisted birth.

By contrast, clients using surrogacy need to obtain approval from ECART, including legal reports for both surrogate and intended parents, and then have to take further legal steps following the birth of the baby.[1] Because the surrogate and her partner are the legal parents at birth,[2] they must formally relinquish the baby for legal adoption by the intended parents.

[1] See https://www.fertilityassociates.co.nz/

[2] The surrogate's partner is the legal father if he consented to the procedure (IVF or Donor Insemination), but his consent is presumed. For him not to be the legal parent at birth the partner must explicitly refuse to consent to the procedure. Status of Children Act 1969, s 27.

The Family Court will then make an adoption order in favour of the intended parents using the same legislation as that for 'stranger' adoptions. The intended parents normally have legal representation and in some cases the court appoints a lawyer for the baby. Thus, there are two distinct sets of legal requirements in a successful surrogacy arrangement: first the one for the application to ECART, where both parties receive advice on the legal status of arrangement and put in place the necessary provisions such as testamentary guardians, powers of attorney and up to date wills, and second, the application to the Family Court for the intended parents to adopt the baby.

How well does this process work? It depends on what we mean by 'working well.' At one level it does work: to date, all intended parents have successfully secured legal parentage or the authority to act as the child's legal parents, usually through adoption. In some cases there have been technical obstacles, which have caused delays or required the use of other mechanisms such as guardianship, but the Court does its best to faciliate the desired outcome for the triad.[3] However, not all surrogacy births are going through the adoption process. As Debra Wilson notes, there are more live births than there are adoption applications.[4] For reasons that are unknown, some intended parents do not complete the formal steps even if they initially obtained approval from ECART.

A further point to keep in mind is that most traditional surrogacies are not clinic-assisted. Instead, the triad make use of a method that is sometimes referred to as "private self-insemination." We don't know how many occur each year nor what proportion of them take steps to secure the intended parents' legal parentage. This is because there is nothing to prevent them from registering the birth with the surrogate as mother and the biological father as the legal father, despite the fact that he is not the legal father (unless, that is, the

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[3] See, for example, *Re DMW* [2012] NZFC 2915, which had to follow the Adoption (Intercountry) Act, and *Re Bowman* [2013] NZFC 7685 where the final adoption order was delayed for lack of the social worker's report. In *Re CGL* [2012] NZFC 9828 only an interim parenting order was made because of missing information. Strettell J sought to reassure the parents that a final order would likely follow [20]. In *Minkov v Caldwell* [2014] NZFC 3587, guardianship orders were sought as a necessary first step in the ultimate plan to apply for adoption in Australia.

[4] D Wilson "Surrogacy in New Zealand" (2016) NZFLJ 401 at 403.

baby was conceived by sexual intercourse, which would be highly unusual).[5] The baby could be handed over to the intended parents to raise with no one the wiser. But their situation will be tenuous: The intended mother will have no legal relationship with the baby, whereas the intended father has claimed a legal relationship that he does not in fact have.

There is a similar loophole for heterosexual couples who use international surrogacy. If a New Zealander gives birth while abroad, the parents can apply for the baby's citizenship and passport using the birth certificate issued by that jurisdiction as documentation. There is anecdotal evidence that some intended parents in jurisdictions that issue birth certificates naming them as the legal parents and not mentioning surrogacy, successfully return to New Zealand without attracting the attention of Immigration. Nevertheless, according to New Zealand law they are not the legal parents until they have been through the Family Court and adopted the baby. Until then the surrogate is the legal mother. Intended parents who avoid compliance or who are unaware that they have not complied with the law have no legal relationship to the child and do not have the right to make decisions that can only be made by the child's legal guardian, for example in medical treatment. The children who have been illicitly brought into the country do not rightfully have New Zealand citizenship because the intended mother did not give birth to the baby. These are potentially serious matters. It could be that no one will ever know but there is the potential for discovery during a crisis, which will make things much worse. In short, then, the process doesn't work well if the criterion is that all surrogacy arrangements end in a legal adoption.

In this paper we use a different strategy to determine how well the system works, which is to consider the views and experiences of three groups of people that are directly involved in the practice, namely the legal profession itself (the 'insiders'), ECART (the 'expert outsiders'), and the surrogacy triad (the 'outsiders'). We argue that these sources show that

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[5] According to the Status of Children Act 1969, s 24 the biological father in a traditional surrogacy will be considered a "non-partner semen donor" and as such, he will not be a parent of the child. However, if the child was conceived through sexual intercourse then he is not a donor. Hence, as is noted by Oranga Tamariki, "If a child is conceived by sexual intercourse between the surrogate mother and the intending father, the man will be the child's legal father." https://practice.orangatamariki.govt.nz/previous-practice-centre/policy/creating-families-through-adoption/resources/the-status-of-parents-in-a-surrogacy-proposal/

in some cases the inexperience of lawyers causes incorrect advice to be given to the triad, which in turn causes avoidable and costly delays, and significant stress. In some cases, the inexperience of judges also leads to problems for the triad. There is a strong case for saying the law is long overdue for reform, which should include surrogacy-specific legislation that would prevent confusion. We will argue that all domestic surrogacies, including traditional surrogacies, should require approval from ECART. We also argue that ECART approval should be all that is needed for legal parentage to be conferred on the intended parents. That is, the Family Court should not be needed except in cases of dispute. However, given that actual reform appears to be some way off, it is crucial that those most affected by the law as it stands are as well-served as possible. We begin by providing some necessary background information.

Context

Three pieces of legislation have a significant impact on the surrogacy triad. The first of these is the Adoption Act 1955, which is the principal means of transferring legal parentage from the surrogate to the intended parents regardless of the type of surrogacy. The second, the Status of Children Act 1969, determines the status of the intended parents prior to an adoption, namely that they are gamete donors and not parents. Third, clinic assisted surrogacies bring the Human Assisted Reproductive Technology Act 2004 (HART Act) to the fore because it is this Act that set the rules regarding payments, among other things. It established the Advisory Committee on Assisted Reproductive Technology (ACART), which formulated guidelines for ECART to implement (and interpret). For the purposes of this article we focus on the matters that must be covered in the legal reports prepared for applications to ECART.

The application form sets out a list of legal issues that have to be covered in the advice given to intended parents and surrogates but makes clear that it is not exhaustive. There is an open-ended question about other legal issues the committee should take into account with the application. Most of the issues are the same for both parties. They both have to understand that surrogacy arrangements are unenforceable, that the surrogate can opt for a legal termination of the pregnancy, that the surrogate and her partner are the legal

parents at birth and until the intended parents formally adopt the baby, and that payment of surrogacy related costs must comply with s 14 of the HART Act. The surrogate and her partner are also to be advised that the intended parents may pay for life insurance premiums because the policy would only be paid out if she died. The intended parents are advised that their names must not appear on the original birth certificate.

It is worth setting out what s14 of the HART Act says about surrogacy-related costs because this is a source of confusion, not just for the triad but also, as we show, for the lawyers. At s 14(3) it prohibits giving or receiving 'valuable consideration' for participating in or arranging a surrogacy but 14(4) reads:

> Subsection (3) does not apply to a payment—
> (a) to the provider concerned for any reasonable and necessary expenses incurred for any of the following purposes:
> (i) collecting, storing, transporting, or using a human embryo or human gamete:
> (ii) counselling 1 or more parties in relation to the surrogacy agreement:
> (iii) insemination or *in vitro* fertilisation:
> (iv) ovulation or pregnancy tests; or
> (b) to a legal adviser for independent legal advice to the woman who is, or who might become, pregnant under the surrogacy arrangement.

Life insurance premiums for the surrogate are not specified, despite the fact that there is a clear expectation from ECART that they should be paid. And it is reasonably clear that direct payments to the surrogate are not envisaged. Wilson is therefore correct to point out that the status quo is 'that the law allows no direct payment to the surrogate.'[6] However, ECART has a different interpretation of s 14. In addition to (almost) mandating life insurance premiums, which would be paid directly to the provider, it has expanded the list of legitimate expenses in other ways. For example, in a case considererd in March 2016 it signalled that paying for the surrogate to have home help would be appropriate and did not, incidentally, comment on how the payments should be made.[7] It appears that in practice

[6] D Wilson "Reflecting on surrogacy: perspectives of family lawyers" (2018) 9 NZFLJ 67.
[7] See https://ecart.health.govt.nz/meetings. E16/04, 3 March 2016.

the emphasis is on what the payment is for, rather than who receives it. and that an expansive interpretation of s 14 is the custom.

The Family Court also has a generous interpretation of legitimate expenses having been faced with international commercial surrogacies that are against policy but require an adoption order in the best interests of the child.[8] They have stretched the notion of expenses to the limits. It is possible that domestic surrogacies are also beneficiaries of these interpretations. It is, however, understandable that confusion arises over what payments are permitted.

The Insiders' Perspective

Wilson conducted a survey of family law practitioners to find out what experience they had had with surrogacy and their thoughts about the rules they had to explain to inquirers and clients.[9] Very few respondents were happy with the current legislation but there was little agreement about how it should be reformed. It is reasonable to conclude that a sizeable number of family law practitioners do not think the process works well.

The number of surrogacy adoptions in New Zealand is small and the corollory is that both judges and lawyers have little experience of them. From 2003 to 2016 there were 26 reported applications. They were heard by 17 different judges with one judge hearing four and six judges hearing two each, from which it follows that ten judges heard one each. Similarly, there were 15 different lawyers, one appeared in nine cases and two were self-representing intended fathers, which leaves the remaining 15 cases distributed among 12 lawyers.[10] Thus the majority of legal personnel involved were inexperienced in surrogacy adoptions.

Some members of the legal community have a long-standing concern about the appropriateness of adoption legislation for establishing legal parentage in surrogacy

[8] D Wilson "Different rhythms, faster tempos and unsystematic advancement: the potential impact of recent European Court of Human Rights cases on international surrogacy and human rights" (2015) 8 NZFLJ 133.
[9] D Wilson (2018), above n5 at 68.
[10] D Wilson (2016), above n3 at 403.

arrangements.[11] Commentators have also pointed out that the rapid advances in assisted reproductive technology (ART) have outstripped legislation leaving courts to make decisions as best they can.[12] The lacunae are particularly evident in the growing number of international surrogacies where the requirements for domestic arrangements cannot be guaranteed. One troubling development is that in New Zealand donor conceived children have the right to access information about their donor but many children whose conception occurs overseas will not because that regime upholds donor anonymity.[13]

The profession is divided about what reforms should occur. Alawi argues cogently for the enforceability of surrogacy agreements and a change to the presumption of parenthood.[14] The 185 lawyers who responded to Wilson's survey were divided on enforceability: 75 were in favour but 54 against. There was no unity even on whether criminal sanctions should be removed. 67 said they should be but 61 thought they should be retained.[15]

In spite of the well-documented difficulties with the process, both Casey and Wilson think the system works reasonably well. Casey praises the sensitivity of the Family Court and judges' 'great awareness of the interests of all affected parties'.[16] As Wilson rightly points out, ECART is 'frequently cited as approaching best practice'.[17] In what follows we argue that ECART is doing all of the valuable work in surrogacy and should become the only formal process the triad has to undergo, replacing the Family Court.

ECART's perspective

[11] C I Rotherham "'Baby C': An adoption following a surrogacy arrangement" (1991) NZLJ 17.
[12] B Atkin "Adoption law: the courts outflanking Parliament" (2012) 7 NZFLJ 119; M Casey "Creating families and establishing parentage when there is a disconnect between Assisted Reproductive Technologies and the Legal System: A New Zealand perspective of a global problem" (2017) 9 NZFLJ 52.
[13] Casey, above, n11 at 52.
[14] S Alawi "Highlighting the need to revisit surrogacy laws in New Zealand" (2015) NZLJ 352.
[15] Wilson, above, n5 at 78.
[16] Casey, above, n11 at 54.
[17] Wilson, above, n3 at 409.

Another source of information about how well the legal process works comes from what might be termed 'expert outsiders', that is, ECART itself. The minutes of all the committee meetings for the period 2014-2018 are available on their website. During that period the committee reviewed 120 surrogacy applications. Of these, 28 were deferred and 2 declined. As we will show, the reasons for deferral are illuminating, and show that ECART plays a vital role in protecting the interests of surrogates, intended parents and any child resulting from the arrangement. The minutes reveal a troubling gap between ECART's expectations and the professional advice that many triads actually receive.

The legal implications for each party to a surrogacy arrangement are significant and it cannot be taken for granted that they know the law regarding parental status and what steps they will need to take to ensure that the intended parents will be the legal parents nor that they would have no say if the surrogate wishes to terminate the pregnancy. There are other matters that they are unlikely to consider on their own and that have to be in place should the worst happen. The surrogate needs life insurance in case she dies and the intended parents need to appoint testamentary guardians in case they die. The rules around payments cause the intended parents fear and uncertainty because it appears to them that an adoption order could be declined if they break them. Accurate information is therefore essential.

The legal reports must set out in detail all the issues discussed and what has been put in place as a result. The explicit item on the application form about life insurance means that both lawyers should cover the matter and make sure that it is in place. Yet, the minutes show that on six occasions the committee had to note that it was either not discussed or had not been put in place.[18] In two cases there was inconsistency between the reports for intended parents and surrogates over whether it was in place or not.[19] In two the committee advised the intended parents that they could pay for it and, in one, that they should consider income insurance for the surrogate as well.[20] A similar problem occurred with testamentary guardianship. On 11 occasions the committee was unable to determine

[18] E14/117, 2 July 2014; E15/74, 24 September 2015; E15/80, 24 September 2015; E16/66, 8 September 2016; E16/96, 3 November 2016; E17/25, 28 April 2017.
[19] E15/62, 30 July 2015; E15/64, 30 July 2015.
[20] E14/59, 5 May 2014; E10/42, 5 May 2014; E14/151, 18 September 2014.

whether testamentary guardians had been discussed or appointed by the intended parents.[21] Some of these applications had to be deferred and others approved subject to confirmation.[22]

Deferrals occurred for many reasons and although it is reasonable to describe the flaws outlined above as minor, deferral adds to an already lengthy process and it involves additional costs for the intended parents. It is regrettable that easily avoidable shortcomings in the legal reports sometimes contribute to those costs. Some of the deferred applications could be reviewed between meetings but that was not always possible due to lack of resources.

More seriously, some of the reports indicated concerning levels of inexperience on the part of the lawyer. Two included contracts between the intended parents and surrogates with no evidence that the triad, in particular the surrogate, had been advised that they were unenforceable.[23] Another report contained a semantically significant 'typo' that suggested an agreement between the parties was enforceable.[24] The lawyer was able to confirm that it was meant to be 'not enforceable.' Two reports showed that the recipients had been incorrectly advised that all payments to the surrogate were prohibited.[25] This error had the potential to leave the surrogate badly out of pocket and her own family at risk should she die. It implied that she would be expected to pay for the obligatory legal advice and counselling. Another incorrectly advised a surrogate that the intended parents could pay for income insurance for her partner so that he could give up work to look after her if necessary.[26] Such advice ran the risk that the surrogate would make important decisions on the basis of erroneous information.

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[21] E10/42, 5 May 2014; E14/113, 2 July 2014; E14/114, 2 July 2014; E14/116, 2 July 2014; E14/249; 14 November 2014; E15/108, 3 December 2015; E16/04, 3 March 2016; E16/14, 3 March 2016; E17/25, 28 April 2017; E18/108, 2 November 2018; E18/125, 13 December 2018.

[22] E.g. E15/74 24 September 2015; 15/108, 3 December 2015; E17/07, 16 February 2017.

[23] E15/74, 24 September; E16/47, 7 July 2016

[24] ECART, above, n6. E17/06, 16 February 2017.

[25] E16/85, 3 November 2016; E17/76, 31 August 2017.

[26] E16/41, 7 July 2016.

One set of intended parents had been told that they could not appoint the birth parents as testamentary guardians when in fact this is 'acceptable common practice'.[27] And in one case the surrogate had been advised that her partner must consent to the procedure because he would be the legal father at birth.[28] In some respects, this is the incorrect advice that troubles us the most because it suggests both vague familiarity with the relevant law and profound misunderstanding of it. It had significant implications for the arrangement as well as returning women to a subservient status where their consent is not enough for a medical procedure to go ahead. The actual state of affairs is this: *if* the partner consents to the procedure, *then* he is the legal father at birth. This couple was told that *because* the partner is the legal father at birth he *must* consent to the procedure.

ECART demonstrably takes considerable care to protect the interests of the surrogate, intended parents and any child born of the arrangement. The surrogate's welfare is particularly important because she bears the greatest burden of risk. In both applications that were declined during the 2014-2018 period it was the exceptionally high risk to the surrogate and any child she was carrying that led to the decision.[29] The intended parents would be able to make a further application with a different surrogate. It was evident from the minutes that not all the women volunteering to be surrogates realized the implications for their own health given such matters as birthing history, medical conditions, age or weight. Where the committee was satisfied that those risks could be managed, they approved applications and did so with a wide range of issues that affected the surrogate.[30] This suggests that ECART does not make unreasonable demands of surrogates and intended parents. It is clear, however, that the quality of information it receives in the applications from professionals is often not of a high enough standard. To put the legal reports in context, the committee is so frustrated with the quality of medical reports that it spent time at two meetings discussing what steps to take to address the problems with inadequate detail and medical issues appearing in the counselling reports.[31]

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[27] E17/25, 28 April 2017.

[28] E17/76, 31 August 2017.

[29] E18/15, 22 February 2018; E18/125, 13 December 2018.

[30] E14/116, 2 July 2014.

[31] 28 April 2017; 29 June 2017.

Participants' Perspective

The most important voices are, of course, those of the surrogacy triad whom the process is intended to serve. From 2015 to 2017 we conducted semi-structured interviews of between 47 and 77 minutes with four surrogates and four intended parents, including one heterosexual couple interviewed together, none of whom were members of the same arrangement. The interviews were recorded on Skype and transcribed. The eight surrogacy arrangements comprised seven heterosexual couples and one gay couple. They included three traditional and five gestational surrogacies. Seven were domestic and one international.

The focus of our research is on what changes users of the system would like to see to the legislative framework. This means that people who responded to the invitation to participate were dissatisfied with some aspect(s) of the New Zealand regime so we do not claim that the sample is representative of the small surrogacy community in New Zealand. Two participants, both intended parents, contacted us following media interviews we had given. The information and invitation were also posted on a closed surrogacy forum by its moderators and an unmoderated social media forum. Six participants responded to those invitations. Eight participants were women. The intended father in the couple interviewed together was the only male. They reported on surrogacies that had occurred over a ten year period during which there were no changes to the legislative framework. Ethical approval for the study was granted by the University of Waikato Human Research Ethics Committee.

It is perhaps inevitable that a flawed process that relies on the ingenious efforts of ECART and the courts to make it work in the interests of babies and their parents is experienced negatively in some respects by those who literally pay the cost of implementing it. Two themes dominated the reports of our participants. One was the cost and the other was the inexperience of practitioners. The two come together because the financial outlay on the path to legal parenthood is significant. To have representation and adjudication marked by the consequences of inexperience after that outlay is particularly painful. Bearing in mind the paucity of cases and their wide distribution through the country, it is not an indictment

of the profession if there are some hiccups along the way but some of the gaps in the knowledge of both lawyers and judges were concerning.

Our participants had no difficulties with s 14 of the HART Act as they had been scrupulously careful over expenses. However, they did find that not everyone knew that:

1. The surrogate and her partner are the legal parents at birth
2. The birth certificate must show the surrogate and her partner as the parents and only they can register the birth
3. If the intended parents have provided gametes, they are classed as donors and not parents.
4. A surrogacy arrangement exists for the sole purpose of providing a child for the intended parents.

Some of our participants reported good experiences. S4 and her intended parents had not known they needed an uplift certificate from CYFS (as it was then) when the intended parents took custody of the baby shortly after birth. She said

> the judge could have said no, because we didn't have the correct paperwork. They didn't and it all worked out okay but yes the judge was amazing. In fact it was a Monday morning and he said, 'oh this is a great way to start Monday morning'. Because obviously in Family Court they deal with some horrible things, he quite liked the fact that Monday was started with something so happy.
>
> …and we were in there for all of about five minutes. It was so quick.

Similarly, IP2 was appreciative of the lawyer's work during their international surrogacy, particularly that they did not bear the full cost of his acquisition of relevant knowledge:

> We had a lawyer who never dealt with it before but to his credit he was a bit slow but he got there and because he was a bit slow he didn't spend all his time on it, so he didn't charge us for all of that.

The surrogacy had taken place in a jurisdiction that issues birth certificates to the intended parents that, of course, do not establish legal parentage in New Zealand. In court there were

three lawyers, a representative from CYFS and the judge, all so that the IPs could adopt the baby from themselves. IP2 remarked:

> The judge could see the funny side of it.

However, IP2 also commented:

> There was a number of people there pretty much wasting everyone's time I felt because everyone knew what the outcome was because the judge had no choice…

Indeed, in international surrogacies where a birth certificate is issued to the intended parents, there is literally no one other than the intended parents to parent the baby. The surrogate has formally given up any parental claim by the laws in her own jurisdiction.

S1 also reported a positive experience with her lawyer:

> I've had a good lawyer so it's not been too bad

Although, she went on to say:

> Quite often I'm telling them what to do, I feel a lot of the time you're teaching lawyers what they're meant to be doing

and to give a negative appraisal of the IPs' lawyer

> my IPs have had useless lawyers so my lawyer has done all the work really

IP4 also did not have difficulties with the lawyers but the judge was a different matter. She suspected that it was the first surrogacy case the judge had heard.

> And the judge when he was doing it was so confused he didn't understand why we had to be in court adopting our own biological child, it was so strange, the whole thing was crazy.

Some of the confusion could have been caused by the Intended Father identifying himself as the father when the judge asked who the father was, but that may be a charitable interpretation of events. IP4 reported that the encounter went something like this:

> Yes, he didn't understand it, he was so, "Who's the mother?", I'm the biological mother and then there is the birth mother, and he was like "So who's the father?"

> and then [Intended Father] was like I'm the father; and then he's like "Well, who are you?" and [Surrogate's Partner] is like, I'm [Surrogate's Partner], and he was on the birth certificate!
>
> "Well, why are you adopting your own baby?" and I was like, because it was a surrogacy and we have to. Then he goes, "Why have his name on the birth certificate like he's got nothing to do with it?" and I was like, because we were told by our lawyer that we had to and he was like "Oh".

IP4 expressed anger at the effect of the judge's inexperience, which appears to have extended to no clear grasp of the law regarding registration of a baby's birth. The triad had fully complied with that law by ensuring that the Intended Father, who was the biological father, did not appear as the legal father on that document and that the surrogate's partner did.

> Then on top of that, when we got to court the judge didn't understand even why we were there, and what we were doing, and it made me really angry, you're killing me, we spent ten thousand dollars on this and you don't even understand why we're here or what we're doing or, it's like he hadn't even read the ten thousand dollar papers, it was crazy,
>
> Instead I gave that money to a bloody lawyer, oh it makes me angry every time I think about it.
>
> The breaking point for us was that judge.

S3, whose traditional surrogacy did not go through ECART, found that the lawyer appointed to represent the baby in her case failed to understand the premise on which surrogacy is based.

> They threw us out, [Baby's] lawyer argued that it was not in [its] best interest to live with [Intended Parents], that it was in [its] best interest to live with [Surrogate's Partner and Surrogate], that [Surrogate's Partner] was the father and I was the mother and therefore [Baby] should live with me. We fought that, the judge said I have no idea where I stand, I need to research this, I will get back to you so left it at that.

The charitable interpretation is that the lawyer had no experience with traditional surrogacies where the surrogate is also the biological mother of the baby, as in S3's arrangement, but that is difficult to square with the nature of the proceedings. S3 held to her strong conviction throughout the arrangement that she was not the mother of the baby and most emphatically did not want to raise it. An assertion that the baby's best interests would be served by remaining with someone who did not want to be its mother suggests the lawyer had missed something important in his preparation for the case.

At their next appearance, S3 was able to explain to the judge what the circumstances were and what they were trying to accomplish

> So I said at court, I said you guys have got it all wrong, you're looking that [Intended Father] is the donor into our family, I said but the reality is I'm the donor into their family. Once I said that to the judge I think he was great, actually he was really good.

It needs to be borne in mind that these cases were all fully consensual. The surrogates never wavered in their decision to relinquish the baby and the intended parents never hesitated over accepting the baby. They were not trying to do anything out of the ordinary or have disputes resolved.

Discussion and Recommendations

The law around surrogacy is tricky to negotiate and it is easy for the general public to be tripped up by it. A case from 2011 is illustrative of the difficulties. It involved an adoption application following a private surrogacy, and the intended parents made a number of mistakes: they did not have an uplift certificate from CYFS for transferring the baby to their care, the surrogate's partner did not properly consent to the adoption, their affidavit did not contain information about the surrogacy, and the intended father registered the birth instead of the surrogate's partner who was the legal father. The judge ruled that these were procedural matters and granted the interim adoption order.[32] Good legal advice would have prevented most of these missteps. It is what legal advice is for. (Ensuring that the intended

[32] *Re Application by ALH* FC North Shore FAM-2011-044-371, 11 August 2011.

parents know the procedure for taking over the care of the baby is the responsibility of the social worker but information is sometimes elusive as one of our participants attests above.)

To return to the legal reports, it might seem like a small error to mistakenly advise the intended parents that they could not appoint the birth parents as testamentary guardians. But if the birth parents are the most appropriate people to have that role in the context of the intended parents' relationships, then someone less appropriate is appointed instead. That has potentially life-altering consequences for the child if the intended parents die while the surrogate is pregnant.

Advice that all payments are prohibited would leave the surrogate without life insurance unless she paid for it herself. Apart from the unfairness of this, it is impossible for some surrogates to afford it. Yet it is an important provision. Only four of the applications considered by ECART during the period had a nulliparous surrogate. All the others had dependent children. Maternal deaths are rare but not vanishingly so. Over the period 2006-2016 there were 63 direct maternal deaths in New Zealand, defined as 'the death of a woman while pregnant or within 42 days of termination of pregnancy (miscarriage, termination or birth), irrespective of the duration or site of the pregnancy, from any cause related to or aggravated by the pregnancy or its management.'[33] Of these, 28 were by suicide, a tragic outcome that is unlikely for surrogates who go through the ECART process because of its careful consideration of risks to the mental health of surrogates and the support that will be available to them. Of the remaining 35 deaths, causes include haemorrage, infection and embolisms. The maternal mortality ratio is steadily declining but such deaths cannot be entirely prevented. There is, then, a low risk of catastrophic harm that would have life-long ramifications for the surrogate's children.

If ECART has had to catch all these mistakes and correct them, it raises serious concerns about the traditional surrogacies that are not going through ECART. There is no one with oversight to ensure that legal advice is accurate. It is reasonable to hold legal practitioners to a high standard because their advice has very significant consequences for the people

[33] PMMRC. 2018. *Twelfth Annual Report of the Perinatal and Maternal Mortality Review Committee: Reporting mortality 2016*. Wellington: Health Quality & Safety Commission. Available at: http://www.hqsc.govt.nz/our-programmes/mrc/pmmrc.

who act on it. As we have argued elsewhere,[34] there is an ethical dimension to the professions that is not present in other occupations. Clients cannot tell for themselves whether the advice they are given is correct or not. You need to be a lawyer to know and, if it seems credible, clients are unlikely to seek a second opinion. Cost puts a high barrier in place for those who would like to do so. And what appears to be a relatively minor mistake can have profound effects. This is partly why one of our major recommendations is that all domestic surrogacies, including traditional surrogacies that are not clinic-assisted, should go through ECART. It would raise costs but provide better protection for surrogates and intended parents.

One response to complaints about the cost is that legal advice just is expensive and to get expert assistance, people must be prepared to pay for it. It should be readily conceded, however, that expensive inexpert advice is not acceptable. More effort should go into educating lawyers and judges about the idiosyncrasies of surrogacy adoption.

A deeper question is whether the process for securing the intended parents' legal relationship to the child has to be this cumbersome and costly. As one of our participants commented, surrogacy is financially out of reach for many New Zealanders who face not just the cost of any unfunded fertility treatment but also the expenses associated with establishing legal parentage. No other users of ART face that hurdle. Advocates of reform should make increased affordability one of their objectives and examine every aspect of current requirements with their costs in mind. Some parts of the process are indispensable and would not change with reform. For example, legal advice and assistance in setting up powers of attorney and guardianship before pregnancy is established is crucial. Life-threatening or life-altering complications are rare in pregnancy and labour but provision for them must be made. This would not change even if the presumption of parenthood changed, which we think it should. The intended parents should be the legal parents from the birth of the baby.

The rights of the surrogate as a pregnant woman would also not be affected by a change in the presumption of parenthood in favour of the intended parents. She would still have the right to terminate the pregnancy and, should she be incapacitous, her partner or whoever

[34] Blinded for reviewing

has power of attorney would make decisions in her best interests. These would not necessarily be in the baby's best interests. Both parties would still have to understand the implications of these rights.

If law reform does ensure that the intended parents are the legal parents from birth, the surrogate would still need legal advice about what she is giving up before the pregnancy is established. Similarly, the intended parents would need to understand their obligations. At the moment they can refuse to adopt the baby even if they have said in their application that they will adopt it. If they are the parents at birth they lose the freedom to renege on their commitments. There is then strong justification for the legal reports that accompany applications to ECART whatever law reform occurs.

It is at the end that there is a case for simplifying the process and eliminating a tranch of fees. We have argued elsewhere that the intended parents should have legal parentage from birth, which would involve the change, recommended by Alawi and others, in the presumption of parenthood. The fact that the Family Court has never declined an adoption application on the grounds that the intended parents would be unsuitable or that the triad has breached the rules tells us not that the system works well in spite of dated legislation, but that it is redundant. Applications *are*, however, declined by ECART. The scrutiny undertaken at that stage means that we can have confidence in the robustness of their decisions. There is no need to replicate the scrutiny and require a court hearing to establish legal parentage. Oranga Tamariki must approve an adoption in principle as part of the application to ECART so it is difficult to see what further insight is gained from the full assessment of the intended parents towards the end of the pregnancy, required by the Family Court.

That full assessment and the Family Court process caused our participants the most stress. They were led to believe that the application to adopt could be declined and they incurred legal costs for what was in effect a fait accompli given the consent of the surrogate. This is even more the case for international surrogacies where the threat of the baby's deportation

hangs over the heads of the intended parents even though judges are determined not to allow that to happen.[35]

A change in the presumption of parenthood is a radical step but one that would align the law with both the purpose and reality of surrogacy, namely that the pregnancy occurs only because the intention of the surrogate and intended parents is to provide a baby for the intended parents and that in the vast majority of cases that intention is fulfilled. When a surrogate does not relinquish the baby or the intended parents refuse to take it, something has gone wrong with that relationship. A rigorous approval process before a surrogacy arrangement is allowed to proceed can mitigate the risk of relationship breakdown. ECART's role should be preserved and the Family Court involved only in those rare cases where a dispute arises.

We also think ECART's scope should be widened. At the moment, approval is required for 'clinic-assisted' surrogacies only. Traditional surrogacies using artificial insemination do not need approval. Herein lies the concern. These triads do not have the benefit of counselling and they have no more oversight than an unassisted pregnancy. The surrogate will have her midwife and GP. If they are concerned about her welfare they can request support from a social worker but that is about all that is available. Unless they know each other very well before embarking on the arrangement, both surrogates and intended parents are very vulnerable in these arrangements.

By the time the professionals are involved the surrogate is pregnant and there has been no formal assessment of the risks to her physical and mental health. It was precisely those risks that led ECART to decline two applications during the 2014-2018 period and require risk mitigation in others through obstetric care. We also think that ECART should review applications for international surrogacy but acknowledge that this would be difficult to execute. At the moment ECART meets five or six times a year and is not concerned exclusively with applications for surrogacy. An increase in resources would be welcome with the workload the committee has now let alone the workload that would occur with all surrogacies requiring approval. However, growing numbers of New Zealanders are going

[35] See *Re an Application by KR and DGR to adopt a female child* [2011] NZFLR 429.

overseas for surrogacy, some because the process is so slow here. That was the main motivation for IP2. At the very least, more resources should be directed to ECART while the advocates of law reform increase the urgency of their call for change. Improvements in the professional education of family law practitioners is essential in the interim.

We realize that what we propose is a radical change to the current system, but it would alleviate ACART's own concerns more effectively than is possible just by updating the guidelines issued to ECART. In its 2017 consultation with the public, ACART asks for comments on a proposal to extend review by ECART to all clinic assisted surrogacies, including those where the surrogate uses her own eggs.[36] The justification for the extension is that 'all surrogacies can be ethically complex.' The risks include coercion of the surrogate, risks to her 'health and wellbeing', risk of one of the parties changing their mind, risk to the 'health and wellbeing' of the child, and in traditional surrogacies between family members, an additional risk of coercion.[37] However, having shown that all surrogacies are ethically complex because these risks apply to all of them to a greater or lesser extent, ACART concludes that all and only clinic assisted surrogacies should be reviewed by ECART. Indeed, the authors note that one of the risks associated with such a change would be a rise in the number of traditional surrogacies occurring outside clinics.[38] Even if they are correct that the increase in numbers would be small, that is an increase in the risks that ECART could potentially mitigate.

We think that there are three types of reason underpinning ACART's recommendations on extending ECART review: practical, legal and ethical. Underfunding makes the practical considerations almost intractable. It is difficult to detect traditional surrogacy arrangements when they are underway, let alone before a pregnancy is established. If that problem were solved and all such surrogacies did come under the purview of ECART the workload would

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[36] Advisory Committee on Assisted Reproductive Technology. 2017. *Donation Guidelines: Proposed guidelines for family gamete donation, embryo donation, use of donated eggs with donated sperm and surrogacy: consultation document.* Wellington: Advisory Committee on Assisted Reproductive Technology. https://acart.health.govt.nz/consultations/past-consultations. Accessed 5 January 2020.

[37] As above, [177-178].

[38] As above, [181].

increase. Given that the number of those surrogacies is unknown, it is impossible to quantify that increase, but it would be noticeable.

The legal issues could only be resolved through law reform because they centre on the framework established by the HART Act. That makes them almost intractable as well. Self-insemination is not an assisted reproductive procedure. The HART Act makes it an offence to carry out certain assisted procedures without ECART approval but has nothing to say about unassisted procedures. That provides the technical reason for ECART's involvement with surrogacies that require fertility services and its lack of involvement with non-clinic traditional surrogacies. Without a legal basis for extending review to them, it will not happen.

However, the rationale for the HART Act is to prevent harm to women and children that might arise from the use of assisted reproductive technology. That rationale is a fundamentally ethical one that turns out to be highly constrained by the law meant to implement it. ACART's concerns are also principally ethical ones that cannot be addressed within the constraints of the HART Act. The risks that it identifies lie not in the use of technology but in the nature of the surrogacy relationship itself. The current legislative framework increases these risks because it provides no certainty to either the surrogate or the intended parents. They have no redress if something goes wrong. The ethical justification for review by ECART is strong partly because the legal protections are weak.

There is an ethical objection to extending review to non-clinic assisted traditional surrogacies. It would be a breach of the right to privacy. If a clinic is not involved then privacy precludes intervention. We believe that this is mistaken. Ethically, the right to privacy in intimate matters such as family formation is not constrained by location or the need for assistance. Legislation tacitly concedes this point with the category of established procedures. Although a couple may have to resort to IVF, for example, and necessarily involve others, their right to procreative privacy is upheld. They do not need permission to have children this way. The nature of the surrogacy arrangement itself grounds the right to intrude on a triad's procreative privacy. It is different from the use of other assisted reproductive technology because a third person gestates the baby and not because of whose gametes are used. At the moment, the only triads who experience that intrusion are the ones using the clinic and it appears understandably unfair to them.

We are left with two possible conclusions. All surrogacies warrant external scrutiny because of their inherent risks or the right to privacy precludes review of any surrogacy arrangement because procreative privacy is not restricted by location or whether it is assisted. The latter conclusion must be rejected because the risks to women and any resulting children outweigh the harm caused by intruding on the triad's privacy. The HART Act put the dividing line in the wrong place by focusing on the technology. It has served its purpose and should be replaced because it leads to the anomalous outcome that all surrogacies are ethically risky but only some are required to have those risks evaluated and mitigated.

ECART can do only what it is resourced to do and what the legislation permits it to do. It could, however, advocate its value more vociferously. At the moment it is seen as one of the obstacles to a successful surrogacy arrangement. International and traditional surrogacy appeal in part because of the apparent certainty they provide. ECART's role in risk mitigation is not well understood. Intended parents and surrogates correctly identify the current law as the source of their problems but they do not always realize that ECART makes the cumbersome route safer than the alternatives. Having said that, we do not think that ECART can fulfil the role it should have without law reform.

Conclusion

In this article we have argued that the legal process in surrogacy does not work well from the perspective of the users, the triad. Most legal professionals lack experience with surrogacy adoptions and do not always provide accurate advice, which leads to additional cost and stress for the intended parents in particular. A large part of the problem is that the legislation itself is not fit for purpose and forces the triad into a Family Court procedure that is antithetical to the intentions of all members. ECART plays a valuable role in facilitating domestic surrogacies and we have argued for it to be expanded to include all traditional surrogacies and also to be the only port of call for the triad to establish the intended parents as the legal parents of the baby from birth.