THREE-WAY PARENTING? A CRITICAL ANALYSIS OF THE TRANSFERAL OF LEGAL PARENTAGE IN SURROGACY ARRANGEMENTS IN NEW ZEALAND

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List of Abbreviations

ACART	Advisory Committee on Assisted Reproductive Technology
ECART	Ethics Committee on Assisted Reproductive Technology
HART Act	Human Assisted Reproductive Technology Act 2004
IVF	In-vitro Fertilisation
UNCRC	United Nations Convention on the Rights of the Child

Introduction

For a long time, family law has been centred around what could be defined as a nuclear family paradigm; a married man and woman giving birth to their own children.[1] Traditional laws based upon this presumption are, however, becoming outdated and are no longer fit for purpose because an increasing number of families do not conform to this conventional approach. Demographic statistics in New Zealand provide evidence for this premise, as census data showed that a sole parent headed 27 per cent of families with dependent children.[2] Additionally, the Social Policy Evaluation and Research Unity released a report which noted the diversification of family forms in New Zealand, which is likely to continue and even accelerate.[3] These forms included sole-parent, defacto couples, single-sex, and multicultural families. It is also the case that in 2016, 46% of all births in New Zealand were to defacto partners.[4] This statistic reflects the effects of changing social norms on attitudes around having and raising children outside of marriage and same-sex relationships.[5]

The focus of this dissertation is on surrogacy; an arrangement made possible by the advances in medical technology. Surrogacy involves a woman, other than the biological mother, gestating and giving birth to a baby for another couple who intend to raise the child.[6] Gestational or clinic-assisted surrogacy is the arrangement that is regulated by the Human Assisted Reproductive Technology Act 2004 (HART Act). While many distinct forms of surrogacy exist, for the purposes of this dissertation, I have chosen to focus on 'full' surrogacy arrangements whereby no genetic relationship exists between the surrogate and the resulting child. Instead, the intending parents have provided the genetic material. This form of surrogacy requires in-vitro fertilisation (IVF) whereby the couple who are intending to have a child undergo IVF, but the embryo is transferred into the uterus of the surrogate mother, who gestates the child. Essentially, the intending parents provide the gametes, and

[1] Mark Henaghan and Bill Atkin *Family Law Policy in New Zealand* (5th ed, LexisNexis, Wellington, 2020).
[2] Social Policy Evaluation and Research Unity and Ministry of Social Development *Families and Whānau Status Report* (Ministry of Social Development, Wellington, 2018) at 64.
[3] Social Policy Evaluation and Research Unity *The Wellbeing of New Zealand Families and Whānau: Demographic Underpinnings* (Social Policy Evaluation and Research Unity, Wellington, 2018) at 33.
[4] Statistics New Zealand "Live births by nuptiality (Māori and total population) (annual-Dec)" (2017). <www.stats.govt.nz>
[5] Law Commission *Relationships and Families in Contemporary New Zealand* (NZLC SP22, 2017) at 67.
[6] Fertility Associates "Donor options and surrogacy" (2020). <www.fertilityassociates.co.nz/treatment-options/donor-options-and-surrogacy/#surrogacy>

the birth mother provides the gestational services of carrying and birthing the child.[7] I appreciate that alternate surrogacy arrangements do indeed exist, such as traditional surrogacy whereby the surrogate mother contributes her own egg. This can thus be a private arrangement that avoids the involvement of a fertility clinic and ECART.[8] However, this approach evokes a myriad of contentious issues, and I have instead chosen to focus my research specifically on 'full' surrogacies occurring via IVF, where the intending parents provide both gametes.

This dissertation will firstly examine the ways in which the current laws are inadequate for surrogacy arrangements. While New Zealand has a partial regulatory scheme that allows for surrogacy arrangements to occur, there are currently no parenthood laws to deal with the unique relationships that exist. At the time of birth, New Zealand law considers the woman who gave birth to the child to be the child's legal mother/guardian. However, surrogacy is unique in that the surrogate never intended to raise the child, and the commissioning parents are the people who intend to parent the child as their own. Importantly, there is no specific legislation that allows for the transfer of parenthood from the surrogate to the commissioning parents in surrogacy arrangements, despite the fact that this is what was agreed prior to conception. This discontinuity in our legislation leaves onerous adoption laws as the only avenue for the intending parents to obtain legal status as parents of their child.

This dissertation then explores the possibility of redefining surrogacy laws by introducing a surrogacy-specific transferal of legal parentage. There are many possibilities for reform, and the solution which is arguably the most preferable is that which effectively prioritises the best interests of the child. While it is clear surrogacy laws need to be re-evaluated in their entirety, I argue that the most pertinent first step would be to introduce a mechanism for transferring legal parentage. Legal commentators agree that this is an aspect of the law that requires urgent revision.[9] Subsequently, enacting such a mechanism could spark a complete overhaul of the legislation, and make way for substantial changes to the way we approach surrogacy in New Zealand.

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[7] Law Commission *New Issues in Legal Parenthood* (NZLC R88, 2005) at 78.
[8] Oranga Tamariki "Adopting a child born via surrogacy*"* (2020). <www.orangatamariki.govt.nz/adoption/surrogacy>
[9] Sandra Coney and Anne Else *Protecting Our Future: The case for greater regulation of assisted reproductive technology* (Women's Health Action Trust, Auckland, 1999); and Rhonda Powell and Annick Masselot *Perspectives on commercial surrogacy in New Zealand: ethics, law, policy and rights* (1st ed, Centre for Commercial & Corporate Law Inc., Canterbury, 2019).

The law in New Zealand has been slow to react to societal changes and medical advances, especially regarding surrogacy arrangements.[10] Surrogacy has become an international fact of life, and while numbers are not yet large here in New Zealand, we are experiencing the global shift towards notions of the family becoming ever more diverse. With the number of children being born into surrogacy arrangements continuing to increase, the law in New Zealand needs to be regulated to respond appropriately. Legal commentators have been continuously criticising the static nature of surrogacy law, as medical technology and social expectations soar ahead of where the law currently resides. As early as 1999, Anne Else stated that 'a comprehensive new approach is urgently needed' when referring to legislation surrounding artificial reproductive technologies.[11] Legal commentators are asserting that this 'piecemeal' approach, which is a blend of the Human Assisted Reproductive Technology Act 2004, Adoption Act 1955 and Status of Children Act 1969, creates unnecessary difficulties and confusion, and is not purpose-built.[12] Previously, the Law Commission has issued a report which outlines the need for reform of the issues surrounding legal parentage, yet this has not been responded to by Parliament almost 16 years later.[13]

While there are many complex challenges confronting surrogacy arrangements, the core family law question concerns the allocation of each parent's legal position and the basis upon which their status should be premised. Should gestation and the sole fact of giving birth be the determinative factor, or should genetic contribution, intention or social parenthood be afforded the most significance? When regulating surrogacy, we are attempting to contemplate and scrutinise what it means to be a parent. The question is undoubtedly a complex one, yet it must be considered given the changing dynamic of family arrangements. Prior to the commencement of artificial reproductive technology, the woman who gave birth to the child also provided her genetic contribution to the child. The law did not need to consider any prior arrangements for the care of the child or other unique relationships which accompany a surrogacy arrangement. Yet, now that medical technology has provided this opportunity for

[10] Jens Scherpe "Breaking the existing paradigms of the parent-child relationship" in Gillian Douglas, Mervyn Murch and Victoria Stephens *International and National Perspectives on Child and Family Law: Essays in Honour of Nigel Lowe* (1st ed, Intersentia, United Kingdom, 2020) at 344.
[11] Coney and Else, above n 9.
[12] Rhonda Shaw "Should surrogate pregnancy arrangements be enforceable in Aotearoa New Zealand?" (2020) 16 *Policy Quarterly* 18 at 19.
[13] Law Commission, above n 7 at 78.

couples to have a child which the intending mother does not gestate, the fact of birth being enough to establish motherhood is no longer accurate.[14]

The revision of the law ought to place great emphasis on ensuring outcomes which are in the best interests of the child. In practice, the case law exemplifies that judges make decisions that align with this philosophy. However, in theory, the governing statute does not provide any reference to the promotion of the child's best interests in a surrogacy arrangement. Any attempt at redefining the surrogacy laws in New Zealand should make the best interests of the child a priority.

There are a myriad of issues concerning surrogacy, both domestically and internationally, which include the potential for surrogacy arrangements to be enforceable contracts, whether commercialisation of surrogacy ought to be allowed, or whether the commissioning couple ought to pay financial consideration for surrogacy services. However, most pertinent to the current New Zealand context is an analysis of the complex issue of allocation of the legal position as a parent, and the need for the law to enact specific legislation to address this. Therefore, this dissertation focuses on the rectification of our current means of transferring legal parentage through the enactment of a surrogacy-specific transferal of parenthood.

[14] Scherpe, above n 10 at 349.

Part I – New Zealand's Current Approach to Surrogacy Arrangements

Chapter One – Current Law and Practice in New Zealand

I. Surrogacy Regulation

Surrogacy in New Zealand is regulated under the Human Assisted Reproductive Technology Act 2004 via specific sections in the legislation, as well as two national-level committees which function to approve surrogacy arrangements based upon established guidelines. Furthermore, two additional statutes contain provisions relevant to the law governing surrogacy; the Status of Children Act 1969 and the Care of Children Act 2004.

A. The Status of Children Act 1969 and the Care of Children Act 2004

The moment the child is born; legal parenthood is attributed to the surrogate mother. This is provided for by Part 2 of the Status of Children Act 1969, which concerns the status of children conceived as a result of artificial reproductive procedures. The provision only refers to assisted reproduction in general, and not surrogacy specifically. Notably, s 17 states that the woman who becomes pregnant is the mother, even though the ovum is donated by another woman. This Act is the law that grants the status of legal parent to the surrogate, and not to the commissioning parents.[15]

The Care of Children Act 2004 contains provisions concerning the guardianship of children. This Act outlines what parenthood equates to, including the rights and responsibilities that accompany being designated the legal parent of the child.[16] Section 15 defines that guardianship means having, in relation to the child, all of the duties, powers, rights, and responsibilities that a parent of the child has in relation to the upbringing of the child, as specified in s 15(a). Additionally, s 16 of the Act elaborates upon what this exercise of guardianship means, and the decisions that the guardian may make about important matters affecting the child.[17] Section 16(1) states that these include having the role of providing day-

[15] Status of Children Act 1969.
[16] Care of Children Act 2004.
[17] Care of Children Act 2004.

to-day care for the child, contributing to the child's intellectual, emotional, physical, social, cultural, and other personal development; and determining for or with the child, or helping the child to determine, questions about important matters affecting the child. "Important matters affecting the child" include, without limitation, decisions such as the child's name (and any changes to it); changes to the child's place of residence that may affect the child's relationship with his or her parents and guardians; medical treatment for the child; where and how the child is to be educated; and the child's culture, language, and religious denomination and practice.[18]

B. ECART and ACART

The regulation of surrogacy goes beyond sections of the legislation as two national-level committees, required by the HART Act, have been set up by the Minister of Health.[19] These are the advisory committee (ACART) and the ethics committee (ECART) on assisted reproductive technology. ACART's functions involve providing advice to the Minister on aspects of assisted reproductive procedures and issuing guidelines which ECART are required to follow and consider when determining whether to approve applications for assisted reproductive procedures. Consequently, ECART's principal function is to consider applications for regulated activities by way of utilising the guidelines put in place by ACART. Specific to surrogacy, ECART must follow the 'Guidelines on Surrogacy Involving Assisted Reproductive Procedures' produced by ACART in 2013.[20] ECART must provide approval before a surrogacy arrangement can go ahead because artificial reproductive procedures are categorised by the HART Act into either 'established procedures', 'prohibited actions', or 'regulated activities.'[21] Established procedures are listed in a piece of secondary legislation titled the Human Assisted Reproductive Technology Order 2005,[22] and can be carried out by fertility clinics without any external approval, while prohibited actions are listed in schedule one of the HART Act as those which can never be carried out.[23] Therefore, all other procedures, including surrogacy, are classified by default as 'regulated procedures.' These can only be conducted with prior approval from ECART, given that ACART has

[18] Care of Children Act 2004, s 16(2)(a)-(e).
[19] Human Assisted Reproductive Technology Act 2004.
[20] Advisory Committee on Assisted Reproductive Technology "Guidelines on Surrogacy involving Assisted Reproductive Procedures" (2013).
[21] Human Assisted Reproductive Technology Act 2004.
[22] Human Assisted Reproductive Technology Act Order 2005.
[23] Human Assisted Reproductive Technology Act 2004, Schedule 1.

issued relevant guidelines.[24] Every individual application must be interpreted in accordance with these guidelines.[25] Therefore, fertility clinics must seek prior approval from ECART for every individual surrogacy procedure, and it is an offence not to do so.[26] In New Zealand, there are currently four fertility clinics licensed to undertake these fertility treatments. These are Fertility Associates, which has 18 offices across Auckland, Hamilton, Wellington, Christchurch and Dunedin, Repromed (Auckland), Fertility Plus (Auckland) and Genea Oxford Fertility (Christchurch).

The ECART website contains an application form which is required to be submitted by a fertility clinic on behalf of the potential commissioning parents. This process also involves medical, legal, and counselling reports being made available to ECART. The application requires both parties to have independent medical and legal advice, as well as separate and joint counselling sessions. Reports on these sessions by the relevant professionals are attached to the application. The fertility clinics employ specialist fertility counsellors who meet with the commissioning parents and the surrogate, as well as any existing children (of either party) who are able to understand the effects of the arrangement. ECART holds Bi-monthly meetings at which decisions concerning surrogacy applications are made, in accordance with the guidance issued by ACART.[27] The guidelines have specific eligibility requirements that must be met on the part of the commissioning parents, as well as the requirement that ECART must 'take into account' whether the intending surrogate has completed her family. The guidelines require a medical report identifying a genetic link between at least one of the commissioning parents and the resulting child, that the proposed surrogacy is 'the best or only opportunity' for genetic parenthood by way of a medical diagnosis or unexplained infertility, and that the surrogacy is not for personal or social convenience. Risks to either party must be justified in the application, including risks to the health and wellbeing of the parties, risks associated with the pregnancy and risks associated with the surrogate relinquishing the child, or by the commissioning parents accepting parental responsibility.[28] The legal report requires both parties are made aware that surrogacy is legally unenforceable, must be altruistic, and that the legal mother is initially the birth

[24] Fertility Associates "Becoming a Surrogate'" (2020). <www.fertilityassociates.co.nz/becoming-a-donor/become-a-surrogate>
[25] Human Assisted Reproductive Technology Act 2004, s 17.
[26] Human Assisted Reproductive Technology Act 2004, s 16.
[27] Advisory Committee on Assisted Reproductive Technology, above n 20.
[28] Lynley Anderson, Jeanne Snelling and Huia Tomlins-Jahnke "The practice of surrogacy in New Zealand" (2012) 52 Aust N Z J Obstet Gyanecol 253.

mother. The counselling report requires applicants to be forthcoming with information about their life experiences to determine any risks or threats. Finally, the counselling report will include a description of the nature of the relationship between all parties, due to the belief that an ongoing relationship may contribute to the child's wellbeing.[29]

C. The HART Act 2004

In terms of specific legislative provisions, s 14 of the Human Assisted Reproductive Technology Act 2004 states that a surrogacy arrangement 'is not of itself illegal, but it is not enforceable by or against any person.' This unenforceability means that, as the child's birth mother, the surrogate mother is the child's legal parent, regardless of any previous arrangement that existed. Thus, the surrogate mother has full parental rights and responsibilities for the child's care, despite her intention to relinquish these at birth. In turn, this means that the intending parents do not have any of the duties, powers, rights and responsibilities of parenthood,[30] even if both are the genetic parents of the child.[31] This is problematic as it encourages a discontinuity between legal responsibility and intended and actual responsibility, inevitably creating uncertainty. Consequently, this causes a significant amount of stress for the adults involved, at a time when a newborn child requires stability and calm from its caregivers. Section 14(3) of the Act clarifies that it will be an offence to give or receive valuable consideration for the participation or arranging for the participation of a person in the arrangement.[32] Despite this, exceptions are made in New Zealand for payments directly to medical and legal professionals for approved services. The Act also prohibits advertising in relation to commercial surrogacy.[33] It is an offence to perform an assisted reproductive procedure without prior written approval from the ethics committee.[34] Furthermore, altruistic surrogacy essentially means 'selfless work' by way of surrogates providing their services as a 'gift' rather than a service which they expect consideration for.[35] Altruistic surrogacy is not explicitly mentioned in the legislation and therefore is presumed to be permitted by default.

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[29] Lynley Anderson, Jeanne Snelling and Huia Tomlins-Jahnke, above n 28.
[30] Care of Children Act 2004, s 15.
[31] Law Commission, above n 7 at 82.
[32] Human Assisted Reproductive Technology Act 2004, s 14(3).
[33] Human Assisted Reproductive Technology Act 2004, s 15.
[34] Human Assisted Reproductive Technology Act 2004, s 16.
[35] Shaw, above n 12 at 19.

II. Incidence of Surrogacy in New Zealand

A record of the number of applications made for domestic surrogacy arrangements in New Zealand, can be found in meeting reports by ECART.[36] ECART has considered 253 surrogacy applications over the period from its establishment in September 2005 until December 2017. This is at a rate of between 16-29 applications per year. Of these 253 applications, 157 were approved at the first instance, while 41 were approved with added conditions, 10 approved with recommendations, 38 were deferred, and 7 were declined. There have been 31 reported adoption or guardianship applications in relation to surrogacy, from 2005 until 2017. Of these 31 cases, 14 were domestic, and 17 were international. The applications have occurred at an average rate of 1-2 per year from 2007 until 2010, from 4-5 per year from 2012 until 2015, and only one in the year from 2016-2017. This is an incredibly low number of adoption or guardianship applications in surrogacy arrangements, relative to the number of applications which have been approved or conditionally approved within the same time frame. While there is no specific research on the reason for this disparity, many commissioning parents consider it unpalatable to obtain an adoption order, as will be explored in chapter two. They believe they should not have to adopt the child they regard as their own and therefore refrain from undertaking any legal steps to gain recognition of parenthood.

The ability of medical technology to engage in artificial reproductive techniques, and the fact that this has become more commonplace, demonstrates how significantly our society has changed in recent years. Thus, traditional concepts of family, and the laws that inform this, are no longer valid.[37]

[36] Deborah Wilson "Surrogacy in New Zealand" in Jens Scherpe, Claire Fenton-Glynn and Terry Kaan *Eastern and Western Perspectives on Surrogacy* (1st ed, Intersentia, United Kingdom, 2019) at 209.
[37] Scherpe, above n 10 at 349.

Chapter Two – Transferal of Legal Parentage in New Zealand

I. The Adoption Act 1955

In New Zealand, there is no specific legal mechanism for the acquisition of parenthood by the commissioning parents. The only way in which legal parenthood can be transferred from the surrogate mother to the commissioning parents, as intended by the arrangement, is for the parents to adopt the child via the Adoption Act 1955.

For an adoption order to be granted, s 4 of the Adoption Act 1955 requires specific criteria to be met by the applicants. Firstly, an application may only be made by a single applicant, unless the co-applicants are spouses. Secondly, one applicant must be over the age of 25 and at least 20 years older than the child, or be over the age of 20 and a relative of the child. An order cannot be made in relation to the adoption of a female child by a sole male applicant unless certain special circumstances are met. Additionally, the applicants cannot keep the child in their home prior to the adoption, if the child is under 15 years of age.[38] The court must be satisfied that the applicants meet the criteria of each being 'a fit and proper person to have the role of providing day-to-day care for the child and of sufficient ability to bring up, maintain, and educate the child.'[39] Finally, the Act also states that the adoption must promote the welfare and interests of the child.[40]

This process is a wholly judicial procedure, which is facilitated by the Family Court.[41] However, utilising the Adoption Act 1955 to transfer parentage is not considered to be a workable option in its application to surrogacy arrangements.[42] The Adoption Act was intended for an entirely different circumstance, as the pre-determined nature of surrogacy is highly distinguishable from adoption. There are therefore particularly onerous requirements that the Act and Oranga Tamariki processes necessitate that do not correspond with surrogacy, making the entire process unfit for purpose.[43] It is also common for reasonable

[38] Adoption Act, 1955, s 6.
[39] Adoption Act 1955, s 11(a).
[40] Adoption Act 1955, s 11(b).
[41] Oranga Tamariki, above n 8.
[42] Law Commission, above n 7 at 82.
[43] Adoption Act 1955.

expenses incurred from the pregnancy to be paid to the surrogate mother. However, this does not align with s 25 of the Act which prohibits payments in consideration for adoption.[44]

In a Law Commission report titled 'New Issues in Legal Parenthood', the Commission conducted interviews with families engaging in surrogacy arrangements, to gain insight into their firsthand experiences of surrogacy, for the purpose of informing the Commission's recommendations.[45] These consultation meetings reinforced several problematic aspects concerning the application of the legislation. Firstly, s 5 of the Adoption Act 1955 states that an interim adoption order to transfer custody is to be made in the first instance, which will remain in force for one year. However, this can only transpire ten days after birth when the mother is able to give consent. Section 7 states that any document signifying consent by the mother is deemed inadmissible unless, on the date of execution of the document, the child was at least ten days old. An application for a final order can be made after six months has surpassed. Therefore, the Act makes it incredibly difficult for the intending parents to care for the newborn child in the weeks' post-birth, which has caused unwitting breaches of the Act.[46] As it is unlawful for prospective adoptive parents to take the child into their homes after the birth, any breach of this provision can gravely damage their application. Furthermore, prospective parents are subject to vetting for their fitness to parent, regardless of their genetic affinity to the child.

The Commission's consultation meetings revealed that commissioning parents had unfavourable attitudes towards using the adoption legislation.[47] This conviction was due to the firm belief that they should not have to adopt their own child, which had the effect of deterring parents from pursuing full adoption.[48] This is problematic as alternatively, these families are caring for the child informally, without any legal recognition of their parental status. Additionally, this legal situation can cause anxiety for surrogate mothers, who expressed concern at the legal implications of their ongoing status as the child's legal parent.

[44] Adoption Act 1955, s 25.
[45] Law Commission, above n 7 at 82.
[46] Adoption Act 1955.
[47] Adoption Act 1955.
[48] Law Commission, above n 7 at 82.

II. Family Court Decisions

As evidenced by judicial decision-making in court procedures, judges are ruling in a way that undermines the restrictions in the Adoption Act 1955. Instead, they tend to make decisions in favour of the welfare of the child, regardless of what the Act may require.[49] For example, in *Re Adoption of P,* the judge ruled in favour of an adoption order for the commissioning parents despite various breaches of the Act that would otherwise have impacted upon their application.[50] These breaches included the fact that the adoption order was sought four years after the surrogacy arrangement occurred, there were concerns that the applicant couple had paid money to the birth mother, and the couple had assumed care of the child without approval from the Department of Child, Youth and Family Services. A similar approach was taken in *Re Adoption of G,* where the commissioning parents were deemed to be suitable candidates for adoption of the child, despite similar breaches including financial payment to the surrogate and suggestions of a poor financial situation and marital conflict.[51] These decisions indicate that the court's approach to breaches of the Act is that they do not bar the making of an adoption order, and rather the interests of the child in having a stable family environment with its intended parents prevailed.[52] It is evidenced by the facts of *Re Adoption of G* that the commissioning parents suffered extreme anxiety and stress during the adoption process. The parents were unaware the law prevented them from taking the child into their home after birth if they contemplated adoption, which may potentially prevent their ability to adopt.[53] Again, this lack of clarity and coherence within the law and its application demonstrates the difficulties in using adoption as a means of granting parental status to commissioning parents in surrogacy arrangements. This inconsistency in the court's rulings and the Adoption Act provisions demands revision of the legislation to reflect the reality of the process, and to avoid such situations which create extreme tension and distress for those involved.[54]

For the aforementioned reasons, it is clear the current adoption model is inappropriate for surrogacy arrangements, specifically in the case of gestational surrogacy. The nature of the

[49] Adoption Act 1955.
[50] *Re P (Adoption: Surrogacy)* [1990] NZFLR 385.
[51] *Re G* (3 February 1993) DC INV Adopt 6/92 Neal DCJ.
[52] Adoption Act 1955.
[53] *Re G* (3 February 1993), above n 51.
[54] Adoption Act 1955.

adoption order coming into effect only after the child is born presents obstacles in regard to certainty, and prevents the formation of an appropriate family structure in the early months of a child's life when the encouragement of attachment and bonding is crucial. Additionally, courts have appeared to overcome these legislative restrictions in their rulings and therefore, there is little coherency between the law in theory and in practice.[55]

III. Guardianship and Parenting Orders

Given the unappealing mode of transferring legal parentage via the Adoption Act 1955, the only other possibility is for the intending parents to obtain a guardianship or parenting order. While these orders grant legal rights to the intending parents in relation to the child, they do not remove legal parentage from the surrogate and her partner. Under the Care of Children Act 2004, the Family Court can appoint any person an additional guardian of the child.[56] According to s 15, a guardian has 'all duties, powers, rights, and responsibilities that a parent of the child has in relation to the upbringing of the child.'[57]

Alternatively, a parenting order can be granted under s 48 of the Care of Children Act 2004. A parenting order primarily concerns day-to-day care and contact, as it was designed to grant particular rights to caregivers or partners of parents. However, for this purpose, the parental status of the surrogate mother is unaffected, meaning she continues to have full parental rights and responsibilities as the child's natural guardian. Clearly, the effect of a guardianship or parenting order does not align with the intention of a surrogacy arrangement making it, too, unfit for purpose.

IV. Conclusions

Given the onerous requirements of either adoption or obtaining a parenting or guardianship order, and the discomfort they feel when being required to adopt their own child, it is commonplace for commissioning parents to make neither application, as described in the ECART statistics in chapter 1.2.[58] Thus, the child is left in an incredibly vulnerable state, as

[55] *Re P (Adoption: Surrogacy),* above n 50; and *Re G* (3 February 1993), above n 51.
[56] Section 27.
[57] Care of Children Act 2004, s 15.
[58] See Chapter 1.2, p 13.

the intending parents are caring for the child informally, without acquiring the appropriate duties, powers, rights and responsibilities to act as the child's legal guardians. The effect of this is that the intending parents cannot consent to medical treatment on the child's behalf, cannot enrol the child in schools, or provide to the child any of the benefits that derive from the legal parent-child relationship, such as succession or immigration entitlements. The child is left in a vulnerable position, lacking those protections and benefits which legal parenthood affords, in a way that cannot be said to be in the best interests of the child's welfare.[59]

It is in the interests of all parties that the child ought to be placed in the care of the intending parents as soon as possible. The surrogate mother and intending parents came to a mutual agreement, prior to the conception of the child, that the intending parents were to raise the child from birth. Thus, it seems illogical to prevent this from transpiring for what might be a long period of time, given that this is what was intended. The mismatch between legal responsibility and intended and actual responsibility inevitably creates uncertainty and has the potential to place significant stress upon the caregiving adult(s) and their family, at a time when the child would benefit from stability and calm. This planned nature of surrogacy before conception distinguishes it from adoption cases, and it would be in the interests of all to introduce greater certainty about the transition process prior to conception and birth. Since that certainty is set out in the surrogacy agreement between the commissioning parents and the surrogate, it is the actual legal process that stymies this intention.

For many years, legal scholars and ethicists have criticised New Zealand's inadequate and incomprehensive approach to surrogacy.[60] The Adoption Act 1955 is not an appropriate tool for the transferal of parentage. The Act's inadequacy is evidenced by the way the Family Court determines cases contradicting it, and by the unfavourable attitudes of those utilising surrogacy arrangements towards it, as identified in the Law Commission's consultations with surrogacy families.[61] The laws surrounding surrogacy need to be redefined and, in particular, a surrogacy-specific transferal of legal parentage ought to be introduced, so that the Adoption Act 1955 no longer needs to be relied upon.

[59] Law Commission, above n 7 at 84.
[60] Shaw, above n 12 at 19.
[61] See Chapter 2.1, p 16.

Part II – International Jurisdictions' Approaches to Transferring Legal Parentage

Given the inadequacies identified in our current law in New Zealand, an analysis of the approaches of overseas jurisdictions to the transfer of legal parentage in surrogacy may provide important insights that can be drawn on here. There exists a global surrogacy market, regardless of whether one approves of surrogacy or not. Therefore, jurisdictions cannot merely avoid taking a position on surrogacy. Scherpe, Fenton-Glynn and Kaan, have identified four different legal approaches to surrogacy and categorised jurisdictions within them; namely the probative, tolerant, regulatory and free market approaches.[62] I next outline how parentage is transferred under these four approaches and will draw upon specific Western countries as examples. This comparative analysis will assist in considering what options might be realistic for future reform in New Zealand.

Chapter Three –The Four International Approaches

I. The Probative Approach

Jurisdictions which adopt a 'probative' approach include France, Germany and Spain. These jurisdictions share a commonality in that they all prohibit surrogacy. However, when a child is born as a result of an international surrogacy arrangement despite this prohibition, they will respond, with reluctance, by recognising the commissioning parents as the legal parents of the child. This recognition is primarily due to it being considered to be in the best interests of the child. In Germany, their hostility towards surrogacy is evident in their restrictive answer to the question of legal parenthood concerning a child born through surrogacy.[63] Surrogacy is treated as a natural birth, and the commissioning parents are solely considered to be donors. Therefore, German law does not provide any specific transfer rules for surrogacy, and the only avenue for acquiring parental status is adoption, which presents its own hurdles. Adoption requires consent by the legal partners and also the child in question. Additionally,

[62] Jens Scherpe, Claire Fenton-Glynn and Terry Kaan *Eastern and Western Perspectives on Surrogacy* (1st ed, Intersentia, United Kingdom, 2019).
[63] Anatol Dutta "Surrogacy in Germany" in Jens Scherpe, Claire Fenton-Glynn and Terry Kaan *Eastern and Western Perspectives on Surrogacy* (1st ed, Intersentia, United Kingdom, 2019) at 209.

an adoption decree can only be granted if it is proven that it will be propitious to the best interests of the child. The prohibitive nature of German law provides that a person who has participated in an illegal or immoral child arrangement shall only be allowed to adopt the child if it is necessary to protect the child's best interests. This heightens the requisite standard for which the best interests of the child are measured against, as it must be that adoption is necessary to protect the best interests of the child, not simply conducive to their interests.

This 'probative' approach is inconsistent with what is occurring internationally. By avoiding taking a position on surrogacy or explicitly prohibiting it, this drives intending parents to utilise the surrogacy market overseas, with the consequences still needing to be dealt with upon their return. Notably, these 'probative' jurisdictions have not enacted surrogacy-specific legislation for the transferal of parentage, and the same could be said about New Zealand. Despite the fact that we regulate surrogacy and are therefore arguably ahead of these jurisdictions in adapting to new technology, we are still comparable to these restrictive jurisdictions in regards to our parenthood laws. This is yet another demonstration of the outdated and inconsistent nature of New Zealand's surrogacy legislation.

II. The Tolerant Approach

The 'tolerant' approach is adopted by jurisdictions which do not regulate surrogacy itself, but rather provide for the regulation of the effects of surrogacy.[64] Countries such as Australia, England and Wales do this by accommodating the transfer of parenthood from the surrogate to the commissioning parents through legal mechanisms following the child's birth. In Australia, all states have legislation enacted specifically for surrogacy arrangements, and their laws are broadly similar regarding legal parenthood.[65] Namely, the commissioning parents in an altruistic arrangement can make an application after the birth of the child for a 'parentage order', whereby parental status is transferred from the surrogate mother to the commissioning parents. The mother's right not to relinquish the child is protected by making altruistic agreements unenforceable, only allowing for 'parentage orders' to be made post-birth, and by conserving the rule that the birth mother is the legal parent. This legislation is

[64] Scherpe, Fenton-Glynn and Kaan, above n 62 at 83.
[65] Mary Keyes "Surrogacy in Australia" in Jens Scherpe, Claire Fenton-Glynn and Terry Kaan *Eastern and Western Perspectives on Surrogacy* (1st ed, Intersentia, United Kingdom, 2019) at 209.

intended to protect the interests of the child, yet there is little explicit reference to this effect contained therein. The law in Western Australia presumes it to be in the child's best interests for the commissioning parents to be the child's parents. However, the legislation in the remaining six states does not elaborate as to what factors are relevant to determining a child's best interests, and there is little consideration of this in the case law.

A similar position of tolerating surrogacy using post-birth orders to transfer parenthood is evident in England and Wales.[66] Importantly, this legislation does not regulate the details of how and by whom a surrogacy arrangement can be entered into. On the contrary, it is a highly restrictive framework that regulates the effects of surrogacy only, regarding how parenthood can be transferred to the commissioning parents following the birth of the child. The Human Fertilisation and Embryology Act 2008 sets out conditions the commissioning parents must satisfy in their application for a 'parental order', and the circumstances which allow granting transferal to the commissioning parents are narrow.[67] However, in practice, the courts are willing to liberally interpret the criteria in favour of the best interests of the child. Previously, the requirement that an application for a 'parental order' must be made within six months of the birth of the child, has been judicially reinterpreted.[68] In *Re X (A Child) (Surrogacy: Time Limit),* it was declared that the courts had the power to grant an order subsequent to the six-month time limit, justified by the duty to exercise this power in the interest of the child's welfare.[69] The president of the Family Division emphasised that such decisions on parenthood do not solely concern the legal status of the child, but rather have important implications for the child's identity as a human being. The consequences of refusing to grant an order will extend well into the child's future, and legal recognition is one small consideration among many that warrant the making of a 'parental order.' Aligning with this rationalisation, the court ruled in favour of an application made two years after the child's birth.

Fundamental to the regulation of surrogacy in England and Wales is the rights of children. Therefore, courts are required to give paramount consideration to the welfare of the child when contemplating 'parental orders.' Both the United Nations Convention on the Rights of

[66] Claire Fenton-Glynn "Surrogacy in England and Wales" in Jens Scherpe, Claire Fenton-Glynn and Terry Kaan *Eastern and Western Perspectives on Surrogacy* (1st ed, Intersentia, United Kingdom, 2019) at 209.
[67] Human Fertilisation and Embryology Act 2008, s 54.
[68] Human Fertilisation and Embryology Act 2008, s 54(3).
[69] *Re X (A Child) (Surrogacy: Time Limit)* [2014] EWHC 3135 (Fam).

the Child (UNCRC);[70] and the European Convention on Human Rights, underpin this obligation.[71] This is exemplified in the English case of *A v P (Surrogacy: Parental Order: Death of Applicant)* whereby the judge relied upon a wide interpretation of s 54, in order to ensure that a 'parental order' was made to reflect the reality of the child's lived experiences.[72] This was justified by article 8 of the UNCRC, the right of a child to preserve his or her identity, and this obligation consequently conferred on the state to protect this identity.[73] The judge considered herself bound to adopt a purposive construction of s 54(4), by preserving the child's identity and the link between the parents and the child.[74]

In 2018, the Law Commission of England and Wales announced it would engage in a complete review and process for legislative change of their surrogacy laws. In 2019 the Commission consequently published a consultation paper, laying out the case for surrogacy reform.[75] This decision was premised upon widespread dissatisfaction with the current laws amongst practitioners, academics and the judiciary. Despite the clear legislative framework that exists which provides certainty in theory, the ex post facto nature of the system has proven to be unworkable in practice. The court is required to navigate two potentially conflicting interests that the legislation gives rise to, namely the onerous statutory requirements for transferring parenthood and the best interests of the child. The issue in practice is that by the time the case reaches the court system, the child is likely to have already been living with the commissioning parents, and thus any ruling which removes the child from their care could gravely compromise the child's welfare. Therefore, in order to promote the child's best interests and reflect their lived realities, the courts use a liberal and extensive interpretation of the legislation.

[70] Convention on the Rights of the Child 1577 UNTS 328 (opened for signature 20 November 1989, entered into force 2 September 1990).
[71] European Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 221 (opened for signature 4 November 1950, entered into force 3 September 1953).
[72] *A v P (Surrogacy: Parental Order: Death of Applicant)* [2011] EWHC 1738.
[73] Convention on the Rights of the Child 1577 UNTS 328 (opened for signature 20 November 1989, entered into force 2 September 1990), art 8.
[74] Human Fertilisation and Embryology Act 2008, s 54(4).
[75] Law Commission and Scottish Law Commission *Building Families through Surrogacy: A New Law* (consultation paper 244 of the Law Commission and discussion paper 167 of the Scottish Law Commission, 2019).

III. The Regulatory Approach

Several Western jurisdictions utilise a specific legal framework to regulate surrogacy arrangements.[76] New Zealand is classified as taking this 'regulatory' approach together with Greece, Israel, South Africa, Portugal and Iceland. These jurisdictions respond to surrogacy in very distinct ways. However, they are similar in that they all regulate surrogacy prior to the conception of the child, as opposed to those in the 'tolerant' approach, which attempt to deal with the consequences of surrogacy on an ex post facto basis. Instead, permission is required to be sought before a surrogacy arrangement can occur.

Despite belonging to the same 'regulatory' approach category, the law in Israel is in stark contrast to that of New Zealand. Surrogacy law in Israel allows payments to be made to the surrogate mother as compensation, and therefore is classified as commercial.[77] Despite this distinction, the way Israel approaches legal parenthood and transferal can be analysed when considering a legislative change in New Zealand. At the time of birth, Israeli law provides that a social worker is appointed to be the child's legal guardian until a parenthood order is granted to the commissioning parents. The child is to be formally handed over to the commissioning parents in the presence of the social worker, as soon as possible after birth. The social worker is the legal parent of the child, yet the commissioning parents will have physical custody. Within seven days of the child's birth, the commissioning parents must apply for a 'parenthood order', the consequence of which is that they are the legal parents of the child, for all intents and purposes. The court must make the 'parenthood order' unless it is satisfied that the making of this order would be inconsistent with the welfare of the child. Therefore, it could be said that the presumption of the best interests of the child is in favour of the commissioning parents.

Israel's transferal process is considered an effective approach. The use of an external party as a legal guardian in the interim of transferal is one that could be worth considering in New Zealand. However, our legislative reform must first focus on a surrogacy-specific transferal of legal parentage. Any consideration of Israel's approach, while valuable, ought to be

[76] Scherpe, Fenton-Glynn and Kaan, above n 62 at 145.
[77] Rhona Schuz "Surrogacy in Israel" in Jens Scherpe, Claire Fenton-Glynn and Terry Kaan *Eastern and Western Perspectives on Surrogacy* (1st ed, Intersentia, United Kingdom, 2019) at 209.

addressed in the future, once New Zealand's law is initially amended to include this mechanism.

IV. The Free Market Approach

Finally, Russia and certain states in the United States adopt the 'free market' approach.[78] This approach is controversial since contractual obligations arise from surrogacy, and therefore, it becomes binding and enforceable. In California, non-government agencies can engage in surrogacy arrangements and facilitate payment as they see fit, with little regulation of this trade. In New Zealand, surrogacy contracts are unenforceable, and commercial surrogacy is prohibited. Therefore, the legislature can be said to have indicated that requiring surrogate mothers to hand over the child unwillingly is contrary to New Zealand's position on surrogacy. Therefore, any reference to a 'free market' approach is an irrelevant consideration for reform of surrogacy laws in New Zealand.

V. Conclusions

By comparing New Zealand's current approach to that of other countries, we can consider the ways other international jurisdictions have resolved these ethical and moral dilemmas surrounding surrogacy. The moral dilemmas are the same internationally, and the way these governments have reconciled them can be applied to our position in New Zealand.

The primary theme identified was the desperate need for change. It appears that in most jurisdictions, some aspect of their legislation was unclear, unworkable or producing unsatisfactory outcomes. Many states, including New Zealand, utilise laws enacted years ago that are no longer fit for purpose. Scherpe et al. identified that the law ought to reflect the current norms, which are certainly no longer comparable to those societal norms that existed when the legislation was first enacted.[79] With surrogacy becoming ever more prevalent, this has changed the crux of family forms, and applying old law to new societal norms prevents the law from being able to respond appropriately to emerging challenges. This concern is particularly evident in New Zealand, as we are using adoption legislation enacted in 1955 to

[78] Scherpe, Fenton-Glynn and Kaan, above n 62 at 279.
[79] Scherpe, Fenton-Glynn and Kaan, above n 62 at 513.

transfer legal parentage. This approach is archaic and inconsistent with what is occurring internationally. Even countries which are less tolerant of surrogacy, such as Australia and the United Kingdom, have enacted specific legislation to enable parenthood to pass from the surrogate to the intending parents. New Zealand, therefore, must provide for the unique surrogacy relationships that occur, by enacting legislation purpose-built for transferring parentage in surrogacy arrangements, rather than using old legislation created for the purpose of adoption.

Analysis of overseas jurisdictions has shown that an important consideration when enacting surrogacy laws is to ensure the legislation provides legal certainty. Certainty is essential as the commissioning parents need to know whether they will be recognised as legal parents. Arguably most crucial is that the law provides certainty for the resulting child regarding their parenthood and nationality, which in turn impacts on their identity. As evidenced by the legal practice in Australia, issuing 'parentage orders' post-birth to transfer parentage does little to provide any certainty.[80] The approach is considered problematic as any requirements or considerations are only contemplated following the birth of the child, which means that the court's ability to ensure compliance is compromised. Consequently, this creates uncertainty for all parties involved; the intending parents who are unsure whether they will be afforded parentage, and the resulting child whose future family arrangements are unknown. An approach of tolerating surrogacy by issuing post-birth orders to transfer parentage is therefore not a desirable avenue for regulation in New Zealand.

Additionally, the law needs to be effective. While this appears self-evident, our judicial decision-making indicates that this is not apparent in our current system. Judges make decisions that do not align with the requirements set out in the Adoption Act, and breaches of the act do not impede upon the making of an adoption order.[81] In New Zealand cases, judges have ruled in contradiction with the Adoption Act 1955 and rather the interests of the child in having a stable family environment with its intended parents prevailed.[82] This is also true of other international jurisdictions. In the United Kingdom, despite the restrictive nature of the applications to gain legal parenthood, the courts liberally interpret the criteria in favour of the

[80] Mary Keyes, above n 65 at 209.
[81] Adoption Act 1955.
[82] *Re P (Adoption: Surrogacy),* above n 50; and *Re G* (3 February 1993), above n 51.

interests of the child, whose welfare would be harmed if the order is not made.[83] To rectify this disparity in the law and in practice, the United Kingdom is undergoing a process for legislative change of their surrogacy laws, as New Zealand ought to as well.

Overall, the law needs to respond appropriately to the needs of children. As overseas jurisdictions have demonstrated, while it is often the case that legislation is intended to protect the child's interests, there is little explicit reference to give effect to this. In Australian states, while the legislation may require the court to consider the child's best interests in the making of a parenting order, what this means in practice is unclear. In the United Kingdom, the courts have made decisions in favour of what it considers to be in the best interests of the child. However, the law ought to provide more guidance as to what this entails, so as to avoid conflicts with the onerous requirements of the legislation. New Zealand's legislation faces a similar problem, with respect to transferring parenthood. Any legal framework which fails to provide certainty and is ineffective in that it causes judicial decision-making contrary to the law, cannot be deemed to be in the best interests of any involved party, especially the child.

[83] *Re X (A Child) (Surrogacy: Time Limit),* above n 69; and *A v P (Surrogacy: Parental Order: Death of Applicant),* above n 72.

Part III – The Way Forward for New Zealand

The current climate in New Zealand in relation to surrogacy, can only be described as stagnant. The Law Commission released a report in 2005, encouraging urgent revision of the legislation, and proposed amendments to be made to Part 3 of the Status of Children Act 1969, providing for interim pre-birth orders to determine legal parental status prior to conception or birth. The Government has not yet responded to this Law Commission report, which was released 15 years ago. In 2019, a Private Member's Bill was announced by Tamati Coffey MP entitled 'Improving Arrangements for Surrogacy.' It is currently sitting in the members' bill ballot, waiting to be drawn. The Bill also intends to amend the Status of Children Act 1969, but by providing that if a child is born of a surrogacy arrangement that is subject to a surrogacy order, the intending parents automatically become the parents of the child at birth.[84] These are currently the only apparent attempts to reform surrogacy legislation in New Zealand. Despite these efforts, the law has remained unchanged. It is important to consider these proposals, and also any additional research and academic perspectives which are informing the current surrogacy debate.

Chapter Four – Law Reform Options Advanced in New Zealand

I. The Law Commission's Proposal of 'Interim Pre-birth Orders'

In 2005, the Law Commission released a report titled 'New Issues in Legal Parenthood.'[85] In its entirety, the report addressed various issues facing the legal status of parent-child relationships. It stated that the law is out of date regarding the increasing diversity in family form as a result of societal changes and advancing birth technologies. The report outlined the need for a coherent and principled framework in regards to all areas concerning assisted human reproduction, with five guiding principles that ought to inform any revision of the law in this area.[86] These principles include the child's welfare and best interests; the desirability of clarity and certainty at the earliest possible time in the child's life; the need for individuals

[84] New Zealand Parliament "Proposed members' bills" (2020). <www.parliament.nz/en/pb/bills-and-laws/proposed-members-bills>
[85] Law Commission, above n 7.
[86] Law Commission, above n 7 at 5.

to access information about their gestational and genetic parentage; the desirability of autonomy and collaboration in parenting; and the equality of children regardless of the circumstances of their creation or family form.

As aforementioned, the report outlined the issues regarding the current approach, and it recommended a comprehensive new legal regime for the transfer of parenthood.[87] The Commission's view was that this required change was urgent, given that the current framework often results in children being cared for by parents with no legal standing in relation to the child, leaving the child incredibly vulnerable. The report maintained that any legal framework which intends to allocate parenthood in surrogacy must consider the interests of the child born of the surrogacy arrangement, the intending parents, the surrogate mother, any of the child's existing siblings, as well as the wider family of the child. The Commission also prioritised ensuring that legal certainty is established at the earliest possible opportunity.

Importantly, the Commission expressed their rejection of any approach that automatically transfers legal parenthood from the surrogate mother to the commissioning parents upon the birth of the child. The report acknowledged that this approach is somewhat appealing, given the nature of the intention to create a child formed by the intending parents, and the agreement entered into with the surrogate to gestate the child on their behalf. Additionally, the commissioning parents are the individuals who will be responsible for the child's upbringing and assume day-to-day care and are most often the genetic parents of the child. However, the nature of the surrogacy arrangement is unique, and distinguishable from situations such as donor gamete conception. In surrogacy arrangements, there exists the critical factor of the role of the birth mother, as even in 'full' or 'gestational' surrogacy arrangements, she is still handing over a baby that she has gestated for nine months. The Commission took a cautionary approach in this regard, by highlighting that to date, there had been insufficient research conducted into the impact of gestation on the mother and child. This lack of scientific certainty ought not to warrant marginalising the surrogate mothers' role in the process. There is potential for severe trauma to be suffered by a closely bonded mother, who is separated from the child. Therefore, the surrogate should not have legal parenthood forcibly removed from her prior to the child's birth, without any legal recourse.

[87] Adoption Act 1955.

The Commission also opposed a process whereby the best interests of all those involved would be determined on a case-by-case basis.[88] Their justification for this rejection was because parental issues need to be determined as early as possible, and the legal framework ought to be clear prior to conception. Problems undoubtedly arise when the court is involved in every family situation of determining legal parenthood, such as stress, uncertainty, delays and financial costs.

In their recommendations, the Law Commission advanced a proposal for a transfer model titled 'interim pre-birth orders.' Their favoured model allows for the determination of interim legal parental status before conception or birth. The Family Court ought to be able to make an order to transfer legal parenthood to the intending parents if it is satisfied that certain circumstances have been met. These circumstances include the surrogate mother being over the age of 18 and already has one child herself; the child would be the genetic child of at least one of the intending parents; the only money that will pass between the parties is for "reasonable and necessary expenses" incurred in the pregnancy; the intending parents and surrogate mother have had separate and joint counselling; and finally that the surrogate mother and her partner have entered into the arrangement voluntarily, having had independent legal advice and having a full understanding of what is involved.[89]

Once an interim pre-birth order has been obtained, the transferal process provides an opportunity for any disputes following the birth of the child. The Commission recommended a 21-day period, during which the surrogate mother can seek to petition the court to overturn the interim order. If the 21 days has passed and the surrogate mother has not filed a petition, a registrar of the Family Court shall approve the application, upon proof of genetic parentage and the presence of the child in the intending parents' care. The effect of this transferal is that a parent and child relationship shall then exist between the child and the intending parents. The registrar's approval will also, in turn, extinguish the legal parenthood of the surrogate mother.

[88] Law Commission, above n 7 at 90.
[89] Law Commission, above n 7 at 93.

Within the specified 21 days, if the interim agreement is disputed, for example, the surrogate mother is refusing to relinquish the baby, the matter should go to court to be determined according to the best interests of the child. In this respect, the Commission has drawn upon the judicial decisions made by the courts in deciding matters in surrogacy disputes and outlined a list of factors the court should take into account. These factors include the genetic relationship between the parents and the child, the gestational relationship between the child and the adult, the intentions of all parties, the sibling relationships of the child, the comparative potential ability of each of the parties to be fit and proper parents of the child, the ability of each of the parties to facilitate the child's relationships with other parties, and whether issues could be resolved by guardianship and parenting orders, rather than declarations of legal parenthood in relation to each of the parties.[90]

The report also contains a post-birth process in the event that the surrogate and the intending parents failed to approach the court before birth. In light of the difficulties with applying adoption legislation to surrogacy arrangements, the Law Commission considered that a simpler mechanism ought to be implemented to transfer parentage in this circumstance. This mechanism would include a limited period post-birth in which a parenthood surrogacy arrangement could be transferred, other than by adoption. The Commission outlined that a 'best interests of the child' approach will need to be taken to ensure consistency with the policy of the Family Court. The Commission also noted that the court is incredibly unlikely to consider that the best interests of the child would be served by ordering that the surrogate mother who wishes to relinquish her parental status, must continue to care for the child, at the expense of the child's genetic parents who intend to parent the child. The time period is stipulated as six months following the birth of the child, within which the Family Court can make the order giving parental status to the intending parents and consequently extinguishing the parental status of the surrogate and her partner. To do so, the court must be satisfied that several requirements have been met, which are similar to those for issuing an interim pre-birth order, except for an additional requirement: that the making of the order is in the best interests of the child.

These changes would be implemented by amendment of the Status of Children Act 1969, by way of including the above requirements into a new 'Part 3.' As aforementioned, the Law

[90] Law Commission, above n 7 at 94.

Commission's report and their specific proposals have not been responded to, and exist as persisting recommendations for reform.[91]

II. Private Member's Bill Proposal to Automatically Transfer Parenthood

While the Private Member's Bill is the only recent activity in this field, it is arguably inconsistent with the view of the Law Commission and academic scholars in this area. The 'Improving arrangements for Surrogacy' Bill is currently sitting in the parliament members' ballot, awaiting selection.[92] It was published only recently in December 2019, supported by Tamati Coffey MP and, in its entirety, the Bill simplifies surrogacy arrangements and provides a mechanism for their enforcement. Given that the focus of this dissertation is recommending a surrogacy-specific transferal of legal parentage, this Bill extends well beyond the scope of the legal parenthood debate. However, it is important to consider because it proposes to make surrogacy arrangements enforceable, and the effect of this is to enforce the automatic transfer of legal status to the commissioning parents. In doing so, the Bill also proposes to make amendments to the Status of Children Act;[93] as did the Law Commission's 2005 recommendations.[94]

The Bill intends to amend the Care of Children Act 2004, by inserting a 'Part 2A' which would provide a mechanism for the parties to a surrogacy arrangement to apply for a surrogacy order of the court. This surrogacy order would enforce the transfer of custody from the surrogate to the intending parents of any child resulting from the arrangement. The order may be made only if both parties consent and ECART has provided its approval under the HART Act.[95] Consequential changes to the Status of Children Act 1969 would mean that when a child who is subject to a surrogacy order is born, the intending parents will automatically become the child's parents and the surrogate will cease to be the parent of the child.[96] Thus, it is a pre-birth order designed to give effect to the surrogacy arrangement, in terms of transferring parentage to the intending parents automatically.

[91] Law Commission, above n 7 at 95.
[92] New Zealand Parliament, above n 84.
[93] Status of Children Act 1969.
[94] Law Commission, above n 7 at 95.
[95] Human Assisted Reproductive Technology Act 2004.
[96] Status of Children Act 1969.

Enforceability and automatic transfer as advanced by this Private Member's Bill would be inappropriate in the current New Zealand context. The proposal is contradictory to that of the Law Commission, and also the recommendation of creating a surrogacy-specific legal framework for transferring parentage in a way that does not marginalise the role of the surrogate mother. Such an outcome is inconsistent with the principles and provisions contained in the HART Act.[97] By making surrogacy contracts unenforceable and prohibiting commercial surrogacy, the legislature can be said to have signalled its view that requiring surrogate mothers to hand over the child against their will is contrary to public policy. While it is important to acknowledge the existence of such proposals in determining the way forward for New Zealand, this Bill's premise is one which extends far beyond the most immediate issue facing surrogacy law at present. The enactment of a surrogacy-specific transferal of legal parentage ought to be the pre-eminent step in the reform of surrogacy law.

The future of the Bill is uncertain as it currently sits in the member's ballot waiting to be drawn once a space on the order paper becomes available. The ballot decides which Bill will be introduced, when its contents can be debated, and when it will be subjected to public submissions via the Select Committee process. This particular Bill may therefore remain in the ballot for an indeterminate period of time and may never actually be drawn. It would be unwise to pin any hopes of surrogacy reform on a particular Bill and so other initiatives are needed.

III. Providing for the Needs and Culture of Māori

Given New Zealand's unique cultural context, any amendments to our legislation must provide adequately for the needs and culture of Māori people. Assisted reproductive procedures are continuing to advance at a rapid rate, and it is essential that these new developments reflect Māori cultural values, given the challenges that this new technological era poses for expression of Tikanga Māori. In the most recent edition of 'Family Law Policy in New Zealand', Jacinta Ruru identifies the way in which these challenges for Māori may manifest.[98] They are complex and, in some ways, contradictory, and therefore to adequately provide for Māori beliefs, these competing ideas and their effects must be considered in their

[97] Human Assisted Reproductive Technology Act 2004.
[98] Jacinta Ruru "Kua tutu te puehu, kia mau: Maori aspirations and family law policy" in Mark Henaghan and Bill Atkin *Family Law Policy in New Zealand* (5th ed, LexisNexis, Wellington, 2020) at 57-97.

entirety. For example, while providing an opportunity for infertile Māori couples to assume parenthood is incredibly exciting, surrogacy procedures also have the potential to threaten the tapu and mauri (living force) of the surrogate woman's body and the embryo. The cultural values of identity, genealogy and history for Māori are under scrutiny when surrogacy is considered.

It is important to note that the HART Act does provide for some consideration of Māori culture in decision-making processes, as evident in the guiding principles stipulated in s 4, namely that "the needs, values and beliefs of Maori should be considered and treated with respect."[99] The Act also accepts the vital role Maori ought to occupy in determining the boundaries of reproductive technologies, by way of requiring by law that at least one Maori member with expertise in Māori customary values and practice, is included in the Advisory Committee on Reproductive Procedures (ACART). However, there is no reference to any specific guidelines that constitute what it actually means to consider Māori customary values and practice.[100]

Jacinta Ruru also identifies the way in which the previous Law Commission report on 'New Issues in Legal Parenthood' failed to make any appropriate reference to Tikanga Maori.[101] The 2005 report only mentioned Tikanga Maori by way of attempting to equate surrogacy with the practice of whangai. While Maori customary practices of whangai are similar in so far as the child is cared for by someone other than the birth mother, there are also significant differences. The primary distinction is that the whangai child will most often remain within the wider family structure of the birth mother, whereas this is not necessarily the case with surrogacy, and there is unlikely to be a familial connection between the surrogate mother and the commissioning parents. Additionally, because the commissioning parents must adopt a child born of a surrogacy arrangement to obtain legal parenthood, this may sever the child's relationship with the birth mother. This approach can be distinguished from whangai, as the children will almost always know their birth parents, and the circumstances surrounding their birth.

[99] Human Assisted Reproductive Technology Act 2004, s 4(f).
[100] Ruru, above n 98 at 75.
[101] Ruru, above n 98 at 76.

Therefore, when considering legislative reform, provisions must be included that explicitly require Māori cultural viewpoints to inform any decisions concerning surrogacy applications, with much greater emphasis than the HART Act currently requires.[102] Any amendments could also include a requirement that the principles of the Treaty of Waitangi must be given effect by decision-makers acting in accordance with the Act.

[102] Human Assisted Reproductive Technology Act 2004.

Chapter Five – The Future from a Socio-legal Perspective and Empirical Evidence

I. Scherpe's 'Multiple Parentage' Approach

A variety of perspectives and areas of research are currently informing the debate surrounding surrogacy. When contemplating law reform, considering a variety of standpoints helps create a law which is responsive and relevant. Jens M. Scherpe advances an important suggestion from a socio-legal perspective in his work titled 'Breaking the Existing Paradigms of Parent-Child Relationships.'[103] Scherpe's approach seeks to address the changing nature of family arrangements, by breaking the existing paradigm of the parent-child relationship. Scherpe discusses many of the medical challenges to the 'two-parent' paradigm that currently exist, of which surrogacy is just one. He addresses the fact that children are no longer being born into traditional family arrangements, and it is in their best interests to recognise and appreciate the unique relationships that surrogacy engenders. The model purports to accommodate all existing family forms, by splitting the parenting position into three levels, and recognising that parenting does not need to be restricted to only two people. He outlines the discrepancy in a situation whereby a surrogate mother gestates and gives birth to the child, yet the child is genetically related to its commissioning parents. Scherpe also considers that a surrogate is not solely a womb, but rather contributes to the creation of the child. While this contribution may not be a genetic one, it is certainly biological and therefore deserving of recognition. It is also crucial that children have an interest, for the purposes of understanding their identity, to know of this arrangement.

The model proposes that parenting has three distinct levels; parentage describing a biological relationship, parenthood which denotes persons who are parents of the child by law, and parental responsibility, which is a term used for individuals who are legally permitted to exercise functions traditionally associated with being a parent. Distinguishing between different levels of 'parental connections' or 'links' to the child can be a useful tool when distinctions between persons need to be made. No immediate legal consequences necessarily need to derive from the allocation of any of these parenting terms or confer specific rights or

[103] Scherpe, above n 10.

duties on the individuals involved. Despite this, Scherpe states that by separating the parental position into three levels, this would enable legal systems to deal adequately with modern family structures, by way of recognising the specific interests that children have in establishing and sustaining links with persons involved in their lives.[104]

'Multiple parentage' would reflect the biological links between a person and the child, which would include the commissioning parents who have a genetic relationship to the child, but also the surrogate, whose gestational contributions will hence be recognised. The surrogate may be registered as having parentage, yet no immediate legal consequences must flow from this, and rather, the surrogate is granted recognition for her contribution. Scherpe outlines that if having parentage were to become legally relevant, the child needs to be at the centre of any policies and decisions in this regard, and must be subject to promoting the best interests of the child. By recognising 'multiple parentage', this also facilitates the provision of information for the resulting child's identity. Moreover, by detaching parentage from parenthood and parental responsibility, this has the effect of potentially establishing a hierarchy among those with parental links. Parenthood and parental responsibility confer the highest priority regarding the child, as they entail an intense social commitment, by way of directly caring for the child daily.

This novel approach would address the concerns the Law Commission has of marginalising the role of the surrogate mother, as it provides her with recognition for her contributions, as well as the possibility of further limited connections with the child.[105] It seeks to protect children and preserve their identity. This structure may prioritise the best interests of the child by accommodating their right to know their biological origin, represent their lived realities, and recognise the parental contributions of all those involved in the child's life in a surrogacy arrangement. Therefore, the transfer of legal parenthood would not completely sever the tie between the resulting child and the surrogate, rather a further dimension of parentage would be added.

Echoing the position of all legal and academic commentary on surrogacy, Scherpe highlights the slow pace of the law in reacting to societal changes and medical advances and emphasises

[104] Scherpe, above n 10 at 350.
[105] Law Commission, above n 7 at 90.

that these issues need to be dealt with as a matter of urgency. Instead of merely trying to amend the existing laws, which are based on this 'two-parent' paradigm, Scherpe is suggesting that the law of parent-child relations ought to be reconceptualised, in order to adequately reflect the biological origin and social relations of the child.[106]

This proposal is arguably incredibly novel and somewhat futuristic; however, it certainly is worth considering. As aforementioned, medical and societal advances have meant that family paradigms no longer fit into the traditional view of two married parents conceiving their own child, as evidenced by the demographic information collected on New Zealanders.[107] Therefore, it is logical that our law should reflect this new arrangement, and Scherpe's model purports to do just that. While the introduction of this exact model may not be the appropriate first step towards surrogacy law reform, it is worth considering for the future, and it provides insight into what legislation surrounding surrogacy in the best interests of the child may look like. This is because it appreciates that the story does not merely end once parenthood is transferred; all parties involved may benefit significantly from enduring relationships with the surrogate, or at least understanding and recognition of their unique dynamic.

II. Empirical Research

Scherpe's proposal is supported by an empirical research study conducted in the United Kingdom, which investigated the long-term experiences of surrogates, and their relationships and contacts with their commissioning families.[108] The study used data from semi-structured interviews, administered in 2013, of 34 surrogates who had given birth to a child conceived through surrogacy approximately seven years prior to the interview. This study is particularly relevant because, in New Zealand, the relationship between the couple and the surrogate is explored by ECART as it is believed that an ongoing, sustained relationship may contribute to the child's wellbeing. The findings offer support for this premise, as in most surrogacy arrangements, the surrogate remained in contact with the commissioning families and reported positive relationships as a result. In 77% of cases, surrogates had remained in contact with the children. In circumstances where the surrogate and the child remained in

[106] Scherpe, above n 10 at 358.
[107] See Introduction, p 4.
[108] Susan Imrie and Vasanti Jadva "The long-term experiences of surrogates: relationships and contact with surrogacy families in genetic and gestational surrogacy arrangements" (2014) 29 Reproductive BioMedicine Online 424.

contact, the surrogate reported a positive relationship with the child in 76% of the arrangements. Overall, the surrogates reported that 87% of surrogacy arrangements had been overtly positive experiences. The findings do not support concerns about the possible adverse outcomes of sustaining relationships over the longer term, and that instead, parties to the relationship were generally comfortable with the type and frequency of contact.

The research served to highlight the myriad of ways that ongoing contact and relationships can transpire. It was also the case that surrogate mothers did not have difficulty in maintaining contact with the child and did not view the child to be their own. The fact that in most cases, the surrogacy relationship continued following the birth of the child, and that this relationship was reportedly positive, is important. The positive nature of the ongoing relationship in the majority of cases means that it is in the best interests of all involved that the surrogate mothers' role is not marginalised and that the relationship is fostered.

In a more recent Canadian study, similar themes were identified surrounding the relationship between the surrogate, the commissioning parents and the resulting child.[109] The findings of a qualitative analysis of the experiences of gestational surrogates were consistent with the British study in that most surrogates had harmonious relationships with the intended parents and maintained ongoing contact with the family post-birth. Additionally, the surrogates did not tend to view the child as their own. They did not hold the belief that they were "giving away" their child; instead, they viewed surrogacy as a positive experience that had an impact on someone else's life.[110]

Other empirical research examined the post-delivery adjustment of gestational carriers, the intended parents, and their children.[111] Overall, this study found that most adolescents who were in contact with their surrogate felt positively about her, often referring to her as a family friend, aunt or godparent. This relationship produced positive psychological outcomes for the child, and there were no differences between surrogacy-born children's self-esteem and psychological adjustment and those of children in other family types. Furthermore, the study showed that at the age of 14, most of the children were aware of their surrogacy birth from a

[109] Samantha Yee, Shilini Hemalal and Clifford L Librach '"Not my child to give away' A qualitative analysis of gestational surrogates' experiences" (2020) 33 Women Birth 256.
[110] Yee, Hemalal and Librach, above n 109.
[111] Vasanti Jadva "Postdelivery adjustment of gestational carriers, intended parents, and their children" (2020) 113 Fertility and Sterility 903.

young age, and this was found to be associated with more positive mother-child relationships during early adolescence.

III. New Zealand Commentary on Children's Perceptions of Family

These overseas research findings coincide with the commentary available in New Zealand suggesting that young people take a flexible and open approach to who they view as their family.[112] Many young people consider non-traditional parenting arrangements, as well as extended family members, to be part of their immediate family.[113] A common observation from this research was the finding that the children believed the existence of love, care and support between members was most pertinent to their concept of family, regardless of who those members may be. The importance of committed and stable parent-child relationships for a child's wellbeing, and the fact that these relationships come in a variety of different forms, reinforces the argument that traditional structures no longer define our ideas of family in New Zealand. Any law reform in the future ought to consider this, and the fact the child greatly benefits from a stable and committed family dynamic, regardless of how that is composed relationally.

Additionally, the Office of the Children's Commissioner undertook research concerning the elements that amount to the wellbeing of children.[114] The findings state that children experience heightened wellbeing when their family and whānau are connected and united, relationships within and beyond the family and whānau are thriving, family and whānau members support each other, there are opportunities for individual and collective growth, and all members of their family and whānau have their needs met. Of utmost importance for children is the feeling of identity and belonging, which is supported by a stable and nurturing family. This research also lends support for the importance of children having prosperous relationships with all of those involved in their lives, which can take on a variety of forms as long as they are loving and supportive.

[112] Law Commission, above n 7 at 12.
[113] Stacey Anyan and Jan Pryor "What is in a family? Adolescent perceptions" (2002) 16 Children & Society 306.
[114] Children's Commissioner "Elements of child wellbeing" (2020). <www.occ.org.nz/wellbeing/elements-of-child-wellbeing>

Finally, a recent large-scale report by the Children's Commissioner entitled 'What makes a Good Life', which involved more than 6,000 participants, asked for the views of children and young people on what wellbeing means to them.[115] One of the primary findings of this study was that relationships with family and whānau are crucial to the children's wellbeing. Critically, if family members are suffering, then the children do as well.

[115] Office of the Children's Commissioner and Oranga Tamariki *What Makes a Good Life? Children and Young People's Views on Wellbeing* (Office of the Children's Commissioner and Oranga Tamariki, Wellington, 2019) at 38.

Chapter Six – Law Reform in Light of the Best Interests of the Child

I. How the Law Currently Provides for the Best Interests of the Child

Family law ought to be oriented around the child and, in many ways, the law and judicial decision-making is indeed reflective of this notion, specifically with regard to s 4 of the Care of Children Act 2004. However, this is not the case for the law regarding surrogacy.

In the Human Assisted Reproductive Technology Act, s 4 contains principles that must guide all persons exercising powers or performing actions under this Act. Principle (a) states that 'the health and well-being of children born as a result of the performance of an assisted reproductive procedure or an established procedure should be an important consideration in all decisions about that procedure.'[116] Notably, this only requires that the health and well-being of children is an important consideration, not a paramount or overriding determinant. Thus, those performing actions under this Act are required only to consider the effects on the child, meaning they still retain the right to act in whichever way they see fit.

The legislation surrounding the transferal of parenthood process also fails to issue specific guidance in providing for the rights of children. The Adoption Act was drafted in 1955, and therefore there are no guiding principles as to the extent the child's rights or interests are relevant when determining whether a transfer of parenthood ought to be permitted. This can be distinguished from the Care of Children Act 2004, which contains s 4 that states the welfare and best interests of a child in his or her particular circumstances must be the first and paramount consideration. Section 11 of the Adoption Act does require that before making an adoption order, the court must be satisfied that 'the welfare and best interests of the child will be promoted by the adoption' yet this is somewhat ambiguous in its application.

International treaties also inform the way New Zealand courts approach the rights of children. New Zealand has ratified the UNCRC, which includes article 21, stating that 'state parties that recognise and permit the system of adoption shall ensure that the best interests of the child are the paramount consideration.'[117] While this treaty may require that the courts read

[116] Human Assisted Reproductive Technology Act 2004, s 4(a).
[117] Convention on the Rights of the Child 1577 UNTS 328 (opened for signature 20 November 1989, entered into force 2 September 1990), art 21.

statutory provisions in a consistent way in adoption cases, this would provide no aid for surrogacy specifically if we were to enact the surrogacy-specific transferal of legal parentage I am proposing.

II. The Best Interests of the Child and a Framework for a Surrogacy-specific Transferal of Legal Parentage

This dissertation makes it clear that law reform in favour of a surrogacy-specific transferal of legal parentage will benefit all parties involved, and especially the child resulting from the arrangement. Our current use of the adoption legislation creates uncertainty and stress for the individuals involved, and this anxious and distressing environment is not one that an infant should be exposed to after birth.[118] As evidenced by the number of applications for adoption and guardianship orders comparative to the number of surrogacy applications, many commissioning parents are not taking steps to become the parents of their child born via surrogacy legally, and are instead choosing to care for the child informally.[119] This has implications for the duties, powers, rights and responsibilities they can exercise in respect of the child, and consequently, the child also lacks the protections granted to them by legal parenthood. Because the surrogate continues to retain parental status, this creates uncertain legal outcomes and has the potential to be disruptive to the child's life, engendering anxiety and uncertainty if their familiar family dynamic is threatened.

Judges have reported that use of the Adoption Act 1955 to transfer parentage creates difficulties due to the inconsistent policy objectives of the Act's requirements, and acting in the best interests of the child. To rectify this disparity in the law would be to ensure a pragmatic and child-focused approach could be taken in making decisions about surrogacy arrangements. Legislation enacted specifically to transfer parentage in surrogacy arrangements would achieve this. As appears to be the consensus, it is difficult to imagine a case whereby the transferal of legal parentage to the commissioning parents, who intended to have the child, is not in the child's best interests.

[118] Adoption Act 1955.
[119] Wilson, above n 36 at 209.

In order for the surrogacy application to be approved in the first instance, the commissioning parents are required to satisfy a number of requirements, including that there has been 'discussion, understanding, and declared intentions between the parties about the day-to-day care, guardianship, and adoption of any resulting child, and any ongoing contact.'[120] Essentially, an agreement has to be made about the care of the child prior to conception. Therefore, declarations made by the commissioning parents to this effect indicate that they have made arrangements for raising the child in the best circumstances possible, with the child's interests in mind. Thus, a mechanism which gives effect to this agreement would understandably be conducive to the best interests of the child. Given the pre-determined nature of surrogacy, abiding by the onerous requirements of adoption legislation should not be necessary.

In addition to enacting this transferal mechanism, specific guidelines that elaborate on what may constitute 'the best interests of the child' ought to be included in the legislation, to ensure certainty and clarity for judicial decision-makers and all involved parties in surrogacy. What precisely these are could be decided following consultation with the public, academics, and key stakeholders and also take account of the research evidence on the lived realities of surrogates and surrogacy families. It was the view of the Law Commission in 2005 that in a surrogacy arrangement, the best interests and welfare of the child were incredibly important, and this tended to be a presumption in favour of the commissioning parents, due to the parties' pre-determined intentions.[121] However, the Commission cautioned that this presumption should not come at the cost of marginalising the surrogate mother, which any drafters of this legislation must consider. Should a dispute arise between the parties, the Commission recommended that the matter should go to court to be determined in the best interests of the child. To provide further clarity, the legislation ought to make it explicit what the best possible outcome for the child may entail, and how decision-makers can ensure these best interests are provided for.

[120] Advisory Committee on Assisted Reproductive Technology, above n 20.
[121] Law Commission, above n 7 at 91.

Chapter Seven – Surrogacy Law Reform in New Zealand

I. Surrogacy Law Revision Generally

It is clear that the use of outdated legislation to transfer legal parentage is inappropriate, and creates legal situations that are neither certain nor effective.[122] The pre-determined nature of surrogacy arrangements distinguishes it from adoption, and therefore legislation ought to reflect this distinction. It is also important to note that any surrogacy-specific means of transferal would not affect the Adoption Act, given that amendments to the legislation would only apply to arrangements where the child is the result of a pre-approved surrogacy arrangement and not merely an adoption process.[123]

The United Kingdom is currently completely revising their surrogacy legislation. They are now on their third version of surrogacy laws, as they are aware they must keep updating them to reflect the use of medical technology becoming more commonplace. A number of substantial changes are being contemplated, including who the legal parents ought to be, the best way to transfer parentage, whether parentage ought to remain with the surrogate during pregnancy and whether payments should be allowed. I consider that New Zealand ought to engage in a similar complete revision of our laws, as they ought to reflect changing times and be able to adapt accordingly.

There are only two provisions contained in our legislation that refer to surrogacy, and minimal discussion or debate on them took place during the legislative process. Any initial intention to address and revisit this at a later date appears to have been lost. While the use of an ethics committee to consider applications is innovative and ought to be regarded as a successful approach, the regulation, in general, is certainly not optimal. Ideally, the entire process should be reviewed and reformed. However, given the apparent lack of legislative will to do so, the first step in the right direction would be to revise the transferal of parentage process. The absence of a specific mechanism to transfer parentage is the aspect of our

[122] Adoption Act 1955.
[123] Adoption Act 1955.

surrogacy laws that presents the most difficulty in practice, a stance shared by legal academics and commentators alike.[124]

II. Implications of the Four Overseas Approaches

Analysing overseas approaches to transferring parentage is important when contemplating law reform in New Zealand, as their methods can inform any changes we may consider implementing. The most pertinent observation is that countries which adopt only a 'tolerant' approach to surrogacy, such as the United Kingdom, have enacted specific legislation which transfers parenthood from the surrogate to the commissioning parents.[125] These 'tolerant' jurisdictions are supposedly less accepting of surrogacy than New Zealand, yet their laws in respect to transferring parenthood are much more advanced and permissive than our own. Additionally, Germany, a country which maintains a 'probative' stance on surrogacy, also utilises their adoption laws to transfer parenthood. This again emphasises that New Zealand's parentage laws do not align with our otherwise regulatory and relatively permissive approach of allowing surrogacy. New Zealand is hence comparable to restrictive jurisdictions like Germany, which are refusing to adapt to societal changes.

The approaches demonstrate that the law must be effective, as reflected by judicial decision-making, whilst also providing legal certainty. When judges rule in a way that is contrary to legal requirements, yet produces the best and most effective outcomes, it is arguably the law which must be defective. Case law in both New Zealand,[126] and the United Kingdom, highlight this.[127] Legal certainty is not achieved by the ex post facto regulation of surrogacy, as seen in Australia and the United Kingdom. Nor is it achieved by New Zealand's current approach of using the Adoption Act 1955, given the legal and attitudinal obstacles that may prevent the adoption from occurring.

[124] Coney and Else, above n 9; Powell and Masselot, above n 9; and Law Commission above n 7.
[125] Scherpe, Fenton-Glynn and Kaan, above n 62 at 115.
[126] *Re P (Adoption: Surrogacy),* above n 50; and *Re G* (3 February 1993), above n 51.
[127] *Re X (A Child) (Surrogacy: Time Limit)* above n 69; and *A v P (Surrogacy: Parental Order: Death of Applicant)*, above n 72.

III. The Viability of Scherpe's Multiple Parentage Approach

Scherpe's multiple parentage approach presents an exciting proposal from a socio-legal perspective. His approach purports to reflect the changing nature of family relationships, which now exist in a variety of forms, as a result of the increased possibilities that assisted reproductive technology has offered.[128] In many ways, his proposal presents a solution for numerous issues surrounding surrogacy. It recognises the role of the surrogate mother, it supports a sustained relationship between the surrogate mother and the resulting child, and it provides legal certainty by assigning each involved individual with a parental position.

Scherpe's approach is incredibly valuable, as it looks towards a legal future that closely reflects our futuristic concepts of family. Despite this, it may be challenging to integrate his model into New Zealand's current legal framework, as it remains to be in a very embryonic stage. Such radical reform so soon may be too difficult for many people to become accustomed to, especially given the limited nature in which our law currently addresses surrogacy. It may be overly optimistic to suggest that legislative reform should adopt this approach of distinguishing between levels of parentage. In the future, once remedial changes have been made to the urgent issues facing our inadequate surrogacy laws, then the Government might consider implementing such an approach. However, the most immediate required change is the adoption of a mechanism for transferring legal parentage in surrogacy arrangements. Following this, New Zealand could later refine and amend the legislation to incorporate Scherpe's socio-legal perspective.

IV. The Empirical and Social Science Research Evidence

Research into the experiences of surrogates and commissioning families, and children's perceptions of the family in New Zealand, provide insight into the lived realities of those who the laws directly affect. We need to ensure that we achieve the best outcomes possible for the surrogate, the commissioning parents and the resulting child and evidently, their views must be considered when enacting legislation. Children in New Zealand recognise a variety of different familial relationships as part of their immediate family, demonstrating that two

[128] Scherpe, above n 10 at 358.

married parents are no longer the norm.[129] Additionally, empirical research into the lived realities of surrogates and commissioning families, conducted in the United Kingdom and Canada, demonstrate that in the majority of surrogacy arrangements, the surrogates remain in close contact with the families. Those who do remain in contact reported positive, sustained relationships, from the perspective of both the surrogate and the resulting child.[130] The research failed to show support for the premise that there were negative consequences of sustained relationships, and children who were aware of the circumstances surrounding their birth at a young age had beneficial relationships as a result.[131] Surrogate mothers also did not appear to view the child as their own; rather, their act simply had the purpose of positively impacting other people's lives.[132]

This research indicating the benefits of sustained positive relationships persisting after the surrogacy arrangement provides support for Scherpe's multiple parentage approach.[133] The idea that children benefit from knowing about the surrogacy from a young age also supports the inclusion of the surrogate in the child's life. Thus, the research endorses introducing elements of socio-legal approaches into our legal framework in the future, following addressing the urgent need for a more workable parenthood framework.

The fact that surrogates generally report not feeling connected to the child as if it were their own supports the use of a mechanism which transfers legal parentage from the surrogate to the commissioning parents in a way that is not onerous or burdensome. However, the mechanism must also be careful not to marginalise the role of the surrogate mother and to give effect to the best interests of the child.

V. Statutory Reform of a Surrogacy-specific Transferal of Legal Parentage

I recommend that a surrogacy-specific transferal of legal parentage be enacted into New Zealand's legislation by amending the Status of Children Act 1969 to include these new sections.[134] This mechanism ought to transfer legal parenthood of a child resulting from a

[129] Anyan and Pryor, above n 113.
[130] Jadva, above n 111.
[131] Imrie and Jadva, above n 108.
[132] Yee, Hemalal and Librach, above n 109.
[133] Scherpe, above n 10.
[134] Status of Children Act 1969.

gestational surrogacy arrangement from the surrogate to the commissioning parents. In turn, this would no longer require using the Adoption Act in surrogacy arrangements.[135] The pre-determined and unique nature of surrogacy warrants making this distinction and enacting laws which specifically concerns parenthood in surrogacy.

The exact components of the new law would need to be decided upon following extensive consultations by lawmakers, however, I recommend the inclusion of a process similar to the Law Commission's 2005 recommendation of an 'interim pre-birth order.'[136] The process should be revised as it was developed a number of years ago, although the determination of interim legal parental status prior to conception or birth remains to be the most balanced approach. For the Family Court to make an interim pre-birth order, certain requirements must be met which are akin to those recommended in the Law Commission's report.[137] By enforcing these specific requirements, this would afford proper protections to the intentions of all parties' involved, and provide certainty for the resulting child. The mechanism also ought to include a period of time whereby the surrogate can petition the court to contest the order. If a dispute arises, the matter ought to be determined by the Family Court according to the best interests of the child. As aforementioned, direction should be given to the court as to what exactly this entails, following consultations.[138] It is also crucial for the amended legislation to explicitly require Māori cultural viewpoints to inform any decisions made regarding these orders. Additionally, appropriate consideration of the principles of the Treaty of Waitangi should be required by the legislation, as careful contemplation of the treaty principles will ensure decisions are made according to the needs and culture of Māori.

VI. The Next Step

Reconsideration of surrogacy laws is not directly on the Government's current legislative agenda. To initiate change, a Cabinet Minister would need to petition the Ministry of Justice, and for a bill to be created as a result. Recommendations from the Law Commission have evidently had little effect, and therefore a much more proactive avenue would be through interest from within Parliament itself. However, the Law Commission could be asked by the

[135] Adoption Act 1955.
[136] Law Commission, above n 7 at 93.
[137] Law Commission, above n 7 at 93.
[138] See Chapter 6.2, p 45.

Minister of Justice to reconsider surrogacy again on their work programme. Alternatively, ACART could make recommendations to the Minister to review aspects of their guidelines, and this could trigger broader discussion on surrogacy regulation. It is clear that change needs to come from within Parliament itself, yet public appeals and demands for revision of our surrogacy laws may help to reorient the Government's legislative agenda.

Conclusion

Advances in assisted reproductive technology present the opportunity for couples who may not otherwise be able to start a family, to have a child of their own. These advancements are momentous and extremely beneficial for infertile families, as well as society as a whole. However, these developments complicate the legal regulation of arrangements such as surrogacy, especially regarding the allocation of legal parenthood.

A foundational characteristic of the law is that it needs to be responsive, and in this case, adapt to the new family paradigms enabled by surrogacy arrangements. The law also needs to be effective and produce the best outcomes for those it directly affects, namely the commissioning parents, the resulting child and the surrogate. The law is currently failing both of these requirements; outdated laws are inapplicable to new societal expectations, with arduous legal implications as a result. Many legal commentators and academics agree that the law surrounding surrogacy in New Zealand needs to be reworked. It has been stagnant for many years, despite numerous appeals for it to be changed. The law no longer reflects the lived realities of all families, which results in acrimonious legal and social issues, of detriment to both the adults involved and particularly the children.[139]

The Government does not appear to intend to review our entire approach to surrogacy. Therefore, the first significant step should be to remove the need to use the outdated Adoption Act and instead enact a surrogacy-specific mechanism for the transferal of legal parentage.[140] This gap in the legislation is the aspect of surrogacy law which most urgently needs addressing. It would allow for certainty and will give effect to the intentions of a surrogacy arrangement, by transferring parenthood from the surrogate to the commissioning parents soon after the birth of the child. Once this requisite change has been made, it is my hope that it will instigate broader discussion around the adequacy of our surrogacy laws in general, and the case will be made for further reform to occur as a result.

The number of surrogacy arrangements occurring is likely to increase as the use of assisted reproductive technology becomes more normalised and accessible. Making the transferal

[139] Scherpe, above n 10 at 344.
[140] Adoption Act 1955.

process easier and more efficient would have the added benefit of encouraging more women to offer their support as a surrogate. New Zealand is a country which prides itself on being innovative, ahead of the times, and accepting of all New Zealanders, no matter their differences or origins. Our law must reflect this vision, by making individuals feel that the law is accommodating of their circumstances, regardless of how they came to be. Family law should be a law for all families, not just those that conform to the traditional view of the 'two-parent' paradigm.

Bibliography

A Cases

1. New Zealand

Re G (3 February 1993) DC INV Adopt 6/92 Neal DCJ.

Re P (Adoption: Surrogacy) [1990] NZFLR 385.

2. United Kingdom

A v P (Surrogacy: Parental Order: Death of Applicant) [2011] EWHC 1738.

Re X (A Child) (Surrogacy: Time Limit) [2014] EWHC 3135 (Fam).

B Legislation and Secondary Legislation

1. New Zealand

Adoption Act 1955.

Advisory Committee on Assisted Reproductive Technology "Guidelines on Surrogacy involving Assisted Reproductive Procedures" (2013).

Care of Children Act 2004.

Human Assisted Reproductive Technology Act 2004.

Human Assisted Reproductive Technology Act Order 2005.

Status of Children Act 1969.

2. United Kingdom

Human Fertilisation and Embryology Act 2008.

C Treaties

Convention on the Rights of the Child 1577 UNTS 328 (opened for signature 20 November 1989, entered into force 2 September 1990).

European Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 221 (opened for signature 4 November 1950, entered into force 3 September 1953).

D Books and Chapters in Books

Sandra Coney and Anne Else *Protecting Our Future: The case for greater regulation of assisted reproductive technology* (Women's health Action Trust, Auckland, 1999).

Anatol Dutta "Surrogacy in Germany" in Jens Scherpe, Claire Fenton-Glynn and Terry Kaan *Eastern and Western Perspectives on Surrogacy* (1st ed, Intersentia, United Kingdom, 2019) at 209.

Claire Fenton-Glynn "Surrogacy in England and Wales" in Jens Scherpe, Claire Fenton-Glynn and Terry Kaan *Eastern and Western Perspectives on Surrogacy* (1st ed, Intersentia, United Kingdom, 2019) at 209.

Mark Henaghan and Bill Atkin *Family Law Policy in New Zealand* (5th ed, LexisNexis, Wellington, 2020).

Mary Keyes "Surrogacy in Australia" in Jens Scherpe, Claire Fenton-Glynn and Terry Kaan *Eastern and Western Perspectives on Surrogacy* (1st ed, Intersentia, United Kingdom, 2019) at 209.

Rhonda Powell and Annick Masselot *Perspectives on commercial surrogacy in New Zealand: ethics, law, policy and rights* (1st ed, Centre for Commercial & Corporate Law Inc., Cantebury, 2019).

Jacinta Ruru "Kua tutu te puehu, kia mau: Maori aspirations and family law policy" in Mark Henaghan and Bill Atkin *Family Law Policy in New Zealand* (5th ed, LexisNexis, Wellington, 2020).

Jens Scherpe, Claire Fenton-Glynn and Terry Kaan *Eastern and Western Perspectives on Surrogacy* (1st ed, Intersentia, United Kingdom, 2019).

Rhona Schuz "Surrogacy in Israel" in Jens Scherpe, Claire Fenton-Glynn and Terry Kaan *Eastern and Western Perspectives on Surrogacy* (1st ed, Intersentia, United Kingdom, 2019) at 209.

Deborah Wilson "Surrogacy in New Zealand" in Jens Scherpe, Claire Fenton-Glynn and Terry Kaan *Eastern and Western Perspectives on Surrogacy* (1st ed, Intersentia, United Kingdom, 2019).

E Secondary Materials

Office of the Children's Commissioner and Oranga Tamariki *What Makes a Good Life? Children and Young People's Views on Wellbeing* (Office of the Children's Commissioner and Oranga Tamariki, Wellington, 2019).

F Journal Articles

Lynley Anderson, Jeanne Snelling and Huia Tomlins-Jahnke "The practice of surrogacy in New Zealand" (2012) 52 Aust N Z J Obstet Gyanecol 253.

Stacey Anyan and Jan Pryor "What is in a family? Adolescent perceptions" (2002) 16 Children & Society 306.

Susan Imrie and Vasanti Jadva "The long-term experiences of surrogates: relationships and contact with surrogacy families in genetic and gestational surrogacy arrangements" (2014) 29 Reproductive BioMedicine Online 424.

Vasanti Jadva "Postdelivery adjustment of gestational carriers, intended parents, and their children" (2020) 113 Fertility and Sterility 903.

Jens Scherpe "Breaking the existing paradigms of the parent-child relationship" in Gilian Douglas, Mervyn Murch and Victoria Stephens *International and National Perspectives on Child and Family Law: Essays in Honour of Nigel Lowe* (1st ed, Intersentia, United Kingdom, 2020).

Rhonda Shaw "Should surrogate pregnancy arrangements be enforceable in Aotearoa New Zealand?" (2020) 16 *Policy Quarterly* 18.

Samantha Yee, Shilini Hemalal and Clifford L Librach '"Not my child to give away' A qualitative analysis of gestational surrogates' experiences" (2020) 33 Women Birth 256.

G Government Publications

1. New Zealand

Law Commission *New Issues in Legal Parenthood* (NZLC R88, 2005).

Law Commission *Relationships and Families in Contemporary New Zealand* (NZLC SP22, 2017).

Social Policy Evaluation and Research Unity and Ministry of Social Development *Families and Whānau Status Report* (Ministry of Social Development, Wellington, 2018).

Social Policy Evaluation and Research Unity *The Wellbeing of New Zealand Families and Whānau: Demographic Underpinnings* (Social Policy Evaluation and Research Unity, Wellington, 2018).

2. United Kingdom

Law Commission and Scottish Law Commission *Building Families through Surrogacy: A New Law* (consultation paper 244 of the Law Commission and discussion paper 167 of the Scottish Law Commission, 2019).

H Internet Materials

Children's Commissioner "Elements of child wellbeing" (2020). <www.occ.org.nz/wellbeing/elements-of-child-wellbeing>

Fertility Associates "Becoming a Surrogate'" (2020). <www.fertilityassociates.co.nz/becoming-a-donor/become-a-surrogate>

Fertility Associates "Donor options and surrogacy" (2020). <www.fertilityassociates.co.nz/treatment-options/donor-options-and-surrogacy/#surrogacy>

New Zealand Parliament "Proposed members' bills" (2020). <www.parliament.nz/en/pb/bills-and-laws/proposed-members-bills>

Oranga Tamariki, "Adopting a child born via surrogacy*"* (2020). <www.orangatamariki.govt.nz/adoption/surrogacy>

Statistics New Zealand "Live births by nuptiality (Māori and total population) (annual-Dec)" (2017). <www.stats.govt.nz>