"ARE YOU MY MOTHER?"

A More Complicated Question than Distinguishing Birds from Barnyard Animals: The Determination of Legal Parentage in Surrogacy Arrangements in New Zealand

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ABBREVIATIONS

ACART – Advisory Committee on Assisted Reproductive Technology

CYF – Child, Youth and Family

CoCA – Care of Children Act 2004

ECART – Ethics Committee on Assisted Reproductive Technology

HART Act – Human Assisted Reproductive Technology Act 2004

HFEA - Human Fertilisation and Embryology Act 2008 (UK)

SoCA – Status of Children Act 1969

SoCAA – Status of Children Amendment Act 2004

UPA – Uniform Parentage Act 1975 (California)

“Biology is the least of what makes someone a mother.”
Oprah Winfrey

Introduction

Surrogacy is the oldest form of assisted reproductive technology.[1] However, it has for the most part been neglected by modern New Zealand law.[2] Crucially, so too has the idea of determining the legal parentage of children born via surrogacy. It is the parentage, and in particular the maternity, of a child born pursuant to a surrogacy arrangement that will be the focus of this dissertation.

The Human Assisted Reproductive Technology Act 2004 ("HART Act") regulates the use of assisted reproductive procedures in New Zealand. It does not prohibit surrogacy, but nor does it determine parentage. The HART Act is simply a regulatory framework to determine when and under what circumstances assisted reproductive procedures can be carried out.

Surrogacy is an intended pregnancy, with a prior agreement that the birth mother is neither the intended, nor desired parent, and will not be the legal parent of the child. The HART Act defines a surrogacy agreement as "an arrangement under which a woman agrees to become pregnant for the purpose of surrendering custody of a child born as a result of the pregnancy."[3] Despite the explicit purpose of any surrogacy being for the commissioning parents to ultimately parent and raise the child, the law does not give effect to its own defined purpose of surrogacy.

The parentage of children born via surrogacy arrangements in New Zealand is simple, but ineffective. The Merriam Webster dictionary defines "parent" as "one that begets or brings forth offspring, or a person who brings up and cares for another".[4] Contrary to this definition, the Status of Children Act 1969 ("SoCA"), which was amended in 2004 to address parentage issues raised by the HART Act, deems the surrogate mother to be the legal mother of the resulting child, regardless of any genetic link that may or may not exist between the

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[1] A childless couple using a surrogate mother to bear children is as old as the Bible story of Abraham and Sarah in Genesis:16

[2] Both the Care of Children Bill 2003 and Human Assisted Reproductive Technology Bill 1996 select committee reports are silent on the effects of the provisions on surrogacy, and more importantly the parentage of surrogacy (Care of Children Bill 2003 (54-2) (select committee report); Human Assisted Reproductive Technology Bill 1996 (195-2) (select committee report)). Surrogacy was not once mentioned during the debates of the Care of Children Bill and Status of Children Amendment Bill ((24 June 2003) 609 NZPD 6539; (26 June 2003) 609 NZPD 6668; (1 July 2003) 609 NZPD 6711; (21 October 2004) 621 NZPD 16415; (2 November 2004) 621 NZPD 16464; (2 November 2004) 621 NZPD 16467; (4 November 2004) 621 NZPD 16675; (2 November 2004) 621 NZPD 16627; (9 November 2004) 621 NZPD 16715).

[3] HART Act 2004, s 5

[4] *Merriam-Webster Dictionary* (online ed, Merriam-Webster Incorporated, 2015, <www.merriam-webster.com>)

commissioning parents and the child, and the intention of the parties that the commissioning parents are the parents of the child.[5]

In any surrogacy arrangement, there are three different genetic links that can exist between the commissioning parents and the resulting child:

i. a full genetic link, where the commissioning parents' sperm and ovum are used;
ii. a partial genetic link, where one commissioning parent's gametes are used in conjunction with and donor gametes (this includes the possibility of the surrogate's ovum); and
iii. no genetic link between the commissioning parents and the child, where only third-party donor gametes (including that of the surrogate) are used to create an embryo.

Given that assisted reproductive technology is becoming more prominent in society, it has been necessary for many jurisdictions to put in place laws to regulate these activities.[6] The determinative factor of parentage differs between jurisdictions, with some finding genetics crucial for a finding of parentage, and others giving effect to the intention of the parties. The United Kingdom, California, and all seven of the Australian jurisdictions have addressed surrogacy via their legislation or case law. The effect of this is that commissioning parents have at least some claim to parentage in these jurisdictions, in contrast to New Zealand where it is deemed that the commissioning parents to have no such claim.

As a result of the above, the question this dissertation will answer is whether the commissioning parents should be recognised as the legal parents of the child born via surrogacy *upon* birth, and whether this recognition should be absolute, or contingent on the existence of a genetic link between the parties. To determine whether or not the commissioning parents should be prima facie recognised as the legal parents of the child requires an analysis of what it means to be a parent.

This dissertation will assess the current New Zealand position, the rationale for it and any perceived shortcomings of the legislative framework in Chapter One. Chapter Two will be an international analysis of parentage in surrogacy situations, focusing particularly on California. This will provide a useful insight into how surrogacy *could* be dealt with by our courts. Chapter Three contains an analysis of the different potential factors that can give rise

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[5] SoCA 1969, s 17. Section 17 states that a woman who becomes pregnant as a result of an assisted human reproduction procedure, even where the ovum or embryo used for the procedure was produced or derived from an ovum produced by another woman, will be for all purposes the mother of any child of the pregnancy.

[6] See Appendix 2 for an outline of the number of domestic surrogacy applications received by the relevant ethical committee since 1997. This information is only recent to 2012, as this is the most recent annual report issued by either ACART or ECART. This information shows a generally increasing trend in the number of surrogacy applications, although the number of "live births" that result from these surrogacy arrangements is relatively constant.

to a finding of parentage generally, and how these principles of parentage apply to the parties to a surrogacy arrangement. The final chapter, Chapter Four, suggests that the SoCA be amended to give effect to the intention of the parties, recognising the commissioning parents as the presumptive legal parents of the child, regardless of a genetic link. This is the antithetical viewpoint to that taken by the current law. This amendment would bring the parentage of children born via surrogacy in line with the parentage of children born via other assisted reproductive procedures under the SoCA. For such a parentage rule to apply, the parent-child relationship must be vested strongly enough in something other than the gestational relationship to negate the existence of a relationship between the birth mother and the child.

Chapter I: The Current New Zealand Position

A The Current Framework

Surrogacy is a way for a couple or individual who cannot carry a baby to term to have a child, and to be involved in the pregnancy process. Surrogacy can be undertaken for a range of reasons. Typically, these reasons are medical in nature, but they can also be social.[7] Further, a surrogacy arrangement can be entered into either domestically or internationally, and can be an altruistic or commercial arrangement.[8] The legal and ethical repercussions of surrogacy are vast; thus social, international and commercial surrogacy are beyond the scope of this discussion – this dissertation will focus solely on non-commercial surrogacy in New Zealand where the commissioning parents are unable to carry the pregnancy to term.

1 The HART Act

The HART Act generally regulates assisted reproduction in New Zealand. Any decision made under or pursuant to the HART Act is to promote the principles of the Act. Such principles include the health and wellbeing of the child being born as a result of a procedure under the Act, which is an *important* consideration, and a consideration of the health and wellbeing of the women involved, be they the commissioning mother, surrogate mother, or gamete donor.[9]

The purposes of the HART Act include securing the benefits of assisted reproductive procedures and established procedures for individuals and society in general, and providing a robust and flexible framework for regulating and guiding the performance of assisted reproductive procedures.[10] The regulation, or lack thereof, of surrogacy in New Zealand

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[7] Social surrogacy is not illegal per se, but when approving any surrogacy arrangement, ECART must be satisfied that the surrogacy is "not for reasons of personal or social convenience" (Advisory Committee on Assisted Reproductive Technology ("ACART") *Guidelines on Surrogacy involving Assisted Reproductive Procedures issued to Ethics Committee on Assisted Reproductive Technology* ("ECART") (12 December 2013)). Arguably social surrogacy could in fact occur, provided the commissioning mother does not require that she is also the genetic mother – the surrogate could be inseminated with the commissioning father's sperm and carry the child to term. This would be an established procedure. Whilst the commissioning mother would not be recognised as the legal mother of the child and thus would have to complete an adoption, by operation of s 17 SoCA , the lack of ECART approval would not disadvantage the commissioning mother's claim to parentage. This permutation of surrogacy is no different to the situation that would occur if the commissioning mother did not have any viable ova and could not, as opposed to did not want to, carry the child.

[8] Commercial surrogacy is currently illegal in New Zealand per HART Act 2004, s 14(3)

[9] HART Act 2004, s 4 expressly states that the health and wellbeing of the child is "important". This reflects the general proposition of child welfare stated in s 5 of the Care of Children Act 2004 ("CoCA") that the best interests and welfare of a child is to be the *paramount* consideration when making decisions pursuant to the CoCA.

[10] HART Act 2004, s 3

means that any purported benefits of surrogacy are derogated from and limited by the legal principles that dictate how parentage of a child born via surrogacy is determined.

a) Framework

The HART Act classifies assisted reproductive technologies into three categories: established procedures, prohibited actions, and assisted reproductive procedures. The oversight that the Ethics Committee on Assisted Reproductive Technology ("ECART") and the Advisory Committee on Assisted Reproductive Technology ("ACART") will have over any given procedure depends on this classification.

Established procedures are those uses of assisted reproductive technology that have become so commonplace they can be carried out in a clinic without prior approval from ECART.[11] Examples of established procedures are the use of artificial insemination, donating gametes and in vitro fertilisation ("IVF").[12] Prohibited actions may not be carried out under any circumstances. Assisted reproductive procedures are all other activities that are not declared established or prohibited procedures, and may only be carried out with prior ECART approval.[13]

However, ECART is constrained by the guidelines and/or advice given by ACART: "ECART may not give approval unless it is satisfied that the activity proposed to be undertaken under the approval is consistent with the relevant guidelines or relevant advice issued or given by the advisory committee."[14] If the proposed activity is not covered by guidelines or advice issued by ACART, ECART must decline the application and refer the application to ACART.[15]

2 Surrogacy under the HART Act

Surrogacy is not a prohibited action, but the regulation of surrogacy depends upon the procedure required to facilitate the pregnancy and the genetic links that exist between the parties. The ACART Guidelines on Surrogacy state that where the embryo is created using both commissioning parents' gametes, or one commissioning parent's gametes and one third-party donor gametes, ECART approval is required.[16]

[11] Procedures are declared established procedures via an Order in Council recommended by the Minister following advice from ACART that a procedure should be declared an established procedure under s 6 of the HART Act.
[12] HART Order 2005, sched 1
[13] HART Act 2004, ss 8 and 16
[14] HART Act 2004, s 19(2)
[15] HART Act 2004, s 18(2)
[16]ACART *Guidelines on Surrogacy involving Assisted Reproductive Procedures issued to ECART* (12 December 2013)

a) Full genetic link

Where the commissioning parents have a full genetic link with the resulting child. The commissioning parents' gametes are used to create an embryo that is then transferred to the surrogate. This comes under the definition of an assisted reproductive procedure and thus requires the approval of ECART.[17] This is commonly referred to as "gestational" surrogacy: the surrogate does not have a genetic link to the child, so her role is purely gestational.

b) Partial genetic link

Another instance of gestational surrogacy is where only one commissioning parent has viable gametes, which are used in conjunction with donor gametes to create an embryo that is then transplanted into the surrogate. This will be an assisted reproductive procedure under the HART Act.[18] Accordingly, the Guidelines on Surrogacy will apply and must be satisfied before ECART will approve a surrogacy arrangement.

"Traditional" surrogacy is where the father's sperm is used to inseminate the surrogate. Under the HART Act, this would be seen as artificial insemination as opposed to surrogacy. Artificial insemination is an established procedure under the HART Act and does not require ethical approval.[19] Equally, where the surrogate's ovum and the commission father's sperm are fertilised in vitro and then implanted (IVF), this would be an established procedure.[20] This demonstrates the irregularities that arise under the current framework. A situation of traditional surrogacy can occur without any input from ECART. Despite the surrogate mother being genetically related to the resulting child, there are no pre-requisites to be met before the arrangement can be entered into, and there is no required ethical oversight of the procedure.

c) No genetic link

Where both donor ovum and sperm are used to create an embryo that is then implanted into the surrogate mother, no party to the surrogacy arrangement would have a genetic relationship with the resulting child. This would be an assisted reproductive procedure under the HART Act, however ECART cannot approve an application for surrogacy without a genetic link to one of the commissioning parents.[21]

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[17] HART Act 2004, s 5

[18] HART Act 2004, s 5

[19] HART Order 2005, sched pt 1

[20] HART Order 2005, sched pt 1

[21] The use of donor ovum and donor sperm is an assisted reproductive procedure to which a set of guidelines applies. Using such donated gametes in a surrogacy situation means that both the surrogacy guidelines and the donor gamete guidelines would apply. This means that ECART would have regard to the ACART *Guidelines*

If the surrogate were implanted with donor sperm, this would be classified as artificial insemination, and hence does not require any form of approval from ECART.

Finally, although inconsistent with many people's preconceived ideas of a surrogacy arrangement, it would be possible for no genetic link to exist between the commissioning parents and the resulting child if the surrogate and her partner had a child via coital procreation and agreed that the commissioning parents could adopt the child.

d) Surrogacy guidelines

For ECART to assess an application under the Guidelines, at least one commissioning parent must be related to the child, and the surrogate's ovum must not be used. The Guidelines further require that the parties have discussed the ongoing care of and contact with the child once born; that each party has received independent medical and legal advice; and that each party has received counselling in accordance with the current Fertility Services Standard.[22] ECART must further be satisfied that the proposed surrogacy is the best or only opportunity for an intending parent to be the genetic parent of a child; that the surrogacy is not for reasons of personal or social convenience; and the risks associated with a surrogacy for the adult parties and any resulting child are justified in the application (this includes the risk that any parties change their mind about parenting or relinquishing the resulting child).[23] In addition to the aforementioned mandatory requirements, ECART must also take into account relevant factors such as whether the surrogate has completed her family; the relationship of the parties; the parties understanding of the legal implications; and the accessibility and extent of the counselling.[24]

Whilst not all surrogacy arrangements require ECART approval, the fertility service provider will informally assess any surrogacy arrangement that involves the use of their services per

on the Creation and Use, for Reproductive Purposes, of an Embryo created from Donated Eggs in Conjunction with Donated Sperm issued to ECART (9 December 2010). However this advice states that where there is an application for a surrogacy agreement, the guidelines on donated sperm and ovum do not apply. Hence under the Surrogacy Guidelines, the application would be rejected as at least one of the commissioning parents needs to have a genetic link to the resulting child.

[22] ACART *Guidelines on Surrogacy involving Assisted Reproductive Procedures the ECART* (12 December 2013) at 2(a)(i)-(vi)

[23] Reasons that surrogacy is the best or only opportunity to be a genetic parent include, for example, that an intending parent is: unable to gestate a pregnancy; unable to conceive for medical reasons; unlikely to survive a pregnancy or birth; have her physical or psychological health and wellbeing significantly affected by a pregnancy or birth; or likely to conceive a child who would be significantly negatively impacted by the pregnancy or birth. ACART *Guidelines on Surrogacy involving Assisted Reproductive the ECART* (12 December 2013) at 2(b)(i)

[24] ACART *Guidelines on Surrogacy involving Assisted Reproductive Procedures issued the ECART* (12 December 2013) at 2

the Guidelines.[25] The fertility service provider or clinic will apply to ECART for an "opinion" so that the clinic is expressly permitted to carry out the requisite procedures, even if it is declared an established procedure under the Act.[26] This does not constitute a formal approval, as ECART does not have the jurisdiction to give approval of established procedures. Should commissioning parents want to avoid their arrangement being assessed by ECART, the surrogate could be artificially inseminated using the commissioning father's sperm "in the community".[27]

B The Legal Effect of Surrogacy

Currently, the law does not recognise any parental rights of the commissioning parents until and unless a formal adoption process is completed. The SoCA deems parentage to vest in the surrogate, even though this is against the intentions of the parties to the surrogacy. Section 17 of SoCA states: [28]

> 17 Woman who becomes pregnant is mother even though ovum is donated by another woman
>
> 1) This section applies to the following situation:
>   a. a woman (woman A) becomes pregnant as a result of an AHR procedure:
>   b. the ovum or embryo used for the procedure was produced by or derived from an ovum produced by another woman (woman B).
> 2) In that situation, woman A is, for all purposes, the mother of any child of the pregnancy.

The SoCA also deems the partner of the birth mother to be the parent of the child, not because of any biological element of parentage, but because the partner's consent to a procedure is seen as equating to an intention to act as parent to the resulting child:[29]

> 18 When woman's non-donor partner is parent, and non-partner semen donor or ovum donor is not parent
>
> 1) This section applies to the following situation:

[25] Interview with Fertility Associates, National Branch (Lucy Clifford, Dunedin, 26 September 2016)
[26] Interview with Fertility Associates, National Branch (Lucy Clifford, Dunedin, 26 September 2016); HART Act 2004, s 28(1)(e)
[27] Either via coital reproduction or via home insemination, by for example, using a turkey baster to inseminate the surrogate with the commissioning father's sperm.
[28] SoCA 1969, s 17
[29] SoCA 1969, s 18

a. a partnered woman (woman A) becomes pregnant as a result of an AHR procedure:
b. the semen (or part of the semen) used for the procedure was produced by a man who is not woman A's partner or, as the case requires, the ovum or embryo used for the procedure was produced by, or derived from an ovum produced by, a woman who is not woman A's partner:
c. woman A has undergone the procedure with her partner's consent.

2) In that situation, woman A's partner is, for all purposes, a parent of any child of the pregnancy.

In all instances of surrogacy in New Zealand, regardless of the genetic link between the commissioning parents and the child, the commissioning parents *must* adopt the child to become the legally recognised parents. The SoCA is resolute: the birth mother is the parent of the child, and, further, her partner is the parent of the child. The birth mother (and her partner) decide if the child is to be adopted by the commissioning parents, and by virtue of this power of consent, they can decide to keep the child even if the child has no genetic link to them.[30] The surrogate and her partner, as the legal parents of the child, carry all the responsibilities – financial, legal and social – for the child. They decide the name of the child, and it is their names that go on the birth certificate as the parents of the child. The child is their child in all respects and for all purposes.

The current law was amended to reflect the intentions of parties using fertility services. However, it does not reflect the intentions of the parties to a surrogacy arrangement – that the relationship between the surrogate and the commissioning parents was entered into in agreement that the child would be the legal child of the commissioning parents.[31]

1 Consequences for the child

If the surrogate and her partner retain legal parentage of the resulting child, they could be liable for child support. Child support may be sought in respect of a qualifying child from any person who is a "parent" of the child.[32] The surrogate and her partner would be parents under the Child Support Act 1991 and therefore eligible to pay child support.[33] Understandably, the

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[30] Adoption Act 1955, s 7(2)(a)

[31] The SoCA was amended in 2004 to reflect the enactment of the HART Act. Part 2 of the Act, which contains s 17, was enacted to codify the parentage of children born via assisted reproductive procedures. For the most part, it gives effect to the intention of the parties i.e. that donors have no parental rights to resulting children, however this parentage provision has had the opposite effect for surrogacy situations.

[32] Child Support Act 1991, s 6

[33] Child Support Act 1991, s 7

surrogate parents paying the commissioning parents to raise the resulting child would not be a result envisaged by the surrogacy arrangement.

The surrogate mother and her partner could retain legal parentage of the child, with the commissioning parents acting as the social parents of the child via a quasi-parental agreement. In this instance, the surrogate mother as the legal mother would retain the right to give the child up for adoption.[34] This could result in a highly anomalous situation in which someone who was not a party to the surrogacy arrangement obtains legal parentage of the child.

Further, if the birth parents were the legal parents of the child, the child could have a claim to the birth parents' estate, but no claim to the commissioning parents' estate if provision was not made for them in the commissioning parents' will. Their claim could be diminished even if provision had been made for them in the commissioning parents' will. If one of the surrogate parents died intestate, the resulting child as their legally recognised child would be entitled to succeed under the intestacy rules as a child of the deceased.[35] The resulting child would also have a claim under the Family Protection Act 1955 to enforce the deceased surrogate's duty to make "adequate provision for the proper maintenance and support" of the child as an eligible family member.[36] The Court of Appeal held that support, within a deceased parent's duty, was wider than the term "maintenance", and accordingly moral and ethical considerations are to be taken into account.[37] Therefore if the surrogate parents maintained legal parentage, the child would be able to bring a claim to the Court for an entitlement under the estate of the surrogate parents. The child would not be an eligible claimant of the commissioning parents' estate under the Family Protection Act 1955.

As a result of the above, to confer anything less than legal parentage to the commissioning parents would not only disregard the parties' intention, but could result in the commissioning parents having no rights in respect of the child, and vice versa.

C Adoption

[34] The Adoption Act 1955, s 3 confers on parents the power to make adoption orders in respect of their child, either jointly or individually.

[35] Nicky Richardson *Nevill's Law of Trusts, Wills and Administration* (11th ed, LexisNexis, Wellington, 2013) at 503

[36] *Banks v Goodfellow* [1861-73] All ER Rep 47. Section 3 of the Family Protection Act 1955 states those eligible to apply for a provision out of the estate of any deceased person, including children of the deceased being both natural and adoptive children.

[37] *Williams v Aucutt* [2000] 2 NZLR 479 (CA) at [52]

The only way for the commissioning parents of a child born to a surrogate mother to be recognised as the parents of that child is by legally adopting the child. The effect of an adoption order in favour of the commissioning parents is that: [38]

> The adopted child shall be deemed to become the child of the adoptive parent, and the adoptive parent shall be deemed to become the parent of the child.
>
> The adopted child shall be deemed to cease to be the child of his existing parents (whether his natural parents or his adoptive parents under any previous adoption), and the existing parents of the adopted child shall be deemed to cease to be his parents.

The adoption process is discretionary, with the Court having the final say as to whether or not an adoption order will be made: there is no guarantee that the commissioning parents will be able to adopt the child once it is born. This is in contrast to the automatic determination of legal parentage on birth. For commissioning parents, this can demonstrate a legal fiction with very odd results – their genetic child is automatically deemed to be the legal child of someone else, and they have to apply to be recognised as their child's parents.

1 The general adoption process

The commissioning parents must meet with Child, Youth and Family ("CYF") to initiate the adoption process before applying to ECART for approval for the surrogacy arrangement.[39] Assessment for the adoption approval must be completed prior to conception.[40] However, the commissioning parents do not have to go through the full process that is usually required of adoptive parents, because the commissioning parents' reason for adopting a child is "very different" to that of typical adoptive parents.[41] There is no requirement for the commissioning parents to go through the education and preparation courses that are normally required of adoptive parents by CYF. [42] This is because their motivations are different – they want to be legally recognised as the parent of "their" child, as opposed to wanting to give a child a better home.[43]

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[38] Adoption Act 1955, s 16(2); Adoption Act 1955, s 16(3)

[39] The Guidelines on Surrogacy require 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". Meeting with CYF to initiate the adoption process evidences this requirement.

[40] "Adopting a step or surrogate child" Child, Youth and Family <http://www.cyf.govt.nz/>

[41] Interview with Sharyn Titchener, Child, Youth and Family (Lucy Clifford, Dunedin, 5 October 2016)

[42] "Adopting a step or surrogate child" Child, Youth and Family <http://www.cyf.govt.nz/>. This is so that the social worker report in favour of the adoption can be prepared for the Court.

[43] Interview with Sharyn Titchener, Child, Youth and Family (Lucy Clifford, Dunedin, 5 October 2016). Sharyn said that she would be "uncomfortable" requiring commissioning parents to complete these courses, because they are already prepared to be parents, and the "hard cases" that arise in the adoption context – for example attachment issues or adoption of a disabled child – either are not relevant for their situation, or have already been addressed through the ECART process.

The Adoption Act requires that no less than 10 days after birth, the birth mother gives her consent to the adoption.[44] Provided that prior approval has been given by a social worker, the commissioning parents may take custody of the child before formal consent to the adoption is given.[45] In every instance of adoption, including the adoption of a child born via surrogacy, the birth mother has every right to change her mind and keep the child in this 10-day window.[46] This rule is well suited to situations of unwanted pregnancy, to allow the birth mother to fully assess her decision to give up her child, but is not appropriate where the pregnancy was undertaken for the purpose of a surrogacy arrangement.

An interim order of adoption can be granted as soon as 10 days post-partum.[47] Typically, the final adoption order is then made six months after the interim order, and at this time the commissioning parents become the legal parents of the child.[48] Judge Callinicos cited a number of reasons for this presumptive two-stage process, including that it provides the birth parent(s) a *limited* opportunity to halt the adoption process and prevent a final adoption order being made.[49]

Under s 5 of the Adoption Act, a final adoption order can be made at first instance if "special circumstances render it desirable".[50] The case law suggests that a surrogacy arrangement generally constitutes "special circumstances", so that the final order will be made 10 days post-partum rather than at six months.[51] The Family Court has concluded that the reasons for the typical six-month probationary period – including the opportunity for the birth mother to revoke her consent – do not apply to surrogacy situations.[52]

In any adoption, the birth parent(s) cannot withdraw their consent while an application to adopt the child is pending.[53] However, the Court can revoke an interim order on "such terms as it thinks fit".[54] The purpose of this provision is to give the adoptive parents "a measure of security which cannot be affected by afterthoughts on the part of the consenting parents".[55] If the birth parents no longer consent to the adoption, the Court would consider this as a factor

[44] Adoption Act 1955, s 7(7)
[45] Adoption Act 1955, s 6(1)(a)
[46] HART Act 2004, s 14
[47] Adoption Act 1955, s 15
[48] Adoption Act 1955, s 13(1)
[49] *DPH v Horton* [2014] NZFLR 843 (FC) at [148]-[150]
[50]Adoption Act 1955, s 5
[51] For example, *Re appln by Arnold (to adopt a child)* [2015] NZFC 3348, *Kirkpatrick v Laurich* [2015] NZFC 1053, and *Re Cobain* [2015] NZFC 1053 are all examples of this.
[52] Henaghan and others *Family Law in New Zealand* (17th ed, LexisNexis NZ Limited, Wellington, 2015) at 707
[53] Adoption Act 1955, s 9
[54] Adoption Act 1955, s 12
[55] *A v B* [1969] NZLR 543 (HC) at 536 per Roper J

in an application to revoke an interim order, but it would not be determinative.[56] For the Court to revoke the interim order, it must be in the best interests of the child.[57]

Essentially, the provision preventing the birth parents from withdrawing their consent to a pending application operates to give effect to the intention of the parties to the adoption. All else being equal, the birth mother will not be able to renege on the agreement that facilitates the parties' intention that the adoptive parents are to be the legal parents. Even in typical adoption scenarios where the birth mother has not entered into the pregnancy for the purpose of giving up the child, the intention of the parties is seen as a strong enough factor of parentage to nullify the birth mother's presumptive maternal claim after 10 days.

2 Application

Before an interim order in support of the adoption can be made, the conditions in s 11 of the Act must be met. The Court must be satisfied that the applicants are "fit and proper" people to parent the child, and that the adoption order is in the "best interests and welfare" of the child.[58] A social worker from CYF must write a report either in support of or against an adoption order being made.[59] Whilst the Court takes into account CYF's view of the adoption, it is still ultimately at the discretion of the Court to approve an application.[60]

a) Section 11(a): Fit and proper applicants

In *Application by JMP,* Judge Callaghan held that determining if an applicant is fit and proper includes consideration "to the type of person the applicants are, whether or not they are of good character, [the applicants'] ages, their means, their expectations for the child and their health."[61] In the context of surrogacy, the commissioning parents have typically demonstrated that they are fit and proper applicants by virtue of the ECART application process they have already engaged in.[62] As was stated in *Re SCR*, "…such commitment has

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[56] Henaghan and others *Butterworths Family Law in New Zealand* (16th ed, LexisNexis NZ Limited, Wellington, 2014) at 1169-1170

[57] Cases where the Courts have refused to revoke an interim order because of an application by the birth parents to withdraw their consent to the adoption include *A v B* [1969] NZLR 534 (HC); *B v G* [2002] 3 NZLR 534 (CA); *GMG v MAB* [2002] NZFLR 241 (HC); *CL v R* [1993] NZFLR 351 (FC); *B v M* [1999] NZFLR 1 (HC); *In the matter of A [adoption]* [1998] NZFLR 964 (FC); and *G v B* (2001) 21 FRNZ 1 (FC)

[58] Adoption Act 1955, s 11

[59] Adoption Act 1955, s 10

[60] Adoption Act 1955, s 3

[61] *Adoption application by JMP* [2000] NZFLR 247 (FC) at [253]

[62] *Re Reynard* [2014] NZFC 7652; *Re Kennedy* [2014] NZFC 2526; *Re SCR* [2012] NZFC 5466; *Re P (adoption: surrogacy)* [1990] NZFLR 385 (DC) and *An appln by A R S and P M C to adopt a child* FAM-2007-009-000745 3 October, 5 November 2007 are all examples of this proposition, yet the Judges do not give substantives reasons for finding that the applicants are fit and proper. When the surrogacy is subject to ECART approval, best practice requires that ECART consult CYF and ensure that the applicants meet the standard required of CYF applicants (Interview with Sharyn Titchener, Child, Youth and Family (Lucy

been demonstrated by the steps they took through the surrogacy arrangement to have [a] child."[63] Even where the parties have completed a surrogacy arrangement "in the community" without oversight from ECART, it is likely this requirement will still be met with relative ease.[64]

b) Section 11(b): Interests and welfare of the child

This requirement is to *promote* the child's welfare and best interests, not simply consider them.[65] Section 11(b) allows a broad consideration of the implications the adoption will have on the child.[66] In an adoption, one of the most important considerations is that the adoption will sever the child's legal relationship with its birth parents.[67] However, in a surrogacy situation, the purpose of the arrangement is that the commissioning parents will assume legal parentage of the child, to the exclusion of the surrogate.

By granting adoption orders in favour of the commissioning parents the Court is recognising the fact that the adoption will promote the welfare and interests of the child. The Court has found that it is in the best interests of the child to be legally recognised as a part of their *intended* family, who have gone to great lengths to bring the child into being.[68]

3 Inadequacy of the adoption regime as it applies to surrogacy

The aim of adoption is "to provide the child who cannot be cared for by his or her own parents with a permanent family."[69] The aim of surrogacy is inherently different: it is to

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Clifford, Dunedin, 5 October 2016)). If the surrogacy is approved by ECART, the commissioning parents will have been assessed against the s 11 Adoption Act 1955 requirements as well as the additional requirements of the Guidelines on Surrogacy.

[63] *Re SCR* [2012] NZFC 5466 at [45]

[64] In *Adoption application by K* (Family Court, Otahuhu, Adoption 048/1/91, 21 April 1997) the social worker stated that 95 per cent of the reports she prepared were in support of the proposed adoption.

[65] *Re Reynard* [2014] NZFC 7652 at [15]

[66] Ruth Ballantyne *Family Law* (2nd ed, LexisNexis, Wellington, 2014) at 190

[67] In *Application by ZF to adopt SA* [2006] NZFLR 337 (FC) a grandmother applied to adopt her grandchild, whose parents remained in Afghanistan with the child's siblings. It was seen that the effects of the adoption i.e. the severing of the legal relationship with the parents, would be too severe and the application was denied. Conversely, in *Re Jan* [2013] NZFC 3188 the adoption order was granted in favour of the child's biological mother and step-father, because she was equally attached to both parents, did not have a relationship with her biological father, and it was felt granting the order would give her a sense of security and belonging in her family (at [41] and [41], as cited in Ruth Ballantyne *Family Law* (2nd ed, LexisNexis, Wellington, 2014) at 193).

[68] General surrogacy cases all demonstrate this point. See *Re Reynard (adoption)* [2014] NZFC 7652; *Re Kennedy* [2014] NZFC 2526; *Re SCR* [2012] NZFC 5466; and *Re P (adoption: surrogacy)* [1990] NZFLR 385 (DC)

[69] United Nations Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally A/RES/41/85 (adopted on 3 December 1986) as cited in Patrick Mahony (ed) *Brookers Family Law – Child Law III: Adoption, Child Support, Parenthood, Reproduction* (looseleaf ed, Brookers) at PA 1.2.14

provide a couple who cannot carry a child to term with a child, and to include them in the gestation process insofar as possible. It is substituting the commissioning mother's ability to gestate for that of the surrogate's. Surrogacy and adoption are "very different ways of creating a family".[70]

The parties' intention is simple: the commissioning parents will be the legal parents of the child for all purposes, while any legal tie to the surrogate parent(s) is severed.[71] This is the effect of adoption. However, using adoption to transfer parentage to the commissioning parents may not be the best mechanism to recognise this intention. In an adoption scenario, the underlying rationale is improving the welfare and facilitating the best interests of the child. Surrogacy, on the other hand, is a method to give a couple or individual a child where they could not otherwise have one.[72] This is not to say that the best interests and welfare of the resulting child should not be a consideration in surrogacy situations, but to equate surrogacy with adoption means that the process dictating the allocation of parental rights does not adequately reflect the reality of the situation. In no other instance of a couple or individual having their own biological child would they have to go through a multi-step process to determine whether or not they are fit to be a parent. It is, as one writer said, like trying to fit a square peg into a round hole.[73]

The adoption process, as it applies to surrogate parents, can and usually will be completed 10 days after the birth of the child, with the commissioning parents having custody of the child essentially from birth.[74] The 10-day period only exists so that the birth mother has an opportunity to consider her decision to give up her child. However, the Family Court has found that the following six-month period before a final adoption order can be made does not apply to surrogacy.[75] This demonstrates that the Family Court has taken the view that a surrogate mother does not, or should not, need the opportunity to withdraw her consent that is typically facilitated by this six-month period.

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[70] Interview with Sharyn Titchener, Child, Youth and Family (Lucy Clifford, Dunedin, 5 October 2016)

[71] Adoption Act 1995, s 13(2)

[72] Advisory Committee on Assisted Reproductive Technology *Advice Given 16 December 2013 to the Ethics Committee on Assisted Reproductive Technology under the Human Assisted Reproductive Technology Act 2004: Applications that fall under more than one of the guidelines issues by the Advisory Committee on Assisted Reproductive Technology* (16 December 2013) state that ECART is not to approve a surrogacy unless there is a medical reason for it. Surrogacy is not permitted for "reasons of social or personal convenience."

[73] Steven L Miller, "Surrogate Parenthood and Adoption Statutes: Can a Square Peg Fit into a Round Hole?" 1988 22 Family Law Quarterly 199

[74] A social worker will place the child with the commissioning parents via "social worker placement approval". This is not codified in the Act, but is "best practice" employed by CYF. Interview with Sharyn Titchener, Child, Youth and Family (Lucy Clifford, Dunedin, 5 October 2016)

[75] Henaghan and others *Family Law in New Zealand* (17th ed, LexisNexis NZ Limited, Wellington, 2015) at 707

Simply, adoption rules are inappropriate for surrogacy arrangements.[76] Sarah Alawi has stated the issue in applying the adoption regime to surrogacy as: [77]

> The appeal behind surrogacy is supported by the idea that it is a more accurate response to infertility. Adoption, by definition, is the method by which the State attempts to provide a suitable home for unplanned children whose biological parents are unable or unwilling to care for them. The primary concern is the interests of the child and not that of the infertile couple (which is why adoptable children are not necessarily adopted by infertile couples). Surrogacy however, is conceptually different. It is focused on the needs of intended parents, especially in the context of gestational surrogacy. As self-interested beings, people attach importance to the ideal of having children who are genetically theirs. As the Judge in the decision of *Matter of Baby M* A 2d 1128 (NJ Super CH 1987) at 331 put it: 'the desire to reproduce blood lines to connect future generations through one's genes continues to exert a powerful and pervasive influence.'

Further, she highlighted a key issue in that "taken together, the current framework eliminates the courts' jurisdiction from considering which party's claim, if any, is to prevail in the event that the surrogate mother refuses to relinquish the resulting child."[78] The unfettered parental rights conferred on the birth mother by operation of the SoCA, coupled with the requirement of paternal consent to adoption, means that the surrogate mother has the final decision of with whom legal parentage should lie, even when the child is not genetically hers.

The adoption process applies to surrogacy not because it is appropriate, but because the law provides no other alternative. Surrogacy has been largely overlooked by Parliament. The Select Committee report on the HART Act only mentioned surrogacy in so far as criminalising commercial surrogacy.[79] The SoCA Amendment Act 2004 ("SoCAA"), which changed the rules to determine parentage in relation to children conceived through assisted reproductive technologies, did not address the implications the SoCAA would have for surrogacy. Metiria Turia of the Green Party made it clear that surrogacy had been overlooked by the legislature during the third reading and debate of the Bill, when she praised the Bill for recognising intended parents as legal parents in other instances of assisted reproduction:[80]

> Another example of the new provisions relates [sic] to assisted human reproduction to ensure that the child's parents, those who have accepted and sought responsibility for that child, have the consequent legal recognition.
>
> …

[76] Frances Joychild and Susan Hall "New issues in legal parenthood" [2005] NZLJ 132 at 133
[77] Sarah Alawi "Highlighting the need to revisit surrogacy laws in New Zealand" [2015] NZLJ 352 at 353
[78] Sarah Alawi "Highlighting the need to revisit surrogacy laws in New Zealand" [2015] NZLJ 352 at 354
[79] Human Assisted Reproductive Technology Bill 1996 (195-2) (select committee report)
[80] (9 November 2004) 621 NZPD 16715

> It is critical that those agreements can be enforced so that those who have actively chosen to become parents, who have made a lifetime commitment to a child, are assured of legal protection.
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> …
>
> So many children are born without thought or preplanning as to their care. So where that planning and commitment is made, surely it is in the best interests of the child, the family, and the community to have those agreements enforced.

In no way does the legislation or policies in regards to surrogacy support the above proposition. In fact, they do the exact opposite, failing to recognise the commissioning parents as the legal parents, and affording them no legal protection in their endeavour to become the legal parents of the child.

Not only are the intentions of the parties inherently different in a surrogacy situation to a typical adoption, so is the social policy that underpins the adoption. The consent requirement is premised on the idea that typically, the birth mother will give her child up for adoption only if she is unable or unwilling to care for the child.[81] If a surrogate does not consent to the adoption, this is likely due to the impact of emotive factors. The surrogate enters into the arrangement in anticipation of giving the child up, so the logic of consenting to adoption does not apply – the rationale of the adoption is not related to her ability or willingness to care for the child, but instead to the stated intention of the parties that the child is the child of the commissioning parents. Whilst the role of the birth mother is crucial and the fact of gestation should be given due consideration, in my opinion, such factors do not carry sufficient weight to deprive the commissioning parents of their presumed parentage.

The California Court of Appeals in *In re Marriage of Moschetta* reiterated this fundamental point: [82]

> Let us be blunt here: [the child] would never have been born if [the commissioning parents] had known [the surrogate] would change her mind. On this point, [the commissioning father] is certainly correct that surrogacy is fundamentally different than adoption, which contemplates a child already conceived.

D Alternatives to Adoption

As an alternative to adoption, commissioning parents could seek to have their legal relationship with the resulting child dictated by the Care of Children Act 2004 ("CoCA"). Under this Act, the commissioning parents could apply to the Court for guardianship and/or

[81] Sarah Alawi "Highlighting the need to revisit surrogacy laws in New Zealand" [2015] NZLJ 352 at 353

[82] *In re Marriage of Moschetta* 25 Cal App 4th 1218 (1998), 30 Cal Rptr 2d 893 at 903

parenting orders. This means that the surrogate mother and her partner (if a legally recognised parent of the child) would remain the legal parents of the resulting child. The legal relationship between the commissioning parents and the child would come to an end when the child turned 18.[83] This would, as aforementioned, impact the succession rights of the child.

For the commissioning parents to be awarded guardianship or day-to-day care of the child, it must be in the child's welfare and best interests. This is the paramount consideration of the CoCA.[84]

Whilst a guardianship order or a parenting order for day-to-day care of the child will enable the commissioning parents to perform the *functions* of a parent, they will not *be* the parent of the child. Neither of these alternatives to adoption confers legal parentage; they instead vest lesser rights of lesser duration with the commissioning parents.

E Conclusion

The current regime does not facilitate the intention of the parties. In 2004, Parliament legislated to effectuate the intention of parties to most assisted reproductive procedures. Unfortunately, surrogacy, and the impact the deeming provisions would have on surrogacy, was not considered. The SoCA should be amended so that the provisions relating to surrogacy align with the current deeming provision under the SoCA that gives effect to the intended parentage of most assisted reproductive procedures. However, that then begs the questions: At what point should the commissioning parents be recognised as the legal parents? How do we justify denying the parental claim of the surrogate? Is it the genetic link that should be determinative of the commissioning parents' rights, or their intention, or a combination of the two? Crucially, what makes a parent?

[83] CoCA 2004, ss 50 and 28, respectively
[84] CoCA 2004, s 4

Chapter II: The International Position

A An Overview of the Parentage Position in the United Kingdom and Australian

1 United Kingdom

Under the Surrogacy Arrangements Act 1985 (UK), altruistic surrogacy is permitted but surrogacy contracts are not enforceable against any person.[85] The Human Fertilisation and Embryology Act 2008 ("HFEA"), like the SoCA, codifies the maternity rule: the woman who gave birth to the child will be the legally recognised mother of the child.[86] As in New Zealand, the commissioning mother has no recognition as a parent, even if she is the child's genetic mother.[87]

Legal parentage must be transferred to the commissioning parents once the child is born via a parental order or adoption. To adopt, adoptive parents are required to be assessed by their local adoption agency before they are placed with a child.[88] The child then needs to live with them for 10 weeks before a court order can be made.[89] The formal adoption typically takes around six months.[90]

If at least one of the commissioning parents is related to the child, they can apply for a "parental order", which is a simpler process than adoption.[91] It is interesting to note that only couples may apply for a parental order. A parental order will be granted if:

i. the birth mother carried a child that was the result of an assisted reproductive procedure; and
ii. the commissioning parents are married, in a de facto relationship, or living as partners "in an enduring family relationship"; and
iii. the application is made within six months of birth; and
iv. the child is living with the applicants; and
v. the birth mother (and father, if applicable) agreed unconditionally to the making of the order no less than six weeks after birth; and
vi. that the court is satisfied that the arrangement is not commercial in nature.[92]

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[85] Surrogacy Arrangements Act 1985 (UK), s 1A
[86] Human Fertilisation and Embryology Act 2008 (UK) ("HFEA"), s 33
[87] "Surrogacy: legal rights of parents and surrogates" (23 September 2016) GOV.UK <www.gov.uk>
[88] "Child adoption" (22 July 2016) GOV.UK <www.gov.uk>
[89] Adoption and Children Act 2002 (UK), s 42(2)
[90] "Child adoption" (22 July 2016) GOV.UK <www.gov.uk>
[91] HFEA 2008, s 54(1)
[92] HFEA 2008, s 54

Whilst consent to the parental order cannot be given by the birth mother until six weeks after birth, it is presumed that the commissioning parents will take custody of the child before this time as evidenced by the requirement of a parental order that the child is living with the applicants. As for adoption, without the birth mother's consent, the order will not be made.[93] The effect of a parental order is the same as adoption: the child will be "treated in law as the child of the applicants".

If the commissioning parents have no genetic connection to the child, they must complete an adoption to be recognised as the legal parents of the child.[94] The paramount consideration is, as it is in New Zealand, the child's welfare.[95]

The United Kingdom has addressed parentage in surrogacy arrangements, but the conferral of parental rights does take a significant amount of time. The birth mother cannot give consent to either order until six weeks after birth.[96] In the case of adoption, the child must live with the adoptive parents for at least 10 weeks before an order is made.[97] So whilst the parentage orders purport to offer a streamlined process for commissioning parents in the United Kingdom, they do not, at least in their current form, offer an improvement to the current adoption regime in New Zealand.

2 Australia

The Australian jurisdictions each take a different approach to regulating surrogacy. However, each jurisdiction makes provision for the commissioning parents to be recognised as the legal parents via a "parentage order", provided the requisite circumstances are met. Similar to the United Kingdom, these parentage orders are simpler and less stringent than a formal adoption but give the same effect as adoption: the commissioning parents are recognised as the legal parents of the child, and the legal relationship that existed between the birth parents and the child is extinguished.[98] The typical requirements of the parentage orders in each jurisdiction are that they are in the best interests of the child; the birth parents unequivocally consent to the order; the parties have all received independent legal advice and counselling; and that the

[93] HFEA 2008, s 54(1)(c) requires that the consent section (s 54(6)) is complied with

[94] Surrogacy Arrangements Act 1985 (UK), s 1(3) states "an arrangement is a surrogacy if, were a woman to whom the arrangement relates to carry a child in pursuance of it, she would be a surrogate mother." This does not suggest that any genetic restrictions apply to surrogacy arrangements in the United Kingdom. However, s 54(1)(b) of the HFEA 2008 (UK) requires that "the gametes of at least one of the applicants were used to bring about the creation of the embryo". If the commission parents cannot obtain legal parentage via a parentage order, the only other means of transferring legal parentage is adoption.

[95] Adoption and Children Act 2002 (UK), s 1

[96] Adoption and Children Act 2002 (UK), ss 47(2) and 52(3)

[97] Adoption and Children Act 2002 (UK), s 42(2)

[98] Surrogacy Act 2008 (WA), s 26; Status of Children Act 1974 (VIC), s 26; Parentage Act 2004 (ACT), s 29; Surrogacy Act 2010 (NSW), s 39; Surrogacy Act 2010 (QL), s 39; Surrogacy Act 2012 (TAS), s 26; Family Relationships Act 1975 (SA), s 10HB(13)

agreement was not commercial in nature. There is also a mandatory period after the birth of the child before the birth mother can give legally effective consent to the order.[99]

Parentage orders in the Australian jurisdictions can be grouped into two categories. The first is where a parentage order is only possible if there is no genetic link between the surrogate and the child. Western Australia is in this category, with the most stringent requirements for a parentage order – the surrogate must not be related to the child, and the commissioning parents must have at least a partial genetic link to the child.[100] The Australian Capital Territory and Victoria are also in this category.[101] If the surrogate has a genetic link to the child, the commissioning parents can only obtain legal parentage through adoption.[102]

The second category is where the parentage order can be granted regardless of the genetic link between the surrogate and the child. Queensland, Tasmania and South Australia do not distinguish between applications for a parentage order based on the genetic link between the parties and the child.[103] New South Wales has the broadest provision in relation to parentage orders. The state allows a parentage order to be granted in regard to a child born of any surrogacy arrangement, regardless of the genetic link that exists between the commissioning parents and the child or the surrogate and the child, and can apply to surrogacy arrangements that were entered into pre- or post-conception.[104]

The key difference between these common law jurisdictions and New Zealand is that both the United Kingdom and the seven Australian states have addressed parentage of children born as a result of surrogacy arrangements specifically, recognising that the existence of a surrogacy arrangement is itself a justification for transferring parentage to the commissioning parents. This is in contrast to New Zealand, where it has been left to the courts to apply the out-dated adoption law to achieve the intended outcome.

Overall, our current adoption regime is a simpler means of transferring parentage than these surrogacy specific parentage orders. In New Zealand, the commissioning parents can be the

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[99] The shortest mandatory period after birth before consent can be given is 28 days, but this consent period differs between jurisdictions. In the United Kingdom, the commissioning parents cannot apply for a parentage order until six weeks after birth (s 54(7), Human Fertilisation and Embryology Act 2008). The commissioning parents can take custody of the child in the intervening period. In Australia, the time period varies between the states however an application cannot typically be made less than 4 weeks after birth, or after 6 months. The commissioning parents can take custody of the child in the intervening period. The time-frames of custody and consent are aligned with the adoption regime in each jurisdiction, so the process of the parental order is a means to streamline the conferring of legal parentage, as opposed streamlining the transferal of functional parentage to the commissioning parents.

[100] Surrogacy Act 2008 (WA), s 21(4)

[101] Parentage Act 2004 (ACT), s 24; Assisted Reproductive Treatment Act 2008 (VIC), s 40(1)(ab)

[102] The relevant legislation would therefore be the Adoption Act 1993 (ACT) and the Adoption Act 1984 (VIC), respectively.

[103] Surrogacy Act 2010 (QL); Surrogacy Act 2012 (TAS), s 16; Family Relationships Act 1975 (SA), s 10HB

[104] Surrogacy Act 2010 No 102 (NSW)

legally recognised parent of the child as early as 10 days after birth. In the United Kingdom and Australia, the process will take a minimum of four weeks.[105] That these comparable jurisdictions have addressed parentage, but have not developed procedures that would simplify New Zealand's current practice warrants looking at the antithetical Californian attitude to parentage.

B Surrogacy in California

Parentage in California follows a radically different approach. The state has not specifically legislated in regards to surrogacy. Instead, the courts have interpreted the existing legislation in light of surrogacy arrangements. The outcome is that in certain circumstances the commissioning parents will be the legally recognised parents of the child *upon* birth.

Surrogacy is prominent in California and has been since the 1990s, as the state is widely recognised as "surrogacy friendly".[106] California's only statute dealing with issues of parentage is the Uniform Parentage Act 1973 ("UPA"), which was drafted before issues of assisted reproductive technology came to the fore.[107]

"Pre-birth parentage orders" are authorised by the California Family Code § 7633, which states that an "action under this chapter may be brought before the birth of the child."[108] A pre-birth parentage order is a Court order that determines who the child's legal parents are from birth. In the context of surrogacy, a pre-birth parentage order stipulates the commissioning parents are the legal parents of the child on birth. The commissioning parents' names go directly on the birth certificate, and they will make any parental decisions relating to the child once it is born. A pre-birth order has the same effect as a formal adoption at a later stage – by recognising the commissioning parents as the legal parents at first instance, it extinguishes any potential parental claim of the surrogate.

The courts have framed the issue of parentage in regards to the genetic link between the surrogate and the resulting child – if the child is genetically related to her, then her claim to parentage will be irrefutable and she retains her capacity to refuse consent to the adoption by

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[105] The shortest mandatory period after birth before consent can be given is 28 days, but this consent period differs between jurisdictions. See above, n 98, for more discussion on this point.

[106] The first major surrogacy case in the United States was that of *Matter of Baby M* (1988) 109 N. J. 396, 537 A. 2d 1227 in 1988 in New Jersey. The first major California case was the 1993 case of *Johnson v Calvert* 851 P 2d 776 (Cal 1993)

[107] Uniform Parentage Act 1973 (USA) ("UPA"). California adopted the Act in 1975, the provisions of which can now be found in Division 12 of the California Family Code.

[108] California Family Code §§ 7600-7730 (1975) as cited in Steven Snyder and Mary Patricia Byrn "The Use of Prebirth Parentage Orders in Surrogacy Proceedings" (2005) 39 Family L Q 633

the commissioning parents.[109] If the surrogate is not genetically related to the child, the commissioning parents will have a claim to parentage via their genetic link (if it exists) and their intention, which they can assert against the surrogate.

1 Case law

a) *Johnson v Calvert*

The leading surrogacy case is *Johnson v Calvert*.[110] The case concerned a gestational surrogacy agreement where there was a full genetic link between the commissioning parents and resulting child. The surrogate mother was trying to assert her parental claim to the exclusion of the commissioning parents. Unlike New Zealand, the maternity section in the UPA is not absolute: [111]

> The parent and child relationship may be established as follows:
> (a) Between a child and the natural parent, it *may* be established by proof of having given birth to the child, or under this part.

Under that "part", the Act declares that a parental relationship may also be established through genetic evidence. Thus, the Supreme Court of California (the highest state court) had to determine whether the surrogate was the "natural" mother of the resulting child by virtue of her gestational role, or whether the commissioning mother, by virtue of her genetic link to the child was the natural mother.

As the commissioning parents had a full genetic link with the resulting child, the surrogate and the commissioning mother both had legally valid claims to parentage under the UPA:[112]

> Both women thus have adduced evidence of a mother and child relationship as contemplated by the Act. Yet for any child California law recognizes only one natural mother, despite advances in reproductive technology rendering a different outcome biologically possible.

Unlike the SoCA, the UPA, "was not motivated by the need to resolve surrogacy disputes, which were virtually unknown at the time the Act was adopted in 1975. Yet it facially applies to *any* parentage determination, including the rare case in which a child's maternity is in

[109] *Johnson v Calvert* 851 P 2d 776 (Cal 1993); *In re Marriage of Buzzanca* 16 Cal App 4th 1410 (1998), 72 Cal Rptr 2d 28; *In re Marriage of Moschetta* 25 Cal App 4th 1218 (1998), 30 Cal Rptr 2d 893

[110] *Johnson v Calvert* 851 P 2d 776 (Cal 1993)

[111] This section is currently codified in the California Family Code, § 7610. However, at the time of *Johnson v Calvert,* the relevant provision was California Civil Code, § 7003 subd (1), which implemented the UPA as Californian state law. The wording of the section has not changed.

[112] *Johnson v Calvert* 851 P 2d 776 (Cal 1993) at 781

issue."[113] One of the key differences between the Californian and New Zealand approach is that the relevant Californian statute does not mandate parentage, allowing the courts to have regard to multiple factors when deciding a parentage issue. Conversely, in New Zealand, the SoCA deems parentage to vest in the surrogate parent(s), and therefore the courts cannot allocate parentage to the commissioning parents without a formal adoption order.

The surrogate established legal parentage under § 7003 by giving birth to the child.[114] The commissioning mother also established legal parentage, via her genetic link to the child, as permitted by § 7015.[115] The factual basis of each woman's claim was clearly established, so the Court was required to make a "purely legal determination as between the two claimants."[116] Californian law only recognises one legal mother of a child, the Court had to determine a method by which to resolve this dispute.[117] Maternal ambiguity, arising from the use of artificial reproductive techniques, "is nowhere explicitly resolved in the Act."[118] This is in stark contrast to the SoCA, the purpose of which was to remove ambiguity of the parentage of children born via assisted reproductive procedures, and for the most part, adequately does so. It is only in relation to surrogacy that the SoCA does not give effect to the purpose and intention of the parties.

The Court decided by a 4:1 majority that parentage should be determined via the intention of the parties. The dissenting judge also supported the commissioning parents as the legal parents, but instead allocated parentage based on the best interests of the child.

(i) Majority decision

The majority of the Court in *Johnson* found the determinative factor of parentage to be the intention of the parties: but for the intention of the commissioning parents, the child would not exist. Whilst it is clear also that but for the actions of the surrogate, the child would not exist, the Court stressed that had the surrogate mother expressed an intention contrary to the commissioning parents', the surrogate would never have been implanted with the embryo:[119]

[113] *Johnson v Calvert* 851 P 2d 776 (Cal 1993) at 779
[114] *Johnson v Calvert* 851 P 2d 776 (Cal 1993) at 780
[115] *Johnson v Calvert* 851 P 2d 776 (Cal 1993) at 781. Section 7015 was the relevant provision of the UPA in the California Civil Code at the time of this decision. The relevant section is now § 7635.5 of the California Family Code.
[116] *Johnson v Calvert* 851 P 2d 776 (Cal 1993) at 781
[117] Under current Californian law, same sex couples can be recorded as the parents of a child, so it is now possible for a child to have two legal mothers. However, as in the *Johnson* case, a child can only have two parents. The commissioning father established parentage via his genetic connection to the child under the Act, so the law only permitted one other person to be recognised as the parent.
[118] *Johnson v Calvert* 851 P 2d 776 (Cal 1993) at 782
[119] *Johnson v Calvert* 851 P 2d 776 (Cal 1993) at 782

> No reason appears why [the surrogate's] later change of heart should vitiate the determination that [the commissioning mother] is the child's natural mother.
>
> …
>
> We conclude that although the Act recognizes both genetic consanguinity and giving birth as means of establishing a mother and child relationship, when the two means do not coincide in one woman, she who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law.

In support of their argument for giving effect to the parties' intention, the majority cites the writings of several legal commentators.[120] Professor Schultz argues, "Intentions that are voluntarily chosen, deliberate, express and bargained-for ought presumptively to determine legal parenthood."[121] As the dissenting judge in the case points out, whilst this statement has some familiarity to it, this familiarity lies in contract law and ensuring specific performance. However it is general knowledge that children are not commodities, and so cannot be "bargained for".

The majority rejected best interests of the child as the determinative factor, finding that such an approach "raises the repugnant spectre of governmental interference in matters implicating our most fundamental notions of privacy, and confuses concepts of parentage and custody."[122] They go on to say: [123]

> The implicit assumption in the dissent is that a recognition of the genetic intended mother as a natural mother may sometimes harm the child. This assumption overlooks California's dependency laws, which are designed to protect *all* children irrespective of the manner of birth or conception.

Even if best interests was to be a determinative factor, the majority concluded that this would support the commissioning parents: "…by voluntarily contracting away any rights to the child, the gestator has, in effect, conceded the best interests of the child are not with her."[124]

The majority further justified their reliance on intention by concluding that should the situation arise where no party wants to take responsibility for the child, "a rule recognizing the intending parents as the child's legal, natural parents should best promote certainty and

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[120] John Hill "What Does it Mean to be a 'Parent'? The Claims of Biology as the Basis for Parental Rights" (1991) 66 NYU L Rev 353; Majorie Schultz "Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality" [1990] Wis L Rev 297; Andrea Stumpf "Redefining Mother: A Legal Matrix For New Reproductive Technologies" (1986) 96 Yale LJ 187

[121] Majorie Schultz "Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality" [1990] Wis L Rev 297 at 323

[122] *Johnson v Calvert* 851 P 2d 776 (Cal 1993) at n 10

[123] *Johnson v Calvert* 851 P 2d 776 (Cal 1993) at n 10

[124] *Johnson v Calvert* 851 P 2d 776 (Cal 1993) at n 10

stability for the child."[125] Professor Schultz amalgamated these arguments, drawing parallels between the intention of the parties and the best interests of the child: the interests of the child are unlikely to run contrary to that of the commissioning parents who have gone to great lengths to bring them into being.[126]

The majority concluded:[127]

> A woman who enters into a gestational surrogacy agreement is not exercising her own right to make procreative choices; she is agreeing to provide a necessary and profoundly important service without (by definition) any expectation that she will raise the child as her own.

Per the intention of the parties, the majority found that "gestational surrogacy differs in crucial respects from adoption and so is not subject to the adoption statutes".[128]

(ii) Minority decision

Kennard J as the sole dissenting judge reached the same conclusion – that the commissioning parents should be the legal parents of the child – however she used the best interests of the child as the "tie breaker" between the competing parentage claims. Kennard J recognised the difficulties presented by parentage of surrogate children, but also "how much prospective parents are willing to endure to achieve biological parenthood."[129] Kennard J noted that the division of the female reproductive role points to three discrete aspects of motherhood: genetic, gestational and social.[130] The commissioning mother will always be the intended social mother, even if she does not have a genetic link to the child.

Kennard J took issue with unregulated surrogacy, and the rigidity of the outcome that would eventuate if intent were used to determine parentage.[131] However, in New Zealand, there can be no denying the rigidity of the current deeming provision.[132]

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[125] *Johnson v Calvert* 851 P 2d 776 (Cal 1993) at 783
[126] Majorie Schultz "Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality" [1990] Wis L Rev 297 at 397
[127] *Johnson v Calvert* 851 P 2d 776 (Cal 1993) at 787
[128] *Johnson v Calvert* 851 P 2d 776 (Cal 1993) at 784
[129] Harvard Law Review Association "Developments in the Law: Medical Technology and the Law" (1990) 103 Harv L Rev 1519 at 1539 as cited in *Johnson v Calvert* 851 P 2d 776 (Cal 1993) at 790
[130] Carmel Shalev, "Birth Power: The case for Surrogacy" Yale U Press 1989 at 115 as cited in *Johnson v Calvert* 851 P 2d 776 (Cal 1993) at 791
[131] *Johnson v Calvert* 851 P 2d 776 (Cal 1993) at 796
[132] SoCA 1969, s 17

Kennard J dismissed the intention of the parties as the basis for a finding of legal parentage, instead concluding that to recognise the commissioning parents as the legal parents of the child would facilitate the best interests of the child. Given that a determination of parentage is "deciding the fate of a child", Kennard J found the most appropriate area of law to resolve the dispute to be family law.[133] The allocation of parental rights affects the welfare of a child. So similarly, the relevant standard used to decide welfare issues – the best interests of the child – should be used to resolve any issues surrounding parentage. In determining the best interests of the child, "the intent of the genetic mother to procreate a child is certainly relevant to the question of the child's best interests; alone, however, it should not be dispositive."[134]

b) *In re Marriage of Moschetta*

In re Marriage of Moschetta was a case of traditional surrogacy.[135] The surrogate had a claim to parentage via her role in gestating the pregnancy and her genetic contribution, while the commissioning father had a genetic claim. The California Court of Appeal, following the *Johnson* decision, found that under the UPA the surrogate was "without a doubt, the natural parent of the child, as is the father."[136] The Court could not use the intention of the parties to determine parentage, as under the UPA, there was no ambiguity as to who should be the legally recognised mother: "the two usual means of showing maternity – genetics and birth – coincide in one woman."[137] In this instance, the Court took a narrow interpretation of natural parentage, finding that only biological parentage was sufficient to fall under the UPA. The Court was relying on the historical notion of parentage – gestation and genetics – to determine what is natural. However this ignores the developments in parentage as a result of assisted reproductive technologies; for example, in the same section of the UPA, a husband's consent to artificial insemination is sufficient to deem him to be the natural parent of the resulting child.[138] The Supreme Court of California in *Johnson* held that the natural parent of a child "simply refers to a mother who is not an adoptive mother."[139] In this regard, the Supreme Court was recognising that parentage is a variable concept, and a natural parent-child relationship can exist even where the typical notions of parentage – gestation and genetics – are not present.

[133] *Johnson v Calvert* 851 P 2d 776 (Cal 1993) at 799
[134] *Johnson v Calvert* 851 P 2d 776 (Cal 1993), at 800
[135] *In re Marriage of Moschetta* 25 Cal App 4th 1218 (1994)
[136] *In re Marriage of Moschetta* 25 Cal App 4th 1218 (1994) at 1219
[137] *Johnson v Calvert* 851 P 2d 776 (Cal 1993) at 782 as cited in *In re Marriage of Moschetta* 25 Cal App 4th 1218 (1994) at 1225
[138] California Civil Code § 7004 (1998). The relevant provision is now California Family Code § 7613
[139] *Johnson v Calvert* 851 P 2d 776 (Cal 1993) at n 9 of the majority decision. In *Johnson*, the Court stressed the difference between adoption and surrogacy as means of obtaining parentage, so strived to find the commissioning mother to be the natural mother under the Act so that she would not have to adopt the child to become the parent.

The Court was constrained by the UPAs reliance on birth origins as a means of determining parentage, and felt they did not have the jurisdiction to determine the matter with regard to factors outside of the Act. The Court recognised the disparity this created in light of the *Johnson* decision for commissioning mothers who were unable to contribute genetic material to the surrogacy:[140]

> While we affirm the judgment so far as it vests parental rights in the surrogate mother, we are not unmindful of the practical effect of our decision in light of *Johnson v Calvert.* Infertile couples who can afford the high-tech solution of in vitro fertilization and embryo implantation in another woman's womb can be reasonably assured of being judged the legal parents of the child, even if the surrogate reneges on her agreement. Couples who cannot afford in-vitro fertilization and embryo implantation, or who resort to traditional surrogacy because the female does not have eggs suitable for in vitro fertilization, have no assurance their intentions will be honoured in a court of law. For them and the child, biology is destiny.

c) *In re Marriage of Buzzanca*

In re Marriage of Buzzanca was a surrogacy case where there was no genetic link between the parties to the surrogacy arrangement and the child.[141] The issue of parentage came before the Court in proceedings to dissolve the commissioning parents' marriage. The commissioning mother wanted to establish herself as the legal mother of the child, to the exclusion of the commissioning father. The surrogate was not attempting to assert her parentage. The California Court of Appeals applied the statutory provision relating to artificial insemination to the commissioning parents to conclude that they were both the natural parents of the child under the UPA:[142]

> If a husband who consents to artificial insemination under section 7613 is "treated in law" as the father of the child by virtue of his consent, there is no reason the result should be any different in the case of a married couple who consent to in vitro fertilisation by unknown donors and subsequent implantation into a woman who is, as a surrogate, willing to carry the embryo to term for them. The statute is, after all, the clearest expression of past legislative intent when the legislature did contemplate a situation where a person who caused a child to come into being had no biological relationship to the child.

The Court recognised the legislation was not drafted to ascertain parentage of children born via surrogacy arrangements, but saw the intention of the parties as the determining factor of

[140] *In re Marriage of Moschetta* 25 Cal App 4th 1218 (1994) at 1235
[141] *In re Marriage of Buzzanca* 16 Cal App 4th 1410 (1998)
[142] *In re Marriage of Buzzanca* 16 Cal App 4th 1410 (1998) at 1418

parentage. To give effect to the parties' intention, they used the artificial insemination provisions to recognise the commissioning parents as the natural parents. The Court applied the *Johnson* intent test, finding that the commissioning mother's intentional act determined her to be the legal mother via the same rationale as a husband consenting to artificial insemination of his wife determines him to be the legal father. By operation of the artificial insemination provision and the general birth rule, both the surrogate and the commissioning mother would have valid statutory claims to parentage. However, following *Johnson v Calvert*, the intent of the parties would support the legal recognition of the commissioning mother over the surrogate.[143] The same rationale applied to the father – via the artificial insemination provisions he was a natural parent. If the surrogate had a partner who was also a natural parent under the Act, the intent of the parties would support the commissioning father being the legally recognised parent over the surrogate's partner.

Ultimately, California prioritises genetic parents over gestational parenthood, and the intention of the parties over both of these biological factors. However, because the UPA does not confer unfettered discretion onto the courts to determine issues of parentage, it is not always possible to recognise the commissioning parents as the legal parents, in accordance with their intention.

C Critique of the International Approach

Parentage in California is more favourable for commissioning parents than Australia, the United Kingdom or New Zealand. California does not automatically deem the birth mother to be the parent of a child. Its legislation is framed to allow other factors to determine natural parenthood *upon* birth rather than transferring parentage to the commissioning parents at some later stage. Whilst the Californian courts give effect to the intention of the parties wherever possible, the UPA still operates as a constraint to finding the commissioning parents (or more typically, the commissioning mother), to be a natural, and therefore legal, parent of the child in cases of traditional surrogacy. In such situations, the commissioning parent(s) have to apply to adopt the child, which requires the consent of the surrogate as the natural mother.

This means that where the commissioning mother, for whatever reason, enters into a traditional surrogacy agreement where the surrogate's ovum will be used to create an embryo, the commissioning parents will not be recognised as the legal parents upon birth. Given the emphasis the Californian courts have put on the intention of the parties that the commissioning parents will be the legal parents of the child, and that the best interests of the

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[143] *In re Marriage of Buzzanca* 16 Cal App 4th 1410 (1998) at 1421 citing *Johnson v Calvert* 851 P 2d 776 (Cal 1993)

child are facilitated by this being the case, that genetics are the determinative factor of parentage does not align with this position.

The emphasis placed on the genetic link between the commissioning parents and the child has allowed the parties to depart from gestational parenthood, and thereby give effect to the parties' intention in some circumstances. However, this current emphasis on the genetic link is misconstrued in light of typical donor laws. The donor laws in the Californian Family Code state that having a genetic link to a child does not equate with having a claim to legal parentage.[144] This is also the position of donors in New Zealand under the SoCA: they are deemed *not* to be the parent of a child created by their gametes. This suggests that genetics is not, and should not, be the determinative factor of parentage in situations of assisted reproductive procedures. Assisted reproductive procedures are a means for couples to have a child where they would not otherwise be able. So by their very nature, parents of children born via assisted reproductive procedures will not readily be able to demonstrate all the aspects of parenthood – genetic, gestational and social. Thus, the key element of parentage in assisted reproductive procedure situations is social parentage, so that despite someone helping the commissioning parents to facilitate the birth of "their" child by donating biological material, this should not be sufficient to vest parentage in that person.

Critics of surrogacy and of the commissioning parents being seen as the legal parents emphasise the importance of the gestation in regards to parentage.[145] They see this as the distinguishing factor between surrogacy and gametes donation. This supports the contention that genetics should not be determinative of parentage. However this argument is in and of itself unsupported by the international jurisdictions – where countries have addressed the issue of surrogacy, legal parentage is never determined by the fact of gestation.

The Court in *Johnson v Calvert* recognised that the maternity presumption, as codified in the UPA and the SoCA, "merely reflects the ancient dictum mater est quam [gestation] demonstrat (by gestation the mother is demonstrated)."[146] However, in a surrogacy context, the birth rule as a determination of parentage cannot, or at least should not, be readily applied to determine parentage: "the mother is in fact "uncertain" because biology and genetics are attached to two separate women who, traditionally, assumed one role."[147] The roles of

[144] California Family Code §§ 7613(b) and (c)

[145] John Hill "What Does it Mean to be a 'Parent'? The Claims of Biology as the Basis for Parental Rights" (1991) 66 NYU L Rev 353 at 358

[146] John Hill "What Does it Mean to be a 'Parent'? The Claims of Biology as the Basis for Parental Rights" (1991) 66 NYU L Rev 353 at 370 as cited in *Johnson v Calvert* 851 P 2d 776 (Cal 1993) at 782

[147] Sarah Alawi "Highlighting the need to revisit surrogacy laws in New Zealand" [2015] NZLJ 352 at 356

parentage can be further separated if we include social parentage as an element of any parent-child relationship.[148]

The Californian courts have had an opportunity to determine who the "natural" parents of a child are. Initially, the courts looked to the biological elements of parentage to determine who was the natural parent. However, in both *Johnson v Calvert* and *Buzzanca,* the ultimate determination of parentage was decided by referring to the intention of the parties.

In the United Kingdom and Australia, parentage is deemed to vest in the birth mother. However, the relevant Parliaments have addressed the specific transfer of parentage to the commissioning parents post-birth via parentage orders.[149] Whether a parentage order, as opposed to an adoption order, can be made in favour of the commissioning parents will usually depend upon the genetic link between the parties and the child. Parentage orders are, for each jurisdiction, a simpler means of transferring parentage than formal adoption. However, the transfer of parentage is still conditional on the birth mother's consent, and the temporal restrictions on when this consent can be given range from 28 days to six weeks.[150] This is significantly longer than the ten-day restriction on giving consent in New Zealand, at which point the Court can make a final adoption order.[151]

What is important here is that these international jurisdictions have addressed the idea of parentage in surrogacy situations, and have made attempts to recognise the parental rights of the commissioning parents at least where the commissioning parents have a genetic link to the child. But to ensure that there is a presumption favouring the commissioning parents in all instances of surrogacy, genetics cannot be the determinative factor of a parent-child relationship. The intention of the parties, the purpose of the arrangement and the best interests of the child would need to be given more weight in the determination of parentage than the birth origins of the child.

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[148] Majorie Schultz "Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality" [1990] Wis L Rev 297 at 317

[149] The language of the jurisdictions vary as between their statutes, however the term "parentage order", as discussed at Heading A, is an order to confer the legal rights and obligations of parentage and has the same effect as that of adoption.

[150] The shortest mandatory period after birth before consent can be given is 28 days, but this consent period differs between jurisdictions. See above, n 98, for more discussion on this point.

[151] Adoption Act 1955, s 5

Chapter III: Who Is, or Should Be, the Parent?

Throughout history, the fundamentals of parentage have changed significantly. In 1799, with the first instance of an assisted reproductive procedure, "the once-insoluble link between coitus and procreation was severed."[152]

In New Zealand, the ancient dictum still applies: birth is the only means by which motherhood is determined. Historically, this presumption was "one of the strongest known to law."[153] It was based on the understanding that the mother of a child is certain on the fact of birth, whereas paternity has always been a more contentious issue.[154] Given the development of assisted reproductive procedures, this presumption is no longer "unshakeable".[155] The Court in *Johnson v Calvert* quoted Professor Hill on the subject of maternity: "It is arguable that, while gestation may demonstrate maternal status, it is not the sine qua non of motherhood."[156]

Martin Johnson stated "modern medicine is challenging conventional notions of parenthood and making us rethink the relative significance of each biological component of parenthood."[157] Previously, "biology provided definitive identification of the mother of a particular child."[158] This is no longer the case. Yet at least in regards to surrogacy, the current legislative framework is incomplete: "…all surrogacy arrangements are left unenforceable and the courts' jurisdiction is inhibited from considering the intricate issues that arise in a surrogacy dispute."[159]

To determine who should be the legally recognised parent in any situation of surrogacy, or in general for that matter, we must first ask: what is a parent?

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[152] John Hill "What Does it Mean to be a 'Parent'? The Claims of Biology as the Basis for Parental Rights" (1991) 66 NYU L Rev 353 at 353

[153] Susan Frelich Appleton "Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era" (2006) 86 B U L Rev 227 at 232-33 as cited in Dara Purvis "Intended Parents and the Problem of Perspective" (2012) 24 Yale Journal of Law and Feminism 210 at 223

[154] Sarah Alawi "Highlighting the need to revisit surrogacy laws in New Zealand" [2015] NZLJ 352 at 356

[155] Andrea Stumpf "Redefining Mother: A Legal Matrix For New Reproductive Technologies" (1986) 96 Yale LJ 187 at 187

[156] John Hill "What Does it Mean to be a 'Parent'? The Claims of Biology as the Basis for Parental Rights" (1991) 66 NYU L Rev 353 at 370 as cited in *Johnson v Calvert* 851 P 2d 776 (Cal 1993) at 782

[157] Martin Johnson "A Biomedical Perspective on Parenthood" in Andrew Bainham, Shelley Day Sclater and Martin Richards What is a Parent? A Socio-Legal Analysis (Hart Publishing, Oxford,1999) 47 at 49

[158] Majorie Schultz "Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality" [1990] Wis L Rev 297 at 316

[159] Sarah Alawi "Highlighting the need to revisit surrogacy laws in New Zealand" [2015] NZLJ 352 at 352

A The Presently Inconsistent Parentage Regime

The key goal of the SoCAA was to take children out of "legal limbo". [160] Whilst it achieves this goal for children born of most assisted reproductive technologies, the deeming provisions fail to remove children born of surrogacy arrangements from legal limbo. The SoCA in its current form applies to surrogacy, but does not adequately address it.

Parliament has legislated to recognise the "gift of parenthood" that a sperm or ovum donor gives to intended parents.[161] However, Parliament has failed to see the parallels that exist between a surrogacy arrangement and donation, in that the surrogate is acting with the intention of relinquishing any rights and liabilities she would otherwise have in relation to the child, just as the donor is.

Giving effect to the intention of donation arrangements, the SoCA extinguishes the parentage, and the associated rights and liabilities, of the donor in all situations, deeming the birth (and intended) parents to be the legal parents.[162] In stark contrast to this, the current surrogacy regime attributes legal parentage to the surrogate: "…the scheme of the legislation denies [the commissioning parents] parental rights contrary to the intention evinced by all of the parties in entering into the surrogacy arrangement."[163] The effect of the SoCA is that the commissioning parents are treated as gamete donors, and the surrogate as a gamete recipient. Yet, as was noted in *Johnson v Calvert*, the commissioning parents "never intended to "donate" genetic material to anyone. Rather, they intended to procreate a child genetically related to them by the only available means."[164]

B Commissioning Parents versus Birth Parents: Who Should Be the Legal Parents?

The fundamental principle of the welfare and best interests of the child guides our laws relating to children.[165] However, what is in the best interests of the child is a variable standard. Parentage should therefore be determined with regard to readily ascertainable factors that presumptively support and facilitate the best interests of the child.

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[160] Mark Henaghan "When biotechnology and the law collide: assisted human reproduction and family law" (2003) 4 BFLJ 143 at 143

[161] (13 August 1986) 473 NZPD 3869 per Hon Geoffrey Palmer as cited in Mark Henaghan "When biotechnology and the law collide: assisted human reproduction and family law" (2003) 4 BFLJ 143 at 144

[162] SoCA 1969, ss 17-22

[163] Margaret Otlowski in *"Re Evelyn* – Reflections on Australia's First Litigated Surrogacy Case" ((1999) 7 Med L Rev 38 at 53 as cited in Sarah Alawi "Highlighting the need to revisit surrogacy laws in New Zealand" [2015] NZLJ 352 at 355-356

[164] Johnson v Calvert 851 P 2d 776 (Cal 1993) at 787

[165] CoCA 2004, s 5(a)

1 In support of recognising the surrogate as the legal parent

a) Gestational bond

One of the most popular arguments in favour of the gestational mother retaining legal parentage is that it would be unconscionable to break the strong bond that develops during the course of pregnancy.[166] It has been contended that the surrogate cannot predict this emotional bond, and thus the consequent emotional harm of relinquishing the child, when agreeing to enter into the surrogacy agreement. Thus, she can never make a "totally informed decision" to give up the child on birth.[167] John Hill described the effects on the surrogate mother of relinquishing the child as one of the most "poignant" arguments in her favour.[168] This argument is essentially protecting the surrogate mother from coming to regret her decision to enter into the arrangement, thereby enabling her to keep the child. However, in doing this we are failing to recognise that her intent was never to parent the child: "we are refusing to treat her as an autonomous and responsible person."[169]

It is crucial that the surrogate enters into the arrangement intending to give up the child. Thus any gestational bond that may otherwise exist between a mother and child is limited by her knowledge that the child is not "her" child. If a surrogate asserts her maternal rights to keep the child on birth, it could be because of her biological response to the fact of giving birth: her hormones, emotions and natural instincts are all telling her to keep the child. It is against this background that she may argue that she has developed a gestational bond with the child such that she should be the parent.

However, research shows that in surrogacy situations, the bond between the gestational mother and the child is much weaker, if it exists at all. Sarah Alawi highlighted that in Lori Andrews' interviews of surrogate mothers, "[surrogate mothers] did not refer to the fetus [sic] as "my baby", as do biological mothers in the context of adoption, but as the intended parents' baby."[170] Evidence has shown that it is more than just gestation that creates a maternal bond between the mother and child – such is presupposed by an expectation, based

[166] John Hill "What Does it Mean to be a 'Parent'? The Claims of Biology as the Basis for Parental Rights" (1991) 66 NYU L Rev 353 at 394

[167] In re of Baby M 537 A 2d 1227 (NJ 1998) at 1248 as cited in Dara Purvis "Intended Parents and the Problem of Perspective" (2012) 24 Yale Journal of Law and Feminism 210 at 236

[168] John Hill "What Does it Mean to be a 'Parent'? The Claims of Biology as the Basis for Parental Rights" (1991) 66 NYU L Rev 353 at 405

[169] Alan Wertheimer "Two Questions about Surrogacy and Exploitation" (1992) 21 Philosophy & Public Affairs 211 at 212-223 as cited in Derek Morgan "A Surrogacy Issue: Who is the Other Mother?" (1994) 8 International Journal of Law and the Family 386 at 399

[170] Lori Andrews "Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood" (1995) 81(8) Virginia Law Review 2343 at 2352 as cited in Sarah Alawi "Highlighting the need to revisit surrogacy laws in New Zealand" [2015] NZLJ 352 at 352

on an intention, to keep the child that arguably does not exist in surrogacy arrangements: "a surrogate mother intends the entire time to give the baby up."[171]

Whilst the gestational bond and effect on the surrogate of relinquishing the child receives a lot of attention, the emotional effect on the commissioning parents that ensue should the surrogate assert her legal right to keep the child receives much less consideration, despite it carrying the same, if not greater, weight.[172] However, the infliction of emotional harm on the surrogate mother or the commissioning parents does not directly impact on the child, thus does not, in and of itself, warrant deviating from the presumption that the commissioning parents should, as intended by the parties, be the legal parents of the child.

The physical process of carrying a child for nine months that gives rise to the purported gestational bond should in and of itself carry weight in any parentage determination.[173] Not only is the birth mother giving up nine months of her time, she must act in the child's interests which could be contrary to her own. She risks sickness and inconvenience and, of course, has to endure labour. Critics of surrogacy arrangements in general consider the "unique female role in human reproduction as the determinative factor in questions of legal parentage".[174] Gestation is an assumption of parental responsibility, as is the commissioning parents' assumption of parental responsibility via their genetic contribution and intention to parent. Gestating a pregnancy evidences a prima facie assumption of parental responsibility. However, this presumption is rebuttable by the surrogate mother agreeing to the surrogacy arrangement. Kennard J addressed this point, however argued that just because a gestational mother "contracts" away her parental rights, this does not amount to a binding concession that such would be in the child's best interests.[175] However, a presumption does not amount to a "binding concession". Presuming the commissioning parents to be the legal parents recognises that the surrogate never wanted to keep the child, and that the commissioning parents have only ever wanted the child. If the surrogate wanted to keep the child, she could, in turn, rebut this presumption on the grounds that to give effect to the parties' intention would, in fact, not be in the child's best interests.

b) Best interests

[171] Dara Purvis "Intended Parents and the Problem of Perspective" (2012) 24 Yale Journal of Law and Feminism 210 at 237

[172] John Hill "What Does it Mean to be a 'Parent'? The Claims of Biology as the Basis for Parental Rights" (1991) 66 NYU L Rev 353 at 398

[173] John Hill "What Does it Mean to be a 'Parent'? The Claims of Biology as the Basis for Parental Rights" (1991) 66 NYU L Rev 353 at 407

[174] Margaret Radin "Market–Inalienability" (1987) 100 Harv L Rev 1849 at 1932 as cited in Johnson v Calvert 851 P 2d 776 (Cal 1993) at 793

[175] Johnson v Calvert 851 P 2d 776 (Cal 1993) at n 4 per Kennard J dissenting

The surrogate enters into the arrangement in agreement that she will give up the child. For the most part, the surrogate does not and never has wanted to parent the child. Conversely, the commissioning parents enter into the arrangement with the expectation that they will be the parents of the child. The commissioning parents engage in a time consuming, expensive and rigorous process to facilitate the surrogacy, and most likely will have spent significantly longer than the duration of the surrogacy with the intention that they will be the legal parents of the child. Is it then in the best interests of the child to be deemed to be the legal child of the surrogate, whose intention and desire was never to keep the child?

Surrogacy is a deliberate pregnancy with a deliberate acknowledgement that the birth mother does not want the child. In this regard, surrogacy is clearly distinguishable from adoption: adoption is a means of transferring parentage where the pregnancy is an accident or some other situation exists such that the birth parents do not want to keep the child.

It should be the intention of the parties that is facilitated by the law. As the circumstances into which a surrogacy arrangement is entered differ markedly from adoption, there is no justification for deeming the surrogate to be the legal parent and then transferring parentage to the commissioning parents – it is in the best interests of the child to deem the commissioning parents to be the legal parents at first instance, thereby facilitating the stated and agreed intention of the parties.

c) Exploitation and commodification

The main jurisprudential concern against enforcing surrogacy agreements is that children are not chattels and therefore may not be subject to contract or gift.[176] If the commodification argument was avoidable such that the child *could* be the subject matter of the contract, by virtue of entering into the surrogacy arrangement, the surrogate has transferred her gestational parental interest in parentage to the commissioning parents by agreeing to act in the place of the intended mother and carry the child.[177]

In New Zealand, commercial surrogacy is illegal.[178] This operates to prevent the exploitation of surrogates, as any agreement entered into does not offer the surrogate a monetary benefit. There is also a feminist contention that disregards this argument: surrogacy allows women to exercise their right to procreate without the further obligations of raising a child.[179] Dara Purvis argued, "To view surrogacy as dehumanizing the surrogate, in other words, assumes

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[176] Sarah Alawi "Highlighting the need to revisit surrogacy laws in New Zealand" [2015] NZLJ 352 at 356
[177] John Hill "What Does it Mean to be a 'Parent'? The Claims of Biology as the Basis for Parental Rights" (1991) 66 NYU L Rev 353 at 408
[178] HART Act 2004, s 14
[179] Sarah Alawi "Highlighting the need to revisit surrogacy laws in New Zealand" [2015] NZLJ 352 at 357

that reproductive labour is central to a woman's life and identity in a way that other forms of labour are not."[180]

Arguably, when looking at the underlying rationale and intention of surrogacy, it is similar to that of donation – the surrogate donates a biological requirement necessary to have a child that the commissioning parents are lacking. The parties are not contracting for the purchase of a specific child: they are entering into an agreement for the possibility of being able to have an unspecific and unspecified child and to be involved in the pregnancy. The commissioning parents are unable to have a child without the involvement of third parties.

It is clear that children should not be subject to contracts such that they can be bought and sold. But that is not what a surrogacy arrangement is suggesting. To give effect to the intention of the parties and deem the commissioning parents to be the legal parents of the child would not amount to commodification of the child. It would instead bring the law regarding surrogacy in line with that of other assisted reproductive procedures, and prevent the surrogate from receiving a windfall of parental rights, allowing her to assert her maternal claim to the detriment of the commissioning parents following a "change of heart".

2 *In support of recognising the commissioning parent(s) as the legal parent(s)*

a) Causation argument

The beginnings of a parentage relationship can "come from mental conception, the desire to create a child."[181] In any surrogacy arrangement, the commissioning parents are the instigators of the arrangement. Whilst the "but for" test can be applied to the surrogate or gamete donors, as a child would not be born "but for" the gestational and genetic component, "the others are participants only after the intention and actions of the intended parents to have a child."[182] Thus temporally, the commissioning parents have the strongest claim to parentage.

Whilst the surrogate's role in gestating the embryo is critical, "any biologically capable woman" could fulfil it.[183] On this basis, Jeffery Place found that the role of egg donation is much more specific as it is the makeup of the gametes that determine the genes of the baby. Determining parentage with reference to genetics would "rest motherhood on the single

[180] Dara Purvis "Intended Parents and the Problem of Perspective" (2012) 24 Yale Journal of Law and Feminism 210 at 235

[181] Andrea Stumpf "Redefining Mother: A Legal Matrix For New Reproductive Technologies" (1986) 96 Yale LJ 187 at 195

[182] John Hill "What Does it Mean to be a 'Parent'? The Claims of Biology as the Basis for Parental Rights" (1991) 66 NYU L Rev 353 at 415

[183] Jeffrey Place "Gestation Surrogacy and the Meaning of 'Mother': Johnson v Calvert, 851 P 2d 776 (Cal 1993)" (1994) 17 Harv J L & Pub Poly 907 at 914

contribution that no other woman can supply for the child".[184] If there were a different donor, there would be a different child. However, under current New Zealand law, gamete donors are deemed to have relinquished any and all of their parental rights. It is not their intention to procreate and raise a child, but to facilitate this process for an infertile couple or individual. Thus, the genetic link between the parties cannot be the decisive factor of parentage.

b) Intention of the parties and the contract

The determinative factor supported by the Californian courts, and many writers, is that of intention.[185] The intention of the parties supports the commissioning parents as the legal parents of the child. This in turn facilitates the best interests of the child: as "children are dependent on adults, at least in the main and at the outset, their interests are not likely to run contrary to those of adults who choose to bring them into being."[186]

"The intended parents rely, both financially and emotionally, to their detriment on the promises of the biological progenitors and gestational host."[187] The current statutory regime gives legal effect to this reliance as between gamete donors and recipients, but does nothing to effectuate the agreement between the commissioning parents and the "gestational host". This has the effect of protecting a surrogate who, on birth, changes her mind and finds that she does not relinquish the child after all.[188] Whilst it could be argued that the current statutory regime also protects commissioning parents who change their mind and do not want to take custody of the child, these facilitated outcomes operate as an exception to the general intention of the parties that the commissioning parents will be the legal parents of the child.

Surrogacy arrangements differ markedly from the typical nuclear family the law has historically perpetuated.[189] However, this does not mean that such an arrangement should not be afforded the same protection:[190]

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[184] Jeffrey Place "Gestation Surrogacy and the Meaning of 'Mother': Johnson v Calvert, 851 P 2d 776 (Cal 1993)" (1994) 17 Harv J L & Pub Poly 907 at 914

[185] *Johnson v Calvert* 851 P 2d 776 (Cal 1993); *In re Marriage of Buzzanca* 16 Cal App 4th 1410 (1998); Dara Purvis "Intended Parents and the Problem of Perspective" (2012) 24 Yale Journal of Law and Feminism 210; Majorie Schultz "Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality" [1990] Wis L Rev 297; Richard Storrow "Parenthood By Pure Intention: Assisted Reproduction and the Functional Approach to Parentage" (2002) 53 Hastings LJ 597; Andrea Stumpf "Redefining Mother: A Legal Matrix For New Reproductive Technologies" (1986) 96 Yale LJ 187

[186] Majorie Schultz "Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality" [1990] Wis L Rev 297 at 397 as cited in Johnson v Calvert 851 P 2d 776 (Cal 1993) at 783

[187] John Hill "What Does it Mean to be a 'Parent'? The Claims of Biology as the Basis for Parental Rights" (1991) 66 NYU L Rev 353 at 416

[188] Derek Morgan "A Surrogacy Issue: Who is the Other Mother?" (1994) 8 International Journal of Law and the Family 386 at 398

[189] Andrea Stumpf "Redefining Mother: A Legal Matrix For New Reproductive Technologies" (1986) 96 Yale LJ 187 at 205

> The fact that the initiating parents mentally conceived of the child and afforded it existence prior to the surrogate mother's involvement must be acknowledged along with the fact that the surrogate entered the arrangement as a third party, willing to assist the initial parents, and that her husband, if she has one, consented to the arrangement with the understanding that the child would not be his – either biologically, psychologically, or legally. Balancing risks and benefits, the initiating parents should be responsible for a child that no one wants, and they should be entitled to a child that everyone wants.

Quite simply, presuming the surrogate to be the legal parent is inappropriate: "When gestation is claimed to be definitive of her own motherhood, the surrogate is no longer simply a surrogate."[191]

c) Avoidance of uncertainty

Whilst it is certain in New Zealand that the birth mother is to be the prima facie legal mother of the child, the transferral of parental rights from the birth mother to the commissioning parents creates uncertainty because the granting of an adoption or parentage order is dependent on the discretion of the Court. Giving effect to the parties' intention would result in the entire arrangement being carried out with the knowledge that legally and morally, the child is not the surrogate's to keep.[192] The certainty of this outcome would support the best interests of the child, as it would constitute "…a system that places the child in the parental hands as unambiguously as possible."[193]

3 So, who should be the parents?

The foundation of a parentage relationship is intention. An intention to parent and an intention to raise a child to the best possible standard will mean that the parent acts in the best interests of the child. The law should reflect this. The commissioning parents should be the legal parents of a child born via surrogacy upon birth.

Sarah Alawi recognised that in surrogacy agreements, "the role of the surrogate mother is to

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[190] Andrea Stumpf "Redefining Mother: A Legal Matrix For New Reproductive Technologies" (1986) 96 Yale LJ 187 at 205

[191] Marilyn Strathern "Surrogates and substitutes: new practices for old?" in James Good and Irving Velody (eds) *Politics of Postmodernity* (Cambridge University Press, Cambridge UK, 1998) 182 as cited in Derek Morgan "A Surrogacy Issue: Who is the Other Mother?" (1994) 8 International Journal of Law and the Family 386

[192] John Hill "What Does it Mean to be a 'Parent'? The Claims of Biology as the Basis for Parental Rights" (1991) 66 NYU L Rev 353 at 407

[193] Andrea Stumpf "Redefining Mother: A Legal Matrix For New Reproductive Technologies" (1986) 96 Yale LJ 187 at 206

carry the child to term *on behalf of* the intended parents *in place of* the intended mother throughout the term of gestation."[194] In any given instance of surrogacy, the typical notions of motherhood can be carried out by up to three different women. It is this usually bifurcated female role in surrogacy arrangements that create the difficulty of determining parentage. Intent as a determination of parentage is "the only parentage rule that recognises adults who actively plan to become parents."[195]

This is in contrast to the current regime, which creates vast inconsistencies. Under s 18 SoCA, a man who intends to be a parent, but only possesses the social element of parentage (that is, an intention to parent), can be recognised by a deeming provision as the legal father of a child. However, the commissioning parents will never be presumptively recognised as the legal parents of their child regardless of the genetic role they play in the conception. It is not just the intent of the commissioning parents to be legal parents that is important. The SoCA currently does not support the surrogate's intent not to be a parent. To facilitate her intention and expectation that she will not be a parent of the child, she must, of her own volition, engage the adoption process.

Undoubtedly, surrogacy "divides pregnancy from the typical understandings of parentage".[196] Despite this, we cannot ignore that regardless of any genetic link that exists between the parties, the anticipated outcome is that the commissioning parents will be the legal parents of the child: [197]

> In acting on behalf of another woman, [the surrogate] represents a facet of motherhood but is not herself the real mother…Indeed, *it is precisely because she stands in for that element that otherwise defines motherhood that she is the surrogate*.

"The biological link between parent and child cannot be altered", yet there is much to be said for social and functional parenting. [198] There is much more to parenting than genes, and courts should not discount the roles of commissioning parents with no genetic link – so much of a person's character and personality is dependent on a nurturing relationship with their social parents, as opposed to the relationship with their biological parents: this is the fundamental tenet of the nurture versus nature debate. If we require a genetic link for a finding of parentage, this could not only have a "perverse effect" where the commissioning

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[194] Sarah Alawi "Highlighting the need to revisit surrogacy laws in New Zealand" [2015] NZLJ 352 at 352

[195] Dara Purvis "Intended Parents and the Problem of Perspective" (2012) 24 Yale Journal of Law and Feminism 210 at 212

[196] Dara Purvis "Intended Parents and the Problem of Perspective" (2012) 24 Yale Journal of Law and Feminism 210 at 231

[197] Derek Morgan "A Surrogacy Issue: Who is the Other Mother?" (1994) 8 International Journal of Law and the Family 386 at 401

[198] Jeffrey Place "Gestation Surrogacy and the Meaning of 'Mother': Johnson v Calvert, 851 P 2d 776 (Cal 1993)" (1994) 17 Harv J L & Pub Poly 907 at 915

parents were unable to provide gametes for the conception, but would also undermine the current law in regards to gamete donation, and the policy reasons in support of general adoption.[199] As stated by the CoCA, the best interests and welfare of the child should be "paramount". For the most part, it is those people who intend and so greatly desire to be parents that will act in the best interests and welfare of the child: "A common thread in these various descriptions of responsible, nurturing, child-focused parenting is advance planning."[200] The commissioning parents have planned for, and committed to, a lifetime of parenthood. The surrogate's contribution to the arrangement, whilst invaluable, is intended to last only for nine months. There is a blatant disparity between these two assumptions of responsibility.

Whilst determining parentage with regard to the parties' intention, where this disregards the genetic or gestational parent, is a hard idea to grasp, it is one that is necessitated by the increasing availability of reproductive technology, and the inconsistent and anomalous results that arise via the use of any other standard to determine parentage.

[199] Dara Purvis "Intended Parents and the Problem of Perspective" (2012) 24 Yale Journal of Law and Feminism 210 at 225

[200] Dara Purvis "Intended Parents and the Problem of Perspective" (2012) 24 Yale Journal of Law and Feminism 210 at 221

Chapter IV: Reform

Part 2 of the SoCA, the status of children conceived as a result of assisted human reproduction procedures, should be amended so that in all situations of assisted reproductive procedures, it is the intended parents that are recognised as the legal parents of the resulting child. The amendment should exclude surrogacy from the current deeming provisions that determine parentage, and introduce a new surrogacy specific provision presumptively recognising the commissioning parents as the legal parents of the child, by virtue of their intention.[201] This would require all instances of surrogacy to engage with ECART so the commissioning parents could be identified and presumptive parentage conferred on them, with parentage taking effect from birth. This amendment would mean ECART had increased and more consistent oversight of surrogacy in New Zealand, but does not itself purport to alter the requirements of the surrogacy guidelines. If some form of ECART approval were necessary to identify the commissioning parents, ACART and ECART would need to consider creating guidelines for situations of traditional surrogacy, which are not currently subject to an application process.

This amendment would only impact instances of surrogacy, but the impact would be vital for commissioning parents. As with any presumption, it could be rebutted. The surrogate mother could dispute the presumption on the grounds that it was in fact not in the best interests of the child to be placed with the commissioning parents, or that they were for whatever reason not fit and proper parents.

Such an amendment would create consistency for those parties engaging in assisted reproductive procedures. Section 18 of the SoCA deems a husband who consents to the artificial insemination of his wife to be the parent of the resulting child. He is a parent not because of any genetic link he has to the child, but because he intends to parent the child as evidenced by his consent. In 2004, the SoCA was amended to reflect that legal parentage of children conceived of assisted reproductive procedures is not dependent on a genetic link to the child. To amend the SoCA to deem the presumptive parentage of a child born via surrogacy to be based on intention would be simply to bring surrogacy within the ambit of this provision.

If such an amendment were given effect, the statutory requirement for a birth mother's consent to adoption and the pre-adoption assessment would not occur. However, as is current best practice, the commissioning parents could be assessed as per CYF's standard for adoptive parents in order to get ECART approval of the arrangement. Further, requiring the commissioning parents to register the agreement would facilitate the interests of all parties – it is the method by which they can become the legal parents of the child, but it would also

[201] Appendix 1 contains the current deeming provisions in Part 2 of SoCA

promote certainty of the outcome, thus facilitating the best interests of the child, whilst also protecting the surrogate's interests and ensuring that the arrangement was entered into as required by the regulations.

The surrogate's consent to the agreement would replace the current adoption requirement of post-birth consent. This would vitiate the surrogate's opportunity to reiterate, or revoke, her consent after the birth of the child. In typical adoptions, once consent is given after 10 days, it cannot easily be revoked. This favours the intention of the parties to the adoption. In the surrogacy context, the initial 10-day period is arguably not necessary because the factors in support of a presumptive maternal relationship between the birth mother and the child do not exist – there is not the same gestational bond as the surrogate entered into the pregnancy with no intention to keep the child. As the surrogate's gestational claim to maternity does not exist, or is much weaker than the typical gestational bond between mother and child, the intention of the parties is sufficient to justify denying any parental claim of the surrogate by initially recognising the commissioning parents as the legal parents of the child. This would be a presumption that per the parties' intention, the commissioning parties should be recognised as the legal parents and will act in the child's best interests and welfare. But it is one that can nevertheless be rebutted.

To recognise the commissioning parents as the presumed legal parents of a child born via a surrogacy arrangement would be a momentous step for Parliament and the first of its kind in the world. The legislative overhaul and regulations required to ensure the interests of all parties were protected would be significant. Nevertheless, whichever way Parliament wants to justify it – the intent of the parties, enforceability of the arrangement, certainty of the outcome, or the best interests of the child – all the arguments presented here support a finding that the commissioning parents should be the legally recognised parents of the child *upon* birth.

Conclusion

Blacks Law Dictionary defines surrogacy as "the act of performing some function in the place of someone else".[202] The current New Zealand law does not recognise the substitution aspect of surrogacy, instead attributing legal parentage to the surrogate mother. Parallels can be drawn between the act of surrogacy and that of donation, but the current New Zealand law does not yet recognise any right of the commissioning parents in surrogacy situations, as it does in donation. It could be that the use of the term surrogate "mother" is fuelling the disparity – the reality of the situation is that the surrogate is not the surrogate "mother" but instead that she is simply a surrogate, or providing a surrogate womb.[203]

Parentage, and specifically motherhood is, in many people's view, an uncontested fact. However, the reality of modern day maternity is that the distinct elements of motherhood can be separated between three parties. This is a somewhat novel concept, and one that courts all over the world have struggled with. Presently in New Zealand, parentage can be transferred from the surrogate to the commissioning parents ten days following birth. Further, the current law reflects the intention of the parties in regards to parentage for all instances of assisted reproductive procedures except that of surrogacy. So to suggest that the law should be amended to give effect to the intention of the parties to a surrogacy arrangement may not in fact be as problematic as it sounds.

In the family law context, the best interests and welfare of the child are the paramount consideration.[204] To deem a surrogate mother to be the legal mother of a child she did not intend to keep or raise is not considering the best interests and welfare of the child. It is the commissioning parents, who have taken extreme measures to facilitate the birth of the child, who should be recognised as the legal parents of the child at first instance. As Dr Seuss said, "sometimes the questions are complicated and the answers are simple."

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[202] Bryan Garner and Henry Campbell Black 1860-1927 *Black's law dictionary* (10th ed, Thomson Reuters, St Paul MN, 2014)

[203] Derek Morgan "A Surrogacy Issue: Who is the Other Mother?" (1994) 8 International Journal of Law and the Family 386 at 400

[204] CocA 2004, s 5

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Appendix 1: Relevant sections in the Status of Children Act 1969

17 Woman who becomes pregnant is mother even though ovum is donated by another woman

(1) This section applies to the following situation:

(a) a woman (woman A) becomes pregnant as a result of an AHR procedure:

(b) the ovum or embryo used for the procedure was produced by or derived from an ovum produced by another woman (woman B).

(2) In that situation, woman A is, for all purposes, the mother of any child of the pregnancy.

18 When woman's non-donor partner is parent, and non-partner semen donor or ovum donor is not parent

(1) This section applies to the following situation:

(a) a partnered woman (woman A) becomes pregnant as a result of an AHR procedure:

(b) the semen (or part of the semen) used for the procedure was produced by a man who is not woman A's partner or, as the case requires, the ovum or embryo used for the procedure was produced by, or derived from an ovum produced by, a woman who is not woman A's partner:

(c) woman A has undergone the procedure with her partner's consent.

(2) In that situation, woman A's partner is, for all purposes, a parent of any child of the pregnancy.

19 Partnered woman: ovum donor not parent unless mother's partner at time of conception

(1) This section applies to the following situation:

(a) a partnered woman (woman A) becomes pregnant as a result of an AHR procedure:

(b) the ovum or embryo used for the procedure was produced by, or derived from an ovum produced by, another woman (woman B).

(2) In that situation, woman B is not, for any purpose, a parent of any child of the pregnancy unless woman B is, at the time of conception, woman A's partner.

20 Woman acting alone: non-partner ovum donor not parent unless later becomes mother's partner

(1) This section applies to the following situation:

(a) a woman acting alone (woman A) becomes pregnant as a result of an AHR procedure:

(b) the ovum or embryo used for the procedure was produced by or derived from an ovum produced by another woman (woman B) who is not woman A's partner.

(2) In that situation, woman B is not, for any purpose, a parent of any child of the pregnancy unless woman B becomes, after the time of conception, woman A's partner (in which case the rights and liabilities of woman B, and of any child of the pregnancy, are determined in accordance with section 23).

21 Partnered woman: non-partner semen donor not parent

(1) This section applies to the following situation:

(a) a partnered woman becomes pregnant as a result of an AHR procedure:

(b) the semen (or part of the semen) used for the procedure was produced by a man (man A) who is not her partner.

(2) In that situation, man A is not, for any purpose, a parent of any child of the pregnancy.

22 Woman acting alone: non-partner semen donor not parent unless later becomes mother's partner

(1) This section applies to the following situation:

(a) a woman acting alone becomes pregnant as a result of an AHR procedure:

(b) the semen used for the procedure was produced by a man (man A) who is not her partner.

(2) In that situation, man A is not, for any purpose, a parent of any child of the pregnancy unless man A becomes, after the time of conception, the woman's partner (in which case the rights and liabilities of man A, and of any child of the pregnancy, are determined in accordance with section 24).

Appendix 2: Domestic Surrogacy Applications 2005-2015

A Applications for Surrogacy Using In Vitro Fertilisation 1997–2006[205]

The following table sets out the numbers and outcomes of surrogacy applications between 1997 and 2005.

Surrogacy applications, 1997–2006

Year	Number approved† ∞	Number declined †	Number deferred
1997	1	0	0
1998	2	1*	4
1999	4	0	3
2000	5	1	2
2001	6	1	1
2002	1	0	3
2003	5	0	3**
2004	5^	0	1
2005	15	4	0
2006	16	0	1
Total	60	7	18

Notes

† The number of 'approved' and 'declined' applications for each year may include some applications that were deferred in previous years.

* In 1999 NECAHR considered a variation to the original application and approved it.

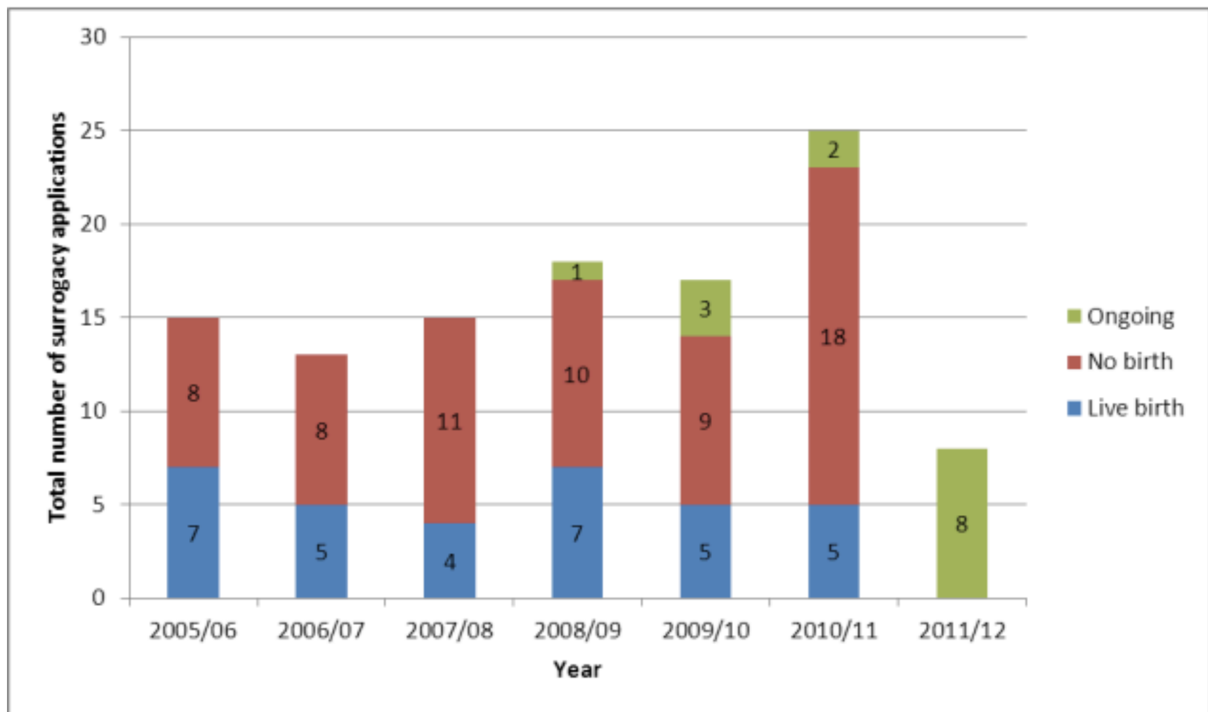
** One application was subsequently withdrawn.

∞ Includes applications approved outright and applications approved subject to conditions.

^ Includes two applications that were provisionally approved and granted final approval in 2005.

B Outcome of Applications for Surrogacy Arrangements involving Providers of Fertility Services by Year, 2005/06-2011/12

[205] Advisory Committee on Assisted Reproductive Technology *Annual Report 2005-2006* (January 2007) at 16


30
25
20
15
10
5
0
Total number of surrogacy applications
8
7
8
5
11
4
1
10
7
3
9
5
2
18
5
8
2005/06
2006/07
2007/08
2008/09
2009/10
2010/11
2011/12
Year
Ongoing
No birth
Live birth