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CONCEPTIONS OF MOTHERHOOD AND
HOW THEY AFFECT THE WAY SURROGACY
IS VIEWED AND REGULATED

DEBORAH NANCY ERICSSON

A thesis submitted for the degree of
Masters of Bioethics and Health Law
at the University of Otago, Dunedin,
New Zealand.

25 March 1999
The way in which surrogacy is viewed and regulated is determined by the conception of motherhood which is held by either an individual or a particular society. Conceptions are not static; they develop and change over time. Each challenge to the conception of motherhood in some way alters that conception, whether it be by strengthening the conception which was held or by altering the conception held to any degree. This thesis will begin by exploring the conceptions of motherhood which have been drawn from the surrogacy literature. A common feature of the different conceptions of motherhood are the elements of motherhood which exist; the genetic, the gestational and the social. The way in which these elements are combined and the emphasis given to each determines the difference between the conceptions. Motherhood is a personal and emotional issue, and as such each individual has a different conception of motherhood. A society's conception of motherhood can be determined by the way motherhood is regulated. The focus of this thesis being the way in which surrogacy is regulated in New Zealand. In particular, surrogacy using assisted reproductive technologies.

The New Zealand conception of motherhood can be determined by looking at the formal ethical debate on surrogacy in this country as well as looking at the language of the statutory law relating to motherhood. The conception of motherhood which can be drawn from these is very traditional, the three elements of motherhood are traditionally fulfilled by one woman. Although the separation of the genetic element from the gestational and social elements is accepted but the separation of the gestational element from the social element is not. The present legal situation does not take surrogacy into account. What this has meant is that surrogacy using assisted reproductive technologies, a process which deliberately sets out to separate these elements, has only recently been approved in this country by the National Ethics Committee on Assisted Human Reproduction. What this means is that those who use assisted reproductive technologies in surrogacy arrangements are treated differently by the law than others who require assisted reproductive technologies to achieve motherhood, a group whose rights as mothers are protected. Legislation dealing with the status of children born as a result of other assisted reproductive procedures is found in the Status of Children Amendment Act 1987. The only way that this discrimination against those who require the
use of a gestational surrogate can be avoided is the enactment of legislation specifically dealing with surrogacy.
I would like to thank Barbara Nicholas, formerly of the Bioethics Research Centre at the University of Otago, for her supervision and support through the developmental stages of this thesis. It was with her help that I was able to focus my work in a complex and extensive area.

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A special thanks to Awatea Edwin who helped me gain an insight into aspects of Maori culture related to this area in a way that could not be achieved through a literature search.
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CHAPTER 1
CONCEPTIONS OF MOTHERHOOD

1.1 Surrogacy the Splitting of Motherhood

The development of assisted reproductive technologies in recent years has opened up the possibility of motherhood to many women. The procedures now available help to alleviate the pain of infertility by offering women some hope of achieving their goal of becoming mothers. Motherhood consists of three primary elements: the two biological elements, the genetic, providing half of the genetic material that makes up the resulting child, and the gestational, being pregnant with the child and carrying it to term. The third is the social element, nurturing and caring for the child.

Our traditional understanding of motherhood is that the three elements are all fulfilled by one woman. Prior to the development of assisted reproductive technologies the only exception to this was adoption, with the separation of the social and biological elements. Assisted reproductive technologies have made it possible for the biological elements to be separated, thus making it possible for the three elements to be fulfilled by three different women. The fragmentation of motherhood possible using such developments forces us to re-examine our conceptions of motherhood. There is the potential to involve up to five “parents” in the creation of a child, the three mothers and two fathers, the genetic and social.

The practice known as surrogacy involves a woman, the surrogate mother, agreeing to become pregnant and carry a child to term with the intention of giving that child to another couple, the commissioning couple, to raise as their own. There are two distinct forms of surrogacy. The first form is where the surrogate mother is both the genetic and the gestational mother of the child. This form is similar to adoption in that the woman carries her own genetic child and then gives that child to another woman after the birth. The difference is that adoption is a reaction to an already existing pregnancy, whereas surrogacy is arranged prior to conception. A second, and more recent, form of surrogacy is known as gestational surrogacy. This is where the gestational surrogate carries a child which is not genetically her child and gives that child to another woman, often the genetic mother, after the birth.

As in any parental situation there is the potential for conflict between the different parents. The conflicts which can arise after the use of assisted reproductive technologies are
different from other parental conflicts in that they generally arise either before or shortly after the birth of a child and involve the determination of who should take on the social element of parenthood. According to our traditional conception of motherhood we have only one mother. A reflection of this conception is seen in the case law involving conflict after surrogacy arrangements. The court in *Johnson v Calvert*\(^1\) did not accept that the child could have two natural mothers. The court considered it necessary to distinguish between the two women who could each claim a biological relationship with the child. The court claimed that dividing motherhood between the two women would not be in the best interests of the child.\(^2\)

What is actually in the best interests of the children in cases like this may not be able to be determined for some time, given the recent development of the practice. There has however been research on the affects on children of separating the elements of motherhood in the adoption situation. Comparison is often made between surrogacy and adoption because the two practices involve the separation of the gestational and social elements of motherhood. There is however a significant difference between the two. The fact that adoption is a response to an already existing pregnancy, whereas surrogacy arrangements, by definition, plan the splitting of the elements of motherhood prior to conception marks a significant difference.\(^3\) Adoption is the process by which an existing child is given a family. In the case of surrogacy the opposite is true as an existing family is given a child. Although this difference makes surrogacy closer to natural reproduction than it is to adoption the principles and issues raised by both are connected. The type of surrogacy being considered will also affect the appropriateness of the analogy between surrogacy and adoption. If the surrogate mother is the genetic mother of the child then some of the issues raised in adoption will also exist with surrogacy. If the surrogate is only the gestational mother then there will be different issues raised. Because of the connection between the issues raised in both surrogacy and adoption, those regulating the area of surrogacy should carefully consider the findings of research into adoption and how they might effect the practice of surrogacy.

The Adoption Practices Review Committee in 1990 said that adoption should not be regarded as the first choice for the placement of a child. Issues of cultural heritage and

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1. 286 Cal. Rptr. 369 (Ct App. 1991)


whakapapa were considered of importance. It was also recommended that the birth mother be recognised as the primary decision maker about the care of the child. These findings have led to major changes in the practice of adoption in New Zealand. Under the open adoption system children are aware that they have more than one “mother” from an early age. The affect that this has on a child will depend how the adults approach the issue. My own cousin, adopted at birth, considers herself special because she has a birth mother as well as “mum”, not to mention twice the number of grandparents, another set of sisters, and a multitude of cousins. This is an example of open adoption at its best. Whenever there is more than one person involved in the parenting of a child there is the potential for conflict. The more people involved the greater the chance of disagreement. Our conception of motherhood is central to the success of both adoption and surrogacy. If it is accepted that the different elements of motherhood can reside in different women there need not be conflict between the three. Each woman can accept her role as “mother”, whether that be birth mother, genetic mother, or social mother. By accepting her role the role of the “other mothers” need not be threatening. Each can have a relationship with the child which reflects their part in the creation of that child. My aunt as “birth mother” has a special position in my cousin’s life, but one which in no way threatens my cousin’s relationship with her “mum”. In modern society there are examples other than adoption of multi-parent families. With the high divorce rate many children have more than two parents. There are their biological parents and step parents. The family groups arising from the use of assisted reproductive technologies, such as gestational surrogacy, are another form of multi-parent family. To recognise each woman for the element of motherhood that is her contribution is merely a reflection of this.

Given the involvement of human beings in the practice of surrogacy there will inevitably be conflict between parties in some cases. The focus of these conflicts will generally be who is to take on the social element of parenting the child, the surrogate or the commissioning couple. In both forms of surrogacy the father of the child is largely undisputed, what is at issue is who is the “real” mother of the child. The understanding of the conceptions of motherhood by all of those involved in such a conflict will be reflected in the way the case is argued and eventually decided. If someone believes that is the genetic contribution which makes a person a mother then that person will consider the genetic

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4 Adoption Practices Review Committee (1990) pages 6-7, 11-12, 77.

mother to be the real mother. If another believes that it is the gestational contribution that makes a person a mother then the gestational mother will be considered to be the real mother.

I would argue that it is the whole of the contribution of each of the parties that must be considered in conjunction with the best interests of the child. In legal terms the “best interests of the child” is the paramount principle for determining matters relating to the custody of children. Conflicts arising in surrogacy arrangements concern who should take on the social element of motherhood, as a result these conflicts are in effect custody conflicts. Factors taken into account when determining custody disputes include the financial security and stability of the different parents, although these factors will never be equal when two women have biologically contributed to a child, one through genetics and the other gestation, who should mother the child can result in a comparison between the relative importance of the two biological elements. To compare simply which element is more important risks the denigration of the element which is not considered as more important. Both biological elements of motherhood are vital. Without one the other is meaningless. To degrade one would have a profound effect on the way women’s unique contribution to reproduction, that of providing two biological elements, is perceived in general. Given the dangers of comparing the biological elements contributed by the two women some other way must be found of determining who should take on the social element of motherhood.

One way the American Courts have used to argue a difference between the two biological mothers is to look at the intent of the parties at the outset of the arrangement. To consider the intent in relation to motherhood where there is conflict between two biological mothers does not alter the motherhood of women who become pregnant without intending to. In that situation the one woman contributed both biological elements of motherhood and there is no dispute over who is the mother of the child. The case where the biological elements are separated is unique and requires a unique solution. If the initial intent to take on the social element of motherhood is taken into account as a part of the whole contribution of each party a solution can be reached without degrading either of the biological elements of motherhood. One reason for considering the initial intent of the parties is that but for that intent the child would not have come into existence.

1.2 The Historical Context of Motherhood

As with any concept in a living society, the concept of motherhood has changed, and continues to change, over time. To fully understand the conceptions of motherhood which exist within modern western society, the history of the concept must first be considered. Changes within society, as a rule, occur gradually. As our society changes the concepts that make up that society adapt to fit the new way in which it operates.

The development of assisted reproductive technologies has resulted in challenges to all aspects of our conception of motherhood, something that has not occurred before. For our conception of motherhood to adapt appropriately to these new challenges, we need to understand how, and why, they have adapted in the past. By understanding the way changes have occurred in the past as well as the consequences of those changes the challenges to the present conception of motherhood which result from the development of assisted reproductive technologies can be evaluated more thoroughly. The first consideration here must be the position of women within western society, and how that has changed though the centuries. It is only then that the position of women as mothers through changing times can be fully appreciated. Reproduction, and its control, has also undergone changes over the years. This will be the final issue discussed in this section.

1.21 The Historical Position of Women in Society

The position of women within society is something which has changed dramatically throughout history. The commonly held belief that it is "natural" for men to provide economically for their families while the women are responsible for the care of the children, was not always the case. Early Anglo-Saxon society (from around 570 AD) was based on kinship. The women of this society were considered essential for their contribution to production as well as reproduction. Under Anglo-Saxon laws there were distinct economic values placed on childbearing and rearing. These economic values being evident in settlements made to separated women and widows. The Anglo-Saxon recognition of the need for a larger settlement to women who retained custody of minor children was not seen again until this century.7

The societal value of contributions made by women deteriorated considerably with the introduction of feudalism in the thirteenth century. Under this social system men derived power from property and inheritance, areas from which women, as a rule, were excluded. Women's only contribution of value was to produce legitimate male heirs. Although single women of the time retained some rights, their societal value was as potential wives and mothers. At this time when a woman married she became legally invisible, an attachment of her husband's legal identity. This is shown by the name taken on by women when they married, for example, Mrs John Smith. The woman not only loses her surname but her christian name as well. Her identity is gained from her husband. The complete loss of legal position by married women resulted in the inferiority of the social position of all women. At the time that the procreative work of women was down graded to the mere production of legitimate heirs the productive work carried out by women also decreased in societal value.\(^8\)

The position of women remained relatively unchanged until the end of the nineteenth and early twentieth centuries. It was at this time that feminists began to fight for the rights of women. This action resulted in married women being granted some legal rights as individuals independent of their husbands. Women did not gain legal equality with men under these changes. They granted to married women some of the limited legal rights enjoyed by single women of the time. At the turn of the century women were still not considered to be legal persons, one effect of this is the barring of women from entry into the professions. By refusing to recognise women as legal persons it was argued that the judiciary was protecting the material interests of men, the option to leave the home being more feasible for women with the prospect of well-paid employment.\(^9\) The law was used in other ways to ensure women stayed within marriage. In 1830 a bill was introduced into the House of Lords, which would have entailed that women would have gained some legal rights as mothers. It was rejected on the grounds that the threat of losing maternal rights was one of the strongest deterrents available to prevent wives from separating from their husbands, thus preserving the institution of marriage.\(^10\)

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\(^8\)Ibid page 10.

\(^9\)Carol Smart \textit{The ties that bind: Law, marriage and the reproduction of patriarchal relations} Routledge and Kegan Paul, 1984. page 17.

The dominant liberal philosophy has hindered change in the status. Within, what is now considered, traditional western society women are largely confined to the domestic sphere. The primary concern of those fighting for change is the public sphere. As a result, women are still finding equality difficult to achieve. Mill saw women as capable of succeeding in all spheres, but assumed that women would want to continue to do the domestic work.\footnote{Will Kymlicka \textit{Contemporary political philosophy: An introduction}. Oxford University Press, 1990. page 248.} Mill’s view seems far from fair simply because of the differences in the consequences of marriage. Like other male liberals Mill assumes that the traditional family is just. This view fails to consider women who work outside the home, who, despite this outside work, are still responsible for the domestic duties. It is this double day of work which has resulted in women being largely confined to part-time and lower paid work outside the home. Continued responsibility for domestic and reproductive work has unjust consequences even before women start a family. Women face choices between family and career and face judgements for those choices in a way men do not.\footnote{Ibid pages 247-262.} The equal opportunities which liberal philosophy aims to achieve for all in western society will remain unrealistic as long as it assumes all people start in an equal position. There are a number of groups who have to start from a position that is disadvantaged by comparison to white middle class males, including those of different race, those with less education as well as women. The longer a wife and mother devotes to the care of her family, the more she disadvantages herself in the world outside the family.\footnote{Kathrine O’Donovan \textit{Sexual divisions in law}. Weidenfeld and Nicolson, 1985. page 167.}

Although the traditional concept of \textit{paterfamilias}, where a woman loses her legal identity on marriage, is no longer with us, some remnants remain. One of these remnants can be seen in the way that the courts have taken the liberal idea of defining a realm within the private sphere where individuals can have privacy. This legal formulation of a right to privacy has resulted in reluctance for the state to interfere with the family. An example of this is the reluctance of the police in the past, and to some extent today, to get involved in “domestics”. Another is the way the law has refused to protect women from being raped by their husbands. It is only relatively recently that woman a has had the legal right to refuse to have sex with her husband. This “protection” of the privacy of family life impedes reforms
designed to protect women and children from abuse. MacKinnon says that “this right to privacy is a right of men to oppress women one at a time”.

In western society the social construction of gender is, and has been for a considerable time, a factor in the oppression of women in western society. Features traditionally classed as feminine differ from those classed as masculine not only in type but also in value. Ways of reasoning and feeling, psychological disposition and activities traditionally classed as masculine were, and to some extent still are, also traditionally classed the norm. As a result those portraying feminine features are considered not to measure up to the norm. Society continues to cling to the ideals of patriarchy, although women are not necessarily confined to the home they are primarily responsible for the domestic work. Until there is a change in these attitudes, women will be competing from a disadvantaged position and motherhood will continue to be a tool in that oppression.

The consideration of the historical position of women in society is important when considering the regulation of surrogacy because it makes us aware that women have been confined by their social position. This social confinement has resulted in women having limited choices in their lives. If the equal opportunities and freedom aimed for by liberal philosophy are to be truly achieved for women then these social limitations on the choices of women must be removed.

1.22 The Historical Position of Women as Mothers

Western society’s view of women as mothers have also changed over time. Since the introduction of the feudal system, in the thirteenth century, the role for which women had any value was the production of legitimate male heirs. Not until this century was the mothering role of women acknowledged outside the home. Prior to this social recognition of mothering, marriage separation would automatically result in the father taking custody of any children. The lack of maternal legal rights was first challenged by Caroline Norton in the 1830s. The result of her campaign was a bill introduced into the House of Lords. As

14Will Kymlicka Contemporary political philosophy: An introduction. pages 247-262.

15Patricia Di Quinzo Exclusion and essentialism in feminist theory: The problem of mothering Hypatia 8 (3) (Summer 1993) pages 2-3.

16Susan Atkins and Brenda Hogget Women in law. page 10.

17Carol Smart The ties that bind: Law, marriage and the reproduction of patriarchal relations. pages 92, 120.
discussed before, the idea of granting legal rights to mothers was rejected as it would have removed an effective method of ensuring women stayed within the institution of marriage.\textsuperscript{18}

The automatic father-right was not revised until the post war era, the time when the best interests of the child principle was developing. By the 1960s the ideology of motherhood was very strong and in the majority of marriage separations the mother’s custody was not contested. In those few cases where it was, the mother’s behaviour became the primary focus. Adulterous women were not only seen to be unfit mothers, but the removal of custody was seen as a suitable punishment for such behaviour. Women who left not only their husbands but their children as well, effectively forfeited any maternal rights, the maternal duty to stay with her children until adulthood having been breached.\textsuperscript{19} The perception of the role of women as mothers had changed, they were no longer caring mothering the fathers heir but rather mothering their children.

Although behaviour of mothers is no longer scrutinised the way it was in the 1960s, lesbian women today are treated in much the same way as the adulterous woman of the previous generation. Custody is the reward for changing her “deviant” behaviour, while the loss of custody remains a suitable punishment.\textsuperscript{20} In New Zealand legislation exists to protect against discrimination on the grounds of sexual orientation, but legislation does not alter attitudes overnight. Surrogacy arrangements in which the surrogate mother is both the genetic and gestational mother, arguably, have changed the rights of women as mothers again. Pateman argues that such arrangements indicate a transformation of modern patriarchy and the reappearance of father-right in this new contractual form.\textsuperscript{21} This new form of the father-right is drawn from the surrogacy case law. Many of these cases only involve the commissioning father and the surrogate mother. The commissioning mother being noticeably absent. The courts have used existing legal principles in these cases to award custody to the fathers, even in cases where the surrogate mother’s parental rights have been recognised. Pateman is arguing that these decisions in favour of the commissioning fathers are similar to the status of fathers in the times when their custody was assured by the law. The current legal

\begin{flushright}
\textsuperscript{18}Carol Smart and Julia Brophy \textit{Locating law: A discussion of the place of law in feminist politics}. page 6.

\textsuperscript{19}Carol Smart \textit{Ties that bind: Law, marriage and the reproduction of patriarchal relations}. pages 92, 94, 121. Carol Smart and Julia Brophy \textit{Locating law: A discussion of the place of law in feminist politics}. pages 99, 103.

\textsuperscript{20}Carol Smart \textit{Ties that bind: Law, marriage and the reproduction of patriarchal relations}. page 124-125.

\end{flushright}
principles enables the courts to justify their decisions to award custody to the fathers. When the best interests of the child are considered the middle class father is seen as being able to provide a better home and a two parent family, as well as better education and the advantages that means. Whereas the genetic and gestational surrogate mothers being from a lower socio-economic group, and in many cases being single, cannot offer the same advantages.

Recognition of the nurturing role of women as mothers has come from the courts in the division of matrimonial property. Taking into account the needs of a mother with custody, larger settlements are being awarded. These settlements allow women to further their role as mothers. Many would argue that this has not gone far enough. Even a fifty-fifty division of property leaves women in a much worse financial position than their husbands. This is due in part to the time spent away from the work force while mothering.

Within our society it is primarily women who spend their time and energy rearing children. Despite challenges to the patriarchal ideology which regards motherhood as a woman’s true aim in life, we are not yet free of it. Child rearing is not biologically determined, it is something both genders can experience, yet society still appoints the task in a rigid way. The prevailing norms of society disadvantage women in the market place because they are mothers. Women find it more difficult than men to achieve the complete separation of work and private lives. Mothers are expected to be home if a child is sick or there is a problem at school. In the work place where male norms prevail this is seen as a nuisance and can be said to be responsible for some of the prejudice against women.

Women’s role as mother significantly effects all aspects of their lives. Even if a woman is not a mother, the potential to become one can have the same effects. Historically speaking mothers have only recently gained recognition for their role. Despite the vast improvement for mothers in the form of legal rights, motherhood has been used against women in terms of equal opportunity in the market place.

When regulation of surrogacy is considered it is important to consider the way in which motherhood has been used as a form of control, a method to oppress women. Without

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24 Susan Atkins and Brenda Hoggett Women in law. pages 83-84.
considering this any new regulation risks continuing the perceived legitimacy of this form of control, something against which women have been fighting.

1.23 The Medicalisation of Reproduction

Pregnancy and childbirth was once entirely the domain of women. Wise women and midwives cared for pregnant women and attended births. This changed during the sixteenth and seventeenth centuries. The science of medicine, a science developed by and until last century exclusively practised by men, came increasingly in conflict with traditional healers and midwives, who were usually women. Medicine was aided in these conflicts by the political situation of the time. This was the burning time, a time when the church was ridding the world of heretics. The focus of the inquisition had moved to women who continued to practice pagan rituals. Anyone who made others uncomfortable was accused. The power and knowledge of these wise women and healers was feared. Those in medicine were able to take over the areas of healing, pregnancy and childbirth as the competition was slowly removed or forced to stop practising. Pregnancy and childbirth was now in the control of medicine.25

By last century husbands were said to have rights to the reproductive services of their wives. As discussed earlier, husbands also have rights concerning any children produced by his wife. If decisions needed to be made about childbirth the medical profession turned to the husband. The nature of these decisions was usually limited to a choice between the life of the mother or child, doctors making decisions concerning the way to treat the patient.26

Women have gained some control over their reproductive capacities. Evidence of this can be seen in the Abortion legislation. This legislation only mentions the pregnant woman, not the father of the child. Although this legislation indicates a vast improvement in the position of women, it does not give women complete self determination in this area. What it grants is power to the medical profession, power which can be used for the benefit of the woman if the doctor considers it appropriate.27 The relatively recent right to self determination when pregnant is still incredibly vulnerable. Although the cases where the


26Susan Atkins and Brenda Hoggett Women in law. page 84.

27Carol Smart Ties that bind: Law, marriage and the reproduction of patriarchal relations. page 4.
courts force women to undergo medical treatment for which they have refused to consent are very rare they indicate just how vulnerable.28

The process of childbirth is something over which the medical profession has a great deal of control. Legislation in the United Kingdom states that only registered midwives with medical supervision can attend a birth. What this means for women is that not only do they have to give birth with the medical profession present, but the medical profession, by stating where they will attend, can dictate the place where the birth will occur.29 New Zealand women have more freedom than their English counterparts. They are free to give birth where they choose and are not required to have medical professionals present. Limiting this freedom is the fact that those providing a professional service have some say in the delivery of that service. For example some doctors and midwives refuse to attend home births, particularly for first time mothers. If the mother wishes to use that particular carer that limits her choices.

Atkins and Hoggett argue that the bases for the medical case to control pregnancy and childbirth are two assumptions. Firstly, that pregnancy is a disease that is bound to cause problems, and secondly, that the medical profession has the best treatments to deal with this “disease” and its associated problems.30 Technological advances in the diagnosis and treatment of problems associated with pregnancy have not only perpetuated these assumptions they have also changed the focus of the medical profession. The foetus often becomes the primary focus of treatment. Due to the unique relationship between mother and foetus treatment inevitably requires invasions of the mother. Questioning the appropriateness of these invasions has received less attention than the medical procedures allowing such treatment.31

The development and use of assisted reproductive technologies has increased the medicalisation of reproduction. Infertility is seen as a problem that can be remedied by advanced technology. There are both advantages and disadvantages associated with this medicalisation. One of the obvious advantages is the options provided to women who are

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29Susan Atkins and Brenda Hoggett Women in law. page 87.

30Ibid pages 87-88.

31Laura Woliver Reproductive technologies and surrogacy: Policy concerns for women. pages 185-186.
unable to have children by other means. Some of the disadvantages concern the control of the systems. Although guidelines are essential with the use of such advanced technology, the formulation of these guidelines can be detrimental to the women who use the services. In New Zealand the guidelines are formulated by those who provide the services, the medical profession. The focus of this group is the creation of pregnancies. The women who require this technology to achieve pregnancies are reduced to little more than foetal environments. Others argue that as the “consumers” of this technology these women are able to assert their rights in the way consumers in other areas do. Both of these approaches, with their focus on the foetus, ignore the importance of the developing mother-child relationship. When guidelines are formulated it is imperative that the focus be returned to those who are meant to benefit from the technology, the women who require it to become mothers.

Reproduction is a natural function, one which most women achieve without technological intervention. The medicalisation of reproduction can be detrimental for women whether or not assisted reproductive technologies are used. A woman’s birth experience is the second most significant variant of the bond she develops for the child. The medicalisation of the pregnancy and childbirth experience can leave women feeling that they had little or no control in an event that is, without question life changing. It is vital when considering any form of regulation in the area of reproduction, be it practise guidelines or legislation, that the effects of the controls be considered from the perspectives of those involved. Due to the nature of biology this means the perspectives of women.

The way in which the medicalisation of reproduction affects those who are involved in gestational surrogacy arrangements is of particular importance when the regulation of the practise is considered. The medicalisation of reproduction rather than providing more options for women in relation to reproduction has in many ways taken away the choices of women by defining those choices for them. To ensure that any new regulation does not further limit the autonomy of women the way in which this has occurred in the past must be considered.

32Dorry De Beijer Motherhood and the new forms of reproductive technology: Passice source of nutrition and rational consumer In Motherhood: Experience, institution, theology. Edited by Anne Carr and Elisabeth Schussler Fiorenza.

33Ibid

1.3 Modern Western Conceptions of Motherhood

The conception of motherhood changes gradually over time, adapting to the new way in which a society views the world. Our conceptions of motherhood have been challenged, like never before, by the recent development of assisted reproductive technologies. The technology is forcing people to re-evaluate their conceptions of motherhood. This process of re-evaluation is only in its early stages due to the recentness of the developments. As a result there is a variety of different conceptions of motherhood which exist within western society. Certain elements exist within conceptions of motherhood. It is our perception of these different elements and the relative importance given to them that will determine the way in which motherhood is viewed, either by the individual or a particular society. The basic elements of motherhood are; the genetic, the gestational, and the social. According to the traditional view all three elements coexist, allowing for only one mother. Other views give primacy to one of the elements, making three other possibilities; the social mother, the genetic mother, and the gestational mother. Each of the four possibilities will be considered in turn.

1.31 The Traditional Mother

Motherhood is something of which we all have experience. Either form being mothered and, for those of us who are mothers, from mothering. Despite this experience, defining our conception of motherhood is difficult. The traditional view defines a mother as a woman who combines all three elements of motherhood: the genetic, gestational and social. As the Concise Oxford Dictionary puts it, a mother is “a woman in relation to a child or children to whom she has given birth”. Motherhood is something which can be proven by the gestation and birth of a child. Motherhood continues to include the nurturing of that child after birth.35

The development and increasing use of assisted reproductive technologies has challenged this traditional view. Using such technology it is possible for the involvement up to five “parents” in the creation of a child. Two genetic parents, one gestational mother and two social parents. The three elements of motherhood may be contributed by three women. Such challenges are viewed as threats by some groups. The Roman Catholic Church is such a group. They consider the use of assisted reproductive technologies, in particular the practice of surrogate motherhood, to be a threat to the stability of the family.\textsuperscript{36} This view is consistent with the Church’s teachings on the prohibition of interference with the process of reproduction, embodied in its teachings on contraception, sterilisation, abortion and homosexuality. According to the Church “\textit{[m]arriage is the institution devoted to procreation}”\textsuperscript{37} Procreation under this view must be limited to normal sexual intercourse of a married heterosexual couple.

For many the Church provides the moral framework used to interpret the realities of the world. Changes in society are be judged with reference to this traditional framework. These changes are often perceived to be a threat to the moral fibre of society and as such they should be prevented. This is true of assisted reproductive technologies, which are seen as an assault on the traditional concept of motherhood, due to the resulting fragmentation of the elements of motherhood. By assaulting motherhood this technology is also considered to assault the family.\textsuperscript{38}

Over time society, and even some churches, have recognised challenges to traditional views. Divorce, once considered unacceptable, is now a common occurrence, which does not attract the social stigma it once did. Illegitimacy, a factor that resulted in people being treated as second class citizens, no longer legally exists.

It is argued that the interference with the natural process of reproduction threatens our “humanness”. According to this view society chooses methods of reproduction which are “natural”. Anything outside this norm is considered a threat. Threatening variations will include such things surrogacy which does not involve the use of medical technology, as well as medical interventions. According to this view a child “created” by such interference is

\begin{itemize}
\item \textsuperscript{36} Karoly Schultz \textit{Assisted reproduction and parent-infant bonding: How do new reproductive technologies affect parent-infant bonding and our understanding of family.} page 234.
\item \textsuperscript{37} Maurizo Mori \textit{Is a “hands off” policy to reproduction preferable to artificial intervention?} In \textit{Creating the child: The ethics, law and practise of assisted procreation.} Edited by Donald Evans. Martinus Nijhoff Publishers, 1996. page 101.
\item \textsuperscript{38} Ibid pages 101-107.
\end{itemize}
somehow less human as a result. The perceived threat of an interference will depend on the intervention used. This view does not necessarily rule out all forms of assisted reproduction. Artificial insemination using the husband's sperm may be considered acceptable, while gamete donation is not.

Others see anything other than the traditional conception of motherhood as a threat to motherhood itself. It is claimed that the fragmentation of motherhood, as occurs with the use of some forms of assisted reproductive technology reduces motherhood to little more than a chain of different jobs and that this denigrates motherhood as a whole. Traditional accounts of “mother” and “mothering” are exclusionary. There are many situations where mothers do not fit the traditional models, for example, the lesbian mother, the single mother and the mother without the custody of her children. Their failure to fit within traditional models does not mean that these women are not mothers. What it means is that there are forms of motherhood which differ from the traditional view which are accepted by society to be motherhood nonetheless. Another case which differs from the traditional view of motherhood is that of the adoptive mother. Although this woman has not given birth to the child she is considered to be its mother.

1.32 The Social Mother

The social mother is the woman who takes on the role of nurturing the child after birth. This woman is in the majority of cases also the biological mother of the child. There is however a long history of this role being assumed by women who are not the biological mothers of the children. It is written in Genesis that Rachael considered two boys born to her husband and her maid, to be her own. Women are under a great deal of social pressure to become mothers. The social definition of all women is as either mothers or potential

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40Maurizio Mori Is a “hands off” policy to reproduction preferable to artificial intervention? page 106.

41Judit Sandor Legal approaches to motherhood in Hungary. page 163.


mothers. All women are questioned about their intent to have children, once they are in a relationship people start asking when are you going to have children. Even if women were asked if they were going to have children this still indicates that society expects women to have children. If women are not in a relationship comments are made about finding a partner, after all the biological clock is ticking. This social pressure is such that women are not seen as achieving their full position in society until they become mothers. Infertile women often suffer a great deal of pain that is in part caused by the social stigma attached to childlessness. The social component of the “problem” of childlessness should not be ignored. Fertility clinics concentrate on the biological causes of infertility. This focus can result in complex social issues being ignored. An argument in favour of the use of assisted reproduction is that if parents are prepared to go to these lengths to have children they must “really” want children, as a result of this the children will be loved. This is not always the case. I know a family who had children with the assistance of in-vitro fertilisation. This was because they were expected to have children by the wider family and had the money for the treatment. Once they had the children they did not know what to do with them. For the first eighteen months they had a twenty-four hour nanny and after that the nanny came from eight until the children were in bed. This mother had as little to do with her children as possible. She would ask the nanny’s permission to see them and did not have a clue how to play with them. One way to address this problem would be to include a social issues component into the counselling completed by infertile couples.

Under “natural law” parenthood was considered to be a social relationship rather than a biological one. It was the regular coincidence of the social and biological father that resulted in people coming to believe that a genetic relationship determined parenthood. As discussed earlier, the sexual division of labour means that the parental roles of mother and father differ. The father is expected to be the provider while the mother cares for the children. To mother a child is to nurture and care for that child as well as have a long-term


47 Maurizio Mori Is a “hands off” policy to reproduction preferable to artificial intervention. pages 102, 106-107. 
emotional commitment to it.\textsuperscript{48} This also indicates that the social element of motherhood is considered more important than the biological. The significance of the social element, when the different strands of motherhood are evaluated, is such that the role overrides the biological when they are in conflict.\textsuperscript{49}

From the perspective of the child the social element of motherhood is most important. To a child a mother is the person who cares for them and provides for their needs, the person with whom they have developed an emotional bond. Although children and young adults are often interested in their genetic history the psychological mother is more important to the young child than a stranger who claims to have a genetic relationship with them.\textsuperscript{50}

The practice of surrogacy provides situations where the different elements of motherhood may conflict. Conflicts arise when the surrogate mother decides that she wants to keep the child she has agreed to bear for another couple. The case law which has developed as a result of such conflicts has brought the ethical debate surrounding surrogacy to public attention. By focusing on the surrogacy aspect of the conflicts the ethical dilemmas concerning the status of the different elements of motherhood can be distorted. Surrogate mothers have been labelled unfit mothers because of their intention to not take on the social element of motherhood prior to the conception.\textsuperscript{51}

Case law like any law reflects the ethical values of society at the time it is made. The case of \textit{Johnson v Calvert}\textsuperscript{52} provides an example of the range of ethical questions that the courts consider. The issue in this case, as in others of its type, is the determination of the legal parents of the child resulting from the arrangement. This is not an issue which would require determination in New Zealand as the Status of Children Amendment Act 1987 states that "[w]here a woman becomes pregnant as a result of a donor ovum or embryo implantation, (a) That woman shall, for all purposes, be the mother of any child of the

\textsuperscript{48}Laura Woliver \textit{Reproductive technologies, surrogacy arrangements and the politics of motherhood}, page 352.


\textsuperscript{50}Sherrie Russell-Brown \textit{Parental rights and gestational surrogacy: An argument against the genetic standard}, page 551.

\textsuperscript{51}Kelly Oliver \textit{Marxism and surrogacy} In \textit{Feminist perspectives on medical ethics}. Edited by Helen Holmes and Linda Purdy. Indiana University Press, 1992

\textsuperscript{52}Supra.
pregnancy, whether born or unborn and, (b) The woman who produced the ovum...shall for all purposes not be the mother of any child of the pregnancy, whether born or unborn.”

The determination of legal motherhood, and therefore social motherhood, in a case like this is important because of the rights and obligations associated with the role. Under the statute law of California both women in this case could claim to be the natural mother of the child, as both women could claim a statutorily recognised biological relationship to the child. Following the traditional view of motherhood the court could not accept the possibility that the child had two mothers. The basis of the decision had to be either the intention of the parties or the best interests of the child. In a case where the relationship of the parties had deteriorated to the point where the courts became involved, it would have been easy to argue that it would not be in the interests of the child to find that she had two mothers. What the majority accepted was that the interests of the child were unlikely to run counter to the people who initiated the process which brought about her being. When the interests of the child are at issue the surrogate mother will inevitably suffer. The commissioning parents provide the traditional family unit, whereas the surrogate is often a single parent, and are generally in a better financial position than the surrogate. The courts view the traditional family unit and financial security, with the advantages that it can offer, as being important when considering the best interests of the child.

In the case Johnson v Calvert the court focused on the intent of the parties. The advantage of determining motherhood by taking into account the intent of the parties is that it is easy to ascertain. Intent is also a factor taken into account by the law in many areas, including contract, an area of law often discussed in relation to surrogacy arrangements. The consideration of surrogacy in terms of contract law does have its ethical difficulties, for example, this area of law is concerned with commodities and its use in the area of surrogacy can intensify the argument that both the resulting child and the surrogate mother are commodified. That does not mean that it is not legitimate to consider the intent of the parties


55 Supra.

56 Goodwin Determination of legal parentage in egg donation, embryo transplantation, and gestational surrogacy arrangements, page 286.
in surrogacy cases. In determining whether the intent of the parties was an appropriate consideration the court considered who in surrogacy arrangements was exercising procreative choices. They held that “a woman who enters into gestational surrogacy arrangement [as the surrogate] is not exercising her right to procreative choices; she is agreeing to provide a necessary and profoundly important service without (by definition) expectation that she will raise the resulting child as her own”.

When determining who should become the social mother of a child when fragmentation of the other elements of motherhood has occurred, there must be consideration of the overall contribution of each “mother”. The initial intent to take on the social element of motherhood is in cases of gestational surrogacy, something which can determine a difference between two women who have both contributed biologically to a child. It is the greater combination of genetic contribution and social intent that wins over gestational contribution alone. To not consider intent when determining who should take on the social element of motherhood in such cases would result in a determination of which of the biological contributions was more valuable. This sort of determination runs the risk of devaluing the unique contribution women make to reproduction. Discussion of why this devaluation would occur is dealt with in the next section. Determining who should take the role of social mother need not always go against the gestational mother. In traditional surrogacy it would be the surrogate mother who would have made the greater contribution, genetic and gestational as opposed to social intent alone of the commissioning mother. This approach would also be appropriate for conflicts arising from the use of other forms assisted reproductive technology. For example in the case of in vitro fertilisation using donated ovum, the gestational mother with social intent contributes more than the genetic mother. This form of determination is also consistent with the current adoption practice. The birth mother has a certain amount of time to change her mind about the adoption. If she does so then her genetic and gestational contribution override the social intent of the adoptive mother. This form of determining the social mother of a child not only provides a method which avoids the potential of degrading women’s unique contribution to reproduction, but also allows for consistency across all forms of assisted reproductive technology.

57Morgan A surrogacy issue: Who is the other mother? page 394.

58Ibid page 391.
1.33 Genetic Mother v Gestational Mother

Currently recognition of motherhood under both common and statutory law, is given to a woman who gives birth to a child. The fact of giving birth has been seen as proof of a genetic link to the child.\(^{59}\) Until 1978 this was the case, but the development of in vitro fertilisation made it possible for the separation of the biological functions of motherhood. This technological advance has created the greatest challenge to our conceptions of motherhood. Assumptions of unitary motherhood are no longer always correct. With the separation of the biological elements of motherhood there is the potential for conflict to occur between two women who are each able to claim that they are the biological mother of a child.

As discussed earlier, the regular coincidence of the social and biological aspects of fatherhood has led people to consider that parenthood to be genetically determined.\(^{60}\) When paternity is in dispute testing is used to determine a man's the genetic link with a child. This testing occurs when it is biological paternity that is in dispute, as the genetic contribution is the only biological contribution made by men to the creation of a child that is appropriate. Men can also be social fathers and have intent to be a social father in the case where donor sperm is used, in those cases the biological paternity is not at issue. Determination of biological maternity is a relatively new occurrence and the rules used in this area are still being developed. The only legal rules available were those used for the determination of paternity and these have been applied, although in some jurisdictions this area has now been legislated, an example being found in section 27 of the Human Fertilisation and Embryology Act 1990 of the United Kingdom. This section states that the birth mother is always the legal mother.

There are various reasons for treating maternity like paternity. Firstly there is the idea that we have some sort of "ownership" of our genetic material. The genetic maternity rule is argued to protect individual choice in reproductive decisions. Deciding against genetic mothers in cases of gestational surrogacy, forces them to become gamete donors. If there is a form of ownership in genetic material then protection of that "ownership" should be available.\(^{61}\)


\(^{60}\)Maurizio Mori Is a “hands off” policy to reproduction preferable to artificial intervention? page 107.

\(^{61}\)Karoly Schultz Assisted reproduction and parent-infant bonding: How do new reproductive technologies affect parent-infant bonding and our understanding of family? page 235. Alice Hofheimer Gestational
Another argument is that genetic kinship is important to identity. Such kinship strengthens family relationships. Genetic Kinship is an integral part of many cultures, the Scottish Clan systems and the importance of whakapapa to Maori being just two examples. In *Johnson v Calvert* the court considered not only that genetics were a powerful factor in human relationships, but that genetic heritage is more decisive in human development than gestation, the whole process being initiated by genes. It was also argued by that court that to not determine maternity on the basis of genetics in this case would amount to gender discrimination. If anything the opposite is true. To determine maternity on the same basis as paternity devalues and degrades the unique role of women in reproduction. Women are not only responsible for a genetic contribution they also provide gestation, ignoring the importance of this role degrades both gestation and women. What could be more discriminatory?

In discussions about cases of gestational surrogacy the role of the gestator has been likened to; “a human incubator for the embryo to develop”, the wet-nurse of the past or a foster parent. Although each of these descriptions has distinctive implications for the nature of the relationship of the gestational mother, they have one thing in common, they devalue the role of gestation. Biology establishes two roles for women in reproduction, to determine maternity like paternity takes into account only one of those roles and denies the unique role of women in reproduction, the role of gestation and childbirth. The relationship between the gestator and foetus is perhaps the most intimate physical relationship that can exist

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63 Supra


between two human beings. Following implantation of an embryo the role of the surrogate gestator goes far beyond having temporary custody.\(^6^9\) It is a role of nurturing, a role that involves both physiological and psychological investments.\(^7^0\)

The devaluation of the gestational element of motherhood has various consequences for women. Firstly, women who are capable of pregnancy face increased chances of exploitation. In the case if commercial surrogacy it has been argued that it is the intention to revoke parental rights to the child that attracts the high fees paid. If the gestational surrogate has no parental rights to revoke then fees would be considerably lower.\(^7^1\) Another consequence of devaluation of the gestational element of motherhood is that the surrogate gestator may disclaim responsibility for the foetus. Although the legal recognition of parental rights cannot ensure that the surrogate gestator takes care of herself, and therefore the foetus, it is argued that they may increase her sense of responsibility for the foetus.\(^7^2\) Others reject this saying that the surrogate gestator has obligations to the foetus as a part of her relationship with the commissioning parents.\(^7^3\)

Consequences of the devaluation of gestation and child birth could also reach further than the gestational surrogacy situation. The pregnant woman’s right to self determination does not date back very far and is in many ways still vulnerable.\(^7^4\) Not only is the self determination of pregnant women at risk but also areas such as maternity leave and job security. It has taken a considerable amount of time for the gestational element of motherhood to be considered of such value that protections be put in place to protect women who wish to continue in a life outside the home. Anything that devalues gestation therefore risks these hard won protections.

\(^6^9\) Anne Goodwin Determining legal parentage in egg donation, embryo transplantation and gestational surrogacy arrangements, pages 284, 288.


\(^7^2\) Ibid page 549.

\(^7^3\) Evelyn Schuster When genes determine motherhood: Problems in gestational surrogacy, page 1031.

Comparison between the gestational and genetic elements of motherhood is not an
acceptable way to determine maternity. The way the courts have linked maternity with
paternity ignores and devalues the gestational element. The same is true of an opposite
determination. To consider gestation the more important contribution to motherhood
devalues the genetic contribution, not only of the mother but of the father as well. There is no
doubt that genetics partly determine the person we are going to be. The environment may
mould the individual in different ways, as can be seen in genetically identical twins, but the
basis material of a person is predetermined. To devalue the genetic contribution devalues the
basic relationships upon which many societies are based, those of kinship.

It is a biological fact of reproduction that women fulfil two roles, roles that require
different investment, but without one the other is meaningless. To compare these two roles in
a way which requires a determination of which is more important will devalue and degrade
the other role. Wherever fragmentation of the biological elements of motherhood occurs
there is the potential for conflict. What must be found is a way to resolve these conflicts
without degrading either of women’s roles in reproduction. One way of achieving this is to
consider the whole contribution of the different mothers, as has been done in the American
courts. Not only the genetic and gestational elements but also the initial intent to become the
social mother. After all it is this initial intent which initiated the pregnancy, initial intent
which is accepted and legally protected when other forms of assisted reproductive
technologies are used. Further discussion of this option will occur in chapter 4.

1.4 The Importance of Considering Conceptions of

Motherhood

The challenges which assisted reproductive technologies are making to our
conceptions of motherhood mean that those conceptions need to be re-evaluated. This re-
evaluation is necessary because of all of the new possibilities open to us through the use of
assisted reproductive technologies. If these possibilities are inconsistent with the society’s
conception of motherhood then regulation will be required to ensure that the practice of
assisted reproductive technologies in consistent with society’s conception of motherhood.
The conception accepted by those responsible for the regulation of the practice of assisted reproductive technologies will determine what regulation exists. For example, the traditional model, with its requirement that all three elements of motherhood be kept together, would limit those options available more than any of the other approaches. Only those procedures which use the gametes of the infertile couple to impregnate the woman of the couple would be acceptable.

This re-evaluation of our conceptions of motherhood is of particular importance in the present New Zealand context. The limited practice of surrogacy was recently been accepted by the National Ethics Committee on Assisted Human Reproduction (NECAHR). There is also legislation before parliament concerning the regulation of the practice of assisted reproductive technologies. If conceptions of motherhood, upon which any form of regulation is to be based, are not certain the resulting regulation will be inconsistent and potentially out of touch with society's views on such practices. Whenever regulation is considered in an area such as this, the whole area must be considered. Regulating with only one form of assisted reproductive technology in mind will result in a distortion of the ethical issues being considered. An example of this can be seen in the Status of Children Amendment Act 1987. A discussion of the problems associated with this act will occur in chapter three. Such distortions can have disastrous consequences for other practices in the area.
CHAPTER 2: THE ETHICAL QUESTIONS RAISED ABOUT SURROGACY IN NEW ZEALAND

2.1 Introduction

Surrogacy is a practice which long predates the technological developments which have resulted in world wide debate on the subject. Despite the history of the practice, some consider surrogacy to be the most contentious issue in the field of artificial reproductive technologies.\(^1\) Consideration of the issue has also occurred in the New Zealand situation. In this chapter I propose to consider the formal discussion of surrogacy in this country and the issues highlighted by this. Following a brief chronology of the debate, the issues raised will be considered. These are, the well-being of the child, commodification of the child, the autonomy of the surrogate mother, the benefits of surrogacy and the Treaty of Waitangi. Each of these issues and the way in which it is discussed indicates the conception of motherhood which is embodied in assumptions underlying the arguments which have been made.

2.11 Chronology of the formal debate in New Zealand

There is no doubt that surrogacy using natural conception does occur in New Zealand but the prevalence of the practice is difficult to determine due to its informality. Along with the informal practice of surrogacy there is the possibility of couples travelling to other jurisdictions, where surrogacy using in-vitro fertilisation (IVF) is permitted, if they wish to have a child using this method.\(^2\) The New Zealand formal debate on surrogacy began in 1985 when the Department of Justice released an issue paper entitled *New Birth Technologies-an issue paper on AID, IVF and surrogate motherhood*. This paper was a response to the birth of New Zealand’s first “test tube baby” in 1984. The following year the same department formed an Interdepartmental Monitoring Committee on Assisted Reproductive Technologies

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\(^1\) *Biotechnology Revisited: Ethical and legal issues in the application of biotechnology to medical practice* A report for the Medical Council of New Zealand prepared by the Bioethics Research Centre, University of Otago. November 1991 page 23.

(IMCART). This committee continued to operate until 1992. In 1993 the Minister of Justice appointed a two person Ministerial Committee on Assisted Reproductive Technologies (MCART) to determine what was occurring in the field and gather information from interested parties. Their report to the Minister was also to include options for the direction of the area of assisted reproductive technologies. In the same year the Minister of Health appointed the Interim National Ethics Committee on Assisted Reproductive Technologies (INECART) in order to alleviate the problems which local ethics committees were having dealing with the protocols submitted by those providing assisted reproductive technologies.  

A formal approval for surrogacy using IVF was sought in October 1993 when Fertility Associates put a proposal to INECART for ethical approval of IVF surrogacy. The application was declined. This was not the first case of IVF surrogacy to be presented for ethical approval. A case was granted ethical approval prior to the setting up of INECART, but the pregnancy ended in miscarriage. In July 1994 MCART released its report. In this report there was disagreement with the decision of INECART and a recommendation that Fertility Associates resubmit their proposal. This was done in September of that year and the proposal was reconsidered in the November. The application was again declined. A report on this decision was released in December 1995. The providers sought a second opinion of that decision from the National Advisory Committee on Health and Disability Services Ethics (NACHDSE). That committee recommended that the National Ethics Committee on Assisted Human Reproduction (NECAHR), which had since replaced INECART, should review its previous decision. That review was completed in July 1997 and resulted in NECAHR granting ethical approval for non-commercial surrogacy using IVF. NECAHR also developed draft criteria for the assessment of such cases. The most recent revision of this was completed in February 1998.

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2.2 Well-being of the Child

In its 1993 rejection of Fertility Associates’ application for ethical approval of IVF surrogacy, INECART’s reasons included the uncertainty of the long term well-being of children born as a result of this procedure. They also referred to the lack of research in the area. MCART considered the need for research to be a valid point but concluded that a lack of research could not be the basis for denying ethical approval. If it were no new procedures could be approved. It was also noted by MCART that research conducted in the area of IVF indicated no untoward consequences for the well-being of the resulting children. In INECART’s 1995 report the matter of the well-being of children resulting from the procedure was said to be paramount. Five areas of potential risk for those born as a result of IVF surrogacy were identified in this report. Firstly, there was the disruption of bonding that may have occurred during gestation; secondly, genealogical bewilderment; thirdly, the potential for custody conflict; fourthly, the possibility that neither the commissioning parents nor the surrogate would want to keep the child if it had some abnormality, and finally the potential for commodification of children. The first four of these will be considered in turn in this section, while consideration of the final issue will occur in a later section.

2.21 Disruption of Gestational Bonding

The first perceived risk to children born using IVF surrogacy is “disruption to bonding which may occur during gestation”. What this means is a disruption to the bond which the child may develop for the gestator, during the gestation, by removing that child from the gestator after the birth. INECART listed this risk among arguments against the IVF surrogacy in its 1995 report. The report does not explain this any further, it merely mentions that the burden of proof to show the absence of these risks is with those who claim that the risk is absent. NACHDSE was concerned about the quality of the evidence used by

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6 "Report of the National Advisory Committee on Health and Disability Services Ethics on Fertility Associates’ request for a second opinion on the ethical review of a proposal for surrogacy using IVF" page 3.


8 "Report of NACHDSE" page 8.


10 Ibid page 12.
INECART in relation to this perceived risk of IVF surrogacy. It is a requirement of the National Standard for Ethics Committees 1996 that expert evidence be sought on such matters. In its report INECART failed to establish, firstly, that children experience bonding during gestation, and secondly, that disruption to such bonding is harmful to children.\textsuperscript{11} In its recommendations INECART considered the need for research into separation of “physical, psychological and spiritual dimensions of parent and child”\textsuperscript{12} to be important.

Despite the recognition by paediatricians that parent-infant bonding is pivotal to healthy family development, how assisted reproductive technologies affect this bonding has been given little attention.\textsuperscript{13} It is not established that a foetus bonds with the gestator before birth, nor whether disrupting this bond would be detrimental to the child. It has been claimed that any detrimental affects resulting from the disruption of gestational bonding in a surrogacy situation would be no different from those suffered by adopted children.\textsuperscript{14} However adoption is different from surrogacy in that the disruption of any bond that the child may develop toward the gestator has already occurred if an adoption is taking place, whereas surrogacy is planning to make that disruption. Nevertheless the need for evidence that such disruption is detrimental remains. The lack of evidence provided by INECART to support the detrimental affects of disruption to gestational bonding was commented on by NACHDSE. The fact that INECART were unable to provide evidence up on which to base its assertion that the disruption of gestational bonding has detrimental affects on the well-being of the child does not mean it is not a relevant consideration. If evidence did show that such detrimental affects did exist then the significance of those affects would have to be considered as in surrogacy arrangements this disruption is planned. What is of concern is that INECART not only asserted this risk without being able to substantiate it but also put the onus of proof on those claiming that it did not exist. The presentation of this issue as a risk to the child, diverting the attention away from the “mother” makes it easier to justify given the family law principle of the paramountcy of the best interests of the child. The


recommendation for research into issues of separating aspects of the parent-child relationship changes the focus from the risks to the child to the separation of the elements of motherhood. IVF surrogacy is the only case of assisted reproductive technology which involves the separation of the gestational and social elements of motherhood. The only other situation which involves this separation of the gestational and legal social mother is adoption. There has been considerable research into the long term affects of adoption. If the affects of disrupting gestational bonding are detrimental to the well-being of the child to such a degree as to justify prevention of the disruption, evidence should be available in the adoption literature. The disruption of gestational bonding was not an issue which was even considered during the review of adoption practises in this country. If such disruption were detrimental then you would expect that to be taken into account by such a review committee, this would surely be a reason for discouraging adoption. If evidence could be produced to show the detrimental affects of the disruption to gestational bonding then this would be relevant in the surrogacy situation, a situation where this disruption is planned, but as no such evidence has been produced this potential risk cannot be used to justify the prohibition of the practice in the way that INECART has.

One of the draft criteria set out by NECAHR arguably relates to concern over harmful effects of disruption to gestational bonding, evidenced by the preference that the gestational surrogate be a family member or close friend of the commissioning parents. Given the existing relationship between the commissioning parents and the gestational surrogate the chances of the child continuing to have a relationship with the gestational surrogate after birth are increased and the disruption with gestational bonding reduced. The relationship between the child and the gestator will not continue in the “normal” way, that of parent and child, but it will continue.

### 2.22 Genealogical Bewilderment

The concept of genealogical bewilderment was developed in discussion of the effects of what are now called “closed” adoptions, that is adoptions where access to information about one’s genealogical past was denied. The concept was introduced by H.J. Sants in 1964. Individuals develop a sense of self from their relationships with parents and other family members during their childhood. These relationships enable the individual to determine their

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place within the family as well as the community in which they live. If a child is denied knowledge about their genealogical background that child can feel emotionally deprived and be unable to develop a healthy self identity.\textsuperscript{16} Humphreys acknowledges the existence of genealogical bewilderment but says that it cannot be generalised to all adoptees.\textsuperscript{17} The distress caused by this inability to access information has been alleviated in part by the open adoption process now practised and new rights to access information once an adoptee reaches the age of twenty.\textsuperscript{18}

Among the list of objections against the use of IVF surrogacy is the effect that genealogical bewilderment has on the well-being of resulting children.\textsuperscript{19} Given the application before the committee, an application for IVF surrogacy using the genetic material of both of the commissioning parents, this concept does not on the face of it seem relevant. Any resulting child would have as much access to their genealogical history as a child conceived naturally. There are some indications in the INECART report that their definition of genealogical bewilderment is different from that mentioned above. They refer to the Canadian Royal Commission Report, \textit{Proceed With Care}, and the mention of the potential damage to family relationships as well as confusion on the part of the child. INECART recommends the keeping of records. Without a clear definition of what the committee means by genealogical bewilderment in the report or in the findings of NACHDSE the relevance of this term cannot be fully understood.\textsuperscript{20} What might be of concern to INECART is the potential for children to be devastated by the knowledge that their birth mother, whether genetic and gestational mother or gestational mother alone, did not ever want them and that they were gestated as a result of an agreement. A possible counter argument to this is that surrogate children can adjust better to any sense of abandonment than an adopted child because the surrogate can be portrayed as an altruistic person.\textsuperscript{21}


\textsuperscript{17}Ibid page 71.

\textsuperscript{18}Adult Adoption Information Act 1985.


\textsuperscript{20}Report of NACHDSE pages 8-9.

\textsuperscript{21}Pamela Smith \textit{Regulating confidentiality of surrogacy records: Lessons from the adoption experience}, pages 76-77.
Genealogical bewilderment occurs because of a lack of knowledge about the circumstances of one's birth. This problem has been alleviated for adoptees through the changes to the adoption system. With open adoptions children have access to information about their birth mothers and as a result they can develop a sense of self from their relationships, not only those with their adoptive family but also with the birth mother and in some cases her extended family. This does not necessarily alleviate all of the problems which arise as a result of adoption, such as a feeling of abandonment, but it does equip the adopted child with the resources which can be used to deal with such problems. With access to the birth mother the adopted child is able to ask “why?”, how they might deal with the answer will depend on the individual but without the access the feelings of abandonment will just continue to be destructive. With records being kept in the way suggested by the NECAHR criteria children born as a result of surrogacy arrangements will also have access to the resources which can answer their questions.

2.23 Potential Custody Conflict and Rejection

The third potential risk to the well-being of children born using IVF surrogacy is the possibility of custody conflict if the parties do not agree after the birth. Linked to this is the possibility that neither the gestational surrogate nor the commissioning parents will want the child if there is, for example, some form of abnormality. In its report INECART stressed the paramountcy of the rights and welfare of the child, along with the importance of their role in protecting the vulnerable parties in a surrogacy arrangement. For the effects of custody conflict and rejection to be a reason to justify the prohibition of surrogacy evidence is required on the likelihood of conflict in surrogacy cases, the effect any conflict would have on such a young child as well as the frequency of rejection of children with abnormalities. To determine whether IVF surrogacy increased the risk of these events, evidence would also be required about the frequency of custody conflict close to the time of birth and rejection of abnormal children in the general population. If the risks associated with such conflict are significantly greater when surrogacy arrangements exist then the affects of this should be considered when deciding whether the prohibition of surrogacy is justified. Without such evidence such justification is not possible.


NECAHR shows continued concern about the potential for custody conflict and rejection in its draft criteria for IVF surrogacy. The requirement that the gestational surrogate be a friend or family member could have the effect of reducing the chances of such events. There are also the stringent counselling requirements for all parties. Along with this there is a specific criterion about dispute resolution. NECAHR prefers that process for the resolution of custody disputes be discussed with both counsellors and legal advisors prior to the proposal being finalised.24

The concern over potential effects of custody conflicts and rejection of children following IVF surrogacy is for the well-being of children born as a result of this procedure. Whenever there is more than one person involved in the parenting of a child there is the potential for custody conflict. The more people involved the more chance that conflict might eventuate, what is important is whether this increased chance of conflict is significantly greater than in other forms of reproduction. To justify the prohibition of the practice the number of custody disputes or abandonment cases involving IVF surrogacy must be compared with the number in the general population and a significantly larger percentage of cases noticed. It also needs to be established that such disputes have a detrimental effect on very young children. To argue that there is harm to the well-being of children has implications for all human reproduction unless a significantly higher chance or amount of harm can be established.25

Although the risks identified by INECART are relevant and require consideration, they cannot be used to justify the prohibition of surrogacy without evidence which supports the claim that these risks to the well-being of children born using IVF surrogacy are significantly greater than the risks to children born through other forms of assisted reproduction. By justifying the prohibition of surrogacy without such evidence INECART's reluctance to consider the separation of the gestational and social elements of motherhood can be seen. By choosing to orient concerns over surrogacy on the well-being of the resulting child is to choose a conservative approach.26

24Draft criteria for IVF surrogacy prepared by NECAHR.


Even though NECAHR has approved the separation of the gestational and social elements of motherhood this is not complete. Given the involvement of third parties, whether these be the ethics committees, the medical profession or the gestational surrogate, in assisted reproduction those third parties have some responsibility for the children born. As a result these third parties might not be prepared to accept the level of risk that exists in some cases of natural conception, because they are in part responsible for the creation of the child. What is not acceptable is for one level of risk to be accepted in one form of assisted reproduction when that same level is not accepted for another form of assisted reproduction. If the third parties are prepared to accept a particular level of risk for one form of assisted reproduction then they should accept that same level for another form. Not to do so is to discriminate against those who require the use of the latter form of assisted reproduction to become parents. To evaluate properly the effects of this separation in the form of IVF surrogacy, evidence of such risks must be considered in relation to both surrogacy and other forms of assisted reproduction as well as natural conception for any evaluation to be meaningful. It is only then that the effects of this separation of the gestational and social elements can be determined. The concern for the welfare of children is something which applies to all children not just those born through the use of assisted reproductive technologies. It is only when we can see whether any detrimental effects of separation of the social and gestational elements of motherhood are of significance in relation to children born through other means, that the prohibition of IVF surrogacy could be justified.

2.3 Commodification of the Child

One of the issues often linked with surrogacy is that of commodification. Surrogacy is often seen as perpetuating the view that all children are commodities. Commercial surrogacy has even been likened to baby selling. INECART in its 1995 report considers that there is a risk of commodification even when payment is not made to the surrogate

27 Ibid page 151-152.


mother. This was described as being a breach of “social values regarding the inherent rather than instrumental worth of all human persons”. The emphasis of INECART on the paramony of the best interests of the child is consistent with the importance of ensuring that the resulting children are not seen merely as commodities. According to MCART, to view resulting children as commodities not only lowers the dignity of those children but also that of all involved in the surrogacy arrangement. Commodification of children as well as being dehumanising can endanger the well-being of the children by diminishing their sense of self. Any commodification of children which results from surrogacy can have implications for all children as they are more likely to be considered as commodities.

The case for commodification of children resulting from commercial surrogacy is more easily made than where non-commercial surrogacy is emphasised. Commercial surrogacy encourages this conception with the payments of surrogate mothers. There are certain problems with viewing non-commercial surrogacy as commodifying children. Given that the technology used in IVF surrogacy is the same as that used in other forms of assisted reproduction, these other forms of assisted reproduction can also be considered to commodify children. Children born using assisted reproduction are commodities in that they are the goal of a procedure which involves expense and sacrifice by the parents. There is also the fact that the use of assisted reproductive technologies is for the purpose of achieving a particular desired result, in some way a desired product, the child. If it is the view of INECART that any practice which involves any degree of commodification should be prohibited then they would have to prohibit many forms of assisted reproduction, not to do so would be an inconsistent application of the anti-commodification principle and therefore unfair to surrogacy.

Another problem with this analysis is that no causal connection between commercial and non-commercial surrogacy has been shown. Although the non-commercial surrogacy

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33 Martha Field The case against enforcement of surrogacy contracts. page 201.


may increase the chances of the development of commercial surrogacy this is not considered to be sufficient grounds to completely ban the non-commercial surrogacy.\textsuperscript{36} INECART's argument that non-commercial surrogacy should be prohibited if there is any possible commodification is inconsistent with social attitudes relating to the area of reproduction.\textsuperscript{37} An example of this is that social practices such as marriage could also be prohibited on the principle that reproductive processes involving any commodification be prohibited. It has been claimed that marriage often includes the exchange of financial support for reproductive services,\textsuperscript{38} men providing financial support for their wives while the wife 'stays in the home and provides the husband with children. It is not the technology used, but rather the attitudes which the practice can cause to develop which links surrogacy with commodification.\textsuperscript{39} Commodification can be found in some degree in many forms of reproduction, to prohibit all of these would be to prohibit reproduction.

The Kantian view is that people should be treated as ends rather than merely a means to an end. INECART's comments about the commodification of resulting children considers this view to be breached. This breach can make the custody relationship appear to be one of ownership of property. The social parents taking “possession” of their new child.\textsuperscript{40} Viewing the custody relationship as a property relationship has certain faults. Having property rights over an item entitles the owner to do with and dispose of that item as they see fit. With the custody of a child that is not the case. In our western society the custody of a child is not something which can be bought and sold. Custody is something which can be reassigned through the courts, but not for payment. There is also the limitation imposed by the extensive laws concerning the treatment of children, laws that reflect the moral position of our society in regard to the place of children. A breach of these laws involves the imposition of sanctions and/or the removal of custody. The disposal of children, either by murder or abandonment, is also viewed with sancture by our laws. As with the disposal of any human being, the murder of a child attracts severe penalties. The relationship of custody is different.


\textsuperscript{37}Ibid

\textsuperscript{38}Ibid page 166.

\textsuperscript{39}Demetrio Neri Child of parent oriented controls of reproductive technologies? page 150.

\textsuperscript{40}Sara Ann Ketchum Selling babies and selling bodies In Feminist perspectives in medical' ethics. Edited by Helen Holmes and Laura Purdy. Indiana University Press, 1992.
from that of property, it is a relationship of guardianship, a relationship which not only entails rights for the guardian, but also imposes extensive responsibilities. The differences between a custody relationship and a property relationship make it inappropriate to consider the two to be alike.

Concern about the commodification of children born using IVF surrogacy is reflected in the draft criteria of NECAHR. IVF surrogacy is only available to those couples whose female partner is unable to carry a pregnancy to term for a medical reason. This is a procedure of last resort, not a procedure available because pregnancy may be inconvenient. There is also the requirement that the genetic material used be that of the commissioning parents. If the child is genetically that of the commissioning parents, that child is already perceived to be their child. Gestational surrogates are to be either close friends or family members of the commissioning couple. If the surrogate is close to the couple the perception is that she is helping the commissioning couple achieve their dream of parenthood, that the surrogate mother is an altruistic person.\(^4\) There is also the requirement that payments made to the gestational surrogate are limited to expenses related to the pregnancy and birth. These payments could not be construed as being for the child. Even without payments commodification can be present in the surrogacy situation but it can also be present in other forms of reproduction, the presence of commodification does not result in the prohibition of these practices.

Concern over the commodification of children born using non-commercial IVF surrogacy also reflects that the conception of motherhood predominantly held by those involved in this formal discussion is concerned about the separation of the gestational and social elements of motherhood. As discussed earlier the technology used to achieve IVF surrogacy is no different from that used in other forms of assisted reproduction. It is inconsistent to apply the strict anti-commodification principle to surrogacy when it is not applied to other assisted reproductive procedures or even natural reproduction, both of these contain elements of commodification. The aspect of this particular form of reproduction which is different from the others is that the woman who carries the child is not the socially intended parent, this being the only form of assisted reproduction that does involve the separation of the gestational and social elements of motherhood.

\(^4\)Pamela Smith Regulating confidentiality of surrogacy records: Lessons from the adoption experience. page 76.
2.4 Autonomy of the Surrogate Mother

The effects of IVF surrogacy on the surrogate mother are a large part of the surrogacy debate throughout the world. The focus of this debate however, is different in the New Zealand context. To a large extent the world debate focuses on the potential commodification and exploitation of the surrogate mother. Concern over these issues revolves around commercial surrogacy, where the surrogate mother receives payment for taking part in the surrogacy agreement. Some of the issues raised here are concerned with the question of whether the surrogate mother is in effect “renting out” part of her body or simply providing a service to the commissioning parents. Some even describe surrogacy as being analogous to prostitution. Other issues arise from the relative economic situations of the commissioning parents and the surrogate mother. Both INECART and MCART acknowledged the potential for the exploitation of the surrogate mother in commercial surrogacy situations. The different focus of the New Zealand debate is due to the fact that consideration of surrogacy in this country has focused on non-commercial or altruistic surrogacy. However the issue which has been debated here is also one which has been debated in relation to commercial surrogacy, the concern over the autonomy of the surrogate mother.

Christine Sistaire has written that a “fundamental moral issue in the surrogacy debate is the nature and extent of women’s freedom: their freedom to control their bodies, their lives, their reproductive powers, and to determine the social use of those reproductive capacities”. She then claims “the question which ought primarily to occupy us is whether there is sufficient justification for society to deny adult women the disposition of their

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reproductive capacities according to their desires". INECART argue in their 1995 report that sufficient justification can be found by examining the decision of the surrogate mother. They acknowledge the importance of respecting autonomy in New Zealand society and go on to say that it is important that this principle is applied equally to all parties. They then claim that the decision of the surrogate mother cannot be described as autonomous because of the potential inability on the part of the surrogate mother to foresee the true consequences of her decision. These unforeseen consequences are of two types. Firstly there are the risks of pregnancy and child birth, and secondly, there is the emotional trauma of giving up a child.

The unforeseen trauma of giving up a child following birth is a problem which can have lasting consequences similar to those experienced by women who have given up children for adoption. The lack of evidence and considered rationale provided by INECART to support their claim that these unforeseen consequences of a surrogacy agreement are sufficient to affect the autonomy of the decision of the surrogate mother was criticised by NACHDSE. Further criticism was made about the comments INECART made about the risks associated with the medical process involved in IVF surrogacy. No distinction was made between the risks to the genetic mother and those to the gestational surrogate. NACHDSE considered the risks to the genetic mother to be irrelevant in this context as the treatment involved was not innovative. The same could be said of the medical risks to the gestational surrogate. The same technology is used to achieve a pregnancy as is used in any IVF procedure. This is not innovative treatment either. As for the risks of pregnancy and childbirth, with the development of modern medical monitoring and care these risks have been considerably reduced. The concern over the autonomy of the surrogate gestator’s decision may be due to the fact that she is prepared to take on the risks of pregnancy when she is not going to get the usual benefits, becoming the mother of the child. This fails to recognise that there are benefits to the surrogate. Along with the gratification of helping a couple, in New Zealand a couple who are part of the surrogate’s family or a close friend,

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49 Judit Sandor Legal approaches to motherhood in Hungary. page 163. Karoly Schultz Assisted reproduction and parent-infant bonding: How new reproductive technologies affect parent-infant bonding and our understanding of family?


51 Ibid page 9.
achieve their goal of parenthood, some women really enjoy being pregnant but do not wish to have any more children. The argument that such motivations might lead to the surrogate doing something that could otherwise be detrimental to her well-being is a central part of the exploitation argument put forward by opponents to surrogacy.\(^{52}\) Judging the benefits the surrogate sees for herself in deciding to become a gestational surrogate in this way shows not only a lack of respect for the autonomy of the surrogate but for the surrogate herself.

The normal presumption, in both ethics and law, is that adults are competent to make informed choices and give informed consent. Beyond commenting on the consequences which may not be fully appreciated by surrogate mothers when making a surrogacy agreement, INECART failed to explain why this presumption could be rebutted if the surrogate mother decided to enter the agreement. What INECART are implying is that for the autonomy of the surrogate mother’s choice to be respected the surrogate mother must have the ability to look into the future and understand exactly what will happen in the course of the pregnancy and birth, and understand what consequences any medical complications will have for her in the future. Her view of the future must also include her exact reaction to the giving up of the child and how that will affect her. As this is not possible INECART are claiming that as the surrogate mother lacks information about a crucial aspect of the agreement, therefore her decision cannot be considered fully informed therefore not fully autonomous.\(^{53}\) Laura Purdy argues that if we are required to be certain about the emotional consequences of our actions then our autonomy would be threatened in any childbearing endeavour, our emotions towards our children being as unpredictable as they are.\(^{54}\) If autonomy requires an actual knowledge of the outcome of the decision then many decisions considered autonomous would not actually be so. The decision to get married is an example, the outcome of a marriage is not known at the outset. If it were there would be a lot fewer marriages. Yet the autonomy of this decision is not questioned. A decision is made which is life changing, but whether it is for better or for worse is not known on the day of the marriage. An autonomous decision does not require actual knowledge of the outcome but


\(^{53}\)Justin Oakley Altruistic surrogacy and informed consent *Bioethics* 6 (4) (1992) page 274.

\(^{54}\)Ibid page 276.
rather an adequate appreciation of the risks, and consequences of those risks, when making the decision.\textsuperscript{55}

In its draft criteria NECAHR has also addressed the issue of unforeseen trauma to the gestational surrogate in giving up the child. The requirement of the birth mother having completed her family means that only women who have had children and are aware of the attachment to the child that develops during pregnancy are included in the programme. The experience of pregnancy and childbirth is not something that can be understood unless you have been through it. What it would be like to give up the child, on the other hand, is something which women who have been through pregnancy and childbirth can understand. From that experience I know that I could never be a gestational surrogate, if someone had tried to take my son away I would have done everything physically possible to prevent that. It is also from that experience that I am able to fully appreciate the incredible gift that women who are able to act as gestational surrogates give to infertile commissioning mothers. This could be achieved by only including women who have had a child, there is no need for the woman to have completed her family to achieve this. What NECAHR might be attempting to prevent with this requirement is that if the gestational surrogate has completed her family she does not want any more children and is therefore less likely to want to keep this child. Another requirement is that the gestational surrogate is either a family member or close friend of the commissioning couple. This could also be seen as some protection of the gestational surrogate. She knows the couple who will raise the child and will be involved in the child’s life. Before deciding to become a gestational surrogate she would be aware of the beliefs and the way of life of the commissioning couple. Because of the enormity of the undertaking it would be expected that the surrogate mother consider the parenting abilities of the commissioning parents and to agree to act as their gestational surrogate she would consider that the commissioning couple would be good parents. Some of the trauma associated with the giving up of a child is the uncertainty of the future that child will have. A third requirement is that the gametes used be those of the commissioning parents. The gestational surrogate therefore has no genetic link to the child and NECAHR might consider that because of this the gestational surrogate is less likely to consider the child to be her own. There are also strict counselling requirements. This counselling will include consideration of all the risks involved. These criteria ensure that the gestational surrogate is fully informed when her consent is given. Her decision can therefore be considered autonomous.

\textsuperscript{55}Ibid pages 270-276.
The treatment of women in relation to issues of pregnancy is reflected in the treatment of the gestational surrogate. The questioning of the autonomy of gestational surrogates in relation to the consequences of their decision shows that the traditional conception of motherhood is again at play. Although other forms of assisted reproduction require extensive counselling they do not require the woman to be able to predict her exact reaction to the pregnancy in the way that INECART expected the surrogate mother to do. Informed consent is vital but predicting the future is not possible. The only difference in the surrogacy situation is that the gestational and social elements of motherhood are separated, where they are not the mothers are just expected to take the risks of the pregnancy. There is no logical reason why a gestational surrogate should not be treated the same as any other pregnant woman. Her decision about pregnancy is different from that of other women but that does not mean that she requires protection from herself because of that decision.

The decision to become a gestational surrogate does have many implications for women, implications that can be life changing. Ensuring that her decision is fully informed and therefore truly autonomous is an important function of guidelines for ethics committees in this area, a function which NECAHR has performed in its draft criteria. Stressing the unforeseen trauma of surrogate mothers when giving up children to the extent that INECART did shows that they did not consider it natural for a woman to give up a child she has carried and given birth to, they did not consider the separation of the gestational and social elements of motherhood as appropriate.

2.5 The Benefits of Surrogacy

Something which has received very little comment in the New Zealand discussion of IVF surrogacy is the benefits of the process. These were alluded to by MCART when it considered the advantages of the process. Perceived advantages were that the child is raised by people it is most likely to be genetically related to and the fact that if the surrogate gestator is a family member or friend then she will play a continued part in the life of the child.56 The positive benefits of IVF non-commercial surrogacy take up three lines of the

1995 report of INECART. The benefits mentioned are that a child born through this process will be wanted and loved, that the commissioning parents fulfil their desire to become parents and that surrogate mother may find some fulfilment by helping the commissioning parents.\(^{57}\) The failure to consider the benefits of the procedure any further than just listing them was criticised by NACHDSE, who felt that the consideration of the risks of the procedure should have been balanced by more attention to the benefits.\(^{58}\) To pay such a small amount of attention to the benefits of a treatment would not occur if it was, for example, a drug treatment. In that case it is the benefits which are the desired goal. If only the harms of drug treatments were considered then no new drug would be approved for use.\(^{59}\) It is the balancing of risks and benefits of any proposed treatment which determines the true ethical nature of that treatment.

The focus of the debate in this country on the risks associated with the treatment shows the reluctance to accept that the separation of the gestational and social elements of motherhood can be of benefit to all of those involved. Without fully considering the benefits of the treatment they cannot fully appreciate the way that motherhood can in certain ways been enriched by such separation. Those commissioning mothers are able to appreciate the invaluable gift that gestational surrogates give them and although they are unable to be gestational mothers this does not degrade their motherhood. The appreciation of the elements which they are unable to fulfil may well have the opposite effect and enhance their experience of motherhood.


\(^{58}\)Report of NACHDSE page 10.

\(^{59}\)Moore & Mulgan The ethics of non-commercial IVF surrogacy. page 202.5.
2.6 The Treaty of Waitangi

The most important way in which the New Zealand discussion of surrogacy differs from that of the rest of the world has to do with the constitutional basis of the country. The Treaty of Waitangi is a document which requires that any policy must be considered in a way which acknowledges the unique bicultural nature of the country. This founding document formed a partnership between two peoples with very different world views, something which has been ignored by the Pakeha government for too long. The difference between the world views of the treaty partners adds an extra dimension to the discussion of IVF surrogacy.

MCART acknowledge the existence of different understandings of concepts of family and parenting which exist between Maori and Pakeha. What this means is that Maori will also have a different conception of motherhood. If this conception is to be altered by or to take into account the practise of surrogacy using IVF then it is for Maori to determine what these alterations will be, not Pakeha. MCART also mention the practice of whaangai, a form of family arrangement which they say could be seen as similar to surrogacy. The practise of whaangai is where a child is given to a woman who is not the biological mother for that woman to raise as her own. There can be different reasons for this but like the modern practice of surrogacy one reason can be that the woman wishes to have children. This is a practice which has occurred for centuries. Where whaangai differs from western cultures is that the child is always aware of who their biological parents are and know their whakapapa. The final acknowledgement made by MCART is that the Crown has a duty to protect the constitutional rights of Maori. In doing this they must ensure that the use of assisted reproductive technologies is culturally safe and open.

INECART also considers issues raised by the Treaty of Waitangi. The traditional Maori practice of whaangai, where an extended family member takes a child to nurture, is acknowledged as having some parallels with the practice of surrogacy. Although there are important issues, such as access to genetic history, raised by the IVF surrogacy this Maori cultural practice is seen to be an argument for the acceptance of IVF surrogacy. Due to the existence of this practice INECART accept that some of the criticisms of surrogacy, such as the concerns over identity and potential difficulties that can arise when a surrogate remains in

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60 Personal conversation with Awatea Edwin.

the life of a child, are not valid in this country as long as whakapapa is protected in the process. They did however make a distinction between Maori and non-Maori, generalising that the European based culture does not provide the support of extended family.\(^{62}\) This generalisation received criticism from NACHDSE as did the failure to consider cultures other than Maori.\(^{62}\) INECART’s generalisation not only fails to take into account other cultures it fails to take into account cultures that are supposed to be a part of the “European” culture. The Scottish family and clan system provide extended networks of family support which are very similar to those in Maori culture. Speaking as a New Zealander of Scottish decent I come from a family which still has very strong extended family networks, as do many others. By making such generalisations INECART are narrowing the European culture down to only include the English culture. INECART recommends that Maori tikanga be respected, taking particular note of whakapapa, whaanau and whaangai, in the development and practice of assisted reproductive technologies.\(^{64}\) As mentioned earlier this is no more than is required by the crown under the Treaty of Waitangi.

The draft criteria of NECAHR have very little in the way of criteria specific to Maori cultural needs. They require that clinic policy takes into account different cultural needs. The example used is that of the disposal of gametes, so that in the case of Maori donors these be offered to the whaanau. There are also the counselling requirements, although no specific mention of cultural counselling is made here. By deferring the issue to the individual clinics NECAHR avoids the difficulty of the task, they also create a situation where inconsistency in the practices of the different clinics could arise.

More understanding of the issues raised by the practice of IVF surrogacy for Maori can be gained by considering the submission of the Minister of Maori Affairs to MCART. In this submission it is noted that the duties which the Crown derive from the Treaty of Waitangi should be considered at several levels; when policy is drafted, implemented and being monitored. For this to occur it is vital that Maori are involved in each of these stages. This involvement should not only be at the level of being invited to make submissions but Maori must be represented on the decision making body.\(^{65}\) In endeavouring to make the practice of


\(^{65}\) Submission of the Minister of Maori Affairs page 2.
IVF surrogacy culturally safe the first step is for the clinics to recognise that the culture of the client may differ from that of the clinic. The Minister stressed the importance of counselling in this process, as well as the availability of Maori counsellors.\(^{66}\) One of the issues highlighted was the importance of the protection of whakapapa. “Whakapapa is the mechanism by which individual whaanau members establish ascent to an eponymous ancestor. This element establishes and determines an individuals status, and formalises their relationships with others who are also able to trace their ascent to a common ancestor.”\(^{67}\) To ensure children resulting from the use of technology such as that used in IVF surrogacy must have access to full records as well as information that will identify their genetic parents should they be other than their social parents. It is noted that this requirement may infringe the present wish for anonymity of the donors and suggested that Maori need to do further work in this area.\(^{68}\)

The acknowledgement of the issues raised under the Treaty of Waitangi is a step in the direction of honouring the duties arising from the treaty. The Ministry in its choice of MCART committee members showed an intention to ensure bicultural input. The task of ensuring the cultural safety of treatments such as IVF surrogacy is made particularly difficult because of the fact that value assumptions of the two different cultures are not always compatible.\(^{69}\) Learning about and attempting to understand other cultures challenges the assumptions of our own culture. This all too often reveals social practices to be culture specific. In the practice of assisted reproductive technology this can be seen in the use of the Australian Reproductive Technologies Accreditation Committee (RTAC) guidelines by clinics in this country. Guidelines that were developed in another country for the culture of its own society, but do not take into account the importance of issues such as whakapapa in the New Zealand.\(^{70}\) These guidelines cannot possibly take into account the specific needs of the New Zealand culture, a bicultural culture. They will be appropriate on most levels for the Pakeha culture but cannot hope to even attempt to be appropriate for the Maori culture, a

\(^{66}\)Ibid page 3-5.

\(^{67}\)Ibid page 5.

\(^{68}\)Ibid page 6.


\(^{70}\)Barbara Nicholas Community and justice: The challenges of bicultural partnership to policy on assisted reproductive technology. pages 215-216.
culture which was not even considered when they were revised. The Crown cannot hope to satisfy the duties arising from the Treaty of Waitangi until they are willing to take responsibility for the practice of assisted reproductive technologies in this country and ensure the regulation of the practice is specifically developed with the unique bicultural nature of New Zealand society in the mind. The issue of particular importance which requires consideration in this country is that of protecting whakapapa.
CHAPTER 3

THE LANGUAGE OF THE STATUTORY LAW IN NEW ZEALAND

3.1 Introduction

The role of our law in relation to issues of morality has been debated over a considerable period of time. One of the most well known debate of recent times in this area is that between Hart and Devlin. Both agreed that the law should protect the highest level of individual freedom that is consistent with the integrity of society. The extent to which the law of a particular society should require conformity to the common morality of that society is where their views differed considerably. The prohibition of activities that provoke feelings of moral retribution in the minds of right thinking people is an appropriate use of the law according to Devlin. This conservative philosophical view uses the law to ensure conformity with the common morality and as a result limits social change. Hart, on the other hand, considered that the law should contain minimum moral content. Leaving people to regulate their own conduct where that conduct does not harm others. This view derived from the positivist theories facilitates social change.¹

Despite the view accepted by any society, the language of the law, as with the language used in an ethical debate, will tell us about the way the conception of motherhood is understood by those making the law. In the first section of this chapter the way in which the statute law determines motherhood will be discussed, along with the expectations of mothers. In the second section the way in which the legal understanding of what a mother is has changed with the development of assisted reproductive technologies. The final section will consider the way the present and proposed legal settings affect the practice of surrogacy using assisted reproductive technology in this country.

3.2 Traditional Statutory Determination of Motherhood

Under the statutory law of New Zealand there are several different considerations of motherhood. Firstly the law determines who is the mother of a child. From here the rights and responsibilities of motherhood are established. This includes provisions which act to protect the child.

The New Zealand statute law does not provide a definition of "mother" or "motherhood", there are however a number of statutes which enable us to imply the statutory meaning. Section 7 of the Child Support Act 1991 provides a definition of parent for the purposes of that act. Included in this definition are those persons listed on the birth certificate, a child conceived or born to a person during a legal marriage, and a natural mother of a child. From this section it is clear that one parent of a child is the person who conceives and gives birth to that child. This act also determines fatherhood on the basis of biological connection to the child, or on adoption if the child has been adopted. Section 5 of the Status of Children Act 1969 states that a child born to a woman is presumed to be the child of that woman and her husband if that child is born during the marriage or within ten months of the end of the marriage. This provision was designed to protect children against illegitimacy. The provision focuses on the woman giving birth to the child, there is no mention of there having to be a genetic connection, but in 1969 when this was enacted that was implied, as the technology which enables the genetic and gestational elements to be separated had not been developed. The presumption of motherhood links the biological mother with the responsibilities of social motherhood.

The law further defines who should take on the responsibilities of parenthood in the Guardianship Act 1968. Section 3 of that act defines guardianship as meaning "the custody of a child...and the right of control over the upbringing of a child". Included in this are all the rights, powers and duties associated with the upbringing of a child. The legal guardian, or guardians, of a child is the person, or persons, who have the legal right to make decisions about the child. Exactly who will have the guardianship of a child will depend on the particular circumstances of that child. Section 6 of the act determines who will be the natural guardians of a child. Subsection (1) saying that the father and the mother of a child will each be a guardian. This is subject to other provisions of the act. The mother will be sole guardian if the conditions set out in subsection (2) of section 6 are met. These being that she is not married to the father, and either has never been so, or her marriage to the father was
dissolved before the child was conceived, and was not living with the father at the time the
child was born. What this means is that the mother’s legal right to control the upbringing of a
child is determined by the fact that she is the mother, the person who has conceived and
given birth to the child. Unlike in the Child Support Act 1991, the father’s legal right under
the Guardianship Act is not determined solely by biology but rather by his relationship with
the mother at the time of the conception and birth of the child. If the mother is the sole
guardian of a child the father is able to apply to the court to be declared a guardian under
sections 6(3) and 6A of the act.

Another act which has provisions concerning the relationship between the father and
child is the Family Proceedings Act 1980 and its provisions concerning paternity orders. This
act, like the Child Support Act 1991, is also concerned with the biological relationship
between the father and child. An application for a paternity order can be made by the mother
under section 47 of that act. Section 52 states that evidence is not required from the mother
for an order to be made. This section also says that if the mother does give evidence then no
corroborated evidence is required. To prevent false allegations there is an offence
created by section 53 of the act for making false statements. This offence carries a penalty in
the form of a fine of up to one thousand dollars.

It is also possible for people other than the legally recognised natural mother or father
of a child to become guardians in various ways. The first of these is as a testamentary
guardian under section 7 of the Guardianship Act 1968. This section allows guardians to
appoint a person or people as guardian for their child in the event of their death. There is also
the possibility for the court to appoint guardians under section 8 of the above act. These
appointments can be either until the child reaches the age of twenty years or until the child
marries, as with other guardianship, or for any shorter period of time.

Other than being appointed a guardian under the provisions of the Guardianship Act
1968 there is one other way for a person who is not the natural parent of a child to be
appointed as a guardian to that child, this is under the Adoption Act 1955. For an adoption to
go ahead under this act section 7 requires that the mother of the child must give consent to
the adoption. As in the Guardianship Act there are various provisions for determining when a
father’s consent is required.\(^2\) Section 8 sets out the circumstances where these consents may
be dispensed with. These include abandonment, neglect and ill-treatment of the child as well
as mental and physical incapacity of the parent. Subsection (6) allows parents whose consent

\(^2\)Section 7 Adoption Act 1955.
has been dispensed with to apply for a revocation of that order. The Adoption Act also contains provisions concerning the adoptive parents. Section 11 requires that those applying to adopt a child must be fit and proper persons. Social workers are required to report to the court on this matter under sections 10 and 13. Section 11 (b) requires that the welfare interests of the child be promoted by the adoption. Once all the requirements of the Adoption Act are met and an adoption order is made a legal fiction comes into play concerning the parentage of the adopted child. Section 16 of the act deems that the adoptive parents are the parents of the child as if it were born to them within marriage. This section also deems that the child ceases to be the child of the existing parents. The Adoption Act uses this legal fiction to put the adoptive child in the legal position of having been born to the adoptive parents. The adoptive parents are then considered to be the natural parents of the child and as such are natural guardians under section 6 of the Guardianship Act 1968. What these provisions indicate is that despite the acceptance of circumstances which necessitate the placement of children with someone who is not their natural mother there is a resistance to this separation. A woman who conceives, carries and gives birth to a child is expected to take on the legal role of mothering that child. If this does not occur then the woman who takes on the role must be deemed to have conceived, carried and given birth to the child within lawful wedlock in order to be the “mother” of that child. This shows the traditional conception of motherhood, all three elements must be fulfilled by one woman, if they cannot the law deems them to have been fulfilled by the woman who is to mother the child.

3.21 Limitations of Motherhood

The law relating to motherhood is not only concerned with establishing who is the mother of the child and therefore who takes on the responsibilities of guardianship, there are also provisions which have limiting effects on motherhood. Guardianship is not something that is static or indeterminate. There is the possibility of the court removing guardianship under section 10 of the Guardianship Act 1968. Under subsection (2) of that section the court must be satisfied that a parent is for some grave reason unfit to be a guardian of the child or is unwilling to exercise the responsibilities of guardianship in order to remove that parent’s guardianship. The court is not only able to remove guardianship they are also able to make a custody order under section 11 of the act, thus determining not only who has responsibility for the child but also who is to have the right to possession and care of the child. In deciding
any matter concerning the guardianship and custody of the child the court is bound by section 23 of the Guardianship Act. This section states that the welfare of the child must be the first and paramount consideration.

As a child gets older the mother's legal right to control the child decreases, the child gains a certain amount of legal independence from the guardian. Under section 25 of the Guardianship Act 1968 consent can be given and refused for certain procedures on a child by the guardian of that child. Once a child is sixteen they can consent to donating blood as well as to medical, surgical and dental procedures which are to their benefit. This consent has the same effect as if the child were an adult. They are however unable to refuse consent if consent is given by the guardian, the procedure can occur against the wishes of the child. This is not the case of the child is married. In that case the child is able to both give and refuse consent as if they were an adult. There is one exception to the provisions of section 25 and that is found in section 25A of the same act. That section states that a female of any age can either consent of refuse consent for an abortion. That consent or refusal having the same effect as if the woman is an adult.

The statute law of this country also contains provisions relating to the treatment of children. Section 10A of the Summary Offences Act 1981 creates an offence of ill-treatment or neglect of a child, for which there is a penalty of up to six months imprisonment or a fine of up to two thousand dollars. Section 10B of that act creates an offence of leaving a child under the age of fourteen years without reasonable provision for supervision and care. That offence attracts a penalty of a fine up to one thousand dollars. The Crimes Act 1961 also creates offences for the neglect of duties owed by parents to their children. Under section 152 there is a legal duty to provide the necessities for any child under sixteen. A criminal failure to do so which results in the death of the child or endangerment to the life of the child or permanent injury to the health of the child can result in imprisonment for up to seven years. These provisions requiring parents to maintain certain minimum standards of care for their children exist for the protection of those children. Although motherhood has rights associated with it the nature of the mother-child relationship is one of guardianship rather than ownership. Children are human beings with their own rights, one of these rights is to protection from neglect and abuse.

New Zealand has one piece of legislation specifically designed for the protection of children, the Children, Young Persons and Their Families Act 1989. This statute not only has provisions concerning the protection of children from abuse but also the way in which
children are to be dealt with by the criminal justice system. In both of these areas the family or whaanau of any child who is dealt with under the act is encouraged to participate in decision making about the best solution for the child. In the area of child abuse this enables families, with the support of the authorities to keep the child within the family and ensure that the child is in a safe environment.

The Crimes Act 1961 contains another provision concerning motherhood in section 178. This provision defines the crime of infanticide. When a woman kills a child of hers, who is under the age of ten, in a way that would be culpable homicide,\(^3\) when she is suffering from a disturbance of the balance of her mind due to, or from a condition consequent on, the fact that she has not fully recovered from childbirth or because of lactation she is guilty of infanticide. If the conditions of infanticide are met then the death of the child cannot be considered to be either murder or manslaughter. The penalty for this offence is imprisonment of up to three years. If the condition suffered by the woman is of such severity that she was insane then an acquittal will result. What this provision recognises is that there are some conditions which result from childbirth and lactation that mean a woman is not entirely responsible for her actions.

The New Zealand statute law implicitly defines a mother as the woman who has conceived, carried and given birth to a child. This woman is considered to be the appropriate person to take on the social rights and responsibilities associated with that child. In the situation where this does not occur, adoption, a legal fiction comes into play to deem the woman taking on the social element of motherhood to be the biological mother of the child. This is a traditional view of the conception of motherhood, all three elements being fulfilled by the one woman. The laws relating to motherhood also set out certain expectations of the person who is to take on the social element of motherhood, these provisions ensuring that a certain minimum standard of care is provided for children.

\(^3\)Defined in section 160 (2) of the Crimes Act 1961 as killing of a person by either, unlawful act, omission without lawful excuse where there is a duty, causing a person by threats or deception to do an act that causes their death, or wilful freighting of a child under sixteen or a sick person.
3.3 How Assisted Reproductive Technologies have Altered the Legal Determination of Motherhood

The development of assisted reproductive technologies has altered the reality of motherhood, these technologies allowing the two biological elements of motherhood to be fulfilled by different women, one providing the genetic element of motherhood and another the gestational element. With the mother of a child being defined as the woman who conceives, carries and gives birth to a child by the law this new technology creates some difficulty. There is no one woman who fulfils the legal criteria of motherhood when assisted reproductive procedures which involve the separation of the biological elements of motherhood are used. This situation has caused problems in other countries. Court cases have ensued in which two women have each claimed to be the mother of the child by virtue of their biological relationship to the child. The focus of these gestational surrogacy cases was the genetic link that the commissioning mothers had with their children, also considered was the intent of the parties at the outset of the arrangements.\(^4\) In these case legal motherhood was granted to the commissioning mother who was also the genetic mother.\(^5\)

The New Zealand legislature has responded to this problem with the Status of Children Amendment Act 1987. Under this act there is recognition of the possibility of separating the biological elements of motherhood using assisted reproductive technologies. When this occurs the legal mother of the resulting child is determined by the provisions of this act. This act deals with the following assisted reproductive procedures: artificial insemination by donor, conception by the use of donor semen in an implantation procedure, conception by the use of donor ovum or donor embryo in an implantation procedure, conception by the use of donor semen in an intra-fallopian transfer procedure, conception by the use of donor ovum in an intra-fallopian transfer procedure, and conception by the use of embryos in an intra-fallopian transfer procedure. Sections 9 (3), 13 (3), and 15 (5) state that if a woman becomes pregnant as the result of one of the above mentioned procedures using donated ovum, then the pregnant woman is for all purposes the mother of the child. There are also provisions concerning the legal father of the child when these procedures are used. These provisions

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\(^5\)Ibid.
make the husband or partner of the pregnant woman the legal father, whether or not he is the biological father, if he has consented to the procedure.6

These provisions are consistent to the United Kingdom provision for determining the legal mother of a child resulting from the use of assisted reproductive technologies. Section 27 of the United Kingdom's Human Fertilisation and Embryology Act 1990 states that the woman who has carried a child as a result of the placing of an embryo or of sperm and eggs is to be treated as the mother of the child. This section has broader application than the New Zealand sections as it does not refer to specific procedures nor to the fact that the genetic material was donated.

This alteration to the law changes the definition of motherhood when assisted reproductive technologies are used. The separation of the biological elements of motherhood is accepted, but what makes a mother under this legislation is pregnancy and childbirth, the method used to achieve the pregnancy is irrelevant to motherhood.

3.4 Surrogacy in the Present Legal Situation

The present legal situation does not mention surrogacy arrangements. There are however certain statutes that have an effect on the practice. In this section these provisions will be considered. The first provisions to be considered are those in sections 10 and 11 of the Bill of Rights Act 1990. Under section 10 every person has the right not to be subjected to experimentation, either medical or scientific, without that persons consent. What this section means for surrogacy is that if the procedures used to achieve the pregnancy are in any way experimental then the participants in the surrogacy arrangement must be made aware of that in order for their consent to be obtained. Section 11 is also concerned with medical treatment. This section gives everyone the right to refuse to undergo medical treatment. This right may be considered fundamental but in some countries it cannot be taken for granted by pregnant women. Cases have occurred in North America where the courts have been forced pregnant women to undergo medical treatments. Many of these cases involve forced caesarean section operations. In the case *Taft v Taft* 388 Mass 331 (1983) involved another form of intervention. It was recommended that Mrs Taft have her cervix sutured so that it

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would hold during her pregnancy. She decided against this but her husband disagreed and went to court to compel her to have the operation. Although at four months pregnant she was legally entitled to have an abortion without the consent of her husband, the trial judge ordered her to have the operation. This decision was appealed to the Court of Appeal and then the Supreme Court, but the order was upheld.\(^7\) If a pregnant woman does not have the right to refuse medical treatment because her husband wants her to have it the situation of the gestational surrogate could be compromised even more. With both the biological father and the genetic and socially intended mother wanting to force medical procedures the gestational surrogate could lose the autonomy enjoyed by adults in this country. This provision in the Bill of Rights Act ensures that it is the pregnant woman, whether carrying a child for herself or for someone else, who has the right to refuse medical treatment.

The way in which the law determines the legal parents of a child has been discussed in detail in earlier sections. The legal mother of the child being the woman who gives birth to that child. The fact that the woman who gives birth to a child in a gestational surrogacy arrangement is not the genetic mother or the socially intended mother is irrelevant by virtue of the Statue of Children Amendment Act 1987. The legal father of the child is determined by who the legal mother of the child is. If she is married and her husband has consented to the use of assisted reproductive techniques then he is the legal father. If he does not consent then he is not the legal father and neither is the biological father. In the case where the mother is not married and assisted reproductive procedures were used the biological father is not the legal father.\(^8\) Married under section 2 of the Status of Children Amendment Act 1987 includes couples who are living together. If assisted reproductive procedures are not used to achieve the pregnancy then the biological father is recognised as the legal father under the Guardianship Act 1968 if the mother is not married. In this case the father is not a guardian of the child and would have to apply under section 6 (3) to be declared a guardian under section 6A. In surrogacy arrangements which use natural methods of conception the surrogate mother is both the genetic and gestational mother of the child, she is also the legal mother of the child as parental responsibilities are something which the surrogacy agreement does not change, adoption is required for the commissioning parents to become legal parents.

\(^{7}\)For further discussion of the case see Ruth Colker *Abortion and dialogue: Pro-choice, prolife and American law*. Indiana University Press, 1992. pages 144-145.

\(^{8}\)Sections 5, 7, 9, 11 and 13 Status of Children Amendment Act 1987.
What all of this means in the case of gestational surrogacy using assisted reproductive technologies is that the legal parents of the child are not the intended parents of the child. The legal parents are the gestational surrogate and her partner while the intended parents, the genetic parents, have no legal rights in relation to the child. This is not the case for any other use of assisted reproductive technologies, the Status of Children Amendment Act 1987 ensures that those who use methods of assisted reproduction that involve the intended mother carrying the child are also the legal parents. In order for intended parents to become legal parents when surrogacy is used the parties must make applications to the court for the adoption of the child by the intended parents according to the provisions of the Adoption Act 1955. For any adoption to go through the consent of the gestational surrogate, as the legal mother of the child, is required under section 7 of that act. The appropriateness of this will be discussed in chapter 4.

There are two provisions in the Adoption Act 1955 that have a more direct impact on surrogacy arrangements. These are found in sections 25 and 26. Section 25 prohibits payments in consideration of adoption, a proposed adoption or making arrangements for an adoption. The section provides an exception to this. It is possibly to get the consent of the court for payment. This section means that any surrogacy arrangement that specifies adoption cannot involve payment without the consent of the court. The first case involving an application for an adoption order in this country was *Re P*. 9 In this case the potential breach of section 25 was discussed as payments were made to the surrogate mother of $375 per week for nine months as well as all birth and legal expenses. The court decided that these payments did not breach the act as payments were made for maintenance rather than profit and the agreement made no mention of adoption. 10 The other provision that has an effect on the practice of surrogacy is the section 26 restriction of advertisements. Except for the Director General of Social Welfare or a social worker it is prohibited to advertise that a parent or guardian wishes their child to be adopted, a person wishes to adopt a child or that any person is willing to make arrangements for the adoption of a child. This means that advertisement for a surrogate mother when the arrangement includes adoption would be prohibited if that advertisement mentions adoption. If adoption is not mentioned then there is the potential that this section is not breached. Even if this section is breached that does not

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rule out the possibility of the adoption going ahead if that adoption promotes the welfare interests of the child as required by section 11 of the Adoption Act 1955.

One issue arising from the practice of surrogacy is access to information by resulting children. Under the present legislation there is a way in which this information can be accessed. This is possible through the Privacy Act 1993. Section 6 of that act sets out the information privacy principles. Principle 6 is concerned with access to personal information and requires that where an agency holds readily retrievable personal information the individual is entitled to confirm whether such information is held and have access to the information. For the purposes of this act “agency” means any person or body in both the public and private sector. Requests for information can be made by any New Zealand citizen, permanent resident or person who is in New Zealand. Sections 35 to 45 of the act determine the way applications are dealt with. There are certain situations where an application may be refused. The grounds for refusal are set out in sections 27 to 32 of the act. For surrogacy the most relevant of these can be found in section 29. Subsection (1) allows refusal if (a) the information would involve unwarranted disclosure of the affairs of another, in the case of gestational surrogacy this could be not only the gestational surrogate but also the genetic commissioning parents. Disclosure about the nature of the individual's birth is also disclosure about the reliance of the genetic parents on assisted reproductive technologies to have a child. Paragraph (b) allows for refusal if disclosure of the information would identify the person who supplied it if there was agreement that the identity of the person would remain confidential. The gestational surrogate may not wish to be identified. Paragraph (d) allows refusal if the person is under sixteen and the disclosure is contrary to the interests of that person. In the Adoption situation information cannot be obtained until the adoptee reaches the age of twenty under the Adult Adoption Information Act 1985. It could be argued that disclosure of the nature of their conception to those under sixteen is contrary to their interests in a similar way to disclosure of information about their natural parents in adoption situations. Under subsection (2) requests can be refused if (a) the information is not readily retrievable, (b) does not exist or cannot be found, or (c) if the information is not held by the agency and there are not grounds to believe that the information is held by another agency. Given the fact that there is no requirement for fertility clinics to keep records there is no guarantee that these will still exist for the individual to

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11 Section 34 Privacy Act 1993.
access Although information relating to surrogacy arrangements is potentially available through the Privacy Act it is by no means assured.

3.5 Surrogacy in the Proposed Legal Situation

The Government have been criticised on a number of occasions for their reluctance to legislate in the area of assisted reproductive technologies. In the past few years there have been two Bills introduced into the New Zealand parliament dealing with this area. The first of these, The Human Assisted Reproductive Technology Bill, was a Private Members Bill introduced by Dianne Yates, the Member of Parliament for Hamilton East. The second was, The Assisted Human Reproduction Bill, was introduced by Doug Graham the Minister of Justice. These Bills would have very different effects on the way surrogacy is practised in New Zealand. The effects of each will be considered in turn.

3.5.1 The Human Reproductive Technology Bill

This bill defines a surrogacy arrangement in section 5 as being an arrangement where a woman agrees to become pregnant and to surrender custody of or rights in relation to the resulting child. These arrangements also include the situation where the person is already pregnant and agrees to surrender the custody of or rights in relation to the resulting child. This second part of the definition seems closer to the adoption system under the Adoption Act 1955. The woman who is already pregnant does not want to keep the child and considers relinquishing that child to the care of others.

In section 2 of the bill there is a prohibition on payment for any surrogacy arrangement and payment for the use of any assisted reproductive technology to enable a surrogacy arrangement. This prohibition is also found in section 9 where it is stated that this prohibition does not apply to the payment of hospital and medical expenses of any person for the use of assisted reproductive technologies. Any contravention of this section is made an offence under section 28 of the bill and attracts a penalty of up to ten years imprisonment and/or a fine of up to one hundred thousand dollars. Even if the section is breached the child must be

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considered, if the commissioning parents and the surrogate mother are sent to prison then the child is left alone and the state would have to care for the child. If a fine were imposed then the child could still remain with the commissioning parents. What this means is that surrogacy using assisted reproductive technologies is permitted but the only payment involved can be for medical expenses. This prohibition is for commercial surrogacy arrangements. This bill uses the existing legal structure to deal with the legal status of children born as a result of surrogacy arrangements, whether the surrogate mother is the genetic mother as well as the gestational mother or just the gestational mother. The status of Children Amendment Act 1969 determines that the gestational mother is the legal mother when assisted reproductive technologies are used. If there is an adoption following a gestational surrogacy arrangement then the legal fiction created by the Adoption Act 1955 comes into play and the social mother is viewed by the law "as if" she gave birth. The traditional conception of motherhood, that the gestational and social elements should not be separated, showing itself again.

One of the principles in section 3 is the right to know one's genetic origins. Part IV of the bill is concerned with the keeping of records for these purposes. Section 25 gives every person who is born as a result of the use of assisted reproductive technologies the right to an amended birth certificate as well as access to information about their genetic parents which is held by the Registrar General. Section 5 defines an amended birth certificate as meaning a certified copy of records based on details of their genetic parents. In the case of gestational surrogacy this information would already be available to the children as the genetic parents would also be the social parents, and if as a part of the arrangement the child is formally adopted by the commissioning parents according to the Adoption Act 1955 the legal parents. If not through the open adoption policy practised, once that child reaches the age of twenty and can gain information under the Adult Adoption Information Act 1985. Section 26 gives the genetic parents an entitlement to receive an original birth certificate and information held by the Registrar General if that person is presumed to be the parent of the person conceived. In the case of gestational surrogacy the genetic parent is also the social, and if there has been an adoption the legal parent, so they would be entitled to this information. If the adoption has taken place then the adoptive genetic parents are entitled to the information under section 27.

3.52 The Assisted Human Reproduction Bill
The only mention of surrogacy in this bill is in the section 2. Here a “full surrogacy agreement” is defined as an agreement where a couple intends to have the custody of a child who is genetically related to both of them but implanted in another woman. The definition of donated gametes earlier in section 2 specifically excludes gametes used in full surrogacy arrangements, so by having an embryo made up of their own gametes implanted into another woman the commissioning couple are not donating that embryo to the gestator. What this means for the practice of surrogacy is that children resulting from surrogacy arrangements and surrogate gestators are not covered by the provisions in the bill that require the keeping of records and access to the information kept. Although the child will have access to its genetic heritage it will not be entitled to know that a third party was involved in a very significant way in their birth. This bill has implications for the determination of the legal patents of the child. When a child is born as a result of a full surrogacy arrangement the gametes of the genetic parents are not donated, as a result the Status of Children Amendment Act 1987 does not apply. In that act the woman who becomes pregnant through the use of the procedures listed in section 3.3 of this chapter is considered the legal mother of the child when donated ova are used. If as this bill states the ovum used are not donated then the legal mother of the child cannot be determined using that act. The situation that existed in the Johnson v Calvert case, where there were two biological mothers each claiming to be the legal mother, will exist in New Zealand. As the legal mother of the child could not be determined under the proposed law it is unclear whether adoption would be required to make the commissioning parents the legal parents.

The bill also provides the statutory basis for the National Ethics Committee on Assisted Human Reproduction (NECAHR). The functions of this committee are set out in section 7 of the bill. These include the review of reproductive proposals, and develop protocols and guidelines for the providers of assisted reproductive services. This allows for protocols and guidelines specific for the New Zealand situation, but it remains to be seen how this will effect the practice of surrogacy.

The present legal situation treats those who require the use of a surrogate differently from others who use assisted reproductive technologies. Under the proposed legal situation surrogacy will either be prohibited if assisted reproduction is involved, or the legal mother of the resulting child will not be able to be determined. All of these situations are problematic in the context of surrogacy using assisted reproductive technologies, a situation that exists in

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13286 Cal Rptr. 368 (At App. 1991).
New Zealand since NECAHR accepted the first proposal for compassionate surrogacy using in-vitro fertilisation in July 1997.
CHAPTER 4

LEGAL AND ETHICAL SYNTHESIS

Motherhood is an experience which is intensely personal and highly emotional, it is also something of which we all have experience, either from being mothered, from watching others mother or from mothering ourselves. The experience which an individual has of motherhood will determine that individual's conception of motherhood, experiences from different perspectives will inevitably result in some differences in those conceptions. Because motherhood is something of which we all have some experience and understanding, albeit from different perspectives, any challenges to the way in which motherhood is perceived is something which affects all of us. Those most affected by such challenges will inevitably be those who are, or will in the future be, doing the mothering or being mothered. These challenges to our conceptions of motherhood force us to re-evaluate these conceptions and by causing such re-evaluation alterations to the conceptions or the individual's perception of the conception will occur. If the re-evaluation results in the conception initially held by the individual being affirmed, the re-evaluation will have altered that individual's perception of the conception to some degree. This may be by either strengthening or weakening the perception of the currently held conception. The re-evaluation could also alter the conception to any degree. It is the continual challenging of the conception of motherhood by changes which occur within a particular society, changes that need not be as drastic as those brought about by the development of assisted reproductive technologies, that ensures that the conception of motherhood, like other basic conceptions, is not static.

With something as personal as the conception of motherhood there can never be one conception held by all members of a particular society, yet a dominant conception can be determined by looking at the way in which any society regulates areas associated with motherhood. This societal conception of motherhood reflects the conceptions of those involved in the determining the way the area should be regulated, in a democratic society these are generally the government or others delegated to the task by the government. The conception of motherhood which can be determined from the way in which motherhood is regulated by the government can be considered to be the society's conception of motherhood because the government are the elected representatives of that particular society. If enough
members of the society are unhappy with the way in which motherhood is regulated, because their conception of motherhood is different from the dominant conception, then there are mechanisms through which these regulations can be changed. If the regulations are changed then the conception of motherhood which can be determined from the regulation will also have changed.

When the New Zealand situation is considered both the language of the law and the ethical discussions of surrogacy indicate the dominant conception of motherhood in New Zealand society. As discussed in chapter three the legal conception of motherhood is very traditional, that the three elements of motherhood should be fulfilled by the same woman. The development of assisted reproductive technologies and the increased use of such procedures in this country led to a re-evaluation of this position and some alteration with the passing of the Status of Children Amendment Act 1987. The new conception of motherhood which emerged from this change can still be considered traditional, the separation of genetic and gestational elements of motherhood was now considered acceptable but the separation of the gestational and social elements was not. This alteration could be linked to the conception of fatherhood. Artificial insemination using donor semen is an assisted reproductive procedure which has been available for some time. The separation of the genetic and social elements of fatherhood in this context is considered not only acceptable but virtuous because the genetic father is helping an infertile couple achieve their dream of parenthood. The separation of the genetic and social elements of motherhood in the context of ovum donation can be viewed as the same as that involved in semen donation. The separation of the gestational and social elements of motherhood on the other hand challenges and threatens society's conception of motherhood in a completely different way. The refusal to accept this separation being illustrated by the legal fiction which comes into play when a child is adopted, the child being deemed to be that of the adoptive parents "as if" it were born to them in lawful wedlock.¹

The conception of motherhood reflected by the language of the law can also be seen in the ethical debates on the practice of surrogacy in New Zealand. The way in which INECART put its case for rejecting IVF surrogacy shows this most strongly. The whole focus of the 1995 report was on the risks of the practice. As discussed earlier there must be a consideration of the whole situation in order to truly evaluate the ethical status of a procedure. The focus on the risks appears to indicate a reluctance to accept that there can be

¹Section 16 Adoption Act 1955.
benefits for all of those involved in the surrogacy process. A large amount of attention was
given to the well-being of any resulting children, but through this discussion it was clear that
there was concern about the way the separation of the gestational and social elements of
motherhood would affect the child. Although the focus here was on the negative affects
INECART did not provide evidence that these negative affects occurred nor whether these
proposed negative affects were significantly different from those experienced by children
born using other assisted reproductive technologies or through natural childbirth.

The questioning of the autonomy of the surrogate mother also showed this reluctance
to accept the separation of the gestational and social elements of motherhood. That the
surrogate mother was prepared to undertake the risks of pregnancy for the benefit of others
was questioned along with her ability to comprehend the potential trauma of giving up a
child. As discussed this form of questioning went beyond what is required for there to be a
fully informed autonomous decision in any other area. There was also a failure to
acknowledge that there could be benefits for the surrogate mother which did not involve
having a child to keep at the end of the pregnancy. This failure showed a lack of respect for
the surrogate mother and the way she understood the surrogacy. The concentration on the
trauma experienced by some surrogate mothers when they give up the babies reflects the
acceptance that this is an expected reaction, women are not supposed to want to give up their
children. This trauma is real and painful for those women who experience it but by
discussing the autonomy of the surrogate mother in this way INECART implied that there
must be something wrong with women who are able to hand over children they have gestated
when they have promised to do so.

The way in which INECART argue against the use of IVF surrogacy shows their
reluctance to accept the separation of the gestational and social elements of motherhood. The
areas they consider are relevant but their use any potential argument against the procedure
even though they are unable to provide evidence to back up their arguments indicates their
reluctance to accept the separation. The failure to consider any of the potential benefits only
reinforces this.

Despite having approved the use of IVF surrogacy NECAHR also shows some concern
over the separation of the gestational and social elements of motherhood. The separation of
the gestational and social elements of motherhood is different from the separation of the
 genetic and social elements because of the nature of gestation. Gestation is after all the most
intimate relationship that can exist between two human beings. As a result some safeguards are required when these elements are deliberately to be separated, safeguards which ensure that all parties are fully informed about the nature of their part in the agreement. In its draft criteria NECAHR considers this. The requirement that the surrogate has completed her family addresses the concern about the attachment which a pregnant woman develops to the child she carries, if the surrogate mother has had children she will understand this. The potential for trauma associated with giving up a child is also dealt with in the counselling that is required. The requirement that the surrogate mother be a family member or close friend of the commissioning couple is also arguably related to the concern over the separation of the gestational and social elements of motherhood. If this is the case then the surrogate mother will be more likely to have a continuing relationship with the child, and although this relationship is not as the mother of the child there is not complete separation of the elements. The surrogate mother would also know the family well and be aware of the way in which the child would be raised, something which a stranger would not know, this can alleviate some of the fears associated with giving up a child. For someone to agree to be a surrogate mother she would be expected to accept the lifestyle of the commissioning parents and the way in which they would be likely to raise the child. One other criterion that relates to this separation is the requirement that a dispute resolution process be discussed, in relation to custody conflict, prior to the proposal being approved.

In the New Zealand context concern over the separation of the gestational and social elements of motherhood can be said to be a concern held by those with an English understanding of family. There are other cultures where this separation is not considered at all “unnatural”. One example of this can be found here in New Zealand with the Maori culture. There is the Maori cultural practice of whaangi, a form of family arrangement, which has been likened to surrogacy. This involves the separation of the gestational and social elements of motherhood. Another example of an acceptance of this separation also occurred in the clan system of Scotland. Children, particularly males, being raised by other members of the clan to ensure loyalty to the clan rather than to the immediate family. In the submissions made by the Minister of Maori Affairs to MCART this issue of separation of the gestational and social elements of motherhood was not considered. The issue which was considered to be of greatest concern to Maori was the protection of whakapapa. What this illustrates is that there are at least two world views in New Zealand each of which see different issues as being of concern. This is what makes the New Zealand situation unique,
any regulation of this area requires the acknowledgement both of these different world views. What it also requires is that Maori be involved in the process of determining how the area should be regulated. Each culture is able to add to the debate and one can learn from the other but what must be remembered is the Crown duty under the Treaty of Waitangi to protect the Maori culture. It is for Maori to determine the way the practice of IVF surrogacy affects the Maori conception of motherhood and whether there are issues which must be addressed to ensure that the practice is culturally safe. Once these areas have been identified it is the Crown’s duty to ensure that the regulation of the area ensures this cultural safety.

IVF surrogacy has been approved by NECAHR, this means that the separation of the gestational and social elements of motherhood will be occurring. What the European culture needs to understand is that this separation is not universally resisted it can be considered to be perfectly natural. The European resistance of this separation is not the only way that motherhood can be viewed.

The way in which surrogacy is presently regulated leads to discrimination against those who can only achieve motherhood through the use of a gestational surrogate. Each proposed surrogacy must be approved by NECAHR, something that is not required with the use of other methods of assisted reproduction. The legal parentage of children resulting from IVF surrogacy also discriminates against the genetic and socially intended mother. As discussed earlier the gestational mother is the legal mother of the child when assisted reproductive techniques are used. In the case of IVF surrogacy the surrogate mother is therefore the legal mother of the child, the opposite situation from that intended by the parties of the surrogacy agreement. This means that the intended parents of the child have to go through the adoption process in order to become the legal parents. This is discriminatory not only in the fact that they have to go to court to be made legal parents with the additional expense that legal process entails but also in the fact that adoptive parents are scrutinised in a way that other parents who require the use of assisted reproductive technologies are not. As discussed earlier the use of assisted reproductive technologies, although there are some differences which need to be taken into account, are closer to the situation of natural childbirth than to adoption in that they involve the provision of a child for a family rather than the reverse which is true of adoption. In New Zealand this scrutiny is therefore inappropriate in the case of IVF surrogacy when it does not occur when other forms of assisted reproduction or natural conception are used.
The legislation pertaining to the regulation of assisted reproductive technologies which is currently before parliament does nothing to alleviate the discrimination against those who require IVF surrogacy to achieve motherhood. Dianne Yates' bill, the Human Reproductive Technology Bill, prohibits payment for surrogacy using assisted reproductive technologies. This proposed legislation does nothing to alleviate the discrimination suffered by those who require the use of a gestational surrogate to become mothers.

The other legislation currently before parliament is the Assisted Human Reproduction Bill. This piece of legislation does nothing but make the situation for those women who require a surrogate gestator even more unsure than it is under the present legislation. Section 2 of that bill states that the gametes of the commissioning couple are not to be considered to be donated gametes when they are used in a full surrogacy arrangement, where the gametes are those of the commissioning couple implanted into a gestational surrogate. This confuses the determination of the legal mother of the child even further. The legal definition of a mother that can be implied from the statute law of New Zealand is very traditional, one woman fulfilling all three elements of motherhood. With the development of assisted reproductive technologies the separation of the two biological elements became possible and as a result there was confusion over who was the legal mother, the genetic or the gestational mother. Recognition of the potential for confusion resulted in the enactment of the Status of Children Amendment Act 1987. That act ensured that those who donated gametes had no legal responsibility for the children produced, it also ensured that the gestational and socially intended mother was recognised as the legal mother. What the Assisted Human Reproduction Bill does by stating that gametes are not donated in cases of full surrogacy is put those who require the use of a gestational surrogate back in the position which existed prior to the enactment of the Status of Children Amendment Act 1987. The traditional law which requires that all three elements of motherhood be fulfilled by the one woman is not met in this situation. The Status of Children Act 1969 presumes that the woman who gives birth is the legal mother but the genetic parents are still legally liable for the child. They are legally liable but are not legally recognised as the parents. This again discriminates against this group as others who use assisted reproductive technologies have had their legal position clarified by the Status of Children Amendment Act 1987, the socially intended parents are made the legal parents.

The focus of INECART’s discussion was the paramouncty of the welfare of the child. In the situation proposed under the Assisted Human Reproduction Bill this principle is also
jeopardised, the resulting child has no clear legal parents. As a result of this situation there is more chance of legal proceedings to determine who is to be the legal and therefore the social mother. Although it is uncertain whether the foetus bonds with the gestator, bonding of the child to its caregiver after birth is recognised as being pivotal to healthy family development.\textsuperscript{2} If the legal and therefore social mother of the child is undetermined and conflict occurs after the birth then the chances of this bonding being disrupted are increased dramatically. The best interests of the child are important when considering the legal determination of parenthood, it is important that the child is the legal child of the parents who are raising it.\textsuperscript{3}

There is an argument that surrogacy alters the definition of motherhood from one based on biology to one based in nurture and social relationships.\textsuperscript{4} This is not necessarily a new way of considering motherhood, under natural law motherhood is also considered a social rather than a biological relationship. The determination of parenthood through biology is something which occurred later.\textsuperscript{5} Feminism also presents this alternative view of motherhood, the family as a whole being viewed as a socially organised unit rather than a biologically organised one.\textsuperscript{6} The rearing of a child is not something for which the biological process of becoming pregnant, carrying and giving birth to a child prepares us any better. Despite this the task of child rearing has in general been assigned to women.\textsuperscript{7} If the ability to rear a child is not determined by the biological process involved in the production of the child then the woman who gives birth to the child is not necessarily the best person to take on the social element of motherhood. What is more important than the biological process is the taking on of the responsibility of caring for and nurturing the child as well as having a


\textsuperscript{3}Ralph Lawrence The medico-legal, social and ethical implications of surrogate parenthood Medicine and Law 11 (1992) page 665.


\textsuperscript{5}Maurizio Mori Is a “hands off” policy to reproduction preferable to artificial intervention? In Creating the child: The ethics, law and practise of assisted procreation. Edited by Donald Evans. Martinus Nijhoff Publishers, 1996. pages 102, 106-107.


\textsuperscript{7}Susan Atkins and Brenda Hoggett Women in the Law Basil Blackwell, 1984. pages 83-84.
long term emotional commitment to that child. It is the person who takes on this responsibility, the person who cares for and loves the child who is most important to the child, at least in its early years. In New Zealand this role of primary care giver is still predominantly fulfilled by the mother.

The fulfilment of the need to be a social mother has a particular human value, this is particularly so for those who require the assisted reproductive technologies to achieve motherhood, none more so than the woman who is unable to carry a child and requires a gestational surrogate. As discussed earlier there is a long history of the social element of motherhood being assumed by women who are not the biological mothers, references being made to this in the Bible. Surrogacy arrangements provide one of the most difficult situations for determining who is the mother of a child. If the biological process of carrying and giving birth does not determine motherhood then an alternative must be found. In these arrangements the roles of the two women must be considered. In the case of Johnson v Calvert when determining who was the mother of a child to which two women had biologically contributed, the court considered who in the surrogacy arrangement was substituting for whom. The court stated that the “stand in” is always the surrogate not the mother. This is consistent with the dictionary definition of surrogate; “a substitute for a person in a specific role”. By assisting a woman overcome an impairment which means that she is unable to carry a child a surrogate mother is like a mother but because she is acting on behalf of the commissioning mother she is not the real mother. The surrogate mother represents a facet of motherhood but only in reference to the commissioning mother. By taking on this “stand in” role the surrogate gestator is the real gestator but not the real

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10Dimetrio Neri Child or parent oriented control of reproductive technologies? page 149.


12286 Cal Rptr. 368 (Ct App. 1991).


mother. Without the contribution of the commissioning mother, as genetic and socially intended mother, the act of the surrogate gestator is meaningless. By viewing the process as a whole the real mother can be determined. The surrogate gestator may form an attachment to the child but this arises from a temporary, although intimate, relationship. A relationship that exists for the length of the gestation. The mother-child relationship is more long-lasting than the gestational relationship, the pregnancy is just one stage of the physical bond which continues through the life of the child. This mother-child relationship is one which fully develop with the woman who is the social mother, whether or not that woman was also the gestational mother.

The rights and obligations which are a part of legal motherhood are something which makes the legal determination of motherhood of considerable importance. Under the present and proposed legal situations in New Zealand the legal determination of motherhood does not take into account surrogacy arrangements. This is not unique to New Zealand, the public and legislative responses to surrogacy arrangements in other countries have not considered all of the implications of these arrangements. One aspect of this debate which has been particularly neglected is the different forms of surrogacy which exist, surrogacy where the surrogate is both the genetic and gestational mother and surrogacy where the surrogate is only the gestational mother, and the different ethical issues that they raise.

NECAHR has approved gestational surrogacy in this country and this approval requires a legislative response if those who use it are not going to be discriminated against, and the interests of the children resulting from this procedure are to be protected. Legislation needs to acknowledge the existence of the practice of gestational surrogacy and specifically deal with the issue of legal determination of the mother, and therefore the legal father, of resulting children. If this does not happen then we run the risk of going against the best interests of the resulting children as well as those who require this technology to become mothers. The Assisted Human Reproduction Bill presently before parliament only makes the situation worse for those involved in surrogacy arrangements. The complications of the

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15 Derek Morgan A surrogacy issue: Who is the other other? page 401.
17 Ibid page 572.
18 Ibid page 577.
Johnson v Calvert\textsuperscript{19} case where two women claimed a biological relationship with the child and required the court to determine who was the “real” mother may occur here. By stating that commissioning genetic parents who require a gestational surrogate are not donating their gametes to the gestator, this bill does protect the genetic parents from forced gamete donation, something that is seen as requiring protection by Hofheimer,\textsuperscript{20} but it does nothing to determine the legal mother of the resulting child. What is required when determining the legal mother when surrogacy arrangements are used is that the interests of the parties are balanced against each other. Because this determination in effect determines the custody of the child the interests of the child must be considered.\textsuperscript{21}

The problem with conflicts between two biological mothers is that only one will be recognised as the social mother. Although the genetic commissioning mother is not able to gestate her child this does not mean that the loss of that child would not be as traumatic to her as it would be to a mother who can gestate her child. The focus on the potential trauma of the gestational surrogate on giving up the child ignores the pain which is going to be cause to the genetic and socially intended mother if the gestational surrogate is allowed to keep the child. It is the intent of the genetic mother to be the social mother which initiated the pregnancy, it is her hopes of motherhood which is denied when the gestational surrogate is given legal parental rights. Her trauma is caused not by the loss of the hope of having a child but by the loss of a particular child, a child she considered to be hers from the time that it was conceived, a child for which she has developed an emotional attachment. These are the reasons for claiming that the gestational surrogate should have overriding parental rights but they are completely denied when it comes to the genetic and socially intended mother. One way to determine the appropriate person to be the legal mother is to consider the whole contribution of the parties, this includes the initial intent of the parties, the intent which initiated the pregnancy. In the case of gestational surrogacy this would mean that the gestational surrogate contributes the gestational element of motherhood while the genetic commissioning mother contributes both the genetic element and the intent to fulfil the social element which initiates the pregnancy. As the genetic and socially intended commissioning mother contributes more she should be the social mother if there is a dispute. In the case of surrogacy where the surrogate is both the gestational and genetic mother then she contributes

\textsuperscript{19}286 Cal Rptr. (Ct App. 1991)

\textsuperscript{20}Alice Hofheimer Gestational surrogacy: Unsettling state parentage law and surrogacy policy. page 603.

\textsuperscript{21}Ibid page 601.
more than the commissioning mother who has contributed the intent to be the social mother which initiated the pregnancy, the surrogate should therefore be the social mother if there is a dispute. This sort of analysis would also be appropriate for other forms of assisted reproduction, as well as fit with the current legislation in that area. An example being the use of donor ovum in an IVF procedure. In that case the gestational mother also contributes the intent to be social mother which initiates the pregnancy, while the ovum donor contributes the genetic element of motherhood. If conflict occurred here then the gestational mother has contributed more and should be the social mother.

Given fully informed consent of all the parties there is no reason why the initial intent of the agreement should not be legally recognised in the legal determination of motherhood. Taking the initial intent of who is to be the social mother also has the advantage that it is easy to determine. This also means that those requiring the use of this particular form of assisted reproduction, gestational surrogacy, are not treated any differently from those who use other forms of assisted reproduction. Just because the gestational surrogate is not given legal parental rights this does not mean that she is merely a foetal environment. The gestational surrogate is still recognised as an autonomous individual and is the decision maker in relation to how she behaves and is medically treated during the pregnancy and the birth. Just because she is a gestational surrogate this does not change, the commissioning parents have no more rights to determine these any more than the father of any pregnant woman’s baby can determine the way that pregnant woman is to behave or be medically treated.

Although surrogacy arrangements using assisted reproductive technology in which the surrogate gestator is also the genetic mother of the child have not been given approval these should also be dealt with by any legislative reform, whether this is to prohibit the practice or determine legal parenthood if the practice is used. What this type of legislation would mean is that all children born in New Zealand would have clearly definable legal parents, this has got to be in the best interests of the children as their bonding with those parents is less likely to be disrupted.

Given the bicultural nature of New Zealand society there are other concerns which must also be addressed by any legislation. In particular the keeping of records and ensuring

22 Ibid page 603.

adequate access to those records so that resulting children are able to trace their genetic heritage or whakapapa. The government has accepted that it has a duty towards Maori under the Treaty of Waitangi in relation to their concerns about the practise of IVF surrogacy. To guarantee that these concerns are addressed legislation is required which specifically deals with the issues of access to records and ensures the culturally safe practice of not only IVF surrogacy but all assisted reproductive technologies.

The practice of surrogacy is a reality in New Zealand. A reality which requires legislative attention to ensure that the discrimination against those who require this technology to become mothers which occurs under the present legislation does not continue. Legislation is also required for the government to fulfil its obligations under the Treaty of Waitangi by making the practice of IVF surrogacy culturally safe.


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