

**FOR LOVE NOT
MONEY,
IVF COMPASSIONATE
SURROGACY:**

**AN ANALYSIS OF PUBLIC
OPINION AND OPTIONS FOR
LAW REFORM
IN NEW ZEALAND**

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"By the action of Modern Industry all family ties among the proletarians are torn asunder and their children formed into simple articles of commerce"

Written by Karl Marx and Friedrich Engel more than 145 years ago.

"Today's controversies crystallise around expressions of concern about how children born as a consequence of these methods [IVF] will relate to their parents. In the abstract this seems a curious concern. After all why should a child conceived in a test tube [or gestated by another woman] have a different relationship with its parents to that experienced by a child conceived in the back seat of a car?"

Ann Bradley, *Living Marxism* issue 66, (April 1994)

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I INTRODUCTION

Maggie and Sev desperately wanted a baby. Maggie could not carry a child because she had undergone a hysterectomy for medical reasons.¹ She could still produce eggs. The couple particularly wanted their own genetic child and tentatively aired the possibility of IVF compassionate surrogacy to their family.²

One of Maggie's sisters offered to donate an egg, the other Linda, offered to gestate Sev and Maggie's genetic child. Linda, a loving mother of two children enjoyed being pregnant, wanted to give her children a cousin and to help her sister.³ She agreed to be impregnated with the embryo of Maggie and Sev and to carry their child for nine months; IVF compassionate surrogacy. The doctor took the ovum from Maggie's womb and fertilised it with Sev's sperm in vitro.⁴ There was no commercial gain to Maggie. She agreed to carry the child out of compassion and give it to Maggie and Sev after the birth.⁵ The baby was Alice and has grown up as Maggie and Sev's child.

The usually quiet Australian community in which this family live was in an uproar over the birth of Alice. Maggie was aware of being seen as "The Big Bad Wolf" by some people, "a wicked manipulator, if not consumer of my sister".⁶ There were some concerns that it amounted to trade in babies and so would be harmful to Alice. Despite this, Linda is glad that she gestated Alice for Maggie; "There are people who if they had had their way would have prevented Alice's conception and birth. [But] she has a right to exist and I'm proud to call her my niece."⁷ IVF compassionate surrogacy is permitted by law and practised⁸ in Alice's birthplace, New South Wales. In New Zealand the procedure is legal but not available because it has been denied ethical approval by the Interim Ethics Committee on Assisted Reproductive Technologies.⁹

This paper investigates the law reform options regarding IVF compassionate surrogacy in New Zealand. As New Zealand is a democracy, law should be by the people and for the people. This research paper has heavily emphasised public opinion on the issues including a survey I conducted on IVF compassionate surrogacy. The target of the survey was all the doctors in the Wellington region and a Family law class, as a control group. Responses were positive to IVF surrogacy and indicated possible methods to prevent problems that could result from the procedure. Ultimately the issue is, whether the best interests of the commissioning parents,¹⁰ the

¹ Access Bulletin *Focal Point: IVF Surrogacy* (Sydney, 1995)

² Above n 1

³ Above n 1, 4

⁴ Outside the body

⁵ This is the definition of IVF compassionate surrogacy that will be used in this paper, a non-commercial arrangement in which a woman who is a friend of a family member of a couple gestates a child for them, created from the ovum and the sperm of the commissioning couple.

⁶ Above n 1, 1

⁷ Above n 1, 5

⁸ Although it is only very rarely practised.

⁹ INECART; which is now referred to as the National Ethics Committee on Assisted Human Reproduction (NECAHR)

¹⁰ The commissioning parents in IVF Compassionate Surrogacy are the couple who organise the creation of the child and intend to raise it. It is their genetics used to create the child.

surrogate mother,¹¹ the resulting child and the community at large are met by allowing IVF compassionate surrogacy in New Zealand.¹²

II IS THERE A NEED FOR IVF COMPASSIONATE SURROGACY IN NEW ZEALAND?

The primary argument for IVF compassionate surrogacy is that it allows infertile couples to have their own genetic child.¹³

A Statistics

There are not sufficient babies available for adoption, compared to the number of infertile people seeking children in New Zealand.¹⁴ Atkin believes the New Zealand rate of infertility is between 7-15%.¹⁵ This amounts to hundreds of thousands of people in New Zealand who are infertile. The problem is, as the infertility rate has increased, the number of babies available for adoption has declined. This has occurred for a number of reasons, for instance greater use of contraception and increased societal acceptance of single mothers.

B The Psychological Need to Have Children

In New Zealand society it is commonly believed, to be normal, complete and fulfilled it is necessary to have children. As Morgan wrote, the birth of a new generation allows every (fertile) person to contribute both genetically and socially to our collective understanding of what it means to be human.¹⁶ An interesting study has been performed in New Zealand to illustrate this point. Cameron discovered in her observation of 89 European families in Hamilton that couples had children because they contributed to a sense of biological and social completeness.¹⁷ Therefore if couples cannot have children it is very likely that they will suffer significant personal loss and a sense of being unfulfilled.

¹¹ The surrogate mother in IVF Compassionate Surrogacy is the friend or family member of the Commissioning parents who agrees to gestate the embryo.

¹² W Atkin "Medico-legal implications of ART (1994) 1 Butterworths Family Law Journal, 92

¹³ However, IVF compassionate surrogacy could be used when the woman is capable of carrying a child. New South Wales Law Reform Commission *Surrogate Motherhood: Australian Public Opinion* (New South Wales, 1987); investigated non-medical reasons for surrogacy and discovered there was very low support for this among the community. For the purposes of this study it is assumed IVF compassionate surrogacy will only be used when the commissioning mother cannot carry a child.

¹⁴ Infertility is defined as one year of unprotected intercourse without conception; Y M Warlen "The Renting of the Womb: An Analysis of Gestational Surrogacy Contracts Under Missouri Contract Law" (1994) 62 UMKC 583; Family law Policy in New Zealand, 256; Social Welfare Statistics indicate that for every three couples on the waiting list to adopt children, only one baby will be available.

¹⁵ Above n 12, 90

¹⁶ D Morgan "A Surrogacy Issue: Who is the Other Mother?" (1994) 28 IJFL 386.

¹⁷ M. Henaghen *Family Law Policy in New Zealand* (Wellington, 1993), 256

C Cases of Infertility When IVF Compassionate Surrogacy is Useful

IVF compassionate surrogacy can be used when the couples' infertility results from the female not being able to carry a child, yet can still produce eggs. There are a number of medical conditions which mean a woman can produce eggs, but not carry a pregnancy to full term. The main ones are recurrent miscarriages, premature labour or when it is dangerous to the women's or child's life for her to become pregnant.¹⁸ IVF compassionate surrogacy would allow some infertile couples, (who cannot have children because of the woman's infertility) to have their own genetic child.

D The Likelihood of IVF Compassionate Surrogacy Cycles Succeeding

There has been one case of IVF compassionate surrogacy in New Zealand which was miscarried before term.¹⁹ The current overall success rate of IVF in New Zealand is around 20% per cycle.²⁰ This is a good success rate when compared to the natural conception rate of the general population which is only 25% at its highest point.²¹ It could be slightly more difficult using IVF compassionate surrogacy because the cycles of the genetic and surrogate mother have to be synchronised.

E Would Many Infertile People Use IVF Compassionate Surrogacy?

Surrogacy provides the only chance that some couples have of becoming parents and genetically related to their children.²² Many people are currently participating in private surrogacy arrangements in New Zealand, often involving young women students trying to pay off student loans.²³

Although a high proportion of infertile people would probably not use IVF compassionate surrogacy,²⁴ a number would, and are anticipating NECAHR's review of the situation. Nineteen couples are waiting for the treatment in Auckland and there are many more around the country.²⁵ Furthermore as surrogacy is currently occurring under cover in New Zealand,²⁶ there is obviously a demand for it and if IVF compassionate Surrogacy was actively permitted by law, many other couples would become aware of the option. There is a need for IVF compassionate surrogacy in New Zealand.

¹⁸ New South Wales Law Reform Commission *Artificial Conception Discussion Paper 3: Surrogate Motherhood* (New South Wales, 1988), 12

¹⁹ Report of the Ministerial Committee on Assisted Reproductive Technologies *Assisted Human Reproduction Navigating Our Future* (Wellington, 1994) 103.

²⁰ Christine Rogan (Spokesperson for the New Zealand Infertility Society), *Interview*, 7 July 1996

²¹ Above n 20

²² N A Russ *Parenthood by Contractual Intent* (LLM) Victoria University Wellington, 1985) 52

²³ Above n 20

²⁴ Fertility Associates Wakefield Hospital, *Interview* 24 June 1996.

²⁵ Ken Daniels, *Interview*, 20 June 1996.

²⁶ Above n 20; There is anecdotal evidence that in some surrogacy arrangements the surrogate gives birth in the name of the recipient woman with her and her partner's name on the birth certificated, so children are born into families carrying destructive secrets.

III HOW NEW ZEALAND LAW APPLIES TO SURROGACY

Surrogacy is not explicitly addressed by law in New Zealand, as such it is unregulated. The New Zealand Infertility Society believes this situation is potentially disastrous as it leaves arrangements to the goodwill of the parties, who often undertake them without the benefit of counselling to ensure fully informed decisions.²⁷ However there are statutes applicable to Surrogacy which would help resolve cases of dispute. Unfortunately when applied to cases of IVF compassionate surrogacy these Acts will sometimes produce unjust and often arbitrary results.

A *The Status of Children Amendment Act 1987*²⁸

The SOCAA has the effect of making the birth mother, and her consenting partner the legal parents of the child, in IVF compassionate surrogacy cases.²⁹ This allows the commissioning parents no rights to the baby even if it is their biological child. It also means if the surrogate decides to keep the child, the husband of the surrogate, may be forced to support the child, although he merely consented to his wife undergoing the procedure. Difficulties may also arise with intestate. If the child was not adopted, she will not legally be one of the "children" of the commissioning parents, but would be in the surrogate's will.

B *The Adoption Act 1955*

The applicable sections are ss 6, 25, 26. If any of these sections are breached it is an offence against s27.³⁰ In order to avoid the contravention of s 6, commissioning parents must have approval of a social worker before they take their child home.

Section 25 provides that no one can give payment or reward for adoption of a child, and under s 26 it is an offence for a person to advertise to adopt a child.³¹

In order for the commissioning parents to adopt the child they must have the consent of the surrogate mother.³² The family court may dispense with the need for consent, but only in exceptional circumstances, where the birth mother has effectively abandoned the child.³³ It is extremely unlikely that an agreement to give up the child before birth constitutes abandonment.³⁴

C *Other Relevant Acts*

Under the Children, Young Persons and Their Families Act 1987³⁵ if a couple has in their custody a child who is not their own, she can be removed from their care.³⁶ Other legislation which

27 Above n 20

28 "SOCAA"

29 Sections 9 and 15

30 The Adoption Act 1955: section 27 provides if an offence has been committed against ss 6, 25 or 26 the child can be removed to a place of safety and the offender can be fined up to \$1,000 or spend up to 3 months in prison.

31 *Re P* [1990] NZFLR 385: Decided that s. 25 did not apply to surrogacy arrangements when money paid to the surrogate can be termed maintenance and s. 26 did not apply to surrogacy because it was not contemplated by parliament when this act was passed.

32 The Adoption Act 1955, Section 7

33 Above n 32

34 C I Rotherham "Surrogate Motherhood in New Zealand a Survey of Existing Law and an Examination of Options for Reform" (1989-92) 7 OLR 427, 432, 458

35 The "CYPFA" s.14(1)(a)(i)

affects the provision of IVF compassionate surrogacy is, the Health and Disability Services Act 1995, the Medical Practitioners Act 1968, the Medicines Act 1981, the Nurses Act 1977, the Medical Auxiliaries Act 1966, and the Guardianship Act 1968.

E The Enforceability of Surrogacy Contracts

There are strong obiter dicta in overseas decisions which indicate that surrogacy contracts would not be enforced because they are contrary to public policy.³⁷ However some cases have held, even though the contracts are void as against public policy, following the best interests of the child results in the commissioning parents being awarded custody of the child.³⁸ New Zealand courts are very likely to follow this trend of non-enforcement and look at the best interests of the child,³⁹ especially in view of the heavy emphasis placed on the importance of the child's interests under New Zealand law.⁴⁰

The law provides a framework for IVF compassionate surrogacy to exist, but it does not deal with many issues and would result in an unfair outcome for the genetic parents of the child.

IV EVALUATION AND CRITIQUE OF NECAHR'S REASONING OF REFUSING TO GIVE ETHICAL APPROVAL FOR IVF COMPASSIONATE SURROGACY

NECAHR refused to grant ethical approval to IVF compassionate surrogacy because the committee believed, "Autonomy and Freedom of Choice" must yield to safeguard the rights of participants."⁴¹ There were five main reasons the Committee gave for this decision.⁴²

A The Birth Mother May be Unable to Foresee the Emotional Trauma in Giving Up A Child⁴³

There is a strong argument that a woman would face emotional trauma when she gives up a child to the commissioning parents. The issues are three fold. Firstly, whether the degree of trauma is so harmful that IVF compassionate surrogacy should be disallowed. Secondly, whether women as rational human beings have the right to become surrogates and thirdly, are there measures that

³⁶ Under the Children's and Young Persons Act commissioning parents who kept a child without taking legal steps would have breached section 73. Under the provision it was an offence to keep a child for over 28 days if you were not the parent or guardian of the infant. But there is no equivalent section under the CYPFA.

³⁷ *A v C* [1985] FLR 445; *Baby M (2)* (1988) 537 A2d 1227; a court will not take contracts into account when making a decision about a child.

³⁸ *In Re a Baby; Re C (a minor) (warship: surrogacy)* [1989] FLR 846

³⁹ NZIS Inc *New Zealand Infertility Society Newsletter* 4.3 (September, 1993) 3

⁴⁰ The Children Young Persons and their Families Act; The Guardianship Act 1968; and the application of the paramountcy of the child principle to the Adoption Act: *Director-General of Social Welfare v L* [1989] 2 NZLR 314

⁴¹ Above n 13, 13

⁴² Above n 13, 13

⁴³ *Interim National Ethics Committee on Assisted Reproductive Technologies Non-Commerical Surrogacy by Means of In Vitro Fertilisation* (Wellington, 1995) 10

can be taken that significantly minimise or eliminate the emotional trauma which the surrogate may face?

1 The Degree of harm

Women bond to the foetus they carry in their womb, so it is likely to be distressing for a birth mother to part with the child.⁴⁴ Any separation may result in lasting harm to the mother. There is even evidence which suggests women who do relinquish the child and suffer little distress at the time can suffer from the experience later.⁴⁵ Some women may have unrealistic ideas about surrogacy and will not be prepared for the pain of parting with the child they have gestated for nine months.⁴⁶ Nonetheless, other women may not be affected by this. It has yet to be shown that the practice is generally harmful to surrogates, and the argument of emotional trauma is mere supposition.⁴⁷

The flaw in NECAHR's reasoning that a surrogate will suffer is that the argument is taken from *Proceed With Care*.⁴⁸ *Proceed With Care* related to surrogacy generally, not IVF compassionate surrogacy.⁴⁹ The Infertility Society believes that IVF compassionate surrogacy is much more likely to succeed than ordinary surrogacy because the main ingredient is compassion.⁵⁰ In adoption and commercial surrogacy cases it is possible for the mother to change her mind and become attached to her baby after birth. However, an IVF compassionate surrogate who has seen the pain and anguish of infertility in her loved one is more likely to be able to give the baby up after the birth, than surrogates who bore babies for purely for financial reasons. It is also in the child's interest to be gestated by a compassionate surrogate because she will be likely to keep in contact with the parents and child after the birth.⁵¹ Linda Kirkman who gestated her sister's child believes an IVF surrogate suffers less distress because the baby is not genetically her own.⁵² This indicates that different reasoning applies to IVF compassionate surrogacy. Emotional trauma is still a risk to the surrogate, but would not be as great as in the case of an ordinary surrogacy arrangement.

2 The Autonomy of Women

Rotherham believes the personal nature of the decision to be a surrogate is difficult for women to make rationally as they cannot be sure how it will affect them. This statement undermines the fact that women are rational, thinking human beings and provided surrogates are adequately prepared for their role they will be able to perform it. A woman has a right to control her own body, provided she is making a fully informed and rational choice, which the state should not interfere with.⁵³ IVF Clinics make sure all participants have counselling and are properly

⁴⁴ Royal Commission on New Reproductive technologies *Proceed with Care* (Ottawa, 1993) 675.

⁴⁵ Above n 44, 675; Although it must be remembered that the long term effects have not been researched and this is merely anecdotal.

⁴⁶ J A Roberston Children of Choice, *Freedom and the New Reproductive Technologies* (New Jersey, 1994)

⁴⁷ Above n, 432

⁴⁸ Above 43, 11-12

⁴⁹ Above n 44,

⁵⁰ Above n 20,

⁵¹ Cross reference to pages 15-16 of this paper.

⁵² Marie Meggit, "Surrogacy in Whose Interests?" Proceeding of the National Conference, (Melbourne, 1991) 31

⁵³ Minors or other people without the mental capacity to know what they are doing should not become surrogates.

prepared, and everyone involved has an informed choice.⁵⁴ The surrogate is the most likely to get hurt, yet it is her autonomy in question which she puts herself at risk to exercise. The surrogate has a right to participate in surrogacy as long as she is of full capacity and is fully informed on the procedure and consequences.

3 Possible solutions to emotional trauma

Emotional Trauma to the surrogate mother is not a reason for prohibiting IVF compassionate surrogacy, because such trauma can be prevented. In the preparation that participants undergo before IVF, the surrogate mother should be counselled and carefully consider her likely emotional reactions to the developing child, the possibility of miscarriage and the effect of parting with the child if the pregnancy is successful.⁵⁵ The surrogate mother should be both physically and psychologically fit.⁵⁶ As Linda Kirkman, an IVF compassionate surrogate said, "Surrogacy can go wrong but if we are careful we can significantly reduce the risks."⁵⁷

In addition there are alternative ways of minimising emotional trauma to the surrogate. For example, part of the surrogacy agreement could include the surrogate mother in rearing rights and duties,⁵⁸ especially in an IVF compassionate surrogacy agreement where the parties are close. The other end of the spectrum is to give the surrogate no rights to the child. If the surrogate clearly understands from the beginning that the contract entails a legal commitment; she will be less likely to waiver during her pregnancy towards keeping the child, and will be spared the psychological pain of ambivalence.⁵⁹ The preferable way is to thoroughly prepare the surrogate mother for her task. A well informed decision is an autonomous one. An empowered and prepared surrogate is likely to be able to gestate and relinquish a child not genetically her own for the love of her friends or family, with minimal emotional trauma.

B Children in Surrogacy Cases Will Become Commodified even if No Monetary Gain is Involved⁶⁰

"State Parties recognise the rights of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education."⁶¹

If IVF compassionate surrogacy does commodify children,⁶² it should not be allowed in New Zealand as it may breach New Zealand's human rights obligations. It is arguable that commodification of children is included within the principle.

⁵⁴ Above n 25

⁵⁵ The British Medical Association and the Human Fertilisation and Embryology Authority *Considering Surrogacy Your Questions Answered* 5

⁵⁶ A E Stumph "Redefining Mother: A Legal Matrix for New Reproductive Technologies" 37 *The Yale Law Journal* 187

⁵⁷ Above n 52, 31

⁵⁸ Above n 46, 132

⁵⁹ Above n 46, 204

⁶⁰ Above n 43, 11

⁶¹ Article 32 of the United Nations Convention on Rights of the Child

⁶² A commodity is defined in the 8th edition of *The Concise Oxford Dictionary* as an articles or raw material that can be bought and sold. Therefore to commodify a child, he or she must be reduced to such an article. Above n 49, 684: The Royal Canadian Commission defined commodification of a child as the exchange of money for a child. To be consistent with both the above definitions this paper will also interpret "commodification"

NECAHR decided that children were commodified in IVF surrogacy arrangements, particularly because much of the language is borrowed from the commercial world.⁶³ Many writers believe that surrogacy amounts to the purchase of a child.⁶⁴ The Royal Commission argued that a child subject to the contract may be made to feel like a commodity.⁶⁵ Some members of the New South Wales Committee felt that even when the surrogate was a true volunteer and no element of commerce was involved, the agreement still involved a manufacture of a child for others.⁶⁶ Similarly, the Warnock Committee believed all surrogate children are created to relieve the childlessness of the infertile couples and therefore the commissioning parents use both the child and the surrogate as a means to their own ends.⁶⁷

Using a child as a means to an end involves considering the child as a possession. The trend in human rights over the past twenty years has been towards an increasing recognition of children as people in their own right and not merely parental property.⁶⁸ Parents may believe that being able to bargain over their child's birth gives them the right to treat their children as chattels, therefore an imperfect child may be rejected.⁶⁹

On the other side of the coin there are arguments that even commercial surrogacy does not commodify children. Robertson believes the argument that payment commodities children fails to show why.⁷⁰ The commodification argument also does not explain why gestation may not be sold, while other attributes, such as physical size, skill, attractiveness and intelligence may be.⁷¹ Luey believes the test of commodification should be, whether it is reducible solely to its monetary features.⁷² Commercial surrogacy, particularly for large sums may commodify the child, but not IVF compassionate surrogacy. IVF compassionate surrogacy would involve at the most a payment of financial expenses and under Luey's test the exchange would be the gestation of a child for love. The financial aspects would be immaterial.

There is a special case for IVF compassionate surrogacy, which NECAHR did not consider. NECAHR followed the Royal Commission's reasoning,⁷³ (which dealt predominantly with commercial surrogacy) and commodification of women and children was one of their main reasons for disproving surrogacy.⁷⁴ However, when the Royal Commission assessed non-commercial surrogacy it principally applied the same reasoning without taking into account the

of a child as treating children as articles of commerce, by allowing them to be bought or sold for money.

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Above n 43,12

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Committee to Consider the Social, Ethical and Legal Issue Arisen from IVF
Report on the Disposition of Embryo Production by IVF (Victoria, 1994) 50 ; Above n 44,
678l; Above n 18, 15

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Above n 44, 677

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*Committee to Consider the Social, Ethical and Legal Issues Arisen from IVF Report on the
Disposition of Embryo Production by IVF* (Victoria, 1994) 54

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*Report of the Committe of Inquiry into Human Fertilisation and Embryology (The Warnock
Report)* (London, July 1984) 104

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Above n 44, 678

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M Luey *Procreative Liberty and the Right to be a Parent* (LLM Research Paper Family Law
(Laws 513) (Victoria University of Wellington, 1994) , 32

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Above n 46, 142

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Above n 46, 142

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Above n 69, 33

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Above n 43 11-13

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Above n 44, 678,689

very important factor, that altruistic surrogacy is performed for love not money.⁷⁵ The Commission did not explain why its members thought children would be commodified if there was no money involved. It does not automatically follow from the commodification of children in commercial surrogacy. The Commission argued even if a child is given away it is still a commodity.⁷⁶ This is a subjective opinion and should have been explained and justified because ordinarily gifts are not commodities. This argument can also be criticised because it is insensitive to other cultures. A custom of some cultures is the gifting of children to infertile or older relatives whose children have grown up, for example, Maori culture.⁷⁷ How can the Commission state no one has a right to make a gift of a child, when this ignores attitudes of different cultures?

Dixon believes any child born of an IVF Compassionate Surrogacy agreement will be very much loved and therefore not commodified.⁷⁸ It is likely that if parents have gone to great trouble and expense to obtain a child through IVF compassionate surrogacy the child will be very well cared for. However Warlen disagrees with this. She argues, just because people are willing to go to great lengths to obtain a genetically related child does not guarantee they will be good parents.⁷⁹ It is fair to conclude, while the resulting children of an IVF compassionate surrogacy agreements will be wanted and materially provided for, they may not necessarily be loved for themselves.⁸⁰ That will ultimately depend on the parents.⁸¹

It has been argued that infertile parents seeking a child through surrogacy do so only to have a child and therefore the child is means to an end, (the cessation of childlessness).⁸² All parents have children because they want them and all parents have expectations of their children.⁸³ This does not make children commodities.

Why should infertile people be discriminated against because they require technology and the assistance of a close friend or family member?⁸⁴

IVF compassionate surrogacy does not commodify children. Unlike commercial surrogacy, it does not involve the exchange of money for a child, which is what the Canadian Royal Commission found so abhorrent.⁸⁵ It is also possible to argue that in cases of IVF compassionate surrogacy, a child is not given to the commissioning parents.⁸⁶ It is the commissioning parents who initiate the child; their ovum and sperm, the surrogate merely gestates it for nine months. Under IVF compassionate surrogacy the child is not commodified.

⁷⁵ Above n 44, 689

⁷⁶ Above n 44, 689

⁷⁷ J Metge *New Growth From Old The Whanau in The Modern World* (Victoria University Wellington, 1995) 223-257

⁷⁸ R Dixon *Whither the Law IVF Compassionate Surrogacy in New Zealand* (LLM) Victoria University Wellington, 1995

⁷⁹ Above n 14, 616

⁸⁰ Above n 14, 616

⁸¹ The screening tests of possible parents can help in evaluating who will be able to provide a stable, loving home for a child.

⁸² Above n 18, 104; Above n 44, 678

⁸³ Above n 52, 31

⁸⁴ Above n 52, 31

⁸⁵ Above n 44, 683

⁸⁶ This is the justification of the Proceed with Care report that even non-commercial surrogacy is a commodification.

C ***There are Significant Medical and Emotional Risks Associated with IVF Compassionate Surrogacy***⁸⁷

There are medical risks to both the commissioning and surrogate mothers participating in IVF compassionate surrogacy. The commissioning mother and the surrogate would take fertility drugs, to produce eggs in the commissioning mother and to ensure the two women's cycles are coordinated. The side effects of the drugs are swelling, nausea and weight gain. IVF drugs carry a risk of ovarian hypertension syndrome and it is possible for the ovaries of the commissioning mother to burst, so cycles are closely monitored.⁸⁸ Aside from that, the medical risks to the surrogate are as in a normal pregnancy; gestational diabetes, high blood pressure, urinary tract infections, haemorrhage, stress incontinence, painful intercourse, haemorrhoids, post-natal depression⁸⁹ and very rarely death.⁹⁰

There are also emotional⁹¹ risks to all the parties in an IVF compassionate surrogacy arrangement. Pregnancy produces physical and hormonal changes in a woman's body that can effect her temperament and therefore have the capacity to alter a surrogate's relationship with her partner and children.⁹² The commissioning parents are at risk because they are dependent on the surrogate mother, who could leave them open to the risk of financial or emotional pressure.⁹³

While there are risks, it is arguable these are not significant and could be overruled by the right of the parties to autonomy. Ken Daniels⁹⁴ believes the risks to parties in IVF compassionate surrogacy are not crucial,⁹⁵ and Fertility Associates agree.⁹⁶ An argument could be made that women's right of autonomy to enter into such an arrangement would be unfairly limited by state legislation. The counter-argument to this is voiced by Macgregor who believes that people who accept surrogacy have a disregard for the rigours of pregnancy and ignore that for centuries women have been controlled through their reproductive capacity.⁹⁷ She asks, "Who will take responsibility for the emotional and physical casualties of surrogacy in an already stressed health system?"⁹⁸ That argument is not convincing because many of the risks are the same as experienced in an ordinary pregnancy and fertile people are not prohibited from having children because of the dangers. Furthermore, many of the risks can be prevented by adequate preparation.

Preparation and continual assistance from a specialist would help reduce the risks to the parties.⁹⁹ The surrogate mother should be in good overall health, be psychologically fit, able to undergo pregnancy with the minimum amount of risk to her own health and ideally should have born at least one child.¹⁰⁰ She should have the support of family and friends.¹⁰¹ Parties must undergo counselling before the procedure.¹⁰²

⁸⁷ Above n 43, 10-12

⁸⁸ Above n 20

⁸⁹ Above n 20

⁹⁰ Above n 18, 16: Death from pregnancy occurs very rarely. Out of the 19,596 women who died in 1986, in New South Wales only seven of these deaths resulted from complications in pregnancy or childbirth.

⁹¹ Or psycho-social risks as Ken Daniels prefers to call them; Above n 25

⁹² Above n 44, 675

⁹³ Above n 18, 118

⁹⁴ A counsellor and Associate Professor in Social Work at Canterbury University.

⁹⁵ Above n 25

⁹⁶ Above n 24

⁹⁷ Above n 52, 22

⁹⁸ Above n 52, 22

⁹⁹ Above n 24

¹⁰⁰ Above n 55, 201; as there is more risks of pregnancy with the first child, than successive children.

Parties should be entitled to both psychological and medical advice and assistance throughout the course of the pregnancy. Although this is expensive,¹⁰³ it will significantly minimise the risks, probably to a low enough level for IVF compassionate surrogacy to be allowed in New Zealand.

D There is a risk to the Child of Disrupting Gestational Bonding¹⁰⁴

“The child shall enjoy special protection and shall be given opportunities and facilities by law and by other means to enable him to develop morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and State parties must recognise that every child has the inherent right to life. State parties shall ensure to the maximum extent possible the survival and development of the child.”¹⁰⁵ “The best interests of the child shall be a primary consideration”¹⁰⁶

There are potentially harmful effects on a child gestated by a surrogate who intends to surrender him on birth. If the surrogate mother views herself as alienated from the child, this could have a negative impact on the foetus who may feel rejected by the person carrying him.¹⁰⁷ That initial lack of bond between the child and the gestational mother could lead to emotional and other problems to the child in later years.¹⁰⁸ On the other hand if the surrogate bonds to the child it may be distressing for the child to be separated from her at birth.¹⁰⁹ The Working Group on IVF of the German Republic found the major problem of surrogacy was that, it ignores the fact that the child’s personality development in the uterus is important and the biological and psychological bond between the woman and child is part of this.¹¹⁰

While it is possible to surmise that surrogacy will have a negative effect on the child, this is not proven. No research has been performed on this issue, even in the United States, where surrogacy is well established. Fertility Associates argued that the risk of the child’s loss of self-identity by bonding to the surrogate then being transferred to another woman is not corroborated by evidence.¹¹¹ In the survey carried out in July 1996 many of the doctors commented that gestational bonding was not an issue and no IVF compassionate surrogacy was no worse for the child than adoption. Parallels can be drawn with adoption,¹¹² and Maori Whangai.¹¹³

101 Above n , 555, 202
102 Above n 25; IVF clinics counsel all participants anyway.
103 Costs will not be dealt with in this paper
104 Above n 43, 10
105 Article 6 of The United Nations Convention on the Rights of the Child
106 Article 3 of The United Nations Convention on the Rights of the Child
107 S L Russell-Brown “Parental Rights and Gestational Surrogacy: n Argument against the Genetic Standard” (1992) 23 Col. HRLR 525, 545.
108 Above n 22, 53, L Bile, S H Himmelweit and G Viles *Tomorrow's Child: Reproductive Technology in the 1990* (London, 1990) , 33
109 Above n 25; the courts have recognised the bond between mother and baby in the nine months; which is one of the reasons they often grant custody to the surrogate.
110 Above n 18, 104
111 Above n 24
112 Above n 25
113 This is Maori customary adoption and involves parents giving their children to other people in their wider family circle to foster. Parents usually remain in contact with their children, but in a whangai adoption another relative gains the primary care giving responsibility to the child. This can occur for any number of reasons but mainly because either parents cannot look after their children or infertile or older relatives with no children at home request children to look after.

There is an argument that surrogate children are in a similar position to adopted children.¹¹⁴ Children may share the need of adopted children to search out their birth mothers and it is important for them to have access to information about surrogates.¹¹⁵ It has been argued that adopted children are greatly disadvantaged and feel rejected. This could extend to surrogate children. Marsha Riber claims that a significantly higher proportion of adopted children become murderers than their percentage in the general population, which has its basis in feelings of rejection.¹¹⁶ David Hirt believes surrogacy should be prohibited unless society is prepared to support the child through her whole life.¹¹⁷ "Monstrous systems produce monsters who wreak havoc on other people."¹¹⁸

The flip side of this argument is that surrogate children may not be as deeply affected by loss of self-identity, or rejection as adopted children.¹¹⁹ In an adoption an unwanted child is given away, in a surrogacy arrangement the child has been created specifically for the purpose of relinquishment.¹²⁰ The analogy may be drawn with sperm donor children who are also products of technology to help infertility, rather than being born unwanted.¹²¹ Studies have shown these children have a healthier adjustment than adopted children and typically do not feel rejected or abandoned, many express gratitude for the gift that made their existence possible.¹²² Until research is done it will not be possible to ascertain the effects on the child, the question becomes, is it better for the child not to be born at all?

The Royal Commission rejected the argument that possible harms to children are outweighed by their opportunity to life.¹²³ The commission believed that argument avoids the issue because asserting that the children have a right to life assumes the very factor under deliberation; the child's conception and birth.¹²⁴ Yet the right to life argument merits more distinction than this. The issue is whether the risks of serious problems to the child are so great, that a child who has no other way to be born, would be better off not existing.¹²⁵ That is a very high threshold and in the majority of cases the child's life would be worth living. Alice (aged 7), who is the child of an IVF compassionate surrogacy arrangement, wrote "It is amazing that my Mum and Dad even thought of having a child this way . I am glad that I am alive and I am lucky to be alive."¹²⁶ In order for IVF compassionate surrogacy to be prohibited the psychological and social problems of the child must make the child's existence a burden and a wrongful life.¹²⁷ Can it be truly said of many people, including those adopted or from abusive homes, their existence is a burden to themselves and our society?

IVF compassionate surrogacy different from ordinary surrogacy and it is possible for the risks to the child to be minimised. A paid surrogate is likely to have a lower level of commitment to the child she is carrying than a volunteer, who gestates the child out of love for a close friend or

114 Above n 22, 53

115 Above n 25

116 Above n 52, 26

117 Above n 52, 26

118 Above n 52, 26

119 Above n 25

120 Above n 20

121 Adopted children are often born unwanted.

122 Above n 46, 122

123 Above n 44, 683

124 Above n 44, 683

125 Above n 46, 122

126 Above n 1, 5

127 Above n 46, 122

family member and will not reject it in her womb.¹²⁸ A surrogate mother in an IVF compassionate surrogacy agreement is also more likely to maintain contact with the family and child, so if a gestational bond has developed it will never be fully broken. For example, Linda Kirkman sees and talks regularly on the phone to her niece Alice, who she gestated.¹²⁹ Alice's mother believes she is unharmed as a result, "Because she has a continuing relationship with the woman who gestated her Alice knows that she was not merely given away and she will not need to seek her birth mother."¹³⁰

In an IVF arrangement the social parents of the child are also the genetic parents so the outcome is as 'natural' as possible.¹³¹ The bonding within the womb between an IVF surrogate and the child will not be as strong as between a surrogate and her genetic child.¹³² The nine months gestation period and the birth must be weighed up against a lifetime of a social environment with the genetic parents. However, more research is needed on this issue to monitor possible effects on children and consider how to minimise any risks.¹³³

E What if the Child is Born Handicapped and is not Wanted by Either the Genetic Parents or the Birth Mother¹³⁴

"State Parties recognise that mentally or physically disabled children should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community."¹³⁵

It is a possibility that if a child, the subject of an IVF compassionate surrogacy agreement is born handicapped or the couple simply do not like her, they may reject her. A couple might reject an abnormal child, on the ground that the abnormalities were due to the surrogate mother's behaviour during the pregnancy, or failure to reveal a known health problem.¹³⁶ There have been cases of parents not accepting defective children. For example, one case in early 1983 where a man who supplied the sperm for a surrogate fertilisation refused to accept the defective child, resulting from the procedure.¹³⁷

The possibility that a child could be born handicapped is not a sufficient reason to prohibit IVF compassionate surrogacy because, New Zealand law identifies the surrogate mother as the legal guardian of the child.¹³⁸

The possibility of the child being born handicapped should be discussed by the parties in the course of preparation before the agreement. If the medical history of all parties is fully aired and

¹²⁸ Parliament of the Commonwealth of Australia *Surrogate Mother; The Legal Issues; Current Issues Brief No. 4*, (Canberra, 1984) 14

¹²⁹ Above n 52, 32

¹³⁰ Above n, 1 5

¹³¹ Above n 20

¹³² Above n 20

¹³³ Above n 20

¹³⁴ Above n 44, 10

¹³⁵ The Convention on the Rights of the Child, Article 5

¹³⁶ Above n 128, 12

¹³⁷ Above n, 46; See also Andrews *The Stork Market, The Law of New Reproduction Technologies* 70 A B A 350,56 (1984) (rejection by all parties of a microphallic child.)

¹³⁸ The Status of Children Amendment Act 1987 ss 9 and 15, The Guardianship Act 1968 s 6: The Surrogate mother is the legal guardian of the child if she is not married to or is not living with the father at the time of birth. She will not be married to or living with the commissioning father at the time of the child's birth.

the surrogate mother agrees not to smoke or drink alcohol during the pregnancy,¹³⁹ the risk of a handicapped child being born is minimised. The New Zealand Infertility Society believes the commissioning parents should have some responsibility to the child, because they are responsible for initiating the procedure.¹⁴⁰ The parties should discuss who would look after the child if it was born disabled, before the procedure begins, but even if they do not resolve it the legal system gives the ultimate responsibility to the surrogate.

F There is a Lack of Law Governing and Regulating IVF Compassionate Surrogacy in New Zealand¹⁴¹

The current law in New Zealand provides a framework, in which IVF compassionate surrogacy could operate, the surrogate mother has the rights and responsibilities to the child. The law governs the legal guardianship of the child,¹⁴² the status of the child,¹⁴³ the adoption of the child,¹⁴⁴ and the common law indicates that surrogate contracts would not be enforced because they are contrary to public policy.¹⁴⁵

The Human Assisted Reproduction Technology Bill 1996 is a private members bill. Two aims of this bill are to control IVF and surrogacy. It would also establish the Human Assisted Reproduction Authority which would regulate surrogacy, and other assisted reproduction.¹⁴⁶ The key principles that govern this bill are, the importance of the welfare of the child,¹⁴⁷ respect for the dignity of human life,¹⁴⁸ the right to know one's genetic origins,¹⁴⁹ the right to individual autonomy¹⁵⁰ and the principles of the Treaty of Waitangi.¹⁵¹ The definition of surrogacy includes IVF compassionate surrogacy.¹⁵² Under this bill it shall not be lawful to give or receive payment in consideration of a surrogate arrangement.¹⁵³ It would be an offence to advertise for a surrogacy arrangement,¹⁵⁴ or to give or receive payment for surrogacy.¹⁵⁵ Records detailing the child's original birth certificate and amended birth certificate are to be kept and given to the child when he comes of age.¹⁵⁶

¹³⁹ The surrogate will probably agree to do this since she is performing the surrogacy arrangement out of compassion, is close to the commissioning parents and would probably like the resulting child to be as healthy as possible.

¹⁴⁰ Above n 20

¹⁴¹ Above n 44 8-9

¹⁴² The Guardianship Act 1968 s.6

¹⁴³ The Status of Children Amendment Act 1987 ss9 and 15

¹⁴⁴ The Adoption Act 1955

¹⁴⁵ *A v C* [1985] FLR 445; *Baby M* (2) (1988) 537 A2d 1227

¹⁴⁶ cl. 2

¹⁴⁷ cl.3(a)

¹⁴⁸ cl. 3(c)

¹⁴⁹ cl.3

¹⁵⁰ cl. 3(e)

¹⁵¹ cl. 3(f)

¹⁵² cl. 5(9): "a person agrees to become pregnant and surrender rights to the child born as a result of the pregnancy."

¹⁵³ cl. 9(A): Apart from approved professional fees.

¹⁵⁴ cl. 11

¹⁵⁵ cl.28

¹⁵⁶ cl. 24 and 25

The current law and even the new Bill do not provide a comprehensive framework dealing with all the possible problems that may result from surrogacy. An Act regulating IVF compassionate surrogacy may be very much in the future, so this bill could provide an interim framework. Meanwhile law does govern surrogacy and it may be wise for NECAHR to allow some monitored IVF compassionate surrogacy to occur, so that when the opportunity to legislate arises New Zealand will have a practical idea of what law is needed.

H NECAHR's Opinion on What an Adequate Framework Would Involve in New Zealand¹⁵⁷

In the event of law reform in New Zealand, NECAHR believed there were some important considerations the law would need to take into account. The law should respect Maori culture and the Treaty, rights of the child should be paramount, individual choice respected and participants protected from harm.¹⁵⁸ NECAHR believes there should be a public consensus on the issue before legislation,¹⁵⁹ but that will never happen. Nonetheless New Zealanders should have an input into the law.¹⁶⁰

V PUBLIC OPINION ON IVF COMPASSIONATE SURROGACY

In a democracy the public should have an input into legislation.¹⁶¹ As an aim of this paper is to canvass possible options for law reform, it is valuable to have an insight into the perception of different groups on the issues of IVF compassionate surrogacy¹⁶². NECAHR stated the public has given little or no support to surrogacy.¹⁶³ The following analysis of public opinion will evaluate the validity of this statement.

A New Zealand is a 'Pluralistic Society'¹⁶⁴

It is very difficult to determine on the basis of public opinion, what law reform should be adopted regarding IVF compassionate surrogacy, because there will not be a consensus on the issue in New Zealand. Especially in issues which affect people deeply, such as pre-birth, birth and death, there are often competing points of view.¹⁶⁵ It is impossible for consensus to be reached if there is no public debate.

¹⁵⁷ Above n 43, 11-14

¹⁵⁸ Above n 43, 11-14

¹⁵⁹ Above n 43, 13

¹⁶⁰ It is a principle of a democratic system that law should be by the people and for the people. While this may not be practical in reality, laws should not entirely be made by "experts" who believe they know what is best for people. People have a right to have some input into law which will govern their lives, particularly on topics such as IVF compassionate surrogacy, which involves making very personal decisions about other people's lives.

¹⁶¹ Although this cannot be carried too far, because public morality may determine the law.

¹⁶² Above n 20; The New Zealand Infertility Society believes this issue should be more widely debated in the public arena and while this is being left solely to NECAHR this is unlikely to happen.

¹⁶³ Above n 43, 11

¹⁶⁴ Above n 12, 93

¹⁶⁵ Above n 12, 93, Family Law Policy; Kirby J said in the 1989 International Conference on Health, Law and Ethics that it is very difficult in a democracy to resolve major moral issues over which there are deeply divided opinions in the community.

Human reproduction is of such a personal, private nature that there is a reluctance to debate and legislate on the issue. However public debate in New Zealand is needed to make people aware of very complicated issues relating to this procedure and determine the best course of law reform for New Zealand.

There has been some sampling of public opinion in relation to IVF in New Zealand but none on IVF compassionate surrogacy, (until July 1996, when I surveyed doctors and Family Law students in the Wellington region). 81% of 1400 respondents to a women's magazine felt that some kind of legislation or rules to control developments in relation to IVF were necessary.¹⁶⁶ A survey of New Zealand obstetricians and gynaecologists revealed that 80% believed New Zealand needed some legislation to control IVF.¹⁶⁷ It follows that if New Zealanders think that legislation is needed for IVF, law is also needed for IVF compassionate surrogacy which is even more complex.

B Views of New Zealand Women

Women's groups in New Zealand are not sufficiently aware of IVF compassionate surrogacy to have developed a policy on it.¹⁶⁸ The National Council of Women believes studies should be performed on the legal and ethical issues relating to all artificial reproduction.¹⁶⁹ The Council also urged public debate on the questions raised by the Ministerial Report.¹⁷⁰

C The Infertile

Groups that represent the interests of the infertile believe IVF compassionate surrogacy should be allowed in New Zealand.¹⁷¹ The New Zealand Infertility Society¹⁷² argues that surrogacy should be a legal contract between the parties, performed under judicial supervision.¹⁷³ The surrogate mother should be the legal mother until she consents to the child's adoption.¹⁷⁴ The society believes the child's interests must be paramount throughout the process, there should be no financial gain to the surrogate, and the commissioning couple should be screened before the procedure.¹⁷⁵ The only aspect on which the New Zealand Infertility Society and Fertility Associates disagree is counselling. The New Zealand Infertility Society believes it should be compulsory by law, but Fertility Associates thinks this is unnecessary as counselling occurs before all IVF already.¹⁷⁶

¹⁶⁶ Above 17, 262

¹⁶⁷ Above n 17, 262

¹⁶⁸ I wrote to three of the largest organisations in the Wellington region: The National Council of Women, Women's Aglow and Maori Women's Welfare League. None of these three had a policy on IVF compassionate surrogacy. Womens Aglow is a Christian Women's Organisation. This group did not have a policy on IVF compassionate surrogacy and could not express an opinion because the group consists of many Christian denominations and the secretary felt there would not be a consensus.

¹⁶⁹ S Casey *100 Years of Resolution The National Council of Women of New Zealand*, (Wellington, 1996)

¹⁷⁰ Above n 169

¹⁷¹ Above n 39, Above n 24

¹⁷² The New Zealand Infertility Society consists mainly of consumers but has representation from various individuals and organisations with an interest in fertility and the issues surrounding its treatment.

¹⁷³ Above n 39, 1

¹⁷⁴ Above n 39, 1

¹⁷⁵ Above n 39, 1: The New Zealand Infertility Society believes a government appointed and widely consultative council should be set up to provides guidelines for the practice of assisted human reproduction

¹⁷⁶ Above n 39, Above n 24

D **Maori Attitudes Towards IVF Compassionate Surrogacy**

Maori do not have a policy towards the issue of IVF compassionate surrogacy and it has not been discussed by them formally.¹⁷⁷ However the Maori perspective on the family is more sympathetic to the infertile than European.¹⁷⁸ In Maoridom infertile people are regarded as part of the community with a valuable contribution to make in the raising of a child.¹⁷⁹ Sometimes a child is produced especially for them by another member of the family.¹⁸⁰ However, it is rare for a woman to deliberately have a baby for a family member or friend, who was unable to have a child. The Maori Council believes that surrogacy conflicts with wairua,¹⁸¹ mauri,¹⁸² whanaungatanga¹⁸³ and manaakitanga.¹⁸⁴ A child belongs to a whanau, rather than a couple.¹⁸⁵ More commonly adoptions are arranged within the whanau to provide for the childless.¹⁸⁶ The case of *Re M (Adoption)*¹⁸⁷ is an example of this. In that case JD gave her baby MJRD as taonga to her "beloved sister" who could not have children of her own.¹⁸⁸ This was accepted as customary adoption by the court.¹⁸⁹

Joan Metge agrees that Maoris provide children to the infertile members of their families, as part of customary adoption.¹⁹⁰ In Maori society the responsibility for bringing up children is shared with relatives.¹⁹¹ Therefore legislation which is concerned with giving exclusive parental rights fails to take into account Maori law. Customarily Maori have no problem with the concept that children can have more than two parents¹⁹². Yet this is a generalisation, and like adoption some children may have suffered because they have not grown up with their birth parents.¹⁹³ While there is no formal policy towards surrogacy, the compassion of Maori culture towards the infertile and the open attitude towards parentage within the whanau, indicates possible sympathy to IVF compassionate surrogacy.

E **Pacific Islander Attitudes towards IVF Compassionate Surrogacy**

Surrogacy is a recent issue and most Pacific Island People have not come in contact with it.¹⁹⁴ The usual practice in Pacific Island culture is for a childless couple to adopt through relatives.¹⁹⁵ This can be arranged before or after the birth of the child. Surrogacy is unlikely to be acceptable

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- 177 Above n 25
178 Above n 39, 5
179 Above n 39, 5
180 Above n 39, 6
181 Letter from Maori Council 24 July 1996; This word means spirituality
182 Above n 181, Life force and life essence
183 Above n 181: kinship ties
184 Above n 181: people caring and sharing
185 Above n 39, 6
186 Above n 39, 6
187 [1994] 2 NZLR 237
188 Above n 187, 240-241
189 Above n 187, 240-241
190 Above n 77, 234; Metge calls this "Atawai" or "Whangai" adoption. This means to show kindness to and foster. Whangai relationships are established for three reasons; (1) Concern for the welfare of whanau children (ie; in the case of an unmarried mother, (2) Concern for the welfare of whanau adults (the infertile the elderly who have no children), (3) The building of whanau strength.
or
191 S A M McClean *Law Reform and Human Reproduction* (London, 1992) 187
192 Above n 77, 235
193 Refer to Part IV for discussion of adoption
194 Above n 39, 7
195 Above n 39, 7

to Pacific islanders if a stranger gestates the infertile couple's child, but if the surrogate is a family member,¹⁹⁶ it could be acceptable to the Pacific Island culture.

F The Department of Social Welfare

The Department of Social Welfare believes that surrogacy should be allowed by law, but regulated.¹⁹⁷ The Department stated it would be impossible to prohibit surrogacy and instead recommended controls which curbed the "most blatant extremes of commercially induced surrogacy arrangements".¹⁹⁸

G Submissions Made to the Ministerial Committee on Assisted Reproductive Technologies

The submissions respected human existence and its vulnerability.¹⁹⁹ Overall, people wanted safeguards to help New Zealand control new technology, recognition of the Treaty as part of the framework for development and use of ART services.²⁰⁰ It was important to people that regulation should focus on women and children.²⁰¹ The child being able to establish his identity was also considered essential especially in terms of the importance Maori culture places on whakapapa.²⁰² Generally people rejected any commercialisation of reproduction and maintained that the interests of the child must be paramount in any legislation.²⁰³

H Submissions on the Issues Paper

45 of the 90 submissions received on surrogate motherhood were opposed to surrogacy.²⁰⁴ The reasons these submissions opposed surrogacy included;

- (1) It is the exploitation of women as breeding machines for money
- (2) It is morally wrong because it is adultery bringing a third party into marriage;
- (3) The legal and ethical issues are too complex;
- (4) It is not in the best interests of the child and it is not known what psychiatric harm may occur to the child concerned;
- (5) It entails the buying and selling of babies
- (6) There are already sufficient children already being conceived in New Zealand for the infertile.²⁰⁵

Although it appears from these submissions that half of New Zealanders are opposed to surrogacy, this is not the case. Firstly, it may have been those who considered the practice to be immoral felt more compelled to make submissions to the committee, than those who favoured the

¹⁹⁶ It is usual that a surrogate in IVF compassionate surrogacy will be a family member or a very close friend.

¹⁹⁷ Above n 18, 43

¹⁹⁸ Above n 18, 42

¹⁹⁹ Above n 19, Appendix C, 10

²⁰⁰ Above n 19, Appendix C, 14

²⁰¹ Above n 19, Appendix C, 14

²⁰² Above n 19, Appendix C, 11

²⁰³ Above n 19, Appendix C, 11

²⁰⁴ Department of Justice Law Reform Division, *New Birth Technologies A summary of the Submissions Received on the Issues Paper* (Wellington, 1986) 30

²⁰⁵ Above n 204,

practice, or did not care.²⁰⁶ Secondly, many of the reasons of those who were opposed to surrogacy in 1986 are not applicable to IVF compassionate surrogacy, in 1996. IVF compassionate surrogacy is non-commercial so reasons (1) and (5) do not apply as neither women nor babies are being sold. It is arguable whether reason (2) applies because in IVF compassionate surrogacy a third party is not being brought into marriage as it is not the surrogate's ovum that is being used to make the baby. Reason (3) is unpersuasive. The fact that an issue is complex does not mean it should be prohibited. Reason (6) is incorrect in 1996 because there is not sufficient children available for adoption for the infertile.²⁰⁷

Thirty six submissions supported surrogacy, 15 submissions supported only non-commercial surrogacy.²⁰⁸ 11 submissions believed that surrogacy arrangements should proceed without being restricted by the law.²⁰⁹ The other submissions believed the law should regulate surrogacy. 7 submissions argued that there should be compulsory counselling for participants.²¹⁰ One submission said surrogate mothers should be selected by health, another their psychological and physical fitness should be tested, and two submissions believed surrogates should only be selected if they have children.²¹¹

The submissions on this issues paper indicate there is no consensus over whether surrogacy should be allowed, and how the law should control it. However many groups do believe there is a need for law to intervene.

I Overseas Surveys on Surrogacy

1 The Australian Public Survey²¹²

A random survey on surrogacy was carried out in Australia of 2476 people, in 1986.²¹³ 16% of Australians approved of surrogacy arrangements, 35% did not object, 33% objected and 13% needed more information.²¹⁴ In the case of a dispute between the surrogate and commissioning parents over custody of the child; 34% said the couple should have the first claim to the child, 26% said the surrogate should, 25% believed the court should decide, and 4% believed it depended on the circumstances. This survey indicates that the majority of people did not object to surrogacy and believed the commissioning couple should have primary rights to the child.²¹⁵

²⁰⁶ Above n 34, 429; Rotherham believes this happened with submissions to the Warnock Commission. That Commission claimed that public opinion in England at the time of the report is against surrogacy, but Rotherham questions this.

²⁰⁷ Above n 14

²⁰⁸ Above n 204, 33: No payment, no private clinics, because of unequal power position of women and only the wealthy would be able to afford it.

²⁰⁹ Above n 204 33; One submission said; "I suspect that the opposing people are, like the majority of people, secure in their fertility and have never known the anguish of involuntary childlessness.... I feel it is not up to the government to decide on the morality of surrogacy but that it is the task of the surrogate and the client couple to decide

²¹⁰ Above n 204, 34

²¹¹ Above n 204, 34

²¹² Above n 13, 10

²¹³ This survey has only limited purpose for this analysis. It focused on surrogacy generally, rather than IVF compassionate surrogacy. Furthermore it was carried out ten years ago and people's views can change rapidly.

²¹⁴ above n 13, 9: Young married men and women without children were more likely to be disposed to surrogacy.

²¹⁵ This is very reflective of the results in the survey I conducted this year.

2 British Opinion

A survey was conducted of commissioning parents who had participated in surrogacy using COTS.²¹⁶ The evidence from this survey indicates that prejudice from the rest of society apart, surrogacy does not raise psychological problems outside the range that are readily tolerated for conventional reproduction.²¹⁷

J Conclusion

While overseas information, and views of New Zealand groups on surrogacy are useful they cannot be definitive of the public opinion on IVF compassionate surrogacy in New Zealand. That is why a survey was needed to determine the New Zealand public's view on IVF compassionate surrogacy, and the law's role in regulating this procedure.²¹⁸

VI OPTIONS FOR LAW REFORM IN NEW ZEALAND : OVERSEAS MODELS

International trends and solutions towards the problem of surrogacy may be helpful in deciding what is the best solution for New Zealand.

A Australia

Parts of Australia have taken a hardline approach to the issue of surrogacy. Even though the national Bioethics Consultative Committee recommended that it be allowed, the Health and Social Welfare Ministers made a joint decision to prohibit surrogacy.²¹⁹ This decision has not been ratified in all states, but has prevented some clinics providing treatment.²²⁰

1 Queensland

Surrogacy is prohibited.²²¹ It is a criminal offence to be involved in a surrogate arrangement, whether or not it is commercial.²²²

2 Victoria

Commercial surrogacy is prohibited, but not voluntary surrogacy.²²³ The paid surrogate and paying commissioning parents are criminally liable.²²⁴ Surrogacy contracts are void.²²⁵

²¹⁶ *Not a Primrose Path Commissioning parents Experience of Surrogacy Arrangements in Britain* 186.
"COTS" stands for Childlessness Overcome Through Surrogacy.

²¹⁷ Above n 216, 194

²¹⁸ See Part VII for the survey results.

²¹⁹ Above n 39, 5

²²⁰ Above n 39, 5

²²¹ The Surrogate Parentage Act, 1988, Sections two and three

²²² Above n 39, 4

²²³ Medical Procedure Act 1984: Even if the surrogate mother is not the genetic mother of the child. IVF is prohibited on women who have not been diagnosed infertile; ss 11-13

²²⁴ Above n 223, s 3.30

²²⁵ Above n 223 s. 30

3 South Australia

Surrogacy contracts and procreation contracts are void and illegal.²²⁶ Any Monetary consideration paid under a procreation contract is recoverable.²²⁷

4 Tasmania

In 1984 a law reform commission decided surrogacy was unacceptable to the Tasmanian community.²²⁸ Tasmania legislated in 1993 to declare surrogacy contracts void and unenforceable.²²⁹

B Canada

Canada has not yet legislated on surrogacy but has commissioned two inquiries which included surrogacy within their agendas. They drew very different conclusions.

1 Ontario Law Reform Commission Report

The Commission recommended legislation to regulate surrogacy. Courts must approve surrogacy agreements before they take place and agreements can include payment.²³⁰ If an agreement has prior Family Court approval it is enforceable. The court can order the surrogate to relinquish the child at birth.²³¹ The need for surrogacy must be medical.²³² The attitude of the commission was that surrogacy was "here to stay" and children must be protected.²³³

2 The Canadian Royal Commission's Report; *Proceed with Care*²³⁴

This Commission did not adopt the Ontario Law Reform proposals.²³⁵ It recommended banning advertising for, paying or acting as an intermediary for surrogacy arrangements, making surrogacy arrangements unenforceable and the birth mother the legal mother.²³⁶ The Commission believed the value of having one's own genetic child should be sacrificed for the good of society.²³⁷ The best interests of the child were to prevail in any dispute.²³⁸

²²⁶ Family Relationship Act Amendment Act 1988. s.10(g)(1): IVF is prohibited on women who are fertile

²²⁷ Above n 226

²²⁸ Tasmania Law Reform Commission, 1984

²²⁹ Surrogacy Contracts Act, 1993

²³⁰ *Report of the Ontario Law Reform Commission*, 180-182

²³¹ Above n 230, 180-182

²³² Above n 230, 180-182

²³³ Above n 22, 57

²³⁴ The essence of this report was that Canada should move forward into the new scientific age, but with a system for managing new technologies. The all female commission had a large budget, with 300 researchers and 40,000 individual contributors.

²³⁵ Above n 44, 689

²³⁶ Above n 44, 688

²³⁷ Above n 44: The commission believed that it would harm society to have surrogacy arrangements because it would hurt the children, who may grow up to hurt society. It would also nurture an unhealthy view of women as mere vehicles for reproduction.

²³⁸ Above n 44, 686

C *The United States*

Only 13 states have legislated on surrogacy. Although there is a national model, few have ratified it.

1 *The Uniform Status of Children Assisted Conception Act*²³⁹

Commissioning parents are in law the parents of the child if judicial approval has been obtained for a surrogacy contract before assisted conception has begun.²⁴⁰ The intended parents must have a genetic connection to the child. When the child is born the intended parents must notify the court and a new birth certificate will be written.²⁴¹ If the commissioning parents fail to obtain judicial approval for the agreement, it is void and the surrogate and her husband will become the legal parents.²⁴² If the surrogate has provided the egg she can terminate the agreement within 180 days after the last insemination.²⁴³

2 *States that have legislated on the Model Act*

Virginia has passed legislation similar to the model, except that any agreement between the parties is void and unenforceable at law.²⁴⁴ Arkansas allows the intended parents to become the legal parents at birth.²⁴⁵ New Hampshire legislation permits expenses to be paid to the surrogate and an order before conception which terminates the parental rights of the surrogate and vests them in the intended parents.²⁴⁶ Washington has legislated that contracts with compensation are void and unenforceable.²⁴⁷

3 *States that have Prohibited Surrogacy*

These states have enacted legislation prohibiting surrogacy and declaring surrogacy contracts invalid: North Dakota²⁴⁸, Arizona²⁴⁹, Indiana²⁵⁰, Kentucky²⁵¹, Louisiana²⁵², New York²⁵³, Utah²⁵⁴, Michigan²⁵⁵, and Nebraska²⁵⁶.

²³⁹ (USCACA) UCLA 122 (Supp. 1991)

²⁴⁰ Above n 239

²⁴¹ Above n 239

²⁴² Above n 239, section 5

²⁴³ Above n 239, section 7. It follows that in a case of IVF the surrogate cannot change her mind.

²⁴⁴ V9. Code Ann, s.20-160 BA (Mitcie Supp. 1992)

²⁴⁵ 1989 Act: Does not address IVF compassionate surrogacy but is broad in acceptance of commissioning parents claims.

²⁴⁶ N.H. Rev. Stat Ann. School 168-B251 Supp. 1993).

²⁴⁷ Wash. Rev. Code ss 26.26.230 (Supp. 1993)

²⁴⁸ N.D. Cent Code ss 14-18-05 [1991]

²⁴⁹ Ariz. Rev. Stat. Ann. S.23-218-A. (1991)

²⁵⁰ Ind. Code Ann. S 31-8-1-5, 38-8-2-1 (Burms Supp.)

²⁵¹ Ky. Rev. Stat. Ann. S.199.45.590 (Baldwin 1992)

²⁵² La. Rev. Stat Ann. S. 21 B (West 1991)

²⁵³ N.Y. Dom. Re. Law s. 722 (McKinney Supp. 1992)

²⁵⁴ Utah Code Ann. S.76-7-204 (Supp. 1992)

²⁵⁵ Mich. Comp Laws Ann ss 722851-722863 (West Supp. 1989)

²⁵⁶ Neb Rev. Stat s. 25-21,00 (Supp. 1988)

D Britain

When the Baby Cotton case was brought to public attention last decade there was a public outcry of moral rage.²⁵⁷ This resulted in the Warnock Report and the Surrogate Arrangements Act 1985.²⁵⁸ Attitudes towards surrogacy have liberalised since then to allow the Human Fertilisation and Embryology Act 1990 to be passed.

1 The Warnock Report

This report rejected surrogacy.²⁵⁹ The commission argued that commercial surrogacy should be illegal and surrogacy contracts unenforceable.²⁶⁰ The Report indicated, in cases of IVF surrogacy the gestational mother should be the legal mother.²⁶¹ It is unusual that the Warnock report believed in autonomy for individuals using artificial insemination, IVF, and embryo donation but not even in altruistic surrogacy.²⁶²

2 The Surrogacy Arrangements Act 1985

This act prohibits commercial surrogacy agencies, the recruitment of women as surrogate mothers and the negotiation of surrogacy arrangements by agencies acting on a commercial basis.²⁶³ Advertising by, or for surrogates is also prohibited.²⁶⁴ Surrogates and commissioning parents are exempt from criminal liability and private commercial arrangements are not prohibited.²⁶⁵

3 The Human Fertilisation and Embryology Act 1990

This act recognises surrogacy and allows commissioning parents to fast track adoption proceedings by granting parental orders.²⁶⁶ Surrogacy arrangements are unenforceable and the act defines the legal parents as the birth mother and her husband.²⁶⁷ The biological commissioning parents, can apply for a parental order under section 30 if the following conditions are satisfied;

- the surrogate and her husband must consent to the parental order freely and with full understanding,
- No money or other benefit other than expenses reasonably incurred must be given in consideration of a parental order
- The child must be related to the commissioning couple
- The commissioning couple must be at least 18 years of age.
- The child must live with the commissioning couple²⁶⁸

²⁵⁷ M D A Freeman "After Warnock Whither the Law?" (1986) 39 CLP 33, 38

²⁵⁸ Above n 257, 38; MP Harry Greenaway talked of the act as "rightly outlawing the hell and wickedness that exists in America where women are exploited and handled in an undignified manner for gain.

²⁵⁹ Above n 67

²⁶⁰ Above n 67, para 8. 19, 47

²⁶¹ Above n 67

²⁶² Above n 257

²⁶³ The Surrogacy Arrangements Act 1985, s.3

²⁶⁴ Above n 263, s.3

²⁶⁵ Above n 263, ss 2 and 3

²⁶⁶ The Human Fertilisation and Embryology Act 1990, s 3

²⁶⁷ Above n 266 ss 26-27: If the surrogate is unmarried; the baby is fatherless.

²⁶⁸ Above n 266, s.30

This Act created the Human Fertilisation and Embryology Authority which licenses and regulates services and has created a code of Practice. This Authority has decided it would be unethical to permit a licensed fertility service to initiate a surrogate pregnancy when the commissioning mother could carry a baby.

The HFEA is fair, it recognises surrogacy exists. The act may be criticised because it does not recognise the commissioning parents as having any parental rights unless the surrogate consents and the fact that the commissioning parents must be legally married is contentious. Furthermore, it is doubtful whether it is in the child's best interests to be legally "fatherless" if the surrogate is not married and decides to keep the child.

E Europe

Generally Europe is opposed to surrogacy. A 1985 resolution to the European parliament condemned surrogacy and encouraged member states to pass legislation against it. In 1987 the Council of Europe Ad Hoc Committee of Experts on Progress of the Biomedical Sciences stated that surrogate contracts should be unenforceable and intermediaries and advertising forbidden.²⁶⁹

Some European countries have judicial and statute law against surrogacy. In the Netherlands it is forbidden to perform an embryo transfer to a woman not willing to be the social mother.²⁷⁰ In Denmark all commercial aspects of motherhood are forbidden.²⁷¹ In Spain all surrogacy contracts are void. Surrogacy is illegal in Greece and Denmark.²⁷² In Norway donation of human oocytes is prohibited.²⁷³ In Germany oocyte and embryo donation and surrogate mother hood is forbidden, the courts have ruled surrogacy contracts void.²⁷⁴ The West German minister of Justice said surrogacy is the purest form of trafficking in human beings and the court would deny adoption papers to couples so "pathological as to want to adopt a baby in this manner."²⁷⁵

F Conclusion

The International Responses to Surrogacy show some desirable traits which New Zealand legislation could use;

- (1) As in some Australian states, women should be prevented from using surrogacy if they are using it for reasons other than medical problems.
- (2) The child should have legal parents.
- (3) There should be regulation to protect the parties, including the child.
- (4) The recognition of the Ontario Law Reform Commission that surrogacy is here to stay and cannot be stopped.
- (5) The need for a national body in New Zealand to regulate IVF compassionate surrogacy, to avoid the inconsistent approach of the United States
- (6) A period after the implantation of the embryo into the surrogate for her to change her mind. The British Model gives the surrogate the ultimate decision regarding the custody

²⁶⁹ Above n 39, 5
²⁷⁰ Above n 39, 5
²⁷¹ Above n 39, 5
²⁷² Above n 39, 5
²⁷³ Above n 39, 5
²⁷⁴ Above n 39, 5
²⁷⁵ Above n 46, 264

of the baby even after the birth but the USA system only gives the surrogate a limited time after conception to change her mind about the arrangement.

VII SURVEY ON IVF COMPASSIONATE SURROGACY²⁷⁶

When I began this assignment there was very little indication of how the New Zealand public perceived IVF compassionate surrogacy. So in June and July I randomly surveyed 300 doctors in the Wellington region, by mail. Doctors were chosen because they were easily accessible (by post), were the most likely group to be aware of IVF compassionate surrogacy and the issues surrounding it. 158 responses were received back, a successful 53% response rate. As a control group I also surveyed 74 members of a Family Law class, in late July.²⁷⁷

A *Opinions On IVF Compassionate Surrogacy*

23% of doctors approved of IVF compassionate surrogacy, and 61%²⁷⁸ either approved or did not object, which is a positive response to the procedure. 28% of doctors disapproved of IVF compassionate surrogacy. The students had an even more positive response to the issue. 83% approved or did not object to the procedure. Only 7% disapproved. 9% of both doctors and students felt they needed to know more about IVF compassionate surrogacy.

B *Who Should Be the Legal Parents in the Event of a Dispute between the Surrogate Mother and the Genetic Parents?*

The majority of doctors believed that the genetic parents should be made the legal parents, 55%. Very few supported the surrogate, (only 10%), they preferred a decision by the court or the parties themselves, (25%) to the surrogate being made the legal mother. There was a split in the majority of students between the genetic parents becoming the legal parents (35%) and the decision to determine legal parentage being made by a court.²⁷⁹ 12% thought the decision should be made by the parties themselves, with only 4% supporting the surrogate.

Comments made by the doctors showed that they believe the assessment of all parties would be necessary. Assessment would involve a counsellor, or medical board evaluating whether the surrogate and the genetic parents were socially and psychologically suitable for their roles. Other suggestions made include the possibility of compensation to the surrogate mother, as she has to undergo the risks of pregnancy, and the preparation of the surrogate to have no rights after the birth.

C *Whether Surrogacy Agreements Should be Enforceable*

An overwhelming majority of doctors believed there should be an enforceable agreement with only 18% who disagreed. The majority of students 62%, (although not as large a majority as the doctors) believed that there should be an enforceable agreement. Only 17% disagreed.

²⁷⁶ See Appendix for a copy of the questionnaire sent to the doctors and given to the Family Law class.

²⁷⁷ This was performed in class, so there was a 100% response rate.

²⁷⁸ Note that this figure includes the 23% who approved of surrogacy.

²⁷⁹ 31%, however it must be remembered that these are law students and may perceive courts as more accessible and just decision makers than the majority of New Zealanders who would have much less knowledge of the court system.

D Whether There Should Be a System that Allows the Child to Find out the Circumstances of the Birth and Who the Surrogate Mother Was

The majority of both students and doctors believed that the child should be able to find out the circumstances of the birth on becoming an adult and who the surrogate mother was. 70% of doctors and 79% of students agreed with this. 15% of doctors said the child should not have this right because they were concerned about the anonymity of the surrogate. Generally they believed that the child should not be told who the surrogate was, if she did not consent to the disclosure of this information.

E The Role of the Law in View of the Possible Emotional Trauma of the Surrogate Mother, when Surrendering the Child

The majority, (76% of doctors and 92% of students) believed that the parties should be required by law to have counselling over possible ramifications of the agreement. Only 18% of doctors believed IVF compassionate surrogacy should be prohibited and only 6% of students. This could have been because students were on average twenty years younger, and were more open to new ideas.²⁸⁰ However, few doctors nor students were open to the idea that IVF compassionate surrogacy should be allowed with no safeguards.²⁸¹

G The Role of the Law in View of the Concern that the Child Being Transferred to the Genetic Mother, After bonding with the Surrogate Mother Could Cause the Child Potential harm

Answers to this question were fairly evenly split among the doctors. 22% believed it should be allowed because there has been no proven harm,²⁸² 28% believed that IVF compassionate surrogacy should be allowed, but monitored until it had been researched,²⁸³ and 27% believed it should not be allowed until thorough research was performed.²⁸⁴ Interestingly, many doctors commented that gestational bonding is not a problem as the child bonds with the mother mainly subsequent to the birth and the child will be given to the genetic parents within a couple of days after birth. Many also said the harm would be no greater than adoption.

40% of students believed IVF compassionate surrogacy should be allowed, but monitored and 37% believed it should only be allowed after thorough research. Only 10% (a much lower percentage than among the doctors) thought it should be allowed because there was no proven harm.

²⁸⁰ The majority of the students who responded were between the ages of 18 and 24. By comparison the average ages of doctors who responded were between 35-60.

²⁸¹ 2% of students and 4% of doctors.

²⁸² These were the responses that generally approved of IVF compassionate surrogacy in question one: See Appendix 1

²⁸³ These responses tended to have answered that they did not disapprove of IVF compassionate surrogacy in Question 1.

²⁸⁴ In Question 1 these respondents tended to answer that they either disapproved, or did not disapprove, or required further information.

H The Importance of the Autonomy of the Parties Versus Protection by the State

It is clear from the survey responses that protective legislation is necessary for IVF compassionate surrogacy. The students favoured regulation ranging from some minor protection, (54%) to an average level of protection (40%). The doctors placed even greater importance on protection. 43% of doctors preferred an average level of protection by the law. 32% believed substantial protection that allows the parties very little autonomy was necessary. However, there was very little support for the extremes of total prohibition and total autonomy, from either the students or the doctors.²⁸⁵

I Whose Responsibility Should a Disabled Child be, in Law?

A majority of both doctors (66%) and students (63%) believed the genetic parents should be legally compelled to keep the child. There was reasonable support for mediation: 25% of students and 15% of doctors supported the option of mediation to decide which of the parties should look after the child. There was less support for the child being given to social welfare.²⁸⁶ Although doctors indicated they would prefer the genetic parents to have the ultimate responsibility for the child, they were concerned that the child's disability would be the result of the surrogate's poor habits during gestation. Other factors which doctors thought should mitigate the genetic parent responsibility, were if the genetic parents had a negative attitude towards the disabled child and would not give it proper care, and the extent of the disability. One doctor suggested a further option might be to terminate the pregnancy if a disability was detected on ultra sound.²⁸⁷

J Trends

There were gender and age trends, but no trends indicating that survey responses were dependent on religion, or whether people were infertile, or knew others who were. Generally male doctors were more positive to IVF compassionate surrogacy. Women doctors were less inclined to favour the commissioning parents as the legal parents, (only 40%), compared to 61% of male doctors. 34% of female doctors and 36% of female students preferred the option of a court determining legal parentage, unlike the male doctors (only 20%) and male students (18%). Females from both groups had a slightly higher preference for the surrogate mother to be the legal parent, than males. Respondents under 25 were 37% more likely to approve of surrogacy, or not disapprove of it, and under 45, 21% more likely to.

K Additional Comments By the Doctors

The doctors were very concerned that thorough research be completed before any, "hard and fast laws were made." Many agreed that IVF compassionate surrogacy should be allowed, particularly in pilot situations, in order to monitor the procedure and respond to any harms caused, through legislation.

Doctors disagreed strongly over whether the surrogate should receive compensation for her services. Several wrote that surrogacy should be truly altruistic.²⁸⁸ However, others believe that

²⁸⁵ 8% of the doctors favoured total prohibition and 3% of students. 6% of doctors favoured total autonomy and 3% of students.

²⁸⁶ 12% of doctors and 9% of students

²⁸⁷ This would detect disabilities such as, downsyndrome and scruma cyla

²⁸⁸ Which is what IVF compassionate surrogacy usually is.

as the surrogate suffers the risks and discomfort of pregnancy, she should be compensated.²⁸⁹ Commercial surrogacy is unethical, but if the commissioning parents wished to pay the surrogate's medical expenses or money compensating for loss of employment during pregnancy, this could be permitted by a court.

L Conclusion

Overall, it is interesting that doctors and students views were very similar, despite the disparity in age and occupation. Perhaps the wider public might also have similar views.

VIII OPTIONS FOR IVF COMPASSIONATE SURROGACY IN NEW ZEALAND

A Prohibition of Surrogacy

Surrogacy is a response to the demand of the infertile; it is here to stay and criminal legislation cannot defeat it.²⁹⁰ If surrogacy was made illegal it could deprive some people of the option to form a family.²⁹¹ On the other hand some people would still use surrogacy despite it being prohibited.²⁹² As with abortion laws and prohibition of liquor in America, surrogacy would be driven underground.²⁹³ This would risk the birth of children suffering from disease and prevent appropriate record keeping, which would inform the child of its origins.²⁹⁴ Prohibition allows exploitation and abuse of surrogacy because it will not be seen. New Zealand public opinion indicates that prohibition is not a preferential option. Only about 1/6 of doctors surveyed, believed IVF compassionate surrogacy should be prohibited to stop the possible emotional trauma of the surrogate, the danger of disrupted bonding for the child, and the protection of the parties.

There is an argument that criminalisation of third parties such as lawyers, or surrogacy agencies could be beneficial. Merely making third parties liable will discourage surrogacy while not directly punishing the commissioning parents and the surrogate, who could be regarded as the victims of surrogacy.²⁹⁵ However, since surrogacy will probably still occur this will only mean that surrogates and commissioning parents will be denied legal, medical psycho-therapeutic advice.²⁹⁶

At this stage negative effects of IVF compassionate surrogacy have not been proved. Criminalising surrogacy will keep it underground. It may also be contrary to the Treaty of

²⁸⁹ One doctor wrote; "The surrogate mother should be paid. If not I am not in favour of this scheme."

²⁹⁰ Above n 257

²⁹¹ Above n 44, 680

²⁹² "backstreet" IVF clinics which are unregistered and medically unsound may be used or AID or natural intercourse surrogacy. People could go overseas for surrogate babies.

²⁹³ Above n 20

²⁹⁴ Department of Justice *Assisted Human Reproduction; A Commentary on Report of the Ministerial Committee on Assisted Reproduction*, (Wellington, September, 1995)

²⁹⁵ Above n 34, 464

²⁹⁶ Above n 25

Waitangi.²⁹⁷ If something is outside the law, participants will not be able to seek help or protection.

B Regulation of Surrogacy by the State

State regulation of surrogacy has the advantage of the state being able to provide procedures which should increase the likelihood of surrogacy arrangements ending satisfactorily for all concerned.²⁹⁸ It would also enable research to be conducted into the consequences of surrogacy,²⁹⁹ and promote accessibility of the procedure.³⁰⁰ State intervention can protect people, by providing for particular procedures to be followed. For example, (as discussed in the survey), counselling and keeping records of the child's birth, so the child can be fully informed on becoming an adult. An overwhelming majority of those surveyed believed that protection of parties was necessary.

C Non-Enforcement of Contracts

Non-enforcement would protect the surrogate who decides not to go through with the arrangement,³⁰¹ but it would disadvantage the commissioning couple. The commissioning couple would have arranged the procedure, and the child is genetically their own. Public opinion indicates that non-enforcement of surrogacy contracts is not a viable option, as only 17-18% of those surveyed believe surrogacy agreements should not be enforced. Contract law is inappropriate for agreements of such a personal nature as surrogacy.

D Enforcement of Contracts

The majority of those surveyed believed that people should be able to enter into enforceable agreements, after dealing with the relevant issues. However, would the issues be dealt with, if contracts were merely enforced? Enforcement of contracts would leave the matter of surrogacy to private arrangements and individual decision making. This allows too much leverage to commercial surrogacy.³⁰² It would also mean no state regulation and no state protection for parties.

There is strong opinion among legal writers that contracts should be enforced on the basis of the parties' autonomy. Carol Shaliev holds that women capable of bearing children should be allowed to do this for others and should have to fulfil their promises.³⁰³ Allan Wertheimer believes by failing to enforce contracts, the law denies surrogates' autonomy.³⁰⁴ Robertson argues that pre-conception intentions of the parties should be binding because the couple will have invested time and energy in finding the surrogate and initiating the pregnancy in reliance on her promise.³⁰⁵ He also believes that enforcement will minimise the frequency of disputes because if the surrogate is aware she will lose the child, she will not develop ambiguous feelings

²⁹⁷ Cross refer to Part V for a discussion of the Maori position on IVF compassionate surrogacy.

²⁹⁸ Above n 34, 462

²⁹⁹ Above n 34, 462

³⁰⁰ For the people who came up to the states assessment of suitable parents.

³⁰¹ As the surrogate is the legal mother under New Zealand law.

³⁰² Above n 257, 42

³⁰³ Above n 16, 398

³⁰⁴ Above n 16, 398

³⁰⁵ Above n 46, 131

for him.³⁰⁶ Ultimately, he argues why should the surrogates loss of the child be privileged over the loss of the commissioning couple?³⁰⁷

It should not be a win-lose situation. The law would be better able to protect the parties by regulating their agreements, not enforcing them unless a set procedure has been followed.

E The Intention Test

The Supreme Court in *Johnson v Calvert*³⁰⁸ chose not to enforce the contract but gave the commissioners custody because it was the parties "intention".³⁰⁹ The court said: but for the Calverts acted on intention, the child would not exist, Mark and Crispina never intended to "donate genetic material" to Anna, and Johnson was not exercising procreative choice because she had agreed to provide the service without any expectation she would raise the child herself.³¹⁰ An intent based test is inappropriate in family law because there is the welfare of parties to be considered, particularly the child's.

F The Best interests of the Child Test

In any New Zealand statute on surrogacy emphasis would need to be on the best interest of the child test.³¹¹ The welfare of the child should prevail over all the interests of adults involved in a surrogate motherhood arrangement, they have control over their lives, the child does not.³¹² That means the child could be cared for by either the surrogate or the commissioning parents, whichever the court determined was best.

IX HOW THE STATE SHOULD REGULATE IVF COMPASSIONATE SURROGACY

A Court Approval of Surrogate Arrangements

One option is to formalise surrogacy agreements before the child's conception occurs by court order.³¹³ The judge would examine the surrogate to make sure she fully understands her duties and is acting freely. The court would also assess the suitability of the commissioning parents. The judge could take into account:

³⁰⁶ Above n 46, 126

³⁰⁷ Above n 46, 126

³⁰⁸ 851 P2d 776 (1993), 778 The facts of the case were that Mark and Crispina Calvert could not have children because Crispina had had a hysterectomy. They found Anna Johnson to be a surrogate for them. She was black, and not as wealthy as the Calverts. Tensions erupted between the parties when Anna believed they neglected her during an episode of premature labour and the Calverts discovered Anna had not disclosed her history of miscarriages and pre-mature births. Both parties took the case to court to determine which party was the legal parent.

³⁰⁹ Above n 308

³¹⁰ Above 308, 787

³¹¹ Above n 308, 93: All our child law is based around the interests of the child

³¹² Above n 128

³¹³ Above n 19, 109

- parenting skills
- the couple's marital relationship
- financial responsibilities
- morals
- physical health
- alcohol/drug use
- integrity
- emotional health.³¹⁴

This option seems a good idea but the surrogate should have some time after conception to change her mind. It is questionable whether this process is too arduous and expensive for couples to go through for a surrogate child. Furthermore, do the courts have this specialist knowledge or should it be done by a review team of counselling and doctors?³¹⁵

B Approval in Each Case by an Ethics Committee

MCART recommended the establishment of an advisory and overseeing body, the Council on Assisted Human Reproduction.³¹⁶ This could monitor and regulate surrogacy, instead of NECAHR.³¹⁷ The members of an ethics council would have the medical and psycho-therapeutic expertise of doctors. Therefore it would be able to make decisions on disputes between the parties, screen them, organise counselling and the records of the child to be kept. Such a committee would also be less formal and more accessible than a court, and therefore preferable.

C The Surrogate Mother as the Legal Mother

It is possible to argue that the surrogate should be the legal mother because she bonds with the child in the gestation period. The surrogate is in control of the health and safety of the child for that nine months and the status of just being a mere incubator, rather than a legal parent would alienate her from the foetus. The commissioning couple and society should want the gestational surrogate to feel some kind of responsibility and duty towards the foetus, which is perhaps best attained by making her the legal parent. Parenthood contains too much responsibility for it to be based solely on genetics.³¹⁸ For Linda Kirkman's own sake when she gestated her sister and brother -in laws's child she had an agreement that if she was unable to give up the baby she had gestated, she would not have been pressured to do so.³¹⁹

D The Commissioning Parents as the Child's Legal Parents³²⁰

It is the commissioning parents who effect the in vitro fertilisation of their gametes and find a surrogate to help produce their genetic child. The commissioning parents would be devastated by the loss of their child to the surrogate. The child if raised by them will have genetic parents as

³¹⁴ Above n 44, 616

³¹⁵ A court would not have specialist medical, ethical and psycho-therapeutic knowledge, but could call witnesses who would.

³¹⁶ Above n 19

³¹⁷ Above n 20: The New Zealand Infertility Society has no confidence in NECAHR's ability to function alone.

³¹⁸ Above 107, 545

³¹⁹ Above n 52, 31

³²⁰ Dixon believes an amendment to the SOCAA giving genetic parents the legal right to the child is the best way to correct legal anomalies; Above n 78

caregivers. The New Zealand Infertility Society believed it is fundamentally unjust to deny the child access to its genetic parents because of the circumstances in which it was born.³²¹ It is in the child's best interests for the genetic parents to have a role in it's life. The commissioning parents will have been carefully prepared for their child. Furthermore, giving the surrogate mother the ultimate right to the child would encourage unsuitable surrogate mothers on the basis that they have an escape clause. A child could also be kept by a surrogate contrary to the wishes of her own husband and to the detriment of her existing family. Making the genetic parents the legal parents correlates with the results from the survey, in which a large majority believed that the commissioning parents should be the child's legal parents. Very few respondents supported the surrogate in that role.

E Both the Surrogate and Commissioners as Legal Parents

Both the surrogate and the commissioning couple have a relationship to the child so they could share parental status.³²² The surrogate has gestated the child for 9 months and the commissioners have created it. Luey believes a woman who chooses to assist an infertile couple by carrying their child through pregnancy should also be seen as a parent.³²³ If the surrogate changes her mind she and the infertile couple should be seen on equal terms with equal parental rights, for example, child support.³²⁴ Despite benefits to the parties of equality, this is not an acceptable option. Shared parental status offers the child no stability and increases the likelihood of disputes. It is not in the child's best interests to begin life the subject of a custody dispute.

F Mediation to Determine Legal Parentage

Mediation is a way of resolving a dispute over the child's custody between the surrogate and commissioning parents. In mediation the intervening third party helps the disputants to reach an agreement. The process appeals to the parties to reach an agreement, unlike the judicial process which decides which party is "right".³²⁵ As custody disputes over a child are personal, strongly felt issues the disputants may be unable reach an agreement. This would mean the child would be in a custody dispute from birth onwards and have no legal parents. About a quarter of survey respondents expressed some support for mediation. However, although this is possible as an initial option, if a dispute cannot be resolved the law should provide that the genetic parents are the child's legal parents, so the child does not experience instability.

G Preparation for Participants

Preparation and assistance before and during the surrogacy arrangement will be vital in any scheme of state regulation to ensure the well-being of all participants. The interests of all parties, as well as society need to be closely considered.³²⁶ At the start of proceedings the parties must assign rights and responsibilities. Participants should be informed of risks and success rates of IVF compassionate surrogacy. In the ideal surrogacy legislation parties should be tested for infectious diseases, to avoid passing them on to each other.³²⁷ A court, or ethics committee

321

Above n 20

322

The commissioning couple have a genetic relationship to the child, and the surrogate has provided for all the child's physical needs during the gestation.

323

Above n 69, 25

324

Above n 69, 26

325

Buddle Finlay *Alternative Dispute Resolution* (Wellington, 1994)

326

Above n 13, 194

327

Above n 20

should assess the suitability of surrogate mothers.³²⁸ It may also be helpful to provide independent legal advice for gestational women.³²⁹ The suitability of the commissioning parents to rear the child should be assessed, prior to medical approval.³³⁰

76% of doctors and 92% of students believed counselling is necessary. The surrogate and genetic parents must be made aware of the consequences of their decision and any possible pitfalls. The New Zealand Infertility Society believes that counselling is vital some women surrogates in New Zealand were not counselled and need it.³³¹ Ken Daniels argues that counselling cannot be compulsory, because it is inherently voluntarily.³³² However other areas of law such as marriage breakdown and domestic violence require compulsory counselling and this has been reasonably successful. Records should be kept of the circumstances of the birth, which the child should be informed of on reaching adulthood.

X CONCLUSION

The Kirkman family several years after the IVF compassionate surrogacy birth of Alice are still very pleased the procedure was performed, "Seven years no itch!"³³³ With protective legislation to prepare and monitor the parties the hundreds of New Zealanders currently waiting for IVF compassionate surrogacy could experience the same successful alleviation of infertility.

NECAHR's reasons for refusing ethical permission for the procedure to be performed are not compelling. Although there are potential medical and emotional risks to parties these can be minimised by adequate preparation, monitoring and assigning parental rights to the commissioning parents. Furthermore NECAHR's reasoning fails to take sufficient account of the individual autonomy of the parties and relies too heavily on the Canadian Commission's finding, which deals predominantly with commercial surrogacy.

Public opinion indicates that the procedure should be allowed in New Zealand. In the range of age groups, religions, states of fertility and males and females I surveyed, only a small percentage disapproved of IVF compassionate surrogacy, and most thought the law should allow an enforceable agreement, as long as there was a protective procedure for the parties. In light of these results, the following recommendations could be implemented by a statute:

Recommendations

- (1) IVF compassionate surrogacy should be expressly permitted by statute, but only in cases which have been ethically and medically approved by a court or ethics committee, or the proposed Human Assisted Reproduction Authority.³³⁴

³²⁸ See Emotional Trauma ideally they should be physically, psychologically fit and had at least one child.

³²⁹ Above n 44, 688

³³⁰ Above n 25; if we are to take seriously the welfare of the child rules should be developed as to what parents would be in the child's best interests, for example s.13(5) HFTA allows Human Fertilisation Clinics to take into account the wellbeing of a child when deciding on whether to treat infertile people.

³³¹ Above n 19

³³² Above n 25

³³³ Above n 1, 1

³³⁴ The Human Assisted Reproduction Bill 1996

- (2) The statute should provide for compulsory initial medical and psycho-therapeutic screening of the commissioning parents to assess their suitability. This should be performed by registered fertility service providers, prior to court or ethical approval of the arrangement.
- (3) Medical and psycho-therapeutic screening of surrogates prior to the arrangement, by fertility service providers, should also be required by the Act.
- (4) Under the statute, medical centres should provide compulsory counselling for the surrogate mother, the commissioning parents and any other family or friend who will be closely linked with the procedure.
- (5) Medical records should be kept of the child's birth in order for the records to be disclosed to the child, when he or she becomes an adult. The surrogate's name should only be disclosed with her consent.
- (6) In the event of a dispute between the surrogate and the genetic parents, the law or ethics committee could offer mediation to the parties.³³⁵ The mediator would ideally be independent to the committee, an expert on mediation and counselling, retained by the committee when required to mediate.
- (7) The genetic parents will be the legal parents of the child only if the correct procedure is followed. In each case the parties must go to a court or an ethics committee and receive approval for IVF compassionate surrogacy to proceed. The law would then deem the genetic parents to be the legal parents, although it is arguable that the surrogate should have three months after conception to change her mind. If this procedure is not followed, theoretically IVF compassionate surrogacy should not proceed as the Fertility Clinics are governed by this proposed statute. If IVF compassionate surrogacy did proceed without approval, this statute would not apply and the current framework of New Zealand law would apply. The surrogate would be the legal mother.
- (8) The statute should provide that the medical service providers monitor each case and give the parties the maximum level of medical and psycho-therapeutic assistance to prevent any major difficulties from occurring until three months after birth.
- (9) No monetary payment or compensation to the surrogate is allowed, unless expressly permitted by the court or ethics committee.
- (10) As in the Human Assisted Reproduction Technology Bill 1996, the Human Assisted Reproduction Authority would govern and regulate IVF compassionate surrogacy. This body would have the power to make regulations under this proposed statute.

Until such legislation is passed there needs to be more public debate and research on IVF compassionate surrogacy. This cannot occur while NECAHR continues to refuse ethical permission to the procedure.

³³⁵

This would only try to settle the dispute, it would not be binding.

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Appendix: Survey to Doctors and Students

I am carrying out a survey to discover whether there is a need for law reform in New Zealand, regarding the issue of IVF-Compassionate Surrogacy. This survey is for an honours paper I am doing at Victoria University Law School. I would very much appreciate your help, to gauge public opinion in New Zealand on this important issue, by filling out the following survey and returning it to me, in the self-addressed envelope provided. If you have any queries feel free to contact my supervisor, Bill Atkin, at Victoria Law School, phone 471-5342.

IVF-Compassionate Surrogacy is used when a woman cannot have children because of medical problems. This process allows a couple to have children genetically related to them. The woman's egg is fertilised by her partner's sperm in a test tube, then implanted into another woman's womb, the surrogate mother. The surrogate gestates the child and agrees to give the baby to the genetic parents once it is born. The genetic parents intend to raise the child. In IVF-Compassionate Surrogacy the surrogate mother is not paid for her services, but does it voluntarily.

At present this situation is not prohibited in New Zealand, but it is not practiced because the Ethics Committee on Assisted Reproductive Technologies has prohibited registered fertility clinics performing this procedure. As you are part of the medical profession and may have views on this subject, I would very much appreciate your opinion in this survey to indicate whether or not New Zealand needs law reform. Your contribution will assist in determining whether IVF-Compassionate Surrogacy should be prohibited, or permitted by law in New Zealand.

These surveys are anonymous, there is no form of identification on them whatsoever. In this particular sample it is important that respondents are part of the medical profession, but individual names are irrelevant. The returned surveys will be used only for the purposes of this honours paper, which will be submitted and held in the Law Library in due course. The questionnaires will be kept secure, so no other person will have access to them. They will be destroyed when the project is completed.

I would be very grateful for your contribution.

Yours faithfully,

Deborah Davies
LL(ons) Programme, Victoria University Law Faculty

Dear Dr

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I would be very grateful for your contribution.

Yours faithfully

Deborah Davies
Llb(hons) Programme, Victoria University Law Faculty

SURVEY ON IVF COMPASSIONATE SURROGACY

IVF Compassionate Surrogacy is a way of overcoming a woman's inability to bear a child and allowing her and her partner to have a child genetically related to them. On the one hand there are positive benefits for all parties. Social parents will fulfil their desire for a child, a child will be born and loved and the birth mother may find fulfilment in helping the couple. On the other hand because there has been little research done into the long term effects on people involved in this process it has the potential to harm participants. It may be distressing for the surrogate mother to give up the baby, it could upset the genetic parents if the surrogate refused to hand over the baby. It is not known what negative long term effects, being part of this arrangement will have on the resulting child. In view of these benefits and potential problems please answer this survey by circling the option of your choice.

- [1] **What is your opinion on IVF Compassionate Surrogacy? [As defined in the covering letter]**
- ⇒ A Generally approve of IVF Compassionate Surrogacy
 - ⇒ B Do not object to IVF Compassionate Surrogacy
 - ⇒ C Generally object to IVF Compassionate Surrogacy
 - ⇒ D Need to know more
 - ⇒ E No opinion
- [2] **The genetic parents contribute their gametes to the creation of the child and intend to be the child's social parents. The Surrogate mother has accepted this, then gestated the baby for nine months. In the event of a dispute between the parties which position do you think the law should take?**
- ⇒ A The law should make the surrogate the legal parent, so she has custody of the child
 - ⇒ B The law should make the genetic parents the legal parents, so they have custody of the child
 - ⇒ C The court should decide who has custody on the circumstances of each case
 - ⇒ D The parties should decide themselves
 - ⇒ E Can not say
 - ⇒ F It depends on the circumstances [*Please List*].
- [3] **Should the law provide for the parties to enter into an enforceable IVF Compassionate Surrogacy agreement after dealing with the relevant issues?**
- ⇒ A Yes
 - ⇒ B No
 - ⇒ C Only in limited circumstances. [*Please list.*]
 - ⇒ D No opinion.

[4] **Should there be a system put in place, which allows the child, on becoming an adult, to find out the circumstances of his/her birth and who the surrogate mother was?**

- ⇒ A Yes
- ⇒ B No
- ⇒ C Don't know
- ⇒ D Depends on the Circumstances. [*Please List.*]

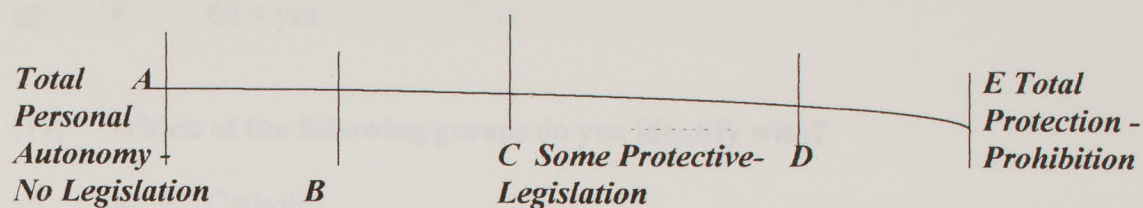
[5] **A major concern about IVF Compassionate Surrogacy, is that upon making the agreement, the surrogate mother will not be able to foresee the emotional trauma involved in surrendering the child, whom she has gestated for nine months, to the genetic parents. In view of this concern, do you think:**

- ⇒ A IVF Compassionate Surrogacy should be prohibited in New Zealand?
- ⇒ B Prior to any Surrogacy Agreement the parties should be required by law to have counselling, over possible ramifications of any such agreement.
- ⇒ C IVF Compassionate Surrogacy should be allowed, with no safeguards.
- ⇒ D Other [*Please list.*]

[6] **The National Ethics Committee that banned IVF Compassionate Surrogacy was concerned about medical risks to the surrogate mother. The Committee was also concerned that the child being transferred to the genetic mother, after bonding with the surrogate mother could cause the child potential harm. In view of this concern do you think:**

- ⇒ A IVF Compassionate Surrogacy should be allowed but monitored, and stopped immediately, if any harm occurs.
- ⇒ B As there is no proven harm, IVF Compassionate Surrogacy should be allowed.
- ⇒ C It should not be allowed until thorough research is done into both short and long term effects.
- ⇒ D It should be prohibited.
- ⇒ E Other. [*Please list.*]

- [7] How important do you rate the personal autonomy of parties to do as they wish, balanced with the protection of them by the state from the possible harms of IVF Compassionate Surrogacy?



- ⇒ Please circle the letter on the continuum that best defines your opinion on the importance of personal autonomy versus protection to participants, in IVF Compassionate Surrogacy.

- [8] A major concern of the ethics committee that banned IVF Compassionate Surrogacy in New Zealand is what happens if the child is born disabled and neither the surrogate mother nor the genetic parents wish to keep it? In the event of this circumstance do you think:

- ⇒ A The genetic parents should be compelled by law to keep the child
 ⇒ B The surrogate mother should be compelled by law to keep the child
 ⇒ C The baby should be given to social welfare to look after
 ⇒ D The parties should undergo mediation to decide who raises the child
 E Other [Please list]

- [9] Should the law provide for the parties to enter into an enforceable agreement after dealing with the relevant issues?

- ⇒ A Yes
 ⇒ B No
 ⇒ C Only in limited circumstances
 ⇒ D No opinion

The following questions are to ascertain trends within age, gender and lifestyle groups regarding people's responses to IVF Compassionate Surrogacy.

- [10] What gender are you?

- ⇒ A Male
 ⇒ B Female

- [11] In what age group do you come?

- ⇒ A 0-15 yrs
 ⇒ B 16-24 yrs
 ⇒ C 25-34 yrs

- ⇒ D 35-44 yrs
- ⇒ E 45-59 yrs
- ⇒ F 60 + yrs

[12] Which of the following groups do you identify with?

- ⇒ A Catholic
- ⇒ B Anglican
- ⇒ C Other Christian
- ⇒ D Non-Christian
- ⇒ E No Religion
- ⇒ F Other. [Please List]

[13] What is your occupation?

[14] Which description best fits you? *[This question is optional.]*

- ⇒ A I have had fertility problems.
- ⇒ B My wife/husband / partner has had fertility problems
- ⇒ C Someone in my family has had fertility problems.
- ⇒ D A friend or someone I know has had fertility problems.
- ⇒ E I have had patients who have experienced fertility problems
- ⇒ F I don't know anyone who has had fertility problems.

Any Other Comments

THANK-YOU VERY MUCH FOR YOUR TIME AND INTEREST!
 Please place the completed survey in the envelope provided and post as soon as possible.

SURVEY GIVEN TO FAMILY LAW CLASS

IVF COMPASSIONATE SURROGACY

IVF Compassionate Surrogacy is used when a woman cannot have children because of medical problems. This process allows a couple to have children genetically related to them. The woman's egg is fertilised by her partner's sperm in a test tube, then implanted into another woman's womb, the surrogate mother. The surrogate gestates the child and agrees to give the baby to the genetic parents once it is born. The genetic parents intend to raise the child. In IVF Compassionate Surrogacy the surrogate mother is not paid for her services, but does it voluntarily. At present this is not prohibited in New Zealand, but is not practiced because the Ethics Committee on Assisted Reproductive Technologies has prohibited registered fertility clinics performing this procedure.

On the one hand there are positive benefits for all parties. Social parents will fulfil their desire for a child, a child will be born and loved and the birth mother may find fulfilment in helping the couple. On the other hand because there has been little research done into the long term effects on people involved in this process it has the potential to harm participants. It may be distressing for the surrogate mother to give the baby, it could upset the genetic parents if the surrogate refused to hand over the baby. It is not known what negative long term effects, being part of this arrangement will have on the resulting child. In view of these benefits and potential problems please answer this survey by circling the option of your choice.

(1) What is your opinion on IVF Compassionate Surrogacy?

- A Generally approve of IVF Compassionate Surrogacy
- B Do not object to IVF Compassionate Surrogacy
- C Generally object to IVF Compassionate Surrogacy
- D Need to know more
- E No opinion

(2) The genetic parents contribute their gametes to the creation of the child and intend to be the child's social parents. The surrogate mother has accepted this, then gestated the baby for nine months. In the event of a dispute between the parties which position do you think the law should take?

- A The law should make the surrogate the legal parent, so she has custody of the child
- B The law should make the genetic parents the legal parents, so they have custody of the child
- C The court should decide who has custody on the circumstances of each case
- D The parties should decide themselves
- E Can not say
- F Depends on the circumstance (Please list)

- (3) **Should the law provide for the parties to enter into an enforceable IVF Compassionate Surrogacy agreement after dealing with the relevant issues?**
- A Yes
 - B No
 - C Only in limited circumstances (Please list)
 - D No opinion
- (4) **Should there be a system put in place, which allows the child, on becoming an adult, to find out the circumstances of his/her birth and who the surrogate mother was?**
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 - B Prior to any surrogacy agreement the parties should be required by law to have counselling, over possible ramifications of such an agreement.
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 - B As there is not proven harm, it should be allowed
 - C It should not be allowed until thorough research is done into both short and long term effects.
 - D It should be prohibited
 - E Other (Please list)
- (7) **How important do you rate the personal autonomy of parties to do as they wish balanced with the protection of them by the state from the possible harms of IVF Compassionate Surrogacy?**
- A Total personal autonomy - no legislation
 - B Some protective legislation

- C Legislation to protect the parties
- D Legislation that allows the parties very little autonomy
- E Total protection - prohibition

(8) **A major concern of the ethics committee that banned IVF Compassionate Surrogacy in New Zealand is what happens if the child is born disabled and neither the surrogate mother nor the genetic parents wish to keep it? In the event of this circumstance do you think:**

- A The genetic parent should be compelled by law to keep the child
- B The surrogate mother should be compelled by law to keep the child
- C The baby should be given to social welfare to look after
- D The parties should undergo mediation to decide who raises the child
- E Other (Please list)

(9) **What gender are you?**

- A Male
- B Female

(10) **In what age group do you come?**

- A 0-15 yrs
- B 16-24 yrs
- C 25-34 yrs
- D 35-44 yrs
- E 45-59 yrs
- F 60+ yrs

(11) **Which of the following groups do you identify with?**

- A Catholic
- B Anglican
- C Other Christian
- D Non-Christian
- E No Religion
- F Other (Please list)

(12) **What is your occupation?**

(13) **Which description best fits you?**

- A I have had fertility problems
- B My wife/husband/partner has had fertility problems
- C Someone in my family has had fertility problems
- D A friend or someone I know has had fertility problems
- E I don't know anyone who has had fertility problems.

THANK-YOU VERY MUCH FOR YOUR TIME AND INTEREST!

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